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Division III
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NO. 36959-5-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ROBERT RAY ABBETT, Appellant.

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

1. Has Abbett failed to establish that his attorney's cross-examination was deficient where his attorney did not ask a trooper about the weights of the drugs seized and has Abbett failed to show that the trooper's answer would have overcome the evidence against him?
2. Did the trial court correctly deny Abbett's motion to suppress the evidence found in his car because the totality of the circumstances showed that the defendant's consent was voluntary?
3. Has Abbett failed to show that the trooper's isolated remark amounted to a manifest error affecting a constitutional right where the defense did not object and later used the remark to their benefit?

II. STATEMENT OF THE CASE

The defendant, Robert Ray Abbett, was charged with two felonies, possession of a controlled substance, methamphetamine, and possession of a controlled substance, heroin. CP 1. The charges were based on the following facts:

Trooper Christensen saw a driver, Abbett, merge on the freeway without using his turn signal. RP 156.¹ Abbett was also going faster than the surrounding cars. RP 156. As Abbett exited the freeway, one of his

¹ The State will use the abbreviation RP to refer to the Verbatim Report of Proceedings filed by Joan Anderson that covered the dates of June 17, 2019 thru June 19, 2019. The other transcripts will be referred to by the date of the hearing, for example "3/6/19 RP."

brake lights did not activate as he slowed down. RP 156. The trooper activated his emergency lights and Abbett pulled over. RP 157. Trooper Christensen then contacted Abbett and told him why he was stopped. RP 158.

During the stop, Trooper Christensen saw what appeared to be used foil which had black material on it next to a blowtorch on the floorboard of Abbett's front passenger seat. RP 156; Ex. SE-4, SE-6. The trooper contacted another unit, Trooper Iverson, to assist. RP 159. Trooper Christensen had Abbett perform some field sobriety tests but there were no signs of impairment. RP 159. Trooper Christensen then told Abbett about the drug paraphernalia seen in his car and that he suspected there may be drugs in his car as well. RP 159.

Initially, Abbett denied that there were drugs in his car. RP 159-60. Later, he stated that there were drugs in the jacket on his front passenger seat. RP 160. Abbett gave the trooper permission to get the jacket and remove the drugs from inside of it. RP 160. The trooper discovered what appeared to be bags of crystal methamphetamine and black tar heroin inside the jacket. RP 162-63; Ex. SE-1, SE-2, SE-6.

The trooper then asked Abbett for consent to search the rest of his car and Abbett told him he could search his front passenger compartment. RP 164. The trooper subsequently found straws, a glass pipe, hypodermic

needles, packaging, aluminum foil, a spoon and a scale, items consistent with drug use. RP 164-66; Ex. SE-4, SE-6.

After the stop, the trooper let Abbett leave the scene because Abbett was in a hurry and on his way to court. RP 166, 181. The bags of drugs were sent to the crime lab and a forensic scientist concluded that one bag contained methamphetamine and the other bag contained heroin. RP 206, 209; Ex. SE-8.

The defense filed a motion to suppress prior to trial. CP 6-22. The defense argued that Abbett's consent was not given freely and voluntarily because the trooper promised Abbett that he could leave and proceed on to his trial if Abbett consented to a search of his car. CP 21-22. The State filed a response, arguing that no promises or threats were made in order to obtain the defendant's consent, and that any pressure that the defendant felt was independent of his conversation with the trooper. CP 23-27. The court denied the motion to suppress and found that Abbett's consent was voluntary. 3/15/19 RP 14; CP 34-39. Findings of fact and conclusions of law were subsequently filed. CP 34-39.

The defense requested a continuance of the trial date in order to have the drugs retested. 4/9/19 RP 131; CP 29-30. Later, the defense made a decision not to pursue the retesting. 5/10/19 RP 142. Abbett's attorney explained, "I've decided not to pursue that at this time, based on

my assessment of the available resources, the costs involved, and the likelihood of helpful information.” 5/10/19 RP 142.

Trial commenced and after the State rested, the defense moved to dismiss the charges. RP 218. The defense claimed that the weights of the drugs were different on the crime lab report than what was testified to by Trooper Christensen. RP 218. The defense also claimed that the State had not established a continuous chain of custody for the drugs. RP 218. The State countered that the initials weights were higher because of packaging and that the chain of custody issue was an admissibility issue. RP 219-20. The court denied the defense motion to dismiss the charges. RP 221.

Abbett did not testify or call any witnesses. RP 222, 224. As for a legal theory, the defense argued that “dominion and control is not proximity alone” and that all the State had was “proximity alone.” RP 260-61. The State argued that Abbett had dominion and control because he was the only occupant of the car and knew, when asked, exactly where the drugs were. RP 263.

After the jury deliberated, Abbett was found guilty as charged. CP 59-61. He was sentenced to a year and a day in prison on both counts, to be served concurrently. CP 63. Abbett subsequently appealed.

III. ARGUMENT

A. Abbett has failed to establish that his attorney's cross-examination was deficient where his attorney did not ask a trooper about the weights of the drugs seized and Abbett has failed to show that the trooper's answer would have overcome the evidence against him.

A defendant receives ineffective assistance of counsel if his attorney's conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct. *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (1993) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

To establish that counsel's performance was deficient, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *State v. King*, 130 Wn.2d 517, 531, 925 P.2d 606 (1996) (quoting *Strickland*, 466 U.S. at 687). To establish that the deficient performance prejudiced the defense, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial." *King*, 130 Wn.2d at 531 (quoting *Strickland*, 466 U.S. at 687). A defendant is denied his right to a fair trial when the result has been rendered unreliable by a breakdown in the adversary process. *King*, 130 Wn.2d at 531. There is, however, a strong presumption that counsel has

rendered adequate assistance and has made all significant decisions in the exercise of reasonable professional judgment. *Benn*, 120 Wn.2d at 665.

For this reason, if defense counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. *Id.*

Regarding the first prong, the reviewing court "must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." *In re Personal Restraint of Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086, *cert. denied*, 506 U.S. 958, 113 S. Ct. 421, 121 L. Ed. 2d 344 (1992). Cross-examination is a matter of trial strategy that typically is immune from challenge as long as it falls within the range of reasonable representation. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 720, 101 P.3d 1 (2004). Even lame or ineffectual cross-examination does not establish ineffective assistance of counsel. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 489, 965 P.2d 593 (1998).

Here, the first defense strategy was to try to suppress the evidence. CP 6-22. Later, the strategy was to have the drugs independently retested. 4/9/19 RP 131. However, the defense then chose to *not* have the drugs tested. 5/10/19 RP 142. One of the reasons given for not pursuing the

testing was the likelihood of helpful information. In other words, the defense did not think that new test results would be helpful.

At trial, the defense made numerous arguments. There was not a primary defense strategy. In closing argument, Abbett's attorney argued the following points: 1) Trooper Christenson's COBAN video, which would have been helpful, was not recorded, 2) Trooper Iverson, who assisted at the stop, was never called to testify and confirm Trooper Christenson's testimony, 3) Trooper Christenson waited over a month and a half after the incident to write his report, 4) the trooper's memory was faulty and he had to be reminded of things, 5) the trooper was not comfortable testifying, 6) the trooper merely paraphrased what Abbett said during the stop, 7) the trooper had an interest in getting a conviction and not being disciplined for failing to follow procedures, 8) the trooper never testified as to the weights of the drugs he found, 9) Tina Lavell and Jason Trigg, two employees in the chain of custody, did not testify, 10) the forensic scientist could not testify as to how much methamphetamine or heroin was in each substance tested, 11) there was no evidence that the jacket with drugs in it belonged to Abbett or even fit him, 12) there was no evidence as to who owned the car, and 13) the State only had proximity alone, and did not establish Abbett's dominion and control over the drugs. RP 254-61.

On appeal, Abbett argues that his attorney was ineffective because he failed to ask the trooper about “the weights that he had found for the substances.” App. Br. at 8-9. As support for this argument, the defense relies on a probable cause report that was admitted at the suppression hearing.

The defense argues that the primary defense theory was that the evidence created a reasonable doubt that the drugs tested by the crime lab were the same ones that had been seized from the defendant’s car. App. Br. at 8-9. However, that was only one of many arguments Abbett made at trial. *See* RP 254-61. The defense clearly argued that proximity alone was not enough to convict. RP 261. The defense also poked holes in the State’s investigation and how it was completed and suggested that the trooper was forgetful. *See* RP 254-61.

Second, Abbett argues that not asking the trooper about the weights was not a tactical choice. App. Br. at 9. However, this is simply an assumption.

At trial, Trooper Christenson testified to the following:

Q: Okay. For example, the two baggies of suspected substance, what would you do with those once you got them sealed and the evidence tape?

A: I weigh them first before I seal them. There is nothing added to it or anything like that for the weight. Then I seal them. One

strip goes on that and put in a secondary bag, and then we seal that as well. It's weighed again.

Q: Is that what we are seeing with the manilla envelope and inside the envelope the internal clear bag?

A: Yes.

RP 171.

Later, the defense asked the forensic scientist about her recorded weights. The cross examination went as follows:

Q: The weights you've listed on your crime lab report are the weights only of the suspected controlled substance, correct?

A: Correct.

Q: Not the containers they're in, the bags they were in?

A: Correct.

RP 215.

When the defense raised the issue of a discrepancy in weights at the end of the State's case in chief, the prosecutor stated the following:

"If your honor looks at the weights that are written on there from Mr. Martin, they are substantially higher. That's because it's all in the packaging. It's what you would expect."

RP 219. After that explanation, the court denied the motion to dismiss, finding that there was sufficient evidence for the case to go to the jury.

After that, the State rested and so did the defense. The defense did not call the trooper to testify.

But the defense did refer to the weight issue in closing, arguing as follows:

I think Trooper Christensen also testified about weighing the substances in this case that state is telling you are controlled substances. It's my recollection that he never told you the weight he found when he was weighing them on September 11th at the state patrol office in Union Gap. We have the weights. The crime lab is telling you these are the weights we are using. We don't have the weights in testimony that the trooper collected, and that could be a factor to determine whether or not we're looking at the same items here.

RP 258. On appeal, Abbett argues that the discrepancy in weights was argued to the jury during closing argument. App. Br. at 7. However, that is incorrect. Abbett argued that the State had not established that the trooper's weights were the same as the crime labs.

The defense could have asked to recall the trooper after realizing that testimony about the weights was not admitted. Abbett claims his attorney learned of the omission at the end of the State's case and prior to the defense resting. App. Br. at 9. It is quite possible that the defense chose not to recall the trooper after the State's reasonable explanation given for the discrepancy in the weights. Not recalling the trooper also allowed the defense to fault the State for not eliciting that testimony. This was a legitimate trial strategy upon learning the State's explanation for

any discrepancy, that the trooper's weights included packaging, but the scientist's weights did not.

Given the testimony admitted at trial, the fact that the defense attorney did not cross-examine the trooper about his specific weights was not deficient performance that deprived Abbett of the right to a fair trial. The defense had many other theories that were pursued, including a "mere proximity" argument. In addition, the State had a reasonable explanation for why the trooper's recorded weights were higher than those at the crime lab. Finally, the defense used the lack of testimony from the trooper about the weight of the drugs to his advantage in closing argument.

The prejudice element is met if a reasonable probability exists that, "but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *Rice*, 118 Wn.2d at 889. "In order to establish prejudice" from deficient cross-examination, the petitioner must show that the testimony to be elicited "could have overcome the ... evidence against him." *Davis*, 152 Wn.2d at 720.

Here, there was substantial evidence that the drugs tested were the same drugs taken out of Abbett's car. Trooper Christensen testified about all the steps he took when he got back to the Union Gap office with the evidence. *See* RP 170-1. He photographed the items and identified the items for storage and testing. RP 170; Ex. SE-6. He weighed the items

and sealed them. RP 171. He then put them in a secondary bag that is sealed and weighed as well. RP 171. He filled out a lab examination form. RP 171; Ex. SE-5. Each item was given a specific identification number. RP 171-2; Ex. SE-1, SE-2, SE-3, SE-4, SE-5, SE-7, SE-9. Here, the methamphetamine was given item number CS8421 and the heroin was given number CS8422. RP 172. *Id.* A barcode then identified each specific item placed in the evidence system. RP 172, Ex. SE-1, SE-2, SE-3, SE-4.

At trial, the State also called the evidence officer, Bryon Martin. Mr. Martin testified that he stored the evidence and took it to the crime lab in Kennewick. RP 187-88. In this case, he received the trooper's lab request form and hand-delivered the evidence to Tina Lavell, the property and evidence custodian at the Kennewick crime lab. RP 189, 202; Ex. SE-7. He later received the evidence back from Jason Trigg, a scientist at the crime lab, and took the evidence back to his vault. RP 191-2. Each time the item was checked in or out, he weighed the package and added his initials and the weight to the outside of the package. RP 190; Ex. SE-1, SE-2, SE-5.

WSP forensic scientist, Sonja Jensen, also testified to security protocols in place. She testified that when a package comes in, the tape is checked to see if it has been opened or broken in any way prior to her

receiving it at the crime lab. RP 203. The evidence custodian logs in the date and time and the evidence goes into a large vault. RP 202. When she gets the evidence from the evidence custodian, Ms. Jensen also does a double-check. RP 203-04. When she unseals it, she preserves any seals in place. RP 203. And when she seals it up, she initials both on and off the tape on both sides as well as adding the date sealed, their case number, and the item number. RP 203. The inner bag also has her blue tape from when she completes the analysis. RP 204. As evidenced by Ms. Jensen's testimony, these standard protocols were followed in this case. *See* RP 203-217. Her case notes and final report were also admitted as evidence. Ex. SE 8, SE 9.

In the case at hand, Abbett has not shown that he was prejudiced by his attorney's cross-examination. The weight of either drug was not an element the State had to prove. Any amount of drug would have been sufficient as long as the crime lab had enough for testing. As indicated above, the chain of custody was covered completely in testimony. Minor discrepancies or uncertainties will affect only the weight of the evidence, not its admissibility. *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984).

Furthermore, it is unknown what the trooper's answer would have been had he been asked the question about the weights. He could have

given a perfectly reasonable explanation for any weight discrepancies that would have had no impact on the outcome of this case. As such, Abbett's claim of prejudice is one of mere speculation and therefore, insufficient to establish the prejudice element.

In sum, Abbett's claim of ineffective assistance of counsel fails because he has not shown that his attorney's lack of cross-examination fell below a minimum objective standard of reasonable attorney conduct or a probability that the outcome would be different but for his attorney's conduct.

B. The trial court correctly denied Abbett's motion to suppress the evidence found in his car because the totality of the circumstances showed that the defendant's consent to search was voluntary.

1. The findings of fact were supported by substantial evidence.

Courts review a trial court's ruling on a motion to suppress evidence to determine whether substantial evidence supports the trial court's findings of fact and whether those findings, in turn, support the trial court's conclusions of law. *State v. Russell*, 180 Wn.2d 860, 866, 330 P.3d 151 (2014). Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Appellate courts review a trial court's legal conclusions de novo. *State v. Roden*, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014).

Here, the defendant challenges two findings of fact, number 14 and number 24. App. Br. at 1. The rest of the findings are verities on appeal. *State v. Bonds*, 174 Wn. App. 553, 562, 299 P.3d 663, *review denied*, 178 Wn.2d 1011 (2013).

Finding number 24 reads as follows: "Mr. Abbett was aware of the procedures and legal principles concerning consent and searches as he has been stopped on other occasions by law enforcement." CP 37. This finding was supported by substantial evidence. Abbett testified at the suppression hearing. He said he had been asked to consent to vehicle searches in the past and had refused every time. 3/6/19 RP 100, 102. In the past, he told officers that he could not give legal permission to search because the car was not in his name. 3/6/19 RP 101. He testified that the past, he had been told that if he did not consent, the officer would get a search warrant and have his car impounded. 3/6/19 RP 101. He testified that he had previously had his cars impounded and that it took several hours. 3/6/19 RP 87. He also testified that most of the times, he was close to home or had someone pick him up. 3/6/19 RP 109. In the case at hand,

he told the trooper that he did not give consent to search the rear of his car.
3/6/19 RP 102-03; 3.6 Ex. DEB.²

As indicated by the defendant's past experience, the defendant knew he had a right to refuse consent. He had refused previously every time when he was asked to consent. He also knew what could happen if he refused consent. And, he knew he had the right to limit the search, as indicated by the comments he made at the scene in this case.

Finding number 14 reads as follows: "Trooper Christensen told Mr. Abbett that whether to consent was his decision and that Trooper Christensen wanted to finish the traffic stop as quickly as feasible given Mr. Abbett's upcoming court appearance." CP 36. The defense claims that the first part of the finding, indicating that "Trooper Christensen told Mr. Abbett that whether to consent was his decision," was not supported by the evidence and contradicts another finding, finding of fact number 17. App. Br. at 12. Finding of fact number 17 states, "Mr. Abbett was not warned that he had the right not to consent to the search, the right to rescind consent to the search, or the right to restrict the search." CP 36. Any error in finding of fact 14 was harmless. As explained above, there was substantial evidence that Abbett understood that the decision to give

² Exhibits from the CrR 3.6 suppression hearing will be referred to as "3.6 Ex. ____."

consent was his decision as he had refused on many occasions and he knew how to limit consent as shown by the facts of this case.

2. The findings of fact supported the court's conclusions of law.

Consent to search is an exception to the warrant requirement. *State v. Thompson*, 151 Wn.2d 793, 803, 92 P.3d 228 (2004). To show valid consent, the State must prove that the consent was freely and voluntarily given. *State v. O'Neill*, 148 Wn.2d 564, 588, 62 P.3d 489 (2003). The voluntariness of a consent to search is a question of fact to be determined by considering the totality of circumstances surrounding the alleged consent. *State v. Shoemaker*, 85 Wn.2d 207, 211-12, 533 P.2d 123 (1975). Whether consent was voluntary or the result of duress or coercion, express or implied, is a question of fact. *O'Neill*, 148 Wn.2d at 588. Factors used to determine whether a person has voluntarily consented include whether *Miranda* warnings were given, the individual's education and intelligence, and whether he was advised of the right to consent. *Id.* Courts may also "weigh any express or implied claims of police authority to search, previous illegal actions of the police, the defendant's cooperation, and police deception as to identity or purpose." *State v. Reichenbach*, 153 Wn.2d 126, 132, 101 P.3d 80 (2004) (citing *State v. Flowers*, 57 Wn. App. 636, 645, 789 P.2d 333 (1990)). No one factor is dispositive. *Id.*

In this case, the totality of the circumstances show that the defendant's consent was voluntary. The COBAN video from Trooper Iverson's car shows that Abbett was very comfortable talking to the troopers. *See* 3.6 Ex. DEB. On that video, one can hear the trooper telling the defendant that he wants to get him on his way and to court. 3.6 Ex. DEB. While the COBAN does not contain the entire traffic stop due to technical issues with Trooper Christensen's video, the COBAN video from the assisting trooper shows that Abbett was cooperative with the officers and there were no threats or promises made to him. *See* 3.6 Ex. DEB. There was no evidence of police deceptiveness. *See* 3.6 Ex. DEB. Furthermore, as indicated above, Abbett appeared to be educated in the area of consent stops from his prior experiences with officers.

As for *Miranda* rights, the communication of *Miranda* rights is not a prerequisite to voluntary consent. *State v. Rodriguez*, 20 Wash. App. 876, 880, 582 P.2d 904 (1978). And while knowledge of the right to refuse consent is relevant, it is not a prerequisite to finding voluntary consent, however. *O'Neill*, 148 Wn.2d at 588. As indicated above, it's clear that Abbett knew he could refuse as he had done so every time in the past.

On appeal, Abbett argues that his case is almost identical to the facts in *O'Neill*. However, the facts are very different in Abbett's case. In

O'Neill, the officer repeatedly asked for consent to search the car before the defendant eventually agreed. 148 Wn.2d at 570. That facts of that case were described as follows:

West then asked O'Neill for consent to search the vehicle. Mr. O'Neill said "no" and said that Sergeant West needed a warrant to search the car. West responded that he did not need a warrant but could simply arrest O'Neill for the drug paraphernalia and search the car incident to that arrest. West asked for consent again. The discussion went back and forth several times, with O'Neill eventually consenting.

Id. at 573. The court stated:

Only after Sergeant West repeatedly pressed the issue did O'Neill relent and give consent.

Id. at 589. *In O'Neill*, the sergeant also told the defendant that he could search in any event in order to pressure the defendant to consent. *Id.* at 591.

Here, Abbett mentioned that he did not believe he had authority to consent to search because he was not the registered owner of the car.

3/6/19 RP 36. However, he then agreed to consent to a search of the jacket. And again, when asked to consent to a search of the center console and front seat area, he agreed. The trooper only had to ask once each time.

3/6/19 RP 68. There was not a case where the trooper repeatedly asked

for consent, got a denial of consent, or had a back and forth discussion about consent. Abbett granted consent each of the two times he was asked to give consent. While repeatedly asking for consent is a factor to consider in assessing voluntariness, as indicated by the trial court's findings of fact and the record, it simply did not happen in this case.

Abbett also assigns error to conclusions of law 5, 8, 10, 11, and 13. App. Br. at 1. However, these conclusions were supported by the court's findings of fact.

Conclusion of Law 5

Conclusion of law 5 states, "Trooper Christensen was not required to give Mr. Abbett *Ferrier* warnings or any type of verbal warning regarding his rights surrounding a consent based search of the vehicle." CP 37. This is a correct statement on the law. In *State v. Witherrite*, 184 Wn. App. 859, 861, 339 P.3d 992 (2014), the defendant asked the court to extend *Ferrier* to vehicle searches. This court stated:

The cited history of *Ferrier* and our court's treatment of the home as most deserving of heightened protection under our constitution leads us to conclude that *Ferrier* warnings need not be given prior to obtaining consent to search a vehicle. While it is undoubtedly best practice to give the full *Ferrier* warnings before any consent search in order to foreclose arguments such as this one, nothing in our constitution requires those

warnings other than in the “knock and talk” situation.

Id. at 864.

Conclusion of Law 8

Conclusion of law 8 states, “Mr. Abbett consented to the search of the jacket and center console.” CP 38. This is supported by the unchallenged finding of fact numbers 13 and 16. Number 13 states, “Trooper Christensen asked whether Mr. Abbett would allow him to retrieve the items from the vehicle.” CP 36. Number 16 states, “Mr. Abbett allowed Trooper Christensen to search the front of the vehicle for the described items.” CP 36. Because these findings of fact were unchallenged, they are verities on appeal. They both support the conclusion that Abbett consented to the search of the jacket and center console.

This conclusion was also supported by the record, including the trooper’s testimony and Abbett’s own testimony. The trooper testified that he first asked Abbett for consent to remove the jacket from his car and remove the drugs. 3/6/19 RP 43. Abbett told him that he could go and retrieve it. 3/6/19 RP 43. The trooper then asked permission to search the front seat area and the center console and the defendant agreed. 3/6/19 RP 59-60, 62-3, 68-9. These were the only two times that Abbett was asked

for consent. 3/6/19 RP 68. Both times he cooperated. 3/6/19 RP 38. The defendant said that he was in a hurry and was going to court. 3/6/19 RP 38-39, 54. The trooper told Abbett that he wanted to get him out of there so he could get him to court. 3/6/19 RP 54; 3.6 Ex. DEB. The trooper made no promises or threats about what might happen if he did not consent to the search of the car. 3/6/19 RP 44; 3.6 Ex. DEB.

The defendant's testimony is similar. He testified that he told the trooper that he could search the vest:

Q: What did you tell him that he could search?

A: The vest.

3/6/19 RP 88. Later, Abbett testified as follows:

Q: Okay. Mr. Abbett, at some point, did the, did you volunteer to the Trooper that there was additional items in the center console?

A: I did after he conducted his first search and I saw him look in the center console—because you can hear, it's an older car, so you can hear it pop open and close. And he had opened it and looked in there, so he came back and he said be honest with me. I mean, what am I supposed to say? He already knows what's in there.

3/6/19 RP 90-91.

Conclusions of Law 10 and 11

Conclusion of law 10 states: "Looking at the totality of the circumstances, Mr. Abbett was aware of his rights concerning consent,

weighed his options regarding consent and his upcoming court appearance, and voluntarily consented to the search.” CP 38. Conclusion of law 11 states: “Trooper Christensen did not exert undue influence on Mr. Abbett to coerce consent to search.” CP 38. Both of these conclusions are supported by the findings of fact and the record.

As indicated above, Abbett was well aware of his right to consent or not consent to a vehicle search. Every time prior, he had refused consent. In the COBAN video admitted at the trial, Abbett was calm and did not appear to be under any pressure. *See* 3.6 Ex. DEB. Trooper Christensen testified that it did not take very much convincing to get Abbett to consent and that Abbett consented to the search of the jacket within less than 10 seconds of being asked for permission. 3/6/19 RP 43, 63.

Conclusion of Law 13

Conclusion of law thirteen states, “The State has proven that the consent was voluntary, that Mr. Abbett had authority to consent, and that the search did not exceed the parameters of the search.” CP 38. The State has already addressed the voluntariness of the search, the first part of this finding. And being the sole occupant of the car, CP 35, Abbett had authority to consent to its search.

In addition, while there was some testimony about searching the back portion of the car, nothing of evidentiary value was found in the back. Trooper Christensen stopped searching the rear of the car when Abbett told Trooper Iverson that he had not given Trooper Christensen to search back there. CP 37. The only item removed from the rear was a precious metals testing kit. CP 37.

C. Abbett has failed to show that the trooper's isolated remark amounted to a manifest error affecting a constitutional right where the defense did not object and later used that remark to their benefit.

Courts in other jurisdictions have held that the prosecution may not use evidence of a person's refusal to consent to a search to prove his or her guilt through an inference of guilty knowledge or consciousness of guilt. *See, e.g., United States v. Runyan*, 290 F.3d 223, 249 (5th Cir. 2002). However, the defense has cited no Washington caselaw to that effect. All of the Washington cases cited by the defense deal with rights involving the Fifth Amendment, not the Fourth Amendment.

Even so, without an objection, Abbett must prove that the comment amounted to a manifest error affecting a constitutional right. RAP 2.5(a). A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error and where the untainted evidence is so

overwhelming it necessarily leads to a finding of guilt. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Where the error is not harmless, the defendant must have a new trial. *Id.*

At trial, Trooper Christensen testified on direct that while he was searching inside Abbett's car, he overheard Abbett say, "I didn't tell him he could search there." RP 165-66. The trooper testified that he then stopped his search. RP 166. The defense did not object or make any motions based on Trooper Christensen's testimony.

On cross-examination, the defense inquired further:

Q: "Trooper Christensen, you told us that when you overheard my client indicating that he didn't want you to search in certain areas of the vehicle that you stopped searching that. Is that your recollection?"

A: "Yes."

Q: "Isn't it true, though, that you found an item in the back underneath the passenger seat accessible from the back seat, something you didn't recognize?"

A: "Yes."

RP 179. The trooper testified that he retrieved the item and asked Abbett what it was. RP 180. The item found did not have any evidentiary value. RP 179.

Because there was no objection to the trooper's testimony, Abbett may obtain review of the trooper's remarks only if they amount to a manifest error affecting a constitutional right. RAP 2.5(a). Here, the

defense did not object to the remark and on cross-examination even reiterated what his client told the trooper about not wanting certain areas searched. First of all, the isolated remark was never used by the prosecutor to emphasize or imply that Abbett was guilty. Rather, the defense was the only one to bring up the statement and then used it to impeach Trooper Christenson. The defense was able to point out that the trooper searched in an area that was not allowed, thereby attacking the trooper's credibility. After bringing up the same remark, Abbett cannot now complain that that remark was a manifest error.

Under the invited error doctrine, a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial. *In re Pers. Restraint of Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). In determining whether the invited error doctrine applies, courts have considered whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it. *Id.* Here, by bringing up the trooper's testimony and benefiting from it, he cannot now claim that the remark was error.

In addition, there was strong evidence of the defendant's guilt. The trooper testified that after he pulled over Abbett for speeding and changing lanes without a turn signal, he saw, in plain view, used foil containing a black material, next to a torch on the right front passenger

seat. RP 156; Ex. SE-6. The trooper told Abbett that he observed items in his car that he believed were paraphernalia and that there may be drugs in his car. RP 159. Abbett initially stated that there were no drugs in his car, but then stated that there were drugs in the jacket on his front right seat. RP 159-60. Abbett gave the trooper permission to look in the jacket and found two items that later tested positive for methamphetamine and heroin. RP 160; Ex. SE-1, SE-2, SE-6, SE-8. Other items found in Abbett's front passenger compartment included straws, needles, spoon, and a scale. RP 164, Ex. SE-4, SE-6. Abbett was the sole occupant of the car.

In sum, the defendant has not proven a manifest error affecting a constitutional right. Abbett benefited from the testimony he now claims was error. In addition, the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.

IV. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Abbett's convictions.

Respectfully submitted this 25th day of August, 2020,

s/Tamara A. Hanlon
TAMARA A. HANLON WSBA 28345
Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on August 25, 2020, via the portal, I emailed the Brief of Respondent to Skylar T. Brett. I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 25th day of August, 2020 at Yakima, Washington.

s/Tamara A. Hanlon
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