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No. 37022-4-III
Whitman County Superior Court No. 19-1-00097-38

IN THE COURT OF APPEALS
OF WASHINGTON STATE
DIVISION III

STATE OF WASHINGTON, Respondent

v.

THOMAS MCBRIDE, Appellant

BRIEF OF RESPONDENT

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RESTATEMENT OF THE ISSUES

- I. Did Deputy Nebe's testimony that Mr. McBride had control of his bedroom actually prejudice Appellant?**
- II. If there was Judicial Comment on the evidence, was it harmless error?**
- III. Was reading a transcript of a recording that was admitted into evidence and played for the jury during trial harmless beyond a reasonable doubt?**
- IV. Is testimony that a Deputy had contacted a Appellant many times or conducted three search warrants at an address propensity evidence when there was no testimony of any convictions or actions by Appellant?**
- V. Can the Appellant prove his burden for ineffective assistance of counsel when the result of trial would not have been different had Defense counsel objected to the alleged erroneous evidence?**

STATEMENT OF THE CASE

At the beginning of each day of trial Judge Libey provided the jury with an instruction that stated that the Washington Constitution prohibited him from commenting on the evidence or providing his opinion. (RP 77, 175) Judge Libey stated that he would not intentionally comment on the evidence or express his opinion of the value or weight of the evidence.

(RP 77, 175) Judge Libey instructed the jury to disregard any comments that appeared to the jury as a comment on the evidence entirely. (RP 77, 175)

Deputy Tim Cox was called as a witness and questioned regarding his execution of a search warrant at the Appellant's residence. (RP 80 – 89) He testified that the warrant was executed at 4:00 am. (RP 91). He testified that Mr. McBride, the Appellant, attempted to hide from law enforcement when they were executing the search warrant and part of his body camera footage was admitted showing the initial clearing of the house. (RP 82-86) Deputy Cox testified that he found Mr. McBride a foot away from a trash can where methamphetamine was later found and that Mr. McBride could easily have grabbed hold of the methamphetamine. RP (88-89) He also testified that Mr. Rowher was seated on Mr. McBride's bed. (RP 100)

Deputy Bryce Nebe was called as a witness and testified that the room he searched and found the methamphetamine in was Mr. McBride's bedroom. (RP 104 -105) He also testified that Mr. McBride did not have another bedroom in the house. (RP 107). Deputy Nebe testified that he had served about 40 warrants for drugs and that in his training and experience as an former Drug Task Force member and as a deputy, Mr. McBride's behavior was consistent with someone who was attempting to hide

contraband. (RP110-111) Furthermore, he testified that the time between when law enforcement knocked an announced to the time Mr. McBride was found hiding in his bedroom was sufficient time for Mr. McBride to hide the methamphetamine. (RP 111 -112) He described the other rooms in the house along with the people or belongings found in them (RP 106-107).

Sergeant Michael Jordan was called as a witness and questioned regarding his employment, training, and experience with the Whitman County Sheriff's Office, as well as his involvement in this case. (RP 116, 117, 118, 119, 120, 121) When asked if he was familiar with Appellant, Sgt. Jordan stated he was and that he had contacted him, "numerous times" prior to this case. (RP 120) He was then asked if that person was in the court and if he could point him out and describe him. (RP 120) Sgt. Jordan pointed to Appellant at the defense table and described him. (RP 120) Sgt. Jordan was questioned about his involvement of the execution of the search warrant that was served on Appellant's residence. (RP 121) While laying foundation of Sgt. Jordan's knowledge of the residence, the State asked Sgt. Jordan how he knew which room belonged to Appellant. (RP 123) Sgt. Jordan stated that he had worked for the city of Oakesdale in 2013 and during his employment he had contacted Appellant regarding an ordinance issue involving Appellant living in a camper. (RP 123)

Sergeant Jordan testified that he issued a citation for the ordinance violation and then followed up with Appellant about remedying the violation. (RP 124) Sgt. Jordan testified that at that time Appellant informed him that he had moved into the bedroom in the garage. (RP 124) The State asked Sgt. Jordan if he had contacted Appellant in that room since 2013. (RP 124) Sgt. Jordan testified that he had contacted the Appellant numerous times since then and that Appellant had informed Sgt. Jordan that was his bedroom. (RP 124) During Sgt. Jordan's testimony, both while discussing how he knew Appellant and knowledge of Appellant's room within the residence, Defense counsel made no objections to the line of questioning, nor any of Sgt. Jordan's statements regarding his knowledge. (RP 124). Sgt. Jordan testified Mr. McBride told law enforcement on prior occasions that the room in question was his bedroom and he has never denied that was his bedroom. (RP 124). The Jury also heard testimony that Mr. McBride's "stuff has always been in that bedroom", and they saw pictures and body camera video of the room with property that Appellant had admitted was his in jail phone calls. (RP 139-144) He testified that the methamphetamine was found in his area of the house as well as a scale was found on his bed with residue that field tested positive for methamphetamine, but that no drugs were found anywhere else in the house. (RP 124, 128) Also found in the room were

hundreds of pieces of mail in the room with Mr. McBride's name on it and no one else's. (RP 125-126) Deputy Jordan testified that there were doors to the room capable of closing. (RP 125)

During the State's examination of Sgt. Jordan the State asked about jail calls between Appellant and other people. (RP 132- 139). The State asked if there was mention of confronting the person who turned in Mr. McBride and Deputy Jordan testified Mr. McBride "said that Clark—he calls him Clark—Johnson is a snitch and he straight up snitched on him." (RP 132) That audio recording from the jail visit between Appellant and visitor, Kim McBride, was later played and admitted into evidence. (RP 136) Also, admitted into evidence and played for the jury was a conversation between the Appellant, and John Lawson, where the Defendant admitted he was caught. (RP 134- 135) Afterword, the State asked Sgt. Jordan what Mr. McBride had said. (RP 134) Defense counsel objected to Sgt. Jordan testifying to what Mr. McBride said, saying that the Jury will hear what they hear. (RP 134) Judge Libey stated that the audio recording was "hard to hear and that is why I'm going to allow the Deputy to state – to read from the transcription¹ of what was said – exactly

¹ The transcript was prepared after a 3.5 hearing to assist the judge in ruling which parts of the recordings were admissible at trial as statements of a party opponent. (RP 45-46) The transcript was never intended to be used during the trial.

what was said. . . .” and directed which lines were admissible. (RP 134). Sgt. Jordan then read those lines from the transcript in which Mr. McBride cause that “caught is caught”. (RP 134) Admitted into evidence next was a jail call between Appellant and Kim McBride in which Mr. McBride is clearly heard to say “He’s a fucking snitch. He snitched on me. Straight-up told on me.” (RP 136). Sgt. Jordan also testified, not reading from a transcript, that Mr. McBride “asked Kim McBride to take some of his property—some fishing poles, some nascar stuff, and his marbles” and to put it somewhere safe.” (RP 137). The recording of that conversation was admitted into evidence and played for the jury. (RP 138). On that recording the jury heard Mr. McBride tell Kim McBride to “go ahead and sell my Nascar stuff and my marbles...” and “bring my fishing stuff...” (RP 138) Sgt. Jordan then read from the transcript. (RP 139).

Sgt. Jordan and Deputy Nebe testified about their training and experience, including that with the Drug Task Force, and that they are familiar with user and dealer amounts of drugs. (RP 102, 117-120) . Deputy Nebe testified that the amount of methamphetamine was consistent with an amount that a dealer would have to sell to multiple people. (RP 112). Sgt. Jordan testified that in his training and experience 30 grams is not a user amount and that the amount was enough for approximately 60 doses worth about \$600. (RP 130).

Admitted into evidence was the 30 grams of methamphetamine found in the Appellant's room. (RP 109) Also admitted into evidence was the scale found on his bed with methamphetamine residue on it. (RP 129) Sgt. Jordan testified that "drug dealers uses scales to weigh out methamphetamine when selling it" when asked why there might be meth residue on the scale. (RP 129)

During cross examination Defense counsel asked about the other occupants of the house and if he had contact with them regarding drug offenses. (RP 144) Sgt. Jordan named the individuals, including Mr. Rowher, and the drugs those people were involved with. (RP 144-145). Deputy Nebe also answered on cross examination that other individuals in the house had drug related involvement with law enforcement. (RP 114)

Jayne Aunan from the Washington State Crime Patrol laboratory testified that she tested the substance submitted by law enforcement in this case and that it was positive for methamphetamine hydrochloride and that methamphetamine hydrochloride is a controlled substance. (RP 151, 153, 155-157).

STANDARD OF REVIEW

Issues not preserved for appeal may be rejected for review by the Appellate Courts. RAP 2.5(a). Improper opinion testimony is subject to harmless error. *State v. Kirkman*, 159 Wn. 2d 918, 927, 155 P.3d 125, 130

(2007). Judicial comments are subject to harmless error. *State v. Levy*, 156 Wn. 2d 709, 725, 132 P.3d 1076, 1084 (2006). Hearsay statements admitted in violation of the Confrontation Clause is subject to harmless error. *State v. Watt*, 160 Wn. 2d 626, 633, 160 P.3d 640, 643 (2007). Under the harmless error standard if the State proves beyond a reasonable doubt that the error was harmless then reversal is not required. *State v. Coristine*, 177 Wn. 2d 370, 380, 300 P.3d 400, 405 (2013).

Interpreting an evidentiary rule is a question of law for which review is de novo. *State v. Gresham*, 173 Wn. 2d 405, 419, 269 P.3d 207, 212 (2012). ER 404(b) errors are subject to harmless error and the nonconstitutional harmless error standard is applied. *State v. Gunderson*, 181 Wn. 2d 916, 926, 337 P.3d 1090, 1095 (2014) (quoting *State v. Gresham*, 173 Wn.2d at 433, 269 P.3d 207 (2012)). That test requires the Appellate Court to determine if within reasonable probabilities, the trial's outcome would have been materially affected absent the error. *Id.* (quoting *State v. Smith*, 106 Wn.2d at 780, 725 P.2d 951(1986).

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ARGUMENT

- I. DEPUTY NEBE TESTIMONY REGARDING CONTROL OF MR. MCBRIDE'S ROOM DOES NOT REQUIRE REVERSAL.
 - a. There was no manifest constitutional error because there is no showing of actual prejudice.

Deputy Nebe's opinion testimony was not objected to at trial, thus the Appellant must prove manifest constitutional error. To prove manifest Constitutional error the appellant must prove that the statement was an explicit or nearly explicit opinion on an ultimate issue of fact. *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125, 135 (2007). Deputy Nebe's testimony that Mr. McBride had control over his bedroom, was limited to his opinion as to whether or not Mr. McBride had control over that room as there were a number of other residents in the house. Deputy Nebe did not testify whether he thought Mr. McBride had dominion and control over the substance, nor whether Mr. McBride possessed the substance with intent to deliver it. While admittedly not the wisest question the State could have asked, even if the testimony was improper not all constitutional errors will be reviewed for the first time on appeal because the exceptions to RAP 2.5(a) are narrow. *Id.* at 935. Were it otherwise, then "permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary

appeals, creates undesirable re-trials and is wasteful of the limited resources of prosecutors, public defenders and courts.” *State v. Lynn*, 67 Wn. App. 339, 344, 835 P.2d 251, 254 (1992). A party’s objection at trial might allow the trial court to correct the error and the failure of a party to give the trial court such an opportunity will not be approved by Appellate courts. *Id.* (citing *State v. Scott*, 110 Wn. 2d 682, 685, 757 P.2d 492, 493 (1988)).

To be considered on Appeal then the error must be manifest and to be considered a manifest error there must be a showing of actual prejudice. *Id.* (citing *State v. Walsh*, 143 Wn. 2d 1, 8, 17 P.3d 591, 594 (2001) and *State v. McFarland*, 127 Wn. 2d 322, 332, 899 P.2d 1251, 1255 (1995), *as amended* (Sept. 13, 1995)). “Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a “manifest” constitutional error.” *State v. Kirkman*, 159 Wn. 2d at 936.

The burden is on the Appellant to make a plausible showing that the alleged error “had practical and identifiable consequences in the trial of the case.” *Lynn*, 67 Wn.App. at 345. Appellant fails to make a plausible showing that Deputy Nebe’s testimony about Mr. McBride having control over his bedroom had practical and identifiable consequences in the trial.

The Jury Instruction referenced by Appellant explicitly tells the jury that they must “consider all relevant circumstances in the case” and lists a number of factors the jury could consider, without limiting the jury to those factors and further states that “[n]o single one of these factors necessarily controls your decision. The jury heard more evidence on dominion and control than just Deputy Nebe’s opinion. They heard testimony about several identifiable belongings that were in Mr. McBride’s bedroom including his nascar memorabilia, marbles, and fishing poles that the jury heard phone recordings of him giving direction for their storage and sale; there were hundreds of pieces of mail in the room with Mr. McBride’s name on it and no one else’s and heard testimony that Mr. McBride’s “stuff has always been in that bedroom”; they heard testimony that he did not have another bedroom in the house, that Mr. McBride told law enforcement on prior occasions that the room in question was his bedroom, that Mr. McBride had never denied that was his bedroom; they heard testimony that Mr. McBride attempted to run and hide from law enforcement when they executed the search warrant, that he was hiding next to the trash can that the methamphetamine was found in, that his behavior was consistent with someone attempting to hide contraband, that there was sufficient time for Mr. McBride to hide the methamphetamine; and they heard testimony that the methamphetamine

was found in his area of the house, that there were doors to the room capable of closing (thus allowing Mr. McBride to exclude others from the room and its contents), and that a scale was found on his bed with residue that field tested positive for methamphetamine. The jury saw pictures of this property including some of that property was located in the same area the drugs were found. They also heard that the only place in the entire house that drugs were found was Mr. McBride's room. So the jury heard evidence that the bedroom was his, that the property found in the bedroom was his, that he had the immediate ability to be in actual possession of the drugs, that he had the ability to either preclude or grant other people from accessing the drugs because of the ability to exclude others from his bedroom or grant them permission to enter, that he had authority to dispose of the property in that room, that no one else's belongings were found in that room.

There was plenty of evidence that Mr. McBride had dominion and control over the methamphetamine other than Deputy Nebe's opinion that Mr. McBride had control over his own bedroom. The Appellant therefore cannot show that Deputy Nebe's opinion had a practical and identifiable effect on the trial.

Appellant cites *State v. King*, as authority to support its allegation that Deputy Nebe's testimony violated Mr. McBride's constitutional right

to a jury trial, but this reliance is misplaced as the initial commissioner never engaged in the analysis of whether the opinion testimony invaded the province of the jury or resulted in prejudice. 167 Wn. 2d 324, 332, 219 P.3d 642, 646 (2009). The Court of Appeals likewise failed to consider the improper testimony claim and did not engage in manifest constitutional error analysis and the Supreme Court did not analyze the issue either because it could decide the case on another issue. *Id.* at 333. Because the Appellant has not shown that the alleged improper opinion testimony had a practical and identifiable effect on the trial the Appellant's argument fails and the conviction should be affirmed.

b. Reversal is not required because any error was harmless.

Even were the testimony to amount to manifest error, it is still subject to harmless error analysis. *State v. Kirkman*, 159 Wn. 2d 918, 927, 155 P.3d 125, 130 (2007). For the same reasons that the Appellant cannot prove the error was prejudicial, the error was harmless. There was substantial evidence to show that the Appellant had dominion and control over the methamphetamine in his bedroom other than the opinion testimony. The jury saw the 30 grams of methamphetamine admitted into evidence that was in his room. They heard testimony from two deputies both of which had training and experience working drug interdiction that the 30 grams was a dealer amount and not a personal use amount of

methamphetamine. They heard about a scale with methamphetamine residue on it and an explanation for why the meth residue would be there—dealers use it weigh the product prior to a sale. They heard that there was a known methamphetamine user in Mr. McBride’s room at 4:00 am. They heard that the substance found in his room was tested by the State Patrol Crime Lab and found to be methamphetamine hydrochloride, a controlled substance. They also heard recordings of Mr. McBride’s conversation from the jail in which he complained about being snitched on and admitted that he was caught. There being ample other evidence to prove dominion and control and there being sufficient evidence to prove beyond a reasonable doubt that he possessed the methamphetamine with intent to deliver, the opinion testimony then was harmless beyond a reasonable doubt. The Appellant’s conviction should be affirmed.

II. ANY JUDICIAL COMMENTS WERE HARMLESS ERROR

- a. The suggestion to read from the transcript did not prejudice the Appellant because the Appellant’s statements were already properly admitted into evidence.

The purpose of prohibiting judicial comments on evidence is to prevent the jury from being influenced by the trial judge’s opinion. *State v. Lane*, 125 Wn. 2d 825, 838 (1995) (quoting *State v. Hansen*, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986)). When the State can show

or the record affirmatively shows that the Appellant was not prejudiced, then judicial comments are harmless error. *State v. Levy*, 156 Wn. 2d 709, 725, 132 P.3d 1076, 1084 (2006). The State concedes that suggesting a witness read from a transcript that was not introduced as an exhibit was a comment on the evidence. However, it was harmless error because doing so did not prejudice the Appellant. In *Levy*, the Appellant was charged with burglary, robbery, and unlawful possession of a firearm. *Id.* at 714. The Appellant, while holding a cocked gun and threatening the occupants with a crow bar, entered an apartment and told the occupants to give him their money and jewelry. *Id.* at 714-15. In the jury instructions the trial judge used “to-wit” to list the crow bar as a “dangerous weapon” and the apartment as a “building.” *Id.* at 716. The Supreme Court of Washington found that the jury instructions were judicial comments because they improperly suggested to the jury that the crow bar was a dangerous weapon and an apartment was a building as a matter of law. *Id.* 721-22. However, the Court also found that while the instructions contained judicial comments they were not prejudicial because no rational juror would find that a crow bar is not a dangerous weapon or that an apartment is not a building. *Id.* at 727. The Court held the judicial comments were harmless error. *Id.* Here the jury heard the actual recording of the Appellant’s statements and in one instance heard the testimony of the

Deputy about what Appellant said before the transcript was even mentioned. No rational juror would doubt the statements made by the Appellant after hearing them on the recordings. Because the jury already heard the evidence, there was no prejudice to the Appellant in allowing the deputy to read what was said.

The judge's comments regarding which lines of the transcript the prosecutor was examining the witness about are harmless error and the verdict should be upheld. Unlike the Judge's jury instruction in *Levy*, which stated as a matter of law that a crow bar was a dangerous weapon and an apartment was a building, here, Judge Libey directed the prosecutor and the witness as to which lines of the transcript applied to the portion of the recording that had been played. Judge Libey did not indicate what the lines stated nor did he give his opinion as to the truth or the context of the information. Instead Judge Libey stated "[i]t's hard to hear and that's why I'm going to allow the Deputy to state – to read from the transcript."

Further, Judge Libey instructed the jury to disregard any unintentional comments or indications of his personal opinions. Even if the jury thought that suggesting the lines from the transcript which may be read indicated the judge's opinion, the judge had preemptively informed the jury to disregard any unintentional comments or indication of personal

opinion. Because the Appellant was not prejudiced the conviction should be affirmed.

- b. The Appellant has not cited authority supporting its allegation that the Judge was actually or potentially biased against the Appellant.

In order for a fairness claim to succeed the Appellant must show that the judge was actually or potentially biased. *State v. Gamble*, 168 Wn.2d 161, 188, 225 P.3d 973, 987 (2010). In *Gamble*, the Appellant argued that the Judge expressed his opinion regarding the Appellant's guilt by reinstating charges that he had previously dismissed and based on political motives. *Id.* The Washington Supreme Court found that before a fairness claim can be successful there must be evidence that the judge had actual or potential bias. *Id.* at 187-88. The Court found that the judge's remarks were not improper at the time and in the context that they were made because they were outside the jury. *Id.* at 188. The Court also found that the Appellant did not provide any evidence supporting his claim that the judge had a political motive. Therefore, the court found that the fairness claim failed and affirmed.

Here, unlike the judge in *Gamble*, who had previously dismissed charges and made statements regarding the Appellant's guilt, Judge Libey did not make any statements regarding his opinion of Appellant's guilt, neither before nor during trial. The Appellant has cited no case law

supporting its allegation that suggesting a witness read from a transcript of a recording the Judge had trouble hearing is evidence of actual or potential bias against the Appellant. Therefore, the Appellant has failed to meet its burden to show the judge was actually or potentially biased and the verdict should be upheld.

III. ANY PROPENSITY EVIDENCE WAS HARMLESS AND NOT PRESERVED FOR APPEAL.

a. The error was not preserved for appeal.

RAP 2.5 grants the Appellant court authority to refuse to review any alleged error that was not raised before the trial court. In an unpublished opinion by the Washington Court of Appeals, the court found that evidentiary errors under ER 404, first raised on appeal, have failed to be preserved for review. *State v. Diaz*, 46016-5-11, 2015 WL 5826487, at *1, *7 (Wash. Ct. App. Oct 6, 2015). In *Diaz*, the officer testified about a domestic disturbance call which had occurred prior and lead to the Appellant's arrest for DUI. *Id.* at *6. The Appellant argued that the testimony was propensity evidence and should have been excluded. *Id.* The Court of Appeals of Washington held that because the Appellant failed to object to the evidence at trial he had failed to preserve the issue for review. *Id.* The court reasoned that, "we generally do not consider issues raised for the first time on appeal absent manifest error of a

constitutional magnitude. *Id.* at *7. The court cited to *Smith*, stating that evidentiary errors were not of constitutional magnitude. *Id.* Therefore, the court held that the Appellant failed to preserve the evidentiary issue and denied to review it. *Id.* Evidentiary issues, which lack constitutional magnitude, not preserved at trial and raised first on appeal, are not reviewed by the appellate court.

Appellant failed to preserve this issue for review by failing to raise it at the trial. In this case, similar to the Appellant in *Diaz*, who did not raise an objection to the officer's testimony regarding a prior incident, here Appellant did not object to Sgt. Jordan's testimony. By failing to object to the testimony at trial Appellant did not preserve the issue for review on appeal. Therefore, Appellant failed to preserve the issue for review by the Appellate Court, this Court should decline review on this issue and the verdict should be affirmed.

- b. Even if the court grants review, the Statements were not propensity evidence.

In this case, the evidence that Appellant argues violated his due process right to fair trial was testimony by Sergeant Michael Jordan that, was introduced merely to lay a foundation of his knowledge of Appellant and the residence. Sgt. Jordan testified that he had contacted Appellant "numerous times" and previously executed "at least three search warrants"

at the residence. This testimony was used to identify that the man sitting at counsel table was Thomas McBride, the Appellant in the charged case, and to lay foundation for a trial exhibit that Sgt. Jordan prepared showing the layout of the residence. ER 404 prohibits evidence of other crimes, wrongs, or acts to show that a person acted in conformity therewith. Sgt. Jordan's testimony was not specific, he did not describe the reasons or circumstances of the prior contacts and he did not give any details as to the circumstances of the previous search warrants. In this small community, the jury could likely have assumed that the prior contacts between Sgt. Jordan and Appellant were merely community contact and not of a criminal nature. The testimony regarding the search warrants at the residence could likely have been for other persons who lived or had lived in the residence. In fact, later during cross examination Defense counsel elicited testimony that the other occupants in the house had been contacted by law enforced and known to be drug users. Sgt. Jordan's testimony elicited by the State did not mention a crime, wrong, or act, it therefore was not propensity evidence. The statements not being propensity evidence there was no error.

c. Even if the statements were error, the error was harmless.

Evidentiary errors under ER 404 are harmless error, unless so prejudicial that the outcome of the trial would have been materially

changed, because it lacks constitutional magnitude. *State v. Smith*, 106 Wn. 2d 772, 780, 725 P.2d 951, 955 (1986). In *Smith*, the Appellant, who had recently been involved and arrested in a series of burglaries, matched the description given by victims of rape and was subsequently charged with rape. *Id.* at 775. Evidence of the Appellant's prior burglaries was admitted at trial, to prove the Appellant's identity, which was a key issue. However, the Supreme Court found that the burglaries were not relevant, highly prejudicial and should have been excluded. *Id.* at 778. The Supreme Court reasoned that "[e]videntiary errors under ER 404 are not of constitutional magnitude" and applied the test in which an "error is not prejudicial unless, within reasonable probabilities, had the error not occurred the outcome of trial would have been materially affected." *Id.* at 780. (quoting *State v. Jackson*, 102 Wash.2d 689, 695, 689 P.2d 76 (1984) (alteration in original)). In *Smith*, because the identity of the Appellant was a critical issue, evidence of the other, unrelated crimes, created "more heat than light, and may well be the basis upon which the jury" convicted the Appellant. *Id.* The court found that the burglary evidence materially affected the trial and reversed and remanded. *Id.* at 781. Thus, when an evidentiary error is not so prejudicial as to materially change the outcome of trial, the error is harmless.

Unlike the evidence of burglaries in *Smith*, which was used to prove the key issue of the Appellant's identity, Sgt. Jordan's testimony was produced to establish Sgt. Jordan's knowledge of where the Appellant's resided, and the layout of the residence. Even if Sgt. Jordan's testimony was propensity evidence, it was not so prejudicial as to materially affect the outcome of the case. The evidence, in this case, would not have materially affected the outcome of the trial because it was used only to lay foundation of Sgt. Jordan's knowledge and provided no substantial information regarding prior bad acts. Thus, it is harmless error and the verdict should be affirmed.

IV. READING FROM THE TRANSCRIPT WAS HARMLESS ERROR.

The case at bar is distinguishable from the interpretation cases because there was no translation from one language into another. The translation cases find testimony of an officer testifying to what an interpreter told the officer the Appellant said to be hearsay because the testimony is not based on the interpreter's understanding of the Appellant's statements, but is based upon the translation and that translation is required before the testifying witness can understand the declarant's words. *State v. Huynh*, 49 Wn. App. 192, 203, 742 P.2d 160, 167 (1987), *State v. Lopez*, 29 Wn. App. 836, 839, 631 P.2d 420, 422

(1981), *State v. Morales*, 173 Wn. 2d 560, 574, 269 P.3d 263, 271 (2012), *as corrected on denial of reconsideration* (Mar. 7, 2012). Here, the Appellant's statements and the transcripts were both in English, so no translation was required before the testifying witness could understand the appellant's words. While the trial judge may have had a hard time hearing the statements, there is no evidence that the testifying witness could not understand what the Appellant said.

Regardless, the State concedes that reading from the transcript constituted double hearsay; however, hearsay statements admitted in violation of the Confrontation Clause is subject to harmless error analysis. *State v. Watt*, 160 Wn. 2d 626, 633, 160 P.3d 640, 643 (2007). Here, the transcript was not admitted as an exhibit. What was admitted as an exhibit were the recordings of the Appellant's actual statements. Those recordings were played in open court for the jury and they went back to the jury room for deliberations. Even before the recording about Mr. McBride being snitched on or the transcript was even mentioned Sgt. Jordan testified that Mr. McBride said that Clark Johnson snitched on him. The jail recording was audible enough that the transcriptionist was able to transcribe the jail recording from the trial recording. It necessarily would have been clearer to the jurors sitting in the court room or back in the Jury Room. Also clearly audible was the Appellant claiming his property and directing its

use. Even had the witness not read from the transcript, the jury could still listen to the recordings and hear what the Appellant said, so the evidence before them would be the same whether read from a transcript or heard on the recording. Admittedly, the transcriptionist was unable to transcribe Mr. McBride's statement that "caught is caught", however, there is no evidence that the jury who had the ability to listen to the recording in trial and during deliberations would not have been able to hear that statement. As defense counsel pointed out, the recording says what it says and the jury will hear what it hears. The jury still could have taken into account Mr. McBride's statements that he was snitched on and caught and the directions he gave for the storage and sale of personal property in his bedroom because the recordings of those statements was untainted evidence and properly before the jury along with all the other untainted evidence presented at trial that was discussed in section b of I. above. Reading from the transcript then was harmless beyond a reasonable doubt and the conviction should be affirmed.

V. THE APPELLANT CANNOT PROVE INEFFECTIVE ASSISTANCE OF COUNSEL.

The burden is on Appellant to establish ineffective assistance of counsel by showing 1) that counsel's representation fell below an

objective standard of reasonableness and 2) that he was prejudiced by showing there was a reasonable probability that the result of the trial would have been different. *State v. Humphries*, 181 Wn.2d 708, 720, 336 P.3d 1121 (2014) citing *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The court need not analyze both prongs if the Appellant fails to meet either. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069 (1984).

a. There was no propensity evidence.

The testimony Appellant alleges was propensity on RP 120 was a statement by Sgt. Jordan that he had numerous contacts with Mr. McBride throughout his career. This was in answer to the State's question if the Sergeant was familiar with Mr. McBride and was followed up with request for the witness to point out and describe Mr. McBride, which the witness did thus identify the individual at the defense table was the defendant in this case. Sgt. Jordan's testimony was not in regards to any prior convictions or acts. Defense counsel had no reason to object to Sgt. Jordan identifying the Appellant and explaining how he was able to identify him. Sgt. Jordan's testimony on RP 123 was that he was familiar with the McBride residence because he had served at least three search warrants there in the past. This again is not propensity evidence because it was not evidence of a prior conviction or act on the part of the Appellant. The

testimony was clearly given as foundation evidence for the trial exhibit showing the layout of the residence to show that Sgt. Jordan had the requisite knowledge to attest to the exhibit's accuracy that the witness had created. Defense counsel had no reason to object to this foundational evidence for a trial exhibit. Defense counsel's representation therefore did not fall below an objective standard of reasonableness. The ineffective assistance of counsel claim fails.

b. The trial's result would not have been different.

Even were the court to find that the defense counsel's representation fell below an objective standard, Appellant cannot show that the result of trial would have been different. Because the alleged propensity testimony was clearly used as evidence to identify the person at counsel table as the Appellant in the case and for foundation of a trial exhibit and was not propensity evidence, the jury still would have heard the evidence and no limiting instruction would have needed to be given. For those reasons and the reasons argued in III above for why the error was harmless, the Appellant cannot show a reasonable probability that the result of the trial would have been different. As to the opinion testimony regarding control of the bedroom, for the reasons argued in section b of I. above that the opinion testimony was harmless error, the result in the trial would not

have been different had the opinion testimony been stricken. The Appellant's argument fails and his conviction should be affirmed.

CONCLUSION

Based on the foregoing, the Respondent requests this Court affirm the Appellant's conviction for Possession of a Controlled Substance with Intent to Deliver.

Dated this 23rd day of June, 2020.



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I hereby certify that I emailed a true and accurate copy of the foregoing document to Jodi r. Backlund, at backlundmistry@gmail.com



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WHITMAN COUNTY PROSECUTOR'S OFFICE

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