

65467-5

65467-5

NO. 65467-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

FELIX WILHITE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN ERLICK

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

BRIDGETTE E. MARYMAN
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

2011 OCT 10 10:53 AM
COURT OF APPEALS
DIVISION I
CLERK

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	3
C. <u>ARGUMENT</u>	6
1. SUFFICIENT EVIDENCE SUPPORTS WILHITE'S CONVICTION FOR POSSESSION WITH INTENT TO DELIVER	6
2. WILHITE RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL	12
3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING DETECTIVE SALTER TO OFFER HIS OPINION OF THE EVIDENCE FOUND IN THE SOUTHWEST BEDROOM	18
a. Relevant Facts	18
b. Detective Salter's Opinion Testimony Was Proper	20
c. Any Error Was Harmless.....	23
4. THE COURT PROPERLY EXERCISED ITS DISCRETION TO IMPOSE EXTRADITION COSTS	25
D. <u>CONCLUSION</u>	30

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Chapman v. California, 386 U.S. 18,
87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)..... 23, 24

Harrington v. Richter, ___ U.S. ___,
131 S. Ct. 770 (2011)..... 14

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 13, 14

Washington State:

State v. Alvarez, 128 Wn.2d 1,
904 P.2d 754 (1995)..... 6

State v. Banks, 149 Wn.2d 38,
65 P.3d 1198 (2003)..... 24

State v. Barnes, 117 Wn.2d 701,
818 P.2d 1088 (1991)..... 26

State v. Barragan, 102 Wn. App. 754,
9 P.3d 942 (2000)..... 15

State v. Callahan, 77 Wn.2d 27,
459 P.2d 400 (1969)..... 7

State v. Cantabrana, 83 Wn. App. 204,
921 P.2d 572 (1996)..... 8

State v. Collins, 76 Wn. App. 496,
886 P.2d 243, review denied,
126 Wn.2d 1016 (1995)..... 8

State v. Fiser, 99 Wn. App. 714,
995 P.2d 107, review denied,
141 Wn.2d 1023 (2000)..... 7

<u>State v. George</u> , 146 Wn. App. 906, 193 P.3d 693 (2008).....	7, 8
<u>State v. Goodman</u> , 150 Wn.2d 774, 83 P.3d 410 (2004).....	7
<u>State v. Heatley</u> , 70 Wn. App. 573, 854 P.2d 658 (1993), <u>review denied</u> , 123 Wn.2d 1011 (1994).....	20
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	13, 16
<u>State v. Hults</u> , 9 Wn. App. 297, 513 P.2d 89 (1973).....	10
<u>State v. Johnson</u> , 59 Wn. App. 867, 802 P.2d 137, <u>reversed on other grounds</u> , 119 Wn.2d 143, 829 P.2d 1078 (1990).....	27
<u>State v. Jones</u> , 168 Wn.2d 713, 230 P.3d 576 (2010).....	23
<u>State v. Knapstad</u> , 41 Wn. App. 781, 706 P.2d 238 (1985), <u>affirmed</u> , 107 Wn.2d 346, 729 P.2d 48 (1986).....	11, 12
<u>State v. Lass</u> , 55 Wn. App. 300, 77 P.2d 539 (1989).....	27
<u>State v. Lord</u> , 117 Wn.2d 829, 822 P.2d 177 (1991).....	14
<u>State v. Madison</u> , 53 Wn. App. 754, 770 P.2d 662, <u>review denied</u> , 113 Wn.2d 1002 (1989).....	14, 15
<u>State v. Mathews</u> , 4 Wn. App. 653, 484 P.2d 942 (1971).....	8
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	14

<u>State v. Montgomery</u> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	20, 21, 23, 25
<u>State v. Moon</u> , 124 Wn. App. 190, 100 P.3d 357 (2004).....	26
<u>State v. Morgan</u> , 78 Wn. App. 208, 896 P.2d 731, <u>review denied</u> , 127 Wn.2d 1026 (1995).....	8
<u>State v. Ortiz</u> , 119 Wn.2d 294, 831 P.2d 1060 (1992).....	20
<u>State v. Powell</u> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	24, 25
<u>State v. Sanders</u> , 66 Wn. App. 380, 832 P.2d 1326 (1992).....	20, 23
<u>State v. Saunders</u> , 91 Wn. App. 575, 958 P.2d 364 (1998).....	15, 16
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	13
<u>State v. Weber</u> , 99 Wn.2d 158, 659 P.2d 1102 (1983).....	17
<u>State v. Wheatley</u> , 10 Wn. App. 777, 519 P.2d 1001 (1974).....	8, 11

Statutes

Washington State:

RCW 9.94A.760	26
RCW 10.01.160.....	26, 27, 28
RCW 10.88.290.....	29
RCW 10.88.410.....	29

Rules and Regulations

Washington State:

CrR 2.2..... 28

Other Authorities

Uniform Criminal Extradition Act 28

A. ISSUES PRESENTED

1. To possess cocaine with intent to deliver, a defendant must have either actual or constructive possession. Constructive possession may be established if the defendant has dominion and control over either the premises or the drugs. Officers found multiple documents belonging to Wilhite in the same bedroom where they found cocaine. Wilhite was also known to live in the house. Is there sufficient evidence from which any reasonable jury could have found beyond a reasonable doubt that Wilhite had constructive possession of the bedroom and the cocaine found therein?

2. To prevail on an ineffective assistance of counsel claim, an appellant must show deficient performance and resulting prejudice. If counsel's conduct can be characterized as legitimate trial strategy, then it cannot be the basis for an ineffective assistance of counsel claim. Trial counsel did not object to infrequent references to the southwest bedroom as "Wilhite's bedroom." Was it legitimate trial strategy to avoid drawing unnecessary attention to the references? If not, has Wilhite failed to demonstrate prejudice?

3. Witnesses may offer opinion testimony, provided that they do not comment directly on a defendant's guilt. It is proper for witnesses to offer their opinions based on physical evidence, even if the opinion relates to an element of the crime. Here, Detective Salter testified that the evidence found in the southwest bedroom was consistent with drug dealing, rather than personal use. Was Salter's testimony proper when he did not offer his opinion of Wilhite's intentions.

4. Trial courts have broad discretion to impose court costs for expenses directly related to prosecuting a defendant. The legislature has not limited a court's ability to include extradition expenses in court costs. Did the trial court properly exercise its discretion when it ordered Wilhite to repay the costs of extraditing him from California?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Felix Wilhite was charged by information with Violation of the Uniform Controlled Substances Act ("VUCSA"); specifically, the State alleged that on or about November 13, 2009, Wilhite possessed cocaine with the intent to deliver it. CP 1-4.

Trial occurred in April of 2010. The jury found Wilhite guilty as charged. CP 115. The court imposed a standard range sentence. CP 125-32.

2. SUBSTANTIVE FACTS.

Detective Todd Salter is a detective with the Major Crimes Unit of the King County Sheriff's Office. 2RP 216.¹ On November 12, 2009, Salter was involved in a homicide investigation. 1RP 31-32; 2RP 218. Wilhite's name came up during the course of the investigation, and officers obtained a search warrant for the house at 825 South 176th Street in Burien, where they believed Wilhite lived. 2RP 218.²

The team began executing the search warrant at 5:46 p.m. 2RP 227. After SWAT officers secured the house, the other officers began searching the house. Id. They found one person in the house; Wilhite was not present. Id.

¹ The verbatim report of proceedings consists of six volumes. The motions, jury trial, and sentencing are labeled Volumes I-III. In order to be consistent with the Brief of the Appellant, they will be referred to as 1RP (Volume I), 2RP (Volume II), and 3RP (Volume III). The remaining volumes, which include pretrial discovery motions and motions for release, will not be cited.

² The jury was not informed of the specific nature of the underlying investigation. 2RP 218.

Salter was assigned to search the southwest bedroom of the house. 2RP 229. The room was an average size for a non-master bedroom and it appeared to be lived-in: there were clothes in the closet, the trashcan was full, and the room was furnished like a typical bedroom. 2RP 243-44.

Salter found several items belonging to Wilhite in the bedroom. The first was Wilhite's expired temporary driver's license, which was in a file folder on the floor of the bedroom. Ex. 2; 2RP 232. In other parts of the bedroom, Salter found two documents from Western Union, including a receipt for a money order sent on September 29, 2009. Id. Wilhite, who was the sender of the money order, listed his address as 825 South 176th Street. Id. Salter found an envelope addressed to Wilhite's father at the 176th Street address and a two-page letter addressed to "Lil Felix," signed "Your Primo Marie, God Bless you." Ex. 2; 2RP 233. The letter was dated August 10, 2009. Ex. 2.

Salter also found an invitation for an event on October 17, 2009. Ex. 2; 2RP 235. The invitation read, "For righteous reasons Felix was there for us. Now lets [sic] be there for him and his son, Halerio." Id. The invitation advertises music, door prizes, and it

says, "Helping out is the right thing to do. Follow the map on the back." Id.

In other parts of the house, officers found a copy of Wilhite's birth certificate and a postcard addressed to Wilhite at the 176th Street house. Ex. 11, 13; 2RP 258, 271.

In addition to Wilhite's paperwork, Salter found three safes in the bedroom. 2RP 236. There was a small, portable safe on the floor, next to Wilhite's driver's license. Id. In the closet, Salter found another small safe and a waist-high, heavy-duty safe on wheels. Id.

Detective Crenshaw opened the two smaller safes for Salter. 2RP 284. In the small safe that was in the closet, Salter found only some plastic wrap. 2RP 239. In the safe that was next to Wilhite's driver's license, Salter found a digital scale, \$5,000 in cash and approximately nine ounces of cocaine. 2RP 238, 242-43. When SWAT officers opened the larger safe outside the house, they found an additional \$2,920. 2RP 243.

The amount of cocaine found in the safe was much larger than an average user would possess. 2RP 268. The street value of that much cocaine would range from \$7,200 to \$9,000. 2RP 263. It is also common for dealers to have a digital scale to

prepare drugs for packaging. 2RP 262. In Salter's opinion, the quantity and the packaging of the cocaine, combined with the digital scale and the large amount of cash, was consistent with drug sales rather than personal use. 2RP 269.

On December 29, 2009, Salter met with Stephen Huff, who lived at the house at the time that officers served the search warrant. 2RP 245. Huff told Salter who lived in each room and said that Wilhite was one of his roommates. Id.

C. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTS WILHITE'S CONVICTION FOR POSSESSION WITH INTENT TO DELIVER.

Wilhite asserts that the State did not prove that he had constructive possession of the cocaine. This argument should be rejected because there was sufficient evidence from which a rational jury could find that Wilhite had constructive possession of the southwest bedroom and the cocaine found there.

The State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any

rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. Id. Circumstantial and direct evidence carry equal weight when reviewed by an appellate court. Id. A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107, review denied, 141 Wn.2d 1023 (2000). The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

Possession may be either actual or constructive. State v. George, 146 Wn. App. 906, 919, 193 P.3d 693 (2008). Actual possession means that the goods are in the personal custody of the person charged with possession, while constructive possession means that the person charged with possession has dominion and control over the goods. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

“Constructive possession is proved when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs were found.” George, 146 Wn. App. at 920 (quoting State v. Mathews, 4 Wn. App. 653, 656, 484 P.2d 942 (1971)). See also State v. Cantabrana, 83 Wn. App. 204, 208, 921 P.2d 572 (1996) (when the sufficiency of the evidence is challenged on the basis that the State has shown dominion and control over premises only, and not over drugs, courts correctly hold that the evidence is sufficient because dominion and control over the premises raises a rebuttable inference of dominion and control over the drugs).

One can be in constructive possession jointly with another person. State v. Morgan, 78 Wn. App. 208, 212, 896 P.2d 731, review denied, 127 Wn.2d 1026 (1995). Courts look at the totality of the circumstances in determining whether the State has proven constructive possession. State v. Collins, 76 Wn. App. 496, 501, 886 P.2d 243, review denied, 126 Wn.2d 1016 (1995).

In State v. Wheatley, officers executed a search warrant on a house in Seattle. 10 Wn. App. 777, 778, 519 P.2d 1001 (1974). In a nightstand in one of the bedrooms, officers found bank deposit slips, a vehicle registration or title document, a bill of sale for a

pistol, and a number of envelopes, all in Wheatley's name. Id. Officers also found a sack of marijuana on the floor near the nightstand, as well as more marijuana in the kitchen and the basement. Id. Wheatley arrived at the house about 25 minutes after the warrant was served, and was immediately arrested. Id. On appeal, the court held that there was sufficient evidence for a jury to find that Wheatley was in constructive possession of the premises and the marijuana. Id. at 779.

Here, Detective Salter found several documents belonging to Wilhite in the southwest bedroom, including Wilhite's old Washington driver's license in a folder next to the safe in which the cocaine was found.³ Ex. 2. Salter found the envelope addressed to Wilhite's father at the 176th Street address, along with the letter to "Lil Felix," dated August 10, 2009. Id. Salter also found the receipt for a Western Union money order on which Wilhite listed his address as 825 S 176th St. Id. The money order was sent on September 25, 2009. Id. Finally, Salter found the invitation for an

³ Wilhite correctly notes that the address on the license did not match the address of the 176th Street house. However, the license was a temporary license, which was issued on August 21, 2008, and expired on October 5, 2008. Ex. 2. Given the presence of more recent documents bearing the 176th Street address, a jury reasonably could have concluded that Wilhite's expired license reflected his prior address.

event on October 17, 2009. In addition to the documents found in the southwest bedroom, officers found Wilhite's birth certificate somewhere in the house, as well as a postcard addressed to Wilhite at the 176th Street house.⁴ Ex. 11, 13.

The documents, which were all important, personal paperwork, reveal that Wilhite recently had held out the 176th Street house as his residence. See State v. Hults, 9 Wn. App. 297, 302, 513 P.2d 89 (1973) (circumstantial evidence, including the defendant's checks that listed the address at issue, showed that the defendant recently had dominion and control over the premises). Further, given the relatively brief time span between the dates on the documents and the date of the search, the jury reasonably could conclude that Wilhite had recent access to the southwest bedroom. Id.

Although Wilhite was not present at the time that the warrant was executed, Wilhite was associated with the house. Officers searched the house specifically because Wilhite's name had come up in the course of an investigation and the officers had obtained a warrant to search the house where Wilhite "was believed to be

⁴ Although the postmark is difficult to read, it appears that the postcard was mailed on October 9, 2009.

living.” 2RP 218. In addition, Salter learned that Stephen Huff lived at the house at the time that the search warrant was executed, and that Wilhite was one of Huff’s roommates. 2RP 245. Based on Wilhite’s paperwork that was found in the southwest bedroom, and his known connections to the house, there was sufficient evidence for a jury to find that Wilhite had constructive possession of the southwest bedroom, and thus of the cocaine. See Wheatley, 10 Wn. App. at 779.

Wilhite argues that the facts of his case are akin to those in State v. Knapstad, 41 Wn. App. 781, 706 P.2d 238 (1985), affirmed, 107 Wn.2d 346, 729 P.2d 48 (1986). Knapstad is distinguishable from this case. Officers found 160 grams of marijuana in the attic of a house rented by Knapstad’s brother. Id. at 783. They found Knapstad’s gasoline credit card receipt in a dresser in a bedroom, and Knapstad’s traffic ticket in a common area. Id. Both documents reflected an address that was different from the house where the marijuana was found. Id. Surveillance officers had seen Knapstad’s vehicle at the house on three separate occasions. Id. The appellate court found that there was insufficient evidence to prove that Knapstad had constructive possession of the premises. Id. at 784.

Contrary to Wilhite's argument, the evidence against Knapstad was not stronger than the evidence against Wilhite. In Knapstad, the drugs were found hidden in an attic, with no indication that Knapstad had ever been in the attic. Id. at 783. The only items connecting Knapstad to the house were found in other rooms, and those documents indicated a different address for Knapstad. Id.

Here, the cocaine was found in the same bedroom as the documents belonging to Wilhite. Multiple recent documents indicated that Wilhite had used the 176th Street address as his own in the months preceding the search warrant. While Wilhite's vehicle was not seen at the house, officers had reason to believe that Wilhite lived at the house. The evidence against Wilhite tied him to both the house and the room in which the cocaine was found. Therefore, there was sufficient evidence from which a jury could find that Wilhite had constructive possession of the cocaine.

2. WILHITE RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Wilhite argues that trial counsel was ineffective when he failed to object to the characterization of the southwest bedroom as

“Wilhite’s bedroom.” Given that an objection would have drawn unwanted attention to the testimony, it was a legitimate tactical decision to not object. Moreover, Wilhite cannot show that he was prejudiced by counsel’s failure to object.

To prevail on an ineffective assistance of counsel claim, Wilhite must show (1) that his attorney’s conduct fell below an objective standard of reasonableness and (2) that this deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Prejudice exists where “there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.” State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). If a defendant fails to demonstrate either prong, the inquiry ends. Id. at 78.

Courts presume that counsel has provided effective representation and are “highly deferential” when scrutinizing counsel’s performance. Strickland, 466 U.S. at 689. “It is all too tempting for a defendant to second-guess counsel’s assistance after conviction . . . and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Id.

Because an ineffective-assistance claim can function as a way to escape rules of waiver and raise issues not presented at trial, the Strickland standard must be scrupulously applied. Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770, 788 (2011).

On review, the relevant inquiry is “whether counsel’s assistance was reasonable considering all the circumstances.” Strickland, 466 U.S. at 688. There is a “wide range” of reasonable performance, and a recognition that even the best criminal defense attorneys take different approaches to defending someone. Id. at 689. If counsel’s conduct can be characterized as legitimate trial strategy or tactics, then it cannot be the basis for an ineffective assistance of counsel claim. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). The defendant must show the absence of legitimate strategic or tactical reasons to support the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Counsel’s decisions about whether or not to object are quintessentially tactical decisions, and only in egregious circumstances relating to evidence central to the State’s case will the failure to object constitute incompetent representation that justifies reversal. State v. Madison, 53 Wn. App. 754, 763,

770 P.2d 662, review denied, 113 Wn.2d 1002 (1989). To prevail on a claim of ineffective assistance of counsel based on a decision not to object, the defendant must show three things: 1) that there were no legitimate tactical reasons for not objecting; 2) that the trial court would have sustained an objection if one had been made; and 3) that the result of the trial would have been different if an objection had been made and sustained. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Courts generally presume that counsel decided not to request a limiting instruction so as to avoid reemphasizing damaging evidence. State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). Such a presumption is appropriate in this case.

Wilhite argues that his attorney should have objected on three occasions. First, he contends that counsel should have objected when the prosecutor referred to the room as “the Defendant’s room.” 2RP 236. Next, he contends that counsel should have objected when Detective Salter referred to the room as “Mr. Wilhite’s room.” 2RP 257. Finally he claims that counsel should have objected when the prosecutor asked, “And was this found in what you believed to be Mr. Wilhite’s bedroom?” 2RP 258.

Throughout trial, the prosecutor and Salter repeatedly referred to the room as “the southwest bedroom” or “the bedroom.” See generally 2RP 229-79. In the context of Salter’s long testimony about the southwest bedroom, the references to the room as “Wilhite’s” were rare. Any objection to the prosecutor’s questions or Salter’s testimony would have drawn unnecessary attention to the fact that Salter believed the southwest bedroom was Wilhite’s. Given the fleeting nature of the references, it was a legitimate tactic to avoid drawing attention to them. This court should presume that trial counsel provided effective representation.

Even if trial counsel was deficient, Wilhite cannot show prejudice. To prevail, Wilhite must show a reasonable probability that “but for counsel’s errors, the result of the trial would have been different.” Hendrickson, 129 Wn.2d at 78. In the case of a missed evidentiary objection, Wilhite must show that the proposed objection would likely have been sustained and that the result of the trial would have been different if the evidence had not been admitted. Saunders, 91 Wn. App. at 578.

Wilhite offers no evidence rule or other authority to support his claim that the trial court would have sustained an objection. Wilhite simply states that “there was no evidence to support the

detective's conclusion" and that the trial court sustained "similar" objections.⁵ None of those objections provides any insight as to how the trial court would have ruled on an objection to the questions and testimony at issue here. Wilhite has not met his burden to demonstrate that any objection would have been sustained.

Moreover, Wilhite cannot show that the result of the trial would have been different had an objection been sustained. In all likelihood, Salter or the prosecutor would have rephrased to clarify that Salter believed that the southwest bedroom was Wilhite's based on the evidence found in the room.⁶ Such testimony would have reminded the jury of the evidence supporting Salter's opinion.

⁵ The trial court ruled that Salter could not refer to the documents found in the southwest bedroom as documents of "dominion and control." 2RP 231. Because the trial court's ruling followed a discussion at sidebar, the basis for the court's ruling is not on the record. The trial court also sustained a hearsay objection regarding statements made by Stephen Huff to Salter. 2RP 245.

⁶ Wilhite argues that the references to the southwest bedroom were especially prejudicial given the stricken testimony that Huff told Salter that the southwest bedroom was Wilhite's. However, the trial court instructed the jury to disregard testimony regarding who lived in the southwest bedroom and the jury is presumed to follow the court's instructions to disregard those remarks. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING DETECTIVE SALTER TO OFFER HIS OPINION OF THE EVIDENCE FOUND IN THE SOUTHWEST BEDROOM.

Wilhite argues that the trial court erred when it allowed Detective Salter to offer his opinion that the combined evidence indicated that the cocaine was likely being sold, rather than possessed for personal use. Wilhite's argument fails because Salter did not give an opinion on Wilhite's guilt. Furthermore, even if the trial court erred in allowing Salter's testimony, any error was harmless.

a. Relevant Facts.

Detective Salter, who has been a police officer for 11 years, has been a detective for 4 years. 2RP 217. During that time, he has become familiar with narcotics investigations. 2RP 261. Salter explained the significance of the evidence found in the southwest bedroom. 2RP 262-69. For instance, people who sell narcotics frequently use digital scales to confirm that each package contains the correct amount of drugs. 2RP 262. Salter also testified that the cocaine would have been worth between \$7,200 and \$9,000 on the street. 2RP 263. He explained that a dealer could make much

more than that by dividing the cocaine into smaller amounts and charging a higher per-unit price. 2RP 265. Finally, Salter offered the following testimony about the quantity of drugs:

[Prosecutor]: And would you consider this a personal use amount?

Det. Salter: Uh, absolutely not.

[Prosecutor]: Alright. Greater or smaller, tells us a little bit about why not?

Det. Salter: Um, much greater. The amount of cocaine here, uh, the street value, just not something you would commonly see with somebody who is, uh, a user. Somebody using cocaine.

[Prosecutor]: Okay. And what, that amount is commonly used, is commonly possessed by someone with what purpose?

Det. Salter: Uh, the amount we saw--

[Defense]: Objection, your Honor, it calls for the ultimate conclusion.

[Court]: Based on his training and experience?

[Prosecutor]: Based on his training and experience?

[Defense]: Uh--, your Honor, it invades the province of the jury.

[Court]: I'll allow it. Overruled.

Det. Salter: Uh, based on my training and experience, the amount of cocaine, uh, that we found, the money we found, the scale we found, uh, clearly indicated to me that this stuff was being sold.

2RP 268-69.

b. Detective Salter's Opinion Testimony Was Proper.

Appellate courts review a trial court's decision to admit opinion testimony for abuse of discretion. State v. Ortiz, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). The mere fact that an expert opinion covers an issue that the jury has to pass upon does not call for automatic exclusion. State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008). However, no witness is allowed to testify to his opinion as to the guilt of a defendant. State v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011 (1994). Testimony that is deemed to be an improper opinion on guilt usually involves an assertion pertaining directly to the defendant. Id. at 577. Testimony that is not a direct comment on the defendant's guilt and is based solely on inferences arising from the physical evidence is proper opinion testimony. Id. at 578.

In State v. Sanders, 66 Wn. App. 380, 832 P.2d 1326 (1992), officers found crack cocaine, guns and plastic baggies in Sanders's house. Officers did not find any pipes or implements used for smoking crack cocaine. Id. at 382-83. The prosecutor asked the officer whether there was any significance to the absence of smoking devices. Id. at 384. The officer answered,

“Based on my experience, the lack of items associated with the smoking of crack cocaine indicates that that house is not used for that purpose and the persons within do not do so frequently.” Id. Sanders challenged her conviction for possession of cocaine with intent to deliver, contending that the court erred in allowing the arresting officer to testify as to the significance of the lack of drug-user paraphernalia at her residence. Id. at 385. The appellate court held that this testimony did not constitute an opinion of the defendant’s guilt on the charge of possession with intent to deliver because the officer’s opinion was an inference based on the physical evidence and the officer’s experience. Id. at 388.

Wilhite relies on Montgomery to support his argument that Salter’s opinion was improper. The facts of Montgomery are distinguishable. In fact, the court in Montgomery approved of testimony similar to that offered by Salter.

Montgomery was charged with possession of pseudophedrine with intent to manufacture methamphetamine. 163 Wn.2d at 584. Montgomery caught the attention of officers conducting surveillance of a local store when he and his co-defendant, Biby, went directly to the cold medicine aisle and selected two boxes of pseudophedrine. Id. at 585. Officers

followed the pair as they went to multiple stores, buying a number of the ingredients necessary to make methamphetamine. Id. at 585-86.

After the detective had described the events, the prosecutor asked whether he had formed any conclusions. Id. at 587. The detective replied, "I felt very strongly that they were, in fact, buying ingredients to manufacture methamphetamine based on what they had purchased, the manner in which they had done it, going from different stores, going to different checkout lanes. I'd seen those actions several times before." Id. at 588. Later, the forensic chemist testified that the combined purchases were what led him to believe that "this pseudophedrine is possessed with intent." Id.

The Supreme Court found that the opinions "went to the core issue and the only disputed element, Montgomery's intent." Id. at 594. The court was particularly concerned that the detective expressed his opinion using expressions of personal belief, such as "I felt strongly that...." Id. The court also took issue with the fact that the chemist's opinion simply parroted the legal standard for possession with intent. Id. The court noted that it would have been proper for the detective to testify that "the chemicals possessed and

the manner in which they were obtained was consistent with intent to manufacture methamphetamine.” Id. at n.8.

Unlike in Montgomery, Detective Salter did not offer his opinion about Wilhite’s actions or intent. Nor did Salter express his opinion in the form of a personal belief. Rather, Salter gave his opinion of the evidence based on his training and experience. See Sanders, 66 Wn. App. at 388. Although perhaps not as eloquent, Salter’s testimony that the evidence was consistent with drug sales is similar to the script proposed in Montgomery. 163 Wn.2d at 594. Salter’s opinion was proper because the jury was still free to decide whether Wilhite possessed the drugs and, if so, whether he possessed them with the intent to deliver. See Sanders, 66 Wn. App. at 389.

c. Any Error Was Harmless.

Nonetheless, even if Salter’s opinion was improper, reversal is still not required. Rather, the record plainly demonstrates that any error is harmless beyond a reasonable doubt.

A constitutional error can be harmless if it is proved to be harmless beyond a reasonable doubt. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010) (citing Chapman v. California, 386

U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). Error is harmless if the court is satisfied beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. Id. Put another way, such error is harmless if there is “no reasonable probability that the outcome of the trial would have been different had the error not occurred.” State v. Banks, 149 Wn.2d 38, 44, 65 P.3d 1198 (2003) (quoting State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995)).

Here, Salter testified that the amount of drugs found in the southwest bedroom was not consistent with personal use. He also testified that it was common for dealers to use digital scales when packaging their drugs for sale. In addition, officers found over \$7,000 in the safes, which was consistent with drug trafficking. Wilhite does not assign error to the admission of this evidence. The testimony to which Wilhite assigns error was simply a summary of Salter’s previously-stated opinions. The jury already had sufficient evidence to conclude that the cocaine was possessed with the intent to deliver.

Furthermore, Wilhite’s defense centered on the question of whether the State had proven that Wilhite had constructive possession of the cocaine. 3RP 510-25. He never challenged

whether the evidence supported an inference of intent to deliver.

Id. In fact, while the trial court instructed the jury on the lesser offense of possession of cocaine, Wilhite never referenced that instruction. CP 162; 3RP 510-25.

Finally, the trial court instructed the jury that they were the “sole judges of the credibility of witnesses,” and that the jurors “are not bound” by expert opinions. CP 145, 152. Absent any jury inquiry or other evidence that the jury was unfairly influenced, this Court should presume that the jury followed the court’s instructions. See Montgomery, 163 Wn.2d at 596 (“important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed”).

Given the totality of Salter’s testimony and the fact that the jury was properly instructed, there is no reason to believe that the outcome of the trial would have been different without Salter’s final opinion testimony. See Powell, 126 Wn.2d at 267.

4. THE COURT PROPERLY EXERCISED ITS DISCRETION TO IMPOSE EXTRADITION COSTS.

Wilhite argues that the trial court erred when it imposed court costs that included the cost of extraditing him from California for

arraignment. Wilhite's argument fails because he cannot establish that the court abused its discretion when it imposed court costs based on expenses incurred by the State while prosecuting him.

Generally, trial courts have the authority to impose costs and fees on a convicted defendant. RCW 9.94A.760(1); RCW 10.01.160. Trial courts have been given wide latitude in matters related to sentencing under these statutes. State v. Moon, 124 Wn. App. 190, 193, 100 P.3d 357 (2004) (citing State v. Barnes, 117 Wn.2d 701, 710, 818 P.2d 1088 (1991)).

Under RCW 10.01.160, the court can order a defendant to repay court costs as part of his felony judgment and sentence. Those costs are limited to "expenses specially incurred by the state in prosecuting the defendant..." RCW 10.01.160(2). The legislature has further limited the amount that can be imposed for certain costs. For instance, the maximum that a defendant can be required to pay for incarceration costs is \$100 per day. Id. Likewise, the costs imposed for pretrial supervision may not exceed \$150. Id.

The legislature has not capped all court costs, though, and the limitations imposed in RCW 10.01.160(2) should not be interpreted to be an exhaustive list of the types of costs that may be

imposed. For instance, RCW 10.01.160(2) is silent regarding the recoupment of attorney's fees. However, a trial court may impose court costs for the recoupment of attorney's fees and has the discretion to determine what amount is reasonable. State v. Johnson, 59 Wn. App. 867, 875-76, 802 P.2d 137, reversed on other grounds, 119 Wn.2d 143, 829 P.2d 1078 (1990).

Here, the State extradited Wilhite from California after he failed to appear for arraignment. 3RP 573. At sentencing, the trial court ordered Wilhite to pay \$1,048.28 in court costs, based on the expenses incurred by the State when Wilhite was extradited from California. CP 127.

Wilhite does not dispute that the costs were "specially incurred by the state" in prosecuting him. RCW 10.01.160(2). Nor does Wilhite cite any authority limiting the imposition of extradition costs. Indeed, RCW 10.01.160(2) does not limit the amount of extradition expenses that the trial court may impose as part of court costs.

In State v. Lass, 55 Wn. App. 300, 77 P.2d 539 (1989), the defendant was ordered to pay \$9,587 in restitution, and \$1,720.41 for witness fees and extradition costs. The defendant acknowledged the trial court's authority to impose restitution, but

argued that the trial court abused its discretion when it imposed the court costs for witness fees and extradition costs. Id. at 307. The appellate court held that witness fees and extradition costs were recoverable under RCW 10.01.160. Id.

Wilhite contends that the trial court was only authorized to impose extradition costs up to \$100. To support this argument, he relies upon the fact that costs related to preparing and serving warrants for failure to appear may not exceed \$100. RCW 10.01.160(2). Wilhite offers no authority to support his theory that this limitation also applies to extradition. Although failure to appear warrants and extradition both provide means for ensuring a defendant's appearance, Wilhite's argument ignores the significant differences between the two processes.

Failure to appear warrants are controlled by court rules. When a defendant fails to appear, the trial court may issue a warrant for arrest. CrR 2.2(b)(4). The authority to execute the arrest warrant is limited to Washington peace officers. CrR 2.2(d).

In contrast, extradition proceedings are controlled by the Uniform Criminal Extradition Act. When the return of a fugitive to Washington is required, the prosecuting attorney must present his "written application for a requisition for the return" of the fugitive to

the governor. RCW 10.88.410. The application must be verified and supported by affidavits and any other necessary documentation. Id. In Washington, before a fugitive from another state can be extradited, he is entitled to a preliminary hearing. RCW 10.88.290. He is also entitled to the advice of counsel and to challenge the legality of his arrest. Id.

In addition to the legal and procedural differences, there are obvious practical distinctions between serving a failure to appear warrant and extraditing a fugitive. Officers serving a failure to appear warrant are operating within Washington. They do not have to coordinate with other law enforcement entities, and they typically transport defendants via automobile. On the other hand, officers extraditing fugitives must deal with all of the complications involved with transporting a defendant across state lines. They must coordinate with local law enforcement and, in some cases, must wait while the defendant exercises his due process rights. As in this case, they frequently incur costs for air travel, hotel and meals. 3RP 573. Preparing and serving a failure to appear warrant is not comparable to the process of extraditing a fugitive.

Wilhite cannot show that the trial court abused its discretion when it ordered that he pay court costs in excess of \$100. This Court should affirm the court costs ordered by the trial court.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Wilhite's conviction and sentence.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Bridgette E Maryman
BRIDGETTE E. MARYMAN, WSBA #38720
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. FELIX WILHITE, Cause No. 65467-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Bora Ly
Done in Seattle, Washington

05/09/11
Date