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**AUG 24 2016**

WASHINGTON STATE  
SUPREME COURT

FILED  
August 22, 2016  
Court of Appeals  
Division I  
State of Washington

Supreme Court No.: 93504-1  
Court of Appeals No.: 72944-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

DENNIS JACKSON,

Petitioner.

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PETITION FOR REVIEW

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KATHLEEN A. SHEA  
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TABLE OF CONTENTS

A. IDENTITY OF PETITIONER AND THE DECISION BELOW .... 1

B. ISSUE PRESENTED FOR REVIEW ..... 1

C. STATEMENT OF THE CASE..... 1

D. ARGUMENT IN FAVOR OF GRANTING REVIEW ..... 4

This Court should grant review because the trial court’s erroneous denial of Mr. Jackson’s request for a unanimity instruction should not be held harmless given the court’s prior decision in *State v. King*.....4

E. CONCLUSION ..... 8

TABLE OF AUTHORITIES

**Washington Supreme Court**

*State v. Bobenhouse*, 166 Wn.2d at 881, 214 P.3d 907 (2009) .....5

*State v. Coleman*, 159 Wn.2d at 509, 150 P.3d 1126 (2007) .....4

**Washington Court of Appeals**

*State v. King*, 75 Wn. App. 899, 878 P.2d 466 (1994) .....*passim*

A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Dennis Jackson requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division One, in *State v. Dennis Jackson*, No. 72944-6-I, filed March 14, 2016. A copy of the opinion is attached as Appendix A. The Court of Appeals denied Mr. Jackson's motion to reconsider on July 22, 2016. A copy of the court's order is attached as Appendix B.

B. ISSUE PRESENTED FOR REVIEW

When a court erroneously denies a defendant's request for a unanimity instruction, the error is harmless only if the State can demonstrate no rational juror could have a reasonable doubt as to any of the incidents alleged. Where this showing could not be made given the fact pattern and analysis presented in *State v. King*,<sup>1</sup> in which the Court of Appeals reversed, should this Court grant review in the substantial public interest? RAP 13.4(b)(2), (4).

C. STATEMENT OF THE CASE

Dennis Jackson was riding in the front passenger seat of a car when it was stopped by police. 1 RP 135-36. During the arrest of the driver for a suspended license, an officer ordered Mr. Jackson out of

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<sup>1</sup> 75 Wn. App. 899, 903-04, 878 P.2d 466 (1994).

the car because the officer did not like the way Mr. Jackson was moving his hands. 1 RP 162; 2 RP 201-02. When Mr. Jackson stepped out of the car, the officer saw white crystals, later found to contain methamphetamine, on the passenger seat and floorboard. 2 RP 203.

The officer detained Mr. Jackson and, after discovering he had an outstanding warrant, placed Mr. Jackson under arrest and performed a search of his person. 2 RP 204, 229. The driver was placed in Officer Stephen Ross's car, and Mr. Jackson was placed in Officer Timothy O'Hara's car. 1 RP 164; 2 RP 206. The driver, who appeared to Officer O'Hara to be a drug addict, remained in Officer Ross's car for 30 minutes to one hour. 1 RP 138; 2 RP 230. He was then released and Mr. Jackson was moved to Officer Ross's vehicle for transport to the jail. 2 RP 206.

Upon arriving at the jail, Officer Ross discovered a small plastic bag, later found to contain heroin, on the floor of one of the back passenger seats. 1 RP 144. No heroin had been found on Mr. Jackson when he was searched at the time of arrest, and no heroin was found in the patrol car he was initially placed in. 1 RP 139; 2 RP 206, 229.

Mr. Jackson was booked into the jail, strip searched, and placed in restraints. 2 RP 320-21. After his hands were released from

restraints to allow him to eat, a deputy testified he noticed another small plastic bag, also later found to contain heroin, in Mr. Jackson's hand. 2 RP 307. Mr. Jackson's resulting scuffle with the correctional officers, which included a sergeant tasing Mr. Jackson three times, was recorded on the jail's surveillance video. 2 RP 305-06.

The State charged Mr. Jackson with one count of possession of methamphetamine and one count of possession of heroin. CP 69. At trial, Mr. Jackson requested a unanimity instruction directing the jurors they must unanimously agree on one act to find him guilty of heroin possession. 3 RP 363. The trial court summarily denied his request "based on [its] reading of the comments from the WPIC book." 3 RP 365.

In closing argument, the State relied on both heroin-related incidents, failing to elect one or the other. 3 RP 367. During deliberations, the jury asked to watch the jail video a second time, and asked questions including whether a strip search included a rectal exam. CP 32-33. The trial court referred the jurors back to their instructions and allowed them to watch the video again. CP 32-33; 3 RP 420.

The jury acquitted Mr. Jackson of possession of methamphetamine and found him guilty of possession of heroin. He was sentenced to 13 months of incarceration. CP 17. The Court of Appeals affirmed Mr. Jackson's conviction. Slip Op. at 7.

D. ARGUMENT IN FAVOR OF GRANTING REVIEW

**This Court should grant review because the trial court's erroneous denial of Mr. Jackson's request for a unanimity instruction should not be held harmless given the court's prior decision in *State v. King*.**

The Court of Appeals correctly found the failure to grant Mr. Jackson's request for a unanimity instruction was error, and that such an error is presumed prejudicial. Slip. Op. at 6. However, the court affirmed after determining this presumption was overcome because "no rational juror could have a reasonable doubt as to any of the incidents alleged." *State v. Coleman*, 159 Wn.2d 509, 512, 150 P.3d 1126 (2007); Slip Op. at 6. The court's finding of harmless error is in conflict with its prior decision in *State v. King*, 75 Wn. App. 899, 903-04, 878 P.2d 466 (1994).

The facts of *King* are very similar to the facts presented here. In *King*, the police arrested the defendant after cocaine was found in a vehicle in which he was a passenger. 75 Wn. App. at 901. During the

inventory search at the jail, an officer found more cocaine in the fanny pack the defendant was wearing. *Id.*

The Court of Appeals held that the defendant in *King* had been wrongly denied a unanimity instruction after the State charged the defendant with only one count of possession of cocaine but relied on both acts to support a conviction. *Id.* at 903. The court reversed after finding the State failed to meet the high burden of demonstrating that no rational juror could have a reasonable doubt as to any of the incidents alleged. *Id.* at 904. It held:

Sufficient conflicting evidence exists as to which one of the car's occupants constructively possessed the Tylenol bottle for us to conclude that a rational trier of fact could entertain reasonable doubt as to whether King was responsible for the Tylenol bottle. The evidence is also conflicting as to King's alleged possession of the cocaine in the fanny pack. King testified that he was unaware of the cocaine in his fanny pack and asserted that the officers must have planted it. We cannot say that no rational trier of fact would entertain a reasonable doubt about King's responsibility for the cocaine in his fanny pack.

*Id.*; *c.f. State v. Bobenhouse*, 166 Wn.2d 881, 895, 214 P.3d 907 (2009)

(finding error harmless where if the jury reasonably believed one incident occurred it must have believed both incidents occurred).



When the court found that the failure to give a unanimity instruction was harmless in Mr. Jackson's case, it contradicted its reasoning in *King*. Here, the State alleged Mr. Jackson was guilty of possession of heroin because the police found heroin on the floor of the patrol car near Mr. Jackson's feet when they arrived at the jail. 1 RP 144. However, Mr. Jackson was not the only individual in the back of Officer Ross's car that afternoon. The driver of the car stopped by police was initially placed under arrest and held in Officer Ross's vehicle between 30 minutes to one hour before he was removed and Mr. Jackson took his place. 1 RP 138.

The Court of Appeals distinguished Mr. Jackson's case from *King* based on the fact the officer testified he checked the rear passenger compartment "very thoroughly" after the first individual left the car. Slip Op. at 6. Because of this representation, the court found a jury could not have reasonably doubted the heroin at issue belonged to Mr. Jackson. Slip Op. at 6.

This conclusion ignores the fact that if one assumes this heroin belonged to Mr. Jackson, the officer who searched Mr. Jackson prior to his arrest must have missed it during the search of his person. 2 RP 204, 229. Given that a search must have failed at some point in time –

either (1) when the officer searched the police vehicle after the first person was removed or (2) when the officer searched Mr. Jackson's person – the officer's representation that he conducted a thorough search of the car can only carry so much weight. A rational juror could have a reasonable doubt that Mr. Jackson constructively possessed the heroin found on the floor of the patrol car. *See* 1 RP 139.

In addition, the jury found Mr. Jackson not guilty of possession of methamphetamine based on the State's allegation that methamphetamine was on the seat where Mr. Jackson was sitting in the car that was stopped, as well as on the floor near his feet. CP 30; 1 RP 142. The jury's acquittal on this charge further demonstrates that a rational juror could have a reasonable doubt Mr. Jackson was guilty of possessing drugs found near him when another individual, who appeared to be a drug addict, had access to the same space. 2 RP 230 (the driver appeared to be a drug addict, according to Officer O'Hara).

Finally, although cocaine was discovered on Mr. Jackson at the jail, just as it was in *King*, a rational juror could have had a reasonable doubt about this act as well. 75 Wn. App. at 901. In *King*, the court determined the error was not harmless, in part, because the defendant asserted the officers planted the cocaine in his fanny pack. *Id.* at 904.

Here, the jury requested to view a video from the jail a second time during its deliberations. CP 31; 3 RP 420. This indicates that at least some of the jurors questioned whether the State could prove its case based on the heroin discovered while Mr. Jackson was in the jail.

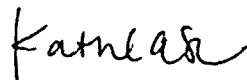
The Court's finding of harmlessness is contrary to its analysis in *King* and raises an issue of substantial public interest. This Court should accept review. RAP 13.4(b)(2), (4).

E. CONCLUSION

This Court should grant review of the Court of Appeals opinion affirming Mr. Jackson's conviction.

DATED this 22<sup>nd</sup> day of August, 2016.

Respectfully submitted,



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Kathleen A. Shea – WSBA 42634  
Washington Appellate Project  
Attorney for Petitioner

APPENDIX A

**COURT OF APPEALS, DIVISION I OPINION**

**March 14, 2016**

STATE OF WASHINGTON  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,	)	No. 72944-6-I
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
DENNIS WAYNE JACKSON,	)	
	)	
Appellant.	)	FILED: March 14, 2016

SCHINDLER, J. — Dennis Wayne Jackson seeks reversal of his jury conviction of one count of unlawful possession of a controlled substance. Jackson asserts the failure to give a Petrich<sup>1</sup> jury instruction violated his constitutional right to a unanimous jury verdict. We conclude the court erred in failing to give a Petrich instruction. However, because no rational juror could have a reasonable doubt as to whether each act established the crime beyond a reasonable doubt, the lack of a unanimity instruction was harmless, and we affirm.

FACTS

On September 27, 2014, Everett Police Officer Stephen Ross pulled over a blue Dodge Neon. Marcus Stoutenburg was driving the car and Dennis Wayne Jackson was

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<sup>1</sup> State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

No. 72944-6-1/2

sitting in the front passenger seat. Officer Ross called for backup. Officer Timothy O'Hara responded.

Officer Ross arrested Stoutenburg for driving while license suspended. Officer Ross frisked Stoutenburg and placed him in the back of his patrol car. Officer O'Hara saw Jackson suspiciously moving his hands and suspected Jackson was attempting to conceal something. Officer O'Hara asked Jackson to step out of the car. After removing Jackson from the car, Officer O'Hara saw methamphetamine on the front passenger seat and floorboard and a digital scale in the passenger door pocket. Officer O'Hara frisked Jackson and arrested him on an outstanding warrant. Officer O'Hara placed Jackson in the back of his patrol car.

Officer Ross removed Stoutenburg from his patrol car and released him. Officer Ross then searched the rear passenger area of his patrol car to ensure there was no contraband. Officer Ross did not find any contraband. Officer O'Hara asked Officer Ross to transport Jackson to the Snohomish County jail. Officer Ross placed Jackson in the back of his patrol car.

After arriving at the jail, Officer Ross removed Jackson from the back of his patrol car. Officer Ross searched the rear passenger area of his patrol car again. This time he found a small plastic bag on the floor. Officer Ross believed the bag contained heroin and collected it as evidence.

While Jackson was in a holding cell, Snohomish County Corrections Deputy Shane Stevie saw him scratching underneath his left leg. Deputy Stevie asked to see his hands. Jackson was holding a small plastic bag in his left hand. Jackson attempted

to put the bag into his mouth and swallow it. After a struggle, Deputy Stevie and Deputy Keith Greely secured Jackson and seized the small plastic bag.

The Washington State Patrol Crime Laboratory (WSPCL) tested the plastic bag found in the patrol car and the plastic bag seized from Jackson. Both bags contained heroin.

The State charged Jackson with one count of unlawful possession of methamphetamine, count I, and one count of unlawful possession of heroin, count II. Jackson pleaded not guilty.

The State called a number of witnesses to testify during the three-day jury trial including Officer Ross, Officer O'Hara, Deputy Stevie, Deputy Greely, and a WSPCL forensic scientist. Jackson did not testify and the defense did not call any witnesses.

Over the defense objection, the court refused to give a Petrich unanimity instruction. The jury acquitted Jackson of possession of methamphetamine, count I. The jury convicted Jackson of possession of heroin, count II.

#### ANALYSIS

Jackson seeks reversal of his conviction for one count of possession of heroin, arguing the court violated his constitutional right to a unanimous jury verdict by failing to give a Petrich instruction. State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984). The State argues a Petrich instruction was not required because the evidence showed a continuing course of conduct.

A defendant has a right to a unanimous jury verdict under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. State v. Fisher, 165 Wn.2d 727, 755, 202 P.3d 937 (2009) (citing State v.

Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)). Where the evidence indicates that more than one distinct criminal act has been committed but the defendant is charged with only one count of criminal conduct, either (1) the State may elect the act upon which it will rely for conviction, or (2) jurors must be instructed that they must agree that the same underlying criminal act has been proved beyond a reasonable doubt. State v. Bobenhouse, 166 Wn.2d 881, 893, 214 P.3d 907 (2009) (citing Petrich, 101 Wn.2d at 572). However, no election or unanimity instruction is required if the evidence establishes a "continuing course of conduct." Petrich, 101 Wn.2d at 571. We review the facts in a commonsense manner to determine whether criminal acts consist of a continuing course of conduct. Petrich, 101 Wn.2d at 571.

The State relies on State v. Love, 80 Wn. App. 357, 908 P.2d 395 (1996), to argue a continuing course of conduct. In Love, during a search of Love, police found 5 rocks of cocaine in a lip balm container that had been in Love's pocket. Love, 80 Wn. App. at 359. The police then searched Love's house and found an additional 40 rocks of cocaine. Love, 80 Wn. App. at 359. The State charged Love with one count of possession of a controlled substance with an intent to deliver. Love, 80 Wn. App. at 362. The court did not give a Petrich instruction. Love, 80 Wn. App. at 360. On appeal, this court concluded that because two acts of possession were part of a "single objective to make money by trafficking cocaine," a Petrich instruction was not required. Love, 80 Wn. App. at 362-63.

Jackson argues State v. King, 75 Wn. App. 899, 878 P.2d 466 (1994), controls. In King, during a search of the car King was a passenger in, Seattle police officers found cocaine in a Tylenol pill bottle. King, 75 Wn. App. at 901. The officers also found



cocaine in King's fanny pack. King, 75 Wn. App. at 901. The State charged King with one count of possession of cocaine. King, 75 Wn. App. at 901.

At trial, King testified the officers planted the cocaine on him. King, 75 Wn. App. at 901-02. King requested a unanimity instruction. The prosecutor told the court the State would elect which act of possession it would rely on to convict. King, 75 Wn. App. at 903. However, the State did not do so. King, 75 Wn. App. at 903.

On appeal, the State argued a continuing course of conduct rather than two separate acts of possession. King, 75 Wn. App. at 902. Because the evidence established two distinct acts of possession of cocaine, we rejected the State's argument:

The State's evidence tended to show two distinct instances of cocaine possession occurring at different times, in different places, and involving two different containers . . . . One alleged possession was constructive, the other actual.

King, 75 Wn. App. at 903. Because there was conflicting evidence regarding King's possession, we concluded the failure to give a Petrich instruction was not harmless error. King, 75 Wn. App. at 904.

Sufficient conflicting evidence exists as to which one of the car's occupants constructively possessed the Tylenol bottle for us to conclude that a rational trier of fact could entertain reasonable doubt as to whether King was responsible for the Tylenol bottle. The evidence is also conflicting as to King's alleged possession of the cocaine in the fanny pack. King testified that he was unaware of the cocaine in his fanny pack and asserted that the officers must have planted it. King's testimony requires a determination of credibility that is uniquely the jury's to make. We cannot say that no rational trier of fact would entertain a reasonable doubt about King's responsibility for the cocaine in his fanny pack.

Under these circumstances, the lack of a unanimity instruction to the jury was not harmless.

King, 75 Wn. App. at 903-04.

We conclude this case is more like King than Love and the court erred in failing to give a Petrich jury instruction. Unlike Love, the State did not charge Jackson with possession with intent to deliver, and there is no evidence that his possession was part of a "single objective."<sup>3</sup> Here, as in King, the evidence showed Jackson possessed heroin at two different times and in two different places.

The State argues that even if a Petrich instruction was required, the error was harmless.

When a court fails to give a required Petrich instruction, we assume the error was prejudicial. Kitchen, 110 Wn.2d at 411. This presumption can be overcome "only if no rational juror could have a reasonable doubt as to any of the incidents alleged." State v. Coleman, 159 Wn.2d 509, 512, 150 P.3d 1126 (2007) (citing Kitchen, 110 Wn.2d at 411-12).

Here, unlike in King, the undisputed facts established Jackson's guilt. Officer Ross testified that after removing Stoutenburg from his patrol car, he checked the rear passenger compartment "very thoroughly" for weapons or contraband. Officer Ross testified Stoutenburg did not leave anything in the patrol car. Officer Ross then put Jackson in his patrol car and took him to the jail. After removing Jackson from his patrol car, Officer Ross checked the backseat again. Officer Ross testified he found a small plastic bag containing what he believed was heroin. Deputy Stevie and Deputy Greely testified they saw Jackson holding a small bag in his hand while Jackson sat in a holding cell. The WSPCL forensic scientist testified that he tested both bags and found they contained heroin. Unlike King, Jackson did not assert a different defense to each act of possession, did not testify, and did not present evidence of his possession.

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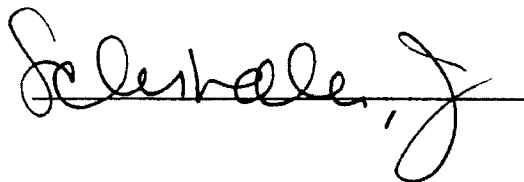
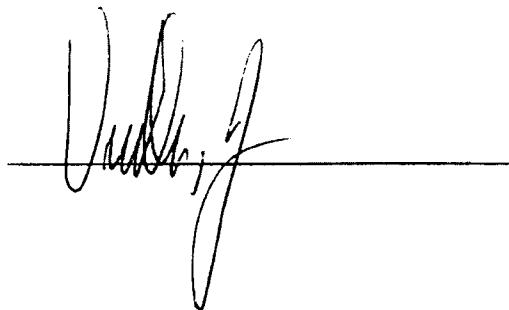
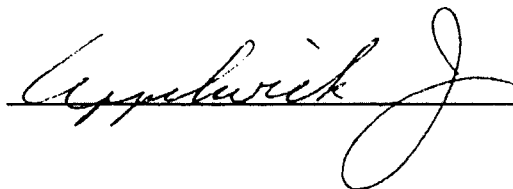
<sup>3</sup> Love, 80 Wn. App. at 362.

No. 72944-6-1/7

Because no rational juror could have a reasonable doubt as to whether each act established the crime beyond a reasonable doubt, the lack of a unanimity instruction was harmless.

We affirm.

WE CONCUR:

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APPENDIX B

**ORDER DENYING MOTION FOR RECONSIDERATION**

**July 22, 2016**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,	)	No. 72944-6-1
	)	
Respondent,	)	
	)	
v.	)	ORDER DENYING MOTION FOR
	)	RECONSIDERATION AND
DENNIS WAYNE JACKSON,	)	COST BILL
	)	
Appellant.	)	

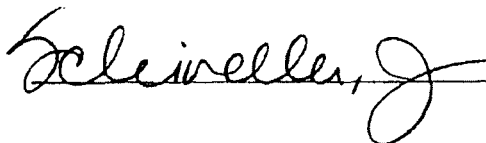
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After the court filed a decision affirming on March 14, 2016 in the above matter, the State filed a cost bill seeking \$4,481.98 in appellate costs. Appellant Dennis Wayne Jackson filed an objection to the State's request for costs, asking this court to exercise its discretion to deny appellate costs, and a motion for reconsideration.

The panel has considered Jackson's motion for reconsideration and objection to appellate costs, the State's answer to the motion for reconsideration and case financial history, and the nonexclusive factors in State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016), and determined that the motion for reconsideration should be denied and the cost bill should be denied. Therefore, it is hereby

ORDERED that the motion for reconsideration is denied. It is hereby further  
ORDERED that the State's request for an award of any appellate costs is denied.  
Done this 22nd of July, 2016.

For the Court:



Judge

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COURT OF APPEALS  
STATE OF WASHINGTON

### DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72944-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Mary Kathleen Webber, DPA  
[kwebber@co.snohomish.wa.us]  
Snohomish County Prosecutor's Office-Appellate Unit
- petitioner
- Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: August 22, 2016