SUPREME COURT NO. 96620-6

NO. 35368-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN THACKER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR OKANOGAN COUNTY

The Honorable Henry Rawson, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Jonathan Thacker, appellant below, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Thacker seeks review of the Court of Appeals decision in State v. Thacker, No. 35368-1-III, 2018 WL 5734392 (Slip Op. filed November 1, 2018). A copy of the decision is attached as an appendix.

C. REASONS TO ACCEPT REVIEW

This Court should accept review because the Court of Appeals decision conflicts with published decisions by this Court and the Courts of Appeals with regard to irreconcilable jury instructions, presents significant questions of law under the State and Federal constitutional provisions regarding the right to present a defense, and involves an issue of first impression that is of substantial public interest that should be determined by this Court, and therefore review is appropriate under RAP 13.4(b)(1)-(4).

D. ISSUES PRESENTED FOR REVIEW

Thacker was charged with possession of methamphetamine, a strict liability offense. Thacker claimed unwitting possession as an affirmative defense, a defense the State did not have to disprove beyond a reasonable doubt because it does not negate an element of the offense.

It is well established that an affirmative defense instruction and the associated to-convict instruction do not need to cross reference each other when the affirmative defense necessarily negates an element of the crime charged.[1] It appears no Washington appellate court, however, has considered whether a different rule is warranted when the affirmative defense does not negate an element of the charged crime. Resolution of this issue should include consideration of the constitutional rights of criminal defendants to present a defense and have the jury properly consider the defense. It should also include consideration of the impact on the State's case of an affirmative defense that negates an element of the charged crime versus an affirmative defense that does not negate an element of the crime charged.

The specific issue here involves whether the 'to-convict' instruction provided Thacker's jurors imposed upon them the "duty to convict" if they determined all elements of the possession charge had been proved beyond a reasonable doubt. Was Thacker deprived of his constitutional right to present and have the jury properly consider his unwitting possession defense when no instruction relieved jurors of their

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[1] See e.g., State v. Hoffman, 116 Wn.2d 51, 804 P.2d 577, 608 (1991) and State v. Meggyesy, 90 Wn. App. 693 958 P.2d 319 (1998), abrogated on other grounds by State v. Recuenco, 154 Wash. 2d 156, 110 P.3d 188 (2005).

"duty to convict" if they found the State had proved possession beyond a reasonable doubt, even if one of more jurors concluded his possession was unwitting?

E. STATEMENT OF THE CASE

In mid-February 2017, City of Omak Police Sergeant Donnelly Tallant, Jr., responded to the parking lot of an apartment complex to reports of a suspicious vehicle playing loud music. RP 84-85. When he arrived, he saw Thacker standing outside of a white Camaro parked in the lot, with no one else around. RP[2] 88. When Tallant got out of his patrol car, Thacker approached telling Tallant "he wasn't in violation of any protection orders" because he was at least 100 feet away from the Linda Ottwell's residence. RP 90-91, 122. After Tallant confirmed Thacker was prohibited from coming within 300 feet of Ottwell's residence, he arrested Thacker for a protection order violation and handcuffed him behind his back. RP 86-87, 93.

Thacker was initially cooperative during the subsequent search incident to arrest, but Tallant testified Thacker seemed to try to prevent the search of a particular pocket, so Tallant pinned Thacker to his patrol car, and noted Thacker had a syringe in his hand, so he took him to the

[2] There is a single volume of verbatim report of proceedings referenced as "RP."

ground and called for back-up. RP 94-97. Tallant eventually took the syringe from Thacker and also notice a vial containing a liquid substance on the ground after Thacker dropped the syringe. RP 99-100. The liquid in the vial contained methamphetamine. RP 73; Ex.5.

Following his arrest, Thacker denied trying to assault Tallant, claiming he was trying to prevent Tallant him from finding the syringe and vial because they were not his, implying he had discovered them while he was cleaning out his car in the parking lot. RP 103, 128. When asked by Tallant, Thacker suggested the vial might contain methamphetamine, but he really did not know. RP 103, 127.

The Okanogan County Prosecutor charged Thacker with one count each of unlawful possession of methamphetamine, violation of a protection order, and obstructing. CP 95-96. The prosecutor later amended the charges, adding seven addition protection order violation charges, allegedly committed between March and April 2017. CP 83-90.

A jury trial was held May 10-11, 2017, before the Honorable Judge Henry Rawson. RP 4-335. Although not filed, it is apparent from the trial record that Thacker's counsel proposed a jury instruction setting forth the affirmative defense of unwitting possession that had language not contained in the one proposed by the prosecution. RP 140. The trial court noted the defense version ended with, "If you find the defendant has

established this defense . . . it will be your duty to return a verdict of not guilty." RP 140. Noting the defense version was no a pattern instruction, the court refused to provide it to the jury. RP 140-42.

In closing argument, defense counsel did not dispute that the vial found during Thacker's arrest contained methamphetamine. Instead, counsel argued the drugs did not belong to Thacker, and that he was unaware what drugs were in the vial. RP 287-89.

Thacker was convicted as charged and subsequently sentenced to 18 months of incarceration. CP 19-31, 45-47; RP 326-32. Thacker appealed. CP 1-14.

On appeal, Thacker challenged his conviction for possession, claiming he was entitled to a new trial because the trial court failed to ensure his jurors were correctly instructed on how to consider his unwitting possession defense, asserting that the to-convict instruction for the possession charge unfairly reduced the possibility the jury would acquit him on that basis and that the instruction were irreconcilable. Brief of Appellant (BOA) at 6-13.

The Court of Appeals affirmed. The Court based its decision on this Court's decision in State v. Hoffman, 116 Wn.2d 51, 108-099, 804 P.2d 577, 608 (1991) and the Court of Appeals decision in State v. Meggyesy, 90 Wn. App. 693, 705, 958 P.2d 319 (1998), abrogated on

other grounds by State v. Recuenco, 154 Wash. 2d 156, 110 P.3d 188 (2005). Appendix at 6-7. The Court of Appeals decision reveals it considered Thacker's unwitting possession claim analogous to the self defense claims at issue in the Hoffman and Meggyesy. Appendix at 6-7. It therefore applied the analysis from those cases to conclude Thacker was not entitled to relief. Thacker now seeks review of that decision.

F. ARGUMENT

THIS COURT OF APPEALS DECISION CONFLICTS WITH PUBLISHED DECISION FROM THIS COURT AND THE COURTS OF APPEALS, RAISES SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW REGARDING THE RIGHT TO PRESENT DEFENSE AND RAISES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

The to-convict instruction Thacker's jury received for the drug possession charge, Instruction 7, unequivocally informed jurors that if they found beyond a reasonable doubt that Thacker possessed methamphetamine in the State of Washington on or about February 13, 2017, "it will be your duty to return a verdict of guilty." CP 58. This was an incorrect statement of the law. It is incorrect because there is no "duty" to convict, despite finding beyond a reasonable doubt Thacker possessed methamphetamine in the State of Washington on February 13, 2017, if jurors also found by a preponderance of the evidence the possession was unwitting. CP 62 (Instruction 11). Unfortunately, the jury was never

properly instructed on the interplay between instructions 7 and 11, leaving the false impression that if Thacker possessed the methamphetamine, the jury had to a "duty" to convict, even if it found the possession unwitting. This deprived Thacker of his right to present a defense.

The Sixth Amendment and due process require an accused be given a meaningful opportunity to present a complete defense. State v. Cayetano-Jaimes, 190 Wn. App. 286, 295-98, 359 P.3d 919 (2015); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. V, VI, XIV; Wash. Const. art. 1, § 3, 22. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

A defendant is also entitled to have the jury fully instructed on the defense theory of the case when there is evidence to support that theory. State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000). This is a due process requirement. State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010), review denied, 170 Wn.2d 1022 (2011); U. S. Const. amend. XIV; Const. art I, § 3. Failure to so instruct is prejudicial error. State v. Riley, 137 Wn.2d 904, 908 n.1, 976 P.2d 624 (1999).

Juries are presumed to follows the instructions provided by the court. State v. Allen, 182 Wn.2d 364, 380, 341 P.3d 268 (2015). A trial

court's instructions to the jury should not contradict each other. State v. Walden, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997). If the inconsistency relates to a material point, the error is presumed prejudicial because "it is impossible to know what effect [such an error] may have on the verdict." Koker v. Armstrong Cork, Inc., 60 Wn. App. 466, 483, 804 P.2d 659 (1991) (citing Hall v. Corp. of Catholic Archbishop of Seattle, 80 Wn.2d 797, 803-04, 498 P.2d 844 (1972)). Instructions providing "inconsistent decisional standards" require reversal.[3] Dever v. Fowler, 63 Wn. App. 35, 41, 816 P.2d 1237 (1991) amended, 824 P.2d 1237 (1992) (citing Renner v. Nestor, 33 Wn. App. 546, 550, 656 P.2d 533 (1983)). Such errors "are rarely cured by giving the stock instruction that all instructions are to be considered as a whole." Donner v. Donner, 46 Wn.2d 130, 137, 278 P.2d 780 (1955).

Although defense counsel did not specifically object to Instruction 7 at trial, Thacker may challenge it for the first time on appeal because it involves "manifest error affecting a constitutional right." RAP 2.5(a)(3).[4]

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[3] Reversal is also required if the inconsistency is due to a "'clear misstatement of the law.'" Walden, 131 Wn.2d at 478 (quoting State v. Wanrow, 88 Wn.2d 221, 239, 559 P.2d 548 (1977) (citations omitted)).

[4] The Court of Appeals exercised its discretion to review the jury instruction issue raised by Thacker and therefore did not address the associated ineffective assistance of counsel claim also raised by Thacker. Appendix at 7-8 n.2.

Constitutional error is manifest when it causes actual prejudice or has practical and identifiable consequences. State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008). As discussed infra, the instructional error here caused actual prejudice to Thacker by compromising the jury's fair consideration his unwitting possession defense.

A conviction for methamphetamine possession requires proof the accused possessed methamphetamine. RCW 69.50.4013(1); CP 58 (Instruction 7).

> This statute sets forth a strict liability crime in that knowledge of the possession is not an element of the offense that the State has to prove. To reduce the harshness of this offense, courts have created an unwitting possession defense and placed the burden on the defendant to establish the defense by a preponderance of the evidence.

State v. Sundberg, 185 Wn.2d 147, 149, 370 P.3d 1 (2016).

Here, the court correctly instructed jurors that methamphetamine is a "controlled substance," (CP 60, Instruction 9), that "possession" can be either "actual" or "constructive," (CP 59, Instruction 8), and that a conviction for possession of methamphetamine requires finding beyond a reasonable doubt that Thacker possessed methamphetamine "on or about February 13, 2017," in the State of Washington, (CP 58, Instruction 7). The court failed, however, to properly instruct jurors on Thacker's unwitting possession defense, despite ample evidence to support it,

because it failed to make clear to jurors they had no "duty" to convict despite finding beyond a reasonable doubt he possessed methamphetamine in Washington on the date in question, if they also found by a preponderance of the evidence that his possession was unwitting.

The problem is with the to-convict instruction, Instruction 7. CP 58. Instruction 7 purports to identify what jurors must find to convict Thacker, even going so far as to assert they have a "duty" to enter a guilty verdict if they find the listed elements beyond a reasonable doubt. "[A]n instruction purporting to contain all the elements must in fact contain them all." Donner v. Donner, 46 Wn.2d 130, 134, 278 P.2d 780 (1955).

Instruction 7, however, failed to advise jurors they must also conclude Thacker failed to establish his unwitting possession before they could convict. As such, the to-convict and unwitting possession instructions provide inconsistent decisional standards. Fowler, 63 Wn. App. at 41. Instruction 7 told jurors they must convict if the State met its burden, while Instruction 11 told jurors a person is not guilty of methamphetamine possession if they did not know they possessed it. CP 58, 62. It cannot be determined how Thacker's jurors interpreted these two instructions. It is possible they recognized their "duty to convict" no longer existed if they found the possession unwitting, but nothing in the court's instructions made that clear.

In rejecting Thacker's claim on appeal, the Court of Appeals concluded that "Exercising common sense, jurors would understand the relationship of the instructions." Appendix at 7. The Court of Appeals attempts to bolster this conclusion by noting jurors were told to "consider the instructions as a whole." Id. The record does not support this conclusion.

The instructions provided to Thacker's jurors, when considered in their entirety, fail to inform jurors that the "duty to convict" no longer applied if they conclude the possession was unwitting. Id. They were informed a person is not guilty if the possession is unwitting (Instruction 11), but never told their duty to convict set forth in Instruction 7 vanished once they find the possession unwitting. Without some specific indication to this effect,[5] the instructions conflict and the error must be presumed prejudicial. Koker, 60 Wn. App. at 483.

The State bears the burden of showing constitutional error is harmless beyond a reasonable doubt. Cayetano-Jaimes, 190 Wn. App. at 303. The State cannot meet this burden here.

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[5] For example, the instruction could have provided: 'If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty, *unless you also find by a preponderance of the evidence that the possession was unwitting as set forth in Instruction 11.*'

The Court of Appeals, rejected Thacker's argument, noting "[t[he 'duty to convict' language in Washington's pattern to-convict instructions has been challenged on several bases but has been consistently upheld." Appendix at 6 (citing State v. Brown, 130 Wn. App. 767, 770, 124 P.3d 663 (2005); State v. Bonisisio, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998); State v. Meggyesy, 90 Wn. App. 693, 705, 958 P.2d 319 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005)). The Court then analogized Thacker's case to Meggyesy and Hoffman, both of which involved similar issues, but in the context of self defense claims instead of an unwitting possession claim. Appendix at 6-7.

A review of the decisions in Meggyesy and Hoffman shows that a significant aspect of those decisions was that once a defendant presents sufficient evidence to warrant instructing the jury on self-defense, the State bears the burden of disproving self-defense beyond a reasonable doubt because a self defense claim negates the intent required to prove the crime. In Meggyesy, the Court noted:

> Meggyesy also argues that the "to convict" instruction is defective because it does not mention self-defense. Our Supreme Court addressed this issue in State v. Hoffman, holding that the court need not include self-defense in the "to convict" instruction as long as the instructions as a whole properly instruct the jury on the applicable law. Instructions 12 through 16 state the law on self-defense.

90 Wn. App. at 705 (emphasis added, footnote omitted).

In Hoffman, this Court stated;

> Specifically, defendants argue that the self-defense instructions must be part of the "to convict" instruction which sets forth the elements of the crime of murder in the first degree. We disagree. As emphasized above, the jury was instructed to consider the instructions as a whole. No prejudicial error occurs when the instructions taken as a whole properly instruct the jury on the applicable law. The self-defense instructions properly informed the jury that the State bore the burden of proving the absence of self-defense beyond a reasonable doubt. In giving a separate instruction on self-defense, which included the State's burden of proof on self-defense, the trial court followed the method for instructing juries recommended by the Washington Supreme Court Committee on Jury Instructions, 11 Wash.Prac., Washington Pattern Jury Instructions 58–63 (Supp.1986); WPIC 26.02 comment, at 111 (Supp.1986); WPIC 35.02 comment, at 119 (Supp.1986). We perceive no error in this instructional mode.

116 Wn.2d at 110 (emphasis added, footnotes omitted).

Thacker's case is significantly different than Meggyesy and Hoffman because possession of methamphetamine is a strict liability offense. Sundberg, 185 Wn.2d at 149. Thus, the State has no burden to disprove unwitting possession because it does not negate an element of the offense; knowledge is not a required element to convict a person of unlawful drug possession. Id.

This difference is significant because when an affirmative defense negates an element of the crime, there is a direct relationship between the charged crime and the affirmative defense because proof of the defense necessarily negate the crime because it necessarily means the State failed to meet its burden of proof as to each element. See State v. Jordan, 180 Wn.2d 456, 465, 325 P.3d 181 (2014) (noting that once self-defense is properly raised, negating it becomes an element State must disprove beyond a reasonable doubt).

In Meggyesy and Hoffman, the self defense instructions were necessarily linked to the to-convict instructions because adequate proof of self defense precludes finding all essential elements of the charged offense listed in the to-convict instruction were proved beyond a reasonable doubt.

But an affirmative defense that does not negate an element of the crime does not have a link to the to-convict instruction because proof of the affirmative defense does not negate an essential element of the charged crime. In the context of drug possession charges, the unwitting possession defense does not negate any essential element. To the contrary, Thacker's jurors received a to-convict instruction that stated jurors had a "duty to convict" if they found beyond a reasonable doubt that Thacker possessed methamphetamine as accused. CP 58 (Instruction 7). They were also told, however, that a person is not guilty of the charge if their possession

was unwitting. CP 62 (Instruction 11). These instructions are irreconcilable in light of the affirmative duty to convict set forth in the to-convict instruction.

The Court of Appeals' contrary decision conflicts with this Court's decision in Walden because it condones the use of conflicting jury instructions, and with Fernandez-Medina because it condones jury deliberations with less than adequate instructions on the defense theory. Therefore, review is warranted under RAP 13.4(b)(1)

The Court of Appeals decision conflicts with the prior Court of Appeals decision in Fowler because it endorses inconsistent decisional standards, and with Donner because it condones to-convict instructions that fails to list everything the jury is required to find to reach a verdict. Therefore, review is warranted under RAP 13.4(b)(2).

The Court of Appeals decision involves consideration of a defendant's right to present a defense under U.S. Const. amend. V, VI, XIV and Wash. Const. art. 1, § 3, 22. Therefore, review is warranted under RAP 13.4(b)(3).

Finally, the Court of Appeals decision involves an issue of substantial public interest because it present an opportunity for this Court to consider whether it is appropriate to instruct jurors differently between affirmative defenses that negates and element of the crime versus

affirmative defenses that do not. Therefore, review is warranted under RAP 13.4(b)(4).

G. CONCLUSION

For the reasons stated herein, this Court should grant review.

DATED this 3rd day of December, 2018

Respectfully submitted,

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CASE # 353681
State of Washington v. Jonathan Ray Thacker
OKANOGAN COUNTY SUPERIOR COURT No. 171000581

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:jab
Enclosure

c: **E-mail**—Hon. Henry A. Rawson

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. JONATHAN RAY THACKER, Appellant.	)	No. 35368-1-III UNPUBLISHED OPINION

SIDDOWAY, J. — Following convictions for possession of methamphetamine, multiple violations of a no-contact order, and obstructing a law enforcement officer, Mr. Thacker appeals only the controlled substance conviction. He argues that "duty to convict" language in the to-convict instruction for possession of a controlled substance deprived him of his right to present his defense of unwitting possession. Read as a whole, as they would have been, the instructions were not misleading. We affirm.

FACTS AND PROCEDURAL BACKGROUND

On February 13, 2017, Sergeant Donnelly Tallant of the Omak Police Department responded to a call from a woman who reported that Jonathan Thacker was parked outside her apartment complex in violation of a no-contact order between Mr. Thacker and another resident. Sergeant Tallant checked Mr. Thacker's name against police

records and verified that there was an active protection order in the system, signed by Mr. Thacker.

Sergeant Tallant responded to the location, where he saw Mr. Thacker standing outside of a white car. Mr. Thacker was standing roughly 120 feet from the protected person's apartment. As the sergeant approached, Mr. Thacker spoke up, volunteering that he wasn't in violation of any protection orders. When the sergeant asked why he thought he was not, Mr. Thacker responded that he was more than 100 feet from the protected person's residence. Sergeant Tallant called dispatch to verify the distance listed on the protection order and, confirming that the order prohibited Mr. Thatcher from being within 300 feet of the residence, he arrested Mr. Thacker and placed him in handcuffs.

The sergeant then conducted a search incident to arrest. Mr. Thacker was initially compliant but began to stiffen up and resist, making it difficult for the sergeant to search his hands and one of his coat pockets. The sergeant saw what appeared to be a syringe in Mr. Thacker's hand and became concerned that Mr. Thacker was trying to poke him with it, so he took Mr. Thacker to the ground to get better control of him. Mr. Thacker eventually released the syringe and a vial that he was holding in his hand, and Sergeant Tallant retrieved them.

Sergeant Tallant spoke with Mr. Thacker after he was transported to jail and was read his *Miranda*[1] rights. Mr. Thacker told the sergeant that he was not trying to assault the officer, he just "didn't want [the officer] to—find the—the needle and the—and the vial." Report of Proceedings (RP) at 103. He told the sergeant that "they weren't his." *Id.* When Sergeant Tallant asked what he thought was in the vial, Mr. Thacker said "he—believed it was meth', but he said he didn't really know for sure." *Id.* Mr. Thacker claimed he was not the owner of the syringe or the vial, and had just been cleaning out his car when Sergeant Tallant responded to the call. The vial tested positive for methamphetamine.

The State charged Mr. Thacker with possession of methamphetamine, violation of a domestic violence no-contact order, and obstructing a law enforcement officer. It later amended the information to add additional counts of violation of a domestic violence no-contact order based on phone calls Mr. Thacker made while in jail.

Consistent with his statements to Sergeant Tallant, Mr. Thacker defended against the controlled substance charge by claiming unwitting possession.

Among the jury instructions given at trial were the pattern to-convict instruction for the controlled substance charge and a pattern instruction on the defense of unwitting possession. They read as follows:

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

INSTRUCTION NO. 7

To convict the defendant of the crime of Possession of a Controlled Substance as charged in count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about February 13th 2017, the defendant possessed a controlled substance, to wit: Methamphetamine; and

(2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Clerk's Papers (CP) at 58, which is based on 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 50.02, at 1118 (4th ed. 2016) (WPIC), and

INSTRUCTION NO. 11

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

CP at 62, which is based on WPIC 52.01, at 1196.

In lieu of the latter, unwitting possession instruction, the defense had proposed the WPIC but with a final sentence added, which stated, "If you find the defendant has established this defense . . . it will be your duty to return a verdict of not guilty." RP at

140. Upon confirming that the sentence was not included in the pattern instruction, the trial court declined to give Mr. Thacker's proposed instruction, explaining it was not going to venture out beyond the pattern instruction without a good reason. When the instructions were finalized and the time came for formal objections, the defense made none. *See* RP at 233 ("Looks good, [Y]our Honor.").

The jury found Mr. Thacker guilty as charged. The trial court sentenced Mr. Thacker to 18 months' incarceration. Mr. Thacker appeals.

ANALYSIS

Mr. Thacker argues that the court erred by giving WPIC 52.01 and failing to include the concluding sentence proposed by his trial lawyer. He contends that "the to-convict and unwitting possession instructions provide inconsistent decisional standards." Br. of Appellant at 10. He continues:

> Instruction 7 told jurors they must convict if the State met its burden, while Instruction 11 told jurors a person is not guilty of methamphetamine possession if they did not know they possessed it. One can only speculate how jurors interpreted these two instructions when [they] convicted Thacker of methamphetamine possession.

Id. (citation omitted).

"Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996).

RCW 69.50.4013 makes it unlawful to possess a controlled substance without a valid prescription or unless otherwise authorized by chapter 69.50 RCW. It contains no mens rea requirement. *State v. Bradshaw*, 152 Wn.2d 528, 539, 98 P.3d 1190 (2004). Yet "[o]nce the State establishes prima facie evidence of possession, the defendant may . . . affirmatively assert that his possession of the drug was 'unwitting, or authorized by law, or acquired by lawful means in a lawful manner, or was otherwise excusable under the statute.'" *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994) (quoting *State v. Morris*, 70 Wn.2d 27, 34, 422 P.2d 27 (1966)).

The "duty to convict" language in Washington's pattern to-convict instructions has been challenged on several bases but has been consistently upheld. *E.g.*, *State v. Brown*, 130 Wn. App. 767, 770, 124 P.3d 663 (2005); *State v. Bonisisio*, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998); *State v. Meggyesy*, 90 Wn. App. 693, 705, 958 P.2d 319 (1998), *abrogated on other grounds by State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005). In *Meggyesy*, one of the defendant's arguments was that the to-convict instruction and the self-defense instructions were "irreconcilable" because they contradicted each other. *Meggyesy*, 90 Wn. App. at 705. This court rejected this argument, explaining that at trial,

> [T]he court first informed the jury that it had a duty to convict if the State proved the elements of the charged crime. It also instructed the jury that if the State was unable to prove the absence of self-defense, the jury must acquit [the defendant]. The second of these instructions supplemented the first. The instructions are not erroneous.

Id. at 706.

The *Meggyesy* court relied in reaching this conclusion on *State v. Hoffman*, 116 Wn.2d 51, 108-09, 804 P.2d 577 (1991), in which the defendant had argued it was error for the trial court not to have made the self-defense instructions a part of the "to convict" instructions. The Supreme Court rejected the argument, noting that "the jury was instructed to consider the instructions as a whole," and, "No prejudicial error occurs when the instructions taken as a whole properly instruct the jury on the applicable law." *Id.* at 109. The court "perceive[d] no error" in the pattern instructions' approach to instructing separately on defenses. *Id.*

Mr. Thacker's argument is the same as that made and rejected in *Meggyesy* and *Hoffman*. While the trial court instructed the jury in instruction 7 that it had a duty to convict Mr. Thacker if the elements of possession of a controlled substance were met, it told jurors in instruction 11 that "[a] person is not guilty of possession of a controlled substance if the possession is unwitting." CP at 62. Exercising common sense, jurors would understand the relationship of the instructions. And in instruction 1, the court told the jurors:

> The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

CP at 52.[2]

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[2] Recognizing that we might refuse to review the jury instruction challenge because it is raised for the first time on appeal, Mr. Thacker makes an alternative

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Fearing, J.

Pennell, A.C.J.

argument of ineffective assistance of counsel. Since we exercise our discretion to review the jury instruction issue and find no error, we need not address the ineffective assistance of counsel issue.

NIELSEN, BROMAN & KOCH P.L.L.C.

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