Supreme Court No. 97873-5
(COA No. 51573-3-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GLORIA INIGUEZ GONZALEZ,

Appellant.

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(3) and RAP 13.4(b)(4), Gloria Iniguez-Gonzalez, petitioner here and appellant below, asks this Court to accept review of a Court of Appeals decision affirming her conviction. A copy of the Court of Appeals' opinion is attached to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. Where a Latina defendant is charged with possession of three ounces of methamphetamine with intent to deliver, does a trial court deny the defendant a fair trial if it refuses to grant a mistrial after the State elicits irrelevant, prejudicial evidence implying that the defendant must be guilty because she and the man with whom she was arrested are Latino? RAP 13.4(b)(3); RAP 13.4(b)(4).

2. Does mere presence when another person possesses methamphetamine with intent to deliver support a conviction for that crime? RAP 13.4(b)(3).

3. In a case charging possession of methamphetamine with intent to deliver, does a trial court's refusal to give a proposed instruction on mere presence deny a defendant a fair trial when the facts and law support

giving the instruction and when a jury would more likely than not have acquitted the defendant had the instruction been given? RAP 13.4(b)(3).

C. STATEMENT OF THE CASE

Scott Shorey is a drug dealer. RP 1/26/18 5-6; RP 2/14/18195-200, 205-211. During the first part of 2017, agents from the Lewis County Joint Narcotics Enforcement Team (JNET) raided his house with a search warrant and found drugs and stolen property. RP 2/14/18 205-211. They then arrested Mr. Shorey. *Id.* In lieu of going to prison for his crimes, Mr. Shorey agreed to work as an informant with JNET. *Id.* In that capacity, Mr. Shorey told the JNET members that one of his methamphetamine suppliers was a Latino male by the name of "Pancho" who sold Mr. Shorey multiple ounces of methamphetamine. RP 1/26/18 5-7. Mr. Shorey claimed that "Pancho" drove a white Honda Odyssey van to deliver the drugs to him at his house and that "Pancho's" wife usually accompanied him. RP 1/26/18 6-7.

Mr. Shorey went on to tell the JNET members that he spoke with "Pancho" over the phone and arranged to have him drive to Mr. Shorey's house between 4:00 and 6:00 pm on March 8, 2017, to deliver 12 ounces of methamphetamine. RP 1/26/18 5-8; RP 2/14/18 165. Mr. Shorey told the JNET members that "Pancho" would probably be getting off I-5 at the Chamber Way Exit. RP 1/26/18 8-10. Based upon this information, two

Detectives by the names of Withrow and Holt went and waited at a parking lot near that exit. *Id.* At 8:13 pm that evening, the detectives saw a white Honda Odyssey van drive by on Chamber Way. *Id.* As the van passed, the detectives were able to see that a Latino male was driving with a Latina female in the passenger seat. *Id.*

The female was Gloria Iniguez Gonzales. RP 2/14/18 30-31. The male driver was Eduardo Morales Martinez. RP 1/26/18 5-6. At this point the two detectives turned around and got behind the vehicle, which turned left on National Avenue. RP 2/14/18 165-166. However, the suspect van did not turn down the road that led to Mr. Shorey's house. RP 2/14/18 184-185. Rather, it continued driving on National Avenue. *Id.* Once it got near a McDonald's restaurant on National, the detectives turned on their lights. RP 1/26/18 10; RP 2/14/18 165-166. The vehicle then pulled into the parking lot of the McDonald's and stopped. RP 2/14/18 165-166.

Upon approaching the vehicle, the detectives saw that Ms. Iniguez-Gonzalez had shifted into the back seat next to her baby, who was in a car seat. RP 2/14/18 165-166. Eventually the detectives allowed Ms. Iniguez-Gonzalez to take her baby and go into the McDonald's while they stayed outside with the driver awaiting the arrival of a drug dog. *Id.* At different times, both Ms. Iniguez-Gonzalez and Mr. Morales Martinez refused to consent to a search of the van. RP 1/26/18 24; RP 2/14/18 36.

About 10 or 15 minutes after the vehicle stop, the canine officer arrived with the drug dog, who alerted on the van for the presence of illegal drugs. RP 1/26/18 23-24. The two JNET officers then applied for and obtained a telephonic warrant and searched the van. RP 2/14/18 36. During the search, the officers found three individually packaged baggies of what was later tested to contain methamphetamine on the floor of the van in the area where Ms. Iniguez-Gonzalez had been sitting next to her baby. RP 2/14/18 169-170. Upon finding these items, the officers arrested the driver and then went into the McDonald's and arrested Ms. Iniguez-Gonzalez. RP 2/14/18 172, 176-177. They later determined that the van was registered to Ms. Iniguez Gonzalez. RP 2/14/18 169.

The State charged the defendant with possession of methamphetamine within 1,000 feet of a school bus stop. CP 1-3, 8-9. The case later came on for trial before a jury with the State calling the two detectives, Mr. Shorey, and the forensic scientist who tested the drugs. RP 2/14/18 155, 205, 212; RP 2/15/18 6. The State also called a school employee and a county employee who testified that there was a school bus stop within 1,000 feet of the McDonald's where the van was stopped. RP 2/15/18, 9-15, 17-23.

The State's first witness at trial was Detective Withrow. RP 1/14/18 155. At the beginning of his testimony, the State elicited evidence

that the majority of methamphetamine and heroin in Washington comes from Mexico. RP 158-161. This exchange went as follows:

> Q Okay. And who do drug dealers get their drugs from?
>
> A A larger supply. Ultimately -
>
> MR. BAUM: Objection. Relevance.
>
> THE COURT: Overruled.
>
> Q (Mr. Masiello continuing.) Go ahead.
>
> A: A larger supply. Most of the methamphetamine and heroin that we receive locally here in Washington state comes up from Mexico and –
>
> MR. BAUM: Objection. I have a motion.
>
> THE COURT: Outside the jury?
>
> MR. BAUM: Yes.
>
> THE COURT: Okay. All right. I'm going to ask the jury at this time to please step out of the courtroom. Just leave your notepads on your chairs, and we will return momentarily.
>
> (Jury not present.)
>
> THE COURT: Mr. Baum.
>
> MR. BAUM: Moving for a mistrial. My client is Hispanic. Okay. He just said most of this stuff comes from Mexico. That, given the nature of this charge and the fact it's charged possession with intent to deliver and my client's Hispanic heritage, that is essentially I think an improper attack or at least the assertion to the jury. And now the jury is made to believe that most drugs are coming up out of Mexico; my client is Hispanic. I can't unturn that clock. I think that's highly prejudicial based on her heritage, so I'm asking for a mistrial.

RP 157-60.

Following further argument, the court sustained the objection but denied the motion for a mistrial. RP 2/14/18 220. However, the court did give a limiting instruction asking the jury to disregard the statement, but it did not specify which statement it was referring to. RP 161.

The State rested its case. RP 2/15/18 32. The court then instructed the jury, but Ms. Iniguez-Gonzalez took exception to the court's refusal to give its proposed instruction from WPIC 52.01 on unwitting possession. RP 2/15/18 34-35, 51; CP 68. However, the court did instruct the jury on the lesser included offense of mere possession as opposed to possession with intent. CP 88.

The jury in this case eventually returned a verdict of guilty on the charge of possession of methamphetamine with intent to deliver. CP 104. The jury also found that the State had proven beyond a reasonable doubt that Ms. Iniguez-Gonzalez had committed this offense within 1,000 feet of a school bus stop. CP 106. The court later sentenced Ms. Iniguez-Gonzalez within the standard range, after which she timely filed a notice of appeal. CP 109-119, 121. The Court of Appeals affirmed Ms. Iniguez-Gonzalez convictions on October 22, 2019.

D. ARGUMENT

1. This Court should accept review because the trial court erred when it denied Ms. Iniguez-Gonzalez's motion for a mistrial after the State elicited irrelevant and prejudicial evidence implying Ms. Iniguez-Gonzalez was guilty because she is Latina.

While due process does not guarantee every person a perfect trial, both the Washington Constitution and United States Constitution, guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. U.S. CONST. amend. XIV; Const. art. I, § 3; *Bruton v. United States*, 391 U.S. 123, 20 L. Ed.2 d 476, 88 S. Ct. 1620 (1968); *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). As the following points out, these related constitution guarantees are embodied in the rules that (1) irrelevant evidence is never admissible, (2) evidence that is relevant but more prejudicial than probative is also not admissible, and (3) propensity evidence is never admissible.

Under ER 401, "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under ER 402, "all relevant evidence is admissible" with certain limitations. By contrast, under this same rule

"[e]vidence which is not relevant is not admissible." Thus, before testimony can be received into evidence, it must be shown to be relevant and material to the case. *State v. Wilson*, 38 Wn.2d 593, 231 P.2d 288 (1951).

In addition, even relevant evidence should be excluded if it is more prejudicial than probative. ER 403. The decision whether or not to exclude evidence is within the discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn. App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

Finally, it is fundamental under our adversarial system of criminal justice that "propensity" evidence, usually offered in the form of prior convictions or prior bad acts, is not admissible to prove the commission of a new offense. See 5 Karl B. Tegland, Washington Practice, Evidence § 114, 383 (3d ed. 1989). This common law rule has been codified in ER 404(b), which states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."

Here, the prosecutor elicited the claim from one of the detectives that the majority of methamphetamine in Washington comes from Mexico. This evidence came before the jury in the following direct evidence from Detective Chad Withrow:

> Q Okay. So given that training and experience, have you developed a familiarity with how drug dealers usually conduct their business?
>
> A Yes.
>
> Q Okay. What amounts do drug dealers usually keep on hand of various controlled substance?
>
> A That kind of depends on the -
>
> MR. BAUM: Objection. Relevance as to what they would normally keep on hand.
>
> THE COURT: Mr. Masiello.
>
> MR. MASIELLO: Given the amounts in this case and the anticipated testimony, I think this type of information is relevant with that future evidence.
>
> THE COURT: Okay. The objection is overruled.
>
> Q (Mr. Masiello continuing.) You may answer the question.
>
> A It depends on the level of the drug dealer and whether it be a smaller drug dealer, street level dealer, that deals anywhere from,

you know, a gram up to three-and-a-half grams, which is on the streets considered a ball, up to ounces or, you know, like an ounce, which is a little bit higher than the ball dealer. And it goes up higher to ounces, you know, multiple ounces and up to half pounds and so forth. When you are getting up into the larger amounts, ounces and more, that's larger sources of supply they could have on hand up to those. Suppliers or dealers are going to have on hand a larger amount and then supply to numerous people out of that larger amount.

Q Okay. And that was going to be my next question. Why do they have such large amounts?

A Because they usually source from more than one person.

Q Okay. And who do drug dealers get their drugs from?

A A larger supply. Ultimately -

MR. BAUM: Objection. Relevance.

THE COURT: Overruled.

Q (Mr. Masiello continuing.) Go ahead.

A A larger supply. Most of the methamphetamine and heroin that we receive locally here in Washington state comes up from Mexico and -

MR. BAUM: Objection. I have a motion.

THE COURT: Outside the jury?

MR. BAUM: Yes.

THE COURT: Okay. All right. I'm going to ask the jury at this time to please step out of the courtroom. Just leave your notepads on your chairs, and we will return momentarily.

(Jury not present.)

THE COURT: Mr. Baum.

MR. BAUM: Moving for a mistrial. My client is Hispanic. Okay. He just said most of this stuff comes from Mexico. That, given the nature of this charge and the fact it's charged possession with intent to deliver and my client's Hispanic heritage, that is essentially I think an improper attack or at least the assertion to the jury. And now the jury is made to believe that most drugs are coming up out of Mexico; my client is Hispanic. I can't unturn that clock. I think that's highly prejudicial based on her heritage, so I'm asking for a mistrial.

RP 2/14/18 157-160.

This evidence can be distilled into three basic claims: (1) that drug dealers follow a hierarchy in which very large amounts of drugs (pounds or multiple pounds) are divided and distributed to the next level of dealer (fewer pounds or numerous ounces), who in turn divides the drugs into

smaller amounts for distributor sale (individual ounces), all the way to lowest level dealer who sells to the drug users (gram amounts); (2) that a person who sells at the multiple ounce levels is a mid level dealer; and (3) the majority of methamphetamine and heroin in Washington comes out of Mexico. At each point in the introduction of this evidence the defense objected on the basis of relevance.

The fact of the matter was that none of this evidence was relevant. The facts at issue were whether or not the defendant was knowingly participating in a multiple ounce transaction Scott Shorey arranged with Eduardo Morales Martinez. The position of these two parties in a drug distribution network, the amount of drugs involved, and particularly the origin of those drugs had no bearing on facts at issue in the case. The facts at issue were: (1) whether or not Eduardo Morales Martinez agreed to deliver any amount of methamphetamine to Scott Shorey, and (2) whether or not Eduardo Morales Martinez intended to deliver any of the methamphetamine from the van to Mr. Shorey. Thus, none of the evidence concerning amounts, relative placement in drug distribution rings, and origin of the drugs was relevant.

In addition, even if this evidence had some marginal relevance, the unfair prejudice from its introduction far exceeded that marginal relevance, particularly given the fact that it invited the jury to convict

solely upon an implicit argument that the defendant must be guilty based upon her propensity to commit similar crimes. Thus, even if the evidence correctly survived a relevance objection (which Ms. Iniguez-Gonzalez does not concede), it did not survive an ER 403 or ER 404(b) analysis.

In assessing the unfair prejudice that this evidence had in this case, the following facts are important to recognize: (1) Ms. Iniguez-Gonzalez is Latina and has an easily identified Latina name, (2) the person identified as her husband and the person who had agreed to deliver the drugs, and had delivered drugs in the past, was also Latino with an easily identified Latino name, (3) Ms. Iniguez-Gonzalez sat through the entire trial using a Spanish interpreter, and (4) the largest Spanish-speaking country in the world is Mexico, which is, of course, the only one that shares a border with the United States. Although this last fact would seem self-evident, the trial court's comment in denying the motion for a mistrial that the defendant might well have been from Spain for all the jury knew seems disingenuous in the extreme.

The fact of the matter is that it was a short bridge from the jury to cross from “Mexico” being the chief supplier to drugs in Washington to “Mexicans” being the chief higher and middle level drug deals, to the defendant more likely than not being guilty because she was a Mexican. As Ms. Iniguez-Gonzalez argued to the court, there was no way to

overcome the unfair prejudice that arose from this highly improper evidence, even had the court given a very pointed instruction that the national origin of the defendant was absolutely not evidence the jury could consider.

The additional problem with this case was that the court did not give a pointed limiting instruction. Rather, after the jury had been out for the time necessary to argue the motion for a mistrial, the court gave the following instruction:

> THE COURT: All right. You may be seated. All right. Thanks again, folks, for your patience. As I'm sure Judge Lawler explained in orientation, sometimes things just have to be handled outside of your presence. And sometimes those breaks will be longer than others, but I do appreciate your patience. *At this time I am instructing you that the last statement made by the detective is - you are to disregard that statement. You are not to consider it in any way, shape, or form in your decisions in this case.* Thank you.

RP 2/14/18 161 (emphasis added).

The problem with the instruction is that it did not tell the jury what that last statement was. Perhaps such an instruction could work if it was given right after the offending words were spoken. However, that is not what happened in this case. Rather, there was a break between the offending testimony and the court's ambiguous instruction. Thus, the unfair prejudice was never truly ameliorated. Consequently, the trial court abused its discretion when it denied the defendant's motion for a mistrial.

2. This Court should accept review because the evidence only supported the conclusion that Ms. Iniguez-Gonzalez was merely present when another person possessed methamphetamine with the intent to deliver.

As a part of the due process rights guaranteed under both the Washington and federal constitution, the State must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza,* 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship:* "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *Winship,* 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore,* 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996). Finally, the test for determining the sufficiency of the evidence is whether "after viewing the evidence in the light most favorable to the

prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S. Ct. 2781, 2797, 61 L. Ed. 2d 560 (1979).

Seen in the light most favorable to the state, the evidence in this case indicates the following: (1) Eduardo Morales Martinez had routinely made multiple ounce sales of methamphetamine to Scott Shorey, (2) at the time in question Scott Shorey arranged for Eduardo Morales Martinez to come to Scott Shorey's house to sell him multiple ounces of methamphetamine, (3) during most of the prior deliveries, Scott Shorey saw Eduardo Morales Martinez driving a white Odyssey van, and on most occasions Mr. Martinez' wife Gloria Iniguez Gonzales was with him, (4) that the van was actually registered in Ms. Iniguez-Gonzalez's name, (5) that when the police walked up to the van they saw that the defendant had got into the back seat next to her baby, who was in a car seat, and (6) the police found three one-ounce bindles of methamphetamine in the back seat in the area where the defendant's feet had been sitting.

This evidence might well lead to a conclusion that the defendant was aware of the fact that methamphetamine was present in the van and that Eduardo was going to sell it to Mr. Shorey. However, this is the extent of the inferences that can be drawn. There are no facts presented at

trial to indicate that the defendant in any way acted as an accomplice to Eduardo's crime.

Thus, the trial court and the Court of Appeals erred when it accepted the jury verdict of guilty on the charge of possession of methamphetamine with intent to deliver because substantial evidence does not support this conclusion.

3. This Court should accept review because the trial court denied the defendant the ability to present a defense when it refused to give her proposed instruction on unwitting possession.

It is a fundamental principle of due process under both our State and Federal Constitutions that a defendant in a criminal proceeding must be permitted to argue any defense allowed under the law and supported by the facts. *State v. McCullum*, 98 Wn.2d 484,656 P.2d 1064 (1983). Thus, the failure to instruct on a defense allowed under the law and supported by the facts constitutes a violation of due process under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. *State v. MacMaster*, 113 Wn.2d 226, 778 P.2d 1037 (1989); *State v. LeBlanc*, 34 Wn. App. 306, 660 P.2d 1142 (1983).

A defendant is entitled to have the jury instructed on a lesser included offense if (1) each of the elements of the lesser offense is a necessary element of the offense charged; and (2) the evidence in the case

affirmatively supports an inference that the defendant committed the lesser crime. *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). In addition, "[r]egardless of the plausibility of th[e] circumstance, [a] defendant ha[s] an absolute right to have the jury consider the lesser included offense on which there is evidence to support an inference it was committed." *State v. Parker*, 102 Wn.2d 161, 166, 683 P.2d 189 (1984) (citing, inter alia, *State v. Jones*, 95 Wn.2d 616, 628 P.2d 472 (1981)).

In the case at bar, the State charged the defendant with one count of possession of methamphetamine with intent to deliver. As was set out in part two of this petition, the evidence presented at trial might support the conclusion that the defendant was aware of the drugs in the van. However, that evidence also equally supports the conclusion that she was unaware of that fact. Specifically, Mr. Shorey and the police testified that Mr. Shorey had set up the drug purchase with Mr. Martinez, not with the defendant. In fact, while Mr. Shorey did claim that the defendant was with Mr. Martinez on many occasions during which he purchased drugs from Mr. Martinez, Mr. Shorey did not claim that the defendant in any way participated or even was aware of what was happening. Thus, in this case, the facts do support a claim that Ms. Iniguez Gonzalez, as the registered owner of the van, had unwittingly possessed the methamphetamine the police found in it. Consequently, the trial court erred when it refused to

instruct on a defense that was available under both the law and the facts of the case.

The error in this case was far from harmless. As was already set out, there was little evidence to tie the defendant with the methamphetamine the police found in the van registered to her other than her relationship to Mr. Martinez. Thus, in this case, there is a high likelihood that had the court instructed the jury on unwitting possession, the jury would have acquitted the defendant.

E. CONCLUSION

Based on the foregoing, Ms. Iniguez Gonzalez respectfully requests that this Court accept review.

DATED this 20th day of November, 2019.

Respectfully submitted,

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Filed
Washington State
Court of Appeals
Division Two

October 22, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GLORIA N. INIGUEZ GONZALEZ, Appellant.	No. 51573-3-II UNPUBLISHED OPINION

GLASGOW, J. — Gloria Iniguez Gonzalez was a passenger in a van where the police found methamphetamine. Iniguez Gonzalez appeals from her conviction for possession of methamphetamine with intent to deliver. She argues that the trial court erred in denying her motion for a mistrial based on an improper statement that a testifying police officer made during testimony. She contends her conviction was supported by insufficient evidence. She also argues that the trial court should have given an instruction on the affirmative defense of unwitting possession in light of a lesser included possession of methamphetamine charge. She challenges the imposition of a criminal filing fee because she is indigent. Iniguez Gonzalez has also filed a statement of additional grounds.

We hold that the trial court did not abuse its discretion in denying Iniguez Gonzalez's motion for a mistrial because the court twice instructed the jury to ignore the improper comment and she was not prejudiced. We hold that her conviction was supported by sufficient evidence because the van where the drugs were found was registered in her name and the drugs were found where she had been sitting. We hold that Iniguez Gonzalez failed to show unwitting possession by a preponderance of the evidence, and so the trial court did not err in denying her request for an instruction. We accept the State's concession that the criminal filing fee should be stricken because Iniguez Gonzalez is indigent. Finally, we conclude that none of the arguments made in the statement of additional grounds warrants reversal.

We affirm Iniguez Gonzalez's conviction and remand for the trial court to strike the criminal filing fee from her judgment and sentence.

FACTS

The informant was arrested for possession of drugs and stolen property. In exchange for a reduced sentence, he agreed to become an informant. In this capacity, the informant called Eduardo Morales Martinez to set up a meeting that night at the informant's house so he could purchase methamphetamine from Morales Martinez. The informant told the police that Morales Martinez would arrive in a white Honda Odyssey van.

That night, detectives Chad Withrow and Robin Holt set up surveillance and observed a white Honda Odyssey heading in the direction of the informant's house. The driver matched the informant's description of Morales Martinez. A woman, later identified as Iniguez Gonzalez, was in the passenger seat. Withrow and Holt followed the van to a McDonald's and then pulled it over for a defective headlight.

As Withrow and Holt approached the van they noticed that Iniguez Gonzalez had moved from the front passenger seat to the back passenger seat and that there was a baby in the back seat. They asked Iniguez Gonzalez where she and Morales Martinez had been going, and she said they were stopping at McDonald's to get food. When Holt confronted her about the fact that there was already McDonald's food in the car, Iniguez Gonzalez said that they were going to buy shoes for the baby. She also told the detectives that she and Morales Martinez were visiting a friend but she could not remember their name or where they lived. Withrow testified that although English was not Iniguez Gonzalez's first language, they were able to converse without issue and it was not until they asked to search the vehicle that she claimed she could not understand English.

While still at the scene, the detectives obtained a warrant to search the van. On the floor below the backseat of the van where Iniguez Gonzalez had been sitting with her baby, the detectives found three bags of methamphetamine. They then arrested Iniguez Gonzalez. The detectives later learned that the van was registered in Iniguez Gonzalez's name.

Iniguez Gonzalez was charged with possession of methamphetamine with intent to deliver, with an enhancement based on the offense being committed within 1,000 feet of a school bus stop.

At trial, Withrow testified, based on his training and experience, about the typical hierarchy of drug trafficking networks, including different levels of drug dealers. At one point Withrow said that the majority of methamphetamine and heroin in Washington comes from Mexico. Iniguez Gonzalez objected and immediately moved for a mistrial on the grounds that the testimony was

highly prejudicial given Iniguez Gonzalez's heritage. After argument outside the presence of the jury, the court declined to grant a mistrial, but sustained the objection and immediately instructed the jury to disregard the statement.

The court instructed the jury to consider the lesser included offense of simple possession should it find Iniguez Gonzalez not guilty of possession with intent to deliver. Because it is an affirmative defense to the lesser included charge of possession, Iniguez Gonzalez requested that the jury be instructed on the defense of unwitting possession, but the court denied her request. The court also instructed the jury again "not to consider statements regarding ethnic origin of persons or property." Clerk's Papers (CP) at 80.

The jury found Iniguez Gonzalez guilty of possession with intent to deliver and that the offense occurred within 1,000 feet of a school bus stop. The court sentenced her to a total of 36 months and one day in prison. The court also imposed a criminal filing fee on Iniguez Gonzalez, who is indigent.

Iniguez Gonzalez appeals her conviction and the imposition of the criminal filing fee as part of her sentence.

ANALYSIS

I. DETECTIVE WITHROW'S TESTIMONY

Iniguez Gonzalez argues the trial court abused its discretion in denying her motion for a mistrial. We disagree.

We review a trial court's denial of a mistrial for abuse of discretion. *State v. Whitaker*, 6 Wn. App. 2d 1, 25, 429 P.3d 512 (2018), *review granted in part*, 193 Wn.2d 1012 (2019). We will find abuse of discretion only when no reasonable judge would have reached the same

conclusion. *Id*. In addition, we will only overturn a trial court's denial of a motion for mistrial when there is a substantial likelihood that the error prompting the request for a mistrial affected the jury's verdict. *Id*.

In *State v. Elkins*, we held that the trial court did not abuse its discretion in denying a motion for a mistrial in part because the trial court directed the jury to disregard the offending statement, and we presume the jury followed the trial court's instructions. 188 Wn. App. 386, 408, 353 P.3d 648 (2015). In less recent cases, we have also examined three factors when determining whether an irregularity warrants a mistrial: (1) seriousness, (2) whether the irregularity involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. *State v. Garcia*, 177 Wn. App. 769, 776, 313 P.3d 422 (2013). We consider these factors with deference to the trial court because the trial court is in the best position to discern prejudice. *Id.* at 776-77.

Here, Iniguez Gonzalez argues that Withrow's statement that the majority of the methamphetamine and heroin in Washington comes from Mexico prejudicially suggested to the jury that she must be guilty on account of her name and the fact that she used an interpreter throughout trial. Iniguez Gonzalez objected before this line of testimony could proceed any further. The trial court correctly ruled that the comment was improper and accordingly instructed the jury to disregard the statement. Neither Withrow nor the prosecutor suggested a connection to the defendant's guilt or innocence, nor was there any evidence presented to suggest that Iniguez Gonzalez is of Mexican heritage or involved with Mexican drug traffickers.

Applying the *Garcia* factors, although Withrow's comment was improper, it was not so serious as to affect the jury's verdict. The comment was isolated. And just before closing arguments and deliberation, the court again instructed the jury "not [to] consider statements regarding ethnic origin of persons or property." CP at 80. We presume the jury followed those instructions. *Elkins*, 188 Wn. App. at 408. Considering all three factors for evaluating a denial of mistrial, the trial court did not abuse its discretion.

Iniguez Gonzalez claims the jury instruction given just after the motion for mistrial was ambiguous because it told the jury to disregard "the last statement made by the detective," after the parties and the court had proceeded outside the presence of the jury for some time to discuss the motion. Verbatim Report of Proceedings (VRP) (Feb. 14, 2018) at 161. It is clear in context which statement the court was referring to and any lingering confusion on the part of the jury would have been ameliorated by the court's later jury instruction on statements regarding national origin. The trial court was in the best position to determine prejudice, and it concluded that these instructions were sufficient to address the improper comment. *Garcia*, 177 Wn. App. at 776-77.

We hold that Iniguez Gonzalez has not shown a substantial likelihood that Withrow's statement affected the jury's verdict. The trial court did not abuse its discretion in denying her motion for a mistrial.[1]

[1] Iniguez Gonzalez also seems to argue that the court erred in admitting other testimony from Withrow about the typical hierarchy of drug sale operations, on the basis that it was not relevant and was unfairly prejudicial. Because this claim was not included in her assignments of error we decline to consider it. RAP 10.3(a)(4); *see also Ang v. Martin*, 154 Wn.2d 477, 486-87, 114 P.3d 637 (2005).

II. SUFFICIENCY OF THE EVIDENCE

Iniguez Gonzalez argues that there was insufficient evidence to support her conviction for possession of methamphetamine with intent to deliver. We disagree.

Evidence is sufficient to support a conviction if, viewing the evidence in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence. *Id*. We draw all reasonable inferences in favor of the State and interpret them most strongly against the defendant. *Id.* We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Pinkney*, 2 Wn. App. 2d 574, 580, 411 P.3d 406 (2018).

To prove possession of methamphetamine with intent to deliver, the State had to show Iniguez Gonzalez possessed methamphetamine with the intent to deliver it. RCW 69.50.401(1), (2)(b).[2] The trial court instructed the jury consistent with this definition and also instructed the jury on accomplice liability. A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, they aid or agree to aid another person in planning or committing the crime. RCW 9A.08.020(3)(a)(ii); 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRS.: CRIMINAL 10.51 (2016).

Iniguez Gonzalez argues that the State's evidence at best showed only that she was present

[2] The legislature amended RCW 69.50.401 in 2019. Because the relevant language has not changed, we cite to the current version of this statute.

and aware that there were drugs in the van that Morales Martinez planned to sell to the informant, but there was no evidence to suggest that she acted as an accomplice. But the van was registered in her name and the drugs were found on the floor where she had been sitting. It was reasonable for the jury to infer from these facts that Iniguez Gonzalez provided her van to Morales Martinez to deliver the drugs to the informant and that she was aiding him in that endeavor. She also provided inconsistent explanations to the police at the scene about why she and Morales Martinez were in the area and what they were doing, so it was reasonable for the jury to draw inferences about her guilt. We defer to the jury's determination regarding Iniguez Gonzalez's credibility and the persuasiveness of the State's evidence. *Pinkney*, 2 Wn. App. 2d at 580.

Drawing all reasonable inferences in favor of the State, the evidence supported a conclusion that Iniguez Gonzalez provided her van and was aiding in the delivery of drugs, and therefore acted as an accomplice. For the reasons stated above, we hold that Iniguez Gonzalez's conviction for possession with intent to deliver was supported by sufficient evidence.

III. UNWITTING POSSESSION INSTRUCTION

Iniguez Gonzalez contends the trial court erred when it denied her request to have the jury instructed on the defense of unwitting possession with respect to her lesser included charge of simple possession of methamphetamine. We disagree.

Unlawful possession of a controlled substance is a strict liability crime that requires the State to prove the nature of the substance and the fact of possession. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). To ameliorate the harshness of strict liability, the defendant may raise the affirmative defense that possession was unwitting. *Id.*

A defendant in a criminal case is entitled to have the trial court instruct the jury on their theory of the case if there is evidence to support the theory. *State v. George*, 146 Wn. App. 906, 915, 193 P.3d 693 (2008). A trial court errs by not instructing the jury on the requested defense when evidence supporting the defense is adduced at trial. *Id.* The requested defense must be considered in light of all the evidence presented at trial, regardless of which party presented it. *Id.*

Iniguez Gonzalez argues that, although the evidence supported a conclusion that she was aware of the drugs in the van, it also equally supported the conclusion that she did not know about the drugs. She reasons that the informant set up the drug deal with Morales Martinez, not her, and that the informant did not claim that she ever participated in previous drug deals or was aware of what was happening.

Iniguez Gonzalez was the registered owner of the vehicle where the drugs were found and the drugs were in plain view on the floor under her seat when the police opened the door. Withrow testified: "I didn't have to search for it at all. I mean, it was just right there." VRP (Feb. 14, 2018) at 202. There was no evidence that she reacted with surprise when police found the methamphetamine. Even interpreting the evidence in her favor, Iniguez Gonzalez has failed to show evidence of unwitting possession in this record. Therefore, we conclude that she was not entitled to the instruction and the trial court did not err when it denied her request for the instruction.

IV. LEGAL FINANCIAL OBLIGATIONS

Iniguez Gonzalez challenges the imposition of the criminal filing fee. The State concedes error. We accept the State's concession and remand to strike the criminal filing fee.

In 2018, the legislature amended former RCW 36.18.020(h) to prohibit the imposition of the criminal filing fee if a defendant is indigent as defined in RCW 10.101.010(3) (a) through (c). LAWS OF 2018, ch. 269, § 17. Our Supreme Court has held that the 2018 amendments to the legal financial obligation statutes apply to cases pending on direct review and not final when the amendments were enacted. *State v. Ramirez,* 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

The 2018 amendments apply here because this case was not final when the amendments took effect. *Id*. The State concedes that Iniguez Gonzalez is indigent under RCW 10.101.010(3) (a) through (c). The criminal filing fee should therefore be stricken from her judgment and sentence.

V. STATEMENT OF ADDITIONAL GROUNDS

Iniguez Gonzalez raises several issues in her statement of additional grounds. First, she argues that a number of jurors should have been excused because of their strong feelings on drugs and drug dealing. However, she has not shown that the jurors who were actually selected were the same people about whom she has concerns. We reject this argument.

She also seems to argue that the school bus stop enhancement was improperly imposed because it was measured from where she and Morales Martinez were stopped, rather than from the informant's home. We reject this argument because the jury found there was a school bus stop within 1,000 feet from where the crime was occurring when it was discovered by the police. Thus, the enhancement was not improper.

Iniguez Gonzalez also seems to suggest other errors related to jury selection and the prosecutor's conduct. Although RAP 10.10 does not require her to refer to the record or cite authority, it does require her inform us of the "nature and occurrence of the alleged errors." These

assertions of error are too vague to allow us to identify the issues and seem to reference facts not in the record. We therefore do not reach her remaining claims.

CONCLUSION

We affirm Iniguez Gonzalez's conviction and remand for the trial court to strike the criminal filing fee.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, J.

We concur:

Maxa, C.J.

Melnick, J.

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 – Division Two** under **Case No. 51573-3-II**, 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:

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☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: November 20, 2019
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