SUPREME COURT NO. 96621-4

NO. 76973-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JASON BUTCHER,

Petitioner.

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

The Honorable Dave Needy, Judge
The Honorable Brian Stiles, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

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

B. COURT OF APPEALS DECISION

Butcher seeks review of the Court of Appeals decision in State v. Butcher, No. 76973-1-I, 2018 WL 5802030 (Slip Op. filed November 5, 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

Butcher was charged with possession of heroin, a strict liability offense. Butcher 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 and 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 Butcher'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 Butcher deprived of his constitutional right to present and have the jury properly consider his unwitting possession defense when no instruction relieved jurors of their "duty to convict" if they found the State had proved possession beyond a

[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

reasonable doubt, even if one of more jurors concluded his possession was unwitting?

E. STATEMENT OF THE CASE

1. Procedural Facts

The Skagit County Prosecutor charged petition Jason Butcher with unlawful possession of heroin. CP 1. The prosecution alleged that on October 16, 2015, Butcher was arrested in Sedro Wooley on an outstanding warrant and a search incident to arrest produced heroin residue on an electronic scale. CP 2-4.

A jury trial was held in April 2017, before the Honorable Judge Brian Stiles. 1RP[2] 45-220. Butcher was convicted as charged. CP 60; 2RP 214-16. In June 2017, Butcher was sentenced and then filed a notice of appeal. CP 82-83, 89-101; 1RP 259.

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v. Recuenco, 154 Wash. 2d 156, 110 P.3d 188 (2005).

[2] There are three volumes of verbatim report of proceedings referenced as follows: **1RP** – two-volume consecutively paginated set for the dates of March 29, April 17 & 18, and June 14, 2017; and **2RP** – single volume for the dates of April 6 & 12, 2017.

2. Substantive Facts

On October 16, 2015, at approximately 9:50 p.m., Sedro Wooley Police Officer James Hannawalt saw Butcher walking in Sedro Wooley near the Mary Purcell Elementary School, so he stopped his patrol car, got out and made contact. 1RP 96-97. They had a brief conversation, during which Butcher identified himself, and the contact ended with Butcher walking away and Hannawalt returning to his patrol car. 1RP 97-98. Hannawalt did not see Butcher discard any items as he walked away. 1RP 128.

Once back in his patrol car, Hannawalt looked up Butcher's name and discovered he had an outstanding arrest warrant, which dispatch confirmed. 1RP 98. Hannawalt re-contacted Butcher, who was still on foot, and arrested him on the warrant. 1RP 98-99. In a search incident to arrest, Hannawalt discovered in Butcher's backpack a bottle of alcohol, an unopened package of "unused syringes" and a scale inside a case with what appeared to be brown tar-like substance Hannawalt suspected was heroin. 1RP 99-100. Hannawalt testified that upon seeing the scale, Butcher said he had seen the case, but had not known it was a scale. 1RP 181.

Hannawalt submitted a sample of the tar-like residue on the scale to the Washington State Patrol Crime Laboratory for identification of the

substance. 1RP 104. Butcher's counsel stipulated before the jury that the substance on the scale was heroin. 1RP 107. A forensic scientist from the crime laboratory confirmed the substance contained heroin. 1RP 132-33.

Hannawalt agreed the scale may have been inside another case, such as a make-up case, when it was in Butcher's backpack, but he could not recall what that might have looked like. 1RP 117, 129-30. If there was such a case, Hannawalt had not kept it as evidence. 1RP 118. Hannawalt also agreed he never tried to obtain fingerprints off the scale. 1RP 120.

The State rested after Hannawalt and the forensic scientist testified. 1RP 133.

Butcher testified in his defense. According to Butcher, prior to his encounters with Hannawalt, he had been at the home of Duane Roberts to make a down payment on a car. 1RP 138-39. Butcher had his backpack with him at the time, which contained nothing but a bottle of vodka. 1RP 142, 159.

Robert's girlfriend, Amber Yates, was at the home as well, until her mother came to pick her up for an AA meeting. 1RP 140. At some point after Yates left, Roberts placed items in Butcher's backpack, including an unopened package of "diabetic syringes" to drop off at the "Friendship House," a local homeless shelter. 1RP 144-45. Butcher

claimed Roberts also put a "flowery" case in his pack, which Butcher assumed was a case for tampons, but Roberts said was a makeup case. 1RP 147-48, 150.[3] Butcher denied ever looking in the case. 1RP 148. Butcher also denied ever using heroin and denied knowing anything Roberts put in his backpack contained heroin. 1RP 149. Butcher explained his plan was to drop the case of with Yates, who would be waiting outside her home when Butcher walked by. 1RP 149-50.

The second day of trial, April 18, 2017, the court began by inquiring whether either party had objections to the proposed jury instructions prepared by the court, the only one of which that had been proposed by the defense was the unwitting possession defense instruction, Instruction 11. CP 43, 57; 1RP 185. Neither side did. The jury was then brought in, provided a copy of the instructions to follow as the court read them aloud. 1RP 186.

In closing argument, the prosecution noted the elements listed in Instruction 10, (CP 56), the to-convict instruction, were uncontested, with Butcher admitting he possessed the heroin residue encrusted scale. 1RP 186-89. The prosecution then turned to Butcher's unwitting possession

[3] When Butcher initially testified Roberts said it was a "make-up case," the court sustained the prosecution hearsay and relevance objections. 1RP 143—44, 147. The prosecution, however, did not object when Butcher later testified that he did not see a scale when Roberts puts stuff in his backpack, and said that instead "it actually was the makeup case that [Roberts] said it was." 1RP 150.

claim, noting it was Butcher's burden to prove by a preponderance of the evidence. 1RP 189-90. The prosecution argued jurors should conclude Butcher failed to meet his burden because his claim Roberts put the scale in his backpack without his knowledge it contained heroin was unbelievable. 1RP 190-94.

During closing argument, Butcher's attorney repeatedly emphasized that despite giving Hannawalt his name during their first encounter, Butcher made no attempt to dispossess himself of the items he received from Roberts, which a person with a warrant out for their arrest likely would have done if they had known they contained heroin. 1RP 194-200, 204, 208-09. Counsel also noted the lack of fingerprint evidence linking Butcher to the scale. 1RP 202. Counsel urged the jury to acquit because Butcher only unwittingly possessed heroin. 1RP 209.

Butcher's jury deliberated from 10:42 a.m. until about 1:14 p.m. before returning with a unanimous guilty verdict. 1RP 213-16. Butcher appealed. CP 82-83.

On appeal, Butcher challenged his conviction, 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 8-12.

The Court of Appeals affirmed. Appendix. The Court based its decision on Butcher's trial counsel's failure to object to the instructions provided and concluded that the alleged err was not manifest constitutional error because there was no prejudice shown to Butcher's defense. Appendix at 3. The Court also rejected Butcher's claim on the basis that the jury instructions provided must be read "as a whole." Appendix at 3 (citing State v. Brown, 130 Wn. App. 767, 770, 124 P.3d 663 (2005)). With regard to Butcher's claim that the "duty to convict" language in the to-convict instruction effectively nullified the unwitting possession defense instruction, the Court described this as "an over technical reading." Appendix at 4.

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 Butcher's jury received for the drug possession charge, Instruction 10, unequivocally informed jurors that if they found beyond a reasonable doubt that Butcher possessed heroin in the State of Washington on or about October 16, 2015, "it will be your duty to return a verdict of guilty." CP 56. This was an incorrect statement of the law. It is incorrect because there is no "duty" to convict, despite finding beyond a reasonable doubt Butcher possessed heroin in the State of Washington on October 16, 2015, if jurors also found by a preponderance of the evidence the possession was unwitting. CP 57 (Instruction 11). Unfortunately, the jury was never properly instructed on the interplay between instructions 10 and 11, leaving the false impression that if Butcher possessed the heroin, the jury had to a "duty" to convict, even if it found the possession unwitting. This deprived Butcher 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.[4] 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 10 at trial, Butcher may challenge it for the first time on appeal because it involves "manifest error affecting a constitutional right." RAP 2.5(a)(3). 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 Butcher by compromising the jury's fair consideration his unwitting possession defense.

A conviction for heroin possession requires proof the accused possessed heroin. RCW 69.50.4013(1); CP 56 (Instruction 10).

> 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

[4] 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)).

> 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 heroin is a "controlled substance," (CP 53, Instruction 7), that "possession" can be either "actual" or "constructive," (CP 55, Instruction 9), and that a conviction for possession of heroin requires finding beyond a reasonable doubt that Butcher possessed heroin "on or about October 16, 2015," in the State of Washington, (CP 56, Instruction 10). The court failed, however, to properly instruct jurors on Butcher'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 that he possessed the heroin 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 10. CP 56. Instruction 10 purports to identify what jurors must find to convict Butcher, 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 10, however, failed to advise jurors they must also conclude Butcher 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 10 told jurors they must convict if the State met its burden, while Instruction 11 told jurors a person is not guilty of heroin possession if the person did not know they possessed it. CP 57-57. It cannot be determined how Butcher'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 Butcher's claim on appeal, the Court of Appeals concluded that his reading of the instructions was "overly technical." Appendix at 4. The Court of Appeals acknowledged the jury instruction that were provided could have been better, but had doubts about whether the ones that were provided misled the jury about the applicable law. Id.

The instructions provided to Butcher'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 10 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.

Another Court of Appeals, Division Three, recently rejected the same argument Butcher makes here in an unpublished decision[6] by, 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." State v. Jonathan Thacker, No. 35368-1-III, 2018 WL 5734392 (Slip Op. filed November 1, 2018), (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)), petition for review pending (filed December 3, 2018). That Court then analogized the issue raised by Butcher here to those raised in Meggyesy and State v. Hoffman,

[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*.'

116 Wn.2d 51, 804 P.2d 577 (1991), both of which involved similar issues, but in the context of self defense claims instead of an unwitting possession claim. Thacker, Slip Op. 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-

[6] Butcher cites to this unpublished case as allowed under GR 14.1(a).

> 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).

Butcher's case is significantly different than Meggyesy and Hoffman because possession of heroin 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 link 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, Butcher's jurors received a to-convict instruction that stated they had a "duty to convict" if they found beyond a reasonable doubt that Butcher possessed heroin as accused. CP 56 (Instruction 10). They were also told, however, that a person is not guilty of the charge if their possession was unwitting. CP 57 (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 element of the crime versus affirmative defenses that do not. Therefore, review is warranted under RAP 13.4(b)(4).

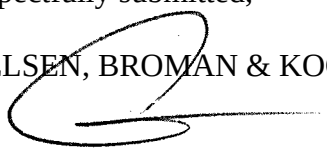
G. CONCLUSION

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

DATED this 4th day of December, 2018

Respectfully submitted,

NIELSEN, BROMAN & KOCH PLLC



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JASON MICHAEL BUTCHER, Appellant.	)	No. 76973-1-I DIVISION ONE UNPUBLISHED OPINION FILED: November 5, 2018

BECKER, J. — A jury convicted Jason Butcher of heroin possession. He contends that flawed jury instructions diluted his defense of unwitting possession. He also contends that his lawyer was ineffective for not objecting to the flawed instructions. We affirm.

Butcher's trial on one count of possession of a controlled substance occurred on April 17 and 18, 2017. A police officer testified that he approached Butcher on the evening of October 16, 2015. They had a brief conversation during which Butcher gave his name. After they parted ways, the officer quickly ascertained that there was an outstanding warrant for Butcher's arrest. He caught up with Butcher, who had continued walking, and arrested him. The officer searched a backpack Butcher was wearing. It contained "unused syringes still in the initial packaging as well as a scale with a brown tar-like substance which appeared to be heroin." Testing confirmed the substance was heroin.

During the defense case-in-chief, Butcher did not dispute that the scale was found in his possession or that the substance on the scale was heroin. He argued that his possession was unwitting. Butcher was the only defense witness. He testified that on the day of the crime, a man he was with put the syringes and a small case in Butcher's backpack and asked him to take the syringes to a homeless shelter and the case to the man's girlfriend. Butcher said that he did not look inside the case. When asked to describe it, Butcher said it was a small case with a floral design and a white zipper on top. Butcher explained that he was on his way to deliver the items when he was arrested. He testified that he learned the case contained the scale when the officer opened it. When asked by defense counsel if he knew before that point that he was possessing heroin, Butcher responded, "No I did not."

The officer testified on rebuttal that he did not remember a floral-patterned case like the one described by Butcher. During the State's case-in-chief, the officer had testified that the scale "might have been in another case or something" but he could not recall.

The jury found Butcher guilty as charged. Based on Butcher's stipulation to the aggravating factor that he committed the offense shortly after being released from incarceration, the court imposed an exceptional sentence of 366 days' confinement, one day above the high end of the standard range. Butcher filed this timely appeal.

Butcher challenges instruction 10, a pattern to-convict instruction:

> To convict the defendant of the crime of possession of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about October 16, 2015, the defendant possessed a controlled substance - Heroin; 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.

Butcher contends that the instruction should have stated that there was no duty to convict if his possession was unwitting.

Butcher did not object to this instruction when it was given. He claims that it can be reviewed as manifest constitutional error under RAP 2.5(a)(3). This requires a showing that the error is manifest, meaning that it caused actual prejudice. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). Butcher asserts that instruction 10 prejudiced him by eliminating his unwitting possession defense from the jury's consideration. But the unwitting possession defense was accurately stated in instruction 11, which was proposed by Butcher:

> 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.

Butcher's argument that this information should also have been stated in the to-convict instruction ignores the general rule that jury instructions are to be read as a whole. State v. Brown, 130 Wn. App. 767, 770, 124 P.3d 663 (2005).

Butcher suggests that failing to include language about unwitting possession in the to-convict instruction is akin to omission of an essential element. But when pursuing a possession charge, the State is not required to prove that the defendant knew he possessed an illegal substance. Rather, unwitting possession is an affirmative defense. As instruction 11 correctly explained, it was Butcher's burden to prove he did not know the heroin was in his possession. State v. Deer, 175 Wn.2d 725, 735, 287 P.3d 539 (2012), cert. denied, 568 U.S. 1148, 133 S. Ct. 991, 184 L. Ed. 2d 770 (2013). The State explained the relationship of the two instructions in closing argument:

> What is unwitting possession? Possession of a controlled substance is unwitting if the person did not know the substance was in his possession. And this instruction Number 11 talks about the fact that the burden is now on the defendant to demonstrate that. When we talked all about what the State's burden is, the State's burden is to prove everything [in] the to convict instruction beyond a reasonable doubt. This instruction for unwitting possession says it's the defendant's burden to prove by a preponderance that the substance was possessed unwittingly.

Butcher argues that instructions 10 and 11 are prejudicial because they are inconsistent. Butcher asserts that instruction 10, telling jurors they had a "duty to convict" if they found he possessed heroin, nullified instruction 11, which told them he was not guilty if they found his possession was unwitting. This is an overly technical reading. While the court might have been able to improve the wording of the instructions if a timely objection had been raised, it is not reasonably likely that the instructions as given led jurors to believe they had a duty to convict even if they found Butcher's possession was unwitting. We

conclude Butcher has not shown a manifest error with respect to instructions 10 and 11.

Butcher also challenges instruction 6: "The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way." CP at 52. Because Butcher did testify, this pattern instruction was not needed. Butcher did not object to including it. He argues on appeal that the instruction effectively told jurors to "ignore" his testimony as if the trial court had ruled it was inadmissible.

Butcher makes no meaningful effort to demonstrate that instruction 6 constitutes manifest constitutional error. It is not reasonably likely jurors would have understood it as a directive to ignore Butcher's testimony, especially when both parties discussed his testimony at length during closing arguments.

Butcher argues in the alternative that he was deprived of effective assistance due to trial counsel's failure to object to the allegedly erroneous instructions. To prove this claim he must show both deficient conduct and prejudice. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). For the reasons explained above, Butcher has not shown that the instructions were prejudicial.

Butcher has filed a statement of additional grounds for review as permitted by RAP 10.10. He claims his speedy trial rights were violated; he was improperly searched; jail staff opened and kept his mail, including correspondence with his attorney; his trial attorney failed to interview certain witnesses; the Skagit County community has targeted him with false reports and beatings; the verbatim report

of proceedings contains errors; and a member of the jury was prejudiced against him. Because these claims lack adequate support, they do not warrant review in this appeal.

Affirmed.

Becker, J.

WE CONCUR:

Chun, J.

Andrus, J.

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

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