SUPREME COURT NO. 98452-2

COA NO. 78677-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

DARREN GENE LAW,

Petitioner.

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

The Honorable Cindy A. Larsen, Judge

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# PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Darren Gene Law asks this Court to grant review of the court of appeals' unpublished decision in State v. Law, 2020 WL 1640231, filed March 23, 2020 (Appendix).

B. ISSUES PRESENTED FOR REVIEW

This case presents the question, what is the proper legal standard for evaluating whether actions are separate and distinct or are a continuing course of conduct, to maintain the requirement of juror unanimity in the context of drug possession charges?

1. Is this Court's review warranted under RAP 13.4(b)(1) and (2) because the decision of the court of appeals conflicts with this Court's legal standard articulated in State v. Petrich,[1] 101 Wn.2d 566, 683 P.2d 173 (1984), and its progeny including State v. Handran, 113 Wn.2d 11, 775 P.2d 453 (1989), and also conflicts with the court of appeals' application of that standard in the context of drug possession charges in State v. King, 75 Wn. App. 899, 878 P.2d 466 (Div. I.1994)?

2. Is this Court's review warranted under RAP 13.4(b)(3) because it presents a "significant question" of constitutional law under

[1] State v. Petrich, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984), overruled in part on other grounds by State v. Kitchen, 110 Wn.2d 403, at 405-06, 406 n.l, 756 P.2d 105 (1988), abrogated in part on other grounds by In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 328, 823 P.2d 492 (1992).

article I, section 22 of the of the Washington Constitution: that the right to a unanimous jury verdict is violated where the State presents evidence of more than one act that could form the basis of a single charge, yet the State fails to elect a specific act, and the jury is not instructed on the requirement of unanimity? Is review warranted where the defense presents evidence of separate and distinct defenses to each act, even where the State's theory is that the acts constitute a continuing course of conduct? Is the review warranted for this Court to clarify that the standard of review is not sufficiency, but rather is based on the context of the trial and specifically, the defenses presented therein?

In the alternative, does the trial attorney's failure to request a Petrich instruction under such circumstances present a significant question involving the constitutional right to effective assistance of counsel under article 1, section 22 of the Washington Constitution and the Sixth Amendment to the U.S. Constitution?

3. Is this Court's review warranted under RAP 13.4(b)(4) because it presents a question of "substantial public interest": whether a drug possession conviction may be sustained under these circumstances?

C. STATEMENT OF THE CASE

The State charged Law with possession of methamphetamine with intent to manufacture or deliver. CP 183. Law pleaded not guilty. 2RP 8.

Partway through the first trial, the parties learned officers had searched Law's phone and destroyed it without informing the prosecutor or defense. 3RP 11-14. The court found the evidence was material, and ordered a mistrial and spoliation instruction. 3RP 14, 23, 27.

During the second trial, Officer O. Kravchun testified he observed Law enter a park. 3RP 166. Law "was very fidgety" and "appeared under the influence of some substance." 3RP 166. O. Kravchun observed Law engage in three transactions, wherein he would reach into his right cargo pocket to sprinkle a "white or clear" substance into the hand of another person. 3RP 167-69, 191. In the third instance, the recipient gave Law what appeared to be currency. 3RP 169, 191. O. Kravchun confirmed he only observed Law reaching into and distributing something from his right cargo pocket, not from any other location, and that he never observed any baggies or packaging during these transactions. 3RP 173-77, 191. Law then walked out of the park. 3RP 169-70.

O. Kravchun continued to watch Cheyenne Pickens, the recipient of one of these transactions, who remained in the park sitting on a blanket with Jacob Warner. 3RP 213. Warner picked something up from the blanket and place it in the end of a syringe. 3RP 214. Pickens was later arrested and found in possession of heroin but not methamphetamine. 3RP 167, 197-98. Warner was later arrested and found to possession a hypodermic needle

containing "a couple of crystals" that Officer A. Kravchun (O. Kravchuns' brother) testified he believed "looked like meth." 3RP 237, 171. The other transaction recipients were never arrested or searched. 3RP 195-97.

Officers A. Kravchun and Mueller, approached Law outside the park as he was walking away. 3RP 171, 229, 243. Law stopped, but "was putting his hands in his pockets and moving around a little bit." 3RP 227. The officers asked Law not to, and he complied. 3RP 227. They told Law he was suspected of selling drugs in the park. 3RP 227. Law denied it and said, "all I have is baggies." 3RP 228, 230, 251. A. Kravchun asked to search the backpack Law was carrying. 3RP 228, 243. Law stated, "Nah, here you go man," put his backpack on the ground, unzipped the main compartment, put his hands up, backed away a step, and gestured at the backpack indicating officers were free to search it. 3RP 243-44, 251.

Officers searched the backpack and found a digital scale and half a dozen small ziplock baggies. 3RP 222. They then arrested Law, searched his clothing, and in the left front pocket, found a plastic sandwich baggie, tied off at end, containing a "clear, crystal, white substance" that A. Kravchun suspected was methamphetamine. 3RP 194, 222, 231, 250.

Once they arrived at the jail, O. Kravchun was advised that Law had been reaching into his right front cargo pocket while he was in the park, so officers searched that pocket again. 3RP 232-33. The pocket was mesh,

meaning something could fall through. 3RP 232-33. This second search of the right front cargo pocket revealed a loose crystal A. Kravchun believed looked like methamphetamine. 3RP 232-34. Officers also found Law in possession of six $5 bills. 3RP 189.

Officer testimony consistently supported that in their expert view, the items in Law's backpack indicated drug use but were inconclusive regarding dealing. Both the scales and the empty baggies with designs could be found on either a dealer or a user. 3RP 223-25, 245, 250. One officer testified he never used anything less than $20 in controlled drug purchase operations, but it was possible to purchase methamphetamine for less than $20. 3RP 201. This too could indicate dealing or personal use.

Dr. David Northrop testified the substance in the baggie tested positive for methamphetamine and weighed 5.9 grams. 3RP 288, 297. The loose crystal had not been sent to the lab and was never tested. 3RP 297, 300. The prosecutor showed Dr. Northrop a photograph of the untested loose crystal and asked whether, in his opinion it resembled methamphetamine. 3RP 288. Defense objected and outside the jury's presence Dr. Northrop stated he had "seen thousands of things that are methamphetamine that look like this" but it would not be "responsible" to offer an opinion beyond "can crystalline methamphetamine look like this? Sure." 3RP 291.

Law did not testify and presented no evidence. 3RP 337.

At the close of the State's case, the trial court read the following limiting instruction to the jury:

> The State introduced evidence of an untested substance, to wit: a crystal, found in Mr. Law's right cargo shorts pocket. This evidence is not sufficient on its own to support a finding that Mr. Law possessed a controlled substances.

3RP 336.

With respect to Law's destroyed cell phone, the jury was instructed it was permitted, but not required, to infer "that the lost evidence is against the State's interest." CP 78 (Instruction 7). An instruction on the lesser charge of simple possession was also supplied. CP 81 (Instruction 10).

The following were the only instructions to discuss unanimity. Instruction 2 provides, in relevant part, "As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict." CP 73 (emphasis added). Instruction 16 provides, in relevant part, "If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form A the words 'not guilty' or the word 'guilty,' according to the decision you reach." CP 87-88 (emphasis added). This sentence is repeated in the instruction's discussion of both Verdict Form A and Verdict Form B, for the charge and lesser crime respectively. The instruction also provides, "Because this is a criminal case, each of you must agree for you to return a verdict." CP 88 (emphasis added).

The State made no election in closing and instead relied on both the tested baggie and the untested loose crystal. Regarding possession, the prosecutor mentioned the baggie and stated there was no question it was meth. 3RP 339. To prove intent to distribute, the prosecutor discussed both the untested crystal and the tested baggie and appeared to rely on the crystal. 3RP 339-40. Officers said the crystal was found in the same pocket Law had been reaching into, that Law had been seen giving things from this pocket to others, and sprinkling it as if to get something off his fingers. 3RP 339-40. The prosecutor then invited the jury to compare the tested baggie and the untested crystal, stating, "You've heard testimony from officers with experience with drug transactions that this [crystal] is consistent with methamphetamine. And not only are you going to be able to take the drugs [in the baggie] back with you, you'll be able to compare it. We've also taken a photo, State's Exhibit No. 9, of the appearance of the shards inside the bag." 3RP 340.

The prosecutor conceded officers had testified the baggies and digital scale were consistent with either dealing or personal use, but encouraged the jury to find these items were evidence of Law's intent to distribute. 3RP 341.

> The prosecutor then summarized his intent argument as follows:
>
> Mr. Law shows up in a '96 Ford Mustang. Immediately goes over to the park. … Within a matter of minutes, multiple people had

> come up to Mr. Law and received something from him and left, again and again. And then mere minutes later he's found with meth and this. And they look in the pocket where he kept reaching into [and] they find this, which is consistent with methamphetamine. Checkers. It's not chess.

3RP 341-42.

Defense objected to Exhibit 10, "the photo that he's been waiving around," and to the State's argument asking the jury to compare Exhibit 10, the photograph of the untested loose crystal, with the tested baggie, and conclude the untested crystal was methamphetamine. 3RP 343. Defense asked the Court to re-read the limiting instruction regarding the loose crystal. 3RP 343.

The State objected, claiming it would be a comment on the evidence. 3RP 344. The prosecutor also said he understood the trial court's ruling allowed the jury to infer the loose crystal was meth, given officer testimony that it was consistent with meth. 3RP 344.

The prosecutor then reasoned, "the court said very specifically that I could not - - or the instruction says that you could not find him guilty of possession of the controlled substance based on the shard that was found in his cargo pocket. I have not made any argument that they could based on that alone. So I don't know how rereading them anything would clarify anything that's occurred right now." 3RP 344.

The defense objected to the State's invitation to compare the photos and convict Law based on the loose crystal. 3RP 344-45. The trial court became concerned, noting the charge was based on possession with intent to deliver the tested substance in the baggie, but the State instead was arguing that Law actually "delivered methamphetamine," and the jury "should find him guilty of possession [with] intent based only on that shard." 3RP 345.

The prosecutor replied, "I don't believe I made that argument and I hope that's not what's been borne out - - [.]" The Court noted, in reference to the baggie, "we may not have gotten to the part where you talk about possession with intent [of] that which has already been tested," and concluded it was inclined to reread the limiting instruction. 3RP 345. The court then cautioned the prosecutor, "counsel needs to be careful about how it's couched as far as him being guilty based solely on sprinkling some unknown substance - - well, suspected, but not confirmed substance. I think there could be an inference certainly that that's what's happening, but he's not charged with delivery, nor do I think he could be realistically. Okay?" 3RP 345-46.

The prosecutor then argued the jury could find intent based on Law's actions in the park, the actions of others with whom he interacted, and the objects seized. 3RP 346-47. In discussing the instruction defining delivery,

the prosecutor stated, "Where do you think this meth was going to go? Two minutes earlier what was he seen doing by an officer?" 3RP 347. The prosecutor concluded stating, "You already know what he was doing in the park. You already know what he had on him. You already know the people he was with weren't interested in staying there," and asked the jury to find Law guilty of possession of meth with intent to deliver. 3RP 348.

After the State's closing argument, the court re-read the limiting instruction to the jury. 3RP 348.

Defense counsel argued the baggie was not intended for sale and the crystal from Law's other pocket was not a controlled substance. 3RP 350-51. Counsel emphasized the case was about whether Law had intended to sell the baggie and there was no evidence of such intent. 3RP 351.

Regarding the loose crystal, counsel repeatedly asserted it had not been tested, and so the jury should not conclude it was an illegal substance. 3RP 350, 351, 354. Regarding the baggie, counsel argued it was for personal use, not to distribute, and emphasized the observing officer saw Law reach into his right cargo pocket, but never saw him access his left pocket where the baggie was located. 3RP 352-55.

Moreover, officers testified the meetings in the park occurred in quick succession, but the baggie was less accessible as it was tied off at the top. 3RP 354-55. Although the State had accused Law of selling

methamphetamine, no alleged buyer had been arrested in possession of methamphetamine despite the presence of multiple officers. 3RP 348-49. Counsel also argued officers had testified the presence of scales and baggies was consistent with both users and dealers. 3RP 359. Although the State asked the jury to infer Law was a dealer because the baggies were unused, such an argument was irrelevant and inconsistent with the State's own allegations in this case – that Law had been distributing drugs by sprinkling into peoples' hands, not by using baggies. 3RP 359-60. Finally, counsel noted the observing officer believed Law was under the influence of drugs. 3RP 360. For all these reasons, counsel asked the jury to find Law merely possessed the baggie for his own use and was not a dealer.

With respect to the cell phone search, the defense asked for the permissive inference, arguing officers had wanted to see if Law had been arranging drug deals in the park with his phone, and had destroyed the phone in the process, thereby destroying any evidence that would prove he had <u>not</u> been using his phone to arrange drug deals. 3RP 356-57.

The jury submitted a question: "We would like clarification if intent to deliver could include a later date & time or if it is limited to the incident reported by the officers." CP 89. The Court responded, "Please refer to the instructions provided." CP 89. The jury found Law guilty of possession of methamphetamine with intent to manufacture or deliver as charged. CP 68.

Law timely appealed. CP 26. In his opening brief, Law raised three issues including (1) his right to a unanimous jury verdict had been violated, or alternatively, that his right to effective assistance had been violated where his trial attorney had failed to request a Petrich instruction, (2) government misconduct in destroying the evidence in his phone warranted dismissal rather than retrial, and (3) the trial court erred by imposing interest on his non-restitution legal financial obligations (LFOs).

On appeal, the argument centered on whether Law's possession of the baggie in his left front pocket and possession of the loose crystal in his right cargo pocket represented a continuous course of conduct.

The State argued the evidence was sufficient to sustain the conviction where the baggie and loose crystal were "a single act: the possession of the same controlled substance (or suspected controlled substance) at the same time and place." Br. Resp. at 19. The State argued King, 75 Wn. App. 899, was inapplicable, because possession of drugs in a container in King's car (where Kraus was at the time of his arrest) and possession of a drugs in a fanny pack on Kraus's person discovered at the station later "has no application to" Law's circumstances. Br. Resp. at 20-21. The State also argued counsel had not been ineffective because the instructions were sufficient and a Petrich instruction would have been confusing. Br. Resp. at 24, 26.

Law argued Handran and Petrich illustrate a critical factor in the separate and distinct act analysis is whether the different acts were amenable to different defenses at trial. Op. Br. at 28. For example, in Petrich, there was a reasoned distinction between the two classes of acts; the testimony regarding some was highly detailed, but regarding others was confused. 101 Wn.2d at 573. In Handran, the defendant was charged with kissing and striking his wife after entering her bedroom through a window. Handran, 113 Wn.2d at 12. There, the kiss and the strike were not amenable to different defenses – there was no reasoned distinction between acts, and thus no plausible reason why a juror would believe his ex-wife lied about one but not the other. C.f. Handran, 113 Wn.2d at 17.

Law also argued in King, the court of appeals also noted the charged acts of drug possession were distinct, despite being simultaneous in time and very close in physical proximity, because a reasonable juror could find Kraus's testimony credible that officers planted the drugs in his fanny pack, and a reasonable juror could also conclude the drugs in the Tylenol bottle belonged to the driver, not Kraus. King, 75 Wn. App. at 903-04. Thus, the court could not conclude the jurors had necessarily agreed on the basis for conviction and reversal was required. Id. By contrast, State v. Fiallo-Lopez, 78 Wn. App. 717, 723, 899 P.2d 1294 (Div. I.1995), addressed one count of cocaine delivery from an undercover buy operation. There, the

charges were the result of one continuous drug purchase, organized in two phases, a sample and final delivery. Id. at 720. During trial, the defense did not present separate defenses with respect to the sample and the quantity for final delivery, so there was no risk two jurors had each believed and disbelieved different defenses, and the conviction was upheld. Id. at 726.

Law also argued that similarly, in State v. Love, the defendant was convicted of one count of possession with intent to deliver, on the basis of drugs in a lip-balm contained in his car and a much larger quantity of drugs in his home several blocks away. 80 Wn. App. 357, 908 P.2d 395 (1996). The court of appeals noted although the locations were physically separated, the defense theory was the same for both sets of drugs: that officers had planted both sets of drugs. Id. at 359, 363. Thus there was no basis for a reasonable juror to believe one defense but not another – it was a holistic defense to both sets of drugs – and the conviction was sustained. Id. at 363.

The court of appeals analyzed Law's Petrich issue in terms of a sufficiency challenge, and viewed the evidence in the light most favorable to the State. C.F. Law, 2020 WL 1640231 at *6 ("A jury could infer" that the items possessed in each pocket were for the same criminal purpose of drug sales, as argued by the State, "[v]iewing the evidence in a commonsense manner … ."). The court reasoned the evidence permitted a rational juror to accept the State's theory that both acts of possession were

for the same criminal purpose, and that coupled with the close proximity of each item, this was sufficient to sustain the conviction. Id. The court of appeals made no meaningful attempt to analyze the issue from the perspective of the different defenses raised for each act, as required by jurisprudence from this Court and the court of appeals.

The court also found the trial court had not erred by declaring a mistrial rather than ordering dismissal, and remanded to strike the non-restitution interest on LFOs. Id. at *8.

## D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

### THIS COURT'S REVIEW IS WARRANTED TO CLARIFY THE LEGAL STANDARD FOR SEPARATEAND DISTINCT ACTS UNDER PETRICH AND ITS PROGENY.

#### 1. The court of appeals' decision conflicts with published Supreme Court and Court of Appeals decisions under RAP 13.4(b)(1) and (2).

Review is warranted because the court of appeals' decision conflicts with the legal standard set forth by this Court in Petrich, 101 Wn.2d 566, and its progeny, including Handran, 113 Wn.2d 11. The decision also conflicts with the court of appeals' application of that standard in the context of drug possession charges in King, 75 Wn. App. 899.

The Washington Constitution guarantees the right to a unanimous verdict by a twelve-person jury. WASH. CONST., ART. I, § 22; Kitchen, 110 Wn.2d at 409; State v. Crane, 116 Wn.2d 315, 324-25, 804 P.2d 10

(1991). When the State presents evidence of more than one act that could form the basis of the single charge, the State must elect a specific act or the trial court must instruct the jury to be unanimous as to a specific act. Petrich, 101 Wn.2d at 570; State v. Workman, 66 Wash. 292, 294-95, 119 P.751 (1911); State v. Osborne, 39 Wash. 548, 552, 81 P. 1096 (1905); Crane, 116 Wn.2d at 324-25.

Where there is evidence of multiple acts but no election or unanimity instruction, "the error will be deemed harmless only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt." Crane, 116 Wn.2d 324-25 (citing Kitchen, 110 Wn.2d at 405-06 (modifying the Petrich harmless error standard). Petrich errors are of constitutional magnitude and may be raised for the first time on appeal. Crane, 116 Wn.3d at 325 (citing Kitchen, 110 Wn.2d at 411)).

As noted above, here the court of appeals essentially imported the standard for a sufficiency claim and applied it to the separate and distinct acts analysis in the context of constitutional unanimity. C.F. Law, 2020 WL 1640231 at *6 ("A jury could infer" that the items possessed in each pocket were for the same criminal purpose of drug sales, as argued by the State). Although the court of appeals stated it was "[v]iewing the evidence in a commonsense manner," it proceeded to analyze the issue only from the

vantage point of the State, and omitted any meaningful analysis of the defenses presented at trial. See id. at *5-*6.

Relevant jurisprudence shows the correct standard for evaluating a Petrich claim is not the same standard as that used for a sufficiency claim. Where a defendant claims the evidence is insufficient to support the verdict, the appellate court reviews the evidence and all reasonable inferences in the light most favorable to the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980); State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)).

The separate and distinct acts analysis requires appellate courts to consider the defenses presented at trial, and specifically, whether more than one underlying act could have formed the basis for a conviction, and whether the defense presented different defenses to those charged acts during trial. See Op. Br. 28-29 (citing Petrich, 101 Wn.2d at 573; Handran, 113 Wn.2d at 17), 29-33 (citing King, 75 Wn. App. 899; Fiallo-Lopez, 78 Wn. App. 717; Love, 80 Wn. App. 357).

The reason for this focus on the defenses raised is to protect the unanimity of the verdict. Here, the State presented evidence of the loose untested crystal and the baggie of meth, either of which, or both of which, could have formed the basis for the conviction. Law agrees the evidence is sufficient, and the court of appeals is correct that a reasonable juror could

have viewed the evidence as consistent with the State's theory that both items were possessed with a common goal of drug delivery in mind. It is obvious the two acts could be viewed as a continuing course of conduct. And as such, a sufficiency claim should properly fail. This misses the point.

The problem occurs because the defense raised separate and distinct defenses. At trial, Law argued to the jury that the baggie of meth was for his own personal use, and they should not convict him of intent to deliver on that basis. Law argued, separately, that the loose crystal had not been tested, could have been something innocuous, and should not be relied upon to convict of any drug possession. Just as in Petrich, here there was a risk the conviction was secured when "'some of the jurors might believe that one of the offenses was so proved and the other jurors wholly disbelieve it but be just as firmly convinced that the other offense was so proved.'" Petrich, 101 Wn.2d at 570 (quoting Workman, 66 Wn. At 294-95). In such a case, there could be no unanimity in the verdict.

Here, the court of appeals appears to dismiss the defense viewpoint and adopts that of the prosecution based either on a sufficiency standard or conversely, some sort of reasonableness standard. C.F. Law, 2020 WL 1640231 at *5-*6 (applying a "common sense" view of the evidence). This is error. King illustrates that it is not the role of the appellate courts to evaluate whether the defenses presented are "common sense" or reasonable,

or even plausible, but to determine whether no rational juror could have viewed the evidence in that manner. King, 75 Wn. App. at 903-04. There, the appellate court could very well have concluded that a "common sense" view of the evidence did not support finding officers planted the drugs in Kraus' fanny pack. But a rational juror could have disagreed. Thus reversal was required. Id. at 904. Here too, the court of appeals may scoff at the defenses raised, but those issues are properly for the jury to determine. And the jurors must agree. Unanimously.

This Court should accept review to set forth the proper standard of review for separate and distinct acts under a Petrich analysis, to preserve the requirement of unanimity, ensure the jury retains its proper role of fact-finder, and avoid the improper application of a sufficiency analysis.

2. This case presents a significant question of federal and State constitutional law under RAP 13.4(b)(3).

This case addresses the correct legal standards to be applied in the context of the right to a unanimous jury verdict. As such, it presents a significant question of law under Washington's Constitution, article I, section 22. Alternatively, this Court should accept review of the ineffective assistance claim where Law's attorney failed to request a Petrich instruction, implicating article 1, section 22 of the Washington Constitution and the Sixth Amendment to the U.S. Constitution.

3. This case presents an issue of substantial public interest under RAP 13.4(b)(4).

This case creates a compelling issue of substantial public interest because left unchecked, the court of appeals' flawed reasoning will erode important constitutional protections for all individuals in Washington accused of crimes, and particularly in the context of drug possession charges which are numerous in our State.

E. CONCLUSION

For the aforementioned reasons, Law respectfully asks this Court to grant review under RAP 13.4(b)(1), (2), (3), and (4).

DATED this 6th day of May, 2020.

Respectfully submitted,

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# APPENDIX

2020 WL 1640231
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

UNPUBLISHED OPINION
Court of Appeals of Washington, Division 1.

STATE OF WASHINGTON, Respondent,
v.
DARREN GENE LAW, Appellant.

No. 78677-6-I
|
FILED: March 23, 2020

**Opinion**

APPELWICK, C.J.

***1** Law appeals his conviction for possession of methamphetamine with intent to manufacture or deliver. He argues that the trial court violated his right to a unanimous jury verdict, because it failed to instruct the jury that it had to unanimously agree on which of two acts supported the conviction. He contends that the trial court erred in denying his motion to dismiss the charge based on governmental misconduct. And, he asserts that the provision in his judgment and sentence imposing interest on nonrestitution LFOs must be struck. We affirm Law's conviction, but remand to the trial court to strike the provision requiring interest accrual on nonrestitution LFOs.

FACTS

On August 15, 2017, Everett police engaged in an "open-air drug market interdiction." As a part of this effort, Officer Oleg Kravchun conducted surveillance at Clark Park. He saw Darren Law arrive at the park and approach an individual lying in a grassy area. As Law approached, the individual got up. Law then reached into his right cargo shorts pocket, retrieved a powdery substance, and sprinkled the substance into the individual's hand. The substance appeared white or clear. At that point, the two bumped fists, and the individual immediately left the park.

After that exchange, a second individual entered the park and approached Law. Law gave the individual something small from the same right cargo shorts pocket, and the individual ran out of the park. A third individual then entered the park. When he made contact with Law, Law reached into the same right pocket and sprinkled a substance into the individual's hand. The third individual quickly left the park as well. Law then gave two more individuals something small from the same right pocket. During the last exchange, Law was given a green, folded up paper that Kravchun believed to be currency. Law then left the park.

Police arrested Law nearby. In a search incident to arrest, they found a loose crystal substance that appeared to be methamphetamine in his right cargo shorts pocket. They also found a sandwich bag containing a substance that appeared to be methamphetamine in his left front pocket. The sandwich bag was tied off at the end. The substance in the sandwich bag in Law's left pocket later tested positive for methamphetamine. The loose crystal in his right pocket was never tested.

Police also searched a backpack Law was carrying. Inside, they found a digital scale and about half a dozen small, ziplock style "baggies." The baggies were empty, and consistent with the type that police often find in the drug trade. Last, police found that Law had a cell phone on him. A case report describing the arrest indicated that they intended to obtain a search warrant for the phone.

On August 18, 2017, the State charged Law with possession of a controlled substance with intent to manufacture or deliver. On August 22, an attorney filed a notice of appearance on Law's behalf. Defense counsel received a copy of the case report mentioning the intent to obtain the search warrant.

***2** On October 3, 2017, Kravchun filed an affidavit for a search warrant for Law's cell phone. The affidavit described different methods that could be used to conduct the search:

> JTAG [ (Joint Test Action Group) ], ISP [In-System Programming) ] and "chip off' are separate processes that may be performed on damaged devices, security protected devices (prohibiting access to the device), devices that do not have debugging mode enabled, and/or devices not fully supported by non-destructive forensic tools or software and/or when a logical

  

> extraction is not sufficient.
>
> JTAG and ISP are non-destructive processes in which the device's memory is accessed via points located on the mainboard. The memory is then extracted using a supported memory box, reader or adaptor.
>
> A "chip off" examination is a destructive process in which the physical memory is removed from the mainboard of the device, cleaned, and the binary memory is extracted using a supported memory box, reader, or adaptor.
>
> The "chip off" process involves the use of heat to physically remove the chip from the seated area on the board and permanently renders the device inoperable. Mobile electronic devices are extremely complex so there is always a risk that the memory chip may be permanently damaged and rendered unreadable during a chip off examination.
>
> JTAG and ISP are usually attempted prior to performing a "chip off' extraction; however not all devices are supported.

A judge issued a warrant the same day, authorizing the JTAG, ISP, and chip off methods. Neither the prosecutor nor defense counsel received notice of the application motion nor issuance of the warrant at the time.

Detective Steve Paxton proceeded to conduct a search of Law's cell phone. The JTAG and ISP search methods were not successful. Therefore, he used the chip off method. The chip off was successful. But, Paxton was unable to read the memory chip or extract any data stored within the chip, effectively ending his examination. The procedure rendered Law's phone inoperable. Paxton and Kravchun both completed case reports concerning the search. Kravchun uploaded his report to the Everett Police Department's computer system. He thought that a detective would send the report to the prosecutor's office. However, this never occurred.

Before trial, defense counsel interviewed Kravchun. Defense counsel did not ask Kravchun any questions about whether he had obtained a search warrant for Law's cell phone, and Kravchun did not raise the subject. By uploading his report about the search, Kravchun believed that the prosecutor, who was at the interview, already had this information. Neither the prosecutor nor defense counsel received information about the search before trial.

Trial began on February 5, 2018. That day, defense counsel cross-examined Kravchun about his intention to obtain a search warrant for Law's cell phone:

> Q. One of the items that you entered into evidence in this case is a phone, a cellular phone; right?
>
> A. Yes.
>
> Q. And you attributed ownership of that phone to Mr. Law; right?
>
> A. Yes.
>
> Q. And you said that it was your plan to seek a search warrant for the contents of that phone; correct?
>
> A. Correct.
>
> Q. And the reason you wanted to seek a search warrant for the contents of that phone is that you wanted to see if people were asking Mr. Law for drugs; right?
>
> ***3** A. Correct.
>
> Q. To see if there were any text messages in that phone requesting drugs; right?
>
> A. Yes.
>
> Q. Okay. No search warrant was ever granted in this case; right?
>
> A. It was.

Defense counsel then asked to be heard outside the presence of the jury. He and the prosecutor both told the trial court that they knew nothing about the search of Law's cell phone. The court took a recess so that the prosecutor could speak with Kravchun. During the recess, the prosecutor learned that Kravchun had completed a follow up report that he did not receive. The prosecutor explained this to the court, and defense counsel received a copy of the search warrant within a few minutes. He also received copies of Paxton's and Kravchun's reports about the search. Law then moved for a mistrial. The court granted his request, and set the case for retrial on April 27, 2018.

On April 24, 2018, Law moved to dismiss the case. He relied in part on CrR 8.3(b), which allows the trial court dismiss a criminal prosecution due to arbitrary action or governmental misconduct. The court denied Law's motion. At the hearing on the motion, it explained,

> I don't think I can find that the failure to disclose rises to the level of government misconduct. I certainly can't find that there was anything intentional about it. So there would have to be such gross mismanagement that that establishes misconduct. And I don't think I have

> found that on the record I have. I'm going to admit there are some gaps I think in exactly what happened, but I don't think I can fill them in by assuming something improper happened without more.
>
> So then, you know, the question has to be more a question of the issue, more a question of whether or not the destruction of the ability to ever access what was on the phone rises to some level that the defendant is entitled to have this case dismissed.
>
> Again, I don't think that the case law supports finding that simply because -- again, it's not as if I can find they intentionally destroyed the phone. I don't think that was their intent. I think the record makes it pretty clear they hoped to get inculpatory evidence. And I think you're right, what you're saying is the more appropriate way to handle it, that you can cross-examine about it, you may be entitled to some instruction about it.

The new trial began on May 22, 2018. Kravchun and Paxton both testified. During Kravchun's direct examination, he testified that he had obtained a search warrant for Law's cell phone, but that Paxton was not "able to get much information, anything that [he] could use, off of the phone." Defense counsel cross-examined Kravchun regarding his failure to inform the prosecutor that he was seeking a search warrant for the phone, and that he had received authorization to search the phone. Paxton testified that, despite the successful chip off procedure, he was unable to get any data from the phone's chip.

After the State rested, the trial court read the following instruction to the jury: "The State introduced evidence of an untested substance, to wit: a crystal, found in Mr. Law's right cargo shorts pocket. This evidence is not sufficient on its own to support a finding that Mr. Law possessed a controlled substance." The court also instructed the jury, "[I]f you find that the State has allowed to be destroyed or lost any evidence whose content or quality are an issue, you may, but are not required to, infer that the lost evidence is against the State's interest."

***4** The jury found Law guilty as charged. The trial court sentenced him to 85 months of confinement and 12 months of community custody. It also imposed a $500 victim assessment. Law's judgment and sentence provided that the legal financial obligations (LFOs) imposed "shall bear interest from the date of the judgment until payment in full."

Law appeals.

## DISCUSSION

Law makes three main arguments. First, he argues that the trial court violated his right to a unanimous jury verdict, because it failed to instruct the jury that it had to unanimously agree on which act supported conviction. Second, he argues that the trial court erred in denying his motion to dismiss the charge based on governmental misconduct. Third, he argues that the provision in his judgment and sentence imposing interest on nonrestitution LFOs must be struck.

### I. Unanimity Instruction

Law argues first that the trial court violated his right to a unanimous jury verdict. He contends that the evidence described two distinct acts, the prosecutor relied on both acts, and the instructions did not require the jury to unanimously agree on which act supported conviction.[1]

"Where the State presents evidence of several distinct acts, any one of which could be the basis of a criminal charge, the trial court must ensure that the jury reaches a unanimous verdict on one particular incident." State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). But, this rule applies only where the State presents evidence of several distinct acts. Id. "[T]he State need not make an election and the trial court need not give a unanimity instruction if the evidence shows the defendant was engaged in a 'continuing course of conduct.' " State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995) (quoting Handran, 113 Wn.2d at 17).

To determine whether criminal conduct constitutes one continuing act, we evaluate the evidence in a commonsense manner. Handran, 113 Wn.2d at 17. "[E]vidence that the charged conduct occurred at different times and places tends to show that several distinct acts occurred." Fiallo-Lopez, 78 Wn. App. at 724. On the other hand, evidence that a defendant engaged in a series of actions intended to secure the same objective supports a continuing course of conduct. Id.

Law relies on State v. King, 75 Wn. App. 899, 878 P.2d 466 (1994). There, police stopped a car in which King was a passenger. King, 75 Wn. App. at 901. As King

stepped out of the car, one of the officers saw him toss something away. Id. The officer also saw that his fanny pack was open, despite having been closed just moments before. Id. As the driver stepped out of the car, another officer saw him make a throwing motion in the direction of the car's interior. Id. One of the officers then searched between the driver and passenger seats, and found a Tylenol container with rock cocaine inside. Id. They arrested King as a result.[2] Id. Upon arrival at the police station, an officer found another piece of rock cocaine in King's fanny pack. Id. The State charged King with only one count of possession of cocaine. Id. At trial, King requested a written unanimity instruction. Id. at 903. The trial court denied his request due to "the State's avowed intention to make an election in argument." Id. However, the State offered both the Tylenol bottle and the fanny pack as a basis for conviction. Id. A jury found King guilty as charged. Id. at 902.

***5** On appeal, this court found that the State's evidence did not tend to show a continuing course of conduct. Id. at 903. It explained, "The State's evidence tended to show two distinct instances of cocaine possession occurring at different times, in different places, and involving two different containers-the Tylenol bottle and the fanny pack. One alleged possession was constructive; the other, actual." Id. Because the State did not elect to rely on either the Tylenol bottle or the fanny pack as a basis for conviction, this court could not "say that the jury acted with unanimity as to one act of possession." Id. Thus, it held that the trial court's failure to issue a unanimity instruction amounted to constitutional error. Id.

Law also attempts to distinguish this case from Fiallo-Lopez and State v. Love, 80 Wn. App. 357, 908 P.2d 395 (1996). In Fiallo-Lopez, Lima delivered a sample of cocaine to a police informant at a restaurant. 78 Wn. App. at 720. The two then met at a Safeway parking lot, where Lima delivered a bag of cocaine. Id. at 722. Lima later agreed to work with police and told them that Fiallo-Lopez supplied the cocaine for these transactions. Id. at 721, 723. The State charged Fiallo-Lopez with one count of delivery of cocaine, and one count of possession of cocaine. Id. at 723. A jury found him guilty as charged. Id. On appeal, Fiallo-Lopez argued that he was entitled to a unanimity instruction as to the delivery charge. Id. This court disagreed, holding that "the testimony and other evidence show that the drug transaction was a continuing course of conduct." Id. at 725. It noted that "the fact that the two deliveries here occurred at different times and places is outweighed by the commonsense consideration that they were both intended for the same ultimate purpose, delivery of cocaine by Fiallo-Lopez to [the informant]." Id. at 726.

In Love, police were conducting surveillance of Love's residence in preparation to execute a search warrant, when Love exited the residence. 80 Wn. App. at 358. Police stopped him a few blocks away, and arrested him after finding 5 rocks of cocaine inside a container in his pocket. Id. at 359. In a subsequent search of Love's residence, police found 40 additional rocks of cocaine and drug paraphernalia. Id. The State charged Love with one count of possession of a controlled substance with intent to deliver. Id. at 362. A jury found him guilty as charged. Id. at 360.

On appeal, Love argued that the trial court erred in failing to give the jury a unanimity instruction. Id. This court disagreed, distinguishing the case from King, Id. at 362-63. It explained,

> Love's possession of five rocks of cocaine on his person and the forty rocks in his residence, when considered in conjunction with the other evidence of an ongoing drug trafficking operation found at Love's residence, reflect his single objective to make money by trafficking cocaine; thus, both instances of possession constituted a continuous course of conduct.

Id. at 362. This court further explained that, in King, a rational juror could have believed that the cocaine found in the car belonged to the driver, and that the cocaine found in the fanny pack belonged to King. Id. at 363. In contrast, an equally rational juror could have believed that King constructively possessed the cocaine found in the car, and that, as King claimed, the police planted the cocaine in his fanny pack. Id. Love had also argued that the police planted the cocaine found in his pocket and at his residence. Id. But, as this court noted, the jury was left "with no rational basis to distinguish the cocaine found on Love from that at his home." Id.

This case is more like Fiallo-Lopez and Love. While at the park, Law sprinkled a substance from his right pocket into multiple individuals' hands. He also gave multiple individuals something small from the same pocket. At one point, Law was given a folded up paper that appeared to be currency. After he left the park, police arrested him nearby. They found a loose crystal substance in his right pocket that appeared to be methamphetamine. They found

a tied off sandwich bag in his left pocket with methamphetamine inside. They also found a digital scale and half a dozen small, ziplock style baggies in his backpack.

***6** This evidence indicates that Law engaged in a series of actions intended to achieve a single objective: make money by selling methamphetamine. Despite their placement in different pockets, Law possessed the methamphetamine and untested crystal at the same time and place. A jury could infer that Law would eventually use the methamphetamine in his left pocket to refill the drugs he was handing out from his right pocket. Viewing the evidence in a commonsense manner, the methamphetamine found in Law's left pocket and the crystal found in his right pocket were part of a continuing course of conduct. As a result, a unanimity instruction was not required.[3]

II. Motion to Dismiss for Governmental Misconduct

Law argues second that the trial court erred in denying his CrR 8.3(b) motion to dismiss the charge. He asserts that the State failed to notify him that (1) it had sought and obtained a warrant to search his cell phone, and (2) it was "preparing to engage in an invasive procedure that would render the phone and data inaccessible." He contends that this failure constituted governmental mismanagement warranting dismissal.

Two things must be shown before a trial court can dismiss a charge under CrR 8.3(b). State v. Puapuaga, 164 Wn.2d 515, 520, 192 P.3d 360 (2008). First, "a defendant must show arbitrary action or governmental misconduct." Id. Second, "a defendant must show prejudice affecting the defendant's right to a fair trial." Id. Washington courts have maintained that dismissal is an "extraordinary remedy to which the court should resort only in 'truly egregious cases of mismanagement or misconduct.' " State v. Wilson, 149 Wn.2d 1, 9, 65 P.3d 657 (2003) (quoting State v. Duggins, 68 Wn. App. 396, 401, 844 P.2d 441, aff'd, 121 Wn.2d 524, 852, P.2d 294 (1993)). We review a trial court's decision on a motion to dismiss charges for manifest abuse of discretion. Puapuaga, 164 Wn.2d at 520-21.

Law relies primarily on State v. Brooks, 149 Wn. App. 373, 203 P.3d 397 (2009), to support that the State's failure to notify constituted governmental misconduct. In Brooks, the State failed to provide discovery required under CrR 4.7 before the defendants', Natalie's and Jason's, omnibus hearings. 149 Wn. App. at 383, 386. Specifically, the State did not provide any discovery, including the names and addresses of its witnesses or any witness statements, before the first scheduled hearing date. Id. at 386. Further,

> The State failed to timely provide Jason's statement. The State failed to follow the local practice of making essentially all of the police file available to the defense by the omnibus date .... The State mismanaged the first CrR 3.5 hearings by failing to issue subpoenas for its witnesses. The State continued to provide stacks of discovery on the mornings of the rescheduled hearings, thus forcing the trial court to continue the hearings multiple times. The trial court continued Natalie's trial twice and Jason's trial once to allow the State to complete its discovery obligations, which it still did not do.

***7** Id.

The trial court found that "the lag time between the date of the incident and the date the officers transcribed the report and witness statements was beyond the prosecutor's control." Id. In some cases, this lag time was about a month and a half. Id. at 382. But, the court indicated that "there was no evidence that the prosecutor's office attempted to work with the sheriff's office to resolve the lag time." Id. at 386. Also, the State took nine more days from the time it received several officer statements before providing those statements to defense counsel. Id. The trial court found governmental misconduct and prejudice under CrR 8.3(b), and granted the defendants' motions to dismiss with prejudice. Id. at 383. On appeal, this court held that, "[e]ven without considering the time that the sheriff's office controlled the requested documents, the trial court did not abuse its discretion by finding governmental misconduct." Id. at 387.

There is no dispute that the State failed to notify Law that police had obtained a search warrant for his phone until the first trial, and that the chip off procedure rendered the phone inoperable. The record does not explain why the prosecutor did not follow up regarding the status of a

  

search warrant, despite Kravchun's statement that police intended to seek one. But, the trial court's ruling emphasized that nothing in the record showed that any mismanagement by the State was intentional. Yet, CrR 8.3(b) does not require that governmental misconduct be intentional.

The State's failure to notify Law about the search warrant does not appear as egregious as failing to provide any required discovery before a court proceeding. At the defense interview before trial, defense counsel did not ask about Kravchun's statement in his report that police intended to seek a search warrant for Law's phone. And, under CrR 4.7(a)(4), the State's discovery obligations are limited to "material and information within the knowledge, possession or control of members of the prosecuting attorney's staff." The record indicates the existence of the search warrant was unknown to the prosecutor and his staff until the first trial. They could not produce what they did not have.

But, even if the State's actions had constituted governmental misconduct, Law has failed to show prejudice as a result of this misconduct. Once Law learned of the search warrant, the trial court granted him a mistrial. At the new trial, Kravchun testified that he had obtained a search warrant for Law's cell phone, but that Paxton was not "able to get much information, anything that [he] could use, off of the phone." Defense counsel cross-examined Kravchun about the lack of communication between police and the prosecutor. Paxton testified that, despite the successful chip off procedure, he was unable to get any data from the phone's chip. Thus, the jury was able to consider this evidence, including the State's failure to get any information off of Law's phone.

Law argues that the chip off procedure destroyed material evidence, thereby prejudicing his right to a fair trial. He points out that his phone could have contained exculpatory evidence, and that, even if the phone contained "nothing" relating to the charge, "that too would be exculpatory evidence."[4] But, the misconduct at issue has to do with the State's failure to notify Law of the warrant and resulting search of his phone—not Paxton's use of the chip off procedure. A judge issued a warrant authorizing use of the procedure. Even if Law knew of the warrant before Paxton conducted the search, he cites no rule that would have prevented police from using the procedure to search Law's phone.

***8** And, the State's case against Law originated from police surveilling "open-air drug market" transactions. The State did not claim that Law engaged in any prearranged transactions. Law has not identified information that the phone may have provided that was material to a defense to the charges. Accordingly, the absence of information about prearranged transactions on Law's phone would not materially affect the case against him.

Law also asserts that he "was prejudiced because he was forced to choose between having prepared counsel and proceeding with a speedy trial." CrR 3.3(h) provides, "No case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution." This court has previously held that "[t]he plain and unambiguous language of CrR 3.3 prohibits dismissal of a case under CrR 8.3(b) for violation of a defendant's time-for-trial rights under CrR 3.3 unless a defendant can show a violation of CrR 3.3, a statute, or the state or federal constitution." State v. Kone, 165 Wn. App. 420, 436, 266 P.3d 916 (2011). Further, "CrR 3.3(b) provides the exclusive means to challenge a violation of the time-to-trial rule." Id. at 437. Law has not asserted a specific violation of CrR 3.3. Nor has he asserted a violation of a statute or his constitutional rights. Therefore, he is precluded from raising his time-to-trial argument under CrR 8.3(b).

Because Law has failed to show prejudice as a result of governmental misconduct, the trial court did not abuse its discretion in denying his motion to dismiss.

III. Legal Financial Obligations

Law argues last that the trial court erred in imposing interest on nonrestitution LFOs. He cites RCW 10.82.090(1), which provides, "As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations." Law was sentenced on July 5, 2018. The State concedes that remand is appropriate to strike the provision in his judgment and sentence requiring interest accrual on nonrestitution LFOs. We accept the State's concession and remand for the trial court to strike the provision.

We affirm Law's conviction, but remand to the trial court to strike the provision requiring interest accrual on nonrestitution LFOs.

WE CONCUR:

**All Citations** Not Reported in Pac. Rptr., 2020 WL 1640231

Footnotes

1 Law failed to raise this alleged error below. A party may raise for the first time on appeal a manifest error affecting a constitutional right. RAP 2.5(a)(3). This court has previously held that, "[b]ecause ... the test for determining whether an alleged error is 'manifest' is closely related to the test for the substantive issue of whether a Petrich [unanimity] instruction was required, we conflate these two analyses." State v. Knutz, 161 Wn. App. 395, 407, 253 P.3d 437 (2011) (citing State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), overruled on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988)). Accordingly, we reach the issue under Knutz.

2 Police had already arrested the driver based on an outstanding warrant. King, 75 Wn. App. at 901.

3 In the alternative, Law argues that his trial counsel was ineffective for failing to alert the trial court to the need for a Petrich unanimity instruction. To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances, and that the deficient performance prejudiced the trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). If one of the two prongs of the test is absent, this court need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). Because a unanimity instruction was not required, defense counsel's failure to request one did not fall below an objective standard of reasonableness. Accordingly, Law's trial counsel was not ineffective.

4 Nothing in the record suggests that defense counsel attempted to obtain evidence from Law's phone that could have been exculpatory before the first trial.

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**NIELSEN KOCH P.L.L.C.**

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