

No. 36451-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

FILED
2015
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

MARK ALLEN CURTIS,
Appellant/Defendant.

PIERCE COUNTY SUPERIOR COURT

NO. 06-1-02177-2

THE HONORABLE BRIAN TOLLEFSON,
Presiding at the Trial Court.

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court committed reversible error when it excluded evidence of Mr. Curtis' character for sobriety where such evidence was pertinent to his defense of unwitting possession.

2. The trial court violated Mr. Curtis' constitutional rights when it excluded evidence supporting his trial defense.

3. Mr. Curtis was denied his constitutional rights where improper jury instructions denied him due process and a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where Mr. Curtis raised an unwitting possession defense to the charge of unlawful possession of a controlled substance, did the trial court abuse its discretion by precluding him from presenting evidence of his sobriety, including testimony that his sobriety was monitored by UAs and that his UAs were consistently clean?
(Assignment of Error Number One)

2. Was Mr. Curtis denied his right to present a defense when the trial court excluded evidence of his consistent sobriety where

his defense to the charge of unlawful possession of a controlled substance was unwitting possession? (Assignment of Error Number Two)

3. Where Mr. Curtis did not raise the affirmative defense of uncontrollable circumstances, and the evidence did not support such defense, was Mr. Curtis denied his federal and state constitutional rights to due process and a fair trial when the jury was incorrectly instructed on the defense, and where the State improperly argued that Mr. Curtis had an obligation to prove the defense? (Assignment of Error Number Three)

C. STATEMENT OF THE CASE

1. Procedural History

On May 15, 2006, the defendant/appellant, Mark Allen Curtis, was charged by Information in Count I with Unlawful Possession of a Controlled Substance, to wit: cocaine,¹ in Count II with Driving While Suspended or Revoked Status in the Third Degree,² and in

¹ RCW 69.50.4013(1)

² RCW 46.20.342(1)(c)

Count III of Buying a Vehicle With Removed or Altered Serial Numbers.³

On October 5, 2006, the Information was amended to add one count of Bail Jumping (Count IV),⁴ and one count of Unlawful Use of Drug Paraphernalia (Count V),⁵ CP 5-7. The Bail Jumping charge arose from Mr. Curtis' alleged failure to appear on May 30, 2006 after being charged with Unlawful Possession of a Controlled Substance. CP 5-7. The Amended Information also amended the type of controlled substance charged in Count I from cocaine to methamphetamine. CP 5-7.

On January 2, 2007, a Second Amended Information was filed in which Mr. Curtis was charged with an additional count of Bail Jumping as the result of again allegedly failing to appear on October 24, 2006. CP 9-13.

³ RCW 46.12.300

⁴ RCW 9A.76.170(1) and 9A.76.170(3)(c)

⁵ RCW 69.50.102 and 69.50.412(1)

On May 17, 2007, the State filed a Third Amended Information which dismissed the charge of Buying a Vehicle With Removed or Altered Serial Numbers (Count III). CP 14-16. RP I 5.

On May 17, 2007, a hearing pursuant to CrR 3.5 was held. RP I 7-25. The trial court held that Mr. Curtis' pre-custodial and post Miranda statements were admissible at trial. RP I 25-26. Findings of Fact and Conclusions of Law regarding Mr. Curtis' statements were entered on June 8, 2007. CP 92-96.

Mr. Curtis proceeded to trial by Jury on May 21, 2007. At trial, in support of its unwitting defense theory, the defense sought to introduce evidence concerning Mr. Curtis' character of sobriety during the time frame in which he was charged with Unlawful Possession of a Controlled Substance. Defense counsel attempted to elicit testimony of Mr. Curtis that he was participating in regular urinalysis tests (UAs) for his employment and that the UA results were negative for drugs. He also wanted to introduce the UA results. RP 3 246-247. The trial court ruled that only Mr. Curtis' sobriety at the time his trial testimony was taken was relevant and admissible. RP 3 247.

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The jury was instructed on unwitting possession for the charge of Unlawful Possession of a Controlled Substance (Court's Instructions to Jury: Number 11). CP 54-72. Over defense counsel's objection, the jury was also instructed on the affirmative defense of uncontrollable circumstances for the bail jumping charges (Court's Instructions to Jury: Numbers 17 and 18). CP 54-72; RP 4 276-286.

On May 24, 2007, the jury returned verdicts of guilt on all charges except Unlawful Use of Drug Paraphernalia. CP 83-87' RP 5 324-338.

On June 18, 2007, the trial court imposed a standard range sentence of eleven (11) months for each of the felony convictions of Unlawful Possession of a controlled Substance and two counts of Bail Jumping, and ninety (90) days for the DWLS conviction, with all sentences to run concurrent to one another. CP 101-113; RP 7 354-355.

2. Factual Summary

On May 14, 2006, at about 4:30 p.m. Police Officer Scott Mock was working patrol in Edgewood. He observed and ran a license plate

check on a Pontiac Firebird. The records check revealed that the license plate number was registered to a Ford Escort. RP 2 49-51.

Officer Mock pulled the vehicle over. The driver advised Officer Mock that his driver's license was probably suspended. The driver was Mark Allen Curtis. A records check confirmed that Mr. Curtis' drivers license was suspended in the third degree. RP 2 52-53.

Officer Mock arrested Mr. Curtis for DWLS and proceeded to search the vehicle "incident to arrest." RP 2 54. An Altoids tin containing a white rocky substance was discovered under the driver's seat. RP 2 55. A second baggie containing more of the white substance was found inside a torn center console along with a pipe. RP 2 55. The substance in the Altoids tin was never tested by the Washington State Crime Lab. RP 2. 116. The white substance in the baggie located inside the console weighed 4.4 grams and contained methamphetamine. RP 2 110. Residue found inside the pipe was also found to contain methamphetamine. RP 2 106. Mr. Curtis' defense theory was unwitting possession, that is, that Mr. Curtis was unaware that he constructively possessed a controlled substance. RP 54-82; RP

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4 303.

Following his arraignment and bail on the original charges, Mr. Curtis was later charged with two additional counts of Bail Jumping based on his alleged failure to appear for preliminary hearings on May 30, 2006 and October 24, 2006. CP 5-7, 9-13.

3. Summary of Trial Testimony

a. The State's Case in Chief

● ***Scott Mock***

Pierce County Sheriffs' Deputy Scott Mock testified that on May 14, 2006 he was working as a patrol officer in the area of Edgewood in Tacoma, Washington. While cruising along 24th Street East at about the 9100 block he observed a vehicle coming towards his direction. The car was a white Pontiac. For reasons unspecified Officer Mock ran a license plate check on the Pontiac. The license plate came back registered to a white Ford Escort. RP 2 49-50. Officer Mock decided to conduct a traffic stop. RP 2 51.

The Pontiac pulled into the driveway of a house. Officer Mock contacted the driver. RP 2 51-52. The driver presented Officer Mock

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with a paper copy of a Washington Driver's License bearing the correct name of Mark Allen Curtis. He told Officer Mock that he thought his license was suspended. Officer Mock then placed Mr. Curtis in the back seat of his patrol car. RP 2 52-53.

Officer Mock testified that he proceeded to run the Vehicle Identification Number through LESA records. The car came back "clear," but Officer Mock verified that Mr. Curtis' drivers license was suspended. RP 2 54. Officer Mock arrested Mr. Curtis for DWLS. He then performed a "search of the vehicle incident to that arrest." RP 2 54. The car's exterior was "beat up" and its interior was a mess. RP 2 80.

Officer Mock found an Altoids can containing a "white rocky type substance" underneath the driver's seat. RP 2 55. In the torn center console where the gearshift was located he also discovered a small plastic baggie containing the same type of white substance and a glass pipe. CP 2 55, 81.

After locating the above mentioned items, Officer Mock returned to Mr. Curtis and *Mirandized* him. RP 2 55-56. Mr. Curtis

responded to his questions. Officer Mock testified that Mr. Curtis explained that the white substance was a diet supplement that he had purchased from a gas station and crushed. RP 2 57. Officer Mock further testified that Mr. Curtis stated he had nowhere to live and was hanging out with some dooper people. Mr. Curtis explained that “he was using the pipe to smoke the substance to keep up this image so that he could stay with them.” RP 2 57.

Mr. Curtis admitted that he should not have been driving but that he was trying to get to his Mom’s house for Mother’s Day. RP 2 57. Finally, Mr. Curtis stated that he did not know the people whose driveway he pulled into when Officer Mock stopped him. RP 2 58.

Officer Mock thought the substance was crack cocaine, and he performed a field test on a portion of it.⁶ The results produced “a slight indication for a cocaine base....” RP 2 58-59. Officer Mock transported Mr. Curtis to jail and the evidence to the South Hill Police

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Although field test evidence is generally inadmissible, here the defense sought to introduce the field test results because the results were inconsistent with those performed by the Washington State Crime Lab. RP 2 39.

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Department where he secured it in the evidence locker. RP 2 68,72.

- ***Maureena Dudschus***

Forensic Scientist Maureena Dudschus with the Washington State Patrol Crime Laboratory testified that she performed multiple tests to determine the presence of controlled substances in the white substance contained in the baggie found in the console and in the residue of the pipe. Both tested positive for the presence of methamphetamine. RP 2 106,110. The substance inside the Altoid tin was not tested. RP 2 116.

- ***Thomas D. Howe***

Deputy Prosecuting Attorney Thomas D. Howe with the Pierce County Prosecutor's Office testified as to the court documents filed in Mr. Curtis' case as they pertain to the bail jumping charges. The documents admitted included the original Information (Plaintiff's Exhibit Number 6), the 05-15-06 Conditions of Release (Plaintiff's Exhibit Number 7), the 05-24-06 Receipt for Bail Payment (Plaintiff's Exhibit Number 8), the 05-15-06 Scheduling Order (Plaintiff's Exhibit Number 9), the 05-30-07 Motion Authorizing Bench Warrant

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(Plaintiff's Exhibit Number 10), the 06-01-06 Order Issuing Bench Warrant (Plaintiff's Exhibit Number 11, the 06-09-06 Order Revoking Bench Warrant (Plaintiff's Exhibit Number 12), the 06-09-06 Conditions of Release (Plaintiff's Exhibit Number 13, the 10-05-06 Order Continuing Trial Date (Plaintiff's Exhibit Number 14), the 10-24-06 Motion Authorizing Bench Warrant (Plaintiff's Exhibit Number 15), the 10-24-06 Order Issuing Bench Warrant (Plaintiff's Exhibit Number 16) and the 11-03-06 Order Revoking Bench Warrant (Plaintiff's Exhibit Number 17). RP 3 147-177; See also Exhibit Record at CP 88-89.

The documents show that, after having been charged with the crime of UPCS, Mr. Curtis was scheduled to appear for a pretrial conference hearing on May 30, 2006 and a Omnibus Hearing on October 24, 2006, and that Mr. Curtis signed both scheduling orders. Further, the documents show that on the same dates motions were presented to authorized the issuance of bench warrants based on Mr. Curtis' failure to appear at the hearings, and that the motions were subsequently granted. RP 3 144-177.

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- ***Steve Hillyard***

Steve Hillyard, who is a property room officer for the Pierce County Sheriff's Department, testified as to the chain of custody of the evidence confiscated during the search of the vehicle. RP 3 214-223.

- b. The Defense Case**

- ***Megan Erickson***

Megan Erickson testified that on Mother's Day, which was the day Mr. Curtis was arrested, she had driven Mr. Curtis to Federal Way to pick up the white Firebird Pontiac he had recently purchased. RP 3 230-231. After Mr. Curtis got the car running, it had been moved to an outdoor garage in Federal Way. RP 3 231-232.

Upon arriving at the Federal Way garage, Ms. Erickson and a man named Paul began to remove the garbage from and clean the interior of the car. RP 3 233. While cleaning, Paul found a white bottle underneath the seat. The bottle was filled with a solid white substance which Paul poured into an Altoid container and melted. RP 3 234-235,237. The bottle had a store type label which read "MSM" or "MSN." RP 3 235. Ms. Erickson and Mr. Curtis told Paul that it was

a dietary supplement and he should throw it away. RP 3 234, 238. Ms. Erickson left shortly thereafter. RP 3 238.

- ***Mark Allen Curtis***

Mark Curtis, the defendant/appellant testified that he has been a Tacoma resident all his life. He had worked for Mountain Pacific Rail as a certified diesel technician for the past seven (7) years and was still employed at the date of his trial. RP 3 244-245.

On Mother's Day of 2006 he was pulled over driving a 1986 Pontiac Firebird Trans Am. He had only been in possession of the vehicle for three or four days. RP 3 248. Mr. Curtis had moved the car from the field in which it was located when he acquired it to a garage/shop in Federal Way.

On Mother's Day he returned to the garage, got the engine running, and sanded and painted the vehicle, while Ms. Erickson and Paul worked on cleaning the interior. RP 3 249.

Mr. Curtis had just met Paul at the garage that day. Paul offered to help. Mr. Curtis paid \$20.00 for helping. RP 3 261. There were many other people and cars at the garage. RP 3 249-250. Mr. Curtis

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recalled that while cleaning the car Paul found a “big white bottle of MSM.” RP 3 250. He saw Paul pour the contents of the bottle into an Altoids tin and light it with a lighter. Paul then “crunched it up and put some of it in a baggie.” RP 3 250. Mr. Curtis told Paul “to throw that shit away.” RP 3 251.

Although the cleaning of the car’s exterior was not complete, Mr. Curtis left to pick up his Mother’s Day present and visit his Mom in Orting. He had just left his Mom’s house when he was stopped by the police. RP 3 251.

Mr. Curtis’ testimony was substantially the same as Officer Mock’s except he disputed the accuracy of the statements Officer Mock attributed to him. Specifically, Mr. Curtis testified that he did not say he had purchased the substance at a gas station or that he used it to fool his “doper friends.” RP 3 253. He told the officer that he believed it was a dietary supplement that one could purchase at any corner store or gas station, but that it was not his. RP 3 263.

Mr. Curtis testified that he believed Paul had gotten rid of the Altoids tin and that he had no idea the Altoids tin, the baggie, or the

pipe were in the car. He had never seen the pipe before. RP 3 254-255.

Mr. Curtis then testified concerning the charges filed as a result of his failure to appear for Court. Mr. Curtis testified that on May 30, 2006 he arrived late for court during the lunch hour. It had been Memorial Day weekend, and he was at work underneath a truck when his foreman told him it was his court date. Mr. Curtis' employer kept a calendar of his court dates because his employer had put up his bail. RP 3 258,269. Mr. Curtis went to DAC the same day to arrange to get the warrant quashed and schedule a new pre-trial hearing date. RP 3 257.

With respect to the October 24, 2006 court date, Mr. Curtis had been confused because multiple dates had been written on the "paperwork" and some dates were crossed out or scribbled over. RP 3 258-260. His employer advised him on the day after the hearing and he immediately scheduled a court date to quash the warrant. RP 3 258-260.

D. ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY EXCLUDED EVIDENCE OF MR. CURTIS' CHARACTER OF SOBRIETY.

The admissibility of evidence pertaining to a criminal defendant's good character is governed by ER 404(1):

(a) **Character Evidence Generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) **Character of Accused.** Evidence of a **pertinent** trait of character offered by an accused, or by the prosecution to rebut the same[.]

(Emphasis added). Courts have determined that the term of "pertinent" is synonymous with "relevant," therefore, " a pertinent character trait is one that tends to make the existence of any material fact more or less probable than it would be without evidence of that trait." *State v. Eakins*, 127 Wn.2d 490,495-96,902 P.2d 1236(1995); see also ER 401.

The concept of character includes a person's reputation for sobriety. *City of Kennewick v. Day*, 142 Wn.2d 1,5-6,11 P.3d 304

(2000). In the context of a drug possession case where the defendant raises an unwitting possession defense, evidence of the defendant's reputation for sobriety from drugs and alcohol is pertinent. Kennewick, 142 Wn.2d at 10. In City of Kennewick v. Day, Mr. Day was charged with possession of marijuana after police found marijuana and a pipe in the center console of his car. Mr. Day raised an unwitting possession defense and sought to introduce testimony as to his reputation for sobriety from drugs and alcohol.⁷

The Supreme Court held that the trial court abused its discretion when it excluded Mr. Day's proffered character evidence without analyzing its pertinence within the context of the case. Kennewick, 142 Wn.2d at 14-15. Undertaking this analysis itself, the Court explained that by raising an unwitting possession defense, Mr. Day placed his knowledge at issue. Kennewick, 142 Wn.2d at 10,12. Once his knowledge was at issue, the "universe of relevant evidence" greatly

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Mr. Day maintained the drugs were not his, that he had not seen them before, and that he had just picked up his truck from a repair shop before the arrest. Kennewick, 142 Wn.2d at 3.

expanded. Kennewick, 142 Wn.2d at 11. The Court concluded that the evidence of Mr. Day's reputation for sobriety from drugs and alcohol tended to support his claim that he did not know the drugs were in his car, thus meeting the "deminimis standard" of 404(a)(1). Kennewick, 142 Wn.2d at 10

Our Supreme Court's holding in Kennewick is controlling here. The trial court abused its discretion by excluding pertinent evidence of Mr. Curtis' character for sobriety. Moreover, it did so without any meaningful analysis of the legal issues. Like the Kennewick defendant, Mr. Curtis raised an unwitting possession defense and sought to introduce pertinent character evidence pertaining to his sobriety and his commitment to maintaining sobriety as evidenced by his continued willingness to participate in UAs and the results of such UAs. Yet, there is nothing on the record indicating that the trial court analyzed the pertinence of such evidence in the context of Mr. Curtis' defense. Instead, the record reveals that once the State objected, the trial court promptly sustained the objection and instructed defense counsel that evidence concerning Mr. Curtis' sobriety was only

relevant in the context of his sobriety for his in court testimony. This ruling seriously limited the effectiveness of the defense case and prevented Mr. Curtis from presenting his complete defense.

There is a reasonable probability that the court's exclusion of the sobriety and UA evidence materially affected the outcome. The State's case against Mr. Curtis was not overwhelming. The jury found him not guilty of Unlawful Use of Drug Paraphernalia. One can reasonably infer from this that the jurors did not conclude that the methamphetamine residue-laden pipe was used by Mr. Curtis, but that under the law they were obligated to find constructive possession because the substance in the baggie was found in Mr. Curtis' car. As noted by our Supreme Court, unlawful possession is a strict liability offense with the exception of the affirmative defense of unwitting possession. *State v. Kennewick, Supra* at 9-11. Given the limited defense available to this charge, and the fact that the defense puts the defendant's knowledge at issue, character evidence may certainly be pertinent to support it. *Supra*.

In Mr. Curtis' trial, character evidence concerning his sobriety and proof thereof was pertinent. Had the jury been permitted to hear

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that Mr. Curtis had maintained sobriety and was regularly tested to verify his sobriety, combined with the proof of his UA results, the defense theory would undoubtedly have been strengthened. The defense would, therefore, have likely been able to meet its burden of proof. As *Kennewick* indicates, the jury would have properly viewed Mr. Curtis' character for sobriety as making it less probable that Mr. Curtis would possess drugs. The trial court erred when it excluded Mr. Curtis' proffered evidence. Because the error was prejudicial on these facts, this Court should reverse Mr. Curtis' conviction for Unlawful Possession of a Controlled Substance.

II. THE TRIAL COURT VIOLATED MR. CURTIS' CONSTITUTIONAL RIGHTS WHEN IT EXCLUDED PROBATIVE EVIDENCE SUPPORTING HIS DEFENSE OF UNWITTING POSSESSION OF A CONTROLLED SUBSTANCE.

The Sixth and Fourteenth Amendments to the United States Constitution,⁸ and Article 1 § 22. of the Washington Constitution,⁹

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The Sixth Amendment provides: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be

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guarantee a defendant the right to defend against the State's allegations by presenting testimony in one's defense. This is a fundamental element of due process. *Chambers v. Mississippi*, 410 U.S. 284,294, 35 L.Ed 2d 297,93 S.Ct.1038 (1973); *Washington v. Texas*, 338 U.S. 14,k19,18 L.Ed.2d 1019, 87 S.Ct.1920 (1967); *State v. Maupin*, 128 Wn.2d 918,924,913 P.2d 808 (1996).

The only limitations on this constitutional right are: (1) the evidence sought to be admitted must be relevant; and (2) the defendant's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to

informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. The Fourteenth Amendment provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

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Article 1, § 22 provides: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases...."

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disrupt the fairness of the fact-finding process. See Washington v. Texas, 388 U.S. at 16; State v. Hudlow, 99 Wn.2d 1,15,659 P.2d 514 (1983); State v. Gallegos, 65 Wn.App. 230,236-37, 828 P.2d 37, review denied, 119 Wn.2d 1024 (1992). If the defendant shows that the evidence is minimally relevant, the evidence must be admitted unless the State can demonstrate a compelling state interest for excluding the evidence. Hudlow, 99 Wn.2d at 16; State v. Reed, 101 Wn.App. 704,709,6 P.3d 43 (2000).

As established in Argument I, Supra, evidence of Mr. Curtis' sobriety was relevant to his unwitting possession defense. The only questions, therefore, are whether the State can show the character evidence was so prejudicial as to disrupt the fairness of the trial and whether the State's interest outweighed Mr. Curtis' need to present the information to the jury.

Evidence of Mr. Curtis' sobriety would not have disrupted the fairness of the trial. While inclusion of this evidence certainly would have weakened the State's case, the evidence was not so unfairly prejudicial that it required exclusion. See Hudlow, 99 Wn.2d at 12

(explaining that evidence is not inadmissible simply because it is detrimental or harmful to the interests of the party opposing its admission). Moreover, the fact remains, had the evidence been admitted, the State would have had a full and fair opportunity to challenge it.

Admitting this evidence would have been far less disruptive to the fairness of the trial than was excluding it. Through Mr. Curtis' testimony that he was not a drug user, that he took regular UAs, and that his UAs were consistently clean, Mr. Curtis could have presented a solid unwitting possession defense. The State offered no testimony or physical evidence alleging Mr. Curtis ever handled the drugs that were found in the vehicle. The sole evidence that Mr. Curtis knew there were drugs in the car was Officer Mock's testimony that Mr. Curtis admitted it, and this testimony was refuted.

By prohibiting any mention of Mr. Curtis' sobriety, the trial court greatly hampered the defense's presentation of its case. Equally important, the exclusion of this evidence affected Mr. Curtis' credibility and Mr. Curtis was the defenses' primary witness. Had the

evidence been admitted it would have greatly bolstered Mr. Curtis' credibility making it more believable that Officer Mock was mistaken in his memory or interpretation of Mr. Curtis' statements.

For these reasons, it cannot be said the evidence was unduly prejudicial to the State or that the State's interest in excluding the evidence outweighed Mr. Curtis' need for it. By excluding this evidence, the court denied Mr. Curtis his constitutional right to a fair trial. Reversal is required. *Hudlow*, 99 Wn.2d at 16.

**III. THE TRIAL COURT ERRONEOUSLY
INSTRUCTED THE JURY ON THE
AFFIRMATIVE DEFENSE OF UN-
CONTROLLABLE CIRCUMSTANCES.**

Over defense counsel's objection Mr. Curtis' jury was instructed as follows concerning the affirmative defense of bail-jumping:

INSTRUCTION NO. 17

It is an affirmative defense to a prosecution for Bail Jumping that uncontrollable circumstances prevented the person from appearing, and that the person did not contribute to the creation of such

circumstances in reckless disregard of the requirement to appear, and that the person appeared as soon as such circumstances ceased to exist.

The defendant has the burden of proving by a preponderance of the evidence that uncontrollable circumstances prevented the defendant from appearing. Preponderance of the evidence means that you must be persuaded, considering all the evidence in this case, that it is more probably true than not true. If you find that the defendant has proved this defense by a preponderance of the evidence, it will be your duty to return a verdict of not guilty. CP 54-82.

INSTRUCTION NO. 18

“Uncontrollable circumstances” means an act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of man such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts. CP 54-82.

Here, neither the bail jumping statute nor the evidence presented at trial supported the affirmative defense of uncontrollable circumstances or the court's instructions thereon.

RCW 9A.76.170(2) provides:

It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

RCW 9A.76.010(4) defines "uncontrollable circumstances" as:

"an act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of man such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts."

Mr. Curtis presented no evidence that would support the affirmative defense of uncontrollable circumstances as defined either by statute or by the parallel instructions given. Rather, his defense theory was a negation of the knowledge element of bail jumping as evidenced by Mr. Curtis' testimony as well as defense counsel's

closing argument. RP 4 306-310. The State, on the other hand, argued vehemently that the defense should not prevail because the defense had not met its burden to prove uncontrollable circumstances. RP 4 295-297. Mr. Curtis' jury was not properly instructed given the facts of his case.

Under both the federal and state constitutions, an accused person has a right to due process of law. U.S. Const. amend XIV;¹⁰ Wash. Const. art. 1, § 3.¹¹ Based on principles of due process, an accused person has the right to have the “jury base its decision on an accurate statement of the law as applied to the facts in the case.” *State v. Miller*, 131 Wn.2d 78,91,929 P.2d 372 (1997).

Defendants are also guaranteed the right to a jury trial. U.S.

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The Fourteenth Amendment provides, in relevant part, “nor shall any state deprive any person of life, liberty, or property, with due process of law.”

11

Article 1 § 3 provides, “No person shall be deprived of life, liberty, or property, without due process of law.”

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Const. amend. VI,¹² Wash. Const. art. 1 § 21,¹³ and § 22.¹⁴ Inherent in the right to a jury trial is the right to have the jury properly instructed. “The right to a jury trial includes the right to have each juror reach his or her own verdict uninfluenced by factors outside the evidence, the court’s proper instructions, and the arguments of counsel.” *State v. Goldberg*, 149 Wn.2d 888,892,72 P.3d 1083 (2003) (citing *State v. Boogaard*, 90 Wn.2d 733,736,585 P.2d 789 (1978)).

In Mr. Curtis’ case, the jury was not properly instructed based on the evidence presented. The State’s emphasis that the defense had failed to meet its burden of proof obscured the State’s burden of proof. In fact, the defense should not have had any burden of proof to carry

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The Sixth Amendment provides, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.

13

Article 1 § 21 provides, “The right of trial by jury shall remain inviolate.

14

And Article 1, § 22 provides, “In criminal prosecutions the accused shall have the right to . . . have a speedy public trial by an impartial jury. . .”

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because it did not give notice of or raise the affirmative defense attributed to it.

By giving the inapplicable, uncontrollable circumstances instructions, and then allowing the State to relegate the defense into a position of having to prove the inapplicable defense, the court needlessly confused the jury and denied Mr. Curtis his right to due process and a fair trial.

E. CONCLUSION

For all of the foregoing reasons and conclusions, Mr. Curtis respectfully requests that this Court reverse and dismiss the bail jumping and the Unlawful Possession of a Controlled Substance charges.

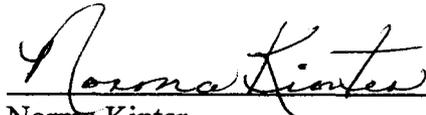
RESPECTFULLY SUBMITTED this 2nd day of January,
2008.



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WSBA # 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on January 2, 2008, she delivered in person a copy of this Opening Brief to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Avenue South, Tacoma, Washington 98402, and delivered by U.S. mail to appellant, Mark A. Curtis,, 2217 11th Avenue East, Edgewood, Washington 98372-1546, true and correct copies of this Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on January 2, 2008.



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