

FILED
COURT OF APPEALS
DIVISION II

08 SEP 15 AM 9:24 No. 37547-8-II

STATE OF WASHINGTON
BY S COURT OF APPEALS, DIVISION II
DEPUTY

ORIGINAL

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DEBORAH CARGO,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable Ken Williams, Judge
Cause No. 07-1-00403-2

BRIEF OF RESPONDENT

CAROL L. CASE
Deputy Prosecuting Attorney
Attorney for Respondent
WSBA # 17052

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A. APPELLANT'S ASSIGNMENTS OF ERROR

1. The defendant claims that the trial court's instructions relieved the state of its burden to prove an element of the charged offense.
2. The defendant claims that the trial court's instructions permitted conviction based solely upon proof that Ms. Cargo had dominion and control over the premises where drugs were found.
3. The defendant claims that the trial court's instructions were insufficient because they did not allow Ms. Cargo to argue her theory of the case.
4. The defendant claims that the trial court's instructions were misleading and failed to inform the jury of the applicable law.
5. The defendant claims that the trial court's instructions were not manifestly clear.
6. The defendant claims that the trial court's instructions as a whole left the jury to speculate about the law.
7. The defendant claims that the trial court's instructions as a whole required counsel to persuade the jury as to what the instructions meant and what the law was.
8. The defendant claims that the trial court erred by rejecting Ms. Cargo's proposed Instruction No. 5, which reads as follows:

Possession of a controlled substance may not be established merely by the defendants' (sic) dominion or control over the area where such substance is found. Supp. CP

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court's instructions relieved the state of its burden to establish possession, an element of the charged offense? (Assignment's of Error Nos. 1-8).

C. STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), the State accepts defendant's recitation of the procedural and substantive facts set forth in her opening brief at pages 2 through 4.

D. ARGUMENT

The Instructions For Possession of a Controlled Substance Were Sufficient and Contained All Essential Elements Of The Crime.

It is well established law that juries are presumed to follow the instructions provided. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

Juries are presumed to follow the law. Not only was the instruction proper, there is no reason to believe that the jury was confused about whether the defendant was in constructive possession of the controlled substance; the confusion was related to the words "dominion" and "control", which occurs more often than not. There is no reason to believe that the jury did not follow the law as instructed.

"To prove constructive possession of drugs, the State must show dominion and control over the drugs. Dominion and control over the premises where the drugs are found is one circumstance to be considered by the trier of fact. Dominion and control of the premises does not,

however, create an inference that the defendant had dominion and control over the drugs found on the premises". *State v. Shumaker*, 142 Wn. App. 300, 331, 174 P.3d 1214 (2008).

In the instant case the defendant was living in her car and that is where she kept all of her belongings. RP (3-20-08) 9, 10, 28. What the defendant would have the jury believe is that she loaned her car to a friend leaving her purse in the car RP (3-20-08) 12 and that friend planted drugs in her car or that Mr. Lyman planted the drugs in her car while they were sleeping in her car at the Wal-Mart parking lot. RP (3-20-08) 32.

The defendant testified that she kept the pouch containing her marijuana stash in her purse. RP (3-20-08) 23-25. However, the pouch containing the marijuana residue and paraphernalia was located on the dashboard of her car during the search incident to arrest. RP (3-19-08) 65, RP (3-20-08) 26 and the defendant had no clue as to how the pouch got on the dashboard RP (3-20-08) 33, or how the marijuana pipe made it to the glove box RP (3-20-08) 30. The jury obviously did not find the defendant credible.

Methamphetamine was located in the defendant's purse, which contained her driver's license. RP (3-19-08) 70-71. The defendant identified the purse in which the methamphetamine was found as hers. RP (3-20-08) 21.

The State was not unconstitutionally relieved of its burden to prove each element beyond a reasonable doubt. The jury was provided with an instruction that reflected the language in WPIC 50.03 with the

following addition, “Proximity alone without proof of dominion and control over the substance is insufficient to establish constructive possession”. Said language is approved by *State v. Porter*, 58 Wn.App. 57, 63 n. 3, 791 P.2d 905, 908 n. 3 (1990).

Given that the court added language to the Instruction No. 9, there was no need to give the defendant’s proposed Instruction No. 5. Furthermore, the language in Instruction No. 9 stating that “Dominion and control need not be exclusive to establish constructive possession” was very clear. Finding one person in constructive possession of a controlled substance in no way precludes finding another person in constructive possession of the same controlled substance. Under the facts of the instant case, both the defendant and Michael Lyman could have been in constructive possession of the methamphetamine. The jury found the defendant guilty because she was the one on trial.

Even if it was error to refuse defendant’s proposed Instruction No. 5, the error was harmless. Here, the jury would have reached the same verdict even if the error had not occurred based on the added language in the court’s Instruction No. 9. An error is harmless only if upon examining the record we conclude beyond a reasonable doubt that the jury verdict would have been the same absent the errors.

State v. Garrison, 129 Wn.App. 258, 271, 118 P.3d 935 (2005) *citing* *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) [*quoting Neder v. U.S.*, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)].

The trier of fact decides questions of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Todd*, 101 Wn.App. 945, 950, 6 P.3d 86 (2000). Witness credibility determinations are for the trier of fact to make, not an appellate court. *State v. McPherson*, 111 Wn.App. 747, 46 P.3d 284 (2002).

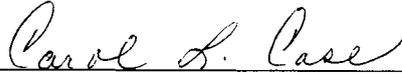
The jury obviously did not believe that the defendant did not know anything about the methamphetamine in her purse and/or car and found her guilty based on the fact that she was in constructive possession of the controlled substance.

E. CONCLUSION

Based on the foregoing, the State respectfully asks this Court to affirm defendant's conviction for possession of a controlled substance, to wit: methamphetamine.

DATED this 12th day of September 2008, at Port Angeles, Washington.

Respectfully submitted,



Carol L. Case, WSBA # 17052
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON
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STATE OF WASHINGTON

NO. 37547-8-II-2
DEPUTY

STATE OF WASHINGTON,
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vs.
DEBORAH CARGO,
Appellant.

AFFIDAVIT OF SERVICE BY MAIL

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STATE OF WASHINGTON)
: ss.
County of Clallam)

The undersigned, being first duly sworn, on oath deposes and says:

That the affiant is a citizen of the United States and over the age of eighteen years; that on the 12th day of September, 2008, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the *Brief of Respondent*, addressed as follows:

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SUBSCRIBED AND SWORN TO before me this 12th day of September, 2008

Janet L. Hendrickson
(PRINTED NAME:) Janet L. Hendrickson
NOTARY PUBLIC in and for the State of Washington
Residing at Port Angeles, Washington
My commission expires: 12-11-15