

IN THE COURT OF APPEALS FOR THE STATE OF
WASHINGTON
DIVISION II

NO. 40181-9-II

STATE OF WASHINGTON

Respondent,

vs.

JENNIFER JOY HATHAWAY

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY
Cause Number: 08-1-00162-3

The Honorable Craddock D. Verser

FILED
COURT OF APPEALS
10 JUN 14 PM 12:13
STATE OF WASHINGTON
BY  JENNY

BRIEF OF RESPONDENT

JUELANNE DALZELL
Jefferson County Prosecuting Attorney
Attorney for Respondent

P.O. Box 1220
Port Townsend, WA 98368
(360) 385-9180
Date: June 8, 2010

 ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
I. Restatement of Issues Presented.....	1
II. Statement of Facts.....	1
III. ARGUMENT.....	4
A. Ms. Hathaway’s identification was properly checked when she asked to visit a jail inmate....	4
B. The evidence did not support giving a “mere proximity” jury instruction.....	7
C. The evidence was sufficient for the jury to find Defendant guilty of possession of a controlled substance.....	8
D. The to-convict instruction was correct.....	9
E. The evidence was sufficient for the jury to find Defendant guilty of possession of a controlled substance.....	10
F. The jury fee of \$1,604.53 is authorized by statute.....	11
CONCLUSION.....	16

TABLE OF AUTHORITIES

Page

CASES

Washington Supreme Court

<i>City of Seattle v. McCready</i> , 123 Wn.2d 260, 270, 868 P.2d 134 (1994).....	7
<i>In re Dependency of Chubb</i> , 112 Wn.2d 719, 721, 773 P.2d 851 (1989).....	15
<i>In re Detention of Turay</i> , 139 Wn.2d 379, 392, 986 P.2d 790 (1999).....	15
<i>State v. Armenta</i> , 134 Wn.2d 1, 16-17, 948 P.2d 1280 (1997).....	7
<i>State v. Clausing</i> , 147 Wn.2d 620, 626, 56 P.3d 550 (2002).....	11
<i>State v. Cord</i> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985).....	10
<i>State v. Eisfeldt</i> , 163 Wn.2d at 635, 185 P.3d 580.....	7
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 71, 917 P.2d 563 (1996).....	7
<i>State v. Jordan</i> , 160 Wn.2d 121, 126, 156 P.3d 893 (2007).....	6
<i>State v. Myrick</i> , 102 Wn.2d 506, 513, 510-11, 688 P.2d 151 (1984).....	7
<i>State v. O'Neill</i> , 148 Wn.2d at 588, 62 P.3d 489.....	7
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	10
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004) <i>aff.d</i> 166 Wn.2d 380, 208 P.3d 1107 (2009).....	10

Washington State Court of Appeals

<i>State v. Alexander</i> , 7 Wn.App. 329, 336, 499 P.2d 263 (1972)....	11
<i>State v. Baldwin</i> , 63 Wn.App. 303, 310-11, 818 P.2d 1116 (1991).....	15
<i>State v. Douglas</i> , 128 Wn.App. 555, 561, 116 P.3d 1012 (2005)..	11
<i>State v. Fleming</i> , -- Wn.App. --, 228 P.3d 804 (2010).....	11
<i>State v. Hall</i> , 104 Wn.App. 56, 60, 14 P.3d 884 (2000).....	11
<i>State v. Powell</i> , 150 Wn.App. 139, 154, 206 P.3d 703 (2009).....	9
<i>State v. Smits</i> , 152 Wn.App. 514, 216 P.3d 1097 (2009)...	13, 15, 16

Codes and Regulations

<i>Wn. Const. art. I, § 7</i>	6
RCW 10.01; Court Fees.....	13-16

BRIEF OF RESPONDENT

State of Washington v. Hathaway

STATEMENT OF THE CASE

I. **Restatement of Issues Presented**

- A. Ms. Hathaway's identification was properly checked when she asked to visit a jail inmate.
- B. The evidence did not support giving a "mere proximity" jury instruction.
- C. The evidence was sufficient for the jury to find Defendant guilty of possession of a controlled substance.
- D. The to-convict instruction was correct.
- E. The evidence was sufficient for the jury to find Defendant guilty of possession of a controlled substance.
- F. The jury fee of \$1,604.53 is authorized by statute.

II. **Statement of Facts**

On July 16, 2008, Jefferson County Sheriff's Deputy Brian Anderson, a former corrections officer, was filling in at the jail during visiting hours running warrant checks on the identification submitted by persons seeking to visit inmates. RP 35. This is a standard practice at the jail to ensure there are no persons with warrants visiting the jail and allowed to leave. RP 36-37. Ms. Hathaway's form came to Deputy Anderson and he determined that her license was suspended. RP 37. Before he left to resume his patrol duties he asked the other corrections officers to notify him when Ms. Hathaway left the facility if she drove away. RP 38.

After Deputy Anderson entered his patrol car, but before he left the jail parking lot, a corrections officer called him and reported Ms. Hathaway had driven away from the facility and described her vehicle. RP 38. Deputy Anderson located the car, stopped it, and got the driver's identification. He confirmed with JeffCom that her license was suspended, notified her that she was under arrest for driving with a suspended license, removed her from her car, secured her in handcuffs, and escorted her back to his patrol car. RP 41.

He placed her facing the right rear quarter panel of his car and searched her incident to arrest. RP 42. While searching her right leg he heard something hit the ground, looked toward the sound and located a small, clear plastic vial with a red cap laying on the ground about six inches away from her right foot. RP 43-44. It was lying just behind the tire where it would have been crushed by his patrol car if it had been laying on the ground before he arrived. RP 62.

The plastic vial contained a white crystalline substance that later field tested positive for methamphetamine. CP 24. Ms. Hathaway was placed in the patrol car and read her Miranda warnings. She said that she understood her rights and she wanted to speak to Deputy Anderson. He asked her what was in the plastic

vial and she said she did not know, it was not hers. CP 24. Ms. Hathaway was transported to the jail and booked for Possession of Methamphetamine and DWLS/R 3.

The white crystalline substance was sent to the Washington State Crime Lab. CP 24.

A jury trial was held on December 28-29, 2009.

On December 28, 2009, while the jury was excused, the court discussed proposed jury instructions with the attorneys. Ms. Hathaway's counsel, Mr. Critchlow, opined that he believed the State had omitted the element of "unlawfully" in its to-convict instruction. That is, the State's proposed instruction only said she had to be "in possession of a controlled substance." The court instructed the attorneys to each review the proposed instructions and be prepared to discuss them the next day. RP 73-75. The attorneys conferred and agreed to add the word "unlawfully" to the State's proposed jury instruction.

Jury instruction number 9, as presented to the jury, stated:

To convict the defendant of the crime of possession of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

That on or about the 16th of July, 2008, the defendant unlawfully possessed a controlled substance, and

The acts occurred in the State of Washington.

If you find from the evidence that each of these element has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

WPIC 50.01 Possession of a controlled substance –

Definition states:

It is a crime for any person to possess a controlled substance [except as authorized by law].

WPIC 50.02 Possession of a controlled substance –

Elements states:

To convict the defendant of the crime of possession of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about _____, the defendant possessed [a controlled substance] [_____]; and
- (2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

On December 29, 2009, after court reconvened, Mr. Critchlow stated the he now believed the to-convict instruction did not have to include the word “unlawfully” as one of the elements, based on his review of *State v. Bradshaw*. Mr. Ashcraft, the State’s

attorney, stated that although that the word “unlawfully” was not required he would not object to its inclusion since it did no harm. RP 80. Mr. Critchlow stated he had no objection to the instruction with the word “unlawfully” included. RP 81.

Mr. Critchlow proposed the court add a jury instruction on “mere proximity. RP 81-82. Mr. Ashcraft objected that in this case the evidence “infers it fell out of her pants, so that she did have possession, whether it be constructive or actual.” RP 83. The court stated “ this doesn’t appear to be a mere proximity case.” RP 83. The court declined to give a “mere proximity” instruction.

Mr. William Marshall, a forensic scientist for the State of Washington, testified on December 29, 2009, that the white crystalline substance contained methamphetamine. RP 92.

The jury found Ms. Hathaway guilty of unlawful possession of a controlled substance methamphetamine. RP 125. Fees of \$1,604.53 were assessed for the specific costs of the jury trial.

This appeal timely followed.

III. Argument

A. Ms. Hathaway's identification was properly checked when she asked to visit a jail inmate.

Ms. Hathaway argues that routinely checking the driver's license status of jail visitors violates their personal privacy protections under art.1. section 7 of the Washington State Constitution and the fourth amendment of the federal constitution. Ms. Hathaway misses the fact that she freely consented to this limited opening of the veil of privacy.

In determining whether a privacy interest merits article I, section 7 protection, we consider several central questions: whether the information obtained via the governmental trespass reveals "intimate or discrete" details of a person's life, *State v. Jordan*, 160 Wn.2d 121, 126, 156 P.3d 893 (2007). What expectation of privacy a person has in the information sought, and whether there are historical protections afforded to the perceived interest. *Id.* at 127, 156 P.3d 893. Also relevant are the purpose for which the information is acquired and by whom it is kept. *Id.* Here the information is compiled by the government and made available only to law enforcement. The analysis is not limited to a subjective expectation of privacy in modern times with modern technology,

City of Seattle v. McCready, 123 Wn.2d 260, 270, 868 P.2d 134 (1994), and does not rest solely on the legitimacy of a subjective expectation of privacy. *State v. Myrick*, 102 Wn.2d 506, 513, 510-11, 688 P.2d 151 (1984).

Consent is one of the narrow exceptions to the Washington State Constitution's prohibition against warrantless searches. See Wn. Const. art. I, § 7; *State v. Einfeldt*, 163 Wn.2d at 635, 185 P.3d 580; *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). For consent to be valid, a person must consent freely and voluntarily. *State v. O'Neill*, 148 Wn.2d at 588, 62 P.3d 489. An illegal seizure may invalidate voluntary consent. See *State v. Armenta*, 134 Wn.2d 1, 16-17, 948 P.2d 1280 (1997). A person is "seized" when his freedom of movement is restrained by physical force or a show of authority, and a reasonable person would not feel free to leave or otherwise decline an officer's request and terminate the encounter. *State v. O'Neill*, 148 Wn.2d at 574, 62 P.3d 489. The standard is objective. *O'Neill*, 148 Wn.2d at 574, 62 P.3d 489.

In this case the County Jail has reasonable procedures in place to protect the health and safety of inmates, staff and the public. The jail requires visitors to provide their name, date of birth, address and the name of the inmate they wish to visit. The county

has a valid public safety interest in preventing people with no-contact orders violating the order, contraband entering the jail, and in permitting people with felony warrants from leaving the facility if they enter it. Deputy Anderson testified that the jail routinely uses this information to check visitors warrant status and validity of their address which automatically also provides the visitor's driver's license status.

Also, Ms. Hathaway was required to provide this information only if she wished to visit an inmate. When handed the form she voluntarily chose to give the information requested. She could have just left. But she chose to provide the information, to release her privacy just enough to get access to the jail. She was not asked to provide any "intimate or discrete" details of her life. She had no expectation of privacy in such commonplace data that is already widely known by others and it would only be used by law enforcement officers.

Ms. Hathaway's privacy was not violated. This motion is without merit and should be denied.

B. The evidence did not support giving a “mere proximity” jury instruction.

Ms. Hathaway argues that she had a right to a jury instruction that accommodated her theory of the case. As a matter of due process, criminal defendants are entitled to have jury instructions that accommodate the defense theory of the case, so long as some evidence supports that theory. *State v. Powell*, 150 Wn.App. 139, 154, 206 P.3d 703 (2009).

Here however, there was no evidence offered to support that she was merely in proximity to the methamphetamine. Rather, evidence was presented to show that the drugs were on her body and she intentionally dropped them on the ground while she was being searched. Specifically, the Deputy heard the vial hit the ground while he was searching her leg and he saw it lying on the ground, just under the rear quarter of his patrol car, behind the car’s rear tire, where it would have been crushed by the car if it had been in that position when he drove up. RP 43-44, 62.

There was no evidence presented to support a mere proximity defense. This motion is without merit and should be denied.

C. The evidence was sufficient for the jury to find Defendant guilty of possession of a controlled substance.

Ms. Hathaway argues the evidence was insufficient to prove simple possession of methamphetamine.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004) *aff.d* 166 Wn.2d 380, 208 P.3d 1107 (2009), *quoting State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Id.* Circumstantial evidence and direct evidence are equally reliable. The court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

Here, evidence was presented that Ms. Hathaway was in actual possession of the methamphetamine, see previous argument. This motion is without merit and should be dismissed.

D. The to-convict instruction was correct.

Ms. Hathaway argues that the to-convict jury instruction contained the extraneous word “unlawful” and therefore her conviction is void because the State failed to prove she intentionally possessed the drug.

In general, the courts review a trial court's choice of jury instructions for an abuse of discretion. *State v. Fleming*, 228 P.3d 804 (2010), quoting *State v. Douglas*, 128 Wn.App. 555, 561, 116 P.3d 1012 (2005). Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case and, when read as a whole, properly inform the jury of the applicable law. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). A trial court has "considerable discretion" in the wording of instructions, *State v. Alexander*, 7 Wn.App. 329, 336, 499 P.2d 263 (1972), and we review the rejection of proposed instructions for abuse of discretion. *State v. Hall*, 104 Wn.App. 56, 60, 14 P.3d 884 (2000).

Here, the defense attorney suggested adding the word “unlawfully” to the wording of WPIC 50.02 proposed by the prosecution. The prosecution agreed that the addition would still properly inform the jury of the law and agreed to the addition. The

judge agreed and issued it as agreed. Clearly, adding the word “unlawfully” did not misinform the jury as to the applicable law, it permitted both sides to argue their theory of the case, and it was supported by substantial evidence.

Ms. Hathaway’s argument is specious and the appeal should be denied.

E. The evidence was sufficient for the jury to find Defendant guilty of possession of a controlled substance.

Ms. Hathaway argues that the State failed to prove she knowingly and intentionally possessed the methamphetamine.

This is incorrect, because, as Ms. Hathaway stated in her appeal brief at page 15,

“possession of a controlled substance is a strict liability crime, in the sense that the defendant has the burden to prove a claim the possession was unwitting, unintentional, or otherwise not unlawful. The controlled substance act requires proof only of possession. RCW 69.50.4013¹.”

Ms. Hathaway relies on her previous assertion that addition of the word “unlawfully” in jury instruction no. 9, required the State to prove she intentionally and knowingly possessed the

¹ It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter. RCW 69.50.4013(1).

methamphetamine. The State's response in argument "D" above shows that to be fallacious.

Ms. Hathaway refers to the "Law of the Case" in her title but cites no authority for her assertion that it is here applicable. The "law of the case" argument is specious for the prosecution may not change the elements of a crime. That right is reserved to the legislature.

Ms. Hathaway's appeal is fallacious and should be denied.

F. The jury fee of \$1,604.53 is authorized by statute.

Ms. Hathaway asserts that there is a statutory upper limit of \$250 on the costs that a court may impose and, therefore, the \$1,604.53 fee imposed by the trial court was excessive and should be reduced. This is an invalid appeal for two reasons.

First, under RCW 10.01.160(1), the court can order a defendant convicted of a felony to repay court costs as part of the judgment and sentence.² RCW 10.01.160(2) limits the costs to those "expenses specially incurred by the state in prosecuting the

² RCW 10.01.160(1) provides:

The court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear.

defendant or in administering the deferred prosecution program under 10.05 RCW or pretrial supervision.”³ *State v. Smits*, 152 Wn.App. 514, 216 P.3d 1097 (2009).

Here, the court only assessed the actual fees of calling a jury pool of 40 people, selecting a jury of 12, and paying court staff for a four hour trial. These charges are explicitly authorized under RCW 10.01.160(1).

Second, the Rules of Appellate Procedure provide two methods of seeking review-review as a matter of right and discretionary review. RAP 2.1(a). RAP 2.2(a) lists the types of

³ RCW 10.01.160(2) provides:

Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law. Expenses incurred for serving of warrants for failure to appear and jury fees under RCW 10.46.190 may be included in costs the court may require a defendant to pay. Costs for administering a deferred prosecution or pretrial supervision may not exceed one hundred fifty dollars. Costs for preparing and serving a warrant for failure to appear may not exceed one hundred dollars. Costs of incarceration imposed on a defendant convicted of a misdemeanor or a gross misdemeanor may not exceed the actual cost of incarceration. In no case may the court require the offender to pay more than one hundred dollars per day for the cost of incarceration. Payment of other court-ordered financial obligations, including all legal financial obligations and costs of supervision take precedence over the payment of the cost of incarceration ordered by the court. All funds received from defendants for the cost of incarceration in the county or city jail must be remitted for criminal justice purposes to the county or city that is responsible for the defendant's jail costs. Costs imposed constitute a judgment against a defendant and survive a dismissal of the underlying action against the defendant. However, if the defendant is acquitted on the underlying action, the costs for preparing and serving a warrant for failure to appear do not survive the acquittal, and the judgment that such costs would otherwise constitute shall be vacated.

decisions that are appealable as a matter of right. If a decision is not appealable as a matter of right, a party may seek discretionary review under RAP 2.3. A decision that is not listed in RAP 2.2(a), is reviewable *solely under the discretionary review criteria set out in RAP 2.3. In re Dependency of Chubb*, 112 Wn.2d 719, 721, 773 P.2d 851 (1989). (The failure to mention a particular decision or proceeding in RAP 2.2(a) indicates the Supreme Court's intent that the matter is only reviewable under the discretionary review guidelines of RAP 2.3.). *State v. Smits*, 152 Wn.App. 514, 518, 216 P.3d 1097 (2009).

A final judgment is one that settles all the issues in a case. *In re Detention of Turay*, 139 Wn.2d 379, 392, 986 P.2d 790 (1999). The decisions [Defendant] appealed from cannot be “final” under RAP 2.2(a)(1) because the order to pay LFOs as part of the judgment and sentence is conditional, and RCW 10.01.160(4) allows a defendant to file a petition to modify or waive LFOs “at any time.” *Id.*

The initial imposition of court costs at sentencing is predicated on the determination that the defendant either has or will have the ability to pay. RCW 10.01.160(3). Because this determination is clearly somewhat “speculative,” the time to examine a defendant's ability to pay is when the government seeks

to collect the obligation. *State v. Baldwin*, 63 Wn.App. 303, 310-11, 818 P.2d 1116 (1991). Until then, the denial of a motion under RCW 10.01.160(4) does not preclude subsequent motions. Moreover, the court can modify the LFOs at any time and there can be no adverse consequences from a failure to pay if the default was not attributable to an intentional refusal to obey the court order, a determination that can only be made when payment is required. [Defendant], therefore, does not have a right to appeal under RAP 2.2(a)(1). *Smits* at 514.

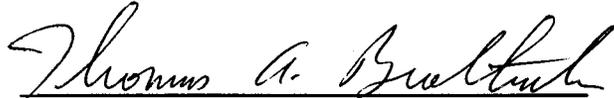
Since Ms. Hathaway can petition the trial court for a reconsideration of her fees at any time under RCW 10.01.160(4), the fees are not "final" and she may not appeal the fees under RAP 2.2(a)(1). Since she did not seek or receive Discretionary Review, this issue is not properly before the court and should be denied.

CONCLUSION

The State respectfully requests that this Court affirm the trial court's and order Appellant to pay costs, including attorney fees, pursuant to RAP 14.3, 18.1 and RCW 10.73.

Respectfully submitted this 3rd day of June, 2010.

JUELANNE DALZELL, Jefferson County
Prosecuting Attorney

A handwritten signature in cursive script, reading "Thomas A. Brotherton".

By: Thomas A. Brotherton , WSBA # 37624
Deputy Prosecuting Attorney

FILED
COURT OF APPEALS

10 JUN 14 PM 12:13

STATE OF WASHINGTON

BY _____ DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JENNIFER JOY HATHAWAY,

Appellant.

Case No.: 40181-9-II

Superior Court No.: 08-1-00162-3

DECLARATION OF MAILING

Janice N. Chadbourne declares:

That at all times mentioned herein I was over 18 years of age and a citizen of the United States; that on the 11th day of June, 2010, I mailed a copy of the State's BRIEF OF RESPONDENT, to the following:

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Jordan McCabe
Law Office of Jordan McCabe
P.O. Box 7212
Bellevue, WA 98008-1212

Jennifer Hathaway
220 South Oak Street, #1
Port Angeles, WA 98362

I declare under penalty of perjury under the laws of the State of Washington that the foregoing declaration is true and correct.

Dated this 11th day of June, 2010 at Port Townsend, Washington.



Janice N. Chadbourne
Legal Assistant

DECLARATION OF MAILING
Page 1

JUELANNE DALZELL
PROSECUTING ATTORNEY
FOR JEFFERSON COUNTY
Courthouse -- P.O. Box 1220
Port Townsend, WA 98368
(360) 385-9180

