

No. 49561-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

State of Washington,

Respondent,

v.

Edwin Tom Santos,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

A person charged with possession of a controlled substance can only present two defenses to the charge. The person can argue they did not actually possess the substance, or the person can assert the defense of unwitting possession. Edwin Tom Santos attempted to present the latter defense to the jury, and the testimony presented at trial supported his defense. However, the trial court inexcusably failed to instruct the jury on Mr. Santos' defense. Additionally, the trial court permitted the State to introduce irrelevant and prejudicial information regarding the circumstances of Mr. Santos' arrest.

Mr. Santos asks this court to reverse his conviction.

B. ASSIGNMENTS OF ERROR

1. Mr. Santos was his denied his right to present a meaningful defense when the trial court refused his request to submit an unwitting possession instruction to the jury.

2. The trial court erred in admitting prejudicial and wholly irrelevant other acts evidence in violation of ER 404(b).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment right to present a defense entitles a defendant to a jury instruction reflective of his theory of the case if the evidence produced at trial supports his theory. This is true even if it is not

the defense, but rather the prosecution, that presents evidence supporting the defendant's theory. Mr. Santos' theory of the case was that he possessed no knowledge of the contents of the residue inside of his pipe. He attempted to submit an unwitting possession instruction to the jury. The evidence supporting his theory of unwitting possession came from a forensic scientist, who testified that she could not determine the contents of the residue inside the pipe until she scanned the contents of the residue into two machines. The trial court refused to give the instruction. Can a trial court correctly fail to give an unwitting possession instruction when the evidence presented at trial substantiates the defendant's theory of the case?

2. The rules of evidence only permit the introduction of relevant evidence. Even where evidence is relevant, the evidence must be excluded if its probative value is outweighed by the danger of unfair prejudice. This is especially true when evidence of bad acts is admitted under ER 404(b), which requires the trial court to weigh the probative value of the evidence versus the danger of unfair prejudice on the record. Here, the trial court permitted the State to enter evidence regarding the circumstances of Mr. Santos' arrest under the *res gestae* exception. Mr. Santos' arrest stemmed from his association with a stolen car, but Mr. Santos was never charged with possessing a stolen vehicle. The trial court failed to make the

required weighing of the evidence on the record. Are the circumstances of Mr. Santos' arrest relevant to the crime of possession of a controlled substance, and if so, does the prejudicial nature of Mr. Santos' association with the stolen vehicle outweigh its probative value?

D. STATEMENT OF THE CASE

On April 14, 2016, the police seized Edwin Tom Santos pursuant to a *Terry* stop. RPI¹ 19, 43, RPII 183, 187; CP 97-99. During the stop, Mr. Santos revealed his name, and the police discovered Mr. Santos had a warrant out for his arrest. RPII 11. The police searched Mr. Santos incident to arrest and discovered a pipe in his pocket. RPI 25, RPII 11, 187. The police sent the pipe to Donna Wilson, a forensic scientist, for analysis. RPII 169, 172.

Ms. Wilson could not determine the substance inside the pipe merely by observation and could only tell that the pipe was a "smoking devise with residue adhering to its inner surface." RPII 177. To determine what was inside the pipe, Ms. Wilson scraped the residue of the pipe with a scalpel to produce a powder and submitted the powder to a chromatography-mass spectrometry and infrared spectroscopy machine. RPII 177, 179. Both machines are highly sensitive and are therefore capable of detecting trace amounts of substances. RPII 178. The machines

¹ RPI refers to the proceedings that occurred on June 17, 2016, and RPII refers to the proceedings that occurred between July 25, 2016 and July 27, 2016.

revealed that the residue inside the pipe contained methamphetamine. RPII 182. On April 19, 2016, the State charged Mr. Santos with one count of possession of a controlled substance (methamphetamine). CP 1-3.

Over Mr. Santos' objections, the court permitted the State to admit evidence of acts that occurred before the police stopped Mr. Santos. RPII 10-13, 15.²

At trial, Mr. Santos attempted to advance several theories in his defense. Primarily, he attempted to argue that his possession of methamphetamine was unwitting; however, his attempts to present this theory were rebuffed several times. RPII 167-168, 198-201. Ultimately, the court stripped Mr. Santos of all possible arguments and theories to present in his defense. RPII 210. Consequently, the jury found Mr. Santos guilty of the crime of possession of a controlled substance. CP 62.

Mr. Santos appeals. CP 81.

² The circumstances of Mr. Santos' arrest is described in detail in Part 2 of the Argument section of this brief.

E. ARGUMENT

1. Mr. Santos's sentence must be reversed because the trial court inexcusably refused to instruct instructing the jury that his possession of methamphetamine may have been unwitting.

- a. A defendant in a criminal case is entitled to have the trial court instruct upon its theory of the case if evidence exists that supports the theory.

The Sixth Amendment demands that defendants be afforded the ability to present a defense. U.S. Const. amend. XI. Therefore, a defendant in a criminal case is entitled to a jury instruction reflective of his theory of the case if the evidence produced at trial supports his theory. *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). This is true even if it is not the defense, but rather the prosecution, that presents testimony supporting the defendant's theory. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000); *State v. Ollinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005). In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret the evidence most strongly in favor of the defendant. *State v. May*, 100 Wn. App. 478, 82-83, 997 P.2d 956 (2000). Critically, the trial court must not weigh the proof because the weighing of the proof is reserved for the jury. *Ollinger*, 130 Wn. App. At 26.

To prove a defendant's unlawful possession of a controlled substance, the State must only prove two elements beyond a reasonable

doubt: the nature of the substance and the defendant's possession of the substance. *State v. George*, 146 Wn. App. 906, 914-15, 193 P.3d 693 (2008); RCW 69.50.401. Unlawful possession of a controlled substance is a strict liability crime. *George*, 146 Wn. App. at 915.

To ease the harshness of this strict liability crime, defendants charged with unlawful possession are permitted to assert the defense of unwitting possession and have the jury instructed on this defense. *Id.* Defendants need only prove unwitting possession with a preponderance of the evidence. *Id.*

A trial court errs when it refuses to instruct the jury on the defense of unwitting possession when the evidence presented at trial supports the defense's theory. *Id.*

b. Mr. Santos was entitled to an unwitting possession instruction.

Because the evidence presented at trial supported Mr. Santos' theory that his possession of methamphetamine was unwitting, the trial court critically erred when it failed to instruct the jury on Mr. Santos' defense of unwitting possession. In *George*, a police officer stopped a car for speeding. 146 Wn. App. at 912. When the officer approached the car, he smelled marijuana. *Id.* The officer searched the vehicle and found a pipe with burned marijuana in the backseat. *Id.* All three occupants of the vehicle, including the defendant, who was seated in the backseat, denied

possessing the pipe. *Id.* The police officer charged all of the occupants of the car with possession of marijuana and drug paraphernalia. *Id.* at 913.

The defendant proceeded to trial and attempted to instruct the jury that his possession of marijuana was unwitting. *Id.* The State objected, arguing insufficient evidence existed to warrant the instruction unless the defendant testified. *Id.* The defense argued the source of the evidence tending to prove his unwitting possession of marijuana was irrelevant; however, the trial court disagreed, stating it would not give the instruction unless the defendant testified. *Id.* at 914.

This court reversed because the testimony of the State's only witness, the police officer, provided a "wealth of evidence" justifying a jury instruction of unwitting possession. *Id.* at 915. The officer testified that the defendant denied knowing about either the marijuana or the pipe in the car. *Id.* The defendant did not own the car, and no fingerprint evidence linked the defendant to the pipe. *Id.* The officer also conceded it was possible that someone in the front seat placed the pipe in the backseat after he stopped the car. *Id.*

Similarly, here, the testimony of one of the State's witnesses, Ms. Wilson, provided a wealth of evidence justifying a jury instruction of unwitting possession. Ms. Wilson is a forensic scientist professionally trained to analyze and identify controlled substances. RPII 169-71.

However, she did not know what was in the pipe until she subjected the contents of the pipe to both an infrared spectroscopy and gas chromatography-mass spectrometry test. RPII 172, 177. This is because the pipe merely contained residue, and there was nothing loose inside the pipe. RPII 177. Ms. Wilson also agreed the tests she subjected the residue powder to are extremely sensitive, and conceded it does not take a lot of a substance for the machines to identify its contents. RPII 177. All of these circumstances indicate that while Mr. Santos may have possessed the pipe, he may have nevertheless possessed no knowledge of its contents.

Like the defendant in *George*, Mr. Santos attempted to give an instruction to the jury that his possession of methamphetamine was unwitting. RPII 198. The State objected, arguing no evidence existed that Mr. Santos unwittingly possessed the methamphetamine. RPII 200. Similar to the judge in *George*, the judge in this case seemingly failed to appreciate that neither Mr. Santos' testimony nor Mr. Santos' failure to introduce witnesses precluded him from instructing the jury on his theory of unwitting possession. The judge asked,

Mr. Schulz,³ what is the evidence that supports [the instruction]? Because the instruction indicates that it is your burden to prove the unwitting possession. And *since your client didn't testify*, the Court needs to know, from your perspective, *what evidence did you, the defense*, present to show unwitting possession?

³ Mr. Schulz was Mr. Santos' trial counsel.

RPII 200 (emphasis added).

The court's reasoning is contrary to the Washington Supreme Court's holding in *Fernandez-Medina*: "A trial court is not to take such a limited view of the evidence, however, but must consider *all* of the evidence that is presented at trial when it is deciding whether or not an instruction should be given." *Fernandez-Medina*, 141 Wn.2d at 456 (emphasis added). Mr. Schulz explained Ms. Wilson's testimony presented enough evidence to warrant an unwitting possession instruction. RPII 200. He also explained that requiring Mr. Santos to take the stand was unnecessary, and that it was the jury, not the judge, who must decide whether a preponderance of the evidence of unwitting possession existed. RPII 200-01.

However, these arguments failed to persuade the judge, who instead usurped the province of the jury. The judge weighed the proof and determined that a preponderance of the evidence failed to support Mr. Santos' theory of unwitting possession. RPII 201. But a jury instruction of unwitting possession is required merely when "there is *evidence* to support the theory." *George*, 146 Wn. App. at 915. While the defendant must prove with a preponderance of the evidence to the *jury* that his possession

of a drug was unwitting, this is not the same quantum of proof necessary to *instruct* the jury of the law relevant to his defense. *Id.*

c. Reversal is required.

The right to present a defense, and to have a jury instructed on a valid theory of defense, is guaranteed by the Sixth Amendment and the more protective right to a jury trial under article I, sections 21 and 22. Thus, the court's error in failing to give the jury this instruction is a constitutional error. U.S. Const. amend. XI. Additionally, "in evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or the judge the witnesses' credibility, which are exclusive functions of the jury." *May*, 100 Wn. App. at 482. Here, the judge failed to weigh the evidence most strongly in favor of Mr. Santos. Additionally, the judge erroneously weighed the proof. Because the failure to instruct is reversible error, reversal is required. *State v. Williams*, 132 Wn.2d 248, 260, 937 P.2d 1052 (1997).

2. The trial court deprived Mr. Santos of his right to a fair trial when it admitted irrelevant and prejudicial evidence of other acts.

- a. The circumstances surrounding Mr. Santos' arrest were irrelevant and prejudicial.

The circumstances of Mr. Santos' arrest were both irrelevant⁴ and prejudicial; therefore, the trial court critically erred when it failed to grant Mr. Santos' motion in limine. The circumstances leading to Mr. Santos' arrest were as follows: a police officer noticed three men pulled over to the side of the road. RPII 184. The officer asked the men if they needed any help, and one of the men replied that he was just having car trouble but that a friend was coming to help. RPII 184. After leaving the scene, the police officer ran the license plate of the car and discovered it was stolen. RPII 184. The police officer returned to the place where he found the men, but the men were no longer there. RPII 184. Poulsbo police went searching for the three men, and ultimately seized Mr. Santos. RPII 185-86. A police officer ran Mr. Santos' name in a database and discovered he had an active warrant. RPII 187. Upon a search incident to arrest, the police found the pipe. RPII 187. However, Mr. Santos was charged only

⁴ Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. In other words, to be relevant, the evidence must "1) tend to prove or disprove the existence of a fact, and 2) that fact must be of consequence to the outcome of the case." *Davidson v. Municipality of Metro Seattle*, 43 Wn. App. 569, 573, 719 P.2d 569 (1986).

with possession of a controlled substance. RPII 11-12. The prosecution did not pursue charges against Mr. Santos relating to the stolen vehicle. RPII 11-12.

Mr. Santos correctly argued that the circumstances of his arrest were both irrelevant and prejudicial, and therefore, the State should be prevented from asking about them. RPII 12. The evidence was irrelevant because the mere fact that Mr. Santos was in a stolen car before his arrest does not make it any more likely that he possessed methamphetamine. RPII 12. And the evidence was prejudicial because it cast Mr. Santos in a criminal light. RPII 12. Instead, counsel for Mr. Santos proposed that the jury merely hear that the police stopped Mr. Santos, discovered he had an arrest warrant, placed him under arrest, and found the pipe in a search incident to arrest. RPII 13.

However, the State argued the evidence of the stolen car was “important to complete the story” and insisted the evidence was admissible under the *res gestae* exception. RPII 13-14. The State also argued the defense could sanitize any prejudicial effect regarding the circumstances of the offense by asking the officer whether Mr. Santos was arrested for possessing a stolen vehicle. RPII 15. The trial court agreed with the State’s arguments and refused to grant the motion in limine. RPII 15-16.

From the outset, the State seized upon its ability to mention the circumstances of Mr. Santos' arrest, stating in opening argument,

the defendant really should have left his meth at home if he was going to be driving around in a stolen vehicle with an active warrant out for his arrest.

RPII 164.

“Counsel may not use the opening statement to get before the jury prejudicial matters or to discuss issues not relevant to the guilt or innocence of the accused.”⁵ Here, the State's presentation of both prejudicial and immaterial information within just a minute of Mr. Santos' trial undoubtedly influenced the jury.

b. The circumstances surrounding Mr. Santos' arrest fail to meet the requirements of the res gestae exception, and the trial court failed to weigh the probative value versus the prejudicial effect of the evidence.

The trial court admitted the evidence surrounding Mr. Santos' arrest under the res gestae exception, but both the court's analysis and the evidence failed to meet the requirements of the res gestae test. ER 404(b) serves as a categorical bar to the admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character. *State v. Gresham*, 173 Wn.2d 405, 420,

⁵ Royce Ferguson, Jr., Washington Practice Series: Criminal Practice & Procedures § 4202.

269 P.3d 207 (2012). However, under ER 404(b), crimes or bad acts other than the acts for which the defendant is charged are admissible to establish the immediate time and place of the charged act's occurrence and therefore complete the story of a crime. *State v. Brown*, 132 Wn.2d 529, 570-71, 940 P.2d 546 (1997). "If another offense or bad act constitutes a 'link in the chain' of an unbroken sequence of events surrounding the charged offense, evidence of that offense or misconduct is admissible to complete the picture for the jury." *Id.* at 571.

Nevertheless, before a trial court may admit evidence of other misconduct under the res gestae exception, it must "(1) find by a preponderance of the evidence that the misconduct occurred; (2) determine whether the evidence is relevant to a material issue; (3) state on the record the purpose for which the evidence is being introduced; and (4) balance the probative value of the evidence against the danger of unfair prejudice." *State v. Trickler*, 106 Wn. App. 727, 732, 25 P.3d 445 (2001); *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014). The balancing test must be conducted on the record. *Trickler*, 106 Wn. App. at 733. Moreover, in doubtful cases, the evidence should be excluded. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Here, the record fails to indicate that the trial court either underwent the required balancing test prior to admitting the evidence

regarding the stolen car or established the relevance of the stolen car to Mr. Santos' crime of possession. After hearing arguments from the defense and the State, the trial court merely stated,

[w]ell, I am going to allow it. It is res gestae. It completes the chain of events. There has to be a reason for the officer's contact with the defendant, and they are certainly able to confirm through your cross-examination that he was not charged with a stolen vehicle. And if you wish, the Court would consider a limiting instruction as well.

RPII 15-16.

While the trial court stated its reason for introducing the evidence, it failed to explain why the circumstances surrounding the officer's initial contact were relevant to the only material issue in this case: Mr. Santos' alleged possession of methamphetamine. The court also failed to balance the probative value of the evidence against the danger of unfair prejudice on the record.

c. Reversal is required.

When a judge erroneously admits evidence, a new trial is necessary "where there is a risk of prejudice and 'no way to know what value the jury placed upon the improperly admitted evidence.'" *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010). The trial court's ruling in favor of admitting prior bad acts under the res gestae exception of 404(b) was in error. The evidence relating to the stolen car does not make it any more likely that Mr. Santos either did or did not

possess the methamphetamine. The evidence regarding the circumstances surrounding Mr. Santos' arrest also unduly prejudiced him because it casted him in a criminal light. The trial court failed to balance the probative value of the evidence against the danger of unfair prejudice. Moreover, the State used the circumstances surrounding Mr. Santos' arrest to depict him in a prejudicial light.

Reversal is required.

F. Conclusion

The trial court failed to give the jury an unwitting possession instruction. It also failed to exclude and weigh irrelevant and prejudicial evidence. For these reasons, Mr. Santos asks this court to reverse his conviction.

DATED this 3rd day of March, 2017.

Respectfully submitted,

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