

No. 49561-9-II

IN THE 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 REPLY BRIEF

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A. ARGUMENT IN REPLY

1. Mr. Santos' conviction must be reversed because the trial court inexcusably refused to instruct the jury on Mr. Santos' theory of defense despite the evidence supporting his theory.

The evidence presented at trial supported Mr. Santos' theory that his possession of methamphetamine was unwitting. The State charged Mr. Santos with possession of methamphetamine after recovering a pipe with methamphetamine residue in his pocket after a search incident to arrest. RPI 25, RPII 11, 187; CP 1-3. At trial, the State presented the testimony of Ms. Wilson, a forensic scientist trained to analyze and identify controlled substances. RPII 169-71. But even Ms. Wilson could not identify the contents of the pipe merely through a visual inspection. RPII 177. To determine the nature of the residue inside the pipe, Ms. Wilson had to scrape the residue off of the pipe and submit it to a chromatography-mass spectrometry and infrared spectroscopy machine. RPII 177, 79.

Ms. Wilson's inability to determine the contents of the residue with the naked eye supported Mr. Santos' theory of defense because if an expert cannot identify the contents of the residue through eyesight alone, the evidence suggested Mr. Santos could not identify the contents of the residue either. RPII 198. Thus, while Mr. Santos possessed the pipe, he may have possessed no knowledge of the nature of the residue inside his

pipe. RPII 198. Therefore, the court was obligated to give the jury the instruction of unwitting possession.

Nevertheless, in response to Mr. Santos' arguments, the State 1) mischaracterizes Mr. Santos' argument and likens the argument to the "measurable amount" defense; 2) attempts to analogize the circumstances in Mr. Santos' case to the circumstances in *State v. Buford*; and 3) and misstates the quantum of evidence necessary to instruct the jury on Mr. Santos' theory of defense. Resp. Br. at 4-9. The State's assertions are erroneous.

Mr. Santos never argued the amount he possessed was so small it did not merit a conviction for possession of methamphetamine; rather, Mr. Santos argued he was entitled to an unwitting possession instruction because Ms. Wilson's testimony demonstrated that the nature of the residue on Mr. Santos' pipe was not visible to the naked eye. Br. of Appellant at 6-9; RPII 198. Therefore, it was entirely reasonable for the jury to conclude that Mr. Santos' possession of methamphetamine was unwitting. Additionally, to support its mischaracterization of Mr. Santos' argument, the State cites to *State v. Bennet*, an unpublished case from 2012.¹ Resp. Br. at 5. This is contrary to GR 14.1,² and this court should

¹ While the Court of Appeals published *Bennet* in part, the portion the State relies on its brief is unpublished.

² GR 14.1 (a), (c):

decline to consider the case. *See Condon v. Condon*, 177 Wn.2d 150, 298 P.3d 86 (2013)(declining to consider cases cited in violation of GR 14.1).

Additionally, *Buford* does not support the State’s position that here, Mr. Santos was not entitled to an unwitting possession instruction. In *Buford*, the only evidence tending to demonstrate that the defendant’s possession was cocaine was unwitting was that the amount seized was small and had to be scraped off a crack pipe. 93 Wn. App. 149, 153, 967 P.2d 548 (1998). Division One held, “this evidence, without more, does not support an inference that [the defendant] unwittingly possessed the cocaine.” *Id.*

In contrast, here, Ms. Wilson’s testimony demonstrated that the nature of the residue in Mr. Santos’ pipe was undetectable to the naked eye. RPII 177, 198. Therefore, the State’s reliance on this case is misplaced.

(a) Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports. Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

(c) Citation of Unpublished Opinions in Subsequent Opinions. Washington appellate courts should not, unless necessary for a reasoned decision, cite or discuss unpublished opinions in their opinions.

Mr. Santos is entitled the reversal of his conviction because the trial court erroneously failed to instruct the jury of his theory of defense despite Ms. Wilson's testimony, which supported his theory of unwitting possession. While the State seems to suggest that a defendant must, with a preponderance of the evidence, demonstrate that his possession of a narcotic may have been unwitting, "a defendant in a criminal case is entitled to have the trial court instruct upon its theory of the case if there is evidence to support the theory." *State v. George*, 146 Wn. App. 906, 915, 193 P.3d 693 (2008)(citing *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986), accord *State v. Thereoff*, 95 Wn.2d 385, 389, 622 P.2d 495 (1993)). In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, like unwitting possession, the court must interpret the evidence the evidence most strongly in favor of the defendant. *State v. May*, 100 Wn. App. 478, 82-83, 997 P.2d 956 (2000).

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.

The circumstances of Mr. Santos' arrest were both irrelevant and prejudicial; therefore, the trial court committed reversible error when it

refused to grant Mr. Santos' motion in limine. The police seized Mr. Santos pursuant to a *Terry* stop when they discovered the pipe containing methamphetamine. RPI 19, 43, RPII 183, 187; CP 97-99. The *Terry* stop occurred due to Mr. Santos' proximity to a stolen vehicle that he did not steal, and the State never charged Mr. Santos with stealing the vehicle. RPII 11-12. Rather than have the jury hear about the irrelevant and prejudicial circumstances surrounding the events preceding his arrest,³ Mr. Santos proposed that the jury merely hear that the police stopped him, discovered he had an arrest warrant, placed him under arrest, and discovered the pipe in a search incident to arrest. RPII 13. But the State insisted the evidence concerning the stolen car was admissible under the *res gestae* exception, and the trial court erroneously agreed. RPII 13-16.

The State denied Mr. Santos' motion without performing the required ER 404(b) analysis on the record. Before admitting evidence under ER 404(b), courts 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

³ Discussed fully on pages 11-12 of the appellant's opening brief.

evidence against the danger of unfair prejudice.” *State v. Trickler*, 106 Wn. App. 727, 732, 25 P.3d 445 (2001); accord *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014); *State v. Foxhoven*, 161 Wn.2d 168, 163 P.3d 786 (2007); *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). This analysis must be conducted on the record. *Gunderson*, 181 Wn.2d at 923 (quoting *State v. Foxhoven*, 162 Wn.2d 168, 175, 163 P.3d 786 (2007)). The trial court only underwent part three of the four-pronged analysis on the record. RPII 15-16.

The State seemingly attempts to distract from the trial court’s failure to undergo the required analysis on the record, arguing 1) the circumstances in this case are analogous to the circumstances in *State v. Lane*; and 2) the exclusion of the evidence of the stolen car may have actually prejudiced the State. Resp. Br. at 9-13. These arguments are untenable.

Lane is inapposite to this case because the events preceding Mr. Santos’ arrest are irrelevant to his crime of possession of methamphetamine. In *Lane*, the defendants committed a string of crimes within a ten day period that culminated in the murder of a woman with a gun shot at point blank range. 125 Wn.2d 825, 828, 889 P.2d 929 (1995). Over the defendants’ objections, the trial court allowed the prosecution to introduce evidence regarding the other crimes the three defendants

committed during the crime spree. *Id.* at 833. The Washington Supreme Court affirmed the ruling of the trial court because the trial court correctly found the evidence was relevant due to 1) its proximity in time to the murder; *and* 2) its tendency to show that all three defendants were involved in the murder. *Id.* at 835. This evidence was highly relevant because the evidence suggested that only one trigger person existed, and to retain three murder convictions, the prosecution had to demonstrate the three defendants acted in unison. *Id.*

Conversely, here, the evidence regarding the stolen vehicle had no relevance to Mr. Santos' possession of methamphetamine. Evidence is relevant only 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 (emphasis added). 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). Mr. Santos' proximity to the stolen vehicle did not make it more likely that he possessed methamphetamine, which was the sole issue the jury had to determine.

The State also ignores that it introduced the evidence of Mr. Santos' association with the stolen vehicle in a highly prejudicial manner. The first few sentences the State uttered to the jury during trial were,

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.

Finally, the State's assertion that the exclusion of the evidence concerning the stolen car may have prejudiced the State is misguided. First, this assertion is purely speculative. Second, this assertion shifts the burden from the State to Mr. Santos, but "the burden of demonstrating a proper purpose [for admitting evidence under ER 404(b)] is on the proponent of the evidence." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

B. CONCLUSION

The trial court failed to instruct the jury on Mr. Santos' theory of defense and admitted irrelevant and prejudicial evidence. For these reasons and the reasons stated in his opening brief, Mr. Santos asks this court to reverse his conviction.

DATED this 5th day of June, 2017.

Respectfully submitted,

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Appellant.)	

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