

**THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON
Division II**

CASE # 49982-7

DARIN HENRY JENSEN,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This action arises out of the conviction of Mr. Jensen for unlawful possession of a controlled substance. As set forth below, the Trial Court erred by excluding pertinent character evidence related to Mr. Jensen's unwitting possession defense.

II. ASSIGNMENT OF ERROR

1. Did the Trial Court err by excluding pertinent character evidence related to Mr. Jensen's unwitting possession defense?

III. STATEMENT OF THE CASE

A. Background.

On January 29, 2016 at approximately 5:30 PM, Darin Jensen was riding his bicycle on the 100 block of North Levee Road in the City of Puyallup, Washington. VRP 9 & VRP 173¹. Officer David Temple was on patrol and observed Mr. Jensen riding his bicycle without a helmet and without lighting equipment. VRP 9. Officer Temple activated his lights and approached Mr. Jensen because a helmet and lighting equipment is required by Puyallup Municipal Code. VRP 9. Mr. Jensen was ultimately taken into custody as a result of outstanding warrants. VRP 10. Officer

¹ Verbatim Report of the Proceeding, ("VRP").

Temple searched Mr. Jensen and alleges that he found a plastic baggie in Mr. Jensen's pants pocket containing a crystal-like substance which was later identified as methamphetamine. VRP 10.

At the time of his arrest, Mr. Jensen was staying at the New Hope homeless shelter where drugs are present. VRP 19. Mr. Jensen alleged that the plastic baggie found by Officer Temple was not found on his person, but rather in his backpack. VRP 19 & VRP 181. Mr. Jensen had just left the New Hope shelter prior to his arrest. VRP 174. On the day of his arrest, a local news station was doing a story on the homeless, and the shelter was packed with people. VRP 19 & VRP 183. Mr. Jensen left his backpack unattended while he received a tetanus shot and participated in a poll for the homeless. VRP 19 & VRP 175; 182. Mr. Jensen believes the baggie found by Officer Temple was placed in his backpack when it was out of his possession at the homeless shelter. VRP. 19-20.

Mr. Jensen had also received clothes from the shelter on the day of his arrest. VRP 20. Mr. Jensen did not check the pockets of the pants prior to putting them on and wearing them and was therefore unaware of the contents of his pockets on the day of the arrest. VRP. 20.

Mr. Jensen was arrested and charged with unlawful possession of a controlled substance. CP 22-23². A trial commenced on January 4, 2017 which led to conviction of one count of unlawful possession of a controlled substance and two counts of bail jumping. CP 93.

B. Procedural History.

During the trial, Mr. Jensen attempted to present an unwitting possession defense to the charge of possession of a controlled substance. In support of his defense, Mr. Jensen called two witnesses, Gina Karlsson, a private investigator assigned to his case, and Cheryl Borden, the executive director of New Hope, which is the homeless shelter where he stayed during the relevant time. VRP 134-147 & VRP 148-172. Ms. Karlsson testified that she visited New Hope and took pictures of the policies requiring backpacks to be placed in a common storage area while visiting the facility. VRP 137. Ms. Borden also testified to the storage policy as well. VRP 165-166. This testimony was in support of Mr. Jensen's defense that a controlled substance was placed in his backpack by a third-party while outside of his control when visiting New Hope.

Ms. Borden testified she knew Mr. Jensen from his regular visits to the shelter during the relevant time period. VRP 149. The State objected

² Clerk's Papers, ("CP").

to inquiry into Ms. Borden's knowledge of Mr. Jensen's behavior and conduct during his time at the shelter. VRP 149. Counsel for Mr. Jensen argued and presented case law showing Ms. Borden's personal knowledge of Mr. Jensen's reputation as a non-drug user was relevant to his character and defense. VRP 150-151; 153-156. The State argued such testimony was inadmissible because it was not directly related to the elements of the charge and because it would make all of Mr. Jensen's prior bad acts relevant. VRP 152-153³. The trial court sustained the State's objection. VRP 156-158.

Counsel for Mr. Jensen attempted to elicit testimony from Ms. Borden as to Mr. Jensen's reputation as a drug user, and the State objected once again. VRP 160. The trial court sustained the objection. VRP 160. The trial court also sustained the State's objection as to whether Mr. Jensen had ever been dismissed from New Hope for violating their no drug policy. VRP 161. Ultimately, Mr. Jensen's counsel was not able to elicit testimony from Ms. Borden regarding Mr. Jensen's character and reputation of sobriety as to drugs. Mr. Jensen was ultimately convicted of one count of unlawful possession of a controlled substance and two counts of bail jumping. CP 93.

³ Mr. Jensen had two prior alcohol related charges in 1993 and 1999.

IV. ARGUMENT

A. Standard of Review

A trial court's decision to admit or exclude evidence is reviewed by the Appellate Court for abuse of discretion. City of Kennewick v. Day, 142 Wash.2d 1, 5, 11 P.3d 304 (2000), citing State v. Bourgeois, 133 Wash.2d 389, 399, 945 P.2d 1120 (1997). A trial court abuses its discretion when the discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Day, 142 Wash.2d at 5, quoting State v. McDonald, 138 Wash.2d 680, 696, 981 P.2d 443 (1999).

B. Admissibility of Character Evidence

"The admissibility of character evidence offered by a criminal defendant, as to his or her own character, is governed by ER 404(a)(1)." Day, 142 Wash.2d at 5. The relevant portion of ER 404(a)(1) states:

(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.

ER 404(a)(1) (emphasis added). The term "pertinent" used in ER 404(a)(1) is synonymous with "relevant." Day, 142 Wash.2d at 6. "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 Wash.2d 490, 495-96, 902 P.2d 1236 (1995). The threshold for relevance is extremely low under ER 401. Day, 142 Wash.2d at 8. Character evidence is admissible if it supports any defense against the charged crime. Eakins, 127 Wash.2d at 499. See also Day, 142 Wash.2d at 10. The only limitation on the admission of character evidence stated in ER 404(a)(1) is that it be pertinent (relevant). Day, 142 Wash.2d at 10, citing Eakins, 127 Wash.2d at 500.

Washington permits the unwitting possession defense to a charge of unlawful possession of a controlled substance. State v. Cleppe, 96 Wash.2d 373, 381, 635 P.2d 435 (1981). This defense is supported by showing one of the following: (1) that the defendant did not know he was in possession of the controlled substance, or (2) that the defendant did not know the nature of the substance he possessed. Day, 142 Wash.2d at 11, citing State v. Staley, 123 Wash.2d 794, 799, 872 P.2d 502 (1994). The defendant bears the burden of proving the defense by a preponderance of the evidence. Day, 142 Wash.2d at 11 (citations omitted). When an unwitting defense is raised as to the defendant being unaware of his possession of a substance, the defendant’s intent to possess the controlled substance is relevant. Day, 142 Wash.2d at 11, citing State v. Hall, 41 Wash.2d 446, 451, 249 P.2d 769 (1952). As the Supreme Court stated in Day:

If a defendant claims to have been unaware of the presence of a controlled substance at all, the defendant's nonuse of drugs lends support to this claim. A person who does not use drugs (by reputation) is less likely to possess drugs. In this case, Day asserted the defense of unwitting possession, claiming he was unaware that the marijuana and marijuana pipe were inside his vehicle. His knowledge was thus at issue, and his reputation for sobriety from drugs and alcohol was a "pertinent" trait of character under ER 404(a)(1).

Day, 142 Wash.2d at 12.

In Day, the defendant raised the defense of unwitting possession of a controlled substance. Day presented evidence he was only in possession of his vehicle for a couple of days after having it repaired in an auto body shop for approximately four months. Day, 142 Wash.2d at 4. Day presented testimony from the owner of the auto body shop, Don Simmonson, that he had terminated an employee for suspected drug use during the time that Day's vehicle was in his shop. Id. The trial court prevented Simmonson from testifying as to his knowledge of Day's sobriety as to both alcohol and drugs. Id. Day appealed the trial court's decision to exclude the character testimony regarding sobriety. Id. The Supreme Court held Day's reputation for sobriety was relevant and important to his unwitting possession defense, reversed the trial court's decision, and remanded the case for a new trial. Id. at 14-15.

In making its decision, the Supreme Court noted that the trial court failed to recognize that sobriety from drugs is a character trait relevant to the unwitting possession defense raised by Day. Day, 142 Wash.2d at 14. Similar to Day, the trial court in this matter failed to recognize that Jensen's sobriety was a character trait relevant to his unwitting possession defense. VRP 149-158; 160-161.

At trial, Jensen attempted to elicit character/reputation testimony as to his sobriety from drugs from Cheryl Borden, the executive director of New Hope homeless shelter Jensen frequented, and the trial court sustained the objection to her testimony. VRP 149 & 160-161. Mr. Jensen argued to the trial court that Ms. Borden's testimony was relevant and necessary to establish that he was not a drug user. VRP 152. The State objected and argued Mr. Jensen was presenting Ms. Borden to testify to his reputation for not using controlled substances. VRP 152. This is the exact testimony the trial court in Day indicated was important to the unwitting possession defense. Day, 142 Wash.2d at 14-15. The trial court sustained the State's objection. VRP 157-158.

By preventing Mr. Jensen from eliciting the reputation testimony as to his drug related sobriety from Ms. Borden, the trial court excluded pertinent (relevant) evidence as to Mr. Jensen's character. ER 404(a)(1). Mr. Jensen's sobriety from drugs is pertinent to the charge of possession of

a controlled substance because he raised the unwitting possession defense. See Day, 142 Wash.2d at 15.

Mr. Jensen presented evidence that the baggie of methamphetamine found by the arresting officer was found in his backpack and not on his person. VRP 19 & VRP 181. Mr. Jensen presented evidence of the policy of the New Hope homeless shelter requiring backpacks be left in a common area while visiting the facility. VRP 137 & VRP 165-166. Jensen presented evidence that on the day of the arrest he visited the New Hope homeless shelter and placed his backpack in the common area. VRP 19, 175, 182. Jensen also presented evidence that New Hope was abnormally full on the day of the arrest as a result of a story being done by a local television station. VRP 19 & VRP 183. Jensen's unwitting possession defense was that he was unaware that he was in possession of the controlled substance because it was placed in his backpack by a third-party while the backpack was out of his control in the common area of the homeless shelter. VRP 19, 175, 181-182.

In Day, the Supreme Court also found the trial court's exclusion of character evidence to be based upon untenable grounds because the trial court failed to consider the elements of Day's unwitting possession defense, and by doing so based its decision to exclude evidence on an incomplete analysis. Day, 142 Wash.2d at 14-15. Similar to Day, the trial court in this

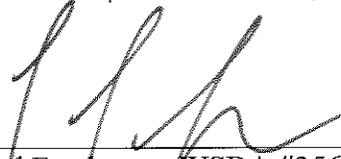
matter excluded Jensen's character evidence as to sobriety using incomplete analysis. VRP 149-158. In sustaining the State's objection to character testimony regarding sobriety, the trial court did not analyze the elements of Jensen's unwitting possession defense. VRP 149-158. An analysis of these basic legal issues was necessary to the effective determination of Jensen's evidentiary request. Day, 142 Wash.2d at 14. The trial court abused its discretion and its decision to exclude relevant evidence was based upon untenable grounds because the trial court failed to perform the necessary analysis of the law. Id., citing Fraser v. Beutel, 56 Wash. App. 725, 734, 785 P.2d 470 (1990); Reese v. Stroh, 128 Wash.2d 300, 310, 907 P.2d 282 (1995).

V. CONCLUSION

The trial court abused its discretion by excluding pertinent character evidence related to Mr. Jensen's unwitting possession defense. The decision of the trial court was made without consideration of the elements of Mr. Jensen's defense and without consideration that sobriety is a character trait that makes the intent to possess an illegal substance less likely to be true. Therefore, the ruling for the trial court should be reversed and this matter should be remanded for a new trial.

RESPECTFULLY SUBMITTED this 28th day of July, 2017.

ROBERTS | FREEBOURN, PLLC

A handwritten signature in black ink, appearing to be 'C. Freebourn', written over a horizontal line.

Chad Freebourn, WSBA #35624

Christian R. Cox, WSBA #29392

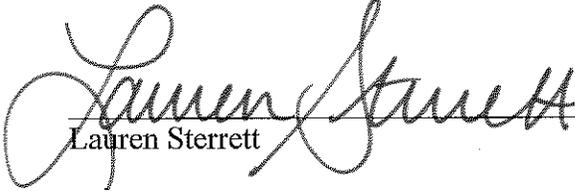
Attorneys for Appellant

CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on the 28th day of July, 2017, a true and correct copy of the foregoing document was served by the method indicated below and addressed to the following:

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DATED this 28th day of July, 2017 at Spokane, Washington.



Lauren Sterrett

ROBERTS FREEBOURN

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