

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

CASE # 49982-7

STATE OF WASHINGTON,

Respondent,

v.

DARIN HENRY JENSEN,

Appellant.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

In its response, the State argues the trial court did not err by sustaining the objections to each time Appellant Darin Jensen (“Jensen”) attempted to elicit character testimony in support of his unwitting defense. The State argues the trial court properly sustained objection to character testimony because proper foundation was not laid, and because Jensen attempted to elicit testimony regarding a specific act and not reputation within the community. Finally, the State argues that if the trial court did in fact commit error, the error was harmless and had no effect on the outcome of the trial. Because Washington recognizes an unwitting possession defense, character evidence related to Jensen’s reputation as a non-drug user is relevant and should have been allowed to be presented at trial.

The trial court was aware of Jensen’s intent to put on the defense unwitting possession defense. The trial court shut Jensen’s unwitting possession defense down by sustaining objections seeking to elicit relevant character evidence from a witness with knowledge of Jensen’s reputation of sobriety within the community. The trial court did not recognize the elements of Jensen’s unwitting possession defense, and did not analyze the basic legal issues necessary to determine Jensen’s evidentiary request regarding character for sobriety within the community. The trial court failed to analyze the elements, despite Jensen providing the trial court with

the relevant case law and making the trial court aware of the intent to put in the unwitting possession defense.

The trial court abused its discretion by preventing Jensen from putting on relevant character evidence in support of his unwitting possession defense, and the trial court's error in this regard was not harmless. The outcome of the trial could have been materially affected had Jensen's character evidence for sobriety been admitted by the trial court. The trial court's decision to exclude relevant character evidence should be reversed, and this matter should be remanded for a new trial.

II. ARGUMENT

A. The Trial Court Committed Err by Sustaining Objections and Preventing Jensen from Presenting an Unwitting Possession Defense.

The State's response brief ignores Washington's recognition of the unwitting possession defense makes Jensen's reputation within the community for sobriety relevant character evidence. City of Kennewick v. Day, 142 Wn.2d 1, 12, 11 P.3d 304 (2000). As the Supreme Court stated:

Similarly, 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 character under ER 404(a)(1).

Id. The record shows Jensen attempted to raise an unwitting possession defense, provided the trial court with the relevant evidence rules and case law, and was prevented from eliciting relevant testimony showing his sobriety within the community. RP 149-161.

Cheryl Borden, the executive director of New Hope Resource Center in Puyallup (“New Hope”), was called to testify on behalf of Mr. Jensen. RP 148. New Hope was a daytime shelter for homeless individuals that provided shelter from the weather, a safe place to resolve their homelessness, assist with finding stable housing, and provide assistance with seeking employment. RP 148-149. Because Jensen was homeless, he frequented New Hope. RP 149. New Hope was Jensen’s community.

Ms. Borden testified that she knew Jensen well, and that she spoke with Jensen on a regular basis. RP 149. The record reflects that Ms. Borden had the requisite foundation to testify regarding Jensen’s reputation within the homeless community. RP 149; 159-160. However, when Jensen sought to elicit testimony regarding his reputation for sobriety within the homeless community the trial court sustained objections preventing this testimony from being presented to the jury. RP 149; 159-160.

Jensen argued that pursuant to Day, he was allowed to present character evidence showing his reputation for sobriety to support his

unwitting possession defense. RP 150-158. The State incorrectly argued that Jensen's character evidence needed to be directly related to one of the elements of the crime. RP 152; Day, 142 Wn.2d at 10. The State argued Ms. Borden should not be allowed to testify to Jensen's reputation because, "[w]hat defense is really wanting to initiate is he has a reputation for not using controlled substances at by her." RP 152. The trial court agreed with the State, and in doing so misinterpreted the ruling in Day. RP 155. The trial court stated:

I'm a little bit confused of what you're doing here, because under the rules as I read it, under 404 – actually, what you're offering under 404(a)(1), character of accused.

And if you look at the Day case, it's talking about reputation, not someone's personal interaction with a person, but their reputation, general reputation in the quote, "community."

And that was not the question. The question was what was her knowledge of his use of drugs or lack of drugs, was where you were going. That's not actually the question asked either. It does seem to be different than what the rule provides.

Reputation amongst the community, if you look at 405(a) [As read]: All cases in which evidence of character or a trait of character of a person is admissible, proof must be made by testimony as to reputation.

RP 155.

What the State and the trial court fail to recognize is that Jensen's "community" is the homeless community. New Hope is the "community" for homeless individuals. As the executive director of the New Hope, there

is no better person to offer reputation testimony on behalf of Jensen within his community. RP 148. Jensen laid the foundation that Ms. Borden knew him and had the opportunity to observe him within his community. RP 159-160. However, when Jensen tried to elicit testimony regarding his reputation for sobriety within his community, the State's objections were sustained preventing the relevant character testimony from being presented to the jury. RP 160-161.

In Day, the unwitting possession defense stemmed from Day's vehicle being repaired at an auto repair shop and he claimed the drug paraphernalia was unknowing placed in his vehicle by an employee of the shop. Day, 142 Wn.2d at 3-4. Don Simmons, owner of the auto repair shop where Day's vehicle was repaired, was called to testify on Day's behalf. Id. at 4. Mr. Simmons testified his employee who worked on Day's vehicle was terminated for suspected drug use, and testified of prior incident where a customer had complained of finding drug paraphernalia in his vehicle. Id. When Day attempted to question Mr. Simmons as to Day's reputation for sobriety within the community, the State's objection was sustained. The trial court wrongly ruled this character evidence would be excluded because it went to past conduct, and not admissible to show present conduct. Id.

Similar to Day, Jensen's unwitting possession defense is based on drugs being placed without his knowledge while his clothes and backpack

were not in his possession at New Hope. RP 141-142; 163-164. Similar to Day, who sought character evidence from the owner of the auto repair shop, Jensen sought to elicit character testimony from Ms. Borden, who was the executive director of New Hope. In Day, the court found character evidence regarding sobriety relevant to Day's unwitting possession defense, and remanded the case for a new trial because the exclusion of this evidence materially affected the outcome of the trial. Day, 142 Wn.2d at 15.

Character evidence is relevant and admissible when offered to support the existence of a defense. Day, 142 Wn.2d at 10, citing Wage v. State, 803 S.W.2d 806, 808 (Tex. App. 1991)(concluding that the trial court erred in excluding evidence of defendant's nonuse of drugs to support defense that the drugs were planted). Under ER 404(a)(1) the only limitation on admissibility of character evidence is that it be pertinent (relevant). The unwitting defense to possession was adopted by Washington to "*ameliorate the harshness of the almost strict liability criminal liability our law imposes for unauthorized possession of a controlled substance.*" Day, 142 Wn.2d at 11. If Jensen's defense were that he was unaware the drugs were in his possession, then character evidence regarding his sobriety is relevant to his unwitting possession defense. Id. at 14-15.

Similar to Day, there is no record the trial court analyzed the elements of Jensen's unwitting possession defense. Id. at 14-15. An analysis of the basic legal issues was necessary to effectively determine Jensen's request to elicit character testimony. Id. "*Since the trial court made its determination based on incomplete analysis of the law, its decision is based on untenable grounds and constituted abuse of discretion.*" Id. at 15, citing Fraser v. Beutel, 56 Wn. App. 725, 734, 785 P.2d 470 (1990)(discretion abused where reason for exclusion of evidence contrary to law), *quoted in* Reese v. Stroh, 128 Wn.2d 300, 310, 907 P.2d 282 (1995).

The trial court abused its discretion when it conducted an incomplete analysis before determining Jensen's character evidence was inadmissible at trial. The trial court's abuse of discretion in this regard was not harmless, there was a reasonable probability "*the outcome of the trial could have been materially affect had the evidence been admitted...*" State v. Eakins, 127 Wn.2d 490, 503, 902 P.2d 1236 (1995), citing, State v. Kelly, 102 Wn.2d 188, 193, 685 P.2d 564 (1984). As such, the trial court's ruling to exclude relevant character testimony regarding Jensen's reputation for sobriety should be reversed and this matter should be remanded for a new trial.

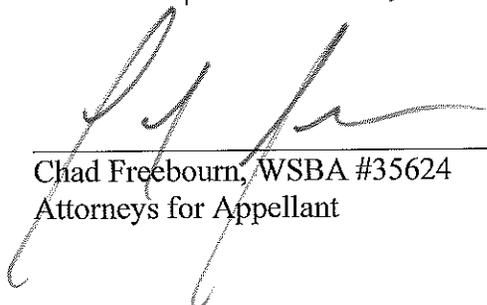
V. CONCLUSION

The trial court abused its discretion by excluding pertinent character evidence related to Mr. Jensen's unwitting possession defense. Therefore,

the ruling for the trial court should be reversed and this matter should be remanded for a new trial.

RESPECTFULLY SUBMITTED this 26th day of October, 2017.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on the 26th day of October, 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 26th day of October, 2017 at Spokane, Washington.


Lauren Sterrett

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