

NO. 50341-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ANTHONY LUJAN,

Appellant.

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

The Honorable John C. Skinder, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in instructing the jury on constructive possession.

Issue pertaining to assignment of error

Appellant was charged with unlawful possession of a controlled substance based on items found in the jacket he was wearing. Although there was no evidence from which a theory of constructive possession could be presented, the court instructed the jury on that theory over defense objection. Where confusion caused by the court's instruction likely affected the verdict, must appellant's convictions be reversed?

B. STATEMENT OF THE CASE

1. Procedural History

The Thurston County Prosecuting Attorney charged appellant Anthony Lujan with unlawful possession of methamphetamine and unlawful possession of heroin. CP 56; RCW 69.50.4013(1). The case proceeded to jury trial before the Honorable John Skinder, and the jury returned guilty verdicts. CP 57, 74. The court found the offenses constituted the same criminal conduct and imposed a standard range sentence of 10 months. CP 90-92. Lujan filed this timely appeal. CP 75.

2. Substantive Facts

Lacy Police Officer Alex Ficek was working overtime detail at Fred Meyer when he spotted Anthony Lujan walking through the store. 1RP<sup>1</sup> 41-43. Ficek recognized Lujan and followed him outside after he bought something. 1RP 43. When Lujan stopped by a trash can, Ficek approached him, and Lujan told the officer he had a warrant for his arrest. 1RP 43. Ficek confirmed the warrant through dispatch and then told Lujan he was going to be detained. 1RP 44. When Ficek attempted to restrain Lujan in handcuffs, Lujan tensed his muscles and pulled his arm away from Ficek. 1RP 45. As he struggled Lujan yelled and cursed, and Ficek dropped the handcuffs. 1RP 45. At that point Lujan reached into his jacket pocket and made a throwing motion toward the parking lot. 1RP 46.

Ficek decided to take Lujan to the ground to place the cuffs on him. 1RP 46. Once Lujan was restrained, Ficek searched him incident to arrest. 1RP 47. He found a black case in the pocket of the jacket Lujan was wearing. Inside the case was a plastic baggie containing methamphetamine and a silicone case containing heroin. 1RP 47, 50, 107, 113. Other police units arrived to assist, and they searched the parking lot in the area Ficek observed the throwing motion. 1RP 70. They did not locate anything in parking lot. 1RP 46, 69.

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<sup>1</sup> The Verbatim Report of Proceedings is contained in three volumes, designated as follows: 1RP—2/21/17 and 2/22/17; 2RP—3/7/17; 3RP—3/15/17

Lujan was charged with two counts of unlawful possession of a controlled substance based on the methamphetamine and heroin found in the jacket he was wearing. CP 56. The State proposed jury instructions informing the jury it is a crime for a person to possess a controlled substance and setting forth the elements of the offenses. CP 13, 16, 17. In addition, the State asked the court to instruct the jury on the definition of actual and constructive possession. CP 15; 1RP 84. The State acknowledged that it had only presented evidence of actual possession, but it argued that defining the different types of possession would be helpful to the jury. 1RP 84-86.

Defense counsel objected to the proposed instruction, arguing that the language defining constructive possession was inappropriate in this case, because the evidence showed only actual possession. The additional language would not clarify anything for the jury but instead was potentially confusing. 1RP 86. The court gave the instruction proposed by the State, saying it saw no error in defining constructive possession for the jury. 1RP 94.

C. ARGUMENT

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY  
ON CONSTRUCTIVE POSSESSION.

Washington has adopted pattern jury instructions and notes on the appropriate use of these instructions to assist trial courts. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Pattern instructions have the advantage of thoughtful adoption and provide some uniformity throughout the state. *Id.* at 308. The pattern instruction defining “possession” in a controlled substance case provides as follows:

Possession means having a substance in one's custody or control. [It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance.]

[Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.]

[In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include [whether the defendant had the [immediate] ability to take actual possession of the substance,] [whether the defendant had the capacity to exclude others from possession of the substance,] [and] [whether the defendant had dominion and control over the premises where the substance was located]. No single one of these factors necessarily controls your decision.]

WPIC 50.03, 11 Washington Practice: Washington Pattern Jury Instructions: Criminal (4<sup>th</sup> Ed.). The note on use for this instruction clarifies that “[f]or many cases involving actual possession, the instruction may need to include only the first sentence. For cases involving constructive possession, the instruction should include the full first

paragraph along with the other bracketed options that relate to the issues involved in the particular case.” *Id.*

In this case the charges were based on actual possession, and no evidence of constructive possession was presented. In accordance with the note on use for WPIC 50.03, the defense proposed only the first sentence of the pattern instruction. CP 47. Over defense objection, however, the State proposed and the court gave the entire first paragraph of the pattern instruction, including the definitions of actual and constructive possession:

Possession means having a substance in one’s custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person with possession. Constructive possession occurs when there is not actual physical possession but there is dominion and control over the substance.

CP 70.

This court reviews challenged instructions in the context of the instructions as a whole. *State v. Castillo*, 150 Wn. App. 466, 469, 208 P.3d 1201 (2009). Instructions must inform the jury of the applicable law, not confuse the jury, and permit each party to argue its theory of the case. *Bennett*, 161 Wn.2d at 307; *Castillo*, 150 Wn. App. at 469. The court’s use of the constructive possession language meets none of these requirements.

First, the definition of constructive possession was inapplicable to this case, and it therefore served no legitimate purpose. The only evidence of possession was the officer's testimony that he discovered controlled substances in the pocket of the jacket Lujan was wearing. 1RP 47. There was no evidence which would require the jury to determine whether Lujan had dominion and control over substances not in his physical possession. Thus, contrary to the trial court's determination, the language regarding constructive possession was inapplicable and could not have been helpful to the jury. 1RP 94.

Not only was the language unhelpful, it was potentially confusing for the jury and therefore prejudicial. *See Smith v. City of Aberdeen*, 7 Wn. App. 664, 667-68, 502 P.2d 1034 (1972). The comments to the pattern instruction recognize that the concept of dominion and control in the definition of constructive possession can be confusing to a jury and may require further clarifying instructions. WPIC 50.03. Although the court's instruction was a correct statement of the law, it injected an element of confusion into the proceedings which did not need to be there. *See State v. Ehrhardt*, 167 Wn. App. 934, 940, 276 P.3d 332 (2012) (court did not err in refusing to give instruction which was correct but potentially misleading under facts of case).

Finally, the instruction did not serve either party's theory of the case. Each side is entitled to instructions on its theory of the case if there is evidence to support that theory. *State v. Theroff*, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980). Here, there was no evidence to support a theory that Lujan was in constructive possession of controlled substances. The State acknowledged this. 1RP 84-86, 147. Thus, while the instruction defining constructive possession was a correct statement of the law in abstract, it was not an instruction supported by the evidence in this case and therefore not an appropriate instruction. *See Theroff*, 94 Wn.2d at 389.

As defense counsel argued in closing, the only evidence of possession in this case came from Ficek's testimony. 1RP 154. Ficek testified not only that he found controlled substances in the jacket Lujan was wearing, establishing actual possession, but also that he recognized Lujan, Lujan had a warrant for his arrest, Lujan struggled when Ficek tried to detain him, and Lujan made a throwing motion toward the parking lot. 1RP 43-46. It is likely that introduction of the extraneous concept of constructive possession, together with Ficek's description of facts beyond those pertaining to actual possession, confused the jury to the extent that its verdict is questionable. The court's instructional error requires reversal.

D. CONCLUSION

For the reasons addressed above, this Court should reverse Lujan's convictions and remand for a new trial.

DATED October 11, 2017.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski".

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Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant in  
*State v. Anthony Lujan*, Cause No. 50341-7-II as follows:

Anthony Lujan  
5441 133<sup>rd</sup> Ave.  
Rochester, WA 98579

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



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Catherine E. Glinski  
Done in Manchester, WA  
October 11, 2017

**GLINSKI LAW FIRM PLLC**

**October 11, 2017 - 12:48 PM**

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