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Court of Appeals
Division II
State of Washington
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No. 50341-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY LUJAN
Appellant.

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

The Honorable John C. Skinder, Judge
Cause No. 16-1-01628-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court properly instructed the jury as to the definition of possession.

2. Whether instructional error, if any occurred, was harmless where the State made a clear election to proceed under the theory of actual possession.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the case with the following additions:

The controlled substances were tested by Tami Kee, a forensic scientist who had worked just over 20 years at the Washington State Patrol Crime Lab. 1 RP 96-97, 105-106, 109. Kee identified the substances as methamphetamine and heroin. 1 RP 107, 113. Her report of findings was admitted as State's Exhibit 9. 1 RP 118-119.

During closing arguments, the prosecutor discussed the difference between actual and constructive possession, stating

> "And then you're given two different definitions for what possession means. We have actual possession and constructive possession. We don't have to deal with constructive possession in this case. We know that the defendant actually possessed it. It was in his coat, left front coat pocket and that's his."

1 RP 147. She continued,

> "When we talk about constructive, a good example would be an individual's purse, like a woman who has a purse that she's set down on the side or set under a chair or you've left back in the jury room, for example. It's still yours, you still are asserting a dominion and control over it, by you're not actually physically holding it. It's not attached to your body at the time."

1 RP 147.

C. ARGUMENT.

1. **The trial court properly instructed the jury as to the definition of possession.**

A challenged jury instruction is reviewed de novo. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). "Instructions must be read as a whole." State v. Kroll, 87 Wn.2d 829, 843, 558 P.2d 173 (1976). Here, Lujan concedes that the challenged instruction was a correct statement of the law. While all parties seemed to agree that the case did not involve constructive possession, the instruction allowed the State to argue its theory of the case be assisting the State in its discussion of actual possession during its closing argument. 1 RP 147.

The trial court has considerable discretion in deciding how many instructions to give. State v. Markham, 40 Wn.App. 75, 86, 697 P2d 263, *review denied*, 104 Wn.2d 1003 (1985). The trial court also has considerable discretion in determining how jury instructions are worded. State v. Krup, 36 Wn.App. 454, 461-462,

676 P.2d 507, *review denied*, 101 Wn.2d 1008 (1984). Instructions are sufficient if they correctly state the law, are not misleading, and permit counsel to argue his or her theory of the case. State v. Mark, 94 Wn.2d 250, 526, 618 P.2d 73 (1980).

The instruction given by the court at issue, is based on WPIC 50.03, and reads,

> Possession means having a substance in one's custody or control. It may be 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.

CP 70. The instruction given correctly state's the law, allowed both parties to argue their theory of the case, and as argued and when taken as a whole, were not misleading.

Had the theories presented by the parties been different, perhaps it would have been prudent to give either a shorter or longer instruction. However, the instruction given was, as the trial court stated, "helpful to the jury" in the context of each party's arguments. 1 RP 94. In her closing argument, the prosecutor made a clear election that the State was proceeding under the theory of actual possession, and used the language from the instruction to distinguish between actual and constructive

possession to illustrate her point that Lujan was in actual possession of the controlled substances. 1 RP 147.

The defense argument did not rest in the difference between actual or constructive possession, rather, the defense theory of the case revolved around a flawed investigation and arguing that the samples tested at the crime lab were somehow tainted. 1 RP156-157. The defense argument was not affected by the instruction at issue. The trial court properly exercised its discretion in choosing the wording of the jury instructions, which taken as a whole, were accurate as to the law, not misleading, and allowed the parties to argue their respective cases.

2. **If any error occurred, it is clearly harmless under the facts of this case.**

"An erroneous jury instruction may be subject to harmless error analysis if the error did not relieve the State of its burden to prove each element of the crime charged." State v. Brown, 147 Wn.2d 330, 332, 58 P.3d 889 (2002). In this instance, Lujan acknowledges that the instructions given were accurate as to the law. "An erroneous instruction is harmless if, from the record in a given case, it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id.

"Whether a flawed jury instruction is harmless error depends on the particular facts of the case." State v. Carter, 154 Wn.2d 71, 81, 109 P.3d 823 (2005).

Here, the State clearly elected to proceed under the theory of actual possession in its closing argument and went as far as to state, "we don't have to deal with constructive possession in this case." 1 RP 147. Lujan speculates in his argument that the jury may have been confused by the instruction, however, any confusion was clearly negated when the State told the jury that they were not dealing with constructive possession.

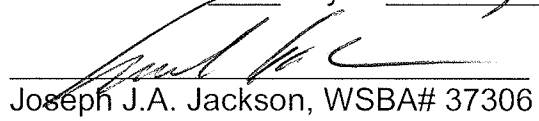
The evidence of actual possession was overwhelming. Officer Ficek located the methamphetamine and heroin in the pocket of the jacket that Lujan was wearing at the time that Officer Ficek contacted him. 1 RP 47, 50, 107. Any error in the court's instructions regarding constructive possession was clearly harmless as it had no effect on the verdict.

D. CONCLUSION.

The Court properly instructed the jury as to the legal definition of possession. Overwhelming evidence supported the conclusion that Lujan actually possessed both Methamphetamine and Heroin. If any error occurred, it did not contribute to the verdict

and was clearly harmless as applied to the facts of this case. The State respectfully asks that this Court affirm Lujan's convictions.

Respectfully submitted this 8 day of January, 2017.



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CERTIFICATE OF SERVICE

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

Dated this 8th day of January, 2018, at Olympia, Washington.

JENA GREEN, PARALEGAL

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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