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

STATE OF WASHINGTON, Respondent

v.

JACOB ALLEN TREASURE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-00432-4

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

I. The trial court properly instructed the jury.

ISSUE PRESENTED

Whether, in a possession of controlled substance trial, it is error for the court to instruct the jury about the definition of ‘knowledge’ using WPIC 10.02 after the defense proposed an unwitting possession jury instruction?

STATEMENT OF THE CASE

The State is not satisfied with the appellant’s ‘STATEMENT OF FACTS’, RAP 10.3 (b), as the appellant’s Statement omits the full context of the defendant’s post-Miranda statements to Officer Gunnar Skollingsberg, and the defendant’s testimony in court.

On February 16, 2017, Officer Robin Griffith of the Vancouver police department was in an unmarked police vehicle in a special operation in an undercover capacity, when Officer Griffith observed a silver Infinity SUV driving in a reckless, highly dangerous manner. RP at 125. The car was drifting between different lanes almost hitting other cars in other lanes. RP at 126. Officer Griffith noted the license plate number, and since she was in an unmarked vehicle she contacted 911. RP at 126. Officer Griffith followed the car until it was stopped by a marked patrol

vehicle. RP at 127. Officer Gunnar Skollingsberg of the Vancouver Police Department responded, and stopped the silver Infinity SUV with the same license plate, and contacted the driver Jacob Treasure. RP at 133. Officer Skollingsberg initiated the contact to start an investigation for potential driving under the influence. RP at 134. A jury trial was held on October 23, 2017.

Officer Skollingsberg read Mr. Treasure his Miranda rights. RP at 134. After being alerted by a fellow officer, Officer Skollingsberg went up to the passenger side of the vehicle, looked in the window, and observed a “clear plastic baggie which was on the passenger’s side front floorboard with a brown, tar-like substance in it, which, based on my training and experience, I believed was heroin.” RP at 135.

After he observed the baggie, Officer Skollingsberg informed Mr. Treasure that “. . . I suspected that was heroin on the passenger’s front floorboard and asked him if it was his.” RP at 137. Mr. Treasure, told Officer Skollingsberg: “. . . if it was his it was from when he had been using in the past” and that the last time Mr. Treasure had used “. . . was approximately two months before that.” RP at 137-138. Officer Skollingsberg testified that Mr. Treasure did not tell him that “. . . it was not his.” (“Q. Okay. Okay. And -- so at any time did he tell you it was not his? A. No.” RP at 138).

John Dunn, the forensic scientist from the Washington State Patrol Crime Lab testified that the baggie contained heroin. RP at 156.

Mr. Treasure testified at trial, and testified that after Officer Skollingsberg pointed out the heroin, Mr. Treasure testified that he was “surprised”; he “didn’t know it was there.” (RP at 171). Mr. Treasure testified that he used heroin before, and had been using “off and on” since he was 19, and was age 24 at the time of trial and was not using heroin regularly. RP 171. Mr. Treasure testified that the bag of heroin “did not” belong to him because he “wasn’t using heroin at the time, cleaned my car in between it. If I had known it was there, being a heroin addict I would have done something with it.” RP at 173. Mr. Treasure admitted telling Officer Skollingsberg that evening that the bag “may or might have belonged to him,” but that in court now he was testifying that the bag did not belong to him. RP at 173.

Mr. Treasure also testified about how he would “generally keep” his heroin. RP at 171. Mr. Treasure admitted to transporting the heroin in his vehicle, “to and from getting it”, and also admitted that he was the only driver of his vehicle. RP at 171-172. He testified that he transported other people in his car as passengers, “maybe a dozen [times], tops”, and some of those passengers included people he knew who used heroin. RP at 172. Mr. Treasure further testified that he generally “would try to keep it on my

person inside my wallet or my cigarette pack”; and that his practice would be to keep his heroin “in my wallet most of the time.” RP at 171-172.

The appellant states that Mr. Treasure “was particularly surprised there would be heroin on the floorboard because in the past he kept his heroin in either his wallet or cigarette pack. RP 171.” Br.of App. at 2. The use of the phrase “particularly surprised” is not a ‘fair statement of the facts’ as required by RAP 10.3(a)(5), and does not properly summarize Mr. Treasure’s testimony. First, the defendant only used the phrase “surprised” to describe his reaction after Officer Skollingsberg brought the heroin to Mr. Treasure’s attention. Second, a fair statement of the facts should note that the defendant qualified the statements about the wallet and cigarette pack with the words “**try to keep it** on my person in my wallet or my cigarette pack” and that it was in his wallet “**most of the time**”. RP at 171-172 (emphasis added).

Mr. Treasure admitted that he couldn’t “recall exactly what I said” to Officer Skollingsberg that evening, that he was “just going off his report.” RP at 178-179.

Both the State and defense proposed jury instructions, but only the State’s was filed with the court. *See* RP at 191-192, compared with CP 16-33 (State’s proposed) and CP 34-51 (Court’s Instructions). Defense counsel proposed an unwitting possession instruction. RP at 192. The

State proposed removing the first bracketed section (not knowing the nature of the substance prong) based on the testimony at trial. RP at 193. Defense counsel argued to include both prongs, and the Court went with the 'single-prong version'. RP at 194.

The State proposed the standard WPIC 'knowledge' instruction, and the court adopted that instruction. RP at 196-197. Defense counsel objected to the WPIC instruction 10.02. RP at 198.

The jury returned a verdict of guilty. CP at 51. On November 7, 2017, the Court imposed Judgment and Sentence. CP at 59-69.

ARGUMENT

I. The Trial court properly instructed the jury.

A. STANDARD OF REVIEW

An appellate court reviews alleged errors of law in jury instructions de novo. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). "Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." *Barnes*, 153 Wn.2d at 382. "It is reversible error to instruct the jury in a manner that would relieve the State of [its] burden to prove "every essential element of a criminal offense beyond a reasonable doubt." *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245

(1995). This Court analyzes a challenged jury instruction by considering the instructions as a whole and reading the challenged portions in context. *Pirtle*, 127 Wn.2d at 656-57. *See generally*, *State v. Hayward*, 152 Wn.App. 632, 641-642, 217 P.3d 354, (2009).

In evaluating whether evidence is sufficient to support an instruction on an affirmative defense, the court must interpret the evidence in the defendant's favor and must not weigh the proof or judge the witnesses' credibility. *State v. May*, 100 Wn.App. 478, 482, 997 P.2d 956, *review denied*, 142 Wn.2d 1004 (2000). The affirmative defense of unwitting possession "must be considered in light of all the evidence presented at trial, without regard to which party presented it." *State v. Olinger*, 130 Wn.App. 22, 26, 121 P.3d 724 (2005), *review denied*, 157 Wn.2d 1009 (2006).

Unwitting possession is a question for the jury. *State v. Mathews*, 4 Wn.App. 653, 658, 484 P.2d 942 (1971). Credibility determinations are for the trier of fact and cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Mere possession does not have a mens rea element. *State v. Bradshaw*, 152 Wn.2d 528, 530, 98 P.3d 1190 (2004), *cert. denied*, 544 U.S. 922 (2005).

B. DISCUSSION

The appellant argues that the trial court incorrectly instructed the jury by issuing, over defense objection, WPIC 10.02 defining ‘Knowledge’. The appellant cites solely to *State v. Sheldon*, 38 Wn.App. 195, 684 P.2d 1350 (1984) for authority that in the context of an unwitting possession defense, issuing WPIC 10.02 results in ‘prejudicial error’. Br. Of App. At 5.

“Here, like the defendant in *Sheldon*, Mr. Treasure denied knowing the drugs were in his car. While possession of a controlled substance does not require a mental state, the affirmative defense requires that the defendant prove by a preponderance of the evidence that he did not know the controlled substance was in his possession. The knowing is a subjective knowledge standard (actual knowledge) and not the objective standard (reason to know).”

Br. Of App. At 6

Defense counsel here objected to Instruction 11b which was based on WPIC 10.02. RP at 198. That instruction read:

A person knows or acts knowingly or with knowledge with respect to a fact circumstance, or result when he or she is aware of that fact, circumstance, or result. It is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime.

If a person has **information that would lead a reasonable person in the same situation to believe that a fact exists**, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

CP at 48 (emphasized same as Br. Of App. At 3).

The appellant argues the trial court's instruction using the highlighted portion ("information that would lead a reasonable person in the same situation to believe that a fact exists") was prejudicial error. Br. of app. At 5.

- a. *Sheldon* is inapplicable and Treasure's reliance on it is misplaced.

The appellant's reliance on *Sheldon* is misplaced since the trial court here did not use the language criticized in *Sheldon*, but rather used the standard WPIC language defining knowledge found in WPIC 10.02 'Knowledge – Knowingly – Definition' 38 Wn.App 195. Accordingly, *Sheldon* does not control the outcome in this case.

The appellant correctly notes that the *Sheldon* court found the second section of the knowledge jury instruction given in that case was improper since it required "the jury to apply an objective standard to determine knowledge". However, the instruction given in *Sheldon* did not contain the current permissive inference language found in the current WPIC 10.02 (second paragraph), which remedied the issue in the instruction given in *Sheldon*. The trial court below did not give the jury

instruction found problematic in *Sheldon*. Rather, the trial court used the WPIC language which properly adds the permissive inference language “the jury is permitted but not required to find that he or she acted with knowledge of that fact.” Compare WPIC 10.02 with jury instruction 11b (CP at 47).

The appellant’s reliance on *Sheldon* is misplaced since *Sheldon* did not discuss the WPIC pattern jury instruction which given below, but only discussed jury instructions relying only upon RCW 9A.08.010 (1)(b) to define knowledge. *Sheldon* itself cites only to *State v. Shipp*, 93 Wn.2d 510, 516, 610 P.2d 1322, (1980), for authority to strike down the knowledge definition jury instruction (instruction 7) in *Sheldon*. *Sheldon*, 38 Wn.App. at 198.

However, since at least the second edition, WPIC 10.02 has correctly stated the law defining knowledge. In *State v. Leech*, 114 Wn.2d 700, 790 P.2d 160 (1990), the Court stated:

“Contrary to the defendant's contention, however, the definition of knowledge instruction given here was based not on the statutory language criticized in *Shipp* but on the revised version of WPIC 10.02, modified to correct the problem identified in *Shipp*. The revised pattern jury instruction states that a jury is permitted but not required to find that a person acted with knowledge if that person has information that would lead a reasonable person to believe that facts exist that constitute a crime. The constitutionality of this revised language has been upheld repeatedly. The definition of knowledge instruction (instruction 10) given

by the trial court in this case is not the instruction condemned in *Shipp* and avoids the due process problem identified in *Shipp*; it was not unconstitutional.”

State v. Leech, 114 Wn.2d at 710, (notes omitted).

Leech settles the issue raised in this case. The trial court below did not instruct the jury using the definition directly from the knowledge statute, RCW 9A.08.010 (1)(b), but rather used the pattern WPIC jury instruction 10.02, as approved of in *Leech*. Jury instruction 11b directly quotes WPIC 10.02, which permitted the jury to find Mr. Treasure had knowledge of the presence of the drugs in his car based upon facts which would lead a reasonable person to believe that fact existed, but did not require the jury do so. CP at 47. The current Comments to WPIC 10.02 notes that the committee specifically revised the pattern instructions to address ‘the constitutional problems identified in *Shipp*’:

Third, the instruction's second paragraph expressly states that jurors may, but are not required to, infer knowledge from circumstantial evidence. *See State v. Shipp*, 93 Wn.2d 510, 610 P.2d 1322 (1980), which held that the statutory definition of knowledge violated due process because jurors could interpret it as creating an impermissible mandatory presumption. This language has been slightly revised from the statutory language.

Comments, Washington Pattern Jury Instructions – Criminal, 11 Wash. Prac. Pattern Jury Instr. Crim. WPIC 10.02 (4th Ed). The Committee’s comments specifically note that the instruction “corrected the

constitutional problem identified in *Shipp*” and has been cited with approval by the courts:

Approval of instruction. The courts have approved the instruction from the second edition of this volume, which is substantively unchanged by the current instruction above. *See, e.g., State v. Leech*, 114 Wn.2d 700, 790 P.2d 160 (1990) (holding that the second edition's instruction corrected the constitutional problem identified in *Shipp*); *State v. Bryant*, 89 Wn.App. 857, 872, 950 P.2d 1004 (1998) (noting that the instruction has been upheld repeatedly since *Leech*).

Comments, Washington Pattern Jury Instructions – Criminal, 11 Wash. Prac. Pattern Jury Instr. Crim. WPIC 10.02 (4th Ed).

Mr. Treasure’s claim that the trial court gave an improper definition of knowledge is without merit. The trial court correctly gave the standard WPIC 10.02 instruction and thereby properly instructed the jury in this case. This claim fails.

b. Subjective knowledge vs. Objective ‘reason to know’ – Passing Treatment.

The appellant argues briefly that “knowing is a subjective knowledge standard (actual knowledge) and not the objective standard (reason to know).” Br. Of App. At 6. The *Sheldon* case does not juxtapose actual knowledge vs. reason to know. The State suggests that this is “passing treatment of an issue”. Appellate courts will often not review issues that a party inadequately briefs or treats in passing. *State v.*

Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970, *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *State v. Cox*, 109 Wn.App. 937, 943, 38 P.3d 371 (Div. III, 2002).

CONCLUSION

The trial court properly instructed the jury concerning the definition of knowledge using the standard Washington Pattern Jury Instruction (WPIC 10.02). The conviction should be affirmed.

DATED this 20th day of June, 2018.

Respectfully submitted:

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