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Division II
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NO. 51573-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

GLORIA INIGUEZ GONZALES,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it refused to grant the defendant's motion for a mistrial after the state elicited irrelevant, highly prejudicial evidence irreparably implying that the defendant must be guilty of the crime of possession of methamphetamine with intent to deliver because she and the man with whom she was arrested are Hispanic.

2. The trial court denied the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it accepted the jury's verdict on the charge of possession of methamphetamine with intent to deliver because substantial evidence only supports the conclusion that the defendant was merely present when another person committed that crime.

3. The trial court denied the defendant her due process right to present a defense under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it refused to give her proposed instruction on unwitting possession.

Issues Pertaining to Assignment of Error

1. In a case in which a Hispanic defendant is charged with possession of three ounces of methamphetamine with intent to deliver, does a trial court deny that defendant a fair trial if it refuses to grant a mistrial after the state elicits irrelevant, highly prejudicial evidence irreparably implying that the defendant must be guilty because she and the man with whom she was arrested are Hispanic?

2. Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, does mere presence when another person possesses methamphetamine with intent to deliver support a conviction for that crime?

3. In a case charging possession of methamphetamine with intent to deliver, does a trial court's refusal to give a proposed instruction on mere presence deny a defendant a fair trial when the facts and law support giving the instruction and when a jury would more likely than not have acquitted the defendant had the instruction been given?

STATEMENT OF THE CASE

Factual History

Scott Shorey is a resident of Lewis County, a drug addict and a drug dealer. RP 1/26/18 5-6; RP 2/14/18 195-200, 205-211.¹ During the first part of 2017, agents from the Lewis County Joint Narcotics Enforcement Team (JNET) raided his house with a search warrant, found methamphetamine, psilocybin mushrooms and stolen property. RP 2/14/18 205-211. They then arrested Mr. Shorey. *Id.* In lieu of going to prison for his crimes, Mr. Shorey agreed to work as an informant with JNET. *Id.* In that capacity Mr. Shorey told the JNET members that one of his methamphetamine suppliers was a Hispanic by the name of “Pancho” who weekly sold Mr. Shorey multiple ounces of methamphetamine. RP 1/26/18 5-7. Mr. Shorey claimed that “Pancho” drove a white Honda Odyssey van to deliver the drugs to him at his house and that “Pancho’s” wife usually accompanied him. RP 1/26/18 6-7.

Mr. Shorey went on to tell the JNET members that he had spoken with “Pancho” over the phone and arranged to have him drive to Mr.

¹The record on appeal includes five volumes of verbatim reports of the ER 404(b) hearing held on 7/10/17, the CR 3.6 hearing held on 1/26/18, the first day of trial held on 2/14/18, and the second day of trial held on 2/15/18 and the sentencing hearing held on 3/2/18. The volumes are not continuously numbered. They are referred to herein as “RP [date][page #].”

Shorey's house on Coal Creek Road between 4:00 and 6:00 pm on March 8, 2017, to deliver 12 ounces of methamphetamine. RP 1/26/18 5-8; RP 2/14/18 165. Mr. Shorey told the JNET members that "Pancho" would probably be getting off I-5 at the Chamber Way Exit. RP 1/26/18 8-10. Based upon this information, two JNET Detectives by the names of Withrow and Holt went and waited at a parking lot near that exit. *Id.* At 8:13 pm that evening the detectives saw a white Honda Odyssey van drive by on Chamber Way. *Id.* As the van passed the detectives were able to see that a Hispanic male was driving with a Hispanic female in the passenger seat. *Id.* The female was the defendant Gloria Iniguez Gonzales. RP 2/14/18 30-31. The male driver was Eduardo Morales Martinez. RP 1/26/18 5-6.

At this point the two detectives turned around and got behind the suspect vehicle, which turned left on National Avenue. RP 2/14/18 165-166. However, the suspect van did not turn down the road that led to Mr. Shorey's house. RP 2/14/18 184-185. Rather, it continued driving on National Avenue. *Id.* Once it got near a McDonald's restaurant on National, the detectives turned on their lights. RP 1/26/18 10; RP 2/14/18 165-166. The suspect vehicle then pulled into the parking lot of the McDonalds and stopped. RP 2/14/18 165-166.

Upon approaching the vehicle, the detectives saw that the

defendant had shifted into the back seat next to her baby, who was in a car seat. RP 2/14/18 165-166. Eventually the detectives allowed the defendant to take her baby and go into the McDonalds while they stayed outside with the driver awaiting the arrival of a drug dog. *Id.* At different times both the defendant and Mr. Morales Martinez refused to consent to a search of the van. RP 1/26/18 24; RP 2/14/18 36.

About 10 or 15 minutes after the vehicle stop the canine officer arrived with the drug dog, who alerted on the van for the presence of illegal drugs. RP 1/26/18 23-24. The two JNET officers then applied for and obtained a telephonic warrant and searched the van. RP 2/14/18 36. During the search, the officers found three individually packaged baggies of what later tested to contain methamphetamine on the floor of the van in the area where the defendant had been sitting next to her baby. RP 2/14/18 169-170. Upon finding these items the officers arrested the driver and then went into the McDonalds and arrested the defendant. RP 2/14/18 172, 176-177. They later determined that the van was registered to the defendant. RP 2/14/18 169.

Procedural History

By information filed March 9, 2017, and later amended, the Lewis County Prosecutor charged the defendant Gloria Iniguez Gonzales with

possession of methamphetamine within 1,000 feet of a school bus stop. CP 1-3, 8-9. Prior to trial the defense brought a motion to suppress arguing that (1) any attempt to justify the stop of the van based upon the commission of a traffic infraction was a pretext, and (2) the officers did not have probable cause to stop the van and detain either the defendant or the driver. CP 27, 28-33. The court later held a hearing on that motion during which the state called Detectives Withrow and Holt as its only witnesses. RP 1/26/18 5, 26. They testified to the facts included in the preceding factual history. See Factual History, *supra*. Following argument the court denied the motion and later entered the findings and conclusions in support of its ruling. CP 45-47.

The case later came on for trial before a jury with the state calling the two detectives, Mr. Shorey, and the forensic scientist who tested the drugs. RP 2/14/18 155, 205, 212; RP 2/15/18 6. The state also called a school employee and a county employee who testified that there was a school bus stop within 1,000 feet of the McDonalds where the van was stopped. RP 2/15/18, 9-15, 17-23.

The state's first witness at trial was Detective Withrow. RP 1/14/18 155. At the beginning of his testimony the state elicited evidence that the majority of methamphetamine and heroin in Washington comes from

Mexico. RP 158-161. This exchange went as follows:

Q Okay. So given that training and experience, have you developed a familiarity with how drug dealers usually conduct their business?

A Yes.

Q Okay. What amounts do drug dealers usually keep on hand of various controlled substance?

A That kind of depends on the –

MR. BAUM: Objection. Relevance as to what they would normally keep on hand.

THE COURT: Mr. Masiello.

MR. MASIELLO: Given the amounts in this case and the anticipated testimony, I think this type of information is relevant with that future evidence.

THE COURT: Okay. The objection is overruled.

Q (Mr. Masiello continuing.) You may answer the question.

A It depends on the level of the drug dealer and whether it be a smaller drug dealer, street level dealer, that deals anywhere from, you know, a gram up to three-and-a-half grams, which is on the streets considered a ball, up to ounces or, you know, like an ounce, which is a little bit higher than the ball dealer. And it goes up higher to ounces, you know, multiple ounces and up to half pounds and so forth. When you are getting up into the larger amounts, ounces and more, that's larger sources of supply they could have on hand up to those. Suppliers or dealers are going to have on hand a larger amount and then supply to numerous people out of that larger amount.

Q Okay. And that was going to be my next question. Why do

they have such large amounts?

A Because they usually source from more than one person.

Q Okay. And who do drug dealers get their drugs from?

A A larger supply. Ultimately –

MR. BAUM: Objection. Relevance.

THE COURT: Overruled.

Q (Mr. Masiello continuing.) Go ahead.

A A larger supply. Most of the methamphetamine and heroin that we receive locally here in Washington state comes up from Mexico and –

MR. BAUM: Objection. I have a motion.

THE COURT: Outside the jury?

MR. BAUM: Yes.

THE COURT: Okay. All right. I'm going to ask the jury at this time to please step out of the courtroom. Just leave your notepads on your chairs, and we will return momentarily.

(Jury not present.)

THE COURT: Mr. Baum.

MR. BAUM: Moving for a mistrial. My client is Hispanic. Okay. He just said most of this stuff comes from Mexico. That, given the nature of this charge and the fact it's charged possession with intent to deliver and my client's Hispanic heritage, that is essentially I think an improper attack or at least the assertion to the jury. And now the jury is made to believe

that most drugs are coming up out of Mexico; my client is Hispanic. I can't unturn that clock. I think that's highly prejudicial based on her heritage, so I'm asking for a mistrial.

RP 2/14/18 157-160.

Following further argument the court sustained the objection, but denied the motion for a mistrial. RP 2/14/18 220. However, the court did give the following limiting instruction:

THE COURT: All right. You may be seated. All right. Thanks again, folks, for your patience. As I'm sure Judge Lawler explained in orientation, sometimes things just have to be handled outside of your presence. And sometimes those breaks will be longer than others, but I do appreciate your patience. At this time I am instructing you that the last statement made by the detective is – you are to disregard that statement. You are not to consider it in any way, shape, or form in your decisions in this case. Thank you.

RP 2/14/18 161.

After calling its six witnesses, and then recalling Detective Withrow for brief testimony the state rested its case. RP 2/15/18 32. The defense did not call any witnesses. *Id.* The court then instructed the jury with the defense taking exception to the court's refusal to give its proposed instruction from WPIC 52.01 on unwitting possession. RP 2/15/18 34-35, 51; CP 68. However, the court did instruct the jury on the lesser included offense of mere possession as opposed to possession with intent. CP 88. Following instruction by the court and argument by counsel the jury retired

for deliberation. CP; 79-102; RP 2/15/18 52-66, 67-95.

The jury in this case eventually returned a verdict of guilty on the charge of possession of methamphetamine with intent to deliver. CP 104. The jury also found that the state had proven beyond a reasonable doubt that the defendant had committed this offense within 1,000 feet of a school bus stop. CP 106. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 109-119, 121.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION FOR A MISTRIAL AFTER THE STATE ELICITED IRRELEVANT, HIGHLY PREJUDICIAL EVIDENCE IRREPARABLY IMPLYING THAT THE DEFENDANT MUST BE GUILTY OF THE CRIME OF POSSESSION OF METHAMPHETAMINE WITH INTENT TO DELIVER BECAUSE SHE AND THE MAN WITH WHOM SHE WAS ARRESTED ARE HISPANIC.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). As the following points out, these related constitution guarantees are embodied in the rules that (1) irrelevant evidence is never admissible, (2) evidence that is relevant but more prejudicial than probative is also not admissible, and (3) propensity evidence is never admissible.

Under ER 401, "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under ER 402, "all relevant evidence is

admissible” with certain limitations. By contrast, under this same rule “[e]vidence which is not relevant is not admissible.” Thus, before testimony can be received into evidence, it must be shown to be relevant and material to the case. *State v. Wilson*, 38 Wn.2d 593, 231 P.2d 288 (1951).

In addition, even relevant evidence should be excluded if it is more prejudicial than probative. Evidence Rule 403 states the following on this issue:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In Graham’s treatise on the equivalent federal rule, it states that the court should consider the following when applying this rule:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies

within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

Finally, it is fundamental under our adversarial system of criminal justice that "propensity" evidence, usually offered in the form of prior convictions or prior bad acts, is not admissible to prove the commission of a new offense. See 5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989). This common law rule has been codified in ER 404(b) wherein it states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Tegland puts this principle as follows:

Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a "criminal type," and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.

Arrests of mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.

The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

At the outset of the state's case-in-chief in the case at bar the prosecutor elicited the claim from one of the Lewis County Drug Force Detectives that the majority of methamphetamine in Washington State comes from Mexico. This evidence came before the jury in the following direct evidence from Detective Chad Withrow:

Q Okay. So given that training and experience, have you developed a familiarity with how drug dealers usually conduct their business?

A Yes.

Q Okay. What amounts do drug dealers usually keep on hand of various controlled substance?

A That kind of depends on the –

MR. BAUM: Objection. Relevance as to what they would normally keep on hand.

THE COURT: Mr. Masiello.

MR. MASIELLO: Given the amounts in this case and the anticipated testimony, I think this type of information is relevant with that future evidence.

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Q (Mr. Masiello continuing.) You may answer the question.

A It depends on the level of the drug dealer and whether it be a smaller drug dealer, street level dealer, that deals anywhere from, you know, a gram up to three-and-a-half grams, which is on the streets considered a ball, up to ounces or, you know, like an ounce, which is a little bit higher than the ball dealer. And it goes up higher to ounces, you know, multiple ounces and up to half pounds and so forth. When you are getting up into the larger amounts, ounces and more, that's larger sources of supply they could have on hand up to those. Suppliers or dealers are going to have on hand a larger amount and then supply to numerous people out of that larger amount.

Q Okay. And that was going to be my next question. Why do they have such large amounts?

A Because they usually source from more than one person.

Q Okay. And who do drug dealers get their drugs from?

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Q (Mr. Masiello continuing.) Go ahead.

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THE COURT: Outside the jury?

MR. BAUM: Yes.

THE COURT: Okay. All right. I'm going to ask the jury at this time to please step out of the courtroom. Just leave your notepads on your chairs, and we will return momentarily.

(Jury not present.)

THE COURT: Mr. Baum.

MR. BAUM: Moving for a mistrial. My client is Hispanic. Okay. He just said most of this stuff comes from Mexico. That, given the nature of this charge and the fact it's charged possession with intent to deliver and my client's Hispanic heritage, that is essentially I think an improper attack or at least the assertion to the jury. And now the jury is made to believe that most drugs are coming up out of Mexico; my client is Hispanic. I can't unturn that clock. I think that's highly prejudicial based on her heritage, so I'm asking for a mistrial.

RP 2/14/18 157-160.

This evidence can be distilled into three basic claims: (1) that drug dealers follow a hierarchy in which very large amounts of drugs (pounds or multiple pounds) are divided and distributed to the next level of dealer (fewer pounds or numerous ounces), who in turn divides the drugs into smaller amounts for distributor sale (individual ounces), all the way to lowest level dealer who sells to the drug users (gram amounts); (2) that a person who sells at the multiple ounce levels is a mid level dealer; and (3) the majority of methamphetamine and heroin in Washington comes out of

Mexico. At each point in the introduction of this evidence the defense objected on the basis of relevance.

The fact of the matter was that none of this evidence was relevant. In this case the facts at issue were whether or not the defendant was knowingly participating in a multiple ounce transaction Scott Shorey had arranged with Eduardo Morales Martinez. The position of these two parties in a drug distribution network, the amount of drugs involved, and particularly the origin of those drugs had no bearing on facts at issue in the case. The facts at issue were: (1) whether or not Eduardo Morales Martinez agreed to deliver any amount of methamphetamine to Scott Shorey, and (2) whether or not Eduardo Morales Martinez intended to deliver any of the methamphetamine from the van to Mr. Shorey. Thus, none of the evidence concerning amounts, relative placement in drug distribution rings, and origin of the drugs was relevant.

In addition, even if this evidence had some marginal relevance, the unfair prejudice from its introduction far exceeded that marginal relevance, particularly given the fact that it invited the jury to convict solely upon an implicit argument that the defendant must be guilty based upon her propensity to commit similar crimes. Thus, even if the evidence correctly survived a relevance objection (which the defendant does not concede), it

did not survive an ER 404(b) analysis.

In assessing the unfair prejudice that this evidence had in this case, the following facts are important to recognize: (1) the defendant is Hispanic and has an easily identified Hispanic name, (2) the person identified as her husband and the person who had agreed to deliver the drugs, and had delivered drugs in the past, was also Hispanic with an easily identified Hispanic name, (3) the defendant sat through the entire trial using a Spanish interpreter, and (4) the largest Spanish speaking country in the world is Mexico, which is, of course, the only one that shares a border with the United States. Although this last fact would seem self evident, the trial court's comment in denying the motion for a mistrial that the defendant might well have been from Spain for all the jury knew seems disingenuous in the extreme.

The fact of the matter is that it was a short bridge from the jury to cross from "Mexico" being the chief supplier to drugs in Washington to "Mexicans" being the chief higher and middle level drug deals, to the defendant more likely than not being guilty because she was a Mexican. As the defense attorney argued to the court, there was no way to overcome the unfair prejudice that arose from this highly improper evidence, even had the court given a very pointed instruction that the national origin of the

defendant was absolutely not evidence the jury could consider.

The additional problem with this case was that the court did not give a pointed limiting instruction. Rather, after the jury had been out for the time necessary to argue the motion for a mistrial, the court gave the following instruction:

THE COURT: All right. You may be seated. All right. Thanks again, folks, for your patience. As I'm sure Judge Lawler explained in orientation, sometimes things just have to be handled outside of your presence. And sometimes those breaks will be longer than others, but I do appreciate your patience. ***At this time I am instructing you that the last statement made by the detective is – you are to disregard that statement. You are not to consider it in any way, shape, or form in your decisions in this case.*** Thank you.

RP 2/14/18 161 (emphasis added).

The problem with the instruction is that it didn't tell the jury what that last statement was. Perhaps such an instruction could work if it was given right after the offending words were spoken. However, that is not what happened in this case. Rather, there was a break between the offending testimony and the court's ambiguous instruction. Thus, under the facts of this case there was no way to ameliorate the unfair prejudice that arose from Detective Withrow's improper testimony. Consequently, the trial court abused its discretion when it denied the defendant's motion for a mistrial.

II. SUBSTANTIAL EVIDENCE ONLY SUPPORTS THE CONCLUSION THAT THE DEFENDANT WAS MERELY PRESENT WHEN ANOTHER PERSON POSSESSED METHAMPHETAMINE WITH INTENT TO DELIVER.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996). Finally, the test for determining the sufficiency of the evidence is whether

“after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

Seen in the light most favorable to the state, the evidence in this case indicates the following: (1) Eduardo Morales Martinez had routinely made multiple ounce sales of methamphetamine to Scott Shorey, (2) at the time in question Scott Shorey had arranged for Eduardo Morales Martinez to come to Scott Shorey’s house to sell him multiple ounces of methamphetamine, (3) during most of the prior deliveries Scott Shorey had seen Eduardo Morales Martinez driving a white Odyssey van, and on most occasions Mr. Martinez’ wife Gloria Iniguez Gonzales was with him, (4) that the van was actually registered in the defendant’s name, (5) that when the police walked up to the van they saw that the defendant had got into the back seat next to her small child, who was in a car seat, and (6) the police found three one-ounce bindles of methamphetamine in the back seat in the area where the defendant’s feet had been sitting.

This evidence might well lead to a conclusion that the defendant was aware of the fact that methamphetamine was present in the van and that Eduardo was going to sell it to Mr. Shorey. However, this is the extent

of the inferences that can be drawn. There are no facts presented at trial to indicate that the defendant in any way acted as an accomplice to Eduardo's crime. Thus, in this case, the trial court erred when it accepted the jury verdict of guilty on the charge of possession of methamphetamine with intent to deliver because substantial evidence does not support this conclusion. As a result, this court should vacate the defendant's conviction and remand with instructions to dismiss.

III. THE TRIAL COURT DENIED THE DEFENDANT THE ABILITY TO PRESENT A DEFENSE WHEN IT REFUSED TO GIVE HER PROPOSED INSTRUCTION ON UNWITTING POSSESSION.

It is a fundamental principle of due process under both our State and Federal Constitutions that a defendant in a criminal proceeding must be permitted to argue any defense allowed under the law and supported by the facts. *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983). Thus, the failure to instruct on a defense allowed under the law and supported by the facts constitutes a violation of due process under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. *State v. MacMaster*, 113 Wn.2d 226, 778 P.2d 1037 (1989); *State v. LeBlanc*, 34 Wn.App. 306, 660 P.2d 1142 (1983).

A defendant is entitled to have the jury instructed on a lesser included offense if (1) each of the elements of the lesser offense is a

necessary element of the offense charged; and (2) the evidence in the case affirmatively supports an inference that the defendant committed the lesser crime. *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). In addition, “[r]egardless of the plausibility of th[e] circumstance, [a] defendant ha[s] an absolute right to have the jury consider the lesser included offense on which there is evidence to support an inference it was committed.” *State v. Parker*, 102 Wn.2d 161, 166, 683 P.2d 189 (1984) (citing, *inter alia*, *State v. Jones*, 95 Wn.2d 616, 628 P.2d 472 (1981)).

In the case at bar, the state charged the defendant with one count of possession of methamphetamine with intent to deliver. As was set out in argument II, the evidence presented at trial does support the conclusion that the defendant was aware of the drugs in the van. However, that evidence also equally supports the conclusion that she was unaware of that fact. Specifically, Mr. Shorey and the police testified that Mr. Shorey had set up the drug purchase with Mr. Martinez, not with the defendant. In fact, while Mr. Shorey did claim that the defendant was with Mr. Martinez on many occasions during which he purchased drugs from Mr. Martinez, Mr. Shorey did not claim that the defendant in any way participated or even was aware of what was happening. Thus, in this case, the facts do support a claim that the defendant, as the registered owner of the van, had

unwittingly possessed the methamphetamine the police found in it. Consequently, the trial court erred when it refused to instruct on a defense that was available under both the law and the facts of the case.

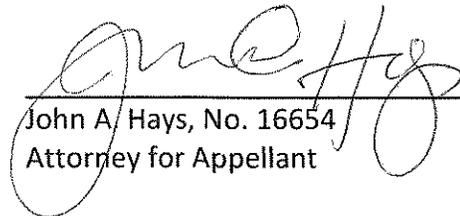
The error in this case was far from harmless. As was already set out, there was little evidence to tie the defendant with the methamphetamine the police found in the van registered to her other than her relationship to Mr. Martinez. Thus, in this case, there is a high likelihood that had the court instructed the jury on unwitting possession, the jury would have acquitted the defendant. As a result this court should reverse the defendant's conviction and remand for a new trial.

CONCLUSION

Substantial evidence does not support the defendant's conviction in this case. As a result, this court should reverse the defendant's conviction and remand with instructions to dismiss with prejudice. In the alternative this court should vacate the defendant's conviction and remand for a new trial based upon the admission of unfairly prejudicial evidence, and based upon the trial court's refusal to give an instruction on unwitting possession.

DATED this 10th day of August, 2018.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

**DEFENDANT'S PROPOSED INSTRUCTION
ON UNWITTING POSSESSION**

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know the substance was in his possession or did not know the nature of the substance.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

WPIC 52.01 Unwitting Possession

**EVIDENCE RULE 401
DEFINITION OF “RELEVANT EVIDENCE”**

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

**RULE 402
RELEVANT EVIDENCE GENERALLY ADMISSIBLE;
IRRELEVANT EVIDENCE INADMISSIBLE**

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

**ER 403
EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS
OF PREJUDICE, CONFUSION, OR WASTE OF TIME**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

vs.

GLORIA INIGUEZ GONZALES,
Appellant.

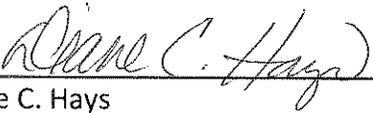
NO. 51573-3-II

AFFIRMATION
OF SERVICE

The undersigned states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 10th of August, 2018, at Longview, WA.


Diane C. Hays

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August 10, 2018 - 4:16 PM

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