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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

GLORIA INIGUEZ GONZALEZ,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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*US now has more Spanish Speakers than Spain – only Mexico has
more, The Guardian, June 29, 2015,
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I. ISSUES

- A. Did the trial court err when it denied Iniguez Gonzalez's request for a mistrial?
- B. Did the State present sufficient evidence to sustain the jury's verdict for Possession of Methamphetamine with the Intent to Deliver?
- C. Did the trial court error when it refused to give Iniguez Gonzalez's proposed jury instruction for the affirmative defense of unwitting possession?

II. STATEMENT OF THE CASE

On March 8, 2017 Scott Shorey had his house raided by police due to his involvement dealing drugs. 1JRP 208.¹ Police located drugs and stolen property at Shorey's residence. *Id.* Shorey agreed to be a confidential informant to receive the benefit of a reduced sentence. *Id.*

Shorey called his drug supplier, Pancho,² that same day and requested Pancho come to Shorey's house. 1JRP 207-08. The purpose of Pancho coming to Shorey's house was to deliver methamphetamine to Shorey. 1JRP 209.

¹ There are multiple volumes of the verbatim report of proceedings. The jury trial volumes are not consecutively paginated, therefore the State will cite to volume I, 2/14/18, as 1JRP. The State will cite to jury trial volume 2 (including sentencing) as 2JRP. All other proceedings will be cited as RP and the date of the proceeding.

² Pancho's true name is Eduardo Morales Martinez. The State will refer to Mr. Morales Martinez as Pancho throughout the briefing as that is how he is identified throughout the trial. There is no disrespect intended.

Shorey informed Detective Withrow that Shorey had ordered methamphetamine from his supplier. 1JRP 162-63. Detective Withrow and Detective Holt set up surveillance on Chamber Way, in the chamber of commerce parking lot in Chehalis, waiting for the vehicle the supplier was supposed to be driving. 1JRP 162-63, 213. The detectives spotted the vehicle, a white Honda Odyssey came from the north exit and went past their location. 1JRP 163, 213.

Pancho was driving the Odyssey and Iniguez Gonzalez was the front seat passenger. 1JRP 164, 213. The Odyssey had a headlight out. 1JRP 214. The Odyssey was headed in the direction of Shorey's residence. 1JRP 163-64. Detective Holt activated his patrol vehicles lights and pulled over the Odyssey, which stopped in the McDonald's parking lot. 1JRP 165, 214.

Detective Withrow contacted the Odyssey. 1JRP 166. Iniguez Gonzalez was now located in the rear passenger seat with the baby, who was seated behind the driver. 1JRP 166. Iniguez Gonzalez conversed with detectives in English, occasionally broken, but without issue. 1JRP 175-76, 216; 2JRP 29. Iniguez Gonzalez gave detectives three different explanations why she and Pancho were in the area when the detectives inquired. 1JRP 175-76, 216. Iniguez Gonzalez stated they were getting food at McDonald's. 1JRP 175,

216. Detective Holt confronted Iniguez Gonzalez with the fact there was already McDonald's food in the vehicle. 1JRP 216. Iniguez Gonzalez said she was visiting a friend, whom she could not provide a name for or tell the detectives where the friend lived. 1JRP 175-76. Finally, Iniguez Gonzalez explained they were in the area to purchase shoes for the baby. *Id.*

Located at Iniguez Gonzalez's feet, just under the bench seat in the minivan, was three ounces of methamphetamine. 1JRP 170-72, 2JRP 22-23. The methamphetamine was divided into three separate packages and then placed into one larger package. 1JRP 171. The methamphetamine was visible when the sliding passenger door was opened. 1JRP 202.

The State charged Iniguez Gonzalez with Possession of Methamphetamine with the Intent to Deliver and included the special allegation the offense was committed within 1,000 feet of a school bus stop. CP 8-9. There was a CrR 3.6 hearing where Iniguez Gonzalez argued for suppression of the search of the minivan. RP (1/26/18) CP 28-33. The State prevailed and Iniguez Gonzalez elected to try her case to a jury. 1JRP; CP 45-47. During the trial Iniguez Gonzalez moved for a mistrial, arguing one of the detective's testimony invited the jury to convict her based upon her heritage.

1JRP 158-60. The trial court denied the motion and Iniguez Gonzalez was convicted as charged. CP 104-05. Iniguez Gonzales was sentenced to 36 months and one day in prison, including the school bus stop enhancement. CP 112. Iniguez Gonzalez timely appeals her conviction. CP 121.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED INIGUEZ GONZALEZ'S REQUEST FOR A MISTRIAL.

The trial court did not abuse its discretion when it denied Iniguez Gonzalez's request for a mistrial following Detective Withrow's statement regarding methamphetamine and heroin coming into the area from Mexico. The trial court correctly handled the matter by giving a limiting instruction after the testimony and at the conclusion of the case in the jury instructions. This Court should affirm Iniguez Gonzalez's conviction.

1. Standard Of Review.

A trial court's decision to deny a mistrial is reviewed under an abuse of discretion standard. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). This Court will find a trial court abused its

discretion “only when no reasonable judge would have reached the same conclusion.” *Rodriguez*, 146 Wn.2d at 269 (internal quotations and citation omitted).

2. The Trial Court Properly Denied Iniguez Gonzalez’s Request For A Mistrial.

Iniguez Gonzalez’s request for a mistrial was properly denied by the trial court. The testimony of the detective was intended as background information to educate the jury regarding how the hierarchy of drug dealer to supplier works. The detective answered the question with more information than the deputy prosecutor anticipated, but the information that methamphetamine and heroin received in this area comes up from Mexico was not an inaccurate statement, nor was it presented with other evidence for the purpose of showing a propensity that Iniguez Gonzalez was a drug supplier. 1JRP 159-61. The trial court properly instructed the jury to disregard and gave a limiting jury instruction and therefore did not abuse its discretion when it denied Iniguez Gonzalez’s request for a mistrial.

A trial court’s granting of a mistrial is an extraordinary remedy. *Rodriguez*, 146 Wn.2d at 270. A trial court “should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly.” *Id.* (internal quotations and citation omitted). A reviewing court will only

overturn a trial court's denial of a motion for a mistrial "when there is a substantial likelihood that the error prompting the mistrial affected the jury's verdict." *Id.* at 269-70.

Trial irregularities are irregularities that occur during a criminal trial that implicate the defendant's due process rights to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 761 n.1, 675 P.2d 1213 (1984). When considering whether an irregularity affected the outcome of a trial, the reviewing court considers "(1) the seriousness of the irregularity, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it." *State v. Rafay*, 168 Wn. App. 734, 811, 285 P.3d 83 (2012), *citing State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

A mistrial should be granted only when "nothing the trial court could have said or done would have remedied the harm done to the defendant." *State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979) (quoting *State v. Swenson*, 62 Wn.2d 259, 280, 382 P.2d 614 (1963)). The trial court has wide discretion to cure trial irregularities. *State v. Post*, 118 Wn.2d 596, 620, 826 P.2d 172 (1992). Great deference is given to the trial court because it is in the best position to discern prejudice. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). Ultimately, this Court will reverse the trial court only if

there is a substantial likelihood the trial irregularity prompting the mistrial motion affected the jury's verdict. *State v. Rodriguez*, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002).

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Id.* The trial judge is in the best position to evaluate the dynamics of the trial and to determine the prejudicial effect, if any, of a particular remark upon the jury. *State v. Harris*, 97 Wn. App. 865, 869, 989 P.2d 553 (1999).

The proponent of evidence must establish its relevance, materiality, and the elements of a required foundation, by a preponderance of the evidence. *State v. Nava*, 177 Wn. App. 272, 290, 311 P.3d 83 (2013) (citations omitted); *State v. Hilton*, 164 Wn. App. 81, 99, 261 P.3d 683 (2011). Under ER 403, evidence that is relevant “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...or needless presentation of cumulative evidence.” There is a danger of unfair prejudice, in the context of ER 403, “[w]hen evidence is likely to stimulate an emotional response rather than a rational decision[.]” *State v. Powell*, 126 Wn.2d 244, 264 893 P.2d 615 (1995).

A party may not admit evidence of other crimes, wrongs, or acts of a person to show action in conformity therewith. *State v.*

Yarbrough, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009). The purpose and scope of ER 404(b) is that it “governs the admissibility of evidence of other crimes or misconduct for purposes other than proof of general character.” 5D Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence*, § 404:6, at 184 (2013-2014). Evidence of other crimes or misconduct is not admissible to demonstrate a defendant’s propensity to commit the crime they are currently charged with. ER 404(b); *State v. Powell*, 166 Wn.2d 73, 81, 206 P.3d 321 (2009). Evidence of other crimes, acts, or wrongs by a person may be admissible for purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or accident. ER 404(b).

The State elicited testimony from Detective Withrow regarding the amount of drugs generally seen at different levels of the supply chain, which was relevant given the amount of methamphetamine recovered from Iniguez Gonzalez’s vehicle. 1JRP 157-59. The State inquired why suppliers have such large amounts of drugs, and Detective Withrow replied it was because they usually source more than one person. 1JRP 158. The following exchange happened when the State asked its next question:

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 [sic]. Comes up from Mexico and - -

MR. BAUM: Objection. I have a motion.

1JRP 159. The jury was excused and Iniguez Gonzalez's counsel moved for a mistrial. *Id.*

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.

1JRP 159-60.

The State responded it did not believe the jury was prejudiced, defense counsel was attributing more weight to the statement than applicable, and Detective Withrow did not state all people from Mexico were drug dealers, he was simply explaining from his training and experience the source of drugs. 1JRP 160. The trial court

acknowledged there was prejudice involved in the statement, but found it did not rise to the level of a requiring a mistrial. 1JRP 160-61. The State made it clear it had not expected Detective Withrow to answer its question in the manner he did. 1JRP 161.

The trial court informed the parties it was going to instruct the jury to disregard. 1JRP 161. When the jury returned the trial court thanked the jury for its patience and then stated, “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.” 1JRP 161.

Iniguez Gonzalez argues none of the evidence was relevant, but in particular the testimony that drugs come from Mexico was prejudicial, propensity evidence elicited by the State in an attempt to convict Iniguez Gonzalez based on her race.³ Iniguez Gonzalez purports that the largest Spanish speaking country in the world is Mexico, but does not give any citation to support this contention. Brief

³ Iniguez Gonzalez discusses the other evidence, states it invites the jury to convict solely upon the implicit argument that the defendant must be guilty based upon the propensity to commit similar crimes, but does not brief the issue in regards to whether or not the trial court erred by admitting the evidence warranting reversal. The only argument raised is the trial court’s denial of the motion for a mistrial, which was requested solely based on the Mexico testimony. Trial counsel did not request a mistrial based upon the other evidence regarding the hierarchy of drug suppliers. Therefore, the State is not addressing the propensity to commit crimes argument based upon the other evidence elicited.

of Appellant 18. While the State acknowledges Iniguez Gonzalez's statement is true, the United States is the second largest Spanish-speaking country in the world, followed by Colombia, then Spain. *US now has more Spanish Speakers than Spain – only Mexico has more*, The Guardian, June 29, 2015.⁴ Iniguez Gonzalez also misstates the trial court's ruling, stating only "the defendant might well have been from Spain for all the jury knew" and arguing this is disingenuous and in the extreme. Brief of Appellant 18. The trial court stated,

I don't even know if your client is from Mexico. I don't even know if that's her heritage. I know that obviously she has a Spanish interpreter, but so do people in Puerto Rico and Spain and other places. Now, I do understand the prejudice that you are concerned with. But just based on that alone, I'm just going to correct it with an instruction to disregard.

1JRP 160-61.

The State does not deny Iniguez Gonzalez is Hispanic and used an interpreter throughout the proceedings. The State does contend the trial court did not abuse its discretion when it denied the motion for a mistrial. Iniguez Gonzalez proclaimed the detective's testimony regarding drugs coming from Mexico was an improper

⁴ This article can be found at <https://www.theguardian.com/us-news/2015/jun/29/us-second-biggest-spanish-speaking-country> (last visited 10/21/18).

assertion to the jury that given her Hispanic heritage Iniguez Gonzalez committed the crime of possession with the intent to deliver. This simply is not true, and any harm and prejudice that may have come from Detective Withrow's testimony was cured by the instruction given after his testimony and the jury instruction requested by Iniguez Gonzalez and given by the trial court at the conclusion of the case.

The State did not intentionally introduce evidence regarding drugs coming from Mexico, as that was not the intent of the question asked of the detective. 1JRP 161. The line of questioning regarding how suppliers and drug dealers operate was a relevant line of questioning in a trial where the allegation was a mid-level supplier was delivering drugs to another drug dealer. 1JRP 157-60, 169-71, 173, 207. This testimony corroborates Shorey's explanation of the deal he set up with Pancho and that the methamphetamine found in the vehicle were intended to be distributed. 1JRP 207-09.

The inadmissible testimony regarding drugs coming from Mexico, while found prejudicial by the trial court did not warrant a mistrial as requested by Iniguez Gonzalez. There was no testimony that Iniguez Gonzalez or her husband were Mexican, involved with Mexican drug suppliers, and the jury was told to disregard the

statement. Further, at the conclusion of the trial the jury was further instructed, “You are not to consider statements regarding ethnic origin of persons or property.” 2JRP 53; CP 80. The instruction to disregard by the judge and jury instruction at the conclusion of the trial was sufficient to cure any prejudice incurred by the detective’s testimony. Juries are presumed to follow the jury instructions provided to them by the trial court. *State v. Ervin*, 158 Wn.2d 746, 756, 147 P.3d 567 (2006). The trial court did not abuse its discretion when it denied Iniguez Gonzalez’s request for a mistrial and this Court should affirm the conviction and sentence.

B. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE JURY’S FINDING THAT INIGUEZ GONZALEZ COMMITTED THE CRIME OF POSSESSION OF METHAMPHETAMINE WITH THE INTENT TO DELIVER.

There was sufficient evidence presented to show beyond a reasonable doubt that Iniguez Gonzalez Possessed Methamphetamine with the Intent to Deliver. Contrary to Iniguez Gonzalez’s assertion, the facts taken in the light most favorable to the State sustain all of the essential elements of the charged offense. The Court should sustain the jury’s verdict.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. The State Proved, As It Is Required To, Each Element Of Possession Of Methamphetamine With The Intent To Deliver Beyond A Reasonable Doubt.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury’s by reweighing the credibility or importance

of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). “The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence.” *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

The crime of Possession of Methamphetamine with Intent to Deliver requires the State to prove Iniguez Gonzalez possessed methamphetamine, including its salts, isomers, and salts of isomers, with the intent to manufacture or deliver it. RCW 69.50.401(1); RCW 69.50.401(2)(b). The State charged Iniguez Gonzalez by amended information, alleging that on or about March 8, 2017,

the above-named defendant did possess, with intent to manufacture or deliver, a controlled substance, to-wit: Methamphetamine, including its salts, isomers, and salts of isomers...

CP 8, citing RCW 69.50.401(1) and (2)(b). The State also alleged the crime was committed within a thousand feet of a school bus stop designated by a school district pursuant to RCW 69.50.401 and RCW 69.50.435(1). CP 8.

The to-convict jury instruction included accomplice language.

To convict the defendant of the crime of possession with intent to deliver a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about March 8, 2017, the defendant, as a principal or accomplice, possessed a controlled substance, to wit: methamphetamine;

(2) That the defendant, as principal or accomplice, possessed the substance with the intent to deliver a controlled substance, to wit: methamphetamine; and

(3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 92 (Instruction 11), *citing* WPIC 50.14. The trial court also gave the jury an instruction regarding accomplice liability.

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP 89 (Instruction 8), *citing* WPIC 10.51.

Iniguez Gonzalez summarizes the evidence in this matter, giving six points she believes highlights the State’s evidence. Brief of Appellant 21. Similar to the prior section of her briefing, Iniguez Gonzalez fails to cite to the record in support of her factual basis. The State acknowledges Iniguez Gonzalez set forth a factual statement at the beginning of her brief, but that factual statement included facts elicited outside of the jury trial, at a CrR 3.6 hearing held on January 26, 2018. Brief of Appellant 3-5. Therefore, it is not possible for the State to know where exactly in the jury trial record Iniguez Gonzalez is pulling her facts from to make her argument that the State did not present sufficient evidence to sustain the jury’s

verdict.⁵ Failure to accurately cite to the record “places an unacceptable burden on opposing counsel and on this court.” *Lawson v. Boeing Co.*, 58 Wn. App. 261, 271, 792 P.2d 545 (1990).

Shorey, a drug dealer and confidential informant, called his methamphetamine supplier, Pancho, to bring methamphetamine to Shorey’s house on March 8, 2017. 1JRP 206-09. Shorey was familiar with Iniguez Gonzales as Pancho’s girlfriend. 1JRP 206. The detectives set up on Chamber Way to look for the vehicle they were informed would be delivering the methamphetamine, a white Honda Odyssey. 1JRP 162-63, 213. Pancho, whose actual name is Eduardo Morales Martinez, was driving the Odyssey and Iniguez Gonzalez was the front seat passenger when the vehicle passed the detectives on Chamber Way. 1JRP 164, 213. The Odyssey headed in the direction of Shorey’s residence. 1JRP 214. The Odyssey had a headlight out. 1JRP 165, 214. Detective Holt stopped the Odyssey, which pulled into the McDonald’s parking lot. 1JRP 165-66, 214.

Detective Withrow contacted the Odyssey. 1JRP 166. Iniguez Gonzalez was no longer in the front passenger seat but was now in

⁵ In complete candor to the Court, some of the facts cited in the sufficiency of evidence argument can be found in the CrR 3.6 hearing. *See* RP (1/26/18) 6-7.

the rear passenger seat with the baby who was behind the driver's seat. 1JRP 166. Iniguez Gonzalez gave multiple explanations to detectives regarding why they were in the area. 1JRP 175-76, 216. Iniguez Gonzalez initially explained they were in the area getting food at McDonald's. 1JRP 175, 216. The McDonald's Pancho and Iniguez Gonzalez had stopped at is not visible from the interstate. 1JRP 175. Detective Holt confronted Iniguez Gonzalez and Pancho about the fact there was already McDonald's food in the car. 1JRP 216. Iniguez Gonzalez then explained they were visiting a friend, whom she did not know the name of or where the friend lived. 1JRP 175-76. Iniguez Gonzalez next stated they were in the area to get shoes for the baby. 1JRP 175-76.

There was approximately three ounces of methamphetamine found on the floorboard on the back passenger side. 1JRP 170; 2JRP 22-23. The methamphetamine was found at Iniguez Gonzalez's feet. 1JRP 171-72. The methamphetamine was packaged into three separate bags which were placed into one larger bag. 1JRP 171. Iniguez Gonzalez is the registered owner of the Honda Odyssey. 1JRP 169.

Iniguez Gonzalez argues she was merely present in the van and aware there was methamphetamine in the van Pancho was

going to sell to Shorey. Brief of Appellant 21-22. Iniguez Gonzalez does not correctly apply the standard of review for a sufficiency of evidence claims, ignores her contradictory statements, the inferences of her providing her vehicle to Pancho to deliver the methamphetamine to Shorey, and that the drugs were found at her feet when the vehicle was ultimately stopped.

Iniguez Gonzalez gave three different untruthful statements to the police as to why she and Pancho were in the area, which exhibits consciousness of guilt. The Odyssey belonged to Iniguez Gonzalez and she allowed Pancho to drive the vehicle to deliver the drugs, a venture for which Iniguez Gonzalez was not only present for, but assisting by providing aid. The evidence taken in the light most favorable to the State, with all reasonable inferences drawn in favor of the State, prove each element of Possession of Methamphetamine with Intent to Deliver beyond a reasonable doubt and this Court should affirm the jury's verdict.

C. THE TRIAL COURT DID NOT ERR WHEN IT DENIED INIGUEZ GONZALEZ'S REQUEST TO GIVE HER PROPOSED UNWITTING POSSESSION JURY INSTRUCTION.

The trial court correctly decided it was not appropriate to give Iniguez Gonzalez's proposed unwitting possession jury instruction. There was not sufficient evidence in the record, in the light most

favorable to Iniguez Gonzalez, to warrant giving the instruction. This Court should affirm.

1. Standard Of Review

Jury instructions are reviewed de novo. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). A challenged jury instruction is reviewed in the context of the jury instructions as a whole. *Bennett*, 161 Wn.2d at 307. Juries are presumed to follow the jury instructions provided to them by the trial court. *Ervin*, 158 Wn.2d at 756.

2. The Trial Court Properly Denied Giving Iniguez Gonzalez's Proposed Unwitting Possession Jury Instruction.

Jury instructions are considered inadequate if they prevent a party from arguing their theory of the case, misstate the applicable law or mislead the jury. *Bell v. State*, 147 Wn.2d 166, 176, 52 P.3d 503 (2002). The State and the defendant have the right to have the trial court instruct the jury upon its theory of the case so long as there is sufficient evidence to support the theory. *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983). A proposed instruction should be given by the trial court if it is not misleading, properly states the law and allows the party to argue her or his theory of the case. *State v. Webb*, 162 Wn. App. 195, 208, 252 P.3d 424 (2011), *citing State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). "When

considering whether a proposed jury instruction is supported by the evidence, the trial court must examine the evidence and draw all reasonable inferences in the light most favorable to the requesting party.” *Webb*, 162 Wn. App. at 208, *citing State v. Hanson*, 59 Wn. App. 651, 656–57, 800 P.2d 1124 (1990).

A defendant may raise an unwitting possession defense, which requires the defendant to show, by a preponderance of the evidence, he or she did not knowingly possess the controlled substance. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004); WPIC 52.01. The ability to raise an unwitting possession defense lessens the harshness of the strict liability crime. *Bradshaw*, 152 Wn.2d at 538. Unwitting possession is an affirmative defense. *State v. George*, 146 Wn. App. 906, 915, 193 P.3d 693 (2008).

“In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility, which are exclusive functions of the jury.” *George*, 146 Wn. App. at 915. The affirmative defense “must be considered in light of all the evidence presented at trial, *without regard to which party presented it.*” *Id.* (emphasis original, citation omitted). If there is evidence supporting the defense

of unwitting possession adduced at trial it is error to not instruct on the affirmative defense. *Id.*

The trial court properly denied Iniguez Gonzalez's request for an unwitting possession jury instruction. 2JRP 35; CP 68, *citing* WPIC 52.01. The State objected to the unwitting possession instruction, arguing there was no evidence to establish the affirmative defense. 2JRP 34-35. Iniguez Gonzalez's counsel stated,

Well, she didn't testify, so that kind of - - I think the circumstances generally support the defense of unwitting possession even though she didn't testify. So I would like that instructions. The state really hasn't shown that she had knowledge of it, and so I think it supports the idea that it is a defense.

2JRP 35. While Iniguez Gonzalez receives the benefit of all the evidence, unwitting possession is still an affirmative defense she must prove by a preponderance of the evidence. WPIC 52.01.

The evidence presented in this matter does not support an unwitting possession instruction. A defendant does not need to testify in order to receive an unwitting possession instruction if the evidence supports such an instruction. *George*, 146 Wn. App. at 915-16. In *George* only the trooper testified, but the testimony elicited was sufficient to warrant an unwitting possession instruction. *Id.* The trooper testified all the occupants of the vehicle denied knowledge of the drugs being present in the car, the vehicle was owned and driven

by someone other than the named defendant, and George denied ownership of the drug paraphernalia. *Id.* at 915-16. It was reversible error for the trial court to deny the requested unwitting possession instruction. *Id.* at 916.

Iniguez Gonzalez is not similarly situated as the defendant in *George*. Iniguez Gonzalez was the owner of the vehicle carrying three ounces of methamphetamine out for delivery to a drug dealer who phoned in his order for methamphetamine to his usual supplier. 1JRP 169-70, 206-09. Iniguez Gonzalez was present in the vehicle. 1JRP 164, 213. Iniguez Gonzalez was located by the detectives in the backseat of the vehicle with the methamphetamine under her seat. 1JRP 166, 171-72. The drugs were not concealed and detectives easily saw the methamphetamine when the passenger side van door was opened. 1JRP 202. Iniguez Gonzalez conversed with detectives in English, occasionally somewhat broken, given three different reasons why she and Pancho were in the area. 1JRP 175-76, 216; 2JRP 29 It was not until Detective Withrow asked Iniguez Gonzalez if he could search the van for drugs Iniguez Gonzalez claimed she could not understand English. 2JRP 31. When Detective Withrow informed Iniguez Gonzalez she was under arrest for possession of methamphetamine with the intent to distribute,

Iniguez Gonzalez had no reaction, she did not cry. 2JRP 28-29. At no point did Iniguez Gonzalez claim she did not know there were drugs in the vehicle. See 1JRP; 2JRP.

The evidence viewed in the light most favorable to Iniguez Gonzalez does not support giving the proposed unwitting possession affirmative defense jury instruction. There was no error committed by the trial court when it denied Iniguez Gonzalez's request for the unwitting possession instruction and this Court should affirm her conviction.

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IV. CONCLUSION

The trial court did not abuse its discretion when it denied Iniguez Gonzalez's request for a mistrial. Any prejudice from the improper testimony was cured by the curative instructions given by the trial court. There was sufficient evidence presented to sustain the jury's verdict convicting Iniguez Gonzalez of Possession of Methamphetamine with the Intent to Deliver. Finally, Iniguez Gonzalez was not entitled to a jury instruction for unwitting possession, therefore the trial court did not err when it denied her request for the instruction. This Court should affirm Iniguez Gonzalez's conviction.

RESPECTFULLY submitted this 24th day of October, 2018.

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by: _____
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LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

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