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State of Washington

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

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STATE OF WASHINGTON,

Respondent,

v.

JAMES HENDERSON LISTOE,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 18-1-00696-18

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BRIEF OF RESPONDENT

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the trial court erred in allowing a peremptory challenge to an African American juror?
2. Whether there was insufficient evidence of possession of the drugs found in the car Listoe was driving?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

James Henderson Listoe was charged by first amended information filed in Kitsap County Superior Court with possession of methamphetamine with intent to manufacture or deliver (hereinafter possession with intent) and possession of a controlled substance (suboxone). CP 1-2.

During voir dire, the prosecutor had an exchange with a juror about following the law. The prosecutor spun a hypothetical in which all things related to cookies were illegal and that he was charged with eating a cookie. 1RP 131-32. When juror 17 was asked whether he would convict for the cookie eating, he replied that he would question the law. 1RP 132. The prosecutor continued the hypothetical explaining that the cookie eating prohibition was the law and there was massive evidence of the event. 1RP 132. Juror 17 again answered that he would question the law. Id. Further questioned, juror 17 repeated a third time that he would

question the law. Id. Juror 17 acknowledged that he would have problems convicting for cookie eating because of the law. 1RP 132-33. Finally, the prosecutor asked “if you have problems with the law, would you have problems following it.” 1RP 133. Juror 17 replied “yeah.” Id.

The prosecutor immediately asked two other jurors, 27 and 3, about following the law on the cookie hypothetical. 1RP 133. The same discussion was had with jurors number 7 and 25 (1RP 134), again with jurors 37 and 38 (1RP 135).

Further along, the prosecutor changed the hypothetical by making himself the defendant for selling cookies that he made in his own home. 1RP 137. Jurors 4, 10, 43, and 45 engaged in this discussion on following the law, juror 17 did not. 1RP 137-39.

Further along in voir dire, juror 17 again expressed his dislike of the cookie law. 1RP 135-36. He told of a law in Arkansas that allowed for a fine if one mispronounced the name of the state. Id. The prosecutor joined this example by enquiring of juror 17 if he would convict in the mispronunciation case. Id. Juror 17 responded that “it’s just for the principles.” Id.

It developed that juror 17 was “an apparent minority member of our jury panel.” 1RP 161. The state lodged a peremptory challenge against juror 17. Id. The trial court asked the state to explain the reasons

for the challenge. Id. The prosecutor responded

Multiple comments about being unable to follow the law. I think he specifically brought up something about Arkansas and "Arkansas," and he said something along the lines of it being ridiculous.

I know I used a hyperbolic example of a cookie, but I think he did say he'd question the law, and he'd have trouble convicting, following the law as given. So my peremptory is based on his statements about being unable to follow the law.

1RP 161-62.

The trial court understood the application of GR 37; the trial court began the process of peremptory challenges with reference to the rule. 1RP 158. The trial court referred to subsection (e) of the rule and ruled that the peremptory, objectively viewed, was based on juror 17's reluctance to follow the law rather than race and allowed the challenge. 1RP 164. At the request of the defense, the trial court verified that juror 17 was the only African American juror in the venire. Id.

The jury found Listoe guilty on both counts. CP 28. The trial court pronounced a drug offender sentencing alternative (DOSA). CP 30. The DOSA cut Listoe's 90-month standard range sentence to 45 months of incarceration. CP 31. Pursuant to the DOSA sentence, the other 45 months was ordered to be served on community custody with required treatment. CP 32.

Listoe timely appealed. CP 40.

## **B. FACTS**

Police saw a car at a 7-Eleven that had expired registration. 2RP 190. Police stopped the car. *Id.* Police observed “a bunch of movements” in the car. 2RP 193. The driver opened the car door and began to get out of the car but the police told him to remain in the car and show his hands. *Id.*

There was one other person in the car. 2RP 197. This passenger was allowed to leave. 2RP 198. Listoe was removed from the car and arrested. 2RP 198. A search incident to arrest revealed a plastic bag of suspected methamphetamine. 2RP 199. A police K-9 unit alerted on the car. 2RP 240.

A search warrant was obtained for the interior of the car. 2RP 202. Behind the driver’s seat, police found a black, zippered pouch in a grocery bag. 2RP 203. The zippered pouch contained “several large shards of crystalline substance” that appeared to be methamphetamine. (2RP 204). The controlled substance found on Listoe weighed 3.3 grams. 2RP 206. The controlled substances found in the zippered pouch weighed roughly 6.5 grams. 2RP 206-07. The substances found were tested and found to be methamphetamine. 2RP 248.

Police also found a digital scale, a Tupperware container with residue, and a plastic bag containing syringes. 2RP 204-05. Police also found Suboxone. 2RP 207. Suboxone is a prescribed pain killer that is in heroin addiction treatment. 2RP 222-23. And Listoe had \$221 in his wallet. 2RP 209. When contacted, Listoe had told the police that he did not own the car and police found no evidence to the contrary. 2RP 234-35.

Experienced police opined that a user amount of methamphetamine is around 3.5 grams or less. 2RP 273. Police opined that the amount of methamphetamine and other evidence in Listoe's possession established possession with intent to deliver. 2RP 275

### III. ARGUMENT

#### A. THE TRIAL COURT PROPERLY FOLLOWED THE PROCEDURE OF GR 37 AND PROPERLY RULED THAT THE PROSECUTOR'S CHALLENGE, OBJECTIVELY VIEWED, COULD NOT BE CONSIDERED RACIALLY BASED.

Listoe argues that the trial court erred in striking the only African American juror from the venire in violation of GR 37. This claim is without merit because the trial court, applying GR 37, properly determined that the reason for the preemptory challenge, objectively viewed, would not raise concern of a neutral observer that the challenge was racially

motivated.

Both the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington Constitution provide a criminal defendant with the right to trial by a fair and impartial jury. *See State v. Davis*, 141 Wn.2d 798, 824, 10 P.3d 977 (2000). Moreover, it falls to the courts to “protect the right of jurors to participate in the civic process and to ensure that our justice system is free from any taint of bias.” *State v. Beliz*, 104 Wn. App. 206, 213, 15 P.3d 683 (2001) *review denied (after retrial)* 158 Wn.2d 1012 (2006). Peremptory challenges assist this process:

The peremptory challenge ... exists to give the task of sorting out the biases most relevant in the given case to those most competent of determining it, i.e., the parties, and to give the parties a degree of flexibility and control over the constitution of the jury panel through their implementation of the challenge mechanism.

Peter J. Richards, *The Discreet Charm of the Mixed Jury: The Epistemology of Jury Selection and the Perils of Post-Modernism*, 26 Seattle U.L.Rev. 445, 459 (2003); *State v. Rhone*, 168 Wn.2d 645, 654, 229 P.3d 752 (2010).

Although peremptory challenges are allowed by both statute and court rule, a limitation has been placed on the ability to strike an otherwise

qualified and unbiased venireperson because of his or her race. *See State v. Luvene*, 127 Wash.2d 690, 699, 903 P.2d 960 (1995), *citing Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Now that limitation has been expanded in order to address perceived unconscious racial bias in the voir dire process by the enactment of general rule 37.

The rule provides:<sup>1</sup>

- (a) Policy and Purpose. The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.
- (b) Scope. This rule applies in all jury trials.
- (c) Objection. A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.
- (d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons that the peremptory challenge has been exercised.
- (e) Determination. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.
- (f) Nature of Observer. For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of

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<sup>1</sup> The quotation is set-off by single space text but not blocked or indented due to the length of the quotation.

potential jurors in Washington State.

(g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

(i) the number and types of Questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to Question the prospective juror about the alleged concern or the types of Questions asked about it;

(ii) whether the party exercising the peremptory challenge asked significantly more Questions or different Questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;

(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

(iv) whether a reason might be disproportionately associated with a race or ethnicity; and

(v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

(h) Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge;

(i) having prior contact with law enforcement officers;

(ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;

(iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;

(iv) living in a high-crime neighborhood;

(v) having a child outside of marriage;

(vi) receiving state benefits; and

(vii) not being a native English speaker.

(i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided

unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

A GR 37 issue raised under the “Determination” section of the rule is reviewed de novo. *State v. Jefferson*, 192 Wn.2d 225, 250, 429 P.3d 467 (2018).

In Washington, “A juror is unfit if he or she exhibits prejudice by refusing to follow the law or participate in deliberations.” *State v. Elmore*, 155 Wn.2d 758, 773, 123 P.3d 72 (2005); *See* RCW 2.36.110. “Moreover, both the defendant and the State have a right to an impartial jury.” *Elmore*, 155 Wn.2d at 773, *citing State v. Hughes*, 106 Wash.2d 176, 185, 721 P.2d 902 (1986).” This case deals with the intersection of these traditional rules and the new overarching requirements of GR 37.

Here, the procedure of the rule was followed. The trial court began peremptory portion of jury selection by making challenged jurors wait in the court room; they were not excused. The issue was raised by defense objection and the trial court did not insist that the defense elaborate or make any sort of prima facie showing.

Then, the prosecutor articulated his reasons for the challenge. The trial court moved to the consideration portion of the rule. The trial court

used the correct standard by considering whether under the totality of the circumstances “an objective observer could view race or ethnicity as a factor in the use of this peremptory challenge.” 1RP 162-63. The trial court did not articulate that its ruling was based upon the persuasiveness of the prosecutor’s race-neutral explanation.

Moreover, the prosecutor did question the challenged juror about following the law, satisfying the circumstances considered, subsection (g)(i). The prosecutor did not ask juror 17 more or different questions than he did other jurors. GR 37 (g)(ii). Generally, all the other jurors questioned about the cookie hypothetical had no problem with convicting if that is the law, and thus the answers of those not challenged were different than the answers of juror 17. GR 37 (g)(iii). There is no information in this record that the reason, not following the law, might be “disproportionately associated with race or ethnicity.” GR 37 (g)(iv). And, finally, there is no information in this record that this prosecutor has used peremptory challenges “disproportionately against a given race or ethnicity, in the present case or in past cases.” GR 37 (g)(v).

Considering subsection (h), none of the historically discriminatory reasons found there apply to the present case. Similarly, none of the negative behavioral factors listed in subsection (i) obtain in the record.

In this case, the applicability of GR 37 was not in issue. The trial

court knew the rule, applied it, and followed the procedure of the rule step-by step. On de novo review, a full consideration of the record and the rule reveals that it was properly applied and that the trail court's ruling is not error.

**B. LISTOE HAD DOMINION AND CONTROL OVER THE FOUND DRUGS.**

Listoe next claims that there was insufficient evidence of drug possession. He does not directly say so, but the argument is directed at the drugs discovered in the back seat of the car. The state assumes that Listoe does not challenge his possession of the drugs found in his pocket. Moreover, insofar as Listoe does not challenge possession of the drugs in his pocket, the issue unclear with regard to the possession with intent count because Listoe does not argue that the drugs found on his person were insufficient to sustain his conviction. The claim regarding the drugs in the car is without merit because the evidence establishes that Listoe had dominion and control of the drugs in the car.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact

differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime are proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

Here, the first amended information charged possession with intent under RCW 69.50.401. CP 1. The jury was properly instructed that the first element of that offense is "that on or about May 11, 2018, the defendant possessed methamphetamine." CP 21 (instruction #12). The jury was properly instructed on the law of possession

Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual

possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance.

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

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

CP 18. The instruction tracks WPIC 50.03 with limited exclusion of bracketed material.

This court has published the same law as WPIC 50.03 with case citation:

Possession may be actual or constructive. *State v. Summers*, 107 Wash.App. 373, 389, 28 P.3d 780, 43 P.3d 526 (2001). Actual possession occurs when the defendant has physical custody of the item, and constructive possession occurs if the defendant has dominion and control over the item. *State v. Jones*, 146 Wash.2d 328, 333, 45 P.3d 1062 (2002). Dominion and control means that the defendant can immediately convert the item to their actual possession. *Jones*, 146 Wash.2d at 333, 45 P.3d 1062. Constructive possession need not be exclusive. *Summers*, 107 Wash.App. at 389, 28 P.3d 780. When a person has dominion and control over a premises, it creates a rebuttable presumption that the person has dominion and

control over items on the premises. *Summers*, 107 Wash.App. at 389, 28 P.3d 78043 P.3d 526; *State v. Cantabrana*, 83 Wash.App. 204, 208, 921 P.2d 572 (1996).

*State v. Reichert*, 158 Wn. App. 374, 390, 242 P.3d 44 (2010). Further, as our Supreme Court has noted, in the final analysis it is “actual control” that the state must prove. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

First, Listoe argues that the evidence is insufficient because the drugs may have belonged to the passenger in the car Listoe was driving. Thus, he claims, this female passenger may have had dominion and control of the drugs or that in fact it is more likely that the drugs belonged to her. Brief at 17. There is no evidence of that in this record. But Listoe’s speculation about the ownership of the drugs squarely ignores that “dominion and control need not be exclusive to establish constructive possession.” The jury could have believed that the passenger was in fact the owner of the drugs and still also have found that Listoe had dominion and control and thus possession. *See State v. Bowen*, 157 Wn. App. 821, 826, 239 P.3d 1114 (2010) (Defendant convicted of unlawfully possessing firearm where another testified to ownership of firearm); *See also State v. Lane*, 56 Wn. App. 286, 297, 786 P.2d 277 (1989).

Taken in a light most favorable to the state, the facts here are that Listoe was the driver of the car in which the drugs were found. When

stopped, Listoe was moving around in the car as if attempting to hide something. 2RP 237. The female passenger had left the scene without claiming that any other item in the car belonged to her. Only the passenger and Listoe could have had dominion and control. Listoe had the same kind of drugs on his person as those that were found behind him in the back seat; from this fact it is reasonable to infer that Listoe had knowledge of the drugs in the back seat. Listoe could have easily converted his dominion and control over the interior of the car into actual possession of the drugs.

From these facts, it is reasonable to infer that Listoe had constructive possession of the drugs in the back seat. With all reasonable inferences in the state's favor, the total circumstances support the jury's finding. Listoe made essentially the same argument to the jury as he advances here. He claimed that the drugs belonged to the female passenger, or someone else, and that they could not be tied to Listoe. 2RP 324 *et. seq.* The jury rejected this argument. The jury also rejected the defense of unwitting possession. CP 19 (instruction #10).

The circumstances of this case and the reasonable inferences that may be drawn provided the properly instructed jury sufficient evidence to make an affirmative answer on the first element of possession with intent to manufacture or deliver methamphetamine and possession of suboxone.

There was no error.

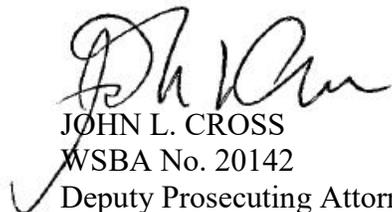
#### IV. CONCLUSION

For the foregoing reasons, Listoe's conviction and sentence should be affirmed.

DATED September 11, 2019.

Respectfully submitted,

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**KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION**

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