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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)	NO. 31829-0-III
Plaintiff/Respondent)	
)	
vs.)	
)	
THOMAS ALVA CURTIS,)	
Defendant/Appellant.)	

BRIEF OF RESPONDENT

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I. Introduction.

Mr. Thomas Curtis was convicted by jury of one count of possession of a controlled substance – methamphetamine. The sole issue on this appeal is whether the trial court erred in denying Mr. Curtis' proposed jury instruction of unwitting possession.

II. Assignment of Error.

State assigns no errors for review.

III. Statement of the Case

The facts set forth in appellant's brief for purpose of this appeal are adopted herein.

In addition to the facts set forth in appellant's brief, Mr. Curtis provided the following cross-examination testimony:

Biggar (prosecutor): Now the nature of this pipe. This isn't a tobacco pipe. Would you agree with that?

Curtis: Uh, yeah. But I ...

Biggar: This is what you normally smoke tobacco with?

Curtis: No.

...

Biggar: In fact, you had marijuana pipes that are somewhat similar in nature. Would you agree with that?

Curtis: Yeah.

Biggar: Ok. But this ... you would recognize this a drug pipe. Would you not?

Curtis: You know, a little pipe for marijuana residue. The opium stuff.

Report of Proceedings 07/11/13, page 235.

...

Biggar (prosecutor): So with regard to the methamphetamine pipe, he pulls that pipe out. And you heard again, Officer Renggli's testimony. And that you stated that you had used it recently to smoke methamphetamine. Do you recall that testimony?

...

And your testimony on the stand is that you didn't tell him that?

Curtis: No.

Biggar: Ok. But you admit that you knew the pipe was in your pocket?

Curtis: Yes.

Biggar: And you admit that you knew that it had illegal substances in it?

Curtis: I knew it was a pipe. I didn't know what type of substance it was.

Biggar: Ok. But you knew that it could've been cocaine? Could've been methamphetamine. Could've been any number of different ones. Would you agree with that?

Curtis: Yeah.

Biggar: Ok. And you kept it in your pocket anyway. With that knowledge. Is that correct?

Curts: Yeah.

Report of Proceedings 07/11/13, pp. 240 – 241.

IV. Argument

The court acted within its discretion to deny the proposed unwitting possession jury instruction under the particular facts of this case because Curtis did not testify that he did not know the pipe contained an illegal substance; instead he testified that he knew it contained an illegal substance, but not which type. Additionally, the unwitting defense does not apply to the baggies of methamphetamine found by the arresting officer on the booking room floor next to defendant because defendant denied that he possessed the baggies.

A party is entitled to have the jury instructed on its theory of the case only where there is evidence to support that theory. State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997). Thus, “a criminal defendant is not entitled to an unwitting possession instruction unless the evidence presented at trial is sufficient to permit a reasonable juror to find, by a preponderance of the evidence, that the defendant unwittingly possessed the contraband.” State v. Buford, 93 Wn.App. 149, 153, 967 P.2d 548 (1998). A trial court's refusal to grant an instruction based upon a

matter of fact, is reviewed only for abuse of discretion. State v. Walker, 136 Wn .2d 767, 771–72, 966 P.2d 883 (1998).

To establish the defense of unwitting possession, the defendant must demonstrate either that he did not know that he was in possession of the controlled substance or that he did not know the nature of the substance. City of Kennewick v. Day, 142 Wash.2d 1, 11, 11 P.3d 304 (2000)(citing State v. Staley, 123 Wn.2d 794, 799, 872 P.2d 502 (1994)); and State v. Balzer, 91 Wn.App. 44, 67, 954 P.2d 931 (1998).

A. Pipe evidence.

The state is not required to prove the defendant's knowledge of the particular type of controlled substance possessed; only that the defendant possessed a controlled substance. See State v. Nunez-Martinez, 90 Wash.App. 250, 254, 951 P.2d 823 (1998); and also State v. Adame, 56 Wash.App. 803, 785 P.2d 1144 (1990). Since knowledge of the particular type of controlled substance is not a prerequisite for conviction, then it stands to reason that neither is defendant's lack of knowledge of the particular type of controlled substance a basis for asking for an unwitting possession instruction. It is defendant's burden to provide sufficient evidence that he did not know the "nature of the

substance.” This phrase should be construed to mean generally that the substance was controlled or illegal. Otherwise the defendant would be entitled to an unwitting possession instruction for a possession of methamphetamine charge if he testified he thought the substance was cocaine instead.

Curtis did not testify that he did not know that the pipe contained an illegal substance. To the contrary, Curtis admitted that he took possession of his friend’s pipe knowing that it contained some sort of illegal substance, but just not the particular type of substance. In other words, Curtis provided insufficient evidence of unwitting possession when he testified that he knew the nature of the substance was an illegal substance.

B. Baggie evidence.

As to the baggies of methamphetamine found on the booking room floor at defendant’s feet, the state is not conceding that the jury did not also find defendant guilty for those items as well. The contents of the pipe and the baggies were properly submitted to the jury as a single possession of methamphetamine. See State v. Adel, 136 Wash.2d 629, 965 P.2d 1072 (1998)(double jeopardy bars multiple convictions for simple possession of same drug based on stashing drug in multiple places).

The unwitting possession defense is not argued by defendant as to the baggies because defendant wants the inquiry limited to the pipe. Although defendant did not request a special interrogatory verdict form be submitted to the jury as to whether it was convicting based only on the pipe or the baggies, or both, he now argues in essence insufficiency of the evidence as to the baggies because of the jury question regarding the residue in the pipe. But since the defendant did not request a special interrogatory instruction verdict form asking the jury to decide possession as to the pipe independent of the baggies, he should not now for the first time on appeal be allowed to argue that the jury decided guilt only as to the pipe.

In a challenge to the sufficiency of the evidence, “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” State v. Goodman, 150 Wash.2d 774, 781, 83 P.3d 410 (2004). In this instance, there is sufficient evidence for the jury to have found the defendant guilty of possession the controlled substances in the baggies.

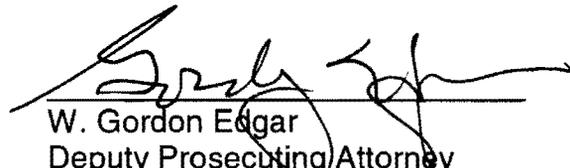
As to the baggies, the defense of unwitting possession does not apply because the defense was purely that defendant did not

possess those items. The unwitting possession “ is a defense that admits that the defendant committed the crime and seeks to excuse the unlawful conduct.” State v. Buford, 93 Wash.App. at 152, (quoting State v. Chapin, 75 Wash.App. 460, 471 n. 20, 879 P.2d 300 (1994)). In this instance, however, defendant denied possession of the baggies and denied dropping them to the floor. The defendant did not argue that the baggies were on his person but he did not know how they got there. There simply was no evidence or claim by defendant to support a jury instruction that he unwittingly possessed the baggies

V. CONCLUSION

It cannot be said that the trial court abused its discretion in refusing to give the requested defense jury instruction of unwitting possession under the particular facts of this case where the defendant did not provide sufficient evidence that his possession of any controlled substance was unwitting.

Respectfully submitted this
4th day of June, 2014.


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