FILED
10/2/2017 3:30 PM
Court of Appeals
Division III
State of Washington

34934-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

STEPHEN HARRIS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Gretchen E. Verhoef
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

I. APPELLANT'S ASSIGNMENT OF ERROR..... 1

II. ISSUE PRESENTED..... 1

III. STATEMENT OF THE CASE 1

Defense Counsel's Opening Statement..... 2

Officer Gately's Testimony – Direct Examination..... 3

Officer Kellee Gately's Testimony – Cross Examination. 5

Hearing Outside the Presence of the Jury..... 6

IV. ARGUMENT 13

A. THE TRIAL COURT DID NOT VIOLATE THE DEFENDANT'S RIGHT TO PUT ON A DEFENSE BY EXCLUDING EVIDENCE OF ANOTHER PERSON'S ALLEGED DRUG USE. 13

Standard of Review..... 13

The Right to Present Evidence..... 14

Defense of Unwitting Possession..... 15

B. UNLESS DEFENDANT'S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT ENTERED THE ORDER OF INDIGENCY, THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT THE APPEAL. 22

V. CONCLUSION 23

TABLE OF AUTHORITIES

WASHINGTON CASES

City of Kennewick v. Day, 142 Wn.2d 1, 11 P.3d 304 (2000) 13, 16, 18

State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (1981),
cert. denied, 456 U.S. 1006, 102 S.Ct. 2296,
73 L.Ed.2d 1300 (1982) 16

State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002) 14, 15

State v. Duarte Vela, No. 33299-3-III, 2017 WL 3864628
(Sept. 5, 2017) 19, 20

State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006) 14

State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983) 15

State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010) 14, 15

State v. Perez-Valdez, 172 Wn.2d 808, 265 P.3d 853 (2011) 19

State v. Staley, 123 Wn.2d 794, 872 P.2d 502 (1994) 15

State v. Sundberg, 185 Wn.2d 147, 370 P.3d 1 (2016) 16

State v. Wiley, 79 Wn. App. 117, 900 P.2d 1116 (1995) 16

FEDERAL CASES

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038,
35 L.Ed.2d 297 (1973) 14

CONSTITUTIONAL PROVISIONS

U.S. Const. amend VI 14

Wash. Const. art 1, § 22 14

STATUTES

RCW 69.50.4013 15

RULES AND REGULATIONS

ER 401 14

ER 402 14

ER 403 21

RAP 14.2..... 22, 23

I. APPELLANT'S ASSIGNMENT OF ERROR

The trial court erred by prohibiting the defendant from asking Officer Gately, on cross-examination, whether Ms. Cline was under the influence of methamphetamine, in order to support his defense of unwitting possession.

II. ISSUE PRESENTED

Whether the trial court violated the defendant's right to put on a defense by excluding an officer's opinion testimony that another person was potentially under the influence of methamphetamine?

III. STATEMENT OF THE CASE

The defendant's sole claim on appeal is that the trial court erred in disallowing testimony from the arresting officer that she believed a woman by the name of Angela Cline was under the influence of methamphetamine at the time that Mr. Harris was arrested and found to be in possession of methamphetamine. There was no dispute at trial, nor is there a dispute on appeal as to the sufficiency of the evidence presented that the substance located on Mr. Harris' person was, in fact, methamphetamine.

Defense Counsel's Opening Statement.

In Mr. Harris' opening statement, defense counsel indicated that the evidence would demonstrate:

> Almost a year ago, Stephen Harris was doing laundry at a laundromat with his girlfriend on Crestline. They were doing laundry there. The police did come to the scene and eventually handcuffing [sic] Mr. Harris and searching [sic] him. While they were doing laundry at the laundromat, Stephen was doing what everyone else does when they do laundry: You put something in the washer. You do one thing, hopefully you do one thing. You check the pockets and you pull what's in the pockets out of that item and then throw it in the washer. If you're at home, you'll put that on top of your dryer. Laundromat, you're probably going to stuff it in your pocket.
>
> That's exactly what he did in this case. Stephen was doing exactly that with a black hoodie. He pulled a phone out of the pocket and put that in his pocket. The hoodie had a card in it. He took that card out, which was related to the lady he was with, and he put that in his pocket. It had a handful of change and a lighter with some odd pieces of paper in it and pulled that out of the pocket and stuffed that in his pocket. That's where those items were that he had a handful of items in his pockets.
>
> The phone he put in his pocket was his girlfriend's because she was wearing the hoodie before it was placed in the wash. They were there doing laundry together. The card he put in his pocket was also hers, and you will hear evidence to that effect. The change and lighter were also hers. He didn't smoke. He didn't have any cigarettes. Didn't carry any pipes, any reason to have any lighter in his pocket. But in with the change and the lighter and the pieces of paper was something else, a very small plastic baggie, a very small plastic baggie you wouldn't notice grabbing a handful of items in a pocket and stuffing it in your own pocket.

> … It was a tiny plastic baggie with residue, something police officers are trained to keep a keen eye out for… So when the officer told him that she found a bag and that she suspected it might have methamphetamine in it, he immediately said, "that's not mine." He said that because it wasn't his. And that is what this case is about. This case is about was that his methamphetamine, did he know he had it in his pocket.
>
> When the officers returned items, they returned the phone in his pocket to the girlfriend. When the officers looked at the card, they returned that card to his girlfriend… They did not return the baggie to the girlfriend. They put that on evidence and charged him with possession of controlled substance. Now they did that even though he did not appear to be under the influence of the drugs. They did that even though she did appear to be under the influence of methamphetamine…

10/18/16 RP[1] 7-10.

For clarity, the testimony elicited by the parties at trial both in the jury's presence and outside the jury's presence is set forth below.

Officer Gately's Testimony – Direct Examination.

Officer Kellee Gately was a Spokane Police Department officer employed in that capacity for 26 years. RP 72-73. Before working with the police department, she was employed by the jail. RP 73. Given this

[1] The Report of Proceedings consists of three separately paginated volumes: one containing the opening statements, reported by Rebecca J. Weeks; one containing the jury trial, reported by Ms. Weeks; and one containing the sentencing hearing, reported by Terri A. Cochran. The volume containing the trial, reported by Ms. Weeks, is referred to herein as "RP." References to other volumes include the date.

experience, and her training, Officer Gately was familiar with the appearance of methamphetamine. RP 74.

On October 26, 2015, Officer Gately was on patrol in the northeast and northwest areas of Spokane. RP 76. At approximately 11:45 a.m., Officer Gately contacted Mr. Harris in a parking lot at Crestline and Wellesley. RP 77. She spoke with several subjects who were on scene, and developed probable cause to arrest Mr. Harris.[2] RP 77.

During the arrest process, Officer Gately handcuffed the defendant and searched him. She discovered a lighter and change in his right pants pocket, and, while pulling those items out of the pocket, a small, clear plastic baggie containing a white substance "popped onto the ground." RP 78-79. Believing the white substance to be methamphetamine, she advised Mr. Harris that, "if, in fact, it was [methamphetamine] that [she] would be charging him with that and that would be a felony." RP 80. Mr. Harris responded by stating "That's not mine." RP 80.

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[2] The trial court ruled, upon a stipulation from the defendant and the state, that the fact that the defendant was arrested for a domestic violence offense was irrelevant to the issue of whether the defendant knowingly possessed a controlled substance. The trial court ruled, "[a]ccordingly, per ER 404, the jury shall only be informed, and the State[']s witnesses shall be instructed to limit their testimony, to the fact that the defendant was lawfully arrested." CP 94-95.

Officer Kellee Gately's Testimony – Cross Examination.

On cross-examination, Officer Gately testified that she contacted Angela Cline and Stephen Harris at a laundromat. RP 86. She testified that one of the two individuals had been inside the laundromat prior to her arrival. RP 86. She located Ms. Cline's telephone in Mr. Harris' pocket, as well as her payee card. RP 86. Officer Gately returned these items to Ms. Cline. RP 89-90. There was also a lighter, some change, and possibly some pieces of paper in Mr. Harris' pocket. RP 86-87. Officer Gately did not locate any cigarettes, smoking devices or pipes on Mr. Harris' person. RP 87. A black sweatshirt may have been put on property as evidence by another officer. RP 89.

Officer Gately testified that when the baggie of methamphetamine residue "popped out" of his pocket, Mr. Harris exclaimed "that's not mine." RP 88. Officer Gately characterized Mr. Harris' reaction as if he were "distancing himself" from the drugs. RP 88. Officer Gately agreed with defense counsel that Mr. Harris' reaction could have been attributed to not expecting to see the drugs. RP 88.

Officer Gately did not believe that Mr. Harris was under the influence of methamphetamine at the time of his arrest. RP 89.

Hearing Outside the Presence of the Jury.

During Officer Gately's cross-examination, defense counsel asked whether it appeared to the officer that Ms. Cline was under the influence of methamphetamine. RP 88. The State objected to the question on the basis of a pretrial ruling requested by defendant and granted by the Court which precluded any testimony regarding a domestic violence incident which had occurred between Mr. Harris and Ms. Cline. RP 16-17, 88. Ms. Cline did not testify at trial, and apparently could not be located before trial. RP 116.

Outside the presence of the jury, the Court heard argument as to whether this testimony should be allowed in support of defendant's claim of unwitting possession and whether it opened the door to additional testimony regarding the domestic violence assault. The State argued that Officer Gately was not a drug recognition expert (DRE), and that it was doubtful that the foundation could be laid for her testimony that Ms. Cline was under the influence of methamphetamine. RP 94. Additionally, the State argued that it would give the jury an unfair picture as to the occurrences on the date in question for defense counsel to "surgically extract some observations" about Ms. Cline's demeanor "without giving the jury a fair and comprehensive picture of what was going on with this lady."

RP 95. Specifically, the State indicated that evidence existed that at the time of Mr. Harris' arrest:

> … Angela Cline, was bleeding. She was distraught. She was dirty. She said she had been threatened. She said she was being held against her will. She said her dog had been threatened, her family had been threatened.[3] There were all sorts of things going on with this lady. To surgically go in and say now, well, she was under the effect of methamphetamine and none of these other problems … is totally disingenuous and would be completely wrong…

RP 94-95.

The State further argued that if the defense opened the door to Ms. Cline's demeanor, the State would be "entitled to present evidence of all of the things [Officer Blakely] observed, including a photograph of [Ms. Cline] which tells more about the demeanor than any testimony could…"[4] RP 95.

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[3] The State also indicated that Ms. Cline had told law enforcement that the defendant had been abusing her "off and on" for two months:

> He told her if she left him, he would kill her dog and kill her family. She believed him. She said that the male had told her to tell everyone else his name was David Christian, which was the name he gave the officer … [The officer] absolutely believed [Ms. Cline] could not get away from the defendant; that he had befriended her daughter by texting, and had been cashing her disability checks for the last two months. There's a lot more here about than meth abuse.

RP 100.

[4] The Court observed a photograph of Ms. Cline which was marked as State's Exhibit 3, but never admitted in evidence. It showed Ms. Cline's injuries and that she was crying. RP 90.

Defense counsel argued that the fourth degree domestic violence assault charge had been dismissed with prejudice,[5] and was not relevant to the issue of possession of methamphetamine, RP 94, 96, but that Ms. Cline's admission of methamphetamine use to Officer Gately and Officer Gately's observations of Ms. Cline which led her to believe Ms. Cline was under the influence of methamphetamine were relevant to whether Mr. Harris knowingly possessed methamphetamine, RP 92, 97.

The Court indicated:

> I appreciate that whether there was or wasn't domestic violence against Ms. Cline is not probative of whether Mr. Harris was in possession of a controlled substance. But the defense has cast the theory that the methamphetamine is Ms. Cline's and the proof of that is how she was behaving. And that ignores her presence, state of being, manner of expression, however one would characterize it, is affected by being traumatized.

RP 97.

The court also indicated that Ms. Cline's admission of methamphetamine use would not be admissible to the jury.[6] RP 98.

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[5] Respondent would surmise that the fourth degree domestic violence assault was dismissed because Ms. Cline could not be located for trial. RP 116.

[6] [Defense counsel]: … And further, there is the second issue of evidence, which is the statement against interest of Ms. Cline that she had, in fact, used methamphetamine in the prior 24 hours, which is an exception to the hearsay rule.

The Court: But not in this case. She is not a party to this case.

However, the Court granted defense counsel's request to allow Officer Gately testify outside the presence of the jury to provide an offer of proof. RP 102. Defense counsel indicated he believed that Officer Gately would testify:

> [T]he officer's conclusion that Ms. Cline was under the influence of methamphetamine was entirely unrelated to her injuries and personal demeanor and behavior such that this had nothing to do with the fourth-degree assault. It was actually based on her training, experience, and with regard to physical manifestations of people who were under the influence of methamphetamine.

RP 103.

Also outside the presence of the jury, Officer Gately testified that she was not a drug recognition expert, and that she "tr[ies] not to give opinion… I'm not always right." RP 107. Officer Gately testified her opinions of Ms. Cline were based on the "totality of the circumstances." RP 112. However, she testified that Ms. Cline's dirty appearance could be attributable to either drug use, or due to a domestic violence situation. RP 107. She testified that Ms. Cline's irrational behavior could be

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> [Defense Counsel]: It's a statement against interest, but the court should know what the basis of – I guess what I'm saying –
>
> The Court: Under ER 104(a) I could consider what you say her statement was whether it was admissible or not. That's a different matter than what the jury hears.

RP 98.

attributable to drug use, or to being frightened or intimidated. She also indicated that Ms. Cline's paranoia could be attributable to drug use or to her work as a confidential informant. RP 109.

Ultimately, the following exchange occurred between defense counsel and Officer Gately:

> [Defense Counsel] Is your opinion that Ms. Cline was under the influence of methamphetamine separate and distinct from her symptoms of having been a victim on an assault?
> …
>
> [Officer Gately] I believe in my honest opinion that it is a totality of the circumstances. It's not just meth. I was there for a different purpose.
>
> [Defense Counsel] I understand you have a different focus and it's hard to separate out the two.
>
> [Officer Gately] Impossible, I would say. I can't tell you if there were head injuries onboard. It appeared she had a broken nose.
>
> [Defense Counsel] And I'm not asking you for a medical diagnosis. But it is your opinion, based on your training and experience, that she was under the influence of methamphetamine; is that correct?
>
> [Officer Gately] That was one drug, yes.
>
> [Defense Counsel] Okay. And she, in fact, admitted to you using methamphetamine that day or within 24 hours?
>
> [Officer Gately] Yes.
>
> [Defense Counsel] And notwithstanding the issues of the assault, do you still believe that she was under the influence of methamphetamine, in your opinion, based on your

> training and experience, not as a doctor, not as a DRE, but as a law enforcement officer with 27 years experience?
>
> …
>
> [The Court] Wait a second before you answer. Mr. Nelson.
>
> [Prosecutor] Your Honor, she's already testified she can't make that distinction. He's asking the same question over and over and over looking for the proper response.
>
> [The Court] She said it was impossible. I think I'm going to sustain the objection…

RP 112-114.

Defense counsel again argued the theory of defendant's case was that the methamphetamine belonged to Ms. Cline, and that it was "significant circumstantial evidence that Ms. Cline appeared to be under the influence." RP 117. The State argued that not only could defense counsel not lay the foundation for the officer's opinion without "dancing around this [lady's] horrible, horrible condition, but moreover, that the entire defense argument was a "red herring" because it is irrelevant who "owned" the drugs, but rather, whether Mr. Harris had unwitting possession of those drugs. RP 118.

The trial court requested counsel provide additional briefing on the issue, due to its concern that the testimony was "misleading and confusing the way you used it given what the officer has testified to." RP 124. Defense counsel argued that under ER 701, 702, and 703, the officer's opinion of

Ms. Cline's methamphetamine use was admissible and proper opinion testimony. RP 126.

Additionally, defense counsel argued:

> We believe it is relevant because we believe, and it's our theory of the case, these two were doing laundry together; that items were moved from pockets to pockets. The State has already elicited testimony that my client said, "that's not mine." We already elicited testimony from the officer that my client was in possession of other items of Ms. Cline's, which they returned to Ms. Cline. So we already have a factual basis to believe he is in possession of some of Ms. Cline's items. The fact that Ms. Cline was under the influence of methamphetamine and the methamphetamine my client is accused of possessing is a used up relatively empty bag of methamphetamine with some residue left in it. I believe it is relevant to show that he unwittingly possessed it along with the other items of hers pursuant to our theory of the case.

RP 128-129.

The court ruled:

> I'm going to limit the defense from attributing the observation that she was under the influence of meth because, as this hearing has demonstrated, it really turns into a mini trial about what should or shouldn't come in along with it and it's just too murky for me. It's too difficult to try to parse it out. For example, when you get to the fact that one of the behaviors that Officer Gately based her opinion on about whether she was or wasn't under the effect of meth, that she declined medical attention. And when I asked what that was, "her face was bleeding," we just get too far and I'm not comfortable with that. So I'm issuing, if you will, an order in limine that we're not going to introduce the officer's

> opinion that the witness appeared to be under the influence of meth.

RP 144-145.

However, over the State's objection, the Court agreed to instruct the jury on the law of unwitting possession. RP 154-155. The defendant did not testify, RP 156, and both parties rested, RP 157. After the court instructed the jury, and both parties gave their closing arguments, during which the defendant argued unwitting possession, the jury returned a verdict of guilty. RP 160-169, 170-178, 179-183; CP 105-119, 122. The court sentenced the defendant, who had an offender score of "10," to a low-end, standard range sentence of 12 months and a day in prison. CP 172-174. The defendant timely appealed his conviction. CP 189.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT VIOLATE THE DEFENDANT'S RIGHT TO PUT ON A DEFENSE BY EXCLUDING EVIDENCE OF ANOTHER PERSON'S ALLEGED DRUG USE.

Standard of Review.

Appellate courts review decisions by the trial court to admit or exclude evidence for abuse of discretion. *City of Kennewick v. Day*, 142 Wn.2d 1, 5, 11 P.3d 304 (2000). The trial court abuses its discretion if its "'discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Id*. at 5 (alteration in original).

Relevant evidence is 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." ER 401. Relevant evidence is generally admissible. ER 402. "The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

The Right to Present Evidence.

The right to present testimony in one's defense is guaranteed by both the United States and the Washington Constitutions. U.S. Const. amend VI; Wash. Const. art 1, § 22. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). A defendant's right to an opportunity to be heard in his defense and cross-examine the witnesses against him and offer testimony is basic to our system of jurisprudence. *Id*. This Court reviews a claim of Sixth Amendment rights de novo. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

However, these rights are not absolute. *Id.* Evidence that a defendant seeks to introduce must be minimally relevant; there is no constitutional right to present irrelevant evidence. *State v. Gregory*,

158 Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006). Even if relevant, evidence may still be excluded if the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. *Darden*, 145 Wn.2d at 622. The State's interest in excluding the evidence must be balanced against the defendant's need for the information sought to be admitted, and relevant evidence may only be excluded if "the State's interest outweighs the defendant's need." *Id*. Both the integrity of the truth-finding process and the defendant's right to a fair trial are important considerations. *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). Generally speaking, no state interest is compelling enough to justify the exclusion of defense evidence of "high probative value." *Jones*, 168 Wn.2d 720. Errors in excluding evidence of high probative value which affect a defendant's constitutional right to present a defense are subject to harmless error review, and may be upheld if the court is convinced "beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." *Id*. at 724.

Defense of Unwitting Possession.

Once the State has established prima facie evidence that the defendant possessed a controlled substance under RCW 69.50.4013, the defendant may affirmatively assert that his or her possession was "unwitting." *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994). The

defense of unwitting possession can be established by showing that the defendant did not know he or she was in possession of a controlled substance or by showing that the defendant did not know the nature of the substance he or she possessed.[7] *Id.* Because this defense does not negate an element of the crime of possession of a controlled substance, the burden of proof is properly allocated to the defendant; the defendant must prove unwitting possession by a preponderance of the evidence. *See*, *State v. Sundberg*, 185 Wn.2d 147, 153, 370 P.3d 1 (2016); *State v. Wiley*, 79 Wn. App. 117, 123, 900 P.2d 1116 (1995). Evidence of a defendant's reputation for sobriety from drugs is admissible to support a claim of unwitting possession. *Day*, 142 Wn.2d at 14-15.

However, *Day* does not stand for the proposition that *another* person's drug use is at all probative of whether the defendant unwittingly possessed drugs. Ms. Cline's physical condition does not make it more or less likely that Mr. Harris unwittingly possessed drugs.[8] Ms. Cline's

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[7] This affirmative defense "'ameliorates the harshness of the almost strict criminal liability our law imposes for unauthorized possession of a controlled substance.'" *State v. Cleppe*, 96 Wn.2d 373, 381, 635 P.2d 435 (1981), *cert. denied*, 456 U.S. 1006, 102 S.Ct. 2296, 73 L.Ed.2d 1300 (1982).

[8] This is especially true given the fact that Officer Gately was unable to distinguish Ms. Cline's physical manifestations which were attributable to her drug use, and which were attributable to other irrelevant factors, to include the alleged abuse she suffered from Mr. Harris. The officer testified that it was "impossible" for her to give an opinion of Ms. Cline's use of

potential drug use had no bearing on whether Mr. Harris knew that there were drugs in his pocket, or rather, that he unwittingly possessed those drugs. Ms. Cline did not testify and neither did Mr. Harris. The facts that Mr. Harris presented in his opening statement, i.e., that he and Ms. Cline were in a boyfriend/girlfriend relationship, that they were doing laundry together, and that they were emptying pockets of their clothing at the laundromat before washing their clothes, were never presented to the jury as substantive evidence. The jury only knew, based on the evidence *actually* presented at trial, that Mr. Harris possessed Ms. Cline's cell phone and payee card, that a sweatshirt was placed on property,[9] and that one of the two individuals was in the laundromat before Officer Gately arrived on scene.[10] While this evidence could theoretically invite a jury to speculate that Mr. Harris and Ms. Cline knew each other, were dating, were at the laundromat together, were washing clothes together, were emptying each other's pockets in order to do so, and Mr. Harris happened to unknowingly

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methamphetamine that was "separate and distinct from her symptoms of having been a victim of an assault." RP 112-113. Moreover, the fact that Ms. Cline may have ingested methamphetamine does not demonstrate ownership of those drugs, or when the drugs may or may not have been ingested.

[9] No facts presented at trial established who owned the sweatshirt.

[10] No facts presented at trial established whether Mr. Harris or Ms. Cline was inside the laundromat.

grab a baggie of methamphetamine from one of Ms. Cline's articles of clothing, it could equally (or more likely) lead to the rational inference that Mr. Harris stole the items from Ms. Cline, or from her laundry basket, or that Mr. Harris was knowingly holding the items for Ms. Cline.[11] Her drug use and physical condition had *no* probative value in determining whether Mr. Harris unwittingly possessed illegal drugs.

This case is unlike *Day*, in which the Court held that a defendant may present evidence of his or her reputation for abstinence in order to support a claim of unwitting possession. *Day*, 142 Wn.2d at 15. Of course, the theory behind that holding is that one who does not use drugs is less likely to knowingly possess them. However, the same cannot be said in such a case as this where a defendant seeks to admit evidence that another person was under the influence of drugs, in the absence of additional evidence that (1) the drugs used by the other individual were the same type of drugs located by law enforcement, and (2) the defendant did not know he

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[11] Given that the trial court had information that Ms. Cline told police that Mr. Harris threatened to kill her family and dog if she left him, was cashing her disability checks, and was holding her against her will, RP 94-95, 100, it was most likely that the defendant was holding her telephone and payee card to prevent her from leaving him or to prevent her from summoning help. That would also make it more likely that he knew he possessed her drugs, as a means of controlling her, as often occurs in domestic violence situations.

possessed the drugs that had been used by the other person. This evidence was not presented at trial as neither Mr. Harris nor Ms. Cline testified.

However, this case is more like *State v. Perez-Valdez*, 172 Wn.2d 808, 265 P.3d 853 (2011), in which the Supreme Court affirmed the defendant's conviction notwithstanding the trial court's exclusion of evidence tending to prove that the child rape victims were willing to take "extreme actions" to be removed from a foster home, including fabricating the allegations against the defendant; the defense was allowed to present evidence that the victims did not like house rules, but excluded evidence that they had committed arson to be moved from the home. "The Supreme Court affirmed, noting that while the trial judge *could* have admitted the evidence under the rules, the court did not abuse its discretion in excluding the evidence." *State v. Duarte Vela*, No. 33299-3-III, 2017 WL 3864628, at *11(Sept. 5, 2017) (Korsmo, J., dissenting) (citing *Perez-Valdez*, 172 Wn.2d at 816-817). "There is a fine line between admissible evidence and evidence that must be admitted. The constitutional right to present a defense means that the defense *theory* must be allowed when there is admissible evidence to support it." *Id*. citing *Jones*, 168 Wn.2d 713 (emphasis added).

> That constitutional right does not mean that any and every bit of evidence offered by the defense in support of its theory is required to be admitted… Judges still retain discretion

> under ER 401, ER 403 and all of the other evidentiary rules to consider the necessity of the evidence in light of the case record and the proffered theory of admissibility. The Rules of Evidence exist for a reason, and both sides are entitled to a fair trial. We count on trial judges to apply the rules and afford them great discretion in doing so.

Id. (internal citations omitted).

Even assuming the evidence of Ms. Cline's potential recent use of methamphetamine was minimally relevant, any error in excluding the evidence was harmless because Mr. Harris was allowed to present other evidence supporting his theory of the case, and attempting to demonstrate that he unwittingly possessed methamphetamine, to include his reaction when confronted with the drugs, his possession of other items belonging to Ms. Cline, and the fact that it appeared to the officer that he had not recently used methamphetamine. The court instructed the jury on the defendant's theory of unwitting possession. CP 118.

Thus, despite his arguments that his constitutional rights were violated, Mr. Harris' claim amounts to one that merely challenges the trial court's discretionary ruling to admit or exclude evidence, and that decision is reviewed for an abuse of discretion. The trial court's decision to exclude the evidence was based on the difficulty in parsing out the officer's observations that were consistent with Ms. Cline's drug use and those that were also consistent with the domestic violence assault that had occurred

(which the defense moved in limine to exclude from the jury's consideration, RP 16). This is a tenable ground pursuant to ER 403, which provides: "[a]lthough 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."

On this basis, the trial court excluded evidence of Officer Gately's opinion that Ms. Cline was under the influence of drugs. The trial court determined that the admission of the evidence would confuse the issues and mislead the jury on a collateral issue, stating "as this hearing has demonstrated, it really turns into a mini trial about what should or shouldn't come in along with it and it's just too murky for me. It's too difficult to try to parse it out." RP 144. Officer Gately testified that it was "impossible" for her to separate her observations of Ms. Cline that were related to Ms. Cline's injuries, and those that were related to her drug use. RP 112-114. Thus, it was reasonable for the trial court to exclude the evidence as unfairly prejudicial, confusing, and, most especially, misleading to the jury, which would only be given a small snippet of evidence that would inaccurately describe Ms. Cline's condition. This claim, therefore, fails.

B. UNLESS DEFENDANT'S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT ENTERED THE ORDER OF INDIGENCY, THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT THE APPEAL.

Effective January 31, 2017, RAP 14.2 reads:

> A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. *When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.* The commissioner or clerk may consider any evidence offered to determine the individual's current or future ability to pay. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A "nominal party" is one who is named but has no real interest in the controversy.

(Emphasis added).

The trial court determined the defendant to be indigent for purposes of his appeal on December 1, 2016, based on a declaration provided by the defendant. CP 207-212. The State is unaware of any change in the defendant's circumstances. Should the defendant be unsuccessful on appeal,

the Court should only impose appellate costs in conformity with RAP 14.2, as amended.

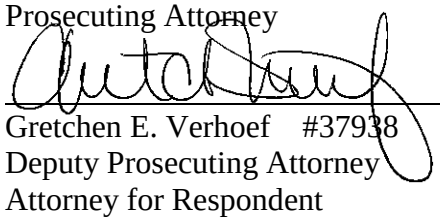
V. CONCLUSION

The trial court did not err in excluding evidence that was misleading, confusing, and unfairly prejudicial, and that did not give the jury an accurate understanding of the events that occurred at the time Mr. Harris was arrested. The defendant was not prohibited from admitting other evidence that he unwittingly possessed methamphetamine, and he did so; therefore, even if it was error to exclude the evidence of Ms. Cline's allegedly recent drug use, such an error was harmless beyond a reasonable doubt. The jury simply rejected the defendant's unsupported claim of unwitting possession, and the admission of Officer Gately's opinion of Ms. Cline's drug usage would not have affected that verdict.

Appellate costs should only be imposed in conformity with RAP 14.2. In all other respects, the State requests this Court affirm the trial court and jury verdicts.

Dated this 2 day of October, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney



Gretchen E. Verhoef #37938
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON, Respondent, v. STEPHEN HARRIS, Appellant.	NO. 34934-9-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on October 2, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Jill S. Reuter
admin@ewalaw.com

10/2/2017	Spokane, WA	
(Date)	**(Place)**	**(Signature)**

SPOKANE COUNTY PROSECUTOR

October 02, 2017 - 3:30 PM

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Appellate Court Case Title:	State of Washington v. Stephen B. Harris
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