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Division III
State of Washington
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No. 36412-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

MODESTO BRAVO GONZALEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CHELAN COUNTY

The Honorable Judge Kristin M. Ferrera

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

Appellant Modesto B. Gonzalez accepts this opportunity to reply to the State's brief.

B. COUNTERSTATEMENT OF THE FACTS

Mr. Gonzalez offers the following counterstatement of the case, in response to the State's comments on the evidence. (State's Response Brief, pgs. 1-13).

The State only acknowledges in its briefing that Mr. Gonzalez and his mother and daughter were residents in the home on Crescent Street. (State's Response Brief, pgs. 1, 5-6). However, the testimony reflects a woman known as "Chavela" or "Isabella Sanchez" also recently occupied the residence and was living in the basement during a portion of the controlled buys. (1RP 107-108).

The State asserts the confidential informant ("CI") never denied using drugs during the controlled buys, but rather the CI stated he did not recall using drugs on February 21, 2017. (State's Response Brief, pg. 9). However, the CI admitted to using drugs during the period of time he was under contract with the State from February to March 2017 (1RP 200), he admitted he was likely using every other day during this time period (1RP 201), and ultimately denied he would have used drugs on February 21, 2017, because he did not think law enforcement would have let him do the controlled buy that day if he had been high. (1RP 205-206). The CI's responses were mixed as to the question of whether he used drugs during the controlled buy contract period—they were not outright concessions to memory failure. (1RP 200-210).

C. ARGUMENT IN REPLY

- 1. Whether Mr. Gonzalez was denied his Sixth Amendment right to conflict free representation, constituting ineffective assistance of counsel, where defense counsel made himself a witness and thereby created an actual conflict which adversely affected his representation of the defendant.**

This argument pertains to Issue 3, raised in Mr. Gonzalez’s opening brief. (Appellant’s Opening Brief, pgs. 25-29).

The State claims Mr. Gonzalez did not receive ineffective assistance of counsel because defense counsel could not have been an impeachment witness due to the CI’s inability to recall. (State’s Response Brief, pg. 9). Therefore, the State posits, impeachment would not have been allowed under ER 607.

However, the State’s representation of the facts ignores other portions of the transcript. (1RP 200-210). The CI may have stated he could not recall whether he used drugs on February 21, 2017, but he also admitted to using drugs throughout the contractual period he entered into with the State between February and March 2017. (1RP 200-210). Despite testifying he was unable to recall whether he specifically used drugs on February 21, 2017, the CI also stated he did not use drugs that day, reasoning he did not believe law enforcement would have allowed a controlled buy to occur on that date he had he been using drugs. (1RP 205-206). There was no outright concession of memory loss. (1RP 200-210). Moreover, the CI’s equivocal statements opened the door to further impeachment testimony—testimony which could have been presented by defense counsel had he not made himself a witness. *State v. Rushworth*, ___ Wn.2d ___, 458 P.3d 1192, 1196-1197 (2020) (addressing the open door doctrine, stating the “open door doctrine recognizes that a party can waive protection from a forbidden topic by

broaching the subject”); (Appellant’s Opening Brief, pgs. 25-29). Because defense counsel was not permitted to pursue specific and further questioning as to what he had witnessed earlier, he was ineffective.

Finally, it cannot be ignored the jury found Mr. Gonzalez was not guilty of the charge pertaining to the controlled buy on February 21, 2017. (CP 275; Supp. CP 367). The jury must have felt it was missing the evidence it needed to convict as to the controlled buy on that date. (1RP 200-210; CP 275; Supp. CP 367). One wonders whether the jury would have convicted as to the other controlled buys, as well, had it known whether it the CI was possibly lying about his dates of drug use. (1RP 200-210; CP 275; Supp. CP 367). The error was not harmless and affected the other counts in the case, as well.

All convictions should be reversed for ineffective assistance of counsel.

2. Whether the trial court violated Mr. Gonzalez’s constitutional right to a unanimous jury verdict by failing to give a unanimity instruction for unlawful possession of a controlled substance with intent to deliver heroin, as charged in count 8.

This argument pertains to Issue 4 raised in Mr. Gonzalez’s opening brief. (Appellant’s Opening Brief, pgs. 29-33).

The State argues no election or unanimity instruction was required as to count 8 as the two acts at issue were part of a continuing course of conduct. (State’s Response Brief, pgs. 10-11). However, the State relies upon authority which is distinguishable from this facts in this case.

In *State v. Handran*, cited by the State, the defendant broke into his ex-wife’s home and attempted to have unwanted sexual contact with her. *State v. Handran*, 113 Wn.2d 11, 12-13, 775 P.2d 453 (1989). There, the defendant argued a unanimity

instruction should have been given because the jury could have found an assault occurred from two distinct acts: his kissing his ex-wife, or his hitting his ex-wife. *Id.* at 17. The Court rejected this argument, stating the “two acts of assault were part of a continuing course of conduct.” *Id.* It stated “where the evidence involves conduct at *different times and places*, then the evidence tends to show several distinct acts.” *Id.* (internal quotations & citations omitted) (emphasis added). The Court added that even if the acts had been distinct, harmless error exists unless a rational fact-finder could not have found guilt beyond a reasonable doubt as to each act. *Id.* at 17-18. If sufficient evidence exists to support each act, “the lack of jury unanimity does not violate a defendant’s right to a unanimous jury verdict.” *Id.* at 17-18 (citation omitted). Here, the heroin in the jacket pocket (the State never presented evidence of who owned the jacket or used it), and heroin residue on the scales in Mr. Gonzalez’s bedroom, were two separate and distinct acts as they did not involve conduct at the same time and place. *Handran* does not apply to this case.

The State also cites to *State v. Love*, 80 Wn. App. 357, 908 P.2d 395 (1996) for support of its argument for continuing course of conduct. (State’s Response Brief, pgs. 10-11). However, that case is distinguishable because in *State v. Love* the drugs were found on the defendant’s person and in the desk drawer of the defendant’s home. *Id.* at 358-359. The evidence showed defendant was the owner of both sets of drugs. *Id.* Besides the defendant’s claim at trial that both sets had been planted by the police—no other evidence in *Love* showed anyone other than the defendant possessed both sets. *Id.* Mr. Gonzalez’s case is more like *State v. King*, 75 Wn. App. 899, 878 P.2d 466 (1994). In *King*, two sets of drugs were found, and the State only charged one count of possession of cocaine, but

used both sets of drugs as a basis for conviction. *Id.* at 900-904. The trial court failed to give an unanimity instruction and the appellate court determined the error was not harmless. *Id.* at 902-904. Because one set of drugs was found in a Tylenol bottle on the floor of a vehicle with multiple occupants, the court reversed, concluding enough conflicting evidence existed as to which person constructively possessed the Tylenol bottle. *Id.* at 903-904.

Here, the State claimed count 8 was based upon two distinct acts—heroin residue on a scale found in Mr. Gonzalez’s bedroom, and heroin in a jacket pocket found in the entrance of the residence. (CP 229; 1RP 320). At trial the jacket was never identified as belonging to anyone, nothing tied the jacket to Mr. Gonzalez, and multiple people lived in the residence. Not only were these two distinct acts of possession because the drugs were found at different times and in different places, but also insufficient evidence existed to tie Mr. Gonzalez to the heroin in the jacket pocket. A unanimity instruction should have been given. *King*, 75 Wn. App. at 900-904 (evidence unclear as to who possessed Tylenol bottle, thus unanimity instruction should have been given).

Count 8 should be reversed and remanded for a new trial.

D. CONCLUSION

In conclusion, Mr. Gonzalez requests his convictions be reversed.

Respectfully submitted this 13th day of April, 2020.

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