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NO. 36851-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

JOYCE ASPEN HOFFMAN,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. SUMMARY OF REPLY

The trial court improperly denied Ms. Hoffman one affirmative defense instruction and improperly ordered another, twice violating her right to control her defense. Her right to a unanimous jury was violated when the prosecutor argued two acts supported a charge and no unanimity instruction was provided. Further, the decriminalization and downgrading of bail jumping applies to her case.

In its response brief, the State ignores binding precedent governing when a court may or must order an affirmative defense instruction and when new statutes apply to cases on appeal. It misrepresents the facts proven to assert Ms. Hoffman's jury did not need a unanimity instruction. This Court should reverse Ms. Hoffman's convictions.

B. ARGUMENT IN REPLY

1. The trial court erred in denying Ms. Hoffman the affirmative defense of unwitting possession

The trial court denied Ms. Hoffman's request for an affirmative defense instruction, stating an "affirmative defense requires affirmative proof." RP 296. However, ample

circumstantial evidence existed to support the instruction; this error requires reversal for a new trial. The trial court violated Ms. Hoffman's right to control her defense. *See State v. Coristine*, 177 Wn.2d 370, 376, 300 P.3d 400 (2013); U.S. Const. amend. VI; Const. art. 1, § 22.

a. Even if the evidence was weak, insufficient, inconsistent, or of doubtful credibility, the defense instruction should have been given.

An accused person must be permitted to argue any lawful defense supported by the facts. *State v. Fisher*, 185 Wn.2d 836, 848–49, 374 P.3d 1185 (2016) (citing *State v. Williams*, 132 Wn.2d 248, 259–60, 937 P.2d 1052 (1997). This Court views the evidence supporting the defense in the light most favorable to the defendant. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455–56, 6 P.3d 1150 (2000).

Even if there is "only some evidence to satisfy the burden of production," the court must grant the instruction. *Fisher*, 185 Wn.2d at 852. The evidence need not be "overwhelming." *Id.* "Even if the … evidence is 'weak, insufficient, inconsistent, or of doubtful credibility,' the

instruction should be given." *Id.* (quoting *United States v. Zuniga*, 6 F.3d 569, 570 (9th Cir. 1993)). Thus, a court may deny the "instruction only where no credible evidence appears in the record to support [it]." *Id.* at 849 (quoting *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983)).

The prosecution claims the standard reaffirmed by the Supreme Court in its 2016 *Fisher* opinion "is not the test" of whether a defense instruction should be given. Resp. Br. at 12. Instead, the State believes the standard is one used in a 1998 Division I case. *Id.* at 12-13 (citing *State v. Buford*, 93 Wn. App. 149, 151, 967 P.2d 548 (1998)). The State provides no precedent to support this position; *Fisher* is binding precedent. Here, the instruction should have been given, "[e]ven if the … evidence [was] 'weak, insufficient, inconsistent, or of doubtful credibility.'" *See Fisher*, 185 Wn.2d at 852 (quoting *Zuniga*, 6 F.3d at 570).

As in *George*, sufficient evidence supported an argument Ms. Hoffman may not have known about the residue the police found in the car. *See* RP 179-81; *State v.*

George, 146 Wn. App. 906, 915-16, 193 P.3d 693 (2008). Ms. Hoffman did not own the car. RP 179; *see George*, 146 Wn. App. at 915. Ms. Hoffman's passenger had equal access to the residue found in the center console. RP 179-81; *see George*, 146 Wn. App. at 915. Ms. Hoffman did not confess to knowing the drugs were in the car. RP 189-90; *see George*, 146 Wn. App. at 915. There was no evidence of dominion and control in the center console, or that Ms. Hoffman had used or owned the paraphernalia containing the residue. RP 183-84; *see George*, 146 Wn. App. at 915-16.

Additionally, Ms. Hoffman immediately consented to a search of the car when the police requested it. RP 179. Her passenger, who showed signs of being under the influence, denied the request. RP 180; CP 8.

Ms. Hoffman "is entitled to the benefit of all the evidence;" the evidence supporting her defense may be "based on facts inconsistent with her own testimony." *Fisher*, 185 Wn.2d at 849. Viewed in the light most favorable to her, the evidence allows an inference she may not have known of the

drug's existence. *See id.* at 849, 852; *Fernandez-Medina*, 141 Wn.2d at 455–56; *George*, 146 Wn. App. at 915-16.

The trial court erred in denying the instruction because Ms. Hoffman had not affirmatively testified she did not know the substance was there. *See* RP 296. Support for an affirmative defense need not come from the accused's testimony; it may come from any evidentiary source. *Fisher*, 185 Wn.2d at 849; *George*, 146 Wn. App. 913-16.

b. Ms. Hoffman preserved the error by requesting the instruction and had no obligation to take exception to its denial.

While the State asserts Ms. Hoffman did not preserve the error by failing to make a specific objection to the trial court's denial of her proposed instruction, it cites no cases supporting this position. The State misleadingly relies on *Ryder's Estate v. Kelly-Springfield Tire Co.*, 91 Wn.2d 111, 114, 587 P.2d 160 (1978). *See* Resp. Br. at 10. The rule quoted by the State is from a portion of the opinion discussing a party's failure to take exception to an instruction the trial court actually ordered. *Ryder's Estate,* 91 Wn.2d at 114-16.

The opinion also addressed the trial court's failure to order a requested instruction; this is Ms. Hoffman's situation. *Id.* at 116-19. However, in that situation, the Court did not require an explicit exception to preserve that type of error. *Id.*

Similarly, the line of cases preceding *Ryder's Estate* only employs the State's rule for instructions actually given, not for instructions denied. *See Nelson v. Mueller*, 85 Wn.2d 234, 237-39, 533 P.2d 383 (1975); *Miller v. Staton*, 58 Wn.2d 879, 883-84, 365 P.2d 333 (1961); *see also Roumel v. Fude*, 62 Wn.2d 397, 399-401, 383 P.2d 283 (1963) (addressing only an instruction given, not an instruction denied).

Ms. Hoffman requested an instruction on unwitting possession of a controlled substance. RP 31. When the prosecutor objected because Ms. Hoffman had not testified to a lack of knowledge, Ms. Hoffman's counsel acknowledged that fact, but asked that the instruction be given anyway, stating, "Judge, there is no testimony from my client to that effect, but there are no admissions from my client, so I would ask (inaudible)." RP 296. The State mischaracterizes this

statement as not being a second request for the instruction. Resp. Br. at 10-11. Ms. Hoffman never abandoned her request for the instruction, and she has preserved the trial court's error by requesting the instruction. *See, e.g., Ryder's Estate,* 91 Wn.2d at 116-19.

The trial court erred in denying this instruction. This Court should reverse and remand for a new trial.

2. The trial court violated Ms. Hoffman's right to control her defense by ordering, over her objection, the bail jumping defense of uncontrollable circumstances.

Ms. Hoffman wanted to testify about why she missed court and her efforts to attend to dispel any inference that she avoided court due to a sense of guilt about the original charges. RP 247, 252, 257. The trial court ruled if she testified about why she missed court, the State would be "entitled" to an uncontrollable circumstances instruction, a defense which created a burden Ms. Hoffman could not meet. RP 258. She elected to testify, and the court ordered the instruction over her objection. RP 253-57, 284-90, 296.

Instructing the jury on an affirmative defense over a defendant's objection violates her constitutional right to control her defense. U.S. Const. amend. VI; Const. art. 1, § 22; *State v. Lynch*, 178 Wn.2d 487, 492, 309 P.3d 482 (2013); *see Faretta v. California*, 422 U.S. 806, 819-20, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

The State does not cite to a single case holding a court may force an affirmative defense on a defendant over her objection. *See* Resp. Br. at 15-21. This is because it cannot. The court's error is indisputable.

The prejudice of this constitutional error is presumed and the prosecution cannot prove the error harmless beyond a reasonable doubt; tellingly, it does not even try. *See Lynch*, 178 Wn.2d at 494; Resp. Br. at 15-21.

The instruction was inconsistent with Ms. Hoffman's chosen defense. *See Lynch*, 178 Wn.2d at 494. It forced her to choose between her right to present a defense and her right to control her defense. As she argued at trial, the court's ruling "[flew] in the face of her right to take the stand." RP 256.

The error was not harmless, because it required Ms. Hoffman to shoulder an affirmative burden greater than that of raising of reasonable doubt. *Lynch*, 178 Wn.2d at 494. The prosecutor capitalized on the situation, emphasizing the defense burden and pointing to the lack of evidence. RP 351-55. Ms. Hoffman's counsel was forced to address the affirmative defense and struggled to make the evidence fit into the defense's constraints. RP 365-67.

The trial court unconstitutionally sought to confine Ms. Hoffman's testimony within narrow bounds. It forced on her a burden she could not meet, which effectively directed a verdict of guilt and violated the presumption of innocence. This error was prejudicial to Ms. Hoffman's case.

This Court cannot be satisfied beyond a reasonable doubt these errors did not affect the verdict. Ms. Hoffman's two convictions for bail jumping must be reversed.

3. The Legislature's determination that bail jumping is a misdemeanor or no crime at all applies to this case.

a. Bail jumping's decriminalization and downgrading applies retroactively to Ms. Hoffman's convictions.

The constitutional prohibition of ex-post facto laws forbids only the retroactive application of laws increasing or creating punishment. *Dorsey v. United States*, 567 U.S. 260, 275, 132 S. Ct. 2321, 183 L. Ed. 2d 250 (2012). Under the common law, when a criminal statute is repealed or modified to benefit defendants, the prior statute "is regarded as though it had never existed regarding all pending litigation." *State v. Grant*, 89 Wn.2d 678, 682, 575 P.2d 210 (1978).

The savings statute, RCW 10.01.040, is in derogation of the common law and must be interpreted narrowly. *Grant*, 89 Wn.2d at 683. Thus, the Legislature may enact a retroactive criminal law to benefit defendants if the statute "fairly convey[s] that intention." *Id.*

Further, the savings statute's effect is dubious, as a legislature cannot bind a future legislature from exercising its legislative power. *Wash. State Farm Bureau Fed'n v.*

Gregoire, 162 Wn.2d 284, 301-02, 174 P.3d 1142 (2007); *United States v. Winstar Corp.*, 518 U.S. 839, 872-73, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996). Yet Washington courts appear to have overlooked this fundamental principle.

The U.S. Supreme Court has held the analogous federal saving statute did not bar retroactive application of a statute reducing punishment, with no statement of retroactivity. *Dorsey*, 567 U.S. at 274. Rather, statutes apply retroactively when retroactive intent can be inferred "by necessary implication." *Id.* This is "because statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from [it], to modify [it], or to apply [it] but as modified." *Id.* The legislative body is free to express its intention of retroactivity "either expressly or by implication as it chooses." *Id.*

The Washington Legislature has recognized it is fundamentally unfair to impose felony liability for missing a court appearance in most circumstances. The "necessary implication" is that the Legislature wanted to stop this

injustice. *See id.* This Court has similarly held the law decriminalizing possession of marijuana applied retroactively, as its purpose was to end all such prosecutions. *State v. Gradt*, 192 Wn. App. 230, 235-36, 366 P.3d 462 (2016). The Legislature here likewise determined the previous bail jumping penalty was not necessary to serve its penological goals. *See State v. Heath*, 85 Wn.2d 196, 198, 532 P.2d 621 (1975). Consequently, no penological purpose is served by applying the old law to Ms. Hoffman's case. *See id.*; *State v. Wiley*, 124 Wn.2d 679, 687, 880 P.2d 983 (1994).

Further, the Supreme Court has consistently held remedial statutes are typically applied retroactively, particularly when they downgrade crimes. *State v. Blank*, 131 Wn.2d 230, 248, 930 P.2d 1213 (1997); *Grant*, 89 Wn.2d at 685; *Heath*, 85 Wn.2d at 198. The State cites to *State v. Kane*, 101 Wn. App. 607, 613, 5 P.3d 741 (2000) to counter this point, but *Kane* was not reviewed by the Supreme Court and *Kane* cannot overrule the Supreme Court's precedent.

The State also tries to distinguish *Heath* because "it pertained to amendments governing civil driver license revocations." Resp. Br. at 26 (citing *State v. Ross*, 152 Wn.2d 220, 239, 95 P.3d 1225 (2004)). However, the Court in *Heath* explicitly held the statute in question would apply retroactively because it "reduced the penalty for a crime." *Heath*, 85 Wn.2d at 198. The Court, citing two out-of-state criminal cases, noted "[t]his rule has even been applied in the face of a statutory presumption against retroactivity and the new penalty applied in all pending cases," *Id.* Thus, the *Heath* Court employed a criminal rule that would not exist in Washington if it were barred by the savings statute, which predated *Heath* by 74 years. *See id.*; RCW 10.01.040.

The prosecutor asserts RCW 9.94A.345 bars retroactive application of bail jumping's decriminalization because it bars retroactive application of changes to the Sentencing Reform Act, Chapter 9.94A RCW ["SRA"]. Resp. Br. at 27-28. This is wrong. Bail jumping and the new failure to appear statute are both under Chapter 9A.76 RCW, not the SRA.

The Supreme Court has repeatedly held when felonies are downgraded to misdemeanors or decriminalized, the changes apply retroactively to cases on appeal. *Wiley*, 124 Wn.2d at 687; *Heath*, 85 Wn.2d at 198; *Ross*, 152 Wn.2d at 239-40. Though the State wants the savings clause to be "an easily administered, bright-line rule" that applies to all situations, the Supreme Court's decades of precedent show decriminalization and declassification cases are outside the savings clause. Resp. Br. at 24 (quoting *State v. Jenks*, 12 Wn. App. 2d 588, 599, 459 P.3d 389 (2020)).

While the State suggests the Legislature overruled *Wiley* by passing RCW 9.94A.345, the Legislature has certainly never done so for crimes outside the SRA. *See* Resp. Br. at 27; *Wiley*, 124 Wn.2d at 687. The State further relies on *Ross* and numerous other sentencing calculation cases to suggest the savings statute applies. *See* Resp. Br. at 22-28; *Ross*, 152 Wn.2d 220. However, this is not a sentencing calculation issue. In *Ross*, the Supreme Court re-affirmed that *Wiley*'s rule for retroactivity was binding precedent

where the Legislature "downgrade[ed] crimes from a felony to a misdemeanor." *Ross*, 152 Wn.2d at 239-40. The State cites to no decriminalization cases where the savings clause was applied, presumably because it could find none.

Supreme Court precedent dictates that when the Legislature decriminalizes conduct or downgrades a felony to a misdemeanor, it is to be applied retroactively to cases pending on appeal. *See Wiley*, 124 Wn.2d at 687; *Heath*, 85 Wn.2d at 198; *Ross*, 152 Wn.2d at 239-40.

b. For additional reasons, the change in the law applies prospectively to Ms. Hoffman's convictions.

Statutes may apply prospectively to cases pending on appeal "even when the precipitating event originated in a situation existing prior to enactment." *State v. Pillatos*, 159 Wn.2d 459, 471, 150 P.3d 1130 (2007). Accordingly, while the originating situation resulting in punishment could be said to be a person's conduct predating a criminal charge, in *Ramirez*, the Supreme Court held the punishment was not final until the direct appeal was final. *State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018). Thus, the Court ruled

that statutory changes regarding legal financial obligations ["LFOs"] applied prospectively to cases pending on appeal. *Id.*

Because *Ramirez* involved LFOs, the prosecutor strives to distinguish all other types of statutory changes in criminal sentencing. While it claims support from two Court of Appeals decisions, *Jenks* and *Molia*, other Court of Appeals cases have held otherwise. In *Johnson*, the Court considered whether the Legislature intended to impose a harsher punishment on people who committed an act in one year than it imposed on people who committed the same act the following year. *State v. Johnson*, 51 Wn. App. 836, 839–40, 759 P.2d 459 (1988); *review denied* 111 Wn.2d 1008 (1988). It held such a disparity "would denigrate the uniform treatment of defendants which is at the very heart of the SRA." *Id.* In *Huxel*, the Court found, relying on *Ramirez*, that statutory changes permitting vacation of a conviction applied to cases pending on appeal. *State v. Huxel*, 36191-8-III, 2020 WL 1656464, at 1-2 (March 19, 2020) (unpublished; cited pursuant to GR 14.1).

In *Jenks* and *Molia*, both involving a change to the "three strikes" statute, both courts held that *Ramirez*'s rule applied only to LFOs. *See Jenks*, 12 Wn. App. 2d at 595; *State v. Molia*, 12 Wn. App. 2d 895, 900, 460 P.3d 1086 (2020). The *Molia* Court distinguished *Ramirez* by holding that LFOs were not part of the sentence, but merely "attendant to a sentence." *Molia*, 12 Wn. App. 2d at 903. However, LFOs are just as much a part of a sentence as jail time and community custody requirements. *State v. Kinneman*, 155 Wn.2d 272, 277-82, 119 P.3d 350 (2005). Some people receive only a fine, and no jail time at all, for their sentence. Further, people can be jailed for willfully failing to pay LFOs, *see State v. Schwartz*, 194 Wn.2d 432, 436 n.2, 450 P.3d 141 (2019); surely they must have been sentenced by a court to pay LFOs if violating that order can result in jail time.

The *Jenks* opinion, and the *Molia* opinion in adopting the *Jenks* Court's analysis, criticized the *Wiley* and *Ramirez* decisions for not addressing RCW 10.01.040, the savings statute. *Jenks*, 12 Wn. App. 2d at 595, 597; *Molia*, 12 Wn.

App. 2d at 904. Regardless of whether the Court of Appeals agrees with the thoroughness of the analysis or the conclusions reached by the Supreme Court in any case, the Court of Appeals is bound to follow the Supreme Court's decisions. While courts may interpret precedent, they may not disregard the modes of analysis employed by the *Ramirez* and *Wiley* Courts. As the Supreme Court has recognized, "even if we had not cited authority for our holding, the Court of Appeals is not relieved from the requirement to adhere to it." *In re Heidari*, 174 Wn.2d 288, 293, 274 P.3d 366 (2012). Thus, whether this Court believes *Wiley* and *Ramirez's* analyses were complete or not, it is required to follow them. *Id.*

Here, as in *Ramirez*, the precipitating event for the imposition of a penalty for conduct is when the convictions are final under RAP 12.7 at the conclusion of the appeal; the decriminalization and downgrading of bail jumping should apply prospectively. *See Ramirez*, 191 Wn.2d at 749.

c. The convictions must be vacated.

The Legislature has corrected what it determined to be an overly harsh penalty for being late to or missing court. Under the changes in the law, Ms. Hoffman's conduct making up her bail jumping convictions is no longer felonious or no longer criminal. The change in the law applies to all cases that are not final. As Ms. Hoffman's case is on direct appeal and not final, the change in the law requires that her convictions for bail jumping be vacated and remanded for one dismissal and the imposition of one gross misdemeanor.

4. Ms. Hoffman's right to a unanimous jury was violated when the prosecutor relied on multiple items to prove the paraphernalia charge.

When the prosecutor presents evidence of multiple acts, any of which could arguably form the basis of one charged count, the prosecutor must elect an act to rely on, or the court must instruct the jury to unanimously agree on a specific act. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007); *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); U.S. Const. amend. VI; Const. art. I, §§ 21, 22.

At trial, the prosecutor argued evidence of paraphernalia use was shown by both the container in the car's center console and the empty plastic baggie in Ms. Hoffman's purse. RP 349-50. It did not elect one item and the trial court did not instruct the jury it must unanimously agree on the item constituting the basis of the conviction. *See* RP 342-56, 368-72; CP 30-52.

a. The use of these two items constitute separate acts, not one continuing course of conduct.

On appeal, the prosecutor suggests the alleged uses of the different items of paraphernalia were part of a continuing course of conduct. Resp. Br. at 31-32. However, the case law does not support this conclusion.

The State relies on *Handran*, involving an ongoing attempt to have sexual intercourse, and *Love*, involving an ongoing commercial enterprise. *See* Resp. Br. at 32-35; *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989); *State v. Love*, 80 Wn. App. 357, 362, 908 P.2d 395 (1996). It attempts to distinguish *King*, the case with arguably the closest facts, ignoring that in both cases, the items were physically

separate, involved different containers, and were likely last touched at different times by potentially different people. *See* Resp. Br. at 32-35; *State v. King*, 75 Wn. App. 899, 901-03, 878 P.2d 466 (1994). In both *King* and this case, one item was at a location in the car where multiple people could reach it, and one item was in the accused's personal bag. *King*, 75 Wn. App. at 901-03; RP 180-81, 184-86, 188.

Additionally, where multiple acts over a lengthy or unknown time period could support multiple charges, the "continuing course of conduct" exception does not apply. *See State v. Kitchen*, 110 Wn.2d 403, 406-09, 756 P.2d 105 (1988). "'[O]ne continuing offense' must be distinguished from 'several distinct acts,' each of which could be the basis for a criminal charge." *State v. Petrich*, 101 Wn.2d 566, 571, 683 P.2d 173 (1984).

Here, while it could be inferred the paraphernalia in the car's center console had been used recently, given the police's determination Ms. Hoffman's passenger was under the influence of an intoxicant, the same cannot be said for the

baggie in Ms. Hoffman's purse. RP 169-70, 184-87; CP 8. As the baggie was empty, any conclusion it had ever been used to store drugs is purely speculative. RP 186-87. Any guess about how long the baggie had been in Ms. Hoffman's purse or when, if ever, it was used to store anything at all, are also completely speculative. There is no basis for the prosecutor's speculation that the baggie was used around the time of its discovery by the police, given there was no evidence the bag was ever used at all. *See* Resp. Br. at 33; RP 186-87.

For this Court to hold these two items of paraphernalia were used in a continuing course of conduct would make this exception to the unanimity requirement one that swallows the rule. The pipe in the center console contained heroin residue; it was probably used to consume heroin. RP 169-70. If the baggie contained heroin residue, that might support an argument the baggie and pipe may have been used in concert. However, the baggie contained nothing whatsoever. RP 186-87. Whatever it had been used for, it cannot be proven to be part of the course of conduct involved in smoking heroin. *See,*

e.g., *Handran*, 113 Wn.2d at 17; *Love*, 80 Wn. App. at 362. Further, if the baggie supported the filing of a paraphernalia charge, it would be a separate act, and thus not part of a continuing course of conduct. *Petrich*, 101 Wn.2d at 571.

The error is undisputable; Ms. Hoffman's constitutional right to a unanimous jury was violated. *See Kitchen*, 110 Wn.2d at 409.

b. This error was not harmless, so reversal is required.

Prejudice is presumed where some jurors may have relied on one act and others on another. *Coleman*, 159 Wn.2d at 512. If a rational juror could have had a reasonable doubt as to any of the acts alleged, the error is not harmless. *Id.*

The State acknowledges it "had to prove use" of paraphernalia. Resp. Br. at 31. It asserts it did actually prove use of the empty bag in Ms. Hoffman's purse. Resp. Br. at 33. This assertion is based on no facts; the bag was lab-tested but no drugs were shown to have been there. RP 186-87.

Consequently, the State cannot prove anyone ever used the bag: "inferences based on circumstantial evidence must be

reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). The State cannot establish no reasonable juror could have a reasonable doubt whether the bag had been used to store drugs. *See Coleman*, 159 Wn.2d at 512.

Further, Ms. Hoffman's passenger appeared intoxicated and refused a search of the vehicle. RP 180; CP 8. Ms. Hoffman was not believed to be under the influence and she immediately agreed to the search. RP 164, 179; CP 8. This is all circumstantial evidence that Ms. Hoffman did not know contraband was there and that the passenger was the person who had used the paraphernalia in the center console.

The *Petrich* doctrine seeks to prevent cases like this. The evidence was speculative regarding the baggie and weak for the pipe, given the presence and actions of the intoxicated passenger. The prosecutor hoped if it argued as much as possible to the jury, the jury would decide there was enough to overcome reasonable doubt. This is why the state and federal constitutions require unanimity. The presumption of

prejudice is not overcome. *See Coleman*, 159 Wn.2d at 512. This Court should reverse Ms. Hoffman's conviction and remand for a new trial.

5. This Court should accept the State's concession that Ms. Hoffman should not pay community custody costs.

The State concedes the community custody supervision costs were improperly imposed. Resp. Br. at 38 (citing *State v. Dillon*, 12 Wn. App. 2d 133, 456 P.3d 1199 (2020)). Ms. Hoffman asks this Court to accept this concession and order the fees stricken if it does not reverse her convictions.

C. CONCLUSION

This Court should reverse Ms. Hoffman's four convictions, or alternatively strike the improper costs.

Respectfully submitted this 7th day of August 2020.

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Washington Appellate Project (WAP #91052)
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 36851-3-III
	)	
JOYCE HOFFMAN,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF AUGUST, 2020, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	JOYCE HOFFMAN PO BOX 975 NORTHPORT, WA 99157	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF AUGUST, 2020.

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