

FILED
Court of Appeals
Division III
State of Washington
12/3/2019 4:42 PM

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

A. INTRODUCTION..... 1

B. ASSIGNMENTS OF ERROR 2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

D. STATEMENT OF THE CASE..... 4

 1. Ms. Hoffman may not have known about the residue in
 the borrowed car..... 4

 2. Concerning the bail jumping charges, the trial court
 instructed the jury on uncontrollable circumstances over
 Ms. Hoffman’s objection, who did not want to take on the
 burden of proving this defense..... 6

 3. The prosecution made no election about what evidence
 proved possession of drug paraphernalia, and the court
 did not instruct the jury on unanimity..... 8

E. ARGUMENT 9

 1. The court erroneously violated Ms. Hoffman’s Sixth
 Amendment rights when it denied her the affirmative
 defense of unwitting possession..... 9

 a. The court erroneously denied Ms. Hoffman a valid
 defense. 9

 b. More than enough evidence supported an unwitting
 possession instruction..... 12

 c. The violation of Ms. Hoffman’s right to present a
 defense requires reversal..... 14

 2. Over Ms. Hoffman’s objection, the trial court instructed
 the jury in an affirmative defense for the bail jumping
 charges, requiring Ms. Hoffman to prove a defense she
 could not meet, effectively directing a verdict of guilt.... 15

 a. Forcing an affirmative defense on Ms. Hoffman violated
 her right to control her defense. 16

b. The denial of Ms. Hoffman’s right to control her defense was not harmless and requires reversal.	18
3. The constitutional right to a unanimous jury was violated on the use of paraphernalia charge when the prosecutor relied on multiple items to prove the charge.	21
a. Where the government charges a single count but presents evidence of multiple counts, it must elect which act constituted the crime, or the court must instruct the jury on unanimity.	21
b. The prosecutor presented evidence of separately located items of paraphernalia but did not elect one, and the court did not instruct the jury on the unanimity requirement.	22
c. The denial of Ms. Hoffman’s right to a unanimous verdict requires the reversal of the use of drug paraphernalia conviction.	25
F. CONCLUSION	27

TABLE OF AUTHORITIES

United States Supreme Court

Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) 16, 17

Washington Supreme Court

State v. Coleman, 159 Wn.2d 509, 150 P.3d 1126 (2007) 22, 25, 26, 27

State v. Coristine, 177 Wn.2d 370, 300 P.3d 400 (2013) .. 9, 17, 18, 19

State v. Elmore, 155 Wn.2d 758, 123 P.3d 72 (2005)..... 21

State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000) 10, 14

State v. Fisher, 185 Wn.2d 836, 374 P.3d 1185 (2016) ... 10, 11, 13, 14, 15

State v. Griffin, 100 Wn.2d 417, 670 P.2d 265 (1983)..... 14, 15

State v. Jones, 168 Wn.2d 713, 230 P.3d 576, 579 (2010) 20

State v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983) 17

State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988).... 22, 25

State v. Lynch, 178 Wn.2d 487, 309 P.3d 482 (2013) 16, 17, 18, 19

State v. Williams, 132 Wn.2d 248, 937 P.2d 1052 (1997).... 10, 14, 15

Washington Court of Appeals

State v. George, 146 Wn. App. 906, 193 P.3d 693 (2008) 10,
11, 12, 13, 14, 15

State v. Holland, 77 Wn. App. 420, 891 P.2d 49 (1995)..... 22

State v. King, 75 Wn. App. 899, 878 P.2d 466 (1994) 23, 24

State v. May, 100 Wn. App. 478, 997 P.2d 956 (2000)..... 10

State v. White, 137 Wn. App. 227, 152 P.3d 364 (2007) 19

Federal Decisions

United States v. Washington, 819 F.2d 221 (9th Cir. 1987) . 14

United States v. Zuniga, 6 F.3d 569 (9th Cir.1993) 11, 14

United States Constitution

Sixth Amendment 9, 16, 22

Washington Constitution

Article I, section 21 21

Article I, section 22 16, 22

Washington Statutes

RCW 9A.76.170 19

RCW 69.50.412 26

A. INTRODUCTION

Sufficient evidence existed in Joyce Hoffman's trial to show she did not know about the drug residue in a borrowed car. Nonetheless, the court denied an unwitting possession instruction, violating her right to control her defense. The court also failed to instruct the jury that to convict Ms. Hoffman of possession of a controlled substance, it must find she knowingly possessed a controlled substance.

Additionally, the court instructed the jury regarding an affirmative defense to bail jumping over Ms. Hoffman's objection, violating her right to control her defense and impermissibly burdening her.

The prosecutor argued that many items in different locations constituted paraphernalia that Ms. Hoffman might have used, not electing one item to support the single charge. However, the court failed to instruct the jury on unanimity about which supported the use of drug paraphernalia.

These errors were each prejudicial and require reversal.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Ms. Hoffman an unwitting possession instruction when credible evidence existed to support one, in violation of the Sixth Amendment.

2. Violating the Sixth Amendment and Article I, section 22, the trial court forced an affirmative defense on Ms. Hoffman over her objection.

3. In violation of the Sixth Amendment and Article I, section 21, the court erred when it did not instruct the jury on unanimity regarding which act supported the possession of drug paraphernalia when the prosecutor did not elect which of multiple acts supported the charge.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is error to deny an affirmative defense instruction when any credible evidence, from any party or source, supports one. Ample evidence existed to support Ms. Hoffman's defense of unwitting possession of a controlled substance. The trial court denied the instruction, ruling that direct, affirmative evidence in support must come from Ms.

Hoffman herself. Does this error require reversal of Ms. Hoffman's possession of heroin conviction?

2. Requiring a person to prove an affirmative defense over her objection violates the person's Sixth Amendment rights to control her defense. This Court must order a new trial unless it is satisfied beyond a reasonable doubt that the error did not affect the jury verdict. The trial court instructed the jury on the affirmative defense of uncontrollable circumstances, over Ms. Hoffman's objection. This error violated the presumption of innocence, essentially directing a guilty verdict. Is the reversal of Ms. Hoffman's bail jumping convictions required?

3. Where multiple acts support a single charge, the government must elect which act supports a charged crime, or the court must instruct the jury on unanimity. The prosecutor argued Ms. Hoffman possessed and used multiple items of drug paraphernalia found in two locations, one of which was between Ms. Hoffman and her passenger. The prosecutor did not make an election, and the trial court did not instruct the

jury on unanimity. Does the lack of unanimity require a reversal of Ms. Hoffman's use of drug paraphernalia conviction?

D. STATEMENT OF THE CASE

Joyce Hoffman lives in Northport. CP 1. She borrowed her mother's car on a winter day to go grocery shopping with her husband. RP 46, 49, 163, 179.

After going to the store, Ms. Hoffman drove the car while her husband sat in the front seat. RP 179-80. Ms. Hoffman turned into the wrong lane and failed to signal her exit from a traffic circle. An officer pulled her over. RP 160.

1. Ms. Hoffman may not have known about the residue in the borrowed car.

While the officer was writing a traffic ticket, another officer arrived with a drug-sniffing dog. The dog smelled an odor coming from the passenger side. RP 162, 277. Ms. Hoffman was cooperative with the officer and consented immediately to a search of the vehicle, but her husband denied permission to search. RP 164, 179, 180.

Ms. Hoffman did not confess possession, use, or knowledge of any controlled substances in the. RP 189-90

While the officer had initially pulled Ms. Hoffman over on suspicion of DUI, based on the traffic infractions he had noted, he did not subsequently recommend that Ms. Hoffman be charged with DUI, though he did ultimately recommend other charges for both the car's occupants. CP 8. He did note, in contrast, that the vehicle's passenger "was exhibiting the signs of being under the influence." *Id.*

The officer impounded the car and searched the car after securing a search warrant. RP 164, 179. On the driver's side floorboard, the officer found a purse containing Ms. Hoffman's credit cards and an empty plastic bag. RP 184-85, 186. The police tested the bag for narcotics, without a positive result. RP 186-87.

In the car's center console, the officer found three used hypodermic needles and a metal tin containing heroin residue. RP 169-70, 172-73, 200. The police did not find any identifying information in the center console connecting the

contraband to any particular person. RP 169-70, 172-73. This console was between the two seats. RP 181. The officer determined there was no evidence Ms. Hoffman used any of the paraphernalia found in the center console, including the tin containing heroin residue. RP 183-84.

The government charged Ms. Hoffman with possession of heroin and the use of drug paraphernalia. CP 1-2, 8. The government added two charges of bail jumping when Ms. Hoffman failed to make court appearances. CP 27.

At her trial, Ms. Hoffman requested an instruction on unwitting possession of a controlled substance. RP 31. The government objected to the instruction because Ms. Hoffman did not directly testify that she “didn’t know there was anything in the car.” RP 296. Ms. Hoffman renewed her request for the instruction, but the trial court concurred with the government, stating it would not so instruct the jury “without affirmative proof.” from Ms. Hoffman. *Id.*

2. Concerning the bail jumping charges, the trial court instructed the jury on uncontrollable circumstances

over Ms. Hoffman's objection, who did not want to take on the burden of proving this defense.

Over Ms. Hoffman's strenuous objection, the trial court instructed the jury on uncontrollable circumstances, which is an affirmative defense to bail jumping. RP 251-53, 256-57; CP 50. Ms. Hoffman did not ask for this instruction because sufficient evidence did not support it and she did not want to the burden of proof it required of her. RP 31-32; 251-52.

Ms. Hoffman stated she wanted to testify about missing court and her efforts to get there to dispel any inference of deliberately missing court because of a feeling of guilt about the drug-related charges. RP 247, 252, 257. She argued that just as evidence of flight is always relevant, so was her evidence rebutting an inference of flight. RP 251-52. She assured the court she would not argue for nullification on the bail jumping charges in closing. RP 252, 256.

Despite her objection, the trial court ruled that if Ms. Hoffman testified about why she did not appear in court, the prosecutor would be "entitled ... to the instruction" on uncontrollable circumstances. RP 258. In her testimony, Ms.

Hoffman explained to the jurors why she missed court so they would know she was not deliberately flouting the law out of a sense of guilt. RP 247, 252, 257, 284-90. The court then instructed the jury on the affirmative defense, allowing the prosecutor to emphasize the defense's burden of proof in closing arguments.

3. The prosecution made no election about what evidence proved possession of drug paraphernalia, and the court did not instruct the jury on unanimity.

The prosecutor argued there was evidence of paraphernalia in Ms. Hoffman's purse (a "little baggie ... used to package" a controlled substance) as well as in the car's center console (a "little tin" and "used needles"). RP 348-49.

The prosecutor asked the jurors to consider whether Ms. Hoffman had "used the drug paraphernalia, the baggie and the needles" and urged the jury to find her guilty of using paraphernalia. RP 349-50. The prosecutor did not elect one item for the jury to consider. *See* RP 342-56, 368-72. The trial court did not instruct the jury it must be unanimous in their

finding of a specific object or act to find Ms. Hoffman guilty of using drug paraphernalia. *See* CP 30-52.

After deliberations, the jury found Ms. Hoffman guilty of all four charges. RP 378. The trial court sentenced her to eight months in jail. RP 400.

E. ARGUMENT

- 1. The court erroneously violated Ms. Hoffman's Sixth Amendment rights when it denied her the affirmative defense of unwitting possession.**

The trial court misstated the law and denied Ms. Hoffman's request for an unwitting possession instruction, despite sufficient evidence showing she may not have known there was drug residue in the car she had borrowed.

a. The court erroneously denied Ms. Hoffman a valid defense.

The right to control one's defense includes "the decision to present an affirmative defense." *State v. Coristine*, 177 Wn.2d 370, 376, 300 P.3d 400 (2013); U.S. Const. amend. VI.

A person accused of a crime must be permitted to argue any defense allowed under the law and supported by the

facts. *State v. Fisher*, 185 Wn.2d 836, 848–49, 374 P.3d 1185 (2016). The accused is also “entitled to have the jury instructed on [her] theory of the case if there [is] evidence to support that theory.” *Id.* (quoting *State v. Williams*, 132 Wn.2d 248, 259–60, 937 P.2d 1052 (1997) (initial alteration in original)).

When deciding whether sufficient evidence existed to support a defense instruction, this Court views the evidence in the light most favorable to the defendant. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455–56, 6 P.3d 1150 (2000). This Court “must not weigh the proof or judge the witnesses’ credibility,” as these determinations are the exclusive province of the jury. *State v. May*, 100 Wn. App. 478, 482, 997 P.2d 956 (2000); *State v. George*, 146 Wn. App. 906, 915, 193 P.3d 693 (2008). Whether sufficient evidence justified the affirmative defense is a question of law, and review is de novo. *Fisher*, 185 Wn.2d at 849.

Support for an affirmative defense can come from any evidentiary source, even if it is inconsistent with the

testimony or statements of the accused. *Fisher*, 185 Wn.2d at 849. An affirmative defense instruction does not require “overwhelming” evidence. *Fisher*, 185 Wn.2d at 852. If there is “only some evidence to satisfy the burden of production,” the court must be permit the instruction. *Id.* (citing *United States v. Zuniga*, 6 F.3d 569, 570 (9th Cir.1993) (“Even if the alibi evidence is ‘weak, insufficient, inconsistent, or of doubtful credibility,’ the instruction should be given.”)). A trial court may only deny an affirmative defense instruction “where no credible evidence” appears in the record to support the defense. *Id.* at 849.

In *State v. George*, this Court found error, holding that testimony from a police officer was sufficient to require an unwitting possession charge. In *George*, the defendant did not testify. *George*, 146 Wn. App. at 913-14. He requested an unwitting possession jury instruction. *Id.* The trial court determined evidence of unwitting possession must come from the defendant and not the officer. *Id.*

The Court of Appeals found the evidence from the trooper sufficient to merit the instruction in Mr. George's trial. *George*, 146 Wn. App. at 916. Though a pipe containing marijuana was on the backseat floorboard next to Mr. George, he told the trooper the pipe and marijuana were not his. *Id.* at 915. He did not own the car and two other people were in the car. *Id.* at 915. The trooper "did not know when the pipe had last been used, who placed it on the floorboard, or when it was placed there." *Id.* at 916. The court's erroneous denial of the instruction justified reversal of Mr. George's conviction. *Id.*

b. More than enough evidence supported an unwitting possession instruction.

As in *George*, there was ample proof to support Ms. Hoffman's request for an affirmative defense. *See George*, 146 Wn. App. at 913-16. Ms. Hoffman's husband was in the car with her, and he had equal access to the residue found in the center console. RP 179-81; *see George*, 146 Wn. App. at 915. The car did not belong to Ms. Hoffman; it was registered to a relative. RP 179; *see George*, 146 Wn. App. at 915. As in *George*, Ms. Hoffman did not confess to knowing the drugs

were in the car. *See id.*; RP 189-90. There was no evidence of dominion and control in the center console, or that Ms. Hoffman had used the paraphernalia containing the residue. RP 183-84; *see George*, 146 Wn. App. at 915-16.

Further, many other facts from the officer's testimony supported the unwitting possession defense. *See Fisher*, 185 Wn.2d at 849. Ms. Hoffman immediately consented to a search of the car when asked by the police. RP 179. The front-seat passenger, who showed signs of being under the influence, denied the request. RP 180; CP 8.

Ms. Hoffman's possessions were in her purse on the driver's side floorboard. RP 166. There were no drugs in her purse. RP 183-87. The purse contained one small plastic bag, but there was no evidence of any drug ever having been in it. RP 186-87. Unlike the purse, there was no evidence linking the items in the center console to Ms. Hoffman or showing her dominion and control over them. RP 169-70, 172-73, 183-84.

As in *George*, when viewed in the light most favorable to Ms. Hoffman, the evidence allowed for an inference that

Ms. Hoffman may not have known of the drug's presence in the center console. *See George*, 146 Wn. App. at 915-16; *see also Fernandez-Medina*, 141 Wn.2d at 455–56.

“Even if the ... evidence is ‘weak, insufficient, inconsistent, or of doubtful credibility,’ the instruction should [have been] given.” *Zuniga*, 6 F.3d at 570 (quoting *United States v. Washington*, 819 F.2d 221, 225 (9th Cir. 1987)).

Denial of Ms. Hoffman's defense would have been appropriate only had there been “no credible evidence” to support the defense. *Fisher*, 185 Wn.2d at 849. The trial court erred in denying Ms. Hoffman the unwitting possession affirmative defense.

c. The violation of Ms. Hoffman's right to present a defense requires reversal.

A court's failure to grant a defense warranted by the evidence is reversible error. *Fisher*, 185 Wn.2d at 848-49, 852; *Williams*, 132 Wn.2d at 260; *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983); *George*, 146 Wn. App. at 916.

This error denied Ms. Hoffman a defense that may have succeeded. Had the court permitted her affirmative defense,

she could have argued that her passenger's intoxication and refusal of consent showed his guilty knowledge, while her consent showed she did not know drug residue was hidden in the center console. *See* RP 179-80; CP 8.

The trial court erred in denying Ms. Hoffman the unwitting possession defense. *See* RP 296; *George*, 146 Wn. App. at 916. This error requires reversal. *See Fisher*, 185 Wn.2d at 848–49, 852; *Williams*, 132 Wn.2d at 260; *Griffin*, 100 Wn.2d at 420. Thus, this Court should reverse Ms. Hoffman's conviction of possession of a controlled substance.

2. Over Ms. Hoffman's objection, the trial court instructed the jury in an affirmative defense for the bail jumping charges, requiring Ms. Hoffman to prove a defense she could not meet, effectively directing a verdict of guilt.

Ms. Hoffman did not seek the affirmative defense of uncontrollable circumstances for bail jumping because she did not have sufficient evidence of the defense and did not want to the burden of proof. RP 31-32; 251-52. She wanted to testify about why she missed court and her efforts to get there to dispel any inference that missing court was because of a feeling of guilt about the original drug-related charges. RP

247, 252, 257. The trial court ruled that if she testified about why she missed court, the court would instruct the jury on uncontrollable circumstances, an instruction Ms. Hoffman did not want, which created a burden she could not meet. RP 258.

a. Forcing an affirmative defense on Ms. Hoffman violated her right to control her defense.

Instructing the jury on an affirmative defense over a defendant's objection violates the accused's constitutional right to control her defense. U.S. Const. amends. VI, IX; 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).

Here, the trial court violated Ms. Hoffman's right to control her defense by instructed the jury on an affirmative defense over her objection. CP 50. During argument on whether Ms. Hoffman could testify about the efforts she had made to appear for the two hearings, the prosecutor contended the jury should receive instruction on the affirmative defense of uncontrollable circumstances. RP 249-

58. Ms. Hoffman made it clear she was not pursuing this defense and objected to the jury instruction. RP 31, 251-57.

The court was aware the instruction should be used “only if the defense is going to give it,” but ordered it anyway. RP 250, 258; CP 50. The court ruled the prosecution was “entitled ... to the instruction ... to eliminate any potential confusion over the nature of the defense to the charge.” RP 258. This left Ms. Hoffman to shoulder a burden she knew she could not meet. RP 31, 247, 251-53.

Rejecting Ms. Hoffman’s chosen defense and instructing the jury on an affirmative defense over her objection was error. An accused person’s right to control her defense is protected by the Sixth Amendment. *Faretta*, 422 U.S. at 819-20; *Lynch*, 178 Wn.2d at 491-93; *State v. Jones*, 99 Wn.2d 735, 740, 664 P.2d 1216 (1983). This right is necessary “to further the truth-seeking aim of a criminal trial and to respect individual dignity and autonomy.” *Coristine*, 177 Wn.2d at 375-76; *see Lynch*, 178 Wn.2d at 492.

The trial court violated Ms. Hoffman's right to control her defense by instructing the jury on the affirmative defense of uncontrollable circumstances over her objection. *See Lynch*, 178 Wn.2d at 492; *Coristine*, 177 Wn.2d at 379.

b. The denial of Ms. Hoffman's right to control her defense was not harmless and requires reversal.

This error was constitutional. Prejudice is presumed and may be overcome only if the government proves the error harmless beyond a reasonable doubt. *Lynch*, 178 Wn.2d at 494. The prosecution cannot overcome the presumption of prejudice in this case.

In *State v. Lynch*, the trial court required the defense to argue of consent because it introduced evidence of willing participation in intercourse. *Lynch*, 178 Wn.2d at 490. That instruction was inconsistent with the defendant's chosen defense, and not harmless, because it forced the defense to shoulder an affirmative burden that was greater than that normally required for gaining acquittal, the raising of reasonable doubt. *Id.* at 494.

However, consistency with the defendant's strategy does not make the error harmless. *Lynch*, 178 Wn.2d at 494-95 (citing *Coristine*, 177 Wn.2d at 381 (“[I]f seizing control over a defendant's trial strategy were harmless so long as the court correctly instructed the jury in the defense it chose, little would remain of the ... right to control one's defense.”)).

Here, uncontrollable circumstances as a defense to bail jumping is a statutory form of a necessity defense, which admits factual proof of the crime's elements but argues justifiable excuse. *State v. White*, 137 Wn. App. 227, 230-31, 152 P.3d 364 (2007); RCW 9A.76.170(2). The defense requires the accused to prove the facts of the defense by a preponderance of the evidence. *White*, 137 Wn. App. at 231.

The court's error in improperly instructing the jury forced Ms. Hoffman to accept an affirmative defense that admitted her guilt to the elements of the crime. It required her to defend herself by proving an affirmative excuse she told the court she did not want and could not prove. It forced

Ms. Hoffman to shoulder an affirmative burden different from and greater than that normally required for acquittal.

In ordering Ms. Hoffman could not testify in her chosen manner without the improper affirmative defense instruction, the trial court forced Ms. Hoffman to choose between two fundamental Sixth Amendment rights: her right to present a defense, and her right to control her defense. *See State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576, 579 (2010) (right to present defense). As Ms. Hoffman argued at trial, this ruling “[flew] in the face of her right to take the stand.” RP 256.

The prosecutor took advantage of the court’s error. In closing arguments, the prosecutor emphasized the defense burden and pointed 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 confined 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 requests that this Court reverse her two convictions for bail jumping.

3. The constitutional right to a unanimous jury was violated on the use of paraphernalia charge when the prosecutor relied on multiple items to prove the charge.

The government argued that various items of potential drug paraphernalia found in different parts of the car that were in reach of different people all supported the single count alleging Ms. Hoffman used drug paraphernalia. RP 180-81, 184-86, 188, 348-49. The jury's verdict was not unanimous as to which item it found Ms. Hoffman had used.

a. Where the government charges a single count but presents evidence of multiple counts, it must elect which act constituted the crime, or the court must instruct the jury on unanimity.

Washington's constitution guarantees the right to a unanimous jury verdict. Const. art. I, § 21; *State v. Elmore*, 155 Wn.2d 758, 771 n.4, 123 P.3d 72 (2005). When the government presents evidence of multiple acts, any of which

could arguably form the basis of one charged count, the prosecutor must tell the jury on which act to rely, or the court must instruct the jury to agree on a specific criminal 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).¹

The failure to follow one of these options violated Ms.

Hoffman's state constitutional right to a unanimous jury

verdict and United States constitutional right to a jury trial.

Kitchen, 110 Wn.2d at 409; U.S. Const. amend. VI; Const. art.

I, §§ 21, 22.

Violation of the right to a unanimous verdict is manifest constitutional error and may be raised for the first time on appeal. *State v. Holland*, 77 Wn. App. 420, 424, 891 P.2d 49 (1995); RAP 2.5(a)(3).

b. The prosecutor presented evidence of separately located items of paraphernalia but did not elect one, and the court did not instruct the jury on the unanimity requirement.

¹ The unanimity instruction may be referred to as a "Petrich instruction," based on *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

If there is evidence tending “to show two distinct instances of [drug] possession occurring at different times, in different places, and involving two different containers,” either the prosecutor must clarify on which incident it is relying or the court must instruct the jury on the unanimity requirement. *State v. King*, 75 Wn. App. 899, 903, 878 P.2d 466 (1994).

In *State v. King*, for example, this Court found that drugs recovered from a car in which the defendant was riding and from a bag the defendant was wearing while he was in the vehicle were two distinct instances, involving different locations, different containers, and different times. *King*, 75 Wn. App. at 901-03. The Court concluded the two separate instances of possession were not a continuing course of conduct. *Id.* at 903. The court’s failure to give a unanimity instruction was error after the prosecutor failed to elect one act, and the potentially reasonable doubt about the two instances required reversal. *Id.* at 902-04

Here, the prosecutor argued there was evidence of paraphernalia in Ms. Hoffman's purse and the center console of the borrowed car. RP 348-49. As in *King*, the item in the purse and the items in the console were physically separated, in different containers, and likely last touched at different times by potentially different people. *See King*, 75 Wn. App. at 903. Ms. Hoffman's purse was on the floorboard by her feet, containing items in her name. RP 184-86. In contrast, the center console was between Ms. Hoffman and her passenger, and the objects found there were not connected by name to anyone. RP 180-81, 188.

The prosecutor asked the jurors to consider whether Ms. Hoffman had "used the drug paraphernalia, the baggie and the needles" and urged the jury to find her guilty of using paraphernalia. RP 349-50. Any of the three items discussed in closing could have formed the basis for the single count of use of paraphernalia, even though some of the jurors could have concluded the empty plastic bag from Ms. Hoffman's purse was not paraphernalia.

The prosecutor did not elect which one of the items provided the basis for the charge in her closing argument. *See* RP 342-56, 368-72. The trial court did not instruct the jury it must unanimously agree on the specific item that constituted the basis of the charge. *See* CP 30-52. Ms. Hoffman’s constitutional right to a unanimous jury was violated. *See Kitchen*, 110 Wn.2d at 409.

c. The denial of Ms. Hoffman’s right to a unanimous verdict requires the reversal of the use of drug paraphernalia conviction.

This type of unanimity error “is presumed to result in prejudice,” as in such a situation, “some jurors [may have] relied on one act ... and some relied on another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” *Coleman*, 159 Wn.2d at 512. This presumption is “overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged.” *Id.*; *Kitchen*, 110 Wn.2d at 411.

The presumption of prejudice cannot be overcome here, as a rational juror could have had a reasonable doubt whether

at least one of the different items of paraphernalia was used by Ms. Hoffman. *Coleman*, 159 Wn.2d at 510.

The use of drug paraphernalia requires the jury to find that the paraphernalia was used. RCW 69.50.412(1). The empty baggie recovered from Ms. Hoffman's purse had no sign of being used to contain drugs. None were visible to the detective, and though the detective had the bag lab-tested for narcotics, there was no evidence of any test showing even residue. RP 186-87. Thus, reasonable doubt existed as to whether the bag had ever been used to store drugs. As such, the presumption of prejudice is not overcome. *See Coleman*, 159 Wn.2d at 510. A reasonable juror could have a reasonable doubt as to whether the bag met the evidentiary requirements. *See id.*

The jury must also find the accused is the person who used the paraphernalia in question. RCW 69.50.412(1). However, here, the government's witness conceded there was no evidence Ms. Hoffman was the person who had used the paraphernalia found in the center console. RP 183-84. Ms.

Hoffman did not state she knew the items were in the center console. RP 189-90. Her passenger's signs of being under the influence and her immediate agreement to search the car, unlike the passenger's refusal, suggest Ms. Hoffman did not know the items were there while the passenger did. RP 179-80; CP 8. The jury could have found Ms. Hoffman was not the person who had used the items in the center console. *See Coleman*, 159 Wn.2d at 510. RP 183-84.

The record fails to overcome the presumption of prejudice created by the court's failure to instruct the jury on unanimity. Thus, "the error is not clearly harmless."

Coleman, 159 Wn.2d at 510. Ms. Hoffman asks this Court to reverse her use of paraphernalia conviction and remand the case for a new trial. *Id.* at 515-17.

F. CONCLUSION

The trial court violated Ms. Hoffman's state and federal constitutional rights in multiple ways. It violated her right to a unanimous jury and her rights to control her defense by

improperly denying one affirmative defense and improperly imposing another.

Ms. Hoffman requests this Court reverse her four convictions.

DATED this 3rd day of December 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Falk', written in a cursive style.

MAREK E. FALK (WSBA 45477)
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 3RD DAY OF DECEMBER, 2019, I CAUSED THE ORIGINAL **OPENING 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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<input checked="" type="checkbox"/> JOYCE HOFFMAN (ADDRESS OF RECORD) ON FILE WITH OUR OFFICE)	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 3RD DAY OF DECEMBER, 2019.

X _____ 

WASHINGTON APPELLATE PROJECT

December 03, 2019 - 4:42 PM

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Appellate Court Case Title: State of Washington v. Joyce Aspen Hoffman
Superior Court Case Number: 17-1-00395-1

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