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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

AMENDED BRIEF OF APPELLANT

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A. INTRODUCTION

Sufficient evidence existed in Joyce Hoffman's trial to show she did not know about drug residue in a borrowed car, but the court denied an unwitting possession instruction, violating her right to control her defense. The court also violated her right to control her defense by instructing the jury on another affirmative defense over her objection.

Further, the prosecutor in Ms. Hoffman's trial did not elect one of several items to support a single use of paraphernalia charge, and the court failed to instruct the jury on unanimity.

Additionally, the Legislature determined the culpability and punishment for bail jumping offense was set too high; its remedial legislation serves to there is no purpose in imposing the previous, harsher punishment. In these circumstances, the amended law applies to cases pending on appeal.

Finally, the trial court intended to impose only mandatory legal financial obligations, but accidentally imposed waivable supervisory fees because they were buried in a lengthy paragraph on community custody conditions.

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. Due to legislative changes in the bail jumping statute that apply to Ms. Hoffman, her conviction does not meet the essential elements of the felony offense.

4. 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.

5. The trial court erred in ordering that Ms. Hoffman pay supervision fees as a term of community custody.

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. In March 2020, Washington passed Engrossed Substitute House Bill 2231. This law will become effective on June 11, 2020 – well before this Court will consider this case. Due to the change in law, an individual’s failure to appear at a court proceeding, other than a failure to appear for trial, or in a case involving a violent felony or sex offense, is now a gross misdemeanor or no crime whatsoever. In light of this change, are Ms. Hoffman’s felony convictions no longer valid?

4. 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?

5. As part of community custody, a trial court may waive the requirement that the defendant pay supervision fees. Supervision fees are discretionary “costs.” Indigent people may not be sentenced to pay costs. Ms. Hoffman is indigent and the trial court intended to impose only mandatory legal financial obligations [LFOs], yet required Ms. Hoffman to pay supervision fees. Did the court err?

D. STATEMENT OF THE CASE

Joyce Hoffman lives in Northport, WA. 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.

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. Ms. Hoffman missed court and the trial court instructed the jury on the uncontrollable circumstances defense to bail jumping over Ms. Hoffman's objection.

Ms. Hoffman did not receive notice of her initial arraignment hearing; the court received her summons returned in the mail as undeliverable. Supp. CP ___ (sub no. 7, 8). She subsequently appeared in court several times while the case was pending, but missed court twice.

She missed her court date on September 4, 2018, and the court issued a warrant. Supp. CP ___ (sub no. 32, 35, 36). Ms. Hoffman quashed her warrant 21 days later, on September 25, 2018. Supp. CP ___ (sub no. 38).

Ms. Hoffman missed court one more time, on December 31, 2018, and the court issued another warrant. Supp. CP ___ (sub no. 43, 45, 46). She moved to have the warrant recalled 21 days later, on January 21, 2019, not having intended to miss court, and appeared in court to quash that warrant. Supp. CP ___ (sub no. 48-51). Following that hearing, she remained out of custody and missed no more court dates. Supp. CP ___ (sub no. 52).

The government added two charges of bail jumping following the quashing of this warrant. CP 27. At trial, over Ms. Hoffman's strenuous objection, the trial court instructed the jury on uncontrollable circumstances, an affirmative defense to bail jumping. RP 251-53, 256-57; CP 50. Ms. Hoffman did not seek this instruction because the evidence did not support it and she did not want the burden of proof it required. 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 court ruled 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.

4. The trial court accidentally imposed a discretionary cost, despite Ms. Hoffman's indigence.

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.

Ms. Hoffman is indigent and the court stated it would only charge the minimum mandatory LFOs: the \$500 crime victims' assessment and the \$100 DNA fee. RP 400-01; *see* CP 66, 74-80; Supp. CP ____ (sub no. 14.99). A provision ordering community custody supervisory fees appeared in the middle of a paragraph in a section removed from the section on LFOs. RP 400; CP 65.

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 "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.

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 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” support the defense. *Id.* at 849.

Support for an affirmative defense can come from any evidentiary source, even if inconsistent with the testimony or statements of the accused. *Fisher*, 185 Wn.2d at 849. In *State v. George*, this Court found error, holding testimony from a police officer was sufficient to require an unwitting possession

defense. In *George*, the defendant did not testify and requested an unwitting possession instruction. *George*, 146 Wn. App. at 913-14. The trial court ruled evidence of the defense must come from the defendant, 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 be 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 she missed court due to 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 instructing 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 knew 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 *Lynch*, the trial court required the defense to argue the affirmative defense 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.

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 Legislature determined missing court should only be a misdemeanor offense or no crime at all and thus amended the statute. This Court should vacate Ms. Hoffman's felony bail jumping convictions and impose a single gross misdemeanor under the current law.

a. The Legislature downgraded bail jump cases like Ms. Hoffman's to a misdemeanor or no crime at all.

On March 7, 2020, Washington passed Engrossed Substitute House Bill 2231, changing the definition and classification of bail jumping. The Governor signed the bill on March 18, 2020. Laws of 2020, ch. 19, §§ 1-2. The new legislation will become effective on June 11, 2020. *Id.*

By statute, a failure to appear for a court date other than a trial now is either not a crime or is only a gross

misdemeanor. *Id.*¹ Under the new law, failing to appear for court in a case like Ms. Hoffman’s drug possession charge results in no crime if the person moves to quash the warrant within 30 days and has not had a prior warrant for failing to appear in the case. Laws of 2020, ch. 19, § 2(1)(a-b). If the person fails to appear promptly to quash the warrant, or has a prior failure to appear in the case, then failing to appear may result in a gross misdemeanor charge, though an affirmative defense of “uncontrollable circumstances” applies to such failures to appear. Laws of 2020, ch. 19, § 2(1-3).

The new law does not contain a formal statement of intent. *See* Laws of 2020, ch. 19. However, the statements of legislative members show agreement between supporters and opponents that the then-current scheme was overly harsh and not used as originally planned, which was to deter people from intentionally evading justice to cause significant delays either to improve their cases or avoid prosecution entirely.

¹ Bail jumping in cases involving certain serious underlying offenses is punished differently under the new law, but Ms. Hoffman’s convictions are not of that type. *See* Laws of 2020, ch. 19, § 1.

See Hearing on HB 2231, H. Pub. Safety Comm. (Jan. 14, 2020) (statements of Rep. Pellociotti, Sponsor, 41:50-46:57, 47:43-48:21) (statement of opponent Rep. Klippert, Member, 46:57-47:34);² *Hearing on ESHB 2231*, S. Law & Just. Comm. (Feb. 25, 2020) (statements of Rep. Pellociotti, Sponsor, 31:26-35:08, 39:16-40:25, 41:42-42:15) (statement of Sen. Holy, Member, 40:25-41:42).³

Under the new law, the first of Ms. Hoffman’s bail jumping incidents likely qualifies as no crime at all, and the second certainly qualifies as a gross misdemeanor rather than a felony. *See* Supp. CP ___ (sub no. 7, 8, 32, 35, 36, 38, 43, 45, 46, 48-51). Her appeal has not yet been litigated and she should benefit from the legislature’s decision to downgrade and partially decriminalize failures to appear.

b. The downgrading and decriminalization of bail jumping applies prospectively to cases on appeal.

“[A] newly enacted statute or court rule generally applies to all cases pending on direct appeal and not yet

² Available at <https://www.tvw.org/watch/?eventID=2020011091>.

³ Available at www.tvw.org/watch/?eventID=2020021343.

final.” *State v. Jefferson*, 192 Wn.2d 225, 246, 429 P.3d 467 (2018) (plurality opinion) (citing *State v. Pillatos*, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007); *State v. Blank*, 131 Wn.2d 230, 248, 930 P.2d 1213 (1997)) (holding the event in question defied this general rule); see *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

In *Ramirez*, the Court applied this standard to statutory changes enacted after a person committed their offense and held that an amendment that took effect while an appeal is pending, and that is relevant to the issues on appeal, applied to that appeal. *Ramirez*, 191 Wn.2d at 747-49. In that case, the Court ruled that certain costs and interest charges that were properly imposed at the time of sentencing were no longer permissible when statutory amendments took effect before the appeal was final. *Id.* Because that statute took effect while his appeal was pending, the Court ruled that because the conviction was not yet final, the new statute applied to Mr. Ramirez’s case. *Id.* Thus, the court directed

that the sentence be changed to omit the newly improper costs. *Id.* at 749-50.

Statutes “operate prospectively when the precipitating event for operation of the statute occurs after enactment.”

Pillatos, 159 Wn.2d at 471; *Ramirez*, 191 Wn.2d at 749.

Statutes may apply prospectively “even when the precipitating event originated in a situation existing prior to enactment.” *Pillatos*, 159 Wn.2d at 471. Thus, a statute may apply prospectively even when it “relates to prior facts or transactions” or “some of the requisites for its actions are drawn from a time antecedent to its passage.” *Blank*, 131 Wn.2d at 248 (quoting *State v. Scheffel*, 82 Wn.2d 872, 879, 514 P.2d 1052 (1973)). In *Ramirez*, the precipitating event for the penalty imposed upon conviction was when the conviction was final under RAP 12.7 at the conclusion of the appeal, thus the application of the statute affecting the penalty was prospective. *Ramirez*, 191 Wn.2d at 749.

Recently, this Court ruled changes in the law regarding the vacation of misdemeanor offenses 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 *Huxel*, the trial court had concluded the prior offense was statutorily ineligible for vacation, and the appellant challenged this denial of his motion to vacate. *Id.* at 1. While the appeal was pending, the Legislature expanded a trial court's ability to vacate offenses. *Id.* Based upon *Ramirez*, and because his appeal was pending when the statutory amendment was enacted, the Court concluded this change in the law applied to the appellant's case. *Id.* at 2. This Court remanded with direction for the trial court to vacate the conviction. *Id.* Thus, the Court understood *Ramirez* to have application beyond legal financial obligations. *Id.*

Here, Ms. Hoffman's case is pending on appeal. As her conviction is not final, the changes brought by the new law can apply to her case, as her judgment is not final until her direct appeal is final. *See Ramirez*, 191 Wn.2d at 749; *Blank*, 131 Wn.2d at 248. The change in the bail jumping law should apply to her case. *See Ramirez*, 191 Wn.2d at 747-49.

- c. *As the legislature has determined that a gross misdemeanor or no conviction at all is adequate to punish the failure to appear, retroactive application of the new law is presumed, and it would be unjust not to apply the law equally to all similar offenders.*
- i. *The complete downgrading of a crime requires retroactive application.*

“When the Legislature downgrades an entire crime, it has judged the specific criminal conduct less culpable. By reclassifying a crime without substantially altering its elements, the Legislature concludes the criminal conduct at issue deserves more lenient treatment.” *State v. Wiley*, 124 Wn.2d 679, 687, 880 P.2d 983 (1994). This is “a fundamental reappraisal of the value of punishment.” *Id.*

Such a reduction in the penalty for an offense creates a presumption that there is no purpose in executing the harsher penalty of the old law in pending cases. *See State v. Heath*, 85 Wn.2d 196, 198, 532 P.2d 621 (1975). Thus, newly effective law applies to all cases where there has been a legislative determination that the offender is less culpable. *See State v. Ross*, 152 Wn.2d 220, 239–40, 95 P.3d 1225 (2004); *Heath*, 85 Wn.2d at 198.

This rule rests on the understanding that when the Legislature reduces the penalty for a crime, it “is presumed to have determined that the new penalty is adequate and that no purpose would be served by imposing the older, harsher one.” *Heath*, 85 Wn.2d at 198. The Court reasoned the evident legislative will in penalty reduction operated retroactively to pending cases. *Heath*, 85 Wn.2d at 197–98.

In *Wiley*, the Court held that legislation modifying the elements of a crime but not its culpability does not apply to pending cases. *Wiley*, 124 Wn.2d at 682. However, when the Legislature downgrades the seriousness of an offense, courts “must give retroactive effect to the Legislature’s decision.” *Wiley*, 124 Wn.2d at 687. This is so because “the reclassification of a crime is no mere refinement of elements, but rather a fundamental reappraisal of the value of punishment.” *Id.* at 687. Thus, “the reclassification of an entire crime to a lower level of punishment” applies retroactively in calculating offender scores. *Id.* at 682.

In *Ross*, the Court re-affirmed that *Wiley*'s rule for retroactivity was binding precedent in cases where the Legislature "downgrade[ed] crimes from a felony to a misdemeanor." *Ross*, 152 Wn.2d at 239-40. While the Court held the rule did not apply to offender score calculations, it has never overturned the *Heath* and *Wiley* rule for laws downgrading culpability, which are still binding on this Court today. *Id.*; *Wiley*, 124 Wn.2d at 687; *Heath*, 85 Wn.2d at 198.

Here, the Legislature downgraded and partially decriminalized bail jumping. This legislative declaration of reduced culpability for certain acts should be applied to Ms. Hoffman's pending case in accordance with Supreme Court precedent. The Legislature's action indicates a determination such conduct "deserves more lenient treatment," *Wiley*, 124 Wn.2d at 687, and there is no purpose in imposing the "older, harsher" penalty, *Heath*, 85 Wn.2d at 198. Thus, the new law applies in Ms. Hoffman's case. *Wiley*, 124 Wn.2d at 687.

ii. Statutes with a remedial effect are to be applied retroactively.

Further, remedial statutes require liberal construction “to effectuate the remedial purpose for which the statute was enacted.” *State v. Grant*, 89 Wn.2d 678, 685, 575 P.2d 210 (1978) (citing 3 C. Sands, *Statutes and Statutory Construction*, ss. 60.01-.02 (4th ed. 1974); *Personal Restraint Petition of Myers*, 105 Wn.2d 257, 267, 714 P.2d 303 (1986).

Thus, the general rule is that remedial statutes are applied retroactively. *State v. Blank*, 131 Wn.2d 230, 248, 930 P.2d 1213 (1997). This “is especially true when the ... statute favorably reduces punishment laws applied to previously convicted criminal defendants.” *Heath*, 85 Wn.2d at 198.

Reductions in penalties serve a remedial function. *Grant*, 89 Wn.2d at 685; *Heath*, 85 Wn.2d at 198. In *Grant*, the Supreme Court held that a new statute decriminalizing public intoxication should apply to cases on appeal before the statute’s enactment, in part because the statute was remedial in effect. *Grant*, 89 Wn.2d at 685. Likewise, though *Heath* was a civil case, it similarly held a statute providing

treatment alternatives to the penalty of a driving privilege suspension was “patently remedial” and thus should be applied retroactively. *Heath*, 85 Wn.2d at 198.

Thus, the decriminalization and downgrading of bail jumping is similarly remedial and should be applied retroactively to cases pending on appeal, like Ms. Hoffman’s case. *See Grant*, 89 Wn.2d at 685; *Heath*, 85 Wn.2d at 198.

iii. The savings statute does not apply to decriminalization and downgrading of offenses.

Washington’s general savings statute, RCW 10.01.040, was enacted over a century ago and states “[n]o offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act.”

However, as this statute is in derogation of the common law, it is to be narrowly construed. *State v. Zornes*, 78 Wn.2d 9, 13, 475 P.2d 109, 112 (1970), *overruled on other grounds by City of Kennewick v. Fountain*, 116 Wn.2d 189, 193, 802 P.2d

1371 (1991). Consequently, the statute's interpretation contains exceptions, including that it is not applicable to declarations of legislative will that downgrade the culpability of criminal offenses. *See Ross*, 152 Wn.2d at 239–40; *Wiley*, 124 Wn.2d at 687; *Grant*, 89 Wn.2d at 683; *Heath*, 85 Wn.2d at 198. The Court in *Grant* noted the language and intent of a new statute overcame the presumption of the savings clause, noting that any ambiguity about this decision must be resolved in the defendant's favor. *Grant*, 89 Wn.2d at 685.

Additionally, the Supreme Court has held it is unnecessary that the Legislature “expressly state” an intention for retroactive application “if such an intention can be obtained by viewing its purpose and the method of its enactment.” *In re Personal Restraint of Matteson*, 142 Wn.2d 298, 307, 12 P.3d 585 (2000) (quoting *Snow's Mobile Homes, Inc. v. Morgan*, 80 Wn.2d 283, 291, 494 P.2d 216 (1972)).

Further, when addressing the application of new principles of decisional law, courts have found that new case law can apply “to all cases, state or federal, pending on direct

review or not yet final, with no exceptions for cases in which the new rule constitutes a clear break from the past.” *State v. Evans*, 154 Wn.2d 438, 444, 114 P.3d 627 (2005) (quoting *Matter of St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492 (1992)). “Final” means “a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.” *St. Pierre*, 118 Wn.2d at 327. Thus, a change in the law can apply to pending cases not yet final, including cases pending on direct review, regardless of the savings statute.

Heath and *Wiley* clearly contemplated circumstances like Ms. Hoffman’s, and distinguished them from those where the savings clause applies, like amendments changing the calculation procedures in offender scoring in *Ross*. The savings clause does not apply to the Legislature’s amendment to downgrade and decriminalize the offense of bail jumping.

d. The bail jumping statute now defines Ms. Hoffman's failure to appear in court as a gross misdemeanor or not a crime; this Court should vacate her conviction.

By decriminalizing certain failures to appear, and downgrading others, the Legislature has corrected what was an extremely harsh penalty for being late to or missing court, sometimes with reasonable reasons. The Legislature has concluded the previous penalty was not necessary to serve its penological goals, and adjusted its laws accordingly. *See Wiley*, 124 Wn.2d at 687; *Heath*, 85 Wn.2d at 198.

The law applies prospectively to all cases pending on appeal. *See Ramirez*, 191 Wn.2d at 747. Alternatively, decades of binding precedents dictate it must be applied retrospectively to Ms. Hoffman's case, given the Legislature downgraded an offense, deeming sufficient a misdemeanor or no conviction at all, which has a remedial effect and is not barred by the savings statute. *See Wiley*, 124 Wn.2d at 687; *Grant*, 89 Wn.2d at 685; *Heath*, 85 Wn.2d at 198; *see also Evans*, 154 Wn.2d at 444.

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

The government argued 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 prosecutor 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 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).⁴ 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 unanimity.

If there is evidence “show[ing] 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).

⁴ 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).

In *King*, this Court found that drugs recovered from a car in which the defendant was riding and from a bag the defendant was wearing while in the vehicle were two distinct instances, with different locations, containers, and 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 trial 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,

accessible to both, 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 [in the purse] and the needles [in the console]” and urged the jury to find her guilty of using paraphernalia. RP 349-50. Any of the items discussed in closing could have formed the basis for the single count of use of paraphernalia, even though the jurors could have concluded the empty plastic bag from Ms. Hoffman’s purse had not been used as paraphernalia.

The prosecutor did not elect an item to provide the basis for the charge. *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.*

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. *Id.* at 510.

The use of drug paraphernalia charge requires the jury to find the paraphernalia was used. RCW 69.50.412(1). The empty baggie recovered from Ms. Hoffman's purse had no sign of ever having been used to contain drugs. No drugs were visible to the detective, and though the detective had the bag lab-tested for narcotics, there was no evidence from 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, the government's witness conceded there was no evidence Ms. Hoffman 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 own immediate consent to a search of 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.

5. Remand is necessary to strike the requirement that Ms. Hoffman pay the costs of community custody.

Ms. Hoffman is indigent. CP 74-80; Supp. CP ___ (sub no. 14.99). Although the trial court appears to have intended to waive all discretionary legal financial obligations [LFOs], the judgment and sentence ordered that Ms. Hoffman “pay supervision fees as determined by [the Department of Corrections]” as a term of community custody. RP 400; CP 65.

The relevant statute provides this is discretionary: “[u]nless waived ... the court shall order an offender to ... [p]ay supervision fees as determined by the department.” RCW 9.94A.703(2)(d) (emphasis added). As they are waivable, costs of community custody are discretionary. *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018),

rev. denied, 193 Wn.2d 1007, 443 P.3d 800 (2019); *State v. Dillon*, ___ Wn. App. 2d ___, 456 P.3d 1199, 1209 (2020).

The Legislature has determined that people indigent at the time of sentencing should not pay costs. RCW 10.01.160(3). Community custody “supervisory fees” are “costs.” *Lundstrom*, 6 Wn. App. 2d at 396 n.3; *State v. Huckins*, 5 Wn. App. 2d 457, 469, 426 P.3d 797 (2018).

Here, the trial court indicated it would only “impose the minimum \$500,” and the mandatory DNA fee, stating it was not necessary for Ms. Hoffman to explain her circumstances for the court “to know they’re desperate.” RP 400-01.

In the judgment and sentence’s section on LFOs, there is no option to order or waive the payment of supervision fees. CP 66. Under the order’s provisions for community custody conditions, the requirement that Ms. Hoffman “pay supervision fees as determined by DOC” is buried in a long paragraph containing ten conditions. CP 65. Given its oral statement, the trial court intended to waive all discretionary LFOs, but inadvertently imposed supervision fees because of

their location in the judgment and sentence. *See id.*; RP 400; *Dillon*, 456 P.3d at 1209.

As the trial court intended to waive discretionary costs and fees, and Ms. Hoffman is indigent, this Court should strike the supervision fee requirement. RP 400-01; CP 74-80; Supp. CP ___ (sub no. 14.99); *see Ramirez*, 191 Wn.2d at 742-46; *Dillon*, 456 P.3d at 1209.

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.

This Court should also hold the new bail jumping law applies here. Should Ms. Hoffman not prevail in her constitutional argument, this Court should vacate her bail jumping convictions and remand for one dismissal and the imposition of one gross misdemeanor.

Ms. Hoffman also asks this Court to remand for the trial court to strike the supervision fees, if her other arguments are not dispositive of this issue.

Submitted this 19th day of May 2020.

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. |) | |

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SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF MAY, 2020.



X _____

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