

No. 36851-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOYCE ASPEN HOFFMAN,

Appellant.

BRIEF OF RESPONDENT

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III. STATEMENT OF THE CASE

Suspecting a possible DUI around midnight on February 25, 2017, Detective Dustin Hughes of the Colville Police Department followed a gold-colored Nissan passenger car. Clerk's Papers 5; Report of Proceedings 47, lines 1-2. After observing a lane violation, Detective Hughes became suspicious. CP 5. The vehicle suddenly sped up as it turned right on to Wynne Street in Colville, Washington. CP 5. Detective Hughes caught up to the Nissan as it made a sudden left onto Columbia Avenue. CP 5. The Nissan then made an abrupt right turn onto Main Street. CP 5. When the Nissan exited a roundabout without signaling, Detective Hughes made the decision to conduct a traffic stop. CP 5.

Joyce Aspen Hoffman (hereinafter "Ms. Hoffman") was the driver of the Nissan. CP 5. Ms. Hoffman's passenger was her husband, James AKA "Jimmy" Pratt (hereinafter "Mr. Pratt"), CP 5. Detective Hughes had never met Mr. Pratt in person, but he knew of Mr. Pratt because he had made threats to kill law enforcement and Mr. Pratt was a known drug dealer. CP 5.

Detective Hughes informed Ms. Hoffman why he stopped her. CP 5. Ms. Hoffman gave her license, vehicle registration, and insurance to Detective Hughes. CP 5. Detective Hughes told Ms. Hoffman about the driving pattern he had observed and asked Ms. Hoffman if she had been

drinking. CP 5. Ms. Hoffman denied drinking and Detective Hughes noted that he could not smell alcohol on Ms. Hoffman. CP 5. Detective Hughes noted that Ms. Hoffman's pupils appeared to be very small and pinpoint, indicating the possibility of a depressant in her system, such as an opiate. CP 5, RP 47, lines 4-9.

Detective Hughes ran Mr. Pratt and Ms. Hoffman through dispatch. CP 5. As he was awaiting information, dispatch advised that Stevens County K-9 Deputy Coon and Stevens County Sheriff's Department Sergeant Gilmore were on their way to Detective Hughes' location. CP 5. Dispatch advised that Ms. Hoffman had an expired driver's license. CP 5. Around the same time, Officer Chartrey of the Colville Police Department, K-9 Deputy Coon, and Sergeant Gilmore arrived to assist. CP 5.

Approximately two weeks prior, Officer Chartrey stopped a vehicle driven by a Robert Mercer. CP 5. Mr. Mercer was found in possession of a Glock .40 caliber pistol. CP 5. Mr. Mercer was a convicted felon and explained that he had no idea about the Glock .40 caliber pistol and claimed the pistol was owned by Mr. Pratt. CP 5. On February 24, 2017, just the day before stopping Ms. Hoffman and Mr. Pratt, Detective Hughes was contacted by Mr. Mercer, who advised that Mr. Pratt wanted to know how to get his pistol back. CP 5.

On the night of February 25, 2017, Detective Hughes took the opportunity to ask Mr. Pratt, now the passenger in Ms. Hoffman's Nissan, about the pistol that was found in Mr. Mercer's car. CP 5. Mr. Pratt exited Ms. Hoffman's Nissan and spoke to Detective Hughes. CP 5. As Mr. Pratt was exiting the car, Detective Hughes noticed that Mr. Pratt had lowered all the windows in the vehicle a few inches and lowered the rear passenger window as well. CP 5. As Mr. Pratt and Detective Hughes were speaking, K-9 Deputy Coon deployed his drug dog, "Keylo", around Ms. Hoffman's car. CP 5.

Detective Hughes noticed Mr. Pratt was wearing only jeans and a short-sleeved shirt, even though it was cold and snowing outside. CP 5-6. Mr. Pratt was fidgeting, could not stand still, and was sweating profusely. CP 6. Based on his training and experience, Detective Hughes believed Mr. Pratt was exhibiting signs of being under the influence of methamphetamine. CP 6. The conversation with Mr. Pratt made it apparent to Detective Hughes that the pistol in Mr. Mercer's car had been purchased on the street. CP 6. At that point, Detective Hughes had Mr. Pratt get back into Ms. Hoffman's car. CP 6.

K-9 Deputy Coon advised that Keylo had showed a change in behavior and made an uninstructed sit alert, indicating the presence of narcotics in the vehicle. CP 6. Detective Hughes spoke with Ms. Hoffman

outside of her car. CP 6. Detective Hughes explained to Ms. Hoffman the significance of Keylo's "alert" on Ms. Hoffman's car. CP 6. Detective Hughes asked if Ms. Hoffman would give consent to search her car. CP 6. Ms. Hoffman responded that the car was owned by and registered to her mother, Terry Hoffman, but that it was alright if the officers searched the car. CP 6. Ms. Hoffman told Detective Hughes that she had been in the Nissan for most of the day and that she and her passenger had some groceries in the back seat. RP 49, lines 4-7; 163, line 22. Ms. Hoffman advised that she and Mr. Pratt were married and that they had both been in the car that day. CP 6.

While preparing the consent documents, Sergeant Gilmore spoke to Mr. Pratt, who was still sitting in the car. CP 6. Sergeant Gilmore explained the situation to Mr. Pratt and asked him for consent to search. CP 6. Mr. Pratt refused to give joint consent to search the car. CP 6. Detective Hughes informed Ms. Hoffman that Mr. Pratt had refused to give joint consent and therefore Detective Hughes could not search the vehicle. CP 6. Ms. Hoffman wanted to talk to Mr. Pratt, to change Mr. Pratt's mind. CP 6. Ms. Hoffman talked to Mr. Pratt in hushed tones for approximately two minutes. CP 6. Ms. Hoffman then asked if the vehicle was going to be towed if consent to search was not given. CP 6. It was at this point that Detective

Hughes told Ms. Hoffman that the vehicle was going to be towed and advised Mr. Pratt to exit the vehicle. CP 6.

Detective Hughes advised dispatch to start the tow and he began writing the traffic infraction citations for Ms. Hoffman. CP 6. Detective Hughes issued Ms. Hoffman a sector infraction for NVOL W/ID, operating a motor vehicle without liability insurance, and failure to use turn signals. CP 6. After issuing the infractions, Detective Hughes informed Ms. Hoffman that she was free to leave. RP 49, lines 17-22. When the tow truck arrived, Mr. Pratt said he had changed his mind and would give consent to search the car, but Detective Hughes advised that time had passed and the car was going to be impounded. CP 6. Detective Hughes allowed Mr. Pratt to retrieve some groceries from the back seat of the car. CP 6. Detective Hughes then followed the car, as it was being towed, to the Colville Police Department evidence lot, maintaining visual contact throughout the towing process. CP 6. While waiting for a search warrant, Detective Hughes secured the car by placing evidence tape on the car, initialed the tape, locked the car, and photographed the car. CP 6.

After obtaining a search warrant, Detective Hughes went to work searching the car. CP 8-9. Assisting him in the search were K-9 Deputy Coon and Colville Office Chartrey. CP 8.

In the center console of the Nissan, Detective Hughes located a black, folded nylon zippered pouch. CP 8. Inside the pouch were cotton balls, a butane torch, 3 hypodermic needles with brown residue, and a small tin container with a metal handle. CP 8. Detective Hughes recognized the tin as a cooking pot, used to cook heroin. RP 170, lines 11-24. The container was covered in brown tarry residue and had a small dirty cotton swab in the bottom of it. CP 8. Based on his training and experience, Detective Hughes knew that the pouch was commonly referred to as a heroin kit. CP 8. In a small metal mints tin, Detective Hughes found a small amount of marijuana. CP 8. In the bottom of the tin was a small clear crystal rock, which Detective Hughes believed to be methamphetamine. CP 8.

On the driver's side floorboards of the Nissan, Detective Hughes found a purse. CP 8. In the purse in a wallet, were several credit cards with the name Joyce Hoffman. CP 8. Also in the purse was a check filled out to "Joy Hoffman", from US Bank. CP 8. The name of the payee on the check was "Touro University Nevada Social", located in an apartment complex in Las Vegas, Nevada. CP 8. The check was dated 1/26/17 and was for \$2,000. CP 8. Suspecting the check was stolen and possibly forged, Detective Hughes seized it as evidence. CP 8.

Also in the wallet was a driver's license for an "Ashley Hawthorne." CP 8. Detective Hughes then found a small ziplock baggie with green dollar

signs. CP 8. Based on his training and experience, Detective Hughes determined the ziplock baggie to be drug paraphernalia. CP 8. Inside the baggie was a crystal substance, which was sent to a lab for further analysis. CP 8. Detective Hughes completed the search by photographing all the items he seized and of the interior and exterior of the vehicle. CP 8.

Lab analysis of the tin cooking pot obtained from the heroin kit determined that the brown residue was heroin. CP 10; RP 200, lines 13-15. Detective Hughes testified that depressants, such as opiates or opiate-based drugs, typically heroin, cause constricted pupils, such as Ms. Hoffman's constricted pupils at the time of the traffic stop. RP 161, lines 1-21.

Based on Detective Hughes' discoveries, the State charged Ms. Hoffman in Stevens County Superior Court (hereinafter "Superior Court") with one count of Violation of the Uniform Controlled Substances Act—Possession of Heroin and one count of Violation of the Uniform Controlled Substances Act—Use of Drug Paraphernalia. CP 1-2.

On August 7, 2018, Ms. Hoffman signed an Order Continuing Trial Date (hereinafter Order 1). CP 12, 15. Order 1 required Ms. Hoffman to appear in court on September 4, 2018, at 10:00 a.m. CP 12, 15. When Ms. Hoffman failed to appear on September 4, 2018, the Superior Court issued a warrant for her arrest. CP 13, 17-18. On November 27, 2018, Ms. Hoffman was again in court and signed another Order Continuing Trial Date

(Order 2). CP 13, 20. Order 2 required Ms. Hoffman to appear in court on December 31, 2018, at 10:00 a.m. CP 13, 20. Ms. Hoffman failed to appear for the second time and the Superior Court issued another warrant for her arrest. CP 13, 22-23.

On May 14, 2019, the State amended the charging information, alleging two additional charges of Bail Jumping, for Ms. Hoffman's failure to appear as commanded in Orders 1 and 2. CP 27-29.

On May 14, 2019, Ms. Hoffman was convicted by a jury, as charged in Counts 1-4 of the Amended Information, of Possession of a Controlled Substance, Use of Drug Paraphernalia, and two counts of Bail Jumping. CP 57-59, 82.

IV. STATEMENT OF THE ISSUES

- I. Did Ms. Hoffman preserve the issue of unwitting possession for appeal when she failed to object to the lack of an unwitting possession instruction?
- II. Did the Superior Court properly instruct the jury on the law of unavoidable circumstances?
- III. Was a unanimity instruction required when the alleged use of paraphernalia showed a continuing course of conduct?

V. ARGUMENT

1. **Ms. Hoffman did not object to the Superior Court's refusal to give the unwitting possession instruction and even if she had properly preserved the issue for appeal, insufficient evidence supported giving the instruction.**

Ms. Hoffman did not object at the Superior Court's announcement that it would not give an instruction on unwitting possession. RP 296-97. Ms. Hoffman's failure or refusal to object deprived the Superior Court of the opportunity to correct any error, if there was such an error, and Ms. Hoffman's failure to object waived this issue for appeal.

"Generally appellate courts will not consider issues raised for the first time on appeal." State v. Cerrillo, 122 Wash.App. 341, 347, 93 P.3d 960 (Div. II, 2004); RAP 2.5(a). Failure to object to jury instructions waives the issue on appeal. Ryder's Estate v. Kelly-Springfield Tire Co., 91 Wash.2d 111, 114, 587 P.2d 160 (1978) ("Where such exception is not taken, the alleged error will not be considered on appeal."). The duty to object at trial is imposed by Criminal Rule 6.15(c):

Objection to Instructions. Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given

or refused. The court shall provide counsel for each party with a copy of the instructions in their final form.

Wash. Rev. Code Ann. § SUPER CT CR CrR 6.15(c) (West).

Ms. Hoffman points out in her Opening Brief that her attorney requested an instruction on unwitting possession. Opening Brief of Appellant at 6. Ms. Hoffman is partially correct; her attorney requested an instruction on unwitting possession, but only asked for that instruction **prior** to trial. RP 31. When the issue came up again, Ms. Hoffman's attorney admitted that there was no evidence of unwitting possession from his client, he was unable to direct the Superior Court to any testimony that would support that theory, and he did not object when the Superior Court announced that it would not give the instruction. RP 296, lines 16-18.

Even if Ms. Hoffman had preserved the issue for appeal, there was insufficient evidence to support giving the instruction. "Even when the party alleges a manifest error affecting a constitutional right, RAP 2.5(a), we will not review a newly raised argument if the facts necessary to adjudicate the alleged error are not in the record." State v. Cerillo, 122 Wash.App. at 347 (internal quotation marks omitted).

"Each side is entitled to have the trial court instruct upon its theory of the case if there is evidence to support that theory." State v. Griffin, 100 Wash.2d 417, 420, 670 P.2d 265 (1983). "Generally, an instruction can be

given to the jury if evidence exists to support the theory upon which the instruction is based.” State v. Buford, 93 Wash.App. 149, 151, 967 P.2d 548, 549 (Div. I, 1998). “We...hold that a criminal defendant is not entitled to an unwitting possession instruction unless the evidence presented at trial is sufficient to permit a reasonable juror to find, by a preponderance of the evidence, that the defendant unwittingly possessed the contraband.” Id. at 153.

Unwitting possession was not part of Ms. Hoffman’s theory of the case at trial and there are insufficient facts in the record to permit a juror to find, by a preponderance of the evidence, that Ms. Hoffman unwittingly possessed the heroin in the car. Ms. Hoffman could have included unwitting possession as a theory of her case and could have explained that theory in opening statements. Ms. Hoffman’s attorney declined to give an opening statement. RP 154, lines 20-22. Ms. Hoffman could have argued the theory to the jury in closing arguments. Ms. Hoffman did not argue unwitting possession. Instead, Ms. Hoffman argued that the State couldn’t prove she possessed the heroin, **not** that she possessed the heroin and didn’t know it. RP 360-62. The latter argument is unwitting possession. In order to get to that argument, the defendant has to concede the issue of possession; Ms. Hoffman was clearly unwilling to do this.

The Superior Court noted that the issue at trial was not unwitting possession; it was simply whether the State could prove possession.

THE COURT: All right. Well, I -- I don't intend to [give the instruction]. I think the state has to be put to its proof. The affirmative defense requires affirmative proof. So, without that affirmative proof I'm not going to give the defense. But the state still has to prove possession, there's still a possession argument to be made. That appears where it's going to go.

RP 296, lines 19-25.

On appeal, Ms. Hoffman misapprehends the applicable evidentiary test by claiming that “Even if the ... evidence is ‘weak, insufficient, inconsistent, or of doubtful credibility,’ the instruction should [have been] given.” Brief of Appellant at 14. This is not the test. The test is whether there is sufficient evidence to persuade a fair-minded juror by a preponderance of the evidence, not whether there is just **any** evidence, no matter how slight. See State v. Buford, 93 Wash.App. at 153.

Simply because Ms. Hoffman did not exclaim that the drugs and paraphernalia were not hers or that she did not know they were in the car is not evidence that she did not know. But as the Superior Court pointed out, the giving of an unwitting possession instruction requires some **affirmative proof**. RP 296, lines 20-23. It could very well be that Ms. Hoffman would now say she did not know that she possessed the drugs. But she was given the opportunity to testify and didn't make such a claim. Ms. Hoffman

testified. Ms. Hoffman provided no evidence, whatsoever, that the drugs were not hers.

Mr. Pratt could have testified. Mr. Pratt could have testified that the drugs were his. Mr. Pratt could have testified that the drugs belonged to someone else. Mr. Pratt did not testify. Ms. Hoffman's mother could have testified. Ms. Hoffman told Detective Hughes at the scene that the Nissan belonged to her mother. Ms. Hoffman's mother did not testify.

None of the officers testified that Ms. Hoffman proclaimed surprise at the discovery of the drugs, primarily because the drugs were found after Detective Hughes obtained a warrant. However, the indication of the presence of drugs occurred at the scene of the seizure, when Ms. Hoffman was present and could have said something. The indication of drugs was when Deputy Coon's K-9 alerted to the possible presence of narcotics and Detective Hughes asked to search the vehicle. Ms. Hoffman made no statements that she did not have drugs. Ms. Hoffman did not make any exculpatory claim at that time or at any time thereafter, either at the scene or at trial.

Finally, a claim of unwitting possession would have flown in the face of direct evidence. Mr. Joshua Gavell testified that when he was in the Stevens County Courthouse, he overheard Ms. Hoffman:

Q What did you hear.

- A I basically just heard [Ms. Hoffman] say, verbatim, that if she was smart she would have thrown her drugs away, and then she went on -- make another comment about the juror process, and, you know, one of the jurors being smart and getting off, and, you know, putting -- putting the work on somebody else or something, something to that effect. But -- but verbatim, if I was smart I would have thrown the drugs away.
- Q And you didn't know Ms. Hoffman prior to this.
- A I did not.

RP 215-16. Ms. Hoffman did not preserve the issue for appeal. Even if she had, the Superior Court did not err when it declined to give an instruction on unwitting possession.

2. The Superior Court did not err when it gave a jury instruction on the only affirmative defense available to Ms. Hoffman because Ms. Hoffman's testimony lent itself to that defense and the Superior Court wanted to avoid confusion.

It was not error for the Superior Court to instruct the jury on unavoidable circumstances. First, there was sufficient testimony at trial for the Superior Court to give the instruction because Ms. Hoffman's testimony about her hospitalization was directly related to the defense of unavoidable circumstances. Second, the instruction on unavoidable circumstances was necessary to clarify the law on bail jumping.

RCW 9A.76.170 provides that:

- (1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this

state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

(2) It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

Wash. Rev. Code Ann. § 9A.76.170 (West). The State need only prove that the defendant knew she had an obligation to appear, not that the defendant knew the precise date of the scheduled hearing. See State v. Ball, 97 Wash.App. 534, 536–37, 987 P.2d 632 (Div. II, 1999).

“The defense [of unavoidable circumstances] relates to the defendant's inability to attend on the date of which she has been previously given notice. Thus, this affirmative defense does not negate the knowledge element of the offense.” State v. Fredrick, 123 Wash.App. 347, 353, 97 P.3d 47 (Div. II, 2004).

Ms. Hoffman’s argument at trial was that the jury should not infer guilt on the possession charge based upon the addition of the two bail jumping counts. Ms. Hoffman’s attorney seemed somewhat overly focused on the possession and paraphernalia charges because his explanation for why he did not want an instruction on the affirmative defense of unavoidable circumstances was:

As I say, I don't want the jury to make an inference that my client feels she's guilty because she didn't come to prosecutions. And that's -- So I'm just simply -- not trying to nullify the jury. I'm just simply giving an explanation, as -- as I say, as to -- to why she didn't come so the jury doesn't think that she makes an inference -- guilt (inaudible) failing to come to court before the bail jumping charges were ever filed, on the drug charge. And that's the only reason that testimony would be delivered, to rebut any juror making inference she must be guilty on the drug charge -- (inaudible) court and face the music. That's all.

RP 252, lines 13-25. It seems Ms. Hoffman's attorney wanted to argue that the jury should not make assumptions about Ms. Hoffman's guilt on the possession charge, based upon Ms. Hoffman's failure to appear. But if that wasn't potentially confusing enough, Ms. Hoffman's testimony had nothing to do with that argument. Her testimony was that she failed to appear because she was in the hospital and/or forgot about court.

The Superior Court's instruction on uncontrollable circumstances dovetailed exactly with Ms. Hoffman's testimony on Count 3, the charge that she failed to appear on September 4, 2018, as required in Order 1. A portion of Instruction No. 18:

It is a defense to the charge of bail jumping that:

1. Uncontrollable circumstances prevented the defendant from personally appearing in court; and
2. The defendant did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear; and
3. The defendant appeared or surrendered as soon as such circumstances ceased to exist.

CP 50. Ms. Hoffman testified about her hospital stay and how it interfered with her ability to attend court. Ms. Hoffman testified on direct examination that she was discharged from the hospital on September 3rd, RP 285, line 17; 285-86. However, Ms. Hoffman seemed to be confused and contradicted herself, as to her discharge status:

Q Do you remember how long -- what date did you go to the hospital if you were discharged on September 3rd. Do you know?

A (Inaudible) was August, around the 24th. It was nine days I was in the hospital.

Q Okay.

A So I'm not sure -- I believe -- I'm not sure what the date would have been.

...

Q Did you come to this courtroom on September 4th of 2018 at 10:00 a.m.

A I didn't.

Q Were you here at 10:00 a.m.

A No, was not.

Q Okay. Did you come to the courthouse that day?

A I -- I (inaudible) -- I don't know. It might have been the next day that I came and submitted the discharge (inaudible) from the hospital so I'm not sure if I came that day.

RP 284-85. Thus, while Ms. Hoffman's attorney seemed to argue to the Superior Court that Ms. Hoffman didn't have a defense, Ms. Hoffman's testimony directly focused on the defense of unavoidable circumstances.

Ms. Hoffman's testimony that she was hospitalized has no relevance to the element of "knowledge" and certainly did not support her attorney's focus on the drug possession charge. The only possible reason Ms.

Hoffman would testify about her hospitalization was to claim unavoidable circumstances. Ms. Hoffman now says she did not want the burden of the affirmative defense; but at trial, she wanted to have the benefit of claiming uncontrollable circumstances without the burden of the affirmative defense. Ms. Hoffman should not be allowed to have her cake and eat it too.

Ms. Hoffman's defense clearly was unavoidable circumstances because midway through the State's case, Ms. Hoffman requested severance based upon her claim of unavoidable circumstances. RP 208-10. Ms. Hoffman's attorney, after the testimony of the State's drug expert, moved the Superior Court for severance of Count 3, one of the bail jumping charges:

My client indicated to me about five minutes ago during the testimony from the state's witness that relates to Count 3, a bail jumping charge, she indicated to me, "I forgot to tell you, I was in the hospital on 9/3 and 9/4, 2018. And there's proof of that but I forgot to tell you."

...

Sorry for the interruption, your Honor. And -- so, I have no choice, even though we violated probably the omnibus order and -- when we reported ready and the pretrial, there was no indication delivered to the state, but if that's the case, out of fairness to my client I am asking the court to sever Count 3 from this charging document and try that charge at a later time when I can prepare that defense on behalf of my client, which is an affirmative defense, under the proposed instruction WPIC19.17 -- And I'm sorry, I just don't have any other explanation as to why this is coming about now.

RP 208-09. The Superior Court heard from the State, regarding Ms.

Hoffman's new claim that she had a defense to Count 3. RP 209-10. The Superior Court denied Ms. Hoffman's motion to sever Count 3 from the three other counts. RP 210-11. The Superior Court primarily focused on the late hour of Ms. Hoffman's claim of an affirmative defense:

But simply saying at the eleventh hour that "I have a defense" isn't a basis for undoing what's been done, and having a different jury on a different day decide a segregated count. I don't see that Ms. Hoffman has been surprised in what has been charged, and her dilatory behavior in not bringing it to the attention of counsel isn't her lawyer's fault, and she's free to -- interpose any defense she wishes. So, -- you know, it may -- may not have additional documents. Maybe it does. If there are, those are disclosed to the prosecutor at 8:30 tomorrow morning. But I'm going to deny the motion to sever.

RP 210-11.

The Superior Court was concerned that the jury could be confused about Ms. Hoffman's defense, particularly when Ms. Hoffman insisted on providing testimony about her hospitalization:

THE COURT: ... to the extent that your client is offering any reason whatsoever, "I got out of the hospital," "I didn't feel well," I mean, anything that is arguably a defense, or in the nature of a defense, to bail jump then -- this case seems to stand for the proposition that it is appropriate for the court to grant the instruction, the affirmative defense instruction, to eliminate any possible confusion on the part of the jury for jury elimination, or -- or whatever that phrase is—

RP 256, lines 10-19.

Based on Ms. Hoffman's testimony, the jury could have easily

concluded that Ms. Hoffman was asserting some type of defense related to her hospitalization. And the only possible affirmative defense she could assert was unavoidable circumstances, *id est* that she was in the hospital on September 4, which is why she did not show up at 10:00 a.m. This kind of confusion was what the Superior Court was trying to avoid, by giving the instruction on unavoidable circumstances: “Again, based on the testimony of Ms. Hoffman and the authority of *State v. Yeats*, I will give the affirmative defense instruction. That will be the final instruction in the series.” RP 296, lines 1-4.

Ms. Hoffman may now say she did not want the instruction on unavoidable circumstances, but her own testimony indicated that she was claiming that very same defense. The Superior Court did not impose an affirmative defense on Ms. Hoffman; it gave the instruction to conform to Ms. Hoffman’s testimony and to avoid any potential confusion the jury may have had regarding the legal sufficiency of Ms. Hoffman’s defense. When the Superior Court decided to give the uncontrollable circumstances instruction, it conformed the instruction on the law to the facts presented at trial, it clarified the knowledge requirement, and, more importantly, it instructed the jury on the one and only affirmative defense to bail jumping.

3. **A unanimity instruction was unnecessary because the State proved a continuing course of conduct. However, if this Court concludes that a unanimity instruction should have been given, this Court should hold that such a failure was harmless error.**

The multiple items of paraphernalia were evidence of a continuing course of conduct. The State charged Ms. Hoffman with use of paraphernalia, not possession of paraphernalia. The charge regarding paraphernalia did not therefore concern actual possession versus constructive possession. The State had to prove use.

“Where the State presents evidence of several distinct acts, any one of which could be the basis of a criminal charge, the trial court must ensure that the jury reaches a unanimous verdict on one particular incident.” State v. Handran, 113 Wash.2d 11, 17, 775 P.2d 453 (1989). “However, this rule applies only where the State presents evidence of several distinct acts.” Id. (internal quotation marks omitted). “It does not apply where the evidence indicates a continuing course of conduct.” Id. (internal quotation marks omitted). “To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner.” Id. “For example, where the evidence involves conduct at different times and places, then the evidence tends to show several distinct acts.” Id. (internal quotation marks omitted).

Instruction No. 13 required the State to prove that on or about February 25, 2017, Ms. Hoffman "...used drug paraphernalia to pack, repack, **store, contain,** conceal, **inject,** ingest, inhale or otherwise introduce into the human body a controlled substance...." CP 45 (emphasis added). Ms. Hoffman exhibited the signs of opiate use. CP 5; RP 161, lines 1-19. Ms. Hoffman had an empty dime bag in her purse. CP 8; RP 186, lines 9-16. Ms. Hoffman had a drug kit in the center console. CP 8; RP 169-70. Inside the drug kit were used syringes, containing blood and a brown residue. CP 8; RP 172, lines 19-23. Also inside the drug kit was a cooking pot to cook the heroin, a lighter to heat up the cooking pot, and cotton balls for straining the cooked drug. RP 170, lines 15-24. Inside the cooking pot was heroin, an opiate. CP 8; RP 182, lines 1-7. The heroin found in the tin cooking pot was the basis for the drug possession charge. RP at 182, lines 5-15; 203, lines 17-24. The State proved to the jury that Ms. Hoffman used the dime bag to store drugs, used the cooking pot and the lighter to cook the heroin, the cotton balls to filter the heroin, used the syringes to inject heroin, and had ingested the heroin on or about February 25, 2017, because she exhibited the signs of having ingested drugs.

Ms. Hoffman cites State v. King for the example of when a unanimity instruction is necessary. Opening Brief of Appellant at 23. However, the evidence in King was that the defendant possessed the cocaine

in two different places and at two different times. King was the passenger in a vehicle. State v. King, 75 Wash.App. 899, 901, 878 P.2d 466 (Div. I, 1994). The driver of the vehicle was arrested on a warrant. Id. One of the officers noticed the driver and King reach down in between the seat. Id. “As King stepped from the car, Officer Bachler saw him make a flipping motion, appearing to toss something away. He noticed that the fanny pack King was wearing was open while it had been closed only moments before.” Id. “Officer Kraus saw the driver also make a throwing motion in the direction of the car's interior with his right hand as he got out of the car. Searching between the driver and passenger seats, Officer Bachler found on the floor a red Tylenol container containing rock cocaine.” Id. As a result of this discovery, the officers arrested King too. Id.

“Upon arrival at the police station, Officer Kraus, conducting an inventory search, found another piece of rock cocaine in King's fanny pack.” Id. “The State charged King with only one count of possession of cocaine.” Id.

At trial, King testified that when the officers arrested him, they dumped the contents of the fanny pack out on top of the car's roof, finding only his identification, cigarettes, and spare change, but no drugs. Id. King asserted that Officer Kraus, planted the rock of cocaine found on King's person. Id. at 901-02.

Division one concluded that, rather than a continuing course of conduct, “[t]he State's evidence tended to show two distinct instances of cocaine possession **occurring at different times, in different places**, and involving two different containers—the Tylenol bottle and the fanny pack. One alleged possession was constructive; the other, actual.” *Id.* at 903 (emphasis added). Division One also pointed out that King’s testimony at trial separated the two instances of possession because of King’s claim that the rock of cocaine found on his person, had been planted. *Id.* at 903-04.

Two years later, Division One again addressed the question of a continuing course of conduct in Love. In that case, police found five rocks of cocaine in the defendant’s pocket, but no devices for the use of the cocaine. State v. Love, 80 Wash.App 357, 362, 908 P.2d 395 (Div. I, 1996). At the defendant’s home, officers found 40 rocks of cocaine, drug paraphernalia, and a large amount of money. *Id.* at 363. The State charged the defendant with possession with intent to deliver. *Id.* at 362. The defendant claimed that the officers planted all of the cocaine. *Id.* at 363. The jury convicted the defendant and Division One concluded that the possessions amounted to a continuing course of conduct because the defendant acted with the singular purpose of selling cocaine. *Id.* Division One distinguished Love from King:

Here, Love contended that the police planted a total of forty-five rocks of cocaine, five onto his person, and forty at his home, leaving the jury with no rational basis to distinguish the cocaine found on Love from that at his home. Either the police planted it all, or the police planted none of it. If the police planted none of it, the jury was left with no rational basis to conclude that Love possessed the cocaine found on his person for personal use, and that found at the residence with intent to deliver.

Id. (emphasis added).

Ms. Hoffman's use of two items of paraphernalia occurred at the same time (on or about the day she used the car) and place (in the car). Ms. Hoffman did not claim that the police planted the paraphernalia, that she did not use the paraphernalia, or that she didn't know about the paraphernalia. Neither item of paraphernalia was found on Ms. Hoffman's person. Both items of paraphernalia were found concealed in items (a purse and a center console) that were close to each other, as both places of concealment were in the same car.

The items of paraphernalia, possessed at the same time and place, were part of the ongoing course of conduct of heroin use. One item of paraphernalia found by Detective Hughes is used to store drugs and the other item Detective Hughes found is used to inject drugs. A baggie is used to store drugs and a needle was obviously used to inject the drugs. Both items were located in the same vehicle at the same time. Both items of paraphernalia are required for a showing of continuity of conduct.

Even if a unanimity instruction was required, the error was harmless beyond a reasonable doubt. “When a court fails to give a required Petrich instruction, we assume the error was prejudicial.” State v. Jackson, 192 Wash.App. 1074 (2016). “This presumption can be overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged.” Id. (internal quotation marks omitted).

The undisputed facts established Ms. Hoffman’s guilt. Detective Hughes found needles with the heroin. The unbiased testimony from witness Joshua Gavell was that Ms. Hoffman was overheard admitting that she possessed drugs. RP 215, lines 23-25. The needles Ms. Hoffman had in the car were “dirty”, meaning they had been used. RP 188, lines 22-25. The dirty needles had “...a little bit of brownish red color inside the plunger portion of the needle. That -- based on my training and experience -- probably thousands of needles I’ve come in contact with, that’s what we know is a used needle.” RP 189, lines 2-7. Beyond a reasonable doubt, the error was harmless because the needles were found with drugs and were clearly used for injection of drugs. Finally, on the night Ms. Hoffman was detained by Detective Hughes, Ms. Hoffman exhibited the signs of having ingested heroin. RP 161, lines 1-16.

The dime bag was found in Ms. Hoffman’s purse, with her ID, with her other documents, and with a check that was made payable to her.

Detective Hughes testified that a dime bag is used to contain drugs. RP 186, lines 15-18. Beyond a reasonable doubt, the error was harmless because of the testimony and evidence that Ms. Hoffman was solely in possession of the dime bag in her purse, which was located on the floorboards on her side of the car, and the undisputed testimony was that a dime bag is used for the purpose of containing drugs.

Ms. Hoffman testified but provided no testimony regarding the items of paraphernalia. Ms. Hoffman presented no witnesses regarding the items of paraphernalia. If there was an error, the error was harmless beyond a reasonable doubt because a juror could convict Ms. Hoffman on either item of paraphernalia, standing alone.

VI. CONCLUSION

For the reasons stated above, the State respectfully requests that the convictions and sentencing of Ms. Hoffman be affirmed.

DATED this 5th day of March, 2020.



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