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DIVISION ONE

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NO. 64216-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DARRELL GREGORY JONES,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Since at least 1891, trial courts have been vested with broad discretion in determining whether to grant or deny a request for more time. Does a trial court abuse its discretion by refusing to grant more time for the defendant to bring before the court a witness, when the court has no information as to how long of a continuance is needed, whether that time will be fruitful, what the witness might say, or whether the witness will assert a privilege?

2. When sufficiency of the evidence is raised on appeal, the court, in making its determination, must take all of the State's evidence as true, and draw all reasonable inferences in favor of the State. Given that knowledge is not an element of the crime of possession of a controlled substance, did the State present sufficient evidence of guilt, when it presented evidence that phencyclidine was found in the pocket of the coat that the defendant was wearing?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On April 10, 2009, the defendant, Darrell Gregory Jones, was charged by way of information with possession of

phencyclidine (hereinafter "PCP"), a controlled substance, and assault in the fourth degree. Clerk's Papers (hereinafter "CP") 1. After preliminary hearings, trial commenced on June 22, 2009, and pretrial motions were heard on that date. Verbatim Report of Proceedings (hereinafter "RP") 4-48. These motions are not at issue in this appeal. The morning that trial proceedings were to commence (June 23), the State moved to dismiss the assault charge based on an inability to proceed. RP 49. The trial court granted that motion. RP 50; CP 45.

After presenting trial testimony in front of a duly-sworn jury, in which the below-outlined substantive facts were testified to, the State rested its case in the afternoon of June 23, 2010. RP 118. The defendant elected to testify, and was subjected to both direct and cross examination. RP 118-30 (direct), 147-56 (cross). The defendant indicated in both direct and cross that the jacket in which the PCP was found belonged to Deshawn Mitchell. RP 124-25 (direct); RP 153 (cross). He further testified that the PCP was not his, RP 129, and he did not know what was in the pockets of the jacket. RP 127.

On the morning of June 24, the trial court and both counsel discussed jury instructions. RP 136-42. This discussion took place

between the direct and cross of the defendant, who indicated that he had no further witnesses. RP 142. Toward the end of the discussion about instructions and procedure, the defendant revised this statement, indicating that there was an additional witness in the jail to whom his attorney had tried (but failed) to speak the previous day. RP 142. After further discussion, the defendant requested that the court recess, such that the prosecutor and his attorney could re-attempt contact at the jail. RP 144.

The defendant's attorney indicated that he had heard about Deshawn Mitchell as a possible cooperating witness only the previous day. RP 145. He further indicated that he had gone to the jail after trial let out that day, to attempt to speak with Mr. Mitchell; however, he "would not come out" to discuss the matter. RP 145. The defendant's attorney further indicated, "I do not know... what Mr. Mitchell would say." RP 145.

Taking this as a request to delay a nearly complete trial, the trial court denied the request. RP 146. It indicated its reasons on the record: that "the witness would not come out and speak with [the attorney]"; that if "it's Mr. Mitchell's jacket and the drugs were found in the jacket, then Mr. Mitchell... would have a Fifth Amendment right not to testify"; and that "I'd have to assign him

counsel to discuss that fact” (indicating a problem with further delay). RP 146.

After the court denied the motion to continue, the defendant completed his testimony, and the jury was instructed prior to closing arguments. RP 147-56. Prior to giving the instructions, the trial court gave both parties an opportunity to object to any instructions. RP 159. The defendant noted no objections to the instructions given by the trial court. RP 159. These instructions included the “to convict” instruction, which did not include a knowledge element. CP 26; RP 166. They also included the unwitting possession instruction proposed by the defendant. CP 14; CP 28; RP 166-67. This instruction placed the burden on the defendant to prove the defense by a preponderance of the evidence. CP 28.

In the afternoon of June 24, after deliberations, the jury returned a unanimous verdict of guilty. RP 197-200; CP 15. A judgment of conviction was entered, and the defendant was sentenced on September 1, 2009. RP 212-19; CP 35-43.

2. SUBSTANTIVE FACTS

On November 25, 2008, at approximately 10:00 PM, the Seattle Police Department received a 911 call, indicating that an

incident had taken place near 23rd Avenue and Union Street, in the central district. RP 66-68. The defendant matched the broadcast description of the suspect. RP 68. This description was of an individual wearing a hat, a dark coat, and blue jeans. RP 68. Officer Adam Losleben detained the defendant, to await the primary officer's arrival. RP 68-69.

When Officer Nicholas Kartes arrived, the defendant was positively identified by the victim of the prior incident, RP 10, and was arrested by Officer Kartes. RP 86. The defendant was searched incident to that arrest, RP 86, and Officer Kartes discovered a small, brown bottle, purporting to be food coloring. RP 87-88. The bottle contained a yellowish liquid substance, which the officers suspected might be PCP. RP 88.

Officer Kartes had been duly trained in the recognition of controlled substances and the proper use of field test kits. RP 83-84. He field-tested the liquid substance, and it came back a presumptive positive for PCP. RP 88. He then packaged the bottle containing the liquid, and sealed it in an evidence envelope. RP 88-89.

Steven Reid is a long-time forensic scientist, who had been working as such for nine and a half years. RP 98-99. He has

substantial training in the field of chemical analysis of controlled substances, and the use of the instruments of his trade. RP 99-105. He was the next person to open the aforementioned evidence envelope. RP 107-08. He analyzed the clear yellow liquid found inside the bottle, using an infrared spectrometer and a gas chromatograph mass spectrometer, and found that the liquid was PCP. RP 109-10.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE DEFENDANT'S REQUEST FOR A CONTINUANCE, MID-WAY THROUGH THE TRIAL, FOR THE PURPOSE OF ATTEMPTING TO CALL A WITNESS WHO WAS UNCOOPERATIVE WITH A DEFENSE INTERVIEW AND LIKELY HAD A FIFTH AMENDMENT PRIVILEGE APPLICABLE TO THAT TESTIMONY.

- a. The Standard Of Review For A Trial Court's Grant Or Denial Of A Continuance Has Remained Unchanged Since 1891, And Is Abuse Of Discretion.

The decision of whether to grant or deny a continuance is left to the discretion of the trial court, and the burden is on the appellant to show an abuse of that discretion. State v. Cadena, 74 Wn.2d 185, 188-89, 443 P.2d 826 (1968), overruled on other grounds, State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975).

“Since 1891, this court has reviewed trial court decisions to grant or deny motions for continuances under an abuse of discretion standard.” State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (citing Skagit Ry. & Lumber Co. v. Cole, 2 Wn. 57, 25 P. 1077 (1891)). When the appellant asserts an abuse of discretion, “a reviewing court can find abuse only if no reasonable person would have taken the view adopted by the trial court.” State v. Barker, 35 Wn. App. 388, 397, 667 P.2d 108 (Div. 1 1983) (holding that in light of the fact that counsel had weeks to prepare, and did not request a continuance until three days prior to trial, the trial court did not abuse its discretion by denying that request).

The appellant attempts to couch the standard of review in terms of a presumptive constitutional violation, in which the State bears the burden of proving harmless error beyond a reasonable doubt. Appellant’s Opening Brief at 8. In support of this assertion, defense cites two cases that dealt not with continuances, but with circumstances where the defendant was denied the use of witnesses who were present and willing to give material testimony. See State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996) (holding

that the defendant's right to compulsory process was violated when the trial court excluded a duly subpoenaed witness from testifying despite having relevant exculpatory evidence to present; the witness was to testify that he had seen the murder victim alive the day after the State had alleged that she had been killed); State v. Burri, 87 Wn.2d 175, 550 P.2d 507 (1976) (holding that the State's use of an inquiry procedure during a pending trial, which denied the defendant access to his witnesses, violated the defendant's right to compulsory process). The analysis presented by the appellant is inapplicable to this case.

In contrast, appellate courts have consistently recognized, because the decision of whether to grant such a delay is so fact-specific—and despite the fact that the denial of a requested delay will implicate such constitutional rights as compulsory process and effective counsel—the proper standard of review is abuse of discretion. See Cadena, 74 Wn.2d at 189; Downing, 151 Wn.2d at 274-75. Because this case involves a trial court's denial of a continuance, the proper standard of review is abuse of discretion.

- b. The Defendant Has A Right To Call Witnesses In His Own Defense, But That Right Is Necessarily Limited By The Trial Court's Discretion To Administer Justice In The Courtroom.

Both the United States and Washington constitutions guarantee a defendant the right to compel witness testimony. U.S. Const. Amend. VI; Const. Art. 1, § 3. "The right to compulsory attendance of material witnesses is a fundamental element of due process and goes directly to the right to present a defense." State v. Carlisle, 73 Wn. App. 678, 679, 871 P.2d 174 (Div. 1 1994). However, the right to compulsory process, although jealously guarded, is not absolute. State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004) (upholding the trial court's decision to exclude witness testimony as to another person's opportunity to commit the alleged crime).

The defendant bears the burden of proving a colorable need for, and the materiality and relevance of a witness, in order to assert right to compulsory process. State v. Smith, 101 Wn.2d 36, 41-42, 677 P.2d 100 (1984) (holding that a witness to the defense of entrapment was properly excluded, because the entrapment defense failed as a matter of law so the testimony was immaterial). Similarly, for a continuance to be granted to secure the testimony of

an absent witness, the proponent of a continuance (even if it is the defendant) must not only show the relevance of proposed testimony, but also that the witness is likely to appear and give material evidence in the time requested. See State v. Lane, 56 Wn. App. 286, 296, 786 P.2d 277 (Div. 3 1989) (citing United States v. Sterling, 742 F.2d 521, 527 (9th Cir. 1984), in holding that the trial court's denial of a continuance was acceptable given the lack of guarantees made by the defendant about being able to track down the witness in the time requested). In short, if the court believes the continuance is unlikely to be fruitful, then the request for more time is properly denied.

The defendant's right to compulsory process is properly balanced against a witness's privilege against self-incrimination. See State v. Lougin, 50 Wn. App. 376, 379, 749 P.2d 173 (Div. 1 1988). Indeed, if properly asserted, a witness's Fifth Amendment privilege against self-incrimination trumps the defendant's Sixth Amendment right to compel testimony. See State v. Levy, 156 Wn.2d 709, 731, 132 P.3d 1076 (2006). In Lougin, the court held that it was error for the trial court to allow the co-defendant to assert a blanket privilege against self-incrimination. Lougin, 50 Wn. App. at 383. Finding the error to be harmless, however, the court

reasoned that the co-defendant would have asserted the privilege for any relevant testimony. Id. Notably, even cases such as Levy and Lougin, which affirm lower court decisions on a theory of harmless error, involve witnesses who are present, as opposed to requests for continuances to seek witnesses. They thus involve a different standard of review, as previously discussed.

Not every denial of a request for more time violates due process. Cadena, 74 Wn.2d at 189. There are “no mechanical tests for deciding when a denial of a continuance is violative of due process, and the answer must be found in the circumstances present in the particular case.” Id. Indeed, the right to compulsory process is not an absolute right, but is among those that are necessarily subject to established rules of evidence and procedure, designed to assure fairness and reliability. See State v. Finch, 137 Wn.2d 792, 825, 975 P.2d 967 (1999) (holding that the trial court’s exclusion of a defense witness was not error, because the only relevant testimony she had to offer was the self-serving hearsay of the defendant).

- c. The Trial Court Was Well Within Its Discretion To Deny A Mid-trial Request For A Continuance, Having Been Given No Reason To Believe That The Delay Would Be Fruitful.

Continuances in criminal cases involve a litany of considerations, such as “surprise, diligence, materiality, redundancy, due process, and the maintenance of orderly procedures.” State v. Harp, 13 Wn. App. 273, 275, 534 P.2d 846 (Div. 1 1975) (holding that a lack of information proffered as to why or for how long a continuance is needed is acceptable reason to deny a continuance). Thus, the decision of whether to grant or deny a continuance is left “largely within the discretion of the trial court,” id., to be disturbed “only if no reasonable person would have taken the view adopted by the trial court.” Barker, 35 Wn. App. at 397. The denial of the continuance in this case was reasonable in light of all of the facts and circumstances.

The Washington State Supreme Court’s relatively recent decision in State v. Downing, 151 Wn.2d 265, 87 P.3d 1169 (2004), provides much guidance to the instant case. In Downing, a continuance was requested to seek an additional expert opinion on the competency of a child witness to testify, in light of a newly disclosed fact that the victim had her memory tainted by having

discussions with other alleged victims. Id. at 270-71. The trial court weighed the likely probative value of the additional expert testimony against the negative effect that another interview about the incident was likely to have on the child victim. Id. at 271. Because there were prior consistent statements weighing against taint, the trial court reasoned that the probative value was minimal, and the request for a continuance to secure that expert's testimony was denied. Id.

On appeal, the Supreme Court compared the continuances in State v. Eller, 84 Wn.2d 90, 524 P.2d 242 (1974) (finding no abuse of discretion denying the continuance, due to the fact that the evidence was cumulative, despite the fact that defendant was diligent in seeking a material witness), and State v. Edwards, 68 Wn.2d 246, 412 P.2d 747 (1966) (finding an abuse of discretion where trial court denied a request for a 45-minute recess to secure the presence of a duly subpoenaed witness with clearly probative testimony on a subject on which the testimony to that point had been contradictory). Downing, 151 Wn.2d at 275. The court likened the case to Eller, in that, although the defendant had acted diligently in securing a witness, the proposed testimony was minimally relevant as compared with the length of continuance

necessary to secure that testimony. See Downing, 151 Wn.2d at 275-76.

In affirming the trial court's decision to deny the continuance, the Downing court observed, "In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure." Id. at 273. Accord, Harp, 13 Wn. App. at 275.

In Downing, the continuance for the purpose of having another expert interview the child victim was denied, based on the fact that it was unlikely to be probative and likely to be harmful to the victim. 151 Wn.2d at 273. In Eller, the continuance for the purpose of securing the testimony of a hostile witness was denied, on the basis that the testimony was minimally probative and the delay was unlikely to be fruitful. 84 Wn.2d at 98. In the instant case, the continuance to secure the purported owner of the jacket was denied, because the delay was unlikely to yield results and it would have caused a nearly completed trial to extend to additional days.

Under the circumstances peculiar to this case, the trial court's denial of the defendant's request for a continuance was not an abuse of discretion. While the relevance of the testimony of the missing witness was shown, the defendant failed to make any showing that the time requested would successfully bring material evidence into the court: the witness had absented himself from an attempted defense interview the previous day, RP 145; the defendant did not actually know what the witness would say, id.; and the witness had a Fifth Amendment privilege against any relevant testimony he would give. U.S. Const. Amend. V.

The trial court denied the continuance, because even if the parties were able to speak with the witness, and took the time necessary to appoint an attorney to substantially advise the witness of his Fifth Amendment privilege, there had been no showing that relevant testimony would actually be brought before the court. RP 146. It certainly cannot be said that no reasonable person would have wielded her discretion in this same manner. The court did not abuse its discretion in denying this request for delay.

2. IN CONSIDERING ALL OF THE EVIDENCE, AND ALL REASONABLE INFERENCES THEREFROM, IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FOR A REASONABLE JURY TO FIND THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT.

- a. The Standard Of Review Upon A Claim Of Insufficient Evidence To Support A Jury Verdict Strongly Favors Upholding That Verdict.

This standard has been well documented, and one need not elaborate on it beyond what has already been written by various appellate courts throughout the state. That standard is as follows.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)

(internal citations omitted) (holding that that evidence was sufficient to support a finding that the defendant possessed cocaine, where an officer testified that when he arrived on scene the defendant had between his legs and was tasting a substance later found to be cocaine).

- b. The State Bears The Burden Of Proving All Elements Of The Crime Charged; When A Violation Of RCW 69.50.4013 Is Alleged, Those Elements Are Simply That The Defendant Possessed A Controlled Substance.

The State bears the burden of proving, beyond a reasonable doubt, every element of the crime charged. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348 (2000); State v. Gellein, 112 Wn.2d 58, 62, 768 P.2d 470 (1989). In this case, the State charged the defendant with one count of violation of the uniform controlled substances act, to wit: possession of a controlled substance. CP 1.

The Uniform Controlled Substances Act, as adopted in Washington State, makes it a class C felony for “any person to possess a controlled substance.” RCW 69.50.4013. In the same chapter, phencyclidine (a.k.a. PCP) is defined as being a controlled substance. RCW 69.50.206(e)(4). “In a prosecution for unlawful possession... the State must establish two elements: the nature of the substance and the fact of possession by the defendant.” State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994) (holding that the defendant’s unwitting possession instruction to the contrary was incorrect, and thus properly not given).

While not taking any issue at trial with the jury instruction outlining the elements as given in Staley and the applicable statute, RP 159, the appellant now appears to argue that knowledge is an implied element. Appellant's Opening Brief at 13. This is a misstatement of the law as it applies to mere possession, as knowledge is not an element of the offense. State v. Bradshaw, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004); State v. Cleppe, 96 Wn.2d 373, 381, 635 P.2d 435 (1981).

In Bradshaw, the court engaged in an exhaustive analysis of whether the crime of possession of a controlled substance (with intent to deliver) contained an implied mens rea element, concluding that it did not. Id. at 532-37. Indeed, the court reasoned, there had not been a mens rea element to this crime since 1923, when the legislature enacted the "mere possession statute." Id. at 532.

In 1971, when the legislature adopted the Uniform Controlled Substances Act, it took the affirmative step of deleting the mens rea ("knowingly or intentionally") element from the uniform language in that statute, further indicating its intent not to require mens rea. Bradshaw, 152 Wn.2d at 532-33. In Cleppe, the supreme court considered this very issue, deciding that the legislature's intention

was not to have a mens rea element in the crime of possession of a controlled substance, while inviting the legislature to correct the court if it was mistaken. Id. at 381.

In the 23 years between Cleppe and Bradshaw, the legislature amended RCW 69.50 numerous times, never adding a mens rea element to the crime of possession, further indicating its intention to have the crime be of a strict liability nature. See Bradshaw, 152 Wn.2d at 533. In the six years since Bradshaw, the legislature still has not imposed a mens rea element upon the State. RCW 69.50.4013(1). Given the legislature's intent, and the Supreme Court's ruling as to that intent given in Cleppe and Bradshaw, the law is clearly that the State has no burden of proving that the defendant knew of the possessed item.

- c. Unwitting Possession Is An Affirmative Defense, Which The Defendant Bears The Burden Of Proving By A Preponderance Of The Evidence.

The jury in this case was instructed, in an instruction proposed by the defendant, that the defendant bore the burden of

proving unwitting possession by a preponderance of the evidence. This is a correct statement of the law in the State of Washington.

As described above, the legislature made possession of a controlled substance a strict liability crime. This begs the question of what sense it makes to have a defense of unwitting possession. That defense is a judicial creation that “ameliorates the harshness of the almost strict criminal liability our law imposes.” Cleppe, 96 Wn.2d at 180. “[B]ecause the defense of unwitting possession does not negate an element of the crime of possession... unwitting possession must be proved by a preponderance of the evidence.” State v. Wiley, 79 Wn. App. 117, 123, 900 P.2d 1116 (Div. 1 1995). Requiring the defendant to prove this defense “does not improperly shift the burden of proof.” Bradshaw, 152 Wn.2d 538.

In its brief, appellant effectively argues that when the defendant makes out a prima facie case of unwitting possession, that the burden then shifts to the State to prove knowledge beyond a reasonable doubt. Appellant’s Opening Brief at 14-16. As outlined above, this is an incorrect statement of the law, and an attempt improperly to shift a defense burden to the State.

- d. Credibility Determinations Are For The Jury Alone To Make: It Is Not Appropriate For A Trial Judge To Make Them In Deciding Whether To Grant A Jury Instruction; It Is Not Appropriate For An Appellate Court To Make Them In Evaluating A Sufficiency Of The Evidence Claim.

Unwitting possession claims frequently hinge on the credibility of the defendant as a witness. State v. Pierce, 134 Wn. App. 478, 482, 142 P.3d 610 (Div. 2 2006). The trial court must leave credibility determinations to the jury when deciding whether to allow a jury instruction as to an affirmative defense, setting aside its own feelings as to the credibility of the defendant to decide whether the defendant has made out a prima facie case. See State v. May, 100 Wn. App. 478, 482, 997 P.2d 956 (Div. 3 2000). Jurors are presumed to follow the court's instructions, absent a strong showing to the contrary. State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). Where a jury is properly instructed on the defense of unwitting possession, and has decided (by its guilty verdict) that the defense was not credible, that determination will not be disturbed on appeal. See Pierce, 134 Wn. App. at 774; Cleppe, 96 Wn.2d at 381.

The appellant claims that because the trial court found sufficient evidence to allow the jury instruction, this court must find

that the State presented insufficient evidence of guilt to affirm the jury's verdict. Appellant's Opening Brief at 14. This single sentence is logically unsound in two distinct ways: it forgets the different standards of review applicable to the different bodies (trial court, jury, and appellate court); it presumes the State has a burden of proving knowing possession.

In deciding whether the defendant has made out a prima facie case sufficient to support the jury instruction, the trial court is obligated to believe the defendant's evidence. May, 100 Wn. App. at 482. The jury, in contrast, has no such obligation; in fact, it has the opposite obligation of weighing the defendant's credibility to decide whether the defense should stand. Pierce, 134 Wn. App. at 774. The appellate court, in ruling on the sufficiency of the State's evidence, has a precisely opposing duty to the trial court: to assume the truth of the State's evidence, and leave the jury's credibility determination (which has now been weighed against the defendant) untouched. Cleppe, 96 Wn.2d at 380-81. To propose that the trial court's determination that the instruction was appropriate should end the inquiry is to neglect the disparate functions of these three bodies.

As analyzed in detail above, the State has no burden of proving knowledge that the item was possessed, or knowledge that the item possessed was a controlled substance. Staley, 123 Wn.2d at 799. Once the State meets its burden of proving possession of a controlled substance, the defendant must prove that this possession was unwitting in some way. Id. This practice “does not improperly shift the burden of proof,” because knowledge is not an element of the crime of possession. Bradshaw, 152 Wn.2d at 538. By suggesting that a prima facie case of unwitting possession is equivalent to the State presenting insufficient evidence of knowledge, the appellant attempts to shift to the State the burden of disproving his affirmative defense.

e. The State Provided Sufficient Evidence For The Jury To Find That The Defendant Possessed A Controlled Substance.

The trial court properly instructed the jury on the only elements of the crime of possession as outlined in Staley. CP 26. The element of possession was established by the State, based on the testimony of both officers that a bottle with a liquid substance in it was found in the pocket of the coat that the defendant was wearing when he was stopped. RP 70; RP 87-88. The element of

the nature of the substance was satisfied by the forensic scientist's testimony that the liquid substance within that bottle contained PCP. RP 110.

By giving the unwitting possession instruction in this case, the trial court properly set aside any opinion that it had of the defendant's credibility, finding that, by his own testimony, he had made out a prima facie case sufficient to support the instruction. CP 28. The properly-instructed jury, having rendered a verdict of guilty, implicitly made its credibility determination against the defendant, and against his defense of unwitting possession. The State presented sufficient evidence to support this guilty verdict. This court is thus required to uphold that credibility determination, and affirm the judgment of conviction leveled against the defendant by the trial court.

D. CONCLUSION

The trial court did not abuse its discretion when it denied the defendant's request to delay the trial for the purpose of bringing a witness before the court. The trial was nearly over. The court would have had to appoint counsel for the witness to advise him of his Fifth Amendment privilege, so the continuance would have been

more than brief. The defendant had made no showing that the continuance would be fruitful: the witness had avoided a defense interview; the witness had a Fifth Amendment privilege not to offer any relevant testimony that could have been elicited.

The State presented sufficient evidence for a reasonable trier of fact to conclude that the defendant was guilty. The State offered evidence that the defendant possessed an item, and that the item possessed was a controlled substance. The State has no burden of proving that the possession was knowing. The jury had no duty to accept the defendant's unwitting possession claim as true. That credibility determination was theirs alone to make.

This court must affirm the judgment of conviction in this case.

DATED this 10th day of May, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jan Trasen, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. JONES, Cause No. 64216-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Betty A. Huddleston
Name

Done in Seattle, Washington

5/10/10
Date

FILED
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