No. 72944-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DENNIS JACKSON,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

The trial court's failure to give a unanimity instruction requires reversal.

a. The two acts of possession did not constitute a continuing course of conduct, which exists only where the defendant engaged in an ongoing enterprise with a single objective.

The State charged Mr. Jackson with one count of possession of heroin, but alleged he possessed heroin in two different locations at two different times. CP 69; 1 RP 144; 2 RP 307. Mr. Jackson requested a *Petrich* instruction, asking the jurors be directed they must unanimously agree the State proved one particular act of possession in order to find him guilty. 3 RP 362. Despite the fact the State refused to elect one of the two alleged acts of possession, the trial court denied Mr. Jackson's request. 3 RP 365.

i. *State v. King Controls*

In his opening brief, Mr. Jackson explained that *State v. King*, 75 Wn. App. 899, 878 P.2d 466 (1994), which involved facts very similar to those presented here, controls. Op. Br. at 9. In *King*, this Court reversed because the case involved multiple acts rather than a continuing course of conduct. *Id*. at 903. The State attempts to distinguish Mr. Jackson's case from *King*, but its argument is meritless. Just like in *King*, drugs were found in a car where Mr. Jackson had

been sitting and on his person at the station. *Id.* at 901. In *King*, this Court found the State's evidence showed two distinct acts of possession, occurring in different places, at different times, and involving two different types of possession (one constructive, the other actual). *Id*. at 903. The same is true here.

The State claims Mr. Jackson "misquotes" the State's argument at trial, but then argues not that the argument is misquoted but instead that it has been taken out of context. Resp. Br. at 9. Neither assertion is true. The quote is correct *and* it accurately portrays the deputy prosecutor's statements. The State used the two separate alleged incidents of heroin possession to illustrate the difference between actual possession (the heroin he had "in his hand" that he tried to put "in his mouth") and constructive possession (the heroin that "was in the back of that patrol car"). 3 RP 374-75.

Only *after* this discussion of actual versus constructive possession does the State move on to discuss the methamphetamine that was found in the suspect's car. 3 RP 375 ("With regard to the suspect vehicle when they stopped it, he's in that front passenger seat… The drugs were found under his seat where he's sitting, not behind him but under his seat and where his feet are and where the scale is to his

right."). There is no question the State argued that one incident of heroin possession was constructive and the other was actual. The State's assertion to the contrary is plainly wrong. This Court's decision in *King* controls, and this Court should reverse.

ii. *The State's Reliance on Cases That Did Not Involve a Simple Possession Charge is Misguided*

In contrast to *King*, the cases upon which the State relies did not involve a possession charge. Resp. Br. at 5-6; *State v. Fiallo-Lopez*, 78 Wn. App. 717, 899 P.2d 1294 (1995); *State v. Love*, 80 Wn. App. 357, 908 P.2d 395 (1996). In *Fiallo-Lopez*, the defendant was charged with one count of *delivery* of cocaine after he provided a sample of cocaine to an informant and then, after concern arose that undercover police were watching, moved to a different location in order to complete the transaction. 78 Wn. App. at 721-22. The Court found "[t]his was one transaction involving the same parties and having as its ultimate purpose the delivery of drugs by [the defendant] to [the informant]." *Id*. at 725. Because this constituted a continuing course of conduct, a unanimity instruction was not required. *Id.* at 725-26.

Similarly, in *Love*, the defendant was charged with possession *with intent to deliver*. 80 Wn. App. at 360. Officers conducted surveillance of the defendant's home, in preparation for executing a

search warrant, and observed the defendant leave the residence in his car. *Id*. at 359. The police stopped the defendant and found cocaine on his person. *Id*. When police executed the search warrant of his home, they found additional cocaine in his house. *Id*. This Court found a unanimity instruction was unwarranted because these facts reflected the defendant's "single objective to make money by trafficking cocaine" and therefore constituted a continuous course of conduct. *Id*. at 362.

In both cases, this Court found that a continuing course of conduct requires an ongoing enterprise intended to secure a single objective. *Id*. at 361; *Fiallo-Lopez*, 78 Wn. App. at 724. This Court must evaluate the facts in a commonsense manner in order to determine whether the criminal conduct constitutes one continuing act. *State v. Petrich*, 101 Wn.2d 566, 571, 693 P.2d 173 (1984). The facts do not demonstrate this here. Because the State alleged Mr. Jackson possessed heroin at two different times in two different places, a unanimity instruction was required. *King*, 75 Wn. App. at 903. When the trial court denied Mr. Jackson's request for this instruction, it erred.

b. The trial court's error was not harmless.

The State argues that even if the trial court erred, that error was harmless. Resp. Br. at 10. In making this argument in relies on *State v. Camarillo*, an indecent liberties case in which the court determined the trial court's failure to instruct on jury unanimity was harmless because the defendant put forth a general denial and there was no conflicting testimony at trial. 115 Wn.2d 60, 71, 794 P.2d 850 (1990). *Camarillo* provides no guidance here. Mr. Jackson was charged with possession of heroin, not a sex offense, and relying on a strained analogy between the two is unnecessary because *King* provides the most useful harmless error analysis given the facts presented in this case.

The State must demonstrate the error is harmless beyond a reasonable doubt. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). The presumption of error is overcome only if no rational juror could have a reasonable doubt as to *any* of the incidents alleged." *Id*. (emphasis added). In *King*, this Court held that the State did not meet this high burden because a rational trier of fact could have entertained reasonable doubt about the defendant's responsibility for the cocaine found in the car or in his fanny pack. 75 Wn. App. at 904.

Similarly, as discussed in his opening brief, Mr. Jackson was not

the only individual in the back of the officer's patrol car that afternoon and no drugs were found on Mr. Jackson when he was searched during his arrest or in the first patrol vehicle he was placed in. 1 RP 138-39; 2 RP 206, 229; Op. Br. at 9-12. In addition, one of the officers testified that the individual originally placed in the patrol car where the heroin was found appeared to be a drug addict and, in contrast, Mr. Jackson did not appear to be under the influence. 2 RP 229-30. Given these facts, a rational juror could have a reasonable doubt that Mr. Jackson constructively possessed the heroin found on the floor of the patrol vehicle.

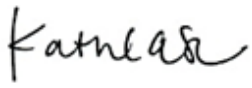
On this basis alone, the Court should reverse. However, the fact that the jury requested to view the video of Mr. Jackson at the jail a second time also suggests that at least some of the jurors questioned the strength of the State's case regarding the alleged possession at the jail as well. *See* Op. Br. at 12. Based on the evidence presented at trial, the State cannot overcome the presumption of the harm and reversal is required.

B. CONCLUSION

For the reasons stated above and in his opening brief, this Court should reverse.

DATED this 13th day of November, 2015.

Respectfully submitted,



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Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF NOVEMBER, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	MARY KATHLEEN WEBBER, DPA [kwebber@co.snohomish.wa.us] SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
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