NO. 72944-6-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

DENNIS W. JACKSON,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. Was the defendant entitled to a unanimity instruction where the evidence showed a continuing course of conduct in a possession of a controlled substances case?

2. If the court erred when it did not give the jury a unanimity instruction was that error harmless?

II. STATEMENT OF THE CASE

On September 27, 2014 at about 2:00 p.m. Everett Police Department Officer Ross was dispatched to a 911 call at the 1500 block of Broadway Avenue. There he stopped a vehicle driven by Mr. Stoutenburg. The defendant, Dennis Jackson, was riding in the front passenger seat. Ms. Walker was riding in the back passenger seat. 12/15/14 RP 134-136, 139, 161.

Officers O'Hara and Cook responded to the scene when Officer Ross called for backup. Officer Ross had arrested Mr. Stoutenburg and placed him in the back of the officer's patrol car. Officer Ross had checked the back of the patrol car before Mr. Stoutenburg was seated there. The backseat held no drugs or weapons at that time. Officer Ross ultimately released Mr. Stoutenburg. After releasing him Officer Ross checked the back of

his patrol car a second time, again finding no drugs or weapons. 12/15/14 RP 136-140.

While Officer Ross contacted Mr. Stoutenburg Officer O'Hara watched the defendant. Officer O'Hara saw the defendant moving his hands in a way that looked like he was trying to conceal something either in the seat, between his legs, or in the door. The officer removed the defendant from the car because he did not know whether the defendant was concealing a weapon. Upon removing the defendant from the car the officer observed a white crystalline substance on the defendant's seat and floorboard that appeared to be crystal methamphetamine. There also was a digital scale in the door pocket. The car was later searched pursuant to a search warrant. In the center console police found a Newport cigarette box that contained suspected methamphetamine. The defendant told officers that he had a box of Newport cigarettes in the car. The substance from the seat, floorboards, and Newport box were later tested positive for methamphetamine. 12/16/14 RP 201-206, 230, 240. 248, 344, 350.

Officer O'Hara asked Officer Ross to transport the defendant to the jail to be booked on the warrant and on probable cause for felony drug possession. Officer O'Hara checked the back of his

patrol car before seating the defendant there. He found no drugs or other contraband. Once they got to the jail and the defendant was removed from the patrol vehicle Officer Ross checked the back passenger compartment again. This time he found a small baggie of brown substance that he suspected was heroin. 9/15/14 RP 143-145, 178.

Officer Ross recommended jail personnel do a strip search during the booking procedure because he suspected the defendant may have more controlled substances on his person. The defendant was placed in a restraint chair after the strip search while jail personnel determined whether he would need medical attention at the hospital. After about two hours the defendant was given a sandwich for dinner. While he was given the sandwich Corrections Officer Stevie noted the defendant was fidgety. When the officer saw the defendant start to scratch under his left leg the officer told the defendant to hold up his hand. When the defendant did that, Officer Stevie saw the defendant holding a small baggie containing a brown substance. The officer struggled with the defendant to get the baggie away from him as the defendant tried to put the baggie in his mouth. Ultimately officers got the baggie away from the defendant. The substance in found in the baggie in the patrol car

and in the defendant's hand were tested positive for heroin. 9/15/14 RP 148; 9/16/14 RP 301-308, 320-322, 351-352.

The defendant was charged with possession of a controlled substance, methamphetamine, count I, and possession of a controlled substance, heroin, count II.[1] 1 CP 69. At trial the defense proposed a Petrich instruction. The State argued that the evidence demonstrated a continuing course of conduct. The court thereafter rejected the proposed instruction. 12/16/14 RP 360; 12/17/14 RP 362-365. The jury acquitted the defendant of count I involving the methamphetamine, and convicted the defendant of count II involving the heroin. 1 CP 29, 30.

III. ARGUMENT

A. THE EVIDENCE DEMONSTRATED A CONTINUING COURSE OF CONDUCT. THE COURT WAS NOT REUQIRED TO GIVE A UNANIMITY INSTRUCTION.

"When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected" by either an instruction requiring the jury to be unanimous as to which act it found constituted the crime or an election by the prosecutor.

[1] Each count contained an allegation that the offense was committed while the defendant was on community custody. The defendant stipulated to that element of the crime before trial. 12/15/14 RP 12-13.

State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), overruled on other grounds, State v. Kitchen, 110 Wn.2d 403, 406, 756 P.2d 105 (1988). Neither a unanimity instruction nor an election is necessary when the acts testified to constitute a continuing course of conduct. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). Whether the defendant's acts constitute a continuing course of conduct is evaluated in a commonsense manner. Id. In doing so the court considers (1) the time separating the criminal acts, and (2) whether the criminal acts involved the same parties, location, and ultimate purpose. State v. Brown, 159 Wn. App. 1, 14, 248 P.3d 518 (2010), review denied, 171 Wn.2d 1015 (2011).

Evidence that the defendant engaged in a series of actions intended to secure the same objective supports a finding that the actions were a continuing course of conduct rather than a several distinct acts. State v. Fiallo-Lopez, 78 Wn. App 717, 724, 899 P.2d 1294 (1995). In Fiallo-Lopez the evidence showed that undercover officers arranged to purchase some cocaine from the defendant through a go-between, Pedro Lima at a restaurant. While the officers waited Lima obtained a sample from the defendant before completing the transaction. Before the sale was complete Lima's wife stopped the negotiations by warning Lima that there may be

undercover officers in the area. Thereafter the transaction was moved to a different location where the sale was completed. Id. 720-723. This court held no unanimity instruction was required because the evidence demonstrated a continuing course of action, involving the same people with the ultimate purpose of a drug delivery by the defendant. Id. at 725-726.

In a possession with intent to deliver case this court similarly found a defendant's possession of drugs on his person and in his home constituted a single continuing course of conduct, rather than two distinct criminal acts. State v. Love, 80 Wn. App. 357, 908 P.2d 395 (1996). There police had a warrant to search the defendant and his home for drugs. They stopped the defendant a few blocks from his home and found him in possession of a small container holding five rocks of cocaine. A subsequent search of his home yielded an additional 40 rocks of cocaine in a desk. Id. at 359. When considered with other evidence the defendant's possession of cocaine in two different places reflected a single purpose to make money trafficking cocaine and thus both instances constituted a continuous course of conduct. Id. at 362.

Evaluating the evidence presented here shows the defendant's possession of two baggies of heroin was a continuing

course of conduct. Both direct and circumstantial evidence established the defendant possessed the heroin at the same time and place. After placing the defendant in the patrol car the officer drove him to the jail. Although no drugs had been in the car before the defendant was placed there when he was removed the officer found a baggie of heroin where the defendant had been sitting. 12/15/14 RP 144. As the prosecutor argued from this evidence "it's pretty clear where that heroin came from." 12/17/14 RP 375. Since Officer O'Hara had searched the defendant before he was arrested and found no drugs, the circumstantial evidence showed the defendant concealed that baggie of heroin in a place the officer would not find it from a pat – down of his clothing. It was either inside his body or inside an article of clothing that he wore that would not be subject to a pat down.

The other baggie of heroin was seen in the defendant's hand after he had been scratching under his left leg. Since he had been strip searched and placed in restraint chair before that happened a reasonable inference was the defendant had concealed that baggie of heroin inside his body.

Because the defendant had no time to obtain more heroin after he dropped the heroin in the patrol car, the evidence showed

that he possessed both baggies of heroin at the same time up to the point that he was removed from the patrol car. The crime involved the same person, the defendant, and it involved the same criminal objective; to possess heroin. Under these facts the court did not err when it refused the defendant's unanimity instruction.

The defendant claims that the jury should have been given a unanimity instruction, comparing his case to State v. King, 75 Wn. App. 899, 878 P.2d 466 (1994). There the defendant was a passenger in a car stopped for a traffic infraction. An officer saw both the defendant and the driver reach down between the seats. The driver was arrested on a warrant. Police searched the interior of the car after they observed both the driver and the defendant throwing something away as they were removed from the car. They found a pill bottle containing rock cocaine, after which the defendant was arrested as well. During an inventory search the officer found another rock of cocaine in the defendant's fanny pack. Id. 901.

Under these facts this court found the evidence tended to show two distinct instances of possession of cocaine occurring at different times, in different places, in different containers, and by different means. One of the possessions was constructive while

the other possession was actual. Id. at 903. Without an election by the prosecutor or a unanimity instruction from the court it was not possible to say that the jury was unanimous as to which possession constituted the crime. Id.

This case differs from King in that the evidence tends to establish that the defendant actually possessed both bags of heroin at the same time and in the same place. The defendant nonetheless argues that the evidence showed the defendant possessed the two baggies at two different locations and two different times. He claims that the State pointed to a constructive and an actual possession of controlled substance in closing argument. But the defendant misquotes the prosecutor's argument. Read in context the prosecutor was illustrating the difference between actual and constructive possession by comparing the actual possession of the heroin with the constructive possession of the methamphetamine. 12/17/14 RP 374-375.

Even if this court concludes that the trial court should have given a unanimity instruction, error in failing to give that instruction was harmless. The standard for review in a multiple acts case whether a "rational trier of fact could find that each incident was proved beyond a reasonable doubt." State v. Camarillo, 115 Wn.2d

60, 65, 794 P.2d 850 (1990). Where the quality of the evidence as to each act is similar, and the defendant only defends on the basis of general denial without presenting facts to distinguish each act, the jury is presented with an either – or choice, and the error is harmless. Id.

Thus in Camarillo error in failing to give a unanimity instruction in an indecent liberties case was harmless because the child victim had no uncertainty about any of the sexual contact that he testified to and he was not impeached, and there was no conflicting testimony about what happened, and the defendant denied any inappropriate touching had occurred. Id. at 72.

In contrast this court found error in failing to give a unanimity instruction was not harmless in King. There was conflicting evidence as to who constructively possessed the cocaine found in the pill bottle in the car. The defendant denied any awareness of the cocaine in his fanny pack and claimed the officers must have planted it. Under those circumstances it was possible that a rational trier of fact could have entertained a reasonable doubt that the defendant possessed the cocaine in his fanny pack, and the error was therefore not harmless. King, 75 Wn. App. at 904.

Here the defense argued that the heroin was not his, but could have come from some other source. The heroin in the back of the car could have been Mr. Stoutenburg. 12/17/14 RP 379-380, 392. The heroin found on the defendant in the jail could have come from the custody officer. 12/17/14 RP393-394. However, there was no evidence presented to contradict the officer's testimony that there were no drugs in the patrol car before the defendant was seated there. Officer Ross was clear and unequivocal that there was no heroin in the back of his patrol car when the defendant was placed there and there was heroin at the defendant's feet when he was removed from there. Similarly Officer Stevie was clear when he testified that the defendant produced the baggie containing heroin after scratching under his leg. Thus, like Camarillo the jury had to make an either or decision. Either they believed the officers and found the defendant guilty, or they disbelieved the officers, and acquitted him. Under these circumstances, any error in failing to give a unanimity instruction was harmless.

IV. CONCLUSION

For the forgoing reason the State asks the court to affirm the defendant's conviction for possession of a controlled substance, heroin.

Respectfully submitted on October 2, 2015.

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON, Respondent, v. DENNIS W. JACKSON, Appellant.	No. 72944-6-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 2nd day of October, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Kathleen A. Shea, Washington Appellate Project, wapofficemail@washapp.org and kate@washapp.org.

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

Dated this 2nd day of October, 2015, at the Snohomish County Office.

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