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NO. 66772-6-1

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

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STATE OF WASHINGTON,

Respondent,

v.

JEROMY LADWIG,

Appellant.

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FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2011 JUN 29 PM 4:12

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

The Honorable Vickie I. Churchill, Judge

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OPENING BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
<u>Issue Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. <u>Procedural Facts</u> .....	1
2. <u>Substantive Facts</u> .....	1
3. <u>Instructions and Argument</u> .....	3
C. <u>ARGUMENT</u> .....	5
LADWIG WAS DENIED HIS RIGHT TO JURY UNANIMITY.	5
D. <u>CONCLUSION</u> .....	10

## **TABLE OF AUTHORITIES**

	Page
<b><u>WASHINGTON CASES</u></b>	
<b><u>State v. Kier</u></b> 164 Wn.2d 798, 194 P.3d 212 (2008) .....	9
<b><u>State v. Crane</u></b> 116 Wn.2d 315, 804 P.2d 10 cert. denied, 501 U.S. 1237 (1991) .....	6
<b><u>State v. King</u></b> 75 Wn. App. 899, 878 P.2d 466 (1994) review denied, 125 Wn.2d 1021 (1995).....	7
<b><u>State v. Kitchen</u></b> 110 Wn.2d 403, 756 P.2d 105 (1988) .....	6, 10
<b><u>State v. Love</u></b> 80 Wn. App. 357, 908 P.2d 395 review denied, 129 Wn.2d 1016 (1996).....	7
<b><u>State v. O'Meara</u></b> 143 Wn. App. 638, 180 P.3d 196 (2008).....	7
<b><u>State v. Ortega-Martinez</u></b> 124 Wn.2d 702, 881 P.2d 231 (1994) .....	5
<b><u>State v. Petrich</u></b> 101 Wn.2d 566, 683 P.2d 173 (1984) .....	6, 7, 8
<b><u>State v. Workman</u></b> 66 Wash. 292, 119 P. 751 (1911) .....	6
<b><u>FEDERAL CASES</u></b>	
<b><u>Miranda v. Arizona</u></b> 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	2

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RCW 69.50.102 .....	7, 9
Wash. Const. art. 1, § 21 .....	5

A. ASSIGNMENT OF ERROR

Appellant was denied his constitutional right to a unanimous jury verdict.

Issue Pertaining to Assignment of Error

Appellant was charged with use of drug paraphernalia. There were several items jurors could have focused on when determining appellant's guilt. Was appellant denied his constitutional right to a unanimous jury verdict where jurors were not required to base their verdict on any one item?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Island County Prosecutor's Office charged Jeromy Ladwig with (count 1) possession of a controlled substance (methamphetamine) and (count 2) use of drug paraphernalia. CP 63-65. Jurors convicted on both counts, the court imposed standard range sentences, and Ladwig timely filed his Notice of Appeal. CP 1-3, 5-6.

2. Substantive Facts

On July 12, 2010, several officers from the Oak Harbor Police Department, along with an officer from the Naval Criminal Investigative Service (NCIS), served a narcotics search warrant. RP

44, 46. The warrant authorized officers to search a residence, 222 Trisha Lane unit A, and “the person of Jeromy Ladwig.” RP 45. The name on the residential lease for unit A was Ray Ladwig, Jeromy’s father. RP 48.

While on the property, officers noticed movements from within a small travel trailer – 10 to 12 feet long – parked to the side and rear of the residence. They knocked on the trailer door, but received no response. RP 47. Officers contacted Ray Ladwig by telephone and he arrived on the property shortly thereafter. RP 48-49, 141. Ray Ladwig was concerned for his son’s safety and, after unsuccessfully attempting to make contact with Jeromy, used a key to allow officers inside the trailer. RP 50-51, 141-144.

Officers found Jeromy in bed and it appeared he had been sleeping. RP 52. They removed him from the trailer, placed him in handcuffs, and put him in a police van. RP 52-53, 90. Jeromy waived his Miranda<sup>1</sup> rights. RP 53-55. He was asked whether there was any methamphetamine in the trailer and he said there was possibly a small plastic baggie in an ashtray near the bed. RP 55, 93-94, 98, 105. He said the last time he had used was the night

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

before, he snorts it, and “that he still has the drip in the back of his throat.” RP 146-147. No evidence was found on Jeromy. RP 97.

Both Jeromy and his father gave officers consent to search the trailer. RP 55-56. In the ashtray, a detective found and collected two small plastic baggies containing a white substance. RP 61-62. The detective also found what he described as “two glass smoking pipes” and a blue tube or straw near the bed. RP 68, 86, 88-89. He believed the pipes were “connected with methamphetamine.” RP 89.

The only item actually tested for the presence of methamphetamine was one of the two small baggies found in the ashtray. RP 125. This was admitted at trial as exhibit 4. RP 136. The material inside that baggie contained methamphetamine. RP 122.

### 3. Instructions and Argument

Jury instruction 13 provided the elements for use of drug paraphernalia:

To convict the defendant of the crime of Use of Drug Paraphernalia as charged in Count 2, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 12th day of July, 2010, the defendant used drug paraphernalia to plant,

propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance; and

(2) That the acts occurred in the State of Washington.

CP 29.

Jurors also were instructed that “drug paraphernalia” means “all equipment, products, and materials of any kind that are used, intended for use, or designed for use in . . . storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance.” CP 30. This includes “glass, stone, plastic, or ceramic pipes[.]” CP 30.

The court did not instruct jurors to focus on any particular object for this charge (glass pipes, straw, or baggie) or otherwise indicate that jurors had to be unanimous as to which act of possession the State had proved. See generally CP 14-32.

During closing argument, the prosecutor indicated that the paraphernalia charge was based on the glass pipes and Ladwig’s admission that he had used the previous night. RP 186, 189-191, 206-207. Defense counsel pointed out that there had been no testimony regarding how the pipes might be used to ingest

methamphetamine and no evidence they had ever been exposed to methamphetamine because they were never tested. RP 197-198.

During deliberations, jurors asked two questions. CP 33-34. First, they wanted to clarify that the charge at issue in count 2 was “use” of paraphernalia as opposed to “possession” of paraphernalia. RP 211. They were told to look to the instructions. RP 211-213. Second, jurors asked, “Does the definition of drug paraphernalia include the small baggie which contained the white substance in Exhibit 4?” RP 213. After a brief discussion, the court suggested several possible responses. RP 215. The prosecutor indicated his preference that jurors simply be instructed that the law is contained in the instructions and they must consider the instructions as a whole. Defense counsel did not object, and the jurors received that language. RP 215.

The verdict form for count 2 does not indicate which item or items jurors ultimately based their guilty verdict on. CP 13.

C. ARGUMENT

LADWIG WAS DENIED HIS RIGHT TO JURY UNANIMITY.

Criminal defendants have a right to unanimous jury verdicts. Const. art. 1, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

In State v. Crane, 116 Wn.2d 315, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991), the Washington Supreme Court succinctly explained Washington law on jury unanimity:

In Washington, a defendant may be convicted only when a unanimous jury concludes the criminal act charged in the information has been committed. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). When the prosecutor presents evidence of several acts which could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specified criminal act. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)(citing Petrich, [101 Wn.2d] at 570; State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911)). In multiple act cases, when the State fails to elect which incident it relies upon for the conviction or the trial court fails to instruct the jury that all jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, the error will be deemed harmless only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt. Kitchen, [110 Wn.2d] at 405-06 (modifying the harmless error standard enunciated in Petrich). Since the error is of constitutional magnitude, it may be raised for the first time on appeal. Kitchen, [110 Wn.2d] at 411.

Crane, 116 Wn.2d at 324-25.

The juror unanimity requirement applies where, as here, jurors could have based their verdict on more than one item found in close proximity to the defendant. For example, in State v. King, 75 Wn. App. 899, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021

(1995), the defendant was charged with a single count of possessing cocaine after police found cocaine on the floor of a car in which he was a passenger and in his fanny pack. *Id.* at 901. There was no election by the prosecutor and no Petrich instruction, which allowed jurors to convict King without unanimity on which cocaine he had possessed. This Court reversed. *Id.* at 902-904; compare State v. Love, 80 Wn. App. 357, 362-363, 908 P.2d 395 (defendant's possession of multiple rocks of cocaine revealed a single "continuous course of conduct" where charge is possession with intent to deliver; no election or instruction necessary), review denied, 129 Wn.2d 1016 (1996).

Based on the above principles, Ladwig was deprived of his constitutional right to a unanimous jury verdict. The State charged him with one count of use of drug paraphernalia. CP 64. However, jurors could have focused on any one or several different items when convicting Ladwig. The definition of "drug paraphernalia" is quite broad, and includes items used to ingest controlled substances and items used to store them. See CP 30; RCW 69.50.102(a) (statutory definition); see also State v. O'Meara, 143 Wn. App. 638, 642-643, 180 P.3d 196 (2008) (playing card tin and pipe with residue qualify). Ladwig's jurors could have considered the glass pipes, the blue

straw, and/or the baggie containing methamphetamine when deliberating on count 2.

Therefore, either the State was required to elect which act it was relying on for conviction or the trial court was required to instruct jurors they must agree that the same underlying criminal act was proved beyond a reasonable doubt. As discussed above, there was no unanimity instruction. And while the prosecutor did focus on the glass pipes for count 2, he never told jurors they could not base their verdict on other items found in the trailer.

Moreover, even if the prosecutor's focus on the pipes is treated as an election, it was not sufficient in light of subsequent events. The jury question on whether the plastic baggie qualified as paraphernalia indicates jurors did not feel compelled to limit their consideration to the pipes.<sup>2</sup> The only adequate responses at that point were to expressly instruct jurors they were only to consider the pipes or give a Petrich instruction, which would have permitted consideration of the baggie, but still ensured a unanimous verdict. Simply telling jurors to look at the instructions again did nothing to

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<sup>2</sup> This is not surprising since jurors are instructed that their deliberations are controlled by the instructions and not the arguments of counsel. CP 15-16. In the context of double jeopardy, the Washington Supreme Court has concluded a prosecutor's "election" during closing argument is an insufficient basis on which to assume jurors deliberated in a particular manner. See State v. Kier, 164 Wn.2d

ensure unanimity.

Therefore, the only way in which Ladwig's conviction on count 2 can stand is if no rational trier of fact could have entertained a reasonable doubt that any of the items at issue (the pipes, the straw, or the plastic baggie) qualified as drug paraphernalia. The State cannot make this showing.

That jurors asked about the plastic baggie demonstrates that at least some of the jurors had doubts about the glass pipes. There was good reason for such doubts. The pipes were not found with the methamphetamine in the baggie. They were never tested for methamphetamine residue.<sup>3</sup> And Ladwig claimed that he snorted methamphetamine; he never claimed to smoke it. See RP 146-147. Similarly, one or more jurors could have entertained doubts about the blue straw. Like the pipes, it was not found with the baggie of methamphetamine and it was never tested for residue. Straws have multiple non-drug-related uses.

Because jurors may have entertained a reasonable doubt concerning the glass pipes and blue straw, the lack of unanimity

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798, 813-814, 194 P.3d 212 (2008).

<sup>3</sup> By statute, the presence of residue is a relevant consideration when determining whether an object qualifies as drug paraphernalia. See RCW 69.50.102(b)(5). So is proximity to controlled substances and expert testimony

instruction or effective election cannot be deemed harmless.

Reversal is required. Kitchen, 110 Wn.2d at 405-06.

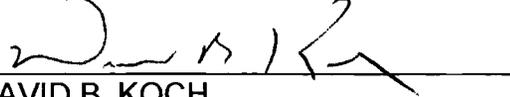
D. CONCLUSION

Ladwig was denied his constitutional right to a unanimous verdict. His conviction for using drug paraphernalia must be reversed.

DATED this 29<sup>th</sup> day of June, 2011.

Respectfully submitted,

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concerning an object's use. See RCW 69.50.102(b)(4), (14).

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STATE OF WASHINGTON,	)	
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Respondent,	)	
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v.	)	COA NO. 66772-6-1
	)	
JEROMY LADWIG,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29<sup>TH</sup> DAY OF JUNE, 2011 I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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**SIGNED** IN SEATTLE WASHINGTON, THIS 29<sup>TH</sup> DAY OF JUNE, 2011.

x *Patrick Mayovsky*

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