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NO. 66772-6-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JEROMY KEITH LADWIG,

Appellant.

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

The Honorable Vickie I. Churchill, Judge  
Superior Court Cause No. 10-1-00216-3

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BRIEF OF RESPONDENT

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## **I. STATEMENT OF THE ISSUES**

A. Whether the jury was properly instructed regarding the elements of the crime of use of drug paraphernalia.

## **II. STATEMENT OF THE CASE**

### **A. Substantive Facts**

A narcotics search warrant was issued July 4, 2010 for the person of the appellant and the property of 222 Trisha Lane #A, Oak Harbor, Washington. RP 44-45. Oak Harbor Police Department Detective Carl Seim, with other officers, served the warrant on July 12, 2010. RP 46. While conducting their search, the officers noticed some movements coming from a small travel trailer on the property. RP 47. The officers knocked on the door of the trailer, but received no response. RP 47.

Detective Sergeant Teri Gardner contacted the appellant's father, who arrived at the property and opened the trailer. RP 48, 52. The appellant was found within the trailer, apparently asleep. RP 52. Det. Seim brought the appellant out of the trailer, placed him into handcuffs, and provided *Miranda* warnings.<sup>1</sup> The appellant then admitted there were two small baggies of methamphetamine in an ashtray in the trailer, next to or

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

near the bed. RP 55. The appellant described the baggies as the remainder of methamphetamine he had used the night before. RP 146.

The appellant and his father both gave the officers permission to search the trailer. RP 55-57. Det. Seim conducted a search of the trailer and found two baggies of methamphetamine in the ashtray, as described by the appellant. RP 61. Det. Seim also found pipes and paraphernalia around the appellant's bed and around the ashtray. RP 68. Two of the pipes found by Det. Seim were connected with the use of methamphetamine. RP 89.

#### **B. Statement of Procedural History**

The appellant was charged by information with one count of Possession of Methamphetamine and one count of Use of Drug Paraphernalia. CP 63-65. At trial, the State proposed instructions for the charge of use of drug paraphernalia, including an instruction describing the elements of the charge. CP 55. That instruction informed the jury that to convict the defendant, the State must prove, “[t]hat 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”. Id. The appellant made no objections to the state's

proposed instructions, including the elements instruction for use of drug paraphernalia. RP 162. The appellant proposed only one instruction, that a defendant is not required to testify. CP 36. The appellant did not propose or demand a unanimity instruction. RP 161-62.

The State's opening statement described the charge of use of paraphernalia as, "for the pipes." RP 41. During the presentation of evidence, the State introduced paraphernalia found in the appellant's trailer that was consistent with the use of methamphetamine, but redacted evidence of use of other controlled substances. See RP 82-83, 167-68. During closing and rebuttal arguments, the prosecutor repeatedly explained to the jury that the use of the pipes to consume methamphetamine was the basis for the use of drug paraphernalia charge. See RP 183, 186, 189, 190, 191, 207.

The appellant was convicted of both counts, and the trial court imposed standard range sentences. CP 3-13. The appellant now timely appeals. CP 1-2.

### III. ARGUMENT

#### A. The trial court's instructions accurately informed the jury of the applicable law.

The instructions provided to the jury for the charge of use of drug paraphernalia accurately described the applicable law. Jury instructions are sufficient if they permit each party to argue his theory of the case and properly inform the jury of the applicable law. *State v. Bowerman*, 115 Wn.2d 794, 809, 802 P.2d 116 (1990). The instructions in this case accurately informed the jury of the applicable law by fully and correctly defining the elements of the crime of use of drug paraphernalia.

The crime of use of drug paraphernalia occurs when a defendant, “use[s] 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.” RCW 69.50.412(1). Thus, the applicable elements of the crime are use of drug paraphernalia to use, prepare, or store a controlled substance. *State v. O’Meara*, 143 Wn.App. 638, 642-43, 180 P.3d 196 (Div. 2, 2008).

The trial court instructed the jury that proof of the charge of drug paraphernalia in this case required proof, “[t]hat 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.” CP 29. That instruction included all elements of the charged crime. In fact, the language of the jury instruction exactly matched the statutory language for the charged crime. Therefore, instructions properly informed the jury of the applicable law.

**B. The trial court was not required to provide a unanimity instruction on the charge of use of drug paraphernalia.**

The appellant’s conviction should be affirmed because a unanimity instruction was not required. A jury may not convict unless it unanimously decides the defendant committed the charged criminal act. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), *overruled on other grounds State v. Kitchen*, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988). When the State presents evidence of two or more acts constituting a single charged count, the State must either tell the jury which act the State is relying on or the trial court must give a unanimity instruction. *Petrich*, 101 Wn.2d at 569-70, 572; *State v. King*, 75 Wn.App. 899, 902, 878 P.2d 466 (Div. 1, 1994). But, where the evidence shows a single act or a continuing course of conduct, a unanimity instruction is not required. *See State v. Petrich*, 101 Wn.2d at 571. In addition, a unanimity instruction is not required

when the State elects which act it will rely upon for a conviction. *See State v. Bland*, 71 Wn.App. 345, 351, 860 P.2d 1046 (Div. 1, 1993), *disapproved on other grounds*, *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007). The necessity of a unanimity instruction is reviewed de novo. *State v. Furseth*, 156 Wn.App. 516, 520, 233 P.3d 902, *rev. denied*, 170 Wn.2d 1007 (2010). No unanimity instruction was required in this case because the evidence did not show multiple acts of use of drug paraphernalia and because the State clearly informed the jury of the act upon which it was relying.

*1. The evidence did not show multiple acts of use of drug paraphernalia.*

A unanimity instruction was not needed because the evidence in this case showed a single act of use of drug paraphernalia. A unanimity instruction is only required where the evidence indicates that more than one distinct criminal act has been committed, but the defendant is charged with only one count of criminal conduct. *State v. Noltie*, 116 Wn.2d 831, 842-43, 809 P.2d 190 (1991). A multiple acts prosecution occurs when several acts are alleged and any one of them could constitute the crime charged. *State v. Furseth*, 156 Wn.App. at 519-20 (*citing State v. Kitchen*, 110 Wn.2d at 411). The facts of a case must be evaluated in a common sense manner to determine whether the defendant committed several

distinct acts. *State v. Petrich*, 101 Wn.2d at 571. A common sense review of the evidence in this case shows the defendant committed one, single act of use of drug paraphernalia.

The evidence admitted in this case only showed the appellant used drug paraphernalia, specifically pipes found in his travel trailer, to consume methamphetamine. The appellant admitted to Det. Seim and Det. Sgt. Gardner that he used methamphetamine the night of July 11, 2010. He also admitted the remaining methamphetamine would be found in his trailer. Det. Seim searched the appellant's trailer and found pipes near the appellant's bed and near two baggies of methamphetamine. Those pipes were consistent with pipes commonly used to consume methamphetamine.

No evidence suggested, and no argument was made, that the appellant used any paraphernalia to produce, manufacture, or package any controlled substances. Similarly, there was no allegation, and no evidence was produced, to show the appellant used any paraphernalia other than the pipes admitted into evidence to consume any controlled substances other than methamphetamine. In fact, paraphernalia consistent with consumption of marijuana was specifically excluded from evidence. See RP 82-83.

The appellant relies on *State v. King*, 75 Wn.App. 899, 878 P.2d 466 (1994), to argue for a unanimity instruction based on the appellant's

proximity to multiple possible pieces of paraphernalia. However, the differences between this case and *King* make clear that a unanimity instruction was not required in this case. The defendant in *King* was convicted of one count of possession of cocaine, but evidence showed two distinct instances of possession, at two different times, in two different places, within two different containers, and under two different definitions of possession. *Id.* at 903. Specifically, two distinct packages of cocaine were found, one on the floor of the defendant's car and the other inside the defendant's fanny pack. *Id.* at 901. While the cocaine in the defendant's car was found at the scene, the additional cocaine in the fanny pack was not found until an inventory search was conducted at the police station. *Id.* As the court in *King* noted, even the legal theory for two possessions varied, as the car was based on constructive possession, while the fanny pack was actual possession. *Id.* at 903.

Unlike *King*, the evidence in this case showed only one violation of the charged crime. The evidence in this case showed only one set of paraphernalia, found in a single location, used at one time, in one manner, and for one purpose. Only one set of pipes was introduced, which was found in a single location inside the appellant's trailer. Those pipes were used, according to the appellant's admission, the night of July 11, 2010, to consume methamphetamine. Because the evidence in this case showed

only a single act of use, the trial court properly instructed the jury as to the elements of use of drug paraphernalia without an unnecessary unanimity instruction.

2. *The State clearly informed the jury of the act upon which it was relying*

A unanimity instruction was also unnecessary because the State clearly elected a single act of use of drug paraphernalia. A unanimity instruction is not required if the State tells the jury which act to rely on in its deliberations. *State v. Petrich*, 101 Wn.2d at 572. The state properly elects a single act when the case is tried throughout upon the theory that the state relied for a conviction upon proof of a specific act. *State v. Moss*, 73 Wash. 430, 432, 131 P. 1132 (1913). For instance, in *Moss*, the defendant was charged with one count of adultery; however evidence was presented tending to prove the commission of similar offenses on three additional dates. *Id.* Although no unanimity instruction was provided, none was necessary, because, the State tried the defendant “from the beginning to the conclusion of the case” only for the first incident in time. *Id.* at 432-33. Similarly, even if the evidence in this case showed some possibility of additional instances of use of drug paraphernalia, the prosecutor’s clear reliance, for the entirety of the trial, upon the

appellant's act of using pipes to consume methamphetamine removed the need for a unanimity instruction.

The State's opening statement clearly explained the basis for the charge of use of drug paraphernalia.<sup>2</sup> During the presentation of evidence, the State voluntarily redacted and excluded evidence of use of paraphernalia for purposes other than consuming methamphetamine.<sup>3</sup> During closing and rebuttal arguments, the State continued to consistently argue only that the evidence showed use of the pipes for the consumption of methamphetamine.<sup>4</sup> Thus, the State made a clear election of the appellant's single, specific act of using pipes to consume methamphetamine.

Throughout the trial, the State presented evidence and argued only that the charge of use of drug paraphernalia was based on the appellant's use of pipes to consume methamphetamine. Based on the prosecutor's

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<sup>2</sup> The State's opening statement included an description that the appellant was charged with, "use of drug paraphernalia for the pipes" RP 41.

<sup>3</sup> Specifically, a smoking device used to consume marijuana was removed from evidence. RP 82-83. Also, a lab testing report was replaced with a redacted copy to remove the results of testing of pills for which the appellant was not charged. RP 167-68.

<sup>4</sup> The State's closing argument repeatedly explained the basis for the charge of use of paraphernalia. See RP 183 ("Jeromy Ladwig used drug paraphernalia in order to ingest that methamphetamine"), 186 ("Use of Drug Paraphernalia for the pipes and the admission or use of the methamphetamine"), 189 ("[pipes are] the paraphernalia that we're talking about"), 190 ("Jeromy Ladwig used the pipes to take the methamphetamine"), 191 ("[t]he use of pipes makes him guilty of Use of Paraphernalia"). The rebuttal argument again reiterated that position. RP 207 ("Jeromy Ladwig [is] guilty of Use of Paraphernalia for the pipes that the evidence tells us he used to ingest the methamphetamine the night before.").

clear reliance on the single act, the trial court's instructions, with no unanimity instruction, fully and accurately provided the law of the case to the jury.

#### **IV. CONCLUSION**

The trial court in this case correctly provided instructions defining the elements of the crime of use of drug paraphernalia, but correctly did not provide an unnecessary unanimity instruction. A unanimity instruction is only necessary when a defendant is charged with one count of criminal conduct, but the State presents evidence of two or more separate acts and does not elect which act it will rely upon for a conviction. The evidence presented in this case did not show two or more separate acts; instead, the evidence showed the appellant committed only a single act of use of paraphernalia by using pipes to consume methamphetamine. In addition, the prosecutor clearly elected that single act by only presenting evidence and argument relating to the use of pipes. Because the evidence only showed one act and the state made a clear election of that single act, no unanimity instruction was needed in this case. The appellant's conviction should, therefore, be affirmed.

Respectfully submitted this 26th day of August, 2011.

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COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,  
  
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Defendant/Appellant.

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DECLARATION OF SERVICE

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

I, MICHELE M. GRAAFF, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the 26<sup>th</sup> day of August, 2011, a copy of Brief of Respondent and Declaration of Service was served on the parties designated below by depositing said documents in the United States Mail, postage prepaid, addressed as follows:

David B. Koch  
Nielsen, Broman & Koch, PLLC  
1908 E. Madison Street  
Seattle, WA 98122

Signed in Coupeville, Washington, this 26<sup>th</sup> day of August, 2011.

  
MICHELE M. GRAAFF