

NO. 34792-0-II

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

STATE OF WASHINGTON, Respondent

v.

COREY ALAN RUNYON, Appellant

CLERK OF COURT
STATE OF WASHINGTON
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FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT L. HARRIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 05-1-02607-3

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

Because of the nature of the assignment of errors, the State will set forth the facts from our point of view in the response to the assignments of error section of this brief.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is that there was insufficient evidence to support a conviction on Count 1 which was a count of Possession of Controlled Substance, Methamphetamine.

When the Washington State Patrol stopped the defendant's vehicle for stolen license plates, the search incident to arrest found drugs. Drugs were found in the area around the plastic covering of the stick shift and a residue of methamphetamine found in a glass pipe that was in the defendant's jacket pocket. He was not wearing the jacket at the time of the recovery. The State did not elect which of these two it was proceeding on for the possession of the controlled substance but instead the jury was instructed under Petrich. A copy of the Court's Instructions to the Jury (CP 45) is attached hereto and by this reference incorporated herein.

The Amended Information (CP 12) alleged in Count 1 Possession of Controlled Substance – Methamphetamine which would have occurred on or about November 24, 2005. Count 2 of this Amended Information

was Unlawful Use of Drug Paraphernalia also on the same date. The appeal in this matter does not appear to involve the finding of guilt on Count 2. Count 2 (Unlawful Use of Drug Paraphernalia) dealt with a glass smoking pipe that was recovered from the defendant's jacket pocket. That item was tested by the State Crime Lab and found to contain residue of methamphetamine. With that in mind, the jury finding on Count 1 could very easily be the drug residue found in the pipe which the defense is not contesting belonged to the defendant. Nevertheless, the State will proceed to analyze the facts as set forth for the jury.

The State called as a witness Noell Carney. Ms. Carney was the girlfriend of the defendant and the mother of the child that was seated in the vehicle being driven by the defendant on November 24, 2005. She testified that she received a telephone call from the defendant indicating that there was a State Trooper behind him with his lights on and that he suspected that he would be going to jail. (RP 44). She testified that she went to the location where he had been stopped on Hazel Dell Avenue and when there he had given her his keys. (RP 45). She indicated that the keys that he provided her were "he has a key ring that has a key to every single thing he owns, so he wanted me to have them." (RP 45, L.22-24). She indicated that the reason he was providing her with these keys was so

she could use the car to move a motor that was in the back of the car and take it to his shop located in Ridgefield, Washington. (RP 46).

Bruce Siggins was called by the State of Washington as their expert. Mr. Siggins identified the baggy of methamphetamine and the glass smoking pipe that were both recovered from the motor vehicle. He indicated that after his testing he concluded that both of them contained methamphetamine. (RP 54; 57). His report and findings were marked as exhibits and later admitted into evidence.

Washington State Trooper Stephen Bettger testified for the State that on November 24, 2005, he was on duty and came in contact with the defendant. (RP 66). He indicated that he first observed the vehicle that the defendant was in on the freeway; he noticed that the plates were expired and when he ran the license plate number it came back as stolen license plates. (RP 69-70).

Once the trooper was aware of that, he radioed for backup and continued to follow the vehicle. It left the freeway and continued up to an area in Hazel Dell. He indicated that the small child was continually looking out the back window at him before he activated any lights or siren and he described the driver of the vehicle (the defendant) as putting on a jacket and he further observed what he considered "furtive movements". (RP 71). The officer was asked to described what he meant by furtive

movements and he indicated “movements within the vehicle that put red flags basically on the back of my neck – (RP 71, L.19-20). He also saw the driver making a call on a cell phone. (RP 74). This would be consistent with the testimony from the previous witness about coming to get the child. He indicated that it took quite a while for the driver to stop the vehicle (RP 74-76) but once he did stop the vehicle the officer, while approaching, saw the defendant take off the jacket that he had put on earlier. He indicated that he took this off very quickly. (RP 79). He was placed under arrest, separated from the vehicle, and the officer went back to the vehicle because of the child in the vehicle and because he was going to conduct a search incident to the arrest. He recalls that the defendant had told him that he had already called the child’s mother to come and pick up the child. (RP 80-81).

The officer indicated that he located the glass smoking pipe in the pocket of the jacket that the defendant was wearing. There were two jackets but he was sure of the identification of the jacket.

QUESTION (Gene Pearce, Deputy Prosecutor): Okay. So you said there was a – a blue and black jacket?

ANSWER (Trooper Bettger): Yes.

QUESTION: And the other one was a white and black jacket; is that correct?

ANSWER: Correct.

QUESTION: Which of these – which of these two jackets was on top?

ANSWER: (pause) the top jacket was the one that the defendant just took off.

QUESTION: Okay.

ANSWER: Whether it was white, blue, black, the combination of the two, I don't specifically recall.

QUESTION: Okay.

ANSWER: But it was the top jacket.

QUESTION: Okay. So you searched that jacket?

ANSWER: Yes sir, I did.

QUESTION: And what did you find?

ANSWER: I found a glass tubular smoking device.

QUESTION: And where was that located at in the jacket?

ANSWER: It was located in the – in the wearer's left pocket.

(RP 82, L.7 – 83, L.3)

The officer testified that he took the pipe and placed it into the evidence system. It was the item that was subsequently tested by Bruce Siggins at the Crime Lab.

The trooper continued his search incident to the arrest and found the second item of contraband. The testimony was as follows:

QUESTION (Gene Pearce, Deputy Prosecutor): Okay, after you found the – did you – after you found the – the pipe, did you continue with your search?

ANSWER (Trooper Bettger): Yes, I did.

QUESTION: And what did you – and what were – where were you searching at, then?

ANSWER: Driver's compartment area where I had observed my driver commit the furtive movements.

QUESTION: Okay. And did you – did you visually observe anything unusual in that area?

ANSWER: Yes, I did.

QUESTION: And what did you see?

ANSWER: I observed – to describe it, it's like a – a bulk. If you have, say, flour in a plastic bag, and it's tucked underneath something, but there's a gap, a portion of that bag will actually bulge out from that area.

So I'm lookin' at approximately about this much space (indicating).

QUESTION: Now, what's – the record doesn't know. What's – what's "this much"? What's the –

ANSWER: Approximately quarter inch.

QUESTION: Okay. By how long?

ANSWER: Three-quarters of an inch.

QUESTION: Okay. And where did you – where did you see that at?

ANSWER: I see that at the – there's a cowling, if you will, that covers the transmission hump, it's a piece of plastic

that has the where the stick shift is in. Then you have the soft plastic that covers the actual handle of the stick shift. So this is the – the hard plastic that meets the carpet at the transmission hump.

(RP 86, L.20 – RP 88, L.1)

The trooper indicated that he than placed this item into the evidence system and subsequently the item was tested by Bruce Siggins at the Washington State Crime Lab.

The trooper, in his testimony, documented for the jury the other items that he inventoried there in the car which included among other things items for the child, the jackets that he had previously described, a cell phone charger, miscellaneous clothing, and a large automotive manifold part which was located in the trunk of the car. He also indicated that he found a key ring with 21 keys on it. Included among those 21 keys was the key that started the vehicle. (RP 98). As the previous witness had testified this would be the key ring that was supplied to her so that the manifold could be taken to the defendant's shop in Ridgefield.

The defendant testified in his behalf in this case. Although he denied any knowledge of the drugs, he did corroborate the trooper's testimony that he had put his jacket on in the vehicle and than took it off before he got out of the vehicle. (RP 146-147). He further indicated that

the area where the drugs were found hidden near the stick shift was an area that was within his reach as driver of the vehicle. (RP 148).

The defendant contends the evidence was insufficient to establish he constructively possessed methamphetamine. On a challenge to the sufficiency of the evidence, the evidence is viewed in a light most favorable to the prosecution. State v. Green, 94 Wn.2d 216, 220-222, 616 P.2d 618 (1980). The appellate court defers to the trier of fact in resolving conflicting testimony and evaluating evidentiary persuasiveness. State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989). Reasonable inferences are drawn in the State's favor and interpreted against the defendant. State v. Partin, 88 Wn.2d 899, 906-907, 567 P.2d 1136 (1977). Viewing the evidence in this light, the court determines whether a rational trier of fact could find the elements of the crime beyond a reasonable doubt. Green, 94 Wn.2d at 220-222.

Possession of a controlled substance can be either actual or constructive. Partin, 88 Wn.2d at 905. Where as actual possession requires physical custody, constructive possession requires dominion and control. State v. Summers, 45 Wn. App. 761, 763, 728 P.2d 613 (1986). Establishing constructive possession requires examination of the "totality of the situation". State v. Cote, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). The situation must provide substantial evidence for a fact finder

to reasonably infer the defendant had dominion and control. Dominion and control means the item can be immediately taken into actual possession. State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Control does not need to be exclusive, but mere proximity to contraband is insufficient. State v. Davis, 117 Wn. App. 702, 708-709, 72 P.3d 1134 (2003).

The defendant relies primarily on State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969) and State v. Spruell, 57 Wn. App. 383, 788 P.2d 21 (1990). The State submits that these cases can be distinguished from the totality of the situation that this jury faced in our case.

In Callahan, a defendant was found in a houseboat sitting next to a box of drugs. The court determined the defendant did not have dominion and control of the drugs because a co-defendant claimed ownership of the drugs. Callahan, 77 Wn.2d at 31. The co-defendant had not sold or given the drugs to anyone. Thus, the circumstances did not show constructive possession.

In our case, unlike Callahan, the defendant did not claim ownership of the methamphetamine. Instead, the claim would have to be that the drugs belonged to somebody else and that he did not know that they were present. However, in our case, the methamphetamine was found in two areas. One area was in the jacket pocket that belonged to the

defendant. The other methamphetamine was found in close proximity to the driver's seat of the vehicle that he was operating. The key to the vehicle was on a key ring that belonged to the defendant and opened his place of business, his home, etc. Found in the vehicle along with his jacket were other items of personal clothing. In examining the totality of the situation, it is also to be noted that he has in constructive possession the exact drug that is found secreted or hidden in an area where he can easily obtain it. Further, the trooper testified about the furtive movements of the defendant prior to stopping him.

Differentiate this with the facts in the Spruell case. In Spruell, a defendant was found in a house containing drugs. The appellate court determined that the defendant did not have dominion and control of the drugs because no evidence connected the defendant to either the house or the cocaine. Spruell, 57 Wn. App. at 388. However, unlike Spruell, our defendant was connected to both the vehicle and the drugs. The vehicle belonged to his friend and at least part of the drugs were found by the jury to have been his. Spruell is distinguishable and the circumstances clearly demonstrate constructive possession. Further, the totality of the situation clearly shows a reasonable trier of fact that either the drugs found in the jacket or the drugs found secreted in the vehicle were constructively

possessed by the defendant. The Petrich instruction was properly given and the jury rendered a decision based on the appropriate law in the case.

The defendant attempted to show unwitting possession but that becomes a credibility determination and the State submits that should not be disturbed on appeal. State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error by the defendant is a claim that the stipulation to the elements of Count 4, Driving While License Suspended in the Third Degree was never perfected because there was no change of plea nor was this matter submitted to the jury. The State has reviewed the transcript in this matter and notes that the stipulation appears to be for purposes of use by the defendant. In other words, he was not going to contest the fact that he was driving while suspended. This matter was not presented to the jury for their determination nor was it set up as change of plea. With that in mind, the State concurs with the defense that this matter has not been preserved and agrees that this count should be dismissed.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error deals with the court's finding in the Judgment and Sentence that the felony conviction involved the use of a

motor vehicle. As held in State v. Batten, 95 Wn. App. 127, 974 P.2d 879 (1999), there must be some reasonable relation to the operation of the motor vehicle or to the use of the motor vehicle in reference to the commission of the felony. For example, a car used to store or conceal a controlled substance falls within the meaning of the statute. Batten, 95 Wn. App. at 131. But the use of the car becomes incidental if the possession of the drugs is found to be on the person and not necessarily in the vehicle. The suspension of the defendant's drivers license was reversed in State v. Wayne, 134 Wn. App. 873, 142 P.3d 1125 (2006) where the drugs were found in his pocket. The court held that there was not a reasonable relation between the defendant's possession of the controlled substance and the operation of the motor vehicle.

In our case, there was sufficient credible evidence for the jury to conclude that the defendant was in possession of drugs secreted in the motor vehicle itself. Because there is sufficient evidence to support that, the State submits that the trial court appropriately found a nexus between the operation of the motor vehicle and the controlled substances.

V. CONCLUSION

The trial court properly instructed the jury in this case. There was sufficient evidence to support the giving of a Petrich instruction and the trier of fact, following the instructions, returned a verdict of guilty. There

was sufficient evidence to indicate that the drugs could have been either secreted in the vehicle itself or in the smoking pipe found in the pocket of his jacket.

The State submits the trial court was within its rights to find that there was a reasonable relationship between the defendant's possession of the controlled substance and the operation of the motor vehicle.

Finally, the State agrees that the conviction for Count 4, Driving While License Suspended in the Third Degree, is inappropriate and should be dismissed.

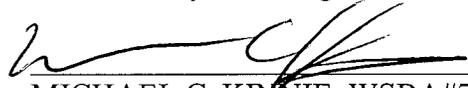
In all other concerns, the trial court should be affirmed.

DATED this 9 day of January, 2007.

Respectfully submitted:

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APPENDIX
COURT'S INSTRUCTIONS TO THE JURY

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

COREY ALAN RUNYON,

Defendant.

No. 05-1-02607-3

COURT'S INSTRUCTIONS TO THE JURY

Robert Blawie

SUPERIOR COURT JUDGE

21 March 2006

DATE

F I L L E D
MAR 21 2006

JoAnne McBride, Clerk, Clark Co.

*Received @ 9:28 AM
Annex Olson
Deputy Clerk
Superior Court*

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INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 3

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 4

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 5

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 6

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 7

To convict the defendant of the crime of possession of a controlled substance, as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 24th day of November, 2005, the defendant possessed a controlled substance; and

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

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 8

It is a crime for any person to possess a controlled substance.

INSTRUCTION NO. 9

Methamphetamine is a controlled substance.

INSTRUCTION NO. 10

Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance. Dominion and control need not be exclusive to establish constructive possession.

INSTRUCTION NO. 11

There are allegations that the defendant committed more than one act of possession of a controlled substance. To convict the defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

INSTRUCTION NO. 12

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession or did not know the nature of the substance.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

INSTRUCTION NO. 13

A person commits the crime of Unlawful Use of Drug Paraphernalia when he or she uses drug paraphernalia to store, contain, conceal a controlled substance.

INSTRUCTION NO. 14

To convict the defendant of the crime of Unlawful 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 November 24, 2006, the defendant unlawfully used drug paraphernalia to store, contain or conceal a controlled substance.
- (2) That the acts occurred in the State of Washington, County of Clark.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 15

"Drug paraphernalia" means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance.

INSTRUCTION NO. 16

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and four verdict forms for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

