NO. 35107-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY DELACRUZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-00794-8

BRIEF OF RESPONDENT

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SERVICE	
Roger Hunko Ste. E, 569 Division St. Port Orchard, WA 98366	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED June 18, 2007, Port Orchard, WA **Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.**

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Defendant's argument that the trial court erred in denying the motion to suppress must fail when the trial court's finding that the Defendant voluntarily consented to the search of his residence was supported by substantial evidence?

2. Whether the trial court abused its discretion in denying the Defendant's motion to dismiss when the Defendant failed to show that he was forced to choose between his right to a speedy trial and his right to adequately prepared defense counsel and when the defendant failed to show governmental misconduct and actual prejudice affecting his right to a fair trial?

3. Whether the trial court erred in failing to give a unanimity instruction when the Defendant's acts involved a continuing course of conduct and when, even if this court were to artificially break the events at issue into separate, distinct events, the State clearly elected which act it was relying on, further obviating the need for a Petrich Unanimity Instruction?

4. Whether the trial court erred in refusing to give the Defendant's proposed jury instruction when the instruction did not correctly state the law and was misleading?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Timothy DeLacruz was charged by amended information filed in Kitsap County Superior Court with one count of possession of methamphetamine and one count of bail jumping. CP 79.

B. FACTS

i. 3.6 Hearing

On January 17, 2006, a 3.6 hearing was held regarding the Defendant's motion to suppress. RP 1/17 1. At the hearing, Detective Aaron Elton of the Bremerton Police Department testified that an informant had given the police some information concerning the Defendant's home RP 1/17 3-7. As a result, Detective Elton and other officers went to the Defendant's home to speak with him. RP 1/17 7. One of the officers knocked on the door, and the Defendant answered. RP 1/17 9. As the officers did not have a search warrant, they were hoping to get the Defendant's cooperation, and thus, the ensuing conversation was polite and the officers explained that someone had informed the officers that there were drug related items in the house and the officers wanted to the Defendant's permission to come in and search for those items. RP 1/17 9-10. The Defendant indicated that the officers would find drug paraphernalia and described one pipe in particular. RP 1/17 15-17.

Detective Elton spoke with the Defendant and noticed that he appeared nervous, sweaty, and "wide-eyed," causing the detective to suspect that the Defendant was high on methamphetamine. RP 1/17 10-11. When asked, the Defendant admitted that he had been using methamphetamine that day. RP 1/17 11. Despite this fact, Detective Elton did not observe anything out of the ordinary or odd, and everything seemed appropriate to him. RP 1/17 11-12. In addition, Detective Elton stated that the Defendant did not appear to have any difficulty understanding what the officers were saying, and appeared to be able to focus on the topic of conversation. RP 1/17 11-12. Detective Elton advised the Defendant of his Miranda and Ferrier warnings, and, when these were discussed with the Defendant, he did not appear to have any difficulty in understanding them. RP 1/17 12-14. Finally, Detective Elton testified that the Defendant did not say or do anything that gave the detective a feeling that the Defendant did not understand the conversation. RP 1/17 17. The Defendant remained cooperative and agreed to let the officers come in the house. RP 1/17 14. The Defendant also remained cooperative while the officers searched the residence. RP 1/17 14.

When the officers searched the home, they found two pipes in the living room that appeared to be related to methamphetamine use. RP 1/17 15. A female was also found in the home, and a makeup bag containing some pills and some "scrapper baggies" was also found. RP 1/17 15, 22.

Detective Elton, however, testified that the pipes were found in the living room and not found in the makeup bag. RP 1/17 15.

The Defendant did not testify at the 3.6 hearing, and at the conclusion of the testimony the State clarified that it was not seeking to offer the items found in the makeup bag. RP 1/17 25, 32. The trial court then issued an oral ruling and stated that,

> The suggestion was that perhaps Mr. DeLaCruz was under the influence of drugs, and, therefore, his consent wasn't appropriately given. There is, however, no indication that he did not understand. His responses were consistent to the questions that were asked. His physical responses were consistent to having been -- consent having been given. I've heard cases where resistance to follow-up after consent was supposedly given that would clearly indicate a lack of understanding or not understanding the process. That is not the case here. There is nothing in the evidence that's contrary to the State's assertion that Mr. DeLaCruz was advised of his rights, that he chose to waive those rights.

RP 1/17 33. The trial court also entered written findings of fact and conclusions of law which included a finding that "the defendant easily followed the conversation, was able to answer questions in a focused and relevant manner and did not have any difficulty in expressing himself," and that the defendant "expressed no confusion or lack of understanding" about his rights and consented to the search of his home. CP 15. The trial court, therefore, concluded that the Defendant voluntarily waived his rights under *Ferrier*. CP 16.

ii. Motion to Dismiss

Prior to trial, the Defendant brought a motion to dismiss, arguing that the trail court should dismiss the bail jumping charge. CP 30, RP 5/19 1-82. The Defendant's argument was that the State may not delay filing an amended information and thereby put a defendant in a position of having to choose between his right to a speedy trial and his right to effective representation of counsel. RP 5/19 65-66. The State argued that the Defendant improperly characterized the choice he faced, and that the Defendant's choice was actually to either (1) have a speedy trial on the drug charge with a later trial on the bail jump with adequately prepared counsel; or, (2) request a continuance of the trial so that the drug charge and bail jump would be tried together thereby giving the defendant the a presumption in favor of concurrent sentences (should he be convicted of both charges).

At the hearing on the Defendant's motion to dismiss, Greg Memovich, the Defendant's former counsel, testified in support of the motion. RP 5/19 5. Mr. Memovich testified that the Defendant had a status hearing scheduled on November 7, 2005, but the Defendant failed to appear for that hearing. RP 5/19 6. Mr. Memovich and the prosecutor sat in the courtroom for a period of time and spoke about several things, including the Defendant's case. RP 5/19 32-34. Mr. Memovich acknowledged that because the Defendant did not appear, he and the prosecutor spoke about the

bail jump charge and had an "active" discussion about that charge. RP 5/19 33-34. A warrant was ultimately issued when the Defendant did not appear before the end of the calendar. RP 5/19 10. This warrant was later served on November 9. RP 5/19 14. The case was eventually set for trial on February 6, but the Defendant again failed to appear when the case was called, and a warrant was issued. RP 5/19 14-16. Mr. Memovich later found the Defendant and brought him into court and the trial court quashed the warrant. RP 5/19 15-16. By that time, however, the court had sent other trials out with the available judges, and there was no longer a courtroom available for trial, so the case was reset for trial on February 8. RP 5/19 14-16.

On February 8, the parties appeared and the State sought to have the Defendant arraigned on the amended information including the bail jumping charge. RP 5/19 20. Mr. Memovich objected to the filing of the amended information, arguing that he was a potential witness on the bail jumping charge, and that he was therefore ready to go on the drug charge but not on the bail jump charge. RP 5/19 20-22. The trail court agreed with the Defendant, and did not allow the State to amend the information to include the bail jump charge, and the parties were instructed to meet with the court scheduler, and they were ultimately assigned a trial judge for 1:30 that day. RP 5/19 22, 41-42.

That morning, however, the prosecutor spoke with Mr. Memovich in

the hallway and explained that having a separate trial on the bail jumping charge would not necessarily be in the Defendant's best interest. RP 5/19 52. The prosecutor explained that this was the case because he was not obligated to give the Defendant an addition benefit, and thus, if the Defendant was convicted of the drug charge, the prosecutor was not going to go out of his way to have the bail jump charge filed in a separate charge and have that second trial happen at the earliest possible moment just so that the Defendant could be sentenced for both on the same date. RP 5/19 59-61. As the prosecutor stated, he had four months of trial already scheduled, and was under no obligation to try to schedule a bail jump trial on an expedited basis just for the Defendant's convenience. RP 5/19 58.

After this conversation, the Defendant and Mr. Memovich discussed his options and decided to go to trial on the drug charge and the bail jump charge at 1:30. RP 5/19 25-26. Mr. Memovich also acknowledged that a judge and jury were ready to begin trial at 1:30. RP 5/19 42.

Over the lunch hour, however, Mr. Memovich had second thoughts, and advised his client that he should get another attorney. RP 5/19 26-27. When the court reconvened at 1:30, Mr. Memovich moved to withdraw. RP 5/19 27. The judge gave the Defendant the option of proceeding merely on the drug charge. RP 5/19 42-43. Mr. Memovich testified, however, that he advised his client that it was in his best interest to not go to trial that day on

just the drug charge, but rather, that it was in his best interest to continue the trail date so that the drug charge and the bail jump could be tried together. RP 5/19 44-45. The Defendant agreed, and chose to continue the trial RP 5/19 45. The transcript from the February 8 hearing indicates that Mr. Memovich explained to the judge that it was in the Defendant's best interests to have the trial date continued, as this was the option made it more likely that he would receive concurrent sentences should he be convicted of both charges. RP 2/8 6-7. The court, therefore, granted the Defendant's motion to continue. RP 2/8 5, 8.

No testimony was given at the hearing on the motion to dismiss, however, regarding when the Defendant's speedy trial expired. Nor was this issue addressed at the February 8 hearing at the time of the motion for the continuance. The record, however, does indicate that the Defendant did not appear when his case was called for trial on February 6. RP 5/19 14-15. The Defendant, however, did claim in his written motion that when his trial was originally set for February 6, speedy trial was calculated to expire on February 21.

At the conclusion of the evidence at the hearing on the Motion to Dismiss, the Defendant argued that he was forced to choose between his right to a speedy trial and a right to effective representation. RP 5/19 65-66. The trial court, however, inquired whether this issue wasn't in fact resolved by the

fact that the court below granted his motion and did not allow the bail jump charge to be added to the information. RP 5/19 69. The trial court ultimately held that there was no violation below since the State had the right to amend up until the date of trial and the trial court had initially granted the Defendant's motion to not allow the amendment and had a judge and jury available for the trial. RP 5/19 78-80. The court acknowledged that the Defendant had a choice to make, but that the choice was not a choice between a speedy trial and effective representation. RP 5/19 79. Rather the choice was between a trial on just the drug charge or moving to continue the trial so that he could get an additional benefit of having the charges tried together. RP 5/19 79-81.

iii. Trial Testimony

At trial, Detective Elton testified that he and several officers went to the Defendant's residence at 203 Naval Avenue on May 26. RP 31. The officers went to the door and knocked. RP 32. The Defendant opened the door. RP 33. Detective Elton asked the Defendant if he had any drugs or paraphernalia in the house, and the Defendant stated that he had a glass pipe and a bottle that had been fashioned into a meth pipe in the house. RP 34, 38. The officers asked for the Defendant's consent to search the house, and the Defendant agreed. RP 36. Detective Elton explained that the residence was rather small, and estimated it was approximately 400 square feet. RP 38.

The officers found the bottle that had been made into a meth pipe as well as another glass pipe as the Defendant had described. RP 41. The pipes were consistent with the use of methamphetamine, and were found to contain residue that contained methamphetamine. RP 68, 158, 164-65.

Detective Elton noticed that the Defendant was "fidgety" and appeared to be high on a central nervous system stimulant. RP 46. Detective Elton asked the Defendant about his use of methamphetamine, and the Defendant said that he had used that day inside the house at 203 Naval Avenue. RP 46.

III. ARGUMENT

A. THE DEFENDANT'S ARGUMENT THAT THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS MUST FAIL BECAUSE THE TRIAL COURT'S FINDING THAT THE DEFENDANT VOLUNTARILY CONSENTED TO THE SEARCH OF HIS RESIDENCE WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Defendant first argues that the trial court erred in denying his motion to suppress because his consent to search was not voluntary. App.'s Br. at 4. This claim is without merit because the trial court's finding that the Defendant voluntarily consented to the search was supported by substantial

evidence.

A trial court's conclusion that a defendant's waiver was voluntary is binding on appeal, provided this court finds that it is supported by substantial evidence. *State v. Ng*, 110 Wn.2d 32, 37, 750, 750 P.2d 632 P.2d 632 (1988).

Where a resident is explained his rights under the *Ferrier* decision, and freely and voluntarily chooses to consent to a search, that search is valid. *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

Evidence of a defendant's intoxication is a factor the courts must consider when determining whether there was a voluntary and knowing waiver. *State v. Cuzzetto*, 76 Wn.2d 378, 383, 457 P.2d 204 (1969); *State v. Gardner*, 28 Wn. App. 721, 723, 626 P.2d 56 (1981). However, a defendant's drug use, mental disability, and sleep deprivation do not automatically establish a confession was involuntary. *State v. Hutchinson*, 135 Wn.2d 863, 885-86, 959 P.2d 1061 (1998), *cert. denied*, 525 U.S. 1157 (1999); *State v. Aten*, 130 Wn.2d 640, 644, 927 P.2d 210 (1996); *State v. Ortiz*, 104 Wn.2d 479, 484-85, 706 P.2d 1069 (1985). The critical factual issue is whether, under the circumstances, the defendant was able to knowingly, intelligently, and voluntarily waive his rights. *Hutchinson*, 135 Wn.2d at 885-86. *See State v. Cuzzetto*, 76 Wn.2d 378, 457 P.2d 204 (1969) (evidence of intoxication goes to weight and credibility to be afforded confession not its admissibility

unless the defendant is manic or babbling hysterically); *State v. Reuben*, 62 Wn. App. 620, 626, 814 P.2d 1177 (1991) (defendant sufficiently cognizant despite .29 blood-alcohol level); *State v. Gardner*, 28 Wn. App. 721, 723, 626 P.2d 56 (1981) (statements voluntary even though defendant claimed to have drunk a fifth of vodka within three hours of arrest).

In the present case, Detective Elton did suspect that the Defendant had been using methamphetamine, and the Defendant admitted that he had used the drug that day. RP 1/17 10-11. Nevertheless, Detective Elton did not observe anything out of the ordinary or odd, and everything seemed appropriate to him. RP 1/17 11-12. In addition, Detective Elton stated that the Defendant did not appear to have any difficulty understanding what the officers were saying, appeared to be able to focus on the topic of conversation, and did not did not appear to have any difficulty in understanding his rights when they were read to him. RP 1/17 11-14. Finally, Detective Elton testified that the Defendant did not say or do anything that gave the detective a feeling that the Defendant did not understand the conversations, and the Defendant agreed to let the officers come in the house and remained cooperative while the officers searched the residence. RP 1/17 14, 17. The trail court's finding that the Defendant's waiver was voluntary was supported by substantial evidence.

The Defendant, however, argues that the fact that the officers sought

consent from someone that they suspected was impaired "might be deemed coercive." App.'s Br. at 6, *citing State v. Sondergaard*, 86 Wn. App. 656, 662, 938 P.2d 351 (1997), *review denied*, 133 Wn.2d 1030 (1998). *Sondergaard*, however, is clearly distinguishable.

In *Sondergaard*, the officers arrived to find the defendant sitting in a dark room, fidgeting, rocking back and forth, and occasionally pointing at nothing at all. *Sondergaard*, 86 Wn. App. at 658. During the officer's conversation with the defendant, she "nonsensically mentioned that a soda can was moving." *Sondergaard*, 86 Wn. App. at 658. The officers nevertheless obtained the defendant's consent to search her purse and found drugs. *Sondergaard*, 86 Wn. App. at 658. Afterwards, the officers took the defendant to the hospital, and on the way she began to "really rave" and screamed that the officer was letting someone be killed by falling ceiling tiles. *Sondergaard*, 86 Wn. App. at 658. The trial court found the consent was not voluntary, noting that the defendant was seeing things moving that weren't actually moving and was in a hallucinatory state. *Sondergaard*, 86 Wn. App. at 658. The court of appeals affirmed the trial court's decision, noting that although some of the evidence might have supported a finding that the defendant understood what was happening, the evidence did not require such a finding. *Sondergaard*, 86 Wn. App. at 664. Thus, since the standard of review was substantial evidence, the court of appeals affirmed,

noting that trial court's finding that the defendant was in a hallucinatory state was a permissible inference from the officer's unrebutted testimony. *Sondergaard*, 86 Wn. App. at 664. Finally, *Sondergaard* does not hold that consent to search is per se involuntary any time the consent is obtained from an individual who appears to be under the influence, and this court should decline the Defendant's implied invitation to read *Sondergaard* in this manner, especially since such a holding is inconsistent with prior caselaw. See *Cuzzetto*, 76 Wn.2d 378; *Reuben*, 62 Wn. App. at 626; and *Gardner*, 28 Wn. App. at 723.

In the present case, the Defendant's responses to the officers were not incoherent, and the Defendant concedes this fact. App.'s Br. at 6. In addition, although there was some evidence that the Defendant appeared to under the influence of a stimulant, there was no evidence that the Defendant was hallucinating or had any trouble accurately observing his environment. To the contrary, the unrebutted testimony was that the Detective did not observe any odd behavior, and the Defendant appeared to be able to focus and understand his conversation with the officers. For these reasons, *Sondergaard* is distinguishable, and the Defendant's argument must fail, as the trial court's findings were supported by substantial evidence.[1]

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[1] The Defendant has also failed to assign error to the trial court's specific, written finding that the Defendant was able to follow the conversation and was able to answer questions in a

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO DISMISS BECAUSE THE DEFENDANT FAILED TO SHOW THAT HE WAS FORCED TO CHOOSE BETWEEN HIS RIGHT TO A SPEEDY TRIAL AND HIS RIGHT TO ADEQUATELY PREPARED DEFENSE COUNSEL AND BECAUSE THE DEFENDANT FAILED TO SHOW GOVERNMENTAL MISCONDUCT AND ACTUAL PREJUDICE AFFECTING HIS RIGHT TO A FAIR TRIAL.

The Defendant next claims that the trial court erred in denying his motion to dismiss, arguing that he was forced to choose between his right to a speedy trial and effective assistance of counsel. App.'s Br. at 6. This claim is without merit because the trial court did not abuse its discretion in denying the motion to dismiss.

The Defendant's argument that he was forced to choose between his right to a speedy trial and his right to an adequately prepared counsel fails for several reasons. First, the record does not establish when speedy trial was set to expire, in part, because the Defendant never raised this argument at the time he requested the continuance below. Rather, the record suggests that there were as many as 88 days of speedy trial remaining when the Defendant's case was called for trial on February 8 since the Defendant failed

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focused and relevant manner, and expressed no confusion or lack of understanding regarding his rights. Theses findings, therefore, become verities in appeal, and provide and additional reason for this court to reject the Defendant's claim. *State v. O'Neill*, 148 Wash.2d 564, 571,

to appear when his case was called on February 6 and a warrant was issued. RP 5/19 15-16. Although the Defendant later appeared in the courtroom, his initial failure to appear when his case was called constituted a failure to appear, resetting speedy trial. *See* CrR 3.3(c)(ii); *State v. Wachter*, 71 Wn. App. 80, 83-84, 856 P.2d 732 (1993)(holding that the defendant's failure to appear at 9:00 when her case was called was a failure to appear, despite the fact that the defendant appeared in court two hours later). Thus even if the amendment of the information "forced" the Defendant to seek a continuance, there is no showing that the Defendant was forced to waive his right to a speedy trial.

Second, even if this court were to ignore the Defendant's failure to appear when his case was called on February 6, the record does not establish when his speedy trial time would have expired. Then only mention the State could find in the record was the Defendant's claim in his motion to dismiss that speedy trial expired on February 21. CP 31. Even assuming this was the case, there is nothing in the record that shows that the case could not have been set within speedy trial and that a new counsel could not have been prepared to try the Defendant's case by February 21.

Third, even if this court were to assume that February 21 was the

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62 P.3d 489 (2003).

expiration of speedy trial and that new counsel could not have been prepared by that time, the Defendant's claims would still fail because he has not shown that State acted improperly in seeking to amend the information to include the charge of bail jump. The record shows that the State and Mr. Memovich specifically spoke about the bail jump charge at the time of the failure to appear, and the Defendant, therefore, was on notice of the charge as far back as November 7. Although the written information was not amended until February, the Defendant can not show any prejudice stemming from the actions of the State, since the State advised defense counsel about the bail jump charge in November (on the actual day the Defendant failed to appear).

Finally even if this court were to conclude that he State acted improperly in amending the information, the Defendant was still not forced to choose between his right to a speedy trial and his right to adequately prepared counsel because the trial court granted his motion and refused to allow the State to amend the information. In addition, a trial judge and a jury were made available to the Defendant on February 8. In short, the Defendant was given the opportunity to have his trial on that day, but he chose instead to continue the trial. If Defendant had chosen to go to trial on February 8 he would have had a speedy trial on the drug charge, and the State, if it chose to do so, would have had to file the bail jump charge under a separate cause number.

The record below makes it perfectly clear that the Defendant saw an advantage in having both the drug charge and bail jumping charges tried together (since he would have a presumption of concurrent sentences if convicted of both). While the Defendant saw this potential benefit, there is no requirement under Washington law that the State must agree to combine the cases. Rather, the State would have been free to file the bail jump separately. The State, however, at the Defendant's ultimate request, agreed to combine the charges. While this amendment also caused the Defendant to seek a continuance of his trial date, this was entirely his choice. The record is clear that the Defendant was given the opportunity to have a speedy trial with adequately prepared defense counsel on the drug charge, but he chose to instead to seek a continuance in order to have all of his charges resolved at once.

In conclusion, the Defendant claims he was forced to choose between his right to a speedy trial and his right to adequately prepared counsel, but his argument mischaracterizes the choice he actually made. The Defendant was given the opportunity for a trial on February 8 with adequately prepared counsel but chose to seek a continuance. In addition, the Defendant essentially argues that there was a speedy trial violation without ever establishing when his speedy trial period was set to expire. Furthermore, the Defendant fails to establish that he could not have had a trial on both charges

with adequately prepared counsel within speedy trial.

Finally, the Defendant argues that the motion to dismiss should have been granted pursuant to CrR 8.3(b). App.'s Br. at 6. As the Defendant points out, however, dismissal is an extraordinary remedy reserved for egregious cases, and a trial court's ruling on a motion to dismiss is reviewed for an abuse of discretion. App.'s Br. at 7. In addition, the Defendant acknowledges that he must show, by a preponderance of the evidence, arbitrary action or governmental misconduct as well as actual prejudice affecting his right to a fair trial. App.'s Br. at 6-7. As outlined above, the Defendant has failed to show arbitrary action or misconduct, and he has also failed to show prejudice. In short, even assuming for the sake of argument that all of the Defendant's claims are true, the Defendant cannot show that his right to a fair trial was prejudiced in any way. While a defendant has a right to a fair trial, the Defendant has cited no authority that hold that a defendant is entitled to fair trial and is entitled to have multiple trials scheduled in the most advantageous way possible. Thus, even viewing the record in a light most favorable to the Defendant, the Defendant was given the opportunity to have speedy (but separate) trials on each charge with adequately prepared counsel, but he chose instead to seek a continuance in order to have the two charges tried together. The Defendant, therefore, fails to demonstrate that his right to a fair trial was in any way diminished, and his arguments, therefore,

must fail.

For all of these reasons the trial court did not abuse its discretion in denying the Defendant's Motion to Dismiss

C. THE TRIAL COURT DID NOT ERR IN FAILING TO GIVE A UNANIMITY INSTRUCTION BECAUSE THE DEFENDANT'S ACTS INVOLVED A CONTINUING COURSE OF CONDUCT AND BECAUSE EVEN IF THIS COURT WERE TO ARTIFICIALLY BREAK THE EVENTS AT ISSUE INTO SEPARATE, DISTINCT EVENTS, THE STATE CLEARLY ELECTED WHICH ACT IT WAS RELYING ON, FURTHER OBVIATING THE NEED FOR A PETRICH UNANIMITY INSTRUCTION.

The Defendant next claims that the trial court erred in refusing to give a unanimity instruction. App.'s Br. at 9. This claim is without merit because the Defendant's acts form a continuing course of criminal conduct.

A unanimity instruction is required where the evidence indicates that several distinct criminal acts have been committed, but the defendant is charged with only one count of criminal conduct. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). A jury unanimity instruction is not required, however, where the defendant's acts form a continuing course of criminal conduct. *State v. Crane*, 116 Wn.2d 315, 330, 804 P.2d 10 (1991). A defendant's acts should be evaluated in a 'common sense manner' to determine whether they form one continuing offense. *Petrich*, 101 Wn .2d at

571. Important factors to consider are whether the charged conduct occurred at different times and places or against different victims. *Petrich*, 101 Wn.2d at 571. Evidence that a defendant engaged in a series of acts intended to secure the same objective supports a finding that the defendant's conduct was a continuing course of conduct rather than several distinct acts. *See State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989); *State v. Campbell*, 69 Wn. App. 302, 311-13, 848 P.2d 1292 (1993).

The continuing course of conduct exception has been applied to multiple acts of assault over a two-hour time period, resulting in a fatal injury, *State v. Crane*, 116 Wn.2d 315, 330, 804 P.2d 10, *cert. denied*, 501 U.S. 1237, 111 S. Ct. 2867, 115 L. Ed. 2d 1033 (1991); to acts of assault occurring in one place, during a short period of time, by the same aggressor upon a single victim, in an attempt to secure sexual relations, *State v. Handran*, 113 Wn.2d at 17, 775 P.2d 453; to acts taken collectively which promote prostitution, *State v. Gooden*, 51 Wn. App. at 620, 754 P.2d 1000; and to acts of assault for the purpose of intimidating a witness, *United States v. Berardi*, 675 F.2d 894 (7th Cir.1982).

Although not cited by the Defendant, Division One of the Court of Appeals has, on at least one occasion, held that a unanimity instruction was required in a possession of a controlled substance case. *See State v. King*, 75 Wn. App. 899, 878 P.2d 466 (1994). Division One, however, has

subsequently backed away from this holding, distinguished it, and essentially limited the *King* decision to its facts. *See State v. Love*, 80 Wn. App. 357, 908 P.2d 395.

In *King*, the defendant was a passenger in a vehicle and when police stopped the vehicle, they found cocaine between the seats and in King's fanny pack. At his trial for a single count of possession, King argued that the police planted the cocaine in the fanny pack. *King*, 75 Wn. App. at 901-02. On appeal, he challenged the lack of a unanimity instruction, and Division One reversed. The court concluded that, rather than a continuing course of conduct, the evidence showed "two distinct instances of cocaine possession occurring at different times, in different places, and involving two different containers." *King*, 75 Wn. App. at 903. Furthermore, there was conflicting evidence on both instances of possession, and one instance was constructive although the other was actual. *King*, 75 Wn. App. at 903.

Approximately two years later, Division One reached a very different conclusion. In *Love*, the defendant was charged and convicted of possession with intent to distribute cocaine. *Love*, 80 Wn. App. at 358. While preparing to execute a search warrant on Love's house, the police stopped him and discovered five rocks of cocaine in his pocket. *Love*, 80 Wn. App. at 358-59. In searching Love's house, the police recovered forty additional rocks of cocaine, guns, a large sum of money, a scale, and packaging materials. *Love*,

80 Wn. App. at 359. On appeal, Love argued that the trial court erred in failing to give a unanimity instruction where the conviction could be based on the cocaine found in his home or his person. The court affirmed the conviction holding that the conviction was based on "substantial evidence of a continuing course of conduct involving an ongoing enterprise with a single objective." *Love*, 80 Wn. App. at 363.

In the present case, the Defendant admitted that he had used methamphetamine in his house earlier in the day. The Defendant's admission was corroborated by the fact that the officers found two pipes in the house with methamphetamine residue and by the fact that the Defendant knew the pipes were there. In short, the defendant's (corroborated) admission led to the reasonable conclusion that the defendant had earlier possessed methamphetamine that he ingested prior to the officer's arrival. The conviction in the present case, therefore, was based upon "substantial evidence of a continuing course of conduct involving an ongoing enterprise with a single objective;" namely, the Defendant's possession of methamphetamine earlier in the day at that moment in time immediately prior to his use of that methamphetamine.

In addition, a *Petrich* instruction is not needed if the State elects which acts it is relying on. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Election of a particular act may be established if the State's

closing argument, when considered with the jury instructions and the charging documents, makes it clear which act or acts the State is relying on for each charge and there is no possibility that the jury could have been confused as to which act related to which charge. *State v. Bland*, 71 Wn. App. 345, 352, 860 P.2d 1046 (1993) (State's closing argument clarifying the particular act for each count supported a conclusion that the State made an election).

In the present case the State never argued that the jury should convict the Defendant based on the fact that a particular pipe with methamphetamine residue was found in his house. Rather, the State's consistent position was that evidence showed the defendant was guilty because: (1) the Defendant admitted that he had consumed methamphetamine in his house that day; (2) this admission was credible; and, (3) this admission was corroborated by the existence of the two pipes. For instance, in closing argument, the State argued as follows.

> How do you know that Mr. DeLaCruz possessed methamphetamine on May 26? Through the most persuasive evidence that probably anyone could present: Mr. DeLaCruz admitting that he possessed methamphetamine.
>
> When he was asked by Detective Elton, he said, "I've been using methamphetamine. I've been using it for several days." He's using methamphetamine today. "I'm high right now."
>
> And if there's anyone that would know whether Mr. DeLaCruz possessed methamphetamine, it would be Mr.

DeLaCruz. Because at the moment that he got ahold of some methamphetamine and he decided to smoke it and ingest it, he has it for a purpose. He's exercised what we call dominion and control, and he's making a decision that he may well regret today. "I'm going to use this." And by making those decisions, he made himself accountable to a law that says you can't possess methamphetamine.

There's also the other evidence. When he was asked: "Is there any drug paraphernalia in your house?" He described, "Well, yeah, there's a couple of methamphetamine pipes." They found them.

When the officer looked at them, the police officer that's seen a number of people in his training and experience under the influence of methamphetamine, his behavior, his mannerisms, and his physical condition seemed to be a person, just like he said, he was under the influence of methamphetamine.

And then they went to the additional step, they sent those pipes off to the crime lab to find out: Is it really methamphetamine? Yeah. It really did contain methamphetamine. It appears to have been smoked in these very pipes.

I want to give you an analogy. Imagine a situation where a man promises his wife, "I'm not going to drink anymore." And this is an important promise to his wife.

He has to go on a business trip, and he goes with a fellow co-worker, they check into a hotel room, and they are there for a few days. And his wife, to surprise her husband, knocks on the door. And he is surprised to see her there. And she looks at him, and it appears to her that he's under the influence of alcohol.

She says to him, "Do you have some liquor bottles in that room?" You know it's not a comfortable thing to admit that you've wronged your spouse. He also would be more uncomfortable to lie about it, and willing to accept the fact. He said, "Yeah, there's a couple of gin bottles from the mini-bar sitting in the room. So the wife goes inside, she sees two empty gin bottles. Maybe the roommate says, "Ma'am, I bought the gin bottles. Those are my gin bottles."

> And she turns to her husband and says, "But did you drink from them?" And he says, Yeah, I did. I've been drinking for a few days, and I was drinking today. I'm sorry. I really did."
>
> Is there any doubt in your mind that the man's wife knows beyond a reasonable doubt that her husband possessed gin that day? If she came to you and asked the question: Do I really know? Just because he told me he had some gin; just because I could see him under the influence; just because he said I would find gin bottles and I did. Would you turn to her and say, "Well before you can know beyond a reasonable doubt you need to send those gin bottles off to a laboratory, and you need to have those gin bottles tested."
>
> The State's defense: No, you wouldn't have to do that. But the State did that, they sent the meth pipes off to be tested, and it is methamphetamine.
>
> Mr. DeLaCruz made a decision to use methamphetamine. You may thoroughly disapprove of that action. You may think: Doesn't harm me, we shouldn't be dragged into this courtroom to decide whether he used methamphetamine? You may be angry about it. I don't know, and ultimately, I don't need to care, because I know that you've been brought here not to issue some sort of referendum whether you like the drug laws or you like how they are enforced or anything like that. You are only here to decide that he possessed and he did.

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In the Defendant's closing argument he made a number of comments about the pipes, who the pipes belonged to, and where exactly they were found, but noted that the State's position was that these specifics didn't matter and that the State's position was, "These are facts that we don't need to know, because Mr. DeLaCruz admitted using methamphetamine earlier that day." RP 260. Thus, even the Defendant was aware that the State was

not arguing that the pipes, in and of themselves, constituted independent acts of possession of methamphetamine. Rather, as the Defendant pointed out to the jury, "the State ultimately is relying upon a statement that 'I used methamphetamine earlier today' as their proof." RP 263.

From the closing argument it is clear that the States election was clear to all involved, and that the State's position was that the defendant was guilty because, as he admitted, he had possessed methamphetamine earlier in the day immediately before he ingested the substance. The pipes with methamphetamine residue, as well as the officer's observations of the Defendant's person corroborated the Defendant's admission. The State never argues that the Defendant was guilty of possession simply due to the residue found, nor did the State ever argue that the Defendant was guilty because he possessed methamphetamine after he ingested it. Because the State elected which act it was relying on, no *Petrich* instruction was required.

The trial court, therefore, did not err in failing to give a *Petrich* instruction because the case involved a continuing course of conduct and because even if this court were to artificially break the events at issue into separate, distinct events, the State clearly elected which act it was relying on, further obviating the need for a *Petrich* instruction.

D. THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE THE DEFENDANT'S PROPOSED JURY INSTRUCTION BECAUSE THE INSTRUCTION DID NOT CORRECTLY STATE THE LAW AND WAS MISLEADING.

The Defendant next claims that the trial court erred in refusing to give a jury instruction limiting the definition of dominion and control. App.'s Br. at 11. This claim is without merit because the trial court did not err in refusing to give the Defendant's proposed instruction since the instruction did not accurately reflect the law and was misleading.

The trial court has considerable discretion in deciding how many instructions to give and how they are to be worded. *State v. Markham*, 40 Wn. App. 75, 86, 697 P.2d 263 (1985); *State v. Krup*, 36 Wn. App. 454, 461-62, 676 P.2d 507 (1984). Instructions are sufficient if they correctly state the law, are not misleading, and permit counsel to argue his or her theory of the case. *State v. Mark*, 94 Wn.2d 520, 526, 618 P.2d 73 (1980); *Krup*, 36 Wn. App. at 461-62. While the trial court in a criminal case is required to define technical words and expressions, it need not define words and expressions which are of common understanding, and the issue of whether words used in an instruction require further definition is necessarily a matter of judgment to be exercised by the trial court. *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986); *State v. Castro*, 32 Wn. App. 559, 564-65, 648 P.2d 485 (1982).

In the present case, the Defendant has not claimed that the instructions that were given the jury were inaccurate, misleading, or prevented him from arguing his theory of the case. Rather, the Defendant claims that his proposed instruction regarding dominion and control should have been given. App.'s Br. at 12-13. The Defendant's primary argument in this regard appears to be that the Defendant's admission that he had used methamphetamine earlier in the day was not relevant to the issue of possession and that prior use only shows passing control, not dominion and control. App.'s Br. at 13. The Defendant, however, understandably provides no authority for these claims, as Washington law does not support his arguments.

The primary error in the Defendant's logic is the claim that a suspect's admission that he or she had used a drug earlier in the day has no relevance regarding possession. While it is true that having a controlled substance in one's bloodstream does not show possession at that moment in time, this evidence is relevant to possession earlier in the day. Stated another was, while a defendant admission to law enforcement at 3:00 pm that he is under the influence of methamphetamine and last used the drug at 2:00 pm does not establish possession of the drug at 3:00, it is certainly relevant to show that the defendant possessed the drug at 2:00.

As the Defendant notes, his proposed instruction was taken from dicta

found in *State v. Hornaday*, 105 Wn.2d 120, 713 P.2d 71 (1986). App.'s Br. at 12. In *Hornaday*, however, the issues before the court was entirely different, as the charge was resisting arrest and the only concern was whether the arrest was lawful. *Hornaday*, 105 Wn.2d at 121-22. The defendant in *Hornaday* was a minor, and a police officer observed that the defendant appeared to be under the influence of alcohol. *Hornaday*, 105 Wn.2d at 122. While a minor in possession of alcohol is guilty of a misdemeanor, under the statute in effect at the time, a police officer could only arrest someone for a misdemeanor if it was committed in the presence of the officer. *See Hornaday*, 105 Wn.2d at 122-23, *citing* RCW 9A.76.040 and 10.31.100. The issue, therefore, was not whether the defendant had possessed alcohol earlier in the day, but whether the minor was actually in possession at the time he had contact with the officer. The court, therefore, held that the arrest was unlawful because having alcohol in one's stomach or bloodstream does not constitute possession. *Hornaday*, 105 Wn.2d at 129-31. The issue of whether the alcohol in the defendant's system was evidence of an earlier possession was not before the court, since the arrest was only lawful if the offense of possession occurred in the officer's actual presence.

Other Washington courts, however, have addressed this issue and have concluded that evidence of drugs or alcohol in defendant's system is evidence of an earlier possession. For instance, in *State v. Dalton*, 72 Wn.

App. 674, 675, 865 P.2d 575 (1994), the defendant was charged with minor in possession of alcohol after an officer contacted the defendant and observed that the defendant appeared to be intoxicated. The officer, however, did not see the defendant consume any alcohol, nor did he see any alcohol in the defendant's possession. *Dalton*, 72 Wn. App. at 675. On appeal, the defendant cited *Hornaday* and claimed that the evidence was insufficient because "circumstantial evidence of assimilation is not proof beyond a reasonable doubt" that the defendant had possessed alcohol. *Dalton*, 72 Wn. App. at 675. The court agreed that the presence of alcohol in one's system does not constitute possession per se because the person's power to control, possess, use or dispose of it ends upon assimilation. *Dalton*, 72 Wn. App. 676. The court, however, distinguished *Hornaday* and held that the evidence was sufficient to show a prior possession, stating,

> [E]vidence of assimilation is circumstantial evidence of prior possession. Although insufficient by itself to support a conviction, when combined with other corroborating evidence of sufficient probative value, evidence of assimilation can be sufficient to prove possession beyond a reasonable doubt.

Dalton, 72 Wn. App. at 676, *citing State v. Flinchpaugh*, 232 Kan. 831, 659 P.2d 208, 212 (1983); *Franklin v. State*, 8 Md.App. 134, 258 A.2d 767, 769 (1969) (evidence of drug use is circumstantial evidence of prior possession and sufficient to support conviction); *United States v. Blackston*, 940 F.2d

877, 888-91 (3d Cir.1991) (positive urine samples can be considered as circumstantial evidence of possession of a controlled substance). The court therefore held that the evidence was sufficient because the defendant appeared intoxicated, smelled of alcohol, and had come from a residence where a keg of beer was found. *Dalton*, 72 Wn. App. at 677.

The pipes in the present case, therefore, are similar to the keg of beer in the *Dalton* case. The issue is not whether the Defendant possessed the pipes or whether the defendant in *Dalton* possessed the keg of beer. Rather, the evidence that both defendants had used drugs or alcohol was circumstantial evidence of a prior possession and was corroborated by the fact that they came from residences where drug pipes or a keg of beer were found.

In the present case, the instruction proposed by the Defendant included a statement that "Evidence of a controlled substance after it is assimilated in a person's blood does not establish possession or control of that substance." CP 87. The trial court, therefore, did not err in refusing to give the instruction because this statement was not an accurate statement of the law and is misleading. While evidence of a controlled substance in a person's blood may not prove possession at that exact moment in time, this same evidence, pursuant to *Dalton*, is clearly "circumstantial evidence of prior possession." As the State argued below, the Defendant's admission that

he was high on methamphetamine and had consumed the drug in his residence, combined with the pipes (containing methamphetamine) found in that residence, was evidence that proved the Defendant had possessed methamphetamine.

The Defendant also claims that the fact that he "may have used methamphetamine earlier in the day is evidence of no more than passing control." App.'s Br. at 13. The only authority cited for this conclusion is a brief citation to a case holding that to establish possession the State must show more than "passing control." App.'s Br. at 12, *citing State v. Staley*, 123 Wn.2d 794, 872 P.2d 502 (1994). The Defendant, however, cites no authority for the proposition that possession with an intention to use the drug, followed by the actual use of the drug, is mere "passing control."

In *Staley*, the court discussed that in order to understand passing control it was important to examine the facts of the leading case in this regard, *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). *Staley*, 123 Wn. 2d at 800. As the *Staley* court noted, in *Callahan*, the defendant was merely a visitor to the houseboat where drugs were found, but had admitted to police that he had handled the drugs. The court found that the fact that the defendant had handled the drugs earlier was not sufficient for a charge of actual possession since possession entails actual control, not a passing control which is only a momentary handling, and this evidence was insufficient to

show constructive possession because proof of mere proximity to the drugs and an earlier momentary handling did not establish dominion and control over the drugs. *Staley*, 123 Wn. 2d at 800-01, *citing Callahan*, 77 Wn.2d at 29-31.

The facts in *Callahan*, however, are distinguishable from the present case because the Defendant in the case at bar actually used the drugs, thereby demonstrating dominion and control over the drugs, whereas there was no such evidence in *Callahan*. Mere handling of drugs that belong to another, therefore, must be distinguished by handling that precedes the exercise of unquestionable dominion and control over the substance evidenced by the actual use of that quantity of drugs. As the *Staley* court noted, "[d]epending on the total situation, a 'momentary handling,' along with other sufficient indicia of control over the drugs, may actually support a finding of possession." *Staley*, 123 Wn.2d at 802, *citing State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). As the Defendant has failed to cite any authority for the claim that handling of drugs followed by the actual consumption of a controlled substance qualifies as "passing control," his citations to *Staley* are misplaced.

In conclusion, the Defendant's proposed instruction that stated that, "Evidence of a controlled substance after it is assimilated in a person's blood does not establish possession or control of that substance," was not an

accurate statement of the law, or was, at the least, misleading because under Washington law evidence of assimilation is circumstantial evidence of prior possession. *Dalton*, 72 Wn. App. at 676. For all of these reasons, the trial court did not err in refusing to give the Defendant's proposed instruction since the instruction did not accurately reflect the law and was misleading. The Defendant's arguments to the contrary, therefore, must fail.

IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED June 18, 2007.

Respectfully submitted,

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