

NO. 46952-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

SANDRA LEE JOHNSTON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON

Superior Court No. 14-1-00218-0

BRIEF OF RESPONDENT

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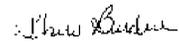
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I. COUNTERSTATEMENT OF THE ISSUES

1. Did the Court abuse its discretion when it excluded evidence which was not material to a fact at issue?

2. Did the Court deprive the defendant of her Constitutional right to present a defense when it excluded irrelevant evidence?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Sandra Lee Johnston was charged by amended information filed in Kitsap County Superior Court with two counts of possession of a controlled substance, morphine and hydromorphone, respectively. CP 8-11. A jury convicted the Defendant of both counts. CP 34-45. The Defendant now appeals this verdict.

B. FACTS

On December 11, 2013, the Defendant reported to Community Corrections Officer Holly Sinn at her Bremerton Field Office. RP (10/15-16) 35-37. The Defendant brought with her a bag, which was searched by Officer Sinn, who discovered it contained pills. *Id.* at 37. The pills were later tested at the Washington State Patrol Crime Lab and determined to contain morphine and hydromorphone. *Id.* at 44, 50-51.

The Defendant's fiancé, Steve Kingston, testified that he had been living with the Defendant in the basement of a shared home for close to

two months in December 2013. *Id.* at 85-87. He testified that the room was cluttered and that the previous resident had left some things behind when she moved out. *Id.* at 97. He also testified that on December 3, he and the Defendant moved and that at the time of moving, they were in a hurry to get to the Defendant's DOC meeting. *Id.* at 98.

Yvonne Burdwood then testified that she had been living in the same home with her friend, Rhonda Goans. *Id.* at 119-120. Ms. Goans lived in the cluttered basement until she fell ill, and Ms. Burdwood moved her upstairs to better care for her. *Id.* In caring for her, Ms. Burdwood testified she would on occasion administer pills. *Id.* When the Defendant and Mr. Kingston moved out, Ms. Burdwood testified it was chaotic. *Id.* at 121.

The Defendant testified that they moved out in two hours and that she just swept everything off of some shelves into her purse. *Id.* at 129. She testified that she had no clue that the pills were in her purse when it was searched by Officer Sinn. *Id.* at 130. She testified that she had an obligation to report to DOC and that she knew ahead of time that she and her possessions would be subject to search. *Id.* at 125-26, 130. The Defendant also testified that she had previously been convicted of crimes of dishonesty including two separate incidences of theft in the third degree and one charge of making a false statement to a public official. *Id.* at 26.

The Defendant sought to enter testimony that she was allergic to Morphine, namely that she reacted to it with a rash, *Id.* at 63, but the Court excluded this testimony, finding that there was no relevance to the actual possession of the drug, since the likelihood of using the drug is different than the likelihood of possessing it. *Id.* at 106.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BECAUSE THE PROFFERED EVIDENCE WAS NOT PROBATIVE OF A FACT IN ISSUE.

Johnston argues that the trial court abused its discretion when it suppressed evidence of her morphine allergy, holding that it was irrelevant to her defense of unwitting possession. This claim is without merit because the proffered evidence would not have been probative of a fact in issue, namely whether the defendant had actual knowledge of her possession, and therefore the suppression was not an abuse of discretion. Even if it was an abuse of discretion, its admission would not have been likely to materially affect the outcome, and therefore, would not warrant reversal.

Admission or exclusion of evidence by the trial court is within the discretion of the trial court, and should be reversed only in the event of abuse of that discretion. *Hizey v. Carpenter*, 119 Wn.2d 251, 268, 830

P.2d 646 (1992). A trial court abuses its discretion when the ruling is manifestly unreasonable or based on untenable grounds such that no reasonable person would take the position adopted. *State v. Lord*, 117 Wn.2d 829, 870, 822 P.2d 177 (1991). It is within the trial court's discretion to exclude evidence that is not probative of a fact in issue. ER 401; ER 402; *State v. Stubbsjoen*, 48 Wn. App. 139, 147, 738 P.2d 306 (1987).

In a prosecution for unlawful possession, once the State has presented prima facie evidence of the nature of the substance and the fact of possession by the defendant, the defendant may affirmatively assert that her possession was unwitting. *State v. Pierce*, 134 Wn. App. 763, 774, 142 P.3d 610 (2006). The defense of unwitting possession may be supported by a showing that the defendant did not know she was in possession of the controlled substance, or that she did not know the nature of the substance she possessed. *State v. Staley*, 123 Wn.2d 794, 505, 872 P.2d 502 (1994). Because this defense puts at issue the defendant's knowledge, "the universe of relevant evidence expands" and can potentially include character evidence when offered to prove intent to possess. *City of Kennewick v. Day*, 142 Wn.2d 1, 10-12, 11 P.3d 304 (2000); *State v. Hall*, 41 Wn.2d 446, 451, 249 P.2d 769 (1952).

The *Kennewick* case analyzed whether evidence of a defendant's

reputation for sobriety was relevant to the charges of possession of marijuana and possession of drug paraphernalia. *Kennewick*, 142 Wn.2d at 6-7. The Court held that the evidence would be relevant to the charge of possession of drug paraphernalia, because the elements of the crime required the State to show that the defendant used or intended to use the paraphernalia. *Kennewick*, 142 Wn.2d at 7-8. The Court stated explicitly in its reasoning that “more than mere possession was at issue here.” *Id.*

In analyzing the relevance of the proffered evidence to the charge of simple possession, the Court recognized the lack of precedent due to the fact that only Washington and North Dakota had adopted the unwitting possession defense. *Kennewick*, 142 Wn.2d at 10-15. The Court explained that the “City’s argument that ‘use’ is not relevant to ‘possession’ is persuasive when applied to the possession of marijuana charge.” *Kennewick*, 142 Wn.2d at 9. However, it was not able to ultimately answer the question because the trial court did not analyze the elements of the asserted unwitting possession defense. The Court held that an effective determination of the defendant’s evidentiary request was not made and reversed because the trial court’s determination was therefore based on an incomplete analysis of the law. *Kennewick*, 142 Wn.2d at 14-15.

In this case, the charges in question are those of mere possession.

Unlike in *Kennewick*, the court here addressed directly the relevance of the

Defendant's purported morphine allergy to the issue of her knowledge arising from the claim of unwitting possession. The court found that "whether or not there's an allergy doesn't really play into the actual possession aspect of it. The likelihood of use is different than possession". RP (10/15-16) 106. This is in accord with the *Kennewick* court's assertion that "the City's argument that 'use' is not relevant to 'possession' is persuasive". *Kennewick*, 142 Wn.2d at 9. As the State argued, there are many motives a defendant may have for possessing a controlled substance other than personal use. The question is whether the Defendant knew she possessed the drug, the reason for her possession is not an element of any crime or defense.

Although *Kennewick* addresses proffered character evidence, and the Defendant explicitly stated that the evidence of the allergy was not being offered as character evidence, RP (10/15-16) at 65, the question of relevance to the issue of knowledge is the same. Since the Washington State Supreme Court acknowledged the persuasiveness of the rationale adopted and the trial court's decision was based on a complete analysis of the applicable law in this case, the trial court did not abuse its discretion in excluding the evidence of the morphine allergy. Therefore the case should be affirmed.

Even if an evidentiary ruling is held to be a manifest abuse of

discretion, reversal is only required if the error, within reasonable probability, materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). The error is harmless if the evidence is of minor significance compared to the overall evidence as a whole. *State v. Bourgeois*, 133 Wn.2d, 389, 403, 945 P.2d 1120 (1997).

Here, even if the Court would find that there was an abuse of discretion, the case should be affirmed because it is unlikely that admission of the evidence would have materially affected the outcome of the trial. The Defendant in this case was allowed to testify that she knew upon reporting to DOC that she and her possessions would be subject to search. Based on this testimony, the jury could have found that the Defendant had sufficient disincentive to intentionally bring a controlled substance in her purse. Certainly, this strong disincentive would have been more persuasive than the lack of incentive to possess for her own consumption that the Defense sought to prove. Furthermore, the Defendant's own testimony that she had previously lied to a public official and been convicted twice of other crimes of dishonesty would have been very likely to negatively affect the credibility of her claim of an allergy.

B. THE DEFENDANT WAS NOT DEPRIVED ON HER RIGHT TO PRESENT A DEFENSE BECAUSE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ADMIT IRRELEVANT EVIDENCE.

Johnston next claims that she was deprived of her constitutional right to due process because the exclusion of evidence of her alleged morphine allergy greatly diminished her ability to present her defense. Appellant's Brief, at 14. This claim is without merit because a defendant is not entitled to present evidence that is not probative of a fact in issue. Even if the Court would find that the exclusion was in error, it was harmless error, and therefore, would not warrant reversal.

The Sixth Amendment to the United States Constitution and Article 1, Section 22 of the Washington State Constitution grant criminal defendants the right to present testimony in their defense. *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983). However, this right is not absolute. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). A criminal defendant has no right, constitutional or otherwise, to have irrelevant evidence admitted in his defense. *Maupin*, 128 Wn.2d at 924; *State v. Weaville*, 162 Wn. App. 801, 256 P.3d 426, *review denied* 173 Wn.2d 1004 (2011). And the admission or refusal of evidence lies largely within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Stubsjoen*, 48 Wn. App. at 147.

Because the trial court did not abuse its discretion in refusing to admit evidence of the defendant's alleged morphine allergy for the reasons discussed above, the Defendant's right to present a defense was not prejudiced. The defense theory was that the Defendant did not know that the pills were in her purse when she presented it to be searched by Officer Sinn. They supported this claim with direct testimony to that fact, and the fact that the Defendant knew that her purse was going to be searched, implying that she would not have handed it over so easily if she had known there were drugs in it. That testimony relates directly to the issue of whether the defendant knew she possessed the drugs. The jury did not find this theory convincing.

Even if error is to be found, "it is the well established law of this state that even constitutional errors may be so insignificant as to be harmless." *Maupin*, 128 Wn.2d at 928, *citing State v. Hoffman*, 116 Wn.2d 51, 96-97, 804 P.2d 577 (1991). Violation of a defendant's constitutional right to compulsory process is assumed to be prejudicial, but and the State has the burden of showing the error was harmless. *State v. Burri*, 87 Wn.2d 175, 181-2, 550 P.2d 507 (1976). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

The Defendant's proffered testimony would not have established a new or different theory, it was only offered to support the theory that was in fact presented—that she did not know the pills were in her purse. However, evidence of her alleged allergy would not have supported her claim of lack of knowledge as to the existence of the pills, but would have established a new claim that she would have lacked a motive to *use* the drugs. Because the matter at issue was knowledge, not motive or intent to use, this evidence was not probative. The Defendant was able to present her intended theory, the court merely precluded the use of inadmissible evidence.

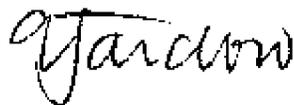
The jury was satisfied beyond a reasonable doubt that the defendant knew she possessed the drugs that were found in her purse, despite her testimony to the contrary and evidence of a strong disincentive for her to have done so. Therefore, the Court should be satisfied beyond a reasonable doubt that introduction of evidence which did not disprove the status of her knowledge would not have caused a reasonable jury to reach a different conclusion. Therefore, even if the Court should find that the Defendant should have been able to argue the relevance of the alleged allergy, the case should not be reversed.

IV. CONCLUSION

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

DATED August 31, 2015.

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