

66244-9

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NO. 66244-9-1

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID FERNANDEZ.

Appellant.

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

The Honorable Vickie I. Churchill, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred when it refused to instruct jurors on an unwitting possession defense.

Issue Pertaining to Assignment of Error

The evidence supporting an unwitting possession instruction is viewed in the light most favorable to the defendant. Where the evidence showed appellant did not know there was methamphetamine in his pocket did the court err in failing to instruct the jury on unwitting possession?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Island County Prosecutor's Office charged David Fernandez with one count of possessing methamphetamine, in violation of RCW 69.50.4013, and one count of resisting arrest, in violation of RCW 9A.76.040(1). CP 77-78.

A jury found Fernandez guilty of the possession charge but he was acquitted of the resisting arrest charge. CP 47-48. Based on an offender score of 0, Fernandez was given a standard range sentence of 5 months. CP 37-46.

2. Substantive Facts¹

On November 2, 2009 police went to Fernandez's home in response to a call that there was a disturbance. RP 45-47, 51. Police met Fernandez outside the house. He told them he and his wife had an argument and she locked him out of the house. RP 52-53.

Police had Fernandez climb through a window and let them inside the house. After they spoke with Fernandez's wife, Fernandez was arrested and searched. RP 54, 56. In the inside left pocket of his jacket was a zipped pouch. RP 56. Inside the pouch was Fernandez's driver's license, some phone cards, \$278 in cash and two zip lock baggies containing a white substance that was later tested and determined to be methamphetamine. RP 58, 86.

Island County Deputy Sheriff Darren Crownover testified he asked Fernandez about the pouch and Fernandez told him it had been in his wife's possession and he did not know what was inside. RP 62. Crownover said he then asked Fernandez about the white substance in the baggies and Fernandez allegedly told him it was methamphetamine and was his (Fernandez's). Id.

On cross examination Crownover said Fernandez told him there was another person at the scene. Somebody called Dusty. RP 65-66.

¹ RP refers to the Verbatim Report of Proceedings for November 3rd and 4th, 2010, which are sequentially numbered.

Crownover admitted in his report and in his probable cause statement. he wrote: “Later, when I asked Fernandez about Dusty, he told me that the substance, methamphetamine, was his and that he had recently relapsed.” RP 67, 70. Crownover admitted his report and probable cause statement were confusing and were different than his testimony that Fernandez said the drugs were his. RP 66-67.

C. ARGUMENT

THE TRIAL COURT ERRED IN REFUSING TO GIVE AN UNWITTING POSSESSION INSTRUCTION.

In a criminal case, the defense is entitled to have the jury instructed on its theory of the case, where the evidence supports that theory. State v. Williams, 132 Wn.2d 248, 259-260, 937 P.2d 1052 (1997); State v. Birdwell, 6 Wn.App. 284, 297, 492 P.2d 249, review denied, 80 Wn.2d 1009 (1972); State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). Refusal to give a requested jury instruction is reversible error when the absence of the instruction prevents the accused from presenting his theory of the case and where there is factual support for the instruction. State v. May, 100 Wn.App. 478, 482, 997 P.2d 956 (2000), review denied, 142 Wn.2d 1004 (2000); Birdwell, 6 Wn.App. at 297; Williams, 132 Wn.2d at 260.

When determining if the evidence was sufficient to support a requested instruction, the appellate court must view the supporting evidence in the light most favorable to the party requesting the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000); State v. Hanson, 59 Wn.App. 651, 656, 800 P.2d 1124 (1990). And, it does not matter which party presents the evidence. Fernandez-Medina, 141 Wn.2d at 456; State v. Olinger, 130 Wn.App. 22, 26, 121 P.3d 724 (2005).

Under RCW 69.50.4013, "[i]t is unlawful for any person to possess a controlled substance." The statute prohibits the possession of any amount of a controlled substance, no matter how small. State v. Malone, 72 Wn.App. 429, 439-440, 864 P.2d 990 (1994).

Once the State establishes prima facie evidence of possession, the defendant may assert that he had unwitting possession of the drug. State v. Staley, 123 Wash.2d 794, 799, 872 P.2d 502 (1994). "Unwitting possession is a judicially created affirmative defense that may excuse the defendant's behavior, notwithstanding the defendant's violation of the letter of the statute." State v. Balzer, 91 Wn.App. 44, 67, 954 P.2d 931, review denied, 136 Wn.2d 1022 (1998). "To establish the defense, the defendant must prove, by a preponderance of the evidence, that his or possession of the unlawful substance was unwitting." Balzer, 91 Wn.App.

at 67; State v. Buford, 93 Wn.App. 149, 153, 967 P.2d 548 (1998). A showing the defendant did not know he was in possession of the controlled substance supports the defense of unwitting possession. Staley, 123 Wn.2d at 799. Thus, a defendant is entitled to an instruction on unwitting possession if the evidence, viewed favorably for the defendant, could convince a reasonable juror that, more likely than not, the defendant did not know he possessed the prohibited substance. Buford, 93 Wn. App. at 149; Hanson, 59 Wn.App. at 656.

Fernandez requested an unwitting possession instruction. RP 113-114; CP 70-71.² The court denied the request. RP 114. The evidence supported the requested instruction.

Crownover testified that Fernandez told him his wife had the pouch earlier and he did not know what was in the pouch. He further testified shortly after he spoke with Fernandez he wrote in his report “when I asked Fernandez about Dusty, he told me that the substance.

² The proposed instruction is identical to WPIC 52.02 and reads:

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 or her 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. CP 70-71.

methamphetamine, was his and that he had recently relapsed.” RP 67, 70. A fair and logical interpretation of Crownover’s testimony is that at the time Crownover spoke with Fernandez, Fernandez told Crownover he did not know what was in the pouch and when confronted with the drugs he believed they belonged to Dusty and that Dusty had relapsed.

Although Crownover also testified at trial that he remembered Fernandez actually told him the drugs were his (Fernandez’s), he admitted his testimony was different than what he wrote in his report (RP 67). The court did not limit the jury’s consideration of Crownover’s testimony or his written statement for any particular purpose so it was substantive evidence. See, State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 110 (1997) (absent a request for a limiting instruction, evidence admitted as relevant for one purpose is deemed relevant for other purposes, citing Lockwood v. AC & S, Inc., 109 Wn.2d 235, 255, 744 P.2d 605 (1987)).

Moreover, Crownover was the only witness to testify that Fernandez resisted arrested. RP 55. The jury’s verdict acquitting Fernandez of that offense supports an inference the jury did not find Crownover’s trial testimony completely credible. It could have likewise found the statement in Crownover’s report, written the day of the incident and a year earlier (RP 64), was more accurate than his memory at trial and that Fernandez told Crownover the drugs belonged to Dusty as Crownover

wrote in his contemporaneous report. But, without an unwitting possession instruction Fernandez was unable to argue it was a defense that Fernandez's wife had the pouch earlier, he did not know what she may have put in the pouch and that when confronted with the drugs he believed they belonged to Dusty who was at the scene earlier. The jury had little choice but to convict Fernandez of possession of the drugs found in his jacket. See, CP 60 (Court's Instruction 9 "Possession means having a substance in one's custody and control.").

Based on Crownover's testimony, along with Fernandez's statement that his wife had the pouch earlier and he did not know what was in it, a reasonable juror could have concluded that it was more likely than not that the drugs belonged to a Dusty and Fernandez was unaware they had been placed in his pouch. Thus, the court erred in failing to instruct the jury on the defense of unwitting possession and Fernandez's conviction should be reversed.

D. CONCLUSION

Fernandez was entitled to an instruction on unwitting possession. His conviction should be reversed and he should be afforded an opportunity to present his defense to a jury.

DATED this 24 day of March, 2011

Respectfully submitted,

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