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66244-9

NO. 66244-9-I

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

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STATE OF WASHINGTON,

Respondent,

v.

DAVID FERNANDEZ,

Appellant.

RECEIVED  
APPELLATE DIVISION  
JAN 11 2009

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

The Honorable Vickie I. Churchill, Judge  
Superior Court Cause No. 09-1-00252-6

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BRIEF OF RESPONDENT

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

A. Whether the trial court properly exercised its discretion in finding an insufficient factual basis for providing the appellant's proposed affirmative defense jury instruction.

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

### **A. Substantive Facts**

Island County Sheriff's Deputy Darren Crownover responded to the appellant's home on November 2, 2009 based on a report of possible shots fired. RP 51. When he arrived at the scene, Dep. Crownover contacted the appellant and learned the appellant and his wife were in an argument and his wife had locked him out of the house. RP 52-53. Following an investigation, Dep. Crownover arrested the appellant for assault in the fourth degree. RP 54. The appellant resisted the arrest, requiring three men to get him under enough control to place him in handcuffs. RP 55.

Deputy Crownover searched the appellant incident to arrest and found a green, zippered pouch inside the left inside pocket of his jacket. RP 56. Inside the pouch, Dep. Crownover found several items, including the appellant's Washington State Driver's License, some phone SIM cards, \$278 in cash, and two small zip-locked bags with a white substance

inside. RP 58-59. The appellant initially claimed the bag had been in his wife's possession; however, he later admitted the bag was his and the white substance inside the baggies was methamphetamine. RP 62. Testing by the Washington State Patrol Crime Laboratory later confirmed appellant's identification of the substance as methamphetamine. RP 86.

**B. Statement of Procedural History**

The appellant was charged with possession of methamphetamine, assault in the fourth degree (domestic violence), and resisting arrest. CP 83-85. The charge of assault in the fourth degree was dismissed upon the State's motion prior to trial. RP 22, CP 77-78.

During trial, the appellant proposed a jury instruction defining the affirmative defense of unwitting possession. RP 88; CP 70-71. The trial court declined to provide that instruction, finding, "there's absolutely nothing that indicates that [the appellant] was unaware that [the methamphetamine] was in his possession." RP 114. The appellant was convicted of the charge of possession of methamphetamine and acquitted of the charge of resisting arrest. RP 170, CP 47-48.

The appellant now timely appeals. CP 35-36.

### III. ARGUMENT

#### A. Standard of Review

The standard of review applied to a trial court's refusal to grant jury instructions depends on whether the decision was based upon a matter of law or fact. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). A trial court's refusal to give instructions to a jury, when based on a factual dispute, is reviewable only for abuse of discretion. *Id.* at 772. An abuse of discretion exists when the trial court's decision is exercised on untenable grounds or for untenable reasons. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

#### B. **The trial court correctly declined to provide an unwitting possession jury instruction because insufficient evidence was offered to support that defense.**

The appellant's conviction should be affirmed because he did not provide sufficient evidence to allow provision of instruction on his claimed affirmative defense. While a defendant is entitled to jury instructions allowing him to argue his case theory, those instructions must be supported by sufficient evidence. *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003); *State v. Janes*, 121 Wn.2d 220, 236-37, 850 P.2d 495 (1993). While the evidence should be reviewed in the light most favorable to the party proposing a jury instruction, that evidence must

affirmatively establish the appellant's theory of the case. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). It is not enough that the jury may disbelieve the evidence pointing to guilt. *Id.* at 456. In this case, the trial court did not abuse its discretion in finding there was not a sufficient factual basis to provide an unwitting possession instruction.

With few exceptions, it is unlawful for a person to possess a controlled substance. RCW 69.50.4013(1). A defendant may raise an affirmative defense of unwitting possession by showing that he did not know he was in possession of the substance or that he did not know the nature of the substance he possessed. *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994). Unwitting possession is an affirmative defense that must be proved by a defendant by a preponderance of the evidence. *State v. Bradshaw*, 152 Wn.2d 528, 537-38, 98 P.3d 1190 (2004); *State v. Balzer*, 91 Wn.App. 44, 67, 954 P.2d 931 (Div. 2, 1998). However, a defendant is not entitled to an instruction for unwitting possession unless the evidence provided at trial is sufficient to permit a reasonable juror to find, by a preponderance of the evidence, that he possessed the contraband unwittingly. *State v. Buford*, 93 Wn.App. 149, 152, 967 P.2d 548 (Div. 1, 1998). The trial court did not abuse its discretion in this case because the

evidence produced at trial did not permit a reasonable juror to find the appellant possessed methamphetamine unwittingly.

The State provided undisputed evidence that the appellant was arrested by Deputy Crownover following his investigation November 2, 2009. RP 54. Dep. Crownover searched the appellant incident to the arrest and found a green, zippered pouch in his inside jacket pocket. RP 56. That pouch contained cash, phone SIM cards, the appellant's driver's license, and two bags with a white substance inside. RP 58. The appellant initially claimed the bag was in his wife's possession, but later admitted the bag was his and he identified the white substance as methamphetamine. RP 62. The substance was later tested and confirmed to be methamphetamine. RP 86. That evidence clearly showed the appellant knowingly possessed methamphetamine.

Although the appellant attempted to use Dep. Crownover's written report to shift blame to a third party, that attempt did not provide sufficient evidence to support an unwitting possession instruction. Dep. Crownover testified that the appellant identified the white substance as methamphetamine and admitted it was his. RP 62. On cross-examination, defense counsel attempted to use Dep. Crownover's written report to suggest the appellant's statement identified another person as the owner of

the methamphetamine. RP 65.<sup>1</sup> However, Dep. Crownover repeatedly testified that the appellant was referring to himself and not to any other person. See RP 65 (“his” referred to Mr. Fernandez), RP 66 (Mr. Fernandez was referring to himself), RP 68 (“his” meant belonging to Mr. Fernandez and “he” meant Mr. Fernandez), RP 72-73 (terms “his” and “he” were referring to Mr. Fernandez).

The trial court did not abuse its discretion in declining to provide the appellant’s proposed instruction because the evidence produced at trial did not permit a reasonable juror to find that the appellant’s possession of methamphetamine was unwitting. The State’s evidence clearly showed the defendant knowingly possessed methamphetamine. The drugs were found, along with the appellant’s driver’s license, in a pouch in the inside pocket of the appellant’s jacket. The appellant identified the substance as methamphetamine and confessed that it was his.

The appellant provided no evidence to contradict State’s clear evidence of his knowing possession. He attempted to use Dep. Crownover’s written report to link the drugs to a third party. However, Dep. Crownover, while admitting his report was poorly worded, consistently and repeatedly testified that the appellant’s statement referred

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<sup>1</sup> The passage in question from Deputy Crownover’s report stated, “Later when I asked Fernandez about Dusty, he told me that the substance, methamphetamine, was his and that he had recently relapsed,” RP 67.

to the appellant and not to a third party. The appellant provided no further evidence that suggested he did not know the drugs were in his jacket pocket, next to his identification card. Thus, no affirmative evidence was produced that could have allowed a reasonable juror to find the appellant's possession of methamphetamine was unwitting.

The trial court did not abuse its discretion by declining to provide the appellant's proposed unwitting possession jury instruction. No evidence was presented during the trial that could affirmatively establish a theory that the appellant did not know the methamphetamine, found in his inside jacket pocket and next to his driver's license, was in his possession. Therefore, an instruction on unwitting possession was not supported by sufficient evidence. This Court should, therefore, affirm the appellant's conviction.

Respectfully submitted this 18th day of May, 2011.

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