IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DAVID MENDEZ FERNANDEZ, Appellant.	))))))))))	DIVISION ONE No. 66244-9-I UNPUBLISHED OPINION FILED: March 5, 2012

Dwyer, C.J. — David Fernandez was charged with possession of a controlled substance after a police officer searching Fernandez incident to arrest discovered methamphetamine in his jacket. The officer testified at trial that Fernandez told him that the methamphetamine belonged to Fernandez. Fernandez was convicted on that charge.

Fernandez now appeals his conviction, contending that the trial court erred by declining to instruct the jury regarding the defense of unwitting possession. Because Fernandez presented no evidence that he was unaware that he was in possession of the controlled substance, the trial court did not err by declining to issue the requested instruction. Accordingly, we affirm.

I

On November 2, 2009, Island County Sheriff's Deputy Darren Crownover

responded to a call reporting a disturbance at Fernandez's home. Fernandez was thereafter arrested. Deputy Crownover searched Fernandez incident to the arrest and found two plastic bags containing a white substance in a zippered pocket inside Fernandez's jacket.

In his probable cause report, Deputy Crownover noted that Fernandez told him that another person, named Dusty, had earlier been present at the scene. Deputy Crownover further stated in his report: "I asked Fernandez about the white powder. Initially Fernandez told me that [his wife] had the green bag earlier and he did not know that was in there. Later when I was asked [*sic*] Fernandez about 'Dusty' he told me that the substance 'methamphetamine' was his and that he had recently relapsed." Clerk's Papers at 81. Testing later confirmed that the substance was methamphetamine. Fernandez was thereafter charged with possession of a controlled substance.

At trial, Deputy Crownover testified—consistent with his probable cause report—that Fernandez had initially stated that the bag was in his wife's possession and that Fernandez was not aware of the contents of the bag. Deputy Crownover further testified that Fernandez, when later questioned about the contents of the bag, stated that it was methamphetamine, "[t]hat it was his," and "that he had recently relapsed." Report of Proceedings (RP) (Nov. 3, 2010) at 62.

During cross-examination, defense counsel questioned whether Deputy

Crownover had intended in his report to state that Fernandez told him that the methamphetamine was Dusty's, not Fernandez's, and that it was Dusty, rather than Fernandez, who had relapsed. Although Deputy Crownover admitted that his report may have been confusing, he affirmed that Fernandez had told him that the methamphetamine belonged to Fernandez, not to Dusty. Thus, Deputy Crownover testified, he intended his report to state the facts as such. Deputy Crownover reiterated multiple times during his testimony that the report was intended to convey that Fernandez stated that the methamphetamine belonged to Fernandez.

Fernandez requested that the trial court instruct the jury regarding the defense of unwitting possession, based upon the ambiguous statement in Deputy Crownover's probable cause report regarding to whom Fernandez said the methamphetamine belonged. The trial court denied Fernandez's request, stating: "Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession. And there's absolutely nothing that indicates that [Fernandez] was unaware that it was in his possession." RP (Nov. 4, 2010) at 114.

The jury convicted Fernandez of possession of a controlled substance. The trial court sentenced Fernandez to five months of incarceration.

Fernandez appeals.

II

Fernandez contends that the trial court erred by declining to instruct the jury regarding the defense of unwitting possession. Because no evidence was presented at trial supporting such a theory of the case, we disagree.

A party is entitled to have the jury instructed on its theory of the case only where there is evidence to support that theory. State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997). Thus, "a criminal defendant is not entitled to an unwitting possession instruction unless the evidence presented at trial is sufficient to permit a reasonable juror to find, by a preponderance of the evidence, that the defendant unwittingly possessed the contraband." State v. Buford, 93 Wn. App. 149, 153, 967 P.2d 548 (1998). We review de novo a trial court's refusal to grant a jury instruction based upon a ruling of law; however, where the refusal to grant an instruction is based upon a matter of fact, our review is only for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

To establish the defense of unwitting possession, the defendant must demonstrate either that he did not know that he was in possession of the controlled substance or that he did not know the nature of the substance. State v. Staley, 123 Wn.2d 794, 799, 872 P.2d 502 (1994); State v. Balzer, 91 Wn. App. 44, 67, 954 P.2d 931 (1998). Fernandez does not contend that he was unaware that the white substance contained in the bags in his jacket pocket was methamphetamine. Thus, Fernandez was entitled to have the jury instructed

regarding the defense of unwitting possession only if there was evidence at trial that Fernandez did not know that the methamphetamine was in his possession.

Fernandez asserts that he was entitled to an unwitting possession instruction based upon Deputy Crownover's trial testimony regarding the ambiguous language in his probable cause statement. However, Deputy Crownover repeatedly testified that, when he wrote that "he told me that the [methamphetamine] was his and that he had recently relapsed," Deputy Crownover intended the words "he" and "his" to refer to Fernandez. Fernandez told him, Deputy Crownover testified, that the methamphetamine belonged to Fernandez—not to some other third party. Based upon this testimony, the trial court did not abuse its discretion by ruling that the evidence presented at trial was not sufficient to permit a reasonable juror to find that Fernandez unwittingly possessed the methamphetamine. See Buford, 93 Wn. App. at 153.

Moreover, as the trial court recognized, even had Fernandez told Deputy Crownover that the methamphetamine belonged to another person, such evidence does not demonstrate that Fernandez was unaware that the contraband was in his possession. "The defense of 'unwitting' possession may be supported by a showing that the defendant did not know he was in possession of the controlled substance." Staley, 123 Wn.2d at 799. Even had the methamphetamine belonged to someone other than Fernandez, there is no evidence to indicate that Fernandez did not know that the controlled substance

was in his possession. Therefore, the trial court correctly concluded that "there's absolutely nothing that indicates that [Fernandez] was unaware that [the methamphetamine] was in his possession," and properly denied Fernandez's request for an unwitting possession instruction.[1]

The trial court did not abuse its discretion in determining that no evidence indicated that Fernandez unwittingly possessed the methamphetamine. Accordingly, an instruction regarding such a defense was not warranted, and the trial court did not err by declining to so instruct the jury.

Affirmed.

[1] Fernandez contends that, because the trial court did not limit the jury's consideration of the statements in Deputy Crownover's probable cause report, which was admitted into evidence, the jury could consider those statements as substantive evidence that Fernandez told Deputy Crownover that the methamphetamine belonged to Dusty—rather than simply as impeachment evidence against Deputy Crownover. Fernandez is correct that "absent a request for a limiting instruction, evidence admitted as relevant for one purpose is deemed relevant for others." State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). Here, however, because the trial court declined to instruct the jury regarding the defense of unwitting possession, there was no reason for the State to request such a limiting instruction; the question of whether Fernandez unwittingly possessed the controlled substance was not before the jury.

Only had the trial court seriously entertained granting Fernandez's request to instruct the jury on unwitting possession would it have been necessary for the State to request an instruction limiting the jury's consideration of the written report. Such a limiting instruction would have been warranted either because the statement made by Deputy Crownover in the report was not testimony given under oath "at a trial, hearing, or other proceeding, or in a deposition," or because the statement made by Fernandez—construed in the manner favored by Fernandez—would be exculpatory and, thus, would not constitute an admission by a party-opponent. See ER 801(d)(1), (2). For either reason, the jury would have been properly instructed not to consider the statement in the report as substantive evidence.

Thus, had the trial court entertained issuing Fernandez's proposed jury instruction, the State would have been entitled to an instruction limiting the jury's consideration of the probable cause statement solely to impeachment purposes. See ER 802. Such a limiting instruction would have undermined Fernandez's proposed jury instruction itself, as without substantive evidence of Fernandez's statement, there would have been no evidence to support an instruction on unwitting possession.

Dwyer, C.J.

We concur:

Grosse, J.

Leach, A.C.J.