IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29245-2-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
AIMEE M. KEMPE,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Siddoway, J. — Aimee Kempe appeals her conviction in a bench trial of possession of a controlled substance (methamphetamine), arguing the trial court abused its discretion by failing to consider the affirmative defense of unwitting possession. Ms. Kempe's position in the trial court was that her claimed lack of knowledge that methamphetamine was in her bag, within her car, bore only on the State's ability to prove its case. By failing to raise the affirmative defense below—indeed, disavowing the defense—Ms. Kempe waived the right to assert it. We therefore affirm.

FACTS AND PROCEDURAL BACKGROUND

In September 2009, Trooper Robert Spencer of the Washington State Patrol stopped Aimee Kempe while she was driving her car in Spokane. Trooper Spencer made the stop to investigate her passenger, Michael Davis, for reasons not revealed by the record. The trooper ordered Ms. Kempe out of her car, placed her in the back of his patrol car, and left Mr. Davis sitting in Ms. Kempe's car with instructions to keep his hands on the dashboard.

While Trooper Spencer was speaking with Ms. Kempe and obtaining consent to search her car, he noticed Mr. Davis briefly take his hands off of the dashboard. He immediately confronted Mr. Davis and ordered him to put his hands back where they were. After some argument from Mr. Davis, the trooper ordered him out of the car, patted him down, and placed him in the patrol car. He had Ms. Kempe step out of the patrol car and stand by her car while he searched it pursuant to her consent.

Ms. Kempe was preparing to move to Oregon and had a number of personal belongings in the back of her car, one being a Victoria's Secret shopping bag located on the right rear floorboard area behind the passenger's seat. In conducting the search, the first item Trooper Spencer removed from the Victoria's Secret bag was a small fabric zipper pouch. Ms. Kempe stated she did not recognize it and it was not hers. In it, he found a plastic container whose contents were several small baggies of white crystal powder, later determined to be methamphetamine. The Victoria's Secret bag also

contained a second pouch in which the trooper found a smoking device and a small amount of marijuana. Ms. Kempe stated at the time of the search and testified at trial that with the exception of the pouch containing the methamphetamine, all of the items, including the pouch containing the marijuana and the shopping bag itself, belonged to her.

In presenting her evidence and in closing argument, Ms. Kempe's defense was that the methamphetamine was not hers and belonged either to the friend who had helped her pack her car or more likely Mr. Davis, who could have reached back and dropped it into the shopping bag during the moments he had his hands off of the dashboard. Yet she never raised the affirmative defense of unwitting possession. Her theory prompted a number of questions from the court about constructive possession and unwitting possession, including the following exchange:

> THE COURT: Let me ask you a question.
> If we were submitting this to a jury panel, if we had a jury in the box today, would you have asked the Court for an unwitting possession instruction; is that where you think your defense lies, or are you indicating to me it is a fleeting—given the fact it's her bag, the Victoria Secret bag—it is a fleeting possession and that that does rise to the level of the statutory definition of actual possession?
> Because you don't have to own it to possess it, we can agree on that?
> [DEFENSE COUNSEL]: I would agree.
> Ms. Kempe did not know the methamphetamine was in the car.
> THE COURT: Okay.
> [DEFENSE COUNSEL]: And I know there could be certain factual patterns, but the unwitting possession where you may know that the contraband is near you, around you, someone else has it—and obviously

> that is not the facts here. If Ms. Kempe had said, for example, yes, this passenger had pulled out methamphetamine earlier and she had seen it, or something along those lines.
>
> But that is not the case.
>
> So to me, Your Honor, this is a simple situation where she says, not mine. It's not found on her person, obviously.
>
> THE COURT: Right.

Report of Proceedings (June 28, 2010) (RP) at 72-73. From this and other statements, defense counsel's position appeared to be that the evidence of Ms. Kempe's lack of knowledge of the methamphetamine bore on whether she had constructive possession, an element on which the State bore the burden of proof. After hearing from both counsel on the meaning of constructive possession and their understanding of the unwitting possession defense, the court announced its decision that the State had proved constructive possession in light of Ms. Kempe's ownership of the car, the shopping bag, and the other items in the shopping bag. In the course of delivering its decision, the court referred twice to why it had inquired about the unwitting possession defense, adding that it understood it was "[n]ot on point here" and applies to "a different kind of situation." RP at 77, 78. Defense counsel did not raise any objection to the court's stated conclusions.

Written findings and conclusions thereafter entered by the court included a finding that Ms. Kempe had constructive possession of the methamphetamine and marijuana because they were found in her bag that was in her car and surrounded by her belongings.

It made no written findings regarding unwitting possession. Ms. Kempe was accordingly found guilty of possession of both the methamphetamine and marijuana. She appeals her conviction for possession of methamphetamine.

ANALYSIS

Ms. Kempe argues on appeal that the trial court abused its discretion by finding her guilty of possession of methamphetamine without first giving consideration to the affirmative defense of unwitting possession. The State responds that because defense counsel informed the trial court that this defense did not apply, she should not be allowed to complain to the contrary on appeal.

Generally, appellate courts will not entertain issues raised for the first time on appeal. RAP 2.5(a); *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008). The reason for this rule is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). A defendant waives his right to assert an affirmative defense if he fails to raise the defense at trial. *City of Seattle v. Lewis*, 70 Wn. App. 715, 718-19, 855 P.2d 327 (1993) (noting that a defense must be raised at trial in order to be reviewable), *review denied*, 123 Wn.2d 1011 (1994); *c.f. State v. Kroll*, 87 Wn.2d 829, 843, 558 P.2d 173 (1976) (finding that "[n]o error can be predicated on the failure of the trial court to give an instruction when no request for such an instruction was ever made").

This court may decline to address an issue under RAP 2.5(a) sua sponte. *State v. Kirkpatrick*, 160 Wn.2d 873, 880 n.10, 161 P.3d 990 (2007).

Ms. Kempe did not ask the trial court to consider the affirmative defense of unwitting possession.[1] Not only did the defense go unrequested, but she also represented to the court that it need not be evaluated. When questioned by the court whether she was pursuing an unwitting possession defense, her counsel responded that "obviously that is not the facts here" and that "this is not the case." RP at 72, 73. And she made no objection when, in announcing its decision, the trial court explained why it had thought unwitting possession might be an issue but had been satisfied by counsels' answers and arguments that it was not. Because Ms. Kempe did not adequately raise the defense below, she cannot complain on appeal about the trial court's failure to consider it.

Ms. Kempe nonetheless argues that "[t]here is no question that sufficient evidence was presented during the trial to warrant consideration of this defense by the court." Br. of Appellant at 9. We also recognize from the record that at a few points defense counsel

[1] 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. Knapp*, 54 Wn. App. 314, 317-18, 773 P.2d 134, *review denied*, 113 Wn.2d 1022 (1989). To establish the defense, the defendant must prove, by a preponderance of the evidence, that his or her possession of the unlawful substance was unwitting. *State v. Riker*, 123 Wn.2d 351, 368, 869 P.2d 43 (1994). A defendant can show unwitting possession through evidence that he or she was unaware of the possession, or did not know the nature of the substance. *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994).

arguably advances the defense in substance if not by name, stating, for example, "I understand [the State's] constructive possession argument. But I believe that still allows the defendant to say, I don't know how it got there, because it's not mine and I didn't put it there. If it is on your person, that is one thing. . . . But if it is near you, that is another." RP at 75. With this in mind, Ms. Kempe asks us to decide her appeal based on the principles that a court's decision is manifestly unreasonable if it is based on a misapplication of the law, citing *Ryan v. State*, 112 Wn. App. 896, 900, 51 P.3d 175 (2002), and that a clear misstatement of the law is presumed prejudicial, citing *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005). But neither of these principles trumps RAP 2.5(a) or its supporting rationale that issues should be raised in the trial court, in order to give that court the opportunity to decide them correctly. And here, the error can fairly be said to be invited. A party may not materially contribute to an erroneous application of law at trial and then complain of it on appeal. *In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (citing *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995)).[2]

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[2] Ms. Kempe's only other assignment of error is to the trial court's finding that Ms. Kempe stated at the time of the search "that she had used methamphetamine before, but quit using a year ago and *concluded* that the methamphetamine may have been left over from that timeframe." Clerk's Papers at 44 (Finding of Fact 8) (emphasis added). She points out that there was no testimony or other evidence that she "concluded" the methamphetamine was left over from that time frame; at best, Trooper Spencer testified

Ms. Kempe waived the affirmative defense by her actions below. We affirm.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Siddoway, J.

WE CONCUR:

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Korsmo, A.C.J.

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Brown, J.

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that she stated "they could have possibly been from her prior use." RP at 18. In light of our disposition of Ms. Kempe's first and principal assignment of error, we need not decide the semantic dispute whether stating a possibility is equivalent to concluding that something may have occurred.