IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TODD VERNON NELSON, Appellant.	No. 38219-9-II UNPUBLISHED OPINION

Bridgewater, J. — Todd Vernon Nelson appeals his conviction on one count of possession of a controlled substance—heroin. The State concedes that the trial court erred in refusing to give an instruction on the affirmative defense of unwitting possession. We reverse Nelson's conviction.

Facts

Puyallup Tribal Police Officer Paul Herrera was on patrol in East Tacoma on the night of April 15, 2008, when he noticed two vehicles parked on the side of East Roosevelt Avenue with their bumpers touching. Thinking the car in front may have backed into the truck parked behind

it, he stopped his patrol vehicle. He then saw a person hunched over in the driver's seat of the car. He parked across the street from the car, activated the red and blue flashing lights on top of his patrol vehicle, and approached the driver. As he approached, he illuminated the driver and the interior of the car with his flashlight.

As he looked in the car, Officer Herrera noticed that the bottom of the steering column was broken leaving wires exposed, which sometimes indicates that a vehicle has been stolen. Officer Herrera was suspicious because the Emerald Queen Casino was nearby, and many cars are stolen from the casino's parking lot.

Officer Herrera spoke with the driver, Nelson, through a partially rolled down window and asked whether the car belonged to him, and Nelson replied that it did not. Officer Herrera stepped to the front of the car and ran a record check on the license plate. The car had not been reported stolen.

Officer Herrera returned to Nelson and asked for his identification, which Nelson provided. A check of Nelson's status revealed an outstanding warrant. Officer Herrera placed Nelson under arrest and placed him in the back of the patrol vehicle. Officer Herrera conducted a search of the car incident to arrest, and located a dark fanny pack on the front passenger seat. He opened the pack, and found hypodermic needles, spoons, and a black tar-like substance, which field tested positive for heroin.

The State charged Nelson with one count of unlawful possession of a controlled substance—heroin and one count of unlawful use of drug paraphernalia. Nelson moved to suppress the drugs and paraphernalia prior to trial in a CrR 3.6 hearing, arguing that he was

unlawfully seized when contacted by the arresting officer. The trial court denied the motion.

Officer Herrera testified to events as above described at both the suppression hearing and at Nelson's jury trial. Officer Herrera also testified at trial that that the fanny pack was zipped closed, and the items inside were not visible until the pack was opened. No usable fingerprints were located on any of the items. Nelson also presented documents showing that he was not the registered owner of the car.

Nelson asked the court to instruct the jury on the defense of unwitting possession, but the court refused. The jury convicted Nelson of possession of a controlled substance, but acquitted him on the charge of using the drug paraphernalia. The trial court imposed a standard range sentence of 24 months of confinement. Nelson appealed.

Discussion

Nelson's opening brief raised two issues. He argued that the trial court erred in denying his suppression motion, and that the court erred when it refused to instruct the jury on the affirmative defense of unwitting possession because the evidence presented at trial would permit a reasonable juror to find by a preponderance of the evidence that Nelson unwittingly possessed heroin. After Nelson filed his opening brief, the Supreme Court decided *Arizona v. Gant*, ___ U.S.___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009),[1] and *Nelson* filed a supplemental brief

[1] *Gant* announced the following rule:

> Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Gant, 129 S. Ct. at 1723-24.

arguing that the search incident to arrest was invalid. The State filed a response conceding the instructional error, but making various arguments that *Gant* does not apply here. We resolve this case by accepting the State's concession.

A defendant in a criminal case is entitled to have the jury instructed on the defense theory of the case if there is evidence to support that theory. *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). A defendant is entitled to an unwitting possession instruction when the evidence presented at trial would 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, 151-53, 967 P.2d 548 (1998). A trial court errs by not instructing the jury on the defense of unwitting possession when evidence supporting the defense is adduced at trial. *Cf. State v. May*, 100 Wn. App. 478, 482-83, 997 P.2d 956, *review denied*, 142 Wn.2d 1004 (2000) (where unlawful possession of a firearm was charged, trial court's refusal to give an unwitting possession instruction was reversible error).

Here the evidence indicated that Nelson did not own the car, the drugs and paraphernalia inside the fanny pack were not visible until the pack was opened, and nothing but Nelson's presence in the car linked him to the fanny pack. We accept the State's concession that the evidence at trial warranted the giving of an unwitting possession instruction. The remedy is reversal of Nelson's conviction. *May*, 100 Wn. App. at 483. Accordingly we reverse Nelson's conviction for unlawful possession of heroin.[2]

[2] If the State seeks to retry Nelson on the unlawful possession charge, the parties are free to argue the applicability of *Gant* in the course of a pretrial CrR 3.6 suppression motion.

Reversed.

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

Bridgewater, J.

We concur:

Houghton, P.J.

Hunt, J.