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The principle of these cases is clear: punishment should not be permitted for the necessary manifestations of an involuntary condition when the individual is without substantial capacity to prevent those manifestations. If it is unlawful to punish for a "status," it should also be unlawful to punish the "acts" which necessarily arise as a result of that status. This principle would seem to apply to the principal case. If the defendant was an addict, his possession of drugs may well have been compelled by that status. If he was without substantial capacity to control that status or the acts which it compelled, then he should not be criminally liable under the possession statute.[36]

EXPOSURE TO UNRELATED BUT INADMISSIBLE EVIDENCE CONSTITUTES REVERSIBLE ERROR

Defendant was charged with unlawful possession of burglary tools,[1] and fraudulent attempt to obtain narcotics.[2] With agreement of defense counsel, the charges were consolidated for trial. At the close of the state's case, the trial court granted defendant's motion to suppress evidence relating to the burglary tools charge because it was obtained by an illegal search, dismissed the charge of unlawful possession of burglary tools, and instructed the jury to disregard all evidence or inferences concerning that charge. The trial court denied defendant's motion for a mistrial, and he was subsequently convicted of fraudulent attempt to obtain narcotics. On appeal, a divided Washington Supreme Court reversed and *held*: Notwithstanding a trial court's explicit instructions, exposure of a jury to evidence and exhibits relating to a charge of possession of burglary tools is so prejudicial to a defendant

wish to make it absolutely clear that mere recidivism or narcotics addiction will not of themselves justify acquittal under the American Law Institute standard...." 357 F.2d at 625.

[36] Such statute should be unconstitutional *only* if applied to the addict, and a defendant should have the burden of showing he falls within this class. Criminal punishment should be provided for the non-addict unlawful possessor. Such approach would be consistent with the dictum in *Robinson,* which upheld the right of the state to punish unlawful possession. In this way there would continue to be control over the narcotics "pusher." However, this would seem to encourage narcotics pushers to be addicts as well, and in this way avoid criminal liability.

An indication as to how the Washington court would hold as to such an argument might be found in State v. Collins, 50 Wn. 2d 740, 314 P.2d 660 (1957). In that case, the court rejected the Durham rule, the irresistible-impulse doctrine, and the American Law Institute's substantial capacity test for criminal responsibility. The rejection was affirmed in *In re* White v. Rhay, 64 Wn. 2d 15, 390 P.2d 535 (1964).

[1] WASH. REV. CODE § 9.19.050 (1956).

[2] WASH. REV. CODE § 69.33.380(1) (1959).

that implications of guilt cannot be adequately struck from the minds of jurors so as to enable defendant to receive a fair and unbiased trial on a separate and distinct charge. *State v. Suleski*, 67 Wash. Dec. 2d 45, 406 P.2d 613 (1965).

One of the fundamental tenets relating to jury trials is that juries presumptively follow a trial court's instructions and consider only evidence properly before them.[3] If error is committed, so the theory goes, a court can remove any prejudicial effect by simply directing the jury to disregard the subject matter of the error when deliberating the case. By taking notice of the practical effects of adhering to this theory, the court in the principal case further stilled the notion that jurors are capable of mechanically erasing from their minds all undue or improper impressions whenever a trial court so commands.[4]

In reaching its decision, the court in the principal case did not concern itself with the trial court's ruling regarding search and seizure of the evidence,[5] and commented only briefly on the issues of whether defense counsel's statement that his motion for a mistrial was only for the record amounted to a waiver of his objections[6] and whether the trial court's instructions effectively struck from the minds of the jury the implications of the possession of burglary tools charge.[7] The court

[3] See, *e.g.*, State v. Long, 65 Wn. 2d 303, 396 P.2d 990 (1964); State v. Moe, 56 Wn. 2d 111, 351 P.2d 120 (1960); State v. Taylor, 47 Wn. 2d 213, 287 P.2d 298 (1955); State v. Weekly, 41 Wn. 2d 727, 252 P.2d 246 (1952).

[4] Several recent cases, arising under divergent factual situations, lend credence to the view that evidence which a jury has heard or observed, and which directly bears on its determination, will affect the ultimate decision, regardless of the trial court's efforts to the contrary. *E.g.*, Jackson v. Denno, 378 U.S. 368 (1964) (jury incapable of validly determining *both* the issue of voluntariness of a confession and the ultimate issue of guilt); Rideau v. Louisiana, 373 U.S. 723 (1963) (change of venue should have been allowed when defendant's confession was televised prior to jury selection). Compare Griffin v. California, 380 U.S. 609 (1965) (comment on defendant's failure to testify is a violation of fifth amendment).

[5] The state did not challenge this ruling. 67 Wash. Dec. 2d at 49 n.2, 406 P.2d at 616 n.2. On the exclusionary rule in Washington, see State v. Riggins, 64 Wn. 2d 881, 395 P.2d 85 (1964), 40 WASH. L. REV. 369 (1965); State v. Gunkel, 188 Wash. 528, 63 P.2d 376 (1936). See generally Morris, *The End of an Experiment in Federalism—a Note on Mapp v. Ohio*, 36 WASH. L. REV. 407 (1961); Comment, 36 WASH. L. REV. 501 (1961).

[6] The waiver contention arose out of the following statement made by defense counsel after the trial court had dismissed the burglary tools charge:

> I feel that the ruling on the part of the Court dismissing the C-850 [burglary tools charge] *probably cures any problem I had* as far as mistrial is concerned on the admission of the weapon and statements of counsel during the course of the opening statement, however, *for the record* I would like to renew those motions at this time, Your Honor. 67 Wash. Dec. 2d at 50, 406 P.2d at 616. (Emphasis added.)

[7] The court devoted three of its instructions to directing the jury to disregard all inferences arising from the dismissed burglary tools charge. Instruction number sixteen, probably the most complete of these, appears at 67 Wash. Dec. 2d at 56, 406 P.2d at 619:

> Instruction No. 16. You are instructed that the charge of possession of burglary

expressed the view that underlying these two issues was a more basic point of inquiry—whether the defendant received a fair and unbiased trial. Using this as its standard, the court decided that implications of guilt were so securely ingrained in the jurors' minds, once improper evidence was admitted, that the trial was inherently unfair to defendant regardless of trial court efforts to avoid this effect.

Although the waiver issue was largely ignored by the majority as being unnecessary to the decision, the dissent dealt extensively with it to establish that defendant's counsel did, in fact, waive his motion for mistrial and therefore lost his right to object on appeal. The general rule is that a party is deemed to waive error when he fails to make a timely objection[8] or when the objector's subsequent actions are inconsistent with the posture of his objection.[9] On the other hand, when the alleged error is extremely flagrant, the Washington Supreme Court has allowed its assertion on appeal even though no objection was made at the trial.[10] "The test as to whether the failure to adequately preserve the record is excused is whether the misconduct was so flagrant that no instruction could cure it."[11] Given this propensity to ignore implications of waiver when manifest injustice would result, and to dismiss as insignificant minor collateral references which might be construed as waiver, the assumption that defendant's waiver in the principal case was unimportant, if in fact it existed, seems consistent with prior results.[12]

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tools has been withdrawn from your consideration. All exhibits dealing with that charge have been stricken and are also withdrawn from your consideration. ... You are instructed and admonished to disregard all exhibits and all information obtained from viewing any exhibits which have been stricken. You are further instructed and admonished to disregard all testimony concerning the stricken exhibits, or concerning the charge which has been withdrawn, together with any and all inferences, or insinuations from any such testimony. You shall confine your deliberations solely to testimony and/or evidence, if any, relating to the charge of attempting to obtain narcotics by fraud.

[8] *In re* Wilburn v. Cranor, 40 Wn. 2d 38, 240 P.2d 563, *cert. denied,* 343 U.S. 911 (1952).

[9] State v. Nelson, 63 Wn. 2d 188, 386 P.2d 142 (1963); State v. Brubaker, 62 Wn. 2d 964, 385 P.2d 318 (1963).

[10] State v. Case, 49 Wn. 2d 66, 298 P.2d 500 (1956), 32 WASH. L. REV. 86 (1957).

[11] *Id.* at 73, 298 P.2d at 504. As to the flagrancy necessary for error to be found uncorrectable, compare State v. Ollison, 68 Wash. Dec. 2d 50, 411 P.2d 419 (1966), a per curiam opinion holding that refusal to grant a motion for mistrial, when defendants were taken to court handcuffed prior to impaneling of a jury and prospective veniremen may have seen them, was not error; State v. Sawyer, 60 Wn. 2d 83, 371 P.2d 932 (1962), holding that, when defendant was handcuffed following adjournment of the first day of trial, the trial court's prompt admonition to the jury cured the error.

[12] Direct authority exists for granting a new trial at the trial court level when the judge determines "that substantial justice has not been done" in a former trial, regardless of other rules of evidence and procedure. WASH. R. PLEAD., PRAC., PROC. 59.04W(9). The leading criminal law case construing this rule is State v. Taylor,

The position of the court in assuring an accused a fair trial, by holding as reversible error undue jury exposure to inadmissible evidence, is commendable. From a jurisprudential viewpoint, the result of the principal case seems desirable because it is at once consistent with current procedural trends[13] and with previous holdings in Washington. In virtually every case in which the court has considered the effect of instructions on a jury, it has prefaced its remarks with a statement that juries are presumed to follow instructions[14] though the rule is well established that this presumption is rebutted when the error is so serious or flagrant that an instruction, no matter how framed, cannot avoid mischief.[15]

While this exception is consistent with prior decisions, its application to the principal case remains somewhat unusual. By agreement of counsel, defendant was tried simultaneously on two charges which were *completely distinct* with respect to the evidence required for conviction, activities engaged in by defendant, res gestae of the crimes, and intent required. This differs greatly from the situation in which the separate crimes alleged and tried together are related to the same event or series of events, and introduction of improper evidence directly affects both allegations. Even so, the court reversed the conviction, and its reason for this may well lie in the observation that, even though the determination of innocence or guilt on one of the charges should not have influenced determination on the other, *under the facts* in the principal case the jury was incapable of properly applying the evidence submitted:

> The adroitly drawn picture of the defendant's criminal proclivities, sketched upon the backdrop of the medical witness's fear of violence and suspicion of drug addiction, literally dissolved any legalistic curtain based upon the theory that the court's instructions could remove all undue impressions from the jurors' minds. The defendant was irretrievably prejudiced.[16]

Under this rationale, even if the evidence of possession of burglary tools had been admissible, so that the jury had received both charges

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60 Wn. 2d 32, 371 P.2d 617 (1962). See generally Trautman, *Serving Substantial Justice—A Dilemma*, 40 WASH. L. REV. 270 (1965).

[13] See note 4 *supra*.

[14] This rule is stated in the principal case, 67 Wash. Dec. 2d at 51, 406 P.2d at 617. *Accord*, State v. Long, 65 Wn. 2d 303, 396 P.2d 990 (1964); State v. Weekly, 41 Wn. 2d 727, 252 P.2d 246 (1952).

[15] State v. Albutt, 99 Wash. 253, 169 Pac. 584 (1917). See also State v. Case, 49 Wn. 2d 66, 298 P.2d 500 (1956); State v. Devlin, 145 Wash. 44, 258 Pac. 826 (1927).

[16] 67 Wash. Dec. 2d at 51, 406 P.2d at 616.

for determination, the court would still have had to reverse, for if convictions were obtained on both charges there would be no way of knowing whether the jury considered the evidence only in relation to the proper charges.[17] Since it seems unlikely that this result was intended by the court, one of two conclusions may be indicated: 1) that the presumption that juries follow instructions should have been found controlling and the conviction affirmed, or 2) that the real error was in combining for trial two unrelated charges arising out of different transactions, their mere joinder being sufficiently improper to warrant reversal. On the other hand, the court in the principal case may simply have been rejecting the procedure employed by counsel. Prior to trial, the defendant's attorney filed, as to each cause, a motion to suppress the burglary tools evidence, but at the time of trial both counsel agreed, with the trial court's consent, that these motions would be determined "upon the basis of the evidence admitted during the trial."[18] Yet the court was adamant in its view that, once this and other evidence was introduced, defendant was irretrievably prejudiced:

> In the instant case, the bells of the dismissed burglary tools charge, prior burglary convictions, a four or five-page F.B.I. record, a possible violation of the Federal Firearms Act, and the fruits of the various searches, were so conclusively rung as to effectively preclude their "unringing."[19]

This view may indicate that, unless evidence alleged to have been obtained unlawfully is subsequently found admissible, its presentation within the jury's hearing will be grounds for a mistrial. If this be true, it follows that, in the interest of avoiding multiplicity of litigation as well as protecting an accused's rights, all of the parties to a criminal action will wish to determine the admissibility of evidence, alleged to have been illegally obtained, out of the jury's presence.

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[17] Notice that this difficulty cannot occur when only one crime is alleged, or when separate crimes alleged and tried together are related to the same event or series of events, since the introduction of improper evidence would have a prejudicial effect on each charge.

[18] 67 Wash. Dec. 2d at 48, 406 P.2d at 615.

[19] *Id.* at 51, 406 P.2d at 616. From the beginning of the opinion, the court indicates its distaste for the methods employed by the trial court and respective counsel to determine the admissibility of evidence in the principal case: "This case strikingly illustrates the incongruity of undertaking to test the legality of a search and the admissibility of seized evidence in the presence of a jury." *Id.* at 46, 406 P.2d at 613.