

State of Oregon v. Maria Schneider (A130729)

Introduction

In this criminal case, defendant Maria Schneider (defendant) was convicted of one count of criminal mistreatment in the second degree. On appeal, she argues that the trial court should have granted her "**motion for judgment of acquittal**" (MJOA) because (1) to be convicted of second-degree criminal mistreatment, a caregiver must, with criminal negligence, withhold adequate physical care or medical attention, and (2) the State failed to prove that defendant withheld adequate physical or medical care from the alleged victim in this case.

The Facts

In May 2000, Willy Lackey moved from Montana to Redmond, Oregon, to live with his nephews because he was elderly and could no longer live alone. Willy suffered from congestive heart failure, depression, anxiety, prostate cancer, and early dementia. In August 2000, Willy was diagnosed with terminal lung cancer and was referred to Hospice for care.

In September 2000, Willy's nephew, Mark, hired defendant as Willy's caregiver. Defendant moved into Mark's home because Willy needed 24-hour care. Defendant took excellent care of Willy and bonded well with him. However, in late December 2000, defendant began to have problems and disagreements with Mark. Defendant was concerned with Mark's behavior because he drank in the evenings and smoked in the house. Mark disagreed with defendant about what medications Willy should take and how defendant organized Willy's medications.

In January 2001, defendant, with the help of Alan Brookshire--an old friend of Mark's--prepared documents that revoked Willy's power of attorney--previously given to Mark--and created another power of attorney in defendant's favor. Willy also executed a new will devising his estate to defendant and Brookshire. At approximately the same time, Brookshire and defendant purchased a motor home in order to return Willy to Montana. Willy's family was unaware of that plan.

On January 31, 2001, defendant moved Willy to the home of one of her friends. She also attempted to use her power of attorney to remove over \$6,000 from Willy's checking account. A bank employee became suspicious and called Mark to inform him of what was happening. The employee told defendant that it would take some time to get the money, so defendant left the bank. Shortly after, the police were called.

Redmond police officers Ludwig and Dickson located defendant and Willy at the home of defendant's friend. Dickson spoke to Willy, while Ludwig interviewed

defendant. Defendant attempted to refuse to allow Willy to be interviewed outside her presence. Defendant refused to leave the room where Ludwig was interviewing Willy, and became belligerent and physically aggressive. Ultimately, defendant was removed from the premises and taken into custody.

After defendant's arrest, Ludwig and Dickson called the office of Senior and Disabled Services and Hospice for assistance. An employee of Senior and Disabled Services arrived at the house. She said that Willy was in "good spirits" but was not on oxygen, and she was unable to locate Willy's medication, despite searching through the house, defendant's car, and the motor home. Willy was supposed to take several medications daily, including congestive heart failure medications, morphine, oxygen, and anti-anxiety medication.

The social worker assigned by Hospice to Willy's case was unaware of any plans to return Willy to Montana, and Hospice was not involved in arranging a move. Willy's primary care physician was also unaware of such a plan, and did not believe that it was in Willy's best interests to travel without physician approval.

Defendant was charged with, among other things, criminal mistreatment in the second degree. After the State presented its case, defendant filed a **motion for judgment of acquittal**. She argued that the State failed to prove that defendant had withheld necessary and adequate physical care or medical attention. The trial court denied that motion, concluding that the State presented sufficient evidence to present the matter to the jury. The jury ultimately convicted defendant on that charge. Defendant now appeals.

Legal Background

An Oregon law, Oregon Revised Statutes (ORS) 163.200, describes the crime of "*Criminal mistreatment in the second degree*" as follows, in relevant part:

"(1) A person commits the crime of criminal mistreatment in the second degree if, with criminal negligence and:

"(a) In violation of a legal duty to provide care for another person, the person withholds necessary and adequate food, physical care or medical attention from that person[.]"

"*Criminal negligence*," under Oregon law, ORS 161.085(10), means that

"a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree

that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

Motion for Judgment of Acquittal (MJOA)

In a criminal trial, the State must present evidence that would permit the factfinder (in this case the jury but sometimes a judge) to conclude beyond a reasonable doubt that the defendant committed the crime charged. The State presents its evidence first. Before the defendant presents any evidence, he can make a **motion for judgment of acquittal (MJOA)**. An MJOA asks the judge to decide whether the State has presented evidence that, if believed, would be enough to establish the **elements** (essential requirements, like **intent**) of an offense *beyond a reasonable doubt*. If the judge decides that there is not enough evidence, he or she will grant the motion and the defendant will be acquitted of that charge. If, however, the judge finds that the State has presented evidence that could support a conviction, the court will deny the motion. If the judge denies the motion, the trial continues and the defendant then presents evidence to counter the State's evidence. After both sides present their case, the factfinder decides whether the defendant is guilty.

If the defendant is found guilty, he or she may appeal the judge's denial of his or her MJOA. When the Court of Appeals considers that appeal, it considers the evidence that was presented at trial *in the light most favorable to the State* and asks whether a rational factfinder (in this case, a juror) could have found the essential elements beyond a reasonable doubt. If the State and defendant disagreed about the facts, the Court of Appeals considers the State's version of the facts as true for purposes of the appeal.

The Parties' Arguments

The Defendant

Defendant argues that the State failed to present enough evidence for a reasonable juror to conclude that defendant withheld adequate physical or medical care from Willy.

Defendant relies on a Court of Appeals decision, *State v. Damofle*. In *Damofle*, the defendants' children were living in a plastic enclosure inside a barn which was cold, wet, and musty. The children were clothed in underwear and were barefoot, despite the fact that there was ground glass on the floor. The children lacked adequate toilet facilities, and, instead, were required to use a three-pound coffee can that remained inside the living area. In addition to garbage, glass, dirty dishes, and diapers, a gasoline can and matches were also found in the living area. The Court of Appeals concluded that those circumstances established that the defendants' conduct was a gross deviation from the standard of care and that the defendants failed to provide adequate physical care for their children.

Defendant contends that her actions did not put Willy's health at risk in the way that the hazards in the home in the *Damofle* case threatened the children's well-being. Rather, defendant contends that she took admirable care of Willy, she attended to Willy's physical needs, and she ensured that he took all of his medications. Defendant emphasizes that when the police spoke with Willy, there was no evidence that he was physically harmed or had not been given his most recent dose of medication.

Defendant admits that her decision to return Willy to Montana without consulting his family members or doctor "may have been a hasty decision," but she argues that her conduct in that respect did not cause defendant to withhold adequate physical or medical care from Willy.

The State

The State responds that, viewing the evidence in the light most favorable to the State, it presented enough evidence to establish that defendant withheld necessary and adequate physical care and medical attention from Willy.

The State also relies on *Damofle*. In *Damofle*, the Court of Appeals stated that whether physical care is adequate depends upon the dependent person's circumstances. The State points out that Willy was terminally ill. His medications required careful management, he could not walk unassisted, and he required a heightened level of care. The State argues that due to Willy's circumstances, defendant's attempt to move him to Montana without consulting his physician and Hospice, and without a plan in place for his care when they arrived, constituted a gross deviation from the standard of care a reasonable person would observe in the situation.

The State also argues that the jury was entitled to infer that defendant was motivated not by her concern for Willy's well-being but, instead, by defendant's eagerness to gain control of Willy's assets.

Finally, the State contends that defendant, by refusing to cooperate with the officers and conducting herself in a way that resulted in her being taken into custody, effectively abandoned Willy without a caretaker and without his medication.

Patricia Piazza, Guardian Ad Litem for Lisbeth Fino-Morales v. Providence Health System-Oregon, dba Providence St. Vincent Medical Center; Kathleen Raetz, C.N.M.; and Donald Glen Bair, M.D. (A137431)

Introduction

The plaintiff in this case is a 6-year-old girl who was born at St. Vincent Hospital in Portland. She was delivered there by Kathleen Raetz, a midwife, and Donald Bair, an obstetrician. The hospital, Raetz, and Bair are the defendants in this case. Plaintiff (through her guardian) alleged that defendants acted negligently during the delivery and that, as a result, she suffered injuries during the delivery that permanently affected her ability to move and feel her left shoulder, arm, and hand.

The issues in this appeal revolve around statements that defendants' lawyer made to the jury about the immigration status of plaintiff's parents, who were not legal residents of the United States. Because plaintiff was born in the United States, she is a citizen of this country.

The Facts

After plaintiff was born and her injuries were discovered, her guardian *ad litem* (a special representative appointed by the court to represent a child during litigation) filed this action for negligence. In her legal complaint, plaintiff alleged that, because of defendants' negligence, she would incur future medical, educational, and rehabilitation expenses for which she should be compensated.

Defendants' lawyers discovered that plaintiff's parents were from Mexico and were not in this country legally. Before trial, plaintiff filed a motion *in limine* (a motion asking the judge to decide before trial whether certain evidence can be presented to the jury--explained further below) to preclude defendants from presenting evidence of her parents' immigration status. The trial judge said that she suspected that the jurors would already know about the immigration status of plaintiff's parents, based on questions on a questionnaire that the potential jurors had to fill out. Three of the questions on the questionnaire asked the potential jurors whether they agreed or disagreed with the following statements: (1) "My general impression of the Latino community is that they are hard-working and honest." (2) "The immigration laws of our country should be made more strict." (3) "It would be difficult for me to listen to plaintiff's parents give testimony through an interpreter."

The judge also concluded that evidence of immigration status was relevant to issues about where plaintiff should expect to live and be educated--which, in turn, would bear on her future earning capacity and, thus, would be relevant if the jury decided to award money damages. The judge ruled that the evidence was admissible but could be

presented *only in connection with those issues*. She also ordered defendants' lawyer not to use inflammatory terms such as "illegal alien" or "illegal immigrant."

After the judge made her ruling, the jury selection process (known as "*voir dire*") began. During that process, defendants' lawyer told the potential jurors, "You are probably going to hear during the course of the trial that the parents of Lisbeth Morales are not documented." Plaintiff's lawyer objected to the relevance of that statement, but the judge overruled the objection. Defendants' lawyer asked the potential jurors whether anything about the parents' status would cause them to have "any difficulty in evaluating the circumstances surrounding the case." He did not tell them that the parents' immigration status would be relevant to determining plaintiff's future earning capacity. The jury was selected, and the trial began.

The trial lasted eight days. During the trial, defendants' lawyer did not raise the issue of plaintiff's future earning capacity or introduce any evidence of her parents' immigration status. After plaintiff presented all of her evidence, and again after defendants presented theirs, plaintiff moved for a mistrial based on the statement that defendants' lawyer had made during jury selection. The judge denied those motions. The jury deliberated for less than half a day and returned a verdict in defendants' favor. The jury was unanimous as to the hospital and Raetz; two jurors stated that they were undecided as to Dr. Bair.

Legal Background

Motion In Limine and Relevance

The purpose of a motion *in limine* is to allow the judge to rule on evidence that is intended to be offered at trial, so that irrelevant or prejudicial matters are not heard by the jury. Under the Oregon Evidence Code, evidence is generally admissible if it is relevant--that is, if it has "any tendency" to make any fact that is significant to deciding the case "more probable or less probable than it would be without the evidence." However, even if evidence is relevant, it is not automatically admissible. Instead, even relevant evidence must be excluded if its value as proof in the case is outweighed by the danger of unfair prejudice--in other words, if it makes a party to the case look bad in the eyes of the jury in a way that is not pertinent to the case.

Sometimes evidence is admissible for some purposes but not for others. In such instances, the evidence may be presented to the jury for that proper purpose. In this case, the trial judge concluded that evidence of plaintiff's parents' immigration status was admissible to show her potential future earning capacity but not for other purposes. For example, it would not have been proper for the jury to "punish" plaintiff by returning a verdict in defendants' favor because her parents were not legal immigrants. If the party

against whom the evidence is admitted requests, the trial judge may give a "limiting instruction," which tells the jury that it may consider the evidence only for the purposes for which it is admissible.

Motion for Mistrial

A party in a case may ask for a mistrial if something happens that makes it so unlikely that the trial will be fair that it should start over again with a new jury. The judge has considerable latitude in deciding whether to grant a mistrial, and the judge's ruling to deny a mistrial and continue the trial will be reversed on appeal only for an "abuse of discretion," which is a relatively lenient standard. That is because the trial judge is in the best position to assess the impact of the complained-of incident and to select the means, if any, of correcting any problem resulting from it. Often, instead of declaring a mistrial, the judge will give a "curative instruction," which tells the jury that, when it decides what the verdict should be, it may not consider something that it heard during the trial. Some lawyers do not like to ask for a curative instruction, because they believe that it only highlights the fact that the jury is not supposed to consider.

Preservation of Error

The purpose of an appeal to the Court of Appeals is to argue that the trial judge made a mistake and to ask the Court of Appeals to correct that mistake. Generally, the Court of Appeals will consider an argument only if the party appealing gave the trial judge an opportunity to avoid making the mistake by pointing it out to the judge. Pointing out the mistake to the trial judge is called "preserving the error." If a party did not preserve the error, the Court of Appeals normally will not consider the argument, even if the trial judge actually did make a mistake.

A motion for a mistrial has an extra requirement in order to preserve the error: The motion generally must be made immediately after the allegedly unfair incident happened, so the judge has an opportunity to take action to prevent any unfairness by, for example, giving a curative instruction.

Harmless Error

Even if the judge made errors in a trial, the Court of Appeals will not reverse the judgment if there is little likelihood that the errors affected the verdict. This is the functional equivalent for appeals of the "no harm, no foul" principle. Under the Oregon Evidence Code, errors in admitting evidence are not presumed to be harmful, so the party making the appeal (the appellant) must show that he or she was harmed by the errors.

The Parties' Arguments

Plaintiff makes three assignments of error--that is, she argues that the trial judge made three mistakes.

First Assignment of Error

Plaintiff's arguments

Plaintiff argues that the trial judge erred when she denied plaintiff's motion *in limine* pertaining to evidence of the immigration status of her parents. Plaintiff argues that the trial judge was wrong to assume that the jury would be aware of her parents' immigration status based on the juror questionnaire, which, according to plaintiff, implied only that they were *immigrants* and said nothing about whether they had immigrated *legally*.

Plaintiff also argues that any probative value of evidence of her parents' immigration status was outweighed by the danger of unfair prejudice. In plaintiff's view, evidence that someone is not a legal resident is highly prejudicial--that is, that a jury is very likely to be influenced negatively by that fact. Plaintiff cites cases from other courts that ruled that such evidence was not admissible because it is unfairly prejudicial. She also refers to Oregon laws that prohibit discrimination based on "alienage." Plaintiff also notes that her own immigration status was not in question, because she is a United States citizen.

Plaintiff also contends that defendants' lawyer violated the trial judge's ruling by failing to connect his statement during the jury selection process with any evidence concerning her future earning capacity.

Finally, plaintiff argues that the error in denying her motion *in limine* was not harmless, pointing out that, even though defendants did not introduce any evidence of the immigration status of her parents, their lawyer mentioned it during the jury selection process, so the jury was aware of it.

Defendants' arguments

Defendants argue that the trial judge properly ruled that evidence regarding the parents' immigration status would be relevant to plaintiff's claim for future economic damages. Defendants argue that it does not matter that plaintiff's own immigration status was not at issue because, if her parents were deported to Mexico, it is at least possible that she would go with them.

Defendants next argue that the probative value of evidence of the parents' immigration status was not outweighed by the danger of unfair prejudice. They first

argue that the fact of plaintiff's parents' immigration status was apparent from the juror questionnaire. They argue that plaintiff herself conceded that in the trial court, pointing to the following statement that plaintiff's lawyer made to the judge: "The immigration status of her parents would be highly prejudicial to her claims in this case, since the Court is well aware that immigration is a highly debated subject in this society at the present time. I'm sure we're going to see that from the juror questionnaires." Defendants next argue that the judge limited the risk of unfair prejudice by limiting the purposes for which the evidence could be offered and by ordering defendants' lawyer not to use the terms "illegal immigrant" or "illegal alien."

Defendants also argue that their lawyer's failure to connect his statement during the jury selection process with evidence about plaintiff's future earning capacity does not affect the correctness of the trial judge's ruling on the motion *in limine*. According to defendants, the correctness of the judge's ruling must be considered only on the basis of the circumstances that existed as of the time she made that ruling, but plaintiff's argument depends on referring to events that occurred later at trial, after the judge ruled.

Finally, defendants argue that, even if the trial judge erred in denying the motion *in limine*, the error was harmless because no evidence of plaintiff's parents' immigration status was offered or admitted at trial.

Second Assignment of Error

Plaintiff's arguments

Plaintiff argues that the trial judge improperly overruled her objection to defendants' lawyer's statement about her parents' immigration status during the jury selection process. She points out that defendants' lawyer did not explain to the jury why their immigration status was an issue in the case and did not offer any evidence regarding their immigration status during the trial. Therefore, she argues, defendants' lawyer never tied his statement to any claim for future economic damages.

Defendants' arguments

Defendants argue that plaintiff failed to "preserve" her argument. They contend that she objected to the statement during jury selection on relevance grounds but had already conceded that the issue of immigration status was relevant. They also argue that questions asked during jury selection are not evidence and, therefore, are not subject to relevance objections. Defendants assert that the proper objection to the statement would have been that it prejudiced plaintiff--and, they argue, plaintiff did not raise *that* objection in a timely fashion, first raising it six days later, when she first moved for a mistrial. Defendants also argue that the Court of Appeals should not consider the second assignment of error because plaintiff failed to include copies of the completed jury questionnaires in the record on appeal. According to defendants, plaintiff's failure to do

that means that she has failed to demonstrate that the trial judge made a prejudicial error.

Defendants also argue that plaintiff cannot demonstrate that the statement made by defendants' lawyer was prejudicial for another reason. They contend that nothing indicates that any of the jurors were actually biased against "undocumented" immigrants. They point out that their lawyer followed his statement by asking whether anything about the parents' immigration status would cause any juror to have difficulty in evaluating the circumstances of the case, and that none of the jurors indicated that they would have a problem. Defendants also point out that, several times during the trial, the judge told the jury that it had to decide the case based on the evidence and that the statements and arguments of the lawyers were not evidence.

Finally, defendants argue that a review of the record reveals that the evidence in their favor was overwhelming. They point out that, after eight days of trial, the jury's verdict was swift and nearly unanimous.

Third Assignment of Error

Plaintiff's arguments

Plaintiff argues that the trial court erred in denying her motions for a mistrial. She notes that the trial judge clearly stated that evidence of the immigration status of her parents was admissible only in connection with issues about future economic damages. Because defendants failed to make that connection during the trial, plaintiff argues, the trial court should have declared a mistrial. She argues that asking for a curative instruction or a limiting instruction would only have reminded the jury about her parents' immigration status.

Defendants' arguments

Defendants argue that plaintiff's mistrial motions were untimely and are, therefore, not "preserved." They contend that she should have made the motion when their lawyer made the statement during the jury selection process. In response to plaintiff's argument that they failed to make the connection between immigration status and future economic damages, defendants argue that plaintiff's position on appeal is that she would have been *less* prejudiced if evidence of her parents' immigration status had been presented to the jury, which, defendants argue, does not make sense. According to defendants, the judge's ruling on the motion *in limine* did not *require* them to present evidence of their immigration status during trial. They argue that there was no need to present such evidence because, after plaintiff's witnesses testified, it appeared that the family would not be moving to Mexico, so issues about plaintiff's future earning capacity/economic damages would not be affected by their immigration status.

State of Oregon v. Aaron Anello (A131090)

Introduction

In this criminal case, defendant Aaron Anello (defendant) was convicted of supplying contraband while he was an inmate at Snake River Correctional Institution. On appeal, he argues that the trial court should have granted his **motion for judgment of acquittal (MJOA)** because the State failed to prove a required element of the crime: that he *possessed* the contraband--a "shank," which correctional officers observed defendant helping others bury in the prison recreation yard. Because of the State's alleged failure of proof, defendant argues, he is entitled to have his conviction reversed.

The Facts

In March 2005, while working in the guard tower in the recreational yard at Snake River Correctional Institution, Correctional Officer Bryan Sundquist (Sundquist) noticed a group of four inmates gathered in the yard. One inmate knelt on the ground and dug in the dirt while another inmate, Sky Jackson (Jackson), placed his jacket on the ground and lay on it with his back to Sundquist. Defendant and another inmate, Juan Delgado, took turns stomping down on the area where the first inmate had knelt. After the inmates walked away, Sundquist went to the area to investigate and noticed an out-of-place clump of grass. He moved the grass and saw the handle of a shank (a makeshift knife) sticking out of the ground. The shank was a 9-inch long flat piece of metal sharpened to a point, with blue tape on one end.

At defendant's trial, prison hearing officer Christopher Powell (Powell) testified that Jackson had told him that the shank belonged to him and that Jackson had asked defendant and Delgado to help him conceal it. Jackson had told Powell that he pushed the shank into the ground and that defendant and Delgado both stepped on the shank to push it further into the ground. Delgado also testified at the trial; he said that he and defendant had stepped on the shank to push it into the ground and that he, Jackson, or defendant could have returned to the area to retrieve the shank at any time.

At the trial, Jackson offered a different version of the events: He claimed that he possessed the shank and buried it in the yard without help. When asked about his earlier statements to Powell and other prison officials that defendant had helped him bury the shank, Jackson said that he had lied to the prison officials but was telling the truth at the trial. The prosecutor asked Jackson whether he could be labeled a "snitch" for testifying against defendant. Jackson responded that there were "two sayings in prison: 'What goes around, comes around,' and 'Snitches get stitches.'"

After the State presented its case, defendant filed a motion for judgment of acquittal (MJOA), arguing that the State had not presented sufficient evidence to prove

that he possessed the shank. The trial court denied that motion, concluding that the jury could reasonably find that defendant possessed the shank. Defendant was subsequently convicted.

Legal Background

An Oregon law, Oregon Revised Statutes (ORS) 162.185, describes the crime of "supplying contraband" as follows:

"(1) A person commits the crime of supplying contraband if:

"* * * * *

"(b) Being confined in a correctional facility, youth correction facility or state hospital, the person knowingly makes, obtains or *possesses any contraband*.

"(2) Supplying contraband is a Class C felony."

(Emphasis added.)

Another Oregon law, ORS 162.135(1)(a), provides the definition of "contraband." Among other things, contraband is:

"(D) Any article or thing which a person confined in a correctional facility * * * is prohibited by statute, rule or order from obtaining or possessing, and whose use would endanger the safety or security of such institution or any person therein."

Furthermore, ORS 166.275 prohibits "[a]ny person committed to an institution" from possessing "any dangerous instrument, or any weapon including but not limited to any blackjack, slingshot, billy, sand club, metal knuckles, explosive substance, dirk, dagger, sharp instrument, pistol, revolver or other firearm without lawful authority."

Motion for Judgment of Acquittal

In a criminal trial, the State must produce evidence that would permit the factfinder (in this case, the jury, but sometimes the factfinder is a judge) to conclude beyond a reasonable doubt that the defendant committed the charged crime. The State presents its evidence first. Before the defendant presents any evidence, he or she can make a motion for a judgment of acquittal (MJOA). An MJOA asks the judge to decide whether the State has presented evidence that, if believed, would be enough to establish the elements (essential requirements) of an offense beyond a reasonable doubt. If the judge decides that there is not enough evidence, he or she will grant the MJOA and the

defendant will be acquitted of that charge. If, however, the judge finds that the State has presented evidence that could support a conviction, he or she will deny the MJOA. In that case, the trial continues and the defendant can present evidence to counter the State's evidence. After both sides present their cases, the factfinder decides whether the defendant is guilty.

The Parties' Arguments

The Defendant

Defendant argues that his actions involving the shank do not constitute "possession" as is required by ORS 162.185. Primarily, he relies on two Court of Appeals decisions, *State v. Miller*, 196 Or App 354, 103 P3d 112 (2004), and *State v. Sosa-Vasquez*, 158 Or App 445, 974 P2d 701 (1999). In those cases, the Court of Appeals held that there are two types of possession: "actual" and "constructive." Constructive possession occurs when evidence shows that a defendant either exercised control of, or had the right to control, an item. Furthermore, although a defendant does not need to be the only person with the right to control the item, his or her mere presence in the vicinity of an item generally is not enough to prove constructive possession.

Here, defendant argues, the only evidence that the State presented of defendant's "possession" was that he pushed the shank into the ground. He argues that the evidence indicates that it was Jackson who possessed the shank and who wished to get rid of it--and that he (defendant) was, in effect, merely present or in the vicinity of Jackson's possession. Defendant further argues that, at most, the evidence showed that he merely pushed the shank away, and so, in effect, *rejected* actual possession and disclaimed any right to control it. Consequently, defendant concludes, the trial court should have granted his MJOA.

The State

The State agrees with defendant's statements of the applicable legal principles as described in *Miller* and *Sosa-Vasquez*. However, the State makes three points to counter defendant's arguments. First, the State relies on another Court of Appeals case, *State v. Casey*, 215 Or App 76, 168 P3d 315 (2007). In that case, the court held that, to prove control, the State must show that the contraband was available for the defendant's use. Here, the State argues, defendant had "actual" possession when he stomped it into the ground, and that he could have used it immediately then, or returned for it later.

Second, the State observes that, in *Casey*, the Court of Appeals held that the right of control may be exercised jointly with others--for example, when a defendant was involved in a criminal activity with a person who physically possessed a weapon. The State notes that, in this case, Jackson testified that he had actual possession of the shank

in the recreation yard. The State argues that defendant's actions in assisting Jackson and in ensuring that he and others would have access to the weapon later was sufficient evidence to support a jury verdict against defendant.

Finally, the State disputes defendant's claim that he was rejecting control of the shank. The State argues that defendant's position is based on an erroneous understanding of the applicable law and that, even if defendant were correct about the law, there is no evidence that defendant declined control of the shank. Rather, the evidence shows that defendant actively helped others hide the shank in a place where inmates could gain access to it. Accordingly, the State concludes, the evidence was sufficient to permit the jury to find that defendant "possessed" the shank.