No. 32824-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CARL MATHENY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Robert G. Swisher

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting prejudicial prior act evidence under ER 404(b).

2. The trial court erred in failing to balance the probative value of the disputed evidence against its prejudicial effect.

3. The trial court failed to find on the record that Mr. Matheny had the ability to pay the Legal Financial Obligations (LFOs).

4. Court's Instruction 9, placing the burden on Mr. Matheny to prove unwitting possession, violated his right to due process.

5. In refusing to impose a Drug Offender Sentence Alternative (DOSA), the trial court penalized Mr. Matheny for exercising his constitutionally protected right to trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Prior acts of a defendant are not admissible simply to prove he acted in conformity with a particular character trait. Prior acts may be admissible if relevant and they fall within one of the designated exceptions enumerated in ER 404(b). Here, in a possession of methamphetamine prosecution, the trial court admitted evidence that Viagra powder was discovered in the rear seat of the police car in which Mr. Matheny had ridden without identifying the purpose for

which the evidence was admitted and without balancing the probative value of the evidence against its prejudice. Must this Court reverse Mr. Matheny's convictions where the evidence of the Viagra was improper propensity evidence used solely to prove Mr. Matheny possessed controlled substances, and the trial court's error was not harmless where the overwhelming prejudice of this evidence outweighed any limited probative value?

2. A court may impose discretionary LFOs only after making an individualized assessment of the defendant's financial situation and determining his ability to pay. This finding must be made on the record. The court here imposed over $2900 in discretionary LFOs without making any finding regarding Mr. Matheny or his ability to pay. Is Mr. Matheny entitled to reversal of his sentence and remand for a new sentencing hearing where the court will be required to make the necessary findings?

3. The trial court may place the burden on the defendant of proving a defense that negates an element of the offense without offending due process. Unwitting possession negates the element of knowledge in a possession of a controlled substance prosecution, yet the court placed the burden of proving unwitting possession on Mr.

Matheny. Did the trial court violate due process in impermissibly shifting the burden onto Mr. Matheny?

4. A court may not impose an enhanced sentence based upon the defendant's exercise of his constitutionally protected right to trial. The court here refused to impose a DOSA and instead, imposed a sentence at the high end of the standard range based upon Mr. Matheny's exercise of his right to trial. Is Mr. Matheny entitled to resentencing?

C. STATEMENT OF THE CASE

The police conducted a traffic stop of Carl Matheny after he committed a traffic violation. RP 30-31. Mr. Matheny was arrested for Driving While License Suspended (DWLS). RP 31. Mr. Matheny was transported to jail, where upon his removal from the police car, the police found white powder on the seat and a similar residue on Mr. Matheny's fingers. RP 33-34. This substance was tested and determined to be Viagra. RP 74.

While searching Mr. Matheny incident to arrest, the police found a pen with methamphetamine residue inside. RP 31. Mr. Matheny was charged with possession of methamphetamine, driving while license suspended in the second degree, and possession of a dangerous weapon (butterfly knife). CP 6-8. Prior to trial, Mr. Matheny

moved the trial court to prohibit the State from eliciting any evidence of the Viagra powder found in the rear of the police car. RP 10-12, 25-26. The State argued that the evidence "shows some knowledge by the defendant of his culpability either for the driving while suspended or possibly possession of some drug." RP 13. The trial court denied Mr. Matheny's motion and allowed the evidence of the white powder to be admitted without identifying the purpose for which it was admitted or balancing the probative value against the prejudice. RP 26 ("Okay. Well, it was tested, so we'll let it in.").

At trial, Deputy Schwarder testified about finding the powder:

> Q: What I really want to talk about next is you had the defendant in your patrol car. What happened then?
>
> A: I transported him to the Benton County Jail. During my transport with him, he had made a comment to me that he was a fireman. That he didn't need any additional charges. That he wanted, you know, these charges to go away.
>
> And when I arrived, I got him out of the car, and I noticed the – white residue on the back – in the backseat of the patrol car where he was sitting.
>
> Q: Okay. Let me show you what we've got marked as Identification No. 3. Can you tell us what this is?
>
> A: This is a picture of the backseat of my patrol car. It shows a residue at the very kind of back corner where your hands would be at if you were handcuffed and in a seated position.

. . .

Q: So can you tell the jurors absolutely positively whether your patrol car had this white stuff in it?

A: Yeah. I – I am very meticulous about my patrol car, but one of the things that we do at the beginning of our shift is we check our backseats. We check under the area where the feet would be just to ensure that nobody has been put – or that there's no contraband or anything that's in that car. And that's checked after each prisoner has been in the vehicle.

Q: If you recall, do you recall if the defendant was the first person that you transported that night?

A: He was.

Q: He was? Okay.
After seeing this, did you notice anything out of the ordinary with respect to the defendant himself?

A: I did. I noticed that he had similar residue on his fingers.

RP 34-35.

During his rebuttal closing argument, the prosecutor talked about the discovery of the Viagra in the back of the police car:

> Now, concerning that, let me talk about a few things the defendant talked about, the defense attorney. This Viagra was on the seat. Weird, weird deal. You know, we hadn't really talked about what was going on there, but I would argue to you the one thing that you can conclude by the fact the defendant has his hands behind him, Corporal Schwarder hadn't transported anybody, made sure his car was clean, and when he gets to the station, all this residue is there, and it turns out it's Viagra. Okay. You know, weird, weird deal. Strange deal.

> But the one thing you can conclude is that the defendant was secreting something on his person. That's the one thing we know. And he was trying to hide things. That's – you know, who knows why he didn't just come clean about that and say, "You know, I've got some Viagra on me," instead of trying to crush it up and make some secret about it. But that's what he did. That's what he did with respect to Viagra. He couldn't crush it up like he could with a pill. But he's definitely trying to secrete things on his person. That's the importance of the Viagra.

RP 133-34.

The trial court instructed the jury in Court's Instruction 9 on unwitting possession:

> A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession or did not know the nature of the substance.
>
> The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded considering all of the evidence in the case that it is more probably true than not true.

CP 21; RP 104.

At the conclusion of the jury trial, Mr. Matheny was found guilty as charged. RP 141-42. At sentencing, the court rejected Mr.

Matheny's request for a DOSA despite a determination that he was eligible for a DOSA. RP 152. In refusing the DOSA, the court stated:

> You know, Mr. Matheny is a valuable person in the community; for instance, I didn't know he was a mechanic. It did come up during trial that he was a firefighter, and that provides a valuable service to the community. But it's obvious he's got a drug problem. You didn't have to send him for an evaluation to know that. You look at his criminal history. Terrible criminal history.
>
> But here's the situation. I don't think he's ready for treatment. He doesn't want treatment. He came into court and said, "It wasn't my fault. It wasn't my drugs." Remember? "I saved the children in the home because I picked up the pen that had drugs in it and saved the children that way. It wasn't my drugs."
>
> You know, he hasn't accepted the fact that he's got a drug problem, and he obviously does. *If – if he had come in here from the beginning and said, "I've got a drug problem," we'll deal with it then. We'll deal with it then. But he's come in and said, "Not me. Not my drug problem.*"

RP 162-63 (emphasis added). The court sentenced Mr. Matheny at the high end of the standard range sentence of 24 months in custody on the possession of methamphetamine count and 364 days on the remaining two misdemeanor counts. CP 110; RP 164.

In addition, the court imposed $3,570 in LFOs of which only $600 were mandatory fees, without making an inquiry into Mr. Matheny's financial situation and without making an on the record

finding that he had the present or future ability to pay. CP 108-10; RP 163-64.

D. ARGUMENT

1. **The Evidence of the Viagra Powder Admitted Pursuant To ER 404(B) Proved Nothing More Than Mr. Matheny Acted In Conformity With A Character Trait Which Violated His Right To A Fair Trial**

a. *The admission of other acts evidence violates the due process right to a fair trial.*

Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. U.S. Const. amend. XIV; *Estelle v. McGuire,* 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Generally, the mere failure to comply with state evidentiary rules does not violate due process. *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991). But, mere compliance with state evidentiary and procedural rules does not *guarantee* compliance with the requirements of due process. *Id.*, *citing Perry v. Rushen*, 713 F.2d 1447, 1453 (9th Cir. 1983), *cert. denied*, 469 U.S. 838 (1984). Due process *is* violated where the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. *Walters v.*

Maass, 45 F.3d 1355, 1357 (9th Cir. 1995); *Colley v. Sumner*, 784 F.2d 984, 990 (9th Cir. 1986).

b. *Evidence of a person's prior actions cannot be admitted to prove he acted in conformity with that trait.*

ER 404(b) prohibits the use of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith.[1] ER 404(b) was designed "to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." *State v. Foxhoven,* 161 Wn.2d 168, 175, 163 P.3d 786 (2007). ER 404(b) is intended to prevent application by jurors of the common assumption "that 'since he did it once, he did it again.'" *State v. Bacotqarcia,* 59 Wn.App. 815, 822, 801 P.2d 993 (1990), *review denied,* 116 Wn.2d 1020 (1991). "This prohibition encompasses not only prior bad acts and unpopular behavior but *any* evidence offered to 'show the character of a person to prove the person acted in conformity' with that character at the time of a crime." *Foxhoven,* 161 Wn.2d at 175 (emphasis in original). This rule is "not designed 'to

[1] "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." ER 404(a).

deprive the State of relevant evidence necessary to establish an essential element of its case,' but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." *Id.* "In no case . . . may the evidence be admitted to prove the character of the accused in order to show that he acted in conformity therewith." *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

Prior act evidence may be admissible for other purposes, depending on its relevance and the balancing of the probative value and danger of unfair prejudice. *State v. Gresham,* 173 Wn.2d 405, 420, 269 P.3d 207 (2012). ER 404(b) includes a nonexclusive list of permissible purposes for admitting evidence of a person's other bad acts.[2]

However, the law resists criminal convictions based upon the jury's view that the defendant is a bad person or has a history of bad conduct. Therefore, the trial court must begin with the presumption that evidence of prior misconduct is inadmissible. *State v. DeVincentis,* 150 Wn.2d 11, 17, 74 P.3d 119 (2003). When demonstrated, such evidence

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[2] "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

may be admissible for purposes "'such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'" *State v. Powell,* 126 Wn.2d 244, 258, 893 P.2d 615 (1995), *quoting* ER 404(b). Before the trial court admits evidence of prior misconduct under ER 404(b), it must (1) find by a preponderance of the evidence that the prior misconduct occurred, (2) identify the purpose for admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Fisher,* 165 Wn.2d 727, 745, 202 P.3d 937 (2009); *DeVincentis,* 150 Wn.2d at 17. The latter factor inserts an ER 403 examination into an ER 404(b) analysis. "Unfair prejudice" is caused by evidence that is likely to arouse an emotional response rather than promote a rational decision. *State v. Rice,* 48 Wn.App. 7, 13, 737 P.2d 726 (1987).

The burden of demonstrating a proper purpose for admitting evidence of a person's prior bad acts is on the proponent of the evidence. *DeVincentis,* 150 Wn.2d at 17. The court must conduct this analysis on the record. *State v. Sublett,* 156 Wn.App. 160, 195, 231 P.3d 231 (2010), *aff'd,* 176 Wn.2d 58 (2012).

Appellate courts review a trial court's evidentiary rulings for an abuse of discretion. "A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons; i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law." *State v. Hudson,* 150 Wn.App. 646, 652, 208 P.3d 1236 (2009). In close cases "'the scale should be tipped in favor of the defendant.'" *State v. Smith,* 106 Wn.2d 772, 776, 725 P.2d 951 (1986), *quoting State v. Bennett,* 36 Wn.App. 176, 180, 672 P.2d 772 (1983).

The question to be answered in applying ER 404(b) is not whether a defendant's prior bad acts are logically relevant; they are. Evidence that a criminal defendant is a "criminal type" is always relevant. But ER 404(b) reflects the long-standing policy to exclude most character evidence because

> it is said to weigh too much with the jury and to so overpersuade them. . . . The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

Michelson v. United States, 335 U.S. 469, 476, 69 S.Ct. 213, 93 L.Ed. 168 (1948).

Thus, the question to be answered in applying ER 404(b) is whether the evidence of the Viagra was relevant for a purpose other than showing Mr. Matheny's propensity.

c. *The court failed to conduct the required balancing of probative value against its prejudicial effect.*

The balancing of the probative value of the disputed evidence against its prejudicial effect must be conducted on the record and doubtful cases must be resolved in favor of the defendant. *Smith*, 106 Wn.2d at 776. Without such balancing and a conscious determination made by the court on the record, the evidence is not properly admitted." *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981). A trial court errs by not fully articulating its balancing process in admitting ER 404(b) evidence. *State v. Carleton,* 82 Wn.App. 680, 685-86, 919 P.2d 128 (1996). The absence of a record of the weighing of the probative versus prejudicial effect precludes effective appellate review. *State v. Jones,* 101 Wn.2d 113, 677 P.2d 131 (1984). Where the trial court has not balanced probative value versus prejudice on the record, the error is harmless unless the failure to do the balancing, "within reasonable probability, materially affected the outcome of the trial." *State v. Halstien,* 122 Wn.2d 109, 127, 857 P.2d 270 (1993), *citing Tharp,* 96

Wn.2d at 599. *See also Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 446, 191 P.3d 879 (2008).

Here, the trial court admitted the evidence of the Viagra powder over Mr. Matheny's's objection. RP 9-11, 24-26. The court failed to identify the purpose for which the evidence was being admitted, and failed to weigh the probative value of the Viagra powder against its prejudicial effect, despite Mr. Matheny's argument that admission of this evidence was unduly prejudicial. Further, the court failed to instruct the jury that the evidence could only be used for a limited purpose.

d. *The evidence of the Viagra was not relevant to Mr. Matheny's knowledge.*

While the trial court did not state a basis for the admittance of the Viagra, the prosecutor in closing argument argued it was relevant to Mr. Matheny's knowledge of the methamphetamine. RP 133-34. This was clearly an improper basis for admitting the Viagra evidence.

This Court's decision in *State v. Pogue* is instructive. 104 Wn.App. 981, 17 P.3d 1272 (2001). Pogue was charged with unlawful possession of cocaine, which police had found in a vehicle he was driving. *Pogue,* 104 Wn.App. at 982-83. Pogue argued unwitting possession because the car belonged to his sister and claimed that the

police planted the drugs in the car. 104 Wn.App. at 983-84. The trial court admitted evidence of an earlier conviction for delivery of cocaine under ER 404(b) and reasoned that Pogue's assertion of unwitting possession raised the knowledge issue, and therefore the prior conviction was admissible to show that Pogue had knowledge about cocaine. 104 Wn.App. at 984-85. On appeal, the court reversed because Pogue never argued that he did not know the substance in the bag was an illegal drug, he argued he did not even know the bag was in the car. 104 Wn.App. at 985. In that situation, the court ruled the evidence had no relevance apart from propensity: "because he knowingly possessed cocaine in the past, it is more likely that he knowingly possessed it on the day of the charged incident." *Pogue,* 104 Wn.App. at 985.

Here, Mr. Matheny was in the same situation as the defendant in *Pogue*. Mr. Matheny did not argue he did not know what the substance was in the pen, he argued he was unaware there was any substance in the pen. RP 80-81, 88-89. As a consequence, following *Pogue*, the evidence of the Viagra powder had no relevance other than propensity, and for that reason, the court erred in admitting evidence of the Viagra powder.

e. *The evidence of the Viagra was not res gestate evidence.*

The trial court failed to clearly state the basis for the admission of the Viagra evidence. Perhaps one could argue it constituted *res gestae* evidence.

Under the *res gestae* exception to ER 404(b), admission of evidence of other crimes or bad acts is allowed to complete the story of a crime or to provide the context for events close in time and place. *Powell,* 126 Wn.2d at 254. *Res gestae* permits a trial court to admit misconduct that would otherwise be inadmissible when that misconduct is connected in time, place, circumstances, or means employed and constitutes proof of the history of the crime charged. *State v. Lillard,* 112 Wn.App. 422, 432, 93 P.3d 969 (2004) (evidence of other crimes or bad acts are admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime).

The decision in *State v. Trickler*, 106 Wn.App. 727, 25 P.3d 445 (2001), is almost identical to Mr. Matheny's matter and must control the outcome. In *Trickler,* officers searched the defendant's room for evidence of property stolen from Thomas Wiley and discovered personal property belonging to Mr. Wiley, as well as a credit card

bearing the name "Kathleen D. Nunez" and a firearm. 106 Wn.App. at 730. The defendant was charged with unlawful possession of a firearm and possession of a stolen credit card belonging to Ms. Nunez. *Id.* at 733. At trial, the State introduced evidence of property stolen from Mr. Wiley, as well as unrelated stolen checkbooks and credit cards that were found in the defendant's possession on a *res gestae* theory. *Id.* On appeal, the court, noted that

> the events leading up to the discovery of the stolen credit card were relevant and somewhat probative, it was not shown that Mr. Trickler's possession of other allegedly stolen items was an inseparable part of his possession of the stolen credit card, which is the test commonly used in this state.

Id. at 734. The Court went on to hold that the evidence was improperly admitted:

> ER 404(b) is meant to prohibit the State from attempting to use evidence of bad acts in order to prove the propensity of the defendant to commit the same type of bad act. In theory, the State probably introduced evidence of the allegedly stolen evidence [sic] (for which Mr. Trickler was not charged) in order to give the jury a complete picture of the events leading to the discovery of the stolen credit card. In practice, however, by allowing the jury to consider evidence that Mr. Trickler was in possession of a plethora of other allegedly stolen items in order for the State to prove that Mr. Trickler must have known that the credit card was also stolen, the court violated the purpose of ER 404(b). After hearing the witnesses' testimony and seeing evidence of 16 pieces of

> stolen property, the jury was left to conclude that Mr. Trickler is a thief.

Id. at 734.

So too here, admission of the Viagra was not admissible pursuant to the *res gestae* doctrine. Mr. Matheny was not on trial for possession of the Viagra; he was being prosecuted for a specific controlled substance; methamphetamine. Further, as the *Trickler* court noted, the State failed to show the possession of the Viagra was "an inseparable part" of Mr. Matheny's possession of the methamphetamine. *Id.* The Viagra powder was not admissible as *res gestae* evidence.

f. *The error in admitting the evidence of the Viagra powder was prejudicial.*

When a court erroneously admits prior bad acts evidence under ER 404(b), reversal is required where, "within reasonable probability, materially affected the outcome of the trial." *Gresham,* 173 Wn.2d at 433.

Here the prosecutor used the Viagra evidence for its improper purpose, arguing in closing argument Mr. Matheny's possession of the Viagra showed he necessarily possessed the methamphetamine. RP 133-34. This argument used the Viagra powder for its improper

purpose and very likely affected the jury's verdict on this issue given the miniscule amount of methamphetamine in the pipe and Mr. Matheny's testimony he was unaware the pen contained anything, let alone a controlled substance. Further, the jury was never instructed the evidence could only be used for a limited purpose, what that purpose was since the trial court failed to articulate it, thus allowing the jury to use it for whatever purpose it wished, including an improper purpose such as propensity. As a result, there is a reasonable probability the admission of this evidence materially affected the outcome of the trial. The error in admitting the evidence of the unrelated Viagra was not a harmless error. Mr. Matheny's convictions should be reversed.

2. **The trial court erred in imposing court costs and attorney's fees without making a finding regarding Mr. Matheny's inability to pay**

a. *The court may impose court costs and fees only after a finding of an ability to pay.*

The allowance and recovery of costs is entirely statutory. *State v. Nolan,* 98 Wn.App. 75, 78-79, 988 P.2d 473 (1999). Under RCW 10.01.160(1), the court can order a defendant convicted of a felony to repay court costs as part of the judgment and sentence. RCW 10.01.160(2) limits the costs to those "expenses specially incurred by

the state in prosecuting the defendant or in administering the deferred prosecution program under 10.05 RCW or pretrial supervision."

However, RCW 10.01.160(3) states that the sentencing court cannot order a defendant to pay court costs "unless the defendant is or will be able to pay them." *See also State v. Blazina*, ___ Wn.2d ___, 2015 WL 1086552, slip op. at 10 (March 12, 2015, No. 89028-5) (citing RCW 10.01.160 and requiring court to make individualized inquiry into defendant's ability to pay). In making that determination, the sentencing court must take into consideration the financial resources of the defendant and the burden imposed by ordering payment of court costs. *Blazina* held:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

slip op. at 10, *citing* RCW 10.01.160(3).

The court here made no such inquiry and under *Blazina*, Mr. Matheny is entitled to a new sentencing hearing.

b. *The trial court failed to make an individualized inquiry into Mr. Matheny's ability to pay the Legal Financial Obligations (LFO)*

In its recent decision in *Blazina*, the Supreme Court held that prior to imposing discretionary LFOs, the trial court *must* make an individualized inquiry into the defendant's financial circumstances and his current and future ability to pay. *Blazina*, slip op. at 10. In addition, the record must reflect this individualized inquiry:

> Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors, as amici suggest, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Id, slip op. at 11.

Here, the trial court failed to make the individualized inquiry required under 10.01.160, and even failed to make a boilerplate finding in the Judgment and Sentence. CP 107-09. At sentencing, the court's imposition of LFOs was short and succinct;

> [A]nd I'm going to enter the judgment, order the defendant to pay the $500 victim's assessment, court costs, which include the filing fee, the clerk's fee of $100, filing fee of $200, Sheriff's fee of $120, jury fee of $250, $700 attorney fees, for a total of $1,370 in court

> costs, and the mandatory $2000 fine, $100 Crime Lab fee, $100 DNA collection fee.

RP 163.

Mr. Matheny immediately moved to waive the $2000 fine. RP 163-64. The State agreed the court could waive the fine, but argued it was waiveable only where there was evidence of some kind of financial hardship. RP 164. The court agreed to "make the fine $1000." RP 164. The court then stated,

> I've just been advised I have to total these all up, so I think the total is $3,570. And, of course, the Department of Corrections, while he's in prison, will – if he's working, will start collecting that once he's released.

RP 164.

Only the victim assessment and DNA collection fee were mandatory fees that could not be waived. *State v. Curry,* 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (the Supreme Court has held that the victim penalty assessment is mandatory); *State v. Thompson,* 153 Wn.App. 325, 336, 223 P.3d 1165 (2009) (DNA laboratory fee mandatory). All of the other fees imposed by the court were discretionary and could have been waived. Yet, the court failed to consider waiving these discretionary costs or even consider the impact

that imposition of these fees would be on Mr. Matheny as required by *Blazina*. This was error.

c. *The remedy for the court's failure to inquire into Mr. Matheny's financial circumstances and make a finding of his ability to pay the LFOs is remand.*

Where the trial court fails to make an individualized inquiry into the defendant's ability to pay, on the record, the remedy is to remand the matter to the trial court for a "new sentence hearing[]." *Blazina*, slip op. at 12. This Court should remand Mr. Matheny's matter to the trial court for a new sentencing hearing.

3. **Placing the burden of proving unwitting possession on Mr. Matheny violated his right to due process which requires the State to prove all elements of the offense beyond a reasonable doubt.**

a. *Due process requires the State to always carry the burden of proving the elements of the offense beyond a reasonable doubt.*

> Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of trial and applies to every element necessary to constitute the crime.

Davis v. United States, 160 U.S. 469, 487, 16 S. Ct. 353, 40 L. Ed. 499 (1895). The Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a

reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

> *Mullaney* [*v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975)] . . . held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. . . . Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.

Patterson v. New York, 432 U.S. 197, 215, 97 S. Ct. 2319, 52 L. Ed. 2d 281 (1977).

Thus, in addition to the elements of an offense, the State must disprove a defense where (1) the statute indicates the Legislature's intent to treat the absence of a defense as "one of the elements included in the definition of the offense of which the defendant is charged;" or (2) the defense negates an essential ingredient of the crime. *State v. McCullum*, 98 Wn.2d 484, 491-93, 656 P.2d 1064 (1983); *see also State v. Deer*, 175 Wn.2d 725, 734, 287 P.3d 539 (2012) ("when a defense 'negates' an element of the charged offense . . . due process requires the State to bear the burden of disproving the defense"), *cert. denied*, 133 S. Ct. 991 (2013).

Applying this framework to the issue of unwitting possession in a possession of a controlled substance prosecution it is clear the State must bear the burden of proving knowing possession beyond a reasonable doubt. This is because unwitting possession negates the element of knowledge, that is to say that proof of unwitting possession will necessarily disprove knowingly possessing.

b. *The decision in State v. W.R. compels the conclusion that placing the burden of proving unwitting possession impermissibly on the defendant violates due process.*

In its recent decision in *State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014), the Supreme Court reexamined its prior decisions and ruled that consent is not an affirmative defense to forcible compulsion on which the burden of proof may be placed on the defendant, as it had previously held on a number of occasions. 181 Wn.2d at 768-69. Rather, the Court concluded that consent negated the element of force, thus the burden of proving the lack of consent must necessarily fall upon the State. *Ibid.*

The Court came to this conclusion by overruling its previous decisions which had consistently rejected the argument that placing the burden of proving consent on the defendant violated due process, instead mistakenly and repeatedly labeling consent as an "affirmative

defense." *W.R.*, 181 Wn.2d at 768-69, *overruling State v. Camara,* 113 Wn.2d 631, 781 P.2d 483 (1989), and *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006). In so doing, the Court stated:

> We hold that when a defense necessarily negates an element of the crime, it violates due process to place the burden of proof on the defendant. *The key to whether a defense necessarily negates an element is whether the completed crime and the defense can coexist.*

W.R., 181 Wn.2d at 765 (emphasis added).

Applying *W.R.* to unwitting possession, it is clear that unwitting possession necessarily negates the element of knowledge, thus placing the burden of proof on Mr. Matheny violated due process. Unwitting possession cannot coexist with knowledge because they are different sides of the same coin; one cannot knowingly and unwittingly possess. One either knowingly possesses or unwittingly possesses.

c. *In light of the decision in W.R., the court erred in placing the burden of proving unwitting possession on Mr. Matheny.*

> The State is foreclosed from shifting the burden of proof to the defendant . . . "when an affirmative defense *does* negate an element of the crime."

Smith v. United States, ___U.S. ___, 133 S. Ct. 714, 719, 184 L. Ed. 2d 570 (2013), *quoting Martin v. Ohio*, 480 U.S. 228, 237, 107 S.Ct. 1098, 94 P.2d 267(1987); *see also Deer* 175 Wn.2d at 734.

A person is guilty of unlawful delivery of a controlled substance if he (1) delivers a controlled substance with (2) knowledge that the substance delivered was a controlled substance. *State v. DeVries,* 149 Wn.2d 842, 849-50, 72 P.3d 748 (2003). Guilty knowledge is intrinsic to the definition of the crime itself and must be shown. *State v. Boyer,* 91 Wn.2d 342, 344, 588 P.2d 1151 (1979). The guilty knowledge required is not knowledge of the substance's exact chemical or street name, it is simply knowledge that the substance is some type of controlled substance. *State v. Nunez-Martinez,* 90 Wn.App. 250, 254, 951 P.2d 823 (1998).

In *Boyer,* the Supreme Court held that the State was required to prove "guilty knowledge" in a prosecution for delivery of a controlled substance. *Ibid.* That holding rested on the Court's conclusion that the Legislature would not have intended a strict liability crime when "even a postal carrier would be guilty of the crime were he innocently to deliver a package which in fact contained a forbidden narcotic." *Id.* Thus, under *Boyer*, possession of methamphetamine requires proof of the defendant's knowledge of the controlled substance as an implied element of the offense. *Id.*

The Supreme Court has altered *Boyer's* holding somewhat over the years. The Court has held that the element of knowledge need not be alleged in the information or stated in the to-convict instruction. *See State v. Johnson*, 119 Wn.2d 143, 146, 829 P.2d 1078 (1991).

Instead, the Court determined that knowledge was not an element of the offense of possession of a controlled substance that the State was required to prove rather, knowledge was an affirmative defense that the defendant bore the burden of proving. *State v. Cleppe*, 96 Wn.2d 373, 380-81, 635 P.2d 435 (1981), *cert. denied*, 456 U.S. 1006 (1982); *accord State v. Bradshaw,* 152 Wn.2d 528, 533, 98 P.3d 1190, *cert. denied,* 544 U.S. 922 (2005).

In light of the Court's decision in *W.R.*, the decision in *Boyer* seems to be the correct one since it required the State to prove knowledge. Placing the burden of proving unwitting possession on Mr. Matheny was violated due process under *W.R.* since unwitting possession necessarily negates knowledge.

d. *The decisions in Cleppe and Bradshaw must be reexamined in light of W.R.*

In *Cleppe,* the Supreme Court held that knowledge is not a required element of unlawful possession because the Legislature had removed the *mens rea* requirement from a previous version of the bill,

thus intending to omit knowledge as an element of unlawful possession. *Cleppe,* 96 Wn.2d at 378, 380. More than twenty years later, in *Bradshaw,* the Supreme Court again examined at the issue and specifically declined to overrule *Cleppe,* 152 Wn.2d at 539. In *Bradshaw*, the Court noted that the Legislature had amended RCW 69.50.401 seven times since *Cleppe* and had not added a *mens rea* element to the unlawful possession statute. *Bradshaw,* 152 Wn.2d at 533.

Cleppe and *Bradshaw* suffer from the same infirmity as *Camara* and *Gregory* did in *W.R.*; the refusal to recognize that unwitting possession, as did consent in *Camara*, negates the implied element of knowledge. One's possession of a controlled substance cannot be unwitting if one has knowledge of the controlled substance. Thus, unwitting possession negates the element of knowledge. Whether the element is explicitly stated in the statute or implied by the courts is of no moment; if that element is negated by a "defense," the defendant cannot be forced to bear the burden of proving the "defense" without violating due process.

Further, there are no instructions which could properly convey to a jury the State's burden of proof on knowledge all the while telling

the jury that the defendant must prove unwitting possession by a preponderance of the evidence. As *State v. Lynch* recognized, attempting to prove the "defense" by a preponderance of the evidence is a far greater burden than simply establishing a reasonable doubt on forcible compulsion. 178 Wn.2d 487, 494, 309 482 (2013) (error to instruct on consent where defendant objected and his trial strategy was to show to the jury the State had not proven forcible compulsion). The effect of any instruction would be to tell the jury that the defendant must prove by a preponderance of the evidence that a reasonable doubt exists as to unwitting possession. More than just a logically impenetrable question, such an instruction is contrary to the guarantees of due process.

A state may not designate a "defense" which actually represents negation of an element of the crime charged, then require the defendant carry the burden of persuasion on the defense. *Mullaney*, 421 U.S. at 684. Requiring a defendant to prove unwitting possession does just that. *Cleppe* and *Bradshaw* are incorrect and must be reexamined.

e. *Mr. Matheny is entitled to reversal of his conviction for possession of methamphetamine and remand for a new trial.*

Where a constitutional error occurs, reversal is ordinarily the proper remedy unless the State can prove the error was harmless beyond a reasonable doubt. *State v. Guloy,* 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The State cannot satisfy that burden here.

It is important to remember that *W.R.* involved a bench trial where the court found *W.R.* had not carried his burden of proving consent. Nevertheless, the Supreme Court found this to be erroneous and not harmless beyond a reasonable doubt.

Here, the defense and prosecution both relied on an incorrect understanding of the law when they fashioned and presented their arguments surrounding unwitting possession. Creating a reasonable doubt for the defense is far easier than proving an affirmative defense by a preponderance of the evidence. The record does not show any consideration of the interplay between unwitting possession and knowledge under the negates analysis, making it impossible to conclude beyond a reasonable doubt that a reasonable fact finder would not have been swayed by arguments made using the correct burden of proof.

Mr. Matheny is entitled to reversal of his convictions for possession of methamphetamine and remand for a new trial with the proper burden allocations. *W.R.*, 181 Wn.2d at 770.

4. **The court penalized Mr. Matheny for exercising his right to trial in denying his request for a DOSA.**

Generally, a standard range sentence may not be appealed. RCW 9.94A.585(1). That statute does not place an absolute prohibition on the right of appeal; rather, it only precludes review of challenges to the amount of time imposed when the time is within the standard range. *State v. McGill,* 112 Wn.App. 95, 99, 47 P.3d 173 (2002). A defendant, however, may challenge the procedure by which a sentence within the standard range is imposed. *State v. Mail,* 121 Wn.2d 707, 712-13, 854 P.2d 1042 (1993). Thus, a defendant "may appeal a standard range sentence if the sentencing court failed to comply with . . . constitutional requirements." *State v. Osman,* 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006).

It is unconstitutional to use enhanced sentencing to punish or penalize a defendant who exercises his constitutional rights. *See United States v. Jackson,* 390 U.S. 570, 581, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) (holding that practice which discourages exercise of Fifth or

Sixth Amendment rights by penalizing through enhanced sentencing the exercise of those rights is unconstitutional). *See also State v. Kellis*, 148 Idaho 812, 814, 229 P.3d 1174, 1176 (Ct. App. 2010) (it is improper for a court to penalize a defendant merely because he or she exercises the right to put the government to its proof at trial).

> Each case requires individualized sentencing procedures; however, whether a defendant exercises his constitutional right to trial by jury to determine guilt or innocence must have no bearing on the sentence.

United States v. Marzette, 485 F.2d 207 (8th Cir. 1973); *accord Bordenkircher v. Hayes,* 434 U.S. 357, 363, 98 S.Ct. 663, 668, 54 L.Ed.2d 604, 610 (1978) ("[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort").

The DOSA program is an attempt by the Legislature to provide treatment for some offenders judged likely to benefit from it. *State v. Grayson*, 154 Wn.2d 333, 337-38, 111 P.3d 1183 (2005). The program authorizes trial judges to give eligible nonviolent drug offenders a reduced sentence, treatment, and increased supervision in an attempt to help them recover from their addictions. *See generally* RCW 9.94A.660. Under a DOSA sentence, the defendant serves only about one-half of a standard range sentence in prison and receives substance

abuse treatment while incarcerated. After completion of the one-half sentence, the defendant is released into closely monitored community supervision and treatment for the balance of the sentence. RCW 9.94A.660(2).

Under RCW 9.94A.660 (1)(a), a defendant is eligible for a DOSA sentence if he is convicted of a felony that is not a violent offense or sex offense and the violation does not involve a firearm or deadly weapon sentence enhancement, and if he meets the requirements stated therein.

Mr. Matheny was deemed eligible for a DOSA. RP 152. As a result, Mr. Matheny asked the court to impose a DOSA. RP 155-62. The court refused to impose a DOSA and, in its statements supporting its denial, indicated it was penalizing Mr. Matheny for putting the State to its burden of proving his guilt. RP 162-63 ("If – if he had come in here from the beginning and said, 'I've got a drug problem,' we'll deal with it then. We'll deal with it then. But he's come in and said, 'Not me. Not my drug problem.'"). This was plainly erroneous and a clear indication that the refusal to impose a DOSA, and instead impose a high end of the standard range sentence, was because Mr. Matheny exercised his right to trial.

The appropriate remedy is reversal of the sentence and remand for resentencing. *Grayson*, 154 Wn.2d at 343 ("We reverse on the limited grounds that the trial judge did not appear to meaningfully consider whether a sentencing alternative was appropriate."). This Court must reverse Mr. Matheny's sentence and remand for resentencing.

E. CONCLUSION

For the reasons stated, Mr. Matheny asks this Court to reverse his convictions and remand for a new trial. Alternatively, Mr. Matheny asks the Court to reverse his sentence and costs imposed and remand for a new sentencing hearing.

DATED this 23rd day of March 2015.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 32824-4-III
	)	
CARL MATHENY,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF MARCH, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF IF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF MARCH, 2015.

X_____

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