

NO. 37097-2-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent

vs.

MARY L. BALASKI,

Appellant

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT  
FOR MASON COUNTY  
The Honorable Toni A. Sheldon, Judge  
Cause No. 07-1-00342-8

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BRIEF OF APPELLANT

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THOMAS E. DOYLE, WSBA NO. 10634  
PATRICIA A. PETHICK, WSBA 21324  
Attorneys for Appellant

P.O. Box 510  
Hansville, WA 98340-0510  
(360) 638-2106

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking the case from the jury where Balaski produced sufficient evidence that her possession was unwitting.
02. The trial court erred in calculating Balaski's offender score when it included her two alleged prior criminal convictions in determining her offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in not taking the case from the jury where Balaski produced sufficient evidence that her possession was unwitting. [Assignment of Error No. 1].
02. Whether the trial court erred in calculating Balaski's offender score when it included her two alleged prior criminal convictions in determining her offender score? Assignment of Error No. 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

Mary L. Balaski (Balaski) was charged by information filed in Mason County Superior Court on July 16, 2007, with unlawful possession of methamphetamine, contrary to RCW 69.50.4013(1). [CP 43-44].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [RP 3]. Trial to a jury commenced on October 18, the

Honorable Toni A. Sheldon presiding. Neither exceptions nor objections were taken to the jury instructions. [RP 49]. The jury returned a verdict of guilty as charged. [CP 23].

Balaski was sentenced within her standard sentence range and timely notice of this appeal followed. [CP 2-18].

02. Substantive Facts

On July 11, 2007, pursuant to an order for non-occupancy of residence, several officers went to the property “to make sure that everybody had vacated.” [RP 17]. They found a trailer parked on the property and encountered Balaski, who told them the trailer belonged to her and her boyfriend. [RP 18]. On the refrigerator inside the trailer was a plastic baggie “containing very little white residue [RP 32],” which subsequently tested positive for methamphetamine. [RP 19-20, 31-32]. Balaski said she had found the baggie the day before outside the trailer and had put it on the refrigerator because she didn’t want kids to get a hold of it. [RP 29, 39-40].

D. ARGUMENT

01. THE TRIAL COURT ERRED IN NOT TAKING THE CASE FROM THE JURY WHERE BALASKI PRODUCED SUFFICIENT EVIDENCE THAT HER POSSESSION WAS UNWITTING.

The test for determining the sufficiency of

the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

In State v. Balzer, 91 Wn. App. 44, 67, 954 P.2d 958 (1998), this court held:

Unwitting possession is a judicially created affirmative defense that may excuse the defendant’s behavior, notwithstanding the defendant’s violation of the letter of the statute. State v. Knapp, 54 Wn. App. 314, 317-18, 773 P.2d 134 (1989), review denied, 113 Wn.2d 1022 (1989). To establish the defense, the defendant must prove, by a preponderance of the evidence, that his or her possession of the unlawful substance was unwitting. State v. Riker, 123 Wn.2d 351, 368, 869 P.2d 43 (1994); State v. Wiley, 79 Wn. App. 117, 900 P.2d 1116 (1995).

Here, the trial court gave the following jury instruction regarding 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 her 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 36].

The circumstances in this case establish proof by a preponderance of the evidence that Balaski's possession of the methamphetamine was unwitting.

Unwitting possession of a controlled substance is a defense to a possession charge. State v. Cleppe, 96 Wn.2d 373, 381, 635 P.2d 435 (1981), cert. denied, 456 U.S. 1006, 73 L. Ed. 1300, 102 S. Ct. 2296 (1982). Once the State establishes a prima facie case for possession, the defendant may affirmatively assert that his or her possession of the drug was unwitting. State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). There are two alternative ways of establishing the defense: (1) that the defendant did not know he or she was in possession of the controlled

substance; or (2) that the defendant did not know the nature of the substance he or she possessed. City of Kennewick v. Day, 142 Wn.2d 1, 11, 11 P.3d 304 (2000).

While Balaski admitted that she recognized the baggie “to be paraphernalia that drug users do use [RP 39](,)” there was no evidence that she knew the nature of the microscopic amount of residue within the baggie: “It didn’t look like there was anything in it to me.” [RP 40]. When this is coupled with the understanding that no evidence was presented that she had special knowledge in being able to recognize the nature of the substance, which she apparently could not even see, her taking responsibility for finding and picking up the baggie cannot be equated with her taking responsibility for knowledge of the contents in the baggie. Accordingly, these facts and all reasonable inferences to be drawn therefrom, by a preponderance of the evidence, demonstrate that Balaski did not know that nature of the substance she possessed, with the result that her possession was unwitting.

Balaski’s conviction for unlawful possession of a controlled substance should be reversed.

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02. THE TRIAL COURT MISCALCULATED  
BALASKI'S OFFENDER SCORE WHEN IT  
INCLUDED HER TWO ALLEGED PRIOR  
CRIMINAL CONVICTIONS IN  
DETERMINING HER OFFENDER SCORE.

Without objection or acknowledgment, the trial court included Balaski's two alleged prior criminal convictions in determining her offender score. [RP 84-89].

One of the following must occur for a trial court to include prior convictions in a defendant's criminal history: (1) the State proves the prior convictions with the required evidence; (2) the defendant admits to the prior convictions; (3) the defendant acknowledges the prior convictions by failing to object to their inclusion in a presentence report. RCW 9.94A.500(1); RCW 9.94A.530(2).

Since none of the above happened during Balaski's sentencing [RP 84-89], the trial court erred in including the two alleged prior criminal convictions in determining her offender score. While issues not raised in the trial court may not generally be raised for the first time on appeal, State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996), illegal or erroneous computations of an offender score that alter the defendant's standard sentence range may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). If Balaski's two alleged prior criminal convictions were improperly included in her

offender calculation, her standard range, would drop from 6+-18 months to 0-6 months. RCW 9.94A.525(7).

At sentencing, the State bears the burden of proving all prior convictions before those convictions can be used in an offender score or otherwise. See State v. Ford, 137 Wn.2d at 479-80. A defendant does not acknowledge an incorrect offender score simply by failing to object at sentencing. State v. Ford, 137 Wn.2d at 481-82.

Balaski's sentence should be remanded for resentencing under the general rule that the State is held to the existing record on remand. State v. McCorkle, 88 Wn. App. 485, 500, 945 P.2d 736 (1997). At the sentencing hearing, given that the State presented no evidence to prove Balaski's two alleged prior criminal convictions, there was nothing to object to in this regard. Unlike the facts in State v. Ford, 137 Wn.2d at 485, where our Supreme Court remanded for an evidentiary hearing to permit the State to prove the disputed matters because "defense counsel has some obligation to bring deficiencies of the State's case to the attention of the sentencing court(,)" 137 Wn.2d at 485, here there was no "State's case." Nothing occurred that could possibly have warranted an objection from Balaski's counsel.

In In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005), a three-strikes case where Cadwallader had failed to

object to his criminal history at sentencing, and thereby failed to put the sentencing court on notice that one of his prior strike convictions had washed out, our Supreme Court ruled that the State would be held to the existing record on remand, stating, “(g)iven that Cadwallader had no obligation to disclose his criminal history, it follows that he had no obligation to object to the State’s failure to include the 1985 Kansas theft conviction in his criminal history.” Id. at 876.

Here, because Balaski was under no obligation to prove her two alleged prior criminal convictions – that being the State’s exclusive burden – she was under no obligation to object to the State’s failure to present any evidence to establish these convictions. In short, since there was no “State’s case” vis-à-vis these convictions, and thus nothing warranting an objection from Balaski, her sentencing on this issue should be remanded and the State held to the existing record.

E. CONCLUSION

Based on the above, Balaski respectfully requests this court to reverse and dismiss her conviction or to remand for resentencing consistent with the arguments presented herein.

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