

COURT OF APPEALS  
DIVISION II

No. 41445-7-II

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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON  
DEPT. OF JUSTICE  
*Ce*

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**STATE OF WASHINGTON,**

Respondent,

vs.

**SHANNON DONOVAN,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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**I. ISSUES**

- A. Did the admission of the Certified Copy of Driving Record without a records custodian violate Donovan's right to confront adverse witnesses?
- B. Did Donovan receive effective assistance from her trial counsel?
- C. Was there sufficient evidence presented to convict Donovan of Possession of a Controlled Substance?

**II. STATEMENT OF THE CASE**

The State filed an information, on May 27, 2010, charging Shannon Lynn Donovan with VUCSA – Possession of Methamphetamine, Count One, and Driving While License Suspended in the Third Degree (DWLS 3), Count Two. A jury trial was held on October 25, 2010. RP 1.

On May 26, 2010, Trooper Sharon Murphy initiated a traffic stop on the vehicle Donovan was driving. RP 25-26. Trooper Murphy pulled over Donovan's van because the license plate tabs did not match the registration on record for the van. 2RP 26-28. Donovan was the sole occupant of the van. RP 28. Trooper Murphy asked Donovan for her driver's license, insurance and registration. RP 29. Donovan began to make excuses why she could not give Trooper Murphy her license. RP 29. Donovan stated, "I just came back from my boyfriend's. You are not going to

believe this. I'm not supposed to drive, but I had to drive today. I just had to go the Department of Licensing and get this printout, but I can get my license now." RP 29. Donovan admitted she did not have a driver's license and had obtained her identification card that morning. RP 29. A driver's check on Donovan returned that Donovan's driving privilege was suspended in the third degree. RP 30; Ex. 1. Trooper Murphy placed Donovan under arrest for DWLS 3 and had Donovan exit the van. RP 30. Trooper Murphy searched Donovan incident to the arrest. RP 39-40. Trooper Murphy located numerous personal items, including jewelry, in one of Donovan's pockets. RP 40. Trooper Murphy also located in a coat pocket a plastic straw with white powder residue and a broken glass pipe. RP 40. The coat fit Donovan, who is approximately five feet and one inches tall and 120 pounds. RP 42-43.

Raymond Kusumi, a forensic scientist at the Washington State Patrol Crime Laboratory performed tests on the straw that was found in Donovan's coat. RP 57-58, 60. Mr. Kusumi concluded the residue on the straw contained methamphetamine. RP 61. Mr. Kusumi explained he performed a qualitative test on the methamphetamine. RP 62. There was not any testimony regarding the actual weight of the methamphetamine.

The State sought to admit a Certified Copy of Driving Record (CCDR) obtained from the Washington State Department of Licensing. RP 31. The CCDR had a cover letter and a copy of the actual letter sent to Donovan informing her that her license was suspended beginning July 19, 2009. Ex. 1. Donovan's trial counsel objected, asserting the CCDR was hearsay. RP 31. Donovan's trial counsel also moved the court to strike Trooper Murphy's testimony regarding Donovan's statement about her licensing status pursuant to the *corpus delicti* rule. RP 34-35. The trial court admitted the CCDR over trial counsel's objection, reasoning the document was under seal. RP 37. The trial court also denied Donovan's attorney's request to strike the statements. RP 37-38.

Donovan and Jeffrey Lucey, Donovan's boyfriend, testified on Donovan's behalf. RP 66, 81. Mr. Lucey stated he was a daily methamphetamine user. RP 66-67. Mr. Lucey testified he and Donovan regularly had possession of each other clothes. RP 66-67. Mr. Lucey stated he had worn the jacket Donovan was wearing when she was arrested. RP 66-67. Mr. Lucey said he put the straw in the coat pocket, along with some empty baggies prior to returning the jacket to Donovan. RP 67, 70-72. Mr. Lucey is

approximately six foot three inches tall and 190 pounds. RP 69. Donovan admitted the coat belonged to her but denied knowing there was a straw containing methamphetamine in the pocket of the coat. RP 82-84, 86. Donovan denied telling Trooper Murphy the straw would probably contain methamphetamine. RP 84-85.

Trooper Murphy testified for a second time. RP 88. Trooper Murphy stated she asked Donovan what the white powdery substance would test positive for. RP 89. Trooper Murphy asked Donovan if the white powder would test positive for cocaine. RP 89. Donovan told Trooper Murphy, “[n]o, not cocaine. It would probably be methamphetamine.” RP 89.

Donovan was convicted of Possession of Methamphetamine and DWLS 3. RP 119. After a sentencing hearing, Donovan was sentenced to 30 days with a first time offender waiver. RP 128-129; CP 4-12.

## **ARGUMENT**

### **A. THE TRIAL COURT’S ADMISSION OF THE CCDR DID NOT VIOLATE DONOVAN’S RIGHTS UNDER THE CONFRONTATION CLAUSE.**

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to confront adverse witnesses. This court reviews alleged violations of the

confrontation clause de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011) (citations omitted).

Hearsay is inadmissible unless it falls into one of the exceptions or exemptions authorized by law. *State v. Kirkpatrick*, 160 Wn.2d 873, 881, 161 P.3d 990 (2007). If a hearsay exception exists, the Confrontation Clause requires a determination if the hearsay is testimonial. *Id.* at 882. Testimonial hearsay is only admissible if the declarant is unavailable and there was a prior opportunity for the accused to cross-examine the declarant. *Id.* If the hearsay evidence is determined to be non-testimonial there is no such requirement. *Id.*

Public records are admissible without testimony from a records custodian if the records are certified. RCW 5.44.040. The statute, RCW 5.44.040, is a codification of the common law public hearsay exception. *Brundridge v. Flour Federal Services, Inc.*, 164 Wn.2d 432, 452, 191 P.3d 879 (2008).

Copies of all records and documents on record or on file in the offices of various departments of the United States and of this state or any other state or territory of the United States, when duly certified by the respective officers having by law custody thereof, under their respective seals, where such officers have official seals, shall be admitted in evidence in the courts of this state.

RCW 5.44.040. A document is not admissible as a public record when the document contains opinions or conclusions that involve exercise of discretion or judgment. *State v. Phillips*, 84 Wn. App. 829, 834, 972 P.2d 932 (1999). A public record must contain facts, which are public in nature, retained for the public's benefit and express authority for the compilation of the record. *Id.* A driving record is considered a public document. *Id.* A document offered under RCW 5.44.040 is self-authenticating and may be admitted without foundational testimony. ER 902. The statute, which is cited to in ER 803(a)(8)<sup>1</sup>, not only authenticates public records but also creates a hearsay exception for those records. *State v. Monson*, 113 Wn.2d 833, 837-39, 784 P.2d 485 (1989).

A certification of record under RCW 5.44.040 need not only attest to the authentication of the attached copy of the record but can also summarize the record. *State v. Kirkpatrick*, 160 Wn.2d 873, 884, 161 P.3d 990 (2007); *State v. Kronich*, 160 Wn.2d 893, 903, 161 P.3d 982 (2007). The Washington State Supreme Court held,

[T]here is no legal or logical reason to treat a certification indicating that a person's driving privilege is suspended differently from a record indicating such a privilege is not suspended. The admissibility of

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<sup>1</sup> ER 803(a)(8) states, *Public Records and Reports*. [Reserved. See RCW 5.44.040.]

such documents under the confrontation clause should not “turn the content therefore when that content includes only verifiable facts, adduced by a government official in the regular course of his or her duties according to a standard procedure.”

*State v. Kronich*, 160 Wn.2d at 903 (citations omitted).

Donovan cites to *State v. Jasper*<sup>2</sup> and *Melendez-Diaz v. Massachusetts*<sup>3</sup> to support her position that the CCDR was inadmissible without testimony from a Department of Licensing (DOL) representative. Brief of Appellant 6. The State does agree that the CCDR admitted into evidence in Donovan’s case contained an affidavit almost identical to the affidavit submitted in *Jasper*. Ex. 1. The State respectfully disagrees with Donovan and the court in *Jasper* that such an affidavit is testimonial hearsay and thereby inadmissible absent testimony from a DOL records custodian.

The court in *Jasper* held that DOL affidavits summarizing a records custodian’s findings after a careful and diligent search of the defendant’s driving record were testimonial hearsay. *State v. Jasper*, 158 Wn. App. 518, 531-32, 245 P.3d 228 (2010). The court relied on its analysis of *Melendez-Diaz*, reasoning that the affidavit was created solely for litigation purposes and provided a testimonial ex parte statement in regards to Jasper’s driving status on the day

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<sup>2</sup> *State v. Jasper*, 158 Wn. App. 518, 245 P.3d 228 (2010).

<sup>3</sup> *Melendez-Diaz v. Massachusetts*, \_\_U.S.\_\_, 129 S. Ct. 2527, 174 L.Ed.2d 314 (2009).

of the collision. *Id.* Yet the documents in *Melendez-Diaz* are drastically different than the CCDR admitted in *Jasper*. In *Melendez-Diaz* the Supreme Court held that use of a certified report of a drug analyst identifying the composition and weight of substances tested solely for criminal prosecution, without testimony, violated the Confrontation Clause. *Melendez-Diaz v. Massachusetts*, \_\_\_U.S.\_\_\_, 129 S. Ct. 2527, 174 L.Ed.2d 314 (2009). The Court rejected the notion that the report was a business record because “a clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysis did here: create a record for the sole purpose of providing evidence against a defendant.” *Melendez-Diaz*, 129 S. Ct. at 2539.

The certified records admitted in Donovan’s case are fundamentally and materially different than those presented in *Melendez-Diaz*. DOL did not create the driving record for the sole purpose of the criminal prosecution of Donovan. Driving records are kept in the DOL’s normal course of business, are public in nature and are retained for the public’s benefit. In contrast, a report summarizing the findings of a chemical analysis of a possible controlled substance for the purpose of criminal prosecution is not a

record that is created and retained for the public's benefit or are normally considered public in nature. The affidavit page is only a summary of the records and does not contain opinions or conclusion that involves an exercise of discretion or judgment, unlike the certified drug analyst's report. The Washington State Supreme Court correctly held that CCDRs, including the affidavit, are not testimonial and do not violate the Confrontation Clause. *See, State v. Kirkpatrick*, 160 Wn.2d 873; *State v. Kronich*, 160 Wn.2d 893. Therefore the trial court correctly ruled that the CCDR was admissible and Donovan's conviction for DWLS 3 should be affirmed.

**B. DONOVAN CAN NOT MEET THE REQUISITE SHOWING THAT HER TRIAL COUNSEL WAS INEFFECTIVE.**

To prevail on an ineffective assistance of counsel claim Donovan must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 688, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *State v. Reichenbach*, 153 Wn.2d at 130, citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Deficient performance exists only if counsel's actions were "outside

the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. If counsel’s performance is found to be deficient, than the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice “requires ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

A defendant who is attacking their trial counsel’s failure to object to the admission of evidence is required to show, (1) absence of tactical reasons or legitimate strategy for failing to object, (2) the objection would likely have been sustained, and (3) had the evidence been excluded the result of the trial would have been different. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (citations omitted).

In the present case Donovan is asserting her trial counsel was ineffective due to his failure to object to Trooper Murphy’s testimony regarding the hearsay statement made by dispatch that Donovan’s license was suspended. Brief of Appellant 9. There is

the possibility that trial counsel decided to not draw any further attention to the statement. The statement was not elicited to prove that Donovan had been driving on a suspended license but to explain the chain of events that occurred that ultimately resulted in Trooper Murphy arresting Donovan. RP 30.

Donovan also argues that the judge relied solely on Trooper Murphy's testimony regarding dispatch's hearsay statement to establish the *corpus delicti* necessary to admit Donovan's statement regarding her driving status and therefore, had there been a proper objection there would be no *corpus delicti* of driving while suspended. Brief of Appellant 9-10. This statement is simply not true. Corpus delicti is established when there is independent evidence which provides prima facie corroboration of the alleged crime or a reasonable and logical inference that someone has committed the crime. *State v. McPhee*, 155 Wn. App. 44, 60, 230 P.3d 284 (2010). The evidence establishes that Donovan was driving and her license was suspended in the third degree. RP 28; Ex. 1. This evidence is sufficient *corpus delicti* to show that the crime of driving while license suspended in the third degree had occurred and the admission by Donovan regarding her driving status is admissible.

Therefore, Donovan has not met the burden of showing her trial counsel was ineffective. Even if Donovan's trial counsel's performance is deemed deficient, which the State is not conceding is the case, there is no showing by Donovan that the outcome of her trial would have likely been different, but for the admission of the hearsay statement. Donovan's conviction for driving while license suspended in the third degree should be affirmed.

**C. THERE IS SUFFICIENT EVIDENCE PRESENTED TO SUSTAIN A CONVICTION FOR POSSESSION OF METHAMPHETAMINE.**

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const., amend. XIV; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If "any rational jury could find the essential elements of the crime beyond a reasonable doubt", the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all

reasonable inferences therefrom are drawn in favor of the State.

*State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004).

When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Further, "the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d at 638.

Donovan argues to this court that there was insufficient evidence to support her convictions because the methamphetamine was not a measurable quantity. Brief of Appellant 17-18. Donovan urges this court to overturn binding precedent reasoning the common-law element of requiring proof of a measurable amount should be recognized. Brief of Appellant 17. Donovan does not

cite to any Washington case law, statutory language or legislative history that would support a common-law element of a measurable amount.

To convict a person of possession of a controlled substance the State must prove that the person possessed a controlled substance, and specify what the substance is. RCW 69.50.4013; WPIC 50.01; WPIC 50.02. Knowledge is not an element of the crime of possession of a controlled substance. *State v. Bradshaw*, 152 Wn.2d 528, 537-38, 98 P.3d 1190 (2004). A defendant may raise an unwitting possession defense, which requires the defendant to show, by a preponderance of the evidence that they did not knowingly possess the controlled substance. *State v. Bradshaw*, 152 Wn.2d at 538; WPIC 52.01. The ability to raise an unwitting possession defense lessens the harshness of the strict liability crime. *State v. Bradshaw*, 152 Wn.2d at 538. The defense also alleviates any concern that a person could be convicted for quantities of a controlled substance that were so small that the person could not have been aware they possessed a controlled substance. For example a person who unwittingly possessed a controlled substance because there was residue found on currency they possessed is protected by the unwitting possession defense.

The State is not required to prove a defendant possessed a minimum amount of a controlled substance to sustain a conviction for unlawful possession of a controlled substance. *State v. Larkins*, 79 Wn.2d 392, 394-95, 486 P.2d 95 (1971); *State v. George*, 146 Wn. App. 906, 919, 193 P.3d 693 (2008); *State v. Malone*, 72 Wn. App. 429, 439, 864 P.2d 990 (1994); *State v. Williams*, 62 Wn. App. 748, 751, 815 P.2d 825 (1991), *review denied* 118 Wn.2d 1019 (1992). Larkins was convicted of unlawful possession of a narcotic drug, Demerol, under former RCW 69.33.230, which prohibited possession of any narcotic drug except authorized by law. There was no knowledge or minimum amount required by the statute, as there is no minimum amount required in RCW 69.50.4013. Larkins argued due to the nature of the definition of narcotic, the State must be required to show Larkins unlawfully possessed a usable amount of the drug. The court rejected Larkins's argument, stating:

The standard suggested by the defendant does violence to the clear language of RCW 69.33.230. Although the legislature had the power to do so, it provided no minimum amount of a narcotic drug, possession of which would sustain a conviction. It adopted no "usable amount" test. On the contrary, the legislature provided that possession of *any* narcotic drug is unlawful unless otherwise authorized by statute...For us to establish the minimum standard would suggested would require us to substitute our wisdom for that of the legislature. This we will not do.

*State v. Larkins*, 79 Wn.2d at 394 (emphasis original). The reasoning in *Larkins* applies to cases prosecuted under RCW 69.50.4013 because the current statute is also silent regarding any minimum quantity.

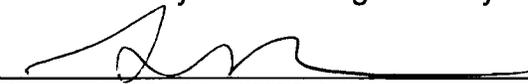
The doctrine of stare decisis precludes the alteration of precedent without a clear showing that the established rule is harmful and incorrect. *In re Stranger Creek*, 77 Wn.2d 649, 652-53, 466 P.3d 508 (1970). Once the Washington State Supreme Court “has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by” the Supreme Court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (citations omitted). Donovan is asking this court to ignore precedent set by the Supreme Court and make a new requirement that is not found in the plain language of the statute, that some minimum quantity of a controlled substance is a necessary and essential element of the crime of unlawful possession of a controlled substance. The State is respectfully requesting this court not break from the clearly established precedent of not requiring a minimum quantity of a controlled substance and affirm Donovan’s conviction.

**CONCLUSION**

For the foregoing reasons, this court should affirm  
Donovan's convictions for VUCSA – Possession of  
Methamphetamine and Driving While License Suspended in the  
Third Degree.

RESPECTFULLY submitted this 28<sup>th</sup> day of April, 2011.

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Lewis County Prosecuting Attorney

by: 

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Attorney for Plaintiff

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STATE OF WASHINGTON  
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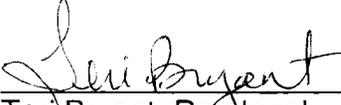
**COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II**

STATE OF WASHINGTON,	)	NO. 41445-7-II
Respondent,	)	
vs.	)	DECLARATION OF
	)	MAILING
SHANNON DONAVAN,	)	
Appellant.	)	
	)	
	)	

Ms. Teri Bryant, paralegal for Sara I. Beigh, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On April 28, 2011, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

Jodi R. Backlund  
Manek R. Mistry  
Backlund & Mistry  
PO Box 6490  
Olympia, WA 98507

DATED this 28 day of April, 2011, at Chehalis, Washington.

  
\_\_\_\_\_  
Teri Bryant, Paralegal  
Lewis County Prosecuting Attorney Office

Declaration of  
Mailing