

No. 46618-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Todd Burman,

Appellant.

Clark County Superior Court Cause No. 14-1-01284-5

The Honorable Judge Scott Collier

Appellant's Reply Brief

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ARGUMENT

I. DUE PROCESS REQUIRES THE STATE TO DISPROVE UNWITTING POSSESSION BECAUSE IT NEGATES THE ELEMENT OF POSSESSION. THE COURT VIOLATED MR. BUURMAN’S CONSTITUTIONAL RIGHTS BY REQUIRING TO PROVE THAT HIS POSSESSION WAS UNWITTING BY A PREPONDERANCE OF THE EVIDENCE.

The legislature may not place the burden on the defense to establish facts negating an element of a crime. *State v. W.R., Jr.*, 181 Wn.2d 757, 762-63, 336 P.3d 1134 (2014). When a “defense” actually merely negates an element, the accused need only present evidence sufficient to raise a reasonable doubt as to the element. *Id.* at 766-67.

Here, the court violated Mr. Buurman’s right to due process by requiring him to prove that his possession of the drugs was unwitting. *W.R.*, 181 Wn.2d at 762-63.

In Mr. Buurman’s constructive possession case, the state was required to prove that he exercised “dominion and control” over a controlled substance. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). But a person cannot exercise dominion or control over an item that s/he does not know exists.

Accordingly, unwitting possession negates constructive possession because a lack of knowledge cannot coexist with dominion and control over a controlled substance. *W.R.*, 181 Wn.2d at 765. The court violated

Mr. Buurman’s right to due process by requiring him to disprove the “dominion and control” element by a preponderance of the evidence. *Id.*

A. Mr. Buurman did not invite the error of the affirmative defense requiring him to disprove an element of the charged offense because he did not “set up the error” trial.

Respondent claims that, even if Mr. Buurman is correct that the unwitting possession defense violates his right to due process, he cannot raise the error on appeal because he “set it up” at trial. Brief of Respondent, pp. 4-5 (*citing to State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); *State v. Winnings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005)).

But Mr. Buurman did not invite the due process violation by proposing a jury instruction on the only defense available to him. Indeed, his only other option was acquiesce to the state’s proposed instructions, which left the jury with the impression that the evidence of his lack of knowledge had no legal significance at all.

Unlike the cases upon which the state relies, Mr. Buurman did not propose an instruction only to turn around on appeal and complain of its wording. *See Henderson*, 114 Wn.2d at 868 (invited error precluded accused from challenging missing language in instruction he proposed);

Studd, 137 Wn.2d at 545 (invited error precluded some defendants from challenging erroneous language in self-defense instructions).

Mr. Buurman does not argue that the instruction in his case inaccurately conveyed the current law on unwitting possession. Rather, he claims that, in light of *W.R.*, the very idea of an unwitting possession defense violates due process. This case does not raise instructional error. The invited error doctrine does not apply.

B. The state’s argument relies exclusively on *Bradshaw* and *Deer*, which are inapposite to the issue of whether unwitting possession negates the element of “dominion and control.”

Respondent claims that Mr. Buurman’s due process argument is foreclosed by the decisions in *State v. Bradshaw* and *State v. Deer*. Brief of Respondent, pp. 6-7 (citing *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004); *State v. Deer*, 175 Wn.2d 725, 287 P.3d 539 (2012)).

First, *Deer* is a child rape case and is inapposite to the analysis of whether the unwitting possession defense negates the “dominion and control” element of a constructive possession case.

Likewise, *Bradshaw* holds only that possession of a controlled substance does not have an implied *mens rea* element. *Bradshaw*, 152 Wn.2d 528. But Mr. Buurman does not argue that it does. Rather, a lack of knowledge negates the “dominion and control” element that the state must already prove in a constructive possession case. *W.R.* makes clear

that, in such a situation, the accused need only raise some evidence the facts negating the element and the burden then shifts to the state to disprove the defense beyond a reasonable doubt. *W.R.*, 181 Wn.2d at 766.

Indeed, *W.R.* does not find that lack of consent is an element of rape. Rather, the holding relies on the fact that consent works to negate the existing element of forcible compulsion. *Id.* A reviewing court need not read an additional element into an offense in order for an affirmative defense to violate due process by shifting the burden of proof.

A person cannot exercise “dominion and control” over an object that s/he does not know exists. The court violated Mr. Buurman’s right to due process by requiring him to prove that he was unaware of the drugs by a preponderance of the evidence. *W.R.*, 181 Wn.2d at 765. Mr. Buurman’s possession conviction must be reversed. *Id.*

II. RCW 69.50.4013 IS UNCONSTITUTIONAL AS APPLIED.

Mr. Buurman relies on the arguments set forth in his Opening Brief.

III. THE INFORMATION CHARGING MR. BUURMAN WITH THEFT WAS CONSTITUTIONALLY DEFICIENT BECAUSE IT FAILED TO ALLEGE THE CRITICAL FACTS NECESSARY FOR HIM TO PREPARE A DEFENSE OR PROTECT AGAINST FUTURE PROSECUTION FOR THE SAME CRIME.

Any offense charged in the language of the statute “must be accompanied with such a statement of the facts and circumstances as will

inform the accused of the specific offense.” *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) (citations and internal quotation marks omitted). Any “critical facts must be found within the four corners of the charging document.” *City of Seattle v. Termain*, 124 Wn. App. 798, 803, 103 P.3d 209 (2004).

Respondent does not claim that the critical facts can be found by any fair construction of the charging document in Mr. Buurman’s case. Brief of Respondent, pp. 12-14. Instead, the state argues that an accused person can never challenge a charging document on appeal for failure to allege critical facts when s/he did not ask for a bill of particulars at trial. Brief of Respondent, pp. 12-14.

But the state ignores numerous cases in which appellate courts considered the merits of claims of failure to charge critical facts even when no bill of particulars was requested at trial. *See e.g. Termain*, 124 Wn. App. at 801; *State v. Greathouse*, 113 Wn. App. 889, 900, 56 P.3d 569 (2002). The state imagines a bright-line rule where none exists.

The standard for challenging a charging document for the first time on appeal is the same whether the error is the omission of an element or of critical facts. *Termain*, 124 Wn. App. at 803. The analysis looks to whether the omitted portions can be found by fair construction of the

document. *Id.*; *State v. Rivas*, 168 Wn. App. 882, 887, 278 P.3d 686 (2012) *review denied*, 176 Wn.2d 1007, 297 P.3d 68 (2013).

The Information is constitutionally deficient. Mr. Buurman's theft conviction must be reversed and the charge dismissed without prejudice. *Rivas*, 168 Wn. App. at 893.

IV. THE COURT EXCEEDED ITS STATUTORY AUTHORITY BY ORDERING MR. BUURMAN TO PAY THE VICTIM PENALTY ASSESSMENT TWICE.

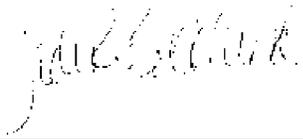
The state concedes this error. Brief of Respondent, pp. 15-16. This court should accept the state's concession for the reasons set forth in Mr. Buurman's Opening Brief.

CONCLUSION

Mr. Buurman's convictions must be reversed for the reasons set forth above and in his Opening Brief.

Respectfully submitted on March 25, 2015,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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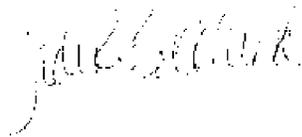
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 25, 2015.



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BACKLUND & MISTRY

March 25, 2015 - 2:48 PM

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