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State of Washington
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NO. 51344-7-II

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

STATE OF WASHINGTON,
Respondent,

v.

RICHARD BAGLEY,
Appellant.

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

The Honorable Andrew J. Toynebee, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. Bagley proved the defense of unwitting possession by a preponderance of the evidence.

B. ISSUE PRESENTED ON APPEAL

1. Whether a reasonable jury could have found Bagley failed to prove by a preponderance of the evidence the defense of unwitting possession when testimony from the state's witness supported Bagley's defense, Bagley's testimony was unrefuted that all of his three or four urinalysis results were negative, and defense expert's testimony was unrefuted that she found DNA from three female contributors, but not from Bagley?

C. STATEMENT OF THE CASE

1. Procedural History

Richard Bagley was charged with possession of a controlled substance to wit: Methamphetamine (RCW 69.50.4013 and 69.50.206(d)(2)). After trial, a jury convicted Bagley as charged. CP 42, RP 167. Bagley timely appeals. CP 58.

2. Substantive Facts

Richard Bagley was sentenced to a residential DOSA and

was receiving treatment at American Behavioral Health Service (“ABHS”) in January 2017. RP 27, 77, 102. About three weeks after Bagley started treatment, he went on a furlough to visit an orthopedic specialist in Tacoma. RP 77, 78-79. His mother, Elaine Bagley, met him at the hospital. RP 79. The treatment center recommended he have a wallet to keep money for the vending machine, so after Bagley’s doctor appointment, Ms. Bagley took him to their home to get one. RP 79. Ms. Bagley retrieved a wallet she found after Bagley left for treatment. RP 83-84. She looked inside and did not see anything, so she gave it to Bagley. RP 83.

All clients are searched upon entering the facility and after every visit. RP 47. Bagley’s mother visited him twice after his furlough. RP 80. After her second visit staff member Jake Sanchez searched Bagley and found a folded baggie tucked deep into the money portion of his wallet, which was on Bagley’s person. RP 48, 49, 57. Sanchez reported the baggie to his team leader and supervisor, who called the police. RP 50. Officer Jeff Fithen responded. He arrested Bagley and seized took the small baggie with residue. RP 27-28, 29.

At trial, Bagley stipulated that the white powder in the baggie

was methamphetamine, but the defense argued unwitting possession. RP 42, 71, 72.

Sanchez testified that if one opened the wallet to take the cash out, they would not see the baggie because it was tucked deep down into the billfold part and he had to really dig to find it. RP 49, 57. Bagley testified that he had not used methamphetamine since January 2016 and he had passed several urinary analysis tests while he resided at ABHS. RP 102, 104. Sanchez confirmed that urinalysis tests were given randomly about every 10 days, and the state did not provide any evidence showing Bagley failed any test. RP 56. Bagley kept his wallet in an unsecured locker. RP 106-07. Bagley testified that to his knowledge there was no methamphetamine in his wallet and he was surprised when Sanchez showed it to him. RP 108.

Defense expert forensic scientist Ann Spong tested swabs from the plastic baggie that held the white powder and found the bag contained a mixture of DNA from three female contributors but none from Bagley. RP 89-90. Defense expert forensic scientist Kay Sweeney was unable to find fingerprints on the baggie. RP 98. The state's expert forensic scientist Trevor Chowen testified that an

abrasive rough surface would scrape off more cells from your hands and that touch DNA can be abraded or wiped off. RP 125, 128.

D. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT BAGLEY POSSESSED METHAMPHETAMINE WHERE BAGLEY ESTABLISHED UNWITTING POSSESSION OF METHAMPHETAMINE.

Under both the federal and state constitutions, due process requires that the state prove every element of a crime beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash. Const. art. I, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Johnson*, 188 Wn.2d 742, 750, 399 P.3d 507 (2017); *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

This Court views the evidence in the light most favorable to the state to determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Johnson*, 188 Wn.2d at 751 (*quoting, State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (*plurality opinion*)).

The state bears the burden of proving the nature of the

substance and the fact of possession. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004) (citing *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994)) “Possession is defined in terms of personal custody or dominion and control.” *Staley*, 123 Wn.2d at 798. “The state may establish that possession is either actual or constructive.” *Staley*, 123 Wn.2d at 798.

A defendant charged with possession of a controlled substance under RCW 69.50.4013, may assert as an affirmative defense that he unwittingly possessed the substance, either because he did not know he possessed it or because he was unaware of the nature of the substance. *City of Kennewick v. Day*, 142 Wn.2d 1, 11, 11 P.3d 304 (2000); *State v. Cleppe*, 96 Wn.2d 373, 381, 635 P.2d 435 (1981). The burden then shifts to the defendant to prove, by a preponderance of the evidence, the possession was lawful or unwitting. *State v. Adame*, 56 Wn. App. 803, 806-07, 785 P.2d 1144 (1990). An unwitting possession defense raises the issue of knowledge and can create reasonable doubt. A defendant has the burden to prove by preponderance that she unwittingly possessed the methamphetamine. *State v. Riker*, 123 Wn.2d 351, 368, 869 P.2d 43 (1994).

If the defendant affirmatively establishes that “his ‘possession’ was unwitting, then he had no possession for which the law will convict.” *Cleppe*, 96 Wn.2d at 381. This “ameliorates” the harshness of the strict liability crime. *Bradshaw*, 152 Wn.2d at 538 (*citing Cleppe*, 96 Wn.2d at 380).

This court reviews affirmative defenses for sufficiency of the evidence. *State v. Lively*, 130 Wn.2d 1, 17, 921 P.2d 1035 (1996). Under this analysis the court asks whether, viewing the evidence in the light most favorable to the state, a rational trier of fact could have found that the defendant failed to prove the defense by a preponderance of the evidence. *Lively*, 130 Wn.2d at 17. The reviewing court gives deference to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Longuskie*, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990). Pointing to evidence that is unrefuted, does not improperly shift the burden back to the state. *See State v. Ingalls*, 196 Wn. App. 1049 (2016), *review denied*, 187 Wn.2d 1028, 391 P.3d 443 (2017), unpublished.¹

¹ Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, identified as such by the citing party, and may be accorded such persuasive

When the court finds the defendant proved his or her affirmative defense, the proper remedy is reversal of the conviction. See *City of Spokane v. Beck*, 130 Wn. App. 481, 485, 123 P.3d 854 (2005). *Beck* is not a possession case but it is helpful to show what the reviewing court may consider when determining whether a defendant has proved his or her affirmative defense. In *Beck*, the defendant was convicted of being in physical control of a motor vehicle while intoxicated. *Beck*, 130 Wn. App. at 483. Beck argued the affirmative defense that the vehicle was safely off the roadway. *Beck*, 130 Wn. App. at 483.

To prevail on her affirmative defense, Beck had to show that she had moved the vehicle safely off the roadway prior to being pursued by a law enforcement officer. *Beck*, 130 Wn. App. at 484. At trial, Beck submitted evidence that her car was running and parked in a lot 20 to 30 yards off the roadway and she called for a ride before she fell asleep in the driver's seat and slumped over onto the passenger side. The arresting officer admitted Beck's car was off the roadway and there was no danger. *Beck*, 130 Wn. App. at 483.

The Court of Appeals rejected the state's argument that the

value as the court deems appropriate. See GR 14.1.

jury must have ignored the officer's testimony and that it was within its province to do so. *Beck*, 130 Wn. App. at 488. Instead, the Court of Appeals held that no reasonable trier of fact would disregard this plain admission that provided the factual basis for the elements of the defense from a trained police officer on the scene. *Beck*, 130 Wn. App. at 488.

Here, although none of the state's witnesses admitted an element of Bagley's affirmative defense as the officer did in *Beck*, Sanchez's testimony supported Bagley's defense that he did not know the methamphetamine was in his wallet. The baggie was tucked so far into the billfold that Bagley would not have seen it if he just opened the wallet to pull out money for the vending machine.

Further, defense expert Sprong's was unable to identify Bagley's prints on the baggie but able to identify the DNA from three females. RP 56, 57, 90, 103-04. Sanchez also corroborated that urinalysis tests were given randomly approximately every 10 days and each UA was negative.

Here Bagley established unwitting possession by a preponderance of the evidence. The expert testimony, the police

testimony, the lab results and Bagley's testimony provided unrefuted evidence that Bagley did not know there was methamphetamine in his wallet; he kept his wallet in an unsecured locker; the methamphetamine was in a hidden place inside his wallet; Bagley had not used drugs in over a year prior to the incident; and neither his fingerprints nor his DNA was on the baggie. RP 49, 89, 98, 102, 106-07. Reviewing the testimony in the light most favorable to the state, no reasonable jury could have found that Bagley failed to prove the defense of unwitting possession by a preponderance of the evidence. Accordingly, Bagley's conviction should be reversed. See *Beck*, 130 Wn. App. at 483.

E. CONCLUSION

Richard Bagley respectfully requests that this court reverse his conviction and dismiss with prejudice.

DATED this 30th day of May 2018.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written over a light blue rectangular background.

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I, Lise Ellner, a person over the age of 18 years of age, served the Lewis County Prosecutor's Office appeals@lewiscountywa.gov and sara.beigh@lewiscountywa.gov and Richard Bagley, 2301 10 Avenue, Milton, WA 98354 a true copy of the document to which this certificate is affixed on May 30, 2018. Service was made by electronically to the prosecutor and Richard Bagley by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

LAW OFFICES OF LISE ELLNER

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