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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**MEAGAN GREENHAW,**

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 trial court's instructions to the jury improperly shift the burden of proof because they failed to require the State to prove Greenhaw knowingly possessed methamphetamine?
- B. If RCW 69.50.4013, the possession of a controlled substance statute, does not require the State to prove a mens rea element is the statute unconstitutional?
- C. Is Greenhaw's issue regarding the alleged improper fact finding and imposition of twelve months of community custody moot?

## II. STATEMENT OF THE CASE

Greenhaw walked into the Chehalis Walmart on June 25, 2018, with the intention of shoplifting items from the store. RP 101-02, 160. Sarah Lupio, an asset protection associate at Walmart, apprehended Greenhaw for shoplifting \$26.02 worth of merchandise from the store. RP 101-02, 110-11. Greenhaw had placed the items, toothpaste, cold medicine, face cream, and Tylenol, in her purse. RP 103, 116-18.

Chehalis Police Sergeant McKnight responded to Walmart regarding the theft. RP 119-20. Sergeant McKnight contacted Ms. Lupio when he arrived at Walmart. RP 121. Ms. Lupio was in the loss prevention office with Greenhaw. *Id.* After receiving information from Ms. Lupio, Sergeant McKnight determined there was probable cause

for Greenhaw's arrest and placed Greenhaw into custody. *Id.* Greenhaw cooperated with Sergeant McKnight. RP 123.

Sergeant McKnight searched Greenhaw pursuant to her arrest. RP 123-24. Sergeant McKnight located a clear plastic bag with a crystal-like substance in Greenhaw's right pants coin pocket. RP 124. The substance appeared to be methamphetamine. *Id.* Greenhaw told Sergeant McKnight she was holding onto the methamphetamine for her boyfriend because they were less likely to search a woman than a man. RP 124-25.

Sergeant McKnight sent the substance to the crime laboratory for testing. RP 125-26. The substance tested positive for methamphetamine. RP 145-52.

On June 26, 2018, the State charged Greenhaw by Information with Count I: Possession of a Controlled Substance – Methamphetamine, and Count II: Theft in the Third Degree. CP 1-3. Greenhaw elected to exercise her right to have her case tried to a jury. See RP. The evidence presented by the State was consistent with the outline above. Greenhaw testified on her own behalf. RP 159-61. Greenhaw was convicted as charged. CP 30-31. Greenhaw was sentenced to 15 days and 364 days with 349 days suspended

for 24 months. CP 37. Greenhaw timely appeals her conviction and sentence. CP 45.

The State will supplement the facts as necessary throughout its argument below.

### III. ARGUMENT

#### A. THE JURY INSTRUCTIONS WERE AN ACCURATE STATEMENT OF THE LAW BECAUSE POSSESSION OF A CONTROLLED SUBSTANCE DOES NOT REQUIRE A MENS REA ELEMENT AS DETERMINED BY THIRTY-EIGHT YEARS OF SETTLED SUPREME COURT PRECEDENT.

Greenhaw asks this Court to ignore 38 years of Washington State Supreme Court precedent and find the jury instructions in her case inadequate because they failed to include a knowledge element. Brief of Appellant 8-14. Greenhaw further argues the failure to give such an instruction improperly shifted the burden and cannot be harmless error in this case, therefore reversal is required. This Court should follow the settled precedent and affirm Greenhaw's conviction.

##### 1. Standard Of Review.

Failure to object to jury instructions generally waives appellate review. *State v. Cardenas-Flores*, 189 Wn.2d 243, 267, 401 P.3d 19 (2017); CrR 6.15(c). A claim of a manifest constitutional error is

reviewed de novo. *State v. Edwards*, 169 Wn. App. 561, 566, 280 P.3d 1152 (2012).

**2. Possession Of A Controlled Substance Does Not Require A Mens Rea Element, As Established By Settled Supreme Court Precedent Which This Court Must Follow, Therefore, The Jury Instructions Were An Accurate Statement Of The Law.**

An appellate court generally will not consider an issue a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). "However, the failure to instruct a jury on every element of a charged crime is an error of constitutional magnitude." *Cardenas-Flores*, 189 Wn.2d at 267. Greenhaw argues the trial court's failure to include a knowledge element in the "to-convict" instruction is such an error. Brief of Appellant 9-14; CP 20. The crux of Greenhaw's argument is the Washington State Supreme Court's previous decisions affirming possession of a controlled substance as a strict liability crime are incorrect and harmful (Greenhaw states it is "wrong"). Greenhaw asserts this Court should depart from the established Supreme Court precedent and hold the trial court erred by failing to include the mental element of "knowing" in the jury instructions, which thereby improperly shifted the burden and requires retrial.

The legislature, since 1951, has consistently withheld a mens rea element from the crime of possession of a controlled substance. Laws of 1951, 2d Ex. Sess., ch. 22, § 2;<sup>1</sup> Laws of 1971, 1<sup>st</sup> Ex. Sess., ch. 308, § 69.50.401(c).<sup>2</sup> The statute, as currently written, states, “It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.” RCW 69.50.4013(1).

The Supreme Court has twice explicitly rejected Greenhaw’s argument, finding knowledge was not a required element of possession of a controlled substance. *State v. Bradshaw*, 152 Wn.2d 528, 534-37, 98 P.3d 1190 (2004), *cert. denied*, 544 U.S. 922 (2005); *State v. Cleppe*, 96 Wn.2d 373, 379-80, 635 P.2d 435 (1981). In *Bradshaw* and *Cleppe*, the Supreme Court rejected constitutional challenges to the statute criminalizing possession of a controlled substance, concluding the legislature intentionally and deliberately

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<sup>1</sup> “It shall be unlawful for any person to manufacture, possess, have under his control, sell prescribe, administer, dispense, or compound, any narcotic drug, except as authorized by this chapter.

<sup>2</sup> “It is unlawful for any person to possess a controlled substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this act.

omitted a mens rea element from the statute. *Bradshaw*, 152 Wn.2d at 534-37; *Cleppe*, 96 Wn.2d 379-80.

The legislature has the authority to create crimes lacking a mens rea element. *Bradshaw*, 152 Wn.2d at 532. The Supreme Court reviewed the historical context of the statutes criminalizing possession of a controlled substance in *Bradshaw*. *Id.* at 532-35. The Supreme Court reviewed the legislatures' deliberate and intentional deletion of "knowingly and intentionally" from the model uniform act. *Id.* at 532-33. The Supreme Court declined Bradshaw's invitation to overrule *Cleppe* and read into the possession statute a mens rea element. *Id.* at 533-39.

Appellate courts are bound by the precedent set by the Washington State Supreme Court. *State v. Jussila*, 197 Wn. App. 908, 931, 392 P.3d 1108 (2017); *State v. McKague*, 159 Wn. App. 489, 514, 246 P.3d 558 (2011). This Court is required to follow the precedent set by the Supreme Court regardless of disagreement it may have with correctness or the premise. *Jussila*, 197 Wn. App. at 931, citing, *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 426 (2006) and *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). "When the Court of Appeals fails to follow directly controlling authority by the Supreme Court, it errs." *Id.*

The trial court's "to-convict" instruction, which was approved by the State and Greenhaw, stated:

To convict the defendant of the crime of possession of a controlled substance each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about June 25, 2018, the defendant possessed a controlled substance, to wit: methamphetamine; and

(2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 20 (Instruction 6), *citing* WPIC 50.02; RP 168-69, 174. The to-convict language, as given, mirrors the essential elements of RCW 69.50.4013, with the additional information of the specific controlled substance, as required. The State was required to prove Greenhaw, on a date certain (June 25, 2018) possessed methamphetamine. RCW 69.50.4013(1); CP 1, 20 (jury instruction 6).

The to-convict jury instruction, as given by the trial court, was an accurate statement of the law and did not shift the burden. The jury was informed the State was required to prove each element of

the charged crime beyond a reasonable doubt, Greenhaw had the presumption of innocence, and it was the State's burden to prove beyond a reasonable doubt she possessed methamphetamine. CP 16, 20-22.

The State's burden did not shift to Greenhaw. The ability to raise an affirmative defense to the charged crime does not shift the burden. This Court must adhere to the settled precedent of the Supreme Court in *Bradshaw* and *Cleppe*, and find the jury instructions, as given, were an accurate statement of the law and did not impermissibly shift the burden upon the defendant, and affirm Greenhaw's conviction for Possession of Methamphetamine.

**B. THE UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE STATUTE, RCW 69.50.4013, IS CONSTITUTIONAL.**

Greenhaw asserts if a knowledge element is not required as part of the Unlawful Possession of a Controlled Substance statute, RCW 69.50.4013, the statute fails to pass constitutional muster. Brief of Appellant 16-17. Greenhaw asserts the statute crosses the line, criminalizes innocent behavior, and shifts the burden. *Id.* Greenhaw's sweeping statements are not persuasive, and she fails to meet her burden to prove RCW 69.50.4013 is unconstitutional beyond a reasonable doubt.

## **1. Standard Of Review.**

Constitutional challenges are reviewed de novo. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 257-58, 241 P.3d 1220 (2010).

## **2. Greenhaw Does Not Meet Her Burden To Prove RCW 69.50.4013 Is Unconstitutional.**

A statute is presumed constitutional and it is the burden of the party attacking the statute to prove the statute is unconstitutional beyond a reasonable doubt. *City of Bellevue v. Lee*, 166 Wn.2d 581, 585, 210 P.3d 1011 (2010), citing *Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998). This high standard is based on respect for a coequal branch of government sworn to uphold the constitution, and one which speaks for the people of the state. *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

As argued above, possession of a controlled substance is a strict liability crime having no mens rea element. *City of Kennewick v. Day*, 142 Wn.2d 1, 9, 11 P.3d 304 (2004). The State must prove the fact of possession and the nature of substance possessed. *Bradshaw*, 152 Wn.2d at 531. A defendant may avoid conviction by proving unwitting possession by a preponderance of the evidence. *Id.* at 531, 533-34. This is not a violation of due process.

Greenhaw takes issue with Washington's possession statute being unlike other states or the federal government's statutes criminalizing possession of a controlled substance. In its very essence, Greenhaw's argument is, you may not have a strict liability crime and all states must be created equal. See Brief of Appellant, 12-13 17.<sup>3</sup> Greenhaw fails to cite any United States Supreme Court case holding a state criminal statute is unconstitutional for lack of mens rea.

The United States Supreme Court has never articulated a general constitutional doctrine regarding mens rea. *Powell v. Texax*, 392 U.S. 514, 535-36, 88 S. Ct. 2145, 20 L. Ed. 2d 1254 (1968). Strict liability crimes do not inherently violate due process. *Lambert v. California*, 355 U.S. 225, 228, 78 S. Ct. 240, 2 L. Ed. 228 (1957) (Legislatures have wide latitude to define an offense and to exclude elements of knowledge and intent). Public policy may require criminal punishment for acts having no element of intent, while resulting legislation may be harsh, it does not violate due process.

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<sup>3</sup> Greenhaw cites to numerous cases to support this position, notably, *Schad v. Arizona*, 501 U.S. 624, 640, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991); *Bradshaw*, 152 Wn.2d at 534; *May v. Ryan*, 245 F. Supp. 3d 1164, 1162-65 (D. Ariz. 2017); *State v. Adkins*, 96 So. 3d 412, 424 n.1 (Fla. 2012); *State v. Bell*, 649 N.W. 2d 243, 252 (2002); *Dawkins v. State*, 313 Md. 638, 547 A.2d 1041, 1045 n.7 (1988).

*Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 70, 30 S. Ct. 663, 54 L. Ed. 930 (1910).

Greenhaw asserts RCW 69.50.4013 shifts the burden and criminalizes innocent behavior. Greenhaw's burden shifting claim has been repeatedly rejected. *Bradshaw*, 152 Wn.2d at 538; *Cleppe*, 96 Wn.2d at 380; *State v. Schmelling*, 191 Wn. App. 795, 801, 365 P.3d 202 (2015). These cases emphasize the affirmative defense of unwitting possession ameliorates the harshness of strict liability and does not shift the burden of proof. *Bradshaw*, 152 Wn.2d at 538; *Cleppe*, 96 Wn.2d at 380-81.

Further, a controlled substance is an inherently illegal item. A person cannot possess a controlled substance absent the exceptions placed in the Uniform Controlled Substances Act. RCW 69.50.4013. A controlled substance is not an item akin to stolen property, where, for example, a person found with a television or a vehicle could not immediately recognize the item as contraband. A person who is prescribed a controlled substance can only possess that substance in the container in which it was delivered or dispensed to the person. RCW 69.50.309. Prescriptions for controlled substances can be lawfully possessed by an ultimate user, which includes a family member of the person to whom the prescription is

written out to. RCW 69.50.101(uu); RCW 69.50.308. There is not large amounts of innocent conduct for which the strict liability of RCW 69.50.4013 is going to result in the mass arrest, prosecution, and incarceration of innocent people engaged in innocent conduct. The few instances where a person may inadvertently and therefore, unwittingly, possess methamphetamine, cocaine, heroin, oxycodone, or any other controlled substance is ameliorated by the unwitting possession defense.

Greenhaw has not met her burden to prove RCW 69.50.4013 is unconstitutional. The statute criminalizing possession of a controlled substance does not violate due process. The legislature is permitted to make a policy decision creating a strict liability crime for the possession of an item that is inherently illegal. The affirmative defense ameliorates the harshness of the strict liability and does not shift the burden. This Court should find Greenhaw has not met her burden, RCW 69.50.4013 is constitutional, and affirm Greenhaw's conviction.

**C. GREENHAW'S ARGUMENT REGARDING THE TRIAL COURT'S ALLEGED IMPROPER FACT FINDING, WHICH RESULTED IN GREENHAW BEING ORDERED TO DO TWELVE MONTHS OF COMMUNITY CUSTODY IS MOOT.**

An issue on appeal is moot if the reviewing court can no longer provide the party effective relief. *State v. Harris*, 148 Wn. App. 22,

26, 197 P.3d 1206 (2006), *citing State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004). A moot issue will not be considered unless “it involves matters of continuing and substantial public interest.” *In re Eaton*, 110 Wn.2d 892, 895, 757 P.3d 961 (1988).

In *Harris*, the court found Harris’s appellate claim regarding the calculation of his offender score moot because Harris had served all of his incarceration time and was not sentenced to serve community custody. *Harris*, 148 Wn. App. at 26. Harris would have had cause for relief if he had some form of community custody terminating earlier had Harris been sentenced under the appropriate offender score. *Id.* at 27. There was no available relief to be offered to Harris because the remedy for an excessive sentence is resentencing. *Id.* at 26-27.

Greenhaw argues the trial court, during her sentencing hearing, improperly found facts which increased her punishment. Brief of Appellant 17-22. Greenhaw argues the trial court made a finding she had a chemical dependency problem, without any notice of any sentencing enhancement and lacking the factual basis to do so. *Id.* The improper conduct, as alleged by Greenhaw, concluded with Greenhaw receiving 12 months of community custody rather than the six months she should have had imposed. *Id.*

Without conceding the substantive legal arguments in regards to the trial court's authority for imposing the sentence, Greenhaw's issue is moot. The trial court did impose 12 months of community custody after finding chemical dependency contributed to Greenhaw committing the crime. RP 213; CP 38. Greenhaw was sentenced on October 10, 2018. CP 35. On November 2, 2018, the Washington State Department of Corrections filed a "**COURT – SPECIAL SUPERVISION CLOSURE**" notice with Lewis County Superior Court. Supp. CP DOC (bold original).<sup>4</sup> The document, which pertains to Greenhaw's case 18-1-00484-21 (the underlying matter here), states, "The above cause has been screened and is not eligible for supervision by DOC. Therefore, DOC has closed supervision interest in this case." *Id.* The document is signed by Community Corrections Officer Yeehang Vang, and is dated October 30, 2018. *Id.*

Greenhaw asks this Court to "reverse the exceptional sentence and remand for resentencing within the standard range of six months." Brief of Appellant. While the judgment and sentence may be changed to reflect such a ruling, it would have no effect, as Greenhaw is not on supervision, and has not ever been on supervision with the Department of Corrections. Greenhaw was

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<sup>4</sup> The State will file a Supplemental Designation of Clerk's Papers.

screened, did not meet the criteria for supervision, and supervision was closed. The Court should decline to remand the case for resentencing, as the issue is moot. This Court should affirm Greenhaw's conviction and sentence.

**IV. CONCLUSION**

The State is not required to prove a knowledge element for possession of a controlled substance, therefore, the trial court's instructions to the jury were an accurate statement of the law. The possession of a controlled substance statute, RCW 69.50.4013, is constitutional. Greenhaw did not meet her burden to prove the statute was unconstitutional. Legislatures are permitted to enact strict liability statutes, and the possession of controlled substance statute does not improperly shift the burden of proof. Finally, Greenhaw's issue regarding the alleged improper fact finding of a

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Chemical dependency problem is moot, as she is not being supervised by the Department of Corrections. This Court should affirm Greenhaw's convictions and sentence.

RESPECTFULLY submitted this 6<sup>th</sup> day of June, 2019.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney

A handwritten signature in blue ink, appearing to be 'SIB', written over a horizontal line.

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