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NO. 52683-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ALLISON POOR,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

Ronald Hoague was a 67-year old man with multiple medical problems. Mr. Hoague repeatedly and voluntarily ingested methamphetamine at a gathering he hosted in his own home. Allison Poor, one of the four other adults present at the house during Mr. Hoague's drug use, called 911 late the next day after consulting with a neighbor because Mr. Hoague was experiencing low blood sugar and had not fully woken up. Mr. Hoague died in the hospital five days later due to acute methamphetamine intoxication complicated by his multiple preexisting medical problems. Notwithstanding the uncontested evidence that Mr. Hoague, a consenting adult, intentionally and of his own free will repeatedly ingested methamphetamine on the night in question, the State pursued criminal charges for Mr. Hoague's tragic death against other individuals present during his voluntary drug use.

The jury convicted Ms. Poor of failing to summon assistance, trafficking in stolen property, and possession of a controlled substance, despite insufficient evidence supporting the first two offenses and despite the vagueness of the failing to summon assistance statute, requiring reversal and dismissal. In addition, other errors in the information and the instructions require reversal and either dismissal without prejudice or remand for a new trial.

B. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to prove beyond a reasonable doubt Ms. Poor was guilty of failing to summon assistance.

2. The failing to summon assistance statute is unconstitutionally vague in violation of due process.

3. The State presented insufficient evidence to prove beyond a reasonable doubt Ms. Poor was guilty of trafficking in stolen property in the first degree.

4. Ms. Poor was deprived of the constitutional right to a unanimous jury verdict.

5. If unlawful possession is a strict liability crime without a knowledge element, the law violates the presumption of innocence and due process, and the court erred by entering the judgment and sentence.

6. The amended information was constitutionally deficient because it failed to specify any facts supporting any of the charges.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Article 1, section 3 and the Fourteenth Amendment require the State to present sufficient evidence to prove beyond a reasonable doubt every element of a charged offense. The offense of failing to summon assistance requires, among other elements, proof that the defendant was present when a crime was committed against a person, that the defendant

knew the person suffered substantial bodily harm as a result of the crime and needed assistance, and that the defendant failed to summon assistance. Where the State elected the crime of controlled substance homicide but Ms. Poor was not present when Mr. Hoague died, where the State failed to prove Ms. Poor knew Mr. Hoague suffered substantial bodily harm as a result of the crime committed against him (as opposed to a host of other medical conditions from which he suffered), and where Ms. Poor did, in fact, eventually call 911, did the State present sufficient evidence?

2. The Fourteenth Amendment and article 1, sections 3 and 22 prohibit conviction under an unconstitutionally vague statute and require statutes to proscribe sufficiently conduct to protect against arbitrary enforcement. RCW 9A.36.160(4) fails to identify a temporal requirement for failing to summon assistance, an average person would not understand what the statute requires, and the undefined timing of the requirement permits arbitrary enforcement. Is the statute impermissibly vague where it fails to identify a temporal requirement for failing to summon assistance?

3. Due process requires the State to present sufficient evidence to prove beyond a reasonable doubt every element of a charged offense. Trafficking in stolen property in the first degree requires proof that the defendant knowingly trafficked in stolen property. Where the State proved a guitar formerly belonged to Mr. Hoague and Ms. Poor pawned it

but presented no evidence that Ms. Poor or anyone else stole the guitar, did the State present insufficient evidence of trafficking in stolen property?

4. Article I, sections 21 and 22 require that when the State presents evidence of multiple acts, any one of which could form the basis of one count charged, either the prosecutor must tell the jury on which act to rely during its deliberations or the court must instruct the jury to agree on a specific criminal act. Here, the State alleged Ms. Poor possessed three separate stashes of methamphetamine in three different locations of Mr. Hoague's house found on three different days. The State did not elect on which stash it was relying and the court did not instruct the jury that it had to unanimously agree as to which stash Ms. Poor possessed. Given that a reasonable doubt existed as to whether Ms. Poor possessed each of the stashes, was Ms. Poor deprived of her right to a unanimous verdict?

5. The possession of a controlled substance statute does not expressly require proof that the possession was knowing, but courts must construe statutes to avoid constitutional deficiencies. If construed to be a strict liability crime without a knowledge element, the statute is likely unconstitutional because it violates the presumption of innocence and due process of law. Consistent with the constitutional-doubt canon, must the possession statute be read to require proof of knowledge?

6. Article I, sections 3 and 22 and the Fourteenth Amendment require charging documents both to inform fairly the defendant of the facts underlying the charges and to enable the defendant to plead double jeopardy as a bar in future prosecutions for the same offenses. Here, the amended information alleging the three charges was entirely generic and failed to allege any facts supporting the offenses. The information contained a county designation and dates but otherwise failed to allege the “who” “what” “where” and “how” for each offense. By failing to provide notice and not enabling a plea of double jeopardy, is the information constitutionally deficient such that it requires reversal of the convictions and dismissal without prejudice?

D. STATEMENT OF THE CASE

Ronald Hoague was 67 years old and “had a lot of physical issues.” 2RP¹ 230; 3RP 338. Mr. Hoague was diabetic. 2RP 233; 3RP 334. He suffered from chronic obstructive pulmonary disease. 3RP 334. In addition, he suffered from hypertensive cardiovascular disease. 3RP 334, 338. He failed to take close care of his diabetic condition and was in poor health. 3RP 334, 402. Mr. Hoague required regular assistance from

¹ All verbatim reports of proceedings are referred to by volume and page number, except for the sentencing hearing, which is referred to by date and page number.

his neighbor with household tasks and running errands. 2RP 208, 233, 243, 246-47.

To make matters worse, Mr. Hoague had a history of methamphetamine use. 4RP 369. In the months before the incident, he allowed other users into his home. 2RP 207-08, 234. His son rarely saw him “because of the people he would allow in his home,” and he had not been in Mr. Hoague’s house in almost a year. 2RP 207, 222. His daughter had not been to his house in over a year. 4RP 368-69.

One evening, Mr. Hoague voluntarily used methamphetamine with a group of four other adults at a gathering he hosted at his home. 3RP 289-90, 296, 305, 312. One of the party guests, Leann Martin,² had been living at Mr. Hoague’s house. 2RP 208; 3 RP 303, 311-12. Allison Poor, a friend of Ms. Martin’s, was also at the party. 3RP 287. Ms. Poor had been staying with Mr. Hoague for several days and claimed she was helping to take care of him. 2RP 210, 234, 240, 245; 3RP 305-06.

The State did not establish whether Mr. Hoague brought the methamphetamine into his own home or someone else brought it into his home. All five adults shared the methamphetamine and passed it around. 3RP 290-91, 306-07. Everyone smoked methamphetamine, including Mr.

² Leann Martin used to be in a relationship with Mr. Hoague’s son and is the mother of Mr. Hoague’s grandchildren. 2RP 208; 3RP 289, 303.

Hoague. 3RP 290-91, 296, 305-06, 312. At times Mr. Hoague needed “assistance” in smoking. 3RP 290-91. All four adults helped him smoke. 2RP 291. Mr. Hoague appeared “perfectly fine” throughout the evening. 3RP 313.

Around 11pm, Nigel Norwood, one of the partygoers, took Ms. Poor to the hospital for treatment for her own medical issue. 3RP 300-01. Ms. Poor returned to Mr. Hoague’s house early the next morning. 3RP 301. All five adults stayed the night in Mr. Hoague’s house. 3RP 292.

The morning after the party, Mr. Norwood and Brandon Ramey³, another partygoer, left the house. 3RP 294, 309. Before leaving, Mr. Norwood observed Mr. Hoague appeared to have difficulty fully waking up but also observed he was responsive to attempts to wake him up. 3RP 293. Mr. Ramey observed nothing other than Mr. Hoague sleeping. 3RP 309. Mr. Ramey saw nothing that gave him any cause for concern. 3RP 313-14. Neither Mr. Norwood nor Mr. Ramey made any efforts to investigate further or seek any assistance for Mr. Hoague, nor did either man suggest to Ms. Poor that she should seek assistance. Although Mr. Norwood claimed he told Mr. Ramey he thought they should call for paramedics *after* the two of them left Mr. Hoague’s house, he did not tell

³ Mr. Ramey is married to Leann Martin. 2RP 208.

Ms. Poor he thought they should call for help, nor did he himself call for help. 3RP 294, 299.

Later that day, *Ms. Poor* consulted *Mr. Hoague's* neighbor, who had stopped by the residence twice earlier in the day, about whether she should call 911 for *Mr. Hoague*. 2RP 238, 251. *Ms. Poor* told the neighbor she was concerned about *Mr. Hoague's* low blood sugar. 2RP 238. *Ms. Poor* also told the neighbor she could not wake up *Mr. Hoague* and asked the neighbor to try. 2RP 238, 251. After the neighbor observed *Mr. Hoague* and the two conferred, *Ms. Poor* called 911. 2RP 238, 251, 276-77; Ex. 1-B. *Ms. Poor* informed the 911 operator she believed *Mr. Hoague* was in a diabetic coma from his low blood sugar. Ex. 1-B. Both *Ms. Martin* and *Ms. Poor* remained in the house after *Mr. Hoague* was taken to the hospital. 2RP 223-24.

Mr. Hoague died at the hospital five days later. 2RP 214; 3RP 329. His preexisting medical conditions contributed to his death, which was also caused by acute methamphetamine intoxication. 3RP 334, 338.

After *Mr. Hoague* went to the hospital, three separate stashes of methamphetamine were found in three different locations in *Mr. Hoague's* house by three different people on three different days. First, on July 9, 2016, *Mr. Hoague's* neighbor found "a meth pipe full of meth" in a drawer in *Mr. Hoague's* kitchen when she was looking for his keys. 2RP 241,

253-54, 258-61. This methamphetamine was not visible but was inside of an unlocked drawer next to the stove. 2RP 241, 253-54. Second, on July 18, 2016, when he was cleaning out his father's house, Mr. Hoague's son found a spoon with methamphetamine on it in in the kitchen area "above the stove." 2RP 216-17; 4RP 380-84. Third, on July 21, 2016, Mr. Hoague's daughter found a bag of methamphetamine inside of a "fanny pack bag" in the kitchen on a counter. 4RP 364, 370-71, 373-77. All these areas were accessible from anywhere in the house. 2RP 253-54.

The family also noticed Mr. Hoague's prized guitar was missing. 2RP 217-220; 4RP 364-65. Police eventually discovered Ms. Poor sold the guitar at a pawn shop. 2RP 269.

A jury convicted Ms. Poor of failing to summon assistance, trafficking in stolen property in the first degree, and possession of a controlled substance. The court sentenced Ms. Poor to a total of 43 months' confinement and 12 months' community custody supervision. CP 61-71; 11/16/18 RP 14-15.

E. ARGUMENT

1. **The conviction for failing to summon assistance should be reversed and the charge dismissed for insufficient evidence.**

- a. The State is required to prove all essential elements of charged offenses beyond a reasonable doubt.

The State is required to prove every element of every charged offense beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A reviewing court must reverse unless it concludes every rational fact finder could have found each essential element beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

RCW 9A.36.160 provides:

A person is guilty of the crime of failing to summon assistance if:

- (1) He or she was present when a crime was committed against another person; and
- (2) He or she knows that the other person has suffered substantial bodily harm as a result of the crime committed against the other person and that the other person is in need of assistance; and
- (3) He or she could reasonably summon assistance for the person in need without danger to himself or herself and without interference with an important duty owed to a third party; and
- (4) He or she fails to summon assistance for the person in need; and

(5) Another person is not summoning or has not summoned assistance for the person in need of such assistance.

Here, the State presented insufficient evidence to establish the first, second, and fourth essential elements of failing to summon assistance.⁴

b. The State failed to prove Ms. Poor was present when a crime was committed against another person.

The first element of failing to summon assistance requires the State to prove beyond a reasonable doubt that the defendant “was present when a crime was committed against another person.” RCW 9A.36.160(1). The State elected and argued, and the court instructed the jury, the crime that was committed against Mr. Hoague while Ms. Poor was present was the crime of controlled substance homicide. 4RP 403-08, 413-14, 424, 454; CP 44.

The law provides:

A person who unlawfully delivers a controlled substance in violation of RCW 69.50.401(2) (a), (b), or (c) which controlled substance is subsequently used by the person to whom it was delivered, resulting in the death of the user, is guilty of controlled substance homicide.

RCW 69.50.415(1).

⁴ No Washington cases, published or unpublished, specifically address the failing to summon assistance statute. The only case referencing the statute does so in passing and does not analyze it. *See State v. Marcher*, 161 Wn. App. 1042, 2011 WL 1843913 (2011) (unpublished) (cited as nonbinding authority per GR 14.1).

The State failed to prove (1) the methamphetamine that was delivered to Mr. Hoague by the other party goers was the methamphetamine that caused his death, and (2) if it was, that the crime of controlled substance homicide occurred in Ms. Poor's presence. There is no crime of controlled substance homicide until there is a homicide. In other words, the crime does not occur until someone dies. Here, the crime of controlled substance homicide, if it occurred at all, did not occur until five days later when Mr. Hoague died in the hospital, five days *after* Ms. Poor summoned aid.

- i. *The State failed to prove Mr. Hoague was the victim of a controlled substance homicide.*

The State presented no evidence as to the source of the methamphetamine that Mr. Hoague and the other adults used the night of the party Mr. Hoague hosted in his home. Thus, there is no evidence that the source of the methamphetamine that caused Mr. Hoague's death was not Mr. Hoague himself. If Mr. Hoague purchased the methamphetamine himself and brought it into his home to share with the other people, none of the four partygoers in his home "delivered" it to him.

In addition, the evidence established all five adults present, including Mr. Hoague, were sharing the methamphetamine and passing it around. Even if the act of passing the methamphetamine from any of the

four other adults to Mr. Hoague constituted a “delivery,” the State presented no evidence that the smoking of that particular methamphetamine which was “delivered” to Mr. Hoague caused his death, as opposed to other methamphetamine he used.

In *State v. Bernal*, this Court affirmed the trial court order dismissing the charge of controlled substance homicide where the State failed to prove how the deceased acquired the controlled substance that caused his death. 109 Wn. App. 150, 33 P.3d 1106 (2001). While the defendant admitted selling the deceased heroin, the State presented no independent evidence corroborating that. *Id.* at 152-53. Because “the record show[ed] absolutely nothing about how [the deceased] acquired the heroin that caused his death,” the court found any inference the deceased’s death was caused by heroin the defendant sold him to be simply speculative and affirmed the dismissal. *Id.* at 154.

Here, as in *Bernal*, the State failed to prove who procured the methamphetamine that caused Mr. Hoague’s death. The State also failed to prove that the methamphetamine that others passed to Mr. Hoague is the methamphetamine that caused his death. The crime of controlled substance homicide requires more than simply death by methamphetamine. It requires the particular methamphetamine that caused the user’s death was delivered from someone to the now-deceased

user. *See State v. Christman*, 160 Wn. App. 741, 754, 249 P.3d 680 (2011) (finding State must prove controlled substance provided to the deceased by the defendant “was a proximate cause,” though not the sole cause, of decedent’s death). Here, the State failed to prove the specific methamphetamine that was passed to Mr. Hoague as the entire group shared was the same methamphetamine that eventually caused his death. Therefore, the State failed to prove a controlled substance homicide was committed against Mr. Hoague.

- ii. *Even if Mr. Hoague was the victim of a controlled substance homicide, Ms. Poor was not present when Mr. Hoague died; therefore, she was not present when a controlled substance homicide was committed against him*

The crime of controlled substance homicide is not established simply when a person dies from using a controlled substance. Rather, the crime of controlled substance homicide requires proof beyond a reasonable doubt (1) a person unlawfully delivered a qualifying controlled substance to another person, (2) the person accepting delivery used the delivered controlled substance, and (3) the delivered controlled substance resulted in the death of the user. RCW 69.50.415(1); *see also State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210 (1996) (“In a homicide case, the *corpus delicti* consists of two elements the State must prove at trial: (1) the fact of death and (2) a causal connection between the death and a

criminal act.”). The crime of a controlled substance homicide does not occur until the person who used the controlled substance which was delivered by another person dies. *See, e.g., State v. Zillyette*, 178 Wn.2d 153, 159, 307 P.3d 712 (2013) (recognizing controlled substance homicide requires proof person died as result of using controlled substance that was delivered to him); *Bernal*, 109 Wn. App. at 153 (same).

Here, although Ms. Poor was present for part of the time when Mr. Hoague *used* methamphetamine, Ms. Poor was not present when Mr. Hoague *died* from methamphetamine. Mr. Hoague used methamphetamine at his house party on July 8, 2016. Ms. Poor called 911 the next day on the July 9, and Mr. Hoague was transferred to the hospital. Mr. Hoague died at the hospital on July 14, 2016, five days later and five days after Ms. Poor, in fact, had summoned aid. Ms. Poor was not present when he died. Therefore, the State failed to prove that she was present when the crime of controlled substance homicide was committed against him.

- iii. *Alternatively, delivery of methamphetamine is not a crime against a person, and it is not the crime the State elected to prove was committed against Mr. Hoague.*

The State may not now attempt to argue that a different crime was committed against Mr. Hoague in Ms. Poor’s presence. First, the State specifically elected that the crime that occurred against Mr. Hoague in Ms.

Poor's presence, which is the first element of failing to summon assistance, was a controlled substance homicide. 4RP 403-08, 413-14, 424, 454; CP 44. The court instructed the jury on controlled substance homicide. CP 44. The fact the jury asked the court to clarify this first element of the failing to summon assistance charge and specifically inquired what crime may be considered "committed against another person" demonstrates the jury focused on this very element.⁵ CP 57.

Second, even had the State not so elected, no other crime occurred against Mr. Hoague in Ms. Poor's presence. Delivery of methamphetamine is not "a crime against another person." The failing to summon assistance statute does not define a crime against another person. Whether a crime qualifies as a crime against a person is a question of law for the court, not a question of fact for the jury. *See State v. Kindell*, 181 Wn. App. 844, 851-52, 326 P.3d 876 (2014) (recognizing whether particular crime constitutes crime against person or property for purposes

⁵ The jury asked:

COUNT 1 - FAILING TO ~~ISSUE~~ SUMMON ASSISTANCE
INSTRUCTION 13

(1) .

PLEASE CLARIFY WHAT CRIME IS TO BE

CONSIDERED RE: "COMMITTED AGAINST ANOTHER PERSON"

The court responded, "Please refer to your jury instructions." CP 57.

of burglary statute is question of law that court must decide, not question of fact for determination by jury). The vast majority of cases addressing the meaning of what are crimes against persons do so in the context of either qualifying crimes for the purposes of community custody supervision or predicate offense for burglary.

RCW 9.94A.701(3)(a) imposes a mandatory term of community custody where a court sentences a defendant for “[a]ny crime against persons under RCW 9.94A.411(2).” RCW 9.94A.411(2) contains a list of particular offenses that are categorized as “crimes against persons.” No controlled substance offenses, including delivery of a controlled substance, are included in this statute as a crime against a person.

All of the burglary statutes require as an essential element of burglary that the person entered or remained unlawfully in a building “with intent to commit a crime against a person or property.” RCW 9A.52.020(1), .025(1), .030(1). For purposes of the burglary statutes, courts have applied a common sense analysis to determine whether a particular crime constitutes a crime against a person. *State v. Snedden*, 149 Wn.2d 914, 919, 73 P.3d 995 (2003). Court look to the plain language of the underlying crime to determine whether it qualifies as a crime against a person. *Id.*

In *Snedden*, the court held that indecent exposure qualified as a crime against a person for purposes of the burglary statute because the indecent exposure statute “requires knowledge that the obscene conduct will cause a reasonable affront or alarm and only a person can be affronted or alarmed by such conduct.” 149 Wn.2d at 923. Likewise, in *State v. Lawson*, the court focused on the repeated use of the word “person” in the statute to find voyeurism is a crime against a person. 185 Wn. App. 349, 357, 340 P.3d 979 (2014) (the perpetrator “views another *person* without that *person*’s knowledge in a place where *he* or *she* has a reasonable expectation of privacy or when that person views the intimate areas of another *person*”) (emphasis in original).

Delivery of methamphetamine is defined as the transfer of methamphetamine from one person to another. RCW 69.50.401 (1), (2)(b), 69.50.101(h). Delivery does not require either person to use the methamphetamine nor does it require one transfer it with the intent someone will use it. It does not require knowledge a person will harm themselves with the methamphetamine. Delivery of methamphetamine fails to qualify as a crime against a person under this definition as well. See *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997) (“victim” of drug sales is “the public at large,” not individual person).

For all these reasons, the State failed to prove that Ms. Poor was present when a crime was committed against Mr. Hoague, which is the first element of failing to summon assistance.

- c. The State failed to prove Ms. Poor knew Mr. Hoague suffered substantial bodily harm as a result of the crime committed against him and was in need of assistance.

The State also failed to present sufficient evidence to establish the second element of failing to summon assistance: that Ms. Poor knew that Mr. Hoague had suffered substantial bodily harm as a result of the crime committed against him and that Mr. Hoague was in need of assistance. RCW 9A.36.160(2).

- i. *The State did not prove Ms. Poor knew Mr. Hoague suffered substantial bodily harm.*

“Substantial bodily harm” is “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.” RCW 9A.04.110(4)(b).

Although the State provided sufficient evidence that Mr. Hoague, in fact, suffered substantial bodily harm and that he suffered that harm as a result of ingesting methamphetamine, the State failed to prove Ms. Poor knew he suffered such harm or that she knew it was as a result of a controlled substance homicide.

The State presented testimony from two fellow drug users present during the party. *See generally* 3RP 285-301 (Norwood), 301-15 (Ramey). Neither person believed Mr. Hoague's condition warranted them calling for medical attention. Both persons believed Mr. Hoague to be sleeping. Mr. Ramey testified Mr. Hoague was sleeping when he left the house. 3RP 309, 313. Nothing he saw the morning he left the house gave him any cause for concern or to believe Mr. Hoague was in medical distress. 3RP 314. Mr. Norwood explained that although Mr. Hoague appeared to have "difficulty fully waking up," he did respond to attempts to wake him up and acknowledged such efforts. 3RP 293.

At no point did any of the adults in the house suggest to Ms. Poor that she should call for medical assistance, nor did any of them call themselves. Although Mr. Norwood claims he told Mr. Ramey he thought perhaps the paramedics should be called, he said this *after* he left the house. 3RP 294. He never suggested to Ms. Poor that she should call for medical assistance, nor did he himself call for assistance. 3RP 299. In addition, the third adult, Leann, was apparently in the house much of the day and did not call for any medical help.

The fact that no one who was present and who observed Mr. Hoague's condition the following morning believed he needed medical attention suggests that the bodily harm he suffered was not readily

apparent to observers. Without proof that Ms. Poor *knew* Mr. Hoague was suffering substantial bodily harm, the State failed to present sufficient evidence of this element of failing to summon assistance.

- ii. *The State did not prove that Ms. Poor knew any substantial bodily harm Mr. Hoague suffered was as a result of the crime committed against him.*

Even if Ms. Poor knew Mr. Hoague was suffering substantial bodily harm, in order for the State to prove the second element of failing to summon assistance, the State had to prove beyond a reasonable doubt that Ms. Poor knew he was suffering substantial bodily harm *as a result of the crime committed against him*. If, for example, she was aware he suffered harm but thought it was a result of his chronic obstructive pulmonary disease, his hypertensive cardiovascular disease, or his diabetes, she would not be guilty of failing to summon assistance.

Here the State proved Mr. Hoague ultimately died of acute methamphetamine intoxication complicated by his other medical problems. 3RP 334, 338. The doctor declaring the cause of death acknowledged Mr. Hoague's other medical conditions could have manifested themselves and rendered him unconscious. 3RP 338-39. In addition, the doctor acknowledged his diabetes could have caused a coma. 3RP 338-39. Finally, the State proved that Ms. Poor herself, when she called 911, thought he was in a diabetic coma as a result of low blood

sugar. 2RP 238; Ex. 1-B. The fact that Mr. Hoague's condition was ultimately a result of his methamphetamine use is not the issue. Rather, the issue is the State failed to prove by sufficient evidence that Ms. Poor *knew* not only that Mr. Hoague was suffering substantial bodily harm but also that she *knew* he suffered that harm *as a result of* the methamphetamine, as opposed to the numerous other medical conditions plaguing him.

In addition, as explained above, the crime committed against Mr. Hoague was the crime of controlled substance homicide. He did not need assistance as a result of the homicide; he needed assistance as a result of his own methamphetamine use.

For all these reasons, the State failed to prove the second essential element of failing to summon assistance.

d. The State failed to prove Ms. Poor did not summon assistance for Mr. Hoague.

The State needed to prove beyond a reasonable doubt that Ms. Poor failed to summon assistance for Mr. Hoague. RCW 9A.36.160(4). The State failed to present sufficient evidence of this essential element.

i. *Ms. Poor called 911 and summoned assistance for Mr. Hoague.*

The undisputed evidence is that Ms. Poor did call 911 and request medical assistance for Mr. Hoague. 2RP 238, 276-77; 4RP 401-02; Ex. 1-

B. In fact, the State proved Ms. Poor called 911 and requested medical assistance for Mr. Hoague within an hour of when she learned his blood sugar was abnormally low. 2RP 238, 276-77; 4RP 401-02; Ex. 1-B.

- ii. *The statute does not impose a temporal requirement for summoning assistance.*

The statute does not require that an individual summon assistance immediately or at the earliest possible opportunity after the other elements are met. Instead, the statute require that the State prove the defendant failed to summon assistance. Here, the State proved Mr. Poor did summon assistance. Indeed, the jury's note, asking for clarification of this element and inquiring if the timeliness of summoning assistance should be considered, reflects the jury's focus on this element.⁶ CP 58.

- e. This Court should reverse the failing to summon assistance conviction with instructions to dismiss the charge with prejudice.

The State did not prove beyond a reasonable doubt that Ms. Poor was guilty of failing to summon assistance because insufficient evidence

⁶ The jury asked:

JURY'S QUESTION: COUNT 1: FAILING TO SUMMON ASSISTANCE
INSTRUCTION 13; (A)
PLEASE CLARIFY THIS: IS IT ABSOLUTE OR SHOULD
TIMELINESS BE CONSIDERED?

The court responded, "Please refer to your jury instructions." CP 58.

supports three of the five essential elements. Where insufficient evidence supports any essential element, double jeopardy prevents the State from retrying the defendant for the same offense. *Burks v. United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); *State v. Hummel*, 196 Wn. App. 329, 359, 383 P.3d 592 (2016). Therefore, this Court should reverse with instructions to dismiss the charge.

2. The failing to summon assistance statute is unconstitutionally vague, requiring reversal of the conviction.

Alternatively, if this Court finds sufficient evidence supports the failing to summon assistance conviction, the statute is unconstitutionally vague because it does not clearly identify any temporal requirement for when assistance must be summoned.

a. Due process requires fair notice of prohibited conduct.

Due process requires a statute sufficiently define the prohibited conduct such that ordinary people may understand what is proscribed and requires that the standards of guilt are sufficiently ascertainable to protect against arbitrary enforcement. U.S. Const. amend. XIV; Const. art. I, § 3; *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). Statutes must provide “fair notice of the conduct they require or proscribe.” *State v. Breidt*, 187 Wn. App. 534, 539, 349 P.3d 924 (2015). Pursuant to that requirement, “a statute is void for vagueness if either: (1) the statute does not define the criminal offense with sufficient definiteness

that ordinary people can understand what conduct is proscribed; or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” *State v. Watson*, 160 Wn.2d 1, 6, 154 P.3d 909 (2007) (internal quotations omitted).

Appellate courts review the constitutionality of a statute de novo and evaluate a vagueness challenge “by examining the statute as applied under the particular facts of the case.” *Id.* (internal quotations omitted). A statute fails to meet constitutional requirements if “persons of ordinary intelligence” cannot understand what the ordinance requires or proscribes. *Id.* at 7 (quoting *Douglass*, 115 Wn.2d at 179).

- b. The statute is unconstitutionally vague because an average person of ordinary intelligence would not understand when the statute required them to summon assistance.

The failing to summon assistance statute imposes no temporal requirement for at what point or when a person must summon assistance. If RCW 9A.36.160(4) is interpreted to require individuals to summon assistance immediately or at some particular point, as opposed to at any time, then the statute is unconstitutionally vague because it fails to identify the specific temporal requirement. An ordinary person of common intelligence would not understand RCW 9A.36.160(4) to require a particular temporal element as part of when he or she must summon assistance in order to avoid guilt under the statute. Where a statute leaves

a person “of common intelligence guessing at the meaning and application” of a word or element in the statute, it “lacks sufficient definiteness as to the proscribed conduct,” and is unconstitutionally vague. *State v. Jenkins*, 100 Wn. App. 85, 91, 995 P.2d 1268 (2000).

- c. The statute is unconstitutionally vague because it provides no ascertainable standards of guilt to protect against arbitrary enforcement.

The statute permits the State to decide at what point in time an individual was required to summon assistance. Here, Ms. Poor did summon assistance, but at a point in time the State believed to be too late. Nothing in the statute notifies a person of ordinary intelligence of the point in time when criminal liability incurs from a failure to act. As such, the statute delegates to juries for ad hoc and subjective resolution on a case by case basis whether the failure to call falls within the intended policy of the statute. Such insufficient definiteness that fails to clearly identify proscribed conduct renders statutes void for vagueness. *Christman*, 160 Wn. App. at 757 (citing *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 513 (9th Cir. 1988)). And the jury sought clarification on this very issue when it inquired if the timeliness of summoning assistance should be considered. CP 58.

3. The conviction for trafficking in stolen property should be reversed and the charge dismissed for insufficient evidence.

- a. Trafficking in stolen property requires proof the property was stolen.

To prove Ms. Poor guilty of trafficking in stolen property in the first degree, the State was required to prove beyond a reasonable doubt that Ms. Poor (1) knowingly (2) trafficked⁷ (3) in stolen property. RCW 9A.82.050(1).

- b. The State failed to prove the guitar Ms. Poor pawned was stolen.

The pawning of an item stolen and known to be stolen constitutes trafficking. RCW 9A.82.010(19) (defining trafficking to include selling or transferring stolen property to another person). However, the mere act of pawning an item does not establish the item was stolen. Where the State fails to prove the item pawned was stolen, it cannot prove trafficking in stolen property.

Here the State established that Mr. Hoague once owned the guitar in question, that he greatly valued the guitar, and that Ms. Poor pawned the guitar. However, the State presented no evidence that Ms. Poor or anyone else stole the guitar. For example, in *State v. Hermann*, several

⁷ RCW 9A.82.010(19) defines traffic as “to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.”

objects were pawned which had been reported stolen by the owners. 138 Wn. App. 596, 600, 604, 158 P.3d 96 (2007). Here, nothing establishes that the guitar was ever stolen by anyone. No evidence established Ms. Poor obtained the guitar by theft. No evidence established Ms. Poor took it without the permission of Mr. Hoague. The State only proved neither Mr. Hoague's two children nor his neighbor were aware of whether he gave the guitar to Ms. Poor.

Nor did other evidence demonstrate the guitar was stolen. For example, the house from which it was taken was not burglarized. No one testified Ms. Poor had not been given permission to have the guitar. Nor is this a case in which knowledge of the stolen item may be reasonably inferred from circumstantial evidence. *Compare with State v. Killingsworth*, 166 Wn. App. 283, 286-88, 296 P.3d 1064 (2012) (finding sufficient evidence supported inference of knowledge that property was stolen based on connections between defendant, who pawned property, and disappearance of property from burglarized car near defendant's house, towards which burglars were observed running); *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997) (pawned items were missing from house to which defendant had access and owners denied giving defendant permission to take items).

Speculation is insufficient to sustain a conviction. A jury may not sustain a conviction solely based on an inference from equivocal evidence. *Vasquez*, 178 Wn.2d at 8-16. In *Vasquez*, the Court found inferring intent to defraud from mere possession of a forged document impermissibly relieved the State of its burden to prove every element of the charged offense beyond a reasonable doubt. 178 Wn.2d at 7. “Inferences based on circumstantial evidence must be reasonable and ‘cannot be based on speculation.’” *Hummel*, 196 Wn. App. at 357 (quoting *Vasquez*, 178 Wn.2d at 16). Where it is equally possible that something did or did not occur, the State has failed to prove that element beyond a reasonable doubt.

- c. This Court should reverse the trafficking in stolen property conviction with instructions to dismiss the charge with prejudice.

The State did not prove beyond a reasonable doubt that Ms. Poor was guilty of trafficking in stolen property in the first degree because insufficient evidence supports the essential element that the property was stolen. The State may not infer that the property was stolen merely from Ms. Poor’s pawning of it. Because the State failed to prove Ms. Poor obtained the guitar by theft or otherwise stole it, it failed to prove each element of trafficking in stolen property by sufficient evidence. Therefore, this Court should reverse with instructions to dismiss the charge.

4. Ms. Poor was deprived of her right to a unanimous jury verdict guaranteed by article I, sections 21 and 22.

- a. Where a single count is charged but evidence of multiple counts is presented, the constitutional right to a unanimous jury requires that either the State elect one act or the court instruct the jury that it must unanimously agree on the specific act committed.

When the State presents evidence of multiple acts, any one of which could form the basis of one count charged, either the prosecutor must tell the jury on which act to rely during its deliberations or the court must instruct the jury to agree on a specific criminal act. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). This rule does not apply to a “continuing course of conduct,” but if there is evidence tending “to show two distinct instances of [drug] possession occurring at different times, in different places, and involving two different containers,” either the prosecutor must clarify on which incident it is relying or the court must instruct the jury on the unanimity requirement. *State v. King*, 75 Wn. App. 899, 903, 878 P.2d 466 (1994).

If the State fails to elect an act and the court fails to instruct the jury that it must unanimously agree that a particular act occurred, some jurors may end up relying on one act or incident and some jurors may end up relying on another, “resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” *Kitchen*, 110 Wn.2d at 411. Thus, “failure to follow one of these options is error, violative of a

defendant's state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial." *Id.* at 409; U.S. Const. amend. VI; Const. art. I, §§ 21, 22.⁸

The right to a unanimous verdict is a fundamental constitutional right that may be raised for the first time on appeal. *State v. Holland*, 77 Wn. App. 420, 424, 891 P.2d 49 (1995); RAP 2.5(a)(3).

- b. The State presented evidence of three separate possible possessions but the State did not elect one of them and the court did not instruct the jury on the unanimity requirement.

Here, the State presented evidence of three separate alleged stashes of methamphetamine, any of which could have formed the basis for the single count of possession of a controlled substance. However, the prosecutor did not elect one of the stashes in closing argument and the court did not instruct the jury that it had to unanimously agree on the specific stash which constituted the possession charge.

⁸ The unanimity instruction is often referred to as a "*Petrich* instruction," based on *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

date found	found by	what found	where found	seized by
July 9, 2016	Hoague's neighbor	pipe full of methamphetamine 2RP 241, 253-54, 258-61	in a closed drawer in the kitchen next to the stove	seized by PO Hughes; introduced as Ex. 9
July 18, 2016	Hoague's son	spoon with methamphetamine 2RP 216-17; 4RP 380-384	in the kitchen area above the stove	seized by PO Davis; introduced as Exs. 7, 10, 11
July 21, 2016	Hoague's daughter	fanny pack bag with methamphetamine 4RP 364, 370-71, 373-377	in the kitchen on a counter inside of a fanny pack bag	seized by PO Strombach; introduced as Ex. 14

Three different witnesses testified they discovered three distinct stashes of methamphetamine in three different places inside of Mr. Hoague's house at three different times. Thus, the evidence the State presented did not constitute a continuing course of conduct, but three separate incidents.

In *King*, this Court found that drugs recovered from a car in which the defendant was riding and from a bag the defendant was wearing when he had been in the car were "two distinct instances of cocaine possession occurring at different times, in different places, and involving two different containers." 75 Wn. App. at 903. It concluded the two distinct instances of possession were not a continuing course of conduct.

Therefore, the State's failure to elect a possession and the court's failure to give a unanimity instruction required reversal and remand for a new trial.

Id. 902-04.

Here, as in *King*, the State failed to elect and the court failed to instruct as to on which act of alleged possession it was relying. The State did not elect on which stash the jury should rely on in deliberations. To the contrary, in closing argument the prosecutor discussed all three stashes, urging the jury to convict Ms. Poor of possession. 4 RP 432-33 (discussing pipe in drawer), 433 (discussing spoon), 433 (discussing "the methamphetamine located in that house"), 439-41 (referencing "the items" plural in referring to the methamphetamine in the house). Moreover, the court did not instruct the jury that all twelve jurors had to unanimously agree on which act of possession it found Ms. Poor guilty. Thus, Ms. Poor's constitutional right to a unanimous jury was violated. Const. art. I, §§ 21, 22; *Kitchen*, 110 Wn.2d at 409.

c. The denial of Ms. Poor's right to a unanimous verdict requires reversal of the possession of a controlled substance conviction.

Because this error is constitutional, prejudice is presumed and is overcome "only if no rational juror could have a reasonable doubt as to any one of the incidents alleged." *Kitchen*, 110 Wn.2d at 411. The presumption of prejudice may not be overcome here. "[A] rational juror

could have entertained reasonable doubt as to whether one or more” of the different stashes was possessed by Ms. Poor. *Kitchen*, 110 Wn.2d at 412.

Mr. Hoague’s house was a small one bedroom house. 2 RP 215, 248; 3 RP 306; 4 RP 370. The house contained not only Mr. Hoague’s belongings but other people’s belonging as well. 2 RP 220. His family had “no idea what was his and what wasn’t” his. 4 RP 370. In addition, in the time immediately before the incident, Leann Martin was also living at the house with Mr. Hoague. 2RP 208; 3 RP 303, 311-12. Ms. Poor had also been staying in the house for several days prior to the incident. 2RP 234, 240, 245. She claimed to others she was living at the house, but the neighbor did not believe that was accurate. 2 RP 210, 240-41, 245.

The day the first stash of methamphetamine was discovered (July 9), five people had been partying in the house. Both Ms. Poor and Ms. Martin remained in the house during the day and after Mr. Hoague was taken to the hospital. Mr. Hoague and his other four party guests all had equal access to the areas where the drugs were found. And the State presented no evidence as to who was in and out of the house in the days following the incident before two of the three stashes were found.

The State only proved that one of these – the July 9 stash – was present in the house on dates Ms. Poor was proven to be in the house. In addition to the fact that multiple other people – including the three other

party goes, the neighbor, the son, and Mr. Hoague himself – all had access to Mr. Hoague’s house on and before July 9, the State failed to prove who did or did not access the house between July 9, when Mr. Hoague was taken to the hospital, and the dates the other stashes were recovered, on July 18 and 21. Thus, a rational juror could have entertained a reasonable doubt as to whether Ms. Poor possessed *any* of the three stashes. *Kitchen*, 110 Wn.2d at 412.

Because a rational juror could have a reasonable doubt as to one or all three of the possessions alleged, the presumption of prejudice is not overcome, and reversal is required. This Court should reverse the conviction and remand for a new trial. *Kitchen*, 110 Wn.2d at 411-12.

5. Interpreting possession of a controlled substance as a strict liability offense violates the presumption of innocence and due process of law.

It is fundamental that “wrongdoing must be conscious to be criminal.” *Morissette v. United States*, 342 U.S. 246, 252, 72 S. Ct. 240, 96 L. Ed. 288 (1952). Although Washington courts have construed the possession of a controlled substance statute as creating a strict liability crime with no mental element, the supreme court is reconsidering that question. *State v. Bradshaw*, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004); *State v. Cleppe*, 96 Wn.2d 373, 380, 635 P.2d 435 (1981). *But see State v.*

A.M., 4 Wn. App. 2d 1061 (2018), *review granted*, 192 Wn.2d 1021 (2019).⁹

The court’s interpretation of the drug possession statute as a strict liability offense void of a mens rea element is wrong. In reaching this conclusion, the court relied on the fact the legislature appeared to have omitted a mental element from the statute. *Bradshaw*, 152 Wn.2d at 534-35; *Cleppe*, 96 Wn.2d at 379-80. The “failure to be explicit regarding a mental element is not, however, dispositive of legislative intent.” *State v. Anderson*, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000); *accord United States Gypsum Co.*, 438 U.S. 422, 438, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978). The apparent absence of a mental element from a statute does not mean none is required. *Elonis v. United States*, ___ U.S. ___, 135 S. Ct. 2001, 2009, 192 L. Ed. 2d 1 (2015). Unless it can be absolutely shown that a legislature intended to exclude a traditional mental element, the courts will infer one. *See, e.g., Anderson*, 141 Wn.2d at 366-67 (declining to interpret unlawful possession of firearm statute as strict liability offense and instead interpreting knowledge element, despite absence of apparent mental intent

⁹ In *A.M.*, the Court is deciding “Whether requiring a defendant charged with possession of a controlled substance to prove the affirmative defense of unwitting possession improperly shifts the State’s burden to prove the elements of the charge beyond a reasonable doubt in violation of due process principles.” https://www.courts.wa.gov/appellate_trial_courts/supreme/issues/May2019.pdf Oral arguments were held on May 28, 2019.

element in statute). Failure to presume the legislature implied a mens rea element creates the potential to criminalize innocent conduct.

Statutes are interpreted to avoid constitutional doubts when statutory language reasonably permits. *Utter v. Bldg. Indus. Ass'n of Washington*, 182 Wn.2d 398, 434, 341 P.3d 953 (2015); accord *Gomez v. United States*, 490 U.S. 858, 864, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989) (“settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question”). Unless interpreted to have a knowledge element, the constitutionality of the statute is dubious in light of fundamental due process principles.

A state has authority to allocate the burdens of proof and persuasion for a criminal offense, but this allocation violates due process if “it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Patterson v. New York*, 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (internal quotation omitted). “The presumption of innocence unquestionably fits that bill.” *Nelson v. Colorado*, __ U.S. __, 137 S. Ct. 1249, 1256 n.9, 197 L. Ed. 2d 611 (2017).

History and tradition provide guidance on when the constitutional line is crossed:

Where a State's particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to demonstrate that the State has shifted the burden of proof as to what is an inherent element of the offense, or has defined as a single crime multiple offenses that are inherently separate. Conversely, a freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions will lighten the defendant's burden.

Schad v. Arizona, 501 U.S. 624, 640, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality); *see Schad*, 501 U.S. at 650 (Scalia, J. concurring) ("It is precisely the historical practices that *define* what is 'due.'").

Washington appears to be the only state that interprets drug possession as a true strict liability crime. *State v. Adkins*, 96 So. 3d 412, 423 n.1 (Fla. 2012) (Pariante, J., concurring); *see Bradshaw*, 152 Wn.2d at 534; *Dawkins v. State*, 313 Md. 638, 647 n.7, 547 A.2d 1041 (1988); *State v. Bell*, 649 N.W.2d 243, 252 (N.D. 2002) (legislature changed North Dakota law to require mental element); *Adkins*, 96 So. 3d at 415-16 (Florida applying knowledge requirement to possession, although not exact nature of substance).

That nearly every drug possession offense in this country has a mens rea requirement is unsurprising. As acknowledged in *Bradshaw*, the Uniform Controlled Substances Act of 1970 has a "knowingly or intentionally" requirement for the crime of possession. Unif. Controlled Substances Act 1970 § 401 (c); *Bradshaw*, 152 Wn.2d at 534. This

element demonstrates the offense of possession of a controlled substance has traditionally required proof of knowledge.

Washington's drug possession law is contrary to the practice of every other state. It is contrary to the tradition of requiring the State prove a mens rea element in drug possession crimes. This suggests the possession statute violates due process. *Schad*, 501 U.S. at 640. Stripped of the traditional mental element of knowledge, there is no "wrongful quality" about a person's conduct in possessing drugs. To conclude otherwise criminalizes the innocent behavior of possessing property. Washington's possession statute is unconstitutional.

If the drug possession statute does not require proof of knowledge, it violates due process principles and is unconstitutional. U.S. Const. amend. XIV; Const. art. I, § 3. As explained, Washington's drug possession statute crosses the constitutional line and criminalizes innocent behavior. For the innocent to avoid a felony conviction, they must disprove the presumption that they were aware of the substance they possessed. This burden shifting scheme for possession of a controlled substance is unlike any in the union. The possession statute turns the presumption of innocence, fundamental to our nation's history and traditions, on its head. This Court should hold the statute unconstitutional. Ms. Poor's conviction should be reversed and the prosecution dismissed

because the statute is unconstitutional, and unconstitutional statutes are void. *City of Seattle v. Grundy*, 86 Wn.2d 49, 50, 541 P.2d 994 (1975).

6. The amended information is constitutionally deficient for failing to allege any particular facts to support the charges.

- a. Due process requires a charging document to provide notice of all the essential elements and supporting facts of every charged offense.

Article I, section 22 and the Sixth Amendment require the State to provide the individuals they accuse of crimes with notice of the “nature and cause” of the offense charged. *State v. Pelkey*, 109 Wn.2d 484, 487, 745 P.2d 854 (1987). Constitutional notice requires the information contain both all the elements of the crime charged and a description of the specific conduct of the defendant which allegedly constituted the crime. Const. art. I, §§ 3, 22; U.S. Const. amend. XIV; *City of Auburn v. Brooke*, 119 Wn.2d 623, 630, 836 P.2d 212 (1992). The State must set forth every essential element of the crime, both statutory and nonstatutory, in the information. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); *see also United State v. Cruikshank*, 92 U.S. 542, 544, 23 L. Ed. 588 (1875) (“A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstance”).

In addition, the State must allege particular facts supporting the elements. “The ‘essential elements’ rule requires that a charging

document *allege facts supporting every element of the offense*, in addition to adequately identifying the crime charged.” *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989) (emphasis in original). Thus, the information must contain not only the essential elements of the offense but also the particular facts supporting those elements. *Zillyette*, 178 Wn.2d at 162-63 (vacating conviction and remanding for dismissal without prejudice where information failed to contain “[t]he particular facts necessary” to support the charge of controlled substance homicide).

“More than merely listing the elements, the information must allege the particular facts supporting them.” *State v. Nonog*, 169 Wn.2d 220, 226, 237 P.3d 250 (2010). This ensures that the defendant is not only “apprised of the elements of the crime charged” but also of “the conduct of the defendant which is alleged to have constituted that crime.” *Kjorsvick*, 117 Wn.2d at 98.

Notifying the defendant of the facts alleged to constitute the charged crime both ensures a defendant may prepare a defense and also protects against double jeopardy by enabling a defense to plead a first judgment as a bar to future prosecutions for the same offense. *Leach*, 113 Wn.2d at 688. Where the “particular facts necessary to charge [the defendant] with [the charged crime] do not appear in any form, or by fair construction” in the information, the information is constitutionally

deficient and courts must dismiss the information without prejudice to the State's ability to refile. *Zillyette*, 178 Wn.2d at 163.

Defendants may challenge the sufficiency of notice provided in the information for the first time on appeal. *Leach*, 113 Wn.2d at 691; RAP 2.5(a)(3). The reviewing court must liberally construe the information and analyze whether "the necessary facts appear in any form." *Kjorsvik*, 117 Wn.2d at 105. If all essential elements and necessary facts do not appear in the information, reversal is required without proof of actual prejudice. *Zillyette*, 173 Wn.2d at 163. Appellate courts review challenges to the sufficiency of the information de novo. *Id.* at 158.

- b. The amended information fails to allege any particular facts supporting the charge of failing to summon assistance.

With respect to the failing to summon assistance charge, the amended information alleged:

Count I
Failing to Summon Assistance

On or about July 9, 2016, in the County of Kitsap, State of Washington, (1) the above-named Defendant was present when a crime was committed against another person; and (2) the above-named Defendant knew that the other person had suffered substantial bodily harm as a result of the crime committed against the other person and that the other person was in need of assistance; and (3) the above-named Defendant could reasonably summon assistance for the person in need without danger to himself or herself and without interference with an important duty owed to a third party; and (4) the above-named Defendant did fail to summon assistance for the person in need; and

(5) another person did not summon or had not summoned assistance for the person in need of such assistance; contrary to the Revised Code of Washington 9A.36.160. (Maximum penalty-Ninety (90) days in jail or \$1,000 fine, or both, pursuant to RCW 9A.36.161 and RCW 9A.20.021(3), plus restitution and court costs.)
JIS Code: Unknown

CP 6-7.

Here, the State failed to include any particularized facts supporting any of the essential elements. The information alleged the date and the county. However, it failed to allege any other “particular facts” necessary to the charge. It does not allege what crime was committed against a person in Ms. Poor’s presence. It does not allege against whom the crime was committed. It does not allege what bodily harm the person suffered or how Ms. Poor knew of it. The information lacks any facts to support any of the elements.

Where a charging document does not allege the “critical facts” to apprise the defendant “of the elements of the charged crime *and* the conduct of the defendant which is alleged to have constituted the crime” within its four corners, it is constitutionally deficient. *City of Seattle v. Termain*, 124 Wn. App. 798, 803, 103 P.3d 209 (2004). In *Termain*, the defendant was charged with violating a domestic violence no contact order. The complaint “track[e]d the language of the ordinance, but other than setting forth the dates of the charging period, the complaint fail[ed] to

specifically identify the order claimed to be violated or the court granting the order.” *Id.* at 803. In addition, the complaint failed to identify the victim or “any factual basis for the charges.” *Id.* The Court affirmed the superior court order dismissing the complaint as constitutionally deficient.

Here, Ms. Poor was not independently charged with the crime allegedly committed against the person that forms the basis of the failing to summon assistance charge. Therefore, even a liberal reading of the information as a whole fails to allege the particularized facts necessary to support the essential elements of the failing to summon assistance charge.

- c. The amended information fails to allege any particular facts supporting the charge of trafficking in stolen property.

With respect to the trafficking in stolen property charge, the amended information alleged:

Count II

Trafficking in Stolen Property in the First Degree

On or about September 9, 2016, in the County of Kitsap, State of Washington, the above-named Defendant did, knowingly initiate, organize, plan, finance, direct, manage or supervise the theft of stolen property for sale to others, or did knowingly traffic in stolen property; contrary to the Revised Code of Washington 9A.82.050(1).

(Maximum Penalty-Ten (10) years imprisonment and/or a \$20,000 fine pursuant to RCW 9A.82.050(2) and 9A.20.021(1)(b), plus restitution and assessments.)

JIS Code: 9A.82.050.1 Stolen Property Trafficking-1

CP 7. Again, the information alleged the date and the county. However, it failed to allege any other “particular facts” necessary to the charge. It

does not allege what stolen property Ms. Poor trafficked. It does not allege how Ms. Poor knew the property was stolen. It does not allege where she trafficked it. It does not allege in what manner she trafficked it. The information lacks sufficient facts for each element.

State v. Lindsey, by contrast, offers an example of a constitutionally sufficient information containing both all the essential elements of trafficking of stolen property and the necessary particularized facts. 177 Wn. App. 233, 238, 311 P.3d 61 (2013). In *Lindsey*, this Court found the information contained sufficiently detailed particularized facts to satisfy constitutional requirements where the information not only contained every essential element of the offense and quoted the statute but also “*identifie[d] the stolen property, and allege[d] the applicable dates and county of the crime.*”¹⁰ 177 Wn. App. 246 (emphasis added).

Here, none of those particularized facts are alleged.

¹⁰ The information in *Lindsey* alleged:

TRAFFICKING IN STOLEN PROPERTY IN THE FIRST DEGREE

The defendant, in the County of Cowlitz, State of Washington, on, about or between July 08, 2011, and July 11, 2011, did knowingly organize, plan, finance, direct, manage and/or supervise the theft of property, to-wit: steel tank and/or cover, for sale to others, or did knowingly traffic in stolen property, to wit: steel tank and/or cover, contrary to RCW 9A.82.050(1) and against the peace and dignity of the State of Washington.

Lindsey, 177 Wn. App. at 238.

- d. The amended information fails to allege particular facts supporting the charge of possession of a controlled substance.

With respect to the possession of a controlled substance charge, the amended information alleged:

Count III
Possession of a Controlled Substance
[Methamphetamine]

On or about July 9, 2016, in the County of Kitsap, State of Washington, the above-named Defendant did possess a controlled substance, to-wit: Methamphetamine, including its salts, isomers, and salts of isomers; contrary to the Revised Code of Washington 69.50.4013 and 69.50.206(d)(2).

(Maximum Penalty-Five (5) years imprisonment and/or a fine of not less than \$1,000 nor more than \$10,000 fine pursuant to RCW 69.50.4013(2) and RCW 69.50.430, plus restitution and assessments.)

(If the Defendant has a second or subsequent conviction under RCW 69.50.401, .4011, .4012, .4013, .4015, .402, .403, .406, .407, .410, or .415, the minimum fine shall be \$2,000 pursuant to RCW 69.50.430.)

JIS Code: 69.50.4013 Cont Subs No Prescription-Felony

CP 7. Unlike the first two counts, the State did include a “to-wit” section identifying the particular controlled substance, as is required by *Zillyette*, 178 Wn.2d at 163. However, it contains none of the other particularized facts, such as how or where Ms. Poor possessed the controlled substance.

- e. The constitutionally deficient information requires reversal of the convictions and remand for dismissal without prejudice.

The amended information contains no particular facts supporting any of the essential elements of the three charged offenses. Instead, it

contains only bare bones, generic reiteration of the statute. The remedy for an insufficient charging document is dismissal without prejudice. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). This Court should reverse Ms. Poor's three convictions and remand for dismissal of the charges without prejudice to refile.

F. CONCLUSION

This Court should reverse and dismiss the trafficking in stolen property and failing to summon assistance convictions for insufficient evidence. Alternatively, the failing to summon assistance statute is unconstitutionally vague.

In addition, Ms. Poor's right to a unanimous jury was violated on the possession of a controlled substance charge, requiring reversal and remand for retrial. Moreover, without a knowledge requirement, the conviction violates the presumption of innocence and due process of law, requiring reversal. Finally, the information is constitutionally deficient, requiring reversal and remand for dismissal without prejudice.

DATED this 26th day of July 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'K. S. M. O.', written in a cursive style.

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