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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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

- 1. This Court should accept the State's proper concession that Ms. Poor's conviction for failing to summon assistance is not supported by sufficient evidence and should reverse the conviction and remand with instructions to dismiss with prejudice.**

Ms. Poor argues the State failed to present sufficient evidence of three of the essential elements of failing to summon assistance. Brief of Appellant at 10-24 (arguing insufficient evidence (1) Poor was present when crime was committed against Hoague, (2) Poor knew Hoague suffered substantial bodily harm as result of crime, and (3) Poor did not summon assistance). The State agrees Ms. Poor's conviction is not supported by sufficient evidence. Brief of Respondent at 1, 6-8. The State agrees the conviction should be reversed and remanded with directions to dismiss. Brief of Respondent at 8.

This Court should accept the State's proper concession that insufficient evidence supports Ms. Poor's conviction for failing to summon assistance and should reverse the conviction and remand for dismissal with prejudice. In addition, given the absence of any cases interpreting the requirements of this statute, Ms. Poor suggests it would be helpful for this Court to address the issue nonetheless.¹ Without guidance

¹ As Ms. Poor indicated in her opening brief, no Washington case addresses this statute or analyzes the elements to determine what evidence is required to sustain a conviction. Brief of Appellant at 11 n.4.

from the Court of Appeals, the risk that individuals will be convicted under this statute in the absence of sufficient evidence continues. Ms. Poor's case represents an overreaching by the State to impose a duty where none exists and to create criminal liability based on a resulting harm divorced from the actions of a defendant. Direction from this Court on the appropriate way in which to interpret the statute and the evidence required to sustain a conviction would benefit the public.

If the Court accepts the State's concession and dismisses the conviction as supported by insufficient evidence, the Court need not address Ms. Poor's argument that the statute is unconstitutionally vague in violation of due process. Brief of Appellant at 24-26.

2. The trafficking in stolen property conviction is not supported by sufficient evidence and should be reversed and dismissed.

To convict an individual of trafficking in stolen property in the first degree, the State must prove by sufficient evidence that the person knowingly trafficked an item that constituted stolen property. RCW 9A.82.050(1). Here, the State presented insufficient evidence of trafficking because the State failed to prove that the item Ms. Poor pawned – the guitar – was stolen property.

The State misunderstands the issue. The issue is not whether Ms. Poor pawned the guitar. Brief of Responded at 8-11. The evidence

considered in the light most favorable to the State proves she did. 2RP 269-72. Rather, the issue is whether the State proved beyond a reasonable doubt that the guitar was stolen property. The evidence considered in the light most favorable to the State fails to prove the guitar was stolen.

This case is distinguishable from cases in which the evidence the item was stolen is undisputed and the issue is simply whether the defendant was aware the item was stolen. *See, e.g., State v. Michielli*, 132 Wn.2d 229, 232-37, 937 P.2d 587 (1997) (owner of property denied giving defendant permission to take property which defendant pawned); *State v. Killingsworth*, 166 Wn. App. 283, 286-88, 296 P.3d 1064 (2012) (defendant pawned property that owner reported stolen); *State v. Hermann*, 138 Wn. App. 596, 603-04, 158 P.3d 96 (2007) (defendant pawned property later discovered missing by owner).

Here, the original owner, Mr. Hoague, did not report the guitar stolen. The State presented no evidence that Ms. Poor or anyone else stole the guitar. The State failed to present any evidence as to how Ms. Poor came to possess the guitar that once belonged to Mr. Hoague. All the State proved was that Mr. Hoague originally owned the guitar, that his family knew he cherished the guitar, and that Ms. Poor, who had been living with Mr. Hoague in his house, pawned the guitar after his death. 2RP 217-221, 269-72; 4RP 364-66. However, the State presented no

evidence that Ms. Poor or anyone else stole the guitar from Mr. Hoague. Instead, only mere speculation supports the State's claim that Ms. Poor must have stolen the guitar from Mr. Hoague. In the absence of any evidence establishing the guitar was stolen, the State failed to present sufficient evidence to establish this essential element of trafficking. A jury may not convict a defendant based on mere speculation or inferences from equivocal evidence. *State v. Vasquez*, 178 Wn.2d 1, 8-16, 309 P.3d 318 (2013).

For these reasons, and the reasons in the opening brief, insufficient evidence supports Ms. Poor's conviction for trafficking in stolen property in the first degree. Brief of Appellant at 27-29. This Court must reverse Ms. Poor's conviction and remand for dismissal with prejudice.

3. Ms. Poor was deprived of her constitutional right to a unanimous verdict.

Where a defendant is charged with a single count but the jury is presented with evidence of multiple acts that could establish that count, the constitutional demands of a unanimous verdict require either the State elect on which act it is relying or the court instruct the jury it must unanimously agree on the specific act the defendant committed. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22; *State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988); *State v. King*, 75 Wn. App. 899, 878

P.2d 466 (1994). Here, the State charged Ms. Poor with one count of possession of a controlled substance but introduced evidence of three separate stashes that three different people found in different parts of Mr. Hoague's house on different dates and times. Because the State did not elect reliance on one of the three stashes and the court did not instruct the jury it needed to be unanimous as to which stash it found Ms. Poor possessed, Ms. Poor's right to a unanimous verdict was violated.

State v. Adel, on which the State relies, is distinguishable. 136 Wn.2d 629, 965 P.2d 1072 (1998). In *Adel*, the court considered whether two possessions of marijuana constituted a single unit of prosecution for purposes of a double jeopardy claim. 136 Wn.2d at 631. The court looked to the legislature's intent and found that because the two stashes were both within the defendant's possession at the same time, the two separate locations did not create two separate possessions. *Id.* at 634-36. However here, unlike *Adel*, the State introduced evidence not just of different stashes that it alleged Ms. Poor possessed, but three different stashes that they alleged she possessed despite separate and different evidence establishing different dates and times of possession. *See* chart in opening brief at Brief of Respondent at 32 (outlining different evidence).

Contrary to the State's response, the evidence of the three separate stashes did not establish a continuing course of conduct, thereby relieving

the State from the unanimity requirement. Brief of Respondent at 14-18. As explained in the opening brief, the State presented evidence not of a single, continuing possession but of three separate possessions. Brief of Appellant at 31-33. Instead, this case is similar to *King*, in which this Court found “two distinct instances” of possession where the State alleged the defendant possessed drugs found in a bag the defendant was wearing as well as in the car in which the defendant was riding while wearing the bag. 75 Wn. App. at 903. In finding the two possessions were separate acts, not a continuing course of conduct, the court noted the two instances of possession involved possessions at different times and in different places. *Id.* Here, as in *King*, the three separate possessions were in distinct locations “at different times, in different places, and involving [] different containers.” *Id.*

Moreover, the State conflates the concept of constructive possession with the issue of required unanimity. Brief of Respondent at 14-18. The issue is not whether Ms. Poor’s alleged possession of the separate stashes was actual or constructive. Even if the State presented sufficient evidence to prove that, by staying in Mr. Hoague’s house, Ms. Poor constructively possessed his stashes of methamphetamine, the State still needs to elect *which* methamphetamine stash it claims she constructively possessed. Without an election as to on which stash the

State was relying to argue Ms. Poor possessed a controlled substance, and without a unanimity instruction from the court informing the jury they must be unanimous, Ms. Poor's right to a unanimous jury was violated.

Ms. Poor was denied her right to a unanimous verdict. For these reasons, and the reasons in the opening brief, this Court should reverse Ms. Poor's conviction for possession of a controlled substance and remand for a new trial. Brief of Appellant at 30-35.

4. The amended information is constitutionally deficient for failing to allege any particular facts to support any of the charged crimes.

To be constitutionally sufficient, an information must contain all elements of the charged offense *and* a description of the conduct which the State claims constitutes the charged crime. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22; *City of Auburn v. Brooke*, 119 Wn.2d 623, 630, 836 P.2d 212 (1992); *see also State v. Pelkey*, 109 Wn.2d 484, 487, 745 P.2d 854 (1987). Only where an information appraises the defendant both of "the elements of the crime charged" and of "the conduct of the defendant which is alleged to have constituted that crime" does an information provide the defendant with the notice which the constitution demands. *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991); *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989) ("[T]he 'essential elements' rule requires that a charging document *allege facts supporting every*

element of the offense, in addition to adequately identifying the crime charged.”) (emphasis in original). Here, the amended information fails to include any facts supporting any of the three crimes with which the State charged Ms. Poor.²

The State agrees, “A charging document must allege facts supporting every element of the offense in addition to adequately identifying the crime charged.” Brief of Respondent at 11 (citing *State v. Lindsey*, 177 Wn. App. 233, 245, 311 P.3d 61 (2013)). However, the State entirely fails to address Ms. Poor’s argument that the information here does not contain facts supporting the crimes charged. Instead, the State argues that because the statutory essential elements of the offenses are included in the information, Ms. Poor was not prejudiced, and the information is constitutionally sufficient. Brief of Respondent at 11-13, 20-22. The State also argues Ms. Poor’s argument is waived because she did not request a bill of particulars. Brief of Respondent at 12. Binding precedent contradicts the State’s arguments, and this Court should reject them.

² Ms. Poor challenges the constitutional sufficiency of the information with respect to each of the three charges. Brief of Appellant at 40-47. However, since the State concedes the evidence is insufficient to support the failing to summon assistance charge and agree that conviction must be reversed and dismissed with prejudice, Ms. Poor focuses here on the argument as it relates to the two remaining charges.

First, a defendant's failure to challenge the information at trial or to request a bill of particulars for clarification does not prevent a defendant from raising a challenge to the constitutional sufficiency of the information on appeal, as the State asserts. Instead, where a defendant challenges the sufficiency of an information for the first time on appeal, the reviewing court must "more liberally construe[]" the information "in favor of validity." *Kjorsvik*, 117 Wn.2d at 102. A defendant's failure to challenge the information below or her failure to request a bill of particulars does not waive the issue. *See, e.g., Lindsey*, 177 Wn. App. at 244 (considering challenge to absence of facts in information for first time on appeal even where appellant failed to challenge sufficiency or request bill of particulars at trial); *City of Seattle v. Termain*, 124 Wn. App. 798, 802, 103 P.3d 209 (2004) (where information did not include any supporting facts, reversing and dismissing without conducting prejudice analysis, even though defendant failed to challenge information below).

Moreover, in *State v. Holt*, our Supreme Court specifically considered and rejected the argument that a defendant's failure to request a bill of particulars waives her right to challenge the sufficiency of an information. 104 Wn.2d 315, 319-20, 704 P.2d 1189 (1985); *State v. Nonog*, 169 Wn.2d 220, 225 n.2, 237 P.3d 250 (2010) (again recognizing

that defendant's challenge to constitutional sufficiency of information "may be raised at any time").

This case is similar to this Court's decision in *Termain*. 124 Wn. App. 798. In *Termain*, this Court found an information deficient where it contained every statutory element of the charged crime, violating an order of protection, but failed to contain supporting facts that identified the order of protection which the State charged the defendant with violating or the victim against whom they claim the violation was made. *Id.* at 803. Because *Kjorsvik* and other cases interpreting constitutional notice require "a defendant be apprised of the elements of the charged crime *and* the conduct of the defendant which is alleged to have constituted the crime," an information citing the elements of the statute alone is insufficient. *Id.* (emphasis in original).

This Court should reject the State's argument that Ms. Poor's argument fails because she had not established prejudice. Brief of Respondent at 8, 12-13, 20-22. The State cites *Kjorsvik* and *Lindsey* in support of its claim that, where a defendant challenges the sufficiency of an information for the first time on appeal, she must establish prejudice. This State misstates the relevant rule. Instead, *Kjorsvik* and its progeny hold that where a defendant challenges an information for the first time on appeal, the reviewing court must liberally construe the information and

consider if “the necessary facts appear in any form.” 117 Wn.2d at 105. Where the necessary facts do not appear, reversal is required without an analysis of prejudice. *Id.* at 105-06; *State v. Zillyette*, 178 Wn.2d 153, 163, 307 P.3d 712 (2013). Reviewing courts consider prejudice only in those instances in which the necessary facts do appear in the information in some form, however inartfully. *Zillyette*, 178 Wn.2d at 163 (presuming prejudice where information failed to include essential element of identity of controlled substance); *Brooke*, 119 Wn.2d at 638 (holding where information does not contain facts supporting elements, court does not reach prejudice prong). As these cases demonstrate, defendants need not establish, and reviewing courts need not consider, prejudice where the essential elements or the necessary facts supporting those elements are entirely absent from the information under a liberal reading.

Here, where the statutory elements of the offenses appear in the information but the information is completely devoid of any facts supporting any of those essential elements, the information fails to comply with the constitutional requirements of notice. For these reasons, and the reasons in the opening brief, this Court should reverse Ms. Poor’s remaining convictions and remand for dismissal without prejudice. Brief of Appellant at 40-47.

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

At Ms. Poor’s trial, the juror was not required to find Ms. Poor *knowingly* possessed methamphetamine in order to find her guilty of possession of a controlled substance. The interpretation of the possession of a controlled substance statute as a strict liability offense devoid of a mens rea element is unconstitutional. This issue was recently considered by the Supreme Court in *State v. A.M.*, although the Court declined to reach it because they reversed on other grounds. ___ Wn.2d ___, 448 P.3d 35, 41 (2019).

In her concurrence, Justice Gordon McCloud, joined by Justice González, urged the Court to reach the issue of “the ongoing criminalization of innocent conduct in Washington’s war on drugs” created by the absence of a knowledge requirement in the statute. *Id.* at 42 (Gordon McCloud, J., concurring). The two Justices recognized that “the settled interpretation of Washington’s basic drug possession statute offends due process insofar as it permits heavy criminal sanctions for completely innocent conduct” because it permits conviction for possession without knowledge of possession. *Id.* They also found that *Cleppe* and *Bradshaw* both departed from “the common law’s presumption in favor of mens rea,” and therefore erred in declining to read the statute “to require

some showing of a guilty mind.” *Id.* at 44. But, because the legislature so created the statute, they found, “The strict liability drug possession statute exceeds the legislature’s authority and offends the Fourteenth Amendment right to due process.” *Id.* at 49.

As the *A.M.* concurrence recognized, the Court’s interpretation of the drug possession statute as a strict liability offense void of a mens rea element is wrong. For these reasons and the reasons in the opening brief, this Court should find the possession of a controlled substance is unconstitutional and should reverse and dismiss the conviction. Brief of Appellant at 35-40.

B. CONCLUSION

The Court should accept the State’s concession that insufficient evidence supports Ms. Poor’s failing to summon assistance conviction and reverse the conviction and remand for dismissal with prejudice. Insufficient evidence also supports the trafficking in stolen property in the first degree conviction, and it too should be reversed and dismissed.

The possession of a controlled substance conviction violates the presumption of innocence and due process of law, requiring dismissal. In addition, the lack of jury unanimity on Ms. Poor’s possession of a controlled substance conviction requires this Court to reverse the conviction and remand for a new trial. Finally, the information is devoid

of any factual allegations and is therefore constitutionally deficient,
requiring reversal of all counts of conviction and remand for dismissal
without prejudice.

DATED this 23rd day of October, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', with a long horizontal flourish extending to the right.

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STATE OF WASHINGTON,)	
)	
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v.)	
)	
ALLISON POOR,)	
)	
Appellant.)	

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