

FILED
Court of Appeals
Division II
State of Washington

NO. 52683-2-II
9/25/2019 8:51 AM

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

STATE OF WASHINGTON,

Respondent,

v.

ALLISON CHANTAL POOR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-00979-1

BRIEF OF RESPONDENT

CHAD M. ENRIGHT
Prosecuting Attorney

JOHN L. CROSS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 328-1577

SERVICE

Kate Huber
1511 Third Avenue, Suite 610
Seattle, Wa 98101
Email: katehuber@washapp.org

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED September 24, 2019, Port Orchard, WA *Elizabeth Allen*
Original e-filed at the Court of Appeals; Copy to counsel listed at left.
Office ID #91103 kcpa@co.kitsap.wa.us

TABLE OF CONTENTS

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

 A. PROCEDURAL HISTORY.....1

 B. FACTS.....2

III. ARGUMENT.....6

 A. THERE WAS INSUFFICIENT EVIDENCE TO PROVE THAT POOR WAS OBLIGATED TO SUMMON AID.6

 B. THE EVIDENCE ADDUCED ALLOWED A REASONABLE INFERENCES THAT POOR KNEW THAT THE GUITAR SHE PAWNED WAS STOLEN.8

 1. The first amended information was sufficient to apprise Poor of the charge in count II and Poor completely fails to articulate and argue actual prejudice from the charging language used.....11

 C. THE STATE PROPERLY CHARGED AND ARGUED A SINGLE ACT OF POSSESSION BECAUSE THE VARIOUS STASHES OF METHAMPHETAMINE THAT WERE UNDER POOR’S DOMINION AND CONTROL CONSTITUTED A SINGLE UNIT OF PROSECUTION.....14

 1. The single count of possession encompassed all the drugs over which Poor had dominion and control; a unanimity instruction was not required.14

 2. Strict liability for possession of controlled substance is Washington law and neither the Supreme Court nor the legislature has changed that fact.18

 3. The first amended information was sufficient to apprise Poor of the charge in count III and Poor completely fails to articulate and argue actual prejudice from the charging language used.....20

IV. CONCLUSION.....	22
---------------------	----

TABLE OF AUTHORITIES

CASES

In re Davis,
142 Wn.2d 165, 12 P.3d 603 (2000)..... 16

Matter of Arnold,
190 Wn.2d 136, 410 P.3d 1133 (2018)..... 20

Moreover, State v. King,
75 Wn. App. 8, 878 P.2d 466 (1994), *review denied*, 125
Wn.2d 1021..... 17

State v. Gonzalez,
2 Wn. App.2d 96, 408 P.3d 743 (2018)..... 21

State v. Adel,
136 Wn.2d 629, 965 P.2d 1072 (1998)..... 16

State v. Basford,
76 Wn.2d 522, 457 P.2d 1010 (1969)..... 8, 9

State v. Bradshaw,
152 Wn.2d 528, 98 P.3d 1190 (2004)..... 19

State v. Cleppe,
96 Wn.2d 373, 635 P.2d 435 (1981)..... 18, 19

State v. Green,
94 Wn.2d 216, 616 P.2d 628 (1980)..... 9

State v. Hermann,
138 Wn. App. 596, 158 P.3d 96 (2007)..... 10

State v. Hernandez,
85 Wn. App. 672, 935 P.2d 623 (1997)..... 9

State v. Kjorsvik,
117 Wn.2d 93, 812 P.2d 86 (1991)..... 11, 12

State v. Leach,
113 Wn.2d 679, 782 P.2d 552 (1989)..... 12

State v. Lindsey,
177 Wn. App. 233, 311 P.3d 61 (2013)..... 11

State v. Myers,
133 Wn.2d 26, 941 P.2d 1102 (1997)..... 9

State v. Schmeling,
191 Wn. App. 795, 365 P.3d 202 (2015)..... 19

STATUTORY AUTHORITIES

RCW 9A.04.110(4)(b) 7

RCW 9A.82.010(19)..... 10

RCW 9A.82.050(1)..... 9, 13

RCW 69.50.401(e)..... 16

RCW 69.50.4013	1
RCW 69.50.4013(1).....	21

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether sufficient evidence supports the conviction for failure to summon aid? (CONCESSION OF ERROR).

2. Whether there was sufficient evidence to support the conviction for trafficking in stolen property?

(a) Whether the first amended information sufficiently charged the crime of trafficking in stolen property?

3. Whether Poor's right to a unanimous verdict was violated when the state charge only one count of drug possession for three different stashes of methamphetamine found on premises over which Poor had dominion and control?

(a) Whether the lack of a mens rea element in RCW 69.50.4013 renders that statute unconstitutional?

(b) Whether the first amended information sufficiently charged possession of methamphetamine?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Allison Chantal Poor was charged by first amended information n filed in Kitsap County Superior Court with failing to summon assistance, first degree trafficking in stolen property, and possession of controlled

substance, methamphetamine. CP 6-7.

Poor was convicted on all three counts. CP 59-60. She was sentenced to 43 months of confinement. CP 63. Poor timely appealed. CP 72.

B. FACTS

The night before Ronald Hoague was taken to the hospital, several people were at his house using methamphetamine. 3RP 290. Present were Brandon Ramey, his wife Leann, Nigel Norwood, Poor, and Mr. Hoague. Id. They smoked methamphetamine from a glass pipe. Id. Mr. Hoague needed assistance when it was his turn to smoke because he could not get the flame to the pipe. 3RP 290-91. All present may have so assisted Mr. Hoague. 3RP 291. Brandon Ramey recalled that Poor helped Mr. Hoague smoke the drugs by holding the lighter for him. 3RP 307.

After smoking, Brandon Ramey believed that Poor and Mr. Hoague injected the drug. 3RP 307-08. He did not see the injection but saw preparations for it. 3RP 208.

They all stayed the night. 3RP 292. Early the next morning, Norwood was up early because he and Branden Ramey had to go to work. Id. As they got ready to go, Norwood became aware that Mr. Hoague

would not wake up. 3RP 293. At first, he was unresponsive but he made “grunts” as the morning went on. Id. As the two left for work, Norwood suggested to Branden Ramey that aid be called. 3RP 294. They left for work around 6:30 a.m. 3RP 294.

In response to Mr. Hoague, going to the hospital, his son, Jesse Arnold, went to his house. 2RP 209. At his house, he discovered Poor and another preparing to smoke methamphetamine. Id. Mr. Arnold returned later to collect medications and belongings. 2RP 211. He made three trips to the house that day. 2RP 211; 226.

On one of the trips, Hoague’s son’s son discovered a methamphetamine smoking pipe in a drawer. 2RP 212. A short time later, Hoague’s son looked but did not see it. Id. On the third trip, another methamphetamine pipe was discovered in the drawer. 2RP 213. This methamphetamine was given to the police. Id. Poor was in the house this entire time.

A friend of Hoague’s, Krista Heiskell, had been to his house earlier in the same day he went to the hospital. 2RP 236-37. She saw Poor and several other people. 2RP 237. One of the people present tried to conceal a methamphetamine pipe. Id.

Ms. Heiskell returned later to return laundry she had washed for Hoague. 2RP 238. Poor asked for her help in waking Hoague. Id. Poor

said that it been unable to wake him up all day. 2RP 238. Ms. Heiskell failed to revive him and told Poor to call 911. Id. The call was made at 5:15 p.m. 2RP 276. Aid responded in five or six minutes. Id.

Ms. Heiskell went with Mr. Hoague in the ambulance. 2RP 239. Poor remained at the house. Id. Ms. Heiskell advised the medical staff that she believed that there was methamphetamine use in the house. Id.

Returning to Hoague's house, Ms. Heiskell suggested to Poor that since Mr. Hoague was in the hospital she should leave the house. 2RP 240. Poor claimed permission to be there. Id. Ms. Heiskell had only seen Poor around the house for a few days or a week. 2RP 241.

After going to pick up her spouse, Ms. Heiskell again returned to the Hoague house. 2RP 241. While looking for the house keys, she found a full meth pipe. Id. Poor, Mr. Arnold and Ms. Heiskell's spouse were present. Id. Poor told Ms. Heiskell that if she called the police she, Poor, would say it was Ms. Heiskell's pipe. Id. Ms. Heiskell called the police anyway. 2RP 241-42.

Hoague died after five days in the hospital. 2RP 214. Toxicological testing of Mr. Hoague's blood after his death revealed the presence of methamphetamine. 3RP 324-25. The medical examiner determined that Ronald Hoague died of "acute methamphetamine intoxication." 3RP 334. He had a "quite high" level of the drug in his

blood and it may have been higher because when the sample was taken he had been unconscious for hours. 3RP 335. Contributing factors were chronic obstructive pulmonary disease, hypertensive cardiovascular disease, and, possibly, diabetes. 3RP 334-35.

As Hoague's daughter and family members cleaned the house, more methamphetamine was found in the kitchen. 2RP 216. This methamphetamine was also given to police. Id. Also, while cleaning they noticed that Hoague's guitar was missing. 2RP 217. Hoague had liked the guitar, had played it, and was sentimental about it because it was a gift from a friend. 2RP 218. The guitar had been there when the daughter first went to the house. 2RP 220.

Later, family members reported the guitar as missing. 2RP 268. Police checked a pawn shop database and found that Poor had pawned a guitar. 2RP 269, 3RP 344. The database describes the pawn ticket: it showed Poor as the person pawning the guitar. 2RP 272.

Additionally, in cleaning out the house after the death, Mr. Hoague's daughter, Manessa Clauss, found a baggie of methamphetamine in a black fanny pack. 4RP 364. This baggie of drugs was also turned over to the police.

III. ARGUMENT

A. THERE WAS INSUFFICIENT EVIDENCE TO PROVE THAT POOR WAS OBLIGATED TO SUMMON AID.

Poor argues that her conviction on count I, failure to summon assistance, is infirm because there was insufficient evidence. On this record, the state agrees.

The state concedes that there was insufficient evidence to establish guilt.¹ First, the state agrees that there is insufficient evidence in this record to determine who delivered the drugs. On this record, it is completely possible that Mr. Hoague procured the drugs from someone other than the people who were present at his house doing the drugs. Mr. Hoague could have provided the drugs to the others. In theory, controlled substance homicide would still be charged because someone delivered the controlled substance that resulted in his death. But on this record it cannot be determined whether Poor was present when that particular unlawful delivery occurred.

Second, the state agrees that Poor's knowledge ("he or she knows") of substantial bodily harm is not proven. As Poor notes, "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). Tracking this definition, Poor could not have been aware of substantial disfigurement or fracture as those conditions were not extant.

This leaves that Poor must have had knowledge that Mr. Hoague suffered “a temporary but substantial loss or impairment of the functions of any body part or organ.” The evidence, taken in a light most favorable to the state, does not establish this knowledge. Poor was up late doing speed with an older and somewhat infirm person. No evidence indicates that after the drug ingestion, Mr. Hoague exhibited any negative symptoms. The evidence shows that he simply went to bed. Next, the evidence shows that this older and somewhat infirm person who had been up late doing speed still slept as the next day went on.

In the fullness of time, Poor believes that Mr. Hoague has slipped into a diabetic coma, not that he is suffering from the drugs ingested. Given Mr. Hoague’s various infirmities, it took an analysis of his blood to establish that acute methamphetamine intoxication caused his death (proximately, in that hypertension, COPD, and diabetes may have contributed). Moreover, on these facts, as Poor points out, there simply is insufficient evidence to find or infer that she knew Mr. Hoague was

¹ Legal principles with regard to sufficiency of the evidence are briefed below at pp. 8-9.

injured at all, let alone injured as the result of the crime committed against him.

The crime was not proven. This count should be remanded with order to dismiss.

B. THE EVIDENCE ADDUCED ALLOWED A REASONABLE INFERENCES THAT POOR KNEW THAT THE GUITAR SHE PAWNED WAS STOLEN.

Poor next claims that there was insufficient evidence to sustain conviction for trafficking in stolen property. And, as with each count in this case, Poor challenges the adequacy of the charging document as to trafficking. The insufficiency claim fails because sufficient information was received to allow a reasonable inference that Poor knew Mr. Hoague's guitar was stolen when she pawned it. The charging document issue fails because the charge contained the essential elements and Poor has shown no prejudice.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the

verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime are proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

By the relevant portion of RCW 9A.82.050(1), Poor is guilty of trafficking in stolen property in the first degree if she "knowingly traffics in stolen property." The term "traffics" is defined as

"Traffic" means 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.

RCW 9A.82.010(19).

In *State v. Hermann*, 138 Wn. App. 596, 158 P.3d 96 (2007), a son was convicted of trafficking in stolen property because he pawned his mother's rings. He claimed that since the pawn slips constituted a loan rather than a sale, the evidence was insufficient to prove guilt. 138 Wn. App. at 603. The facts included that at the time the son pawned the items, they had not been reported stolen; in fact, the victim did not even know that one of the rings was missing.

In deciding the case, the Court of Appeals had to address the son's knowledge at the time of the pawning. In the present case, the first element of the "to convict" instruction demonstrates the issue: "(1) That on or about September 9, 2016, the defendant knowingly trafficked in stolen property." CP 50 (instruction #18). In *Herman*, the evidence indicated that the mother had not given permission for the pawning. Thus, at the point of pawning "[a] reasonable jury could conclude beyond a reasonable doubt that Herman knew the rings were stolen when he pawned them." *Herman*, 138 Wn. App. at 604.

In the present case, it was established that Mr. Hoague owned the pawned guitar. It was established that Mr. Hoague prized that particular guitar. There was no evidence that Mr. Hoague had given permission to

anyone to take the guitar or not.² Mr. Hoague’s family had reported the guitar missing. Poor was clearly identified as the person who pawned the guitar.

Here, as in *Herman*, taking the evidence in a light most favorable to the state, a reasonable jury could infer that Poor pawned the guitar with knowledge that it was stolen.

1. The first amended information was sufficient to apprise Poor of the charge in count II and Poor completely fails to articulate and argue actual prejudice from the charging language used.

A challenge to the sufficiency of the charging document implicates Washington constitution article I, section 22: “In criminal prosecutions the accused shall have the right . . .to demand the nature and cause of the accusation against him.” *See also* United State Constitution, Sixth Amendment (the accused “shall . . .be informed of the nature and cause of the accusations.”). As a constitutional issue, the sufficiency of the charging document may be raised for the first time on appeal. *See State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Review is de novo. *State v. Lindsey*, 177 Wn. App. 233, 244, 311 P.3d 61 (2013).

A charging document must allege facts supporting every element of the offense in addition to adequately identifying the crime charged. *Linsey*, 177 Wn. App. at 245. The language of the statute may be used.

² Not attempting to shift the burden; it is simply a fact of the case that the jury knew.

See State v. Leach, 113 Wn.2d 679, 686, 782 P.2d 552 (1989) (“it is sufficient to charge in the language of the statute if the statute defines the crime sufficiently to apprise an accused person with reasonable certainty of the nature of the accusation.”); *Lindsey*, 177 Wn. App. at 246. “All essential elements of the crime charged, including nonstatutory elements, must be included in the charging document so that a defense can be properly prepared.” *Id.*

When, as in this case, there is no objection to the charging language in the trial court, the information is construed liberally in favor of validity. *Lindsey*, 177 Wn. App. at 244. “The test is: “(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he was nonetheless actually prejudiced by the inartful language which caused a lack of notice?” *Lindsey*, 177 Wn. App. at 245, *citing*, *Kjorsvik*, 117 Wn.2d at 105–06. Poor must show that the necessary facts do not appear in any form or by any reasonable construction and that she suffered actual prejudice from that omission. *See Lindsey* 177 Wn. App. at 246 (defendant has burden of “raising and demonstrating prejudice”).

The focus is on the inclusion of the essential elements of the crime. *Leach*, 113 Wn.2d at 687. A defendant may not challenge a merely vague charge unless she first requested a bill of particulars in the trial court. *Id.*

The document here provided Poor with adequate notice of the

charge. The charge in count II says that

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 stolen property.

CP 7. Further, the exact statute under which Poor was charged is included. RCW 9A.82.050(1) provides that

A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

The charge tracks the statute verbatim and clearly provides the statutory citation under which Poor is charged. Poor and the date of the incident are identified and the essential elements, including the necessary mental state, are included. The essential elements rule is satisfied.

But Poor's argument is further unmeritorious in that she neither alleges nor demonstrates actual prejudice in this case. Her argument here simply does not answer the question of how she was prejudiced in the presentation of her defense. The essential elements were included and there was no prejudice. This claim fails.

C. THE STATE PROPERLY CHARGED AND ARGUED A SINGLE ACT OF POSSESSION BECAUSE THE VARIOUS STASHES OF METHAMPHETAMINE THAT WERE UNDER POOR'S DOMINION AND CONTROL CONSTITUTED A SINGLE UNIT OF PROSECUTION.

Poor next claims that since there were three different locations in Mr. Hoague's house where methamphetamine was discovered, the state was tasked with electing which of the methamphetamine Poor possessed. Poor adds that this conviction is infirm because based on a strict liability application of the drug possession statute. And, finally, she claims that this conviction must be reversed because of a defect in the charging document.

The first claim is without merit because, having dominion and control over the house, Poor possessed all the methamphetamine. Put another way, the three different locations equated to a single unit of prosecution. Further, Poor's strict liability argument is contrary to long-standing Washington law and raises a question that should be addressed by the legislative branch. Finally, the information included sufficient statutory and factual verbiage that fair construction shows that Poor had sufficient notice of the crime charged.

1. The single count of possession encompassed all the drugs over which Poor had dominion and control; a unanimity instruction was not required.

The jury was properly instructed on the law of possession.

Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to establish constructive possession.

In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the ability to take actual possession of the substance, whether the defendant had the capacity to exclude others from possession of the substance, and whether the defendant had dominion and control over the premises where the substance was located. No single one of these factors necessarily controls your decision.

CP 52 (instruction #20); WPIC 50.03.

Mssrs. Norwood and Ramey confirm by un rebutted testimony that there were drugs in the house. Indeed, the gravaman of the entire case is that there was methamphetamine in the house the use of which resulted in Mr. Hoague's death. Moreover, the fact that others were present is of no accord--the possession need not be exclusive.

From these facts a rationale jury could easily conclude that Poor had constructive possession of the premises in which methamphetamine was discovered. Poor does not challenge her dominion and control over Mr. Hoague's residence.

But Poor asserts that the three different locations in which methamphetamine was found raises a unanimity issue. The unit of

prosecution available to the state under these circumstances belies that claim. In *State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998), police had searched Adel's store and his car, finding marijuana in both places. The state charged Adel with two separate instances of possession. The Supreme Court considered a double jeopardy challenge to the two convictions. *Adel*, 136 Wn.2d at 631-32.

The Supreme Court decided that the proper inquiry was to determine the unit of prosecution under the marijuana possession statute. 136 Wn.2d at 634. The Court held

A person is *equally guilty* of possession whether that person has the drug stashed in one place or hidden in several places under the person's dominion and control. There is no statutory indication the Legislature intended to punish a person multiple times merely because the person separates and keeps small amounts of marijuana in different locations. We find the unit of prosecution in RCW 69.50.401(e) is possessing 40 grams of marijuana or less, regardless of where or in how many locations the drug is kept. Adel's conduct constitutes only one violation of the statute, so we reverse one of his two convictions, and we remand for resentencing on the remaining conviction.

Adel, 136 Wn.2d at 637 (emphasis by the court); *accord In re Davis*, 142 Wn.2d 165, 12 P.3d 603 (2000).

Thus, analysis of the present issue must include that under *Adel* the state could not have charged Poor with three counts of possession—the unit of prosecution under these facts is one count. The state was constrained to argue, and did argue, that since Poor had dominion and

control over the residence, she had dominion and control over all the places where the methamphetamine was found in the residence. 4RP 433 (“methamphetamine located in the house where the defendant claimed to be living and taking care of Ronnie. . .”)

Moreover, *State v. King*, 75 Wn. App. 8, 878 P.2d 466 (1994) *review denied* 125 Wn.2d 1021 (1995), is distinguishable. There, King was a passenger in a car in which cocaine was discovered. At the police station, more cocaine was found in a fanny-pack that King was wearing. King was convicted of one count of possession and on appeal argue that the state had not elected which of the two instances of discovered cocaine constituted the crime and thus his right to a unanimous verdict was violated. The Court of Appeals agreed and reversed the conviction. 75 Wn. App. at 904.

But that disposition was based on a crucial finding that

The State's evidence tended to show two distinct instances of cocaine possession occurring at different times, in different places, and involving two different containers-the Tylenol bottle and the fanny pack. One alleged possession was constructive; the other, actual.

King, 75 Wn. App. at 903.

In the present case, Poor's single charge did not constitute three distinct instances of methamphetamine possession. Poor had dominion and control of the residence. Poor constructively possessed all the

methamphetamine over which she had dominion and control. There was no error.

2. *Strict liability for possession of controlled substance is Washington law and neither the Supreme Court nor the legislature has changed that fact.*

Poor claims that a strict liability application of the drug possession statute is unconstitutional. The state is aware of no case or legislative action that has changed Washington law on drug possession. This claim is without merit because it is unsupported by controlling authority.

First, the matter that was pending when Poor filed her brief has been decided. *State v. A.M.*, slip. op. no. 96354-1 (9/12/19); 2019 WL 4314895. Although Poor is correct that the due process question she asserts here was part of *A.M.*, the Supreme Court majority did not address the issue. The matter was resolved, reversed, on a violation of *A.M.*'s right against compulsory self-incrimination. *A.M.*, at ¶26. Two justices addressed the due process claim in a concurring opinion. Thus, it remains the case that the Washington Supreme Court has still not changed the law of simple possession.

In *State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981), our Supreme Court considered the same claim not long after this state adopted the Uniform Controlled Substances Act. 38 years ago, it was held that “if the legislature had intended guilty knowledge or intent to be an element of

the crime of simple possession of a controlled substance it would have put the requirement in the act.” *Cleppe*, 96 Wn.2d at 380. Further, the Court found the legislative reason for the omission of a mens rea element in observing that “the legislature in responding to the problem of drug abuse, one of the major social evils of our time,” created the present statute. *Id.* And, finally, the *Cleppe* Court found compelling that the legislature was aware that a prior drug possession statute had an intent element and removing that element indicated that the legislature intended strict liability. 96 Wn.2d at 378-79.

22 years after *Ceppe*, the Supreme Court was asked to overrule it in *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004). The Court refused to overrule *Cleppe*. 152 Wn.2d at 539. Once again, like the *Cleppe* Court, the *Bradshaw* Court closely considered the legislative intent on this issue. The *Bradshaw* Court concluded that

We affirm the Court of Appeals and uphold *Cleppe*. *Cleppe* properly looked to the language of the mere possession statute and because the statute did not have an explicit mens rea element, the court looked to the legislative history. The legislative history for the mere possession statute supports the court's conclusion that no mens rea element should be implied. In the 22 years since *Cleppe*, the legislature has not added a mens rea element. Where legislative intent is so clear, we will not overrule *Cleppe* and will not read a mens rea element into the mere possession statute.

152 Wn.2d at 539-40 (page break omitted). Since *Bradshaw*, neither the courts nor the legislature has taken action to change the law. *Accord State*

v. *Schmeling*, 191 Wn. App. 795, 801, 365 P.3d 202 (2015) (“Our Supreme Court repeatedly has stated that the legislature has the authority to create strict liability crimes that do not include a culpable mental state.”).

“[S]tare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned.” *Matter of Arnold*, 190 Wn.2d 136, 150, 410 P.3d 1133 (2018) (internal quotation omitted). Poor has not addressed this rule. And, since the *A.M.* majority failed to address the issue, Poor is bereft of controlling authority that supports her argument. The issue remains in the hands of the legislature. This issue fails.

3. *The first amended information was sufficient to apprise Poor of the charge in count III and Poor completely fails to articulate and argue actual prejudice from the charging language used.*

Poor claims that the first amended information does not sufficiently charge count II, possession of a controlled substance. The claim lacks merit because count II included the essential elements of drug possession and Poor cannot articulate prejudice from the language used.

The above-recited legal principles apply here. *See supra* pp. 9-10. Here, as with count II above, since Poor failed to object below, the information will be liberally construed in favor of validity. Moreover, the essential elements being present, Poor must articulate and argue actual

prejudice. Poor does not identify any prejudice from the charging language used.

The operative portion of count III is that “On or about July 9, 2016. . . [Poor] did possess a controlled substance, to-wit: Methamphetamine. . .” CP 7. The statute under which the charge was lodged is clearly cited. That statute provides that “It is unlawful for any person to possess a controlled substances. . .” RCW 69.50.4013(1).

Recently, in *State v. Gonzalez*, 2 Wn. App.2d 96, 408 P.3d 743 (2018) a “to convict” instruction omitted the nature of the drugs, there methamphetamine. This was error but the conviction was affirmed because harmless error. 2 Wn. App.2d at 113. Relevance to the present case is found in that Gonzalez was charged just as Poor was charged: that Gonzalez possessed “a controlled substance, to-wit: Methamphetamine, classified under Schedule II of the Uniform Controlled Substances Act.” 2 Wn. App.2d at 101-02.³ Gonzalez did not raise an issue of the sufficiency of the charging language. Moreover, since the to convict instruction tracked the charging language, the only flaw was the omission of the type of drug.

The charge tracks the essential elements of the crime of drug possession. No authority requires that the charging language include

³ The “Schedule II” verbiage was covered in the present case by the immediately previous instruction, # 21, which provides that “Methamphetamine is a controlled

where the possessor hid the drugs or that she possessed them either actually or constructively. Appellant's Brief at 46.

Finally, here, as above, since the essential elements are extant in the charge, Poor is tasked with showing actual prejudice from the language used. She has not. This claim is without merit.

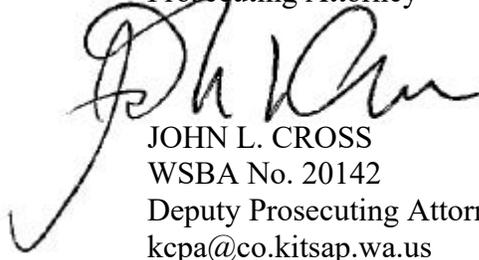
IV. CONCLUSION

For the foregoing reasons, Poor's convictions on counts II and III should be affirmed and, should the Court allow the state's concession, Poor should be resentenced without count I.

DATED September 24, 2019.

Respectfully submitted,

CHAD M. ENRIGHT
Prosecuting Attorney



JOHN L. CROSS
WSBA No. 20142
Deputy Prosecuting Attorney
kcpa@co.kitsap.wa.us

substance.” CP 53.

KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION

September 25, 2019 - 8:51 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52683-2
Appellate Court Case Title: State of Washington, Respondent v. Allison C. Poor, Appellant
Superior Court Case Number: 17-1-00979-1

The following documents have been uploaded:

- 526832_Briefs_20190925085109D2661434_6050.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Poor allison 20190916 coa resp brief.pdf

A copy of the uploaded files will be sent to:

- KCPA@co.kitsap.wa.us
- greg@washapp.org
- katehuber@washapp.org
- rsutton@co.kitsap.wa.us
- wapofficemail@washapp.org

Comments:

Sender Name: Elizabeth Allen - Email: erallen@co.kitsap.wa.us

Filing on Behalf of: John L. Cross - Email: jcross@co.kitsap.wa.us (Alternate Email:)

Address:
614 Division Street, MS-35
Port Orchard, WA, 98366
Phone: (360) 337-7171

Note: The Filing Id is 20190925085109D2661434