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Division III  
State of Washington

NO. 34069-4-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

JIOVANNY JIMENEZ, Appellant.

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BRIEF OF RESPONDENT

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## **I. ASSIGNMENTS OF ERROR**

### **A. ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR**

1. Whether the trial correctly concluded that RCW 69.50.101(v) did not apply to RCW 69.50.4013(4) when the legislature evinced an intent to criminalize the possession of marijuana by minors regardless of THC concentration?
2. Whether substantial evidence supports the trial court's conclusion that Jimenez violated RCW 69.50.4013(4)?<sup>1</sup>

### **B. ANSWERS TO THE ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR**

1. The trial court correctly concluded that RCW 69.50.101(v) did not apply to RCW 69.50.4013(4) because the legislature evinced an intent to criminalize the possession of marijuana by minors regardless of THC concentration.
2. Substantial evidence supports the trial court's conclusion that Jimenez violated RCW 69.50.4013(4).

## **II. STATEMENT OF THE CASE**

The Appellant, Jiovanny Jimenez, was charged in juvenile court with first degree criminal trespass and minor in possession of less than 40 grams of marihuana. Clerk's Papers (CP) at 2.<sup>2</sup> A pretrial hearing was held as to whether RCW 69.50.101 required the State to prove the substance

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<sup>1</sup> Combined with Appellant's Assignment of Error C. *See* Brief of Appellant at 1.

<sup>2</sup> The name of the offense listed in the information is possession of a controlled substance, marihuana – less than 40 grams – under age of 21. The offense is referenced as minor in possession of marijuana throughout this brief.

found in Jimenez' pocket had a tetrahydrocannabinol (THC) concentration of at least 0.3 percent when RCW 69.50.4013 criminalized the possession of marijuana by minors regardless of THC concentration. VRP at 13-19. The trial court reserved ruling on the issue until after the evidence was presented. *Id.* at 21.

At the disposition hearing, Officer Ryan Davis from the Yakima Police Department testified that he responded to 919 Fenton Street in Yakima, Washington during the evening of October 11, 2015. *Id.* at 25-26; 40. He arrived on scene at 11:00 p.m. and noticed two people standing near a shed in the backyard of the residence. One of the persons was later identified as Jiovanny Jimenez. *Id.* at 27. Officer Davis arrested Jimenez for criminal trespass and searched Jimenez prior to placing him in the back of the patrol car. *Id.* at 30. During the search, Officer Davis discovered a clear plastic baggie containing a green leafy substance in Jimenez' pocket. *Id.* at 30-31. Officer Davis collected the baggie as evidence. *Id.* at 32-33.

The green leafy substance was submitted to the Washington State Crime Laboratory for analysis. *Id.* at 48. There, Dr. Jason Stenzel, supervising forensic scientist, determined that the substance contained delta-9 tetrahydrocannabinol (THC). *Id.* at 52-53, 55. Dr. Stenzel testified that he performed a "special derivatization to ensure that [he] could identify Delta 9 THC to the exclusion of all other compounds." *Id.* at 55. According

to Dr. Stenzel, “[a]s far as – the unique properties of marijuana, it is the only plant source for Delta 9 THC that is currently known today.” *Id.* at 61. The laboratory did not have the capability to determine the amount of THC in the substance. *Id.* at 58.

The State also admitted a certified copy of the Jimenez’ birth certificate and a certified copy of a guilty plea as evidence that Jimenez was under 21 years old.

The trial court concluded the legislature did not intend for the definition of marijuana in RCW 69.50.101(v) to apply in cases involving minors. CP at 29; Conclusion of Law 6. Accordingly, the trial court found Jimenez guilty of minor in possession of marijuana. *Id.*; Conclusion of Law 7. The court sentenced Jimenez to credit for time served (two days) and no probation. CP at 19.

This timely appeal then followed.

### **III. ARGUMENT**

#### **A. THE TRIAL COURT PROPERLY CONCLUDED THAT RCW 69.50.4013(4) DID NOT REQUIRE THE STATE TO PROVE THE SUBSTANCE FROM JIMENEZ’ POCKET HAD A THC CONCENTRATION OF AT LEAST 0.3 PERCENT.**

Jimenez alleges the trial court misapplied RCW 69.50.101 and RCW 69.50.4013. *See* Br. of Appellant at 1. His challenge is without merit because the legislature clearly evinced an intent to criminalize the

possession of marijuana by minors regardless of THC concentration. *See* RCW 69.50.4013(4).

The interpretation of a statute is a question of law that is reviewed de novo. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Similarly, the trial court's conclusions of law are reviewed de novo. *State v. Chambers*, 197 Wn. App. 96, 124 (2016); *see also State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006) (same).

The issue before the Court here is whether the trial court erred in interpreting RCW 69.50.4013(4) and RCW 69.50.101(v). Jimenez alleges the trial court erred in concluding that “On October 11, 2015 in Yakima, WA the respondent was under 21 years of age and he had in his pants pocket a baggie containing marijuana.” CP at 29, Conclusion of Law No. 7; *see* Br. of Appellant at 1. He further argues that the trial court erred when it found him guilty of minor in possession of marijuana. *See* Br. of Appellant at 1.

In cases such as this, the primary responsibility of courts in interpreting statutes is to discern and implement the legislature's intent. *J.P.*, 149 Wn.2d at 450 (citing *Nat'l Electrical Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)). Washington courts have consistently recognized that “[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered

meaningless or superfluous.” *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)). Moreover, the plain meaning of a statute is gleaned “from all that the [l]egislature has said in the statute and related statutes which disclose legislative intention about the provision in question.” *Dep’t of Ecology v. Campbell & Guinn L.L.C. (Campbell & Guinn)*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). “[T]he only permissible interpretation is that which gives effect to the plain language” when the meaning of the statute is plain. *State v. Linssen*, 131 Wn. App. 292, 296, 126 P.3d 1287 (2006) (citing *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001)). If, after conducting a plain meaning analysis, the statute is ambiguous, the court is then permitted to resort to the canons of statutory construction or legislative history. *State v. Hodgins*, 190 Wn. App. 437, 443, 360 P.3d 850 (2015) (citing *Campbell & Guinn*, 146 Wn.2d at 12).

Beginning with RCW 69.50.4013(4), the statute provides that “[n]o person under twenty-one years of age may possess, manufacture, sell, or distribute marijuana, marijuana-infused products, or marijuana concentrates, regardless of THC concentration. This does not include qualifying patients with a valid authorization.” Meanwhile, RCW 69.50.101 defines a number of terms. At the very beginning of the statute, it states: “[t]he definitions in this section apply throughout this chapter

*unless the context clearly requires otherwise.*” RCW 69.50.101 (emphasis added). THC concentration is defined as the “percent of delta-9 tetrahydrocannabinol and tetrahydrocannabinolic acid in any parts of the plant *Cannabis* regardless of moisture content. RCW 69.50.101(rr).

Additionally, marijuana and marihuana are defined as:

. . . all parts of the plant *Cannabis*, whether growing or not, with a THC concentration greater than 0.3 percent on a dry weight basis; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. The term does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination

RCW 69.50.101(v).

Applying a plain meaning analysis of RCW 69.50.101 and RCW 69.50.4013 reveals that the legislature did not intend for the definition of marijuana in RCW 69.50.101(v) to apply to RCW 69.50.4013(4). The legislature provided that the definitions in RCW 69.50.101 would apply throughout chapter RCW 69.50 “unless the context clearly requires otherwise.” The plain language of RCW 69.50.4013(4) demonstrates that the legislature, in no uncertain terms, criminalized the possession of

marijuana by minors regardless of THC concentration in RCW 69.50.4013(4).

In other statutes, the legislature empowered the Liquor Control Board to deny licenses to marijuana producers, processors, and retailers when, among other things, they are to persons younger than 21 years of age. RCW 69.50.331(1)(c)(i). It also authorized the Liquor Control Board to deny licenses to locations employing persons younger than 21 years of age and locations not restricting access to persons younger than 21 years of age. RCW 69.50.331(6), (8)(a); *see also* RCW 69.50.357(3)(a)(requiring licensed marijuana retailers to train staff to prevent persons under the age of 21 from entering establishments). The legislature also granted licensed marijuana retailers involved in selling, delivering or distributing specified amounts of marijuana and marijuana-based products to persons 21 years of age and older immunity from prosecution. RCW 69.50.360(3)(a)-(d). These statutes help reinforce the legislature's intent not to treat the possession of marijuana by persons under 21 years of age the same as for persons 21 years of age and older.

The language of RCW 69.50.4013(4) is clear. The plain meaning analysis would support that the legislature did not intend for the definition of RCW 69.50.101(v) to apply to RCW 69.50.4013(v). Therefore, the trial court did not err in its interpretation of these two statutes.

**1. Extrinsic evidence supports that the legislature did not intend for the definition of RCW 69.50.101(v) to apply to RCW 69.50.4013(4).**

Entertaining for the sake of argument that the plain meaning analysis is not dispositive of the statutory interpretation issue, it is necessary to consider extrinsic evidence to determine what the legislature intended. *State v. Pittman*, 185 Wn. App. 614, 620-21, 341 P.3d 1024 (2015) (citing *Campbell & Guinn*, 146 Wn.2d at 12). Extrinsic evidence can be found in the form of legislative history, common law precedent, or the canons of construction. *Id.*

Beginning with legislative history, the Comprehensive Marijuana Reform Act (CMRA) amended a number of statutes in 2013 including both RCW 69.50.101 and RCW 69.50.4013. LAWS OF 2013, ch. 3; *see also* S. B. 5519, 63rd Reg. Sess. (Wash. 2013). In 2015, RCW 69.50.4013 was amended again. LAWS OF 2015, ch. 70, § 14. The amendments were in response to Washington voters approving Initiative Measure No. 502. LAWS OF 2013, ch. 3. The intent section of Initiative Measure No. 502 authorized the Liquor Control Board to regulate and tax marijuana for persons 21 years of age and older. Initiative Measure No. 502, 63rd Reg. Sess. (Wash. 2013). The legislature effectuated the desire of Washington voters to “stop treating adult marijuana use as a crime” when it amended RCW 69.50.101 and RCW 69.50.4013. LAWS OF 2013, ch. 3, § 1. It also

effectively decriminalized the possession of marijuana for persons 21 years of age and older when the amount of marijuana does not exceed proscribed amounts. *Id.* What is clear from these amendments is the legislature's intent to treat the possession of marijuana by minors differently from that of adults.

Turning now to case law, the statutory interpretation issue presented concerning RCW 69.50.101(v) and RCW 69.50.4013(4) has not yet been addressed in any Washington cases. There are, however, Washington cases clarifying the relationship between definitional terms and essential elements of crimes. Here, marijuana or marihuana as defined in RCW 69.50.101(v) is a definitional term to an essential element in RCW 69.50.4013(4).

Definitional terms do not add elements to the crime that the State has the burden of proving beyond a reasonable doubt. *See State v. Saunders*, 177 Wn. App. 259, 268-69, 311 P.3d 601 (2013); *see also State v. Strohm*, 75 Wn. App. 301, 308-09, 879 P.2d 962 (1994). Rather, they explain the meaning of an essential element. *Saunders*, 177 Wn. App. at 268. The *Saunders* Court explained that "sexual gratification" was a definitional term clarifying the meaning of "sexual contact," an essential element of child molestation.

At first blush there may appear to be tension between the definitional term of marijuana in RCW 69.50.101(v) and the elements in RCW

69.50.4013(4). Closer examination of the two statutes reveals that there is not actually any tension between the two. The legislature provided that the definitional terms in RCW 69.50.101 would not apply in cases where the “context clearly requires otherwise.” This case presents one of those situations contemplated by the legislature where the “context clearly requires otherwise.” RCW 69.50.101. What this means ultimately is that the definitional term of marijuana or marihuana in RCW 69.50.101(v) does not apply to RCW 69.50.4013(4) based on the plain language of the two statutes.

The next matter to address is the canons of statutory construction. Three of those canons apply here. The first requires courts to “interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous.” *Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010). The language in RCW 69.50.101 provides that the definitions apply “unless the context clearly requires otherwise.” The context of RCW 69.50.4013(4) requires otherwise because the legislature criminalized the possession of marijuana regardless of THC concentration. Effectuating all of the language in both statutes supports that the legislature did not intend for the definition of marijuana in RCW 69.50.101(v) to apply to RCW 69.50.4013(4).

The second canon provides that where there exists two conflicting parts of a statute, the latest provision prevails unless the first provision is clearer and more explicit than the last. *State v. ex rel. Graham v. San Juan County*, 102 Wn.2d 311, 320, 686 P.2d 1073 (1984). The legislature amended the definition of marijuana in RCW 69.50.101 to include the language “with a THC concentration greater than 0.3 percent on a dry weight basis” in 2013. *See LAWS OF 2013, ch. 3, § 2*. That same year, RCW 69.50.4013(4) was amended too. *See LAWS OF 2013, ch. 3, § 20*. It was not until 2015 when the legislature amended RCW 69.50.4013 to criminalize the possession of marijuana by minors regardless of THC concentration. *See LAWS OF 2015, ch. 70, § 14*. Applying that canon here, the amendment to RCW 69.50.101 in 2013 is not clearer or more specific than the amendment to RCW 69.50.4013 in 2015. Therefore, RCW 69.50.4013 may properly be considered the more specific statute.

Similar to the second canon, the third canon holds that a more specific recent statute prevails when there is conflict with an older, more general statute. *Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 37, 785 P.2d 447 (1990). As discussed above, RCW 69.50.4013(4) is more specific than RCW 69.50.101(v), which was enacted earlier. Accordingly, RCW 69.50.4013 controls.

Thus, the legislative history and canons of construction demonstrate that RCW 69.50.4013 is the more specific statute. The extrinsic evidence analysis also comports with the results of the plain meaning analysis. It is clear that the legislature did not intend for the definition of marijuana in RCW 69.50.101(v) to apply to RCW 69.50.4013(4).

**B. SUFFICIENT EVIDENCE SUPPORTS JIMENEZ' CONVICTION UNDER RCW 69.50.4013(4).**

Jimenez claims that his conviction was not supported by sufficient evidence, but this is without merit because the trial court's undisputed findings of fact are supported by substantial evidence. *See* Br. of Appellant at 4. Following a bench trial, appellate review is limited to determining whether substantial evidence supports the trial court's findings of fact and whether the findings of fact support the trial court's conclusions of law. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). Substantial evidence exists when there is sufficient evidence to convince a "fair-minded, rational person that the findings are true." *State v. Smith*, 185 Wn. App. 945, 956, 344 P.3d 1244 (2015) (quoting *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005)). Unchallenged findings of fact supported by substantial evidence are treated as verities on appeal. *Schmidt v. Cornerstone Inv., Inc.*, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990).

In asserting a sufficiency of the evidence challenge, Jimenez admits the truth of the State's evidence and all reasonable inferences that can be

drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The ultimate issue is whether “any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt” after viewing the evidence in the light most favorable to the State. *State v. Budik*, 173 Wn.2d 727, 733, 272 P.3d 816 (2012) (quoting *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009)). To determine if the State produced sufficient evidence to prove each element of the offense requires the reviewing court to interpret the underlying statute. *Budik*, 173 Wn.2d at 733.

The analysis above supports that the trial court properly interpreted and applied RCW 69.50.4013(4) and RCW 69.50.101. Thus, the inquiry is narrowed to whether sufficient evidence proved each element of the crime. The elements of minor in possession of marijuana require the State to prove beyond a reasonable doubt:

1. That on or about October 11, 2015, Jimenez possessed marijuana; and
2. That Jimenez was under 21 years old; and
3. That this act occurred in the State of Washington.

*See* WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 50.04.03 (4th ed. Supp. 2016). Jimenez does not challenge the trial court’s findings of fact. *See* Br. of Appellant at 1-2. The undisputed findings provide substantial evidence that Jimenez violated RCW 69.50.4013(4). For

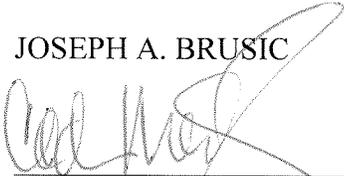
example, Jimenez does not dispute that he was contacted by police on October 11, 2015 in the backyard of a residence in Yakima, Washington. CP at 27; Finding of Fact Nos. 1, 2. He does not dispute that a clear plastic baggie containing a green leafy substance was found in his pocket. *Id.* at 28; Finding of Fact No. 8. He does not dispute that Dr. Stenzel determined the green leafy substance contained THC. *Id.* at 28; Finding of Fact No. 21. He does not dispute that marihuana is the only plant known to create THC. *Id.* at 28; Finding of Fact No. 22. And, he does not dispute that he was under 21 years old on October 11, 2015. *Id.* at 28; Finding of Fact No. 23. Viewing the evidence in the light most favorable to the State, there is sufficient evidence to support Jimenez' conviction for minor in possession of marijuana. Accordingly, because substantial evidence supports the undisputed findings, the findings of fact should be treated as verities on appeal.

#### **IV. CONCLUSION**

The trial court properly concluded that the State was not required to prove the substance recovered from Jimenez' pocket had a THC concentration of at least 0.3 percent. The legislature clearly evinced its intent to criminalize the possession of marijuana regardless of the THC concentration in RCW 69.50.4013(4). Therefore, the definition of marijuana in RCW 69.50.101(v) does not apply to RCW 69.50.4013(4).

This is a situation where the “context clearly requires otherwise” as provided for in RCW 60.50.101. Additionally, Jimenez does not challenge the trial court’s findings of fact. These findings were supported by substantial evidence. Jimenez’ conviction for minor in possession of marijuana was supported by sufficient evidence and should be affirmed.

Respectfully submitted this 14th day of March, 2017

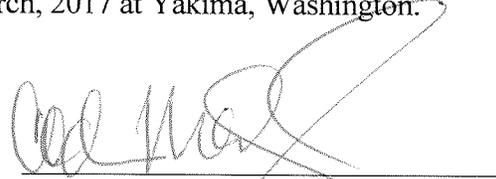
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DECLARATION OF SERVICE

I, Codee L. McDaniel, state that on March 14, 2017, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to Ms. Marie Trombley at [marietrombley@comcast.net](mailto:marietrombley@comcast.net).

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14th day of March, 2017 at Yakima, Washington.

A handwritten signature in black ink, appearing to read "Codee L. McDaniel", is written over a horizontal line. The signature is stylized and somewhat cursive.

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# YAKIMA COUNTY PROSECUTOR'S OFFICE

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