

FILED
Feb 22, 2017
Court of Appeals
Division III
State of Washington

No. 34579-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

RAFAELITO AGUSTIN,

Appellant.

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

The Honorable Steve Dixon

APPELLANT'S OPENING BRIEF

LAURA M. CHUANG, Of Counsel
KRISTINA M. NICHOLS
Nichols Law Firm, PLLC
Attorneys for Appellant
P.O. Box 19203
Spokane, WA 99219
(509) 731-3279
Wa.Appeals@gmail.com

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT1

B. ASSIGNMENTS OF ERROR2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR2

D. STATEMENT OF THE CASE.....3

E. ARGUMENT.....5

Issue 1: Whether the trial court erred in finding Mr. Agustin guilty of minor in possession of marijuana where the evidence was insufficient5

a. The State presented insufficient evidence that the substance discovered was marijuana 7

b. The State presented insufficient evidence that Mr. Agustin was under the age of 21 years old13

c. The State presented insufficient evidence of jurisdiction14

Issue 2: Whether the trial court abused its discretion for failing to dismiss the case upon the State’s own motion..... 15

F. CONCLUSION.....19

TABLE OF AUTHORITIES

United States Supreme Court

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)5

Washington Supreme Court

State v. Conover, 183 Wn.2d 706, 355 P.3d 1093 (2015)8, 9, 10, 11

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)5

State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998).....7

State v. Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997).....15

State v. Partin, 88 Wn.2d 899, 567 P.2d 1136 (1977).....6

State v. Rice, 174 Wn.2d 884, 279 P.3d 849 (2012).....16, 17, 18

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992)5

State v. Smith, 155 Wn.2d 496, 120 P.3d 559 (2005).....6

State v. Squally, 132 Wn.2d 333, 937 P.2d 1069 (1997)14

State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004)6

Washington Courts of Appeal

State v. Askham, 120 Wn. App. 872, 86 P.3d 1224 (2004).....6

State v. Batson, 194 Wn. App. 326, 377 P.3d 238 (2016)8, 9, 10

State v. Boyd, 109 Wn. App. 244, 34 P.3d 912 (2001).....15

State v. Colquitt, 133 Wn. App. 789, 137 P.3d 892 (2006)11, 12, 13

State v. Crowder, ___ Wn. App. ___, 385 P.3d 275 (2016).... 7-8, 8, 10, 11

State v. Fateley, 18 Wn. App. 99, 566 P.2d 959 (1977)6

<i>State v. King</i> , 113 Wn. App. 243, 54 P.3d 1218 (2002)	6
<i>State v. K.N.</i> , 124 Wn. App. 875, 103 P.3d 844 (2004).....	13, 14
<i>State v. Roth</i> , 131 Wn. App. 556, 128 P.3d 114 (2006).....	14
<i>State v. Sweany</i> , 162 Wn. App. 223, 256 P.3d 1230 (2011), <i>aff'd</i> , 174 Wn.2d 909, 281 P.3d 305 (2012).....	6-7
<i>State v. Theroff</i> , 25 Wn. App. 590, 608 P.2d 1254 (1980)	6

Washington Statutes

RCW 9A.04.030.....	15
RCW 9.94A.411(1).....	15
RCW 66.44.270(2).....	18
RCW 69.50	8
RCW 69.50.101	8
RCW 69.50.101(w).....	9
RCW 69.50.101(cc)	9
RCW 69.50.101(v).....	1, 8, 10, 11
RCW 69.50.406(2).....	8
RCW 69.50.4013(4).....	1, 1-2, 3, 7, 8, 9, 10, 11, 14, 15, 18

Court Rules

CrR8.3(a)	15
RAP 2.5(a)(2).....	7

A. SUMMARY OF ARGUMENT

Rafaelito Agustin was convicted of minor in possession of marijuana. The conviction should be dismissed.

Mr. Agustin was found guilty under RCW 69.50.4013(4) of minor in possession of marijuana. RCW 69.50.4013(4) does not require the possessed marijuana to have a THC concentration. However, RCW 69.50.101(v), which defines marijuana, does require a THC concentration. Under statutory construction principles, the definition of “marijuana” under RCW 69.50.101(v) overrides RCW 69.50.4013(4), and THC concentration is required for a substance to qualify as “marijuana.” The State did not present any evidence that the marijuana allegedly possessed by Mr. Agustin had a THC concentration. Insufficient evidence exists to sustain the conviction.

If this Court finds RCW 69.50.101(v) does not control RCW 69.50.4013(4), Mr. Agustin asserts the rule of lenity should apply because the statutes as read are ambiguous. Under the rule of lenity the statutes should be read in Mr. Agustin’s favor such that a THC concentration is required to prove a substance is “marijuana.” Thus insufficient evidence exists to prove the substance in this case was marijuana.

In addition to the statutory construction arguments, the State failed to present sufficient evidence of three elements of the crime under RCW

69.50.4013(4). The State failed to present sufficient evidence Mr. Agustin possessed a substance that was marijuana, the respondent was under the age of 21 years, and the crime was committed in Adams County or Washington State (jurisdiction). The case must be dismissed for insufficient evidence.

Finally, the trial court abused its discretion when it refused to dismiss the charges upon the State's motion. The State moved the trial court to dismiss the case for insufficient evidence. Because the trial court denied the motion, it usurped the separation of powers doctrine and exceeded its judicial authority. Only the executive branch has the discretion to prosecute a crime. For this reason, the trial court's denial of the motion to dismiss should be reversed.

Mr. Agustin's conviction must be reversed and dismissed.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Agustin guilty of minor in possession of marijuana when there was insufficient evidence to convict. (CP 76; RP 97-98).

2. The trial court abused its discretion by denying the State's motion to dismiss the case.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred in finding Mr. Agustin guilty of minor in possession of marijuana where the evidence was insufficient.

- d. The State presented insufficient evidence that the substance discovered was marijuana.
- e. The State presented insufficient evidence that Mr. Agustin was under the age of 21 years old.
- f. The State presented insufficient evidence of jurisdiction.

Issue 2: Whether the trial court abused its discretion for failing to dismiss the case upon the State's own motion.

D. STATEMENT OF THE CASE

On June 7, 2016, a patrol sergeant with the Othello Police Department responded to a report that a group of juveniles was smoking marijuana in an alleyway. (RP 77). As the sergeant approached the scene, he saw the respondent, Rafaelito Agustin, drop a soda can on the ground and begin to walk away. (RP 78). The soda can appeared to be fashioned into a smoking device and contained brownish-black residue. (RP 78-79, 83, 88-89). Law enforcement believed the device was used for smoking marijuana based on the smell. (RP 83, 89). Some ashes were also on the ground and they smelled like marijuana. (RP 89). No lab or field testing was performed on the can or its contents. (RP 90-91).

The State charged Mr. Agustin with minor in possession and/or consumption of alcohol (Count I) and minor in possession of a controlled substance (Count II). (CP 13-14). Regarding Count II, the State alleged "On or about the 7th day of June, 2016, in the County of Adams, State of Washington, the above-named Respondent did unlawfully possess a

controlled substance, to-wit: Marijuana contrary to Revised Code of Washington 69.50.4013(4).” (CP 14).

Three law enforcement officers testified at a fact-finding hearing consistent with the facts above. (RP 75-94). Law enforcement admitted none of the officers at the scene were lab certified to identify controlled substances. (RP 90-91).

Also, an officer testified he could guess Mr. Agustin’s approximate age, and stated he knew Mr. Agustin was a freshman in high school. (RP 82). No other evidence of Mr. Agustin’s age was presented. (RP 75-94). And no evidence was presented stating the crime occurred in Adams County or Washington State. (RP 75-94).

Prior to a fact-finding hearing, the State moved to dismiss the charges, citing insufficient evidence as a basis for dismissal. (RP 67).

The trial court denied the State’s motion, stating:

The reason I did not sign is that I did not suppress the -- the soda can which was fashioned into a smoking device with the burnt residue which smelled like marijuana.¹ I figured there is enough information still in this case to prosecute the defendant.

(RP 67-68).

¹ The trial court is referring to its suppression of evidence earlier in the case. (RP 64-66; CP 69-74).

All statements were suppressed prior to the fact-finding, and thus no statements identifying a controlled substance were admitted. (RP 65-66; CP 73).

The trial court found Mr. Agustin not guilty of minor in possession and/or consumption of alcohol (Count I), but found Mr. Agustin guilty of minor in possession of marijuana (Count II). (RP 97-98; CP 76-77).

Mr. Agustin timely appeals his adjudication of guilt and disposition. (CP 92).

E. ARGUMENT

Issue 1: Whether the trial court erred in finding Mr. Agustin guilty of minor in possession of marijuana where the evidence was insufficient.

In every criminal prosecution, due process requires the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the

defendant.” *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

“Circumstantial evidence and direct evidence are equally reliable.” *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Circumstantial evidence “is sufficient if it permits the fact finder to infer the finding beyond a reasonable doubt.” *State v. Askham*, 120 Wn. App. 872, 880, 86 P.3d 1224 (2004) (citing *State v. King*, 113 Wn. App. 243, 270, 54 P.3d 1218 (2002)). The appellate court “defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *Thomas*, 150 Wn.2d at 874-875.

Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

“[A] criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal.” *State v.*

Sweany, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011), *aff'd*, 174 Wn.2d 909, 281 P.3d 305 (2012) (citing *State v. Hickman*, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998)); *see also* RAP 2.5(a)(2) (stating “a party may raise the following claimed errors for the first time in the appellate court . . . failure to establish facts upon which relief can be granted. . . .”). “A defendant challenging the sufficiency of the evidence is not obliged to demonstrate that the due process violation is ‘manifest.’” *Id.*

To find Mr. Agustin guilty of minor in possession of marijuana, the trial court had to find the respondent was under 21 years old and possessed marijuana in Adams County, Washington. (CP 14); RCW 69.50.4013(4) (“No person under twenty-one years of age may possess, manufacture, sell, or distribute marijuana, marijuana-infused products, or marijuana concentrates, regardless of THC concentration . . .”).

In this case, insufficient evidence existed to show Mr. Agustin possessed marijuana as defined by the statute, he was under 21 years of age, and the crime occurred in Adams County, Washington.

a. The State presented insufficient evidence that the substance discovered was marijuana.

The State “is obliged to present sufficient evidence to establish that a defendant’s conduct falls within the scope of a criminal statute, regardless of whether the statute’s requirements are elemental or definitional.” *State v. Crowder*, ___ Wn. App.

___, 385 P.3d 275, 279 (2016). Definitions apply throughout chapter RCW 69.50 “unless the context clearly requires otherwise.” RCW 69.50.101. Thus, a statutory definition of “marijuana” is pertinent to criminal prosecution under RCW 69.50.4013(4) (minor in possession of marijuana). RCW 69.50.101 (v). *See also Crowder*, 385 P.3d at 279 (2016) (utilizing definition from RCW 69.50.101 to define “marijuana” under RCW 69.50.406(2) (distribution of a controlled substance to a minor)).

“Marijuana” is defined under RCW 69.50.101(v) as follows:

(v) "Marijuana" or "marihuana" means 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).

Statutory construction is a question of law that is reviewed *de novo*. *State v. Batson*, 194 Wn. App. 326, 331, 377 P.3d 238 (2016). Ascertaining and carrying out the legislature’s objective is a court’s fundamental objective in reading a statute. *Id.* If the

statute's meaning is plain, the court gives effect to that meaning. *Id.* If the statute defines a term, the definition of that term controls. *Id.* at 331-32.

“If, after examining the ordinary meaning of the statute's language and its context in the statutory scheme, more than one reasonable interpretation exists, we treat the statute as ambiguous.” *State v. Conover*, 183 Wn.2d 706, 711-12, 355 P.3d 1093 (2015) (citation omitted). If the statute is ambiguous, the rule of lenity applies and the statute is interpreted in the defendant's favor. *Id.* at 712; *Batson*, 194 Wn. App. at 332.

The State only charged Mr. Augustin with minor in possession of “marijuana”. (CP 14). At no point was the information changed to include “marijuana concentrates” or “marijuana-infused products”, and for that reason Mr. Augustin asserts these latter two types of controlled substances are not applicable to his case. RCW 69.50.101(w) & (cc).

RCW 69.50.4013(4) states marijuana cannot be possessed by a minor regardless of the THC content. RCW 69.50.4013(4) (minor in possession of marijuana). A plain reading of RCW 69.50.4013(4) does not require a THC concentration for a minor in possession of marijuana conviction. *Batson*, 194 Wn. App. at 331

(plain meaning). Yet whether RCW 69.50.4013(4) can do away with a THC concentration requirement is less clear given the definition of “marijuana” under RCW 69.50.101(v).

When the statute defines a term, such as here where “marijuana” is defined by RCW 69.50.101(v), the statutory definition controls. *Batson*, 194 Wn. App. at 331-32. Thus, since “marijuana” under RCW 69.50.010(v) requires a THC concentration level “greater than 0.3 percent on a dry weight basis” this definition requirement controls RCW 69.50.4013(4). *Batson*, 194 Wn. App. at 331-32. Mr. Agustin asserts that the definition of “marijuana” under RCW 69.50.101(v) applies to RCW 69.50.4013(4), and a THC concentration must be proven in order for the State to secure a conviction. *Crowder*, 385 P.3d at 279. No evidence of THC concentration was presented at trial (RP 75-94), so insufficient evidence was presented to show Mr. Agustin possessed marijuana.

However, even if this Court should find RCW 69.50.101(v) (marijuana definition) does not control RCW 69.50.4013(4) (minor in possession of marijuana), the two read together are ambiguous as more than reasonable interpretation exists. *Conover*, 183 Wn.2d at 711-12 (addressing ambiguity in statutory language). First, the

penal statute could be read to uphold a conviction under RCW 69.50.4013(4) without proven THC concentration. But also, one could read the definition of “marijuana” under RCW 69.50.101(v) and reasonably believe THC concentration is required to uphold a conviction under RCW 69.50.4013(4). Because these statutes have two reasonable means of interpretation, the rule of lenity should apply. *Conover*, 183 Wn.2d at 712. The statutes are ambiguous and under the rule of lenity the statute must be interpreted in Mr. Agustin’s favor. *Id.* The statute should be interpreted to require the State prove a THC concentration in marijuana, as mandatory in RCW 69.50.101(v). *Crowder*, 385 P.3d at 279. Since no evidence of THC concentration was presented at trial, there was insufficient evidence to support the conviction.

In the alternative, if this Court finds the penal statute RCW 69.50.4013(4) is sufficiently clear and is not ambiguous, and that THC concentration is not required to secure a conviction, Mr. Agustin also asserts the State did not prove with sufficient evidence that he possessed marijuana.

A defendant’s challenge for insufficient evidence is fact sensitive. *State v. Colquitt*, 133 Wn. App. 789, 800, 137 P.3d 892 (2006). “[L]ay testimony and circumstantial evidence may be sufficient to establish the

identity of a controlled substance.” *Id.* However, circumstantial evidence must prove the identity of a controlled substance beyond a reasonable doubt. *Id.* at 801.

In *Colquitt*, the court determined the circumstantial evidence did not prove the identity of a controlled substance beyond a reasonable doubt. 133 Wn. App. at 801. The evidence consisted of a positive field test and an officer’s opinion that the white substance appeared to look like rock cocaine, but this was not enough. *Id.* The court noted:

[w]hether the State has met its burden of establishing the identity of the items depends on a non-exhaustive list of factors, including: (1) testimony by witnesses who have a significant amount of experience with the drug in question, so that their identification of the drug as the same as the drug in their past experience is highly credible; (2) corroborating testimony by officers or other experts as to the identification of the substance; (3) references made to the drug by the defendant and others, either by the drug’s name or a slang term commonly used to connote the drug; (4) prior involvement by the defendant in drug trafficking; (5) behavior characteristic of use or possession of the particular controlled substance; and (6) sensory identification of the substance if the substance is sufficiently unique.

Id. (citations omitted).

The evidence presented here was based on two things: law enforcement’s statements that they recognized the smell of marijuana, and a soda can fashioned into what law enforcement believed was a marijuana smoking device. (RP 78-79, 83, 88-89). No lab testing was performed on

the soda can. (RP 90-91). No field test was done. (RP 75-94). No statements or confession identified the burned substance in the can as marijuana. (RP 65-66; CP 73)². No drug ledgers, cash, or information indicating prior involvement of the respondent with drugs was presented. (RP 75-94). More evidence was present in *Colquitt* of a controlled substance than there was in this case, because in *Colquitt* there was at least a field test identifying the substance. 133 Wn. App. at 801. Here, insufficient evidence was presented to show the substance in the soda can was marijuana. The case should be dismissed.

Considering the evidence in the light most favorable to the State, insufficient evidence was presented to show Mr. Agustin possessed marijuana. The conviction must be dismissed.

b. The State presented insufficient evidence that Mr. Agustin was under the age of 21 years old.

Although a defendant may stipulate to his date of birth for purposes of juvenile court jurisdiction, the State is not relieved of its burden of proving age. *State v. K.N.*, 124 Wn. App. 875, 884, 103 P.3d 844 (2004). When the defendant is charged with a crime such as a minor in possession offense, the State must prove the minority element. *Id.* at 880. “[T]he State is required to prove the age of the defendant as part of the defendant’s due process rights.” *State v. Roth*, 131 Wn. App. 556,

² All statements were suppressed by the trial court. (RP 65-66; CP 73).

562, 128 P.3d 114 (2006) (citing *K.N.*, 124 Wn. App. at 880). A trial court cannot take judicial notice of age. *K.N.*, 124 Wn. App. at 877.

To be found guilty of minor in possession of marijuana, a person must be under the age of 21 years. RCW 69.50.4013(4).

In this case insufficient evidence was presented that Mr. Agustin was under 21 years old at the time of the incident. One law enforcement officer testified he could guess Mr. Agustin's approximate age, and also stated he knew Mr. Agustin was a freshman in high school. (RP 82). This is the only evidence the State presented to show Mr. Agustin was under 21 years old. (RP 75-94).

Considering the facts in the light most favorable to the State, the State failed to prove the respondent was the requisite age at the time of the incident as required by RCW 69.50.4013(4). The case should be dismissed for insufficient evidence.

c. The State presented insufficient evidence of jurisdiction.

“Proof of jurisdiction beyond a reasonable doubt is an integral component of the State's burden in every criminal prosecution.” *State v. Squally*, 132 Wn.2d 333, 340, 937 P.2d 1069 (1997) (citation omitted). In general, evidence that a crime was committed in Washington State satisfies the jurisdictional element. *Id.* (citation omitted). A person is “liable to punishment” if a “person commits in the state any crime, in

whole or in part.” RCW 9A.04.030. *See State v. Boyd*, 109 Wn. App. 244, 246, 34 P.3d 912 (2001) (affirming trial court’s decision that State sufficiently proved jurisdiction).

No evidence was presented at trial that the crime herein occurred in Washington State or even Adams County. (RP 75-94). The State failed to present any evidence to prove the element of jurisdiction. RCW 69.50.4013(4); RCW 9A.04.030; (CP 14). Because the State failed to prove jurisdiction, there is insufficient evidence to uphold the conviction. The case should be dismissed.

Issue 2: Whether the trial court abused its discretion for failing to dismiss the case upon the State’s own motion.

Upon motion of the prosecuting attorney, a trial court may dismiss criminal charges. CrR8.3(a). A trial court’s power to dismiss charges is reviewed for manifest abuse of discretion. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997) (citation omitted). “Discretion is abused when the trial court’s decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons.” *Id.* (citation omitted).

A prosecuting attorney has broad discretion when seeking justice. *See* RCW 9.94A.411(1). Specifically, a “prosecuting attorney may decline to prosecute, even though technically sufficient evidence to prosecute exists” *Id.* “The legislature has acknowledged by statute that prosecuting attorneys have broad charging discretion, notwithstanding

seemingly mandatory filing language in the very same section.” *State v. Rice*, 174 Wn.2d 884, 898, 279 P.3d 849 (2012) (citing RCW 9.94A.411(1)) (other citation omitted). Although statutes may contain mandatory charging language, this is generally interpreted as the legislature’s method of ensuring priority to certain crimes. *Id.* at 899 (“The use of mandatory language . . . can be seen as a legislative expression of priority, meant to guide prosecuting attorneys but always subject to the prosecutor’s underlying charging discretion”). This is because the separation of powers doctrine prevents the legislature from requiring prosecuting attorneys to file charges. *Id.* at 900.

The separation of powers doctrine is meant to defuse and limit power by spreading it among the three branches: judicial, executive, and legislative. *Rice*, 174 Wn.2d at 900-901. The doctrine is a fundamental principle of America’s constitutional system and “forms the basis of our state government.” *Id.* at 900. “The division of governmental authority into separate branches is especially important within the criminal justice system, given the substantial liberty interests at stake and the need for numerous checks against corruption, abuses of power, and other injustices.” *Id.* at 901 (citations omitted). The legislature defines crimes and punishments, the executive branch collects evidence and seeks

prosecution of the crimes, and the judiciary confirms guilt and imposes an appropriate sentence. *Id.* (citations omitted).

“A prosecuting attorney's most fundamental role as both a local elected official and an executive officer is to decide whether to file criminal charges against an individual, and if so, which available charges to file.” *Rice*, 174 Wn.2d. at 901. This role allows a prosecutor to consider many factors when deciding whether to enforce criminal laws, including the facts and circumstances of a case, resource limitations, prioritization of competing investigations and prosecutions, reflection of local values and priorities, whether mercy is warranted, and individualized justice. *Id.* at 901-03. It is generally accepted that a prosecuting attorney has “complete discretion” with respect to charging. *Id.* at 902 (citation omitted). For example, a prosecutor has discretion to select charges, not the legislature. *Id.* at 903.

“[T]he division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment.” *Rice*, 174 Wn.2d at 906.

Here, the trial court declined to dismiss the charges³ upon the State's motion. (RP 67). But by doing so, the trial court manifestly abused its discretion. The State specifically informed the court it did not believe there was sufficient evidence to prosecute the case. (RP 67). However, the trial court disagreed, stating "I figured there is enough information still in this case to prosecute the defendant." (RP 67-68). Under the separation of powers doctrine, no branch of government may usurp the power of another branch, even with that branch's permission. *Rice*, 174 Wn.2d at 906. The trial court in this case did just that. It is a prosecuting attorney's decision whether to pursue charges and seek justice. *Id.* at 901-03. It is also a prosecuting attorney's decision whether to decline to prosecute. *Id.* The decision to prosecute does not lie with the trial court, which is exactly what the trial court did here. *Id.* at 901. (RP 67-68). Because the trial court did not have the authority to prosecute this case, the trial court abused its discretion by denying the State's motion to dismiss the charges.

This case should never have been prosecuted as the State did not want to pursue prosecution and wanted to dismiss the case. The conviction should be dismissed.

³ The respondent was originally charged with two crimes: minor in possession of alcohol (RCW 66.44.270(2)) and minor in possession of marijuana (RCW 69.50.4013(4)). (CP 13-14). After the fact-finding hearing, the trial court dismissed the first charge based on insufficient evidence. (RP 97; CP 76-78).

F. CONCLUSION

Insufficient evidence exists to uphold the conviction of minor in possession of marijuana. The presence of a controlled substance was not proven at the fact-finding hearing under the definitional statute for “marijuana.” In the alternative, Mr. Agustin asserts the statutes are ambiguous and thus the statutes should be interpreted in his favor. The case should be dismissed.

If this Court finds that the statutory language is clearly not in the respondent’s favor, insufficient evidence was presented to prove Mr. Agustin possessed a controlled substance. There was also insufficient evidence to prove jurisdiction, and insufficient evidence of the age of the respondent. The case should be dismissed.

Finally, the trial court abused its discretion by denying the State’s motion to dismiss the charges for insufficient evidence. The State has the sole authority under the separation of powers doctrine to decide whether to prosecute a case. The case should be dismissed.

Respectfully submitted this 22nd day of February, 2017.

/s/ Laura M. Chuang
Laura M. Chuang, WSBA #36707

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Nichols Law Firm, PLLC
Attorneys for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 34579-3-III
vs.)
)
)
RAFAELITO AGUSTIN)
) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Kristina M. Nichols, of Nichols Law Firm, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on February 22nd, 2017, I deposited for first-class mailing with the U.S. Postal Service, postage prepaid, a true and correct copy of the Appellant’s opening brief to:

Rafaelito Agustin
305 S 2nd Ave
Othello, WA 99344

Having obtained prior permission from the Adams County Prosecutor’s Office, I also served the Respondent State of Washington at **padocs@co.adams.wa.us** using Division III’s e-service feature.

Dated this 22nd day of February, 2017.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Nichols Law Firm, PLLC
PO Box 19203
Spokane, WA 99219
Phone: (509) 731-3279
Wa.Appeals@gmail.com