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No. 36387-2-III  
Whitman County Superior Court No. 18-1-60-38

IN THE COURT OF APPEALS  
OF WASHINGTON STATE  
DIVISION III

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STATE OF WASHINGTON, Respondent

v.

Eli Gallegos, Appellant

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BRIEF OF RESPONDENT

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## RESTATEMENT OF THE ISSUES

- I. Should the Court continue to interpret Washington's possession statute as not requiring a *mens rea* element?**
- II. Is RCW 69.59.4013 unconstitutional simply because it lacks a *mens rea* element?**
- III. Does the defense of unwitting possession shift the burden to the defendant?**
- IV. Was the instructional error harmless beyond a reasonable doubt?**

## STATEMENT OF THE CASE

On March 4, 2018 Whitman County Deputy Sheriffs interviewed the Appellant, Eli Gallegos, regarding a trespass committed earlier that day. VRP 81-82. Mr. Gallegos was not wearing a shirt during the conversation. *Id.* at 105. After he was told he was under arrest, but before he could be handcuffed Mr. Gallegos put a jacket on and then began walking toward the kitchen, away from the deputies, while putting his hand in his pant pocket. *Id.* at 82, 105. Sgt. Jordan briefly struggled with Mr. Gallegos and during the struggle the deputy located a bag of methamphetamine. *Id.* at 82- 84. Sgt. Jordan inquired why Mr. Gallegos pulled away from him and Mr. Gallegos proceeded to explain how he came to get the methamphetamine while trying to get a washer from a

neighbor who was going to rehab. *Id.* at 85-86, 124.<sup>1</sup> Mr. Gallegos later testified that the baggie came from the jacket pocket and that he did not know it was in the jacket or what was in the baggie. *Id.* at 107. Mr. Gallegos testified that he had change in his pants pocket. *Id.* at 108. Upon recall as a rebuttal witness, Sgt. Jordan testified that after telling Mr. Gallegos he was under arrest he kept his eyes on Mr. Gallegos and Mr. Gallegos never reached in the jacket pocket. *Id.* at 109. On cross examination he testified that the change came out of Mr. Gallegos's pant pocket and fell to the floor, but Mr. Gallegos kept hold of the bag. *Id.* at 110. Sgt. Jordan further testified that Mr. Gallegos was trying to hide the methamphetamine in the kitchen drawer. *Id.* at 111.

Ms. Elizabeth Sauer testified that Mr. Gallegos did not have permission to be on her property and that she told him fifteen to twenty times that he was not welcome on her property. *Id.* at 68-69. She further testified that: Mr. Gallegos had never asked for the trespass to be lifted, she never indicated to him that she was going to lift the trespass, and after he was trespassed she never invited him to her home. *Id.* at 60-70.

Sgt. Dan Brown testified that he informed Mr. Gallegos he was trespassed from Ms. Sauer's property and that if he went back to her

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<sup>1</sup> The Court reporter was unable to transcribe the audio from the exhibit shown at trial, but the State in closing argument reiterated what the defendant said on the recording of Deputy Jordan's body camera video.

property he would be arrested. *Id.* at 74-75. Sgt. Brown further testified that Mr. Gallegos said he understood. *Id.* at 75. Sgt. Jordan testified that when he interviewed Mr. Gallegos the day of the incident Mr. Gallegos admitted that he remembered the contact with Sgt. Brown about being trespassed. *Id.* at 79, 86.

Mr. Gallegos testified “ ...and he told me arrested by trespassing, so I asked him—I didn’t know (inaudible) trespassing but—put—jacket on...” and “And -- officers came in saying that -- I was not -- I was arrested because I was -- (inaudible) supposed to be, which I didn’t even know-- ” *Id.* at 105, 107. Neither of Mr. Gallegos’s comments were in response to a question about trespassing. *Id.* In closing arguments the State argued that the evidence showed Mr. Gallegos knew he was not lawfully on the property and directed the jury’s attention to Instruction Number 10.<sup>2</sup> *Id.* at 125. The state argued that Mr. Gallegos knew he was not lawfully on the property because of all the times Ms. Sauer had told him he was not permitted on her property and because of Sgt. Brown’s trespassing the defendant from the property. *Id.* at 125. When the State did reference the jury instruction with the erroneous language the State referred to the second paragraph<sup>3</sup> regarding whether a reasonable person would know they were not lawfully present and

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<sup>2</sup> Instruction Number 10 was the To Convict instruction which included that the State had to prove beyond a reasonable doubt that the defendant knew he was on the property unlawfully.

<sup>3</sup> The first paragraph contained the erroneous language.

why a reasonable person in this case would know they were not on the property lawfully. *Id.* at 127. Defense counsel during closing argument stated, “No. 10, the trespass, says that he knowingly committed criminal conduct.” *Id.* at 128.

### ARGUMENT

Washington’s possession statute has been interpreted by the Washington Supreme Court more than once and each time the Court determined there was no *mens rea* element. “The principle of stare decisis is vital to protecting the rights of litigants and the integrity of the common law.” *State v. W.R., Jr.*, 181 Wn. 2d 757, 768, 336 P.3d 1134, 1139 (2014). Prior decisions are only overruled when a clear showing is made that the announced rule is harmful and incorrect. *Id.* at 768.

Merely because a statute lacks a *mens rea* element does not mean the statute would violate due process. Whether a statute meets Constitutional muster is reviewed de novo. *State v. Bradshaw*, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004). Statutes are presumed to be constitutional and the burden falls on the challenger to prove beyond a reasonable doubt the statute is not constitutional. *State v. Hollis*, 93 Wn. App. 804, 811, 970 P.2d 813, 817 (1999).

Because the Court has interpreted the possession statute to not require a *mens rea* element there is no burden to be shifted when a

defendant claims unwitting possession. “When a defense necessarily negates an element of the crime, it violates due process to place the burden of proof on the defendant. The key to whether a defense necessarily negates an element is whether the completed crime and the defense can coexist.” *State v. W.R., Jr.*, 181 Wn. 2d at 765.

The State concedes instructional error, but the error was harmless beyond a reasonable doubt. Where instructional error occurs, but the error is harmless beyond a reasonable doubt the conviction need not be reversed. *State v. Hayward*, 152 Wn. App. 632, 647, 217 P.3d 354, 362 (2009). The burden to prove the error was harmless beyond a reasonable doubt is on the State. *Id.*

The State concedes it was error to impose all but the mandatory legal financial obligations. The matter should be remanded for correction.

I. THE COURT SHOULD CONTINUE TO INTERPRET WASHINGTON’S CONTROLLED SUBSTANCE POSSESSION STATUTE TO NOT HAVE A MENS REA ELEMENT.

This Court should continue to refuse to imply a *mens rea* element. Vital to the integrity of the common law and protecting the rights of litigants is the principle of stare decisis. *State v. W.R., Jr.*, 181 Wn. 2d at 768. Because “prior decisions are only overruled when a clear showing is

made that the announced rule is harmful and incorrect” *Cleppe* and *Bradshaw* should only be overruled if the defendant can make a clear showing that lack of *mens rea* is harmful and incorrect. The announced rule is not incorrect, nor is it harmful. Unwitting possession “ameliorates the harshness of the almost strict criminal liability our law imposes for unauthorized possession of a controlled substance. If the defendant can affirmatively establish his “possession” was unwitting, then he had no possession for which the law will convict.” *State v. Cleppe*, 96 Wn. 2d 373, 380–81, 635 P.2d 435, 439–40 (1981).

The Supreme Court of Washington first decided that Washington’s mere possession statute does not contain a *mens rea* element in *State v. Henker* back in 1957. 50 Wn.2d 809, 314 P.2d 645 (1957). In that case, the court held that whether intent or guilty knowledge was an essential element for possession of a narcotic drug was to be the legislature’s determination. *Id.* at 812. The Court reasoned that if the legislature had intended there to remain a *mens rea* element, as in the precursor statute, then the legislature would have explicitly included the *mens rea* element in the statutory language, but because they omitted the words ‘with intent’ the legislature intended mere possession or control to be criminal. *Id.*

The Court reiterated this stance four years later when a defendant alleged on appeal that the State must prove awareness of the narcotic

character of the substance he possessed based on an assumption that intent was a required element of mere possession; however, the Court held the assumption to be erroneous. *State v. Boggs*, 57 Wn. 2d 484, 485, 358 P.2d 124, 125 (1961). That Court stated, “The legislature, by its enactment of controls against the evils of the narcotic traffic through the adoption of the Uniform Narcotic Drug Act, has made *mere possession* of a narcotic drug a crime, unless the possession is authorized in the act.” *Id.*

The Supreme Court again looked to whether Washington’s controlled substance statute required a *mens rea* element thirty eight years ago when it took up the issue because of a split in the Court of Appeals. *State v. Cleppe*, 96 Wn.2d 373, 378, 635 P.2d 435 (1981). In that case, the Court noted its own prior cases decided under the predecessor statute held that the statute did not contain a *mens rea* element for mere possession. *Id.* (citing *State v. Henker* and *State v. Boggs*). The Court was compelled by that view in its decision of the cases then before it. *Id.* The Court noted that the prior statute was repealed and replaced with the Uniform Controlled Substance Act under RCW 69.50 and the legislative process for adoption of the Act resulted in specifically excluding the “knowingly or intentionally” language of the Uniform Act in subsection 401(c) as elements for mere possession. *Id.* at 379. The Court held that the legislative intent as to mere possession was clear. *Id.*

In 2004 the Washington Supreme Court granted review of two cases to determine whether it should imply a *mens rea* element into the mere possession statute overruling *State v. Cleppe*. *State v. Bradshaw*, 152 Wn. 2d 528, 531, 98 P.3d 1190, 1191 (2004). The Court again held that it is within the legislature's authority to create a statute omitting a *mens rea* element. *Id.* at 532. In that case, the Court rejected the argument that because every other state, except North Dakota, had a *mens rea* element to their possession crimes that Washington courts are required to read into the statute a *mens rea* element. *Id.* at 534-535. The Court further found that because the legislature had not amended the mere possession statute to include a *mens rea* element despite seven other amendments in the twenty-two years since it had decided *Cleppe* the legislature intended to omit the *mens rea* element. *Id.* at 535. The Court refused to imply a *mens rea* element and *Cleppe* was not overturned. *Id.*

As the Court of Appeals pointed out the Supreme Court "did not express any concerns in either *Bradshaw* or *Cleppe* that allowing a conviction for the possession of a controlled substance without showing intent or knowledge somehow was improper." *State v. Schmeling*, 191 Wn. App. 795, 802, 365 P.3d 202, 206 (2015).

"If the legislature does not register its disapproval of a court opinion, at some point that silence itself is evidence of legislative

approval.” *1000 Friends of Washington v. McFarland*, 159 Wn. 2d 165, 181, 149 P.3d 616, 625 (2006), *as amended* (Jan. 8, 2007)(citing *State v. Coe*, 109 Wash.2d 832, 846, 750 P.2d 208 (1988)). As the concurrence in the recent *State v. A.M.* case notes thirty-eight years have passed since *Cleppe* and fifteen years since *Bradshaw* affirmed *Cleppe* and in that time there have been eleven amendments to the basic drug possession statute and neither the people nor the legislature have explicitly added a *mens rea* element. 194 Wn.2d 2d 33, 55, 448 P.3d 35, 52 (2019). It has been sixty two years since *Henker* was decided which initially found the possession statute to not require a *mens rea* element. It can hardly be said that the people have not had fair warning that possession of controlled substances is illegal in Washington.

The Appellant has not shown the rule in the *Bradshaw* and *Cleppe* cases is harmful or incorrect especially when the unwitting possession defense is available. Thus, the Court should uphold both *Bradshaw* and *Cleppe*. The Appellant’s conviction for possession of a controlled substance should be affirmed.

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II. RCW 69.50.4013 DOES NOT OFFEND DUE PROCESS MERELY BECAUSE IT HAS NO *MENS REA*.

The argument that RCW 69.50.4013 violates due process merely because it does not have a *mens rea* element fails. The Court of Appeals has held “that RCW 69.50.4013 does not violate due process even though it does not require the State to prove intent or knowledge to convict an offender of possession of a small amount of a controlled substance.” *State v. Schmeling*, 191 Wn. App. 795, 802, 365 P.3d 202, 206 (2015). That Court also rejected the argument that the statute was unconstitutional because it lacked a *mens rea* element stating:

The Fourteenth Amendment to the United States Constitution provides that no state may deprive a person of liberty without due process of law. We hold that RCW 69.50.4013 does not violate due process even though it makes possession of drug residue a crime without requiring any culpable mental state.

15 Strict liability crimes—crimes with no *mens rea* requirement—do not necessarily violate due process.

“We do not go with Blackstone in saying that ‘a vicious will’ is necessary to constitute a crime, for conduct alone without regard to the intent of the doer is often sufficient. There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition.” *Lambert v. California*, 355 U.S. 225, 228, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957) (citation omitted). 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. *State v. Bradshaw*, 152 Wash.2d 528, 532, 98 P.3d 1190 (2004); *State v. Anderson*,

141 Wash.2d 357, 361, 5 P.3d 1247 (2000); *State v. Rivas*,  
126 Wash.2d 443, 452, 896 P.2d 57 (1995).

*Id.* at 801.

The general argument that a lack of *mens rea* violates due process ignores every other strict liability statute that has been held to be constitutional. For example, neither rape nor rape of a child require a *mens rea* element. *State v. Chom*, 128 Wn.2d. 739, 743, 911 P.2d 1014 (1996); *State v. Joseph*, 3 Wn. App. 365, 374, 416 P.3d 738 (2018). First degree rape contains no *mens rea* element. *State v. DeRyke*, 149 Wn.2d 906, 913, 73 P.3d 1000 (2003). Third degree rape of a child is a strict liability crime lacking any *mens rea*. *State v. Deer*, 175 Wn.2d at 731, 734, 287 P.3d 539 (2012). Just because strict liability offenses are not favored, does not mean that they are not constitutional. *See, United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437-38 (1978); *United States v. Balint*, 258 U.S. 250, 252 (1922); *Sherlin-Carpenter v. Minnesota*, 218 U.S. 57, 69-70 (1910). The DUI statute does not require a *mens rea* element either. RCW 46.61.502. The Appellant claims that because there is no *mens rea* element to the mere possession statute it is unconstitutional because it “criminalizes the innocent behavior of possessing property.” Appellant’s brief, at 13. Under that same logic then, the DUI statute would be unconstitutional because it also lacks a *mens rea* element and without it, it criminalizes the innocent

behavior of driving. Just as the DUI statute is not unconstitutional just because it lacks a *mens rea* element, neither is the possession statute unconstitutional just because it lacks a *mens rea* element.

The Appellant refers to *State v. Anderson*, in support of its argument that the Court should imply a *mens rea* element. Brief of Appellant at 10. However, the defendant in *Bradshaw* made the same argument and the *Bradshaw* court held that the defendant's reliance on *Anderson* was misplaced because the case actually supported the Court's holding that they not imply a *mens rea* element and that *Anderson* held that whether a statute is meant as a strict liability crime is an "issue of statutory construction and/or legislative intent". *Id.* at 537. The *Bradshaw* court noted that *Anderson* looked to the legislative history of the statute at issue in that case and the *Bradshaw* court noted that in the case before it the legislative history of the mere possession statute was clear that no *mens rea* element was intended. *Id.*

The Appellant further argues that interpreting the mere possession statute to have no *mens rea* element "rejects the presumption of innocence and creates a presumption of guilt", but fails to provide any analysis as to how the mere possession statute creates a presumption of guilt and rejects the presumption of innocence nor does the Appellant cite any case law supporting these allegations. The Appellant further references the

concurrent opinion's stance in *State v. A.M.*, that the legislature exceeded its authority to create a strict liability crime without a public welfare rational, but the Appellant fails to support this stance with analysis or binding precedent. Supp. Brief at 3-6. These "naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." *Bradshaw*, 152 Wn.2d at 539.

The defendant is not presumed guilty as the State is required to prove beyond a reasonable doubt the fact of possession and the nature of the substance and were the State to fail proving either element the presumption of innocence demands acquittal, the defendant would not even need to put forward an unwitting possession defense. The Court should refuse to entertain the Appellant's arguments that RCW 69.50.4013 creates a presumption of guilt, rejects the presumption of innocence, or exceeded the legislature's authority for lack of a public welfare rational.

The Appellant claims that under the avoidance canon of statutory construction the Court must interpret the statute to include a *mens rea* element, but the State Supreme Court rejected the argument that a *mens rea* element must be read into the statute in *Bradshaw*. 152 Wn. 2d at 535-537. Appellant argues that under this canon the Courts interpret statutes to avoid constitutional doubts and that unless this statute is read to have a *mens rea* element then the statute's constitutionality is "dubious in light of

fundamental due process principles.” Supp. Brief at 5. However, the principles the Appellant repeatedly claims require finding that the statute violates due process are that the statute: 1) impermissibly burden shifts, 2) creates a presumption of guilt, and 3) rejects a presumption of innocence, but the Appellant fails to explain how the statute creates a presumption of guilt or rejects a presumption of innocence and as explained in the next section there is no burden shifting. Thus, the Appellant’s avoidance canon of statutory construction theory fails. This Court should refuse to find that a *mens rea* element is required to be read into the statute under the avoidance canon or any other theory. The Appellant has failed to meet his burden of proof that would be necessary to show that the statute was unconstitutional beyond a reasonable doubt. The Court should affirm the Appellant’s conviction.

III. BECAUSE RCW 69.50.4013 DOES NOT HAVE A *MENS REA* ELEMENT, UNWITTING POSSESSION IS NOT BURDEN SHIFTING.

Before a burden can be shifted there must first be a burden. Under the current interpretation of RCW 69.50.4013 the State does not have a burden to prove a *mens rea* element; therefore, when a defendant presents an unwitting possession defense there is no burden shifting because a

burden did not exist to begin with. Placing the burden of proof on a defendant violates due process if the defense necessarily negates an element of the crime. *State v. W.R., Jr.*, 181 Wn. 2d 757, 765, 336 P.3d 1134, 1138 (2014). But if a defense and the completed crime may coexist then the defense does not negate an element of the crime and there would be no due process violation. *Id.*

In *Bradshaw*, the defendant alleged that the affirmative defense of unwitting possession improperly shifted the burden of proof. 152 Wn. 2d at 538. The Court held that the elements the State had to prove were the substance's nature and the fact of possession and that the unwitting possession defense did not shift the burden of proof, but rather ameliorated the harshness of a strict liability offense. *Id.*

Unwitting possession does not negate an element of the crime because knowledge is not an element of possession, so it cannot be a shifted burden. Because the completed crime of possession and the defense of unwitting possession may coexist due process is not violated.

The Appellant relies on *Schad v. Arizona* to claim that because every other State requires a *mens rea* element then Washington's statute must violate due process and must shift the burden of proof; however, by *Schad's* own logic Washington's history of interpreting the mere possession statute as not requiring a *mens rea* element makes it unlikely

for the appellant to be able to prove that the burden of proof has been shifted to defendants. *Schad v. Arizona*, 501 U.S. 624, 640, 111 S.Ct 2491, 115 L.Ed.2d 555 (1991).

The Court should reject the Appellant's burden shifting claim and affirm the Appellant's conviction.

IV. THE INSTRUCTIONAL ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

The State concedes that jury instruction numbers ten and eleven as regards criminal trespass and the knowledge requirement were contradictory. However, even erroneous jury instructions which omit an element of the crime charged or misstates the law are subject to harmless error analysis. *State v. Hayward*, 152 Wn. App. 632, 646, 217 P.3d 354, 362 (2009). If the State can show the error was harmless beyond a reasonable doubt then the conviction may stand. *Id.* at 646. If the element that is misstated is supported by uncontroverted evidence then the error is harmless. *Id.*

In this case, the error was harmless beyond a reasonable doubt because the uncontroverted evidence was that: 1)the owner of the property told Mr. Gallegos fifteen to twenty times that he was not allowed on her property, 2) he was never invited to her property after being trespassed, 3)

she never gave him any indication she was going to have the trespass lifted, 4) Sgt. Brown told Mr. Gallegos that he was trespassed and if he returned to the property he would be arrested and Mr. Gallegos said he understood, and 5) on the day of the incident Mr. Gallegos admitted that he remembered the conversation with Sgt. Brown about being trespassed. The Appellant argues that Mr. Gallegos testified that he did not know that he was not supposed to be on Ms. Sauer's property, but what Mr. Gallegos actually testified to was "...and he told me arrested by trespassing, so I asked him—I didn't know (audible) trespassing but—put—jacket on..." and "and -- officers came in saying that -- I was not -- I was arrested because I was -- (inaudible) supposed to be, which I didn't even know—". What that stream of consciousness actually means is questionable. Did he mean he did not know trespassing was an arrestable offense and he would actually be taken to jail for trespassing? Did he not know Ms. Sauer would really call the police on him? Mr. Gallegos's testimony in that regards was not in answer to a question about trespassing let alone whether he knew that he was on the property unlawfully.

There was never any argument that the State need not prove the defendant knew that his presence was unlawful. To the contrary the State referred to Instruction Number 10 and argued that Mr. Gallegos knew that he was on the property unlawfully. The State pointed out that Ms. Sauer

had testified that she told him fifteen to twenty times that he was not permitted on the property and that the day of the incident Ms. Sauer told him he was not allowed on the property and she was calling the police, but that even after the warning he lingered on the property. The State further argued that Mr. Gallegos was told by Sgt. Brown that he was trespassed from the property and that if he returned he would be arrested.

Even when discussing Instruction 11, the State used it to show that the defendant knew he was there unlawfully because a reasonable person would have known that he was there unlawfully because of all the times he was told he was not welcome on the property. Defense counsel also pointed out that the State had to prove the defendant knew he was on the property unlawfully. Given that it was never argued that the State did not have to prove the defendant knew he was on the property knowingly and given the entirety of the State's closing argument in that regard it was clear that the State had to prove that Mr. Gallegos knew his presence on the property was unlawful. The evidence was uncontroverted that Mr. Gallegos was told on a number of occasions by the property owner that he was not permitted on the property and was told by law enforcement that he was trespassed, that he understood he was trespassed, and that on the day of the incident he remembered being trespassed by Sgt. Brown.

The Court should find the instructional error was harmless beyond a reasonable doubt and affirm the conviction.

### CONCLUSION

Based on the foregoing, the Respondent requests this Court affirm the defendant's conviction for Possession of a Controlled Substance and Trespassing. The Respondent further requests the Court uphold *Bradshaw* and *Cleppe*, hold that RCW 69.50.4013 does not violate due process, and hold that unwitting possession does not shift the burden of proof to the defendant.

Dated this 20<sup>th</sup> day of December 2019.

  
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I hereby certify that I emailed a true and accurate copy of the foregoing document to Kate Huber, attorney for Appellant, to [katehuber@washapp.org](mailto:katehuber@washapp.org).

  
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**WHITMAN COUNTY PROSECUTOR'S OFFICE**

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