

FILED
Court of Appeals
Division III
State of Washington
8/5/2019 4:13 PM

No. 36437-2-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CAMREN BUCHE,

Appellant.

BRIEF OF RESPONDENT

Will M. Ferguson, WSBA 40978
Attorney for Respondent
Special Deputy Prosecuting Attorney
Office of the Stevens County Prosecuting Attorney
215 S. Oak Street, Room #114
Colville, WA 99114
(509) 684-7500
wferguson@stevenscountywa.gov
trasmussen@stevenscountywa.gov

I. TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii-iii.

STATEMENT OF THE CASE.....1-2.

STATEMENT OF THE ISSUES.....3.

STANDARDS OF REVIEW.....3.

ARGUMENT.....4-13.

 1. Unlawful possession of a controlled substance does not require
 the defendant to knowingly possess the substance.....4-8.

 2. Even if knowledge becomes an element of unlawful possession
 of a controlled substance, the State submitted sufficient facts to
 convict Mr. Buche.....8-11.

 3. RCW 69.50.4013 is not unconstitutional because it does not
 violate due process.....11-13.

CONCLUSION.....14.

II. TABLE OF AUTHORITIES

Washington State Supreme Court Cases:

<u>State v. Bennett</u> , 161 Wash.2d 303, 165 P.3d 1241 (2007).....	9.
<u>State v. Bradshaw</u> , 152 Wash.2d 528, 98 P.3d 1190 (2004)....	4-5, 7, 12-13.
<u>State v. Brown</u> , 147 Wash.2d 330, 58 P.3d 889 (2002).....	8.
<u>State v. Byrd</u> , 125 Wash.2d 707, 887 P.2d 396 (1995).....	8.
<u>State v. Cleppe</u> , 96 Wash.2d 373, 635 P.2d 435, 438 (1981).....	5-7, 12-13.
<u>State v. Horrace</u> , 144 Wash.2d 386, 28 P.3d 753, 756 (2001).....	10-11.
<u>State v. Pirtle</u> , 127 Wash.2d 628, 904 P.2d 254 (1996).....	3, 9.
<u>State v. Sibert</u> , 168 Wash.2d 306, 230 P.3d 142 (2010), <u>as corrected</u> (Apr. 1, 2010).....	8.

Washington State Court of Appeals Cases:

<u>State v. Schmeling</u> , 191 Wash.App. 795, 365 P.3d 202 (Div. II, 2015).....	3-4, 11-13.
<u>State v. Utter</u> , 4 Wash.App. 137, 479 P.2d 946, 948 (Div. I, 1971).....	5.

Unpublished Washington State Court of Appeals Cases:

<u>State v. Muse</u> , 197 Wash.App. 1042 (Div. III, 2017).....	12.
---	-----

Federal Cases:

<u>United States v. Wulff</u> , 758 F.2d 1121 (6 th Cir., 1985).....	13.
---	-----

State Cases from Other Jurisdictions:

State of Louisiana v. Charley Brown, Jr., 398 So.2d 48 (1980).....13.

Washington State Rules:

WA GR 14.1.....12.

III. STATEMENT OF THE CASE

Overwhelming evidence was presented at trial to prove Camren Buche (hereinafter “Mr. Buche”) possessed methamphetamine. Mr. Buche’s methamphetamine was found in *his* wallet, which officers retrieved from Mr. Buche’s person. RP 253-54.

On February 14, 2018, Mr. Buche was arrested for suspicion of Possession of a Stolen Motor Vehicle. RP at 251, lines 14-15. During the arrest, Washington State Patrol Detective Steve White of the Spokane Regional Auto Theft Task Force, performed a cursory pat-down of Mr. Buche and placed Mr. Buche in the patrol car of a Stevens County Sheriff’s Detective. RP at 228; 253, line 22. Detective White did not remove Mr. Buche’s wallet during the initial search because the Detective was searching for weapons. RP at 255, lines 1-2. Detective White testified that he wished he had secured Mr. Buche’s wallet prior to placing Mr. Buche in the patrol car, but the arrest scene was quite chaotic. RP at 253, lines 18-19; 254, lines 23-26. After securing the scene, the Detective conducted another search of Mr. Buche, this time removing Mr. Buche’s wallet from Mr. Buche’s person. RP at 253-54. Located in the main compartment of Mr. Buche’s wallet, was a ziplock baggie, containing a white, crystalline substance. RP at 242, lines 19-22. The Detective seized the baggie and entered it into evidence. RP at 239, lines 11-15.

Mr. Buche was charged with Possession of a Stolen Motor Vehicle, Attempted Trafficking in Stolen Property in the First Degree, and Violation of the Uniform Controlled Substances Act – Possession of Methamphetamine. CP 60-61.

At jury trial, Mr. Tyndal, for the State, elicited testimony about Mr. Buche's possession of the methamphetamine. RP 237-246; 256-58. Mr. Tyndal proved to the jury that the baggie in the main compartment of Mr. Buche's wallet was methamphetamine. RP at 237, lines 6-7. Ms. Jennifer Allen, of the Washington State Patrol Crime Laboratory, testified that she tested the substance in the baggie and the result was that the substance was methamphetamine. RP at 264; 271, lines 8-11.

The jury was instructed on the law regarding possession of a controlled substance. CP 44 (Instruction No. 12); RP at 288. The jury convicted Mr. Buche of possession of a stolen vehicle and possession of methamphetamine, a controlled substance. CP 28.

Mr. Buche did not object to what he now claims are erroneous jury instructions. RP 284-88 (discussion of jury instructions). Mr. Buche now challenges his conviction of possession of his bag of methamphetamine.

IV. STATEMENT OF THE ISSUES

- I. Did the Superior Court err by giving the current and accurate jury instructions on unlawful possession of methamphetamine?
- II. Could a reasonable jury find Mr. Buche guilty of unlawful possession of methamphetamine when Mr. Buche hid the baggie of methamphetamine in his wallet?
- III. Is RCW 69.50.4013 illegal, given the previous constitutional challenges, which resulted in this and other courts upholding the statute?

V. STANDARDS OF REVIEW

Courts “...review a challenged jury instruction de novo, evaluation it in the context of the instructions as a whole.” State v. Pirtle, 127 Wash.2d 628, 656, 904 P.2d 254 (1996). Constitutional challenges are reviewed de novo. State v. Schmeling, 191 Wn.App. 795, 797, 365 P.3d 202 (Div. II, 2015). Statutes are presumed constitutional. Id. The challenger to the statute bears “...the heavy burden of convincing the court that there is no reasonable doubt that the statute is unconstitutional.” Id.

VI. ARGUMENT

- 1. Possession of a controlled substance does not require proof of the defendant's knowing possession of drugs. To say otherwise would be a misstatement of the current law. The Superior Court properly instructed the jury in regards to Mr. Buche's possession of methamphetamine.**

Mr. Buche argues against the current state of Washington law and invites this Court to find error in the administration of jury instructions that were accurate reflections of our State's law. No mens rea element is required for unlawful possession of a controlled substance. State v. Bradshaw, 152 Wash.2d 528, 535, 537, 98 P.3d 1190 (2004).

Possession of a controlled substance in Washington is a strict liability crime. It is unlawful to possess a controlled substance without a valid prescription or as otherwise authorized. RCW 69.50.4013(1). Section 4013 prohibits possession of any amount of a controlled substance, including residue. State v. Schmeling, 191 Wn.App. 795, 797 fn. 2, 365 P.3d 202 (Div. II, 2015). "There are two components of every crime. One is objective-the actus reus; the other subjective-the mens rea. The actus reus is the culpable act itself, the mens rea is the criminal intent with which one performs the criminal act. However, the mens rea does not encompass the entire mental process of one accused of a crime. There is a certain minimal mental element required in order to establish the actus reus itself. This is the

element of volition.” State v. Utter, 4 Wash.App. 137, 139, 479 P.2d 946, 948 (1971).

The crux of Mr. Buche’s argument is that he believes the jury instructions should include a knowledge element. Brief of Appellant at 6-9. Mr. Buche’s first argument at pages 6-9 of his brief is simply his third argument at page 16, restated. What Mr. Buche wants is to have this Court insert a new element in the current and standard jury instructions. However, Washington law is clearly inapposite.

Prior to Bradshaw’s ruling that there is no mens rea requirement to possession of a controlled substance, our Supreme Court was confronted by the issues of knowledge, the apparent disagreement between divisions of the Court of Appeals, and whether the Washington Legislature intended to remove the mens rea requirement from the Uniform Controlled Substances Act. Mr. Buche takes another run at the argument that should have been laid to rest. In State v. Cleppe, the Supreme Court identified the disagreement between the divisions of the Court of Appeals:

The Court of Appeals is divided on the matter of guilty knowledge or intent to possess. Division One holds that simple possession of a controlled substance is a crime mala in se and that “guilty knowledge” is a necessary element of the crime. Division Three, on the other hand, has declined to follow Division One and holds that after establishing the nature of the substance and jurisdiction, possession alone, actual or constructive, is the sole element to be proved to convict of the crime of possession of a controlled substance under RCW 69.50.401(c).

State v. Cleppe, 96 Wash. 2d 373, 377, 635 P.2d 435, 438 (1981) (internal citations omitted). Here was Division III’s rationale, which was ultimately left undisturbed by the Supreme Court, on possession and mens rea:

In Hartzog, Division Three read Boyer to mean that delivery of a controlled substance was to be regarded as a crime mala in se when “guilty knowledge” was held by this court to be an intrinsic element of the offense, though mala in se is not discussed in the case. Division Three, however, did not extend the mala in se characterization to the crime of simple possession of a controlled substance. That offense was held to be mala prohibita because possession is proscribed in a separate subsection, and does not provide that guilty knowledge or intent are elements of the crime. Division Three harmonizes Boyer by characterizing subsection 401(a) crimes as mala in se and bases its construction of subsection (c) as a mala prohibita crime on Henker reasoning. That is, 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.

Id. at 379–80. “[Uniform Controlled Substances Act], as introduced in the Senate, made ‘knowingly’ and ‘intentionally’ elements of the misdemeanor of simple possession of a controlled substance.” Id. “As the legislature worked its will on the bill, the words ‘knowingly or intentionally’ were deleted from subsection 401(c) and the crime was upgraded from a misdemeanor to a felony. No change was made in subsection 401(a), as introduced.” Id.

The Court in Cleppe resolved the disagreement between divisions, by rightfully putting the dispute in the hands of our Legislature:

This conflict, if such it be, must be corrected by the legislature, not the court. The legislature has met twice since our decision in *Boyer* that guilty knowledge is an implicit element of the subsection 401(a) crime of delivery, and it has not revised subsection 401(a). As to subsection 401(c), the legislative intent is clear.

That unwitting possession has been allowed as an affirmative defense in simple possession cases may seem anomalous. If guilty knowledge or intent to possess are not elements of the crime, of what avail is it for the defendant to prove his possession was unwitting? Such a provision 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. The burden of proof, however, is on the defendant.

Id. at 380–81. Approximately thirteen years later, the Washington Supreme Court made itself very clear and did not upset its ruling in Cleppe:

The *Cleppe* court relied on this legislative history when it refused to imply a mens rea element into the mere possession statute. The legislature has amended RCW 69.50.401 seven times since *Cleppe* and has not added a mens rea element. Given that the legislative history is so clear, we refuse to imply a mens rea element.

Bradshaw, 152 Wash.2d at 537.

Had the State, through its trial attorney, Mr. Tyndal, asked for modification of the applicable jury instruction, Mr. Tyndal would have been asking the Superior Court to violate well-settled Washington caselaw and the will of our Legislature, and would have given Mr. Buche the opportunity to argue on his inevitable appeal that the Superior Court unlawfully deviated from the current applicable jury instruction. Mr. Tyndal’s proposed jury

instructions were accurate and in accordance with the current law. There was no error in the Superior Court's administration of jury instructions.

2. **Even if this Court reverses the current state of the law and holds that the Superior Court should have instructed on "knowledge", the error would be harmless because the State proved beyond a reasonable doubt that Mr. Buche's possession was knowing.**

The State presented sufficient evidence at trial to convince a jury beyond a reasonable doubt that Mr. Buche knowingly possessed methamphetamine. Assuming, arguendo, that the current state of the law requires a mens rea element in the 'to convict' instruction, the jury's finding should be left undisturbed.

Even if a jury instruction lacks a necessary element, the result is not automatic reversal; it is subject to harmless error analysis. State v. Brown, 147 Wash.2d 330, 339, 58 P.3d 889 (2002). "The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld." State v. Sibert, 168 Wash. 2d 306, 311, 230 P.3d 142, 144–46 (2010), as corrected (Apr. 1, 2010) (quoting State v. Byrd, 125 Wash.2d 707, 713, 887 P.2d 396 (1995)). "[A] 'to convict' jury instruction must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." Id. (internal quotations omitted). "The test for reviewing a defendant's challenge to the sufficiency of evidence in a criminal case is

whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt”. State v. Pirtle, 127 Wash. 2d 628, 643, 904 P.2d 245, 255 (1995) (internal citations omitted). The doubt in the minds of jurors must be reasonable. State v. Bennett, 161 Wash.2d 303, 308, 165 P.3d 1241 (2007).

There was no reasonable doubt that Mr. Buche knowingly possessed methamphetamine because the methamphetamine was in a baggie in his wallet and the wallet was on his person. RP at 237; 253-54. When officers arrested Mr. Buche, his wallet was on his person; it was not in a dresser, in a car, or even in someone else’s pocket. RP at 237, lines 7-14; 253-54. The initial search of Mr. Buche did not include a search of his wallet. RP at 255, lines 16-22. It was only when the officers secured the situation, due to the threat of Mr. Buche’s brother, that the officers had the chance to conduct a more thorough search of Mr. Buche. RP at 253, lines 18-26. Once the officers were able to conduct a more thorough search, they found the wallet and the ziplock baggie of methamphetamine. RP at 255, lines 16-22. The ziplock baggie of methamphetamine was located in the main pouch of the wallet. RP at 239, line 7. The arresting officer noted, “[y]ou could see – and, clearly see in there, there’s like a crystal residue substance there.” RP at 239, lines 7-8. The arresting officer seized the baggie of

methamphetamine as evidence, and entered the baggie into the State Patrol Evidence System. RP at 239, lines 13-15. The arresting officer requested that the ziplock baggie be tested for a controlled substance. RP at 242, lines 19-22. Ms. Jennifer Allen of the Washington State Patrol Crime Laboratory tested the baggie and found that the baggie contained methamphetamine. RP at 271, lines 8-11.

On appeal, Mr. Buche claims that “Mr. Buche never stated he knew the bag contained drugs.” Brief of Appellant at 15. Mr Buche never stated he knew the bag contained drugs because Mr. Buche did not testify. Even if he had testified and denied knowing that he had wedged a baggie of methamphetamine in his wallet, the jury’s verdict should stand because a defendant’s in-court confession is not necessary to find a defendant guilty.

Had Mr. Buche testified and claimed that someone other than he had placed the baggie of methamphetamine in his wallet, he would not be the first to so claim. In State v. Horrace, defendant Ronald Horrace was found to be in possession of methamphetamine. State v. Horrace, 144 Wash.2d 386, 390, 28 P.3d 753, 756 (2001). The methamphetamine was located in his wallet and was discovered by the arresting officer when the officer searched Mr. Horrace’s person. Id. Mr. Horrace claimed that the methamphetamine was not his and his theory to the jury was that “...the

driver had slipped the methamphetamine into his wallet as it lay open in his lap.” Id. at 391. The jury responded with a verdict of guilty as charged. Id.

Mr. Buche is at an even greater factual disadvantage than Mr. Horrace was. Unlike Mr. Horrace, Mr. Buche was alone in the patrol vehicle, prior to the discovery of Mr. Buche’s wallet and his baggie of methamphetamine. RP at 253-54. Unlike Mr. Horrace, Mr. Buche didn’t have anyone to blame and couldn’t claim that someone had slipped the baggie into his wallet.

Based on the facts and common sense, it likely was not difficult for the jury to find Mr. Buche guilty of possession of a controlled substance. Even if the jury instruction had omitted a necessary element, the error would have been harmless because the State proved that Mr. Buche knew the baggie in his wallet contained methamphetamine. The State submitted sufficient evidence; the jury’s verdict should be left undisturbed.

3. Mr. Buche claims RCW 69.50.4013 is unconstitutional because it does not contain a mens rea element.

RCW 69.50.4013 is constitutional. Our courts have examined Mr. Buche’s argument before and have rejected the same.

Statutes are presumed to be constitutional, and the party challenging the constitutionality of a statute must prove its unconstitutionality beyond a reasonable doubt. State v. Schmeling, 191 Wash.App. 795, 798, 365 P.3d

202, 206 (Div. II, 2015) (see also State v. Muse, 197 Wash.App. 1042 (Div. III, 2017) (unpublished opinion; See WA GR 14.1(a)).

The Fourteenth Amendment to the United States Constitution prohibits the state from depriving a person of liberty, without due process of law. RCW 69.50.40134 does not violate due process, simply because it is a strict liability crime. Id. at 801.

“Strict liability crimes—crimes with no mens rea requirement—do not necessarily violate due process.” Id. “There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition.” Id. “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.” Id. (citing State v. Bradshaw, 152 Wash.2d 528, 532, 98 P.3d 1190 (2004)). “Our Supreme Court twice has directly addressed whether the elements of possession of a controlled substance under prior versions of RCW 69.50.4013 contain a mens rea element. Id. (citing Bradshaw, 152 Wash.2d 528, 98 P.3d 1190 and Cleppe, 96 Wash.2d 373, 635 P.2d 435 (1981)). “In both cases, the court held that the legislature deliberately omitted knowledge and intent as elements of the crime and that it would not imply the existence of those elements. Id. (citing Bradshaw, 152 Wash.2d at 534–38; Cleppe, 96 Wash.2d at 380–81). Division II completed its review in Schmeling by

stating, "...given our Supreme Court's repeated approval of the legislature's authority to adopt strict liability crimes and the express findings in *Bradshaw* and *Cleppe* that the possession of controlled substances statute contains no intent or knowledge elements, we do not find Schmeling's authority persuasive." Id. at 802.

Schmeling offered citation to other jurisdictions which have held that strict liability possession crimes are unconstitutional; the Court of Appeals was unpersuaded by both cases. Id. (see United States v. Wulff, 758 F.2d 1121, 1125 (6th Cir., 1985) (holding that Congress should have imposed a scienter requirement for violation of the Migratory Bird Treaty Act); (State of Louisiana v. Charley Brown, Jr., 398 So.2d 48, 51 (1980) (holding that the Louisiana version of the Uniform Controlled Substances Act should contain a scienter requirement).

Mr. Buche presents Schmeling's argument, now with more caselaw, which he hopes will persuade this Court. Brief of Appellant at 12. However, simply saying 'more jurisdictions have invalidated strict liability drug possession crimes' does not undermine the solid and tested rationale of our Supreme court in Bradshaw and Cleppe. Popularity arguments and laws do not mix well in our Republic or our State. This Court should hold that RCW 69.50.4013 does not violate due process.

VII. CONCLUSION

For the reasons stated above, the State respectfully requests that the Superior Court's decisions be affirmed, Mr. Buche's conviction be upheld, and that Mr. Buche's appeal be denied.

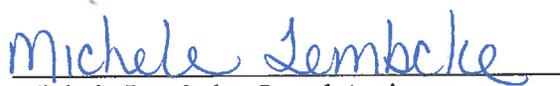
DATED this 5th day of August, 2019.



Will Ferguson, WSBA 40978
Special Deputy Prosecuting Attorney
Office of the Stevens County Prosecuting Attorney

Affidavit of Certification

I certify under penalty of perjury under the laws of the State of Washington, that I electronically filed a true and correct copy of the Brief of Respondent to the Court of Appeals, Division III, and e-mailed a true and correct copy to Travis Stearns, Washington Appellate Project, 1511 Third Avenue, Suite 610, Seattle, WA 98101 on August, 5, 2019.



Michele Lembcke, Legal Assistant
for Will Ferguson

STEVENS COUNTY PROSECUTOR'S OFFICE

August 05, 2019 - 4:13 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36437-2
Appellate Court Case Title: State of Washington v. Camren Jay Buche
Superior Court Case Number: 18-1-00038-1

The following documents have been uploaded:

- 364372_Briefs_20190805161219D3541207_2858.pdf
This File Contains:
Briefs - Respondents
The Original File Name was brief of respondent.pdf

A copy of the uploaded files will be sent to:

- greg@washapp.org
- mlembecke@co.stevens.wa.us
- trasmussen@stevenscountywa.gov
- travis@washapp.org
- wapofficemail@washapp.org
- will.ferguson208@gmail.com

Comments:

Sender Name: Michele Lembcke - Email: mlembecke@co.stevens.wa.us

Filing on Behalf of: Will Morgan Ferguson - Email: will.ferguson208@gmail.com (Alternate Email:)

Address:

215 S. Oak Rm 114

Colville, WA, 99114

Phone: (509) 684-7500 EXT 3145

Note: The Filing Id is 20190805161219D3541207