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No. 96354-1

NO. 76758-5-1

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

STATE OF WASHINGTON,

Respondent,

v.

A.M.,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Was the trial evidence sufficient to convict the defendant of possession of a controlled substance, where she asserted the affirmative defense of unwitting possession?

2. The defendant claims that signing a property sheet form at booking constituted a compelled statement of self-incrimination. Has that issue been preserved for review?

3. Does the possession of a controlled substance statute violate due process?

II. STATEMENT OF THE CASE

Kent Caldwell has been a loss prevention manager at Goodwill for eleven years. He watches for shoplifting and theft, and provides security. On October 24, 2015, he was working at the downtown Everett Goodwill store. This included watching closed circuit security which uses 32 cameras to record the location from a variety of angles. Caldwell can move, focus and zoom in different cameras when something appears askew. RP 23-25.

Caldwell became focused on the suspicious activity of three females acting together. The group consisted of two juvenile females (including defendant A.M.) and an adult female. Caldwell observed the adult female put two Halloween costumes in a cart.

A.M. then looked around before removing the hangars from the items, and concealing the costumes inside a backpack in the shopping cart. A.M. was the only one of the three observed opening the backpack, manipulating the backpack and putting anything into the backpack. RP 26-28; Ex. 1. (Security camera video).

After A.M. secreted the merchandise into the backpack, she and the other juvenile walked to the front door. A.M. then took the backpack out of the cart and put it on her back. She exited the store without paying for the merchandise she hid inside the backpack. Caldwell observed this on the security cameras as the adult female continued shopping. RP 29, 47.

Caldwell went outside and contacted A.M. He identified himself and detained A.M. for theft. He removed the backpack from her body. He brought A.M. to the manager's office inside the store, accompanied by a witness coworker. Caldwell recovered the costumes A.M. stole from inside her backpack. A.M. was arguing and uncooperative to such a degree that Caldwell called the police. A.M. refused to cooperate or even sit down until the police arrived a few minutes later and arrested her. Caldwell trespassed her from the store and took her picture. Her picture was taken from the side

because she refused to cooperate or sit down. RP 29-34, 53; Ex. 2 (Photos and trespass notice).

Officer Worthington has 22 years' experience in law enforcement. He arrived within a few minutes of the incident being called in. Worthington contacted A.M. at the manager's office. He placed her under arrest for theft of the costumes. Worthington searched the defendant incident to arrest. He located a lighter in her pocket, along with a cell phone and a folded up dollar bill. In the backpack A.M. was wearing, Worthington found a pill bottle with baggies inside. One baggy contained a crystal like substance which Worthington recognized from training and experience to be methamphetamine¹. A.M. was then arrested for possession of a controlled substance and also third degree theft. RP 58, 62-64, 74.

A.M. was transported to the Denney Juvenile Justice Center (DJJC). All of A.M.'s property went with her when she was booked into DJJC, including the backpack she was wearing when detained outside Goodwill. DJJC records custodian Ashley Thomas described the intake process at booking. All property a juvenile brings with them at intake is itemized and recorded. This includes

¹ Officer McLauchlan arrived on scene and field tested the substance from the backpack as confirmed methamphetamine. RP 72.

any items on their person, like the clothes they are wearing. RP 87-89, 91.

The juvenile and the intake staff member fill out and review a property form called the Snohomish County Juvenile Detention Services property sheet. The juvenile fills out the form and signs it upon arriving at booking. There is a similar process on release, whereby the juvenile changes into their street clothes, and again reviews their property sheet. The juvenile signs out for any items they were booked in with in order to ensure they are leaving with all of their own property. The intake and exit process are both recorded on this same form. The form typically records personal property brought in such as clothing, personal items, money and medication. RP 87-91; Ex. 3.

A.M. property sheet listed the items she had at booking. These included the black shirt, black pants, a black jacket, purple socks, and black shoes she was wearing. She had \$11 in cash, a lip ring and the backpack she wore at Goodwill. No wallet or ID was present. A.M. signed a statement on the form which said: "I have read the above accounting of my property and money and find it to be accurate. I realize that property not claimed within 30 days will

be subject to disposal." A.M. signed the property sheet at 20:40 pm on October 24, 2015.

A.M.'s was released to her father the next day. He was there when A.M. signed the same property sheet and acknowledged receiving the above listed property. She signed this at 4:15 pm on October 25, 2015. Ashley Thomas confirmed the release form is signed only with the juvenile sitting present along with the adult picking them up. One purpose is to ensure the defendant leaves with all the property they came in with. Another purpose is to avoid any misunderstanding or loss of property. RP 94-95.

If a defendant disagrees with the listed inventory or refuses to sign the sheet, that is noted on the form. If they refused to take their property out with them at release, then that is also noted and the parent or adult picking them up is informed. At A.M.'s adjudicated hearing, her attorney conceded that her property sheet was admissible as a business record. The court also ruled it relevant. The property someone comes in with at booking is theirs unless a third party or law enforcement provides information that it belongs to someone else. RP 95-98, 103.

At the adjudicated hearing, the parties stipulated that the substance recovered from the backpack A.M. wore was

methamphetamine. CP 50. The stipulation included that neither party requested DNA or fingerprint testing of the packaging, baggies, or bottle the methamphetamine was found in. Id. Mr. Caldwell, Officers Worthington and McLaughlin and Ashely Thomas testified for the State. RP 22-104. Defendant A.M. testified on her behalf.

A.M. testified she went to the Goodwill that day to steal. She identified the other juvenile present as her best friend "Augustina." She said the adult female with them was Augustina's mother. A.M. claimed that she did not know the name of her best friend's mother. The defendant said the three went to Goodwill to steal costumes. A.M. thought her best friend's mother may have been under the influence because A.M. saw her drink beer on the way to Goodwill. RP 107, 109, 115.

A.M. said she only remembered "bits and pieces" of what occurred at Goodwill when she was arrested for a felony. She was not sure, but thought maybe the backpack belonged to Augustina or her family. A.M. admitted she intentionally stole the items from Goodwill. She knew they were in the backpack she wore out of the store. When her attorney asked, "Now when you walked out of the

store, did you know the items were in your backpack," A.M. replied yes. RP 108-109, 115.

A.M. testified she just could not recall whether she wore the backpack when the three entered the store. She stated that she does not have a very good memory in general. A.M. confirmed that she was angry at Caldwell for stopping her, despite her intentional stealing. She testified that she could not remember how much money she had on her the day of the theft, although she had \$12 on her when she stole \$12 worth of merchandise. She was able to remember having her phone, the money and a lighter on her. She said she took the backpack when released to her father from DJJC because she thought it belonged to her friend or the friend's family. RP 112-114.

III. ARGUMENT

A. THE EVIDENCE WAS MORE THAN SUFFICIENT TO PROVE THAT THE DEFENDANT POSSESSED METHAMPHETAMINE.

1. Standard Of Review.

Due process requires the State to prove beyond a reasonable doubt all elements of the crime charged. State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995), citing In re Winship, 297 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Where a defendant bears the burden of proving an affirmative

defense, the standard of review on appeal is whether any rational trier of fact could have found that the defendant failed to prove the defense by a preponderance of the evidence. State v. Lively, 130 Wn.2d 17, 921 P.2d 1035 (1996).

JuCR 7.11 requires the court to hold an adjudicatory hearing on the allegations in the information. After a finding of guilty or not guilty, the court shall state its findings of fact and enter its decision on the record. JuCR 7.11(c). The findings shall include the evidence relied upon in reaching its decision. Id. In cases that are appealed, the court must enter written findings and conclusions which state the ultimate facts for each element of the crime charged and the evidence relied on in reaching its decision. JuCR 7.11(d).

Review examines whether substantial evidence supports the trial court's findings of fact, and whether the findings support the conclusions of law. State v. B.J.S., 140 Wn. App. 91, 97, 169 P.3d 34 (2007). Unchallenged findings of fact are verities on appeal. State v. Alvarez, 105 Wn. App. 215, 220, 19 P.3d 485 (2001). Challenged findings that are supported by substantial evidence are also binding on appeal. State v. E.J.J., 183 Wn.2d 497, 514-15, 354 P.3d 815. (2015). Conclusions of law are viewed de novo. State v. A.M., 163 Wn. App. 414, 260 P.3d 229 (2011). Where the evidence

is sufficient to support an adjudication of guilt, but the court's findings are deficient, the appellate court will remand for revision of the findings. State v. Ware, 111 Wn. App. 738, 46 P.3d 280 (2011).

2. The Evidence Supported The Trial Court's Determination That A.M. Possessed Methamphetamine.

RCW 69.50.401 makes it a felony to possess a controlled substance in Washington. Methamphetamine is a controlled substance. RCW 69.50.206(d)(2). The elements of the crime which the state has to prove are 1) the nature of the substance and 2) the fact of possession. State v. Bradshaw, 152 Wn.2d 528, 537-38, 98 P.3d 1190 (2004). Possession of a controlled substance is a strict liability crime. Id. There is no mens rea or element of guilty knowledge required to convict under RCW 69.50.401. State v. Bailey, 41 Wn. App. 724, 706 P. 2d 229 (1985). A defendant who asserts the affirmative defense of unwitting possession bears the burden of proving the defense by a preponderance of the evidence. State v. Balzer, 91 Wn. App. 44, 67, 954 P.2d 931 (1998).

The trial court here entered written findings of fact and conclusions of law. CP 37-38. The defendant assigns error to only one specific finding of fact- finding number 1. Brief of Appellant (BOA) at 2. That finding states that the incident occurred on

October 24, 2016. The date is clearly a scrivener's error, because the conclusions of law correctly note twice that the correct date was October 24, 2015. CP 37-38. Additionally, each of the State's witnesses testified to the date of violation as October 24, 2015. RP 23-25, 58, 72, Ex. 2, Ex. 3, Ex. 4. Thus the record contains substantial evidence to support the court's conclusions of law regarding the date, regardless of the scrivener's error in the sole challenged finding.

The defendant does not assign error to any other specific finding of fact here. Instead, she refers to "the trial court's findings of fact" and "these findings" generally as not supporting the conclusion of law that A.M. failed to prove her burden regarding unwitting possession. BOA at 14, 15.

RAP 10.3(g) requires a separate assignment of error for each finding of fact a party asserts was improperly made, and a reference to the finding by number. A general assignment of error to the "findings of fact" is insufficient under the rule. State v. Roggenkamp, 115 Wn. App. 927, 943, 64 P.3d 92 (2003). Where the assignments of error to the court's findings of fact fail to comply with RAP 10.3(g), the trial court findings become verities on appeal. Id. Appellate review is then limited to determining whether the

findings support the court's conclusions of law and judgment. Id. at 944.

The logic of Roggenkamp regarding the failure to comply with RAP 10.3(g) should result here in the trial court's findings of fact being the established facts of this case. Additionally, the findings are supported by substantial evidence. Substantial evidence is evidence that is sufficient to persuade a fair minded person of the truth of the assertion. State v. Homan, 181 Wn.2d 103, 106, 330 P.3d 182 (2004).

The testimony of Kent Caldwell and the security video from Goodwill clearly demonstrate that A.M. went to that store on October 24, 2016 with two other persons. The three were acting suspicious, staring at the security cameras, trying to block the cameras view at times. A.M. pushed a shopping cart with a backpack in it through the store. Caldwell observed a person with A.M. put merchandise in the cart. He then observed A.M. take that merchandise and hide it inside the backpack. RP 23-28, Ex. 1. This evidence supports the court's findings of fact 1, 2, 3, and 4.

Caldwell watched A.M. and the other juvenile with her walk to the front door. A.M. picked up the backpack and put it on. A.M. wore the backpack on her body as she exited the store without

paying for the merchandise she concealed inside. From the entire time inside Goodwill until she exited the store, A.M. was the only person seen touching the backpack, opening the backpack, putting things in the backpack, handling the backpack or wearing the backpack. RP 26-29, 47, Ex. 1. This substantial evidence supports findings of fact 5 and 7.

Caldwell contacted A.M. outside the store. He identified himself and detained her for theft. Caldwell removed the backpack A.M. was wearing and took her back inside. A.M. was so argumentative and uncooperative that Caldwell called the police. Officer Worthington arrived in a couple of minutes. He arrested A.M. for theft and searched her incident to arrest. In the backpack that A.M. alone manipulated, handled, opened and wore, Worthington located a pill bottle hiding a baggy of methamphetamine. The parties stipulated at trial that the substance was in fact methamphetamine. The merchandise A.M. stole was also recovered from the backpack she was wearing. RP 58, 62-64, 74. This substantial evidence supports findings of fact 6 and 8.

Possession of a controlled substance may be either actual or constructive. Actual possession occurs when a defendant has physical custody of the item. State v. Hathaway, 251 P.3d 253, 161

Wn. App. 634 (2011). Constructive possession is proved where the defendant has dominion and control over the drugs or the premises in which they are located. State v. Callahan, 459 P.2d 400, 77 Wn.2d 27 (1969), State v. George, 146 Wn. App. 906, 920, 193 P.3d 693 (2008). One characteristic of the act of possession of a controlled substance is the exclusion of others. State v. Edwards, 514 P.2d 192, 9 Wn. App. 688 (1973).

A.M. here was the only person seen by witnesses and on security video handling, using and wearing the backpack. Concerns of officer safety and evidence preservation are present whenever an officer makes an arrest. Virginia v. Moore, 533 U.S. 164, 176-77, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008). Courts have long held that search of an arrested person is not limited to his body alone but also his clothing and personal effects possessed at the time of or immediately preceding arrest. State v. Byrd, 178 Wn.2d 611, 621-23, 310 P.3d 793 (2013) (purse in arrestee's lap validly searched as part of her person).

The established authority regarding such searches and related issues like the time of arrest rule recognize that personal items are often so closely associated with an individual that searching the item constitutes a search of the person. Id. This

includes backpacks. See State v. Ellison, 172 Wn. App. 710, 291 P.3d 921 (2013) (affirming defendant had possession of backpack at his feet when arrested); State v. Brock, 184 Wn.2d 148, 355 P.3d 1118 (2015) (backpack part of defendant's person at time of arrest); State v. MacDicken, 179 Wn.2d 936, 938-39, 942, 319 P.3d 31 (2014) (affirming luggage and bags carried by defendant when arrested were part of his person).

Applying the underlying principle of those cases, A.M. had actual possession of the backpack here. She alone handled it. She alone opened it. She alone hid items inside it. She alone wore it on her body. She alone was wearing it on her body when contacted by Mr. Caldwell. A.M. had actual physical custody of the backpack, as shown in part by her ability to exclude others from accessing the backpack and its contents from others. Because A.M. had actual physical custody of the backpack, she also had actual possession of the methamphetamine inside the backpack.

For the reasons above, A.M. additionally had clear dominion and control over the backpack and its contents. No one else handled it, used it, or put things in it except A.M. She was the only person wearing the backpack. The defendant did not have mere proximity to the methamphetamine in the backpack she wore.

Instead, the evidence demonstrated other circumstances linking the backpack and its contents to her alone. A.M. alone hid stolen items in the backpack. She alone handled it, opened it and wore it on her body. Witness testimony and security video both showed A.M. and only A.M. having dominion and control of the backpack. She therefore had constructive possession of the methamphetamine inside as well.

The aforementioned findings of the trial court support its conclusions of law that the defendant possessed methamphetamine on the date of violation. The findings support that A.M. had both actual and constructive possession under the evidence and the totality of the circumstances proved at trial.

3. The Trial Court Correctly Concluded That The Defendant Failed To Meet Her Burden Of Proving Unwitting Possession.

Unwitting possession is an affirmative defense that the defendant must prove by a preponderance of the evidence. State v. Deer, 175 Wn.2d 725, 735, 287 P.3d 539 (2012). A.M. testified she went to Goodwill that day to steal. She could not say who the backpack belonged to but said it was not hers. She could not recall whether she wore the backpack into the store. She testified to not knowing the drug was in the backpack. She acknowledged having a

bad memory. She remembered only "bits and pieces" of what happened the day of her felony arrest. She did not know the name of her best friend's mother, although she said they went to Goodwill together. RP 107-112.

The trial court found the defendant failed its burden of proving unwitting possession. The question on review is whether, considering the evidence in the light most favorable to the State, any rational trier of fact could have found that the defendant failed to prove unwitting possession by a preponderance of the evidence. Lively, 130 Wn.2d at 1043.

A.M. here conceded going to Goodwill to commit a crime of dishonesty. She was the only person having any control over the backpack. She may have arrived at the store wearing the backpack, she was unsure of that. She called no witnesses to corroborate the backpack belonged to anyone but her. She alone put things in it. She alone wore it. When contacted by Caldwell for stealing, A.M. refused to cooperate and was argumentative to the point Caldwell called police. Taking the evidence in the light most favorable to the State, this presents circumstantial evidence that her reaction was disproportionate for intentional stealing. She may

have reacted strongly because she knew the backpack Caldwell removed from her person would incriminate her for more than theft.

The backpack which A.M. alone manipulated and wore on her body had no identification in it. Nor did A.M. have any identification on her. A.M. was also booked on a warrant, and Officer Worthington testified that persons not wanting to be located will often not carry identification on them. RP 68-69. A.M. had a lighter on her person, but no cigarettes. A reasonable inference to make was that the lighter could be used to smoke the methamphetamine in the backpack she alone wore.

The defendant appears to equate a statement of not knowing the methamphetamine was there to proving her affirmative defense. That is not correct. Rather, the question is whether any reasonable trier of fact could determine she failed to prove the defense, taking all the evidence from trial in the light most favorable to the State.

The court was correct to find the defendant failed to prove her affirmative defense. Noteworthy here, the defense saw its main theory as general denial and not unwitting possession. Defense counsel did not put the State on notice of the affirmative defense, stating pretrial: "I mean to me, my theory essentially is that she

never possessed the substance. But if the court wants to consider unwitting possession and put the burden on me, I guess the court has the ability to do that.” After the State noted that the defense needed to be affirmatively pled and proven did the defendant decide to add unwitting possession as a defense. In closing argument the defense counsel reiterated a blasé position on the affirmative defense: “Quite frankly your honor, I don’t think I need it. I don’t think my case breaks in that direction. But what does it hurt to have the instruction or have the court consider it?” RP 7-9, 116.

Proving the affirmative defense admits that the defendant committed the crime, but seeks to excuse the unlawful conduct. State v. Buford, 93 Wn. App. 149, 152, 967 P.2d 548 (1998). Here, A.M.’s theory of the case was she did not possess the methamphetamine at all. Unwitting possession requires proving either she did not know the substance she possessed was methamphetamine, or did not know she possessed the substance. A.M. instead focused on denying there was any possession at all. RP 119-121. The primary defense theory was not that A.M. unwittingly possessed methamphetamine, but instead that there was no possession.

Taking the entire evidence in the light most favorable to the State, the trial court was correct in concluding that A.M. failed to prove unwitting possession. The reviewing court defers to the trial court on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). The trial court considered the affirmative defense but found the defendant failed to meet her burden of proof. The courts findings and conclusions here were correct in determining that A.M. failed to meet her burden of proving the affirmative defense.

B. THE BOOKING FORM ISSUE HAS NOT BEEN PRESERVED FOR REVIEW.

The defendant argues that the trial court should have suppressed her signature agreeing to the property she was booked with because it was an improperly compelled statement of self-incrimination. She did not move to suppress the “statement” on this basis at trial.² Generally appellate courts will not consider issues raised for the first time on appeal. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The rule is designed to encourage efficient use of judicial resources by ensuring that a trial court has

² The defense did object to that evidence for lack of relevance. RP 97-98.

an opportunity to correct any errors, and thereby avoid unnecessary appeals. State v. Hamilton, 179 Wn. App. 870, 878, 320 P.3d 142 (2014).

An exception applies in the case of “manifest error affecting a constitutional right.” RAP 2.5(a)(3). A party seeking review of an otherwise unpreserved claim of error must demonstrate that the error is truly of constitutional dimension and show how the alleged error actually affected his rights at trial. State v. O’Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Error is “manifest” if the defendant shows the error actually prejudiced him. McFarland, 127 Wn.2d at 333. An appellant shows he was actually prejudiced if the asserted error had a practical and identifiable consequence in the trial of the case. State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” McFarland, 127 Wn.2d at 333.

But even manifest constitutional error is subject to harmless error analysis. It is harmless if the court is convinced beyond a reasonable doubt that the verdict would have been the same absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

The general rule is that routine booking questions are not considered interrogation which violates Miranda. State v. Wheeler, 108 Wn.2d 230, 238, 737 P.2d 1005 (1987). These routine questions are not likely to elicit an incriminating response. Id. Where a defendant in custody has validly invoked his right to remain silent, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response. Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed. 297 (1980).

Innis was arrested for robbery and murder charges involving an unrecovered shotgun. He was Mirandized and invoked his right not to speak without a lawyer. Two police officers transporting Innis to the jail spoke to each other of the danger that a child would find the missing shotgun. Innis interrupted the officers, saying he wanted to be driven to where the gun was located so that no children would be hurt. Innis moved to suppress his statements at trial as violating his Miranda rights. Rhode Island v. Innis, 446 U.S. at 293-303.

The U.S. Supreme Court rejected Innis' argument, finding there was no express questioning or functional equivalent of

questioning involved. Id. at 303. The court held that there was no reason the officers should have known that their conversation was reasonably likely to elicit an incriminating response from Innis. Id. The court noted that nothing in the record showed the officers should have known Innis was susceptible to an appeal to child safety. Nothing in the record suggested that police knew Innis was emotional or upset. No “lengthy harangue” of Innis was involved. Id. Nothing in the record supported Innis contention that under the circumstances of the case, the officer’s comments were particularly evocative. Id.

Like that case, the defendant here makes multiple assertions unsupported by the record. Nothing in the record indicates that the staff member filling out A.M.’s inventory property sheet had any idea that the backpack was somehow incriminating to her. The record contains nothing to show the staff member involved knew that methamphetamine was found in the backpack. The record is silent as to any information the staff member who filled out the property sheet had. There is nothing in the record to suggest that the backpack was incriminating, any more than the lighter or lip ring or shoes A.M. wore and inventoried. The defendant’s argument that the staff member should have known that signing a routine property

sheet was somehow inviting an incriminating response is unsupported by the record.

The record is equally silent as to whether and when A.M. invoked her Miranda rights. The defendant made a pre-trial motion that the State not comment on A.M.'s right to remain silent. CP 51-52, RP 10-11. The State agreed, saying there were no statements of A.M. to officers that it intended to elicit. The record itself contains no information regarding A.M. invoking her right to remain silent or when this occurred, much less any questions police asked her. This contrasts sharply with the facts of Innis, where that defendant was Mirandized multiple times at various points as documented in the record and capable of being analyzed on review.

The defendant cites State v. Denney, 152 Wn. App. 665, 218 P.3d 633 (2009) to support her position. That defendant was booked on possession of morphine in her purse and other charges. Id. at 667-669. The record documented that arresting Officer Davis remained present at Denney's booking process, where jail staff asked her questions of her drug use in the prior 72 hours. Denney replied that she had used morphine. Davis overheard this. Denney moved to suppress this statement at both a Cr. 3.5 hearing and at trial; but they were admitted. Id. The conviction was reversed on

appeal because the drug use question asked was highly relevant to Denney's charge of possessing morphine, and invited an admission of guilt. Id. at 671-674.

The defendant's reliance on Denney here is unavailing. Unlike that case, the record here shows no questions asked in the presence of the investigating officer. RP 64. The record here shows nothing to support that a staff member filling out a property sheet should have known a backpack was relevant or incriminating. This case involves no questions asked of A.M. The record here contains no question asked by anyone amounting to an admission of possessing methamphetamine.

Rather, inventorying the clothing and items a person arrives with at booking is precisely the kind of routine statement which is admissible, regardless if the information is later considered incriminating. State v. Walton, 64 Wn. App. 410, 414, 824 P.2d 533 (1992).

For the first time on appeal, the defendant claims it was constitutional error to admit Ex. 3, the property sheet which inventories a defendant's possessions when booked. The defendant did not object to this at trial, except solely for lack of relevance.

The general rule is that an appellate court will not consider an alleged error that was not objected to at trial. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). When there is a failure to object, the trial court is deprived of a chance to strike the testimony or give a curative instruction. A failure to object is often tactical. Id. at 934. An unpreserved error typically will not be reviewed. Id. 926.

The State at trial did not give the property sheet in question the outsized importance now ascribed to it by the defendant. The State elicited from Ashley Thomas general information of the booking and intake process. This includes itemizing and recording whatever clothing and personal items are present. The purpose is to ensure that each defendant leaves the facility with all of the personal effects they arrived with. The sheet will also reflect if a defendant disclaims property with them or refuses to sign the sheet. It also notes if someone refuses to take property with them on release. The State asked no questions regarding the backpack. RP 89-97.

By contrast, the defense counsel asked multiple questions regarding A.M.'s backpack. RP 100-102. This included eliciting testimony that the staff views property as staying with whoever

brought it in, as opposed to owned by that person. Counsel asked if "Dan Smith" was booked with a backpack that had the name "Bart Simpson" on it, would the staff ensure the backpack left with "Dan Smith?" Mr. Thomas agreed it would. Defense counsel also elicited that "her backpack" meant the one A.M. came in with, and not implying her ownership of the backpack. RP 100-104.

This line of questioning shows that defense counsel made a deliberate tactical choice in not objecting to Ex. 3 being admitted. He used the exhibit strategically to demonstrate that signing a form of what A.M. brought in at booking was completely different than any claim of her ownership of the backpack. The record clearly demonstrates that it was the defendant and not the State that elicited repeated testimony of the backpack related to the booking process.

The same was true of questions posed to A.M. Her attorney asked multiple questions on direct of the backpack. He elicited the testimony that she "could not recall" wearing it into Goodwill. He asked her if booking returned it to her on release. He asked her why she took the backpack she signed for on release if it didn't belong to her. In contrast to her attorneys numerous questions regarding the backpack, the State asked none except a clarifying

question on cross that she testified to not recalling if she wore it into the store. RP 107-111, 115.

The record shows that the defendant not only failed to object to the now claimed error regarding the property sheet. It also shows that was the defense counsel who focused repeatedly on the role of the backpack in the booking process and A.M. taking it as her own on release. This court should not consider the issue now raised because the defendant failed to preserve the issue and could have easily allowed the trial court to correct an error it truly contested.

The defendant also fails to establish the necessary prejudice to justify review because the evidence of possession was overwhelming without the property sheet. A.M. was observed by witnesses to be the only person handling the backpack, opening it and hiding stolen property inside it. A.M. was the only person observed wearing the backpack. A.M. was wearing the backpack when Kent Caldwell physically removed it from her body. Her possession of the backpack and the methamphetamine inside was proven based on this uncontroverted evidence. It was also demonstrated on security video admitted at trial.

The above evidence of possession did not rely in any way on the property sheet information. The trial court explicitly stated that it

found A.M. had possession of the methamphetamine in the backpack based on her wearing it and handling of it at Goodwill. The Court made clear possession was proven by that part of the incident to when Kent Caldwell detained A.M. The court specifically stated that it was not focused on the booking related part of the evidence, that it was not a big factor. RP 134-35.

Given that evidence and the trial court's stated basis for finding possession, the defendant cannot show that the property sheet issue made a difference in the outcome of the case. The defendant fails to show manifest constitutional error that actually prejudiced her at trial. It was not error to admit the property sheet here, and if there was error it was harmless for the reasons above.

C. SETTLED AUTHORITY HOLDS THAT RCW 69.50.4013 DOES NOT VIOLATE DUE PROCESS.

The defendant asserts that RCW 69.50.4013 violates due process by lacking a mens rea element, and also shifts the burden of proof. BOA 28-37. This assertion contradicts decades of settled authority. Constitutional challenges are reviewed de novo. In re Welfare of A.W., 182 Wn.2d 689, 701, 344 P.3d 1186 (2015). Statutes are presumed constitutional. Id. The challenger bears the

heavy burden of convincing the court beyond a reasonable doubt that the statute is unconstitutional. Id.

Strict liability crimes do not necessarily violate due process. Lambert v. California, 355 U.S. 225, 228, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957), State v. Schmeling, 191 Wn. App. 795, 799, 365 P.3d 202 (2015). Legislatures have broad authority to define a criminal offense and exclude knowledge as an element. Id. The Washington State Supreme Court has repeatedly affirmed that the legislature has the authority to create strict liability crimes which require no culpable mental state. Bradshaw, 152 Wn.2d at 532; State v. Anderson, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000); Deer, 175 Wn.2d at 735.

The defendant fails to appreciate that our Supreme Court has explicitly rejected this constitutional challenge to the statute at least twice. Bradshaw, 152 Wn.2d at 534-537, State v. Cleppe, 96 Wn.2d 373, 379-80, 635 P.2d 435 (1981). Both times the court concluded that the legislature intentionally and deliberately omitted a mens rea element from the statute. Id. The court also held that it would not infer an implied knowledge requirement where legislative intent was absolutely clear. Bradshaw, 152 Wn.2d at 534-38,

Cleppe, 96 Wn.2d at 380-381. See also State v. Staley, 123 Wn.2d 794, 799, 872 P.2d 502 (1994).

The Bradshaw Court rejected the argument A.M. repeats here that the statute be read to require a mens rea element because other states do. Bradshaw, 152 Wn.2d at 534-535. The court reviewed the legislatures' deliberate and intentional deletion of "knowingly and intentionally" from the model uniform act. The legislature is authorized to enact a statute which deletes language from a model uniform act. State v. Jackson, 137 Wn.2d 712, 723, 976 P.2d 1229 (1999).

The defendant's assertion (BOA at 32-33) that "the offense of possession of a controlled substance has traditionally required the State to prove knowledge" ignores that simple possession in Washington has not contained a mens rea element. The 1981 Cleppe decision reviewed this history, noting: "This court's cases decided under the prior statute, the uniform narcotic act, rather uniformly held that neither "intent" nor "guilty knowledge" was a required element of the crime of simple possession of a narcotic drug." Cleppe, 96 Wn.2d at 377-380. See State v. Henker, 50 Wn.2d 809, 314 P.2d 645 (1957); State v. Boggs, 57 Wn.2d 484 358 P.2d 124 (1961).

The defendant's citation to a federal district court case involving an Arizona child molestation statute is unpersuasive. The issue there was claimed burden shifting when lawmakers eliminated the existing sexual motivation element and replaced it with an affirmative defense burden of disproving sexual motivation. May v. Ryan, 245 F. Supp.3d 1145 (D. Ariz. 2017). In contrast, the challenged statute here has not been changed to lessen the state's burden or require the defendant to disprove any element.

A.M. claims that the affirmative defense of unwitting possession shifts the burden to the defendant. Long settled authority has rejected this claim. The State has the burden of proving the elements of the nature of the substance and the fact of possession. Staley, 123 Wn.2d at 798. A defendant can prove the affirmative defense of unwitting possession. Id. The affirmative defense ameliorates the harshness of a strict liability crime. Cleppe, 96 Wn.2d at 380-381. It does not improperly shift the burden of proof. Bradshaw, 152 Wn.2d at 538.

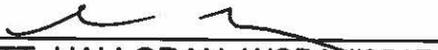
For the forgoing reasons, the defendant's constitutional challenge to the statute fails.

IV. CONCLUSION

For these reasons, the State respectfully requests this Court to affirm the defendant's conviction.

Respectfully submitted on March 26, 2018.

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Attorney for Respondent

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

THE STATE OF WASHINGTON,

Respondent,

v.

A.M.,

Appellant.

No. 76758-5-I

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 26th day of March, 2018, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Washington Appellate Project; wapofficemail@washapp.org; richard@washapp.org;

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

Dated this 26th day of March, 2018, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office