

FILED
Court of Appeals
Division I
State of Washington
7/18/2018 4:50 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
7/23/2018
BY SUSAN L. CARLSON
CLERK

Supreme Court No. _____
(COA No. 76933-2-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

M.F.,

Petitioner.

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

PETITION FOR REVIEW

TIFFINIE MA
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711
tiffinie@washapp.org

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES..... ii

A. IDENTITY OF PETITIONER AND DECISION BELOW 1

B. ISSUES PRESENTED FOR REVIEW..... 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT 5

1. This Court should address whether a juvenile’s credible, uncontroverted testimony regarding his unwitting possession of marijuana negates knowledge..... 5

2. Review should be granted to determine whether the trial court misapprehended the law when it required M.F. to prove marijuana was placed on his person without his knowledge. .. 8

3. This Court should grant review to determine whether requiring an accused to prove unwitting possession deprives him of liberty without due process of law. 10

a. The presumption of innocence is fundamental and due process requires the State to prove every element of an offense beyond a reasonable doubt. 10

b. The possession statute unconstitutionally shifts the burden of proving lack of knowledge to the defendant. 11

E. CONCLUSION 18

TABLE OF AUTHORITIES

United State Supreme Court Cases

Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) 12

Coffin v. United States, 156 U.S. 432, 15 S. Ct. 394, 39 L.Ed. 481 (1895) 10

Elonis v. United States, ___ U.S. ___, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015) 11

In re Winship, 397 U.S. 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 5, 10, 12

Lambert v. California, 355 U.S. 225, 78 S. Ct. 240, 2 L.Ed.2d 228 (1957) 12

Morissette v. United States, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952) 10

Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) 12

Nelson v. Colorado, ___ U.S. ___, 137 S. Ct. 1249, 197 L. Ed. 2d 611 (2017) 12

Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) 12, 13

Schad v. Arizona, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) 13, 15

United States v. X-Citement Video, Inc., 513 U.S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994)..... 11

Wellness Int’l Network, Ltd. v. Sharif, ___ U.S. ___, 135 S. Ct. 1932, 191 L. Ed. 2d 911 (2015)..... 17

Washington Supreme Court Cases

State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000)..... 11
State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190 (2004) ... 5, 11, 14, 17
State v. Cleppe, 93 Wn.2d 373, 635 P.2d 435 (1981)..... 8
State v. Staley, 123 Wn.2d 794, 872 P.2d 502 (1994) 6, 8
State v. Sundberg, 185 Wn.2d 147, 370 P.3d 1(2016)..... 6

Washington Court of Appeals Cases

Grisby v. Herzog, 190 Wn. App. 786, 362 P.3d 763 (2015)..... 17
State v. Buford, 93 Wn. App. 149, 967 P.2d 548 (1998)..... 5, 6, 10
State v. Schmeling, 191 Wn. App. 795, 365 P.3d 202 (2015) 17
State v. Warfield, 119 Wn. App. 871, 80 P.3d 625 (2003) 12

Decisions of Other Jurisdictions

Dawkins v. State, 313 Md. 638, 547 A.2d 1041 (1988)..... 14
May v. Ryan, 245 F. Supp. 3d 1145 (D. Ariz. 2017) 15, 16
State v. Adkins, 96 So. 3d 412 (Fla. 2012) 14
State v. Bell, 649 N.W.2d 243 (N.D. 2002) 14

Constitutional Provisions

Const. art. I, § 3 5
U.S. Const. amend. XIV..... 5

Statutes

RCW 69.50.204(c)(22)..... 5
RCW 69.50.3014..... 5

RCW 69.50.4013(5) 5

Unif. Controlled Substances Act 1970 § 401(c)..... 14

Rules

RAP 13.4(b)(1)..... 10

RAP 13.4(b)(3)..... 8, 17

RAP 13.4(b)(4)..... 8, 10, 17

A. IDENTITY OF PETITIONER AND DECISION BELOW

M.F. asks this Court to review the opinion of the Court of Appeals in State v. Fuller, No. 76933-2-I. A copy of the opinion is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. Does a juvenile's credible, uncontroverted testimony regarding his unwitting possession of marijuana negate knowledge?

2. Did the trial court misapprehend the law when it required M.F. to prove marijuana was placed on his person without his knowledge?

3. Does Washington's strict liability possession law, which requires defendants to prove the affirmative defense of unwitting possession, deprive M.F. of liberty without due process of law?

C. STATEMENT OF THE CASE

M.F. was a freshman at Blaine High School. RP 26. During his first period weight lifting class, a teacher reported M.F. to the vice-principal, Wayne Vezzetti, because the teacher believed M.F. exhibited an odor of marijuana. RP 27. Mr. Vezzetti dispatched the school security officer, Kelly Freeman, to bring M.F. to his office. RP 27. Upon meeting M.F. at his weightlifting class, Ms. Freeman also noticed

the smell of marijuana on M.F., which she believed came from M.F.'s clothing. RP 16.

Once in the office, Mr. Vezzetti directed Ms. Freeman to search M.F.'s belongings, including his sweatshirt and his backpack. RP 28. M.F. was cooperative throughout the search. RP 51. In M.F.'s sweatshirt, Ms. Freeman located "remnants of marijuana" that she shook out onto Mr. Vezzetti's desk. RP 17. After reaching into M.F.'s backpack, Ms. Freeman found additional remnants of marijuana on her hand. RP 21. Together, the adults placed all of the trace marijuana onto a tissue on Mr. Vezzetti's desk. RP 18. In total, only one hundredth of a gram of marijuana was recovered from M.F. RP 63-64.

Mr. Vezzetti contacted the Blaine Police Department, and Officer Brent Greene responded to the school. RP 29. When he arrived, Officer Greene noticed a "strong pungent odor of marijuana." RP 36. The school employees provided the officer with the tissue from Mr. Vezzetti's desk. RP 42. Officer Greene placed M.F. under arrest and read him his Miranda rights. RP 37, 39. The officer conducted a second search of M.F. pursuant to his arrest which revealed no additional marijuana. RP 46. Officer Greene noted the "odor was stronger than what [they] found on [M.F.]." RP 46.

Officer Greene questioned M.F. during the encounter. RP 38. The officer asked about the substance found on M.F., and the youth replied that “he didn’t realize he still had marijuana on him.” RP 38. M.F. told Officer Greene he had “smoked marijuana three, four days prior” and “didn’t know he still had it on his person.” RP 38. M.F. did not object to Officer Greene’s search or questions; in fact, M.F. even assisted in the search by voluntarily removing items from his pocket and providing them to the officer. RP 50-51. There is no indication M.F. was anything but forthcoming throughout the encounter.

The officer next collected the suspected marijuana and conducted a field test which returned “presumptively positive” for marijuana. RP 39. He packaged the marijuana as evidence and ultimately sent it to the Washington State Patrol (WSP) Toxicology Laboratory for testing. RP 40. The WSP lab results confirmed only that the substance collected on the tissue was consistent with marijuana. RP 59.

At trial, M.F. asserted the affirmative defense of unwitting possession and testified on his own behalf, explaining he did not realize there were trace amounts of marijuana still on his person. RP 73, 76, 84. M.F. testified he had last possessed marijuana approximately a week prior to his arrest, and he believed it was no longer on his person.

RP 78. M.F.'s testimony was uncontroverted, and the State offered no rebuttal witnesses.

After weighing the evidence, the trial court found M.F. had possessed marijuana and had failed to prove unwitting possession by a preponderance of the evidence. RP 102-03. To support this finding, the court stated, "There needs to be, I think, some evidence of a reason or a basis for the Court to find that [the marijuana] got there without [M.F.'s] knowledge." RP 102. The court reiterated, "I need to have something to go on that would indicate that there was some other explanation for it being in his pockets or in his backpack." RP 102. The court found "for the defense to be supported would require the Court to have a basis in that evidence to determine that the marijuana got there without his knowledge." RP 102-03. The trial court did not enter any written findings of fact or conclusions of law. Because the trial court determined M.F. needed to prove how the marijuana came into his possession, the trial court found M.F. failed to prove unwitting possession.

D. ARGUMENT

1. This Court should address whether a juvenile's credible, uncontroverted testimony regarding his unwitting possession of marijuana negates knowledge.

Due process demands the State prove all the elements of a criminal offense beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; In re Winship, 397 U.S. 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Possession of marijuana by a person under the age of twenty-one is unlawful. RCW 69.50.4013(5); RCW 69.50.3014; RCW 69.50.204(c)(22). As construed by this Court, this crime only requires the State to prove the nature of the substance and the fact of possession. State v. Bradshaw, 152 Wn.2d 528, 537-38, 98 P.3d 1190 (2004). The statute does not require the State to prove that the defendant's possession was knowing. Id. It is a strict liability crime.

In light of this, the judiciary has created the affirmative defense of "unwitting possession." Bradshaw, 152 Wn.2d at 538; State v. Buford, 93 Wn. App. 149, 151-52, 967 P.2d 548 (1998). The defendant must prove by a preponderance of the evidence his possession of the substance was unwitting. Buford, 93 Wn. App. at 152. Possession is unwitting if a person did not know the substance was in his possession

or did not know the nature of the substance. State v. Staley, 123 Wn.2d 794, 799, 872 P.2d 502 (1994).

The Court of Appeals relied on Buford and State v. Sundberg, 185 Wn.2d 147, 370 P.3d 1(2016), to hold M.F.’s testimony that he was not aware mere remnants of marijuana remained lodged in his sweatshirt pocket “does not negate knowledge and does not support an inference of unwitting possession.” Slip Op. at 7. But, those cases do not stand for the proposition that such testimony does not negate knowledge, nor should this be the law.

In Buford, the defendant requested an unwitting possession defense instruction, even though he had not testified or presented any evidence regarding unwitting possession. Buford, 93 Wn. App. 150-51. The Court of Appeals held the trial court had not erred in refusing to give the requested instruction because the evidence was insufficient to support the instruction. Id. at 153. Likewise in Sundberg, the issue before this Court did not concern the defendant’s testimony about knowledge. Rather, the issue was whether it was misconduct for the prosecutor to comment on the defendant’s failure to produce an exculpatory witness. Sundberg, 185 Wn.2d at 151-52. Neither of these

cases addressed whether testimony a defendant was unaware of the presence of drugs could negate knowledge.

Here, M.F. testified he was unaware of the presence of remnants of marijuana in his pocket. In its oral ruling, the trial court found M.F. possessed “a hundredth of a gram” of marijuana, and that it was a “very small quantity.” RP 98. The court noted it was M.F.’s uncontroverted testimony “that he told the officer that he *didn’t know* he still had any, which is consistent with [M.F.’s] previous admission that he had had some at sometime previously.” RP 100 (emphasis added). Officer Greene corroborated M.F.’s testimony: “[M.F.] said he smoked marijuana three, four days prior to [January 20, 2017], and *he didn’t know* that he still had it on his person.” RP 38 (emphasis added).

Additionally, the trial court made no adverse credibility finding in its oral ruling, which is inconsistent with its untimely-filed findings and conclusions. Nonetheless, the Court of Appeals concluded the trial court “specifically found [M.F.] was not credible,” when in fact the trial court stated “[M.F.] has the largest incentive to say what he had to say,” but did not find M.F. was not credible. No other witnesses disputed or rebutted M.F.’s testimony that he did not know he still

possessed vanishingly small remnants of marijuana. That a witness has incentive to lie is not a finding the witness did in fact lie.

By holding that testimony a defendant was unaware he possessed drugs does not negate knowledge, the Court of Appeals places significant restrictions on the type and form of evidence a defendant may present to support an unwitting possession defense. This Court should accept review. RAP 13.4(b)(3), (4).

2. Review should be granted to determine whether the trial court misapprehended the law when it required M.F. to prove marijuana was placed on his person without his knowledge.

Where a defendant asserts he did not know he was in possession of a controlled substance, there is no requirement the defendant present evidence the substance came into his possession without his knowledge, only that the defendant demonstrate he was unaware of its presence. See, e.g., State v. Cleppe, 93 Wn.2d 373, 635 P.2d 435 (1981) (holding burden of proof for affirmative defense falls on defendant, but not specifying what proof is required); Staley, 123 Wn.2d at 799 (unwitting possession may be supported by showing defendant did not know he was in possession of a controlled substance).

The Court of Appeals found the trial court had properly stated and applied M.F.'s unwitting possession defense, but did not specifically address M.F.'s argument the trial court improperly required him to prove the marijuana came into his possession without his knowledge. Slip Op. at 8-10.

Here, the trial court concluded M.F. did not prove unwitting possession because "for the defense to be supported would require the Court to have a basis in that evidence to determine that the marijuana got there without his knowledge." RP 102-03. The court further stated, "There needs to be, I think, some evidence of a reason or a basis for the court to find that [the marijuana] got there without [M.F.'s] knowledge." RP 102. Moreover, the trial court asserted that it needed "to have something to go on that would indicate that there was some other explanation for [the marijuana] being in [M.F.'s] pockets or in his backpack other than he put it there. Id.

The court's statements reveal its misapprehension of the affirmative defense of unwitting possession. Rather than requiring proof as to how a controlled substance came into his possession without his knowledge, unwitting possession only requires the defendant prove by a preponderance of the evidence that his possession

was just that: unwitting. Buford, 93 Wn. App. at 152. To require specific evidence of how a controlled substance came into a defendant's possession without his knowledge places a burden of production on the defense that is not otherwise required by the defense of unwitting possession. This Court should accept review to resolve this issue. RAP 13.4(b)(1), (4).

3. This Court should grant review to determine whether requiring an accused to prove unwitting possession deprives him of liberty without due process of law.

a. The presumption of innocence is fundamental and due process requires the State to prove every element of an offense beyond a reasonable doubt.

“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” Coffin v. United States, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L.Ed. 481 (1895). To overcome the presumption of innocence, due process requires the State to prove every element of a charged offense beyond a reasonable doubt. In re Winship, 90 S. Ct. at 1072. It is fundamental that “wrongdoing must be conscious to be criminal.” Morissette v. United States, 342 U.S. 246, 252, 72 S. Ct. 240, 96 L. Ed. 288 (1952). Accordingly, even where a statute appears to not contain

any mental element, this does not mean there is not any. Elonis v. United States, __ U.S. __, 135 S. Ct. 2001, 2009, 192 L. Ed. 2d 1 (2015). Where a statute omits a mental element, courts typically imply a traditional mental element unless the legislature clearly intended to omit one. See, e.g., United States v. X-Citement Video, Inc., 513 U.S. 64, 70, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994); State v. Anderson, 141 Wn.2d 357, 366-67, 5 P.3d 1247 (2000). This prevents criminalizing otherwise innocent behavior.

Nevertheless, this Court has held drug possession is a strict liability crime which only requires proof of the nature of the substance and the fact of possession. State v. Bradshaw, 152 Wn.2d at 537. Thus, for an innocent person to avoid conviction, he must prove by a preponderance of the evidence his possession was unwitting. Id. at 538. In other words, a defendant charged with possession is presumed guilty rather than innocent. This burden-shifting scheme deprives persons of their liberty without due process of law and should be held unconstitutional.

b. The possession statute unconstitutionally shifts the burden of proving lack of knowledge to the defendant.

A State has authority to allocate the burdens of proof and persuasion for a criminal offense, but this allocation violates due

process if “it offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental.” Patterson v. New York, 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (internal quotation omitted). “The presumption of innocence unquestionably fits that bill.” Nelson v. Colorado, ___ U.S. ___, 137 S. Ct. 1249, 1256 n.9, 197 L. Ed. 2d 611 (2017).

Accordingly, although legislatures have broad authority to define crimes and some strict liability crimes may be permitted, “due process places some limits on its exercise.” Lambert v. California, 355 U.S. 225, 228, 78 S. Ct. 240, 2 L.Ed.2d 228 (1957) (strict liability registration scheme violated due process when applied to person who had no knowledge of duty to register); State v. Warfield, 119 Wn. App. 871, 876, 80 P.3d 625 (2003) (acknowledging there are “due process limits” on strict liability crimes). The recognition in Winship that due process requires proof beyond a reasonable doubt of every element is “concerned with substance,” not a “kind of formalism.” Mullaney v. Wilbur, 421 U.S. 684, 699, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) (law requiring defendant to prove “heat of passion” in order to reduce murder to manslaughter violated due process); see Apprendi v. New Jersey, 530 U.S. 466, 467, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)

(recounting that the Supreme Court had not “budge[d] from the position that . . . constitutional limits exist to States’ authority to define away facts necessary to constitute a criminal offense”). Hence, in allocating burdens of proof in criminal cases, “there are obviously constitutional limits beyond which the States may not go . . .” Patterson, 432 U.S. at 210.

The United States Supreme Court has relied on historical context to define these limits. As the Court has explained:

Where a State’s particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to demonstrate that the State has shifted the burden of proof as to what is an inherent element of the offense, or has defined as a single crime multiple offenses that are inherently separate. Conversely, a freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions will lighten the defendant’s burden.

Schad v. Arizona, 501 U.S. 624, 640, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality); see Schad, 501 U.S. 650 (Scalia, J. concurring) (“It is precisely the historical practices that define what is “due.”).

Washington appears to be the *only* State that makes drug possession a true strict liability crime.¹ State v. Adkins, 96 So. 3d 412, 424 n.1 (Fla. 2012) (Pariente, J., concurring); see Bradshaw, 152 Wn.2d at 534; Dawkins v. State, 313 Md. 638, 547 A.2d 1041, 1045 n.7 (1988). Although Florida eliminated a mens rea requirement from its drug possession statute, this only eliminated the State's burden to prove that the defendant knew the nature of the substance. Adkins, 96 So. 3d at 415-16. It did not eliminate the requirement that the State prove a defendant knew he possessed the substance.² Id. Unlike in Washington, the State in Florida must at least prove the defendant was aware of the presence of the substance.

That nearly every drug possession offense in this country has a mens rea requirement is unsurprising. As acknowledged in Bradshaw, the Uniform Controlled Substances Act of 1970 has a “knowingly or intentionally” requirement for the crime of possession. Unif. Controlled Substances Act 1970 § 401(c); Bradshaw, 152 Wn.2d at 534. This

¹ North Dakota had made drug possession a strict liability offense, but the Legislature changed the law to require a mental element. State v. Bell, 649 N.W.2d 243, 252 (2002).

² The standard jury instructions confirm this. Available at: http://www.floridasupremecourt.org/jury_instructions/instructions-ch25.shtml

shows the offense of possession of a controlled substance has traditionally required the State to prove knowledge.

Washington's drug possession law is truly "freakish." Schad, 501 U.S. 640 (plurality). It is contrary to the practice of every other State, as well as to the tradition of requiring the State prove a mens rea element in drug possession crimes. This is a strong indication Washington's possession statute violates due process. Id.

A recent federal district court decision addressing the constitutionality of an Arizona law is instructive. May v. Ryan, 245 F. Supp. 3d 1145 (D. Ariz. 2017). In May, Arizona eliminated the requirement the State prove sexual motivation in prosecuting child molestation, effectively criminalizing broad swaths of innocent conduct (such as changing a baby's diaper). Id. at 1155-56. Defendants could avoid conviction if they affirmatively proved, by a preponderance of the evidence, that their touching lacked sexual motivation. Id. at 1156.

The federal court recognized due process limits States in placing burdens on defendants, and found the Arizona law unconstitutionally shifted the burden of proof to the defendant to prove his innocence. Id. at 1157-59. The court found proof of sexual intent had traditionally

been part of the offense of child molestation. Id. at 1159-61. It determined Arizona's law was "freakish." Id. at 1161-62.

The court acknowledged that "[s]hifting what used to be an element to a defense is not fatal if what remains of the stripped-down crime still may be criminalized and is reasonably what the state set out to punish," but that was not true for the Arizona offense. Id. at 1163. It held, "If the 'affirmative' defense is to disprove a positive—and that positive is the only wrongful quality about the conduct as a whole—it is a nearly conclusive sign that the state is unconstitutionally shifting the burden of proof for an essential element of a crime." Id. at 1164.

Here, when a person possesses a controlled substance without knowledge, there is nothing wrong with their conduct. For example, if a person rents or buys a car, and drugs are hidden inside, there is nothing blameworthy about the person's conduct. The same is true if a person borrows a backpack and, unknown to that person, there are drugs inside. Stripped of the traditional mental element of knowledge, there is no "wrongful quality" about the person's conduct in possessing drugs. To conclude otherwise criminalizes the innocent behavior of possessing property, which is one of the "three 'absolute' rights" identified by the English philosopher John Locke and jurist William Blackstone.

Wellness Int'l Network, Ltd. v. Sharif, ___ U.S. ___, 135 S. Ct. 1932, 1965, 191 L. Ed. 2d 911 (2015) (Thomas J., dissenting).

The Court of Appeals found Bradshaw foreclosed this argument because that case concluded the affirmative defense of unwitting possession does not shift the burden of proof to the defendant. Slip Op. at 12-13. This holding misses the mark: Bradshaw did not address the issue of whether strict liability crimes violate due process. Although the defendants in Bradshaw raised the issue, the Court did not reach the merits of this argument because the defendants failed to properly brief the issue. As a result, the Court in State v. Schmeling, 191 Wn. App. 795, 365 P.3d 202 (2015), incorrectly rejected a due process challenge to the possession statute in light of Bradshaw. This Court is not obligated to perpetuate this error. Grisby v. Herzog, 190 Wn. App. 786, 806-811, 362 P.3d 763 (2015) (recognizing that Court of Appeals' decisions may conflict and stare decisis does not preclude a holding that is inconsistent with a previous Court of Appeals' opinion). This Court should decline to follow Schmeling and grant review to determine if Washington's strict liability drug possession statute violates due process. RAP 13.4(b)(3), (4).

E. CONCLUSION

Based on the foregoing, petitioner M.F. respectfully requests that this review be granted. RAP 13.4(b).

DATED this 18th day of July 2018.

Respectfully submitted,

/s Tiffinie B. Ma

Tiffinie B. Ma – WSBA #51420

Washington Appellate Project – WSBA
#91052

Attorney for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of Reference to MICHAEL J. FULLER,)	No. 76933-2-I
)	
A juvenile.)	DIVISION ONE
)	
STATE OF WASHINGTON,)	
)	
Respondent,)	UNPUBLISHED OPINION
)	
v.)	
)	
MICHAEL J. FULLER,)	
)	
Appellant.)	FILED: June 18, 2018

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2018 JUN 18 AM 8:42

SCHINDLER, J. — Michael J. Fuller¹ appeals the juvenile court adjudication that he was guilty of possession of marijuana in violation of RCW 69.50.4013. Fuller seeks dismissal, arguing he proved unwitting possession by a preponderance of the evidence. Fuller also contends RCW 69.50.4013 violates due process by unconstitutionally shifting the burden to Fuller to prove lack of knowledge. We affirm.

FACTS

Michael J. Fuller attends Blaine High School. During the first-period class on January 20, 2017, the teacher smelled marijuana on 14-and-a-half-year-old Fuller and contacted Vice Principal Wayne Vezzetti.

¹ See Gen. Order 2017-1 of Divisions I, II, & III, In re Changes to Case Title (Wash. Ct. App.), http://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=1-021&div=1.

School security employee Kelly Freeman accompanied Fuller from the classroom to the vice principal's office. Freeman "noted the strong smell of marijuana" coming from Fuller. Vezzetti and Freeman searched Fuller's backpack and clothing. Freeman found "[a] small quantity of a green leafy substance" in the pocket of Fuller's sweatshirt and in the bottom of his backpack.

Vezzetti called the Blaine Police Department. Officer Brent Greene responded. Officer Greene identified the leafy substance as "consistent with what marijuana looks like, and the smell also consistent with marijuana." Officer Greene "noted a strong smell of marijuana coming from [Fuller]." After Fuller "turned out some of his pockets," Officer Greene found and collected more green leafy substance.

Officer Greene read Fuller his Miranda² rights with the juvenile warnings. Fuller told Officer Greene that "he didn't realize he still had marijuana on him." Officer Greene performed a field test and the "green leafy substance" tested positive for marijuana. Officer Greene arrested Fuller.

Washington State Patrol Crime Laboratory forensic scientist Karen Finney tested and confirmed the substance was marijuana.

The State charged Fuller as a juvenile with possession of a controlled substance on January 20 in violation of RCW 69.50.4013. Fuller pleaded not guilty and asserted the defense of unwitting possession.

At the adjudication hearing, Vezzetti, Freeman, Officer Greene, and Finney testified on behalf of the State.

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Vezzetti testified that there was a "very strong smell" of marijuana on Fuller. Freeman testified that the "strength of the odor . . . was pretty strong." Freeman said she found marijuana in Fuller's backpack. Freeman said she "emptied [the backpack] out on the desk" and the contents "just kind of went all over, and . . . when I searched it, there was remnants of [marijuana] in the bottom of his bag because I had gotten it on my hand." Freeman testified that she found marijuana in the side pockets of Fuller's sweatshirt.

Officer Greene testified that as soon as he walked into Vezzetti's office, "there was a strong pungent odor of marijuana" coming from Fuller. Officer Greene testified he asked Fuller "about the substance" and Fuller said he had "smoked marijuana three, four days prior to that, and didn't know that he still had it on his person."

Fuller testified. Fuller said he had not smoked marijuana on January 20. Fuller testified that he was not "aware of" being "in possession of any marijuana." Fuller admitted he possessed marijuana "around the week before" but he did not know "there were bits of marijuana in the pocket of that sweatshirt." Fuller admitted there was a "green leafy substance that came out of [his] pocket." Fuller said that marijuana "sticks to the fabric of the inside of the pocket pretty well."

On cross-examination, Fuller admitted that he possessed marijuana the week before and that no one else had access to his sweatshirt.

- Q. Okay, and had you testified that you had marijuana in your pocket of your jacket a week prior, correct?
- A. Umm, kind of, in the, I don't remember having it in my pocket, but I did encounter marijuana the week prior.
- Q. Okay. So you know what marijuana looks like, correct?
- A. Yes.
- Q. And it was your sweatshirt, correct?
- A. Yes.

- Q. And you wear that sweatshirt every other day, you say?
A. Not exactly every other, but pretty often.
Q. Okay, and would you say you put your hands in your pockets pretty regularly?
A. Yeah.
Q. And you know that marijuana had been in your pocket?
A. No.
Q. Okay, but you had marijuana in your possession a week ago or a week prior to the 20th?
A. Right around, yes.
Q. Okay, and did anyone else have access to your sweatshirt?
A. Not that I can think of.

Fuller also testified that "nobody messed with" his backpack.

During closing argument, the prosecutor argued the evidence established proof beyond a reasonable doubt that Fuller possessed marijuana. The prosecutor argued the evidence did not show unwitting possession. "There's no person in the middle who might have had access or placed the marijuana in his possession unwitting to Mr. Fuller. Mr. Fuller had full control of all of the items that the marijuana was located in." The prosecutor argued Fuller "didn't think that there was any[]more marijuana on him, because essentially he had used it all."

Defense counsel argued Fuller proved by a preponderance of the evidence that he did not know he had possession of the marijuana on January 20.

[Fuller] admitted that he had had possession of marijuana prior to this incident about a week according to his testimony, about three or four days according to the testimony of law enforcement. That does not in any way establish that he had marijuana in that pocket.

We know that marijuana was found in that pocket. So it's presumed that there was marijuana in there previous[ly], but what's at issue here is whether or not [Fuller] on this day had knowledge that that marijuana was in his pocket.

Defense counsel also argued that the "minimal amount" of marijuana found on Fuller "suggests that he could certainly have possessed that without . . . knowingly being in

possession of that.”

In rebuttal, the prosecutor pointed out that “Washington [S]tate does not require knowledge in simple possession cases.” The prosecutor argued, “Simply forgetting that you still had some on you, or not realizing that you still had some on you when you knew at one point you had it on you . . . is [not] unwitting possession. . . . I didn’t realize there was any left, that’s not unwitting possession.”

The court ruled Fuller did not prove unwitting possession by a preponderance of the evidence. The court entered an order on adjudication and disposition finding Fuller guilty of possession of marijuana. The court imposed 12 months of probation.

On May 31, 2017, Fuller filed a notice of appeal. On November 17, Fuller filed his opening brief. The court entered written findings of fact and conclusions of law on December 5.³

ANALYSIS

Unwitting Possession

Fuller contends the court erred by concluding he did not prove unwitting possession by a preponderance of the evidence.

Unwitting possession is an affirmative defense to a charge of possessing a controlled substance. State v. Staley, 123 Wn.2d 794, 799, 872 P.2d 502 (1994). “ ‘Unwitting possession is a judicially created affirmative defense that may excuse the defendant’s behavior, notwithstanding the defendant’s violation of the letter of the statute.’ ” State v. Buford, 93 Wn. App. 149, 151-52, 967 P.2d 548 (1998) (quoting State v. Balzer, 91 Wn. App. 44, 67, 954 P.2d 931 (1998)). To establish the defense of

³ A commissioner of this court granted Fuller’s motion to supplement his assignments of error.

unwitting possession, the defendant must prove by a preponderance of the evidence that he did not know the substance was in his possession or did not know the nature of the substance. State v. Deer, 175 Wn.2d 725, 735, 287 P.3d 539 (2012). In evaluating the persuasiveness of the evidence and the credibility of witnesses, we defer to the trier of fact. State v. Andy, 182 Wn.2d 294, 303, 340 P.3d 840 (2014).

We review challenged findings of fact for substantial evidence and challenged conclusions of law de novo. State v. Homan, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. Homan, 181 Wn.2d at 106. Unchallenged findings of fact are verities on appeal. State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). We review findings of fact erroneously labeled conclusions of law as findings of fact. State v. Ross, 141 Wn.2d 304, 309-10, 4 P.3d 130 (2000).

Fuller assigns error to conclusion of law 5(a). Conclusion of law 5 states:

The Respondent failed to prove the defense of Unwitting Possession by a preponderance of the evidence.

- a. Respondent failed to show that he did not know he was in possession of marijuana.
- b. Respondent failed to show that he did not know the nature of the substance located in his sweatshirt pockets and backpack.

Fuller contends he proved unwitting possession by a preponderance of the evidence because the evidence shows he was "unaware" that he possessed marijuana. Substantial evidence supports conclusion of law 5(a) that Fuller "failed to show that he did not know he was in possession of marijuana."

The uncontroverted testimony of three witnesses established that on January 20, a very strong smell of marijuana emanated from Fuller. Vice Principal Vezzetti testified the "very strong smell" of marijuana was "very pungent, and so my suspicion was he

had it on himself or he had smoked it." School security employee Freeman and Officer Greene also "noted a strong smell of marijuana coming from" Fuller.

Fuller admitted he "know[s] what marijuana looks like" and possessed marijuana approximately a week before. Officer Greene testified that Fuller admitted he "smoked marijuana three, four days prior." Fuller told Officer Greene he "didn't know that he still had it on his person."

Fuller testified he had "marijuana in [his] possession while . . . wearing that sweatshirt." Fuller testified no one else had access to his sweatshirt or his backpack. Fuller said he put his hands in his pockets "pretty regularly." Freeman said that loose pieces of marijuana stuck to her hand when she searched Fuller's sweatshirt pockets and backpack, and Fuller testified marijuana "sticks to the fabric of the inside of the pocket pretty well."

Fuller's testimony that "I don't remember having [marijuana] in my pocket" and that he was not "aware" he "still had it" on him does not negate knowledge and does not support an inference of unwitting possession. See, e.g., Buford, 93 Wn. App. at 153; State v. Sundberg, 185 Wn.2d 147, 149-50, 156-57, 370 P.3d 1 (2016).

Fuller also argues that the small amount of marijuana found on him supports the defense of unwitting possession by a preponderance of the evidence. But the amount of marijuana does not diminish the proof of guilt. State v. Malone, 72 Wn. App. 429, 439, 864 P.2d 990 (1994).

Fuller assigns error to conclusion of law 6:

The court concludes Respondent's explanation/assertion that he did not know the marijuana was in his possession is not credible based on the evidence presented at trial.

Fuller contends substantial evidence does not support the finding because the court "did not find [Fuller] was not credible" in its oral ruling. The trier of fact decides all credibility issues. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), abrogated in part on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). We will not set aside the court's credibility determination. See Thomas, 150 Wn.2d at 874-75. Here, the court specifically found Fuller was not credible.⁴

Of course, [Fuller] has the largest incentive to say what he had to say and to avoid a finding that he was in possession of marijuana. Lots of things are at stake, driver's license, many other things that could be impacted as a result of this.

Fuller also argues the court misstated the law and improperly shifted the burden by requiring him to present evidence that the marijuana came into his possession without his knowledge. In support of his argument, Fuller cites out of context portions of the court's oral ruling.

The record shows the court weighed all the evidence and correctly stated and applied the law. The court ruled:

The affirmative defense of unwitting possession which must be put forward by the Defendant requires him to show by a preponderance of the evidence either that he didn't know that he was in possession or didn't know the nature of the substance.

The court found Fuller smelled strongly of marijuana.

[F]our adults, all of whom stated they have some experience and some training regarding the identification [of] drugs by, particularly marijuana by odor said they smelled a strong odor — actually, three were by training, the [teacher] we didn't have testimony about his training, but he was the

⁴ We also note an oral decision "has no binding or final effect unless it is formally incorporated into findings of fact, conclusions of law, and judgment." State v. Dailey, 93 Wn.2d 454, 458-59, 610 Wn.2d 357 (1980). An oral decision may support, but not contradict, the findings of fact. State v. Hinds, 85 Wn. App. 474, 486, 936 P.2d 1135 (1997).

one that first reported it and said Mr. Fuller smelled like marijuana. Ms. Freeman who has been trained and has a lot experience, mostly experience, said I smelled it. It was a strong odor. The same for the [vice] principal and the officer who clearly has been trained said, yes, it was a strong odor, and I smelled it as well.

The court noted the marijuana found on Fuller was "a very small quantity. . . . It's not a whole lot in the sense that it would be obvious to someone that it existed if they were to just put their hand in his pocket or his bag unless it stuck to their hand as Ms. Freeman testified it did to her." But the court found, "It's pretty clear from his testimony that he knows the nature of marijuana. He has had some in the past. He's aware of it."

The court found the evidence established Fuller knew that he possessed marijuana and that he put the marijuana in his sweatshirt and backpack.

There is no indication or anything offered to the Court as to how the marijuana could have gotten into Mr. Fuller's backpack or his pockets other than from him. It is his testimony that within a matter of [a] few days or a week, he had had marijuana in his possession. It's his testimony that he wore this sweatshirt frequently, every other day or more often, because it was one of his favorites. He testified that no one had messed with his backpack in the locker room, and no one else had worn, there's no evidence that anyone else had worn the sweatshirt.

It is his testimony that he, the testimony was that he told the officer that he didn't know he still had any, which is consistent with his previous admission that he had had some at sometime previously. . . .

....
There needs to be, I think, some evidence of a reason or a basis for the Court to find that it got there without his knowledge. I have no basis for that. In fact, the only evidence I have is evidence that it would have been there with his knowledge, quite possibly because of the fact that he had had some previously, and he wore the sweatshirt regularly, and nobody else had anything else to do with his backpack, and since the substance that was tested and found positive came from both the backpack and the pockets, and since the odor was noticeable by people around him, . . . there is sufficient evidence that someone in his position should have and would have known what was in his backpack, what was in his pockets, and would have noticed the odor.

The court concluded Fuller did not prove by a preponderance of the evidence that he did not know he possessed marijuana.

[T]he evidence requires the Court to make a determination based on all of that evidence, and for the defense to be supported would require the Court to have a basis in that evidence to determine that the marijuana got there without his knowledge, and all the evidence that I do have, what little I have, is that he is likely to have known about it.

We conclude the court did not err in concluding Fuller failed to prove unwitting possession by a preponderance of the evidence.

Entry of Findings of Fact and Conclusions of Law

Fuller contends we must reverse the conviction and strike the untimely findings of fact and conclusions of law because they are tailored to meet the issues raised in his opening brief.

We will not reverse a conviction based on the failure to enter timely findings and conclusions where the delay causes no prejudice to the defendant. State v. Byrd, 83 Wn. App. 509, 512, 922 P.2d 168 (1996). “[A] defendant might be able to show prejudice resulting from the lack of written findings and conclusions where there is strong indication that findings ultimately entered have been ‘tailored’ to meet issues raised on appeal.” State v. Head, 136 Wn.2d 619, 624-25, 964 P.2d 1187 (1998). An appellant cannot show prejudice where the findings and conclusions are consistent with the trial court’s oral opinion and do not contain unanticipated information. State v. Brockob, 159 Wn.2d 311, 344, 150 P.3d 59 (2006); State v. Cannon, 130 Wn.2d 313, 330, 922 P.2d 1293 (1996).

Fuller contends the findings “omit the trial court’s erroneous understanding and application of the unwitting possession defense.” But as previously noted, the record

shows the court correctly stated and applied the defense of unwitting possession. Fuller asserts prejudice because the court did not include Officer Greene's testimony that Fuller told him "he did not know he was in possession of any marijuana" and Fuller's testimony that he was not aware that he possessed marijuana in the findings. The findings of fact make clear the court took into account that testimony. For example, findings of fact 14 and 15 state:

14. Prior to the evidentiary portion of the trial, Respondent stipulated that his statements were voluntary and waived a [CrR] 3.5 hearing.
15. On January 20, 2017, Respondent told Officer Greene that he had marijuana three or four days prior. During his testimony, Respondent admitted to having possession of marijuana about a week prior to January 20, 2017.

Fuller cannot show prejudice from the delayed entry of the findings of fact and conclusions of law.

Due Process

Fuller contends that requiring a defendant to prove unwitting possession violates due process because it allows the State to prove possession without requiring any culpable mental state.⁵

We review the constitutionality of a statute de novo. State v. Bradshaw, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004). A statute is presumed to be constitutional, and the party challenging a particular statute has the burden to prove it is unconstitutional. Homan, 181 Wn.2d at 113.

⁵ RCW 69.50.4013(1) states, "It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter."

The Fourteenth Amendment to the United States Constitution provides that no state may deprive a person of liberty without due process of the law. Strict liability crimes do not necessarily violate due process. State v. Schmeling, 191 Wn. App. 795, 801, 365 P.3d 202 (2015). The legislature has the authority to create strict liability crimes that do not include a culpable mental state. Bradshaw, 152 Wn.2d at 532.

In Schmeling, we considered and rejected the same due process challenge to RCW 69.50.4013. Schmeling, 191 Wn.2d at 801-02. We concluded the legislature has wide latitude to create strict liability crimes that do not require a culpable mental state and the Washington Supreme Court has repeatedly affirmed the legislature's authority to do so. Schmeling, 191 Wn.2d at 801. We also concluded our Supreme Court has twice held the legislature intentionally omitted a mens rea element for the crime of possession of a controlled substance. Schmeling, 191 Wn.2d at 801 (citing Bradshaw, 152 Wn.2d at 534-38 (declining to imply a mens rea element where legislative intent is clear); State v. Cleppe, 96 Wn.2d 373, 380-81, 635 P.2d 435 (1981)). Thus, we held RCW 69.50.4013 does not violate due process even though it does not contain a mens rea element. Schmeling, 191 Wn.2d at 802.

Fuller acknowledges but asks this court not to follow Schmeling. Citing a federal district court case, Fuller contends RCW 69.50.4013 violates due process by shifting the burden to the defendant to prove his innocence. See May v. Ryan, 245 F.Supp.3d 1145, 1157-61 (D. Ariz. 2017) (removing sexual intent from child molestation law required defendant to prove a negative and unconstitutionally shifted burden of proof).

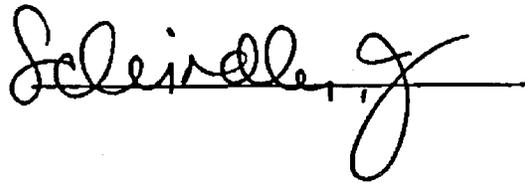
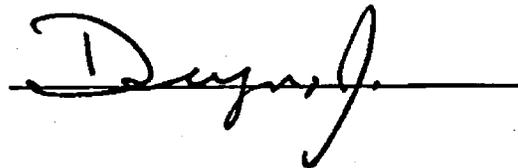
But in Bradshaw, the Washington Supreme Court concluded the affirmative defense of unwitting possession did not shift the burden of proof:

The State has the burden of proving the elements of unlawful possession of a controlled substance as defined in the statute—the nature of the substance and the fact of possession. Defendants then can prove the affirmative defense of unwitting possession. This affirmative defense ameliorates the harshness of a strict liability crime. It does not improperly shift the burden of proof.

Bradshaw, 152 Wn.2d at 538.⁶ Contrary to Fuller's assertion, RCW 69.50.4013 does not require him to prove his innocence. RCW 69.50.4013 requires the State prove beyond a reasonable doubt that Fuller possessed marijuana. Accordingly, we hold RCW 69.50.4013 does not violate due process.

We affirm.

WE CONCUR:

Handwritten signature of Schneider, written in cursive over a horizontal line.Handwritten signature of Leach, written in cursive over a horizontal line.Handwritten signature of Dwyer, written in cursive over a horizontal line.

⁶ Citations omitted.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 76933-2-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

respondent Hilary Thomas, DPA
[Appellate_Division@co.whatcom.wa.us]
Whatcom County Prosecutor's Office

petitioner

Philip Buri
Attorney At Law
[philip@burifunston.com]



MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: July 18, 2018

WASHINGTON APPELLATE PROJECT

July 18, 2018 - 4:50 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 76933-2
Appellate Court Case Title: State of Washington, Respondent v. Michael J. Fuller, Appellant
Superior Court Case Number: 17-8-00034-3

The following documents have been uploaded:

- 769332_Petition_for_Review_20180718165013D1599289_1340.pdf
This File Contains:
Petition for Review
The Original File Name was washapp.071818-22.pdf

A copy of the uploaded files will be sent to:

- Appellate_Division@co.whatcom.wa.us
- hthomas@co.whatcom.wa.us
- philip@burifunston.com

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Tiffinie Bie Ha Ma - Email: tiffinie@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20180718165013D1599289