

71427-9

71427-9

NO. 71427-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS BRUCE-JOHN GOGEL,

Appellant.

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CLERK OF COURT
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS NORTH

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ERIN H. BECKER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. This Court only reviews an issue on appeal if it is an error of constitutional magnitude that prejudices a defendant's trial rights. Here, Gogel contends that he was improperly charged with a violation of the Legend Drugs Act when he should have been charged under the parallel provision of the Uniform Controlled Substances Act. He did not raise this specific objection at trial. The error is not of constitutional magnitude, and Gogel has not alleged or proved prejudice. Should this Court decline to consider Gogel's claim?

2. Due process requires that the Information include all essential elements of the crime in order to give adequate notice to the accused. Here, the Forged Prescription statute that Gogel was charged with violating does not include any mental element, even though other provisions in the same statute and the parallel statute in another chapter do. Is mens rea not one of the essential elements of Forged Prescription? If it is an essential element, did the Information's provision that Gogel committed the crime by "knowingly and intentionally . . . attempt[ing] to obtain a legend drug . . . by means of a false and forged prescription" adequately inform him of the crime charged?

3. A consent search is an exception to the warrant requirement. Here, the trial court found, based on testimony of an officer

it deemed credible, that Gogel was advised of his Miranda rights and his right to refuse to consent to a search of his truck, after which he granted such consent without limitation. The officer searched the truck, including opening a computer located inside. Was the trial court's finding that Gogel consented supported by substantial evidence? Was the search conducted within the scope of Gogel's unlimited consent? If the trial court should have suppressed evidence found in the truck, was any error harmless beyond a reasonable doubt, where Gogel confessed in detail to the crime?

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

On May 21, 2012, the defendant, Douglas Bruce-John Gogel, approached the pharmacy counter inside the Crossroads Bartell's in Bellevue. 4RP¹ 75-76, 105. He spoke with Lauren Wolfer, the pharmacy technician, and provided her with a prescription he wanted filled. 4RP 76; Ex. 1. The prescription was for 120 30-mg tablets of oxycodone. Ex. 1; 4RP 81. Because Gogel was a new patient for the pharmacy, Wolfer had

¹ The six volumes of the Verbatim Report of Proceedings, each entitled "Volume I" but not consecutively paginated, will be referred to herein as follows: 1RP is the volume dated June 11, 2013; 2RP is December 23, 2013; 3RP is December 31, 2013; 4RP is January 2, 2014; 5RP is January 6, 2014; and 6RP is January 8, 2014.

him fill out a new patient information card and provide his identification. 4RP 76, 87-88. Gogel completed the card using the name Thomas Blake and showed identification in that name, which depicted a photograph of Gogel. 4RP 87-88; Ex. 2, 3.

Suspicious because of the large amount of narcotics in the prescription, the fact that Gogel was a new patient, and the fact that he was paying cash, Wolfer contacted the physician who purportedly wrote the prescription, Dr. Kenneth Allen Feucht. 4RP 80. Dr. Feucht did not write the prescription, and had never had a patient named either Thomas Blake or Douglas Gogel. 4RP 98-102. After speaking with Dr. Feucht, Wolfer called 911 to report the forged prescription. 4RP 79. She was told to call back when someone returned to pick up the oxycodone. 4RP 82.

About twenty minutes after Gogel had presented the forged prescription to Wolfer, a woman approached the pharmacy counter and tried to pick up the filled prescription. 4RP 82. Wolfer again dialed 911. 4RP 82. Bellevue Police Department Officer Lauriano Perreira responded to the call and contacted the woman who tried to pick up the oxycodone from the forged prescription. 4RP 107. The woman was carrying the identification card bearing Gogel's photograph and the name Thomas Blake. 4RP 108. Perreira observed a black truck leaving the parking lot

and arranged for other officers to stop the vehicle.² 4RP 108-09. Bellevue Police Department Corporal Benjamin Buck and Officer Daniel Finan did so. 4RP 120-22.

Once the truck was stopped, Buck and Finan removed the occupants from the vehicle. 4RP 122-24. Gogel was in the front passenger seat. 4RP 123. Buck told Gogel he was being detained for investigation of prescription forgery. 4RP 124. He advised him of his Miranda³ warnings and questioned him. 4RP 125. Gogel told Buck that the truck was his, that he had been at the Bartell's pharmacy earlier, and that he had used the laptop computer inside the truck to print the forged prescription. 4RP 126. He explained that he had gone into the Bartell's in order to present the prescription to the pharmacy to have it filled. 4RP 126.

The investigating officers arranged to have Wolfer transported to the scene of the stop to see if she could identify Gogel as the man who presented the forged prescription. 4RP 109. When he heard that there would be a show-up identification procedure, Gogel volunteered, "Of

² During the pretrial hearings, the State explained that the truck was stopped because the woman who had tried to pick up the oxycodone—co-defendant Breanna Byrd—had identified it as involved in the forgery. The State agreed not to elicit that testimony during trial in light of the confrontation clause issues that that would have raised. 4RP 61-62.

³ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

course I'm the suspect." 4RP 127. Wolfer indeed identified Gogel as the perpetrator. 4RP 83-86, 109-15.

After the positive identification, Buck arrested Gogel. 4RP 127. Buck also asked Gogel for consent to search his truck, and advised him of his right to refuse pursuant to State v. Ferrier.⁴ 4RP 127; P.Ex. 3.⁵ Gogel consented. 4RP 127. Because Gogel was handcuffed behind his back, he was only able to sign the consent form with an "X." 4RP 128; P.Ex. 3. Gogel then sat in a patrol car about 15 feet from his truck, with the window rolled down and Finan standing by, while Buck searched the truck. 4RP 129. Gogel never stopped or limited the search. 4RP 136. During the search, Buck located a bright green construction shirt, which matched what Wolfer had reported Gogel had been wearing at the Bartell's, a laptop computer, a printer, and prescription paper. 4RP 77, 114-15, 130-33. Buck opened the laptop; on the screen was a program showing a prescription consistent with the prescription Gogel had presented to Wolfer. 4RP 131.

Buck then spoke further with Gogel. 4RP 136. Gogel told him that the truck was his (although it was registered to his mother), that he was in pain and needed more pills, and that he had printed the forged

⁴ 136 Wn.2d 103, 960 P.2d 927 (1998).

⁵ This brief uses the abbreviation "P.Ex." to refer to a pretrial exhibit, as opposed to the exhibits admitted at trial ("Ex.").

prescription on his printer that morning. 4RP 135-36. He also said that he had decided to fill the prescription at the Bartell's because it was open 24 hours and it was getting late, and that the other two occupants of the car were not involved in the forgery. 4RP 137.

2. PROCEDURAL FACTS

On October 19, 2012, the State of Washington charged Gogel with one count of attempting to obtain a legend drug by means of a forged prescription in violation of RCW 69.41.020(1).⁶ CP 1. A co-defendant, Breanna Joann Byrd, was charged with the same crime. CP 1. Gogel proceeded to trial before the Honorable Douglass North on December 23, 2013. 2RP 1-2. He moved pursuant to CrR 3.6 to suppress the show-up identification of him by Wolfer, and the fruits of the search of his truck conducted by Buck.⁷ 3RP 2; 4RP 43-50.

After a brief jury trial at which he did not testify, Gogel was convicted as charged. 5RP 7; CP 21. The court imposed a standard range sentence, to be served on Enhanced CCAP (Community Center for Alternative Programs). CP 40-48. This appeal timely followed. CP 49.

⁶ The Information identifies the name of the crime as a Violation of the Uniform Controlled Substances Act, but also refers to the drug at issue as a legend drug and cites to the Legend Drug Act. The overlap of these statutory provisions is at the heart of one of Gogel's claims on appeal. For simplicity, this brief will hereinafter refer to the crime as Forged Prescription.

⁷ Although it appears from the transcript that Gogel submitted a written brief in support of his motion, that brief is not in the record. 3RP 2.

C. ARGUMENT

1. **GOGEL HAS FORFEITED HIS CLAIM THAT HE WAS IMPROPERLY CHARGED WITH VIOLATION OF THE LEGEND DRUGS ACT INSTEAD OF THE UNIFORM CONTROLLED SUBSTANCES ACT.**

Gogel contends that his conviction must be reversed because he was improperly charged with an offense under the Legend Drugs Act instead of the Uniform Controlled Substances Act, as required by RCW 69.41.072. But Gogel never raised this issue before the trial court. Any error in the choice of charge is not reviewable on appeal unless he demonstrates both an error of constitutional magnitude and prejudice to his trial rights. He has shown neither.

Generally, an appellate court will not consider an issue raised for the first time on appeal. RAP 2.5(a); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The policy underlying the rule is to encourage the efficient use of judicial resources: where an objection would have given the trial court an opportunity to address any error and avoid an appeal, the appellate court should not sanction a party's failure to timely object. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

RAP 2.5(a)(3), however, permits the defendant to raise a claim of error for the first time on appeal if it is a manifest error affecting a constitutional right. Kirkman, 159 Wn.2d at 926. The purposes of this

exception are to correct any “serious injustice to the accused” and to preserve the fairness and integrity of the judicial proceedings. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). To warrant review, however, any alleged error must be truly of constitutional magnitude. Id.; Kirkman, 159 Wn.2d at 926. Moreover, the constitutional error must be manifest, meaning that the defendant must demonstrate actual prejudice to his rights at trial, and that prejudice must appear in the record. Kirkman, 159 Wn.2d at 926-27; McFarland, 127 Wn.2d at 334. Actual prejudice, in turn, means that the alleged error had practical and identifiable consequences in the trial. O’Hara, 167 Wn.2d at 99. This exception to the ordinary requirement that an error be preserved by a timely objection must be construed narrowly. Kirkman, 159 Wn.2d at 935.

Here, Gogel failed to object to the charging document on the basis that it charged him with a violation of the Legend Drugs Act instead of the Uniform Controlled Substances Act, in violation of RCW 69.41.072. This failure is fatal to his claim.

First, the error Gogel alleges is not of constitutional magnitude. Gogel’s argument is essentially an application of the rule that a specific

statute prevails over a general one. Brief of Appellant at 9-10; see State v. Danforth, 97 Wn.2d 255, 258, 643 P.2d 882 (1982). This rule arises from principles of statutory construction, and in particular, the application here of RCW 69.41.072. Danforth, 97 Wn.2d at 258-59. Accordingly, any error in charging Gogel with a violation of the Legend Drugs Act instead of the Uniform Controlled Substances Act was not constitutional in nature. Id. at 259 (noting that “no constitutional rights are affected” when defendants are improperly charged with a more general statute). Indeed, Gogel cites to no constitutional provision in his argument.

Second, Gogel has failed to demonstrate any practical and identifiable consequences to his trial from any error in the choice of charge. As he himself points out, the elements of the two crimes are functionally identical. Compare RCW 69.41.020(1)(b) (“No person shall obtain or attempt to obtain a legend drug, or procure or attempt to procure the administration of a legend drug: . . . By the forgery or alteration of a prescription or of any written order.”) with RCW 69.50.403(1)(c)(ii) (“It is unlawful for any person knowingly or intentionally: . . . To obtain or attempt to obtain a controlled substance, or procure or attempt to procure the administration of a controlled substance . . . by forgery or alteration of

a prescription or any written order.”).⁸ Further, any differences in the language of the crimes were resolved in Gogel’s favor by the jury instructions, which explicitly required the jury to find that Gogel had acted “willfully,” which was further defined to mean “knowingly.” CP 32, 38.

Gogel suggests that he was prejudiced because a conviction under the Legends Drug Act is treated more harshly than the same conviction under the Uniform Controlled Substances Act. Brief of Appellant at 9 n.5. But Forged Prescription, whether proven under RCW 69.50.403 or RCW 69.41.020, has the same sentencing consequences. RCW 9.94A.518. Both are level I offenses with a standard sentencing range—given Gogel’s criminal history—of 0 to 6 months in custody. RCW 9.94A.517, .518. Although the maximum sentences differ, the sentencing court had no basis to impose an exceptional sentence, and did not do so. Compare RCW 69.50.403(3) (Class C felony with a maximum sentence of two years and \$2,000) with RCW 69.41.020 (Class B felony); CP 51-53. And, although the crime of Forged Prescription under RCW 69.41.020 has a longer wash-out period, RCW 9.94A.525(2)(b), (c), this fact has no practical and identifiable consequences to this case. It will only have an effect if Gogel

⁸ Oxycodone, the drug at issue in Gogel’s case, is both a legend drug and a controlled substance. RCW 69.41.010(12) (defining legend drugs as those required to be prescribed or dispensed by a practitioner); RCW 69.50.101(d) (defining controlled substance to include any substance in Schedules I-V), .206(b)(1)(xvi) (listing oxycodone in Schedule II), .308(b) (requiring a Schedule II substance to be prescribed or dispensed by a practitioner).

reoffends between five and ten years from his last release from confinement on this case—an event that is both speculative and wholly within Gogel’s control.

Gogel may argue that he did object, thereby preserving any error. But Gogel made only one comment during the course of trial regarding the Information. His attorney stated, at the conclusion of the jury instruction conference, “Your Honor, for purposes of the record, I would object to any defects in the information that might raise an issue on appeal and I want to make sure I note that.” 5RP 5-6. This does not constitute an objection that preserves any error for review.

It is well established that, to preserve an issue for review, an objection must be sufficiently specific to apprise the court and the State of the issue, so that it may be addressed. *E.g.*, State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) (holding that an objection that fails to specify the particular ground on which it is based is insufficient to preserve the issue for review); State v. Sublett, 176 Wn.2d 58, 75-76, 292 P.3d 715 (2012) (observing that objections to jury instructions and the grounds therefor must be put on the record to preserve review). Here, Gogel’s objection was generic and without content. It did not put the court or the State on notice as to the error now raised. Indeed, the record suggests that Gogel did not notice the error he now alleges until after

sentencing. At sentencing, Gogel's attorney referred to the crime as a violation of the Uniform Controlled Substances Act, and signed her name to the Judgment and Sentence, which referred to the crime in that manner and listed the maximum sentence for that crime instead of the crime of conviction. 6RP 9; CP 50-51.

In short, Gogel's purported objection was insufficient to preserve for review the issue he now raises. He has failed to show actual prejudice to his rights at trial, and he has failed to show a constitutional violation. This Court should decline to consider his claim.

2. THE INFORMATION CORRECTLY INCLUDED ALL ELEMENTS OF THE OFFENSE OF FORGED PRESCRIPTION.

Gogel complains that the Information was deficient because it failed to allege the essential element of knowledge that the prescription was forged. However, knowledge that the prescription was forged is not an element of the crime of Forged Prescription. Moreover, if it is an element, the State adequately included the element in the Information, and Gogel was not prejudiced by any inartful wording in the charging instrument. Gogel's claim should be rejected.

- a. Knowledge That A Prescription Is Forged Is Not An Essential Element Of The Crime Of Forged Prescription.

The elements of a crime are defined by the legislature.

State v. Chambers, 157 Wn. App. 465, 475, 237 P.3d 352 (2010).

Whether knowledge that a prescription is forged is an element of the offense of Forged Prescription is a question of statutory construction.

State v. Bradshaw, 152 Wn.2d 528, 535-36, 98 P.3d 1190 (2004).

Statutory interpretation is reviewed de novo. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

The principles of statutory construction are well settled. The Supreme Court has provided a concise summary of the principles that should be applied to any issue of statutory construction:

In interpreting a statute, we do not construe a statute that is unambiguous. . . . If the statute is ambiguous, the courts must construe the statute so as to effectuate the legislative intent. In so doing, we avoid a literal reading if it would result in unlikely, absurd, or strained consequences. . . . The purpose of an enactment should prevail over express but inept wording. . . . The court must give effect to legislative intent determined “within the context of the entire statute.” . . . Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. . . . The meaning of a particular word in a statute “is not gleaned from the word alone, because our purpose is to ascertain legislative intent of the statute as a whole.”

Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (citations omitted).

The legislature has the authority to create strict liability crimes. Bradshaw, 152 Wn.2d at 532. The crime of Forged Prescription appears to be such a crime. It provides, in relevant part:

No person shall obtain or attempt to obtain a legend drug, or procure or attempt to procure the administration of a legend drug . . . [b]y the forgery or alteration of a prescription or of any written order.

RCW 69.41.020(1)(b). The plain language of the statute does not include any mental element. No further construction of the statute is warranted.

Further, that the legislature intended to omit any mens rea from this offense is clear from context. First, two subsections of the same statute do include a mental element: “willfully.” RCW 69.41.020(3), (7). Second, the parallel statute in the Uniform Controlled Substances Act contains the mens rea of “knowingly or intentionally.” Compare RCW 69.50.403(1)(c)(ii) (“It is unlawful for any person knowingly or intentionally . . . [t]o obtain or attempt to obtain a controlled substance, or procure or attempt to procure the administration of a controlled substance . . . by forgery or alteration of a prescription or any written order.” (emphasis added)). When a statute that is so nearly identical to another omits certain language—“knowingly or intentionally”—this Court should

assume the omission was intentional and give effect to the legislature's intent. Compare Bradshaw, 152 Wn.2d at 532.

Gogel argues that a knowledge element is implied, because the language "by the forgery or alteration" means that the person who attempts to obtain the legend drug had himself committed the act of forgery or alteration. Brief of Appellant at 11-12. This interpretation is flawed. Subsection (5) of the same statute independently criminalizes the making or uttering of a forged prescription. RCW 69.41.020(5). Thus, requiring that the person who obtained the legend drug with the forged prescription in violation of subsection (1)(b) to have forged the prescription himself would make the two subsections redundant.

Gogel also contends the Supreme Court's interpretation of a predecessor statute to include the element of knowledge that the prescription was forged supports his argument. It does not. The predecessor statute, unlike the current statute, explicitly included knowledge as an element of the offense. Rem. Rev. Stat. § 2509-3 ("Any person . . . who shall falsely make, forge or alter or knowing the same to have been falsely made, forged or altered shall present to any druggist a physician's prescription with intent by means thereof to procure from such druggist any narcotic drug . . . shall be guilty of a felony." (emphasis added)), quoted in State v. Harkness, 196 Wash. 234, 237, 82 P.2d 541

(1938). The legislature's choice to exclude the element of knowledge that had previously been included again strongly suggests that the legislature did not intend for knowledge of the forgery to be an element of the crime. State v. Cleppe, 96 Wn.2d 373, 378, 635 P.2d 435 (1981) (holding that, where previous statute included mental element of intent and new statute is silent, new statute imposes strict liability) (citations omitted); Bradshaw, 152 Wn.2d at 532 (same).

This court should conclude that the crime of Forged Prescription, as codified under RCW 69.41.020(1)(b), does not have a mental element, and does not require that the offender know that the prescription is forged.

- b. If RCW 69.41.020(1)(b) Includes The Element Of Knowledge That The Prescription Was Forged, That Element Was Adequately Alleged And Gogel Was Not Prejudiced By The Charging Document.

If this Court holds that knowledge that the prescription is forged is in fact an element of the crime, Gogel is still not entitled to relief. The State must allege all essential elements of a crime in the Information, in order to give adequate notice to the accused of the crime that he must prepare to defend against. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). When a defendant challenges the sufficiency of the Information pretrial, the charging language is construed strictly.

State v. Johnson, 119 Wn.2d 143, 149-50, 829 P.2d 1078 (1992). If the elements are absent, prejudice is presumed and reversal is required.

State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

When the first challenge is raised after verdict, however, the reviewing court construes the Information liberally to determine if the necessary elements appear in any form or can be found by fair construction. Johnson, 119 Wn.2d at 149-50; Kjorsvik, 117 Wn.2d at 105-06. If the elements are present, the defendant must show that he was actually prejudiced by vague or inartful language to obtain relief. McCarty, 140 Wn.2d at 425; Kjorsvik, 117 Wn.2d at 105-06. The burden of showing prejudice lies with the defendant. State v. Goodman, 150 Wn.2d 774, 789, 83 P.3d 410 (2004).

Here, as discussed above, Gogel made a vague objection to the Information, without identifying the sufficiency of the Information as the basis of his complaint. 5RP 5-6. This objection was inadequate to warrant the heightened standard of review.

First, the objection was untimely. Under Johnson, the defendant is accorded the stricter standard of review when the objection occurs pretrial. 119 Wn.2d at 149-50. Here, Gogel objected after the State had completed

the presentation of its case-in-chief, after the State and Gogel had both announced their intentions to rest once the jury was present, and after the parties had conferred with the court about the appropriate jury instructions. 5RP 2-6. At that point, the State likely could not have amended the Information. State v. Pelkey, 109 Wn.2d 484, 745 P.2d 854 (1987). Under these circumstances—where the timing of an objection could have resulted only in the dismissal of the charges without prejudice, rather than amendment—the court construes the Information liberally. State v. Phillips. 98 Wn. App. 936, 941-43, 991 P.2d 1195 (2000).

Second, as discussed above, Gogel’s nonspecific objection failed to apprise the court and the State of the issue so that it could be addressed. Guloy, 104 Wn.2d at 422. Gogel’s unadorned objection “to any defects in the information that might raise an issue on appeal,” 5RP 5-6, does not constitute an objection adequate to preserve the issue for heightened review.

Because of either the lateness of Gogel’s objection or its generality, this Court should apply the liberal standard in evaluating his challenge to the sufficiency of the Information. Here, if knowledge that the prescription was forged is a necessary element, it “appear[s] in any

form, or by fair construction can be found” in the Information. Johnson, 119 Wn.2d at 149. Indeed, even under a strict reading, the Information properly apprised Gogel of the nature of the offense with which he was charged.

Specifically, the Information alleged:

That the defendants DOUGLAS BRUCE-JOHN GOGEL and BREANNA JOANN BYRD, and each of them, in King County, Washington, on or about May 21, 2012, then and there knowingly and intentionally did attempt to obtain a legend drug, to-wit: Oxycodone, a controlled substance, by means of a false and forged prescription[.]

CP 1 (emphasis added). This language was sufficient to apprise Gogel that he was accused of knowing that the prescription was forged. In a similar case, this Court held (pre-Kjorsvik) that an Information that charged a defendant with “unlawfully and feloniously [delivering] to another a certain controlled substance, and a narcotic drug, to-wit: cocaine” was sufficient to notify the defendant of the element that he knew the identity of the substance he delivered. State v. Nieblas-Duarte, 55 Wn. App. 376, 777 P.2d 583 (1989), cited in Johnson, 119 Wn.2d at 147-48. In other words, this Court has already determined that the placement of the mental element early in the charge can be fairly read to apply to elements later in the charge. Indeed, it is unclear to what the element of “knowingly” could apply, if not to the fact that the prescription

was forged, as the act of attempting to obtain an item already implies knowledge of the attempt. Compare Brief of Appellant at 12 (“A person who forges a prescription knows the prescription is forged.”). This Court should conclude that, under either a strict or liberal reading, the Information was sufficient.

Further, Gogel has failed to demonstrate that he was actually prejudiced by the charging language. The burden is on him to do so, and he has not alleged any such prejudice. Given that the jury was instructed that the State bore the burden of proving beyond a reasonable doubt that Gogel knew the prescription was forged, CP 32, it is hard to imagine how any inartful drafting of the Information could have prejudiced him.

Finally, if this Court construes RCW 69.41.020(1)(b) as requiring the State to plead and prove that Gogel knew the prescription was forged, and concludes either that the State failed to allege that element adequately or that Gogel was prejudiced by the inartful language of the Information, the remedy is dismissal, but without prejudice to the State’s ability to refile charges. State v. Vangerpen, 125 Wn.2d 782, 794-95, 888 P.2d 1177 (1995).

3. THE FRUITS OF THE CONSENT SEARCH OF GOGEL'S TRUCK WERE PROPERLY ADMITTED INTO EVIDENCE.

- a. Remand For Entry Of Findings Of Fact And Conclusions Of Law Is Unnecessary Because The Trial Court Has Since Entered Its Findings And Conclusions.

Gogel first contends that this Court should remand this case for entry of findings of fact and conclusions of law. Brief of Appellant at 21. Criminal Rule 3.6 requires the trial court to enter written findings of fact and conclusions of law if an evidentiary hearing is conducted on a defendant's motion to suppress evidence. CrR 3.6(b). The trial court here failed to do so in a timely manner. But on September 11, 2014, the required written findings and conclusions were entered. CP 62-67. Remand would thus serve no purpose.

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if, under the facts of the case, there is no appearance of unfairness and the defendant is not prejudiced thereby.

State v. Hillman, 66 Wn. App. 770, 773-74, 832 P.2d 1369 (1992);

State v. McGary, 37 Wn. App. 856, 861, 683 P.2d 1125 (1984).

A defendant bears the burden of showing unfairness or prejudice.

Hillman, 66 Wn. App. at 774; McGary, 37 Wn. App. at 861.

Here, Gogel cannot meet his burden. A review of the written findings illustrates that the State did not engage in tailoring to address the defendant's claims on appeal; rather, the written findings and conclusions closely track the trial court's oral findings and conclusions. Compare CP 65 with 4RP 50-51. Further, the prosecutor who tried the case and belatedly prepared the written findings and conclusions based them on the trial transcript and was ignorant of the issues on appeal. CP 72. And, as the purpose of the rule—providing for a record to enable appellate review—has been served, the delay has had no effect on the appeal. Compare State v. Hoffman, 116 Wn.2d 51, 95, 804 P.2d 577 (1991).

Gogel has not shown unfairness or prejudice. The findings of fact and conclusions of law are now before this Court. Gogel has never sought a sanction of reversal for the untimely entry of the findings, only remand. His request for the matter to be remanded for entry of the findings of fact and conclusions of law is moot and should be denied.

b. Gogel Validly Consented To The Search Of His Truck.

Gogel contends that the trial court erred by denying his motion to suppress the evidence found in his truck, claiming that the search was not supported by any exception to the warrant requirement. But Gogel validly

consented to the search of his truck. The fruits of that consent search were properly admitted against him at trial.

On review, unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Challenged findings of fact are reviewed for substantial evidence. Id. at 647. Evidence is substantial when it is enough to persuade a fair-minded person of the truth of the stated premise. Id. at 644. Conclusions of law are reviewed de novo. State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010).

Both the United States and Washington Constitutions protect individuals from unreasonable searches and seizures. U.S. CONST. amend. IV; WASH. CONST. art. I, § 7. A warrantless search is presumptively unreasonable, and the State bears the burden of proving that such a search falls into one of the narrow exceptions to this rule. State v. Tibbles, 169 Wn.2d 364, 368-69, 236 P.3d 885 (2010). Consent is an exception to the warrant requirement. Id.; State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). To show a search was supported by valid consent, the State must show that the defendant voluntarily consented to the search, that he had authority to consent,⁹ and that the

⁹ Gogel does not challenge the trial court's conclusion that Gogel had authority to grant permission to search the truck.

search did not exceed the scope of the consent. Id.; State v. O'Neill, 148 Wn.2d 564, 588, 62 P.3d 489 (2003).

Turning first to the question of voluntariness, whether consent was voluntarily given is a question of fact to be determined from the totality of the circumstances; those circumstances include whether the defendant was advised of his Miranda warnings, his degree of education and intelligence, and whether he had been advised of the right to refuse consent. O'Neill, 148Wn.2d at 588. Gogel failed to assign error to any of the trial court's findings; as such, they are verities on appeal. Hill, 123 Wn.2d at 644. Even if Gogel's brief is construed liberally to constitute a challenge to the findings, however, the totality of the circumstances support a finding that Gogel consented to the search of his truck.

First, it is uncontested that law enforcement informed Gogel of his Miranda warnings prior to seeking consent to search; Gogel acknowledged as much during his testimony. 3RP 9-10; 4RP 27, 34.

Second, although there was no evidence specifically in the record regarding Gogel's education or intelligence, the transcript shows that he was clear and well-spoken during his own testimony. E.g., 4RP 35-38. He had previous experience with the criminal justice system, having been earlier convicted of the same offense. 4RP 40. When interacting with the police at the time of the crime, Gogel acknowledged understanding his

rights and displayed no confusion. 3RP 10, 19. And, he told the investigating officer that he had created the forged prescription on his computer and printed it, demonstrating some sophistication. 3RP 14. All of this evidence supports a finding that Gogel was capable of giving voluntary consent.

Third, the evidence strongly supports the trial court's finding that Corporal Buck advised Gogel of his Ferrier warnings, including the right to refuse consent. Buck testified that he read Gogel the warnings from a preprinted card, which was admitted into evidence.¹⁰ 3RP 16-18; P.Ex. 3. Buck explained that Gogel marked the card with an X instead of signing it, because Gogel was in handcuffs at the time. 3RP 18, 24, 27-28, 34-35. During the search, Gogel was seated in the back of a patrol car in view of the truck so he could watch the search. 3RP 20, 42. Officer Finan stood by Gogel so that he could communicate to the officers any withdrawal of consent or limitation on the scope of the search, consistent with Ferrier. 3RP 20-21, 42. There would have been no reason for these arrangements besides affording Gogel his Ferrier rights. The trial court found Buck credible. 4RP 51; CP 65. Credibility determinations are for the trier of fact and are not reviewable on appeal. State v. Camarillo, 115 Wn.2d 60,

¹⁰ The warnings advised Gogel that he could lawfully refuse to consent to a search, could revoke his consent at any time, and could limit the scope of his consent to certain areas of his truck. P.Ex. 3.

71, 794 P.2d 850 (1990); State v. Bailey, 79 Wn.2d 477, 478-79, 487 P.2d 204 (1971).

Although Gogel disputed that he had been advised of his Ferrier warnings or had given consent, he corroborated much of the officers' testimony, acknowledged that he was willing to talk and did not want to impede the investigation, conceded that he was focused on his dog in the car, and admitted that he had probably used drugs that day. 4RP 34-37. The trial court found that Gogel was less credible than the officer because the circumstances made it likely that he did not accurately recollect the events. 4RP 51; CP 65. Thus, there is substantial evidence in the record to support a finding that Gogel was advised of his Ferrier warnings and consented to a search of his vehicle.

Even if the trial court should have concluded that Gogel was not advised of his Ferrier rights, however, that would not have been dispositive. Ferrier warnings are not required prior to obtaining consent to search except in limited circumstances not present here. State v. Bustamante-Davila, 138 Wn.2d 964, 981, 983 P.2d 590 (1999) (Ferrier limited to knock and talk procedures). Instead, whether a suspect has been advised of his Ferrier warnings is just one factor in assessing whether, under the totality of the circumstances, consent was freely given. Id. at 981-82. Where the other factors are met, and there is no evidence

that Gogel was coerced, the trial court properly found that Gogel validly consented to the search of his truck.

Turning next to the scope of the search, Buck's search of the truck did not exceed the scope of Gogel's consent. Gogel allowed Buck to search his truck and did not limit the scope in any way. 3RP 19. As the search proceeded, Gogel did not withdraw or limit the consent he had previously given. 3RP 20-21, 41-42. All of the items found were located within the truck. 3RP 19-20.

Gogel contends that the scope of the consent search was limited to the truck and locked containers within it, thereby implicitly excluding any unlocked containers or other items, like his computer. Brief of Appellant at 24-25, citing P.Ex. 3. This argument lacks merit. Where a defendant fails to expressly or impliedly limit the scope, a general search, including a search of personal belongings, is authorized. E.g., State v. Mueller, 63 Wn. App. 720, 721-24, 821 P.2d 1267 (1992). Further, the reference to locked containers did not limit the scope of the authorized search to those items in the truck that were locked or were containers. Locked containers have heightened protection in Washington, so additional consent must be obtained to open locked containers within an area for which consent to search has been obtained. State v. Monaghan, 165 Wn. App. 782, 791, 266 P.3d 222 (2012). Thus, Gogel's express consent to search locked

D. CONCLUSION

For all of the foregoing reasons, Gogel's conviction for Forged Prescription should be affirmed.

DATED this 16th day of October, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
ERIN H. BECKER, WSBA #28289
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Richard W Lechich, the attorney for the appellant, at richard@washapp.org, containing a copy of the Brief of Respondent, in State v. Douglas Bruce-John Gogel, Cause No. 71427-9, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 16th day of October, 2014.

U Brame

Name:

Done in Seattle, Washington