

NO. 46765-8-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

PHYLLIS HOLMAN,

Appellant.

RESPONDENT'S BRIEF

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I. ISSUES PRESENTED

- 1) Does due process require the State to disprove unwitting possession?
- 2) Is arguing the deficiencies in an unwitting possession defense injecting facts not in evidence?
- 3) Is RCW 69.50.4013 unconstitutional as applied?

II. SHORT ANSWER

- 1) No.
- 2) No.
- 3) No.

III. STATEMENT OF THE CASE

A. Procedural History:

On March 19, 2014, Phyllis Holman was charged with Violation Uniform Controlled Substances Act – Possession. CP 5. Holman proceeded to a jury trial on July 22, 2014 and the Judge declared a mistrial. RP 31. On August 14, 2014, the case was tried by a jury again and Holman was convicted of Violation Uniform Controlled Substances Act – Possession. RP 158, CP 20. On September 16, 2014, Holman was sentenced and the Judgment and Sentence was entered. RP 171-173, CP 36.

B. Statement of Facts:

On March 15, 2014, Longview Police Officer Kevin Sawyer received a call regarding an issue with money at seven that evening at the 20th Avenue Grocery in Longview, WA. RP 57-58. Once he arrived he

made contact with Phyllis Holman. He asked her for her identification, which she retrieved from her purse. RP 58. After she was identified, he asked her if she had any money in her purse. She said she did, so Officer Sawyer requested to search her purse. She consented. When he reached in and pulled the money out, he saw a plastic bag underneath containing what he suspected was Methamphetamine. RP 60. After the retrieved the bag, Officer Sawyer stopped searching the purse, and gave the bag to Officer Calvin Ripp, who had just arrived. The bag was later tested and was found to contain .1 grams of Methamphetamine. RP 67. Officer Ripp searched Holman's purse incident to arrest and found a cut piece of straw, which in his experience is commonly found in drug possession cases and can be used as a scoop, a tutor to smoke drugs, or as packaging for drugs. RP 57.

Holman's sister, Pamela Jackson testified that Holman had driven to her house to pick her up and that when they returned to Holman's house, there were ten to twelve teenagers at Holman's house, and that all of their bags and purses were in one section of the living room. RP 84, 87. She said that she saw a girl look around and put her hand down into the area of the purses, but that she could not see her hand when she reached down nor if something was in it. RP 89. She also did not see if something was placed in a bag or purse or if something was taken out. RP 94. She

did not think there was anything unusual about what she saw at the time, and the arm was only out of view for a second. RP 93, 94. She then agreed that the arm movement was meaningless and that it never occurred to her that it meant something had happened. RP 93. She then testified that when she and Holman left the house, Holman had her purse with her. RP 91.

Phyllis Holman testified that the teenagers that came to the house put their bags at the end of the couch in front of the window in an orderly manner and that she put her bag there as well. RP 103, 109. She also testified that there were three gold bags in addition to her own, but that they were “maybe not the same style but pretty much the same color,” and that her purse snapped shut at the top. PR 104, 109-10. She explained that the area at the end of the couch was a pretty big area, and that the bags were placed “out from the couch.” RP 108, 109.

IV. ANALYSIS

I. Due process does not require the State prove unwitting possession.

A. Unwitting possession does not negate the element of constructive possession, it is a defense to constructive possession.

In a prosecution for unlawful possession under RCW 69.50.401 the State must prove to the fact finder the nature of the substance charged and

the fact that the defendant possessed the substance. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994) *citing State v. Cleppe*, 96 Wn.2d 373, 378, 635 P.2d 435 (1981), *cert. denied*, 456 U.S. 1006, 102 S.Ct. 2296, 73 L.Ed.2d 1300 (1982). Possession is defined in terms of personal custody or dominion and control. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

Possession may be either actual or constructive. *State v. Walcott*, 72 Wn.2d 959, 968, 435 P.2d 994 (1967), *cert. denied*, 393 U.S. 890, 89 S.Ct. 211, 21 L.Ed.2d 169 (1968). “Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods.” *Callahan*, 77 Wn.2d at 29, 459 P.2d 400. To meet its burden on the element of possession the State must establish “actual control, not a passing control which is only a momentary handling.” *Id.* at 29.

“The State is not required to prove either knowledge or intent to possess, nor knowledge as to the nature of the substance in a charge of simple possession.” *Staley*, 123 Wn.2d. at 799 *citing Cleppe*. 96 Wn.2d at 380. *See, e.g., Walcott*, 72 Wn.2d at 968 (defendant claimed error in failure to give instruction that State must prove that he knew existence of

drugs). Once the State establishes prima facie evidence of possession, the defendant may, nevertheless, affirmatively assert that his possession of the drug was “unwitting, or authorized by law, or acquired by lawful means in a lawful manner, or was otherwise excusable under the statute”. *Staley*, 123 Wn.2d 799, citing *State v. Morris*, 70 Wn.2d 27, 34, 422 P.2d 27 (1966).

A defendant may argue a defense of “unwitting” possession by a showing that the defendant did not know he was in possession of the controlled substance. *Staley*, 123 Wn.2d at 799 citing *Cleppe*, 96 Wn.2d at 381, 635 P.2d 435. *See, e.g., State v. Bailey*, 41 Wn. App. 724, 728, 706 P.2d 229 (1985) (trial court properly instructed jury that possession not unlawful if defendant did not know drug was in his or her possession). The fact that the defendant can prove the affirmative defense of unwitting possession does not improperly shift the burden of proof. *State v. Bradshaw*, 152 Wn. 2d. 528, 537, 98 P.3d 1190 (2004).

Holman argues that due process demands that the State disprove unwitting possession. She goes on to say that because her sister did not see the teenager put the drugs in her purse, the jury may have found she failed to prove unwitting possession. Further, that if the State had the burden of disproving unwitting possession, the fact finder could have found the State’s burden unmet. Appellant’s Opening Brief at 8-9. The Washington

Supreme Court has held that the State not need to prove knowledge in *State v. Cleppe*, 96 Wn.2d 373, 380-381, 635 P.2d 435 (1981).

“If guilty knowledge or intent to possess are not elements of the crime, of what avail is it for the defendant to prove his possession was unwitting? Such a provision ameliorates the harshness of the almost strict criminal liability our law imposes for unauthorized possession of a controlled substance. If the defendant can affirmatively establish his “possession” was unwitting, then he had no possession for which the law will convict. The burden of proof, however, is on the defendant.” *Id.* at 380-381.

The Courts have reaffirmed *Cleppe's* interpretation numerous times in the years following the ruling. *See State v. Johnson*, 119 Wn.2d 143, 146, 829 P.2d 1078 (1992); *State v. Sims*, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992); *State v. Staley*, 123 Wn.2d 794, 798–99, 872 P.2d 504 (1994); *State v. Vike*, 125 Wn.2d 407, 412, 885 P.2d 824 (1994); *City of Kennewick v. Day*, 142 Wn.2d 1, 11, 11 P.3d 304 (2000).

Holman had the ability to argue, and did argue, that she was in unwitting possession of the Methamphetamine. She argued that someone may have put the Methamphetamine in her purse, as was her right. The very fact that Holman argued unwitting possession, shows that the State proved she was in possession. Holman’s due process rights were not violated by her choice to argue the defense that she unwittingly possessed the Methamphetamine.

B. Holman proposed the unwitting possession instruction, therefore she cannot claim error.

A Defendant cannot propose an instruction and then appeal and say that the instruction was offered in error. “When an instruction given is one defense counsel proposed, the invited error doctrine restrains us from reversing the conviction based on an error in that jury instruction.” *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); *see also State v. Studd*, 137 Wn.2d 533, 546–47, 973 P.2d 1049 (1999). Even where constitutional rights are involved, we are “precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording.” *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005). Such claims are reviewed under an ineffective assistance of counsel framework, however because Holman does not allege that counsel was ineffective for proposing the unwitting possession instruction, her argument is without merit. *See Studd*, 137 Wn.2d at 550–51.

II. Holman received a fair trial because the State did not assume facts not in evidence in closing argument.

A failure to object to prosecutorial misconduct waives the issue for appeal unless the conduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *State v. Glassman*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Here, Holman has not shown that the conduct was flagrant and ill-intentioned. In fact, the State did not

submit evidence to the jury nor assume facts not in evidence in the closing argument.

A defendant claiming prosecutorial misconduct on appeal must demonstrate that the prosecutor's conduct at trial was both improper and prejudicial. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). "Once a defendant has demonstrated that the prosecutor's conduct was improper, we evaluate the defendant's claim of prejudice on the merits under two different standards of review depending on whether the defendant objected at trial." *State v. Sakellis*, 164 Wn. App. 170, 183, 269 P.3d 1029 (2011). "If the defendant objected to the misconduct, we must determine whether the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict." *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009). If the defendant failed to object, we must ascertain whether the prosecutor's misconduct was so flagrant and ill-intentioned that it caused an "enduring and resulting prejudice" incurable by a jury instruction. *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). "This standard requires the defendant to establish that (1) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict,' and (2) no curative instruction would have obviated the prejudicial effect on the jury." *Sakellis*, 164 Wn. App. at 184 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

Here, Holman claims that a portion of the State's closing argued that Ms. Holman did not present any evidence on the issue of Ms. Holman's bag. Appellant's Opening Brief at 12. That assertion is not supported by the record, and Holman has not demonstrated that the State's argument was improper. In fact, the portion of the record cited expressly states the evidence that Holman presented to the jury; that a "teenager over here flopped her arm down" and that there were "three gold bags" in addition to her own. RP 133.

If the court finds that the State's conduct was improper, the court must then ascertain whether the prosecutor's misconduct was "so flagrant and ill-intentioned that it caused an 'enduring and resulting prejudice' incurable by a jury instruction." *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

Holman cites to *State v. Glasmann* for the proposition that a prosecutor commits misconduct by urging a jury to consider facts that have not been admitted into evidence. 175 Wn.2d 696, 286 P.3d 673 (2012). In *Glasmann*, the prosecutor intentionally presented the jury copies of Glasmann's booking photo by adding captions, such as "DO YOU BELIVE HIM?" *Id.* at 705-706. The court found that the caption was misconduct as the "long-standing rule" is that "'consideration of any material by a jury not properly admitted as evidence vitiates a verdict

when there is a reasonable ground to believe that the defendant may have been prejudiced.” *Id.* at 705 citing *State v. Pete*, 152 Wn.2d 546, 555 n.4, 98 P.3d 803 (2004). Furthermore, the prosecutor expressed his personal opinion of Glasmann’s guilt throughout his closing argument. *Id.* at 707. The court found that the conduct was so pervasive that it could not have been cured by an instruction. *Id.*

The fact that the State pointed out insufficiencies in the unwitting possession defense is not flagrant and ill-intentioned conduct. Holman has not shown that a curative instruction would have removed any prejudice, likely because there is not a curative instruction that would “cure” the State’s argument that there were deficiencies in the unwitting possession defense.

A. Holman’s defense attorney did not provide ineffective assistance of counsel.

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80 (2006). For a defendant to prevail on a claim of ineffective assistance of counsel, he must show (1) that counsel's representation was deficient and (2) that the deficient representation prejudiced him. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To meet the first part of the test, the representation must have fallen “below an objective standard of reasonableness based on

consideration of all of the circumstances.” *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). This part is “highly deferential and courts will indulge in a strong presumption of reasonableness.” *Id.* at 226. For the second part, there must be “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” but the appellant “need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” *Strickland v. Washington*, 466 U.S. 668, 693-94, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Here, Holman simply claims that the defense attorney should have objected to the State’s argument that there was insufficient evidence to show unwitting possession. It is not alleged what the objection should have been nor how, but for the objection, there existed a reasonable probability that the result of the trial would have been different. Without argument that counsel’s performance was deficient and prejudiced Holman, this argument should not be considered.

III. RCW 69.50.4013 is not unconstitutional.

As previously argued in section I. of this brief, RCW 69.50.4013 requires the state prove to the fact finder the nature of the substance charged and the fact that the defendant possessed the substance. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994), *State v. Cleppe*, 96

Wn.2d 373, 378, 635 P.2d 435 (1981), *cert. denied*, 456 U.S. 1006, 102 S.Ct. 2296, 73 L.Ed.2d 1300 (1982). The State need not prove that Holman knew the drugs were in her purse, just that she constructively possessed them. The Washington Supreme Court, facing divided divisions of the Court of Appeals, decided the issue of whether the state needs to prove “guilty knowledge” in *State v. Cleppe*. 96 Wn.2d 373, 378, 635 P.2d 435 (1981). The court found that while the prior incarnation of RCW 69.50.4013 contained a knowledge element, the fact that it was removed, and the fact that the statute allows an affirmative offense, indicates this is a strict liability crime. *Id.* 378-379.

“That unwitting possession has been allowed as an affirmative defense in simple possession cases may seem anomalous. If guilty knowledge or intent to possess are not elements of the crime, of what avail is it for the defendant to prove his possession was unwitting? Such a provision ameliorates the harshness of the almost strict criminal liability our law imposes for unauthorized possession of a controlled substance. If the defendant can affirmatively establish his “possession” was unwitting, then he had no possession for which the law will convict. The burden of proof, however, is on the defendant.” *Cleppe* at 380-381.

The Courts have reaffirmed *Cleppe*’s interpretation numerous times in the years following the ruling. *See State v. Johnson*, 119 Wn.2d 143, 146, 829 P.2d 1078 (1992); *State v. Sims*, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992); *State v. Staley*, 123 Wn.2d 794, 798–99, 872 P.2d 504 (1994);

State v. Vike, 125 Wn.2d 407, 412, 885 P.2d 824 (1994); *City of Kennewick v. Day*, 142 Wn.2d 1, 11, 11 P.3d 304 (2000), *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004).

In *State v. Deer*, the Supreme Court goes on to say “[t]he burden properly falls on the defendant because unwitting possession does not negate the fact of possession. Rather, as this court explained, “[t]his affirmative defense ameliorates the harshness of a strict liability crime.” 175 Wn.2d 725, 735, 287 P.3d 539 (2012), *citing Cleppe*, *Wn.2d at 380*. “Thus, the defense must be allowed in order to avoid an unjust conviction, but the defendant bears the burden of proving it.” *Id.*

Here Holman argues that the four penological interests are not served by convicting someone of “unwittingly” possessing drugs. That is not what is at issue in the case. The crime is one of possession, and the defendant had the opportunity to argue that the possession was unwitting. The fact that she argued the affirmative defense, but the jury still convicted, does not indicate that she unwittingly possessed the drugs. As the court in *State v. Cleppe* stated, “[i]f the defendant can affirmatively establish his “possession” was unwitting, then he had no possession for which the law will convict.” 96 Wn.2d at 381. The fact that the law may unfairly punish those who “unwittingly” possessed drugs is an issue for the trier of fact, and does not make the statute unconstitutional.

V. CONCLUSION

For the above stated reasons, the convictions should be affirmed.

Respectfully submitted this 23 day of June.

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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on June 23rd, 2015.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

June 23, 2015 - 3:45 PM

Transmittal Letter

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