

58623-8

58623-8

NO. 58623-8-I

80752-3

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

HUYEN BICH NGUYEN, aka GABRIELLE NGUYEN,

Appellant.

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD EADIE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A defendant waives the right to a jury trial by executing a written waiver. A trial court is under no obligation to inquire further absent some reason to doubt that the defendant's waiver is intelligently and voluntarily made. The relevant question on appeal is whether the defendant's waiver was valid at the time it was made based on the circumstances demonstrated by the record. In this case, the defendant waived the right to a jury trial. Although the defendant had some history of mental illness and prior periods of incompetence, she had completed a two-year mental health treatment program, and her attorney represented to the court that she had fully recovered. When the trial court asked if any further inquiry was necessary, counsel represented that the defendant was waiving the right to a jury trial intelligently and voluntarily. Should this court reject the defendant's argument that the trial court was obligated to conduct a colloquy?

2. If a party fails to object to the factfinder's consideration of a lesser included offense at trial, that party cannot claim error based on the factfinder's consideration of that offense on appeal. Moreover, precedent establishes that physical control of a vehicle while under the influence is an included offense of driving under the

influence (DUI). In this case, the defendant agreed that the factfinder could consider physical control as an included offense of DUI. Should this court reject the defendant's claim on appeal that physical control is not an included offense of DUI?

3. Controlling precedent from the Washington Supreme Court holds that the crime of possession of a controlled substance does not have a mens rea element, and that unwitting possession is an affirmative defense that the defendant must prove by a preponderance of the evidence. Should this court reject the defendant's claim that possession of cocaine requires guilty knowledge?

B. STATEMENT OF THE CASE

The defendant, Huyen Bich Nguyen, aka Gabrielle Nguyen, was charged with possession of cocaine (count I) and DUI (count II) based on an incident that occurred February 14 and 15, 2003, although the charges were not filed until March 2004. CP 1-6. In July 2004, the court ordered that Nguyen should be evaluated for competency. CP 14-17. Nguyen was evaluated and judged to be incompetent by staff at Western State Hospital on two occasions: once in December 2003 in connection with an unrelated prior

misdemeanor charge, and once in March 2005 in connection with this case. CP 38-92, 94-104.

However, Nguyen was evaluated again in June 2005 by Dr. Frederick Wise, who was hired by Nguyen to assess her mental health status. Dr. Wise concluded that Nguyen was competent, not delusional and high functioning. In fact, Dr. Wise admitted that he was "at a loss to describe the different presentation to Western State Hospital psychologists." CP 106-08. In addition, Nguyen successfully completed a treatment program through the Seattle mental health court system beginning in 2003. 1RP 6; 3RP 291.¹ In July 2005, the trial court found that Nguyen was competent, and the case was set for trial. CP 20-21.

Trial began on March 23, 2006 before the Honorable Richard Eadie. Nguyen executed a written waiver of her right to a jury trial. CP 39. In addition, Nguyen's attorney represented to the trial court that although Nguyen had experienced prior periods of incompetence, she had "fully recovered" through the mental health court program, "which was very successful." 1RP 6. Counsel

¹ The verbatim report of proceedings comprises four volumes, which will be referenced as follows: "1RP" is March 23, 2006; "2RP" is March 27, 2006; "3RP" is March 28, May 18, June 15, and July 27, 2006; and "4RP" is July 19, 2006.

stated that he had no issues with Nguyen's current mental health status, and further stated that "there are some technical defenses in this case, which would be much better tried to a court than to a jury." 1RP 6. When the trial court questioned whether any further inquiry was necessary, defense counsel stated that he had discussed the right to a jury trial with Nguyen, and that she was waiving that right voluntarily with the advice and assistance of counsel. 1RP 6. Counsel further stated that Nguyen would be raising the defenses of unwitting possession and entrapment, and acknowledged that both were affirmative defenses. 1RP 10-11.

The trial testimony established that Washington State Patrol Trooper Christopher Magallon saw Nguyen's car stopped in the gore point near the Howell Street onramp to southbound Interstate 5 in the early morning hours. 1RP 27-28. The engine was running, and the car was partially in the onramp in an unsafe location. 1RP 28-29, 114. When Magallon approached the car, he found that Nguyen was on her cellular phone; he waited for her to finish her call, at which point Nguyen indicated that she intended to drive away. 1RP 29-30.

Trooper Magallon noticed an odor of alcoholic beverages, and noted that Nguyen was "excited" and "anxious." 1RP 31.

Nguyen indicated she had been drinking wine at Rocksalt, a Seattle nightclub. 1RP 33. Magallon asked Nguyen to move her car to the shoulder to perform some field sobriety tests, and Nguyen agreed to do so. 1RP 34-35, 39. Instead, however, Nguyen drove to the next exit, exited the freeway, turned the corner, and eventually parked near the Convention Center. 1RP 40. Nguyen performed poorly on the field sobriety tests. 1RP 45-60. Nguyen asked repeatedly whether Magallon had a girlfriend, and at one point she tried to hug him. 1RP 62-63. Magallon suspected that Nguyen was under the influence of stimulants as well as alcohol. 1RP 64-65. He placed her under arrest. 1RP 65-66.

Trooper Magallon searched Nguyen's car incident to arrest, and he found a baggie of cocaine and a small straw in the console. 1RP 67; CP 26-30. Magallon took Nguyen to Harborview Medical Center for a blood draw, which revealed that Nguyen had alcohol and cocaine in her system. 1RP 75-76, 97; CP 26-30.

In her defense, Nguyen offered telephonic testimony from George Khader Al-Zoughbi, who claimed that the cocaine in the car belonged to him. He claimed that he put the cocaine and the straw between the front seats "by the ashtray" without Nguyen's knowledge while they were kissing in the car. 2RP 164, 169-70.

Nguyen also testified at trial. She stated that she had almost no memory of the incident. 2RP 186. She further stated that she was now clean and sober, and had participated in a two-year program with the mental health court. 2RP 187-88.

The trial court suppressed Nguyen's post-arrest statements, which included Nguyen's admission that she drove from Rocksalt to the gore point. 3RP 279-80; CP 169-73. Accordingly, the State argued in closing that the trial court should consider the charge of physical control of a vehicle while under the influence as a "lesser included offense" of DUI. 2RP 234-36, 242. Nguyen argued in closing that Nguyen had established by a preponderance of the evidence that her possession of cocaine had been unwitting. 2RP 243-44. Nguyen further argued entrapment as a defense to DUI. 2RP 251. However, in the alternative, Nguyen argued the "safely off the roadway" defense to the included charge of physical control under RCW 46.61.504(2). 2RP 256-59. Nguyen did not object to the trial court's consideration of physical control as an included offense of DUI.

The trial court found that Al-Zoughbi's testimony was not credible and rejected Nguyen's unwitting possession defense. Accordingly, the court found Nguyen guilty of possession of cocaine

as charged. In addition, the trial court insufficiently admissible evidence to prove that Nguyen had driven the car from Rocksalt to the gore point, but also found that Nguyen was not safely off the roadway. Therefore, the court found Nguyen guilty of the included offense of physical control. 3RP 275-81; CP 157-61.

The trial court continued Nguyen's sentencing hearing several times so that Nguyen could present sufficient information regarding her mental health history and treatment. 3RP 283-89, 318. At the second hearing, however, Nguyen indicated to the court that she was "doing much better," and had "totally changed" since 2003. 3RP 301, 303-04. At the third hearing, Nguyen's trial attorney indicated that he had recently learned that he had previously represented Nguyen's ex-husband in an assault case where Nguyen was the victim. 4RP 1. Although Nguyen's attorney correctly noted that there was not an actual conflict of interest, he further noted that Nguyen was now claiming that he had coerced her into waiving her right to a jury trial and that these allegations gave him concerns about her competency. 4RP 2, 6, 14-15.

Nguyen's attorney was allowed to withdraw, and a new attorney represented Nguyen at the fourth and final hearing. 3RP 319. Nguyen moved for a new trial on grounds that her trial

counsel had a conflict of interest. The motion was denied. 3RP 321-26. The trial court further found that Nguyen had made a voluntary waiver of her right to a jury trial, and observed that Nguyen had participated in the trial proceedings and had given the court no reason to question the validity of the waiver. 3RP 334-35.

The court imposed a standard range sentence on count I and the mandatory minimum sentence on count II, and ordered the sentences to be served concurrently. CP 183-93. Nguyen now appeals. CP 202-11. The relevant facts of this case will be discussed in greater detail as necessary for argument.

C. **ARGUMENT**

1. **THE TRIAL COURT HAD NO BASIS TO QUESTION THE DEFENDANT'S WAIVER OF THE RIGHT TO A JURY TRIAL, AND THE RECORD SHOWS THAT THE WAIVER WAS VALID AT THE TIME IT WAS MADE.**

Nguyen first argues that the trial court was obligated to conduct a colloquy in order to establish that Nguyen's waiver of the right to a jury trial was valid. Specifically, Nguyen argues that a colloquy was required due to her history of mental illness and prior findings of incompetence. In the absence of such a colloquy, Nguyen asks this court to hold that her waiver of the right to a jury trial was not valid, and to grant a new trial. Opening Brief, at 9-22.

This argument should be rejected. The record in this case is sufficient to establish a valid waiver of the right to a jury trial. Given Nguyen's execution of a written waiver, Nguyen's trial counsel's representations to the court, and the trial court's own observations of Nguyen at trial, the lack of a formal colloquy does not provide a basis to reverse in this case. Rather, the record supports the trial court's determination that Nguyen's waiver was valid at the time it was made.

A criminal defendant has the constitutional right to be tried by a jury. State v. Stegall, 124 Wn.2d 719, 723, 881 P.2d 979 (1994). Accordingly, the decision to waive the right to a jury trial must be made knowingly, intelligently, and voluntarily. Id. at 725. However, "[t]he validity of any waiver of a constitutional right, as well as the inquiry required by the court to establish waiver, will depend on the circumstances of each case, including the defendant's experience and capabilities." Id. (citing Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 2d 1461 (1938)).

Some constitutional rights may be waived more easily than others. In other words, "the inquiry by the court will differ depending on the nature of the constitutional right at issue."

Stegall, 124 Wn.2d at 725. For instance, a waiver of the right to counsel generally requires a full colloquy on the record to ensure that the defendant's request for self-representation is unequivocal and that the defendant understands the risks inherent in proceeding pro se. Id. (citing Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 957 (1984)). In addition, a guilty plea, "which involves waiving numerous trial rights," requires a record sufficient to demonstrate not only a voluntary and intelligent waiver of such rights, but also the defendant's understanding of the consequences of the plea. Stegall, 124 Wn.2d at 725 (citing State v. Smissaert, 103 Wn.2d 636, 643, 694 P.2d 654 (1985)).

On the other hand, unlike the right to counsel or the right to plead not guilty, the right to a jury trial may be waived for tactical reasons "while still preserving to the accused the right to a fair trial." State v. Likakur, 26 Wn. App. 297, 303, 613 P.2d 156 (1980). Accordingly, "no such colloquy or on-the-record advice as to the consequences of a waiver is required for waiver of a jury trial; all that is required is a personal expression of waiver from the defendant." Stegall, 124 Wn.2d at 725. In fact, "[t]he claim that an extended colloquy on the record is required for jury waiver has been rejected each time it has been presented." State v. Brand, 55

Wn. App. 780, 788, 780 P.2d 894 (1989), rev. denied, 114 Wn.2d 1002 (1990). Thus, a written waiver of the right to a jury trial constitutes "strong evidence" that the waiver is valid, particularly when coupled with trial counsel's representations to the court that the right is being waived intelligently and voluntarily. Id.

In cases where concerns arise regarding a defendant's current mental health status or competency to stand trial, a trial court should exercise greater caution in ensuring that a jury waiver is valid, particularly if trial counsel suggests that the trial court should conduct a colloquy. See United States v. David, 511 F.2d 355 (D.C. Cir. 1975). However, contrary to Nguyen's claims, such considerations are not relevant "in the absence of a showing that [the defendant] was mentally ill *at the time of trial.*" Brand, 55 Wn. App. at 787 (emphasis in original). As this court has recently held in the context of a waiver of the right to counsel – a right that requires a far more rigorous inquiry than the right to a jury trial – the relevant consideration for the court "is the state of mind and knowledge of the defendant *at the time the waiver is made,*" not at some other point in the proceedings. State v. Modica, ___ Wn. App. ___ (filed 12/26/06), slip op., at 10 (emphasis supplied).

Without any indication that the defendant is suffering from mental illness at the time of trial, "[t]he court and the prosecutor should be entitled to rely on a defendant's written waiver in compliance with" CrR 6.1(a). Brand, 55 Wn. App. at 786. In other words, when the record demonstrates that the defendant is presently competent and not currently suffering from mental illness, a written waiver made with the advice and assistance of counsel is sufficient to relinquish the right to a jury trial, and the trial court is under no obligation to inquire further. See State v. Downs, 36 Wn. App. 143, 672 P.2d 416 (1983), rev. denied, 100 Wn.2d 1040 (1984).

In this case, Nguyen executed a written waiver of the right to a jury trial as required by CrR 6.1(a). CP 39. In addition, Nguyen's trial counsel unequivocally represented to the trial court that despite prior periods of incompetence, Nguyen was presently competent, had "fully recovered" her mental health through a treatment program with Seattle's mental health court, and was making a voluntary and intelligent waiver of her right to a jury trial for legitimate tactical reasons:

MR. BROWNE: You will find that the court file is somewhat thick with somewhat rather minor offenses. I didn't bring mine. I would need a truck.

The reason this case is so old is that there was a long period of incompetency. And that's why it was old. I personally today have no belief of any kind that Ms. Nguyen is incompetent. I think that she has recovered fully. She went through mental health court, which was very successful. So, I don't have any issue now with competency, which I think I should probably put on the record. Also, we believe that there are some technical defenses in this case, which would be much better tried to a court than to a jury. Ms. Nguyen agrees with me. We have executed a waiver of jury trial.

MS. GILCHRIST: The State has no objection to that.

THE COURT: I assume no further inquiry is necessary, both parties are stipulating to this?

MR. BROWNE: I think, your Honor, and for the record, I should indicate that I went over that with my client in detail, and I told her she had an absolute right, a constitutional right, to a jury trial. And she is voluntarily giving that up. And I think the reasons make sense.

1RP 5-6.

Based on this record, the trial court was given no reason to question the validity of Nguyen's written waiver of the right to a jury trial. To the contrary, the court was entitled to rely on the waiver and the unchallenged representations of Nguyen's trial counsel that she was making a knowing, intelligent, and voluntary decision to have her case heard by the court rather than by a jury. In fact, Nguyen's trial counsel confirmed that there was no need for the

court to inquire further. Judging the validity of this waiver at the time it was made, this court should hold that the trial court was under no obligation to conduct a colloquy sua sponte, and affirm.

But furthermore, although the relevant inquiry for this court is whether Nguyen's waiver was valid at the time it was made, further evidence in the record also undercuts Nguyen's claim that the trial court should have had reason to doubt her mental health and/or her competency to waive the right to a jury trial. During Nguyen's trial testimony, she acknowledged that she was clean and sober, that she had participated in a two-year program with the mental health court, and that she was currently working as a mortgage banker. 2RP 187-88. Moreover, during the second of four scheduled sentencing hearings, the deputy prosecutor assigned to mental health court confirmed that Nguyen was in that program from 2003 through 2006, and that she had completed the program successfully. 3RP 291. During that same hearing, the trial court noted that Dr. Frederick Wise -- who was hired by the defense to evaluate Nguyen's mental health status in 2005 -- had found that Nguyen was competent, not psychotic or delusional, and that he was "at a loss" to explain how Nguyen had presented as such while at Western State Hospital. 3RP 310; CP 108. In addition, during

her allocution at this hearing, Nguyen herself acknowledged that she was "doing much better," and that she had "totally changed" since 2003. 3RP 301, 303-04.

Nguyen later claimed, several months after trial, that her attorney had coerced her into having a bench trial, and her attorney voiced concern about Nguyen's competency based on that allegation. 4RP 2, 6, 14-15. However, the trial court found that Nguyen had made a voluntary waiver of the right to a jury trial, and personally observed that Nguyen had participated in the trial proceedings and had given the court no reason to question the validity of the waiver at the time it was made. 3RP 334-35. Based on a totality of the circumstances as evidenced by the record, and given that this court cannot review the trial court's firsthand observations of the defendant at trial, this court should reject Nguyen's assertion that her jury waiver was invalid absent some further inquiry by the trial court. This court should reject Nguyen's claim that a colloquy was required, and affirm.

2. **THE DEFENDANT AGREED AT TRIAL AND CONTROLLING AUTHORITIES ESTABLISH THAT PHYSICAL CONTROL IS AN INCLUDED OFFENSE OF DUI.**

Next, Nguyen asks this court to hold that physical control of a motor vehicle while under the influence is not a "lesser included" offense of DUI because both offenses are gross misdemeanors with the same potential penalties. Accordingly, Nguyen argues that her conviction for physical control should be dismissed. Opening Brief, at 23-32. This argument should be rejected. First, Nguyen agreed at trial that physical control is an included offense of DUI, and thus her claim is waived. Furthermore, the plain language of the applicable statute, precedent from the Washington Supreme Court, and precedent from this court establish that physical control is an included offense of DUI. Nguyen's conviction for physical control should be affirmed.

The invited error doctrine dictates that a party may not set up an error at trial and then claim such error on appeal. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). A claim of error is waived on appeal "if the party asserting such error materially contributed thereto." Id. This rule applies in the context of erroneously submitted lesser included offenses, both

when the defendant actually proposed the included offense and when the defendant acquiesced to its consideration by the factfinder. See State v. Bailey, 114 Wn.2d 340, 787 P.2d 1378 (1990); State v. Lewis, 15 Wn. App. 172, 548 P.2d 587, rev. denied, 87 Wn.2d 1005 (1976). Moreover, the question of whether an included offense should be considered by the factfinder is a statutory issue, not a constitutional one. See State v. Tamalini, 134 Wn.2d 725, 728, 953 P.2d 450 (1998); State v. Scott, 110 Wn.2d 682, 688 n.5, 757 P.2d 492 (1988). Accordingly, an alleged error regarding an included offense cannot be claimed for the first time on appeal. RAP 2.5(a).

In this case, Nguyen acquiesced to the State's request for the trial court to consider physical control as an included offense of DUI. In fact, Nguyen's trial counsel devoted a substantial portion of his closing argument to asking the court to find that Nguyen was "safely off the roadway," and had thus established the statutory defense to physical control under RCW 46.61.504(2). 2RP 256-59. Nguyen's counsel also submitted case law to the trial court on this defense to physical control in support of the argument. 2RP 256, 271. At no point in the trial court proceedings did Nguyen argue that physical control was not a legally included offense of DUI, nor

did Nguyen argue that consideration of that charge was inappropriate based on the facts of the case. Therefore, based on the record, Nguyen has waived any claim that the trial court erred in considering physical control as an included offense of DUI, and RAP 2.5(a) precludes raising such a claim for the first time on appeal.

This court's analysis need proceed no further. But even if this court were to consider Nguyen's claim on the merits, it fails nonetheless.

A criminal defendant cannot be convicted of an uncharged crime unless the uncharged crime is "an offense the commission of which is necessarily included within that with which he [or she] is charged[.]" RCW 10.61.006. In interpreting this statute, Washington courts have devised a well-established, two-part test for determining whether an offense is "necessarily included" within the charged crime. First, each element of the included offense must be a necessary element of the crime charged (the legal prong). Second, the evidence produced at trial must support an inference that only the included offense was committed (the factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); State v. Berlin, 133 Wn.2d 541, 545-46, 550, 947 P.2d 700

(1997). If both parts of this test are satisfied, then either party is entitled to request that the included offense be submitted to the factfinder for consideration. Tamalini, 134 Wn.2d at 728.

This court has previously utilized this well-established test to conclude that physical control is a necessarily included offense of DUI. McGuire v. City of Seattle, 31 Wn. App. 438, 642 P.2d 765 (1982), rev. denied, 98 Wn.2d 1017 (1983). As this court held, "[t]he charge of 'driving while intoxicated' contains all of the elements of 'being in physical control' and has the additional element of vehicular motion." Id. at 442. Accordingly, in cases where there is a question as to whether the State can prove that the defendant drove the vehicle, as in this case, it is entirely appropriate to allow the factfinder to consider physical control as an included offense of DUI. Id. at 444.

The Washington Supreme Court's decision in State v. Votava, 149 Wn.2d 178, 66 P.3d 1050 (2003), does not compel a different result. The Votava court overruled a portion of McGuire that the court acknowledged was dicta, and held that the "safely off the roadway" defense to physical control applies regardless of whether the defendant was the person who actually moved the vehicle off the roadway. Votava, 149 Wn.2d at 182, 184-88.

However, the Votava court also acknowledged that physical control is a "lesser offense" of DUI, thus recognizing that the core holding of McGuire remains good law. Votava, 149 Wn.2d at 178.

Therefore, under the well-established test for included offenses and precedent from this court and the Washington Supreme Court, the trial court in this case properly considered physical control as an included offense of DUI, and no error occurred.

Nonetheless, Nguyen claims that physical control is not an included offense of DUI because both crimes are gross misdemeanors, and thus the potential penalties are the same. In support of this argument, Nguyen claims that "RCW 10.61.006 is completely silent about the meaning of lesser-included offenses[.]" Opening Brief, at 29. Accordingly, Nguyen cites divergent case law from other jurisdictions, and urges this court to adopt a new rule that a crime is a "lesser included offense" only if it carries lesser penalties than the crime charged. Opening Brief, at 27-28, 31-32. These arguments are without merit, as the applicable statute is not silent as to what constitutes an included offense. To the contrary, RCW 10.61.006 expressly defines what constitutes an included offense, and Nguyen's claim fails.

As noted above, RCW 10.61.006 unambiguously states that an included offense is "an offense *the commission of which is necessarily included* within that with which [the defendant] is charged[.]" RCW 10.61.006 (emphasis supplied). Thus, the statute plainly establishes that a crime is an included offense if all of the essential elements necessary for its commission are contained within the crime charged. Berlin, 133 Wn.2d at 548. In other words, this statute is focused solely upon the elements necessary for "the commission of" a crime, not the punishment that may flow from a conviction for that crime. Indeed, the statute is entitled "*Included offenses*," not "*Lesser offenses*." RCW 10.61.006. Therefore, although case law typically uses the term "*lesser included offenses*" – probably because included offenses *are* less serious than the charged crime in most cases due to the absence of one or more elements present in the charged crime – the term "lesser" is nowhere to be found in the statute itself.

When interpreting a statute, the court's primary objective is to give effect to the legislature's intent. When a statute's plain language is clear and unambiguous, the court will go no further to ascertain such intent, and will apply the statute as written. State v. Cromwell, 157 Wn.2d 529, 534, 140 P.3d 593 (2006). In this case,

the plain language of RCW 10.61.006 defeats Nguyen's claim because the statute defines an included offense based upon its essential elements, not its penalties. This court should reject Nguyen's arguments to the contrary, and affirm.

3. CONTROLLING PRECEDENT ESTABLISHES THAT POSSESSION OF A CONTROLLED SUBSTANCE IS A CRIME WITH NO MENS REA.

Finally, Nguyen argues that the trial court erred in placing the burden of proving unwitting possession of cocaine on the defense by a preponderance of the evidence. Specifically, she argues that the statute criminalizing the possession of a controlled substance is unconstitutional unless the court includes a mens rea element that the State must prove beyond a reasonable doubt. Opening Brief, at 32-41. This argument should be rejected because it is contrary to controlling precedent from the Washington Supreme Court, and because it is not supported by the other authority the defendant cites.

It is well settled that the legislature has plenary power to define crimes and to fix their punishments. State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005); State v. Whitfield, 132 Wn. App. 878, 894, 134 P.3d 1203 (2006). Therefore, the question of whether a crime contains a mens rea element is purely a question

of statutory construction. See Staples v. United States, 511 U.S. 600, 604, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994) (recognizing the long-standing principle that "determining the mental state required" for a crime involves statutory construction to determine legislative intent). Under traditional common law principles, "offenses that require no *mens rea* generally are disfavored[.]" Id. at 606 (citing Liparota v. United States, 471 U.S. 419, 426, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985)). However, courts also recognize that "[t]he legislature has the authority to create a crime without a mens rea element." State v. Bradshaw, 152 Wn.2d 528, 532, 98 P.3d 1190 (2004), cert. denied, 544 U.S. 922 (2005). Thus, if the legislature's intent to omit a mental state from the elements of a crime is clear from the language of the statute and from its legislative history, a court will not construe the statute otherwise. State v. Cleppe, 96 Wn.2d 373, 380-81, 635 P.2d 435 (1981).

The Washington Supreme Court has concluded – twice – that the crime of possession of a controlled substance contains no mens rea element, and that the burden of proving the defense of unwitting possession is properly allocated to the defendant by a preponderance of the evidence. These holdings are based mainly upon the court's determination, based on statutory language and

legislative history, that the legislature specifically intended to omit any mental state from this crime. Cleppe, 96 Wn.2d at 380-81; Bradshaw, 152 Wn.2d at 534-38. This court is bound by precedent from the Washington Supreme Court. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Accordingly, Nguyen's claim fails and this court's analysis should proceed no further.

Nonetheless, Nguyen argues that the Washington Supreme Court has not previously considered her argument, which she asserts is a claim of constitutional magnitude that is "still an open question." Opening Brief, at 36. This assertion should be rejected. The authorities Nguyen cites are based on principles of statutory construction, not a federal constitutional analysis, and they do not support her position in any event. In fact, Nguyen's arguments were rejected in Bradshaw based on the very authority she cites.

Nguyen argues that the question of whether a crime should contain a mens rea element under traditional common law principles of "malum in se" and "malum prohibitum" is a constitutional question. Opening Brief, at 36-41. In addition, Nguyen asserts that the Supreme Court's analysis in Staples dictates that the federal constitution requires a mens rea element for all offenses except those that may be characterized as "public

welfare" offenses that fall into the "malum prohibitum" category. Opening Brief, at 40-41. However, Staples is based purely upon principles of statutory construction, not some constitutional requirement. Moreover, Staples was properly relied upon in Bradshaw in reaching the conclusion that possession of a controlled substance has no mental state.

In Staples, the Supreme Court considered whether the crime of possession of an unregistered machine gun required proof of the defendant's knowledge of the firearm's characteristics. In considering this question, the Court stated the basis for its analysis clearly and unambiguously:

Whether or not [the statute] requires proof that a defendant knew of the characteristics of his weapon that made it a "firearm" under the Act *is a question of statutory construction.*

Staples, 511 U.S. at 605 (emphasis supplied). The Court then stated that, because crimes lacking mens rea are generally disfavored based on the common law principle of scienter, some further evidence of legislative intent is required in order to dispense with the traditional element of guilty knowledge in cases where the statute itself is silent:

Relying on the strength of the traditional rule, we have stated that offenses that require no *mens rea*

generally are disfavored, and have suggested that some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime.

Id. at 606 (citation omitted). Finding no further evidence of legislative intent in the relevant firearms statute or its legislative history, the Court applied the traditional common law analysis, and held that knowledge was required because to conclude otherwise would punish otherwise lawful behavior – gun ownership² – even in cases where the characteristics of the firearm were wholly unknown to its possessor:

[O]ur holding depends critically on our view that if Congress had intended to make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons, and to subject them to lengthy prison terms, it would have spoken more clearly to that effect.

Id. at 620.

Far from undermining the conclusion in Bradshaw, Staples supports the result reached in that case, as the Washington Supreme Court itself recognized:

² It is worth noting that cocaine possession, unlike gun ownership, is conduct that any reasonable person would immediately recognize as unlawful. Therefore, the State in no way concedes Nguyen's substantive arguments under the traditional common law analysis. Rather, the State merely argues that it is wholly unnecessary to analyze the possession statute anew because existing authority soundly defeats Nguyen's claims.

Defendants err in relying on *Staples* and *Anderson*³ because both cases support our holding that we must not imply a mens rea element into the mere possession statute. Both cases state that the legislature has the authority to define crimes. *Staples*, 511 U.S. at 604; *Anderson*, 141 Wn.2d at 361. Both cases characterize the issue of whether a statute defines a strict liability crime as an issue of statutory construction and/or legislative intent. *Staples*, 511 U.S. at 605; *Anderson*, 141 Wn.2d at 361. Both cases turn to the language of the statute to determine legislative intent. *Staples*, 511 U.S. at 605; *Anderson*, 141 Wn.2d at 361. After finding the language inconclusive, *Anderson* turned to legislative history. 141 Wn.2d at 362.

The legislative history of the mere possession statute is clear. The legislature omitted the "knowingly or intentionally" language from the Uniform Controlled Substances Act.

Bradshaw, 152 Wn.2d at 537.

In sum, Staples does not hold that the traditional common law analysis is a constitutional mandate. Rather, Staples shows that this analysis is simply another method of statutory construction that courts utilize when a statute and its legislative history are insufficient to demonstrate whether the legislature intended to create a strict liability offense. As Bradshaw holds, however, the

³ See State v. Anderson, 141 Wn.2d 357, 364, 361, 5 P.3d 1247 (2000) (holding that unlawful possession of a firearm requires knowledge because the statute and legislative history did not evidence clear legislative intent to the contrary, and because crimes lacking mens rea are disfavored "where such construction would criminalize a broad range of apparently innocent behavior[.]")

legislature's intent in this case is clear, and Nguyen's arguments fail.

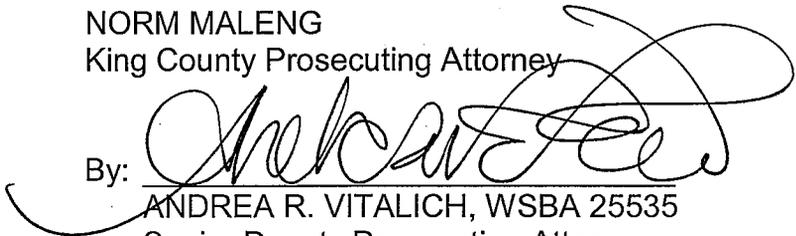
D. CONCLUSION

The trial court had no basis to question the validity of the defendant's waiver of the right to a jury trial. The defendant waived any argument that physical control is not an included offense of DUI, and controlling authority establishes that physical control is an included offense of DUI. Controlling authority also defeats the defendant's claim that the crime of possession of a controlled substance requires proof of guilty knowledge. For all of the foregoing reasons, the State asks this court to affirm.

DATED this 5th day of January, 2007.

RESPECTFULLY submitted,

NORM MALENG
King County Prosecuting Attorney

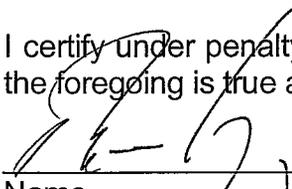
By: 

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Sheryl Gordon McCloud, the attorney for the appellant, at 1301 Fifth Ave., Suite 3401, Seattle, WA 98101-2605, containing a copy of the Brief of Respondent, in STATE V. HUYEN BICH NGUYEN, Cause No. 58623-8-I, 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.



Name
Done in Seattle, Washington

1-5-07

Date

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