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No. 96354-1

No. 76758-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

A.M.,

Appellant.

---

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

---

APPELLANT'S OPENING BRIEF (AMENDED)

---

RICHARD W. LECHICH  
Attorney for Appellant

ERIKA S. RUSHER  
Licensed Legal Intern

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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## **A. INTRODUCTION**

A.M., a 15-year-old girl, walked out of a Goodwill with a backpack containing \$13 worth of Halloween costumes that were not paid for. Unknown to A.M., the backpack used to commit the shoplifting contained methamphetamine. A.M. had been accompanied to the store by her friend and her friend's mother, who appeared to be under the influence of substances. The backpack had come from her friend's house. Her companions fled when A.M. was detained outside the Goodwill.

A.M. contested the charge of possession of a controlled substance, raising the affirmative defense of "unwitting possession." Although the evidence suggested the methamphetamine belonged to her friend's mother and A.M.'s testimony supporting her defense was uncontroverted, the juvenile court concluded she failed to prove her defense. The court did not find that A.M. was not credible, remarking simply that she had not met her burden.

Because A.M. proved her defense, this Court should reverse and order the charge dismissed. Alternatively, this Court should reverse because evidence was admitted in violation of A.M.'s right against self-incrimination. Reversal is further warranted because requiring A.M. to prove unwitting possession violated due process.

## **B. ASSIGNMENTS OF ERROR**

1. In violation of due process as guaranteed by the Fourteenth Amendment to the United States Constitution and article I, § 3 of the Washington Constitution, the trial court erred in concluding that A.M. did not prove the defense of unwitting possession.

2. In violation of the right against self-incrimination, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and article I, § 9 of the Washington Constitution, the trial court improperly admitted A.M.'s compelled statement that a backpack, found to contain drugs, belonged to her.

3. In violation of due process as guaranteed by the Fourteenth Amendment to the United States Constitution and article I, § 3 of the Washington Constitution, the criminal offense of possession of a controlled substance lacks a mental element and improperly shifts the burden to defendants to prove their possession was "unwitting."

4. Lacking substantial evidence, the trial court erred in finding that the event happened on October 24, 2016 rather than October 24, 2015. CP 37 (Finding of Fact (FF) 1).

5. Violating JuCR 7.11(c) and (d), the trial court failed to enter adequate findings explaining what evidence the court was relying upon in

concluding that A.M. had failed to prove unwitting possession by a preponderance of the evidence.

### **C. ISSUES**

1. Drug possession is a strict liability crime. But liability is excused if the defendant proves “unwitting” possession. A.M.’s testimony that she did not know drugs were in a backpack in her possession was uncontroverted. The backpack came from a friend’s house and the friend’s mother appeared to use drugs. The court did not find that A.M. was not credible, yet still found her guilty. Is reversal required because A.M. proved unwitting possession?

2. Absent a valid waiver, statements elicited during custodial interrogation violate the privilege against self-incrimination. After her arrest, A.M. invoked her right to silence. The backpack that police found drugs in was left with A.M. during booking. The juvenile detention facility had A.M. sign a paper stating that what she arrived with and left with was her property. Did the admission of these compelled statements violate A.M.’s right against self-incrimination?

3. The presumption of innocence is a principle fundamental to America’s history and tradition. “Freakish” criminal laws that eliminate traditional *mens rea* elements and shift the burden to defendants to prove their innocence are contrary to this fundamental principle. In Washington,

if a person possesses drugs, the person is guilty unless he or she can prove “unwitting” possession. Does this presumption of guilt deprive defendants of their liberty without due process of law?

#### **D. STATEMENT OF THE CASE**

On the evening of October 24, 2015, a week before Halloween, Kent Caldwell was working his job as a loss prevention officer at a Goodwill store in Everett. RP 22-23, 25. A typical duty of Mr. Caldwell’s was to observe the store through the many cameras. RP 24-25. He could rotate or pivot these cameras and zoom in and out. RP 25. The footage was recorded and admitted into evidence. Ex. 1.

Mr. Caldwell became suspicious of a group of three people in the store: two African-American teenage girls and an adult Caucasian woman. RP 26-27, 42-43. As defense counsel would later argue, RP 121, the adult woman had the appearance of a person who used controlled substances, like methamphetamine:



Ex. 1.



Ex. 1

In contrast, the girl in the black and gray jacket, later identified to be 15-year-old A.M., did not appear to be under the influence of substances:



Ex. 1; CP 54.

The other girl, in a red shirt, was pushing a shopping cart with a backpack inside.



Ex. 1; see RP 28, 47.

Mr. Caldwell saw the adult put two small costumes in the cart. RP 27; Ex. 1. Shortly thereafter, A.M. took the hangers off these costumes and put the costumes into the large compartment of the backpack. RP 46; Ex. 1. He never saw A.M. place anything else into the backpack. RP 46. The group then walked around the store. RP 28; Ex. 1. The girls went to the area near the front door. RP 28; Ex. 1. Leaving the shopping cart, A.M. put the backpack on and walked out of the store. RP 28-29; Ex. 1.

Mr. Caldwell followed and detained A.M. RP 47. A.M. did not resist. RP 49-50. Mr. Caldwell saw the other girl run away. RP 47. He did not see where the adult woman went. RP 29. Mr. Caldwell took A.M.

to the manager's office. RP 29. Nothing indicated to Mr. Caldwell that A.M. was under the influence of any substance. RP 53.

Mr. Caldwell took the backpack from A.M. and opened it. RP 30, 37. The children's costumes, a monkey and a ladybug, were in the large compartment. RP 51; Ex. 2. Mr. Caldwell called the police. RP 31. Mr. Caldwell did not continue to search the backpack once he retrieved the costumes. RP 30. During his search of the backpack, nothing inside indicated to Mr. Caldwell that the backpack belonged to A.M. RP 52.

Officer Rodney Wolfington arrived. RP 58, 60. After determining that he had probable cause to believe that A.M. had stolen the two costumes, valued at about \$13, he arrested A.M. for theft. RP 62.

He searched A.M. and the backpack incident to the arrest. RP 62. A.M. had a dollar bill, a lighter, and a cell phone. RP 62. He did not find any drug paraphernalia. RP 66-67. In a smaller compartment of the backpack, Officer Wolfington found a small medicine bottle, which had a label reading "Cush." RP 62. Based on his experience, Officer Wolfington knew this item to be from a marijuana dispensary. RP 62. Inside the bottle were several small baggies. RP 62. One baggie had a small crystal-like substance consistent with methamphetamine. RP 63.

Officer Wolfington turned the substance over to Officer Andrew McLaughlan, who had arrived after the search of the backpack. RP 63,

73. Before his arrival, Officer McLaughlan had been advised by dispatch that one of the suspects appeared to be drugged or under the influence. RP 78-79. The dispatch record confirmed Officer McLaughlan's recollection, stating that a suspect in her "MID 30'S APPEARED 'DRUGGED' UP." Ex. 4.

Officer McLaughlan tentatively confirmed the substance was methamphetamine. RP 74. He opined that the small bottle was consistent with what was sold at marijuana stores. RP 81. These stores sell products to people 21 years and older, not to juveniles like A.M. RP 81-82

Officer Wolfington advised A.M. she was under arrest for a felony. RP 63-64. A.M., whom Officer Wolfington said did not really want to talk to him, invoked her right to silence. RP 10-11, 60; CP 51-52.

Officer Wolfington booked A.M. into the juvenile facility. RP 63-64; Ex. 3. Officer Wolfington testified that A.M.'s "personal property," including the backpack, was sent to the property room. RP 64. In other words, Officer Wolfington did not seize the backpack as evidence. A property invoice from the facility recounts that a backpack was among A.M.'s items. Ex. 3. The invoice appears to contain a signature belonging to A.M., stating that she "read the above accounting of my property and money and find it to be accurate." Ex. 3. Another signature, dated

October 25, 2015 and appearing to belong to A.M., states that “I have received the above listed property.” Ex. 3.

A.M. was charged not merely with third degree theft—a gross misdemeanor, but also with possession of a controlled substance, methamphetamine—a felony. CP 54. The court held an adjudicatory hearing on the charges on February 14, 2017. A.M. contested only the charge of possession. RP 15-16.

The parties stipulated that the substance was methamphetamine. CP 50. The packaging, including the baggies and bottle, were not tested for DNA or fingerprints. CP 50.

The prosecution called Mr. Caldwell, officers Wolfington and McLaughlan, and Ashley Thomas to testify. RP 22-104. Mr. Thomas was an employee at the detention facility and supervised other employees responsible for the intake and outtake of juveniles. RP 88-90. Although Mr. Thomas did not conduct the inventory of the items that A.M. arrived with, the State successfully had the property invoice admitted into evidence as a business record. RP 97-100.

A.M. testified in her defense. She explained that the girl at the Goodwill was her former friend, Augustina. RP 107. The woman was Augustina’s mother. RP 107. They went to the Goodwill to get Halloween costumes for Augustina’s younger brother and sister. RP 107.

Augustina's mother did not have money so they tried to steal them. RP 107, 109. Augustina's mother had been drinking and reeked of beer. RP 109. A.M. thought Augustina's mother had been under the influence. RP 109.

A.M. explained that the backpack was not hers. RP 108. The backpack was from Augustina's house. RP 108. She had not looked into the small outer pocket of the backpack. RP 108, 111. She had never seen the pill bottle or the little baggies before. RP 111. She did not know there was methamphetamine in the backpack. RP 111.

When A.M. was picked up from the juvenile facility the next day by her father, the facility gave the backpack to her. RP 110. She took it so that she could return to her friend's family, which she did. RP 110.

The trial court found A.M. guilty, concluding that A.M. failed to prove the affirmative defense of unwitting possession by a preponderance of the evidence. RP 133-34. A.M. moved for reconsideration, but the court adhered to its ruling. RP 150-51.

At disposition, A.M. told that court she had turned her life around because she realized who her true friends were and was focusing on herself. RP 156. Recognizing that A.M. had not been in trouble in the year and half since the incident, the court sentenced A.M. to two days,

with credit for two days served. RP 160. The court rejected the notion that A.M. needed probation and did not impose it. RP 160-61.

## **E. ARGUMENT**

### **1. A.M. proved the affirmative defense of unwitting possession by a preponderance of the evidence.**

#### **a. Standard of review.**

Due process demands the State prove all the elements of a criminal offense beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; In re Winship, 397 U.S. 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). When the defendant has the burden of proving an affirmative defense by a preponderance of the evidence, the standard of review on appeal is “whether, considering the evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant failed to prove the defense by a preponderance of the evidence.” State v. Lively, 130 Wn.2d 1, 17, 921 P.2d 1035 (1996).

Following a juvenile adjudication hearing, the court must state its findings, including the evidence relied upon, and enter its decision. JuCR 7.11(c). In cases that are appealed, the court must enter written findings of fact, and these findings must state all ultimate factual determinations for each element and the evidence relied upon to reach these determinations.

JuCR 7.11(d). This facilitates appellate review. See State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998).

On review, the trial court's findings of fact are reviewed for substantial evidence. State v. B.J.S., 140 Wn. App. 91, 97, 169 P.3d 34 (2007). Substantial evidence exists where there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). The court reviews *de novo* whether the conclusions of law are supported by the findings. State v. A.M., 163 Wn. App. 414, 419, 260 P.3d 229 (2011); B.J.S., 140 Wn. App. at 97. If the findings and evidence do not support the trial court's adjudication of guilt, reversal and dismissal of the charge is the proper remedy. See State v. Alvarez, 128 Wn.2d 1, 19, 904 P.2d 754 (1995).

**b. Under the findings and the evidence, no rational trier of fact could have concluded that A.M. failed to prove unwitting possession.**

Possession of a controlled substance, such as methamphetamine, is unlawful. RCW 69.50.4013(1); 69.50.206(d)(2). As construed by our Supreme Court, this crime requires the State to prove only the nature of the substance and the fact of possession. State v. Bradshaw, 152 Wn.2d 528, 537-38, 98 P.3d 1190 (2004). The statute does not require the State to prove that the defendant's possession was knowing. Id. It is a strict

liability crime. In light of this, the judiciary has created the affirmative defense of “unwitting possession.” Bradshaw, 152 Wn.2d at 538; State v. Buford, 93 Wn. App. 149, 151-52, 967 P.2d 548 (1998). The defendant must prove, by a preponderance of the evidence, that her possession of the substance was unwitting. Buford, 93 Wn. App. at 152.

The trial court concluded that A.M. had “not proven unwitting possession by a preponderance of the evidence.” CP 38 (CL 3). The trial court’s findings of fact do not support this conclusion. In their entirety, the findings read:

1. The incidents in the case at bar occurred on October 24, 2016, in Snohomish County, Washington.
2. The respondent was in Goodwill with two other persons.
3. The respondent pushed the shopping cart containing a blue backpack while in the store.
4. The respondent concealed Goodwill merchandise into the blue backpack.
5. The respondent put the backpack on her back and left the store with concealed merchandise, passing all points of sale.
6. Methamphetamine was recovered from the backpack, as was the stolen Goodwill merchandise.
7. No one else was observed touching or handling the backpack.
8. Respondent’s possession of the controlled substance was both actual and constructive.

CP 37-38.<sup>1</sup>

These findings say nothing about the contested issue of unwitting possession. The court did not find that A.M.'s testimony was not credible. The court did not find that it was rejecting A.M.'s claim due to a lack of corroborating evidence. The court did not find that any particular piece of evidence rebutted A.M.'s claim, such as A.M.'s signing a statement that the backpack was part of her property during booking and release from jail. In sum, the written findings do not support the trial court's conclusion that A.M. did not prove unwitting possession by a preponderance of the evidence.

Relatedly, the trial court's oral rulings on the topic are similarly conclusory. RP 133, 150. They do not fill the void. Cf. State v. Radka, 120 Wn. App. 43, 48, 83 P.3d 1038 (2004) (record provided adequate information for review on suppression issue despite trial court not entering written findings and conclusions).

Remand is sometimes appropriate when there are deficient findings. Alvarez, 128 Wn.2d at 19. But here, reversal is warranted because—in light of the evidence and what the trial court found—no

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<sup>1</sup> As noted before, the trial court erred in finding that the events took place on October 24, 2016. They took place on October 24, 2015.

rational trier of fact could have concluded that A.M. failed to prove unwitting possession by a preponderance of the evidence.

A.M. testified that the backpack was not hers and came from Augustina's house. RP 108. A.M. did not look into the outer pocket of the backpack, where the pill bottle with the drugs was located. RP 111. She testified she did not know that methamphetamine was in the backpack. RP 111. Her testimony was uncontroverted. The State did not call any witness in rebuttal.

Although the video showed A.M. using the backpack to help her companions shoplift, the video did not show her carrying the backpack into the store or accessing it before the shoplift. Ex. 1.

Critically, the trial court did not reject A.M.'s testimony as being not credible. The record affirmatively shows the court did not rest its ruling on A.M.'s credibility. In support of a post-verdict motion for arrest of judgment, defense counsel argued the only rational way for the court to reject the affirmative defense was to disregard A.M.'s testimony and find his client not credible:

Your Honor, there's no evidence that my client knew the methamphetamine was in that backpack.

The only way for the court to find that the burden of proving unwitting possession was met -- was not met by the defense is if you completely disregard her testimony and

find her to be a liar and I cannot see how the court could possibly do that.

RP 148. In response, the court disagreed, refusing to say it found A.M. less than credible, instead insisting that it was simply concluding that the defense had not met its burden:

I don't accept your argument as true, Mr. Rothstein, that I have to basically ignore everything your client's saying. I'm just finding that the defense has not proved by a preponderance of the evidence unwitting possession.

RP 150. Upon further inquiry by defense counsel, the court expressed it was not finding A.M. to be a perjurer. RP 152. The court reiterated this personally to A.M.:

I just want to make sure you understand it's not that I think that you're perjuring yourself. That's not the situation.

I just don't think that your attorney - - that your attorney met the burden of showing unwitting possession, okay?

RP 157-58.

The remaining evidence did not support a rational determination that A.M. failed to prove unwitting possession by a preponderance of the evidence. There was no evidence that A.M. was under the influence of substances. Mr. Caldwell affirmatively testified that A.M. did not appear to be under the influence of drugs when detained. RP 53. Rather, Augustina's mother appeared to be a drug user. Although A.M. was

observed handling the backpack in the store while it was in the cart, the evidence did not show who brought the backpack into the store. RP 40, 47, 108; Ex. 1. Nothing in the backpack, like school books or an identification, showed that the backpack belonged to A.M. RP 52. A.M. signed for the backpack at booking so that she could return it to her friend's family. RP 110.

Given the foregoing evidence and the trial court's remarks stating its ruling was not based on a credibility determination as to A.M., the trial court erred in concluding that A.M. had not proved unwitting possession. See City of Spokane v. Beck, 130 Wn. App. 481, 483, 488, 123 P.3d 854 (2005) (in prosecution for physical control of a motor vehicle while intoxicated, evidence was insufficient for jury to conclude that defendant did not prove affirmative defense of being safely off the roadway).

**c. The guilty adjudication for possession should be reversed and the charge dismissed.**

"The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." Burks v. United States, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978). Thus, when there is insufficient evidence, the remedy is reversal and dismissal of the charge with prejudice. Id.; State v. Jussila, 197 Wn. App. 908, 932, 392 P.3d

1108 (2017). The same is true when a trier of fact irrationally rejects an affirmative defense. If the trial court had properly entered a not guilty adjudication, the State could not have appealed and the prohibition against double jeopardy would have barred such an appeal. RAP 2.2(b)(1); State v. Bundy, 21 Wn. App. 697, 702-03, 587 P.2d 562 (1978). Accordingly, the guilty adjudication for possession should be reversed and the charge dismissed with prejudice. If so, the court need not reach the next two issues.

**2. Violating the privilege against self-incrimination, the court admitted A.M.'s compelled statement that a backpack was her property.**

**a. The state and federal constitutions afford defendants a privilege against self-incrimination.**

The federal and state constitutions protect against self-incrimination. U.S. Const. amend. V; Const. art. I, § 9. This protection “spare[s] the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense.” Pennsylvania v. Muniz, 496 U.S. 582, 595, 110 S. Ct. 2638, 110 L. Ed. 2d 528 (1990). To secure these constitutional rights, the police must advise suspects in custody of their right to remain silent and the presence of an attorney before interrogation. Miranda v. Arizona, 384 U.S. 436, 445, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); State v. Radcliffe, 164 Wn.2d 900, 905, 194 P.3d

250 (2008). Absent a valid waiver, statements obtained from custodial interrogation are involuntary. Miranda, 384 U.S. at 475; State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988). Their use against a defendant violate the privilege against self-incrimination. Sargent, 111 Wn.2d at 648.

The term “interrogation” refers to “any words or actions” that a person “should know are reasonably likely to elicit an incriminating response from the suspect.” Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980) (emphasis added).

This “should have known” standard is objective. Sargent, 111 Wn.2d at 651; State v. Denney, 152 Wn. App. 665, 671, 218 P.3d 633 (2009) (abrogated on other grounds by In re Cross, 180 Wn.2d 664, 681 n.8, 327 P.3d 660 (2014)). The test is not whether the state actor intended to elicit an incriminating response. Sargent, 111 Wn.2d at 651; State v. Wilson, 144 Wn. App. 166, 184, 181 P.3d 887 (2008). Thus, a “legitimate question, asked with good intentions, will still violate a defendant’s *Miranda* rights if it is reasonably likely to produce an incriminating response.” Denney, 152 Wn. App. at 673. The focus is on “the perceptions of the suspect,” not the person eliciting the response.<sup>2</sup> Innis,

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<sup>2</sup> When assessing how a youth, like A.M., perceives a situation, age is a consideration. J.D.B. v. North Carolina, 564 U.S. 261, 277, 131 S. Ct. 2394, 180

446 U.S. at 301; Cross, 180 Wn.2d at 685. Whether there was “interrogation” is an issue of law reviewed *de novo*. Cross, 180 Wn.2d at 681.

Routine booking questions generally do not constitute “interrogation.” State v. Wheeler, 108 Wn.2d 230, 238, 737 P.2d 1005 (1987); Denney, 152 Wn. App. at 673. This is because they are unlikely to elicit an incriminating response. Wheeler, 108 Wn.2d at 238. But routine booking questions may still constitute interrogation. Denney, 152 Wn. App. at 672. They may also result in involuntary statements from a defendant. State v. DeLeon, 185 Wn.2d 478, 487, 374 P.3d 95 (2016) (use of gang information from jail intake forms violated prohibition against self-incrimination because statements could not be considered voluntary under the circumstances). Thus, the use of statements elicited from a defendant during the booking process may violate the Fifth Amendment and article I, § 9.

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L. Ed. 2d 310 (2011) (child’s age is properly part of custody analysis under Miranda); see also State v. Streepy, 199 Wn. App. 487, 495-96, 400 P.3d 339 (2017) (child’s age relevant in Sixth Amendment confrontation clause analysis) (petition for review filed).

**b. The admission of A.M.'s compelled statement—on a booking form—that a backpack belonged to her, violated her privilege against self-incrimination.**

Mr. Thomas, a supervisor at the juvenile facility where A.M. was detained, was called by the State to testify. RP 87. He testified about the booking process. RP 88-90. Part of the intake process is to record what items the juveniles have with them, including their clothes. RP 89. The juveniles review the property invoice with staff and sign it. RP 89, 91; Ex. 3. A similar process occurs for outtake. RP 90. The facility uses the same property invoice. RP 90-91; Ex. 3. If the juvenile refused to sign, that would be noted. RP 96.

Based on Mr. Thomas's testimony and over A.M.'s objection for lack of relevance, the court admitted the property invoice that was filled out when A.M. was booked in and out of the facility. RP 97-99; Ex. 3. The invoice recounted the items that A.M. arrived with, including the backpack that had contained the methamphetamine. Ex. 3. Above what appears to be A.M.'s signature, it states: "I have read the above accounting of my property and money and find it to be accurate. I realize that property not claimed within 30 days will be subject to disposal." Ex. 3. At the bottom of the invoice, next to what also appears to be A.M.'s signature, it states: "I have received the above listed property." Ex. 3.

The admission of A.M.'s statements that the backpack belonged to her violated her right against self-incrimination. She was in custody and had invoked her right to silence. CP 51-52; RP 10-11, 60. Asking A.M. to sign a statement that the backpack belonged to her was "interrogation" because it was reasonably likely to elicit an incriminating response. She was charged with possession of a controlled substance and this substance was found in the backpack. Accordingly, the staff at the facility should have known that by asking A.M. if the backpack belonged to her, they were inviting an incriminating response.

This analysis is supported by State v. Denney, 152 Wn. App. 665, 218 P.3d 633 (2009). There, the defendant was booked into jail based on allegations of theft and possession of a controlled substance, morphine. Denny, 152 Wn. App. at 667-68. Jail staff administered a standard questionnaire that included questions about drug use. Id. The defendant admitted to taking morphine. Id. at 668. This Court held this constituted interrogation because jail staff should have known this was reasonably likely to elicit an incriminating response. Id. at 673. That staff had a legitimate reason for asking the question and were acting in good faith did not matter. Id. The Court reversed the defendant's conviction for possession. Id.

Similarly, A.M. had been arrested for theft and possession of a controlled substance. The methamphetamine was found in the backpack. The question about whether the backpack belonged to her was directly relevant to the charges and invited an incriminating response. It would have plainly been “interrogation” for one of the arresting officers to ask A.M.: “Is this your backpack?” That the question was made through a property invoice during booking is no different. Under Denny, the admission of A.M.’s statement that the backpack belonged her violated her right against self-incrimination. See also State v. Harms, 137 Idaho 891, 55 P.3d 884, 886-88 (Ct. App. 2002) (“interrogation” to request that defendant, who was facing unlawful possession of firearm charges, sign property invoice that listed firearms removed from home).

As in Denny, the State may protest that staff were acting in accordance to procedure and that the questions were necessary. This does not matter.<sup>3</sup> Denny, 152 Wn. App. at 673. Although the juvenile facility may be required to secure the property of detainees, this does not mean the State gets to use statements acquired during this process against defendants. See DeLeon, 185 Wn.2d at 487 (constitutional violation

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<sup>3</sup> Obtaining a statement of ownership is also unnecessary. The form could simply ask whether the items collected are consistent with what the person came in with. The purpose of the property invoice was simply to make sure that everything that came into the facility with a person left with the same person. RP 95.

occurred not when defendants were asked at booking about belonging to a gang, but when these statements were used against defendants at trial).

The Court should hold it was error to admit A.M.'s compelled statement that the backpack was her property.

**c. The error is properly raised as manifest constitutional error.**

“Constitutional errors are treated specially because they often result in serious injustice to the accused.” State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). Thus, under RAP 2.5(a)(3), manifest error affecting a constitutional right may be raised for the first time on appeal as a matter of right. State v. Blazina, 182 Wn.2d 827, 833, 344 P.3d 680 (2015) (“The text of RAP 2.5(a) clearly delineates three exceptions that allow an appeal as a matter of right.”). To make this determination, the appellate court asks: (1) is the error of constitutional magnitude, and (2) is the error manifest? State v. Kalebaugh, 183 Wn.2d 578, 583, 355 P.3d 253 (2015).

Here, the claimed error is plainly constitutional. It is also “manifest.” To be “manifest,” there must be a showing of “actual prejudice,” meaning “that the claimed error had practical and identifiable consequences in the trial.” State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). This standard is satisfied when “the record shows that there is

a fairly strong likelihood that serious constitutional error occurred.” Id.  
The appellate court may examine whether the trial court could have corrected the error. Kalebaugh, 183 Wn.2d at 583. The analysis previews the claim and should not be confused with establishing an actual violation. Lamar, 180 Wn.2d at 583.

The record establishes that A.M. was in custody and had invoked her right to silence when she was asked if the backpack belonged to her. In a motion *in limine*, A.M. requested the court to “[p]rohibit any witness from testifying regarding [A.M.]’s decision to invoke her Fifth Amendment right to remain silent.” CP 51 (emphasis added). The State did not disagree with this motion and the court granted it. RP 10-11. Moreover, there is no indication that A.M. waived her Miranda rights.

A.M. also objected to the admission of the property invoice, albeit on different grounds. RP 97-99. The trial court had the opportunity to correct the error. See Kalebaugh, 183 Wn.2d at 584 (trial court “should have known” that jury instruction was misstatement of the law).

As explained in more detail below, the error had identifiable consequences. The trial court found the evidence probative, overruling A.M.’s relevance objection. RP 97-99. The State relied on this evidence to prove its case and argued it rebutted A.M.’s claim of unwitting

possession. RP 119. It was a close case, as the trial court remarked. RP 133.

Because RAP 2.5(a)(3) is satisfied, the Court must address the claimed error.

**d. The error is not harmless beyond a reasonable doubt.**

The constitutional harmless error test applies to violations of the Fifth Amendment and article I, § 9. DeLeon, 185 Wn.2d at 487. Prejudice is presumed and the State bears the burden of proving the error is harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013).

A “confession is like no other evidence.” Arizona v. Fulminante, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). This recognition explains, in part, why about 25 percent of known wrongful convictions involved a false confession or incriminating statement by the innocent person. <https://www.innocenceproject.org/causes/false-confessions-admissions/> (last accessed November 1, 2017).

Here, the State used the statements to argue that A.M. had effectively confessed to owning the backpack. During closing the State emphasized that A.M. had “signed for the backpack,” indicating that it

was hers, not someone else's. RP 119. There was no comparable evidence indicating that the backpack belonged to A.M. Moreover, as explained earlier, A.M. had a strong case of unwitting possession. In the trial court's mind, "it was actually a close case." RP 133. Although the trial court also remarked that the evidence related to booking was "not a big factor" in its decision, this remark indicates that it was still *a* factor. Given this record, the State cannot meet its burden to prove the error harmless beyond a reasonable doubt. This Court should reverse.

**3. Requiring A.M. to prove that that she unwittingly possessed the controlled substance, found in a backpack, deprived her of liberty without due process of law.**

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

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453, 15 S. Ct. 394 (1895). To overcome this presumption, due process requires the State to prove every element of the charged offense beyond a reasonable doubt. Winship, 397 U.S. at 364.

It is fundamental that "wrongdoing must be conscious to be criminal." Morrisette v. United States, 342 U.S. 246, 252, 72 S. Ct. 240,

96 L. Ed. 288 (1952). Accordingly, even where a statute appears to not contain any mental element, this does not mean there is not any. Elonis v. United States, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2001, 2009, 192 L. Ed. 2d 1 (2015). Unless it can be absolutely shown that a legislature intended to omit the traditional mental element, the courts will imply one. See, e.g., United States v. X-Citement Video, Inc., 513 U.S. 64, 70, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994); State v. Anderson, 141 Wn.2d 357, 366-67, 5 P.3d 1247 (2000). This makes sense because otherwise innocent conduct may be criminalized.

Notwithstanding the foregoing principles, the Washington Supreme Court has held that drug possession is a strict liability crime. Bradshaw, 152 Wn.2d at 537. The State need only prove the nature of the substance and the fact of possession. Id. at 537-38. For the innocent to avoid conviction, they bear the burden of proving, by a preponderance of the evidence, that their possession was unwitting. Id. at 538.

In other words, instead of a presumption of innocence, there is a presumption of guilt. As explained below, this burden shifting scheme deprives persons of their liberty without due process of law and should be held unconstitutional.

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

A State has authority to allocate the burdens of proof and persuasion for a criminal offense, but this allocation violates due process if “it offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental.” Patterson v. New York, 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (internal quotation omitted). “The presumption of innocence unquestionably fits that bill.” Nelson v. Colorado, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1249, 1256 n.9, 197 L. Ed. 2d 611 (2017).

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

defendant to prove “heat of passion” in order to reduce murder to manslaughter violated due process); see Apprendi v. New Jersey, 530 U.S. 466, 467, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (recounting that the Supreme Court had not “budge[d] from the position that . . . constitutional limits exist to States’ authority to define away facts necessary to constitute a criminal offense”). Hence, in allocating burdens of proof in criminal cases, “there are obviously constitutional limits beyond which the States may not go . . .” Patterson, 432 U.S. at 210.

Finding the line is not necessarily easy. But that does not mean there is no line. Thankfully, history and tradition provide guidance:

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

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

Washington appears to be the *only* State that makes drug possession a true strict liability crime.<sup>4</sup> State v. Adkins, 96 So. 3d 412, 424 n.1 (Fla. 2012) (Pariente, J., concurring); see Bradshaw, 152 Wn.2d at 534; Dawkins v. State, 313 Md. 638, 547 A.2d 1041, 1045 n.7 (1988). Although Florida eliminated a *mens rea* requirement from its drug possession statute, this only eliminated the State’s burden to prove that the defendant knew *the nature* of the substance. Adkins, 96 So. 3d at 415-16 It did not eliminate the requirement that the State prove defendants knew they possessed the substance.<sup>5</sup> Id. Unlike in Washington, the State in Florida must at least prove that the defendant was aware of the presence of the substance.

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

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<sup>4</sup> North Dakota had made drug possession a strict liability offense, but the Legislature changed the law to require a mental element. State v. Bell, 649 N.W.2d 243, 252 (2002).

<sup>5</sup> The standard jury instructions confirm this. Available at: [http://www.floridasupremecourt.org/jury\\_instructions/instructions-ch25.shtml](http://www.floridasupremecourt.org/jury_instructions/instructions-ch25.shtml)

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

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

A recent federal district court decision addressing the constitutionality of an Arizona law is instructive. May v. Ryan, 245 F. Supp. 3d 1145 (D. Ariz. 2017). There, the court held that Arizona's child molestation law violated a defendant's right to due process. Id. at 1162-65. Arizona had eliminated the requirement that the State prove sexual motivation, effectively criminalizing broad swaths of innocent conduct (such as changing a baby's diaper). Id. at 1155-56. Defendants could avoid conviction if they affirmatively proved, by a preponderance of the evidence, that their touching lacked sexual motivation. Id. at 1156.

The federal court ruled this violated due process. The court recognized that due process limits States in placing burdens on defendants. Id. at 1157-58. The Arizona law unconstitutionally shifted the burden of proof to defendants to prove their innocence. Id. at 1158-59. The court recognized that proof of sexual intent had traditionally been part of the

offense of child molestation. Id. at 1159-61. Arizona’s law was “freakish.” Id. at 1161-62.

The court recognized that “[s]hifting what used to be an element to a defense is not fatal if what remains of the stripped-down crime still may be criminalized and is reasonably what the state set out to punish,” but that was not true for the Arizona offense. Id. at 1163. Formulated,

If the ‘affirmative’ defense is to disprove a positive—and that positive is the only wrongful quality about the conduct as a whole—it is a nearly conclusive sign that the state is unconstitutionally shifting the burden of proof for an essential element of a crime.

Id. at 1164.

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

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

The State may argue that the foregoing argument is inconsistent or foreclosed by United States v. Balint, 258 U.S. 250, 42 S. Ct. 301, 66 L. Ed. 604 (1922). There, the court upheld a narcotics law that did not require the defendant know the item he was selling qualified as an unlawful narcotic within the meaning of the statute. See Balint, 258 U.S. at 254; United States v. Staples, 511 U.S. 600, 606, 132 S. Ct. 593, 181 L. Ed. 2d 435 (2011). This was a kind of public welfare offense where the activity is highly regulated. Staples, 511 U.S. at 606-07. “By interpreting such public welfare offenses to require at least that the defendant know that he is dealing with some dangerous or deleterious substance, [the United States Supreme Court has] avoided construing criminal statutes to impose a rigorous form of strict liability.” Id. at 607 n.3; accord Warfield, 119 Wn. App. at 878. In contrast, Washington’s possession law does not require any kind of knowledge by the defendant. Unlike the offense in Balint, it is a rigorous form of strict liability.

The State may also argue A.M.’s argument is foreclosed by Bradshaw. There, however, our Supreme Court did not address the issue. Bradshaw, 152 Wn.2d at 539 (rejecting vagueness argument because petitioners offered little analysis in support of their argument). “An

opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered.” Cont’l Mut. Sav. Bank v. Elliott, 166 Wash. 283, 300, 6 P.2d 638 (1932). “Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive . . .” ETCO, Inc. v. Dep’t of Labor & Indus., 66 Wn. App. 302, 307, 831 P.2d 1133 (1992). Therefore, Bradshaw does not address whether strict liability for drug possession complies with due process.

For this reason, a panel on Division Two of this Court erred in rejected a due process challenge to the possession statute. State v. Schmeling, 191 Wn. App. 795, 801-02, 365 P.3d 202 (2015). The Schmeling court rejected the argument in light of Bradshaw. Id. But Bradshaw did not address the issue.

This Court is not obligated to perpetuate this error. Grisby v. Herzog, 190 Wn. App. 786, 806-811, 362 P.3d 763 (2015) (recognizing that Court of Appeals’ decisions may conflict and *stare decisis* does not preclude a holding that is inconsistent with a previous Court of Appeals’ opinion). The Court should decline to follow Schmeling.

**c. As applied in this case, requiring A.M. to prove that she lacked knowledge of the drugs in the backpack violated due process.**

As applied to A.M.'s case, forcing her to prove she did not know the methamphetamine was in the backpack violated due process. She raised the affirmative defense of unwitting possession and testified to a lack of knowledge. Still, the trial court found her guilty. The court concluding this was not because A.M. was not credible in her testimony, but that she had simply not met her burden. In other words, she had not overcome the presumption of guilt. The requirement that A.M. prove her innocence deprived her of liberty without due process of law. Her guilty adjudication should be reversed and the drug possession statute held unconstitutional.

**F. CONCLUSION**

The trial court erred in concluding that A.M. had not met her burden to prove unwitting possession. The guilty adjudication for possession should be reversed and the charge dismissed. Alternatively, this adjudication should be reversed because A.M.'s right against self-incrimination was violated. Additionally, reversal is warranted because requiring A.M. to prove unwitting possession violated due process.

DATED this 27th day of November, 2017.

Respectfully submitted,

/s Richard W. Lechich

Richard W. Lechich – WSBA #43296  
Washington Appellate Project  
Attorney for Appellant



Erika S. Rusher  
Erika S. Rusher  
Licensed Legal Intern 9750492  
Washington Appellate Project

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 76758-5-I
	)	
A.M.,	)	
	)	
Juvenile Appellant.	)	

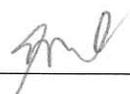
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