

FILED  
Court of Appeals  
Division I  
State of Washington  
4/25/2018 4:37 PM

No. 96354-1

No. 76758-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

---

STATE OF WASHINGTON,

Respondent,

v.

A.M.,

Appellant.

---

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

---

REPLY BRIEF OF APPELLANT

---

RICHARD W. LECHICH  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 610  
Seattle, Washington 98101  
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT ..... 1

    1. A.M. proved the affirmative defense of unwitting possession by a preponderance of the evidence. The guilty adjudication for possession should be reversed and the charge dismissed. .... 1

    2. The admission of A.M.’s compelled statement that the backpack containing the drugs was her property violated her privilege against self-incrimination. The State has not met its burden to prove this manifest constitutional error harmless beyond a reasonable doubt, requiring reversal..... 6

    3. The strict liability offense of felony possession of a controlled substance violates due process. Washington’s possession statute should be declared unconstitutional and the guilty adjudication reversed. .... 14

    4. The State’s recitation of the “facts” misstates the record and violates the rules of appellate procedure..... 16

B. CONCLUSION ..... 19

TABLE OF AUTHORITIES

**United States Supreme Court**

J.D.B. v. North Carolina, 564 U.S. 261, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011)..... 8, 10

Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)..... 9

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)..... 7

Nelson v. Colorado, \_\_ U.S. \_\_, 137 S. Ct. 1249, 197 L. Ed. 2d 611 (2017)..... 15

Schad v. Arizona, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991)..... 14

**Washington Supreme Court**

City of Seattle v. Slack, 113 Wn.2d 850, 784 P.2d 494 (1989)..... 5

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 828 P.2d 549 (1992)..... 3, 17

In re Cross, 180 Wn.2d 664, 327 P.3d 660 (2014) ..... 8, 10

In re Stockwell, 179 Wn.2d 588, 316 P.3d 1007 (2014) ..... 15

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 6

State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190 (2004)..... 14, 15

State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (1981)..... 15

State v. DeLeon, 185 Wn.2d 478, 374 P.3d 95 (2016)..... 11

State v. Lamar, 180 Wn.2d 576, 327 P.3d 46 (2014) ..... 11, 13

State v. Sargent, 111 Wn.2d 641, 762 P.2d 1127 (1988)..... 8

Yakima County Deputy Sheriff’s Ass’n v. Bd. of Comm’rs for Yakima County, 92 Wn.2d 831, 601 P.2d 936 (1979)..... 16

**Washington Court of Appeals**

City of Spokane v. Beck, 130 Wn. App. 481, 123 P.3d 854 (2005)..... 1

Hurlbert v. Gordon, 64 Wn. App. 386, 824 P.2d 1238 (1992) ..... 17, 18

Lawson v. Boeing Co., 58 Wn. App. 261, 792 P.2d 545 (1990) ..... 17

Northlake Marine Works, Inc. v. City of Seattle, 70 Wn. App. 491, 857 P.2d 283 (1993)..... 16

State v. A.M., 163 Wn. App. 414, 260 P.3d 229 (2011)..... 5

State v. Buford, 93 Wn. App. 149, 967 P.2d 548 (1998)..... 14

State v. Contreras, 92 Wn. App. 307, 966 P.2d 915 (1998) ..... 13

State v. Denney, 152 Wn. App. 665, 218 P.3d 633 (2009)..... 9, 10

State v. Jones, 163 Wn. App. 354, 266 P.3d 886 (2011) ..... 13

**Other Cases**

May v. Ryan, 245 F. Supp. 3d 1145 (D. Ariz. 2017)..... 15, 16

United States v. Williams, 842 F.3d 1143 (9th Cir. 2016) ..... 8, 9, 10

**Rules**

RAP 10.3(a)(5)..... 16, 17

RAP 10.3(a)(6)..... 3

RAP 10.3(b) ..... 3

RAP 12.1(a) ..... 3

RAP 2.5(a)(3)..... 6, 13

## A. ARGUMENT

### **1. A.M. proved the affirmative defense of unwitting possession by a preponderance of the evidence. The guilty adjudication for possession should be reversed and the charge dismissed.**

As explained in the Opening Brief, the evidence and the court's findings established that 15-year-old A.M. did not know the backpack she briefly possessed in the thrift store contained methamphetamine. Br. of App. at 15-18. A.M.'s testimony on the matter was uncontroverted. Critically, the trial court did not find A.M.'s testimony lacked credibility, explaining that the court was not finding A.M. was dishonest. And the circumstantial evidence corroborated A.M.'s testimony. This included a lack of evidence showing that the backpack belonged to A.M., the presence of A.M.'s friend and her friend's mother at the thrift store, and the mother's appearance of being on controlled substances. Accordingly, even when viewed in the light most favorable to the State, no rational trier of fact could conclude that A.M. failed to establish her defense of unwitting possession by a preponderance of the evidence. Br. of App. at 12, 18; see City of Spokane v. Beck, 130 Wn. App. 481, 483, 488, 123 P.3d 854 (2005) (evidence was insufficient for jury to reject affirmative defense).

Before addressing A.M.'s actual arguments, the State wastes the time of A.M.'s counsel and this Court by knocking over some strawmen.<sup>1</sup> Br. of Resp't at 10-15. Contrary to the State's contention, there has been no failure to challenge any findings of fact. Br. of Resp't at 10-11. Excluding the error as to the date of the incident, A.M. is not challenging the findings of fact.<sup>2</sup> A.M. is not challenging the court's determination that she possessed the backpack and the methamphetamine found inside. Br. of Resp't at 12-15. And she is not arguing that the search of backpack was unlawful. Br. of Resp't at 13-14. Rather, A.M. is arguing that the findings and evidence do not support the trial court's legal conclusion that she failed to prove the defense of unwitting possession by a preponderance of the evidence.

On the actual issue before this Court, the State agrees with A.M. as to the standard of review, but maintains the trial court properly adjudicated A.M. guilty. Br. of Resp't at 16. In support, the State notes that A.M. went to the thrift store intending to commit theft, a crime of dishonesty. Br. of Resp't at 16.<sup>3</sup> The implication is that that the trial court had a sound

---

<sup>1</sup> [https://en.wikipedia.org/wiki/Straw\\_man](https://en.wikipedia.org/wiki/Straw_man).

<sup>2</sup> The State agrees the incident occurred on October 24, 2015, not October 24, 2016. Br. of Resp't at 10. The State, however, perpetuates the "scrivener's error" on the next page of its brief. Br. of Resp't 11 (stating that incident occurred on October 24, 2016).

basis to not credit her testimony in light of this disclosure. But the court did not find A.M.'s testimony incredible or dishonest. CP 37-38. In fact, the trial court assured A.M. personally that the court was not finding that she was dishonest in her testimony. RP 150, 157-58. These facts are critical and demonstrate the court did not reject A.M.'s affirmative defense on the basis she was not credible. Rather, the court ruled (incorrectly) that A.M. had not presented enough evidence to prove unwitting possession. RP 157-58.

The State next asserts that A.M. failed to prove her theory because the evidence showed she was the person who had control over the backpack in the store.<sup>4</sup> Br. of Resp't at 16-17. But her testimony that she borrowed the backpack from her friend's house was uncontested. RP 108. In any event, that she exercised control over the backpack in the store says little to nothing about whether she knew the backpack contained drugs.

---

<sup>3</sup> For much of its argument, including its assertion that A.M. went to the thrift store intending to commit a crime of dishonesty, the State fails to cite to the record or to authority. This Court need not consider arguments that fail to refer to the record or cite authority. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(a)(6) & (b).

<sup>4</sup> Below, the State maintained A.M.'s signing for the backpack as her property at the jail showed the backpack belonged to her. RP 118-19. On appeal, however, the State does not attach any significance to this evidence. Br. of Resp't at 9-19. Accordingly, the court should not consider this evidence in its analysis on this issue. See RAP 12.1(a) (court will ordinarily resolve case based on the arguments of the parties).

Under the State's theory, a person who borrows a friend's car should know if the car contains drugs hidden inside because the person is exercising control over the car. This does not follow.

The State highlights A.M.'s purported uncooperative behavior with the security at the Goodwill. Br. of Resp't at 16. The State asserts A.M.'s behavior (who it must be recalled was a 15-year-old girl) "was disproportionate for intentional stealing." Br. of Resp't at 16. The evidence does not support the State's contentions. A.M. did not resist detainment. RP 49-50. That she was not completely submissive while detained in the security office and did not want her picture taken does not tend to show that A.M. was aware there were drugs in the backpack. Officer Wolfington, who arrested A.M. for theft and discovered the drugs in the backpack afterward, did not testify that A.M.'s behavior was uncooperative. RP 57-70.

The State notes that A.M. had a lighter. Br. of Resp't at 17. A lighter can be used for many legal purposes, such as lighting a candle or a jack o'lantern.<sup>5</sup> The State failed to ask A.M. during her testimony why she had a lighter. RP 111-15. No drug paraphernalia was found on A.M. RP 66-67.

---

<sup>5</sup> The events occurred about a week before Halloween. RP 25.

In its discussion of the evidence, the State recounts that “A.M. was also booked on a warrant.” Br. of Resp’t at 17. Besides being irrelevant, the evidence did not establish this. The court granted A.M.’s motion to exclude such evidence and the prosecution below disavowed an intent to elicit such evidence. RP 11. This Court should reject the prosecution’s attempts at distraction and focus its inquiry where it belongs, on the admitted evidence and the trial court’s findings.

The State emphasizes that A.M.’s primary theory below was general denial. 17-18. Even if true, this is irrelevant. What is relevant is whether the trial court’s findings and the evidence permitted the court to reject A.M.’s defense of unwitting possession. This is a legal issue that is properly raised for the first time on appeal and is reviewed de novo. See City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989); State v. A.M., 163 Wn. App. 414, 419, 260 P.3d 229 (2011).

A.M.’s testimony was uncontroverted. The trial court did not find her testimony incredible or dishonest. A.M. proved her defense of unwitting possession by a preponderance of the evidence. Under the evidence and the court’s findings, no reasonable trier of fact could conclude otherwise. The guilty adjudication for possession should be reversed and the charge dismissed with prejudice. Br. of App. at 19. If so, the Court need not decide the remaining two issues.

**2. The admission of A.M.'s compelled statement that the backpack containing the drugs was her property violated her privilege against self-incrimination. The State has not met its burden to prove this manifest constitutional error harmless beyond a reasonable doubt, requiring reversal.**

Over A.M.'s objection for lack of relevance, the court admitted into evidence a "Property Sheet" that A.M. was compelled to sign following her arrest when she was admitted to and from the juvenile detention facility. Ex. 3; RP 97-99. On the form, 15-year-old A.M. admitted that the backpack (which contained the drugs) was "my property" and that she had claimed this "property" upon release. Ex. 3. As explained in the Opening Brief, the admission of this evidence was manifest constitutional error that violated A.M.'s privilege against self-incrimination. Br. of App. at 23-27. Because the State has not met its burden to rebut the presumption of prejudice by proving the error harmless beyond a reasonable doubt, the guilty adjudication must be reversed. Br. of App. at 27-28.

A.M. agrees that she did not argue below that the admission of the property sheet containing her compelled statements violated her right against self-incrimination. The error, however, is properly raised as a matter of right because it is manifest constitutional error. RAP 2.5(a)(3); State v. Blazina, 182 Wn.2d 827, 833, 344 P.3d 680 (2015).

In arguing otherwise, the State appears to argue the error is not “manifest.” Br. of Resp’t at 20-28. The State contends the necessary information to adjudicate the issue is not in the record and that, therefore, the error is not “manifest.” Br of Resp’t at 22-23.

The State is incorrect. As the trial court’s ruling on A.M.’s motion in limine establishes, A.M. invoked her Miranda<sup>6</sup> rights following her arrest. CP 51-52; RP 10-11. The court later sustained A.M.’s objections to testimony from the arresting officer in violation of the court’s ruling on the motion in limine. RP 60-61. Moreover, there is no reason to believe that A.M. waived her Miranda rights. The State does not argue otherwise.

In further support of its contention that the error is not “manifest,” the State asserts the record is inadequate to adjudicate whether there was “interrogation” within the meaning of Miranda. The State argues A.M. cannot show the property sheet constituted “interrogation” without evidence about the subjective intentions of the officer who administered form. Br. of Resp’t at 22, 24. But the test for interrogation—whether a government actor’s words or actions are reasonably likely to elicit an incriminating response—is an objective standard and depends not on the government actor’s state of mind, but on the objective circumstances.

---

<sup>6</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

State v. Sargent, 111 Wn.2d 641, 651, 762 P.2d 1127 (1988); United States v. Williams, 842 F.3d 1143, 1148-49 (9th Cir. 2016). Thus, the focus is on the “suspect’s perceptions, rather than the officer’s intent.” In re Cross, 180 Wn.2d 664, 685, 327 P.3d 660 (2014). The State’s position is directly contrary to basic Miranda principles. See J.D.B. v. North Carolina, 564 U.S. 261, 277 n.8, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011) (noting “the basic principle that an interrogating officer’s unarticulated, internal thoughts are never—in and of themselves—objective circumstances of an interrogation.”).

Here, the testimony from Ashley Thomas and the property sheet itself provide the necessary record to adjudicate the issue. Mr. Thomas, the supervisor at the juvenile detention facility where A.M. made the statements, testified after they “record whatever items [the youths] have on their person,” the youths review that “with the intake staff, and they sign upon arriving in the facility.” RP 89. When the youths leave, they “have to go to the intake counter and they review again the property sheet and sign out for whatever item they brought in . . .” RP 90. When this happens, the youth generally sits with the officer across from them. RP 94. Any disagreement by the youth or refusal sign is noted by the officer. RP 96.

A.M.'s argument that her right against-self-incrimination was violated is supported by State v. Denney, 152 Wn. App. 665, 218 P.3d 633 (2009). Br. of App. at 23-24. Like A.M., the defendant in that case was administered a standard questionnaire by jail staff. Denney, 152 Wn. App. at 667-68. Although there were legitimate reasons supporting the use of the questionnaire and there was no evidence of bad faith, the questionnaire constituted interrogation because it was reasonably likely to elicit an incriminating response. Id. at 673. Similarly, viewed objectively and under the circumstances, asking 15-year-old A.M. whether the backpack was her property was likely to elicit an incriminating response because she was charged for possessing a controlled substance which was found in the backpack. Br. of App. at 23-24; Denney, 152 Wn. App. at 673 (questions to defendant were interrogation because they were "directly relevant to the charges against her and invited an incriminating response."); see Williams, 842 F.3d at 1148-49 (routine question about gang-affiliation reasonably likely to elicit incriminating response if person is charged with a crime like murder, but probably not in case of Medicaid fraud). Moreover, because "children are different,"<sup>7</sup> it is objectively reasonable to conclude that asking a youth in custody about her ownership of a container found to

---

<sup>7</sup> Miller v. Alabama, 567 U.S. 460, 481, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

hold an illicit substance is likely to elicit an incriminating response. See J.D.B., 564 U.S. at 277 (when engaging in the objective inquiry required by Miranda, a child's age is a relevant consideration).

Contrary to the State's suggestions, it is not determinative whether A.M. was asked about the backpack in the presence of the arresting officer. Br. of Resp't at 24. As explained, the objective circumstances control, not the subjective intent of the actor who elicits the statement. J.D.B., 564 U.S. at 277 n.8; Cross, 180 Wn.2d at 685.

To be sure, obtaining a statement from a detainee to inventory property may be "routine." Br. of Resp't at 24. But this is not decisive. Denney, 152 Wn. App. at 670; Williams, 842 F.3d at 1147.

In sum, the record is adequate to adjudicate the Miranda issue. A.M. was in custody when she was forced to make a statement about whether the backpack was her property. She had invoked her right to silence and there is no basis to suspect she waived her Miranda rights. And the objective circumstances establish that it was "interrogation" to ask 15-year-old A.M. if the backpack (found to contain drugs which formed the basis for her booking on possession of a controlled substance) was her property. The State's contrary arguments should be rejected.

Regardless of Miranda, the record shows the statements were involuntary because they were compelled. See State v. DeLeon, 185

Wn.2d 478, 487, 374 P.3d 95 (2016) (questions to detainees at booking about gang affiliation compelled; no discussion of Miranda). As Mr. Thomas testified, children entering the facility are required to make a statement about whether the items with them are their property. RP 89-90, 94, 96. Given these circumstances, any statement elicited from a youth about her “property” (including a refusal to say) is compelled and involuntary. See DeLeon, 185 Wn.2d at 487.

In addition to requiring an adequate record, for an error to be manifest, the error must have practical and identifiable consequences. State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). Minimizing the consequences of the asserted error, the State represents that it “did not give the property sheet in question the outsized importance now ascribed to by the defendant.” Br. of Resp’t 25. The record shows the opposite. The State called Mr. Thomas for the sole purpose of getting the property sheet (and A.M.’s inculpatory statement that the backpack was her property) into evidence. RP 12-13, 87. A.M. objected to both Mr. Thomas’s testimony and to the State’s request to admit the property sheet. RP 11-13, 86-87, 97. And during closing argument, the State cited to the improperly admitted evidence, arguing that it showed the backpack belonged to A.M., that it contradicted A.M.’s testimony that the backpack

was not hers, and that it was one of the reasons for the court to reject

A.M.'s claim of unwitting possession:

We know that she signed for the backpack, indicated it was her property when she was booked in. We know that she signed for it again when she was released, even though today she has testified that it wasn't her backpack.

...

I think for those reasons, the court should find that the respondent has not proved by a preponderance of the evidence that she didn't know that the controlled substance was there.

RP 118-19. The State maintained this position later when opposing A.M.'s motion to reconsider, arguing that "she couldn't explain why she signed for the backpack as her own when she entered the custody of DJJC." RP 149. Finally, the record shows the court considered the evidence in making its decision and remarked that it was "a close case." RP 133-34. Given all the foregoing, the error had practical and identifiable consequences.

The State makes much of the fact that defense counsel vigorously cross-examined Mr. Thomas and (after unsuccessfully trying to have the court exclude the evidence) elicited testimony about the backpack and the booking process. Br. of Resp't 25-27. That defense counsel was doing his job says nothing about whether the error is manifest.

The State argues that A.M. has not established the necessary prejudice to justify review because the evidence showed she possessed the backpack. Br. of Resp't at 27. That A.M. handled the backpack in the thrift store is not the same as a statement from A.M. that the backpack belonged to her. Further, A.M. does not have to establish prejudice justifying reversal for the claimed error to be reviewed under RAP 2.5(a)(3). "The requirements under RAP 2.5(a)(3) should not be confused with the requirements for establishing an actual violation of a constitutional right or for establishing lack of prejudice under a harmless error analysis if a violation of a constitutional right has occurred." Lamar, 180 Wn.2d at 583.

Because RAP 2.5(a)(3) is satisfied, this Court must address the claim. See State v. Jones, 163 Wn. App. 354, 359-60, 266 P.3d 886 (2011) (considering whether evidence was unlawfully seized because record was adequate to adjudicate constitutional issue); State v. Contreras, 92 Wn. App. 307, 313-14, 966 P.2d 915 (1998) (reviewing suppression issue even though there was no motion to suppress or trial court ruling).

A.M. establishes that the admission of her statements was manifest constitutional error. Prejudice is presumed. The State has not met its heavy burden to prove the error harmless beyond a reasonable doubt. Br. of App. at 27-28. There was no other evidence like A.M.'s statement that

the backpack was her property. Although the court remarked that this evidence was not a “big factor,” this appears to have related to the issue of possession, not A.M.’s affirmative defense of unwitting possession. RP 133-34. The court also remarked it was a “close case.” Given this record, the error is not harmless beyond a reasonable doubt. The guilty adjudication for possession should be reversed.

**3. The strict liability offense of felony possession of a controlled substance violates due process. Washington’s possession statute should be declared unconstitutional and the guilty adjudication reversed.**

Our Supreme Court has construed Washington’s felony drug possession statute as lacking any mental element. State v. Bradshaw, 152 Wn.2d 528, 537-38, 98 P.3d 1190 (2004). It is a strict liability crime. Id. For the innocent to overcome the presumption of guilt, they must prove it more likely than not that their possession of the illicit substance was unwitting. State v. Buford, 93 Wn. App. 149, 151-52, 967 P.2d 548 (1998).

This scheme, which presumes guilt and forces the accused to prove their innocence violates due process. Br. of App. at 30-36. Washington is the *only* state that has true strict criminal liability for felony drug possession. Br. of App. at 32. Thus, Washington’s drug possession law is “freakish.” Schad v. Arizona, 501 U.S. 624, 640, 111 S. Ct. 2491, 115 L.

Ed. 2d 555 (1991) (plurality). It stands alone against the practice every other state. Br. of App. at 33. It turns the presumption of innocence, a fundamental principle of justice firmly rooted in the traditions of our people, on its head. Nelson v. Colorado, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1249, 1256 n.9, 197 L. Ed. 2d 611 (2017). Accordingly, the possession statute violates due process and should be held unconstitutional. Cf., May v. Ryan, 245 F. Supp. 3d 1145, 1162-65 (D. Ariz. 2017) (child molestation statute that did not require State to prove sexual motivation and required defendants to prove lack of sexual motivation violated due process).

The State's response to A.M.'s argument is no response at all. The State pretends that the issue is settled. Br. of Resp't at 28-29. It is not. Neither Bradshaw nor Cleppe<sup>8</sup> addressed the issue. In Bradshaw, the due process challenge, which concerned vagueness, was insufficiently briefed. Bradshaw, 152 Wn.2d at 539. And Cleppe does not even utter the phrase "due process." Cleppe, 96 Wn.2d at 374-83. Thus, these cases are not controlling. In re Stockwell, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014).<sup>9</sup>

---

<sup>8</sup> State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (1981).

<sup>9</sup> "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 and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court." (internal quotation omitted).

Contrary to the State's affirmative misrepresentation, A.M. is *not* arguing that the statute must be read to contain a mental element. Br. of Resp't at 30. That issue has been settled by our Supreme Court and only it or the Legislature may revisit that issue. What A.M. is arguing is that the lack of a mental element makes the possession statute unconstitutional in violation of due process. See May, 245 F. Supp. 3d at 1157-64.

For the reasons stated in the Opening Brief, Washington's felony drug possession statute violates due process. Br. of App. at 28-37. A.M. has met her burden to overcome the presumption that this criminal statute is constitutional. See Yakima County Deputy Sheriff's Ass'n v. Bd. of Comm'rs for Yakima County, 92 Wn.2d 831, 839, 601 P.2d 936 (1979) (Utter, J., concurring) ("The presumption of constitutionality applies with far greater force to economic statutes than to statutes which affect personal civil liberties."). The guilty adjudication for possession should be reversed and the felony drug possession statute declared unconstitutional.

**4. The State's recitation of the "facts" misstates the record and violates the rules of appellate procedure.**

The rules of appellate procedure require that "each factual statement" be supported by a citation to the record. RAP 10.3(a)(5) ("Reference to the record must be included for *each* factual statement.") (emphasis added). "Allegations of fact without support in the record will

not be considered by an appellate court.” Northlake Marine Works, Inc. v. City of Seattle, 70 Wn. App. 491, 513, 857 P.2d 283 (1993). “The failure to cite to the record is not a formality. It places an unacceptable burden on opposing counsel and on this court.” Lawson v. Boeing Co., 58 Wn. App. 261, 271, 792 P.2d 545 (1990). Violating these rules may even sometimes warrant sanctions. See, e.g., Hurlbert v. Gordon, 64 Wn. App. 386, 400, 824 P.2d 1238 (1992) (imposing sanctions because “the briefing errors wasted the time of opposing counsel and hampered the work of the court.”).

In its brief, the State fails to comply with the rules of appellate procedure. Many of its factual assertions are not supported by a citation to the record. Br. of Resp’t at 1-7. For example, the State provides no citation for the paragraph beginning on page four and ending on page five. Br. of Resp’t at 4-5. Where the State provides citations, it does so at the end of paragraphs. Br. of Resp’t at 3-9. This practice violates RAP 10.3(a)(5). And “[s]uch shotgun references to the record are of little assistance and ill serve a party.” Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549 (1992).

The State’s account also misrepresents the record. For example, the State asserts that A.M.’s “attorney conceded that her property sheet was admissible as a business record.” Br. of Resp’t at 5. This is incorrect.

A.M.'s attorney vigorously objected on relevance grounds to the admission of this document. RP 86-87, 97. Defense counsel explained, "I'm not arguing that it's not a business record," "I'm just arguing that it's not relevant." RP 97.

The State even misquotes the transcript. The State represents that defense counsel asked A.M., "Now when you walked out of the store, did you know the *items* were in your backpack." Br. of Resp't at 6-7 (emphasis added). But the transcript says: "Now, when you walked out of the store, did you know the *costumes* were in your backpack?" RP 97 (emphasis added).<sup>10</sup>

In light of the State's violations of the rules of appellate procedure and its misrepresentations of the record, this Court should disregard factual assertions by the State which are not supported by an accurate citation to the record. The Court should also inform the State that citations should appear at the end of each sentence, not each paragraph.<sup>11</sup> See Hurlbert, 64 Wn. App. at 400 (informing party of briefing errors).

---

<sup>10</sup> In another misstatement of the record, the prosecution states that A.M. had \$12 and the costumes cost \$12. Br. of Resp't at 7. But the jail property sheet indicates that A.M. had \$11, not \$12. Ex. 3. Further, the costumes were valued at nearly \$13, not \$12. RP 62; CP 57.

<sup>11</sup> Based on briefing submitted by other Snohomish County appellate prosecutors in cases that counsel has appeared in, this appears to be the practice of the appellate unit of the Snohomish County Prosecutor's Office. See, e.g.,

## B. CONCLUSION

A.M. proved the affirmative defense of unwitting possession. The guilty adjudication for possession should be reversed and the charge dismissed with prejudice. Alternatively, the adjudication should be reversed because evidence was admitted in violation of A.M.'s privilege against self-incrimination and the felony drug possession statute violates due process.

DATED this 25th day of April 2018.

Respectfully submitted,

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

---

Respondent Briefs in State v. Salas, No. 74209-4-I; State v. Sinrud, No 75052-6-I; and State v. Fisher, No. 76443-8-I. Available at [http://www.courts.wa.gov/appellate\\_trial\\_courts/coaBriefs/index.cfm?fa=coaBriefs.Div1Home&courtId=A01](http://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coaBriefs.Div1Home&courtId=A01).

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

---

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

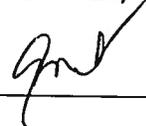
---

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25<sup>TH</sup> DAY OF APRIL, 2018, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |     |   |                   |  |
|-----|---|-------------------|--|
| [X] | J. SCOTT HALLORAN, DPA<br>[shalloran@co.snohomish.wa.us]<br>SNOHOMISH COUNTY PROSECUTOR'S OFFICE<br>3000 ROCKEFELLER<br>EVERETT, WA 98201 | ( )<br>( )<br>(X) | U.S. MAIL<br>HAND DELIVERY<br>E-SERVICE VIA PORTAL |
| [X] | A.M.<br>1829 MADISON ST<br>EVERETT, WA 98203  | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____                |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 25<sup>TH</sup> DAY OF APRIL, 2018.

X \_\_\_\_\_  


**Washington Appellate Project**  
1511 Third Avenue, Suite 610  
Seattle, Washington 98101  
Phone (206) 587-2711  
Fax (206) 587-2710