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STATE OF WASHINGTON
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NO. 96354-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

A.M.

Petitioner.

SUPPLEMENTAL
BRIEF OF RESPONDENT

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I. ISSUES

1. For the first time on appeal, the defendant asserts it was manifest constitutional error to admit a property sheet into evidence at her bench trial. Has she failed to demonstrate prejudice, where the trial court stated it did not rely on that evidence?

a. Alternatively, if it was error to admit the property sheet, was the error harmless?

2. Does RCW 69.50.4013 violate due process and shift the burden of proof by imposing strict liability with no mens rea element?

II. STATEMENT OF THE CASE

The facts of this case have been adequately set out in the State's response brief in the Court of Appeals and that court's slip opinion.

III. ARGUMENT

A. THE UNPRESERVED PROPERTY SHEET ISSUE WAS NOT A MANIFEST CONSTITUTIONAL ERROR. ALTERNATIVELY, IF THERE WAS ERROR, IT WAS HARMLESS.

A.M. challenges the admission of a booking property slip (Ex. 3) at trial. The defendant takes issue with the Court of Appeals application of RAP 2.5(a)(3) analysis, which determined that the claimed error was not manifest. Pet. Rev. 6-10. A.M. asserts that

recent decisions of this court announced a new rule regarding such analysis, citing to State v. Lamar, 180 Wn.2d 576, 327 P.3d 46 (2014) and State v. Kalebaugh, 183 Wn.2d 578, 355 P.3d 253 (2015). The nature of this claimed new rule is unclear, but the record shows that the Court of Appeals applied the correct analysis.

A.M. did not raise a Fifth Amendment objection to the property sheet at trial, objecting solely to relevance. RP 97-99. The Court of Appeals noted that with a claim of manifest constitutional error, it previews the issue to determine if there is both error and prejudice. Slip op. at 6-7. That “preview” mirrors the same “gatekeeping” language of Lamar and Kalebaugh. Kalebaugh, 183 Wn.2d at 583. “These gatekeeping questions open meritorious constitutional claims to review without treating RAP 2.5(a)(3) as a method to secure a new trial every time any error is overlooked.” Id., citing Lamar, 180 Wn.2d at 582, citing State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

A.M. incorrectly asserts that she was not required to show prejudice. Pet. Rev. at 10. The Court of Appeals noted a showing of prejudice requires the defendant to demonstrate that the asserted error had practical and identifiable consequences in the trial. Slip. Op. at 7, citing State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d

125 (2007). Kalebaugh reiterated the same framework that manifestness “requires a showing of actual prejudice”. Kalebaugh, 183 Wn.2d at 584, citing State v. O’Hara, 167 Wn.2d 91, 99, 217 P.3d (2009) (quoting Kirkman at 918). A.M. failed to demonstrate any identifiable consequences at trial here, because the trial court did not rely on the booking evidence in reaching its result. RP 135.

The defendant’s claim that Kalebaugh and Lamar represent a new rule in RAP 2.5(a)(3) analysis is refuted by the fact that those cases utilize the same approach traditionally applied, as they cite to O’Hara, Kirkman and other precedent. The Court of Appeals applied the correct analysis in determining that A.M. failed to demonstrate manifest constitutional error because there were no identifiable consequences at trial in admitting the property sheet. Slip op. at 7-8.

1. If It Was Error To Admit The Property Sheet Evidence, That Error Was Harmless.

Assuming without conceding that the defendant was entitled to review of the issue, any error was harmless. The property sheet showed that A.M. entered and left the facility with clothing and a backpack, among other belongings. RP 91-92, 94-95; Ex. 3. Counsel elicited that the form does not indicate ownership of the

items, but instead documents what a person came in with and what they left with. RP 103. A.M. testified that the backpack was not hers. RP 108.

The defendant assigned no error to the trial court's findings of fact other than to a scrivener's error in the date of the first finding. Br. Of App. at 2. The unchallenged findings thus became verities on appeal. State v. Roggenkamp, 115 Wn. App. 927, 943-944, 64 P.3d 92 (2003). The Court of Appeals focus on those verities included that A.M. pushed a cart containing the backpack through the store. Sl. Op. 4-5. A.M. concealed merchandise in the backpack. Id. She put the backpack on her back and left the store with concealed merchandise. Id. Methamphetamine and stolen merchandise was recovered from the backpack. Id. No one else was observed touching or handling the backpack. Id.

These unchallenged verities are part of the overwhelming evidence that A.M. was the only person seen handling, wearing and using the backpack containing methamphetamine. The record contained powerful evidence of A.M.'s possession, as described in detail in the respondent's brief. Br. Of Resp. 1-3, 6-7, 11-13, 15-18. The Court of Appeals emphasized that the trial judge clearly made a determination of A.M.'s credibility regarding her claimed unwitting

possession. Slip Op. 5-6. None of this detailed evidence of A.M.'s possession or her credibility relies on the property slip evidence. Rather, all the evidence related to possessing methamphetamine inside the backpack came from what happened at the store. That evidence came from the testimony of multiple witnesses and security film corroborating that testimony. RP 26-28, Ex.1.

Constitutional error is harmless where the court is convinced beyond a reasonable doubt that the trier would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. State v. Burke, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

The overall evidence here, including the verities on appeal, demonstrates that the property slip played no part in A.M.'s conviction. The trial judge plainly stated,

“Quite frankly, whether she removed the backpack or whether the backpack went with her from detention was really not a big factor in my case. It was only, it was that she was the only one that was possessing the backpack and I don't find that there was unwitting possession in this matter.”

RP 135.

Any error in admitting the property slip was harmless. A.M. was found with methamphetamine in the backpack which she alone

manipulated and wore when concealing stolen items. The trial court did not rely on the property slip evidence. A.M. did not challenge the findings demonstrating that she alone touched, handled and wore the backpack containing methamphetamine. None of this overwhelming evidence of her possession would change by excluding the property sheet evidence. This plainly demonstrates why the trial court gave no weight to the property sheet. The challenged evidence did not affect the outcome of the trial.

B. THE STRICT LIABILITY OF RCW 69.50.4013 DOES NOT VIOLATE DUE PROCESS.

A.M. maintains that RCW 69.50.4013, the possession of a controlled substance statute, violates her right to due process by imposing a felony punishment for a strict liability crime. Pet. Rev. 12-17. She further claims that the affirmative defense of unwitting possession shifts the burden of proof to the defendant. Id.

The constitutionality of a statute is reviewed de novo. State v. Bradshaw, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004). Statutes are presumed constitutional, and the challenging party has the heavy burden of proving unconstitutionality beyond a reasonable doubt. Island County v. State, 135 Wn.2d 141, 147, 955 P.2d 377 (1998). This high standard is based on respect for a coequal

branch of government sworn to uphold the constitution, and one which speaks for the people of the state. Id.

Possession of a controlled substance is a strict liability crime having no mens rea element. City of Kennewick v. Day, 142 Wn.2d 1, 9, 11 P.3d 304 (2000); Bradshaw, 152 Wn.2d at 531. The State must prove the fact of possession and the nature of the substance. Bradshaw at 538. A defendant may avoid conviction by proving unwitting possession by a preponderance of the evidence. Id. at 531, 533-534. A.M. asserts that the affirmative defense shifts the burden of proof in violation of due process.

This court has repeatedly upheld the legislature's authority to enact strict liability crimes. Bradshaw, 152 Wn.2d at 532-534; State v. Cleppe, 96 Wn.2d 373, 380, 635 P.2d 435 (1981); State v. Deer, 175 Wn.2d 725, 731, 287 P.3d 539 (2012). Nonetheless, A.M. relies on Schad v. Arizona, 501 U.S. 624, 111 S.Ct 2491, 115 L.Ed.2d 555 (1991), which did not involve strict liability, to suggest that the possession statute is unconstitutional for imposing strict liability where other states do not. The Court should reject this argument because the legislature clearly intended the statute to impose strict liability.

Bradshaw and Cleppe reviewed the language and legislative history of the possession statute in determining that the legislature clearly intended it to be a strict liability crime. Bradshaw, 152 Wn.2d at 537. In Cleppe, this court noted that under the prior statute, the 1951 Uniform Narcotic Drug Act, neither intent nor guilty knowledge was a required element of the crime of simple narcotic possession. Cleppe, 96 Wn.2d at 378. Regarding the legislative history of adopting the current statute in 1971, this court stated:

[T]he legislature in responding to the problem of drug abuse, one of the major social evils of our time, adopted the Uniform Controlled Substances Act. The act, as introduced in the Senate, made “knowingly” and “intentionally” elements of the simple possession of a controlled substance. As the legislature worked its will on the bill, the words “knowingly or intentionally” were deleted from subsection 401(c) and the crime was upgraded from a misdemeanor to a felony.

Cleppe, 96 Wn.2d at 380. (Determining that legislative intent was clear).

This Court reached the same conclusion twenty three years later in Bradshaw:

The legislative history of the mere possession statute is clear. The legislature omitted the “knowingly or intentionally” language from the Uniform Controlled Substances Act. The Cleppe court relied on this legislative history when it refused to imply a mens rea element into the mere possession statute. The

legislature has amended the statute seven times since Cleppe and has not added a mens rea element. Given that the legislative history is so clear, we refuse to imply a mens rea element.

Bradshaw, 152 Wn.2d at 537, 539-540.

This Court found no constitutional deficiencies in the statute, determining that the affirmative defense "does not improperly shift the burden of proof." Id. at 538. Because the statute has no inferred knowledge requirement, the affirmative defense of unwitting possession does not shift the burden of proving a mens rea element to the defendant. Id. The State is required to prove all elements beyond a reasonable doubt. Id.

This Court would have to overrule these authorities to find that strict liability was unconstitutional. These cases should only be overruled upon a clear showing that the established precedent is incorrect and harmful. Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). The possession statute here is not incorrect and not harmful because an accused can always defend on the basis of unwitting possession. Thus, the statute will effect its purpose of punishing drug users and sellers while allowing for acquittal of those who innocently possess controlled substances.

By the logic of Schad itself, Washington's long history of defining controlled substance possession as a strict liability crime makes it "unlikely" that the defendant can demonstrate that the State has shifted the burden of proof. Schad, 501 U.S. at 640. The defendant's reliance on the federal district court case of May v. Ryan, 245 F. Supp.3d 1145, 1157-1161 (D. Ariz. 2017) is equally misplaced. Ryan involved eliminating the existing sexual motivation element of a child molestation statute and replacing it with an affirmative defense of disproving sexual motivation. By contrast here, the possession statute has not been changed to lessen the state's burden or require the defendant to disprove any element. Bradshaw, 152 Wn.2d at 538.

The defendant fails to cite any federal Supreme Court case holding a state criminal statute unconstitutional for lack of a mens rea. The U.S. Supreme Court has never articulated a general constitutional doctrine of mens rea. Powell v. Texas, 392 U.S. 514, 535, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968) (Doctrines of knowledge, mistake, and duress have always been considered the province of the States). Strict liability crimes do not inherently violate due process. Lambert v. California, 355 U.S. 225, 228, 78 S.Ct. 240, 2 L.Ed. 228 (1957) (Legislatures have wide latitude to

define an offense and to exclude elements of knowledge and intent.) Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 70, 30 S.Ct. 663, 54 L.Ed. 930 (1910). (Public policy may require criminal punishment for acts having no element of intent, these do not violate due process.)

The defendant's claim regarding improper burden shifting has been repeatedly rejected. Bradshaw, 152 Wn.2d at 538; Cleppe, 96 Wn.2d at 380; State v. Schmeling, 191 Wn. App. 795, 801, 365 P.3d 202 (2015) (RCW 69.50.4013 does not violate due process by lacking a mens rea element). These cases emphasized that the affirmative defense of unwitting possession ameliorates the harshness of strict liability, and does not improperly shift the burden of proof. Cleppe, 96 Wn.2d at 380-381; Bradshaw, 152 Wn.2d at 538.

A.M.'s basic contention that strict liability crimes lacking a mens rea violate due process ignores other crimes like rape. This is where a contrary rule would be harmful. The crimes of rape and rape of a child involve no mental element and are considered strict liability crimes. State v. Chhom, 128 Wn.2d. 739, 743, 911 P.2d 1014 (1996); State v. Joseph, 3 Wn. App. 365, 374, 416 P.3d 738 (2018). First degree rape contains no mens rea element. State v.

DeRyke, 149 Wn.2d 906, 913, 73 P.3d 1000 (2003). Third degree rape of a child is a strict liability crime lacking any mens rea. Deer, 175 Wn.2d at 731, 734.

Deer claimed she was asleep during several acts of intercourse and therefore was not guilty of child rape. Deer, 175 Wn.2d at 731-732. This court treated lack of volition as an affirmative defense which she was properly required to prove by a preponderance of the evidence. Id. at 732-733. Deer's claimed lack of awareness through sleep was akin to the defense of unwitting possession of a controlled substance. Id. at 735. Neither affirmative defense negates an element of the crime, and the burden of proving the affirmative defense rests properly with the defendant. Id. If A.M. is correct that statutes imposing strict liability violate due process, then so too would the rape statutes.

Affirmative defenses are uniquely within the defendant's knowledge and ability to establish, making it reasonable for a defendant to have the burden of proof in such cases. Deer, 175 Wn.2d at 737 (Citing State v. Riker, 123 Wn.2d 351, 367, 869 P.2d 43 (1994)). This court affirmed the reasonable policy choice supporting the allocation of burdens in these types of affirmative

defenses. Id. A.M.'s claims regarding burden shifting should be rejected for the same reasons.

IV. CONCLUSION

The defendant failed to demonstrate manifest constitutional error occurred in admitting the property slip evidence because the trial court did not rely on it in reaching its result. RCW 69.50.4013 does not violate due process by imposing strict liability. The affirmative defense of unwitting possession does not shift the burden of proof because a defendant is not required to prove or disprove any element of the crime. For these reasons, the State respectfully requests that the conviction be affirmed.

Respectfully submitted this 6th day of March, 2019.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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Respondent,

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No. 96354-1

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Dated this 7th day of March, 2019, at the Snohomish County Office.



Diane K. Kremenich
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SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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