IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 67636-9-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
SHANNON LYNN DONOVAN,	)	
Appellant.	)	FILED: April 23, 2012
	)	
	)	
	)	

Appelwick, J. — Donovan appeals her convictions for driving while license suspended in the third degree and possession of a controlled substance. Her Sixth Amendment right to confrontation was violated by the admission of an affidavit from the Department of Licensing, and the State has not asserted harmless error. Therefore, we reverse her conviction for DWLS 3. We need not address whether she received ineffective assistance of counsel when her attorney failed to raise objections to hearsay testimony from the arresting officer about the suspended status of her license. Substantial evidence supports her possession conviction. We reverse in part, affirm in part, and remand for further proceedings consistent with this opinion.

FACTS

On May 26, 2010, Officer Sherri Murphy initiated a traffic stop on the

vehicle Shannon Donovan was driving, because the license plate tabs did not match the registration on record for the van. When Officer Murphy requested Donovan's driver's license, registration, and insurance information, Donovan eventually responded that she did not have a driver's license, and was only able to supply an identification card. Officer Murphy testified at trial that Donovan said, "I'm not supposed to drive, but I had to drive today. I just had to go to the Department of Licensing and get this printout, but I can get my license now." Officer Murphy also testified that she ran a driver's check on Donovan, which indicated that Donovan's driving privilege was suspended in the third degree. Officer Murphy then arrested Donovan for driving while license suspended in the third degree (DWLS 3).

On a search incident to arrest, Officer Murphy found drug paraphernalia in Donovan's coat pocket, including a plastic straw with white powder residue. A subsequent lab test of residue from the straw revealed the presence of methamphetamine.

The State charged Donovan with one count of possession of a controlled substance and with one count of DWLS 3.

The State offered as an exhibit a certified copy of Donovan's driving record (CCDR). The CCDR included a copy of a suspension letter and an affidavit from the custodian of driving records at the Department of Licensing from May 27, 2010. The affidavit states that it pertains to the driving record of Donovan, and that "[a]fter a diligent search, our official record indicates that the status on May 26, 2010, was: . . . Personal Driver License Status: . . .

Suspended in the third degree." (Boldface omitted.)

Before trial, Donovan's counsel moved to exclude the CCDR on the grounds that admission would violate her rights under the confrontation clause. The trial court denied the motion as premature. During trial, Donovan again objected to the admission of the CCRD on confrontation grounds and also asked the court to strike Officer Murphy's testimony recounting Donovan's statements about her license status. The trial court overruled Donovan's objections and admitted the CCDR.

Donovan presented an unwitting possession defense to the possession charge. Her boyfriend, Jeffrey Lucey, testified that he was addicted to methamphetamine, that he had borrowed the coat she was wearing on the day of the arrest, and that the straw with the methamphetamine belonged to him. Donovan admitted the coat belonged to her but denied knowing the straw was in the pocket.

The jury convicted Donovan of both charges. Donovan timely appeals.

DISCUSSION

I. Confrontation Clause Violation

Donovan contends the trial court's admission of her CCDR amounted to admission of testimonial hearsay in violation of her Sixth Amendment right to confrontation. An alleged violation of the confrontation clause is reviewed de novo. State v. Jasper, ___ Wn.2d ___, 271 P.3d 876, 883 (2012) (Jasper II).

The State concedes that the CCDR admitted into evidence in Donovan's case contained an affidavit almost identical to the affidavit submitted in State

v.Jasper, but it disagrees with the reasoning and the outcome in that case. 158 Wn. App. 518, 525, 254 P.3d 228 (2010) (Jasper I), aff'd, ___Wn.2d ___ (2010). After the parties submitted their appellate briefing, the Washington State Supreme Court issued an opinion affirming our holding in Jasper I. Jasper II, 271 P.3d 876 (2012). The Supreme Court stated:

> After Melendez-Diaz[v. Massachusetts, 557 U.S. 305, ___, 129 S. Ct. 2527, 2539-40, 174 L. Ed. 2d 314 (2009)], it is difficult to regard certifications of the type here . . . as akin to business records, which may be admitted into evidence without confrontation. Instead, as other courts have recognized since Melendez-Diaz, they are best understood as testimonial statements falling within the ambit of the Sixth Amendment. Accordingly, we hold the clerk's affidavits involved in these three cases are testimonial statements . . . . Because the defendants were not given the opportunity to cross-examine the official who authored the certifications, the admission of the certifications into evidence violated the defendants' rights under the confrontation clause.

Id. at 887. The law established in Jasper II is clear, and is plainly applicable here, in light of the State's concession and the similarities between the affidavits used in this case and in Jasper II. The affidavit pertaining to Donovan's driving record was testimonial hearsay, just as was the affidavit in Jasper II. We hold that the trial court erred in admitting the CCDR, in violation of Donovan's Sixth Amendment rights.

Confrontation clause errors are subject to harmless error analysis. Id. Constitutional error is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980). Here, the State raises no argument that the error was harmless. As in Jasper II, we hold that "the constitutional error in

admitting the affidavit was not harmless beyond a reasonable doubt" as to the DWLS 3 conviction. 271 P.3d at 887. We reverse that conviction.

In light of our reversal of this conviction under the confrontation clause analysis, we need not address Donovan's ineffective assistance of counsel claim.

II. Sufficiency of the Evidence for Possession of a Controlled Substance

Donovan argues there was insufficient evidence presented to sustain her conviction for possession of a controlled substance, methamphetamine. When reviewing a party's challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

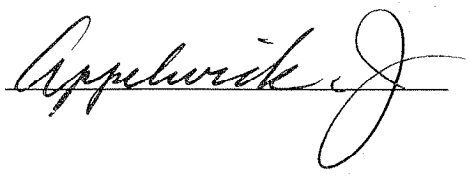
In order to convict a defendant for possession of a controlled substance, the State must prove that the person possessed a controlled substance and, specifically, what the substance is. RCW 69.50.4013. Knowledge is not an element of the crime of possession of a controlled substance. State v. Bradshaw, 152 Wn.2d 528, 537-38, 98 P.3d 1190 (2004). A defendant may raise an unwitting possession defense, which requires the defendant to show, by a preponderance of the evidence, that they did not knowingly possess the controlled substance. State v. Balzer, 91 Wn. App. 44, 67, 954 P.2d 931 (1998).

Donovan does not dispute that she possessed methamphetamine residue on her person, nor does she raise an argument about the jury's rejection of her unwitting possession defense. Instead, she essentially asks us to read into

RCW 69.50.4013 an additional requirement that there must be proof of a minimum measureable quantity of the substance. We have expressly considered such an argument in State v. Malone and rejected it, holding that the possession of a controlled substance statute "does not require that a minimum amount of drug be possessed, but that possession of *any* amount can support a conviction." 72 Wn. App. 429, 439, 864 P.2d 990 (1994).[1] The legislature had the power to create such a minimum requirement in the statutory language, but has not done so. We will not substitute our judgment for that of the legislature by reading a new requirement into the statute. See State v. Larkins, 79 Wn.2d 392, 394, 486 P.2d 95 (1971).

We hold that there is sufficient evidence to support Donovan's conviction for possession of a controlled substance, methamphetamine.

We reverse in part, affirm in part, and remand for further proceedings consistent with this opinion.



WE CONCUR:

[1] In Malone, the contested statute was Former RCW 69.50.401(d) (1998), the former version of RCW 69.50.4013. Laws of 2003, ch. 53, § § 331, 334. Both statutes provide that it is unlawful to possess a controlled substance, and are silent with regards to any minimum quantity.

Spearman, A.C.J.

Cox, J.