

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

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

GREGORY D. BRAYTON,

Appellant.

No. 40875-9-II

UNPUBLISHED OPINION

Armstrong, J. — Gregory Brayton appeals his conviction for unlawful possession of methamphetamine. He argues that he proved by a preponderance of the evidence that his possession of the methamphetamine was unwitting. We affirm.<sup>1</sup>

On March 20, 2010, Deputy Chris Mondry stopped Brayton for speeding. Brayton gave Deputy Mondry his identification card. He was not smoking a cigarette at that time, although there was a pack of Pall Mall cigarettes in the center console. While Deputy Mondry was checking Brayton's identification, he saw Brayton reach around a red jacket in the back seat and then reach underneath the driver's seat. Deputy Mondry learned that a warrant had been issued for Brayton's arrest. By the time he returned to arrest him, Brayton had started smoking a cigarette. After arresting Brayton and obtaining his consent, Deputy Mondry searched his vehicle. He found a pack of Pall Mall cigarettes under the driver's seat. The pack of cigarettes he had

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<sup>1</sup> A commissioner of this court initially considered Brayton's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

seen in the center console was no longer there. When he opened the pack of cigarettes, he found a few hand-rolled cigarettes and a small plastic baggie containing methamphetamine. While driving Brayton to the jail, he told Deputy Mondry that the pack of cigarettes belonged to his roommate.

The State charged Brayton with unlawful possession of methamphetamine. Deputy Mondry testified as described above. Brayton testified that upon leaving his house, he took a pack of cigarettes from his roommate. He denied putting the pack of cigarettes under the driver's seat and denied knowing that the plastic baggie was in it. He testified that had he known the plastic baggie was in the pack of cigarettes, he "would have threw it out of the vehicle or ate it or something." Report of Proceedings at 60. The jury found Brayton guilty as charged.

Brayton argues that he proved his possession of the methamphetamine was unwitting. Unwitting possession is an affirmative defense as to which the defendant has the burden of proof by a preponderance. *State v. Balzer*, 91 Wn. App. 44, 67, 954 P.2d 958 (1998); *State v. Wiley*, 79 Wn. App. 117, 123, 900 P.2d 1116 (1995). He contends that his taking of a cigarette from the pack, rather than removing and destroying the plastic baggie, supports his denial that he knew that the baggie was in the pack of cigarettes and therefore proves unwitting possession by a preponderance of the evidence. The jury was correctly instructed as to unwitting possession. It did not find that Brayton had satisfied his burden of proving unwitting possession. In so doing, it apparently found Brayton not to be credible. We do not review a jury's credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We affirm its verdict that Brayton was guilty of unlawful possession of methamphetamine.

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A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Armstrong, J.

We concur:

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Hunt, J.

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Penoyar, C.J.