IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0745

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHRISTINE LYNNE SHUMWAY,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable John W. Larson, Presiding

APPEARANCES:

TIMOTHY C. FOX
Montana Attorney General
MADISON L. MATTIOLI
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
mlmattioli@mt.gov

JIM NUGENT
Missoula City Attorney
435 Ryman St.
Missoula, MT 59801

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

CHAD WRIGHT
Appellate Defender
MOSES OKEYO
Assistant Appellate Defender
Office of the Appellate Defender
555 Fuller Avenue
P.O. Box 200147
Helena, MT 59620-0147

ATTORNEY FOR DEFENDANT
AND APPELLANT

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ISSUE PRESENTED

Whether sufficient evidence existed to support Appellant's convictions for two charges of possession of drug paraphernalia.

Whether the municipal court properly allocated to Appellant the responsibility to demonstrate she fell within the exemption from prosecution contained in the possession of drug paraphernalia statute.

STATEMENT OF THE CASE

The State charged Shumway with two misdemeanor charges of possession of drug paraphernalia, in violation of Mont. Code Ann. § 45-10-103, after an officer arrested her and she admitted she had two glass pipes in her purse and failed to present a valid marijuana registry card. (D.C. Doc. 1, Acknowledgement of Rights.)[1] Shumway appeared and pled not guilty to both charges. (*Id*.) The court released Shumway on her own recognizance and ordered her to personally appear at the omnibus hearing. (*Id*., Order of Release and Order Setting Omnibus.) Shumway requested permission to appear telephonically at the omnibus hearing scheduled for November 29, 2016, which the court granted. (*Id*., Motion to Appear Telephonically and Order.)

[1] Municipal Court Record, with references to the document's title.

Shumway did not appear telephonically at the November 29, 2016 hearing, and the court continued the hearing to December 13, 2016. (D.C. Doc. 1, Order of Continuance.) Shumway again failed to appear at the scheduled hearing and the municipal court issued its final continuance, resetting the hearing for December 20, 2016. (*Id*., Bench Order.) Shumway appeared at the December 20, 2016 hearing and the court set a jury trial date. (*Id*., Scheduling Order.)

On January 13, 2107, Shumway filed a motion to dismiss the two paraphernalia charges for lack of probable cause. (D.C. Doc. 1, Motion to Dismiss.) In her motion, Shumway alleged that she explained to the arresting officer that "she had an expired medical marijuana card but had not yet received a new card." (*Id*. at 1.) She went on to state that "[d]ispatch informed the [arresting officer] that Shumway's medical marijuana card had actually expired recently." (*Id*.) Shumway argued that the court needed to dismiss the complaint because it failed to establish Shumway's status as a (past) medical marijuana cardholder, thus lacking probable cause that she had committed an offense when she possessed drug paraphernalia. (*Id*.)

The City responded that the arresting officer uncovered that Shumway's previous card had expired more than three months before the date of the citation and that the complaint established probable cause for the offenses. (D.C. Doc. 1,

City's Response.) The court denied Shumway's motion. (Case Register Report, bench order dated February 7, 2017.)

Shumway failed to appear at the scheduled bench trial, and the municipal court found Shumway guilty of both possession of drug paraphernalia charges. (D.C. Doc. 1, Order Re: Bench Trial.) The municipal court deferred imposition of Shumway's sentence on both charges for a period of six months and imposed a total of $350 in fines and costs. (Appellant's App. A.) The court also granted Shumway's motion to stay execution of the judgment pending her appeal to the district court. (*Id.*, Notice to Appeal and Motion to Stay, and Order.)

Shumway appealed to the district court, again alleging that the charging document lacked probable cause, and adding her claim that the municipal court "erred in shifting the burden to Shumway because legal marijuana use is not an affirmative defense, rather intent to use marijuana illegally is an element of the crime charged." (D.C. Doc. 8.) The City responded that there "is no requirement under the [possession of drug paraphernalia] statute that the State prove that no exceptions apply." (D.C. Doc. 11.)

The district court upheld the municipal court sentence, order, and verdict, and remanded to the municipal court for further proceedings. (D.C. Doc. 12; Appellant's App. B.) Shumway then appealed to this Court. (Appellant's Br.)

STATEMENT OF THE FACTS

On September 24, 2016, at approximately 5:30 p.m., City of Missoula Police Officer Nathan Mattix (Mattix) responded to a call at a Missoula Walmart where two people were being held and investigated for shoplifting. (Tr. at 5:00-33.) Mattix identified Shumway as one of the suspects. (*Id*. at 5:33-43.) Mattix eliminated Shumway as a suspect in the theft but took her into custody due to outstanding warrants. (*Id*. at 5:43-6:23.)

As Mattix arrested her, Shumway told him she had marijuana pipes in her purse but that she had a medical marijuana card. (Tr. at 6:23-31, 16:15-17:04.) Shumway did not present her registry identification card to Mattix, and Mattix did not uncover any evidence that Shumway had a valid registry card. (*Id*. 6:31-8:05, 10:24-45.) Shumway did not tell Mattix that her registry card was expired. (Tr. at 8:05-10:24.) Mattix cited Shumway with two counts of possession of drug paraphernalia for having two multicolored glass pipes in her possession with burnt marijuana residue in the bowls of the pipes. (Tr. at 10:50-11:08, 13:50-14:03.) Mattix seized the pipes in Shumway's purse following a contraband search at the Missoula County Jail. (Tr. at 11:08-51.)

At trial, the City introduced the evidence package containing both pipes as Plaintiff's Exhibits One and Two. (Tr. at 11:51-14:25.) Mattix opened the evidence package and confirmed that the contents were in fact the two pipes he seized from

Shumway's purse. (Tr. at 12:25-13:50.) Mattix opined that based on the presence of burnt marijuana residue, both pipes had been previously used to consume marijuana. (Tr. at 13:50-14:03.) The municipal court judge described Exhibit One as a blue and green glass pipe, about two inches in length, and Exhibit Two as a "purple or pink or brown" glass pipe of about three inches in length, both pipes having "a strong odor of marijuana having been burnt in them previously." (Tr. at 14:55-15:30.)

Shumway was not present at trial and did not testify or otherwise present any evidence. The municipal court determined that the Montana Marijuana Act (MMA) requires the defendant to show proof that she has a valid marijuana registry card to avoid being found guilty of possession of drug paraphernalia. As such, the court concluded that Shumway had failed to present any evidence to support her defense that she was a registered cardholder at the time of the offense. Based on the evidence presented, the municipal court found her guilty of both possession of drug paraphernalia charges. (D.C. Doc. 1, Order Re: Bench Trial; Tr. at 48:50-52:15.)

SUMMARY OF ARGUMENT

Contrary to Shumway's assertions, this is not a case in which the municipal court impermissibly shifted the burden to Shumway to "prove" her innocence. Rather, the City presented a prima facie case of possession of drug paraphernalia

and Shumway alleged, in defense, that she possessed a valid marijuana registry card. Yet Shumway failed to demonstrate, or present even a "scintilla" of evidence, that she was entitled to claim exemption from prosecution under the MMA. From the outset she was not in compliance with the MMA's requirement that she keep her registry card in her immediate possession and exhibit the card on demand of law enforcement. Her conduct of possessing drug paraphernalia at a Missoula Walmart, therefore, if even protected by the MMA, falls outside of its protections as she was never in compliance with it. The City was not required to prove that Shumway was shielded from prosecution under the MMA because of her noncompliance. Shumway's argument to the contrary conflicts with the other statutes within the MMA and would render many of the statutes meaningless, thus leading to absurd results. When viewing the evidence in the light most favorable to upholding the verdict, the City presented sufficient evidence from which a rational trier of fact could conclude beyond a reasonable doubt that Shumway possessed drug paraphernalia with the intent to consume a dangerous drug, and this Court should affirm.

The municipal court correctly allocated to Shumway a responsibility to demonstrate that she fell within the exemption from prosecution contained in the possession of drug paraphernalia statute. Even if the court's labeling of this responsibility as an affirmative defense was in error, such error was harmless as

there is substantial authority supporting the proposition that it is the defendant's responsibility to prove him or herself within the class of excepted people in cases involving use, possession, or sale of dangerous drugs. The municipal court reached the right result in this case and this Court should affirm.

STANDARD OF REVIEW

"District courts serve as intermediate appellate courts for cases tried in municipal courts," and this Court reviews district court appellate court decisions under the applicable standard of review as if originally appealed to this Court. *City of Helena v. Grove*, 2017 MT 111, ¶ 4, 387 Mont. 378, 394 P.3d 189 (citations omitted).

This Court reviews *de novo* a trial court's conclusion as to whether sufficient evidence exists to support a verdict. *State v. Sutton*, 2018 MT 143, ¶¶ 10, 391 Mont. 485, 419 P.3d 1201 (citing *State v. Criswell*, 2013 MT 177, ¶ 12, 370 Mont. 511, 305 P.3d 760 (citation omitted)). In making this assessment, this Court views the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Id*. (citing *Criswell*, ¶ 13 (citation omitted)). This Court reviews a verdict only to determine whether sufficient evidence exists to support the verdict, not whether the evidence could

have supported a different result. *State v. Weigand*, 2005 MT 201, ¶ 7, 328 Mont. 198, 119 P.3d 74 (citation omitted). It is within the province of the factfinder to weigh the evidence based on the credibility of the witnesses and determine which version of events should prevail. *Id*. (citation omitted).

A trial court's statutory interpretation constitutes a conclusion of law, which this Court reviews for correctness. *Sutton*, ¶ 11, citing *State v. Sheehan*, 2017 MT 185, ¶ 18, 388 Mont. 220, 399 P.3d 314 (citation omitted). When interpreting statutes within an act, this Court "interprets individual sections of the act in a manner that ensures coordination with the other sections of the act." *Sutton*, ¶ 11, citing *State v. Pirello*, 2012 MT 155, ¶ 16, 365 Mont. 399, 282 P.3d 662 (citation omitted).

ARGUMENT

I. The State presented sufficient evidence to convict Shumway of possession of drug paraphernalia.

It is unlawful for a person to use or possess with intent to use drug paraphernalia to inhale or otherwise introduce into the human body a dangerous drug. Mont. Code Ann. § 45-10-103. Marijuana is defined as a dangerous drug. Mont. Code Ann. § 50-32-222(4)(x). "However," as this Court has noted, "criminal liability under these provisions has been altered *for persons complying with the MMA*, codified at §§ 50-46-301 through -345, MCA." *Sutton*, ¶ 14

(emphasis added). As Shumway observes, "the purpose of the MMA is to 'provide legal protections to individuals with debilitating medical conditions' by providing a regulatory system that 'allow[s] for the limited cultivation, manufacture, delivery, and possession of marijuana' *by persons who are registered cardholders*. *See* § 50-46-301, MCA." *Id*. (emphasis added).

The MMA, read in its entirety, places several responsibilities on registered cardholders before they may claim to fall within the exemption from criminal liability. Montana Code Annotated § 50-46-319(7) makes clear that its provisions "relating to protection from arrest or prosecution *do not apply* to an individual *unless* the individual has obtained a license or registry identification card prior to an arrest or the filing of a criminal charge." (Emphasis added.) A "[r]egistry identification card" means a document issued by the department pursuant to Mont. Code Ann. § 50-46-303 that identifies an individual as a registered cardholder. Mont. Code Ann. § 50-46-302. A "[r]egistered cardholder" or "cardholder" means a Montana resident with a debilitating medical condition who has received *and maintains* a valid registry identification card. Mont. Code Ann. § 50-46-302 (emphasis added).

Indeed, Mont. Code Ann. § 50-46-317 mandates that "[a] registered cardholder, provider, or marijuana-infused products provider *shall* keep the individual's registry identification card or license in the individual's or person's

immediate possession *at all times*." (Emphasis added.) This section instructs further that "[t]he registry identification card or license and a valid photo identification *shall be displayed* upon demand of a law enforcement officer, justice of the peace, or city or municipal judge." *Id*. (Emphasis added.)

Montana Code Annotated § 50-46-319(8)(a)(i)-(ii) makes clear that a registered cardholder is *only* presumed to be engaged in the use of marijuana as allowed by the MMA *if* the person is in possession of a valid registry identification card or license and is in possession of an amount of marijuana that does not exceed the amount permitted under Mont. Code Ann. § 50-46-302. (Emphasis added.) The following subsection provides that this "presumption may be rebutted by evidence that the possession of marijuana was not for the purpose of alleviating the symptoms or effects of a registered cardholder's debilitating medical condition." Mont. Code Ann. § 50-46-319(8)(b). Notably, rather than affirmatively protecting possession of drug paraphernalia for medical marijuana use, the MMA is completely silent on possession of drug paraphernalia, except to repeat the definition or paraphernalia provided in Mont. Code Ann. § 45-10-101.

When interpreting statutes within a legislative act, this Court has a duty to ensure that the individual statutes coordinate with one another. *Zuazua v. Tibbles*, 2006 MT 342, ¶ 25, 335 Mont. 181, 150 P.3d 361. Similarly, this Court will harmonize statutes relating to the same subject to give effect to each. *State v.*

Brendal, 2009 MT 236, ¶ 18, 351 Mont. 395, 213 P.3d 448; *see also Sutton*, ¶ 11. This Court presumes that the Legislature did not pass meaningless legislation, and this Court will construe statutes to avoid absurd results. *Brendal*, ¶ 18.

Pursuant to Mont. Code Ann. § 50-46-319(8)(a)(i)-(ii), Shumway was not entitled to the presumption that her possession of drug paraphernalia was allowed under the MMA for medicinal purposes because she was not in possession of a valid registry identification card and failed to display it upon demand by law enforcement as required by Mont. Code Ann. § 50-46-317. If Shumway, in fact, possessed a valid registry identification card, the MMA placed upon her an affirmative duty to display it to the officer. *See id.* Her noncompliance with the MMA places her conduct of possessing drug paraphernalia outside any exemption for medical marijuana use allowed under the MMA.

Shumway's interpretation of Mont. Code Ann. § 50-46-319(7) is not persuasive because it is inconsistent with the other aforementioned statutes within the Act. *See* Appellant's Br. at 27-28. Shumway nevertheless claims, pursuant to this statute and the "except as provided in" language contained in the paraphernalia statute, that "to prosecute under the criminal possession of paraphernalia statute, the City bears the burden to prove that Shumway had not obtained a registry identification card prior to her arrest or prior to the filing of the criminal charges." *Id*. She claims that this principle is the same as it was in *State v. Johnson*, 2012 MT

101, ¶ 30, 365 Mont. 56, 277 P.3d 1232, where this Court held that "to support a conviction for possession of marijuana, the City bore the burden to show that Johnson possessed marijuana and was not shielded from prosecution by the MMA." *Id*. at ¶ 28.

Johnson is distinguishable, however, because after a Trooper pulled Johnson over for erratic driving and he asked her if she had been smoking marijuana, she "stated that she had a valid Montana Medical Marijuana Card, which she showed to [the Trooper]." ¶ 5. Notably, since Johnson presented the Trooper with a valid registry card, he did not charge her with criminal possession of drug paraphernalia, "reasoning that Johnson was allowed to have the pipe due to her Medical Marijuana Card." *Id*.

Because Johnson presented the Trooper with a valid medical marijuana card, she "was presumed to be engaged in the use of marijuana as allowed by the MMA," pursuant to Mont. Code Ann. § 50-46-319(8)(a)(i)-(ii). The issue, then, was whether the City had presented sufficient evidence to rebut this presumption by presenting evidence that she was not in compliance with the MMA's requirement that she obtain marijuana only from her caregiver. The fact that Johnson presented the Trooper with a valid medical marijuana card on demand was critical to this Court's analysis, and this Court should narrow its interpretation of

the language Shumway quotes to apply only to the specific facts presented in that case. *Johnson*, ¶ 30.

If this Court were to hold otherwise, it would create absurd results. The 2011 MMA "repealed the 2004 [MMA]—which was established by voter initiative (I-148)—and replaced it with a new statutory framework. The Act contains multiple provisions that *limit* both the eligibility of patients to qualify for its protections and the activities of medical professionals and providers of marijuana for medical purposes." *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 3, 382 Mont. 256, 368 P.3d 1131 (emphasis added). These amendments were intended to tighten the reigns on medical marijuana use, cultivation, and possession following several abuses that occurred under the 2004 MMA, not to increase the burden on the State in prosecuting misdemeanor drug possession cases by "sneaking in" an extra element. Principles of statutory construction and common sense belie Shumway's argument to the contrary.

The plain language of the statute is instructive. Montana Code Annotated § 45-10-103 reads in its entirety:

> Except as provided in [section 9] or Title 50, chapter 46, it is unlawful for a person to use or to possess with intent to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a dangerous drug. A person who violates this section is guilty of a misdemeanor and upon conviction shall be imprisoned in the county jail for not more than 6 months, fined an amount of not

> more than $500, or both. A person convicted of a first violation of this section is presumed to be entitled to a deferred imposition of sentence of imprisonment.

(Emphasis added.) It is clear that the offense elements of this crime begin after the phrase, "except as provided in," where the Legislature inserted the common offense-defining phrase, "it is unlawful for." The sentencing provisions are listed following the offense elements.

If Shumway's interpretation of the MMA is correct, and the fact that an individual is not shielded from prosecution under the MMA is an additional offense element of every marijuana or marijuana paraphernalia possession offense, the State would be required to present testimony regarding the medical marijuana cardholder status of every individual prosecuted in every single case involving marijuana, regardless of whether they purported to be a registered cardholder or not. This Court is required to presume that the Legislature did not intend such an onerous and absurd result.

Considering the foregoing principles and viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of possession of drug paraphernalia beyond a reasonable doubt. To establish the offense of criminal possession of drug paraphernalia here, the State needed to prove that Shumway purposely or knowingly possessed with intent to use drug paraphernalia to inhale a dangerous

drug. Mont. Code Ann. § 45-10-103. Contrary to Shumway's repeated assertions, "unlawful use" is not an element of this offense.

Possession means the knowing control of anything for a sufficient time to be able to terminate control. Mont. Code Ann. § 45-2-101(59). Possession of dangerous drugs may be either actual or constructive. Actual possession means that the goods are in the personal custody of the person charged with possession. *State v. Meader*, 184 Mont. 32, 42, 601 P.2d 386, 392 (1979) (citations omitted).

A conviction cannot be overturned if the evidence, when viewed in a light most favorable to the prosecution, would allow a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Bernhardt*, 249 Mont. 30, 32, 813 P.2d 436, 437 (1991) (citations omitted). The weight and credibility of witnesses are exclusively the province of the trier of fact. *State v. Kaske*, 2002 MT 106, ¶ 25, 309 Mont. 445, 47 P.3d 824 (citation omitted). A single witness's testimony is sufficient to prove a fact, and the State may use circumstantial evidence to prove any element of an offense. *Id*. When circumstantial evidence is susceptible to two interpretations, one which supports guilt and the other which supports innocence, the trier of fact determines which is the more reasonable. *Bernhardt*, 249 Mont. at 32.

The State presented the testimony of Mattix, the arresting officer, who testified that Shumway told him she had marijuana pipes in her purse,

demonstrating her actual and knowing possession of drug paraphernalia. The municipal court was entitled to credit as reasonable Mattix's testimony that Shumway told Mattix she had a medical marijuana registry card and that she never presented the card to Mattix at any time. Mattix seized the two pipes from Shumway's purse during a contraband search at the jail, and the City introduced the pipes into evidence. Contrary to Shumway's assertions (Appellant's Br. at 18-19), Mattix twice testified that he believed based on the presence of burnt marijuana residue that both pipes had been previously used to consume marijuana (Tr. at 10:50-11:08, 13:50-14:03).

Marijuana is classified as a dangerous drug, Mont. Code Ann. § 50-32-222(4)(x). This Court has held that "marijuana is not difficult to characterize without chemical analysis" and that the "testimony of officers who have had experience searching for and identifying marijuana is sufficient." *State v. Salois*, 235 Mont. 276, 282, 766 P.2d 1306, 1310 (1988) (citations omitted); *State v. Nichols*, 1998 MT 271, ¶ 7, 291 Mont. 271, 291 Mont. 367, 970 P.2d 79; *State v. Ostwald*, 180 Mont. 530, 540, 591 P.2d 646, 652 (1979) (citation omitted); *see also In re Ondrel M.*, 918 A.2d 543, 555 (Md. App. 2007) ("A witness need only to have encountered the smoking of marijuana in daily life to be able to recognize the odor."). Circumstantial evidence may also support the conclusion that a substance is a dangerous drug. *State v. Henrich*, 268 Mont. 258, 269, 886 P.2d 402, 409

(1994) (citing *State v. Dunn*, 155 Mont. 319, 472 P.2d 288 (1970)). The arresting officer's eleven years total experience in law enforcement and corrections qualified him to identify burnt marijuana residue from his prior experience with the drug. (*See* Tr. at 4:20-4:48.)

Finally, Shumway claims it is undisputed that she told Mattix she suffers from rheumatoid arthritis, yet her counsel failed to elicit any testimony at trial to establish this. Counsel also questioned Mattix regarding certain alleged facts portrayed in the video of Shumway's arrest, but this video was never played for the municipal court at trial or introduced as an exhibit and, therefore, the facts allegedly portrayed within it carry no evidentiary weight. *See* Appellant's Br. 5-6, and 28; *also State v. Llamas*, 2017 MT 155, ¶ 34, 388 Mont. 53, 402 P.3d 611.

Viewing the evidence presented in the light most favorable to the prosecution, there was ample evidence for the municipal court to find that Shumway was in actual possession of drug paraphernalia beyond a reasonable doubt.

II. The municipal court correctly allocated to Shumway the responsibility to demonstrate that she fell within the exemption from prosecution contained in the possession of drug paraphernalia statute.

Shumway next alleges that "the City convinced the [municipal court] to shift the burden on Shumway to prove an affirmative defense that she is a medical

marijuana registry cardholder." (Appellant's Br. at 29.) She goes on to write, "Shumway was automatically culpable of possessing drug paraphernalia with intent to inhale a dangerous drug unless she presented a medical marijuana card on demand." (*Id*.) Indeed, the State believes this is a correct statement of the law. The MMA is explicit in its requirement that registered cardholders maintain and display their registry cards to law enforcement on demand. Failure to comply with the provisions of the MMA results in criminal liability. *See e.g.*, Mont. Code Ann. § 50-46-330, and *Sutton*, ¶ 14.

In rendering its verdict, the municipal court remarked that the requirement under the MMA that registered cardholders carry and present their cards on demand to be "remarkably similar to the insurance rules," stating that both statutory schemes require proof of a card to "do" something. (Tr. at 50:00-08, 51:25-40.) The State agrees and would also analogize the cardholder requirements under the MMA to the requirement that drivers on Montana's highways be licensed.

Montana Code Annotated § 61-5-102(a) states that, "[e]xcept as provided in 61-5-104, a person may not drive a motor vehicle upon a highway in this state unless the person has a valid Montana driver's license." Montana Code Annotated § 61-5-104 lists several persons who are exempt from this requirement, but the exemption fails to negate the rule. If a person is stopped on a Montana highway

without a valid license on their person, they are presumed in violation of this statute unless they can establish that they fall within the excepted class. As this Court has held, an officer need not investigate every possible innocent explanation or legal exception prior to entertaining a reasonable suspicion that an offense has been committed. *See e.g.*, *State v. Hatler*, 2001 MT 38, ¶ 11, 304 Mont. 211, 19 P.3d 822.

In *State v. Quandt*, 495 P.2d 158, 159 (Ariz. App. 1972), an Arizona Court of Appeals rejected an argument identical to the one Shumway presents. Quandt appealed from a jury conviction for criminal possession of dangerous drugs in violation of Ariz. Rev. Stat. §§ 32-1964(A)(7); and 32-1975(B) (1967), after being arrested with 200 LSD tablets in his pants pocket. *Id*. at 158. He did not testify at trial. *Id*. On appeal, he "assign[ed] as fundamental error the failure of the State to produce evidence that defendant did not come within any of the excepted categories contained in A.R.S. § 32-1965." *Id*. at 159. Like Montana's possession statute, "[t]his statute provided that certain persons were authorized to have possession of the drug. Those so authorized included licensed physicians, veterinarians, drug salesmen, drug wholesalers and manufacturers." *Id*. Like Shumway, Quandt rested his argument "on the presumption of his innocence and on the fact that the State has the burden of proving every element of a criminal offense." *Id*.

Quandt argued "that his conviction must be set aside as there was no proof at trial that he was not a person in one of the categories excepted from the purview of A.R.S. §§ 32-1974 and 32-1975, subsec. B." *Id.* at 159. The Arizona court noted that while there was no Arizona case on point, the case reporters "are replete with pronouncements by federal and state courts which have held that it is the defendant's responsibility to prove himself within the class of excepted people in cases involving use, possession or sale of dangerous drugs." *Id*. at 159 (citing *United States v. Ramzy*, 446 F.2d 1184 (5th Cir. 1971); *Tritt v. United States*, 421 F.2d 928 (10th Cir. 1970); *Williams v. United States*, 292 F.2d 157 (8th Cir. 1961); *People v. Moore*, 186 N.W.2d 788 (Mich. App. 1971); *State v. Alley, Me.*, 263 A.2d 66 (Me. 1970); *People v. Adams*, 263 N.E.2d 495 (Ill. 2d1970); *Stanley v. State*, 245 N.E.2d 149 (Ind. 1969); *Henley v. State*, 387 S.W.2d 877 (Tex. Crim. App. 1965); *People v. Vasquez*, 224 Cal. App. 2d 206, 236 Cal. Rptr. 337 (1964)).

The rule pronounced by these cases makes sense as a matter of policy, and this Court should hold the same here. There are certain factual ingredients, such as those comprising most exceptions to general rules, whose existence or otherwise falls "peculiarly within the knowledge of the defendant." Francis Bennion,

Statutory Exceptions: A Third Knot in the Golden Thread?, Crim LR (1988) 31.[2] Coupled with this is the frequent difficulty of proving a negative. *Id.*

It was proper for the municipal court to hold Shumway to a persuasive rather than an evidential burden of producing *some* evidence that she fell within the excepted class. As the court noted, such evidence, if it existed, would constitute an absolute defense to the charged offense. If Shumway possessed evidence that she was a registered cardholder on the date of her arrest, it would be to her benefit alone to come forward with that evidence.

It is also worth noting that the affirmative defense provision that Montana's Legislature repealed in 2011 was a generous allowance for an individual charged with any criminal offense involving marijuana to *after the fact* obtain an opinion from a physician that the potential benefits of medical marijuana would likely outweigh the health risks for the person. (*See* Appellant's Br. at 25; Tr. at 50:55-51:28.) That the Legislature repealed this affirmative defense and replaced it with strict and specific requirements for cardholders supports the State's position in this case. *See* Mont. Code Ann. § 50-46-319(7) ("It is not a defense to a criminal charge that an individual obtains a license or registry identification card after an arrest or the filing of a criminal charge.")

[2] Accessed at http://www.francisbennion.com/pdfs/fb/1988/1988-003-third-knot.pdf on August 17, 2018.

The City met its burden in this case of presenting sufficient evidence that Shumway's conduct prima facie contravened the general rule proscribing possession of drug paraphernalia. The municipal court properly allocated a persuasive burden to Shumway to demonstrate, if she could, that she fell within the exception to the general rule. Even if the court's labeling this persuasive burden as an affirmative defense was in error, such error was harmless because the court reached the right result based on the evidence presented in the light most favorable to upholding the conviction.

CONCLUSION

The State respectfully requests that this Court affirm Shumway's convictions and sentence.

Respectfully submitted this 27th day of August, 2018.

TIMOTHY C. FOX
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ Madison L. Mattioli*
MADISON L. MATTIOLI
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,945 words, excluding certificate of service and certificate of compliance.

/s/ Madison L. Mattioli
MADISON L. MATTIOLI

CERTIFICATE OF SERVICE

I, Madison L. Mattioli, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-27-2018:

Kirsten H. Pabst (Prosecutor)
200 W. Broadway
Missoula MT 59802
Representing: Missoula, City of
Service Method: eService

James P. Nugent (Attorney)
435 Ryman St
Missoula MT 59802
Representing: Missoula, City of
Service Method: eService

Chad M. Wright (Attorney)
P.O. Box 200147
Helena MT 59620-0147
Representing: Christine Lynne Shumway
Service Method: eService

Moses Ouma Okeyo (Attorney)
610 N Woody St
Missoula MT 59802
Representing: Christine Lynne Shumway
Service Method: eService

Electronically signed by Beverly Holnbeck on behalf of Madison L. Mattioli
Dated: 08-27-2018