SUMMARY
August 6, 2020

2020COA120M

No. 18CA0827, *People v. McClintic* — Crimes — Introducing Contraband in the First Degree

Addressing a novel fact pattern, a division of the court of appeals considers whether there was sufficient evidence to support a conviction for introducing contraband in the first degree when the defendant was arrested with marijuana in her pocket and was generally uncooperative with a strip search, but volunteered her possession of marijuana to booking officers and surrendered it when asked to do so.

The division concludes that there was no evidence of a voluntary act to support the defendant's conviction because she did not voluntarily enter the jail, deny her possession of marijuana, or attempt to conceal the contraband. The division further concludes that in Colorado, mere knowing possession of contraband upon

involuntary entry to a detention facility, without denial when asked or concealment or attempted concealment, is insufficient to support a conviction for introducing contraband.

COLORADO COURT OF APPEALS **2020COA120M**

Court of Appeals No. 18CA0827
Teller County District Court No. 17CR124
Honorable Lin Billings Vela, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Stacy Anne McClintic,

Defendant-Appellant.

JUDGMENT AFFIRMED IN PART, VACATED
IN PART, AND CASE REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE TAUBMAN*
Dunn and Yun, JJ., concur

Opinion Modified
On the Court's Own Motion

Announced August 6, 2020

Philip J. Weiser, Attorney General, Trina K. Taylor, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Meredith E. O'Harris, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2019.

OPINION is modified as follows:

Caption page currently reads:

Teller County District Court No. 17CR127

Opinion now reads:

Teller County District Court No. 17CR124

¶ 1 Defendant, Stacy Anne McClintic, appeals the judgment of conviction entered on jury verdicts finding her guilty of introducing contraband in the first degree, driving under the influence, and a lane usage violation. Because we conclude that there is insufficient evidence to support her conviction for introducing contraband, we vacate that conviction and remand for a correction of the mittimus, including any necessary recalculation of costs.

I. Background

¶ 2 According to the prosecution's evidence, McClintic was weaving between lanes of traffic and was stopped by police. The officer suspected McClintic was impaired or suffering from a medical condition because she was dazed, distracted, and confused, and because her purse was full of prescription medicine bottles. She told the officer she had a heart condition. She confessed that she would not pass a roadside sobriety test, and she could not maintain her balance when she got out of the vehicle. She refused a blood test, and officers brought her to the Teller County jail.

¶ 3 During "prebooking," an officer told McClintic that she would be conducting a strip search for safety purposes. McClintic verbally refused to be strip searched and said she was "not giving [the

officers her] weed." Shortly thereafter, McClintic complained of chest pains and was transported to the hospital.

¶ 4 When she was released from the hospital, McClintic was transported back to jail. The transporting officer's usual practice was to ask those he transported whether "they have anything else on them that [he] should know about." Although he did not specifically remember his interaction with McClintic, the officer testified that he did not obtain anything from McClintic or write a report about it.

¶ 5 Back at the Teller County jail, McClintic refused to stand to walk to the bathroom for a strip search. After helping her to the bathroom, the prebooking officer asked McClintic (now standing) if she had "anything on [her] other than the clothes [she was] wearing." McClintic again disclosed that she was carrying "weed" in her pocket, pulled out a clear plastic baggie of marijuana, and handed it to a deputy. She was otherwise "verbally and passively" uncooperative with the search, which did not reveal any additional contraband.

¶ 6 After a two-day trial, a jury found McClintic guilty of driving under the influence, a misdemeanor; lane usage violation, a traffic

infraction; and introducing contraband in the first degree, a felony. The issues McClintic raises on appeal relate only to the felony conviction. She contends that it was not supported by sufficient evidence and that the court improperly instructed the jury on that charge.

¶ 7 We agree that there was insufficient evidence to support McClintic's conviction for introducing contraband in the first degree because there was no evidence that she committed a voluntary act. Accordingly, we vacate that conviction. In light of our resolution, we need not address her contentions that she lacked the mens rea to commit that offense, that there was insufficient evidence of a qualifying detention facility, and that the trial court erred in instructing the jury.

II. Insufficient Evidence

A. Standard of Review

¶ 8 We evaluate de novo whether, after viewing the relevant evidence as a whole and in the light most favorable to the prosecution, "a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010). We give the prosecution the

benefit of every reasonable inference which may fairly be drawn from the evidence, and we do not consider vague, speculative, or imaginary doubt to be reasonable doubt. *Id.* at 1292. However, "[i]f the evidence is such that reasonable jurors must necessarily have a reasonable doubt, then the evidence is insufficient to sustain the defendant's conviction." *Id.* A mere modicum of relevant evidence, supported by speculation, will not rationally support a conviction beyond a reasonable doubt. *People v. Gonzales*, 666 P.2d 123, 128 (Colo. 1983).

¶ 9 The relevant criminal act for introducing contraband in the first degree is statutorily defined as "[i]ntroduc[ing] or attempt[ing] to introduce . . . marijuana . . . into a detention facility or at any location where an inmate is or is likely to be located . . . ."[1] § 18-8-203(1)(a), C.R.S. 2019. McClintic contends that there was insufficient evidence that she committed a voluntary criminal act

[1] At oral argument, the People argued that McClintic had been convicted of attempting to introduce contraband, and that the evidence was sufficient to support that conviction. At trial, however, the prosecutor did not articulate a theory of guilt and did not mention attempt during closing argument; the jury verdict forms asked only whether McClintic was guilty of introducing contraband in the first degree.

because she was brought to the jail involuntarily, she twice disclosed the marijuana in her possession, and she freely gave the marijuana to booking officers before a strip search. We agree.

B. No Voluntary Criminal Act

¶ 10 At the outset, we note that the People's answer brief does not address whether the prosecution presented sufficient evidence of a voluntary criminal act. However, the jury was instructed on this requirement, and McClintic raised this argument in a separate section of her opening brief (although it was presented under the umbrella of insufficient evidence of mental culpability). The People addressed questions regarding evidence of a voluntary criminal act during oral argument.

¶ 11 We must address this alleged insufficiency because "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact necessary* to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970) (emphasis added); *accord McCoy v. People*, 2019 CO 44, ¶ 20, 442 P.3d 379, 385.

¶ 12 McClintic stipulated at trial that the substance she gave to deputies at the jail was marijuana. Possession of small amounts of

marijuana was legal under Colorado law at the time of her arrest[2]; possession of a legal amount of marijuana alone cannot constitute a voluntary act for purposes of the relevant criminal liability. *See Dep't of Nat. Res. v. 5 Star Feedlot Inc.*, 2019 COA 162M, ¶ 33, ___ P.3d ___, ___ (*cert. granted* Apr. 27, 2020) ("[A] lawful voluntary act that alone doesn't result in any transgression of the law can lead to criminal culpability only if coupled with an unlawful voluntary act.").

¶ 13 "The minimum requirement for the imposition of criminal liability is that [a] criminal act be performed voluntarily or consciously." *People v. Marcy*, 628 P.2d 69, 73 (Colo. 1981); *accord People v. Johnson*, 2016 COA 15, ¶ 18, 381 P.3d 348, 352. This general tenet of criminal law is codified at section 18-1-502, C.R.S. 2019. A voluntary act is "an act performed consciously as a result of effort or determination, and includes the possession of property if the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it." § 18-1-501(9),

[2] The prosecution did not allege that McClintic possessed an illegal amount of marijuana, and there is no information in the record regarding the weight of the marijuana in McClintic's pocket.

C.R.S. 2019; *see Hendershott v. People*, 653 P.2d 385, 390 (Colo. 1982) ("[I]n order to subject a person to criminal liability for a felony or serious misdemeanor, there must be a concurrence of an unlawful act (actus reus) and a culpable mental state (mens rea).").

¶ 14 Involuntary acts — acts *not* performed consciously and as a result of effort or determination — do not constitute criminal conduct. For instance, if sleep or involuntary intoxication prevents a defendant from having an awareness of his or her acts and the requirements of the law, the defendant is not criminally responsible. *See Johnson*, ¶ 18, 381 P.3d at 352 ("[A] person cannot have unlawful sexual contact while he or she is asleep and unaware of the contact."); *see also* § 18-1-804(3), C.R.S. 2019 (involuntarily intoxicated defendants are "not criminally responsible" for acts committed by reason of their intoxication). Moreover, when a defendant consciously acts as a result of duress or inducement by law enforcement officers, rather than as a result of effort or determination, he or she is also relieved of criminal responsibility. *See* § 18-1-708, C.R.S. 2019 ("A person may not be convicted of an offense, other than a class 1 felony, based upon

conduct" performed only under duress.); *see also* § 18-1-709, C.R.S. 2019 (the entrapment statute).

¶ 15 There is insufficient evidence that McClintic engaged in an unlawful voluntary act prior to or upon entering the jail. There is no evidence in the record that McClintic placed the marijuana on her person after the traffic stop. The evidence suggests only that McClintic was transported to jail with marijuana in her possession upon her arrest. Thus, there is no evidence that McClintic consciously caused the entry of contraband into the detention facility "as a result of effort or determination." § 18-1-501(9).

¶ 16 Still, we recognize that the legislative purpose of the statute is generally "to control contraband in penal institutions." *People v. West*, 43 Colo. App. 246, 247, 603 P.2d 967, 968 (1979). That being the case, active concealment of contraband upon involuntary entry to a detention facility may constitute an unlawful voluntary act giving rise to criminal liability for introducing contraband in the first degree. *See People v. Frye*, 2014 COA 141, ¶ 19, 356 P.3d 1000, 1005 (concluding that evidence for introduction of contraband was overwhelming where there was unrebutted testimony that the defendant "tried to conceal a pouch containing

drugs under her breast and resisted an officer's search of this area of her body" upon booking after her arrest); *see also People v. Allen*, 199 P.3d 33, 34-35, 37-38 (Colo. App. 2007) (concluding that evidence was not overwhelming where, upon booking after his arrest, the defendant denied having contraband, a baggie of marijuana was found in his leg cast, and he testified that he had forgotten that he had put it there).

¶ 17 The prosecution presented evidence that McClintic twice voluntarily admitted to jail personnel during the booking process that she had marijuana in her possession. When, immediately before the strip search, she was asked where it was located, she told the inquiring detective that it was in her pocket and she quickly presented it to another detective. Thus, the evidence showed not only that McClintic neither concealed nor attempted to conceal her marijuana, but that she voluntarily gave it to the police.

¶ 18 Although they do not directly address the voluntary criminal act component of introduction of contraband, the People argue in their answer brief that evidence of the following actions by McClintic support her conviction: (1) she resisted being searched; (2) she told the police officers that she did not want to give jail

personnel her marijuana; (3) she was uncooperative with medical personnel; and (4) she did not disclose to a transport deputy that she had marijuana when returning from the hospital. We cannot agree that these actions amount to an unlawful voluntary act of concealment.

¶ 19 First, McClintic's passive and verbal noncooperation with the strip search did not extend to concealment of contraband, which she gave up as soon as she was asked about it, before the search began. Her "resistance," according to the booking officer's testimony, was passive — it did not include a voluntary act — and, in any event, resisting a strip search with no intent to conceal contraband does not amount to introducing contraband or attempting to do so. *Cf. Frye*, ¶ 19, 356 P.3d at 1005. Second, McClintic's verbal expression of a desire to keep the marijuana did not amount to an act of concealment, especially since she relinquished it when asked to do so. Third, we do not perceive the relevance of her interactions with medical personnel.[3] Finally,

[3] At oral argument, the People contended that the jury could infer from McClintic's noncooperation with medical personnel that she was feigning her symptoms to distract the officers so she could bring marijuana into the jail. Because McClintic again admitted

although the transport deputy speculated that he had asked McClintic if she had "anything else on [her] that [he] should know about" on her return to the jail from the hospital, because he did that "with everyone," there was no evidence that she ever denied having marijuana in her possession.

¶ 20 Accordingly, we cannot conclude that the prosecution's evidence of a voluntary criminal act rationally supports a conviction beyond a reasonable doubt. *See Gonzales*, 666 P.2d at 128.

C. Voluntary Criminal Act for Introducing Contraband

¶ 21 While Colorado law requires a voluntary act to impose criminal liability, Colorado courts have not previously addressed what may constitute a voluntary criminal act when an arrestee is brought to jail with contraband on his or her person. We find guidance in cases from other states.

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possession of marijuana on her return to the jail, we conclude that these inferences are not supported by the record. *See People v. Donald*, 2020 CO 24, ¶ 19, 431 P.3d 7 (holding that although we give the prosecution the benefit of all reasonable inferences, those inferences "must be supported by a 'logical and convincing connection between the facts established and the conclusion inferred'" (ultimately quoting *People v. Gonzales*, 666 P.2d 123, 128 (Colo. 1983))). Further, there is no record support for an inference that McClintic feigned her symptoms of illness.

¶ 22 Some state courts hold that possession of contraband on arrest cannot create criminal liability for introduction of contraband, even if the defendant denies or does not admit possession. *See, e.g.*, *State v. Sowry*, 803 N.E.2d 867, 870 (Ohio Ct. App. 2004) (holding that no voluntary act by the defendant caused his person and the possessions on his person to be in jail; a denial of possession relates more to the culpable mental state of "knowingly" than to the prohibited conduct).

¶ 23 In *State v. Tippetts*, the Oregon Court of Appeals applied laws similar to Colorado's to determine that, in the context of possession of contraband on arrest, a voluntary act demonstrating more than an awareness of possession — an act showing "that the defendant had the ability to choose to take a particular action" — was necessary for criminal liability. 43 P.3d 455, 459 (Or. Ct. App. 2002) (where the defendant was arrested at his home with marijuana in his pocket and did not admit possession). The court noted that "the Fifth Amendment to the United States Constitution prevent[s] the state from forcing a defendant to choose between admitting to possession of a controlled substance and being charged with introducing that substance into a correctional

facility." *Id.* at 457 n.2. The court further noted that "no reasonable juror could find that the introduction of contraband into the jail was a reasonably foreseeable consequence of possessing it." *Id.* at 460.

¶ 24 The New Mexico Court of Appeals similarly concluded that a defendant could not be held liable for bringing contraband into a jail when he did so involuntarily because he did not meet the actus reus element of the crime; it was "of no moment" that the defendant could have admitted to the booking officer that he possessed marijuana. *State v. Cole*, 164 P.3d 1024, 1026-27 (N.M. Ct. App. 2007).

¶ 25 Additionally, in *State v. Eaton*, 229 P.3d 704, 710 (Wash. 2010), the Washington Supreme Court concluded that for possession of contraband to merit an enhanced sentence, the prosecution must prove that the defendant entered the jail "volitionally."

¶ 26 Some states hold that the voluntary acts of denying possession or forgoing an informed opportunity to relinquish possession of contraband upon entering a jail are sufficient to support a conviction. *See State v. Alvarado*, 200 P.3d 1037, 1042-43 (Ariz. Ct.

App. 2008) (where the defendant denied having contraband but expressed disappointment when a detention officer found marijuana in his pocket); *People v. Ross*, 76 Cal. Rptr. 3d 477, 481-82 (Ct. App. 2008) ("An arrestee commits a sufficiently voluntary act to violate the statute if he or she knowingly brings a deadly weapon into a jail after having denied possessing such a weapon.").

¶ 27 McClintic is less blameworthy than the defendants in these out-of-state cases because she did not deny possessing contraband. To the contrary, she twice admitted that she had "weed." Further, she relinquished the marijuana when she was asked to do so.

¶ 28 We note that in *State v. Barnes*, 747 S.E.2d 912, 919-20 (N.C. Ct. App. 2013), *aff'd*, 756 S.E.2d 38 (N.C. 2014), the North Carolina Court of Appeals stated that its conclusion that "the necessary voluntary act occurs when the defendant knowingly possesses the controlled substance" is in line with the majority of court cases. In *Barnes*, the court applied a statute banning *possession* of a controlled substance on the premises of a local confinement facility, *see* N.C. Gen. Stat. § 90-95(e)(9) (West 2019),[4] and reasoned that

[4] In so concluding, the court noted that "nothing in the relevant statutory language requires proof that [the d]efendant voluntarily

the defendant could be guilty of the crime "even though he was not voluntarily present in the facility in question." *Barnes*, 747 S.E.2d at 918. However, in nearly every case the court cited in support of its assertion of a majority stance, as well as in *Barnes* itself, there was evidence that the defendant had not merely possessed contraband on entry into a detention facility but had also concealed or denied having contraband. *See Alvarado*, 200 P.3d 1037, 1038-39 (denied possession); *People v. Low*, 232 P.3d 635, 644-45 (Cal. 2010) (same); *State v. Canas*, 597 N.W.2d 488, 491-92 (Iowa 1999) (attempted to conceal in underwear); *State v. Cargile*, 916 N.E.2d 775, 776 (Ohio 2009) (denied possession); *Brown v. State*, 89 S.W.3d 630, 631-632 (Tex. Crim. App. 2002) (same); *see also State v. Windsor*, 110 S.W.3d 882, 884 (Mo. Ct. App. 2003) (remained silent when asked about possession and advised of criminal penalty for possession in jail). Accordingly, we conclude that *Barnes* and the cases on which it relies are distinguishable.

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introduced a controlled substance into the . . . confinement facility." *State v. Barnes*, 747 S.E.2d 912, 918 (N.C. Ct. App. 2013), *aff'd*, 756 S.E.2d 38 (N.C. 2014). Our statute, in contrast, requires proof that a defendant introduced contraband into a detention facility.

¶ 29 We further conclude that to be convicted of introduction of contraband in the first degree, a defendant whose entry into a detention facility is involuntary must either deny possession when asked or conceal or attempt to conceal the presence of contraband on his or her person.

III. Conclusion

¶ 30 We vacate McClintic's conviction for introducing contraband in the first degree, and we remand to the district court to correct the mittimus accordingly. The judgment is otherwise affirmed.

JUDGE DUNN and JUDGE YUN concur.

SUMMARY
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2020COA120

No. 18CA0827, *People v. McClintic* — Crimes — Introducing Contraband in the First Degree

Addressing a novel fact pattern, a division of the court of appeals considers whether there was sufficient evidence to support a conviction for introducing contraband in the first degree when the defendant was arrested with marijuana in her pocket and was generally uncooperative with a strip search, but volunteered her possession of marijuana to booking officers and surrendered it when asked to do so.

The division concludes that there was no evidence of a voluntary act to support the defendant's conviction because she did not voluntarily enter the jail, deny her possession of marijuana, or attempt to conceal the contraband. The division further concludes that in Colorado, mere knowing possession of contraband upon

involuntary entry to a detention facility, without denial when asked or concealment or attempted concealment, is insufficient to support a conviction for introducing contraband.

COLORADO COURT OF APPEALS **2020COA120**

Court of Appeals No. 18CA0827
Teller County District Court No. 17CR127
Honorable Lin Billings Vela, Judge

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Stacy Anne McClintic,

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JUDGMENT AFFIRMED IN PART, VACATED
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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2019.

¶ 1 Defendant, Stacy Anne McClintic, appeals the judgment of conviction entered on jury verdicts finding her guilty of introducing contraband in the first degree, driving under the influence, and a lane usage violation. Because we conclude that there is insufficient evidence to support her conviction for introducing contraband, we vacate that conviction and remand for a correction of the mittimus, including any necessary recalculation of costs.

I. Background

¶ 2 According to the prosecution's evidence, McClintic was weaving between lanes of traffic and was stopped by police. The officer suspected McClintic was impaired or suffering from a medical condition because she was dazed, distracted, and confused, and because her purse was full of prescription medicine bottles. She told the officer she had a heart condition. She confessed that she would not pass a roadside sobriety test, and she could not maintain her balance when she got out of the vehicle. She refused a blood test, and officers brought her to the Teller County jail.

¶ 3 During "prebooking," an officer told McClintic that she would be conducting a strip search for safety purposes. McClintic verbally refused to be strip searched and said she was "not giving [the

officers her] weed." Shortly thereafter, McClintic complained of chest pains and was transported to the hospital.

¶ 4 When she was released from the hospital, McClintic was transported back to jail. The transporting officer's usual practice was to ask those he transported whether "they have anything else on them that [he] should know about." Although he did not specifically remember his interaction with McClintic, the officer testified that he did not obtain anything from McClintic or write a report about it.

¶ 5 Back at the Teller County jail, McClintic refused to stand to walk to the bathroom for a strip search. After helping her to the bathroom, the prebooking officer asked McClintic (now standing) if she had "anything on [her] other than the clothes [she was] wearing." McClintic again disclosed that she was carrying "weed" in her pocket, pulled out a clear plastic baggie of marijuana, and handed it to a deputy. She was otherwise "verbally and passively" uncooperative with the search, which did not reveal any additional contraband.

¶ 6 After a two-day trial, a jury found McClintic guilty of driving under the influence, a misdemeanor; lane usage violation, a traffic

infraction; and introducing contraband in the first degree, a felony. The issues McClintic raises on appeal relate only to the felony conviction. She contends that it was not supported by sufficient evidence and that the court improperly instructed the jury on that charge.

¶ 7 We agree that there was insufficient evidence to support McClintic's conviction for introducing contraband in the first degree because there was no evidence that she committed a voluntary act. Accordingly, we vacate that conviction. In light of our resolution, we need not address her contentions that she lacked the mens rea to commit that offense, that there was insufficient evidence of a qualifying detention facility, and that the trial court erred in instructing the jury.

II. Insufficient Evidence

A. Standard of Review

¶ 8 We evaluate de novo whether, after viewing the relevant evidence as a whole and in the light most favorable to the prosecution, "a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010). We give the prosecution the

benefit of every reasonable inference which may fairly be drawn from the evidence, and we do not consider vague, speculative, or imaginary doubt to be reasonable doubt. *Id.* at 1292. However, "[i]f the evidence is such that reasonable jurors must necessarily have a reasonable doubt, then the evidence is insufficient to sustain the defendant's conviction." *Id.* A mere modicum of relevant evidence, supported by speculation, will not rationally support a conviction beyond a reasonable doubt. *People v. Gonzales*, 666 P.2d 123, 128 (Colo. 1983).

¶ 9 The relevant criminal act for introducing contraband in the first degree is statutorily defined as "[i]ntroduc[ing] or attempt[ing] to introduce . . . marijuana . . . into a detention facility or at any location where an inmate is or is likely to be located . . . ."[1] § 18-8-203(1)(a), C.R.S. 2019. McClintic contends that there was insufficient evidence that she committed a voluntary criminal act

[1] At oral argument, the People argued that McClintic had been convicted of attempting to introduce contraband, and that the evidence was sufficient to support that conviction. At trial, however, the prosecutor did not articulate a theory of guilt and did not mention attempt during closing argument; the jury verdict forms asked only whether McClintic was guilty of introducing contraband in the first degree.

because she was brought to the jail involuntarily, she twice disclosed the marijuana in her possession, and she freely gave the marijuana to booking officers before a strip search. We agree.

B. No Voluntary Criminal Act

¶ 10 At the outset, we note that the People's answer brief does not address whether the prosecution presented sufficient evidence of a voluntary criminal act. However, the jury was instructed on this requirement, and McClintic raised this argument in a separate section of her opening brief (although it was presented under the umbrella of insufficient evidence of mental culpability). The People addressed questions regarding evidence of a voluntary criminal act during oral argument.

¶ 11 We must address this alleged insufficiency because "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact necessary* to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970) (emphasis added); *accord McCoy v. People*, 2019 CO 44, ¶ 20, 442 P.3d 379, 385.

¶ 12 McClintic stipulated at trial that the substance she gave to deputies at the jail was marijuana. Possession of small amounts of

marijuana was legal under Colorado law at the time of her arrest[2]; possession of a legal amount of marijuana alone cannot constitute a voluntary act for purposes of the relevant criminal liability. *See Dep't of Nat. Res. v. 5 Star Feedlot Inc.*, 2019 COA 162M, ¶ 33, ___ P.3d ___, ___ (*cert. granted* Apr. 27, 2020) ("[A] lawful voluntary act that alone doesn't result in any transgression of the law can lead to criminal culpability only if coupled with an unlawful voluntary act.").

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[2] The prosecution did not allege that McClintic possessed an illegal amount of marijuana, and there is no information in the record regarding the weight of the marijuana in McClintic's pocket.

C.R.S. 2019; *see Hendershott v. People*, 653 P.2d 385, 390 (Colo. 1982) ("[I]n order to subject a person to criminal liability for a felony or serious misdemeanor, there must be a concurrence of an unlawful act (actus reus) and a culpable mental state (mens rea).").

¶ 14 Involuntary acts — acts *not* performed consciously and as a result of effort or determination — do not constitute criminal conduct. For instance, if sleep or involuntary intoxication prevents a defendant from having an awareness of his or her acts and the requirements of the law, the defendant is not criminally responsible. *See Johnson*, ¶ 18, 381 P.3d at 352 ("[A] person cannot have unlawful sexual contact while he or she is asleep and unaware of the contact."); *see also* § 18-1-804(3), C.R.S. 2019 (involuntarily intoxicated defendants are "not criminally responsible" for acts committed by reason of their intoxication). Moreover, when a defendant consciously acts as a result of duress or inducement by law enforcement officers, rather than as a result of effort or determination, he or she is also relieved of criminal responsibility. *See* § 18-1-708, C.R.S. 2019 ("A person may not be convicted of an offense, other than a class 1 felony, based upon

conduct" performed only under duress.); *see also* § 18-1-709, C.R.S. 2019 (the entrapment statute).

¶ 15 There is insufficient evidence that McClintic engaged in an unlawful voluntary act prior to or upon entering the jail. There is no evidence in the record that McClintic placed the marijuana on her person after the traffic stop. The evidence suggests only that McClintic was transported to jail with marijuana in her possession upon her arrest. Thus, there is no evidence that McClintic consciously caused the entry of contraband into the detention facility "as a result of effort or determination." § 18-1-501(9).

¶ 16 Still, we recognize that the legislative purpose of the statute is generally "to control contraband in penal institutions." *People v. West*, 43 Colo. App. 246, 247, 603 P.2d 967, 968 (1979). That being the case, active concealment of contraband upon involuntary entry to a detention facility may constitute an unlawful voluntary act giving rise to criminal liability for introducing contraband in the first degree. *See People v. Frye*, 2014 COA 141, ¶ 19, 356 P.3d 1000, 1005 (concluding that evidence for introduction of contraband was overwhelming where there was unrebutted testimony that the defendant "tried to conceal a pouch containing

drugs under her breast and resisted an officer's search of this area of her body" upon booking after her arrest); *see also People v. Allen*, 199 P.3d 33, 34-35, 37-38 (Colo. App. 2007) (concluding that evidence was not overwhelming where, upon booking after his arrest, the defendant denied having contraband, a baggie of marijuana was found in his leg cast, and he testified that he had forgotten that he had put it there).

¶ 17 The prosecution presented evidence that McClintic twice voluntarily admitted to jail personnel during the booking process that she had marijuana in her possession. When, immediately before the strip search, she was asked where it was located, she told the inquiring detective that it was in her pocket and she quickly presented it to another detective. Thus, the evidence showed not only that McClintic neither concealed nor attempted to conceal her marijuana, but that she voluntarily gave it to the police.

¶ 18 Although they do not directly address the voluntary criminal act component of introduction of contraband, the People argue in their answer brief that evidence of the following actions by McClintic support her conviction: (1) she resisted being searched; (2) she told the police officers that she did not want to give jail

personnel her marijuana; (3) she was uncooperative with medical personnel; and (4) she did not disclose to a transport deputy that she had marijuana when returning from the hospital. We cannot agree that these actions amount to an unlawful voluntary act of concealment.

¶ 19 First, McClintic's passive and verbal noncooperation with the strip search did not extend to concealment of contraband, which she gave up as soon as she was asked about it, before the search began. Her "resistance," according to the booking officer's testimony, was passive — it did not include a voluntary act — and, in any event, resisting a strip search with no intent to conceal contraband does not amount to introducing contraband or attempting to do so. *Cf. Frye*, ¶ 19, 356 P.3d at 1005. Second, McClintic's verbal expression of a desire to keep the marijuana did not amount to an act of concealment, especially since she relinquished it when asked to do so. Third, we do not perceive the relevance of her interactions with medical personnel.[3] Finally,

[3] At oral argument, the People contended that the jury could infer from McClintic's noncooperation with medical personnel that she was feigning her symptoms to distract the officers so she could bring marijuana into the jail. Because McClintic again admitted

although the transport deputy speculated that he had asked McClintic if she had "anything else on [her] that [he] should know about" on her return to the jail from the hospital, because he did that "with everyone," there was no evidence that she ever denied having marijuana in her possession.

¶ 20 Accordingly, we cannot conclude that the prosecution's evidence of a voluntary criminal act rationally supports a conviction beyond a reasonable doubt. *See Gonzales*, 666 P.2d at 128.

C. Voluntary Criminal Act for Introducing Contraband

¶ 21 While Colorado law requires a voluntary act to impose criminal liability, Colorado courts have not previously addressed what may constitute a voluntary criminal act when an arrestee is brought to jail with contraband on his or her person. We find guidance in cases from other states.

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possession of marijuana on her return to the jail, we conclude that these inferences are not supported by the record. *See People v. Donald*, 2020 CO 24, ¶ 19, 431 P.3d 7 (holding that although we give the prosecution the benefit of all reasonable inferences, those inferences "must be supported by a 'logical and convincing connection between the facts established and the conclusion inferred'" (ultimately quoting *People v. Gonzales*, 666 P.2d 123, 128 (Colo. 1983))). Further, there is no record support for an inference that McClintic feigned her symptoms of illness.

¶ 22 Some state courts hold that possession of contraband on arrest cannot create criminal liability for introduction of contraband, even if the defendant denies or does not admit possession. *See, e.g.*, *State v. Sowry*, 803 N.E.2d 867, 870 (Ohio Ct. App. 2004) (holding that no voluntary act by the defendant caused his person and the possessions on his person to be in jail; a denial of possession relates more to the culpable mental state of "knowingly" than to the prohibited conduct).

¶ 23 In *State v. Tippetts*, the Oregon Court of Appeals applied laws similar to Colorado's to determine that, in the context of possession of contraband on arrest, a voluntary act demonstrating more than an awareness of possession — an act showing "that the defendant had the ability to choose to take a particular action" — was necessary for criminal liability. 43 P.3d 455, 459 (Or. Ct. App. 2002) (where the defendant was arrested at his home with marijuana in his pocket and did not admit possession). The court noted that "the Fifth Amendment to the United States Constitution prevent[s] the state from forcing a defendant to choose between admitting to possession of a controlled substance and being charged with introducing that substance into a correctional

facility." *Id.* at 457 n.2. The court further noted that "no reasonable juror could find that the introduction of contraband into the jail was a reasonably foreseeable consequence of possessing it." *Id.* at 460.

¶ 24 The New Mexico Court of Appeals similarly concluded that a defendant could not be held liable for bringing contraband into a jail when he did so involuntarily because he did not meet the actus reus element of the crime; it was "of no moment" that the defendant could have admitted to the booking officer that he possessed marijuana. *State v. Cole*, 164 P.3d 1024, 1026-27 (N.M. Ct. App. 2007).

¶ 25 Additionally, in *State v. Eaton*, 229 P.3d 704, 710 (Wash. 2010), the Washington Supreme Court concluded that for possession of contraband to merit an enhanced sentence, the prosecution must prove that the defendant entered the jail "volitionally."

¶ 26 Some states hold that the voluntary acts of denying possession or forgoing an informed opportunity to relinquish possession of contraband upon entering a jail are sufficient to support a conviction. *See State v. Alvarado*, 200 P.3d 1037, 1042-43 (Ariz. Ct.

App. 2008) (where the defendant denied having contraband but expressed disappointment when a detention officer found marijuana in his pocket); *People v. Ross*, 76 Cal. Rptr. 3d 477, 481-82 (Ct. App. 2008) ("An arrestee commits a sufficiently voluntary act to violate the statute if he or she knowingly brings a deadly weapon into a jail after having denied possessing such a weapon.").

¶ 27 McClintic is less blameworthy than the defendants in these out-of-state cases because she did not deny possessing contraband. To the contrary, she twice admitted that she had "weed." Further, she relinquished the marijuana when she was asked to do so.

¶ 28 We note that in *State v. Barnes*, 747 S.E.2d 912, 919-20 (N.C. Ct. App. 2013), *aff'd*, 756 S.E.2d 38 (N.C. 2014), the North Carolina Court of Appeals stated that its conclusion that "the necessary voluntary act occurs when the defendant knowingly possesses the controlled substance" is in line with the majority of court cases. In *Barnes*, the court applied a statute banning *possession* of a controlled substance on the premises of a local confinement facility, *see* N.C. Gen. Stat. § 90-95(e)(9) (West 2019),[4] and reasoned that

[4] In so concluding, the court noted that "nothing in the relevant statutory language requires proof that [the d]efendant voluntarily

the defendant could be guilty of the crime "even though he was not voluntarily present in the facility in question." *Barnes*, 747 S.E.2d at 918. However, in nearly every case the court cited in support of its assertion of a majority stance, as well as in *Barnes* itself, there was evidence that the defendant had not merely possessed contraband on entry into a detention facility but had also concealed or denied having contraband. *See Alvarado*, 200 P.3d 1037, 1038-39 (denied possession); *People v. Low*, 232 P.3d 635, 644-45 (Cal. 2010) (same); *State v. Canas*, 597 N.W.2d 488, 491-92 (Iowa 1999) (attempted to conceal in underwear); *State v. Cargile*, 916 N.E.2d 775, 776 (Ohio 2009) (denied possession); *Brown v. State*, 89 S.W.3d 630, 631-632 (Tex. Crim. App. 2002) (same); *see also State v. Windsor*, 110 S.W.3d 882, 884 (Mo. Ct. App. 2003) (remained silent when asked about possession and advised of criminal penalty for possession in jail). Accordingly, we conclude that *Barnes* and the cases on which it relies are distinguishable.

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introduced a controlled substance into the . . . confinement facility." *State v. Barnes*, 747 S.E.2d 912, 918 (N.C. Ct. App. 2013), *aff'd*, 756 S.E.2d 38 (N.C. 2014). Our statute, in contrast, requires proof that a defendant introduced contraband into a detention facility.

¶ 29 We further conclude that to be convicted of introduction of contraband in the first degree, a defendant whose entry into a detention facility is involuntary must either deny possession when asked or conceal or attempt to conceal the presence of contraband on his or her person.

III. Conclusion

¶ 30 We vacate McClintic's conviction for introducing contraband in the first degree, and we remand to the district court to correct the mittimus accordingly. The judgment is otherwise affirmed.

JUDGE DUNN and JUDGE YUN concur.