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NO. 34647-8-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

Respondent,

v.

DON EDWARD GRIST,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF PACIFIC COUNTY

Before the Honorable Michael J. Sullivan, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. There was insufficient evidence to convict the Appellant of possession of marijuana.

2. The lower court erred in allowing an unwitting possession jury instruction that shifted the burden of proof to the defendant.

3. The Appellant received ineffective assistance of counsel based upon failure to object to an erroneous unwitting possession instruction, by asking the Appellant regarding the presence of marijuana in the car after securing an agreement that the Appellant's alleged statements to law enforcement regarding possession of marijuana would not be used in the State's case-in-chief, and by failing to object to a statement made by the prosecution during closing argument that it did not have prove knowledge of the methamphetamine obtained by law enforcement at the jail.

4. The deputy prosecuting attorney committed misconduct by ridiculing the Appellant's explanation regarding the presence of methamphetamine during his search in the jail as "magical static cling."

5. The deputy prosecuting attorney inappropriately argued, in connection with an unwitting possession defense, that the State did not need to prove "knowledge" beyond a reasonable doubt.

6. The cumulative error of the alleged acts of prosecutorial misconduct, errors by trial counsel, and errors committed by the trial court

prejudiced the Appellant and materially affected the outcome at the trial.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Was the Appellant denied due process of law under the state and federal constitutions where there was insufficient evidence that the Appellant had constructive possession of a baggie of marijuana found on the floorboard near the driver's seat in a car driven by the Appellant for five minutes, and occupied by the Appellant for a total of 35 minutes? Assignment of Error No. 1.

2. Does the unwitting possession instruction, which shifts the burden of proof to a criminal defendant, require reversal of the conviction for possession of marijuana and methamphetamine? Assignment of Error No. 2.

3. Did ineffective assistance of counsel deprive Mr. Grist of his constitutional right to a fair trial? Assignments of Error No. 3.

4. Does prosecutorial misconduct during cross-examination require reversal of Mr. Grist's convictions? Assignment of Error No. 4.

5. Is that State required to prove that Mr. Grist knew about the presence of methamphetamine when the jury had been instructed on the defense of unwitting possession? Assignment of Error No. 5.

6. Did the cumulative errors cumulatively deny Mr. Grist a fair trial? Assignment of Error No. 6.

## C. STATEMENT OF THE CASE<sup>1</sup>

### 1. Procedural history:

A jury convicted Don Grist of possession of methamphetamine and possession of marijuana. Clerk's Papers [CP] at 49, 50. The State charged Mr. Grist in an amended information filed by the State in Pacific County Superior Court on February 24, 2006, with knowing possession of methamphetamine while confined in a county or local correctional institution, contrary to RCW 9.94.041(2)<sup>2</sup> and possession of marijuana, contrary to RCW 69.50.4014.<sup>3</sup> CP at 17-18.

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<sup>1</sup>This Statement of the Case addresses the facts related to the issues presented in accord with RAP 10.3(a)(4).

<sup>2</sup> RCW 9.94.041 provides:

(1) Every person serving a sentence in any state correctional institution who, without legal authorization, while in the institution or while being conveyed to or from the institution, or while under the custody or supervision of institution officials, officers, or employees, or while on any premises subject to the control of the institution, knowingly possesses or carries upon his or her person or has under his or her control any narcotic drug or controlled substance as defined in chapter 69.50 RCW is guilty of a class C felony.

(2) Every person confined in a county or local correctional institution who, without legal authorization, while in the institution or while being conveyed to or from the institution, or while under the custody or supervision of institution officials, officers, or employees, or while on any premises subject to the control of the institution, knowingly possesses or has under his or her control any narcotic drug or controlled substance, as defined in chapter 69.50 RCW, is guilty of a class C felony.

(3) The sentence imposed under this section shall be in addition to any sentence being served.

<sup>3</sup> RCW 69.50.4014 provides:

Except as provided in RCW 69.50.401(2)(c), any person found guilty of possession

Over defense objection, Pacific County Superior Court Judge Michael J. Sullivan gave an instruction for possession of methamphetamine, contrary to RCW 69.50.4013, as a lesser-included offense in Count I. CP at 49. Report of Proceedings [RP] at 113-14, 133.

In Count I Mr. Grist was convicted of violating RCW 69.50.4013.<sup>4</sup> At sentencing on March 6, 2006, Judge Sullivan imposed a standard range sentence of 90 days for Count I and 10 days for Count II, to be served concurrently. RP (3.6.06) at 22. CP at 51-64. Timely notice of this appeal followed. CP at 67.

**2. Substantive facts:**

**a. Marijuana found by law enforcement in the borrowed car.**

Don Grist was driving a car at approximately 8:40 p.m. on November 27, 2005, when he was pulled over by Pacific County Deputy Sheriff Pat

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of forty grams or less of marihuana is guilty of a misdemeanor.

<sup>4</sup> RCW 69.50.4013

(1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

(2) Except as provided in RCW 69.50.4014, any person who violates this section is guilty of a class C felony punishable under chapter 9A.20 RCW.

Matlock. RP at 3. After the vehicle was stopped, Deputy Matlock placed him under arrest for driving with a suspended license in the second degree. RP at 4, 6. After Mr. Grist was arrested, the car was searched and Deputy Mike Robbins pointed out the presence of what later tested to be marijuana in a bag “on the floorboard of the driver’s seat.” RP at 7, 8, 14. Exhibits 1 and 2. Deputy Matlock picked up the marijuana. RP at 14.

Mr. Grist testified that the car belongs to a friend of his and it was driven by eight to ten other persons. RP at 55. Prior to his arrest, he testified that he had last driven the car a little over a month prior to the time of his arrest on November 27. RP at 55. On that date he had driven the car for approximately five minutes before he was stopped by Deputy Matlock. RP at 54. Immediately prior to that it was driven by his friend Brianne and he had been a passenger in the car. RP at 54. He did not search the car when he started driving it that evening. RP at 55.

**b. Alleged statements to law enforcement.**

The Appellant declined a CrR 3.5 hearing with the agreement that no statements by Mr. Grist would be included in the State’s case-in-chief. CP at 21. Mr. Grist testified that he was unaware that there was marijuana in a car. RP at 55. He denied telling Deputy Matlock that he had just bought the marijuana and stated that he told Deputy Matlock that he used marijuana to

treat a medical condition in his back. RP at 64.

On rebuttal, Deputy Matlock testified that after he was stopped, Mr. Grist told him that “he had just returned from buying marijuana down the road” and that the marijuana was his. RP at 69.

**c. The search at the jail.**

After his arrest, he was taken to the Pacific County Jail in South Bend. RP at 11-12. At the jail, Mr. Grist was searched by Correction Officer Penny Drake while Deputy Matlock was doing paperwork regarding probable cause. RP at 15-16. Officer Drake testified that she conducted a search of Mr. Grist, and that when she lifted his shirt out of pants, a plastic baggie fell out of his shirt and landed on the floor. RP at 32, 39.

Deputy Matlock first saw the baggie when it was on the floor of the jail. RP at 25.

Mr. Grist stated that they searched him several times, lifted his shirts, and went through his wallet, and then allowed him to give the wallet to a friend who was on the scene. RP at 57. Mr. Grist stated that once he was taken inside the jail, Deputy Matlock searched him prior to getting on the elevator. Mr. Grist testified that he was searched a total of four times, and that they went through his pockets and lifted his shirts. RP at 56, 58.

Mr. Grist stated that the baggie could not have fallen from his clothes

because he had removed his sweatshirt and kicked around in the police car at the time of his arrest. RP at 63. He stated the baggie could not have come from his clothes. RP at 63. He testified: “[u]nless it came from a dryer or— there’s no way. It’s not possible. Static cling. I don’t know.” RP at 63.

**3. Jury instructions:**

The court gave the following instruction regarding unwitting possession:

INSTRUCTION NO. 8.

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case that it is more probably true than not true.

CP at 33. Appendix A-1.

**4. Verdict:**

The jury found Mr. Grist guilty of possession of methamphetamine and possession of marijuana. CP at 49, 50.

**5. Sentencing:**

The matter came on for sentencing on March 6, 2006. The court

imposed a standard range sentence. CP at 56.

Timely notice of appeal was filed on April 6, 2006. CP at 67. This appeal follows.

#### **D. SUMMARY OF ARGUMENT**

Mr. Grist was convicted of possession of marijuana upon insufficient evidence that he knew of the presence of marijuana on the floorboard of the vehicle he was driving.

Trial counsel was ineffective for questioning Mr. Grist about the presence of marijuana in the car, thus opening the door to admission of his alleged statement to law enforcement regarding ownership of the marijuana. The State had stipulated to the inadmissibility of the alleged statements in its case-in-chief.

The unwitting possession instruction shifted the burden of proof. The Appellant contends that Division 3's reasoning in *State v. Carter*, 127 Wn. App. 713, 112 P.3d 561 (2005), which addressed a substantially similar unwitting instruction in the milieu of firearm possession, should be adopted by this Court and that Mr. Grist's conviction should be reversed and the case remanded for a new trial. Trial counsel was ineffective for failure to object to the defective instruction.

Mr. Grist established the defense of unwitting possession by a

preponderance of the evidence. The State's evidence was insufficient to overcome this defense. Once sufficient evidence of unwitting possession has been presented, the State must overcome that evidence beyond a reasonable doubt. The State failed to carry its burden of proof.

The prosecuting attorney's cross-examination of Mr. Grist was improper. The deputy prosecutor committed misconduct by ridiculing Mr. Grist's defense regarding a possible way that the baggie of methamphetamine could have been in his clothing at the jail as "magical static cling."

Mr. Grist presented testimony regarding unwitting possession. The trial court gave an unwitting possession instruction. The deputy prosecuting attorney improperly argued that the State had no burden concerning the element of "knowledge" or "knowingly" when an unwitting possession defense is propounded. The State carried the burden of proving each and every elements of an offense beyond a reasonable doubt. Once unwitting possession evidence was presented, the burden shifted to the State to prove the Mr. Grist knew that he possessed the drugs.

Mr. Grist's convictions for possession of methamphetamine and marijuana must be dismissed.

**E. ARGUMENT**

1. **MR. GRIST WAS DENIED DUE PROCESS OF LAW WHEN HE WAS FOUND GUILTY OF POSSESSING MARIJUANA BASED PRIMARILY UPON HAVING DRIVEN A CAR WHEREIN MARIJUANA WAS FOUND.**

b. **This Court reviews a sufficiency challenge for evidence sufficient to allow a rational trier of fact to find the elements of the crime charged beyond a reasonable doubt.**

When a criminal defendant challenges the sufficiency of the evidence, the appellate court will review the record and determine whether enough evidence was presented below to allow a rational trier of fact to find all of the elements of the crime charged beyond a reasonable doubt, as required by the Fourteenth Amendment due process clause. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980); *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 260 (1970). The Court of Appeals draws all reasonable inferences from the evidence in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Summers*, 107 Wn. App. 373, 388, 28 P.3d 780 (2001). *State v. Gosby*, 85 Wn.2d 758, 765-66,

539 P.2d 680 (1975). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced beyond a reasonable doubt but only that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023 (2000). Substantial evidence is evidence that would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed. *Summers*, 107 Wn. App. at 388.

There must be substantial evidence showing dominion and control. *State v. Morgan*, 78 Wn. App. 208, 212, 896 P.2d 731, *review denied*, 127 Wn.2d 1026, 904 P.2d 1158 (1995).

b. **Conviction on the charge required proof beyond a reasonable doubt that Mr. Grist had constructive possession of the marijuana.**

Mr. Grist was charged in Count II with possession of marijuana under 40 grams. The elements of possession of methamphetamine are (1) that Mr. Grist unlawfully possessed marijuana and (2) that the possession occurred in Washington State. CP at 17-18; RCW 69.50.4014. see also, *State v. Cleppe*, 96 Wn.2d 273, 378, 635 P.2d 435 (1981), *cert. denied*, 456 U.S. 1006, 73 L. Ed. 2d 1300, 102 S. Ct. 2296 (1982); *State v. Morris*, 70 Wn.2d 27, 34, 422 P.2d 27 (1966) (the State's burden is to prove possession of a narcotic drug

beyond a reasonable doubt).

The State is not required to prove either knowledge of possession or knowledge as to the nature of the substance. *Cleppe*, at 380; *State v. Bradshaw*, 152 Wn.2d 528, 535, 98 P.3d 1190 (2004). However, once the State establishes prima facie evidence of possession, the defendant may affirmatively assert, as was done in Mr. Grist's case, that his possession of the drug was "unwitting, or authorized by law, or acquired by lawful means in a lawful manner, or was otherwise excusable under the statute." *State v. Morris*, 70 Wn.2d 27, 34, 422 P.2d 27 (1966). The defense of "unwitting" possession may be supported by a showing that the defendant did not know he was in possession of the controlled substance. *Cleppe*, at 381; *see, e.g., State v. Bailey*, 41 Wn. App. 724, 728, 706 P.2d 229 (1985) (trial court properly instructed jury that possession not unlawful if defendant did not know drug was in his or her possession). The defendant may also show that he did not know the nature of the substance he possessed. *See State v. Adame*, 56 Wn. App. 803, 806, 785 P.2d 1144, *review denied*, 114 Wn.2d 1030 793 P.2d 976 (1990) (trial court correctly instructed the jury that possession was unwitting if the person did not know that the substance was present or did not know the nature of the substance). If the defendant affirmatively establishes that "his 'possession' was unwitting, then he had no

possession for which the law will convict.” *Cleppe*, at 381.

Here, Mr. Grist challenges the proof that there was sufficient evidence that he actually or constructively possessed the marijuana found in the car by law enforcement on November 27.

Possession may be actual or constructive. *State v. Callahan*, 77 Wn.2d, 27, 29, 459 P.2d 400 (1969). *State v. Davis*, 117 Wn. App. 702, 708-09, 72 P.3d 1134 (2003), *review denied*, 151 Wn.2d 1007, 87 P.3d 1185 (2004); *State v. Roberts*, 80 Wn. App. 342, 353, 908 P.2d 892 (1996). A person has actual possession when he has physical custody of the item. *Id.* Moreover, to “possess” means “to have actual control, care and management of, and not passing control, fleeting and shadowy in its nature.” *State v. Staley*, 123 Wn.2d 794, 801, 872 P.2d 502 (1994). “Actual possession” means that the goods are in the personal custody of the person charged with possession – such as in their hand, or in a pocket of their clothing. *Callahan*, 77 Wn.2d at 29. To meet its burden on the element of possession, the State must establish “actual control, not a passing control which is only a momentary handling.” *Callahan*, 77 Wn.2d at 29. Thus a fingerprint on a container of drugs does not prove actual possession, only fleeting, past possession. *Callahan*, at 29.

In contrast, “constructive possession” means that the accused, while

not physically possessing the substance or goods, had dominion and control over the article:

[C]onstructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods.

*Callahan*, at 29. This “constructive” possession over goods can be shown, in turn, two ways: by proving that the defendant had dominion and control over either (1) the article of goods itself; or (2) the premises where the goods are found. *State v. Cantabrana*, 83 Wn. App. 204, 206, 921 P.2d 572 (1996); *State v. Coahran*, 27 Wn. App. 664, 668, 620 P.2d 116 (1980). An automobile is deemed “premises” for purposes of this rule that dominion and control over premises may show constructive possession of substances found thereupon. *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971); *State v. Huff*, 64 Wn. App. 641, 654, 826 P.2d 698 (1992).

In general, “[d]ominion and control means that the object may be reduced to actual possession immediately.” *State v. Jones*, 146 Wn.2d 328, 333, 45 P.2d 1062 (2002). Constructive possession need not be exclusive. *Coste*, 123 Wn. App. at 549; *State v. Coahran*, 27 Wn. App. 664, 668, 620 P.2d 116 (1980). No single factor, however, is dispositive in determining whether there was dominion and control. *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243, *review denied*, 136 Wn.2d 1016, 894 P.2d 565 (1995).

Importantly, the mere fact of a person's physical nearness or "proximity" to certain goods or an article of goods is not enough, standing alone, to prove dominion and control over the goods and therefore constructive possession of them. *State v. Turner*, 103 Wn. App. 515, 521, 13 P.3d 234 (2000). Whether constructive possession is established is based on the totality of the circumstances. *Turner*, 103 Wn. App. at 521; *Collins*, 76 Wn. App. at 501. *State v. Partin*, 88 Wn. App. 899, 906, 567 P.2d 1136 (1997). No single factor is dispositive. *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243, *review denied*, 126 Wn.2d 1016 (1995). Thus the fact of close proximity alone is not enough to establish constructive possession; other facts must enable the trier of fact to infer that the defendant had dominion and control. *State v. Spruell*, 57 Wn. App. 383, 388-89, 788 P.2d 21 (1990). Although exclusive control is not necessary to establish constructive possession, a showing of more than mere proximity to the item is required. *State v. Hystad*, 36 Wn. App. 42, 49, 671 P.2d 793 (1983). The fact of temporary residence, personal possessions on the premises, or knowledge of the presence of the item without more is insufficient to show the dominion and control necessary to establish constructive possession. *Id.*

For example in *Callahan*, 77 Wn.2d 27, defendant Callahan was sitting at a table in a houseboat when police served a search warrant. *Id.* at

28. Sitting next to him at the table was another man. *Id.* Sitting on the floor between Callahan and the other man was a cigar box filled with various illegal drugs. *Id.* Other drugs were found in the kitchen and bedroom of the houseboat. *Id.* Callahan admitted he owned two guns, two books on narcotics, and a set of broken scales of the type used to measure drugs, found during the search. *Id.* He also admitted to having handled the drugs earlier in the day. *Id.* He also initially acknowledged that he had stayed on the houseboat for the prior two or three days. *Id.*

On review, none of this evidence was deemed sufficient evidence of constructive possession to uphold Callahan's possession conviction. *Callahan*, 77 Wn.2d at 31.

c. **The State failed to produce evidence sufficient to allow a rational trier of fact to find constructive possession of the marijuana beyond a reasonable doubt.**

The precise question presented here, whether Mr. Grist's occupancy of the car for thirty-five minutes establishes dominion and control of the vehicle or the marijuana, is a question of fact decided based on the totality of the circumstances. *Turner*, 103 Wn. App. at 521; *Coahran*, 27 Wn. App. at 668-69; *Mathews*, 4 Wn. App. at 656.

Like *Callahan*, the evidence of constructive possession in the present

case does not meet the necessary criteria of substantial evidence to support the State's case. Substantial evidence cannot be based upon guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

Here, there was insufficient evidence that Mr. Grist actually physically possessed the marijuana. Mr. Grist was contacted deputy Matlock for driving with a suspended license.<sup>5</sup> The vehicle was owned by a friend and that it was used by “[a]t least eight to ten” people. RP at 55. Mr. Grist testified that he had driven the car for five minutes before he was stopped, that the dome light did not work, and that it was dark when he got into the car. RP at 54, 56.

Deputy Matlock testified that Mr. Grist told him that he had bought the marijuana and that it belonged to him; Mr. Grist denied the statement, testifying that he said that he told him that he used marijuana for medical conditions for this back. RP at 64. Mr. Grist testified in his defense that he did not know there was a baggie of marijuana on the floor of the car. RP at 55. He denied telling the deputy that he had bought the marijuana. RP at 64.

The only physical evidence produced at trial linking Mr. Grist with

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<sup>5</sup> The Declaration of Probable Cause alleges that Deputy Matlock pulled over Mr. Grist for having expired tabs and driving while suspended. CP at 2. Deputy Matlock, however, did not testify regarding expired tabs. RP at 5. Trial counsel did not challenge the probable

the car for any appreciable of time was that he testified that he had driven it for five minutes, and that he had been in the car with a friend named Brianne for approximately one half hour. RP at 54.

Under our facts, Mr. Grist was driving a vehicle that belonged to an unnamed friend. Many other people had use of the car. RP at 55. A friend named Brianne had been in the car with Mr. Grist earlier that day. RP at 54. The marijuana was discovered on the “floorboard of the driver’s seat.” RP at 8. Mr. Grist made no effort to conceal the baggy during his contact with deputy Matlock. No evidence was introduced that Mr. Grist was under the influence of marijuana. In essence, there was no physical evidence or constructive possession at all linking Mr. Grist to the marijuana.

**d. Reversal and dismissal of the charge is required.**

A review of the applicable rules of constructive possession and Washington cases with comparable facts shows that the trial court’s verdict of guilty was not supported by constitutionally sufficient evidence. As a consequence, the trial court’s verdict of guilty must be reversed and the charge against Mr. Grist dismissed with prejudice. *Hudson v. Louisiana*, 450 U.S. 40, 1010 S. Ct. 970, 67 L. Ed. 2d 30 (1981); *State v. Hickman*, 135

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cause to stop the vehicle.

Wn.2d 97, 103, 954 P.2d 900 (1998).

2. **DEFENSE COUNSEL HAMSTRUNG MR. GRIST'S STRONG UNWITTING POSSESSION DEFENSE BY ASKING HIM IF HE ANY KNOWLEDGE OF MARIJUANA IN THE VEHICLE, THEREBY OPENING THE DOOR TO ADMISSION OF HIS ALLEGED STATEMENTS REGARDING OWNERSHIP OF MARIJUANA THAT THE STATE HAD AGREED NOT TO PRESENT IN ITS CASE-IN-CHIEF.**

As argued *supra*, Mr. Grist has a valid unwitting possession defense. Unwitting possession has been recognized as an affirmative defense since *State v. Cleppe*, 96 Wn.2d 373, 380-81, 635 P.2d 435 (1981), *cert. denied* 456 U.S. 1006, 102 S. Ct. 2296, 73 L. Ed.2d 1300 (1982).

The defense of unwitting possession may be established either by showing that the person did not know he was in possession of a controlled substance, or, alternatively, that he did not know the nature of the substance possessed. *See, State v. Staley*, 123 Wn.2d 794, 799, 872, P.2d 502 (1994).

Mr. Grist had only limited contact with the car in which he was arrested. He was in it for a short period of time and it was used by a number of other people.

The foregoing combination of factors easily establishes an unwitting possession defense. The State alleged that he made inculpatory statement at

the time of his arrest regarding the marijuana. The State agreed, however, not to use the statements in its case-in-chief. CP at 21. The defense waived a CrR 3.5 suppression hearing. Instead of precluding the possibility of admission of the damaging statements during rebuttal, defense counsel presented Mr. Grist's testimony regarding the arrest and then—almost unbelievably—asked him if had “any knowledge of any marijuana in that vehicle?” RP at 55. Mr. Grist responded “no.” RP at 55. The deputy prosecutor immediately proceeded through this opened door during cross-examination and then during rebuttal presented Deputy Matlock's testimony regarding the alleged statements that Mr. Grist “had just returned from buying the marijuana” and that he said “it was his.” RP at 69.

Under the sixth amendment to the United States Constitution and article I, section 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings. To successfully challenge the effective assistance of counsel, Petitioner must satisfy a two-part test. Petitioner must show that “(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. The United States Supreme Court has defined reasonable probability as “a probability sufficient to undermine confidence in the outcome.” A failure to establish either element of the test defeats the ineffective assistance of counsel claim.

This court approaches an ineffective assistance of counsel argument with a strong presumption that counsel's representation was effective. Petitioner can "rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances.

*Personal Restraint of Davis*, 152 Wn.2d 647, 672-73, 101 P.3d 1 (2004), quoting *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995), *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)).

Mr. Grist contends that any competent defense attorney would have immediately recognized the strength of the unwitting possession defense and taken caution not to damage it by permitting admission of Mr. Grist's alleged statements.

There was no need for Mr. Grist to testify regarding the marijuana and his knowledge thereof. The testimony regarding his use of the car, his arrest, and multiple searches and the testimony of the officers would have been more than sufficient to establish the unwitting possession defense.

Generally, choosing a particular defense is a strategic decision "for which there is no correct answer, but only second

guesses.”

*Personal Restraint of Davis, supra*, 745, quoting *Hendricks v. Caleron*, 70 F.3d 1032, 1042 (9<sup>th</sup> Cir. 1995).

There can be no excuse for defense counsel’s strategy in asking about the marijuana. Defense counsel’s strategy resulted in the conviction in Count II.

3. **INSTRUCTION 7 PERTAINING TO UNWITTING POSSESSION SHIFTS THE BURDEN OF PROOF TO THE DEFENDANT. THIS COURT SHOULD FOLLOW THE HOLDING OF DIVISION 3 IN STATE V. CARTER, WHICH FOUND THAT A SUBSTANTIALLY IDENTICAL INSTRUCTION REGARDING UNWITTING POSSESSION OF A FIREARM SHIFTED THE BURDEN OF PROOF AND REQUIRED REVERSAL.**

Don Grist had a strong unwitting possession defense. Unwitting possession has been recognized as an affirmative defense since *State v. Cleppe*, 96 Wn.2d 373, 380-81, 635 P.2d 435 (1981), *cert. denied* 456 U.S. 1006, 102 S. Ct. 2296, 73 L. Ed. 2d 1300 (1982).

The trial court submitted WPIC 52.01, the unwitting possession instruction. Defense counsel did not object to the proposed instruction. RP at 89-90.

The unwitting possession instruction was Instruction Number 7. It

stated:

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case that it is more probably true than not true.

CP at 24-47. Appendix A-1.

In *State v. Carter*, 127 Wn. App. 713, 718 (2005), the court gave the following instruction:

A person is not guilty of unlawful possession of a firearm if the possession is unwitting. Possession of a firearm is unwitting if a person did not know that the firearm was in his possession.

The burden is on the defendant to prove by a preponderance of the evidence that the firearm was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

*State v. Carter*, 127 Wn.App. 713, 112 P.3d 561, (2005)

Unwitting possession instruction was declared by Division 3 of this Court to be inconsistent with the burden of proof instruction. In *Carter*, Division 3 held:

“When instructions are inconsistent, it is the duty of the

reviewing court to determine whether ‘the jury was misled as to its function and responsibilities under the law’ by that inconsistency.” *Wanrow* [*State v. Wanrow*, 88 Wn.2d 221, 559 P.2d (1977)] at 239 (quoting *State v. Hayes*, 73 Wn.2d 568, 572, 439 P.2d 978 (1968)). If the inconsistency results from a clear misstatement of the law, the misstatement is presumed to have misled the jury in a manner prejudicial to the defendant. *Wanrow*, 88 Wn.2d 239.

Here, the jury was obviously misled to believe Mr. Grist had the burden of proving unwitting possession. The inconsistent instruction involving the burden of proof was a clear misstatement of the law. Mr. Grist is presumed to have been prejudiced. Therefore, Mr. Grist is entitled to a new trial with new counsel. *State v. Ermert*, 94 Wn.2d 839, 851, 621 P.2d 121 (1980).

Mr. Grist’s case is on all fours with *Carter*. The unwitting possession instruction shifted the burden of proof. This was improper. The Appellant contends that Division 3’s reasoning should be adopted by this Court and that Mr. Grist’s convictions should be reversed and the case remanded for a new trial, with new counsel.

**4. INEFFECTIVE ASSISTANCE OF COUNSEL.**

Defense counsel did not object to the erroneous unwitting possession instruction. RP at 89-90.

The *Carter* case determined that the unwitting possession instruction

was error. The *Carter* case also determined that it was ineffective assistance of counsel to submit the instruction. *Carter*, 127 Wn. App. at 718.

Mr. Grist asserts that he received ineffective assistance of counsel in his case and that he was prejudiced thereby.

5. **THE DEPUTY PROSECUTING ATTORNEY COMMITTED MISCONDUCT BY RIDICULING MR. GRIST'S EXPLANATION REGARDING THE PRESENCE OF METHAMPHETAMINES DURING HIS SEARCH IN THE JAIL AS "MAGICAL STATIC CLING".**

During cross-examination of Mr. Grist, the deputy prosecuting attorney referred to Mr. Grist's testimony as the "magical static cling," asking him if his testimony was that "magical static cling caused this methamphetamine to come out of nowhere and stick to your sock; is that right?" RP at 66. An objection to the question was overruled. RP at 66.

The prosecution's question amounted to ridicule of both Mr. Grist's testimony and the unwitting possession defense.

The trial court obviously found that sufficient evidence was presented to instruct the jury on the defense of unwitting possession.

The prosecuting attorney's reference to the testimony as "magical" maligned the law and did not constitute fair comment upon the evidence presented.

In presenting a criminal case to the jury, it is incumbent upon a public prosecutor, as a quasi-judicial officer, to seek a verdict free of prejudice and based upon reason. As we have stated on numerous occasions, the prosecutor, in the interest of justice, must act impartially, and his trial behavior must be worthy of the position he holds. Prosecutorial misconduct may deprive the defendant of a fair trial. And only a fair trial is a constitutional trial.

*State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978).

The prosecuting attorney's question deprived Mr. Grist of a fair trial and reversal is merited.

6. **THE DEPUTY PROSECUTOR COMMITTED MISCONDUCT BY INAPPROPRIATELY ARGUING THAT THE STATE DID NOT NEED TO PROVE "KNOWLEDGE" BEYOND A REASONABLE DOUBT.**

The defense of unwitting possession was defined by the Court in Instruction No. 7. CP at 33.

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not **know** that the substance was in his possession or did not **know** the nature of the substance.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly.

Preponderance of the evidence means that you must be persuaded considering all of the evidence of the case that it is more probably than not true.

(Emphasis supplied.)

Mr. Grist presented evidence of unwitting possession. The trial court instructed the jury accordingly.

During closing argument, the deputy prosecutor told the jury regarding the “lesser-included” offense:

If, however, you are not convinced beyond a reasonable doubt in that particular charge, you have possession of methamphetamine—this is Instruction number 14—to fall back on. Elements, only two of them that you have to have a firm belief in the truth of are as follows:

*“That on other about the . . .”, same date, “. . . .27<sup>th</sup> of November, 2005, the Defendant possessed a controlled substance. . .”. **Not knowingly possessed**, not possessed in jail, not possessed in a prison, not anywhere else, just possessed, that all there is to it, in Pacific County.*

RP at 142 (emphasis added).

The prosecuting attorney’s argument that the State did not have any burden concerning “knowingly possessing the drug” was a misstatement of the law as it relates to this particular defense.

Mr. Grist presented an explanation of why the methamphetamine was found in the jail during the search of his person.

The State did not present any evidence that Mr. Grist knew the baggie was present.

Mr. Grist maintains that once he established the necessary quantum of proof to present the unwitting possession defense to the jury, that the burden

shifted back to the State to prove that he knew the item was on his person.

The proof required would be beyond a reasonable doubt.

7. **WAIVER AND A FURTHER INSTANCE OF INEFFECTIVE ASSISTANCE OF COUNSEL.**

Mr. Grist recognizes that defense counsel did not object to the alleged prosecutorial misconduct during closing argument.

If the failure to objection could have been legitimate trial strategy, it cannot serve as a basis for claim of ineffective assistance. *State v. Neidigh*, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (citing *State v. Kwan Fai Mak*, 105 Wn.2d 692, 731, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986)).

Mr. Grist cannot conceive of any possible trial strategy that would could condone or support the failure to object to the State's attempt to shift the burden of proof. There can be no doubt that the deputy prosecuting attorney's ruling that the State had no burden concerning "knowingly" in connection with the unwitting possession defense was error.

Defense counsels' representation fell below any "objective standard of reasonableness." His decision could not have been tactical.

Mr. Grist has shown that his defense was prejudiced. Mr. Grist's trial was not a constitutionally fair trial.

8. **CUMULATIVE ERROR DENIED MR. GRIST A FAIR TRIAL.**

The combined effects of error may require a new trial, even when those errors individually might not require reversal. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *United States v. Preciado-Cordobas*, 981 F.2d 1206, 1215 n.8 (11<sup>th</sup> Cir. 1993). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the Appellant a fair trial. *Mak v. Blodgett*, 970 F.2d 614 (9<sup>th</sup> Cir. 1992); *United States v. Pearson*, 746 F.2d 789, 796 (11<sup>th</sup> Cir. 1984). In this case, the cumulative effect of the trial court's errors, errors of counsel, and prosecutorial misconduct cited *supra* produced an unmistakable series of errors that prejudiced the Appellant and materially affected the outcome of the trial.

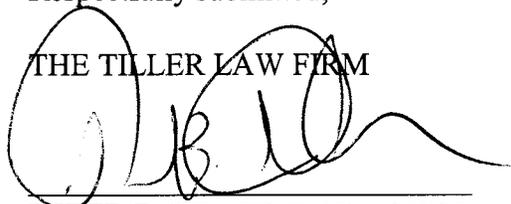
**F. CONCLUSION**

For the foregoing reasons, Don Grist respectfully requests that this Court reverse and dismiss with prejudice his convictions in Count I and Count II.

DATED: November 2, 2006.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. B. Tiller', is written over a horizontal line. The signature is fluid and cursive, with a long tail extending to the right.

PETER B. TILLER-WSBA 20835  
Of Attorneys for Don Grist

A

INSTRUCTION NO. 7

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession or did not know the nature of the substance.

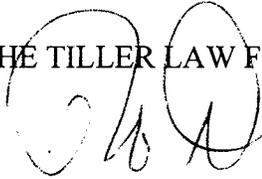
The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.



Mr. Don Edward Grist  
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DATED: November 2, 2006.

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. B. Tiller', is written over the text 'THE TILLER LAW FIRM'.

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PETER B. TILLER – WSBA #20835  
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CERTIFICATE OF  
MAILING

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