

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

34647-8-II

STATE OF WASHINGTON
RESPONDENT

VS.

DON EDWARD GRIST,
APPELLANT

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY URGENT

APPEAL FROM PACIFIC COUNTY SUPERIOR COURT
HONORABLE MICHAEL J. SULLIVAN, JUDGE

BRIEF OF RESPONDENT

DAVID J. BURKE
PROSECUTING ATTORNEY
WSBA #16163

David J. Burke

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A.
**STATE'S RESPONSE TO DEFENDANT'S
ASSIGNMENTS OF ERROR**

1. Sufficient evidence was presented to convict Don Grist of possession of marijuana less than 40 grams.
2. The trial court did not err in using WPIC 52.01 to instruct the jury about the defense of unwitting possession.
3. Mr. Grist's trial attorney did not provide ineffective assistance of counsel.
4. The State's attorney did not commit misconduct by using the phrase "magical static cling".
5. The closing argument of the State's attorney was not improper.
6. Mr. Grist received a fair trial. The cumulative errors alleged by Mr. Grist did not occur.

B.
STATEMENT OF THE CASE

The State of Washington charged Don Grist on February 24, 2006, in an amended information with knowing possession of methamphetamine while confined in a correctional institution in violation of RCW 9.94.041(2) and possession of marijuana less than

40 grams in violation of RCW 69.50.4014. See Appendix A. The trial occurred on February 28, 2006. Report of Proceedings [RP] passim.

This case stems from an incident that occurred on November 27, 2005, when Mr. Grist was pulled over by Pacific County Deputy Sheriff Pat Matlock. RP at 3 at (2/28/06). Deputy Matlock stopped the vehicle that Mr. Grist was driving, because Mr. Grist was driving with a suspended license. Mr. Grist was placed under arrest for driving with a suspended license in the second degree. The vehicle was searched incident to the arrest and a baggie of suspected marijuana was found on the floorboard of the driver's seat. RP at 7-8 (2/28/06). The suspected marijuana was later determined to be marijuana. RP at 10 (2/28/06).

Based on a pre-trial agreement, no statements of Mr. Grist were introduced during the State's case-in-chief. See Appendix B. Mr. Grist testified at trial that he was unaware that there was marijuana in a car. RP at 55 (2/28/06). Deputy Matlock testified on rebuttal that Mr. Grist stated that "he had just returned from buying the marijuana down the road." RP at 69 (2/28/06). Mr.

Grist 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 (2/28/06).

After his arrest, Mr. Grist was taken to the Pacific County Jail. RP at 11-12 (2/28/06). At the jail, Mr. Grist was searched by Correction Officer Penny Drake. RP at 15-16 (2/28/06). Officer Drake testified that she conducted a search of Mr. Grist, and that when she lifted his shirt out of his pants, a plastic baggie fell out of his shirt and landed on the floor. RP at 32, 39 (2/28/06). The contents of the baggie contained methamphetamine. RP at 22-24 (2/28/06). Mr. Grist testified that the baggie could not have come from his clothes. RP at 63 (2/28/06). He stated: “[u]nless it came from a dryer or – there’s no way. It’s not possible. Static cling. I don’t know.” Id.

The jury convicted Mr. Grist of possession of a controlled substance (methamphetamine), which was a lesser-included charge, and possession of marijuana less than 40 grams. See Appendix C. At the sentencing hearing on March 6, 2006, the

Superior Court imposed a standard range sentence of 90 days for possession of methamphetamine and 10 days for possession of marijuana. These sentences were ordered to run concurrently. RP at 22 (3/6/06). Mr. Grist filed a notice of appeal on April 6, 2006, 31 days after the sentencing. See Appendix D.

C. ARGUMENT

1. THE TRIER OF FACT WAS PRESENTED WITH SUFFICIENT EVIDENCE TO FIND THAT MR. GRIST WAS GUILTY OF POSSESSION OF MARIJUANA LESS THAN 40 GRAMS.

When a claim of insufficient evidence is made, a reviewing court examines whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,” viewing the evidence in the light most favorable to the State. State v. Hughes, 154 Wash.2d 118, 152, 110 P.3d 192 (2005) (quoting State v. Green, 94 Wash.2d 216, 221, 616 P.2d 628 (1980)), overruled on other grounds by Washington v. Recuenco, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). “Determinations of credibility are for the fact finder and are not reviewable on appeal.” *Id.* (citing State v. Camarillo, 115 Wash.2d 60, 71, 794 P.2d 850 (1990)).

Mr. Grist also asserts that there was insufficient proof that he actually or constructively possessed marijuana. Appellant's Brief at 13. Mr. Grist claims that his "possession" of marijuana was unwitting, i.e., he did not know that marijuana was in the vehicle he was driving. Appellant's Brief at 19. To establish actual possession, the State must show "actual control, not a passing control which is only a momentary handling." State v. Callahan, 77 Wash.2d 27, 29, 459 P.2d 400 (1969). Whether constructive possession exists depends on the totality of the circumstances. State v. Turner, 103 Wash.App. 515, 521, 13 P.3d 234 (2000); State v. Collins, 76 Wash.App. 496, 501, 886 P.2d 243 (1995); and State v. Partis, 88 Wash.App. 899, 906, 567 P.2d 1136 (1997). No single factor is dispositive. Collins, 76 Wash.App. at 501. In addition, mere proximity to marijuana does not establish constructive possession, State v. Hystad, 36 Wash.App. 42, 671 P.2d 793 (1983).

In this case, Mr. Grist was stopped by Deputy Pat Matlock of the Pacific County Sheriff's Office for a traffic violation. RP at 4-6 (2/28/06). Because Mr. Grist had a suspended license he was

arrested, and his car was searched incident to arrest. Deputy Matlock found a baggie of marijuana on the floorboard of the driver's seat where Mr. Grist had been sitting. RP at 8 (2/28/06). Mr. Grist testified that he did not know that there was a baggie of marijuana on the floor. RP at 55 (2/28/06). Deputy Matlock then testified on rebuttal that Mr. Grist told both him and Deputy Mike Robbins that he [Mr. Grist] "had just returned from buying marijuana down the road." RP at 69 (2/28/06).

Mr. Grist emphasizes that he was driving a car that belong to an unnamed friend and that he had spent very little time in the car. Appellant's Brief at 17-18. Based on these limited contacts, Mr. Grist asserts that the totality of the evidence does not support a finding of either actual or constructive possession of marijuana. What Mr. Grist fails to emphasize is that the reviewing court, when analyzing an insufficient evidence argument, must look at the evidence in a light most favorable to the State. Hughes, 154 Wash.2d at 152. In this instance, there is specific testimony from Deputy Matlock that Mr. Grist stated that he purchased the marijuana. Since the trier of fact is the sole judge of credibility,

Camarillo, 115 Wash.2d at 71, it is within the province of the jury to believe Deputy Matlock's testimony and reject Mr. Grist's assertions.

In any event, when the facts are judged in a light most favorable to the State, a rational trier of fact could find that Mr. Grist knew that there was marijuana in the car he was driving and that he had actual or constructive possession of that marijuana, since the marijuana was under the floorboard of his seat. Hence, Mr. Grist's argument concerning the insufficiency of the evidence should be rejected.

2. MR. GRIST HAS NOT DEMONSTRATED INEFFECTIVE ASSISTANCE OF COUNSEL WITH REGARD TO THE DEFENDANT'S UNWITTING POSSESSION DEFENSE.

Mr. Grist argues that his trial counsel committed an inexcusable blunder in "opening the door" and thereby allowing the State to present rebuttal testimony. Mr. Grist claims that his trial counsel's egregious error allowed Deputy Matlock to testify on rebuttal that Mr. Grist stated that he "had just returned from buying the marijuana." Appellant's Brief at 20. Mr. Grist asserts that this alleged error constitutes ineffective assistance of counsel.

To sustain a claim of ineffective assistance of counsel, the defendant must show both that trial counsel's performance was deficient and that this deficiency prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687-688, 104 S. Ct. 2052 80 L.Ed. 2d 674 (1984). Representation is deficient if it falls below an objective standard of reasonableness, based on a consideration of all of the circumstances. State v. McFarland, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995). Mr. Grist is prejudiced if there is a reasonable probability that but for the deficiency the trial result would have differed. McFarland, 127 Wash.2d at 335. The reviewing court presumes that trial counsel's representation fell within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689; In re Pers. Restraint of Pirtle, 136 Wash.2d 467, 487, 965 P.2d 593 (1998). Ineffective assistance of counsel claims are reviewed de novo. State v. Shaver, 116 Wash.App. 375, 382, 65 P.3d 688 (2003). Strategic or tactical reasons do not support an ineffective assistance of counsel claim. McFarland, 127 Wash.2d at 336.

Mr. Grist's argument for ineffective assistance of counsel fails on both prongs. Mr. Grist's trial counsel's performance was not deficient. Mr. Grist fails to point out that the "big enchilada" was the felony charge involving methamphetamine -- not the misdemeanor charge pertaining to possession of marijuana under 40 grams. Mr. Grist's trial counsel reasonably could have assumed that his client's testimony concerning the methamphetamine charge would not be believable unless Mr. Grist also addressed the circumstances surrounding the marijuana charge. Thus, the choice made by Mr. Grist's trial counsel involved strategy and tactics. His decision to "open the door" pertaining to the marijuana charge was not irrational since defending the felony methamphetamine charge was a more critical endeavor.

While one obviously can disagree with the strategy promulgated by Mr. Grist's trial counsel, the tactic adopted at trial does not fall below an objective standard of reasonableness. Additionally, since the reviewing court starts with the presumption that trial counsel acted properly, Mr. Grist has not overcome his burden to demonstrate that his trial counsel's performance was

outside the ambit of reasonable strategic decision making. Hence, Mr. Grist's argument fails the first prong of the Strickland test.

With regard to the second prong of the Strickland test, Mr. Grist has not demonstrated that he was prejudiced by his trial counsel's strategy. In other words, Mr. Grist cannot show with a reasonable probability that, except for his trial counsel's alleged unprofessional errors, the trier of fact would have found Mr. Grist not guilty of the marijuana charge. Mr. Grist was found to be in close proximity to the marijuana. Subsequently, methamphetamine was found on Mr. Grist. From these facts it is not clear that the trier of fact would have reached a different decision if Mr. Grist's trial counsel had not "opened the door" and allowed the State to call into question the veracity of Mr. Grist's testimony. Consequently, the second prong of the test for ineffective assistance of counsel has not been satisfied.

3. THE COURT'S UNWITTING POSSESSION INSTRUCTION DID NOT IMPROPERLY SHIFT THE BURDEN OF PROOF TO MR GRIST.

Mr. Grist, for the first time on appeal, claims that jury instruction no. 7, which pertained to unwitting possession,

improperly shifted the burden of proof to the defendant. At trial, the Court used WPIC 52.01 to define unwitting possession. See Appendix E. Trial counsel for Mr. Grist did not object to this instruction. Mr. Grist now claims that this WPIC instruction was improper because it misled the jury. Appellant's Brief at 22-24. Mr. Grist urges this reviewing court to follow the reasoning articulated by Division III of the Court of Appeals in State v. Carter, 127 Wash.App. 713, 112 P.3d 561 (2005).

Simply put, the Carter case is inapposite. Carter involved the unlawful possession of a firearm. The trial judge gave an unwitting possession instruction in combination with a "to convict" instruction that required the State to prove "knowing" possession. Division III of the Court of Appeals took issue with the combination of these instructions, because the "to convict" instruction placed the burden of proving "knowing" possession on the State, whereas the unwitting possession instruction placed the burden of proving the lack of knowledge on the defendant.

The Carter decision is not applicable to the present case because the State must prove "knowing" possession to convict a

person of unlawful possession of a firearm. See State v. Anderson, 141 Wash.2d 357, 366, 5 P.3d 1247 (2000). However, unlawful possession of a controlled substance is a different “kettle of fish.” Under State v. Bradshaw, 152 Wash.2d 528, 537-538, 98 P.3d 1190 (2004), unlawful possession of a controlled substance does not require “knowledge,” and the affirmative defense of unwitting possession does not improperly shift the burden of proof. Hence, the logic of the Carter decision is inapplicable to the present case, because unlawful possession of a firearm contains a mens rea element, whereas unlawful possession of a controlled substance does not impose this requirement.

In short, if this reviewing court were to accept Mr. Grist’s argument, the holding of the Washington State Supreme Court in Bradshaw would be eviscerated. Mr. Grist’s argument is therefore untenable. The jury instructions that were given by the trial court did not mislead the jury and were a correct statement of the law.

Finally, even if there were some merit to Mr. Grist’s analysis of the holding in Carter, Mr. Grist is arguably subject to the invited error doctrine, because Mr. Grist did not object to the jury

instruction no. 7 (unwitting possession, WPIC 52.01) at trial. City of Seattle v. Patu, 147 Wash.2d 717, 58 P.3d 273 (2002).

Consequently, Mr. Grist's rejected contention should be rejected.

4. MR. GRIST'S TRIAL COUNSEL WAS NOT INEFFECTIVE BECAUSE HE FAILED TO OBJECT TO THE UNWITTING POSSESSION INSTRUCTION.

The Appellant's Brief at 24-25 alleges that Mr. Grist received ineffective assistance of counsel because his trial attorney did not use the holding of State v. Carter, 127 Wash.App. 713, 112 P.3d 561 (2005), to object to the unwitting possession instruction (WPIC 52.01). Because State v. Bradshaw, 152 Wash.2d 528, 98 P.3d 1190 (2004), is dispositive on the interplay between unlawful possession of a controlled substance and unwitting possession, Mr. Grist's trial counsel had no reason to object to the unwitting possession instruction that was given by the trial judge. Thus, Mr. Grist's ineffective assistance of counsel argument fails.

5. THE STATE'S REFERENCE TO "MAGICAL STATIC CLING" DURING CROSS EXAMINATION OF MR. GRIST DID NOT CONSTITUTE MISCONDUCT.

During cross examination of Mr. Grist, the State's attorney (Mr. Anderson) asked Mr. Grist a question that used the phrase

"magical static cling." The relevant portion of the report of proceeding reads as follows:

Q. (By Mr. Anderson) Your testimony is that magical static cling caused this methamphetamine to come out of nowhere and stick to your sock; is that right?

MR. TURNER: Objection. Argumentative, Your Honor.

THE COURT: Overruled.

Q. (By Mr. Anderson) Is that right? You need to answer yes or no for the record, Mr. Grist.

A. I said hypothetically speaking.

W. Hypothetically speaking.

A. I've had static bounce come out of my sock and pant leg.

Q. Thank you.

A. I'm sure all of us have.

Q. Thank you, Mr. Grist.

MR. ANDERSON: Your Honor, I have no more questions for this witness.

THE COURT: Thank you.

RP at 66-67 (2/28/06).

A defendant alleging prosecutorial misconduct must establish both improper conduct and prejudice. State v. Brown, 132 Wash.2d 529, 561, 940 P.2d 546 (1997). The reviewing court examines the challenged remarks in "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." Brown, 132 Wash.2d at 561. To show prejudice, there must be a substantial likelihood that the misconduct affected the jury's verdict. Id.

In this instance, the State's attorney used the phrase "magical static cling" because Mr. Grist has previously mentioned on direct examination that "static cling" was a possible explanation for why drugs were found on his person when he was being booked into the Pacific County jail. The trial court overruled Mr. Grist's objection. RP at 66 (2/28/06). Mr. Grist now alleges that the State's attorney was trying to ridicule Mr. Grist. In using the

phrase "magical static cling," the State's attorney was trying to pin down Mr. Grist with regard to why he felt that drugs could attach to his person. While the use of the word "magical" might be best described as hyperbole, it is clear that there is little likelihood that this one comment affected the outcome of the trial. Hence, Mr. Grist was not deprived of a fair trial, and there is no basis to reverse the decision of the trier of fact.

6. THE STATE'S ATTORNEY DID NOT COMMIT MISCONDUCT BY ARGUING THAT THE STATE DID NOT NEED TO PROVE "KNOWLEDGE" BEYOND A REASONABLE DOUBT.

Mr. Grist alleges that the State's attorney committed misconduct because he emphasized a particular jury instruction pertaining to the lesser-included offense of possession of a controlled substance without referencing the unwitting possession instruction. Appellant's Brief at 26-27. This alleged misconduct occurred during closing argument. Every attorney arguing before a jury has the right to weave his argument in a manner that best supports his theory of the case. The State is aware of no case law that requires a litigant to mention every jury instruction during closing argument.

Moreover, instruction no. 1 that was given to the jury contained the following language:

The lawyers' remarks, statements and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony of the witnesses. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

See Appendix F.

When the court gives an instruction to disregard statements of counsel, the reviewing court should presume that the jury followed the instruction. State v. Swan, 114 Wash.2d 613, 662, 790 p.2d 610 (1990). "[This] presumption will prevail until it is overcome by a showing otherwise." City of Bellevue v. Kravik, 69 Wash.App. 735, 743, 850 P.2d 559 (1993). So even if one assumes arguendo that the prosecutor's remarks were improper, "[t]he trial court minimized prejudice when it stated the State's argument was not evidence." State v. Rice, 120 Wash.2d 549, 573, 844 P.2d 416 (1993).

Although the State does not concede that the closing argument of the State's attorney was improper, it is clear that the alleged misconduct did not affect the verdict of the trier of fact. Mr. Grist's attorney during closing argument was able to reference the importance of the unwitting possession instruction. RP at 151 (2/28/06). Because the standard articulated in State v. Brown, 132 Wash.2d 529, 561, 940 P.2d 546 (1997) has not been met (Mr. Grist has failed to demonstrate improper conduct and prejudice), Mr. Grist's argument is without merit.

7. THE FAILURE OF MR. GRIST'S TRIAL COUNSEL TO OBJECT DURING CLOSING ARGUMENT DOES NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Grist alleges that his trial counsel was ineffective because he did not object during the State's closing argument. Mr. Grist argues that this omission cannot be deemed to be a legitimate trial strategy. Appellant's Brief at 28. What Mr. Grist fails to realize is that attorneys do not commonly object during closing argument absent egregious misstatements. In re Pers. Restraint of Davis, 152 Wash.2d 647, 717, 101 P.3d 1 (2004). A decision not to object during closing argument is within the latitude of permissible

professional legal conduct. Id. Lawyers are permitted broad discretion to argue the facts in evidence and draw reasonable inferences from the evidence. State v. Dhaliwal, 150 Wash.2d 559, 577-78, 79 P.3d 432 (2003); State v. Boehning, 127 Wash.App. 511, 519, 111 P.3d 899 (2005).

In this insistence, the fact that the State's attorney focused on a particular jury instruction to the exclusion of another should not automatically elicit an objection. Further, Mr. Grist has not demonstrated either that the trial court would have sustained an objection to the State's alleged improper argument or that his trial's outcome would have been different. Thus, this last attempt "to waive the flag" of ineffective assistance of counsel fails.

8. CUMULATIVE ERROR DID NOT PREVENT MR. GRIST FROM RECEIVING A FAIR TRIAL.

The State acknowledges that the combined effects of many errors may require the reviewing court to order a new trial, even though individual errors, standing alone, may not be sufficient, to merit a new trial. State v. Coe, 101 Wash.2d 772, 789 684, P.2d 668 (1984). However, this case does not contain a series of errors that would constitute cumulative error. Any errors that may exist

are harmless, i.e., any alleged errors did not affect the outcome of the trial. The Appellant's Brief reads as though Mr. Grist believes that he is entitled to a perfect trial rather than a fair trial. Cf. State v. Green, 71 Wash.2d 372, 373, 428 P.2d 540 (1967). Mr. Grist received a fair trial. Hence, there is no basis to disturb the decision of the trier of fact.

**D.
CONCLUSION**

For the reasons listed above, the relief sought by Mr. Grist should be denied. Mr. Grist's convictions for possession of a controlled substance (felony) and possession of marijuana less than 40 grams should be upheld.

Respectfully Submitted by:



DAVID J. BURKE, WSBA#16163
Pacific County Prosecuting Attorney

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

STATE OF WASHINGTON,)
)
Plaintiff,)
)
vs.)
)
DON E. GRIST,)
DOB: **08/21/67**)
)
Defendant.)
_____)

NO. **05-1-00288-1**

AMENDED INFORMATION

RCW 9.94.041(2)
RCW 69.50.4014

COMES NOW DAVID J. BURKE, Prosecuting Attorney for Pacific County,
Washington, and amends the Information to accuse the defendant of one count of
Possession of Controlled Substance in a County Jail and one count of Possession of
Marijuana Less Than 40 Grams, committed as follows:

COUNT I

The defendant, **DON E. GRIST**, in Pacific County, Washington, on or about
November 27, 2005, who was confined in a county or local correctional

1 institution, ^{who} without legal authorization, ^{and} while in the institution or while being
2 conveyed to or from the institution, or while under the custody or supervision of
3 institution officials, officers, or employees, or while any premises subject to the
4 control of the institution, did knowingly possess or have under his control any
5 narcotic drug or controlled substance, to wit: methamphetamine, in violation of
6 RCW 9.94.041(2).
7
8
9
10
11

12 The maximum penalty for this count is confinement in the county jail for 5
13 years, a fine of \$10,000 or both such confinement and fine.
14

15 **COUNT II**
16

17 The defendant, **DON E. GRIST**, in Pacific County, Washington, on or about
18 **November 27, 2005**, did unlawfully possess marijuana under 40 grams, in
19 violation of RCW 69.50.4014.
20
21

22 The maximum penalty for this crime is imprisonment in the county jail for a
23 period of 90 days, a fine of \$1,000, or both such imprisonment or fine.
24

25 Dated this 23rd day of February, 2006.
26

27 DAVID J. BURKE, Prosecuting Attorney
28

29 
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31 by _____
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33 WSBA #34636

FILED

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY**

STATE OF WASHINGTON)	
)	NO. 05-1-00288-1
Plaintiff,)	
)	STIPULATION OF
vs.)	PARTIES
)	
DON E. GRIST,)	
)	
Defendant.)	
_____)	

Pursuant to CrR 6.13 (b)(1) and (2), the defendant, Don Grist, based on his attorney's advice, agrees that the official crime laboratory report (lab# 505-002317; agency# 058560; request# 0001; item# 05110289) signed and dated by Jason W. Dunn on January 24, 2006, shall be admitted as evidence during the trial of this case. Also pursuant to CrR 6.13(b)(1) and (2), the defendant also agrees that the official laboratory report from the Pacific County Sheriff's Office (lab #05-061S; case #05-8560; item #05110288)

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18

APPENDIX 'B'

1 signed and dated by Sharon Horne, Evidence Officer for Pacific
2 County Sheriff's office on December 20, 2005, shall be admitted as
3 evidence during the trial of this case.
4

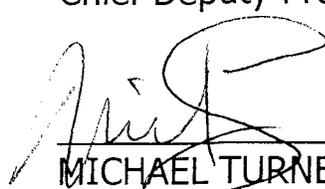
5
6 By this agreement, the defendant hereby waives any and all
7 reasons for objecting regarding the chain of custody of evidence in
8 this case and to the above-mentioned laboratory reports.
9

10
11 In exchange for this agreement, the state will not recommend
12 more that 120 days of jail if the defendant is convicted.
13
14

15
16 DATED this 17th day of February, 2006.
17

18
19 
20 _____
21 JUDGE
22

23
24 
25 _____
26 MICHAEL ANDERSON, WSB#34636
27 Chief Deputy Prosecuting Attorney

28
29 
30 _____
31 MICHAEL TURNER, WSB #13216
32 Attorney for Defendant

33


DON GRIST, Defendant

Pacific County Prosecuting Attorney
P.O. Box 45
Courthouse
South Bend, WA 98586
Phone: (360) 875-9361
Fax: (360) 875-9362

FILED
2006 FEB 28 PM 6:44
VIRGINIA LEACH CLERK
PACIFIC CO. WA
BY af DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

STATE OF WASHINGTON,)
)
 Plaintiff,) NO. **05-1-00288-1**
)
 vs.) VERDICT FORM "A"
)
)
 DON E. GRIST,)
)
 Defendant.)
 _____)

We, the jury of the above entitled cause, do find the
defendant, **DON E. GRIST** not guilty
(Not guilty or guilty)

of the crime of **Possession of a Controlled Substance,**
Methamphetamine, while being confined in a county correctional facility.

DATED this 28 day of February, 2006.

Rebecca Marin
PRESIDING JUROR

FILED

2006 FEB 28 PM 6:44

VIRGINIA LEACH CLERK
PACIFIC CO. WA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

BY *[Signature]*
DEPUTY

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 DON E. GRIST,)
)
 Defendant.)
 _____)

NO. **05-1-00288-1**

VERDICT FORM "B"

We, the jury, having found the defendant not guilty of the crime of **Possession of a Controlled Substance, Methamphetamine, while being confined in a county correctional facility** in Count I as charged, or being unable to unanimously agree as to that charge, find the defendant, **Don E. Grist** *guilty*
("not guilty" or "guilty")

the lesser included crime of **Possession of a Controlled Substance, Methamphetamine.**

DATED this 28 day of February, 2006.

Rebecca Martin
PRESIDING JUROR

FILED

2006 FEB 28 PM 6:44

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

VIRGINIA LEACH CLERK
PACIFIC CO. WA

BY [Signature] DEPUTY

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 DON E. GRIST,)
)
 Defendant.)
 _____)

NO. **05-1-00288-1**
VERDICT FORM "C"

We, the jury of the above entitled cause, do find the
defendant, **DON E. GRIST** guilty
(Not guilty or guilty)

of the crime of **Possession of Marijuana Less Than 40 Grams.**

DATED this 28 day of February, 2006.

[Signature]
PRESIDING JUROR



SUPERIOR COURT OF WASHINGTON - COUNTY OF **Pacific** FILED

06 APR -6 PM 3:06

VIRGINIA LEACH, CLERK
PACIFIC COUNTY, WA

BY il DEPUTY

CASE NO. 05-1-00288-1

NOTICE OF APPEAL

STATE OF WASHINGTON

Plaintiff,

vs.

Don Grist

Defendant(s)

The defendant: Don Grist
seeks review by the Court of Appeals of the:

entered on: 2/28/06
(Date)

Dated: 2/28/06

Don E Grist

Defendant's Signature

Address: 428 Butte Creek
(Street)

Raymond WA 98577
(City) (State) (Zip)

Michael S. Turner
Defendant's Lawyer

Address: PO Box 1217
(Street)

South Bend, WA 98586
(City) (State) (Zip)

FILED

2006 APR -6 PM 3: 10

VIRGINIA LEACH CLERK
PACIFIC CO. WA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PACIFIC

DEPUTY

STATE OF WASHINGTON,)
Plaintiff,)
vs.)
Don Grist,)
Defendant/Respondent.)
_____)

NO. 05-1-00288-1

AFFIDAVIT OF SERVICE
OF NOTICE OF APPEAL

STATE OF WASHINGTON)
) ss.
COUNTY OF PACIFIC)

I, Michael S. Turner, being first duly sworn on oath, depose
and state that:

I am the attorney for Defendant/Respondent, Don Grist.

I served a true copy of the Notice of Appeal on the Plaintiff by:

- Personally delivering a true copy of the aforementioned Notice of Appeal to the Prosecuting Attorney or a member of the Prosecutor's staff on 4/16/06.
- Depositing in the United States mail, postage prepaid, a true copy of the aforementioned Notice of Appeal addressed to the Plaintiff on _____.

DATED this 6th day of April 2006.

Michael S. Turner
Attorney for Defendant/Respondent

SUBSCRIBED AND SWORN to before me this _____ day of _____.

NOTARY PUBLIC in and for the State of
Washington, residing at: _____

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.

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all

of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony of the witnesses. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any

conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this.

If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberation, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties received a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

FILED
COURT OF APPEALS
DIVISION II
07
06 JAN -5 PM 2:03
STATE OF WASHINGTON
BY
 DEPUTY

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

STATE OF WASHINGTON,)
)
 Respondent.)
)
 vs.)
)
DON EDWARD GRIST,)
)
 Petitioner.)
_____)

NO 34647-8-II

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) ss.
COUNTY OF PACIFIC)

VICKI FLEMETIS, being first duly sworn on oath, deposes and says:

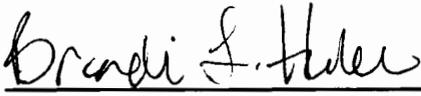
I am the Office Administrator for the Pacific County Prosecutor.

That on JANUARY 4, 2007, I mailed two copies of Respondent's Brief to the Attorney for Petitioner at the following address:

PETER B. TILLER
ATTORNEY AT LAW
P.O. BOX 58
CENTRALIA, WA 98531


VICKI FLEMETIS

SUBSCRIBED & SWORN to before me this 4th day of
JANUARY, 2007.


NOTARY PUBLIC in and for the State
Of Washington, residing at Raymond