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DIVISION II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Deborah Cargo,**

Appellant.

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Clallam County Superior Court

Cause No. 07-1-00403-2

The Honorable Judge Ken Williams

**Appellant's Opening Brief**

Jodi R. Backlund  
Manek R. Mistry  
Attorneys for Appellant

**BACKLUND & MISTRY**  
203 East Fourth Avenue, Suite 404  
Olympia, WA 98501  
(360) 352-5316  
FAX: (866) 499-7475

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### **ASSIGNMENTS OF ERROR**

1. The trial court's instructions relieved the state of its burden to prove an element of the charged offense.
2. The trial court's instructions permitted conviction based solely upon proof that Ms. Cargo had dominion and control over the premises where drugs were found.
3. The trial court's instructions were insufficient because they did not allow Ms. Cargo to argue her theory of the case.
4. The trial court's instructions were misleading and failed to inform the jury of the applicable law.
5. The trial court's instructions were not manifestly clear.
6. The trial court's instructions as a whole left the jury to speculate about the law.
7. The trial court's instructions as a whole required counsel to persuade the jury as to what the instructions meant and what the law was.
8. The trial court erred by rejecting Ms. Cargo's proposed Instruction No. 5, which reads as follows:

Possession of a controlled substance may not be established merely by the defendants' [sic] dominion or control over the area where such substance is found.  
Supp. CP

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Possession may not be inferred solely from proof that an accused person had dominion and control over the area where drugs were found. The trial court's instructions permitted conviction based solely on proof that Ms. Cargo had dominion and control over the car where drugs were found. Did the trial court's instructions relieve the state of its burden to establish possession, an element of the charged offense?  
Assignments of Error Nos. 1-8.

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Debra Cargo was living in her car in Clallam County in the latter part of the summer of 2007. RP (3/20/08) 9-10. On August 11, 2007, she let a friend borrow her car while Ms. Dixon washed her clothes at her friend's home. RP (3/20/08) 11-14. On August 13, 2007, she was driving in the early morning when she saw Lyman walking in the heavy rain. RP (3/20/08) 14-15. Even though there was an order prohibiting her from contacting him, she picked him up and they both slept in her car parked at the local WalMart. RP (3/20/08) 15-16.

Officer Graham came by, discovered that there was a No Contact Order that applied to the owner of the vehicle, and contacted Ms. Cargo. RP (3/19/08) 53-57. He asked her to get out of the car and close the door behind her, so he could talk with her. Mr. Lyman remained in the car. RP (3/19/08) 57, 98-99. Misapprehending who was the protected party in the order, he arrested Mr. Lyman. RP (3/19/08) 57-58. After confirming that Mr. Lyman was the protected party, he was released and Ms. Cargo was arrested. RP (3/19/08) 57-59.

During his search of the vehicle, Mr. Graham found on the dashboard a pouch with rolling papers, a tin case with marijuana residue, and a cut straw piece. RP (3/19/08) 66, 67. The officer located a purse

which contained Ms. Cargo's identification. In an outer pocket of the purse, a folded bus schedule was found that contained methamphetamine. RP (3/19/08) 70-76. Two pipes and a straw were found in the glove box. RP (3/19/08) 80. Another pouch was located under the passenger seat, where Lyman had been sitting, with a pipe that had white residue. RP (3/19/08) 84-85, 102. Ms. Cargo was charged with Possession of Methamphetamine and Violation of a No Contact Order.<sup>1</sup> CP 20-21.

At trial, her attorney argued that the state had not proven that Ms. Cargo possessed the methamphetamine. RP (3/19/08) 17-23, 47; RP (3/20/08) 35-57, 64-76. Ms. Cargo argued that her denial of knowledge of the methamphetamine was credible, that it could have been Mr. Lyman's<sup>2</sup>, that her friend could have left it in the car, and that she did not have exclusive dominion and control over the area in which methamphetamine was found. RP (3/20/08) 7-34, 36, 56, 64-76.

Ms. Cargo requested the following instruction relating to possession:

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<sup>1</sup> The defense conceded that she had knowingly violated the No Contact Order. RP (3/20/08) 15-16.

<sup>2</sup> The state had served Mr. Lyman with a subpoena for trial, but did not present any testimony from him.

Possession of a controlled substance may not be established merely by the defendants' dominion or control over the area where such substance is found.

Defendant's Proposed Instructions to the Jury No. 5.

The court declined to instruct the jury as the defense requested. RP

(3/20/08) 52-55.

Ms. Cargo was convicted as charged, and she timely appealed. CP

6-19, 5.

### ARGUMENT

#### **I. THE TRIAL JUDGE ERRED BY REFUSING MS. CARGO'S PROPOSED INSTRUCTION NO. 5.**

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt.

U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358 at 364, 90 S.Ct.

1068, 25 L.Ed.2d 368 (1970). Jury instructions, when taken as a whole,

must properly inform the jury of the applicable law. *State v. Douglas*, 128

Wn.App. 555 at 562, 116 P.3d 1012 (2005). An omission or misstatement

of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process.

*State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v.*

*Randhawa*, 133 Wn.2d 67 at 76, 941 P.2d 661 (1997).

Jury instructions are sufficient if they allow each party to argue their theory of the case, are not misleading, and properly inform the trier of fact of the applicable law. *Douglas*, at 562. Jury instructions must be “manifestly clear,” since juries lack the tools of statutory construction available to courts. *See, e.g., State v. Harris*, 122 Wn.App. 547 at 554, 90 P.3d 1133 (2004). Jurors should not have to speculate about the law, and counsel should not have to persuade the jury as to what the instructions mean or what the law is. *State v. Olmedo*, 112 Wn. App. 525 at 534-535, 49 P.3d 960 (2002).

It is a crime to possess a controlled substance. RCW 69.50.4013. It is not a crime to have dominion and control over the premises where drugs are found. *State v. Shumaker*, 142 Wn. App. 330 at 334, 174 P.3d 1214 (2007). Furthermore, dominion and control of the premises does not (by itself) create an inference that an accused person had dominion and control over drugs found on the premises. *Shumaker*, at 331.

Ms. Cargo proposed an instruction explaining this to the jury: “Possession of a controlled substance may not be established merely by the defendants’ [sic] dominion or control over the area where such substance is found.” Defendant’s Proposed Instruction No. 5, Supp. CP. The court rejected the instruction, and the prosecutor took advantage of this decision by asking the jury to find that Ms. Cargo possessed the drugs

simply because she had dominion and control over the car where they were found. RP (3/20/08) 62. During deliberations, the jury asked for additional instructions defining dominion and control; the court refused to provide additional instructions. Inquiry from the Jury and Court's Response, Supp. CP.

Under these circumstances, the court's instructions were insufficient. First, they did not allow Ms. Cargo to argue her theory of the case (that the state had merely proved dominion and control over the car, but not over the substance). *Douglas, supra*. Second, the instructions were misleading and did not inform the jury of the applicable law. *Douglas, supra*. Third, they were not "manifestly clear." *Harris, supra*. Fourth, jurors were required to speculate about the law, and could only rely on the prosecuting attorney's misleading argument to determine the meaning of dominion and control. *See* RP (3/20/08) 62. The instructions did not provide defense counsel with any authority to refute the prosecutor's misleading argument. *Olmedo*.

The instructions here did not *require* the jury to convict if it found that Ms. Cargo had dominion and control over the car; however, jurors were *permitted* to convict merely because she had dominion and control

over the car.<sup>3</sup> See Instruction No. 9, Supp. CP. The court's instructions as a whole thus relieved the state of its burden to prove possession and violated Ms. Cargo's constitutional right to due process. *Thomas, supra*. Accordingly the conviction for possession of a controlled substance must be reversed and the case remanded to the superior court for a new trial.

### CONCLUSION

Ms. Cargo's conviction for Possession of a Controlled Substance must be reversed. Her case must be remanded to the trial court for a new trial, with instructions to give Ms. Cargo's proposed Instruction No. 5, Supp. CP.

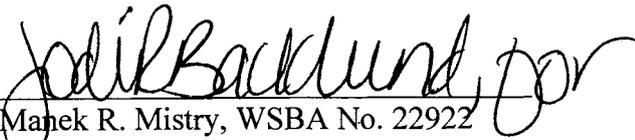
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<sup>3</sup> This is in contrast to *Shumaker*, in which the court's instructions required the jury to find the defendant guilty based on a finding that he had dominion and control over the premises where drugs were found.

Respectfully submitted on August 21, 2008.

**BACKLUND AND MISTRY**

  
\_\_\_\_\_  
Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

  
\_\_\_\_\_  
Mahek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

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STATE OF WASHINGTON

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Deborah Cargo  
1636 E Third Ave.  
Port Angeles, WA 98362

and to:

Clallam County Prosecuting Attorney  
223 E. 4th Street, Suite 11  
Port Angeles, WA 98362-0149

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on August 21, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 21, 2008.



Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

**APPENDIX**  
Court's Instructions to the Jury

**ORIGINAL**

61-  
SCANNED

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

STATE OF WASHINGTON,  
Plaintiff,  
  
vs.  
  
DEBORAH LYNN CARGO,  
Defendant.

NO. 07-1-00403-2

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BARBARA CHRISTENSEN

COURT'S INSTRUCTIONS TO THE JURY

MARCH 20, 2008  
Date

  
JUDGE

410  
Blm

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, stipulations, and the exhibits that I have admitted, 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.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

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 and the exhibits. 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 deliberations, 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 receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

NO. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The Defendant has no burden to prove a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

NO. 4

A separate crime is charged in each count. You must decide each count separately.  
Your verdict on one count should not control your verdict on any other count.

NO. 5

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

NO. 6

It is a crime for any person to possess a controlled substance except as authorized  
by law.

NO. 7

To convict the Defendant of the crime of POSSESSION OF A CONTROLLED SUBSTANCE as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 13th day of August, 2007, the Defendant possessed a controlled substance; and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

NO. 8

Methamphetamine is a controlled substance.

NO. 9

Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance. Proximity alone without proof of dominion and control over the substance is insufficient to establish constructive possession. Dominion and control need not be exclusive to establish constructive possession.

NO. 10

“Dominion” means the power (as authority) or right (as ownership) to use or dispose of property.

NO. 11

A person commits the crime of VIOLATION OF A DOMESTIC VIOLENCE NO-CONTACT ORDER when he or she willfully has contact with another when such contact was prohibited by a no-contact order and the person knew of the existence of the no-contact order.

NO. 12

To convict the Defendant of the crime of VIOLATION OF A NO-CONTACT ORDER as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 13th day of August, 2007, the Defendant willfully had contact with Michael Lyman;
- (2) That such contact was prohibited by a no-contact order;
- (3) That the Defendant knew of the existence of the no-contact order;
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any<sup>one</sup> of these elements, then it will be your duty to return a verdict of not guilty.

NO. 13

A person acts willfully when he or she acts knowingly.

NO. 14

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and a verdict form for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in each blank provided in the verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form to express your decision. The presiding juror must sign the verdict form and notify the bailiff. The bailiff will bring you into court to declare your verdict.