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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY                       
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No. 37547-8-II

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 Judges Ken Williams and George Wood

**Appellant's Reply Brief**

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## ARGUMENT

### **THE COURT'S INSTRUCTIONS RELIEVED THE STATE OF ITS CONSTITUTIONAL BURDEN TO PROVE POSSESSION BEYOND A REASONABLE DOUBT.**

At trial, Ms. Cargo's defense rested on the argument that she was not in possession of the drugs. The court's instructions did not allow Ms. Cargo to fully argue her theory of the case: the instructions were not "manifestly clear," they were misleading, and they did not properly inform the jury of the applicable law. *State v. Douglas*, 128 Wn.App. 555, 116 P.3d 1012 (2005); *State v. Harris*, 122 Wn.App. 547 at 554, 90 P.3d 1133 (2004). Under the instructions as given, the jurors had "to speculate about [the law]," and defense counsel had to "engage in legalistic analysis or argument in order to persuade the jury as to what the instructions [meant] or what the law [was]," contrary to *State v. Olmedo*, 112 Wn. App. 525 at 534-535, 49 P.3d 960 (2002).

The instructions were insufficient, and prejudiced Ms. Cargo. First, the prosecutor improperly argued that dominion and control over the car was sufficient to convict Ms. Cargo. RP (3/20/08) 62; *see State v. Shumaker*, 142 Wn. App. 330 at 331, 174 P.3d 1214 (2007). Second, the jury asked for additional instructions defining dominion and control. Inquiry from the Jury and Court's Response, CP 25.

The jury was required to pick between the prosecutor's argument (that dominion and control over premises was sufficient for conviction) and defense counsel's argument (that such dominion and control was, by itself, insufficient). By permitting the jury to convict based on the prosecutor's misleading argument, the instructions relieved the state of its burden to prove possession, and violated Ms. Cargo's constitutional right to due process. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004).

Although these instructions might be sufficient in some cases, they were not sufficient in this case. The missing language went to the heart of Ms. Cargo's defense, and the prosecutor took advantage of the omission to make an improper and misleading argument. The jury's confusion is evident from their question to the judge.

Constitutional error is presumed prejudicial. *State v. Gonzales Flores*, 164 Wn.2d 1, 186 P.3d 1038 (2008). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Gonzales Flores, supra; State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002). Respondent cannot make this showing, especially in light of

the jury's question to the court regarding the definition of dominion and control.

Because the court's instructions relieved the state of its burden to prove possession, the conviction for possession must be reversed and the case remanded for a new trial.

Respectfully submitted on September 23, 2008.

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CERTIFICATE OF MAILING

STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

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

Deborah Cargo  
106 Oxenford Road  
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and to:

Clallam County Prosecuting Attorney  
223 E. 4th Street, Suite 11  
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on September 23, 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 September 23, 2008.

[Signature]  
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