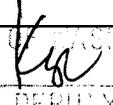


NO. 38700-0-II

COURT OF APPEALS  
DIVISION II

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
BY   
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

NATHAN WINDFIELD, APPELLANT

Appeal from the Superior Court of Pierce County  
The Honorable Gary Steiner, Judge

No. 08-1-00727-0

**Brief of Respondent**

GERALD A. HORNE  
Prosecuting Attorney

By  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Did the trial court exercise permissible discretion in refusing to submit defendant’s proposed unwitting possession instruction to the jury? ..... 1

2. Should this court reject defendant’s claims of prejudicial misconduct when the prosecutor’s challenged arguments were based upon evidence adduced at trial or inferences reasonably drawn from such evidence? ..... 1

3. Did the State adduce sufficient evidence to support the jury verdicts? ..... 1

B. STATEMENT OF THE CASE. .... 1

1. Procedure..... 1

2. Facts ..... 2

C. ARGUMENT..... 7

1. THE TRIAL COURT PROPERLY REFUSED DEFENDANT’S PROPOSED UNWITTING POSSESSION JURY INSTRUCTION..... 7

2. THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT DURING CLOSING AND REBUTTAL ARGUMENTS. .... 14

3. SUFFICIENT EVIDENCE WAS ADDUCED FROM WHICH THE JURY COULD FIND DEFENDANT HAD POSSESSION OF THE FIREARM, COCAINE, AND MARIJUANA. .... 21

D. CONCLUSION. .... 34

## Table of Authorities

### State Cases

<i>City of Seattle v. Rainwater</i> , 86 Wn.2d 567, 571, 546 P.2d 450, 453 (1976).....	8
<i>Seattle v. Gellein</i> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989).....	21
<i>State v. Barrington</i> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), <i>review denied</i> , 111 Wn.2d 1033 (1988) .....	21
<i>State v. Binkin</i> , 79 Wn. App. 284, 902 P.2d 673 (1995), <i>rev. denied</i> , 128 Wn.2d 1015 (1996).....	15
<i>State v. Boehning</i> , 127 Wn. App. 511, 521, 111 P.3d 899 (2005) .....	20
<i>State v. Brown</i> , 68 Wn. App. 480, 483-84, 843 P.2d 1098 (1993) .....	31
<i>State v. Bryant</i> , 89 Wn. App. 857, 950 P.2d 1004 (1998) .....	15
<i>State v. Buford</i> , 93 Wn. App. 149, 153, 967 P.2d 548 (1998).....	13
<i>State v. Callahan</i> , 77 Wn.2d 27, 31, 459 P.2d 400 (1969) .....	24, 26, 33
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	22
<i>State v. Campos</i> , 100 Wn. App. 218, 220, 224, 998 P.2d 893, <i>review denied</i> , 142 Wn.2d 1006 (2000) .....	31
<i>State v. Casbeer</i> , 48 Wn. App. 539, 542, 740 P.2d 335, <i>review denied</i> , 109 Wn.2d 1008 (1987).....	22
<i>State v. Chakos</i> , 74 Wn.2d 154, 443 P.2d 815 (1968), <i>cert. denied</i> , 393 U.S. 1090, 89 S. Ct. 855, 21 L. Ed. 2d 783 (1989).....	26
<i>State v. Cleppe</i> , 96 Wn.2d 373, 380-81, 635 P.2d 435 (1981), <i>cert. denied</i> , 456 U.S. 1006, 102 S.Ct. 2296 (1982) .....	10
<i>State v. Coahran</i> , 27 Wn. App. 664, 668, 620 P.2d 116 (1980) .....	24

<i>State v. Collins</i> , 76 Wn. App. 496, 501, 886 P.2d 243, <i>review denied</i> , 126 Wn.2d 1016, 894 P.2d 565 (1995).....	25
<i>State v. Cord</i> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985) .....	22
<i>State v. Darden</i> , 145 Wn.2d 612, 624-625, 41 P.3d 1189 (2002).....	31
<i>State v. Delmarter</i> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....	22, 30
<i>State v. Echeverria</i> , 85 Wn. App. 777, 934 P.2d 1214 (1997) .....	30
<i>State v. Gutierrez</i> , 92 Wn. App. 343, 347, 961 P.2d 974 (1998).....	14
<i>State v. Hagler</i> , 74 Wn. App. 232, 236, 872 P.2d 85 (1994).....	31
<i>State v. Hansen</i> , 46 Wn. App. 292, 297, 730 P.2d 706 (1986), <i>modified by</i> , 737 P.2d 670 (1987).....	12
<i>State v. Holbrook</i> , 66 Wn.2d 278, 401 P.2d 971 (1965) .....	21
<i>State v. Huff</i> , 64 Wn. App. 641, 654, 826 P.2d 698 (1992).....	29, 30
<i>State v. Jones</i> , 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).....	24
<i>State v. Joy</i> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....	21
<i>State v. Lane</i> , 56 Wn. App. 286, 297, 786 P.2d 277 (1989) .....	31
<i>State v. Lopez</i> , 79 Wn. App. 755, 768, 904 P.2d 1179 (1995).....	31
<i>State v. Lucky</i> , 128 Wn.2d 727, 731, 912 P.2d 483 (1996), ( <i>overruled on other grounds by State v. Berlin</i> , 133 Wn.2d 541, 544, 947 P.2d 700 (1997)).....	7, 8
<i>State v. Mabry</i> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988).....	21
<i>State v. Mak</i> , 105 Wn.2d 692, 726, 718 P.2d 407, <i>cert. denied</i> , 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986).....	15
<i>State v. Mantell</i> , 71 Wn.2d 768, 430 P.2d 980 (1967).....	26
<i>State v. Manthie</i> , 39 Wn. App. 815, 820, 696 P.2d 33 (1985).....	14
<i>State v. Mathews</i> , 4 Wn. App. 653, 656, 484 P.2d 942 (1971).....	24

<i>State v. May</i> , 100 Wn. App. 478, 482, 997 P.2d 356 (2000) .....	10
<i>State v. McCullum</i> , 98 Wn.2d 484, 489, 656 P.2d 1064 (1983).....	21
<i>State v. McPherson</i> , 111 Wn. App. 747; 46 P.3d 284 (2002) .....	31
<i>State v. Morris</i> , 70 Wn.2d 27, 422 P.2d 27 (1966) .....	26
<i>State v. Ng</i> , 110 Wn.2d 32, 41, 750 P.2d 632 (1988).....	11
<i>State v. Olinger</i> , 130 Wn. App. 22, 26, 121 P.3d 724 (2005).....	10
<i>State v. Potts</i> , 1 Wn. App. 614, 618, 464 P.2d 742 (1969) .....	25
<i>State v. Powell</i> , 126 Wn.2d 244, 258, 893 P.2d 615 (1995) .....	7
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) .....	21
<i>State v. Sanders</i> , 66 Wn. App. 380, 390, 832 P.2d 1326 (1992) .....	11
<i>State v. Simpson</i> , 22 Wn. App. 572, 573, 590 P.2d 1276 (1979) .....	31
<i>State v. Sims</i> , 119 Wn.2d 138, 142, 829 P.2d 1075 (1992) .....	11
<i>State v. Spruell</i> , 57 Wn. App. 383, 788 P.2d 21 (1990).....	33
<i>State v. Staley</i> , 123 Wn.2d 794, 799, 872 P.2d 502 (1994).....	7, 10, 11
<i>State v. Turner</i> , 103 Wn. App. 515, 521, 13 P.3d 234 (2000).....	24
<i>State v. Turner</i> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981).....	21
<i>State v. Walker</i> , 136 Wn.2d 767, 771, 966 P.2d 883 (1998).....	7
<i>State v. Weekly</i> , 41 Wn.2d 727, 252 P.2d 246 (1952).....	14
<i>State v. Weiss</i> , 73 Wn.2d 372, 438 P.2d 610 (1968).....	26
<i>State v. Williamson</i> , 100 Wn. App. 248, 257, 996 P.2d 1097 (2000).....	8

**Federal and Other Jurisdictions**

*Beck v. Washington*, 369 U.S. 541, 557, 82 S.Ct. 955,  
8 L.Ed.2d 834 (1962).....14

**Statutes**

RCW 69.50.101 .....23  
RCW 69.50.401 .....23  
RCW 9.41.010.....23  
RCW 9.41.040 .....23

**Rules and Regulations**

CrR 6.15.....8  
CrR 6.15(a) .....8  
CrR 6.15(b).....8

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court exercise permissible discretion in refusing to submit defendant's proposed unwitting possession instruction to the jury?
2. Should this court reject defendant's claims of prejudicial misconduct when the prosecutor's challenged arguments were based upon evidence adduced at trial or inferences reasonably drawn from such evidence?
3. Did the State adduce sufficient evidence to support the jury verdicts?

B. STATEMENT OF THE CASE.

1. Procedure

On February 8, 2008, the Pierce County Prosecuting Attorney's Office charged NATHAN RAY WINDFIELD hereinafter "defendant," with one count of unlawful possession of a controlled substance with intent to deliver (cocaine), one count of unlawful possession of a controlled substance (40 grams or less of marijuana), one count of resisting arrest, and one count of unlawful possession of a firearm in the first degree. CP 1-3. On October 22, 2008, an amended information was filed which added one count of bail jumping. CP 7-9.

The case was assigned to the Honorable D. Gary Steiner for trial. After a CrR 3.5 hearing, the court ruled defendant's statements made to Officer Jared Williams were admissible in the State's case in chief. RP 43. Upon hearing the evidence and deliberating on it, the jury returned a verdict finding defendant guilty of all five charges. CP 73-78. By special verdict, the jury found defendant possessed the controlled substances within one thousand feet of a school bus route and that he was armed with a firearm during the commission of this crime. *Id.*

Defendant was sentenced below the standard range on the possession of cocaine with intent to deliver, receiving 60 months in order not to exceed the statutory maximum term. He received an additional 36 months for the firearm enhancement, and 24 months for the school bus enhancement, to run consecutively with each other and with the cocaine sentence. CP 82-95. He was given a high end standard range on the resisting arrest and the possession of a firearm, to run concurrently with the cocaine sentence. *Id.* Additionally, he received a suspended sentence on the misdemeanor convictions of possession of marijuana and bail jumping. CP 101-105. This resulted in a total confinement period of 120 months. CP 82-95. From entry of this judgment, defendant filed a timely notice of appeal. CP 96.

## 2. Facts

On February 7, 2008, several witnesses reported an altercation in a parking lot on the corner of S. 56<sup>th</sup> St. and Orchard St., in Tacoma,

Washington<sup>1</sup>. RP 62, 79, 232. At trial, witnesses testified that an African-American male wearing a puffy black jacket left the scene of the altercation in a silver Chrysler Sebring. RP 63, 79-80, 110-112. One witness provided a license plate number of 270-WRF to police. RP 64. Two witnesses testified the suspect wore a blue New York Yankees baseball cap. RP 63, 111. The witnesses also testified to seeing the suspect pull a semiautomatic, Glock handgun out from under his coat. RP 63, 110, 117.

Police dispatch broadcast the witnesses' descriptions of the suspect and Sebring to patrol officers in the area. RP 124, 235, 341.

Approximately eight minutes after receiving the information, Tacoma Police Officer Betts and his partner spotted the Sebring heading Northbound on S. Tyler St. RP 342, 345. Officer Betts, driving an unmarked police vehicle, did a u-turn, confirmed the vehicle matched the description, and notified other officers in the area via radio. RP 344. Officer Betts followed the Sebring to a Shell gas station located at the corner of S. Center St. and S. Tyler St. RP 346. He parked across the street from the Shell gas station and observed the driver through binoculars. RP 351, 403. The driver, later identified as the defendant, got out of the Sebring, walked into the gas station, returned to the car, and began pumping gas. RP 346, 350. Defendant fit the suspect description;

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<sup>1</sup> Hereinafter referred to as "original scene."

he was wearing a blue baseball cap, black puffy jacket and dark pants. RP 267, 346. Two passengers remained in the Sebring. RP 346.

As defendant pumped gas, several patrol cars pulled into the gas station. RP 349-350. Defendant attempted to hide behind the gas pump. RP 349. When officers turned on their overhead lights, defendant ran in a Northeast direction through the parking lot. RP 350. The passengers in the Sebring complied with officer demands. RP 351. Officer Betts drove across the street and attempted to block the parking lot exit with his vehicle, but defendant ran around the front of the car. RP 351-352. Officer Betts got out of his car and began to pursue defendant on foot. RP 352. Several Tacoma police officers followed. RP 138. Jared Williams and Samuel Lopez followed the chase in their patrol car. RP 136-139, 269. Officers pursued defendant Northbound on S. Tyler St., then Eastbound through the parking lot of the Madrona Park Apartments. RP 139, 270, 353-354. After entering the apartment complex parking lot, Officers Williams and Lopez got out of their vehicle and pursued defendant on foot. RP 139-140. In an attempt to head off defendant, Officer Betts ran East on S. 31<sup>st</sup> St., then North on S. Monroe St.; in doing so he lost sight of defendant for the first time since spotting the Sebring. RP 351-352, 415. The other officers, including Williams and Lopez, continued running in an Eastward direction through the parking lot and toward Monroe St. into a backyard. RP 140. Officers caught defendant when he fell while running through a backyard. RP 126, 270. Defendant

resisted arrest so Officer Lopez used an electronic control tool (ECT) to stop defendant from struggling. RP 127. Officers Williams and Lopez both testified that they did not lose sight of defendant from the time defendant ran from the Sebring at the Shell gas station until defendant was arrested. RP 165, 289.

Officer Lopez performed a pat down on defendant and found a shoulder harness with an empty pistol holster on one side and a loaded Glock 21 magazine with ball ammunition on the other. RP 128, 271, 330, 358. Officer Williams found the blue New York Yankees baseball cap close to the scene of the arrest. RP 271. Officers read defendant his Miranda rights on two separate occasions. RP 238, 273-275. After the second reading, defendant denied being in the Sebring, running from the Shell gas station, and wearing the holster police found on him. RP 308.

Some officers remained at the Shell gas station during the chase and monitored the Sebring. RP 364. Officer Betts returned to the Shell gas station and searched the Sebring. RP 364-365. He found three grams of marijuana in plain view in the center console drink holders. RP 364. Upon opening the center console, Officer Betts removed a purple Crown Royal bag containing several two gram bindles of crack cocaine, totaling 38 grams. RP 365, 515. Below that, Officer Betts found a blue and purple digital scale with a white residue, later identified as cocaine, on the face. *Id.* At the bottom of the center console, Officer Betts located a black Glock box and paperwork for a GTL 21 tactical light. RP 366. Betts also

found a loaded Glock 21 firearm under the front passenger seat floor mat with the GTL 21 tactical light attached. RP 376-377. The tactical light appeared to go with the Glock box in the center console. RP 377.

At trial, an expert witness from the Tacoma Police Department narcotics division testified that the amount and packaging of the crack cocaine, presence of the digital scale and firearm, and lack of drug use paraphernalia, was indicative of an intent to sell the drugs as opposed to having them for personal use. RP 510, 513, 517-518. A forensic firearms expert testified that the firearm found in the Sebring fit in defendant's holster when the tactical light was not attached and demonstrated how the tactical light could be easily attached and removed within seconds. RP 535, 539. That witness also tested the gun prior to trial and confirmed the magazine found on defendant fit into the gun found in the Sebring. RP 530-531.

Defendant testified at trial and denied ever being in the Sebring. RP 628, 642. Defendant testified he was in the apartment complex parking lot between two cars, smoking marijuana, when he saw police pull into the Shell station, and then saw an African-American man start running. RP 631. Defendant said as soon as the man took off running, defendant ran in an Eastward direction through the lot to avoid being seen by the police. *Id.* Defendant remembers being tackled, officers trying to arrest him, and being put into a patrol vehicle, but denies being the man who ran from the Shell gas station. RP 632-634.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY REFUSED  
DEFENDANT'S PROPOSED UNWITTING  
POSSESSION JURY INSTRUCTION.

A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). The standard for review applied to a trial court's failure to give jury instructions depends on whether the trial court's refusal to grant the jury instructions was based upon a matter of law or of fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), (*overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997)). An abuse of discretion exists only when a trial court's exercise of its discretion is manifestly unreasonable or based on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The range of discretionary choices is a question of law and the judge abuses his or her discretion only if the discretionary decision is contrary to the law. *State v. Williamson*, 100

Wn. App. 248, 257, 996 P.2d 1097 (2000). The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo. *Lucky*, 128 Wn.2d at 731.

CrR 6.15 requires proposed jury instructions to be filed with the clerk when a case is called for trial. CrR 6.15(a); *see* Appendix A. Additional instructions, not originally reasonably anticipated, can be served and filed any time before the court instructs the jury. *Id.* Courts may allow parties to request certain instructions by number from any published book of instructions. *Id.* A party objecting to proposed or refused jury instructions must state the reason for the objection, specify the number, paragraph, and part of instruction to be given or refused. CrR 6.15(b). Exceptions to the trial court's refusal to give an instruction must clearly inform the trial judge of the points of law involved. *City of Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450, 453 (1976). If the exception and discussion does not do so, issues involved will not be considered on appeal. *Id.*

As to possession charges, the court instructed the jury on unlawful possession of a controlled substance with intent to deliver (cocaine), a lesser included unlawful possession of a controlled substance (cocaine), unlawful possession of a firearm, and unlawful possession of a controlled substance (40 grams or less of marijuana). On appeal, defendant contends he was entitled to an unwitting possession instruction for each of the possession charges.

- a. Defendant did not properly preserve the objection for appeal.

Defendant did not file or serve proposed jury instructions for unwitting possession at any time during the proceedings. At close of defendant's case, counsel for defendant verbally requested an unwitting possession instruction but did not provide a written proposal, request the instruction by number from any published book of instructions, or provide a case supporting the use of the instruction. RP 658. After the initial request, the trial court judge gave defendant's counsel time during the recess to provide a more concrete argument for the unwitting possession instruction. RP 660. Defendant failed to provide better information, including specific wording as to what an unwitting possession instruction entails. RP 664. Based upon the information before it, the court refused to submit the requested instruction to the jury. *Id.* While defendant formally objected to the refusal of the instruction, there is nothing in the record below setting forth the wording of the rejected instruction. RP 663. By failing to follow court procedure in submitting a proposed instruction, and failing to make a detailed objection, defendant has failed to properly preserve this issue for review.

Should the court find the issue was properly preserved, the State asserts defendant preserved his claim only with respect to the charge pertaining to the cocaine. When informally discussing the proposed unwitting possession instruction, defendant only addressed the

applicability of the charge as to the drugs that “were concealed.” RP 659. Evidence presented showed the only concealed drugs to be the cocaine found in the center console. Later in the proceedings, defendant formally objected to the refusal of the proposed instruction but never specifically addressed the applicability of the unwitting possession instruction as to the firearm charge or the possession of marijuana charge; defendant did not preserve his claim as to the firearm and marijuana charges for appeal.

- b. The trial court did not err by refusing to submit unwitting possession instructions to the jury with respect to the firearm or the possession with intent to deliver charge.

In evaluating if sufficient evidence exists to support a jury instruction on an affirmative defense, the evidence must be interpreted most strongly in favor of the defendant without weighing the proof or judging witnesses’ credibility. *State v. May*, 100 Wn. App. 478, 482, 997 P.2d 356 (2000). All evidence must be considered regardless of which party presented the evidence. *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005).

Unwitting possession is an affirmative defense to simple possession charges. *State v. Cleppe*, 96 Wn.2d 373, 380-81, 635 P.2d 435 (1981), *cert. denied*, 456 U.S. 1006, 102 S. Ct. 2296 (1982). There are two disjunctive elements to an unwitting possession defense. *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994). In order for an

unwitting possession defense to be successfully asserted, defendant has the burden of showing by a preponderance of the evidence either of the following: (1) he did not know he was in possession of the controlled substance or, (2) he did not know the nature of the substance he possessed. *Id.* Therefore, because unwitting possession challenges a defendant's knowledge of possession, the instruction does not apply to charges with knowledge as an element. See *State v. Ng*, 110 Wn.2d 32, 41, 750 P.2d 632 (1988) (a requested instruction need not be given if the subject matter is adequately covered elsewhere in the jury instructions).

To convict defendant of unlawful possession of a firearm, the jury had to find beyond a reasonable doubt defendant knowingly possessed a firearm. CP 34-72, Jury Instruction No. 14. Therefore, the State had the burden of proving knowing possession even in the absence of an unwitting possession instruction, making the instruction unnecessary.

Likewise, the instruction was unnecessary for the charge of unlawful possession of a controlled substance with intent to deliver (cocaine). It is impossible for a person to intend to deliver a controlled substance without knowing the nature of the substance he is delivering. *State v. Sims*, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992). Because one must know the substance is a controlled substance in order to intend to deliver it, an unwitting possession instruction is improper. *State v. Sanders*, 66 Wn. App. 380, 390, 832 P.2d 1326 (1992). The elements of

the crime put the burden on the State to prove knowledge of possession; the court need not instruct the jury on unwitting possession for this charge.

The State acknowledges an unwitting possession instruction would have been relevant to the lesser included offense of unlawful possession of a controlled substance (cocaine), however, any error in failing to instruct on unwitting possession for this lesser offense is harmless. The omission of an instruction may be harmless error if the “factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions.” *State v. Hansen*, 46 Wn. App. 292, 297, 730 P.2d 706 (1986), *modified by*, 737 P.2d 670 (1987). The factual question posed by an unwitting possession instruction is whether defendant knew he possessed or maintained control over the controlled substance. The jury found requisite knowledge when considering the greater charge of possession with intent to deliver. Because the jury found defendant possessed the cocaine with the intent to deliver it to another, the jury never reached the lesser included charge of unlawful possession. Omission of the proposed instruction had no effect on the jury’s final decision and did not prejudice defendant.

- c. The record shows the trial judge properly refused to instruct on unwitting possession with respect to the unlawful possession of marijuana charge as the instruction was not factually supported.

Here, the record shows that with regard to the possession of marijuana charge, the trial judge properly refused the unwitting possession jury instruction for lack of factual support. A criminal defendant is not entitled to an unwitting possession instruction unless evidence sufficiently permits a reasonable juror to find, by a preponderance of the evidence, that he unwittingly possessed the contraband. *State v. Buford*, 93 Wn. App. 149, 153, 967 P.2d 548 (1998).

At trial, defendant did not articulate what evidence was before the jury that would support the unwitting possession instruction with regard to the marijuana. Officer Betts watched defendant get out of the driver's seat of the Sebring while at the Shell gas station. RP 346. When searching the Sebring, Betts found three grams of marijuana in plain sight in the center console cup holder – a place meant to be easily accessible to drivers. RP 364. Even viewing this evidence in the light most favorable to the defendant, it does not support the giving of an instruction. The evidence indicates that defendant knows what marijuana looks like, and that there was marijuana right next to him in the Sebring. While, defendant denied being in the Sebring at any time, he did testify to past use of marijuana,

indicating defendant would recognize marijuana if he saw it. Neither prong to asserting unwitting possession is factually supported in this case. While the trial judge did not accurately articulate the facts supporting refusal of the instruction, his ultimate decision was not an abuse of discretion. A reviewing court can affirm the decision of a trial court on any ground supported by the record, even if it is not the ground used by the trial judge. *State v. Gutierrez*, 92 Wn. App. 343, 347, 961 P.2d 974 (1998). The facts in the record support the trial judge's refusal of the proposed unwitting possession instruction and therefore, the decision can be affirmed despite the trial judges flawed reasoning.

2. THE PROSECUTOR DID NOT COMMIT  
PREJUDICIAL MISCONDUCT DURING CLOSING  
AND REBUTTAL ARGUMENTS.

To prove a prosecutor's actions constitute misconduct, the defendant must show the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." *Beck v. Washington*, 369 U.S. 541, 557, 82 S.Ct. 955, 8 L.Ed.2d 834 (1962). A defendant claiming prosecutorial misconduct in argument bears the burden of demonstrating that the remarks were improper and that they

prejudiced the defense. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986); *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995), *rev. denied*, 128 Wn.2d 1015 (1996). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *Binkin*, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Id.* Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. *State v. Bryant*, 89 Wn. App. 857, 950 P.2d 1004 (1998).

On appeal, defendant contends the prosecutor committed misconduct by arguing facts not supported by the evidence. Defendant challenges three arguments made by the prosecutor. Appellant's Brief 28. Defendant objected to only two of the challenged arguments in the trial court. RP 676, 729. The court overruled both objections, indicating that the jury had been presented the facts and the law. *Id.* Each challenged argument will be addressed below.

Defendant challenges the following emphasized portion of the argument as being improper:

Prosecutor: We have people in the original scene, Mr.

Blessum and Mr. Nagle, both who said *I saw him pull a gun, I saw that person pull a gun out from underneath and wave it around*. They didn't provide a description beyond semiautomatic. You can ask also in your common experience whether that detail would be something that would be reported, if they saw this fight, adrenalin pumping, are they going to get every single detail on the gun...

...There were three witnesses from the original scene all who said *the person with the gun was wearing a big black coat and the black and blue cap*. There is no evidence – they all testified they filled out those written statements very soon after.

RP 733. There was no objection to this argument in the trial court; defendant must show that it was so flagrant and ill-intentioned that no instruction could have eliminated the prejudice.

To begin with, this argument was supported by evidence adduced at trial or by reasonable inferences flowing from the evidence. On direct examination both Mr. Blessum and Mr. Nagel testified to seeing a man reach into his coat and pull out a gun. RP 76, 110. Mr. Nagel described the gun as semiautomatic, probably a small Glock. RP 117. Both Mr. Blessum and Mr. Nagel described the man with the gun as African-American, wearing a black puffy jacket and a blue baseball cap. RP 63, 111. Thus, the prosecutor's statement was based upon the evidence in the case.

Nor does the argument appear to be one made in bad faith. The prosecutor brought up these facts to support the inference that defendant knowingly possessed the firearm. The facts discussed here combined with the description of the vehicle officers saw defendant in, support the inference that defendant was at the original scene. It was reasonable for the prosecutor to ask the jury to infer that the man described by these witnesses was the defendant. It is not improper to ask a jury to draw inferences and conclusions from the evidence; it is up to the jury to decide if the inference is supported by the evidence and if it is reasonable. Connecting defendant to the firearm and original scene was important to the case, and the argument was not ill-intentioned.

Defendant's next challenged argument presents similar issues. Defendant challenges the following emphasized portion of the argument as being improper:

Prosecutor: [the witnesses] did identify the other two people [in the Sebring]. They said, yeah, I think those guys were there. I didn't see either of them with the gun. I asked Officer Betts, is it against the law to watch a fight, to be present at a fight? He said no. In addition, *I believe he testified as to the clothes that [the men in the Sebring] were wearing. Neither of them were wearing a black jacket or a New York Yankee's baseball hat. The young gentleman was wearing either white or tan.*

Defendant's Counsel: Objection, not in evidence.

Court: The jury has the evidence. Objection is overruled.

RP 729. Looking at this argument in context and based upon the evidence at trial, the challenged argument falls within acceptable boundaries.

During testimony, Officer Betts described one passenger in the Sebring as wearing red clothing. RP 422. Officer Betts described the other passenger as wearing a white and beige button up shirt and a black, non-puffy jacket.

*Id.* Witnesses described the suspect at the original scene as wearing a black puffy jacket and a blue New York Yankee's baseball cap. RP 80, 111. Officers described defendant's clothing at time of arrest as matching that of the suspect who drove away from the original scene. RP 267, 346.

Therefore, this evidence allows the inference that defendant, not the passengers, drove the car from the original scene, putting defendant in primary control of the Sebring. It is not improper to ask a jury to draw inferences from the evidence; it is up to the jury to decide if the inference is supported by the evidence and if it is reasonable. Once again, the prosecutor's argument stemmed from evidence that was before the jury, and therefore the record does not support a conclusion that the prosecutor was intentionally engaging in improper argument.

Finally, defendant challenges the following emphasized portion of the argument as being improper:

Prosecutor: The defendant took the stand and he admitted he was wearing the shoulder holster. Circumstantial

evidence that he was wearing the shoulder holster at the fight are from the civilian witnesses that testified earlier in the case. *Mr. Blessum testified that he saw defendant reach under his jacket.*

Defendant's Counsel: Objection. Did not identify the defendant. Identified a person at the scene.

Court: The objection is overruled. The jury has both the facts and the law. Thank you for your objection.

Prosecutor: Mr. Blessum testified that the person he saw in the parking lot reached under his jacket in a manner, and he demonstrated like this (indicating). He didn't say he pulled out from his waistband from behind or out of the pocket. The gun came across this way (indicating). That is circumstantial evidence of a gun being in a shoulder holster.

RP 676. The record does not support a conclusion that the prosecutor was intentionally engaging in improper argument. The prosecutor did initially state a witness identified defendant as being at the original scene. *Id.* However, following the objection, the prosecutor immediately rephrased her statement by saying the witness saw "a person" at the fight. *Id.* This action demonstrates the prosecutor was acting in good faith by correcting her poor phrasing. This does not constitute misconduct.

Moreover, the trial court instructed the jury to disregard any lawyer's remarks not supported by the evidence or the law. CP 34-72, Jury Instruction No. 1. Despite overruling defendant's objection, the trial court reminded jurors they had the facts and law. RP 676. This reminder, renders the prosecutor's initial overstatement harmless.

In the Appellant's Brief, defendant discusses a comment about him leaving the original scene in the Sebring, however, it is unclear to what part of the prosecutor's argument defendant is referring. Appellant's Brief 28. The prosecutor does not specifically mention defendant leaving the original scene in a Chrysler Sebring during any part of closing argument. RP 669-687.

Defendant's reliance on *State v. Boehning* to support his prejudicial misconduct claim is misplaced. In *Boehning*, the prosecutor made suggestions not reasonably inferred from the evidence, and discussed prior rape charges against Boehning that had been dropped and were inadmissible as evidence. *State v. Boehning*, 127 Wn. App. 511, 521, 111 P.3d 899 (2005). This Court found the prosecutor's statements in *Boehning* to be flagrant and prejudicial. *Id.* The prosecutor's statements in the case at hand are supported by the evidence and were based on reasonable inferences from the evidence. Misconduct requires defendant to show that the prosecutor was acting in bad faith or that the prosecutor's challenged arguments were improper. Defendant has failed to meet his burden. The claim of prejudicial misconduct should be rejected.

3. SUFFICIENT EVIDENCE WAS ADDUCED FROM WHICH THE JURY COULD FIND DEFENDANT HAD POSSESSION OF THE FIREARM, COCAINE, AND MARIJUANA.

Due process requires the State to bear the burden of proving each element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v.*

*Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

*State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, if the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld. Defendant challenges the sufficiency of the evidence that he possessed the firearm, cocaine, and marijuana.

To convict defendant of unlawful possession of a firearm, the State had to prove beyond a reasonable doubt:

- (1) that on or about the 7<sup>th</sup> day of February, 2008, defendant knowingly had a firearm in his possession or control;

- (2) that defendant had previously been convicted of a serious offense; and
- (3) that the possession or control of the firearm occurred in the State of Washington.

CP 34-72, Jury Instruction No. 15. *See also* Jury Instruction No. 14, RCW 9.41.010, RCW 9.41.040.

To convict defendant of unlawful possession of a controlled substance with intent to deliver – cocaine, the State had to prove beyond a reasonable doubt:

- (1) that on or about the 7<sup>th</sup> day of February, 2008, defendant possessed a controlled substance;
- (2) that defendant possessed the substance with the intent to deliver a controlled substance; and
- (3) that the acts occurred in the State of Washington.

CP 34-72, Jury Instruction No. 5. *See also* Jury Instruction No. 4, RCW 69.50.401, RCW 69.50.101.

To convict defendant of unlawful possession of a controlled substance – 40 grams or less of marijuana, the State had to prove beyond a reasonable doubt:

- (1) that on or about the 7<sup>th</sup> day of February, 2008, defendant unlawfully possessed forty grams or less of marijuana; and
- (2) that the acts occurred in the State of Washington.

CP 34-72, Jury Instruction No. 21. *See also* Jury Instruction No. 20, RCW 69.50.401, RCW 69.50.101.

The trial court provided the jury with the following instruction on possession:

Possession means having a substance/firearm 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/item.

CP 34-72, Jury Instruction No. 6, 17. As the jury was instructed in this case, possession may be actual or constructive. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). A defendant actually possesses an item if he has physical custody of it; he constructively possesses the item if he has dominion and control over it or the premises where the item is found. *Jones*, 146 Wn.2d at 333; *State v. Coahran*, 27 Wn. App. 664, 668, 620 P.2d 116 (1980) (citing *State v. Callahan*, 77 Wn.2d 27, 31, 459 P.2d 400 (1969)). An automobile is considered to be "premises." *State v. Turner*, 103 Wn. App. 515, 521, 13 P.3d 234 (2000); *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971). A person has dominion and control of an item if he has immediate access to it. *Jones*, 146 Wn.2d at 333. Mere proximity, however, is not enough to establish possession. *Id.* No single factor is dispositive in determining dominion and control. *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243, review denied, 126 Wn.2d

1016, 894 P.2d 565 (1995). The totality of the circumstances must be considered. *Collins*, 76 Wn. App. at 501.

- a. As defendant had dominion and control over the Sebring, the jury could find that he constructively possessed items found inside the vehicle.

The State adduced sufficient evidence to support the conclusion that defendant maintained dominion and control over the premises (the Sebring). Witnesses testified a man wearing a black jacket, blue New York Yankee's baseball hat, and carrying a gun drove away from the original scene in the Sebring. RP 63, 79-80, 110-112. Officer Betts testified to watching defendant, wearing clothes matching the suspect's description, get out of the driver's seat of the same Sebring 20 minutes later at a Shell gas station. RP 346. After defendant's arrest, officers found a gun holster on defendant's person in a location similar to where witnesses testified to seeing the suspect pull a gun from at the original scene. RP 128, 271, 358. From this evidence, the jury could reasonably infer defendant is the suspect who drove the Sebring from the original scene to the Shell gas station, maintaining dominion and control over the Sebring for the duration of the incident.

The case at hand is similar to *State v. Potts* in which the court found Potts had dominion and control over a vehicle containing drugs, even though he did not own the car. *State v. Potts*, 1 Wn. App. 614, 618, 464 P.2d 742 (1969). The court found that Potts driving the vehicle and

his possession of the vehicle's keys contributed to a reasonable conclusion that he had dominion and control over the vehicle, and therefore constructively possessed the drugs inside it. *Id.*

Similarly, evidence in the case at hand shows defendant drove the Sebring and therefore was in possession of the vehicle's keys. This, combined with other evidence, shows defendant maintained dominion and control over the Sebring. When there is sufficient evidence of defendant's dominion and control over the premises, defendant may be found guilty of constructive possession of contraband found in those premises even if he denies knowledge of the item. *Callahan*, 77 Wn.2d at 29-30 (citing *State v. Weiss*, 73 Wn.2d 372, 438 P.2d 610 (1968); *State v. Chakos*, 74 Wn.2d 154, 443 P.2d 815 (1968), *cert. denied*, 393 U.S. 1090, 89 S. Ct. 855, 21 L. Ed. 2d 783 (1989); *State v. Mantell*, 71 Wn.2d 768, 430 P.2d 980 (1967); *State v. Morris*, 70 Wn.2d 27, 422 P.2d 27 (1966)). As will be more fully discussed below, defendant's dominion and control over the Sebring put him in possession of the contraband it contained.

- b. The jury had sufficient evidence to convict defendant of unlawful possession of a firearm.

The State adduced sufficient evidence to show defendant knowingly possessed the firearm. As discussed above, defendant had dominion and control over the Sebring. At trial, Officer Betts testified to finding a black, semiautomatic, Glock 21 firearm under the floor mat of

the Sebring's front passenger seat. RP 376-377. As driver of the Sebring, defendant had easy access to the passenger floor area and could quickly and easily hide the firearm there. This goes beyond mere proximity to the firearm; the firearm was immediately accessible to defendant, and therefore in his constructive possession. Additionally, the gun found in the Sebring matched the description of the gun witnesses testified to seeing at the original scene in the actual possession of a person matching defendant's description. *Id.*, RP 63, 110, 117. Officers testified to finding a loaded Glock 21 magazine on defendant's person at the time of arrest. RP 128. Later, testing showed the magazine fit into the Glock found in the Sebring. RP 530-531. This leads to the inference that defendant was the person holding the Glock firearm at the scene of the altercation.

To further support defendant's knowledge of possession, the jury heard evidence that upon seeing police at the Shell gas station, defendant first attempted to hide, then took off running. RP 350. Upon arrest, he denied everything to police, including being in the Sebring. RP 275. This behavior indicates a consciousness of guilt. There is sufficient evidence to support the conclusion that defendant knowingly possessed the firearm.

It must also be noted that defendant took the stand and denied any knowledge or possession of the gun. RP 628. This means the jury was asked to assess defendant's credibility in making a determination as to the "knowingly possessed" element. By its verdict, the jury clearly found defendant was lying when he denied knowledge and possession. This

credibility assessment must be considered when weighing the sufficiency of the evidence. Accepting the State's evidence as true, and viewing the evidence in the light most favorable to the State, the jury had sufficient evidence and was within their rights to find defendant possessed the firearm.

- c. The jury had sufficient evidence to convict defendant of unlawful possession of a controlled substance with intent to deliver (cocaine).

The State adduced sufficient evidence that defendant possessed cocaine. As discussed above, defendant maintained dominion and control over the Sebring. Having dominion and control over the Sebring, defendant also had dominion and control over the controlled substances inside the Sebring. In the Sebring, Officer Betts found a firearm with a tactical light attached. RP 376-377. Reasonable inferences from witness testimony suggests defendant possessed that firearm, without the tactical light, while at the original scene. Therefore, it is reasonable to infer defendant attached the tactical light at some point after leaving the original scene but before abandoning the vehicle at the Shell gas station. Officer Betts located the box for the tactical light and the paperwork for it in the center console of the vehicle, under the purple Crown Royal bag, containing 38 grams of cocaine, and the digital scale with cocaine residue on it. RP 365, 515. It is a reasonable inference that the tactical light was stored in this box when not attached to the gun. Therefore, to retrieve the

tactical light from the box, defendant had to either remove the box from the center console or put the box back in the center console and place the cocaine and scale on top. Additionally, the presence of the tactical light box in the center console suggests defendant knowingly used the center console for storage of items, and therefore it is a reasonable inference that defendant knowingly used the center console to store the cocaine and scale as well.

To further support defendant's knowledge of possession, the jury heard evidence that upon seeing police at the Shell gas station, defendant first attempted to hide, then took off running. RP 350. Upon arrest, he denied everything to police, including being in the Sebring. RP 275. This behavior indicates a consciousness of guilt. Additionally, defendant took the stand and put his credibility at issue by testifying he never occupied the Sebring and knew nothing about the Sebring or its contents. RP 628. The jury's verdict indicates it did not find defendant to be credible in his explanations.

The conclusion that defendant knowingly possessed the cocaine is supported by *State v. Huff*, in which the defendant, Huff, attempted to evade police when they tried to stop his vehicle. *State v. Huff*, 64 Wn. App. 641, 654, 826 P.2d 698 (1992). The police found drugs in a bag buried under laundry in the back seat of Huff's car. *Id.* The court found his behavior, combined with his dominion and control over the car, sufficient evidence to support a possession conviction even though the

drugs were hidden. *Id.* In the case at hand, the cocaine was hidden in the Sebring defendant had dominion and control over and defendant attempted to evade police. Accepting the State's evidence as true, and viewing the evidence in the light most favorable to the State, the jury had sufficient evidence and was within their rights to find defendant possessed the cocaine.

Defendant mistakenly tries to compare his possession of the firearm and cocaine to *State v. Echeverria*, 85 Wn. App. 777, 934 P.2d 1214 (1997). A trial court found Echeverria guilty of "carrying" a Chinese throwing star found below Echeverria's seat in his car. The appellate court reversed, not because "close proximity alone is not enough," but because the State did not prove Echeverria "carried" the throwing star in any way. *Id.* at 784; Appellant's Brief, 13. In defendant's case, the State did not have to prove defendant carried the firearm or cocaine; constructive possession of the items is sufficient.

Defendant does not formally assign error to the sufficiency of evidence supporting the intent to deliver element of the charge, but does discuss the issue in his brief to the court. Appellant's Brief 11-12. Criminal intent may be inferred from conduct if it is evident "as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Intent to deliver may not be based solely on possession of a controlled substance; there must be at least one additional factor to make an inference of intent to deliver. *State v. Darden*, 145 Wn.2d 612, 624-

625, 41 P.3d 1189 (2002); *State v. Brown*, 68 Wn. App. 480, 483-84, 843 P.2d 1098 (1993). “The additional factor must be suggestive of sale as opposed to mere possession in order to provide substantial corroborating evidence of intent to deliver.” *State v. Hagler*, 74 Wn. App. 232, 236, 872 P.2d 85 (1994). A police officer’s opinion that a defendant possessed more drugs than normal for personal use is insufficient to act as a corroborating factor to establish intent to deliver. *State v. Lopez*, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995).

Case law has provided a variety of factors that may be used as a corroborating factor: *State v. Lane*, 56 Wn. App. 286, 297, 786 P.2d 277 (1989) (\$1000 worth of drugs, scales and controlled buy sufficient to support finding of intent to deliver); *State v. Simpson*, 22 Wn. App. 572, 573, 590 P.2d 1276 (1979) (large quantity of uncut heroin combined with large amount of cutting agent and packaging material sufficient to support intent to deliver); *Hagler*, 74 Wn. App. at 237, (the amount of drugs found on defendant, which officer testified was inconsistent with personal use, coupled with large amount of cash sufficient to prove intent to deliver); *State v. McPherson*, 111 Wn. App. 747; 46 P.3d 284 (2002) (drugs found in possession of nearby accomplice combined with defendant’s possession of scale, cash, and notebooks with records of sales sufficient to uphold finding of intent to deliver); *State v. Campos*, 100 Wn. App. 218, 220, 224, 998 P.2d 893 (25 grams of rock cocaine, \$1,750 cash, opinion testimony that amount of drugs and cash consistent with drug sales, a

pager, a cell phone, and cell phone charger found in defendant's truck, together with a paper list of columns of numbers and a slang word for cocaine sufficient to establish intent to deliver) *review denied*, 142 Wn.2d 1006 (2000).

The Tacoma Police Department narcotics expert witness testified that the presence of the firearm and scale, the packaging of 38 grams of cocaine into separate baggies, and the lack of drug use paraphernalia in the vehicle supported an inference that defendant intended to sell the cocaine. RP 510, 513, 517-518. This opinion, in addition to defendant's actions, provided sufficient corroborating evidence to support the jury's conclusion that defendant not only knowingly possessed the cocaine, he had an intent to deliver the cocaine as well.

- d. The jury had sufficient evidence to convict defendant of unlawful possession of a controlled substance (40 grams or less of marijuana).

Under the above instructions, the State did not have to prove defendant knowingly possessed the marijuana. Rather, the State needed only to prove the marijuana was in fact in defendant's possession. The State adduced sufficient evidence to show defendant had dominion and control over the Sebring, and therefore constructively possessed the marijuana located inside. Betts found the marijuana in the Sebring's center console cup holder. This area is meant to be readily accessible to

vehicle drivers, and was readily accessible to defendant as driver of the Sebring, whether or not he knew the marijuana was there.

Accepting the State's evidence as true, and viewing the evidence in the light most favorable to the State, the jury had sufficient evidence and was within their rights to find defendant possessed the marijuana.

Defendant mistakenly relies on *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969), and *State v. Spruell*, 57 Wn. App. 383, 788 P.2d 21 (1990), to show defendant did not constructively possess the drugs and firearm in the Sebring. Defendant's case differs from these cases in that Spruell and Callahan did not have dominion and control over the premises in which drugs were found. Both cases feature defendants, charged with possessing controlled substances, arrested in homes, not cars, where defendants were merely guests. *Callahan*, 77 Wn.2d at 28. *Spruell*, 57 Wn. App. at 388. In contrast, officers arrested defendant in the case at hand for items found in a vehicle, not a house. Additionally, possessing the keys for, and driving the Sebring, gave defendant dominion and control over the premises; the above defendants lacked dominion and control over their locations. Accepting the State's evidence as true, and viewing the evidence in the light most favorable to the State, the jury had sufficient evidence and was within their rights to find defendant maintained dominion and control over the Sebring, and possessed the firearm, cocaine, and marijuana found inside the vehicle.

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STATE OF WASHINGTON  
BY KH  
DEPUTY

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the judgment and sentence below.

DATED: July 15, 2009

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

Kathleen Proctor  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

Amanda Kunzi  
Amanda Kunzi  
Legal Intern

Certificate of Service:  
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7-15-09 Theresa Ke  
Date Signature

## **APPENDIX “A”**

*Superior Court Criminal Rules (CrR 6.15 – Instructions and Arguments)*

Westlaw

Superior Court Criminal Rules, CrR 6.15

Page 1

**C**

West's Revised Code of Washington Annotated Currentness

Title 10 Appendix. Criminal Procedure

<sup>Ⓝ</sup> Superior Court Criminal Rules (Crr) (Refs & Annos)        <sup>Ⓝ</sup> 6. Procedures at Trial (Refs & Annos)            → **RULE 6.15 INSTRUCTIONS AND ARGUMENT**

(a) **Proposed Instructions.** Proposed jury instructions shall be served and filed when a case is called for trial by serving one copy upon counsel for each party, by filing one copy with the clerk, and by delivering the original and one additional copy for each party to the trial judge. Additional instructions, which could not be reasonably anticipated, shall be served and filed at any time before the court has instructed the jury.

Not less than 10 days before the date of trial, the court may order counsel to serve and file proposed instructions not less than 3 days before the trial date.

Each proposed instruction shall be on a separate sheet of paper. The original shall not be numbered nor include citations of authority.

Any superior court may adopt special rules permitting certain instructions to be requested by number from any published book of instructions.

(b) [Reserved.]

(c) **Objection to Instructions.** Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the instructions in their final form.

(d) **Instructing the Jury and Argument of Counsel.** The court shall read the instructions to the jury. The prosecution may then address the jury after which the defense may address the jury followed by the prosecution's rebuttal.

(e) **Deliberation.** After argument, the jury shall retire to consider the verdict. The jury shall take with it the instructions given, all exhibits received in evidence and a verdict form or forms.

**(f) Questions from Jury During Deliberations.**

(1) The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing. In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence. Any additional instruction upon any point of law shall be given in writing.

(2) After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.

**(g) Several Offenses.** The verdict forms for an offense charged or necessarily included in the offense charged or an attempt to commit either the offense charged or any offense necessarily included therein may be submitted to the jury.

CREDIT(S)

[Amended effective January 2, 1974; September 1, 1986; October 1, 2002.]

Current with amendments received through March 1, 2009.

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