

No. 43132-7-II

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

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**STATE OF WASHINGTON,**  
**Respondent,**

v.

**MICHAEL DEAN HAMILTON,**  
**Appellant.**

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**APPELLANT'S BRIEF**

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## **I. INTRODUCTION/SUMMARY OF THE ARGUMENT**

At the time of the incident, the defendant-appellant in this case, Michael Dean Hamilton, was a night driver for Hannigan Express (Hannigan). Hannigan is a trucking company that employs drivers to transport fresh fish from Hoquiam, Washington, to Burlington or Bellingham during the summer season. Mr. Hamilton routinely drove different trucks for Hannigan: the company owned three trucks and leased another four to five during the seasonal summer months. It employed eight to nine drivers during the summer. Truck assignments changed daily.

Toward the end of his shift in July 2011, Mr. Hamilton was stopped for a traffic infraction. The state trooper smelled the odor of methamphetamine coming from the truck's cab and asked Mr. Hamilton if the drug was in the vehicle. Mr. Hamilton answered "no" and freely gave the trooper permission to search the truck.

The trooper found a pair of jeans in the cab. In the pocket of the jeans was a baggie containing methamphetamine residue and a pipe. Mr. Hamilton said the jeans were not his, he had only brought his lunch, logbook and a sweatshirt into the truck when he started his shift the previous evening.

The State charged Mr. Hamilton with one count of possession of a controlled substance. At trial, it needed to prove he possessed a controlled substance in Washington. During closing arguments, defense counsel conceded

Mr. Hamilton had constructive possession of the methamphetamine but argued the State had not proven the possession was knowing. “Knowing” possession was not an element the State was required to prove.

Mistakenly believing the State needed to prove knowing possession, defense counsel not only conceded the only contested element, but took no steps to establish the affirmative defense of unwitting possession. His sole argument for acquittal was that the State failed to prove Mr. Hamilton knew about the methamphetamine: “The issue is did the State convince you beyond a reasonable doubt that he knew what was in those pants pocket?” Verbatim Report of Proceeding for January 30 and 31, 2012 (VRP) 129.

The jury found Mr. Hamilton guilty. This felony conviction prevents him from pursuing his career as a truck driver.

On appeal, Mr. Hamilton argues the State failed to prove he constructively possessed the methamphetamine when it did not establish he had dominion and control over either the truck or the jeans, counsel was ineffective when he was ignorant of the nature of the charge the State sought to prove, and Mr. Hamilton was denied a fair trial by the State’s closing argument which averred that the jury could only find Mr. Hamilton unwittingly possessed the methamphetamine if it believed him strongly enough so as to be willing to award him a million dollars.

## II. ASSIGNMENT OF ERROR

### A. Assignment of Error

1. The trial court erred in allowing the issue of Mr. Hamilton's guilt to go to the jury when the evidence was insufficient to convict as a matter of law.

2. The trial court erred in allowing Mr. Hamilton to be tried in violation of his right to effective counsel.

3. The trial court erred in allowing Mr. Hamilton to be tried in violation of his due process rights.

4. The trial court erred in allowing the State to make an improper, prejudicial argument distorting the defendant's burden of proof during closing arguments.

### B. Issues Pertaining to Assignment of Error

1. When the State proved that a pair of jeans containing a baggie with methamphetamine residue and a pipe was found in the truck Mr. Hamilton was driving during an overnight work shift, did the State fail to prove he constructively possessed the drugs when the truck belonged to his employer, was assigned to him just for that shift, was also driven by several other drivers, and the State failed to establish any connection between the jeans or the drugs and Mr. Hamilton?

2. When defense counsel, based on the erroneous belief the State was required to prove knowing possession, conceded the only contested element of the only charged offense and failed to mount the affirmative defense of unwitting possession, a) did counsel “entirely fail to subject the prosecution’s case to meaningful adversarial testing,” denying Mr. Hamilton his rights to counsel and due process and requiring reversal as prejudicial per se or, alternatively, b) provide deficient representation that created a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different?

3. Did the prosecutor’s mischaracterization of Mr. Hamilton’s burden of proof—that the jury would have to be willing to award him a million dollars in order to find in his favor on the affirmative defense—deny Mr. Hamilton a fair trial when the comment was improper, could not have been cured by a remedial instruction, and was prejudicial to Mr. Hamilton?

### **III. STATEMENT OF THE CASE**

#### **A. Procedural History**

By information filed July 19, 2011, the State charged Mr. Hamilton with possession of a controlled substance, methamphetamine, in violation of RCW 69.50.4013(1), and allegedly occurring on July 15, 2011. Clerk’s Papers (CP) 3.

Mr. Hamilton was convicted after a one-day jury trial, the Honorable Chris Wickham presiding. CP 6; see VRP. During deliberations, the jury sent out three notes. One stated, “Is it possible to get a diagram of the truck cab? From the company? Or manufacturer?” CP 4, 5, 7; VRP 148. The court answered all three notes with the agreed-to admonition that the jury review jury instruction number 1. VRP 149; CP 4, 5, 7.

At sentencing held on February 29, 2012, Mr. Hamilton’s sentencing range was determined to be zero to six months. The court imposed 60 days with authorization for work release, plus twelve months’ community custody. It waived those fees that it could and cut the drug enforcement fee in half. Verbatim Report of Proceeding for February 29, 2012, 10-12; CP 28-30.

Notice of appeal was timely filed the day of sentencing. CP 25.

## **B. Substantive Facts**

### **1. Trial Evidence**

On the night of the incident, Mr. Hamilton was a night driver for Hannigan Express (Hannigan), a company that transports fresh fish from Hoquiam, Washington, to Burlington or Bellingham during the summer season. VRP 70. Hannigan owns about three trucks and leases another four to five for the summer season. VRP 72. The company employs eight or nine drivers, mostly male, during

the summer. VRP 73. A driver would not know which truck he would drive until showing up for work and locating his paperwork in his designated truck. VRP 72, 74. The truck assignments changed every day and trucks were constantly driven by different drivers. VRP 74.

Mr. Hamilton reported for work around 8:45 p.m. the evening before the traffic stop. VRP 71. He unlocked the gate securing the facility, found the truck with his paperwork on the dashboard and conducted his pre-trip inspection. VRP 74. A pre-trip inspection of the interior and exterior of the vehicle is conducted for safety considerations every time a driver worked a shift. VRP 72. The truck, which was a 2012 model, checked out fine. VRP 75, 54. Mr. Hamilton had driven this particular truck before. VRP 72.

For his shift, Mr. Hamilton had brought a bag containing his truck-driver's log book, his lunch and a sweatshirt. VRP 78-79. He did not need a change of clothes for the nine-hour trip. VRP 79. It was dark when he picked up the truck and put his things on the floor board between the seats. VRP 79. He did not notice any items on the floor of the cab during his inspection or when he first put his things in the cab. VRP 79, 96. However, he noticed the jeans during the trip, most likely when he began to eat his sandwiches. VRP 80. He remembered them being behind

the seat. VRP 103. He did not pick them up or touch them. VRP 80. People sometimes leave property in the vehicles, even though they try not to. VRP 80-81.

Mr. Hamilton's route that night was from Hoquiam to Burlington and back. VRP 71, 75, 40, 54. He arrived in Burlington around 1:30 a.m. VRP 76. There, he waited about an hour and a half while his load of fish was unloaded and then began the return trip with an empty trailer. VRP 75-76. Leaving the site around three in the morning, Mr. Hamilton stopped at the first rest area he came to for coffee. VRP 77.

State Trooper Ryan Santhuff stopped Mr. Hamilton for a traffic infraction in Thurston County. VRP 38-39, 40. Mr. Hamilton was compliant and polite. VRP 39, 58. He said he was tired but seemed normal; typically tired people are wide awake by the time a police officer is speaking to them through the window. *See* VRP 39.

Santhuff smelled a "sweet, acidic-like" odor coming from the cab of the truck, which he believed was methamphetamine. VRP 41. The trooper asked Mr. Hamilton if methamphetamine was in the cab. Mr. Hamilton said no, that the odor was the smell of a new vehicle. VRP 42. When he answered, he looked down toward the console of the vehicle's cab and seemed a little nervous. VRP 42, 64. The trooper did not think the odor resembled the smell of a new vehicle. VRP 43.

Trooper Santhuff then sought Mr. Hamilton's permission to search the vehicle. He read him the constitutional warnings and informed him of his right to refuse to consent, to limit the scope of the search, and to rescind consent once granted. VRP 57. Mr. Hamilton voluntarily waived his rights and allowed Santhuff to search the truck. VRP 57. He exited the vehicle and waited while the trooper performed the search. VRP 58.

Santhuff located a small Ziploc baggie and coin pouch in a pair of jeans on the floor inside the cab. VRP 44. He initially said he found the jeans on the floorboard between the driver and the passenger seats, directly below the center console. VRP 44. However, when questioned further, he acknowledged that the truck had no center console, and the jeans were where the center console would be if there was one. VRP 60.

Inside the baggie was a less than a gram of methamphetamine and a pipe typically used for smoking methamphetamine. VRP 45, 49-51, 63, Exh. 2. The officer found no receipts or other indicia of the jeans's ownership in the pants. VRP 60-61. He did not keep the pants as evidence, but returned them to the truck. VRP 61. Mr. Hamilton told the trooper the pants were not his. VRP 62. The jeans were a size 38/30 and Santuff thought they would fit Mr. Hamilton. VRP 66-67.

However, he did not have Mr. Hamilton try them on, so could not say for sure.

VRP 68.

## **2. The Court's Jury Instructions**

Before argument by counsel, the trial court presented the jury instructions to the jury. VRP 105-17. The to-convict instruction in this case required the State to prove two elements: 1) possession of a controlled substance 2) that occurred in Washington. VRP 114-15 (Jury Instruction No. 10). Possession could be actual or constructive. VRP 113-14. (Jury Instruction No. 9). "Knowing" possession was not required for conviction. *See* VRP 114-15 (Jury Instruction No. 10).

The court also instructed the jury that Mr. Hamilton would not be guilty of unlawful possession "if the possession is unwitting." VRP 115 (Jury Instruction No. 11). "Unlawful 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." *Id.* It explained proof of unwitting possession was the defendant's burden to establish by a preponderance of the evidence:

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 this case that it is more probably true than not true.

VRP 115.

### **3. Arguments of Counsel**

The State focused its closing argument on whether Mr. Hamilton constructively possessed the methamphetamine. VRP 119-123. It maintained there was no dispute about where the incident occurred or whether the substance was methamphetamine. VRP 118-19. It acknowledged Mr. Hamilton did not have actual possession of the substance, but argued he had constructive possession because he had dominion and control. VRP 119-123.

The State explained dominion and control could be determined by whether Mr. Hamilton had the immediate ability to take actual possession of the substance, VRP 120, whether he had the capacity to exclude others from possession, VRP 121, and whether he had dominion and control over the truck where the drugs were found. VRP 121-22.

Defense counsel began his argument by discussing the burden of proof and explaining the defendant was required to prove nothing:

So every time you're back there deliberating and a question comes up and a concern comes up whether or not Michael is guilty of this charge, you don't look to me, you don't look to Michael to answer those questions. Every time you look to the State. Okay? It's their burden.

If [you] are going to convict somebody of a crime in our state in our country, they are the ones who have to convince you beyond a reasonable doubt that he's guilty.

VRP 124.

And, again, we don't have any burden okay? The burden is on them to convince all of you to convict.

VRP 126.

Counsel agreed the substance in the jeans was methamphetamine:

I told you in the beginning of this trial the State just indicated what was found in these jeans. It's not in dispute. It's methamphetamine. It's a controlled substance. It's against the law. We know that. We heard the testimony.

VRP 126. He also agreed Mr. Hamilton had dominion and control:

Was he in dominion and control of the vehicle? Of course he was. This is his job. His job is to take the truck from Hannigan Express where he is an employee and he is a commercial truck driver, get in the truck, and drive it to its load. Of course he can tell people to get out of the truck. He has to physically sit in the car and drive it. So, yes, but that's not the issue, right? That's not in dispute.

VRP 126-27.

Having conceded his client had dominion and control, counsel argued the only issue was whether the State proved Mr. Hamilton knew the methamphetamine was in the jeans:

What's in dispute is did he know what's in the pants. We can dance around it. It's the elephant in the room, but, hey, that's what it is, and what evidence has the State used to convince you beyond a reasonable doubt that he knew what was in those pants that were in the truck.

VRP 127.

Throughout his argument, defense counsel focused on the State's burden of proving knowing possession:

[That a controlled substance was found is] undisputed, but also I indicated what this case is is can the State convince you beyond a reasonable doubt that Michael knew about that methamphetamine, right? And you have to be convinced beyond a reasonable doubt that he knew.

VRP 126.

Again, we are not disputing what was in the car. They found methamphetamine. Again, again, that's not the issue. The issue is did the State convince you beyond a reasonable doubt that he knew what was in those pants pocket?

VRP 129.

You heard evidence and testimony from Michael [Mr. Hamilton] he saw the pants. Sure he saw the pants. He said he did, but where in the evidence do you find beyond a reasonable doubt that he knew what was in them? . . . [Y]ou certainly didn't hear any other evidence, additional evidence in those pants to say, well, this is proof beyond a reasonable doubt, right? And as the judge instructed you -- you're looking at, you're judging reasonable doubt by the -- evidence or lack of evidence, but both ways, so lack of evidence, right?

VRP 129-30.

At this point, counsel discussed the lack of State's evidence showing the pants belonged to Mr. Hamilton: no indicia of ownership in the pants, no DNA, fingerprint or other evidence tying the pants to him, no jeans in court for him to try

on. VRP 130-31. With regard to the State's failure to produce the jeans at trial, counsel stated:

We don't convict people on assumptions. So if you are assuming that they fit, is that good enough? I don't think so. That's evidence, proof beyond a reasonable doubt to support it, right? That's evidence to support a conviction, but we don't have that in this case.

VRP 131.

Counsel then reiterated the State's burden of proof before explaining its burden to prove unwitting possession as explained in Jury Instruction No. 11:

Now, I've been saying that I don't have any duty, I don't have any burden in this case, which I don't. If you are going to convict him of the crime, all the burden lies on the State to convince you beyond a reasonable doubt, but you did hear the judge instruct you on Jury Instruction No. 11, and that's that instruction . . .

VRP 132. After discussing its burden under Jury Instruction No. 11, counsel said that even if the defense had not proved unwitting possession, the State could not convict unless it proved knowing possession:

But even if you are not convinced of that, which I support there is evidence to find him not guilty based on that instruction and based on the evidence, even if you weren't convinced of Jury Instruction No. 11 to find him guilty on that instruction, you still go back to the other instructions in which the State has to prove beyond a reasonable doubt the knowing element that I have already gone over.

I know it's been a long day, so I won't go back over it, but you still hold them responsible for proving beyond a reasonable doubt that he knew what was in those pants.

VRP 133-34.

Counsel concluded his argument with the idea that the jury could only convict if it had an abiding belief Mr. Hamilton knew methamphetamine was in the pants:

There is also this instruction, and the judge mentioned it, that there is an abiding belief. When you are pulling out your measuring stick to find a case beyond a reasonable doubt, keep in mind what that means. An abiding belief in the truth of the charge, that's a belief that you believe he knew what was in those pants, he knew it, and that's why I convicted him, I believe it today, I will believe it ten years from now, I won't waiver, I won't go back and say he was not guilty.

VRP 134-35.

In its rebuttal argument, the State explained it did not have to prove ownership or knowledge, just possession. VRP 135-37. It noted defense counsel's only argument was "they are simply saying Mr. Hamilton did not know the substance, the methamphetamine, was in his possession." VRP 137. It explained Mr. Hamilton had the burden of proving unwitting possession and discussed the evidence he had failed to introduce at trial. VRP 137-41.

The State concluded with an unobjected-to explanation of preponderance of the evidence:

Preponderance [of] the evidence is basically a burden that is heard of in a civil case, and, you know, in civil cases the issue is always money, how much money are you wanting to grant one party

or one side over the other, and when you go back and you think about Jury Instruction No. 11 and what his burden is, would you say that based on what Mr. Hamilton, himself, said that you're willing to award him a million dollars to say that he didn't know that methamphetamine was in the car it? I submit to you the answer is no, because he did know in this case.

VRP 144.

#### IV. ARGUMENT

**POINT I: Mr. Hamilton's Conviction Should be Reversed When He Had Only Temporary Use of His Employer's Truck, and Thus Lacked Dominion and Control of the Truck, and the State Failed to Prove Dominion and Control over the Controlled Substance Itself**

The evidence at trial was insufficient as a matter of law to prove Mr. Hamilton guilty of possession of a controlled substance. A challenge to the sufficiency of the evidence requires the Court to view the evidence in the light most favorable to the State. The relevant question is whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In claiming insufficient evidence, the defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it: "All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Hosier, 157 Wn.2d at 8; Salinas, 119 Wn.2d at 201.

In this case, the State failed to prove Mr. Hamilton constructively possessed a controlled substance when Mr. Hamilton had only temporary use of the truck and no connection beyond proximity to the methamphetamine. To prove the charged crime, the State was required to prove beyond a reasonable doubt Mr. Hamilton actually or constructively possessed the substance. RCW 69.50.4013(1); VRP 114-15 (Jury Instruction No. 10); VRP 113-14 (Jury Instruction No. 9). The State sought to prove constructive possession as the evidence failed to establish actual possession. *See* VRP 119-23. Constructive possession is shown by proof of dominion and control. VRP 114 (Jury Instruction No. 9) (“Constructive possession occurs when there is not actual physical possession but there is a dominion and control over the substance.”); *see State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002) (discussing possession as a requirement of automatic standing). Proximity alone is insufficient to prove dominion and control. *Id.*

The State failed to prove dominion and control in this case when all it established was Mr. Hamilton’s temporary presence in the truck where the jeans containing the drug were located. Temporary use of premises is insufficient to establish dominion and control over the premises. *State v. Callahan*, 77 Wn.2d 27, 31, 459 P.2d 400 (1969) (guest staying on houseboat for two to three days did not have dominion and control over the premises). Without dominion and control over

the premises, proximity to a controlled substance does not establish constructive possession of that substance: “[T]he rule is that ‘where the evidence is insufficient to establish dominion and control of the premises, mere proximity to the drugs and evidence of momentary handling is not enough to support a finding of constructive possession.’” State v. George, 146 Wn. App. 906, 920, 193 P.3d 693 (2008), *quoting*, State v. Spruell, 57 Wn. App. 383, 388, 788 P.2d 21 (1990). Under these circumstances, the State failed to establish Mr. Hamilton’s dominion and control over the methamphetamine in this case.

The Supreme Court’s decision in Callahan controls the result in this case. In Callahan, the defendant had been staying for two to three days on a houseboat where drugs were recovered, but did not pay rent or maintain the houseboat as a residence. Callahan, 77 Wn.2d 27, 31. Most of the drugs were found near the defendant and he admitted handling the drugs earlier in the day. *Id.*

Having reviewed cases where it previously found dominion and control over premises, 77 Wn.2d at 29-31, the Court found these facts did not establish dominion and control over the houseboat. *Id.* at 31 (“there was no showing that the defendant had dominion or control over the houseboat”). Further, it found the facts did not provide “sufficient evidence to establish dominion and control and thus

make the issue of constructive possession a question for the jury.” *Id.* Accordingly, it reversed the defendant’s possession conviction. *Id.* at 32.

For similar reasons, Mr. Hamilton’s temporary possession of his employer’s truck failed to establish his dominion and control over either the truck or the drugs and his conviction should be reversed. Here, the evidence established that, similar to the defendant’s situation in Callahan, Mr. Hamilton was merely a temporary user of his employer’s truck. As was true of the defendant and houseboat in Callahan, Mr. Hamilton did not own or lease the truck. VRP 72. Indeed, he had been driving it for only a single nine-hour shift when the methamphetamine was discovered, VRP 79, as opposed to living in it for several days as the defendant in Callahan did.

Moreover, in this case, it was undisputed that the truck where the methamphetamine was found belonged to a trucking company and was driven by multiple drivers, any one of whom could have left the jeans behind. VRP 70-74. Further, the defendant in Callahan had actually handled the drugs, whereas, in this case, Mr. Hamilton never touched the jeans. VRP 80. Accordingly, this case shows even less indication of Mr. Hamilton’s dominion and control than was true in Callahan, and for the reasons the conviction was reversed in Callahan, it should be reversed here.

In Callahan, the Court also found relevant the fact that another individual had claimed ownership of the drugs. Callahan, 77 Wn.2d 27, 31-32. While no one claimed ownership of the jeans in this case, Mr. Hamilton provided undisputed testimony that the jeans did not belong to him. VRP 78-81. The State, by contrast, provided no evidence as to who owned the jeans, other than the State trooper's guess that the jeans might have fit Mr. Hamilton. VRP 60-61, 66-68. Thus, the lack of evidence as to ownership also militates against a finding of Mr. Hamilton's dominion and control.

The State in this case made much of the fact that Mr. Hamilton was able, at least temporarily, to exclude strangers from the truck. In Callahan, too, the defendant was likely able temporarily to exclude strangers from the houseboat he was staying on. In both cases, however, the person with temporary possession could not exclude the actual owners or anyone else to whom the owners authorized admission. For this reason also, in both cases, the defendants did not have actual dominion and control.

Another case that directly controls the outcome here is State v. Spruell. Building on the rule of Callahan that even several days temporary presence in a location does not give an individual dominion and control over that location or items found there in proximity to the individual, Division One found "a mere

visitor in a house” did not have dominion and control over drugs discovered near him. Spruell, 57 Wn. App. 383, 388.

Police, while executing a search warrant at a residence, came upon the defendant near a table on which there was cocaine residue, a scale, vials and a razor blade. His fingerprint was on a plate that had apparently held cocaine and seemed to have been thrown upon the arrival of the police. Spruell, 57 Wn. App. at 384–85. Relying on Callahan, the court found this evidence insufficient to support a possession conviction when the State failed to establish a connection between the defendant and either the drugs or the house:

There is no basis for finding that Hill had dominion and control over the drugs. Our case law makes it clear that presence and proximity to the drugs is not enough. *There must be some evidence from which a trier of fact can infer dominion and control over the drugs themselves.* That evidence being absent, Hill’s conviction must be reversed and dismissed on double jeopardy grounds.

Spruell, 57 Wn. App. at 388–89 (emphasis added).<sup>1</sup>

As in Spruell, here the State also failed to provide evidence of Mr. Hamilton’s dominion and control over the drugs themselves. Like the defendant in Spruell, here Mr. Hamilton was essentially a visitor to the premises, in this case, the truck. He merely had use of the truck during his shifts. His use, moreover, was

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1. It appears the phrase “on double jeopardy grounds” was inserted mistakenly as defendant Hill’s conviction was reversed for insufficient evidence.

not exclusive but was shared by other drivers. Under these circumstances, as was similarly found in Spruell, Mr. Hamilton could not be found to have had dominion and control over either the truck or the drugs found in proximity to him in the truck, absent evidence of dominion and control over the drugs themselves. Accordingly, this Court should reverse his conviction.

While another Division One case concerned a passenger of a vehicle rather than a driver, its analysis is relevant here. In State v. George, the State had argued the backseat passenger of a vehicle had constructive possession of a drug pipe and its contents when it was found on the floor at his feet and he was the only person in the backseat. 146 Wn. App. 906, 920. In addition, the detaining officer had detected a strong odor of marijuana coming from the vehicle. 146 Wn. App. at 923.

Division One of this court found these facts insufficient to establish constructive possession, holding the law required more than mere proximity or even handling of the contraband:

Here there was no evidence about George's past use or ownership of marijuana or paraphernalia. No drugs or paraphernalia were found on his person. There was no evidence such as dilated pupils, odor on his person, matches, or a lighter to suggest that George had been smoking marijuana with or without the pipe. There was no testimony tending to rule out the other occupants of the vehicle as having possession of the pipe. There was no testimony establishing when George got into the vehicle or how long he had been riding in it. There was no fingerprint evidence linking George to the pipe. And George made no statements or admissions probative of guilt.

146 Wn. App. 906, 922.

For similar reasons, the State failed to prove constructive possession in this case. Here also, there was no evidence Mr. Hamilton used methamphetamine or had been smoking the pipe found in the truck. As in George, an odor of drugs came from the vehicle, not Mr. Hamilton's person. VRP 41. While in this case, no one else was in the truck with Mr. Hamilton, it was undisputed that other drivers had driven the truck before Mr. Hamilton took possession. VRP 74. As in George, the State did not rule out the ownership of the drugs by those other, previous, drivers.

While Mr. Hamilton had been in the truck for an overnight shift, there was no evidence in this case, in contrast to George, as to when the meth pipe may last have been used. Finally, as was true in George, there was no evidence linking the pipe or the jeans to Mr. Hamilton and, far from admitting ownership, he denied ownership of both. Accordingly, for the same reasons the conviction was reversed in George, it should be reversed here. *Accord State v. Cote*, 123 Wn. App. 546, 96 P.3d 410 (2004) (reversing possession conviction on sufficiency grounds when defendant was passenger in stolen truck containing precursors in the manufacture of methamphetamine and his fingerprints were on mason jar containing chemicals).

Moreover, Mr. Hamilton did not act in a suspicious manner during or before the traffic stop. To the contrary, he cooperated with the detaining officer and

voluntarily consented to the search of his vehicle. VRP 57-58. These facts also weigh against a finding of constructive possession. *Cf. State v. Huff*, 64 Wn. App. 641, 826 P.2d 698 (1992) (finding sufficient evidence of constructive possession when defendant driver smelled like methamphetamine, did not stop when officer flashed emergency lights, passenger looked back and made furtive movements, and drugs were hidden under laundry in back seat).

Finally, this case is distinct from cases finding the driver of a vehicle to have dominion and control over the vehicle or contraband within it for two reasons. First, in those cases, additional facts other than the mere fact of being the driver of a vehicle where contraband was found established constructive possession. No such additional facts are present here. Second, in those cases, the drivers all had unrestricted possession of the vehicle if not outright ownership. Here, far from owning the vehicle, Mr. Hamilton's possession of it was limited, temporary, and shared. *See e.g., State v. Bowen*, 157 Wn. App. 821, 827-28, 239 P.3d 1114 (2010) (holding constructive possession of contents of vehicle established when defendant was owner, driver, sole occupant of vehicle, and firearm was in nylon bag next to driver's seat); *State v. Turner*, 103 Wn. App. 515, 524, 13 P.3d 234 (2000) (holding issue was appropriate for jury when defendant owned and drove truck and knew he was transporting firearm behind him most of

the day but did nothing to remedy situation); State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997) (finding constructive possession when weapon was sticking out in plain sight at defendant's feet); State v. McFarland, 73 Wn. App. 57, 70, 867 P.2d 660 (1994) (defendant constructively possessed firearms when he knowingly transported them in his car and had taken them from other's house); State v. Reid, 40 Wn. App. 319, 325, 698 P.2d 588 (1985) (defendant constructively possessed gun when he admitted having gun in his car and moving it so it would not be seen by police); *see also* State v. Shumaker, 142 Wn. App. 330, 174 P.3d 1214 (2008) (jury instruction case holding dominion and control over premises does not prove constructive possession of substance; State must prove dominion and control over substance itself).

For all these reasons, the evidence established Mr. Hamilton was only a temporary user of the truck and, thus, did not have dominion and control over the truck. Without evidence of his dominion and control over the methamphetamine itself, the State failed to prove constructive possession and this Court should reverse his conviction.

**POINT II: Trial Counsel was Ineffective When, Based on His Ignorance of the Elements Required to Prove the Charge, He Conceded the Only Element the State Needed to Prove and Failed to Attempt to Establish a Viable Affirmative Defense**

**A. Trial Counsel “Entirely Fail[ed] to Subject the Prosecution’s Case to Meaningful Adversarial Testing” and Violated Mr. Hamilton’s Due Process Rights, Requiring Reversal**

Defense counsel in this case “entirely fail[ed] to subject the prosecution’s case to meaningful adversarial testing,” denying Mr. Hamilton his rights to counsel and requiring reversal as prejudicial per se. United States v. Cronie, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); U.S. Const. amend. VI; Wash. Const. art. 1 § 22. This failure occurred when, based on the erroneous belief the State was required to prove Mr. Hamilton knowingly possessed a controlled substance, defense counsel conceded the only contested element—Mr. Hamilton’s constructive possession of the substance—and failed to present the affirmative defense of unwitting possession. His concession also violated Mr. Hamilton’s due process right to require the State to prove the charged crime beyond a reasonable doubt. U.S. Const. amend. V & amend. XIV; Wash. Const. art. 1 § 3.

While an ineffective assistance of counsel claim usually requires a showing of prejudice, Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) the Supreme Court has carved out certain exceptions to the general Strickland rule:

In United States v. Cronin, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed.2d 657 (1984), decided on the same date as Strickland, “the Supreme Court created an exception to the Strickland standard for ineffective assistance of counsel and acknowledged that certain circumstances are so egregiously prejudicial that ineffective assistance of counsel will be presumed.” . . . Cronin presumes prejudice where there has been an actual breakdown in the adversarial process at trial.

United States v. Swanson, 943 F.2d 1070, 1072 (9th Cir. 1991) (citations and quotation omitted). The instant case requires remand under the Cronin exception because trial counsel “entirely fail[ed] to subject the prosecution’s case to meaningful adversarial testing,” amounting to a denial of the right to counsel “that makes the adversary process itself presumptively unreliable.” Cronin, 466 U.S. at 659; *see* State v. Davis, 152 Wn.2d 647, 674, 101 P.3d 1 (2004) (noting one of the exceptions under Cronin is “where ‘counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing’”).<sup>2</sup>

The Ninth Circuit has reversed under Cronin when defense counsel conceded during closing argument the only contested elements in the only charge sought to be proven. In Swanson, during closing arguments, defense counsel stated the evidence against the defendant was overwhelming and that he was not going to

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2. “Apart from circumstances of this nature and magnitude, the Supreme Court has said ‘there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt.’” Davis, 152 Wn.2d 647, 674-75.

insult the jurors' intelligence. 943 F.2d 1070, 1071. Although the attorney discussed inconsistencies in the testimony of the Government's witnesses, he admitted that the inconsistencies did not rise “to the level of raising reasonable doubt.” *Id.* He advised the jury that, if they voted guilty, “they should not ‘ever look back’ and agonize regarding whether they had done the right thing.” *Id.*

In reversing under Cronic, the Ninth Circuit held counsel “failed to function as the Government's adversary during his summation to the jury.” Swanson, 943 F.2d at 1074. His concession did “not demonstrate mere negligence in the presentation of his client’s case or a strategy to gain a favorable result that misfired.” *Id.* Instead, counsel’s “statements lessened the Government's burden of persuading the jury . . . [and] tainted the integrity of the trial.” *Id.*

Regarding counsel’s failure to hold the Government to its burden of proof, Swanson explained the due process requirement that guilt be proved beyond a reasonable doubt. Swanson, 943 F.2d at 1073. It noted: “When a defense attorney concedes that there is no reasonable doubt concerning the only factual issues in dispute, the Government has not been held to its burden of persuading the jury that the defendant is guilty.” *Id.*; *see also* Wiley v. Sowders, 647 F.2d 642, 650 (6th Cir. 1981) (pre-Cronic, pre-Strickland case finding ineffective assistance of

counsel without a showing of prejudice when defense counsel admitted guilt during closing argument).

In this case, similar to the situation in Swanson, trial counsel's concession of the only contested issue violated Mr. Hamilton's rights to counsel and due process and tainted the integrity of the trial. Here, the State only needed to prove Mr. Hamilton possessed a controlled substance in Washington. VRP 114 (Jury Instruction No. 10); CP 3. Where the incident occurred and whether it was a controlled substance were not in dispute. VRP 40; VRP 45, 49-51, 63, Exh. 2; VRP 126. Thus, the only contested issue was whether Mr. Hamilton possessed the drug.

Defense counsel conceded this solitary contested issue. To establish Mr. Hamilton's possession, the State was required to prove possession as defined in the jury instructions, which allowed for actual or constructive possession. VRP 113-14 (Jury Instruction No. 9). The State had not proven actual possession. Instead, it argued the facts proved constructive possession through dominion and control. VRP 119-23. Defense counsel agreed with the State, eliminating the State's burden of proving constructive possession:

Was he in dominion and control of the vehicle? Of course he was. This is his job. His job is to take the truck from Hannigan Express where he is an employee and he is a commercial truck driver, get in the truck, and drive it to its load. Of course he can tell people to get

out of the truck. He has to physically sit in the car and drive it. So, yes, but that's not the issue, right? That's not in dispute.

VRP 126-27.

With this concession, defense counsel admitted Mr. Hamilton was guilty of the one charge against him. This open admission that the State had proven the contested element was even more blatant than counsel's statements in Swanson that there was no reasonable doubt. Similar to Swanson, the admission in this case was error that should be presumed prejudicial under Cronic because it removed any "meaningful adversarial testing," eliminated the State's burden of proof and tainted the integrity of the trial. Thus, as was held in Swanson, this Court should find ineffective assistance of counsel under Cronic.

While the concession alone is enough to show ineffective assistance under Swanson, trial counsel's errors went even further in this case than the error there. Here, the concession was made through utter ignorance of the charge against Mr. Hamilton. During closing argument, defense counsel repeatedly expressed his mistaken belief the State was required to prove knowing possession. VRP 126 ("you have to be convinced beyond a reasonable doubt that he knew"); VRP 127 ("What's in dispute is did he know what's in the pants. . . . what evidence has the State used to convince you beyond a reasonable doubt that he knew what was in those pants"); VRP 129 ("The issue is did the State convince you beyond a

reasonable doubt that he knew what was in those pants pocket?"); VRP 130 ("where in the evidence do you find beyond a reasonable doubt that he knew what was in them?"); VRP 133-34 ("you still go back to the other instruction in which the State has to prove beyond a reasonable doubt the knowingly element that I have already gone over"); VRP 134-35 ("An abiding belief in the truth of the charge, that's a belief that you believe he knew what was in those pants"). But the State only had to prove simple possession. VRP 114 (Jury Instruction No. 10); CP 3; State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190 (2004) (holding possession of controlled substance does not have a mens rea element). This fundamental ignorance of the charged crime caused defense counsel to concede the only contested element.

Counsel's ignorance of the nature of the charge also made him fail to establish Mr. Hamilton's affirmative defense of unwitting possession. *See* VRP 115 (Jury Instruction No. 11). Counsel repeatedly and mistakenly told the jury Mr. Hamilton had nothing to prove at trial. *See* VRP 124 ("So every time you're back there deliberating and a question comes up and a concern comes up whether or not Michael is guilty of this charge, you don't look to me, you don't look to Michael to answer those questions. Every time you look to the State. Okay? It's their burden."); VRP 126 ("And, again, we don't have any burden okay?"); VRP 132

(“Now, I’ve been saying that I don’t have any duty, I don’t have any burden in this case, which I don’t.”).

Although counsel discussed his burden under the unwitting possession jury instruction, he spent little time on the topic because he erroneously believed the State needed to prove, by a more exacting standard, knowing possession:

But even if you are not convinced of that [unwitting possession], which I support there is evidence to find him not guilty based on that instruction and based on the evidence, even if you weren’t convinced of Jury Instruction No. 11 [unwitting possession] to find him guilty on that instruction, you still go back to the other instructions in which the State has to prove beyond a reasonable doubt the knowing element that I have already gone over.

I know it’s been a long day, so I won’t go back over it, but you still hold them responsible for proving beyond a reasonable doubt that he knew what was in those pants.

VRP 133-34.

This mistake resulted in counsel’s failure even to try to prove unwitting possession. As the State rightfully pointed out, VRP 139-42, defense counsel did not present any evidence other than Mr. Hamilton’s uncorroborated testimony. He could have presented company records showing patterns of use of the trucks, logs showing who else besides Mr. Hamilton drove the specific truck before he did and, most significantly, he could have brought in the jeans. Instead, he berated the State for failing to produce the jeans, VRP 131, when it was his burden to establish unwitting possession.

Thus, defense counsel based Mr. Hamilton's defense on the erroneous belief the State was required to prove a nonexistent additional element. Such a fundamental misunderstanding of the case, combined with concession of the only contested element of the only charged crime and failure to attempt to establish a viable affirmative defense, rendered counsel's performance so inadequate as to amount to a complete denial of Mr. Hamilton's right to counsel under Cronic.

Underscoring counsel's failures in this case is the fact that Mr. Hamilton did not have a difficult case to defend. In Cronic, the Supreme Court acknowledged that counsel is not required to "do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." Cronic, 466 U.S. 648, 657 n.19. Here, by contrast, defense counsel was in no manner compelled to concede constructive possession of the controlled substance.

The truck in which the jeans were found was driven by many drivers. VRP 70-74. Mr. Hamilton did not own the truck, VRP 72, and testified he did not own the jeans. VRP 78-81. He had only been in the truck for a single overnight shift. VRP 79. The only evidence tying Mr. Hamilton to the jeans was his proximity to the pants, VRP 44, and Trooper Santhuff's unsubstantiated belief that the jeans could have fit Mr. Hamilton. VRP 66-68. Thus, defense counsel had an

exceedingly viable argument that Mr. Hamilton did not have dominion and control over the truck or the jeans and, thus, was not in constructive possession of the controlled substance. *See* Point I, above.

Significantly, the Supreme Court's acknowledgment regarding concessions in difficult cases came with the caveat that once the decision is made to go to trial, counsel may not concede the contested issues: "At the same time, even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt." Cronic, 466 U.S. 648, 657 n.19. In this case, in conceding constructive possession, defense counsel failed to hold the State to its heavy burden of proof and denied Mr. Hamilton his due process rights.

Further, concession of the only contested element in the only charged offense in a case in which the State's evidence of constructive possession was far from overwhelming distinguishes this case from cases holding that the admission of guilt to some, but not all, charged offenses constitutes valid trial tactics. *See State v. Silva*, 106 Wn. App. 586, 596-97, 24 P.3d 477 (2001) (holding admission of guilt in face of overwhelming evidence of guilt of two charges was legitimate attempt to gain credibility and obtain acquittal on more serious charges), *citing*, Underwood v. Clark, 939 F.2d 473 (7th Cir. 1991) (acknowledging weight of

evidence of lesser of two charges was legitimate trial tactic); *see also* United States v. Thomas, 417 F.3d 1053, 1056-59 (9th Cir. 2005) (holding attorney's admission of guilt to some charges so as better to defend against others required a showing of prejudice under Strickland); Visciotti v. Woodford, 288 F. 3d 1097, 1106 (9th Cir. 2002) (holding trial counsel's closing argument was strategy to avoid death penalty subject to Strickland test), *rev'd on other grounds*, 537 U.S. 19, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002).

For all these reasons, Mr. Hamilton was deprived of his right to counsel in the most fundamental sense of the term, he was deprived of his due process rights, and the adversarial process itself was compromised. Under these circumstances, this Court should reverse under Cronic.

**B. Alternatively, Counsel Was Ineffective Under the Strickland Test When His Actions Created a Reasonable Probability That, but for Counsel's Unprofessional Errors, the Result of the Proceeding Would Have Been Different**

If the Court finds defense counsel's ignorance of the charged crime coupled with his concession of the only contested element and failure to put on an affirmative defense did not amount to a failure of counsel and violation of due process under Cronic and as found in Swanson, Mr. Hamilton's State and federal rights to effective counsel were nevertheless violated under Strickland. The right to counsel includes the right to effective counsel. *See* U.S. Const. amend. VI; Wash.

Const. art. 1 § 22. To demonstrate ineffective assistance of counsel, the defendant must show both a) that defense counsel's representation fell below an objective standard of reasonableness and b) prejudice. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (reaffirming adherence to the Strickland test).

The Court begins with “a strong presumption that counsel’s performance was reasonable.” Grier, 171 Wn.2d 17, 33. Moreover, “legitimate trial strategy or tactics” fall outside the bounds of an ineffective assistance of counsel claim. *Id.* “[T]he ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Id.* at 34 (citation omitted).

Counsel’s concession that the State proved everything but Mr. Hamilton’s knowledge of the methamphetamine and his failure to mount a viable affirmative defense amounted to deficient performance in this case. Deficient performance “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Grier, 171 Wn.2d 17, 33-34, *quoting*, Strickland, 466 U.S. at 687. This standard was met here, when counsel’s errors resulted in concession of the only contested element of the only charged crime and a failure to raise a viable affirmative defense. *See* Point II(A), above. Defending Mr. Hamilton with an incorrect

understanding of the elements of the charged crime was an error “so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Grier, 171 Wn.2d 17, 33-34.

In addition, the error was prejudicial, likely resulting in Mr. Hamilton’s conviction. Prejudice is shown if “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. 668, 694; Grier, 171 Wn.2d at 34.

Counsel’s actions in this case were more than sufficient to undermine confidence in the outcome of the case. Without counsel’s mistakes, this case presented a very close contest. Mr. Hamilton was driving a company truck at the time of the traffic stop, a truck many drivers had driven before him. There was no evidence the jeans in which the controlled substance was found belonged to him. Indeed, he was convicted on proximity to the jeans alone. *See* Point I, above. Thus, if counsel had not conceded the only contested element, misunderstood the nature of the charged crime, and failed to present an affirmative defense, Mr. Hamilton very likely would have been acquitted.

For all these reasons, trial counsel's performance was both deficient and prejudicial and this Court should reverse Mr. Hamilton's conviction.

**POINT III: Improper Prosecutorial Comment Deprived Mr. Hamilton of His Right to a Fair Trial**

Mr. Hamilton was deprived of his right to a fair trial by the prosecutor's improper comment in this case. Defendants are guaranteed the right to a fair and impartial trial by the Sixth and Fourteenth Amendments of the United States Constitution, and by article I, section 3 and article I, section 22 (amendment 10) of the Washington Constitution. In re Crace, 157 Wn. App. 81, 96, 236 P.3d 914 (2010). "Prosecutorial misconduct may deprive a defendant of his right to a fair trial." State v. Evans, 163 Wn. App. 635, 642, 260 P.3d 934 (2011); *citing*, State v. Jones, 144 Wn. App. 284, 290, 183 P.3d 307 (2008).

A prosecuting attorney, a quasijudicial officer, must act with impartiality in the interest of justice and "subdue courtroom zeal for the sake of fairness to the defendant." State v. Thorgerson, 172 Wn.2d 438, 448, 258 P.3d 43 (2011) (citations omitted). While "the prosecuting attorney has wide latitude to argue reasonable inferences from the evidence" in closing arguments, Thorgerson, 172 Wn.2d 438, 443, the prosecutor also owes the defendant a duty to ensure the right to a fair trial is not violated. State v. Ramos, 164 Wn. App. 327, 333, 263 P.3d 1268 (2011), *citing*, State v. Monday, 171 Wn.2d 667, 676, 297 P.3d 551 (2011).

A prosecutor's argument carries particular weight because "[t]he jury knows that the prosecutor is an officer of the State." State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008).

To prevail on appeal, Mr. Hamilton must show "that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial." Thorgerson, 172 Wn.2d 438, 442 (citations omitted). "Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." State v. Russell, 125 W.2d 24, 86, 882 P.2d 747 (1994).

When conduct was not objected to in the trial court, the standard for establishing prejudice is heightened. "Under this heightened standard, the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" State v. Emery, \_\_\_ Wn.2d \_\_\_, 278 P.3d 653 (2012), *quoting*, State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). This Court reviews prosecutors' comments "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and

the jury instructions.” Evans, 163 Wn. App. 635, 642, *citing*, State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

In this case, the prosecutor’s argument purporting to explain the preponderance of the evidence standard was both improper and prejudicial under the heightened standard because it had absolutely no relationship to the preponderance of the evidence standard. The prosecutor told the jury preponderance meant it had to believe so strongly in Mr. Hamilton’s unwitting possession defense so as to be willing to award him a million dollars:

Preponderance [of] the evidence is basically a burden that is heard of in a civil case, and, you know, in civil cases the issue is always money, how much money are you wanting to grant one party or one side over the other, and when you go back and you think about Jury Instruction No. 11 and what his burden is, would you say that based on what Mr. Hamilton, himself, said that you’re willing to award him a million dollars to say that he didn’t know that methamphetamine was in the car it? I submit to you the answer is no, because he did know in this case.

VRP 144. While “preponderance of the evidence” is a standard typically applicable in civil cases, that it requires the jury to be willing to award Mr. Hamilton a million dollars if he did not know methamphetamine was present was nothing more than an inflammatory remark designed to eliminate Mr. Hamilton’s affirmative defense.

Mr. Hamilton’s burden in this case was not to prove the State owed him a million dollars but to prove he possessed the methamphetamine unwittingly.

Throwing a million dollars into the equation was a red herring clearly designed to appeal to the jury's emotions regarding his burden of proof. The prosecutor must seek a verdict based on the evidence, not the jury's passion or prejudice:

Appeals to the jury's passion and prejudice are improper. It is the prosecutor's duty to "seek a verdict free of prejudice and based on reason." The prosecutor's duty to act impartially derives from his or her position as a quasi-judicial officer.

State v. Echevarria, 71 Wn. App. at 598 (citations omitted). Indeed, the jury did not have to believe Mr. Hamilton's unwitting possession argument such that it would be willing to hand him a million dollars, but only if he had shown it was "more probably true than not true." VRP 115 (Jury Instruction No. 11); Mohr v. Grant, 153 Wn.2d 812, 822, 108 P.3d 768 (2005). Accordingly, the prosecutor's injection of an irrelevant and inflammatory dollar amount was highly improper.

Further, the prosecutor's argument was prejudicial because it provided such a powerful metaphor it could not have been remedied with a curative instruction and it had a substantial likelihood of affecting the jury's verdict. Once jurors got in their minds the idea of awarding Mr. Hamilton a million dollars if they believed his possession was unwitting, it would be an impossible image to erase. Even if the court instructed the jury that the preponderance standard did not mean awarding Mr. Hamilton a million dollars, the impression deliberately created by the State could not have been eradicated.

The State's argument also likely affected the jury's verdict, given the nature of the State and defense cases. The State established methamphetamine was found in a pair of jeans found in the truck Mr. Hamilton was driving, the only issue was whether Mr. Hamilton possessed the drugs. Whether he possessed the drugs rested largely on whether the jury believed Mr. Hamilton's testimony. Thus, the case came down largely to the credibility of Mr. Hamilton.

In cases where a conviction is reversed for prosecutorial error, the evidence has generally been a "credibility contest." State v. Walker, 164 Wn. App. 724, 737-38, 265 P.3d 191 (2011), *discussing*, State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010); State v. Venegas, 155 Wn. App. 507, 228 P.3d 813 (2010). Walker reversed the defendant's conviction due to several unobjected-to errors when the evidence against the defendant "was largely a credibility contest in which the prosecutor's improper arguments could easily serve as the deciding factor." Walker, 164 Wn. App. at 738.

Here, similarly, the evidence was a credibility contest with the main issue—whether Mr. Hamilton possessed the controlled substance—in dispute. Under these circumstances, and as was held in Walker, Johnson and Venegas, the prosecutor's comment could easily have been the deciding factor, denying Mr. Hamilton his right to a fair trial and requiring reversal.

For all these reasons, the prosecutor's comment was both improper and prejudicial and this Court should reverse Mr. Hamilton's conviction.

#### **V. CONCLUSION**

For all of these reasons, Michael D. Hamilton respectfully requests this Court to reverse his conviction.

Dated this 9th day of August 2012.

Respectfully submitted,

/s/ Carol Elewski  
Carol Elewski, WSBA # 33647  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I certify that on this 9th day of August, 2012, I caused a true and correct copy of Appellant's Brief to be served, by e-filing, on:

Respondent's Attorney

Ms. Olivia Zhou  
Deputy Prosecuting Attorney  
Thurston County Prosecutor's Office  
[zhouo@co.thurston.wa.us](mailto:zhouo@co.thurston.wa.us)

and, by U.S. Mail, on:

Mr. Michael Dean Hamilton  
57 Clemons Road, Unit 10  
Montesano, WA 98563.

*/s/ Carol Elewski* \_\_\_\_\_  
Carol Elewski

# ELEWSKI, CAROL ESQ

**August 09, 2012 - 12:10 PM**

## Transmittal Letter

Document Uploaded: 431327-Appellant's Brief.pdf

Case Name: State v. Hamilton

Court of Appeals Case Number: 43132-7

**Is this a Personal Restraint Petition?**  Yes  No

### The document being Filed is:

- Designation of Clerk's Papers  Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: \_\_\_\_\_
- Answer/Reply to Motion: \_\_\_\_\_
- Brief: Appellant's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_  
Hearing Date(s): \_\_\_\_\_
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Carol Elewski - Email: [celewski@yahoo.com](mailto:celewski@yahoo.com)

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