

NO. 43758-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY HUMPHRIES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 12-1-00344-9

BRIEF OF RESPONDENT

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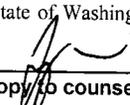
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DATED April 16, 2013, Port Orchard, WA 

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether evidence that Humphries had drunk alcohol, smoked marijuana, was slurring his words, staggering, had very red and watery eyes, and was passed out and drooling on himself within minutes of driving, and refused a blood test, was sufficient to support his conviction of driving under the influence?

2. Whether the trial court properly instructed the jury that to convict Humphries of possession of a controlled substance it need to find that he possessed “oxycontin” and that “oxycontin” was the brand name for a controlled substance?

3. Whether evidence that: (1) before Humphries was placed in the back of the patrol car, the officer had searched the compartment with a flashlight and found nothing, (2) that no one else had been in the compartment before Humphries, (3) that afterwards there was a pack of Newports in the back of the car that had 17.8 grams of crack cocaine in it, (4) that Humphries smoked Newports, and (5) that Humphries also had another cigarette pack with likely proceeds of dealing in his jeans pocket, was sufficient to support the element that he possessed cocaine?

4. Whether Humphries shows prosecutorial misconduct where his counsel introduced the concept of constructive possession and the State

essentially responded that the possession was actual?

5. Whether counsel was ineffective for failing to request an unwitting possession instruction where the defense is not available for the crime of possession with intent to deliver?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Timothy Humphries was charged by amended information filed in Kitsap County Superior Court with possession of cocaine with intent to deliver, possession of a controlled substance, “oxycontin,” driving under the influence (with refusal), and unlawful display of a weapon. CP 97. After trial, the jury found Humphries guilty as to the first three counts, and acquitted him of the weapons charge. CP 326.

B. FACTS

Tia Eddington was a good friend of Humphries’s ex-girlfriend. 3RP 364. On the day of Humphries’s arrest, Eddington and others had gone to a barbecue at Humphries’s sister’s house. 3RP 365. It was time to put the kids to bed, so Eddington, her fiancé, Humphries’s ex-girlfriend, her current boyfriend, “E,” and another friend went back to Eddington’s house to continue partying. 3RP 366. They got back to the house around 10:30. 3RP 367.

Humphries was drinking. 3RP 368. Humphries and his ex got into an

altercation, and then E joined in. 3RP 369. It was just verbal, but they were pretty angry. 3RP 369. E threatened to pull out a gun, but Humphries responded that he was not going to disrespect her place and asked E to meet him at a mini-mart. 3RP 369. They each got into their own car and drove off up the hill. 3RP 369.

Eddington did not see E again, but Humphries returned and said that if E “wants some, let him know he can come get some.” 3RP 369. Eddington could see that Humphries had a gun in the car. 3RP 374. Then Humphries left again, with a passenger that Eddington did not know. 3RP 369. Eddington had seen Humphries drunk 30 or 40 times in the past. 3RP 377. She had seen him sober hundreds of times. 3RP 377. That night he was “pretty buzzed.” 3RP 377. Humphries smoked Newports. 3RP 377. After other threats were made someone called 911.

Bremerton Patrol Sergeant Billy Renfro responded to the dispatch reporting a threat with a firearm. 2RP 113. Renfro proceeded north on Warren Avenue. 2RP 113. As he approached the bridge, he saw Humphries’s car headed southbound off the bridge. 2RP 113, 116.

Renfro was driving a marked patrol car. 2RP 113. He had his emergency lights on. 2RP 113. The car turned eastbound onto 17th Street. 2RP 114. Renfro followed. 2RP 114. He pulled up behind the vehicle, and

when it turned again onto Elizabeth Avenue, Renfro activated his siren. 2RP 114. Two blocks later, the car stopped. 2RP 115.

There were two people in the car. 2RP 116. Officer Hall, the K-9 officer, arrived just as Renfro was conducting the stop. 2RP 116. They treated it as a high-risk stop. 2RP 116. This was because of the time of day, 11:30 pm, and the nature of the 911 report, which included reported threats with a firearm. 2RP 117. The passenger, Dufloth, was cooperative, but the driver, Humphries, was not. 2RP 117-18. Humphries repeatedly lowered his right hand, and repeatedly leaned to the right. 2RP 117. Once he was out of the car, he said things like “Don’t shoot me,” and acted like he was weak in the knees and was going to drop to a kneeling position. 2RP 117.

After they cleared the scene, Officer Roessel told Hall they had probable cause to arrest Humphries. 2RP 163. Hall informed Humphries he was under arrest and read him his rights. 2RP 163. Hall then removed him from the vehicle and searched him incident to arrest. 2RP 164. Hall retrieved a cigarette pack that had \$900 in cash in hundreds, fifties, twenties and small bills, and, from the small change pocket in his jeans, a small baggy with prescription pills in it. 2RP 164, 221. The in Humphries’s front pocket. 2RP 165. Humphries was in the back of Thuring’s car. 2RP 168.

Thuring had to leave for another priority call. 2RP 119. After

Humphries was removed from the car, but before he left the scene, Thuring searched the back of the patrol car to make sure there was nothing there. 2RP 195-96. In the course of his experience, he had had handcuffed suspects leave items in the back of his car “[m]any, many times.” 2RP 196. Thuring found a pack of Newport cigarettes sitting conspicuously on the seat where Humphries had been sitting. 2RP 196. In the pack was a razor blade and what appeared to be several packages of cocaine. 2RP 198.

Thuring explained that the Bremerton patrol cars did not have a standard back seat; the original was replaced with a hard plastic molded seat. 2RP 192. The floor was rubberized and sealed. 2RP 192. There was no carpet. 2RP 192. Thuring inspected his vehicle at the beginning of his shift. 2RP 191. He did not find anything in the back of it. 2RP 192-93. Thuring had not placed anyone in the back of his car that evening before Humphries. 2RP 194.

Humphries appeared to be asleep when Renfro approached him to transfer him to another car. 2RP 131. There was spittle and drool down his face and shirt. 2RP 131. He smelled strongly of intoxicants, and seemed unsteady on his feet. 2RP 131-32. He appeared intoxicated: his speech was slurred and he had difficulty maintaining his balance. 2RP 132.

Renfro contacted Officer Rogers to assist with processing because

based on Renfro's experiences with impaired drivers, Humphries was obviously impaired. 2RP 133.

BPD. 2RP 295.

Rogers was certified to administer field sobriety tests and is a Drug Recognition Expert (DRE) instructor. 2RP 296. When he arrived, Rogers spoke with Renfro and Roessel, and then contacted Humphries. 2RP 301.

Humphries was in the rear of Roessel's car. 2RP 302. When Rogers opened the door, he was hit with the odor of alcohol, as well as a strong burnt marijuana smell. 2RP 304-05. He told Humphries that he was going to move him to his patrol car. 2RP 303. Rogers observed that Humphries had "very, very red, watery eyes." 2RP 303. His pupils were dilated. 2RP 303. His speech was very slow and slurred. 2RP 306. Humphries had some issues with walking to the other car. 2RP 303. He was stumbling and staggering to the point that Rogers had to hold on to Humphries and help him walk. 2RP 306.

After they were seated in Rogers's car, Rogers told him that he was investigating the possibility that he was impaired. 2RP 307. Humphries responded that he had had a drink or two and that he had smoked some marijuana, but that he had a marijuana "green card." 2RP 308. Rogers responded that having a green card did not confer the right to drive while

impaired. 2RP 308. Humphries responded, “That’s bullshit.” 2RP 308. Believed Humphries was under the influence of both drugs and alcohol. 3RP 351.

Rogers then took Humphries to the jail and there, went over the DUI packet with him. 2RP 309. Rogers read him the informed consent form for a blood draw. 2RP 313. He sought the blood draw because Humphries had stated that he used marijuana, which the breath test would not measure. 2RP 313. Humphries refused the test. 2RP 316.

III. ARGUMENT

A. EVIDENCE THAT HUMPHRIES HAD DRUNK ALCOHOL, SMOKED MARIJUANA, WAS SLURRING HIS WORDS, STAGGERING, HAD VERY RED AND WATERY EYES, AND WAS PASSED OUT AND DROOLING ON HIMSELF WITHIN MINUTES OF DRIVING, AND REFUSED A BLOOD TEST, WAS SUFFICIENT TO SUPPORT HIS CONVICTION OF DRIVING UNDER THE INFLUENCE.

Humphries argues that the evidence was insufficient to support his conviction for DUI. Although he gives lip service to the standard of review, his argument essentially asks this Court to ignore that standard and reweigh the evidence.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by

substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

Humphries first misapprehends the testimony of Officers Hall, Roessel and Thuring. None of these officers testified that he did not believe that Humphries was intoxicated. Rather they testified that they did not note

the fact in their reports, and/or did not recall one way or the other. 2RP 169-70, 175, 177-78, 184, 200, 207-08, 209, 210-11. They also testified that their primary responsibilities at the scene were not the processing of the DUI. 2RP 182, 195, 200. Officer Hall in particular clearly had very little recollection of the call, and indeed could not recall the correct month of the incident and was even off on the time of arrest by three hours. 2RP 154, 157. Officer Roessel did not have interaction with Humphries at all, and was not asked about his level of intoxication. 2RP 217.

In any event, the standard of review requires this Court to accept the most favorable evidence, not the least favorable. The two officers with the most reason to have recorded their impressions of Humphries's condition were quite clear: Humphries was decidedly impaired.

Sergeant Renfro testified that Humphries was not cooperative when he was first stopped. 2RP 117-18. Humphries repeatedly lowered his right hand, and repeatedly leaned to the right. 2RP 117. Once he was out of the car, he said things like "Don't shoot me," and acted like he was weak in the knees and was going to drop to a kneeling position.¹ 2RP 117.

When went to remove Humphries from Thuring's car, Humphries appeared to be. 2RP 131. There was spittle and drool down his face and

¹ Even Hall noted that Humphries was "less than compliant." 2RP 157, 174.

shirt. 2RP 131. He smelled strongly of intoxicants, and seemed unsteady on his feet. 2RP 131-32. His speech was slurred and he had difficulty maintaining his balance. 2RP 132. Renfro then contacted Rogers to assist with processing because based on Renfro's experiences with impaired drivers, Humphries was obviously impaired. 2RP 133.

Rogers first encountered Humphries in the rear of Roessel's car. 2RP 302. When Rogers opened the door, he was hit with the odor of alcohol, as well as a strong burnt marijuana smell. 2RP 304-05. Rogers observed that Humphries had "very, very red, watery eyes." 2RP 303. His pupils were dilated. 2RP 303. Red eyes would be consistent with use of both alcohol and marijuana. 3RP 355. Rogers emphasized that they were "very" red and watery. 3RP 355. The redness was more indicative of marijuana usage, while the wateriness suggested alcohol. 3RP 355. Humphries's speech was very slow and slurred. 2RP 306. Humphries had some issues with walking to the other car. 2RP 303. He was stumbling and staggering to the point that Rogers had to hold on to Humphries and help him walk. 2RP 306.

After they were seated in Rogers's car, Rogers told him that he was investigating the possibility that he was impaired. 2RP 307. Humphries responded that he had had a drink or two and that he had smoked some marijuana, but that he had a marijuana "green card." 2RP 308. Rogers responded that having a green card did not confer the right to drive while

impaired. 2RP 308. Humphries responded, “That’s bullshit.” 2RP 308.

Additionally, Tia Eddington, who was with Humphries just before the police became involved, testified that Humphries was drinking. 3RP 368. Eddington had seen Humphries drunk 30 or 40 times in the past. 3RP 377. She had seen him sober hundreds of times. 3RP 377. That night he was “pretty buzzed.” 3RP 377.

Viewed in the light most favorable to upholding the conviction, the evidence also showed impaired driving. Renfro activated his siren when Humphries turned onto Elizabeth Avenue. 2RP 114. Hall was right behind Renfro and had his lights and siren on as well. 2RP 155-56. Nevertheless, it took Humphries two blocks to stop. 2RP 115. Humphries was driving slowly on the side street. 2RP 135. There were places he could have stopped before he did. 2RP 135. Indeed, he did not stop until they arrived at his passenger’s house. 2RP 147. A logical conclusion that could be drawn is that due to his intoxication, Humphries was oblivious to the lights and sirens until he stopped at his destination.

Finally, Humphries criticizes Rogers for not performing a DRE evaluation or field sobriety tests. However, as he explained at trial, Rogers did not perform field sobriety tests or a DRE evaluation for several reasons. 2RP 320. First, Humphries was accused of a fairly significant crime and he

did not want to unhandcuff him and conduct the tests in the middle of the night in a residential neighborhood. 2RP 320. Additionally, the had a number of pending priority calls that night, and based on what Renfro had told him, and his own observations, he felt they already had sufficient evidence of impairment. 2RP 320. Could not do DRE at the jail because it required two officers and he did not have another officer available. 3RP 352. Moreover, based on his own observations and the information Renfro had given him, Rogers felt there was more than enough evidence to conclude that Humphries was driving while impaired. 2RP 321, 3RP 351.² This claim should be rejected.

B. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT TO CONVICT HUMPHRIES OF POSSESSION OF A CONTROLLED SUBSTANCE IT NEED TO FIND THAT HE POSSESSED “OYXCONTIN” AND THAT “OXYCONTIN” WAS THE BRAND NAME FOR A CONTROLLED SUBSTANCE.

Humphries next claims that the trial court erred in instructing the jury with regard to his possession of oxycodone, which has a brand name of OxyContin. Humphries’s argument is somewhat fluid, but the State will attempt to address it.

² Humphries devotes multiple pages to discussing the alleged difficulty of quantifying drugs in the bloodstream in relation to impairment. Brief of Appellant at 13-15. Given that Humphries refused a blood test, the State fails to understand the relevance of this argument.

1. *There was no variance between the information and to-convict instruction.*

Humphries first asserts that he “challenges the possession of oxycontin ‘to-convict’ jury instruction when he was charged with possession of ‘oxycodone.’” Brief of Appellant at 16, 21. The State is unsure what to make of this contention. The entire issue below arose because the information alleged possession of “oxycontin.” See CP 98. Defense counsel objected to the instruction containing the term “oxycodone” when the charge was possession of “oxycontin.” 3RP 389. Counsel chose to wait until after the parties had rested to raise the issue, although he was aware of the discrepancy beforehand. 3RP 393, 418-19. Further, counsel conceded, based on RCW 69.50.206(a) and *State v. Long*, 19 Wn. App. 900, 578 P.2d 871 (1978), that the pleading of “oxycontin” was sufficient to put Humphries on notice that he was charged with possession of oxycodone. 3RP 417.

Here, the to-convict instruction, like the information, required the jury to find that Humphries possessed “oxycontin.” CP 310. There is no factual basis to this claim.

2. *Humphries cited preservation of error “preserved” issues that were decided in his favor below or invited greater error than that he now claims.*

Humphries next alleges that he “preserved the issue for review by objecting to the state’s motion to amend the information to replace

‘oxycontin’ with ‘oxycodone’ after the defense rested. CP 391-395, 408-419. The trial court denied the motion. Id. The defense also timely objected to jury instruction #17. RP 425.” Brief of Appellant at 16. The record also fails to support this claim.

He is correct that he objected to the State’s motion to amend the information. However, as he also notes, that objection was sustained, primarily because under *Long* the pleading was sufficient to put Humphries on notice of the charged offense. 3RP 417-19. Having been granted what he sought, Humphries objection to the amendment of the information preserves nothing for review.

Nor does his objection to Instruction 17 preserved anything for review. The Court gave the following instruction in paragraph one of the instruction:

- (1) That on or about or between March 3, 2012, and March 4, 2012, the Defendant possessed oxycontin and that oxycontin is an official name, common or usual name, chemical name or brand name for a controlled substance.

CP 310. Humphries objected only to the final phrase:

I would just take exception to the wording in Number 1 and would prefer that it indicate that on or about or between March 3, 2012, and March 4, 2012, the Defendant possessed a controlled substance, to wit, OxyContin.

3RP 424-25. As the State reads Humphries’s subsequent arguments in his

brief, his present objection appears to be that the to-convict instruction did not require the jury to find that he possessed the controlled substance “oxycodone.” Brief of Appellant at 16-22.

The instruction that the court gave required the jury to find *both* that he possessed “oxycontin” *and* that “oxycontin” was, *inter alia*, a brand name for a controlled substance. The instruction that Humphries sought was more limited, and would have presumed that “oxycontin” was a controlled substance. Humphries’s proposed instruction would have committed the very error he accuses the trial court of making. This amounts to invited error and clearly did not preserve anything to review.

3. Instruction 17 required the jury to identify the controlled substance Humphries possessed.

Humphries relies on the *dissenting* opinions in *State v. Sibert*, 168 Wn.2d 306, 230 P.3d 142 (2010), for his argument that the to-convict instruction was inadequate because it did not require the State to prove the identity of the controlled substance. This simply is not true as a matter of fact.

The instruction required the jury to *find* two things: (1) that Humphries possessed “oxycontin” and (2) that “oxycontin” is a brand name for a controlled substance. The Statute clearly provides that controlled substances are illegal to possess whether named by generic or brand name:

The drugs and other substances listed in this section, by whatever official name, common or usual name, chemical name, or brand name designated, are included in Schedule II.

RCW 69.50.206(a). The requirement that the jury find the identity of the controlled substance was thus met. *Sibert*, 168 Wn.2d at ¶ 8.

Even were the dissent followed in *Sibert*, Humphries's claim would have to fail. Unlike in that case, where the plurality looked to the charging document to supply the missing identity of the substance, here, the jury had to specifically find that Humphries possessed "oxycontin," and that "oxycontin" was the brand name of a controlled substance.

Given these instructions, Humphries attempt to distinguish the harmless error analysis in *Sibert* must also fail. While it is true that there was more than one controlled substance in this case, there was only one controlled substance that any witness testified was known by the brand name of OxyContin: oxycodone. Nor did the State in any way in its closing arguments suggest that the marijuana or crack cocaine could satisfy the elements of Count 2. In short there is simply zero probability that the jury was confused by Instruction 17 into convicting Humphries of any crime but possession of OxyContin/oxycodone. This claim should be rejected.

C. EVIDENCE THAT: (1) BEFORE HUMPHRIES WAS PLACED IN THE BACK OF THE PATROL CAR, THE OFFICER HAD SEARCHED THE COMPARTMENT WITH A FLASHLIGHT AND FOUND NOTHING, (2) THAT NO ONE ELSE HAD BEEN IN THE COMPARTMENT BEFORE HUMPHRIES, (3) THAT AFTERWARDS THERE WAS A PACK OF NEWPORTS IN THE BACK OF THE CAR, THAT HAD 17.8 GRAMS OF CRACK COCAINE IN IT, (4) THAT HUMPHRIES SMOKED NEWPORTS, AND (5) THAT HUMPHRIES ALSO HAD ANOTHER CIGARETTE PACK WITH LIKELY PROCEEDS OF DEALING IN HIS JEANS POCKET, WAS SUFFICIENT TO SUPPORT THE ELEMENT THAT HE POSSESSED COCAINE.

Humphries next claims that the evidence was insufficient to show that he possessed the cocaine found in the back of the police car. This claim is without merit because the evidence was more than sufficient to show actual possession.

The standard of review is discussed with regard to Point A, *supra*. Humphries first asserts that there was “no evidence” that he had actual possession of the cocaine. Brief of Appellant at 23. He is mistaken.

As noted above, circumstantial evidence is no less reliable than direct evidence. *Myers*, 133 Wn.2d at 38; *see also State v. Manion*, ___ Wn. App. ___, ¶ 72, 295 P.3d 270 (2013) (“Manion fails to acknowledge that actual possession can be proved by circumstantial evidence.”). The circumstantial

and direct evidence at trial pointed to only one conclusion: Humphries directly possessed the cocaine.

The only way the box of cigarettes containing the cocaine could have gotten to where it was found was if Humphries dropped it there. To drop it, he necessarily had to be in direct possession of it.

Officer Thuring provided the evidence in support of this charge. He testified that Bremerton patrol cars did not have a standard back seat; the original was replaced with a one-piece plastic molded seat that was bolted in. 2RP 192, 204. The floor was rubberized and sealed. 2RP 192. There was no carpet. 2RP 192. Thuring inspected his vehicle at the beginning of his shift. 2RP 191. He used a flashlight and inspected it from the floor up and all around the seat. 2RP 202. He did not find anything in the back of it. 2RP 192-93. Thuring had not placed anyone in the back of his car that evening before Humphries. 2RP 194.

After Humphries was removed from the car, but before he left the scene, Thuring again searched the back of the patrol car to make sure there was nothing there. 2RP 195-96. Thuring found a pack of Newport cigarettes sitting conspicuously on the seat where Humphries had been sitting. 2RP 196. In the pack was a razor blade and what appeared to be several packages of cocaine. 2RP 198.

Tia Eddington testified that Humphries smoked Newports. 3RP 377. Additionally when he was searched incident to arrest, Humphries had another pack of Newports that contained \$900 in cash. 2RP 164, 221. A narcotics dog alerted on the cash. 2RP 285.

The foregoing evidence, viewed in the light most favorable to upholding the conviction, provided a more than sufficient basis for the jury to conclude the Humphries actually (or constructively) possessed the cocaine. This claim should be rejected.

D. HUMPHRIES FAILS TO SHOW PROSECUTORIAL MISCONDUCT WHERE HIS COUNSEL INTRODUCED THE CONCEPT OF CONSTRUCTIVE POSSESSION AND THE STATE ESSENTIALLY RESPONDED THAT THE POSSESSION WAS ACTUAL.

Humphries next claims that he was denied a fair trial when the State and his own counsel discussed the law of constructive possession without a jury instruction on the issue. This claim is without merit because to the extent that any error occurred it was invited by Humphries and the prosecutor's argument was fair response.

Prosecutorial misconduct requires a showing that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. *State v. Hughes*, 118 Wn.App. 713, 727, 77 P.3d

681 (2003). Prejudice is established only if there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). The Court reviews a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005).

In her initial closing argument, the prosecutor made no mention of constructive possession. Her argument appears directed at *actual* possession. First, she argued, "I believe it was Officer Thuring testified that, in his experience, he's seen many handcuffed persons deposit, leave items in their possession in the back of patrol cars. It can be done, easily." 3RP 457. She later described the possession again only in terms of actual possession: "Tim Humphries has 17.7 grams *on him* in the cigarette pack." 3RP 460 (emphasis supplied).

Constructive possession was first broached by Humphries's own counsel:

There's two ways that an individual can possess something, actual possession and constructive possession. Now, it could be said that I'm in actual possession of the jury instructions. I'm holding them. Maybe they're in my pocket, my jacket. I'm in actual possession. Clearly, what's been proffered before you is that Mr. Humphries wasn't in actual possession of any cocaine. There's been no evidence of that. Now, what the State's theory is is that Mr. Humphries was in constructive possession of the cocaine, i.e., he had some dominion and

control over it, even though he may not have actually possessed it. You guys all just saw me put that down there. I'm in arms reach of it. You guys can tell me I'm in constructive possession of those jury instructions. But you guys saw me put it there. You guys see that I'm standing near it.

3RP 467. It was not until rebuttal that the State responded to this argument, basically disavowing any claim that this was a case of constructive possession:

Counsel also talked about actual possession versus constructive possession. *Timothy Humphries was in actual possession up until the moment he ditched these drugs in the patrol car.* And I'm not sure if I quite follow Counsel's argument from there, whether or not it was saying that once he leaves these drugs behind he's no longer in possession of the cocaine? I'm not sure if we're supposed to then charge Officer Thuring with possession of a controlled substance, since they were in his car, at that point? But the constructive possession is there. *The actual possession is there until the moment he tries to hide them.*

3RP 480.

It is well settled that a party may not materially contribute to an erroneous application of law at trial and then complain of it on appeal. *In re K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). Further, a prosecutor's remarks in rebuttal, even if they would otherwise be improper, are not misconduct if they are ““invited, provoked, or occasioned”” by defense counsel's closing argument, so long as the remarks do not go beyond a fair reply. *State v. Davenport*, 100 Wn. 2d 757, 761, 675 P.2d 1213 (1984).

Moreover, even were the alleged error not invited, Humphries fails to demonstrate that the jury heard any misstatement of the law. WPIC 50.03 provides:

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

The jury was given the first a sentence. CP 304. Humphries fails to establish how his counsel's comments would have caused the jury to misapply the above precepts. As noted, the State argued that Humphries was in actual possession of the cocaine. Humphries fails to show either misconduct or prejudice. This claim should be rejected.

E. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUEST AN UNWITTING POSSESSION INSTRUCTION WHERE THE DEFENSE IS NOT AVAILABLE FOR THE CRIME OF POSSESSION WITH INTENT.

Humphries next claims that counsel was ineffective for not requesting an unwitting possession instruction. This claim is without merit because the defense is not available to the charge of possession with intent to deliver.

Unwitting possession is a judicially created affirmative defense that

may excuse the defendant's behavior, notwithstanding the defendant's violation of the letter of the statute. *State v. Knapp*, 54 Wn. App. 314, 317–18, 773 P.2d 134, *review denied*, 113 Wn.2d 1022 (1989). To establish the defense, the defendant must prove, by a preponderance of the evidence, that his or her possession of the unlawful substance was unwitting. *State v. Riker*, 123 Wn.2d 351, 368, 869 P.2d 43 (1994). A defendant can show unwitting possession through evidence that he or she was unaware of the possession, or did not know the nature of the substance. *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994).

However, the unwitting possession defense applies only to possession, not the greater offense of possession with intent. While knowledge of the nature of the controlled substance is not an element of the offense of possession with intent to deliver, it is impossible for a person to intend to manufacture or deliver a controlled substance without knowing what he or she is doing. *State v. Sims*, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992); *State v. Sanders*, 66 Wn. App. 380, 390, 832 P.2d 1326 (1992). Thus, guilty knowledge of the nature or presence of the substance is subsumed under the statutory requirement that the defendant intended to deliver a controlled substance. *Sanders*, 66 Wn. App. at 380.

Because unwitting possession is not a defense to the charge of which Humphries was convicted, he has established neither deficient performance

nor prejudice. Indeed had counsel requested such an instruction, he would have effectively removed the burden of proving the scienter element from the State and placed it upon Humphries. This claim should clearly be rejected.

IV. CONCLUSION

For the foregoing reasons, Humphries's conviction and sentence should be affirmed.

DATED April 16, 2013.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to be 'R. Hauge', with a long horizontal stroke extending to the right.

RANDALL AVERY SUTTON
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Deputy Prosecuting Attorney

KITSAP COUNTY PROSECUTOR

April 16, 2013 - 4:55 PM

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