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State of Washington  
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No. 51732-9-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Kenneth Kylo,**

Appellant.

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Cowlitz County Superior Court Cause No. 17-1-00506-9

The Honorable Judge Michael H. Evans

**Appellant's Reply Brief**

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## ARGUMENT

### **I. DEFENSE COUNSEL’S DEFICIENT PERFORMANCE SHIFTED THE BURDEN OF PROOF, REQUIRING MR. KYLLO TO DISPROVE AN ELEMENT OF THE CHARGED CRIME.**

Mr. Kylo was accused of possession “with intent to deliver,” a charge which required the State to prove intent. CP 17-18. As part of its burden, the State was obligated to prove Mr. Kylo’s knowledge – that he knew he possessed a controlled substance. CP 36, 38; *see State v. Sims*, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992).

Despite this, his attorney proposed an instruction burdening Mr. Kylo with the obligation to disprove knowledge. CP 20-21. This improperly shifted the burden of proof as to an essential element. *Id.*; *State v. Newton*, 179 Wn.App. 1056 at p. 4 (2014) (unpublished); *see also State v. Carter*, 127 Wn.App. 713, 112 P.3d 561 (2005).

By proposing the burden-shifting instruction, defense counsel’s performance was objectively unreasonable. Respondent concedes that “trial counsel’s performance was deficient.” Brief of Respondent, p. 10.

Counsel’s deficient performance prejudiced Mr. Kylo. It created an inconsistency in the instructions that allowed the State to evade its

burden to prove one component of the intent to deliver.<sup>1</sup> *See Newton*, 179 Wn.App. 1056 at p. 4 (unpublished); *Carter*, 127 Wn.App. at 718.

In *Newton*, as here, the defendant was accused of possession with intent. *Newton*, 179 Wn. App. 1056 at p. 1 (unpublished). Her lawyer erroneously proposed an unwitting possession instruction, despite the State's obligation to prove knowledge. *Id.*, at p. 4 (unpublished). The Court of Appeals reversed based on ineffective assistance. *Id.*, at pp. 3-5 (unpublished).

Similarly, in *Carter*, defense counsel proposed an unwitting possession instruction in a case involving unlawful possession of a firearm. *Carter*, 127 Wn. App. at 716. The Court of Appeals reversed, finding that the inconsistency in the court's instructions "obviously misled [jurors] to believe [the defendant] had the burden of proving unwitting possession." *Id.*, at 718.

Here, as in *Newton* and *Carter*, the error is presumed prejudicial because "the combination of the unwitting possession instruction and the to convict instruction[s] created a clear misstatement of the law." *Newton*, 179 Wn. App. 1056 at p. 4 (unpublished); *see also Carter*, 127 Wn. App. at 718. The jury "was obviously misled to believe Mr. [Kyllo] had the

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<sup>1</sup> The error was further compounded by the instruction focusing jurors on a search for "truth," and the prosecution's reliance on official suspicion as evidence of Mr. Kyllo's guilt. *See Appellant's Opening Brief*, pp. 13-17, 29-31.

burden of proving unwitting possession.” *Carter*, 127 Wn.App. at 718.

Mr. Kylo is entitled to a new trial. *Id.*

Respondent suggests that the court’s other instructions cured any error. Brief of Respondent, pp. 7-8, 11. This argument was rejected in *Carter. Id.*

Respondent also appears to argue that the jury *ignored* the court’s unwitting possession instruction, apparently because jurors should have known that the instruction applied only to the uncharged crime of simple possession. Brief of Respondent, pp. 78, 11.

Respondent cites no authority for this novel proposition. Where no authority is cited, this court should presume that counsel found none after diligent search. *See State v. Arredondo*, 188 Wn.2d 244, 262, 394 P.3d 348 (2017). Furthermore, juries are presumed to *follow* the court’s instructions, not ignore them. *Id.*, at 264.

Respondent goes on to argue that the jury “would have rejected” an unwitting possession defense to simple possession. Brief of Respondent, p. 11. In fact, jurors *did* reject the affirmative defense. This is wholly irrelevant, because the defense did not apply to the charged crime, even if it “would have” applied to a hypothetical lesser included offense. Brief of Respondent, p. 11.

The problem is not that Mr. Kylo failed to persuade the jury. Instead, the error stems from the inconsistency. The court's instructions simultaneously placed the burden on both the State and the defense to establish Mr. Kylo's *mens rea*. CP 36, 38, 39.

Respondent also relies on the fact that “[t]he jury found both the possession and the intent to deliver.” Brief of Respondent, p. 11. Respondent appears to suggest that the jury's guilty verdict somehow proves an absence of prejudice. Brief of Respondent, p. 11.

This argument has no merit. The jury's finding on intent is tainted by the instructional error. The jury's verdict was based on the fatally inconsistent instructions and does not support Respondent's position.

Respondent suggests that harmless error analysis applies to a claim of ineffective assistance. Brief of Respondent, pp. 6-8, 10 (citing *State v. Woods*, 138 Wn.App. 191, 156 P.3d 309 (2007)).<sup>2</sup> This is incorrect. An ineffective assistance claim requires a showing of prejudice.

By definition, an error that is prejudicial cannot be harmless. Furthermore, even if Mr. Kylo's claim were subject to harmless error analysis, the State could not meet its burden of proving the error harmless

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<sup>2</sup> Respondent's citation to *Woods* erroneously attributes that decision to the Supreme Court. Brief of Respondent, p. 10. In *Woods*, it is not clear why Division III chose to address the State's harmless error argument after concluding that the defendant was prejudiced. *Woods*, 138 Wn. App. at 201-202.

beyond a reasonable doubt. The error is not trivial, formal, or merely academic. *State v. Walden*, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997). It “may have affected the final outcome of this case.” *Id.*

It is well-established that inconsistent instructions such as those given in this case are “presumed to have misled the jury in a manner prejudicial to the defendant.” *Id.* (quoting *State v. Wanrow*, 88 Wn.2d 221, 239, 559 P.2d 548 (1977)). In both *Walden* and *Wanrow*, the Supreme Court reversed because the trial court’s instructions contained inconsistencies based on a clear misstatement of law.

The Court of Appeals has reached the same result in cases involving unwitting possession as an affirmative defense to charges requiring proof of intent. *Newton*, 179 Wn.App. 1056 at p. 4 (unpublished); *Carter*, 127 Wn.App. at 718.

Counsel’s error went to the very heart of Mr. Kylo’s case. The defense argument was that Wiggins was the drug dealer, and that Mr. Kylo did not know what was in the backpack or elsewhere in the room. RP (2/16/18) 79-94, 126, 141.

Police found pay/owe sheets in Wiggins’s wallet and on the table where Wiggins was seated. RP (2/15/18) 104, 120-122. The backpack that Mr. Kylo tossed out the window—under instructions from Wiggins—contained Wiggins’s prescription medication. RP (2/15/18) 205-212; RP

(2/16/18) 81-82, 86. Under these circumstances, the error cannot be considered harmless beyond a reasonable doubt.

As in *Newton*, *Carter*, *Walden*, and *Wanrow*, the error is presumed prejudicial. Mr. Kylo was deprived of his constitutional right to the effective assistance of counsel. Because of this, his convictions must be reversed. *Newton*, 179 Wn.App. 1056 at p. 4 (unpublished); *Carter*, 127 Wn.App. at 718.

**II. THE TRIAL COURT VIOLATED ER 403 AND MR. KYLLO’S RIGHT TO DUE PROCESS BY ADMITTING EVIDENCE THAT ENCOURAGED JURORS TO CONVICT BASED ON “OFFICIAL SUSPICION” RATHER THAN THE EVIDENCE.**

Appellant’s Opening Brief fully addressed the arguments set forth in the Brief of Respondent. Accordingly, Mr. Kylo rests on the Opening Brief.

**III. MR. KYLLO’S CONVICTIONS MUST BE REVERSED BECAUSE THEY WERE BASED ON EVIDENCE UNLAWFULLY SEIZED IN VIOLATION OF THE FOURTH AMENDMENT AND WASH. CONST. ART. I, §7.**

Appellant’s Opening Brief fully addressed the arguments set forth in the Brief of Respondent. Accordingly, Mr. Kylo rests on the Opening Brief.

**IV. THE TRIAL COURT VIOLATED MR. KYLLO’S RIGHT TO COUNSEL BY FAILING TO ADEQUATELY INQUIRE INTO HIS CONFLICT WITH HIS ATTORNEY.**

Appellant’s Opening Brief fully addressed the arguments set forth in the Brief of Respondent. Accordingly, Mr. Kylo rests on the Opening Brief.

**V. THE COURT’S “REASONABLE DOUBT” INSTRUCTION IMPROPERLY FOCUSED THE JURY ON A SEARCH FOR “THE TRUTH” IN VIOLATION OF MR. KYLLO’S RIGHT TO DUE PROCESS AND TO A JURY TRIAL.**

Appellant’s Opening Brief fully addressed the arguments set forth in the Brief of Respondent. Accordingly, Mr. Kylo rests on the Opening Brief.

**CONCLUSION**

Mr. Kylo’s convictions must be reversed and the case dismissed. Alternatively, the case must be remanded for a new trial. If the convictions are not reversed, the sentence must be vacated, and the case remanded for the appointment of a new attorney.

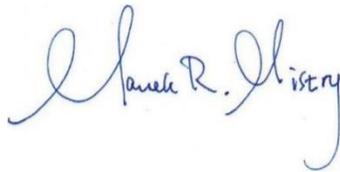
Respectfully submitted on February 4, 2019,

**BACKLUND AND MISTRY**

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the Brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on February 4, 2019.



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**Transmittal Information**

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