

FILED

SEP 13 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 283666-III

COURT OF APPEALS

DIVISION III

OF

THE STATE OF WASHINGTON

**State of Washington,
*Respondent***

v.

**Mark E. Davis,
*Appellant***

Appeal from the Superior Court of Benton County

REPLY BRIEF OF APPELLANT

Attorney for Appellant Mark E. Davis:
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I. ISSUES ON REPLY

1. The presence of evidence to support passing, fleeting, momentary, or temporary possession requires the giving of instructions to avoid a due process violation requiring a new trial.
2. Vouching for the memory of one witness over the memory of another witness is factually the same as giving an opinion as to another witness's credibility.

II. ARGUMENT ON REPLY

1. **The presence of evidence to support passing, fleeting, momentary, or temporary possession requires the giving of instructions to avoid a due process violation requiring a new trial.**

The State appears to concede that the defense presented evidence of passing possession citing RP 6/30/09, p.45. (Respondent's Brief p.3) At the same time the State argues the appellant "attempts to paint the situation differently than it was." The jury is the trier of fact. The failure of the Superior Court to instruct in a manner allowing the defense to argue its theory of the case where evidence is present to support that theory is a due process violation. *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986)

The first question is whether the jury was properly instructed. A jury instruction must correctly state the applicable law. *State v. Mark*, 94 Wash.2d 520, 526, 618 P.2d 73 (1980) "Jury Instructions are sufficient if

they allow the parties to argue their theories of the case, do not mislead the jury and when taken as a whole, properly inform the jury of the law to be applied.” *Hue v. Farmboy Spray Co.* 127 Wash.2d 67, 92, 896 P.2d 682 (1995)

In this case, the courts failure to instruct the jury on “momentary, fleeting, temporary, or passing control” goes to the question of possession ever being established. This is different from unwitting possession which is an affirmative defense the defendant may use to counter possession of the drugs. *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994) The difference between unwitting possession and fleeting or passing control requires a *Staley* instruction on momentary or passing control. The failure to instruct based upon the testimony at trial establishes a due process violation requiring a new trial.

2. Vouching for the “memory” of one witness over the “memory” of another witness is factually the same as giving an opinion as to another witnesses credibility.

The Superior Court instructed the jury that there are a number of things the jury should consider in evaluating a witnesses testimony. Among factors the jurors are to consider is “the quality of a witnesses memory while testifying.....and any other factors that affect your

evaluation or belief of a witness or your evaluation of his or her testimony.” (RP 57 lines 1-9)

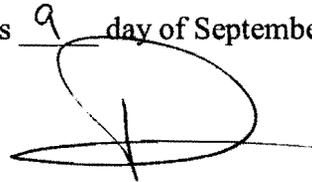
A prosecuting attorney commits misconduct when his cross-examination seeks to compel a witness to opine whether another witness is telling the truth. *State v. Suarez-Bravo*, 72 Wash. App. 359, 366, 864 P.2d 426 (1994); *State v. Padilla*, 69 Wash. App. 295, 299, 846 P.2d 564 (1993) Such questioning invades the jury’s province and is unfair and misleading. *State v. Castenada-Perez*, 61 Wash. App. 354, 362, 810 P.2d 74 (1991)

An objection was made during the trial to the questioning. (RP 32 lines 20-25) Mr. Swaby objected and the court ruled: “The answer will stand.” (RP 33)

V. CONCLUSION

The failure of the Superior Court to properly grant the defense request to instruct the jury as to “momentary, temporary, passing, or fleeting possession” given the testimony establishes a due process violation requiring a new trial. The appellate court here may correct the confusion between constructive possession and passing control in criminal possession cases. The defendant respectfully requests that the court remand for a new trial.

Respectfully submitted this 9 day of September, 2010

A handwritten signature in black ink, appearing to be 'D. Phelps', written over a horizontal line.

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**COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON)	
Respondent)	Cause No. 283666
)	Cause No. 08-1-00232-6
vs.)	
)	
)	DECLARATION OF
MARK E. DAVIS)	SERVICE
Appellant)	
_____)	

I, Leah M. Hill, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a legal assistant in the office of Phelps & Associates, PS, served in the manner indicated below, an original and one copy of the Reply Brief of Appellant, on September 10, 2010.

COURT OF APPEALS DIV III
500 N. CEDAR
SPOKANE, WA 99201

Legal Messenger
 U.S. Regular Mail

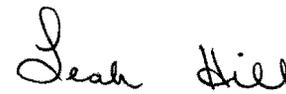
I further declare that I served in the manner indicated below a true and correct copy of the Reply Brief of Appellant, on September 10, 2010.

BENTON COUNTY PROSECUTOR
7122 W. OKANOGAN PLACE
KENNEWICK, WA 99336

Legal Messenger
 U.S. Regular Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Spokane, WA on this 10 day of September, 2010



LEAH M. HILL