

FILED

JUN 14 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**No. 28366-6-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

---

*BRIEF OF APPELLANT*

---

Attorney for Appellant Mark E. Davis:  
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(509) 892-0467

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## **I. ASSIGNMENTS OF ERROR AND ISSUE STATEMENTS**

1. The court erred in failing to instruct the jury on passing or momentary possession based upon the evidence before the jury.
2. There was insufficient evidence to sustain the conviction.
3. The court committed reversible error in denying the defense objection to improper vouching testimony solicited by the prosecution.

## **II. STATEMENT OF THE CASE**

A jury found Mark Eric Davis guilty of Possession of a Controlled Substance Cocaine after he was found with a pipe that contained residue later identified as cocaine. Mr. Davis was arrested on December 16, 2007 for a misdemeanor charge arising from a family dispute and the pipe was found during a search of his person incident to arrest. (RP 24)

The trial began on June 29, 2009 with jury selection. On June 30, 2009 the prosecutor requested a motion in limine to exclude “any mention of the reasons for the arrest.” (RP 5 lines 2-6) The defense commented that it was concerned that not telling the jury the basis for the arrest could lead to speculation by the jury. (RP 6 lines 5-8) The state argued that the other charges were taken to trial with “acquittal on a couple or a conviction on one or something like that”, a reference to the misdemeanor charges. (RP 6 lines 20-25) The state argued that the prior trial was not relevant to this case. (RP 7 lines 1-2) A decision was made to say the arrest was for a

misdemeanor and the court granted the prosecutions motion to exclude mention of the basis of the arrest. (RP 7 lines 10-13)

The first witness for the state was a Mr. Robert Hegel a forensic scientist with the Washington State Patrol Crime Laboratory in Kennewick, Washington. (RP 14 lines 13-25) The residue was removed from the pipe by the lab technician. (RP 17) The residue tested positive as cocaine. (RP 18) Residue was described as an amount too small to weigh on a scale. (RP 19 lines 8-12) Further, that the age of the drugs could not be established through testing. (RP 22 lines 2-11)

Officer Wayne Meyer was next called to testify from the Kennewick Police Department. (RP 23) He arrested Mr. Davis on misdemeanor charges. (RP 24 lines 7-11) The testimony was that after the arrestee was handcuffed Officer Meyer removed the contents of the pockets placing them in plastic bags. (RP 24 lines 17-25) He was assisted by an Officer Malone, but he was the primary officer conducting the search. (RP 25 lines 1-7) Officer Meyer said he found the pipe in the front pocket of Mr. Mark Davis' pants. (RP 25 lines 1-14)

The prosecution then began to question the officer about whether there was an incident involved in the arrest. (RP 27 lines 11-15) The defense objected based upon "relevance". (RP 27 line 16) Mr. Swaby argues that the court "excised what happened before the arrest", a

reference to the courts pretrial ruling. (RP 27 lines 20-25) The prosecution stated they need to inquire into “the fact that the police fought with Mr. Davis to explain inconsistencies in the officer testimony about where the pipe was found either pants pocket or coat pocket.” (RP 28 lines 1-9)

On cross examination defense counsel Ms. Meehan began to question Officer Meyer regarding the length of time it took to arrest Mr. Davis. (RP 29 lines 11-25) Ms. Meehan attempted to narrow the scope of the question by narrowing the time frame. (RP 30 lines 1-9) The police officer in an unresponsive answer stated: “I don’t know if Mr. Swaby would want me to answer that, due to the circumstances.” The question was re-phrased and the witness responded appropriately to the question. The officer responded that it was three to five minutes from the time he decided to arrest Mr. Davis until he searched Mr. Davis. (RP 30 lines 16-21) The defense moved for a mistrial based upon the unresponsive statement creating the impression that defense counsel was hiding something from the jury. Further, that a curative instruction would not cure the statement made by Officer Meyer. (RP 41 lines 16-42 line 22) The court denied the motion for mistrial without instructing the jury to disregard the testimony regarding Mr. Swaby not wanting an answer “due to circumstances.” (RP 43 lines 13-17)(RP 30 lines 16-21)

Officer Ken Melone testified he was with Kennewick Police Department on December 16, 2007. (RP 31 lines 6-13) He assisted with the arrest of Mark Davis. (RP 31) The arrest report he made documents the small metal pipe being found in the right front jacket pocket of Mr. Mark Davis. (RP 32 lines 11-19) He acknowledged that Officer Meyer believed that he had found the pipe in Mr. Davis' front pants pocket. (RP 32 lines 13-22)

The prosecutor then asked Officer Melone to vouch for Officer Meyers testimony by asking "Do you have an opinion on whose memory would be better of that aspect of the incident? Yours or his?" (RP 32 lines 20-25) Mr. Swaby objected and the court ruled: "The answer will stand." (RP 33) The answer was that Officer Meyers' memory would be better than his memory. (RP 32 lines 23-25)

In cross examination Officer Melone testified that his report documents that he found the pipe. (RP 33 lines 17-25) It was pointed out that the mistake was a mistake about not only where the pipe was found but about who found it. (RP 33 line 21 to RP 34 line 5) Officer Melone testified he tries to be as accurate as possible when making police reports. (RP 36 lines 1-5) The police report says he found the pipe in the right front jacket pocket and it contained steel wool filter. (RP 36 lines 1-21) The pipe was identified as the one that he recovered. (RP 37 lines 1-9)

The prosecutor then approached the court at a side bar where he discussed his desire to again discuss the events involved in arresting Mr. Mark Davis contrary to his motion in limine and the courts pretrial order. (RP 37-38 line 16) Officer Melone testified that he may have made a mistake in his report because both officers were trying to restrain the defendant as he was being searched. (RP 3- lines 14-25)

The defense called Mark Davis to the stand to testify on his own behalf. (RP 44) Mr. Davis testified that he was in the process of moving the day of this incident. (RP 44) Mr. Davis said he was “going through his garage and found the pipe in the tool box.” He then picked it up with the intention of throwing it away in a garbage can outside. (RP 45)

He testified he had used drugs that day but not with that pipe. (RP 45 lines 7-20) Mr. Davis said he intended to put the pipe in the garbage can outside the house. (RP 45 lines 1-9)

Arguments raised regarding instructions involved the question of whether the jury should be instructed as proposed by the defense counsel Mr. Swaby. (RP 47 lines 23-25)(CP 35-42) Mr. Swaby’s proposed instructions were based upon *State v. Staley*, 123 Wn2d 794, 872, P.2d 502 (1994). The prosecution opposed the giving of an instruction based upon the theory of fleeting possession. (RP 48 lines 2-15)(CP 35-42)

The defense argued that *Staley* stands for the proposition “that a fleeting --- a momentary, temporary, or fleeting handling goes to the question of whether the State has carried its burden.” (RP 48 line 16 to 49 line 18)(CP 35-42) Mr. Swaby argued that “momentary, temporary, or fleeting handling of a narcotic drug goes to the question of whether the State had carried its burden of proof on the element of possession.” Mr. Swaby also offered: “A momentary handling along with other sufficient indicia of control over the narcotic may support a finding of possession.” (RP 49)(CP 35-42)

Mr. Mark Davis’ testimony that he had the pipe planning to throw it out placed it in close proximity to the police arrival which supports an argument of temporary, momentary possession. (RP 49) The defense argued that the testimony was that the possession was fleeting. (RP 49 lines 9-18) The prosecution argued that: “temporary, fleeting, or momentary possession, along with other indicia of control might support a finding of guilt.” (RP 49 lines 19-24)

The defense proposed five different instructions regarding momentary, temporary, or fleeting handling of narcotic drugs. (RP 50 lines 8-12)(CP 35-42) Defense counsel argued that the State had the burden to prove the possession was more than passing control. (RP 50 lines 8-12) (RP 51 lines 1-7)(CP 35-42)

The court refused to give the instructions proposed by the defense, ruling that *Staley* “was really sort of an unwitting possession sort of instruction.” (RP 51 lines 20-25) The court stated that it would allow argument that the State hasn’t established possession because the intention was to throw it away. (RP 52) The defense maintained that both *Staley* and *Callahan* requires that the State prove more than passing control. (RP 52 lines 15-20)(CP 35-42) The defense pointed out that fleeting possession and what constitutes that sort of possession is not fully defined in the instructions. But Mark Davis was not intending to exhibit control over the drug but to throw away the pipe. (RP 53 lines 20-25) The court ruled that the defense was allowed to argue momentary possession. (RP 54 lines 1-5) Defense counsel verified that the proffered instructions were included in the court record which the court verified. (RP 54 lines 21-25)(CP 35-42) Mr. Swaby stated his objections to the instructions were those that he proposed be given. (RP 54 lines 21-25)(CP 35-42)

The court instructed the jury in instruction number eight: “Possession means having a substance in one’s custody or control. Actual possession occurs when the items in the actual physical custody of the person charged with possession.” (RP 61 lines 11-14) (CP 5-18) During the deliberation the jury had questions for the court. The first question was, “Is it ever not a crime to be in possession of a controlled substance?”

The second question, “Is there any law in the State of Washington that addresses the quantity of a controlled substance, specifically, cocaine?”

(RP 72)

The court declined to give the jurors further instruction in response to question one. (RP 73 lines 1-13 and RP 74 lines 16-19) As to question number two the court responded, “You have all the courts instructions on the law.” (RP 74 lines 19-20 and RP 77 lines 15-16) Thirty minutes later the jury returned a verdict of guilty. (RP 77 lines 18-20) The defendant timely filed his appeal.

### **III. INTRODUCTION**

This case presents the court with the issue of the meaning of passing control and the proper instruction to the jury on passing control. The failure of the court to give the jury an instruction on passing control denied the defense the ability to maintain that passing control does not amount to actual control. The appellate court here may correct the confusion between constructive possession and passing control in criminal possession cases.

### **IV. ARGUMENT**

Mr. Mark Davis was convicted of one count of Possession of Cocaine. The cocaine was a residue amount of cocaine scraped from inside the pipe by the lab technician. (RP 20 lines 7-22) The defense maintained that Mr. Davis had found

the pipe in a tool box while moving. (RP 44 line 24 to RP 44 lines 1-6) Mr. Davis had the pipe because he found it and did not want his grandchildren to find it. He intended to throw the pipe in the trash can outside his garage. (RP 45 lines 6-20) Mr. Davis did not know when or if he had ever used the pipe he was found to have in his pocket. (RP 45 lines 20-25) The defense maintained that this was a passing or momentary possession of the drugs inside the pipe. (RP 68 line 15 to RP 69 line 10)(CP 35-42) The court refused to instruct the jury regarding the fleeting, momentary, or temporary possession and how that was to be considered by the jury. The trial judge said the *Staley* instruction “was really sort of an unwitting possession sort of instruction.” (RP 51 lines 20-25)

The significance of the failure of the court to instruct regarding the momentary or fleeting possession was demonstrated by the jury’s questions: “Is it ever not a crime to be in possession of a controlled substance, specifically cocaine?” Still the court failed to give an instruction to explain momentary or fleeting possession. (RP 74 lines 19-20 and RP 77 lines 15-16)

Multiple incidents of prosecutorial misconduct occurred including an incident where the government used one officer to testify that the other officer would have better recall of where the pipe was found. (RP 32 lines 23-25) A question objected to by the defense and which the court allowed over the defense counsels objection by ruling: “The answer will stand.” (RP 33)

**1. The failure of the court to give requested instructions on passing or momentary possession instructing on the defense theory requires a new trial.**

The Washington Supreme Court has ruled that if the state establishes possession of a controlled substance and the nature of the substance, that is all that is necessary to establish a prima facie case. *State v. Staley*, 123 Wn2d 794, 798, 872 P.2d 502 (1994) A defendant may then present affirmative defenses to the charge of possession of a controlled substance. *State v. Staley*, 123 Wn2d 794, 799, 872 P.2d 502 (1994) citing *State v. Cleppe*, 96 Wn2d 373, 381, 635 P.2d 435 (1981)

The Washington Supreme Court further ruled that “unwitting” possession may establish an affirmative defense to the charge of possession. That as to unwitting possession it does not matter how long the drugs were in the defendants possession since, under the theory, the defendant explains he was unaware of the drugs or the nature of the substance. *State v. Staley*, 123 Wn2d 794, 800, 872 P.2d 502 (1994) citing *Cleppe*, at 381

The *Staley* decision also clarified that “momentary, temporary, and fleeting possession” are not related to the defense of “unwitting” possession but rather goes to the element of possession. *State v. Staley*, 123 Wn2d 794, 800, 872 P.2d 502 (1994) citing to *State v. Callahan*, 77 Wn2d 27, 29, 459 P.2d 400 (1969) Momentary, temporary, and fleeting or passing control goes to the question of

whether the state has carried its burden of proof on the element of possession.

*State v. Staley*, 123 Wn2d 794, 802, 872 P.2d 502 (1994) The position that momentary or passing control is not an affirmative defense was affirmed by the Washington Court of Appeals in *State v. Summers*, 107 Wn App. 373, 387, 28 P.3d 780 (2001)

Applying this law to the case before this court, Mr. Davis provides testimony that the pipe was found in a tool box in his garage. (RP 44) That he was in the process of moving when he found the pipe. (RP 44) Mr. Davis said he picked up the pipe intending to throw it in the garbage outside the garage. (RP 45) Mr. Davis said he used drugs that day but he did not use the pipe. (RP 45 lines 7-20)

Defense counsel sought to have the court instruct the jury based upon *State v. Staley* arguing a theory of fleeting possession. (RP 47 lines 23-25) The defense explained to the court that under *Staley* the momentary, temporary, or fleeting handling goes to the question of whether the state has carried its burden. (RP 48 lines 16-23) Again the defense argues that momentary, temporary, or fleeting handling of a narcotic drug goes to the question of whether the state has carried its burden of proof on the element of possession. (RP 49 lines 1-18)

The defense recommended five different instructions related to momentary or passing possession. (RP 50)(CP 35-42) One proposed instruction was:  
Possession is an element of the offense and therefore the burden is on the state to

establish the possession that is more than passing control. (RP 50 lines 8-16)(CP 35-42) Another of the defense proposed instruction would have advised: “Momentary, temporary, or fleeting handling of a narcotic drug is lawful without other evidence of control over the narcotic drug.” (CP 35-42)

The trial court denied the instruction ruling: “I think *Staley* was really sort of an unwitting possession sort of instruction, but under the circumstances.” The court had suggested that perhaps an enhanced instruction with regards to the requirement of possession might be appropriate. “....So I’m going to deny the request for one of those proposed instructions.” (RP 51-52)

The defense argued: “He says that he has it. He gets it. He finds it in the garage. And I think he places, as I hear him, he places it the same day as the incident is alleged to have occurred. I don’t know what fleeting is thirty seconds, it’s a minute, it’s an hour. He says, “I picked it up intending to throw it away.”” (RP 53 lines 16-25) The defense maintained an exception to the courts failure to give the defense proffered instructions. The court affirmed that these instructions were included in the record. (RP 54 lines 21-25)(CP 35-42)

The court denied the instruction believing that unwitting possession and momentary /passing possession were legally the same. (RP 51 lines 20-25) That the defense could argue unwitting possession and accomplish the same goal. (RP 51-52) The failure of the 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 Wn2d 176, 191, 721 P.2d 902 (1986)

The first issue is whether the jury was properly instructed. On appeal, instructional errors are reviewed de novo. *State v. Brett*, 125 Wash.2d 136, 171, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L.Ed. 858 (1996) 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 the possession of the drugs. *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994) The error here denied the defense a legal argument to defeat the government establishing possession. It is because of this difference that the appellate court must remand for retrial where the court properly instructs the jury.

**2. There was insufficient evidence to sustain the conviction.**

The question becomes whether there was evidence to allow the jury to find Mr. Davis in constructive possession of the drugs contained inside the pipe. The

lab technician testified that the residue was too small to weigh on a scale. (RP 19 lines 8-12) The residue had to be removed from inside the pipe by the technician. (RP 17)

When sufficiency of the evidence is at issue, the test is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Green*, 94 Wn2d 216, 221, 616 P.2d 628 (1980)(quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) All reasonable inferences must be drawn in the states favor and interpreted most strongly against the defendant. *Id.* See also *State v. Partin*, 88 Wn2d 899, 906-07, 567 P.2d 1136 (1977) “In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence.” *State v. Delmarter*, 94 Wn2d 634, 638, 618 P.2d 99 (1980)(internal citation omitted) It is the fact finders province to believe or disbelieve any witness whose credibility it is called upon to consider. *State v. Williams*, 96 Wn2d 215, 222, 634 P.2d 868 (1981)(quoting *Rettinger v. Bresnahan*, 42 Wn2d 631, 633-34, 257 P.2d 633 (1953)

Here the evidence was that the pipe was found by Mr. Davis planning to throw it away. (RP 45) That the drug amount in the pipe was very small and had to be removed from inside the pipe. (RP 17-19) Based on these facts along a jury

would be unable to find beyond a reasonable doubt that Mr. Davis possessed the cocaine for more than a momentary or temporary period of time.

But even should the jury find possession of cocaine consideration of the affirmative defense of unwitting possession leads the court to only one inescapable burden of not guilty. For these reasons the defendant seeks the dismissal of the charges.

**3. The court committed reversible error in denying the defense objection to improper vouching testimony solicited by the prosecuting attorney from a law enforcement officer.**

The prosecution in its direct examination of Officer Melone tried to clarify a disagreement between Officer Melone and Officer Meyer as to where the pipe was found and which officer found the pipe. (RP 32 lines 13-22) After the prosecutor asked Officer Ken Melone to acknowledge that Officer Meyer believed he found the drug pipe. (RP 32 lines 13-22) Then the prosecution asked Officer Melone to vouch for Officer Meyer's testimony by asking: "Do you have an opinion on whose memory would be better of that aspect of the incident? Yours or his?" (RP 32 lines 20-25) Mr. Swaby objected and the court ruled: "The answer will stand." (RP 33) The answer was that Officer Meyer's memory would be better than his memory. (RP 32 lines 23-25)

A witness may not give an opinion as to another witness's credibility. *State v. Casteneda-Perez*, 61 Wash.App. 354, 360, 810 P.2d 74, review denied, 118 Wash.2d 1007, 822 P.2d 287 (1991) Credibility determinations lie within the sole province of the fact finder. *State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990) 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. Casteneda-Perez*, 61 Wash App 354, 362, 810 P.2d 74 (1991) When the case turns on the credibility of two witnesses, "the likelihood of the jury's verdict being affected by the improper questioning is substantial." *Padilla*, 69 Wash App at 302, 846 P.2d 564 (1993)

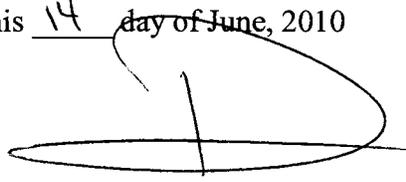
The prosecutor in the Davis case on direct examination of his own witness asked that witness to give an opinion about the credibility of his fellow law enforcement officer. The prejudice to the defendant is clear and the defense objected to the questioning during the trial. The defense requests the court remand the case for re-trial.

## V. CONCLUSION

The trial court committed reversible error by denying the defense request for instructions regarding momentary possession. The trial court

confused the affirmative defense of unwitting possession with the defense of momentary possession. The courts failure to instruct pursuant to defense counsels request requires reversal for a new trial.

Respectfully submitted this 14 day of ~~June~~, 2010

A handwritten signature in black ink, appearing to be "D. Phelps", written over a horizontal line. The signature is stylized with a large loop and a vertical stroke.

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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.                 | ) |                        |
|                     | ) |                        |
| MARK E. DAVIS       | ) | DECLARATION OF         |
| Appellant           | ) | SERVICE                |
|                     | ) |                        |
| _____               | ) |                        |

I, Leah M. Holbert, 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 Brief of Appellant, on June 14, 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 Brief of Appellant, on June 14, 2010.

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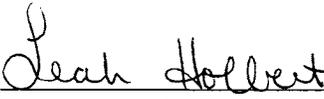
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Spokane, WA on this 14 day of June, 2010

  
LEAH M. HOLBERT