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NO. 63649-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

TRAVIS MARTINEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable David R. Needy, Judge
The Honorable Susan K. Cook, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to give appellant's proposed instruction on passing, fleeting, or momentary control. CP 79; 10RP 57-59, 63-64. A copy of the instruction is attached as appendix A.

2. The trial court erred by denying appellant's motion to admit the entirety of his statement to police at the time of his arrest. 10RP 16-18.

3. Appellant was denied his constitutional right to present a defense when the trial court excluded evidence of appellant's drug test results. 10RP 27, 43-44

Issues Pertaining to Assignments of Error

The State charged appellant with possession of methamphetamine. The defense theorized appellant's possession was fleeting. Appellant testified he seized a baggie containing what appeared to be drugs from a tenant solely to destroy them and had them for five to seven minutes. To support his defense, appellant sought to introduce evidence that he passed a drug test within 24 hours of being arrested. He told the arresting officer he thought the baggie contained drugs and where he obtained the baggie before his arrest. Appellant also proposed a jury instruction correctly stating that possession is determined from all relevant circumstances, and required more than passing, fleeting, and momentary handling. The trial

court excluded evidence of the drug test results, refused to allow him to cross-examine the officer on his complete statements to police, and denied the proposed instruction. The trial court gave no other instruction which defined passing, fleeting, or momentary handling.

1. Was appellant denied his opportunity to present his theory of the case when the trial court refused to give either appellant's proposed jury instruction, or any instruction whatsoever, on passing, fleeting, or momentary handling?

2. Did the trial court violate ER 106, the rule of completeness, when it refused to allow appellant to cross-examine the police officer as to appellant's complete statements to the officer at the time of arrest?

3. Was appellant denied his constitutional right to present evidence relevant to his defense when the trial court excluded evidence of his drug test results?

B. STATEMENT OF THE CASE

1. Procedural History

On January 14, 2008, The Skagit County prosecutor charged Travis Martinez with possession of methamphetamine and two accounts of fourth degree assault, occurring on or about January 7, 2008. CP 1-2. On

March 26, 2008, the Honorable Dave Needy dismissed both charges of fourth degree assault. CP 5; 1RP 4-5.¹

Judge Needy conducted a pre-trial hearing on October 15 and 28 2008, on the State's motion to admit photographs taken of Martinez's property. 3RP; 4RP. The court found the photographs inadmissible and entered written findings of fact and conclusions of law on November 4, 2008. CP 10-11; 4RP 21.

The first trial occurred between January 12, 2009 and January 14, 2009. 5RP; 6RP; 7RP. On January 14, 2009, over Martinez's objection, Judge Needy declared a mistrial because of juror misconduct. CP 19-21; 7RP 13, 21.

The second trial began on May 18, 2009. See 9RP. A jury found Martinez guilty. CP 31. Martinez was sentenced to 2 months in jail, stayed pending appeal. CP 100-08; 11RP 4-6. Martinez timely appeals. CP 109.

2. Charged Offense

On January 7, 2008, Martinez went to Debbie Baker's mobile home residence at her request to fix an outlet problem. 10RP 23, 32. The

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – March 26, 2008; 2RP – June 4, 2008; 3RP – October 15, 2008; 4RP – October 28, 2008; 5RP – January 12, 2009; 6RP – January 13, 2009; 7RP – January 14, 2009; 8RP – April 30, 2009; 9RP – May 18, 2009; 10RP – May 19, 2009; 11RP – June 3, 2009.

mobile home was owned by Martinez and located on his property on Peavey Road. Martinez rented the mobile home to Baker who lived with several other people. Baker was in the process of moving out. 10RP 31-33.

After fixing the outlet, Martinez saw a baggie containing what he thought was an illegal substance in Baker's bedroom drawer. Martinez put the bag in his pocket and left. 10RP 23-24, 38. Martinez said Baker was in the trailer when he took the bag. He believed she saw him take it. 10RP 34-35. Martinez intended to take the bag to his shop on Peavey Road and destroy it by burning it in a wood stove. After arriving at the shop, Martinez was distracted by employees who asked him questions. 10RP 23-24, 30. Martinez realized that Deputy Brian Morgan was on his property when Morgan walked through the closed shop doors and said he needed to talk to Martinez. 9RP 117; 10RP 25.

When Morgan arrived at Peavey Road he first spoke with Baker at her mobile home.² Morgan said he talked to Baker for seven to ten minutes, but could not remember how long it took him to get to Baker's residence or where he was coming from. 9RP 118-21. Morgan said he

² Morgan's Probable Cause Affidavit states that he went to Peavey Road in response to a reported domestic dispute between Martinez and Baker. CP 3-4; 81-83. The jury was not informed of the reason for Morgan's presence on Martinez's property. 9RP 113.

then went the 150-200 feet to the shop to talk to Martinez. 9RP 122, 125. Because of the shop noise, he motioned Martinez outside to talk to him. 9RP 123-25; 10RP 25, 35. Morgan said he spoke with Martinez for three to five minutes before leaving Martinez with Officer Bill Story of the Sedro-Woolley Police Department. Morgan then went to speak with Jody Prender. 9RP 123-26; 10RP 36, 39, 52-53.

Martinez said the exchange with Morgan was only long enough for Morgan to tell him to wait outside while Morgan left to go find someone. Martinez believed Morgan went to talk to Baker. 10RP 25, 36.

Morgan spoke with Prender for five to seven minutes, then returned to the shop intending to arrest Martinez. 9RP 126. Morgan told Martinez he was under arrest and asked if he had any weapons. According to Morgan, Martinez said he had no weapon but began reaching into his front pocket. Morgan told Martinez to stop because he would search Martinez's pockets. Morgan said he found a baggie of meth inside Martinez's front pocket. 9RP 126-28; 137-38. The bag was not fingerprinted and weighed 0.38 grams. 9RP 129, 149.

Martinez's testimony differed from Morgan's account. When Morgan came back he asked Martinez "what is really going on here." Martinez then reached into his pocket and handed Morgan the bag. Martinez had already pulled the bag out of his pocket before being told not

to reach into his pocket. 10RP 25-26, 33-34, 37-38. Martinez said he was then arrested and asked whether he had any sharp objects or weapons on him. Martinez said the bag was in his pocket for five to seven minutes. 10RP 29, 33-34.

3. Martinez's Trial Defense of Passing Control

At trial, Martinez argued the evidence was insufficient because he had only momentary or passing control of the bag. 9RP 92.

To support Martinez's testimony that he picked up the bag solely to destroy it, defense counsel sought to introduce the testimony of Dr. Michael Dillard. Dillard tested Martinez for drugs on January 8, 2008, the day after the arrest. 9RP 92-94; 10RP 40-41. Finding the testimony "irrelevant" to the issue of possession, the court excluded the evidence. 10RP 43-44. When Martinez attempted to testify he had a blood test following his arrest, the court sustained a relevancy objection and instructed the jury to disregard the answer. 10RP 27.

Martinez also proposed a jury instructing defining possession. It was based on WPIC 50.03, State v. Staley, 123 Wn.2d 794, 872 P.2d 502 (1994), and State v. Summers, 107 Wn. App. 373, 28 P.3d 780 (2001), opinion modified on reconsideration, 43 P.3d 526 (2002), and stated:

Possession means having a substance in one's custody or control. Possession requires more than a passing control of an item, it must be more than fleeting control or momentary handling, it must

constitute the care or management of the item. In determining whether possession has occurred you are to consider all the relevant circumstances in the case.

10RP 58-59; CP 79.

Martinez proposed this same instruction at the first trial. CP 13. At the first trial, the court excluded Martinez's proposed instruction but allowed a fleeting possession instruction, finding it necessary for both sides to adequately argue their theories of the case. 6RP 120-26. At the first trial, instruction no. 8 stated:

Possession means having a substance in one's custody or control. Possession requires more than a passing control of an item, it must be more than fleeting control or momentary handling.

CP 33.

At the second trial however, the court refused to give Martinez's proposed instruction or any fleeting possession instruction, stating "fleeting possession" was "something for argument" and to instruct the jury on it would comment on the evidence. 10RP 57, 63-64. Defense counsel objected, arguing that without an instruction on passing or fleeting control Martinez would be denied the ability to present his defense. 10RP 64.

During closing, defense counsel argued that based on the possession instruction given, every juror would be guilty of possession

when they took the bag into the jury room. The court sustained the prosecutor's objection that the argument was unsupported by the evidence. 10RP 77.

4. Refusal to Admit the Entire Conversation Between Martinez and Morgan

During his pretrial CrR 3.5 hearing testimony and during the first trial, Morgan said that after arresting Martinez he asked whether Martinez had any weapons. 2RP 22-23; 6RP 202. Morgan said Martinez told him there was something in his pockets that might be narcotics. 2RP 22-23, 26, 28; 6RP 202, 211-13, 216. Morgan said he found the baggie in Martinez's pants pocket after Martinez told him where it was located. 6RP 202-03, 215.

At the pretrial CrR 3.5 hearing, Morgan also said Martinez told him he had gotten the baggie from Baker's drawer. 2RP 28. Morgan's Probable Cause Affidavit confirmed "Martinez said he had possible narcotics in his front pocket, he said the baggy was Baker's from her underwear drawer." CP 3-4; 81-83. Morgan admitted what was in his report was "the most accurate representation of exactly what he [Martinez] said." 2RP 28. Finding that the statements made by Martinez were admissible at trial, the pretrial court held that Martinez's statements to Morgan were in response to a "direct question by the officer prior to

search; which is, do you have any weapons, anything like knives or needles on your person.” 2RP 33-34.

During the second trial however, Morgan limited his testimony on this point. Morgan testified only that Martinez said he did not have any weapons and started to reach into his front pocket. Morgan said he told Martinez to stop, and that he would check Martinez’s pockets. Morgan said he found a crystal substance in a zip-lock bag in Martinez’s front pants pocket during the search incident to arrest. 9RP 127.

Defense counsel then tried to cross-examine Morgan about Martinez’s entire statement to him about the baggie and where he got it. The court sustained multiple hearsay objections by the prosecutor. 9RP 134-38.

During initial argument on the issue, defense counsel emphasized that a full explanation of Martinez’s statements to Morgan was necessary not only to complete the picture of the baggie’s discovery, but also, because it was necessary to Martinez’s defense of passing control. 9RP 154-56. Defense counsel later argued that the full disclosure of the conversation between Martinez and Morgan was required under both ER 106 and also constituted an excited utterance under ER 803(a)(1). 10RP 9-10, 15.

Agreeing with the State, the court found that a full disclosure of the conversation was not required. The court held that the rule of completeness did not apply because Martinez's statement was unrelated to Morgan's question about whether Martinez had any weapons. The court also held that Martinez's statement was inadmissible under any hearsay exception because it was being offered primarily for the truth of the matter asserted and as a way to challenge the accuracy of the subsequent police investigation. 10RP 16-18.

C. ARGUMENT

I. THE TRIAL COURT'S REFUSAL TO GIVE AN INSTRUCTION ON FLEETING OR PASSING POSSESSION DENIED MARTINEZ THE OPPORTUNITY TO PRESENT HIS THEORY OF THE CASE TO THE JURY

1. Martinez was Entitled to a Passing Control Instruction

In a criminal case, the defense is entitled to have the jury instructed on its theory of the case, where that theory is supported by the evidence. State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). “[A] defense attorney is only required to argue to the jury that the facts fit the law; the attorney should not have to convince the jury what the law is.” State v. Irons, 101 Wn. App. 544, 559, 4 P.3d 174 (2002) (citing State v. Acosta, 101 Wn.2d 612, 622, 683 P.2d 1069 (1984)). Refusal to give a requested

jury instruction is reversible error when the absence of the instruction prevents the accused from presenting his theory of the case. State v. May, 100 Wn. App. 478, 482, 997 P.2d 956 (2000), review denied, 142 Wn.2d 1004 (2000); State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997).

Here, in order to properly evaluate whether the State had met its burden to prove Martinez possessed a controlled substance, the jury had to be apprised of a crucial element of possession; that Martinez had more than passing control of the drugs removed from Baker's residence. Staley, 123 Wn.2d at 802 (citing State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969)).

In refusing to give Martinez's proposed instruction, the trial court's concern was not that Martinez's proposed jury instruction was an incorrect statement of the law, but rather, that the concept of "fleeting possession" was "something for argument." The court believed instructing the jury on it would constitute a comment on the evidence. 10RP 63. In so ruling, the court erred.

The Washington Supreme Court recognized the "mere passing control" qualification in Callahan. In Callahan, police conducted a search of a houseboat and found Hutchinson sitting at a desk, with a cigar box containing drugs underneath the desk. Hutchinson had been a guest on the

houseboat for several days and admitted handling the drugs earlier in the day. Callahan, 77 Wn.2d at 31. A jury found him guilty of possession, but the Supreme Court reversed.

The Callahan court concluded that the mere fact Hutchinson had handled the drugs was “not sufficient for a charge of possession since possession entails actual control, not a passing control which is only a momentary handling.” Callahan, 77 Wn.2d at 29, (citing United States v. Landry, 257 F.2d 425, 421 (7th Cir. 1958) (“To ‘possess’ means to have actual control, care and management of, and not a passing control, fleeting and shadowy in nature.”)). The Supreme Court reaffirmed this holding in Staley, “to establish possession, the state must prove more than a passing control; it must prove actual control.” Staley, 123 Wn.2d at 801 (citing Callahan, 77 Wn.2d at 29).

The Washington Supreme Court has approved instructing the jury on “passing control,” noting that it may be “proper to further explain ‘possession’ by including language on the theory of passing control when defining possession for the jury.” Staley, 123 Wn.2d at 802; See also State v. Garbaccio, 151 Wn. App. 716, 736, 214 P.3d 168 (2009) (Instruction allowing jury to consider the duration of Garbaccio’s handling of child pornography in determining whether State carried its burden of

proving possession would have been appropriate had Garbaccio requested such an instruction).

As the Staley court noted, “ the duration of the handling is only one factor to be considered in determining whether control, and therefore possession, has been established.” Staley, 123 Wn.2d at 801-02. Other factors to consider include a motive to hide the item from police, and dominion and control over the premises. Summers, 107 Wn. App. at 386-87. Moreover, “[c]onsideration must be given to the ownership of the drugs as ownership can carry with it the right of dominion and control.” Callahan, 77 Wn.2d at 31.

The “passing control” instruction proposed here was based on language from Callahan and Staley and correctly stated the law. CP 69-80; 10RP 59-62. Furthermore, the instruction was supported by substantial evidence that Martinez’s actions amounted only to “passing control.” Martinez had the baggie in his pocket for only 5-7 minutes. The drugs belonged to Baker, from whose residence Martinez took them for the purpose of destroying them. Moreover, the evidence established that Martinez made no attempt to hide the drugs from police, but instead alerted police he thought the baggie contained drugs.

Evidence of Martinez’s lack of ownership, momentary handling of the bag for the purpose of destroying it, and alerting police of its

existence, supports the defense theory that Martinez did not possess the drugs but had merely a passing control. Accordingly, a “passing control” instruction was mandated regardless of whether there was conflicting evidence from the state. State v. Thompson, 47 Wn. App. 1, 7, 733 P.2d 1039 (1992), review denied, 108 Wn.2d 1014 (1987) (evidence which supports a party’s theory of the case is sufficient to warrant an instruction on that theory, even if such evidence is disputed and contrary evidence has been submitted). Without the passing control instruction, the jury was not fully informed of the relevant law, and Martinez was prevented from presenting his theory of the case. The court’s refusal to give a “passing control” instruction was reversible error.

2. Martinez’s Proposed Instruction was a Proper Statement of the Law

In response, as it did in the trial court, the State can be expected to cite Staley and Summers, two cases where fleeting or momentary possession instructions were refused. Both cases are quickly distinguished.

Staley was arrested for driving under the influence after leaving a nightclub wherein he had given a musical performance. When arrested, Staley told the police officer he was possessing cocaine. He claimed an unknown individual at the nightclub had slipped into his tip jar a vial of

cocaine, of which he became aware only while counting his tips and of which he inadvertently retained possession while rushing to secure his earnings. Staley, 123 Wn.2d at 796-97.

Staley argued the trial court erred by not instructing the jury that possession that “is fleeting, momentary, temporary or unwitting” is not unlawful. Staley, 123 Wn.2d at 796-97. Staley’s proposed instruction incorrectly stated that momentary and fleeting possession is lawful. It also incorrectly conflated the terms “momentary and fleeting” with the defense of unwitting possession. The Court therefore held that the trial court properly refused its inclusion.

Unlike Staley, Martinez’s proposed instruction correctly stated the law. Martinez also abandoned his unwitting possession defense, 10RP 40-41, and nothing in Martinez’s proposed “momentary and fleeting” instruction referred to unwitting possession.

Summers was charged with unlawful possession of a firearm after police found a firearm under the pillow of his bed while investigating a meth lab. Summers, 107 Wn. App. at 378-79. As in Staley, Summers proposed two instructions which stated that passing, momentary, or temporary possession is lawful. Summers, 107 Wn. App. at 383.

Because momentary, passing, or fleeting possession goes to the question of whether the state has met its burden of proving possession,

both the Staley instruction and Summers instructions indicating that momentary possession is lawful are misstatements of the law. Staley, 123 Wn.2d at 802; Summers, 107 Wn. App. at 386-87. In contrast, Martinez's proposed instruction did not instruct the jury that momentary or fleeting possession was lawful. Rather, Martinez's proposed instruction merely stated that possession requires more than passing control and must be determined from all the relevant circumstances in the case. Where this accurately stated the law, the trial court erred in refusing the instruction.

3. The Error was Prejudicial

Instructions are sufficient only if they are not misleading, correctly state the law, and allow the defendant to satisfactorily argue his theory of the case. State v. Hackett, 64 Wn. App. 780, 785, 827 P.2d 1013 (1992). In Hackett, evidence was presented that Hackett was under the influence of drugs at the time of the incident in question, and defense counsel requested a voluntary intoxication instruction. The trial court denied the instruction, incorrectly ruling that it did not apply to drug use. The Court of Appeals reversed, finding the instructions insufficient because the subject matter of the proposed instruction was not covered elsewhere in the instructions and the instructions therefore did not allow a sufficient opportunity for Hackett to argue his theory of the case. Hackett, 64 Wn. App. at 784-85.

The instructions given here were likewise insufficient. The possession instruction did not explain the State's burden to prove that Martinez's handling of the baggie amounted to more than passing control, nor did any other instruction. The instruction on passing control proposed by defense counsel was necessary to make the instructions complete and to allow Martinez to argue his theory of the case. "Erroneous instructions given on behalf of the party in whose favor the verdict was returned are presumed prejudicial unless it affirmatively appears they were harmless." State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984) (reversing a homicide conviction for trial court's failure to give proposed instruction, citing State v. Golladay, 78 Wn.2d 121, 470 P.2d 191 (1970)). Instructional error is harmless only if it has no effect on the final outcome of the case. Rice, 102 Wn.2d at 123; Hackett, 64 Wn. App. at 787. The court's refusal to give the proposed instruction here was not harmless and therefore requires reversal.

The prejudice of not having a "passing control" instruction took its full toll on Martinez's theory of the case during closing. 10RP 77. In lieu of the court's refusal to instruct on "passing control," defense counsel was forced to argue possession was a strict liability offense, and every juror would be guilty of possession when they took the baggie into the jury room. The State took full advantage on rebuttal, arguing: "Having a drug

in someone's custody or control is possession of a controlled substance. That's what the defendant did on this particular day." "I didn't hear one argument that stated that the defendant was not in possession of this controlled substance on that particular day." 10RP 82-83.

Properly instructed on passing or fleeting control, a rational juror could reasonably doubt the state met its burden of proof.³ As defense counsel pointed out, the state failed to call any other witnesses with knowledge of what occurred, including Prender, Baker, or Story. 10RP 78-80. The State could not establish a definite timeframe of Martinez's handling of the baggie. Morgan admitted could not remember how long it took him to get to Baker's residence or where he was coming from. 9RP 118-21. Moreover, the State did not call Story to rebut Martinez's testimony that his initial exchange with Morgan was only long enough for Morgan to tell him to wait outside while Morgan left to go find someone. 9RP 123-26; 10RP 36, 39, 52-53; 10RP 25, 36.

³ During deliberation at the first trial the jury asked two questions pertaining to possession: "what is possession – fleeting control or momentary handling with intent?" and "what is the legal definition of fleeting control or momentary handling?" 7RP 3-8; Supp CP __ (sub no. 61, Question From Deliberating Jury, 1/14/09); 7RP 3-8. Based on documents obtained from the jury room after the mistrial was declared, it is apparent at least one juror was unconvinced the State had met its burden of proving possession. CP 19-22.

The court's refusal to give Martinez's proposed instruction, or any instruction that explained that passing control is not possession, was not harmless and requires reversal. Staley, 123 Wn.2d at 801-02; May, 100 Wn. App. at 482.

II. THE TRIAL COURT'S REFUSAL TO ALLOW MARTINEZ'S COMPLETE STATEMENT TO MORGAN VIOLATED ER 106, THE RULE OF COMPLETENESS

The State elicited one part of Morgan's discovery of the baggie – that it was found in Martinez's pants pocket during the search incident to arrest – but excluded the full explanation Martinez had given. A fair and complete summary would have included Morgan's admission that Martinez told Morgan about the baggie in his pocket, and where he got it, before he was searched. The court erred in refusing the complete explanation Martinez gave Morgan.

“When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.” ER 106. This rule is essentially the same as Fed. R. Evid. 106 and may be analyzed consistently with the federal rule. State v. Larry, 108 Wn. App. 894, 910, 34 P.3d 241 (2001), review denied, 146 Wn.2d 1022 (2002).

ER 106 is also known as the “rule of completeness,” which is violated when the admission of part of a statement distorts the meaning of the statement or excludes “substantially exculpatory” information. State v. Alsup, 75 Wn. App. 128, 133, 876 P.2d 935 (1994) (quoting United States v. Kaminski, 692 F.2d 505, 522 (8th Cir. 1982)). The purpose of the rule is “to protect against the misleading impression which might otherwise result from hearing or reading matters out of context.” 5 Karl B. Tegland, *Washington Practice: Evidence* § 106.1, at 145 (5th ed. 2007) (citation omitted).

In United States v. Valasco, 953 F.2d 1467 (7th Cir. 1992), the court applied a four-part test to determine whether the offered portions of the statement are necessary to: (1) explain the admitted evidence; (2) place the admitted portions in context; (3) avoid misleading the trier of fact; and (4) insure fair and impartial understanding of the evidence. Larry, 108 Wn. App. at 910. The trial court's ruling should be reversed when the court abuses its discretion. Larry, 108 Wn. App. at 910; State v. Roberts, 142 Wn.2d 471, 495-96, 14 P.3d 713 (2000). An accused's entire statement ordinarily should be admitted under the rule of completeness. United States v. Wenzel, 311 F.2d 164, 168 (4th Cir. 1962).

When one party has presented part of a conversation, the opposing party is entitled to introduce the remainder to explain, modify or rebut the

evidence already introduced if it relates to the same subject matter and is relevant to the issue involved. State v. West, 70 Wn.2d 751, 754-55, 424 P.2d 1014 (1967). This is true even though the remark may be self-serving, so long as the comment is connected with the part admitted and tends to modify or explain it. State v. La Pierre, 71 Wn.2d 385, 388, 428 P.2d 579 (1967); see also United States v. Haddad, 10 F.3d 1252, 1258 (7th Cir. 1993) (“Ordinarily a defendant's self-serving, exculpatory, out of court statements would not be admissible. But here the exculpatory remarks were part and parcel of the very statement a portion of which the Government was properly bringing before the jury, i.e. the defendant's admission about the marijuana.”). The Larry court, citing Haddad, applied the same rationale to Washington law. Larry, 108 Wn. App. at 909-910.

In State v. Perez, 139 Wn. App. 522, 161 P.3d 461 (2007), a police officer testified: “[Perez] said that he-ended up going in the apartment and giving Mr. Ingram the one-two-three,” moving his hands in a boxing motion. Perez, 139 Wn. App. at 525. At the CrR 3.5/3.6 hearing however, the police officer testified Perez told him, “After Mr. Ingram swung at me, I gave him the old one, two, three.” On appeal, Perez argued that the full exculpatory statement should have been admitted under the “rule of completeness,” as evidence that Perez acted in self-defense. Perez, 139 Wn. App. at 530-31. The court found that the rule of

completeness did not apply to Perez's verbal statement to police that he was acting in self-defense because ER 106 was limited to written or recorded statements. Perez, 139 Wn. App. at 530-31. Nothing in Perez suggests Perez's verbal statements to police were also recorded in writing.

Perez is distinguishable from the present case. Here, Martinez's statements to Morgan were also recorded in Morgan's Probable Cause Affidavit and report. CP 3-4; 81-83. Morgan admitted his report was "the most accurate representation of exactly what he [Martinez] said." 2RP 28. In testifying, Morgan corroborated parts of his affidavit, which states, "Martinez said he had possible narcotics in his front pocket, he said the baggy was Baker's from her underwear drawer." CP 3-4.

Moreover, the rule has been applied to oral statements. West, 70 Wn.2d at 753-54 (prosecutor entitled to introduce on redirect examination another part of West's statement to police officer after West's counsel on cross-examination elicited evidence of different part); United States v. Li, 55 F.3d 325, 329 (7th Cir. 1995) ("We have recently refused to extend this rule [ER 106] to oral statements but have held that Fed.R.Evid. 611(a) grants district courts the same authority regarding oral statements which Fed.R.Evid. 106 grants regarding written and recorded statements. United States v. Haddad, 10 F.3d 1252, 1258 (7th Cir.1993). Therefore, the rule of completeness applied to the oral statement."). The court in Larry also

adopted the rationale of that portion of Haddad to which the Li court cited. Larry, 108 Wn. App at 910.⁴

1. Martinez's Statements to Morgan Should Have Been Included to Give Context to the States Elicited Submissions and to Avoid Misleading the Jury.

A trial court abuses its discretion if its ruling is based on an erroneous view of the law. In re Detention of Rogers, 117 Wn. App. 270, 274, 71 P.3d 220 (2003). The trial court rejected Martinez's request to admit the full conversation because it reasoned (1) Martinez's statement was unrelated to Morgan's questions about whether Martinez had any weapons, and (2) Martinez's statement was inadmissible under any hearsay exception. 10RP 16-18.

As the above authority indicates, the court's reasons are contrary to law. Statements are admissible under ER 106, even if self-serving hearsay, as long as they "explain, modify, or rebut the evidence already introduced" and when they relate to the same subject matter and are

⁴ Cf., Tegland, supra, § 106.1 at 145 (because language of ER 106 does not apply to unrecorded oral conversations, opposing party may not rely on rule to complete statements introduced by opposing party, but may bring out remainder of conversation on cross-examination or as part of his own case). Martinez specifically requested he be permitted to elicit his exculpatory statements on cross-examination. 9RP 134-38; 154-57. Tegland also notes, "Washington's version of Rule 611 is the same as the corresponding federal rule. Thus, federal case law . . . should be helpful in interpreting the Washington rule.") (citations omitted). 5A Tegland, supra, § 611.1, at 522-23.

relevant to the issue involved. Here, as the pretrial court recognized, Martinez's statements to Morgan were in response to a "direct question by the officer prior to search; which is, do you have any weapons, anything like knives or needles on your person." 2RP 33-34. Furthermore, a statement is not hearsay when it is consistent with the declarant's testimony at trial and is "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." ER 801(d)(1)(ii). Here, Martinez's entire statement to Morgan modified the already introduced evidence of Morgan's discovery of drugs on Martinez and was relevant to rebut Martinez's implied fabrication.

The situation here is similar to West. West was charged with robbery. Although West had given a statement to a police officer, the prosecutor avoided all mention of the statement during his direct of the officer. On cross-examination, and over the state's objection, defense counsel was allowed to elicit testimony that West told the officer he had some connection with the robbery but did not admit his entry into the building, taking money, or running from the building. On re-direct, the state elicited the balance of the conversation from the officer. West objected to the balance, arguing there had been no pretrial hearing to determine the statement's admissibility. The court rejected this argument. The court held West was not at liberty to explore broad areas at will, seek

to leave inferences with the jury, and then preclude the state from attempting to explain or rebut the inferences. West, 70 Wn.2d at 753-54.

By allowing Morgan to testify that he discovered drugs in Martinez's pocket, but excluding evidence of Martinez's statement to Morgan which alerted Morgan to the drugs and where Martinez got them, the court allowed the state to create the misleading impression that Martinez had no explanation for possessing the drugs and was attempting to hide them from police. This is far from the truth. Martinez told Morgan on January 7, 2008, the same thing he told the jury when he testified at trial: he took the baggie from Baker's drawer for the purpose of destroying it, then he handed it to Morgan before being searched. 10RP 23-26, 30, 33-35, 37-38. Morgan's written affidavit as well as his testimony at the pretrial CrR 3.5 hearing and first trial demonstrates Martinez's testimony was a true and accurate explanation of what occurred.

The court's one-sided ruling admitting part of Morgan's discovery of the baggie, but excluding Martinez's full explanation was error.

2. The Unfair Exclusion of Martinez's Complete Statement was Prejudicial

The erroneous exclusion of evidence is prejudicial if, within reasonable probabilities, the verdict would have been materially affected

absent the error. State v. Brockob, 159 Wn.2d 311, 351, 150 P.2d 59 (2006).

The State went to great lengths to suggest Martinez's testimony about what he told Morgan was fabricated. The State fully seized on the court's error in excluding the full context of Martinez's statements during closing: "according to Deputy Morgan's testimony, he [Martinez] didn't tell the officer the story that he claims." "You have two vastly diverted stories about what happened at the point that the defendant – that these drugs were located on the defendant. I put forth to you the defense story is not reasonable in light of the other evidence you have in this case." 10RP 75. Without the opportunity to cross-examine Morgan on the full context of Martinez's statements, Martinez was unfairly portrayed as a liar.

The full context of Martinez's statements to Morgan was necessary to fairly rebut the State's effort to imply Martinez fabricated his testimony. Furthermore, testimony from Morgan that Martinez alerted him to the baggie and where he obtained it would have allowed the jury to consider both the ownership of the bag, and whether Martinez attempted to hide the drugs from police; both relevant factors in determining whether possession had been established. Summers, 107 Wn. App at 386-87; Callahan, 77 Wn.2d at 31.

Because the error was prejudicial, Martinez's conviction should be reversed and the case remanded for a new trial.

III. THE TRIAL COURT'S EXCLUSION OF MARTINEZ'S DRUG TEST RESULTS VIOLATED MARTINEZ'S CONSTITUTIONAL RIGHT TO PRESENT EVIDENCE RELEVANT TO HIS DEFENSE

Few rights are more fundamental than the right of an accused to present defense witnesses. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). The Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution provide similar guarantees of the right to present evidence to defend against the State's allegations. Taylor v. Illinois, 484 U.S. 400, 408, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988), rehearing denied, 485 U.S. 983 (1988); State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (citing State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983)). This right is a fundamental attribute of both the adversary system and due process of law. Taylor, 484 U.S. at 408; Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019 (1967).

Relevant evidence is evidence tending to make the existence of any significant fact more or less probable than it would be without the evidence. ER 401. "The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." State v. Darden, 145

Wn.2d 612, 621, 41 P.3d 1189 (2002). A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. Darden, 145 Wn.2d at 619. However, ER 403 does not authorize the exclusion of defense evidence where it is "crucial to the central contention of a valid defense." State v. Brown, 48 Wn. App. 654, 660, 739 P.2d 1120 (1997).

Hudlow, analyzed in State v. Darden, provided a three-prong approach to analyze the exclusion of defense evidence. One, the evidence must be minimally relevant. Two, if relevant, the state bears the burden of showing the evidence sufficiently prejudicial to disrupt the fairness of the fact-finding process. Three, the accused's need for the information is balanced against the state's interest in excluding prejudicial evidence. Darden, 145 Wn.2d at 621-22; Hudlow, 99 Wn.2d at 15. No state interest can be compelling enough to exclude evidence with high probative value. Hudlow, 99 Wn.2d at 16; State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000).

1. Evidence of Martinez's Drug Test was Relevant

To support Martinez's testimony that he picked up the baggie solely to destroy it, counsel sought to introduce testimony that Martinez passed a drug test 24 hours after his arrest. 9RP 92-94; 10RP 40-41. The court denied counsel's request to allow testimony from the doctor who administered the test, and excluded testimony that Martinez had a blood

test following his arrest. 10RP 27, 43-44. The court's exclusion of the drug test results violated Martinez's right to present a defense.

Courts have recognized a positive drug test result is relevant to show possession. Cargile v. State, 261 Ga. App. 319, 582 S.E.2d 473, 474 (2003); Jones v. State, 207 Ga. App. 46, 427 S.E.2d 40, 41 (1993). The converse is also true. State v. Stoddard, 909 S.W.2d 454, 459 (Tenn. Crim. App. 1994); See also City of Kennewick v. Day, 142 Wn.2d 1, 5-6, 11 P.3d 304 (2000) (reputation for sobriety relevant when offered to support unwitting possession defense).

Stoddard was charged with possession of cocaine and marijuana. Stoddard's trial defense was that he found the drugs during his duties as a police officer and placed them in a suitcase in his police car for safekeeping until he could take them to the police evidence room. Stoddard argued on appeal that evidence of his drug tests results were relevant to his defense and the trial court erred in excluding it. Relying on ER 401, the Court of Appeals agreed evidence of the drug test was relevant, but found failure to admit the evidence was harmless. Stoddard, 909 S.W.2d at 459-60.

Like Stoddard, that Martinez took and passed a drug test 24 hours after his arrest supported the inference he was not using drugs and was

relevant to his defense.⁵ Martinez should not have been limited only to his testimony to suggest that he took the baggie to destroy, rather than use it. As Washington courts have recognized, “the duration of the handling is only one factor to be considered in determining whether control, and therefore possession, has been established.” Staley, 123 Wn.2d at 801-02; Summers, 107 Wn. App. at 383. Evidence of the drug test results would have aided the jury’s credibility determination and given the jury another factor to consider in determining whether possession had been established. No State interest was sufficiently compelling to preclude its admission.

2. Failure to Admit Evidence of Martinez’s Drug Test was Prejudicial

Constitutional error is presumed prejudicial. State v. McDaniel, 83 Wn. App. 179, 187, 920 P.2d 1218 (1996), review denied, 131 Wn.2d 1011 (1997). The State bears the burden of proving the error harmless beyond a reasonable doubt. McDaniel, 83 Wn. App. at 187. “An error is not harmless beyond a reasonable doubt where there is a reasonable

⁵ See United States v. Pond, 36 M.J. 1050, 1058 (A.F.C.M.R. 1993), review denied after remand, 42 M.J. 103 (1995) (appellate court took judicial notice that methamphetamine use can be detected for 24 to 48 hours following ingestion); State v. Buchholz, 598 N.W.2d 899, 908 (S.D. 1999) (citing Pond, 36 M.J. at 1058); See also State v. Flannigan, 194 Ariz. 150, 978 P.2d 127, 129-31 (Ariz. App. 1998), cert. denied, 528 U.S. 1074 (2000) (methamphetamine and cocaine use can be detected in urine for as long as twelve to forty-eight hours after ingestion).

probability the outcome of trial would have been different had the error not occurred....A reasonable probability exists when confidence in the outcome of the trial is undermined.” State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995). The State cannot meet its heavy burden here.

Unlike Stoddard, the exclusion of Martinez’s negative drug test was prejudicial. The State bore the heavy burden to prove Martinez’s brief handling of the baggie to destroy it was more than passing control. In a case where multiple factors had to be considered in determining whether possession had been established, exclusion of the drug test results unfairly undermined Martinez’s explanation. Without the evidence, defense counsel could only persuade the jury that Martinez’s testimony regarding his reason for handling the baggie was true. Without this evidence the jury was unfairly left to see Martinez as a possible drug user who had a motive to take the drugs for personal use. This was not true.

Because exclusion of Martinez’s drug test profoundly influenced his ability to explain the circumstances surrounding his handling of the baggie and deprived him of the opportunity to present his defense, the error is prejudicial. This Court should reverse.

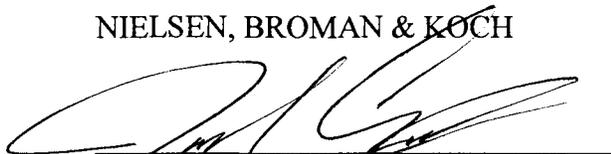
D. CONCLUSION

For the above reasons, Martinez's conviction should be reversed and the case dismissed.

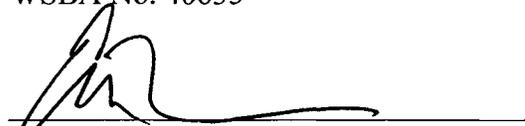
DATED this 6th day of January, 2010.

Respectfully submitted,

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APPENDIX A

INSTRUCTION NO. _____

Possession means having a substance in one's custody or control. Possession requires more than a passing control of an item, it must be more than fleeting control or momentary handling, it must constitute the care or management of the item. In determining whether possession has occurred you are to consider all the relevant circumstances in the case.