

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

35116-1-II

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STATE OF WASHINGTON  
RESPONDENT,

VS.

JAMES V. HESLEN  
PETITIONER.

FILED  
JUN 11 2013  
CLERK OF COURT  
COURT OF APPEALS  
DIVISION II  
SEATTLE, WA

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BRIEF OF RESPONDENT

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**A.**

**STATE'S RESPONSE TO APPELLANT'S  
ASSIGNMENTS OF ERROR**

1. The Washington State Patrol Trooper in this case did not conduct an unconstitutional warrantless criminal investigation. The trial court did not err in allowing the State to introduce at trial the contraband that was found in Mr. James Heslen's pants. The State presented sufficient evidence at the CrR 3.6 hearing which allowed the trial court to make appropriate findings of fact which justified the admission of damaging evidence against Mr. Heslen.

2. Appellant's assignment of error no. 2 appears to repeat the allegations contain in assignment of error no. 1. The State's response to assignment of error no. 2 is delineated above.

3. The trial court did not err in entering its "Undisputed Findings of Fact" that pertain to the constitutionality of the traffic stop in this case.

4. The trial court did not err in rendering its decision after the CrR 3.6 hearing. The trial court correctly decided to uphold the constitutionality of the traffic stop and to allow the evidence seized to be introduced at trial during the State's case in chief.

5. The trial court did not err in giving an unwitting possession

jury instruction. Jury instruction no. 8 (WPIC 52.01) did not impermissibly shift the burden of proof to Mr. Heslen.

6. Mr. Heslen did not receive ineffective assistance of counsel based on the failure to object to an unwitting possession jury instruction (WPIC 52.01).

**B.**

**STATEMENT OF THE CASE**

The State accepts Mr. Heslen's recitation of the statement of the case.

**C.**

**ARGUMENT**

**1. THE TRIAL COURT PROPERLY DETERMINED THAT THE TRAFFIC STOP IN THIS CASE WAS NOT MADE FOR AN IMPERMISSIBLE PURPOSE.**

Mr. Heslen challenges his convictions for possession of a controlled substance (methamphetamine) and driving while license suspended/revoked in the second degree.

Mr. Heslen argues that the trial court did not make appropriate findings of fact to justify the traffic stop of the defendant. Mr. Heslen asserts that because the trial court did not make a formal finding of fact regarding the purpose for the traffic

stop by Washington State Patrol Trooper Shane Madsen, the reviewing court must presume that the State failed to sustain its burden of proof on this issue. Mr. Heslen cites State v. Ladsen, 138 Wash. 2d 343, 350, 979 P.2d 833 (1999), for the proposition that the State must prove that a traffic stop was not pretextual.

Because the findings of fact and conclusions of law only say that “[t]he stop for failing to illuminate the license plate light pursuant to RCW 46.37.050 was lawful,” CP at 30, Mr. Heslen claims that there is not a sufficient factual basis to justify the traffic stop. Mr. Heslen notes that Judge Michael J. Sullivan’s memorandum opinion states that “the initial stop for failing to properly illuminate the rear license plate was not a pretext stop based on the evidence presented to this court.” Appellant’s Brief at 13. Nevertheless, because this statement was not incorporated into the formal findings of fact, Mr. Heslen argues that the State did not meet its burden of proof and that his convictions should be reversed. Mr. Heslen cites State v. Armenta, 134 Wash. 2d 1, 14, 948 P.2d 1280 (1997) and State v. Byrd, 110 Wash. App. 259, 265, 39 P.3d 1010 (2002) to buttress his contention.

Unfortunately for Mr. Heslen, this case is distinguishable from Armenta and Byrd. Unlike those cases, the trial judge in this case wrote a thorough memorandum opinion which fully addresses the concerns raised by Mr. Heslen. See Appendix A and B. Moreover, “a party may refer to the trial court’s memorandum opinion to explain or clarify the formal findings, so long as they do not contradict such findings.” In re Marriage of Zeigler, 69 Wash. App. 602, 607, 849 P.2d 695 (1993) (citing Ferree v. Doric Co., 62 Wash. 2d 561, 567, 383 P.2d 900 (1963)). The memorandum opinion of Judge Sullivan makes it abundantly clear that the court determined that the traffic stop by Trooper Madsen was not a pretextual stop. Since the findings and conclusions in the memorandum opinion do not contradict the formal findings of fact, the statements made by Judge Sullivan in the memorandum opinion can be used to clarify the formal findings of facts. In re Marriage of Zeigler, 69 Wash. App. at 607.

In examining the formal findings of fact in light of the memorandum opinion, it is obvious that the State met its burden of proof in demonstrating that the traffic stop of Mr. Heslen was not pretextual. Among other things, Judge Sullivan stated:

There is no testimony from any person that the trooper was on any special emphasis patrol that night. There is also no testimony that the defendant's vehicle was operating in any suspicious or negligent manner prior to the stop. Therefore, the court has no testimony of any motive that officer may have had to make a pretextual stop. The fact that a law enforcement officer elects to not stop every vehicle for some infraction is within the discretion of the officer. There is no evidence before the court that the officer stopped the defendant's vehicle for the real reason of searching the defendant's vehicle or the defendant.

See Appendix A at 3-4.

In short, the judge's memorandum opinion provides ample evidence that is consistent with the judge's formal conclusion that the traffic stop was lawful and that the evidence seized should not be suppressed.

To summarize, Mr. Heslen wants to place form over substance in asserting that the reviewing court cannot look at the memorandum opinion to clarify the formal findings of fact. Mr. Heslen's specious argument should be rejected.

**2. THE COURT'S UNWITTING POSSESSION INSTRUCTION DID NOT IMPROPERLY SHIFT THE BURDEN OF PROOF TO MR. HESLEN.**

Mr. Heslen, for the first time on appeal, claims that jury instruction no. 8 which pertained to unwitting possession improperly

shifted the burden of proof to the defendant. At trial, the court used WPIC 52.01 to define unwitting possession. See Appendix C. The trial counsel for Mr. Heslen did not object to this instruction. Mr. Heslen now claims that this WPIC instruction was improper because it misled the jury. Appellant's Brief at 15-17. Mr. Heslen urges this reviewing court to follow the reasoning articulated by Division III of the Court of Appeals in State v. Carter, 127 Wash. App. 713, 112 P.3d 561 (2005).

Simply put, the Carter case is inapposite. Carter involved the unlawful possession of a firearm. The trial judge gave an unwitting possession instruction in combination with a "to convict" instruction that required the State to prove "knowing" possession. Division III of the Court of Appeals took issue with the combination of these instructions, because the "to convict" instruction placed the burden of proving "knowing" possession on the State, whereas the unwitting possession instruction placed the burden of proving the lack of knowledge on the defendant.

The Carter decision is not applicable to the present case because the State must prove "knowing" possession to convict a person of unlawful possession of a firearm. See State v. Anderson,

141 Wash. 2d 357, 366, 5 P.3d 1247 (2000). However, unlawful possession of a controlled substance is a different matter. Under State v. Bradshaw, 152 Wash. 2d 528, 537-538, 98 P.3d 1190 (2004), unlawful possession of a controlled substance does not require “knowledge,” and the affirmative defense of unwitting possession does not improperly shift the burden of proof. Hence, the logic of the Carter decision is inapplicable to the present case, because unlawful possession of a firearm contains a mens rea element, whereas unlawful possession of a controlled substance does not impose this requirement.

In essence, if this reviewing court were to accept Mr. Heslen’s argument, the holding of the Washington State Supreme Court in Bradshaw would be eviscerated. Mr. Heslen’s argument is therefore untenable. The jury instructions that were given by the trial court did not mislead the jury and were a correct statement of the law.

Finally, even if there were some merit to Mr. Heslen’s analysis of the holding in Carter, Mr. Heslen is arguably subject to the invited error doctrine, because Mr. Heslen did not object to jury instruction no. 8 (unwitting possession, WPIIC 52.01) at trial. City of

Seattle v. Patu, 147 Wash. 2d 717, 58 P.3d 273 (2002).

Consequently, Mr. Heslen's contention does not pass muster.

**3. MR. HESLEN'S TRIAL COUNSEL WAS NOT INEFFECTIVE BECAUSE HE FAILED TO OBJECT TO THE UNWITTING POSSESSION INSTRUCTION.**

To sustain a claim of ineffective assistance of counsel, Mr. Heslen must show that trial counsel's performance was deficient and that this deficiency prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687-688, 104 S. Ct. 2052 80 L.Ed. 2d 674 (1984). Representation is deficient if it falls below an objective standard of reasonableness, based on a consideration of all of the circumstances. State v. McFarland, 127 Wash. 2d 322, 334-35, 899 P.2d 1251 (1995). Mr. Heslen is prejudiced if there is a reasonable probability that but for the deficiency the trial result would have differed. McFarland, 127 Wash. 2d at 335. The reviewing court presumes that trial counsel's representation fell within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689; In re Pers. Restraint of Pirtle, 136 Wash. 2d 467, 487, 965 P.2d 593 (1998). Ineffective assistance of counsel claims are reviewed de novo. State v. Shaver, 116 Wash. App. 375, 382, 65 P.3d 688 (2003). Strategic or tactical reasons for

adopting a certain cause of action do not support an ineffective assistance of counsel claim. McFarland, 127 Wash. 2d at 336.

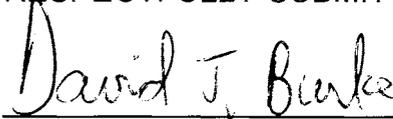
The Appellant's Brief at 17-18 alleges that Mr. Heslen received ineffective assistance of counsel because his trial attorney did not use the holding of State v. Carter, 127 Wash. App. 713, 112 P.3d 561 (2005), to object to the standard unwitting possession instruction (WPIC 52.01). Because State v. Bradshaw, 152 Wash. 2d 528, 98 P.3d 1190 (2004), is dispositive on the interplay between unlawful possession of a controlled substance and unwitting possession, Mr. Heslen's trial counsel had no reason to object to the unwitting possession instruction that was given by the trial judge. Therefore, it cannot be said that Mr. Heslen's trial counsel was deficient in not proposing such an instruction. This is especially the case since there is a presumption that trial counsel's representation fell within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689; In re Pers. Restraint of Pirtle, 136 Wash. 2d at 487. Thus, Mr. Heslen's ineffective assistance of counsel argument fails.

D.

**CONCLUSION**

For the reasons delineated above, the relief sought by Mr. Heslen should be denied. Mr. Heslen's convictions for possession of a controlled substance (methamphetamine) and driving while suspended/revoked in the second degree should be upheld.

RESPECTFULLY SUBMITTED BY:

A handwritten signature in cursive script that reads "David J. Burke". The signature is written in black ink and is positioned above a horizontal line.

DAVID J. BURKE – WSBA # 16163  
PROSECUTING ATTORNEY

2006 MAY -2 PM 2:47  
[Handwritten signature]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PACIFIC

STATE OF WASHINGTON,	)	
	)	NO. 05-1- <sup>00218</sup> <del>00042</del> -1
Plaintiff,	)	MEMORANDUM OPINION
	)	RE: 3.6 HEARING
vs.	)	
	)	
JAMES HESLEN,	)	
	)	
Defendant.	)	
_____	)	

This matter came before the court for a 3.6 hearing on April 28, 2006. The Court, after considering the testimony and the file and records therein, and after argument of counsel, the Court now upholds the traffic stop, the search of the defendant incident to arrest and the contraband found from said search.

**Undisputed Facts**

1. That trooper Madsen and defendant's car passed each other in opposite directions during dark hours and the trooper observed the rear of defendant's vehicle in his side mirror.
2. The trooper turned around and followed defendant's vehicle.
3. The trooper stopped defendant's vehicle. The defendant was the driver.

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4. The trooper asked for defendant's identification and ran driver's license check via dispatch. The trooper did not recognize the driver prior to the stop.
5. Driver's check verified defendant's license was suspended in second degree.
6. Trooper placed defendant under arrest for driving without a suspended license in the second degree.
7. Trooper searched the defendant incident to arrest and located in defendant's right, front, pants pocket folded cellophane.
8. Trooper unfolded the cellophane, found what looked like methamphetamine.
9. Trooper released defendant's 1978 Camaro to the female passenger, Tracy Vaughn.
10. Tracy Vaughn checked the license plate light shortly after traffic stop and it was working properly.
11. Tracy Vaughn drove the Camaro to their shared residence in the Nahcotta area.

#### **Disputed Facts**

1. Whether the defendant's license plate white light was working at the time the trooper observed it when defendant's vehicle passed by troopers vehicle.
2. Whether the trooper's stop of the defendant's vehicle for an unlit license plate was actually a pretext for trying to discover some criminal activity.

#### **Summary of Decision**

The burden of proving that the stop was pretextual is the moving party's burden, here the defendant. The trooper testified that no light was illuminating defendant's

license plate and that the trooper could not see the license plate through the trooper's side mirror. This was the reason the trooper turned around and followed the vehicle for a short ways before initiating his traffic stop. The trooper testified that he bent down to check the license plate light but there was no light coming from the license plate light holder. He asked the driver (Mr. Heslen) for I.D. and was provided a punched driver's license, which he ran and subsequently arrested Mr. Heslen for driving on a suspended license in the second degree.

The defendant testified that he is a long-time automotive mechanic and that he was rebuilding the 1978 Camaro and had also wired the vehicle. Tracy Vaughn, who was riding in the vehicle during the stop, testified that she checked the license plate light shortly after the trooper released the vehicle to her and she observed a properly working license plate light.

The trooper testified that he had made at least one hundred license plate light stops during his career, but did not stop every vehicle that he saw with a nonworking license plate light. He testified that he will not stop a vehicle for this violation if he is engaged in some other stop at the time or is on his way to some other call. There is no testimony from any person that the trooper was on any special emphasis patrol that night. There is also no testimony that the defendant's vehicle was operating in any suspicious or negligent manner prior to the stop. Therefore, the Court has no testimony of any motive that officer may have had to make a pretextual stop. The fact that a law enforcement officer elects to not stop every vehicle for some infraction is within the discretion of the

officer. There is no evidence before the court that the officer stopped the defendant's vehicle for the real reason of searching the defendant's vehicle or the defendant.

Further, the trooper testified that he observed the license plate light not working on three occasions: (1) initially in his side mirror as the defendant's vehicle passed him; (2) while following the defendant's vehicle after the trooper turned around; and (3) after the stop when the trooper bent down to check the license plate light. Neither the defendant nor the passenger were able to see the license plate light from their positions inside the Camaro. If accepted as true just for the sake of argument, that the license plate light was working when the passenger checked it just prior to driving the auto home, this does not negate the three, distinct times the trooper viewed the license plate without a functioning light.

RCW 46.37.050 (3) states that the light must be a white light. Again, for the sake of argument, if the tail lights (not white) displayed the license plate, the light had to be a white light.

Therefore, the initial stop for failing to properly illuminate the rear license plate was not a pretext stop based upon the evidence presented to the Court. The search of the defendant was lawful pursuant to a search incident to arrest and also for officer safety. The items taken from the defendant's person are admissible in the state's case-in-chief. The statements by the defendant during the search of his person were not before the court as this hearing was solely for 3.6 purposes.

Finally, the fact that the trooper released the Camaro to Ms. Vaughn does not prove that the traffic stop was pretextual. Evidently the tail lamps were functioning

properly so there was no safety issue to the public at large. Law enforcement officers are expected to make reasonable judgment calls at the scene. A challenge raised as to the wisdom of the trooper to allow a vehicle to be driven at night without a license plate light should be decided through administrative channels.

The state shall prepare findings of fact and conclusions of law for presentation at least one week prior to the trial date of May 18<sup>th</sup>. This memorandum is not intended to limit further findings as to both contested and uncontested facts and the Court will entertain such additions or editions to the findings listed above at the presentation hearing.

Decided this 2<sup>nd</sup> day of May, 2006.

  
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JUDGE MICHAEL J. SULLIVAN

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PACIFIC COUNTY

STATE OF WASHINGTON, )  
)  
Plaintiff, )  
)  
vs. )  
)  
**JAMES V. HESLEN,** )  
Defendant. )  
\_\_\_\_\_ )

NO. **05-1-00218-1**

FINDINGS OF FACT  
AND CONCLUSIONS OF LAW

**I. UNDISPUTED FACTS**

1. That Trooper Madsen and defendant's car passed each other in opposite directions during dark hours and the Trooper observed the rear of the defendant's vehicle in his side mirror.
2. The Trooper turned around and followed defendant's vehicle.
3. The Trooper stopped defendant's vehicle. The defendant was the driver.
4. The Trooper asked for defendant's identification and ran driver's license check via dispatch. The Trooper did not recognize the driver prior to the stop.
5. Driver's check verified defendant's license was suspended in the second degree.

FINDINGS OF FACT &  
CONCLUSIONS OF LAW - 1

**Pacific County Prosecuting Attorney**  
**P.O. Box 45**  
**Courthouse**  
**South Bend, WA 98586**  
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**Fax: (360) 875-9362**

**APPENDIX 'B'**

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1  
2 6. Trooper Madsen placed defendant under arrest for driving with a suspended  
3 license in the second degree.  
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5 7. Trooper Madsen searched the defendant incident to arrest and located in  
6 defendant's right , front pants pocket folded cellophane.  
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8 8. Trooper Madsen unfolded the cellophane, found what looked like  
9 methamphetamine.  
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11 9. Trooper Madsen released defendant's 1978 Camaro to the female  
12 passenger, Tracy Vaughn.  
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14 10. Tracy Vaughn checked the license plate light shortly after the traffic stop  
15 and it was working properly.  
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17 11. Tracy Vaughn drove the Camaro to their shared residence in the Nahcotta  
18 area.  
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23 **II. DISPUTED FACTS**

24 1. Whether the defendant' license plate white light was working at the time  
25 the Trooper observed it when defendant's vehicle passed by the trooper's  
26 vehicle.  
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28 2. Whether the Trooper's stop of the defendant's vehicle for an unlit license  
29 plate was actually a pretext stop for trying to discover some criminal  
30 activity.  
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**III. DECISION**

The stop for failing to illuminate the license plate light pursuant to RCW 46.37.050 was lawful. Therefore, the subsequent arrest and search of the defendant were also lawful. The items discovered on the defendant's person and seized as a result of the search incident to arrest are admissible in the State's case-in-chief.

DATED this 30 day of May, 2006.

  
JUDGE

Presented by:



MICHAEL ANDERSON, WSB#34636  
Chief Deputy Prosecuting Attorney

Approved as to form:

  
HAROLD KARLSVIK, WSBA#  
Attorney for Defendant.

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Pacific County, WA

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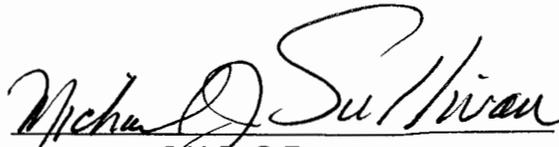
Virginia Leach, Clerk  
By  Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PACIFIC COUNTY

STATE OF WASHINGTON, )  
 )  
 Plaintiff, ) NO. **05-1-00218-1**  
 )  
 vs. )  
 )  
 **JAMES V. HESLEN,** )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

COURT'S INSTRUCTIONS

DATE: 5/30/06

  
JUDGE

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I

have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony of the witnesses. The law is contained in my instructions to you. You must disregard any

remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this.

If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberation, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To

assure that all parties received a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

The defendant has entered pleas of not guilty. The pleas put in issue every element of each of the crimes charged. The State is the plaintiff and has the burden of proving each element of the crimes beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

INSTRUCTION NO. 3

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on the other count.

INSTRUCTION NO. 4

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 5

It is a crime for any person to possess a controlled substance.

INSTRUCTION NO. 6

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.

INSTRUCTION NO. 7

Methamphetamine is a controlled substance.

INSTRUCTION NO. 8

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know the substance was in his possession or did not know the nature of the substance.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

INSTRUCTION NO. 9

To convict the defendant of the crime of possession of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 11<sup>th</sup> day of September, 2005, the defendant possessed a controlled substance; and
- (2) That the act occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 10

A person commits the crime of driving while license suspended or revoked in the second degree when he drives a motor vehicle while an order is in effect that suspends or revokes his driver's license or driving privileges by reason of a previous conviction for violating RCW 46.20.342 relating to driving while license suspended or revoked in the second degree.

INSTRUCTION NO. 11

To convict the defendant of Driving While License Suspended or Revoked in the Second Degree, each of the following five elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about September 11, 2005, the defendant drove a motor vehicle;
- (2) That at the time of driving an order was in effect that suspended or revoked the defendant's driver's license or driving privileges;
- (3) That the order was entered by reason of a previous conviction for violating RCW 46.20.342 relating to driving while license suspended or revoked in the second degree;
- (4) That at the time of driving the defendant was not eligible to reinstate his driver's license or driving privileges; and
- (5) That the driving occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (3), (4) and (5) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4) or (5), then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 12

A person knows or acts knowingly or with knowledge when he is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

INSTRUCTION NO. 13

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with you fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 14

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and a reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted into evidence, these instructions, and two verdict forms for recording your verdict.

You must fill in the blank provided in the verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

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

STATE OF WASHINGTON, )  
 ) NO 35116-1  
 Respondent. )  
 ) AFFIDAVIT OF MAILING  
 vs. )  
 )  
 JAMES V. HESLEN, )  
 )  
 Petitioner. )  
 \_\_\_\_\_ )

STATE OF WASHINGTON )  
 ) ss.  
 COUNTY OF PACIFIC )

VICKI FLEMETIS, being first duly sworn on oath, deposes and says:

I am the Office Administrator for the Pacific County Prosecutor.

That on 3/30, 2007, I mailed a two copies of BRIEF OF RESPONDENT to the following address:

PETER B. TILLER  
ATTORNEY AT LAW  
P.O. BOX 58  
CENTRALIA, WA 98531

Pacific County Prosecuting Attorney  
P.O. Box 45  
Courthouse  
South Bend, WA 98586  
Phone: (360) 875-9361  
Fax: (360) 875-9362

  
VICKI FLEMETIS

SUBSCRIBED & SWORN to before me this 30<sup>th</sup> day of  
MARCH, 2007.

  
NOTARY PUBLIC in and for the State  
of Washington, residing at Raymond