COA No. 332179

SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington,
Respondent

v.

William J. Wright,
Petitioner

PETITION FOR REVIEW

APPEAL FROM THE COURT OF APPEALS DIVISION III

Attorneys for Petitioner William J. Wright:
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I. IDENTITY OF PETITIONER

COMES NOW, Mr. William Wright, Petitioner, respectfully brings this Petition for Review pursuant to RAP 13.4, and respectfully requests this court to accept review of the Court of Appeals decision designated in part II of this motion.

II. COURT OF APPEALS DECISION

The Petitioner seeks review of Court of Appeals Decision issued May 2, 2017 upholding the lower court's conviction of the Petitioner. The decision of the lower courts is in violation of Mr. Wright's right to due process and right to be free from unreasonable searches and seizures. The Supreme Court should accept review of this decision because it is conflict with decisions in the Court of Appeals and Supreme Court, involves a significant question of law under the State and Federal Constitution, and involves an issue of substantial public interest. RAP 13.4(b)(1-4).

III. ISSUES PRESENTED FOR REVIEW

1. **Pursuant to RAP 13.4(b)(3), should the Supreme Court accept review when the lower courts denied the Defendant's request for a *Franks* hearing after a search warrant was obtained based on the statements of an informant with a known grudge against the Defendant?**

2. **Pursuant to RAP 13.4(b)(3), should the Supreme Court accept review when the lower court denied a motion to dismiss for destruction of evidence when the government destroyed the recorded interview with the informant that was the basis for the search warrant?**

3. **Pursuant to RAP 13.4(b)(4), should the Supreme Court accept review when the lower court allowed prejudicial and irrelevant evidence to be introduced at trial which was taken from another residence during the search of the property?**

4. **Pursuant to RAP 13.4(b)(1-2), should the Supreme Court accept review when the lower court allowed improper vouching by the prosecutor of its informant witness during trial?**

III. STATEMENT OF THE CASE

Mr. William J. Wright was charged on October 21, 2013 with one count of Possession with Intent to Manufacture or Deliver a Controlled Substance – Methamphetamine, one count of Possession with Intent to Manufacture or Deliver a Controlled Substance – Hydrocodone, and four counts of Possession of a Stolen Vehicle. CP 1-7. The matter proceeded to trial on January 20, 2015 in Pend Oreille County Superior Court in front of The Honorable Allen Nielson. CP 409-429, RP 111-822.

Ultimately, the jury returned a verdict of guilty on Counts I, III, IV, V, and VI. CP 404-408, RP 814-815. Count II was dismissed pursuant to defense motion at the close of the State's case. RP 698-699, 712. Mr. Wright was sentenced on February 19, 2015 to 120 months of incarceration on all counts, to be served concurrently along with legal financial obligations totaling $2,950.00, and twelve months of community custody. CP 498-507, RP 831-847. The Petitioner timely filed an Appeal in the Court of Appeals

Division III. The Court of Appeals upheld the trial court's rulings. This Petition for Review to the Washington State Supreme Court timely follows.

IV. ARGUMENT

1. **The Court should accept review because the Defendant's right to be free from unreasonable searches and seizures under the State and Federal Constitutions was violated when the Court denied the Defendant's request for a *Franks* hearing to challenge the validity of a search warrant that had omitted pertinent facts.**

The denial of a *Franks* hearing to challenge the validity of the search warrant executed on Defendant's property is a significant question of law under the State and Federal Constitution. Moreover, it is in conflict with decisions of this Court. The Fourth Amendment to the United States Constitution guarantees the right of the people to be secure in their persons, homes, papers, and effects against unreasonable searches and seizures. The due process clause of the Fourteenth Amendment extends this right to protect against intrusions by state governments. *Mapp v. Ohio*, 367 U.S. 643 (1960). The federal constitution, however, only establishes the minimum level of protection for individual rights. *State v. Chrisman*, 100 Wn.2d 814, 817 (1984). The Washington Constitution has consistently provided greater protection of individual rights than its federal counterpart. *See State v. Ladson*, 138 Wn.2d 343 (1999).

In order to hold a *Franks* hearing to challenge the validity of a search warrant for omission of pertinent facts in procuring a search warrant, a defendant must have a more than conclusory attack that is supported by more than a mere

desire to cross-examine. *Franks v. Delaware*, 438 U.S. 154, 171, 98 S.Ct. 2674 (1978). In Washington, the *Franks* test includes material omissions of fact. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). For an omission to rise to the level of a misrepresentation, the challenged information must be necessary to the finding of probable cause. *State v. Garrison*, 118 Wn.2d 870, 874, 827 P.2d 1388 (1992).

It was testified to repeatedly that Mr. Castro was up front with law enforcement as regards his hatred of Mr. Wright. CP 98-118, RP 353, 550, 553. It was also testified to repeatedly, and the documentation bears out, that no officer included that information in the affidavit for search warrant. CP 74-84, RP 168, 256, 550, 553, 667-668. That information is directly related to Mr. Castro's motives for talking to law enforcement, as well as any possible sentence he could receive. Failing to include the most pertinent information as regards Mr. Castro's veracity casts doubt on the entirety of the affidavit for search warrant. Mr. Castro's veracity is, furthermore, crucial to a finding of probable cause because his information was the sole basis for the search warrant.

Mr. Castro's veracity is exceedingly doubtful. In the search warrant affidavit, it is alleged he said that he had been out to buy from Mr. Wright a mere two to three days before his arrest but then in his interview with defense counsel, stated with great assurance it had been at least two weeks and he had told officers that. CP 74-84, CP 98-118. Then in trial testimony, he stated once again that it

was a couple of days. RP 359. This indicates that the information in the search warrant affidavit was stale. In the search warrant affidavit, it is claimed that he said he and another person put together $300 each to buy a half ounce from Mr. Wright. CP 74-84. Then in the defense interview he stated that it was a quarter ounce he purchased, and he maintained both then and at trial that that was what he had told law enforcement. CP 98-118, RP 367.

In the search warrant affidavit, it is claimed that Mr. Castro said he had been purchasing from Mr. Wright for several years and that he had bought from him six or seven times in the previous thirty days. CP 74-84. However, at trial he then stated that he only went to the property five or six times total, then he stated that he had bought from Mr. Wright eight times. RP 355, 359. In the interview with defense counsel, he stated that the drugs he had at the time of his arrest in Pend Oreille county were not from Mr. Wright but the ones on him at the time of his arrest in Spokane county were. CP 98-118. Then at trial, he stated that not even that methamphetamine was from Mr. Wright. RP 374. Again, this would indicate the staleness of the information provided by Mr. Castro.

Most importantly, the only information listed in the search warrant affidavit regarding Mr. Castro's hatred of Mr. Wright was that he "does not usually like to buy" from him. CP 74-84. However, the defense counsel interview revealed a deep seated hatred of Mr. Wright. Mr. Castro stated he wanted to "do heinous stuff" to him, that he was "trying to set Bill up," he was "out for vigilante justice,"

that he was "going to shoot him," and he stated repeatedly that he had told officers all of that. CP 98-118.

Perhaps most importantly, a *Franks* hearing is the only appropriate venue to address these issues. As noted at trial, any attempt to dig into Mr. Castro's motives would be excessively likely to cause the incidental introduction of very prejudicial, ordinarily inadmissible character testimony against Mr. Wright. RP 618-620. Addressing the issue at a *Franks* hearing would have allowed for the issue to be fully addressed without that risk.

Beyond the *Franks* issue, the defense challenged the search warrant on grounds that it lacked particularity, did not satisfy the *Aguilar-Spinelli* test, and that if it did, it still did not provide probable cause.

"To comply with the mandate of the Fourth Amendment particularity clause, a search warrant must be sufficiently definite so that the officer executing the warrant can identify the property sought with reasonable certainty." *State v. Stenson*, 132 Wn.2d 668, 691-92 (1997). A general description will suffice only if a more specific description is not possible. *Stenson*, 132 Wn.2d at 692; *State v. Perrone*, 119 Wn.2d 538, 547 (1992). With respect to the items to be seized, the particularity requirement serves the dual purpose of limiting police discretion and informing the subject of the search as to what may be legally taken. *State v. Riley*, 121 Wn.2d 22, 29 (1993).

The search warrant itself and the affidavit for search warrant use general terms for all items the law enforcement officers wished to seize, allowing officers to seize nearly anything they wished if it could conceivably be at all related to manufacturing, delivering, or possessing a controlled substance or to possession of a stolen vehicle. CP 74-84, 85-90. The search warrant authorized search of four parcels of land, when all the information available, even if taken as true, limited the possible criminal activity to one parcel – that on which Mr. Wright resided. CP 85-90. There was no nexus between the other parcels and the alleged criminal activity. A general search wherein officers may seize basically anything is not permitted and the trial court was in error when it found that the warrant here had sufficient particularity. *See State v. Murray*, 8 Wn.App. 944, 509 P.2d 1003 (1973).

A finding of probable cause may be predicated on information provided by an informant. *State v. Northness*, 20 Wn. App. 551, 554 (1978). Information provided by an informant must be carefully scrutinized, however. *State v. Mickle*, 53 Wn. App. 39, 41 (1988). In determining whether an informant's tip is sufficient to establish probable cause, Washington applies the two-pronged *Aguilar-Spinelli* test. *State v. Bauer*, 98 Wn. App. 870, 875 (2000). Our state constitution mandates continued use of this test despite changes in federal case law. *State v. Jackson*, 102 Wn.2d 432 (1984). "[A]rticle I, section 7 demand[s] adherence to the *Aguilar/Spinelli* test." *State v. Chenoweth*, 160 Wn.2d 454, 466

(2007). To satisfy the *Aguilar-Spinelli* test, police must establish (1) that the informant has a factual basis for his or her allegations, and (2) that the information is reliable and credible. *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964); *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969); *State v. Jackson*, 102 Wn.2d 432 (1984).

The State also failed to establish Mr. Castro's veracity. The veracity prong seeks to "evaluate the truthfulness of the informant." *State v. Lair*, 95 Wn.2d 706, 709, 630 P.2d 427 (1981). The level of proof required to establish an informant's veracity depends in part on whether the informant is a professional or citizen informant. *Bauer*, 98 Wn. App. at 876. The standard for demonstrating reliability is somewhat relaxed for an identified citizen informant; for example, no proof of past performance is required. *Bauer*, 98 Wn. App. at 876; see also *State v. Riley*, 34 Wn. App. 529, 533 (1983) (ordinary citizen has no opportunity to establish track record of reliability); *State v. Chatmon*, 9 Wn. App. 741, 746 (1973) (no requirement that police show previous reliability of citizen informer).

Nonetheless, some showing of reliability is required. *State v. Jones*, 85 Wn. App. 797, 800, review denied, 133 Wn.2d 1012 (1997). Indeed, even with the relaxed standard, "it is axiomatic under the *Aguilar-Spinelli* rule that the police must ascertain some information which would reasonably support an inference that the informant is telling the truth." *State v. Chatmon*, 9 Wn. App. 741, 746 (1973); *Bauer*, 98 Wn. App. at 876; *State v. Wilke*, 55 Wn. App. 470,

477, review denied, 113 Wn.2d 1032 (1989); *State v. Franklin*, 49 Wn. App. 106, 109 (1987); *State v. McCord*, 125 Wn. App. 888, 893 (Wash. Ct. App. 2005). To make such a showing, police must obtain background facts to support a reasonable inference that the informant is credible and without motive to falsify. *Bauer*, 98 Wn. App. at 876; *State v. Cole*, 128 Wn.2d 262, 287-88 (1995); *State v. Ibarra*, 61 Wn. App. 695, 700 (1991); *Wilke*, 55 Wn. App. at 477; *Chatmon*, 9 Wn. App. at 748. A citizen informant's tip may be self-authenticating if the information provided is so detailed as to demonstrate intrinsic indicia of reliability. *Northness*, 20 Wn. App. at 557.

This prong demonstrates why a *Franks* hearing was so necessary – the veracity prong requires authentication of the information or some reason to believe the informant's veracity. As noted *supra*, there were significant inconsistencies and outright falsities between the search warrant affidavit and what Mr. Castro told defense counsel and later, the jury. As the *Bauer* decision makes clear, there must be reason provided to indicate that the informant is credible and without motive to falsify. Here, Mr. Castro's hatred for Mr. Wright provided significant motive to falsify his tip. He also had several crimes of dishonesty in his past. CP 51-120. "Any crime involving dishonesty necessarily has an adverse effect on an informant's credibility." *United States v. Elliot*, 322 F.3d 710, 716 (9th Cir. 2003) (citing *United States v. Reeves*, 210 F.3d 1041, 1045 (9th Cir. 2000). Due to his crimes of dishonesty, Mr. Castro effectively begins at a

reduced level of credibility. "Therefore, when an informant's criminal history includes crimes of dishonesty, additional evidence must be included in the affidavit 'to bolster the informant's credibility or the reliability of the tip.' *Id.* Otherwise, 'an informant's criminal past involving dishonesty is fatal to the reliability of the informant's information, and his/her testimony cannot support probable cause.'" *Id.* (citing *United States v. Meling*, 47 F. 3d 1546, 1554-55 (9th Cir. 1995). No such additional evidence was included here. The entirety of the search warrant affidavit was based on information provided by Mr. Castro. Even the relaxed standard for a named informant for the veracity prong was not met here.

If an informant's tip fails under either prong, as the tip failed under both prongs here, the trial court must determine if law enforcement conducted independent investigation in order to corroborate the information so as to supply the missing element or elements. *State v. Young*, 123 Wn.2d 173, 195 (1994); *State v. Jackson*, 102 Wn.2d at 438; *Duncan*, 81 Wn. App. at 76. The police must corroborate more than just public or innocuous facts, however. *Young*, 123 Wn.2d at 195; *State v. Duncan*, 81 Wn. App. 70, 77, review denied, 130 Wn.2d 1001 (1996) ; see also *State v. Maxwell*, 114 Wn.2d 761, 769 (1990). There was no investigation of any kind by the officers and therefore no corroboration. This was testified to repeatedly, as discussed above. The trial court erred in ruling the search warrant valid.

Lastly, even if the Aguilar-Spinelli test did not apply, there was neither probable cause to search for most items listed in the search warrant nor probable cause to believe that any evidence at all would be found in Mr. Wright's home or on his property. A search warrant may issue only upon a showing of probable cause to believe that contraband or other evidence of a crime will be found at a particular location. *State v. Goble*, 88 Wn. App. 503, 508-09 (1997); *State v. Cole*, 128 Wn.2d 262, 286 (1995).

While the affidavit for search warrant does include statements from Castro that he had recently purchased and smoked meth in Wright's home even a recent drug sale from a house may not give rise to probable cause that drugs will be found in the house. CP 74-84. See *State v. Sanchez*, 74 Wn.App. 763 (1994). In *State v. Sanchez*, the police had evidence that: 1) a person had very recently purchased cocaine from "Joe" at a particular house; 2) the house had been raided the previous March and drugs were found; 3) during the prior search, police observed the house was marred by shotgun blasts; and 4) unidentified citizens had lodged unspecified complaints about suspected drug activity at the residence. *Id.* at 713. The court of appeals in *Sanchez* properly concluded that because there was just one recent sale at the house, there was no probable cause that evidence of criminal activity would be found within the house. *Id.* at 715.

However, conclusory predictions that evidence will likely be found in a residence do not establish probable cause, and mere suspicion and personal belief

do not establish probable cause. See *Thein*, 138 Wn.2d 133, 147; *State v. Klinger*, 96 Wn. App. 619, 624 (1999). Castro's uncorroborated statements, absent actual facts indicating that methamphetamine would likely be found on the Wright property, were not sufficient to establish probable cause to search the property, especially the buildings/homes thereon, for methamphetamine. The court was in error in denying the motion to suppress.

2. The Court should accept review because the Defendant's right to due process was violated when the government failed to preserve the recorded interview with the informant that was the basis for the search warrant executed on his property.

The lower court violated the Defendant's right to due process under the State and Federal Constitutions when it denied the Defendant's motion to dismiss for destruction of evidence. The Supreme Court should accept review because this decision raises a significant question of law under the State and Federal Constitutions.

The inconsistencies between what Mr. Castro was alleged to have said in his initial interview with law enforcement and what he said in his interview with defense counsel, defense counsel filed a motion to dismiss due to the failure of the State to preserve the video recording of Mr. Castro's interview. CP 210-254. This recording would have been significant in any renewal of the suppression motion and separately warranted dismissal of the case, as it is evidence that was

not only not turned over to defense counsel but was destroyed due to failure of the State to timely request a copy.

Under both the state and federal constitutions, due process in a criminal prosecution requires fundamental fairness and meaningful opportunity to present a complete defense. *State v. Wittenbarger*, 124 Wn. 2d 467, 474-5, 880 P.2d 517 (1994) (citing *California v. Trombetta,* 467 U.S. 479 (1984)). The state's failure to preserve evidence that is material and exculpatory violates a defendant's right to due process. *Wittenbarger* at 475.

Material and exculpatory evidence must "possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable available means." *Id* at 475 (citing *California v. Trombetta,* 467 U.S. 479, 489 (1984)). However, if the evidence does not meet this two part test and is only potentially useful to the defense, failure to preserve the evidence does not constitute a denial of due process unless the criminal defendant can show bad faith on the part of the state. *Wittenbarger* at 477 (citing *Arizona v. Youngblood,* 488 U.S. 51, 58 (1988)). If the evidence meets the standard as materially exculpatory or the State acted in bad faith then the criminal charges against the defendant must be dismissed if the State fails to preserve it. *Wittenbarger* at 475.

The courts found that a jacket, unable to be produced at trial, containing drugs and worn by the defendant asserting an unwitting possession claim was

materially exculpatory. *See State v. Burden,* 104 Wn. App. 507, 17 P.3d 1211, (Wash. App. Div. 2 2001). The court found that the coat's exculpatory value was apparent before it disappeared because the fit and appearance of the jacket where the illegal substances were found were important factors in determining its ownership. *Id.* at 513-4. Moreover, the court found that a different but comparable coat was not sufficient because the jury could not determine whether the thickness and fit of a substitute coat were the same as the original. *Id* at 514. Thus, the court found there was no comparable evidence left for the defendant to properly prepare for his case and upheld the dismissal. *Id* at 514.

On the other hand, the courts in *Groth* found that destruction of several pieces of evidence in an old unsolved murder case were only "potentially material" because the evidence had no exculpatory value without testing or analysis and it is unclear that that was done before the evidence was destroyed. *See State v. Groth*, 103 Wn. App. 548, 261 P.3d 183, (Wash. App. Div. 1 2011). Moreover, the court found that the evidence was destroyed 15+ years after the crime was committed and the case was unsolved and closed as part of a space making effort. *Id.* Since the evidence was only "potentially material" the court found that the defendant did not show bad faith by the State in destroying the evidence and upheld his conviction.

In the case at hand, the Court of Appeals ruled that the recording was not material or exculpatory because defense counsel could get the same or similar

information by interviewing the informant. *State of Washington v. Wright,* No. 332179-III, Filed May 2, 2017 p. 20.

However we disagree with the Court of Appeals: the exculpatory value of the recording was significant as without that recording, there is no verification for any of the statements Mr. Castro allegedly made that are the entire basis for the search warrant and subsequent search. It is analogous to *Burden* because of the numerous inconsistencies between the alleged statements made in that interview and the statements actually made in the interview with defense counsel and subsequently on the stand. Absent the tape, proper preparation of a defense was all but impossible. This case is unlike *Groth* because the tape was misplaced while the case was in active litigation, not 15 years after the crime was committed in an effort to make room in a warehouse.

Secondly, the videotaped interview/interrogation of the "informant" was impossible to obtain by any other available means. In fact, in defense counsel's interview with Mr. Castro he denied several accusations made by the State. CP 98-118. An interview is a unique event that cannot be recreated after that fact. As such, the videotape in this case met the two part test to show materially exculpatory evidence, the State failed to preserve the tape, and thus the denial of this motion must be reversed.

Even if the interview were only potentially material, the court was in error in denying the motion because the testimony of Deputy McKay and Deputy Bowman

at trial was clear that they should have preserved the interview. RP 230, 232, 548-549. Their failure to do so was in bad faith, meeting the standard for destruction of potentially material evidence.

3. The Court should accept review because the decision of the lower court is an issue of substantial public interest because it allowed prejudicial and irrelevant evidence about a gun found in another residence, unrelated to the defendant, to be introduced at trial.

Allowing irrelevant and prejudicial evidence in at trial is an issue of substantial public interest that requires review from the Supreme Court. Over objection, the trial court allowed in evidence, specifically drugs and firearms, that were seized from the trailer belonging to other people. RP 312-313. Defense counsel had argued that this evidence was irrelevant, as there was no evidence that Mr. Wright had any dominion and control over the contents of that trailer, to the point that law enforcement requested written consent from the owners and residents of the trailer in order to search it. RP 308-313, 323-325.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *City of Auburn v. Hedlund*, 165 Wn.2d 645, 654, 201 P.3d 315 (2009). That discretion is abused where the exercise of discretion is "manifestly unreasonable or based upon untenable grounds or reasons." *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Irrelevant evidence is not admissible. ER 402. Evidence is relevant if it has "any tendency to make the

existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

The State argued that the items found in the trailer are relevant because the baggies had similar designs on them as ones located in Mr. Wright's residence. RP 312. The trial court even acknowledged that the relevance was tenuous. RP 313. Defense counsel maintains that rather than tenuous, the relevance was quite simply not there. The baggies found are mass produced with those designs, and Mr. Wright had no ownership or residence in the trailer.

Furthermore, the evidence seized from the other persons residence included firearms. RP 309-311, 324. Deputy Dice was allowed to testify as to the firearms found in that trailer. The Washington Supreme Court has opined that "many individuals view guns with great abhorrence and fear. Still others may consider certain weapons as acceptable but others as 'dangerous.' A third type may react solely to the fact that someone who has committed a crime has such weapons. Any or all of these individuals might believe that defendant was a dangerous individual..." *State v. Rupe*, 101 Wn.2d 664, 708, 683 P.2d 571 (1984).

Here, not only was such highly prejudicial testimony allowed to be presented to the jury, it was not even relevant. The firearms belonged to someone else and were found in someone else's home, not Mr. Wright or his home. RP 324-325. However, the jury could infer from the court's admission of that

evidence that Mr. Wright had some ties to the firearms, despite the fact that that is patently false. Once there is firearm evidence admitted, a jury may very well decide that although the crimes alleged are wholly unrelated to firearms, Mr. Wright was a "dangerous individual" as meant by *Rupe* and therefore deserving of punishment. The trial court's ruling was an abuse of discretion because it was manifestly unreasonable.

4. The Court should accept review because the decision of the lower court is in conflict with the Supreme Court's decisions in regards to prosecutorial misconduct and vouching for witnesses.

The Court should accept review because the lower court's ruling is in conflict with the Supreme Court's previous decisions on prosecutor misconduct for vouching for a witness. Prosecuting attorneys are quasi-judicial officers charged with the duty of ensuring that a defendant receives a fair trial. *State v. Boehning*, 127 Wn.App. 511, 518, 111 P.3d 899 (2005). Prosecutorial misconduct violates that duty and can constitute reversible error. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). A prosecutor commits misconduct by personally vouching for a witness's credibility. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). We will reverse a conviction when the defendant has met his burden of establishing (1) the State acted improperly and (2) the State's improper act prejudiced the defendant. *State v. Emery,* 174 Wn.2d 741, 756, 278 P.3d 653 (2012).

Denial of a motion for a mistrial is reviewed for abuse of discretion, giving great deference to the trial court because it is in the best position to discern prejudice. *State v. Smith*, 124 Wn.App. 417, 428, 102 P.3d 158 (2004). Abuse of discretion occurs where the trial court exercises it on untenable grounds or reasons. *Id.*

Here, counsel for the State made repeated comments about his own view of the case. RP 766, 768, 801-802. Defense counsel's objections were overruled every time until the final comment, wherein counsel stated: "As the evidence showed, we made a deal with Mr. Castro. After looking at all those things, I made a deal with Mr. Castro. In looking at his criminal history and looking [at] what he was charged with and looking at the multiple felonies and looking at what he was potentially facing, and then looked at Mr. Wright and I made a deal with Mr. Castro. And the deal was worth it. I would ask that all of you--" RP at 802. Defense counsel objected stating that was vouching for the witness. *Id.* The Judge instructed the jury to "disregard the last comment." *Id.* Under that instruction his last comment would have been "I would ask that all of you--" and that was the comment to be disregarded. Defense counsel moved for mistrial based on the above comments. The trial court denied the motion. RP 811-12.

In regards to the first prong of proving prosecutorial misconduct, the Court of Appeals ruled that "[w]e are uncertain, whether that statement was improper vouching. Because we are uncertain, we conclude the trial court did not abuse its

discretion in its assessment of that statement and in denying Wright's motion for mistrial." *State of Washington v. Wright,* No. 332179-III, Filed May 2, 2017 p. 26. Under the second prong, the lower court ruled that even if the statements were vouching it was not prejudicial because the trial court instructed the jury to disregard it. *Id.* However, under the instruction by the Judge the jury was to disregard "I would ask that all of you--" not the "and the deal was worth it."

Further, the jury cannot un-hear the counsel for the State inserting himself and his interest into the case and had already heard every comment up to that point. The cumulative effect of these comments cannot help but be prejudicial to Mr. Wright. Multiple incidents of a prosecutor's improper conduct that, when combined, materially affect the verdict violate a defendant's right to a fair trial and require a new trial. *See State v. Case*, 49 Wn.2d 66, 73-74, 298 P.2d 500 (1956); *State v. Henderson*, 100 Wash.App. 794, 805, 998 P.2d 907 (2000). Here, the trial court itself agreed that at least the final comment was improper conduct. It was preceded by enough similar if milder comments to rise to reversible error.

V. CONCLUSION

The case should properly be reversed for the above reasons and remanded to the trial court for a new trial with evidence properly excluded.

Respectfully submitted this 1 day of June, 2017.

Douglas D. Phelps, WSBA #22620

SUPREME COURT
OF THE STATE OF WASHINGTON

WILLIAM WRIGHT, Appellant	)	Cause No. 332179
v.	)	DECLARATION OF SERVICE
STATE OF WASHINGTON, Respondent	)	

I, Patricia L. Snyder, 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 on the Supreme Court of Washington via email to: 'Supreme@courts.wa.gov' an original of the Petition for Review on June 1, 2017.

I further declare I served in the manner indicated below a true and correct copy of the Petition for Review on June 1, 2017.

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

X Legal Messenger
__ U.S. Regular Mail

I further declare that I served in the manner indicated below a true and correct copy of the Petition for Review on June 1, 2017.

PEND OREILLE COUNTY PROSECUTOR
231 S. GARDEN AVE.
NEWPORT, WA 99156

__Legal Messenger
X U.S. Regular Mail

Signed at Spokane, WA on this 1 day of June, 2017

Patricia Snyder

PATRICIA SNYDER
Legal Assistant

FILED
MAY 2, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. WILLIAM JOHN WRIGHT, Appellant.	)	No. 33217-9-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — William J. Wright appeals his convictions for one count of possession with intent to deliver a controlled substance—methamphetamine, and four counts of possession of a stolen vehicle. He argues the trial court erred in several respects. His primary arguments challenge the veracity of the disclosed informant, the adequacy of the affidavit in support of the search warrant, the particularity of the search warrant, and the State's failure to preserve the recording of the informant's interview that lead to the search warrant. We disagree with these and other arguments and affirm.

FACTS

A. PREARREST FACTS

Facts included in the affidavit for the search warrant

On October 17, 2013, Deputy Jordan Bowman arrested Charles Castro in Newport, Washington, for an outstanding Department of Corrections warrant. Deputy Bowman advised Castro about the methamphetamine pipe and firearms he saw in Castro's truck. Castro responded that he had information about where methamphetamine was coming from in the Newport area and wanted to talk about it.

Deputy Bowman took Castro to the sheriff office's interview room, provided Castro his *Miranda*[1] warnings, and advised him that the interview was being video-audio recorded. Deputy Bowman later testified that unless one requested a copy of the recorded interview within 45 days, the system automatically recorded over the old interview.

Castro said he and a friend purchased methamphetamine from William Wright on or about October 14, that the three of them smoked the purchased methamphetamine in Wright's shop that day, and that Wright lived in an apartment above the shop. Castro provided specific details of the purchase, including that he went upstairs on the day of the purchase and saw Wright with a grapefruit sized rock of methamphetamine. Castro said

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Wright usually kept methamphetamine behind and to the right of a black recliner chair in the upstairs living room. Castro also said there is a cabinet behind the recliner where he had personally observed and handled a 7 mm rifle, a .45 caliber revolver, and a .30-06 rifle. Deputy Bowman's affidavit in support of probable cause noted that Wright was a convicted felon. Castro further stated there are always methamphetamine pipes, scales, and bindle "baggies" on the coffee table in the living room.

Castro said he had purchased methamphetamine from Wright for several years. Castro admitted he had a longtime methamphetamine addiction, but said he did not like to buy from Wright because Wright was a "predator." Clerk's Papers (CP) at 144. Castro admitted to having purchased methamphetamine from Wright six to seven times in the past 30 days.

Castro also described his observations of illegal activity on Wright's property. He said he had purchased and smoked methamphetamine in a trailer on Wright's property where Monty Radan and Ellen Dailey lived. He also said he had smoked methamphetamine at a remote location on Wright's property near a concrete slab. Castro, based on his belief that Wright walked to this remote location daily, thought Wright might keep his money at that location. Castro also described a vehicle junkyard 400 to 500 yards west of Wright's residence where he and Wright would shoot guns and

smoke methamphetamine. Castro believed that drugs and firearms might be stored in the junkyard.

Castro also mentioned another location, 50 to 75 yards north of Wright's residence, where a stolen Dodge pickup was possibly located. Castro said he overheard a conversation between Wright and Justin Ackaret about replacing an ignition on the stolen pickup.

In the affidavit in support of the search warrant, Deputy Bowman partially corroborated the information provided by Castro. Deputy Bowman noted that law enforcement arrested Ackaret on Wright's property five or six months before. He also noted that Ackaret had multiple felony convictions, including two convictions for possession of a stolen vehicle, and had a history of stealing Dodge pickups.

Also in the affidavit, Deputy Bowman disclosed that Castro has six felony convictions: two counts of possession of a stolen vehicle, two counts of possession of a controlled substance, and an attempt to elude, all from 2012; and a separate conviction for possession of a stolen vehicle in 2011.

Scope of the search warrant

A judicial officer reviewed the affidavit and then issued a search warrant. The warrant granted authorization to search, among other things, four contiguous parcels belonging to Wright, one of which had his shop and residence on it, one of which had a

trailer on it, and two of which contained no buildings. The warrant authorized officers to search for a white mid-90s Dodge Ram pickup, all firearms including but not limited to a .45 caliber revolver, a 7 mm rifle, a .30-06 rifle, and all other things by means of which the crimes of manufacturing, delivering, or possessing a controlled substance have or reasonably appear to have been committed.

Execution of the search warrant and items found

Deputies knocked and announced their presence at Wright's shop. A male's voice from inside the shop said "'[j]ust a minute.'" Report of Proceedings (RP) at 165. The deputies heard furtive movement in the upstairs portion of the shop. After nearly two minutes, deputies pried open the door and found Wright and three others in the shop.

Deputies found a small amount of methamphetamine, two small digital scales with methamphetamine residue, 75 hydrocodone pills in separate unlabeled bottles, $230 in cash, and hundreds of small unused sealable 1-inch by 1-inch bindle baggies with designs on them. Drug dealers often use small bindle baggies to distribute illegal drugs, including methamphetamine. Many of the baggies bore a red smiley face.

Deputies also searched the travel trailer in which Radan and Dailey lived. Both residents gave consent to search. Deputies found a drug kit with Dailey's name on it and two firearms. The drug kit contained drug paraphernalia and a single used bindle baggie with a red smiley face, just like those found in Wright's residence. The firearms

belonged to Radan. Elsewhere on Wright's property, the deputies found three stolen vehicles and a stolen all-terrain vehicle.

B. POST ARREST FACTS BEFORE TRIAL

The State charged Wright with one count of possession with intent to deliver a controlled substance—methamphetamine, one count of possession with intent to deliver a controlled substance—hydrocodone, and four counts of possession of a stolen vehicle.

In December 2013, defense counsel sought a copy of the recording of Castro's video-audio interview. However, the recording no longer existed because no one had requested a copy within 45 days.

On March 17, 2014, defense counsel interviewed Castro. The purpose of the interview was to question Castro about the information he gave Deputy Bowman that led to the search warrant. Through this interview, defense counsel learned of information Castro told Deputy Bowman that was not included in his affidavit. For instance, Castro told Deputy Bowman that he wanted to do heinous things to Wright because Wright was a pedophile, gave drug cocktails to women, and fried the mind of his child's mother. In addition, Castro told Deputy Bowman that his dislike for Wright was so intense that he considered shooting him, that he was out for vigilante justice, and that revenge was one of his reasons for providing information that could lead to Wright going to jail.

Castro provided defense counsel information that was different from what was in Deputy Bowman's affidavit. The different information, however, was not exculpatory; rather, it generally consisted of how often and when Castro had purchased methamphetamine from Wright.

Prior to trial, Wright requested a *Franks*[2] hearing. Wright argued that Deputy Bowman intentionally omitted information about Castro's hatred toward Wright in the warrant affidavit. In denying Wright's request for a *Franks* hearing, the trial court determined that Wright failed to make the required showing that Deputy Bowman's omissions were material and were intended to mislead or deceive the judicial officer who signed the warrant. The trial court found that the omissions were not material because it would be reasonable to presume that Castro had an ulterior motive for sharing unfavorable information about Wright with law enforcement.

Wright later filed a motion to suppress the evidence obtained from the search warrant. Wright argued that the search warrant was deficient because it failed the *Aguilar/Spinelli*[3] test. The trial court denied the motion, and found that Castro had met the basis of knowledge and veracity prongs of the *Aguilar/Spinelli* test. The knowledge

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[2] *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

[3] *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), *abrogated by Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), *but adhered to by State* v. *Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984).

prong was satisfied by: (1) Castro's personal observations of methamphetamine being sold and possessed by Wright, (2) Castro's own purchase of methamphetamine from Wright in the recent past and over the last few years, (3) Castro's shooting of firearms with Wright, (4) Castro's observations of firearms in Wright's residence, (5) Castro's overhearing a conversation between Wright and a known car thief about a stolen 1990s Dodge pickup truck, and (6) Castro's observations of abandoned vehicles on Wright's property. The veracity prong was satisfied by: (1) Castro's numerous statements against his penal interests—including his use, purchase, and possession of illegal drugs, and his illegal use and possession of firearms; (2) Castro's willingness to allow himself to be fully identified and to forgo a confidential status; (3) Castro's detailed knowledge of the layout of Wright's property; and (4) law enforcement's ability to corroborate some of Castro's information.

Wright also moved to dismiss the charges on the basis that law enforcement violated his due process rights when it failed to preserve Castro's recorded interview. The trial court conducted an evidentiary hearing and heard from witnesses including Deputy Bowman. In addition, the trial court compared the transcript of defense counsel's March 17, 2014 interview of Castro with Deputy Bowman's search warrant affidavit. The trial court found that Castro's omitted statements were not exculpatory. The trial court also found that the omitted statements were not inconsistent with the statements

contained in the search warrant affidavit. In particular, the affidavit's reference to Wright as a "predator" was consistent with Castro's omitted statements that Wright was a pedophile, a rapist, and had wronged "[Castro's] mama's babies." CP at 313. The trial court further found that Castro's statements to defense counsel supplied defense counsel "considerably more detail than the [unpreserved] recorded interview with Deputy Bowman." *Id.* Finally, the trial court found that Deputy Bowman's failure to request a copy of the recorded interview was not due to a desire to cover up any statement by Castro in the interview. Rather, it was because Deputy Bowman did not believe he needed a copy of the recording. Based upon these findings, the trial court denied Wright's motion to dismiss the charges.

C. OBJECTIONS DURING TRIAL

The case went to trial on January 20, 2015. Deputy Dan Dice testified that law enforcement found firearms inside the trailer where Radan and Dailey lived. The State also sought to admit a picture of the single used red smiley face bindle baggie found in Dailey's drug kit. Wright objected based on relevancy. The trial court determined that the baggie has some relevance and overruled the objection.

During closing argument, the State began discussing Castro's criminal history. Wright objected on the basis that the State was improperly vouching for Castro. The trial court did not rule on the objection but said it would "bear that in mind." Report of

Proceedings (RP) at 767. Wright argued in closing that the State would make a "bargain with the devil." RP at 781. In rebuttal, the State again began to discuss Castro's criminal history. Wright again raised a vouching objection. The trial court overruled the objection. The State then admitted that it made a deal with Castro and said, "the deal was worth it." RP at 802. Wright again objected. The trial court partially sustained the objection by instructing the jury to disregard the last part of the State's comment.

After the jury left to deliberate, Wright moved for a mistrial based on vouching. The trial court noted that no vouching had occurred until the ambiguous final comment and ultimately concluded that not even the final comment was vouching. The trial court denied Wright's motion for mistrial.

The jury found Wright guilty of possession of a controlled substance with intent to deliver—methamphetamine, and four counts of possession of a stolen motor vehicle. In addition to a lengthy sentence and community service, the trial court imposed mandatory and discretionary legal financial obligations (LFOs). Wright appealed.

ANALYSIS

A. DENIAL OF *FRANKS* HEARING

Wright argues the trial court erred when it denied his request for a *Franks* hearing to challenge the search warrant affidavit. Wright contends law enforcement intentionally or recklessly omitted the material statements from Castro to minimize Castro's hatred

toward him. Wright further contends, if those statements had been included in the search warrant affidavit, they would have negated probable cause and all evidence would have been suppressed.

This court reviews denial of a *Franks* hearing for an abuse of discretion. *State v. Wolken*, 103 Wn.2d 823, 829-30, 700 P.2d 319 (1985). Under the Fourth Amendment to the United States Constitution, omissions in a warrant affidavit may invalidate the warrant if the defendant establishes that they are material and made in reckless disregard for the truth. *Franks*, 438 U.S. at 155-56; *State v. Cord*, 103 Wn.2d 361, 366-67, 693 P.2d 81 (1985).

A defendant challenging a warrant on this basis is entitled to a *Franks* hearing if he makes a substantial preliminary showing of the materiality of the omissions. *Franks*, 438 U.S. at 155-56. An omission is material if it was necessary to the finding of probable cause. *State v. Copeland*, 130 Wn.2d 244, 277, 922 P.2d 1304 (1996).

An affiant's mere negligence or inadvertence is insufficient. *Franks*, 438 U.S. at 171; *State v. Seagull*, 95 Wn.2d 898, 908, 632 P.2d 44 (1981). "Recklessness may be shown by establishing that the affiant actually entertained serious doubts about the informant's veracity. 'Serious doubts' may be inferred from either (a) an affiant's actual deliberation or (b) the existence of obvious reasons to doubt the informant's veracity or

the information provided." *State v. Chenoweth*, 160 Wn.2d 454, 479, 158 P.3d 595 (2007) (citations omitted).

If the defendant makes a substantial preliminary showing, the test for probable cause when the affiant omits information is whether the affidavit remains sufficient to support a finding of probable cause when the omitted information is inserted. *State v. Atchley*, 142 Wn. App. 147, 158, 173 P.3d 323 (2007). If the affidavit supports probable cause even when the omitted information is inserted, the suppression motion fails and no hearing is required. *Id.*

First, Wright fails to explain how the omission was material in finding probable cause. The trial court presumed that an informant typically has a motive to provide information to law enforcement. Here, Castro's motivation was revenge against Wright for the bad things he had done, most of which involved selling methamphetamine to others. Inclusion of the omitted information—Castro wanting to do heinous things to Wright because Wright was a pedophile, gave drug cocktails to women, and fried the mind of his child's mother—would only strengthen probable cause.

Second, law enforcement did not omit information of Castro's dislike for Wright. The affidavit states that Castro "did not usually like to buy from [Wright], because he was a predator." CP at 144. Calling a person a predator has obvious and strong implications of dislike. The level of detail in the affidavit is certainly less than that given

in Castro's transcribed interview with defense counsel. However, because the affidavit called Wright a predator, any judicial officer reviewing it could infer that Castro disliked Wright.

Finally, inclusion of the omitted information does not detract from probable cause to issue the search warrant. Castro admitted he hated Wright and wanted to shoot him. Castro stated, "I wanted to do some heinous stuff to [Wright], but I didn't." CP at 100. Castro also explained his motive for informing on Wright:

> [Castro:] I wanted to get vigilante justice, now I [just] want justice. I want to put him in prison where he belongs.
>
> . . . .
>
> . . . It wasn't—it's not that I'm trying to get even with the dude; it's what needs to be done. He needs to be put into prison.
>
> . . . .
>
> . . . I told the police that where my head was at that I was going to shoot him. That's what I told them. But I didn't so.

CP at 103. Castro later clarified:

> . . . I don't want to get even with Mr. Wright; I want to put him in prison for what he has done.
>
> . . . .
>
> . . . He sells methamphetamine to the community and its killing everybody and including myself.

CP at 105. Although Castro wanted to do heinous things to Wright, his desire to do such things was because Wright sold methamphetamine to the community and

methamphetamine was killing people. Inclusion of the omitted information does not detract from probable cause, it adds to probable cause.

We conclude the trial court did not abuse its discretion when it denied Wright's request for a *Franks* hearing.

B. SUFFICIENCY OF SEARCH WARRANT

Wright next argues the trial court erred when it denied his motion to suppress. Wright claims that neither prong of the *Aguilar/Spinelli* test was met, and the search warrant lacked particularity. We disagree.

When reviewing the denial of a motion to suppress, this court must determine whether substantial evidence supports the trial court's findings and, in turn, whether those findings support the conclusions of law. *State v. Russell*, 180 Wn.2d 860, 866, 330 P.3d 151 (2014). Unchallenged findings of fact are verities on appeal. *State v. Ross*, 141 Wn.2d 304, 309, 4 P.3d 130 (2000). Probable cause to issue a warrant is established if the supporting affidavit sets forth "facts sufficient for a reasonable person to conclude the defendant probably is involved in criminal activity." *State v. Huft*, 106 Wn.2d 206, 209, 720 P.2d 838 (1986). This court tests the affidavit in a commonsense rather than hyper-technical manner. *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003). The existence of probable cause is a legal question that a reviewing court reviews de novo. *State v. Chamberlin*, 161 Wn.2d 30, 40, 162 P.3d 389 (2007). However, we afford great

deference to the issuing magistrate's determination of probable cause. *Cord*, 103 Wn.2d at 366.

1. Aguilar-Spinelli *test*

Under circumstances where an informant's tips lead to the issuance of a search warrant, Washington follows the *Aguilar/Spinelli* test requiring that the affidavit must demonstrate the informant's (1) basis of knowledge and (2) veracity. *State v. Vickers*, 148 Wn.2d 91, 112, 59 P.3d 58 (2002).

a. *Basis of knowledge*

An informant's personal knowledge and detailed observations support the basis of knowledge. *Wolken*, 103 Wn.2d at 827. If the informant's information is hearsay, the basis of knowledge prong can be satisfied if there is sufficient information so that the hearsay establishes a basis of knowledge. *Jackson*, 102 Wn.2d at 437-38.

The search warrant affidavit established that Castro had direct knowledge of Wright's illegal activities involving the sale of methamphetamine, the possession of firearms, and the possession of stolen vehicles. Castro stated he had purchased methamphetamine from Wright for years and multiple times in the past 30 days. He gave details about his personal observations of methamphetamine, methamphetamine use, and drug paraphernalia both inside Wright's residence and on his property. He also described

the precise location and type of firearms he saw inside Wright's residence and how he and Wright shot firearms at various locations on Wright's property.

Castro also related a conversation he personally overheard between Wright and Ackaret about a stolen Dodge pickup truck. Deputy Bowman was able to corroborate Castro's statement because he knew law enforcement recently arrested Ackaret on Wright's property and he knew Ackaret stole Dodge pickups.

b. *Veracity*

Named informants are a strong indicator of reliability. *Chenoweth*, 160 Wn.2d at 483. A showing of reliability is relaxed when the search warrant discloses the identity of the informant to the reviewing magistrate. *State v. Gaddy*, 152 Wn.2d 64, 72-73, 93 P.3d 872 (2004). Willingness to provide an address and police interview are additional circumstances supporting reliability. *Chenoweth*, 160 Wn.2d at 483. "Statements against penal interest are intrinsically reliable because a person is unlikely to make a self-incriminating admission unless it is true." *Id.* A strong motive to be truthful such as seeking a deal with law enforcement is also an indicator of reliability. *State v. Bean*, 89 Wn.2d 467, 471, 572 P.2d 1102 (1978).

As discussed above, the search warrant affidavit established Castro's veracity. In addition, Castro was an openly named informant who agreed to give a recorded interview

with law enforcement. Castro also made numerous statements against his penal interest in the interview.

Wright again argues that Castro had ulterior motives for providing information to law enforcement, such as revenge. But as explained above, Castro's desire to provide information to law enforcement was because he knew Wright sold methamphetamine to people. Such motivation only adds to Castro's veracity.

2. *Particularity requirement*

A search warrant may be issued only if the affidavit shows probable cause. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause exists where the search warrant affidavit sets forth "facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). Accordingly, "'probable cause requires a nexus between [the] criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.'" *Thein*, 138 Wn.2d at 140 (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). For drug crimes, this nexus between criminal activity and the place to be searched requires more than a showing that the suspect is probably involved in drug dealing and resides at the place to be searched. *Id.* at 141. Rather, the probable cause standard requires specific facts from which to

conclude evidence of illegal activity will likely be found at the place to be searched. *Id.* at 147. A warrant must also be sufficiently definite so that an officer executing the warrant can identify the property with reasonable certainty. *State v. Stenson*, 132 Wn.2d 668, 691-92, 940 P.2d 1239 (1997). If "the precise identity of items sought cannot be determined when the warrant is issued, a generic or general description of items will be sufficient if probable cause is shown and a more specific description is impossible." *Id.* This court reviews warrants describing physical objects with less scrutiny. *State v. Chambers*, 88 Wn. App. 640, 644, 945 P.2d 1172 (1997).

Deputy Bowman's search warrant affidavit is replete with specific facts that establish a nexus between the items to be seized, places to be searched, and criminal activity. As discussed above, the affidavit established that Wright had sold and used methamphetamine in his residence and at numerous specific locations on his property outside of his own residence. The affidavit notes that Castro had purchased methamphetamine from Wright for years, and several times in the 30 days preceding Castro's interview. Castro described methamphetamine and drug paraphernalia as always being present in Wright's living room, and Wright recently handling a grapefruit sized ball of methamphetamine. The affidavit also described Castro saw and handled numerous firearms possessed by Wright in his living room near a black recliner chair.

evidence that: (1) possesses an exculpatory value apparent before its destruction, and (2) the defendant is unable to obtain comparable evidence by other reasonably available means. *Groth*, 163 Wn. App. at 557 (quoting *State v. Wittenbarger*, 124 Wn.2d 467, 475, 880 P.2d 517 (1994)). Destroyed evidence that does not meet both parts of the test is instead potentially useful evidence, and no due process violation occurs unless the defendant can show bad faith by the police. *Id.* Bad faith turns on whether the police knew the exculpatory value of the evidence at the time it was destroyed or lost. *Id.* at 558-59. A defendant must therefore show that the destruction was improperly motivated. *Id.* at 559. Unchallenged findings of fact are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

1. *The recording was not material or exculpatory*

The recording was not material or exculpatory. The recording was not material because defense counsel could obtain substantially the same information, or more, by personally interviewing Castro. As found by the trial court, defense counsel actually obtained more detailed information than likely was obtained by Deputy Bowman.

Nor was the recording exculpatory. There is no evidence that Castro provided information to Deputy Bowman that could be helpful to Wright. To the contrary. The evidence omitted from the deputy's affidavit actually provided greater probable cause for the search warrant. At most, the recording was potentially useful evidence.

2. *The State's failure to preserve the recording was not bad faith*

Wright cites the testimony of Deputy Bowman and Deputy Matt McKay as proof of bad faith. Deputy McKay testified that law enforcement interviews of this nature are recorded so that law enforcement can later request a copy. Deputy McKay also testified that it would have been a better police practice to have preserved a recording. Wright's reference to Deputy Bowman's testimony is similar. The trial court issued an order denying Wright's motion to dismiss for destruction, and in finding of fact B described the circumstances of the recording:

> Deputy Bowman did tell Mr. Castro he was being audio and video recorded. Deputy Bowman failed to request a copy of the interview recording, and it was automatically overridden after 45 days. He did not think he needed a copy. He was not trying to cover up any statements by Mr. Castro in the interview. Also, Deputy Bowman did not request that the interview recording be altered or destroyed prior to the 45 day override.

CP at 311. Wright does not specifically challenge the finding that Deputy Bowman did not think a copy of the tape was necessary. Instead, he simply asserts that bad faith exists because both deputies admitted that the better police practice would have been to request a copy of the recording. However, the exculpatory value of the tape, if any, was not apparent. Wright does not persuade us that the trial court's finding that Deputy Bowman did not think a copy of the recording was necessary. We therefore decline to overturn

this finding. Because the exculpatory value of the recording was not apparent to Bowman, Wright has failed to establish bad faith.

D. TRIAL COURT'S DISCRETIONARY ADMISSION OF BAGGIE NOT IMPROPER

Wright next contends that the trial court erred when it admitted Deputy Dan Dice's testimony about the firearms and the smiley face baggies found inside Radan and Dailey's trailer. Wright contends the evidence was irrelevant.

The determination of relevance is within the broad discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990). "Abuse exists when the trial court's exercise of discretion is 'manifestly unreasonable or based upon untenable grounds or reasons.'" *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002) (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

Generally, all relevant evidence is admissible and all irrelevant evidence is inadmissible. ER 402. "Relevant evidence" is any "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable 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." *Darden*, 145 Wn.2d at 621. A party must object at trial to preserve this

issue for review. RAP 2.5(a); *State v. Perez-Cervantes*, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000).

Wright did not object to Deputy Rice's testimony about the firearms found inside the trailer. Because Wright did not preserve this issue for review, we decline to address it.

The State sought to have a photograph of the used bindle baggie found inside Dailey's drug kit admitted. The trial court permitted Wright to ask questions of Deputy Dice in aid of a potential objection. Deputy Dice admitted to Wright there was no evidence the used baggie belonged to him. Wright then objected based on relevance, and stated that baggies with smiley faces are mass-produced. The State noted that the used baggie with the smiley face was identical to the baggies with smiley faces found in Wright's residence. The trial court determined that the similarity between the baggies made the photograph somewhat relevant and overruled Wright's objection. We agree.

Here, the State charged Wright with possession with intent to deliver—methamphetamine. A reasonable juror could find the delivery aspect of the charge more likely proved by the fact that the used smiley face baggie in Dailey's drug kit was the same as the baggies found in Wright's residence. We find no abuse of discretion.

E. MOTION FOR MISTRIAL—NO PROSECUTORIAL MISCONDUCT

Wright next contends the State engaged in prosecutorial misconduct during closing argument and reversal is required. Here, Wright preserved the issue of prosecutorial misconduct by objecting during the State's closing arguments and by moving for a mistrial after the parties concluded oral arguments.

A prosecutorial misconduct inquiry consists of two prongs: (1) whether the prosecutor's comments were improper and (2) if so, whether the improper comments caused prejudice. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). We review a trial court's rulings of whether prosecutorial conduct occurred or not for an abuse of discretion. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014).

1. First prong: The prosecutor's first two statements were not improper

Wright contends the State improperly vouched for Castro during closing argument.

> Improper vouching occurs when the prosecutor expresses a personal belief in the veracity of a witness or indicates that evidence not presented at trial supports the testimony of a witness. Whether a witness testifies truthfully is an issue entirely within the province of the trier of fact.

State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011) (citation omitted).

The allegation of improper vouching concerns the State's discussion of Castro's criminal history and the deal the State made with Castro. Wright's first and second

objections came when the State discussed Castro's criminal history. Castro's criminal history was a fact in the case; it was not the prosecutor's personal belief of Castro's believability. The trial court did not err when it permitted such argument.

In Wright's closing argument, he argued Castro made a deal with the devil. In rebuttal, the State argued:

> [State]: As the evidence showed, we made a deal with Mr. Castro. After looking at all those things, I made a deal with Mr. Castro. In looking at his criminal history and looking [at] what he was charged with and looking at the multiple felonies and looking at what he was potentially facing, and then we looked at Mr. Wright and I made a deal with Mr. Castro. And the deal was worth it. I would ask that all of you—
> [Defense counsel]: Your Honor, that's vouching.
> THE COURT: I'll ask the jury to disregard the last comment . . . .

RP at 802. After rebuttal, the jury left to deliberate. Wright promptly made a motion for mistrial based on the above three comments. The trial court denied the motion, and reasoned:

> Well, Counsel, the Court overruled two objections prior to the third and indicated that there was no vouching, and there was none. . . . The only aberration was at the very end there where it was worth it, or words to those—that effect by [the State], but that language I did direct the jury to disregard.
> I think it's an ambiguous comment. I think it was meant to be a response to the defense, and a response in the sense that the—this is a common police investigative tactic, this is a common position for this kind of trial to be in at the end, namely arguing over the credibility of a witness, but [the State] was careful to not say anything directly about the believability, if you will, of Mr. Castro according to his own personal belief. That's not what I heard him say. I heard him say that this agreement overall was part of traditional and everyday police procedure and that's what occurred. So that's how I see it. I did direct the jury to

> disregard it. It was a brief comment and it came in the context, again, of absolutely no vouching at any time prior to this comment.

RP at 811-12. We agree with the trial court's assessment.

The State never vouched for the veracity of Castro. The State simply responded to Wright's argument about its deal with Castro. Those are facts that the jury already knew.

The only statement by the State that one might construe as improper vouching was the prosecutor's statement that the deal was worth it. We are uncertain whether that statement was improper vouching. Because we are uncertain, we conclude the trial court did not abuse its discretion in its assessment of that statement and in denying Wright's motion for a mistrial.

2. Second prong: The prosecutor's final statement was not prejudicial

Although we need not address the second prong, we wish to provide an alternative basis to affirm the trial court's denial of Wright's motion for a mistrial.

To show prejudice, a defendant must show a substantial likelihood that the prosecutor's statement affected the jury's verdict. *Lindsay*, 180 Wn.2d at 440.

The prosecutor's statement is improper vouching only if one could reasonably construe the statement as the prosecutor's opinion that Castro was believable. Even if one so construed the statement, the trial court instructed the jury to disregard it. We presume the jury adheres to the trial court's instructions when the trial court instructs the

jury to disregard an improper question or argument. *Swan*, 114 Wn.2d at 661-62. Given this presumption, we conclude the questionable statement could not have affected the jury's verdict and, therefore, it was not prejudicial.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW: IMPOSITION OF LFOS NOT ERRONEOUS

In his statement of additional grounds for review, Wright argues the trial court erred by imposing mandatory and discretionary LFOs without performing an individualized inquiry into his current or future ability to pay. We disagree.

The trial court did engage in an individualized inquiry into Wright's current or future ability to pay. The trial court stated on the record that Wright probably had made substantial money by selling illegal drugs. The trial court also stated that Wright probably found his chosen business quite lucrative and benefitted financially despite the proceedings against him. The trial court was satisfied that Wright had the current ability to pay the assessed LFOs. Because the trial court's comments were based on the evidence presented at trial, we find no error.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Fearing, C.J.

Korsmo, J.