

66443-3

66443-3

NO. 66443-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RENE SANTIAGO,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHERYL CAREY

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Child Protective Services (CPS) investigators often ask police officers to accompany them on welfare checks to ensure the investigators' safety and to secure a scene. In this case, police officers accompanied three CPS workers to the defendant's home for a mandatory welfare check of a two-year-old child who allegedly had been exposed to methamphetamine. Did the trial court properly conclude that, because this was a welfare check, and not a criminal investigation, the police officers' presence did not constitute a search?

2. An exception to the warrant requirement is the community caretaking function, which allows police officers to invade one's home when making a routine check on one's health or safety. Here, CPS had a mandatory duty to investigate an allegation that a two-year-old child was being exposed to methamphetamine. Police officers accompanied CPS to the defendant's home for the sole purpose of checking on the well-being of the child. Did the trial court properly conclude that the police officers' warrantless entry was justified by their community caretaking role?

3. Consent that is given freely and voluntarily is an exception to the warrant requirement. In this case, the police

officers told the defendant's brother (Anthony) that they were there to check on the welfare of the two-year-old child and to speak to the child's mother. Anthony then invited the police officers inside for the limited purpose of conducting a welfare check. Was Anthony's consent given freely and voluntarily, as the trial court found?

4. A trial court has broad discretion to admit evidence. When a witness has not been asked about a prior inconsistent statement during direct or cross-examination, impeachment by extrinsic evidence, pursuant to ER 613(b), may be accomplished as long as arrangements are made for the witness to be recalled. The trial court permitted the State to introduce extrinsic evidence to impeach the defendant and his brother. The defendant's brother had not been excused from his subpoena and was subject to recall. Was it within the trial court's broad discretion to allow the State to introduce the prior inconsistent statement?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

By information, the State charged the defendant, Rene Santiago, with one count of possession with intent to manufacture

or deliver methamphetamine. CP 1-2. Pretrial, Santiago filed two motions to suppress evidence. CP 7-68, 69-76. After four days of testimony and argument, the trial court denied Santiago's motion.¹ CP 120-24; 9/28/10 RP 209-18; 9/30/10 RP 377-87. Following trial, a jury convicted Santiago as charged. CP 98. The trial court imposed a standard range sentence. CP 102-09. Santiago timely appeals. CP 110.

2. SUPPRESSION HEARING FACTS.

a. Drug Enforcement Agency Referral.

Between 2004 and 2009, Des Moines police detective Robert Tschida worked on an interagency street crimes task force. 9/27/10 RP 76-78. Early 2008, the Drug Enforcement Agency ("DEA") sent Detective Tschida a referral. An anonymous caller had reported to the DEA that methamphetamine was being sold out of Rene Santiago's house. 9/27/10 RP 82; CP 4; Pretrial Ex. 12,

¹ After the State presented its evidence at the suppression hearing, Santiago made a motion to dismiss. 9/28/10 RP 208. The trial court made oral findings of fact and conclusions of law in support of its order denying the motion. 9/28/10 RP 209-18. Then, after Santiago and the State (in rebuttal) presented additional evidence, the trial court made more detailed oral findings of fact and conclusions of law. 9/30/10 RP 377-87. Later, the trial court entered written findings, pursuant to CrR 3.6. CP 120-24.

at 6.² Detective Tschida conducted surveillance, but he was unable to confirm any drug activity. 9/27/10 RP 83.

b. Child Protective Services Referrals Generally.³

Tabitha Pomeroy, a CPS investigator, explained how the “Central Intake Unit” (Intake) processes referrals, and the distinction between a 24-hour (emergent) and a 72-hour (non-emergent) response time. 9/28/10 RP 142-47, 177-78, 181-82. For example, a newborn infant who had been exposed to drugs *in utero* or a child hospitalized with serious or life-threatening injuries would be classified as emergent. 9/28/10 RP 145, 177-78. For other child abuse or neglect referrals, the 72-hour response time is the absolute deadline by which a CPS investigator must respond. 9/28/10 RP 142-47, 181-82.

CPS frequently works in tandem with law enforcement, either because the referral involves criminal activity or to ensure the

² Originally, the affidavit for the search warrant was admitted as pretrial exhibit 5. CP 97. That exhibit was withdrawn, redacted, and admitted at trial as exhibit 15. CP 97, 101. On April 8, 2011, in order for this Court to have the unredacted version of the affidavit that was before the trial court during the suppression hearing, appellant’s counsel filed exhibit 12 with the trial court, and on April 19, 2011, counsel designated the exhibit to the Court.

³ The CPS program is authorized under federal and state laws and regulations. The federal authorities are Public Law 93-247 and 45 Code of Federal Regulations (CFR), Part 1340 and 1357.20. The authorizing state laws and regulations are Chapter 74.13 RCW, Chapter 26.44 RCW, WAC 388-15-130 - 134 and WAC 388-70-095.

CPS investigator's safety. 9/27/10 RP 54-56; 9/28/10 RP 149; 9/29/10 RP 314-15. For example, referrals that involve caregivers who may be under the influence of drugs, and may become very emotional when the CPS investigator addresses issues concerning their children, law enforcement accompanies the investigator to secure the scene—to make sure that there are no weapons and to protect the investigator. 9/27/10 RP 56, 71; 9/28/10 RP 150-51. The police officers “stand by” while the CPS investigator checks on the safety and well-being of the referred person. 9/27/10 RP 71; 9/29/10 RP 315.

A CPS investigator has a right to interview and see any child who is the subject of a referral. 9/28/10 RP 169. If a CPS investigator goes to a home unescorted by law enforcement, and a parent refuses the investigator access to the child, the investigator will return with law enforcement because CPS must validate the child's health and safety. 9/28/10 RP 169, 180.

There are three ways by which CPS can take custody of a child: (1) the police may take a child into protective custody⁴, or (2) CPS can file a petition in juvenile court to remove parental custody⁵, or (3) a medical provider may detain the child until CPS can file a petition in court.⁶ 9/28/10 RP 184.

c. The CPS Referral In This Case.

On February 26, 2008, Jennilyn Custodio, the mother of Rene Santiago's brother's (Anthony's) children, made a confidential report to CPS. Pretrial Ex. 2, at 4. Ms. Custodio's information to CPS was all second-hand. Pretrial Ex. 2, at 4. Custodio had spoken to Rubie Santiago, Rene's new wife and the mother of L.S., their two-year-old daughter.⁷ Rubie said that she had seen methamphetamine in the house and torches and scales in the garage. Pretrial Ex. 2, at 2. Rubie also told Custodio that she had seen Rene sort methamphetamine into little bags while L.S. was in the room, and that sometimes when Rubie awakened, she smelled

⁴ RCW 26.44.050.

⁵ RCW 13.34.050, .060.

⁶ RCW 26.44.056.

⁷ Because Rene, Anthony and Rubie share the same surname, the State has used first names to avoid confusion. No disrespect is intended. The verbatim report of proceedings and most of the exhibits misspell "Rubie" as "Ruby." The State has used the correct spelling, as supplied in declarations by family and acquaintances of the Santiagos. See CP 44-45, 49-50, 52-53, 55, 57-58.

burning plastic. Pretrial Ex. 2, at 2, 6. Rubie was concerned that Rene and Anthony (who lived with Rene, Rubie and L.S.) were cooking methamphetamine in the house, although Rubie had never seen them do so. Pretrial Ex. 2, at 2. Custodio said that Rubie had limited English skills—she spoke Tagalog, a Philippine dialect—and Rubie was too afraid to call CPS. Pretrial Ex. 2, at 2-3.

Intake classified the response time and investigation standard for Custodio's referral as "High Non-Emergent," which meant that there was a high risk of immediate (as opposed to imminent) harm. Pretrial Ex. 2, at 1, 6; 9/28/10 RP 155, 177. Pomeroy said that this was "definitely a situation that need[ed] to be addressed as soon as possible." 9/28/10 RP at 155. Of concern to Pomeroy were L.S.'s age and vulnerability, the fact that Rubie had only recently come into the country and was "sort of isolated from everyone," the possibility of domestic violence and drug abuse in the home, the possibility that methamphetamine was being sold out of the home and there had been a prior drug-related criminal

complaint (although no charges were filed after the police had searched the home).⁸ 9/28/10 RP 155; Pretrial Ex. 2, at 2-3, 6.

d. The Plan To Investigate The Allegations.

Later the same day that CPS received the referral, Pomeroy completed the necessary paperwork to ensure her safety at a visit to Santiago's home. 9/28/10 RP 155, 169. Intake sent a copy of the referral via facsimile to the Des Moines Police Department and Pomeroy then telephoned Detective Mike Thomas to ask if he could accompany her on a welfare check. 9/27/10 RP 57-59, 63, 66; 9/28/10 RP 158; Ex. 1, at 1. Thomas reviewed the referral and, because he was uncertain what "we were getting into," he concluded that Pomeroy needed to be accompanied by more people than just himself.⁹ 9/27/10 RP 60. Thomas asked Detective

⁸ Santiago challenges finding of fact 2, to the extent that the written CPS referral alleged "possible domestic violence in the home." Br. of Appellant at 1, 39. Although the referral did not allege *physical* abuse, it did allege possible "*emotional* abuse of the mother by the father." Pretrial Ex. 2, at 3 (italics added). Emotional or psychological abuse can constitute domestic violence. See RCW 9.94A.535(3)(h)(i) (aggravating circumstance that may be submitted to a jury is a domestic violence crime that includes "an ongoing pattern of psychological, physical, or sexual abuse."); State v. Zatkovich, 113 Wn. App. 70, 81, 52 P.3d 36 (2002) (finding that the trial court properly considered facts demonstrating defendant's ongoing pattern of domestic emotional and physical abuse of the victim to justify an exceptional sentence for stalking conviction). Moreover, after the referent alleged emotional abuse, Intake provided the referent with the Domestic Abuse Hotline number. Pretrial Ex. 2, at 3-5.

⁹ Another police officer said that when he assists CPS, he always has at least one other officer accompany him. 9/29/10 RP 338-39.

Tschida to assist Pomeroy, because the Street Crimes Unit had more resources, i.e., more personnel, and Tschida had experience with narcotics investigations. 9/27/10 RP 60-61, 83.

The following day, February 27, Pomeroy contacted Detective Tschida to discuss the referral and coordinate a response. 9/27/10 RP 85-89; 9/28/10 RP 87, 158, 183; Pretrial Ex. 3, at 1. Tschida had concerns about the smell of burning plastic because the odor could have been a byproduct of manufacturing methamphetamine and could have exposed L.S. to dangerous chemicals. 9/27/10 RP 87-88; Pretrial Ex. 3, at 1. Tschida stated, "My concern was primarily for the child's welfare." 9/27/10 RP 88.

Because of a manpower shortage, and concerned that he and Pomeroy might walk into a methamphetamine lab, Detective Tschida delayed their trip until the following day, February 28. 9/27/10 RP 88-91. Tschida arranged for an interpreter, Officer Clement Jimenez, who spoke Tagalog, to accompany them so that he and Pomeroy could speak to Rubie. 9/27/10 RP 89; 9/28/10 RP 158, 189-90; Pretrial Ex. 3, at 1. Pomeroy arranged for two additional CPS caseworkers to accompany her because she knew

this was a situation that could very well lead to L.S.'s removal
9/28/10 RP 160, 191.

The plan was for Tschida and Pomeroy to knock on the door
(while the other officers waited in patrol cars as back-up if needed)
and explain that they were there to check on L.S.'s welfare.

9/27/10 RP 91, 93-94. The key, Tschida said, was to ensure that
L.S. was not being exposed to drugs and that the home provided a
safe environment. 9/27/10 RP 91.

e. The Welfare Check And The Events That
Happened "Very, Very Quickly."¹⁰

As Tschida and two uniformed police officers (Arico and
Shepherd) arrived at Santiago's home, the garage door opened;
there was one male occupant, later identified as Anthony. 9/27/10
RP 93-94; 9/29/10 RP 315-16; Pretrial Ex. 3, at 1. Tschida
identified himself to Anthony and said that they were there to check
on L.S.'s welfare and then talk to Rubie. 9/27/10 RP 95; 9/28/10
RP 254, 277, 291-92; Pretrial Ex. 3, at 1. Tschida said that
Anthony invited the police officers inside—a point contested by

¹⁰ 9/28/10 RP 214 (trial court's oral findings).

Anthony, who adamantly denied giving the police consent.¹¹

9/27/10 RP 95; 9/28/10 RP 245, 249-50; Pretrial Ex. 3, at 1.

Tschida had not advised Anthony that he could refuse to allow the police officers into the house or revoke his consent because this was not a criminal investigation; rather, the police officers and Pomeroy were there to "ascertain the welfare of a child." 9/27/10 RP 116-18, 126, 133, 135-37; 9/28/10 RP 253; 9/29/10 RP 330, 335, 339.

After Tschida, Arico and Shepherd followed Anthony into the house, Officer Jimenez and Pomeroy contacted Rubie. 9/27/10 RP 96; 9/29/10 RP 192-95. Rubie was scared and concerned about her safety. 9/28/10 RP 196. Pomeroy explained to Rubie that CPS had received a referral and she asked Rubie if she could speak with her and L.S.; Rubie agreed. 9/28/10 RP 161, 164.

When a lady seated on the couch (Teri Tindal, Anthony's then current girlfriend), saw Tschida walk into the house, she immediately stuffed something between the couch cushions.

¹¹ Anthony stated that six police officers (not in uniform) approached him and displayed their badges. He said that he asked the police officers if they had a search warrant and that he did not give the officers permission to enter the home. Anthony said that he felt intimidated and that he raised his hand to stop the officers, but all six police officers "just walked by me." 9/28/10 RP 244-45.

9/27/10 RP 97; Pretrial Ex. 3, at 1. Tschida was unsure whether Tindal was trying to hide something or if she was retrieving a gun. 9/27/10 RP 97. Tschida told Tindal to stand, and he then asked Officer Arico to check the couch for officer safety. 9/27/10 RP 99; 9/29/10 RP 318; Pretrial Ex. 3, at 1.

Arico retrieved a bag, which he gave to Tschida. 9/27/10 RP 99; Pretrial Ex. 3, at 1. Tschida felt an object that he believed might be a gun. 9/27/10 RP 99; 9/29/10 RP 347-48; Pretrial Ex. 3, at 1. Tschida opened the bag and found a glass narcotics smoking pipe and baggies of methamphetamine, each sealed with either a flame or heat sealer (which was consistent with the referent's comment that Rubie had smelled burning plastic). 9/27/10 RP 101; Pretrial Ex. 1, at 3. The police arrested Tindal and removed her from the home—her arrest occurred within minutes of the police officers' entry into the home. 9/27/10 RP 101; 9/29/10 RP 318-19; Pretrial Ex. 1, at 3.

Immediately after Tindal's arrest, Anthony became visibly agitated. 9/27/10 RP 99-100; 9/29/10 RP 321. Tschida tried to speak to Anthony about L.S.'s welfare, and whether the home environment was safe, but Anthony asked the police officers to leave. 9/27/10 RP 102-03; 9/29/10 RP 322. Anthony then called

his attorney, Eric Schurman. 9/27/10 RP 105; 9/28/10 RP 246-48, 272-73; 9/29/10 RP 322-23; Pretrial Ex. 3, at 1. Tschida asked Jimenez and Pomeroy to talk to Rubie outside both to honor Anthony's request and for officer safety.¹² 9/27/10 RP 104; 9/28/10 RP 196; Pretrial Ex. 3, at 1.

Rubie told Jimenez and Pomeroy that there were drugs and guns in the house and where Rene stored the drugs. 9/28/10 RP 164, 197, 199-200; Pretrial Ex. 3. Rubie said that Rene and Anthony snorted drugs and sold drugs in baggies that had been sealed with a device. 9/28/10 RP 165; Pretrial Ex. 3. Rubie said there had been times that Rene locked L.S. in the master bedroom with him while he sealed baggies of drugs.¹³ 9/28/10 RP 197; Pretrial Ex. 3, at 1. Rubie stated that she was afraid of Rene and Anthony and what they might do to her if she spoke to the police. 9/28/10 RP 165; Pretrial Ex. 3, at 1.

¹² In addition, they went outside because the commotion was upsetting L.S. 9/28/10 RP 166-67.

¹³ Santiago assigns error to the trial court's finding that the CPS referral included an allegation that L.S. was in a "locked room" with her father while he packaged methamphetamine. Br. of Appellant at 39. Although the assignment of error is technically correct (the written referral did not allege that the door was locked; the information was gathered by Officer Jimenez during his conversation with Rubie), it is a meaningless distinction. The allegation of L.S. being present in a room (whether locked or not) while Santiago packaged methamphetamine warranted a CPS investigation and a hospital visit so that L.S. could be evaluated for exposure to toxins. 9/28/10 RP 185-86.

Jimenez told Tschida what Rubie had said. 9/27/10 RP 107-11, 130. Afterward, Tschida decided that he should apply for a search warrant. 9/27/10 RP 108-11, 129-30. Tschida's decision to get a search warrant was based on the evolving circumstances (the CPS referral, the prior DEA referral, Tindal's possession of methamphetamine in the home while L.S. was there, Rubie's statements regarding other drugs in the home and where the drugs were stored and Anthony's insistence that the police leave, with seemingly no regard for his niece's welfare). 9/27/10 RP 129-30.

Meanwhile, Anthony spoke to attorney Schurman (who had advised Anthony to leave the home). Anthony handed his cell phone to Tschida so that he and Schurman could speak to one another. 9/27/10 RP 105-06; 9/28/10 RP 275. Schurman told Tschida, in no uncertain terms, that Anthony had not consented to the officers' entry, but that if Tschida believed there had been prior consent, "it is specifically revoked." 9/28/10 RP 277. Tschida told Anthony that he was free to leave; however, Anthony could not take his car because Tschida intended to get a search warrant for the

home and the car. 9/27/10 RP 106-07, 113; 9/28/10 RP 251;
9/29/10 RP 322-23.

By then, Pomeroy had determined that there was an imminent risk to L.S.; she could not permit L.S. to remain in the home. 9/28/10 RP 162. Pomeroy called some domestic violence shelters and expressed her concerns to the police about L.S. staying in the home. 9/28/10 RP 166. Pomeroy then gave Rubie two choices: Pomeroy could consult with the police department about it taking protective custody of L.S. or, if Rubie was willing, she and L.S. could relocate until further information could be gathered. 9/28/10 RP 162, 166. Rubie was very cooperative; she wanted to protect L.S. from the unsafe environment. 9/28/10 RP 162, 166-67. CPS escorted Rubie and L.S. out of the home and L.S. was then taken to a hospital and evaluated for exposure to toxins. 9/27/10 RP 114; 9/28/10 RP 185-86; 9/29/10 RP 336.

f. Summary Of The Trial Court's Findings.

In addition to detailed oral findings, which the trial court incorporated by reference, the court entered written findings of fact

and conclusions of law.¹⁴ 9/28/10 RP 217-18; 9/30/10 RP 378-87; CP 120-24.

In sum, the trial court concluded that the officers' entry into Santiago's home was lawful pursuant to their "community caretaking function." The court said, "This initiated as a welfare check only; it was not a criminal investigation. There is no evidence to suggest otherwise." 9/30/10 RP 382; CP 121 (Findings of Fact 3, 5); CP 123 (Conclusion of Law 2).

The trial court also found that Anthony consented, voluntarily and without coercion, to the officers' entry for the limited purpose of checking on L.S.'s welfare. CP 122 (Finding of Fact 8); 9/28/10 RP 217-18; 9/30/10 RP 383, 386. The court found that after Tindal's arrest, Anthony revoked his consent and asked the police officers to leave, which they did. CP 122 (Finding of Fact 12); 9/30/10 RP 383-84, 386.

Because Tschida then applied for a search warrant, the trial court concluded that there was no illegal search; the search was

¹⁴ See State v. Martinez, 76 Wn. App. 1, 3-4 n.3, 884 P.2d 3 (1994) (oral opinion does not become final unless it is incorporated in written findings of fact and conclusions of law; oral decision can be used to interpret but not to impeach written findings and conclusions); State v. Bryant, 78 Wn. App. 805, 812-13, 901 P.2d 1046 (1995) (an appellate court may consider a trial court's oral decision provided it is not inconsistent with the trial court's written findings and conclusions.).

conducted pursuant to a warrant. 9/28/10 RP 218; 9/30/10 RP 385-86; CP 122 (Finding of Fact 13); CP 123 (Conclusions of Law 6, 7); Pretrial Ex. 3. The court accordingly denied the motion to suppress the evidence. CP 123.

3. DEFENSE AT TRIAL.

In large part, the evidence against Rene at trial consisted of the physical evidence collected pursuant to the search warrant and much of the same testimony by Detective Tschida as he had given at the suppression hearing.¹⁵

In addition, the trial testimony established that Rene's brother, Anthony, had moved into Rene's house while he (Anthony) was in drug rehabilitation. 11/3/10 RP 786, 796. Often Anthony

¹⁵ In the master bathroom vanity, police found a box that contained 32 baggies of methamphetamine, a Tupperware container with 16 additional baggies of methamphetamine, an electronic scale, a large quantity of unused baggies (with the same designs as were on the baggies of methamphetamine), spoons and containers. Pretrial Ex. 3, at 2, 7. In a safe found under the bed, police discovered \$3680 in U.S. currency, documents with Rene's name and Rene's and Anthony's passports. Pretrial Ex. 3, at 2. In Rene's bedroom, police also found a 30-30 rifle in a gun case with ammunition and, in the night stand, a loaded 9mm pistol. Pretrial Ex. 3, at 2. In Anthony's room, police found a locked box under the bed that contained methamphetamine residue and documents with Anthony's name. In a dresser drawer, police found three glass pipes and used baggies with methamphetamine residue. Pretrial Ex. 3, at 2. In Anthony's car, police found a small tin with shards of methamphetamine. Pretrial Ex. 3, at 2. There was a gun safe in the garage that contained several additional guns. Pretrial Ex. 3, at 2.

A complete list of the items seized and the location where each item was found is contained in Pretrial Ex. 3, at 7-10.

and Tindal invited people over to Rene's house while Rene was at work. 11/3/10 RP 787, 769-72. Those people were allowed to use Rene's bathroom. 11/3/10 RP 771-72.

Rene said (as did Anthony and Tindal) that he had never before seen the box or its contents that the police seized from the master bathroom. 11/3/10 RP 779, 792-93, 802, 811-13. Rene denied possessing any drugs; his job required random drug tests. 11/3/10 RP 795, 799. Rene said, "I didn't have drugs at that time." 11/3/10 RP 799.

Additional facts will be supplied in the sections of the brief to which they pertain.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED THE MOTION TO SUPPRESS BECAUSE THE EVIDENCE AGAINST SANTIAGO WAS SEIZED PURSUANT TO A VALID SEARCH WARRANT.

a. Standard Of Review.

Washington Constitution article I, section 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The Washington Constitution is explicitly

broader than that of the Fourth Amendment¹⁶ as it “clearly recognizes an individual's right to privacy with no express limitations” and places greater emphasis on privacy. State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994) (quoting State v. Simpson, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980)). The best “authority of law” is a warrant. State v. Schultz, 170 Wn.2d 746, 753, 248 P.3d 484 (2011). There are, however, a few “jealously and carefully drawn exceptions” to the warrant requirement. Id. at 753-54. The State bears the burden of showing that an exception applies. State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000), cert. denied, 531 U.S. 1104 (2001).

One exception to the warrant requirement is the “community caretaking function,” which allows a police officer to invade constitutionally protected privacy rights when making a routine check on one’s health or safety. Kinzy, 141 Wn.2d at 385-86; State v. Hos, 154 Wn. App. 238, 246, 225 P.3d 389 (2010).

¹⁶ The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

U.S. CONST. AMEND IV.

Another exception to the warrant requirement is consent. State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). The State bears the burden to establish that consent was informed and given freely and voluntarily. State v. Flowers, 57 Wn. App. 636, 645, 789 P.2d 333 (1990).

A trial court's factual findings related to a motion to suppress evidence will be upheld if, after analyzing the evidence and all inferences that can reasonably be drawn therefrom in favor of the trial court's findings, there is substantial evidence to support those findings. State v. Trasvina, 16 Wn. App. 519, 525, 557 P.2d 368 (1976), review denied, 88 Wn.2d 1017 (1977). Substantial evidence is "evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Where findings of fact and conclusions of law are supported by substantial but disputed evidence, an appellate court will not disturb the trial court's ruling. State v. Smith, 84 Wn.2d 498, 527 P.2d 674 (1974). Credibility determinations are for the trier of fact and not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

This Court reviews the trial court's written conclusions of law *de novo* to determine whether the findings are supported by

substantial evidence in the record and, if so, whether the conclusions of law are supported by those findings of fact. Scott v. Trans-System, Inc., 148 Wn.2d 701, 707-08, 64 P.3d 1 (2003).

The Court reviews a trial court's decision upholding a search warrant for abuse of discretion. State v. Maddox, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). All doubts are resolved in favor of the warrant's validity. State v. Kalakosky, 121 Wn.2d 525, 531, 852 P.2d 1064 (1993). A party challenging the warrant bears the burden of proving it deficient. State v. Fisher, 96 Wn.2d 962, 967, 639 P.2d 743, cert. denied, 457 U.S. 1137 (1982).

b. There Was Only One Search.

Santiago first contends that the police officers' entry into his home constituted an unlawful search irrespective of the officers' purpose. Br. of Appellant at 19-20. This is incorrect. To determine whether an officer's warrantless entry was lawful, the analysis must begin by determining the police officers' purpose in entering the home. Here, because the police accompanied CPS to Santiago's home for the sole purpose of checking on two-year-old L.S.'s welfare, the trial court properly concluded that the only search that occurred was later, pursuant to a lawfully issued search warrant. Santiago's claim fails.

A police officer's purpose as to why he wants to gain access to a home determines what course of action he must take. See, e.g., State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998); State v. Bustamante-Davila, 138 Wn.2d 964, 983 P.2d 590 (1999).

In Ferrier, the police officers suspected that a marijuana grow operation was occurring in a private residence. 136 Wn.2d at 106. They went to the home without a search warrant for the purpose of conducting a "knock and talk procedure."¹⁷ Id. at 107. Ferrier consented to the police officers' entry and she then signed a "consent to search" form, which "did not indicate that she had the right to refuse consent to the search." Id. at 108. After the police officers seized marijuana plants from Ferrier's home, she moved to suppress the evidence; the motion was denied. Id. at 109. On review, the Washington Supreme Court reversed her conviction and announced an explicit rule for "knock and talk" procedures:

[W]hen police officers conduct a knock and talk *for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant*, they must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that

¹⁷ A "knock and talk" procedure is used by law enforcement officers who seek to search a home without a warrant. Ferrier, 136 Wn.2d at 106. Police officers knock on the door and talk with the resident, asking permission to enter. Id. Once inside, the officers explain why they are there, that they have no search warrant, and ask for permission to search. Id.

they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home. The failure to provide these warnings, prior to entering the home, vitiates any consent given thereafter.

Ferrier, at 118-19 (italics added).

Later, the supreme court limited the scope of Ferrier where at least four law enforcement officers and an Immigration and Naturalization Service (INS) agent accompanied another INS agent to the defendant's home to arrest him under a "removal order" that an immigration judge had issued. Bustamante-Davila, 138 Wn.2d at 966-68 & n.10. The INS agent testified that it was his normal practice to ask for "backup" from local law enforcement officers. Id. at 968. After Bustamante-Davila allowed both the INS agent and the police officers into his home, the officers noticed a rifle in plain view. Id. at 968-69. The State charged Bustamante-Davila with unlawful possession of a firearm. Id. at 970.

The supreme court affirmed the denial of Bustamante-Davila's suppression motion and limited the scope of Ferrier to knock and talk procedures, i.e., where police, not having obtained a warrant, seek permission to enter a residence for the specific purpose of searching for contraband. Bustamante-Davila, at 966-67. Because the law enforcement officers in Bustamante-

Davila were not looking for contraband—they merely accompanied the INS agent as backup—the Ferrier rule did not apply. Id. at 980, 984. See also State v. Khounvichai, 149 Wn. 2d 557, 566, 69 P.3d 862 (2003) (holding that Ferrier warnings were unnecessary when police “request entry into a home merely to question or gain information from an occupant.”).

As in Bustamante-Davila (where local law enforcement provided backup for INS agents), law enforcement frequently accompanies CPS workers on welfare checks, often to secure the scene (by checking for weapons) and to protect the CPS worker’s safety. CP 121 (Finding of Fact 3); 9/27/10 RP 54-56, 71-72; 9/28/10 RP 149-51, 155; 9/29/10 RP 314-15, 338-39; 9/30/10 RP 380-81. See also Hos, 154 Wn. App. at 241 (CPS worker asked law enforcement to accompany her to Hos’s house for a welfare check on Hos’s daughter). “Given the information that CPS had at the time, it was reasonable for law enforcement to be there to assist CPS.” CP 121 (Finding of Fact 3); CP 123 (Conclusion of Law 4).

In addition to ensuring the safety and security of the CPS workers, the trial court found that, “This initiated as a welfare check only; it was not a criminal investigation. There is no evidence to

suggest otherwise.” 9/30/10 RP 382. The police officers did not go to Santiago’s home to conduct a search; the sole purpose of the visit was to check on the welfare of two-year-old L.S., who may have been exposed to methamphetamine. CP 120-21 (Findings of Fact 1, 5); CP 123 (Conclusion of Law 2); 9/30/10 RP 381, 386; 9/28/10 RP 217-18. The trial court’s findings of fact and conclusions of law are supported by substantial evidence.

Tschida repeatedly stated that he went to Santiago’s home only to assist CPS. 9/27/10 RP 88 (“My concern was primarily for the child’s welfare”), 91 (the purpose of the visit was to “check on the welfare of the child”), 126 (this was not a criminal investigation, “We were there to check on the child”), 136 (“We were there to ascertain the welfare of a child”), and 137 (“[I]t’s a CPS investigation – its a welfare check. It’s not an investigation. We’re just checking the welfare of a child.”).

Officer Arico said that he accompanied Tschida and Pomeroy only to “assist Child Protective Services.” 9/29/10 RP 314; see also 9/29/10 RP 322 (when they arrived, Tschida told Anthony that, “[W]e were there for a CPS referral and that we were checking on the well-being of an infant child”), 329 (Arico and the other police officers were at Santiago’s home to assist CPS),

330 (we were not there to investigate a crime, “We were there to assist Child Protective Services to do – for them to investigate”), and 339 (“My function in this particular case was solely to be there for security purposes, to assist [CPS].”).”

Because the officers in this case accompanied CPS for the sole purpose of conducting a welfare check and not a search, Santiago’s claim fails. CP 121 (Findings of Fact 3, 5); CP 123 (Conclusion of Law 2); 9/28/10 RP 217-18; Bustamante-Davila, 138 Wn.2d at 980.

c. A Welfare Check Is A Valid Community Caretaking Function That Permits A Warrantless Entry.

Santiago next contends that the trial court erred when it concluded that the police officers’ entry was justified as a community caretaking function. Br. of Appellant at 25-32. Specifically, Santiago claims that, according to the supreme court’s recent decision in State v. Schultz¹⁸, a true emergency must exist in any instance where the police make a warrantless entry. Br. of Appellant at 25-32.

This Court should reject Santiago’s expansive reading of Schultz. The “emergency aid” doctrine, which is a separate, but

¹⁸ 170 Wn.2d 746, 248 P.3d 484 (2011).

related community caretaking function, was at issue in Schultz. The court's holding in Schultz, that an entry justified under the emergency aid exception requires an imminent threat of substantial injury or one's need for immediate help for health or safety reasons, does not subsume the requirements for a warrantless entry based on a routine welfare check.

As this Court has recognized, people look to the police under many circumstances unrelated to a criminal investigation, "including delivering emergency messages, giving directions, searching for lost children, assisting stranded motorists, and rendering first aid." State v. Acrey, 110 Wn. App. 769, 773, 45 P.3d 553 (2002), aff'd, 148 Wn.2d 738 (2003); see also State v. Acrey, 148 Wn.2d 738, 748 n.33, 64 P.3d 594 (2003) (recognizing community caretaking includes "assisting persons involved in a natural disaster, or warning members of a community about a hazardous materials leak in the area") (citation omitted); Kinzy, 141 Wn.2d 398-99 (Talmadge, J., dissenting) (stating community caretaking includes things like the "mediation of noise disputes, the response to complaints about stray and injured animals, and the provision of assistance to the ill or injured."). Routine checks on health and safety involve less urgency than the related emergency aid

exception.¹⁹ State v. Schultz, 170 Wn.2d 746, 248 P.3d 484 (2011) (Fairhurst, J., dissenting) (citing Kinzy, 141 Wn.2d at 386).

The community caretaking role by police is totally divorced from a criminal investigation. Cady v. Dombrowski, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973) (“community caretaking functions [are] totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.”); accord Acrey, 148 Wn.2d at 750-51. Where a police officer’s primary motivation is to search for evidence or make an arrest, the community caretaking exception does not apply. State v. Williams, 148 Wn. App. 678, 683, 688, 201 P.3d 371 (noting that a proper community caretaking function and the related emergency aid exception cannot overlap with a criminal investigation), review denied, 166 Wn.2d 1020 (2009); Kinzy, 141 Wn.2d at 399 (Talmadge, J., dissenting) (stating that the law does not require a warrant for community caretaking or emergency aid

¹⁹ The community caretaking, emergency aid, or routine checks on public health and safety exceptions sometimes overlap or are mislabeled. See State v. Williams, 148 Wn. App. 678, 693 n.12, 201 P.3d 371, review denied, 166 Wn.2d 1020 (2009). As well, the emergency aid doctrine is different from the “exigent circumstances” exception; the former does not involve officers investigating a crime, but arises from the police officers’ community caretaking responsibility to aid people believed to be in danger of death or physical harm. Kinzy, 141 Wn.2d at 387 n.39. But cf. Schultz, 170 Wn.2d at 754-55 (holding that the police did not encounter “exigent circumstances” that would permit a warrantless entry under the “emergency aid” exception).

functions unless the police intend a search or an arrest, in which case, neither exception applies).

A determination of whether a police officer's encounter made for noncriminal noninvestigatory purposes is reasonable as part of a routine check on safety, depends on balancing the individual's interest in freedom from police interference against the public's interest in having the police perform a "community caretaking function." Acrey, 148 Wn.2d at 750. "The noncriminal investigation must end when reasons for initiating an encounter are fully dispelled." Id. at 750 (quoting Kinzy, 141 Wn.2d at 388).

Under the facts of this case, there can be no question that the public's interest in having the police check on the welfare of a vulnerable two-year-old child who may have been exposed to toxins outweighs any individual's interest in freedom from police investigation—especially given that this was not a police investigation, it was a CPS investigation. As discussed fully above, there is substantial evidence that the police officers' visit to Santiago's home was for the noncriminal noninvestigatory purpose of checking on two-year-old L.S.'s welfare. CP 121 (Finding of

Fact 5). The trial court said, "This initiated as a welfare check only; it was not a criminal investigation. There is no evidence to suggest otherwise." 9/30/10 RP 382.

The investigation did not morph into a criminal investigation until after (1) Tindal's furtive movements and arrest, and (2) Rubie confirmed that L.S. was in an unsafe, possibly toxic environment. 9/27/10 RP 108-10, 129-30; 9/28/10 RP 216; 9/30/10 RP383; CP 122 (Findings of Fact 10, 11, 13); CP 123 (Conclusions of Law 2, 6). Only then did Tschida believe that the police officers' community caretaking function had ended and that he needed to make an application for a search warrant to pursue a criminal investigation. 9/27/10 RP 108-10, 129-30; 9/30/10 RP 384-85. The previous DEA tip contributed to Tschida's probable cause and it had heightened the need for law enforcement to provide security for the CPS workers; it did not, however, transform the welfare check into a criminal investigation. CP 121 (Finding of Fact 3); CP 123 (Conclusion of Law 4); 9/30/10 RP 382; Pretrial Ex. 12, at 6. The trial court properly concluded that: (1) the police officer's "entry was a community caretaking function" and that it was "reasonable under the circumstances"; and (2) the only search of Santiago's home

was executed later pursuant to a lawfully issued search warrant.

9/30/10 RP 386; CP 123 (Conclusion of Law 7).

Santiago's reliance on State v. Schultz is misplaced because the State is not justifying the police officers' entry into Santiago's home under the emergency aid exception to the warrant requirement. 170 Wn.2d 746. In Schultz, two police officers had responded to a 911 call concerning a male and a female yelling. 170 Wn.2d at 750. When officers arrived, they heard a male and a female talking with raised voices and they heard the man say that he wanted to be left alone and needed his space. Id. at 750-51. Schultz answered the officer's knock on the door and she appeared "agitated and flustered." Id. at 751. She initially lied to the officers about whether a man was in the apartment, even though the officers had heard a raised male voice upon their arrival. Id. Schultz then called for Sam Robertson, who emerged from a nearby room. Id. Afterward, "Schultz then stepped back, opened the door wider," and one of the police officers followed her inside, although neither officer had requested permission to enter, nor advised Schultz or Robertson that they could refuse a search. Id.

Once inside, events unfolded that led to the discovery of a handgun and marijuana pipe. Id. at 752. Officers then asked

Schultz for permission to search; she consented. Id. As one officer accompanied Schultz to the bathroom to get her anti-anxiety medicine, the other officer spoke to Robertson, who was then arrested for use of drug paraphernalia. Id. Schultz then revoked her consent to search; afterward, the officers applied for a search warrant, which led to the discovery of methamphetamine and Schultz's arrest.²⁰ Id.

On review, the supreme court reversed Schultz's conviction and, in so doing, announced a new six factor test that courts must use to justify an intrusion under the emergency aid exception. The government must show:

(1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; [] (3) there was a reasonable basis to associate the need for assistance with the place being searched[;](4) there is an imminent threat of substantial injury to persons or property; (5) state agents must believe a specific person or persons or property are in need of immediate help for health or safety reasons; and (6) the claimed emergency is not a mere pretext for an evidentiary search.

²⁰ The State discusses the issue of consent in § C.1.d, infra.

Schultz, at 754-55 (internal quotations and citations omitted). The failure to meet any one of the six factors is “fatal to the lawfulness of the State’s exercise of authority.” Id. at 759-60 & n.5.

Because the State is not relying on the emergency aid exception as a justification for the initial entry into Santiago’s home, Schultz is inapt.²¹ The State does not think that the Schultz decision eliminated the distinction between community caretaking functions that involve routine checks on health or safety (such as checking on the welfare of a 12-year-old minor on a city street after midnight and without adult supervision²² or responding to a stray or injured animal²³) and the emergency aid exception. That is, even after Schultz, police officers should still be able to render assistance to persons—whether in their homes or in their cars—in the absence of an imminent threat of substantial bodily injury or need for immediate help.

This Court should hold that Schultz did not conflate the welfare check component of an officer’s community caretaking

²¹ The State agrees that the emergency aid exception does not apply to the instant case. Accordingly, the State does not address the argument at § V.B.4 of appellant’s opening brief.

²² Acrey, 148 Wn.2d 738, supra.

²³ Kinzy, 141 Wn.2d at 398-99 (Talmadge, J., dissenting).

function with the emergency aid doctrine, and accordingly affirm the trial court's order denying the motion to suppress evidence.

d. Anthony Consented To The Officers' Entry.

Santiago next contends that Anthony never said anything to the officers that could have been construed as an invitation to enter. Santiago thus claims that, as a matter of law, Anthony's conduct did not amount to consent. Br. of Appellant at 20-25. The State disagrees. After hearing testimony, assessing the credibility of the witnesses and reviewing the exhibits, the trial court found that Anthony had invited the officers inside and concluded that the consent was given voluntarily and without coercion. The Court should affirm the trial court's order denying the motion to suppress evidence on this additional basis.

Under the totality of the circumstances, the trial court properly concluded that Anthony "voluntarily and without coercion" gave law enforcement and CPS "limited consent to enter the home to check on the welfare of L.S.," and that after Tindal's arrest, Anthony revoked his consent. CP 122 (Findings of Fact 8, 12²⁴);

²⁴ To the extent that Finding of Fact 12 states Anthony withdrew his consent after he spoke with his attorney, it is incorrect. The record demonstrates that Anthony revoked his consent before he called his attorney. However, the temporal sequence does not undermine the trial court's conclusions that consent was given and then, following Tindal's arrest, it was revoked.

CP 123 (Conclusion of Law 5); 9/28/10 RP 217-18; 9/30/10
RP 384-86.

Tschida said that after he told Anthony the police were there to check on L.S.'s welfare and talk to Rubie, "[Anthony] invited us in." 9/27/10 RP 95. Tschida stated that, because two and a half years had passed between the incident and the suppression hearing, "I don't remember what the words – what words he said or if he said words at all." 9/27/10 RP 95. However, Tschida said he had written in his report (a report that was admitted without objection and that the trial court considered in making its findings) that, "[Anthony] invited us in." 9/27/10 RP 95, 115; 9/28/10 RP 209, 215; 9/30/10 RP 377; Pretrial Ex. 3, at 1.

The trial court found that after the police told Anthony they were there to check on L.S.'s welfare, Anthony allowed the officers in, "this not being [Anthony's] issue." 9/30/10 RP 383. In other words, Anthony had no reason not to allow the police officers inside—they were there to see L.S. and talk to Rubie, not to investigate Anthony for any criminal conduct. See 9/28/10 RP 280 (attorney Schurman asked Tschida if Anthony was being investigated for any crime and Tschida said no). This was a reasonable inference from the evidence. Trasvina, 16 Wn. App.

at 525. The court said, “I am finding that the officers were invited in. I do not find Anthony’s testimony regarding what took place in the garage as credible.”²⁵ 9/30/10 RP 383; CP 122 (Finding of Fact 8); CP 123 (Conclusion of Law 5).

Later, Anthony withdrew his consent. CP 122 (Finding of Fact 12). Tschida said that up until Tindal was arrested, Anthony was “pretty low key”; there was no concern about us or concern about anything. 9/27/10 RP 99. But then, Anthony asked the officers to leave. 9/27/10 RP 103. Officer Arico agreed; he said that initially Anthony was calm, but after the police arrested Tindal, Anthony became “visibly agitated” and asked the police officers to leave. 9/27/10 RP 103; 9/29/10 RP 321. It was then that Anthony said he was going to call his attorney. 9/29/10 RP 322.

During the telephone call between attorney Schurman and Tschida, Schurman told Tschida that if he had any understanding that there had been prior consent, “it is specifically revoked at this point.” 9/29/10 RP 277. The trial court properly concluded that after Tindal was arrested, Anthony revoked his consent. CP 123 (Conclusion of Law 5).

²⁵ The trial court’s determination that Anthony was not credible is not subject to review. See Camarillo, 115 Wn.2d at 71.

Santiago relies on Schultz for the proposition that silent acquiescence does not equal consent. Br. of Appellant at 23-24. The State agrees that Schultz stands for that proposition, but disagrees that Anthony's words and conduct were mere acquiescence.

In Schultz, as discussed above, after Robertson emerged from a nearby room, "Schultz then stepped back, opened the door wider," and one of the police officers followed her inside. Schultz, 170 Wn.2d at 751. On review, the supreme court held that "officers may not enter a home based upon acquiescence alone." Id. at 759. It is not enough for one simply to fail to object; the right to be free from an invasion of one's home without lawful authority "may be waived but only by informed and meaningful consent." Id. at 758.

Here, Anthony's consent was both informed and meaningful. The trial court found that by all accounts—even Anthony's and Schurman's—Tschida informed Anthony that he was there to check on L.S.'s welfare. 9/30/10 RP 382. Although two and one half years later, Tschida could not remember what words Anthony had spoken or what actions Anthony had taken, Tschida was very clear that Anthony had "invited us in." 9/27/10 RP 95; Pretrial Ex. 3. The

trial court properly found that Anthony consented to the police officers' initial entry.

e. The Search Warrant Was Valid.

Finally, Santiago argues that because the search warrant was based on information gathered after the police officers' warrantless entry, the affidavit for the warrant is invalid and the evidence seized pursuant to the warrant should have been suppressed. Br. of Appellant at 36-38. This claim fails. As discussed fully above, the officers' entry was lawful because it was pursuant to their community caretaking function and because Anthony consented. The trial court properly concluded that the warrant was valid. This Court should affirm the trial court's denial of Santiago's motion to suppress evidence.

2. ANTHONY'S DRIVER'S LICENSE AND REGISTRATION WERE PROPERLY ADMITTED.

Santiago claims that the trial court erred when it permitted the State to introduce Anthony's driver's license and registration as impeachment evidence. Br. of Appellant at 40-43. This Court should reject Santiago's argument; it puts form over substance. The trial court exercised its discretion properly when it permitted the

State to impeach Anthony with evidence contrary to his testimony.

Moreover, error, if any, was harmless.

a. Facts.

On direct examination, Anthony said that Rene had kicked him out of the house after Tindal's arrest. 11/3/10 RP 787. On cross-examination, the prosecutor followed up; she asked:

Q. What's your address?

A. 18 – uh, 18 –

Q. Forgot your address?

A. Uhm, I (inaudible).

11/3/10 RP 788.

Rene also testified that he kicked Anthony out of his home after the February 28, 2008 search. 11/3/10 RP 796.

As rebuttal evidence, the State sought to introduce certified copies of Anthony's driver's license and vehicle registration (both renewed after the police executed the search warrant at Rene's home²⁶), which listed his address as 1812 245th Place—the same as Rene's address. 11/3/10 RP 800, 833-38. The State argued that the documents contradicted Anthony's claim that Rene had

²⁶ The search occurred on 2/28/08 and the documents were renewed in 2009. 11/3/10 RP 838, 840; Pretrial Ex. 3.

kicked him out because when asked his new address, Anthony “couldn’t remember.” 11/3/10 RP 837.

Defense counsel objected; he argued that the documents were hearsay and constituted improper impeachment. 11/3/10 RP 833-40. Counsel recalled Anthony’s testimony differently. Counsel believed that when Anthony was asked his current address, he did not answer the question at all.²⁷ 11/3/10 RP 840.

In determining that the evidence was admissible to impeach Anthony, the trial court said, “Mr. Santiago, Anthony, testified when asked what his address was, couldn’t really – couldn’t remember it.” 11/3/10 RP 835. The court overruled the objections.²⁸ 11/3/10 RP 840-41. The court said that the documents were proper impeachment because Anthony said that he had been thrown out of Rene’s house and the driver’s license and registration showed that Anthony still lived at Rene’s house. 11/3/10 RP 840-41.

b. The Documents Were Properly Admitted.

This Court reviews a trial court’s decision to admit evidence under an abuse of discretion standard. State v. Johnson, 90 Wn.

²⁷ The “inaudible” portion of the transcript makes it impossible to know for certain how Anthony answered the State’s question.

²⁸ Santiago has not challenged the trial court’s hearsay ruling on appeal.

App. 54, 69, 950 P.2d 981 (1998). A trial court abuses its discretion by making a decision based on untenable grounds or for untenable reasons. Id.

Under ER 613(b), extrinsic evidence of a witness's prior inconsistent statement is admissible. The rule provides:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

ER 613(b).

Although generally counsel should first ask a witness about a prior inconsistent statement, it is permissible under ER 613 for a witness to be given an opportunity to explain or deny the prior inconsistent statement after the introduction of extrinsic evidence. State v. Horton, 116 Wn. App. 909, 916, 68 P.3d 1145 (2003). If the witness is not asked about the statement during direct or cross-examination, impeachment may still be accomplished at a later point provided arrangements are made for the witness to be recalled. Id. at 915-16 (citing ROGER C. PARK, ET AL., EVIDENCE LAW 536-37 (1998)).

Here, after Anthony testified, neither side specifically requested in open court that Anthony remain in attendance, but the court did not excuse Anthony from his subpoena.²⁹ 11/3/10 RP 794. Moreover, after the court ruled that the documents were admissible, defense counsel said, "I guess, Your Honor, I would then ask to recall Anthony Santiago to explain - - " 11/3/10 RP 841. The court responded that, after the defense rested, if the State offered additional evidence, defense counsel "may then have an opportunity to have other witnesses testify and that's perfectly fine." 11/3/10 RP 841. Later, counsel renewed his objection. 11/3/10 RP 842-43. The court reiterated that, following the State's rebuttal evidence, "the Defense may very well want to provide evidence following that . . . , which is perfectly acceptable." 11/3/10 RP 843.

Although Horton allows for the admissibility of extrinsic evidence when arrangements have been made to recall the witness, it is clear from the record that, despite no request in open court for Anthony to remain in attendance, defense counsel had the option to recall Anthony. Counsel's ultimate decision to not recall Anthony does not invalidate the trial court's discretionary ruling.

²⁹ See CrR 6.12(b).

c. Error, If Any, Was Harmless.

The improper admission of evidence may be harmless error if that evidence is of minor significance in reference to the “overall, overwhelming evidence as a whole.” State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error in admitting evidence that does not result in prejudice to the defendant does not require reversal. Id.

In this case, the evidence established that the methamphetamine and other drug-related paraphernalia were recovered from Rene’s master bathroom. Tindal, Anthony, and Rene each denied that the drugs belonged to her or him. 11/3/10 RP 779, 792-93, 799, 802, 811-13. Yet, it was the defense that impeached Anthony—that asked the jury whether Anthony’s denial was credible. Counsel argued,

So did you believe that he’d never seen that stuff in the box before when he answered, no, I’ve never seen that before? Did you guys really believe that based on his facial expressions and the way he answered that? Did he make eye contact with you guys, did he make eye contact with the State?

11/4/10 RP 872. Counsel then highlighted the fact that Anthony had admitted to possessing drug pipes and drug residue and

asked, "Can someone tell me why [Anthony] wasn't arrested for anything - - can anyone tell me that?" 11/4/10 RP 873.

With regard to the driver's license and vehicle registration, defense counsel argued that "upstanding sober people" forget to update their driver's license and registration. 11/4/10 RP 893. Counsel argued that, for the "guy who does drugs, who admitted that he does drugs," it is not likely that he would update his address. 11/4/10 RP 894. Counsel asked, "What's the big deal about the fact that his address happens to be my client's address? You could even conclude that [Rene] kicked him out at that time and then he invited him back in later." 11/4/10 RP 893. At the end of the day, counsel said, "That doesn't matter, *it's such a minor detail.*" 11/4/10 RP 894 (italics supplied).

Because the impeachment evidence is "such a minor detail" in reference to the "overall, overwhelming evidence as a whole," even if the court erred in admitting the documents, the error was harmless. See Bourgeois, 133 Wn.2d at 403.

D. CONCLUSION

For the reasons stated above, the State asks this Court to affirm Santiago's conviction for possession with intent to manufacture or deliver methamphetamine.

DATED this 28 day of June, 2011.

Respectfully submitted,

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