

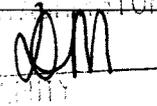
NO. 33599-9

FILED
COURT OF APPEALS

06 OCT -2 PM 3:26

STATE OF WASHINGTON

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**



STATE OF WASHINGTON, RESPONDENT

v.

JAMES MICHAEL LOCKE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Beverly Grant

No. 04-1-02685-9

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
TODD A. CAMPBELL
Deputy Prosecuting Attorney
WSB # 21457

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A.	<u>ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR</u>	1
1.	Is defendant entitled to a re-trial on the offense of making a false statement to a public servant where the court's instructions failed to ensure jury unanimity? (Appellant's Assignment of Error No. 1)	1
2.	Did the trial court properly exercise its discretion when it determined that ammunition found in defendant's trunk was relevant to the defendant's charge of manufacturing methamphetamine? (Appellant's Assignment of Error No. 2).....	1
3.	Has defendant demonstrated his counsel's performance was constitutionally defective where counsel's actions were legitimate trial tactics and defendant has not demonstrated resulting prejudice? (Appellant's Assignment of Error No. 3).....	1
4.	Did defendant fail to meet his burden of showing prosecutorial misconduct that was prejudicial when prosecutor properly drew reasonable inferences from the State's evidence during closing argument, when the court instructed the jury to disregard any comment made by an attorney not supported by evidence, where defendant failed to ask the court for curative instructions, and failed to show that the remarks were "so flagrant and ill intentioned" that they resulted in prejudice that could not have been neutralized by a curative instruction? (Appellant's Assignment of Error Nos. 3 and 4).....	1
5.	Is defendant entitled to a new trial on Counts I and II under the cumulative error doctrine where defendant has not demonstrated any error or if error did occur, that it was so egregious it effected the outcome of the trial? (Appellant's Assignment of Error No. 5)	2

B.	<u>STATEMENT OF THE CASE</u>	2
1.	Procedure.....	2
2.	Facts.....	3
3.	Ammunition suppression motion.....	12
4.	Closing argument.....	13
C.	<u>ARGUMENT</u>	15
1.	REVERSAL IS REQUIRED FOR DEFENDANT’S MAKING A FALSE STATEMENT TO A PUBLIC SERVANT OFFENSE BECAUSE THE COURT FAILED TO GIVE A “TO CONVICT” INSTRUCTION ON THE ELEMENTS OF THAT CRIME TO THE JURY.....	15
2.	DEFENDANT FAILED TO PROPERLY PRESERVE THE ISSUE OF THE ADMISSIBILITY OF AMMUNITION AS IMPROPER “CHARACTER EVIDENCE” UNDER ER 404(b).....	16
3.	THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT FOUND THAT AMMUNITION WAS RELEVANT TO DEFENDANT’S CHARGE OF UNLAWFUL MANUFACTURING A CONTROLLED SUBSTANCE.....	18
4.	DEFENDANT DID NOT MEET HIS BURDEN IN SHOWING INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE DID NOT SATISFY EITHER PRONG OF <u>STRICKLAND</u> : DEFICIENT PERFORMANCE OR ACTUAL PREJUDICE.....	22
5.	DEFENDANT WAIVED THE ISSUE OF PROSECUTORIAL MISCONDUCT WHERE TRIAL COUNSEL DID NOT REQUEST A CURATIVE INSTRUCTION AND THE PROSECUTOR’S COMMENTS WERE NOT SO FLAGRANT AND ILL INTENTIONED TO WARRANT REVERSAL.	28

6.	THE DEFENDANT RECEIVED A FAIR TRIAL BECAUSE THERE WAS NOT CUMULATIVE ERRORS OR EGREGIOUS CIRCUMSTANCES THAT WARRANTED REVERSAL.....	34
D.	<u>CONCLUSION</u>	35

Table of Authorities

Federal Cases

<u>Beck v. Washington</u> , 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).....	28
<u>Strickland v. Washington</u> , 466 U.S. 668, 688-89, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	22, 23, 27

State Cases

<u>Davis v. Globe Mach. Mfg. Co</u> , 102 Wn.2d 68, 77, 684 P.2d 692 (1984).....	20
<u>Kull v. Department of Labor & Indus.</u> , 21 Wn.2d 672, 682-83, 152 P.2d 961 (1944).....	16
<u>State v. Aumick</u> , 126 Wn.2d 422, 430, 894 P.2d 1325 (1995).....	20
<u>State v. Boast</u> , 87 Wn.2d 447, 451-452, 553 P.2d 1322 (1976)	16
<u>State v. Brett</u> , 126 Wn.2d 136, 175, 892 P.2d 29 (1995).....	29
<u>State v. Brown</u> , 132 Wn.2d 529, 566, 940 P.2d 546 (1997).....	29
<u>State v. Brown</u> , 147 Wn.2d 330, 339, 58 P.3d 889 (2002).....	15
<u>State v. Bryant</u> , 89 Wn. App. 857, 873, 950 P.2d 1004 (1998).....	29
<u>State v. Bythrow</u> , 114 Wn.2d 713, 722 fn. 4, 790 P.2d 154 (1990).....	21
<u>State v. Cienfuegos</u> , 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001)	24
<u>State v. Davis</u> , 117 Wn. App. 702, 708, 72 P.3d 1134 (2003).....	24-25, 33
<u>State v. Deryke</u> , 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).....	15
<u>State v. Easter</u> , 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).....	20
<u>State v. Ferrier</u> , 156 Wn.2d 103, 960 P.2d 927 (1998).....	5

<u>State v. Finch</u> , 137 Wn.2d 792, 839, 975 P.2d 967, <u>cert. denied</u> , 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999).....	28, 29
<u>State v. Garrett</u> , 124 Wn.2d 504, 520, 881 P.2d 185 (1994)	22-23
<u>State v. Greer</u> , 62 Wn. App. 779, 792-93 815 P.2d 295 (1991).....	29
<u>State v. Greiff</u> , 141 Wn.2d 910, 928, 10 P.3d 390 (2000).....	34, 35
<u>State v. Grisby</u> , 97 Wn.2d 493, 509, 647 P.2d 6 (1982).....	32, 34
<u>State v. Halstien</u> , 122 Wn.2d 109, 127, 857 P.2d 270 (1993)	21
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)	22
<u>State v. Hoffman</u> , 116 Wn.2d 51, 93, 804 P.2d 577 (1991)	29, 30
<u>State v. Jackson</u> , 102 Wn.2d 689, 695, 689 P.2d 76 (1984).....	21
<u>State v. Johnson</u> , 119 Wn.2d 143, 146, 829 P.2d 1078 (1992).....	24
<u>State v. Kinard</u> , 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979).....	34
<u>State v. King</u> , 24 Wn. App. 495, 501, 601 P.2d 982 (1979).....	23
<u>State v. Kruger</u> , 116 Wn. App. 685, 690-91, 67 P.3d 1147 (2003), <u>review denied</u> , 150 Wn.2d 1024, 81 P.3d 120, (2003)	23
<u>State v. Linehan</u> , 147 Wn.2d 638, 643, 56 P.3d 542 (2002).....	24
<u>State v. Lorenz</u> , 152 Wn.2d 22; 93 P.3d 133 (2004)	15
<u>State v. Manthie</u> , 39 Wn. App. 815, 820, 696 P.2d 33 (1985).....	28
<u>State v. McCorkle</u> , 88 Wn. App. 485, 500, 945 P.2d 736 (1997).....	16
<u>State v. McFarland</u> , 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)	23
<u>State v. Mills</u> , 154 Wn.2d 1, 7, 109 P.3d 415 (2005)	15
<u>State v. Pastrana</u> , 94 Wn. App. 463, 479, 972 P.2d 557 (1999)	29
<u>State v. Picard</u> , 90 Wn. App. 890, 902, 954 P.2d 336, <u>review denied</u> , 136 Wn.2d 1021 (1998).....	24

<u>State v. Powell</u> , 126 Wn.2d 244; 264, 893 P.2d 615 (1995).....	19, 20
<u>State v. Ray</u> , 116 Wn.2d 531, 548, 806 P.2d 1220 (1991)	23
<u>State v. Rehak</u> , 67 Wn. App. 157, 162, <u>review denied</u> , 120 Wn.2d 1022 (1992)	18
<u>State v. Riker</u> , 123 Wn.2d 351, 368, 869 P.2d 43 (1994)	24
<u>State v. Scott</u> , 110 Wn.2d 682, 690, 757 P.2d 492 (1988).....	15
<u>State v. Sims</u> , 119 Wn.2d 138, 142, 829 P.2d 1075 (1992).....	24
<u>State v. Stenson</u> , 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)	28
<u>State v. Swan</u> , 114 Wn.2d 613, 658, 790 P.2d 610, 632 (1990)	18
<u>State v. Thach</u> , 126 Wn. App. 297, 311, 106 P.3d 782 (2005)	21
<u>State v. Thomas</u> , 109 Wn.2d 222, 226, 743 P.2d 816 (1987)	23
<u>State v. Thompson</u> , 73 Wn. App. 654, 663, 870 P.2d 1022 (1994).....	28
<u>State v. Wall</u> , 52 Wn. App. 665, 679, 763 P.2d 462 (1988)	34
<u>State v. Weber</u> , 99 Wn.2d 158, 166, 659 P.2d 1102 (1983)	29
<u>State v. Weekly</u> , 41 Wn.2d 727, 252 P.2d 246 (1952)	28
<u>State v. Whalon</u> , 1 Wn. App. 785, 804, 464 P.2d 730 (1970)	34
<u>State v. Whelchel</u> , 115 Wn.2d 708, 728 801 P.2d 948 (1990).....	20
<u>State v. Wiley</u> , 79 Wn. App. 117, 900 P.2d 1116(1995)	24

Constitutional Provisions

Sixth Amendment, United States Constitution	23
---	----

Statutes

Former RCW 69.50.401(a)(1)(ii)..... 2
Former RCW 69.50.401(d)..... 2
RCW 69.50.101(p)..... 33
RCW 69.50.401(1)..... 24
RCW 9A.76.175..... 2

Rules and Regulations

ER 401 18
ER 402 17
ER 403 12, 17, 18
ER 404 21
ER 404(b)..... 16, 17, 18
ER 608 17

Other Authorities

WPIC 52.01..... 25

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is defendant entitled to a re-trial on the offense of making a false statement to a public servant where the court's instructions failed to ensure jury unanimity? (Appellant's Assignment of Error No. 1)
2. Did the trial court properly exercise its discretion when it determined that ammunition found in defendant's trunk was relevant to the defendant's charge of manufacturing methamphetamine? (Appellant's Assignment of Error No. 2)
3. Has defendant demonstrated his counsel's performance was constitutionally defective where counsel's actions were legitimate trial tactics and defendant has not demonstrated resulting prejudice? (Appellant's Assignment of Error No. 3)
4. Did defendant fail to meet his burden of showing prosecutorial misconduct that was prejudicial when the prosecutor properly drew reasonable inferences from the State's evidence during closing argument, when the court instructed the jury to disregard any comment made by an attorney not supported by evidence, where defendant failed to ask the court for curative instructions, and failed to show that the remarks were "so flagrant and ill intentioned" that they resulted in prejudice that could not

have been neutralized by a curative instruction? (Appellant's Assignment of Error Nos. 3 and 4)

5. Is defendant entitled to a new trial on Counts I and II under the cumulative error doctrine where defendant has not demonstrated any error or if error did occur, that it was so egregious it effected the outcome of the trial? (Appellant's Assignment of Error No. 5)

B. STATEMENT OF THE CASE.

1. Procedure

On June 3, 2004, the State charged JAMES MICHAEL LOCKE, hereinafter, "defendant", with unlawful manufacturing of methamphetamine,¹ unlawful possession of methamphetamine,² and making a false or misleading statement to a public servant.³ CP 1-3.

On June 1, 2005, pre-trial proceedings were held before the Honorable Beverly Grant. RP 1-26.⁴ Defendant brought a pre-trial motion to exclude as not relevant any reference to 24 nine millimeter bullets that were

¹ Former RCW 69.50.401(a)(1)(ii).

² Former RCW 69.50.401(d).

³ RCW 9A.76.175.

⁴ Consistent with Appellant's Opening Brief, the State will refer to the four volumes of pretrial and trial verbatim report of proceedings as "RP" and the volume containing the verbatim report of proceedings for sentencing as "SRP."

located in the trunk of defendant's car. RP 12. The court reserved its ruling pending an evidentiary hearing at trial. RP 14.

After trial commenced, the court conducted an evidentiary hearing and denied defendant's motion to exclude reference to the bullets found in defendants' trunk. RP 198-207. The jury convicted defendant as charged. CP 99-101, RP 475.

On July 22, 2005, the court sentenced the defendant to a 110 month DOSA sentence on the manufacturing charge. CP 110-125, SRP 14-15.⁵ This timely appeal follows.

2. Facts

On June 2, 2004, Deputy Redding, a 14 year veteran of the Pierce County Sheriff's Department, was on routine patrol near SR 507. RP 51-56. Redding has responded to scores of methamphetamine labs and has received training on recognition of items associated with the production of methamphetamine. RP 53-55, 82.

While on patrol, Redding observed a black Dodge Stratus at a gas station. RP 58. The car was unoccupied. RP 60. Deputy Redding was aware the Stratus was associated with defendant who had outstanding

⁵ The court verbally imposed a 116 month sentence. As the midpoint of the standard range for the manufacturing charge is 110 months, not 116, this is incorrect. The judgment and sentence reflects the correct DOSA term. CP110-125.

arrest warrants. RP 58-59. Deputy Redding waited for the assistance of Deputy Filing before making contact with defendant who had exited the gas station store. RP 60-61. Defendant was carrying a three-year-old child. RP 61. Redding asked defendant if he was the driver of the Stratus and whether his name was James Locke. RP 62. Defendant responded that he was the driver of the Stratus and that his name was Jason Locke. RP 62, 93, 157. The registered owner of the car was Renee Walton. RP 164. Defendant stated he did not have any identification with him. RP 63, 93. While speaking with defendant, Redding noticed a glass smoking pipe on the front passenger floorboard. RP 63. Redding recognized the pipe as commonly used to smoke methamphetamine. RP 63, 96.

Defendant reached into the car to shut off the ignition and stated, "I am James Locke and I'm ready to go to jail." RP 64, 95, 157. At that point, Redding advised defendant he was under arrest. RP 64. Redding then advised defendant of his Miranda rights. RP 65, 97. Post Miranda, defendant stated that the glass pipe belonged to him. RP 66, 98.

A search of the passenger compartment of the car revealed a black nylon "shaving kit" type bag containing a Tupperware container, a large plastic baggie, and a coil of plastic tubing. RP 67, 118. A white power substance was contained inside the Tupperware and the baggie. RP 67. Defendant stated the substance in the Tupperware container was

methamphetamine. RP 74. Redding later conducted a field test of the substance and determined it was not methamphetamine. RP 75.

Defendant stated that there was about a half ounce of methamphetamine in the Tupperware container and that defendant had a very large habit. RP 75-76. Defendant claimed the white powder in the baggie was a cutting agent to dilute the methamphetamine. RP 77. Redding also noticed plastic tubing coiled around the gear shifter for the automatic transmission. RP 118. Redding was familiar with how plastic tubing is often used in the manufacture of methamphetamine. RP 118-119.

After defendant permitted⁶ Redding to open the trunk, Redding opened the trunk and could smell a strong chemical odor commonly associated with “meth labs”. RP 78-79. Defendant assisted Deputy Redding in opening the trunk because Redding had difficulty with the lock. A broken key was used to open the trunk. RP 103-04, 167. Redding found other items commonly associated with methamphetamine production including a stringer basket, a sealed bottle of hydrogen peroxide, a Mason type jar with liquid, a disposable top to a propane cylinder, a propane cylinder, acetone, a pot, yellow stained coffee filters,

⁶ Under cross-examination, Redding testified that he advised defendant he had the right to refuse the search, right to limit the search, and the right to withdraw the search pursuant to State v. Ferrier, 156 Wn.2d 103, 960 P.2d 927 (1998). RP 101-03. Deputy Filing provided similar testimony. RP 166-67.

and aluminum foil. RP 79- 88. The hydrogen peroxide was inside a plastic shopping bag and appeared to have just been purchased. RP 106. After discovering these items, Redding called the county sheriff's clandestine lab team. RP 89.

Prior to the search of the trunk, Redding contacted defendant's girlfriend to take custody of their child. RP 89-90. She arrived after Redding searched the trunk. RP 90. While Redding explained to her the dangers of what he found in the trunk, defendant became agitated and yelled, "Hey, isn't that illegal search and seizure?" RP 90, 108, 159.

On June 18, 2004, Deputy Kory Shaffer, a member of the Pierce County Sheriff's Department Methamphetamine Lab Team, executed a search warrant on defendant's car at the South Hill precinct. RP 122-26. Shaffer testified that the two typical types of methamphetamine production in Pierce County are the lithium ephedrine reduction method and the red phosphorus method. RP 124. Shaffer explained to the jury that store bought chemicals such as muriatic acid and common solvents are used with rock salt, aluminum foil, pseudoephedrine, and anhydrous ammonia are used in the lithium ephedrine method. RP 124. In the "red-p" method hydrochloric acid and red phosphorus is used instead of lithium and anhydrous ammonia. RP 124-25. Shaffer opined that the lithium batteries found in the car can be used in the reaction phase of the

lithium ephedrine method of manufacturing methamphetamine. RP 136.

The lithium has to be removed from the battery which creates waste products. RP 143.

Shaffer explained how individuals involved in manufacturing methamphetamine often work in teams where individuals become responsible for different phases of methamphetamine production. RP 140. Shaffer testified that it might be rare to see evidence of three phases of methamphetamine manufacture, extraction, reaction, and gassing out, in a vehicle lab. RP 142.

Deputy Bannach, also a member of the Pierce County Clandestine Lab Team, testified about the “red-p” and the anhydrous lithium methods of manufacturing methamphetamine. RP 170-185. In describing some of the differences between the two methods, Bannach explained that hydrogen peroxide is used with iodine crystals and red phosphorus in the “red-p” method. RP 183-84.

Bannach assisted Deputy Shaffer execute the search warrant on defendant’s car. RP 190-191. Inside the passenger compartment he found vinyl tubing, lithium batteries, a steel fitting for gas container, a glass stirring rods, and coffee filters containing a white substance. RP 208-214. Inside the trunk, Bannach found, a strainer, factory sealed hydrogen peroxide, twenty-four 9 mm bullets, and a red powder. RP 215-221.

Contained inside a brown suitcase located in the trunk, Bannach found acetone, a glass jar with yellowish liquid, plastic funnel, plastic drinking bottle with a tri-layered liquid, a jar with aluminum foil, coffee filters with binder material, plastic bottle labeled "bleach" containing acid, and tubing attached to brass fittings with blue corrosion. RP 221-36. Bannach explained to the jury how all these items are used in the manufacture of methamphetamine. RP 209-235. Next to the amplifier in the trunk, Bannach found a receipt with defendant's name on it. RP 236-37. Bannach collected samples from the red powder, the acetone container, glass jar with yellow liquid, drinking bottle with tri-layered liquid, and the white gallon bottle for testing at the State crime lab. RP 240. No fingerprints were found on any of the items found in the defendant's car. RP 196.

Under cross examination, Bannach testified that most of the "car labs" that he has processed involved the transportation of methamphetamine manufacturing items associated with one or two phases of the manufacturing process. RP 253. Bannach stated that most dump sites he has investigated involve trash bags on the side of the road and usually do not contain any usable chemicals or other materials like unused batteries. RP 254. One of the batteries found in the car appeared to have something peeled off it. RP 262. In Bannach's experience, he has never

seen red phosphorous as a waste product at a dump site. RP 278, 285.

Bannach opined that if someone was throwing away the items found in the trunk, there would be nothing there that was usable [to make methamphetamine]. RP 287.

Frank Boshears, a forensic scientist at the Washington State Patrol Crime laboratory, analyzed the glass rod with white residue, and coffee filters with tan powder and found no controlled substances or precursor chemicals used to manufacture methamphetamine. RP 299-300. Boshears explained this is not uncommon and that the residue and powder are consistent with pseudoephedrine extraction pill binder waste. RP 299, 301. Under cross-examination, Boshears testified this binder waste was probably garbage. RP 318-19.

Boshears confirmed the red substance was red phosphorus and that the substance exhibited reaction by-products from the manufacture of methamphetamine. RP 303-04. Boshears analyzed the liquid samples Bannach had collected and determined the liquid from the acetone container was either acetone or an alcohol, that the liquid from the glass jar contained methamphetamine and a reaction by-product associated with the ammonia method of manufacturing methamphetamine, and the liquid in the gallon jug was hydrochloric acid. RP 304-310. Boshears opined that the methamphetamine contained in the yellow liquid was indicative of

the acetone cleaning process used to take the impurities out of the final powder form of methamphetamine. RP 308, 328-29. This methamphetamine can be reclaimed if the liquid is evaporated. RP 322. Whether this liquid is garbage depends on the person doing the manufacturing. RP 322.

Walter Larsen, a friend of the defendant, testified he had been “pretty good friends” for about seven years. RP 347-48. Larsen had once been defendant’s roommate and had borrowed defendant’s car more than ten times. RP 348. Larsen testified that he borrowed defendants’ car on June 1, 2004 at about “11, 12, 1, early morning to go pick up some women [he] knew” because “that was hard to do on a motorcycle”. RP 349. Defendant was unaware that Larsen had taken defendant’s car. RP 349-50. Larsen drove the car to visit an acquaintance he knew only as “Little Dean”. RP 350. Larsen would visit “Little Dean” to get high on methamphetamine and “hit on the women” who “congregated” at little Dean’s house. RP 351, 355. Larsen did not know whether Dean made methamphetamine. RP 351.

During his stay, Dean asked Larsen if Larsen could use defendant’s car to haul away Dean’s trash when he left. RP 351. Larsen agreed and told him to put the trash in the trunk and to be careful because the key was cracked. RP 351. According to Larsen, Dean had thrown his

trash into the car before. RP 351. Larsen would never check the contents of Dean's garbage that usually were in gym bags, canvas bags, or a suitcase. RP 352. He would normally take the trash to a dumpster between defendant's residence and a neighbor. RP 352.

At sunrise Larsen got into the car and broke the key when starting the motor. RP 354. Larsen dropped off the car at defendant's residence and left a note about the broken key. RP 354. Larsen did not notice the plastic tubing coiled around the gear shift because he was high and the dome light did not illuminate. RP 372, 385. Larsen forgot about the garbage in the car. RP354. A couple weeks later, Larsen learned that defendant had been arrested for items "Dean had thrown in the trunk". RP 356.

Under cross-examination, Larsen admitted he had "hung out" with defendant about 50 times in the last year. RP 358. Larsen admitted he knew about defendant's charges about two weeks after he was arrested but did not come forward with this information until a month before defendant's trial. RP 358.

Larsen testified that he knew roughly how methamphetamine is made because he "got in trouble for it years ago" when someone else put items in the trunk of a car. RP 361. Larsen was aware that the trash was in a bag in the trunk. RP 385, 392. He recognized the hydrogen peroxide

and said defendant was using it for a cut on his leg. RP 386. Larsen indicated that the bag appeared to be nice bag with a functional handle. RP 388. Larsen explained Little Dean's girlfriend would often bring home nice bags she found "dumpster diving" at Goodwill. RP 389.

3. Ammunition suppression motion.

During the search, Bannach discovered bullets inside the trunk. RP 201. Bannach explained that it is very common to find weapons and/or ammunition at methamphetamine labs. RP 201. Based on his training and experience, he explained that weapons and/or ammunition are often found at methamphetamine labs because one of the effects of methamphetamine is paranoia and that those involved in this endeavor often get "ripped off" and require these items for protection or as a method of intimidation. RP 200-01. Bannach did not find any handguns in the trunk and testified that bullets are not used in the methamphetamine manufacturing process. RP 202-03. Defendant challenged the admission of these bullets as not relevant to the manufacturing of methamphetamine. RP 198. Defendant argued that the bullets had not probative value, would confuse the jury, would be "bringing in character evidence", and would be unfairly prejudicial. RP 199. The State argued that under ER 403, the probative value of the evidence outweighed the prejudicial nature of the

evidence. RP 200-04. After permitting the State to elicit further foundation testimony from Officer Bannach, the court ruled that the prejudicial effect of admitting the bullets did not outweigh the probative value and admitted the evidence. RP 204.

4. Closing argument

Prosecutor began his argument with the following statement:

Well, as I told you at the beginning of this case, it's about irresponsible behavior and its about avoiding responsibility. The defendant was irresponsible when he involved himself in methamphetamine, when he involved himself in manufacturing methamphetamine and he acted even more irresponsibly when he exposed his child to those things.

He first tried to avoid responsibility when he gave a fake name to Deputy Redding. And he continues to try to avoid responsibility during this trial. And this is where it ends, at the end of this trial.

RP 419. The prosecutor went on to state that the jury must use the evidence and the law to decide whether the defendant is responsible and accountable for his actions. RP 420. The prosecutor explained the very broad definition of manufacturing and how the evidence was not garbage defendant's witnesses had claimed, but was all connected with manufacturing as "all pieces of the puzzle". RP 420-21. The prosecutor explained these "pieces of the puzzle" to the jury and then remarked, "When you do that, you will see that the pieces fit together. That the

puzzle comes together and you will see that the defendant was behaving irresponsibly and that is now trying to avoid responsibility”. RP 437-38.

In rebuttal, the prosecutor argued “What the defense would have you believe is that Mr. Locke had nothing whatsoever to do with manufacturing. “That’s what you would have to believe to find him not guilty of manufacturing.” RP 468. This comment followed the prosecutor’s discussion of the defendant’s level of involvement in the crime of manufacturing methamphetamine. In discussing defendant’s role in manufacturing methamphetamine, the prosecutor stated, “Now, his level of involvement you may disagree on. But it doesn’t matter. The evidence is clear that he was involved in at least some way and that’s all it takes for him to be an accomplice and equally guilty. If he is involved in the actual making of meth, you believe that he is an accomplice. If he is involved in transporting supplies, he is an accomplice. He is just getting rid of garbage, he is an accomplice.” RP 457. In his concluding remarks, the prosecutor stated, “The pattern here is that the defendant’s behaving irresponsibly. He is living this illegal life-style. He is trying to avoid responsibility and that’s where we are today”. RP 471.

C. ARGUMENT.

1. REVERSAL IS REQUIRED FOR DEFENDANT'S MAKING A FALSE STATEMENT TO A PUBLIC SERVANT OFFENSE BECAUSE THE COURT FAILED TO GIVE A "TO CONVICT" INSTRUCTION ON THE ELEMENTS OF THAT CRIME TO THE JURY.

“‘To convict’ instructions must contain all of the elements of the crime because it serves as a “yardstick” by which the jury measures the evidence to determine guilt or innocence.” State v. Lorenz, 152 Wn.2d 22; 93 P.3d 133 (2004)(quoting State v. Deryke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003)). Instructions that relieve the State of its burden to prove every element of the crime require automatic reversal. State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). Claims of erroneous jury instructions are reviewed de novo. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). The inquiry is whether they are supported by the evidence, allow the parties to argue their theories of the case, are not misleading to the jury, and properly set forth the applicable law. Id. The absence of an essential element of a crime in a jury instruction violates due process by relieving the State of its burden to prove every element. State v. Scott, 110 Wn.2d 682, 690, 757 P.2d 492 (1988). On appeal, courts may not rely on other instructions to supply missing elements. Mills, 154 Wn.2d at 7.

In the instant case, the court instructed the jury on the definition of the crime of making a false or misleading statement to a public servant,

but failed to give a “to convict” instruction for that crime. CP 75-98.

Because the jury was not properly instructed on the elements of that crime, reversal of that conviction is required.

2. DEFENDANT FAILED TO PROPERLY PRESERVE THE ISSUE OF THE ADMISSIBILITY OF AMMUNITION AS IMPROPER “CHARACTER EVIDENCE” UNDER ER 404(b).

An objection which does not specify the particular ground upon which it is based is insufficient to preserve the issue for appellate review. State v. Boast, 87 Wn.2d 447, 451-452, 553 P.2d 1322 (1976). “Where a defendant makes an objection not accompanied by a reasonably definite statement of the grounds, neither the State nor the trial court is put on notice of the defendant's claimed defects.” State v. McCorkle, 88 Wn. App. 485, 500, 945 P.2d 736 (1997). Further, an assignment of error upon a certain ground cannot be made where no objection was made on that same ground below. State v. Boast, 87 Wn.2d 447 at 451-452 (quoting Kull v. Department of Labor & Indus., 21 Wn.2d 672, 682-83, 152 P.2d 961 (1944)).

In the instant case, defendant brought a motion in limine to exclude the ammunition found in defendant’s car. RP 12. Defendant objected to the admission of the ammunition on the grounds that it was not relevant to the charge of manufacturing methamphetamine, that it was unfairly prejudicial, and that it would bring in character evidence. RP 12-14, 198.

The court deferred its ruling until it conducted an evidentiary hearing at trial. RP 14. Defendant's trial counsel explained he was referring to "the character of people in the methamphetamine world, [the jury would] particularly infer that my client, that his character is that he was somebody who would arm himself or he is a dangerous person and it's not part of this crime." RP 14. Counsel made no reference to ER 404(b). RP 14, 198-99.

During Deputy Bannach's testimony at trial, defendant again objected to the admission of the ammunition under ER 402 and ER 403. RP 198. Trial counsel added that such evidence would confuse the jury, bring in character evidence and unfairly prejudice the jury. RP 199. In its ruling the court weighed the probative value verses the prejudicial affect of the ammunition and found that the probative value of the ammunition outweighed its prejudicial affect. RP 204. The court did not render a specific ruling on character evidence. Nor did defendant request the court rule on that issue. Therefore, defendant did not properly preserve the issue of ER 404(b) evidence for review.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT FOUND THAT AMMUNITION WAS RELEVANT TO DEFENDANT'S CHARGE OF UNLAWFUL MANUFACTURING A CONTROLLED SUBSTANCE.

Even if defendant properly preserved this issue for review, his claim fails because the court properly exercise its discretion when it found the ammunition was relevant to the charge of unlawful manufacturing of a controlled substance. The admission or exclusion of relevant evidence is within the discretion of the trial court. State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610, 632 (1990); State v. Rehak, 67 Wn. App. 157, 162, review denied, 120 Wn.2d 1022 (1992). The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. Rehak, 67 Wn. App. at 162. Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable. ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

The Defendant argues that the bullets found in defendant's car are inadmissible character evidence under ER 404(b). ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In the instant case, the ammunition was not admitted to prove character “in order to show action in conformity therewith”. Driving a car with ammunition in the trunk does not tend to show defendant acted in conformity with his character when he manufactured methamphetamine. Nor is it evidence of bad character. Whether one travels with ammunition does not by itself show bad character. This is true for the other innocuous items found in the car like the lithium batteries, plastic tubing, common solvents, and hydrogen peroxide. Rather, the bullets were admitted in context of other testimony showing how these otherwise innocuous items can be associated with methamphetamine production.

Defendant’s theory of the case was that he was unaware of the items in the trunk and that these items were simply garbage. The fact that police often find bullets at methamphetamine labs as well as these other common items is probative of the fact that these items are more likely associated with meth production, not garbage or household items. Evidence which is relevant and necessary to purposes other than proving character or propensity will not be excluded because it may also tend to show that the defendant committed another bad act unrelated to the crime charged. State v. Powell, 126 Wn.2d 244; 264, 893 P.2d 615 (1995).

The Defendant argues that the trial court erred in failing to balance on the record the probative value of the evidence with the prejudicial impact. When making its ruling that the ammunition was relevant, the court found that “based upon the officer’s experience and expertise in dealing with meth labs and with regards to it I do not find that the prejudicial effect will outweigh the probative value.” RP 204. Accordingly, the court did not abuse its discretion, as the decision to admit the evidence was not manifestly unreasonable or based upon untenable grounds. See Powell, 126 Wn.2d at 258; Davis v. Globe Mach. Mfg. Co., 102 Wn.2d 68, 77, 684 P.2d 692 (1984).

Even if the court committed error when it admitted the ammunition, the error was harmless. The State bears the burden of demonstrating that a constitutional error was harmless. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). A constitutional error is harmless only (1) if the court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error. Easter, 130 Wn.2d at 242; State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995); and (2) the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Easter, 130 Wn.2d at 242; State v. Whelchel, 115 Wn.2d 708, 728 801 P.2d 948 (1990).

However, “an evidentiary error which is not of constitutional magnitude requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial”. State v.

Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). Evidentiary errors under ER 404 are not of constitutional magnitude, so the court must determine whether the trial outcome would have differed if the error had not occurred. State v. Thach, 126 Wn. App. 297, 311, 106 P.3d 782 (2005) (citations omitted). When evidence that is inadmissible is nonetheless admitted, the question then is whether there is harmless error. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Only if the outcome of the trial would have been different had the errors not occurred is the error deemed reversible error. Id., at 695.

In making such a determination, the court obviously looks to the strength of the State's evidence. If the evidence is strong on each count then the results of the trial would not have been different if the error had not occurred. On the other hand, if the State's evidence is weak on each count then the outcome of the trial would be different. State v. Bythrow, 114 Wn.2d 713, 722 fn. 4, 790 P.2d 154 (1990).

In the instant case, the state adduce overwhelming evidence of a methamphetamine lab in defendant's car. Items used to produce methamphetamine were found in the passenger compartment and trunk of the Dodge defendant was driving. This evidence was related to two methods of making methamphetamine, anhydrous ammonia and "red-p". Methamphetamine was detected in liquid form inside an open suitcase in the trunk. Before the police searched his car, defendant admitted to using

methamphetamine and told the police to take him to jail. There is no question defendant was in constructive possession of the items the car.

Defendant's friend, Mr. Larsen, testified that "Little Dean" put the items found in a suitcase or travel bag into defendant's car unbeknownst to defendant. Larsen claimed the hydrogen peroxide that was new and outside the "trash" bag was for defendant's injured leg. The jury chose not to believe Mr. Larsen. In addition, Larsen was unable to explain the presence of other items associated with manufacturing methamphetamine that were not inside the alleged "garbage" bag. These items included the vinyl tubing, batteries, coffee filters, or stirring sticks in the passenger compartment of the car. Accordingly, the exclusion of the ammunition would not have affected the outcome of the trial.

4. DEFENDANT DID NOT MEET HIS BURDEN IN SHOWING INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE DID NOT SATISFY EITHER PRONG OF STRICKLAND: DEFICIENT PERFORMANCE OR ACTUAL PREJUDICE.

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 688-89, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. State v. Garrett, 124 Wn.2d 504, 520, 881

P.2d 185 (1994). The first prong of the test requires proof of “errors so serious that counsel was not functioning as the ‘counsel’ guaranteed . . . by the Sixth Amendment”. Strickland, at 687; State v. Ray, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991).

Under the second prong, the defendant must show counsel’s deficient performance prejudiced the defendant, i.e., that there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). The competency of counsel is determined from a review of the entire record below. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Courts engage in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335.

The Court of Appeals, Division Three, has articulated a three-step process for determining whether counsel was prejudicially deficient for failing to offer a jury instruction. State v. Kruger, 116 Wn. App. 685, 690-91, 67 P.3d 1147 (2003), review denied, 150 Wn.2d 1024, 81 P.3d 120, (2003). First, the court determines “whether the defendant was entitled to the instruction[.]” Id. (citing State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979)(counsel not ineffective for failing to present a defense not warranted by the facts)). Second, the court determines “whether it was appropriate not to ask for the instruction. Id. (Citing State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)(requiring defendant to show absence of legitimate strategic or tactical rationales for challenged

attorney conduct)). Third, the court determines whether the defendant was prejudiced. Id. (Citing State v. Cienfuegos, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001)(rejecting argument that failure to propose an instruction to which defendant was entitled under the law constitutes per se ineffective assistance of counsel)).

Instructions are sufficient if they permit each party to argue his or her theory of the case, are not misleading and, when read as a whole, properly inform the jury of the applicable law. State v. Picard, 90 Wn. App. 890, 902, 954 P.2d 336, review denied, 136 Wn.2d 1021 (1998); see also State v. Linehan, 147 Wn.2d 638, 643, 56 P.3d 542 (2002).

Knowledge is not an element of unlawful possession of a controlled substance. RCW 69.50.401(1). State v. Johnson, 119 Wn.2d 143, 146, 829 P.2d 1078 (1992); State v. Sims, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992). “Unwitting possession” raises the issue of knowledge and can create reasonable doubt. Defendant has the burden to prove by preponderance that defendant unwittingly possessed the methamphetamine. See State v. Riker, 123 Wn.2d 351, 368, 869 P.2d 43 (1994)(“Generally, an affirmative defense which does not negate an element of the crime charged, but only excuses the conduct, should be proved by a preponderance of the evidence.”); State v. Wiley, 79 Wn. App. 117, 900 P.2d 1116(1995). Knowledge, is however, an element of the crime of unlawful manufacturing a controlled substance-methamphetamine. See State v. Davis, 117 Wn. App. 702, 708, 72 P.3d

1134 (2003). The court properly instructed the jury the State had to prove defendant knew the substance manufactured was methamphetamine. CP 85.

Here, defendant was entitled to an unwitting possession instruction on the possession offense. The Washington Pattern Jury instructions set forth the defense of unwitting possession as follows:

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

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

WPIC 52.01.

However, trial counsel's reasons for not proposing the instruction were tactical. The defense for the possession of methamphetamine offense was that the State did not prove the substance was truly methamphetamine, that defendant was not in possession of methamphetamine, and that defendant was unaware of any of the items associated with making methamphetamine that was found in his trunk. RP 443-448. The methamphetamine was detected in solution located with other items associated with methamphetamine production. RP 208-24, 308

The defense for the manufacturing offense was similar; defendant was unaware of any of the items associated with the manufacture of methamphetamine in trunk or the passenger compartment of his car and that many of the items found had common uses not related to the manufacture of methamphetamine. RP 448-460. It would be awkward for trial counsel to argue that defendant was absolutely not in possession of any of the items commonly associated with methamphetamine production but that if he was in possession of the methamphetamine, that possession was unwitting.

In addition, it could be confusing for the jury for trial counsel to argue that the state did not meet its burden of proving beyond a reasonable doubt that defendant knowingly manufactured methamphetamine because defendant was unaware of the items associated with methamphetamine production in the trunk of his car, but that defendant met its burden of proving by a preponderance of evidence that the methamphetamine product found with these items was unwitting. By not offering this instruction, trial counsel was able to argue defendant's theory of the case to the jury without unnecessarily confusing the jury with distinct burdens of proof. Defense counsel was aware that if the jury did not convict defendant of knowingly manufacturing methamphetamine, that the jury would also not convict defendant of possessing methamphetamine contained in a by-product of that manufacturing process. The converse is also true.

Even, if counsel's actions were not tactical, defendant has not demonstrated prejudice. Defendant claims that the jury "instructions were virtually guaranteed to ensure that Mr. Locke's argument was not considered at all, despite being a lawful, valid defense to the crime – and the only defense Mr. Locke put forward. Brief of Appellant at 29. Defendant concludes that there can be no question that his trial counsel's action prejudiced defendant. This argument lacks merit.

As argued above, trial counsel's closing arguments were supported by the jury instructions. Defendant cannot show the outcome of his trial would have been different but for his counsel's actions. He is hard pressed to show that the jury would have found him not guilty of knowingly possessing the methamphetamine found with the items associated with methamphetamine production after finding him guilty of knowingly manufacturing methamphetamine. Because, defendant has not met this second prong of the Strickland, his claim of ineffective assistance of counsel must fail.

5. DEFENDANT WAIVED THE ISSUE OF PROSECUTORIAL MISCONDUCT WHERE TRIAL COUNSEL DID NOT REQUEST A CURATIVE INSTRUCTION AND THE PROSECUTOR'S COMMENTS WERE NOT SO FLAGRANT AND ILL INTENTIONED TO WARRANT REVERSAL.

A trial court's rulings based on allegations of prosecutorial misconduct are reviewed under the abuse of discretion standard. See State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967, cert. denied, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999); State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). “A defendant's right to a fair trial is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's decision.” State v. Thompson, 73 Wn. App. 654, 663, 870 P.2d 1022 (1994). The defendant bears the burden of establishing both the impropriety of the prosecutor's remarks and their prejudicial effect. Finch, 137 Wn.2d at 839. To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require “that [the] burden of showing essential unfairness be sustained by him who claims such injustice”. Beck v. Washington, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. State v. Bryant, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998). “Remarks must be read in context.” State v. Pastrana, 94 Wn. App. 463, 479, 972 P.2d 557 (1999); citing State v. Greer, 62 Wn. App. 779, 792-93 815 P.2d 295 (1991). Improper remarks do not constitute prejudicial error unless the appellate court determines there is a substantial likelihood that the misconduct affected the jury's verdict. Finch, 137 Wn.2d at 839. The trial court is best suited to evaluate the prejudice of the statement. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). Even improper remarks are not grounds for reversal if they are a pertinent reply to defense acts and statements. State v. Brown, 132 Wn.2d 529, 566, 940 P.2d 546 (1997).

“Prosecutors may, however, argue an inference from the evidence, and prejudicial error will not be found unless it is “clear and unmistakable” that counsel is expressing a personal opinion.” State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). If the error could have been obviated by a curative instruction and the defendant failed to request one, reversal is not required. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Where the defendant does not request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill intentioned that it evinces an enduring and

resulting prejudice that could not have been neutralized by an admonition to the jury.” Hoffman, 116 Wn.2d at 93.

In this case defendant argues that the prosecutor made numerous improper statements during closing argument, and that the cumulative effect of these statements denied him a fair trial. (Appellant’s brief at pp. 31-36). However, by not requesting curative instructions at trial, defendant waived the alleged errors, and thereby failed to preserve the issue of prosecutorial misconduct for appeal. Even if the issue was preserved, defendant fails to meet his burden of showing conduct that was improper and prejudicial. The State will address each of the alleged improper statements in turn.

a. Comment on defendant’s lack of responsibility.

Defendant first contends that the prosecutor committed highly prejudicial misconduct in arguing the defendant was “trying to avoid responsibility” by going to trial. Defendant has taken the prosecutor’s comments out of context. The prosecutor’s theme in closing was defendant’s lack of responsibility, which included giving a false name to the police, involving himself with manufacturing methamphetamine, and exposing his child to “those things”. RP 419. The prosecutor concluded this remarks with the following: “And he continues to try to avoid responsibility during this trial. And this is where it ends, at the end of this

trial.” RP 419. Defendant objected to this statement. RP 419. After explaining circumstantial evidence to the jury, the prosecutor stated the following:

So you have to take the facts. You have like those listed and draw the reasonable conclusions. When you do do (sic) that, you will see that the pieces fit together. That the puzzle comes together and you will see that the defendant was behaving irresponsibly and that is now trying to avoid responsibility.”

RP 437. In rebuttal, the prosecutor concluded his argument by stating with the following:

So look at the connections, see the pattern here. Sometimes like with the elements, things are the way they look. Sometimes you can take that circumstantial evidence and you add it up and its is exactly what it looks like. The pattern here is that the defendant’s behaving irresponsibly. He is living this illegal life-style. He is trying to avoid responsibility and that’s where we are today.

RP 471. Defendant did not object to these two references to defendant’s attempts of avoiding responsibility. RP 438, 472. Contrary to defendant’s claim, the prosecutor did not argue to the jury that defendant was avoiding responsibility by going to trial. Rather, he argued that defendant was avoiding responsibility during trial. This was an obvious comment on the credibility of defendant’s witness, Mr. Larsen, who tried to convince the jury that “Little Dean” was responsible for the suspect items found in the trunk of defendant’s car.

Even if this comment was an improper comment on the defendant's right to trial, defendant did not request a curative instruction to obviate the potential prejudice. Moreover, defendant objected to the first comment and the judge sustained the objection. RP 419. The court instructed the jury that the attorney's remarks, statements and arguments are not evidence and must be disregarded if not supported by the evidence or the law as stated by the court. CP 77. The jury is presumed to follow the court's instructions. State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982).

b. Prosecutor's comment regarding defendant's role in manufacturing methamphetamine.

Defendant next claims that the prosecutor misstated the law when he told the jury that: "What the defense would have you believe is that Mr. Locke had nothing whatsoever to do with manufacturing. That's what you would have to believe to find him not guilty of manufacturing." RP 468.

This comment followed the prosecutor's discussion of the defendant's level of involvement in the crime of manufacturing methamphetamine. "Now, his level of involvement you may disagree on. But it doesn't matter. The evidence is clear that he was involved in at least some way and that's all it takes for him to be an accomplice and equally guilty. If he is involved in the actual making of meth, you believe that he is an

accomplice. If he is involved in transporting supplies, he is an accomplice. He is just getting rid of garbage, he is an accomplice.” RP 457. Viewed in context of the entire argument, this remark is not a misstatement of the law.

Manufacture includes “the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly.” RCW 69.50.101(p). CP 86. A person who knowingly plays a role in the manufacturing process can be guilty of manufacturing, even if someone else completes the process. State v. Davis, 117 Wn. App. 702, 708, 72 P.3d 1134 (2003). The jury was instructed on accomplice liability. CP 93. As such, the prosecutor’s comment that the jury would have to find defendant had nothing to do with manufacturing to acquit him was not a misstatement of the law.

c. Prosecutor’s comment regarding transporting garbage.

Next, defendant claims that the prosecutor misstated the law when he told the jury that the items associated with manufacturing methamphetamine that were found in the trunk of his car were not garbage and that “even if some how you do believe it’s garbage and that everything in that trunk was garbage, even if you some how buy that whole theory of the case, just getting rid of garbage is enough to make him an accomplice.” RP 470. This statement was incorrect. Knowingly

transporting methamphetamine lab waste would not constitute knowingly manufacturing methamphetamine. Though this statement improperly overstated accomplice liability in this case, it did not prejudice the defendant. Defendant objected to this comment and the court sustained the objection. RP 470. The jury in this case was instructed to disregard any remarks by the attorneys not supported by the law as stated by the court. CP 77. The jurors were instructed that they were to apply the law as given by the court. CP 77. Jurors are presumed to follow the instructions given to them by the court. State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982).

6. THE DEFENDANT RECEIVED A FAIR TRIAL
BECAUSE THERE WAS NOT CUMULATIVE
ERRORS OR EGREGIOUS CIRCUMSTANCES
THAT WARRANTED REVERSAL.

The cumulative error doctrine applies only where there have been several trial errors that alone may not be sufficient to justify reversal, but when combined denied the defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 928, 10 P.3d 390 (2000). Cumulative error does not turn on whether a certain number of errors occurred. Compare State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (three errors amounted to cumulative error and required reversal), with State v. Wall, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (three errors did not amount to cumulative error) and State v. Kinard, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979)

(same). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial. The defendant is not entitled to a new trial when the errors had little or no effect on the outcome of the trial. Greiff, 141 Wn.2d at 928.

The defendant in this appeal challenges the court's failure to give an unanimity instruction on the making a false statement offense (Count III), challenges the trial court's evidentiary ruling, and challenges certain remarks the prosecutor made during closing argument. On different grounds, the State conceded that the court's instructions to the jury on Count III were insufficient. Even if this court finds there were other errors, a complete review of the record shows they could not have constituted egregious circumstances that denied the defendant a fair trial.

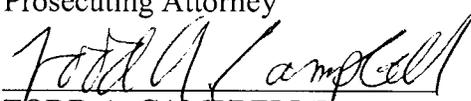
D. CONCLUSION.

For the foregoing reasons, the State request the court affirm defendant's convictions for unlawful manufacturing a controlled

substance-methamphetamine and unlawful possession of a controlled substance – methamphetamine.

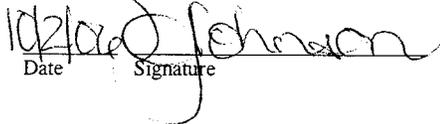
DATED: OCTOBER 2, 2006

GERALD A. HORNE
Pierce County
Prosecuting Attorney


TODD A. CAMPBELL
Deputy Prosecuting Attorney
WSB # 21457

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/2/06
Date Signature 

FILED
COURT OF APPEALS
DIVISION II
06 OCT -2 PM 3:26
STATE OF WASHINGTON
BY 