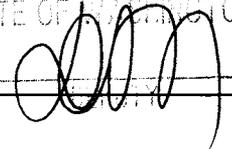


NO. 33812-2-II

FILED
COURT OF APPEALS
DIVISION II

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

05/12/06 PM 12:30
STATE OF WASHINGTON

BY: 

STATE OF WASHINGTON,

Respondent,

v.

ADA MOORE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 04-1-01801-1

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

JEREMY A. MORRIS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

ORIGINAL

SERVICE

Roger Hunko
Ste. E, 569 Division St.
Port Orchard, WA 98366

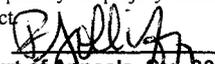
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED August 31, 2006, Port Orchard, WA 
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. COUNTERSTATEMENT OF THE ISSUES 1

II. STATEMENT OF THE CASE 2

 A. PROCEDURAL HISTORY 2

 B. FACTS 2

III. ARGUMENT 10

 A. SUBSTANTIAL EVIDENCE SUPPORTED THE TRIAL COURT’S RULING REGARDING THE ADMISSIBILITY OF MOORE’S STATEMENTS BECAUSE MOORE WAS ADVISED OF HER MIRANDA WARNINGS, INDICATED SHE UNDERSTOOD HER RIGHTS, AND WAIVED HER RIGHTS AND AGREED TO SPEAK WITH THE OFFICERS, AND BECAUSE MOORE HERSELF DID NOT CLAIM THAT HER STATEMENTS WERE COERCED, BUT RATHER DENIED MAKING THE STATEMENTS 10

 B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MOORE’S MOTION TO STRIKE THE TESTIMONY OF DETECTIVE BERNTSEN BASED ON THE CLAIM THAT BERNTSEN WAS NOT COMPETENT TO TESTIFY CONCERNING WHERE THE DRUGS WERE FOUND BECAUSE: (1) ALTHOUGH THE ASSISTING NCIS AGENTS MAY HAVE BEEN THE FIRST TO SEE THE ITEMS, DETECTIVE BERNTSEN WAS THE ONE WHO ACTUALLY RECOVERED AND PROCESSED THE SEIZED ITEMS; AND, (2) DETECTIVE BERNTSEN TESTIFIED THAT HE SAW THAT THE METHAMPHETAMINE WAS RECOVERED FROM THE MASTER BEDROOM. 15

C.	VIEWING ALL OF THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE AND ADMITTING THE TRUTH OF THE STATE'S EVIDENCE AND ALL INFERENCES THAT REASONABLY CAN BE DRAWN FROM THEM, A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT BECAUSE: (1) METHAMPHETAMINE AND METHAMPHETAMINE PIPES WERE RECOVERED IN MOORE'S BEDROOM AS WERE ITEMS ESTABLISHING DOMINION AND CONTROL; (2) MOORE ADMITTED SHE SOLD METHAMPHETAMINE TO SURVIVE; AND, (3) THE CONFIDENTIAL INFORMANT TESTIFIED THAT HE TWICE PURCHASED METHAMPHETAMINE FROM MOORE IN HER BEDROOM AND THAT MOORE USUALLY KEPT THE DRUGS IN A LITTLE BOX; A FACT THAT WAS CONSISTENT WITH WHAT WAS FOUND BY LAW ENFORCEMENT DURING THE SEARCH.....	20
D.	THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY BECAUSE THERE WAS NO PREJUDICIAL ERROR IN THE PRESENT CASE.....	22
IV.	CONCLUSION.....	23

TABLE OF AUTHORITIES
CASES

<i>State v. Braun</i> , 82 Wn. 2d 157, 509 P.2d 742 (1973).....	13
<i>State v. Broadway</i> , 133 Wn. 2d 118, 942 P.2d 363 (1997).....	12, 13
<i>State v. Chapman</i> , 78 Wn. 2d 160, 469 P.2d 883 (1970).....	21
<i>State v. Cushing</i> , 69 Wn. App. 388, 842 P.2d 1035 (1993).....	11
<i>State v. Delmarter</i> , 94 Wn. 2d 634, 618 P.2d 99 (1980).....	21
<i>State v. Green</i> , 94 Wn. 2d 216, 616 P.2d 628 (1980).....	21
<i>State v. Hodges</i> , 118 Wn. App. 668, 77 P.3d 375 (2003).....	23
<i>State v. Hughes</i> , 118 Wn. App. 713, 77 P.3d 681 (2003).....	12
<i>State v. Powell</i> , 126 Wn. 2d 244, 893 P.2d 615 (1995).....	15
<i>State v. Putnam</i> , 65 Wn. App. 606, 829 P.2d 787 (1992).....	13
<i>State v. Riley</i> , 19 Wn. App. 289, 576 P.2d 1311 (1978).....	12, 14
<i>State v. Salinas</i> , 119 Wn. 2d 192, 829 P.2d 1068 (1992).....	21

State v. Saunders,
120 Wn. App. 800, 86 P.3d 232 (2004).....23

State v. Tucker,
32 Wn. App. 83, 645 P.2d 711 (Div. 1, 1982).....12

In re the Pers. Restraint of Lord,
123 Wn. 2d 296, 868 P.2d 835 (1994).....23

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether substantial evidence supported the trial court's ruling regarding the admissibility of Moore's statements when Moore was advised of her Miranda warnings, indicated she understood her rights, and waived her rights and agreed to speak with the officers, and when Moore herself did not claim that her statements were coerced, but rather denied making the statements?

2. Whether the trial court abused its discretion in denying Moore's motion to strike the testimony of Detective Berntsen based on the claim that Berntsen was not competent to testify concerning where the drugs were found when: (1) although the assisting NCIS agents may have been the first to see the items, Detective Berntsen was the one who actually recovered and processed the seized items; and, (2) Detective Berntsen testified that he saw that the methamphetamine was recovered from the master bedroom?

3. Whether, viewing all of the evidence in the light most favorable to the State and admitting the truth of the State's evidence and all inferences that reasonably can be drawn from them, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt when: (1) methamphetamine and methamphetamine pipes were recovered in Moore's bedroom as were items establishing dominion and

control; (2) Moore admitted she sold methamphetamine to survive; and, (3) the confidential informant testified that he twice purchased methamphetamine from Moore in her bedroom and that Moore usually kept the drugs in a little box; a fact that was consistent with what was found by law enforcement during the search?

4. Whether the cumulative error doctrine applies when there was no prejudicial error in the present case?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Ada Moore was charged by amended information filed in Kitsap County Superior Court with two counts of delivery of methamphetamine, one count of possession of methamphetamine, and one count of possession of marijuana. CP 94-96. After a jury trial, Moore was convicted of possession of methamphetamine, and acquitted of the other charges. CP 156-57. Moore then received a standard range sentence. CP 160. This appeal followed.

B. FACTS

After a confidential informant had twice purchased methamphetamine from Moore, officers obtained a search warrant for Moore's residence. RP (8/24) 121-22, 215. During that search, methamphetamine, marijuana, and a firearm were found. RP (8/24) 127-28. Moore was arrested and Mirandized, and admitted to the officers that she sold methamphetamine to survive. RP

(8/22) 32-34.

A 3.5 hearing was held prior to trial. RP (8/22) 30. At the hearing, Randy Plumb with the Bremerton Police Department testified that he was one of the officers who executed a search warrant at the defendant's residence. RP (8/22) 31-32. Officer Plumb stated that the defendant was arrested and advised of her Miranda rights. RP (8/22) 32. The defendant indicated she understood these rights. RP (8/22) 33. She did not appear confused, and no threats or promises were made to get the defendant to waive her rights. RP (8/22) 33. The defendant agreed to answer the officers' questions, and stated that she sold methamphetamine to survive. RP (8/22) 33-34. She also gave the names of about five people that she sold methamphetamine to, and gave the names of a couple of people from whom she purchases methamphetamine. RP (8/22) 34. Plumb stated that after the arrest and Miranda, the defendant was given an offer to work with police. RP (8/22) 35-36.

Ms. Moore testified at the 3.5 hearing, and claimed that Officer Plumb told her "If you don't want to go to prison, you can work for me, you can work for me." RP (8/22) 41. Moore, however, denied that she ever said she sold methamphetamine to survive. RP (8/22) 44.

Although Moore claimed that Officer Plumb stated that she might go to jail if she didn't cooperate and that this demeaned her, she denied ever telling the officers that she sold meth to survive and denied giving names of people that had purchased methamphetamine from her. RP (8/22) 43-44. Moore was asked if she remembered Officer Plumb advising her of her Miranda rights, and Moore stated, "I don't remember hearing him read me my rights. And I won't say no, but you have to-". RP (8/22) 45-46. Moore never finished this thought. RP (8/22) 46.

The trial court found that Moore was read her Miranda warnings, indicated she understood the rights, and chose not to exercise them. RP (8/22) 59. No threats or promises made to get her to make statements. RP (8/22) 59. Written Findings of Fact and Conclusion of Law were entered. CP 94. Those findings and conclusion stated,

I.

That on November 16, 2004, Bremerton Police Department's Special Operation's Group (SOG) conducted a search, pursuant to a search warrant, of the defendant's home.

II.

That when SOG Detective Plum initially made contact with the defendant, the defendant asked Detective Plumb what was going on and why was she being arrested.

III.

That Detective Plumb placed the defendant under arrest.

IV.

That after the arrest was made, Detective Plumb read the defendant her Miranda rights. Detective Plumb testified that she understood those rights, she did not appear intoxicated, she did not invoke her rights, she did not ask to speak with an attorney and she agreed to answer any questions.

V.

That post-Miranda, the defendant told SOG Detectives that she “sells methamphetamine to survive.” She also told SOG Detectives that she has about five people she sells methamphetamine to and gave SOG some names. The defendant also told SOG detectives that there was a revolver in her bedroom.

VI.

That sometime after the Miranda warnings were read, Detective Plumb asked the defendant if she had ever been to jail. Detective Plumb also made an offer to the defendant to work with SOG in exchange for a favorable recommendation to the prosecutor’s office.

VII.

That drugs, other contraband, money and a firearm were found in the residence.

CONCLUSIONS OF LAW

I.

That the above-entitled Court has jurisdiction over the parties and the subject matter of this action.

II.

That the defendant made a knowing and intelligent waiver of her Miranda rights.

III.

That no threats or promises were made to the defendant to get her to waive those rights

IV.

That the defendant's statements, including: "I sell methamphetamine to survive" and "there is a revolver in the bedroom" are admissible.

CP 94-95.

At trial, Officer Plumb of the Bremerton Police Department Special Operations Group stated that a search warrant of Moore's residence was executed on November 16, 2004 at about 7:25 pm. RP (8/24) 85, 121-22.

The officers announced their presence and then entered the home. RP (8/24) 123. Ms. Moore, an adult male, and a child, were inside. RP (8/24) 123. A revolver, a tin box containing a powder substance, white powder, crystalline substance, at least one methamphetamine smoking pipe, a marijuana pipe and \$200 in cash were found. RP (8/24) 127-28.

Ms. Moore was arrested and advised of her Miranda rights. RP (8/24) 123. Ms. Moore asked why she was being arrested, and Plumb told her she was under arrest for delivery of a controlled substance, methamphetamine. RP (8/24) 125. During the conversation, Moore stated that she sold methamphetamine to survive. RP (8/24) 125. Detective Aaron Elton of the Bremerton Police Department also heard this comment. RP (8/24) 163, 168-69.

Detective Spencer Berntsen of the Bremerton Police Department was also present when the warrant was served on November 16. RP (8/24) 178,

181. Once the residence was secured, Detective Berntsen went back through the residence and photographed the entire residence. RP (8/24) 181.

Several NCIS agents assisted with the “perimeter surveillance,” and Detective Berntsen asked two of the NCIS agents to come in and help him with the search of the bedroom. RP (8/24) 197. Two agents then assisted in the search of the bedroom. RP (8/24) 182, 197. Detective Berntsen had instructed the NCIS agents that if they found something to not pick it up, but to just call him and he would photograph it and then process the item. RP (8/24) 197. Detective Berntsen was in the master bedroom with the two NCIS agents, and the agents would point something out, and then Berntsen would photograph the item, physically pick up the item from where it was located in the master bedroom, and then transport the item out of the room. RP (8/24) 182. Detective Berntsen stated that a silver box (Exhibit 3) was found in the master bedroom of the residence, and that he processed the box as described above. RP (8/24) 181-83. Detective Berntsen stated that he thought methamphetamine was recovered in the box, along with several items belonging to Moore (including a J.C. Penney’s card along and a group health card, along with another card with the name “JaPrea” and a plastic zip lock baggie). RP (8/24) 183-84. Papers belonging to Ms. Moore (including mail and medical records) were also recovered in the master bedroom. RP (8/24) 192. Two smoking devices were also recovered from the defendant’s

bedroom. RP (8/24) 188-89. In particular, pipes used to ingest methamphetamine were found in the master bedroom. RP (8/24) 189.

Detective Berntsen stated repeatedly that the procedure followed during the search was that the NCIS agents would locate an item and then he would then come and photograph and collect the item. *See for instance*, RP (8/24) 182, 185, 186, 192-93.

Detective Berntsen also testified that most of the recovered evidence came from the master bedroom, and the only things Berntsen remembered coming from another room were two marijuana “bongs.” RP (8/24) 196.

Moore moved to strike all of Berntsen’s testimony concerning where the items were found, and that there was no competent evidence that the items were found in the house. RP (8/24) 199-200. Defense counsel, however, tempered the argument somewhat, and stated,

Maybe there’s evidence I suppose from which reasonably to infer these items were found in the house. Beyond that, I don’t think there’s competent evidence in terms of where inside the house these items were found.

RP (8/24) 200. The trial court denied the motion, stating that,

The testimony is that Officer Berntsen was there, present in the house. He was in the master bedroom during part of the search. Part of the search he was called in there and photographed items, and I think the inference is they were not moved, and you can cross examine about that, if they appeared to be moved when he came in to photograph them.

That's proper cross-examination as to what his observations were. The motion to strike is denied.

RP (8/24) 201. The court also noted that Officer Berntsen saw the room before any work was done by NCIS. RP (8/24) 201.

Later, after the motion to strike was denied, Detective Berntsen testified that Exhibit 13 consisted of several baggies, one of which appeared to have methamphetamine in it. RP (8/24) 258. Detective Berntsen testified that this item was recovered from inside the master bedroom of Moore's house. RP (8/24) 258. When specifically asked about the methamphetamine, Detective Berntsen stated it was found in the master bedroom and when asked, "Did you see it," he replied, "Yes." RP (8/24) 257. Defense counsel later asked about the methamphetamine (Exhibit 13) on cross-examination, in the following exchange,

Q. You didn't see where that was found?

A. From inside the master bedroom, but again, I don't know exactly where inside the room.

RP (8/24) 258).

Mark Strongman, a forensic scientist with the Washington State Patrol Crime Laboratory, testified that Exhibit 13 (the sealed zip lock baggie) was tested, and the crystalline material inside contained methamphetamine. RP (8/25) 291-92, 296. Exhibit 13 was admitted without objection when offered. RP (8/25) 297.

Jay McNeal, a confidential informant who worked with the Bremerton Police Department on approximately twenty controlled buys, also testified. RP (8/24) 207-09. McNeal testified that Moore was a friend, and that he and his family had previously stayed with Moore for about a week. RP (8/24) 212-13. McNeal stated that a couple of weeks after they moved out, Ms. Moore's name came up as a person of interest. RP (8/24) 213-14. Mr. McNeal then did two controlled buys from Ms. Moore in which he purchased methamphetamine. RP (8/24) 215. The first buy took place in Ms. Moore's bedroom. RP (8/24) 222. When McNeal went to Moore's residence for the second buy, he again went to Ms. Moore's bedroom. RP (8/24) 226. McNeal also described that during the controlled buys Moore usually kept the drugs in a little box. RP (8/24) 231.

III. ARGUMENT

- A. **SUBSTANTIAL EVIDENCE SUPPORTED THE TRIAL COURT'S RULING REGARDING THE ADMISSIBILITY OF MOORE'S STATEMENTS BECAUSE MOORE WAS ADVISED OF HER MIRANDA WARNINGS, INDICATED SHE UNDERSTOOD HER RIGHTS, AND WAIVED HER RIGHTS AND AGREED TO SPEAK WITH THE OFFICERS, AND BECAUSE MOORE HERSELF DID NOT CLAIM THAT HER STATEMENTS WERE COERCED, BUT RATHER DENIED MAKING THE STATEMENTS.**

Moore argues that the trial court erred in failing to suppress Ms. Moore's admission, claiming it was involuntary and coerced. App.'s Br. at 6. This claim is without merit because substantial evidence supports the trial court's finding that Moore knowingly and intelligently waived her Miranda rights and that no threats or promises were made to Moore to get her to waive those rights.

The State has the burden of proving, with substantial evidence, that a defendant's confession to law enforcement is voluntary by a preponderance of the evidence. *State v. Cushing*, 69 Wn. App. 388, 393, 842 P.2d 1035 (1993). A trial court's finding of voluntariness will not be disturbed on appeal if it is supported by substantial evidence. *Cushing*, 69 Wn. App. at 393. Findings of fact entered following a CrR 3.5 hearing will be verities on appeal if unchallenged, and, if challenged, they are verities if supported by substantial evidence in the record. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Substantial evidence is that which persuades a fair-minded, rational person of the finding's truth. *State v. Hughes*, 118 Wn.App 713, 722, 77 P.3d 681 (2003) citing *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

The test for voluntariness is "whether the behavior of the State's law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined...." *State v. Tucker*, 32

Wn. App. 83, 85, 645 P.2d 711 (Div. 1, 1982). Even a promise of leniency standing alone does not automatically invalidate a confession; rather the totality of the circumstances must be closely examined to determine its impact. *State v. Riley*, 19 Wn. App. 289, 297-98, 576 P.2d 1311 (1978).

A confession is coerced if the defendant's will is overborne. *Broadaway*, 133 Wn.2d at 132. In deciding whether the confession was coerced, the court considers a defendant's physical condition and mental ability and the conduct of police, including any promises or misrepresentations made. *Broadaway*, 133 Wn.2d at 132. No single factor is dispositive. *See Broadaway*, 133 Wn.2d at 132. Thus, direct or implied promises do not necessarily render a confession involuntary. *See Broadaway*, 133 Wn.2d at 132. Moreover, even an officer's reference to potential leniency alone will not necessarily invalidate a confession. *State v. Riley*, 19 Wn. App. 289, 297, 576 P.2d 1311 (1978) (officer's references to potential leniency, if defendant confessed, did not constitute direct or implied promise that rendered confession involuntary), *review denied*, 89 Wn.2d 1014 (1978). Similarly, a promise to speak with the prosecutor on a defendant's behalf or a promise of leniency standing alone is not coercive. *State v. Putnam*, 65 Wn. App. 606, 613, 829 P.2d 787 (1992), *review denied*, 122 Wn.2d 1015, 863 P.2d 73 (1993).

When faced with a claim of coercion, the court examines whether the law enforcement officer's behavior overrode the petitioner's will to resist and brought about a confession that was not freely self-determined. *State v. Braun*, 82 Wn.2d 157, 509 P.2d 742 (1973).

Moore claims that the trial court erred in ruling that the statements in the present case were voluntarily made and admissible. App.'s Br. at 10-11. Moore claims that this position is supported by the fact that there was a "display of weapons combined with threats and promises of leniency" if Moore cooperated. App.'s Br. at 10. While there was testimony that weapons were likely drawn during the entry of the house, there was no testimony, however, that weapons were drawn while the officers spoke with Moore after Mirandizing her. *See, for instance*, RP (8/22) 35, 38-46.

As outlined above, direct or implied promises do not necessarily render a confession involuntary. *See Broadaway*, 133 Wn.2d at 132. In addition, an officer's reference to potential leniency alone will not necessarily invalidate a confession. *Riley*, 19 Wn. App. at 297. The trial court was able to observe the testimony of Detective Berntsen and Moore, and judge the credibility of each. In this case, the trial court specifically found that Moore was advised of her *Miranda* warnings and verbally acknowledged her understanding of those rights, and agreed to answer the officer's questions. CP 95. Moore has not assigned error to the trial court's findings in this

regard. The record, therefore, shows that the trial court's conclusion that Moore knowingly and intelligently waived her rights was supported by substantial evidence.

In addition, although Moore testified at the 3.5 hearing, she never claimed that the officer's actions overcame her will. As Moore herself points out, "the critical inquiry is whether the officer's actions overcame the defendant's will to resist." App.'s Br. at 7, *citing State v. Braun*, 82 Wn.2d 157, 161-62, 506 P.2d 742 (1973). At the 3.5 hearing, Moore denied ever telling the officers that she sold meth to survive and denied giving names of people that sold methamphetamine to. RP (8/22) 43-44. The record, therefore, does not contain any testimony that the statements at issue were coerced or that Moore's will was somehow overcome. The trial court, therefore, did not abuse its discretion in admitting Moore's statements.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MOORE'S MOTION TO STRIKE THE TESTIMONY OF DETECTIVE BERNTSEN BASED ON THE CLAIM THAT BERNTSEN WAS NOT COMPETENT TO TESTIFY CONCERNING WHERE THE DRUGS WERE FOUND BECAUSE: (1) ALTHOUGH THE ASSISTING NCIS AGENTS MAY HAVE BEEN THE FIRST TO SEE THE ITEMS, DETECTIVE BERNTSEN WAS THE ONE WHO ACTUALLY RECOVERED AND PROCESSED THE SEIZED ITEMS; AND, (2) DETECTIVE BERNTSEN TESTIFIED THAT HE SAW THAT THE METHAMPHETAMINE WAS RECOVERED FROM THE MASTER BEDROOM.

Moore next claims that her Sixth Amendment right to confrontation was violated because the two NCIS agents who assisted with the search were not called to testify. App.'s Br. at 14. This claim is without merit because no hearsay statements from the NCIS agents were actually introduced at trial and because Detective Berntsen, who did testify at trial, was the one charged with actually recovering the evidence and he personally saw that the methamphetamine was found in Moore's bedroom.

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Abuse of discretion exists if a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons. *Powell*, 126 Wn.2d at 258, 893 P.2d 615.

Moore's argument is that her Sixth Amendment rights were violated because the NCIS agents who located the items did not testify. App.'s Br. at 12-14, *citing Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 1363, 1369, 158 L. Ed. 2d 177 (2004). Moore argument appears to be that the NCIS agents' acts of pointing to the evidence (which Officer Berntsen would then collect) was "testimonial." Even assuming for the sake of argument that the NCIS agents physical act of pointing to evidence was testimonial, Officer Berntsen never testified to the exact location in the bedroom where the evidence was recovered from. Thus, the "testimonial" act itself was never introduced, as the exact location that the agents may have pointed to was not discussed.

While Moore testified that the NCIS agents found the evidence in the bedroom, Detective Berntsen was able to testify to that fact based on his own observations that this agents were in the bedroom, and that he himself recovered the evidence from the bedroom. RP (8/24) 182. Furthermore, Detective Berntsen testified that he had instructed the agents to not pick up anything they found, but to notify him and that he would then process the evidence. RP (8/24) 197.

In addition, Detective Berntsen explained the process that was used in collecting the evidence. For instance, when asked if he recovered any evidence, Detective Berntsen stated,

Yes. I was in the master bedroom. There were two NCIS agents there that were assisting with the search. They at times would point to the box, I would photograph it, then I would physically pick up the item from where it was located in the master bedroom, transport it out. I believe we were processing evidence in the living room and somebody else would document it on the property sheet form.

RP (8/24) 182. Detective Berntsen further testified that that he thought methamphetamine was recovered in the box. RP (8/24) 183-84.

Detective Berntsen also stated that the above-described procedure for the collection of evidence was used repeatedly, that is, that the agents would find an item, and then Detective Berntsen would come and photograph and collect the item. *See for instance*, RP (8/24) 182, 185, 186, 192-93. When specifically asked about the methamphetamine, Detective Berntsen stated it was found in the master bedroom and when asked, "Did you see it," he replied, "Yes." RP (8/24) 257. Defense counsel later asked about the methamphetamine (Exhibit 13) on cross-examination, in the following exchange,

Q. You didn't see where that was found?

A. From inside the master bedroom, but again, I don't know exactly where inside the room.

RP (8/24) 258.

A trial, Moore's motion to strike all of Berntsen's testimony was based on the claim that there was no competent evidence that the items were found in the house. RP (8/24) 199-200. The defense counsel himself,

however, tempered the argument somewhat, and stated,

Maybe there's evidence I suppose from which reasonably to infer these items were found in the house. Beyond that, I don't think there's competent evidence in terms of where inside the house these items were found.

RP (8/24) 200. The trial court denied the motion, stating that,

The testimony is that Officer Berntsen was there, present in the house. He was in the master bedroom during part of the search. Part of the search he was called in there and photographed items, and I think the inference is they were not moved, and you can cross examine about that, if they appeared to be moved when he came in to photograph them. That's proper cross-examination as to what his observations were. The motion to strike is denied.

RP (8/24) 201. The court also noted that Officer Berntsen saw the room before any work was done by NCIS. RP (8/24) 201.

The actual testimony was that Detective Berntsen asked the two NCIS agents to assist in the search of the bedroom, and instructed them not to pick anything up. Furthermore, Detective Berntsen explained that the procedure used was that he NCIS agents would find an item and that he would then photograph and collect the item. Finally, Detective Berntsen stated he saw the methamphetamine and saw that it was found in the master bedroom. RP (8/24) 257-58.

While the NCIS agents may have been the first to actually see the seized items, Detective Berntsen recovered the items. The defense objection, therefore, properly went to weight, not admissibility. Furthermore, Detective Berntsen did not ever testify concerning what exact location the NCIS agents may have pointed to. Thus, no hearsay was actually admitted.

The outcome, perhaps, would be different if the NCIS agents had actually seized the items and brought them to the living room for processing. Under such a scenario, testimony from Detective Berntsen concerning where the items were located would potentially have been based on hearsay. In the present case, however, Detective Berntsen was the one who recovered the items and transported them out of the bedroom. He was, therefore, competent to testify about where the items were located regardless of the fact that someone else may have been the first person to see the items in the bedroom. As Detective Berntsen recovered the items from the bedroom and saw that the methamphetamine was recovered from the master bedroom, he was competent to testify that the methamphetamine was recovered from the master bedroom.

For all of these reasons, the trial court did not abuse its discretion in denying the defense motion to strike the testimony of Detective Berntsen.

C. VIEWING ALL OF THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE AND ADMITTING THE TRUTH OF THE STATE'S EVIDENCE AND ALL INFERENCES THAT REASONABLY CAN BE DRAWN FROM THEM, A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT BECAUSE: (1) METHAMPHETAMINE AND METHAMPHETAMINE PIPES WERE RECOVERED IN MOORE'S BEDROOM AS WERE ITEMS ESTABLISHING DOMINION AND CONTROL; (2) MOORE ADMITTED SHE SOLD METHAMPHETAMINE TO SURVIVE; AND, (3) THE CONFIDENTIAL INFORMANT TESTIFIED THAT HE TWICE PURCHASED METHAMPHETAMINE FROM MOORE IN HER BEDROOM AND THAT MOORE USUALLY KEPT THE DRUGS IN A LITTLE BOX; A FACT THAT WAS CONSISTENT WITH WHAT WAS FOUND BY LAW ENFORCEMENT DURING THE SEARCH.

Moore next claims that there was insufficient evidence to convict Moore of possession of a controlled substance. App.'s Br. at 14. This claim is without merit because, viewing all of the evidence in the light most favorable to the State and admitting the truth of the State's evidence and all inferences that reasonably can be drawn from them, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

In reviewing the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, any

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). A claim of sufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn from them. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A reviewing court is to defer to the trier of fact on matters of witness credibility. *State v. Chapman*, 78 Wn.2d 160, 164, 469 P.2d 883 (1970).

In the present case, extensive evidence supports Moore's conviction. As outlined above, Officer Plumb stated that "a tin box containing a powder substance, white powder, crystalline substance," was recovered. RP (8/24) 127-28. In addition, Defendant Berntsen testified that a silver box (Exhibit 3) and methamphetamine (Exhibit 13) were recovered from Moore's bedroom. RP (8/24) 181-83, 258. Mail and other cards and paperwork belonging to Moore were also found in the bedroom and from the small box that Berntsen stated contained methamphetamine. RP (8/24) 183-84, 192, 258. Additionally, pipes used to ingest methamphetamine were found in the bedroom. RP (8/24) 189. Detective Berntsen also testified that the only items recovered from a location other than the master bedroom were two marijuana "bongs" recovered from another room. RP (8/24) 196.

Mark Strongman, the forensic scientist, testified that Exhibit 13, contained methamphetamine. RP (8/25) 291-92, 296. When Moore was interviewed by the officers, she stated that she sold methamphetamine to survive. RP (8/24) 125, 168-69. Finally, the confidential informant testified that twice purchased methamphetamine from Moore, and that both transactions took place in the bedroom, and further testified that Moore usually kept the drugs in a little box. RP (8/24) 222, 226, 231.

Viewing all of this the evidence in the light most favorable to the State, and admitting the truth of the State's evidence and all inferences that reasonably can be drawn from them, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

D. THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY BECAUSE THERE WAS NO PREJUDICIAL ERROR IN THE PRESENT CASE.

Moore next claims that cumulative error deprived her of a fair trial. App.'s Br. at 16. This claim is without merit because, in the present case, there was no prejudicial error that deprived Moore of a fair trial; thus, the cumulative error doctrine does not apply.

If several errors occurred at the trial court level, none of which alone warrants reversal, but cumulatively the errors denied the defendant a fair trial,

then reversal is proper. *State v. Hodges*, 118 Wn. App. 668, 673, 77 P.3d 375 (2003). The defendant bears the burden of proving cumulative error. *See In re the Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). The defendant's burden includes the requirement that he or she prove an accumulation of error of sufficient magnitude that retrial is necessary. *Lord*, 123 Wn.2d at 332. Similarly, a defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair. *State v. Saunders*, 120 Wn. App. 800, 826, 86 P.3d 232 (2004). But absent prejudicial error, there can be no cumulative error that deprived the defendant of a fair trial. *Saunders*, 120 Wn. App. at 826.

In the present case, there was no prejudicial error that deprived Moore of a fair trial; thus, the cumulative error doctrine does not apply.

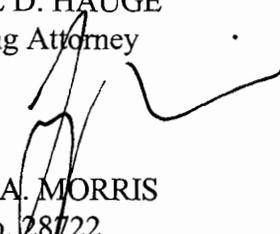
IV. CONCLUSION

For the foregoing reasons, Moore's conviction and sentence should be affirmed.

DATED August 31, 2006.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



JEREMY A. MORRIS
WSBA No. 28722
Deputy Prosecuting Attorney

DOCUMENT1