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COURT OF APPEALS

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

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL ELMORE, APPELLANT

Appeal from the Superior Court of Pierce County  
The Honorable John A. McCarthy

No. 05-1-01844-7

**BRIEF OF RESPONDENT**

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

1. Was the defendant entitled to a unanimity instruction to determine if he possessed pseudoephedrine or ephedrine when both terms are defined together in RCW 69.50.440(1), which is a definitional statute that does not create an alternative means of committing the crime?

2. Has the defendant waived any claim on the basis of corpus delicti by failing to raise such claim below, and alternatively, if this court addresses a corpus delicti claim, is evidence that the defendant possessed a large quantity of pseudoephedrine and multiple other precursor items sufficient to demonstrate a prima facie case for purposes of corpus delicti of possession of pseudoephedrine with the intent to manufacture methamphetamine?

3. Was the defendant entitled to a unanimity instruction to determine if he possessed pseudoephedrine or ephedrine when both terms are defined together in RCW 69.50.440(1), which is a definitional statute that does not create an alternative means of committing the crime?

B. STATEMENT OF THE CASE.

1. Procedure

On April 18, 2005, MICHAEL DUANE ELMORE, hereinafter “defendant,” was charged in Pierce County Superior Court Cause Number 05-1-01844-7 with unlawful possession of pseudoephedrine and/or ephedrine with the intent to manufacture methamphetamine. CP 1-3. An amended information was filed on May 24, 2005, adding a count of unlawful manufacturing of methamphetamine. CP 4-5.

On November 1, 2005, both parties appeared for pretrial motions. RP 3. A CrR 3.5 hearing was conducted, and the court concluded that the defendant’s statements were admissible. RP 32. The parties then proceeded to trial. At the conclusion of the State’s case, the defendant moved for a directed verdict on count II, unlawful manufacturing of methamphetamine, on the basis that the State did not present sufficient evidence to prove the charge of unlawful manufacturing of methamphetamine. CP 11-19; RP 220-241. The court found that the evidence presented, taken in the light most favorable to the State, supported the charge of unlawful possession of pseudoephedrine, not that he was manufacturing methamphetamine. RP 232. The court denied the defendant’s motion for a directed verdict on count I, unlawful possession of pseudoephedrine and/or ephedrine with the intent to manufacture methamphetamine. RP 230-231.

Defendant objected to jury instruction number nine. RP 290.

Defendant's objection to jury instruction number nine was that it was not relevant in the absence of the manufacturing charge. Id. Defense counsel did state that the instruction was accurate. Id. Defendant objected to jury instruction numbers 10 and 12. RP 292-293. The defendant objected to the "to convict" instruction, number 13, arguing that it shifted the intent element from the defendant to an accomplice. RP 293-298. The defendant did not object to the language in the instruction that stated that the defendant or an accomplice possessed ephedrine or pseudoephedrine. CP 29-45; RP 303.

On November 28, 2005, the defendant was convicted of unlawful possession of pseudoephedrine and/or ephedrine with the intent to manufacture methamphetamine. RP 343-351. On January 20, 2006, the defendant appeared for sentencing. IRP<sup>1</sup> 2. At sentencing, the defendant made a motion for a judgment notwithstanding the verdict, based on State v. Whalen, 131 Wn. App. 58, 126 P.3d 55 (2005), and corpus delicti. CP 46-49; IRP 2-4. The court denied the defendant's motion and made the following ruling:

My role in this motion is not to substitute my judgment for that of the jury. But in looking at the evidence, the State produced evidence of, I believe it was, six boxes of

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<sup>1</sup> RP refers to the verbatim report of proceedings for volumes 1-3. IRP refers to the verbatim report of proceedings for the sentencing hearing, which occurred on January 20, 2006.

pseudoephedrine found in the possession of these two people.

They produced evidence not only of the Red Devil lye and rubbing alcohol, coffee filters and propane cylinder within the vehicle, there was also evidence of discarded blister packs.

And those, while certainly could be used in the manufacturing process, the State presented evidence that indeed those were items that are used in the manufacturing process.

So it was up to the jury to determine the reasonable inferences from that evidence, consider defendant's position that there was legitimate nonmanufacturing uses for those items. Those arguments were made, and the jury reached the conclusion that the defendant is guilty of possession with the intent to manufacture; that there was sufficient evidence for that decision, so I am going to deny the motion.

IRP 6.

The defendant was sentenced to 110 months of confinement. CP 53-65. This timely appeal follows. CP 66.

2. Facts adduced at trial

On April 15, 2005, the Pierce County Sheriff's Department conducted a "store op." RP 49. A "store op" is an operation in which deputies are stationed at local businesses that sell precursor chemicals, such as Red Devil lye, toluene, acetone, Coleman fuel, Heet, and isopropyl alcohol, or stores that sell cold medications containing pseudoephedrine. RP 44. During a "store op" deputies are positioned in the store, and

additional units in the parking lot. Id. The April 15<sup>th</sup> “store op” was conducted at a Target Store located at 23<sup>rd</sup> and Union in Tacoma. RP 49, 129. Deputy Jones, Deputy Banach, Detective-Sergeant Dewey, Detective Loeffelholz, Deputy Marquiss, Deputy Messineo, Deputy Purviance, and Sergeant Redding all participated in the April 15<sup>th</sup> operation. RP 50-51.

Deputy Jones was located in the Target parking lot. RP 50.

During the operation, the investigation focused on the defendant. RP 51. Detective Loeffelholz was in the security office at the Target store when he observed a female, later identified as Lana Martin, enter the store and purchase two boxes of Target brand generic pseudoephedrine. RP 132. Martin exited the store and entered the white pickup truck. RP 134. Using the Target surveillance equipment, Detective Loeffelholz observed the defendant purchase two boxes of Target brand pseudoephedrine. RP 136-137.

Detective Loeffelholz continued the surveillance of the individuals they were following at the Fred Meyer store. RP 143. The male went to the pharmacy counter of the store and was able to see through the shopping bag that he had purchased Red Devil lye. RP 143-144. Red Devil lye is used in the manufacturing process to make anhydrous ammonia and also in the gassing off process. RP 79. Red Devil lye, specifically, is the most common brand that is used in the manufacturing process because it does

not have a lot of other chemicals mixed in it, unlike Drain-o. RP 158. Detective Loeffelholz also saw a purchase of what he later learned was a pseudoephedrine product. RP 144. According to the receipt which was obtained from the Fred Meyer store, the defendant had purchased Red Devil lye, dog food, and pseudoephedrine. RP 145.

Based on Detective Loeffelholz's observations from inside the Target store, Deputy Jones determined that a particular vehicle would be followed. RP 51, 56. The vehicle that was to be followed was a Toyota pickup truck driven by the defendant. RP 57. In the bed of the truck Deputy Jones observed two propane cylinders. RP 58. Propane cylinders are used in the manufacture of anhydrous ammonia and/or the storage of anhydrous ammonia in the manufacturing of methamphetamine. Id. Propane cylinders are observed in a manufacturing context in approximately 90% of cases. RP 59. While Deputy Jones was following the defendant, he observed that the defendant made "heat checks," which are actions to see if police are following. RP 60. "Heat checks" are very common when people are purchasing pseudoephedrine products. RP 61.

The defendant and Martin drove to the Burger Barn at 38<sup>th</sup> and Thompson in Tacoma. RP 61. The defendant and Martin purchased some food items and Martin was observed throwing a brown plastic bag into a nearby trash can. RP 62. Minutes later, the defendant was observed

throwing away a white bag in the same trash can. Id. The discarded bags were retrieved by Detective Purviance. RP 167.

In the brown bag, Detective Purviance recovered ten empty boxes of nasal decongestants containing pseudoephedrine in various brands and numerous empty blister packs. RP 168. There were also two store receipts from the brown bag. RP 168. The first receipt, dated April 15, 2005, was from Safeway for the purchase of one container of Red Devil lye and pseudoephedrine. RP 169. The second receipt, also dated April 15, 2005, was from Target for the purchase of two boxes of pseudoephedrine. Id. The white bag contained garbage that appeared to be from the meal the defendant and Martin had at the Burger Barn. RP 169.

The defendant was followed next to a Walgreen's store located at 38<sup>th</sup> and Pacific. RP 63. Inside the store, Deputy Shaffer observed the defendant purchase what appeared to be isopropyl alcohol and another smaller item. RP 183-186. Isopropyl alcohol is a precursor that is used in the extraction process—separating the ephedrine from the sugar and starches. RP 186. Deputy Shaffer later confirmed with the clerk that the defendant had also purchased a pseudoephedrine product. RP 186. After the defendant and Martin were stopped and contacted, Deputy Shaffer asked Martin why she had been purchasing pills. RP 189. Martin stated

that the pseudoephedrine pills were going to be taken to an individual in Gig Harbor who was going to make the methamphetamine. RP 189.

Because the defendant and Martin had been observed each purchasing four boxes of pseudoephedrine products when only three are permitted, Deputy Jones advised the other units that he would be stopping the defendant and taking him into custody. RP 66. Deputy Jones advised the defendant of his Constitutional Rights, which the defendant indicated he understood. RP 67. The defendant told Deputy Jones that he had purchased “some dog food and some other stuff.” RP 68. When asked about the “other stuff,” the defendant stated that he had gotten some cold medication. Id. The defendant stated that he had gone to Safeway. Id. The defendant did not mention any of the stores he had been to when he was being followed by the deputies. Id. When Deputy Jones told the defendant that he had been following him, the defendant lowered his head and stated, “I’m already going down for this.” RP 69. The defendant denied cooking methamphetamine, but indicated that he knew what the pills were going to be used for. RP 70. Lana Martin told Deputy Jones that she had helped the defendant pop the pills. RP 72.

Deputy Jones and Deputy Banach executed a search warrant on the defendant’s vehicle. RP 73-74. Inside the vehicle the following items were recovered:

- (1) a Fred Meyers plastic shopping bag containing one box of Kroeger brand 12 decongestant 12 caps 120 milligrams of pseudoephedrine, and receipt for the same dated April 15, 2005, at 2:49 p.m.;
- (2) two full containers of Red Devil lye;
- (3) another Fred Meyers bag containing a receipt for two containers of Red Devil lye and dog food, dated April 15, 2005;
- (4) a Fred Meyers pharmaceutical bag with a receipt for pseudoephedrine, dated April 15, 2005;
- (5) a box of Kroger brand 12 hour decongestant containing 120 milligrams of pseudoephedrine;
- (6) another container of Red Devil lye in the center console;
- (7) a Walgreen's shopping bag containing a full container of isopropyl alcohol and a box of Walgreen's Wal-phed, which contained 120 milligrams of pseudoephedrine;
- (8) a Fred Meyer bag containing two boxes of Kroger brand pseudoephedrine pills and a receipt dated April 15, 2005;
- (9) a Kmart bag containing an opened bag of snack bags;
- (10) a Red Apple Market shopping bag containing an unopened package of 500<sup>2</sup> coffee filters;
- (11) a Walgreen's shopping bag containing a 5.82 ounce bottle of butane fuel;

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<sup>2</sup> The appellant states that 50 coffee filters were recovered. Brief of Appellant at 7. The testimony from Deputy Jones, however, was that 500 coffee filters were recovered. RP 90.

(12) a Walgreen's shopping bag containing a receipt from Walgreen's for one box of Wal-Act tabs dated April 15, 2005;

(13) a Safeway receipt for suphedrine, the Safeway brand pseudoephedrine pills;

(14) a Walgreen's receipt for "Wal-phed 20s" dated April 15, 2005;

(15) a Kmart receipt for "nasal" dated April 15, 2005;

(16) two boxes of pseudoephedrine pills wrapped in newspaper;

(17) a Longs Drugstore bag containing a receipt for 12 hour pseudoephedrine dated April 15, 2005.

RP 78-104.

Based on the evidence recovered, Deputy Jones formed the conclusion that the items were indicative of individuals either manufacturing methamphetamine or assisting in the manufacture of methamphetamine. RP 104.

Coffee filters are used in the manufacturing process to separate the binding material out during the extraction phase. RP 91. They are very common, and are used to filter the sludge material, and also in the final state to catch the methamphetamine crystals. RP 159. Ziploc bags are common because they are used to store the finished product after the methamphetamine is cooked. RP 89-90. Cold medicine containing pseudoephedrine is needed for the extraction phase of methamphetamine

manufacture. RP 154. There is not a required number of pseudoephedrine tablets required to make methamphetamine, and can be made with as little as two boxes. RP 160.

Lana Martin testified that on April 15, 2005, the defendant was giving her a ride home. RP 192. She stated that the defendant had given her money to purchase pseudoephedrine pills and showed her an advertisement for the pills. RP 193. The pills cost .99¢, and the defendant had given Martin \$20.00. RP 193. He told Martin she could keep the change. Id. When the defendant and Martin stopped to eat, the defendant had asked her to throw away a bag of garbage that was behind the seat. RP 194. The bag was tied up. Id.

The defendant called Jeff Pentz, a former employer, who knew that the defendant drank coffee and used a propane heater. RP 247-248. Pentz also testified that the defendant was a customer at his scuba shop, that the defendant had taken scuba lessons, and that scuba divers use pseudoephedrine to clear their sinuses. RP 253-256. The defendant also called Chuck Blair, a former employer of the defendant's, who stated that the defendant drank coffee. RP 263. Finally, the defendant called Manny Cruz, who ran a housing program in which the defendant participated. RP RP 271. Cruz testified that the defendant once told him he had purchased

a hand snake to unclog a toilet. RP 272. Cruz was not aware of the defendant using lye to address plumbing problems. RP 273.

C. ARGUMENT.

1. A RATIONAL TRIER OF FACT COULD HAVE FOUND BEYOND A REASONABLE DOUBT THAT DEFENDANT POSSESSED PSEUDOEPHEDRINE WITH THE INTENT TO MANUFACTURE METHAMPHETAMINE.

A person violates RCW 69.50.440 if he or she unlawfully possesses pseudoephedrine with the intent to manufacture methamphetamine. Here, defendant makes several claims. First, he argues that, without his admissions, the evidence failed to establish the corpus delicti with respect to his the intent to manufacture methamphetamine. Brief of Appellant at 13. Second, he claims that even with his admissions, the evidence of his intent to manufacture methamphetamine is insufficient to support his conviction. Id. at 9. However, because the broad definition of “manufacture” includes the result defendant intended, both claims fail.

- a. A person intends to “manufacture” methamphetamine even if that person only intends to play a limited role in the manufacturing process.

RCW 69.50.440 requires proof of the following elements to sustain a conviction for possession of pseudoephedrine with intent to manufacture

methamphetamine: (1) defendant possessed pseudoephedrine, and (2) he did so with the intent to manufacture methamphetamine.<sup>3</sup> CP 29-45 (Instruction No. 13). Here, the court instructed the jury that “[a] person acts with intent ... when acting with the objective or purpose to accomplish a result which constitute a crime.” CP 29-45 (Instruction No. 9). The Court also instructed the jury that these elements could be proven by circumstantial evidence, which is “evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience.” CP 29-45 (Instruction No. 3).

RCW 69.50.101(p) defines manufacturing as “the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly.” In cases addressing the manufacturing of methamphetamine, this Court has found that someone who knowingly plays even a limited role in the manufacturing process is guilty, “even if someone else completes the process.” See, e.g., State v. Keena, 121 Wn. App. 143, 148, 87 P.3d 1197 (2004).

In light of the broad definition of “manufacture,” RCW 69.50.440 contemplates that a defendant acts with the purpose of indirectly preparing methamphetamine by having one of its ingredients delivered to a third

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<sup>3</sup> RCW 69.50.440 provides: “It is unlawful for any person to possess ephedrine or any of its salts or isomers or salts of isomers, pseudoephedrine or any of its salts or isomers or salts of isomers, pressurized ammonia gas, or pressurized ammonia gas solution with intent to manufacture methamphetamine.”

party for processing. That statute asks only whether the defendant acted with the objective of accomplishing a specific result: playing at least “a limited role” in the preparation of methamphetamine. A person who intends to procure and deliver items necessary for the methamphetamine manufacturing process intends to play at least a “limited role” in the indirect preparation of pseudoephedrine for use in creating methamphetamine. While the statute requires that defendant intend to play some role, it does not require that defendant intend to be the person doing *all* of the manufacturing. See Keena, 121 Wn. App. at 148.

- b. The State produced sufficient evidence for a rational trier of fact to conclude that defendant acted with the objective of playing at least a limited role in the preparation of pseudoephedrine for methamphetamine production.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). This evidence is sufficient if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt after viewing it in the light most favorable to the prosecution. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993);

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987). The reviewing court draws all inferences from the evidence in favor of the State and most strongly against the defendant. Joy, 121 Wn.2d at 339. Thus, appellate courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). Circumstantial evidence need not be inconsistent with any hypothesis of innocence. State v. Zunker, 112 Wn. App. 130, 135, 48 P.3d 344 (2002) (citing State v. Gosby, 85 Wn.2d 758, 764-65, 539 P.2d 680 (1975)). It need be sufficient only to convince a reasonable jury of guilt beyond a reasonable doubt. Id.

Here, defendant claims the evidence is insufficient to show that he intended to manufacture methamphetamine either himself or with an accomplice. As noted, RCW 69.50.440 only required circumstantial evidence that his objective was to play a limited role in the indirect preparation of pseudoephedrine for use in creating methamphetamine. Here, the testimony was sufficient for a reasonable jury to find that the

defendant possessed pseudoephedrine with the intent to manufacture methamphetamine.

In State v. Moles, 130 Wn. App. 461, 123 P.3d 132 (2005), defendants had purchased the legal maximum limit of pseudoephedrine from two different stores and were in a stolen vehicle. Id. at 462. The defendants were stopped by law enforcement, who searched the vehicle and found empty blister packs and approximately 440 loose pills. Id. at 464. A search of the defendants revealed receipts for the purchase of pseudoephedrine, powder, and several coffee filters that tested positive for methamphetamine. Id. at 462-465. The court found that there was sufficient evidence to support the defendants' convictions for unlawful possession of pseudoephedrine and/or ephedrine with the intent to manufacture methamphetamine. Id. at 466. The court stated, "the fact that so many pills had been removed from the blister packs leads to the only plausible inference: that the defendants were in the process of preparing the pseudoephedrine for the first stage of the manufacturing process." Id. Moreover, courts have found sufficient evidence where police find several items used to make methamphetamine, but find no actual methamphetamine is present. Keena, 121 Wn. App. 143 at 148 (citing State v. Todd, 101 Wn. App. 945, 6 P.3d 86 (2000), overruled in part on other grounds by State v. Rangel-Reyes, 119 Wn. App. 494, 81 P.3d 157 (2003)).

The evidence presented in this case is similar to Moles, except that the defendant in the present case had even more precursor items that are used in the manufacturing process. Testimony was presented that the defendant possessed or purchased multiple items that are used in the manufacture of methamphetamine, including multiple containers of Red Devil lye, a full container of isopropyl alcohol, snack bags, 500 coffee filters, propane tanks, and butane fuel. RP 78-104. The defendant and his accomplice, Martin, were observed purchasing multiple packages of pseudoephedrine. Six boxes of pseudoephedrine were found in the defendant's vehicle. Id. Empty blister packages with the pills popped out and missing were found in the garbage can. RP 168. There were five different receipts from five different stores indicating the purchase of pseudoephedrine. RP 78-104. The defendant and Martin purchased six boxes of pseudoephedrine when they were being followed by law enforcement. RP 132-137, 143-145, 183-186.

Moreover, the defendant purchased the items in a very suspicious manner, by driving to different stores and conducting "heat checks" in order to avoid detection. The defendant gave Martin money to purchase pseudoephedrine and stated to police that he was "already going down for this." RP 69. Additionally, Martin stated that she had removed pills from the packaging, and that the pills were going to be used to make

methamphetamine. RP 72, 189. Moreover, two boxes of pseudoephedrine were concealed in a newspaper in the defendant's vehicle, which is not normal storage for a legitimate purpose. RP 99.

The defendant asserts that all of the items recovered from his vehicle had legitimate uses, and therefore the evidence was insufficient for the jury to find him guilty. Brief of Appellant at 11-12. The defendant's argument, however, does not take the evidence in the light most favorable to the State. While it is possible that there is a plausible explanation for the defendant to have lye, or to have isopropyl alcohol, when examined collectively the defendant's explanations for each and every item is not credible, and the jury clearly did not find it credible. The defendant argued to the jury, through the testimony of Jeff Pentz, that the defendant took diving lessons and that divers use pseudoephedrine to clear their sinuses. RP 248. Pentz, however, never dove with the defendant. RP 253. Moreover, Pentz's testimony would not account for the defendant driving to multiple stores on the same day to purchase multiple boxes of pseudoephedrine, including pseudoephedrine boxes concealed in a newspaper. Pentz and Chuck Blair also testified that the defendant drank coffee, apparently in an attempt to explain why the defendant had 500 coffee filters. RP 248, 263. Perhaps if the defendant had possessed only the coffee filters such explanation would be plausible, but when

considered with all of the other evidence recovered such explanation does not make sense. Finally, Manny Cruz testified that on one occasion previously the defendant had purchased a hand snake to unclog a drain, which the defendant now asserts is an explanation for his possession of three bottles of Red Devil lye. RP 272. Cruz was not aware of the defendant buying lye to address any plumbing problems. RP 273.

While the defendant offered potential explanations for the presence of the evidence recovered from his vehicle, the jury clearly found such explanations not credible. When taken in the light most favorable to the State, the evidence indicates that the defendant was intent to manufacture methamphetamine, either himself or as an accomplice. He had multiple precursor items and stated that he was “already going down for this” and that he knew what the pills were going to be used for. RP 69-70. There was sufficient evidence presented for the jury to find the defendant guilty. The defendant’s purchases, combined with his actions and statements, clearly supports a finding that he possessed pseudoephedrine with the intent to manufacture methamphetamine.

2. THE DEFENDANT HAS WAIVED ANY CORPUS DELICTI CLAIM BY FAILING TO RAISE SUCH A CLAIM BELOW, BUT EVEN IF SUCH CLAIM HAS NOT BEEN WAIVED, SUFFICIENT EVIDENCE CORROBORATED THE DEFENDANT'S ADMISSION TO ESTABLISH THE CORPUS DELICTI OF POSSESSION OF PSEUDOEPHEDRINE WITH INTENT TO MANUFACTURE METHAMPHETAMINE.<sup>4</sup>

a. The defendant waived a corpus delicti claim by failing to raise such argument below.

“The corpus delicti rule is a judicially created rule of evidence, not a constitutional sufficiency of the evidence requirement, and a defendant must make proper objection to the trial court to preserve the issue. State v. C.D.W., 76 Wn. App. 761, 763-64, 887 P.2d 911 (1995). The failure to object precludes appellate review because “it may well be that ‘proof of the corpus delicti was available and at hand during the trial, but that in the absence of [a] specific objection calling for such proof it was omitted.’” C.D.W., at 763-64 (quoting People v. Wright, 52 Cal. 3d 367, 404, 802 P.2d 221, 245, 276 Cal. Rptr. 731 (1990), cert. denied, 502 U.S. 834, 112 S. Ct. 113, 116 L. Ed. 2d 82 (1991)); but see State v. Pietrzack, 110 Wn. App. 670, 41 P.3d 1240 (2002), review denied, 147 Wn.2d 1013 (2002)

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<sup>4</sup> While the State does not request that this court stay this case, the issue of corpus delicti as it relates to the crime of unlawful possession of pseudoephedrine with the intent to manufacture methamphetamine is currently before the Washington Supreme Court in State v. Brockob, #78571-6.

(finding that the rule is more than a rule of evidence, crafted to protect a defendant from an unjust conviction based on a false confession).

Here, the respondent never raised the issue of corpus delicti below and this court should not consider this evidentiary issue for the first time on appeal. While the defendant did move for a directed verdict, nothing in the defendant's oral motion or pleadings raised a corpus delicti argument. The State may have sought to call additional witnesses to rebut a corpus delicti claim if the defendant had challenged the corpus delicti below. It is unfair to allow the defendant to raise it at this time.

- b. Assuming arguendo that this court finds the defendant has properly preserved a corpus delicti claim, sufficient evidence corroborated defendant's admission to establish the corpus delicti of possession of pseudoephedrine with intent to manufacture.

The corpus delicti of a crime charged refers to “the objective proof or substantial fact that a crime has been committed.” State v. Solomon, 73 Wn. App. 724, 727, 870 P.2d 1019 (1994). Confessions alone are insufficient to establish the corpus delicti of a crime. C.D.W., 76 Wn. App. 761 at 762, (quoting State v. Smith, 115 Wn.2d 775, 780, 801 P.2d 975 (1990)). Rather, there must be some independent proof that establishes that the crime occurred before the confession can be considered. Id. Absent such evidence, a defendant's confession is inadmissible. State v. Powers, 124 Wn. App. 92, 103, 99 P.3d 1262

(2004). However, State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995), made clear that the independent evidence “need not have been sufficient to support a conviction or even to send the case to the jury.” Id. at 796.

In assessing whether there is sufficient evidence of the corpus delicti independent of a defendant’s statement, the court assumes the truth of the State’s evidence and all reasonable inferences from it in a light most favorable to the State. State v. Aten, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996) (citing Bremerton v. Corbett, 106 Wn.2d 569, 571, 723 P.2d 1135 (1986)). The independent evidence need not be of such a character as would establish the corpus delicti beyond a reasonable doubt or even by a preponderance of the evidence. Corbett, 106 Wn.2d at 575. It is sufficient if it “prima facie” establishes the corpus delicti. Id.

Moreover, the exclusion of “every reasonable hypothesis” consistent with innocence is unnecessary. Corbett, 106 Wn.2d at 579; see also State v. Rooks, 130 Wn. App. 787, 125 P.3d 192 (2005) (holding that when there is a reasonable and logical inference of guilt, corpus delicti is established). Rather, in this context, “prima facie” means only that “there be evidence of sufficient circumstances which would support a logical and reasonable inference” that defendant committed the crime. Corbett, 106 Wn.2d at 579-80 (citing State v. Hamrick, 19 Wn. App. 417, 419, 576 P.2d 912 (1978); State v. DePriest, 16 Wn. App. 824, 560 P.2d 1152 (1977)).

As noted, defendant here specifically challenges the sufficiency of the evidence corroborating his confession regarding the intent element. Br. of Appellant at 9. Thus, corroborative evidence must show, absent defendant's confession, that he possessed the pseudoephedrine with the intent to manufacture methamphetamine. State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995); State v. Cobelli, 56 Wn. App. 921, 925, 788 P.2d 1081 (1989) (corpus delicti of intent element must be established in order to convict for possession with intent to deliver marijuana). See also Smith v. United States, 348 U.S. 147, 156, 75 S. Ct. 194, 99 L. Ed. 192 (1954) ("Evidence corroborating a confession is required for all elements of an offense established by admissions alone in order to provide the corpus delicti.").

Here, even absent defendant's confession, the evidence demonstrated a logical and reasonable inference that defendant possessed the pseudoephedrine with the intent to manufacture methamphetamine. Defendant and Martin, acting together did not merely possess pseudoephedrine; they possessed a large quantity of it, over five boxes. RP 78-104, 132-137, 143-145, 183-186. Together the defendant and Martin possessed much more pseudoephedrine than would be needed for any legitimate use. Moreover, defendant did not come to possess the boxes of pseudoephedrine in an innocent way. He drove to multiple stores purchasing it. Further, the defendant purchased and possessed multiple other precursors—isopropyl alcohol, butane fuel, propane tanks, coffee

filters, and lye. Boxes of pseudoephedrine were concealed in his vehicle. This is consistent with intent to manufacture methamphetamine. There were also empty blister packages recovered, which he had directed Martin to throw away, indicating that pills had already been removed from the packages, which suggests that, in addition to collecting the ingredients, that the pills themselves were being “prepared” for a methamphetamine cook.

As noted, the statutory definition of “manufacture” includes “preparation ... of a controlled substance.” RCW 69.50.101(p). The manner in which defendant came to possess the pseudoephedrine, the amount he came to possess, the other precursors he purchased or possessed, and what he or an accomplice did with the pills while they were in his possession all shed light on his intent. Taken in the light most favorable to the State, this is sufficient corroborative evidence of his confession because it supports a logical and reasonable inference that his intent was to manufacture methamphetamine. There is no other explanation for defendant’s actions.

The three cases on which the defendant relies are distinguishable from the present case. In State v. Whalen, 131 Wn. App. 58, 126 P.3d 55 (2005), Whalen attempted to shoplift seven boxes of pseudoephedrine. Id. at 60-62. The police officer then said to Whalen, “we both know why people take Sudafed,” to which Whalen stated, “yes.” Id. at 61. The court found there was insufficient evidence to find that Whalen possessed the

pseudoephedrine with the intent to manufacture methamphetamine. Id. at 66. The court stated, “Whalen is correct that bare possession of pseudoephedrine is not enough to prima facie establish the corpus delicti for an intent to manufacture conviction, at least one additional factor, suggestive of intent, must be present.” Id. at 63.

In the present case, there was not only one, but multiple additional factors present which are suggestive of intent. The presence of multiple precursor items, all of which can be used in the manufacture process is additional evidence of the defendant’s intent. Moreover, evidence that pills were removed from the packaging is evidence of intent. Finally, Martin’s statement, which is not subject to the corpus delicti rule as applied to the defendant, that the pseudoephedrine was going to be used to manufacture methamphetamine and that the defendant directed her to purchase the pills is evidence of the defendant’s intent. Unlike Whalen, where there was bulk possession of pseudoephedrine only, the defendant had multiple other items used to manufacture methamphetamine and was directing another to purchase pseudoephedrine on his behalf.

The defendant also relies on State v. Cobelli, 56 Wn. App. 921, 788 P.2d 1081 (1989). Brief of Appellant at 15. In Cobelli, law enforcement stopped a suspect on a report that he had sold marijuana. 56 Wn. App. at 923. The court considered the amount of marijuana in defendant’s possession “a relatively small amount,” and thus not “an amount associated with an intent to deliver.” Id. at 924. It considered,

therefore, the suspect to be in “mere possession,” which “without more, does not raise an inference of the intent to deliver.” Id. at 925. Again, as argued above, there was considerable evidence of the defendant’s intent to manufacture methamphetamine in addition to the possession of large amounts of pseudoephedrine.

Finally, the defendant relies on State v. Bernal, 109 Wn. App. 150, 33 P.2d 1106 (2006), review denied, 146 Wn.2d 1010, 52 P.3d 518 (2002). Bernal was charged with controlled substance heroin when the victim died from a heroin overdose. Id. at 152-153. The State presented no evidence that the heroin which killed the victim was the same heroin delivered by Bernal, who had confessed that she had sold the victim heroin. Id. at 152-154. The present case is distinguishable from Bernal. In Bernal, there was no evidence presented linking Bernal to the homicide. In the present case there was direct evidence linking the defendant to the crime—he was observed purchasing pseudoephedrine and other precursor items.

The defendant’s reliance on Whalen, Cobelli, and Bernal is misplaced. Evidence was presented that the defendant purchased pseudoephedrine and other precursor item, and directed Martin to purchase pseudoephedrine for him. The defendant went to multiple stores and made multiple purchases. Martin stated that the pills were going to be used to make methamphetamine. A logical, reasonable person could infer that the defendant had the intent to make methamphetamine. Thus,

evidence is sufficient to demonstrate corpus delicti, and defendant's statements were properly admitted. The State requests that this court find that the State presented a prima facie case and that the defendant's statements were properly admitted.

4. THE DEFENDANT WAS NOT ENTITLED TO A UNANIMITY INSTRUCTION FOR THE JURY TO DETERMINE IF HE POSSESSED PSEUDOEPHEDRINE OR EPHEDRINE, BECAUSE BOTH TERMS ARE DEFINED TOGETHER IN RCW 69.50.440(1), WHICH IS A DEFINITIONAL STATUTE THAT DOES NOT CREATE AN ALTERNATIVE MEANS.

Criminal defendants have a right to a unanimous jury verdict. Const. art. 1, § 21. A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Jury unanimity issues can arise when the State charges a defendant with committing a crime by more than one alternative means, State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976), or when the State presents evidence of several acts that could form the basis of one count charged. State v. Petrich, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984). In an alternative means case the threshold test is whether sufficient evidence exists to support each of the alternative means presented to the jury. If the evidence is sufficient to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by

which the defendant committed the crime is unnecessary to affirm a conviction. State v. Ortega-Martinez, 124 Wn.2d 702, 708, 881 P.2d 231 (1994); State v. Whitney, 108 Wn.2d 506, 739 P.2d 1150 (1987).

The defendant argues that the court erred in instructing the jury that it could find him guilty of possession of “Ephedrine or Pseudoephedrine” with the intent of manufacturing methamphetamine because there was no evidence that he possessed ephedrine. Brief of Appellant at 18. He contends that possession of ephedrine or pseudoephedrine with intent to manufacture methamphetamine is an alternative means crime, such that the evidence must support each of the alternative means on which the jury is instructed. Ortega-Martinez, 124 Wn.2d 702 at 707-08. But unlike rape in the second degree, with which Ortega-Martinez was charged, possession of ephedrine or pseudoephedrine with intent to manufacture methamphetamine is not an alternative means crime. Id. at 705. Ephedrine and pseudoephedrine are defined together in RCW 69.50.440(1) as among those materials it is unlawful to possess with the intent to manufacture methamphetamine. Definitional statutes do not create additional alternative means of committing a crime. State v. Linehan, 147 Wn.2d 638, 646, 56 P.3d 542 (2002), cert. denied, 538 U.S. 945, 123 S. Ct. 1633, 155 L. Ed. 2d 486 (2003). The court did not err in instructing the jury, and the defendant was not entitled to a unanimity instruction.

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D. CONCLUSION.

For the aforementioned reasons, the State respectfully requests that the defendant's conviction be affirmed.

DATED: SEPTEMBER 16, 2006

GERALD A. HORNE  
Pierce County  
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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.

9/16/06 Michelle Hyer  
Date Signature