

NO. 34887-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHN EDWARD SMITH,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Sergio Armijo

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BRIEF OF APPELLANT

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION TWO  
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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to dismiss based on the State's violations of discovery rules and mismanagement of the case.

2. The State's violations of discovery rules and mismanagement of the case denied appellant his constitutional rights to a fair trial and effective assistance of counsel.

3. The trial court erred in admitting appellant's statement of a prior bad act.

4. There was insufficient evidence to convict appellant of possession of pseudoephedrine with the intent to manufacture methamphetamine.

5. The trial court's failure to take any remedial action to cure jury misconduct violated appellant's constitutional right to a fair trial.

6. The trial court abused its discretion in refusing to meaningfully consider a Drug Offender Sentencing Alternative (DOSA) for appellant.

7. Cumulative error denied appellant his constitutional right to a fair trial.

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to dismiss based on the State's violations of discovery rules and mismanagement of the case.

2. The State's violations of discovery rules and mismanagement of the case denied appellant his constitutional rights to a fair trial and effective assistance of counsel.

3. The trial court erred in admitting appellant's statement of a prior bad act.

4. There was insufficient evidence to convict appellant of possession of pseudoephedrine with the intent to manufacture methamphetamine.

5. The trial court's failure to take any remedial action to cure jury misconduct violated appellant's constitutional right to a fair trial.

6. The trial court abused its discretion in refusing to meaningfully consider a Drug Offender Sentencing Alternative (DOSA) for appellant.

7. Cumulative error denied appellant his constitutional right to a fair trial.

Issues Pertaining to Assignments of Error

1. Did the trial court err in denying appellant's motion to dismiss because the State's violations of discovery rules and mismanagement of the case denied appellant his constitutional rights to a fair trial and effective assistance of counsel?

2. Did the trial court err in admitting appellant's statement of a prior bad act prohibited under Evidence Rule 404(b)?

3. Was there insufficient evidence to convict appellant of possession of pseudoephedrine with the intent to manufacture methamphetamine because the State failed to prove beyond a reasonable doubt that appellant possessed the pseudoephedrine with the intent to manufacture more methamphetamine?

4. Did the trial court violate appellant's constitutional right to a fair trial by failing to take any remedial action to cure jury misconduct?

5. Did the trial court abuse its discretion by refusing to meaningfully consider a DOSA for appellant?

6. Did cumulative error deny appellant his constitutional right to a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

On August 5, 2005, the State charged appellant, John Edward Smith, with one count of unlawful manufacturing of a controlled substance, methamphetamine. CP 1-3; RCW 69.50.401(1)(2)(b). On January 30, 2006, the State filed an amended information, charging Smith with a second count of unlawful possession of pseudoephedrine and/or ephedrine and adding a school zone enhancement to both counts. CP 9-10; RCW 69.50.440(1), RCW 69.50.435. The State filed the same amended information on February 22, 2006. CP 132-33. Following a trial<sup>1</sup> before the Honorable Sergio Armijo, on February 21, 22, 23, 28 and March 1, 2, 7, 8, 9, 2006, a jury found Smith guilty as charged. CP 168. On May 19, 2006, the court sentenced Smith to 84 months in confinement. CP 172. Smith filed this timely appeal. CP 181 - 94.

2. Substantive Facts<sup>2</sup>

a. Pre-trial and Trial

The court held an omnibus hearing on January 4, 2006 and ordered counsel to exchange the names, addresses, and contact information of all witnesses and written statements of such witnesses, including expert

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<sup>1</sup> Smith was tried with co-defendant, Debra Burrill.

<sup>2</sup> This case contains 1519 pages of verbatim report of proceedings. In accord with RAP 10.3(a)(4), the Statement of the Case addresses facts and procedure relevant to the issues presented for review.

reports and test results. CP 6-7. On January 25, 2006, the State filed a supplemental witness list, adding co-defendant, Robert Allan Tucker, and Ken Bryant from Clover Park Schools.<sup>3</sup> Supp CP \_\_ (sub no. 68, State's List of Witnesses, 1/25/06). On February 21, 2006, the court ruled that any statements made by co-defendant Tucker were excluded under Crawford because Tucker could not be found. 11RP<sup>4</sup> 305. Over objections by the defense, on February 22, 2006, the court allowed the State to amend the information and rearraigned Smith on the subsequent charges. 12P 410 - 23, 439.

During a 3.5 hearing, defense counsel moved to exclude Smith's statement that he was arrested for manufacturing a controlled substance before, arguing that ER 404(b) prohibited admission of prior bad acts. 11RP 368-69, 382-83. The court admitted the statement ruling that it was relevant and more probative than prejudicial. 11RP 394.

At trial, Lakewood Police Officer Skeeter Manos testified that on April 6, 2005, he was dispatched to Bob's Trailer Park at 2:30 in the morning to serve a no-contact order. 13RP 453, 458. When he arrived,

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<sup>3</sup> The State previously filed a list of witnesses on September 21, 2005, which included a "Forensic Analyst, WSP Crime Lab." Supp CP (sub no. 18, State's List of Witnesses, 9/21/05).

<sup>4</sup> There are 21 verbatim report of proceedings: 1RP - 2/2/06; 2RP - 2/3/06; 3RP - 2/6/06; 4RP - 2/7/06; 5RP - 2/13/06; 6RP - 2/14/06; 7RP - 2/15/06; 8RP - 2/16/06; 9RP - 2/17/06 a.m.; 10RP - 2/17/06 p.m.; 11RP - 2/21/06; 12RP - 2/22/06; 13RP - 2/23/06; 14RP - 2/28/06; 15RP - 3/1/06; 16RP - 3/2/06; 17RP - 3/7/06; 18RP - 3/8/06; 19RP - 3/9/06; 20RP - 4/21/06; 21RP - 5/19/06.

Debra Burrill was standing outside the trailer and said she wanted a no-contact order served on Tucker, Smith's roommate. 13RP 459-60. Officer Johnson who had also reported to the trailer, told Burrill that they needed to talk to Smith before serving Tucker. Burrill invited them in the trailer and Smith was in his bedroom. Smith explained that he obtained the no-contact order because Tucker assaulted him. 13RP 460-64.

The officers went down the hallway to Tucker's bedroom, knocked on the door, and Tucker invited them in. 13RP 465. They noticed a "glass smoking device, commonly used for smoking methamphetamine," in Tucker's room. 13RP 465. The officers advised Tucker that he had to pack his belongings and leave the trailer. As Manos was escorting Tucker out of the trailer, they passed by a garbage can and Tucker "flipped up the lid." 13RP 465-66. The garbage can contained some jars with red and white coating and released a "strong odor of chemicals." 13RP 467.

Manos called Johnson over to look in the garbage can and they "agreed that it was probably the remnants of a methamphetamine lab." 13RP 468. He took Tucker outside and Johnson questioned Smith and Burrill. 13RP 469. Smith and Burrill were taken into custody but Tucker was released. 13RP 500-02, 517-521.

Lakewood Police Officer Peter Johnson testified that when Manos asked him to look in the garbage can he saw several jars with red and

white residue and “noted a slight chemical odor and expected that I might be looking at the remnants of an old meth lab.” 15RP 703. Manos took Tucker outside while he questioned Smith and Burrill. Then he called Officer Wurts for assistance. 15RP 703-04.

Lakewood Police Officer Brian Wurts testified that he was part of a cooperative lab team that responds when an officer suspects a meth lab. 13RP 533, 535. Wurts reported to the trailer because of “a possible methamphetamine lab, or remnants of a lab.” 13RP 536. Wurts inspected the garbage can and obtained a search warrant because he believed there was a meth lab. A lab team was assembled that conducted a search of the trailer and collected evidence. 13RP 542-50.

Wurts questioned Smith and Burrill after advising them of their Miranda rights. 13RP 543. According to Wurts, during the interrogation, Smith said “when he was arrested for manufacturing before, he did not use red phosphorous in the process he had used before.” 13RP 547.

On the fifth day of trial testimony, the State informed the court that Tucker was found and booked into jail. 15RP 683. Defense counsel moved to exclude Tucker from testifying because of the State’s lack of due diligence in locating him and the highly prejudicial effect of his testimony on the defense’s theory of the case. Defense counsel also raised concerns about Tucker’s competency to testify. 15RP 742-44. The court

held a voir dire of Tucker, found him competent, and allowed his testimony. 15RP 1034, 1046. Tucker testified that he was leasing the trailer and Smith had been living with him for about four years. 18RP 1102-1103. He claimed that he saw Smith manufacturing methamphetamine on April 3 and April 4, 2005. 18RP 1105.

On the sixth day of trial testimony, the State called Jane Boysen, a forensic scientist for the Washington State Patrol crime lab, as an expert witness. 16RP 861. After explaining the red phosphorous method of manufacturing methamphetamine, Boysen attempted to refer to her notes to identify and describe the evidence she tested for the case. 16RP 866-69. Defense counsel requested a side bar and objected to the 83 pages of handwritten notes that they had not received in violation of the rules of discovery. The court directed the State to provide the defense with copies of the notes over the lunch recess and subsequently allowed Boysen to testify. 16RP 870-74.

The next day of trial, defense counsel moved to dismiss, arguing that the State's mismanagement of the case deprived Smith and Burrill their right to a fair trial and effective assistance of counsel. Defense counsel pointed to several violations of discovery, including failure to provide Boysen's curriculum vitae and 83 pages of the notes used at trial, and the State's failure to make a good faith effort to locate Tucker in a

timely manner. Defense counsel also brought to the court's attention that the jury had calculated and written on a white board in the jury room how much time it spent listening to testimony versus how much time it spent waiting. Arguing that the jury violated the court's order not to discuss the case in any fashion, defense counsel moved to dismiss on the basis of jury misconduct. 16RP 977-1000. The court denied the motion stating, "I'm not going to dismiss this case because the witness or the notes or the other things that have been going on in this case are not picture perfect." 16RP 1045.

b. Sentencing

At sentencing, defense counsel informed the court that Smith had been evaluated for treatment and appears to qualify and requested a DOSA sentence for Smith to enable him to address his drug issues and become a "meaningful contributing member of society." 21RP 1217-19. The State argued against a DOSA because "methamphetamine cooks are not appropriate people for the Court to put into DOSA, even if they are eligible for it." 21RP 1215. The court refused to consider DOSA for Smith, "I'm not going to consider DOSA, I'm not." 21RP 1225.

C. ARGUMENT

1. THE STATE'S VIOLATIONS OF DISCOVERY RULES AND GOVERNMENTAL MISCONDUCT DENIED SMITH HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL.

The trial court erred in denying Smith's motion to dismiss because the State's violations of discovery rules and mismanagement of the case denied Smith his constitutional rights to a fair trial and effective assistance of counsel. The court's error requires reversal.

Under CrR 4.7(h)(7)(i), when a party fails to comply with discovery rules, the court may dismiss the action.<sup>5</sup> In the furtherance of justice, under CrR 8.3(b), the court may dismiss any criminal prosecution due to arbitrary action or governmental misconduct.<sup>6</sup> Governmental misconduct "need not be of an evil or dishonest nature; simple

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<sup>5</sup> (7) *Sanctions*.

(i) if at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

CrR 4.7(h)(7)(i)

<sup>6</sup> **(b) On Motion of Court.** The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

CrR 8.3(b)

mismanagement is sufficient.” State v. Michielli, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997)(emphasis added by the court)(citing State v. Blackwell, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993)). The defendant must show that the mismanagement prejudiced his right to a fair trial. Id. at 240. Such prejudice includes the “right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.” Id. (citing State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)); State v. Teems, 89 Wn. App. 385, 389, 948 P.2d 1336 (1997). Dismissal under CrR 8.3(b) is an extraordinary remedy which requires material prejudice to the rights of the accused. State v. Moen, 150 Wn.2d 221, 226, 76 P.3d 721 (2003).

In State v. Sherman, 59 Wn. App. 763, 771-72, 801 P.2d 274 (1990), this Court held that the State’s late amendment of the information, failure to produce a witness list, and motion to add an expert witness on the day of trial, constitutes mismanagement and warrants dismissal. In State v. Dailey, 93 Wn.2d 454, 459, 610 P.2d 357 (1980), the Washington Supreme Court held that the State’s late compliance with the omnibus order, failure to disclose its witness list until one court day before trial, dilatory compliance with the bill of particulars, and late dismissal of charges against a co-defendant, constitutes mismanagement and warrants dismissal.

Like in Sherman and Dailey, the record substantiates that the State's egregious mismanagement of the case materially prejudiced Smith's constitutional rights to a fair trial and effective assistance of counsel.

The State charged Smith with unlawful manufacturing of methamphetamine on August 5, 2005. CP 1. The declaration of probable cause states that officers found "numerous items associated with the manufacture of methamphetamine via the red phosphorus method throughout the trailer," noting Smith's address at the trailer park. CP 2. The declaration names the items found, including pseudoephedrine. CP 3.

On August 25, 2005, Smith's counsel filed a notice of appearance and demand for discovery. Supp CP \_\_\_ (sub no. 11, Notice of Appearance and Request for Discovery, 8/25/05). On September 21, 2005, the State filed a witness list, which included a "Forensic Analyst, WSP Crime Lab." Supp CP \_\_\_ (sub no. 18, State's List of Witnesses, 9/21/05). The court held an omnibus hearing on January 4, 2006 and ordered counsel to exchange the names, addresses, and contact information of all witnesses and written statements of such witnesses, including expert reports and test results by January 6, 2006. CP 6-7. The State filed a supplemental witness list on January 25, 2006, adding co-defendant, Robert Tucker, and Ken Bryant from Clover Park Schools. Supp CP \_\_\_ (sub no. 68, State's

List of Witnesses, 1/25/06). On January 30, 2006, the State filed an amended information, charging Smith with a second count of unlawful possession of pseudoephedrine with intent to manufacture methamphetamine and adding a school zone enhancement to both counts. CP 9-10. Pre-trial motions were heard between February 3 and 17, 2006. 1RP - 10RP. Trial testimony began on February 21, 2006 and the court ruled that any statements made by co-defendant Tucker were excluded under Crawford because Tucker could not be found. 11RP 305.

On February 22, 2006, defense counsel argued that the State should not be allowed to amend the information because the State failed to provide discovery related to the school zone enhancement:

We were not provided with the chart from the school district, the map that shows where the bus stops are and we were not provided with the reports regarding the measurements. So even though I knew of the State's intention to file the school zone enhancement, there was nothing that we could do because we did not have the discovery pertinent to any investigation regarding that enhancement; therefore, we could not investigate or prepare.

12RP 410-112.

The court questioned whether it was enough for the State "to start talking about an amendment and not actually provide discovery of any kind showing this is what I have, concrete probable cause to charge them with this." 12RP 418. Despite finding prejudice, the court permitted the

amendment ruling that the extent of the prejudice was insufficient. 12RP 421-22.

On March 1, 2006, the State revealed that Tucker was located and he was willing to testify. 15RP 683, 742. Defense counsel moved to exclude his surprise testimony due to the State's lack of due diligence in finding him and the highly prejudicial effect of allowing his testimony at such a late stage in the trial. 15RP 742-44. The State claimed that it made a good faith effort to locate Tucker and the defense was always aware that he could potentially testify. 15RP 744-47. The court directed the defense to interview Tucker and subsequently allowed his testimony. 15RP 751-52, 17RP 1045-46.

On March 2, 2006, the State called Jane Boysen, a forensic scientist for the Washington State Patrol crime lab, as its expert witness. 16RP 861. Boysen explained the red phosphorus method of manufacturing methamphetamine. 16RP 866. To identify and describe the items that she analyzed for the case, she attempted to refer to her notes. This prompted defense counsel to request a sidebar. Boysen disclosed that she brought 83 pages of notes. Defense counsel argued that the State violated discovery in failing to provide Boysen's notes and failing to provide her curriculum vitae as an expert. 16RP 869-72. The court

directed the State to provide the defense with copies of her notes during the lunch recess and subsequently allowed her testimony. 16RP 874.

Considered collectively, the State's conduct constitutes mismanagement that materially prejudiced Smith's right to a fair trial and effective assistance of counsel. The State knew that officers found pseudoephedrine at the trailer and knew the location of the trailer park. Yet it waited over five months to file an amended information, adding charges of possession with intent to manufacture and manufacturing within a school zone.<sup>7</sup> Furthermore, the State failed to provide discovery relating to the school zone enhancement. On the sixth day of trial testimony, the State surprised the defense by revealing that it located Tucker. On the seventh day of trial testimony, the State presented an expert forensic scientist not specifically named on its witness list, who used extensive notes not provided to the defense, in violation of discovery.<sup>8</sup>

The State claimed that it made a good faith effort to provide discovery and blamed the defense for not taking the initiative to obtain the discovery. The State's argument has been rejected by this Court in Sherman, 59 Wn. App. at 768-69, where this Court concluded that the

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<sup>7</sup> A long delay in adding more charges, without any justifiable reason, suggests "less than honorable motives." Michielli, 132 Wn.2d at 244.

<sup>8</sup> Another forensic scientist also testified for the State. 16RP 832.

State is not excused for failing to comply with discovery in violation of an omnibus order agreed to by the prosecution. The State's claim that it exercised due diligence in locating Tucker is equally without merit. Tucker testified that the State Department of Licensing had his current address since May 2005:

Q. . . . . You said you updated your Department of License information last summer, is that right, to add your knew [sic] address?

A. Actually I went to DMV and obtained a new driver's license.

Q. That new driver's license has your address that you currently live at. Is that right?

A. That is correct.

Q. And you've had that since the summer of last year. Is that right?

A. Yes, May.

Q. So you actually did receive your summons to come in to court on the methamphetamine manufacturing case. Is that right?

A. Yes. I didn't have transportation.

.....

Q. And you attempted to call the prosecuting attorney's office. Is that right?

A. I attempted to.

7RP 1038-39.

The State's egregious mismanagement of the case materially prejudiced Smith because defense counsel had insufficient time and opportunity to prepare a proper defense in light of the State's failure to provide timely discovery and its late disclosure of key witnesses.<sup>9</sup> 17RP 979-87, 991-1000. Consequently, the State's mismanagement deprived Smith of his constitutional rights to a fair trial and effective assistance of counsel. The trial court erred in denying the defense motion to dismiss under CrR 4.7(h)(7)(i) and CrR 8.3.(b).

2. THE TRIAL COURT ERRED IN ADMITTING SMITH'S STATEMENT OF A PRIOR BAD ACT.

Reversal is required because the trial court erred in admitting Smith's statement of a prior bad act prohibited under ER 404(b).

ER 404(b) prohibits evidence of past misdeeds solely to prove a defendant's criminal propensity: "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." State v. Nelson, 131 Wn. App. 108, 115, 125 P.3d 1008 (2006). The State must meet a

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<sup>9</sup> "Each trial must be conducted within the rules and each prosecutor must labor within the restraints of the law to the end that defendants receive fair trials and justice is done." State v. Torres, 16 Wn. App. 254, 263, 554 P.2d 1069 (1976).

substantial burden when attempting to bring in evidence of prior bad acts under one of the exceptions to this general prohibition. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Appellate courts presume that evidence of prior bad acts is inadmissible and resolve doubts as to admissibility in favor of exclusion. Nelson, 125 Wn. App. at 115.

“The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined.” State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). To that end, ER 404(b) forbids evidence of prior acts that tend to prove a defendant’s propensity to commit a crime. Id. To determine admissibility of evidence under ER 404(b), the trial court must engage in a three-part analysis. First, the court must identify the purpose for which the evidence will be admitted. Second, the evidence must be materially relevant. Third, the court must balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder. Further, to avoid error, the court must identify the purpose of the evidence and conduct the balancing test on the record. Id. at 333-34.

In State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (1997), this Court held that the trial court abused its discretion in admitting Perrett’s statement of a prior bad act. The State charged Perrett with assault in the second degree with a deadly weapon. Id. at 316. On appeal,

Perrett argued that the trial court erred in admitting his statement to a deputy that “the last time the sheriffs took his guns, he didn’t get them back.” Id. at 319. This Court concluded that the statement should have been excluded because it was unfairly prejudicial, raising the inference that Perrett had committed a prior crime involving a gun, thereby making it more likely he had done so again. Id. at 319-20.

Like in Perrett, Smith stated to an officer, “When I was arrested for manufacturing a controlled substance before, I did not use the red phosphorus technique.” 11RP 394. Defense counsel argued that the statement should be excluded under ER 404(b). 11RP 382-83. The State argued that the statement was admissible under the exceptions of motive, knowledge, and intent. 11RP 383-84. Quoting Smith’s statement verbatim, the court denied defense counsel’s motion to exclude it:

I find that to be prejudicial, yet very probative to what the whole case is about. The case is about manufacturing controlled substances, methamphetamine. I find that to be relevant and probative, and it is very prejudicial. But it’s there. I won’t take it out under 404(b).

11RP 394.

The trial court erred in failing to engage in the three-part analysis required by this Court in Wade. The court neglected to identify the purpose for which it was admitting the statement, explain why it was materially relevant, and explain why it was more probative than

prejudicial. The court's error notwithstanding, "regardless of relevance or probative value, evidence that relies on the propensity of a person to commit a crime cannot be admitted to show action in conformity therewith." State v. Salterelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Clearly, the State's purpose for admitting the statement was to show propensity, that because Smith was convicted of manufacturing methamphetamine before, it is likely that he manufactured methamphetamine here.

The trial court erred in admitting Smith's highly prejudicial statement that materially affected the outcome of the trial.

3. **THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT SMITH POSSESSED PSEUDOEPHEDRINE WITH THE INTENT TO MANUFACTURE METHAMPHETAMINE.**

Reversal and dismissal is required because there was insufficient evidence to prove that Smith possessed pseudoephedrine with the intent to manufacture more methamphetamine.

In a criminal prosecution, due process requires that the State prove every element necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. XIV; Wash. Const. art. 1, sect. 3. "[T]he reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the

facts in issue.’ ” State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995) (quoting In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970));<sup>10</sup> State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984), reversed on other grounds, 101 Wn.2d 612, 683 P.2d 1069(1984).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)); State v. Williams, 144 Wn.2d 197, 212, 26 P.3d 890 (2001). A claim of insufficiency admits the truth of the State’s evidence and all inferences that can reasonably be drawn from it. DeVries, 149 Wn.2d at 849.

Dismissal is required following reversal for insufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (the double jeopardy clause of the Fifth Amendment protects against a second prosecution for the same offense after reversal for insufficient evidence) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L.

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<sup>10</sup> The United States Supreme Court noted, “It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of guilt with utmost certainty.” In re Winship, 397 U.S. at 364.

Ed. 2d 656 (1996), overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)).

To establish that Smith possessed pseudoephedrine with intent to manufacture methamphetamine, the State had to prove beyond a reasonable doubt that he: (1) possessed pseudoephedrine and (2) intended to use the pseudoephedrine to manufacture methamphetamine. RCW 69.50.440(1). Bare possession of a controlled substance is not enough to support an intent to manufacture conviction; at least one additional factor, suggestive of intent, must be present. State v. Moles, 130 Wn. App. 461, 466, 123 P.3d 132 (2005). The defendant's intent must logically follow as a matter of probability from the evidence. State v. McPherson, 111 Wn. App. 747, 759, 46 P.3d 284 (2002).

At trial, Officer Jeff Nolta testified that he was assigned as the processing officer when the police searched and collected evidence at the trailer. 15RP 726, 729. Nolta stated that he sampled a prescription bottle marked as pseudoephedrine. 15RP 768-71. Forensic scientist, Jane Boysen, testified that she tested the liquid in that same bottle and the results of her testing indicated the presence of pseudoephedrine. 16RP 882-84. However, their testimony failed to establish that Smith had the pseudoephedrine because he intended to manufacture more methamphetamine.

The State's evidence only showed the existence of the remnants of an old methamphetamine lab and the remains of pseudoephedrine. 13RP 468, 536; 17RP 730, 719, 723. Reversal and dismissal is required because without further evidence suggestive of intent, there is insufficient evidence to prove beyond a reasonable doubt that Smith possessed pseudoephedrine with intent to manufacture methamphetamine.

4. THE TRIAL COURT'S FAILURE TO TAKE ANY REMEDIAL ACTION TO CURE JURY MISCONDUCT VIOLATED SMITH'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Reversal is required because the trial court's failure to take any remedial action to cure jury misconduct violated Smith's constitutional right to a fair trial.

The United States and Washington State Constitutions provide that the right to trial by jury shall be preserved and remain inviolate. U.S. Const. amend VII; Wash. Const. art I, sect. 21. The right of trial by jury means a trial by an unbiased and unprejudiced jury, free of jury misconduct. In re Detention of Broten, 130 Wn. App. 326, 122 P.3d 942, 947 (2005). A constitutionally valid jury trial is a trial by an unbiased and unprejudiced jury, free of jury misconduct. State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991).

Communications by or with jurors constitute misconduct. Once established, it gives rise to a presumption of prejudice which the State has the burden of disproving beyond a reasonable doubt. State v. Murphy, 44 Wn. App. 290, 296, 721 P.2d 30 (1986), review denied, 107 Wn.2d 1002 (1986)(citing Remmer v. United States, 347 U.S. 227, 229, 74 S. Ct. 450, 98 L. Ed. 2d 654 (1954)). The trial court must objectively determine whether jury misconduct could have affected the jury's deliberations. State v. Barnes, 85 Wn. App. 638, 669, 932 P.2d 669 (1997). The trial court has discretion to take whatever remedial action is necessary to neutralize the effect of irregularities at trial. State v. Blum, 17 Wn. App. 37, 42, 561 P.2d 226 (1977).

Here, defense counsel brought to the court's attention that the jury had calculated on a white board in the jury room how much time it spent listening to testimony versus just waiting on the day of March 2, 2006.<sup>11</sup> This was the same day that the court commented, "I'll remind you, to the attorneys, I'm telling you, we have had this jury up and down, up and down for a whole week and they are going to get tired of this. I'm reminding you of that." 17RP 875.

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<sup>11</sup> See Supp CP \_\_ (sub no. 101, Memorandum in Support of Motion to Dismiss, 3/7/06).

Defense counsel argued that the jury violated the court's order not to discuss the case, "discussing time management of the case is discussing the case." 17RP 988-89. Defense counsel emphasized that the biggest concern was potential jury bias against the Smith. 17RP 1047. The prosecutor responded that if the court "wanted to interview the jury to address that, I'd have no problem with that." 17RP 1048. The court agreed that it was a concern but took no remedial action, concluding that "[b]y addressing it, you raise the issue more." 17RP 1048.

The court erred in ignoring evidence that the jury had discussed the case in some manner, which constitutes jury misconduct. Despite its observation that the jurors were getting tired of coming and going, the court made no attempt to determine whether their impatience affected their ability to be impartial. The court abused its discretion by failing to take any remedial action to cure the misconduct, denying Smith his right to a fair trial.

**5. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO MEANINGFULLY CONSIDER A DOSA FOR SMITH.**

Remand for resentencing is required because the trial court abused its discretion in refusing to meaningfully consider a DOSA for Smith.

While a trial court's decision whether to grant a DOSA is generally not reviewable, an offender can always challenge the procedure by which a sentence was imposed. State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). Thus, it is well established that appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies. State v. White, 123 Wn. App. 106, 114, 97 P.3d 34 (2004). Reversal is required when a trial court categorically refuses to meaningfully consider whether a sentencing alternative is appropriate. State v. Grayson, 154 Wn.2d 333, 342-43, 111 P.3d 1183 (2005).

At sentencing, defense counsel requested a DOSA for Smith, informing the court that Smith "has been evaluated, appears to be amenable to treatment, appears to qualify." 21RP 1217. Defense counsel explained that a DOSA would allow Smith to "address his drug issues and have an opportunity to get out and become a meaningful contributing member of society." 21RP 1219. Even though the State had initially offered Smith DOSA, it argued against DOSA, stating that "generally methamphetamine cooks are not appropriate people for the Court to put into the DOSA program." 21RP 1215. The State argued that "this is a last minute attempt to reduce his sentence and it's not deserved." 21RP 1215.

The court abruptly denied a DOSA for Smith:

THE COURT: With regard to the DOSA, I don't have any documentation and we've been waiting for that documentation now -- I don't know how long, a month, month and a half, maybe even two months. Nothing has come through. I know his parents would like him to get treatment. That's the letters that I received. He would do better if he was in treatment versus jail.<sup>12</sup> I'm not going to consider DOSA, I'm not.

MR. UNDERWOOD: If I can provide the Court with documentation?

THE COURT: No, not at this point.

RP 1225.

The purpose of DOSA is to provide treatment and rehabilitation incentives for those convicted of drug crimes when it would be in the best interests of the individual and the community. Williams, 154 Wn.2d at 343. The trial court's refusal to meaningfully consider a statutorily authorized sentencing alternative constitutes reversible error.

6. REVERSAL IS REQUIRED BECAUSE CUMULATIVE ERROR DENIED SMITH HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The cumulative error doctrine applies when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial and warrants

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<sup>12</sup> Smith's mother and father provided letters to the court explaining that Smith "used bad judgment in the past, but has since tried to turn his life around." They asked the court to consider "the shortest possible sentence so that he can once again become a tax paying citizen." CP 134-37.

reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992); State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970), review denied, 78 Wn.2d 992 (1970).

Here, an accumulation of errors affected the outcome of the trial: 1) the trial court erred in denying Smith's motion to dismiss because of the State's violations of discovery rules and mismanagement of the case; 2) the trial court erred in admitting Smith's statement of a prior bad act; 3) there was insufficient evidence to prove beyond a reasonable doubt that Smith possessed pseudoephedrine with intent to manufacture methamphetamine; 4) the trial court erred in failing to take any remedial action to cure jury misconduct; and 5) the trial court abused its discretion in refusing to meaningfully consider a DOSA for Smith.

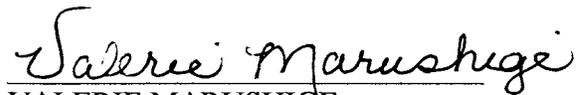
Reversal is required because cumulative error denied Smith his constitutional right to a fair trial.

D. CONCLUSION

“From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which each defendant stands equal before the law.”<sup>13</sup> Mr. Smith did not stand equal before the trial court. For the reasons stated, this Court should reverse his convictions.

DATED this 22<sup>nd</sup> day of January, 2007.

Respectfully submitted,



VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant

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<sup>13</sup> Gideon v. Wainwright, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

**DECLARATION OF SERVICE**

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached, to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and John Smith, DOC# 788149, B-219-2, McNeil Island Correction Center, P.O. Box 88-1000, Steilacoom, Washington 98388.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22<sup>nd</sup> day of January, 2007 in Des Moines, Washington.

*Valerie Marushige*  
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Valerie Marushige  
Attorney at Law  
WSBA No. 25851

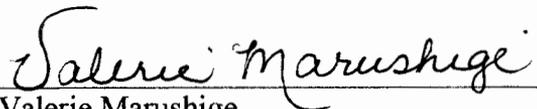
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Valerie Marushige  
Attorney at Law  
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