

NO. 35357-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent,

v.

RACHELLE MARIE BIRDSONG,

Appellant/Defendant

FILED
COURT OF APPEALS
DIVISION II
07 FEB 20 AM 10:13
STATE OF WASHINGTON
BY MM
CLERK

BRIEF OF APPELLANT

PIERCE COUNTY SUPERIOR COURT

CAUSE NO. 05-1-04222-4

THE HONORABLE JOHN R. HICKMAN,

Presiding at the Trial Court

Sheri L. Arnold
Attorney for Appellant
WSBA No. 18760

P. O. Box 7718
Tacoma, Washington 98406
email: slarnold2002@yahoo.com
(253)759-5940

TABLE OF CONTENTS

	<i>Page(s)</i>
I. ASSIGNMENTS OF ERROR.....	1
II. ISSUES PRESENTED.....	1-2
1. Was there sufficient evidence to convict Ms. Birdsong of being an accomplice to manufacturing methamphetamine where the State presented insufficient evidence to establish that methamphetamine was being manufactured at Mr. Judge's house?.....	1
2. Was there sufficient evidence to convict Ms. Birdsong of being an accomplice to manufacturing methamphetamine where the State presented no evidence Ms. Birdsong was aware that any methamphetamine was being manufactured at the house?.....	1
3. Was there sufficient evidence to establish that Ms. Birdsong possessed methamphetamine where the State presented no evidence that Ms. Birdsong was ever in actual possession of the methamphetamine and presented insufficient admissible evidence that Ms. Birdsong was in constructive possession of the methamphetamine?.....	1-2
4. Did the trial court err in admitting the letter addressed to Ms. Birdsong as evidence of her dominion and control of the house?.....	2
5. Was there sufficient evidence to convict Ms. Birdsong of possessing a firearm where Ms. Birdsong the State presented insufficient evidence to establish that Ms. Birdsong had dominion and control over the house and Ms. Birdsong was never seen in physical possession of the firearms and her fingerprints were not recovered from them?.....	2

TABLE OF CONTENTS (continued)

	<u>Page (s)</u>
6. Was there sufficient evidence to support the special verdict that Ms. Birdsong was armed with a firearm while being an accomplice to the manufacture of methamphetamine where the State presented insufficient evidence to establish that Ms. Birdsong either actually or constructively possessed the firearms found in the search and where the State presented insufficient evidence to establish that methamphetamine was being manufactured at Mr. Judge's house?.....	2
III. STATEMENT OF THE CASE.....	2-16
A. Procedural Background.....	2-4
B. Factual Background.....	4-16
IV. SUMMARY OF TESTIMONY.....	17-26
V. ARGUMENT.....	26-50
1. The State presented insufficient evidence to establish that Ms. Birdsong was an accomplice to manufacturing methamphetamine.....	26
a. <i>The State presented insufficient evidence to establish that Mr. Judge was manufacturing methamphetamine.....</i>	<i>27</i>
i. <i>The State presented insufficient evidence to establish that the first phase of methamphetamine production was occurring at Mr. Judge's house.....</i>	<i>30</i>
ii. <i>The State presented insufficient evidence to establish that the second phase of methamphetamine production was occurring at Mr. Judge's house.....</i>	<i>31</i>

TABLE OF CONTENTS (continued)

Page (s)

iii.	<i>The State presented insufficient evidence to establish that the third phase of methamphetamine production was occurring at Mr. Judge's house.....</i>	33
b.	<i>Even if this court finds that the State presented sufficient for a jury to find that methamphetamine production was occurring at Mr. Judge's house, the State presented insufficient evidence to establish that Ms. Birdsong was an accomplice to the production of methamphetamine.....</i>	35
2.	<i>The State presented insufficient evidence to establish that Ms. Birdsong possessed methamphetamine.....</i>	38
a.	<i>The State presented insufficient evidence to establish that Ms. Birdsong had actual possession of the methamphetamine.....</i>	38
b.	<i>The State presented insufficient admissible evidence to establish that Ms. Birdsong had constructive possession of the methamphetamine.....</i>	39
i.	<i>The trial court abused its discretion in admitting the advertisement addressed to Ms. Birdsong found in the garbage in Mr. Judge's garage where the advertisement was hearsay.....</i>	42
ii.	<i>Even if the trial court did not err in admitting the advertisement, there was insufficient evidence to establish Ms. Birdsong had dominion and control over the house.....</i>	46

TABLE OF CONTENTS (continued)

	<u>Page (s)</u>
3. The State presented insufficient evidence to establish that Ms. Birdsong unlawfully possessed a firearm.....	48
<i>a. There was insufficient evidence that Ms. Birdsong possessed the guns.....</i>	<i>48</i>
<i>b. There was insufficient evidence that Ms. Birdsong knowingly possessed the guns.....</i>	<i>49</i>
4. There was insufficient evidence to support the finding that Ms. Birdsong was an accomplice to the manufacture of methamphetamine while armed with a firearm.....	49
VI. CONCLUSION.....	50

TABLE OF AUTHORITIES

Page (s)

Table of Cases

Washington Cases

<i>In re Wilson</i> , 91 Wn.2d 487, 588 P.2d 1161 (1979).....	36
<i>State v. Amezola</i> , 49 Wn.App. 78, 741 P.2d 1024 (1987).....	36,37
<i>State v. Anderson</i> , 141 Wn.2d 357, 5 P.3d. 1247 (2000).....	48
<i>State v. Atsbeha</i> , 142 Wn.2d 904, 16 P.3d 626 (2001).....	42
<i>State v. Bencivenga</i> , 137 Wn.2d 703, 974 P.2d 932 (1999).....	27
<i>State v. Bradford</i> , 60 Wn.App. 857, 808 P.2d 174, <i>review denied</i> , 117 Wn.2d 1003, 815 P.2d 266 (1991).....	39, 41,46
<i>State v. Callahan</i> , 77 Wn.2d 27, 459 P.2d 400 (1969).....	38, 39, 40
<i>State v. Cronin</i> , 142 Wn.2d 568, 14 P.3d 752 (2000).....	36
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	27
<i>State v. Dobyys</i> , 55 Wn.App. 609, 779 P.2d 746, <i>review denied</i> , 113 Wn.2d 1029, 784 P.2d 530 (1989).....	41,46
<i>State v. Echeverria</i> , 85 Wn.App. 777, 934 P.2d 1214 (1997).....	38,39,48
<i>State v. Galisia</i> , 63 Wn.App. 833, 822 P.2d 303 (1992), <i>review denied</i> , 119 Wn.2d 1003, 832 P.2d 487 (1992), <i>abrogated on other grounds by</i> <i>State v. Trujillo</i> , 75 Wn.App. 913, 883 P.2d 329 (1994).....	27
<i>State v. Hagen</i> , 55 Wn.App. 494, 781 P.2d 892 (1989).....	41
<i>State v. Hickman</i> , 135 Wn.2d 97, 945 P.2d 900 (1998).....	50

TABLE OF AUTHORITIES(continued)

Page (s)

Table of Cases

Washington Cases (continued)

State v. Jones, 146 Wn.2d 328, 45 P.3d 1062 (2002).....39, 47

State v. Morgan, 78 Wn.App. 208, 896 P.2d 731, *review denied*,
127 Wn.2d 1026, 904 P.2d 1158 (1995).....38, 47,48

State v. Partin, 88 Wn.2d 899, 567 P.2d 1136 (1977).....40, 46

State v. Perrett, 86 Wn.App. 312, 936 P.2d 426, *review denied*,
133 Wn.2d 1019 (1997).....42

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992).....26,27

State v. Tadeo-Mares, 86 Wn.App. 813, 939 P.2d.220.(1997).....39

State v. Turner, 103 Wn.App. 515, 13 P.2d 234 (2000).....48

State v. Walton, 64 Wn.App. 410, 824 P.2d 533, *review denied*,
119 Wn.2d 1011, 833 P.2d 386 (1992)40,41,46

State v. Yoakum, 37 Wn.2d 137, 222 P.2d 181 (1950).....27

Washington Court Rules

ER 801.....42

ER 802.....42,45

TABLE OF AUTHORITIES(continued)

Page (s)

Table of Cases

Washington Statutes

RCW 5.45.020.....	45
RCW 9A.08.020.....	35
RCW 69.50.401.....	35
RCW 69.50.4013.....	38

I. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to establish that methamphetamine was being manufactured at Mr. Judge's house.
2. The State presented insufficient evidence to establish that Ms. Birdsong was an accomplice to manufacturing methamphetamine.
3. The State presented insufficient evidence to establish that Ms. Birdsong possessed methamphetamine.
4. The trial court erred in admitting the letter with Ms. Birdsong's address.
5. The State presented insufficient evidence to establish that Ms. Birdsong possessed a firearm.
6. There State presented insufficient evidence to establish that Ms. Birdsong was armed with a firearm while she was an accomplice to the manufacture of methamphetamine.

II. ISSUES PRESENTED

1. Was there sufficient evidence to convict Ms. Birdsong of being an accomplice to manufacturing methamphetamine where the State presented insufficient evidence to establish that methamphetamine was being manufactured at Mr. Judge's house? (Assignments of Error Nos. 1 and 2)
2. Was there sufficient evidence to convict Ms. Birdsong of being an accomplice to manufacturing methamphetamine where the State presented no evidence Ms. Birdsong was aware that any methamphetamine was being manufactured at the house? (Assignments of Error Nos. 1 and 2)
3. Was there sufficient evidence to establish that Ms. Birdsong possessed methamphetamine where the State presented no evidence that Ms. Birdsong was ever in actual possession of

the methamphetamine and presented insufficient admissible evidence that Ms. Birdsong was in constructive possession of the methamphetamine? (Assignments of Error Nos. 3 and 4)

4. Did the trial court err in admitting the letter addressed to Ms. Birdsong as evidence of her dominion and control of the house? (Assignment of Error No. 4)
5. Was there sufficient evidence to convict Ms. Birdsong of possessing a firearm where Ms. Birdsong the State presented insufficient evidence to establish that Ms. Birdsong had dominion and control over the house and Ms. Birdsong was never seen in physical possession of the firearms and her fingerprints were not recovered from them? (Assignment of Error No. 5)
6. Was there sufficient evidence to support the special verdict that Ms. Birdsong was armed with a firearm while being an accomplice to the manufacture of methamphetamine where the State presented insufficient evidence to establish that Ms. Birdsong either actually or constructively possessed the firearms found in the search and where the State presented insufficient evidence to establish that methamphetamine was being manufactured at Mr. Judge's house? (Assignment of Error No. 6)

III. STATEMENT OF THE CASE

A. Procedural Background

On August 29, 2005, Ms. Birdsong was charged with one count of being an accomplice to the unlawful manufacturing of a controlled substance while armed with a firearm, one count of being an accomplice to the unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine while armed with a firearm, one count of unlawful

possession of a controlled substance, one count of unlawful possession of a firearm in the second degree, and one count of tampering with physical evidence-destroy evidence. CP 1-4.

On July 18, 2006, the State moved for a dismissal of the charge of unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine. CP 12-14. The court granted the motion. CP 12-14.

Prior to trial, Ms. Birdsong moved to suppress a letter found in Mr. Judge's home on grounds that it was hearsay. RP 74. The State intended to offer the letter as proof of Ms. Birdsong's dominion and control of the home because the letter was addressed to Ms. Birdsong at the address searched. RP 74-75. The trial court found that the address on the mail was not hearsay allowed the mail to be introduced into evidence. RP 76, 80.

Jury trial began on August 16, 2006. RP 81.

Ms. Birdsong and the State entered a stipulation that Ms. Birdsong had previously been convicted of a felony. RP 702-703, CP 120-122.

At the close of the State's case, Ms. Birdsong moved for dismissal on grounds of insufficient evidence to establish she was an accomplice in the manufacture of methamphetamine and insufficient evidence to establish constructive possession. RP 818, CP 23-41. The trial court denied the

Birdsong, Rachelle M. - COA # 35357-1-II

motion. RP 834.

The jury returned verdicts of guilty on all counts (CP 115-118) and returned a special verdict that Ms. Birdsong was armed with a deadly weapon during the commission of the crime of unlawful manufacturing of a controlled substance. CP 119.

Notice of appeal was timely filed on September 22, 2006. CP 142.

B. Factual Background

On August 28, 2005, Puyallup Police Officers Kitts and Brosseau were contacted by dispatch and asked to investigate a suspicious odor coming from a house located at 1313 11th Street Place Southwest in Puyallup, Washington. RP 114-115, 313-314.

Upon arriving at the house, Officer Kitts walked up the driveway and approached the front door while Officer Brosseau stopped at the garage door. RP 118-119. The garage door was open about one foot off the ground. RP 119. The garage door was a four or five panel wooden door and as the door rolled open cracks would appear between the panels. RP 119.

As Officer Brosseau got near to the garage door, she heard a noise like crinkling plastic or crinkling foil. RP 316. As Officer Brosseau got closer to the garage, she smelled a light chemical smell and observed a pool of clear liquid coming from underneath the garage door. RP 316-317. Officer

Brosseau could not tell what the chemical smell was. RP 318. Officer Brosseau knocked on the garage door but did not get a response so the officers went to the front door of the house. RP 316-318.

On the walkway to the front door, Officer Kitts smelled a strong odor of ammonia. RP 119. Due to the shape of the house and the air currents, the odor of ammonia would pool at the front door. RP 144, 318. The odor of ammonia caused Officer Brosseau concern because it can be an indicator of a methamphetamine lab. RP 319.

Officer Kitts knocked on the front door to the home but received no response. RP 120. After Officer Kitts knocked on the front door, Officer Brosseau went back to the garage door and looked through a cracked between the panels of the door that was about at Officer Brosseau's eye level. RP 320. Officer Kitts then moved back towards the corner of the garage because Officer Brosseau said she had heard someone in the garage. RP 120. Three or four minutes after Officer Kitts knocked on the front door, Mr. Judge answered at the door. RP 121.

Officer Kitts told Mr. Judge that the police were there to investigate a chemical smell coming from Mr. Judge's house. RP 122. Mr. Judge replied, "That's just crazy" (RP 336), and told Officer Kitts that he was doing some painting in the garage. RP 122.

Officer Kitts and Officer Brousseau asked Mr. Judge for permission to search his house to make sure that any people inside the house were all right and Mr. Judge did not allow the officers to search. RP 122-123.

Mr. Judge told the officers that his girlfriend was inside the house. RP 338. After Mr. Judge told the officers his girlfriend was in the home, the officers again asked if they could enter the home. RP 123-124, 338. The officers were concerned that if Mr. Judge's girlfriend was asleep that she wouldn't be aware of the fumes. RP 339. Mr. Judge again did not allow the police to enter his home, but instead made a number of phone calls into the home. RP 339.

During the phone calls, Officer Brousseau heard the phone in the house ringing so she knew that Mr. Judge was calling into the home. RP 340. Mr. Judge appeared to be talking to a message machine because he would stop and then he would call again. RP 340. At one point, Mr. Judge was saying something to the effect of, "There's cops outside here. They're talking about getting a search warrant." RP 340. While on the phone, Mr. Judge also said that the police "were concerned because she was asleep or that she needed to wake up." RP 340-341.

Officer Kitts called a narcotics detective and asked him to respond to the scene. RP 125. Officer Kitts' sergeant and Officer Pigman also arrived

at the scene. RP 127. When Officer Pigman arrived at the residence, he observed Mr. Judge standing outside with the other officers. RP 164.

During the time Officer Kitts and Officer Brosseau were talking to Mr. Judge, Sergeant Thompson arrived. RP 342. After Sergeant Thompson arrived, Officer Brosseau went into the side yard of the neighbor's house to the south of the house where Mr. Judge was located. RP 342. The neighbor's name is Pat O'Leary. RP 342.

Officer Brosseau went into Mr. O'Leary's yard to see if there was an area where Officer Brosseau could look into the side or back yard of Mr. Judge's home. RP 343. While looking over the fence, Officer Brosseau observed a blonde woman throw a red plastic gas can into some bushes. RP 346.

Officer Brosseau ran back to the front of the house, yelling for the other officers to come with her. RP 348. Officer Kitts accompanied her. RP 349. Officer Brosseau ran around to the other side of the house and into the back yard to see if the blonde woman was still there. RP 348. Officer Brosseau was concerned that the woman was trying to destroy or conceal evidence. RP 348. When Officer Brosseau returned to the back yard, the female was gone. RP 348-349.

After Officer Brosseau made Officer Pigman aware that Officer

Brosseau had seen a woman throwing gas cans into some blackberry bushes, Officers Pigman, Kitts, and Reiber went to the back yard and found gas cans lying in some blackberry bushes. RP 168-170.

Officer Brosseau went back to the garage to look through the crack in the door. RP 350. When Officer Brosseau looked through the crack, she saw the woman backing out of the garage shaking powder from a can onto the carpet. RP 350. Officer Brosseau yelled to the woman, telling her Officer Brosseau could see her and that she needed to come out. RP 350-351. The woman went back into the house. RP 351.

After retrieving the gas cans, Officer Pigman went around to the front of the residence with some other officers and attempted to get Ms. Birdsong out of the residence. RP 188-189. By this time, other officers began to show up, so Officer Brosseau, Officer Pigman, and Officer Kitts went to the front door and Officer Brosseau opened the front door. RP 351. Officer Pigman went to the front door, opened the door, requested Ms. Birdsong come out, and then ordered Ms. Birdsong to come out when she didn't comply. RP 189. The woman was just within view of the officers at the front door. RP 351. The officers drew their weapons and yelled at the woman to come towards them, and she did. RP 351, 382. Officers Pigman and Kitts restrained the woman and Officer Brosseau put handcuffs on her. RP 351.

Birdsong, Rachelle M. - COA # 35357-1-II

The woman identified herself as Rachelle Birdsong. RP 352. Officer Brosseau transported Ms. Birdsong to the Puyallup jail and booked her. RP 352.

Based on the odor of ammonia, the gas can, and the observations from other officers, Officer Pigman obtained a search warrant for the house. RP 192.

On August 28, 2005, Officer Engle was contacted by Sergeant Brokaw who asked Officer Engle to respond to 1313 11th Street Place Southwest in Puyallup as part of a "clandestine response team." RP 390-391. Officer Brokaw is the team leader of the Puyallup Methamphetamine Lab Team. RP 545. Officer Brokaw was asked to respond to Mr. Judge's residence on August 28, 2005. RP 578. Officer Brokaw supervised the search of the residence. RP 578.

Officer Earick is a member of the Puyallup methamphetamines team. RP 634. On August 28, 2005, Officer Brokaw requested Officer Earick respond to assist in processing a suspected methamphetamine lab located at 1313 11th Street Place Southwest. RP 634. Officer Earick assisted in processing the items found in the house, including taking fingerprints, taking sample sets, and testing the pH level of items. RP 635.

Officer Engle was assigned the task of evidence identification,

Birdsong, Rachelle M. - COA # 35357-1-II

collection, and retention. RP 392. Office Engle looks for any items that “may be associated with the manufacture.” RP 392-393. Office Engle searched the entire home. RP 395.

The police searched the house for approximately six hours. RP 289. The items Officer Brokaw found and which he believed constituted a methamphetamine lab were spread out in the garage in trash cans and on benches. RP 597.

From a garbage can in the garage, Officer Engle recovered blister packages, Safeway nasal decongestant, a battery package, and correspondence addressed to Ms. Birdsong. RP 398-400, CP 79-83. Officer Brokaw testified that the empty blister packs discovered at Mr. Judge’s residence previously contained tablets which had 30 milligrams of pseudoephedrine per tablet. RP 553. The police did not find any lithium battery parts (RP 267) and Officer Brokaw found no evidence that batteries had been stripped for lithium at the house and had no idea what the batteries which had been contained in the empty battery container found at the house were used for. RP 589. The boxes of nasal decongestant found in the house did not contain ephedrine or pseudoephedrine. RP 592, CP 79-83. Nasal decongestants containing phenylephrine cannot be used to manufacture methamphetamine. RP 756.

From a different garbage can in the garage, Officer Engle recovered

a container of lye, tubing, a vial, and a glass pipe. RP 400-401, CP 79-83.

On the floor of the garage, Officer Engle recovered tubing and a "canning lid." RP 402, CP 79-83.

On a table in the garage, Officer Engle recovered a gas mask. RP 402-403, CP 79-83.

Officer Engle also recovered a Radio Shack radio scanner from the garage. RP 403, CP 79-83. Officer Engle also discovered a piece of paper in the garage that listed the radio frequencies of the Washington State Patrol. RP 407. The scanner was operational and was tuned to the same frequency as Officer Engle's radio. RP 421-422.

Officer Engle recovered a box of latex gloves and a can of paint thinner in the garage as well. RP 404-405, CP 79-83. Officer Engle did not recover any used latex gloves. RP 426.

Inside a sandblaster in the garage, Officer Engle found some coffee filters. RP 405. Also found in the sandblaster was some tubing. RP 405-406, CP 79-83.

In a tool box in the garage, Officer Engle discovered small plastic baggies. RP 407-408, CP 79-83.

On a dresser in the garage, Officer Engle discovered a set of scales. RP 408, CP 79-83.

Birdsong, Rachelle M. - COA # 35357-1-II

On a workbench in the garage, Officer Engle discovered an air respirator. RP 409.

Officer Engle also recovered a surveillance camera mounted on the outside of the house and a TV screen which was connected to the camera. RP 409, CP 79-83. The TV screen was mounted in the garage and the camera was mounted pointed at the driveway. RP 422.

Officer Engle found two loose coffee filters in the garage with a substance in them. RP 537-539, CP 79-83.

Officer Engle also recovered a Coleman propane bottle with the top on it on a table in the garage. RP 397-398.

Officer Engle recovered two red gas cans from a grassy area in back of the house. RP 396.

In a bedroom, Officer Engle discovered three electronic scales. RP 411. Officer Engle also recovered a small plastic bottle with a white substance inside it from the bedroom. RP 417.

Officer Engle discovered a glass plate with a credit card and a white substance on it in a cupboard in the kitchen. RP 410, 416-417.

On a wooden stereo case in the downstairs hallway, Officer Engle recovered a handgun and a rifle. RP 418, CP 79-83. The stereo case was 20 feet inside the front door of the house. RP 418. Both guns were loaded when

Birdsong, Rachelle M. - COA # 35357-1-II

they were recovered. RP 419.

Officer Engle did not find remnants of batteries, stripped batteries, ephedrine or pseudoephedrine powder, ephedrine or pseudoephedrine liquid, tanks with valve systems on them, ether, camping fuel, aluminum foil, rock salt, or any items that are necessary for creating an acid gas for use in meth production. RP 427-429. Officer Engle also did not find two large cans of paint thinner as described by Officer Brosseau. RP 429.

No pseudoephedrine was found at the house. RP 264. No denatured alcohol or "Heat" gas additive was found during the search. RP 265. The police did not find any propane tanks or other tanks with valves on them during the search. RP 266. The police did not find any pseudoephedrine powder mixed with lithium. RP 267. The police did not recover any substance consistent with the reaction phase of methamphetamine production. RP 267-268. The police did not recover any ether or camping fuel such as is used in the reaction phase of methamphetamine manufacturing. RP 268-269. The police did not find and rock salt, acid, or foil as is used in an acid gas generator during methamphetamine production. RP 269-270. During the search, officers located a bucket that contained an acidic liquid (RP 643), however, the police did not find any containers consistent with an acid gas generator. RP 270. Officer Brokaw did not find any liquids consistent with

the second stage of methamphetamine manufacturing. RP 621-622.

The police did not locate any containers which appeared to have had a heat source applied to them to assist in evaporating any substance. RP 270-271. The police did find coffee filters in the trash and the sandblasting cabinet. RP 274.

Other than proximity, Officer Brokaw had no reason to suspect that the substance he found at the house and suspected was methamphetamine was manufactured at the house. RP 597.

No caps were found for the red gas cans. RP 620.

Officer Reiber is a member of the methamphetamine team. RP 664. On August 28, 2005, Officer Reiber was asked to respond to a suspected methamphetamine lab at 1313 11th Street Place Southwest. RP 665-666.

Officer Reiber processed evidence at the scene by lifting fingerprints from items, testing pH levels, and sampling liquids and other substances. RP 677.

Officer Reiber did not obtain any fingerprints from the firearms which were located in the house. RP 685.

The credit card found on the piece of glass in the bedroom had the name of Mr. Warner on it. RP 686.

No fingerprints submitted for analysis in relation to this case matched

Birdsong, Rachele M. - COA # 35357-1-II

either Mr. Judge or Ms. Birdsong. RP 726-727.

Mr. Boshears is a forensic scientist for the Washington State Patrol Crime Lab. RP 752. Mr. Boshears analyzed the powder recovered from the piece of glass in the bedroom and the baggie on the piece of glass in the bedroom. RP 766. There was .2 grams of loose powder on the piece of glass and .1 grams of powder in the baggie. RP 767. Both powders contained methamphetamine. RP 771-772. The powder found loose on the glass plate was consistent with methamphetamine manufactured using the ammonia alkaloid metal method. RP 771-773.

Mr. Boshears tested the samples labeled 1A and 2A and both samples contained ammonium sulfate, which can be used to generate ammonia in the manufacture of methamphetamine. RP 773-774. If lye had been mixed with the ammonium sulfate, it would have been indicated in the infrared spectrometer test performed by Mr. Boshears. RP 778-779. The infrared spectrometer indicated that there was no lye in the ammonium sulfate. RP 779. There is no way to use ammonium sulfate fertilizer to produce anhydrous ammonia without using lye. RP 780-781.

Mr. Boshears also tested exhibit 35, the baggie containing a pink substance, and identified it as a sugar or a starch, which could be binder material found in pseudoephedrine tablets. RP 775-776, CP 79-83.

Birdsong, Rachelle M. - COA # 35357-1-II

Mr. Boshears also tested paper filters contained in item 14, or exhibit 77. RP 776-777. Mr. Boshears determined that the substance in the filters was sugar or starch. RP 777. The substance could be a binder, but the substance did not contain any ephedrine or pseudoephedrine. RP 788.

In order to liquefy anhydrous ammonia gas to use it in the manufacture of methamphetamine, the gas must be cooled to 28 degrees Fahrenheit below zero. RP 781. Ice cubes obtained from a refrigerator vary in temperature from zero degrees to 32 degrees. RP 781. Zero degrees would be too warm to liquefy anhydrous ammonia. RP 782. In order to liquefy anhydrous ammonia using pressure, the gas would have to be pressurized to 115 pounds per square inch. RP 782. This would require an air compressor and something with a cap to contain the pressurized gas. RP 782. An individual would have to possess several gallons of propane in order to cool ammonia gas into liquid ammonia. RP 799-800.

In his testing, Mr. Boshear never found any indication of the presence of pseudoephedrine or ephedrine, substances which are necessary to the production of methamphetamine. RP 786.

It would be impossible to make methamphetamine without anhydrous ammonia, lithium metal, or acid. RP 793-794.

The tubing Mr. Boshears observed looked unused. RP 805-806.

IV. SUMMARY OF TESTIMONY

- ***Officer Douglas Kitts***

Officer Kitts discusses his training and employment. RP 109-114.

Officer Kitts does not consider himself an expert in methamphetamine labs. RP 114.

Officer Kitts describes being dispatched to the house in response to a smell, smelling ammonia upon approaching the front door, looking into the partially opened garage, and finally contacting Mr. Judge at the front door to the house. RP 114-121.

Officer Kitts describes his initial contact with Mr. Judge, Mr. Judge's denial of the police's request to search his home, and Mr. Judge's statement that his girlfriend was asleep in the house. RP 122-124.

Officer Kitts describes Mr. Judge calling into the house and leaving a message saying the police were at the house and asking his girlfriend to come outside because the police thought there was a methamphetamine lab in the house. RP 124-125.

Officer Kitts discusses Officer Brosseau discovering a thin, blonde, white, woman throwing things off the deck behind Mr. Judge's house, the officer's running into the back yard, and Officer Kitts' discovery of gas cans in blackberry bushes. RP 125-129.

Officer Kitts describes retrieving the gas cans and going back to the front of the house and taking Ms. Birdsong into custody. RP 130-131, 188-189.

- ***Officer Steven Pigman***

Officer Pigman describes his training and employment. RP 157-RP 158.

Officer Pigman describes responding to Mr. Judge's house in response to a call from Officer Kitts to investigate a possible methamphetamine lab. RP 162-164.

Officer Pigman describes arriving, observing Mr. Judge standing outside with other officers, smelling ammonia coming from the front of the residence, and not smelling odors by the garage. RP 164-168, 252.

Officer Pigman discusses retrieving the gas cans from the back yard and describes the contents of the gas cans. RP 168-170, 188.

Officer Pigman describes arresting Ms. Birdsong. RP 188-190, 291.

Officer Pigman discusses obtaining and executing a search warrant for the house. RP 191-194.

State's exhibits 11, 23 through 29, 30, 31, 33 through 39, 41 through 43, 45 through 49, 50 through 59, 61, 62, and 90 through 92 are all pictures of items found during the search of the house. RP 222-223.

Officer Pigman describes the items that were and were not found during the search of Mr. Judge's home. RP 264-289.

- ***Officer Rochelle Brosseau***

Officer Brosseau discusses her employment and training. RP 310-313.

Officer Brosseau discusses being dispatched to Mr. Judge's residence and the observations she made while approaching the garage and her observations of the contents of the garage. RP 313-318.

Officer Brosseau describes attempting to contact the occupants of the house at the front door then going back and looking in the garage some more. RP 318-322, 361-362.

Officer Brosseau describes contacting Mr. Judge at the front door to the house, asking Mr. Judge for permission to search the house, Mr. Judge's denial that there was a meth lab in the house, and Mr. Judge's denial of the officer's requests to search the house. RP 336-338.

Officer Brosseau describes Mr. Judge telling the officer that his girlfriend was asleep in the house and Mr. Judge's phone calls into the house. RP 338-341.

Officer Brosseau describes walking into a neighbor's yard to look over the fence into Mr. Judge's back yard and observing a woman throw a red

plastic gas can into the bushes. RP 342-346.

Officer Brosseau describes running around the house, telling the other officers about the woman throwing things into the bushes, and running to the back yard. RP 348-349.

Officer Brosseau describes going back to the garage and looking in and seeing the woman spreading Carpet Fresh on the carpet in the house. RP 350-351.

Officer Brosseau discusses taking Ms. Birdsong into custody and transporting her to jail. RP 351-352, 382.

- ***Scott Engle***

Officer Engle describes his employment and training. RP 388-390.

Officer Engle describes being asked to respond to Mr. Judge's house and his subsequent duties of evidence collection, identification, and retention. RP 390-395.

Officer Engle discusses the items which were and were not found in the search of Mr. Judge's home. RP 396-433.

- ***Sheri Theuerkauf***

Officer Theuerkauf is an evidence technician with the Puyallup Police Department. RP 440-441. Officer Theuerkauf confirmed the chain of custody of the evidence recovered from Mr. Judge's house. RP 441-462.

Birdsong, Rachelle M. - COA # 35357-1-II

- ***Dalan Brokaw***

Officer Brokaw is employed by the City of Puyallup police department. RP 542-543. Officer Brokaw is the team leader of the Puyallup Methamphetamine Lab Team. RP 545. Officer Brokaw testified regarding the different methods used to manufacture methamphetamine. RP 546-564.

Officer Brokaw testified that the empty blister packs discovered at Mr. Judge's residence previously contained tablets which had 30 milligrams of pseudoephedrine per tablet. RP 553.

Officer Brokaw also testified regarding the techniques used by the methamphetamine lab team at the scene of a suspected methamphetamine lab. RP 564-568, 573-577.

Officer Brokaw was asked to respond to Mr. Judge's residence on August 28, 2005. RP 578. Officer Brokaw supervised the search of the residence. RP 578.

Officer Brokaw found no evidence that batteries had been stripped for lithium at the house and had no idea what the batteries which had been contained in the empty battery container found at the house were used for. RP 589.

The boxes of nasal decongestant found in the house did not contain ephedrine or pseudoephedrine. RP 592, CP 79-83.

The items Officer Brokaw found and which he believed constituted a methamphetamine lab were spread out in the garage in trash cans and on benches. RP 597.

Other than proximity, Officer Brokaw had no reason to suspect that the substance he found at the house and suspected was methamphetamine was manufactured at the house. RP 597.

No caps were found for the red gas cans. RP 620.

Officer Brokaw did not find any liquids consistent with the second stage of methamphetamine manufacturing. RP 621-622.

- ***William Earick***

Officer Earick describes his employment, his training, and his response to Mr. Judge's House to assist in processing a suspected methamphetamine lab. RP 632-634.

Officer Earick assisted in processing the items found in the house, including taking fingerprints, taking sample sets, and testing the pH level of items. RP 635.

During the search, officers located a bucket that contained an acidic liquid. RP 643. Officer Earick turned the scanner located at the house on and discovered it was tuned to the Puyallup primary dispatch channel. RP 644.

- ***Greg Reiber***

Officer Reiber discusses his employment and training and his response to Mr. Judge's house to investigate a suspected methamphetamine lab. RP 663-666.

Officer Reiber discusses going into the back yard and locating the gas cans in the bushes. RP 667.

Officer Reiber discusses taking Mr. Birdsong into custody. And doing a "cursory inspection" of the house to make sure no other people were in the house. RP 667-668, 690.

Officer Reiber processed evidence at the scene by lifting fingerprints from items, testing pH levels, and sampling liquids and other substances. RP 677.

Officer Reiber looked into the gas cans found in the back yard and observed a white substance that was "wet in nature." RP 680-681. The contents of the gas cans had a pH of 11. RP 681. Officer Reiber took samples of the contents of the gas cans. RP 681-682.

Officer Reiber was able to lift a fingerprint from a piece of mail addressed to Ms. Birdsong. RP 683. Officer Reiber took a sample of the pink substance found in a coffee filter. RP 683. Officer Reiber was able to obtain a fingerprint from the empty can of Red Devil lye. RP 684. Officer

Birdsong, Rachelle M. - COA # 35357-1-II

Reiber obtained a fingerprint from the box of latex gloves. RP 685.

Officer Reiber did not obtain any fingerprints from the firearms which were located in the house. RP 685.

The credit card found on the piece of glass in the bedroom had the name of Mr. Warner on it. RP 686. Officer Reiber packaged the white substance on the plate for processing. RP 686. Officer Reiber also sampled the packaged substance. RP 687.

- ***Steven Mell***

Mr. Mell is a forensic investigator with the Pierce County Sheriff's Department. RP 711. Mr. Mell testified regarding his training, what a fingerprint is and how fingerprints are collected. RP 711-723. Mr. Mell received print cards for analysis in relation to this case. RP 723. There were only two fingerprints which were of comparison value. RP 723. Neither fingerprint matched either Mr. Judge or Ms. Birdsong. RP 726-727.

- ***Brenda Lawrence***

Ms. Lawrence is a forensic scientist with the Washington State Patrol Crime Lab. RP 739. Ms. Lawrence is a firearms and tool mark examiner. RP 739.

The rifle and the handgun found in the house were operable firearms. RP 745-750.

Birdsong, Rachelle M. - COA # 35357-1-II

- ***Franklin Boshears***

Mr. Boshears is a forensic scientist for the Washington State Patrol Crime Lab. RP 752. Mr. Boshears testified that nasal decongestants containing phenylephrine cannot be used to manufacture methamphetamine. RP 756.

Mr. Boshears testified regarding different methods of manufacturing methamphetamine. RP 757-765.

The canning lid with tubes pictured in exhibits 42, 43, and 46 is consistent with using a glass jar as a hydrochloride generator. RP 765.

Mr. Boshears discusses testing the items found during the search of Mr. Judge's house. RP 766-788.

Mr. Boshears discusses the methods used to make ammonia for purposes of manufacturing methamphetamine. RP 781-800.

In his testing, Mr. Boshear never found any indication of the presence of pseudoephedrine or ephedrine, substances which are necessary to the production of methamphetamine. RP 786.

It would be impossible to make methamphetamine without anhydrous ammonia, lithium metal, or acid. RP 793-794.

The tubing Mr. Boshears observed looked unused. RP 805-806.

- ***Robert Jerome Judge***

Robert Judge is the father of the codefendant, Rick Judge. RP 837. Robert Judge owns the home located at 1313 11th Street Place Southwest and has owned it since 1991. RP 838.

In the garage of the home were several bookcases with paint, spray cans, thinners, and other “garage chemicals.” RP 840. There were air compressors and hoses in the garage. RP 841.

Mr. Judge would refurbish mechanical items such as cars, jet skis, and lawnmowers. RP 841.

Exhibits 42 and 43 are pictures of a system used to bleed the brakes on a car. RP 845.

Mr. Judge has allergies and uses pills containing pseudoephedrine for his allergies. RP 851-852.

V. ARGUMENT

1. The State presented insufficient evidence to establish that Ms. Birdsong was an accomplice to manufacturing methamphetamine.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial evidence and direct evidence are equally reliable, and

criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068. In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt; the reviewing court need only be satisfied that substantial evidence supports the State’s case. *State v. Galisia*, 63 Wn.App. 833, 838, 822 P.2d 303 (1992), *review denied*, 119 Wn.2d 1003, 832 P.2d 487 (1992), *abrogated on other grounds by State v. Trujillo*, 75 Wn.App. 913, 883 P.2d 329 (1994).

“A person being tried on a criminal charge can be convicted only by evidence, not by innuendo.” *State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950). In cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied solely by a pyramiding of inferences. *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 932 (1999).

a. *The State presented insufficient evidence to establish that Mr. Judge was manufacturing methamphetamine.*

Here, the State alleged that Mr. Judge was manufacturing

methamphetamine using the “Birch Reduction” method, also known as the “anhydrous ammonia” method or “lithium metal reduction” method. RP 546-563.

Officer Brokaw testified that this method has three steps: (1) the extraction phase where ephedrine and pseudoephedrine are extracted from cold tablets (RP 548-554); (2) the reaction or reduction phase where one oxygen molecule is removed from the pseudoephedrine molecule, thereby turning the pseudoephedrine molecule into a methamphetamine molecule (RP 554-558); and (3) the “gassing” or “salting out” phase where the methamphetamine is initially suspended in a solvent and extracted into a crystallized or powder form safe for ingestion. RP 558-563.

Officer Brokaw testified that the first phase consists of grinding the cold tablets into a powder and putting the powder in a solvent which will evaporate rapidly, leaving pseudoephedrine. RP 549-550. Officer Brokaw testified that most methamphetamine manufacturers use ethyl alcohol such as “Heat” gas additive for automobiles. RP 550. When the powder is dissolved in the solvent, the pseudoephedrine molecules are released from the binders in the pills, such as sucrose, dextrose, or sugars, as well as any dye in the tablets. RP 550. After the powder is dissolved in the solvent, the mixture is passed through a filter, most commonly coffee filters, to remove

the liquid solvent. RP 550-551.

In the second phase of the Birch Reduction method of methamphetamine production, one oxygen molecule is removed from the pseudoephedrine molecule, thereby turning the pseudoephedrine molecule into a methamphetamine molecule. RP 554. This is most commonly done by using lithium metal obtained from “stripping” lithium batteries, mixing it with the pseudoephedrine and anhydrous or distilled ammonia. RP 554-557. Officer Brokaw testified that, most commonly, methamphetamine cooks obtain ammonia by mixing ammonium sulfate, or fertilizer, with sodium hydroxide, or lye, and adding water. RP 556-558.

In the third phase, the methamphetamine is suspended in a solvent, which would be caustic to the human body. RP 558. The methamphetamine is converted from liquid form to powder or crystalline form, most commonly by using an acid gas generator. RP 558. The acid gas is created using rock salt or aluminum foil and mixing it with sulfuric or muriatic acid. RP 558-559. The gas must be contained in some type of vessel because ingesting it will burn a person’s lungs. RP 559. This process results in a solvent with methamphetamine crystals in the bottom of it which must be filtered or evaporated to separate the solvent from the methamphetamine. RP 560. This third phase requires tubing. RP 561.

- i. *The State presented insufficient evidence to establish that the first phase of methamphetamine production was occurring at Mr. Judge's house.*

Here, no denatured alcohol or "Heat" gas additive was found during the search. RP 265. The State also did not present any evidence that pills were being crushed at Mr. Judge's home. The search of Mr. Judge's home did reveal coffee filters containing a substance which ultimately tested positive as being a starch or a sugar, substances which can be used as binders in pills. RP 405, 776-777, 778. However, the testing of these items did not reveal the presence of ephedrine or pseudoephedrine, substances which are necessary to the production of methamphetamine. RP 786, 788. In fact, the only evidence introduced by the State that ephedrine or pseudoephedrine had ever been present in Mr. Judge's home was the single empty blister pack of cold medicine (RP 427-429, 553), which Mr. Judge's father testified Mr. Judge used to combat his allergies. RP 851-852.

The State failed to present substantial evidence sufficient to allow a rational any rational of fact to conclude that the first phase of methamphetamine productions was occurring at Mr. Judge's home. Any conclusion that the first phase was occurring would be based entirely on a series of inferences from circumstantial evidence, and therefore be improper under *Bencivenga* and *Yoakum*.

- ii. *The State presented insufficient evidence to establish that the second phase of methamphetamine production was occurring at Mr. Judge's house.*

Officer Brokaw did not find any liquids consistent with the second stage of methamphetamine manufacturing. RP 621-622. Further, it is impossible to make methamphetamine by this method without anhydrous ammonia or lithium metal. RP 793-794.

Officer Engle did not find remnants of batteries, stripped batteries, ephedrine or pseudoephedrine powder. RP 427-429. The police did not find any lithium battery parts (RP 267) and Officer Brokaw found no evidence that batteries had been stripped for lithium at the house and had no idea what the batteries which had been contained in the empty battery container found at the house were used for. RP 589. The police did not find any pseudoephedrine powder mixed with lithium. RP 267. In fact, the police did not recover any substance consistent with the reaction phase of methamphetamine production. RP 267-268. The police did not recover any ether or camping fuel such as is used in the reaction phase of methamphetamine manufacturing. RP 268-269.

No ammonia was found during the search. The red plastic gas cans which were found in the bushes did contain ammonium sulfate (RP 773-774), which can be used to generate ammonia in the manufacture of

methamphetamine if lye is added to it. RP 556-558. While the police did recover an empty can of "Red Devil" brand lye in a garbage can in the garage (RP 400-401), tests of the contents of the gas cans revealed that no lye was present. RP 778-779. There is no way to use ammonium sulfate fertilizer to produce anhydrous ammonia without using lye. RP 780-781.

Further, even if the gas cans had, in fact, been used to make ammonia gas, Mr. Boshears testified that in order to liquefy anhydrous ammonia gas to use it in the manufacture of methamphetamine, the gas must be cooled to 28 degrees Fahrenheit below zero. RP 781. Officer Kitts did observe ice cubes falling while a gas can was thrown from the deck of the house (RP 129), however, ice cubes obtained from a refrigerator vary in temperature from zero degrees to 32 degrees. RP 781. Zero degrees would be too warm to liquefy anhydrous ammonia. RP 782. Alternatively, in order to liquefy anhydrous ammonia using pressure, the gas would have to be pressurized to 115 pounds per square inch. RP 782. This would require an air compressor and something with a cap to contain the pressurized gas. RP 782. No containers with caps or valves suitable for pressurizing a gas were found. RP 427-429. No caps were found for the red gas cans. RP 620.

If an individual wished to use propane instead of ice to cool the ammonia gas, an individual would have to possess several gallons of propane

in order to cool ammonia gas into liquid ammonia. RP 799-800. Here, while Officer Engle recovered a Coleman propane bottle with the top on it on a table in the garage (RP 397-398), the amount of propane contained in the bottle would not be sufficient to effectively cool ammonia gas because the propane would evaporate too quickly to be useful. RP 804.

The State failed to present substantial evidence sufficient to allow a rational juror to conclude that the second phase of methamphetamine production was occurring at Mr. Judge's home. It would be physically impossible to produce methamphetamine using the evidence discovered during the thorough search of the home, and the officers did not find any substances consistent with the second phase actually occurring at the home. Any conclusion that the second phase was occurring would be based entirely on a series of inferences from circumstantial evidence, and therefore be improper under *Bencivenga* and *Yoakum*.

iii. The State presented insufficient evidence to establish that the third phase of methamphetamine production was occurring at Mr. Judge's house.

Officer Engle did not find aluminum foil, rock salt, or any items that are necessary for creating an acid gas for use in meth production. RP 427-429. During the search, officers located a bucket that contained an acidic liquid (RP 643), however, the police did not find any containers consistent

with an acid gas generator.

The State failed to present substantial evidence sufficient to allow a rational any rational of fact to conclude that the third phase of methamphetamine production was occurring at Mr. Judge's home. Without an acid gas generator, it would be physically impossible to produce ingestible methamphetamine, and the officers did not find any substances consistent with an acid gas generator in the search. Any conclusion that the third phase was occurring would be based entirely on a series of inferences from circumstantial evidence, and therefore be improper under *Bencivenga* and *Yoakum*.

As stated above, the State failed to present substantial evidence to allow any rational trier of fact to conclude that any part of the processes involved in the manufacture of methamphetamine using the Birch Reduction method were occurring at Mr. Judge's house. In fact, several of the State's own witnesses testified that it would be physically impossible to manufacture methamphetamine using the materials found in Mr. Judge's home. The conclusion that Mr. Judge was not manufacturing methamphetamine is strengthened by the fact that the alleged "lab" was not an assembled functioning unit, but was found scattered amongst several work tables and garbage cans.

Even when viewed in a light most favorable to the State, the evidence as insufficient to permit a rational trier of fact to find that methamphetamine production was occurring at Mr. Judge's home.

b. Even if this court finds that the State presented sufficient for a jury to find that methamphetamine production was occurring at Mr. Judge's house, the State presented insufficient evidence to establish that Ms. Birdsong was an accomplice to the production of methamphetamine.

Ms. Birdsong was charged with being an accomplice to the unlawful manufacture of methamphetamine in violation of RCW 69.50.401. CP 1-4. RCW 69.50.401 provides, in pertinent part,

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(2) Any person who violates this section with respect to:

(b) ...methamphetamine, including its salts, isomers, and salts of isomers, is guilty of a class B felony

RCW 9A.08.020 provides, in pertinent part,

(2) A person is legally accountable for the conduct of another person when:

(c) He is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the

commission of the crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it; or

(b) His conduct is expressly declared by law to establish his complicity.

“[I]n order for one to be deemed an accomplice, that individual must have acted with knowledge that he or she was promoting or facilitating the crime for which that individual was eventually charged.” *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). Guilt cannot be inferred by mere presence and knowledge of activity. *In re Wilson*, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979).

Washington case law has consistently stated that physical presence and assent alone are insufficient to constitute aiding and abetting. *Wilson*, 91 Wn.2d at 491, 588 P.2d 1161. Presence at the scene of an ongoing crime may be sufficient if a person is “ready to assist.” *Wilson*, 91 Wn.2d at 491, 588 P.2d 1161.

“One does not aid and abet unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about, and seeks by his action to make it succeed.” *State v. Amezola*, 49 Wn.App. 78, 89, 741 P.2d 1024 (1987).

As stated above, the State presented insufficient evidence to establish that the manufacturing of methamphetamine was occurring at Mr. Judge's house. It would therefore be impossible for Ms. Birdsong to be an accomplice to an act which was not occurring. However, should this court find that the State presented sufficient evidence to establish that Mr. Judge was manufacturing methamphetamine, the State presented insufficient evidence to establish that Ms. Birdsong had associated herself with the undertaking or manufacturing methamphetamine, participated in the manufacture of methamphetamine as if it were something she desired to bring about, and sought action to make the manufacture of methamphetamine succeed.

As stated above, mere presence and knowledge that criminal activity is occurring is insufficient evidence to establish accomplice liability. Here, the only evidence presented regarding Ms. Birdsong was that she was present at the house on the day of the search and that she threw the gas cans containing fertilizer into the bushes. At best, when viewed in a light most favorable to the State, this evidence would establish that Ms. Birdsong knew Mr. Judge was manufacturing methamphetamine and simply sought to hide evidence of this fact from the police. The State presented no evidence that Ms. Birdsong ever associated herself with, participated in, or desired to bring

about the manufacture of methamphetamine.

2. The State presented insufficient evidence to establish that Ms. Birdsong possessed methamphetamine.

Ms. Birdsong was charged with unlawful possession of a controlled substance in violation of RCW 69.50.4013. CP 1-4.

RCW 69.50.4013 provides, in pertinent part,

It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

Possession may be actual or constructive. *State v. Echeverria*, 85 Wn.App. 777, 783, 934 P.2d 1214 (1997). One can be in constructive possession jointly with another person. *State v. Morgan*, 78 Wn.App. 208, 212, 896 P.2d 731, *review denied*, 127 Wn.2d 1026, 904 P.2d 1158 (1995). A defendant has actual possession when he or she has physical custody of the item and constructive possession if he or she has dominion and control over the item. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

a. The State presented insufficient evidence to establish that Ms. Birdsong had actual possession of the methamphetamine.

Here, the State presented no evidence that Ms. Birdsong ever had actual possession of the methamphetamine found in the kitchen. Ms. Birdsong did not have possession of it when she was arrested and her

Birdsong, Rachelle M. - COA # 35357-1-II

fingerprints were not found on the glass plate or the credit card.

- b. *The State presented insufficient admissible evidence to establish that Ms. Birdsong had constructive possession of the methamphetamine.*

Constructive possession means the contraband is not in the person's actual, physical possession, but that the person charged with possession has dominion and control over either the contraband or the premises where it was found. *Callahan*, 77 Wn.2d at 29, 459 P.2d 400 (1969); *Echeverria*, 85 Wn.App. at 783, 934 P.2d 1214 (1997). Dominion and control means that the object may be reduced to actual possession immediately. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). However, mere proximity is not enough to establish possession. *Jones*, 146 Wn.2d at 333, 45 P.3d 1062.

Although exclusive control is not a prerequisite to establishing constructive possession, mere proximity is insufficient to show dominion and control. Temporary residence, personal possessions on the premises, or knowledge of the presence of the drug, without more, are also insufficient. Whether an individual has dominion and control over a controlled substance is determined by considering the various indicia of dominion and control and their cumulative effect—that is, the totality of the situation.

State v. Bradford, 60 Wn.App. 857, 862-863, 808 P.2d 174, *review denied*, 117 Wn.2d 1003, 815 P.2d 266 (1991) (internal citations omitted).

Constructive possession of an apartment is usually established by showing the defendant leased the apartment or paid rent and resided there.

State v. Tadeo-Mares, 86 Wn.App. 813, 816, 939 P.2d 220 (1997). Payment of rent or possession of keys will do. *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). Some evidence of participation in paying rent is generally required. *Callahan*, 77 Wn.2d at 31, 459 P.2d 400. Short of that, letters and bills addressed to the defendant at that address and the defendant's flight to the room in which the contraband was found when the police arrived may be enough. *State v. Walton*, 64 Wn.App. 410, 416, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

Evidence of temporary residence or the mere presence of personal possessions on the premises is, however, not enough. *Partin*, 88 Wn.2d at 906, 567 P.2d 1136.

In *Partin*, a finding of occupancy was based on photographs and articles featuring the defendant, a payment book for the purchase of the premises with Mr. Partin's paycheck stubs inside, three letters addressed to him, and his unemployment documents. Mr. Partin gave out the address as his own and had acted as if he owned the place on a previous police visit. *Partin*, 88 Wn.2d at 907-08, 567 P.2d 1136. The phone rang repeatedly with callers asking for Mr. Partin. *Id.* at 907, 567 P.2d 1136.

In *Callahan*, 77 Wn.2d 27, 31, 459 P.2d 400, two books, two guns and a broken scale belonging to the defendant, plus evidence the defendant

had been staying on the premises for two or three days was not enough to establish dominion and control.

In *State v. Hagen*, 55 Wn.App. 494, 781 P.2d 892 (1989), evidence that a person received some mail at a residence and lived there off and on was not sufficient to show constructive possession. *Hagen*, 55 Wn.App. at 500, 781 P.2d 892. “The single fact that he had personal possessions, not of the clothing or personal toilet article type, on the premises is insufficient” to support a conclusion of dominion and control. *Id.*

A selection of minimal sufficient evidence is collected in *Walton*: receipts, utility and telephone bills addressed to the defendant; the presence of his small children; a business card with his name and the address of the premises. *Walton*, 64 Wn.App. at 416, 824 P.2d 533.

In *Bradford*, 60 Wn.App. at 864, 808 P.2d 174, the court found constructive possession based on receipts, utility and telephone bills all addressed to the defendant together with his presence at the address alone with two small children.

In *State v. Dobyms*, 55 Wn.App. 609, 616, 779 P.2d 746, *review denied*, 113 Wn.2d 1029, 784 P.2d 530 (1989), constructive possession was based on a witness’ observation of the defendant’s car parked near the residence, a bill addressed to the defendant found in the residence, and his

business card with a telephone number matching that of the residence.

Here, the only evidence presented by the State that Ms. Birdsong had dominion and control over the premises where the methamphetamine was found was her presence at the house on the day of the search and a single piece of bulk mailing found in a garbage can at the home addressed to Ms. Birdsong at the address where the search occurred.

- i. The trial court abused its discretion in admitting the advertisement addressed to Ms. Birdsong found in the garbage in Mr. Judge's garage where the advertisement was hearsay.*

The trial court's admission of evidence is reviewed for abuse of discretion. *State v. Atsbeha*, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds." *State v. Perrett*, 86 Wn.App. 312, 319, 936 P.2d 426, *review denied*, 133 Wn.2d 1019 (1997).

Under ER 801(c), "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Such statements are not admissible under ER 802, unless allowed by an evidentiary rule, court rule, or statute.

Prior to trial, Ms. Birdsong moved to suppress a piece of mail found in Mr. Judge's home on grounds that it was a statement of Ms. Birdsong's address being offered to demonstrate that Ms. Birdsong resided at Mr.

Judge's house and that the advertisement was therefore hearsay. RP 74.

The State responded that the advertisement "was not being offered for the truth of the matter," but was being offered "to show [Ms. Birdsong] resides there as dominion and control over the premises." RP 74-75. Upon questioning by the court, the State indicated that "the contents [of the advertisement] itself is [sic] not what the State is seeking to admit. Simply the fact that it was sent to Ms. Birdsong at the address where the search warrant was executed." RP 75. The trial court found that the contents of the advertisement would be hearsay, but the address on the advertisement was not hearsay, and allowed the advertisement to be introduced into evidence. RP 76.

Counsel for Ms. Birdsong pressed the objection and argued that the addressing of the advertisement was a statement, and that in the context in which the State was seeking to offer the advertisement, the address on the mail was offered to prove the truth of the matter asserted (that Ms. Birdsong lived at Mr. Judge's house) and was therefore hearsay. RP 76-77. The State responded by citing the comment to ER 801 contained in Tegland's Courtroom Handbook on Washington Evidence that "if the statement is relevant simply because it was made, and without regard to whether the statement was true or false, the statement is not hearsay." RP 77. The State

then directed the court's attention to a case cited in Tegland where a piece of paper with both the defendant's fingerprints and directions to a moving company which was found at the scene of a robbery was admitted at trial for the robbery since the paper was offered to establish the presence of the defendant at the scene of the crime, not the location of the moving company.

RP 78.

The State argued that,

These pieces of mail found at a crime scene, someone's identification that's found at a crime scene are routinely admitted at trial because they are not being offered for the truth of the matter.

The contents of this particular exhibit is [sic] absolutely irrelevant. It's the fact that she is receiving mail at that particular residence, and that in and of itself is not being offered for the truth of the matter. They are routinely admitted at trials to show – to place the defendant at the crime scene.

RP 79-80.

The trial court took a brief recess and then ruled that the address on the advertisement was not hearsay and allowed the admission of the advertisement "pursuant to argument made by the prosecution." RP 80.

The State's argument that the address on the advertisement was not hearsay was inconsistent and illogical: the State first argued it was offering the address on the advertisement (RP 75) for purposes of establishing that

Birdsong, Rachele M. - COA # 35357-1-II

Ms. Birdsong resided at the address searched, and thus had dominion and control over it, but then argued that the address on the advertisement was not being offered to prove the truth of the matter asserted (that Ms. Birdsong lived at the address given on the advertisement). RP 74-75.

It is clear from the State's argument that the State was offering the contents of the address label on the advertisement as evidence that Ms. Birdsong resided at Mr. Judge's house and had dominion and control over the premises. RP 74-75. Thus, as asserted by trial counsel, the address on the advertisement was an out-of-court statement offered to prove the truth of the matter asserted, specifically, that Ms. Birdsong resided at Mr. Judge's house. The address was therefor hearsay under ER 801 and was inadmissible under ER 802.

Further, no exception to ER 802 would apply to the introduction of the advertisement for the purpose of establishing that Ms. Birdsong resided at Mr. Judge's home and had dominion and control. Had the piece of mail been a utility bill rather than an advertisement, it might arguably have been admissible under RCW 5.45.020,¹ however, the piece of mail *was* an advertisement and not evidence of any regularly conducted activity, such as

¹"A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

monthly sale of a utility to a customer.

The trial court abused its discretion by admitting the advertisement on the untenable and illogical grounds provided by the State.

- ii. *Even if the trial court did not err in admitting the advertisement, there was insufficient evidence to establish Ms. Birdsong had dominion and control over the house.*

Washington law requires more than an individual's mere presence at a location and a single piece of junk mail addressed to the individual at a location to establish that the individual has dominion and control over the location.

In the cases where mail has been determined to be evidence of dominion and control, the mail has been utility bills or personalized letters, not mass advertising of the sort commonly mailed *en masse* using information culled from mailing lists. *See Walton, Partin, Hagen, Bradford, Dobyms, supra.* A bulk mailing advertisement lacks the persuasive authority of a utility bill when being used as evidence an individual has dominion and control over a premises. A utility bill or personalized letter will only be sent to a person following some affirmative representation on the part of the recipient that the address to which the letter or bill is mailed actually is the residence of the recipient.

This court can take judicial notice of the fact that bulk mailing

advertisements are addressed to the recipients based on information mined from mailing lists and other information collected by on-line and catalog retailers, credit card companies, and numerous other information collection sources. It is entirely possible that Ms. Birdsong had an item shipped to Mr. Judge's address through an on-line retailer such as Amazon.com and her name and Mr. Judge's address were associated in the retailer's database then sold to a third party.

The only admissible evidence presented by the State to establish that Ms. Birdsong was in dominion and control of Mr. Judge's house and was therefore in constructive possession of the drugs found therein was her presence at the house and the single piece of advertising addressed to her found in a garbage can at the house. The trial court erred in admitting the advertisement into evidence since it was barred as hearsay, leaving the only admissible evidence that Ms. Birdsong constructively possessed the drugs found in the home being Ms. Birdsong's presence in the home. As stated above, mere proximity is not enough to establish possession. *Jones*, 146 Wn.2d at 333, 45 P.3d 1062

Even if it was not an abuse of discretion to admit the advertisement, the State presented insufficient evidence to establish that Ms. Birdsong was in constructive possession of the methamphetamine found in the kitchen

Birdsong, Rachelle M. - COA # 35357-1-II

since the State still failed to present sufficient evidence that Ms. Birdsong had dominion and control over the premises where the drugs were found.

3. The State presented insufficient evidence to establish that Ms. Birdsong unlawfully possessed a firearm.

As stated above, possession may be actual or constructive. *Echeverria*, 85 Wn.App. at 783, 934 P.2d 1214. A jury can find a defendant constructively possessed a firearm if the defendant had dominion and control over it or over the premises where the firearm was found. *Echeverria*, 85 Wn.App. at 783, 934 P.2d 1214. One can be in constructive possession jointly with another person. *Morgan*, 78 Wn.App. at 212, 896 P.2d 731. Close proximity alone is not sufficient to establish constructive possession; other facts must enable the trier of fact to infer dominion and control. *State v. Turner*, 103 Wn.App. 515, 521, 13 P.2d 234 (2000).

In addition to the statutory elements, in *State v. Anderson*, the Washington Supreme Court held that the legislature intended that RCW 9.41.040 required the State to prove that the offender knowingly possessed the firearm beyond a reasonable doubt. *State v. Anderson*, 141 Wn.2d 357, 367, 5 P.3d 1247 (2000).

a. There was insufficient evidence that Ms. Birdsong possessed the guns.

The argument set forth above in relation to Ms. Birdsong's possession

of the drugs found during the search also applies to the charge that Ms. Birdsong unlawfully possessed the firearms in the house. The guns were not found in Ms. Birdsong's possession and Ms. Birdsong's fingerprints were not found on the guns. The State presented insufficient evidence to establish that Ms. Birdsong had dominion and control over the house, and therefore the State presented insufficient evidence to establish that Ms. Birdsong had constructive possession of the guns.

b. There was insufficient evidence that Ms. Birdsong knowingly possessed the guns.

Even if this court finds that Ms. Birdsong had constructive possession of the house, and therefore constructive possession of the guns, or simply constructive possession of the guns, under *Anderson* the State still had the burden of proving that Ms. Birdsong possessed the guns *knowingly*. The State presented no evidence at trial that would establish that Ms. Birdsong knew the guns were in the house.

4. There was insufficient evidence to support the finding that Ms. Birdsong was an accomplice to the manufacture of methamphetamine while armed with a firearm.

As discussed above, the State presented insufficient evidence to establish that the manufacture of methamphetamine was occurring at Mr. Judge's house. However, should this court find that sufficient evidence existed for a jury to find that the manufacture of methamphetamine was

occurring, and that Ms. Birdsong was an accomplice to the manufacture of methamphetamine, as stated above, the State failed to present sufficient evidence that Ms. Birdsong was in constructive possession of the firearms found in the house. Therefore, the State presented insufficient evidence to establish that Ms. Birdsong armed with a firearm while acting as an accomplice to the manufacture of methamphetamine.

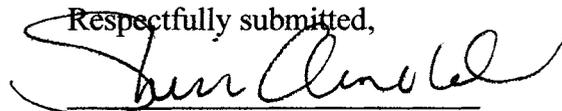
VI. CONCLUSION

Should this court find that there was insufficient evidence to convict Ms. Birdsong of any crime, the proper remedy is vacation of the conviction and dismissal of the charge with prejudice. *See State v. Hickman*, 135 Wn.2d 97, 103, 945 P.2d 900 (1998) (Retrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the remedy.)

This court should reverse and vacate Ms. Birdsong’s convictions for unlawful manufacturing of a controlled substance, unlawful possession of a controlled substance, and unlawful possession of a firearm in the second degree.

DATED this th 20 day of February, 2007.

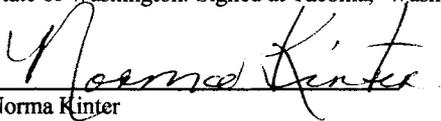
Respectfully submitted,



Sheri Arnold,
WSBA No. 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on February 20, 2007, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, WA. 98402, and by U.S. Post Office to appellant Rachele M. Birdsong, DOC # 859245, Washington Corrections Center for Women, 9601 Bujacich Road N.W., Box 1899, Airway Heights, WA. 99001, true and correct of this Opening Brief. 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 February 20 2007.


Norma Kinter

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
07 FEB 20 AM 10:43
BY  DEPUTY