

NO. 35357-1 (Consolidated No.)

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RACHELLE BIRDSONG and
RICK JUDGE, APPELLANTS

Appeal from the Superior Court of Pierce County
The Honorable Susan K. Serko
And
The Honorable John R. Hickman

No. 05-1-04222-4

And

No. 05-1-04223-2

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
P. GRACE KINGMAN
Deputy Prosecuting Attorney
WSB # 16717

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

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3. Does the doctrine of invited error prohibit appellate review of the admissibility of defendant Judge’s statements where he affirmatively stipulated to their admissibility at the second trial after he did not prevail at a contested 3.5 hearing before the first trial? 1

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WPIC 16.0238

A. ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion by denying defendant Judge's motion to suppress evidence when that evidence was seized pursuant to a valid search warrant?

(Pertains to Appellant Judge's Assignment of Error #'s 1 & 2.)

2. Were defendant Judge's Fourth Amendment rights violated by evidence that he refused to consent to a search where (1) no inference of guilt was drawn from that evidence, and (2) there was other overwhelming evidence of guilt? If there was no violation and no prejudice, do the claims of ineffective assistance of counsel and prosecutorial misconduct fail as well?

(Pertains to Appellant Judge's Assignments of Error #'s 3, 4, & 5.)

3. Does the doctrine of invited error prohibit appellate review of the admissibility of defendant Judge's statements where he affirmatively stipulated to their admissibility at the second trial after he did not prevail at a contested 3.5 hearing before the first trial?

(Pertains to Appellant Judge's Assignments of Error #'s 6 & 7.)

4. Is defendant Judge entitled to relief under the cumulative error doctrine where there were no errors?

(Pertains to Appellant Judge's Assignments of Error #8.)

5. Did the trial court abuse its discretion when it admitted a piece of mail that was relevant to defendant Birdsong's dominion and control over the residence containing the methamphetamine lab and was not hearsay?

(Pertains to Appellant Birdsong's Assignment of Error #4.)

6. Was there sufficient evidence to support defendant Birdsong's convictions and firearm sentencing enhancement?

(Pertains to Appellant Birdsong's Assignments of Error #'s 1, 2, 3, 5, & 6.)

7. Did the trial court err by imposing a drug/alcohol evaluation and treatment as a condition of defendant Judge's community custody where defendant does not dispute evaluation and treatment for substance abuse, when alcohol *is* a substance?

(Pertains to Appellant Judge's Assignment of Error #9.)

B. STATEMENT OF THE CASE.

1. Procedure

On August 29, 2005, the State charged Rachelle Birdsong and Rick Judge (defendants) as follows: Count I, unlawful manufacturing of a controlled substance; Count II, unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine; Count III unlawful possession of a controlled substance – methamphetamine. BCP

1-4; JCP 1-3.¹ The State also charged Birdsong with Count IV, second degree unlawful possession of a firearm; and Count V, tampering with physical evidence – destroying evidence. BCP 3. At the beginning of trial, the State moved to dismiss Count II on both Informations. 1RP 7.²

The trial court conducted a suppression hearing pursuant to CrR 3.6. 1RP 3. After hearing testimony, the trial court made an oral ruling, followed by written Findings and Conclusions on Admissibility of Evidence CrR 3.6, denying defendants’ motion to suppress evidence based on an invalid search warrant. 3RP 104-110; JCP 80-87. The trial court also denied the defendants’ motions for a *Franks*³ hearing. *Id.*

The cases proceeded to a joint jury trial before The Honorable Kathryn Nelson, Judge, on July 24, 2006. 4RP 1. Judge Nelson conducted a 3.5 hearing and concluded that *Miranda*⁴ was not applicable because the State sought to admit (1) only identifying information obtained during the booking procedure regarding defendant Birdsong, and (2) statements made by defendant Judge were not made in response to

¹ “BCP” refers to the clerk’s papers designated in defendant Birdsong’s case and “JCP” refers to the clerk’s papers designated in defendant Judge’s case.

² Citations to the verbatim report of proceedings shall be referenced according to the format adopted by defendant Judge in his Brief of Appellant, page 4, footnote 2.

³ *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2675, 57 L. Ed. 2d 667 (1978).

⁴ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

custodial interrogation. 4RP 88. Therefore, Judge Nelson ruled that both defendants' statements were admissible at trial. 4RP 88.

Opening statements and trial testimony began on July 26, 2006. 4RP 97-112. On August 1, 2006, Judge Nelson granted defendants' joint motion for a mistrial due to juror misconduct. 4RP 433.

On August 14, 2006, the case was reassigned to The Honorable John Hickman for the new trial. 5RP 35. The court discussed with the parties the need for a second 3.5 hearing. 5RP 37. At that time, the parties agreed that the statements were admissible as ruled by Judge Nelson and affirmatively stipulated to admissibility. 5RP 37-39.

On August 16, 2006, trial testimony began. 5RP 109. The jury found both defendants guilty as charged. BCP 115-118; JCP 59-60. The jury also returned a special verdict finding that defendants were armed with a firearm at the time of the manufacturing offense. BCP 119; JCP 61.

The trial court sentenced defendant Judge to a total of 87 months of actual confinement in the department of corrections. JCP 71. The court sentenced defendant Birdsong to a total of 114 months of actual confinement. BCP 123-136.

On November 9, 2007, this Court granted the State's motion for leave to settle the record, so that the Complaint for Search Warrant and Search Warrant could be made a part of the record on appeal. On November 16, 2007, the trial court entered an order providing that the Complaint for Search Warrant and Search Warrant be filed with the clerk

of the court. JCP 101-116. Defendant Judge challenges the validity of the search warrant on appeal, but submitted his brief without having seen the actual search warrant. BOAJ 17-54. Defendant Birdsong does not challenge the validity of the search warrant. BOAB 1.

2. Facts

a. Suppression hearing.

On August 28, 2005, Puyallup Police Officers Kitts, Brosseau, and Pigman were dispatched to the Judge residence. 1RP 25, 69; 2RP 50. A neighbor noticed a strong ammonia odor coming from the Judge residence and suspected a drug lab. 2RP 51. Dispatch informed the officers that the anonymous complainant was Mr. O’Leary, Judge’s neighbor directly to the south. 2RP 70, 75. Officer Broussard was well-acquainted with O’Leary, who was a City employee of long-standing. 2RP 70-71.

Officers Kitts and Brosseau were the first to arrive. 1RP 25. As they approached the house together, Brosseau heard sounds in the garage. 1RP 30, 55. The garage door was partially open, leaving a one foot gap between the bottom of the door and the ground, and leaving small cracks in between the panels of the garage door. 2RP 30, 60. Brosseau knocked on the garage door with no response. 1RP 56. The two then continued on to the front door. Id. As they passed the garage, they noticed an ammonia odor. 1RP 57-58. When the officers got the front door, the ammonia odor was very strong. 1RP 32, 57-58. Officer Brosseau feared that they may

be overcome by the fumes. 2RP 58. Both officers knew from their training that caustic chemical smells and ammonia odors are tell tale signs of a methamphetamine lab. 2RP 24, 50.

The officers knocked on the front door several times, rang the door bell, and knocked very loudly, but no one responded. 2RP 59. Brosseau went back to the garage and looked inside, peering through a crack in between the panels. 2RP 59-60. She saw defendant Judge, whom she recognized, and she asked him to come and talk to her. 2RP 62. Judge asked "Why?" Brosseau explained about the complaint. Id. Instead of talking to the officer, defendant Judge went back into the house. 2RP 63.

While looking into the garage, Officer Brosseau observed some items that could be associated with the manufacture of methamphetamine. 2RP 63.

Meanwhile, Officer Kitts continued to ring the doorbell. 2RP 59. Eventually defendant Judge came to the door. 2RP 59. The officers explained they were there to investigate a chemical odor. 1RP 32. Defendant responded by saying that he was painting. 1RP 32. While talking to defendant Judge at the front door, officers continued to smell a strong ammonia odor. 1RP 32. Because of the heavy fumes, the officers asked Judge to step away from door out of concern that Judge may be overcome by fumes, or that they would. 2RP 64-66.

Officer Kitts explained to defendant the nature of the complaint. 2RP 66. Defendant responded by saying that "This is just crazy," and that

he had not done anything wrong. 2RP 67. Officers asked for Judge's permission to enter the residence which Judge declined. 2RP 67. When officers asked if anyone else was in the house, Judge said his girlfriend (Birdsong) was sleeping upstairs. 1RP 33; 2RP 67. Due to the possible existence of a methamphetamine lab and the dangerous chemicals associated therewith, officers became concerned for the safety of remaining occupant of the house. 1RP 68; 2RP 68.

Officers could not let Judge back into the residence due to the fumes, fire danger, and the possibility he would destroy evidence. 1RP 68; 2RP 68. They again asked Judge for permission to enter to get his girlfriend. Judge said no, he did not want the officers to enter the house, but that he would call Birdsong on his cell phone. 1RP 37; 2RP 68. Officer Brosseau could hear Judge's phone calls into the residence. 1RP 37; 2RP 69. Judge told Birdsong that he was there with police and that they were talking about getting a warrant. 2RP 69. His tone was as if he were trying to warn somebody that the police were outside, so do whatever you need to do. Id. Officers then became concerned about destruction of evidence and potential use of weapons against them. 2RP 69; 70. Birdsong did not come outside. 1RP 37.

Sergeant Thompson arrived and he and Officer Kitts stayed with Judge. 2RP 70. Officer Brosseau went next door to O'Leary's property and walked through O'Leary's front yard, down a clear path, along the side of the house to the side yard. 2RP 70-71. Police procedure dictates

that when there is the possibility of criminal activity, officers usually post officers to observe the front and back of the property in question, to prevent destruction of evidence or escape of perpetrators. 2RP 76. Additionally, Officer Brosseau was worried about Birdsong's safety. They did not want to be thinking she could be in jeopardy if, in fact, she had fled after Judge's warning. 2RP 76.

Remaining on the O'Leary side of the fence, which is only three and one-half to four feet tall, Officer Brosseau could see into the Judge backyard that is on substantially lower ground. 2RP 72-73. There, she observed Birdsong throwing a red gas can off of the deck into the blackberry bushes. 2RP 77. Officer Brosseau quickly went back to the front of the residence to inform the other officers that Birdsong was destroying evidence. Id. Upon hearing this, Officer Kitts ran to the back gate and saw a second red gas can fly from the house into the blackberry bushes. 1RP 52. Judge had been placed in handcuffs and was in the back of a patrol car. 1RP 52. Brosseau then ran around the other side of the house and into the Judge backyard with the intent to stop Birdsong. Id. Once Brosseau got into the back yard, she looked for Birdsong, but did not see her. She did see a pile of ice cubes on the ground. Id. Brosseau, worried Birdsong was destroying more evidence, returned to the front of the house and again looked into the garage through the cracks in the door. 2RP 79. She saw Birdsong inside the house sprinkling what appeared to be Carpet Fresh on the carpet. 2RP 80. She yelled at Birdsong to come

out, but Birdsong did not obey. 2RP 80. At that point, Officer Pigman had arrived and Brosseau, Pigman, and Kitts all went to the front door. They opened it just far enough for Pigman and Kitts to grab Birdsong and pull her out. Id. Brosseau placed Birdsong in handcuffs. Id.

Officer Pigman has 20 year experience in law enforcement. At the time of this incident, he was assigned to the Drug Enforcement Agency Task Force in Tacoma. 1RP 69. Officer Pigman has conducted hundreds of narcotics investigations and well over fifty methamphetamine lab investigations. 1RP 71. Officer Pigman responded to the scene at the Judge residence pursuant to the request of Officer Kitts. 1RP 74. Upon arriving at the scene, Pigman talked to Kitts and Brosseau to learn what was happening at the residence. 1RP 75. While approaching the house via the front lawn, Pigman smelled a very strong ammonia odor. Id. Officer Pigman did not want to get too close because ammonia fumes can seriously damage the lungs. 1RP 76. The overwhelming odor of ammonia led Pigman to believe that the manufacture of methamphetamine was currently in progress. Id.

Officer Pigman entered the back yard. He observed ice on the ground across the lawn towards the blackberry bushes. 2RP 33. Pigman put on protective clothing and an air purifying respirator and retrieved the two gas cans. 1RP 82. The gas cans had white pellets that looked like they were breaking down and liquefying. Id. Pigman, based on his training and experience, believed the pellets to be fertilizer containing

ammonium sulfate. 1RP 83. Anhydrous ammonia is a key ingredient in the Nazi method of manufacturing methamphetamine. 1RP 72.

Anhydrous ammonia is hard to get, but a meth cook can make anhydrous ammonia by adding lye to fertilizer. 1RP 73. Mixed in a sealable container, it produces a gas. Id. The gas is cooled by using ice, which causes it to liquefy. 1RP 73. The liquid forms anhydrous ammonia. 1RP 73, 81. Both gas cans tested positive for the presence of ammonia. 2RP 3, 41.

b. Trial.

On August 28, 2005, Puyallup Police dispatched officers to investigate a report of a suspicious odor coming from the Judge residence at 1313 11th Place SW, about a mile and a half from downtown Puyallup. 5RP 115. Officers Kitts and Brosseau approached the residence together. 5RP 114-15, 313. One of the garage doors was open about six inches from the ground. 5RP 119. This created spaces between the door panels. 5RP 119, 316. Officers smelled a chemical odor near the garage and Officer Brosseau heard a crinkling sound coming from inside the garage as they passed by. 5RP 120, 316. When they neared the front door, the odor of ammonia became very strong. 5RP 119, 318. Officers knew this was an indication of a methamphetamine lab. 5RP 113, 319. Officers knocked on the front door and rang the door bell, but there was no answer. 5RP 120, 319. Officer Brosseau went back to the garage and looked in the

eye-level crack in the garage door. 5RP 120, 320. She saw defendant standing inside the garage in the doorway that led into the house. 5RP 320-21. She recognized him from a prior contact regarding a parking complaint and called to him by name, telling him to come to the garage door so she could talk to him. 5RP 320-21. Defendant Judge asked “Why?” 5RP 321. Judge did not come to the garage door as requested, but retreated into the interior of the house. 5RP 321-22. Inside the garage, officers saw two large cans of paint thinner, both with tops open, hand held torches and coffee filters. 5RP 121, 322.

After three or four minutes, defendant Judge came to the front door. 5RP 121, 323. The ammonia fumes were so strong that officers asked defendant Judge to step out towards the street. 5RP 122, 336. Officer Kitts then told defendant that they were investigating a complaint about chemical odors coming from his house. 5RP 122, 336. Defendant Judge said that that was “just crazy” and that he had been doing some painting in the garage. Id. He asked the officers if they had a warrant. 5RP 337. They told him they did not have one, but that they thought they could get one. Id.

Officers asked for permission to enter the house to determine if the smell was coming from illegal activity and to assure that everyone inside was all right. 5RP 123, 337. Defendant did not grant permission for the officers to enter, explaining that he needed to check with his father because the house belonged to him. 5RP 337-38. While defendant

unsuccessfully tried to find his father's phone number, Officer Brosseau asked him if there was anyone else inside the house. 5RP 338. Defendant said that his girlfriend, who turned out to be defendant Birdsong, was asleep upstairs. 5RP 338-39, 352.

Due to the strong fumes coming out of the house, officers asked defendant if they could accompany him in the house to wake Birdsong. 5RP 338-39. Defendant said no, and instead offered to call into the residence to tell her to come out. 5RP 124, 339. Defendant had his cell phone with him and made several calls into the house while officers stood right there. 5RP 124-25, 339-41. They heard defendant on the phone saying that the police were outside and that they wanted her to come out because they thought there was a meth lab inside. *Id.* Defendant also mentioned that the police were talking about getting a search warrant. 5RP 340.

Officers contacted narcotics detectives and requested they respond to the scene. 5RP 125. Sgt. Thompson was the next to arrive and he waited with Judge and Kitts. 5RP 127. Upon learning that Birdsong was in the residence and likely aware of police presence and suspicions, Officer Brosseau became concerned about officer safety and also the possibility of an accomplice escaping out the back of the house. 5RP 343. Therefore, she went around into the next door neighbor's side to look into the Judge's backyard. 5RP 342-43. The neighboring property in question belongs to Pat O'Leary, a personal acquaintance of Officer Brosseau. 5RP

342. O'Leary also works for the City of Puyallup in the Public Works Department. Id. The O'Leary property is on higher ground than the Judge's due to a steep slope that goes down and drops off. 5RP 344. From O'Leary's side yard, Officer Brosseau had a clear unobstructed view into the Judge back yard. Id.

Officer Brosseau looked over the chest-high fence and saw defendant Birdsong throwing a red gas can into the blackberry bushes, to the next yard over. 5RP 346. Officer Brosseau, perceiving that Birdsong was destroying evidence, immediately ran back around to the front of the house yelling at the other officers what she had seen. 5RP 348. She ran past them to the other side of the Judge house to the back yard. 5RP 348. When she got to the back yard, she did not see Birdsong, nor did she see the gas can. 5RP 348-49. She did, however, observe a pile of ice cubes on the back lawn. 5RP 349. Officer Kitts also looked into the Judge backyard. 5RP 129. He saw a second gas can go flying off the back deck. 5RP 129.

Officer Brosseau then went back to the garage door and again looked in. 5RP 350. This time she could see Birdsong just inside the residence sprinkling what appeared to be 'Carpet Fresh' on the floor. 5RP 350. She yelled at Birdsong that she could see her and that she needed to come out of the house. 5RP 350-51. Birdsong then disappeared from view back inside the house. 5RP 351. Several of the officers went to the

front door, opened it, saw Birdsong near the front door, grabbed her, pulled her outside, and handcuffed her. 5RP 351.

Officer Pigman had arrived at the scene around the same as Sgt. Thompson. 5RP 127, 162. He is currently assigned to a Drug Enforcement Agency task force and has investigated over 50 meth labs. 5RP 157-60. At the Judge residence, Officer Pigman could smell ammonia just standing in the front yard with the front door to the house closed. 5RP 165-66. He noted that the odor was very strong near the front of the house. Id. Anhydrous ammonia is used in the second phase of manufacturing methamphetamine. 5RP 166. The smell of ammonia in the yard indicates current or recent manufacture or cooking of methamphetamine. 5RP 168.

Inhaling the ammonia can burn the lungs. 5RP 166. Other potential hazards surrounding this process include fires and even explosions. Id. Wearing protective gear, including rubber gloves, Nomex BDU's, a fire retardant outfit, and an air purifying respirator (APR), Officer Pigman retrieved and inspected the gas cans that Birdsong had thrown into the bushes. 5RP 187-88. Inside the gas cans, Pigman saw white fertilizer pellets that had been mixed with a liquid. 5RP 188. Anhydrous ammonia can be made by mixing fertilizer pellets with Red Devil lye. 5RP 167.

Officer Pigman obtained a search warrant for the premises. 5RP 192; JCP 103-116. Officers found: empty blister packs of cold tablets,

which contain pseudoephedrine or ephedrine, the main ingredient in methamphetamine (Ex. 28; 5RP 241, 293, 548-53, 757); coffee filters, one with pink binder material present, which are used to separate out the binder material in the cold tablets from the pseudoephedrine (Ex. #35, 51; 5RP 274, 538-40, 405, 550,760, 775); an empty can of Red Devil lye on top of the garbage in the garbage can in the garage, which is used to make anhydrous ammonia (5RP 167, 774, 272); an empty package of lithium batteries, the lithium from which is added to the ammonia, which is then added to the pseudoephedrine to dissolve it, converting it into methamphetamine in the second stage of the manufacture (5RP 294, 554, 761); a Coleman propane bottle, used in the reaction stage (5RP 397, 763); a box of latex gloves used to protect the cook's skin from solvents and acids (5RP 404, 567); an air respirator due to the caustic fumes caused by acids and solvents used to manufacture methamphetamine (Ex. #56; 5RP 187, 409); Xylene, a solvent which is added after the reaction phase (5RP 405, 558-60,763); a hand held torch which is used as a heat source to speed up the evaporation of solvents (5RP 322, 579-80); tubing set up consistent with being used as a hydrochloride generator in the gassing out phase (Ex. #'s 42, 43, 46; 5RP 301, 406, 765).

In the kitchen cupboard, officers found a plate with loose white powder that turned out to be methamphetamine. 5RP 410, 771. There was also methamphetamine in a bag on the plate. Id. In defendant Judge's bedroom, officers found three electronic scales which could be

used to weigh the finished product for distribution. Ex. #61; 5RP 273, 411.

Officers also found a piece mail addressed to defendant Birdsong at the Judge residence. Ex. # 31; 5RP 241.

It is common for methamphetamine cooks to use surveillance equipment for advance warning of police approaching the residence or rival members of the trade coming to steal the product. 5RP 581. It is also common to find police scanners at a meth lab. 5RP 582. The Judge residence was equipped with both. There was a camera mounted on the corner of the house in front of the garage, aimed at the driveway and roadway so as to view anyone approaching the residence. Ex. # 58; 5RP 422-23. The monitor for this camera was located inside the garage between the two roll up doors. Ex. #57; 5RP 422. Officers also found a police scanner that was on and operational. 5RP 422-24. The scanner was tuned to the Puyallup Police frequency. 5RP 422. Officer Engle heard his own voice on the scanner when he transmitted on his police radio. 5RP 422. Officers also found a sheet of paper containing the radio frequencies for the Washington State patrol (WSP). 5RP 407.

Near the front door, officers found two loaded firearms sitting on a wood stereo case. 5RP 418-20. One of the firearms was an assault rifle, a Norinco Mac 90 Sporter semiautomatic rifle. Ex. #91 (photo); 5RP 418, 747. The other was a semiautomatic Cobray/SWD 9 millimeter pistol. Ex. #90 (photo); 5RP 418. Officer Engle ejected the magazine and cleared

the chamber of each firearm at the scene. 5RP 420. A forensic scientist at the WSP Crime Lab test fired the Mac 90 assault rifle and the 9mm handgun and found both to be fully operable without any malfunctions. 5RP 749-50.

Robert Judge, defendant Judge's father, testified at the trial. 5RP 837. He said that his son is a mechanic and that the garage was his domain. 5RP 839. He admitted that he did not want to see his son get into any trouble. 5RP 847. At the time of this incident, the elder Mr. Judge was working full-time for Boeing and was gone a couple of weeks per month. 5RP 847-48. He spent weekends at his girlfriend's house. 5RP 848-49. He claimed that the tubing set up (Ex. #'s 42 and 43) found in the garage was something typically used by mechanics for bleeding brakes. 5RP 845. Brake fluid is sticky and oily. 5RP 850. Both Officer Pigman and WSP Forensic Scientist Frank Boshears testified that the tubing set-up was consistent with use with a glass jar as a hydrochloride generator or an acid gas generator. 5RP 301, 765. See Ex. #46. The tubing did not show signs of a sticky oily substance, but rather contained a white residue. Ex. #'s 42, 43, & 46; 5RP 766.

The jury found both defendants guilty as charged. BCP 115-118; JCP 59-60. The jury also returned a special verdict finding that defendants were armed with a firearm at the time of the manufacturing offense. BCP 119; JCP 61.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING DEFENDANT JUDGE'S MOTION TO SUPPRESS EVIDENCE OBTAINED PURSUANT TO A VALID SEARCH WARRANT.

When a search warrant has been properly issued by a judge, the party attacking the warrant has the burden of proving its invalidity. State v. Fisher, 96 Wn.2d 962, 639 P.2d 743 (1982); State v. Trasvina, 16 Wn. App. 519, 523, 557 P.2d 368 (1976); See also, State v. Chapin, 75 Wn. App. 460, 469, 879 P.2d 300 (1994)(holding that where appellant was challenging the affidavit for the warrant but had not made that part of the record he had failed to meet his burden in establishing the invalidity of the warrant).

A judge's determination that a warrant should issue is an exercise of discretion that is reviewed for abuse of discretion and should be given great deference by the reviewing court. State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). See also, State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994)("Generally, the probable cause determination of the issuing judge is given great deference."). Doubts as to the existence of probable cause will be resolved in favor of the warrant. State v. J-R Distributions, Inc., 111 Wn.2d 764, 774, 765 P.2d 281 (1988). Hyper-technical interpretations should be avoided when reviewing search warrant affidavits. State v. Feeman, 47 Wn. App. 870, 737 P.2d 704 (1987). The

magistrate is entitled to draw common sense and reasonable inferences from the facts and circumstances set forth in the affidavit. State v. Yokley, 139 Wn.2d 581, 596, 989 P.2d 512 (1999); State v. Helmka, 86 Wn.2d 91, 93, 542 P.2d 115 (1975).

A neutral and detached magistrate must determine whether there is probable cause to issue a search warrant. State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997). To establish probable cause the evidence presented must lead a reasonable person to believe both (1) that the item sought is contraband or other evidence of a crime, and (2) that the item sought is likely to be found at the place searched. Id. at 508-509 (citations omitted). Thus there must be “nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.” Id. The application for a search warrant must be judged in the light of common sense, with doubts resolved in favor of the warrant. State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994).

Where the reviewing court finds some of the evidence contained in the affidavit supporting the complaint for search warrant was obtained in violation of the defendant’s rights, the court then evaluates whether the untainted evidence, standing alone, establishes probable cause. See State v. Ross, 141 Wn.2d 304, 314-15, 4 P.3d 130 (2000).

a. Trial court ruling

In the present case, defendant Judge has assigned error to only one finding of fact, #15. Brief of Appellant Judge (BOAJ) at 1; JCP 82. Unchallenged findings of fact are verities on appeal and an appellate court reviews only those facts to which the appellant has assigned error. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). An appellate court reviews whether substantial evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993).

Finding of fact #15 reads as follows:

The neighboring property is elevated above the Judge back yard. There is a fence on the neighbor's portion of the property. A portion of the fence is roughly at chest level for Officer Brosseau and offers a clear and unobstructed view into the Judge backyard.

JCP 82. Officer Brosseau testified "Mr. O'Leary's property is higher and Mr. Judge's property actually is lower ... And it drops off substantially..." 2RP 72-75. She also testified she could rest her arm on the top of the fence and estimated it was three and one-half to four feet high. 2RP 72-75. When asked if she had any difficulty seeing and looking over the fence into Judge's back yard, Officer Brosseau responded, "No. None whatsoever." 2RP 75. Officer Pigman testified that the fence is on the neighbor's side of the property, not the Judge's. 2RP 34. This

unequivocal, undisputed testimony provides ample support for the trial court's finding #15.

The remaining findings are verities on appeal: (1) A neighbor called police regarding a suspicious odor that was possibly related to drug activity. JCP 80. (2) As officers walked by the garage on the way to the front door to contact residents, Officer Brosseau heard noises in the garage. JCP 81. (3) Officers knocked on the garage door and received no response. JCP 81. (4) Officers observed a strong odor of ammonia at the corner of the garage. JCP 81. (5) Officer Brosseau called to Judge to come and talk to them and again received no response. JCP 81. (6) Three to five minutes later Judge answered the front door. JCP 82. (7) Judge told officers that his girlfriend (Birdsong) was asleep in the residence and he was allowed to call her on his cell phone. JCP 82. (8) Police overheard Judge tell Birdsong that the police were there and that they were about to get a warrant. JCP 82. (9) Officer Brosseau saw Birdsong throw a red gas can off the deck into the blackberry bushes. (10) Detective Pigman of the clandestine methamphetamine lab team arrived at the scene. He, too, smelled a strong odor of ammonia, which he associated with the on-going production of methamphetamine. JCP 83. (11) Officer Kitts sees another object fly off the deck into the bushes. JCP 83. (12) Birdsong is inside the house sprinkling carpet freshener on the carpet. JCP 83.

b. Looking into garage

The trial court ruled that the officers' observations made by looking into the Judge garage through cracks between the panels were not justified under either the plain view doctrine nor exigent circumstances. 3RP 104-05; JCP 84; 86. Therefore, the trial court properly excised those observations from the affidavit for search warrant. 3RP 108. Eliminating the evidence gained from looking into the garage, the trial court found there was still sufficient evidence to support probable cause for the issuance of the warrant. Id.

Defendant Judge claims that all of the evidence in the search warrant was tainted by what officers saw when they looked into the garage, with the exception of the strong smell of ammonia by the complaining neighbor and the two officers. BOAJ at 18-19. This claim can only succeed if what was seen inside the garage caused officers to then contact Judge. However, the claim fails because the officers had already knocked on Judge's door, fully intending to contact him, *before* they looked into the garage. JCP 81 (Disputed Facts 4-9⁵); 2RP 56. The contact with Judge was not a result of whatever officers saw in the garage. It was the result of a citizen complaint, which was substantiated by officers' own observations of an over-powering smell of ammonia. 2RP

⁵ As noted above, defendant Judge did not assign error to these facts and they are therefore verities on appeal. State v. Hill, 123 Wn.2d at 647.

30, 51, 57-58. Therefore, the contact, and subsequently discovered evidence, was in no way tainted. The inevitable discovery doctrine applies when there is a reasonable probability that evidence in question would have been discovered other than from the tainted source. State v. Warner, 125 Wn.2d 876, 889, 889 P.2d 479 (1995).

c. Defendant's statements to police.

Reason for Admissibility #4 provides:

4. The odor of ammonia combined with the fact that Officer Brosseau was aware that at least one person was in the garage or residence made it reasonable for the officers to attempt to locate that individual and encourage him or her to come out. Mr. Judge's actions in asking "**why**" when asked to come out of the garage and **refusing to allow the officers to go into the house to locate other occupants** are borderline furtive – especially when considered in light of the totality of the circumstances.

JCP 85 [bold and bold italics added].

Defendant Judge correctly claims that the magistrate issuing the search warrant was not entitled to rely on defendant's refusal to consent to a search to establish probable cause. BOAJ at 21. However, a review of the complaint for search warrant reveals that such information was not ever provided to the magistrate, thereby rendering the claim moot. JCP 108-09.

Although a defendant's statement denying consent to search cannot be used against him, any other statements made by a defendant can be used to determine probable cause. State v. McGovern, 111 Wn. App. 495,

500-501, 45 P.3d 624 (2002). The magistrate had both the right and duty to weigh and assess defendant's question, "Why?" See McGovern at 501. The magistrate was similarly entitled to take the statement in conjunction with all the other circumstances (the overwhelming odor of ammonia, taking so long to answer the door, the phone call into the house, the destruction of evidence, etc.) and to infer that defendant probably had a methamphetamine lab in his house. Id.

d. Entry onto O'Leary's property

This Court should uphold the trial court's legal conclusion that "[n]either of the defendants have an expectation of privacy in a backyard which can be viewed from the neighbor's yard." JCP 85. Thus, the trial court found that the observations were analogous to a situation where officers smell marijuana while on a neighbor's property. JCP 85. See State v. Littlefair, 129 Wn. App. 330, 119 P.3d 359 (2005).

A search occurs under the Fourth Amendment if the government intrudes upon a reasonable expectation of privacy (or under Washington State Constitution Article I, section 7 if there is an intrusion on an individual's "private affairs.") State v. Bobic, 140 Wn.2d 250, 258, 996 P.2d 610 (2000). Fourth Amendment rights are personal. They may be enforced only at the instance of one whose own protection was infringed by the search and seizure. State v. Boot, 81 Wn. App. 546, 547, 915 P.2d 592 (1996). Fourth Amendment rights may not be vicariously asserted.

Id. To establish a Fourth Amendment violation, one must demonstrate a personal and legitimate expectation of privacy in the area searched or property seized. The analysis focuses on the extent of a particular defendant's rights, which turns on a determination of whether, under the totality of the circumstances, the disputed search and seizure invaded the defendant's personally held legitimate expectation of privacy in the particular area searched. State v. Jones, 68 Wn. App. 843, 847, 845 P.2d 1358 (1993).

To qualify for Fourth Amendment protection, a criminal defendant must, at a minimum, show that he or she has standing to contest the invasion of privacy. State v. Jacobs, 101 Wn. App. 80, 87, 2 P.3d 974 (2000). Standing to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place. Id. This involves a two-part inquiry: First, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? Id. The burden is on the defendant to establish the expectation of privacy. Boot, 81 Wn. App. at 550). A defendant does not have a reasonable expectation of privacy in areas outside the curtilage of *his* residence. State v. Niedergang, 43 Wn. App. 656, 659, 729 P.2d 576 (1986).

In the present case, Officer Brosseau observed defendant Birdsong throwing the gas can into the brush from the neighboring property, a place where neither Judge nor Birdsong had a reasonable expectation of privacy. Brosseau did not intrude onto Judge's property in order to make these observations. There is no indication that defendant had the right to invite anyone onto, or exclude anyone from, O'Leary's property. The right to exclude is a component of an interest in property. Jones, 68 Wn. App. at 852. There is no evidence that Judge has ever manifested a subjective expectation of privacy in O'Leary's property. Further defendants failed to take any steps to block the view into their yard from the O'Leary's property. The fence, which was quite low where Officer Brosseau looked over it, was on the O'Leary's property, not the Judge's property. Further, the O'Leary property was on much higher ground than the Judge property, making the Judge property less private and open to view than other properties. Even if defendants did try to manifest such an expectation of privacy, it is not one that society would be willing to recognize as reasonable. See Jacobs, 101 Wn. App. at 87.

Given the lack of any interest in O'Leary's property, defendant Judge lacks standing to challenge the entry onto that property. Once on that property, Officer Brosseau's observations of Birdsong's activities were in "open view" and therefore do not constitute a search. Under the "open view" doctrine, when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully

present at the vantage point where those senses are used, that detection does not constitute a “search” within the meaning of the Fourth Amendment. Bobic, 140 Wn.2d at 258-259; State v. Seagull, 95 Wn.2d 898, 901, 632 P.2d 44 (1981). It is also important to note that Birdsong made absolutely no effort to conceal her activities from anyone who might be on the neighbor’s property (i.e. the neighbor, a family member, guest, or lawn maintenance personnel).

Thus, defendant Judge lacks standing to object to the entry onto the O’Leary property by Officer Brosseau and her subsequent observations of Judge’s backyard. Because defendant Judge did not have an expectation of privacy in the O’Leary’s backyard and therefore any observations were properly included in the search warrant affidavit.

Whether there was a “trespass” onto the O’Leary’s property, as urged by defendant, is therefore irrelevant. It is quite questionable that O’Leary would have objected to his friend, Officer Brosseau, going into his side yard to investigate O’Leary’s own suspicions that there was a meth lab next door to him, especially when he was the one who had officially complained to the police in the first place. 2RP 70-75.

The trial court additionally found exigent circumstances justified warrantless entry onto the O’Leary property due to possible escape of a perpetrator or possible destruction of evidence. JCP 85-86. See below.

e. Warrantless entry in Judge backyard to retrieve gas cans.

In State v. Cardenas, 146 Wn.2d 400, 47 P.3d 127 (2002), the Washington State Supreme Court considered six factors as a guide in determining whether exigent circumstances justify a warrantless entry and search. Id. at 406. Those factors are:

1. The gravity or violent nature of the offense with which the suspect is to be charged;
2. Whether the suspect is reasonably believed to be armed;
3. Whether there is reasonably trustworthy information that the suspect is guilty;
4. There is strong reason to believe that the suspect is on the premises;
5. A likelihood that the suspect will escape if not swiftly apprehended; and
6. The entry is made peaceably.

Id. The court further noted:

Nevertheless, it is not necessary that every factor be met to find exigent circumstances, only that the factors are sufficient to show that the officers needed to act quickly. *See, e.g., State v. Patterson*, 112 Wn.2d 731, 736, 774 P.2d 10 (1989) (no one factor is conclusive; weight varies with circumstances); *State v. Flowers*, 57 Wn. App. 636, 789 P.2d 333 (1990) (fact that some factors not present is not controlling).

Id. at 408.

Analysis of these factors show justification for entry into the Judge backyard. (1) The manufacture of methamphetamine with a firearm enhancement is a Class B felony and a “most serious offense.” RCW 69.50.401(1), (2)(b), and RCW 9.94A.030(29)(t). Additionally, a

methamphetamine lab poses serious risks to neighbors due to the caustic chemicals used and the potential for fire and explosions. 1RP 76. (2) People engaged in the manufacture of drugs are frequently armed and also have poor impulse control. 1RP 38; 2RP 65. (3) There was strong reason to believe that defendants were guilty because the overwhelming odor of ammonia indicated that the manufacture of methamphetamine was current or very recent and Judge and Birdsong were the only two present at the residence. 1RP 76. (4) At the time police entered the O'Leary property and the Judge backyard, defendant Judge was with police in the front yard, but police knew that defendant Birdsong was still inside the residence. Judge had left Birdsong warning messages about the police being there and she did not come out of the residence. (5) There was some likelihood that Birdsong would escape out the back of the residence, if she had not done so already. (6) Entry was made very peaceably into the O'Leary side yard and the Judge backyard and therefore the potential for harm was very low. This was a less intrusive way to prevent escape and destruction of evidence than going into the residence itself.

Under this analysis, all of the guiding factors are met. Therefore, the officers, concerned with possible escape of a perpetrator and destruction of evidence, were more than justified in going into the neighbor's side-yard and going into Judge's backyard to check on the contents of the gas cans. Officers feared highly flammable chemicals in the gas cans could cause a fire in the dry brush in August. 1RP 79-80.

2. DEFENDANT JUDGE’S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY EVIDENCE THAT HE REFUSED TO CONSENT TO A SEARCH WHERE (1) NO INFERENCE OF GUILT WAS DRAWN FROM HIS REFUSAL, AND (2) THERE WAS OVERWHELMING EVIDENCE OF GUILT.

Defendant Judge claims that his right to refuse to consent to a search of his residence was used against him to imply guilt, thus violating his constitutional rights. BOAJ at 59. Conceding that there is no applicable Washington Law to support his claim, defendant analogizes to case law pertaining to the right to remain silent. Id. However, defendant fails to note the distinction between a mere reference to silence versus an impermissible comment on silence.

The privilege against self-incrimination is based upon the Fifth Amendment to the U.S. Constitution which provides that “no person... shall be compelled in any criminal case to be a witness against himself[.]” State v. Easter, 130 Wn.2d 228, 241, 922 P.2d 1285 (1996). The purpose of the right is to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the government. Id.

Courts have generally treated comments on post-arrest silence as a violation of a defendant’s right to due process because the warnings under *Miranda* constitute an “implicit assurance” to the defendant that silence in

the face of the State's accusations carries no penalty. State v. Easter, 130 Wn.2d at 236. The use of silence at the time of arrest and after the *Miranda* warnings is fundamentally unfair and violates due process. Id.

A police witness may not comment on the silence of the defendant to imply guilt from a refusal to answer questions. State v. Henderson, 100 Wn. App. 794, 798, 998 P.2d 907 (2000)(citing State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996)). But a mere reference to silence, which is not a comment on the silence, is not reversible error absent a showing of prejudice. State v. Lewis, 130 Wn.2d at 705; State v. Sweet, 138 Wn.2d 466, 481, 980 P.2d 1223 (1999). Testimony about an accused's silence is a "comment" only if used to suggest to the jury that the refusal to talk is an admission of guilt. State v. Lewis, 130 Wn.2d at 707.

The Washington Supreme Court distinguished mere reference to silence and improper comment on silence in two companion cases: Easter and Lewis. In Easter, the court held that police officer testimony that the defendant was a "smart drunk" who refused to answer questions violated the defendant's right to silence. State v. Easter, 130 Wn.2d at 241. The Easter officer testified at trial that defendant was a "smart drunk," which meant the defendant was evasive, "wouldn't talk," and was hiding something. Id. at 235. The prosecution used this silence as a "central theme" in closing argument. Id. at 230.

However, in Lewis, the court held that an officer's indirect reference to the defendant's silence was not a "comment" inferring guilt. State v. Lewis, 130 Wn.2d at 706. There, the officer testified that he told the defendant that "if he was innocent he should just come in and talk to me about it." Id. at 703. The court held that this did not amount to a comment on the defendant's silence because the officer did not say that the defendant refused to talk to him or reveal the fact that the defendant failed to keep his appointment. Id. at 706.

Similarly, in Sweet, an officer testified that the defendant had said he would be willing to take a polygraph examination and give a written statement after speaking with his attorney. State v. Sweet, 138 Wn.2d at 480. However, no evidence of a polygraph examination nor any written statement by defendant was ever introduced as evidence. Id. The Sweet court distinguished Easter, *citing Lewis* for the proposition that the officer's testimony was a mere reference to silence. Id. Therefore, "[e]ven assuming it might have been error to admit the testimony, any error was harmless." Id.

- a. The record in this case does not support a finding that a "comment" occurred.

The record in this case shows that Officers Brosseau and Kitts testified to the mere fact that defendant refused to consent to a search. See

excerpt in BOAJ at 56-58. The first time police asked for consent, defendant gave a plausible reason for declining to consent. He explained that it was his father's house and that he needed to check with him. 5RP 337. The second time, when police were asking to go in to check on Birdsong, defendant still declines, but offered to call her on his cell phone to wake her up and ask her to come out. 5RP 339. Neither Officer Brosseau nor Officer Kitts testified that this refusal indicated defendant was guilty, nor did they so imply.

In closing argument, the prosecutor did not even make a reference to defendant's refusal to consent to a search, let alone an impermissible comment. 5RP 875-902. The prosecutor's theme in closing argument was that defendants were working together as a "team." *Id.* She then discussed dominion and control over the residence where the meth lab was found, and then reviewed some of the court's instructions to the jury and the elements of the crimes. 5 RP 877-880. In arguing defendant Judge's lack of cooperation, the prosecutor specifically linked that to the behavior of taking so long to answer the door and to his phone calls warning Birdsong of the police presence. 5RP 880-81. She said:

[PROSECUTOR]: Also keep in mind both defendants' conduct in this case is absolutely inconsistent with innocent activity that was occurring at the residence.

You have Mr. Judge who takes a **pretty significant period of time coming to the door, being unwilling to**

cooperate with law enforcement, making phone calls

into the residence where he either speaks with Ms. Birdsong or leaves messages. Something to the effect of, “The police are out here. They are going to get a warrant. We need you to come out here.” That type of thing.

Then Ms. Birdsong’s own conduct going out to the back yard and tossing gas cans...

Id. The prosecutor never mentioned defendant’s refusal to consent to a search. Further, there was no objection to this argument.

- b. There is no prejudice to defendant under the Supreme Court’s explicit rationale in *State v. Lewis*.

In this particular case, the prosecutor did not ask the jury to infer guilt from Judge’s refusal to consent to search. Also, Officers Kitts and Brosseau testified on August 16, 2006, and August 21, 2006, respectively. The jury heard the testimony of nine more witnesses, as well as closing arguments, before beginning deliberations on August 29, 2006. Thus, the mere references to the refusal occurred only twice near the beginning of a lengthy trial.

There can be no finding of prejudice based on the record in this case. The Lewis court explicitly held that: “[m]ost jurors know that an accused has a right to remain silent and, absent any statement to the contrary by the prosecutor, would probably derive no implication of guilt from a defendant’s silence.” State v. Lewis, 130 Wn.2d at 706. Thus, it

held that “mere reference to silence which is not a ‘comment’ on the silence is not reversible error absent a showing of prejudice[.]” Id. at 706-07. Following defendant’s suggested analogizing with cases involving a comment on the right to remain silent, a mere reference to refusal to consent to a search is not reversible error absent a showing of prejudice. See Lewis at 706-07. Even if introduction of that evidence was improper, Lewis precludes any finding of prejudice. If there were any possible prejudice, it would be overcome by the overwhelming evidence against defendant Judge. See Section 6 herein.

Because there was no error regarding this issue, defense counsel was not ineffective for failure to object. Similarly, the prosecutor did not engage in misconduct because she did not even reference defendant’s refusal to consent, nor did she make any comment thereon.

Defendant Judge’s claims fail.

3. THE DOCTRINE OF INVITED ERROR
PROHIBITS APPELLATE REVIEW OF THE
ADMISSIBILITY OF DEFENDANT JUDGE’S
STATEMENTS.

At the 3.5 hearing, only Officer Brosseau testified. 4RP 44-71. Defendant was not under arrest, nor was he handcuffed at any time that he made statements. 4RP 48, 52, 55. Nor does the record show that the officers in any way “induced” defendant Judge to call into the residence.

In fact, the record from the 3.5 hearing tends more to show it was *defendant's* idea and that he actually offered to do so. 4RP 54. Other testimony affirmatively shows defendant offered to call into the residence. 4RP 204. During all of the times these officers testified, there is absolutely no testimony from which it could be inferred that the officers asked defendant Judge to make the phone calls. 1RP 37; 2RP 65; 5RP 123-24; 5RP 338-39.

In this case, Judge Nelson, the first trial judge, orally presented her findings and conclusions on the record. 4RP 88. She ruled that defendant's Judge's statements were not a result of custodial interrogation.

Id.

Written findings of fact and conclusions of law are required for all rulings on motions made under CrR 3.5(b), which provides: "After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefore." Although the failure to submit written findings and conclusions pursuant to CrR 3.5 is error, the error is considered harmless where the trial court's oral findings are sufficient to permit appellate review. State v. Riley, 69 Wn. App. 349, 352-53, 848 P.2d 1288 (1993) (quoting State v. Smith, 67 Wn. App. 81, 87, 834 P.2d 26 (1992), aff'd,

123 Wn.2d 51, 864 P.2d 1371 (1993)); see State v. Clark, 46 Wn. App. 856, 859, 732 P.2d 1029 (1987). Defendant Judge has waived appellate review of this issue.

The court's failure to enter written findings and conclusions does not require reversal. The first trial resulted in a mistrial due to juror misconduct. 4RP 433. At the beginning of the second trial, assigned to Judge Hickman, the admissibility of defendant's statements was addressed a second time. 5RP 37. At this time, defense counsel for defendant Judge affirmatively stipulated that his statements were admissible. 5RP 38-39.

The following colloquy took place:

[PROSECUTOR]: As far as the other statements which were the subject of the 3.5 hearing in front of Judge Nelson, I don't think either party has any grounds to contest Judge Nelson's ruling. Not that we feel that this court is bound by it, but simply **we don't have any reason to believe the outcome would be any different.**

There were some statements made by Mr. Judge at the scene. Telephone calls made into the residence. That type of thing that were overheard by the officers, and I believe we are in agreement that those also would be admissible.

[DEFENSE]: **That's correct, Your Honor.**

[THE COURT]: Are the parties husband and wife?

[DEFENSE]: No, Your Honor.

[THE COURT]: Anything else you want to put on the record regarding 3.5 hearings? It would appear that from

representations from both counsel and the State that we've got agreements or stipulations on all those issues.

[DEFENSE]: **I believe that's correct, Your Honor.**

5RP 38-39 [emphasis added].

The doctrine of invited error “prohibits a party from setting up an error at trial and then complaining of it on appeal.” In re Pers. Restraint of Breedlove, 138 Wn.2d 298, 312, 979 P.2d 417 (1999). The invited error doctrine is strict in Washington. The doctrine has been applied to errors of constitutional magnitude, including where an offense element was omitted from the “to convict” instruction. Id. (citing State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999); State v. Henderson, 114 Wn.2d 867, 869, 792 P.2d 514 (1990)(failing to specify the intended crime in a conviction for attempted burglary). The doctrine has been applied even in cases where the error resulted from neither negligence nor bad faith. See e.g., Studd, 137 Wn.2d at 547.

In Studd, a consolidated case, the six defendants all proposed instructions that were modeled after WPIC 16.02, which was a proper statement of the law at the time the instruction was offered. After trial, the Supreme Court in State v. LeFaber, 128 Wn.2d 896, 913 P.2d 369 (1996), ruled that a similar instruction erroneously stated the law of self-defense. Studd, 137 Wn.2d at 545. While concluding that the error was of

constitutional magnitude, and therefore presumed prejudicial, the Supreme Court held that the defendants who had proposed the instruction had invited the error and could not therefore complain on appeal. Studd, 137 Wn.2d at 546-47.

Defendant affirmatively agreed that his statements were admissible. He had litigated the issue before Judge Nelson, cross-examined the witness, and argued his position. He stipulated below that there was no reason to believe that a new 3.5 hearing would obtain a different result and therefore waived a re-hearing on the issue.

The invited error doctrine prohibits defendant Judge from obtaining relief on this issue.

4. DEFENDANT JUDGE IS NOT ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE.

Under the cumulative error doctrine, a defendant may be entitled to a new trial or reversal where errors cumulatively produced a trial that is fundamentally unfair. In re Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). This doctrine is employed where “the combined effect of an accumulation of errors ... may well require a new trial.” State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). The defendant bears the burden of proving an accumulation of errors of sufficient magnitude that retrial is

necessary. Lord, 123 Wn.2d at 332. Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. State v. Stevens, 58 Wn. App. 478, 498, 794 P.2d 38 (1990). As argued above, there was no error in the proceedings below. Assuming, arguendo, that error occurred, it was not of such magnitude as to warrant a retrial or reversal. Defendant Judge's claims under the cumulative error doctrine thus fail.

5. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING NON-HEARSAY MAIL ADDRESSED TO DEFENDANT BIRDSONG AT THE ADDRESS THAT CONTAINED THE METHAMPHETAMINE LAB.

Defendant Birdsong claims that the trial court abused its discretion by admitting into evidence a piece of mail addressed to Birdsong at the Judge address. BOAB at 42-46. See Ex. #31.

An analogous situation occurred in State v. Collins, 76 Wn. App. 496, 886 P.2d 243(1995). Collins was charged with possession of cocaine with intent to deliver. Id. at 497. While serving the search warrant on his residence, a detective answered Collins' phone when it rang. Id. at 497. The detective testified that several of the callers asked for Collins and wanted to purchase cocaine. Id. The Collins court held that the callers wanting cocaine was not the issue, but that their belief that they could get

the drugs from Collins was relevant. Id. at 497-98. The trial court found that the calls were circumstantial evidence of the person with dominion and control over the drugs to deliver them. Id. at 498. On appeal, the Collins court affirmed, holding that the inquiries for cocaine were not hearsay:

“A ‘statement’ is (1) an oral or written *assertion* or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” (Italics ours.) ER 801(a).
“‘Hearsay’ is a *statement* . . . offered in evidence to prove the truth of the matter asserted.” (Italics ours.) ER 801(c).
Assertion is not defined by the rule, but the advisory committee’s note to subdivision (a) of *Fed. R. Evid.* 801, to which the Washington rule defers, provides that “nothing is an assertion unless intended to be one. Therefore, because an inquiry is not assertive, it is not a “statement” as defined by the hearsay rule and cannot be hearsay. United States v. Lewis, 902 F.2d 1176 (5th Cir. Miss. 1990); *see also* United States v. Long, 284 U.S. App. D.C. 405, 905 F.2d 1572 (D.C. Cir.), *cert. denied*, 498 U.S. 948, 112 L. Ed. 2d 328, 111 S. Ct. 365 (1990). The trial court properly ruled the detective’s testimony regarding the callers’ inquiries was nonhearsay.

Collins at 497.

When someone addresses an envelope, they are not making a statement. Rather, they are trying to send the correspondence to the person named and use the address that they have for that person. Here, the mail is circumstantial evidence that Birdsong did receive mail at that address. Because she was more than a visitor in the house, she had dominion and control over the residence. The sender of the mail was not

asserting, “Rachelle Birdsong has dominion and control over the residence located at 1313 11th Street in Puyallup, Washington.” An address is not an assertion. Under defendant’s reasoning, however, the officers would not have been able to testify to the address of the residence, because the street sign for 11th Place would be hearsay, as would the “1313” house numbers.

Defendant has incorrectly interpreted the hearsay definition.

Because the mail addressed and delivered to Birdsong was not hearsay, defendant’s claim has no merit.

6. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT DEFENDANT BIRDSONG’S CONVICTIONS FOR MANUFACTURING METHAMPHETAMINE, POSSESSION OF A CONTROLLED SUBSTANCE – METHAMPHETAMINE, AND UNLAWFUL POSSESSION OF A FIREARM.

Defendant Birdsong alleges that there is insufficient evidence to establish that (1) she was an accomplice to manufacturing methamphetamine; (2) she unlawfully possessed a controlled substance; or (3) she was in possession of any firearm. She additionally claims that there was insufficient evidence to support the special verdict that she was armed with a firearm. These arguments fail in the light of the overwhelming evidence in this case.

The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Rempel, 114 Wn.2d 77, 82-83, 785 P.2d 1134 (1990) (*citing State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980) and Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(*citing State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

In this case the State had to prove that the defendant manufactured methamphetamine. RCW 69.50.401(1),(2)(b). “Manufacture” means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance.” State v. Todd, 101 Wn. App. 945, 952, 6 P.3d 86 (2000)(citing RCW 69.50.101(p)). Where the State presents evidence of methamphetamine lab components and can link those components to the defendant the evidence is sufficient to establish defendant’s guilt of manufacturing. Todd, 101 Wn. App. at 952.

A defendant may be shown to be in constructive possession of a controlled substance when he “has dominion and control over either the drugs or the premises upon which the drugs were found.” State v. Mathews, 4 Wn. App. 653, 656, 484 P.2d 942 (1971). This dominion and control need not be exclusive. See State v. Tadeo-Mares, 86 Wn. App.

813, 816, 939 P.2d 220 (1997). A court considers whether a person has dominion and control over an item by considering the totality of the circumstances. State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). When a person has dominion and control over a premises, it creates a rebuttable presumption that the person has dominion and control over items on the premises. State v. Cantabrana, 83 Wn. App. 204, 208, 921 P.2d 572 (1996).

In the instant case there is substantial evidence in the record to show defendant Birdsong had dominion and control over the residence containing the meth lab. First, she was present at the residence when police arrived. 5RP 124. She was receiving mail at that address, showing that she was more than a mere visitor at the house. Ex. #31. Defendant Judge, Birdsong's boyfriend, lived in the residence owned by his father. 5RP 837-39. Mr. Judge, Sr. was away from the house quite a bit. 5RP 849. He traveled for work and was out of town a couple of weeks per month. 5RP 847-48. He usually spent weekends at his girlfriend's house. 5RP 849. The garage, where the majority of evidence was located was defendant Judge's domain. 5RP 839. There is no evidence any one else had access to the residence.

Defendant Birdsong was in actual possession of perhaps the most incriminating items of all, the gas cans containing wet fertilizer pellets

used to make anhydrous ammonia, a key ingredient in the manufacture of methamphetamine. 5RP 129, 346, 167, 554, 761, 774. She was physically throwing the gas cans off the deck into blackberry bushes behind the residence because they were evidence of the crime of manufacturing methamphetamine. 5RP 128, 346. Laboratory tests confirmed that both gas cans contained the presence of ammonium sulfate, which, combined with lye generates anhydrous ammonia. 5RP 774. The presence of anhydrous ammonia was not found, but this is not surprising since it evaporates very quickly. 5RP 801.

One of the tell-tale signs of a meth lab is the strong odor of ammonia. 5RP 113, 319. The odor at the Judge residence was so overpowering that it was obvious to the next door neighbor, Officer Brosseau, Officer Kitts, and Officer Pigman. 5RP 119, 166, 318. The very strong odor is indicative of a current or very recent phase two of the cook. 5RP 168; 319. Defendant Judge called into the residence ostensibly to tell Birdsong to come out, but police thought he was actually warning his partner of the impending search warrant. 5RP 124, 340. Sure enough, when Officer Brosseau goes into the neighbor's yard, she sees Birdsong throwing out the gas cans that were the source of the ammonia odor. 5RP 346. Birdsong then went back inside the residence and began sprinkling a carpet freshening product to mask any remaining ammonia odor. 5RP

350. Defendant Birdsong did not respond to officers' commands to come out of the house. 5RP 350-51. Officers had to open the front door of the residence and remove Birdsong at gunpoint. 5RP 189, 350-51.

In the garage, police found two new cans of Xylene, an empty container of Red Devil lye, a funnel, empty boxes and empty blister packs of pseudoephedrine tablets (the main ingredient in methamphetamine), a hand-held torch, chemical resistant rubber tubing, new and used coffee filters, latex gloves, filterized gas mask (Ex. #56), an empty package of lithium batteries. Each and every one of these items is used in the manufacture of methamphetamine using the Birch reduction method. 5RP 293-301, 322, 392-411, 547-61, 753-65. Methamphetamine, the finished product, was also found in the residence. Three electronic scales were found in defendant Judge's bedroom. Ex. #61; 5RP 411.

Defendant Birdsong's mail was found in the garage with all the lab components.

Officers also found the coffee filters on a table in the garage with no coffee maker in sight. Ex. #51. On the table were rubber gloves and another mason jar ring. Id. In the garbage in the garage there was one coffee filter with pinkish residue that lab analysis confirmed was starch. 5RP 775-77. The binder material in cold tablets is starch, and the pills are frequently red. Id. It is more than reasonable for the jury to infer that that

coffee filter (Ex. #35) was used to extract pseudoephedrine from cold tablets, the empty packaging for which was in the same garbage can. 5RP 274. The residue/binder material got its pink color from the red on the outside of the cold tablets.

The exact location of the cold tablet packaging is significant. The photos admitted at trial show empty blister packs together in the trash, suggesting rather strongly that all the tablets were all used at the same time. Ex. #28. This is consistent with the manufacture of methamphetamine, and inconsistent with use for “allergies.” The empty boxes of cold tablets were near the top of the trash, right under the empty blister packs. Ex. #29. The empty bottle of Red Devil lye was also on the top of the trash. 5RP 272. Although defendants claim these items are “innocuous” and have legitimate uses, these key ingredients used to make methamphetamine were all found in the same area, consistent with being used recently and being used together. Viewed in the light most favorable to the State, this could only be for making methamphetamine.

Some of the plastic tubing had been rigged up to a mason jar lid ring, which could be used as an acid gas generator or hydrochloride generator. See Ex. #42, 43, 46 (photographs). 5RP 169, 301, 559-61. This device is used to gas out the methamphetamine in the third phase of the cook. 5RP 301, 763-64. Defendant’s father testified that he thought

this item was used for bleeding brakes. 5RP 845, 850. However, the residue inside the clear tubing is a white powder, not a substance consistent with brake fluid. Ex. #43.

Lastly, the house was set up to protect the criminal enterprise. There was an operational surveillance camera mounted on the outside of the house, with the corresponding monitor mounted in the garage that was being used as the drug lab. 5RP 422-23; Ex. #'s 57 & 58. A photograph of the monitor taken by police captures the view of the driveway from the garage. Ex. #57. Anyone in the garage could have seen Officers Brosseau and Kitts approaching on foot and have advance warning of their presence. Id. Police also found a police scanner tuned to Puyallup Police frequency, and a list of WSP radio frequencies. 5RP 407, 422.

Consistent with a clandestine drug lab, defendants also had firearms loaded and readily accessible near the front door through which both defendant eventually exited. 5RP 418-19; Ex. #'s 90 & 91.

Defendant argues that the lack of anhydrous ammonia amounts to insufficient evidence to sustain a conviction. BOAB at 31. This argument fails for two reasons. First, as discussed above, evidence of the components of the lab is sufficient. Todd, 101 Wn. App. at 952. The State does not have to show that the entire process was undertaken by defendant(s). Mere preparation is sufficient. Id. Second, police located

ammonium sulfate in the gas cans and the container of Red Devil lye, which when combined make anhydrous ammonia. The Red Devil lye container was on *top* of the trash, suggests recent use. The overpowering odor of ammonia, observed by many, is another clear indication it was not household ammonia used for “innocuous” cleaning tasks.

Defendant Birdsong also argues that the State produced insufficient evidence to show that the first, second, and third phase of manufacture “was actually occurring” at the residence. BOAB 30-34. Again, the definition of manufacture is very broad. State v. Keena, 121 Wn. App. 143, 147, 87 P.3d 1197 (2004). Because the State presented evidence of methamphetamine lab *components* and can link those components to the defendant the evidence is sufficient to establish defendant’s guilt of manufacturing. Todd, 101 Wn. App. at 952. It is not necessary to prove that any particular phase or all phases of the manufacture was “actually occurring” at the time of the search warrant. Id. In fact, expert testimony at trial showed that meth cooks can do different phases at different locations to avoid detection. SRP 563-64.

Defendant Birdsong claims that there was insufficient evidence to prove she was an accomplice. BOAB at 35-37. However, as discussed above, defendant Birdsong had dominion and control over the residence, and therefore, she is presumed to be in possession of the items located

there. See State v. Cantabrana, 83 Wn. App. at 208. This presumption, along with the totality of the circumstances, were more than sufficient evidence for the jury to find defendant guilty, not only as an accomplice, but as a principal as well. She had at least constructive possession of many, many components of a methamphetamine lab, which were found in the garage, along with her mail. She also had constructive possession of the methamphetamine found in the kitchen. She had actual possession of the gas cans as she tried to conceal her crime from police. Her actions on the day in question seal her guilt. She tried to destroy the gas cans, not only to dispose of incriminating evidence, but to eliminate the odor that brought the police there in the first place; she did not come out of the house when ordered to by Officer Brosseau; and she continued to try to clean up and eliminate the tell-tale odor in the house by putting down carpet fresh.

The same analysis applies to the charge of second degree unlawful possession of a firearm. Defendant Birdsong is presumed to be in constructive possession of these loaded firearms by virtue of having dominion and control over the residence in which they were found. See State v. Cantabrana, 83 Wn. App. at 208.

The State presented ample evidence for the jury to find defendant guilty of all three crimes charged. This court should affirm the jury's verdicts.

Defendant Birdsong claims there was insufficient evidence to show she was armed with a firearm in the commission of manufacturing methamphetamine. BOAB at 1. However, her only support for that claim is one sentence arguing that because the State failed to show sufficient evidence that Birdsong was in constructive possession, the State therefore failed to show she was "armed." BOAB at 50. Birdsong presents no law, authority, or argument in support of her claim.

To show Birdsong was *armed* with a firearm requires a different analysis than showing *possession* of a firearm.

A person is "armed" under the statute "if a weapon is accessible and readily available for use, either for offensive or defensive purposes." State v. Schelin 147 Wn.2d 562, 567, 55 P.3d 632 (2002)(citations omitted). There must be a nexus between the defendant, the crime, and the weapon. Id. at 568.

In State v. Gurske, 155 Wn.2d 134, 118 P.3d 333 (2005), the defendant was arrested for driving on a suspended license. In a search incident to arrest, police found a back pack behind the driver's seat where Gurske had been sitting. Id. at 136. Inside the zipped back pack police

found a Coleman torch, a holstered handgun under the torch, and three grams of methamphetamine. Id. The Supreme Court held that there was insufficient evidence to show that the firearm was easily accessible and readily available for use because in order to reach it, Gurske would have had to exit the vehicle or move over into the passenger seat. Id. at 143. The Court further noted that the facts did not give rise to the inference that Gurske could access the weapon from the driver's seat. Id.

Gurske is distinguishable from this case. Here, the uncontroverted testimony showed that the firearms were loaded and very readily accessible. 5RP 418-20. Further, these firearms were located just inside the front door where both defendants had ready access to them as they moved around the residence and as they exited through the front door. Viewed in the light most favorable to the State, the connection between both defendants and the firearms is supported by overwhelming evidence.

There is also a connection between the firearms and the manufacturing of methamphetamine. The defendants were, for the most part, the sole occupants of the premises and they were manufacturing methamphetamine on those premises. The evidence of the surveillance cameras and police scanners support an inference that defendants were on alert for detection by police investigators. The surveillance equipment can

be used to protect the contraband in criminal enterprises and to avoid detection and capture.

The law does not require evidence that a defendant use or attempt to use the firearm to be liable for the enhancement. Rather, the firearm must only be **available** for use. State v. Schelin, 147 Wn.2d at 567.

In State v. Willis, 153 Wn.2d 366, 103 P.2d 1213 (2005), the Supreme Court held there was sufficient evidence to find that the handgun was easily accessible and readily available for Willis's use, either for offensive or defensive purposes, and that there was a nexus between Willis, the crimes, and the handgun. Id. at 375. Willis burglarized an apartment with the help of others. Id. at 368-69. Willis kicked in the door and carried electronic equipment out of the apartment and put it in the trunk of the car he was driving. Id. Later that night, officers stopped the car Willis was driving. Id. When police pulled the car over, Willis took a handgun that was under the driver's seat and handed it to another passenger who placed it under the back seat. Id. at 369. Officers located the handgun under the back seat of the car. Id. Defendant admitted to handling the gun, but claimed it belonged to someone else. Id. There was no evidence that Willis had the handgun on his person when he entered the apartment or while he was committing the theft or that the handgun was anywhere other than in the car at all times relevant.

Under the Supreme Court's holding in Willis, a claim that because the guns were not in the garage where the majority of the manufacturing occurred fails. In Willis, the court held that evidence that the gun in a car parked outside the scene of a burglary and theft was "easily accessible and readily available for Willis's use ... and that there was a nexus between Willis, the crimes, and the handgun." Willis at 375. Here, defendants had the firearms in the center hallway, within their grasp when they were anywhere near the hallway or front door. This forms the nexus between defendants, their crime, and the handguns.

In State v. Schelin, 147 Wn.2d 562, defendant had a marijuana growing operation in a room in his basement. Id. at 564. There was a loaded pistol in a holster hanging on a nail on the wall in the basement. Id. When police arrived, defendant was in the basement within 6 to 10 feet of the pistol. Id. Police ordered him to come up the stairs, which he did. The Schelin Court held that the jury could infer that Schelin was using the weapon to protect his marijuana grow operation. Id. at 574. They further noted, "Schelin stood near the weapon when police entered his home and could very well have exercised his apparent ability to protect the grow operation with a deadly weapon, to the detriment of the police." Id. The same is true in the present case. Defendant Birdsong went right past the firearms when she finally exited the residence. Birdsong could

have used the firearms to protect the lab as the police had not yet discovered or removed her. More egregious in this case is that defendants had at least two weapons they could access and fire quickly. Taken in the light most favorable to the State, it is “reasonable to infer that the purpose of the loaded guns near the front door was to defend the manufacturing site in case it was attacked.” State v. Simonson, 91 Wn. App. 874, 883, 960 P.2d 955 (1998), review denied, 137 Wn.2d 1016, 978 P.2d 1098 (1999) (*criticized on other grounds in State v. Johnson*, 94 Wn. App. 882, 895, 974 P.2d 855 (1999)). So here, was it reasonable for the jury to make such an inference.

Looking at the evidence in the light most favorable to the State, there is sufficient evidence to show that defendant Birdsong was armed while there was a methamphetamine laboratory nearby in the garage. There is both proximity to the weapon and control over the premises where defendant was involved in illegal drug production. Defendant’s claim must fail.

7. THE TRIAL COURT DID NOT ERR WHEN IT IMPOSED DRUG/ALCOHOL EVALUATION AND FOLLOW-UP ON DEFENDANT JUDGE AS A CONDITION OF COMMUNITY CUSTODY.

Defendant Judge claims that the trial court erred by requiring a “drug/alcohol” evaluation and follow-up. BOAJ at 79-81. He concedes,

however, that the trial court did not err when it ordered evaluation and treatment for substance abuse. BOAJ at 81, n.16. This is a distinction without a difference. Alcohol *is* a substance. A substance upon which people can become chemically dependent and abuse.

Defendant's reliance on State v. Jones, 118 Wn. App. 199, 76 P.3d 258 (2003), is misplaced. In that case, there was no evidence to suggest that alcohol, or any other substances, contributed to Jones' crimes. Here, defendant was engaged in the manufacture of a controlled substance and the unlawful possession of that a controlled substance. If this Court were take defendant Judge's argument to its logical conclusion, the evaluation and treatment would have to be limited to methamphetamine, the only substance of which there is evidence in this case. It is much more logically consistent to hold that if substance abuse treatment is to rehabilitate defendant, he must be treated for the abuse of all substances, not just methamphetamine.

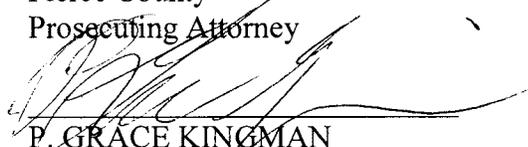
This Court should reject this claim and affirm the sentence.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm the convictions of both defendants as well as defendant Judge's sentence.

DATED: December 7, 2007.

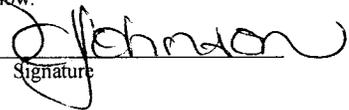
GERALD A. HORNE
Pierce County
Prosecuting Attorney



P. GRACE KINGMAN
Deputy Prosecuting Attorney
WSB # 16717

Certificate of Service:

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

12/7/07 
Date Signature

