

NO. 35481-1-II

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

STATE OF WASHINGTON  
BY \_\_\_\_\_

STATE OF WASHINGTON,

Respondent,

v.

RENATA ABRAMSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 05-1-01786-2

BRIEF OF RESPONDENT

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DATED December 5, 2007, Port Orchard, WA *Signature*  
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## I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court properly found that the complaint for search warrant presented sufficient probable cause, did not contain any material omissions, was not stale, and showed a sufficient nexus between the crime and property to be searched?

2. Whether the evidence was sufficient to convict Abramson of the substantive crimes and the firearms enhancements? (Partial concession of error as to school-zone enhancement.)

3. Whether Abramson fails to meet her burden of showing counsel was ineffective for failing to call a witness who would have had to incriminate herself to testify as Abramson now speculates?

4. Whether the trial court properly admitted evidence that Abramson recently sold drugs to the police operative to rebut Abramson's claim that the operative would have had no reason to think she would sell her drugs?

5. Whether the record clearly shows that the jury was fully instructed?

## II. STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY

Renata Abramson was charged by first amended information filed in Kitsap County Superior Court with (1) delivery of methamphetamine, (2) possession of methamphetamine, (3) possession of methamphetamine with intent to manufacture or deliver, and (4) second-degree unlawful possession of a firearm. CP 69. Counts II and III included firearms allegations, and Count III additionally bore a school-zone enhancement allegation. *Id.*

Abramson moved to suppress, alleging that the warrant for the search of her home was faulty. CP 32. She alleged that the complaint showed neither the basis of knowledge or veracity of the informant, that there was no nexus between place searched and items to be seized, and that the information was stale. 1RP (pm) 8-9. Abramson also alleged that the complaint omitted a material fact, that the police operative was in jail and wanted out when she contacted the police. 1RP (pm) 12. The trial court rejected these contentions. 1RP (pm) 32-38; CP 305.

The case proceeded to trial and the jury convicted her as charged on all counts. CP 234-38. The jury returned its verdicts on May 24, 2006. *Id.*

On June 7, 2006, Abramson filed a motion to arrest judgment, asserting that the evidence was insufficient to support the school-zone

enhancement. CP 240.

On September 21, 2006, Abramson filed a motion for new trial, alleging that trial counsel had been deficient. CP 339.

On September 29, the trial court denied both motions as untimely. 10RP 7. The trial court thereupon imposed a standard-range sentence. 10RP 13, *et seq.*

## **B. FACTS**

Poulsbo Police Detective John Halsted was assigned to the West Sound Narcotics Enforcement Team (WESTNET). 3RP 97-98. Halsted provided information to the jury regarding methamphetamine use and dealing. He explained that a single dose of methamphetamine was about one tenth to one quarter of a gram. 3RP 100. By comparison, a single serving sugar packet contains a gram. 3RP 100. Halsted noted that dealers sometimes sold quarter-grams, but more commonly sold by the gram. 3RP 100. The drugs were are usually packaged in one-inch square Zip-loc baggies. 3RP 101.

Stacy Maykis had worked with Halsted and WESTNET as a confidential informant for a number of years. 3RP 104. She had assisted in the investigation of “many, many people” since 2001. 3RP 104.

In late 2005, she contacted Halsted from jail. 3RP 104. She was in

custody on a probation violation and a was serving time on an old DUI conviction. 3RP 105. Halsted helped to speed up her release from jail in exchange for some information. 3RP 105.

Maykis owed Abramson money for drugs she had purchased in September and October. 4RP 198. Those purchases were not for WESTNET. 4RP 198. They occurred at Abramson's home. 4RP 199.

Abramson was driving when she arrived in the Camaro. 4RP 202. Maykis did not tell Abramson how much she wanted. 4RP 202. Her standard purchase was a quarter ounce [sic] for \$300.00. 4RP 202.

As a result of that information, on November 1, 2005, Halsted set up a surveillance of Abramson's house at 2003 Shamrock Drive in Bremerton. 3RP 106. He saw Abramson come out of the residence and get into a tan Chevrolet Camaro. 3RP 106. Abramson had resided there at least as far back as 2003. 3RP 107.

The next day, Halsted met with Maykis to set up a controlled buy of methamphetamine from Abramson. 3RP 107. Maykis had called Abramson around 9:30 a.m., before meeting with the police. 3RP 110, 4RP 200. After they met, Maykis called Abramson again, around 10:00 a.m. 3RP 111.

Abramson did not want to do the sale at her home because she was not "feeling comfortable." 4RP 199, 205, 208. Abramson had to go to work,

so they agreed to meet in the parking lot at the mall, where she worked. 4RP 200-01. They agreed to meet at 10:30. 3RP 112.

Following standard protocol, Maykis was searched before the buy. 3RP 110. They gave Maykis money and searched her vehicle. 3RP 111-12. Maykis drove her own car to the mall and the police followed her in a separate vehicle. 3RP 112. Maykis waited in her car. 3RP 113.

WESTNET Sergeant Randy Drake and Detective Roy Alloway set up a surveillance of Abramson's home, and maintained phone contact with Halsted. 3RP 111. Alloway advised Drake that Abramson was leaving the home in the Camaro. 4RP 223. Drake followed her to the mall. 4RP 223. Alloway followed her in his own vehicle. 4RP 314. She did not make any stops on the way. 4RP 224.

Abramson arrived at 10:55 in the Camaro. 3RP 114, 158, 4RP 241. A second woman was sitting in the passenger seat. 3RP 114. Abramson backed into a space near the entrance to the mall parking lot. 3RP 115.

Maykis drove over and parked next to her. 3RP 115. Maykis got out and approached the driver's window. 3RP 115. Maykis handed Abramson the money in a paper sack through the car window. 4RP 203. Abramson got out and walked to the back of the Camaro, and then got back in and moved the car back a bit further. 3RP 115, 4RP 203. The passenger also got out

during the transaction, but stayed by her door. 3RP 162. As Abramson and her friend headed for the mall, Abramson said it was under the back of the car in a white napkin. 3RP 115, 4RP 204. Maykis retrieved the napkin. 4RP 204.

Maykis got in her car and left the mall with the police following. 3RP 116. They met behind the movie theatre across the street from the mall. 3RP 116. Maykis and her car were searched again. 3RP 124-25. She had a Ziploc baggie with methamphetamine in it. 3RP 116, 4RP 280, 282.. The baggie was wrapped in a piece of Kleenex. 3RP 120. The bag weighed four grams, which was the equivalent of 12 doses. 3RP 124.

After the buy, the detectives then obtained a warrant to search Abramson's home. 3RP 125. They executed the warrant the next day. 3RP 126. They had to knock down the door to gain entry. 3RP 126. In the home were Abramson, Amanda Cormany, Curtis Griffin, Terrence griffin and Kathleen Conway. 3RP 128. Abramson was in a bedroom when the police came in through the window to that room. 3RP 132.

There was a surveillance camera mounted in the apex of the roof at the front of the house. 3RP 127. The camera on the roof was for a closed-circuit television. 3RP 137. There was a second camera in the backyard pointed toward the side and front of the property. 3RP 138. In Halsted's

experience, many drug dealers used closed-circuit cameras to monitor whether police or customers were approaching their homes. 3RP 140. The cameras were functioning. 3RP 172. There was no evidence of any lawful business being conducted in the home. 3RP 139.

There were a total of four bedrooms in the house. 3RP 132. The police recovered evidence from Abramson's bedroom, which also contained an office area, 3RP 165-66, a hall closet, and the room temporarily occupied by Abramson's daughter Cormany, and Cormany's boyfriend Griffin.

In Abramson's room, the police found numerous items of interest, including \$212.00 in cash, 3RP 142-43, and a cell phone. 3RP 175, 4RP 243.

The police recovered a quantity of "drug packaging" in the form of small Zip-loc baggies. 4RP 251. The baggies were one-inch-square with an eightball design on them. 4RP 252. "Eightball" is the term commonly used for an eighth of an ounce of drugs, which is a common sales amount. 4RP 253 There were also some larger baggies. 4RP 252.

There was a small baggie of methamphetamine. 4RP 254. It was yellow with a Batman print on it. 4RP 255. The methamphetamine and some of the packaging were by the nightstand, and some of the packaging was elsewhere. 4RP 261.

A larger bag of methamphetamine was found on the computer desk. 4RP 355. It contained 7.04 grams of methamphetamine. 4RP 282-83.

There was a digital scale on the computer desk. 4RP 349.

From the safe in Abramson's bedroom the police recovered two identification cards bearing Abramson's name. 4RP 332. Also in the safe was another \$1207.00 in cash. 4RP 334.

Throughout the room were documents that were addressed to Abramson, some of which were business documents. 4RP 250, 261. The mail was addressed to Abramson at 2003 Shamrock Drive. 4RP 274. There was also personal mail addressed to her. 4RP 275.

In the room were several photographs, including some of Abramson with other people. 4RP 275. One of them was with Griffin. 4RP 275.

There was also a piece of paper with names and dollar amounts. 4RP 275. This was of interest to Weiss, because drug dealers frequently keep such ledgers. 4RP 275.

Finally, the police found a set of factory-issue Beretta pistol grips in the dresser. 4RP 348. Exh. 12: The factory grips were in a package for a Hogue after-market grip kit for a Beretta. 4RP 351-52.

In the hall closet, the police found a zip pouch. 4RP 349-50. It

contained Ruger and Beretta semi-automatic pistols. 4RP 289, 291, 350. The Hogue grips from the packaging in Abramson's dresser had been installed on the Beretta. 4RP 352. Both has magazines and were fully functional. 4RP 291-292. Also in that closet was a baggy with white powder. 3RP 141.

In the bedroom occupied by Cormany and Griffin the police found a "Curious George" tin that contained numerous bags of methamphetamine and five digital scales. 3RP 135, 4RP 318-19. The baggies had eightballs on them' like the empty ones in Abramson's room. 4RP 320. There were 10 baggies in the tin, nine weighing 7.4 to 7.6 grams and one weighing 1.3 grams. 4RP 283-84, 323.

There was an additional Zip-loc bag that contained 13.5 grams of methamphetamine. 4RP 327-28, 284-85. There was another bag containing what appeared to be methamphetamine of undetermined weight. 4RP 328.

Also in that room were six bullets for the Beretta, 4RP 291, 4RP 324-25, along with a bag containing two boxes of ammunition for the Beretta, a receipt and a gun cleaning kit. 4RP 326.

There was a blue zippered case containing a plastic bowl with drug residue and a leather pouch with two handgun magazines. 4RP 329.

Finally, the police recovered \$946.00 in cash from Griffin's pants.

4RP 336.

Abramson stipulated that she had prior convictions for the purposes of Count IV, the unlawful possession of a firearm charge. 4RP 355-68.

Abramson testified essentially that she never sold drugs to Maykis. 5RP 382. She told Maykis when she called her after getting out of jail that she did not have any drugs. 5RP 388. She also stated that Cormany, who was her daughter was just staying there for a few nights. 5RP 395. She claimed that she did not know there were any guns in the house. 5RP 402.

### III. ARGUMENT

#### A. THE TRIAL COURT PROPERLY FOUND THAT THE COMPLAINT FOR SEARCH WARRANT PRESENTED SUFFICIENT PROBABLE CAUSE, DID NOT CONTAIN ANY MATERIAL OMISSIONS, WAS NOT STALE, AND SHOWED A SUFFICIENT NEXUS BETWEEN THE CRIME AND PROPERTY TO BE SEARCHED.

Abramson argues that the evidence seized during the execution of the search warrant at her home should have been suppressed, alleging that there was no nexus between the crime being investigated and the home, and that the evidence supporting the warrant was stale. She also asserts, for the first time on appeal, that material information was omitted from the complaint for search warrant. This claim is without merit because the police presented the

magistrate with sufficient non-stale evidence that Abramson was dealing methamphetamine from her home. Her allegation that material information was omitted should not be considered for the first time on appeal, and even if it were considered, the allegedly omitted information would not render the warrant invalid.

The warrant clause of the Fourth Amendment of the United States Constitution and article 1, section 7 of the Washington Constitution require that a search warrant be issued upon a determination of probable cause based upon “facts and circumstances sufficient to establish a reasonable inference” that criminal activity is occurring or that contraband exists at a certain location.” *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). Probable cause is established when an affidavit supporting a search warrant provides sufficient facts for a reasonable person to conclude there is a probability the defendant is involved in the criminal activity. *Vickers*, 148 Wn.2d at 108.

A magistrate exercises judicial discretion in determining whether to issue a warrant. That decision is reviewed for abuse of discretion, and a reviewing court generally accords great deference to the magistrate and views the supporting affidavit for a search warrant in the light of common sense. *Vickers*, 148 Wn.2d at 108. Doubts concerning the existence of probable cause are generally resolved in favor of issuing the search warrant. *Vickers*, 148 Wn.2d at 109.

**1. The complaint for search warrant demonstrated a sufficient nexus between the home and the crimes under investigation.**

Abramson first argues that the complaint was insufficient because it failed to establish a nexus between the crime being investigated and her home. This claim is without merit. Abramson has intertwined a *Franks* claim<sup>1</sup> with this contention, but the State will address that claim separately, *infra*.

As noted, a search warrant may issue only upon a determination of probable cause. Accordingly, “probable cause requires a 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.” *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

In *Thein*, where there was “no incriminating evidence linking drug activity to” the defendant’s home, such as “observations of him leaving” with the contraband or “other suspicious activity at” the home. *Thein*, 138 Wn.2d at 150. Here, on the other hand, the police observed Abramson go directly from her home at 10:00 in the morning to the scene of a “controlled buy” where she delivered methamphetamine to a police operative. CP 394. This is precisely the type of evidence that *Thein* indicates provides a nexus.

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<sup>1</sup> *Franks v. Delaware*, 438 U.S. 1354, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

Further, the same operative, who had years of reliable performance with the officer in question, had purchased methamphetamine on numerous occasions from Abramson “for the last couple months,” presumably at her home, since the operative had observed “a large amount of methamphetamine at Abramson’s residence.” CP 393.

Additionally, the operative reported that Abramson had a surveillance camera “that she uses to protect her drug operation from law enforcement.” CP 396. The officer reported that he had extensive experience in narcotics investigation, have been involved in it since at least 1999. CP 400. In his experience drug dealers used such equipment to protect the property where they engaged in their illegal enterprises. CP 402.

Finally, the police were also looking for evidence of unlawful possession of firearms. The operative reported that Abramson had guns in the residence within the last two months. CP 396. Abramson was a convicted felon. CP 395-96. The operative also reported that Abramson’s daughter, Cormany, was also presently residing at the house. CP 396. Her residency there was corroborated by a recent police report of a burglary of Cormany’s storage unit. CP 396. Cormany was also a convicted felon. CP 396.

The foregoing was more than sufficient to establish a nexus between

the crimes and the property to be searched. *State v. G.M.V.*, 135 Wn. App. 366, ¶ 16, 144 P.3d 358 (2006), *review denied sub nom. State v. Vargas*, 160 Wn.2d 1024 (2007). The trial court properly concluded that the complaint for search warrant was sufficient to establish probable cause to search Abramson's home.

**2. *The trial court did not abuse its discretion by failing to hold a Franks hearing.***

Abramson also claims, citing to *Franks v. Delaware*, that the trial court erred in failing to “acknowledge the misrepresentations and omissions” in the complaint for search warrant. She appears to fault the police for failing to include the fact that Abramson had a passenger in her car when she left her house.<sup>2</sup> This claim was not raised below, and even had it been, it would have been without merit.

RAP 2.5(a) provides that a party may not raise a claim of error on appeal that was not raised at trial unless the claim involves (1) trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. *State v. Kirkpatrick*, 160 Wn.2d 873, ¶ 7, 161 P.3d 990 (2007) (*quoting State v. Scott*, 110 Wn.2d 682,

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<sup>2</sup> Abraham specifically argues that “another individual was with Ms. Abramson when leaving her home and arriving at the mall parking lot.” Brief of Appellant at 12. Since the complaint specifically mentioned that “there was an unknown female in the passenger seat” when Abramson arrived at the mall, CP 94, *also* CP 95, the State presumes her complaint is that the police did not recite that she was seen leaving Abramson's home with her.

686, 757 P.2d 492 (1988)). The Supreme Court has noted, however, that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below.” *Id.* (quoting *Scott*, 110 Wn.2d at 687) (internal quotation marks omitted).

Whether RAP 2.5(a)(3) should allow the new argument on appeal is determined after a two-part analysis. *Kirkpatrick*, 160 Wn.2d at ¶ 8. First, the Court determines whether the alleged error is truly constitutional. *Id.* Second, the Court determines whether the alleged error is “‘manifest,’ i.e., whether the error had ‘practical and identifiable consequences in the trial of the case.’” *Id.* (quoting *State v. Stein*, 144 Wn.2d 236, 240, 27 P.3d 184 (2001)).

An error will not be deemed “manifest” where, as a result of the appellant’s failure to raise the issue at trial, this Court would have to engage in fact-finding an appellate “court is ill equipped to perform.” *Kirkpatrick*, 160 Wn.2d at ¶ 11. That is precisely the case here.

Although Abramson moved for a *Franks* hearing at trial, it was not based on of the complaint’s failure to mention that Abramson’s passenger was in the car when she left her house. Rather, Abramson alleged below that the police had committed a material omission by not disclosing in the

complaint that the operative was in jail and wanted to be released when she contacted the police. 1RP (pm) 12; CP 45. While both claims allege that a material omission was made such that the warrant was invalid, they are factually entirely distinct. Raising one ground for suppression at trial does not preserve for appeal a different basis. *Kirkpatrick*, 160 Wn.2d at ¶ 10. RAP 2.5 thus applies.

Here, because Abramson did not raise this issue below, the parties did not explore at the suppression hearing the issue of whether the police observed the passenger when Abramson got into her car and left her home. Likewise the trial court made no findings in this regard. 1RP (pm) 35; CP 305-06. The record is thus inadequate for review and this issue should not be considered.

Moreover, even if the record were considered adequate, Abramson also fails to show manifest constitutional error because she fails to show that the omission was material. The *Franks* test for material misrepresentations applies to allegations of material omissions. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985); *State v. Garrison*, 118 Wn.2d 870, 872-73, 827 P.2d 1388 (1992), *Franks*, 438 U.S. at 155-56. In determining materiality, the challenged information must be *necessary* to the finding of probable cause. *State v. Taylor*, 74 Wn. App. 111, 117, 872 P.2d 53, *review denied*, 124 Wn.2d 1029 (1994). It is not enough to say that the information tends to

negate probable cause. *Taylor*, 74 Wn. App. at 117. If the facts were relevant, the court must delete the false or misleading information or insert the omitted information. *State v. Taylor*, 74 Wn. App. at 117. If the affidavit with the matter deleted or inserted, as appropriate, remains sufficient to support a finding of probable cause, the suppression motion fails. *Garrison*, 118 Wn.2d at 873; *Taylor*, 74 Wn. App. at 117.

Here insertion of the fact that the passenger left Abramson's house with her would not necessarily negate probable cause. Indeed, it is hard to see how this information would have affected probable cause in any manner. The complaint stated that the passenger was present at the mall where the controlled buy took place. CP 394-95. It also stated that the police followed Abramson from the time she left her house until she arrived at the mall, and that Abramson made no stops along the way. CP 394. The only reasonable inference was that the passenger must have been in the car when she left the house. Had the trial court been asked to consider this issue, it cannot be said on this record that it would have abused its discretion if it denied a *Franks* hearing or upheld the warrant even had it deemed the omission material. This claim should be rejected.

**3. *The information contained in the complaint for search warrant was not stale.***

In evaluating whether the facts underlying a search warrant are stale, a

reviewing court looks at the totality of the circumstances. *State v. Maddox*, 152 Wn.2d 499, 506, 98 P.3d 1199 (2004). “The length of time between issuance and execution of the warrant is only one factor to consider along with other relevant circumstances, including the nature and scope of the suspected criminal activity.” *Maddox*, 152 Wn.2d at 506. Whether information is timely and whether evidence is likely to remain at the place sought to be searched depends on the nature of the evidence sought. *State v. Dobyms*, 55 Wn. App. 609, 620, 779 P.2d 746, *review denied*, 113 Wn.2d 1029 (1989).

Here the operative reported that she had regularly bought methamphetamine over the past two months at Abramson’s house. The operative reported that Abramson had guns and always had a lot of methamphetamine at the house. The day the police applied for the warrant, Abramson went directly from her house at 10:00 in the morning to the mall where she delivered a significant quantity of methamphetamine to the operative. The information was simply not stale.

Abramson’s complaint about the reference to the 2003 arrests and convictions is a red herring. As the trial court noted, this information was not offered for the purpose of showing that there would presently be drugs in the house, but to show Abramson’s long-time connection to the residence, and that she had felony convictions, for the purpose of establishing probable

cause to believe she was a felon in possession of a firearm. 1RP (pm) 37.

This claim should also be rejected and the trial court's ruling upholding of the warrant should be affirmed.

**B. THE EVIDENCE WAS SUFFICIENT TO CONVICT ABRAMSON OF THE SUBSTANTIVE CRIMES AND THE FIREARMS ENHANCEMENTS, BUT NOT THE SCHOOL-ZONE ENHANCEMENT (PARTIAL CONCESSION OF ERROR).**

Abramson next claims that the evidence was insufficient to support her possession of methamphetamine convictions and the firearms and school-zone sentence enhancements. Her claims regarding the substantive crimes and the firearm enhancements are without merit. The State concedes that evidence was insufficient to support the school-zone enhancement.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court

examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

**1. Firearm Possession and Enhancements**

Abramson alleges that the evidence of the firearms enhancements was inadequate because "no evidence existed that Ms. Abramson even had knowledge of the firearms, let alone control." Brief of Appellant at 17 *see also* at 23-24. This statement ignores the fact that the packaging for the custom grips that had been installed on the Beretta was found in her desk drawer in her bedroom, and the original factory grips were in that packaging. Moreover, she testified that her daughter Cormany, and Cormany's boyfriend Griffin were only staying at the house briefly and temporarily. The jury could

conclude that the guns were hers especially since she had the original grips in her desk. Even accepting her daughter's assertion of sole ownership of guns the evidence was more than sufficient for the jury to find that they were acting as accomplices.<sup>3</sup> There were significant quantities of retail-packaged methamphetamine throughout the house. The locations and quantities were such that anyone entering it would have seen it. It is reasonable to conclude, especially since she was caught delivering red-handed, that the operation was Abramson's and Cormany was the accomplice. This claim should be rejected.

## **2. School Zone Enhancement**

To support a school-zone enhancement, there must be evidence that the distance between the school bus stop and the site of the offense was no more than 1000 feet. Where there is no measurement to the actual site in the home where the offenses occurred, the evidence is insufficient. *State v. Jones*, 140 Wn. App. 431, ¶¶ 16-19, 166 P.3d 782 (2007). Here the only testimony was that it was 891 feet between the stop and "2003 Shamrock." 3RP 144. There was no testimony as to where on the property the measurement ended, or how far back the house of the rooms sat from the

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<sup>3</sup> The jury was instructed that it could find both the unlawful possession and the enhancement based on accomplice liability, which Abramson does not now contest. See CP 113, 134; SRP 441-42, 450. (See Point E, *infra*, regarding the instructions the jury was given).

road. As such, the State concedes that the school-zone enhancement and the and the resulting portion of Abramson's sentence must be vacated.

**3. Possession and Delivery of Methamphetamine**

Abramson finally claims that the evidence was insufficient to show "possession or delivery of methamphetamine." Brief of Appellant at 18. She also seems to argue that the State failed intent to deliver. *Id.* at 19.

Abramson's house was a virtual methamphetamine warehouse. She had closed circuit security cameras. She delivered a significant quantity of methamphetamine to a police operative. The contentions that the methamphetamine in her house was not hers, particularly since a good portion of it was in her own bedroom, and that she had no intent to deliver, given that she *did* deliver it, and given that most all of it was packaged in sale amounts in baggies with an eightball on them, which a street term for the common sale amount, is laughable. This claim should be rejected.

**C. ABRAMSON FAILS TO MEET HER BURDEN OF SHOWING COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL A WITNESS WHO WOULD HAVE HAD TO INCRIMINATE HERSELF TO TESTIFY AS ABRAMSON NOW SPECULATES.**

Abramson next claims that he trial counsel was ineffective for . This claim is without merit because counsel did not call a witness and did not investigate Abramson's mobile phone records.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

Where, as here, the claim is brought on direct appeal, the Court limits review to matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

Abramson bases these claims on her motion for new trial filed below. None of these claims were developed in any meaningful way below, however, because the motion was filed some four months after the verdict was rendered and the trial court rejected the motion as grossly untimely under CrR 7.4. 10RP 5-7.

***1. Failure to call Kathy Conway***

Based on the hearsay-within-hearsay declaration of a defense investigator, Abramson claims that her counsel was deficient for failing to call Kathy Conway, her purported passenger when she delivered the methamphetamine at the mall. Even setting aside the inadmissible nature of this evidence, it would not establish either deficient performance or prejudice.

First there is no evidence that Conway would have been available to testify. Presumably she would have been appointed counsel who would have advised her not to incriminate herself by testifying to the possession or delivery of methamphetamine.

Moreover counsel could reasonably have concluded that the testimony would be implausible and hurt her credibility with the jury. First, she claimed

that she, not Abramson went to the rear of the car and dropped the methamphetamine there. CP 346. This was directly contradicted by several eyewitnesses. Secondly, she claimed that the napkin contained only trace amounts of the drug. *Id.* This, too was refuted by the evidence in court, through which the jury saw the methamphetamine delivered to the operative and were informed it weighed four grams, which was the equivalent of 12 doses. 3RP 120, 124-25.

For the same reasons, it is highly unlikely that this testimony would have altered the outcome, any more than Cormany's claim did.

**2. *Failure to examine mobile phone records***

The claim that counsel should have examined Abramson's cell phone records is not even supported by hearsay evidence. Moreover, since Abramson herself testified that the operative repeatedly called her during the relevant time frame, 5RP 388-90, it is hard to imagine what these records would have proven. This claim is utterly insufficient to state any basis for relief and should be rejected.

**D. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE THAT ABRAMSON RECENTLY SOLD DRUGS TO THE POLICE OPERATIVE TO REBUT ABRAMSON'S CLAIM THAT THE OPERATIVE WOULD HAVE HAD NO REASON TO THINK SHE WOULD SELL HER DRUGS.**

Abramson next claims that the trial court erred in admitting prior bad acts evidence that she had previously sold methamphetamine to Maykis and that she had resided in her home in 2003. This claim is without merit because the former evidence was relevant to rebut her claims that she had never sold drugs to Maykis, and that she knew nothing about the methamphetamine found in her home. The latter is simply not bad-acts evidence.

A trial court's admission of evidence is reviewed for abuse of discretion. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971). A trial court's judgment is presumed to be correct and should be sustained absent an affirmative showing of error. *Smith v. Shannon*, 100 Wn.2d 26, 35, 666 P.2d 351 (1993).

Abramson's defense was that she knew nothing about the presence of methamphetamine in her house, that the police operative was lying about the

“buy” at the mall, and that she had no idea why the operative would call her seeking drugs. That Abramson had previously and recently sold methamphetamine to the operative at her home was therefore highly relevant to show motive, intent, and absence of mistake, which the trial court found. This was within its discretion.

“[E]vidence of defendant’s prior drug sales was relevant to rebut his denial of an intent to sell a controlled substance.” *State v. Thomas*, 68 Wn. App. 268, 273, 843 P.2d 540 (1992) (citing *State v. Hubbard*, 27 Wn. App. 61, 64, 615 P.2d 1325 (1980)), *review denied*, 123 Wn.2d 1028 (1994). Nor, under the circumstances is such evidence unduly prejudicial. *Thomas*, 68 Wn. App. at 274. *See also, State v. Weiss*, 73 Wn.2d 372, 438 P.2d 610 (1968) (that defendant had smoked marijuana in the past was relevant in his possession trial where the defendant denied knowing that it was in his home).

Moreover, the evidence was not used for any improper purpose. In 20 pages of transcript of the State’s closing argument, 5RP 458-72, 485-88, the prosecutor only mentioned this evidence twice. 5RP 462, 469. Both mentions were brief, the first to explain why Maykis would know that Abramson might have drugs to sell, and the second to rebut Abramson’s testimony that there was no reason Maykis would think she had drugs.

As for the officer’s prior contact with her, the testimony neither

mentioned any conduct on Abramson's part nor implied that the contact involved any criminality. Indeed, the prosecutor emphasized, twice, that the contact had nothing to do with the investigation. *See* 3RP 106-07. The evidence was therefore not within the purview of ER 404(b). The evidence was, as the trial court ruled, however, probative of Abramson's dominion and control over the residence. Finally, it should be noted that this testimony was not even mentioned in closing argument.

Abramson also suggests this evidence was improper profile evidence. This assertion is incorrect. "Profile" testimony identifies a group as more likely to commit a crime and is generally "inadmissible owing to its relative lack of probative value compared to the danger of its unfair prejudice." *State v. Avendano-Lopez*, 79 Wn. App. 706, 710-711 & n.5, 904 P.2d 324 (1995) (citing *State v. Petrich*, 101 Wn.2d 566, 576, 683 P.2d 173 (1984) (as offering an example of "true 'profile' evidence")), *review denied*, 129 Wn.2d 1007 (1996). Where testimony does not identify any group as being more likely to commit drug offenses, it is not profile evidence. *Avendano-Lopez*, 79 Wn. App. at 711. Here, the testimony did not suggest that Abramson was a member of a group that was more likely to commit drug offenses. Instead, it merely alluded to her *own* recent activities. The trial court did not abuse its discretion.

Finally, any purported error would be harmless. "Evidentiary errors

under ER 404 are not of constitutional magnitude” and are harmless unless the outcome of the trial would had differed had the error not occurred. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Here the operative testified directly to her purchase of methamphetamine from Abramson. Several police officers corroborated her testimony. The police obtained a warrant the same day and upon searching Abramson’s home found nearly 100 grams of methamphetamine (which would come to about 300 doses), numerous drug scales, baggies, and other drug dealing paraphernalia. That Abramson had previously supplied drugs to Maykis was mentioned once in a three-day trial. There is no reasonable likelihood the outcome of trial would have been different without the brief mention of Abramson’s prior deliveries.

**E. THE RECORD CLEARLY SHOWS THAT THE JURY WAS FULLY INSTRUCTED.**

Abramson’s final claim is that the trial court failed to instruct the jury on the sentencing enhancements, accomplice liability, or “one of the crimes”<sup>4</sup> with which she was charged. While the copy of the written instructions filed with the clerk after trial is clearly incomplete, the record nevertheless clearly shows that the jury was fully instructed. Moreover, to the extent the present record is inadequate, it was Abramson’s duty to attempt to remedy the

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<sup>4</sup> Abramson fails to identify the charge to which she refers. As will be discussed, it actually appears that the instructions given for both Counts III *and* IV are missing from the court file.

inadequacy. Her failure to even attempt to do so waives the claim.

The court's instructions to the jury included in the clerk's papers are clearly incomplete. Abramson was charged and convicted of four crimes plus enhancements, yet the packet contains only the introductory instructions and complete instructions for Counts I & II. *See* CP 210-29.<sup>5</sup>

Nevertheless, the record does not support the notion that the jury was not completely instructed. The State filed a full set of proposed instructions and two supplemental instructions that corrected typos in its original submission. CP 79-121, 134, 175-77. Abramson also filed proposed instructions pertaining to the defense theories. CP 172-74. Before the jury was instructed, the court and the parties spent a significant amount of time going over each proposed instruction and the verdict forms. 5RP 436-56. Included in the instructions the court agreed to give were all the instructions that Abramson alleges the jury did not receive: complete instructions for Counts III and IV, 5RP 439-44, 452, 456, the definition of "accomplice," 5RP 445-47, and complete definitional instructions for the sentencing enhancements. 5RP 447-53, 456. After recesses to prepare some alterations ordered or agreed to, the parties then assembled the packet in an agreed order. 5RP 456-57. The trial court then recessed to make copies of the final packet

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<sup>5</sup> The clerk's papers accurately reflect the document as it appears in the superior court file.

to give to the jurors (minus the verdict forms). 5RP 458. The copies were distributed to the jury and the court read the instructions to the jurors. 5RP 458. Neither the State nor Abramson objected to the court's reading of the instructions.

It is simply not credible that after having spent a considerable period of time discussing the instructions, arguing objections to them and finally assembling them in an agreeable fashion, that *neither* party would mention it if the court only half the instructions to the jurors. Moreover, the final instruction in the agreed order was that for the sentencing enhancement. 5RP 456. The prosecutor specifically referred to this instruction in his closing argument. 5RP 467.

Plainly, the jury was fully instructed, but for reasons not known, the copy of the instructions placed in the court file after trial was incomplete. Abramson cites no authority that requires reversal under these circumstances. The precedent is to the contrary.

A criminal defendant is "constitutionally entitled to a 'record of sufficient completeness' to permit effective appellate review of his or her claims." *State v. Tilton*, 149 Wn.2d 775, 781, 72 P.3d 735 (2003). That does not necessarily mean a verbatim transcript. *Tilton*, 149 Wn.2d at 781. Alternative methods allowing effective review are permissible. As discussed

above, the record here is sufficient to determine that the jury was instructed, and indeed to determine *how* they were instructed.<sup>6</sup>

Moreover, Abramson bears the burden of preparing the record. Her burden was not satisfied by merely complaining (disingenuously) that the jury was not fully instructed.

When the record is incomplete, the appellate rules allow parties seeking review to prepare a narrative or agreed reports of proceedings and file them with the trial court, which will settle objections and approve amendments. RAP 9.3, 9.4, 9.5. The rules allow, but do not require, that a narrative or agreed report of proceedings be submitted. RAP 9.3, 9.4.

The burden of reconstructing the record would be on the party raising the issue for which that part of the record is needed. RAP 9.3; *see Tilton*, 149 Wn.2d at 782. The usual remedy for a defective record is to supplement it with affidavits and have the judge that heard the case resolve discrepancies. *Tilton*, 149 Wn.2d at 783. Affidavits can be obtained from any third party, such as “attorneys, witnesses, jurors, court attaches, or anyone present during the trial.” *State v. Larson*, 62 Wn.2d 64, 68, 381 P.2d 120 (1963) (Hill, J., concurring). Only if the affidavits are insufficient to satisfactorily recount the

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<sup>6</sup> Abramson does not now suggest any of the trial court’s rulings on the instructions to be given were improper.

events material to the issues on appeal must the appellate court order a new trial. *Tilton*, 149 Wn.2d at 783.

However, a defendant waives the right to a complete record by failing to obtain affidavits from the trial court and counsel concerning the missing portion of the record. *State v. Miller*, 40 Wn. App. 483, 488, 698 P.2d 1123 (1985); *see also State v. Keller*, 65 Wn.2d 907, 400 P.2d 370 (1965) (noting that no attempt was made to remedy the claimed deficiency in the record by narrative statement or otherwise). Abramson has clearly waived this claim. It should be rejected.

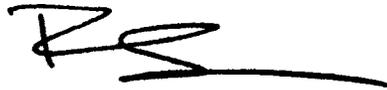
#### IV. CONCLUSION

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

DATED December 5, 2007.

Respectfully submitted,

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