

NO. 35851-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD JACKSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 06-1-00594-3

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED September 24, 2007, Port Orchard, WA
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ORIGINAL

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion in denying the motion to dismiss when the Defendant failed to show material prejudice, and whether the trial court erred in instructing the jury on the school zone enhancement when the enhancement was not stricken, as claimed by the Defendant?

2. Whether the trial court abused its discretion in denying the motion to suppress when the Defendant failed to make the required showing that the destroyed materials were materially exculpatory?

3. Whether the trial court abused its discretion in failing to give the Defendant's proposed instruction regarding the destruction of evidence when: (1) the instructions that were given properly informed the jury of the law, were not misleading, and permitted the parties to argue their theories of the case; and, (2) the Defendant cited no authority below or on appeal to support the proposed instruction?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Richard Jackson was charged by amended information filed in Kitsap County Superior Court with Possession of Pseudoephedrine with Intent to Manufacture Methamphetamine with a school zone enhancement, and

Possession of Methamphetamine. CP 34. After a jury trial, the Defendant was found guilty as charged and the trial court imposed a standard range sentence. CP 68, 85. This appeal followed.

B. FACTS

The Defendant was initially charged with Possession of Pseudoephedrine with Intent to Manufacture Methamphetamine after officers found methamphetamine, 26.7 grams of pseudoephedrine, recipes for how to manufacture methamphetamine, and numerous other items associated with the manufacture of methamphetamine in the Defendant's home. CP 1, 4-5.

i. The Amended Information

On the morning of trial, the State filed an amended information that added a school zone enhancement to the existing count and also added a second count (possession of methamphetamine). RP 2, CP 34. The Defendant objected to the filing of the amended information, arguing that there had been a discovery violation because the State had not yet provided the defense with the measurement of how far the residence was from the school bus stop. RP 2-3. The State acknowledged that the actual measurement had not been performed yet and anticipated that report would be completed the next day. RP 4. The State, however, explained that the defense had been aware of the school zone enhancement for several months and noted that the school zone enhancement was noted in Detective

VanGesen's initial report. RP 4. This report was attached to the original information, filed in April, and stated,

There are two children under 10 YOA, which occupy the neighboring bedroom inside the residence, possible enhancement. Also the school bus stop for the same children is located three trailers away at the entrance to the park (much less than 1000 feet away from the residence, protected zone).

CP 5. The trial court then asked defense counsel what his request was regarding the "wrong that you believe has been done to your client?" RP 4-5.

Defense counsel responded by asking the court to strike the school zone enhancement from the information. RP 6.

The trial court stated that,

We don't have a situation where the defense is faced with the issue of a school zone enhancement at the last minute without any forecasting or warning. It was clearly mentioned in the initial report, at the least the one that was filed with the information, which reads: "also the school bus stop for the same children, the ones that were living in the residence, is located three trailers away at the entrance to the park (much less than 1,000 feet away from the residence, protected zone.)"

RP 6-7. The court noted, however, that the State had not provided yet provided the exact measurement, but was expecting a report the next day. RP

7. The court, therefore, decided to proceed as follows:

What we'll do is when I read the instructions – the preliminary instructions to the jury and read the information, the charges to them, I will not read the special allegation

regarding the school bus zone; that will allow the prosecution to bring in their information tomorrow.

If this is something that the State wants to pursue then we'll make sure that the report is – that it is less than a thousand feet; and then, presumably, we'll do a special verdict form as with any special allegation. But until then, it is not going to be mentioned to the jury to preserve the defense's right to challenge whatever report comes up.

Mr. Weaver, from your perspective, if the report comes in that it is less than a thousand feet, I will grant you a continuance; I'll appoint an investigator at public expense to go out and measure that for you. I expect that process should take just a few hours, if that, and allow you to challenge it.

RP 7-8. Then court then proceeded with arraignment on the information, and the following exchange took place:

The Court: All right. Having said that, and preserving the defense's rights for appeal, Mr. Weaver, you have no objection to the other amendment to the First Amended - -

Mr. Weaver: No, we'll waive reading and enter a plea of not guilty as well as everything else.

RP 9.

The following morning, the State informed the court that the distance from the residence to the school zone had been measured and was within 1000 feet, and that a written report had been provided to the defense. RP 29-30. The State also indicated that it would present testimony from a representative from the Central Kitsap School District named Sheryl Dahlke. RP 30. The Defendant again asked the court to deny the State the

opportunity to submit the school bus enhancement to the jury, citing some uncertainty regarding where the actual school bus stop was. RP 39.

The trial court acknowledged that the State had provided some late discovery, but stated that the “significant remedy proposed by Mr. Weaver” was not appropriate. RP 41. Rather, the court stated that it would grant a request for a continuance if one was requested, would appoint an investigator, and would allow the defense to interview Ms. Dahlke. RP 41. The court also noted that it continued to believe that these things could be accomplished in less than half a day and that, as the trial was likely going to go into the next week, there was time to accomplish these things. RP 41. Defense counsel then noted that he was not interested in prolonging the trial and that there was “enough stuff we can do in this trial to keep it moving” and that he could interview Ms Dahlke at 4:30 that day and then visit the scene with his investigator. RP 42. Defense counsel further state that if he could conduct the interview at 4:30 and then visit the scene he would be ready to go at 9:00 the next morning. RP 42. The court then proceeded with a 3.5 hearing, opening statements, and testimony. RP 46-150. The trial court also signed an order authorizing a defense investigator as proposed by the defendant. RP 77.

The following morning defense counsel informed the court that it had interviewed Ms. Dahlke and had had an opportunity to go out with his

investigator and view the scene. RP 159. Nevertheless, the defense renewed its request that the court not submit the enhancement to the jury because of the discovery violation. RP 159-60. The court, however, held that the State would be allowed to go forward with the school zone enhancement. RP 160.

The State then inquired whether the court was going to read the school zone enhancement language to the jury (referring to the fact that the court had not read the school zone enhancement language to the jury when it informed the jury of the charges in the case). RP 160. The trial court responded,

I don't think it will – if you want, I can read it at this point. But I don't think that they would be confused by simply eliciting the testimony, making it part of the jury instructions, and one of the tasks that they have at the end.

RP 160. After the State agreed, the court then went on,

My concern is that if I read it, it would give it some magic that the other charges don't have.

RP 161. The defense raised no objection to this procedure, and did not object to the special verdict form that was submitted to the jury on the school zone enhancement. RP 247.

ii. Motion to Suppress

The Defendant also brought a motion to suppress any testimony concerning a number of items that the police had destroyed prior to trial. RP 44-45. The Defendant outlined that the police had found a milk crate containing a number of items, and although the contents were photographed, some of the items were eventually destroyed. RP 67-71. The defense argued that RCW 69.55.11 required the police to obtain a destruct order along with the search warrant. RP 69. The only argument raised by defense counsel regarding potential prejudice was the argument that there were “several items in that milk crate that could have very potentially had fingerprints either of my client or of someone else.” RP 68.

The State argued that the RCW did not apply because the statute only applies to meth lab facilities. RP 72. In addition, the state argued that suppression was not warranted because the Defendant had failed to show that the evidence was material or exculpatory or that the police acted in bad faith. RP 73.

The trial court denied the defense motion to suppress, noting that the defense had not shown any prejudice. RP 75. The court did state, however, that the defense was free to cross-examine the officers about the fact that the materials were destroyed. RP 75.

iii. Trial Testimony

The testimony at trial was that on April 17, 2006, Deputies Chad Birkenfeld and John VanGesen of the Kitsap County Sheriff's Office, as well as some additional officers, contacted the Defendant at his residence. RP 98-100. The Defendant lived at the Mountain View Mobile Home Park, located at 2958 Mountain View Road. RP 100.

Detective VanGesen knocked on the front door of the Defendant's home and eventually spoke with the Defendant. RP 118. The Defendant admitted that he had a marijuana pipe in the house and retrieved the pipe from inside the house and gave it to the officers. RP 118-19. The Defendant was arrested and the officers applied for and received a search warrant for the residence. RP 119. The officers asked the Defendant if anything else was in the house, and the Defendant stated that there were bags with methamphetamine residue and a digital scale in the house, and also confirmed that the pipe was his and that it contained marijuana. RP 120. The house was then searched. RP 120.

In the master bedroom, the officers found a small black case containing a number of plastic baggies. RP 102-03. Later analysis at the Washington State Patrol Crime Laboratory found that at least one of these

baggies contained methamphetamine RP 78, 80-82.

The officers also found papers containing several recipes for how to manufacture methamphetamine in the master bedroom. RP 133. One of the recipes called for 96 pseudoephedrine pills and a second recipe called for 200 pseudoephedrine pills. RP 231-32. One of the recipes was labeled, "How to Make Methamphetamine," another was labeled "Crystal Meth Ingredients," and a third was labeled "Methamphetamine, the Easy Way." RP 139-40, 144-45, 210. A digital scale was also found in the master bedroom. RP 134.

A gray plastic milk crate was also found in the master bedroom and the crate contained items relating to the manufacture of methamphetamine. RP 121. In particular, the crate contained vinyl tubing, a plastic funnel, vinyl or latex gloves, dust masks, bottles of sodium hydroxide, a couple containers of ether, lithium batteries and a plastic container containing two types of pills. RP 122, 128. The pills or tablets weighed 26.7 grams. RP 123. A forensic chemist Washington State Patrol Crime Laboratory examined the contents of the plastic container and found that it contained two different types of tablets, both of which contained pseudoephedrine. RP 83-85. There were 95 tablets of each type for a total of 190 tablets. RP 86.

Deputy VanGesen explained to the jury how methamphetamine is typically manufactured. RP 109. He explained that there are several methods of manufacturing methamphetamine, and that pseudoephedrine is main

ingredient used in the most common ways of manufacturing methamphetamine. RP 109-10. He also explained that the "Birch method" (using anhydrous ammonia and lithium metal) is the most common method used to manufacture methamphetamine. RP 109. To make the methamphetamine, cold medications containing pseudoephedrine are ground up or crushed and then dissolved in a solvent. RP 110. The mixture is then filtered through a coffee filter or funnel in order to separate the pseudoephedrine (which is dissolved in the solvent) and the binders and starches that are also present in the pills (and which do not dissolve into the solvent). RP 110-11. The solvent is then evaporated off, leaving a pure pseudoephedrine powder. RP 111.

The next step involves a chemical reaction, and in the Birch method, anhydrous ammonia and lithium strips from inside lithium batteries are added to the powder, creating methamphetamine. RP 112, 114. A water-insoluble solvent is then added. RP 114. Ether is a water insoluble solvent. RP 131.

In the next step, hydrogen chloride gas is needed. RP 114-15. This gas is often created by mixing an acid with rock salt in a container, and then tubing of some type is used to vent the gas through the methamphetamine solution. RP 114-15. Once the gas is added, methamphetamine powders or crystals begin to "fall out" of the solution. RP 115. The methamphetamine can then be collected and "washed" again, if desired. RP 115. Depending on

the skill level of the maker or "cook," the amount of pseudoephedrine at the start of the process can be converted "nearly one-to-one" to finished methamphetamine. RP 117.

Detective VanGesen explained that a number of the necessary ingredients for manufacturing methamphetamine were present in the milk crate found at the Defendant's residence, including pseudoephedrine, lithium, and a water insoluble solvent. RP 131-32. Some of the equipment that is needed was also found, including a funnel, glassware and plastic tubing. RP 131-32. Several necessary items, however, were not present, including another solvent (such as water), acid, rock salt, and anhydrous ammonia. RP 131-32.

Although anhydrous ammonia was not found, Detective VanGesen explained that the Red Devil Lye that was found contained sodium hydroxide, and that this could be mixed with a lawn fertilizer (ammonium sulfate) and water to produce anhydrous ammonia. RP 131. In addition, one of the recipes found in the house outlined how to create anhydrous ammonia using sodium hydroxide and ammonia sulfate. RP 133. Based on the items that were found, Detective VanGesen testified that it was his opinion that the items located in the milk crate were intended to be used in the manufacture of methamphetamine using the anhydrous ammonia-lithium metal (the Birch method) of producing methamphetamine. RP 136.

On cross examination Deputy VanGesen agreed with defense counsel that the contents of the milk crate “did not constitute an actual meth lab,” as there were components missing, and agreed that it was more accurate to say that it was a potential meth lab or the beginnings of a meth lab. RP 185.

The milk crate and its contents were photographed, but a number of the items were turned over to the Department of Ecology for destruction prior to trial. RP 128, 130. Deputy VanGesen testified that this was standard practice since the Sheriff’s property room did not store these types of materials. RP 130.

Sheryl Dahlke from the Central Kitsap School District testified that on April 17, 2006, there was a school bus stop at 2958 Mountain View Road, directly in front of the mobile home park. RP 177-79. Ms. Dahlke explained that the bus stop was located at the entrance to the mobile home park and that there was actually a bus stop on both sides of the street. RP 183.

Deputy VanGesen measured the distance from the crime scene to the school bus stop, and found that it was 395 feet. RP 228-30. Deputy VanGesen also explained that he had obtained the location of the school bus stop from the Central Kitsap School District. RP 229. He also explained that he had personally observed a school bus stop at the entrance to the mobile home park on the date of the incident. RP 237, 239.

iv. Jury Instructions

The Defendant submitted a proposed jury instruction that stated,

If you find that the State has allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest.

CP 44. The trial court declined to give the instruction, noting that could not find any case in Washington in which the instruction had been used. RP 256.

The court also noted that there had been no showing that the destruction was prejudicial beyond the defense's speculation that other fingerprints might have been found on some of the items. RP 256. In addition, the court stated that any harm that came from the destruction was remedied by the fact that defense counsel was allowed to cross-examine the detective concerning the destruction of the items and by the fact that defense counsel could argue to the jury that "something smells bad because of the destruction of the evidence." RP 256-57. Defense counsel made such an argument in his closing argument. RP 277-78.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION TO DISMISS BECAUSE THE DEFENDANT FAILED TO SHOW MATERIAL PREJUDICE, AND THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE SCHOOL ZONE ENHANCEMENT BECAUSE THE ENHANCEMENT WAS NOT STRICKEN, AS CLAIMED BY THE DEFENDANT.

Jackson argues that the trial court erred in not dismissing the school zone enhancement pursuant to CrR 8.3(b) and erred in instructing the jury on the school zone enhancement after he alleges it was struck from the information. App.'s Br. at 5-6. These claims are without merit because dismissal is an extraordinary remedy and is only available if the Defendant's rights have been materially prejudiced, and because the enhancement was not stricken, as claimed by the Defendant.

1. *The trial court did not abuse its discretion in denying the motion to dismiss*

To support dismissal under CrR 8.3(b), the defendant must show by a preponderance of the evidence both (1) arbitrary action or governmental misconduct, and (2) actual prejudice affecting the defendant's right to a fair trial. *State v. Rohrich*, 149 Wn.2d 647, 654, 658, 71 P.3d 638 (2003); *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003). Dismissal under CrR 8.3(b), however, is an extraordinary remedy that is improper except in truly

egregious cases of mismanagement or misconduct that materially prejudice the rights of the accused. *State v. Moen*, 150 Wn.2d 221, 226, 76 P.3d 721 (2003); *Wilson*, 149 Wn.2d at 9; *State v. Korum*, 157 Wn.2d 614, 638, 141 P.3d 13 (2006),

A trial court's decision on a CrR 8.3(b) motion to dismiss is reviewed for manifest abuse of discretion. *Moen*, 150 Wn.2d at 226. Discretion is abused if the trial court's decision is manifestly unreasonable or is based on untenable grounds. *Rohrich*, 149 Wn.2d at 654. A reviewing court will find a decision manifestly unreasonable “if the court, despite applying the correct legal standard to the supported facts, adopts a view ‘that no reasonable person would take.’” *Rohrich*, 149 Wn.2d at 654, quoting *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990). A decision is based on untenable grounds “if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *Rohrich*, 149 Wn.2d at 654.

The Defendant argues that although the he had been aware of the school zone enhancement for a considerable time, “no discovery concerning the holdback charge had been provided or even gathered by the State” and that “the location of the school bus stop had not been identified.” App.’s Br. at 5-6. These allegations are incorrect. While the State had not provided an exact measurement of the school zone enhancement, the reports attached to the original information stated that a school bus stop was located “three

trailers away at the entrance to the park.” CP 5. The trial court itself noted that this information was “clearly mentioned in the initial report” that was filed with the original information. RP 6-7. There was no question, then, that the Defendant did have some discovery on the school zone enhancement including the location of the stop and an estimate of its distance from the defendant’s residence. Nevertheless, there was a late disclosure of the exact measurement and of the name of the school district employee who would testify about the location of the school bus stop.

The trial court, however, did not abuse its discretion in denying the motion to dismiss. As outlined above, dismissal is an extraordinary remedy and is only available if the Defendant’s rights have been materially prejudiced. In the present case, the Defendant failed to show material prejudice because, as the trial court found, any issues regarding the enhancement could be resolved in a very short time. RP 7-8. In addition, the trial court stated that it would appoint an investigator and noted that the Defendant could interview the witness and view the scene with little to no delay in the actual trial. RP 7-8, 41. In fact, these tasks were accomplished and resulted in no delay. RP 159. In addition, the court indicated that it would grant a continuance if one was requested by the Defendant, but the Defendant indicated that that was not necessary. RP 41-42.

Given all of these facts, the Defendant has failed to show that the trial court abused its discretion or that the trial court's ruling was manifestly unreasonable, since the record does not show that the Defendant was materially prejudiced.

2. *The trial court did not err in submitting the school zone enhancement to the jury because the enhancement was not stricken from the amended information.*

The Defendant argues that the trial court "struck" the school zone enhancement from the information, the amended information was not accepted, and that there was no arraignment or amendment on the school zone enhancement. App.'s Br. at 6-7. These arguments are without merit, as the record does not indicate that the trial court "struck" the enhancement; rather, the record shows that the trial court only decided not to read that portion of the amended information to the jury because the discovery issue had not yet been resolved. In addition, the record demonstrates that the trial court actually did arraign the Defendant on the enhancement and did not strike the enhancement.

First, when the trial court initially dealt with the Defendant's objection to the amended information, the trial court never stated that it was "striking" the enhancement. Rather, the trial court stated,

What we'll do is when I read the instructions – the preliminary instructions to the jury and read the information,

the charges to them, I will not read the special allegation regarding the school bus zone; that will allow the prosecution to bring in their information tomorrow.

RP 7-8. The trial court's statement shows that it considered the enhancement to still be part of the amended information since if the court had stricken the enhancement there would be no question that it would not be read to the jury. Instead, the trial court decided to hold off on reading the instruction to the jury until the discovery issue was resolved. Furthermore, the trial court then proceeded with arraignment on the information, and the following exchange took place:

The Court: All right. Having said that, and preserving the defense's rights for appeal, Mr. Weaver, you have no objection to the other amendment to the First Amended - -

Mr. Weaver: No, we'll waive reading and enter a plea of not guilty as well as everything else.

RP 9. Again, this portion of the record shows that the trial court did not "strike" the enhancement. If the court had stricken the enhancement, there would be no defense issues to "preserve" for appeal. The only objection ever mentioned was the objection to the school zone enhancement. Thus, by proceeding with the arraignment and "preserving" the Defendant's objection for appeal, the record shows the Defendant was arraigned on the amending information including the school zone enhancement. If the trial court had

“stricken” the school zone enhancement as claimed, the comments of the trial court would make no sense.

Furthermore, the record demonstrates that even the Defendant was under the understanding that the enhancement was still present, since on the following morning, after defense counsel had interviewed the witness and had an opportunity to go out with his investigator and view the scene, the defense renewed its objection to the enhancement and again asked that the court not submit the enhancement to the jury because of the discovery violation. RP 159-60. These actions make no sense if the court had “stricken” the enhancement as claimed by the Defendant on appeal. The court, however, held that the State would be allowed to go forward with the school zone enhancement. RP 160.

In addition, the State then inquired whether the court was going to read the school zone enhancement language to the jury (referring to the fact that the court had not read the school zone enhancement language to the jury when it read the information to the jury). RP 160. The trial court responded,

I don't think it will – if you want, I can read it at this point. But I don't think that they would be confused by simply eliciting the testimony, making it part of the jury instructions, and one of the tasks that they have at the end.

RP 160.

After the State agreed, the court then went on,

My concern is that if I read it, it would give it some magic that the other charges don't have.

RP 161. Again, the record demonstrates that the court did not "strike" the enhancement, but rather considered it to still be a part of the amended information. Finally, the Defendant raised no objection to the trial court's proposed procedure, did not object to the special verdict form that was submitted to the jury on the school zone enhancement, and never argued that the Defendant had not been arraigned on the enhancement. RP 247.

The record, therefore, demonstrates that the trial court and the parties were operating under the understanding that the enhancement was part of the amended information, but that it was not initially read to the jury since the trial court wanted to first conclude the discovery issue. Furthermore, the enhancement language was not read to the jury the next day only because the trial court did not want to put undue emphasis on the enhancement, and the Defendant, understandably, did not object to this procedure. In addition, the fact that the defendant renewed his objection to the enhancement and did not object when the enhancement instructions were presented to the jury demonstrates that even the Defendant understood that the enhancement was still a part of the amended information.

For all of these reasons, the Defendant's contention that the enhancement was "stricken" is without merit. It is also worth noting that the constitutional right violated by an inadequate information is the right of an accused to be informed of the nature and cause of the accusation against him, guaranteed by the Sixth Amendment to the United States Constitution, and the state constitution, Art. I, § 22. *See State v. Bergeron*, 105 Wn.2d 1, 18, 711 P.2d 1000 (1985); *State v. Newson*, 8 Wn. App. 534, 536, 507 P.2d 893 (1973). The record below clearly demonstrates that the Defendant was aware of the school zone enhancement and proceeded accordingly and that his rights, therefore, were not violated.

The Defendant also argues that the enhancement was stricken because on the written document there is an "x" over the enhancement language, and the Defendant argues that the trial court is the one who crossed through the enhancement. App.'s Br. at 6. The record, however, does not indicate who crossed through the language on the written document, nor does the record reveal when this was done. The Defendant assumes that the trial court must have done this with the intention to "strike" the enhancement, but an equally reasonable conclusion is that the trial court crossed out the enhancement language so that she would remember to not read it to the jury, perhaps accidentally marking on the original information rather than on her bench copy. In any event, the record is simply unclear on this matter, and the

remainder of the record, as outlined above, demonstrates that the parties were all operating under the understanding that the enhancement was still a part of the amended information.

3. *A stricter standard applies to the Defendant's arguments regarding the enhancement being stricken since these arguments were raised for the first time on appeal.*

As mentioned above, the Defendant did not object when the enhancement instructions were presented to the jury and never objected to the submission of the enhancement on the basis that he was not arraigned on the enhancement or that the enhancement had been "stricken." When the sufficiency of an information is raised for the first time on appeal, the reviewing court should test the information's sufficiency by a stricter standard than if the question had been raised first below. Under these circumstances, the courts have held that the information is immune from attack unless it is so obviously defective as not to charge the offense by any reasonable construction. *State v. Smith*, 49 Wn. App. 596, 598, 744 P.2d 1096 (1987), *review denied*, 110 Wn.2d 1007 (1988). That is not the case here. Rather, a reasonable construction of the amended information is that it included the enhancement. The Defendant's arguments to the contrary, therefore, must fail.

4. ***Even if the this court were to find that the trial court did not arraign the Defendant on the school zone enhancement, the Defendant has still failed to show a due process violation warranting a new trial because he had sufficient notice and adequate opportunity to defend.***

Finally, even if this court were to find that the trial court struck the enhancement and erred in not re-arraigning the Defendant on the enhancement, that Defendant has still failed to show a due process violation that would warrant a new trial. Failure to re-arraign a defendant on amended charges amounts to a due process violation only if it results in a failure to give her sufficient notice and adequate opportunity to defend. *State v. Royster*, 43 Wn. App. 613, 619, 719 P.2d 149 (1986). Amendment may be permitted without re-arraignment if the substantial rights of the defendant are not prejudiced. *State v. Allyn*, 40 Wn. App. 27, 35, 696 P.2d 45 (1985) (citing *State v. Hurd*, 5 Wn.2d 308, 312, 105 P.2d 59 (1940)). A defendant bears the burden of showing prejudice. *Royster*, 43 Wn. App. at 619-20. As noted, the Defendant has not shown any prejudice.

In *State v. Anderson*, 12 Wn. App. 171, 173, 528 P.2d 1003 (1974) the court found no prejudice from non-arraignment and found the defendant had waived his right to be arraigned because the defendant had actual notice of the burglary charges, had a full trial on the merits as if a plea of not guilty had been entered, and proceeded to trial without objection. The court found that by this conduct defendant effectively waived his right to a formal

arraignment. *Anderson*, 12 Wn. App. at 173, citing *Williams v. State*, 227 Ark. 228, 297 S.W.2d 771 (1957); *State v. Borchert*, 312 Mo. 447, 279 S.W. 72 (1926).

Furthermore, the *Courneya* decision cited by the Defendant is distinguishable. App.'s Br. at 7, citing *State v. Courneya*, 132 Wn. App. 347, 354, 131 P.3d 343 (2006). In that case, the information itself was faulty because it failed to list the required element of knowledge. *Courneya*, 132 Wn. App. at 352. The court of appeals, therefore, held that it was bound to apply the essential elements rule, and noted that "[t]he primary goal of the essential elements rule is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against. *Courneya*, 132 Wn. App. at 352-53. Ultimately, the court held that reversal was required because the State's information failed to include a required nonstatutory element of the charged offense and the defendant, therefore, was never informed of the elements of the crime. *Courneya*, 132 Wn. App. at 352-53.

In the present case, the amended information gave the Defendant notice of the elements required for the school zone enhancement. In addition, the Defendant had been on notice for a long period of time that a school zone enhancement would be filed. Even if this court were to hold that the fact that the enhancement was stricken and the trial court erred by not re-arraigning the Defendant, there is still no dispute that the defendant had notice of all of

the required elements. No prejudice occurred, and the fact that the Defendant did not object to the jury instruction in the enhancement only further supports this finding.

For all of the above mentioned reasons, the Defendant's arguments regarding the school zone enhancement must fail.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION TO SUPPRESS BECAUSE THE DEFENDANT FAILED TO MAKE THE REQUIRED SHOWING THAT THE DESTROYED MATERIALS WERE MATERIALLY EXCULPATORY.

The Defendant next claims that the trial court erred in failing to grant the motion to suppress evidence that had been destroyed prior to trial. App.'s Br. at 7. This claim is without merit because the Defendant failed to make the required showing that the destroyed materials were materially exculpatory.

A trial court is given wide latitude in granting or denying a motion to dismiss a criminal prosecution for discovery violations. *See State v. Hanna*, 123 Wn.2d 704, 715, 871 P.2d 135 (1994). "To comport with due process, the prosecution has a duty to disclose material exculpatory evidence to the defense and a related duty to preserve such evidence for use by the defense." *State v. Wittenbarger*, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). A

reviewing court will not disturb a trial court's denial of a motion to dismiss criminal charges for a discovery violation unless it finds that the denial constitutes a manifest abuse of discretion. *State v. Farnsworth*, 133 Wn. App. 1, 13, 130 P.3d 389 (2006). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

1. The trial court properly denied the motion to suppress because the Defendant failed to show that the items were materially exculpatory.

With respect to a due process claim based upon the State's destruction of evidence, the Washington Supreme court had adopted the test developed by the United States Supreme Court to determine whether the government's failure to preserve evidence significant to the defense violates a defendant's due process rights. *See State v. Wittenbarger*, 124 Wn.2d 467, 474, 880 P.2d 517 (1994), *citing California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1983) and *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). While a dismissal is required if the State has failed to preserve "materially exculpatory evidence," the Court has recognized that the right to due process is limited and the Court, therefore, has been unwilling to "impose on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Wittenbarger*, 124

Wn.2d at 475, *quoting Youngblood*, 488 U.S. at 58. Furthermore,

A showing that the evidence might have exonerated the defendant is not enough. In order to be considered “material exculpatory evidence,” the evidence must both possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

Wittenbarger, 124 Wn.2d at 475, *citing Trombetta*, 467 U.S. at 489, 104 S. Ct. at 2534. Under the Fourteenth Amendment, failure to preserve “potentially useful” evidence does not constitute a denial of due process unless a criminal defendant can show bad faith on the part of the State. *Wittenbarger*, 124 Wn.2d at 477, *citing Youngblood*, 488 U.S. at 58, 109 S. Ct. at 337. The Washington Supreme Court has held that there are no separate and independent state grounds that support a broader interpretation of the state due process clause in the context of preservation of evidence, and thus the federal standard is the proper standard. *Wittenbarger*, 124 Wn.2d at 481.

In the present case, the Defendant failed to show that the destroyed materials were “materially exculpatory” under the federal test because he failed to show that the items possessed an exculpatory value that was apparent before it was destroyed. Rather, the Defendant’s arguments only speculated that someone else’s fingerprints might have been on the items.

RP 68. Furthermore, even if someone else's fingerprints had been on the items, this evidence would still not have disproved the Defendant's guilt since the State was not required that Defendant exclusively possessed the items or that he had been the only person to have ever handled the items.

In short, as the Defendant failed to show that the items were "materially exculpatory," the trial court properly denied his motion to suppress.

The Defendant argues that because the milk crate contained some items that were not relevant to the manufacture of the methamphetamine, the exculpatory value was apparent. App.'s Br. at 10. This argument appears to be referencing the two bottles of energy drink or iced tea and the "Moen" box found in the milk crate. App.'s Br. at 3. The Defendant, however, fails to explain what is exculpatory about the fact that items related to the manufacture of methamphetamine were stored in the same place as items unrelated to methamphetamine. Later, the Defendant again asserts that the "fact that some items clearly had nothing to with intent to manufacture methamphetamine has some evidentiary value," but again, the Defendant fails to explain what possible evidentiary value this has. App.'s Br. at 10.

2. ***RCW 69.50.511 does not apply because the plain language of the statute only applies to drug manufacturing facilities and there was no evidence below that the Defendant's residence was ever used as a drug manufacturing facility.***

The defendant also argues that RCW 69.50.511 prohibited the State from destroying the evidence without an order from the Superior Court. App.'s Br. at 9. RCW 69.50.511 provides,

Law enforcement agencies who during the official investigation or enforcement of any illegal drug manufacturing facility come in contact with or are aware of any substances suspected of being hazardous as defined in RCW 70.105D.020, shall notify the department of ecology for the purpose of securing a contractor to identify, clean-up, store, and dispose of suspected hazardous substances, except for those random and representative samples obtained for evidentiary purposes. Whenever possible, a destruct order covering hazardous substances which may be described in general terms shall be obtained concurrently with a search warrant. Materials that have been photographed, fingerprinted, and subsampled by police shall be destroyed as soon as practical. The department of ecology shall make every effort to recover costs from the parties responsible for the suspected hazardous substance. All recoveries shall be deposited in the account or fund from which contractor payments are made.

The statute by its plain language applies to situation where law enforcement is investigating an "illegal drug manufacturing facility." There was no evidence below that the Defendant's residence itself was ever used, or was intended to be used, as a location to manufacture methamphetamine. Rather, the evidence showed that the defendant possessed pseudoephedrine and

several other items with the intention to manufacture methamphetamine. Where the Defendant intended to produce the methamphetamine is unclear, but the mere fact that items were stored together in a crate for easy transport suggests that the actual manufacture may well have been intended to take place at another location. In addition, Detective VanGesen, on cross-examination, agreed with defense counsel that the contents of the milk crate “did not constitute an actual meth lab,” as there were components missing. The record, therefore, does not establish that the Defendant’s residence was an actual “illegal drug manufacturing facility,” and RCW 69.50.511, therefore, does not apply.

In addition, RCW 69.50.511 only states that a destruct order shall be obtained concurrently, whenever possible, with a search warrant. In the present case, however, the officers had no idea at the time that they obtained the search warrant that they would find the milk crate and its contents. RP 218. Rather, as the defense pointed out on cross-examination, the officers were expecting to find a methamphetamine pipe and some baggies with methamphetamine residue. RP 217. The officers, therefore, had no reason to obtain a destruct order concurrently with the search warrant, since there was no advance indication that they would find items associated with the manufacture of methamphetamine. The officers, therefore, did not violate the terms of the statute.

Furthermore, even if the officers were considered to have violated the statute, RCW 69.50.511 does not provide that failure to comply with the statute requires suppression of evidence, nor has any Washington case has every reach such a holding. In short, the Defendant has cited no authority that holds that anything other than the usual test regarding destruction of evidence should apply.

Although the trial court did question why the officers had not obtained a destruct order, the trial court stated that this wasn't the real issue, and the court, therefore, never fully examined this issue. RP 74. Instead, the court turned to the issue of the "potential importance of the missing evidence" and the fact that the defense had not established any prejudice. RP 74-5. The trial court's analysis, therefore, mirrored the appropriate analysis in cases of destroyed evidence established by *Wittenbarger* and *Youngblood* as outlined above. For all of the reasons outlined above, the Defendant has failed to show that the trial court erred in focusing on this analysis rather than on RCW 69.50.511.

The Defendant also argues that "bad faith can be shown by the lack of compliance with established procedures." App.'s Br. at 9, *citing Wittenbarger*, 124 Wn.2d at 477. The trial court, however, did not make a finding of bad faith, and Detective VanGesen testified that the items were destroyed according to standard practice since the Sheriff's property room did

not store these types of materials. RP 130. It should be noted that VanGesen's testimony about the standard practice did not come in until after the trial court made its ruling, although the State did offer to put him on the stand before the court ruled. See, RP 74. The court, however, declined to hear the testimony, noting that it was more for the judge's "curiosity" rather than an issue that was actually relevant to the analysis. RP 74. In any event, the record as a whole does not establish a showing of bad faith, and the Defendant's argument the contrary must fail.

In short, the Defendant has failed to show that the trial court's denial of the motion to suppress constituted a manifest abuse of discretion. *Farnsworth*, 133 Wn. App. at 13.

3. ***Harmless Error***

Even if this court were to find that the trial court erred in failing to suppress testimony concerning the destroyed items, any error in this regard was harmless. Even under the "overwhelming untainted evidence test" used in cases of constitutional violations, any error in the present case was harmless. *State v. Hieb*, 107 Wn.2d 97, 109-10, 727 P.2d 239 (1986). Under this test, a finding of harmless error is required if the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt. *Hieb*, 107 Wn.2d at 109-10, *citing State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

In the present case the State preserved a number of items that established the Defendant's guilt beyond a reasonable doubt. First, the State admitted the pseudoephedrine tablets themselves, and the evidence established that there were two different types of tablets found and that there were 95 tablets of each type for a total of 190 tablets. RP 86. In addition, in the master bedroom the officers also found several recipes for how to manufacture methamphetamine labeled "How to Make Methamphetamine," "Crystal Meth Ingredients," and "Methamphetamine, the Easy Way." RP 133, 139-40, 144-45, 210. One of the recipes called for 96 pseudoephedrine pills and a second recipe called for 200 pseudoephedrine pills; numbers that coincided with the amount of pills called for in two of the recipes. RP 231-32. In addition, the Defendant told the officers that they would find a methamphetamine pipe and some baggies with methamphetamine residue in the residence. RP 217. The present of the pseudoephedrine, recipes indicating how to convert it into methamphetamine, in addition to the defendant's admission that there was methamphetamine residue and a pipe for using methamphetamine in the house was overwhelming evidence on its own that the Defendant possessed pseudoephedrine with the intent to manufacture methamphetamine. The admission of the other items, while further evidence of the Defendant's intent, was harmless, given the overwhelming evidence that the pseudoephedrine was possessed with the

intent to manufacture methamphetamine.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO GIVE THE DEFENDANT'S PROPOSED INSTRUCTION REGARDING THE DESTRUCTION OF EVIDENCE BECAUSE: (1) THE INSTRUCTIONS THAT WERE GIVEN PROPERLY INFORMED THE JURY OF THE LAW, WERE NOT MISLEADING, AND PERMITTED THE PARTIES TO ARGUE THEIR THEORIES OF THE CASE; AND, (2) THE DEFENDANT CITED NO AUTHORITY BELOW OR ON APPEAL TO SUPPORT THE PROPOSED INSTRUCTION.

The Defendant next claims that the trial court erred in failing to give the Defendant's proposed jury instruction regarding the destruction of evidence. This claim is without merit because the Defendant has provided no authority for its claim that the trial court abused its discretion or was required to give the proposed instruction.

As the Defendant notes, jury instructions satisfy the fair trial requirement when, taken as a whole, they properly inform the jury of the law, are not misleading, and permit the parties to argue their theories of the case. App.'s Br. at 11, *citing State v. Morgan*, 123 Wn. App. 810, 814-15, 99.P.3d 411 (2004). A trial court's refusal to give a requested instruction will not be disturbed on review except for an abuse of discretion. *State v. Pesta*, 87 Wn. App. 515, 524, 942 P.2d 1013 (1997), *citing Herring v. Department of Social*

& Health Servs., 81 Wn. App. 1, 22, 914 P.2d 67 (1996); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. *Carroll*, 79 Wn.2d at 26.

Defendant cites no authority requiring the trial court to give the proposed instruction. Defendant's only citation is to a concurring opinion in *Youngblood*. App.'s Br. at 12. While Justice Stevens concurring opinion mentions a similar jury instruction, he did not indicate that such an instruction was mandatory, and, more importantly, the plurality opinion did not give any indication that such an instruction was required. *Youngblood*, 488 U.S. at 59-61, 109 S.Ct. 338-39. The Defendant, therefore, has cited no controlling authority in support of the proposed instruction. Parties' briefs should contain legal authority and citation to the relevant parts of the record to support the issues presented. RAP 10.3(a)(5). Where a party fails to follow RAP 10.3(a)(5), this court need not consider its unsupported arguments. *Idahosa v. King County*, 113 Wn. App. 930, 938, 55 P.3d 657 (2002) (citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)), *review denied*, 149 Wn.2d 1011 (2003).

In the present case, the trial court allowed the Defendant to cross examine the detective concerning the fact that some of the evidence was destroyed and allowed defense counsel to present arguments on this issue

during closing argument. The instructions that were given, therefore, allowed the Defendant to argue his theory of the case. Absent any authority indicating that the Defendant's proposed instruction was required, the Defendant has failed to show that the trial court abused its discretion.

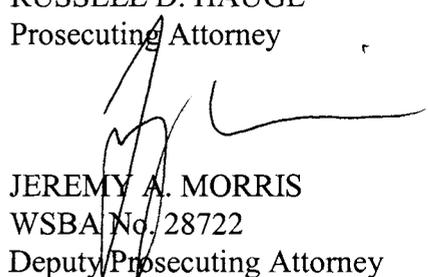
IV. CONCLUSION

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

DATED September 24, 2007.

Respectfully submitted,

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