

NO. 36470-1-II

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

STATE OF WASHINGTON, Respondent

v.

MELISSA R. DANIELSON AND
ALAN G. BREWER, Appellants

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DIVISION II
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FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT L. HARRIS
CLARK COUNTY SUPERIOR COURT CAUSE NO.
06-1-01604-1 AND 06-1-01605-0

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

Because of the nature of the issues raised by the defense, the factual recitation will be set forth in the argument section of the brief. The State does accept, in part, in the information provided by both defendants in their statement of the case.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1 FOR DEFENDANT BREWER AND DEFENDANT DANIELSON JOINTLY

The first assignment of error raised by defendants jointly is a claim that the trial court committed error when it denied the defendant's motions to suppress. The claim is that the search included an out building next to the mobile home that was not covered or authorized by the search warrant.

This matter was brought to suppression hearing on June 7, 2007. The State filed a response to the defense motion to suppress (CP 31). As part of that response and as attachments thereto the State had attached the Affidavit for Search Warrant and the Search Warrant itself. A copy of the Affidavit for Search Warrant and the Search Warrant are attached hereto and by this reference incorporated herein. The Search Warrant (Appendix, CP 31) includes a description of the property which reads as follows:

A white mobile home with green trim and an adjacent shed with a gray tarp covering the roof and front of the shed. The mobile home is located down a gravel drive that runs east to west from 131 Avenue. There is a mailbox on the

south side of the driveway entrance that reads 5910. The home has a specific address of 5910 NE 131 Avenue, Vancouver, Clark County Washington.

Detective Tim Boardman is a deputy sheriff with the Clark County Sheriff's Office and is assigned as a detective with the Clark/Skamania Drug Task Force. He was the officer who prepared the affidavit for the search warrant. At the suppression hearing Detective Boardman testified about what access he had to information concerning the property to be searched.

Question (Deputy Prosecutor) Thank You. In the warrant you asked to search the trailer. You described it in -- some detail -- with color and -- and the structure and whatnot. You don't ask to search outbuildings. Why is that?

Answer (Detective Boardman) Because I -- from my investigation, I determined that the -- the large shop on the east side of the property just due east of the trailer was not under the dominion and control of my suspects, so I didn't want to ask to search anything that -- that my suspects didn't have access to.

-(RP 45 L.1-10)

Question (Deputy Prosecutor) In your affidavit for search warrant you list out this attached carport, but you don't list out the shed. Why is that?

Answer (Detective Boardman) Because the -- shed wasn't visible from any vantage point that -- that I can get from outside without going onto the, say, go beyond the curtilage of the property.

Q. But could you distinguish that the shed --

A. I--

Q. Explain.

A. I went to the – I actually went into the trailer park behind there and to look and see to get a, you know, an accurate description of the property for my warrant, and I didn't know that – to me, it was like all one building which is why I wrote it that way.

-(RP 47 L.19- 48, L.8)

The owner of the real property in question here was Tantun Thorp. Mr. Thorp indicated that this was rental property and that the defendants were tenants of his living at the location that was searched (RP 12).

Mr. Thorp was asked to described the real estate and in particular the trailer in relation to the shed. The land owner was asked to describe the rental agreement that he had with the defendants and he indicated as follows:

Q.(Deputy Prosecuting Attorney) What did the lease include with reference to – (Pause; reviewing document.) Plaintiff's 2. We've already broadly circled with the highlighter the – the subject location, this mobile – mobile home.

I'll ask you to with a pen—and I'm gonna first ask you a question before you do any writing. What did the lease include when it – would they pay you – I assume they paid you month rent every month.

A.(Mr. Thorp) Uh-huh.

Q. What was that rent for?

A. It was for the use of the driveway.

Q. Uh –huh.

A. They had access to park a vehicle in, you know, in the carport. And then they had another parking spot beside the carport.

And it included the front of the mobile home to the back fenced –the –the –the property was fenced at the time that they lived there, there was a fence that went from the back yard and it was – it was completely fenced in. And that was what they were – they were leasing from me.

Q. So the carport, the trailer. Is there any storage facilities that they rented?

A. The storage facility was included with the – with the mobile home, and it was attached to the mobile home. It was –it was attached to the—to the—to the awning out there, attached – it had wiring running into the mob—from – from the mobile home into the –the—the actual unit that was – with the rent.

Q. Let me ask you to –to with that blue pen I gave you circle on the map this storage building, building or – shed. I'll ask you to do the same thing on Plaintiff's 1.

A. (Witness complying.)

Q. So you just – you just said it was attached. You said there was wiring running from – correct me if I'm wrong – wiring running from the trailer or mobile home to the shed.

A. That's correct. It was tied in on the roof. It had—

Q. Tied in on the roof?

A. It had nails attaching it to the –to the mobile home. The –the framing was all framed up to the mobile home. It had concrete bolts which tied it to the ground. It was—it was all part of the mobile home.

Q. Was there any space between this shed and the mobile home?

A. No, it was – it was nailed to the mobile home.

Q. Oh, the walls were – were—

A. Yeah.

Q. -- nailed to –.

Now, you'll – you'll recall your interview with, interview you had at – at the prosecutor's office.

Mr. Veljacic: (Conferring with counsel off the record.)

Brief moment, Your Honor.

(Conferring with counsel off the record.)

BY MR. VELJACIC: (Continuing)

Q. Do you recall the interview we had in my office back on March 6th of 2007 –

A. Yes.

Q. -- a few – a few months ago.

A. Yes.

Q. Do you recall if we – either myself or Investigator Teply asked you whether – at that time whether the – this shed, this storage shed you speak of, whether it was attached or not?

A. I don't recall the exact verbiage, but I remember talking about it, and, you know, it's not an actual room off of the house, but it's attached. It's – it's part of – like a garage, but it – it—it was – it's part of the mobile home. It's—

Q. So is – is it—is there access to that shed from inside the mobile home?

A. No.

Q. Where's the access to this shed?

A. It's under the awning outside the back door. There's an awning that – that – that – that is attached to the mobile home that goes to the – to the shed.

Q. And the –

A. So –

Q. -- the – and is it a door or –

A. There was – there was a – a door, a locking door, that was attached to the – to the—to the outside of the – the – the shed.

Q. So the only way to access that shed is from the outside, versus inside.

A. Correct.

Q. So it's not attached – it's – it's not attached in terms of being access- -- being able to access it from the inside, but it's attached physically?

A. It's attached physically, and the only way you can go into that shed is to go under the awning that is attached to the property, so you would have to walk into the back yard and – into a fenced back yard to be able to get into the

– into the shed. It, you know, was exclusive, you know, it – it was nailed up to that – to that building.

Q. And you say the back yard is entirely fenced in?

A. It – except for a small section that – that, you know, was – that was taken down, you know, so that, you know, you could get some equipment in and out of to clean it up.

Q. How about at the time of June 13, 2006, was that section that – that was taken down, was that still up?

A. No, it was down.

Q. Oh, it was down.

(Pause; reviewing notes.) And you say the framing is tied into the mobile home?

A. Yes.

Q. What do you mean by that?

A. It was attached – that – there was – it was – it was three walls. There was – there was a wall that – that was three walls, and then the mobile home acted as the third wall to the shed.

Q. The fourth wall or the third wall?

A. Or, the – I'm sorry, the fourth wall, yes.

Q. Did you build this?

A. No, it was existing when I bought the property.

-(RP 18, L.12-23, L.10)

Detective Boardman also testified that he examined this shed and determined that it was attached to the mobile home (RP 47 L.2-12). The State also called Detective Rosanna Hopkins who was also present during the execution of the search warrant. Detective Hopkins also described this shed and its relationship to the trailer and indicated that they were attached. (RP 59 L.19-22).

At the end of the suppression hearing after all the testimony and argument by counsel, the court made the following observations concerning this shed and the mobile home:

The Court: Well, my only comment is, you know, there is really nothing characteristically that will identify that this is a separate independent structure that we think of as outbuildings. You have the blending of it through – by the roof lines. You have the blending of it by the electricity. I mean, its – it has no separate, independent entity in itself to set it separate and apart from the trailer.

I mean, that is—you look at it, it is part of the same unit. You may have a little garden thing attached to and not attached to and not necessarily nailed to, but it still part of the house and the structure.

It doesn't create a separate unit in itself in that – in that classic definition of what is within control of a person who is use- who is dealing, supposedly, with the drugs within that particular housing unit.

Where you have the outbuildings, you have no separate identity or tying to that particular structure because it is separate and apart.

And we – and then we are talking separate and apart. You've got a garage, but you've got a barn, you've got outbuildings that are 20, 30 feet away. I mean, these are separate and independent structures that are separate.

This would never have any separate, independent valuation placed on it by an assessor if he's approaching the property. He would look at it as one unit. And that's what it basically was tied to, is a kind of a ram shackling type of things, but that's exactly what you would find in that type of – type of structure.

-(RP 101 L.22- 103 L.5).

This line of reasoning is consistent with the memorandum of opinion that the trial court filed on November 28, 2007. (CP 157). A copy of that Memorandum of Opinion is attached hereto and by this reference incorporated herein.

The Washington case that's closest on point to the issues here is State V. Llamas-Villa, 67 Wn. App. 448, 836 P.2d 239 (1992). In Llamas-Villa, the officers were executing a warrant at an apartment. One of the officers left the apartment through the front door and noticed a door marked "storage" immediately to his right and a couple of feet from the front door of Llamas-Villa's apartment. The officer opened the door and entered a room containing several lockers, some of which had locks on them. One of the lockers was labeled "101" and was padlocked. The detective believed that the locker was a storage locker for apartment 101, which was the apartment that they were searching. He went back in to Llamas-Villa's apartment to get a ring of keys which were found on the defendant and ultimately one of the keys opened the pad lock to the locker which contained contraband.

Llamas-Villa asserted that the detective had exceeded the scope of the search warrant when he searched the locker that was located in the storage room but was not located in the apartment itself. The locker that came with the apartment was not mentioned in the affidavit supporting the

search warrant but the trial court noted that there was no indication that the storage locker would not have been included in the warrant had the police known the layout of the apartment building.

Here, the locker to Llamas apartment was located inside a storage room a few feet away from the entrance to Llamas apartment. Unlike the cabinet, the locker was not in plain view. However, the door labeled “storage” was in plain view. Since it was located only a couple of feet away from Llamas apartment, it is reasonable for police to believe that the storage room either belonged to Llamas apartment or contained a locker belonging to his apartment. Moreover, upon entering the storage room, it was reasonable for police to assume that the locker labeled “101” belonged to Llamas apartment “as in fact it did”. (cite omitted).

Based on the above cases, we conclude that the storage locker labeled “101” was not a place different or separate from Llamas apartment, the search of the storage locker fell within the scope of the warrant to search Llamas apartment.

-(Llamas-Villa, 67 Wn. App. at 453).

In U.S. v. Heldt, 215 U.S. App. DC 206, 668 F.2d 1238 (1981) a search warrant was executed on a suite of offices belonging to Mr. Heldt. The warrant dealt with his offices which were located on the sixth floor of a particular building. When the officers arrived they discovered that there was also a free standing penthouse room which was built on top of the roof extending outside Mr. Heldt’s office. It was not mentioned in the

warrant. It was searched and a lot of incriminating documents were seized. The question for the appellate panel was whether or not the penthouse room could reasonably have been viewed by the searching agents as constituting part of “the suite of offices of Mr. Heldt”.

The defendant’s maintained that this was separate and apart and contended that there was a physical discontinuity of the suite and the penthouse room. To reach the penthouse room the agents had to go outside onto the roof of the office building and approach the freestanding structure which was approximately nine feet from Mr. Heldt’s office windows. Since the penthouse room was independently locked, access to the Heldt offices would not also provide access to it. Further, it was undisputed that the structure could be easily reached without ever entering the Heldt suite of offices. (U.S. v. Heldt, 668 F.2d at 1265).

The district court in Washington D.C. based much of its decision of the physical nature of the set up on the roof. It noted, for example, that from the vantage point of the agent attempting to locate the boundary of the Heldt offices, it would be reasonable to assume that this penthouse room, right outside the doors of Heldts office, would be part of the suite. Further, because the nearest entrance to the room was through the office of Mr. Heldt, it was logical to assume that these offices formed a unit. People who worked in the penthouse testified that they had to use the

restroom in Mr. Heldts office. And there was nothing to indicate that it did not constitute part of the Heldt suite. Access to the penthouse could be had through the French doors in Mr. Heldt's private office, nine feet from the penthouse entrance and the bathroom used by the occupant of the penthouse was in Mr. Heldt's office. The court felt that these factors taken together convinced them that the entry into the penthouse was not outside the area of limitation of the search warrant. (U.S. v. Heldt, 668 F.2d at 1265).

This line of reasoning is also followed in U.S. v. Principe, 499 F.2d 1138 (1st. Cir., 1974).

Principe argues that the warrant could not, in any event, support the seizure of evidence from a cabinet outside of the apartment. The warrant authorized search of the premises "known as a three-story, woodframe building, at 63 Princeton Avenue, Providence, Rhode Island, the second-floor apartment, in the southwest corner of said building". The cabinet was in the southwest corner of the building, three to six feet away from the entrance to the apartment, in a small hallway directly opposite the door that led into the apartment. The owner of the building testified that the cabinet went with the apartment, that the tenant had been told he could use it and had been provided with a key. We agree with Principe that authority to search is limited to places described in the warrant and not additional or different places. Keiningham v. United States, 109 U.S. App. D.C. 272, 287 F.2d 126 (1960); cf. United States v. Micheli, 487 F.2d 429, 432 (1st Cir. 1973). However, the officers could reasonably suppose, given the second floor layout and its proximity to the apartment, that the cabinet was appurtenant to the apartment, as in fact it was. See United States v. Lumia, 36 F. Supp. 552

(W.D.N.Y. 1941); cf. United States v. Long, supra; Fine v. United States, 207 F.2d 324 (6th Cir. 1953), cert. denied, 346 U.S. 923, 98 L. Ed. 417, 74 S. Ct. 310 (1954).

-(U.S. v. Principe, 499 F.2d at 1137).

As the landlord in our case has clearly indicated, he rented the mobile home with the storage shed as one continuous item to the defendants. There is absolutely nothing in the evidence that was produced that would indicate otherwise. Further, the land owner and the two detectives have indicated that it was attached to the mobile home. This is not a search of an entirely different location but rather of the same location. The shed belongs to the mobile home and is therefore included in the probable cause to search the mobile home. This is also consistent with the comments by the trial Judge in both his comments immediately at the time of the suppression hearing and later on in his memorandum opinion. Appellate courts evaluate search warrants in a “common sense, practical manner” rather than applying a hyper-technical standard. State v. Stenson, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997). The officer, when he was trying to get a view of this property, determined that it was one unit. The landlord, who rented the property to the defendants, considered it one unit. The other detective who was there at the scene also considered it to be one unit. State submits that there is ample evidence in this record

to support the contention that the search of the shed was within the scope of the search warrant that was authorized.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2- JOINT

Second assignment of error raised by both defendants is that the trial court denied the defendants' constitutional protections when it granted a motion to amend the Information during the State's case in chief. Specifically, the claim is that the court should not have allowed the amendment of the enhancement from the school zone enhancement under RCW 69.50.435 (1)(c) to the school bus enhancement which is found under RCW 69.50.435 (1)(b).

Both attorneys on appeal have argued that the amendment occurred after the State had rested. This was incorrect. This matter was first raised with the trial court and attorneys when the state still had three more witnesses testifying in their case-in-chief. (RP 320)

The court asked the prosecutor whether the enhancement dealt with the school bus stop or the school enhancements. The deputy prosecutor indicated that he thought that it was a school bus stop and that was what the witnesses were going to be covering, that were going to be talking about this. (RP 321). This is also confirmed by the Deputy Prosecutor's comment during the opening statement (RP 130). The

prosecutor moved to amend to the school bus stop because that would be consistent then with the maps that were going to be introduced into evidence and the anticipated testimony of the witnesses still in the state case-in-chief. (RP 321). Both defense attorney's at trial objected to the amendment near the end of the state's case-in-chief. As the deputy prosecutor indicated it changed essentially nothing. They were the same witnesses and either enhancement contained the same penalties. (RP 322)

The court then indicated that they would worry about it later and proceeded on with the testimony.

Before the start of the defense case this matter was readdressed by the court and the attorneys. At no time was there any request by the defense for a continuance or to allow additional time to question the witnesses. The court heard from both the prosecution and the defense concerning this (RP 351-354). The trial court determined that it would grant the motion to amend the enhancement and reasoned as follows:

The Court: Alright. In so far as the motion to amend, I am going to grant it.

 And looking at the case, Supreme Court case that stems from the other, it basically talks of changing the nature of the crime rather than – and here we're not changing the crime, the crime remains the same and the issue is whether there is an enhancement. In the situation here it's a parallel enhancement, whether it be a bus stop or whether it be a school.

 It was put on notice prior to these people from the school district testifying and the map being presented. And

so there is clearly on notice what is the issues, and – under that basis I’m going to permit the amendment.

-(RP 354 L. 24- 355 L.13).

CrR 2.1 (d) provides:

The court may permit any Information or Bill of Particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudice.

Amendments during trial are discretionary with the trial court.

State v. Collins, 45 Wn. App. 541, 551, 726 P.2d 491(1986). A defendant must show prejudice in the amendment process. State v. Ureano, 101 Wn.2d. 745, 761, 682 P.2d 889(1984); State v. Gosser, 33 Wn. App. 428, 435, 656 P.2d 514(1982). Not seeking a continuance shows lack of surprise and prejudice. Gosser, 33 Wn. App. at 435.

The State submits that neither defendant can show that there has been any prejudice to his or her defense. Enhancements do not increase the penalties (both enhancements contain the 24 month enhancement, so in that regard, they are the same). The defendant bears the burden of showing prejudice. State v. Royster, 43 Wn. App. 613, 619- 620, 719 P.2d 149(1986). State submits that they have not done so in this case.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3 (BREWER BRIEF) AND ASSIGNMENT OF ERROR NO. 4 (DANIELSON BRIEF)

The next assignment of error raised by both defendants is a claim that the convictions for manufacture of methamphetamine and possession of pseudoephedrine with intent to manufacture methamphetamine should merge or that they constitutes double jeopardy. The claim under both briefs is that these two offenses meet the “same elements” test and thus there should not be separate convictions and potential separate penalties for these two crimes.

The State submits that this matter has recently been put to rest by a decision in Divison 1: State v. Gaworski, 138 Wn. App. 141, 156 P.3d 288(2007). The identical issue was raised in Division 1 with the claim of either merger or double jeopardy. However, Division 1 rejected this defense.

Gaworski first contends that possession of pseudoephedrine and anhydrous ammonia with the intent to manufacture merge with unlawful manufacture of methamphetamine, because manufacture necessarily involves possession of precursors with intent to manufacture. This proposition is incorrect and, in any case, the doctrine of merger does not apply here.

The doctrine of merger is one means of determining whether the legislature intends multiple punishments and applies when a crime is elevated to a higher degree by proof of some other crime. None of Gaworski's offenses

was elevated to a higher degree by commission of another crime.

Gaworski's argument is better evaluated under the test announced in *Blockburger v. United States*, which asks whether each crime requires proof of a fact the other does not. If so, we presume the legislature intended separate punishment. The *Blockburger* presumption may be rebutted by evidence of contrary legislative intent.

The criminal code defines “manufacturing” as

the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container.

Possession of precursor ingredients is not a required element of manufacturing. A person who knowingly plays even a limited role in any of these processes manufactures methamphetamine, and a person can knowingly commit the crime of manufacturing a controlled substance without ever constructively possessing it. For example, fingerprints on four items in a “box lab” used only to manufacture methamphetamine were sufficient evidence to sustain a conviction of manufacturing. Conversely, a person may possess precursor ingredients with intent to manufacture methamphetamine without ever beginning the actual manufacturing process. The two crimes do not require proof of the same facts, and we presume the legislature intended separate punishments. (cite omitted)

Gaworski presents no contrary evidence of legislative intent. His conviction under both statutes does not violate double jeopardy.

-(Gaworski, 138 Wn. App at 291-292)

The precedent set by Gaworski is based on sound reasoning and appears to address the issues raised by both defendants in this case.

V. RESPONSE TO ASSIGNMENT OF ERROR NO. 4 (BREWER)
AND ASSIGNMENT OF ERROR NO. 3 (DANIELSON)

The next assignment of error raised jointly by the defendants is insufficient evidence to support the concept of actual or constructive possession of the drugs in question.

The elements of the various charges were set forth in the Court's Instructions to the Jury (CP 54). A copy of the Court's Instructions to the Jury is attached hereto and incorporated herein. As part of the instructions is Instruction No. 12 that deals with actual and constructive possession.

That instruction reads as follows:

Instruction No. 12

Possession means having a substance in one's custody or control. I may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there in dominion and control over

the substance. Dominion and control need not be exclusive to establish constructive possession.

-(Court's Instructions to the Jury, Instruction No. 12, (CP 54)).

To establish the elements of the crime the State called, among other witnesses, the following witnesses to testify about the living arrangements at the trailer and the possession of the illegal substances.

The State called Tim Boardman, a detective for the Clark County Sheriff's Office assigned to the Clark/Skamania Dug Task Force. He indicated that he was involved in the execution of the search warrant on June 13, 2006, at the single wide mobile home at 5910 NE 131 Avenue in Vancouver, Clark County, Washington. (RP 137). He told the jury that he had contact with defendant Brewer who told him that he had lived there in the mobile home for approximately four months and he told the officer that the contents of the mobile home belonged to him. (RP 149). This officer and others discussed with the jury the various items of illegal substance and meth cooking and meth use paraphernalia that was found in the home and the adjoining storage shed.

Defendant Danielson told Detective Boardman that she was in the process of moving out. (RP 146). She further told the officer that a box that was found in the master bedroom contained various items in it including a glass pipe. She indicated that she used the glass pipe to smoke

methamphetamine. (RP 201). When she was asked concerning the cooking of meth she indicated “I don’t cook meth around my children” (RP 203, L.4-5).

The State also called Detective Josanna Hopkins and indicated that she was a police officer for the City of Vancouver and was assigned to the Clark/Skamania Drug Task Force. She indicated that the defendant Danielson pointed out to her a red suitcase that was out in the shed. (RP 160). The Officer found that the items in the suitcase relating to the operation of a meth lab. (RP 161). Also found in the shed were identification items for defendant Danielson (RP 173-174). Further, in a steel box that was located in the red suitcase in the shed the officers found a prescription for defendant Danielson. (RP 179).

Steve Nelson from the Clark County Sheriff’s Office was also involved in the search. He told the jury that he had found pieces of identification with the address of the trailer being searched in the name of Ms. Danielson. This was found in the master bedroom area (RP 217). He also described for the jury pieces of identification with Mr. Brewer’s name also found in the bedroom area (RP 241-243).

The State also called the landlord of the property, Tanton Thorp. Mr. Thorp indicated that he was the landlord for both defendants. He considered both of them his tenants. He indicated that Mr. Brewer had

moved into the residence sometime in approximately February and that Ms. Danielson actually preceded him and had been there since at least January (RP 301-302). Mr. Thorp also testified that both of them would pay the rent and he specifically remembers Ms. Danielson paying part of the rent (RP 304).

Mr. Thorp indicated that he had seen both of the defendants using the shed (where the red suitcase was found) on numerous occasions. (RP 303; 316). Concerning the red suitcase, which contained drug paraphernalia and the meth lab items, Mr. Thorp indicated that he saw Mr. Brewer physically put that into the shed (RP 303).

Questions were asked of Mr. Thorp concerning whether or not Ms. Danielson had already moved out and he indicated that in fact no, that he was in the process of evicting both of them from the property. (RP 305). There were also questions asked of him concerning what items were left in the shed by previous tenants. He described the items that were left in the shed and indicated a scooter had been left along with a box of photos. Other items were stored around the property, but were all large items like an engine block, a freezer, and a bed (RP 315).

The standard of review for a sufficiency of the evidence claim is whether, after reviewing evidence most favorable to the State, any rational trier of fact could have found essential elements of the crime beyond a

reasonable doubt. State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005); State v. Salinas, 119 Wn.2d 192, 201 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Smith, 155 Wn.2d at 501. A reviewing court will reverse a conviction for insufficient evidence only where no trier of fact could find that all the elements of the crime were proved beyond a reasonable doubt. Smith, 155 Wn.2d at 501; Salinas, 119 Wn.2d at 201. "We may infer criminal intent from conduct, and circumstantial evidence as well as direct evidence carries equal weight." State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). The Appellate Court must defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence. State v. Jackson, 129 Wn. App. 95, 109 117 P.3d 182 (2005). Put another way, credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71 794 P.2d 850 (1990).

Dominion and control need not be exclusive and can be established by circumstantial evidence. State v. Weiss, 73 Wn.2d 372, 375, 438 P.2d 610 (1968). To determine whether a defendant was in constructive possession of an object, the Appellate Court looks to the totality of the circumstances. State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). One aspect of dominion control is that the defendant may reduce the

object to actual possession immediately. While proximity alone is not sufficient to establish constructive possession, proximity coupled with other circumstances from which the trier of fact can infer dominion and control is sufficient to show constructive possession. State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).

The State submits that the totality of circumstances indicate that there was constructive possession of the drugs by both defendants. As the various witness had indicated, Ms. Danielson pointed out the red suitcase in the shed which contained items of a meth lab. Found in the shed were ID items belonging to Ms. Danielson (CP 173-174). Also, found in the steel box which was in the red suitcase was a prescription for Ms. Danielson. Further, she indicated to the two officers that “I don’t cook meth around my children” (RP 203). The evidence concerning Mr. Brewer is just as equally as strong. Various pieces of identification identifying him to the residence were found throughout the area. Further, the landlord talked about Mr. Brewer physically having possession of the red suitcase and he was the one that actually put it in the shed. He also indicated that he had seen both of them on numerous occasions entering in and out of the shed. Further, Mr. Brewer made comment to the officers involved that all of the contents of the mobile home belong to him. As

indicated in the testimony, numerous items of drug and drug paraphernalia were found in the mobile home.

The State submits that both defendants had dominion and control over the premises and also over the drugs and drug paraphernalia that was found there. The totality of the circumstances indicate constructive possession and certainly enough to allow this question to go to the jury.

VI. RESPONSE TO ASSIGNMENT OF ERROR/ COMMUNITY CUSTODY CONDITIONS

Both defendants maintain that certain conditions of the community custody in their Judgment and Sentences (Danielson, CP 125; Brewer, CP 96) contain vague language concerning paraphernalia.

Division 2 has previously ruled on this identical question in State v. Motter, 139 Wn. App. 797, 162 P.3d 1190 (2007). As the court in Motter indicates:

Second, Motter challenges the trial court's order that he: shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand held electronic scheduling and data storage devices. (CP at 149). This condition does not order affirmative conduct. And, as demonstrated above, Motter's crime was related to his substance abuse. Thus, forbidding Motter from possessing or using controlled substance

paraphernalia is a “crime-related prohibition” authorized under RCW 9.94A.700(5)(e). Thus, this condition is valid.

Motter argues that “almost any item can be used for the ingestion of controlled substances, such as knives, soda cans, or other kitchen utensils.” Br. of Appellant at 29. A community custody condition may be void for vagueness if it fails to define specifically the activity that it prohibits. State v. Riles, 86 Wn. App. 10, 17-18, 936 P.2d 11 (1997), aff'd, 135 Wn.2d 326, 957 P.2d 655 (1998). But Motter fails to cite to authority and his argument consists of one unhelpful sentence in the context of a complex constitutional legal doctrine.

Moreover, Motter's challenge is not ripe. In State v. Massey, 81 Wn. App. 198, 200, 913 P.2d 424 (1996), the defendant challenged a condition that he submit to searches. This court held that the judicial review was premature until the defendant had been subjected to a search he thought unreasonable. And in State v. Langland, 42 Wn. App. 287, 292-93, 711 P.2d 1039 (1985), we held that the question of a law's constitutionality is not ripe for review unless the challenger was harmed by the law's alleged error. Here, Motter claims that the court order could prohibit his possession of innocuous items. But Motter has not been harmed by this potential for error and this issue therefore is not ripe for our review. It is not reasonable to require a trial court to list every item that may possibly be misused to ingest or process controlled substances, items ranging from “pop” cans to coffee filters. Thus, we can review Motter's challenge only in context of an allegedly harmful application of this community custody condition. This argument is not properly before this court and we will not address it.

-(Motter, 139 Wn.App at 803-804)

Finally, the defendants maintain that under the WAC provisions that this matter would not come back before the court nor would there be

an opportunity for review of the conditions once they become “ripe”. However, the State would submit that since this matter is not ripe at this time, that when it becomes ripe, the defendant would have the opportunity to file a personal restraint petition to seek some type of other relief at that time. It would not make any sense to forestall either defendant at that point from raising it.

A petitioner who has had no previous or alternative avenue for obtaining State judicial review need only satisfy the requirements under RAP 16.4. E.g., In Re: Personal Restraint of Cashaw, 123 Wn.2d 138, 148-149, 866 P.2d 8 (1994). In that case a personal restraint petition challenging the decision of the indeterminate sentencing review board concerning parole did not meet the threshold requirements for constitutional and nonconstitutional errors because the policy of finality underlying those requirements was absent where the prisoner has had no previous or alternative avenue for obtaining the State judicial review of the board decision. See also In Re: Personal Restraint of Shepard, 127 Wn.2d 185, 191, 898 P.2d 828 (1995).

The State submits that Motter is the controlling case law and should be applied in this circumstance.

VII. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 12 day of March, 2008.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By: 
MICHAEL C. KINNIE, WSBA#7869
Senior Deputy Prosecuting Attorney

APPENDIX "A"

AFFIDAVIT FOR SEARCH WARRANT

transfer, concealment, and/or expenditure of money and/or dominion and control over assets and proceeds;

(6) Currency, precious metals, jewelry, and financial instruments, including stocks and bonds for the purpose of tracking proceeds and/or profits;

(7) Address and/or telephone books, telephone bills, Rolodex indices and papers reflecting names, addresses, telephone numbers, pager numbers, fax numbers and/or telex number of sources of supply, customers, financial institution, and other individual or businesses with whom a financial relationship exists;

(8) Correspondence, papers, records, and any other items showing employment or lack of employment of defendant or reflecting income or expenses, including but not limited to items listed in paragraph 5, financial statements, credit card records, receipts, and income tax returns;

(9) Paraphernalia for packaging, weighing and distributing Methamphetamine including but not limited to scales, baggies, and other items used in the distribution operation, including firearms;

Are on this 03 day of June, 2006 in the unlawful possession of the defendant(s) in:

A white mobile home with green trim and an adjacent shed with a gray tarp covering the roof and front of the shed. The mobile home is located down a gravel drive that runs east to west from 131st Ave. There is a mailbox on the south side of the driveway entrance that reads 5910. The home has a specific address of 5910 NE 131st Ave, Vancouver Clark County Washington.

I am informed and aware, based upon the following:

I am a Deputy Sheriff with the Clark County Sheriff's Office, and have been so employed since February 2001. I am currently assigned as a Detective with the Clark/Skamania Drug Task Force, and was assigned there in January 2006. During my employment as a Deputy Sheriff I have investigated numerous narcotics related complaints and made numerous arrests for the same.

Prior to my commission as a Deputy Sheriff, I was employed for three years by the Clark County Sheriff's Office as a Custody Officer. I investigated many controlled substance violations in the Clark County Jail while employed there.

I am a certified police officer in the State of Washington through the Washington State Criminal Justice Training Commission. I am a graduate of the 720 hour Washington State Criminal Justice Training Commission Basic Law Enforcement Academy. This course included training in narcotics recognition and enforcement.

I have also attended and graduated from the Drug Enforcement Administration's "Basic Drug Investigation" course.

In this official capacity, I was contacted by a confidential reliable informant. The CRI advised me that within the past 72 hours, and prior to the presentation of this affidavit the informant was an invited guest of Melissa Danielson (AKA "Red") at the residence of 5910 NE 131st Ave, Vancouver, Washington. The CRI knows the residents of the mobile home to be Melissa Danielson, her boyfriend "Joe", and her two infant children. The CRI stated that he/she has known Melissa Danielson AKA Red for over one year. While the CRI was at the location he/she observed Melissa Danielson with what the CRI believed to be more than two ounces of methamphetamine. The CRI stated that the methamphetamine was inside the residence at the time it was seen. During the time the CRI was at the above residence he/she observed at least 5-6 drug transactions where money was exchanged for methamphetamine. The CRI also observed numerous drug scales inside the residence. The CRI also observed numerous types of clean and dirty packaging material and drug paraphernalia within the residence. The CRI also observed numerous people consuming methamphetamine while at the residence.

The CRI knows Melissa Danielson to be the resident of 5910 NE 131st Ave for at least three weeks. The CRI was able to point out the mobile home during a drive by with Detectives of the Drug Task Force. Melissa Danielson listed 5910 NE 131st Ave as her residence in a recent arrest report from CCSO on 04/04/2006.

As to the informant's credibility,

The CRI is reliable to Detective Hopkins and me. The informant has completed at least one controlled buy of illegal drugs while under the direction of the Clark Skamania Drug Task Force. On one controlled buy, the informant claimed that he/she knew particular places where drugs were for sale. During the drive by's with the informant, these particular places were pointed out to me by the informant. During this controlled buy the informant and their vehicle was searched and no monies, drugs or contraband's were found. The informant was given a specific amount of monies from the interagency Drug Task Force fund. After the search the informant was kept under constant police observation until the informant entered the home with in Clark County. The informant exited the residence a short time later and was kept under constant police observation until we meet at a pre-determined location. The informant handed over a plastic baggie of crystalline substance. The informant stated that the substance in the baggie was methamphetamine. The amount of methamphetamine purchased by the informant was consistent with the amount of monies given. The substance was field tested and showed positive for methamphetamine. The informant and their vehicle were searched again and no monies, drugs or contraband were found. In addition to controlled buys, the CRI has been able to provide us helpful information with ongoing investigations. The information has been verified and shown to be correct.

As to the informants basis of knowledge,

The informant has used methamphetamine in the past and also been around the distribution of methamphetamine. The informant has been in the drug subculture for numerous years.

The informant also has basic knowledge of methamphetamine labs from being around them in the past.

As to the informants motivation,

The informant's motivation is for monetary compensation.

As to the informant's criminal history,

The CRI's criminal history shows Unlawful Issuance of Bank Checks as of May 2006.

As to the defendant's criminal history,

Melissa Danielson's criminal history as of June 2006 shows an Attempt to Elude, and a felony VUCSA violation.

I know from my training knowledge and experience that persons involved in the distribution of controlled substances commonly maintain records to assist them in their business activities. That the records are used to record credits and debits, profits and proceeds, and to reconcile profits and stock on hand. Because the suspect mentioned above is involved in the distribution of controlled substances, to wit methamphetamine, it is more likely than not that the records of this activity will be found at **5910 NE 131st Ave Vancouver, Clark County Washington.**

I know from my training, knowledge and experience that persons involved in the distribution of controlled substances almost always use packaging material including plastic baggies to hold the controlled substances, repackage it in smaller quantities utilizing scales to sell to individual users and these packaging materials will be found at the same location as the controlled substances. I also know that subjects who distribute methamphetamine will also frequently consume methamphetamine and will have drug paraphernalia at their residence. Because the suspect mentioned above is involved in the distribution of controlled substances it is more likely than not that packaging material and drug paraphernalia will be found at **5910 NE 131st Ave Vancouver , Clark County Washington.**

I know from my training, knowledge and experience that most people involved in the distribution and possession of controlled substances possess items of identification (including but not limited to driver's licenses, rent receipts, bills, and address books). I also know that these items are relevant to the identity of the possessor of the controlled substances, possessor of other items seized, and occupants of the premises searched. It is therefore more likely than not that these items of identification will be found at **5910 NE 131st Ave Vancouver, Clark County Washington.**

I know from my training, knowledge and experience that subjects involved in distribution of methamphetamine hide narcotics in many places, including but not limited to, mattresses, inner walls, bathroom fans, secret compartments, vehicles, outbuildings and adjoining structures. I am seeking to search all areas of the premises. I know from my training, knowledge and experience that pagers, drug records, packaging material, weapons (including rifles, shotguns, and handguns) are tools of the trade and instrumentality of the crime of delivery and trafficking in narcotics. I am seeking to seize these items.

I know from my training, knowledge and experience that proceeds of the sales and/or distribution of drugs are often found which include not only monies, but items taken in trade or purchased with monies earned through illicit activities, and although these items are subject to civil forfeiture the evidentiary value in showing an ongoing conspiracy is invaluable.

I know from my training, knowledge and experience, and investigation of this case, the property to be seized is described as: any controlled substances, any money or accounts, and/or other items of value including, but not limited to real property, which constitutes profits and/or proceeds which were used or intended to be used to facilitate prohibited conduct; any equipment including, but not limited to conveyances and weapons which constitutes proceeds and/or profits which were used or intended to be used or available to be used to facilitate prohibited conduct; any records and/or proceeds of the above, constitutes profits, proceeds, and/or instrumentality of delivery, and possession of Methamphetamine and is subject to civil forfeiture.

Based on the foregoing, I believe there is probable cause and I pray the court for issuance of a Search Warrant authorizing the search of the aforescribed residence, and vehicles for the above-described items and if any are found authorizing the seizure of the same as it appears that the above listed residence is involved in ongoing criminal enterprise involving the manufacture and delivery of the controlled substance Methamphetamine.



Tim Boardman
Clark County Skamania Drug Task Force

Subscribed and Sworn to before me this 03 day of June, 2006.



District Court Judge
Clark County
State of Washington

APPENDIX "B"
SEARCH WARRANT

IN THE DISTRICT COURT OF CLARK COUNTY

STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

Danielson, Melissa Rene
5910 NE 131st Ave
Vancouver, Washington 98682

Defendant(s).

SEARCH WARRANT

COPY

THE PEOPLE OF THE STATE OF WASHINGTON, to any Sheriff, Policeman or Peace Officer in the County of Clark: Proof by affidavit under oath, made in conformity with the State of Washington Criminal rules for Justice Court, Rule 2.3, section(c), having been made this day to me by Det. Tim Boardman of the Clark Skamania Drug Task Force , that there is probable cause for the issuance of a Search Warrant on the grounds set forth in the State of Washington Criminal Rules for Justice Court, Rule 2.3, section (c).

YOU ARE THEREFORE COMMANDED, that with the necessary and proper assistance to make a diligent search, good cause having been shown therefore, of the following described property, within 10 days of the issuance of this warrant:

A white mobile home with green trim and an adjacent shed with a gray tarp covering the roof and front of the shed. The mobile home is located down a gravel drive that runs east to west from 131st Ave. There is a mailbox on the south side of the driveway entrance that reads 5910 . The home has a specific address of 5910 NE 131st Ave, Vancouver Clark County Washington.

for the following goods:

- (1) Methamphetamine substances controlled by the Uniform Controlled Substances Act of the State of Washington, and items used to facilitate the distribution and packaging of Methamphetamine;
- (2) Records relating to the transportation, ordering, manufacturing, possession, sale, transfer and/or importation of controlled substances in particular, Methamphetamine, including but not limited to books, notebooks, ledgers, check book ledgers, handwritten notes, journals, calendars, receipts and the like;

(3) Records showing the identity of co-conspirators in this distribution operation, including but not limited to address and/or phone books, telephone bills, Rolodex indices, notebooks, ledgers, check book ledgers, handwritten notes, journals, calendars, receipt and the like;

(4) Records which will indicate profits and/or proceeds of the illegal distribution operation of Methamphetamine to include, but not limited to books, notebooks, ledgers, check book ledgers, handwritten notes, journals, calendars, receipts and the like;

(5) Books, records, invoices, receipts, records of real estate transactions, purchase, lease or rental agreements, utility and telephone bills, records reflecting ownership of motor vehicles, keys to vehicles, bank statements and related records, passbooks, money drafts, letters of credit, money orders, bank drafts, pay stubs, tax statements, cashiers checks, bank checks, safe deposit box keys, money wrappers, and other items evidencing the obtaining, secreting, transfer, concealment, and/or expenditure of money and/or dominion and control over assets and proceeds;

(6) Currency, precious metals, jewelry, and financial instruments, including stocks and bonds for the purpose of tracking proceeds and/or profits;

(7) Address and/or telephone books, telephone bills, Rolodex indices and papers reflecting names, addresses, telephone numbers, pager numbers, fax numbers and/or telex number of sources of supply, customers, financial institution, and other individual or businesses with whom a financial relationship exists;

(8) Correspondence, papers, records, and any other items showing employment or lack of employment of defendant or reflecting income or expenses, including but not limited to items listed in paragraph 5, financial statements, credit card records, receipts, and income tax returns;

(9) Paraphernalia for packaging, weighing and distributing Methamphetamine including but not limited to scales, baggies, and other items used in the distribution operation, including firearms;

And if you find the same or any part thereof, then items of identification pertaining to the residency thereof, bring the same before the Honorable District Court Judge James P. Swinney to be disposed of according to law.

GIVEN, under my hand this 3rd day of June, 2006.

This Search Warrant was issued:

Time: 12:45 p.m.

Date/Time Execution:

2/13/06 0935

James P. Swinney
District Court Judge
Clark County
State of Washington

By: Tim Boardman
Detective Tim Boardman
Clark-Skamania Drug Task Force

APPENDIX "C"
MEMORANDUM OF OPINION

3

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

FILED

NOV 28 2007

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 MELISSA DANIELSON,)
)
 Defendant.)

Case No.: 06-1-0160 Sherry W. Parker, Clerk, Clark Co.

06-1-01604-1

Memorandum of Opinion

Defendant raises two principal issues on her Motion for New Trial and/or Arrest of Judgment. The first being that the charges were amended after the State had rested, and that the defense moved to dismiss the school zone enhancement. However, that is incorrect in that the amendment reflecting the proper school zone enhancement was made prior to the State resting their case and as such is permitted to conform to the proof presented during the State's case-in-chief.

The second major issue is whether the search warrant covers the storage portion attached to the mobile home, which was the location of the drugs and the drug paraphernalia used for the manufacturing of methamphetamine. Tanton Thorp is not the deputy sheriff in the case but the owner of the property located at 5910 NE 131st Avenue. He lives on the property and rents out the mobile home under a written lease agreement with Casey Norris, although Brewer and Danielson apparently took possession some time the first part of the year 2006.

125 gm

1 A search was conducted on June 13th and both Ms. Danielson and Mr. Brewer were
2 present as well as Danielson's two children. The mobile home was in total
3 disarray and was later subject to an abatement motion by the Public Health
4 and Building Department to remove the facilities as they were unable to be
5 appropriately restored.

6
7 The mobile home had attached to it a carport and storage unit. The owner of
8 the premises testified that the shed was nailed to the mobile home as part of
9 the framing and had concrete blocks tying it to the ground and was all part
10 of the mobile home. *Verbatim Report of Proceedings*, Volume II, Page 20.

11 There is an awning extending over the carport and storage unit, which was not
12 a separate unit. It basically consisted of three walls, using the mobile
13 home as the fourth wall to the shed, and could be reached only from the
14 outside.

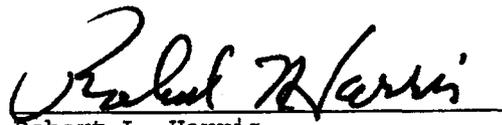
15
16 Counsel's cases referring to outbuilding are not on point in that this is and
17 continues to be part of the mobile home. It was not separated by distance so
18 as to render it to be a separate, free-standing structure and not
19 interrelated storage unit or the mobile home. I am standing on my original
20 ruling as I feel there is no reason to change the same.

21
22 The other two issues used in the motion were whether Ms. Danielson was denied
23 effective assistance of counsel and whether sufficient evidence was presented
24 to sustain the jury's verdict. The testimony of the witnesses that were
25 suggested as a discussion between Brewer and Thorp is inadmissible hearsay.
Brewer elected not to testify and that conversation could not be brought

1 forward. The decision as to calling of witnesses are clearly within the
2 control of the defense, and the strategies whether or not those witnesses
3 could be of value is a decision trial counsel must make. There is no showing
4 that they would be of any material value. Deny the motion as to ineffective
5 assistant of counsel.

6
7 The evidence that Ms. Danielson was not living at the mobile home at the time
8 of the search warrant is again totally dependent upon her testimony. She was
9 present at the time of the execution of the search warrant, and her personal
10 items were found on the premises. She did not testify during the suppression
11 hearing anything about her moving out and establishing a new separate living
12 arrangement but merely testified regarding her familiarity and having lived
13 there, occasionally paying rent. As such, I find that she was a tenant and
14 subject to the search warrant and not a mere guest. The Court's original
15 ruling stands.

16
17 Dated this 28th day of November, 2007.

18
19
20 
21 Robert L. Harris
22 Superior Court Judge, Dept. 5

23
24 RLH:lmk

APPENDIX "D"

COURT'S INSTRUCTIONS TO THE JURY

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

NO. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 4

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 5

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

NO. 6

A separate crime is charged against one or more of the defendants in each count. The charges have been joined for trial. You must decide the case of each defendant or each crime charged against that defendant separately. Your verdict on any count as to any defendant should not control your verdict on any other count or as to any other defendant.

INSTRUCTION NO. 7

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION NO. 9

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 9

It is a crime for any person to possess a controlled substance.

INSTRUCTION NO. 10

To convict the defendant, Melissa Rene Danielson, of the crime of possession of a controlled substance, ^{Court 1} each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 13th day of June, 2006, the defendant possessed a controlled substance; and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 11

To convict the defendant, Alan Gene Brewer, of the crime of possession of a controlled substance, ^{Count 4} each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 13th day of June, 2006, the defendant possessed a controlled substance; and
- (2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 12

Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance. Dominion and control need not be exclusive to establish constructive possession.

INSTRUCTION NO. 13

It is a crime for any person to manufacture a controlled substance that the person knows to be a controlled substance.

INSTRUCTION NO. 14

Manufacture means the production, preparation, propagation, compounding, conversion, processing, directly or indirectly of any controlled substance.

INSTRUCTION NO. 15

To convict the defendant, Melissa Rene Danielson, of the crime of manufacture of a controlled substance, ^{Count 2} each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 13th day of June, 2006, the defendant, Melissa Rene Danielson, manufactured a controlled substance;

(2) That the defendant, Melissa Rene Danielson, knew that the substance manufactured was a controlled substance Methamphetamine; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 16

To convict the defendant, Alan Gene Brewer, of the crime of manufacture of a controlled substance, ^{Count 4} each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 13th day of June, 2006, the defendant, Alan Gene Brewer, manufactured a controlled substance;

(2) That the defendant, Alan Gene Brewer, knew that the substance manufactured was a controlled substance Methamphetamine; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 17

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

INSTRUCTION NO. 18

To convict the defendant, Melissa Rene Danielson, of the crime of Possession of Ephedrine or Pseudoephedrine with Intent to Manufacture – Methamphetamine, ^{Count 3,} each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 13th day of June, 2006, the defendant possessed a controlled substance;

(2) That the defendant possessed Ephedrine or Pseudoephedrine with the intent to manufacture methamphetamine; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 19

To convict the defendant, Alan Gene Brewer, of the crime of Possession of Ephedrine or Pseudoephedrine with Intent to Manufacture – Methamphetamine, ^{Controlled} each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 13th day of June, 2006, the defendant possessed a controlled substance;

(2) That the defendant possessed Ephedrine or Pseudoephedrine with the intent to manufacture methamphetamine; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 20

Methamphetamine is a controlled substance.

INSTRUCTION NO. 21

The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him or her in any way.

INSTRUCTION NO. 22

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and verdict forms for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

INSTRUCTION NO. 23

If you find the defendant guilty of manufacturing a controlled substance, it will then be your duty to determine whether or not the defendant manufactured the controlled substance within one thousand feet of a school bus route stop designated by a school district. You will be furnished with a special verdict form for this purpose.

If you find the defendant not guilty of Manufacture of a Controlled Substance, do not use the special verdict form. If you find the defendant guilty, you will complete the special verdict. Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.

If you find from the evidence that the State has proved beyond a reasonable doubt that the defendant manufactured the controlled substance within one thousand feet of a school bus route stop designated by a school district, it will be your duty to answer the special verdict "yes".

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt that the defendant manufactured the controlled substance within one thousand feet of a school bus route stop designated by a school district, it will be your duty to answer the special verdict "no".

INSTRUCTION NO. 28

"School bus" means a school bus as defined by the superintendent of public instruction which is owned and operated by any school district and all school buses which are privately owned and operated under contract or otherwise with any school district in the state for the transportation of students. The term does not include buses operated by common carriers in the urban transportation of students such as transportation of students through a municipal transportation system.

The superintendent of public instruction has defined a "school bus" as a vehicle with a seating capacity of more than ten persons including the driver which is regularly used to transport students to and from school or in connection with school activities.

INSTRUCTION NO. 25

"School bus route stop" means a school bus stop as designated by a school district.

INSTRUCTION NO. 25

If you find the defendant Melissa Rene Danielson guilty of the crime of Manufacture of a Controlled Substance – Methamphetamine as charged in Count 2, or the crime of Possession of Ephedrine or Pseudoephedrine with Intent to Manufacture Methamphetamine as charged in Count 3, it will then be your duty to determine whether or not the defendant committed the crime when a person under the age of eighteen was present in or upon the premises of manufacture. If you find the defendant Alan Gene Brewer guilty of the crime of Manufacture of a Controlled Substance – Methamphetamine as charged in Count 5, or the crime of Possession of Ephedrine or Pseudoephedrine with Intent to Manufacture Methamphetamine as charged in Count 6, it will then be your duty to determine whether or not the defendant committed the crime when a person under the age of eighteen was present in or upon the premises of manufacture. You will be furnished with a Special Verdict Form B for each Count for this purpose.

If you find the defendant not guilty of one of the crimes charged in Count 2, 3, 5 or 6, do not use the Special Verdict Form B ^{for C} for that Count. If you find a defendant guilty of the crime charged in one of those Counts, you will complete the Special Verdict Form B ^{for C} for that defendant and for that Count. Since this is a criminal case, all twelve of you must agree on the answer to the Special Verdict.

If you find from the evidence that the State has proved beyond a reasonable doubt that the defendant committed the crime when a person under the age of eighteen was present in or upon the premises of manufacture, it will be your duty to answer Special Verdict "yes".

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt that the defendant committed the crime when a person under the age of eighteen was present in or upon the premises of manufacture, it will be your duty to answer the Special Verdict "no".

WPIG-59:00

~~RCW 59.50.005~~
