

**FILED**

APR 30 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 30575-9-III

BENTON COUNTY SUPERIOR COURT NO. 04-1-00630-2

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT TODD WALKER,

Appellant.

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BRIEF OF APPELLANT

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Attorney for Appellant

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BRIEF OF APPELLANT  
TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

A. ASSIGNMENTS OF ERROR ..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 2

C. STATEMENT OF THE CASE .....3

D. ARGUMENT

1. *The Trial Court’s admission of Plaintiff’s exhibit No. 23 violated Mr. Walker’s sixth amendment right to confront witnesses* ..... ..

2. *The Trial Court violated Mr. Walker’s Due Process right to a fair trial by admitting unfairly prejudicial evidence of the circumstances following his arrest*..... ..

3. *The State engaged in prosecutorial misconduct in its closing argument*..... ..

    a. *Inviting the Jury to find guilt based on silence*..... ..

    b. *The “right verdict”*..... ..

    c. *Personal opinion of the prosecuting attorney*..... ..

4. *The defendant received constitutionally ineffective assistance of counsel* ..... ..

    a. *Trial counsel was ineffective for failing to subpoena necessary witnesses to the hearing on the defendant’s motion in limine*..... ..

    b. *Trial counsel was ineffective for failure to adequately investigate and prepare for trial* ..... ..

- c. *Trial counsel was ineffective for failing to pursue a third party perpetrator theory.....*
  - d. *Trial counsel was ineffective for failing to object to the admission of laboratory reports.....*
  - e. *Trial counsel was ineffective for failing to object to testimony of Ms. Wagner-Weidner and Detective Moss .....*
  - f. *Trial counsel was ineffective for failing to object to prosecutor’s prejudicial and inflammatory statements during closing argument .....*
5. *The Trial Court erred when it instructed the jury on accomplice liability.....*
  6. *The Trial Court violated Mr. Walker’s Due Process rights and CrR 6.15 when it responded to an inquiry from the jury on three different occasions without conferring with counsel.....*
  7. *The evidence was insufficient to sustain a conviction for manufacturing methamphetamine .....*
  8. *Reversal is required because cumulative error denied Mr. Walker his Constitutional right to a fair trial.....*
  9. *The Trial Court erred in imposing exceptional consecutive sentences.....*

E. CONCLUSION  
 .....

TABLE OF AUTHORITIES

Table of Cases

Washington Cases

*In Re Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004).....30, 33, 36

*In re Pers. Restraint of Brett*, 142 Wn.2d 868, 16 P.3d 601 (2001).....32

*In re Parentage of Jannot*, 110 Wn.App. 16, 37 P.3d 1265 (Div. 3, 2002), affirmed, 149 Wn.2d 123, 65 P.3d 664 (2003).....18

*In Re Wilson*, 91 Wn.2d 487, 588 P.2d 1161 (1979).....53

|   |            |
|---|------------|
| <i>Matter of Pirtle</i> , 136 Wn.2d 467, 965 P.2d 593 (1998).....             | 29         |
| <i>State v. Ager</i> , 128 Wn.2d 85, 904 P.2d 715 (1995).....                 | 38         |
| <i>State v. Alexander</i> , 64 Wn.App. 147, 822 P.2d 1250 (Div. 1, 1992)..... | 44         |
| <i>State v. Allen</i> , 50 Wn.2d 412, 749 P.2d 702 (1988).....                | 39         |
| <i>State v. Aumick</i> , 126 Wn.2d 422, 894 P.2d 1325 (1995).....             | 23         |
| <i>State v. Badda</i> , 63 Wn.2d 176, 385 P.2d 859, (1963).....               | 44         |
| <i>State v. Belgard</i> , 110 Wn.2d 504, 755 P.2d 174 (1988).....             | 22, 23, 27 |
| <i>State v. Bencivenga</i> , 137 Wn.2d 703, 974 P.2d 932 (1999).....          | 42         |
| <i>State v. Benn</i> , 120 Wn.2d 631, 845, 845 P.2d 289 (1993).....           | 38         |
| <i>State v. Bowen</i> , 48 Wn.App. 187, 738 P.2d 316 (Div. 3, 1987).....      | 21         |
| <i>State v. Branch</i> , 129 Wn.2d 635, 919 P.2d 1228 (1996).....             | 45         |
| <i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006).....              | 20         |
| <i>State v. Bruton</i> , 66 Wn.2d 111, 401 P.2d 340 (1965).....               | 19         |
| <i>State v. Byrd</i> , 30 Wn.App. 794, 638 P.2d 601 (Div. 1, 1981).....       | 31         |
| <i>State v. Caliguri</i> , 99 Wn.2d 501, 664 P.2d 466 (1983).....             | 39         |
| <i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990).....            | 42         |
| <i>State v. Charlton</i> , 90 Wn.2d 657, 585 P.2d 142 (1978).....             | 22         |
| <i>State v. Chase</i> , 134 Wn.App. 792, 142 P.3d 630 (Div. 1, 2006).....     | 37         |
| <i>State v. Clark</i> , 139 Wn.2d 152, 985 P.2d 377 (1999).....               | 13         |
| <i>State v. Coe</i> , 101 Wn.2d 772, 684 P.2d 668 (1984).....                 | 44         |
| <i>State v. DeVincendis</i> , 150 Wn.2d 11, 74 P.3d 119 (2003).....           | 17         |

|  |            |
|--|------------|
| <i>State v. Downs</i> , 168 Wn. 664, 13 P.2d 1 (1932).....                     | 33         |
| <i>State v. Earls</i> , 116 Wn.2d 364, 805 P.2d 211 (1991).....                | 25         |
| <i>State v. Easter</i> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....              | 23, 25     |
| <i>State v. Echevarria</i> , 71 Wn. App. 595, 860 P.2d 420 (Div. 1, 1993)..... | 21         |
| <i>State v. Evans</i> , 96 Wn.2d 1, 633 P.2d 83 (1981).....                    | 16         |
| <i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 6 P.3d 1150 (2000).....      | 38         |
| <i>State v. Flemming</i> , 83 Wn.App. 209, 921 P.2d 1076 (Div. 1, 1996).....   | 28         |
| <i>State v. Foxhoven</i> , 161 Wn.2d 168, 163 P.3d 786 (2007).....             | 17         |
| <i>State v. Freeburg</i> , 105 Wn.App. 492, 20 P.3d 984 (Div. 1, 2001)..       | 8, 19, 21  |
| <i>State v. French</i> , 101 Wn.App. 380, 4 P.3d 857 (Div. 3, 2000).....       | 23, 27     |
| <i>State v. Gallagher</i> , 112 Wn.App. 601, 51 P.3d 100 (Div. 2, 2002).....   | 43         |
| <i>State v. Garza</i> , 123 Wn.2d 885, 872 P.2d 1087 (1994).....               | 45         |
| <i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....                | 33         |
| <i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985).....               | 16         |
| <i>State v. Hendrickson</i> , 138 Wn.App. 827, 158 P.3d 1257 (Div. 2, 2007)... | 35         |
| <i>State v. Hilton</i> , 164 Wn.App. 81, 261 P.3d, 683 (Div. 3, 2011).....     | 33         |
| <i>State v. Jackson</i> , 102 Wn.2d 689, 689 P.2d 76 (1984).....               | 18, 20, 22 |
| <i>State v. Jasper</i> , 271 P.3d 876 (2012).....                              | 13, 40, 41 |
| <i>State v. Jefferson</i> , 11 Wn.App. 566, 524 P.2d 248 (Div. 1, 1974).....   | 18         |
| <i>State v. Keene</i> , 86 Wn.App. 589, 938 P.2d 839 (Div. 2, 1997) .....      | 25, 26     |
| <i>State v. Kroll</i> , 87 Wn.2d 829, 558 P.2d 173 (1976).....                 | 21         |

|  |        |
|--|--------|
| <i>State v. Larson</i> , 160 Wn.App. 577, 249 P.3d 669 (Div. 3, 2011).....   | 28     |
| <i>State v. London</i> , 69 Wn.App. 83, 848 P.2d 724 (Div. 2, 1993).....   | 43     |
| <i>State v. Lough</i> , 125 Wn.2d 847, 889 P.2d 487 (1995).....  | 16     |
| <i>State v. Luna</i> , 71 Wn.App. 755, 862 P.2d 620 (Div. 3, 1993).....  | 38, 43 |
| <i>State v. McNeal</i> , 98 Wn.App. 585, 991 P.2d 649 (Div. 2, 1999), <i>aff'd</i> , 145<br>Wn.2d 352, 37 P.3d 280 (2002) .....                                | 42     |
| <i>State v. McPherson</i> , 111 Wn.App. 747, 46 P.3d 284 (Div. 3, 2002).....   | 42     |
| <i>State v. Munden</i> , 81 Wn.App.192, 913 P.2d 421 (Div. 1, 1996).....   | 38     |
| <i>State v. Myers</i> , 49 Wn.App. 243, 742 P.2d 180 (Div. 3, 1987).....   | 17, 18 |
| <i>State v. Nichols</i> , 5 Wn.App. 657, 491 P.2d 677 (Div. 2, 1971).....  | 18     |
| <i>State v. Perrett</i> , 86 Wn.App. 312, 936 P.2d 426 (Div. 2, 1997), <i>rev.</i><br><i>denied</i> , 133 Wn.2d 1019 (1997).....                               | 44     |
| <i>State v. Rehak</i> , 67 Wn.App. 157, 834 P.2d 651 (Div. 2, 1992), <i>cert.</i><br><i>denied</i> , 508 U.S. 953, 113 S.Ct. 2449, 124 L.Ed.2d 665 (1993)..... | 33     |
| <i>State v. Romero</i> , 113 Wn.App. 779, 54 P.3d 1255 (Div. 3, 2002).....   | 25     |
| <i>State v. Rupe</i> , 101 Wn.2d 664, 683 P.2d 571 (1984).....   | 22     |
| <i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....   | 42     |
| <i>State v. Saltarelli</i> , 98 Wn.2d 358, 655 P.2d 697 (1982).....  | 17     |
| <i>State v. Schroeder</i> , 164 Wn.App. 164, 262 P.3d 1237 (Div. 3, 2011).....   | 33     |
| <i>State v. Sexsmith</i> , 138 Wn.App. 497, 157 P.3d 901 (Div. 3, 2007), <i>review</i><br><i>denied</i> , 163 Wn.2d 1014 (2008).....                           | 18     |
| <i>State v. Smith</i> , 106 Wn.2d 772, 725 P.2d 951 (1986).....  | 17     |
| <i>State v. Stephens</i> , 93 Wn.2d 186, 607 P.2d 304 (1980).....  | 13     |

*State v. Thang*, 145 Wn.2d 630, 41 P.3d 1159 (2002).....18

*State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987).....28

*State v. Thomason*, 123 Wn.2d 877, 872 P.2d 1097 (1994).....39

*State v. Tilton*, 149 Wn.2d 775, 72 P.3d 735 (2003).....33

*State v. Tili*, 139 Wn.2d 107, 985 P.2d 365 (1999).....37

*State v. Vance*, 168 Wn.2d 754, 230 P.3d 1055 (2010).....45

*State v. Whelchel*, 115 Wn.2d 708, 801 P.2d 948 (1990).....23

*State v. Yoakum*, 37 Wn.2d 137, 222 P.2d 181 (1950) .....42

**United States Supreme Court**

*Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).....22

*Bullcoming v. New Mexico*, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011)....15

*Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).....13

*Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).....13, 14

*Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).....14

*Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed. 2d 91 (1976).....25

*Griffon v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed. 2d 106 (1965).....22

*Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999).....13

*McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970).....28

|   |                    |
|---|--------------------|
| <i>Melendez-Diaz v. Massachusetts</i> , 557 U.S. 305, 129 S.Ct. 2527 (2009).....            | 14, 15             |
| <i>Rogers v. United States</i> , 422 U.S. 35, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975).....       | 39                 |
| <i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....  | 28, 29, 30, 32, 33 |
| <i>United States v. Jackson</i> , 390 U.S. 570, 88 S.Ct. 1229, 14 L.Ed. 2d 106 (1965) ..... | 22                 |
| <i>Wiggins v. Smith</i> , 539 U.S. 510, 123 S.Ct. 2527. 156 L.Ed. 2d 471 (2003).....        | 37                 |
| <i>Wong Sun v. United States</i> , 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).....    | 19                 |

**Other Jurisdictions**

|  |        |
|--|--------|
| <i>Impson v. State</i> , 721 N.E.2d 1275 (Ind.App.2000).....   | 27     |
| <i>Jackson v. State</i> , 791 So.2d 979 (Ala.Crim.App. 2000). <i>cert. denied</i> , 532 U.S. 934, 121 S.Ct. 1387, 149 L.E.d.2d 311 (2001)..... | 26, 27 |
| <i>Lisle v. State</i> , 113 Nev. 540, 937 P.2d 473(1997).....  | 27     |
| <i>State v. Musser</i> , 721 N.W. 2d 734 (Iowa, 2006) .....  | 26     |
| <i>United States v. Myers</i> , 550 F.2d 1036 (5th Cir.1977).....  | 19     |
| <i>United States v. Robinson</i> , 475 F.2d 376 (D.C.Cir.1973).....  | 19     |

**Constitutional Provisions**

|  |                       |
|--|-----------------------|
| United States Constitution, amend V.....   | 16, 24, 25            |
| United States Constitution, amend VI.....  | 1, 13, 14, 28, 29, 34 |
| United States Constitution, amend XIV..... | 16                    |

|   |    |
|---|----|
| Wash. Const. Article I, Section 3.....  | 16 |
| Wash. Const. Article I, section 9.....  | 25 |
| Wash. Const. Article I, section 22..... | 28 |

Statutes and Court Rules

|                    |               |
|--------------------|---------------|
| CrR 6.12.....      | 7, 35         |
| CrR 6.13.....      | 7, 35         |
| CrR 6.15.....      | 3, 39, 40, 41 |
| ER 404.....        | 9, 17, 18, 20 |
| RAP 2.5.....       | 13            |
| RCW 9A.08.020..... | 42, 43        |
| RCW 9.94A.535..... | 45            |
| RCW 9.94A.585..... | 45            |
| RCW 9.94A.589..... | 44, 45        |

A. ASSIGNMENTS OF ERROR

1. Mr. Walker was denied his Sixth Amendment confrontation rights.
2. Mr. Walker was denied his right to a fair trial.
3. The trial court erred in admitting unfairly prejudicial evidence of the circumstances following Mr. Walker's arrest.
4. The prosecutor committed misconduct.
5. Mr. Walker received ineffective assistance of counsel.
6. The trial court erred when it instructed the jury on accomplice liability.
7. There was insufficient evidence to convict Mr. Walker of Manufacture of a controlled substance.
8. The trial court erred in responding to jury inquiries without first conferring with counsel and Mr. Walker.
9. The trial court erred in imposing an exceptional sentence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did ineffective assistance, prosecutorial misconduct, trial irregularities, admission of inadmissible evidence and improper responses to jury inquiries deprive Mr. Walker of a fair trial? (Assignment of Error 1, 2, 3, 4, 5, 6, 7 & 8).

2. Was it ineffective assistance of counsel for Mr. Walker's trial counsel to fail to subpoena a corrections officer to the hearing on Mr. Walker's motion in limine when he knew this individual was a necessary witness? (Assignment of Error 2 & 5).

3. Was it ineffective assistance of counsel for Mr. Walker's trial counsel to fail to contact or interview at least one witness, Joe Leckenby, when defense counsel knew Mr. Leckenby's statements were the only ones that could potentially link Mr. Walker to the manufacture of a controlled substance? (Assignment of Error 2 & 5).

4. Was it ineffective assistance of counsel when Mr. Walker's trial counsel failed to investigate and pursue a third party perpetrator theory of defense when the evidence supported it and the trial court indicated it was open to such a theory? (Assignment of Error 2 & 5).

5. Was it ineffective assistance of counsel when Mr. Walker's trial counsel failed to object to the admission of laboratory reports when he based his failure to object on the flawed reasoning that such documents were "self-authenticating"? (Assignment of Error 2 & 5).

6. Was it ineffective assistance of counsel for Mr. Walker's trial counsel to fail to object to the testimony of Ms. Wagner-Weidner after the state had dismissed the bail jumping charge when such testimony contained only

prejudicial, irrelevant evidence of Mr. Walker's actions after his arrest?

(Assignment of Error 2, 3 & 5).

7. Was it ineffective assistance of counsel when Mr. Walker's trial counsel failed to object to prejudicial and inflammatory statements made by the prosecuting attorney regarding Mr. Walker's silence and his admonitions to the jury to make the "right decision." (Assignment of Error 2, 4 & 5).

8. Was Mr. Walker's right to confront witnesses violated when the court admitted the laboratory reports? (Assignment of Error 1, 2 & 5).

9. Was it prosecutorial misconduct for the prosecutor to continually infer Mr. Walker was guilty because he exercised his constitutional right to remain silent? (Assignment of Error 2, 4 & 5).

10. Was it prosecutorial misconduct for the prosecutor to tell the jury "you need to get this right, and the right decision, the right verdict, is to find the defendant guilty." (Assignment of Error 2, 4 & 5).

11. Did the trial court abuse its discretion when it instructed the jury on accomplice liability when the evidence was insufficient to prove more than mere presence? (Assignment of Error 2, 6 & 7).

12. Did the trial court violate Mr. Walker's Due Process rights and CrR 6.15 when it responded to an inquiry from the jury on three different occasions without conferring with counsel or Mr. Walker? (Assignment of Error 2 & 8).

13. Was there insufficient evidence to convict Mr. Walker of Manufacture of Methamphetamine when the only evidence adduced at trial, when viewed in the light most favorable to the state, showed mere presence at the scene of the methamphetamine lab discovered inside Mr. Leckenby's bedroom at Mr. Leckenby's residence? (Assignment of Error 2 & 7).

14. Was it abuse of discretion to impose a clearly excessive exceptional sentence when the evidence, viewed in the light most favorable to the state, showed that Mr. Walker was, at most, a minimal participant. (Assignment of Error 9).

C. STATEMENT OF THE CASE

On September 14, 2003 there was a fire at the residence of Joe Leckenby in Kennewick, Washington. 07/31/07 RP 83. The fire emanated from Mr. Leckenby's bedroom. 07/31/07 RP 61, 84, 104, 116. Mr. Leckenby was at the residence when the fire occurred. 07/31/07 RP 59. Mr. Leckenby's niece, Leann Brown, testified that she saw Robert Walker at the residence when the fire occurred as well. 07/31/07 RP 58, 59. Ms. Brown testified that she saw Mr. Walker jump in and out of Mr. Leckenby's bedroom window. 07/31/07 RP 60-62, 68. Ms. Brown then testified that she left to call the fire department, and returned to see a white thunderbird leave, but was unsure of who was in the vehicle. 07/31/07 RP 62-63 73. Ms. Brown also indicated that there was another

individual, a man in a purple shirt that was at the scene of the fire as well. 07/31/07 RP 70. An individual named, Raymond, was also believed to have been present at the scene of the fire. 07/31/07 RP 105. Ms. Brown did not see the individual she believed to be Mr. Walker with anything that “looked as if it was drugs or the production of drugs or anything like that.” 07/31/07 RP 74. Ms. Brown was unsure of whether Mr. Walker remained at Joe Leckenby’s residence while law enforcement came to investigate. 07/31/07 RP 75. Ms. Brown indicated that she spoke with Mr. Leckenby after the fire, but could not recall whether she spoke with him before or after giving her statement to police. 07/31/07 RP 77.

Once police arrived at the scene of the fire, evidence suggesting the possible manufacture of an illegal substance, methamphetamine, was discovered in the Northeast bedroom – Mr. Leckenby’s bedroom. 07/31/07 RP 61, 84. Among the evidence discovered at the location was dry ice, propane, a torch, a water cooler with two pieces of clear plastic tubing with tape, a one-pint glass mason jar with clear tan liquid, a half-inch tube with a granular substance in it, a plastic Dr. Pepper bottle with clear granules and a yellowish liquid, a two-quart glass jar containing rock salt and yellow liquid, small Ziploc baggies with residue, a mirror with residue and two glass smoking pipes. 07/31/07 RP 85-88. The granules, liquid and residue were sent to the Washington State Patrol Crime Lab for testing. 07/31/07 RP 89. The evidence

collected was also processed for fingerprints. 07/31/07 RP 103. No fingerprints or other physical evidence was discovered that tied Mr. Walker to the evidence or the location. 07/31/07 RP 104.

Mr. Walker was charged with manufacture of a controlled substance on June 8, 2004. CP 1-2. Mr. Walker was represented by Christopher Swaby (“Defense Counsel”). 07/31/07 RP 6. The State filed an amended information on August 19, 2005 adding the charge of bail jumping to the underlying charge of manufacture of a controlled substance. CP 3-4. On October 18, 2006 the State moved to consolidate the manufacturing charge with two other cases, one from September 2000, Cause No. 00-1-0103202, and one from April 2001, Cause No. 01-1-00389-9. CP 5-9. This motion to consolidate was denied on November 30, 2006. CP 10. The State Filed a motion to reconsider denial of motion to consolidate on June 13, 2007, this time including a fourth charge of unlawful possession, Cause No. 07-1-00237-9. CP 11-13. This motion to reconsider was denied on June 19, 2007. CP 14.

On the day of trial, July 30, 2007, the State filed a second amended information removing the bail jumping charge and returning to the original charge of manufacture of a controlled substance only. CP 15-16; 07/31/07 RP 6. Defense Counsel filed a Motion in *Limine* on July 30, 2007 alleging violations of WA CrR 3.3 and the reading of Mr. Walker’s legal material by jail

staff. CP 17-20. The State did not file a response brief to Mr. Walker's motion in *limine* until December, 26, 2007. CP 70-72.

Prior to the trial beginning the State indicated that it was planning on offering the Washington State Crime Lab reports, exhibit No. 23. 07/31/07 RP 7; CP 22. The State indicated that the reports were written by a Matt Jorgenson and sought to have them qualified under the "the Criminal Rule having to do with expert reports." 07/31/07 RP 7. The trial court then sought to ascertain whether the process under CrR 6.12<sup>1</sup> had been complied with. 07/31/04 RP 8. No documentation was provided regarding compliance. Defense counsel then indicated that he viewed the crime laboratory reports as "self-authenticating documents." 07/31/07 RP 8. During trial the Crime Laboratory Report was admitted, as Plaintiff's Exhibit No. 23 and defense counsel again stated that he did would not object on the basis that this report was "self authenticating". 07/31/07 RP 89-91.

Defense counsel then addressed the issue of jail staff reading with Mr. Walker's legal material, an issue identified in the Motion in *Limine* as a violation of Due Process. 07/31/07 RP 10. CP 17-20. Defense counsel indicated that he needed to make a record and he would need to call the Corrections Officer, Williams, to testify. 07/31/07 RP 18. The court indicated that defense

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<sup>1</sup> CrR 6.12 does not address expert reports. It is possible that the trial court and counsel were referring to CrR 6.13 although this rule is never referred to on the record or on any documents provided to the court.

counsel could call Officer Williams to make such a record but defense counsel had “not anticipated that the court would allow that.” 07/31/07 RP 19. Defense counsel then indicated that he would go to the jail to see if Officer Williams was available to testify. 07/31/07 RP 19. The trial court indicated that hearing from Officer Williams was particularly important in the current case. 07/31/07 RP 20-21. The trial court requested that defense counsel speak with Officer Williams and “advise us in the morning [if] you want to call him for an in-camera hearing or an evidentiary hearing.” 07/31/07 RP 21. Defense counsel returned the following morning and advised the court that he was not aware of the process through which a corrections officer must be subpoenaed for a hearing. 07/31/07 RP 35. Defense counsel then attempted to clarify another pre-trial issue but then simply asked Mr. Walker to address the court. 07/31/07 RP 37. The trial court then informed defense counsel that this was inappropriate, as he (defense counsel) was representing Mr. Walker. 07/31/07 RP 37.

Detective J.B. Moss testified regarding the source and cause of the fire in relation to the manufacture of methamphetamine. 07/31/07 RP 98-99. Defense counsel did not object to Detective Moss’s speculative testimony or the lack of a foundation for Detective Moss’s qualification to give testimony as an expert in these matters. Detective Moss testified that he did not witness Mr. Walker at the scene, that there were no fingerprints linking him to the home, and that Mr. Leckenby was the suspect on the top of the police reports.

07/31/07 RP 104-105. Detective Moss also testified that there may have been another individual, Raymond, at the scene. 07/31/07 RP 105. This line of testimony resulted in an objection by the State and a side-bar conference extensively discussing the possibility of a third-party perpetrator. 07/31/07 RP 105-109. The trial court informed defense counsel “I do not know that that is an inappropriate area. I think if you have evidence that you can – evidence that makes it prima facie case for the involvement of a third party, you can explore that.” 07/31/07 RP 107-108. The trial court clarified that there is a threshold that would need to be met first and he was unclear as to whether Mr. Leckenby provided that or not. 07/31/07 RP 108. There was somewhat extensive discussion on Mr. Leckenby’s statements and whether Mr. Leckenby was unavailable to testify. 07/31/07 RP 109. The State indicated that Mr. Leckenby’s probation had been transferred to Oregon and some effort had been to try and locate him. 07/31/07 RP 109. There is no indication that defense counsel had made any attempts to contact or interview Mr. Leckenby.

The State called a Sarah Wagner-Weidner, a deputy clerk with the Benton County Superior Court Clerk’s Office. 07/31/07 RP 118. The only testimony elicited from Ms. Wagner-Weidner had to do with Mr. Walker’s court dates and those days which he had failed to appear. 07/31/07 RP 118-127. Defense counsel did not object to this testimony and the court did not make a ruling regarding ER 404(b) or evidence of flight.

At end of both the State and the Defense's case in chief, defense counsel objected to the admission of the accomplice liability instruction. 07/31/07 RP 138. The trial court noted the objection and ruled that the accomplice liability instruction would be given to the jury. 07/31/07 RP 139.

During the State's closing argument the prosecutor made the following statements:

Now, I'm not here telling you the only person involved in this is the defendant. I do not know, but I know that he – I think the evidence shows that he is involved without any question.  
07/31/07 RP 151.

Now, what's really important is that actions speak louder than anything that I could say or anybody else could say, and the actions here of the defendant speak volumes. Did he stay at the scene? Do he, you know, wait until the police arrive? Fire investigators arrive? Firemen arrive? Does he wait for any authority? No he takes off.  
07/31/07 RP 153.

And not only does he take off then, but he takes off after he's been charged. Let me put this to you. Let me suggest what would you have thought if you were called in to jury duty yesterday, Monday, and then the clerk walks up to you and says, 'You can all go home. The defendant didn't come to court. Thank you very much for coming, but we don't have a defendant here.' What would you have thought? Well, I would suggest that the obvious thing to think is this guy doesn't want to come to court, and the reason he doesn't want to come to court, he doesn't want people to sit in judgment of him, and the reason is because he's guilty.  
07/31/07 RP 153.

The presumption is innocence. I would be suggesting to any of you, 'Bring it on. Let me hear what evidence the State prosecutor has against me. Bring it out in court...but no, the

defendant flees the scene at the time, and then he doesn't want people like you, a jury, to consider whether or not he's guilty or not guilty. The reason he doesn't is that he knows – I know he knows what the outcome should be.

07/31/07 RP 153-154.

The defendant made his own decision. The defendant made the decision to go in there, bring the meth lab, have the meth lab, to flee, to do whatever he did to get the fire going and attempt to make methamphetamine.

07/31/07 RP 155.

I'm just asking you to hold him accountable for his own actions and his own decisions. Ladies and gentlemen, this is not a close case. We've got him as close to in the act as we possibly can. He is guilty, and I'm gonna ask that you find him guilty.

07/31/07 RP 155-156.

Lawyers talk about a concept called omissions by conduct. It has to do with when a person might be silent when you'd expect them to speak or does some act that would indicate what – well, would indicate that they're guilty of something. In this case, the defendant by his conduct has admitted to you that he knew what was going on, and he was involved in it.

07/31/04 RP 162. "Why did he flee the scene if he's innocent? Why didn't he come to the court for trial when we had a jury here if he's innocent?" 07/31/07 RP 162.

He was the one that fled. Ladies and gentlemen, I'm asking you to hold this person accountable for what he did. You need to get this right, and the right decision, the right verdict, is to find the defendant guilty.

07/31/07 RP 163.

The jury sent an inquiry on July 31, 2007 at 4:04 pm and the court responded on July 31, 2007 at 4:07 pm. CP 54. The jury sent another inquiry on August 1, 2007 at 9:04 am and the court responded on August 1, 2007 at 9:20

am. CP 55. The jury again sent an inquiry on August 1, 2007 at 9:35 am that the court responded to on August 1, 2007 at 9:35 am. CP 56. Mr. Walker was convicted of manufacture of a controlled substance on August 1, 2007 at 11:18 am. CP 98.

The State filed the sentencing memorandum on September 12, 2007, CP 58-64, and a supplemental sentencing memorandum on September 20, 2007. CP 65-67. Mr. Walker filed a motion to consolidate Cause No. 00-1-01032-2 and Cause No. 07-1-00237-9 with the manufacturing charge for sentencing purposes. CP 68. On December 18, 2007 Mr. Walker filed a motion for Habeas Corpus and dismissal of his manufacturing conviction based on ineffective assistance of counsel and other due process violations. CP 69. The court dismissed manufacture charge on July 9, 2008 - after trial had already been held- on the basis of violations of CrR 3.3. The order of dismissal was appealed and this Court reversed the order of dismissal and remanded this case for sentencing. CP 74-82. Mr. Walker was represented by Norma Rodriguez at sentencing. Mr. Walker was sentenced to 100 months on January 17, 2012. CP 83-90. Mr. Walker was given an exceptional sentence by the Honorable Bruce Spanner when he ordered the current cause number to run consecutive with Benton County Cause numbers 07-1-00237-9 and 00-1-01032-3. C.P. 83-92.

Mr. Walker now appeals his underlying conviction and his exceptional sentence.

F. ARGUMENT

1. ***The Trial Court’s admission of Plaintiff’s exhibit No. 23 violated Mr. Walker’s sixth amendment right o confront witnesses.***

An accused in guaranteed the right to be “confronted with the witnesses against him.” U.S. Const. Amend. VI. Alleged violations of a defendant’s right to confront witnesses are reviewed de novo. *State v. Jasper*, ---Wn.2d---, 271 P.3d 876, 883 (2012); *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999). Error in admitting evidence in violation of the confrontation cause is reviewed under the harmless error analysis. *Jasper*, 271 P.3d at 883, *citing*, *Chapman v. California*, 386 U.S. 18, 21–22, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Under the harmless error standard, the State bears the burden to show “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Jasper*, 271 P.3d at 887, *quoting*, *Chapman*, 386 U.S. at 24. *See also*, *State v. Stephens*, 93 wn.2d 186, 190-91, 607 P.2d 304 (1980). Denial of the right of confrontation is a manifest constitutional error that may be raised for the first time on appeal. *State v. Clark*, 139 Wn.2d 152, 156, 985 P.2d 377 (1999), *citing*, RAP 2.5.

The Confrontation Clause applies to “witnesses against the accused – in other words, those who bear testimony.” *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The Confrontation Clause also “bars admission of testimonial statements of a witness who did not appear at

trial unless [the declarant] was unavailable to testify, and the defendant had had prior opportunity for cross examination.” *Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), quoting, *Crawford*, 541 U.S. at 53-53.

The United States Supreme Court has made it clear that admission of laboratory reports, such as those admitted into evidence in the case at hand, violate a defendant’s right to confront the witnesses against him. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 2532 (2009). In *Melendez-Diaz* the defendant was charged with distributing and trafficking cocaine. *Id.* At 2530. At trial the court admitted three “certificates of analysis” stating that the results of forensic testing performed on the substances seized from Mr. Melendez-Dias were cocaine. *Id.* at 2531. The analyst who performed these forensic tests did not testify. *Id.* The Supreme Court held that a laboratory technician’s certification prepared in connection with a criminal prosecution was “testimonial” and that the analysts were “witnesses” for the purposes of the Sixth Amendment under the test first set forth in *Crawford* in 2004. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 2532 (2009). The Supreme Court made it clear that the analysts who write reports introduced as evidence must be made available for confrontation even if they have “the scientific acumen of Mme. Curie and the veracity of Mother Teresa.” *Id.* at 2714-2715. The United States Supreme Court recently reaffirmed its decision in

*Melendez-Diaz* in *Bullcoming v. New Mexico*, holding that, “the accused's right is to be confronted with the analyst who made the certification,” not a substitute analyst who was familiar with the procedures used in testing. *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2710. 180 L.Ed.2d 610 (2011).

In the instant case, the state moved to introduce the Washington State Crime Laboratory reports, which found that the substance/liquids tested contained methamphetamine. 07/31/07 RP 7, 152; CP 22. The state relied on this evidence in its opening and closing arguments. 07/31/07 RP 152. In fact, in its opening argument after discussing the laboratory reports and the role they will play, the prosecutor stated “[i]f there’s any question about it, really the key, the kicker is on this HCL generator. There was meth residue in that plastic tube going from muriatic acid into mason jars or whatever, the source of the methamphetamine.” 07/31/07 RP 52. Defense counsel did not object to the admission of this evidence, on the basis that it was “self-authenticating” on more than one occasion<sup>2</sup>. 07/31/07 RP 8, 89-90. The crime laboratory report admitted here as Plaintiff’s Exhibit No. 23 is almost identical to the “certificates of analysis” in *Melendez-Diaz*. There is no indication that the individual who analyzed the substance was unavailable to testify at trial, or that Mr. Walker had a prior opportunity to cross-examine this individual. Mr. Walker was entitled to confront the analyst at trial. *See Melendez-Diaz*, 129 S.Ct. at 2532.

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<sup>2</sup> Defense counsel’s failure to object was also ineffective, as discussed, *infra*.

The admission of the laboratory report in this case was not harmless. There is a reasonable possibility that the use of this report was necessary for the jury to find Mr. Walker guilty of manufacturing of methamphetamine as the report was the only evidence that the liquids and substances found in Mr. Leckenby's residence contained methamphetamine. See, *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (A conviction should be reversed "where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict."). Mr. Walker's conviction for manufacturing a controlled substance – methamphetamine- should be reversed.

***2. The Trial Court violated Mr. Walker's Due Process right to a fair trial by admitting unfairly prejudicial evidence of the circumstances following his arrest***

Both the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, section 3 of the Washington State Constitution guarantee criminal defendants the right to a fair trial. Criminal defendants are "entitled to a trial free from prejudicial error". *State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). It is fundamental that a criminal defendant should be tried based on evidence relevant to the crime charged, and not convicted simply because the jury believes he is a bad person. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

It is because of this principle of fundamental fairness that ER 404(b) forbids evidence of prior acts establishing only a defendant's propensity to commit a crime. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). While ER 404(b) may allow for the introduction of evidence of other acts in certain circumstances<sup>3</sup>, such evidence is admissible only if the trial court finds the substantial probative value of the evidence outweighs its prejudicial effect. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Prior to admission of evidence under ER 404(b), the trial court must engage in a three-part analysis. First, the court must identify the purpose for which the evidence was admitted. Second, the court must determine that the proposed evidence is logically related to an issue, of consequence to the outcome of the action, and that the evidence tends to make the existence of an identified fact more or less probable. Third, the court must determine whether its probative value outweighs any potential prejudice to the defendant. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986), quoting, *State v. Saltarelli*, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982)). The trial court "must always begin with the presumption that evidence of prior bad acts is inadmissible." *DeVincentis*, 150 Wn.2d at 17. In a doubtful case, the scale tips in favor of the defendant and the exclusion of the evidence. *State v. Myers*, 49 Wn.App. 243, 247, 742 P.2d 180

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<sup>3</sup> ER 404(b) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

(1987). To justify admission of the evidence, the trial court must conduct this balancing on the record. *State v. Jackson*, 102 Wn.2d 689, 693, 689 P.2d 76 (1984). This cautious approach recognizes the “inherent prejudice” of evidence of other bad acts. *State v. Sexsmith*, 138 Wn.App. 497, 505-506, 157 P.3d 901 (2007), *review denied*, 163 Wn.2d 1014 (2008).

The trial court’s decision to admit evidence under ER 404(b) is reviewed for abuse of discretion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). The “abuse of discretion standard is not, of course, unbridled discretion.” *In re Parentage of Jannot*, 110 Wn.App. 16, 19, 37 P.3d 1265 (2002), *affirmed*, 149 Wn.2d 123, 65 P.3d 664 (2003). A court abuses its discretion if its decision is contrary to relevant law, based on untenable grounds, or supported by untenable reasons. *Thang*, 145 Wn.2d at 642; *Jannot*, 110 Wn.App at 22.

Evidence of flight is admissible only if it “creates a reasonable and substantive inference that defendant’s departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.” *State v. Nichols*, 5 Wn.App. 657, 660, 491 P.2d 677 (1971). However, “[w]hen evidence of flight is admissible, it tends to be only marginally probative as to the ultimate issue of guilt or innocence.” *State v. Freeburg*, 105 Wn.App. 492, 498, 20 P.3d 984 (Div. 1, 2001), citing, *State v. Jefferson*, 11 Wn.App. 566, 571, 524 P.2d 248 (1974) ,

quoting *U.S. v. Robinson*, 475 F.2d 376, 384 (D.C.Cir.1973)); *Wong Sun v. United States*, 371 U.S. 471, 483 n. 10, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) (“we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime”).

It is precisely because of this that “while the range of circumstances that may be shown as evidence of flight is broad, the circumstance or inference of consciousness of guilt must be substantial and real, not speculative, conjectural, or fanciful.” *Freeburg*, 105 Wn.App at 498, citing, *State v. Bruton*, 66 Wn.2d 111, 112–113, 401 P.2d 340 (1965). A helpful analytical approach has been set forth in Division one:

[T]he probative value of evidence of flight as circumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

*Freeburg*, 105 Wn.App at 498, citing, *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir.1977).

In the instant case, the State had originally charged Mr. Walker with bail jumping, but then amended the information to remove this charge and proceeded to trial solely on the underlying offense of manufacture of a controlled substance. CP 15-16; 07/31/07 RP 6. Therefore, any evidence relating to missed court appearances or dates was no longer necessary to a

finding of guilt and the entire line of testimony directed to and elicited from Ms. Wagner-Weidener should have been prohibited, subject to a 404(b) or flight analysis; which the trial court never performed. Defense counsel did not object to Ms. Wagner-Weidner's testimony<sup>4</sup> and the record is devoid of any discussion relating to why her testimony was permitted or even relevant after the bail jumping charge was dismissed, even though a balancing analysis must be conducted on the record prior to admission of such evidence. *State v. Jackson*, 102 Wn.2d at 693.

In this case the court abused its discretion in admitting the testimony of Ms. Wagner-Weidner. It is difficult to infer from the record whether the decision to allow such testimony was based on untenable grounds or contrary to relevant law when the court failed to perform any sort of analysis or make any findings regarding the prejudicial testimony. The prejudicial nature of this testimony is apparent throughout the remainder of the trial, as the state refers to Mr. Walker's missed court appearances, and his constitutionally protected silence, as evidence of guilt on numerous occasions. 07/31/07 RP 153, 154, 162. What is not difficult to infer from the record is that the admission of this evidence was not harmless as it is highly probable that the evidence affected the jury's verdict. *State v. Brockob*, 159 Wn.2d 311, 351, 150 P.3d 59 (2006). The State's case against Mr. Walker was far from overwhelming. The evidence

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<sup>4</sup> Defense counsel's failure to object was also ineffective, as discussed, *infra*.

presented, at most, proved Mr. Walker's mere presence at Joe Leckenby's residence on the date of the fire. The jury sent three notes indicating that they wanted additional information, to review critical witness statements, and even that they had reached an impasse. CP 54, 55 & 56. The state used Ms. Wagner-Weidner's testimony to infer guilt from Mr. Walker's missed court appearances. 07/31/07 RP 153, 154, 162.

It is clear that the testimony elicited from Ms. Wagner-Weidner impermissibly shifted the jury's attention to the defendant's criminal propensity, the "forbidden inference." *State v. Bowen*, 48 Wn.App. 187, 196, 738 P.2d 316 (1987), *overruled on other grounds*; See also, *State v. Freeburg*, 105 Wn.App. at 502. Given the powerful nature of this evidence, its lack of relevance, and the weakness of the State's case, the court's error cannot be considered harmless. Admission of Ms. Wagner-Weidner's testimony deprived Mr. Walker of a fair trial and his conviction should be reversed.

**3. *The State engaged in prosecutorial misconduct in its closing argument***

Prosecutors are quasi-judicial officers and therefore have the duty to seek verdicts free from prejudice and based on reason. *State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (Div. 1, 1993), *citing*, *State v. Kroll*, 87 Wash.2d 829, 835, 558 P.2d 173 (1976). This is consistent with the

prosecutor's obligation to ensure that the accused receives a fair and impartial trial. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); *State v. Charlton*, 90 Wn.2d 657, 665, 585 P.2d 142 (1978).

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

*Berger v. United States*, 295 U.S. at 88. It is grave misconduct for the prosecutor to argue that the jury should draw a negative inference from a defendant's exercise of a constitutional right. *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 571 (1984), citing, *Griffon v. California*, 380 U.S. 609, 614, 85 S.Ct. 1229, 14 L.Ed. 2d 106 (1965). Such argument amounts to a violation of the right in question and also violates due process itself because it "chills" the exercise of a right. *See, State v. Belgard*, 110 Wn.2d 504, 512, 755 P.2d 174 (1988); *United States v. Jackson*, 390 U.S. 570, 581, 88 S.Ct. 1229, 14 L.Ed. 2d 106 (1965).

Prosecutorial misconduct requires reversal even where there was no defense objection if the prosecutor's remarks were so flagrant and ill-

intentioned that they produced an enduring prejudice which could not have been neutralized by a curative instruction to the jury.<sup>5</sup> *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Prosecutorial misconduct that also affects a separate constitutional right is subject to analysis under the stricter standard of constitutional harmless error. *State v. French*, 101 Wn.App. 380, 386, 4 P.3d 857 (2000); *see also State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Under a harmless error analysis, “[t]he State bears the burden of showing a constitutional error was harmless.” *Easter*, 130 Wn.2d at 242. A constitutional error harmless only if convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error, *State v. Aumick*, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995), and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Welchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990). “Where the error was not harmless, the defendant must have a new trial.” *Easter*, 130 Wn.2d at 242.

a. *Inviting the Jury to find guilt based on silence*

On multiple occasions during both opening and closing argument the prosecutor commented on Mr. Walker’s silence:

Now, what’s really important is that actions speak louder than anything that I could say or anybody else could say, and the

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<sup>5</sup> Defense counsel’s failure to object was also ineffective, as discussed, *infra*.

actions here of the defendant speak volumes. Did he stay at the scene? Do he, you know, wait until the police arrive? Fire investigators arrive? Firemen arrive? Does he wait for any authority? No he takes off.

07/31/07 RP 153.

Let me put this to you. Let me suggest what would you have thought if you were called in to jury duty yesterday, Monday, and then the clerk walks up to you and says, 'You can all go home. The defendant didn't come to court. Thank you very much for coming, but we don't have a defendant here.' What would you have thought? Well, I would suggest that the obvious thing to think is this guy doesn't want to come to court, and the reason he doesn't want to come to court, he doesn't want people to sit in judgment of him, and the reason is because he's guilty.

07/31/07 RP 153.

The presumption is innocence. I would be suggesting to any of you, 'Bring it on. Let me hear what evidence the State prosecutor has against me. Bring it out in court....but no, the defendant flees the scene at the time, and then he doesn't want people like you, a jury, to consider whether or not he's guilty or not guilty. The reason he doesn't is that he knows – I know he knows what the outcome should be.

07/31/07 RP 153-154.

*Lawyers talk about a concept called omissions by conduct. It has to do with when a person might be silent when you'd expect them to speak or does some act that would indicate what – well, would indicate that they're guilty of something. In this case, the defendant by his conduct has admitted to you that he knew what was going on, and he was involved in it.*

07/31/04 RP 162 (emphasis added). "Why did he flee the scene if he's

innocent? Why didn't he come to the court for trial when we had a jury here if

he's innocent?" 07/31/07 RP 162.

Both the state and federal constitutions guarantee the accused to be free from self-incrimination and to remain silent. U.S. Const. Amend

V. Washington Const. Article I section 9; *see also*, *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991) (A defendant has a constitutional right to remain silent in the face of accusation). It is clear that it is completely improper, impermissible, and misconduct for the government to even suggest that a negative inference be drawn from a defendant's exercise of the right to remain silent. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1991). Indeed, it is not simply a violation of the right against self-incrimination; it is a violation of the right to due process. *State v. Romero*, 113 Wn.App. 779, 786, 54 P.3d 1255 (2002); *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed. 2d 91 (1976).

The clear implication of the prosecutor's statements was that Mr. Walker should be found guilty because he did not stick around to tell police he was innocent. Characterizing a defendant's silence as somehow being "evasive and evidence of his guilt" amounts to improper use of that silence as "substantive evidence of guilt." *Easter*, 130 Wn.2d at 235. The *Easter* court then went on to hold: "[w]hen the State may later comment an accused did not speak up prior to an arrest, the accused effectively has lost the right to silence." *Id* at 238-239. In *Keene*, Division II held, even a single comment telling the jury it should consider whether someone who does not return police phone

calls after having been told that failure to do so would result in potential prosecution constitutes an impermissible comment on the right to pre-arrest silence. *State v. Keene*, 86 Wn.App. 589, 938 P.2d 839 (Div. 2, 1997). The court in *Keene* reasoned that by simply asking the jury to consider whether the actions of the defendant were the actions of an innocent man suggested that the failure to contact police and give them a statement was “an admission of guilt.” *Id* at 594.

b. *The “right verdict”*

The prosecutor improperly told the jury “[y]ou need to get this right, and the right decision, the right verdict, is to find the defendant guilty.” 07/31/07 RP 163. A prosecutor improperly broadens the jury’s duty when it asks the jury “to do the right thing” and return a guilty verdict. *State v. Musser*, 721 N.W. 2d 734, 756 (Iowa, 2006). The issue in any criminal case is ultimately one of guilt or innocence as shown by the evidence. Consequently, an exhortation to the jury to make “the right decision” or “to do the right thing” has been held error where it implies, in order to do so, the jury can only reach a certain verdict, regardless of its duty to weigh the evidence and follow the court’s instructions on the law. *Jackson v. State*, 791 So.2d 979, 1029 (Ala.Crim.App. 2000). *cert. denied*, 532 U.S. 934, 121 S.Ct. 1387, 149

L.E.d.2d 311 (2001.); *Impson v. State*, 721 N.E.2d 1275, 1283  
(Ind.App.2000); *Lisle v. State*, 113 Nev. 540 937 P.2d 473, 482 (1997).

c. *Personal opinion of the prosecuting attorney*

The prosecutor made at least two statements regarding his  
personal opinion regarding the defendant's guilt:

Now, I'm not here telling you the only person involved in this is  
the defendant. I do not know, but I *know that he* – I think the  
evidence shows that he is involved without any question.  
07/31/07 RP 151 (emphasis added).

Bring it out in court....but no, the defendant flees the scene at  
the time, and then he doesn't want people like you, a jury, to  
consider whether or not he's guilty or not guilty. *The reason he  
doesn't is that he knows – I know he knows what the outcome  
should be.*  
07/31/07 RP 153-154 (emphasis added).

In this case, the prosecutor's multiple statements violated Mr  
Walker's right to remain silent, against self-incrimination, and to due  
process. The statements were were so flagrant and ill-intentioned that  
they produced an enduring prejudice which could not have been  
neutralized by a curative instruction to the jury. *Belgarde*, 110 Wn.2d  
at507. Furthermore, because they entailed Mr. Walker's Constitutional  
rights they should be subject to a harmless error analysis. *French*, 101  
Wn.App. 386. In this case, the misconduct itself is an indication of just  
how close of a case this was:

Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.

*State v. Flemming*, 83 Wn.App. 209, 215, 921 P.2d 1076 (Div. 1, 1996).

It is precisely for this reason that the misconduct by the prosecutor in this case requires reversal.

4. ***The defendant received constitutionally ineffective assistance of counsel***

Ineffective assistance of counsel claims are reviewed de novo. *State v. Larson*, 160 Wn.App. 577, 589, 249 P.3d 669 (Div. 3, 2011). A defendant in a criminal proceeding is guaranteed the right to counsel by both the Washington Constitution and the United States Constitution. U.S. Const. Amend. VI; Washington Const. art. I § 22. The United States Supreme Court has long recognized that “the right to counsel is the right to the effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), quoting, *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14, 25 L.Ed.2d 763 (1970). The Washington Supreme Court has consistently held that “[t]he purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial.” *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987).

In determining whether counsel fell below the assistance Constitutionally required, Washington courts apply the two-pronged analysis

outlined in *Strickland*:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant a fair trial, a trial whose results is reliable.

*Strickland*, 466 U.S. at 687.

To meet this standard a defendant must show that his trial counsel was "not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Matter of Pirtle*, 136 Wash.2d 467, 487, 965 P.2d 593 (1998), quoting, *Strickland*, 466 U.S. at 689. The first prong is satisfied by showing "that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstance. *Strickland*, 466 U.S. at 688.

The second prong is satisfied when the defendant can show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. However, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466

U.S. at 693.

While it may be true that “[g]enerally the decision whether to call a particular witness is a matter for differences of opinion and therefore presumed to be a matter of legitimate trial tactics.” *In Re Davis*, 152 Wn.2d 647, 742, 101 P.3d 1 (2004). The Washington Supreme Court has held that:

This presumption of counsel's competence can be overcome, however, by showing counsel failed to conduct appropriate investigations to determine what defenses were available, adequately prepare for trial, or subpoena necessary witnesses.

*In Re Davis*, 152 Wn.2d at 742.

*a. Trial counsel was ineffective for failing to subpoena necessary witnesses to the hearing on the defendant's motion in limine.*

A showing that defense counsels failed to subpoena necessary witnesses can overcome the presumption of counsel's competence. *In Re Davis*, 152 Wn.2d at 742. Defense counsel made a motion in *limine* arguing that the cause should be dismissed because a corrections officer went through Mr. Walker's legal material and mail without Mr. Walker's presence. 07/31/07 RP 11-12. Defense counsel recognized that that the appellate court might eventually question why he had failed to call necessary witnesses to hold an evidentiary hearing at some point in time. 07/31/07 RP 12, 17-18. The trial court recognized the importance of testimony regarding this matter and noted that the jail corrections officer Williams had never testified and that in order to make a

complete record William's would need to testify. 07/31/07 RP 18-19. The trial court also indicated that William's testimony was of particular importance in the instant case. 07/31/07 RP 20-21. Defense counsel was unprepared when the court granted his request to have William's testify. 07/31/07 RP 19. The trial court allowed defense counsel time to go speak with William's and call him for a hearing. 07/31/07 RP 21. Defense counsel returned the following morning and advised the trial court that "it appears that there's a process through which a corrections officer would have to be subpoenaed for a hearing" and that the corrections officer would not be available testify on that day 07/31/07 RP 35. The record does not reflect that defense counsel ever actually complied with the trial court's request to subpoena officer Williams. It is unclear what effect this would have had on the result of the motion to dismiss because there is no indication of what William's would have testified to but it is precisely because of this complete lack of investigation and preparation that defense counsel was ineffective.

*b. Trial counsel was ineffective for failure to adequately investigate and prepare for trial.*

Generally, an attorney's decision to call a witness to testify is a "matter of legitimate trial tactics," which "will not support a claim of ineffective assistance of counsel." *State v. Byrd*, 30 Wn.App. 794, 799, 638 P.2d 601 (1981). An appellant can overcome this presumption by showing that his or her

counsel failed to adequately investigate or prepare for trial. *Id.* Counsel has a duty to conduct a reasonable investigation. *Strickland*, 466 U.S. at 691. A decision not to investigate must be directly assessed for reasonableness, with again great deference given to counsel's judgments. *Id.* To provide constitutionally adequate assistance, counsel must, at a minimum, conduct a reasonable investigation so that counsel can make informed decisions about how best to represent the client. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

It is apparent that defense counsel did not interview Mr. Leckenby, because all of his knowledge of Mr. Leckenby is based on the various interviews contained in police reports. 07/31/07 RP 108-109. His failure to do so constituted ineffective assistance because he himself stated: “[i]t is Mr. Leckenby who gives up a great deal of information that suggests to the State that Mr. Walker is involved...I think it is only Mr. Leckenby whose testimony would say that Mr. Walker was involved.” 07/31/07 RP 106. Failure to interview and investigate the statements of a key witness in this case had a prejudicial effect on Mr. Walker’s case and affected defense counsel’s ability to make a reasonable and informed tactical decision regarding whether to call Mr. Leckenby as a witness.

*c. Trial counsel was ineffective for failing to pursue a third party perpetrator theory.*

Although “exceptional deference must be given when evaluating trial counsel's strategic decisions” it is important to note that “deliberate tactical choices may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance” *In Re Davis*, 152 Wn.2d at 714. The Washington Supreme Court has held that “[f]ailure of defense counsel to present a diminished capacity defense where the facts support such a defense has been held to satisfy both prongs of the *Strickland* test.” *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003). For Mr. Walker to prevail on this issue, he must rebut the presumption that counsel's failure to raise this defense “can be characterized as *legitimate* trial strategy or tactics.” *In Re Davis*, 152 Wn.2d at 714. However, “[d]etermining that a decision was strategic or tactical does not mean that counsel’s action necessarily satisfied Strickland’s reasonableness standard.” *State v. Schroeder*, 164 Wn.App. 164, FN1, 262 P.3d 1237 (2011), *citing*, *State v. Grier*, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011).

To raise the third party perpetrator theory the defense must establish “a train of facts or circumstances as tend clearly to point out some one besides the prisoner as the guilty party.” *State v. Hilton*, 164 Wn.App. 81, 99, 261 P.3d, 683 (Div. 3, 2011), *citing*, *State v. Downs*, 168 Wn. 664, 667, 13 P.2d 1 (1932); *State v. Rehak*, 67 Wn.App. 157, 162, 834 P.2d 651 (1992), *cert. denied*, 508 U.S. 953, 113 S.Ct. 2449, 124 L.Ed.2d 665 (1993).

Defense counsel began asking questions about third parties at the scene of the crime which resulted in an objection by the state and a lengthy sidebar conference. 07/31/07 RP 105. The trial court made a comment suggesting the applicability of a third party perpetrator defense and an openness to allowing evidence regarding such a defense. 07/31/07 RP 107-108. The court indicated that testimony from Mr. Leckenby may be sufficient to provide this threshold evidence and began questioning whether Mr. Leckenby was available as a witness. 07/31/07 RP 108-109. It becomes clear that defense counsel did not interview Mr. Leckenby because all of his knowledge of Mr. Leckenby is based on the various interviews contained in police reports. 07/31/07 RP 108-109. Defense counsel should have pursued a third party perpetrator defense and likely would have succeeded presenting a prima facie case if he had done adequate investigation. *See discussion infra.*

*d. Trial counsel was ineffective for failing to object to the admission of laboratory reports.*

As outlined and stated above, the trial court's admission of the crime laboratory report, absent testimony at trial by the individual who analyzed the substance, violated Mr. Walker's Sixth Amendment right to confront witnesses. There was no tactical reason for defense counsel's failure to object to the admission of this document. The evidence contained in this laboratory report was crucial to the State's case, as it was the only evidence that the various

granules and liquids found at Mr. Leckenby's residence contained methamphetamine. There is a reasonable probability that without this evidence, Mr Walker would have been acquitted of manufacture of methamphetamine. *See State v. Hendrickson*, 138 Wn.App. 827, 831-33, 158 P.3d 1257 (2007) (defense counsel's failure to object to evidence crucial to the state's case which violated the defendant's rights under the confrontation clause constituted ineffective assistance of counsel.).

A decision made by defense counsel which could be characterized as "tactical" cannot be reasonable when it is made on the basis of unsound legal reasoning. Defense counsel did not object, but stated that the reason for doing so was on the basis that the laboratory reports were "self-authenticating" documents. 07/31/07 RP 8, 89-91. He did not agree that the procedures outlined in CrR 6.13<sup>6</sup> were complied with and nowhere in CrR 6.13 are reports, such as those admitted here, referred to as "self-authenticating." Therefore, defense counsel was ineffective in not objecting to the trial court's admission of the crime laboratory report and Mr. Walker's conviction for manufacture of methamphetamine should be reversed and remanded for a new trial.

*e. Trial counsel was ineffective for failing to object to testimony of Ms. Wagner-Weidner and Detective Moss.*

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<sup>6</sup> Again, the only mention of the rule number given on the record is "6.12" which does not address laboratory reports. 07/31/07 RP 8. It is assumed for purposes of this argument, that this rule number was misstated and the reference was intended to be CrR 6.13.

To establish ineffective assistance of counsel for failure to object to the admission of evidence, Whittier must show that (1) the failure to object fell below prevailing professional standards; (2) the objection would have likely been sustained by the trial court; and (3) the result of the trial would have likely been different if the disputed evidence had been excluded. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

As outlined above, the testimony of Ms. Wagner-Weidner violated Mr. Walker's Due Process right to a fair trial. Defense counsel's failure to object may have resulted in a waiver of the admissibility of this testimony, and, at the very least, resulted in a limited record on appeal regarding whether such an objection would likely have been sustained. There is no question that failure to object fell below prevailing professional standards. Absolutely nothing beneficial to the defendant was obtained from Ms. Wagner-Weidner's testimony and there is no tactical reason whatsoever to allow such evidence in without objection.

Detective Moss testified regarding the source and cause of the fire in relation to the manufacture of methamphetamine. 07/31/07 RP 98-99. Defense counsel did not object to Detective Moss's speculative testimony or the lack of a foundation for Detective Moss's qualification to give testimony as an expert in these matters. An objection to his testimony is likely to have been sustained as he admitted during direct examination that he had no chemistry background,

and that there were many speculative reasons for why and how the fire could have started. 07/31/07 RP 80, 98.

*f. Trial counsel was ineffective for failing to object to prosecutor's prejudicial and inflammatory statements during closing argument.*

While, in general, the decision of whether to object or request instruction is considered "trial tactics," tactical or strategic decisions by defense counsel must still be reasonable decisions. *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed. 2d 471 (2003). Under the analysis outlined above the failure to object was unreasonable as there is no tactical reason not to object to such overtly prejudicial and inflammatory comments. Additionally, it is very likely that an objection to any one of these comments would have been sustained. For all the reasons previously outlined, there is no doubt the statements affected the outcome of the trial.

**5. *The Trial Court erred when it instructed the jury on accomplice liability.***

On appeal, the decision whether to give a particular jury instruction is reviewed for an abuse of discretion. *State v. Chase*, 134 Wn.App. 792, 803, 142 P.3d 630 (2006), *review denied*, 160 Wn.2d 1022 (2007). Jury instructions are sufficient when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case. *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). "It is error

for a trial court to give an instruction which is not supported by the evidence.” *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). *See also, State v. Munden*, 81 Wn.App.192, 195, 913 P.2d 421 (1996); *State v. Benn*, 120 Wn.2d 631, 654, 845, 845 P.2d 289 (1993). The appellate court views the supporting evidence in the light most favorable to the party that requested the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

The concern set forth by defense counsel when he objected to the admission of the accomplice liability instruction was that jurors would be invited to consider a theory of accomplice liability that was inadequately supported by the evidence. 07/31/07 RP 138. In the instant case there was insufficient proof to suggest that Mr. Walker was an accomplice. As defense counsel noted: “what you have in essence is mere presence, and that isn’t sufficient...Mere presence isn’t enough to support guilt...” 07/31/07 RP 138. Defense counsel was correct in his assertion: “[m]ere presence at the scene of a crime, even if coupled with assent to it, is not sufficient to prove complicity. The State must prove that the defendant was ready to assist in the crime.” *State v. Luna*, 71 Wn.App. 755, 759, 862 P.2d 620 (1993). The court made no finding on the issue and instead only indicated “[t]he objection of the defendant is noted. The court will give that instruction.” 07/31/07 RP 139. The trial court erred when it gave the jury an instruction on accomplice liability. This error was not harmless as outside of accomplice liability there was no evidence

presented to suggest Mr. Walker acted as a principle. The accomplice liability instruction likely allowed the jury to convict Mr. Walker on the evidence which suggested he was at the scene of the fire.

**6. *The Trial Court violated Mr. Walker's Due Process rights and CrR 6.15 when it responded to an inquiry from the jury on three different occasions in Mr. Walker's absence and without first conferring with counsel.***

The discussion of a jury inquiry is a critical stage of a criminal proceeding at which a defendant has the right to be present and receive meaningful representation. *Rogers v. United States*, 422 U.S. 35, 39, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975); *State v. Thomason*, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994). A trial court commits error when it communicates with the jury without notice to the defendant or counsel. *State v. Caliguri*, 99 Wn.2d 501, 509 664 P.2d 466 (1983); *State v. Allen*, 50 Wn.2d 412, 419, 749 P.2d 702 (1988). CrR 6.15(f)(1) requires that the trial court involve the defendant and his counsel when the jury asks a question:

The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing. In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the

possibility that jurors will give undue weight to such evidence. Any additional instruction upon any point of law shall be given in writing.

Violation of the rule against ex parte judicial communications with a jury requires reversal unless the State proves that the error was harmless beyond a reasonable doubt. *State v. Russell*, 25 Wash.App. 933, 948, 611 P.2d 1320 (1980).

In the instant case, the trial court answered the jury's questions without obtaining counsel's input and in Mr. Walker's absence. The jury sent an inquiry on July 31, 2007 at 4:04 pm that stated "[c]an we have a copy of the court reporter's transcript of Ms. Brown's testimony?" CP 54. On July 31, 2007 at 4:07 pm the court responded: "a transcript of testimony cannot be provided to you." CP 54. The jury sent another inquiry on August 1, 2007 at 9:04 am and asked the court: "[d]id Mr. Walker reside at Joe Leckenby's residence?" CP 55. On August 1, 2007 at 9:20 am the court responded "You must rely upon your recollection and understanding of the evidence." CP 55. The jury again sent an inquiry on August 1, 2007 at 9:35 am and informed the court that "[w]e are at an impasse." CP 56. The court responded by telling them "please continue your deliberations" on August 1, 2007 at 9:35 am. CP 56.

The trial calendar as well as the transcript is void of any contact between the court and defense counsel, the prosecuting attorney or Mr. Walker. CP 94-98. Furthermore, unlike the jury inquiries upheld in *State v. Jasper*, the

form used by the court to respond to the jury did not contain any boilerplate, preprinted or format language that counsel was consulted with prior to responding. CP 54-56. *Jasper*, 271 P.3d at 889. The jury did not return with the guilty verdict until 11:18 am on August 1, 2007. CP 98. The questions indicated that the jury was struggling with factual issues and when these questions were not responded to, the jury indicated it had reached a deadlock, but the court ordered them to continue deliberations. There was no reason for the court to order the jury to continue deliberations, but yet it expressed its concern that the jurors do so. Courts must be cautious when directing the jury to continue deliberations, as it implies the court is dismissive of the jury's concerns or has a stake in the deliberations. The jury should deliberate without any pressure from the court. *State v. Froed*, 151 Wn.2d 530, 539, 213 P.3d 54 (2009); *State v. Boogard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978); CrR6.15(f)(2).

The error was not harmless. For the many reasons outlined previously, this was a close case and the obvious struggle of the jury simply reinforces this fact.

**7. *The evidence was insufficient to sustain a conviction for manufacturing methamphetamine***

In reviewing a challenge to the sufficiency of the evidence, the court views the evidence in the light most favorable to the State and asks whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v.*

*Hepton*, 113 Wn.App. 673, 681, 54 P.3d 233 (2002). Circumstantial and direct evidence are equally reliable. *State v. McNeal*, 98 Wn.App. 585, 592, 991 P.2d 649 (Div. 2, 1999), *aff'd*, 145 Wn.2d 352, 37 P.3d 280 (2002). All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “Credibility determinations are for the trier of fact and cannot be reviewed on appeal.” *State v. McPherson*, 111 Wn.App. 747, 756, 46 P.3d 284 (2002) (quoting *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

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

RCW 9A.08.020(3) provides that a person is an accomplice of another in the commission of the crime if:

- (a) With knowledge that it will promote or facilitate the commission of the crime, he or she: (i) Solicits, commands, encourages, or requests such other person to commit it; or (ii) Aids or agrees to aid such other person in planning or committing it; or (b) His or her conduct is expressly declared by law to establish his or her complicity.

RCW 9A.08.020(3). Therefore, to find Walker “guilty as an accomplice, the State had to show that [Walker] aided [another] in his manufacturing endeavors.” *State v. Gallagher*, 112 Wn.App. 601, 613, 51 P.3d 100 (Div. 2, 2002). “Mere presence at the scene of a crime, even if coupled with assent to it, is not sufficient to prove complicity. The State must prove that the defendant was ready to assist in the crime.” *State v. Luna*, 71 Wn.App. 755, 759, 862 P.2d 620 (1993). *See also, In re Wilson*, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979) (Guilt cannot be inferred by mere presence and knowledge of activity.).

In the instant case, the evidence introduced at trial does not establish that Mr. Walker promoted or facilitated the manufacture of methamphetamine. At the most, it establishes his presence at the scene. Even mere presence is doubtful. There was no fingerprint evidence, evidence of dominion and control or other physical evidence linking Mr. Walker to the residence and the fire. 07/31/07 RP 104-105 Furthermore, Mr. Leckenby, who was not charged with manufacture of a controlled substance, was the suspect on the top of the police reports. 07/31/07 RP 104-105 However, contrary to the prosecuting attorney’s argument to the jury that Mr. Walker was involved because the duplex was small and smelled strongly of solvent and Mr. Walker “would have had to have known that there’s meth production going on,” mere presence is insufficient to support a conviction. *State v. London*, 69 Wn.App. 83, 91, 848 P.2d 724 (1993). The rest of the evidence used to infer Mr. Walker’s guilt was commentary on

his constitutional right to remain silent that should never have been admitted.

*See discussion infra.*

**8. Reversal is required because cumulative error denied Mr. Walker his Constitutional right to a fair trial**

Reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859, (1963); *State v. Alexander*, 64 Wn.App. 147, 154, 822 P.2d 1250 (1992). Reversal is required whenever cumulative errors “deny a defendant a fair trial.” *State v. Perrett*, 86 Wn.App. 312, 322, 936 P.2d 426, *rev. denied*, 133 Wn.2d 1019 (1997).

Mr. Walker did not receive a fair trial. The combination of severe errors of Constitutional issues including the violations of Mr. Walker’s confrontation clause rights, his right to effective assistance of counsel, his right to be present at all critical stages of the trial, and his right to have a jury determine guilt based on relevant evidence cumulatively require reversal.

**9. The Trial Court erred in imposing exceptional consecutive sentences.**

RCW 9.94A.589(1)(a) requires that offenses that are not serious violent offenses “shall be served concurrently.” Consecutive sentences for RCW 9.94A.589(1)(a) crimes may only be imposed “under the exceptional sentence

provisions of RCW 9.94A.535.” A departure from the presumption of concurrent sentences for nonserious violent felonies is an exceptional sentence. *State v. Vance*, 168 Wn.2d 754, 759–60, 230 P.3d 1055 (2010). The Sentencing Reform Act of 1981(SRA), chapter 9.94A RCW, authorizes trial courts to impose sentences outside the standard range if, considering the purposes of the SRA, there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535.

Review of an exceptional sentence is governed by RCW 9.94A.585(4). An appellate court may reverse only if it finds (1) using a clearly erroneous standard, that the reasons supplied by the sentencing court are not supported by the record before the judge; (2) using a de novo standard, that those reasons do not justify a sentence outside the standard sentence range for that offense; or (3) using an abuse of discretion standard, that the sentence imposed was clearly excessive or too lenient. *State v. Branch*, 129 Wn.2d 635, 645–46, 919 P.2d 1228 (1996) (quoting *State v. Garza*, 123 Wn.2d 885, 889, 872 P.2d 1087 (1994)).

In the instant case, the court abused its discretion by imposing a clearly excessive exceptional sentence when the evidence, viewed in the light most favorable to the state, showed that Mr. Walker was, at most, a minimal participant.

G. CONCLUSION

Based on the forgoing, Mr. Walker respectfully requests that this Court reverse his conviction for manufacturing of methamphetamine.

April 26, 2012

Respectfully submitted,  
RODRIGUEZ & ASSOCIATES, P.S.

  
\_\_\_\_\_  
Norma Rodriguez  
Attorney for Appellant, WSBA# 22398

**FILED**

PROOF OF SERVICE

APR 30 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

I, Cirilo Gomez, being over the age of 18, hereby declare that on the 27<sup>th</sup> day of April, 2012, I caused a true and correct copy of the Brief of Appellant for COA #305759, to be served on the following in the manner indicated below:

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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 27<sup>th</sup> day of April, 2012

By:   
Cirilo Gomez