

No. 31544-1-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON,  
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND K. HATCHIE,

Appellant.

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COURT OF APPEALS  
DIVISION TWO  
SEATTLE  
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STATE OF WASHINGTON  
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OPENING BRIEF OF APPELLANT

On appeal from the Superior Court of Pierce County, the  
Honorable Beverly Grant, Judge

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to suppress evidence gathered in violation of appellant's Fourth Amendment and Article I, §7 rights.

2. Appellant assigns error to the portion of finding of fact 5 on the CrR 3.6 motion to suppress which provides:

The information gathered from Peddicord [SP] and the neighbors indicated that Mr. Schinnell lived at the residence.

CP 133.

3. Appellant assigns error to the portion of finding of fact 7 which provides that Mr. Robbins stated that "he assumed Mr. Schinnell was home," and the portion which indicates that it was after Mr. Robbins was arrested that the deputies "repeatedly announced their presence, and asked Mr. Schinnell to come outside," and then entered. CP 133-34.

4. Appellant assigns error to the CrR 3.6 conclusions of law, in their entirety. CP 134-35.

5. Appellant's rights to a unanimous jury were violated.

6. Appellant's state and federal constitutional rights to fair trial, trial by jury, and due process were violated by improper opinion testimony.

7. The trial court erred in admitting highly prejudicial, irrelevant evidence and refusing to give proper limiting instructions.

8. Appellant's state and federal constitutional rights to effective assistance of counsel were violated.

9. The prosecutor committed serious, flagrant, prejudicial misconduct which deprived appellant of a fair trial.

10. Appellant's right to allocution and the appearance of fairness doctrine were violated at sentencing.

11. Cumulative error deprived appellant of a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Officers without a search warrant may not enter a third party's home to serve an arrest warrant, unless they have "reasonable cause" to believe that the person named in the arrest warrant resides at the home. Were Mr. Hatchie's Fourth Amendment and Article 1, §7 rights violated when officers entered his home to serve an arrest warrant on Eric Schinnell without reasonable cause to believe he resided there? Further, did the trial court err in refusing to suppress evidence gathered as a result?

2. Under Article 1, §7, officers may not enter a person's home to serve an arrest warrant for a "minor" offense if there are no "exigent" circumstances. Were Mr. Hatchie's Article 1, §7, rights violated where officers entered his home to serve a misdemeanor warrant on Mr. Schinnell and there were no "exigent" circumstances? Further, did the trial court err in refusing to suppress evidence gathered as a result of that entry?

3. For the "plain view" doctrine to apply, officers must be lawfully in the place where they view the evidence. Did the trial court err in failing to suppress evidence gathered under the doctrine when the arrest warrant upon which the entry was made was invalid?

4. Was appellant's right to a unanimous jury violated where there was insufficient evidence to prove one of the two ways the prosecution claimed Mr. Hatchie had committed the crime and there was no unanimity instruction? Further, was counsel ineffective for failing to

request such an instruction?

5. Did an officer give improper opinion testimony where he testified that “manufacturing had occurred” at Mr. Hatchie’s home?

6. Did the trial court err in admitting evidence that Mr. Hatchie possessed a drug pipe at work and that others may have been involved in selling drugs at his home where Mr. Hatchie was accused only of being an accomplice to manufacturing of methamphetamine? Further, did the court err in refusing to give proper limiting instructions when admitting highly prejudicial evidence likely to be misused without such instruction? And was counsel ineffective in failing to request limiting instructions on evidence he had unsuccessfully moved to exclude?

7. Was counsel ineffective in failing to request a cautionary instruction on proper evaluation of an accomplice’s testimony where there was insufficient corroboration of that testimony and the testimony was crucial to the prosecution’s case?

8. Did the prosecutor commit misconduct which compels reversal by 1) misstating the standard of reasonable doubt and inviting the jury to convict based upon far less than the required standard of proof, and 2) bolstering and vouching for the only witness who linked Mr. Hatchie to the manufacturing, with facts not in evidence? Further, was counsel ineffective in failing to object to some of the misconduct?

9. Was Mr. Hatchie deprived of his right to allocution and was the appearance of fairness doctrine violated when the sentencing judge declared the sentence without asking if Mr. Hatchie wanted to speak, then said she would consider what he had to say only if it was different from

what counsel had already said?

10. Did the cumulative effect of the errors deprive Mr. Hatchie of a fair trial where the errors went directly to the heart of the prosecution's case, the proper standard of reasonable doubt, the presumption of innocence, the right to be convicted based upon evidence and not "propensity," and the fairness of the entire proceeding?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Raymond K. Hatchie was charged by information filed in Pierce County on June 23, 2003, with Unlawful Manufacture of a Controlled Substance, and of committing that crime while armed with a firearm. CP 1-2; RCW 9.41.010, RCW 9.94A.310, RCW 9.94A.370, RCW 9.94A.510, RCW 9.94A.530, RCW 69.50.401(a)(1)(ii).

Pretrial and trial proceedings were held before the Honorable Beverly G. Grant on December 3-5, 8, 11, 15-18, 22 and 23, 2003, and January 5, 7-9, 2004, after which the jury found Mr. Hatchie guilty as charged. RP 1, 193 241, 264, 270, 373, 390, 456, 614, 782, 985, 1091, 1249, 1RP 1, 2RP 1, 97;<sup>1</sup> CP 124-25.

On March 12, 2004, Judge Grant ordered Mr. Hatchie to serve a standard range sentence. CP 136-46. Mr. Hatchie timely appealed, and

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<sup>1</sup>The verbatim report of proceedings in this case consists of 19 volumes, which will be referred to as follows:

the 14 chronologically paginated volumes containing pretrial and trial proceedings of December 4-5, 8, 11, 15-18, 22-23, 2003, January 5, 7-9, 2004, as "RP;"  
the proceedings of December 3, as "1RP;"  
the 2 volumes containing the voir dire of December 16-17, 2003, as "2RP;"  
the opening arguments on December 17, 2003, as "3RP;" and  
the sentencing of March 12, 2004, as "SRP."

this pleading follows. See CP 149.

2. Testimony at trial

On June 11, 2003, Pierce County Sheriff's Department Deputy Byron Brockway and his unit were conducting "surveillance detail" in Tacoma, to see who was buying "precursor items" used in the manufacture of methamphetamine. RP 420, 425-26, 674. They saw a man later identified as Eric Schinnell go to three separate stores and buy such items. RP 426-33, 677-78.

Officers followed Mr. Schinnell as he drove to the stores in his truck, and, at one point, pulled into a grocery store parking lot, did a quick u-turn, then came out the same way. RP 433-34. Meanwhile, officers searched the registration Mr. Schinnell's truck, learning his name and that he had an outstanding misdemeanor arrest warrant. RP 583-84, 1035.

Ultimately, the truck went into a residential area, where the officers lost sight of it but later spotted it and Mr. Schinnell in the driveway of a duplex on Patterson Street South. RP 422-41. Officers went to the home, set up an area of "containment," and started knocking on the front door of the house, off and on for about 40 minutes. RP 430-45, 681. Other officers went to speak to neighbors about the residence, learning from one that there was "a lot of" vehicle traffic there at all hours. RP 444, 1033-34. By this time, officers had noticed a revolver in Mr. Schinnell's truck, and several items used in making methamphetamine. RP 445, 682.

At some point, the door to the duplex was opened by Donald Robbins, who said "Eric" was in the house. RP 445. After deciding they had "enough probable cause" to enter, officers went inside, and found a

small “surveillance monitor” in the living room and a “glass drug pipe” inside a black bag in the kitchen. RP 446, 522-24, 691-30, 1036. Mr. Schinnell was hauled out from under a car in the garage, and in his pocket was found a bag of a white substance which later field tested positive for methamphetamine. RP 523-32, 647, 700, 1009-10. Also in the “very cluttered” garage with him were a gallon can of acetone and a gallon of Toluene, “squirrel cage” fans, a funnel, and, in the car under which he was hiding, rubber tubing and a bag containing empty pseudoephedrine boxes. RP 446, 522-26, 691-98.

One of the deputies climbed a fold-down ladder leading to a crawl space above the garage, and found several propane tanks he thought could be used to store anhydrous ammonia. RP 527-28, 707. He admitted, however, that they did not have the corrosion that such use would create. RP 708. The tanks were later checked and, in fact, “none of them were found to contain ammonia” or to have been involved in the manufacture of methamphetamine in any way. RP 885.

Mr. Schinnell denied knowledge of the items found in the garage and actually pointed out that some of the items would not work in the manufacture of methamphetamine. RP 1148-52. He claimed nothing in the garage was used to make methamphetamine while he was there. RP 1142-43.

After Mr. Schinnell and Mr. Robbins had been arrested, the officers continued searching the two-bedroom house, finding some papers in the name “Raymond Hatchie.” RP 536-51, 565. The officers later learned that Mr. Hatchie was a tenant at the house. See RP 1257-58.

When the officers found no one else in the home, they sought a search warrant which included several of the vehicles. RP 536-37. Based on that warrant, they searched Mr. Schinnell's truck and found a marijuana pipe, three packages of lithium batteries, respirator masks, a metal garden sprayer, a blue travel bag containing a receipt for lithium batteries dated in April, stripped lithium batteries, used coffee filters, rock salt and plastic tubing, another blue travel bag with aluminum foil and battery tops, a bag and a half of ammonium sulfate, three empty bags for dry ice, drain cleaner, a glass jam jar with clear liquid, and a cardboard box for commercial sized coffee filters. RP 804-17. A blue "Chevy Love" truck had several lengths of vinyl tubing, unused coffee filters, a receipt for Toulene, used coffee filters with pink powder, empty or nearly empty one-gallon cans of Toulene, an empty jug and empty five gallon container of muriatic acid, aluminum foil, empty dry ice bags, an "acid rotted" tool bag with a homemade generator, stripped lithium batteries, a pitcher with white residue, and coffee filters with tan residue. RP 439, 819-31. An orange-red "Chevy Love" truck had two open bags of ammonium sulfate fertilizer, two unopened bags of coffee filters, assorted lengths of tubing, some lye, a "water bong" made out of a vase, a plastic funnel, and two empty bags "for ice," two items officers said were homemade generators, a five gallon bucket with what appeared to be ammonium sulfate, battery packaging, several cans with different levels of suspected Toulene, aluminum foil, a funnel, jugs labeled "muriatic acid," a cooler about 1/3 full of "sparkl[y, yellow liquid," a can of acetone, a whiskey bottle with tubing and one inch of "yellow sludge" in it, a pitcher with a white powder residue and a bottle

of liquid ammonia. RP 439, 831-50. A Buick also parked in the driveway only had plastic tubing in the trunk, and a Volkswagen van also in the driveway did not appear to have any contraband and therefore was not searched. RP 439, 543-44, 850.

None of the vehicles the officers searched belonged to Mr. Hatchie. RP 619-22. Instead, all of the trucks with manufacturing items in them belonged to Mr. Schinnell. RP 438, 626-28, 1203-1204.<sup>2</sup>

In his truck, Mr. Schinnell had identification and other items in the name of April Otto. RP 881-84. Mr. Schinnell later admitted he did not know Ms. Otto but had tried to use her credit card and had gotten her identification, the card and other documents of hers from "some guy" who had offered to fill up his tank in exchange for drugs. RP 1188, 1154-55. Although Mr. Schinnell tried to get cash from Ms. Otto's card a number of times and to use it to buy some gas, he did not succeed. RP 1200.

In the garage where Mr. Schinnell was found, in addition to the other items the police had already seen, with the warrant they secured unused coffee filters, an empty bottle of "Heet," a used glass "drug" pipe on top of a toolbox, a "filtration system" with a coffee filter, a plastic cup with pink residue, a small electric dryer like a hair dryer, a box of rubber gloves, a sandwich bag with used coffee filters, a pint-sized plastic squeeze bottle half full of a clear liquid, an electric skillet with a ground pink substance in it, and a half gallon pitcher about a fourth full of pink sludge.

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<sup>2</sup>An officer admitted that none of the vehicles searched belonged to or were shown to be associated with Mr. Hatchie, but no specifics were given as to the Buick's actual registration. See RP 619-28, 1203-1204.

RP 712-56. The crawlspace above the garage had a yellow tool bag just next to the opening which had an empty bottle of "Heet" in it, "many" empty packages of Chorafed, a cold medicine, and boxes of the same medicine in different brands, including Walgreens, Wal-Fed and Rite Aid. RP 712-56, 888-89,

The searches of other areas of the house were far less fruitful. In the living room, officers found only a digital scale and a used coffee filter inside a vase, in the entertainment center. RP 712-56. In the kitchen was found a mixer, a quart of denatured alcohol, an electric skillet, a "handy chopper" with pink residue in it and, in the freezer, a one quart glass jar of yellow liquid. RP 712-56. The bathroom contained only some unused coffee filters. RP 712-16, 719-56.

Mr. Schinnell admitted that it was he and Mr. Robbins who used the grinder, to grind pills for making methamphetamine. RP 1146. Mr. Schinnell also admitted it was he who used the frying pan to extract some ephedrine. RP 1151. It was his scale in the entertainment center, and he and Mr. Robbins were the ones who had taken pills out of blister packs to make drugs. RP 1177, 1234.

In the bedroom the officers associated with Mr. Robbins, they found an unloaded .20 gauge shotgun, used coffee filters with stains, a ziploc baggie with a tan powder, and a baggie with tan "residue" that was never tested. RP 766-78. In the other bedroom, in a drawer, the officers found a short straw which was never tested, a very small plastic bag with white powder residue and a sandwich bag with similar residue, a full package of Chorafed, four Chorafed pills still in their packaging, three

short links of vinyl tubing which was never tested to determine for what purpose it had been used, and some used coffee filters in a drawer. RP 576, 652, 756-65. A pair of used green latex gloves were also in the room, but Mr. Schinnell admitted that those gloves were far too thin to use in making methamphetamine, because they would have dissolved. RP 1147-48.

Also in that room was a programmable scanner which gets emergency channels, which police initially thought might have been used to monitor local police traffic. RP 756-765. It turned out, however, that Mr. Hatchie was a firefighter at the Boeing fire department. RP 552. Officers called there, but Mr. Hatchie was out camping with a friend in Idaho. RP 552. He called them himself from Idaho and agreed to contact them when he returned. RP 553-61. A few days later, on the 20<sup>th</sup>, Mr. Hatchie was arrested near the house. RP 555-62. No money was found in the house, and only \$12 was found, in Mr. Schinnell's truck. RP 853-54.

Officers later used some receipts found in Mr. Schinnell's truck, along with some store videos, to show that he had purchased, or had someone purchase, items which could have been used in the manufacture of methamphetamine not only on the day he was arrested but also on other days. RP 574-95. None of the items was purchased by Mr. Hatchie and none of the videos showed him. RP 596.

A search of Mr. Hatchie's locker at Boeing revealed a "glass like smoking device" inside. RP 1098-1104. A Boeing employee testified that Boeing had previously used Chorafed in its first aid kits throughout its buildings. RP 1106. He admitted that there was no way to track or

monitor who used the drug and Boeing could not confirm that the lot number of the Chorafed packaging found at the home was even “consistent with the numbers that” were stocked in those kits. RP 1106-1108. The employee was never able to link anyone to any missing pseudoephedrine. RP 1110.

A neighbor, Mr. Huntsman, testified about seeing traffic at the house at all hours and sometimes for a few minutes at a time, said that people were “always” moving things in and out of Mr. Schinnell’s truck and that they would sometimes knock on his door and ask for the person who had previously there, then go next door. RP 1051-61. He also claimed to have seen “people” open up a manhole cover nearby and put black trash bags inside and later take them out. RP 1062-63.

Mr. Huntsman admitted that none of that activity involved Mr. Hatchie. RP 1065. He never saw Mr. Hatchie let any of the people who first came to Mr. Huntsman’s door into the duplex. RP 1065-66. And despite all of her observations of the activity she described occurring next door, Lena, Mr. Huntsman’s daughter, did not recognize Mr. Hatchie as being involved in any of it or even recognize him at all. RP 1066-77. Her brother, Patrick, testified that he only recognized Mr. Hatchie from having seen him on the property, but never saw Mr. Hatchie engaged in any of the suspicious activity he, his sister or his father described. RP 1076-88.

The bulk of the items found in the various vehicles, as well as in the house, tested positive for the presence of methamphetamine or precursors. RP 924-81. None of the methamphetamine samples contained the specific antihistamine from Chorafed in them, but the scientist claimed that did not

necessarily mean there was none in the pseudoephedrine used to make the methamphetamine found. RP 974, 981.

Eric Schinnell testified that he had only been "associated" with the duplex for about two months, having been taken there one day by his friend, Timothy Petticord. RP 585. Once there, they smoked methamphetamine with other people who Mr. Schinnell said came to the home periodically "just to get high and party and socialize." RP 585, 1123-28. Mr. Schinnell was an occasional visitor, and, when he became homeless at one point, would stop by and be allowed to shower and "crash" on the couch. RP 1129-30.

Mr. Schinnell, who testified on behalf of the prosecution, admitted that he had been involved in the manufacture of methamphetamine for about two years. RP 1132-34. He stated unequivocally and repeatedly, however, that the manufacturing was occurring at a specific location across the Narrows Bridge, or another location in Tacoma, and he never saw methamphetamine being made at the duplex. RP 1132-34, 1136, 1158, 1212. In fact, Mr. Schinnell related a story about Mr. Hatchie which occurred before Mr. Schinnell met him, in which Mr. Hatchie was at work and found out someone was manufacturing methamphetamine in his house, so he came home and kicked everyone out. RP 1135-36.

Mr. Schinnell admitted that he ran errands to collect things for the manufacture of methamphetamine probably twice a week. RP 1131-42. The person he was running errands for was a guy named "Chuck." RP 1183-85. He had since learned that Chuck was serving time for manufacturing methamphetamine. RP 1183.

Mr. Schinnell bought cold tablets from Walgreens and Rite Aid to make drugs with, and, once he had items, would meet with Chuck to trade for drugs. RP 1177-78, 1185. The items he bought the day of his arrest were for Chuck. RP 1185-86.

Mr. Schinnell claimed that he did not make methamphetamine in all of the vehicles he had at the property, but just stored things in them. RP 1144-62. He admitted, however, that all the items found in his truck were his. RP 1206-1207. Although he did not recognize most of the items found in his various vehicles and thought people might have driven his truck when he was passed out, or thrown things into his truck, he admitted he did not really remember everything he put in his trucks. RP 1148-61, 1211-12.

Mr. Hatchie was not present most of the times when "people" were at the house. RP 1163. With his schedule, Mr. Hatchie would go to Boeing and stay there for 48 hours for a shift. RP 1223.

In fact, Mr. Schinnell said, Mr. Hatchie had no involvement in any of the manufacturing activity, except for giving Mr. Schinnell some Chorafed tablets, which Mr. Schinnell thought Mr. Hatchie got from work, and which Mr. Schinnell then took and traded for or used to make drugs RP 1135-37, 1218. Mr. Schinnell opined that Mr. Hatchie knew what Mr. Schinnell was going to be doing with the tablets, because Mr. Hatchie was going to get methamphetamine in exchange. RP 1152. According to Mr. Schinnell, he got pseudoephedrine from Mr. Hatchie seven times. RP 1152, 1224.

Mr. Schinnell claimed he was testifying "[t]o help the case along,"

but admitted he was getting “[a] lesser charge” in return for implicating Mr. Hatchie. RP 1169. In fact, Mr. Schinnell had faced multiple counts and a possible 10 years in prison but it was reduced down to one count and probably “time served” of 109 days. RP 1169,1214. Just a few days after making the “deal” with the prosecution, he was out of jail. RP 1216.

None of the many, many items submitted for fingerprint testing showed Mr. Hatchie’s fingerprints on them. RP 1247.

The prosecution’s theory, set forth in closing argument, was that Mr. Hatchie was guilty as an accomplice to the manufacture of methamphetamine, either based on his giving Mr. Schinnell pseudoephedrine to be turned into drugs or because Mr. Hatchie “allowed his home to be a center of narcotics activity.” RP 1301-1302, 1310.

3. The motion to suppress

Before trial, Mr. Hatchie moved to suppress the evidence seized from his house, arguing, inter alia, that his state and federal rights to be free from unreasonable searches and seizures was violated by the officers’ entry into his home to serve the misdemeanor warrant on Mr. Schinnell. CP 3, 153-81.<sup>3</sup> More specifically, he argued that the entry was not supported by the misdemeanor warrant, and that it was an invalid “cash bail” warrant. CP 3, 153-81.

At the suppression hearing, the officers testified about following Mr. Schinnell, seeing him purchase the suspected precursor items, then following him to the duplex. Deputy Brockway testified that the officers

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<sup>3</sup>Mr. Hatchie filed a “joinder” adopting the arguments made in the motions filed on behalf of Mr. Robbins and Mr. Schinnell, filed before Mr. Schinnell’s deal. CP 3.

discovered the existence of the misdemeanor arrest warrant as they were following his truck, before Mr. Schinnell made any "maneuvers." RP 4-14. The warrant was a \$500 district court warrant for driving while license suspended in the third degree. RP 15.

The arrest warrant for Mr. Schinnell had his address as 950 North Ducka Bush in Hoodspport, not a Patterson Street South address in Tacoma. RP 65. The officers admitted they were aware of that fact before they decided to enter Mr. Hatchie's home. RP 65, 130. They were also aware that address for the registration on the vehicle Mr. Schinnell was driving was the North Ducka Bush address in Hoodspport, as was the registration on a second vehicle registered to Mr. Schinnell which was also parked at the duplex. RP 80.

The warrant indicated that it was "CASH BAIL ONLY - No Personal Recognizance or Bail Bond." CP 172.

Deputy Brockway admitted that the house was under surveillance during the entire time the deputies were knocking on the door, prior to Mr. Robbins answering and prior to the entry. RP 23-24. No one would have been able to enter or leave, because the house was under surveillance and inside a "containment." RP 23-24, 62-66, 70. In fact, a K-9 search unit was standing by to track anyone who might try. RP 62-66, 70.

The deputies knocked on the front door off and on from about 7:10 p.m. to about 8:20 p.m. before Mr. Robbins answered. RP 62-66, 70, 132-33. The deputies admitted that, during all that time, they did not hear any noise coming from inside the residence, such as flushing or breaking glass, which might have indicated an attempt to destroy evidence. RP 67-91.

The officers also saw no evidence that anyone was attempting to leave or that there were any fires or danger. RP 67-70, 91. There was nothing which indicated any "threat" to the officers or anyone else. RP 75-76.

The officers were aware that they had to attempt to "establish" Mr. Schinnell's "residency" in the home before they entered to serve the warrant, so they contacted neighbors. RP 116. Deputy Brockway detailed the information those neighbors gave, stating that he spoke with a neighbor named "Rowland" and discovered that she knew Mr. Schinnell only by the name "Eric," thought he had been at the duplex earlier and believed he lived there. RP 21. The deputy also talked to the neighbor, Mr. Huntsman, who thought there were six different people living at the house, had seen the red truck there before, and had seen "Eric" around. RP 22, 82. The only "independent corroboration" that the deputy said the officers had about any of this information was that the red truck was parked in the driveway and a second vehicle registered to Mr. Schinnell was parked on the lawn. RP 21.

Deputy Clark testified that he approached Timothy Petticord, Mr. Schinnell's friend, outside the residence and established that "Eric" was likely inside the house if his truck was there. RP 178. Deputy Clark did not indicate that he ever asked Mr. Petticord whether "Eric" lived at the residence, even though the deputy testified that Mr. Petticord indicated he himself stayed there sometimes. RP 179. The only other contact Deputy Clark related regarding who lived in the home was with an unnamed "neighbor" who said only that "the main renter of the residence was a Ray Hatchie." RP 186.

Deputy Collier also spoke to Mr. Petticord, for about five or ten minutes. RP 154-55. Like Deputy Clark, Deputy Collier did not testify that Mr. Petticord provided any information about Mr. Schinnell living at the home, or whether that question was even asked of Mr. Petticord during the five to ten minutes the deputy spoke with him. RP 156-57.

Deputy Brockway and other officers had cell phones with them and he admitted they were capable of contacting a judge to request a telephonic search warrant during the hour or so officers were knocking and consulting neighbors, or before later entering the residence. RP 68-91.

When Mr. Robbins answered the door, he was not asked to consent to the entry. RP 28, 71-72.

After arresting Mr. Robbins' for the contraband they found on him, officers consulted about entering the house. RP 29. They spoke about what they had "observed" and been told by neighbors. RP 29. Deputy Collier testified that bulk of the "considerations" raised were whether Mr. Schinnell was in the home, not whether he lived there. RP 159. The only part of the discussion Deputy Collier described which focused on Mr. Schinnell's status as a resident was Deputy Brockway's conversations with the neighbors. RP 159. Deputy Brockway testified that there was "a discussion," and he told others that the neighbors "had told us that he lived there." RP 65.

Deputy Brockway admitted the officers never asked Mr. Robbins questions about whether Mr. Schinnell lived there or not until *after* the officers had entered and arrested Mr. Schinnell. RP 28, 71-72, 116. At *that* point, the officers finally asked, and Mr. Robbins said that Mr.

Schinnell only stayed there sometimes for the past two months. RP 38.

Before the officers entered the home, they learned that Mr. Schinnell's only prior conviction was for misdemeanor marijuana possession, which Deputy Brockway admitted showed no evidence of violence, weapon usage or a history of escape. RP 86, 93.

The officers conceded that the reason they decided to go into the home to arrest Mr. Schinnell was not just because of the existence of the warrant, but also to investigate their suspicions about the drug activity in which they thought he was involved at the house. RP 29. Deputy Collier admitted that he would "probably not" have served the warrant and arrested Mr. Schinnell without the suspicion of drug activity because his "assignment is to investigate methamphetamine, the distribution, sale and manufacture and we believe that he was involved somehow in this." RP 152. When first asked why he wanted to contact Mr. Schinnell at the duplex, Deputy Brockway said, "[a]t this point he had purchased those three precursor chemicals or components," and then added, "[h]e had also had this misdemeanor warrant for his arrest and was driving on a suspended license." RP 18. He admitted that the "ultimate purpose" of serving the arrest warrant was "to talk with [Mr. Schinnell] or investigate further these purchases of precursor chemicals." RP 19, 67. Deputy Fry admitted that he went into Mr. Hatchie's home not just because of Mr. Schinnell's warrant but also because he "obviously had the other information [we] needed to follow up on" about drug activity, although the deputy maintained he would have entered the home just to serve the warrant alone. RP 110.

Deputy Brockway conceded the members of the unit usually follow someone they see buy "precursor" items for as long as they can, in order to see where that person ends up, because it might lead to evidence of a lab and potential co-defendants. RP 51-52.

The items the officers saw when they went into the residence to arrest Mr. Schinnell on the misdemeanor warrant were relied on in securing the warrants to search the house. RP 30-43.

At the suppression hearing, the prosecutor conceded that there were no "exigent" circumstances to justify the entry into Mr. Hatchie's home. RP 236-37. He admitted that it was later established that Mr. Schinnell did not reside there, but only stayed there occasionally. RP 238. Nonetheless, the prosecutor argued, the entry was proper because officers had concerns about Mr. Schinnell's "evasive maneuvers" on the way to the duplex and how long it took for someone to answer the door. RP 236-28. The prosecutor also declared that, at the time of the search, the officers reasonably believed Mr. Schinnell was an "actual resident." RP 238.

In denying the motion to suppress, Judge Grant stated she did not think the officer's actions were "mere pretext" for investigation of drug crimes. RP 244-45. She then stated that, based on "the evasiveness of the defendant along with the traffic maneuvers," the deputies "were with[in] the authority to enter the residence and arrest Mr. Schinnell." RP 244-45. The judge did not think the validity of the warrant was "a significant impediment because of the nature of the type of warrant that was issued." RP 245.

Judge Grant's written findings and conclusions reflected her oral

ruling and concluded “that the deputies had specific and articulable facts justifying their entry into the residence to arrest Mr. Schinnell on his outstanding warrant.” CP 135.

4. Ineffective assistance and the jury instructions

The prosecution’s theory was that Mr. Hatchie was guilty as an accomplice to the manufacture of methamphetamine either because he gave pseudoephedrine to Mr. Schinnell or because he allowed his home to be a “center” of drug activity. RP 1301-1302, 1310. Counsel did not request an instruction telling the jury it had to be unanimous about which act it relied upon in finding Mr. Hatchie guilty. See CP 96-101. Counsel also did not propose a cautionary instruction regarding proper evaluation of the testimony of an accomplice. See CP 96-101.

5. Improper opinion testimony

After first establishing Deputy Fry’s “training and experience” in methamphetamine lab investigations, the prosecutor asked the deputy, “based on your training and experience as a member of the clandestine lab team, did you form an opinion as to whether or not methamphetamine had been manufactured at this particular site?” RP 851. Counsel’s objections were overruled, and the deputy then stated his opinion as follows; “I believe manufacturing had occurred there.” RP 851.

6. Irrelevant, prejudicial evidence, denial of limiting instructions and ineffectiveness

At trial, the neighbor’s son, Patrick, testified that he had seen people he recognized at the duplex, that it was awkward seeing them, and that they did not “fit there” because they were all younger. RP 1081-82.

After a defense objection was sustained, the prosecutor then asked if Patrick had formed an opinion of what was going on next door, and another defense objection was sustained. RP 1082-83. The prosecutor next asked if Patrick had seen people he recognized “from another place next door,” and asked “[d]id you know the individuals that you recognized to be associated with any illicit activity?” RP 1082-83. Over defense objections, the witness was allowed to testify that those people were involved in “[p]ot smoking, Marijuana.” RP 1083. The court overruled counsel’s ER 404(b) objection, based upon the prosecutor’s declaration it was relevant to “common scheme.” RP 1082-84. Counsel did not request a limiting instruction for the evidence. RP 1082-84.

Mr. Hatchie also moved to exclude evidence that a pipe was found in his locker at Boeing, which was also never tested and was cumulative of the evidence of the pipes at the home. RP 517-19. The judge admitted the evidence as showing there were “similar” items at his work and home, and declined to give a limiting instruction. RP 519, 1098-1100.

In addition, Mr. Hatchie moved to exclude as highly prejudicial and irrelevant testimony from the neighbor about there being “lots of activity” at the home and traffic at all hours. RP 245-310, 315-16; CP 12-16. The prosecution argued that the evidence showed drug deliveries or sales “activity” at the property, and that it was admissible to show that the house was a “drug house,” to show “intent” and motive. RP 310, 320, 323. The prosecution conceded, however, that there was no evidence Mr. Hatchie was involved in any of the alleged deliveries or sales and that it did not have to prove intent or motive to prove the manufacturing. RP 310, 320-

23. The court denied Mr. Hatchie's motion. RP 333. Counsel did not request a limiting instruction for the evidence. RP 333.

At trial, Mr. Hatchie asked the court to give limiting instructions for testimony about glass "drug pipes" found in the kitchen and garage, and the straw found in Mr. Hatchie's room, which was never tested and thus had never been shown to be linked to methamphetamine. RP 450-62, 506-508. The court denied the requests. RP 499-500, 504-505, 508-10.

In closing argument, the prosecution relied on the pipe in the kitchen and "use and trafficking" at the house as evidence of "motive," the straw in Mr. Hatchie's room as consistent with manufacturing, and declared, "Ray Hatchie was using drugs. Ray Hatchie was dealing drugs and Ray Hatchie was making drugs." RP 1297, 1303-1304, 1310, 1340-41.

7. Prosecutorial misconduct

In opening argument, the prosecutor declared the reason Mr. Schinnell was going to be testifying was "because he took a plea bargain that included him testifying truthfully in this case." 3RP 15. During trial, the prosecutor attempted to minimize the possible bias Mr. Schinnell might have because of the deal he was getting for his testimony against Mr. Hatchie, implying that Mr. Schinnell might not actually "automatically" get credit towards his presumptive 0-12 month sentence for "the time served" already but could still face 12 months in custody after testifying. RP 1221. And in rebuttal closing argument, the prosecutor told the jury that the deal Mr. Schinnell got was "not to convict anybody but required truthful testimony, to tell the truth." RP 1343.

In closing argument, the prosecutor told the jury that not every question the jury had would have to be answered for the prosecution to have met its burden, but that the jury only had to decide the “ultimate issue” of whether Mr. Hatchie was guilty of the crime as the jurors understood it to be defined

and as you understand particularly his role as an accomplice. That’s what the issue is. Are you confident of that? Do you believe that? The law commands that if some of you have great and serious doubts about that, that you should acquit.

RP 1317 (emphasis added). Counsel objected that the prosecutor was “mistaking” the law, and the court told the jury, “the law is controlled by the instructions as I’ve read them to you and not by argument of counsel.”

RP 1317. The prosecutor agreed, told the jury that “the instruction is controlling” if there was a conflict between that and anything he said, and that the defendant should get “the benefit” of any reasonable doubt the jury had. RP 1317-18. The prosecutor then told the jury there was a “flip side” to the reasonable doubt standard, that if the jury was “confident that someone is guilty of a crime,” they should not feel “compelled to vote to acquit someone just because you have been instructed that there is a thing called reasonable doubt.” RP 1317-18. He went on:

So the question becomes does anyone ever walk out of a jury deliberation room saying something like, well, we know he did it, but there just wasn’t enough evidence?

Well, you all came into these cases hopefully not knowing a thing about the crime or the party involved or what the evidence would be. So how could a person walk out when they knew nothing about the case to begin with but they walk out of the case saying, well, we knew he did it, and say but there wasn’t enough evidence? How do you know he did it then[?] [Y]ou know he did it because of the evidence that’s presented and that’s another concept that’s behind this concept of proof beyond a reasonable

doubt. If you believe someone is guilty, you reach a guilty verdict.

RP 1319 (emphasis added).

8. Sentencing

Mr. Hatchie requested an exceptional sentence below the standard range, arguing it was proper because his involvement was only minor. CP 126-29; SRP 4-11. The prosecution sought a sentence at the high end of the standard range, disputing the level of involvement and faulting Mr. Hatchie for failing to take advantage of the “Breaking the Cycle” programs offered prior to trial for his addiction. SRP 3, 16-17.

After Judge Grant heard from counsel, she said:

All right. The Court is ready to rule. The standard sentence range will be adopted and 55 months plus the three years for the deadly weapon firearm enhancement, unless your client has something else to add or say, [defense counsel], on his own behalf. I am really concerned. I did look at that BTC record and [the prosecutor] is correct, it was totally unsatisfactory. There appears to be no attempt by your client to say that he wants help and I realize if you are involved in drugs and you're an addict, that sometimes it's often hard to accept or request for help but here was an opportunity he certainly could have exercised.

SRP 19. The prosecutor then reminded the court that “probably before” it made “a final ruling on sentence, we should ask formally whether Mr. Hatchie wishes to allocute.” SRP 19-20. Because the court had already ruled, counsel said allocution was “really for nothing now,” and the judge said she would consider what Mr. Hatchie had to say if it was something counsel had “not said, that I don't know about.” SRP 20. Mr. Hatchie then spoke to the court about his belief he would have been found innocent, said that he will try to have a “positive thing to come out of this” by trying to get treatment and admitting he was an addict, and apologized.

SRP 21. The court then questioned Mr. Hatchie and counsel about the BTC program and why he did not participate, and Mr. Hatchie responded that his “head just wasn’t there” at the time the case began. SRP 21.

Judge Grant then stated that she would “knock off a couple months” of the original sentence and reduce it to “a 53 month plus three years for” the enhancements. SRP 22.

D. ARGUMENT

1. MR. HATCHIE’S FOURTH AMENDMENT AND ARTICLE 1, §7 RIGHTS WERE VIOLATED AND THE EVIDENCE SHOULD HAVE BEEN SUPPRESSED

Both the Fourth Amendment and Article I, §7 of the Washington constitution protect citizens against unreasonable searches. Steagald v. United States, 451 U.S. 204, 205, 211, 101 S. Ct. 1642, 68 L. Ed.2d 38 (1981)<sup>4</sup>; State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996).<sup>5</sup> A warrantless search of a home is presumptively unreasonable, unless the prosecution can prove one of the very limited exceptions to the warrant requirement applies. See Arizona v. Hicks, 480 U.S. 321, 327, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987); State v. Mathe, 102 Wn.2d 537, 540-41, 688 P.2d 859 (1984). Where a search does not fall within one of those few exceptions, it violates both the state and federal constitutions and any evidence seized as a result of such a search must be suppressed. See Wong

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<sup>4</sup>The Fourth Amendment to the United States Constitution provides: “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause.”

<sup>5</sup>Article I, §7 provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

Sun v. United States, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); Hendrickson, 129 Wn.2d at 72.

A trial court's decision on the suppression of evidence is reviewed *de novo*. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Further, the findings of fact upon which that decision relied must be supported by substantial evidence in the record. *Id.* If the trial court's conclusion depends upon erroneous facts or is in error as a matter of law, reversal and dismissal is required unless the "overwhelming untainted evidence" supports the conviction. State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002).

In this case, the trial court erred in refusing to suppress the evidence seized as a result of the intrusion into Mr. Hatchie's home to arrest Mr. Schinnell, because that entry was an unreasonable search under both the state and federal constitutions. Further, because the conviction depends upon the evidence so seized, reversal and dismissal is required.

- a. The entry was unlawful under the Fourth Amendment and Article I, section 7, because the officers did not have "reasonable cause" to believe Mr. Schinnell lived at Mr. Hatchie's home

The unreasonable search of a person's home is the "chief evil against which the wording of the Fourth Amendment is directed." United States v. United States District Court, 407 U.S. 297, 313, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972). Indeed, the U.S. Supreme Court has declared, the "zone of privacy" protected by the Fourth Amendment is nowhere "more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home." Payton v. New York, 445 U.S. 573,

589, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). As a result, unless there is consent or exigent circumstances, the U.S. Supreme Court has “consistently held that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant.” Steagald, 451 U.S. at 211.

Like its federal counterpart, the Washington constitution recognizes that “[i]n no area is a citizen more entitled to his privacy than in his home.” State v. Young, 123 Wn.2d 173, 185, 867 P.2d 593 (1994). Although Article 1, §7 provides greater protection than that provided by the Fourth Amendment, the federal standards apply as a minimum. State v. McKinney, 49 Wn. App. 850, 856, 746 P.2d 835 (1988).

Here there was no consent. There were - as the prosecution conceded - no exigent circumstances. RP 236-37. The only authorization for entry into Mr. Hatchie’s home was the arrest warrant for Mr. Schinnell.

The question of whether an arrest warrant is sufficient to support an entry into a home under the Fourth Amendment depends upon whether the person challenging the search is the person named in the warrant, and whether that person lives at the place searched.<sup>6</sup> If both of those conditions are met, it is presumed that the requirements for issuing the warrant served to protect that person’s constitutional rights, because

the arrest warrant requirement may afford less protection than a search warrant, but it will suffice to interpose the magistrate’s determination of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen’s participation in a felony to persuade a judicial officer his arrest is justified, it is

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<sup>6</sup>Washington uses these standards but also provides greater protection, as discussed, *infra*.

constitutionally reasonable to require him to open his doors to the officers of the law.

Payton, 445 U.S. at 602-603; State v. Williams, 142 Wn.2d 17, 24, 11 P.3d 714 (1990) (quoting Payton and holding the same). In other words, “[b]ecause an arrest warrant authorizes the police to deprive a person of his liberty, it necessarily also authorizes a limited invasion of that person’s privacy interest when it is necessary to arrest him in *his home*.” Steagald, 451 U.S. at 214 n. 7 (emphasis added); Payton, 445 U.S. at 602-603; Williams, 142 Wn.2d at 25-27.

Indeed, when the person objecting to the search is the person named in the warrant, the warrant is deemed to have protected that person’s privacy interests even if he is in someone else’s home. See U.S. v. Underwood, 717 F.2d 482, 484 (9<sup>th</sup> Cir. 1983), cert. denied, 465 U.S. 1036 (1984); Williams, 142 Wn.2d at 24-26. And when the police enter the home of the person named in the warrant, that warrant is sufficient even when the person complaining of the search is not the named person but a co-resident. See U.S. v. Ramirez, 770 F.2d 1458 (9<sup>th</sup> Cir. 1985).

It is far different, however, when the person named in the warrant does not live at the home and someone other than the person named in the warrant is objecting to the search. In that situation, the rights at issue are the rights of the individual “in the privacy of his home and possessions” to be protected “against the unjustified intrusion of the police.” Steagald, 451 U.S. at 213-15; State v. Chrisman, 100 Wn.2d 814, 819-20, 676 P.3d 419 (1984); State v. Anderson, 105 Wn. App. 223, 230-31, 19 P.3d 1094 (2001). Those rights are not considered to have been sufficiently

protected by the existence of the arrest warrant for someone else, who is not a resident of the home. Steagald, 451 U.S. at 213-15; Anderson, 105 Wn. App. at 232.

Thus, in Steagald, the U.S. Supreme Court held that, absent exigent circumstances, the Fourth Amendment prohibits the entry and search of a third party's home based upon an arrest warrant for a person who does not live there. 451 U.S. at 215. Indeed, to hold to the contrary, the Court noted, would create a "significant potential for abuse," because, "[a]rmed solely with an arrest warrant for a single person, the police could search all the homes of that individual's friends and acquaintances" to find him. 451 U.S. at 215; see Anderson, 105 Wn. App. at 231 (the existence of a felony arrest warrant and the belief that the subject may be a guest in a third party's home is "insufficient legal authority to enter the home"); Hocker v. Woody, 95 Wn.2d 822, 825, 631 P.2d 372 (1981) (an arrest warrant for a suspect only authorizes entry into the suspect's own home, not that of a third person, absent exigent circumstances).

Here, there is no question that Mr. Schinnell did not live or reside at Mr. Hatchie's home. The prosecution conceded that fact. RP 238. The question is not, however, whether he actually lived there but whether, at the time the officers entered the home, they had "reasonable cause" to believe he did, sufficient to hold the entry constitutional under the Fourth Amendment.

Put simply, they did not. No Washington court has yet decided what amounts to "reason to believe" or "reasonable cause to believe" someone resides at a place under Steagald and Payton. The 9<sup>th</sup> Circuit,

however, has examined the issue and concluded that the standard “embodies the same standard of reasonableness inherent in probable cause.” United State v. Gorman, 314 F.3d 1105 (9<sup>th</sup> Cir. 2002). The reasoning behind that decision is sound. Interpreting “reasonable cause to believe” someone resided at a home as requiring only the lesser standard of a “reasonable suspicion” would be improper because the question was what was needed to justify an officer’s entry into a person’s home, an entry which always requires probable cause. 314 F.3d at 1113-14. Other states have similarly applied the “probable cause” standard. See State v. Smith, 208 Ariz. 20, 90 P.3d 221, review denied (2004); State v. Kiper, 193 Wis.2d 69, 532 N.W.2d 698 (1995) (applying the “probable cause” standard); Taylor v. State, 642 P.2d 1378, 1382 (Alaska App. 1982) (same).

Thus, in Kiper, the Court relied on probable cause as the required standard and noted that standard “serves to ‘safeguard the privacy and security of individuals against arbitrary invasions by government officials.’” 532 N.W.2d at 704 (quotations omitted). And in Smith, the Court rejected the idea that the “reasonable suspicion” standard for stop-and-frisk searches could support entry into a home under the Fourth Amendment, because that standard was adopted as a specific exception to probable cause largely for officer safety reasons and “only justifies a limited public encounter with, and intrusion upon, a suspect” for investigative detention. 90 P.3d at 226. In contrast, the Smith Court noted, “the reason-to-believe standard set forth in Payton guards against unwarranted intrusions into a suspect’s home,” the intrusion which is the chief evil against which the

Fourth Amendment was intended to protect. Smith, 90 P.2d at 226; see also United States v. Howard, 828 F.2d 552, 555 (9<sup>th</sup> Cir. 1987) (“[e]ntry into a person’s home is so intrusive that such searches always require probable cause regardless of whether some exception would excuse the warrant requirement”).

The reasoning behind these decisions is sound. Entry into a home without a search warrant is presumptively unreasonable. A search warrant may only issue upon probable cause. To allow officers to enter a home without a search warrant based upon an arrest warrant for someone based only upon “reasonable suspicion” the person lives there effectively circumnavigates the very protections the Fourth Amendment was written to provide. Put another way, the government’s entry into a home is a far greater intrusion into “private affairs” than the limited, brief retention of a person for investigative purposes that may be done upon “reasonable suspicion,” and the probable cause standard should apply.

In any event, regardless which standard applies, the entry here was unreasonable, because there was not even evidence sufficient to support a “reasonable suspicion” that Mr. Schinnell lived in Mr. Hatchie’s home. It is not enough to prove that the person “inhabits” or “occupies” a place - it must be the person’s actual residence. Perez v. Simmons, 884 F.2d 1136, 1140-42 (9<sup>th</sup> Cir. 1989), as amended by 900 F.2d 213 (1990), as corrected 998 F.2d 775 (1993); see U.S. v. Patino, 830 F.2d 1413 (7<sup>th</sup> Cir. 1987). And to prove that a home was someone’s residence, it is not sufficient to simply prove that they had a “reasonable expectation of privacy” there, because that standard can be met merely by proof of

temporary occupancy and the Fourth Amendment rights of the person objecting to the search cannot be so “diminished by the mere presence of a guest in the home.” Perez, 885 F.2d at 1140-41; see Anderson, 105 Wn. App. at 229-31 (there must be proof the subject of the warrant is more than just a guest) .

Here, the testimony at the suppression hearing established that the evidence the officers had at the time at the time they entered the home was that 1) Mr. Schinnell had gone to the house that day, 2) a neighbor named “Rowland” who knew Mr. Schinnell only by the name “Eric” thought he lived there and had seen his truck there, 3) another neighbor had seen the truck there and had seen “Eric” “around,” 4) Mr. Robbins, who lived there, thought Eric might be there at the time because his truck was there, 5) Mr. Petticord knew Mr. Schinnell and thought he was probably there, and 6) some vehicles at the property were registered to Mr. Schinnell. RP 21-22, 82, 116.

At most, that evidence established that Mr. Schinnell was probably at the home at the time. But the fact that a neighbor who did not really know Mr. Schinnell well thought he lived there, coupled with the possibility he was there and the presence of his truck and another vehicle, was insufficient to support even a reasonable suspicion that he lived there, let alone proving the higher standard of “reasonable cause,” given the other evidence the officers had that the Tacoma address was not Mr. Schinnell’s residence. As the officers themselves admitted at the suppression hearing, they knew before entering the home that it was not the address listed on Mr. Schinnell’s driver’s license, either of the two vehicles, or *the warrant*

*itself*. RP 65, 80, 130. It was not even in the same *city*. RP 65, 80, 130. The protections citizens have in the most protected area of all - the home - simply cannot depend upon a neighbor's general belief that someone might live there, coupled with presence and a few vehicles at the home, especially where, as here, there is evidence that the person lives somewhere else.

Further, it is telling that the officers specifically did not ask Mr. Robbins if Mr. Schinnell *lived* at the house until after they had already entered and arrested Mr. Schinnell, and apparently never asked that of Mr. Petticord, either, although the officers knew proof of "residence" was essential to justifying their entry under the law. RP 38, 116, 154-57, 178-79.

Indeed, the trial court effectively made a finding that the evidence known to the officers did not support the conclusion that Mr. Schinnell lived there, because the court specifically applied a standard for evaluating "[e]ntry into a third party's dwelling to arrest the subject of a misdemeanor warrant" in its conclusions on the suppression motion. See CP 134 (emphasis added). Obviously, if the trial court had found that the officers had reasonable cause to believe Mr. Schinnell lived at the home, it would not have used the "third party's dwelling" language in analyzing the issue.

Aside from properly finding that Mr. Hatchie's home was a "third party's dwelling" as to Mr. Schinnell, however, the trial court erred in its analysis of the entry. First, the court relied on several erroneous findings in reaching its conclusion. To withstand review, findings must be supported by substantial evidence in the record, defined as evidence which is sufficient to convince a rational, fair-minded trier of fact that the declared premise is

true. State v. Thetford, 109 Wn.2d 392, 396, 745 P.2d 496 (1987).

Several of the court's findings do not meet that standard. First, the court's declaration in finding 5 that "[t]he information gathered from Peddicord [sp] and the neighbors indicated that Mr. Schinnell lived at the residence" is erroneous. See CP 133. In fact, the officers who testified about what Mr. Petticord did not testify that they asked him whether Mr. Schinnell lived there but only if he was there at that time. RP 154-57, 178-79. And only one neighbor said she thought Mr. Schinnell lived there, according to the officers' testimony - not "neighbors," plural. RP 21, 22, 82.

Further, to the extent that finding could be construed as a conclusion that the information given by the neighbors was legally sufficient to indicate Mr. Schinnell was living at the residence, the general declaration by a neighbor that she believes someone who she knows only as "Eric" lives in a nearby house does not amount to "reasonable cause" to believe he actually lives there, sufficient to support an entry into the most protected area of our lives.

Similarly, the court's finding of fact 7 erroneously refers to Mr. Robbins as stating Mr. Schinnell was "home." CP 133-34. The officers' testimony was not that Mr. Robbins said Mr. Schinnell was "home," but rather that Mr. Robbins said he thought Mr. Schinnell was inside the house, because his truck was there. RP 21, 22, 82, 116. The officers themselves admitted that they never asked Mr. Robbins if Mr. Schinnell lived there (and thus was "home") until *after* Mr. Schinnell was arrested. RP 21, 22, 82, 116.

In addition, finding 7 gives an inaccurate picture of the actual sequence of events, by indicating that the officers first talked to Mr. Robbins, then “repeatedly announced their presence, and asked Mr. Schinnell to come outside,” and finally entered. CP 133-34. In fact, the officers testified that they announced their presence, knocked and called for Mr. Schinnell to come outside before Mr. Robbins finally answered the door. RP 62-91, 132-33. Once he did, and he was arrested, the officers then spent the next 20 minutes discussing whether it would be proper for them to enter the residence to get Mr. Schinnell. RP 29, 65, 159. This Court should not rely on the erroneous findings in its review of this case.

In addition to relying on erroneous facts, the trial court incorrectly focused on whether the officers had “legitimate concerns” about Mr. Schinnell’s behavior and “reasonable grounds” to believe he was “inside the house.” CP 134-35. Taking the latter first, it is absolutely true that, when police are serving an arrest warrant on someone in their home, they must have “reason to believe” that person is within the premises before entering. Payton, 445 U.S. at 603; see State v. Wood, 45 Wn. App. 299, 303, 725 P.2d 435, review denied, 107 Wn.2d 1017 (1986).

But where, as here, the prosecution conceded there were no exigent circumstances, it is irrelevant whether the officers had “reasonable grounds” to believe Mr. Schinnell was inside the house. Even if they could see him through a window and knew he was inside, they could not enter to serve the arrest warrant under Steagald because they did not have reasonable cause to believe he lived there.

The trial court’s conclusions about the officers’ “legitimate

concerns” are equally erroneous. Again, all of the officers testified - and the prosecution conceded - that there were no exigent circumstances here. RP 236-37. There was no indication anyone was destroying any evidence, or threatening anyone, or themselves or an officer, prior to the entry into the home. RP 23-24, 62-66, 70-91. And the officers specifically admitted they had ample time, opportunity and ability to seek a telephonic search warrant for the home. RP 68-91. Regardless of the officers’ “concerns” that Mr. Schinnell had used evasive maneuvers when being followed and had not answered the door, and regardless of the fact that officers had been told by Mr. Robbins there was a firearm in the house, not a single officer testified that he or she was afraid for their safety or the safety of others based on those facts - so that the “exigent circumstances” exception in Steagald might apply. RP 1-233.

Further, the officers’ concerns about Mr. Schinnell’s evasive maneuvers are deceptive, because the officers themselves admitted that they were driving unmarked vehicles, not wearing uniforms, and not otherwise indicating they were police. RP 76-78, 100. There was no evidence whatsoever that Mr. Schinnell knew that the people following him were police, rather than someone else he did not want to encounter, such as creditors, or an ex-wife’s current boyfriend, or someone similar. This Court should not rely on the unsupported findings and erroneous conclusions of the trial court in deciding this issue.

There is no question that the officers in this case had good intentions of ferreting out potential drug manufacturing on the day they went into Mr. Hatchie’s home. Indeed, every one of them admitted that a

major motivation for entering to serve the warrant on Mr. Schinnell was to get inside the house because of the potential for finding evidence of drug manufacturing. RP 18-19, 29-30, 51-61, 67, 110, 152.<sup>7</sup> Aside from whether such motivations can render an entry based on an arrest warrant an invalid “pretext” search, the officers’ good intentions do not justify their intrusion into Mr. Hatchie’s home. It is the “[l]audable desire to detect and stamp out crime” which “continually threatens to undermine the equally laudable protections of the Fourth Amendment” when officers act on that desire and enter a home. United States v. Albrektsen, 151 F.3d 951, 953 (9<sup>th</sup> Cir. 1998). That is why the courts are tasked to “patrol the boundary between the sanctity of the home and officers of the law,” either through the requirements for issuing a search warrant to enter that home, or through vindicating that sanctity by suppressing the evidence gained when it is violated. Id. This Court is so tasked here, and should reverse the trial court’s erroneous decision on suppression. Because the evidence used against Mr. Hatchie was all gathered after the unlawful entry, reversal and dismissal is required.

- b. Even if there was sufficient proof Mr. Schinnell lived at the home, the misdemeanor arrest warrant did not support the entry under Article I, §7

Even if this Court holds that the entry was proper under the Fourth Amendment, reversal is nevertheless required, because the entry was in

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<sup>7</sup>The trial court’s finding that the officers were not using the warrant as a pretext to get into the house is thus somewhat surprising. In any event, it appears that the failure of officers to serve misdemeanor arrest warrants in general unless there is some other motive to do so is epidemic throughout the state. See Van De Veer, *The Honorable P., No Bond, No Body, and No Return of Service: The Failure to Honor Misdemeanor and Gross Misdemeanor Warrants in the State of Washington*, 26 Seattle U. L. Rev. 847 (2003).

violation of Mr. Hatchie's rights under Article 1, §7, of the Washington constitution.

As noted above, Washington treats Steagald as the floor, not the ceiling, on the issue of entry into a third-party's home to serve an arrest warrant. In addition to the standards of Steagald, Washington makes an additional distinction between arrest warrants for felonies and those for misdemeanors. Chrisman, 100 Wn.2d at 821-22. Where the warrant is for a misdemeanor, that warrant will not justify even entry into the residence of the person named in the warrant unless there is a "strong justification." Id.; see Anderson, 105 Wn. App. at 230. More specifically, "[i]n cases of minor violations" such as misdemeanors, where there are no facts sufficient to demonstrate "(1) a threat to the officer's safety, (2) the possibility of destruction of evidence of the misdemeanor charged, or (3) a strong likelihood of escape," there is "no compelling need" authorizing entry into even the home of the person named in the warrant. Chrisman, 100 Wn.2d at 821-22.

As a result, even if there was some way the scant evidence in this case might possibly be sufficient proof that Mr. Schinnell lived at the home, the search was in violation of Mr. Hatchie's Article I, §7 rights unless there was "danger" to someone, threat of "destruction of evidence" relating to the misdemeanor itself, or strong likelihood of escape to justify the entry. Chrisman, 100 Wn.2d at 821-22; McKinney, 49 Wn. App. at 857-58.

None of those conditions were present here. The prosecution conceded there were no "exigent circumstances" justifying the entry. RP 236-37. And the officers admitted they perceived nothing indicating any

potential destruction of evidence, or that anyone was trying to flee, or that there was any danger to anyone either within or outside the residence, during the hour or more that they were outside maintaining a “containment” around the house. RP23-24, 67-91.

Indeed, the officers admitted that they had enough time and the means and knowledge to have sought a telephonic warrant. RP 68-91. The facts of this case would not have justified the officers’ intrusion into even *Mr. Schinnell’s* residence to serve the misdemeanor arrest warrant, let alone supporting entry into the home of Mr. Hatchie.

The officers in this case conceded that they searched Mr. Schinnell’s records in order to find an excuse to pull him over. RP 56-61. And there is no question that such a stop would have been permissible. When they lost track of him, however, they sought to turn that excuse - the misdemeanor warrant - into a justification to enter the home of another. And they admitted that a major motivation for that entry was to look for evidence of the drug manufacturing they thought might be occurring inside. RP 18-19, 29-30, 51-61, 67, 110, 152. This is exactly the kind of police conduct, and governmental intrusion into the sanctity of the home, which Chrisman prohibits. As the Anderson Court stated:

[t]o allow an arrest warrant for a non-violent misdemeanor to create carte blanche for searching the homes of third parties creates the risk of the sort of abuse complained of here: using the arrest warrant as a “pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place.

Anderson, 105 Wn. App. at 232. The misdemeanor warrant for Mr. Schinnell’s arrest did not justify the police entry in the home under Article

1, §7. This Court should reverse and dismiss the conviction.

c. The arrest warrant for Mr. Schinnell was invalid

Even if the misdemeanor arrest warrant for Mr. Schinnell could have supplied authority under either the Fourth Amendment or Article 1, §7, for the entry into Mr. Hatchie's home, the evidence still should have been suppressed because the arrest warrant was invalid.

In general, in Washington, when officers are lawfully in a place and see contraband or evidence of illegal activity in "plain view," that evidence - and evidence gathered as a result - is admissible. See State v. Dennis, 16 Wn. App. 417, 424, 558 P.2d 296 (1978). However, where officers are not lawfully in the place where they make the observations, the evidence must be suppressed. Chrisman, 100 Wn.2d at 819; Dennis, 16 Wn. App. at 424 ("plain view" doctrine does not "render lawful a seizure of evidence procured or brought into view by invasion of an accused's constitutional rights"), quoted in, State v. Lansden, 144 Wn.2d 654, 664, 30 P.3d 483 (2001).

Here, in upholding the search, the judge stated her belief that the issue of the validity of the warrant did not pose "a significant impediment" in the prosecution's case. RP 245. But where an entry is based upon an invalid warrant, "the officers were not lawfully present on the [] property" and any evidence seen or seized as a result must be suppressed. Lansden, 144 Wn.2d at 662-63. Thus, the validity of the warrant was clearly an issue, and, if the warrant was invalid, there was more than a "significant impediment" in the case - the evidence had to be suppressed.

Had the court properly applied the law, it would have suppressed

the evidence, because the arrest warrant was invalid. Under CrRLJ 3.2, a court may issue a warrant for a person's arrest when they fail to appear at a scheduled proceeding, however nothing in that rule authorizes the issuance of such a warrant with "cash only" bail. Yakima v. Mollett, 115 Wn. App. 604, 610, 63 P.3d 177 (2003). Here, the misdemeanor arrest warrant for Mr. Schinnell specifically states that it is "CASH BAIL ONLY-No Personal Recognizance or Bail Bond." CP 172. The warrant was therefore invalid. Because the officers entered Mr. Hatchie's home pursuant to an invalid warrant, they were not lawfully in a place they had a right to be, and the evidence they saw and seized then and later as a result of the warrants sought based on that evidence, should have been suppressed. The trial court's holding to the contrary was in error and should be reversed.

2. APPELLANT'S STATE CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED

Article 1, §21, of the Washington constitution guarantees citizens the right to a unanimous jury verdict. See State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). As a result, a jury may convict a defendant only if it unanimously agrees that he committed the charged act. Kitchen, 110 Wn.2d at 409. Where the prosecution files a single charge but presents evidence of multiple acts which could amount to that charge, either the prosecution must specify upon which act it is relying or the jury must be instructed that they must be unanimous as to which act was proved beyond a reasonable doubt. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), clarified on other grounds by, Kitchen, 100 Wn.2d at

409. If neither occurs, reversal is required unless no rational trier of fact could have had a reasonable doubt about whether each incident established the charged crime beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411; see State v. Parra, 96 Wn. App. 95, 102, 977 P.2d 1272, review denied, 139 Wn.2d 1010 (1999) (a failure to give a unanimity instruction is harmless beyond a reasonable doubt when the evidence of each act was overwhelming).

In this case, the prosecution charged Mr. Hatchie with only one count of manufacturing methamphetamine as an accomplice but argued two different acts upon which the jury could have relied in finding guilt. According to the prosecution, either Mr. Hatchie was guilty for allowing his house to be a “drug house” where drug activity occurred, or he was guilty for giving Mr. Schinnell pseudoephedrine in order for Mr. Schinnell to turn it into methamphetamine<sup>8</sup>. RP 1301-1302, 1310. Because there was no unanimity instruction given and a rational trier of fact could easily have had a reasonable doubt about whether the “drug house” act was established beyond a reasonable doubt, reversal is required.

As a threshold matter, this Court may address this issue despite counsel’s failure to request a unanimity instruction at trial or object to the failure to give one. It is well-settled that the issue may be raised for the first time on appeal as a manifest error affecting a constitutional right. State v. Fiallo-Lopez, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995); RAP

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<sup>8</sup>The insufficiency of the evidence to corroborate Mr. Schinnell’s claim that Mr. Hatchie committed this “act,” and counsel’s ineffectiveness in failing to request a cautionary instruction on the uncorroborated testimony is discussed *infra*.

2.5(a)(3).

Under RCW 9A.08.020, to prove Mr. Hatchie guilty as an accomplice to manufacturing methamphetamine, the prosecution had to show he somehow aided in the manufacturing endeavors. See State v. Gallagher, 112 Wn. App. 601, 614, 51 P.3d 100 (2002), review denied, 148 Wn.2d 1023 (2003).

Put another way, the prosecution had to show that Mr. Hatchie had either aided or agreed to aid “another in committing a crime by associating himself with the criminal undertaking and participating in it as something he desires to accomplish.” State v. McPherson, 111 Wn. App. 747, 757-58, 46 P.3d 284 (2002). There must be sufficient evidence which “would convince an unprejudiced, thinking mind of the truth” of the theory that the defendant “associated with the criminal venture and participated in it expecting success.” Gallagher, 112 Wn. App. at 614. Further, it is not enough that the defendant was present where the crime occurred, or even assented to its commission; he must have “sought by his acts to make it succeed.” State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993). And a defendant’s culpability as an accomplice cannot extend beyond crimes of which he is shown to actually have knowledge. State v. Roberts, 142 Wn.2d 471, 511, 14 P.3d 713 (2000).

Thus, to prove the “drug house” means of committing the crime, the prosecution had to show more than just that Mr. Hatchie lived at a home where there was drug activity, or even that he knew such activity was occurring. It had to show he somehow encouraged or sought to have that activity occur or succeed. And in addition, because Mr. Hatchie was

accused of being an accomplice to manufacturing, the prosecution had to prove that his “acts” in relation to that drug activity somehow amounted to associating with and participating in manufacturing of methamphetamine.

The prosecution failed in these burdens of proof. First, it is highly questionable whether the “drug house” means of committing the crime was proper, as a matter of law. Despite the prosecution’s emphasis on how the activity showed “sales” and “use” of drugs at the home, the relevant crime was manufacturing. Evidence that others sold and used drugs at the home, without proof of any action of Mr. Hatchie in support of, encouraging or assisting in those acts would not even support accomplice liability for drug sales, let alone manufacturing, because “there must be proof that [the alleged accomplice] did something in associating with the principal to accomplish the crime.” State v. Boast, 87 Wn.2d 447, 456, 553 P.2d 1322 (1976); see State v. Amezola, 49 Wn. App. 78, 89, 741 P.2d 1024 (1987). And this is true even when the alleged accomplice is made aware in advance of the potential crime or takes some act to conceal knowledge of it later. See State v. Castro, 32 Wn. App. 559, 564, 648 P.2d 485, review denied, 98 Wn.2d 1007 (1982).

In addition, here, there was no evidence that Mr. Hatchie had in any way encouraged or sought to have the alleged trafficking or other activity occur at the home. The testimony was that there was “a lot of vehicle” traffic for short periods both days and nights, that people other than Mr. Hatchie were “always” moving things in and out of Mr. Schinnell’s truck, that people would sometimes knock on the neighbor’s door and ask for a

previous tenant, then go next door and be let in by someone other than Mr. Hatchie, that juveniles were seen hanging out or waiting over there who were known to be involved in pot smoking, and that people other than Mr. Hatchie sometimes opened up a manhole cover on the property and put things in and took them out. RP 444, 1033-34, 1051-62. Mr. Huntsman, the neighbor, admitted that none of this activity involved Mr. Hatchie at all, and Mr. Huntsman's daughter, who also saw the activity, did not even recognize Mr. Hatchie as being involved. RP 1066-77. Further, Mr. Huntsman's son, who also saw the activity, admitted he only recognized Mr. Hatchie from having seen him on the property, but never saw Mr. Hatchie engaged in any of the suspicious activity he, his sister or his father described. RP 1076-88.

Indeed, the prosecutor himself admitted there was no proof that Mr. Hatchie was involved in any of the alleged deliveries or sales "activity" at the property. RP 310, 320, 323. Thus, there was no evidence Mr. Hatchie ever associated with or encouraged the activity, even if being an accomplice to drug sales was somehow legally sufficient to make one an accomplice to manufacturing.

Gallagher, supra, is instructive. In Gallagher, this Court found sufficient evidence to prove the defendant guilty as an accomplice to the manufacturing of methamphetamine which occurred in his home. The evidence upon which the Court relied was that the defendant gave the manufacturer a room in his home rent free, had a fan going on in his own room even though it was not a hot day (apparently to dissipate the strong smell), and, most significantly, had left his fingerprints were on items

“critical to the manufacturing” which were found both in the bathroom next to the defendant’s bedroom and in the manufacturer’s bedroom. 112 Wn. App. at 613-14.

While Gallagher did not involve the same kind of “drug house” claim raised here, that case clearly shows that there must be some evidence of encouragement or other acts by the accomplice, other than just living with the alleged manufacturer, to support a conviction. Mere presence at a home, even coupled with knowledge, is not enough unless it is proved that the defendant “shared in the criminal intent of the principal, demonstrating a community of unlawful purpose at the time the act was committed.” Castro, 32 Wn. App. at 564 (citations omitted). Nor is even the potential “encouragement” that Mr. Hatchie’s presence might provide to others sufficient, because “something more than presence alone plus knowledge of ongoing activity must be shown to establish the intent requisite” to finding someone guilty as an accomplice. In re Wilson, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979).

Indeed, the prosecution did not even prove that Mr. Hatchie was operating a “drug house.” Aside from the fact that Mr. Hatchie was not charged with that offense, to prove it the prosecution would have had to show that Mr. Hatchie kept or maintained his home “knowingly” for the primary, “substantial purpose” not of living there but of allowing people who did not live there to use, keep or sell drugs there. See RCW 69.50.402(a)(6) (defining that crime); State v. Ceglowski, 103 Wn. App. 346, 351 P.2d 160 (2000); State v. Fernandez, 89 Wn. App. 292, 298-300, 948 P.2d 872 (1997).

Based upon the evidence the prosecution presented at trial, a rational trier of fact could easily have had a reasonable doubt about whether Mr. Hatchie was guilty as an accomplice to manufacturing methamphetamine based upon the “drug house” means upon which the prosecution relied. As a result, the failure to give a unanimity instruction was not harmless, and reversal is required. See Kitchen, 110 Wn.2d at 411.<sup>9</sup>

3. APPELLANT’S STATE AND FEDERAL RIGHTS TO FAIR TRIAL, TRIAL BY JURY AND DUE PROCESS WERE VIOLATED BY IMPROPER OPINION TESTIMONY

Because it is the jury’s duty to determine guilt or innocence, no witness may testify as to his opinion about the defendant’s guilt, whether directly or by inference. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Farr-Lenzini, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999). Such testimony compels reversal, because it violates a defendant’s constitutional rights to a fair trial, trial by jury, and due process. See State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

In this case, this Court should reverse, because Deputy Fry’s testimony that “methamphetamine was manufactured” at the home was improper opinion testimony about Mr. Hatchie’s guilt under the unique facts of this case.

As a threshold matter, this issue is properly before the Court. Counsel specifically objected to the testimony as “opinion” below. RP 851. Further, the issue is one of constitutional magnitude which may be raised

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<sup>9</sup>Counsel’s ineffectiveness in failing to propose this instruction is discussed, *infra*.

for the first time on appeal as a manifest error affecting a constitutional right. State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003); RAP 2.5(a)(3); see State v. Florczak, 76 Wn. App. 55, 74, 882 P.2d 199 (1994), review denied, 126 Wn.2d 1010 (1994); Demery, 144 Wn.2d at 759 (plurality holding that the error violates constitutional rights). Thus, even if counsel had not objected below, this Court could reach this issue.

Here, there can be no question that Deputy Fry's testimony was improper opinion testimony about Mr. Hatchie's guilt, under the prosecution's theory of this case. Mr. Hatchie was accused of being guilty not for committing the manufacturing himself but for being an accomplice to manufacturing, either for giving Mr. Schinnell the pseudoephedrine or for allowing manufacturing to occur at his home. The deputy's opinion, based on his "training and experience," was, "I believe manufacturing had occurred there" at that home. RP 851. In an ordinary case, where the defendant was accused of having performed the manufacturing himself, this testimony would not necessarily indicate that the deputy thought that defendant was guilty, because it would not indicate a belief in the identity of the manufacturer. Here, however, because Mr. Hatchie was accused of being guilty in part by operating a "drug house" which included having manufacturing at his home, not of making it himself, the officer's testimony that manufacturing had occurred there clearly amounted to an improper comment on Mr. Hatchie's guilt.

Reversal is required. Where an officer gives improper opinion testimony in violation of the defendant's rights to trial by jury, to a fair trial and due process, reversal is required unless the prosecution can show that

the untainted evidence is so overwhelming that it necessarily supports a guilty verdict. Florczak, 76 Wn. App. at 75. Further, where, as here, it is a police officer who testifies and provides the improper opinion testimony, it is especially prejudicial and likely to sway the jury. Farr-Lenzini, 93 Wn. App. at 459-60.

The prosecution cannot meet the burden of proving that the untainted evidence was so overwhelming that it necessarily proved that Mr. Hatchie was guilty as an accomplice of manufacturing methamphetamine here. The only one of the prosecution's theories to which the improper opinion went was the theory that Mr. Hatchie was guilty as an accomplice for living in a "drug house" or letting drug activity go on at his home. The other theory, that he was guilty for giving Mr. Schinnell pseudoephedrine Mr. Schinnell was going to make into or trade for drugs, did not involve manufacturing occurring at the home.

As noted above, the evidence on the "drug house" theory was, in fact, insufficient to support the conviction. Had the jury not heard the officer's improper opinion testimony, it would not have convicted Mr. Hatchie based upon that theory. Obviously, because there was no unanimity instruction, it is impossible for the prosecution to prove that the jury did not rely upon the tainted evidence of the officer's opinion testimony in convicting. This Court should reverse.

4. THE TRIAL COURT ERRED IN ADMITTING  
IRRELEVANT, HIGHLY PREJUDICIAL EVIDENCE  
AND REFUSING TO GIVE PROPER LIMITING  
INSTRUCTIONS

This Court should also reverse based on the trial court's admission

of irrelevant, prejudicial evidence and the failure to give proper limiting instructions for that evidence. ER 403(b) addresses evidence which may be “relevant” but so prejudicial that it should not be admitted except in very limited circumstances. See State v. Wade, 98 Wn. App. 328, 334-36, 989 P.2d 576 (1999). Under that rule, evidence of other crimes, wrongs or acts is not admissible to prove the defendant’s “character” or that he acted “in conformity therewith.” ER 403(b). Such evidence may be admissible for other purposes, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 403(b).

Before admitting other “bad acts” evidence, a trial court is required to 1) identify the purpose for which it is being admitted and 2) on the record, balance the probative value of the evidence with its potential for prejudice. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). Further, the court must determine that the evidence is not just relevant but actually “necessary to prove an essential ingredient of the crime.” State v. White, 43 Wn. App. 580, 587-88, 718 P.2d 841 (1986) (emphasis added); State v. Laureano, 101 Wn.2d 745, 764, 682 P.2d 889 (1984), overruled in part and on other grounds by, State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988), on reconsideration, 113 Wn.2d 520, 782 P.2d 1013 (1989). Doubts are to be resolved in favor of exclusion. Smith, 106 Wn.2d at 776.

Here, the trial court erred in repeatedly admitting improper “propensity” evidence which was neither relevant nor necessary.

First, the court erred in allowing Patrick, the neighbor’s son, to testify that he had seen young people at Mr. Hatchie’s home and knew they were involved in “[p]ot smoking” and “marijuana,” based on the

prosecutor's declaration that the evidence went to "common scheme." RP 1082-83. Evidence of other bad acts are not admissible to prove a "common scheme" unless those acts "show a pattern or plan with marked similarities to the facts in the case" before the court. State v. DeVincentis, 150 Wn.2d 11, 13, 74 P.3d 119 (2003). There was no allegation of such similarities here, nor was there any claim that Mr. Hatchie's alleged acts of accomplice liability for manufacturing methamphetamine were somehow involving pot smoking juveniles.

Second, the trial court erred in admitting evidence of the pipe found in Mr. Hatchie's personal locker at Boeing, and that neighbors said there was lots of "activity" at the house, day and night. RP 245-310, 315-16, 517-19. The prosecutor claimed the pipe evidence was relevant to show "knowledge" of what was happening at the home and a "motive" to make methamphetamine, but the court admitted it because it showed there were "similar items" found both at Mr. Hatchie's home and his workplace. RP 517-19.

The court did not explain, however, why it was relevant to the charge of accomplice to manufacturing of methamphetamine that drug pipes were found at Mr. Hatchie's home and his work. RP 517-19. Indeed, that evidence is only evidence of use, which is "necessarily prejudicial in the minds of the average juror." State v. Renneberg, 83 Wn.2d 735, 737, 522 P.2d 835 (1974). The fact that Mr. Hatchie may have been smoking drugs at work was completely irrelevant to whether he was guilty of assisting in manufacturing of methamphetamine in his home.

Further, the evidence was unnecessary. The prosecution already

had evidence of similar pipes from the garage and kitchen, and testimony that Mr. Hatchie did drugs. Even if there was some relevance to establishing Mr. Hatchie's use of drugs in this manufacturing case, a court admitting other "bad acts" evidence must limit the amount of such evidence to only what is "necessary." White, 43 Wn. App. at 587-88. The court erred in admitting the evidence which, as counsel specifically objected below, was irrelevant, prejudicial and cumulative.

Regarding the evidence from the neighbors, the prosecutor stated it showed drug deliveries and sales, "intent" and "motive," and that Mr. Hatchie lived in a "drug house." RP 310, 320, 323. But the prosecution conceded it did not have to prove "intent" or "motive." RP 310, 320, 323. Further, to admit ER 403(b) evidence for proof of "intent," there must be some logical relevance *other than propensity* between the other acts and the required intent for the charged crime. Wade, 98 Wn. App. at 334-35 (emphasis in original). As this Court stated, simply declaring "[t]hat a prior act 'goes to intent' is not a 'magic [password] whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in [its name].'" Wade, 98 Wn. App. at 335, quoting, State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982) (citations omitted).

Nor was the evidence relevant to "motive." The prosecution never claimed that Mr. Hatchie was an accomplice to making methamphetamine for the purposes of engaging in drug sales or deliveries. And there was no evidence of such sales or deliveries, other than the "traffic" evidence - no money or "deal" books or records or testimony from anyone who alleged to have "bought" there from anyone, let alone Mr. Hatchie.

In addition, in all three of these situations, the trial court failed to balance the probative value of the evidence with the unfair prejudice its admission would cause. RP 245-310, 315-16, 320-23, 333, 517-19.

In short, the highly prejudicial evidence of the juveniles “known” to have been involved in marijuana, the drug pipe at Mr. Hatchie’s work, and the alleged “sales” or “delivery” traffic at the home by others should not have been admitted. As the Supreme Court declared more than 50 years ago, where such evidence is “not essential to establishment of the state’s case it should not be admitted,” and even if admissible it should be excluded if “the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it.” State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950).

Mr. Hatchie was not charged with selling or delivering drugs. He was not charged with associating with minors, or providing them with drugs, or being in any way involved with marijuana. Yet the trial court admitted evidence of all of these things, over defense objection. This evidence was nothing more than improper propensity evidence, inviting the jury to convict Mr. Hatchie because he had a drug problem, and may have associated with drug dealers, even if he himself was not involved in those deals. Especially egregious was the evidence regarding juveniles involved in marijuana, evidence likely to elicit strong negative emotions in any juror and involving a completely different drug than that Mr. Hatchie was alleged to have been involved in making. The trial court erred in admitting this highly prejudicial “propensity” evidence.

After making that error, the court then compounded it by refusing

to give proper limiting instructions, not only on the evidence which should have been excluded but on other evidence, as well. In addition to refusing Mr. Hatchie's request for a limiting instruction on the pipe at work, the court refused to give such instructions on the pipes found in the kitchen and garage, and the straw found in Mr. Hatchie's room.<sup>10</sup> RP 450-62, 506-519.

Under ER 105, a trial court must give a limiting instruction when evidence is admissible for one purpose but not another and the party against whom the evidence is being offered requests such instruction. This is especially true with "other bad acts" evidence. State v. Simpson, 22 Wn. App. 572, 574-75, 590 P.2d 1276 (1979) (admission of other drug possession highly prejudicial and irrelevant; "at a minimum" the jury should be admonished to limit its use of such evidence to only the "proper" purpose for which it was admitted); State v. Griswold, 98 Wn. App. 817, 825, 991 P.2d 657 (2000), reversed on other grounds by, DeVincentis, supra (where evidence is admissible to prove common scheme or plan, "the court should give limiting instructions to direct the jury to disregard the propensity aspect of the evidence and focus solely on its evidentiary effect"). The court erred in failing to give limiting instructions which would have at least made a token effort at curing the prejudice caused by introduction of this highly improper, inflammatory and prejudicial evidence.

Reversal is required. Where, as here, the prosecution is allowed to present evidence of highly prejudicial "propensity" evidence, reversal is

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<sup>10</sup>Counsel's ineffectiveness in failing to request limiting instructions for the juveniles evidence and for the neighbors evidence is discussed, *infra*.

required if it is reasonably probable that the outcome of the trial was affected. White, 43 Wn. App. at 587. That standard is more than met in this case. The evidence that Mr. Hatchie was guilty of being an accomplice to the manufacturing of methamphetamine, on either of the prosecution's two theories, was extraordinarily thin. And the prosecution actually exploited the improper nature of the evidence by highlighting it to the jury, declaring: "Ray Hatchie was using drugs. Ray Hatchie was dealing drugs and Ray Hatchie was making drugs." RP 1310. The evidence necessarily invited the jury to convict Mr. Hatchie based on his "propensity" to be involved in drug activity, not actual evidence. The evidence effectively placing Mr. Hatchie "on trial for offenses with which he [was] not charged," and was "better calculated to inflame the passions of the jurors than to persuade their judgment." Goebel, 36 Wn.2d at 378. There is more than a reasonable probability that the outcome of the trial was materially affected by admission of this evidence, and this Court should reverse.

5. COUNSEL WAS INEFFECTIVE IN MULTIPLE WAYS

Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 366 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Hendrickson, 129 Wn.2d at 77-78. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990), limited on other grounds by Matter of Grisby, 121 Wn.2d 419, 853 P.2d 901 (1993). Mr. Hatchie can meet that burden here.

a. Failure to request a cautionary instruction

First, counsel was seriously deficient in failing to request that the court give a cautionary instruction on accomplice testimony. In Washington, the uncorroborated testimony of an accomplice may support a conviction. See e.g., State v. Denney, 69 Wn.2d 436, 418 P.2d 468 (1966). In such cases, however, it is necessary to give a cautionary instruction about the testimony. State v. Harris, 102 Wn.2d 148, 152-53, 685 P.2d 584 (1984), overruled in part and on other grounds by, State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988), on reconsideration, 113 Wn.2d 520, 782 P.2d 1013 (1989). The instruction is required because there is an “obvious recognition of the danger that innocent persons may easily be convicted upon such uncorroborated testimony.” See State v. Callaway, 267 P.2d 970 (Wyo. 1954).

The relevant pattern instruction in Washington provides:

The testimony of an accomplice, given on behalf of the plaintiff, should be subjected to careful examination in light of the other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony you are satisfied beyond a reasonable doubt of its truth.

WPIC Criminal Instruction 6.05. Failure to give the instruction is reversible error if an accomplice’s testimony is insufficiently corroborated. Harris, 102 Wn.2d at 152-53.

An accomplice’s testimony is only sufficiently corroborated if there was a “substantial amount” of corroboration from other evidence. Harris, 102 Wn.2d at 154. Thus, in Harris, the Court held there was a “substantial amount” of corroboration of testimony of accomplices who disputed the

defendant's claim of diminished capacity based upon intoxication, where they testified that they had spent the day with the defendant and he had not consumed lots of drugs and alcohol, and that testimony was corroborated by several officers who testified that they smelled no alcohol on the defendant when he was arrested, and saw no impairment of his functions. Harris, 102 Wn.2d at 156.

Here, there was not a substantial amount of corroboration of Mr. Schinnell's testimony of the agreement with Mr. Hatchie and of the times Mr. Schinnell said Mr. Hatchie had given him pseudoephedrine. Aside from Mr. Schinnell's word, the only evidence which might provide minimal support was evidence that Boeing might possibly have been missing some Chorafed. But no one, least of all Mr. Hatchie, was ever linked to any missing drugs, and the Chorafed packages found in among the packages of pseudoephedrine from Wal-Mart, Rite-Aid and elsewhere were not shown to have been from Boeing, rather than elsewhere. And there was no evidence, other than Mr. Schinnell's testimony, of anyone ever seeing Mr. Hatchie passing anything to Mr. Schinnell in any way.

Because there was insufficient corroborative evidence for Mr. Schinnell's testimony on one of the two means the prosecution claimed were used in committing the crime, counsel was ineffective in failing to request the cautionary instruction. Giving such an instruction is mandatory where, as here, there was not sufficient corroboration, and the court's failure to give it if requested would have compelled reversal. Harris, 102 Wn.2d at 153-54. There could be no tactical reason for counsel to have failed to request this instruction. Without it the jury was not given the

proper tools with which to weigh the inherently suspect accomplice testimony. Further, because that testimony was absolutely crucial to the prosecution's case, the failure to request the instruction was highly prejudicial and resulted in a conviction which would not have occurred if counsel had been effective. This Court should reverse.

b. Failure to propose a unanimity instruction

Reversal is also required for counsel's ineffectiveness in failing to propose a unanimity instruction. As noted above, there was insufficient evidence to convict on the "drug house" means of committing the crime, and insufficient corroboration for Mr. Schinnell's testimony establishing Mr. Hatchie's guilt on the "providing pseudoephedrine" means. Counsel's failure to request a unanimity instruction permitted Mr. Hatchie to be convicted by a less than unanimous jury, in violation of his constitutional rights. There could be no tactical reason to permit such a violation of a client's rights, with such obvious prejudice that results. This Court should so hold and should reverse.

c. Failure to request proper limiting instructions

Counsel was also ineffective in his handling of the irrelevant, inadmissible and highly prejudicial evidence of the juveniles known to be involved in marijuana and of "traffic." As noted above, this evidence was highly prejudicial, improper "propensity" evidence. It invited the jury to convict Mr. Hatchie based upon repugnance for anyone perceived to be in any way associated with corrupting young people with drugs, or associated with drug dealers. Yet counsel made no effort to blunt the prejudicial effect by requesting a proper limiting instruction. Having objected to the

admission of the evidence, there could be no reason for counsel not to at least try to minimize the damage done by its admission. See e.g., Hendrickson, 129 Wn.2d at 78 (no tactical reason for counsel to allow admission of highly prejudicial evidence).

Because counsel was deficient and the deficiencies prejudiced appellant, reversal is required.

6. THE PROSECUTOR'S MISCONDUCT WAS SO PREJUDICIAL THAT IT DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL

Prosecutors are quasi-judicial officers, entrusted with special public duties. See State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993); State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). Foremost among these is the duty to seek justice and ensure that an accused receives a fair trial, with a result based upon reason and the evidence, not prejudice or emotion. See State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). When a prosecutor fails in this duty, the defendant is deprived of a fair trial. See id.

In this case, the prosecutor committed misconduct by 1) relieving himself of the full weight of his burden of proof by misstating the law on the crucial standard of reasonable doubt, and 2) repeatedly vouching for and bolstering the credibility of the witness who formed the foundation of his case, based on facts not in evidence.

First, the prosecutor committed serious, prejudicial misconduct and relieved himself of the full burden of proof by misstating the crucial

standard of reasonable doubt. It is misconduct for any attorney to mislead the jury as to the relevant law. See State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986), overruled in part and on other grounds by, State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994); State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984); State v. Huckins, 66 Wn. App. 213, 217, 836 P.2d 230 (1992), review denied, 120 Wn.2d 1020 (1993). It is especially egregious when the attorney misstating the law is the prosecutor, because of the potential for such misconduct to have a great effect on the jury, and because of the prosecutor's quasi-judicial duties to ensure a fair trial. See Davenport, 100 Wn.2d at 763; Reeder, 46 Wn.2d at 892.

Further, reasonable doubt is the touchstone of the criminal justice system, and correct application of it is in fact the "prime instrument for reducing the risk of convictions resting on factual error." Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), overruled in part and on other grounds by Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Indeed, it is so vital to our system that failure to properly define it and the "concomitant necessity for the state to prove each element of the crime by that standard" is not just error, it is "a grievous constitutional failure." State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977).

Here, the prosecutor misstated the standard of reasonable doubt not once but several times in closing argument. After first telling the jury that reasonable doubt means they only had to be "confident" in or "believe" Mr. Hatchie played a role as an accomplice, the prosecutor said it was only if

“some of you have great and serious doubts” that they should acquit. RP 1317-18. Once counsel objected, the prosecutor told the jury that the defendant was to get the “benefit of” any “reasonable doubt.” RP 1317-18. He then told the jury that they should convict Mr. Hatchie if they were “confident” he was guilty, and that, if they “knew he did it,” that knowledge must be based upon the evidence, so that if they believed he was guilty, they were to “reach a guilty verdict.” RP 1317-19.

Thus, the prosecutor stood the reasonable doubt standard on its head, first by telling the jury it should convict unless some of them had “great and serious doubts” about Mr. Hatchie’s guilt, then by telling them that conviction was proper if the jury was “confident” or “knew” or “believed” Mr. Hatchie was guilty, regardless of the standard of reasonable doubt. But a jury could be “confident” or “know” or “believe” someone guilty based upon a far lesser standard, such as a preponderance of evidence. And the standard is not that the jury must convict unless someone has “great and serious doubts” about guilt, it is that there is a presumption of innocence which is only overcome if the prosecution provides sufficient evidence to prove the allegations beyond a reasonable doubt. It is not only misconduct but grave, serious and prejudicial misconduct when the prosecutor misstates the law of reasonable doubt so as to make it seem the jury should presumptively convict.

Second, the prosecutor committed serious, prejudicial misconduct in repeatedly referring to Mr. Schinnell’s plea agreement and the portion which required him to tell the truth, and in misstating the law on the possible effect of his testimony incriminating Mr. Hatchie. After first

declaring, in opening argument, that Mr. Schinnell's plea bargain conditions "included him testifying truthfully in this case," the prosecutor then misstated the law in front of the jury, trying to get them to believe that Mr. Schinnell would actually not get credit towards his time served "automatically," so that he could still face 12 months in custody after testifying. 3RP 15, RP 1221. And in rebuttal closing argument, the prosecutor again referred to the "truthtelling" requirement of Mr. Schinnell's plea agreement, telling the jury that agreement did not require Mr. Schinnell to get "anybody" convicted by "required truthful testimony, to tell the truth." RP 1343.

It is flagrant, prejudicial misconduct for a prosecutor to bolster a witness, especially one so crucial as Mr. Schinnell. See State v. Bourgeois, 133 Wn.2d 389, 400, 401, 945 P.2d 1120 (1997). Further, evidence that a witness is required by a plea or immunity agreement to "testify truthfully" at a trial is irrelevant and prejudicial, and admission of such evidence amounts to improper vouching for the witness' veracity. State v. Green, 119 Wn. App. 15, 21, 24, 79 P.3d 460 (2003), review denied, 151 Wn.2d 1035, cert. denied, \_\_ U.S. \_\_, 125 S. Ct. 660 (2004); see United States v. Roberts, 618 F.2d 530, 533-34 (9<sup>th</sup> Cir. 1980) (vouching for a government witness by admitting such evidence is especially egregious when the government referred to it in closing argument). And it is misconduct for the prosecutor to rely on facts not in evidence in an effort to win the case. See State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955). Indeed, it is akin to the prosecutor testifying, without providing the defendant his rights to

confront and cross-examine the “witness.” Belgarde, 110 Wn.2d at 508-509.

Arguably, if the only comment the prosecutor made on this issue was the one in rebuttal closing argument, the prosecution might have a colorable claim that it was made in response to Mr. Hatchie’s argument that Mr. Schinnell’s deal required him to give the prosecution someone to convict. By the time counsel made that argument, however, the prosecution had already set the stage, right at the outset of the case, in opening argument. And the prosecutor had already implied that Mr. Schinnell was not going to be getting credit for time served towards the sentence which would later be imposed - even though there was no evidence in the record that Mr. Schinnell was not serving time in relation to the charges he faced. See RCW 9.94A.505(6) (credit for all confinement served prior to sentencing shall be given except if that time was not regarding that offense).

Reversal is required. In general, where the defendant objected below, reversal is required if there is a substantial likelihood the misconduct affected the verdict. Belgarde, 110 Wn.2d at 508. Here, Mr. Hatchie objected to the prosecutor’s misstatements of the law of reasonable doubt. Because these misstatements affected Mr. Hatchie’s constitutional rights, however, the standard is not the “substantial likelihood” standard but rather the stricter constitutional harmless error standard, of reversal unless the prosecution can show the untainted evidence was so overwhelming it necessarily leads to a finding of guilt. See State v. Contreras, 57 Wn. App. 471, 473, 788 P.2d 1114, review denied, 115 Wn.2d 1014 (1990); State v.

Traweck, 43 Wn. App. 99, 107-108, 715 P.2d 1148, review denied, 106 Wn.2d 1007 (1986), overruled in part and on other grounds by, State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

The prosecution cannot meet that burden in this case. As noted above and *infra*, there was insufficient evidence to support one of the “means” of committing the offense, and the other means was based upon the insufficiently corroborated testimony of an accomplice. Had the prosecutor not repeatedly misstated the crucial standard, the jury would almost certainly not have convicted based on the extremely thin evidence in this case.

Reversal is also required for the misconduct to which counsel did not object. Where there was no objection, reversal is required where the misconduct is so flagrant and prejudicial that its damaging effects could not have been cured by instruction. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). The misconduct in telling the jury that Mr. Schinnell had an agreement with the prosecution which required “truth-telling,” and the misstatement of the benefits he would enjoy for incriminating Mr. Hatchie. All of this misconduct was likely to weigh heavily on the minds of jurors, especially the implication that the government had somehow “ensured” that Mr. Schinnell, the only witness who tied Mr. Hatchie to manufacturing in any way, was telling the truth.

Even if this Court finds that this misconduct could have been remedied by objection and curative instruction, reversal is required because counsel was ineffective in failing to take those steps. While the decision

whether to object is usually considered “trial tactics,” in egregious circumstances, on important testimony, the failure to object can be ineffective assistance. See State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989); see also Hendrickson, 129 Wn.2d at 77-78. In such cases, counsel is shown ineffective if there is no legitimate tactical reason for counsel’s failure to object, an objection would likely have been sustained, and an objection would have affected the result of the trial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

There could be no legitimate tactical reason for counsel to fail to object to the prosecutor’s bolstering of the truthfulness of the only witness who claimed Mr. Hatchie was involved. There is no possible benefit which a reasonable attorney could foresee arising from allowing such misconduct on such vital issues to pass by unaddressed. The obvious result of allowing such misconduct to occur without objection is the jury believing that the misstatement was correct, and being swayed by their respect for the office and function of the prosecutor into placing greater emphasis on Mr. Schinnell’s claims than it deserved. Further, it is likely any objection would have been sustained, given how egregious the misconduct. And there can be no question that an objection, sustained and followed by instruction, would have affected the outcome of the trial, if indeed the misconduct could have been “cured” by instruction. While Mr. Hatchie maintains that this misconduct was so flagrant and prejudicial it could not have been remedied, if this Court disagrees, it should reverse, based on counsel’s ineffectiveness.

Finally, even if one of the acts of misconduct would not compel reversal standing alone, this Court should reverse based on the cumulative effect of misstating the burden of proof, declaring highly prejudicial facts not in evidence and bolstering the credibility of the only witness who ever claimed Mr. Hatchie was in any way involved in any manufacturing activity. See State v. Henderson, 100 Wn. App. 794, 804, 998 P.2d 907 (2000) (reversal may be granted for cumulative effect of misconduct); State v. Torres, 16 Wn. App. 254, 263, 554 P.2d 1069 (1976) (same). This Court should reverse.

7. THE SENTENCING COURT VIOLATED  
APPELLANT'S RIGHT TO ALLOCUTION

Under the Sentencing Reform Act (SRA), defendants have a statutory right to allocution. See In re Echevarria, 141 Wn.2d 343, 6 P.3d 573 (2000). This right requires that, at the sentencing hearing, the “court shall. . . allow arguments from the prosecutor, the defense counsel, [and] the offender.” RCW 9.94A.500(1). This statutory codification of a common law right requires not only that the court take no steps to prevent a defendant from speaking but also that “a specific and personal invitation to speak” is extended from the trial judge to the defendant, prior to the judge’s declaration of a sentence. State v. Crider, 78 Wn. App. 849, 899 P.2d 24 (1995). When the right to allocution is inadvertently omitted until after the court has orally announced a sentence it intends to impose, the appearance of fairness doctrine is violated along with the right. State v. Aguilar-Rivera, 83 Wn. App. 199, 200, 920 P.2d 623 (1996). The remedy is remand for resentencing in front of a different judge. Id.

In this case, Mr. Hatchie was deprived of his right to allocution and the appearance of fairness doctrine was violated when the sentencing judge announced, after hearing arguments from counsel, that she was ready to rule, was not going to grant the requested exceptional sentence below the standard range, and was going to adopt a standard range sentence of 55 months plus the enhancement, prior to inviting Mr. Hatchie to address the court. SRP 19.

Further, the error was not somehow “cured” by the judge’s subsequent declarations of willingness to hear from Mr. Hatchie after being reminded of his right to speak, and her “knocking off” a few months from the sentence she originally imposed after hearing from him. The right to allocution and the appearance of fairness doctrine require the opportunity to speak prior to any declaration of sentence, because having the opportunity to speak “extended for the first time after” there has been such a declaration seems, at best, an empty gesture. See Crider, 78 Wn. App. at 861. Indeed, “[e]ven when the court stands ready and willing to alter the sentence when presented with new information, . . . from the defendant’s perspective the opportunity comes too late. The decision has been announced and the defendant is arguing from a disadvantaged position.” Id.

Here, that is exactly what happened. Instead of having the opportunity to address the court prior to its decision to reject his request for an exceptional sentence below the standard range, Mr. Hatchie was only given the chance to speak after the court had already decided to reject that request. For Mr. Hatchie, the opportunity came too late for him to

have a meaningful opportunity to argue for the exceptional sentence he sought, which the court had already rejected. And it is small comfort that the court decided to “knock off” a few months to a slightly lesser sentence but still not the lowest sentence in the standard range, when the court’s decision to sentence Mr. Hatchie within the standard range had already been made before he spoke.

In addition, it is questionable whether the court’s “invitation” to speak was even sufficient. The judge did not tell Mr. Hatchie he had the right to speak and she would consider whatever he said; she said that she would only consider what he had to say if it was something counsel had not already said, that she did not already “know about.” SRP 20.

Nor was the error “harmless.” In very limited circumstances, where remand could not result in a different sentence, Divisions One and Three have held that the error in failing to allow the defendant his right to allocution was “harmless.” See State v. Gonzales, 90 Wn. App. 852, 854, 954 P.2d 360, review denied, 136 Wn.2d 1024 (1998) (defendant received the bottom of the standard range; Court specifically relying on his failure to ask for exceptional down in finding error harmless); State v. Avila, 102 Wn. App. 882, 898, 10 P.3d 486 (2000), review denied, 143 Wn.2d 1009 (2001) (sentence well below statutory maximum and likely already served so remand would serve no purpose). However, those limited circumstances are not present here, where Mr. Hatchie’s sentence was not at the bottom of the standard range and he will not have already served it because he got three years of flat time for the enhancement alone. Further, because he specifically sought a sentence below the standard range, the

appearance of unfairness caused by court's failure to allow him to speak prior to deciding to reject that request cannot be erased.

Because Mr. Hatchie's right to allocution, and the appearance of fairness, were violated at sentencing, this Court should reverse and remand for resentencing before a different judge, if it does not reverse and remand for a new trial, based upon the other arguments contained herein.

#### 8. CUMULATIVE ERROR COMPELS REVERSAL

Even if this Court does not find that the prejudice caused by each individual error compels reversal, reversal is nevertheless required because their cumulative effect deprived Mr. Hatchie of his state and federal constitutional rights to a fair trial. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

Aside from the fact that the entire case was based upon evidence gathered in violation of our most cherished constitutional rights, the trial errors all went to the heart of the prosecution's claims and the jury's ability to properly decide this case. The jury was bombarded with improper, prejudicial evidence of drug use and possible drug activity, told of juveniles being corrupted at the home with drugs other than methamphetamine, informed that Mr. Hatchie not only imbibed in the privacy of his own home but possibly at work while he was supposed to be fighting fires, told that a police officer who knew such things believed that manufacturing had occurred at the residence, and was not instructed to limit its consideration of highly prejudicial "propensity" evidence to any permissible purpose. And the jury was not told how to properly evaluate the inherently suspect evidence of accomplice testimony, instead being told by the prosecution

that it had ensured that such testimony was actually truthful, because it had an agreement with the witness on that. Finally, the jury was told it should convict Mr. Hatchie not if the prosecution had proved the case beyond a reasonable doubt but if jurors simply “believed” his guilt. And counsel failed to take basic steps to try to remedy much of these prejudicial errors.

There is no way that the cumulative effect of these errors had any result other than to completely foreclose the possibility of Mr. Hatchie receiving a fair trial. Even in the highly unlikely event that this Court declines to reverse based on the very serious errors individually, the cumulative effect of the errors compels reversal in this case, and this Court should so hold. See State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992).

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 5<sup>th</sup> day of March, 2005.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached opening brief to opposing counsel and appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

To: Ms. Kathleen Proctor, Esq., Pierce County Prosecuting Attorney's Office, 946 County City Building, 930 Tacoma Avenue S., Tacoma, Washington, 98402;

To: Mr. Raymond K. Hatchie, DOC #868776, MICC, D-129-2, P.O. Box 88-100, Steilacoom, WA. 98388-1000.

DATED this 27th day of March, 2005.



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