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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence of appellant's participation in methamphetamine manufacture to support the required proof beyond a reasonable doubt standard.

2. Appellant was denied due process by repeated violations of motions in limine.

3. The trial court abused its discretion under 404(b) by admitting defendant's prior conviction for possession of methamphetamine.

4. There was insufficient independent evidence to establish the corpus delicti of the crime of manufacture of methamphetamine.

Issues Presented on Appeal

1. Was there sufficient evidence of appellant's participation in methamphetamine manufacture to support the required proof beyond a reasonable doubt standard?

2. Was appellant denied due process by repeated violations of motions in limine?

3. Did the trial court abuse its discretion under 404(b) by admitting defendant's prior conviction for possession of methamphetamine?

4. Without Frank's admissions, was the independent evidence sufficient to establish the corpus delicti of the crime of manufacture of

methamphetamine?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Gregory Lane Franks was charged by information filed April 14, 2003. He was charged with manufacturing methamphetamine in violation of RCW 69.50.401(a)(1)(ii) within 1000 feet of a school zone, and unlawful possession of methamphetamine in violation of RCW 69.50.401(d). 1CP 1-4.1 Franks challenged the admissibility of custodial statements and the court permitted the statements finding that the statements were not custodial and that Miranda² warnings were properly provided. CP 75-78. Franks and co-defendant Donald Kirtland's first trial resulted in a mistrial on the manufacture charge. Franks was convicted as charged of possession in the first trial. 1RP 3.3

Twice Franks moved for a mistrial for violations of motions in limine. First when the state violated the motion in limine not to mention the first trial and second when deputy Minion violated the motion in limine not to mention any outstanding arrest warrants. 1RP 840, 854, 859, 1010. In both instances

¹ CP refers to the clerk's papers for Pierce County Superior Court Cause No. 03-1-01706-1.

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

the court agreed that the motions in limine were violated but denied the motions. 1RP 859, 1010-1013. Franks objected to the accomplice liability jury instruction 19 on grounds that there was no evidence of accomplice liability. 1RP 1214-15.

Franks also moved in limine to suppress mention of his possession of methamphetamine found during the booking for the manufacture charge. 1RP 33. The Court allowed the evidence because it believed the evidence was relevant and, stated, "I think people who have meth in their possession might know more about meth manufacturing than people without meth in their possession." 1RP 36. . 1RP 33-35. The Court did not conduct a thorough 404(b) analysis, but did revisit the issue during the trial. The Court again denied the motion to suppress citing its earlier ruling, and the fact that the evidence was relevant even though prejudicial. 1RP 799-805. Franks was convicted as charged. CP54-65, 1RP 1391-92. This timely appeal follows. CP139-153.

2. SUBSTANTIVE FACTS

On April 12, 2003, Barney Heubner called 911 to report his suspicion of methamphetamine activity in the neighbor's house at 3137 North Huson. 1RP637-639. Huebner reported that there were at least six or so people in the

neighbor's yard digging up the grass and dumping meth residue. 1RP 637-39, 641-42. No such evidence was found. The yard looked like it was prepped for a cement pour and no one was located at the residence other than Franks. 1RP 328-29. Mr. Heubner also informed the police that he saw someone holding a bag with a granular substance. 1RP 637-39. He also claimed to have seen Franks and Kirtland 1 ½ seconds outside prior to calling 911. 1RP 680, 843.

Heubner testified that on two occasions he could not work in his garage due to an overwhelming smell of ammonia he believed came from the neighbor's garage. 1RP 629-33. Heubner never saw Franks digging and never saw him when he smelled ammonia. 1RP 740. Heubner's testimony changed significantly from the first trial to the second. He initially testified that his meat smoker smelled up the entire neighborhood at the time Franks was arrested. RP 77. After first trial where the police testified to not smelling the meat smoking, his testimony changed to indicate that he shut down the smoker so there was no smell in the neighborhood when the police arrived. 1RP 162-63, 249, 661-62. Heubner admitted to having a beer in hand almost all of the time and admitted to drinking a lot of beer. 1RP 640

The police responded to the 911 call and officers Mettler and Quilio entered the side yard of 3137 North Huson near the garage associated with

3 1RP refers to the second trial which resulted in a binding verdict.

that property. 1RP 101-05. Neither Mettler nor Quilio observed Mr. Franks exit the garage, but both assumed that he came from the garage and inaccurately wrote in their reports that they observed him emerge from the garage simply because he was near the garage. 1RP 156. Mettler testified that he smelled an odor of solvents coming from the garage but no solvents were found in the garage and the source of the supposed odor was never found. 1RP 158, 382. Mettler testified that he recognized the smell of solvents but later on cross examination admitted that stripped batteries smell like ether rather than solvents and he did not detect a smell of ether. 1RP 101-05; 159. Mettler denied smelling smoked meat from Huebner's adjacent. 1RP 162-63. The police found partially stripped lithium batteries wrapped in plastic in the garage at 3137 North Huson. 1RP 158.

When the police observed and detained Franks, Mettler provided Miranda warnings. Franks allegedly informed police that he was in the garage stripping batteries for lithium for a friend. The testimony of all of the police experts indicated that to strip batteries, a wire cutter, pliers or saw or similar tool would be needed to open the batteries. No such device was found in the garage, the house or on Mr. Franks' person. 1RP 160-61, 331, 396, 495-96. Mettler continued his testimony on a later day and added at that time that Franks also told him that he was putting the stripped batteries in a bucket

of water, but no such bucket was found in the garage, just the partially stripped batteries wrapped in plastic. 1RP 167-68. On yet a different date, Mettler testified that he reviewed Quilio's report and remembered that Franks actually told him that he was planning on putting the batteries into water but was interrupted by the police. 1RP 907-910. Mettler also testified to yet a different version: that Franks actually said he was putting the batteries in kerosene or mineral spirits. There was kerosene in a closed container in the garage but no mineral spirits. 1RP 906-08, 911.

Quilio testified that she never heard any of Franks' statements because she left to investigate the garage immediately after Franks was detained. 1RP 346-47. Notwithstanding the fact that Quilio did not hear any of Frank's statements, she nonetheless wrote a report which included Frank's alleged admissions. Mettler relied on Quilio's suspect report in testifying to Frank's statements. 1RP 346-48, 907.

Quilio also testified that she observed Frank's wearing a leather glove on his left hand and testified that a leather glove or protective glove is normally worn on the non-dominant hand when stripping batteries to protect against heat and sharp edges. 1RP 254, 336-37. Franks is left handed, thus his non-dominant hand is his right hand. 1RP 1013.

Franks never lived at 3137 North Huson but did work on cars for the

owner of the property, Donald Kirtland. 1RP 262-63, 621, 1038-42, 1086. Latent fingerprints were retrieved from the residence but none matched Franks. 1RP 798, 793-94. Franks was taken into custody and stripped searched. Methamphetamine was found on his person. 1RP 818.

After the police obtained a search warrant for 3137 North Huson, they breached the property. 1RP 941. No one was inside the house or garage, but there were items consistent with a methamphetamine lab such as a bowl of pseudoephedrine tablets, Tupperware with white residue, a possible HCl generator, Pyrex dishes with white residue, Muriatic acid, denatured alcohol, methamphetamine, partially stripped lithium batteries in the garage and other similar items. 1RP 261-63, 298-299, 437-38, 440-41, 941-42, 945. There was no evidence or testimony to suggest that Franks had access to or ever entered the house at 3137 North Huson.

Tami Lee, a forensic scientist with the Washington State Patrol testified via a prepared transcript from the prior trial. Plaintiff's Exhibit 94 (hereinafter Ex. 94 VRP ____). Ms. Lee testified that she conducted a number of scientifically reliable tests and discovered the presence of methamphetamine in several of the state's exhibits. (Ex 94 VRP 1319). For example she found methamphetamine residue in the state's exhibits: 37A, 37B, A13, 37D1, 22A, 39A37F, 37G and 38A. (Ex 94 VRP 1335-1350). Ms.

Lee also analyzed exhibits 32A, 32B, 33 and 35 which contained a combined estimated fourteen thousand pseudoephedrine tablets. (Ex 94 VRP 1321-1330). Ms. Lee estimated that this quantity could possible yield one thousand two hundred and thirty grams of pseudoephedrine. (Ex 94 VRP 1330).

Ms. Lee testified that pseudoephedrine or ephedrine, an alkaline metal such as lithium and a liquid ammonia-type material were necessary to manufacture methamphetamine using the anhydrous method. (Ex. 94 VRP 1314). Ms. Lee did not find the presence of any anhydrous ammonia, ether, acetone, denatured alcohol, kerosene, or lithium in any of the state's exhibits. (Ex. 94 VRP 1355-1359).

C. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE OF THE MANUFACTURE OF METHAMPHETAMINE.

Franks was charged with unlawful manufacture of methamphetamine. He was not charged with stripping lithium batteries and it is not a crime to strip lithium batteries. It is a crime to manufacture methamphetamine. RCW 69.50.401(1)(a)(ii) provides in relevant part:

Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance.

“Manufacture means the production, or preparation, or compounding, or conversion, or processing, directly or indirectly, as well as the packaging or repackaging of any controlled substance.” RCW 69.50.101(p); WPIC 10.02, Supp CP__ Jury Instruction No. 10, July 1, 2005). A challenge to the sufficiency of the evidence requires the reviewing Court to view the evidence in the light most favorable to the State to determine whether any rational trier of fact could find all the elements of the crime beyond a reasonable doubt. State v. Hepton, 113 Wn. App. 673, 681, 54 P.3d 233 (2002), review denied, 149 Wn.2d 1018 (2003). Circumstantial evidence is considered to be as reliable as direct evidence. State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). Any questions of conflicting testimony, witness credibility, and persuasiveness of the evidence are left to the trier of fact. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

In the instant case, the batteries located in the garage were partially stripped and wrapped in plastic. Franks was seen near the garage, not inside the garage. According to the police Franks either said that he was stripping lithium batteries and his fingerprints were on the batteries, he was stripping lithium batteries to help a friend and was putting the batteries in a bucket of water or he was stripping batteries and intended to put the batteries in a bucket of water but was interrupted by the police. Mettler also testified to yet

a different version: that Franks actually said he was putting the batteries in kerosene or mineral spirits. There was kerosene in a closed container in the garage but no mineral spirits. 1RP 106-06, 131, 153-55, 167-68, 906-08, 911. There were no fingerprint matches for Franks anywhere on the premises. 1RP 789, 793-94. Why Franks would say that he was putting batteries in kerosene or mineral spirits makes no sense and stretches Mettler's credibility, particularly because the batteries were in plastic, there was no water and no mineral spirits and no bucket, just a closed can of kerosene. 1RP 912-14.

In any case, Franks never said he was assisting in the manufacture of methamphetamine, and he never said he knew how to make methamphetamine or was ever asked to strip lithium batteries for the purpose of making methamphetamine. The evidence at trial established a house with a number of methamphetamine manufacturing elements. The house was locked and Franks was never present in the house and there was no evidence to suggest that he had access to the house. 1RP 250, 356. The evidence in the garage consisted of partially stripped lithium batteries wrapped in plastic. There was no bucket and no water. The garage also contained tools typically found in a garage, a car belonging to Kirtland and testimony that Kirtland bought and sold cars had people working on cars in his garage. 1RP 389, 636, 692, 1-87-88, 1164.

Lithium is an element used in the manufacture of methamphetamine but it also has other legal uses. Diveriteexpress.com. (See attached Exhibit A). Dive Rite Gear sells VR3, an air/nitrox computer for divers. greatamerican outfitters.com (See Exhibit B). The VR3 needs lithium batteries to operate. Diveriteexpress.com. (See attached Exhibit A). Dive Rite describes the need in certain circumstances to strip the plastic cover from the lithium battery to permit the battery to fit the VR3. Diveriteexpress.com.

Viewing the evidence and the reasonable inferences arising from the evidence in the light most favorable to the State, there was insufficient evidence that Franks manufactured methamphetamine. The evidence suggested that he stripped lithium batteries which is not in itself a crime. Even officer Mettler conceded that he could not determine what if any stage in the manufacture process Franks might have been involved in 1RP 218.

2. APPELLANT WAS DENIED DUE
PROCESS AND A FAIR TRIAL BY THE
STATE'S WITNESSES REPEATED
VIOLATIONS OF MOTIONS IN
LIMINE.

Police officer Woodward violated a motion in limine prohibiting mention of the prior mistrial. Officer Woodward testified as follows: "I read her report the last time this went to trial a year ago or however long." 1RP 840. Franks moved for a mistrial on grounds that he could not get a fair trial

because the jury knew that this was 'round two' and additionally his attorney observed the jury react to the introduction of this evidence. 1RP 856-859. The state suggested lying to the jury and telling them that the reference to the prior trial was really just reference to a prior motion. Franks opposed this idea. 1RP 855 The Court offered a curative instruction, but Franks believed this would just "ring the bell louder". 1RP 860. The Court denied the motion reasoning that there was some taint, but "It's clearly speculative is what it is". 1RP 859-60.

There was a second serious violation of a motion in limine which impacted Franks by making it appear that he was associated with a serious criminal who was already in the criminal justice system. 1RP 1010. Officer Minion violated a motion in limine not to mention co-defendant Kirtland's outstanding warrants. He testified as follows: "we searched the vehicle incident to arrest. He was under arrest for some other charges." The court refused to strike the response. Kirtland moved for a mistrial joined by Franks. 1RP 1010-12. The trial court agreed that the violation was prejudicial and a violation of the motion of limine but nonetheless denied the motion without providing a basis. 1RP 1012-1013. The court offered a curative instruction. 1RP 1312-13.

The trial court abused its discretion by denying Franks' motion for a mistrial. Whenever there is a violation of motions in limine, the impact on the jury is always, by its nature, speculative. "In a criminal proceeding, a new trial is necessitated only when the defendant' has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly." State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997) (quoting State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)).

Whether a mistrial should be granted on trial irregularities is a matter primarily within the discretion of the trial court, and will not be disturbed unless there is a clear abuse of that discretion. Bourgeois, 133 Wn.2d at 406 (citing State v. Bartholomew, 98 Wn.2d 173, 211, 654 P.2d 1170 (1982)). See also, State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996); State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172, modified, 837 P.2d 599 (1992). The trial court is best suited to judge the prejudice of the statement. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). In considering whether a trial irregularity warrants a new trial, the court considers three factors: (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could be cured by an instruction. Post, 118 Wn.2d at 620 (citing State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987)).

As to the first factor of the analysis described in Post, supra, because the evidence against Franks was so limited (his alleged statements to officer Mettler, whose credibility was questionable) the taint from both violations was too great to guarantee Franks a fair trial. Weber, 99 Wn.2d at 165-66. Even the judge recognized in the first instance that the officer's statement was improper and violated the order in limine. The second violation of a motion in limine was cumulative of the first. Alone it created a sense that Franks was involved with a hardened criminal who had multiple outstanding warrants and cumulatively further impeded Franks' ability to receive a fair and impartial trial. The third factor, a curative instruction is always problematic because it tends to "ring the bell louder". Because the evidence against Franks was minimal, the violations cumulatively rose to a level requiring a mistrial.

The seriousness of an irregularity is measured by considering the nature of the irregularity, the effect of it on the defense strategy, and the overall strength of the State's case State v. Hopson, 113 Wn.2d 273, 286, 778 P.2d 1014 (1989); Escalona, 49 Wn. App. at 254-55. Mentioning a mistrial allows the jury to believe that the case is of significant importance to the state such that they are willing to take the matter to trial again. This could create a sense of obligation by the jury to convict, particularly where the co-defendant

may be perceived as a serious criminal. For these reasons the taint was not curable by a limiting instruction and ultimately deprived Franks his right to a fair trial.

3. THE TRIAL COURT ABUSED ITS DISCRETION UNDER 404(b) BY ADMITTING EVIDENCE OF A PRIOR CONVICTION FOR POSSESSION OF METHAMPHETAMINE.

The trial court erred by admitting evidence of Franks' prior bad acts; specifically his possession of methamphetamine. Evidentiary rulings are reviewed for an abuse of discretion. State v. Lane, 125 Wash. 2d 825, 889 P.2d 929 (1995). ER 404(b) forbids the admission of evidence of prior bad acts that tend to prove a defendant's propensity to commit a crime, but the rule allows bad act evidence for other limited purposes. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.*

Division Two set forth the analysis required under ER 404(b) in State v. Wade, 92 Wash. App. 885, 890, 966 P.2d 384 (1998): To determine admissibility of evidence under ER 404(b), the trial court must engage in a

three-part analysis established in State v. Saltarelli, 98 Wash. 2d 358, 362, 655 P.2d 697 (1982). First, the court must identify the purpose for which the evidence will be admitted. Second, the evidence must be materially relevant. Third, the court must balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder. Saltarelli, 98 Wash. 2d at 362-66. Further, to avoid error, the trial court must identify the purpose of the evidence and conduct the balancing test on the record. State v. Jackson, 102 Wash. 2d 689, 693-94, 689 P.2d 76 (1984). Doubtful cases should be resolved in favor of the defendant. State v. Smith, 106 Wash. 2d 772, 776, 725 P.2d 951 (1986).

"[R]egardless of relevance or probative value, evidence that relies on the propensity of a person to commit a crime cannot be admitted to show action in conformity therewith." State v. Wade, 98 Wn. App. 328, 334, 989 P.2d 576 (1999). Moreover "if the only relevancy is to show propensity to commit similar acts, admission of prior acts may be reversible error." State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001).

In the instant case, the trial court did not specifically identify the purpose for which the prior bad acts evidence would be admitted. Instead, the court merely stated that the evidence was relevant because a person who

possessed drugs might know more about meth manufacturing than someone who did not possess drugs. 1RP 33-36, 799-805. This analysis does not pass the Saltarelli test under any prong because it fails to identify the purpose of admissibility or the material relevance. State v. Saltarelli, 98 Wash. 2d at 362. Additionally, the court did not balance, on the record, the probative value of admitting the evidence against the prejudicial effect the evidence might have on the jury. State v. Jackson, 102 Wash. 2d 689, 693-94, 689 P.2d 76 (1984). The Trial court's admission of the evidence of possession essentially allowed the State to argue that once a person has used drugs, he always has a motive to use drugs and thus is capable of manufacturing drugs. This is exactly the kind of propensity argument prohibited by ER 404(b).

The evidence is also not admissible to show knowledge or identification. In State v. Pogue, 104 Wn. App. 981, 17 P.3d 1272 (2001), a possession case, the defendant was convicted of possession of cocaine found in the car he was driving. Pogue, 104 Wn. App. at 981-82. Pogue offered an unwitting possession defense, denying that he knew the drugs were in the car. *Id.* The trial court allowed the State to elicit Pogue's testimony that he had used cocaine in the past. *Id.* The Court of Appeals reversed the trial court, explaining that Pogue's defense was not that he did not recognize the substance as an illegal one, but that he simply did not know it was there.

Pogue, 104 Wn. App. at 985. Thus, the evidence of prior use was only relevant through a prohibited propensity argument. *Id.*

In the instant case, Franks was viewed near a garage containing stripped lithium batteries. This was Franks only connection to the manufacturing evidence. He was never inside the house and there were no other facts linking him to the activity in the house. There was no testimony that he had any knowledge regarding the methamphetamine manufacture. He only stated that he was helping a friend strip lithium batteries. Franks' possession of methamphetamine is not relevant to the knowledge of the manufacture of methamphetamine or to the manufacture itself; it is relevant to the issue of possession and use of methamphetamine which are not elements of the crime of manufacturing methamphetamine as set forth in the to-convict instruction number 12. The only purpose for admitting Franks' possession was to show propensity, which is prohibited by 404(b).

The Courts also recognize a "res gestae" or "same transaction" exception in which "evidence of other crimes is admissible 'to complete the story of the crime on trial by proving its immediate context of happenings near in time and place.'" State v. Lane, 125 Wn.2d at 831, (quoting State v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980)).

The evidence is admissible to complete a picture for the jury "where another offense constitutes a 'link in the chain' of an unbroken sequence of events surrounding the charged offense" State v. Lane, 125 Wn.2d at 831 (quoting State v. Tharp, 27 Wn. App. at 204). In the instant case, Franks' possession does not constitute an link in a chain of an unbroken sequence of events. There was never any finished, bleached methamphetamine found at the house and the methamphetamine on Franks was bleached white.

The "error in admitting the evidence of possession is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Robtoy, 98 Wn.2d 30, 44, 653 P.2d 284 (1982), accord, Jackson, 102 Wash. 2d at 695. The evidence of Franks' guilt is not overwhelming. Rather it is within reasonable probabilities, that had the error not occurred, the outcome of the trial could have been materially affected and thus, the error was prejudicial. Without the evidence of drug possession, and given the evidence that the house was locked and separate from the garage, the absence of any connection between Franks and the manufacturing operation, his work on cars, and the lack of testimony that anyone saw Franks in the house or involved in any illegal activity, the jury could have decided that Franks participation in the stripping of lithium batteries did not establish that he

manufactured a controlled substance. Because the admission of the possession could have reasonably altered the outcome of the trial, it is prejudicial and reversal is required.

4. THE STATE FAILED TO PROVE THE CORPUS DELECTI OF THE CRIME OF MANUFACTURE OF A CONTROLLED SUBSTANCE.

“The confession or admission of a defendant charged with a crime cannot be used to prove the defendant's guilt in the absence of independent evidence corroborating that confession or admission.” State v. Whalen, 131 Wn. App. 58, 62, 126 P.3d 55 (2005), citing, State v. Aten, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996). The corpus delecti rule requires that the State produce evidence, independent of the accused's statements, sufficient to support a finding that the charged crime was committed by someone. State v. Riley, 121 Wn.2d 22, 32, 846 P.2d 1365 (1993); State v. Bernal, 109 Wn. App. 150, 152, 33 P.3d 1106 (2001) review denied, 146 Wn.2d 1010, 52 P.3d 518 (2002), citing, City of Bremerton v. Corbett, 106 Wn.2d 569, 574-75, 723 P.2d 1135 (1986). The rule does not require the State to prove who committed the charged crime. Bernal, 109 Wn. App at 152-53, citing, Corbett, 106 Wn.2d at 574.

To be sufficient, independent corroborative evidence need not establish

the *corpus delecti*, or "body of the crime," beyond a reasonable doubt, or even by a preponderance of the evidence. *Riley*, 121 Wn.2d at 32. Rather, independent corroborative evidence is sufficient if it *prima facie* establishes the *corpus delecti*. *State v. Smith*, 115 Wn.2d 775, 781, 801 P.2d 975 (1990). *Prima facie* in this context means evidence of sufficient circumstances supporting a logical and reasonable inference of criminal activity. *Aten*, 130 Wn.2d at 656; *State v. Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). In determining whether the State has produced sufficient *prima facie* evidence, we must assume the truth of the State's evidence and all reasonable inferences drawn therefrom. See *Bremerton v. Corbett*, 106 Wn.2d 569, 571, 723 P.2d 1135 (1986); *State v. Pineda*, 99 Wn. App. 65, 77-78, 992 P.2d 525 (2000). **But the independent evidence must support a logical and reasonable inference of criminal activity only.** *Aten*, 130 Wn.2d at 659-60. If the independent evidence also supports logical and reasonable inferences of non-criminal activity, it is insufficient to establish the *corpus delecti*. *Aten*, 130 Wn.2d at 659-60.

(Emphasis added) Whalen, 131 Wn. App at 131.

In Whalen, the defendant stole seven packages of pseudoephedrine tablets from Target®. Whalen confessed to the security guard who detained him that he was taking the pills for a meth cook to satisfy a marijuana debt. He was charged with robbery in the second degree and

possession of pseudoephedrine with intent to manufacture. The robbery charge was eventually dropped. Whalen, 131 Wn. App. at 60-62. The Court of Appeals reversed Whalen's conviction because absent his confession the evidence did not support a logical and reasonable inference of the charged criminal activity only. Whalen, 131 Wn. App. at 66. The independent evidence established that Whalen shoplifted cold medicine and violated RCW 69.43.110, which limits the amount of pseudoephedrine a person can purchase in a 24 hour period. This evidence was not however sufficient to establish intent to manufacture. Whalen, 131 Wn. App. at 63-64, 66.

State v. Cobelli, 56 Wn. App. 921, 924, 788 P.2d 1081 (1989) is another corpus delicti case with similar issues to both Whalen and the instant case. Therein, the Court of Appeals reversed a conviction for possession with intent to deliver. According to the state's evidence, Cobelli contacted a small group of people, spoke briefly, and then walked away. Cobelli, 56 Wn. App. at 922. Although the police did not observe an actual exchange, they believed and testified that, "[t]he manner in which it was happening [was] real indicative of what I've seen before in the sales and purchase of drugs." Cobelli, 56 Wn. App. at 922. The police arrested Cobelli, and he produced from his pocket 1.4 grams of marijuana in

baggies and cash from and confessed to selling two baggies of marijuana for \$10 each. Cobelli, 56 Wn. App. at 923.

Cobelli was convicted of possession of marijuana with intent to deliver. Cobelli, 56 Wn. App. at 922. The Court of Appeals reversed Cobelli's conviction because the evidence independent of his confession did not support the element of delivery. The evidence indicated a man talking to others in close proximity with only the appearance or possibility of a delivery. Cobelli, 56 Wn. App. at 924-25

In Bernal, another case involving corpus delecti, the defendant was charged with among other things, controlled substances homicide. Bernal, 109 Wn. App. at 153. The evidence established that the victim died of an overdose, but did not establish with corroborating evidence that the accused delivered the heroin. The accused confessed to the delivery, but there was no other extrinsic evidence to suggest a delivery other than the accused's statement. There were also other plausible ways in which the victim could have obtained the heroin, such as finding it or stealing it. Bernal, 109 Wn. App. at 154. For this reason, Division Two of the Court of Appeals reversed the conviction finding that the corpus delecti rule had not been satisfied. *Id.*

Whalen, Cobelli and Bernal provide authority for reversal in the instant case. In the instant case, the independent evidence established that Franks was seen near an unlocked garage that contained a car that might have been worked on, garage and car tools and partially stripped lithium batteries that were wrapped in plastic. There was no evidence of a tool available to Franks to strip the batteries and the batteries were not in a preservative solution to maintain their usefulness in the meth manufacture process. There was evidence that Franks was in the garage working on the car. The house associated with the garage was locked and there was no evidence that Franks had any access to the house. Like Whalen and Cobelli and Bernal, this evidence does not support a logical and reasonable inference of manufacture. Rather, it raises an inference that Franks may have been in the garage working on the car **or** stripping lithium batteries; it does not establish intent to manufacture methamphetamine only. It is therefore insufficient to prima facie establish the corpus delicti of manufacturing methamphetamine.

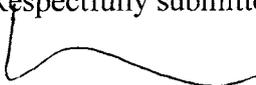
D. CONCLUSION

In sum, the state failed to prove the crime of manufacture of methamphetamine beyond a reasonable doubt and failed to satisfy the corpus delicti rule requiring corroborating evidence of each element of a crime

absent an accused's confession. Mr. Franks was also denied a fair trial by repeated violations of motions in limine and violations of evidence rule 404(b). For these reasons, Mr. Franks respectfully requests this Court reverse his conviction for manufacture of methamphetamine.

DATED this 27th day of March 2006.

Respectfully submitted,



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Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Gregory Franks 3961 Griffith Ave. Bellingham, WA 98225 a true copy of the document to which this certificate is affixed, on March 27, 2006. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature

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