

NO. 33651-1 (CONSOLIDATED)

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DONALD KIRTLAND, APPELLANT
GREGORY FRANKS, APPELLANT

FILED
COURT OF APPEALS
DIVISION II
06 AUG - 7 PM 4:45
STATE OF WASHINGTON
BY MS
DEPUTY

Appeal from the Superior Court of Pierce County
The Honorable Ronald Culpepper

No. 03-1-01706-1
No. 03-1-01962-5
(Consolidated)

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Was denying the defendants' motion to suppress appropriate when:

(a) the challenged findings of fact were either supported by substantial evidence or were irrelevant to whether the evidence was admissible; (Appellant Kirtland's Assignment of Error 1)

(b) the officers' observations were valid under the open view doctrine and emergency exception to the warrant requirement; and (Appellant Kirtland's Assignment of Error 1)

(c) probable cause existed for the search warrant based off facts in the affidavit which established a reasonable inference that defendants were involved in manufacturing methamphetamine on Kirtland's property? (Appellant Kirtland's Assignment of Error 1).....1

2. Was it appropriate to admit the following evidence when it was relevant and not unduly prejudicial:

(a) methamphetamine found on Franks at the time of his arrest; (Appellant Kirtland's Assignment of Error 1-2) (Appellant Franks' Assignment of Error 3)

(b) \$15,000 in cash found on Kirtland at the time of his arrest; and (Appellant Kirtland's Assignment of Error 3)

(c) that two grams of methamphetamine could be purchased for \$150? (Appellant Kirtland's Assignment of Error 3).....1

3.	Was the State’s questioning appropriate and non-prejudicial when the court overruled two of defendants’ objections and instructed the jury to disregard any of the attorneys’ remarks which were not supported by law as stated by the court? (Appellant Kirtland’s Assignment of Error 3).....	2
4.	Was denying the motion for a mistrial appropriate when the jury was instructed not to consider any reference to a previous trial? (Appellant Kirtland’s Assignment of Error 3) (Appellant Franks’ Assignment of Error 2).....	2
5.	Has Kirtland received a fair trial when there were not cumulative errors or egregious circumstances that warrant reversal? (Appellant Kirtland’s Assignment of Error 3).....	2
6.	Was there ample evidence to support Franks’ conviction of manufacturing methamphetamine when he admitted he was stripping lithium batteries and was found with methamphetamine on his person at the time of arrest? (Appellant Franks’ Assignment of Error 1).....	2
7.	Did the State satisfy the corpus delecti rule by presenting ample proof that someone had committed the crime of manufacturing methamphetamine? (Appellant Franks’ Assignment of Error 3).....	2
B.	<u>STATEMENT OF THE CASE</u>	2
1.	Procedure	2
2.	Facts.....	4
C.	<u>ARGUMENT</u>	11
1.	DENYING THE MOTION TO SUPPRESS WAS APPROPRIATE	11
2.	ADMITTING THE EVIDENCE AT ISSUE WAS WITHIN THE TRIAL COURT’S DISCRETION.....	31

3.	THE STATE’S QUESTIONING WAS APPROPRIATE AND DID NOT PREJUDICE KIRTLAND.....	40
4.	DENYING THE MOTION FOR A MISTRIAL WAS APPROPRIATE WHERE THE JURY WAS INSTRUCTED NOT TO CONSIDER ANY REFERENCE TO A PREVIOUS TRIAL.....	43
5.	KIRTLAND IS NOT ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE BECAUSE THERE WERE NO PREJUDICIAL ERRORS.	46
6.	THERE WAS AMPLE EVIDENCE TO SUPPORT FRANKS’ CONVICTION OF MANUFACTURING METHAMPHETAMINE	47
7.	THE STATE SATISFIED THE CORPUS DELECTI RULE BY PRESENTING PRIMA FACIE PROOF THAT SOMEONE HAD COMMITTED THE CRIME OF MANUFACTURING METHAMPHETAMINE	50
D.	<u>CONCLUSION</u>	52

Table of Authorities

Federal Cases

<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S. Ct. 1354, 58 L. Ed. 2d 177 (2004).....	35
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694	6
<u>Steagald v. U.S.</u> , 451 U.S. 204, 214 n.7 (1981).....	25
<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed 2d 889 (1968).....	25
<u>United States v. Dunn</u> , 480 U.S. 294, 304-305, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987).....	21

State Cases

<u>Carson v. Fine</u> , 123 Wn.2d 206, 867 P.2d 610 (1994)	38
<u>City of Bremerton v. Corbett</u> , 106 Wn.2d 569, 578-79, 723 P.2d 1135 (1986).....	50
<u>Henderson Homes, Inc. v. City of Bothell</u> , 124 Wn.2d 240, 244, 877 P.2d 176 (1994).....	12
<u>In re Sego</u> , 82 Wn.2d 736, 513 P.2d 831 (1973)	19
<u>Nissen v. Obde</u> , 55 Wn.2d 527, 348 P.2d 421 (1960)	19
<u>People v. Wright</u> , 52 Cal.3d 367, 404, 802 P.2d 221, 276 Cal. Rptr. 731 (1990), <u>cert. denied</u> , 502 U.S. 834, 112 S. Ct. 113, 116 L. Ed. 2d 82 (1991).....	51
<u>Robel v. Roundup Corp.</u> , 148 Wn.2d 35, 42-43, 59 P.3d 611 (2002).....	11, 14, 24, 27
<u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12, 482 P.2d 775 (1971), <u>review denied</u> , 104 Wn.2d 1019 (1985).....	31
<u>State v. Avery</u> , 103 Wn. App. 527, 537, 13 P.3d 226 (2000).....	31

<u>State v. Bockman</u> , 37 Wn. App. 474, 682 P.2d 925, <u>review denied</u> , 102 Wn.2d 1002 (1984)	34
<u>State v. Broadaway</u> , 133 Wn.2d 118, 131, 942 P.2d 363 (1997).....	11
<u>State v. Brown</u> , 132 Wn.2d 529, 561, 940 P.2d 546 (1997), <u>cert. denied</u> , 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998).....	40
<u>State v. C.D.W.</u> , 76 Wn. App. 761, 763-64, 887 P.2d 911 (1995)	50, 51
<u>State v. Camarillo</u> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	12, 16, 19
<u>State v. Carleton</u> , 82 Wn. App. 680, 685, 919 P.2d 128 (1996)	33
<u>State v. Cobelli</u> , 56 Wn. App. 921, 924, 788 P.2d 1081 (1989)	50
<u>State v. Coe</u> , 101 Wn.2d 772, 782, 684 P.2d 668 (1984)	33
<u>State v. Collins</u> , 121 Wn.2d 168, 172, 847 P.2d 919 (1993)	25
<u>State v. Cord</u> , 103 Wn.2d 361, 367, 693 P.2d 81 (1995).....	19
<u>State v. Costello</u> , 59 Wn.2d 325, 332, 367 P.2d 816 (1962)	43
<u>State v. Darden</u> , 145 Wn.2d 612, 621, 41 P.3d 1189 (2002)	32
<u>State v. Davis</u> , 117 Wn. App. 702, 708, 72 P.3d 1134 (2003), <u>review denied</u> , 151 Wn.2d 1007, 87 P.3d 1185 (2004)	48
<u>State v. Dennison</u> , 115 Wn.2d 609, 628, 801 P.2d 193 (1990).....	32
<u>State v. Downey</u> , 53 Wn. App. 543, 544, 768 p.2d 502 (1989).....	26, 27
<u>State v. Downs</u> , 11 Wn. App. 572, 523 P.2d 1196 (1974).....	44
<u>State v. Ecklund</u> , 30 Wn. App. 313, 316, 633 P.2d 933 (1981).....	44
<u>State v. Ferro</u> , 64 Wn. App. 181, 182, 824 P.2d 500, <u>review denied</u> , 119 Wn.2d 1005 (1992)	22
<u>State v. Finch</u> , 137 Wn.2d 792, 810, 975 P.2d 967, <u>cert. denied</u> , 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999).....	31
<u>State v. Franks</u> , 2005 Wash. App. LEXIS 2787	3

<u>State v. Gatalski</u> , 40 Wn. App. 601, 610, 699 P.2d 804, <u>review denied</u> , 104 Wn.2d 1019 (1985).....	31, 38
<u>State v. Gave</u> , 77 Wn. App. 333, 337, 890 P.2d 1088 (1995)	21
<u>State v. Goble</u> , 88 Wn. App. 503, 509, 945 P.2d 263 (1997)	29
<u>State v. Gould</u> , 58 Wn. App. 175, 180, 791 P.2d 569 (1990).....	38
<u>State v. Greiff</u> , 141 Wn.2d 910, 928, 10 P.3d 390 (2000).....	46
<u>State v. Hanna</u> , 123 Wn. 2d 704, 711, 871 P.2d 135 (1994)	44
<u>State v. Henderson</u> , 100 Wn. App. 794, 800, 998 P.2d 907 (2000).....	40
<u>State v. Hentz</u> , 32 Wn. App. 186, 190, 647 P.2d 39 (1982), <u>rev'd on other grounds</u> , 99 Wn.2d 538, 663 P.2d 476 (1983).....	31
<u>State v. Hoffman</u> , 116 Wn.2d 51, 93, 804 P.2d 577 (1991)	41, 43
<u>State v. Hoke</u> , 72 Wn. App. 869, 873, 866 P.2d 670 (1994)	21
<u>State v. Jacobson</u> , 92 Wn. App. 958, 965 n.1, 965 P.2d 1140 (1998).....	11, 12, 18
<u>State v. Johnson</u> , 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).....	36, 45
<u>State v. Johnson</u> , 124 Wn.2d 57, 76, 873 P.2d 514 (1994).....	44
<u>State v. Johnson</u> , 40 Wn. App. 371, 382, 699 P.2d 221 (1985).....	31
<u>State v. Johnson</u> , 79 Wn. App. 776, 780, 904 P.2d 1188 (1995).....	29
<u>State v. Jordan</u> , 79 Wn.2d 480, 487 P.2d 617 (1971)	34
<u>State v. Koepke</u> , 47 Wn. App. 897, 911, 738 P.2d 295 (1987).....	45
<u>State v. Lewis</u> , 130 Wn.2d 700, 707, 927 P.2d 235 (1996), <u>review denied</u> , <u>State v. Walker</u> , 136 Wn.2d 1002, 966 P.2d 902 (1998).....	43, 44
<u>State v. Loewen</u> , 97 Wn.2d 562, 568, 647 P.2d 489 (1982).....	26
<u>State v. Lord</u> , 117 Wn.2d 829, 887, 822 P.2d 177 (1991).....	41

<u>State v. Madarash</u> , 116 Wn. App. 500, 509, 66 P.3d 682 (2003)	11
<u>State v. Maxwell</u> , 125 Wn.2d 378, 399, 886 P.2d 123 (1994).....	23
<u>State v. McGovern</u> , 111 Wn. App. 495, 499, 45 P.3d 624 (2002).....	29
<u>State v. Mendez</u> , 137 Wn.2d 208, 214, 970 P.2d 722 (1999)	11
<u>State v. Muir</u> , 67 Wn. App. 149, 153, 835 P.2d 1049 (1992).....	26
<u>State v. Myers</u> , 117 Wn.2d 332, 345, 815 P.2d 761 (1991).....	22
<u>State v. Myers</u> , 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).....	19, 36
<u>State v. Myers</u> , 49 Wn. App. 243, 247, 742 P.2d 180 (1987).....	37, 38
<u>State v. Olson</u> , 126 Wn.2d 315, 321, 893 P.2d 629 (1995)	36
<u>State v. Olson</u> , 73 Wn. App. 348, 356, 869 P.2d 110 (1994)	29
<u>State v. Perez-Cervantes</u> , 141 Wn.2d 468, 482, 6 P.3d 1160 (2000).....	45
<u>State v. Pirtle</u> , 127 Wn.2d 628, 643, 904 P.2d 245 (1995), <u>cert. denied</u> , 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996).....	47
<u>State v. Rife</u> , 133 Wn.2d 140, 150-51, 943 P.2d 266 (1997).....	25
<u>State v. Riley</u> , 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)	45
<u>State v. Rivers</u> , 129 Wn.2d 697, 710, 921 P.2d 495 (1996)	33
<u>State v. Roberts</u> , 73 Wn. App. 141, 145, 867 P.2d 697, <u>review denied</u> , 124 Wn.2d 1022, 881 P.2d 255 (1994).....	40
<u>State v. Rose</u> , 128 Wn.2d 388, 392, 909 P.2d 280 (1996).....	22
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994)	39
<u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)	47
<u>State v. Seagull</u> , 95 Wn.2d 898, 902, 632 P.2d 44 (1981).....	21, 22, 23
<u>State v. Smith</u> , 104 Wn.2d 497, 508, 707 P.2d 1306 (1985)	45
<u>State v. Smith</u> , 93 Wn.2d 329, 352, 610 P.2d 869 (1980)	28, 29

<u>State v. Stevens</u> , 58 Wn. App. 478, 498, 795 P.2d 38, <u>rev. denied</u> , 115 Wn.2d 1025, 802 P.2d 38 (1990).....	46
<u>State v. Thein</u> , 138 Wn.2d 133, 140, 977 P.2d 582 (1999)	28, 29
<u>State v. Thomas</u> , 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004).....	36, 45
<u>State v. Thompson</u> , 90 Wn. App. 41, 45, 950 P.2d 977 (1998).....	43, 44
<u>State v. Thrift</u> , 4 Wn. App. 192, 196, 480 P.2d 222 (1971).....	44
<u>State v. Vonhof</u> , 51 Wn. App. 33, 41, 751 P.2d 1221 (1988).....	29
<u>State v. Walker</u> , 136 Wn.2d 1002, 966 P.2d 902 (1998)	43
<u>State v. Wall</u> , 52 Wn. App. 665, 679, 763 P.2d 462 (1988)	46
<u>State v. Whalon</u> , 1 Wn. App. 785, 804, 464 P.2d 730 (1970)	46
<u>State v. Williams</u> , 142 Wn.2d 17, 24, 11 P.3d 714 (2000)	25

Constitutional Provisions

U.S. Const. amend. VI	35
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Statutes

RCW 69.50.101(p).....	47, 48
-----------------------	--------

Rules and Regulations

ER 401	32
ER 402	32
ER 403	32, 38
ER 404(b).....	32, 34, 37, 38
RAP 10.3(a)(5).....	45
RAP 2.5(a)	51

Other Authorities

5D KARL B. TEGLAND, WASHINGTON PRACTICE: COURTROOM
HANDBOOK ON WASHINGTON EVIDENCE, at 209 (2005) 38

E. Clearly, McCormick on Evidence, §190 at 448 (2d ed. 1972)..... 34

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was denying the defendants' motion to suppress appropriate when:
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B. STATEMENT OF THE CASE.

1. Procedure

On April 14, 2003, the State charged defendant Gregory Franks with the crimes of (1) knowingly manufacturing and (2) unlawfully

possessing a controlled substance, methamphetamine.¹ CP-F² 1-4. On April 28 2003, the State charged defendant Donald Kirtland with the crime of knowingly manufacturing a controlled substance, methamphetamine. CP-K 1-4.

On April 13, 2004, the case came before the Honorable Judge Stolz for a suppression hearing. RPI 1.³ The court denied the defendants' motion to suppress. RPI 372. Findings of fact and conclusions of law were subsequently entered. CP-F 66-74. On May 4, 2004, the State filed an amended information charging Kirtland with unlawful possession of pseudoephedrine with the intent to manufacture methamphetamine. CP-K 24-25. The parties proceeded to a jury trial, which resulted in a conviction for Franks' possession charge and a hung jury for the remaining charges. RPII 3.⁴ Franks unsuccessfully appealed his possession charge. (State v. Franks, 2005 Wn. App. LEXIS 2787).

On June 14, 2005, the case came before the Honorable Judge Culpepper for pretrial motions and voir dire for the second trial. RPII 1. The defendants successfully made the following motions: (1) to suppress any of Franks' statements regarding Kirtland (RPII 5-8); (2) to exclude

¹ The State also charged that the manufacturing offense occurred within 1000 feet of a school bus route stop. CP-F 1-4. Defendants stipulated that Kirtland's property was located within 1000 feet of two school bus stops. RPII 1029.

² CP-F refers to Clerk's Papers for Franks; CP-K refers to Clerk's Papers for Kirtland.

³ RPI refers to the Record of Proceedings for the suppression hearing held on April 13-22, 2004.

⁴ RPII refers to the Record of Proceedings for the second trial held on June 14-30, 2004.

witnesses (RPII 9); (3) to exclude any reference to Kirtland's prior convictions (RPII 9); (4) to exclude any statement by Mr. Huebner that he saw a bag of drugs (RPII 10, 17); (5) to exclude any reference to Kirtland being known as a cook (RPII 21-22); (6) to exclude any mention of outstanding arrest warrants for Kirtland's probation violations (RPII 22, 25); (7) to exclude any statement that Officer Mettler had previously arrested Kirtland (RPII 31); and (8) to exclude any reference to the prior trial (RPII 44). Kirtland withdrew his motion for severance of the defendants. RPII 10.

Defendants also made the following motions which were denied:

(1) to exclude any statement by Mr. Huebner about smelling chemicals coming from Kirtland's residence (RPII 10-11, 14, 17); (2) to exclude statements referring to the manufacture of methamphetamine as the Nazi method (RPII 18, 21); (3) to exclude any reference to the \$15,000 found on Kirtland at the time of arrest (RPII 24-26, 27, 36); and (4) to exclude any reference to methamphetamine found on Franks (RPII 32-33, 36).

After the second trial, both defendants were found guilty of unlawful manufacturing of a controlled substance, and Kirtland was found guilty of unlawful possession of pseudoephedrine with the intent to manufacture methamphetamine. CP-F 109; CP-K 78-79.

2. Facts

When Kirtland moved into his house at the beginning of 2003, bars went up on his windows, his garage was sealed off and traffic started

coming through his property at all times during the day and night. RPII 620, 622-623. Franks was a regular visitor to Kirtland's house. RPII 624-625.

A neighbor, Barney Huebner, smelled ammonia on a couple different occasions coming from Kirtland's property about a month after Kirtland had moved in. RPII 629-631. During one of these instances, the smell of ammonia was so strong it burned Mr. Huebner's eyes and nose. RPII 631. On another occasion, Mr. Huebner observed one of Kirtland's visitors drop off an acetylene container. RPII 634. Mr. Huebner saw people dig up Kirtland's yard, shake the dirt out, and then take it into the garage. RPII 638. There was also a dead patch of grass, which Mr. Huebner thought was from dumping chemicals. RPII 639.

On Saturday April 12, 2003, Mr. Huebner went out to his garage to smoke some jerky and have a few beers. RPII 640. Around 7:00 PM, Mr. Huebner heard a lot of people start showing up at Kirtland's house. RPII 641. After hearing people outside Kirtland's garage, Mr. Huebner climbed up a stepladder to see what was going on. RPII 637-638. Mr. Huebner saw over a dozen people standing in a circle, including Franks and Kirtland. RPII 638, 643. One of the other guys was holding a clear tan colored bag which contained about three pounds of a granular substance. RPII 638. The group scattered after they noticed Mr. Huebner. RPII 644. Mr. Huebner heard some people drive away and saw the door

open and close to Kirtland's house. RPII 644. About an hour or two later, Mr. Huebner discussed the incident with his wife and then called 911. RPII 645. Within twenty-five minutes, officers began arriving. RPII 647.

Officer Mettler was one of the officers dispatched to Kirtland's house. RPII 99-100. He parked in the alley and spoke with Mr. Huebner. RPII 101-2. After Officer Quilio and Officer Woodard arrived, the officers walked on a worn path around the corner of Kirtland's garage where they encountered Franks. RPII 104. Franks had a leather work glove on his left hand. RPII 159.

At this point, the officers started smelling odors which were consistent with manufacturing methamphetamine. RPII 105. The smell got a lot stronger as the officers got closer to the garage. RPII 130. Officer Mettler told Franks that a neighbor had reported a drug lab on the property. RPII 164. Officer Mettler then gave Franks his Miranda Warnings, including the right to remain silent.⁵ RPII 106.

Franks stated that he had been inside the garage stripping lithium out of batteries for a friend and that his fingerprints would appear on the battery packages. RPII 106, 131. Franks also stated he was going to put the lithium strips into a bucket with kerosene, but had been interrupted by the officers. RPII 908. Franks also made reference to other people being

⁵ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

in the garage or in the house. RPII 251. Officer Mettler heard something moving around inside the house while he was talking to Franks. RPII 131. Franks was then placed in the back seat of a patrol car. RPII 108.

While Officer Mettler was talking to Franks, Officer Quilio heard other voices coming from inside the garage. RPII 251. Officer Quilio approached the garage door and could hear a very distinct male and female voice. RPII 251. Officer Quilio pushed open the door and yelled, "Come out here." RPII 251. She then realized that the voices were coming from a radio. RPII 252. Officer Quilio scanned the garage for people and noticed some batteries stripped of their outer metal jackets. RPII 252. The odor got stronger when she entered the garage. RPII 254.

At this point, the officers believed there was at least a partial methamphetamine lab on the property, so they contained the house, called for more units and tried to make contact at the residence. RPII 107. There were lights on inside the house, and as Officer Mettler approached he noticed there was a strong solvent smell coming from a bathroom window. RPII 132-133. After an unsuccessful effort to contact Kirtland in the house, the officers applied for a search warrant. RPII 109.

About 11:00 PM that night, Officer Kelley arrived to help contain the house. RPII 809-810. Franks was placed in the back seat of Officer Kelley's patrol car. RPII 810. Once the search warrant was served, Officer Kelley transported Franks to the Pierce County Jail. RPII 812. During the booking procedure Franks was strip searched and a Ziploc

baggy containing white powdery substance was found on his person. RPII 818. The white powder tested positive for methamphetamine. Exhibit 94 at 1352.

After the search warrant was issued, an officer used a public announcement system directed at Kirtland's house to explain why the police were there. RPII 259. The officers also knocked and announced their presence at the house, which was met with no response. RPII 111. The officers then entered the house and cleared each individual room. RPII 111. No one was found in the house. RPII 170.

Officer Mettler was assigned to a bedroom in the southeast corner of the house where he found and collected kitchen bowls filled with Sudafed tablets and empty Sudafed blister packs. RPII 112-113. There were approximately 14,350 pills, which would have produced a large amount of methamphetamine. RPII 149; Exhibit 94 at 1323-1325. In the same bedroom was also a baggie of white powder, which tested positive for methamphetamine. RPII 142-143, 942; Exhibit 94 at 1335.

Officers also investigated the attic and found glassware and tubing set up for a methamphetamine lab. RPII 261-263. There was a two-quart plastic Rubbermaid container two-thirds full of light yellow colored liquid. RPII 432. On top of the container was a Tupperware bowl with holes punched in it for a strainer. RPII 433. There were large industrial sized coffee filters, which are commonly used for the separation of pseudoephedrine. RPII 443. There was a pair of heavy duty rubber

gloves. RPII 449. There was a jug of muriatic acid, a forty pound bag of solar salt water softener, and an aluminum foil roll, all of which are used in the final stage of manufacturing methamphetamine to produce hydrochloric acid. RPII 440-441, 445, 447-448. There was also a garden sprayer with tubing attached to it, which was considered to be used as a hydrochloric acid generator. RPII 436-437. There was a two-foot clear glass vase with white powder residue on the inside and a tube coming out of it. RPII 444. The vase was considered to be where the hydrochloric acid would be mixed with the methamphetamine base. RPII 444. There was a roll of clear vinyl tubing which matched the tubing coming out of the vase and the garden sprayer. RPII 450. There were also two wastebaskets in the corner of the attic filled about a quarter full of clear liquid. RPII 428, 431.

In the living room, Officer Quilio found a book on manufacturing methamphetamine and mail addressed to Kirtland on a coffee table. RPII 263-4. In the master bedroom, Officer Quilio found a baggie containing white powder residue, a small digital scale, and a bag containing \$132 in small bills on the headboard. RPII 265-268. The residue from the baggie and residue scraped off the scale tested positive for methamphetamine. Exhibit 94 at 1337-1339. Officer Quilio also found another scale and baggie on top of a security monitor in the master bedroom. RPII 280-283. There was a bowl on top of the scale that was coated in white powder residue. RPII 281.

In the master closet, Officer Quilio found a pyrex cooking dish that had chunks of white power in it. RPII 288. Officer Quilio also found a Tupperware dish which contained white powder and a baggie which contained powder residue. RPII 287-288, 291. The powder from the Tupperware dish tested positive for methamphetamine. Exhibit 94 at 1347-1348. On the floor of the closet, Officer Quilio found a can of acetone, a can of denatured alcohol and a glass mug with liquid and powder resembling a byproduct of manufacturing methamphetamine. RPII 292-293. The liquid from the mug tested positive for methamphetamine. Exhibit 94 at 1345-1346.

After the officers finished searching the house, they searched the garage. RPII 295. The officers found a pair of pliers and roughly a dozen lithium batteries with the casings removed. RPII 152, 154-155. There was also an unopened package of lithium batteries on the table next to the stripped batteries. RPII 298. There was a garbage can next to the table, which contained the outer battery casings and some battery packaging. RPII 301. On the floor underneath the table there was a bag containing 24 packs of unopened lithium batteries. RPII 299, 305. Near the door there was a one-gallon can of kerosene, which is commonly used to store stripped lithium. RPII 302-303, 305. Officer Quilio also found two one-gallon cans of denatured alcohol. RPII 295. Denatured alcohol is commonly used in the extraction of pseudoephedrine from cold tablets. RPII 296.

A couple weeks later, on April 26 2003, Kirtland was pulled over on Highway 512 by Deputy Minion. RPII 996. Deputy Minion arrested Kirtland and searched his car incident to arrest. RPII 997. Deputy Minion found \$14,984 in cash in the car. RPII 998.

C. ARGUMENT.

1. DENYING THE MOTION TO SUPPRESS WAS APPROPRIATE.

Deciding whether the trial court erred in denying the motion to suppress depends on whether substantial evidence exists to support the findings of fact and, in turn, the conclusions of law. State v. Madarash, 116 Wn. App. 500, 509, 66 P.3d 682 (2003) (citing State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997)). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). The Court of Appeals of Washington treats unchallenged findings of fact as verities on appeal and reviews challenges to a trial court's conclusions of law de novo. Robel v. Roundup Corp., 148 Wn.2d 35, 42-43, 59 P.3d 611 (2002). When a party assigning error to findings of fact fails to argue that the findings are not supported by substantial evidence and does not cite to authorities or to the record to support its assignments of error, the assignments are without legal consequence and the findings of fact are accepted as verities on appeal. State v. Jacobson, 92 Wn. App.

958, 965 n.1, 965 P.2d 1140 (1998), (citing Henderson Homes, Inc. v. City of Bothell, 124 Wn.2d 240, 244, 877 P.2d 176 (1994)). Credibility determinations are for the trier of fact and not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In this case, Kirtland alleges that the trial court erred in denying his motion to suppress evidence. Kirtland challenges findings of facts numbers 3, 6, 7, 14, 20, 24 and conclusions of law numbers 3 through 11.⁶

- a. The challenged findings of fact were either supported by substantial evidence, were not relevant to whether the evidence was admissible or were not addressed in the argument section of Kirtland's brief.

Undisputed Fact No. 3 stated:

Mr. Huebner observed constant foot traffic to and from the residence and garage at all hours of the night and day. The foot traffic was mainly through a pathway next to Mr. Huebner's fence line and Mr. Kirtland's garage. A wood, privacy fence separates Mr. Huebner and Mr. Kirtland's property. Mr. Huebner's garage is adjacent to Mr. Kirtland's garage and about four feet apart. The vehicle entrances to both garages are along an alley. Between the fence and Mr. Kirtland's garage there is about a three foot pathway that leads to the side of the garage that faces Mr. Kirtland's residence and which contains a man door. A lot of foot traffic occurred on this pathway at all hours of the night and day. There is no gate blocking the entrance from the alley way to the pathway that runs alongside Mr. Kirtland's garage.

⁶ In the court's "FINDINGS AND CONCLUSION ON ADMISSIBILITY OF EVIDENCE CrR 3.6." the findings of fact are referred to as "THE UNDISPUTED FACTS" and the conclusions of law are referred to as "REASONS FOR ADMISSIBILITY OF THE EVIDENCE." CP-K 40-48.

CP-K 40-48.

At the suppression hearing, Mr. Huebner drew a rough diagram of where his residence was located in comparison to Kirtland's residence. RPI 23. Mr. Huebner testified that there was a privacy fence separating his house from Kirtland's house. RPI 25. Mr. Huebner also stated that there was, "about four [feet] between the two [garages]." RPI 26. Mr. Huebner testified that he lived at his house for about fifteen years and that there had never been a fence that blocked the passway in between the garages and the alley. RPI 72-73. Mr. Huebner stated that both garages had small drive type on-ramps coming from the alley. RPI 25-26. Mr. Huebner testified that Kirtland's garage had a man door. RPI 77-78. Mr. Huebner testified that after Kirtland moved in his "garage got sealed off. People started coming in and out at all hours of the night." RPI 19. Mr. Huebner testified that a lot of the traffic came in from the alley. RPI 25. Mr. Huebner also testified that "all the people that parked in the alleyway" used the area in between the two garages. RPI 72.

Officer Mettler also drew a diagram of Kirtland's residence in relation to Mr. Huebner's residence. RPI 101. Officer Mettler testified that between Kirtland's garage and fence there was a four foot walkway. RPI 101. Officer Mettler testified that Kirtland's main garage doors go out to the alley. RPI 104. Officer Mettler testified that he believed the garage also had a side door. RPI 104.

Officer Quilio testified that Mr. Huebner informed her that people came and went by the side of the garage because they used a side door to the house. RPI 193. Officer Quilio stated the path was very well-worn from quite a bit of traffic. RPI 194. Testimony from the record shows there was evidence sufficient to persuade a fair-minded, rational person of the truth of Undisputed Fact No. 3.

Undisputed Fact No. 6 stated:

Mr. Huebner decided to use a step ladder and take a look over the fence in order to see what the “pow wow” was all about. When Mr. Huebner peeked over the fence, he observed about a half dozen males standing in front of Mr. Kirtland’s garage in a half circle. Mr. Huebner saw Mr. Kirtland in the circle as well as Mr. Franks. Mr. Huebner also saw an individual holding a clear/tan bag that contained a granular type substance (2-3lbs.). When the individuals noticed Mr. Huebner’s presence, they all scattered “like a covey of quail.” Mr. Huebner suspected that the granular substance was methamphetamine based on his previous observations and the fact that he has previously seen methamphetamine on t.v.

CP-K 40-48.

On April 12, 2003, Mr. Huebner noticed that vehicles were showing up in Kirtland’s residence and that individuals were going into his garage. CP-K 40-48; Undisputed Fact No. 5.⁷ Mr. Huebner’s suspicion was raised based on his previous observations. CP-K 40-48; Undisputed Fact No. 5. Mr. Huebner testified that he saw the individuals

⁷ Kirtland did not assign error to this finding and thus, it is a verity on appeal. Roundup Corp., 148 Wn.2d at 42-43.

leave the garage and get in a circle. RPI 32. He testified that he used a step ladder to look over the fence and saw at least a half dozen individuals standing in the circle, including “Donny” Kirtland and Gregory Franks. RPI 32-33. Mr. Huebner testified that the individuals were holding a clear tan bag that was about two or three pounds and filled with a granular substance. RPI 33-34. Mr. Huebner testified that after he saw the bag, “they all scattered like a covey of quail.” RPI 34. Mr. Huebner testified that he was sure Kirtland had a meth lab because he saw the bag of stuff. RPI 34-35. Mr. Huebner testified that he had “seen the stuff before on television and, you know, I mean I’ve just see the stuff before.” RPI 34. Testimony from the record shows there was evidence sufficient to persuade a fair-minded, rational person of the truth of Undisputed Fact No. 6.

Undisputed Fact No. 7 stated:

At some point that evening or possibly on another day, Mr. Huebner also observed individuals dumping stuff in the yard in front of Mr. Kirtland’s garage. He thought that they might be dumping some sort of chemicals on the lawn. He observed individuals digging up the grass and shaking it out and then taking it into the garage. This also raised his suspicion.

CP-K 40-48.

There was testimony that Huebner called the police on April 12, 2003, and informed them that he saw people “dumping chemicals in the driveway, or just to the north of the house” and

that he believed it was meth-related. RPI 100, 127. During the suppression hearing, Mr. Huebner stated that he could not state specifically what he had said when he called 911. RPI 50. Mr. Huebner did testify that, "I think I do remember telling them that I thought they'd already made their meth... and it looked to me like they were cleaning it up." RPI 50. Mr. Huebner stated that people had been digging in the back yard, but he couldn't remember exactly when that had occurred. RPI 51. Mr. Huebner also stated he had, "thought it was kind of strange because they was shaking the grass, shaking the dirt out of it, putting it in a wheelbarrow and taking it in the garage." RPI 52. Testimony from the record shows there was evidence sufficient to persuade a fair-minded, rational person of the truth of Undisputed Fact 7.⁸

Undisputed Fact No. 14 stated:

Officer Mettler is familiar with Donald Kirtland from previous contacts, which involved meth labs and weapons.

CP-K 40-48.

⁸ On cross-examination Mr. Huebner was asked, "[I]sn't it true that when you called 911 you indicated that there were people digging in the back yard and dumping meth chemicals?" RP 51. Mr. Huebner responded, "No, I -- did I say something of that nature?" RP 51. The testimony shows that Mr. Huebner was unsure of exactly what he had said when he called in. It was appropriate for the trial court to find other testimony credible, which showed that Mr. Huebner had called in about dumping chemicals. Credibility determinations are for the trier of fact and not subject to review. Camarillo, 115 Wn.2d at 71.

Officer Mettler testified that he had arrested Kirtland many times, mainly related to manufacturing methamphetamine. RPI 107. Officer Mettler testified that Kirtland's record showed he had "admitted that he had a manufacturing possession and a felony possession of a firearm." RPI 110. Officer Mettler also testified that he knew Kirtland had pled out to manufacturing or conspiracy to manufacture. RPI 157. Officer Quilio testified that Kirtland's name was typically associated with weapons and meth labs. RPI 245. Officer Quilio also testified that Kirtland's name was well-known to the police in general and caution was associated with his name. RPI 296. Testimony from the record shows there was evidence sufficient to persuade a fair-minded, rational person of the truth of Undisputed Fact No. 14.

Undisputed Fact No. 20 stated:

Officer Mettler told Officer Quilio about Mr. Franks' statements. Officer Mettler conducted a records check on Donald Kirtland and discovered that he had three confirmed felony warrants for his arrest.

CP-K 40-48.

Officer Mettler testified that he ran Kirtland's "name on records" and found he had three separate felony warrants for his arrest. RPI 109-110, 168. Testimony from the record shows there was evidence sufficient to persuade a fair-minded, rational person of the truth of the second sentence in Undisputed Fact No. 20.

The State concedes that the record does not support the first sentence in Undisputed Fact No. 20. Officer Mettler did not tell Officer Quilio about Franks' statements.⁹ RPI 201. However, Kirtland fails to support this assignment of error in the argument section of his brief. Appellant's Brief 30-34. Therefore, the finding should be treated as a verity on appeal. Jacobson, 92 Wn. App. at 965 n.1.

Undisputed Fact. No 24 stated:

Mr. Franks was ultimately arrested for Unlawful Manufacturing of a Controlled Substance and he was transported to the Pierce County Jail. During the booking process, correctional officer Edward Correll found a baggie of methamphetamine located on Mr. Franks person.

CP-K 40-48.

The State concedes that the record does not support the first sentence in Undisputed Fact No. 24. However, this unsupported finding is not relevant to the analysis of whether the evidence obtained was admissible. The search warrant was issued at 2:37AM, before Franks was taken to the Pierce County Jail at 3:12AM. RPI 142. Further, Kirtland fails to support this assignment of error in the argument section of his brief. Appellant's Brief 30-34. Therefore, the finding should be treated as a verity on appeal. Jacobson, 92 Wn. App. at 965 n.1.

⁹ Officer Quilio did return in time to hear part of Franks' conversation and hear who actually lived in the house. RP 201.

- b. The trial court's conclusions of law were appropriate when it determined the State's witnesses were credible, Franks conceded that he lacked standing to challenge the illegality of the search, and the officers' observations were valid under the open view doctrine and emergency exception to the warrant requirement.

Reasons for Admissibility of the Evidence No. 3 stated that, "[t]he State's witnesses that testified at the hearing were credible." CP-K 40-48. Kirtland's challenge of the court's credibility determinations is not proper on appeal. "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." Camarillo, 115 Wn.2d at 71. The trial court alone is the one to view the witness' demeanor and to evaluate each witness' veracity. State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1995). Great deference is to be given to the trial court's factual findings. Cord, 103 Wn.2d at 367 (citing In re Sego, 82 Wn.2d 736, 513 P.2d 831 (1973)); Nissen v. Obde, 55 Wn.2d 527, 348 P.2d 421 (1960).

Reasons for Admissibility of the Evidence No. 4 addressed Franks' lack of standing to challenge the illegality of the search of Kirtland's garage and residence. CP-K 40-48. At the suppression hearing, Franks conceded that he lacked standing. RPI 13. This concession precludes appellate review of Franks' standing. See State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997) ("A party may not set up error at trial and then complain of it on appeal").

Kirtland also challenges the following Reasons for Admissibility of the Evidence:

5. The officers had a right to enter the property from where the constant foot traffic and commotion occurred which is the well-worn pathway between Mr. Huebner's garage and Mr. Kirtland's garage. This is the only access to Mr. Kirtland's garage from the alley. The officers were on legitimate police business and were investigating a possible meth lab.

6. The officers had a right to stop Mr. Franks and inquire about the activity Mr. Huebner observed and inquire about the strong chemical odor emanating from the garage.

7. Based on exigent circumstances and officer safety reasons (information provided by Mr. Huebner, the strong chemical odor, additional voices coming from the garage, and Mr. Kirtland's prior history with law enforcement), Officer Quilio was lawful in opening the garage door. Officer Quilio did not enter the garage but simply glanced around to ensure that there were no additional suspects or additional safety hazards associated with manufacturing methamphetamine.

8. Law enforcement officers may search premises without obtaining a warrant specifically if the officers know that the premises contains a dangerous substance which may likely burn, explode, or otherwise cause harm.

9. The officers were justified in contacting the residence. The officers were attempting to make contact with possible other suspects at the residence, attempting to locate Mr. Kirtland in order to serve the three outstanding felony warrants, and check for additional safety hazards associated with a suspected meth lab.

10. The judge who issued the search warrant did not abuse his/her discretion in finding probable cause to search the garage and residence because there was a sufficient nexus between the crime and the areas to be searched for evidence of the crime.

11. The motion to suppress should be denied because the defendant has failed to show that the evidence found was the fruit of an unlawful search.

CP-K 40-48.

The Fourth Amendment protects against warrantless searches of the curtilage of a residence. United States v. Dunn, 480 U.S. 294, 304-305, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987); State v. Hoke, 72 Wn. App. 869, 873, 866 P.2d 670 (1994). Curtilage is an area intimately tied to the home, and may be determined by reference to (1) the proximity of the area to the home, (2) whether the area is bounded by an enclosure surrounding the home, (3) the nature of the area's uses, and (4) the steps taken by the resident to protect the area from observation by passerby. Hoke, 72 Wn. App. at 873.

An officer's presence within the curtilage of a residence is not automatically an unconstitutional invasion of privacy. State v. Seagull, 95 Wn.2d 898, 902, 632 P.2d 44 (1981). Police with legitimate business may enter curtilage that is impliedly open to the public, such as access routes to the residence, the driveway, or a walkway. Seagull, 95 Wn.2d at 902. If a government official does not go beyond those areas impliedly open to the public, no privacy interest is invaded. State v. Gave, 77 Wn. App. 333, 337, 890 P.2d 1088 (1995). An officer is permitted the same license to intrude as a reasonably respectful citizen. Seagull, 95 Wn.2d at 902.

If an officer is within an impliedly open area or a nonintrusive vantage point and detects something by use of the senses, such as a sight

or smell, it is in “open view.” State v. Myers, 117 Wn.2d 332, 345, 815 P.2d 761 (1991). Such an observation can provide the basis for a search warrant. State v. Ferro, 64 Wn. App. 181, 182, 824 P.2d 500, review denied, 119 Wn.2d 1005 (1992). No search within the meaning of the Fourth Amendment occurs where the “open view” doctrine is satisfied. State v. Rose, 128 Wn.2d 388, 392, 909 P.2d 280 (1996).

For instance, in Seagull, 95 Wn.2d at 905, the court upheld an officer’s actions under the open view doctrine even though the officer did not choose the most direct route. In that case, the officer was canvassing the neighborhood for information about an unrelated incident. Seagull, 95 Wn.2d at 900. The officer knocked on the back door of the residence, which was located on the south side of the house. Seagull, 95 Wn.2d at 900. When no one answered the door, the officer proceeded to walk toward the north door. Id. In doing so, he did not take the most direct route along the side of the house. Id. Rather, he walked through the yard and down the middle of the open space, traversing the patchy grass area of the defendant’s yard. Id. He came across a greenhouse located by the defendant’s house where he observed a marijuana plant growing in the corner. Id. The officer obtained a search warrant, which was ultimately executed by another officer. Id. The Court held that the officer’s action did not amount to an unconstitutional invasion of privacy. Seagull, 95 Wn.2d at 905. The court observed that it would be unreasonable to require, in every case, that police officers walk a tightrope while on

private property engaging in legitimate police business. Seagull, 95 Wn.2d at 905. The Court further reasoned that the police, on legitimate business, may enter areas of curtilage which are impliedly open, such as access routes to the house. Seagull, 95 Wn.2d at 902.

Similarly, in State v. Maxwell, 125 Wn.2d 378, 399, 886 P.2d 123 (1994), the Supreme Court held that a government agent did not unreasonably depart from an area of a residence which was open to the public. In that case, the investigator was called to the defendant's residence to investigate a possible marijuana grow operation. Maxwell, 125 Wn.2d at 382. The investigator went to the house and knocked on the door. Maxwell, 125 Wn.2d at 383. There was no answer but he heard voices in the garage so he walked across the driveway to the garage and then on what appeared to be a pathway to an entry door. Id. He knocked on the door but there was no answer. Id. He smelled marijuana, observed mildew on the garage door, and observed potting soil all consistent with a marijuana grow operation. Id. The evidence was the basis for the search warrant which led to the discovery of a marijuana grow operation. Id. The Supreme Court held that no privacy interest was invaded in this case. Maxwell, 125 Wn.2d at 399. The court found that the fact that the investigator was attempting to find evidence of a marijuana grow operation was not relevant to the lawfulness of the officer's conduct. Id.

In this case, the trial court properly denied defendants' motion to suppress where there was no unconstitutional invasion of privacy. First, the officers were at Kirtland's residence on legitimate police business. The officers responded to the 911 call that was made by Mr. Huebner. CP-K 40-48 (Undisputed Fact No. 8).¹⁰ Mr. Huebner suspected that Kirtland was manufacturing methamphetamine. CP-K 40-48 (Undisputed Fact No. 8). Thus, the officers were on the Kirtland's property to investigate a potential methamphetamine lab.

Second, the officers did not exceed the scope of their implied invitation. The officers were on a well-traveled walkway when they detected an odor of solvents consistent with chemicals used in manufacturing methamphetamine. The officers walked on a four-foot pathway located between Mr. Huebner's garage and Kirtland's garage. CP-K 40-48 (Undisputed Fact No. 15). Officer Mettler testified that the pathway had matted down grass consistent with a well-traveled walkway. CP-K 40-48 (Undisputed Fact No. 15). This pathway is not closed off by a fence or a gate. CP-K 40-48 (Undisputed Fact No. 15). Mr. Hueber further testified that he observed constant traffic on this pathway. RPI 25, 72. The officers did not exceed scope of the impliedly open area when

¹⁰ Kirtland did not assign error to Undisputed Facts No. 8 and 15, and thus they are verities on appeal. Roundup Corp., 148 Wn.2d at 42-43.

they detected the odor of chemicals. Consequently, the officers' initial entry onto the Kirtland's property did not constitute a search.¹¹

Further, Officer Quilio was lawful in opening the unlocked garage door under the emergency exception of the warrant requirement. When evidence is obtained by a warrantless search, the burden is on the state to show that the search falls within an exception to the Fourth Amendment. State v. Collins, 121 Wn.2d 168, 172, 847 P.2d 919 (1993). These jealously and carefully drawn exceptions include consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and Terry investigative stops. State v. Rife, 133 Wn.2d 140, 150-51, 943 P.2d 266 (1997) (citing Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed 2d 889 (1968)).

¹¹ Alternatively, the officers were properly on the property where there were outstanding warrants for co-defendant Kirtland's arrest. The United States Supreme Court has held that an arrest warrant "authorizes a limited invasion of that person's privacy interest when it is necessary to arrest him in his home." State v. Williams, 142 Wn.2d 17, 24, 11 P.3d 714 (2000) citing Steagald v. U.S., 451 U.S. 204, 214 n.7 (1981). A valid arrest warrant implicitly carries with it the limited authority to enter a dwelling in which the suspect lives if the deputies have reason to believe the suspect is within. Williams, 142 Wn.2d at 24. In this case, a records check revealed that co-defendant Kirtland had outstanding warrants for his arrest. RPI 181. The arrest warrant listed 3137 North Huson Street as the address. RPI 181; 99. According to Officer's Mettler's testimony, Franks indicated that Kirtland lived at the residence. RPI 106-107. He further indicated that Kirtland had left Franks in the garage approximately 20 minutes prior to the officer's arrival. RPI 109. The officers had reason to believe that Kirtland would be on the property. Consequently, the officers had authority to enter the property and attempt to locate Kirtland on the property in order to arrest him.

Although warrantless searches are per se unreasonable, an emergency situation can justify such a search. State v. Downey, 53 Wn. App. 543, 544, 768 p.2d 502 (1989). Courts have established the emergency exception to the requirement for a search warrant, whereby police may enter a building if they reasonably believe persons are in imminent danger of death or harm, or where there are objects likely to burn or explode. State v. Muir, 67 Wn. App. 149, 153, 835 P.2d 1049 (1992).

In order for the search to come within the emergency exception, the appellate court must be satisfied that the “search was actually motivated by a perceived need to render aid or assistance.” Downey, 53 Wn. App. at 545. The State must show that: (1) the searching officer subjectively believed an emergency existed; and (2) a reasonable person in the same circumstances would have thought an emergency existed. State v. Loewen, 97 Wn.2d 562, 568, 647 P.2d 489 (1982).

Courts recognize that a high level of chemical odors such as ether can justify a warrantless search. Downey, 53 Wn. App. at 546. In Downey, the court held that exigent circumstances justified the initial entry into the defendant’s residence. In that case, officers were dispatched to the defendant’s residence to investigate a report of a strong odor of ether. Downey, 53 Wn. App. at 543. The officers noticed the odor 150 to 200 feet away from the residence. Downey, 53 Wn. App. at 544. The

officers contacted the narcotics unit, which cautioned them that ether is highly volatile and explosive. Id. The officers entered the defendant's residence without obtaining a warrant. Id. Upon entry, the officers observed a chemical type lab. Id. The trial court denied defendant's motion to suppress finding that the officers' warrantless entry was justified under the exigent circumstances doctrine. Id. Division One affirmed the trial court finding that a reasonable person in these circumstances would have thought that an emergency, which demanded an immediate search existed and that the search was reasonable. Downey, 53 Wn. App. at 546.

In this case, the trial court properly denied defendants' motion to suppress under the emergency exception to the warrant requirement. First, Officer Quilio subjectively believed an emergency existed when she opened the garage door. Officer Quilio and Officer Mettler both testified that they detected a chemical odor emitting from the vicinity of Kirtland's garage. CP-K 40-48 (Undisputed Fact No. 17).¹² Both officers testified that they have extensive training on the dangers associated with methamphetamine labs. CP-K 40-48 (Undisputed Fact No. 12). The dangers involve highly volatile chemicals, which may spontaneously explode, start a fire, and possibly cause inhalation problems. Id. The odor

¹² Kirtland did not assign error to Undisputed Facts No. 12, 16 and 17, and thus they are verities on appeal. Roundup Corp., 148 Wn.2d at 42-43.

that the officers detected was consistent with the same type of odors involved in manufacturing methamphetamine. CP-K 40-48 (Undisputed Fact No. 16). The officers also knew that Kirtland was involved with methamphetamine labs from previous contacts and arrests. RPI 107, 110, 157, 245, 296. Officer Quilio subjectively believed an emergency existed when she heard voices coming from the garage. Furthermore, a reasonable person in these circumstances would have thought an emergency existed. Consequently, the warrantless entry search was justified under the emergency exception.

- c. There was probable cause for the search warrant based off facts in the affidavit which established a reasonable inference that defendants were involved in manufacturing methamphetamine on Kirtland's property.

A search warrant may issue only upon a determination of probable cause." State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). "An application for a warrant must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate." Thein, 138 Wn.2d at 140 (citing State v. Smith, 93 Wn.2d 329, 352, 610 P.2d 869 (1980)). "Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence

of the crime can be found at the place to be searched." Thein, 138 Wn.2d at 140; accord State v. McGovern, 111 Wn. App. 495, 499, 45 P.3d 624 (2002). Probable cause thus requires (1) a nexus between criminal activity and the item to be seized, and (2) a nexus between the item to be seized and the place to be searched. Thein, 138 Wn.2d at 140 (quoting State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)); McGovern, 111 Wn. App. at 499.

In considering the adequacy of smell observations to support probable cause, the court should consider the experience and the expertise of the officers involved. State v. Johnson, 79 Wn. App. 776, 780, 904 P.2d 1188 (1995). The officers' particular expertise is considered critical. Johnson, 79 Wn. App. at 780 (citing Smith, 93 Wn.2d at 351-52); State v. Olson, 73 Wn. App. 348, 356, 869 P.2d 110 (1994) ("When an officer who is trained and experienced in marijuana detection actually detects the odor of marijuana, this by itself provides sufficient evidence to constitute probable cause justifying a search."). The officers' sense observations must consist of more than mere personal belief. State v. Vonhof, 51 Wn. App. 33, 41, 751 P.2d 1221 (1988).

The affidavit in this case established a reasonable inference that defendants were involved in manufacturing methamphetamine on Kirtland's property. The affidavit stated that the officers recognized an odor consistent with that of a drug manufacturing lab. CP-K 315-324. Both officers had received extensive training related to the manufacturing

of methamphetamine. Both were part of the Tacoma Clandestine Lab team. CP-K 315-324. Additionally, between the two officers they had investigated and processed more than 400 drug laboratories. CP-K 315-324. Officer Mettler had completed the Clandestine Laboratory Safety Certification School, had instructed other officers in the area of Clandestine Drug Labs, and was familiar with manufacturing methamphetamine. CP-K 315-324. It can reasonably be inferred the officers' determination that the smell was consistent with drug manufacturing was based off their training.

In addition to recognizing a strong odor near the garage, the affidavit stated that the officers were dispatched in regard to some suspicious persons in the house that were believed to have dumped remnants of a methamphetamine lab outside. CP-K 315-324. The affidavit also stated that the officers had contacted someone on the property who said he had been stripping lithium batteries inside the garage with someone else. CP-K 315-324. The affidavit stated the affiant was familiar with Kirtland from numerous contacts involving methamphetamine. CP-K 315-324. The affiant also learned that Kirtland had three felony warrants out for his arrest. CP-K 315-324. The affidavit also stated that they could hear moving around from inside the house, but that no one would answer the door. CP-K 315-324. The facts in the affidavit were sufficient to provide a nexus between the suspected methamphetamine lab and the search of Kirtland's property. Accordingly,

the facts asserted in the affidavit provided a substantial basis to support the trial court's finding of probable cause.

2. ADMITTING THE EVIDENCE AT ISSUE WAS WITHIN THE TRIAL COURT'S DISCRETION.

An appellate court reviews a trial court's decision to admit evidence for an abuse of discretion. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967, cert. denied, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999). Abuse "occurs when the ruling of the trial court is manifestly unreasonable or discretion was exercised on untenable grounds[.]" State v. Gatalski, 40 Wn. App. 601, 606, 699 P.2d 804 (citing State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971)), review denied, 104 Wn.2d 1019 (1985). The appellant bears the burden of proving abuse of discretion. Gatalski, 40 Wn. App. at 606; State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), rev'd on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983).

Physical evidence is admissible against the accused as long as it has some bearing on the facts at issue. State v. Johnson, 40 Wn. App. 371, 382, 699 P.2d 221 (1985). A trial court has wide discretion in determining the admissibility of physical evidence. Johnson, 40 Wn. App. at 382. The appellate court may affirm the trial court's admission of evidence on any basis supported in the record. State v. Avery, 103 Wn. App. 527, 537, 13 P.3d 226 (2000).

“All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute... or by other rules or regulations applicable in the courts of this state.” ER 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. The relevance threshold is very low and even minimally relevant evidence is admissible. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). However, relevant evidence may be excluded if its probative value is substantially outweighed by its prejudicial effect. ER 403. Evidence of other crimes, wrongs or acts is inadmissible to prove a person's character; but such evidence is admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

- a. The trial court properly admitted the methamphetamine found on Franks when it determined that the probative value of the methamphetamine outweighed its prejudicial effect.

In evaluating ER 404(b) evidence, a trial court must engage in a three-step analysis: it must determine: (1) the purpose for offering the evidence; (2) its relevance; and (3) whether it outweighs the probative value of the evidence against its prejudicial effect. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). A trial court has "wide discretion in balancing the probative value of evidence against its potentially

prejudicial impact." State v. Rivers, 129 Wn.2d 697, 710, 921 P.2d 495 (1996) (citing State v. Coe, 101 Wn.2d 772, 782, 684 P.2d 668 (1984)). Although this balancing test should be done on the record, its absence is not fatal to the claim if the record establishes reasons for admission. State v. Carleton, 82 Wn. App. 680, 685, 919 P.2d 128 (1996) (where record shows the trial court adopted the argument of one of the parties regarding probative value of the evidence and its prejudicial effect, there is no error).

i. Defendant Franks.

In this case, the trial court properly admitted evidence of methamphetamine found on Franks at the time of his arrest for manufacturing methamphetamine. The record shows the trial court determined the following: (1) the purpose for offering the methamphetamine was to show Franks' knowledge about manufacturing methamphetamine; (2) the relevance of the methamphetamine was that it made it more probable that Franks knew he was manufacturing methamphetamine; and (3) the probative value of the methamphetamine outweighed its prejudicial effect.

During pre-trial motions, the State argued that the methamphetamine found on Franks was relevant to the process of manufacturing because it was the finished product of that process. RPII 35. The trial court ruled that the evidence of methamphetamine found on Franks was admissible, but directed the State not to mention Franks' conviction for possession. RPII 36. The trial court stated that the

methamphetamine was an item of evidence the jury may use because it was clearly evidence seized at the time.¹³ RPII 36. The trial court also suggested that someone with methamphetamine in his possession might know more about methamphetamine manufacturing. RPII 36.

During the trial, Franks renewed his motion to exclude the evidence of the methamphetamine found on his person. RPII 789-799. The trial court suggested that a person in possession of methamphetamine might know more about methamphetamine manufacture than a person without methamphetamine in his possession. RPII 799. The State also argued that the methamphetamine was admissible under ER 404(b) because it showed proof of knowledge and motive. RPII 802-803. The trial court then reaffirmed its ruling to admit the methamphetamine stating that the fact Franks had methamphetamine in his possession at the scene was clearly relevant. RPII 804. The trial court stated that the relevance of the methamphetamine possession was not overcome by the prejudicial value. RPII 804-805. In essence, the trial court determined that the probative value of the methamphetamine outweighed its prejudicial effect.

¹³ It may be inferred from the trial court's statement that because the methamphetamine was evidence seized at the time of the crime it was admissible to complete the story of the crime. Washington courts have recognized, as a basis for the admission of other crimes evidence, criminal acts which are part of the whole deed. State v. Bockman, 37 Wn. App. 474, 682 P.2d 925, review denied, 102 Wn.2d 1002 (1984) (citing State v. Jordan, 79 Wn.2d 480, 487 P.2d 617 (1971)). Under this "res gestae" or "same transaction" exception, 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." Bockman, 37 Wn. App. at 490 (citing E. Clearly, McCormick on Evidence, §190 at 448 (2d ed. 1972)).

Accordingly, the trial court properly admitted evidence about the methamphetamine found on Franks.

ii. Defendant Kirtland.

Further, whether someone detained on Kirtland's premises was found with the finished product of methamphetamine would be relevant to the charges against Kirtland. If someone leaving Kirtland's premises was found hiding the finished product of methamphetamine, it became more probable that Kirtland was involved with manufacturing a controlled substance, which he knew was methamphetamine. Although the case against Kirtland could not stand on that evidence alone, it is, nonetheless, relevant evidence and its admission was well within the trial court's discretion. Kirtland incorrectly relies on Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), which dealt with the Sixth Amendment confrontation clause and hearsay evidence. The confrontation clause guarantees that a person accused of a crime "shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Crawford analysis does not apply to the physical evidence admitted in this case because it was not a statement or hearsay.

Kirtland also refers to other hearsay in his assignment of errors and statement of the case (Appellant's Brief at 5, 27, RP 757), but fails to argue the issue in his argument section. Accordingly, the State has not responded. Courts of appeal will not review issues for which inadequate argument has been briefed or only passing treatment has been made. State

v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); State v. Olson, 126 Wn.2d 315, 321, 893 P.2d 629 (1995). Further, during pre-trial motions, Kirtland withdrew his motion for severance of the defendants. RPI 10. This concession precludes appellate review of the defendants being tried together. See Myers, 133 Wn.2d at 36 ("A party may not set up error at trial and then complain of it on appeal").

- b. Allowing testimony about \$15,000 in cash found when Kirtland was arrested was appropriate because it was relevant to show Kirtland's motive for manufacturing methamphetamine.

Kirtland challenges testimony about the \$15,000 in cash found at the time of his arrest. Appellant's Brief at 6, 36. The court should not review this issue because Kirtland has presented an inadequate argument consisting of a two sentence assertion without citing to any authorities.¹⁴ See State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (declining review of issue where defendant did not argue the issue nor cite any authority).

Kirtland unsuccessfully argued below that the cash was highly prejudicial and irrelevant during pre-trial motions. RPII 26-29. Kirtland also unsuccessfully moved for a mistrial based off the State's reference to

¹⁴ Kirtland cites authority for his cumulative error argument (Appellant's Brief at 37), but fails to show how it applies to this argument concerning the \$15,000.

the cash in its opening statement. RPII 70-73. Kirtland also unsuccessfully tried to argue for exclusion of the cash during a colloquy at trial. RPII 986-992. Kirtland's argument relied on language from State v. Myers, which stated:

When considering misconduct which does not rise to a level of criminal activity, but which may nonetheless disparage the defendant, extreme caution must be used to avoid prejudice... [W]here the decision is doubtful, the scale must tip in favor of the defendant and the exclusion of the evidence.

49 Wn. App. 243, 247, 742 P.2d 180 (1987).

Myers does not control this issue for several reasons.¹⁵ Kirtland never argued that the evidence should be excluded under ER 404(b). RPII 25-29; 70-73; 987-992. This is fatal to Kirtland's analysis as the language he relies on in Myers is specific to ER 404(b). 49 Wn. App at 247.

Further, the trial court did not address whether the cash would be considered an inadmissible wrong or act under ER 404(b), because it only heard arguments on whether the testimony about the cash was relevant and prejudicial. RPII 26-29. Based on the arguments below the trial court

¹⁵ In Myers the defendant was appealing two counts of first degree custodial interference based on the trial court's decision to allow prior misconduct testimony in violation of ER 404(b). 49 Wn. App at 245-247. The prior misconduct had occurred four years earlier and dealt with defendant's failure to comply with the other parent's visitations and travel arrangements. Myers, 49 Wn. App at 245. At trial, the State was allowed to argue the misconduct could be used to prove defendant's intent to commit custodial interference. Myers, 49 Wn. App at 245-246. On appeal, the court held that the prior misconduct was not relevant to defendant's intent at the time she failed to return the children. Myers, 49 Wn. App at 249.

tentatively denied the motion to suppress any mention of the cash. RPII 29. When the trial court revisited the issue of the cash during Kirtland's motion for a mistrial, it stated that Myers did not apply, and that it would not change its earlier ruling. RPII 71, 73. Based on these statements, and the parties earlier arguments about relevance and prejudice, it can be inferred the court's rulings relied on ER 403 and not ER 404(b). This interpretation is further supported by the State's argument during the colloquy at trial when it stated it was not considering the cash an illegal activity. RPII 992.

ER 403 requires exclusion of evidence, even if relevant, where the prejudicial effect outweighs the probative value. Because of the trial court's considerable discretion in administering ER 403, reversible error is found only in the exceptional circumstance of a manifest abuse of discretion. State v. Gould, 58 Wn. App. 175, 180, 791 P.2d 569 (1990); State v. Gatalski, 40 Wn. App. 601, 610, 699 P.2d 804, review denied, 104 Wn.2d 1019 (1985). ER 403 contemplates a balancing process between the probative value of the evidence and the undesirable characteristics. 5D KARL B. TEGLAND, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON WASHINGTON EVIDENCE, at 209 (2005). When the balance is even, the evidence should be admitted. Id. at 210 (citing Carson v. Fine, 123 Wn.2d 206, 867 P.2d 610 (1994)). In this case, the probative value of the cash outweighed the undesirable characteristics. The cash was relevant to the State's theory of the case that manufacturing

methamphetamine is often done for profit and was done so in this case as indicated by the size of Kirtland's operation.

- c. Allowing testimony about purchasing methamphetamine was appropriate because it was relevant to show Kirtland's motive for manufacturing methamphetamine.

Kirtland challenges testimony about the "actual delivery of methamphetamine." Appellant's Brief at 5, 36.¹⁶ Kirtland argued below that information about purchasing methamphetamine was irrelevant. RPII 146. However, allowing testimony about purchasing methamphetamine was appropriate in this case because it was relevant to the manufacturing of methamphetamine charge. This line of questioning established that a significant amount of money could be made from selling methamphetamine. RPII 148-150 (two grams would sell for \$100 to \$150). This line of questioning also established that the amount of pills

¹⁶ Kirtland cites State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994) as authority for his argument about methamphetamine delivery. The objection at trial for this issue was in regards to the relevance of testimony about purchasing methamphetamine. RPII 146. The State has addressed the relevance argument above. Further, Kirtland's reliance on Russell is misplaced. In Russell, the court reviewed several of the State's statements alleged to be misconduct and found that only one statement regarding the likelihood of defendant continuing to kill had the capability of lasting prejudicial effect. 125 Wn.2d at 119-132. The Russell court stated it was unhappy with the comment, but that it was insufficient to warrant a new trial. 125 Wn.2d at 132. The line of questioning at issue in Kirtland's case had nothing to do with his future dangerousness and is not analogous to the statement in Russell.

found at Kirtland's house would produce more methamphetamine than a heavy user would need. RPII 149. It can reasonably be inferred that some of the methamphetamine would be sold for a profit; which in turn indicated a motive for manufacturing the methamphetamine. This evidence tended to make it more probable that Kirtland had manufactured methamphetamine. Accordingly, this testimony was relevant admissible evidence and the trial court did not abuse its discretion in admitting it.¹⁷

3. THE STATE'S QUESTIONING WAS APPROPRIATE AND DID NOT PREJUDICE KIRTLAND.

Kirtland challenges the State's conduct at trial. Appellant's Brief at 6, 36. In a claim of prosecutorial misconduct, the defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial. State v. Henderson, 100 Wn. App. 794, 800, 998 P.2d 907 (2000). A prosecutor's remarks "must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998). The conviction will be reversed only

¹⁷ Kirtland alludes that the evidence should have been excluded as unduly prejudicial. Appellant's Brief at 5, 36. However, Kirtland did not raise this specific objection below so it should be waived. State v. Roberts, 73 Wn. App. 141, 145, 867 P.2d 697, review denied, 124 Wn.2d 1022, 881 P.2d 255 (1994).

if "there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict." State v. Lord, 117 Wn.2d 829, 887, 822 P.2d 177 (1991). If the error could have been obviated by a curative instruction and the defendant failed to request one, reversal is not required. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Where the defendant does not request a curative instruction, the error is considered waived unless the court finds that the remark was "so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Hoffman, 116 Wn.2d at 93.

In this case, Kirtland fails to meet its burden of showing improper conduct that was prejudicial. Kirtland states the "arguments between the defense attorney and the deputy prosecuting attorney... were set off by the deputy prosecuting attorney." Appellant's Brief at 36 citing to RPII 147. This point of the record shows that the defendants made two objections

which were overruled.¹⁸ RPII 147. It does not contain an “argument” between the parties.

Kirtland also states that “it is apparent by reading the record that the... Deputy Prosecuting Attorney was arguing with the defense attorney.” Appellant’s Brief at 36 citing to RPII 752. At this point in the record the State asked Officer Quilio, “At the time you were processing the lab scene, did you know then [the defense] was going to raise a challenge as to how these [batteries] were stripped?” RPII 752. The defense made an objection, which the court sustained. RPII 752. The State could have re-phrased the question to focus on how the stripped batteries were proper evidence without referencing the defense’s challenge. However, the question did not prejudice Kirtland as the court instructed the jury that the attorney’s remarks were not evidence. CP 54-77 (Jury Instruction 1). The court also instructed the jury to disregard any remark by an attorney that was not supported by the law as stated by the

¹⁸ RPII 147 contains the following:

Q: (By Mr. Trinen) And what are typical quantities that a user might purchase on the street?

MR. UNDERWOOD: Again, objection; also irrelevant.

THE COURT: Overruled.

A: Quarter gram, half a gram, a gram or a “teener,” which is a 16th of an ounce.

MR. MOSLEY: Your Honor, I’m going to have to object to this line of questioning. We’re getting total speculation what someone may purchase. Someone may purchase a lot; someone may purchase a little bit. It’s irrelevant. It has nothing to do with what happened on the night of this incident.

THE COURT: As I said earlier, overruled.

court. CP 54-77 (Jury Instruction 1). The jury would not have considered the State's question as supported by the law when the court admonished the State by sustaining the objection. See State v. Costello, 59 Wn.2d 325, 332, 367 P.2d 816 (1962) (The jury is presumed to have followed the court's instructions).

Further, Kirtland failed to show how this question would have affected the verdict and failed to request a curative instruction to disregard this specific question. CP 325-26. Accordingly, the error should be considered waived as the remark was not "so flagrant and ill intentioned" that it evinced an "enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Hoffman, 116 Wn.2d at 93 (1991).

4. DENYING THE MOTION FOR A MISTRIAL WAS APPROPRIATE WHERE THE JURY WAS INSTRUCTED NOT TO CONSIDER ANY REFERENCE TO A PREVIOUS TRIAL.

A trial court's denial of a motion for a mistrial is reviewed for abuse of discretion. State v. Thompson, 90 Wn. App. 41, 45, 950 P.2d 977 (1998) (citing State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)), review denied by State v. Walker, 136 Wn.2d 1002, 966 P.2d 902 (1998). "Mistrial is appropriate only when the defendant has been so prejudiced that nothing short of a new trial will insure that the defendant will be tried fairly." Thompson, 90 Wn. App. at 45; Lewis, 130 Wn.2d at

707 (citing State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994)).

Generally, the trial court is best suited to determine the prejudice of a statement. Thompson, 90 Wn. App. at 45-46 (citing Lewis, 130 Wn. 2d at 707).

Juries are presumed to follow instructions and admonishments. State v. Hanna, 123 Wn.2d 704, 711, 871 P.2d 135 (1994). The trial court has broad discretion in determining whether an error can be cured by an instruction. State v. Ecklund, 30 Wn. App. 313, 316, 633 P.2d 933 (1981) (citing State v. Downs, 11 Wn. App. 572, 523 P.2d 1196 (1974)). The trial judge can impartially observe and appraise the impact of inadmissible testimony upon the jury. Ecklund, 30 Wn. App. at 316 (quoting State v. Thrift, 4 Wn. App. 192, 196, 480 P.2d 222 (1971)). A trial court's discretionary judgment that a corrective instruction and admonition effectively cures an error should be respected by the appellate court unless the record demonstrates that beyond a reasonable doubt the refusal to grant a new trial denied the defendant a fair trial. Ecklund, 30 Wn. App. at 316.

In this case, it was appropriate for the trial court to deny the defendants' motion for a mistrial and issue an instruction to correct an isolated mention of an earlier trial. Officer Woodward did violate a motion in limine to exclude references to the prior trial by responding on cross-examination that he had read a report "the last time this went to trial." RPII 840. During the next recess, Franks joined in Kirtland's

motion for a mistrial based on the introduction of the prior trial. RPII 854. Instead of granting the motion for a mistrial, the trial court discussed the possibility of a curative instruction. RPII 854-861. At the end of the testimony the trial court instructed the jury not to consider any reference to a previous trial and to not make any inference regarding any such reference. RPII 1233; CP-F 156-179 (Instruction No. 7). The record does not support that the isolated violation of the order in limine corrupted the trial beyond cure by an instruction. Accordingly, the trial court did not err by refusing to grant the defendants' motion for a mistrial.¹⁹

¹⁹ Franks also contests Deputy Minion's violation of the motion in limine to exclude mention of the outstanding arrest warrants for Kirtland. The court should not review this issue because Franks failed to preserve it below and failed to argue it was a constitutional error on appeal. A party's failure to object to testimony at trial generally precludes appellate review as to whether that testimony should have been excluded. State v. Perez-Cervantes, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000) (citing State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)). A party may assign error in the appellate court only on the specific ground given at trial. State v. Koepke, 47 Wn. App. 897, 911, 738 P.2d 295 (1987) (citing State v. Smith, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985)). On direct examination, Deputy Minion was asked why Kirtland's vehicle was searched. RPII 997. Deputy Minion responded that the vehicle was searched incident to arrest and that Kirtland was under arrest for some other charges. RPII 997. Kirtland then objected, which the trial court overruled. RPII 997. Franks never joined the objection. RPII 997. At the next recess Kirtland moved for a mistrial. RPII 1010. Franks never joined the motion. RPII 1010. Instead of granting the mistrial, the trial court instructed the jury not to consider evidence of Kirtland's arrest unrelated to the alleged methamphetamine lab. RPII 1233; CP-F 156-179 (Instruction No. 6). The trial court specifically instructed the jury not to use the evidence for the purpose of connecting Kirtland to the date of the crime. CP-F 156-179 (Instruction No. 6). Franks did not propose an instruction. Accordingly, he should not be able to challenge on appeal the instruction that was issued. Further, Franks has not provided a manifest constitutional error analysis in his brief. Accordingly, this court should decline to review the issue. RAP 10.3(a)(5); State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (citing State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992)).

5. KIRTLAND IS NOT ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE BECAUSE THERE WERE NO PREJUDICIAL ERRORS.

The cumulative error doctrine applies only where there have been several trial errors that alone may not be sufficient to justify reversal, but when combined denied the defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 928, 10 P.3d 390 (2000). Cumulative error does not turn on whether a certain number of errors occurred. Compare State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (three errors amounted to cumulative error and required reversal), with State v. Wall, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial. The defendant is not entitled to a new trial when the errors had little or no effect on the outcome of the trial. Greiff, 141 Wn.2d at 928. Errors that individually are not prejudicial can never add up to cumulative error that mandates reversal because when the individual error is not prejudicial, there can be no accumulation of prejudice. See State v. Stevens, 58 Wn. App. 478, 498, 795 P.2d 38, rev. denied, 115 Wn.2d 1025, 802 P.2d 38 (1990) (defendant not deprived of a fair trial where no prejudicial error occurred).

Kirtland has not established that any prejudicial errors occurred at his trial. The trial court properly denied the defendants' motion to

suppress, admitted relevant evidence that was not unduly prejudicial and instructed the jury to ensure they considered the proper evidence. Even if this court finds there were errors, a complete review of the record shows they could not have constituted egregious circumstances that denied Kirtland a fair trial.

6. THERE WAS AMPLE EVIDENCE TO SUPPORT FRANKS' CONVICTION OF MANUFACTURING METHAMPHETAMINE.

When evaluating the sufficiency of the evidence for a criminal conviction, appellate courts view the evidence in the light most favorable to the State and determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. State v. Pirtle, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996). Appellate courts should draw all reasonable inferences in favor of the State and interpret the evidence most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

RCW 69.50.101(p) defines the manufacture of controlled substance, in part:

"'Manufacture' means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis."

Because manufacturing is often an ongoing process involving many steps, a defendant need not possess the final product in order to meet the statutory requirements of RCW 69.50.101(p). State v. Davis, 117 Wn. App. 702, 708, 72 P.3d 1134 (2003), review denied, 151 Wn.2d 1007, 87 P.3d 1185 (2004). Thus, "a person who knowingly plays even a limited role in the manufacturing process is guilty, even if someone else completes the process." Davis, 117 Wn. App. at 708.

In this case, there was overwhelming evidence to support Franks' conviction for manufacturing methamphetamine. The State presented evidence that Franks had come out of the garage. RPII 104. The officers smelled odors consistent with manufacturing methamphetamine coming from the garage. RPII 105, 130. Franks stated that he had been inside the garage stripping lithium out of lithium batteries and that his fingerprints would appear on the battery packages. RPII 106, 131. Franks also stated he was going to put the lithium strips into a bucket with kerosene, but had been interrupted by the officers. RPII 908.

A pair of pliers and roughly a dozen lithium batteries with the casings removed were found inside the garage. RPII 152, 154-155. There was also an unopened package of lithium batteries on the table next to the stripped batteries. RPII 298. There was a garbage can next to a table, which contained the outer battery casings and some battery packaging. RPII 301. On the floor underneath the table there was a bag containing twenty-four packs of unopened lithium batteries. RPII 299, 305. There

was evidence that lithium is required in the reactionary phase of manufacturing methamphetamine and that lithium batteries are commonly stripped to gain the lithium needed for the process. RPII 84. Near the door of the garage there was also a one-gallon can of kerosene, which is commonly used to store lithium strips. RPII 302-303, 305.

Further, there was overwhelming evidence of a methamphetamine lab inside the house. There was testimony that Franks was at the house “quite a bit.” RPII 251, 624-625. There were approximately 14,350 Sudafed tablets found in the house. RPII 133, 149; Exhibit 94 at 1323-1325. Denatured alcohol, which is commonly used in the extraction of pseudoephedrine from cold tablets, was found in the house and garage. RPII 292-296. Several containers and a baggie of white powder found in the house tested positive for methamphetamine. Exhibit 94 at 1335, 1345-1346, 1347-1348. During the booking procedure, Franks was strip searched and a Ziploc baggy containing white powdery substance was found on his person. RPII 818. The white powder tested positive for methamphetamine. Exhibit 94 at 1352. Based on testimony that he was in the house and that the final product was found on his person, it can reasonably be inferred that Franks was aware of and indirectly participated in the manufacturing activities inside the house. It can also be reasonably inferred that Franks had a direct role in manufacturing methamphetamine by stripping lithium batteries in the garage. In sum, the State produced ample evidence for the jury to find that Franks had assisted in

manufacturing a controlled substance and knew the substance was methamphetamine.

7. THE STATE SATISFIED THE CORPUS DELECTI RULE BY PRESENTING PRIMA FACIE PROOF THAT SOMEONE HAD COMMITTED THE CRIME OF MANUFACTURING METHAMPHETAMINE

Under the corpus delicti rule, a defendant's extrajudicial confession or admission is not admissible unless there is independent prima facie proof that the crime charged has been committed by someone. State v. Cobelli, 56 Wn. App. 921, 924, 788 P.2d 1081 (1989). A prima facie showing requires evidence of sufficient circumstances supporting a logical and reasonable inference that the charged crime occurred. City of Bremerton v. Corbett, 106 Wn.2d 569, 578-79, 723 P.2d 1135 (1986). The corpus delicti rule is a judicially created rule of evidence, not a constitutional sufficiency of the evidence requirement, and a defendant must make proper objection to the trial court to preserve the issue. State v. C.D.W., 76 Wn. App. 761, 763-64, 887 P.2d 911 (1995). A defendant's failure to object precludes appellate review because "[i]t may well be that 'proof of the corpus delicti was available and at hand during the trial, but that in the absence of [a] specific objection calling for such proof it was

omitted.'" C.D.W., 76 Wn. App. at 763-64 (quoting People v. Wright, 52 Cal.3d 367, 404, 802 P.2d 221, 276 Cal. Rptr. 731 (1990), cert. denied, 502 U.S. 834, 112 S. Ct. 113, 116 L. Ed. 2d 82 (1991)).

In this case, Franks did not object at the 3.6 hearing (RPI 108), or during trial (RPII 106) when testimony was elicited regarding his statements. Thus, he is unable to bring his claim now. RAP 2.5(a). Even so, Franks' corpus delicti claim fails because the State presented prima facie proof that the crime of manufacturing a controlled substance was committed. Without relying on Franks' statements, the State still produced ample evidence supporting a logical and reasonable inference that someone was manufacturing a controlled substance, which he or she knew was methamphetamine. CP-F 156-179 (Jury Instruction 12).

The following evidence supporting this conclusion was detailed above in the sufficiency of the evidence argument: (1) Franks was observed coming out of the garage (RPII 104); (2) the smell of manufacturing methamphetamine was coming from the garage (RPII 105, 130); (3) a pair of pliers and roughly a dozen lithium batteries with the casings removed were found inside the garage (RPII 152, 154-155); (4) kerosene, which is commonly used to store lithium strips, was found inside the garage (RPII 302-303, 305); (5) Franks was at Kirtland's house "quite a bit" (RPII 251, 624-625); (6) approximately 14,350 Sudafed tablets were found in the house (RPII 133, 149; Exhibit 94 at 1323-1325); (7) denatured alcohol, which is commonly used in the extraction of

pseudoephedrine from cold tablets, was found in the house and garage (RPII 292-296); (8) several containers and a baggie of white powder found in the house tested positive for methamphetamine (Exhibit 94 at 1335, 1345-1346, 1347-1348); and (9) a Ziploc baggy containing white powdery substance which tested positive for methamphetamine was found on Franks (RPII 818; Exhibit 94 at 1352). In sum, it can reasonably be inferred that the State presented ample evidence proving the corpus delicti of manufacturing a controlled substance.

D. CONCLUSION.

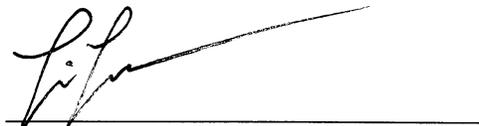
For the foregoing reasons this court should affirm the defendants' convictions.

DATED: August 7, 2006.

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Levi Larson
Rule 9 Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8.7.06 [Signature]
Date Signature

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