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NO. 33852-1 (CONSOLIDATED WITH 33815-7)

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

STATE OF WASHINGTON, RESPONDENT

v.

DAVID CORNELL, APPELLANT
BRITNEY KAYE FLOWERS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie A. Arend
The Honorable Ronald E. Culpepper

No. 05-1-00880-8 (Cornell)
No. 05-1-00881-6 (Flowers)

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE.

1. Procedure

On February 22, 2005, David Glenn Cornell, hereinafter referred to as “Cornell,” and Britney Kaye Flowers, hereinafter referred to as “Flowers,” were both charged with unlawful manufacturing of methamphetamine. ¹CP 1-3; ²CP 1-3. On May 12, 2005, both parties appeared for pretrial motions. IRP³ 1. Cornell and Flowers sought to suppress all evidence found in a shed on the property because law enforcement did not advise Flowers of her Ferrier warnings, there was no basis to perform a protective sweep, no exigent circumstances existed, and that without the initial search, the search warrant was insufficient. 1 CP 8-

¹ 1CP refers to Clerk’s Papers from Cornell’s Superior Court file.

² 2CP refers to Clerk’s Papers from Flowers’s Superior Court file.

³ The verbatim report of proceedings are referenced as follows:

IRP: Verbatim report of proceedings from May 12-17, 2005. (three volumes)

IIRP: Verbatim report of proceedings from June 15, 2005.

IIIRP: Verbatim report of proceedings from June 22, 2005 (a.m. session).

IVRP: Verbatim report of proceedings from June 22, 2005 (p.m. session).

VRP: Verbatim report of proceedings from August 22, 2005.

VIRP: Verbatim report of proceedings from August 24 - September 16, 2005. (eight volumes)

VIIRP: Verbatim report of proceedings from September 23, 2005.

30; 2CP 18-24. The State responded that the deputies were legitimately on the premises and that they were not required to advise Flowers of Ferrier warnings. 1CP 32-41. The State also asserted that Cornell did not have standing to challenge the search and that exigent circumstances were present. Id.

The court concluded that Cornell did have standing, and that any evidence obtained from the initial entry into the residence was suppressed. 1CP 43-52; 2CP 40-49. The court also found that evidence from a second shed on the property was suppressed, but that entry into the primary⁴ shed was admissible because there were health and safety concerns, a need for assistance, and entry was not done as a pretext. Id.

On August 24, 2005, the parties appeared for trial. VIRP 1. On September 7, 2005, Cornell and Flowers were found guilty of unlawful manufacturing of methamphetamine. 1CP 103-104; 2CP 111-112.

On September 16, 2005, Cornell and Flowers appeared for sentencing. IVRP 1246-1270. The court sentenced Cornell to 110 months in custody, costs and conditions. 1CP 112-126. Flowers was sentenced to 68 months in custody, costs, and conditions. 2CP 120-134. Cornell and Flowers filed timely notices of appeal. 1CP 132-145; 2CP 143-144.

⁴ For purposes of the State's brief, the "primary shed" or "shed," is the shed on the property in which the majority of the methamphetamine lab was recovered. The "secondary shed" is the shed in which no evidence was recovered. Unless specifically identified, the "shed" referred to in the State's brief is the shed in which evidence was recovered.

2. Facts

a. Pretrial Motions

Aaron McConnell testified that he lived next door to Flowers, who was his second cousin. IRP 18. McConnell and Flowers both lived in homes on their uncle's property. IRP 41. McConnell lived with his wife and child. Id. McConnell had been working all day and observed a "red glow" coming from the shed. IRP 19. At approximately 3:00 p.m., McConnell had walked by the shed and observed a red glow, burners, and detected a strong acetone or ammonia odor. IRP 19, 27. He was able to detect the odor from 30 to 35 feet away from the shed. IRP 24. The odor burnt McConnell's nose. IRP 31. McConnell observed Cornell inside the shed. IPR 20. McConnell had been a resident firefighter for a period of time and knew what smell was associated with methamphetamine labs. IRP 21. After observing the inside of the shed, McConnell called 911. Id. Earlier in the day McConnell had observed a group of people on the property. IRP 22.

At approximately 6:30 p.m. Deputy Johanson and Deputy Smith responded to the scene. IRP 52-53, 88-89. When Deputy Johanson exited his car he could smell an ammonia smell. IRP 55. Deputy Smith was able to smell the ammonia smell five to ten feet from the shed. IRP 90. Deputy Johanson observed an individual, later identified as Otis Vella, walk to the shed. IRP 53-54. Vella appeared to be locking the shed. IRP 53, 89. Vella indicated that he had been locking a chainsaw inside the

shed. IRP 89-90. Deputy Smith felt that Vella was not being truthful because a chainsaw was still sitting outside the shed. IRP 90.

As Deputy Johanson spoke to Vella, Flowers walked up a trail and contacted them. IRP 56-57. Flowers denied that there was a methamphetamine lab on the property. IRP 57. Deputy Johanson and Flowers walked to the secondary shed and Flowers opened the door to it. IRP 57. Deputy Johanson did not see anything or anyone inside the secondary shed. IRP 57. Deputy Johanson did not advise Flowers of the Ferrier warnings. IRP 68. He stated that safety was his concern. IRP 69.

Deputy Smith indicated to Deputy Johanson that the strong odor was coming from the primary shed. IRP 58. Due to safety concerns, Vella and Flowers were detained while additional law enforcement units were called. IRP 59. Flowers was advised of her Miranda warnings, which she indicated she understood. IRP 59-60.

Deputies then “cleared” the main residence and did not find anyone else. IRP 62, 95. Deputy Smith learned from Deputy Johanson that another person named “David” was probably at the scene because his vehicle was still present with his dog inside. IRP 97. Deputy Smith was also suspicious because Vella kept asking the deputies if they had found anyone else in the house. IRP 112. Deputies knocked on the shed door and announced their presence, but received no response. IRP 97. The shed was locked from the outside. IRP 97.

Deputy Messineo is a methamphetamine lab investigator with the Pierce County Sheriff's Department. IRP 154. He had training on hazardous material and was lab certified. Id. He responded to the scene. IRP 158. Deputy Messineo walked to the shed and immediately smelled the odor of anhydrous ammonia. IRP 158. He noticed an exhaust tube in the eaves of the shed and an exhaust fan on the back on the shed. IRP 159. There was an extension cord going to the shed. IRP 250. Deputy Messineo contacted Flowers, who told him that she rented the shed to Cornell for \$50.00 per month. IRP 161. Flowers admitted to Deputy Messineo that she uses methamphetamine but denied getting methamphetamine from Cornell. IRP 162. Vella pointed out a car on the property that was Cornell's vehicle. IRP 167. There was a dog inside the vehicle. IRP 167. No one knew where Cornell was located. IRP 167-168.

Deputy Messineo has had prior experiences of individuals locking themselves in methamphetamine labs. IRP 210. Individuals who have locked themselves in methamphetamine labs get sick. IRP 213. Deputy Messineo concluded that Cornell would not leave his car and dog behind, and concluded that Cornell was in the shed. IRP 168. Deputy Gosling also concluded that someone may have been inside the shed. IRP 226. Deputies knocked on the shed and announced their presence. IRP 168. There was no response from the shed. IRP 226. Deputy Messineo believed that Cornell was inside the shed and, based on the chemical smell

around the shed, that his health was in danger. IRP 168. Deputy Gosling believed that there was possibly someone inside the shed who was either unwilling to respond or incapacitated. IRP 227. The effects of ammonia include burning of the skin and serious respiratory hazards. IRP 168-169. Other chemicals used in the manufacturing can cause hazards to eyes, skin kidneys, and liver. IRP 169. They can also cause respiratory and central nervous system damage. IRP 169.

Deputy Gosling, the “warrant writer” for the lab team, stated that “time was of the essence.” IRP 224, 228. Deputy Gosling intentionally did not look into the shed once it was opened because he did not want to “taint” the warrant he was going to request. IRP 250. Deputy Gosling stated:

I deliberately did not search or look inside the shed because I didn't want to taint that to use my—to getting a warrant. It's something that I didn't—I didn't feel I needed to at that stage. I was going to get a search warrant. So we were going to see what was inside the shed. I didn't use that to make a determination to get the search warrant. . .

IRP 250-251. Deputy Gosling obtained a search warrant the following morning. IRP 255.

When the shed was opened, the smell almost overpowered Deputy Christian, who was providing light and cover. IRP 133. Cornell was found inside the shed. IRP 133. Cornell indicated that he did not feel too good. IRP 179. He appeared sick. IRP 181. He was extremely disorientated. IRP 228. Cornell was taken into custody and given a wet

contamination to remove any vapors, liquids, toxins, or poisons. IRP 181-182.

Once the shed was open, Deputy Messineo observed a small propane bottle which had an active burning flame. IRP 184. He immediately backed away and was worried that the shed was going to explode. IRP 184.

Vella indicated to Deputy Gosling that he and Cornell had a standing agreement that if police came to the property that Vella was to lock the shed from the outside. IRP 235. Flowers admitted to purchasing dry ice for Cornell. IRP 239.

The court ruled that all statements made by Cornell and Flowers were made either before they were detained or after they were advised of their rights. 1CP 53-60; 2CP 32-39; IRP 275. The court found that the deputies were on the curtilage of the property on legitimate police business. 1CP 43-52; 2CP 40-49. The court suppressed any evidence obtained from the second shed and from the initial entry into the residence, but found that the primary shed was legitimately accessed because of an emergency. *Id.* The court found that (1) Deputy Messineo subjectively believed Cornell was locked in the shed and needed assistance for health and safety reasons, (2) a reasonable person in the same situation would have believed there was a need for assistance, (3) there was a reasonable basis to associate the need for assistance with the

place to be searched (the shed) and (4) that the forced entry into the shed was not merely a pretext for conducting an evidentiary search. Id.

b. Facts Adduced at Trial

On February 19, 2005, Aaron McConnell, a second cousin of Flowers, telephoned 911 because he believed he saw and smelled a methamphetamine lab. VIRP 172, 176-178. McConnell observed the suspected lab in a small shed on the Flowers' residence when he was bringing Flowers' mail to her house. VIRP 174, 175, 180. When McConnell was approximately 30 feet from the shed, he was able to detect a strong ammonia smell that burned when he smelled it. VIRP 177. Inside the shed he observed a heat source and a red glow. VIRP 178. Cornell was inside the shed and quickly pulled the door closed after seeing McConnell. VIRP 178, 181. After looking inside the shed, McConnell became concerned that he had seen a methamphetamine lab. VIRP 183. McConnell had previously seen Flowers in the shed a minimum of 20 times. VIRP 184.

Otis Vella was living with Flowers and Cornell on February 19, 2005. VIRP 283-284. When Cornell stayed on the property he would stay on the couch or in the shed. VIRP 287. Vella indicated that there was an active methamphetamine lab on the property when he lived there. VIRP 287. The lab was located in the shed. Id. On February 19th, Vella and Cornell had driven to some stores and purchased toluene and dry ice. VIRP 289. Vella was aware that toluene and dry ice are used to

manufacture methamphetamine. VIRP 291-292. Cornell had given Vella money for the purchases and had told him what to buy. VIRP 294.

Cornell could not go into the stores himself because his ankles were swollen. VIRP 290. Later that day, Cornell gave Vella methamphetamine. VIRP 294. When the police arrived, Vella locked Cornell in the shed because Cornell had instructed him to do so. VIRP 305. Cornell was inside the shed manufacturing methamphetamine. VIRP 306. Cornell had told Vella that he was "getting busy" in the shed. VIRP 341.

On February 19, 2005, Deputy Smith and Deputy Johanson responded to the 911 call of a possible methamphetamine lab. VIRP 358-360, 413. Approximately 75 to 100 feet from the shed Deputy Smith was able to detect the odor of ammonia. VIRP 363. Deputy Johanson was able to smell ammonia when he got out of his patrol vehicle. VIRP 416. Deputy Smith became suspicious that there may be someone locked inside the shed because there was a vehicle present with a dog inside. VIRP 371-372. Once the shed door was opened, Deputy Smith observed Cornell inside. VIRP 374. The chemical odor coming from Cornell was very strong. VIRP 376. Deputy Smith recovered a white powdery substance from Cornell. VIRP 377. That powder was later confirmed to be methamphetamine and a byproduct indicating it was manufactured using the alkaline metal liquid ammonia method of manufacture. VIRP 489, 1014-1015.

Deputy Christian also responded to the 911 call. VIRP 218. When Deputy Christian moved toward the residence, he was able to detect a chemical odor. VIRP 222. Deputy Messineo, Deputy Gosling, and Deputy Christian all yelled into the shed for anyone inside to identify themselves and there was no response. VIRP 227. Once the shed was open there was an overpowering smell coming from it. VIRP 232.

Deputy Messineo, a methamphetamine lab investigator for the Pierce County Sheriff's Department, responded to the scene. VIRP 460, 464. He was directed to the shed where other deputies suspected a methamphetamine lab. VIRP 465-466. Deputy Messineo detected the odor of anhydrous ammonia which is used in the manufacturing process. VIRP 466. Deputy Messineo became concerned that Cornell was inside the shed because Vella had pointed out Cornell's vehicle and there was a dog inside. VIRP 471. Deputy Messineo used an ax to get the door to the shed open and found Cornell inside. VIRP 476. The shed was an active methamphetamine lab. Id. Deputy Messineo believed that the door to the shed would not open once the lock was removed because Cornell was holding it shut. VIRP 475-477. Deputy Messineo looked in the shed and determined that it was a Nazi method lab. VIRP 482. He observed ammonium sulfate, coffee filters, acetone, mason jars with residue, Red Devil lye, a propane torch, Heet, sodium hydroxide, lithium batteries, and

vinyl tubing. VIRP 482-485. Deputy Messineo discovered a digital scale on Cornell. VIRP 489.

Deputy Gosling responded to the scene upon request from Deputy Messineo. VIRP 569. He interviewed Flowers, who told him that she “kind of knew” what was going on in the shed but “didn’t want to know.” VIRP 588. Flowers admitted to Deputy Gosling that she had purchased dry ice for Cornell. VIRP 1148.

Detective Daryl Purviance responded to the scene on February 20, 2005. VIRP 668. He was assigned to be the finding officer, which is the person actually conducting the search for items of an evidentiary value. VIRP 669. Inside the shed Detective Purviance recovered ammonium sulfate fertilizer, a coffee grinder, pliers, aluminum foil, tubing, a large electronic scale, a large blower with the name “Cornell” printed on it, Red Devil lye, a can of toluene, a jar labeled “sludge, 2-15-05,” a propane cylinder, empty Heet bottles, an empty dry ice bag, a heat lamp, cans of starting fluid, a blow dryer, wet coffee filters, jars with liquid, and lithium batteries, all of which are used in the manufacture of methamphetamine. VIRP 678-722, 888-889. A cooler was recovered from the shed that was consistent with being used to manufacture anhydrous ammonia. VIRP 901. The cooler still had a bag of ice in it. Id.

Outside the shed, Detective Purviance recovered a coffee filter with white powder residue and multiple coffee filters from a garbage can to the right of the shed. VIRP 743. In a plastic bag next to the shed were

numerous empty boxes and blister packs of psueduephedrine products.
VIRP 746.

In a white Pontiac vehicle on the property, Detective Purviance recovered a jar with white residue, rubber gloves, and a glass casserole dish with brown residue. VIRP 752. In the main residence, Detective Purviance recovered a stir stick with white residue on it from the kitchen, a jar with crusted powder in it from the kitchen, a filter mask, a bottle of Heet, a container of Red Devil lye, wadded up coffee filters which had been twisted into wads, casings from batteries, pliers, powdered caffeine, vinyl tubing, funnels, and a respirator. VIRP 772-785. A police scanner was also recovered. VIRP 788. In the residence a computer printout referencing the chemical "palladium" was recovered. VIRP 795. Palladim can be used to make methamphetamine. Id. A book entitled "Secrets of Methamphetamine Manufacture" by "Uncle Fester" was recovered. VIRP 803-804.

Detective Purviance testified that an active lab occurs when there are components of a meth lab that are actually reacting or that are actually in progress. VIRP 817. It was his opinion that there was an active lab on the property. Id.

Analysis of items recovered from the property confirmed the presence of methamphetamine, byproduct, ammonium sulfate, sodium hydroxide, binders such as starch and sugar, pharmaceutical preparation of pseudoephedrine, diphenhydramine and starch consistent with cold pills,

antihistamine, ammonium, and lithium. VIRP 1014-1044. Jane Boysen, who conducted the analysis, concluded that the samples she examined were consistent with the alkaline metal liquefied ammonia method of manufacturing. VIRP 1012, 1038.

C. ARGUMENT.

1. THE VALIDITY OF THE ENTRY INTO THE SHED IS IRRELEVANT BECAUSE THE SEARCH WARRANT WAS NEVER CHALLENGED AND ALL EVIDENCE WAS SEIZED PURSUANT TO THE WARRANT.

The search warrant which was obtained in this case was not challenged. Failure to raise a challenge to the search warrant affidavit at trial precludes appellate review. State v. Christensen, 40 Wn. App. 290, 297, 698 P.2d 1069 (1985). All evidence collected in this case was obtained pursuant to the warrant. The defendants did not challenge the propriety of the search warrant issued for the property either in the trial court or on appeal. While appellate counsel suggests that officer observations articulated in the warrant application were the result of an illegal search, it does not appear that the trial court was ever asked to examine the sufficiency of the warrant excluding any information that was, allegedly, the result of an illegal search.

There is no evidence whatsoever to suggest that any information from the initial entry into the shed was included in the affidavit for the

search warrant. On the contrary, there is evidence to suggest that nothing from the initial entry into the shed was even used in the search warrant which was later obtained. The “warrant writer” for the lab team, Deputy Gosling, specifically indicated that he did not want to use any evidence from the shed in obtaining his search warrant. IRP 250-251. He stated that he deliberately did not search the shed for that reason. Id.

There was no record developed below regarding the sufficiency of the search warrant affidavit, and it appears that Deputy Gosling took great efforts to ensure that the entry into the shed was not part of his affidavit. Because all of the evidence in this case was seized pursuant to a valid search warrant, the issue of whether the initial entry in to the shed was lawful is of no consequence because no evidence was seized as a result of that entry, and no information appears to have been used from the entry in obtaining a search warrant. Deputy Gosling obtained the search warrant at 8:51 a.m. on February 20, 2005. IRP 224, 255. Detective Purviance arrived at the scene *after* the search warrant was obtained and began to search. VIRP 669. The defendants cannot now challenge the validity of the search warrant because such issue was not raised below, no evidence was seized from the initial entry into the shed, and it appears that no information gained from the initial entry into the shed was used in obtaining a search warrant.

2. ASSUMING, ARGUENDO, THAT THE COURT WERE TO REACH THE ISSUE OF WHETHER AN EMERGENCY EXCEPTION EXISTED, THE COURT BELOW CORRECTLY FOUND THAT AN EMERGENCY EXISTED.

As argued above, it is irrelevant whether an emergency existed at the time the shed was opened, because all evidence was seized to a valid search warrant which was not contested below. If, however, this court reaches the issue of whether an emergency existed at the time the shed was opened, the court did not err in finding that such an emergency existed. When an appellate court is asked to review findings of fact and conclusions of law entered by the trial court, the court reviews “solely whether the trial court’s findings of fact are supported by substantial evidence and, if so, whether the findings support the trial court’s conclusions of law.” Mairs v. Department of Licensing, 70 Wn. App. 541, 545, 854 P.2d 665 (1993), quoting Nordstrom Credit, Inc. v. Department of Rev., 120 Wn.2d 935, 939-40, 845 P.2d 1331 (1993), see also State v. Teran, 71 Wn. App. 668, 671, 862 P.2d 137 (1993). Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the truth of the matter asserted. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). An appellate court reviews a trial court’s conclusions of law de novo. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

Credibility determinations are for the trier of fact and are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trial court's findings of fact will not be disturbed on appeal if supported by substantial evidence. State v. Teran, 71 Wn. App. 668, 671, 862 P.2d 137 (1993).

Warrantless searches are per se unreasonable under both the Fourth Amendment and article I, section 7 of our State constitution unless they fall within a specific, well established and well delineated exception to the warrant requirement. State v. Ross, 141 Wn.2d 304, 311-12, 4 P.3d 130 (2000). An emergency situation is such an exception. State v. Downey, 53 Wn. App. 543, 545, 768 P.2d 502 (1989). Thus, when premises contain persons in imminent danger of death or harm; objects likely to burn, explode or otherwise cause harm; or information that will disclose the location of a threatened victim or the existence of such a threat, police may search those premises without first obtaining a warrant. Downey, 53 Wn. App. at 545 (citing Utter, J., Survey of Washington Search and Seizure Law: 1988 Update, 11 U. Puget Sound L. Rev. 421, 538-39 (1988); see also, State v. Loewen, 97 Wn.2d 562, 568, 647 P.2d 489 (1982); State v. McAlpin, 36 Wn. App. 707, 677 P.2d 185, review denied, 102 Wn.2d 1011 (1984).

To establish an emergency exception to the warrant requirement, the State must establish that the police searched the area because of a perceived need to render aid or assistance. State v. Loewen, 97 Wn.2d 562, 568, 647 P.2d 489 (1982). The State must show (1) that the searching officer subjectively believed an emergency existed; and (2) that a reasonable person in the same circumstances would have thought an emergency existed. Loewen, 97 Wn.2d at 568.

In determining whether the first of these conditions is satisfied, the court may examine whether the officer's acts were consistent with his claimed motivation. State v. Downey, 53 Wn. App. 543, 545, 768 P.2d 502 (1989). The court must then evaluate whether the officer's "acts in the face of a perceived emergency were objectively reasonable . . . in relation to the scene as it reasonably appeared to the officer at the time, 'not as it may seem to a scholar after the event with the benefit of leisured retrospective analysis.'" State v. Lynd, 54 Wn. App. 18, 22, 771 P.2d 770 (1989) (quoting State v. Bakke, 44 Wn. App. 830, 837, 723 P.2d 534 (1986)). The court "must be satisfied that the claimed emergency was not simply a pretext for conducting an evidentiary search." Lynd, 54 Wn. App. at 21.

The emergency exception recognizes the "community caretaking function of police officers, and exists so officers can assist citizens and protect property." State v. Gibson, 104 Wn. App. 792, 796 (2001), citing

State v. Menz, 75 Wn. App. 351, 353, 880 P.2d 48 (1994); State v. Davis, 86 Wn. App. 414, 420, 937 P.2d 1110 (1997). The community caretaking function exception recognizes that a person may encounter police officers in situations involving not only emergency aid, but also involving a routine check on health and safety. State v. Kinzy, 141 Wn.2d 373, 387, 5 P.3d 668 (2000).

Courts have found that police officers acting in their “community caretaking function” occasionally perform services in addition to enforcement of the penal laws. When an officer makes a reasonable and good faith search in the course of such a service, evidence of a crime he or she discovers during that search arguably is admissible. State v. Lynch, 84 Wn. App. 467, 477, 929 P.2d 460 (1996). In citizen-police encounters initiated for “non-criminal, non-investigatory purposes” the question of admissibility of evidence gained thereby is determined by “balancing of the individual’s interest in freedom from police interference against the public’s interest in having the police perform a ‘community caretaking function.’” Id., citing State v. Mennegar, 114 Wn.2d 304, 313, 787 P.2d 1347 (1990), rev’d on other grounds by State v. Hill, 123 Wn.2d 641, 645, 870 P.2d 313 (1994).

Once the exception does apply, police may conduct a non-criminal investigation so long as it is necessary and strictly relevant to performance of the community caretaking function. State v. Kinzy, 141 Wn.2d 373, 394, 5 P.3d 668 (2000). The non-criminal investigation must end when

reasons for initiating an encounter have been fully dispelled. Kinzy, 141 Wn.2d at 394. The State has the burden of proving that the exception applies. State v. Bell, 108 Wn.2d 193, 196, 737 P.2d 254 (1987).

Washington courts have determined that “the state interest in protecting its citizens’ private property in an emergency situation is consistent with the Fourth Amendment’s protection.” State v. Bakke, 44 Wn. App. 830, 840, 723 P.2d 534 (1986). Consequently, the Washington court adheres to the federal test in assessing whether the emergency exception applies. State v. Johnson, 104 Wn. App. 409, 418, 16 P.3d 680 (2001).

The court uses six factors as a guide in determining whether exigent circumstances justify a warrantless entry and search:

(1) the gravity or the violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that his suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry is made peaceably.

State v. Cardenas, 146 Wn.2d 400, 406, 46 P.3d 127 (2002), cert. denied 538 U.S. 912, 123 S. Ct. 1495, 155 L.Ed.2d 236 (2003), citing State v. Terranova, 105 Wn.2d 632, 644, 716 Wn.2d 295 (1986). It is not necessary that every factor be met to find exigent circumstances, only that the factors are sufficient to show that the officers had to act quickly.

Cardenas at 408, citing State v Patterson, 112 Wn.2d 731, 736, 774 P.2d 10 (1989) (no one factor is conclusive; weight varies with circumstances).

As argued above, no search of the shed was conducted when it was initially opened. A search of the shed only occurred after a search warrant was obtained. If, however, this court wishes to reach the issue as to whether an emergency exception existed at the time the shed was opened, sufficient evidence was admitted to establish that such an emergency existed.

Washington courts have applied the “emergency exception where “premises contain . . . objects likely to burn, explode or otherwise cause harm[.]” State v. Downey, 53 Wn. App. 543, 544-545, 768 P.2d 502 (1989). In this case, deputies suspected that there was a person in a methamphetamine lab, which Deputy Messineo knew to be highly flammable. Deputies had information that there was a chemical smell coming from the shed, which caused burning to McConnell as he breathed it in. IRP 31. McConnell, who reported the odor, was familiar with the smell being associated with methamphetamine labs because he had received training as a resident firefighter. IRP 21. McConnell had been working all day and observed a “red glow” coming from the shed. IRP 19. At approximately 3:00 p.m., McConnell had walked by the shed and observed a red glow, burners, and detected a strong acetone or ammonia

odor. IRP 19, 27. When Deputy Johnson exited his vehicle at the scene he was able to detect the ammonia smell. IRP 55. Deputy Smith was able to detect the ammonia smell several feet from the shed. IRP 53-54.

The ventilation fan coming from the shed was off. IRP 160. At the time the door was opened, Cornell had been locked inside for approximately two hours. IRP 179. The health effects of ammonia include dangers to the eyes and skin. IRP 169. It can cause frost bite, burning, and respiratory hazards. Toluene, a chemical used in the manufacture process, causes damage to eyes and skin, as well as damage to respiratory systems, kidneys, and livers. IRP 169. Deputy Messineo believed that Cornell's health was in danger. IRP 168. The trial court correctly found that an emergency existed at the time the shed was opened. However, the shed was not searched at that time, and there is no evidence to suggest that any information gained from the initial entry into the shed was used in obtaining a search warrant.

Recently, in State v. Lawson, __ Wn. App. __, __P.2d__ (2006), this court found that the emergency exception did not apply when deputies received a call of a chemical smell, arrived to investigate the odor, entered a shed on the property, and located evidence of methamphetamine lab inside. Id. In Lawson, the court held that because the deputies had no information that anyone inside the shed was in danger, but rather were

“investigating a potential danger to the community,” that the emergency exception was not applicable. Id. The court found that there was no evidence that a specific person was in danger. Id.

The facts of the present case are distinguishable from Lawson. In the case at bar, the deputies had specific concerns for Cornell, not for the general public. IRP 168-169, 210, 213, 227. Unlike Lawson, where officers had no information that anyone else was on the Lawson property, in the present case, deputies believed that Cornell’s health was in danger because he had been in the shed for so long without ventilation. Id. Deputy Messineo articulated a specific concern for a specific person—Cornell—and believed that he was in danger. Id. When Cornell was extracted from the shed, he was immediately questioned about his health. IRP 179. Deputies in this case clearly believed that Cornell was inside the shed and in danger. The court did not err in finding that an emergency existed.

3. THERE IS NO RECORD DEVELOPED WHICH WOULD INDICATE WHAT, IF ANY, INFORMATION GAINED FROM THE ENTRY OF THE CURTILAGE WAS USED TO OBTAIN A SEARCH WARRANT, AND IN THE ALTERNATIVE, DEPUTIES WERE LEGITIMATELY ON THE PROEPRTY TO INVESTIGATE A POTENTIAL DANGER AND IN AREAS THAT WERE IMPLICITLY OPEN.

As argued above, the defendants did not challenge the valid search

warrant that was obtained in this case. No record was made below as to what information was contained in the affidavit in support of the search warrant. Therefore, it is unknown what information, if any, which was gained from Deputy Smith and Deputy Johanson's entry onto the curtilage of the property was used in obtaining a search warrant. Therefore, if this court were to find that the deputies did not stay within the areas which were implicitly open, any error would be harmless, because the warrant is valid and was undisputed.

If, however, this court reaches the issue of whether the deputies remained in implicitly open areas, there was evidence presented that they did so. The curtilage of a home is that area so intimately tied to the home itself that it should be placed under the protection of the Fourth Amendment protection. State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (1999). It must be remembered that under the Fourth Amendment, if an area is not within a home's curtilage, it is considered open fields and not protected by the Fourth Amendment regardless of how many fences or no trespassing signs are posted by the property holder. Oliver v. United States, 466 U.S. 170, 178 (1984) (an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home). The Washington State Constitution provides greater protection in that it allows a property holder to extend the boundaries of the area constitutionally protected by the erecting of barriers. State v. Myrick, 102 Wn.2d 506, 510-511, 688 P.2d

151 (1984). No Washington case has ever noted this distinction when discussing the definition of curtilage. Even under the state constitution, the presence of “no trespassing” signs is not dispositive of the establishment of privacy, but is a factor to be considered “in conjunction with other manifestations of privacy[.]” State v. Johnson, 75 Wn. App. 692, 706, 879 P.2d 984 (1994), review denied, 126 Wn.2d 1004 (1995).

Police with legitimate business may enter areas of a home’s curtilage which are impliedly open, such as access routes to the house. State v. Seagull, 95 Wn.2d 898, 902, 632 P.2d. 44 (1981). An officer who approaches a residence in connection with an investigation from a common access route, when acting in the same manner as a reasonably respectful citizen, does not violate the resident’s reasonable expectation of privacy. State v. Myers, 117 Wn.2d 332, 344, 815 P.2d 761 (1991). If police detect something while lawfully present on areas of impliedly open curtilage, that detection does not constitute a search under either the Fourth Amendment of the U.S. Constitution or Article I, Section 7, of the Washington State Constitution. State v. Ross, 141 Wn.2d 304, 312-313, 4 P.3d 130 (2000). Open curtilage includes areas apparently open to the public, such as driveways, walkways, or any access route. State v. Maxfield, 125 Wn.2d 378, 398, 886 P.2d 123 (1994). Under the “open view” doctrine, detection by an officer who is lawfully present at the vantage point and able to detect something by utilization of one or more of

his senses does not constitute a search within the meaning of the Fourth Amendment. State v. Seagull, 95 Wn.2d 898, 901, 632 P.2d 44 (1981).

Flowers asserts that a “reasonably respectful citizen” would not go beyond the driveway, porch, or entrance to the home without feeling that he or she was invading the owner’s privacy. Brief of Appellant Flowers at 32. Flowers, however, fails to articulate how the path taken by the initial responding deputies violates the curtilage rule.

The court made the following ruling with respect to curtilage:

When they [Deputy Smith and Deputy Johanson]—the testimony, I think, is consistent that where they walked over by the shed—now I’m talking about the shed that’s in the front of the house that is circled in red and the fire pit adjacent to it. There isn’t anything to suggest to me that they weren’t walking in an area where they saw Mr. Vella walk, where they saw Ms. Flowers walk that is an open area that would be part of the curtilage that they could walk into, which is an access route and impliedly open. Nobody testified on direct or cross or otherwise that it was through some secret passageway or off of a path or anything like that. In fact, they had seen Mr. Vella walk to the shed and back and presumably there would be a path to get to and from the shed.

IRP 305-306.

The court then made the following conclusion of law:

Evidence obtained during the deputies’ entry onto the curtilage of Flower’s residence is admissible because the deputies were there on legitimate police business investigating a potential hazardous crime, and were not on the property merely to gather evidence. The deputies

stayed within the areas of curtilage which were implicitly open and acted in the same manner as a reasonably respectful citizen.

1CP 43-52; 2CP 40-49.

The defendants have cited to nothing in the record that the deputies deviated from the pathway. Flowers states that the deputies made a “substantial departure from the area,” but fails to articulate what the substantial departure was. The only testimony regarding the path taken by the deputies was Deputy Smith’s statement that they “made a loop” between the shed and the house. IRP 107. That testimony does not suggest that the deputies were even off of the pathway. Rather, the court found that the deputies were in an impliedly open access route. The defendant cannot establish that the trial court erred in finding that the deputies violated the defendants’ privacy.

4. ENTRY INTO THE SHED WAS NOT A PRETEXT TO CONDUCT A SEARCH OF THE SHED BECAUSE NO SEARCH OF THE SHED WAS DONE UNTIL A VALID SEARCH WARRANT WAS OBTAINED.

Flowers asserts that the deputies entered the shed in order to gain additional information for use in obtaining a search warrant. Brief of Appellant Flowers at 28. As argued above, there was no record developed below regarding what information was contained in the affidavit in support of the search warrant. Moreover, Deputy Gosling testified that he did not look in the shed once it was open because he did not want to taint

the warrant. IRP 250-251. There clearly was no pretext when the deputies opened the shed because no evidence was collected at that point.

Cornell and Flowers both rely on State v. Schlieker, 115 Wn. App. 264, 62 P.3d 520 (2003), in which officers responded to a domestic violence call involving a reported gun shot. When the officers arrived, they were told that things were fine and the gun shot was the sound of a lighter exploding in a dryer, but were told that the individuals in a trailer on the property were trespassing and possible drug activity. Id. As the officers approached the home, two men who were standing outside attempted to flee the scene but were apprehended. Id. Concerned that someone in the trailer might be injured, the officers called out to the occupants of the home through the open front door and, receiving no response, entered the home. Id. After finding the defendants unharmed, the officers immediately handcuffed and arrested them and conducted a warrantless search of the home and the surrounding premises. Id.

The court noted that (1) the officers were not at the trailer out of concern for the Schlieker's safety, but to investigate allegations of trespassing and drug activity; (2) the domestic violence call did not include anyone at the Schlieker trailer; (3) the deputies had no information that someone at the defendants' was injured; (4) the gun shot which prompted the call to the police had not come from the Schlieker trailer;

and (5) after discovering Schlieker was unharmed, the officers did not inquire about his well-being, but rather arrested him and searched the trailer for evidence. Id. 271-272.

In this case, the caller, Aaron McConnell, reported on a chemical odor coming from defendant's property that had caused burning as he breathed. IRP 31. McConnell also reported seeing a "red glow" coming from inside the shed. IRP 19. The deputies were responding to a call concerning defendant's property and shed. IRP 52, 88-89, 130. Deputy Messineo stated that the chemical odor, anhydrous ammonia, can cause serious respiratory hazards and burning of the skin. IRP 169-170. The chemicals used in methamphetamine labs are explosive. Id. Unlike Schlieker, all the information the deputies had indicated that the potential emergency was at the defendant's residence when they arrived.

Unlike Schlieker, the deputies were not solely concerned with finding a possible gun shot victim in need of medical assistance, the deputies were concerned about the inhalation hazards and risk of explosion posed by methamphetamine labs. IRP 169-170. Deputy Smith and Deputy Johanson initially believed that there was a possible methamphetamine lab in the shed. IRP 63. Deputy Smith determined that the odor he smelled was associated with methamphetamine labs. IRP 91.

Deputy Messineo and Deputy Gosling both testified about the danger of explosion and the other dangers associated with the manufacture of methamphetamine. IRP 169-170, 227. Once they had determined that

there was a methamphetamine lab, they arrested defendants, but unlike Schlieker, they did not conduct a search of the shed. Rather, the shed was only accessed to remove the person locked inside, Cornell. They then waited for a warrant before the shed was finally searched for evidence. IRP 224, 255; VIRP 669.

5. DEPUTIES WERE NOT REQUIRED TO GIVE FERRIER WARNINGS TO FLOWERS BECAUSE THE SHED WAS NOT SEARCHED WHEN IT WAS INITIALLY OPENED.

As argued above, any potential error committed when the deputies entered the shed is harmless because no evidence was seized from the initial entry into the shed—it was all seized pursuant to a valid search warrant. Also as argued above, this court should treat the undisputed findings of fact as verities under the invited doctrine rule.

Flowers cites State v. Ferrier for the proposition that the deputies needed to obtain Flowers’s consent prior to entering the shed. The court in Ferrier set forth the following rule:

That when police officers conduct a knock and talk for the purpose of obtaining a consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior to entering the home, inform the person from whom consent is sought that the person may lawfully refuse to consent to the search...

State v. Ferrier, 136 Wn.2d 103, 118-19, 960 P.2d 927 (1998).

The scope of this rule was limited in State v. Bustamante-Davila, 138 Wn.2d 964, 983 P.2d 590 (1999), where the court held that where the

police do not go to the home with the intent to search for contraband, and the consent is not obtained through a coercive measure, the officers do not need to inform the consenting person that they have the right to refuse the search. Id. 138 Wn.2d 964, 980-81, 983 P.2d 590 (1999). See State v. Williams, 142 Wn.2d 17, 11 P.3d 714 (2000) (police officers seeking consent to enter a private residence for a reason other than a search for contraband are not required to advise the person present of the right to refuse entry.)

Ferrier is not analogous to the case at bar. In Ferrier, the officers testified that they met prior to the knock and talk to “discuss a procedure whereby they could gain entry into the home.” Ferrier, 136 Wn.2d at 106-7, 960 P.2d 103. Unlike in Ferrier, the deputies did not go into the shed with the intent to conduct a warrantless search. Rather, while investigating the report of a possible methamphetamine lab, deputies believed that there may be someone locked inside the suspected lab. IRP 168. It is clear that the deputies did not enter the shed to conduct a warrantless search, because the “warrant writer,” Deputy Gosling, testified that he did not want the future search warrant tainted by any evidence from the initial entry into the shed. IRP 250-251. It is clear that the shed was not breached for the purposes of conducting a search. Rather, it was breached because deputies believed that there was an emergency situation of someone locked inside a potential methamphetamine lab. Ferrier warnings were not necessary in this case because of the exigent

emergency posed by the anhydrous ammonia odor and danger of explosion created by the methamphetamine lab. More importantly, it does not appear that any information gained from the entry into the shed was used in the search warrant, so even if Ferrier warnings were required, failure to give them to Flowers, in this case, was harmless.

6. THE CHALLENGED FINDINGS OF FACT SHOULD BE TREATED AS VERITIES ON APPEAL AND, IN THE ALTERNATIVE, THE DOCTRINE OF INVITED ERROR PRECLUDES THE DEFENDANTS FROM CHALLENGING FINDINGS OF FACT WHICH WERE UNDISPUTED BELOW.

a. The challenged facts should be treated as verities on appeal because no argument has been presented by either defendant as to how the challenged findings are unsupported by the evidence.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. Id. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. Hill, at 644. Credibility determinations are for the trier of fact and are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850

(1990). The trial court's conclusions of law are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

In applying the above law to the case now on appeal, the court should treat the findings of fact as verities. Both defendants have assigned error to of the findings of fact from the CrR 3.6 motion. There is no argument in either brief, however, as to how these findings are unsupported by the evidence. In Henderson Homes, Inc v. City of Bothell, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact but did not argue how the findings were not supported by substantial evidence; made no cites to the record to support its assignments; and cited no authority. The court held that under these circumstances, the assignments of error to the findings were without legal consequence and that the findings must be taken as verities.

It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities.

Henderson, 124 Wn.2d at 244; see also State v. Jacobson, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998).

Because both defendants have failed to support his or her assignments of error to the trial court's findings of facts with argument,

citations to the record, and citations to authority, this court should treat the assignments as being without legal consequence. The findings should be considered as verities upon appeal.

- b. The doctrine of invited error precludes this court from reviewing the undisputed facts challenged on appeal.

Under the doctrine of invited error a party may not set up error at trial and then complain of it on appeal. State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), overruled on other grounds by State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995). The invited error doctrine prevents parties from benefiting from an error they caused at trial regardless of whether it was done intentionally, negligently, or unintentionally. See City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). The Washington Supreme Court has observed that the invited error doctrine appears to require affirmative actions by the defendant in which “the defendant took knowing and voluntary actions to set up the error; where the defendant’s actions were not voluntary, the court did not apply the doctrine.” In re Pers. Restraint of Call, 144 Wn.2d 315, 328, 28 P.3d 709 (2001); In re Pers. Restraint of Tortorelli, 149 Wn.2d 82, 66 P.3d 606 (2003), cert. denied, 540 U.S. 875, 124 S. Ct. 223, 157 L.Ed.2d 137 (2003) (defendant who sought admission of an exhibit at trial without requesting limiting instruction precluded from raising challenge to the admission of

such evidence). The doctrine has been applied to preclude review of errors of constitutional magnitude, including where an element of the offense was omitted from the “to convict” instruction. State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999); State v. Henderson, 114 Wn.2d 867, 869, 792 P.2d 514 (1990).

In the case before the court, there were 37 “undisputed facts” entered by the court, which were approved by both defendants. 1CP 43-52; 2CP 40-49. The defendants assign error to the majority⁵ of the “undisputed facts.” Neither defendant assigns error to “undisputed facts” numbers 25, 26, 28, 31, and 33. Brief of Appellant Cornell at 1; Brief of Appellant Flowers at 1-6. Neither defendant assigns error to any of the “disputed facts.” Unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

This court should refuse to review *all* assignments of error regarding the “undisputed facts” under the invited error doctrine. Trial counsel for both defendants specifically approved all of the undisputed facts. 1CP 43-52; 2CP 40-49. They were approved as “undisputed,” meaning that the facts were agreed to by each defendant. Id. Any errors the trial court made in its “undisputed facts” are errors that each defendant approved. There is nothing in the record to suggest that either defendant

⁵ Cornell assigns error to “undisputed fact” number 27. Brief of Appellant Cornell at 1. Flowers assigns error to “undisputed facts” 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 29, 30, 32, 34, 35, 36, and 37.

made any specific objections to any of the undisputed findings of fact. To allow the defendants to now dispute facts that were agreed to below would violate the doctrine of invited error. If this court finds that the challenges to the "undisputed facts" is proper, then, as argued above, the court's finding that an emergency exception applied to the entry into the shed is harmless because no evidence was seized until after a valid search warrant was obtained.

D. CONCLUSION.

For the aforementioned reasons the State respectfully requests that this court affirm both defendant's convictions.

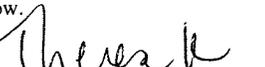
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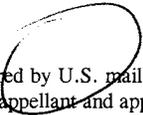
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Deputy Prosecuting Attorney
WSB # 32724

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.

10-16-06 
Date Signature


Self & Spouse

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