

NO. 34054-2

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

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT HUNTER, APPELLANT

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

No. 05-1-01927-3

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**BRIEF OF RESPONDENT**

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

1. Was there sufficient evidence presented for the jury to find the defendant guilty of unlawful possession of pseudoephedrine with the intent to manufacture methamphetamine? (Appellant's Assignment of Error No. 1).

2. Should this court decline to review claims that have not been properly presented in compliance with RAP 10.3(a)(5), but if this court should review such claims are they wholly without merit? (Appellant's Assignment of Error No. 2).

3. Did the trial court properly exercise its discretion in giving instructions on accomplice liability where there was sufficient evidence to support them? (Appellant's Assignment of Error No. 3).

B. STATEMENT OF THE CASE.

1. Procedure

On April 22, 2005, ROBERT LAWRENCE HUNTER, hereinafter "defendant," was charged with unlawful possession of pseudoephedrine

and/or ephedrine with intent to manufacture methamphetamine. CP 1-2.

On October 5, 2005, both parties appeared for trial. 10/05/05<sup>1</sup> RP 2.

On the day of trial, the defendant raised a motion to suppress any evidence recovered from the defendant's vehicle based on an unlawful detention and arrest. 10/05/05 RP 3-9. The court ruled that the evidence recovered was admissible. 10/05/05 RP 19, 27. The court also ruled that officers had probable cause to arrest the defendant. 10/05/05 RP 26.

Defendant raised a motion that the State would be unable to establish the defendant's intent to manufacture methamphetamine.

10/05/05 RP 18. The court and both parties engaged in a discussion regarding the intent element for the charge of possession of

pseudoephedrine with the intent to manufacture methamphetamine.

10/05/05 RP 27. The court deferred ruling on the defendant's motion.

10/05/05 RP 33.

At the close of the State's case, the defendant made a motion for a directed verdict. 10/11/05 RP 58. The defendant asserted that the State did not present sufficient evidence to establish that the defendant intended to manufacture methamphetamine. 10/11/05 RP 58-60. The State argued that the evidence of the defendant hiding pseudoephedrine in his vehicle, that he had enlisted Lance Cornish to assist him in purchasing pills, that

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<sup>1</sup> There are multiple volumes of the verbatim report of proceedings, many of which are not sequentially numbered. For convenience of reference, the State will refer to each volume by date of which the proceedings occurred.

the defendant went to multiple stores to purchase pills, and that he hid the boxes by throwing them in a dumpster all established that the defendant had the intent to manufacture methamphetamine. 10/11/05 RP 61-62.

The court ruled that a rational finder of fact could find that the defendant intended to manufacture methamphetamine or assist another in the manufacture of methamphetamine. 10/11/05 RP 67.

The State proposed a jury instruction number seven, which stated:

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result, which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

CP 3-17.

Defendant objected to the State's proposed instruction. 10/11/05 RP 106. The defendant also objected to the accomplice language in the "to convict" instruction. CP 3-17: 10/11/05 RP 107. The court stated that the defendant, under the State's theory, was perhaps aiding a methamphetamine cook by giving him needed ingredients. 10/11/05 110.

On October 12, 2005, the defendant was found guilty of unlawful possession of pseudoephedrine with the intent to manufacture methamphetamine. 10/12/05 RP 159. On November 4, 2005, the defendant brought a motion for a judgment notwithstanding the verdict, a new trial, and exceptional sentence, and a DOSA. 11/4/05 RP 2. The court denied the defendant's motion for a new trial. The court held:

. . . First with respect to the motion for a new trial, I am going to deny the motion. What I think Mr. Hetter's doing actually is just arguing again the applicability of some of the instructions which we argued at the time of trial. Mr. Hunter was convicted of possession with intent to manufacture, not manufacturing. The jury would have had to find he had the intent to manufacture.

We gave them an instruction about intent; we gave them an instruction on manufacture, which is very broad, and it is much broader—the law with respect to manufacturing meth is much broader than what people think of, you know, assembling things. Also includes preparation, gathering of ingredients. There was evidence that that's what Mr. Hunter was doing. There was also the receipt for the xylene, which is something most people don't have in their cars, xylene. The jury found him guilty. And I see no reason to reverse or substitute my judgment for theirs. So I am going to deny the motion for a new trial.

11/4/05 RP 33-34.

The defendant was sentenced to a standard range sentence of 72 months confinement. CP 3-17. He filed a notice of appeal on November 17, 2005. CP 48.

## 2. Facts

On April 21, 2005, Detective James Loeffelholz, Deputy James Jones, and Detective Oliver Hickman were present at a “pseudoephedrine investigation.” 10/06/05 81-82, 131; 10/11/05 RP 6. A “pseudoephedrine investigation” is a police operation in which law enforcement works in conjunction with pharmacies or grocery stores. 10/06/05 82. Deputies conduct surveillance on the stores and monitor individuals purchasing pseudoephedrine products. Id. Deputies then follow individuals to see if other methamphetamine-related items are purchased or stolen. Id. Anywhere from six to fifteen deputies are involved in a pseudoephedrine investigation. Id. Pseudoephedrine is one of the ingredients needed to manufacture methamphetamine. 10/10/05 RP 18.

On April 21, 2005, Pierce County Sheriffs deputies were conducting surveillance at the Walgreen’s store and a Fred Meyer store. 10/06/05 83-84. The defendant had been observed driving into the Walgreen’s store. 10/06/05 RP 85, 134. The passenger in the defendant’s vehicle, later identified as Lance Cornish, had exited the vehicle, entered the Walgreen’s store, and purchased a pseudoephedrine product. 10/06/05 85, 134; 10/11/06 RP 47. In order to make the purchase, Cornish had to ask the clerk for the pills. 10/06/05 RP 136.

The defendant and Cornish then drove across the street to the Fred Meyer store where the defendant purchased two boxes of a pseudoephedrine product. 10/06/05 RP 85; 10/11/05 RP 48. The

defendant exited the store. Id. Cornish then entered the store and purchased two boxes of pseudoephedrine products. 10/06/05 RP 85; 10/11/05 RP 49. The defendant and Cornish then drove behind the Fred Meyer store and were observed looking at a large dumpster. 10/06/05 85-86.

Detective Hickman went to the dumpster to determine if the defendant had thrown anything inside. 10/10/05 RP 14. In the dumpster, on top of a pallet, was a Walgreen's bag. 10/10/05 RP 15. Inside the Walgreen's bag was a receipt and two empty boxes of Actifed tablets. 10/10/05 RP 16.

The defendant then drove to a Safeway store. 10/06/05 RP 87. The defendant entered the Safeway store and purchased what appeared to be two boxes of cold medicine. 10/06/05 RP 88. The defendant then left the store and was observed doing something under the hood of the car. 10/06/05 89-90.

Detective Loeffelholz contacted the Safeway clerk, who indicated that the defendant had purchased three boxes of a pseudoephedrine product. 10/06/05 RP 90. In total, the defendant purchased five packages of pseudoephedrine. 10/06/05 RP 116. Cornish purchased six boxes. 10/06/05 RP 116; 10/11/05 RP 48. The defendant was then stopped and contacted. Id. The defendant's vehicle was impounded while Detective Loeffelholz applied for a search warrant. 10/06/05 RP 95.

On April 29, 2005, a search warrant was served on the vehicle. 10/06/05 RP 97. Inside the vehicle, Detective Loeffelholz recovered various boxes of pseudoephedrine and a receipt for the chemical xylene from Lowe's hardware store. 10/06/05 RP 97; 10/10/05 RP 24. Xylene is a chemical that can be used after the reaction phase of the methamphetamine manufacturing process. 10/10/05 RP 24. Xylene or other solvents are added after the reaction phase to destroy any remaining lithium left from the reaction. 10/10/06 RP 22.

Under the hood of the car were nine blister packs of pseudoephedrine. 10/06/05 RP 97, 120; 10/10/05 RP 22. Also recovered was \$306.00 and \$1,100.00 in currency. 10/06/05 RP 102. The \$306.00 was recovered from the defendant's front pants pocket. 10/10/05 RP 10.

The defendant was questioned by Deputy James. 10/06/05 RP 148. The defendant indicated that he had purchased three boxes of cold medication. Id. The defendant also stated that there were three boxes of cold medication in his vehicle. Id. The defendant denied stopping at any other stores. 10/06/05 RP 149.

Cornish and the defendant had smoked methamphetamine together in the past. 10/11/05 RP 47. Methamphetamine was available at the defendant's home. 10/11/05 RP 50. On April 21, 2005, the defendant asked Cornish if he wanted to go with him to the stores. 10/11/05 RP 47. Cornish stated that he and the defendant went to Walgreen's, Fred Meyer, and Safeway to purchase pills. 10/11/05 RP 48. Cornish was aware that

pseudoephedrine is used in the manufacture of methamphetamine. Id.

The defendant gave Cornish the money to purchase the pills. 10/11/05 RP 49.

The defendant testified that he used methamphetamine. 10/11/05 RP 85. He stated that Cornish suggested that they purchase pseudoephedrine pills as a way to make money because they could sell the pills for a profit or drugs. 10/11/05 RP 89. The defendant and Cornish had purchased psuedoephedrine pills before. 10/11/05 RP 92. The defendant admitted to providing Cornish with money to purchase the pills. Id. The defendant stated that he discarded some of the boxes in a dumpster because, if he was caught, he would have fewer things in the car. 10/11/05 RP 93. He denied knowledge of the xylene receipt. 10/11/05 RP 94. The defendant acknowledged that he knew the pills would likely be used for an unlawful purpose. 10/11/05 RP 96. The defendant stated that both he and Cornish sold the psuedoephedrine. 10/11/05 RP 102.

C. ARGUMENT.

1. SUFFICIENT EVIDENCE WAS ADDUCED FOR THE JURY TO FIND THE DEFENDANT GUILTY OF UNLAWFUL POSSESSION WITH INTENT TO MANUFACTURE BEYOND A REASONABLE DOUBT.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also Seattle

v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. Id.; State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

In this case, defendant challenges the sufficiency of evidence to support his conviction for unlawful possession of pseudoephedrine or ephedrine with intent to manufacture methamphetamine. The jury was instructed that, in order to find the defendant guilty, it needed to find each of the following elements:

- (1) That on or about the 21st day of November, 2005, Robert Hunter or an accomplice knowingly possessed ephedrine and/or pseudoephedrine or any of their salts or isomers or salts of isomers;
- (2) That Robert Hunter or an accomplice possessed ephedrine and/or pseudoephedrine or any of their salts or

isomers or salts of isomers with the intent to manufacture methamphetamine; and

(3) That the acts occurred in the State of Washington

Instruction No 6, CP 3-17.

Defendant's sole challenge to the sufficiency of the evidence is that the evidence adduced was insufficient regarding the intent to manufacture methamphetamine. Br. of Appellant at p. 5. Looking at the evidence adduced below in the light most favorable to the State, this element was supported with sufficient evidence.

First, Detective Loeffholz, Deputy Jones, and Lance Cornish all testified that the defendant drove to three different stores where pseudoephedrine was purchased. 10/06/05 85, 87-88; 10/11/05 48. The defendant personally made purchases at two of the stores. Id. The number of stores frequented to acquire pseudoephedrine suggests that defendant was familiar with the law prohibiting large purchases of pseudoephedrine and intentionally engaged in numerous purchases of small amounts to hide his illegal activity. His activities do not suggest an innocent explanation for the acquisition of so much pseudoephedrine.

Second, the State introduced detailed testimony by Detective Oliver Hickman, a six year veteran of the Pierce County Sheriff's Office as a Methamphetamine Lab Investigator. 10/11/05 RP 8. Detective Hickman described the process of manufacturing methamphetamine, and

listed the ingredients necessary for its production, including pseudoephedrine and xylene. 10/11/05 RP 18-22.

The defendant or Cornish had removed the blister packs from the boxes. 10/06/05 97; 10/10/05 RP 14-16, 22. Detective Hickman indicated that people who intend to use the pseudoephedrine for methamphetamine typically separate the blister packs from the boxes. 10/11/05 RP 29. Taking preparatory steps toward manufacturing indicates an intent to manufacture.

Third, a receipt for xylene, another chemical used in the manufacture of methamphetamine was located in the defendant's vehicle. 10/06/05 97; 10/10/05 24. Defendant classifies the xylene receipt as "old<sup>2</sup>," when in fact it is dated April 15, 2005—six days before the defendant's arrest. CP 47 (Exhibit 14). Xylene is an ingredient, along with pseudoephedrine, that can be used in the manufacture of methamphetamine. 10/11/05 RP 22. The fact that the defendant had a receipt in his vehicle for the recent purchase of xylene further suggests that he intended to manufacture methamphetamine.

Fourth, the defendant attempted to conceal his criminal activity. He removed the blister packages from the boxes and disposed of the boxes

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<sup>2</sup> Br. of Appellant at page 4.

in a dumpster. 10/06/05 RP 97, 16, 120; 10/10/05 RP 22. Detective Hickman indicated that it is typical for individuals engaged in the manufacture of methamphetamine to remove the blister packs from the boxes. 10/11/05 RP 28-29. The defendant himself admitted that he was trying to limit the number of boxes that he had in his possession in case he was caught. 10/11/05 RP 93. He then concealed the blister packs of pseudoephedrine under the hood of his vehicle. 10/06/05 RP 97, 120; 10/10/05 RP 22. The defendant admitted that he knew he was committing a crime. 10/11/05 RP 93. He also admitted that he knew at some point the pseudoephedrine pills were likely going to be used for an unlawful purpose. 10/11/05 RP 96. It was the defendant that suggested to Cornish that they purchase the pseudoephedrine. 10/11/05 RP 47.

Finally, the defendant admitted that he planned to sell the pills to make a profit or receive drugs. 10/11/05 RP 89. Defendant's testimony at trial that he was addicted to methamphetamine also supports the inference that defendant had a motive to engage in the manufacture of methamphetamine – to supply his own habit. 10/11/05 RP 85, 103.

Upon examining the evidence introduced at trial in the light most favorable to the State, it is clear to see that more than sufficient evidence was adduced to convince a rational trier of fact that defendant possessed the pseudoephedrine with the intent to manufacture methamphetamine.

Defendant argues that the evidence in this case is akin to that in State v. Whalen, 131 Wn. App. 58, 126 P.3d 55 (2005), which was held insufficient. In Whalen, the court has ruled that bare possession of pseudoephedrine is not enough to establish the intent to manufacture conviction; at least one additional factor, suggestive of intent must be present. Whalen at 63. In Whalen, the Court reversed a possession of pseudoephedrine with intent to manufacture methamphetamine conviction because the State had only presented evidence of the defendant having shoplifted seven boxes of pseudoephedrine. Whalen at 56.

The evidence presented in defendant's case was far more substantial than that presented in Whalen. The State in the present case fulfilled the "additional factor requirement" set forth in Whalen by showing evidence that (1) the defendant was working in concert with another individual, Cornish, (2) that xylene, an ingredient used in the manufacturing process, was purchased six days before the defendant's arrest, (3) that there is the existence of a motive, (4) and the defendant's own statements which suggest his intent to manufacture.

In State v. Moles, 130 Wn. App. 461, 123 P.3d 132 (2005), the court found sufficient evidence to support a possession of pseudoephedrine with the intent to manufacture methamphetamine conviction. Id. at 466-467. Moles and two other males had been observed

purchasing the maximum amount of pseudoephedrine from two different grocery stores. Id. at 463. In the vehicle the three men were in were four empty blister packs, a box of Suphedrine, a grocery bag containing two empty blister packs and several loose white pills, a second grocery back containing two empty boxes of Suphedrine, two blister packs, and numerous loose white pills, and a black bag containing two sealed packages of Contac cold medicine. Id. at 464. There were approximately 440 loose pills in the vehicle. The court, citing State v. Davis, 117 Wn. App. 702, 72 P.3d 1134 (2003), review denied, 151 Wn.2d 1007 (2004), stated that “a person who knowingly plays a role in the manufacturing process can be guilty of manufacturing even if someone else completes the process.” Id. at 466. The court found that the quantity of loose pills alone was sufficient to support a conviction of possession of pseudoephedrine with the intent to manufacture methamphetamine. Id. at 466. The court also held that a coffee filter recovered, and evidence that the defendant were “acting in concert to purchase the maximum allowable amount of cold pills containing pseudoephedrine from various stores over a short period of time” were additional factors supporting a conviction. Id. at 466-467.

In State v. Brockob, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.2d \_\_\_ (2006), the court found that four bottles of pseudoephedrine and coffee filters were

sufficient to support a conviction for possession of pseudoephedrine when two defendants were “acting in concert” to acquire the pills. Id. at \*40.

The case at bar is similar to Brockob and Moles. In the present case, the defendant had a large quantity of pills removed from the boxes, was acting in concert with Cornish, had a receipt for xylene, and attempted to conceal his criminal activity by disposing of the outer boxes and hiding the blister packs under the hood of his vehicle. When taken together and in the light most favorable to the State, there was sufficient evidence presented to support a conviction for possession of pseudoephedrine with the intent to manufacture methamphetamine. This court should uphold the verdict of the jury rendered below.

2. THIS COURT SHOULD NOT REVIEW CLAIMS THAT HAVE NOT BEEN PRESENTED IN COMPLIANCE WITH RAP 10.3(a)(5) BUT IF IT DOES IT SHOULD FIND THAT THE STATE’S CLOSING ARGUMENT WAS PROPER.

Defendant alleges that the State argued that, “all the jury needed to determine was whether Mr. Hunter purchased the ephedrine for a lawful purpose, and if not, must convict.” Br. of Appellant at p. 7. There is not a single citation to the record in this entire argument section. Id.

Under RAP 10.3(a)(5), an appellate brief should contain references to the relevant parts of the record, argument supporting issues presented for review, and citations to legal authority. An appellate court need not

consider issues unsupported by specific references to relevant parts of the record. Estate of Lint, 135 Wn.2d 518, 531-32, 957 P.2d 755 (1998).

Defendant has failed to make any effort to specifically identify where the allegedly improper argument occurred, or show that a claim of error was preserved with a proper objection. Neither the court nor the respondent should have to do the work that is the responsibility of the appellant. The court should refuse to review this claim as it has not been properly presented under the rules of appellate procedure.

The defendant has asserted an assignment of error stating, “the court erred in permitting the State to argue that purchasing pseudoephedrine unlawfully constitutes the preparation element of manufacture.” Br. of Appellant at p. 3. In the body of his brief, however, the defendant presents argument on the issue of whether the purchase of five boxes of cold capsules constitutes the manufacture of methamphetamine. Br. of Appellant at p. 7.

It is unclear to the State what issue the defendant is seeking to raise. The defendant appears to be concerned with the propriety of the State’s closing argument. As argued above, the defendant provides no authority to support his claim, but if the court reaches the issue, the State’s closing argument was proper.

The defendant does not allege prosecutorial misconduct, nor did the defendant object during the State’s closing argument. The defendant asserts that “the State argued that all the jury needed to determine was

whether Mr. Hunter purchased the ephedrine for a lawful purpose, and if not, must convict.” Br. of Appellant at p. 7. This claim is without merit.

The State made the following argument in closing:

So, I would suggest to you that Robert Hunter is the person of primary responsibility under these facts and I would suggest to you Robert Hunter had the intent to manufacture methamphetamine because the definition of manufacturing is broad and includes preparation and includes direct or indirect participation. And he had indirect participation simply by the fact that he purchased the pseudoephedrine knowing that he was going to turn it over to someone where it ultimately was going to be used in the manufacture of methamphetamine. That alone is enough to establish the element of the crime in this case.

10/11/05 RP 133-134.

The State clearly did not argue to the jury that if the defendant purchased the pseudoephedrine for *any* unlawful purpose, it must acquit. To the extent the defendant is alleging an error in the State’s closing argument, such contention is without merit.

An appellate court will not consider an issue on appeal where there was no timely objection in the trial court. This affords the trial court the full opportunity to correct any alleged error and to create a factual record with respect to the issue for the appellate courts to consider. See RAP 2.5(a); State v. Sengxay, 80 Wn. App. 11, 15, 906 P.2d 368 (1995) (failure to timely object at trial waives appellate review of non-constitutional issues); State v. Barber, 38 Wn. App. 758, 770, 689 P.2d 1099 (1984), review denied, 103 Wn.2d 1013 (1985). A defendant may only appeal a

non-constitutional issue on the same grounds that he or she objected on below. State v. Thetford, 109 Wn.2d 392, 397, 745 P.2d 496 (1987).

If a defendant fails to object to the misconduct, fails to request a curative instruction, and fails to request a mistrial, the defendant has a higher burden on appeal. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105, cert. denied, 516 U.S. 843, 116 S. Ct. 131, 133 L. Ed. 2d 79 (1995). First, the defendant must prove that the improper conduct was “so flagrant and ill intentioned that it was inherently prejudicial.” Gentry, 125 Wn.2d at 640. Then the defendant must prove that “the prejudice resulting therefrom [was] so marked and enduring that corrective instructions or admonitions could not neutralize its effect[.]” State v. Swan, 114 Wn. 2d 613, 661, 790 P.2d 610 (1990). The absence of an objection and motion for a mistrial strongly suggests that defense counsel did not think that the conduct was critically prejudicial in the context of the trial as a whole. Swan, 114 Wn.2d at 661. A defendant may not remain silent, speculate on the outcome of the trial, and then complain afterward when the gamble does not pay off. Swan, 114 Wn.2d at 661.

Where the defendant did not object or 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.” State v. Dahlia, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. Id.

In the present case, the defendant did not object during the State’s closing argument, nor does he allege prosecutorial misconduct. The State’s closing argument was not flagrant or ill-intentioned, but was entirely permissible argument based on the law. The State’s closing argument was proper.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN GIVING AN INSTRUCTION ON ACCOMPLICE LIABILITY AS THERE WAS SUFFICIENT EVIDENCE TO SUPPORT IT.

The law concerning the giving of jury instructions may be summarized as:

We review the trial court’s jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

State v. Fernandez-Medina, 94 Wn. App. 263, 266, 971 P.2d 521, review granted, 137 Wn.2d 1032, 980 P.2d 1285 (1999), citing Herring v. Department of Social and Health Servs., 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are

supported by the evidence. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. State v. Colwash, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. State v. Rahier, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing State v. Jackson, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. State v. Harris, 62 Wn.2d 858, 385 P.2d 18 (1963). Absent constitutional error, a party cannot fail to object to a jury instruction and later challenge it on appeal. State v. Bailey, 114 Wn.2d 340, 787 P.2d 1378 (1990).

Defendant asserts that the court's to convict instruction<sup>3</sup> for unlawful possession of pseudoephedrine with the intent to manufacture methamphetamine improperly relieved the State of its burden of proof by including references to an accomplice. An examination of all the jury instruction reveals that this claim is meritless.

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<sup>3</sup> While the defendant assigns error to instructions five and seven in his brief, it appears he intended to reference instructions six and eight. Instruction number five and seven have no references to accomplice liability.

The jury was instructed that in order to prove the crime of unlawful possession of pseudoephedrine with the intent to manufacture methamphetamine, it had to find:

- (1) That on or about the 21<sup>st</sup> day of April, 2004, Robert Hunter or an accomplice knowingly possessed ephedrine and/or pseudoephedrine or any of their salts or isomers or salts of isomers[“Element A”];
- (2) That Robert Hunter or an accomplice possessed ephedrine and/or pseudoephedrine or any of their salts or isomers or salts of isomers with the intent to manufacture methamphetamine; and [“Element B”]
- (3) That the acts occurred in the State of Washington. [Element “C”]

Instruction No. 6, CP 3-17 (bracketed material added). The jury was given the following instruction on accomplice liability<sup>4</sup>:

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of a crime, with knowledge that it will promote or facilitate the commission of that crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime unlawful delivery of a controlled substance; or
- (2) aids or agrees to aid another person in planning or committing the crime of unlawful delivery of a controlled substance.

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<sup>4</sup> While the defendant addresses error with instructions five and seven in his brief, it appears he intended to reference instructions six and eight. Instruction number five and seven have no references to accomplice liability.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person is an accomplice.

Instruction No 8, CP 3-17.

To convict a person under accomplice liability in Washington, the State must prove that the accomplice acted with knowledge that his or her actions promoted or facilitated the commission of the crime. State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). While conspiracy requires a prior agreement, accomplice liability does not. State v. Markham, 40 Wn. App. 75, 88, 697 P.2d 263, review denied, 104 Wn.2d 1003 (1985). An accomplice need not share the mental state of the principal nor have specific knowledge of every element of the crime the principal committed so long as he or she has general knowledge of that specific substantive crime. State v. Roberts, 142 Wn.2d 471, 512, 14 P.3d 713 (2000); State v. Sweet, 138 Wn.2d 466, 479, 980 P.2d 1223 (1999); State v. Hoffman, 116 Wn.2d 51, 104, 804 P.2d 577 (1991).

To the extent that defendant is arguing that the State must prove defendant’s participation in every element of the crime, defendant misunderstands the law of accomplice liability. The State does not have to prove that defendant was aware of all the elements of his accomplice’s crime much less prove actual participation. But the instruction did not

allow the jury to convict without the proper finding of accomplice liability.

Defendant's claim is that the jury might have convicted defendant by finding that he knew only of a potential that the pseudoephedrine might be used to make methamphetamine by an unspecified individual. Br. of Appellant at p. 8. In other words, defendant facilitated someone else cooking methamphetamine. The instructions properly stated the law and defendant was properly convicted under these facts. There was no error.

Accomplice liability is a theory of vicarious liability that makes a person accountable for the actions of others; once established, accomplice liability is indistinguishable from principle liability. State v. McDonald, 138 Wn.2d 680, 688, 981 P.2d 443 (1999). To be an accomplice, a defendant must act knowing his actions will promote or facilitate the commission of a crime. RCW 9A.08.020. An accomplice need not participate in or have specific knowledge of every element of the crime nor share the same mental state as the principal. State v. Berube, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003); State v. Sweet, 138 Wn.2d 466, 479, 980 P.2d 1223 (1999).

Accomplice liability is not an alternative means of committing a crime. State v. Haack, 88 Wn. App. 423, 428, 958 P.2d 1001 (1997), review denied, 134 Wn.2d 1016, 958 P.2d 314 (1998). The elements of the crime are the same for both a principal and an accomplice. State v. Carothers, 84 Wn.2d 256, 264, 525 P.2d 731 (1974), overruled on other

grounds by State v. Harris, 102 Wn.2d 148, 685 P.2d 584 (1984). An information need not allege accomplice liability in order to state the nature of the charge -- charging the accused as a principal is adequate notice of the potential for accomplice liability. State v. Teal, 117 Wn. App. 831, 838, 73 P.3d 402 (2003), review granted, 151 Wn.2d 1009, 88 P.3d 965 (2004); State v. Rodriguez, 78 Wn. App. 769, 774, 898 P.2d 871 (1995), review denied, 128 Wn.2d 1015, 911 P.2d 1343 (1996).

The fact that there may be sufficient evidence to convict a defendant as a principal does not exclude the possibility that he also acted as an accomplice. State v. McDonald, 138 Wn.2d 680, 686-691, 981 P.2d 443 (1999), State v. Munden, 81 Wn. App. 192, 196, 913 P.2d 421 (1996). If the evidence could support either accomplice or principal liability, the court may instruct on both theories. Id.

There was sufficient evidence that defendant was not acting alone to support an instruction on accomplice liability. The evidence showed that he was working in concert with Lance Cornish to acquire a large quantity of pseudoephedrine pills. 10/06/05 RP 48, 85-86, 116, 134; 10/11/05 RP 47-49, 92, 102. There was evidence by the defendant's own testimony that he was acting at Cornish's request. Thus, the defendant could have been acting as Cornish's accomplice. Moreover, there was evidence that the defendant was going to provide the pseudoephedrine to a third party who was going to make methamphetamine. The defendant also could have been acting as an accomplice to the third party. It is reasonable to

infer that other individuals were participating in the purchasing of ingredients and the actual cooking process. Thus, from this evidence a jury could have believed that while defendant was involved in the manufacturing process that he was not acting alone in that endeavor or that defendant was not personally engaged in the actual cooking process but was providing ingredients to be used in that process. The trial court did not abuse its discretion in instructing the jury on accomplice liability.

D. CONCLUSION.

For the above mentioned reasons, the State respectfully requests that the defendant's conviction be affirmed.

DATED: January 11, 2007.

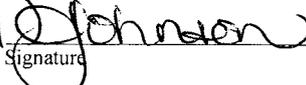
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STATE OF WASHINGTON  
BY DEPUTY

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.

1/12/07   
Date Signature