

FILED
COURT OF APPEALS
DISTRICT

NO. 34177-8

05 OCT -4 PM 2:08

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BY
COURT CLERK

STATE OF WASHINGTON, RESPONDENT

v.

MARVIN DOUGLAS McCORMICK, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Sergio Armijo

No. 04-1-05364-3

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

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

 1. Did defendant waive his claim regarding whether the corpus delicti rule was satisfied by not raising this issue in the trial court? 1

 2. Was there sufficient evidence to support the jury's determination that defendant committed the crime of possession of pseudoephedrine or ephedrine with intent to manufacture? 1

 3. Has the defendant failed to meet his burden of showing ineffective assistance of counsel when the record does not reveal any deficient performance or resulting prejudice? ... 1

 4. Is defendant entitled to a new sentencing hearing when the court may have erroneously concluded that defendant was not eligible for a DOSA sentence? 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure 1

 2. Facts 2

C. ARGUMENT.

 1. DEFENDANT FAILED TO PRESERVE FOR APPELLATE REVIEW THE ISSUE OF WHETHER THE CORPUS DELICTI RULE WAS MET IN THE TRIAL COURT..... 7

 2. SUFFICIENT EVIDENCE WAS ADDUCED FOR THE JURY TO FIND THE DEFENDANT GUILTY OF UNLAWFUL POSSESSION WITH INTENT TO MANUFACTURE BEYOND A REASONABLE DOUBT. 9

3.	THE DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING INEFFECTIVE ASSISTANCE OF COUNSEL.....	14
4.	THE DEFENDANT IS ENTITLED TO A NEW SENTENCING HEARING, AS THE COURT ERRED IN FINDING THAT DEFENDANT WAS INELIGIBLE FOR A DOSA SENTENCE.....	22
D.	<u>CONCLUSION</u>	26

Table of Authorities

Federal Cases

<u>Campbell v. Knicheloe</u> , 829 F.2d 1453, 1462 (9th Cir. 1987), <u>cert. denied</u> , 488 U.S. 948 (1988).....	16
<u>Harris v. Dugger</u> , 874 F.2d 756, 761 n.4 (11th Cir. 1989)	17
<u>Kimmelman v. Morrison</u> , 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).....	15, 18
<u>Strickland v. Washington</u> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	15, 16, 17, 22
<u>United States v. Cronin</u> , 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).....	14
<u>United States v. Layton</u> , 855 F.2d 1388, 1419-20 (9th Cir. 1988), <u>cert. denied</u> , 489 U.S. 1046 (1989).....	16
<u>United States v. Molina</u> , 934 F.2d 1440, 1447-48 (9th Cir. 1991)	18

State Cases

<u>Bremerton v. Corbett</u> , 106 Wn.2d 569, 573-574, 723 P.2d 1135 (1986).....	7, 18
<u>People v. Wright</u> , 52 Cal. 3d 367, 404, 802 P.2d 221, 245, 276 Cal. Rptr. 731 (1990), <u>cert. denied</u> , 502 U.S. 834, 112 S. Ct. 113, 116 L. Ed. 2d 82 (1991).....	8
<u>Seattle v. Gellein</u> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989)	9
<u>State v. Aten</u> , 130 Wn.2d 640, 656, 927 P.2d 210 (1996)	7, 8, 18, 19
<u>State v. Barrington</u> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), <u>review denied</u> , 111 Wn.2d 1033 (1988).....	9
<u>State v. Benn</u> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993)	17

<u>State v. Brett</u> , 126 Wn.2d 136, 198, 892 P.2d 29 (1995); <u>cert. denied</u> , 516 U.S. 1121, 133 L. Ed. 2d 858, 116 S. Ct. 931 (1996).....	16
<u>State v. C.D.W.</u> , 76 Wn. App. 761, 763-64, 887 P.2d 911 (1995)	8
<u>State v. Camarillo</u> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	10
<u>State v. Carpenter</u> , 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).....	16
<u>State v. Casbeer</u> , 48 Wn. App. 539, 542, 740 P.2d 335, <u>review denied</u> , 109 Wn.2d 1008 (1987)	10
<u>State v. Ciskie</u> , 110 Wn.2d 263, 751 P.2d 1165 (1988).....	15
<u>State v. Conners</u> , 90 Wn. App. 48, 52, 950 P.2d 519 (1998).....	23
<u>State v. Cord</u> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985).....	10
<u>State v. Delmarter</u> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....	10
<u>State v. Grayson</u> , 154 Wn.2d 333, 337, 111 P.3d 1183 (2005)	22, 23
<u>State v. Herzog</u> , 112 Wn.2d 419, 423, 771 P.2d 739 (1989).....	23
<u>State v. Holbrook</u> , 66 Wn.2d 278, 401 P.2d 971 (1965).....	9
<u>State v. Joy</u> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993)	9
<u>State v. Komoto</u> , 40 Wn. App. 200, 206, 697 P.2d 1025 (1985).....	7, 19
<u>State v. Lynn</u> , 67 Wn. App. 339, 342, 835 P.2d 251 (1992)	8
<u>State v. Mabry</u> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988)	9
<u>State v. McCullum</u> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).....	9
<u>State v. McFarland</u> , 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) ...	8, 15-16
<u>State v. Pietrzak</u> , 110 Wn. App. 670, 679, 41 P.2d 1240 (2002).....	19
<u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)	10
<u>State v. Scott</u> , 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988)	8
<u>State v. Smith</u> , 115 Wn.2d 775, 781, 801 P.2d 975 (1990)	18

<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	15, 16, 17
<u>State v. Turner</u> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981).....	9
<u>State v. Whalen</u> , 131 Wn. App. 58, 126 P.3d 55 (2005).....	13, 14, 18
<u>State v. Williams</u> , 149 Wn.2d 143, 147, 65 P.3d 1214 (2003).....	23

Constitutional Provisions

Sixth Amendment, United States Constitution.....	15
--	----

Statutes

Former RCW 9.94A.600(1) (2002)	24
Laws of 2005, ch. 460, § 1.....	24
RCW 9 9.94A.660(1)(f) (2005)	24
RCW 9.94A.345 (2000).....	24
RCW 9.94A.660.....	22

Rules and Regulations

RAP 2.5(a)	8
RAP 2.5(a)(3).....	8

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

1. Did defendant waive his claim regarding whether the corpus delicti rule was satisfied by not raising this issue in the trial court?
2. Was there sufficient evidence to support the jury's determination that defendant committed the crime of possession of pseudoephedrine or ephedrine with intent to manufacture?
3. Has the defendant failed to meet his burden of showing ineffective assistance of counsel when the record does not reveal any deficient performance or resulting prejudice?
4. Is defendant entitled to a new sentencing hearing when the court may have erroneously concluded that defendant was not eligible for a DOSA sentence?

B. STATEMENT OF THE CASE.

1. Procedure

On November 16, 2004, the Pierce County Prosecutor's Office charged appellant, MARVIN DOUGLAS MCCORMICK, hereinafter "defendant," with one count of possession of pseudoephedrine or ephedrine with intent to manufacture methamphetamine in Pierce County

Superior Court Cause Number 04-1-05364-3. CP 1-2. At arraignment on, November 17, 2004, defendant entered a plea of not guilty.

Trial was originally set for January 4, 2005. After many continuances, the matter came for trial before the Honorable Sergio Armijo on October 10, 2005. 2RP 1¹. After hearing the evidence the jury found the defendant guilty as charged. 3RP 32.

The court held a sentencing hearing on November 18, 2005. The court rejected a sentence under the Drug Offender Sentencing Alternative (DOSA) finding that defendant did not qualify. SRP 10. The court sentenced defendant to a standard range sentence of 100 months and imposed a \$400 Department of Assigned Counsel recoupment fee. SRP 10-11. The defendant filed a timely notice of appeal. CP 40-49, 50-52.

2. Facts

On November 16, 2004 Deputy Shaffer, along with other Pierce County Sheriff's Office deputies, conducted surveillance on stores to target individuals purchasing precursors to manufacture methamphetamine. 2RP 55.

¹ The State will use the same references to the verbatim report of proceeding as appellant did. See Brief of Appellant, p. 3, fn.1.

During the investigation, Deputy Shaffer witnessed the defendant, and a woman who was later determined to be Ms. Perkovich, pull into the parking lot of a Rite Aid drug store located at 72nd and Pacific Avenue in Tacoma. 2RP 56. Deputy Shaffer witnessed the defendant enter the Rite Aid store, and walk immediately to the front counter. A short while later the defendant exited the store. Deputy Shaffer entered the store, and verified that the defendant had attempted to buy the Rite Aid store brand of cold and allergy pills, which contain pseudoephedrine. 2RP 57.

The defendant returned to the vehicle and Ms. Perkovich drove to a Walgreens drug store located at 38th and Pacific Avenue. 2RP 57. Deputy Shaffer followed the defendant as he entered the Walgreens, and observed him purchase one, 48 count box of Wal-Act 60 milligram pseudoephedrine tablets. Deputy Shaffer confirmed the purchase with the pharmacist. The defendant waited in line at the front of the store and attempted to purchase another box of pseudoephedrine, but was informed that it was sold out. The defendant then exited the store and got into the vehicle. 2RP 57-58. Deputy Shaffer also observed Ms. Perkovich purchase the same cold medicine defendant had. Prior to leaving the Walgreens parking lot, deputies watched as defendant threw something underneath his vehicle; it was later determined to be an empty Wal-Act pseudoephedrine tablet box. 2RP 58-59.

Next, defendant and Ms. Perkovich drove to another Rite Aid store located at 12th and Martin Luther King. 2RP 59. Again, the defendant entered the drug store and purchased one box of Rite Aid brand cold and allergy pills containing pseudoephedrine. 2RP 59.

Deputy Shaffer, and the surveillance team, continued to follow the defendant as he drove to a Target store located at 23rd and Union. 2RP 60. Defendant entered the Target and was observed, by Detective Loeffelholz via store security cameras, purchasing two boxes of Target brand cold and allergy pills containing pseudoephedrine. 2RP 60. After defendant left the store he was observed discarding an empty box of the cold and allergy pills. 2RP 61. Ms. Perkovich was also observed purchasing Target store brand cold and allergy pills. 2RP 61.

After the defendant and Ms. Perkovich left the parking lot of the Target store, Deputy Shaffer directed a marked police unit to stop defendant's vehicle. The officer stopped defendant and Ms. Perkovich and defendant was read his Miranda rights, which he acknowledged. 2RP 62.

Deputy Shaffer interviewed the defendant in the back of the marked patrol vehicle. 2RP 62. When Deputy Shaffer asked the defendant if he would be willing to speak with him, the defendant replied, "Man, can we just make a deal." Deputy Shaffer replied, "Well, I can't

promise you anything, but what have you been up to tonight?” The defendant said, “Well, you know, you’ve been watching me.” 2RP 63.

Deputy Shaffer asked the defendant where he had begun purchasing pseudoephedrine pills that evening. Defendant replied, “Well, you’ve been watching us. We started in Lakewood at the Rite Aid, bought some pills at the Rite Aid and then some pills at the Target in Lakewood.” 2RP 63. Deputy Shaffer testified that as the officers had not conducted surveillance on the defendant at either of these stores, he took this to mean that the defendant been attempting to purchase pseudoephedrine before the deputies had him under observation. 2RP 63.

When asked what he planned to do with the pills he had purchased, the defendant replied that he buys them for approximately \$6.00 per box, and sells them for \$10.00. The defendant also said that he sold the pills to a friend of a friend, whom he did not know. 2RP 66. Deputy Shaffer testified the defendant told him that, “The guy makes meth with it, and in turn I get a cheaper price for meth.” 2RP 67. The defendant also admitted to having seen the final stage of methamphetamine manufacturing. 2RP 67.

A search incident to the arrest of the defendant revealed he had a metal spoon and three syringes on his person. 2RP 68. A search of the vehicle uncovered: multiple receipts for the purchase of pills containing

pseudoephedrine, a package of ammonium sulfate, a receipt for muriatic acid, over 500 pills containing pseudoephedrine, and postmarked mail addressed to the defendant. 2RP 68-81.

The spoon was later tested by John Dunn of the Washington State Patrol Crime Laboratory. Residue on the spoon was found to contain methamphetamine. 2RP 101-102. Mr. Dunn also testified that in his position as a forensic scientist, he had tested cocaine over 600 times, and had never known cocaine to be cut with pseudoephedrine. 2RP 105.

Deputy Shaffer also testified about how methamphetamine was manufactured, providing a detailed description of the process, materials used, and typical methods of manufacture. 2RP 49- 54.

Defendant testified at trial. He admitted to purchasing pseudoephedrine on the day he was arrested, and that he was intending to trade the pseudoephedrine for crack cocaine. 2RP 108-109, 111. Defendant testified that he had been a methamphetamine addict for approximately ten years, and was using methamphetamine on the day he was arrested. 2RP 109, 119. Defendant admitted to being familiar with the methamphetamine manufacturing process, but claimed he had only seen it through an HBO special, and during a drug treatment class. 2RP 113. Defendant testified that he was unaware of the presence of the fertilizer, and that he had not purchased the muriatic acid. 2RP 115.

Defendant testified about his own unstable employment, gambling, and increasing addiction to methamphetamine. 2RP 119-122, 129. The defendant also said that he knew that pseudoephedrine was used in the manufacture of methamphetamine. 2RP 124-126.

C. ARGUMENT

1. DEFENDANT FAILED TO PRESERVE FOR APPELLATE REVIEW THE ISSUE OF WHETHER THE CORPUS DELICTI RULE WAS MET IN THE TRIAL COURT.

Corpus delicti consists of two elements: (1) an injury or loss and (2) someone's criminal act which caused it. Bremerton v. Corbett, 106 Wn.2d 569, 573-574, 723 P.2d 1135 (1986). Proof of the corpus delicti of any crime requires evidence that the crime charged was committed by someone. State v. Komoto, 40 Wn. App. 200, 206, 697 P.2d 1025 (1985). "Confessions or admissions of a person charged with a crime are not sufficient, standing alone, to prove the corpus delicti and must be corroborated by other evidence." State v. Aten, 130 Wn.2d 640, 656, 927 P.2d 210 (1996). "Corpus delicti" means "body of the crime", and may be proven by either direct or circumstantial evidence, independent of the defendant's statements or admissions. Aten, at 655. If sufficient corroborative evidence exists, the confession or admission of a defendant

may be considered along with the independent evidence to establish a defendant's guilt. Aten, at 656.

As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). A defendant may claim error for the first time on appeal only if it is a "manifest error affecting a constitutional right". RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (citing State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988)); State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). "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).

The failure to object precludes appellate review because "it 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., at 763-64 (quoting People v. Wright, 52 Cal. 3d 367, 404, 802 P.2d 221, 245, 276 Cal. Rptr. 731 (1990), cert. denied, 502 U.S. 834, 112 S. Ct. 113, 116 L. Ed. 2d 82 (1991)).

As defendant in this case never raised the issue of corpus delicti during trial, this claim has not been preserved for appellate review, *unless* it is error of constitutional magnitude. As set forth in C.D.W., an

allegation of error under the corpus delicti doctrine is an evidentiary issue, rather than a constitutional issue; therefore defendant is precluded from raising a corpus delicti issue for the first time on appeal.

2. 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 16th day of November, 2004, the defendant knowingly possessed ephedrine and/or pseudoephedrine or any of their salts or isomers or salts of isomers;
- (2) That the defendant 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 4-19. Defendant's sole challenge to the sufficiency of the evidence is that the evidence adduced was insufficient regarding the intent to manufacture methamphetamine. Appellant's Brief at p. 7. Looking at the evidence adduced below in the light most favorable to the State, this element was supported with sufficient evidence.

First, Deputy Shaffer testified that he personally witnessed the defendant enter four different stores where he purchased, or attempted to purchase, cold and allergy pills containing pseudoephedrine. 2RP 56-66 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 Deputy Shaffer, a five year veteran of the Pierce County Sheriff's Office as a Methamphetamine Lab Investigator. Deputy Shaffer described the process of manufacturing methamphetamine, and listed the ingredients necessary for its production, including: pseudoephedrine, ammonium sulfate (fertilizer), and muriatic acid. 2RP 49-54. Deputy Shaffer also testified to discovering over 500 pseudoephedrine pills, a bag of ammonium sulfate, and a receipt for the purchase of muriatic acid, all within the vehicle the defendant used throughout the time he was under observation by the deputies. 2RP 75-80, 102-103. As these items are commonly used for the manufacture of methamphetamine, their combined presence suggests that the defendant was gathering the ingredients and supplies necessary to manufacture methamphetamine. Taking preparatory steps toward manufacturing indicates an intent to manufacture.

Third, Deputy Shaffer testified that he discovered a metal spoon and three syringes in a search of defendant's person. 2RP 68. The residue on the metal spoon contained methamphetamine. 2RP 101- 102. This suggests that defendant was a methamphetamine user and therefore, would have a motive to manufacture this controlled substance.

Defendant's statements² to Deputy Shaffer after arrest support the conclusion that he was acquiring the pseudoephedrine so that it could be used in the manufacturing of methamphetamine. 2RP 66-67. He indicated that he planned to sell the pills, at a hefty profit, to a "friend of a friend" who makes "meth." 2RP 66. He also indicated that, in return, he got his "meth" at a cheaper price. 2RP 67.

Defendant's testimony at trial that he was addicted to methamphetamine and had been using it on the day he was arrested also supports the inference that defendant had a motive to engage in the manufacture of methamphetamine – to supply his own habit. 2RP 109, 119.

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

² These statements were admitted at trial and therefore may properly be considered by the court in assessing the sufficiency of the evidence to show 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 of the acquisition of other items used in the manufacturing process, the existence of a motive, and the defendant's own statements which revealed his intent to manufacture.

As the State adduced sufficient evidence to establish guilt beyond a reasonable doubt, this court should uphold the verdict of the jury rendered below.

3. THE DEFENDANT HAS FAILED TO MEET HIS
BURDEN OF SHOWING INEFFECTIVE
ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been

conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. Id. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that the defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 335, 899

P.2d 1251 (1995); see also Strickland, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

There is a strong presumption that a defendant received effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); cert. denied, 516 U.S. 1121, 133 L. Ed. 2d 858, 116 S. Ct. 931 (1996); Thomas, 109 Wn.2d at 226. The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), cert. denied, 489 U.S. 1046 (1989); Campbell v. Knicheloe, 829 F.2d 1453, 1462 (9th Cir. 1987), cert. denied, 488 U.S. 948 (1988). A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn.2d at 336. Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's

actions "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

Post-conviction admissions of ineffectiveness by trial counsel have been viewed with skepticism by the appellate courts. Ineffectiveness is a question which the courts must decide and "so admissions of deficient performance by attorneys are not decisive." Harris v. Dugger, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." Strickland, 466 U.S. at 694.

A defendant must demonstrate both prongs of the Strickland test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In the present case, the defendant is alleging that he received ineffective assistance of counsel for the single reason³ that his attorney

³ Defendant also alleged that his counsel was ineffective during the sentencing hearing. The State is conceding that defendant is entitled to a new sentencing hearing, see infra; therefore rendering considering of this claim unnecessary.

failed to make a motion based on corpus delicti. The defendant asserts that this failure to make a motion directly caused him to be convicted based solely upon his statements and admissions to officers.

When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, the defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991). In this case defendant cannot make either showing.

As stated in the first argument section of this brief, “corpus delicti” means “body of the crime” and consists of two elements: (1) an injury or loss and (2) someone’s criminal act which caused it. Bremerton v. Corbett, 106 Wn.2d 569, 573-574, 723 P.2d 1135 (1986). Proof of corpus delicti may be proven by either direct or circumstantial evidence, independent of the defendant’s statements or admissions. Aten, at 655. The prosecution has the burden of making a prima facie showing of the corpus delicti. Whalen, at 62, citing to State v. Smith, 115 Wn.2d 775, 781, 801 P.2d 975 (1990). Prima facie, when applied to the corpus delicti doctrine, means there is evidence of sufficient circumstances which would support a logical and reasonable inference of the facts sought to be proved.

Aten, at 656. “The independent evidence need not be sufficient to support conviction or to even send the case to the jury.” State v. Pietrzak, 110 Wn. App. 670, 679, 41 P.2d 1240 (2002). In determining whether corpus delicti has been established, the court assumes the truth of the State’s independent evidence, and all reasonable inferences drawn from it, and views the evidence in the light most favorable to the State. Pietrzak, at 679.

Proof of the corpus delicti of any crime requires evidence that the crime charged was committed by someone. State v. Komoto, 40 Wn. App. 200, 206, 697 P.2d 1025 (1985). The identity of the person who has committed the crime is not normally material in establishing the corpus delicti. Komoto, 40 Wn. App. At 205.

In order to satisfy the corpus delicti rule in a charge of possession of ephedrine or pseudoephedrine with intent to manufacture methamphetamine, the State would have to present prima facie evidence to show that the individual charged: (1) possessed ephedrine or pseudoephedrine; and (2) intended to manufacture, or aid in the manufacture of, methamphetamine.

In this case the prosecution had considerable evidence, independent of the defendant’s statements that he possessed pseudoephedrine. The defendant was seen purchasing pills containing

pseudoephedrine, observed throwing away the packaging for these pills, and was found with over 500 pills containing pseudoephedrine in his possession once he was stopped by law enforcement. 2RP 57-81.

As for the evidence of intent, the prosecution presented evidence regarding the materials needed for the manufacturing of methamphetamine including: pseudoephedrine, ammonium sulfate (fertilizer), and muriatic acid. 2RP 49- 54. This list of supplies matched items found in defendant's possession at the time he was stopped by deputies; inside defendant's vehicle were over 500 pseudoephedrine pills, a bag of ammonium sulfate, and a receipt for the purchase of muriatic acid. 2RP 75-80, 102-103. As these items are commonly used for the manufacture of methamphetamine, their combined presence suggests that the defendant was gathering the ingredients and supplies necessary to manufacture methamphetamine. Taking preparatory steps toward manufacturing indicates an intent to manufacture.

Additionally, the defendant was found in possession of: a metal spoon with methamphetamine residue and three syringes indicating that defendant was a methamphetamine user. This provides defendant with a motive for manufacturing methamphetamine –he needs it to supply his own habit.

The State's evidence at trial, therefore, satisfied the corpus delicti rule because it demonstrated that: (1) the defendant was in possession of pseudoephedrine; and (2) the defendant was gathering supplies for the purpose of manufacturing methamphetamine, regardless of whether he intended to do the manufacturing himself or to provide the supplies to someone else who would. The corpus delicti rule was met below.

Had defendant's counsel brought a motion based upon the corpus delicti rule, it would have been denied. As counsel is under no obligation to bring a meritless motion, the decision to forgo making a corpus delicti motion cannot be considered deficient performance. Defendant has failed to meet his burden of showing deficient performance.

Additionally, defendant cannot show that he was prejudiced by the failure to bring a motion under the corpus delicti rule. Defendant cannot be prejudiced by the failure to bring a motion that would have been denied. Moreover, even without the admission of defendant's statements to Deputy Shafer, the jury had ample evidence upon which to find an intent to manufacture. The surreptitious manner in which defendant was gathering an illegal amount of pseudoephedrine, evidence that he was gathering supplies necessary to the manufacturing process and the existence of a motive - admission of methamphetamine use - for producing methamphetamine all create a powerful inference that

defendant was intending the pseudoephedrine in his possession to be used to manufacture methamphetamine. None of this evidence pertains to the defendant's statements. Defendant has failed to show that the results of his trial would have been different even if a corpus delicti motion had been granted. Defendant cannot demonstrate that the outcome of the case would have differed had the motion been made regardless of the court's ruling on the motion. He has failed to meet his burden of demonstrating the prejudice prong of the Strickland test.

Defendant has failed to meet his burden under the Strickland test as he is unable to demonstrate that his trial counsel's performance was deficient or that he suffered any resulting prejudice.

4. THE DEFENDANT IS ENTITLED TO A NEW SENTENCING HEARING, AS THE COURT ERRED IN FINDING THAT DEFENDANT WAS INELIGIBLE FOR A DOSA SENTENCE.

As a sentencing alternative, an offender may request a Drug Offender Sentencing Alternative (DOSA). RCW 9.94A.660. The DOSA program is an attempt to provide treatment for some offenders judged likely to benefit from it. It authorizes trial judges to give eligible nonviolent drug offenders a reduced sentence, treatment, and increased supervision in an attempt to help them recover from their addictions. State v. Grayson, 154 Wn.2d 333, 337, 111 P.3d 1183 (2005).

A DOSA is a decision left to the discretion of the trial judge. Grayson, at 335. As a general rule, the trial judge's decision whether to grant a DOSA is not reviewable. State v. Conners, 90 Wn. App. 48, 52, 950 P.2d 519 (1998). However, an appellant is not precluded from challenging on appeal the procedure by which a sentence was imposed. State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989). Despite the broad discretion given to the trial court under the Sentencing Reform Act, the trial court must exercise its discretion within the confines of the law. Grayson, at 335.

While defendant is not entitled to automatically receive a DOSA sentence simply by requesting it, he is entitled to have his request for an alternative sentence considered by the court. Grayson at 342. Appellate review is not precluded for the correction of legal errors or abuses in discretion in the determination of what sentence applies. State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003). Challenges to the appropriateness of a court's sentencing eligibility decision are challenges of legal error, and are thus

Current provisions governing offender eligibility for DOSA states that an offender is eligible for the special drug offender sentencing alternative if the offender has not received a drug offender sentencing alternative more than once in the prior ten years before the current offense.

RCW 9 9.94A.660(1)(f) (2005). This portion of the statute became effective on October 1, 2005. Laws of 2005, ch. 460, § 1. Defendant committed his crime in November 2004.

When applying the SRA, “Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.” RCW 9.94A.345 (2000). The 2005 eligibility limit on DOSA sentencing was not in effect at the time the defendant committed his crime. Therefore, because it took effect *after* the defendant’s commission of the crime, the 2005 version of the law governing DOSA eligibility is not applicable to defendant. The former version of the statute governing DOSA eligibility, did not place limits on the number of DOSA sentences an offender was eligible to receive. Former RCW 9.94A.600(1) (2002).

At sentencing the prosecutor argued that defendant was ineligible for a DOSA sentence because of the recent amendment to the statute that limited a criminal defendant to one DOSA sentence every ten years. SRP 3. Defendant received a DOSA sentence three years earlier. Id. Defense counsel contended that a DOSA sentence was an option arguing that the amendment limiting DOSA eligibility was not in effect at the time of defendant’s crime. SRP 4-6. The court rejected a DOSA sentence stating:

COURT: You bring the issue of whether this new statute is retroactive. Something more than just argument needs to be done. Some type of statutory analysis as to when this statute came into effect and why and how. Just to argue, I take this to be just like any other deferred prosecution or any other type of program that people go through. He's gone through one. He doesn't qualify for a second one, not within ten years. That's the way I see it.

SRP 10. The first portion of this ruling appears to be chastising the prosecutor for not providing more authority that the new amendment should apply retroactively to defendant's crime. This suggests that the court was not convinced by the prosecutor's argument. However, the statement that defendant "doesn't qualify for a second one, not within ten years" would appear to be a finding that the defendant is ineligible for a DOSA sentence for reasons consistent with the amendment to the statute. The last statement by the court - "That's the way I see it." - can either be construed as a conclusion that the defendant is legally ineligible for a DOSA sentence or as a statement that the court found a DOSA sentence would be inappropriate for someone who did not succeed after getting a previous DOSA sentence. The State submits that this record is ambiguous as to whether the court was rejecting a DOSA sentence based upon an error of law or as a result of a discretionary determination. If the court was finding defendant ineligible as a matter of law, defendant would be entitled to a new sentencing hearing.

Because the court may have erroneously considered defendant to be ineligible for a DOSA, the State agrees to a new sentencing hearing

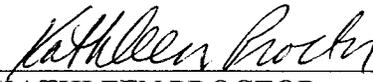
where the court can clarify whether or not it was making a discretionary ruling rejecting a DOSA sentence. If the court indicates that it did not believe that defendant was legally eligible for a DOSA, the court may reassess its sentence based upon a correct assessment of defendant's eligibility.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the conviction below, but to remand for a new sentencing hearing.

DATED: OCTOBER 2, 2006

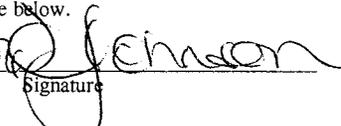
GERALD A. HORNE
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Jessica Mitchell
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.

10/4/06 
Date Signature

STATE OF WASHINGTON
BY  DEPUTY
06 OCT -4 PM 2:08
FILED
COURT OF APPEALS
DIVISION II