

NO. 34259-6-II

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

STATE OF WASHINGTON, RESPONDENT

v.

JEFFREY ELTON GILBERT, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John A. McCarthy

No. 04-1-0-02985-8

BRIEF OF RESPONDENT

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

1. Has the defendant established that his counsel was ineffective when the defendant has failed to established either deficient performance or prejudice? (Appellant's Assignment of Error Nos. 1, 2, 3 and 5).¹
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¹ Appellant's counsel has listed the first two assignments of error as "3" and "4" respectfully.

B. STATEMENT OF THE CASE.

1. Procedure

On June 17, 2004, the State charged defendant, Jeffrey E. Gilbert, hereinafter “defendant,” with the crime of unlawful manufacturing of methamphetamine.² CP 1-2. Wayne Williams and Patricia Whetstine³ were listed as co-defendants. CP 1-2.

On October 6, jury trial commenced before the Honorable John A. McCarthy. RP 6. Defendant had no objection to the State’s accomplice instruction. CP 6-20, RP 422-23, Instruction No. 10. Defendant proposed an instruction on “attempted” manufacturing of methamphetamine. RP 427. The court denied defendant’s requested instruction, finding he was not entitled to this instruction as a matter of law. RP 429-30. The jury returned a verdict of guilty. CP 21.

Prior to trial the State dismissed the charges against Williams and Patricia.⁴ RP 11. The defendant indicated he might call two witnesses at trial. RP 9. These witnesses did not testify. RP 417. Defendant presented a motion in limine to prevent the State from referring to

² Former RCW 69.50.401(a)(1)(ii) (1998).

³ Patricia and Richard Whetstine testified at trial. For purposes of clarification, the State will refer to their first names. In so doing, the State intends no disrespect.

⁴ The State originally declined to charge Patricia with manufacturing methamphetamine, then charged her, then dismissed the charge after obtaining missing pages to a detective’s report. RP 104-115. The State made no threats or promises to Patricia to testify against defendant. RP 125.

defendant's prior conspiracy to manufacture a controlled substance conviction during defendant's trial. RP 11. The court granted this motion subject to change if defendant "opened the door" to this conviction. RP 12. This prior conviction also involved Williams. RP 11, 184, 193, 200. During the trial the State unsuccessfully argued that defendant opened the door to this conviction during cross-examination of Williams. RP 199-210.

On December 2, 2005, the court held defendant's sentencing hearing and imposed a mid range sentence of 60 months imprisonment. CP 24-35. The court declined defendant's request for a Drug Offender Sentencing Alternative sentence. CP 24-35, SRP 9.⁵

This timely appeal followed. CP 38-48.

2. Facts

On August 31, 2003, Deputy Joseph Messineo, a member of the Pierce County Sheriff's Clandestine Methamphetamine Lab Unit responded to a 911 call regarding a methamphetamine lab at 912 74th Street East in Pierce County. RP 24-25. The 911 caller, Mrs. Whetstine claimed she was cooking methamphetamine and mixing chemicals wrong

⁵ Because the verbatim report of proceedings for the sentencing hearing was not paginated sequentially with the other volumes, the State will refer to this volume as "SRP."

and causing harmful fumes which she feared were endangering the children who lived in the apartment building. RP 26. When Messineo arrived, Mrs. Whetstine told him that it was safe, that there was no anhydrous ammonia inside. RP 27. Messineo detected the smell of chemicals emanating from a back bedroom, retrieved his air purifying respirator and entered the room. RP 27-29. Inside the room, Messineo observed a glass Mason jar containing brown liquid with a funnel in the top of the jar, a pressure cooker, two hydrochloric acid generators, Coleman fuel, muriatic acid, unused coffee filters, a Pyrex dish with white residue, an electronic gram scale, and three Ziploc baggies with white powder residue. RP 29-34. Messineo explained how these items were associated with the three phases of methamphetamine production. Notably, Messineo indicated that the pressure cooker is used in the red phosphorous method of making methamphetamine but that he did not observe items associated with the anhydrous ammonia method of manufacturing meth that Whetstine had intimated may have occurred at her apartment. RP 35.

Post Miranda, Mrs. Whetstine told Messineo that she had called 911 and told the 911 operator that she mixed the chemicals wrong and that the chemicals were smoking, that all drug users should go to jail, and that she thought the police would get there faster. RP 36, 46, 53-56. Contrary

to her claims, Messineo did not observe containers with chemicals “off gassing,” “bubbling,” or “smoking.” RP 35. It did not appear to Messineo that Mrs. Whetstine knew how to manufacture methamphetamine because she claimed to be extracting pseudoephedrine when Messineo did not observe extraction occurring in the back bedroom. RP 47.

On September 1, 2003, Pierce County Sheriff’s Detective Daryl Purviance was part of the Clandestine Lab team that executed a search warrant at 912 74th St E, Apartment A. RP 240-45. Detective Purviance explained that the two primary methods of manufacturing methamphetamine in Pierce County are the lithium metal anhydrous ammonia and Phosphorous hydroiodic acid methods.⁶ For both methods, the foundational precursor chemical is pseudoephedrine or ephedrine. RP 219. Basically, methamphetamine production can be summarized in three states: extraction; reaction, and “gassing off.” RP 220-230. Extraction involves removing pseudoephedrine or ephedrine from tablets or ephedra plant with alcohol and coffee filters. RP 221-24, 240. The reaction creates a bi-layered liquid which contains a “meth base” and solvent. RP 224-228. The primary difference between the two methods of production occurs in the reaction phase where anhydrous ammonia and lithium are

⁶ As part of his training, Detective Purviance has manufactured methamphetamine over 150 times and has investigated over 300 methamphetamine labs. RP 217-18.

used in the first method and red phosphorous and iodine are used in the second method. RP 224-28, 231-32. Once the solvent is drawn off, hydrogen chloride gas (HCL) is used to form methamphetamine crystals. RP 228-230. Although almost impossible to buy, HCL can be made from rock salt, aluminum foil, sulfuric acid, or muriatic acid. RP 229. Similarly anhydrous ammonia is difficult to buy but can be made from drain opener (lye) and ammonia fertilizer. RP 225-26.

Numerous items associated with all phases of both methods of methamphetamine production were located in the southwest bedroom or "computer" room. RP 249-297, 307.⁷ States Exhibit No. 158. These items included a Mason jar with attached funnel containing brown liquid,⁸ another similar Mason jar with brown liquid,⁹ a Mason jar with yellow liquid and used coffee filters,¹⁰ a glass jar with electrical tape and aluminum foil containing wet coffee filters,¹¹ acetone, several HCL

⁷ In a red cooler, Purviance found several items associated with all three phases of methamphetamine production. This and numerous other items were located under the table. RP 256-259, State's Exhibit Nos. 23-30.

⁸ This item was on the computer table and contained ephedrine and pseudoephedrine. State's Exhibit Nos. 4, 7, 181.

⁹ This jar was under the computer table. RP 255, State's Exhibit Nos. 6, 20, 158. The liquid contained ephedrine and pseudoephedrine. RP 181 (Sample 17A).

¹⁰ This was located in the red cooler and is associated with the extraction phase of methamphetamine production. RP 259, State's Exhibit No. 30. The liquid contained pseudoephedrine and ephedrine. State's Exhibit No. 181 (Sample 25A).

¹¹ This item was located under the computer desk. RP 265. State's Exhibit No. 39. A sample from this item contained ephedrine. State's Exhibit No. 181 (Sample 31A).

generators,¹² numerous used and unused coffee filters, numerous solvents, rock salt, several Mason jars with and without liquid and/or coffee filters, with yellowish liquid and coffee filters, a magazine page with red powder consistent with red phosphorous, red phosphorous, DampRid, plastic tubing next to the computer,¹³ buckets of chemical sludge, containers of acid,¹⁴ a gas container containing ephedrine,¹⁵ turkey baster for extracting the bi-layered liquid, ph strips,¹⁶ large cardboard barrel containing ephedra powder,¹⁷ iodine,¹⁸ drug paraphernalia, glass baking dish with white residue,¹⁹ rusty razor on a glass plate with residue,²⁰ Red Devil brand lye, lithium batteries (some with casings removed), gloves, a fan, ducting and, particulate mask, and a military style gas mask.²¹ RP 249-296.

In the bathroom, Detective Purviance located a spoon, cotton, and a syringe which he opined could be used to ingest methamphetamine.²²

¹² These devices can contain rock salt and DampRid and are used in the third phase to "gas out" the final product. RP 228-30, 259.

¹³ State's Exhibit No. 63.

¹⁴ State's Exhibit No. 55, 112.

¹⁵ State's Exhibit No. 181 (Sample 73A).

¹⁶ These PH strips are important for the red phosphorous method of methamphetamine manufacturing and are not commonly found at lab sites. RP 281-82.

¹⁷ State's Exhibit Nos. 96-97. The shipping label indicated the ephedra was likely obtained from Eureka Botanicals in Georgia. RP 286. This was the largest amount of ephedra that Detective Purviance had ever seen. RP 287.

¹⁸ State's Exhibit No. 162, 181. (Sample 86A).

¹⁹ State's Exhibit No. 45.

²⁰ State's Exhibit No. 59.

²¹ State's Exhibit No. 116.

²² State's Exhibit No. 139.

RP 297. In the master bedroom, he found several unused insulin syringes in a dresser drawer.²³ RP 298. A book entitled “Narcotics Anonymous Step Working Guide” with the name “Patty Whetstine” was inside the master bedroom.²⁴ RP 310. In the kitchen, Detective Purviance found a pressure cooker containing a dark paste,²⁵ numerous glass jars with brown or yellow residue and a plastic funnel.²⁶ RP 298. A white bucket with brown residue, muriatic acid, and a measuring cup was located outside the entrance to the apartment. RP 300.

In the living room, Purviance found a personal planner with several names and phone numbers that included the name Sean Olson. RP 316. A wallet contained a jail photo of Sean Olson was located in the southwest bedroom closet. RP 318. Other documents in this room were found on the table including cancelled checks belong to Williams and documents related to the Whetstines. RP 314-15, 326-27.

Deputy Shaffer was the officer responsible for taking samples of the liquids and solids found at the apartment. RP 336. He explained that he used PH test paper to determine the PH of these liquids. RP 340. The

²³ State’s Exhibit No. 141.

²⁴ In his opening brief, defendant **incorrectly** asserts that this item was on the table in the room where the methamphetamine lab was located. Brief of Appellant at 7.

²⁵ State’s Exhibit No. 142. This paste contained ephedrine. State’s Exhibit No. 181 (Sample 129A).

²⁶ State’s Exhibit Nos. 143, 145, 148, 150-52.

PH of water is seven or neutral. RP 340, 346. Very acidic solutions have a PH of zero. RP 354. Several items were tested and found to have PH ranges from zero to eight. RP 341-346. The PH of the containers marked “acetone”, methyl ethyl ketone, Coleman fuel, sulfuric acid, and muriatic acid had PH values consistent with their known PH values. RP 343-346. Some tubing for two devices had a PH value of zero consistent with a HCL generators. RP 345.

Patricia lived with her husband Richard Whetstine at Apartment A. in August 2003. RP 58. It was a two bedroom apartment, one of the bedrooms was converted to a computer room. RP 61, 87. Patricia forced Richard out of the residence because he started using methamphetamine. 91, 98. Wayne Williams and defendant also were residing at the apartment. RP 59. Defendant lived there for three months. RP 59. Defendant and Williams stayed in the computer room. RP 61. Because of medical problems, the Whetstines would often stay overnight in Maple Valley, leaving defendant alone in the house. RP 61-62. When she returned from these trips, she would smell chemicals. RP 62. This occurred over the three months defendant lived there. RP 62. She and Richard asked defendant to leave the apartment but he did not leave. RP 63. Patricia testified that defendant said he would “kick [Richard’s] ass.” RP 63. Richard was in no condition to defend himself as he has cirrhosis

of the liver, fourth stage Hepatitis C, and a tumor on his liver. RP 63-64. Patricia threatened defendant that she would call the police if he did not leave. RP 64. At that point, defendant took what she believed was the “main chemical” (red phosphorous) and left the apartment. RP 65, 78.

Patricia admitted she had lied to the 911 operator about her involvement in methamphetamine in order to get the police to respond quicker. RP 66.²⁷ She admitted she did not mix any chemicals, that the chemicals were not boiling over or were “smoking.” RP 75-76. She testified she had never been involved in manufacturing methamphetamine. RP 66-67. Patricia admitted she used methamphetamine about two weeks before the incident. RP 67. Patricia observed defendant and Williams bring Mason jars,²⁸ Pyrex, tubing, toluene, and Coleman fuel into her apartment. RP 68-69. At defendant’s request, Patricia stored a box in her closet for defendant that contained a gas mask, aerator, tubing, chemicals, coffee filters, jars, and Pyrex. RP 69.²⁹ Defendant called the box his “felony box.” Patricia described the box as the type used to ship salmon.

²⁷ This testimony was consistent with what she told Deputy Messineo at the apartment. RP36.

²⁸ Under cross-examination, Patricia stated she never used Mason jars for drinking water at her residence. The Mason jars she used were the small ones that her sister used for preserves. RP 114. It appears from the testimony and photographs that the Mason jars located in the apartment had the single purpose of vessels used in the manufacture of methamphetamine.

²⁹ A blue plastic tote box with similar items was found in the closet of defendant’s room. RP 289-295. State’s Exhibits 110-132.

RP 68, 122. The box was about six feet long and 18 inches wide and was to heavy for Patricia to lift. RP 122. Once Patricia discovered what was in the box, defendant moved the chemicals into his van. RP 69. She intimated that defendant used other locations to manufacture methamphetamine. RP 69, 118.

She stated that Williams left the apartment about two weeks before she called the police. RP 70. Defendant remained at the apartment until she called the police. RP 70. During this time, Patricia would spend most of the time staying with her sister, who lived near by. RP 98-99.

On the day Patricia called the police, she had an argument with defendant about the smell of chemicals and the unwanted traffic of visitors that came over at night. RP 70. Earlier, Patricia observed defendant and a man named “Sean” bring more materials related to the manufacture of methamphetamine into her apartment. RP 66. On one occasion, she asked defendant about the chemical smell and he told Patricia that he was “washing his dope.”³⁰ RP 71. The chemical smell affected Patricia’s asthma. RP 71. Patricia also has a weak immune system due to her hepatitis and the chemical exposure affected her illness. RP 96. She was twice hospitalized for pneumonia during the time defendant lived with her.

³⁰ Detective Purviance indicated that acetone, which he found in the second room, is often used to clean the final methamphetamine product. RP 230, 257.

RP 96. When she told him to put the chemicals into his van, defendant said he would take care of it. RP 71.

Defendant left the apartment when Patricia called the police. Unbeknownst to her, he had gone to the apartment upstairs. RP 65, 72. After he left, Patricia went into the computer room and found paint thinner, Coleman fuel, coffee filters, and Ma Huang in the closet. RP 73. Defendant extracted ephedra from this root and told her it was not illegal. RP 73. Patricia believed defendant and “Sean” ordered the Ma Huang root through the internet on her husband’s computer. RP 73. She said defendant and Williams took over the computer by creating their own password, which prevented her from using it. RP 74, 88. Except for a television, the computer, and furniture, all other items in this room belonged to defendant and Williams. RP 74. Patricia waited to call the police because she was afraid. RP 75. When she asked defendant to leave, defendant told her to “chill out” or he would make sure that she “did chill out.” RP 63. As her health and Richard’s health declined and the traffic of unwanted people increased, Patricia finally called the police. RP 66, 75.

Richard Whetstine had known defendant since they attended junior high school together. RP 127. Initially, Richard agreed to allow them to stay over for a few days, but they stayed for months. RP 128. Patricia

forced Richard to leave their apartment about two weeks before she called the police. RP 138. According to Richard, after his wife forced him out of the residence, defendant and Williams still lived there. RP 128. Defendant slept in the extra bedroom or in his van. RP 133. This room contained Richard's computer, a computer desk, a stereo and some paper materials. RP 147. Once they moved in, Richard did not use his computer as much as defendant and Williams used it. RP 149. Richard did not recall anyone using Mason jars for drinking vessels at the apartment. RP 153.

Richard observed defendant and Williams often bring materials³¹ into the house that were used to manufacture methamphetamine. RP 129. Richard testified that Williams was not involved in manufacturing meth but that defendant "was always piddling around with it." RP 131. This caused problems between Richard and defendant. He was afraid to argue with defendant of the type of people that defendant associated with. RP 132.³²

Richard does not know how to make methamphetamine. RP 130. Richard was not aware of any anhydrous ammonia or red phosphorous in

³¹ These materials consisted of tubes, jars, and solvents. RP 129.

³² Richard expressed this fear during trial when defense counsel asked Richard what relative he was living with after Patricia forced him to leave. RP 140.

the apartment, but was aware these chemicals could be used to make methamphetamine. RP 145. Richard did not believe defendant made methamphetamine inside the apartment, but saw defendant extract ephedrine from the Ma Huang root for that purpose. RP 150-51.

In August 2003, Richard used methamphetamine. RP 130. During that time Richard was fight cirrhosis of the liver, a tumor, and a herniated disk in his back. RP 130. Though ill, he was ambulatory. RP 130.

According to Williams, he and the defendant resided with Richard and Patricia for a “couple of months.” RP 182. Defendant stayed in the computer room while Williams stayed on a couch in the living room. RP 177. Patricia was “stressed out because of what was taken place at the apartment.” RP 178. Williams testified that she was upset at all the “drugs, I mean, doing the manufacturing and all of that stuff.” RP 183. Williams recalled one incident where he observed defendant trying to extract ephedrine from Ma Huang in the kitchen. RP 178-79. On the evening this event occurred, Patricia was experiencing a “blood sugar attack” related to her diabetes. RP 180. Williams agreed to help Patricia by dumping defendant’s “stuff” into a dumpster outside the apartment. RP 180-81.

Williams testified that he was vaguely familiar with how to make methamphetamine but that he was not involved in the manufacturing of methamphetamine. RP 180-81. He stated that he never observed defendant manufacture methamphetamine. RP 181. Williams moved out of the apartment about six days before the Patricia called the police. RP 182-83.

Williams pleaded guilty to unlawful possession and conspiracy to manufacture a controlled substance on an unrelated case³³ and agreed to testify truthfully at defendant's trial as part of that plea bargain. RP 183-84, 191-96. He stated he was only guilty of possession of methamphetamine in that case but pleaded guilty because it was the only option he had. RP 184.

Under cross-examination, Williams testified that he never discussed manufacturing methamphetamine with Patricia or Richard. RP 199. He observed defendant with roots which he was told was "Ma Huang." RP 190. Defendant told Williams he was trying to extract

³³ On direct examination, Williams testified that he pleaded guilty because he had not filled out the proper lease or rental paperwork and intimated he could not mount a defense. RP 184. On cross-examination, Williams explained that he was in custody on those charges because, "I had rented an apartment to Jeff and the sheriff had come (sic) to our house." RP 193.

ephedrine but Williams was not aware if defendant was successful. RP 190-91.

During the time he resided at the apartment, Williams believed Richard was terminally ill. RP 189. Williams stated numerous people came over to the apartment and “mooched” food, took glassware, water, and electricity from the apartment. RP 186-188. Mason jars were often used as drinking vessels. RP 188. The people sometimes came over to “get high.” RP 186. Patricia often expressed her anger about these visits. RP 187.

Franklin Boshears, a forensic scientist for the Washington State Patrol Crime Lab, and expert in methamphetamine lab investigations, testified about anhydrous ammonia and red phosphorus methods of methamphetamine production. RP 351-403. Boshears explained that Ma Huang in the plant where ephedra originates from. RP 353. Pseudoephedrine is also derived from this plant. RP 353. Ephedra or ephedrine is a key ingredient in the clandestine production of methamphetamine. RP 352-53, 219. Because only three or four percent of the Ma Huang plant contains ephedrine, the methamphetamine yield is significantly lower than if pseudoephedrine tablets are used. RP 354-55.

The red powder Detective Purviance found in the defendant’s room was consistent with red phosphorous. RP 363, 379, State’s Exhibit

No. 181. The brown liquid in the Mason jar found on the table and in a Mason jar under the table in the defendant's room contained ephedrine and pseudoephedrine. RP 364, State's Exhibit No. 181. This indicated that the "meth cook" used ephedra or Ma Huang rather than, ephedrine or pseudoephedrine tablets. RP 364-67. The yellow liquid in the Mason jar located inside the red cooler contained pseudoephedrine and ephedrine. RP 368, State's Exhibit No. 181. The yellow color indicates presence of acetone or alcohol. RP 368. The liquid inside the can labeled acetone that was located in the red cooler was consistent with alcohol or acetone. RP 367.

The red gas container found in the closet of defendant's room contained ephedrine, but not pseudoephedrine. RP 370.³⁴ This indicated ephedra, not pseudoephedrine tablets were not used in the process. RP 371. The barrel Purviance found in this closet was a consistent with extracted ground ephedra. RP 371-72. The sample taken from the bottle labeled iodine was iodine which is used in the red phosphorous method of meth manufacturing. RP 372. The sample of black paste taken from the pressure cooker in the kitchen contained ephedrine. RP 372. Boshears opined that this evidence indicates the extraction phase of the red phosphorous method of production. RP 373.

Lithium batteries are used in the lithium anhydrous method of meth production. RP 374. Boshears found nothing to indicate the anhydrous ammonia method was used in this operation. RP 383. No methamphetamine was detected in any of the samples submitted to Boshears. RP 382. The residue on the glass baking dish, glass plate with razor, and the gram scale was not submitted to the crime. State's Exhibit 181.³⁵ In Boshears experience, he was unaware of any other reason to extract the ephedrine or pseudoephedrine other than to make methamphetamine. RP 387. In addition, ephedrine extraction from Ephedra³⁶ is an uncommon method used in the manufacturing process because it is so inefficient. RP 385.

Deputy Oleson was a member of the lab team that processed the methamphetamine lab at Apartment A. RP 163. He obtained fingerprints from 23 items of the 131 items recovered from the lab. RP 164-66. He obtained a fingerprint on a jar containing a dark-colored liquid that was located under the table in defendant's room. RP 166, 255.

³⁴ State's Exhibit Nos. 159, 181 (Sample 73A).

³⁵ The corresponding sample numbers for the crime lab would have been 37, 51, and 120, which would correlate to the "item" numbers the police designated for this evidence.

³⁶ In 2004, Federal Drug Administration made it illegal to sell ephedra except in bronchodilators and decongestants. RP 377, 384-85. Prior to that event, ephedra was commonly sold as a stimulant or energy supplement. RP 377, 385.

Steven Wilkins, the lead forensic investigator for Pierce County matched the latent print Deputy Olesen obtained from a glass Mason jar, located under the tablet, with the defendant's known print of his left middle finger. RP 403, State's Exhibit No. 158. Wilkins compared known prints from Wayne Williams, Richard Whetstine, and Patricia Whetstine with negative results. RP 403. Of the 38 prints the police submitted to Wilkins to process, only defendant's fingerprint had sufficient detail to be of "comparison value." RP 407.

Wilkins opined that it is very difficult to obtain fingerprints from methamphetamine labs because of the anhydrous ammonia reaction with air causing humidity and condensation. RP 399. This environment is not conducive for latent prints because they consist of 97 percent water and three percent salts and fatty acids. RP 413. However, the evidence found in defendant's room indicated that red phosphorous was the primarily method he used to manufacture methamphetamine. RP 231-287.³⁷ The age of the fingerprint could not be determined. RP 410, 441.

³⁷ Specifically, red phosphorous was present at the lab site, but not anhydrous ammonia. RP 363, 379, 383.

C. ARGUMENT.

1. DEFENDANT DID NOT MEET HIS BURDEN IN SHOWING INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE DID NOT SATISFY EITHER PRONG OF STRICKLAND: DEFICIENT PERFORMANCE OR ACTUAL PREJUDICE.

The Sixth Amendment and article I, section 22 of the Washington Constitution require that criminal defendants have effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Cienfuegos, 144 Wn.2d, 226, 25 P.3d 1011 (2001). 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 proceedings has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment 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).

To establish counsel was constitutionally deficient, a defendant bears the burden of showing that his attorney's performance fell below an objective standard of reasonableness, and that the deficiency prejudiced

him. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

If either part of the test is not satisfied, the inquiry need go no further.”

State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To demonstrate prejudice, a defendant must establish that “counsel’s errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable.” Strickland, 466 U.S. at 687. “This showing is made when there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.”

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, In re PRP of Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086, cert. denied, 506 U.S. 958, 113 S. Ct. 421, 121 L. Ed. 2d 344 (1992) (citing 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).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

Defendant must show that trial counsel is deficient based on the entire record. State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003). Competency is not measured by the result. State v. Early, 70 Wn. App. 452, 461, 853 P.2d 964 (1993)(citing State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972), review denied, 123 Wn.2d 1004, 868 P.2d 872 (1994)). There is great judicial deference to counsel's performance and there is a strong presumption that counsel was effective. Strickland, 466 U.S. at 689-90; 127 Wn.2d at 335. This presumption will only be overcome by a clear showing of incompetence. State v. Piche, 71 Wn.2d 583, 590-91, 430 P.2d 522 (1967); State v. Sherwood, 71 Wn. App. 481, 483, 860 P.2d 407 (1993). Defendant has not overcome this presumption.

Defendant contends that his trial counsel was ineffective for not proposing a cautionary accomplice jury instruction. Defendant further contends that had trial counsel proposed such an instruction, it would have been reversible error for the court not to give it. Brief of Appellant at 18. The instruction defendant claims his counsel should have proposed reads as follows:

“The testimony of an accomplice, given on behalf of the plaintiff, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.”

WPIC 6.05.

The Washington Supreme court provided guidance on when a trial court should give this instruction in State v. Harris, 102 Wn.2d 148, 152, 685 P.2d 584 (1984). The Harris court held the following:

(1) it is always the better practice for a trial court to give the cautionary instruction whenever accomplice testimony is introduced; (2) failure to give this instruction is always reversible error when the prosecution relies solely on accomplice testimony; and (3) whether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends upon the extent of corroboration. If the accomplice testimony is substantially corroborated by testimonial, documentary or circumstantial evidence, the trial court does not commit reversible error by failing to give the instruction.

Id. at 155.

It is not necessary for the State to present corroborating evidence for every part of the accomplice's testimony; it is sufficient if corroborating evidence tends to connect the defendant with the commission of the crime. State v. Calhoun, 13 Wn. App. 644, 648, 536 P.2d 668 (1975) (quoting State v. Gross, 31 Wn.2d 202, 216-17, 196 P.2d 297 (1948)). Where the testimony of an accomplice is corroborated by independent evidence, the appellate court will first look to whether the trial court's failure to give the instruction prejudiced the defendant before making the determination that this failure was reversible error. State v. Harris, 102 Wn.2d 148, 154, 685 P.2d 584 (1984) (citing State v. Troiani, 129 Wash. 228, 224 P. 388 (1924)).

Here two of the State's witnesses were not accomplices. Richard Whetstine was never charged. RP 133. Patricia Whetstine was mistakenly charged and the State later dismissed her case. RP 112-114. There was no agreement between the State and Patricia regarding her testimony and the dismissal of her charge. RP 77, 112-13. Though they admitted their use of methamphetamine there was a paucity of evidence supporting their complicity³⁸ with defendant in manufacturing methamphetamine. Richard often observed defendant and Williams bringing tubes, jars, solvents, and other materials used to make methamphetamine into the apartment. RP 129. Defendant kept these materials in the room he occupied. RP 133. Richard never observed Williams manufacturing methamphetamine, but testified that defendant

³⁸ The jury was instructed on accomplice liability as follows:

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 if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

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

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 present is an accomplice. WPIC 10.51 (as modified by State v. Cronin, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000)). CP 17, Instruction No. 10.

was “always piddling around with it” and that he saw defendant trying to extract ephedra. RP 131. Richard asked defendant to stop these activities but defendant would get mad at Richard and not listen to him. RP 132. Richard was afraid of arguing with defendant because of the kind of people that “came around” the apartment who knew the defendant. RP 132-33.

Patricia also observed defendant and Williams moving Mason jars, Pyrex, tubing, toluene, and Coleman fuel into her apartment. RP 68-69. At defendant’s request, Patricia stored his “felony box” in her closet until he moved it into his van. RP 69. According to Patricia, Williams left within two weeks of her 911 call. RP 70. Richard had also moved out. RP 70. During that time, defendant remained at the apartment. When Patricia called the police, he left the apartment with a bag of “his main chemical” red phosphorous. RP 65. Patricia also observed defendant “washing his dope.” RP 71.

Though Williams denied making methamphetamine alone or with defendant (RP 181), Richard and Patricia testified that they observed Williams help defendant bring items associated with the manufacture of methamphetamine into the apartment. RP 129. To the extent, Williams is defendant’s accomplice, Williams’ testimony about defendant’s attempts to extract ephedrine, defendant’s acknowledgment that he was trying to extract ephedrine, and defendant’s use of the second bedroom are

substantially corroborated by Richard and Patricia's testimony as well as other items found in the second room.

Consistent with Patricia's testimony, Williams testified that he moved out of the apartment about a week before Patricia called the police. RP 182. Defendant remained at the apartment. Defendant occupied the second bedroom. RP 177. There is no question that the second room contained an extensive methamphetamine lab. Items associated with all three phases of methamphetamine production were present in this room. RP 249-296. Inside this bedroom closet was a barrel of ephedra from a Georgia botanical store. RP 283, State's Exhibit Nos. 96-97. Defendant's fingerprint was located on a Mason jar containing ephedrine that the police found under the computer desk. RP 255, State's Exhibits 20, 158, 181. This Mason jar was located next to several other items associated with the clandestine production of methamphetamine. RP 256-272. Thus, the prosecution was not relying solely on Williams' testimony to convict defendant as it adduced independent evidence that corroborated Williams' testimony. Indeed, Williams asserted that defendant was not manufacturing methamphetamine, a fact not missed in defendant's closing argument. RP 478.

In addition, the jurors were told about Williams' plea agreement with the State. RP 183-84, 191-96, 478. It is reasonable to conclude they were cautious about accepting his testimony. See, State v. Mannhalt, 68 Wn. App. 757, 770 n. 3, 845 P.2d 1023 (1992) (the fact that the jurors

were told about the accomplice's criminal history would cause reasonable jurors to be cautious about accepting his testimony). Defense counsel made this clear to the jury when he argued that Williams had a motive to lie because of his plea agreement with the State. RP 478.

Finally, there is little support for defendant's argument that Williams' testimony was not substantially corroborated because the credibility of the State's witnesses was certainly disputed. RP 462-493. 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)). Having considered the testimony of all the witnesses, the jury convicted defendant. There was evidence substantially corroborating defendant's testimony and the trial was not obligated to give a cautionary accomplice instruction. Because the absence of the cautionary jury instruction was not prejudicial, defendant cannot establish ineffective assistance of counsel on this ground. Harris, 102 Wn.2d at 155, State v. Mannhalt, 68 Wn. App. 757, 770 n. 3 (1992).

Moreover, trial counsel was not ineffective because his decision not to propose a cautionary instruction was tactical. In closing, defense counsel, challenged the sufficiency of the State's witnesses and attacked the credibility of the Whetstines and Williams. RP 466-494. The trial strategy was to show there was not a link between the defendant to the

apartment or the second bedroom, not to claim Williams was responsible for the lab. RP 478, 482. Defendant also suggested that Sean was a “person of interest” in this crime and that he was likely associated with the Whetstines. RP 465-66. However, this alleged accomplice did not testify at trial. The cautionary accomplice instruction would have been inconsistent with defendant’s arguments to the jury because part of his defense was that he had not “acted as an accomplice to anything.” RP 493. Thus it would not be wise to advise the jury that they should consider, with caution, the testimony of defendant’s accomplice. Having failed to establish either prong of the Strickland test, defendant has not demonstrated his trial counsel was constitutionally ineffective.

2. DEFENDANT FAILED TO PRESERVE THE ISSUE WHETHER THE PROSECUTOR MADE INAPPROPRIATE REMARKS IN CLOSING ARGUMENT, AND FAILS TO MEET HIS BURDEN OF PROVING IMPROPER CONDUCT THAT WAS PREJUDICIAL.

Absent a proper objection, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so “flagrant and ill intentioned” that no curative instruction would have obviated the prejudice it engendered. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990), State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). An objection which does not specify the particular ground upon which it is

based is insufficient to preserve the issue for appellate review. State v. Boast, 87 Wn.2d 447, 451-452, 553 P.2d 1322 (1976). “Where a defendant makes an objection not accompanied by a reasonably definite statement of the grounds, neither the State nor the trial court is put on notice of the defendant’s claimed defects.” State v. McCorkle, 88 Wn. App. 485, 500, 945 P.2d 736 (1997). Further, an assignment of error upon a certain ground cannot be made where no objection was made on that same ground below. State v. Boast, 87 Wn.2d 447 at 451-452 (quoting Kull v. Department of Labor & Indus., 21 Wn.2d 672, 682-83, 152 P.2d 961 (1944)).

A trial court’s rulings based on allegations of prosecutorial misconduct are reviewed under the abuse of discretion standard. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). The defendant bears the burden of establishing both the impropriety of the prosecutor’s remarks and their prejudicial effect. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require “that [the] burden of showing essential unfairness be sustained by him who

claims such injustice.” Beck v. Washington, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. State v. Bryant, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998). “Remarks must be read in context.” State v. Pastrana, 94 Wn. App. 463, 479, 972 P.2d 557 (1999) (citing State v. Greer, 62 Wn. App. 779, 792-93, 815 P.2d 295 (1991)). Improper remarks do not constitute prejudicial error unless the appellate court determines there is a substantial likelihood that the misconduct affected the jury’s verdict. Finch, 137 Wn.2d 792 at 839. The trial court is best suited to evaluate the prejudice of the statement. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

If the error could have been obviated by a curative instruction and the defendant failed to request one, reversal is not required. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Where the defendant does not request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Id. “The absence of a motion for mistrial at the time of the argument strongly suggests . . . that the argument or event in question did not appear critically prejudicial to [the

defendant] in the context of the trial.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (citations omitted).

In this case, defendant argues that the prosecutor made improper statements during closing argument and that the cumulative effect of these statements denied him a fair trial. (Appellant’s Brief at pp. 19-25, 32-33). However, by not sufficiently objecting to the statements or requesting curative instructions at trial, defendant waived the alleged errors and thereby failed to preserve the issue of prosecutorial misconduct for appeal. Even if the issue was preserved, defendant fails to meet his burden of showing conduct that was improper and prejudicial. The State will address each of the alleged improper statements in turn.

Defendant first asserts that the prosecutor misstated the State’s burden of proof during rebuttal closing argument when he projected a partial picture of the Seattle skyline on a wall to illustrate his argument that the jury need have all the parts of the picture to be convinced beyond a reasonable doubt that the photo depicts the Seattle skyline. Defendant did not object to the prosecutor’s argument. Contrary to defendant’s claim, this illustration did not suggest to the jury that they could convict if they were 60 percent convinced defendant committed the crime. Rather, the projection demonstrated that the jury need not have 100 percent of the information to be convinced beyond a reasonable doubt that a fact or event occurred.

Additionally, the prosecutor's statement came after he correctly defined the State's burden of prove to the jury. RP 499-500. Referring the jury to the reasonable doubt instruction, the prosecutor explained this concept to the jury as follows:

If after such consideration you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt. An abiding belief in the truth of the charge, that's a belief that's going to last. It's a belief that's going to stick with you. And if you do have that belief that the charge is true, you do not have a reasonable doubt.

RP 500.

At that point in his argument, the prosecutor used the Seattle skyline illustration to show that a jury can be convinced beyond a reasonable doubt of the fact that the picture was the Seattle skyline even though the picture was 40 percent incomplete. RP 501. The prosecutor then argued that the evidence in this case provided a more complete picture of defendant's conduct than the Seattle photo. RP 501. This picture helped illustrate the concept of "abiding belief." In addition, this remark could have been rebuttal to defendant's "pieces of the [State's] puzzle" argument. RP 478. Viewed in context of the entire closing argument, this analogy helped the jury understand the difficult concept of reasonable doubt as defined in the jury instruction. As such, these remarks did not misstate the State's burden of proof.

Had defendant properly objected, the court could have again instructed the jury that the State alone had the burden of proving each and

every element of the crime. See, In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The court properly instructed the jury on the burden of proof. CP 9 (Jury Instruction No. 2). The jury is presumed to have followed this instruction. State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982).

Defendant next contends that the prosecutor improperly stated defense counsel's role when he told the jury that counsel's job was to "create reasonable doubt" and "muddy the waters." Again, defendant did not object to this remark. If defense counsel thought this remark was so flagrant, offensive, or ill-intentioned, he would have objected. His silence demonstrates how insignificant this remark was. Additionally, the court instructed the jury that the attorney's remarks were not evidence, and to disregard any comment made by an attorney not supported by law or evidence. CP 8 (Jury Instruction No. 1). Again, the jury is presumed to follow the court's instructions. Grisby, 97 Wn.2d at 499.

Finally, in the context of the entire closing argument, there is little or no likelihood that the prosecutor's comments affected the verdict. The remarks came in rebuttal closing argument and were directed at defense counsel's arguments that there was a lack of evidence establishing defendant's presence at the home or his complicity in the crime. RP 478, 482, 493, 499-93. Several times, defense counsel explained how the State's case consisted of numerous "red herrings." RP 488. Defense counsel also attempted to persuade the jury that the most damning

evidence, the defendant's fingerprint on the mason jar containing evidence of ephedrine extraction - a critical state in the production of methamphetamine - did not link defendant to the manufacturing enterprise. RP 480-84. The jury was not persuaded. CP 21.

The State adduced overwhelming evidence that defendant occupied the "computer" room. Almost all the components associated with the lab were found in this room. Defendant's specialty was extracting ephedrine from the Ma Huang plant. A large barrel of this plant material was found in defendant's room. His fingerprint was on one of the vessels used for the extraction process located in the room he occupied. Before the police arrived, defendant left the residence with red phosphorous. The iodine and red phosphorous found in defendant's room indicated he used the "red phosphorous" reaction method for manufacturing. In the face of such evidence, it is beyond reasonable possibilities that the outcome of defendant's trial was affected by trial counsel's failure to object to the prosecutor's remarks. Because the individual statements discussed above do not amount to prosecutorial misconduct, defendant's claim based on cumulative effect also fails.

3. THE TRIAL COURT PROPERLY EXERCISED
ITS DISCRETION WHEN IT DENIED
DEFENDANT’S REQUEST FOR THE DRUG
OFFENDER SENTENCING ALTERNATIVE
(DOSA).

As a general rule, a trial court’s decision whether to grant a DOSA sentence is not reviewable on appeal. State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005) (citing RCW 9.94A.585(1); State v. Bramme, 115 Wn. App. 844, 850, 64 P.3d 60 (2003)). However, a defendant may challenge the procedure by which the sentence was imposed. Grayson, 154 Wn.2d at 338. While no defendant is entitled to a DOSA sentence, every defendant is entitled to request the trial court to consider such a sentence and for the trial court to give that request meaningful consideration. Id. at 342. Moreover, a defendant is entitled to a review of the denial of a request for a DOSA sentence in order to correct a legal error or an abuse of discretion. State v. White, 123 Wn. App. 106, 114, 97 P.3d 34 (2004) (quoting State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003)). “Discretion is abused only if the court’s decision is manifestly unreasonable or based on untenable grounds or reasons.” State v. Wood, 117 Wn. App. 207, 211, 70 P.3d 151 (2003).

The minimum eligibility requirements for receipt of the Drug Offender Sentencing Alternative (DOSA) are listed in RCW 9.94A.660(1)(a) – (d), related to the nature of the crime, whether the violation involves a deadly weapon enhancement, the quantity of

controlled substance involved. Under RCW 9.94A.660(2), the sentencing court is given discretion to impose the DOSA if the midpoint of the standard range is greater than one year and the sentencing judge determines that the offender is eligible for this option and that the offender and the community will benefit from the use of the special drug offender sentencing alternative.

Under RCW 9.94A.660(1)(c), a defendant is eligible for a DOSA sentence if his current offense is a violation of chapter 69.50 RCW and involved only a small quantity of drugs as determined by the judge. When determining whether the quantum of drugs involved is a “small quantity,” the judge may consider such factors as the weight, purity, packaging, sale price, and street value of the controlled substance. RCW 9.94A.660(1)(c).

In the case at bar, defendant claims the trial court's failure to address any factor discussed in RCW 9.94A.660(1)(c) constitutes an abuse of discretion by the trial court. Defendant cites no legal authority for this assertion. The statute is not mandatory, e.g., it does not specify that the court must consider any of these factors when rejecting a DOSA sentence. The judge may determine defendant's eligibility for DOSA if the crime involves only a small quantity of drugs, “as determined by the judge.” RCW 9.94A.660(1)(c). Additionally, the statute states the judge's determination may be guided by, “such factors as the weight, purity, packaging, sale price, and street value of the controlled substance.” RCW 9.94A.660(1)(c) (emphasis added).

In the instant case the trial judge gave adequate consideration of defendant's request for a DOSA sentence. During allocution, the defendant stated the following:

After my divorce, I went through a few years of really hard times dealing with my divorce, and it was at that time that I made – became friends with some of these people that were involved in the methamphetamine game. I had no idea about it then. I was never involved in it. I didn't – I am all new into this game.

The people I befriended have thrown this on me. I have taken – due to my involvement with them, I am taking this time. I am guilty of it. I know that. It is a substance abuse problem I do have which got me there and kept me there. SRP 7

The court then questioned defendant on his prior conspiracy to manufacture methamphetamine charge, which he committed on May 4, 2003, less than four months before he committed the instant offense. SRP 8. Defendant stated that the same group of friends was involved in that case with him. SRP 8. While considering defendant's representations, the court stated the following:

You, know, the State hasn't recommended the high-end sentence for you. They have kind of recommended a middle-end sentence. After trial on this case, and I heard the evidence and I saw the exhibits and I know that the jury considered and the evidence. Even though, a counsel points out, there was only one glass with your print on it, that is strong evidence that there was manufacturing going on at this particular location, and that you we involved in it, and that's a serious crime. This is a serious offense. I am going to sentence you to 60 months.

The logical conclusion here is that the trial judge was considering defendant's DOSA request otherwise he would not have engaged in this

colloquy with defendant. Evidently, the trial judge was not impressed with defendant's assertion that though he had a drug problem, he was not responsible for his manufacturing crimes, that he was "taking the time" for his more culpable friends. Similarly, the trial judge could not be impressed with defendant committing his current manufacturing offense less than four months after being convicted of conspiracy to manufacture methamphetamine. Moreover, the large amount of ephedra, lack of methamphetamine, numerous buckets and Mason jars with waste material, packaging material, and the gram scale suggested this operation was for distribution of methamphetamine not a one time experiment or small operation to supply defendant's personal habit. Accordingly, the court's decision not to impose a DOSA sentence is not manifestly unreasonable nor based on untenable grounds and, therefore, was not an abuse of discretion.

Defendant next contends that sentencing judge violated principles relating to the doctrine of separation of powers. The purpose of the separation of powers doctrine is "to prevent one branch of government from aggrandizing itself or encroaching upon the 'fundamental functions' of another." State v. Bramme, 115 Wn. App. 844, 850, 64 P.3d 60 (2003) (citing Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). In considering an argument that judicial action violates the separation of

powers doctrine, one concern is that the judicial branch not be allowed tasks that are more properly accomplished by the other branches. State v. Hunter, 102 Wn. App. 630, 636, 9 P.3d 872 (2000). It is well-settled in Washington that setting criminal penalties is a function of the legislature, see, State v. Thorne, 129 Wn.2d 736, 767, 921 P.2d 514 (1996), the legislature may grant the trial court discretion in sentencing matters. See, State v. Barnes, 117 Wn.2d 701, 710, 818 P.2d 1088 (1991). In this regard, RCW 9.94A.660 grants discretion to the sentencing court to sentence offenders using the DOSA option. It partly provides “the judge may waive imposition of a sentence within the standard sentence range and impose a sentence [under the DOSA alternative]” if it “determines that the offender is eligible . . . and that the offender and the community will benefit from use of the [sentencing] alternative.” RCW 9.94A.660(2).

Here, the court properly exercised its discretion after viewing the evidence adduced at trial, that defendant was entitled to a mid-range sentence, not the benefit of the sentencing alternative. The court’s decision is supported by the fact that defendant’s recent criminal history and his refusal to take responsibility for his actions undermine his amenability to treatment in the DOSA program. Indeed, the only possible benefit here was defendant’s reduction of half his sentence. This is hardly a benefit for the community. It is readily apparent the court was not interested in reducing defendant’s sentence by half. SRP 9. The court in its discretion determined the defendant was more deserving of a 60 month

mid-range sentence. SRP 9. The court also considered defendant's request for treatment when it imposed drug treatment as a condition of his DOC supervision. SRP 9. The court did not abuse its discretion.

4. THE DEFENDANT RECEIVED A FAIR TRIAL
BECAUSE THERE WAS NOT CUMULATIVE
ERRORS OR EGREGIOUS CIRCUMSTANCES
THAT WARRANTED REVERSAL.

The cumulative error doctrine applies only where there have been several trial errors that alone may not be sufficient to justify reversal, but when combined denied the defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 928, 10 P.3d 390 (2000). Cumulative error does not turn on whether a certain number of errors occurred. Compare State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (three errors amounted to cumulative error and required reversal), with State v. Wall, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (three errors did not amount to cumulative error) and State v. Kinard, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979) (same). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial. The defendant is not entitled to a new trial when the errors had little or no effect on the outcome of the trial. Greiff, 141 Wn.2d at 928.

As stated above, the defendant has not established that any error occurred at his trial. Defendant has not established his trial counsel was ineffective, that the prosecutor committed misconduct, or that the court

erred when it denied his request for a DOSA sentence. Even if this court finds there were errors, a complete review of the record shows they could not have constituted egregious circumstances that denied the defendant a fair trial.

D. CONCLUSION.

For the foregoing reasons, the State request this court affirm defendant's conviction for the unlawful manufacture of methamphetamine.

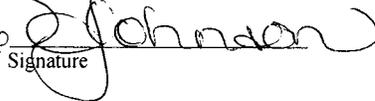
DATED: DECEMBER 4, 2006

GERALD A. HORNE
Pierce County
Prosecuting Attorney


TODD A. CAMPBELL
Deputy Prosecuting Attorney
WSB # 21457

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.

12/5/06 
Date Signature

U.S. DEPT. OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION
12/5/06 5:51 PM
BY 