

NO. 34887-0-II

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

STATE OF WASHINGTON, RESPONDENT

v.

JOHN EDWARD SMITH, APPELLANT

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

No. 05-1-03817-1

BRIEF OF RESPONDENT

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

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B. STATEMENT OF THE CASE.

1. Procedure

The State charged JOHN EDWARD SMITH, defendant, by way of second amended information with unlawful manufacture of a controlled substance in count I and unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine in count II. CP 132-33. Each count alleged a school bus stop sentencing enhancement. Id. On January 23, 2006, the State faxed a copy of the second amended information to defense counsel. 6RP 39¹. Trial herein began on February 14, 2006. 6RP 1.

The trial court conducted a 3.6 hearing, a 3.5 hearing, and ruled on numerous pretrial motions. 6RP through 12RP. The State gave opening statement on February 23, 2006. 13RP 453.

The jury returned verdicts of guilty as charged, along with school bus stop sentencing enhancements on each count. 19RP 1199-1200.

¹ The State follows the citation format as set forth in the Brief of Appellant, footnote 4, page 4.

2. Facts

On April 6, 2005, at around 2:30 a.m., Officers Manos and Johnson of the Lakewood Police Department went to Bob's Trailer Court to serve a no contact order on Robert Tucker. 13RP 453-59. The no contact order had been requested by defendant, who was Tucker's roommate. Defendant was also the payee of Tucker who was handicapped. 13RP 464. Officers inquired why defendant wanted the order served on Tucker at 2:00 a.m. when everything seemed fine in the residence. Id. Although no police report was ever filed, defendant claimed Tucker had previously assaulted him. 13RP 464.

Officers went to Tucker's bedroom and advised him of the no contact order and that he would have to leave. 13RP 465. While talking to Tucker, officers noticed a glass smoking device commonly used for smoking methamphetamine. Id.

Tucker packed his belongings and the officers escorted him out. 13RP 466. As Tucker walked past the kitchen area, he flipped open the lid of a large garbage can. Id. Officers observed mason-type jars in the garbage can, which was three quarters of the way full. 13RP 466, 467. Some of the jars had a red residue and some had a white residue. 13RP 466-67, 15RP 703. As Officer Manos walked by looking into the garbage can, he smelled a strong chemical odor, almost like a vapor cloud. 13RP 467. When it hit his face, he felt nauseated and his eyes began to burn and water. Id.

From what the officers could see in the garbage can, they concluded it was the remnants of a methamphetamine lab. 13RP 468. The officers called for the methamphetamine lab team to respond to the residence. 13RP 469. Officers then talked to Tucker, defendant, and Ms. Burrill.² Id.

Officer Wurts of the Lakewood Police Department, who is also a member of the methamphetamine lab team, responded to the scene. 13RP 535-36. He read defendant and Ms. Burrill their rights. 13RP 543. When he asked them what was in the garbage can, they said they did not know what he was talking about. Id. Officer Wurts believed the contents of the garbage can, found in the kitchen area, was a methamphetamine lab because the items were consistent with items used to manufacture methamphetamine and because there were no food remnants or food packaging in there. 13RP 545.

Noting the red residue in some of the containers, Officer Wurts then asked defendant if there was red phosphorous³ in any of the containers. 13RP 547. Defendant stated that when he was arrested for manufacturing before, he did not use red phosphorus in the process he had used before. Id.

² Ms. Burrill was charged and tried as a co-defendant with defendant, herein. The trial court dismissed the charges against her at the close of the State's case. 18RP 1131-45.

³ Red phosphorus is a key ingredient in one method of manufacturing methamphetamine. 14RP 615. Red residue on glassware can indicate a red phosphorus lab. 14RP 660.

Officer Wurts contained the scene and obtained a search warrant. 13RP 547-48. In Tucker's bedroom officers found a glass pipe on the headboard (commonly used for smoking methamphetamine) 13RP 465, 565, 579. They also found a large box containing just the covers of matchbooks (the match heads are a source of red phosphorus). 13RP 580, 16RP 893.

In defendant's room, officers found, rock salt (used in the salting out phase in the final stage of manufacturing methamphetamine), three glass pipes, one on top of the mattress and two under the mattress, and a baggie with smaller baggies inside (used to package finished product). 13RP 566-67, 14RP 657. The baggies had a residue that contained methamphetamine. 16RP 880. A pill-sized bottle approximately one-half full of a white powdery substance was also found under defendant's mattress. 16RP 926. The white powder identified as pure caffeine (used to cut the methamphetamine to add volume and weight). 14RP 667, 16RP 884, 16RP 907.

In the living room, officers found allergy relief tablets, Y-shaped glassware and a siphon pump (used to separate two layers of liquid to extract ephedrine from tablets), a drawer full of matchbooks and matches (striker plates from match books and match heads are a source of red phosphorus), and a hot plate (used to speed up the process of drying or evaporation). 13RP 569-71, 14RP 657-660, 16RP 893. Police also found

a prescription bottle of liquid that indicated the presence of pseudoephedrine. 13RP 571, 16RP 884.

In the kitchen area, officers found the large Rubbermaid garbage can that Tucker flipped the lid off as Officer Manos was walking past it. 13RP 466-67, 572, 585. The garbage can contained numerous items of glassware, mostly mason jars, some with red residue. 13RP 572-76, 585. A sample of red residue taken from a mason jar was consistent with red phosphorus. 16RP 886. It is common for investigators to find a lot of glassware at a methamphetamine lab. 14RP 662. Officers also found four empty bottles of rubbing alcohol (used to soak the striker plates to extract the red phosphorus and also used to extract the pseudoephedrine from the tablets). 13RP 576-77, 16RP 892-93. In other areas of the kitchen, officers found another jar of red liquid and stacks of coffee filters (used for filtration while manufacturing methamphetamine). 13RP 578, 16RP 892-93. It is very common to see a lot of coffee filters at methamphetamine labs. 14RP 664.

In a garbage sack outside the front door, officers found five boxes of Wal-Act cold medicine, filters, a four-pack of "Heet" (a solvent which can be used to extract ephedrine), an empty alcohol bottle, "Brakleen" (another solvent which can be used to extract ephedrine), iodine (used in the red phosphorus method of manufacturing methamphetamine), many books of matches missing their striker plates, a container of glass syringes and glass pipes, and many boxes of different brands of cold medicine

(which contains ephedrine, an indispensable ingredient in methamphetamine). 13RP 580-84, 14RP 656, 660, 666.

Defendant's fingerprints matched latent prints recovered by officers from seized evidence. Fingerprint comparisons revealed that two of the glass mason jars found in the Rubbermaid garbage can in the kitchen area contained defendant's fingerprints. 15RP 765, 798; 16RP 844, 846. Defendant's fingerprints were also on the can of "Brakleen" found right inside the front door. 13RP 552, 15RP 796-97, 16RP 846.

When searching Ms. Burrill at the jail, officers found a bag of methamphetamine in her bra. 15RP 704; 16RP 906. Burrill told police the bag was not hers, but that she saw it in plain view in defendant's room and she picked up to hide it to keep him out of trouble. 15RP 705.

Defendant did not testify at trial.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING DEFENDANT'S MOTION TO DISMISS WHERE THE STATE COMPLIED WITH RULES OF DISCOVERY, DID NOT MISMANAGE THE CASE, AND DEFENDANT WAS NOT PREJUDICED.

Discovery in criminal cases is governed by CrR 4.7. State v. Pawlyk, 115 Wn.2d 457, 471, 800 P.2d 338 (1990). CrR 4.7(a) mandates that the State disclose certain materials to the defense while CrR 4.7(b)(1) outlines those materials which the defense is required to disclose. State v.

Blackwell, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993). Any matters not covered under those mandatory provisions of the rule fall within the discretion of the court. CrR 4.7(b)(2) lists matters that the court may require the defendant to disclose. CrR 4.7(e)(1) provides that the court, in its discretion, may require the State to disclose matters to the defense which are not otherwise provided for by the rule.

A court may dismiss a prosecution for discovery violations under either CrR 4.7 or CrR 8.3(b). State v. Cannon, 130 Wn.2d 313, 328, 922 P.2d 1223 (1996). A trial court has wide latitude in granting or denying a motion to dismiss a criminal prosecution for discovery violations. State v. Hanna, 123 Wn.2d 704, 715, 871 P.2d 135, cert. denied, 513 U.S. 919, 115 S. Ct. 299, 130 L. Ed. 2d 212 (1994). An appellate court will not disturb the trial court's denial of the motion to dismiss unless it finds that the denial constitutes a manifest abuse of discretion. Id.

A trial court may dismiss any criminal prosecution in the furtherance of justice pursuant to CrR 8.3(b) if there is a showing of arbitrary action or governmental misconduct. State v. Dailey, 93 Wn.2d 454, 457, 610 P.2d 357 (1980). The governmental misconduct need not be of an evil intent or dishonest nature; mismanagement meets the standard. Dailey, at 457. In considering whether a criminal case may be dismissed under CrR 8.3(b), the trial court must determine: (1) whether there has been any governmental misconduct or arbitrary action, and (2) whether there has been prejudice to the rights of the accused. If there is no

showing of governmental misconduct or if there is no prejudice to the defendant, then dismissal is inappropriate. State v. Blackwell, 120 Wn.2d 822, 845 P.2d 1017 (1993).

Whether under CrR 4.7 or 8.3(b), a trial court should not dismiss a prosecution casually:

Dismissal of the charges is an extraordinary remedy. It is available only when there has been prejudice to the rights of the accused which materially affected the rights of the accused to a fair trial and that prejudice cannot be remedied by granting a new trial.

State v. Baker, 78 Wn.2d 327, 332-333, 474 P.2d 254 (1970); State v. Woods, 143 Wn.2d 561, 582, 23 P.3d 1046 (2001); State v. Laureano, 101 Wn.2d 745, 682 P.2d 889 (1984). The trial court's authority under CrR 8.3(b) to dismiss has been limited to "truly egregious cases of mismanagement or misconduct by the prosecutor." State v. Duggins, 68 Wn. App. 396, 401, 844 P.2d 441, aff'd, 121 Wn.2d 524, 852 P.2d 294 (1993)(citing State v. Stephans, 47 Wn.App. 600, 736 P.2d 302 (1987) as an example of egregious misconduct warranting dismissal under CrR 8.3(b) based on the State's encouragement of two witnesses to disobey the court's discovery order). The Supreme Court has emphasized that CrR 8.3(b) is designed to protect against arbitrary action or governmental misconduct and not to grant courts the authority to substitute their judgment for that of the prosecutor. State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

As with a motion to dismiss under CrR 4.7, a trial court's decision on an 8.3(b) motion to dismiss charges is reviewable under the manifest abuse of discretion standard. Michielli, 132 Wn.2d at 240. Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. Blackwell, 120 Wn.2d at 830.

The State is required to disclose to defendant "the names and addresses of persons whom the prosecuting attorney intends to call as witnesses..." CrR 4.7(a)(1)(i).

Defendant first claims that the State failed to specifically name the forensic scientist who would be testifying. BOA at 14. However, defendant did not object to this below and it therefore has not been preserved for review. When no objection is made to evidence at trial, an evidentiary error is not preserved for appeal. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1995).

Defendant next claims that Jane Boysen, the forensic scientist, referred to 83 pages of notes during her testimony, which had not been provided to defense. BOA at 13. At trial, Boysen explained to the court that only 9 pages were actually notes and the remaining pages contained

instrumental data.⁴ 16RP 874. Boysen's testimony was interrupted when defense counsel requested a sidebar. 16RP 869. Without even reviewing the notes, defendant moved to dismiss. 16RP 871. The trial court ordered that the notes be immediately provided to defense to review over the lunch recess. 16RP 874. The trial court denied defendant's motion to dismiss, indicating that it would reconsider its ruling, subject to defense counsel's review of the content of the notes to determine if something in the notes constituted a change. 16RP 874.

After the lunch recess, defendant did not request the court to reconsider its ruling on the motion to dismiss. Therefore, this argument has been waived. There is a difference between final rulings and those that are only tentative or advisory:

If the trial court has made a definite, final ruling, on the record, the parties should be entitled to rely on that ruling without again raising objections during trial. When the trial court refuses to rule, or makes only a tentative ruling subject to evidence developed at trial, the parties are under a duty to raise the issue at the appropriate time with proper objections at trial.

State v. Koloske, 100 Wn.2d 889, 896, 676 P.2d 456 (1984). "When a ruling on a motion in limine is tentative, any error in admitting or excluding evidence is waived **unless the trial court is given an**

⁴ Boysen later informed the State that she had recently been the witness on three unrelated methamphetamine lab prosecutions where defense counsel participated. She stated that defense counsel is familiar with her testing processes and the notes she uses. 16RP 1005. Defense counsel did not dispute this assertion. Id.

opportunity to reconsider its ruling.” State v. Carlson, 61 Wn. App. 865, 875, 812 P.2d 536 (1991) [emphasis added]. See also State v. Riker, 123 Wn.2d 351, 369, 869 P.2d 43 (1994) (no error where trial court issued tentative ruling excluding witness testimony after offer of proof where defendant did not call witness nor did he seek a final ruling, thus waiving objection).

Here, the trial court invited defendant to move to reconsider should something in the notes be problematic for the defense. Defendant’s failure to do so results in a waiver of this ruling, because defendant did not demonstrate that the late discovery of the notes was prejudicial.

Defendant next claims that the State engaged in mismanagement of the case by filing the second amended information, which added one count of unlawful possession of pseudoephedrine with intent to manufacture methamphetamine, along with a school bus zone sentencing enhancement on both counts. BOA at 10, 22, CP 132-33. At trial, defendant acknowledged that he received a faxed copy of the amended information on January 23, 2006. 6RP 34. Testimony in this case did not begin until February 23, 2006, one whole month later. 13RP 453. Defense counsel also acknowledged that the school bus zone enhancement is generally pretty clear. 6RP 34. Counsel indicated he still needed to see the documentation on that issue. Id. The State indicated to the court and counsel that the school district had not yet generated a report, but that school district official’s name was on the State’s witness list. 6RP 34.

Eight days later, still objecting to the filing of the amended information, defense counsel insisted he had been unable to investigate the matter because there was nothing to follow-up on. 12RP 419. However, the name of the school district official who would testify was named on the State's supplemental witness list along with his affiliation with the school district. CP 213. The supplemental witness list was filed on January 25, 2006. Id. The State was able to contact the school official by getting his number out of the phone book, using no more information than that available to the defense. 12RP 421. The information provided on the supplemental witness list was sufficient for defense counsel to contact the witness in the same manner used by the State – the phone book.

Defendant did not move for a continuance, nor did he articulate how he was prejudiced insofar as how the filing of the amended information affected his defense, strategy, or trial tactics. The trial court did not find prejudice such that it was improper for the State to file an amended information and allowed the filing. 12RP 421-22.

The court may allow the State to file an amended information any time up to verdict, if substantial rights of defendant are not prejudiced thereby. CrR 2.1(d). State v. Michielli, 132 Wn.2d 229, 937 P.2d 587, (1997), relied upon by defendant, is distinguishable. In that case, the court held that the State's filing of four additional charges just three court days before trial was mismanagement that prejudiced defendant. Michielli at 244-45. The prejudice resulted because Michielli could be forced to waive

speedy trial rights to seek a continuance to prepare. Id. Here, defendant would not have had to move for a continuance. He had one month's notice of the amended charges and he himself acknowledged that the bus stop zone enhancement is "generally pretty clear." 6RP 34. In fact, the issue was so straight forward that the school district official's testimony lasted only a total of 6 pages, including direct, cross, and re-direct. 15 RP 691-96.

Lastly, defendant alleges that on the sixth day of trial he was "surprised" by the arrest of a testifying co-defendant, Mr. Tucker, who had been on bench warrant status for failing to appear for his arraignment. BOA at 14. Although a warrant had issued, defendant claims that the prosecutor had a duty to arrest him sooner. BOA at 14-16. However, he cites no authority for this claim. Defendant further states that he was deprived of effective assistance of counsel and a fair trial because the "late disclosure" of the witness left counsel with insufficient time to prepare. BOA at 16.

Pursuant to CrR 4.7, as discussed above, the State filed an amended witness list noting Tucker as a potential witness on January 25, 2006. CP 213. Tucker did not testify until March 8, 2006. Counsel for the State and defense interviewed Tucker on March 3, 2006, five days before he testified. 17RP 977-78. During the interview, Tucker gave the attorneys more details about the case, but his statements were not substantially different than what was contained in the police reports.

17RP 1004. Thus, neither the content of Tucker's testimony nor the fact that he did testify were a "surprise" to the defense. Defendant was not entitled to rely on Tucker remaining unavailable for testimony, given the totality of the circumstances.

Defendant claims that he had insufficient time to prepare his case, but does not even attempt to point this Court to any specific unfair prejudice that resulted from Tucker's testimony or how locating Tucker sooner would have materially affected the outcome of the case. On the contrary, at trial, counsel told the court that the alleged discovery violations individually did not present a particular problem, but that it was the cumulative effect that warranted dismissal. 17RP 983. Further, counsel informed the court that Tucker's testimony, rather than being unduly prejudicial, contained some information that was actually helpful to the defense. 17RP 1014. Nonetheless, defense counsel moved for a dismissal, or in the alternative, suppression of Tucker's testimony. 17RP 977, 981-82. The trial court denied defendant's motion to dismiss:

THE COURT: . . . The other motions have to do with what's argued by defense, that the State has, in this case, mismanaged the case and even created misconduct. At some point that adds up to a miscarriage of justice and the matter should be dismissed, period. They point out to [sic] the report, 83 pages of notes by Boysen, and they point out to [sic] a whole bunch of other matters, the consent forms, how Mr. Tucker was brought in here, timeliness, and it just - - no doubt that any case can be presented in a better, more [efficient] direct manner. But, you know when you have the case that you have and you're dealing with what you have and it develops

as you go along, it would be great if you had everything you knew about the case before it started, but in the middle of the case, the State, Mr. Trinen, figures out how to get a hold of Mr. Tucker. **How much prejudice is there to the defense when Tucker's testimony is basically what I think we all know?** He's the one that flipped the trash can lid open so that the police officers could see it. He's the one that told the police officers the Mr. Smith provided the meth to him.

. . . I'm not going to dismiss this case because the witness or the notes or the other things that have been going on in this case are not all picture perfect. So with regard to the extensive motions put together by the defense this morning for this Court to dismiss the case, I'm not going to do that. After hearing every little concern that the defense has about this case, I don't think it's enough for this Court to dismiss it.

. . . I don't think it adds up to saying that the State did some type of wrong-doing here, that he was hiding the ball. Like I say, he was going along with the case and somehow he comes up with the idea of how to track down Mr. Tucker and he does that. I don't think - - **I don't find misconduct by Mr. Trinen.**

17RP 1044-46 [emphasis added]. The court also denied defendant's motion to exclude Tucker's testimony. 17RP 1047.

As discussed above, the State disputes that any discovery violation occurred. Had there been an error as alleged by defendant, defendant still must meet his burden in showing that there has been prejudice which materially affected his rights and that that prejudice could not be remedied by granting a new trial. Baker, 78 Wn.2d at 332-33. Instead, defendant only broadly alleges that his constitutional rights were violated, but makes

no effort to articulate *any* prejudice that could warrant dismissal. The trial court properly denied the motion to dismiss.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING DEFENDANT'S HIGHLY PROBATIVE STATEMENT ABOUT HIS PRIOR ARREST FOR MANUFACTURING METHAMPHETAMINE UNDER ER 404(b).

A trial court's admission of evidence is reviewed for an abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 135 L. Ed. 2d 1084 (1996). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds." State v. Perrett, 86 Wn. App. 312, 319, 936 P.2d 426 (1997)(quoting Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 168, 876 P.2d 435 (1994), review denied, 133 Wn.2d 1019 (1997)). The appellant bears the burden of proving abuse of discretion. State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), rev'd on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983). Evidentiary errors under ER 404(b) are not of constitutional magnitude and are harmless unless the outcome of the trial would have differed had the error not occurred. State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999).

ER 404(b) forbids evidence of prior acts that tend to prove a defendant's propensity to commit a crime, but it does allow its admission for other limited purposes:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Wade at 333 (quoting ER 404(b)).

To determine admissibility under ER 404(b), the trial court must engage in a three-part analysis. Wade, 98 Wn. App. at 333-34. The Wade court explained:

First, the court must identify the purpose for which the evidence will be admitted. Second, the evidence must be materially relevant. Third, the court must balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact finder. Further, to avoid error, the trial court must identify the purpose of the evidence and conduct the balancing test on the record. Doubtful cases should be resolved in favor of the defendant.

Wade, 98 Wn. App. at 334 (citations omitted). “Regardless of relevance or probative value, evidence that relies on the propensity of a person to commit a crime cannot be admitted to show action in conformity therewith.” Wade, 98 Wn. App. at 334.

During direct examination of Officer Wurts in this case, the prosecutor elicited the following testimony:

- Q: And what did you talk to [defendant] about?
A: I asked him about the possibility of if there was red phosphorus being in any of the containers with the red that I saw.
Q: And what was his response?
...

A: He said when he was arrested for manufacturing before, he did not use red phosphorus in the process he had used before.

13RP 547.

Defendant's answer to the officer's question was highly probative because it demonstrated he knew what red phosphorus was and understood exactly what the officer was talking about. A person who was not knowledgeable about (1) the significance of the containers in the garbage can or (2) how to manufacture methamphetamine would have no idea what "red phosphorus" is or what was on the containers. Defendant's statement that he had manufactured methamphetamine in the past was highly probative of his **knowledge** about this complicated chemical process. See 14RP 615-22; 16RP 866-68. Further, the fact that he knew how to manufacture methamphetamine coupled with the equipment in the residence to do so shows defendant's **intent**.

Washington courts have also recognized, as a basis for the admission of evidence of other crimes, criminal acts which are part of the whole deed. State v. Bockman, 37 Wn. App. 474, 490, 682 P.2d 925 (1984), review denied, 102 Wn.2d 1002 (1984)(citing State v. Jordan, 79 Wn.2d 480, 487 P.2d 617 (1971)). Under this "res gestae" or "same transaction" exception, evidence of other crimes is admissible to "complete the story of the crime on trial by proving its immediate context of happenings near in time and place." Bockman, supra (citing E. Clearly,

McCormick on Evidence, § 190 at 448 (2d ed. 1972). The fact that defendant himself mentions his prior arrest for a similar offense while he is being investigated for the current methamphetamine lab, demonstrates defendant's guilty knowledge. Defendant was not asked about any prior manufacturing arrest. His statement gives the jury the whole picture about defendant's involvement in the current charges.

Although the res gestae exception to ER 404(b) was not argued below, an appellate court may affirm the trial court's ruling on any basis supported by the record. State v. Bobic, 140 Wn.2d 250, 258, 996 P.2d 610 (2000). As discussed above, the record below supports this basis for admission of defendant's statement as well as the purposes allowed by the court.

The admissibility of defendant's statement about his prior manufacturing using a technique other than red phosphorus was argued extensively below. 6RP 19-20, 11RP 369-71, 11RP 382-94. The State argued the statement was admissible under ER 404(b) to prove knowledge, intent, and motive. Id. At the beginning of the argument on this issue, the court stated: "... Let's deal with the 404. It's not a slam dunk either way, reading the case law. Make your pitch." 11RP 382. During the argument, the court stated: "Probative? Yes. Prejudicial? Very prejudicial..." 11RP 390. After hearing additional argument and reviewing the case law, the court ruled:

THE COURT: Okay. With regard to Mr. Smith on [his statement], “When I was arrested for manufacturing a controlled substance before, I did not use the red phosphorus technique.” I find that to be prejudicial, yet very probative to what the whole case is about. The case is about manufacturing controlled substances, methamphetamine. I find that to be relevant and probative, and it is very prejudicial. But it’s there. I won’t take it out under 404(b).

11RP 394. The court’s statements demonstrate that the court was balancing the probative value of the evidence against the unfair prejudicial effect and ruling only after weighing the pertinent factors.

Defendant argues that the court did not state the purpose for which he was admitting the evidence. BOA at 18. However, the State repeatedly stated that it was offering the statement for the limited purpose of proving knowledge, intent, and motive. 6RP 19, 11RP 369, 384, 385, 389, 390, 391, 392. The evidence was not offered for any other purpose. Similarly, the court’s instruction to the jury clearly states the purpose for which the statement was admitted: “...Such evidence may be considered by you in deciding intent, motive or knowledge and for no other purpose.” CP 114 (Instruction #6).

Defendant’s statement was materially relevant. First, in order to prove manufacture of a controlled substance, the State had to prove, among other things, “[t]hat the defendant *knew* that the substance was a controlled substance; Methamphetamine.” CP 121 (Instruction #13)(bold italics added). Second, in order to prove possession of ephedrine and/or

pseudoephedrine with intent to manufacture methamphetamine, the State had to prove that the defendant “*knowingly* possessed ephedrine and/or pseudoephedrine...with the *intent* to manufacture methamphetamine.” CP 124 (Instruction #16)(bold italics added). Acting knowingly and acting with intent are defined in Instructions 11 and 12, respectively. CP 119-20. The purpose for which the statement was admitted pertains directly to elements of the crimes. Thus it was materially relevant.

Lastly, although the State is not required to prove motive as an element of the offense, evidence showing motive is admissible pursuant to ER 404(b). State v. Boot, 89 Wn. App. at 789; see State v. Hubbard, 37 Wn. App. 137, 679 P.2d 391 (1984); State v. Robinson, 38 Wn. App. 871, 691 P.2d 213 (1984). Motive is an inducement which tempts a mind to commit a crime. State v. Boot, 89 Wn. App. 780, 789, 950 P.2d 964 (1998)(citing State v. Bowen, 48 Wn. App. 187, 191, 738 P.2d 316 (1987)). In State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995), the court explained that, “motive goes beyond gain and can demonstrate an impulse, desire, or any other moving power which causes an individual to act.” Powell, 126 Wn.2d at 259 (emphasis added). As such, the motive for a crime can be the *reason* for the crime. Here, officers found three glass pipes used for smoking methamphetamine in defendant’s room. 13RP 566-67. One pipe was found on the defendant’s mattress, the other two were hidden under the mattress. Id. There was also a baggie of methamphetamine in plain view in defendant’s room that Burrill put in her

bra to hide from police to keep defendant from getting in trouble. 15RP 705. Police also located a container full of syringes and glass pipes in the trash at the residence. 13RP 583. This evidence shows defendant was a methamphetamine user, which would be a motive or reason to manufacture methamphetamine for his personal use. Defendant also sold his product, which provides a financial motive or reason to manufacture methamphetamine. 18RP 1105.

The evidence could be unfairly prejudicial to defendant because there is some danger that the jury could use information of a prior arrest as propensity evidence, which is prohibited by the rule. ER 404(b). However, the probative value of this evidence is so high that it would outweigh any possible unfair prejudice. Additionally, at the request of the defense, the trial court properly gave the limiting instruction as to how the jury is to use the evidence. CP 114. Juries are presumed to follow the court's instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). In closing argument, the prosecutor, reminding the jury of the court's instruction, properly argued the evidence, limiting its use to knowledge, intent, or motive. 18RP 1159.

Should this Court find that the trial court did not make a sufficient record or that it abused its discretion by admitting the ER 404(b) evidence, the next step is to assess whether the error was harmless. As stated above, evidentiary errors under ER 404(b) are not of constitutional magnitude and are harmless unless the outcome of the trial would have differed had the

error not occurred. Wade, 98 Wn. App. 328 at 333. Here, there was substantial other evidence of defendant's guilt. Item-after-item consistent with the manufacture of methamphetamine was found all over the small trailer. 13RP 551-91; 16RP 926-56. Defendant's fingerprints were found on two of the glass mason jars found in the Rubbermaid garbage can in the kitchen area. 15RP 765, 798; 16RP 844, 846. Defendant's fingerprints were also on the can of "Brakleen" found right inside the front door. 13RP 552, 15RP 796-97, 16RP 846. Defendant's roommate testified that he personally saw defendant manufacturing methamphetamine. 18RP 1105. He saw defendant separating ephedrine from the tablets and also saw him package the finished product and sell it to people who came to the trailer. Id. In defendant's room, officers found, rock salt (used in the salting out phase in the final stage of manufacturing methamphetamine), three glass pipes, one on top of the mattress and two under the mattress, and a baggie with smaller baggies inside (used to package finished product) 13RP 566-67, 14RP 657. The baggies had a residue that contained methamphetamine. 16RP 880. A pill-sized bottle approximately one-half full of a white powdery substance was also found under defendant's mattress. 16RP 926. The white powder identified as pure caffeine (used to cut the methamphetamine; to add volume and weight). 14RP 667, 16RP 884, 16RP 907. This is overwhelming evidence of defendant's guilt. The outcome would have been the same even

without the ER 404(b) evidence. Therefore, defendant's claim of reversible error fails.

3. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO CONVICT DEFENDANT OF POSSESSION OF EPHEDRINE/ PSEUDOPHEDRINE WITH INTENT TO MANUFACTURE METHAMPHETAMINE WHERE DEFENDANT HAD A PRESCRIPTION BOTTLE OF PSEUDOEPHEDRINE ALONG WITH ALL THE OTHER INGREDIENTS AND EQUIPMENT NECESSARY FOR MANUFACTURING METHAMPHETAMINE.

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. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). “Credibility 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. 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 the present case, defendant claims there is insufficient evidence to convict him of unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine. BOA at 19. Defendant does not seem to contest the knowing possession of the pseudoephedrine, rather he claims lack of evidence with regard to the intent element. Id. at 21.

To establish defendant possessed pseudoephedrine with intent to manufacture methamphetamine, the State has to prove that he possessed the pseudoephedrine and that he intended to use it to manufacture methamphetamine. RCW 69.50.440, State v. Moles, 130 Wn. App. 461,

465, 123 P.3d 132 (2005). Possession alone does not establish the intent to manufacture. Id. at 466. [A]t least one additional factor, suggestive of intent, must be present. Id. In Moles, this Court held that the mere possession of a large number of pseudoephedrine tablets removed from the blister packs was sufficient evidence from which the jury could infer intent. Id. at 466. Additionally, in Moles, officers found a coffee filter with methamphetamine residue in a co-defendant's pocket. Id.

In the present case, numerous factors were present: There were large quantities of stripped out pseudoephedrine packaging found at the residence. Such a large quantity of pseudoephedrine already used in a short time leads to only one inference: defendant prepared other tablets for manufacture. There was methamphetamine residue on the baggies in defendant's bedroom, along with 3 glass smoking pipes. Burrill removed a bag of methamphetamine from defendant's room when police arrived. There was a large quantity of ingredients and equipment used to process methamphetamine. Defendant had recently gone shopping with his roommate and purchased other ingredients used in the manufacturing process. Tucker witnessed defendant manufacturing methamphetamine in the trailer as well as selling methamphetamine out of the trailer. Defendant instructed Tucker how to prepare the strike plates and matches to extract the chemicals needed. Defendant had made one batch near the time of his arrest and the making of a second batch was interrupted by an argument with Tucker. All these factors lead to a strong inference that

defendant intended to manufacture methamphetamine with the pseudoephedrine found in his room.

Tucker testified that defendant took several car loads off the property prior to his arrest. The fact that defendant kept the manufacturing equipment in the garbage can in the kitchen and attempted to have Tucker removed from the trailer. This demonstrates that defendant was planning to remain in the trailer and to re-use the lab items in the future. The totality of the circumstances under which defendant possessed the pseudoephedrine leads to only one inference: that he intended to manufacture methamphetamine, just as he had done in the recent past. In the present case, there is much more evidence of intent to manufacture than there was in Moles. Defendant's claim fails.

4. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS BASED ON JURY MISCONDUCT WHERE DEFENDANT FAILED TO SHOW THAT JURORS' ACTIONS (1) AMOUNTED TO MISCONDUCT AND (2) THAT HIS RIGHTS WERE MATERIALLY AFFECTED.

CrR 7.5(a)(2) provides that the court may grant a new trial when it appears that a substantial right of the defendant was materially affected by juror misconduct. The grant or denial of a motion for a new trial is within the court's discretion and will be reversed only for an abuse of that discretion. State v. Balisok, 123 Wn.2d 114, 117, 866 P.2d 631 (1994).

A new trial may be warranted based on juror misconduct if a jury considers information other than the evidence admitted at trial. State v. Brown, 139 Wn.2d 20, 24, 983 P.2d 608 (1999). “A strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.” State v. Balisok, 123 Wn.2d at 117-18.

In the present case, counsel for the defense and State interviewed a witness in the jury room when the jury was not present. They observed some markings on the white board that could indicate the jury was keeping track of time spent in the courtroom vs. time spent in the jury room. 17RP 987-88. Defendant moved for dismissal based on the grounds that the jury violated the court’s order not to discuss the case. 17RP 989.

When the court addressed the issue, the following exchange occurred:

DEFENSE: Likewise, the markings on the board by the jury is not a concern to the court?

COURT: It is a concern, but it doesn’t rise to the level to call a mistrial or to dismiss it. I don’t think so.

DEFENSE: My biggest concern about that is it evidences potential jury bias against Mr. Smith and [co-defendant].

COURT: It could be the other way, too. There’s been a lot of objections. There’s been a lot of

exhibits and that's slowed down the process a whole lot.

17RP 1047.

A review of the record indicates that the State requested that matters be heard outside the presence of the jury on at least 10 occasions. 13RP 470, 523, 552, 14RP 608, 676, 15RP 725, 16RP 835, 857, 870, 18RP 1121. While defendant made numerous objections during testimony, the majority of those were ruled on in a summary fashion with minimal delay and without the jury leaving the courtroom. Several times, in response to a defense objection, *the State* asked that if there was to be further argument that it should be done outside the presence of the jury. The court would then excuse the jury. Although the defense made the objection, it was the prosecutor that asked that the jury be excused. As the trial court noted, the State also caused several lengthy delays trying to organize the numerous exhibits. 17RP 1047. Therefore, if the jury were to have animosity against a party (and there is no evidence that there was animosity at all) it would likely be against the State. The State suggested that the court question the jurors to address the issue, rather than to speculate on the feelings of the jury. 17RP 1048. Defendant did not join in that request, leaving the jurors' motives and potential bias unknown. Neither did defendant provide the court with an affidavit presenting the facts as required by the rule. The rule provides:

When the motion is based on matters outside the record, the facts shall be shown by affidavit.

CrR 7.5, last paragraph of subsection (a).

Defendant fails to make a strong, affirmative showing that misconduct occurred. Any discussion by the jury of court time vs. jury room time did not concern the facts of the case, evidence, or testimony. Defendant conceded below that equating the jurors' discussion of time in the courtroom with discussion of the case was a "loose connection." 17RP 988. This does not amount to a strong, affirmative showing under Balisok.

Even if the discussions did amount to misconduct, only instances of juror misconduct that cause prejudice warrant a new trial. State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). Defendant has similarly failed to show that a substantial right was materially effected. Any possible prejudice to defendant, which is unlikely, would have been cured by the court's instruction to the jury regarding objections by counsel:

. . . Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

. . .

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on the lawyer's objections.

CP107-08 (Instruction #1).

The trial court properly denied defendant's motion for dismissal or mistrial where no misconduct occurred and defendant's substantial rights were not materially effected.

5. DEFENDANT IS NOT ENTITLED TO RELIEF
UNDER THE CUMULATIVE ERROR
DOCTRINE.

Under the cumulative error doctrine, a defendant may be entitled to a new trial or reversal where errors cumulatively produced a trial that is fundamentally unfair. In re Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). This doctrine is employed where "the combined effect of an accumulation of errors ... may well require a new trial." State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). The defendant bears the burden of proving an accumulation of errors of sufficient magnitude that retrial is necessary. Lord, 123 Wn.2d at 332. Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. State v. Stevens, 58 Wn. App. 478, 498, 794 P.2d 38 (1990). As argued above, there was no error in the proceedings below.⁵ Assuming, arguendo, that error occurred, it was not of such magnitude as to warrant a retrial or reversal. Defendants' claims under the cumulative error doctrine thus fail.

⁵ Defendant claims a sentencing error as part of "an accumulation of errors" that deprived defendant of a fair *trial*. Alleged error at *sentencing* is not properly included in a cumulative error doctrine analysis.

6. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S REQUEST FOR DOSA.

Generally, a trial court's decision to deny a DOSA sentence is not reviewable. State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). Because a DOSA sentence falls within the standard sentence range set by the legislature in the sentencing statute, a reviewing court presumes that the trial court did not abuse its discretion. State v. Williams, 149 Wn.2d 143, 146-47, 65 P.3d 1214 (2003). But a party may challenge a trial court's legal error in determining which sentencing provision applies to a specific case. Williams, 149 Wn.2d at 147. A party may also challenge a trial court's failure to exercise any discretion where the trial court categorically denies a DOSA sentence. Grayson, 154 Wn.2d at 342.

In Grayson, the trial court categorically denied Grayson's request for DOSA, mainly because the program was under-funded. Id. at 337. Grayson had been screened and the parties agreed he was eligible for DOSA. Id. at 336. The Supreme Court reversed the sentence, because "the trial judge did not appear to meaningfully consider whether a sentencing alternative was appropriate." Id. at 343.

In the present case, the sentencing hearing was set for April 21, 2006, 44 days after verdict. 19RP 1199, 20RP 1206. On that day, defense counsel moved for a continuance advising the court that defendant was seeking a DOSA sentence and that the DOSA evaluation "should be done

on the 27th, mailed on the 28th.” 20RP 1207. Defense counsel requested a new sentencing date of May 5, 2006. Id.

However, the sentencing hearing was not held until May 19, 2006, 72 days after verdict. 20RP 1206. At that time, only defendant had a copy of the DOSA evaluation. 21RP 1210. Counsel advised the court that defendant said he is eligible for DOSA. Id. Defense counsel explained to defendant that they could continue the hearing to get a copy of the evaluation. 21RP 1120. Defendant chose to proceed without the evaluation, even after being told that the State would adamantly oppose DOSA. 21RP 1121.

The prosecutor argued in favor of a high end sentence and against DOSA for several reasons: (1) defendant had a prior conviction for the same criminal behavior as the present offenses; (2) someone who knows how to manufacture methamphetamine will have a fixed client base of drug addicts when they are in treatment allowing them to undermine the program from the inside out; (3) defendant, the appointed payee of Mr. Tucker, lived off of Mr. Tucker’s disability benefits, used his residence to manufacture methamphetamine, and then used a no contact order to remove Tucker from his residence, knowing he had no where else to go or live; (4) defendant sent a threatening e-mail to Tucker after charges were filed. 21RP 1214-15.

Defense counsel argued in favor of DOSA or in the alternative, a low end sentence for the following reasons: (1) defendant *appeared* to be

amenable to treatment and *appears* to qualify for DOSA; (2) defendant's prior convictions show that defendant is in need of treatment; (3) the threats to Tucker were unproven allegations; (4) Tucker assaulted defendant, which is what lead to the no contact order; (5) Tucker was not innocent as he was a participant in the manufacturing. 21RP 1217-20. Defense counsel advised the court that letters of recommendation had been filed on defendant's behalf. The court acknowledged reading the letters. 21RP 1220.

After hearing these arguments, the court ruled:

COURT: With regard to the DOSA, I don't have any documentation and we've been waiting for that documentation now - -I don't know how long, a month, month and a half, maybe even two months. Nothing has come through.

I know his parents would like him to get treatment. That's the letters I received. He would do better if he was in treatment versus jail.

I'm not going to consider DOSA, I'm not.

DEFENSE: If I can provide the Court with documentation?

COURT: No, not at this point.

The thing that does stick out is somewhat what [the prosecutor] says, Tucker, Tucker's involvement or being taken advantage of. The most poignant aspect of the case, I recall, it the disdain shown by Mr. Smith for Mr. Tucker when Mr. Tucker was testifying. It was very obvious that there was complete

dislike for him... The defendant was found guilty, he has a prior and now he has a score of two.

He doesn't present himself very good when he testifies or when he tries to explain himself. He doesn't do good. Something – something during the case came out or the facts showed something. I'm not going to punish him for taking the matter to trial or what I perceive as a certain type of character. I won't give him the high end, I will give him 60 months, plus 24.

21RP 1225-26.

Although the court used the words, "I'm not going to consider DOSA," the record shows he *did* consider what factors were available to him in ascertaining whether DOSA appropriate. The court complained about not having the documentation (presumably the DOSA evaluation) that he had been waiting for, he read and considered the parents' letters, and ultimately decided not to grant a DOSA due to defendant's exploitation of Mr. Tucker. This is not a categorical denial of DOSA as seen in Grayson, where the judge based his reason on lack of funding. Here, unlike Grayson, there was no agreement by the parties that defendant was eligible or amenable to treatment. The DOSA evaluation was not before the court. Further, the court evaluated the factors as presented by the attorneys, ultimately denying DOSA due to the lack of evaluation and exploitation of Mr. Tucker. This was not a categorical refusal to grant a DOSA sentence, rather an exercise of discretion based

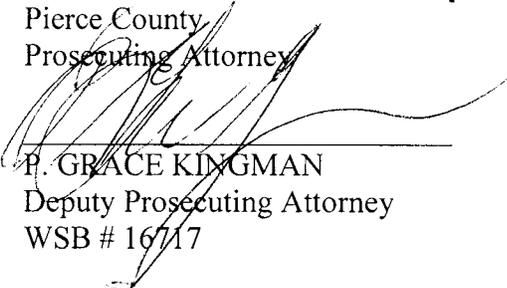
on what was before the court to consider. Defendant's claim is without merit.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions and sentence.

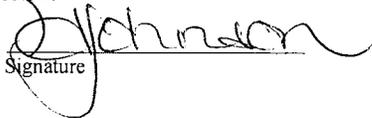
DATED: May 22, 2007.

GERALD A. HORNE
Pierce County
Prosecuting Attorney


P. GRACE KINGMAN
Deputy Prosecuting Attorney
WSB # 16717

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.

5/22/07 
Date Signature

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DIVISION II
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DEPUTY