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

STATE OF WASHINGTON, RESPONDENT

v.

ZOE ANN MARSHALL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson and
The Honorable Kitty-Ann van Doorninck

No. 06-1-001386-9

RESPONSE BRIEF

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Appendix A

Appendix B

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

1. Did the trial court abuse its discretion by denying defendant's motion to suppress evidence when that evidence was seized pursuant to a valid search warrant?
2. Was there sufficient evidence to support defendant's conviction and firearm sentencing enhancement?
3. Did the trial court abuse its discretion when it admitted Officer Boulay's testimony when the testimony was relevant to impeach co-defendant Brown's testimony and was not hearsay?

B. STATEMENT OF THE CASE.

1. Procedure

On April 11, 2006, Zoe Ann Marshall ("defendant") was charged by information in Pierce County Superior Court cause number 06-1-01386-9 with unlawful manufacturing of a controlled substance – methamphetamine, Count I. CP 1-3.

A CrR 3.6 hearing to suppress evidence was held on November 16, 2006, before the Honorable Brian Tollefson. No testimony was presented but all parties submitted briefs and the court heard argument from both sides. RP 1-33, 11-16-06, CP 6-15, 16-19, 25-53. The court denied

defendant's motion to suppress evidence and entered Findings of Fact and Conclusions of Law regarding the CrR 3.6 hearing. RP 37-40, 11-16-06, CP 20-24, Appendix A.

On August 20, 2007, the State filed an amended information adding Count II, unlawful possession of a controlled substance with the intent to deliver and adding two firearm enhancements and a school bus route stop enhancement to Count I. CP 56-57, RP 27-28, 8-22-07. The case proceeded to trial on August 22, 2007 before the Honorable Kitty-Ann van Doorninck. RP 2-37, 8-22-07.

A second amended information was filed on August 27, 2007, adding the aggravating circumstance that the defendant was under community custody at the time of the commission of the crime and adding one point to her offender score. CP 58-59, RP 6, 8-27-07.

Trial testimony began on August 28, 2007. RP 24, 8-28-07. Defendant moved to dismiss Count I, Count II and the firearm sentencing enhancements at the close of the State's case. RP 56-69, 9-4-07. The court denied defendant's motion to dismiss Count I and the firearm enhancements. RP 69, 127-129 9-4-07. The court dismissed the intent to deliver on Count II leaving the unlawful possession of a controlled substance charge for the jury. RP 69, 127-129.

The jury returned with a verdict of guilty on Count I and a verdict of not guilty on Count II and found that defendant or an accomplice was armed with a pistol and a rifle at the time of the manufacturing offense.

CP 160-165, RP 321-324, 9-10-07. The jury also found that defendant or an accomplice was within 1,000 feet of a school bus route stop at the time of the manufacturing. CP 160-165, RP 321-324, 9-10-07.

Defendant was sentenced to 120 months total confinement on November 30, 2007. CP 175-187, RP 1-19, 11-30-07. A timely appeal followed. CP 190.

2. Facts

On February 20, 2006, Sumner Police Officer Boulay was working as a patrol officer when he saw a vehicle without any tail lights. He stopped the vehicle for the traffic infraction and arrested the driver for traffic offenses. RP 26, 8-28-07¹. Officer Boulay searched the vehicle and located materials relating to identity theft and financial fraud associated with the driver. RP 27, 8-28-07. Officer Boulay obtained a search warrant for the address in Graham where the materials were being mailed to. RP 27, 8-28-07. A search warrant was issued for 9024 216th Court East, Graham, Washington. RP 28, 8-28-07. Officer Boulay testified that there was a trailer on the property and a storage trailer. RP 29, 8-28-07.

¹ The volumes of the report of proceedings are not numbered continuously between the volumes. The Respondent will use the same reference numbers as the Appellant for consistency. Reference will be made by giving the page number followed by the date of the hearing.

Officer Boulay and other officers served the warrant on February 24, 2007. RP 49, 8-28-07. Ron Brown answered the door and defendant was located in the back bedroom. RP 32, 8-28-07. The two were detained. RP 32, 8-28-07. Officer Boulay made a general sweep through the trailer and observed some items in a bedroom that he suspected could be associated with methamphetamine production. RP 33, 8-28-07.

Officer Boulay observed some buckets with reddish stains, a funnel with white residue and a bottle labeled "toluene." Toluene is a solvent commonly used in methamphetamine production. RP 33, 8-28-07. Officer Boulay observed several buckets with unknown contents, a milk jug with unknown contents and a bucket containing a reddish -brown sludge. RP 34, 8-28-07. Officer Boulay located these items in the southeast bedroom that appeared to be used as a storage room. RP 33, 8-28-07.

Officer Boulay located some pieces of mail, a small plastic straw that he suspected had been used to inhale methamphetamine, a small glass vial with white powdery residue in the southwest bedroom identified as the master bedroom. RP 37-38, 8-28-07. Officer Boulay also located two glass smoking devices of the type commonly used to smoke methamphetamine on the nightstand. The pipes were charred and discolored. RP 38-39, 8-28-07.

Officer Boulay located a water bong next to the bed and found two coffee filters, one with white residue, and two empty pill boxes labeled

“Sudafed” in the drawers of bed. RP 39, 8-28-07. The box showed that “pseudoephedrine” was an ingredient. Inside the same plastic bag as the boxes, Officer Boulay found ten empty blister packs with printing that indicated they had contained pseudoephedrine. RP 40, 8-28-07.

Officer Boulay returned to the southeast bedroom and opened the box and found that it contained tubing, a box labeled “rock salt” and several plastic containers. RP 41, 8-28-07. Officer Boulay determined that it was likely that methamphetamine production was occurring so he decided to pull out and obtain an addendum to the search warrant. RP 41, 8-28-07.

The addendum was obtained and the Pierce County Lab Team was called out to investigate the scene. RP 42, 8-28-07. Officer Boulay testified that defendant was not involved with the identity theft that he was investigating. RP 46, 8-28-07.

Deputy Brockway has been a member of the Pierce County Lab Team for seven years. RP 66-67, 8-28-07. He explained the methamphetamine manufacturing process to the jury. RP 68-73, 8-28-07. There are two methods for manufacturing methamphetamine, the Nazi method, and the red phosphorus method. RP 68, 8-28-07. The Nazi method is also known as the “lithium method.” RP 68, 8-28-07. The first stage is the extraction process. Cold pills are ground into a powder and poured into a solvent solution of denatured alcohol or methyl alcohol. The ground up pills and alcohol are mixed and then poured through coffee

filters. RP 68-70, 8-28-07. This is done to extract the pill binder and pure ephedrine comes out into the solvent. The binder is discarded and the solution containing the ephedrine is left in a jar or another container. RP 70, 8-28-07.

Items associated with the first stage are coffee filters, items containing methyl alcohol, gas line anti freeze containing methanol, and cold pills containing pseudoephedrine as a necessary precursor. RP 70, 8-28-07.

The next stage in the Nazi method is the reaction phase. The solvent is evaporated leaving pure ephedrine powder. RP 70, 8-28-07. The ephedrine powder is mixed with anhydrous ammonia. Anhydrous ammonia is a commercially available solvent that is often stored in propane tanks. RP 70, 8-28-07. The liquid ammonia is combined in a container with the ephedrine and lithium metal obtained from batteries that have had the metal stripped out. RP 71, 8-28-07. Once the combination has stopped reacting roughly one half to one hour later, a solvent such as Coleman fuel or toluene is added. RP 71, 8-28-07. The solution then separates into two layers. The top layer is used in the next phase and the bottom layer is discarded. RP 71, 8-28-07.

Anhydrous ammonia can be obtained from commercially available fertilizer. RP 72, 8-28-07. It can also be produced by combining ammonium sulfate and Red Devil lye containing sodium hydroxide. The solution "gases off" and is cooled through dry ice. RP 72-73, 8-28-07.

The anhydrous ammonia can be contained in a thermos or any container that would keep it from evaporating. RP 73, 8-28-07.

In the final phase, the top layer of solution is moved onto the "salting out" phase. RP 71, 8-28-07. Hydrogen gas is introduced into the solution using pop bottles with tubing or garden sprayers. The gas is bubbled through the solution and it starts to form white crystals. The methamphetamine crystals are poured through a coffee filter and the methamphetamine is left behind. RP 72, 8-28-07. The finished product can be further processed by washing it with acetone to make it appear whiter. RP 72, 8-28-07. Hydrogen gas is made by combining muriatic acid and aluminum foil or by combining sulfuric acid and rock salt. RP 72, 8-28-07.

The Red Phosphorus method is similar in that the first and last phase is the same. RP 93, 8-28-07. The reaction phase differs in that the ephedrine is combined with red phosphorus and iodine. The mixture is heated for seven to ten hours. Red phosphorus is obtained from the striker plates from matchbooks or road flares. RP 74, 8-28-07. Red Devil lye is absorbed into the solution and often an ice bath is used to cool the solution. The solvent is then added and it moves on to the next phase. RP 74, 8-28-07.

Deputy Brockway responded to the residence in Graham. He photographed the scene and began a systematic search of the vehicles and

a Wells Cargo trailer. RP 77-78, 8-28-07. Officers found and photographed the following items in the Wells Cargo trailer: A five gallon bucket half full of a rusty-colored liquid (Ex. #1, RP 81, 8-28-07); documents in the names of Heather Sorum and Darren Lumsden (Ex. #2, RP 81, 8-28-07); a black metal can half full of a dark sludge (Ex. #3, RP 82, 8-28-07); a plastic grocery bag containing a plastic spoon, aluminum foil and used coffee filters (Ex. #4, RP 83, 8-28-07); a plastic bag containing white chunky materials (Ex. #5, RP 84, 8-28-07); a black trash bag containing used coffee filters, an empty 12 ounce gas line anti freeze container, a plastic container and cut up lithium batteries (Ex. #6, RP 84-85, 8-28-07); used coffee filters possibly containing rock salt (Ex. #7, RP 86, 8-28-07); documents including a Wal-Mart receipt for lithium batteries (Ex. #8, 173, RP 86-87, 171-172 8-28-07); numerous used coffee filters that appeared to contain rock salt (Ex. #9, RP 87-88, 8-28-07); four empty bottles of Red Devil lye (Ex. #10, RP 88, 8-28-07); pieces of a double A lithium battery and an empty box of rock salt found in a trash bag (Ex. #11, RP 89, 8-28-07); numerous used coffee filters (Ex. #12, RP 89-90, 8-28-07); trash bag containing numerous used coffee filters (Ex. #13, RP 90-91, 8-28-07); three empty bottles of Red Devil lye found in Ex. #13 (Ex. #14, RP 91-92, 8-28-07); pieces of double A Energizer batteries containing lithium strips found in Ex. 13 (Ex. #15, 174, RP 92-93, 172-

173, 8-28-07); a coffee filter containing white powder found in Ex. #13.

Ex. #16, RP 93, 8-28-07.

A plastic tote (Ex. #17, RP 94, 8-28-07) containing a picture, a mug, used coffee filters, rock salt, rubber gloves, a length of vinyl tubing, a two quart Mason jar containing an amber and dark colored sludge, a two quart Mason jar containing a tri-layered clear, dark or amber colored liquid, a plastic container half full of a yellow liquid, an empty one quart Mason jar, a pint jar one quarter full of a red sludge, a glass carafe with white residue, a 250 milliliter Pyrex flask, a receipt for rock salt, a two foot length of vinyl tubing with blue corrosion on the fittings consistent with anhydrous ammonia storage, four red plastic funnels with dark staining, and an empty one quart Mason jar with a broken bottom. Ex. #18-28, #176-178, RP 94-103, 175-176, 8-28-07.

A gray white plastic tote (Ex. #29 RP 103, 8-28-07) containing: a one gallon metal can, no label, full of a clear liquid, a one gallon can labeled Coleman fuel with a small amount of a clear liquid, a one gallon can of Coleman fuel with a trace amount of liquid, a two quart glass jar half full of a tri-layer liquid, one quart Mason jar with a small amount of gray liquid, and a one quart Mason jar with the letter "E," which often refers to ephedrine, written on one side and a small amount of white residue. Ex. #30-35, RP 103-107, 8-28-07.

In a shed in the back yard, Officers located four 12 ounce bottles of gas line antifreeze and a one gallon can of Coleman fuel. Ex. 37, Ex. 38, RP 110-111, 8-28-07. Deputy Brockway located a burned blister pack in a burn pile in the back yard. Ex. 36, RP 112, 8-28-07.

Inside a plastic 50 gallon barrel (Ex. #39, RP 112, 8-28-07) Deputy Brockway located an empty one gallon can of acetone, an empty 12 ounce bottle of HEET, and empty 18 ounce bottle of Red Devil lye, and several blister packs labeled Tylenol Sinus. HEET is a gas line antifreeze and often contains methanol which is used in the extraction phase. RP 113, 8-28-07. Also found in the barrel, was the bottom of a weed sprayer which is used during the salting out phase to mix the HCL gas. Ex. #40, RP 113, 8-28-07. Deputy Brockway located a glass bottle labeled sulfuric acid which is used during the salting out phase packed in a Styrofoam container. Ex. 41, RP 114, 8-28-08.

Inside the house, officers located a Crown Royal bag containing a plastic bag filled with white powder. Ex. #43, RP 115, 171, 8-28-07. The Crown Royal bag was located in the living room in a duffel bag that also contained women's clothing. RP 115, 8-28-07. Next to the duffel bag, officers located a black purse containing a small notebook and a Washington I.D. card for defendant. Ex. #44, 181A, 181B, RP 117-118, 155-156, 178, 8-28-07. The notebook contained a recipe on how to

manufacture methamphetamine. RP 118, 156, 179, 8-28-07, RP 244-245 8-29-07. The diagram illustrated a pH scale to show acid as zero. The diagram showed “7” which is water and “14” which is lye. In the middle of the diagram, the words, “dope falls out of the solvent” is written down and is part of the process of manufacturing methamphetamine.

Ex. #181A, RP 179 8-28-07, RP 244-245, 8-29-07. The diagram shows how to extract or “salt out” the drugs. RP 245, 8-29-07. There is also a drawing depicting a chemistry jar, a siphon and a funnel. Ex. #181A, RP 179, 8-28-07.

A hand held electric grinder with white residue was located in a cabinet in the kitchen. Ex. 47, 184, RP 121, 182, 8-28-07. Grinders are used during the extraction phase to grind the cold pills into a powder. RP 122, 8-28-07. A quart can three quarters full labeled acetone, a half full one pint container labeled iodine, a 20 ounce plastic container labeled “Tri-Hist Granules” a decongestant which often contains pseudoephedrine, and a half full one quart container labeled mineral spirits was found under the sink. Ex. #48, 49, 50, 51, RP 122, 8-28-07. Mineral spirits are often used to store stripped out lithium metal as it is volatile with water. Lithium metal will not react with mineral spirits. RP 124-125, 8-28-07. Also under the sink, officers located a plastic bag containing three bottles of HEET and one half full bottle of HEET. Ex. # 52, 53 RP 125-126, 8-

28-07. A large bag of coffee filters were found in a cupboard in the kitchen. Ex. 54, RP 125, 8-28-07.

In the bathroom, officers located several unused coffee filters. Also found in the bathroom was a one gallon plastic jug labeled "muriatic acid," and an 8 ounce bottle labeled iodine under the sink. Ex. 56, 58, 59, RP 126-128, 8-28-07.

In the master bedroom, officers located a Pyrex dish with white residue, a pop bottle made into a smoking device, a coffee filter with white crystallized residue, and two empty boxes labeled Sudafed. Ex. #60, 61, 62, 64, 175, 187, RP 130-133, 174, 183, 8-28-07. Also in the master bedroom, officers found small empty plastic baggies that are often used to package finished methamphetamine. Ex. 60 RP 167-169, 8-28-07.

Officers located documents belonging to Ron Brown and defendant in the master bedroom. Ex. 65, 189, RP 133-134, 184, 8-28-07. The mail that was addressed to defendant listed an address in Auburn and an address in Seattle. Ex. #189, RP 202, 8-28-07. The mail did not list the search warrant address in Graham. RP 202, 8-28-07. The documents were located throughout the master bedroom. RP 202-203, 8-28-07.

In the southeast bedroom, officers located a five gallon bucket containing a dark sludge, a one gallon can label toluene, a red plastic funnel with white residue, a one gallon jug with a clear liquid and white

sludge, a yellow funnel, two pieces of glassware, a white funnel. Ex. 67, 68, 69, 70, 71, RP 135-138, 8-28-07. Officers located a five gallon bucket containing a red sludge and used coffee filters in the southeast bedroom. Ex. 72, RP 138-139, 8-28-07.

Inside a box in the southeast bedroom, officers located lengths of vinyl tubing, used coffee filters, an empty plastic milk jug, a corroded spoon, a plastic container with yellow liquid and a plastic container with a small amount of blue liquid. Ex. 74, 77, 78, RP 140, 8-28-07. Also found in the box in the southeast bedroom was a metal can with used stained coffee filters, and a four pound box of rock salt. Ex. 75, 76, RP 142-143, 8-28-07. The yellow liquid in the plastic container is significant because it is an acid and could be used in the salting out phase. Ex.77, RP 143-144, 8-28-07. The next item found was a plastic container with a small amount of an amber liquid and a length of black tubing coming from the top. It appeared to be an HCL gas generator. Ex. 79, RP 145, 8-28-07.

Also found in the southeast bedroom was a small soda bottle containing a small amount of liquid with a length of tubing attached to the top, a medic bag with vinyl tubing leading from the mouth into another small plastic container with a small amount of liquid inside, two 18 ounce bottles of Drano, three empty bottles of Red Devil Lye and a 16 ounce bottle of household lye that was one quarter full. Ex. 80, 81, 82, 83, 188,

RP 146-148, 184, 8-28-07. Officers located a blue plastic bottle with a bi-layered sludge and a two-liter bottle containing a three layered liquid. Ex. 84, 85, RP 148-149, 08-28-07.

The officers also located two firearms in a room identified as the "storage room." The storage room entry was right from the hallway. RP 150 8-28-07. A loaded black powder pistol and a rifle loaded with three rounds. Ex. 86, 87, 123, 194, 195, RP 149-150, 160-161, 188-189, 8-28-07. Exhibit 86 depicts the location of the pistol in a holster with the butt sticking up out of the container. Ex. 86. Appendix B. There was a round chambered in the rifle. Ex. 123 RP 160-161 8-28-07. The pistol was loaded with ball and powder rounds. Ex. 87, 125, 194 RP 158-159, 8-28-07.

Officers sampled a number of chemicals located throughout the house and property. Two samples of each item were taken and sealed into two containers labeled sample set "A" and "B." Ex. #192, 193, RP 185-187, 192, 8-28-07, RP 38-39, 9-4-07. Officers also reserved prints from various items in the house and were placed on latent prints cards. Ex. #88, 190, RP 187 8-028-07 RP 43-44 9-4-07. Steve Mell, a fingerprint expert, was able to compare a print from one card. The print belonged to Ronald Brown. RP 285-286, 293-294, 8-29-07.

Deputy Brockway and Deputy Gosling testified that they had heard from different individuals that suspects have tried to extract ephedrine out of fish food. RP 195, 8-28-07, RP 48-49, 9-4-07. In Deputy Brockway's experience, he would call this a "typical lab" with about 50 items and in his opinion, methamphetamine was being manufactured at this location. RP 195-196 8-28-07.

Frank Boshears has been employed by the Washington State Patrol Crime Lab for 19 ½ years as a forensic scientist. RP 218, 8-29-07. He has a bachelor's degree in biology and a master's degree in chemistry. RP 218, 8-29-07. He has attended several courses on clandestine drug labs and has been the responding chemist to over 300 laboratories. RP 219, 8-29-07. Mr. Boshears received evidence in this case consisting of seven items and thirty three samples. RP 224-226, 8-29-07.

Mr. Boshears found that samples numbered 1 and 54 contained pseudoephedrine and samples 33, 34, and 82 contained methamphetamine. Sample 33 also contained a reaction by product from the production process specific to the ammonia lithium method. RP 226-227, 233, 237-238, 8-29-07. Item number 44 was identified as sodium bicarbonate or baking soda. RP 231-232, 8-29-07. Item number 5 was identified as a substance similar to sodium phosphate, a breakdown of fertilizer. RP 234, 8-29-07. Item 7 was a clear crystalline substance that appeared to be rock

salt. RP 234, 8-29-07. Sample 23 was identified as containing methorphan. Dexromethorphan is a decongestant that can be combined with pseudoephedrine and sold over the counter as a cold product. RP 235-236, 8-29-07. Sample 70 and 73 tested consistent with ammonia. RP 240-241, 8-29-07.

Mr. Boshears testified that he has heard of people in clandestine laboratories using commercial fish food, used at fish hatcheries, in the manufacturing process. He did not know if it is actually possible or not but has interviewed suspects that have attempted it. RP 260-262, 8-29-07. Some cooks believe commercial fish foods contain pseudoephedrine. RP 262, 8-29-07. After being shown a page in the notebook (Ex. 181A) Mr. Boshears read an entry "fish food hatchery" from the left side of a page. Above that entry, Mr. Boshears read "ammono (pH.) chloride fertilizer" and "two bags." RP 263-264, 8-29-07.

Mr. Boshears testified that fertilizer is used in the manufacturing process to produce ammonia gas or liquefied ammonia in lieu of anhydrous ammonia. RP 263-264, 8-29-07. Ammonium sulfate or ammonium phosphate is used in fertilizer. Ammonium chloride is not used as a fertilizer but Mr. Boshears believes it could be used in the manufacture of methamphetamine but could not be sure. RP 263, 8-29-07.

The bicarbonate of soda can be used in the manufacturing process instead of lye in the red phosphorus method. RP 265-266, 8-29-07.

Mr. Boshears opined, after reviewing the crime scene photos and his lab analysis results, that methamphetamine manufacturing was taking place at the location. RP 264-265, 8-29-07. The method used was the ammonia method. RP 265, 8-29-07.

Ross Hartman testified that 9024 216th Street Court East in Graham is within 1,000 feet of four school bus route stops. RP 279-280, 8-29-07. He measured the distance himself using a 100 foot tape measure. RP 280, 8-29-07. The nearest location was 429 feet and 10 inches from the address. RP 280, 8-29-07.

Sumner Police Officer Gary Backus testified that he has been a police officer for 23 years. He is a certified firearms instructor with the State of Washington for the last 17 years. RP 5-6, 9-4-07. Officer Backus has had both professional and personal experience with a variety of firearms including black powder, modern firearms and pyrotechnics. RP 6, 9-4-07. He is an armor meaning that he fixes and repairs firearms, making sure that firearms are operational before being put into the field. RP 7, 9-4-07.

Officer Backus testified that exhibit 195 is a large caliber black powder pistol. RP 18, 9-4-07. The photographs taken at the scene show

the same pistol and a fully loaded cylinder chamber. RP 18, 19, 22, 9-4-07. The pistol appeared to be operable and the hammer was pulled back in the ready to fire position. RP 18, 23, 9-4-07. The pistol was replica and was pretty new, less than 30 years old. RP 25, 9-4-07. The rifle was a WW II era Springfield .30-06 but the cartridges were modern day ammunition. RP 19, 9-4-07. The magazine was operable and the bolt was in place. The rifle, if loaded, would function perfectly. RP 20, 9-4-07.

Defendant called three witnesses in her defense including the co-defendant Ronald Brown. RP 71-123, 9-4-07.

Jim Tracy testified that defendant worked for him at the Emerald Downs Racetrack and his farm in Monroe. RP 73-74, 9-4-07. Defendant worked training horses and was working for him around February 24, 2006. RP 74, 9-4-07. Mr. Tracy testified that iodine is used to treat wounds on horses. RP 79, 9-4-07. Mr. Tracy identified exhibit no. 59 as an iodine based foot treatment for horses. RP 80, 9-4-07. Mr. Tracy identified exhibit no. 50 and 114 as depicting a product used to make horses breathe called Tri-Histamine. RP 81-82, 9-4-07. Both items are available at tack shops. RP 81, 9-4-07.

Gary Smith testified that defendant lived with him in Auburn beginning prior to Thanksgiving 2005. RP 85, 9-4-07. She stayed with him “off and on” and helped around the house but was there “pretty much

there most of the time.” RP 85-86, 9-4-07. Mr. Smith knew Ron Brown to be defendant’s boyfriend. RP 89-90, 9-4-07. Defendant was with Ron Brown the night before the arrest at Mr. Smith’s house and left to stay the night with him. RP 91, 9-4-07. Defendant took her purse with her when she left. RP 91, 9-4-07.

Ronald Brown testified that he and defendant had a dating relationship and he had known her for about four years. RP 114, 9-4-07. Mr. Brown testified that defendant is currently his girlfriend. RP 115, 9-4-07. Mr. Brown remembered telling officers that defendant came over about once a week. RP 115, 9-4-07. Mr. Brown admitted that the firearms were his even though he was legally prohibited from having them. RP 116, 9-4-07. Mr. Brown testified that the guns were antiques. RP 116, 9-4-07. Mr. Brown testified that the black powder gun did not fire and was an “1856 Spanish Mikoletto.” RP 116, 9-4-07. The guns were in a locked storage room with other antiques. RP 116-117, 9-4-07.

Mr. Brown testified that the lab items were “old stuff” and that it was all to be thrown away. RP 117, 9-4-07. He testified that he hadn’t “done anything in three, four or five weeks.” RP 117, 9-4-07.

Mr. Brown testified that he had pled guilty to manufacturing methamphetamine and two counts of unlawful possession of a firearm. He admitted that he had been manufacturing methamphetamine at the house

and had used both the anhydrous ammonia method and the red phosphorus method. RP 106, 114, 118-120, 9-4-07. Mr. Brown testified that there was fish food at the house and that he had tried to extract ephedrine from it. RP 118, 9-4-07. Mr. Brown testified that five gallon bucket found at his house contained fish food. Ex. #1, RP 120, 9-4-07. Mr. Brown testified that the bottle of Tri-Hist granules was in his cupboard and it might have had ephedrine in it. Ex. 50, RP 121, 9-4-07. Mr. Brown testified that someone probably brought it to him. RP 121, 9-4-07.

In rebuttal, Officer Boulay testified that Mr. Brown had stated that the material in the bucket in the closet was leftover because someone had come to his residence and had tried to extract "E" from fish food. RP 14-15, 9-5-07. Officer Boulay understood "E" to mean ephedrine. RP 14-15, 9-5-07.

A stipulation was read to the jury stating "that between October 3rd, 2005 and November 1st, 2006, Ms. Marshall reported 8856 16th Street, Seattle as her legal address. RP 26, 9-5-07.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED PURSUANT TO A VALID SEARCH WARRANT.

When a search warrant has been properly issued by a judge, the party attacking the warrant has the burden of proving its invalidity. *State v. Fisher*, 96 Wn.2d 962, 639 P.2d 743 (1982); *State v. Trasvina*, 16 Wn. App. 519, 523, 557 P.2d 368 (1976); *see also, State v. Chapin*, 75 Wn. App. 460, 469, 879 P.2d 300 (1994)(holding that where appellant was challenging the affidavit for the warrant but had not made that part of the record he had failed to meet his burden in establishing the invalidity of the warrant).

A judge's determination that a warrant should issue is an exercise of discretion that is reviewed for abuse of discretion and should be given great deference by the reviewing court. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). *See also State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994)("Generally, the probable cause determination of the issuing judge is given great deference."). Doubts as to the existence of probable cause will be resolved in favor of the warrant. *State v. J-R Distribs., Inc.*, 111 Wn.2d 764, 774, 765 P.2d 281 (1988). Hyper-technical interpretations should be avoided when reviewing search warrant affidavits. *State v. Feeman*, 47 Wn. App. 870, 737 P.2d 704 (1987). The

magistrate is entitled to draw common sense and reasonable inferences from the facts and circumstances set forth in the affidavit. *State v. Yokley*, 139 Wn.2d 581, 596, 989 P.2d 512 (1999); *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975).

A neutral and detached magistrate must determine whether there is probable cause to issue a search warrant. *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997). To establish probable cause the evidence presented must lead a reasonable person to believe both (1) that the item sought is contraband or other evidence of a crime, and (2) that the item sought is likely to be found at the place searched. *Id.* at 508-509 (citations omitted). Thus there must be “nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.” *Id.* The application for a search warrant must be judged in the light of common sense, with doubts resolved in favor of the warrant. *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994).

Where the reviewing court finds some of the evidence contained in the affidavit supporting the complaint for search warrant was obtained in violation of the defendant’s rights, the court then evaluates whether the untainted evidence, standing alone, establishes probable cause. *See State v. Ross*, 141 Wn.2d 304, 314-15, 4 P.3d 130 (2000).\

a. Trial court ruling

In the present case, defendant has not assigned error to any of the findings of fact therefore the findings are verities on appeal. CP 20-24, Appendix A.

Unchallenged findings of fact are verities on appeal and an appellate court reviews only those facts to which the appellant has assigned error. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). An appellate court reviews whether substantial evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993).

Defendant assigns error only to conclusion of law number III which states: There are sufficient facts to establish probable cause to believe that evidence of identity theft could be found at the address of 9024 216th St Ct, Graham, WA.

In this case, Officer Boulay located fake identification with a picture of Monica Shiels in the name of Dawn Hewitt, a credit card statement dated 2/6/06 in the name of Dawn Hewitt listing the mailing address as 9024 216th St. Ct. in Graham, and a receipt with the same last four numbers as the fraudulent credit card showing it had been used within the last three days. CP 20-24, F.O.F. #3a, 3b, 3e, Appendix A. Shiels had used the same Graham address when booked into jail and Officer Boulay

verified that the same Graham address was listed with the Department of Licensing records for Sheils. CP 20-24, F.O.F. #7 Appendix A. The credit card statement was dated two weeks prior to Sheils' arrest and the receipt shows that the credit card was used three days prior to her arrest. F.O.F. #3b, 3e, Appendix A. Shiels obviously had to pick up the statement from the Graham address at some point over the two weeks prior to her arrest. If one credit card statement pertaining to a credit card obtained by identity theft was being sent to the Graham address, it was reasonable to conclude that other such statements could be found at the residence.

Defendant argues that there is no reason to believe that the Graham address was Sheils' "true residence." Brief of Appellant at 16. The credit card statement was evidence that the address was being used to further the use of a credit card that was fraudulently obtained in Hewitt's name. It was an address that Sheil's had used multiple times for a variety of purposes. It is irrelevant whether Shiels actually lived at the residence or was using it only to further criminal activity. There are ample facts supporting the Court's conclusion that there was probable cause to believe that evidence of identity theft could be found at the Graham address.

2. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT DEFENDANT'S CONVICTIONS FOR MANUFACTURING METHAMPHETAMINE.

Defendant alleges that there is insufficient evidence to establish that (1) she was an accomplice to manufacturing methamphetamine. She additionally claims that there was insufficient evidence to support the special verdict that she was armed with a firearm. These arguments fail in the light of the evidence in this case.

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); *State v. Rempel*, 114 Wn.2d 77, 82-83, 785 P.2d 1134 (1990)(citing *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980) and *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). 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 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). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

In this case the State had to prove that the defendant manufactured or assisted Brown in manufacturing methamphetamine. RCW 69.50.401(1), (2)(b). “Manufacture” means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance.” *State v. Todd*, 101 Wn. App. 945, 952, 6 P.3d 86 (2000)

(citing RCW 69.50.101(p)). Where the State presents evidence of methamphetamine lab components and can link those components to the defendant the evidence is sufficient to establish defendant's guilt of manufacturing. *Todd*, 101 Wn. App. at 952.

A person is an accomplice if, with knowledge that it will promote or facilitate the commission of the crime, he solicits, commands, encourages, or requests such other persons to commit it; or aids or agrees to aid such other persons in planning or committing it; or his conduct is expressly declared by law to establish his complicity. RCW 9A.08.020(3)(a)-(b).

A defendant may be shown to be in constructive possession of a controlled substance when he "has dominion and control over either the drugs or the premises upon which the drugs were found." *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971). This dominion and control need not be exclusive. See *State v. Tadeo-Mares*, 86 Wn. App. 813, 816, 939 P.2d 220 (1997). A court considers whether a person has dominion and control over an item by considering the totality of the circumstances. *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). When a person has dominion and control over a premises, it creates a rebuttable presumption that the person has dominion and control over items on the premises. *State v. Cantabrana*, 83 Wn. App. 204, 208, 921 P.2d 572 (1996).

- a. There was sufficient evidence on the record for a rational jury to find that the defendant assisted in the manufacture of methamphetamine.

In this case, there was overwhelming evidence that there was ongoing manufacture of methamphetamine occurring at the Graham residence. There were old receipts for methamphetamine manufacturing related products, empty and full containers of necessary ingredients, and methamphetamine and/or pseudoephedrine was detected in five of the sampled items. Ex. #1 -50, RP 226-227, 233, 237-238, 8-29-07. In addition, co-defendant Brown took the stand and admitted that he had been manufacturing methamphetamine at the residence. RP 106, 114, 9-4-07.

In the instant case there is evidence in the record to show defendant had dominion and control over the residence containing the meth lab. Defendant had a four year relationship with Brown and by his testimony had been at his house “once a week” for the last six months. RP 85-86, 9-4-07. Defendant was there the morning the warrant was served and was found in the master bedroom. RP 32, 8-27-07. Defendant had mail in the master bedroom where officers also found meth lab related items such as empty baggies, a pyrex dish with white residue, two empty Sudafed boxes, a pop bottle fashioned into a smoking device, and a coffee filter with white

residue. Ex. #60-64, 65, RP 133-134, 184, 8-28-07. A duffle bag of women's clothing and defendant's purse was found in the living room. Ex. 44, RP 115, 117-118, 8-28-07. Even considering that Brown tried to minimize the relationship with defendant, the evidence shows that she was more than an occasional overnight guest and it was reasonable for the jury to infer that she exercised dominion and control over the residence.

In addition, defendant had a notebook in her purse that detailed the salting out phase of methamphetamine production. Ex 181A. In the same purse, officers found a baggie containing baking soda. Ex. #43. Baking soda can be used in the red phosphorus method of methamphetamine manufacture which Brown admitted to using. RP 264-265, 8-29-07 RP 106, 114, 118-120, 9-4-07. The notebook also listed references to commercial fish food and to "ammono chloride" fertilizer. Co-defendant Brown testified that he had tried to extract ephedrine from the commercial fish food and that the bucket depicted in Exhibit #1 contained the fish food. RP 106, 114, 118, 120, 9-4-07. Rebuttal testimony from Officer Boulay revealed that Brown had originally attributed that process to "someone else." RP 14-15, 9-5-07. Mr. Boshears testified that item number 5 contained sodium phosphate which is a break down of fertilizer. RP 234 8-29-07.

There were also two items, the Tri-Hist granules and the iodine (ex. #50, 59, RP 80-82 9-4-07) that Mr. Tracy identified as being related to the treatment of horses and were available at Tack Shops. Mr. Tracy also testified that defendant worked for him exercising horses at both his farm and Emerald Downs racetrack. Brown testified that the Tri-Hist granules were something that he had tried to extract ephedrine from and that someone had brought it him. RP 121, 9-4-07. From this evidence, it was reasonable for the jury to infer that defendant was supplying Brown with items he used in manufacturing methamphetamine. Brown testified that no one assisted him in manufacturing methamphetamine however, it is clear that the jury rejected this contention in returning a guilty verdict.

- b. There was sufficient evidence for a rational jury to find that the defendant or an accomplice was armed during at the time of the commission of the manufacturing.

A person is “armed” under the statute “if a weapon is accessible and readily available for use, either for offensive or defensive purposes.” *State v. Schelin*, 147 Wn.2d 562, 567, 55 P.3d 632 (2002)(citations omitted). There must be a nexus between the defendant, the crime, and the weapon. *Id.* at 568.

In *State v. Gurske*, 155 Wn.2d 134, 118 P.3d 333 (2005), the defendant was arrested for driving on a suspended license. In a search

incident to arrest, police found a back pack behind the driver's seat where Gurske had been sitting. *Id.* at 136. Inside the zipped back pack police found a Coleman torch, a holstered handgun under the torch, and three grams of methamphetamine. *Id.* The Supreme Court held that there was insufficient evidence to show that the firearm was easily accessible and readily available for use because in order to reach it, Gurske would have had to exit the vehicle or move over into the passenger seat. *Id.* at 143. The Court further noted that the facts did not give rise to the inference that Gurske could access the weapon from the driver's seat. *Id.*

In *State v. Neff*, while officers were responding to an unrelated call, they smelled a strong ammonia smell and a neighbor directed them to Neff's home as the likely source of the smell. *State v. Neff*, 163 Wn.2d 453, 181 P.3d 819 (2008). Neff agreed to assist the officers in locating the smell but, when they observed items used to manufacture methamphetamine, Neff tried to walk away. As an officer sat him in a squad car, Neff tossed a set of keys under another car. The officers opened the garage door with Neff's keys to investigate the ammonia smell and saw what appeared to be a methamphetamine manufacturing laboratory and a marijuana growing operation. The officers then obtained a search warrant and found two loaded handguns in a locked safe under a desk in the garage, a loaded gun in a tool belt hanging from a garage

rafter, and two surveillance cameras covering the yard and driveway.

Neff, 163 Wn.2d at 456-57. The plurality of the Court concluded that the “facts, together with all inferences favoring the State, [were] enough for a rational person to find beyond a reasonable doubt that Neff was armed.”

Neff, 163 Wn.2d at 464.

Gurske is distinguishable from this case. Here, the uncontroverted testimony showed that the firearms were loaded and very readily accessible. Ex. 86, 87, 123, 194, RP 149-150, 160-161, 188-189, 8-27-07. Both firearms were loaded and the pistol was cocked and in the ready to fire position. Further, these firearms were located in the open in the storage room accessible from the center hallway. Co-defendant Brown had knowledge of where the firearms were located and testified that he kept the firearms in the storage room. RP 116, 9-4-07. It is significant to note that methamphetamine production related items were found throughout the residence, the out buildings, the storage trailer, and in the trash piles outside the residence.

Brown testified that the black powder pistol was an antique and did not fire however, Officer Backus testified that the pistol was a replica, less than 30 years old, and was fully loaded and in the “ready to fire” position with the hammer pulled back. RP 18, 23, 9-4-07. Exhibit 86 depicts the location of the gun in the room. Ex. 86. Appendix B. The photo clearly

shows that the pistol grip sticking up out of a plastic container. Ex. 86. Appendix B. Anyone stepping into the room would have had easy access to the pistol. The location of the firearms in this case is more analogous to *Neff*. By virtue of the verdict, the jury credited Officer Backus' testimony and rejected Brown's characterization of condition of the firearms. It was reasonable for the jury to infer that the firearms were readily accessible. Viewed in the light most favorable to the State, the connection between defendant or an accomplice and the firearms is supported by sufficient evidence.

There is also a connection between the firearms and the manufacturing of methamphetamine. Brown testified that he was the sole resident of the premises and that he was manufacturing methamphetamine on those premises. Brown again tried to minimize the import of the manufacturing items by testifying that it was a "dead lab" and that he hadn't "done anything" for the past several weeks. RP 117, 9-4-07. Again, the jury chose not to credit his explanation and instead credited the testimony of the State's witnesses that manufacturing was taking place. RP 195-196, 8-28-07, 264-265 8-29-07.

The law does not require evidence that a defendant use or attempt to use the firearm to be liable for the enhancement. Rather, the firearm must only be **available** for use. *State v. Schelin*, 147 Wn.2d at 567.

In *State v. Willis*, 153 Wn.2d 366, 103 P.2d 1213 (2005), the Supreme Court held there was sufficient evidence to find that the handgun was easily accessible and readily available for Willis's use, either for offensive or defensive purposes, and that there was a nexus between Willis, the crimes, and the handgun. *Id.* at 375. Willis burglarized an apartment with the help of others. *Id.* at 368-69. Willis kicked in the door and carried electronic equipment out of the apartment and put it in the trunk of the car he was driving. *Id.* Later that night, officers stopped the car Willis was driving. *Id.* When police pulled the car over, Willis took a handgun that was under the driver's seat and handed it to another passenger who placed it under the back seat. *Id.* at 369. Officers located the handgun under the back seat of the car. *Id.* Defendant admitted to handling the gun, but claimed it belonged to someone else. *Id.* There was no evidence that Willis had the handgun on his person when he entered the apartment or while he was committing the theft or that the handgun was anywhere other than in the car at all times relevant.

Under the Supreme Court's holding in *Willis*, a claim that because neither Brown nor defendant was in actual possession of the guns at the time their arrest and the search of the residence and property fails. In *Willis*, the court held that evidence that the gun in a car parked outside the scene of a burglary and theft was "easily accessible and readily available

for Willis's use ... and that there was a nexus between Willis, the crimes, and the handgun." *Willis* at 375. Here, Brown had the fully loaded firearms readily accessible in the storage room easily accessed from the main hallway within his grasp from almost any location in the residence. This forms the nexus between Brown, defendant, their crime, and the firearms.

Looking at the evidence in the light most favorable to the State, there is sufficient evidence to show that Brown was armed while there was ongoing methamphetamine manufacture and that defendant assisted him in the crime. There is both proximity to the weapons and control over the premises where defendant assisted in illegal drug production. Defendant's claim fails.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING NON-HEARSAY TESTIMONY REGARDING THE PRIOR INCONSISTENT STATEMENTS OF CO-DEFENDANT BROWN.

- a. The testimony was impeachment and was not offered to prove the truth of the matter asserted.

Defendant argues that the trial court abused its discretion in allowing hearsay testimony. Defendant is incorrect. The testimony in question was clearly impeachment evidence offered to challenge co-

defendant Brown's credibility and was not offered to prove the truth of the matter asserted.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, *review denied*, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence. A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987).

A court's decision to permit impeachment evidence under ER 607 will be upheld absent an abuse of discretion. *State v. Hancock*, 109 Wn.2d 760, 767, 748 P.2d 611 (1988). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). If the witness testifies to an inconsistent story, the prior statement is admissible to show that the witness is unreliable. *State v. Swagerty*, 98 Wn. App. 452, 463, 989 P.2d 1222 (1999); *State v. Hancock*, 109 Wn.2d 760, 763, 748 P.2d 611 (1988). Evidence offered to impeach is relevant only if (1) it tends to cast doubt on the credibility of the person being impeached, and (2) the credibility of the person being impeached is a fact of consequence to the action. *State v. Swagerty*, 98 Wn. App. 452, 460, 989 P.2d 1222 (1999).

In this case, co-defendant Brown took the stand and testified for the defense. The prosecutor asked Brown who was attempting to extract ephedrine from fish food and Brown replied that he was. The prosecutor then asked the following questions:

Prosecutor: And do you recall telling the officer that someone else was attempting to do that?

Brown: No, I don't. I told them that I was extracting it from fish food.

Prosecutor: So you don't recall telling them that some other person came there to do that?

Brown: No, I don't.

RP 120-121, 9-4-07.

The State then recalled Officer Boulay who testified that he talked with Brown after he had been arrested and advised of his rights. Officer Boulay testified that Brown stated that someone else, who he would not identify, came to his residence and attempted to extract what he called "E" from fish food. RP 14-15, 9-5-07. Officer Boulay understood "E" to mean ephedrine. RP 14 9-5-07. Defense counsel objected to the testimony as hearsay. The court overruled the objection as it was clearly impeachment testimony and not hearsay. RP 14, 9-5-07.

The State properly argued in rebuttal that Brown had made a statement regarding who was extracting ephedrine from the fish food that was inconsistent with his testimony at trial. RP 88, 9-5-07. Defendant did not object. The testimony was not offered for the truth of the matter asserted. The court did not abuse its discretion in allowing the State to impeach Brown.

b. The testimony did not result in a trial irregularity.

Defendant argues that the impeachment testimony given by Officer Boulay resulted in a trial irregularity and deprived defendant of a fair trial and cites *State v. Escalona*, 49 Wn. App. 251, 742 P.2d 190 (1987) in support of this proposition. Appellant's Brief at 31. The case at bar is clearly distinguishable from *Escalona*.

In *Escalona*, the Court of Appeals held the trial court abused its discretion by not declaring a mistrial after the victim testified in front of the jury that Escalona had a record of having stabbed someone. The trial court had granted a motion in limine to exclude evidence of Escalona's prior conviction. Although the trial court instructed the jury to disregard the testimony of the prior offense, the jury found Escalona guilty after the court denied the motion for a mistrial. The Court of Appeals reversed the conviction because it was concerned that the jury might have used the information of Escalona's prior conviction to conclude he had acted on this occasion in conformity with the assaultive behavior he had demonstrated in the past. *Escalona*, 49 Wn. App. at 256-57.

The defendant has the burden of demonstrating the impropriety of the remarks and their prejudicial effect. *State v. Guizzotti*, 60 Wn. App. 289, 803 P.2d 808 (1991). Misconduct can be so prejudicial that it cannot

be cured by an objection or a curative instruction. *State v. Stith*, 71 Wn. App. 14, 23, 856 P.2d 415 (1993). “[R]eversal is not required if error could have been avoided by a curative instruction, but the defense failed to request one.” *Guizzotti*, 60 Wn. App. at 296-97.

In this case, the State did not elicit prejudicial testimony regarding defendant’s prior conviction for unlawful possession of anhydrous ammonia and then ask the jury to find her guilty because of conformity with her prior conviction as in the *Escalona* case. The State properly challenged Brown’s credibility.

In addition, defendant has failed to demonstrate that any prejudice resulted from the impeachment testimony. Defendant contends that the State was asking the jury to infer that defendant was the “some one else” that attempted to extract the ephedrine from the fish food. Appellant’s Brief at 30. There was additional evidence on the record that Brown had been assisted by another during the manufacturing that occurred at his residence.

Brown testified that another item was likely provided by a second party. In unchallenged testimony, Brown told the jury that he had also tried to extract ephedrine from the Tri-Hist granules that were found in the kitchen. When asked where it came from, Brown testified that “probably bought it from somebody or somebody brang (sic) it to me.” RP 121 9-4-

07. It was reasonable for the jury to infer that a product related to horses could have been supplied by defendant.

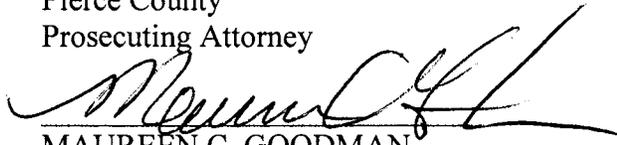
In addition, the State attacked Brown's credibility regarding his testimony given regarding other evidence. Brown minimized the condition of the firearms, he minimized the import of the manufacturing items by calling it a "dead lab" and that he hadn't "done anything" in weeks. The evidence the State presented demonstrated that the guns were not "antiques" incapable of firing, that methamphetamine and ephedrine was found in five of the sampled liquids, and that two items tested positive for ammonia. The State challenged Brown's credibility on several points in his testimony and his credibility was properly an issue for the jury. There was no trial irregularity and defendant's convictions should be affirmed.

D. CONCLUSION.

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

DATED: DECEMBER 12, 2008.

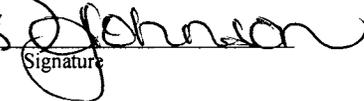
GERALD A. HORNE
Pierce County
Prosecuting Attorney



MAUREEN C. GOODMAN
Deputy Prosecuting Attorney
WSB # 34012

Certificate of Service:

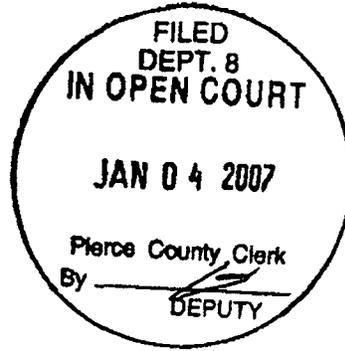
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/12/08 
Date Signature

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DIVISION II
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STATE OF WASHINGTON
BY 
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APPENDIX "A"

Findings and Conclusions
on
Admissibility of Evidence CrR 3.6



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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY
STATE OF WASHINGTON,

Plaintiff,

vs.
ZOE ANN MARSHALL
(06-1-01386-9),

Defendant.

CAUSE NO. 06-1-01386-9

FINDINGS AND CONCLUSIONS ON
ADMISSIBILITY OF EVIDENCE CrR
3.6

THIS MATTER having come on before the Honorable Brian Tollefson on the 16th day of
November, 2006, and the court having rendered an oral ruling thereon, the court herewith
makes the following Findings and Conclusions as required by CrR 3.6.

UNDISPUTED FACTS

On 02-23-2006 Officer Boulay of Sumner Police obtained a search warrant for 9024
216th ST CT, Graham, WA in an investigation of identity theft. While serving the search warrant
he found evidence of possible methamphetamine manufacture at the address and obtained and
submitted an addendum to the warrant to search for evidence of methamphetamine
manufacturing as well. The addendum was approved as well. The facts relevant to this motion
are the contents of the probable cause declaration to the search warrant and are part of the record
in this case and are hereby incorporated by reference.

ORIGINAL

06-1-01386-9

FINDINGS OF FACT THAT PROVIDE THE BASIS FOR THIS RULING

1 I. Standing of Zoe Marshall

2 The court finds that Zoe Marshall was an overnight guest of Ronald Brown on the
3 night before the search warrant was served.

4 II. Suppression of Search of the House

5 The court finds that the probable cause declaration contains the following facts
6 that:

- 7
- 8 1. On 02-20-2006 Sumner Police Officer Boulay pulled a vehicle over for an
9 infraction and ultimately arrested the driver of the vehicle, Monique Shiels, for driving
10 without a valid license, and making a false statement to an officer.
 - 11 2. Officer Boulay searched the vehicle incident to arrest and found numerous items
12 of evidence that appeared to relate to the crime of identity theft.
 - 13 3. Several specific items relevant to this motion were found. They include:
 - 14 a. apparent fake ids, including at least one with Shiels's photo on it in the
15 name of Dawn Hewitt; a real person contacted by Officer Boulay
 - 16 b. a credit card statement in the name of Dawn Hewitt dated 02-06-2006 for
17 credit card number 4266 9240 0089 9403 that had a mailing address of 9024 216th
18 ST CE E, Graham, WA
 - 19 c. five blank checks in Hewitt's name on Hewitt's actual checking account,
20 but with an address slightly different than Hewitt's actual address
 - 21 d. a receipt for purchases at Fred Meyer on 02-16-06 using a credit card
22 ending with the four digits 0854
23
24
25

06-1-01386-9

1 e. two receipts for purchases at Macy's on 02-17-06 one using a credit card
2 with the last four digits 0854 and the other using a credit card with the last four
3 digits 9403

4 4. Officer Boulay contacted Dawn Hewitt about the possible id theft. Hewitt
5 advised him that she checked on her credit and showed that two accounts had been
6 fraudulently opened in her name, one under the account number 0266 9240 0089 9403,
7 the other under account number 4266 9240 0090 0854; Hewitt also advised officer
8 Boulay that a fraudulent \$500 check had been cashed on her account.

9 5. Some address would be necessary to establish credit.

10 6. Officer Boulay contacted the registered property owner of the address, Marilyn
11 McCarrell. McCarrell advised Officer Boulay that she did not live at that address.
12 McCarrell stated that she owns the property but her son, Ronald Brown, lives there.
13 McCarrell stated that as far as she knows nobody else lives there.

14 7. Officer Boulay confirmed that Shiels had listed 9024 216th ST Ct as her address
15 during booking and as her address with the Department of Licensing. There is no
16 evidence of any other address associated with Shiels.

17 8. Officer Boulay obtained a warrant to search for evidence of identity theft on 02-
18 23-06 and served that warrant on 02-24-06.

19 9. While serving the warrant to search for evidence of identity theft, officers
20 observed evidence of the manufacture of methamphetamine;

21 10. Officers prepared an addendum to the search warrant allowing them to search for
22 evidence of methamphetamine manufacture, had it approved by the court and served it on
23 02-24-2006.
24
25

06-1-01386-9

1 11. Among the items found and searched was Marshall's purse which was located in
2 the living room. It contained a notebook with notes the officers believed related to the
3 manufacture of methamphetamine. Marshall's purse was searched after officers first
4 served the warrant for identity theft, but before the officers obtained the addendum to the
5 warrant to also allow them to search for evidence of methamphetamine manufacture.

6 12. The parties agree that Monique Shiels and Zoe Marshall are two different real
7 persons.

8 REASONS FOR ADMISSIBILITY OR INADMISSIBILITY OF THE EVIDENCE

9 I. Under the law, the burden is on the party challenging the warrant, here the defendants, to
10 show that it should not have issued. The issuance of the search warrant is reviewed for abuse of
11 discretion.

12 II. The court finds that based upon the fact that Zoe Marshall was an overnight guest of
13 Ronald Brown she had an expectation of privacy in the residence and has standing to challenge
14 the search.

15 III. There are sufficient facts to establish probable cause to believe that evidence of identity
16 theft could be found at the address 9024 216th ST CT, Graham, WA.

17 IV. Once the officers served the warrant and were searching for evidence of identity theft,
18 they observed evidence of methamphetamine manufacture. The officers prepared an addendum
19 to the warrant, which contained sufficient facts to establish probable cause to search for and seize
20 evidence of methamphetamine manufacture.
21

22 V. Small areas and containers may be opened to look for documents and drugs.

23 VI Zoe Marshall's purse was at the scene and subject to search under the warrant where it
24 could contain documents relevant to identity theft including receipts and/or false identification,
25

06-1-01386-9

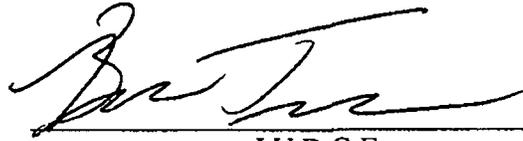
etc., and where after the addendum to the warrant was approved, the purse could contain methamphetamine, pseudoephedrine, receipts and/or other evidence relative to the manufacture of methamphetamine.

RULING

I. The court denies the motions of defendants Brown and Marshall to Suppress the evidence.

II. The court declines at this time to consider two additional defense suppression motions, one related to evidence of prior criminal history, the other related to evidence related to Loompanics, Inc. as not sufficiently relevant. Both those matters shall be reserved to be heard as motions *in limine* by the trial court.

DONE IN OPEN COURT this 4th day of January, 2007.



JUDGE

Presented by:



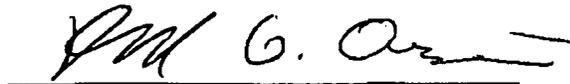
STEPHEN D TRINEN
Deputy Prosecuting Attorney
WSB # 30925

FILED
DEPT. 8
IN OPEN COURT

JAN 04 2007

Pierce County Clerk
By _____
DEPUTY

Approved as to Form:



DAVID G. ARGANIAN
Attorney for Defendant Brown
WSB # 18827

APPENDIX “B”

Exhibit