

COURT OF APPEALS NO. 44452-2-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Appellant,

v.

TIMOTHY FAGER and STEVEN FAGER,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR JEFFERSON COUNTY

The Honorable Craddock Verser, Judge

RESPONSE BRIEF OF CO-RESPONDENT TIMOTHY FAGER

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A. ISSUES IN RESPONSE

1. The State filed a motion in limine to exclude Dr. Woodford's testimony on the basis that he lacked the proper expertise to testify. The trial judge reserved ruling until he could hear the testimony. At the hearing, Dr. Woodford offered his opinions without objection. Because there was no objection, the trial court was not called upon to make a ruling. Without a ruling on the admissibility of the testimony, there is no ruling for this Court to review. Did the State fail to preserve any challenge to Dr. Woodford's testimony?

2. The trial court is granted great discretion in admitting expert testimony, particularly when the case is tried to the bench. For over 20 years, Dr. Woodford has testified as an expert in marijuana. While some courts have disagreed with his conclusions, his testimony regarding marijuana has never been excluded on the basis that he was unqualified to testify. Even assuming the State preserved its ER 702 objection, has the State proven that no reasonable judge would have admitted Dr. Woodford's testimony?

3. The State argues that no "rational person" would have accepted the testimony of the defense witnesses over that of the OPNET officers regarding the use of a filtration system. Given that the appellate

courts will not evaluate witness credibility or re-weigh the evidence, is this a frivolous argument by the State?

4. The State filed a lengthy motion to exclude Dr. Woodford's testimony based on his perceived lack of qualifications. The State never requested a *Frye*¹ hearing and never identified the specific scientific principle Dr. Woodford relied upon that was not accepted within the relevant scientific community. Should the State be permitted to raise a *Frye* challenge for the first time on appeal?

5. While Dr. Woodford's conclusions were not well known, his conclusions were based on solid scientific principles. Is a *Frye* hearing necessary where the conclusions may be novel but the scientific principles behind those conclusions are not novel?

6. After listening to Detective Grall testify, and observing his demeanor on the stand, the trial court determined that Detective Grall had demonstrated a reckless disregard for the truth. The court further explained that if there had been a single instance of untruthfulness, the court would be more willing to view it as a simple mistake. But given the multiple times and multiple locations from which the detectives claimed to have smelled something which they could not have done, the court found a

¹ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)

reckless disregard for the truth. Did the court abuse its discretion in finding a “reckless disregard for the truth” in the *Franks*² hearing?

7. Where the warrant for the thermal image was based largely upon the detectives’ claimed “nose hits” of marijuana, did the trial court err in suppressing the thermal image results?

8. Where the existing evidence, other than the claimed “nose hits” of marijuana, did not even rise to the level of reasonable suspicion, did the trial court correctly conclude there was no probable cause for the warrant once the smell evidence was removed from the affidavit?

B. STATEMENT OF THE CASE

On October 9, 2009, the Jefferson County Prosecutor charged brothers Steve and Tim Fager with one count of Manufacturing Marijuana and one count of Possession with Intent to Deliver Marijuana. CP 1-2, 197-198, RCW 69.50.401(1). The charges were based on marijuana found in a building located in rural property at 115 Freeman Lane. The two cases were joined together for purposes of trial. CP 11-12.

The Fagers brought a joint motion to suppress and/or dismiss, pursuant to CrR 3.6 and CrR 8.3(b). CP 206-1429; CP 65; The motion to suppress included a *Franks* motion. The *Franks* motion focused on the statement in the search warrant affidavit that on multiple occasions,

² *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)

OPNET officers were able to smell growing marijuana emanating from a building, which was located anywhere from 130 feet to 306 yards away.

The hearings began on August 15, 2012 and ran for nine non-consecutive days. On September 24, 2012, the parties delivered final argument on the motions. The court then took the matter under advisement, before issuing an oral ruling on December 19, 2012 in favor of the defense. Formal findings were presented and signed on January 9, 2013. CP 161-175.

In granting the *Franks* motion, the trial court concluded that OPNET officers had repeatedly made false statements regarding their ability to smell marijuana, and that the false statements were made with a reckless disregard for the truth. CP 172. After striking the smell evidence from the warrant application for the thermal image, the court concluded that the thermal image search warrant was not supported by probable cause. CP 174. Similarly, once the smell evidence was stricken from the Freeman Lane search warrant affidavit, that search warrant was no longer supported. CP 174. Accordingly, all evidence procured as a result of the 115 Freeman Lane search warrant was suppressed. CP 175. The court signed an order of dismissal based on suppression of evidence. CP 176.

Additionally, the court found governmental mismanagement due to the destruction of the thermal image tape under questionable circum-

stances. CP 173-74. This provided an independent basis for suppressing evidence relating to the thermal image, and all evidence gained as a result of the thermal image search warrant. CP 173-74.

The State filed a timely appeal (CP 178-193), but did not order a complete set of transcripts from the hearing. Unable to convince the State to order more of the record, the defense noted a RAP 9.2 motion to compel the State to produce a more complete record. Supp CP __ (sub 150, 4/25/13). The trial court agreed with the defense, and directed the State to produce a more complete record. Supp CP __ (sub 150, 4/25/13). Additional transcripts were ordered. This has resulted in two sets of sequentially numbered transcripts, the original and a supplemental, which will be referred to, respectively, as “RP” and “SRP.”

This Response Brief will address the State’s arguments relating to Dr. Woodford and the trial court’s finding of “reckless disregard for the truth” by OPNET officers. So as to avoid needless duplication, the facts relating to these arguments will be set forth in each of the respective argument sections.

C. ARGUMENT IN RESPONSE

1. THE STATE FAILED TO PRESERVE ANY OBJECTION TO DR. WOODFORD'S TESTIMONY.

Dr. Woodford testified as to the chemical composition of the marijuana odor bouquet, and how the combination of atoms with a different molecular weight limited the distance that odor could travel. RP II 74. The State did not object. Dr. Woodford testified as to the distances that the marijuana odor could travel under optimum circumstances. He explained that at 30 feet, it was possible for some people to smell growing marijuana, at 40 feet it was more questionable, at 50 feet an individual probably could not smell anything, and by 60 feet it simply was not possible. RP II 57-59, 70-76. The State did not object to this testimony. Dr. Woodford discussed an Alaskan study suggesting that the average range at which an officer could smell marijuana was 40 feet. RP II 63. Again there was no objection. Dr. Woodford unequivocally stated that the officers could not possibly have smelled marijuana at the distances claimed. RP II 69-74. The State did not object.

The State now argues that this evidence was inadmissible under ER 702 and *Frye*. It is well established, however, that these issues cannot be raised for the first time on appeal. RAP 2.5(a); *In re Marriage of Wehr*, 165 Wn. App. 610, 267 P.3d 1045 (2011) (challenge to expert testimony

under ER 702 will not be considered for first time on appeal); *State v. Wilbur-Bobb*, 134 Wn. App. 627, 141 P.3d 665 (2006) (*Frye* objection not properly preserved). In order to avoid this shortcoming, the State asserts that it “had a standing objection to Dr. Woodford’s testimony because it had moved in limine.” BOA a5 28, fn 11. But that is an incorrect statement of law. A motion in limine does not preserve the issue unless the judge issues a final ruling on the motion. *Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 416-417 (2002), *rev. denied* 149 Wn.2d 1034 (2003). As this Court explained in *Eagle Group*, “when a trial court makes a tentative ruling before trial, error is not preserved for appeal unless the party objects to admission of the evidence when it is offered, allowing the court an opportunity to reconsider its prior ruling. *Id.* In the absence of a final ruling, the opposing party is required to object so that the court can issue a proper ruling after hearing the testimony. *Id.*”

Applying that rule here, the court did not even make a tentative ruling. Rather, the court made it abundantly clear that it was reserving ruling on the admissibility of Dr. Woodford’s testimony. Indeed, the trial prosecutor himself fully acknowledged that he anticipated the court would reserve ruling on the issue. The prosecutor told the judge, “Last is my favorite part, is Dr. Woodford. . . . And I know you’re going to reserve it, but I want to make sure you’re really clear on the State’s position on this.”

(8/15/12 I-41-42) (emphasis added). Defense counsel asked why, if the prosecutor understood the issue is to be reserved, the parties were going to spend court time arguing about it now. The prosecutor responded that it was because he wanted the judge to know that “I don’t think he’s [Dr. Woodford] the person that people think he is.” *Id.* at 42. The judge again reminded the prosecutor that he had read the State’s memorandum on Dr. Woodford. The prosecutor then launched into his complaints regarding Dr. Woodford’s lack of qualifications. *Id.* at 42-43. At the end of his argument, the court informed the prosecutor that, as with the other motions in limine, the court was not going to rule at this time.

The Court: Well, to me, the defense is going to have to lay a foundation for his testimony when he’s here. And so, when that time comes, I’ll have to hear it and determine whether his testimony is relevant or not.

Mr. Schrawyer: I suspect the State’s going to have a long - a request for voir dire before we ever get to that stage.

The Court: Okay.

Id. at 44-45.

As promised, the State did voir dire Dr. Woodford during his direct examination. 8/20/12 at II-48-52. At the end of the voir dire, however, the prosecutor simply stated, “Thank you, that answers my question. I have no further questions, Judge.” *Id.* at 52. The State did not lodge an

objection to the testimony. In failing to object, the State signaled to the trial court that while it would dispute Dr. Woodford's conclusions, there was no objection to the testimony. Without an objection, the judge was not called upon to make a ruling on the admissibility of this evidence.

This case reveals one of the reasons why objections are necessary when a ruling has been reserved. It was clear from the prosecutor's motion in limine that he had not interviewed Dr. Woodford and had serious misconceptions regarding his background and training. For instance, the State's written motion in limine claimed, "There is nothing to show he had any experience with marijuana detection other than what he may have read from others." CP 2299. When Dr. Woodford testified that he had extensive experience (37 years), much of the prosecutor's initial objection was gutted. RP II 38-52. If the State still wished to preserve this issue in light of the testimony from Dr. Woodford, it was obligated to alert the trial court to that objection. *See, Ahmad v. Town of Springdale*, 178 Wn. App. 333, 344, 314 P.3d 729(2013) ("An objection would have given the trial court an opportunity to address the issue and correct any possible errors.") The failure to object suggests the prosecutor came to understand that the testimony was admissible and the only remaining issue was whether the court would accept or reject that expert's conclusions.

Furthermore, the rule requiring an objection is “supported by considerations of fairness to the opposing party.” *State v. Avendano-Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995). Had the prosecution lodged a timely objection, and had the court sustained it, the defense would have been on notice that it needed to lay more foundation. But the State did not do so. As such, there was no need or obligation on the part of the defense to present additional evidence.

During the motions in limine, the prosecutor acknowledged his awareness that he would be required to object at the time the testimony was introduced. During those motions, the trial judge repeatedly stated that he would reserve ruling until he heard the testimony. *8/15/12 at RP I-12, 29, 32, 34, 36 & 41*. After one such ruling, the prosecutor responded:

Mr. Schrawyer: Judge, I hate to say this, but Division Two just decided a case in which a defense attorney . . . was denied a motion in limine and the purpose of that is - of the motion in limine is to hold the objection so it doesn't have to be repeated through the trial. Well, they held it against the defense attorney, because he didn't continue to object. So I will raise —

The Court: **Raise your objections during the proceedings.**

RP I-11-12 (emphasis added). It is clear that the prosecutor knew he had to object, and it is equally clear that the trial court was not going to make

any rulings in the absence of an objection at the time the evidence was presented.

The State cites to *Millican v. N.A. Degerstrom*, 177 Wn. App. 881, 313 P.2d 1215 (2013) for the proposition that merely presenting a motion in limine preserves the issue. BOA at 28, fn 11. But *Millican* does not say that. The issue in *Millican* was whether the trial court's ruling on a motion in limine was a final ruling. The moving party in that case had specifically asked the judge whether the motion in limine was granted, denied or reserved for later ruling, and the court responded that the motion was denied. *Id.* at 889. The court of appeals found that this was sufficiently final to preserve the issue on appeal. By contrast, in our case, the trial court reserved ruling on the admissibility of Dr. Woodford's testimony. *Millican* does not support the State's argument.

The State did not object to Dr. Woodford's testimony at the hearing. Without an objection, the trial court was not called upon to make a ruling. And without a ruling, there is nothing for this Court to review. The State's argument fails.

2. THE COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING DR. WOODFORD'S TESTIMONY UNDER ER 702.

The State argues that Dr. Woodford's testimony was inadmissible under ER 702. As set forth above, the State failed to preserve this argu-

ment when it did not object to Dr. Woodford’s testimony at the time of the hearing. But even if the objection had been preserved, the State still fails to establish an abuse of discretion in admitting this testimony.

a. ER 702 and the standard of review.

“Generally, a party may introduce expert testimony as long as the expert is qualified, relies on generally accepted theories, and assists the trier of fact. *In Marriage of Katare*, 175 Wn.2d 23, 38, 283 P.3d 546 (2012) (citing to ER 702). The trial court has “wide discretion” in determining the admissibility of expert testimony. *Martini v. Post*, 178 Wn. App. 153, 163, 313 P.3d 473 (2013). The exercise of that discretion will not be reversed except for a very plain abuse thereof. *Hill v. C&E Construction Co*, 52 Wn.2d 743, 746, 370 P.2d 255 (1962). “Discretion is abused only when no reasonable person would have decided the issue as the trial court did.” *State v. Russell*, 125 Wn.2d 24, 78, 882 P.2d 747, 781 (1994). Abuse is more likely to be found when a court excludes expert testimony, than when such testimony is admitted. Robert Aronson, *Law of Evidence in Washington* (4th Ed.), Section 8.03(4).

b. The State mischaracterizes Dr. Woodford’s education and experience.

The State’s primary argument is that Dr. Woodford was not qualified to testify as an expert. But in making this argument, the State misrep-

resents Dr. Woodford's background and expertise. According to the State, Dr. Woodford "has no education in the olfactory senses of human beings." BOA at 29. This is inaccurate. Dr. Woodford described the focus of his Ph.D in chemistry:

Well, I was on a scholarship, partially, by Coca-Cola to be a flavors and fragrance chemist. And my specialty was naturally occurring products. And these are materials formed in nature, particularly in plants. And it's a wide section of plant chemistry called tureen chemistry. And the tureens form the odors of - of plant materials, and they end up in our food—food and drinks and stuff like that. And so I did research analyzing odors, tureen odors, and synthesizing tureen odors. And I got my Ph.D for that.

VRP II-39 (emphasis added). Dr. Woodford continued his education with two years of post-doctorate work in medicinal chemistry, which included the study of toxicology, pharmacology, body metabolism and biology. Because a formal forensic chemistry degree had not yet been established, this was the normal path into forensic work. RP II-40-42

One of Dr. Woodford's professors arranged for him to spend time working in the Scotland Yard Laboratories in London, which is where he began his study of marijuana. RP II 42. Upon returning to the United States, Dr. Woodford continued to follow up with forensic work. By the mid-1970s, he had begun work as an independent examiner in the Georgia Crime Lab. One of his clients at that time was a farmer charged with a marijuana grow operation. RP II 43. As a result of his work on that case,

Dr. Woodford published a peer-reviewed article debunking one of the then current tests for marijuana (a test which has since been discontinued). RP II 43-44.

Dr. Woodford's education was furthered when he was allowed to visit a "marijuana farm" run by the U.S. Government and the University of Mississippi. *Id.* at 45-46. By this point, his research had begun to focus on the chemical composition of cocaine's odor, and the odor of marijuana. RP II 47.

Although much of Dr. Woodford's work has been done in a lab, he also has conducted research and studies in the field. RP II 49-50. One such time was in Northern California, where the judge ordered the DEA to maintain a grow operation they'd seized so that Dr. Woodford could conduct tests on the property. This included tests to see to what extent the marijuana could be smelled outside the periphery of the marijuana field. RP II 49-50. Dr. Woodford found that no one could smell the marijuana beyond fifty feet. This was one of his early experiments and piqued his interest in pursuing this line of research. RP II 50. In other informal outdoor experiments with police, prosecutor's and newspapers, the distance was most often less. *Id.*

In arguing that Dr. Woodford's testimony should not have been admitted under ER 702, the State argues that Dr. Woodford's credentials

only include laboratory work. BOA at 30. As described above, that is not accurate. While much of Dr. Woodford's work has been in the laboratory, he has also worked in the field. More importantly, the State's observation about lab work is simply irrelevant to the ER 702 analysis. It does not matter whether Dr. Woodford gained his knowledge and expertise in the laboratory or in the field. Either way, he gained the necessary expertise to testify on this subject. While some fact finders might be more impressed with field work than laboratory work, such considerations go to the weight of the evidence, not its admissibility. *See Keegan v. Grant County PUD*, 34 Wn. App. 274, 661 P.2d 146 (1983) ("Once the basic requisite qualifications are established, any deficiencies in an expert's qualifications go to the weight, rather than the admissibility of his testimony.")

c. Even the cases cited by the State support the ruling that Dr. Woodford is an expert in the field of marijuana.

In attempting to show that Dr. Woodford was unqualified to testify as to the smell of marijuana, the State cites to *State v. Remboldt*, 64 Wn. App. 505, 827 P.2d 282 (1992). The State characterizes this as a case in which the appellate court rejected Dr. Woodford's expert opinion. BOA at 33. But the State has misread the case.

In *Remboldt*, a magistrate issued a warrant based on an officer's smell of marijuana coming from a house. *Id.* at 507. Dr. Woodford was

called as a “chemist and expert witness” for the defendant. *Id.* at 508. He was allowed to testify that the deputy could not have smelled marijuana from the distance claimed. Dr. Woodford also testified that the officer may have been smelling the juniper bushes out in front of the house, which have a similar odor as immature marijuana plants. *Id.* This was referred to as “selective perception.” The trial court was impressed with Dr. Woodford’s opinions and agreed that the detective could not smell marijuana from that distance. The trial court found that while the detective thought he smelled marijuana, he probably smelled the juniper plants instead. *Id.* at 508-09. Accordingly, reasoned the trial court, the warrant was not supported by probable cause. *Id.*

On Appeal, Division III did not disagree with Dr. Woodford’s opinions or find that he lacked the expertise to testify as to the distance marijuana can be perceived. The appellate court did find, however, that Dr. Woodford’s opinions did not constitute legal grounds to challenge the warrant. Specifically, a simple mistake will not invalidate the warrant, and that the issuing magistrate was entitled to rely upon the expertise of the detective. *Id.* at 509-511. That stands in sharp contrast to our case, where the court specifically found that the officers did not make a simple mistake.

What is particularly notable about *Remboldt* is that it refutes the State's claim that Dr. Woodford has no recognized expertise as to the smell of marijuana and the distances it travels. *Remboldt* reveals that even 20 years ago Washington trial courts recognized Dr. Woodford as an expert in the field of marijuana.

The State's reliance upon *State v. Easton*, No. 28998-9-I (Wn. App. 2004) suffers the same fate. In that unpublished case, the trial court specifically found that "Dr. Woodford is an authority concerning the odor of marijuana and how marijuana plants emanate odors." *Id.* at 9. While acknowledging Dr. Woodford's expertise, the trial court accepted the detective's opinions over that of Dr. Woodford. That credibility call was upheld on appeal. For purposes of our appeal, however, the key issue is not whether the trier of fact ultimately accepted Dr. Woodford's opinion, but whether Dr. Woodford was a recognized marijuana expert for purposes of ER 702. As with the *Remboldt* decision, *State v. Easton* undercuts the State's argument that no reasonable judge would recognize Dr. Woodford as an expert in marijuana odor detection.

In claiming that Dr. Woodford should not have been allowed to testify, the State cites to two other cases in which the finder of fact did not give much weight to Dr. Woodford's opinions. In doing so, however, the State again loses sight of the inquiry on appeal. The issue is not what

weight should be given to Dr. Woodford's testimony, as that is an issue of credibility for the trial court. *See, Johnston-Forbes v. Matsunaga*, 177 Wn. App. 402, 408, 311 P.3d 1260 (2013), *review granted* 177 Wn App. 402 (2014) ("Washington appellate courts generally do not weigh expert testimony.") The only issue on appeal is whether the court abused its discretion in admitting Dr. Woodford's testimony. In other words, has the State proven that no reasonable judge would have allowed Dr. Woodford to testify? Significantly, in each case cited by the State, Dr. Woodford was allowed to testify as an expert regarding the smell of marijuana. This is because once the evidence passes a threshold determination under ER 702, "evidence is tested by the adversarial process within the crucible of cross-examination, and adverse parties are permitted to present other challenging evidence." *Hickok-Knight v. Wal-Mart Stores*, 170 Wn. App. 279, 317, 284 P.3d 749 (2012).

Some courts have accepted Dr. Woodford's conclusions and some have not. Some of these cases were set forth in the defendants' response to the State's motion in limine to exclude Dr. Woodford. See CP 41-118, 2371-2391. Those cases will not be repeated here, other than to note that the State has mischaracterized the trial court's reasoning in *U.S. v. Roland Arsons*, 1:05-cr-243 AWI (East Dist. Cal. 2007).

The State suggests that the trial court in *Arsons* favored other witnesses' testimony over Dr. Woodford's. BOA at 31. This is inaccurate. In that case, there was competing expert testimony from two Ph.Ds as to whether the odor of immature plants could have been perceived by the officer. In his findings, the judge concluded that although both experts were qualified, Dr. Woodford was more credible on this issue:

So I'm not going to disregard Dr. Rost's declaration, but I do find that on balance, Dr. Woodford's declaration – two declarations, the original and supplemental and testimony, at least from the scientific standpoints are more convincing, at least in terms of the marijuana.

...

So in this case, I am going to conclude that the marijuana plants in this case were not of a sufficient maturity level that they would emanate the characteristic odor of marijuana.

CP 43-44. While the trial court ultimately decided that the officers had probable cause to arrest as a result of marijuana in a backpack, the trial court certainly did not elevate other testimony over that of Dr. Woodford.

It is not altogether clear how the State can argue that no reasonable judge would have admitted Dr. Woodford's expert testimony, when every case cited by the State allowed Dr. Woodford to testify. CP 26-31. But even if there were cases where his testimony was excluded, "the broad standard of abuse of discretion means that courts can reasonably reach dif-

ferent conclusions about whether, and to what extent, an expert's testimony will be helpful to the jury in a particular case.” *Stedman v. Cooper*, 172 Wn. App. 9, 18, 292 P.3d 764 (2012).

d. Dr. Woodford’s testimony and conclusions were based on established scientific principles.

Dr. Woodford testified at length regarding the molecular makeup of what we perceive as the odor of growing marijuana. He discussed the 68 different molecules that compromise the marijuana odor, and how each needs to be present to create the recognized “marijuana bouquet.” RP II 51-55. He further explained that each of these molecules have a different molecular weight, meaning that they are pulled to the ground by gravity at different rates. Given these vastly different weights, the distance they can travel as a cohesive unit is not far. *Id.* Additionally, because even the lightest molecule within this marijuana odor bouquet is heavier than air, this heaviness prevents the marijuana odor from rising very high in the air. RP II-55.

Dr. Woodford then contrasted this marijuana bouquet with certain single odor molecules. As the name implies, these are odors that are created by a single molecule. RP II 52-55. For these odors, disentanglement is not a limiting factor. Additionally, many of these single molecule odors, such as that from a paper mill, are able to attach to a water mole-

cule, thus allowing them to travel vast distances. *Id.* By contrast, the marijuana bouquet is unable to attach itself to water, thereby limiting the distance it can travel. *Id.* at 53. All of this is basic chemistry, upon which Dr. Woodford was more than qualified to offer an opinion.

After determining the basic nature of the growing marijuana odor bouquet, and its short life span, Dr. Woodford was able to determine the narrow range the odor travels by conducting tests using a length of breathing tube. RP II at 53-55. The tube was useful in eliminating outside influences that could prematurely disentangle the various molecular components of the marijuana bouquet. *Id.* Based upon these tests, Dr. Woodford determined that the odor bouquet begins to dissipate within approximately 30 feet. From 30 to 50 feet the trace odor completely disappears. RP II 57-58, 70-76.

The State also argues that Dr. Woodford's testimony should not have been admitted, because he relied upon photographs supplied by the Fagers rather than personally inspecting the growing plants (which, of course, were no longer growing plants by the time Dr. Woodford became involved). BOA at 33. But that challenge goes to the weight of his testimony, not admissibility. *See, Tokarz v. Ford Motor Co*, 8 Wn. App. 645, 653, 508 P.2d 1370 (1973) (thoroughness of an expert's examination is a matter of weight for the jury). There is no requirement under ER 702 for

the expert to personally review the subject of his testimony. *See, In re Marriage of Katare*, 175 Wn.2d at 39 (“That an expert’s testimony is not based on a personal evaluation of the subject goes to the testimony’s weight, not to its admissibility.”); *State v. Roberts*, 142 Wn.2d 471, 522, 14 P.3d 713, (2000) (Although blood splatter expert did not travel to crime scene, she reviewed photographs of the crime scene so that she “based her testimony on these personal observations.”).

e. The expert testimony aided the trier of fact.

A judge, as trier of fact, is in the best position to know whether the expert testimony would be helpful. *See, State v. Massey*, 60 Wn. App. 131, 144, 303 P.2d 340 (1990). Here the trial court, as finder of fact, concluded that Dr. Woodford’s testimony would be helpful in deciding this suppression issue. There is no suggestion that the trial court abused its discretion in reaching this conclusion.

The State presents various arguments as to why the court should not have accepted Dr. Woodford’s conclusions. But that train left the station at the time of the *Franks* hearing. The credibility battles are over. The State’s arguments are meritless.

3. THE COURT'S FINDING REGARDING THE FILTERS WAS CORRECT.

The State argues that the trial court erred when it accepted Dr. Woodford’s testimony about the filtration system. But because the State

did not object to this testimony at the hearing, the State cannot object to it now on appeal.

The record reveals that the State lodged an objection when Dr. Woodford began to testify about charcoal filtration. RP II-77. The State claimed that Dr. Woodford had no expertise in this area. The Court asked the defense to lay a foundation. *Id.* Defense counsel then asked Dr. Woodford a series of questions about his familiarity with charcoal filters. Dr. Woodford described his extensive use of charcoal filters and charcoal canisters to collect air from marijuana plants. *Id.* at 78. The reason he uses charcoal filters is because charcoal “loves to capture and hold marijuana odor.” *Id.* After laying the foundation as to his experience in this area, defense counsel asked Dr. Woodford whether he agreed with Detective Grall’s earlier statement in the application for a search warrant that if someone utilizes a charcoal filtration system, it is difficult to smell anything. *Id.* at 79. Dr. Woodford agreed with that statement. The State did not lodge an objection. *Id.*

The examination continued. Defense counsel asked Dr. Woodford what happened when ozone is added into the mix. Dr. Woodford explained that ozone acts just like ultraviolet light, and that it breaks the double bonds contained within the odor ingredients comprising the marijuana odor bouquet. In doing so, the molecules lose the characteristic odor

of marijuana. *Id.* Accordingly, explained Dr. Woodford, you end up with an odorless material. *Id.* Again the State did not object. The State has waived its right to challenge that testimony.

But even if the State had objected, the evidence was properly admitted. While Dr. Woodford may not be an expert on filter systems in general, he does have considerable knowledge and experience relating to the effect of charcoal and ozone on marijuana odor. *Id.* at 78-79. The State claims that because Dr. Woodford did not personally inspect the filter system, he could not testify as to whether it worked. The State is mistaken for two reasons. First, as previously noted, whether an expert personally inspected the system or relied upon photographs, goes to the weight of the expert's testimony, not admissibility. Second, Dr. Woodford did not offer an opinion as to whether the filter system was operational. He simply discussed the impact of charcoal and ozone on marijuana odor. See RP II 78-79

By contrast, Steve Fager did testify that the filter system was in working order. See SVRP IV-125. Steve Fager has an extensive background in this area. For 15 years, he worked for a company that contracted with large mills and factories to automate many of their processes, in which airflow and pressures within hog fuel boilers were critical. SVRP IV-112-114. In doing so, he became experienced and very familiar

with thermodynamics, air flow, and pumps. *Id.* at 113. At the hearing he was able to describe the process of negative airflow, a subject upon which Detective Waterhouse did not seem to have a firm understanding. RP 116-119

The State's argument on appeal is that no "rational person" would have accepted Steve Fager's testimony over that of the OPNET officers regarding the filter system. BOA at 36. This is an improper argument, as "the trier of fact, which observes the witness's manner while testifying, alone passes on a witness's credibility and measures the weight of the evidence." *In re Palmer*, 145 Wn. App. 249, 266, 187 P.3d 758 (2008).

The State's argument is similar to the one made by the appellant in *Bartel v. Zuckriegel*, where the appellate court noted:

"The Cafe's argument is essentially that the trial court should have believed the testimony of Mr. Zuckriegel and Ms. Forchemer. But, as we have already noted, the weight given to conflicting evidence is for the trial court to decide--not us."

112 Wn. App. 55, 63-64, 47 P.3d 581 (2002). *See also, Gormley v. Robertson*, 120 Wn. App. 31, 39, 83 P.3d 1042 (2004) ("While there may be evidence to the contrary, credibility determinations are for the trial court.")

The State's argument that the trial court should have believed the OPNET officers instead of Steve Fager and Dr. Woodford is frivolous.

4. THE STATE DID NOT REQUEST A FRYE HEARING
NOR WAS ONE REQUIRED.

The State argues that the trial court erred in failing to hold a *Frye* hearing before allowing Dr. Woodford to testify. This argument fails for two reasons. First, the State failed to request a *Frye* hearing below and thus failed to preserve the issue. Second, this is not the type of expert testimony to which *Frye* applies.

a. The State did not request a *Frye* hearing.

A *Frye* challenge cannot be raised for the first time on appeal. *State v. Wilbur-Bobb*, 134 Wn. App. 627, 634, 141 P.3d 665 (2006). Here, the State filed a lengthy motion in limine attacking Dr. Woodford's background and expertise. The attack was far reaching, citing to unpublished cases on unrelated issues in which the trier of fact had rejected Dr. Woodford's conclusions. CP 21-30. What the motion in limine did not do, however, was identify any novel scientific methodology or request a *Frye* hearing.

In arguing the motions in limine, the State acknowledged that the trial court would reserve any ruling on Dr. Woodford. RP I 41-42 But the prosecutor stated that he wanted to say a few words about Dr. Woodford, because he wanted the court to see that Dr. Woodford isn't the "person that people think he is." RP I 42. The prosecutor focused upon Dr.

Woodford's lack of training and experience in this area. *Id.* He claimed Dr. Woodford was self-trained and referred to him as "idiosyncratic":

Mr. Schrawyer: He's idiosyncratic. And this is an area where — I don't know how idiosyncratic he is in all things —but he has made this up. He has no scientific support for it. I always forget the name of that rule, but it has to be something that's accept- generally accepted in the scientific community. I can't remember the name of it.

The Court: The *Frye* standard?

Mr. Schrawyer: *Frye* standard. He has nothing to support the testimony. Nothing in his background anywhere that he's ever done this.

RP 8/15/12 I-43-44. Although prompted by the court with the name of the case, the prosecutor still failed to request a *Frye* hearing, and instead continued to talk about Dr. Woodford's background and lack of expertise. *Id.* Further, the prosecutor failed to identify anything novel about Dr. Woodford's research. As such, the trial court was never provided a concrete *Frye* objection upon which to rule. *See, Presnell v. Safeway Stores*, 60 Wn.2d 671, 675, 374 P.2d 939 (1962) ("Objections must be accompanied by a reasonably definite statement of the grounds therefor so that the judge may understand the question raised and the adversary may be afforded an opportunity to remedy the claimed defect.")

Likewise, when the prosecutor conducted voir dire on Dr. Woodford during his direct testimony, the prosecutor's focus was on Dr. Woodford's qualifications: "I have found nothing you have written or that anybody else has written that indicates that you have any qualifications on telling how far marijuana will go in the air under open conditions." RP II-49.

This is similar to the situation presented in *State v. Wilbur-Bobb*, *supra*. In that case, the defense made a foundation objection to the state toxicologist's testimony on retrograde extrapolation. After a few follow up questions by the prosecutor, defense counsel objected again:

He's read articles. I can read articles as to what to testify to as a toxicologist. He said he has two days total of training in this area. **I don't have any information or any indication that this is scientifically accepted. We don't have any model or any information as to that.** We don't know what specific articles he's read.

...

I continue my objection as to foundation.

134 Wn. App. at 633 (emphasis added). The trial court overruled the objection, stating that the expert was qualified to render an opinion. On appeal, the court found that the *Frye* issue had not been properly raised. The court noted that defense counsel "did not request a hearing on that issue, nor did she ask the court to clarify whether or not its ruling was intended to encompass that issue." *Id.* The appellate court held that "we will not

allow an objection to credentials to be transformed into a *Frye* argument on appeal.” *Id.* at 634.

In the present case, the prosecutor raised a similar objection to credentials by focusing on Dr. Woodford and his lack of expertise. Similar to *Wilbur-Bobb*, the prosecutor did not ask for a hearing. More importantly, the prosecutor never identified any particular principle or theory that was not accepted within the scientific community.

b. The State failed to object after the court reserved rulings on all motions in limine relating to Dr. Woodford.

Even assuming the prosecutor’s “idiosyncratic” remark during motions in limine could be construed as a proper *Frye* objection, the judge was quite clear that any objection to Dr. Woodford’s testimony would need to be raised at the time Dr. Woodford testified. As previously discussed, there was no objection made at that time. As such, the issue cannot be raised on appeal.

c. *Frye* does not apply to Dr. Woodford’s testimony.

Even if an objection had been made and preserved, a *Frye* hearing was not required for Dr. Woodford’s testimony. “While *Frye* governs the admissibility of novel scientific testimony, the application of accepted techniques to reach novel conclusions does not raise *Frye* concerns.” *Lakey v. Puget Sound Energy*, 176 Wn.2d 909, 919, 296 P.3d 860 (2013)

(holding the trial court erred in excluding evidence under *Frye* standard). "The *Frye* test is only implicated where the opinion offered is based upon novel science." *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 611, 260 P.3d 857 (2011).

In the present case, the State clearly disagreed with Dr. Woodford's conclusions. But the State did not identify anything novel about the science Dr. Woodford relied upon in reaching those conclusions. This is because Dr. Woodford's testimony was based on sound scientific principles. In reaching his conclusions, Dr. Woodford looked at the molecular composition of marijuana odor. He then took into consideration the molecular weight of those 68 components. In doing so, he could estimate how they would disentangle, thereby losing the distinctive odor of growing marijuana. VRP II 53-54. He also considered other scientific principles, such as whether this combination of molecules could attach itself to water molecules, thereby allowing the marijuana odor to travel a greater distance. *Id.* He further explained that because the components were all heavier than air, the smell of growing marijuana would not travel very far up a hill. VRP II 55. All of this is basic chemistry, none of it novel.

After determining the limited mobility of the chemical compound associated with the smell of growing marijuana, Dr. Woodford was able to further refine his opinion through experimentation with test subjects. VRP

II 49-50. Again, there is nothing novel about the use of test subjects to confirm and refine the scientific opinions. Further, to the extent that there is a concern regarding the number of subjects or conditions of the testing, that goes to weight of testimony, not its admissibility under *Frye*. See e.g., *Advanced Health Care, Inc. v. Guscott*, 173 Wn. App. 857, 876, 295 P.3d 816 (2013) (any argument that the expert’s results were unreliable because he “eyeballed” the chart rather than performing a computer assisted evaluation go to the weight and can be raised with the finding of fact.)

Frye only bars evidence when there is a “*significant* dispute among *qualified* scientists in the relevant scientific community.” *State v. Gore*, 143 Wn.2d 288, 302, 21 P.3d 262 (2001) (emphasis in original); overturned on other grounds, by *Blakely v. Washington*, 542 U.S. 296 (2004). In the present case, the State failed to present any evidence of a dispute within the scientific community. In fact, although this case is now on appeal, and the State has filed its opening brief, the State still has not identified what novel science Dr. Woodford employed in reaching his conclusions. The State remains fixated on Dr. Woodford’s conclusions, rather than the methodology behind those conclusions.

The State argues that Dr. Woodford was required to present peer review articles or other scholarly writings in order to demonstrate that his theories were accepted within the scientific community. BOA at 22-23.

But this Court rejected that same argument in *Advanced Health Care, Inc. v. Guscott, supra*. The plaintiff in that case moved under *Frye* to exclude the defense expert from testifying. Plaintiff complained that the expert "did not offer any peer-reviewed articles, texts, etc." to support his opinion. The trial court agreed and excluded the expert's opinion. This Court reversed, holding that peer-reviewed studies "may strengthen" the expert's testimony but "the competence of expert testimony does not depend on such studies." 173 Wn. App. at 877. Similarly, in *Reese v. Stroh*, 128 Wn.2d 300, 308-310, 907 P.2d 282 (1995), the Supreme Court rejected the defendant's *Frye* argument that no scientific studies existed supporting the expert's opinion, and held that the expert may testify from his own knowledge and experience.

That is precisely what occurred here. As described above, Dr. Woodford employed his education and experience to determine the molecular structure of the marijuana odor bouquet, and based on that structure, determine the role gravity would play in the disentanglement of that molecular compound. Dr. Woodford then used simple laboratory experiments with live subjects to confirm and further refine his opinions.

In sum, the State never requested a *Frye* hearing. Even when the Court provided the name of the case, the State continued to focus on Dr. Woodford's background and his novel conclusions. The State never did

identify any aspect of the science behind those conclusions that was novel or not accepted within the general scientific community. There was no proper objection or request for a *Frye* hearing. But even assuming that the prosecutor did raise the issue, the trial court reserved ruling and told the parties they would need to object when the witnesses testified. When Dr. Woodford testified as to his opinions regarding the officer's ability to smell marijuana, the State did not lodge an objection. Accordingly, the issue was waived. Finally, even if the issue had not been waived, because there was no novel science involved, *Frye* plays no role in this case.

5. THE COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT DETECTIVE GRALL DEMONSTRATED A RECKLESS DISREGARD FOR THE TRUTH.

The State argues that the trial court's application of the *Franks* test to the OPNET detectives was "totally wrong." As set forth below, the State's argument is based upon a misreading of the facts and a misunderstanding of the law.

a. The trial court never found that the officers smelled marijuana.

The State claims that the trial court found the officers could smell marijuana, but then found a reckless disregard for the truth. BOA 36, 44. This is incorrect; no such finding exists. To the contrary, the court specifically found in Finding of Fact No. 10 that "OPNET officers did not

smell marijuana from the locations claimed in the affidavit for the search warrant.”

b. The state is mistaken as to the standard of review.

The State claims that the standard of review on this issue is de novo. BOA at 49-50. This is inaccurate. As the Washington Supreme Court in *State v. Cord* explained, a finding of reckless disregard is a factual finding afforded great deference:

Appellant disputes the trial court's finding that the affiant's omissions were neither intentional nor made with reckless disregard for the truth. Initially, we note the great deference that is to be given the trial court's factual findings. [Citations omitted] It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity. We find nothing in the record, here, to call the trial court's findings into question.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (emphasis added).

On appeal, all evidence relating to a finding of reckless disregard must be viewed in a light most favorable to the prevailing party. *United States v. Kirk*, 781 F.2d 1498, 1502 (11th Cir. 1986).

In support of its position that this should be a de novo review, the State cites to *State v. Ollivier*, 178 Wn.2d 813, 848, 312 P.3d 1 (2013). But the question of whether the officers acted with reckless disregard was not an issue on appeal in that case. The issue in *Ollivier* was whether probable cause still existed after portions of the affidavit had been struck.

That is a question of law with a de novo review. By contrast, in our case, the question is whether the officers acted with reckless disregard for the truth, and that “is a factual determination, upheld unless clearly erroneous.” *State v. Clark*, 143 Wn.2d 731, 752, 24 P.3d 1006 (2001).

In determining whether an affiant’s false statements were made with reckless disregard for the truth, the test is “whether, viewing all of the evidence, the affiant must have entertained serious doubts as to the truth of his statements.” *U.S. v. Clapp*, 46 F.3d 795, 801 (8th Cir. 1995). Here, the trial court was called upon to determine Detective Grall’s state of mind at the time he made those representations in the affidavit. This is a decision that can only be reached by observing the witness’s demeanor on the stand and listening to how he dealt with inconsistencies in his testimony. *See, In re Marriage of Fahey*, 164 Wn. App. 42, 65, 262 P.3d 128 (2011) (“As an appellate court, we are not entitled to weigh evidence or the credibility of witnesses that a trial court has determined in part by its observations of a witness's demeanor.”)

c. The trial court’s finding of “reckless disregard for the truth” is supported by the record.

In arguing that the court’s finding of reckless disregard is wrong, the State attempts to rely upon a comment made by the judge at the time of the oral ruling. BOA at 38. As an initial matter, the State reads too

much into the court's off hand comment that "I don't know what they were smelling" when referring to one of the many "nose hits" claimed by Detective Grall and the other officers. This does not suggest that the court found the officers believed they smelled marijuana at each of the impossible distances at which they claim to have done so. More importantly, "the oral opinion itself is not a finding of fact." *State v. Reynolds*, 80 Wn. App. 851, 860, 912 P.2d 494 (1996). Rather, a "trial court's oral opinion is only an indication of the court's views or thinking, and is subject to change or expansion until put in writing." *Johnson v. Whitman*, 1 Wn. App. 540, 541, 463 P.2d 207 (1969).

Ironically, while quoting the court's oral remark word for word, the State pays little attention to the actual written finding on this specific issue. Finding of Fact No.11 states,

The court is aware that a simple mistake will not invalidate a warrant under *Franks v. Delaware*, 438 U.S. 154 (1985). If this was simply one "nose hit" of marijuana at an impossible distance, the Court might be more inclined to treat this [as] a reasonable mistake, or that perhaps the officers were smelling marijuana growing from some other location. But given the number of "nose hits" claimed at multiple locations, all of which are impossible distances from the shed, this Court has no option but to treat these statements as demonstrating a reckless disregard for the truth.

CP 172.

The question becomes whether there is substantial evidence in the record from which the court can make the determination that Detective Grall acted with reckless disregard for the truth. This is a credibility determination. As our Supreme Court explained, “The trial court has the witnesses before it and is able to observe them and their demeanor upon the witness stand. It is more capable of resolving questions touching upon both weight and credibility than we are.” *In re Sego*, 82 Wn.2d 736, 739-740, 513 P.2d 831 (1973).

In the present case, the trial court had substantial reasons to question the credibility and integrity of Detective Grall and the other OPNET officers. While testifying, Detective Grall was repeatedly impeached with inconsistent statements.³ The court learned that another OPNET detective had previously reported Detective Grall’s illegal practices in the field. SVRP I 27-29. The court heard testimony about evidence disappearing under suspicious circumstances. SVRP IV 111-112. The court also learned that there had been a prior judicial ruling in which Detective Grall demonstrated a reckless disregard for the truth. SVRP I 19-20. These factors, and many more from within the record, provide a factual basis from which the court could make this credibility decision.

³ See Steve Fager’s brief for a sampling of inconsistent statements.

Moreover, all of this is in addition to the fact that Detective Grall and his colleagues repeatedly claimed to have smelled something that was impossible for them to smell. As the trial court pointed out, one time might be a mistake. But repeated claims to an impossible occurrence reveal, at the very least, that Detective Grall must have entertained serious doubts that he and his OPNET cohorts actually smelled marijuana emanating from 115 Freeman Lane.

The State argues that the trial court's opinion is "illogical." According to the State, the trial court only had two options once it determined the officers could not smell the marijuana from the claimed distances: either the officers lied about smelling marijuana or it was a simple mistake. BOA at 41. The State cites to no support for this proposition, nor does any exist. By its very terms, *Franks* provides a third option of reckless disregard for the truth.

As an initial matter, the line between "intention" and "reckless disregard" may be thinner than the State perceives. For instance in *United States v. Kirk*, 781 F.2d 1498 (1986), the detective misidentified the suspect. Although the detective knew that the suspect's physical attributes did not come close to the description they had of the man who had committed a crime, the detective identified that person as the suspect. The trial court found that this statement was made with a reckless disregard for

the truth. In upholding that finding, the appellate court noted that the misstatement “was made, if not intentionally, at least with reckless disregard for the truth.” *Id.* at 1505.

Under the State’s theory in our case, the federal district court in *Kirk* would have been required to find that the officer either lied when he made the identification, or he simply made a mistake. But that is not the law. Here, while the trial court may have suspected an intentional misstatement, the trial court was very comfortable finding the false statements were made, “if not intentionally, at least with reckless disregard for the truth.”

Additionally, a reckless disregard for the truth can be based on the conclusions drawn from the evidence perceived. For instance, in *United States v. Schmitz*, 181 F.3d 981, 986 (8th Cir. 1999), Detective Palen described an assault she observed in her affidavit for a search warrant. In describing the appropriate standard for a *Franks* hearing, the appellate court explained, “If Palen lacked a reasonable basis for her conclusion that an assault had occurred, then her statement to that effect might have been an intentional lie or the result of reckless disregard for the truth.” *Id.* at 986. Similarly here, the judge was entitled to conclude that Detective Grall’s claim that they could determine the location of the marijuana grow based on their triangulating the various “nose hits,” all from impossible

distances, demonstrated a reckless disregard for the truth. Further, the trial court's finding of reckless disregard was not made in a vacuum, but rather, after hearing Detective Grall testify at length on five separate occasions during the hearing. RP I 46-84, SVRP I 1-156, SVRP II 94-163, RP III 122-172, SVRP III 2-80, RP IV 39-47.

d. The cases cited by the State do not support the State's argument.

The State cites to a number of cases for the proposition that simple mistakes, negligence, or record keeping errors are not enough to justify suppression under *Franks*. Defendants do not disagree with that proposition. Nor did the trial court. In fact, the trial court specifically acknowledged in Finding Number 11 that a simple mistake would not satisfy the requirements of *Franks*.

In arguing against the finding of reckless disregard, the State relies most heavily upon the analysis in *State v. Seagull*, 95 Wn.2d 898, 632 P.2d 44 (1981). BOA at 42-43. In that case, a somewhat inexperienced officer looked through a two-inch piece of clear plastic to see what appeared to be a marijuana plant. A search warrant was obtained and it turned out that the spied upon plant was actually a tomato plant. *Id.* at 900. The trial court found that this was an innocent mistake.

The primary issue on appeal in *Seagull* was whether the officer's intrusion upon the land was illegal. In the last two paragraphs, the Court addressed the defendants' claim that the misidentification of the tomato plant invalidates the warrant. The Washington Supreme Court rejected that argument, noting that there was no claim by the defense that this was an intentional misrepresentation or that it was made with a reckless disregard for the truth. *Id.* at 907-08. The Court upheld the trial court's finding that this was an innocent mistake. *Id.*

Our case stands in sharp contrast. Here, four OPNET operatives claimed to have smelled marijuana a total of 23 times, from multiple locations, none of which were possible. More importantly, in our case, the trial court made a specific factual finding that this was not a simple mistake. Thus, the State is in the same position as the defendant in *Seagull*, asking the appellate court to find that the trial court's ruling was clearly erroneous. Given that this determination was based upon the trial court's assessment of witness credibility, the State fares no better here than did the defendant in *Seagull*.

The other main case relied upon by the State is *Herring v. U.S.*, 555 U.S. 135, 129 S.Ct 695, 172 L.Ed. 2d 496 (2009). The State cites to this for the proposition that an error must be more than mistake or mere negligence. BOA at 39-40. As an initial matter, this was not even a

Franks case. Rather, it was a case that addressed whether a simple administrative error triggers Fourth Amendment protections against unreasonable seizures. In *Herring*, there was an error in the recording keeping department, which showed an active warrant when none existed. The lower court found that failing to update the computer database to reflect the recall of the warrant was a mistake, but not purposeful. *Id.* at 138-39. The Supreme Court held that in order to trigger the 4th Amendment, with its focus upon reasonableness, the police conduct needs to be deliberate, or at the very least, reckless. *Id.* at 144, 146. The Court concluded that because the trial court had found that this behavior was not deliberate, or even reckless, suppression was not appropriate. *Id.* at 147-48.

By contrast, our case does not involve an administrative error or a finding by the trial court that this was a simple mistake. It involves officers repeatedly claiming to smell marijuana emanating from 115 Freeman Lane when it was not possible to do so, and a finding by the trial court that this repeated false claim demonstrated a “reckless disregard” for the truth. *Herring* lends no support to the State’s challenge to the trial court’s ruling.

Ultimately, the question is not whether this Court agrees with the trial court’s finding of reckless disregard for the truth, but whether the trial court had a factual basis to make the finding. As described above, the trial court certainly had a sufficient record to support that finding. If the court

had ruled against the defense and found that Detective Grall made an honest mistake and did not have a reckless disregard for the truth, the Fagers could not have reasonably challenged that ruling on appeal. While the defense would have been convinced that the trial court had reached the wrong conclusion, it was the court's credibility call to make. In this case, the court made its call in favor of the defense. The State's challenge to that credibility call are, at the very least, meritless.

6. THE TRIAL COURT PROPERLY SUPPRESSED EVIDENCE GATHERED FROM BOTH THE THERMAL IMAGE AND 115 FREEMAN LANE SEARCH WARRANTS.

The State argues that probable cause still exists for both search warrants, even after the smell evidence is stricken. For the reasons set forth in Steve Fager's Response Brief, which is incorporated herein by reference, the State's argument is meritless.

7. THE COURT CORRECTLY SUPPRESSED ALL EVIDENCE RELATING TO THE THERMAL IMAGE UNDER CrR 8.3(B).

The destruction of evidence under highly suspicious circumstances justified the suppression of the thermal image pursuant to CrR 8.3(b). The response to this argument is set forth in Steve Fager's brief and is incorporated herein by reference.

8. THE STATE’S CHALLENGE TO THE FINDINGS OF FACT ARE ALL WITHOUT MERIT.

The State challenged the majority of findings of fact relating to the smell of marijuana. On appeal, a finding of fact will stand if it is supported by substantial evidence. *McDonald v. Parker*, 40 Wn.2d 987, 988, 425 P.2d 910 (1972). Evidence is substantial if it is sufficient to persuade a fair minded, rational person of the declared purpose. *Merriman v. Cokelley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010). This does not mean the reviewing court weighs the evidence to determine whether there is substantial evidence. To the contrary, “[a]s an appellate tribunal, we are not entitled to weigh either the evidence or the credibility of witnesses even though we may disagree with the trial court in either regard.” *In re Seago*, 82 Wn.2d 736, 739-740, 513 P.2d 831 (1973). Consequently, “[w]here there is conflicting evidence, the court needs only to determine whether the evidence viewed most favorable to respondent supports the challenged finding.” *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998).

In the present case, the State claims that the record does not support the following findings relating to the smell of marijuana: 1-2, 4-6, 10-12. Each of these will be briefly addressed and the location of the corresponding testimony or exhibit will be identified.

FINDING OF FACT 1

The Court heard testimony from Dr. Woodford. Dr. Woodford has a Ph.D. in chemistry from Emory University, with Postdoctoral studies in Medicinal Chemistry from Kansas University. He has been testifying as an expert in marijuana and controlled substances since the 1990s. The State has acknowledged that Dr. Woodford is an expert on canine drug detection, but argues that Dr. Woodford is not an expert on human detection of marijuana. The Court finds Dr. Woodford to be a credible expert on the subject of odor of marijuana, and finds his opinions to be helpful to the issues at hand.

Dr. Woodford described his education at pages RP II 39-41. The State's motion in limine acknowledged that Dr. Woodford is an expert in canine drug detection. CP 169. The brief filed in response to the State's motion in limine, cites to marijuana cases dating back to the 1990s. CP 47. The trial court's credibility call is supported by the court's first hand observation of Dr. Woodford, as he described his prior experience and his opinions in this case. RP II 40-44, 66, 72-74.

FINDING OF FACT 2

Dr. Woodford testified that the odor of growing marijuana is comprised of 68 chemical components, all of which must be together in order to produce the smell we associate with growing marijuana. These components all have different molecular mass weights, however, which cause them to disentangle once they are airborne. As a result, the odor of growing marijuana cannot travel far, as the necessary 68 components sink to the ground at different rates. Dr. Woodford further explained that given the relatively heavy molecular weight of the marijuana aroma bouquet, the smell of marijuana cannot travel very far upwards.

Dr. Woodford described the chemical components and the impact of their differing molecular weights at pages RP II 74.

FINDING OF FACT 4

Given the physical properties of the marijuana bouquet, growing marijuana is difficult to smell from distance. For instance, it may be possible for a human to smell growing marijuana that is 30 to 40 feet away. It might even be within the realm of possibilities, although extremely unlikely, for a human to catch a trace of marijuana at 50 to 60 feet. But any further, it is no longer humanly possible to detect the smell of growing marijuana.

Dr. Woodford set forth his opinions as to all of these distances at pages RP II 57-59.

FINDING OF FACT 5

Dr. Woodford emphasized that the above distances assume ideal conditions. If, for example, there is a filtration system in effect, it may not be possible to smell growing marijuana at any distance outside of the building. This is consistent with Det. Grall's statement in his affidavit that a filtration system makes it difficult or impossible to smell marijuana coming from an indoor marijuana grow operation. The Court heard persuasive testimony that there were two independently operating, sophisticated filtration systems in place at the time of the surveillance.

Dr. Woodford testified to his assumption of ideal conditions at pages RP II 58, 71-72, 76. He discussed the filtration system's use of charcoal and oxidation and how they eliminate odor at pages RP II 78-79. Detective Grall's sworn statement regarding the effectiveness of a work-

ing filtration system is at CP 937. Steve Fager's testimony regarding the filtration system is at pages SVRP IV 123, 127.

The State claims that while there might have been testimony from Steve Fager establishing these facts, that no *rational* person would have accepted Steve Fager's testimony over that of the OPNET officer. In other words, the trial court believed the wrong witness. Because this is a significant departure from established law, this argument is addressed separately in Respondent's brief.

FINDING OF FACT 6

The State did not present any expert testimony to contradict Dr. Woodford's scientific testimony relating to the odor of marijuana.

The basis for this objection is unclear. The State cannot seriously dispute that the finding is supported by substantial evidence. The State did not bring in an expert to refute any of Dr. Woodford's testimony regarding the chemical components of the marijuana bouquet, how those chemicals interact with the atmosphere, and how they dissemble within a relatively short distance. The State's real argument is that there was no need for an expert, but this is not a basis for challenging a factual finding. The State was either unable to find an expert to contradict Dr. Woodford, or made a strategic decision not to use one. Either way, the trial court's finding is supported by substantial evidence.

FINDING OF FACT 10

Dr. Woodford was presented with the various distances at which OPNET officers claimed to have smelled growing marijuana emanating from the shop at 115 Freeman Lane. Dr. Woodford was unequivocal that it would have been impossible for the officers to smell the marijuana at those locations. The Court finds Dr. Woodford's testimony on this issue credible. The Court finds that OPNET officers did not smell marijuana from the locations claimed in the affidavit for the search warrant.

Dr. Woodford's opinion as to OPNET officers claimed "nose hits" from various distances can be found at pages RP II 73 of the transcript and in his declaration at CP 2271, 2273. To the extent that the State is asking this Court to find the judge erred in making the wrong credibility call, that is something this Court cannot do. *See, Gormley v. Robertson*, 120 Wn. App. 31, 39, 83 P.3d 1042 (2004) ("While there may be evidence to the contrary, credibility determinations are for the trial court.")

FINDING OF FACT 11

The court is aware that a simple mistake will not invalidate a warrant under *Franks v. Delaware*, 438 U.S. 154 (1985). If this was simply one "nose hit" of marijuana at an impossible distance, the Court might be more inclined to treat this [as] a reasonable mistake, or that perhaps the officers were smelling marijuana growing from some other location. But given the number of "nose hits" claimed at multiple locations, all of which are impossible distances from the shed, this Court has no option but to treat these statements as demonstrating a reckless disregard for the truth.

This challenge to the court's credibility call in finding a reckless disregard for the truth is addressed in Argument 5 of this Response Brief.

FINDING OF FACT 12

The Court finds that all references to the smell of marijuana must be stricken from the affidavit in support of the thermal image warrant as well as the affidavit in support of the search warrant for 115 Freeman Lane.

This finding is a logical corollary of Finding of Fact 11. Because the officers did not smell marijuana, and because their claim to the contrary was made with a reckless disregard for the truth, it necessarily follows that all references to that smell evidence must be stricken from the affidavit in support of the search warrants.

In addition to the above findings, the State also assigns error to the trial court's statement that "this case boils down to the officers' claim that they smelled marijuana." BOA at 1, 44. The State argues that this demonstrates the trial court did not understand a simple mistake would not nullify the warrant. BOA at 44. But this must be read in context. First, this was not even a specific finding but an introduction to a set of findings. The trial court stated that, "[w]hile the defense has raised a number of challenges to the warrants, this case boils down to the officers' claim that they smelled marijuana." CP 127. In doing so, the court was simply acknowledging that despite the other issues raised by the defense, the ultimate issue in this *Frank's* hearing centered on the smell of marijuana. As demonstrated by Finding of Fact 11, the court understood that "a simple

mistake will not invalidate a warrant under *Franks v. Delaware*, 438 U.S. 154 (1985).”

D. CONCLUSION

Most of the State’s arguments are directed at Dr. Woodford’s testimony. But because there was no objection when he testified, those issues are all waived. Even if they could be raised for the first time on appeal, the trial court did not abuse its discretion in considering Dr. Woodford’s testimony. Dr. Woodford is a recognized expert on the odor of marijuana, and his opinions were properly introduced.

The State fares no better in its challenge to the trial court’s credibility ruling as to Detective Grall. The State characterizes the court’s finding of a “reckless disregard for the truth” as an issue of law. It is not. It is a factual finding, and the trial judge had more than sufficient reason to conclude that this was not a simple mistake.

For the reasons stated above and in Steve Fager’s response brief, Timothy Fager respectfully requests this Court affirm the suppression order and the dismissal of charges against him.

Dated this 10th day of April, 2014



James R. Dixon, WSBA 18014
Attorney for Respondent Timothy Fager

CERTIFICATE OF SERVICE

I, James R. Dixon, certify that on April 10, 2014, I did electronically serve a true and correct copy of this Brief of Appellant to Lewis Schrawyer and Michael E. Haas:

Dated this 10th Day of April, 2014, in Seattle, WA

James R Dixon
James R. Dixon