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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 30575-9-III

BENTON COUNTY SUPERIOR COURT NO. 04-1-00630-2

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT TODD WALKER,

Appellant.

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT
TABLE OF CONTENTS

TABLE OF AUTHORITIES
..... ii

A. ARGUMENT

1. The Trial Court’s admission of Plaintiff’s exhibit No. 23 violated Mr. Walker’s sixth amendment right to confront witnesses.....1

a. *This claim may be raised for the first time on appeal...1*

b. *State v. O’Cain is distinguishable from the current case.....1*

c. *The admission of these reports caused the defendant actual prejudice and was not harmless.....2*

2. The Trial Court violated Mr. Walker’s Due Process right to a fair trial by admitting unfairly prejudicial evidence of the circumstances following his arrest.....4

a. *This claim may be raised for the first time on appeal..4*

b. *The trial court abused its discretion in admitting the evidence on the basis that the appropriate hearing and findings were not entered prior to admission of the evidence.....5*

c. *ER 404(b) provides the appropriate framework for determining admissibility.....6*

d. *The lack of an evidentiary hearing on the evidence of flight makes it difficult, if not impossible, for the appellant to respond to the State’s assertion that such prejudicial evidence was admissible in the defendant’s trial.....7*

3. The State engaged in prosecutorial misconduct in its closing argument.....8

a.	<i>The defendant has shown that the prosecutor's remarks were improper and so flagrant and ill-intentioned that an instruction would not have cured the resulting prejudice</i>	8
b.	<i>Inviting the Jury to find guilt based on silence</i>	10
c.	<i>The "right verdict"</i>	12
d.	<i>Personal opinion</i>	12
4.	The defendant received constitutionally ineffective assistance of counsel	13
a.	<i>Trial counsel was ineffective for failing to subpoena necessary witnesses to the hearing on the defendant's motion in limine</i>	13
b.	<i>Trial counsel was ineffective for failure to adequately investigate and prepare for trial</i>	14
c.	<i>Trial counsel was ineffective for failing to pursue a third party perpetrator theory</i>	15
d.	<i>Trial counsel was ineffective for failing to object to the admission of laboratory reports</i>	16
e.	<i>Trial counsel was ineffective for failing to object to testimony of Ms. Wagner-Weidner and Detective Moss</i>	17
f.	<i>Trial counsel was ineffective for failing to object to prosecutor's prejudicial and inflammatory statements during closing argument</i>	17
5.	The Trial Court erred when it instructed the jury on accomplice liability	18
6.	The Trial Court violated Mr. Walker's Due Process rights and CrR 6.15 when it responded to an inquiry from the jury on three different occasions without conferring with counsel	19
a.	<i>The appellant has proven that this occurred</i>	19
b.	<i>The defendant had a right to be present when the trial was responding to the jury question</i>	20
c.	<i>The State bears the burden of proving this error was harmless</i>	21

7.	The evidence was insufficient to sustain a conviction for manufacturing methamphetamine.....	22
8.	Reversal is required because cumulative error denied Mr. Walker his Constitutional right to a fair trial.....	22
9.	The Trial Court erred in imposing exceptional consecutive sentences.....	23
B.	<u>CONCLUSION</u>	24

TABLE OF AUTHORITIES

Table of Cases

Washington Cases

<i>In Re Davis</i> , 152 Wn.2d 647, 101 P.3d 1 (2004).....	16
<i>In re Pers. Restraint of Brett</i> , 142 Wn.2d 868, 16 P.3d 601 (2001).....	15
<i>State v. Bowen</i> , 48 Wn.App. 187, 738 P.2d 316 (Div. 3, 1987).....	8
<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	5
<i>State v. Clark</i> , 139 Wn.2d 152, 985 P.2d 377 (1999).....	1
<i>State v. Earls</i> , 116 Wn.2d 364, 805 P.2d 211 (1991).....	9
<i>State v. Easter</i> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	9, 10, 11
<i>State v. Evans</i> , 96 Wn.2d 1, 633 P.2d 83 (1981).....	4
<i>State v. Flemming</i> , 83 Wn.App. 209, 921 P.2d 1076 (Div. 1, 1996).....	13
<i>State v. Foxhoven</i> , 161 Wn.2d 168, 163 P.3d 786 (2007).....	4
<i>State v. Freeburg</i> , 105 Wn.App. 492, 20 P.3d 984 (Div. 1, 2001).....	6, 8

<i>State v. French</i> , 101 Wn.App. 380, 4 P.3d 857 (Div. 3, 2000).....	9
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985).....	2-3
<i>State v. Hendrickson</i> , 138 Wn.App. 827, 158 P.3d 1257 (Div. 2, 2007)...	17
<i>State v. Jackson</i> , 102 Wn.2d 689, 689 P.2d 76 (1984).....	6, 7
<i>State v. Jasper</i> , 158 Wn. App. 539-540, 245 P.3d 228 (2010).....	20-21
<i>State v. Jasper</i> , 174 Wn.2d 96, 271 P.3d 876 (2012).....	19
<i>State v. Lewis</i> , 130 Wn.2d 700, 927 P.2d 235 (1996).....	11
<i>State v. London</i> , 69 Wn.App. 83, 848 P.2d 724 (Div. 2, 1993).....	22
<i>State v. Lough</i> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	4
<i>State v. Luna</i> , 71 Wn.App. 755, 862 P.2d 620 (Div. 3, 1993).....	18, 19
<i>State v. Montgomery</i> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	3, 17
<i>State v. O’Cain</i> , 169 Wash.App. 228, 279 P.3d 92 (2012).....	1
<i>State v. O’Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	2, 4
<i>State v. Romero</i> , 113 Wn.App. 779, 54 P.3d 1255 (Div. 3, 2002).....	10
<i>State v. Saltarelli</i> , 98 Wn.2d 358, 655 P.2d 697 (1982).....	6
<i>State v. Schroeder</i> , 164 Wn.App. 164, 262 P.3d 1237 (Div. 3, 2011).....	1
<i>State v. Sexsmith</i> , 138 Wn.App. 497, 157 P.3d 901 (Div. 3, 2007), <i>review denied</i> , 163 Wn.2d 1014 (2008).....	6
<i>State v. Smith</i> , 106 Wn.2d 772, 725 P.2d 951 (1986).....	6
<i>State v. Tilton</i> , 149 Wn.2d 775, 72 P.3d 735 (2003).....	16
<i>State v. Vance</i> , 168 Wn.2d 754, 230 P.3d 1055 (2010).....	23

United States Supreme Court

Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed. 2d 91 (1976).....10
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674
(1984).....15, 16

Other Jurisdictions

Impson v. State, 721 N.E.2d 1275 (Ind.App.2000).....12
Jackson v. State, 791 So.2d 979 (Ala.Crim.App. 2000). *cert. denied*, 532
U.S. 934, 121 S.Ct. 1387, 149 L.E.d.2d 311 (2001).....12
Lisle v. State, 113 Nev. 540, 937 P.2d 473(1997).....12
United States v. Myers, 550 F.2d 1036 (5th Cir.1977).....6

Constitutional Provisions

United States Constitution, amend V.....4, 9
United States Constitution, amend VI.....1
United States Constitution, amend XIV.....4
Wash. Const. Article I, Section 3.....4
Wash. Const. Article I, section 9.....9

Statutes and Court Rules

CrR 6.15.....19, 20, 21
ER 404.....4, 5, 6, 7
RAP 2.5.....1
RCW 9.94A.535.....23
RCW 9.94A.589.....23

A. ARGUMENT

I. **The Trial Court's admission of Plaintiff's exhibit No. 23 violated Mr. Walker's sixth amendment right to confront witnesses.**

a. *This claim may be raised for the first time on appeal*

Denial of the right of confrontation is a manifest constitutional error that may be raised for the first time on appeal. *State v. Clark*, 139 Wn.2d 152, 156, 985 P.2d 377 (1999), *citing*, RAP 2.5. Defendant concedes that *State v. Schroeder*, 164 Wn. App. 164, 262 P.3d 1377 (2011) holds that a defendant may waive his confrontation clause rights by failing to object. However, a defendant is dependent upon his trial counsel to make such objections. Defense counsel did not object to the admission of this evidence, on the basis that it was "self-authenticating" on more than one occasion¹. 07/31/07 RP 8, 89-90. at 2532.

b. *State v. O'Cain is distinguishable from the current case*

While the defendant concedes that *State v. O'Cain* holds that the trial court cannot sua sponte interpose objections, this assertion appears to be based on the assumption that trial counsel's failure to object is legitimate trial strategy. *State v. O'Cain*, 169 Wash.App. 228, 243, 279 P.3d 92 (2012). For the reasons stated above and those outlined in appellant's arguments regarding his trial

¹ Defense counsel's failure to object was also ineffective, as discussed, *infra*.

counsel's numerous errors, his trial counsel's waiver of this important right for him was not part of a legitimate trial strategy.

c. *The admission of these reports caused the defendant actual prejudice and was not harmless*

Mr. Walker has been able to set forth a "plausible showing" that the "asserted error had practical and identifiable consequences in the trial of the case." *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). In the instant case, the state moved to introduce the Washington State Crime Laboratory reports, which found that the substance tested contained methamphetamine. 07/31/07 RP 7, 152; CP 22. The state relied on this evidence in its opening and closing arguments. 07/31/07 RP 152. In fact, in its opening argument after discussing the laboratory reports and the role they will play, the prosecutor stated "[i]f there's any question about it, really the key, the kicker is on this HCL generator. There was meth residue in that plastic tube going from muriatic acid into mason jars or whatever, the source of the methamphetamine." 07/31/07 RP 52.

The use of this report was necessary for the jury to find Mr. Walker guilty of manufacturing of methamphetamine as the report was the only evidence that the liquids and substances found in Mr. Leckenby's residence contained methamphetamine. See, *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (A conviction should be reversed "where there is any

reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict.”). Furthermore, Washington courts have made it clear that both law enforcement and expert testimony, as to their personal beliefs regarding whether a defendant intended to manufacture methamphetamine, is improper opinion testimony in the prosecution of possession with intent to manufacture methamphetamine. *State v. Montgomery*, 163 Wn.2d 577, 587-88, 183 P.3d 267 (2008).

The appellant finds the State’s continued reference to a “SODDI” defense of “some other dude did it” completely disrespectful. This flippant attitude of the serious nature of the offenses Mr. Walker was charged with and the serious consequences as well as the important constitutional issues presented in appellant’s opening brief are indicative of the attitude and behavior present throughout Mr. Walker’s trial.

Despite the State’s assertions, the defendant does not have to offer an alternative explanation to the presence of certain items in Mr. Leckenby’s residence that are frequently used in methamphetamine production. The State’s information charged Mr. Walker with the manufacture of “a controlled substance, to wit: METHAMHETAMINE...” CP 3-4. Furthermore, the jury was instructed that because the defendant had entered a plea of not guilty and therefore “[t]hat plea puts in issue every element of the crime charged.” 07/31/07 RP 144. Whether the alleged controlled substance was in fact methamphetamine is an element of the crime

charged and since appellate counsel has found no stipulation of this element in the record, the logical conclusion is that the jury was required to find that the substance was methamphetamine.

2. The Trial Court violated Mr. Walker's Due Process right to a fair trial by admitting unfairly prejudicial evidence of the circumstances following his arrest

a. *This claim may be raised for the first time on appeal*

An appellant may raise an issue for the first time on appeal if the error is both manifest and constitutional. *O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). The claimed error unquestionably falls within the category of an issue that is constitutional: Both the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, section 3 of the Washington State Constitution guarantee criminal defendants the right to a fair trial. Criminal defendants are "entitled to a trial free from prejudicial error". *State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). It is fundamental that a criminal defendant should be tried based on evidence relevant to the crime charged, and not convicted simply because the jury believes he is a bad person. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). It is because of this principle of fundamental fairness that ER 404(b) forbids evidence of prior acts establishing only a defendant's propensity to commit a crime. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

The prejudicial nature of this testimony is apparent throughout the trial. The state refers to Mr. Walker's missed court appearances, and his constitutionally protected silence as evidence of guilt on numerous occasions. 07/31/07 RP 153, 154, 162. What is not difficult to infer from the record is that the admission of this evidence was not harmless as it is highly probable that the evidence affected the jury's verdict. *State v. Brockob*, 159 Wn.2d 311, 351, 150 P.3d 59 (2006). Once again, the State appears aggravated and annoyed that the appellant has asserted his rights to a fair trial. The appellant cannot simply "pick" his argument. In order to ensure that the issues are preserved from this point on, all alternative arguments must be raised. To suggest that appellate counsel do less is essentially requesting that the appellant, once again, receive ineffective assistance of counsel.

b. The trial court abused its discretion in admitting the evidence on the basis that the appropriate hearing and findings were not entered prior to admission of the evidence.

The trial court failed to conduct the appropriate hearing prior to the admission of this evidence and failed to make the necessary findings. Prior to admission of evidence under ER 404(b), the trial court must engage in a three-part analysis. First, the court must identify the purpose for which the evidence was admitted. Second, the court must determine that the proposed evidence is logically related to an issue, of consequence to the outcome of the action, and

that the evidence tends to make the existence of an identified fact more or less probable. Third, the court must determine whether its probative value outweighs any potential prejudice to the defendant. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986), quoting, *State v. Saltarelli*, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982)). To justify admission of the evidence, the trial court must conduct this balancing on the record. *State v. Jackson*, 102 Wn.2d 689, 693, 689 P.2d 76 (1984). This cautious approach recognizes the “inherent prejudice” of evidence of other bad acts. *State v. Sexsmith*, 138 Wn.App. 497, 505-506, 157 P.3d 901 (2007), review denied, 163 Wn.2d 1014 (2008). Without such a framework, the admission of such evidence was manifestly unreasonable.

c. *ER 404(b) provides the appropriate framework for determining admissibility.*

The appellant’s assertion of ER 404(b), as the appropriate framework for analysis, is not a novel or new argument and has been utilized by Washington Appellate Courts. It also has a long history of use in federal appellate courts. See, *State v. Freeburg*, 105 Wn.App. 492, 498, 20 P.3d 984 (Div. 1, 2001); *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir.1977). These and the multitude of other cases originally cited to in the appellant’s opening brief provided the framework for analysis utilized by the appellant.

d. The lack of an evidentiary hearing on the evidence of flight makes it difficult, if not impossible, for the appellant to respond to the State's assertion that such prejudicial evidence was admissible in the defendant's trial.

In the instant case, the State had originally charged Mr. Walker with bail jumping, but then amended the information to remove this charge and proceeded to trial solely on the underlying offense of manufacture of a controlled substance. CP 15-16; 07/31/07 RP 6. Therefore, any evidence relating to missed court appearances or dates was no longer necessary to a finding of guilt. The entire line of testimony directed to and elicited from Ms. Wagner-Weidener should have been prohibited, subject to a 404(b) or flight analysis; which the trial court never performed. Defense counsel did not object to Ms. Wagner-Weidner's testimony² and the record is devoid of any discussion relating to why her testimony was permitted after the bail jumping charge was dismissed. A balancing analysis must be conducted on the record prior to admission of such evidence. *State v. Jackson*, 102 Wn.2d at 693.

The State's case against Mr. Walker was far from overwhelming. The evidence presented, at most, proved Mr. Walker's mere presence at Joe Leckenby's residence on the date of the fire. The jury sent three notes indicating that they wanted additional information, to review critical witness

² Defense counsel's failure to object was also ineffective, as discussed, *infra*.

statements, and even that they had reached an impasse. CP 54, 55 & 56. The state used Ms. Wagner-Weidner's testimony to infer guilt from Mr. Walker's missed court appearances. 07/31/07 RP 153, 154, 162.

It is clear that the testimony elicited from Ms. Wagner-Weidner impermissibly shifted the jury's attention to the defendant's criminal propensity, the "forbidden inference." *State v. Bowen*, 48 Wn.App. 187, 196, 738 P.2d 316 (1987), *overruled on other grounds*; See also, *State v. Freeburg*, 105 Wn.App. at 502. Given the powerful nature of this evidence and the weakness of the State's case, the court's error cannot be considered harmless. Admission of Ms. Wagner-Weidner's testimony deprived Mr. Walker of a fair trial and his conviction should be reversed.

3. The State engaged in prosecutorial misconduct in its closing argument

- a. *The defendant has shown that the prosecutor's remarks were improper and so flagrant and ill intentioned that an instruction would not have cured the resulting prejudice.*

In response to the State's assertion that the appellant "has not even suggested that there was any prejudice," we would draw this court's attention to page 27 of appellant's opening brief which states:

In this case, the prosecutor's multiple statements violated Mr Walker's right to remain silent, against self-incrimination, and to due process. The statements were so flagrant and ill-intentioned *that they produced an enduring prejudice which could not have been neutralized by a curative instruction to the jury.*

Appellant's Brief p 27 (emphasis added).

Prosecutorial misconduct that affects a separate constitutional right is subject to analysis under the stricter standard of constitutional harmless error.³ *State v. French*, 101 Wn.App. 380, 386, 4 P.3d 857 (2000); *see also State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Under a harmless error analysis, "[t]he State bears the burden of showing a constitutional error was harmless." *Easter*, 130 Wn.2d at 242. "Where the error was not harmless, the defendant must have a new trial." *Easter*, 130 Wn.2d at 242. Both the state and federal constitutions guarantee the accused to be free from self-incrimination and to remain silent. U.S. Const. Amend V. Washington Const. Article I section 9; *see also, State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991) (A defendant has a constitutional right to remain silent in the face of accusation).

It is clear that it is completely improper, impermissible, and outright misconduct for the government to even suggest that a negative

³ The State fails to respond to the appellant's extensive analysis regarding the harmless error standard.

inference be drawn from a defendant's exercise of the right to remain silent. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1991). It is not simply a violation of the right against self-incrimination; it is a violation of the right to due process. *State v. Romero*, 113 Wn.App. 779, 786, 54 P.3d 1255 (2002); *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L/Ed. 2d 91 (1976).

b. Inviting the Jury to find guilt based on silence

The State argues that the multitude of comments regarding the defendant's failures to speak with police and failure to give the court his side of the story are simply comments referencing his flight.⁴ Appellate counsel would suggest that the obvious inference of the statements quoted is that because the defendant never stood up and defended himself from the moment police arrived that he is guilty.

Lawyers talk about a concept called omissions by conduct. It has to do with when a person might be silent when you'd expect them to speak or does some act that would indicate what – well, would indicate that they're guilty of something. In this case, the defendant by his conduct has admitted to you that he knew what was going on, and he was involved in it.

07/31/04 RP 162 (emphasis added). He may not have stated "the defendant didn't testify today because he is guilty" but the message to the jury was clear: because the defendant had exercised his right to

⁴ This provides further basis for the appellant's argument that the evidence of flight was prejudicial.

remain silent from the beginning of the investigation he must be guilty of something and that if he was innocent he would have spoken up. Characterizing a defendant's silence as somehow being "evasive and evidence of his guilt" amounts to improper use of that silence as "substantive evidence of guilt." *Easter*, 130 Wn.2d at 235. It is difficult to think of any argument more prejudicial to a defendant who has chosen to consistently invoke his right to remain silent throughout the investigation and court proceedings. The sheer number of times these prejudicial comments were made makes it nearly impossible for the prejudice to be cured with a jury instruction.

The prosecution cites to *State v. Lewis*, 130 Wn.2d 700, 927 P.2d 235 (1996), to support the assertion that his comments were not improper. In that case the issue was testimony and the court explicitly based their decision on the fact that:

There was no statement made during any other testimony or during argument by the prosecutor that Lewis refused to talk with police, nor is there any statement that silence should imply guilt.

Lewis, 130 Wn.2d at 706. Such was not the case for Mr. Walker as the State repeatedly referenced his silence throughout the closing argument and implied that his failure to speak up implied guilt.

c. The "right verdict"

The issue in any criminal case is ultimately one of guilt or innocence as shown by the evidence. Consequently, an exhortation to the jury to make "the right decision" or "to do the right thing" has been held error where it implies, in order to do so, the jury can only reach a certain verdict, regardless of its duty to weigh the evidence and follow the court's instructions on the law. *Jackson v. State*, 791 So.2d 979, 1029 (Ala.Crim.App. 2000). *cert. denied*, 532 U.S. 934, 121 S.Ct. 1387, 149 L.E.d.2d 311 (2001.); *Impson v. State*, 721 N.E.2d 1275, 1283 (Ind.App.2000); *Lisle v. State*, 113 Nev. 540 937 P.2d 473, 482 (1997).

The full quotation offered by the State in its reply is not any less improper. It is obvious from the State's brief that the prosecutor in this case has taken the defendant's actions personally. The prosecution doesn't need to say the exact phrase "it's the right thing to do" to make the comments improper when the inference to the jury is that they should convict the defendant because it's the "right verdict."

d. Personal opinion

"The reason he doesn't is that he knows – I know he knows what the outcome should be." 07/31/07 RP 153-154. While this statement alone might not be sufficient to warrant reversal, when taken in context with the multitude of other improper statements made, it is clear that

this was a close case that the prosecutor wanted to win. He crossed the line and prejudiced the defendant. The misconduct itself is an indication of just how close of a case this was:

Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.

State v. Flemming, 83 Wn.App. 209, 215, 921 P.2d 1076 (Div. 1, 1996).

4. The defendant received constitutionally ineffective assistance of counsel

The State's response argues that the majority of the appellant's claims on appeal may have been waived because of trial counsel's failure to object. For this reason, along with the other issues presented, that trial counsel was ineffective.

a. Trial counsel was ineffective for failing to subpoena necessary witnesses to the hearing on the defendant's motion in limine.

After receiving additional information from the State it appears that trial counsel did in fact eventually subpoena the officers he should have originally subpoenaed prior to trial. However, the jury trial on the underlying charge was held on August 1, 2007. CP 94-98. On December 18, 2007, Mr. Walker filed a pro se Motion for Habeas Corpus for Ineffective Assistance of Counsel & Violations of Due Process because of trial counsel's numerous failures. CP 69.

On June 3, 2008, a hearing was held. This was an entire year after the jury verdict was entered on this matter, almost a year after trial counsel was originally instructed to subpoena the necessary officers, and six months after appellant filed a motion for ineffective assistance of his trial counsel. The fact that it took a motion by Mr. Walker about his trial counsel's failures and, took place almost a year after the original hearing was requested is evidence of his counsel's ineffectiveness, regardless of the substance of the hearing itself.

b. Trial counsel was ineffective for failure to adequately investigate and prepare for trial.

The State responds that there is nothing in the record that trial counsel knew about Mr. Leckenby's whereabouts and declined to interview him. The State misunderstands the appellant's concerns. Trial counsel should have discovered Mr. Leckenby's whereabouts and should have requested and conducted an interview prior to trial. To make an informed decision on whether to call Mr. Leckenby as a witness required investigation into his testimony and statements, including an interview with him. Counsel has a duty to conduct a reasonable investigation. *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To provide constitutionally adequate assistance, counsel must conduct a reasonable investigation so that counsel can make informed decisions about how best to represent the client. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

Failure to interview and investigate the statements of a key witness in this case had a prejudicial effect on Mr. Walker's case and affected defense counsel's ability to make a reasonable and informed tactical decision regarding whether to call Mr. Leckenby as a witness.

c. *Trial counsel was ineffective for failing to pursue a third party perpetrator theory.*

The State points out that an attempt to introduce this defense probably would not have succeeded and bases this assertion on the fact that there was nothing to link Mr. Leckenby to the "meth lab," other than it was on his property. First, Mr. Leckenby was present at the scene when police arrived and the "meth lab" was not simply on his property, but rather in his bedroom. 07/31/07 RP 61, 84, 104, 116. These facts are exceptionally strong evidence linking Mr. Leckenby to the crime. So much so, that the trial judge, *sua sponte*, suggested this defense might be developed more fully by defense counsel. 07/31/07 RP 107-108.

Furthermore, trial counsel was ineffective for failing to interview Mr. Leckenby. Although "exceptional deference must be given when evaluating trial counsel's strategic decisions," it is important to note that "deliberate tactical choices may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance" *In Re Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). The Washington Supreme Court has

held that “[f]ailure of defense counsel to present a diminished capacity defense where the facts support such a defense has been held to satisfy both prongs of the *Strickland* test.” *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003).

d. Trial counsel was ineffective for failing to object to the admission of laboratory reports.

As previously stated, appellant respectfully disagrees with the State’s assertion that such an objection would have been overruled. The defendant placed every element at issue by pleading not-guilty. There is no stipulation to the element of the illegal substance being methamphetamine. There was no tactical reason for defense counsel’s failure to object to the admission of this document. The evidence contained in this laboratory report was crucial to the State’s case, as it was the only evidence that the various granules and liquids found at Mr. Leckenby’s residence contained methamphetamine. There is a reasonable probability that without this evidence, Mr Walker would have been acquitted of manufacture of methamphetamine. *See State v. Hendrickson*, 138 Wn.App. 827, 831-33, 158 P.3d 1257 (2007).⁵

The “fact of the meth lab” cannot be proven by the observations of the detective. As previously discussed, the detective’s characterization and opinion

⁵ Once again, the defendant finds offense with the State’s use of the phrase “some other dude did it.” The defendant has never used this term and the State’s repeated use of this flippant phrase is disrespectful and minimizes the defendant’s legitimate arguments regarding serious and important constitutional rights.

regarding whether there was a “meth lab” would have been improper opinion testimony. *State v. Montgomery*, 163 Wn.2d 577, 587-88, 183 P.3d 267 (2008).

e. Trial counsel was ineffective for failing to object to testimony of Ms. Wagner-Weidner and Detective Moss.

For the reasons previously outlined, the appellant must respectfully disagree with the State’s contention that evidence of flight was admissible. If trial counsel had been effective and objected to this exceptionally prejudicial evidence, there would have been a hearing to determine admissibility of this evidence. Absolutely nothing beneficial to the defendant was obtained from Ms. Wagner-Weidner’s testimony and there is no tactical reason whatsoever to allow such evidence in without objection.

Defense counsel did not object to Detective Moss’s speculative testimony or the lack of a foundation for Detective Moss’s qualification to give testimony as an expert in these matters. An objection to his testimony is likely to have been sustained as he admitted during direct examination that he had no chemistry background, and that there were many speculative reasons for why and how the fire could have started. 07/31/07 RP 80, 98.

f. Trial counsel was ineffective for failing to object to prosecutor’s prejudicial and inflammatory statements during closing argument.

The State consistently argues that the defendant waived his right to raise this issue and it is obvious that trial counsel’s failure may have resulted in

waiver on multiple issues; this failure is only one more example of trial counsel's deficiencies. The appellant is not as certain as the prosecution that a curative instruction would not have changed the outcome of the trial nor that such an instruction would have been sufficient to alleviate the prejudice caused. This was a close case, the jury showed confusion and concern and these statements undoubtedly swayed the jury and affected their verdict.

5. The Trial Court erred when it instructed the jury on accomplice liability.

One of the few objections made by defense counsel was to the jury instruction on accomplice liability. 07/31/07 RP 138. His concern was that jurors would be invited to consider a theory of accomplice liability that was inadequately supported by the evidence. 07/31/07 RP 138. In the instant case there was insufficient proof to suggest that Mr. Walker was an accomplice, only that he was present and "[m]ere presence at the scene of a crime, even if coupled with assent to it, is not sufficient to prove complicity. The State must prove that the defendant was ready to assist in the crime." *State v. Luna*, 71 Wn.App. 755, 759, 862 P.2d 620 (1993). The court made no finding on the issue and instead only indicated "[t]he objection of the defendant is noted. The court will give that instruction." 07/31/07 RP 139. The trial court erred when it gave the jury an instruction on accomplice liability. This error was not harmless as outside of accomplice liability there was no evidence presented to suggest

Mr. Walker acted as a principle. The accomplice liability instruction likely allowed the jury to convict Mr. Walker on the evidence which suggested he was at the scene of the fire.

6. The Trial Court violated Mr. Walker's Due Process rights and CrR 6.15 when it responded to an inquiry from the jury on three different occasions in Mr. Walker's absence and without first conferring with counsel.

a. The appellant has proven that this occurred.

The State concedes that there is no record that CrR 6.15 was complied with. However, this complete lack of record is insufficient to convince the State that CrR 6.15 was not complied with. Appellant would again draw this court's attention to *State v. Jasper*, ---Wn.2d---, 271 P.3d 876 (2012). In that case, the court upheld the jury inquires made without a record but did so because the form used by the court to respond to the jury contained boilerplate, preprinted language that counsel was consulted prior to responding. *Jasper*, 271 P.3d at 889. In this case the form has no such language. CP 54-56. It is impossible for the appellant to present any more facts to "prove" that CrR 6.15 was violated and it does not appear that any lack of record would be sufficient to satisfy the state. While the appellant has no doubts about the diligence of the Honorable Judge Yule, this alone is not sufficient to prove that this exceptionally important rule was complied with.

Violation of the rule against ex parte judicial communications with a jury requires reversal unless the State proves that the error was harmless beyond a reasonable doubt. *State v. Russell*, 25 Wash.App. 933, 948, 611 P.2d 1320 (1980). In the instant case, the record on appeal indicates that the trial court answered the jury's questions without obtaining counsel's input and in Mr. Walker's absence.

b. *The defendant had a right to be present when the trial was responding to the jury question.*

State v. Jasper does not support the state's blanket assertion that "the defendant does not have a right to be present regarding the trial court's response to jury questions, since it is not a critical stage of the proceedings." Brief of Respondent 40. The court of appeals in *Jasper* stated:

Here, the issue raised by the jury's first inquiry involved a question of law regarding a driver's obligation to fulfill his or her duties pursuant to the statute. The issue raised by the jury's second inquiry involved a question of law regarding a definition for the "spirit of the law." No factual issue is raised by either of these questions. Because the jury's questions did not raise any issues involving disputed facts, the court's consideration of and response to the jury's inquiries did not constitute a critical stage of the proceedings. Therefore, Jasper's presence when the trial court resolved the jury's inquiries was not constitutionally required.

State v. Jasper, 158 Wn. App. 539-540, 245 P.3d 228 (2010). *Jasper* does not stand for the assertion that a defendant's presence is *never* constitutionally required in addressing jury questions. Rather, the determination revolves

around the nature of the question. At least one of the jury's questions involved a factual question: "[d]id Mr. Walker reside at Joe Leckenby's residence?" CP 55. In this case, discussion of the jury inquiry constituted a critical stage of a criminal proceeding at which a defendant had the right to be present.

c. *The State bears the burden of proving this error was harmless.*

Violation of the rule against ex parte judicial communications with a jury requires reversal unless the State proves that the error was harmless beyond a reasonable doubt. *State v. Russell*, 25 Wash.App. 933, 948, 611 P.2d 1320 (1980). The questions indicate that the jury was struggling with factual issues and when these questions were not responded to, the jury indicated it had reached a deadlock, but the court ordered them to continue deliberations. There was no reason for the court to order the jury to continue deliberations, but yet it expressed its concern that the jurors do so. Courts must be cautious when directing the jury to continue deliberations, as it implies the court is dismissive of the jury's concerns or has a stake in the deliberations. The jury should deliberate without any pressure from the court. *State v. Froed*, 151 Wn.2d 530, 539, 213 P.3d 54 (2009); *State v. Boogard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978); CrR6.15(f)(2).

The error was not harmless. For the many reasons previously outlined throughout this reply and Appellant's Opening Brief, this was a close case and the obvious struggle of the jury simply reinforces this fact.

7. The evidence was insufficient to sustain a conviction for manufacturing methamphetamine

In the instant case, the evidence introduced at trial does not establish that Mr. Walker promoted or facilitated the manufacture of methamphetamine. At the most, it establishes his presence at the scene. Even mere presence is doubtful. There was no fingerprint evidence, evidence of dominion and control or other physical evidence linking Mr. Walker to the residence and the fire. 07/31/07 RP 104-105. Furthermore, Mr. Leckenby, who was not charged with manufacture of a controlled substance, was the suspect on the top of the police reports. 07/31/07 RP 104-105. However, contrary to the prosecuting attorney's argument to the jury that Mr. Walker was involved because the duplex was small and smelled strongly of solvent and Mr. Walker "would have had to have known that there's meth production going on," mere presence is insufficient to support a conviction. *State v. London*, 69 Wn.App. 83, 91, 848 P.2d 724 (1993).

The rest of the evidence used to infer Mr. Walker's guilt was commentary on his constitutional right to remain silent that should never have been admitted. *See discussion infra*.

8. Reversal is required because cumulative error denied Mr. Walker his Constitutional right to a fair trial.

The State's only response is that there were absolutely no errors. It is difficult to believe that over the course of a two-day jury trial on a serious

conviction based essentially on circumstantial evidence that *no errors* occurred. Mr. Walker did not receive a fair trial. The combination of severe errors of Constitutional issues include the violations of Mr. Walker's confrontation clause rights, his right to effective assistance of counsel, his right to be present at all critical stages of the trial, and his right to have a jury determine guilt based on relevant evidence cumulatively require reversal.

9. The Trial Court erred in imposing exceptional consecutive sentences.

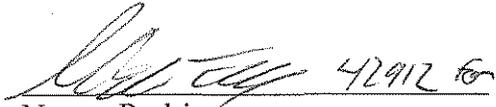
RCW 9.94A.589(1)(a) requires that offenses that are not serious violent offenses "shall be served concurrently." Consecutive sentences for RCW 9.94A.589(1)(a) crimes may only be imposed "under the exceptional sentence provisions of RCW 9.94A.535." A departure from the presumption of concurrent sentences for nonserious violent felonies is an exceptional sentence. *State v. Vance*, 168 Wn.2d 754, 759–60, 230 P.3d 1055 (2010). The Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, authorizes trial courts to impose sentences outside the standard range if, considering the purposes of the SRA, there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535. In the instant case, the court abused its discretion by imposing a clearly excessive exceptional sentence when the evidence, viewed in the light most favorable to the state, showed that Mr. Walker was, at most, a minimal participant.

B. CONCLUSION

Based on the forgoing, Mr. Walker respectfully requests that this Court reverse his conviction for manufacturing of methamphetamine.

October 26, 2012

Respectfully submitted,
RODRIGUEZ & ASSOCIATES, P.S.


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PROOF OF SERVICE

I, Robert Todd Walker, being over the age of 18, hereby declare that on the 26 day of October, 2012, I caused a true and correct copy of the Reply Brief of Appellant for COA #305759, to be served on the following in the manner indicated below:

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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 26 day of October, 2012

By: Robert Todd Walker