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Court of Appeals
Division III
State of Washington

NO. 305759-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

ROBERT TODD WALKER, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 04-1-00630-2

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

TERRY J. BLOOR, Chief Deputy
Prosecuting Attorney
BAR NO. 9044
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

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COUNTER STATEMENT OF THE CASE

There is a methamphetamine lab and resulting fire at 2218 W. 12th, #B in Kennewick, Washington on September 14, 2003. (RP¹ 83-84).

The evidence of a methamphetamine lab on these premises include:

- Dry ice. (RP 85).
- A propane torch. (RP 85).
- Two HCL generators used to turn methamphetamine from a liquid to a salt. (RP 85-86).
- One of the HCL (for hydrochloric gas) generators involved a Dr. Pepper bottle with yellow liquid and clear granules. (RP 86).
- The other HCL generator involved a pint mason jar with an 18" tube tied at the end with black tape and containing white residue. (RP 86).

¹ "RP" refers to the Verbatim Report of Proceedings of July 30-31, 2007.

- That tubing contained methamphetamine (EX. 23 [see "A-3]).
- A can of acetone. (RP 116).
- A jar containing acetone (EX 23; RP 86).
- Two quart glass jars containing rock salt and a yellow liquid. (RP 86).

A police meth lab expert, Det. Moos, was certain there was a meth lab on the premises. (RP 98-99). The only reason to have HCL generators and tubing with methamphetamine therein was to produce methamphetamine. (RP 99). That opinion was consistent with a former Captain with the Benton County Sheriff's Office, John Hodge, who saw the fire and observed methamphetamine chemicals in the residence (RP 129-30). The opinion of Det. Moos was also consistent with forensic scientist Matthew L. Jorgenson of the Washington State Patrol Crime Laboratory. (EX. 23).

Witnesses link the defendant to the residence.

Leann Brown is the defendant's cousin. (RP 58-59). Ms. Brown lived on a cul-de-sac behind the scene, and saw the residence on fire. (RP 58-59). Ms. Brown saw the defendant at the scene jumping out of a window, going back into the residence through the window, then jumping back out. (RP 60). Ms. Brown also saw him throw something from the window. (RP 60). Ms. Brown then saw the defendant run around the house and leave in a white Thunderbird. (RP 62, 71).

The occupant of the residence was Joe Leckenby, Ms. Brown's uncle. (RP 58). As the defendant ran away, Ms. Brown remembers Mr. Leckenby come running around the front of the house with a hose. (RP 70).

Retired Benton County Sheriff Captain Hodge also remembered seeing the defendant leave the

scene in a Thunderbird, while another person was using a garden hose on the fire. (RP 131-32, 135-36).

While Mr. Leckenby was still at the scene when the police responded to the fire, the defendant was not. (RP 116).

The defendant flees the scene and flees again...and again.

The defendant was arraigned on June 18, 2004. (RP 120). The defendant's next appearance was an omnibus hearing set for June 30, 2004. (RP 120). The defendant missed that court date and next appeared on August 8, 2005. (RP 120).

After some continuances, the defendant was scheduled for a jury trial on December 18, 2006. His also missed that trial date. (RP 121-22).

Trial issues:

The defense is SODDI² rather than an argument that the defendant was present, but the items discovered did not constitute a meth lab.

The defendant argued at trial, as he does on appeal, that the evidence did not establish that he was involved in the manufacture of methamphetamine. (App. Brief at 43; RP 156).

Consistent with that defense, the report from the Washington State Patrol Crime Laboratory, Exhibit 23, was admitted without objection. (RP 91).

The report includes the certification required in CrR 6.13(b)(2) regarding "Test Report by Expert" in lieu of testimony. (EX. 23). It was dated 04/29/04. (EX 23).

Possibly because the defense admitted the existence of a methamphetamine lab, the defendant anticipated that forensic scientist Jorgenson

² SODDI: "Some other dude did it."

would not testify and did not object to the admission of the report. (RP 91).

In any event, the report is dated April 29, 2004, and has a certification pursuant to CrR 6.13(b), regarding the admission of test reports by experts. (EX 23).

Issues regarding Joe Leckenby:

Mr. Leckenby's family did not know his whereabouts. (RP 109). If Mr. Leckenby had been available, the defense attorney knew his testimony could help, but could hurt him. (RP 110). Nevertheless, the defense attorney elicited testimony that the police suspected Mr. Leckenby. (RP 104). Further, the defense attorney argued, "If a fire is in the uncle's [Mr. Leckency's] house, if methamphetamine is being produced in the uncle;s house, there's probably some reason to believe that the uncle might be involved If there's a prejudice, if

there's a bias towards somebody it's the uncle and not Mr. Walker. (RP 158).

The defendant was found guilty, and ultimately is sentenced to a standard range sentence to be served consecutive with another cause number.

The defendant was sentenced on this and another cause number on January 17, 2012. (CP 83-90). The defendant's offender score on both cause numbers was nine. (CP 91). Based on a "free crime" theory, the trial court sentenced the defendant to the minimum standard range, but ordered that the sentences be served consecutively. (CP 92).

This appeal follows.

RESPONSE TO DEFENDANT'S ARGUMENTS

1. **ARGUMENT NO. 1:**
"The Trial Court's Admission of Plaintiff's exhibit No. 23 violated Mr. Walker's sixth amendment right to confront witnesses."

A. This Court should refuse to review the claimed error because the defendant is raising it for the first time on appeal.

Under RAP 2.5(a), "The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following ... manifest errors affecting a constitutional right." The defendant did not object to the admission of the laboratory report.

This issue has been addressed in *State v. Schroeder*, 164 Wn. App. 164, 262 P.3d 1237 (2011), which specifically dealt with the admission of laboratory reports in drug cases pursuant to CrR 6.13. As *Schroeder* held, a defendant may waive his confrontation clause rights.

The defendant waived any error by not objecting to the admission of the report.

B. The trial court cannot sua sponte interpose an objection based on the confrontation clause on the defendant's behalf.

See *State v. O'Cain*, ___ Wn. App. ___, 279 P.3d 926 (2012). As stated in *O'Cain*, such a requirement would make a trial untenable.

C. Further, even if there had been an objection, the report and CrR 6.13(b)(3)(iii) pass muster under *Melendez-Diaz*.

Even if the defendant had objected, CrR 6.13(b)(3)(iii) comports with the requirements of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct 2527, 2541, 174 L. Ed. 2d 314 (2009). As stated in *Schroeder*, 164 Wn. App. at 168, the States are allowed, as part of their procedural rules to require that defendants demand the presence of an expert. CrR 613(b) meets the requirements of *Melendez-Diaz*.

D. In any event, if there had been an objection, it is not "manifest" that the trial court would have erred in admitting the report.

The American Heritage Dictionary of English Usage defines the word manifest as, "clearly apparent to the sight or understanding; obvious."

E. The defendant has not shown "actual prejudice" by the admission of the lab report.

1) "Actual prejudice" is the standard.

A "manifest" error has usually been defined as one which actually affected the defendant's right to a fair trial, which means that there must be a "plausible showing by the appellant 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). As noted in *O'Hara*, this is a higher burden than simply a harmless error analysis.

The defendant has not addressed this standard. Nevertheless, for the below reasons, the defendant could not show any actual prejudice.

2) The lab report did not impinge on the defendant's SSODI defense.

The defendant's substantive argument at trial and on appeal is the same. To paraphrase the argument, "There may have been a meth lab at his Uncle's residence, but he did not participate in it." The admission of the lab report had no impact on this defense. In fact, it was wise of the defendant not to contest whether there was a meth lab. The existence of the meth lab was obvious, and if the defendant argued otherwise his credibility with the jury would have been diminished.

3) Further, the existence of the meth lab was proven by the observations of witnesses, including Detective Moos.

The defendant has offered no explanation, other than the presence of a methamphetamine lab for the tubing, HCL generators, glass jars with chemicals, acetone, and propane torch at the scene.

2. ARGUMENT NO. 2:

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

The defendant is referring to his repeated flight from prosecution and flight from arrest. To reiterate, the defendant fled from the scene of the crime, was later arrested, then missed his court hearing and fled from prosecution. (RP 62, 120, 132, 135-36). The defendant was arrested again, and then again missed his court hearing, a jury trial, and fled one more time. (RP 122).

A. The defendant failed to object to the evidence at trial and cannot raise the issue for the first time on appeal.

The State incorporates the above references to RAP 2.5. The defendant should pick his argument: either his attorney was ineffective in not objecting, or the trial court erred by admitting the evidence over an objection. The

defendant should not be able to raise both issues.

B. Even if the defendant had objected, his arguments on appeal fail.

1) The defendant would have to show that the trial court abused its discretion in admitting the flight evidence (if the defendant had objected).

State v. Moran, 119 Wn. App. 197, 218, 81 P.3d 122 (2003). A trial court abuses its discretion when its decision is manifestly unreasonable, or is based upon untenable grounds or reasons.

2) The defendant's ER 404(b) arguments are not applicable; evidence of flight is admissible under ER 402.

Flight from the scene of a crime or from prosecution is an admission by conduct, and is admissible under ER 402. See Courtroom Handbook on Washington Evidence, 2011-2012 Edition, page 211-212. ER 404(b) is not applicable regarding

an analysis of the admissibility of evidence of flight; the defendant's long discussion of ER 404(b) misses the mark.

- 3) Flight to evade arrest or avoid prosecution is admissible if the evidence of flight is "substantial and real" as opposed to "speculative, conjectural or fanciful."

This was the holding in *State v. Price*, 126 Wn. App. 617, 645, 109 P.3d 27 (2005). Here, the defendant skipped court two times. On the second occasion, a jury had been summonsed and was waiting to begin his trial. (RP 122). That is direct, substantial evidence of the defendant's flight to avoid prosecution.

3. ARGUMENT NO. 3:

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

- A. The defendant did not object to the closing argument, and therefore waived this argument absent a showing that both the argument was improper and that the misconduct was so flagrant and ill intentioned that an instruction

could not have cured the resulting prejudice.

The recent case of *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012) clarified the analysis of prosecutorial misconduct. *Emery* held that "reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Id.* at 762.

The defendant argued the first issue, that the prosecutor's statements were improper. However, he has not even suggested that there was any prejudice. Nevertheless, the first question is whether the prosecutor's closing argument was improper.

B. The prosecutor's argument was proper.

The defendant has pointed to three areas: "inviting the Jury to find guilt based on silence," "the 'right verdict,'" and "personal opinion of the prosecuting attorney."

1) **"Inviting the Jury to find guilt
Based on silence."**

The prosecutor made no such comment or argument. None of the statements quoted by the defendant in his brief at pages 23-24, refer to the defendant not testifying or declining to speak with the police. Rather, all of the quoted comments refer to the defendant's flight from the scene and flight from prosecution. Some examples:

- "[A]ctions speak louder than anything that I could say." (RP 151-52).
- "[If the defendant had vanished after jury selection] the obvious thing to think is this guy doesn't want to come to court, and the reason he doesn't want to come to court, he doesn't want people to sit in judgment of him, and the reason is because he's guilty." (RP 153).

- [T]he defendant flees the scene at the time, and then he doesn't want people like you, a jury, to consider whether or not he's guilty or not guilty." (RP 154).
- "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." (RP 162).

At no time did the prosecutor refer to the defendant's failure to testify or refusal to speak with the police. This is in contrast to the cases cited by the defendant in which the prosecutor directly referred to the defendant's exercise of his right to remain silent.

For example, *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996) dealt with an officer who said the defendant was a "smart drunk" which referred to his evasive behavior and silence when

interrogated. The prosecutor repeatedly referred to this in closing argument.

State v. Lewis, 130 Wn.2d 700, 927 P.2d 235 (1996) dealt with the issue of when is a statement a comment on the defendant's right to remain silent. The testimony was:

Q And did you have any further conversation with him?

A I told him—my only other conversation was that if he was innocent he should just come in and talk to me about it.

Q Was there any other part in the investigation that you had anything else—that you have done?

A I prepared a bulletin to be distributed to the patrol officers with Mr. Lewis's picture on the bulletin stating there was probable cause to arrest him for that crime, distributed to all patrol precincts, and I drove to his house at one point but nobody was home. And later, once I was notified when he was arrested by patrol, and then just prepared the filing of the case.

State v. Lewis, 130 Wn.2d 700, 703, 927 P.2d 235, 236 (1996).

The Court held this was not a comment on the defendant's right to remain silent.

There was no statement made during any other testimony or during argument by the prosecutor that Lewis refused to talk with the police, nor is there any statement that silence should imply guilt. Most jurors know that an accused has a right to remain silent and, absent any statement to the contrary by the prosecutor, would probably derive no implication of guilt from a defendant's silence. See *Tortolito v. State*, 901 P.2d 387, 390 (Wyo.1995) (citing *Parkhurst v. State*, 628 P.2d 1369 (Wyo.), cert. denied, 454 U.S. 899, 102 S.Ct. 402, 70 L.Ed.2d 216 (1981) (a mere reference to silence which is not a "comment" on *707 the silence is not reversible error absent a showing of prejudice)). A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt. *Tortolito*, 901 P.2d at 391. That did not occur in this case.

State v. Lewis, 130 Wn.2d at 706-07.

Reference to the defendant's flight from the crime scene and from prosecution is fair game. Reference to the defendant's decision not to testify is not fair game. The prosecutor only commented on the defendant's flight.

2) The "right verdict."

As stated in *State v. Musser*, 721 N.W.2d 734 (Iowa, 2006) whether finding a defendant guilty is "the right thing to do" in an abstract sense is not the issue. In that case the prosecutor asked for a guilty verdict because 1) the evidence supported it and 2) "it is the right thing to do." This was not appropriate because a jury could believe that the evidence did not support a guilty verdict but still find the defendant guilty because "it's the right thing to do." (Of course, that is if a jury ignored the jury instructions about reasonable doubt and deciding the case on the evidence.) If the prosecutor said a guilty verdict was the right thing to do because the evidence supported it, there would not have been a problem.

The prosecutor's argument passes muster. The prosecutor did not ask the jury to consider the impact of meth labs on communities and find

the defendant guilty because it was "the right thing to do." Rather, the prosecutor told the jury that the right verdict was guilty because the evidence supported it.

The defendant did not fully quote the prosecutor's closing statement. The defendant's quote is, "You need to get this right, and the right decision, the right verdict is to find the defendant guilty." (App. brief at 26). of defendant's brief, RP 163)

The actual quote: "It's him. He was the one there at the scene actively going in, going out, tossing things out the window. He was the one that fled. Ladies and gentlemen, I'm asking you to hold this person accountable for what he did. You need to get this right, and the right decision, the right verdict is to find the defendant guilty." (RP 163).

The prosecutor did not tell the jury that it had a responsibility to do the right thing by

finding the defendant guilty whether or not the evidence supported it. Indeed, the prosecutor never said "it's the right thing to do."

3) Personal opinion.

It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.

State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59, 61 (1983), and quoted with approval in *State v. McKenzie*, 157 Wn.2d 44, 54, 134 P.3d 221 (2006).

The defendant complains about two of the prosecutor's comments.

1) "The reason he doesn't is that he knows - I know he knows what the outcome should be." (RP 154). First, the statement is not articulate. The prosecutor never said that what the defendant knew. The prosecutor does not give his personal opinion, such as "I know the defendant knows he is guilty" or "I know the defendant is guilty." Second, under the holding of *Papadopoulos*, it is inappropriate for the defendant to pick out one comment. Rather, the total argument must be examined in context. In the context of the total argument and the evidence, it is clear that the prosecutor was arguing the evidence, rather than a personal opinion.

The context is that the prosecutor was arguing that the defendant's repeated flight from prosecution and the crime scene was telling.

Now, what's really important is that actions speak louder than anything that I could say or anybody else could say, and the actions here of the defendant

speak volumes. Does he stay at the scene? Does he, you know, wait until the police arrive? Fire investigators arrive? Firemen arrive? Does he wait for any authority? No, he takes off.

And not only does he take off then, but he takes off after he's been charged. Let me put this to you. Let me suggest what would you have thought if you were calling in to jury duty yesterday, Monday, and then the clerk walks up to you and says, "You can all go home. The defendant didn't come to court. Thank you very much for coming, but we don't have a defendant here."

What would you have thought? Well, I would suggest that the obvious thing to think is this guy doesn't want to come to court, and the reason he doesn't want to come to court, he doesn't want people to sit in judgment of him, and the reason is because he's guilty.

The presumption is innocence. I would be suggesting to any of you, Bring it on. Let me hear what evidence the State prosecutor has against me. Bring it out in court. Let me have my attorney examine all the evidence you've got. Let me sit there and see what's said," but no, the defendant flees the scene at the time, and then he doesn't want people like you, a jury, to consider whether or not he's guilty or not guilty. The reason he doesn't is that he knows -- I know he knows what the outcome should be.

(RP 153-54).

While the prosecutor's last statement is inarticulate and in fact meaningless, the prosecutor argued the facts and proved the defendant's guilt.

2) "Now, I'm not here telling you the only person involved in this is the defendant. I do not know, but I know that he is - I think the evidence shows that he is involved without question." (RP 151).

The prosecutor should not have used the clause, "I think the evidence shows that he is involved without question." (RP 151). However, in *State v. Hoffman*, 116 Wn 2d 51, 94-95, 804 P.2d 577 (1991), the Court held that the prosecutor's phrasing an argument in terms of "I think" or "I think the evidence shows" to which trial counsel did not object, is not

prosecutorial misconduct if the arguments are based on evidence or reasonable inferences.³

Here, viewed in the context of the entire closing argument, the prosecutor's comments were based on evidence, and the reasonable inferences from the evidence. The immediate statements after the above quote are telling:

But again, the issue can be boiled down to did he assist in simply preparing to make methamphetamine.

Let's go through this and look at some of the things. There's no question that he was there. His own relative There's no question that she clearly identified him as jumping in, jumping out, jumping in, jumping out of that window where the meth lab was. Former police officer Hodge now citizen Hodge, you know, says, "Okay, I think that's the guy that I saw coming out - walking towards the white T-Bird." No question he was there. . . .

. . . .
Now, what's really important is that actions speak louder than anything that I could say or anybody else could say,

³ This prosecutor would like to assure this Court that the *Hoffman* case will not be viewed as a green light to say "I think..." in closing arguments. The prosecutor is aware of the admonition in *Jackson* that prosecutors should edit out of closing arguments any statements that could be viewed as an expression of personal opinion.

and the actions here of the defendant speak volumes. Does he stay at the scene?

And not only does he take off then, but he takes off after he's been charged."

(RP 151-53).

In context of the entire argument, the prosecutor was not asking the jury to convict because the prosecutor believed the defendant to be guilty. The prosecutor argued that the jury should convict because the evidence supported a guilty verdict. The prosecutor's comment, although it should have been omitted, passes muster under *Hoffman* and *Papadopoulos*.

C. In any event, the prosecutor's statement was not ill intentioned or flagrant and there was no prejudice to the defendant.

The defendant has the burden of proving that there is a substantial likelihood that any misconduct affected the jury's verdict. *State v. Jackson*, 150 Wn. App. 877, 209 P.3d 553 (2009).

As argued above, there was no misconduct and the defendant waived his right to make this argument when he failed to object. The defendant cites only two sentences from the prosecutor's closing argument which might constitute a personal opinion. This was not ill intentioned or flagrant, and had nothing to do with the verdict. In any event, any problems could have been cured by a cautionary instruction. The defendant was found guilty because witnesses saw him at a meth lab and he repeatedly tried to flee from arrest and prosecution.

In *Jackson*, supra, at page 888-89, the Court discussed the prosecutor's comment, "*I think maybe (Greene) might have ulterior motives.*" The Court noted that the prosecutor made this statement in the context of recounting evidence and reasonable inferences from the evidence that could support the jury's conclusion that the

defendant was not credible and held that the argument did not cause undue prejudice.

In this case, the prosecutor should not have used the phrase "*I think . . .*" (RP 151). However, that could have easily been cured by an instruction. Even if improper, the comment caused no lasting prejudice.

4. ARGUMENT NO. 4:

"The defendant received constitutionally ineffective assistance of counsel.

The defendant cannot establish that his attorney fell below an objective standard of reasonableness, and if he did, that there is a reasonable probability that the outcome would have been different but for his attorney's poor performance. *Matter of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

To address each of the defendant's arguments:

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

The defendant is incorrect. He did have a hearing on the issue of corrections officers allegedly taking or reading his legal papers. Officer Williams testified at the hearing, Cpl. Vandine testified, and the defendant testified. (06/03/08, RP 266-305). The trial court denied the motion. (06/03/08, RP 328).

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

The defendant specifically criticizes his attorney for not interviewing Joe Leckenby. First, there is nothing in the record showing that the defense attorney at some point prior to trial knew Mr. Leckenby's whereabouts, and declined to interview him. Second, in any event, Mr. Leckenby's whereabouts were unknown at the time of trial. It would not have mattered

whether or not the defense attorney interviewed him.

Further, Mr. Leckenby would possibly helped and possibly hurt the defendant's cause. The defense attorney was aware of this. Indeed, the defense attorney knew that Mr. Leckenby's testimony would directly implicate the defendant. (RP 106). Even if the defense attorney had Mr. Leckenby subpoenaed, the choice to not call him would have been a legitimate trial strategy.

C. "Trial counsel was ineffective for failing to pursue a third party perpetrator theory."

First, the defense attorney did point out that Mr. Leckenby, through his questioning of Leann Brown, that Mr. Leckenby was at the residence when the fire occurred and argued that the defendant was not at the scene when the police arrived, and that family members may have been protecting Mr. Leckenby. (RP 70).

Second, an attempt to introduce a third party perpetrator theory would probably not have succeeded. The defendant's evidence had to "create a trail of facts or circumstances that clearly pointed to someone other than the defendant as the guilty party." *State v. Mezquia*, 129 Wn. App. 118, 118 P.3d 378 (2005). Here, there was nothing to link Mr. Leckenby to the meth lab, other than it was on his property. Unlike the defendant, he did not jump in and out, in and out, of a window while the fire was building. Unlike the defendant, he did not throw anything from the window. Unlike the defendant, he did not flee the scene before the police arrived.

Third, in any event, many trial attorneys may choose to avoid a third party perpetrator theory. Which of the following statements is more acceptable? Argument X: "The State has not proven the defendant is guilty beyond a

reasonable doubt," or Argument TPP (third party perpetrator), "The State has not proven the defendant is guilty beyond a reasonable doubt and Joe is the guilty party."

The third party perpetrator argument requires the defendant to persuade the jury of more facts than the first. The reason that third party perpetrator evidence is not favored is because it is usually irrelevant. The issue is whether the defendant committed the crime, not whether another person did so. A defense attorney may as a legitimate strategy focus on only the question at hand, "Did the defendant do it?" rather than, "Did person X do it?"

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

As argued above, an objection would have been overruled. In addition, an objection would have only mattered if the defendant had argued that there was not a meth lab at 1106 S. Yelm, in

Kennewick, Washington. However, the defendant has always argued, at trial and on appeal that "some other dude did it."

Finally, the fact of the meth lab was easily proven by the observations of Detective Moos, particularly his description of the HCL generator at the residence. The lab report confirmed his observations. The jury could have concluded that a meth lab was at the residence whether or not the lab report was admitted.

E. "Trial counsel was ineffective for failing to object to the testimony of Ms. Wager-Weidner and Detective Moos."

Regarding Ms. Wager-Weidner's testimony, please review the State's argument above in RESPONSE TO ARGUMENT 2, section B (2). The testimony regarding the defendant's flight was admissible. If the defendant had objected, the objection would have been overruled.

Regarding Detective Moos: First, the defendant's statement, "Detective Moos testified regarding the source and cause of the fire in relation to the manufacture of methamphetamine" is not accurate. (App. brief at 36). Detective Moos did testify about various ways in which the manufacture of methamphetamine might cause a fire.⁴ He did not testify about the "source and cause" of the fire in this case.

⁴Q: Can you tell the jury how a fire might have started when you're mixing together various items involved in a meth lab?

A: There's several ways, I mean, it could have started. The beginning, like I said, when they're evaporating in the extraction process, if they're using an open flame to speed up the evaporation, but the vapors are heavier than air, and the vapors come down and start a fire. The lithium metal they use reacts very violently to water. Will actually start, depending on the size of the chunk of lithium, actually it's a bunch of mini explosions. That could start a fire.

At any point if they're trying all these -- like at the end when they're trying to dry it out again, they could use a heat source there. I mean, it's -- you don't really know. There's so many spots during the process that they could start one, it's all basically if they are -- if they just get in a hurry or get sloppy. (RP 98-99).

Second, the evidence is that Detective Moos had gone to a 40-hour class on methamphetamine labs, and had investigated about 70 meth labs over a five-year period. (RP 79). Detective Moos was qualified to testify about possible causes of a meth lab fire.

Third, in any event, the defendant cannot show any prejudice. There was a fire; there was a meth lab. The defendant did not at trial, and does not on appeal, contest either fact. Detective Moos testimony on how those two facts might be related had no prejudicial affect.

F. "Trial counsel was ineffective for failing to object to prosecutor's prejudicial and inflammatory statements during closing argument."

As argued above, the prosecutor's comments were not improper. Nevertheless, if the defendant had objected, and the objection had been sustained, the court would have issued a

curative instruction. The outcome of the trial would not have changed.

Further, there are good reasons why the defense attorney may have chosen not to object to the prosecutor's closing argument. One, an objection may have been overruled. Two, an objection may have been viewed by the jury as an unfair interruption of the other side's argument. Three, an objection may have highlighted the prosecutor's closing argument, i.e., an objection to an argument that the defendant's flight is evidence of guilty may have cemented that thought to the jury.

5. **ARGUMENT NO. 5:**

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

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole, properly inform the jury of the applicable law. *State v. Woods*, 138 Wn. App.

191, 196, 156 P.3d 309 (2007). An accomplice instruction is appropriate if it is accurate and allows the defendant to argue his theory of the case. *State v. Williams*, 28 Wn. App. 209, 211, 622 P.2d 885 (1981).

Here, the defendant could argue that he was not at the scene, and even if he was, he did nothing to contribute to the meth lab. The instruction was appropriate.

6. ARGUMENT NO. 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 defendant has not proven that this occurred; the court may have notified the parties without making a record.

The State concedes there is no record that the trial judge "notified the parties of the contents of the question and provide[d] them an opportunity to comment upon an appropriate response" pursuant to CrR 6.15(f)(1). However,

there is nothing in the rule requiring that there be a record of the trial judge contacting the attorneys and asking for comments. CrR 6.15(f) states that the "court shall respond to all questions from a deliberating jury in open court or in writing." (Emphasis added).

The rule does not specify in what manner the trial court notify the parties of the jury question and provide the parties with an opportunity to comment upon the response. Given the diligence of the trial judge, The Honorable Dennis D. Yule, now retired, it is very probable that the trial judge notified counsel telephonically with his proposed answer and gave the attorneys an opportunity to comment. That procedure would not violate CrR 6.15.

B. The defendant is incorrect in claiming that he had a right to be present when the trial court decided how to respond to the jury question.

As held in *State v. Jasper*, 158 Wn. App. 518, 539, 245 P.3d 228 (2010), 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.

C. In any event, the defendant must show that he was prejudiced; if there was err, it was harmless.

Jasper held that when an error occurs involving CrR 6.15(f)(1) regarding the court's response to jury questions, the defendant must show the communication between the judge and jury was prejudicial and the State may demonstrate that the error is harmless. *Id.* at 541. Here, there was no prejudice by any of the trial court's responses.

To address each jury inquiry and the response:

First Jury Inquiry: 07/31/07 at 4:04 p.m.,
"Can we have a copy of the court reporter's transcript of Ms. Brown's testimony?"

The Court's response at 4:07 p.m. was, "A transcript of testimony cannot be provided to you." (CP 54).

If the trial court had provided the jury a transcript of Ms. Brown's testimony, the conviction would probably be reversed. *State v. Monroe*, 107 Wn. App. 637, 27 P.3d 1249 (2001) dealt with this issue. The *Monroe* Court noted that transcripts are similar to depositions which are expressly not allowed in the jury room, under CR 51(h). The *Monroe* Court reversed the defendant's conviction after the trial judge granted the jury's request for a transcript of a witness. *Id.* at 640-641. As stated in WPIC 151.00, "Testimony will rarely, if ever, be repeated for you [the jury] during your deliberations."

The trial judge made the right decision here; the trial court would have emphasized Ms. Brown's testimony if it had granted the jury's

request. There was no prejudice to the defendant.

Second Jury Inquiry: 08/01/07 at 9:04 a.m.,
"Did Mr. Walker reside at Joe Leckenby's residence?"

The Court's response at 9:20 a.m. was, "You must rely upon your recollection and understanding of the evidence." (CP 55).

It seems obvious that the trial court could not have answered the jury question without commenting on the evidence.

Third jury inquiry: 08/01/07, at 9:35 a.m.,
"We are at an impasse."

The Court's response at 9:35 a.m. was, "Please continue your deliberations." (CP 56).

At the time of this inquiry, the jury had deliberated for, perhaps, only two hours and fifteen minutes. (Assume that the jury deliberated from 2:46 p.m. to 4:30 p.m. on July 31, 2007, and for another 35 minutes from 9:00

a.m. to 9:35 a.m. on August 1, 2007.) The jury had 23 exhibits. There were instructions concerning the legal definitions of "manufacture" and "accomplice" which are different than dictionary definitions. (CP 48, 51). It was reasonable for the judge to expect the jury to deliberate longer.

The decisions regarding declaring a mistrial because a jury is deadlocked is subject to an "abuse of discretion" analysis. *State v. Jones*, 97 Wn.2d 159, 641 P.2d 708 (1982). In *Jones*, the Court held that the trial court improperly granted a mistrial although the jury had deliberated from 11:10 a.m. to midnight. The defendant's conviction was reversed. Here, the jury had deliberated for a much shorter time.

As stated in *Jones*, a too quick discharge of a hung jury would be held a violation of the defendant's right to a verdict of that jury. If the trial court had declared a mistrial after

this inquiry, a conviction in a second trial probably would have been reversed.

The jury may have intended the statement as a response to the trial court's refusal to answer its question about 15 minutes before. The jury statement does not say that the jurors were hopelessly deadlocked. Rather, the statement says only that they were at an "impasse" and came shortly after the trial court declined to answer it's second inquiry. One meaning of that word is "dilemma." The jury may not have intended to imply that it was deadlocked, but that it was disappointed, stymied, or put into a dilemma by the court's refusal to answer that question.

In any event, any possible error is harmless because the jury was able to reach a decision. The trial court did not suggest any result, or even suggest that the jury had to reach a result. The jury found the defendant guilty on its own.

7. ARGUMENT NO. 7:

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

There was a methamphetamine lab on the property at 1106 S. Yelm in Kennewick, Washington on September 14, 2003. The defendant was at the scene, jumping in and out of a window and throwing something out of the residence. The defendant fled the scene before the police arrived, and was the only one who fled the scene. The defendant then skipped out on his required court appearances, one of which was set for a jury trial. In this light most favorable to the State, the jury had sufficient evidence to convict the defendant. See *State v. Hepton*, 113 Wn. App. 673, 681, 54 P.3d 233 (2002).

8. ARGUMENT NO. 8:

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

As argued above, there has been no error.

9. ARGUMENT NO. 9:

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

The defendant's argument is that the sentence was "clearly excessive" rather than that the trial court did not have the authority to impose an exceptional sentence.⁵ (App. brief at 45). To prevail, the defendant must show that the trial court abused its discretion in determining the length of the sentence. *State v. Batista*, 116 Wn.2d 777, 808 P.2d 1141 (1991).

Here, the defendant was sentenced to the bottom of the standard range on both this offense and the other offense. In addition, in this case, the defendant was manufacturing methamphetamine in a residential area and a fire resulted. He then fled from the scene, fled from a court hearing and inconvenienced an entire jury

⁵ The trial court had the authority to impose an exceptional sentence under the "free crimes" provision of RCW 9.94A.535 (2)(c). The defendant was sentenced on this and another case. If the defendant had been sentenced concurrently, he would have had no punishment for committing the other crime. See CP 92-93.

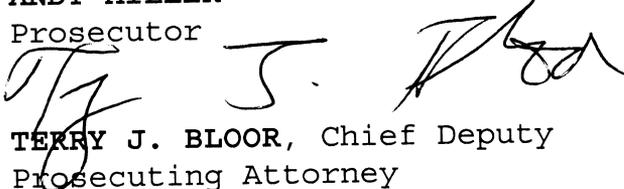
panel. The trial court did not abuse its discretion.

CONCLUSION

For the above reasons, the conviction and sentence should be affirmed.

RESPECTFULLY SUBMITTED this 12th day of September 2012.

ANDY MILLER
Prosecutor


TERRY J. BLOOR, Chief Deputy
Prosecuting Attorney
Bar No. 9044
OFC ID No. 91004

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

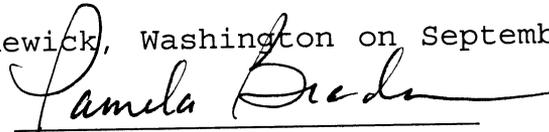
Norma Rodriguez
Rodriguez & Associates, PS
7502 W. Deschutes Pl
Kennewick, WA 99336-7719

E-mail service by agreement was made to the following parties:
Norma@rodriguezlawwa.com
mtrombley@rodriguezlawwa.com

Robert Todd Walker
#992335
Coyote Ridge Corrections
Center
P.O. Box 769
Connell, WA 99326

U.S. Regular Mail,
Postage Prepaid

Signed at Kennewick, Washington on September 12, 2012.



Pamela Bradshaw
Legal Assistant