

RECEIVED
06 JUN -8 PM 12:46
BY C. J. HERRITT
hjh

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL J. BROCKOB,

Appellant.

NO. 78571-6

STATEMENT OF ADDITIONAL
AUTHORITY

Pursuant to RAP 10.8, RESPONDENT, State of Washington, respectfully submits
the following as additional authority:

1. RCW 10.58.030
2. RCW 10.58.035
3. State v. Whalen, 131 Wn. App. 58, 126 P.3d 55 (2005)
4. State v. Moles, 130 Wn. App. 461, 123 P.3d 132 (2005)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Dated: June 7, 2006.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



Michelle Hyer
Deputy Prosecuting Attorney
WSB # 32724

Certificate of Service:

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

Date Signature

Rev. Code Wash. (ARCW) § 10.58.030

2006 by Matthew Bender & Company, Inc.,
a member of the LexisNexis Group.
All rights reserved.

*** STATUTES CURRENT THROUGH 2005 GENERAL ELECTION (2006 c 2) ***
*** ANNOTATIONS CURRENT THROUGH MARCH 21, 2006 ***

TITLE 10. CRIMINAL PROCEDURE
CHAPTER 10.58. EVIDENCE

♦ **GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY**

Rev. Code Wash. (ARCW) § **10.58.030** (2006)

§ **10.58.030**. Confession as evidence

The confession of a defendant made under inducement, with all the circumstances, may be given as evidence against him, except when made under the influence of fear produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony.

HISTORY: Code 1881 § 1070; 1873 p 234 § 232; 1854 p 117 § 96; RRS § 2151.

Rev. Code Wash. (ARCW) § 10.58.035

2006 by Matthew Bender & Company, Inc.,
a member of the LexisNexis Group.
All rights reserved.

*** STATUTES CURRENT THROUGH 2005 GENERAL ELECTION (2006 c 2) ***
*** ANNOTATIONS CURRENT THROUGH MARCH 21, 2006 ***

TITLE 10. CRIMINAL PROCEDURE
CHAPTER 10.58. EVIDENCE

♦ **GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY**

Rev. Code Wash. (ARCW) § **10.58.035** (2006)

§ **10.58.035**. Statement of defendant -- Admissibility

(1) In criminal and juvenile offense proceedings where independent proof of the corpus delicti is absent, and the alleged victim of the crime is dead or incompetent to testify, a lawfully obtained and otherwise admissible confession, admission, or other statement of the defendant shall be admissible into evidence if there is substantial independent evidence that would tend to establish the trustworthiness of the confession, admission, or other statement of the defendant.

(2) In determining whether there is substantial independent evidence that the confession, admission, or other statement of the defendant is trustworthy, the court shall consider, but is not limited to:

(a) Whether there is any evidence corroborating or contradicting the facts set out in the statement, including the elements of the offense;

(b) The character of the witness reporting the statement and the number of witnesses to the statement;

(c) Whether a record of the statement was made and the timing of the making of the record in relation to the making of the statement; and/or

(d) The relationship between the witness and the defendant.

(3) Where the court finds that the confession, admission, or other statement of the defendant is sufficiently trustworthy to be admitted, the court shall issue a written order setting forth the rationale for admission.

(4) Nothing in this section may be construed to prevent the defendant from arguing to the jury or judge in a bench trial that the statement is not trustworthy or that the evidence is otherwise insufficient to convict.

HISTORY: 2003 c 179 § 1.

LEXSEE 131 WN.APP. 58

THE STATE OF WASHINGTON, *Respondent*, v. VICTOR ALBERT LYLE WHALEN,
Appellant.

No. 31931-4-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

131 Wn. App. 58; 126 P.3d 55; 2005 Wash. App. LEXIS 3239

December 28, 2005, Filed

PRIOR HISTORY: [***1] Superior Court of Thurston County. Superior Court Docket No. 03-1-02040-4. Date Filed In Superior Court: July 1, 2004. Superior Court Judge Signing: Gary R. Tabor.

CASE SUMMARY:

PROCEDURAL POSTURE: The Superior Court of Thurston County (Washington) convicted defendant of unlawful possession of ephedrine or pseudoephedrine with intent to manufacture methamphetamine, pursuant to *Wash. Rev. Code § 69.50.440*. Defendant appealed.

OVERVIEW: Defendant was arrested when attempting to shoplift seven boxes of pseudoephedrine. He contended that the lack of sufficient independent evidence corroborating his admissions to the arresting officer warranted their exclusion. He asserted the State failed to establish his intent to manufacture and the trial court unreasonably and erroneously inferred intent solely from his possession of pseudoephedrine. Because he conceded possession of pseudoephedrine, the crucial inquiry was whether the State produced sufficient independent corroborative evidence suggesting his intent to manufacture methamphetamine. Acquiring more than three packages of pseudoephedrine within a 24-hour period did not constitute possession of pseudoephedrine with intent to manufacture; it constituted a violation of Washington's regulation of the acquisition of pseudoephedrine. Absent defendant's statements and assuming the truth of the State's evidence and all reasonable inferences from it, the State failed to produce sufficient evidence that defendant's shoplifting cold tablets was the first step of a methamphetamine manufacturing process. The trial court erred in refusing to suppress defendant's statements.

OUTCOME: The conviction was reversed and vacated.

LexisNexis(R) Headnotes

*Evidence > Hearsay > Exemptions > Confessions > Corpus Delicti Doctrine
Evidence > Procedural Considerations > Circumstantial & Direct Evidence*

[HN1] The confession or admission of a defendant charged with a crime cannot be used to prove the defendant's guilt in the absence of independent evidence corroborating that confession or admission. The independent corroborative evidence may be either direct or circumstantial. The State has the burden of producing evidence sufficient to satisfy the corpus delicti rule. If sufficient corroborative evidence exists, the confession or admission of a defendant may be considered along with the independent evidence to establish a defendant's guilt.

Evidence > Hearsay > Exemptions > Confessions > Corpus Delicti Doctrine

Evidence > Inferences & Presumptions > Inferences

[HN2] To be sufficient to satisfy the corpus delicti rule, independent corroborative evidence need not establish the corpus delicti, or "body of the crime," beyond a reasonable doubt, or even by a preponderance of the evidence. Rather, independent corroborative evidence is sufficient if it prima facie establishes the corpus delicti. Prima facie in this context means evidence of sufficient circumstances supporting a logical and reasonable inference of criminal activity. In determining whether the State has produced sufficient prima facie evidence, courts must assume the truth of the State's evidence and all reasonable inferences drawn therefrom. But the independent evidence must support a logical and reasonable inference of criminal activity only. If the independent evidence also supports logical and reasonable inferences of non-criminal activity, it is insufficient to establish the corpus delicti.

Criminal Law & Procedure > Scienter > General Intent

[HN3] A person acts with intent when he acts with the objective or purpose to accomplish a result which constitutes a crime. *Wash. Rev. Code § 9A.08.010(1)(a)*.

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence

[HN4] In determining whether the State's evidence is sufficient to meet its burden, courts review the evidence in the light most favorable to the State.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Manufacture > General Overview***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview***

[HN5] Acquiring more than three packages of pseudoephedrine within a 24-hour period does not constitute possession of pseudoephedrine with intent to manufacture, a class B felony. *Wash. Rev. Code § 69.50.440*. Rather, it constitutes a violation of Washington's regulation of the acquisition of pseudoephedrine, a gross misdemeanor. *Wash. Rev. Code § 69.43.110*. *Wash. Rev. Code § 69.50.440* and *Wash. Rev. Code § 69.43.110* are distinct offenses punishable by highly disparate penalties. That there are two distinct offenses with disparate punishments indicates that the legislature did not intend to equate the acquisition of more than three boxes of cold medicine containing pseudoephedrine within a 24-hour period with intent to manufacture methamphetamine.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview

[HN6] While possession of pseudoephedrine is generally legal, possession in an amount of more than 15 grams is unlawful under certain circumstances. *Wash. Rev. Code § 69.43.120*.

COUNSEL: *Patricia A. Pethick* and *Thomas E. Doyle*, for appellant.

Edward G. Holm, Prosecuting Attorney, and *James C. Powers*, Deputy, for respondent.

JUDGES: Written By: Van Deren, A.C.J. Concurred In By: Houghton, J. Hunt, J. (Dissent).

OPINIONBY: Van Deren

OPINION:

[**56] [*60] VAN DEREN, A.C.J. - Victor Albert Lyle Whalen appeals his conviction for unlawful possession of ephedrine or pseudoephedrine with intent to manufacture methamphetamine, *RCW 69.50.440*. Whalen argues that (1) under the corpus delicti rule, the trial court should have granted his motion to suppress his statements made to an Olympia police officer; (2) the evidence is insufficient to support his conviction; (3) the prosecutor's

closing argument was improper; and (4) his defense counsel was ineffective. Whalen asserts numerous other arguments in his Statement of Additional Grounds for Review (SAG). n1 We reverse and vacate his conviction because the State had insufficient independent [***2] corroborative evidence of intent to manufacture methamphetamine.

n1 *RAP 10.10*.

FACTS

On October 24, 2003, Whalen entered a Target(R) store in Olympia. Store security observed him remove seven boxes of nasal decongestant containing pseudoephedrine from a shelf and place them in his cart. n2 Whalen then walked to another section of the store, concealed the boxes of pseudoephedrine in another box containing an unrelated product, and exited the store. Approximately thirty minutes to one hour later, Whalen returned to the store and walked to the aisle where he had concealed the pseudoephedrine. He removed the pseudoephedrine from its hiding place, concealed it in his shirt, and walked toward the store's exit. After he passed the store's registers without paying for the items, store security asked him to stop. Whalen ran out of the store where he was tackled and eventually detained by store security.

n2 Three of the boxes were Sudafed(R) and four were Target(R) brand.

[***3]

After handcuffing Whalen, store security escorted him to the store's security office and removed six of the seven boxes of pseudoephedrine from Whalen's shirt. The [*61] store's security manager photographed the pseudoephedrine and prepared a report on the incident.

Store security contacted the Olympia Police Department regarding the incident and Officer Lyle Schaeffer responded. [**57] Schaeffer advised Whalen of his *Miranda* n3 rights. Whalen indicated that he understood his rights and Schaeffer began questioning him. Specifically, Schaeffer said, "We both know why people take Sudafed(R)," and Whalen responded, "[Y]es." Report of Proceedings (RP) (May 17-18, 2004) at 80. Schaeffer then asked Whalen if he was a "cook" and Whalen explained that he was not. RP at 80. Schaeffer then asked who the cook was and Whalen responded with the name of a third party. He further explained that he was obtaining the pseudoephedrine for the third party to satisfy a marijuana debt owed to the third party.

n3 *Miranda v. Arizona*, 384 U.S. 436, 444, 86

S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[**4]

At that point, Schaeffer patted Whalen down and discovered the seventh box of pseudoephedrine. All seven boxes of pseudoephedrine were returned to the store and were not taken into evidence by the Olympia Police Department.

On October 29, 2003, the State charged Whalen with one count of unlawful possession of ephedrine or pseudoephedrine with intent to manufacture methamphetamine, contrary to *RCW 69.50.440*, and one count of second degree robbery, contrary to *RCW 9A.56.210*. The State later amended the information eliminating the robbery charge.

During a *CrR 3.5* hearing, Whalen stipulated to his responses to Schaeffer's questions prior to being taken to the Olympia Police Department. A jury trial commenced that same day, resulting in a guilty verdict. Whalen timely appealed.

[*62] ANALYSIS

CORPUS DELICTI RULE

Whalen argues that the trial court should have granted his motions to suppress his admissions to Schaeffer and dismissed the charge of possession with intent to manufacture under the corpus delicti rule. More specifically, he contends that the lack of sufficient independent evidence corroborating his admissions [***5] to Schaeffer warranted their exclusion at trial.

[HN1] The confession or admission of a defendant charged with a crime cannot be used to prove the defendant's guilt in the absence of independent evidence corroborating that confession or admission. n4 *State v. Aten, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996)*. The State has the burden of producing evidence sufficient to satisfy the corpus delicti rule. *State v. Riley, 121 Wn.2d 22, 32, 846 P.2d 1365 (1993)*. If sufficient corroborative evidence exists, the confession or admission of a defendant may be considered along with the independent evidence to establish a defendant's guilt. *Aten, 130 Wn.2d at 656*.

n4 The independent corroborative evidence may be either direct or circumstantial. *State v. Aten, 130 Wn.2d 640, 655, 927 P.2d 210 (1996)*.

[HN2] To be sufficient, independent corroborative evidence need not establish the *corpus delicti*, or "body of the crime," beyond a reasonable doubt, or even by [***6] a preponderance of the evidence. *Riley, 121 Wn.2d at 32*.

Rather, independent corroborative evidence is sufficient if it *prima facie* establishes the *corpus delicti*. *State v. Smith, 115 Wn.2d 775, 781, 801 P.2d 975 (1990)*. *Prima facie* in this context means evidence of sufficient circumstances supporting a logical and reasonable inference of criminal activity. *Aten, 130 Wn.2d at 656; State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995)*. In determining whether the State has produced sufficient *prima facie* evidence, we must assume the truth of the State's evidence and all reasonable inferences drawn therefrom. *See Bremerton v. Corbett, 106 Wn.2d 569, 571, 723 P.2d 1135 (1986); State v. Pineda, 99 Wn. App. 65, 77-78, [*63] 992 P.2d 525 (2000)*. But the independent evidence must support a logical and reasonable inference of criminal activity only. *Aten, 130 Wn.2d at 659-60*. If the independent evidence also supports logical and reasonable inferences of non-criminal activity, it is insufficient to establish the *corpus delicti*. *Aten, 130 Wn.2d at 659-60. [***7]*

Whalen concedes that he possessed pseudoephedrine, but he argues that possession alone is insufficient to show intent to manufacture methamphetamine without independent [**58] corroborative evidence. Whalen asserts that the State failed to establish his intent to manufacture and that the trial court unreasonably and erroneously inferred intent solely from his possession of pseudoephedrine.

Whalen is correct that bare possession of pseudoephedrine is not enough to *prima facie* establish the *corpus delicti* for an intent to manufacture conviction; at least one additional factor, suggestive of intent, must be present. *See State v. McPherson, 111 Wn. App. 747, 759, 46 P.3d 284 (2002)*. To satisfy the *corpus delicti* rule in this case, the State was required to present *prima facie* proof that Whalen (1) possessed pseudoephedrine; and (2) intended to manufacture methamphetamine. *See State v. Cobelli, 56 Wn. App. 921, 924, 788 P.2d 1081 (1989)*. Because Whalen concedes possession of pseudoephedrine, the crucial inquiry is whether the State produced sufficient independent corroborative evidence suggesting Whalen's intent to manufacture methamphetamine. [***8]

[HN3] A person acts with intent when he acts with the objective or purpose to accomplish a result which constitutes a crime. *RCW 9A.08.010(1)(a)*. The State argues that (1) pseudoephedrine is a primary precursor to methamphetamine; (2) the amount of pseudoephedrine in Whalen's possession was indicative of an intent to manufacture; (3) his efforts to shoplift seven packages of cold remedies containing pseudoephedrine indicates an illicit use was intended; and (4) the fact that *RCW 69.43.110* limits individuals to the purchase of three packages of [*64] pseudoephedrine in a 24 hour period implies an

intent to manufacture if one buys or shoplifts more than the legal limit.

[HN4] In determining whether the State's evidence is sufficient to meet its burden, we review the evidence in the light most favorable to the State. *Pineda*, 99 Wn. App. at 77. Here, absent Whalen's admissions to Schaeffer, the State's evidence indicates only that store security apprehended Whalen attempting to shoplift more pseudoephedrine than he could legally purchase at one time. But Whalen's mere possession of the amount of pseudoephedrine in the seven boxes [***9] may not have been illegal if acquired within the statutory timeframe. n5 Nor were there other indications that Whalen was part of a manufacturing plan. The dissent emphasizes that Whalen's attempt to acquire more than three boxes of pseudoephedrine within the statutory 24-hour time period creates the reasonable inference in and of itself that Whalen intended to manufacture methamphetamine. n6 But [HN5] acquiring more than three packages of pseudoephedrine within a 24-hour period does not constitute possession of pseudoephedrine with intent to manufacture, a class B felony. *RCW 69.50.440*. Rather, it constitutes a violation of Washington's regulation of the acquisition of pseudoephedrine, a gross misdemeanor. *RCW 69.43.110*. *RCW 69.50.440* and *RCW 69.43.110* are distinct [*65] offenses punishable by highly disparate penalties. That there are two distinct offenses with disparate punishments indicates that the legislature did not intend to equate the acquisition of more than three boxes of cold medicine containing pseudoephedrine within a 24-hour period with intent to manufacture methamphetamine. [***10]

n5 [HN6] While possession of pseudoephedrine is generally legal, possession in an amount of more than 15 grams is unlawful under certain circumstances. *RCW 69.43.120*. The record is unclear on how much pseudoephedrine Whalen had in his possession at the time of his arrest. Even if Whalen possessed more than 15 grams of pseudoephedrine at the time of his arrest, his offense would have been a gross misdemeanor, not a felony. Further, the State did not charge Whalen with possession of more than 15 grams of pseudoephedrine.

n6 The dissent reasons that:

A reasonable trier of fact could reasonably infer that Whalen's surreptitious plan to conceal, to leave the store, and later to return to steal the seven concealed boxes of pseudoephedrine cold tablets, was an unambiguous attempt to circumvent a

law designed to prevent the quick collection of sufficient quantities of precursor drugs needed to manufacture methamphetamine. Rather than legally purchasing the pseudoephedrine over the course of three days, perhaps plausibly for personal use, Whalen intentionally broke the law, planned, and shoplifted seven packages at one time.

Dissent at 3.

[***11]

This case is similar to *Cobelli*. In *Cobelli*, officers observed Cobelli carry out a [**59] series of short conversations with several "clusters" of people in a parking lot near a convenience store. *56 Wn. App. at 922*. According to officer testimony, Cobelli made contact with a person or persons, talked briefly, and then walked away. *Cobelli*, *56 Wn. App. at 922*. Officers did not observe any actual exchanges, but testified that, "[t]he manner in which it was happening [was] real indicative of what I've seen before in the sales and purchase of drugs." *Cobelli*, *56 Wn. App. at 922*. After police arrested Cobelli, he removed baggies containing a total of 1.4 grams of marijuana and money from his pockets and admitted selling two baggies of marijuana for \$10 each. *Cobelli*, *56 Wn. App. at 923*. Cobelli was found guilty of possession of marijuana with intent to deliver. *Cobelli*, *56 Wn. App. at 922*.

Reversing the conviction, Division One of this court held that in order for the State to satisfy the *corpus delicti* rule, it had to produce *prima facie* evidence that Cobelli (1) possessed marijuana; and (2) intended [***12] to deliver it. *Cobelli*, *56 Wn. App. at 924*. The court held that in the absence of Cobelli's admissions, there was insufficient independent corroborative evidence of intent to deliver. *Cobelli*, *56 Wn. App. at 924*. The court observed that while the manner in which Cobelli interacted with others in the parking lot was consistent with the sale of drugs, there was no actual observation of exchange of drugs for money. *Cobelli*, *56 Wn. App. at 924-25*. Furthermore, although Cobelli removed marijuana and money from his pockets, the amount of marijuana was relatively small and the record did not indicate exactly how much money Cobelli had in his possession. *Cobelli*, *56 Wn. App. at 924-25*.

[*66] More recently, we addressed a similar issue in *State v. Moles*, *130 Wn. App. 461*, *123 P.3d 132* (2005). In *Moles*, the defendants shoplifted pseudoephedrine from three different stores within a short timeframe and had over 400 loose tablets in their stolen vehicle. We held that the short timeframe involving three purchases at three sep-

131 Wn. App. 58, *66; 126 P.3d 55, **59;
2005 Wash. App. LEXIS 3239, ***12

arate stores, the loose pills, and evidence of a coffee filter containing methamphetamine [***13] in a defendant's pocket constituted sufficient evidence of intent to manufacture. *Moles*, 2005 Wn. App. LEXIS, at **7-8. Here, the State had to prove more than mere possession of unopened boxes of pseudoephedrine to carry its burden of a *prima facie* showing of Whalen's intent to manufacture methamphetamine.

Therefore, absent Whalen's statements and assuming the truth of the State's evidence and all reasonable inferences from it, the State failed to produce sufficient evidence that Whalen shoplifting cold tablets was the first step of a methamphetamine manufacturing process. Under these circumstances, the trial court erred when it refused to suppress Whalen's statements to Schaeffer.

Whalen raises additional issues that we do not address because we hold that the charges should have been dismissed upon suppression of his statements to Schaeffer.

We reverse and vacate his conviction.

Houghton, J., concurs.

DISSENTBY: Hunt

DISSENT:

Hunt, J. (dissenting) — I respectfully dissent. I disagree with the majority's holding that the evidence does not sufficiently establish the *corpus delicti* independent of Whalen's voluntary confession. I would uphold the trial court's finding [***14] that (1) Whalen's secretive possession and shoplifting of seven boxes of pseudoephedrine was not reasonably consistent with an innocent purpose, and (2) a trier of fact could reasonably conclude that Whalen intended to use this excessive quantity of pseudoephedrine (as compared to an innocuous quantity for personal use) to [*67] manufacture methamphetamine, whether as the principal manufacturer or as an accomplice supplying the precursor drugs to another for methamphetamine manufacture.

Accordingly, I would affirm the trial court's ruling that these facts constitute sufficient independent corroborative evidence to establish the *corpus delicti* of the charged crime. And I would hold that admission of [**60] Whalen's statement to the police did not violate the *corpus delicti* rule.

As the majority acknowledges, under the *corpus delicti* rule,

The confession or admission of a defendant charged with a crime cannot be used to prove the defendant's guilt in the absence of independent evidence corroborating that

confession or admission. *State v. Aten*, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996). . . If sufficient corroborative evidence exists, the confession or admission [***15] of a defendant may be considered along with the independent evidence to establish a defendant's guilt. *Aten*, 130 Wn.2d at 656.

To be sufficient, independent corroborative evidence need not establish the *corpus delicti*, or "body of the crime," beyond a reasonable doubt, or even by a preponderance of the evidence. [*State v. JRiley*, 121 Wn.2d 22, 32, 846 P.2d 1365 (1993)]. Rather, independent corroborative evidence is sufficient if it *prima facie* establishes the *corpus delicti*. *State v. Smith*, 115 Wn.2d 775, 781, 801 P.2d 975 (1990). *Prima facie* in this context means evidence of sufficient circumstances supporting a logical and reasonable inference of criminal activity. *Aten*, 130 Wn.2d at 656; *State v. Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). In determining whether the State has produced sufficient *prima facie* evidence, we must assume the truth of the State's evidence and *all reasonable inferences drawn therefrom*. See *Bremerton v. Corbett*, 106 Wn.2d 569, 571, 723 P.2d 1135 (1986); *State v. Pineda*, 99 Wn. App. 65, 77-78, 992 P.2d 525 (2000). [***16]

Majority at 62 (footnote omitted; emphasis added).

I agree that mere possession of pseudoephedrine tablets is insufficient to prove intent to manufacture methamphetamine and that "at least one additional factor, [*68] *suggestive* of intent, must be present." Majority at 64 (emphasis added). But here there is other evidence "suggestive of intent," in addition to mere possession, that is sufficient to satisfy the *corpus delicti* rule.

RCW 69.43.110(2) and (4) make it a gross misdemeanor to "purchase or acquire" more than three boxes of pseudoephedrine within a 24-hour period. n7 The Legislature has amended this statute to lower the number to two boxes per 24-hour period, effective [**61] next year. Laws of 2005, ch. 388, §4. In enacting this law, the Legislature has [*69] expressly recognized that restricting access to certain "precursor drugs" used to manufacture methamphetamine is an "essential step to controlling the manufacture of methamphetamine." Laws of 2005, ch. 388, §1. The seven boxes of pseudoephedrine that Whalen shoplifted are, therefore, by definition such precursor drugs.

n7 The majority's assertion at n. 5 on page 6 that Whalen possessed a legal quantity of pseudoephedrine is in error. *RCW 69.43.110(2)* and (4) clearly make it a gross misdemeanor to "purchase or acquire" more than three boxes of pseudoephedrine within a 24-hour period. *Subsection (1)* of this statute uses the disjunctive "or" between subsections (a) and (b), which references three grams of the listed substances rather than the number of packages. *RCW 69.43.110(1)*.

RCW 69.43.110, Ephedrine, pseudoephedrine, phenylpropanolamine—Sales restrictions—Penalty, provides:

(1) It is unlawful for a pharmacy licensed by, or shopkeeper or itinerant vendor registered with, the department of health under chapter 18.64 RCW, or an employee thereof, or a practitioner as defined in *RCW 18.64.011*, knowingly to sell, transfer, or to otherwise furnish, in a single transaction:

(a) *More than three packages* of one or more products that he or she knows to contain ephedrine, pseudoephedrine, or phenylpropanolamine, their salts, isomers, or salts of isomers; or

(b) A single package of any product that he or she knows to contain more than three grams of ephedrine, pseudoephedrine, or phenylpropanolamine, their salts, isomers, or salts of isomers, or a combination of any of these substances.

(2) *It is unlawful* for a person who is not a manufacturer, wholesaler, pharmacy, practitioner, shopkeeper, or itinerant vendor licensed by or registered with the department of health under chapter 18.64 RCW to purchase or acquire, in any twenty-four hour period, more than the quantities of the substances specified in subsection (1) of this section.

(3) It is unlawful for any person to sell or distribute any of the substances specified in subsection (1) of this section unless the person is licensed by or registered with the department of health under chapter 18.64 RCW, or

is a practitioner as defined in *RCW 18.64.011*.

(4) A violation of this section is a *gross misdemeanor*.

(Emphasis added).

RCW 69.43.120(1), which the majority cites in support of its assertion, describes a separate crime, not at issue here—simple, passive possession of more than 15 grams of pseudoephedrine, also a gross misdemeanor. This statute does not, however, as the majority implies, decriminalize Whalen's actively *acquiring* more than three packages, a gross misdemeanor under *RCW 69.43.110(2)*.

[***17]

That pseudoephedrine possession can also have an innocent purpose does not require exclusion of this evidence under the corpus delicti rule here. A reasonable trier of fact could reasonably infer that Whalen's surreptitious plan to conceal, to leave the store, and later to return to steal the seven concealed boxes of pseudoephedrine cold tablets, was an unambiguous attempt to circumvent a law designed to prevent the quick collection of sufficient quantities of precursor drugs needed to manufacture methamphetamine. Rather than legally purchasing the pseudoephedrine over the course of three days, perhaps plausibly for personal use, Whalen intentionally broke the law, planned, and shoplifted seven packages at one time. That Whalen chose to collect, to conceal, and then to steal seven boxes all at once sufficiently supports the reasonable inference that he intended to use them for the manufacture of methamphetamine, most likely shortly thereafter.

This case is unlike *Aten*, where the facts logically and reasonably supported an inference of the baby's death by either innocent sudden infant death syndrome (SIDS) or criminal smothering. *130 Wn.2d 640, 660-62, 927 P.2d 210*. [***18] Here, in contrast, the only logical and reasonable conclusion was that Whalen intended to use the tablets for manufacturing methamphetamine. Unlike *Aten*, here, there are no logical or reasonable inferences that Whalen needed to steal seven boxes of decongestant in a single action for a non-criminal purpose. Even the majority hints at this reasonable inference of Whalen's illegal purpose when it states, "Whalen's mere possession of the amount of pseudoephedrine in the seven boxes *may not have been illegal if acquired within the statutory timeframe*." Majority at 64-65 (emphasis added.) [*70] The negative implication of this observation is that since Whalen did not acquire this quantity of pseudoephedrine within the legal statutory timeframe, the reasonable in-

ference is that his possession, and therefore, his purpose, was illegal.

The facts here also contrast with those in *State v. Cobelli*, where the defendant possessed a *small* amount of marijuana from which the court could infer it was solely simple possession without the intent to deliver. 56 Wn. App. 921, 925, 788 P.2d 1081 (1989). Here, the sheer number of boxes and the amount of cold tablets that Whalen [***19] stole does not give rise to a similar inference of a lesser degree of culpability. Instead, as in *State v. Moles*, the corroborating evidence of his multi-step plan and the amount of pseudoephedrine he attempted to steal lead to the logical and reasonable inference that Whalen intended either to manufacture methamphetamine himself or to deliver it to someone else to use in its manufacture. 130 Wn. App. 461, 466-67, 123 P.3d 132 (2005). Regardless, the evidence showed that Whalen intended to use the pseudoephedrine to manufacture methamphetamine either as a principal or as an accomplice.

Given the purpose of *RCW 69.43.110*, to control an essential step in the manufacture of methamphetamine, and Whalen's multi-step plan to circumvent this law, the only reasonable inference available for Whalen's actions

was his illegal purpose—the manufacture of methamphetamine. Reiterating the well-settled standard of review that the trial court has broad discretion in deciding what evidence to admit, I would hold that Whalen has failed to show that the trial court abused its discretion in allowing his voluntary admissions into evidence.

With the admission [***20] of Whalen's statement of his intent to deliver the tablets to another to use in manufacturing methamphetamine, to repay a drug debt, I would also hold, as the majority acknowledges, that sufficient evidence supports Whalen's conviction [**62] for unlawful possession [*71] of ephedrine or pseudoephedrine with the intent to manufacture. n8

n8 Reiterating the Supreme Court's explanation of the *corpus delecti* rule in *Aten*, if sufficient corroborative evidence exists, the confession or admission of a defendant may be considered alongside the independent evidence to establish a defendant's guilt. 130 Wn.2d at 656.

Again, I would affirm.

LEXSEE 123 P.3D 132

THE STATE OF WASHINGTON, *Respondent*, v. WILLIAM CHESLEY MOLES ET AL.,
Appellants.

No. 31742-7-II (consolidated with), 31779-6-II, 32010-0-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

130 Wn. App. 461; 123 P.3d 132; 2005 Wash. App. LEXIS 2962

November 22, 2005, Filed

NOTICE: [***1] PART PUBLISHED

LexisNexis(R) Headnotes

PRIOR HISTORY: Superior Court of Pierce County. Superior Court. Docket No. 03-1-03637-6. Superior Court Judge Signing: James Orlando.

Evidence > Procedural Considerations > Circumstantial & Direct Evidence

Evidence > Procedural Considerations > Weight & Sufficiency

[HN1] Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Circumstantial evidence and direct evidence are equally reliable.

CASE SUMMARY:

PROCEDURAL POSTURE: Three defendants sought review of the decision of the Superior Court of Pierce County (Washington), which convicted them of the unlawful possession of pseudoephedrine with intent to manufacture methamphetamine. The second defendant appealed his conviction for unlawful possession of a controlled substance and the first defendant appealed his convictions for first-degree possession of stolen property and making a false or misleading statement.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Manufacture > General Overview

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Drug Paraphernalia > General Overview

Criminal Law & Procedure > Scienter > Knowledge

OVERVIEW: Defendants appealed their convictions, but the court affirmed, stating that the State presented sufficient evidence for a rational trier of fact to find defendants guilty of unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine in violation of *Wash. Rev. Code § 69.50.440*. The police officer counted close to 440 loose white pseudoephedrine pills in defendants' stolen vehicle. The pills had been removed from the blister packs. The officer testified that the first stage in the manufacturing process was to acquire pseudoephedrine tablets and then process them. The fact that so many pills had been removed from the blister packs led to the only plausible inference: that defendants were in the process of preparing the pseudoephedrine for the first state of the manufacturing process. The officer's testimony and the police stolen vehicle report were sufficient to establish the reliability of the dispatch and thus, the officer had probable cause to arrest defendants and to search the vehicle pursuant to the Fourth Amendment.

[HN2] To establish that defendants possessed pseudoephedrine with intent to manufacture methamphetamine, the State has to prove that they: (1) possessed pseudoephedrine; and (2) intended to use the pseudoephedrine to manufacture methamphetamine. *Wash. Rev. Code § 69.50.440*. Manufacture is the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly. *Wash. Rev. Code § 69.50.101(p)*. Bare possession of a controlled substance is not enough to support an intent to manufacture conviction; at least one additional factor, suggestive of intent, must be present. A person acts with intent when he acts with the objective or purpose to accomplish a result that constitutes a crime. *Wash. Rev. Code § 9A.08.010(1)(a)*. A person who knowingly plays a role in the manufacturing process can be guilty of manufacturing, even if someone else completes the process.

OUTCOME: The judgments were affirmed.

*Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence
Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence
Evidence > Procedural Considerations > Weight & Sufficiency*

[HN3] Appellate courts review the trial court's denial of a suppression motion by determining whether substantial evidence supports its findings of fact. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. Courts review only those findings to which appellants assign error; unchallenged findings are verities on appeal.

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > General Overview

[HN4] Appellate courts review the trial court's conclusions of law de novo.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > General Overview

[HN5] Whether a person has been seized under the Fourth Amendment is a mixed question of law and fact.

*Criminal Law & Procedure > Arrests > Probable Cause
Criminal Law & Procedure > Appeals > Standards of Review > General Overview*

[HN6] Probable cause to arrest exists when facts and circumstances, within the arresting officer's knowledge and of which the officer has reasonably trustworthy information, are sufficient to warrant a person of reasonable caution to believe that the defendant has committed an offense. Although more than a bare suspicion of criminal activity is necessary, proof beyond a reasonable doubt is not required. Appellate courts look to the totality of the circumstances and determine whether all facts, taken together in light of the officer's experience and knowledge, are sufficient to establish probable cause.

Criminal Law & Procedure > Arrests > Probable Cause

[HN7] The fellow officer rule justifies an arrest on the basis of a police bulletin, such as a hot sheet, if the police agency issuing the bulletin has sufficient information to form a basis for probable cause. The bulletin does not, however, insulate the arresting officer from problems with the sufficiency or reliability of the agency's information. The State's burden to establish reliability of its dispatches regarding stolen automobiles is not particularly onerous, and there is more than one way that the burden can be satisfied.

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview

[HN8] Appellate courts may refuse to review any claim of error that was not raised in the trial court. Wash. R. App. P. 2.5(a). But a party may raise a manifest error affecting a constitutional right for the first time on appeal.

Criminal Law & Procedure > Jury Instructions > General Overview

[HN9] As long as a jury instruction properly informs the jury of the elements of the charged crime, any error in further defining terms used in the instruction on the elements is not of constitutional magnitude.

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > General Overview

[HN10] Under the invited error doctrine, a party may not request a jury instruction and later argue that the instruction is erroneous on appeal.

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > General Overview

Criminal Law & Procedure > Appeals > Reversible Errors > General Overview

[HN11] The defendant bears the burden of showing prejudicial misconduct. A prosecutor's misconduct warrants a new trial where there is a substantial likelihood that the misconduct affected the verdict. The prosecutor's statements of the law must be confined to the law as set forth in the court's instructions to the jury. But a case will not be reversed for improper argument unless such error is prejudicial to the accused. Only those errors that may have affected the trial outcome are prejudicial.

Criminal Law & Procedure > Jury Instructions > Curative Instructions

Evidence > Procedural Considerations > Objections & Offers of Proof > Objections

[HN12] Where the defendant did not object or request a curative instruction, the error is considered waived unless the remark was so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Manufacture > General Overview

[HN13] A person who knowingly plays even a limited role in the manufacturing process may be guilty of the crime.

COUNSEL: Mary K. Young High, Reed Manley Benjamin Speir, Stephanie C. Cunningham, and Sheri L. Arnold, for appellants.

Gerald A. Horne, Prosecuting Attorney, and P. Grace Kingman and Kathleen Proctor, Deputies, for respondent.

JUDGES: Written By: Van Deren, A.C.J. Concurred In By: Houghton, J., Armstrong, J.

OPINIONBY: Van Deren VAN DEREN

OPINION:

[*462] [**133] VAN DEREN, A.C.J. - William Chesley Moles, Louis Gouveia Cambra, and Alan Robert Conn appeal their convictions for unlawful possession of pseudoephedrine with intent to manufacture methamphetamine as well as Cambra's separate conviction for unlawful possession of a controlled substance, and Moles' separate convictions for first degree possession of stolen property and making a false or misleading statement to a public servant. They assert that: (1) the evidence fails to support their convictions [*463] for possession of pseudoephedrine with intent to manufacture methamphetamine; (2) [***2] the trial court erred by denying their motion to suppress; and (3) jury instruction number 11 was ambiguous and thus, the State's argument based on jury instruction number 11 was a misstatement of the law. We affirm.

FACTS

On August 9, 2003, Officer Byerley was on routine patrol when he received a dispatch informing him that three males in an unconfirmed stolen red Geo Prism had purchased the maximum allowed quantity of pseudoephedrine from two local grocery stores.

Byerley observed a red Geo Prism matching the dispatch description and license plate number parked in a drug store parking lot. Two males exited the store and got into the car. Byerley stopped the car as it left the parking lot and requested back-up assistance. Once Officer Scott Lane arrived on the scene, the officers asked the three individuals to exit the vehicle one at a time. The officers then handcuffed and searched the defendants before placing them in a police car.

Byerley found store receipts from two grocery stores in Conn's right pocket, reflecting the purchase of three Allerfed packets and three Triphed packets. Byerley found a plastic bag containing brown powder residue, a second bag containing white powder [***3] residue, and several coffee filters in Cambra's pockets. Byerley advised Cambra of his *Miranda* n1 rights. Cambra acknowledged that he understood his rights and agreed to talk to the officer. He stated that Moles had possessed the stolen car for several days and that the three defendants had been purchasing pseudoephedrine from various stores.

n1 *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

After taking the defendants into custody, Byerley noticed that the Prism's ignition had been "punched," and [*464] contacted dispatch to confirm that the Prism was stolen. Report of Proceedings (RP) at 25. A subsequent search of the Prism revealed (1) four empty blister packs; (2) one box of Suphedrine; (3) a grocery bag containing two empty blister packs and one full package of pseudoephedrine and several loose white pills; (4) a second grocery bag containing two empty boxes of Suphedrine, two blister packs, and numerous loose white pills; and (5) a black bag with two sealed packages of Contac Cold Medicine. n2 According to Byerley's trial testimony, he found [***4] close to 440 loose white pills in the vehicle.

n2 The pills seized by the officers all contained pseudoephedrine or ephedrine that can be separated from the other ingredients to be used in the manufacture of methamphetamine.

The State charged all three defendants with unlawful possession of pseudoephedrine [**134] with intent to manufacture methamphetamine. The State charged Cambra with unlawful possession of a controlled substance. The State also charged Moles with first degree possession of stolen property and with making a false or misleading statement to a public servant.

At the pretrial suppression hearing, Byerley testified that he stopped the Prism "because it was a reported stolen vehicle." RP at 25. The court denied the defendants' motion to suppress.

At trial, Byerley testified that he was a member of the Pierce County Sheriff's clandestine lab team and that he had training in identifying controlled substances. He further testified that the first stage of the manufacturing process is the acquisition [***5] of pseudoephedrine tablets that are then crushed and mixed with a solvent. The mixture is strained through a coffee filter, separating the drug from the liquid mixture. Frank Boshears, a forensic scientist, testified that he tested the white tablets, the tan powder, and the white powder residue on the coffee filters. The pills contained pseudoephedrine. He further testified that the brown powder and the white powder residue on the coffee filters tested positive for methamphetamine.

[*465] Chung Hoon Lee testified that he shared the Prism with his parents and that it had been stolen. He testified that he called 911 to inform the police about the theft but that it was "probably" his brother who filled out the written report. RP at 212.

The jury found all three defendants guilty as charged.

Defendants filed timely notices of appeal.

ANALYSIS

Sufficiency of the Evidence

Defendants argue that their convictions must be reversed because the jury did not have sufficient evidence to find that they possessed pseudoephedrine with intent to manufacture methamphetamine. The State responds that the evidence was sufficient because the jury could infer intent to manufacture from the quick [***6] succession of cold pill purchases, the drugs in Cambra's pocket, and the large number of loose pseudoephedrine tablets in the car.

[HN1] Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201 (citation omitted). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) (citing *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975)).

[HN2] To establish that defendants possessed pseudoephedrine with intent to manufacture methamphetamine, the State had to prove that they: (1) possessed pseudoephedrine; and (2) intended to use the pseudoephedrine to manufacture methamphetamine. *RCW 69.50.440*. Manufacture is "the production, preparation, propagation, compounding, conversion, or processing [***7] of a controlled [*466] substance, either directly or indirectly." *RCW 69.50.101(p)*; *State v. Davis*, 117 Wn. App. 702, 708, 72 P.3d 1134 (2003), review denied, 151 Wn.2d 1007, 87 P.3d 1185 (2004).

Bare possession of a controlled substance is not enough to support an intent to manufacture conviction; at least one additional factor, suggestive of intent, must be present. *State v. McPherson*, 111 Wn. App. 747, 759, 46 P.3d 284 (2002). A person acts with intent when he acts with the objective or purpose to accomplish a result that constitutes a crime. *RCW 9A.08.010(1)(a)*. A person who knowingly plays a role in the manufacturing process can be guilty of manufacturing, even if someone else completes the process. *Davis*, 117 Wn. App. at 708.

Here, the State presented sufficient evidence for a rational trier of fact to find the [**135] defendants guilty of unlawful possession n3 of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine. *RCW 69.50.440*. Byerley counted close to 440 loose white

pseudoephedrine pills in the defendants' stolen vehicle. The [***8] pills had been removed from the blister packs. Byerley testified that the first stage in the manufacturing process is to acquire pseudoephedrine tablets and then process them. The fact that so many pills had been removed from the blister packs leads to the only plausible inference: that the defendants were in the process of preparing the pseudoephedrine for the first stage of the manufacturing process. We hold that this alone is sufficient to support the jury's finding of intent to manufacture. Further, Byerley found a coffee filter with methamphetamine residue in defendant Cambra's pocket. And the defendants were acting in concert to purchase the maximum allowable amount of cold pills containing pseudoephedrine from various stores over a short period of time. Thus, additional factors suggesting manufacture exist, and the evidence was sufficient [*467] to support a manufacturing conviction for each of the three defendants.

n3 Possession of the pseudoephedrine is not disputed. Alternatively, the record is sufficient to support the jury's finding of possession. See, e.g., *State v. Huff*, 64 Wn. App. 641, 653-54, 826 P.2d 698 (1992).

[***9]

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to *RCW 2.06.040*, it is so ordered.

[HN3]

[HN4] [HN5]

[HN6]

[HN7]

[HN8]

[HN9]

[HN10]

[HN11]

[HN12].

130 Wn. App. 461, *467; 123 P.3d 132, **135;
2005 Wash. App. LEXIS 2962, ***9

[HN13] We affirm.

Van Deren, A.C.J.

Houghton, J.

We concur:

Armstrong, J.