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FILED

No. \_\_\_\_\_  
Court of Appeals No. 31544-1-II

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND K. HATCHIE

Petitioner.

RECEIVED  
COURT OF APPEALS  
DIVISION ONE

JUN 22 2006

PETITION FOR REVIEW

On review from the Court of Appeals, Division Two,  
and the Superior Court of Pierce County

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A. IDENTITY OF PETITIONER

Petitioner Raymond K. Hatchie, appellant below, asks this Court to grant review of the decision designated in Section B.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(1), (2), (3) and (4), petitioner seeks review the part published opinion of the court of appeals, Division Two in State v. Hatchie, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (2006) (2006 Wash. App. LEXIS 1055), issued on May 23, 2006.<sup>1</sup>

C. ISSUES PRESENTED FOR REVIEW

1. Does Article I, section 7 of the Washington constitution prohibit police from entering a citizen's home to serve a misdemeanor arrest warrant on a suspect inside where there is not probable cause to believe the residence is the suspect's home? Should Washington courts adopt a requirement that proof of residence must meet an "actual residence" standard as noted in federal caselaw?

Further, where the trial court has made a specific factual finding that officers entered into "a third party's dwelling" (CP 134) and the prosecution did not cross-appeal, did Division Two err in applying the law applicable to entry into a suspect's home, not the home of a third party?

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<sup>1</sup>A copy of the opinion is attached as Appendix A.

2. Does Article I, section 7, of the Washington constitution prohibit entry into even a suspect's home to serve a misdemeanor warrant for a minor offense, absent a "strong justification" under State v. Chrisman, 100 Wn.2d 814, 676 P.2d 419 (1984)?

Further, should review be granted because the published portion of the decision in this case held to the contrary, in direct conflict with State v. Anderson, 105 Wn. App. 223, 231, 19 P.3d 1094 (2001), and State v. McKinney, 49 Wn. App. 850, 746 P.2d 835 (1987)?

D. OTHER ISSUES SUPPORTING REVIEW

3. In State v. Crider, 78 Wn. App. 849, 899 P.2d 24 (1995) and State v. Aguilar-Rivera, 83 Wn. App. 199, 290 P.2d 623 (1996), Divisions One and Three of the court of appeals held that a defendant's right to allocution has been impermissibly violated and reversal is automatically required when allocution does not occur until after the court orally declares the sentence. In the published portion of the decision in this case, Division Two specifically rejected Crider and Aguilar-Rivera by name. Should review be granted under RAP 13.4(b)(2) to address this split in decisions by the court of appeals?

4. In Personal Restraint of Echeverria, 141 Wn.2d 323, 6 P.3d 573 (2000), this Court held that the right to allocution is satisfied if the opportunity to speak is given at the sentencing hearing "at some prior

to imposition of sentence.” In the published portion of this case, Division Two held that the right to allocution was not violated where a judge orally pronounced a sentence prior to asking if the defendant wished to speak, because the oral decision was not a “final sentence.”

Should review be granted to address whether Division Two’s interpretation of Echeverria is correct or the right to allocution includes the right to speak prior to a judge orally declaring the sentence?

Further, should review be granted under RAP 13.4(b)(3), because the conflict in published decisions of the different Divisions results in defendants in Division Two not receiving the same rights to allocution under RCW 9.94A.500(1) as those in other Divisions, in violation of equal protection rights?

E. STATEMENT OF THE CASE

1. Procedural facts

After petitioner Raymond K. Hatchie was convicted of unlawful manufacture of a controlled substance and of committing that crime while armed with a firearm, he received a standard range sentence. CP 1-2, 124-25, 136.<sup>2</sup> He appealed and, on May 23, 2006, in a part published decision, Division Two of the court of appeals affirmed. Appendix A at 1-31. This

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<sup>2</sup>Reference to the 19 volumes of the verbatim report of proceedings is explained in Appellant’s Opening Brief (“AOB”) at 5, n. 1.

Petition timely follows.

2. Overview of relevant facts<sup>3</sup>

On June 11, 2003, Pierce County Sheriff's Department Deputies who saw a man named Eric Schinnell driving around buying suspected "precursor items" used in methamphetamine manufacture followed Mr. Schinnell to Raymond Hatchie's home. RP 426-33, 677-78. The officers set up "containment" at the home and ultimately, more than 40 minutes later, entered Mr. Hatchie's home without a search warrant, in order to effectuate a misdemeanor traffic arrest warrant on Mr. Schinnell RP 430-45, 681. Once inside, the officers saw inter alia, items they suspected were used in manufacturing of methamphetamine. RP 446, 522-32, 691-30, 1036.

Subsequent searches of Mr. Schinnell's many vehicles pursuant to a warrant revealed similar items. RP 439, 536-37, 804-50. Mr. Schinnell said Mr. Hatchie had no involvement in any drug manufacturing, except for giving Mr. Schinnell some Chorafed tablets that Mr. Schinnell took and traded for drugs or used in making them. RP 1135-37, 1218. A person from Mr. Hatchie's work testified about suspected drug thefts from

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<sup>3</sup>This brief overview is not intended to provide all the details of evidence and allegations in this case but only to acquaint the Court with the general circumstances involved. More detailed discussion of relevant facts is contained in the argument, *infra*. More detailed discussion of all of the facts is contained in Appellant's Opening Brief ("AOB") at 5-25.

employee first aid kits, which might have included Chorafed. RP 1106.

No thefts were ever traced to Mr. Hatchie or anyone else. RP 1106-10.

F. REASONS WHY REVIEW SHOULD BE GRANTED

1. REVIEW SHOULD BE GRANTED TO ADDRESS WHETHER ARTICLE I, SECTION 7 PROHIBITS ENTRY INTO A HOME BASED SOLELY UPON A MINOR MISDEMEANOR WARRANT AND WHETHER THE OFFICERS HAD TO HAVE PROBABLE CAUSE TO BELIEVE THE HOME IS THE SUSPECT'S ACTUAL RESIDENCE

In this case, review should be granted under RAP 13.4(b)(1), (2), (3) and (4), to address both 1) whether a misdemeanor warrant for a suspect is sufficient to permit entry into a home under Article I, section 7 and 2) whether officers are constitutionally required to have probable cause to believe a home is the suspect's "actual residence," prior to entering that home to serve an arrest warrant on that suspect.

a. Relevant facts

The following discussion of facts may seem long, but it is necessary to understand the issues.

At the suppression hearing, the officers testified about following Mr. Schinnell, seeing him purchase the suspected precursor items, then following him to the duplex. One deputy testified that the officers discovered the existence of the misdemeanor arrest warrant for Mr. Schinnell as they were following Mr. Schinnell's truck. RP 4-14. The

warrant was a \$500 district court warrant for driving while license suspended in the third degree. RP 15. On the drive to the duplex, Mr. Schinnell seemed to be making maneuvers to try to lose the officers, who were following in plain clothes and an unmarked police car. RP 4-34.

The misdemeanor arrest warrant for Mr. Schinnell listed his address as 950 North Ducka Bush in Hoodspport, not a Patterson Street South address in Tacoma. RP 65. The officers admitted they were aware of that fact before they decided to enter Mr. Hatchie's home. RP 65, 130. They were also aware that address for the registration on the vehicle Mr. Schinnell was driving was the North Ducka Bush address in Hoodspport, as was the registration on a second vehicle registered to Mr. Schinnell which was also parked at the duplex. RP 80.

After following Mr. Schinnell to the property, the deputies placed the house under surveillance so that no one could have entered or left. RP 23-24, 62-66, 70. They knocked repeatedly on the front door of Mr. Hatchie's house, trying to get Mr. Schinnell to answer, for about 55-70 minutes before someone answered.. RP 62-66, 70, 132-33. The deputies admitted that, during all that time, they did not hear any noise coming from inside the residence, such as flushing or breaking glass, which might have indicated an attempt to destroy evidence. RP 67-91. The officers also saw no evidence that anyone was attempting to leave or that there

were any fires or danger. RP 67-70, 91. There was nothing which indicated any "threat" to the officers or anyone else. RP 75-76.

The officers were aware that they had to attempt to "establish" Mr. Schinnell's "residency" in the home before they entered to serve the warrant, so they contacted neighbors. RP 116. A neighbor named "Rowland" who knew Mr. Schinnell only by the name "Eric" and not very well thought he had been at the duplex earlier and believed he lived there. RP 21. A neighbor, Mr. Huntsman, thought there were six different people living at the house, had seen the red truck belonging to Schinnell there before, and had seen "Eric" around. RP 22, 82. The only "independent corroboration" that the deputy said the officers had about any of this information was that the red truck was parked in the driveway and a second vehicle registered to Mr. Schinnell was parked on the lawn. RP 21.

Another deputy approached a man outside the residence and established that "Eric" was likely inside the house if his truck was there. RP 178. That deputy never asked whether "Eric" lived at the residence, and neither did another deputy who spoke with the same man for 5-10 minutes. RP 154-57, 179. That deputy also spoke to another unnamed neighbor, who said only that "the main renter of the residence was a Ray Hatchie." RP 186. All the officers had cell phones and admitted they had ample time to seek a telephonic warrant prior to entering the house. RP

68-91.

When a man answered Mr. Hatchie's door, he was frisked and arrested for contraband, and officers then consulted with each other about whether they should enter the house. RP 29. They spoke about what they had "observed" and been told by neighbors. RP 29. The bulk of the "considerations" raised were whether Mr. Schinnell was in the home, not whether he actually lived there. RP 159. The only part of the discussion which focused on Mr. Schinnell's status as a resident was just that the neighbors appeared to think so. RP 65.

The officers did not ask the man who answered the door whether Mr. Schinnell lived there until after they had entered the house and arrested Mr. Schinnell. RP 28, 71-72, 116. At that point, the officers finally asked, and were told that Mr. Schinnell only stayed there sometimes for the past two months. RP 38.

The officers conceded that the reason they decided to go into the home to arrest Mr. Schinnell was not just because of the existence of the warrant, but also to investigate their suspicions about the drug activity in which they thought he was involved at the house. RP 29. One deputy admitted that he would "probably not" have served the warrant and arrested Mr. Schinnell without the suspicion of drug activity because his "assignment is to investigate methamphetamine, the distribution, sale and

manufacture and we believe that he was involved somehow in this.” RP 152. When first asked why he wanted to contact Mr. Schinnell at the duplex, another deputy said, “[a]t this point he had purchased those three precursor chemicals or components,” and then added, “[h]e had also had this misdemeanor warrant for his arrest and was driving on a suspended license.” RP 18. He admitted that the “ultimate purpose” of serving the arrest warrant was “to talk with [Mr. Schinnell] or investigate further these purchases of precursor chemicals.” RP 19, 67; see also RP 110.

At the suppression hearing, the prosecutor conceded that there were no “exigent” circumstances to justify the entry into Mr. Hatchie’s home. RP 236-37. He also admitted that it was later established that Mr. Schinnell did not reside there, but had only stayed overnight occasionally. RP 238.

In denying the motion to suppress, the judge concluded “that the deputies had specific and articulable facts justifying their entry into the residence to arrest Mr. Schinnell on his outstanding warrant.” CP 135.

On review, in the published portion of its decision in this case, Division Two first held that it was immaterial that the warrant was for a minor misdemeanor. Appendix A at 13. It next held that officers seeking to serve either a misdemeanor or felony warrant at a suspect’s home must have probable cause to believe that the person “resides” in the place to be

searched and that he is inside at the time of the entry. Appendix A at 13. Finally, it held that the evidence was sufficient to support probable cause here because the evidence indicated Schinnell was not a “mere guest.” Appendix A at 14.

b. Review should be granted

This Court should grant review under RAP 13.4(b)(1), (2), (3) and (4) to address the issues presented in this case. Prior to the decision in this case, no Washington court has previously held that a misdemeanor arrest warrant for a minor offense justifies breaching the sanctity of even a *suspect’s* home, let alone the home of a third party. In Chrisman, *supra*, this Court indicated that Article I, section 7 of the Washington constitution would be offended by allowing a minor misdemeanor to so compromise privacy rights. Chrisman, 100 Wn.2d at 821-22. More specifically, this Court said that, “[i]n cases of minor violations” such as misdemeanors, where there are no facts sufficient to demonstrate “(1) a threat to the officer’s safety, (2) the possibility of destruction of evidence of the misdemeanor charged, or (3) a strong likelihood of escape,” there is “no compelling need” authorizing entry into even the home of the person named in the warrant. Chrisman, 100 Wn.2d at 821-22.

In Anderson, *supra*, and McKinney, *supra*, the courts cited this language in Chrisman and held that police need a “strong justification” for

entering even a suspect's home to serve a misdemeanor warrant.

Anderson, 105 Wn. App. at 231; McKinney, 49 Wn. App. at 857. In this case, the Court specifically refused to follow Anderson and McKinney, instead giving Chrisman the narrowest possible scope and concluded that, under Article I, section 7, it was proper for the police to enter a suspect's home *even on* a minor misdemeanor warrant. Appendix A at 10-12.

This Court should grant review under RAP 13.4(b)(1),(2), (3) and (4) on this issue. The holding in the published portion of this case is not only contrary to Anderson and McKinney, it is contrary to the fundamental protections of our homes found in Article I, section 7, which this Court in found, in Chrisman, outweighed the police interest when there is only a minor misdemeanor involved. As the Anderson Court stated:

[t]o allow an arrest warrant for a non-violent misdemeanor to create carte blanche for searching the homes of third parties creates the risk of the sort of abuse complained of here: using the arrest warrant as a "pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place.

Anderson, 105 Wn. App. at 232.

Further, review should be granted because police officers on the front line needing clear guidance on the issue of whether a misdemeanor warrant will be sufficient now have conflicting information, and need this Court's guidance.

Review should also be granted under RAP 13.4(b)(3) and (4) on the issue of whether officers must have probable cause that a home is the suspect's "actual residence" before entry on any warrant for that suspect is proper. The reason this is crucial is because a person who is a co-resident is deemed to have run the risk that roommates might get into trouble and entry into the suspect's home would be proper even for evidence admitted against a co-resident. See U.S. v. Ramirez, 770 F.2d 1458 (9<sup>th</sup> Cir. 1985).

In this case, the trial court found that the entry of police was into a "third-party's home" - not Mr. Schinnell's, to serve the warrant. CP 134. On appeal, although the prosecution never assigned error to that finding and did not cross-appeal, Division Two held that there was "probable cause to believe Mr. Schinnell lived" at the home, based upon the minimal information the officers had and standards from cases interpreting when a sex offender has to give their address to police as a "residence" and when service of process is proper. Appendix A at 13-15, n. 8.

This Court should grant review. Again, no Washington court has previously addressed the proper standard of how to determine whether a person "resides" at a home for the purposes of protecting the rights of others who live there against unreasonable searches and seizures. But federal caselaw has examined this important issue and held that it is not enough that the person "inhabits" or "occupies" a place - it must be the

person's actual residence. Perez v. Simmons, 884 F.2d 1136, 1140-42 (9<sup>th</sup> Cir. 1989), as amended by 900 F.2d 213 (1990), as corrected 998 F.2d 775 (1993); see U.S. v. Patino, 830 F.2d 1413 (7<sup>th</sup> Cir. 1987). They have also held that, to prove that a home was someone's residence, it is not sufficient to simply prove that they had a "reasonable expectation of privacy" there, because that standard can be met merely by proof of temporary occupancy and the Fourth Amendment rights of the person objecting to the search cannot be so "diminished by the mere presence of a guest in the home." Perez, 885 F.2d at 1140-41.

Here, the testimony at the suppression hearing established that the evidence the officers had at the time at the time they entered the home was that 1) Mr. Schinnell had gone to the house that day, 2) a neighbor named "Rowland" who knew Mr. Schinnell only by the name "Eric" thought he lived there and had seen his truck there, 3) another neighbor had seen the truck there and had seen "Eric" "around," 4) Mr. Robbins, who lived there, thought Eric might be there at the time because his truck was there, 5) Mr. Petticord knew Mr. Schinnell and thought he was probably there, and 6) some vehicles at the property were registered to Mr. Schinnell. RP 21-22, 82, 116.

At most, that evidence established that Mr. Schinnell was probably at the home at the time. But the fact that a neighbor who did not really

know Mr. Schinnell well thought he lived there, coupled with the possibility he was there and the presence of his truck and another vehicle, was insufficient to support even a reasonable suspicion that he lived there, let alone proving the higher standard of “reasonable cause,” given the other evidence the officers had that the Tacoma address was not Mr. Schinnell’s residence. As the officers themselves admitted at the suppression hearing, they knew before entering the home that it was not the address listed on Mr. Schinnell’s driver’s license, either of the two vehicles, or *the warrant itself*. RP 65, 80, 130. It was not even in the same *city*. RP 65, 80, 130. The protections citizens have in the most protected area of all - the home - simply cannot depend upon a neighbor’s general belief that someone might live there, coupled with presence and a few vehicles at the home, especially where, as here, there is evidence that the person lives somewhere else. This Court should grant review to address the very significant constitutional questions presented by this case, the conflicts with Anderson and McKinney, and the clear confusion now existing about this issue of great importance to police and citizens of this state.

G. OTHER REASONS REVIEW SHOULD BE GRANTED

2. REVIEW SHOULD BE GRANTED TO ADDRESS THE DIRECT CONFLICTS WITH CRIDER AND AGUILAR-RIVERA AND THE IMPORTANT PUBLIC ISSUE OF THE SCOPE OF THE STATUTORY RIGHT TO ALLOCUTION

In Echevarria, this Court held that defendants have a statutory right to allocution. 141 Wn.2d at 336. This right requires that, at the sentencing hearing, the “court shall. . . allow arguments from the prosecutor, the defense counsel, [and] the offender.” RCW 9.94A.500(1).

In this case, this Court should grant review under RAP 13.4(b)(2) (3) and (4), because Division Two erred in holding there was no violation of Mr. Hatchie’s right to allocution and the decision in this case directly conflicts with other decisions of the court of appeals and creates an equal protection problem by providing different rights than those provided in other divisions.

a. Relevant facts

At sentencing, Mr. Hatchie requested an exceptional sentence below the standard range, arguing it was proper because his involvement in the crime was only minor. CP 126-29; SRP 4-11. The prosecution sought a sentence at the high end of the standard range, disputing the level of involvement and faulting Mr. Hatchie for failing to take advantage of the “Breaking the Cycle” programs offered prior to trial for his addiction.

SRP 3, 16-17.

After Judge Grant heard from counsel, she said:

All right. The Court is ready to rule. The standard sentence range will be adopted and 55 months plus the three years for the deadly weapon firearm enhancement, unless your client has something else to add or say, [defense counsel], on his own behalf. I am really concerned. I did look at that BTC record and [the prosecutor] is correct, it was totally unsatisfactory. There appears to be no attempt by your client to say that he wants help and I realize if you are involved in drugs and you're an addict, that sometimes it's often hard to accept or request for help but here was an opportunity he certainly could have exercised.

SRP 19. The prosecutor then reminded the court that "probably before" it made "a final ruling on sentence, we should ask formally whether Mr. Hatchie wishes to allocute." SRP 19-20. Because the court had already ruled, counsel said allocution was "really for nothing now," and the judge said she would consider what Mr. Hatchie had to say if it was something counsel had "not said, that I don't know about." SRP 20. Mr. Hatchie then spoke to the court about his mistaken belief that he would be exonerated and found innocent, said that he will try to have a "positive thing to come out of this" by trying to get treatment and admitting he was an addict, and apologized. SRP 21. The court then questioned Mr. Hatchie and counsel about the BTC program and why he did not participate, and Mr. Hatchie responded that his "head just wasn't there" at the time the case began. SRP 21.

Judge Grant then stated that she would “knock off a couple months” of the original sentence and reduce it to “a 53 month plus three years for” the enhancements. SRP 22.

In holding that Mr. Hatchie’s statutory right to allocution had not been violated, in the published portion of this case, Division Two noted that Division Three and Division One have both held that a defendant is “automatically entitled to a new sentencing hearing when allocution comes after pronouncement of a sentence.” Appendix A at 17. Division Two also noted contrary caselaw in Division One, which held that “harmless error analysis” could apply. Appendix A at 17. Division Two then declined to follow any of that caselaw and held, inter alia, that Mr. Hatchie was “provided a meaningful opportunity to address the court before sentence was imposed” because he was allowed to speak before the final, written sentence was entered. Appendix A at 17-18.

b. Review should be granted

This Court should grant review under RAP 13.4(b)(2), (3) and (4) on this issue. With its decision, Division Two expressly set up a conflict between this case and both Crider and Aguilar-Rivera by refusing to follow those cases. See Appendix A at 17-18. In Crider, the defendant was not offered an opportunity to speak until after the sentence was entered. When counsel immediately tried to file a notice of appeal based

upon the lack of opportunity for allocution, the court *then* asked the defendant if he wished to say anything. 78 Wn. App. at 852-53. In reversing, the majority rejected the claim, made by the dissent, that the right was not violated because the sentence was still subject to modification, as it had been signed but not entered and the parties were still before the court. 78 Wn. App. at 861, 863-64. The majority stated:

[W]e agree with Mr. Crider that an opportunity to speak extended for the first time after sentence has been imposed is “a totally empty gesture.” Even when the court stands ready and willing to alter the sentence when presented with new information (and we assume this to be the case here), from the defendant’s perspective, the opportunity comes too late. The decision has been announced, and the defendant is arguing from a disadvantaged position.

78 Wn. App. at 861. In Aguilar-Rivera, the court orally announced the sentence after rejecting the defense arguments. 83 Wn. App. at 200-201. When the defendant was directed to come forward for fingerprinting, counsel objected that the right to allocution was not offered, the judge thanked defense counsel for reminding him, and counsel said it might be “a moot point now.” 83 Wn. App. at 201. The court held that, although it was clear the sentencing court “sincerely tried to listen to allocution with an open mind,” the failure to invite allocution prior to the sentence being announced left the defendant “in the difficult position of asking the judge to reconsider an already-imposed sentence.” 83 Wn. App. at 203-204.

In this case, instead of following Crider, Aguilar-Rivera, or even

the caselaw disagreeing about whether the error could be “harmless,” Division Two forged a new path, declaring that the right to allocution is not deprived even if the court has already orally pronounced a sentence because oral opinions are “informal” and may be “subject to further study and consideration.” Appendix A at 17.

With this decision, Division Two equated two completely different situations. There is no doubt that it has long been the law that a party cannot enforce an oral opinion and that a written opinion controls over an oral opinion every time. See State v. Hescocock, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999). But the issue of whether a party should rely on an oral opinion before that opinion is reduced to writing is far different than the question of whether a defendant, facing the judge at sentencing, is permitted a meaningful opportunity to speak on his own behalf before being sentenced.

Division Two’s published decision on this issue fundamentally changes the right to allocution in that division. It conflicts with Crider, Aguilar-Rivera, and other caselaw honoring the right of the defendant and interpreting the statutory right so that it has some appearance of meaning. This Court should grant review under RAP 13.4(b)(2), (3) and (4) on this issue, to address not only the conflict but the imbalance of protections now afforded some defendant’s in some divisions over others and the potential

equal protection problem.

F. CONCLUSION

For the reasons stated herein, this Court should grant review.

DATED this 22nd day of June, 2006.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel and petitioner by depositing the same in the United States Mail, first class postage pre-paid, as follows:

To: Michelle Luna-Green, Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

To: Mr. Raymond Hatchie, DOC 868776, Olympic Corretions Center, 1123 Hoh Main Line, Forks, WA. 98331.

DATED this 22nd day of July, 2006.

  
\_\_\_\_\_  
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STATE OF WASHINGTON  
BY \_\_\_\_\_

DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

No. 31544-1-II

Respondent,

v.

RAYMOND KAMIOLANI HATCHIE,

PART PUBLISHED OPINION

Appellant.

QUINN-BRINTNALL, C.J. — Officers entered Raymond Hatchie's home to arrest Eric Schinnell on a misdemeanor warrant. At the time of entry, the officers had probable cause to believe that Schinnell lived in Hatchie's home and that Schinnell was present. While inside, the officers discovered evidence of methamphetamine manufacture. The officers then obtained a search warrant for Hatchie's home. That search warrant eventually led to Hatchie's conviction for unlawful manufacture of a controlled substance.

This appeal presents two significant questions: First, does article I, section 7 of the Washington Constitution permit law enforcement to enter a suspect's residence to serve a misdemeanor arrest warrant? Second, is a defendant entitled to a new sentencing hearing when

he is given an opportunity to allocute after the court has orally pronounced its sentence? We answer the first question yes and the second no and affirm Hatchie's conviction and sentence.<sup>1</sup>

#### FACTS

On June 11, 2003, Pierce County Sheriff's Deputies were watching a Tacoma hardware store for purchases of methamphetamine precursors when they saw Schinnell buy a container of muriatic acid. The deputies followed Schinnell and observed him purchasing lithium batteries in a second store and two bottles of lye in a third store. Muriatic acid, lithium batteries, and lye are all used in methamphetamine manufacturing.

The deputies continued to follow Schinnell at a distance in an unmarked car. A check with the Department of Licensing revealed that Schinnell's driver's license was suspended. It also revealed that he had an outstanding misdemeanor warrant for failing to appear for sentencing on a conviction for third degree driving while license suspended. The warrant provided for a \$500 cash-only bail.

The deputies decided to pull Schinnell over at this point, but they lost sight of him once he drove into a residential area. The deputies eventually saw Schinnell's truck parked in the driveway of a duplex unit. Schinnell was standing next to a fifth-wheel trailer in the driveway. Parked in the yard of the unit was a second car registered to Schinnell. Schinnell's vehicles were registered to a different address in Hoodspport, Washington; Schinnell's misdemeanor warrant also listed that same Hoodspport address. The deputies established surveillance and called for a uniformed unit in a marked patrol car to contact Schinnell.

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<sup>1</sup> We address Hatchie's additional assignments of error in the unpublished portion of this opinion. Our resolution of those issues does not alter the result.

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When the uniformed squad arrived, the deputies interviewed two people who were neighbors of the duplex unit. One neighbor stated that Schinnell lived at the unit and that he had been there earlier that day. The other neighbor, John Huntsman, told the deputies that there was a lot of traffic to the unit at all hours of the day. Huntsman said that people would often show up at his home looking for drugs and, when he turned them away, they would head to the unit. Huntsman also stated that as many as six people lived at the unit and that he had seen Schinnell and his truck there before.

After talking with the neighbors, the deputies decided to contact Schinnell, who by that time was no longer standing in front of the duplex unit. As the deputies approached the unit, they spoke with Timothy Petticord, who was standing in the unit's yard. Petticord told the deputies that if Schinnell's truck was there, he was in the unit. Petticord also stated that he (Petticord) "stayed at the residence but generally outside the residence." 1 Report of Proceedings (RP) at 179.

The deputies knocked intermittently on the duplex unit door for 45 minutes before Donald Robbins answered. When asked, Robbins first said that Schinnell was inside. He then stated that he had been sleeping and that he assumed Schinnell was "home" because his truck was there. 1 RP at 28. The deputies announced their presence and asked Schinnell to come out. When there was no response, the deputies decided to enter the unit to serve the arrest warrant on Schinnell and to talk to him about his questionable purchases. While looking for Schinnell in the unit, the deputies saw numerous items used to manufacture methamphetamine. The deputies eventually found Schinnell hiding under a truck in the garage. They arrested him on the outstanding arrest warrant.

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After Schinnell's arrest, the deputies learned that the duplex unit was being rented by Hatchie. Robbins told the deputies that Hatchie was at work. Robbins indicated that he had been living with Hatchie for three months. Robbins also stated that Schinnell had been staying at the unit off and on for the last two months.

The deputies obtained a warrant to search Hatchie's duplex unit for evidence of possession and manufacture of methamphetamine. Based on the evidence seized from the unit, the State charged Hatchie with unlawful manufacture of a controlled substance. *See* former RCW 69.50.401 (1998).

Hatchie moved to suppress the evidence seized under the search warrant. Hatchie maintained that the deputies could not enter his home to arrest Schinnell on the outstanding misdemeanor warrant, and that, even if they could, the arrest warrant was invalid because it provided for a cash-only bail. Hatchie also maintained that the deputies used Schinnell's warrant as a pretext to enter his home. The trial court denied Hatchie's suppression motion.

A jury found Hatchie guilty as charged. At sentencing, the prosecutor recommended that the court sentence Hatchie to the high end of his 51- to 68-month standard sentencing range. Defense counsel requested an exceptional sentence downward. The court then indicated that it was "ready to rule" and that it would impose a 55-month sentence "unless your client has something else to add or say . . . on his own behalf." RP (Mar. 12, 2004) at 19. Hatchie and defense counsel did not respond.

When the court began explaining the reasons for its sentence, the prosecutor interjected: "Your Honor, I think probably before you make a final ruling on sentence, we should ask formally whether Mr. Hatchie wishes to allocute." RP (Mar. 12, 2004) at 19-20. Defense counsel responded that allocution would be pointless because the court had already ruled. The

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court then stated: "If he has something to say that you have not said, that I don't know about, I will consider it." RP (Mar. 12, 2004) at 20. Hatchie then addressed the court. After hearing from Hatchie, the court imposed a sentence of 53 months.

This appeal followed.

### ANALYSIS

#### MISDEMEANOR ARREST WARRANTS AND HOME ENTRY

Hatchie contends that under the Fourth Amendment and article I, section 7 of the Washington Constitution, law enforcement could not enter his home to serve a misdemeanor arrest warrant on Schinnell. Alternatively, he maintains that even if home entry to serve a misdemeanor arrest warrant is permissible, Schinnell's warrant was invalid because it provided for a cash-only bail. We disagree with both contentions.

Two constitutional interests are implicated when law enforcement enters a home to serve an arrest warrant: the arrestee's interest in being free from an unreasonable seizure, and the resident's interest in the privacy of his home. *Steagald v. United States*, 451 U.S. 204, 216, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981); *State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994). Here, the arrestee and the resident are different people with different interests at stake. The arrestee's liberty interest is protected by the requirement that the arrest warrant be issued by a neutral and detached magistrate upon a showing of probable cause. *State v. Williams*, 142 Wn.2d 17, 24 n.2, 11 P.3d 714 (2000). Schinnell's interest, as the arrestee, is not at issue in this appeal; we are concerned only with Hatchie's interest as a resident of the home which police entered to arrest Schinnell. If the entry to arrest Schinnell was unlawful, then Hatchie's rights were violated by the admission of evidence obtained as a result of the search warrant that was based on information obtained during that unlawful entry. See *State v. Ladson*, 138 Wn.2d 343,

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359, 979 P.2d 833 (1999). If the entry was lawful, then Hatchie's rights were not violated by the admission of the evidence because it was seized pursuant to a search warrant that was based on the officer's plain view observations from inside the home made when they lawfully entered to arrest Schinnell. *State v. Kull*, 155 Wn.2d 80, 85, 118 P.3d 307 (2005).

The Fourth Amendment prohibits unreasonable searches. Article I, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Under both constitutional provisions, lawful searches generally require search warrants. *Ladson*, 138 Wn.2d at 349. There are, however, several exceptions that "provide for those cases where the societal costs of obtaining a warrant . . . outweigh the *reasons* for prior recourse to a neutral magistrate." *Ladson*, 138 Wn.2d at 348-49 (alteration in original) (quoting *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)). The exceptions include consent, exigent circumstances, plain view, inventory searches, investigatory *Terry*<sup>2</sup> stops, and searches incident to a valid arrest. *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). In Washington, these search warrant exceptions are "jealously and carefully drawn" because article I, section 7 provides greater privacy protections than its federal counterpart. *Ladson*, 138 Wn.2d at 349 (quoting *Houser*, 95 Wn.2d at 149). Article I, section 7 recognizes that "[i]n no area is a citizen more entitled to his privacy than in his or her home." *Young*, 123 Wn.2d at 185.

In *Payton v. New York*, 445 U.S. 573, 576, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), the United States Supreme Court held that absent exigent circumstances, the Fourth Amendment "prohibits the police from making a warrantless and nonconsensual entry into a suspect's home

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<sup>2</sup> *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

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in order to make a routine felony arrest.” In narrowing the scope of its holding, the Court rejected the contention that “only a search warrant based on probable cause to believe the suspect is at home at a given time can adequately protect the privacy interests at stake”:

It is true that an arrest warrant requirement may afford less protection than a search warrant requirement, but it will suffice to interpose the magistrate’s determination of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen’s participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

*Payton*, 445 U.S. at 602-03. *Payton*’s holding is limited to cases where law enforcement enters a home to arrest a person they believe to be a resident; the Court held one year later in *Steagald*, 451 U.S. at 213, that entry was not permissible to arrest a person believed to be a guest.

The Washington Supreme Court applied *Payton* in *Williams*, 142 Wn.2d 17, and *State v. Thang*, 145 Wn.2d 630, 41 P.3d 1159 (2002). In both cases, officers entered homes with the resident’s consent to arrest a guest on an outstanding felony warrant. The court concluded both times that the consent was voluntary and the entry was therefore lawful. *Thang*, 145 Wn.2d at 637-39; *Williams*, 142 Wn.2d at 27-28. In dictum, both courts also concluded that the entry was lawful under *Payton* because officers could have entered the arrestee’s home to effectuate the arrest and a person for whom an arrest warrant has been issued is not entitled to additional privacy protections in a host’s home. *Thang*, 145 Wn.2d at 638-39; *Williams*, 142 Wn.2d at 23-24. In neither case did the court discuss whether the search warrant exception for arrest warrants applied under article I, section 7, or whether the exception depended on the seriousness of the crime for which the warrant was issued.

Those courts directly addressing *Payton* have held that its rule applies with equal force to misdemeanor warrants.<sup>3</sup> These courts have concluded that the felony/misdemeanor distinction is irrelevant because *Payton*'s main focus is the necessity of a magistrate's probable cause finding as a restraint on law enforcement's ability to enter a home for purposes of making an arrest. *See, e.g., United States v. Spencer*, 684 F.2d 220, 223-24 (2nd Cir. 1982), *cert. denied*, 459 U.S. 1109 (1983); *State v. Coma*, 133 Idaho 29, 31-32, 981 P.2d 754 (Idaho Ct. App. 1999). Such decisions are supported by the United States Supreme Court's later discussion of *Payton* in *Steagald*: "Because an arrest warrant authorizes the police to deprive a person of his liberty, it necessarily also authorizes a limited invasion of that person's privacy interest when it is necessary to arrest him in his home." 451 U.S. at 214 n.7. *See also Welsh v. Wisconsin*, 466 U.S. 740, 750 & n.11, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984) (in a case where the officer entered a home without an arrest or search warrant, the Court noted that *Payton* was "expressly limited to felony arrests," but also stated that "[w]hen the government's interest is only to arrest for a minor offense," and the government seeks to enter the home to effectuate the arrest, "the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate").

The cases interpreting *Payton* delineate the protections provided by the Fourth Amendment and, as such, are of little value in addressing the broader privacy protections afforded under Washington's article I, section 7. Thus, we must determine whether *Payton* is

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<sup>3</sup> *United States v. Clayton*, 210 F.3d 841, 843 (8th Cir. 2000); *United States v. Spencer*, 684 F.2d 220, 222-24 (2nd Cir. 1982), *cert. denied*, 459 U.S. 1109 (1983); *United States v. Meindl*, 83 F. Supp. 2d 1207, 1214-15 (D. Kan. 1999); *Smith v. Tolley*, 960 F. Supp. 977, 990-91 (E.D. Va. 1997); *People v. LeBlanc*, 60 Cal. App. 4th 157, 164, 70 Cal. Rptr. 2d 195 (Cal. Ct. App. 1997); *State v. Coma*, 133 Idaho 29, 31-32, 981 P.2d 754 (Idaho Ct. App. 1999); *Green v. State*, 78 S.W.3d 604, 611 (Tex. Ct. App. 2002); *Archer v. Commonwealth*, 26 Va. App. 1, 10-11, 492 S.E.2d 826 (Va. Ct. App. 1997).

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good law in Washington and, if so, whether the Washington Constitution distinguishes between felony and misdemeanor warrants. Hatchie maintains that *State v. Chrisman*, 100 Wn.2d 814, 676 P.2d 419 (1984) (*Chrisman II*), controls this inquiry. We disagree.

In *Chrisman*, a college student was arrested for possessing alcohol when he appeared to be a minor. The student told the officer that he had identification in his dorm room and the officer accompanied him to retrieve it. From his vantage point in the dorm hallway, the officer noticed what appeared to be marijuana seeds and a smoking pipe inside the dorm room. The officer entered the room to investigate and his suspicions were confirmed.

The Washington Supreme Court held that the officer's warrantless, nonconsensual entry into the dorm room violated the Fourth Amendment. *State v. Chrisman*, 94 Wn.2d 711, 717-18, 619 P.2d 971 (1980). The United States Supreme Court reversed, concluding that the entry was lawful because, under the Fourth Amendment, an officer has the "right to remain literally at [an arrestee's] elbow at all times." *Washington v. Chrisman*, 455 U.S. 1, 6, 102 S. Ct. 812, 70 L. Ed. 2d 778 (1982). On remand, the Washington Supreme Court held that the officer's entry violated article I, section 7:

[T]he officer's warrantless entry into the dormitory room, following the misdemeanor arrest, was not permitted because the officer was not presented with facts sufficient to demonstrate (1) a threat to the officer's safety, or (2) the possibility of destruction of evidence of the misdemeanor charged, or (3) a strong likelihood of escape. . . . The heightened protection afforded state citizens against unlawful intrusion into private dwellings places an onerous burden upon the government to show a compelling need to act outside of our warrant requirement. In cases of minor violations, where no danger exists, and where there is no threat of destruction of the evidence, we can find no compelling need to enter a private residence.

*Chrisman II*, 100 Wn.2d at 821-22.

*Chrisman II* was applied in *Kull*, 155 Wn.2d 80. There, officers entered an apartment building to arrest Kull on a misdemeanor warrant. Before reaching Kull's apartment, the officers noticed Kull in the community laundry room. Kull was arrested but informed that she could avoid being booked into jail if she posted the value of the warrant. Kull then went to her apartment and instructed a friend to retrieve her purse from her bedroom. When an officer followed the friend into Kull's bedroom, he saw a baggie of cocaine. The officer then seized Kull's purse and found methamphetamine inside.

Citing *Chrisman II*, Kull moved to suppress the evidence found in her apartment. The trial court denied the motion, finding that the officer had a legitimate safety concern in following the friend into Kull's bedroom. The Washington Supreme Court reversed, finding no support for the trial court's finding of exigent circumstances. *Kull*, 155 Wn.2d at 87-89.

*Chrisman II* and *Kull* do not apply here because, in both cases, the arrest occurred before the police entered into the dwelling. The officers in *Kull* lost any authority that they had to enter Kull's apartment to make an arrest under the arrest warrant when they arrested her in the community laundry room. See *Wilson v. Layne*, 526 U.S. 603, 611, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999) (“[T]he Fourth Amendment does require that police actions in execution of a warrant be related to the objectives of the authorized intrusion.”). The same analysis applies to *Chrisman II*, with the added distinction being that due to the absence of a warrant, there was no shield between the officer and the resident's privacy interests.

Because the officers in *Chrisman II* and *Kull* lacked any authority to enter the dwellings to serve arrest warrants, lawful entry required proof of an exception to the search warrant requirement. The pertinent exceptions in this situation include consent and exigent circumstances, with the latter including the officer safety, destruction of evidence, and likelihood

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of escape sub-exceptions discussed in *Chrisman II* and *Kull*. See *Hendrickson*, 129 Wn.2d at 71; *State v. Counts*, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983); see also *State v. Nelson*, 47 Wn. App. 157, 162-64, 734 P.2d 516 (1987) (where officers had a misdemeanor warrant and made the arrest outside the home, officers lawfully entered the home due to the arrestee's consent). *Chrisman II* and *Kull* represent two propositions: First, a continuation of precedent applying the search warrant exceptions; and second, a refusal to apply in Washington the Fourth Amendment's warrant exception allowing law enforcement the "right to remain literally at [an arrestee's] elbow at all times." *Chrisman*, 455 U.S. at 6. But *Chrisman II* and *Kull* do not, as Hatchie contends, distinguish between felony and misdemeanor warrants for purposes of authorizing home entry to effectuate the arrest.<sup>4</sup>

We turn now to whether the *Payton* rule applies under article I, section 7, and if so, whether a distinction must be made between felony and misdemeanor warrants. The protections of article I, section 7 extend to "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *Young*, 123 Wn.2d at 181 (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)); accord

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<sup>4</sup> This does not mean the felony/misdemeanor distinction played no role in *Chrisman II*. The seriousness of the crime will heighten the burden placed on the government to show that an exception to the warrant requirement applies. *Chrisman II*, 100 Wn.2d at 822. This is particularly true when the government seeks to invoke the exigent circumstance exception. *Welsh*, 466 U.S. at 753 ("[A]n important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made."). The *Chrisman II* court simply concluded that the exigency threshold had not been met under the facts presented. Here, we are not dealing with the exigent circumstances exception. Thus, *Chrisman II* does not control.

Hatchie contends that Division Three has held to the contrary. In *State v. Anderson*, 105 Wn. App. 223, 231, 19 P.3d 1094 (2001), and *State v. McKinney*, 49 Wn. App. 850, 857, 746 P.2d 835 (1987), the court did cite *Chrisman II* for the proposition that police need a "strong justification" for entering a residence on a misdemeanor warrant. But these statements were without analysis and are dictum in both cases. *Anderson*, 105 Wn. App. at 231-32 (officer entered home without any evidence that arrestee resided there); *McKinney*, 49 Wn. App. at 857-58 (officers lawfully entered home in hot pursuit of the arrestee).

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*Ladson*, 138 Wn.2d at 349. Our inquiry into *Payton*'s application requires a balancing of "societal need" with the "privacy interests provided by article 1, section 7." *State v. Patterson*, 112 Wn.2d 731, 735, 774 P.2d 10 (1989).

"[A] person's home is a highly private place" subject to rigorous constitutional protection. *Kull*, 155 Wn.2d at 84; *Young*, 123 Wn.2d at 185. Absent a search warrant, any governmental entry into a home raises serious privacy concerns. But once a neutral magistrate has issued an arrest warrant, probable cause exists to believe that a citizen has violated the law of the land, and the citizen's privacy concerns are outweighed by society's interests in requiring him to answer those charges. The framers of the state constitution in 1889 did not intend that a person's home be an inviolate sanctuary unbreachable by law enforcement armed with a lawful warrant for the resident's arrest. We believe that article I, section 7, like the Fourth Amendment, recognizes that "[b]ecause an arrest warrant authorizes the police to deprive a person of his liberty, it necessarily also authorizes a limited invasion of that person's privacy interest when it is necessary to arrest him in his home." *Steagald*, 451 U.S. at 214 n.7.

The privacy concerns implicated by our holding are best addressed by narrowly drawing the scope of the search warrant exception rather than creating a distinction between misdemeanor and felony arrest warrants. We emphasize that if law enforcement uses an arrest warrant as a pretext for entering the resident's home to conduct an otherwise impermissible search, the entry will be unlawful. *Ladson*, 138 Wn.2d at 358; *see also United States v. Albrektsen*, 151 F.3d 951, 954 (9th Cir. 1998) (rejecting argument that misdemeanor warrants permitted entry where arrest could have occurred at the front door but the officer entered to search for drugs). In addition, we hold that lawful entry into a dwelling to serve an arrest warrant requires that law enforcement have probable cause to believe (1) that the person named in the arrest warrant resides in the

home to be entered, and (2) the arrestee is in the home at the time of entry.<sup>5</sup> Probable cause exists when the 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 in the beliefs. *State v. Graham*, 130 Wn.2d 711, 724, 927 P.2d 227 (1996).

We hold that under article I, section 7, a felony or misdemeanor arrest warrant carries with it the limited authority to enter a dwelling to serve the warrant if there is probable cause to believe that the arrestee resides there and is present at the time law enforcement seeks to enter

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<sup>5</sup> We believe these heightened standards are required under article I, section 7. We note, however, a split of authority on the standards necessary under the Fourth Amendment. The majority of courts hold that officers need have only a reasonable belief that the arrestee resides in and is currently present at the dwelling to be searched. See *United States v. Gay*, 240 F.3d 1222, 1226 (10th Cir.), cert. denied, 533 U.S. 939 (2001); *United States v. Lovelock*, 170 F.3d 339, 343 (2nd Cir.), cert. denied, 528 U.S. 853 (1999); *United States v. Route*, 104 F.3d 59, 62 (5th Cir.), cert. denied, 521 U.S. 1109 (1997); *United States v. Risse*, 83 F.3d 212, 216 (8th Cir. 1996); *United States v. May*, 68 F.3d 515, 516 (D.C. Cir. 1995); *United States v. Magluta*, 44 F.3d 1530, 1534-35 (11th Cir.), cert. denied, 516 U.S. 869 (1995); *People v. Aarness*, 116 P.3d 1233, 1237-38 (Colo. Ct. App. 2005); *Dockery v. United States*, 853 A.2d 687, 694 (D.C. 2004); *Commonwealth v. Silva*, 440 Mass. 772, 776-78, 802 N.E.2d 535 (Mass. 2004) (applying state constitution); *Green*, 78 S.W.3d at 610-12; *State v. Blanco*, 2000 WI App 119, ¶¶ 13-15, 237 Wis. 2d 395, 614 N.W.2d 512 (Wis. Ct. App.), review denied, 2000 WI 121 (2000). A minority of courts hold that probable cause is required. See *United States v. Gorman*, 314 F.3d 1105, 1111-13 (9th Cir. 2002); *State v. Smith*, 208 Ariz. 20, 23, 90 P.3d 221 (Ariz. Ct. App. 2004); *State v. Jones*, 332 Or. 284, 27 P.3d 119 (Or. 2001) (applying state constitution); see also 3 WAYNE R. LAFAVE, SEARCH & SEIZURE § 6.1(a), at 265-67 (4th ed. 2004) (opining that probable cause is required). As the Arizona Court of Appeals has noted, however, the split of authority may be more a matter of semantics than substance:

Those courts that have distinguished reasonable belief from probable cause have done so not because those standards require differing levels of certainty necessary to justify a police action. Rather, they have done so because "probable cause" has become a term of art and has traditionally engendered a need for an additional magisterial finding to authorize police action.

*Smith*, 208 Ariz. at 24.

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the dwelling.<sup>6</sup> Applying our holding to the facts of this case, the deputies lawfully entered Hatchie's home to arrest Schinnell on the outstanding arrest warrant.

Here, the deputies had a warrant for Schinnell's arrest. Hatchie does not contend that the deputies lacked probable cause to believe that Schinnell was inside the unit at the time they entered it. Nor does Hatchie contend, as he did below, that the deputies used Schinnell's warrant as a pretext for entering the unit.<sup>7</sup> Rather, Hatchie argues that the deputies lacked probable cause to believe that Schinnell resided at the unit. We disagree.

A neighbor told the deputies that Schinnell lived at the duplex unit. They had also been told by three people—a neighbor and two individuals associated with the unit—that if Schinnell's truck was at the unit, he would be inside. Robbins, who answered the door, specifically stated that Schinnell would be "home" if his truck was there. 1 RP at 28. Schinnell also had two of his trucks at the residence, one parked on the lawn; the presence of multiple vehicles, parked in irregular locations, suggests that the vehicles' owner is not a mere guest in the home.

Hatchie relies on the fact that Schinnell's arrest warrant and vehicle registration listed a different address in Hoodspport, Washington. But individuals frequently change their residence without updating Department of Licensing records as they are legally required to do. RCW

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<sup>6</sup> Because our holding discusses the authority inherent in an arrest warrant and the safeguards necessary to protect a resident's interests in his home, it is of limited applicability when the party challenging the entry is a nonresident. See *Minnesota v. Olson*, 495 U.S. 91, 95-97, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990) (holding that only a person with a reasonable expectation of privacy in a residence may complain that an entry into the residence was unlawful); *United States v. Agnew*, 407 F.3d 193, 196-97 (3rd Cir. 2005); *Thang*, 145 Wn.2d at 638-39; *Williams*, 142 Wn.2d at 27-28.

<sup>7</sup> Hatchie does give this issue vague and passing mention in his briefing. But it is insufficient to warrant our consideration. *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.2d 970 (2004).

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46.20.205(1); *Pascua v. Heil*, 126 Wn. App. 520, 531, 108 P.3d 1253 (2005). And it is certainly not surprising that an individual with outstanding warrants will fail to inform the government of his current residence. Moreover, probable cause does not require absolute certainty; it requires only facts and circumstances sufficient to form a reasonable conclusion that the person named in the warrant resides and is present in the residence to be entered. *See Graham*, 130 Wn.2d at 724. The totality of the facts known to the deputies who followed Schinnell established probable cause to believe that Schinnell resided in the duplex unit.<sup>8</sup>

Hatchie lastly argues that even if home entry to serve a misdemeanor warrant is generally permissible, it was not in this case because Schinnell's warrant was invalid due to the cash-only bail provision. Hatchie is correct that under article I, section 7, Schinnell's arrest warrant authorized law enforcement to enter the duplex unit only if the warrant was valid. *State v. Lansden*, 144 Wn.2d 654, 662-64, 30 P.3d 483 (2001); *City of Seattle v. McCready*, 123 Wn.2d 260, 280, 868 P.2d 134 (1994). But Hatchie is incorrect that the bail provision invalidated Schinnell's arrest warrant.

Hatchie relies entirely on *City of Yakima v. Mollett*, 115 Wn. App. 604, 63 P.3d 177 (2003). There, Division Three ruled that the pre-trial release provisions of CrRLJ 3.2(a) do not allow a court to require a cash-only bail. *Mollett*, 115 Wn. App. at 609-10. Even if we assume that *Mollett* applies, and that the cash-only bail provision of Schinnell's warrant was invalid, the

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<sup>8</sup> We note that it is an open question as to whether Schinnell was in fact a resident of Hatchie's unit. "Residence as the term is commonly understood is the place where a person lives as either a temporary or permanent dwelling, a place to which one intends to return, as distinguished from a place of temporary sojourn or transient visit." *State v. Pickett*, 95 Wn. App. 475, 478, 975 P.2d 584 (1999); *see also Sheldon v. Fetting*, 129 Wn.2d 601, 611, 919 P.2d 1209 (1996) (an individual can maintain more than one "dwelling place[ ]" or "house of usual abode"). Here, Schinnell testified that for the two months before his arrest, he was unemployed, homeless, and staying and sleeping at Hatchie's home three nights per week. Schinnell would sleep in his truck the other nights except for once a week when he would stay with a woman.

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bail provision is severable from the warrant's probable cause determination and its presence does not invalidate the court's otherwise proper warrant for Schinnell's arrest. A warrant is invalid if it is not issued by a neutral and detached magistrate;<sup>9</sup> is not based on probable cause;<sup>10</sup> or if the court lacks authority to issue it.<sup>11</sup> Such failings go to the constitutional heart of the warrant; a type of bail provision does not. Moreover, Hatchie's reliance on *Mollett* is misplaced. The *Mollett* court merely held that the bail provision was unlawful, it did not hold that Mollett's arrest made pursuant to the warrant was unlawful. We reject Hatchie's claim that Schinnell's arrest warrant was invalid due to the cash-only bail provision.

We conclude that the deputies lawfully entered Hatchie's duplex unit to serve a misdemeanor arrest warrant on Schinnell, whom they had probable cause to believe was residing there. As part of the lawful entry, the deputies saw in plain view evidence of a methamphetamine lab and subsequently obtained a valid search warrant to seize that lab. We, therefore, affirm the trial court's order denying Hatchie's motion to suppress.

#### ALLOCUTION

RCW 9.94A.500(1) requires that the defendant be given an opportunity to allocute, i.e., plea for mercy, before the court imposes a sentence. *In re Pers. Restraint of Echeverria*, 141 Wn.2d 323, 336, 339 n.54, 6 P.3d 573 (2000). Hatchie maintains that he is entitled to be resentenced before a different judge because the court announced its intended sentence before giving him a chance to allocute. We disagree.

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<sup>9</sup> *Staats v. Brown*, 139 Wn.2d 757, 777, 991 P.2d 615 (2000).

<sup>10</sup> *State v. Nusbaum*, 126 Wn. App. 160, 166, 107 P.3d 768 (2005).

<sup>11</sup> *Bosteder v. City of Renton*, 155 Wn.2d 18, 32-33, 117 P.3d 316 (2005).

Division Three has held that a defendant is automatically entitled to a new sentencing hearing when allocution comes after pronouncement of a sentence. *See State v. Crider*, 78 Wn. App. 849, 860-61, 899 P.2d 24 (1995). According to that court:

[A]n opportunity to speak extended for the first time after sentence has been imposed is “a totally empty gesture.” Even when the court stands ready and willing to alter the sentence when presented with new information (and we assume this to be the case here), from the defendant’s perspective, the opportunity comes too late. The decision has been announced, and the defendant is arguing from a disadvantaged position.

*Crider*, 78 Wn. App. at 861. Division One agreed with *Crider* in *State v. Aguilar-Rivera*, 83 Wn. App. 199, 203, 920 P.2d 623 (1996). But more recently, Division One declined to follow *Aguilar-Rivera* in *State v. Gonzales*, 90 Wn. App. 852, 954 P.2d 360, *review denied*, 136 Wn.2d 1024 (1998). The *Gonzales* court concluded that harmless error analysis “should be available, albeit used infrequently,” to determine whether resentencing is required when the defendant is not afforded an opportunity to allocute. 90 Wn. App. at 853-55 (error harmless because the defendant received a low-end sentence, he told the sentencing court to “get it over with,” and he thanked the court for the sentence). *See generally State v. Zimmerman*, 130 Wn. App. 170, 176-78, 121 P.3d 1216 (2005) (discussing the “very limited class” of errors not subject to harmless error analysis).

We decline to follow *Crider*, *Aguilar-Rivera*, or *Gonzales*. We initially note the long standing rule that a court’s oral opinion is no more than an oral expression of the court’s informal opinion at the time rendered; it is “necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned.” *State v. Hescock*, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999) (quoting *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963)); *accord State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). A court’s

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oral ruling has no binding or final effect until it is reduced to writing. *State v. Mallory*, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966); *Hescock*, 98 Wn. App. at 605-06. The trial court's premature statement of its contemplated sentence is therefore not the imposition of a sentence. As such, Hatchie was provided a meaningful opportunity to address the court before sentence was imposed.

Furthermore, in *State v. Hughes*, 154 Wn.2d 118, 152-53, 110 P.3d 192 (2005), the Washington Supreme Court held that a defendant waives his statutory right to allocution if he does not request an opportunity to exercise that right. *See also State v. Canfield*, 154 Wn.2d 698, 707-08, 116 P.3d 391 (2005) (applying the same waiver rule to an offender's limited procedural due process right to allocute at a sentence revocation hearing; waiver found where offender attempted to reargue the evidence but did not give "some indication of his wish to plead for mercy"). We agree with *Crider* that "[o]ffering a defendant the opportunity to address the court prior to passing sentence should be a rote exercise at every sentencing. It should be a mechanical act so routine as to require no thought." 78 Wn. App. at 861; *accord Echeverria*, 141 Wn.2d at 336-37. But if a defendant has no remedy when he is not offered an opportunity to allocute at any point during sentencing, he surely has no remedy when he is offered allocution, albeit after the court has orally indicated its intended sentence.

We also note that Hatchie never indicated that he wished to offer a statement in mitigation of his sentence. Hatchie and his attorney remained silent when the court stated that it was "ready to rule" and that it would impose a 55-month sentence "unless your client has something else to add or say . . . on his own behalf." RP (Mar. 12, 2004) at 19. It was the prosecutor who sought to ensure that Hatchie had an opportunity to allocute before the court issued its final ruling. Had the prosecutor simply remained quiet, Hatchie would have waived

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his right to allocute under *Hughes* and he would have received the orally announced 55-month sentence, rather than the 53-month sentence the court imposed after hearing from Hatchie. Hatchie is not entitled to resentencing.

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.

Having addressed the arrest warrant and allocution issues, we turn to Hatchie's remaining assignments of error. Hatchie maintains that the trial court erred in (1) its evidentiary rulings; (2) refusing to give limiting instructions he requested; (3) admitting improper opinion testimony; and (4) refusing to give a unanimity instruction. He also maintains that he received ineffective assistance of counsel and that the prosecutor committed misconduct. To address these claims, an additional recitation of facts is necessary.

#### ADDITIONAL FACTS

Deputies seized the following items from Hatchie's bedroom when they served the search warrant: a straw with residue inside it, a baggie of methamphetamine, and a full packet of Cor-A-Fed brand pseudoephedrine tablets. Deputies also seized the following items from the kitchen, living room, and garage: a glass smoking pipe, toluene, acetone, funnels, vinyl tubing, boxes of pseudoephedrine pills, unused coffee filters, several propane tanks, a digital scale, a food processor with pseudoephedrine residue, denatured alcohol, a jar of yellow liquid that tested positive for methamphetamine, a filtration system that had pseudoephedrine residue, a pitcher filled with pink sludge, and empty packets of Cor-A-Fed brand pseudoephedrine tablets.

Before his arrest, Hatchie worked as a firefighter for the Boeing Company. At trial, the State presented the testimony of two Boeing security officers. One of the security officers

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testified that he found a pipe used to smoke methamphetamine in Hatchie's work locker when he searched the locker after Hatchie's employment was terminated. The other officer testified that Boeing's first aid kits used to contain Cor-A-Fed pseudoephedrine tablets but that the company removed the tablets from the kits when they began disappearing at an irregular rate.

Schinnell testified for the State as part of a plea agreement. The State presented the terms of Schinnell's plea agreement, including the requirement that he testify truthfully. Schinnell testified that he first came to Hatchie's home two months before June 11, 2003. According to Schinnell, he and others would go there to "get high and party and socialize." 12 RP at 1128. Schinnell eventually began sleeping at Hatchie's home three nights a week.

Schinnell described himself as a "middle man" in a methamphetamine manufacturing operation. 12 RP at 1134. He would collect methamphetamine precursors and trade them to a manufacturer for finished product. Hatchie would help by purchasing batteries and pseudoephedrine tablets when needed. On approximately seven occasions, Hatchie provided Schinnell with Cor-A-Fed tablets from work. According to Schinnell, Hatchie did so with the understanding that he would receive methamphetamine in return. Schinnell testified that the manufacturing would occur elsewhere; he did not see it produced in Hatchie's home on the days when he stayed there.

#### ADDITIONAL ANALYSIS

##### EVIDENCE ISSUES

Hatchie maintains that the trial court erred in admitting certain evidence and testimony and in refusing to give requested limiting instructions. We disagree.

Hatchie assigns error to the trial court's ruling admitting evidence of the pipe found in his work locker. He argues that the pipe was inadmissible under ER 404(b). But at trial he objected

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only that the pipe evidence was irrelevant and cumulative. We do not consider specific objections raised for the first time on appeal. *State v. Roberts*, 73 Wn. App. 141, 145, 867 P.2d 697, *review denied*, 124 Wn.2d 1022 (1994).

Hatchie assigns error to admission of a neighbor's testimony that people known to smoke marijuana frequented Hatchie's duplex unit. Hatchie argues that this testimony was also inadmissible under ER 404(b). But Hatchie's ER 404(b) objection was untimely as it was made after the witness testified and the prosecutor had posed another question. *State v. Gallo*, 20 Wn. App. 717, 728, 582 P.2d 558 (1978). Hatchie also did not combine his ER 404(b) objection with a motion to strike. *Gallo*, 20 Wn. App. at 728. This alleged error is not preserved for our review.

Hatchie assigns error to admission of a neighbor's testimony that there were "[a] lot of vehicles showing up and leaving at all hours of the day and night" and that the vehicles "would only stay for . . . five, ten minutes and they would be gone." 11 RP at 1053-54. Hatchie argues that this testimony was irrelevant and inadmissible under ER 404(b). But evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401; *see also State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002) ("The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible."). Evidence of an unusual level of traffic is relevant in a drug dealing and manufacturing case. *See State v. Kennedy*, 107 Wn.2d 1, 8, 726 P.2d 445 (1986); *State v. Goodin*, 67 Wn. App. 623, 631, 838 P.2d 135 (1992), *review denied*, 121 Wn.2d 1019 (1993).

As to Hatchie's ER 404(b) objection, that rule prohibits the admission of evidence of *other* acts to suggest a person's character and that the person acted in conformity with such

character. *See State v. Cook*, 131 Wn. App. 845, 849-50, 129 P.3d 834 (2006). Here, the traffic level at Hatchie's duplex unit was not introduced as evidence of *other* unlawful activity. It was introduced as circumstantial evidence of the drug manufacturing activity with which he was charged. Hatchie's reliance on the limitation of evidence found in ER 404(b) is misplaced.<sup>12</sup>

This leaves Hatchie's contention that the trial court erred in refusing to give limiting instructions on the glass smoking pipe and the residue-laden straw found in his home. Hatchie argues that limiting instructions were required because the presence of tools used to consume methamphetamine could not be considered on a charge of manufacturing methamphetamine. We disagree. Evidence of methamphetamine consumption makes it more probable that innocuous household items associated with methamphetamine manufacture, like coffee filters and tubing, were present for an illicit purpose. The trial court did not err in refusing to limit the jury's consideration of this relevant evidence.

#### OPINION TESTIMONY

A witness may not offer a personal opinion as to the defendant's guilt. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). To do so invades the jury's fact-finding role. *State v. Sanders*, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992). But expert opinion testimony addressing an ultimate factual issue is admissible if the opinion is relevant and based on inferences from the physical evidence and the expert's experience. ER 704; *State v. Baird*, 83 Wn. App. 477, 485, 922 P.2d 157 (1996), *review denied*, 131 Wn.2d 1012 (1997). That an opinion encompassing

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<sup>12</sup> Because the traffic level testimony was not ER 404(b) evidence, we need not address Hatchie's contention that his counsel was ineffective for not requesting a limiting instruction. *See generally State v. DeVincentis*, 150 Wn.2d 11, 23 n.3, 74 P.3d 119 (2003) (requested limiting instructions should be given when evidence is properly admitted under ER 404(b)). Likewise, because Hatchie did not preserve ER 404(b) objections to the workplace pipe or the marijuana testimony, we need not address the trial court's alleged error in failing to give limiting instructions on this evidence.

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ultimate factual issues supports the conclusion that the defendant is guilty does not make the testimony improper: “[I]t is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material.” *State v. Wilber*, 55 Wn. App. 294, 298 n.1, 777 P.2d 36 (1989).

Hatchie maintains that an officer impermissibly opined that methamphetamine had been manufactured in Hatchie’s home. Hatchie does not dispute the officer’s opinion, which was based on his training and duties as a member of a police division that processes methamphetamine labs. Rather, Hatchie contends that the officer’s conclusion was improper because Hatchie “was accused of being guilty in part by operating a ‘drug house’ which included having manufacturing at his home, not of making it himself.” Br. of Appellant at 48. This argument is not well taken.

Hatchie apparently believes that he was charged with unlawful use of a building for drug purposes. See RCW 69.53.010. But Hatchie’s criminal liability was based on his actions as an accomplice to the manufacturing of methamphetamine, not mere ownership or control of the real estate where the manufacturing occurred. The State had to prove that Hatchie either (1) solicited, commanded, encouraged, or requested another to manufacture methamphetamine; or (2) aided or agreed to aid another in planning or committing the manufacture of methamphetamine. RCW 9A.08.020(3); former RCW 69.50.401. The jury was instructed that it was insufficient to merely be present at the scene with knowledge of the criminal activity. The officer’s testimony recounted his observations of the conditions of the duplex unit; it was not an opinion of Hatchie’s actions or of his guilt to the charged crime. *Accord Sanders*, 66 Wn. App. at 388-89 (holding proper an experienced officer’s opinion in a drug-dealing case that the lack of

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drug paraphernalia in the defendant's home indicated that the defendant did not use drugs regularly). Hatchie's challenge to this testimony fails.

#### UNANIMITY INSTRUCTION

In general, where the State presents evidence of several acts that could form the basis for one charged count, the State must elect the act it is relying on for conviction or the court must instruct the jury to agree on a specific criminal act. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), *overruled on other grounds by State v. Kitchen*, 110 Wn.2d 403, 405-06 & n.1, 756 P.2d 105 (1988). The failure to give a required unanimity instruction is harmless only if a rational trier of fact could have no reasonable doubt as to whether each act established the charged crime. *Kitchen*, 110 Wn.2d at 411; *see also State v. Hanson*, 59 Wn. App. 651, 659, 800 P.2d 1124 (1990) (failure to give a unanimity instruction may be raised for the first time on appeal).

Hatchie maintains that a unanimity instruction was required here because the State set forth two grounds for his guilt as an accomplice to the manufacture of methamphetamine. According to Hatchie, the State argued that guilt was established either by "allowing his house to be a 'drug house' where drug activity occurred," or by "giving Mr. Schinnell pseudoephedrine in order for Mr. Schinnell to turn it into methamphetamine." Br. of Appellant at 42. We disagree.

A unanimity instruction is not required wherever the charged crime involves several prosecutable acts. When the defendant's several acts form a continuing course of criminal conduct, no unanimity instruction is necessary. *State v. Crane*, 116 Wn.2d 315, 326, 330, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991). A continuing offense will generally not be found where the multiple acts occurred at different times and places. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989); *see also Petrich*, 101 Wn.2d 566 (unanimity instruction required for

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one count of child molestation where evidence suggested numerous incidents over 22-month span). A continuing course of conduct will be found where the multiple acts reflect an ongoing enterprise with a single objective. *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395, *review denied*, 129 Wn.2d 1016 (1996); *see also State v. Fiallo-Lopez*, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995) (court should consider whether the crime can be charged as a continuing course of conduct). Ultimately, common sense dictates whether multiple acts form one continuing offense. *Petrich*, 101 Wn.2d at 571.

Cases finding a continuing course of criminal conduct are instructive here. In *State v. Marko*, 107 Wn. App. 215, 220-21, 27 P.3d 228 (2001), multiple threats over a 90-minute span constituted a continuing act of intimidating a witness. In *State v. Gooden*, 51 Wn. App. 615, 620, 754 P.2d 1000, *review denied*, 111 Wn.2d 1012 (1988), a unanimity instruction was not required where 10 days of promoting prostitution reflected an “ongoing enterprise.” And in *State v. Simonson*, 91 Wn. App. 874, 884, 960 P.2d 955 (1998), *review denied*, 137 Wn.2d 1016 (1999), evidence that the defendant and his girl friend committed a single continuing offense of manufacturing methamphetamine over a six-week period did not require a unanimity instruction “because there [wa]s no danger that some jurors would have found the occurrence of one crime while other jurors found the occurrence of a different crime.”

The evidence in this case demonstrated Hatchie’s continuing course of conduct. The manufacture of methamphetamine is often an ongoing enterprise occurring over a protracted period of time. *See State v. Poling*, 128 Wn. App. 659, 668, 116 P.3d 1054 (2005); *Simonson*, 91 Wn. App. at 884. And while a prolonged manufacturing operation can often involve several

distinct and chargeable acts,<sup>13</sup> the critical focus is still whether those acts revolve around an ongoing enterprise with a single objective. Here, the evidence reflected that Hatchie allowed his home to become a sustained methamphetamine lab and that he provided ingredients to be used in the manufacture, all with the objective of securing methamphetamine for his personal use. No unanimity instruction was required.

#### INEFFECTIVE ASSISTANCE

Hatchie maintains that his counsel provided ineffective assistance by not requesting a unanimity instruction, a limiting instruction, and a cautionary instruction on accomplice testimony. An ineffective assistance claim requires deficient and prejudicial performance. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). We will not find deficient performance if counsel's actions could be legitimate trial strategy or tactics. *McNeal*, 145 Wn.2d at 362. When the issue is counsel's failure to bring a motion, the defendant can establish prejudice only if the motion would have been granted and the outcome would have been different. *State v. Price*, 127 Wn. App. 193, 203, 110 P.3d 1171 (2005), *review granted in part*, 156 Wn.2d 1005 (2006).

Hatchie's counsel was not deficient for failing to request a unanimity instruction because, as already discussed, such an instruction was not required.

Hatchie has also not shown that his counsel was ineffective for not requesting a limiting instruction on the neighbor's testimony that marijuana users were often present at Hatchie's duplex unit. Even assuming that the neighbor's testimony required a limiting instruction, Hatchie fails to articulate the instruction that should have been requested. Moreover, it may have been a tactical decision not to call attention to this evidence; the record contains a 60-page

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<sup>13</sup> See *State v. Davis*, 117 Wn. App. 702, 708, 72 P.3d 1134 (2003), *review denied*, 151 Wn.2d 1007 (2004).

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passage where counsel requested numerous limiting instructions that he did think were appropriate. *See State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447 (“We can presume trial counsel decided not to ask for a limiting instruction as a trial tactic so as not to reemphasize this very damaging evidence.”), *review denied*, 121 Wn.2d 1024 (1993). We need not address this argument further.

This leaves Hatchie’s claim that counsel was ineffective for not requesting the following instruction concerning Schinnell’s testimony:

The testimony of an accomplice, given on behalf of the plaintiff, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

11 WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 6.05, at 136 (2nd ed. 1994) (WPIC). A trial court is required to give this instruction only when the State relies solely on accomplice testimony. *State v. Harris*, 102 Wn.2d 148, 155, 685 P.2d 584 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 157, 761 P.2d 588 (1988), and *State v. McKinsey*, 116 Wn.2d 911, 914, 810 P.2d 907 (1991).

The State did not rely solely on Schinnell’s testimony to establish Hatchie’s guilt. It also relied on evidence that methamphetamine was manufactured in Hatchie’s duplex; that methamphetamine and pseudoephedrine tablets, including Cor-A-Fed tablets, had been found in his bedroom; that neighbors had seen an unusual level of traffic at his home; that neighbors had seen Hatchie associate with the traffic coming to his home; that Hatchie had a methamphetamine smoking pipe in his work locker; and that Cor-A-Fed tablets had been disappearing from Hatchie’s workplace at an unusual rate. Because the trial court was not required to give WPIC 6.05, Hatchie cannot show that counsel’s failure to request this instruction was prejudicial. *See*

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*generally State v. Rehak*, 67 Wn. App. 157, 165, 834 P.2d 651 (1992) (trial court has considerable discretion in choice of jury instructions), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993). Nor can he show that counsel's decision was not tactical; counsel was still able to argue at length in closing that Schinnell's testimony and his motives be subject to careful scrutiny. *See generally State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002) (jury instructions sufficient if they allow the parties to argue their theories of the case). Hatchie has not shown that he received ineffective assistance of counsel.

#### PROSECUTORIAL MISCONDUCT

Hatchie also maintains that the prosecutor committed reversible misconduct by referencing the terms of Schinnell's plea agreement and misstating the concept of reasonable doubt in closing argument. A prosecutorial misconduct claim requires the defendant to show improper conduct resulting in prejudice. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). Hatchie has not made any such showing here.

#### REFERENCE TO SCHINNELL'S PLEA AGREEMENT

The prosecutor remarked in his opening statement: "Mr. Schinnell will testify about his own involvement. . . . And Mr. Schinnell you will certainly have . . . emphasized to you is going to be testifying in this case because he took a plea bargain that included him testifying truthfully." RP (Dec. 17, 2003) at 14-15. The prosecutor elicited Schinnell's testimony that his plea agreement required truthful testimony and that he could receive a sentence beyond the time he had already served. And during closing, the prosecutor maintained that Schinnell's plea bargain required "truthful testimony," not "a story to convict." 13 RP at 1343.

Hatchie contends that the prosecutor's references to the plea agreement were impermissible attempts to bolster Schinnell's testimony. In *State v. Green*, 119 Wn. App. 15, 24,

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79 P.3d 460 (2003), *review denied*, 151 Wn.2d 1035, *cert. denied*, 543 U.S. 1023 (2004), Division One held that a plea agreement provision requiring truthful testimony should be redacted upon request because it improperly vouches for a witness's credibility. *But see* ER 603 (requiring a witness to declare under oath or affirmation that she will testify truthfully). The court also held, however, that the failure to object waives any error. *Green*, 119 Wn. App. at 24-25 & n.19. If there is no redaction request, the prosecutor does not commit misconduct by making an argument based on the plea agreement provision. *State v. Clapp*, 67 Wn. App. 263, 274, 834 P.2d 1101 (1992) (prosecutor could tell jury that a witness "escaped prosecution in exchange for his truthful testimony"), *review denied*, 121 Wn.2d 1020 (1993); *see also State v. Bourgeois*, 133 Wn.2d 389, 400-02, 945 P.2d 1120 (1997) (State may address a witness's credibility if done to pull the sting out of an "inevitable, central issue" that the defendant will raise).

Here, Hatchie did not request that the plea agreement be redacted, nor did he object to the prosecutor's references to the terms of the agreement. Error, if any, was thus waived. *See generally* RAP 2.5(a); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (unobjected-to alleged misconduct is waived unless it is so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a curative instruction). Hatchie has not shown prosecutorial misconduct on this basis.

#### DISCUSSION OF REASONABLE DOUBT

During closing argument, the prosecutor made the following remarks regarding reasonable doubt:

[PROSECUTOR]: . . . The ultimate issue is do you believe that Ray Hatchie is guilty of this crime, as you understand the crime to be defined and as you understand particularly his role as an accomplice? That's what the issue is.

*Are you confident of that? Do you believe that?* The law commands that if some of you have *great and serious doubts* about that, that you should acquit.

[DEFENSE COUNSEL]: Objection, Your Honor, he is mistaking the law.

[PROSECUTOR]: This is argument.

THE COURT: Well, you should be advised that the law is controlled by the instructions as I've read them to you and not by argument of counsel, all right.

[PROSECUTOR]: And that's absolutely correct. . . . [T]he idea behind the concept behind proof beyond a reasonable doubt and the presumption of innocence is that if you have doubt, if you have doubt, reasonable doubt about whether or not someone is guilty of a crime, they get the benefit of that doubt.

. . . You are not required to believe it beyond a shadow of a doubt. You are simply required to be *confident* of an abiding belief in the truth of the charge, okay, that's that proof beyond a reasonable doubt.

So the question becomes does any one ever walk out of a jury deliberation room saying something like, well, we knew he did it, but there just wasn't enough evidence. ? [sic]

. . . So how could a person walk out when they knew nothing about the case to begin with but they walk out of the case saying, well, we knew he did it, and say but there wasn't enough evidence? *How do you know he did it* then you know he did it because of the evidence that's presented and that's another concept that's behind this concept of proof beyond a reasonable doubt. *If you believe someone is guilty, you reach a guilty verdict.*

13 RP at 1317-19 (emphasis added).

Hatchie assigns error to four remarks in this passage: (1) that a "confident" belief of guilt requires a conviction; (2) that "great and serious doubts" require acquittal; (3) that proof beyond a reasonable doubt exists when jurors are "confident of an abiding belief in the truth of the charge"; and (4) that jurors should convict if they "know" and "believe" that the defendant is guilty. But Hatchie did not object to remarks three and four. Those remarks are therefore waived because the jury could have been instructed to disregard the remarks and to focus solely on the written reasonable doubt instruction. *Dhaliwal*, 150 Wn.2d at 578. Moreover, we note that remark three was entirely proper. *Pirtle*, 127 Wn.2d at 656-58.

As to remark two, the prosecutor did not, as Hatchie now contends, state that a conviction was required unless the jury had "great and serious doubts"; nor did the prosecutor state that only

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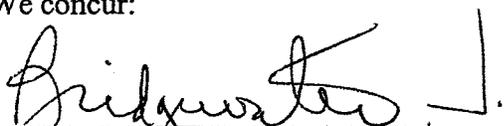
“great and serious doubts” require a not guilty verdict. Rather, the prosecutor simply stated that “great and serious doubts” require a not guilty verdict. That is an accurate statement.

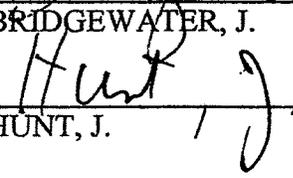
This leaves the prosecutor’s remark that a “confident” belief of guilt requires a conviction. In isolation, this remark was improper. But improper remarks are reviewed within the context of the prosecutor’s entire argument. *Dhaliwal*, 150 Wn.2d at 578. Here, the prosecutor tempered his incorrect remark with the accurate statements that Hatchie should be found not guilty if the jurors had reasonable doubts or did not have a confident and abiding belief in the truth of the charge. After the inaccurate remark, the trial court gave the very curative instruction that is intended to obviate any prejudicial effect. *See generally State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001) (jury is presumed to follow court’s instructions). The jury was provided an accurate reasonable doubt instruction that we presume it followed. Hatchie was not prejudiced by the prosecutor’s closing remark, and thus his prosecutorial misconduct claim fails.

Affirmed.

  
QUINN-BRINTNALL, C.J.

We concur:

  
BRIDGEWATER, J.

  
HUNT, J.