

86214-1

No.

COURT OF APPEALS  
DIVISION II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

BY *cm*  
DEPUTY

**FILED**  
JUL -6 2011  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON  
*[Signature]*

STATE OF WASHINGTON,

Respondent,

Vs.

DARA RUEM

Appellant.

APPEAL FROM DIVISION II  
OF THE COURT OF APPEALS  
Cause No. 39053-1-II

PETITION FOR REVIEW

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WSB #27813

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ORIGINAL

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**I. IDENTITY OF PETITIONER**

Dara Ruem, petitioner, respectfully requests that this court accept review of the Court of Appeals' decision in case number 39053-1-II terminating review designated in Part II of this petition.

**II. COURT OF APPEALS' DECISION**

Dara Ruem respectfully requests that this court review these portions of the Court of Appeals decision, affirming the trial court's decision in this case. The Court of Appeals erroneously determined that the police properly entered and searched Mr. Ruem's residence without a search warrant and without properly informing Ruem of his rights.

A copy of the decision from the Court of Appeals, Division II, terminating review which was filed June 1, 2011 is attached hereto as Exhibit "A".

**III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Did the Court of Appeals err in affirming Mr. Ruem's conviction when it failed to properly apply constitutional analysis to his case?

1. Was the Court of Appeals' decision in conflict with State v. Ferrier and State v. Schultz?
2. Because Mr. Ruem did not consent to the search of his residence, was the Court of Appeals' decision in conflict with State v. Hatchie?

#### **IV. STATEMENT OF THE CASE**

##### **A. Procedural History**

On June 4, 2008, police discovered marijuana plants, marijuana, and a weapon in and around a trailer located at 10318 McKinley Ave. E., Tacoma, Washington. RP 3. As a result, Mr. Dara Ruem was initially charged with one count Unlawful Manufacturing of a Controlled Substance (including firearm enhancement), Unlawful Possession of a Controlled Substance with Intent to Deliver (including firearm enhancement), and Unlawful Possession of a Firearm in the First Degree. RP 1-2.

On December 10, 2008, the trial court<sup>1</sup> entertained a hearing under CrR 3.6 upon Defense's Motion to Suppress. RP 29-37. RP (12/10/2008) 1-67, (12/11/2008) 1-60. The motion was denied, and the court entered findings and conclusions consistent with police testimony. RP 204-211, RP (12/11/2008) 57-60.

Mr. Ruem eventually stood trial under the Second Amended Information for all of the same charges in the original Information, plus school bus stop enhancements as parts of Counts I and II. RP 51-52. A jury found Mr. Ruem guilty on all three counts, including firearm and school bus stop enhancements. RP Vol. VI, 578-88. Mr. Ruem was originally sentenced to 156 months. RP 219-231, 223, RP (3/13/2009) 592-609. However the court later ordered the judgment and sentence modified to reflect a series of consecutive sentences that add up to 168 months. RP 290-292, RP (6/26/2009) 2-7.

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<sup>1</sup> The hearing was held before the Honorable Judge Frederick W. Fleming; the trial was held before the Honorable Lisa Worswick.

Mr. Ruem appealed to the Division II court of Appeals and in an unpublished opinion<sup>2</sup> the Court affirmed Mr. Ruem's convictions, affirmed the firearm enhancement on count II and reversed the firearm enhancement on count I, and remanded this matter for resentencing. This petition is timely filed.

**B. Facts**

Around February, 2008, Pierce County Sheriff's Deputy Jeff Reigle went to 10318 McKinley Ave. E. in Tacoma, Pierce County, Washington to serve an arrest warrant on Chantha Ruem (hereinafter "Chantha"). RP (2/23/09) 220. In attempting to serve the warrant, Deputy Reigle made contact with at least two residents of the main house on the property. RP (2/23/09) 220-24. After telling Deputy Reigle Chantha was not home, the person who answered the door allowed Deputy Reigle into the house, showing him Chantha's empty bedroom. Id. at 222-23. Also inside the main house, police had contact with a young woman who said she and Chantha shared children in common, but that Chantha was not in the house at the moment. Id. at 220-24. A trailer/mobile home is located on the same property and neither Deputy Reigle nor any other Deputy knocked on the door of, nor made any contact with anyone who resided in the trailer (which is located behind the main house) on that same day. Id. at 222. Deputy Reigle learned a white car on the property belonged to Chantha. RP (12/10/08) 14. Between February and June of 2008 Deputy Reigle revisited the McKinley address several times to surveille and search for Chantha, the subject of the arrest warrant. RP (2/23/09) 224-25. Deputy Reigle never witnessed Chantha at this address or anywhere else. On one visit Deputy Reigle approached the house and

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<sup>2</sup> The opinion was originally slated to be published, but an Order Amending Opinion, filed on June 3<sup>rd</sup>, 2011 changed the decision to an "unpublished opinion."

spoke with a young man who Deputy Reigle thought might be Chantha, but who identified himself as David, Chantha's brother. RP (12/10/08) 15. Deputy Reigle asked if he knew where Chantha was, and David told him Chantha had moved to California. Id. at 15-16.

On June 4, 2008 at approximately 5:00 p.m., several deputies gathered to serve arrest warrants on several suspects. RP (2/23/09) 226. The group of deputies went to the McKinley address hoping to find Chantha to serve the arrest warrant on him. RP (2/19/09) 75. While other deputies were speaking to residents of the main house, Deputy Kevin Fries knocked on the door of the trailer behind the main house, and Appellant Dara Ruem (hereinafter "Mr. Ruem") answered. Id. at 76. Deputy Fries asked Mr. Ruem about the white car, and Mr. Ruem confirmed it was Chantha's, but that Chantha had obtained a new car prior to moving to California. Id. at 77. After searching for outstanding warrants for Mr. Ruem and finding none, police first told Mr. Ruem they were going to go in and search, and then asked Mr. Ruem's permission to go in and search. Id. at 76-77. Before entering Mr. Ruem's trailer, the deputies did not advise Mr. Ruem of his Miranda rights (Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966)), nor they did not advise him of his right to refuse consent to enter.

Mr. Ruem initially gave permission to enter the trailer. Then, as deputies were crossing the threshold of the trailer, Mr. Ruem retracted consent by saying, "Wait, not now, no. Now is not a good time." Id. at 77-78. At this point Deputy Fries was close enough to the inside of the trailer and close enough to Mr. Ruem to smell what he thought to be marijuana smoke (Id. at 78-79); Sergeant Seymour also smelled marijuana smoke from the trailer and/or Mr. Ruem himself. Id. at 105. Both Deputy Fries and Sergeant Seymour, as well as a third Deputy, entered and searched the trailer. Id. at 79. Deputy Fries soon observed several starter marijuana plants in

plain view in the kitchen area. He notified Sergeant Seymour, who placed Mr. Ruem under arrest and read him his Miranda rights. Id. at 78-79.

Sergeant Seymour then called the Special Investigations Unit (SIU), and SIU members arranged for a search warrant, and eventually conducted a full search of the trailer, and obtained more evidence used to convict Mr. Ruem. Id. at 107-09. While talking on the phone to Deputy Kris Nordstrom, who was the SIU member writing the search warrant, Sergeant Seymour walked around the trailer looking for distinguishing marks, as instructed by Deputy Nordstrom. Id. at 110. At this time Sergeant Seymour discovered, on the west side of the property, more "starter" marijuana plants between and amongst trash cans and trash on the ground. Id.

## V. ARGUMENT

Mr. Ruem respectfully requests that this court accept review of this case as it involves a decision of the Court of Appeals that conflicts with prior Supreme Court decisions and with well established matters of constitutional analysis.

RAP 13.5A and RAP 13.4(b) set forth the considerations governing the Supreme Court's acceptance of review of appeals dismissed by the Court of Appeals. See RAP 13.5A, 13.5A(b), 13.4(b). Specifically, RAP 13.4(b) states that a petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

See RAP 13.5A, 13.5A(b), 13.4(b).

Here, by ignoring facts testified to by police and subsequent arguments raised by Mr. Ruem in his direct appeal, respectfully, the Court of Appeals failed to address important constitutional issues and analyze the appropriate Supreme Court cases. Specifically, by ignoring the fact that police had evidence Chantha resided in the house on the property, but no evidence that he resided in the trailer, the Court of Appeals decision outright ignored Mr. Ruem's argument that the police entry into his trailer, without a search warrant, without reading him his Miranda rights, and without informing him of his right to refuse consent to enter, was in direct conflict with Washington Supreme Court cases State v. Hatchie, 161 Wn.2d 390, 166 P.3d 698 (2007); State v. Schultz, 170 Wn.2d 746, 248 P.3d 484 (2011), and State v. Ferrier, 136 Wn.2d 103, 118, 960 P.2d 927 (1998). As such, the Court of Appeals decision conflicts with decisions of the Washington Supreme Court and review is appropriate under RAP 13.4(b)(1). Moreover, because each of the conclusions reached by the Court of Appeals surrounds issues at the heart of both the Fourth Amendment of the US Constitution and Article I § VII of the Washington State Constitution, this case is reviewable under RAP 13.4(b)(3).

**A. The Court of Appeals decision was inconsistent with State v. Ferrier and State v. Schultz.**

The Court of Appeals concluded that Mr. Ruem "consented" to the entry of his residence, and because police were not there to seek contraband without a search warrant – only to serve an

arrest warrant on Chantha – police did not employ a “knock and talk” procedure and thus, “Ferrier does not apply.” See Court of Appeal’s decision at 8. This effectively finds established constitutional analysis irrelevant (i.e. the fact that “the home enjoys a special [constitutional] protection,” Schultz, 170 Wn.2d at 753), and subordinates constitutional concerns to the subjective intent of police - so long as police are attempting to execute an arrest warrant on a 3<sup>rd</sup> party. Respectfully, this conclusion is inconsistent with Article I § VII’s obvious purpose.

Under existing Constitutional/Ferrier analysis, the Court of Appeals decision was wholly inconsistent with this Court’s commitment to Constitutional principles as well. This Court has held that voluntariness of consent is measured by the totality of the circumstances, including (1) whether Miranda warnings were given prior to consent, (2) the consenting person’s intelligence and education, and (3) whether police advised the consenting person of their right to refuse consent. Simply put, it is Petitioner’s position that because Miranda warnings were not given, and Mr. Ruem was not informed of his right to refuse consent, the appellate court’s decision violates the Constitution.

In Ferrier, this Court affirmed the notion that “knock and talk” procedures are “inherently coercive” because “[m]ere acquiescence to authority does not confer voluntary consent to search,” Bumper v. North Carolina, 391 U.S. 543, 548-49, 20 L.Ed.2d 797, 88 S.Ct. 1788 (1968); State v. Browning, 67 Wn.App. 93, 98, 834 P.2d 84 (1992).

In State v. Morse, 156 Wn.2d 1, 123 P.3d 832 (2005), this Court stated:

We have been quite explicit that under our constitution, the burden is on the police to obtain consent from a person whose property they seek to search. In obtaining that consent, police are required to tell the person from whom they are seeking consent that they may refuse to consent, revoke consent, or limit the scope of consent.

Id. at 16 (*quoting Ferrier*, 136 Wn.2d at 116).

Quite recently, in State v. Schultz, 170 Wn.2d 746, 248 P.3d 484 (2011), this Court addressed consent to enter in the context of a domestic violence investigation. Id. at 751. In Schultz, neighbors called police because the male and female residents of the property were arguing. Id. Police knocked on the apartment door and spoke with the female resident, Schultz, for a few moments. Id. At some point Schultz “stepped back, opened the door wider, and [police] followed Schultz inside” and found contraband. Id. The Court of Appeals concluded that this “acquiescence” to police entry was allowable under Article I § VII. Id. at 756. This Court disagreed, stating the following:

Thus the police, the trial court, and the Court of Appeals seem to be of the view that the protections of article I, section 7 against warrantless intrusions into private affairs and homes are easily waived by silent acquiescence. We disagree. Individuals do not waive this constitutional right by failing to object when the police storm into their homes.<sup>3</sup> Nor do they waive their rights when the police enter their homes without their consent just because they are too afraid or too dumbfounded by the brazenness of the action to speak up. The right not to be disturbed in one’s home by the police without authority of law is the bedrock principle upon which our search and seizure jurisprudence is grounded. Wash. Const. art. I, § 7; Ferrier, 136 Wn.2d at 112 (*citing State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994)).

Id. at 757.

Here, the facts suggest that police had already confirmed that the subject of the arrest warrant, Chantha, shared a bedroom with his girlfriend and children in a room of the main house on the property, and thus, he did not reside in Dara Ruem’s trailer. Nonetheless, police arrived

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<sup>3</sup> This Court included a footnote in this passage stating, “[w]e do not mean to suggest that [the police officers in this case] stormed Schultz’s apartment.

on Mr. Ruem's front door and began asking about Chantha. As it relates to his entry of Mr. Ruem's trailer, Deputy Fries testified to the following:

Q: [W]hat happened after that?

A: I was running [Dara Ruem] on records to see if he had any warrants; told him we were going to go inside and check. I said we'd like to go inside and check.

RP (12/10/2008) at 31.

At no point did police inform Mr. Ruem of his right to refuse consent for police to enter. Moreover, police never read Mr. Ruem his Miranda warnings. As this Court stated so eloquently stated in Schultz:

The Fourth Amendment to the United States Constitution establishes the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. This constitutional protection was, in part, in response to representatives of the King, writs of assistance, and doubtlessly with muskets in hand, entering homes at will both in England and in the colonies. A century later the framers of the Washington Constitution were presented with a proposed state provision identical to the Fourth Amendment, and they rejected it in favor of the present article I, section 7 prohibiting the invasion of a home without authority of law. Article I, section 7 differs from the Fourth Amendment in that it clearly recognizes an individual's right to privacy with no express limitations. Article I, section 7 does not use the words 'reasonable' or 'unreasonable.' Instead, it requires 'authority of law' before the State may pry into the private affairs of individuals. These important constitutional protections cannot easily be brushed aside by representatives of the government. As without other constitutional rights, they are not necessarily absolute and may be waived but only by informed and meaningful consent.

Schultz, 170 Wn.2d at 757-58 (internal citations and quotations omitted).

As noted above, the Court of Appeals dismissed Mr. Ruem's "Ferrier" argument because police were not utilizing the "knock and talk" procedure – in that police were not subjectively seeking to search the residence for contraband without a warrant. However, in Schultz, this Court re-affirmed the rationale behind Ferrier – that it is not the subjective intent of police that requires them to inform a resident of his or her right to refuse consent, but rather, it is the fact that "under our constitution, the home enjoys a special protection," Schultz, 170 Wn.2d at 753, and that, "'the closer officers come to intrusion into a dwelling, the greater the constitutional protection.'" Ferrier, 136 Wn.2d at 112 (*quoting State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994)). Here, because Mr. Ruem's home was entered by police who did not have a search warrant, and because he did not give "informed and meaningful consent," respectfully, this Court should accept review.

**B. Because Mr. Ruem did not consent to the search of his residence, the Court of Appeals decision was in direct conflict with the Washington State Supreme Court's decision in State v. Hatchie.**

If this Court concludes that Mr. Ruem did not give meaningful consent, then the police entry into his separate residence, without evidence that Chantha was actually present on the property, was unconstitutional.

The Washington Constitution provides, "No person shall be disturbed in his private affairs or his home invaded, without authority of law." Wash. Const. Art. I § 7. This provision provides even greater protection than the federal constitution in some areas of search and seizure jurisprudence. State v. McKinney, 148 Wn.2d 20, 29, 60 P.3d 46 (2002). "Police have limited authority to enter a residence to make an arrest as long as (1) the entry is reasonable, (2) the entry is not a pretext for conducting other unauthorized searches or investigations, (3) the police have probable cause to believe the person named in the arrest warrant is an actual resident of the

home, and (4) said named person is actually present at the time of entry." Hatchie, 161 Wn.2d at 392-93.

A warrant provides adequate "authority of law" to justify entry into a home to effectuate an arrest. Hatchie, 161 Wn.2d at 399-400. Probable cause is determined by taking into account facts and circumstances within the officer's knowledge, which, viewed in a practical, non-technical manner, would lead a person of reasonable caution to believe the suspect is an actual resident of the home. Id. at 403-05 (*quoting State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986)).

In Hatchie, law enforcement made multiple observations to support a determination of probable cause. First, they followed the suspect's vehicle to the residence in question (though they did not see the suspect enter the residence), and there they confirmed not one but two vehicles registered to the suspect. Id. at 393. Law enforcement also interviewed two neighbors, one of whom said he believed the suspect lived at the residence, the other of which told law enforcement he wasn't sure if the suspect lived there, but often saw him there. Id. A third person informed law enforcement if the suspect's vehicle was there, the suspect was there. Id. Finally, when law enforcement spoke to the person who answered the door of the residence, that person told police he believed the suspect was home. Id. Despite many independent indicia of proof, the Supreme Court noted, "These facts together seem barely enough to suggest to a reasonable person this was [the suspect]'s residence." Id. at 405. Further, the Court found the fact that there were two cars particularly persuasive, and may not have held as it did but for that fact. Id. The Court eventually found the search valid and upheld the defendant's conviction. Id. at 406.

Here, the third element of the Hatchie test is the first issue to address. That is, no testimony and no evidence indicated Chantha was present. The police did have an arrest warrant

for Chantha, and his last known address was Appellant's same street address, and, at one time a "neutral and detached magistrate" made a determination of probable cause to arrest. However, Hatchie also requires police have probable cause to believe the suspect is an actual resident of the dwelling to be searched. Hatchie at 403-05. Unlike in Hatchie, the deputies in the instant case did little investigating as to whether Chantha was an actual resident of either the house or the trailer on the property. They spoke to no neighbors to discover whether Chantha was still a resident of that address, and every single person deputies spoke with told them Chantha was no longer a resident of that address.

Ironically, the minimal police efforts in this case only established Chantha was *not* an actual resident of the house or trailer. Deputy Reigle testified that after the initial service of the arrest warrant on the McKinley residence, he occasionally surveilled the address to attempt to either confirm Chantha's residency there or to actually serve the warrant to arrest the suspect. Save Chantha's parked car, Deputy Reigle found no evidence showing Chantha actually lived at the residence.

The state's case also fails to meet the final element in Hatchie - that the suspect is actually present at the time of police entry. Hatchie, 161 Wn.2d at 406. Though the Court does not expand on its reasoning for the inclusion of this element, it is clear and unambiguous. The Hatchie court included this element to apply to circumstances wherein police affirmatively identify a suspect's presence in a residence, and for good reason. Should this court ignore this final element of the Hatchie test, it gives law enforcement the right to enter and search the homes of citizens at will, simply because Chantha once lived there; this is not what Washington law allows.

Because they did not have probable cause to believe Chantha was an actual resident of the address, in addition to the fact that Chantha was not present at the residence at the time of entry, the actions of Sheriff's Deputies violated the Washington State Constitution. For these reasons, this Court should accept review.

**C. The Court should accept review of the remaining issues.**

This Court is asked to refer to the content of the Court of Appeals' opinion and the preceding memorandum. For the reasons cited by Appellant therein, this Court should accept review on all remaining issues that have not already been ruled upon favorably for Mr. Ruem. The issues bear on constitutional issues and are governed by established, but to this point not followed, case law.

**VI. CONCLUSION**

Based on the above points and authorities, Mr. Ruem respectfully requests that this Court accept review of these substantial Constitutional issues.

Respectfully submitted this 1<sup>st</sup> day of July, 2011.

HESTER LAW GROUP, INC., P.S.  
Attorneys for Appellant



LANCE M. HESTER  
WSB #27813

CERTIFICATE OF SERVICE

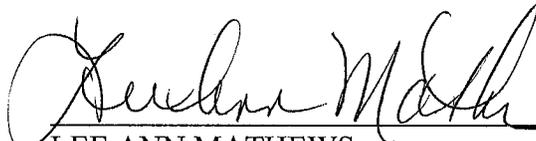
Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the Petition for Review to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Dara Ruem  
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11 JUL -1 PM 4:50  
COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY Lee Ann Mathews  
DEPUTY

Signed at Tacoma, Washington, this 1<sup>st</sup> day of July, 2011.

  
\_\_\_\_\_  
LEE ANN MATHEWS

FILED  
COURT OF APPEALS  
DIVISION II

11 JUN -3 AM 10:33

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BY [Signature]  
DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

DARA RUEM,

Appellant.

No. 39053-1-II  
(consolidated with 39451-1-II)

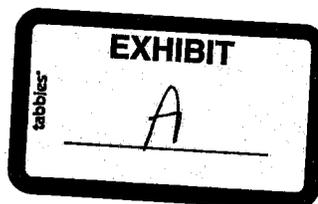
ORDER AMENDING OPINION

The published opinion for the above matter that was filed on June 1, 2011, is hereby amended as follows: The published opinion is now unpublished, the caption will now read "UNPUBLISHED OPINION" and the following language is inserted on the last page following the last line of opinion text and before the signature lines:

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

DATED this 3RD day of JUNE, 2011.

[Signature]  
Penoyar, C.J.





FACTS<sup>2</sup>

On February 11, 2008, Pierce County Superior Court issued a felony arrest warrant for Chantha Ruem, who is Ruem's older brother. The arrest warrant listed a Tacoma address on McKinley Avenue as Chantha's<sup>3</sup> residence. The McKinley Avenue property contains a house and a single-wide mobile home.

On June 4, 2008, police officers went to the McKinley Avenue property to serve the arrest warrant on Chantha. Chantha's white car was parked near the mobile home. Deputy Kevin Fries and Sergeant Tom Seymour knocked on the mobile home's door. Ruem opened the door and spoke with Fries and Seymour while standing in the doorway. Fries told Ruem that they were looking for Chantha, and Ruem replied that Chantha was not there. Because Fries thought that Ruem looked like Chantha based on photographs of Chantha that he had seen, Fries asked Ruem for identification, which Ruem provided.

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<sup>2</sup> After the CrR 3.6 hearing, the trial court entered extensive findings of fact and conclusions of law, including 18 "undisputed facts" and 17 "reasons for admissibility or inadmissibility of the evidence." Clerk's Papers (CP) at 204-211.

Ruem stated in his assignments of error that "[t]he trial court erred when it entered Findings and Conclusions 3-17 following a hearing under CrR 3.6." Appellant's Br. at 3. The parties extensively debate the impact of this ambiguous assignment of error. In his reply brief, Ruem clarifies that he meant to challenge the trial court's "reasons for admissibility or inadmissibility of the evidence," which are primarily conclusions of law.

Because Ruem directs his challenge at the trial court's conclusions of law and does not argue that its findings of fact are not supported by substantial evidence, we treat the trial court's 18 undisputed facts as verities. *See State v. Afana*, 169 Wn.2d 169, 176, 233 P.3d 879 (2010) (unchallenged findings are verities on appeal).

<sup>3</sup> To avoid confusion, we refer to the appellant by his surname and to appellant's family members by their first names. We intend no disrespect.

At the suppression hearing, Fries testified about what happened next:

Q: What happened after that?

A: I asked him who all lived there. And he said he lives there with his brother.

Q: Did you ask him his relation to Chantha Ruem?

A: I assumed it was his brother.

Q: Okay. Do you recall ever confirming with the defendant?

A: You know, I honestly don't remember if I got that detail . . . I assumed they were brothers. They look close. His last name was the same. And then, when we were talking about it, he knows that I'm there looking for Chantha. He says he lives there with his brother. He says he's not there. I assumed we were talking about the same person, a brother.

Q: Okay. So, he said—But he said that he does live in that mobile with his brother?

A: Yes.

Q: Okay. Who—

A: Who I assumed was Chantha.

Q: Okay. What happened after that?

A: I asked him if Chantha Ruem was inside. He said no, that he had moved to California. I asked him if Chantha's car was there, and he said yes, and he pointed to a white Toyota that was parked right in front of the mobile home.

So I asked him why would his car be here if he's moved to California, and he told me that he had gotten a new car.

....  
Q: [W]hat happened after that?

A: I was running him on records to see if he had any warrants; told him we were going to go inside and check. I said we'd like to go inside and check. Certainly, would like cooperation more so than force, although the warrant has that address on it, the fact that we're talking, he is referring to his brother living there with him, his car is out front, it's — it gives me reason to believe that he is there. So I told him I was going to go in and look for him, and asked him if that was okay. And he initially agreed to that but, as we started to step in, he stopped and said, "Well, now is not a good time." But, we had already started to step over the threshold, and I could smell some marijuana in the air. And I turned around to him and I says, "What's your concern?" He said, "Marijuana." I said, "Are you smoking it? Are you growing it? What are you doing?" He says, "I'm"—"Is it just personal use?" I said, "I'm not here for personal use. If you've got a bong or something laying out," I said, "I'm not concerned about that. We're looking for your brother, looking for Chantha."

Q: . . . Okay.

A: . . . So we entered to search the residence.

Report of Proceedings (RP) (Dec. 10, 2008) at 31-34.

At the suppression hearing, Seymour described the same exchange with Ruem as follows:

[W]e asked him if we could enter the residence to search for Chantha. I don't recall exactly the verbiage or how it went, but at some point in time he said we could go in, and then he said, "This is not a good time." At that point in time, we actually smelled . . . burnt marijuana . . . . Because he was not the focus of our target, and because it was his residence, we honestly were not going to pursue or arrest him for smoking marijuana at that time. That was our intent. But, we assumed that what he was doing was not letting us in because he had been smoking marijuana. We expected to go in and perhaps find a bong or something on the couch or on the table, but that's not what we're interested in. So we were actually convincing him that, no, we are going to go in, we are not going to take you for smoking marijuana. And so we were telling him at that point in time that we were going to go ahead and go in and search.

RP (Dec. 10, 2008) at 49-50.

At the suppression hearing, Ruem testified that he told officers that he lived with his brother David, not Chantha, in the mobile home, and that Chantha had lived in the main house but had since moved to California. Ruem testified that he did not consent to the officers' entry.

The trial court entered a written finding that Ruem's testimony at the suppression hearing was not credible.

Fries and another deputy entered the mobile home while Seymour remained with Ruem in the living room. The deputies observed several marijuana starter plants<sup>4</sup> in plain view in the kitchen. The deputies informed Seymour, who "took a look" and then handcuffed and arrested Ruem. RP (Dec. 10, 2008) at 55.

Once officers determined that Chantha was not present, Seymour called the Special Investigations Unit (SIU) for assistance in obtaining a search warrant for the mobile home. The

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<sup>4</sup> Fries testified at the suppression hearing that he had received training to recognize marijuana.

STU detective asked Seymour if the mobile home had any distinguishing marks to include in the search warrant affidavit. As Seymour walked around the exterior of mobile home looking for distinguishing marks, he discovered two flats of marijuana starter plants next to the mobile home's rear exterior wall.

A magistrate issued a search warrant for the mobile home. In the north bedroom, police discovered a "grow room" with dozens of marijuana plants under a 1000-watt bulb, a thermometer, a timer, and other cultivation materials. Police found Ruem's driver's license and other documents with Ruem's name in the north bedroom.

In the closet of the south bedroom, police discovered marijuana, two bulletproof vests, and a locked combination safe on the floor. Police opened the safe with a hydraulic tool and found \$2,760 in cash, two gallon-size plastic bags with marijuana, and a .45 caliber semi-automatic pistol with a loaded magazine. The pistol was operable and could have been fired after the operator chambered a bullet, a task that requires about one second. The safe also held four credit cards, banking documents, and a casino card, all in the name of Ruem's brother, David.

Ultimately, police confiscated about six pounds of marijuana from the mobile home. Police found five .45 caliber bullets, an empty handgun holster, and "a metal ammunition magazine" in the living room, eight .45 caliber bullets in a kitchen drawer, and an ammunition box with several expended cartridges in the laundry room. 2 RP at 166. Police also seized other drug paraphernalia distributed throughout the house, including a grinder, strainer, and cooking pot with green residue, scales, and a hydroponic grow mat.

The State charged Ruem with the unlawful manufacture of marijuana (count I),<sup>5</sup> the unlawful possession of marijuana with intent to deliver (count II),<sup>6</sup> and first degree unlawful possession of a firearm (count III).<sup>7</sup> The State sought enhanced sentences, alleging, in relevant part, that Ruem committed counts I and II while armed with the .45 caliber pistol.<sup>8</sup> The trial court denied Ruem's motion to suppress, which argued that police did not have probable cause to believe that Chantha was actually present at the time of police entry.

The jury convicted Ruem as charged and returned a special verdict supporting the firearm enhancements. Ruem appeals his convictions and sentence.

#### ANALYSIS

##### I. RUEM'S CONSENT AS BASIS FOR POLICE ENTRY

Ruem asserts that his consent did not justify police entry into his home because police did not advise him of his right to refuse consent under *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998). In the alternative, he argues that even if *Ferrier* does not apply, his consent was "mere acquiescence to authority." Appellant's Br. at 26. We disagree.<sup>9</sup>

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"No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I, § 7. "[A] citizen's privacy is most protected in his or

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<sup>5</sup> Former RCW 69.50.204(c)(14) (1993); RCW 69.50.401(1), (2)(c).

<sup>6</sup> Former RCW 69.50.204(c)(14) (1993); RCW 69.50.401(1), (2)(c).

<sup>7</sup> RCW 9.41.040(1)(a).

<sup>8</sup> RCW 9.94A.533(3).

<sup>9</sup> Ruem did not challenge the validity of his consent in his motion to suppress. Because we resolve this case on the basis of Ruem's consent, we do not address the parties' dispute about whether Chantha's arrest warrant gave police officers a valid justification to enter Ruem's mobile home.

her home.” *State v. Hatchie*, 161 Wn.2d 390, 397, 166 P.3d 698 (2007). A warrantless search is per se unreasonable under article I, section 7 “unless excused under one of a narrow set of exceptions to the warrant requirement.” *State v. Tibbles*, 169 Wn.2d 364, 368-69, 236 P.3d 885 (2010). The State has the burden to demonstrate that an exception applies. *Tibbles*, 169 Wn.2d at 369. We review a trial court’s conclusions of law pertaining to the suppression of evidence de novo. *State v. Fry*, 168 Wn.2d 1, 5, 228 P.3d 1 (2010).

The officers in this case saw marijuana plants in plain view in Ruem’s kitchen after entering his home. Plain view is an exception to the warrant requirement. *Hatchie*, 161 Wn.2d at 395. A plain view search is legal when police (1) have a valid justification to be in an otherwise protected area and (2) are immediately able to realize that the evidence they see is associated with criminal activity. *Hatchie*, 161 Wn.2d at 395.

In order to determine whether the officers’ plain view search was lawful, we must analyze whether Ruem consented to their entry, thereby giving the officers a valid justification to be in Ruem’s kitchen. We determine whether an individual’s consent to police entry into the individual’s home was voluntary by analyzing the “totality of the circumstances,” including the consenting person’s education and intelligence, whether police provided *Miranda*<sup>10</sup> warnings prior to consent, if applicable, and whether police advised the consenting person of his right not to consent. *State v. Bustamante-Davila*, 138 Wn.2d 964, 981-82, 983 P.2d 590 (1999). No single factor is dispositive. *Bustamante-Davila*, 138 Wn.2d at 982.

Consent granted “only in submission to a claim of lawful authority is not given voluntarily.” *State v. O’Neill*, 148 Wn.2d 564, 589, 62 P.3d 489 (2003) (internal quotation marks omitted) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 233, 93 S. Ct. 2041, 36 L. Ed.

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<sup>10</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

2d 854 (1973)). Thus, as the U.S. Supreme Court has explained in the Fourth Amendment context, “[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.” *Bumper v. North Carolina*, 391 U.S. 543, 550, 88 S. Ct. 1788, 20 L. Ed. 2d. 797 (1968).

Ruem argues that because police employed a “knock and talk” procedure, they were required to inform him of his right to refuse consent. Appellant’s Br. at 24-25. In *Ferrier*, the court held that because a “knock and talk” is inherently coercive, the police’s failure to advise a defendant of the right to refuse entry vitiates the defendant’s consent. 136 Wn.2d at 114. Our Supreme Court later clarified that a “knock and talk” occurs when police “proceed to [a] residence with the intent to find contraband without obtaining a search warrant.” *Bustamante-Davila*, 138 Wn.2d at 980; accord *State v. Thang*, 145 Wn.2d 630, 637, 41 P.3d 1159 (2002) (concluding that defendant’s reliance on *Ferrier* was “misplaced” where police entered third party’s home based on defendant’s arrest warrant). Here, because officers knocked on Ruem’s door to serve an arrest warrant on Chantha—not to seek contraband without a warrant—*Ferrier* does not apply.

We believe that the totality of the circumstances demonstrates that the State met its burden to prove the voluntariness of Ruem’s consent. Significantly, both Fries and Seymour testified that they asked for Ruem’s permission to enter and that Ruem allowed them to enter. The trial court did not believe Ruem’s assertions to the contrary and found that he was not credible. As we have noted, the deputies did not inform Ruem that he could refuse consent, but Ruem’s belated statement that it was “not a good time” for police to enter suggests that Ruem

knew that he could freely give and withhold consent.<sup>11</sup> RP (Dec. 10, 2008) at 33, 49. Finally, although Fries testified that he informed Ruem that police were going to “go inside and check” for Chantha, neither Fries nor Seymour told Ruem that police had legal authority to enter Ruem’s residence on the basis of the arrest warrant regardless of Ruem’s wishes. RP (Dec. 10, 2008) at 33; see *Bumper*, 391 U.S. at 550; *O’Neill*, 148 Wn.2d at 589. On this record, we think that Ruem’s consent was voluntary.

After Ruem consented to entry, the officers were legally entitled to be in his residence where they observed marijuana plants. Fries associated these plants with criminal activity based on his previous law enforcement training. Therefore, because the State can demonstrate that both prongs of the plain view exception apply here, the trial court properly admitted evidence of the marijuana plants that police observed in plain view in the kitchen while looking for Chantha. Furthermore, because this plain view observation also served as probable cause for the subsequent search warrant, the trial court also properly admitted evidence that police discovered while executing the search warrant.<sup>12</sup>

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## II. FIREARM ENHANCEMENTS

Ruem next argues that insufficient evidence supports the jury’s special verdicts that he was armed with a firearm during the commission of counts I and II. We agree that insufficient evidence supports the firearm enhancement on count I, but we conclude that sufficient evidence supports the firearm enhancement on count II.

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<sup>11</sup> Because Ruem does not argue that he withdrew consent by stating that it was “not a good time,” we do not address this argument. See RP (Dec. 10, 2008) at 33, 49.

<sup>12</sup> Ruem also contends that the trial court should have suppressed evidence of the marijuana plants that police observed next to the mobile home’s rear exterior wall. But Ruem’s premise for this argument is that the officers were not legally on his property, which we reject in light of Ruem’s consent.

We review a jury's special verdict that a defendant was armed to determine whether there was sufficient evidence for any rational trier of fact to find beyond a reasonable doubt that the defendant was armed. *State v. Eckenrode*, 159 Wn.2d 488, 494, 150 P.3d 1116 (2007). A sufficiency challenge admits the truth of the State's evidence and accepts all reasonable inferences that may be made from this evidence. *Eckenrode*, 159 Wn.2d at 496.

A court must add time to a defendant's sentence for certain felonies if the jury enters a special verdict that the defendant was armed with a firearm while committing the crime. RCW 9.94A.533(3), .825.<sup>13</sup> A person is "armed" if "a weapon is easily accessible and readily available for use, either for offensive or defensive purposes." *Eckenrode*, 159 Wn.2d at 493 (quoting *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993)). Additionally, in a constructive possession case like this one, there must be "a nexus between the weapon and the defendant and between the weapon and the crime." *State v. Schelin*, 147 Wn.2d 562, 567-68, 55 P.3d 632 (2002) (plurality opinion); *Schelin*, 147 Wn.2d at 576-77 (Alexander, C.J., concurring); accord *State v. Gurske*, 155 Wn.2d 134, 138, 141, 118 P.3d 333 (2005). Whether a defendant is "armed" presents "a particularly difficult question when the defendant had only constructive possession over a weapon." *State v. Easterlin*, 159 Wn.2d 203, 206, 149 P.3d 366 (2006).

The "easily accessible and readily available" requirement means that "mere constructive possession is insufficient to prove a defendant is 'armed' with a deadly weapon during the commission of a crime." *Gurske*, 155 Wn.2d at 138 (internal quotation marks omitted) (quoting *Schelin*, 147 Wn.2d at 567 (plurality opinion)). "[T]he weapon must be easy to get to for use against another person, whether a victim, a drug dealer (for example), or the police." *Gurske*,

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<sup>13</sup> At the time of Ruem's crimes, the statute governing deadly weapon special verdicts was codified at RCW 9.94A.602. See LAWS OF 1983, ch. 163, § 3. We cite to the current statute, RCW 9.94A.825, for ease of future reference.

155 Wn.2d at 139. A defendant does not have to be armed at the moment of arrest to be armed for purposes of the firearm enhancement. *State v. O'Neal*, 159 Wn.2d 500, 504, 150 P.3d 1121 (2007). “[T]he State need not establish with mathematical precision the specific time and place that a weapon was readily available and easily accessible, so long as it was at the time of the crime.” *O'Neal*, 159 Wn.2d at 504-05.

When a crime is a continuing crime—like a drug manufacturing operation—a nexus obtains if the weapon is “there to be used,” which requires more than just the weapon's presence at the crime scene. *State v. Neff*, 163 Wn.2d 453, 462, 181 P.3d 819 (2008) (plurality opinion) (quoting *Gurske*, 155 Wn.2d at 138). This potential use may be offensive or defensive and may be to facilitate the crime's commission, to escape the scene, or to protect contraband. *Neff*, 163 Wn.2d at 462 (plurality opinion) (citing *Gurske*, 155 Wn.2d at 139.)

With regard to count I, the unlawful manufacture of marijuana, we note that the State has presented no evidence that the pistol was anywhere but locked in a safe in the bedroom closet at the time that Ruem and/or an accomplice<sup>14</sup> manufactured marijuana. In our view, therefore, the pistol was not “easily accessible and readily available” at the time of this crime because it was not “easy to get to for use against another person.” *Cf. O'Neal*, 159 Wn.2d at 504-05 (firearms were “easily accessible and readily available” where police discovered a rifle leaning against a wall and a pistol underneath a mattress in the residence where defendants manufactured drugs);<sup>15</sup> *Eckenrode*, 159 Wn.2d at 494 (firearm was “easily accessible and readily available” where

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<sup>14</sup> The trial court instructed the jury on accomplice liability. The trial court's instruction on the firearm enhancement also contained accomplice liability language.

<sup>15</sup> In the residence in *O'Neal*, police also discovered several other guns in two gun safes, one locked and one unlocked. 159 Wn.2d at 503. The court, however, did not discuss whether these guns supported the enhancements, because the State's theory focused on the rifle leaning against the wall and the pistol underneath a mattress. *See O'Neal*, 159 Wn.2d at 504-07.

defendant told 911 operator that he had a loaded gun in his hand and was prepared to shoot an intruder); *Schelin*, 147 Wn.2d at 564, 573-54 (plurality opinion); *Schelin*, 147 Wn.2d at 576 (Alexander, C.J., concurring) (a loaded revolver in a holster hanging from a nail in the wall was "easily accessible and readily available" where the defendant was 6 to 10 feet from the revolver when the police discovered him); *State v. Simonson*, 91 Wn. App. 874, 876-78, 883, 960 P.2d 955 (1998) (affirming deadly weapon enhancements where police found several guns hidden in a bedroom in a residence where defendant manufactured drugs); *but cf. Neff*, 163 Wn.2d at 462 (plurality opinion) (defendant was "armed" where the defendant kept two loaded pistols in a locked safe in the locked garage where he manufactured drugs, together with a loaded pistol in a tool belt hanging from the garage's rafters; the garage also contained counter surveillance equipment). Accordingly, insufficient evidence supported the firearm enhancement on this count.

We conclude, however, that sufficient evidence supported the firearm enhancement on count II, unlawful possession of marijuana with intent to deliver. First, there is a nexus between the weapon and the crime because the safe that contained the pistol also contained harvested marijuana ready for sale and over \$2,700 in cash. Second, there is a nexus between Ruem (or an accomplice) and the weapon. Police discovered a large amount of marijuana, cultivation materials, and drug paraphernalia scattered throughout Ruem's home. The bedroom that served as a grow room contained Ruem's identity documents. From these facts, a rational factfinder could have reasonably inferred that Ruem possessed marijuana with intent to deliver and, accordingly, that he knew about the fruits of this crime and the pistol in the safe. Finally, the "easily accessible and readily available" requirement is met for count II because the home's contents and the safe's contents support a reasonable inference that Ruem and/or an accomplice

opened the safe to deliver harvested marijuana to buyers and to deposit the sale proceeds. Thus, at the time of delivery, the pistol, which was operable and could have been fired in about one second, was “easily accessible and readily available.” As our Supreme Court stated in *O’Neal*, a valid firearm enhancement does not require the defendant to be armed at the moment of arrest, just “at the time of the crime.” 159 Wn.2d at 504-05.

### III. STATEMENT OF ADDITIONAL GROUNDS (SAG)

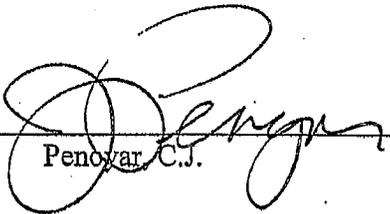
In his SAG, Ruem argues that police officers unlawfully seized him and “[went] beyond the reasonable scope of the initial contact” when they ran a warrants check on him while they questioned him. SAG at 1. We disagree.

A seizure occurs under article I, section 7 when “considering all the circumstances, an individual’s freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer’s use of force or display of authority.” *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). This is an objective inquiry to determine “whether a reasonable person in the individual’s position would feel he or she was being detained.” *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009).

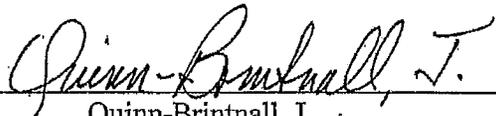
The removal of a suspect’s identification from the suspect’s presence may, in some circumstances, constitute a seizure. *See, e.g., State v. Dudas*, 52 Wn. App. 832, 833-34, 764 P.2d 1012 (1988) (officer seized individual by taking a suspect’s identification back to his or her patrol car to run a warrants check); *State v. Aranguren*, 42 Wn. App. 452, 457, 711 P.2d 1096 (1985) (same); *see also State v. Thomas*, 91 Wn. App. 195, 198, 201, 955 P.2d 420 (1998) (officer seized suspect when he stepped back three steps to the rear of the suspect’s car while holding suspect’s identification in order to use hand-held radio for a warrants check).

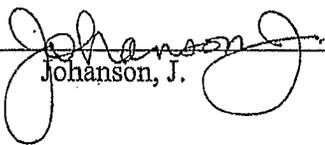
Police did not seize Ruem. Nothing in the record indicates that Fries removed Ruem's identification from his presence, as the officers did in *Dudas* and *Aranguren*. Nor was Ruem a suspect; Fries asked for Ruem's identification because he physically resembled Chantha, the subject of the arrest warrant. A reasonable person in Ruem's position would recognize from Fries's questioning that Chantha, not Ruem, was the focus of police inquiry. Because a reasonable person would not feel detained under these circumstances, there was no seizure.

We affirm Ruem's convictions, affirm the firearm enhancement on count II, reverse the firearm enhancement on count I, and remand for resentencing.

  
Penovar, C.J.

We concur:

  
Quinn-Brintnall, J.

  
Johanson, J.