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COURT OF APPEALS
DIVISION II

NO. 39053-1-II

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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

DARA RUEM, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Frederick Fleming (suppression motion)
The Honorable Judge Lisa Worswick (trial)

No. 08-1-02685-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the Findings and Conclusions three through seventeen entered by the trial court judge that heard the suppression hearing are verities on appeal where the appellant has provided no argument in support of his assignment of error to their entry?
2. Whether the evidence of marijuana manufacture was lawfully obtained pursuant to a valid warrant?
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B. STATEMENT OF THE CASE.

1. Procedure

On June 5, 2008 the State filed an information charging Dara Ruem with three counts: Count I, unlawful manufacture of a controlled substance, marijuana; Count II, unlawful possession of a controlled substance with intent to deliver, marijuana; and Count III, unlawful possession of a firearm in the first degree. CP 1-2. Counts I and II included firearm sentence enhancements. CP 1-2. The charges were based on an incident that occurred on June 4, 2008. CP 1-2.

The defense filed a motion to suppress evidence claiming that the entry into the defendant's trailer was unlawful where police did so while looking for the defendant's brother where they had a warrant for the brother's arrest. CP 14-16. The State filed a response. CP 18-24. The defendant then filed a second motion to suppress evidence claiming that a second warrant that was obtained to search his premises lacked probable cause at least in part because the declaration contained facts that the officers knew or should have known were false. CP 29-36. The case was assigned to the Honorable Frederick Fleming on December 10, 2008 for a hearing to suppress evidence.¹ CP 42. The court denied the suppression motion. RP 12-11-08, p. 59, ln. 11-12; CP 204-211.

On February 18, 2009 the case was assigned to the Honorable Lisa Worswick for trial. CP 64. The State filed an Amended Information that added a Count IV, unlawful possession of a controlled substance, cocaine and also added school bus route stop enhancements to Counts I and II. CP 53-56. Apparently later that same day the State also filed a Second Amended Information that removed Count IV, but left the school bus route stop enhancements in place. CP 51-52.

¹ At least two records refer to the hearing as a [CrR] 3.5 hearing. CP 43; 45. However, apparently only the CrR 3.6 hearing took place from December 10-11, 2008. *See* CP 186. This is consistent with the Transcript. *See* RP 10-10-2008; RP 10-11-2008.

The jury found the defendant guilty of Counts I, II, and III and also found the firearm enhancements and school bus route top enhancements as to Counts I and II.

On March 13, 2009 the court entered findings and conclusions as to both the CrR 3.6 motion to suppress evidence as well as the CrR 3.5 motion to suppress statements. CP 104-211; 212-216.

On March 13, 2009 the court also sentenced the defendant to a total of 156 months in prison based on an offender score of 3.

A notice of appeal was timely filed on March 18, 2009.

On June 26, 2009 the State brought, and the court entered, a motion and order correcting the Judgment and Sentence regarding how the enhancements were recorded, but that did not change either the components of the defendant's sentence (i.e. base sentences and enhancements on each count) or his total sentence (which remained 156 months). CP 290-292.²

A Notice of Appeal was filed on June 30, 2009, presumably in response to the corrected sentence. CP 303-308 [Notice of Appeal of 06-30-09].

² The order correcting the judgment and sentence contains a typographical error under section 2) a) and b), where it lists Count I and should list Count II. *See* CP 291, ln. 21 and ln. 22. Additionally, the total sentence should have been corrected to 180 months and was not.

Each notice of appeal was assigned its own case number at the Court of Appeals, and the two appeals have been consolidated for purpose of this review.

2. Facts

The probable cause declaration to the search warrant contained the following declaration which has been copied verbatim in the relevant portion. It is taken from Exhibit 3 from the CrR 3.6 hearing (filed 12-11-08 the Exhibit Record was mislabeled as 3.5 Hearing).

On June 4, 2008, at about 1815 hours I was contacted by members of the Pierce County Sheriff's Department Community Support Team. Deputy Fires #244 relayed the following information to me:

On June 4, 2008 at about 1750 hours, Deputy Fries, along with other members of the Pierce County Sheriff's Department Community Support Team and Department of Corrections responded to 10318 McKinley Ave E, in unincorporated Pierce County. Deputy Fries and his team were trying to serve a Superior Court arrest warrant on Chantha NMN Ruem (01-14-81). I check with LESA Records' they confirmed that Chantha Ruem has an outstanding felony warrant for Attempted Unlawful Delivery of a Controlled Substance with a Minor Involved. LESA Records advised that the address listed on the arrest warrant was 10318 E. McKinley Ave.

Deputy Fries told me that they believed that Chantha lived in the trailer behind the main house. Deputy Fries and his team contacted the trailer and spoke with a male who identified himself as Dara NMN Ruem (09-02-81). Deputy Fries told me that when Dara identified himself to Deputy Fries, he mentioned that his brother, Chantha, sometimes used his name. Dara also identified a

white car on the property, which he said belonged to Chantha. Dara told Deputy Fries that if the car was there, Chantha should be as well.

Deputy Fries asked for permission to search the trailer for Chantha. Deputy Fries told me that Dara originally consented to the search, then told Deputy Fries "maybe now's not a good time." While he was having this discussion with Dara, Deputy Fries told me that he could smell burned marijuana.

Deputy Fries and his team secured Dara and entered the trailer. When Deputy Fries and his team found 6 "starter" marijuana plants, which were about 6"-8" tall, in the kitchen, and a locked bedroom, they stopped their search for Chantha and searched the trailer.

I talked with Sgt. Seymour who told me that the team also found 52 "starter" marijuana plants outside the trailer in the yard. Sgt. Seymour said that these plants were 4"-8" tall.

Deputy Fries told me that Dara was advised of, then invoked, his Miranda Rights.

Sgt. Seymour advised me that members of his team had contacted Dara and Chantha's mother, who lives in the main house on the property. Sgt. Seymour told me that, based on the contact with the mother in the main house, they did not believe that any marijuana was being cultivated inside the house. Sgt. Seymour said that his team did not try to enter the detached garage to determine whether or not marijuana was being cultivated inside it (Deputy Fries did note, however, that the garage had power running to it.) I asked Sgt. Seymour if he thought that, considering the amount of space, light and water it would take to cultivate them, 58 marijuana plants could grow to maturity in the locked room in the trailer. Sgt. Seymour did not think that the room in the trailer was large enough to accommodate such a crop of marijuana.

The court entered the following Findings of Fact and Conclusions on Admissibility after the CrR 3.6 hearing. They are copied here verbatim.

THE UNDISPUTED FACTS

1. The Court heard testimony from Deputy Jeff Reigle, Deputy Kevin Fries, and Sergeant Tom Seymour. Deputy Reigle has been with the Pierce County Sheriff's Department for 17 years. Deputy Fries has over 22 years of police experience. Sergeant Seymour has 24 years of experience as a deputy sheriff, including 2 years as a narcotics specialist, and is currently in charge of the Pierce County Sheriff's Department Community Support Team. Each of these deputies has served hundreds of arrest warrants over the course of his career.
2. All three of these deputies are assigned to the Pierce County Sheriff's Department Community Support Team ("CST"), and part of their duties includes locating fugitives with outstanding warrants for their arrest and serving arrest warrants.
3. On February 11, 2008, a felony warrant was issued for the arrest of Chantha Ruem ("Chantha"). The warrant for Chantha's arrest was admitted into evidence as exhibit #1. The address listed on the bench warrant as Chantha's residence is 10318 E. McKinley Ave., Tacoma, WA 98444. Chantha is the defendant's older brother. Chantha's date of birth is 1-14-1980, and the defendant's date of birth is 9-2-1981.
4. Deputy Reigle went to the residence at 10318 E. McKinley Ave., Tacoma, WA 98444, sometime in February of 2008 in an attempt to locate Chantha and serve the warrant. On that property there is a house and a short distance behind the house there is a mobile home. The house and the mobile home share a driveway and a mailbox, and the address of both the house and the mobile

home is the same, which the defendant confirmed during his testimony at this CrR 3.6 hearing.

5. When he went to the residence in February of 2008 during the day, Deputy Reigle was met at the door of the house by a man that later said that he was Chantha's father. Chantha's father initially indicated that Chantha was present, but then said that he was gone. Chantha's father let Deputy Reigle into the house to look for Chantha, but Deputy Reigle did not find Chantha present. Deputy Reigle did talk to a young woman with a child that said that she and Chantha shared the child in common, but that Chantha wasn't at the house at the moment.

6. Deputy Reigle checked back on the residence during the daytime on several separate occasions between February and June of 2008. Sometimes when he would check the residence he would see a white car parked on the property near the mobile home and house. He was able to determine the white car belonged to Chantha by checking registration records. Since Chantha's car was not always present when the deputy drove by the residence, the deputy believed that it was being used. Deputy Reigle did not encounter Chantha during his daytime checks at the residence.

7. On June 4, 2008, CST deputies Reigle, Fries, Rickerson, and Sergeant Seymour, went to 10318 McKinley Avenue East to attempt to serve the arrest warrant on Chantha. The deputies went at about 5:50 PM, which was much later in the day than Deputy Reigle's previous visits. Sgt. Seymour testified that one of the tactics used by law enforcement to serve arrest warrants is to visit their residence at different times of the day.

8. Deputy Reigle went to the house with Deputy Rickerson while Deputy Fries and Sgt. Seymour went to the mobile home about 10 yards away simultaneously to attempt and find Chantha. Chantha's white car was parked near the mobile home.

9. Deputy Fries and Sgt. Seymour contacted the mobile home and spoke with a male, who identified himself as Dara Ruem (hereinafter Defendant). The defendant was standing in the doorway of the mobile while he spoke to the deputies. The defendant informed the deputies that Chantha sometimes used the defendant's name.

10. The defendant identified the white car parked outside the mobile home as belonging to Chantha. The defendant then informed the deputies that Chantha had moved to California, bought a new car, and had left his white vehicle. Deputy Fries testified that the defendant was hesitant, and based on his experience with serving arrest warrants and interacting with the public in a law enforcement capacity, the deputy believed that the defendant's demeanor was consistent with someone who is not being honest or is being deceitful.

11. Initially, the defendant agreed to allow the deputies to enter the mobile home but changed his mind and said, "Now wasn't a good time." By this time, the deputies were standing at the front of the door to the mobile home and could smell marijuana in the air. Deputy Fries also noticed that there was an odor of marijuana coming from the defendant's clothing. Deputy Fries asked the defendant if he was growing marijuana or if it was just for personal use. The defendant said it was only for personal use. The deputies informed the defendant that they were there only to find Chantha, and were not interested in arresting the defendant for personal use of marijuana.

12. Sergeant Seymour and Deputy Fries informed the defendant that they were going to check the inside of the mobile home for Chantha because they had a warrant for his arrest and his car was parked outside the mobile home. Sgt. Seymour, Deputy Fries and Deputy Rickerson entered the mobile home to look for Chantha. Sgt. Seymour stood in the living room with the defendant while deputies Fries and Rickerson cleared the mobile home. The deputies went only into unlocked rooms and only looked in places where a person might be hiding. They did not open any containers,

drawers, or cabinets. There was a locked room near the entrance of the mobile home. The deputies did not force the door open or go into that room.

13. The deputy's search for Chantha in the mobile home lasted no longer than one and a half minutes.

14. During their brief look around the mobile home for Chantha, the deputies observed, in plain view, about six "starter" marijuana plants in the kitchen. The deputies all had extensive law enforcement experience and immediately recognized the plants as marijuana.

15. Sgt. Seymour advised the defendant of his Constitutional Miranda warnings and the defendant said he wanted to exercise his rights. Sgt. Seymour and the other deputies exited the mobile home and closed the door and called Deputy Nordstrom with the Special Investigations Unit to get a search warrant. At that time Sergeant Seymour also located fifty-two "starter" marijuana plants growing outside the mobile home in the yard. Sgt. Seymour and the other CST deputies then waited outside the mobile for Deputy Nordstrom to obtain a search warrant.

16. Deputy Nordstrom obtained a warrant to search the mobile home, and the search was conducted that same day. Photographs were taken by the deputies during the search warrant, and a montage of those photos was admitted as plaintiff's exhibit #4.

17. The State presented testimony from Deputy Reigle, Deputy Fries, and Sgt. Seymour. All of these deputy sheriffs have about a decade or more of experience as law enforcement officers. Each deputy has also served over a hundred arrest warrants over the course of their career.

18. All of these deputies have extensive experience with serving an arrest warrant at a suspect's residence. Sgt. Seymour and Deputy Fries testified that it is common for a family member to greet the deputies at the entrance of the residence and tell the deputies that the subject of the arrest

warrant is not present, even though the subject that the deputies are looking for is in fact inside the residence.

THE DISPUTED FACTS

1. There are no significant disputed facts.

FINDINGS AS TO DISPUTED FACTS

1. All findings incorporated into Reasons for Admissibility as set out below.

REASONS FOR ADMISSIBILITY OR INADMISSIBILITY OF THE EVIDENCE

1. I find that Deputy Reigle is an experienced law enforcement officer. I also find that Deputy Reigle's testimony during this hearing was honest and credible.
2. I find that Deputy Fries is an experienced law enforcement officer. I also find that Deputy Fries' testimony during this hearing was honest and credible.
3. I find that Sergeant Seymour is an experienced law enforcement officer. I also find that Sergeant Seymour's testimony during this hearing was honest and credible.
4. I find that the defendant's testimony at the hearing was not credible or reasonable.
5. The deputies had probable cause to believe that Chantha Ruem resided at the house and the mobile home located at 10318 E. McKinley Ave., Tacoma, WA 98444.
6. I find that the deputies had reasonable cause to believe that the house and mobile home were so closely related as to be the same residence.
7. I find the deputies had a reasonable basis to believe Chantha Ruem was at the residence on June 4, 2008, based on Chantha Ruem's father's statement that he resided there

and the fact that Chantha Ruem's vehicle was there and had been used continuously and recently.

8. I find that the deputies entered the mobile home for the sole purpose to locate Chantha Ruem, the subject of the arrest warrant.

9. I find that the deputies had no pretextual investigative purpose for entering the mobile home where Dara Ruem resided.

10. The deputies validly entered the mobile home and validly swept it for Chantha Ruem pursuant to the lawfully issued warrant for Chantha Ruem's arrest.

11. The extremely brief and limited entry by the deputies into the mobile home was reasonably related to the attempted service of the arrest warrant upon Chantha Ruem.

12. The brief intrusion by the deputies into the mobile home did not exceed the allowable scope of a reasonable protective sweep of the residence for Chantha Ruem.

13. I find that the deputies promptly exited the mobile home after they did not find Chantha during their sweep.

14. I find that the marijuana plants observed by the deputies in the kitchen of the mobile home were in plain view of the deputies during their reasonable protective sweep.

15. I find that the deputies were lawfully present on the property when they saw the marijuana plants growing outside of the mobile home, and thus those marijuana plants were in plain view of the deputies.

16. I find that the deputies have more than sufficient training and experience with marijuana to immediately recognize the growing plants as marijuana.

17. Because the deputy's entry into the mobile home was a lawful and reasonable attempt to serve a valid arrest warrant, the defendant's motion to suppress evidence is

DENIED.

The trial record established that officers found a large number of items related to the manufacture of marijuana. Those items included marijuana plants, packaged marijuana, plant pots, light equipment, cash, other items related to marijuana manufacture and a safe with marijuana, cash and guns. Trial Exs. 1-21, 23-141, 154, 162, 189, 193-97; 2 RP 153 to 183; 2 RP 189 to 218.

C. ARGUMENT.

1. FINDINGS AND CONCLUSIONS 3 TO 17, WHICH WERE ENTERED BY THE TRIAL COURT JUDGE THAT HEARD THE SUPPRESSION HEARING, ARE VERITIES ON APPEAL WHERE THE APPELLANT HAS PROVIDED NO ARGUMENT IN SUPPORT OF HIS ASSIGNMENT OF ERROR TO THEIR ENTRY.

In his Assignment of Error, #4 the defendant claims, “[t]he trial court erred when it entered Findings and conclusions 3-17 following a hearing under CrR 3.6.” Br. App. 3. In the Issues, it is listed as #5, and phrased as, “Did the trial court err when it entered Findings and Conclusiosn 3-17 following a hearing under CrR 3.6 (Assignment of Error 1-4)” Br. App. 4.

No argument is provided in support of the assignment of error or corresponding issue. Assignments of error that are not supported by argument or authority are waived. *Collins v. Clark County Fire Dist. No. 5*, Slip. Op. 36968-1, p. 24 ___ Wn. App. ___, ___ P.3d ___ (2010)(citing *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004)(citing *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986))).

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. *Hill*, 123 Wn.2d 641, 647. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. *Hill*, at 644. Credibility determinations are for the trier of fact and are not subject to appellate review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In *Henderson Homes, Inc v. City of Bothell*, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact but did not argue how the findings were not supported by substantial evidence; made no cites to the record to

support its assignments; and cited no authority. The court held that under these circumstances, the assignments of error to the findings were without legal consequence and that the findings must be taken as verities.

It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities.

Henderson, 124 Wn.2d at 244; *see also State v. Jacobson*, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998).

Ordinarily the court reviews challenged findings for substantial evidence, while unchallenged findings become verities, and the court reviews conclusions of law *de novo*. *State v. Smith*, ___ Wn. App. ___, ___ P.3d ___ (2010)(citing *State v. O'Neill*, 148 Wn.2d 464, 571, 62 p.3d 489 (2003); *State v. Eisfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580 (2008)). However, the court will not consider any issues not supported by argument and citation to relevant authority. *Collins*, Slip Op. 36968-1, p. 24 (citing *Bercier*, 127 Wn. App. at 824 (citing *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990))).

Further, because the defendant failed to provide argument on this issue, it is unclear if the defendant is claiming there is not sufficient evidence to support the court's findings (and conclusions); if he is arguing

that the court erred by entering findings and conclusions where the issue involves review of a warrant; or if he has some different issue.

The assignment of error and the corresponding issue suffer from an additional ambiguity. The court's findings and conclusions are divided between Undisputed Facts (which are numbered through 18) and Reasons For Admissibility Or Inadmissibility Of The Evidence (which are numbered through 17). Because both contain numbers 3-17, it is unclear which the defendant is referring to. However, it appears most likely the assignment is to the Reasons for Admissibility, since the other findings were labeled as "undisputed."

Because the defendant has failed to provide argument in support of his assignment of error, challenging the trial court's findings and conclusions, the findings are verities on appeal.

2. THE EVIDENCE OF MARIJUANA
MANUFACTURE WAS LAWFULLY OBTAINED
PURSUANT TO A VALID WARRANT.

When a search warrant has been properly issued by a judge, the party attacking it has the burden of proving its invalidity. *State v. Fisher*, 96 Wn.2d 962, 639 P.2d 743 (1982). A judge's determination that a warrant should issue is an exercise of discretion that is reviewed for abuse of discretion and should be given great deference by the reviewing court.

State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). See also *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994) (“Generally, the probable cause determination of the issuing judge is given great deference.”); *State v. J-R Distribs., Inc.*, 111 Wn.2d 764, 774, 765 P.2d 281 (1988) (“[D]oubts as to the existence of probable cause [will be] resolved in favor of the warrant.”)]. Hypertechnical interpretations should be avoided when reviewing search warrant affidavits. *State v. Feeman*, 47 Wn. App. 870, 737 P.2d 704 (1987). The magistrate is entitled to draw commonsense and reasonable inferences from the facts and circumstances set forth. *State v. Yokley*, 139 Wn.2d 581, 596, 989 P.2d 512 (1999); *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975). Doubts are to be resolved in favor of the warrant. *State v. Casto*, 39 Wn. App. 229, 232, 692 P.2d 890 (1984)(citing *State v. Partin*, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977)).

[W]hen a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.

State v. Walcott, 72 Wn.2d 959, 962, 435 P.2d 994 (1967)(quoting, with approval from *United States v. Ventresca*, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965)).

In reviewing probable cause the court looks to the four corners of the search warrant itself. Probable cause to search is established if the affidavit in support of the warrant sets forth facts sufficient facts for a reasonable person to conclude that the defendant is probably involved in criminal activity, and that evidence of a crime can be found at the place to be searched. *State v. Maxwell*, 114 Wn.2d 761, 791 P.2d 223 (1990). Facts that, standing alone, would not support probable cause can do so when viewed together with other facts. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995).

Generally, the “four corners rule” does not permit challenges to facially valid affidavits establishing probable cause for warrants. *See State v. Moore*, 54 Wn. App. 211, 214, 773 P.2d 96 (1989)(citing *U.S. v. Bowling*, 351 F.2d 236, 241-42 (6th Cir. 1965)). However, *Franks v. Delaware* established a procedure for challenging parts of a warrant that are predicated on an affiant’s deliberate falsehoods or statements made with deliberate disregard for the truth. *See State v. Garrison*, 118 Wn.2d 870, 827 P.2d 1388 (1995); and *Moore*, 54 Wn. App. at 214 (both citing *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667

(1978)). The *Franks* hearing was instituted to detect and deter the issuance of warrants based on information gathered as a result of governmental misconduct. *Moore*, 54 Wn. App. at 214-15 (citing *Thetford*, 109 Wn.2d at 399). Under the *Franks* procedure, a defendant is only entitled to an evidentiary hearing if the defendant first makes a “substantial preliminary showing” that an officer or agent of the State knowingly or recklessly made a statement that was the basis of a court’s probable cause finding. *Moore*, 54 Wn. App. at 214 (*State v. Thetford*, 109 Wn.2d 392, 398, 745 P.2d 496 (1987) and *Franks*, 438 U.S. at 155.

Washington has followed the federal standard, and a defendant must show either a material falsehood or a material omission of fact by the officer. *State v. Chenoweth*, 127 Wn. App. 444, 111 P.3d 1217 (2005) (rejecting the argument that Article I, Section 7 of the Washington Constitution demands a standard of mere negligence), *review granted*, *State v. Chenoweth*, 156 Wn.2d 1031 (May 2, 2006). Intentional omissions or misstatements occur when the affiant shows “reckless” disregard for the truth. Recklessness is shown where the affiant, “in fact entertained serious doubts as to the truth of the facts or statements in the affidavit.” *State v. O’Connor*, 39 Wn. App. 113, 117, 692 P.2d 208 (1984), quoting *U.S. v. Davis*, 617 F.2d 677, 694 (D.C.Cir. 1979).

“[S]uch serious doubts can be shown by (1) actual deliberation on the part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports.”

O'Connor, 39 Wn. App. at 117.

A defendant has the burden of proving by a preponderance of the evidence that there was an intentional misrepresentation or a reckless disregard for the truth by the affiant. *State v. Hashman*, 46 Wn. App. 211, 729 P.2d 651 (1986); *State v. Stephens*, 37 Wn. App. 76, 678 P.2d 832 (1984). Even if a defendant were able to prove an intentional or reckless misstatement or omission, he still would be required to show that probable cause to issue the warrant would not have been found had those false statements been deleted and the omissions included. *State v. Gentry*, 125 Wn.2d 570, 607, 888 P.2d 1105 (1995).

Courts have approached claims that a warrant is based upon illegally obtained information in a manner similar to a *Franks* hearing. See *State v. McReynolds*, 117 Wn. App. 309, 330-331, 71 P.3d 663 (2003); *State v. Coates*, 107 Wn.2d 882, 735 P.2d 64 (1987). In *State v. McReynolds*, the court ruled the trial court did not err when it conducted a *Franks* hearing and suppressed a series of four warrants because they were tainted by unlawfully obtained evidence, but upheld a fifth warrant because the trial court found that the fifth warrant was not tainted by the

illegally obtained evidence. *McReynolds*, 117 Wn. App. 330-31.

Similarly, in *State v. Coates*, the court held that a warrant was valid and affirmed the defendant's conviction where a defendant's illegally obtained statement was included in the probable cause statement for the warrant.

Coates, 107 Wn.2d at 886-88.

As the court in *Coates* noted, the procedure for review of a warrant containing illegally obtained evidence, is to strike any information from the warrant that is illegally obtained and review the affidavit to determine whether probable cause still exists without the struck material. *Coates*, 107 Wn.2d at 888. Moreover, the court in *State v. Thompson*, 151 Wn.2d 793, 92 P.3d 228 (2004) cited *Coates* with approval for precisely this proposition. *Thompson*, 151 Wn.2d at 807-808 (citing *Coates*, 107 Wn.2d at 888).

- a. The Search Warrant Was Valid Where It Was Based Upon Observations The Officers Made In The Course Of Pursuing An Arrest Warrant For The Defendant's Brother.

An officer in possession of an arrest warrant, whether for a misdemeanor or for a felony, "may break open any outer or inner door, or windows of the suspect's dwelling house or other building, or any other enclosure, if, after notice of his office and purpose, he be refused admittance." RCW 10.31.040; *State v. Hatchie*, 161 Wn.2d 390, 166 P.3d

698 (2007). Before breaking down a door, the officer must have (1) probable cause to believe that the building, house, hotel room, etc., that is being entered is the suspect's residence and (2) must have probable cause to believe that the named person is actually present at the time of the entry. *Payton v. New York*, 445 U.S. 573, 603, 100 S. Ct. 1371, 1380, 63 L. Ed. 2d 639 (1980); *United States v. Gorman*, 314 F.3d 1105, 1110-11 (9th Cir. 2002); see *Hatchie*, 161 Wn.2d at 395-96; *State v. Vy Thang*, 145 Wn.2d 630, 638, 41 P.3d 1159 (2002); see also *State v. Hopkins*, 113 Wn. App. 954, 958, 55 P.3d 691 (2002)("[A]n arrest warrant, by itself, provides authority for the police to enter a person's residence to effectuate his or her arrest.").

However, "the police cannot use an arrest warrant – misdemeanor or otherwise – as a pretext for conducting a search or other investigation of someone's home." *Hatchie*, 161 Wn.2d at 401; see *State v. Michaels*, 60 Wn.2d 638, 644, 374 P.2d 989 (1962)("An arrest may not be used as a pretext to search for evidence" citing *United States v. Lefkowitz*, 285 U.S. 452, 52 S. Ct. 420, 76 L. Ed. 877 (1932)). In serving an arrest warrant, police are given "lawful authority for a limited intrusion to enter a residence, execute the arrest, and then promptly leave." *Hatchie*, 161 Wn.2d at 402.

While warrantless searches of a residence are per se invalid, officers "may conduct a reasonable 'protective sweep' of the premises for security purposes" in the course of executing a valid arrest warrant.

Hopkins, 113 Wn. App. 954, 959, 55 P.3d 691 (2002) citing *Maryland v. Buie*, 494 U.S. 325, 334-35, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990). “The scope of such a ‘sweep’ is limited to a cursory visual inspection of places where a person may be hiding.” *Hopkins*, 113 Wn. App. at 959. However, if the swept area immediately adjoins the place of arrest, the officers do not have to justify their actions by establishing concern for their safety. *Hopkins*, 113 Wn. App. at 959. Specifically, the *Hopkins* court held that where protective sweeps took place after the arrest warrant had been executed, and that the officers articulated no facts supporting a reasonable belief that dangerous people were in the areas outside the place of arrest, the search of those areas were not a lawful protective sweep. *Hopkins*, 113 Wn. App. at 960-61.

Here, the officers had probable cause to believe Chantha lived at the residence.

Deputy Reigle went to the residence in February of 2008 and was met at the door by Chantha’s father. CP 205, FOF 5. Chantha’s father initially indicated that Chantha was present, but then said he was gone. CP 205, FOF 5. Deputy Reigle also spoke to a young woman with a child that said that she and Chantha shared the child in common, but that Chantha wasn’t at the house at the moment. CP 205, FOF 5.

Deputy Reigle checked back at the residence on several occasions between February and June of 2008. CP 205, FOF 6. Sometimes when he would check the residence he would see a white car registered to Chantha

parked on the property near the mobile home. CP 205-06, FOF 6. The car was not always present when the deputy drove by, which caused him to believe it was being used. CP 206, FOF 6.

On June 4, 2008 several deputies attempted to serve the arrest warrant on Chantha at the residence. CP 206, FOF 7. Chantha's car was parked near the mobile home.

Simultaneously some deputies went to the house while others went to the mobile home. CP 206, FOF 8. The deputies who contacted the mobile home spoke to a male who identified himself as Dara Ruem (the defendant). CP 206, FOF 9. He claimed his brother sometimes used his (Dara's) name. CP 206, FOF 9. He was standing in the doorway of the mobile home while he spoke to the deputies. CP 206, FOF 8. Dara identified the white car as Chantha's. CP 206, FOF 10. Dara then claimed that Chantha had moved to California and bought a new vehicle. CP 206, FOF 10. However, when he said this Dara was hesitant and based on his experience serving warrants and interacting with the public, he believed Dara's demeanor was consistent with someone who was not being honest, or was being deceitful. CP 206-07, FOF 10.

As Dara spoke to the officers at the trailer, he told the officers that he lived there with his brother, that his brother's car was there and then claimed his brother was not there. RP 12-10-08, p. 31, ln. 22 to p. 32, ln. 1; p. 49, ln. 9-12. It was only after saying this that he then claimed that his brother had moved to California. RP 12-10-08, p. 32, ln. 6-7.

Deputies informed Dara they were going to check the inside of the mobile home for Chantha because they had a warrant for Chantha's arrest and his car was parked outside. CP 207, FOF 12.

These facts caused the officers to positively believe that Chantha was living there. RP 12-10-08, p. 51, ln. 8-21.

These facts are sufficient to support probable cause to believe Chantha was at his residence.

Here, Chantha's father and brother had previously advised police that Chantha lived there, as did Chantha's girlfriend and mother of his child. Chantha's car was present, but had only been present intermittently prior to the service of the warrant, suggesting it was being used. These facts were sufficient to permit a reasonable person to believe that Chantha resided there, and in light of the presence of his car that he was likely there at the time.

Additionally, Dara's claim that Chantha had moved to California should not serve to defeat that probable cause. Otherwise, any time a person other than the defendant answered the door, that person could aid the defendant and thwart the search simply by claiming the defendant wasn't there. Here, Dara's claim that Chantha was not present was not credible under the circumstances and the outcome of the case should not be controlled by that statement.

b. The Search Warrant Was Valid Where It Was Based Upon Observations The Officers Made After The Defendant Consented To Their Entry Into The Trailer.

In *State v. Thang*, the court held that *Ferrier* standards do not apply when officers contact a location to serve an arrest warrant. *State v. Thang*, 145 Wn.2d 630, 636-37, 41 P.3d 1159 (2002) (citing *State v. Ferrier*, 136 Wn.2d 103, 107, 960 P.2d 927 (1998)). This is because *Ferrier* warnings are only required for a “knock and talk” which is where officers knock on a suspect’s door, obtains permission to enter to discuss a complaint and then subsequently ask permission to search the premises. *Thang*, 145 Wn.2d at 636. In a “knock and talk,” “the goal of the police is to search without first obtaining a warrant.” *Thang*, 145 Wn.2d at 636. The court held that the “knock and talk” procedure is inherently coercive. *Thang*, 145 Wn.2d at 636.

In Washington, when officers request permission to search in a context that is not knock and talk, the courts employ a totality of the circumstances test to determine whether the consent to search is valid. *Thang*, 145 Wn.2d at 637. Under that test the court considers factors that include the education and intelligence of the consenting person, whether *Miranda* warnings were given prior to consent, and whether the person was advised of his right to consent. *Thang*, 145 Wn.2d at 637.

Here, there was no particular evidence on Dara’s education or intelligence. However, there was nothing to suggest he was not of

ordinary intelligence or was unable to make an intelligent and informed decision. The issue of *Miranda* rights did not apply because Ruem was not under arrest at the time the officers requested his consent. The officers did not expressly advise Dara of his right to consent. However, given that he hesitated about whether or not to consent, discussed his concerns about marijuana, gave the officers consent and then withdrew it shows that he clearly understood his right to consent and his right to withdraw his consent.

This case is similar to *Thang*, the facts of which are very close. The officers there also did not advise the defendants of their right to refuse entry. *Thang*, 145 Wn.2d at 637. But the officers also did not draw weapons or order the residents to open the door. *Thang*, 145 Wn.2d at 637. Thus the court in *Thang* held that on balance the search was valid. *Thang*, 145 Wn.2d at 637.

Here, Dara consented to the entry and then withdrew that consent as the officers smelled the odor of marijuana. That observation alone was properly the result of consent and would have been sufficient to independently support probable cause for the search warrant to issue. *See State v. Fry*, Slip. Op. 81210-1, p. 5, ___ Wn.2d ___, ___ P.3d ___ (2010); *State v. Cole*, 128 Wn.2d 262, 290, 906 P.2d 925 (1995).

It is also worth noting that the officers conducted themselves properly in searching the premises for Chantha. The deputies properly observed the marijuana plants found at the Residence during their sweep

for Chantha. The deputies limited the scope of their sweep of the residence “to a cursory visual inspection of places where a person may be hiding” and observed the six “starter” marijuana plants in the. *See Hopkins*, 113 Wn. App. at 959. The deputies did not enter the mobile home under any pretexts for searching for contraband. Rather, the deputies properly entered the mobile home at the residence to execute the felony arrest warrant on Chantha and properly observed the marijuana plants during a limited sweep of the mobile home for Chantha.

3. THERE WAS SUFFICIENT EVIDENCE THAT THE FIREARM WAS READILY AVAILABLE FOR OFFENSIVE OR DEFENSIVE PURPOSES.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State’s evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d

632 (1987), *review denied*, 111 Wn.2d 1033 (1988)(citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[...]great deference [. . .] is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)(citations omitted).

A defendant is armed with a firearm when, during the commission of a crime, the weapon was easily accessible and readily available for use for offensive or defensive purposes. See *State v. Willis*, 153 Wn.2d 366, 371, 103 P.3d 1213 (2005)(citing *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993)). This requires the State to show that there is a nexus between the defendant, the crime and the gun in order to establish that the defendant was armed. *Willis*, 153 Wn.2d at 372-73 (citing *State v. Schelin*, 147 Wn.2d 562, 563-64, 55 P.3d 632 (2002)). Where the underlying crime is continuing or ongoing in nature, as is drug manufacturing, a nexus exists if the weapon was “there to be used.” *State v. Neff*, 163 Wn.2d 453, 462, 181 P.3d 819 (2008)(citing *State v. Gurske*, 155 Wn.2d 134, 138, 118 P.3d 333 (2005)).

Here, officers found a safe inside the South bedroom of the mobile home. 3 RP 189, ln. 24 to p. 190, ln. 2; p. 195, ln. 19 to p. 196, ln. 6; Ex.72. The safe contained two bags of marijuana. Ex. 129, 142, Ex. 163; 3 RP 196, ln. 7 to p. 199, ln. 5; 4 RP 466, ln. 14 to p. 469, ln. 5. Also in the safe was \$2,700 in U.S. Currency. 3 RP 201, ln. 9 to p. 202, ln. 10; Ex. 132; 158. In the safe with the marijuana and the cash was a semi-automatic handgun with a magazine inside it loaded with bullets. 3 RP 199, ln. 6 to p. 200, ln. 8; Ex 155. The gun could be prepared to be fired immediately. 3 RP 201, ln. 7-8.

Here, the safe contained the loaded gun together with the proceeds of the marijuana grow. Those proceeds consisted of the literal proceeds, the two bags of marijuana, as well as the financial proceeds of \$2,700 in cash. The gun was there to be used to protect the valuable proceeds of the manufacturing operation. Accordingly, there was a strong nexus between the gun and the crime where the crime occurred in the trailer where the defendant resided. There was also a nexus between the crime and the defendant. The gun was readily available for offensive or defensive purposes because it was located where it could be used to protect the valuable proceeds of the crime, i.e. the packaged marijuana, and the cash.

It is worth noting that the safe did contain four credit cards for David Ruum and no paperwork specific to Dara. Ex. 137, 3 RP 202, ln. 11 to p. 203, ln. 5. However, the safe was located in one of the bedrooms of the trailer Dara resided in, which trailer also contained the growing marijuana, and the safe itself contained marijuana. Here, the jury was given an accomplice liability instruction and the instruction on the firearm enhancement also contained accomplice liability language. CP 175; 183. The jury could reasonably infer that either the defendant or an accomplice had access to the safe and its contents and that the gun was there to be used to protect the proceeds of the operation. Indeed, that is the most likely and obvious inference to be made from the facts.

Because this was an ongoing crime and the gun was there to be used, the jury could reasonably infer that the defendant was armed. Thus,

sufficient evidence supported the jury's finding as to the firearm enhancement.

D. CONCLUSION.

The evidence of marijuana manufacture was obtained pursuant to a valid warrant because probable cause supported the search warrant when the evidence that formed the basis of the warrant was observed in plain view where officers had had an arrest warrant for Chantha Ruem and they had probable cause to believe he was in the trailer. Probable cause also supported the warrant where the defendant initially validly consented to the officers' entry and they smelled the odor of marijuana before he withdrew that consent.

Sufficient evidence supported the firearm sentence enhancements where the gun was found in a safe in the trailer that contained growing plants, the safe contained also contained marijuana and cash, and the jury could infer the gun was there ready to be used.

The court should affirm the conviction.

DATED: March 30, 2010

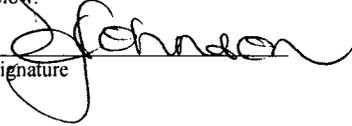
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Certificate of Service:

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

3/30/10 
Date Signature

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DIVISION II
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DEPUTY