IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NATASHA ANN PENLAND, Appellant,	No. 40695-1-II (CONSOLIDATED WITH
STATE OF WASHINGTON, Respondent, v. REED LEROY STONE, Appellant.	No. 40705-1-II) UNPUBLISHED OPINION

Hunt, J. — Natasha Ann Penland and Reed Leroy Stone appeal their jury trial convictions for unlawful manufacturing of a controlled substance, unlawful possession of a controlled substance, and unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine and their related school-bus-stop sentencing enhancements. Penland also appeals her jury trial conviction for endangerment with a controlled substance. Both

argue that (1) the State failed to present sufficient evidence to support their possession with intent to manufacture convictions because (a) they had possessed only three unrefined pseudoephedrine pills, and (b) there was no evidence that they had any "future intent"[1] to manufacture methamphetamine or had possessed an unlawful amount of pseudoephedrine beyond that already used in the "extraction phase"[2] phase of the manufacturing process; and (2) RCW 9.94A.533[3] is ambiguous about whether their school-bus-stop sentencing enhancements should have run consecutively to or concurrently with each other and, under the rule of lenity, we should interpret the statute to require concurrent enhancements.[4]

In Penland's Statement of Additional Grounds (SAG), she asserts that the State violated her Fourth Amendment rights[5] because (1) the State's search warrant allegedly did not include the house in which she and Stone were living as the area to be searched; and (2) the State took her minor daughter, AN,[6] to the hospital and allowed the hospital to perform a urinalysis on her

[1] Br. of Appellant (Penland) at 17; Br. of Appellant (Stone) at 4.

[2] Br. of Appellant (Penland) at 19; Br. of Appellant (Stone) at 7.

[3] In 2011, the Legislature amended RCW 9.94A.533(6) to substitute RCW 9.94A.827 for RCW 9.94A.605, the former statute for the manufacturing methamphetamine with a child on the premises. This amendment does not affect our analysis here.

[4] The State responds that (1) it presented sufficient evidence to support Penland's and Stone's unlawful possession of pseudoephedrine and/or ephedrine with the intent to manufacture methamphetamine convictions; but (2) Penland's and Stone's school-bus-stop sentencing enhancements should not have been applied to these convictions, and we should remand for new sentencing hearings.

[5] U.S. Const., amend. IV.

[6] It is appropriate to provide some confidentiality in this case. Accordingly, we have used initials in the body of the opinion to identify juveniles.

without a warrant or Penland's consent. In Stone's SAG, he asserts that (1) he received ineffective assistance because his trial counsel did not request an entrapment instruction, investigate his case, and adequately examine witnesses; (2) the prosecutor committed several unspecified acts of misconduct; and (3) cumulative error requires reversal of his convictions.

We affirm Penland's conviction for endangerment with a controlled substance, Count II. We also affirm Penland's and Stone's convictions for unlawful manufacturing of a controlled substance, Counts I and IV, respectively; unlawful possession of a controlled substance, Counts III and V, respectively[7]; and unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine, Counts V and VII, respectively. We affirm Penland's and Stone's school-bus-stop enhanced sentences for their unlawful controlled substance manufacturing convictions; but we reverse their enhanced sentences on their convictions for unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine[8] and remand for resentencing on these counts.

FACTS

I. Crimes

A. Manufacturing and Possession of Controlled Substances

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[7] Although Penland and Stone were charged with unlawful possession of a controlled substance with intent to deliver, the jury found them guilty of the lesser included offense of unlawful possession of a controlled substance for these counts.

[8] Penland's second amended information, dated March 10, 2010, lists unlawful manufacturing of a controlled substance as Count I and unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine as Count V; but Stone's amended information lists these charges as Counts IV and VII respectively.

Reed Leroy Stone shared a residence, comprising a house, several outbuildings, and vehicles, with his girlfriend, Natasha Ann Penland, and her five-year-old daughter, AN. In March and early April 2009, a Pierce County Sheriff's Department confidential informant (CI) made two controlled buys of methamphetamine from Stone's house. During the second controlled buy, the CI asked to purchase methamphetamine from Penland. Penland had only a drug pipe with methamphetamine "residue" on it, which the CI offered to buy for $40 and Penland sold to the CI. V Verbatim Report of Proceedings (VRP) at 497. The substances purchased during both controlled buys field-tested positive for methamphetamine.

Based on these controlled buys, the police obtained a search warrant for evidence related to unlawful delivery of a controlled substance at Penland's and Stone's residence, including their "single story home," "detached garage(s)," and "any outbuilding(s) and/or trailer(s) and/or motorhome(s) which could contain a cache of methamphetamine." Clerk's Papers (CP) (Stone) at 15. The morning of April 14, the police served the April 6 search warrant, found Penland and Stone in the master bedroom, handcuffed them, arrested them, and put them in the back of police cars. The police searched the residence and discovered glassware and other evidence of pseudoephedrine "extraction"[9] in the kitchen; and they began to suspect that the residence contained a methamphetamine laboratory. II VRP at 109. The police immediately stopped their search, exited the house for "safety concerns," called the sheriff department's "lab team," and obtained an amended search warrant, permitting them to search the residence for evidence of a

[9] "Extraction" is the first phase in the methamphetamine manufacturing process, during which ephedrine or pseudoephedrine is separated from other pill ingredients. IV VRP at 339.

"meth lab" in the house, detached garages, and any outbuildings, trailers, and/or motor homes on the property. II VRP at 90.

Resuming their search, the police collected evidence related to methamphetamine manufacturing. In the master bedroom, they found (1) children's clothes in the dresser; (2) a methamphetamine pipe; (3) double A lithium batteries; (4) two Walgreens receipts for pseudoephedrine (the main "precursor"[10] drug for methamphetamine) dated within two minutes of each other[11]; (5) a Pyrex dish with white powder inside; (6) sandwich baggies with white powder residue; (7) a bottle with white powder labeled "caffeine" (an ingredient used as a cutting agent to increase methamphetamine volume); (8) three cell phones; (9) Department of Social and Health Services documents addressed to Penland; (10) a wallet containing Stone's identification; and (11) $240 wadded up inside a pair of jeans. IV VRP at 361, 365.

In the kitchen, the police found (1) a container with pink sludge; (2) a glass jar with pink residue on the lid and amber colored liquid inside; (3) a glass jar with white powder residue; (4) a plastic funnel with pink powder residue; (5) a Pyrex dish with pink and white powder; (6) used coffee filters; (7) a can of acetone; (8) a can labeled "lacquer thinner"; (9) a Ziploc bag with a large amount of pinkish-white powder; (10) a Ziploc bag containing a white crystal substance; (11) a digital gram scale with white powder residue; (12) a heart-shaped tin with white powder

[10] According to forensic scientist Frank Boshears, a "precursor" is something that can be converted into a controlled substance. VIII VRP at 762. Pseudoephedrine and ephedrine are common precursors to methamphetamine.

[11] According to Officer Robert Tjossem, the multiple receipts were indicative of "smurfing," which involves one person teaming up with another to purchase pseudoephedrine in excess of the amount a single person can purchase under state law. IV VRP at 366.

residue; (13) a glass pipe with vinyl tubing and white residue; (14) a coffee grinder with white powder residue; (15) a can labeled "Drano Kitchen Crystals"; (16) a respirator; (17) an empty can of starter fluid; (18) a can of brake cleaner; and (19) a brown pouch with three unrefined red pills resembling Sudafed, known to contain pseudoephedrine. IV VRP at 386, 394. In the laundry area, the police found a five-gallon bucket of labeled "methanol." IV VRP at 397. These powders and liquids later tested positive for controlled substances.[12]

After reading Penland and Stone their *Miranda*[13] rights, the officers spoke with them. Penland admitted to using methamphetamine and to selling a pipe with methamphetamine residue for $40 the week before; but she denied selling or manufacturing methamphetamine and knowing anything about an "extraction lab" in the kitchen, except for stating that, even if the police found an extraction lab, extraction was not the same as "manufacturing." II VRP at 109. When the police told Stone that he was being booked for unlawful manufacture of a controlled substance, he similarly responded, "It's not a meth lab. It's just an extraction." II VRP at 127.

An environmental health specialist inspected and determined that there were elevated levels of "volatile organic compounds" throughout all of the structures, including the house, and

[12] The lab team took samples of the powders and liquids and sent them off for testing. The Ziploc bag with ground-up pinkish-white powder was determined to contain 26.3 grams of pseudoephedrine. The powder on the coffee grinder and the residue on the used coffee filters tested positive for pseudoephedrine; several of the powder residues tested positive for either pseudoephedrine, methamphetamine, or a "reaction by-product," VIII VRP at 797; one powder tested positive for caffeine; and several of the liquids tested positive as either solvents or other chemicals used in the methamphetamine manufacturing process. The Ziploc bag with white crystalline substance tested positive for 0.7 grams of methamphetamine, and the three unrefined red pills from the brown pouch tested positive for pseudoephedrine.

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

that the "air quality was unsafe to breathe." VI VRP at 593-94. The specialist took surface samples from several items and found residual concentrations of methamphetamine that showed "higher than average contamination" "well above the state criteria . . . for mandatory cleanup." VI VRP at 638-39. These samples were consistent with methamphetamine manufacturing. The front door of the house was 965 feet from an active school bus stop.

B. Child Endangerment

When police discovered children's items in the house, they again interviewed Penland in jail after reading her *Miranda* rights a second time. Penland stated that her daughter, AN, lived "part time" in the house and "part time" elsewhere with her biological father. I VRP at 63. She admitted to "using" and to "smoking" methamphetamine, but she denied having done so front of AN. I VRP at 65. The police told Penland they needed to find AN to take her to the hospital to be examined for exposure to dangerous chemicals from the methamphetamine laboratory; Penland responded by crying and saying she did not want AN to go the hospital because she feared Child Protective Services (CPS) would take AN away from her.[14]

Penland told the police that AN's biological father had picked her up at the house the day before Penland's arrest, but she did not know where AN's father lived or have his phone number. The police learned where AN's father lived and that he had a felony warrant for his arrest, contacted CPS, drove to AN's father's house, and arrested him on the warrant. According to Officer O'Brien, AN was living in a "tin barn" without adequate living conditions; and she was

[14] Apparently, CPS had previously taken a male child away from Penland under similar circumstances.

"dirty," hungry, and "walking around in [her] pajamas" at 2:00 pm. I VRP at 68. The police took AN into "protective custody" for a medical evaluation at Mary Bridge Children's Hospital, where a CPS social worker met them. I VRP at 68.

Hospital staff conducted a "head-to-toe" examination of AN. I VRP at 47. Based on this initial examination, AN's treating physician ordered a urinalysis. The hospital staff then collected AN's urine, a portion of which it gave to police for a toxicology analysis and later tested positive for methamphetamine and amphetamine.

II. Procedure

The State charged Penland and Stone with unlawful manufacturing of a controlled substance, unlawful possession of a controlled substance with intent to deliver, and unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine, all with school-bus-stop sentencing enhancements.[15] The State also charged Penland with endangerment with a controlled substance based on AN's exposure to the methamphetamine laboratory chemicals.

A. Pretrial Motions

Penland moved to suppress the test results of AN's urine sample, arguing that the State had unconstitutionally searched AN by allowing the hospital to perform a urinalysis on her without first obtaining a warrant, a court order, or Penland's consent. The trial court denied the motion based on the community caretaking exception to the warrant requirement.

[15] The State also charged Penland and Stone with unlawful delivery of a controlled substance, but it dropped these charges before trial when its CI was unavailable to testify.

Stone moved to suppress all physical evidence, arguing that (1) the State's search warrant "complaint" did not establish probable cause for searching the outbuildings, detached garages, and vehicles[16]; and (2) the search warrant was unclear about whether police could search the "house *and* the outbuildings or just the outbuildings." CP (Stone) at 9; II VRP at 196 (emphasis added). Penland joined in this motion. The trial court denied the motion, finding a sufficient nexus among the criminal drug activity, the areas searched, and the items seized.

B. Trial

Officer William Brand testified that there were three phases in the methamphetamine manufacturing process: (1) extraction, (2) reaction, and (3) gassing. During the "extraction" phase, pseudoephedrine pills are ground up and placed into a container with an alcohol solvent and left to dissolve, leaving behind pure ephedrine. IV VRP at 336. In the "reaction" phase, the pills are combined with lithium metal and anhydrous ammonia. IV VRP at 339. And in the "gassing" phase, the "meth oil solution" from the reaction phase is combined with an acid gas to convert the methamphetamine molecules into hydrogen chloride, or a "usable meth molecule." IV VRP at 340. In Brand's experience, it was very common for methamphetamine manufacturers to perform one phase of the operation at a time.

Officer Robert Tjossem testified that (1) several items in the house were used in the second and third phases of the methamphetamine manufacturing process; (2) lithium batteries contained the "main ingredient" used in the reaction phase; (2) coffee filters and plastic funnels

[16] Most of the evidence presented at trial, however, was seized from the house bedroom and kitchen.

were used in all three phases; (3) "Drano Kitchen Crystals" and brake cleaner were commonly used in the reaction phase; and (4) acetone was commonly used at the end of the of the process to wash the crystals and to make them appear white. VI VRP at 363, 394.

Penland testified that she had cooked AN breakfast in the house kitchen on morning of April 13; but she denied having seen any controlled substances or evidence of methamphetamine manufacturing in the kitchen. She claimed that she had been in bed most of the afternoon and evening with a sore back and had awakened the next morning to the police yelling that they had a "search warrant." VIII VRP at 855.

Stone testified that (1) he had been at work all day on April 13; (2) he had returned to the house around 4:30 or 5:00 am on April 14 to find two "girls" in his kitchen, who had "irritated" him; (3) he had gotten angry and asked them to leave; and (4) he had gone to bed. VIII VRP at 898, 899. Aside from a couple "Pyrex dishes" on the kitchen counter, he claimed to have seen nothing unusual in the house. VIII at 899. He denied extracting pseudoephedrine or ephedrine and denied possessing chemicals used to manufacture methamphetamine.

C. Verdicts and Sentencing

A jury found both Penland and Stone guilty of (1) unlawful manufacturing of a controlled substance; (2) unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine; and (3) unlawful possession of a controlled substance, the lesser-included offense of unlawful possession with intent to deliver. The jury also found Penland guilty of endangerment with a controlled substance. The jury returned special verdicts on the unlawful manufacturing of a controlled substance and unlawful possession of pseudoephedrine and/or

ephedrine with intent to manufacture methamphetamine counts, finding that Penland and Stone had committed both crimes within 1,000 feet of a school bus stop.

The trial court sentenced Penland and Stone to standard-range concurrent sentences on all

counts.[17] It imposed two 24-month school bus stop sentencing enhancements on Penland's and Stone's unlawful manufacturing of a controlled substance and unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine convictions, running them consecutively to each other and consecutively the sentences for the underlying crimes. Penland and Stone appeal their convictions and sentences.

ANALYSIS

I. Sufficiency of Evidence

Penland and Stone argue that the State failed to present sufficient evidence to support their possession with intent to manufacture methamphetamine convictions because (1) the police found only three unrefined pills of pseudoephedrine in their house, and (2) there was no evidence that they had "future intent" to manufacture methamphetamine or that they had possessed an unlawful amount of pseudoephedrine beyond that which had already been used in the "extraction phase" of the methamphetamine manufacturing process.[18] We disagree.

When reviewing a challenge to the sufficiency of the evidence, we ask whether, "after viewing the evidence in the light most favorable to the State, any rational trier of fact could have

[17] Specifically, the sentencing court sentenced Penland to 68 months for unlawful manufacturing of a controlled substance, 18 months for unlawful possession of a controlled substance, 68 months for unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine, and 20 months for unlawful endangerment of a child with a controlled substance. The sentencing court sentenced Stone to standard range concurrent sentences for all counts: 68 months for unlawful manufacturing of a controlled substance, 6 months for unlawful possession of a controlled substance, and 68 months for unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine.

[18] Br. of Appellant (Penland) at 17, 19; Br. of Appellant (Stone) at 4, 7.

found the essential elements of the crime beyond a reasonable doubt." *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Moles*, 130 Wn. App. 461, 465, 123 P.3d 132 (2005). A reviewing court must also defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004) (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

To establish that Penland and Stone possessed pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine, the State needed to prove that they had possessed pseudoephedrine and/or ephedrine and that they had intended to use the pseudoephedrine and/or ephedrine to manufacture methamphetamine. RCW 69.50.440; *Moles*, 130 Wn. App. at 465. "Manufacture" includes "the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly or by *extraction* from substances of natural origin . . . or by a *combination of extraction and chemical synthesis*." Former RCW 69.50.101(p) (2008) (emphasis added). Mere possession of a controlled substance, however, is not enough to support an intent to manufacture conviction; instead, at least one "additional factor" suggestive of intent must be present. *Moles*, 130 Wn. App. at 466. A person acts with intent when he acts with the objective or purpose to accomplish a result that constitutes a crime. RCW 9A.08.010(1)(a).[19] A person who knowingly plays a role in the manufacturing process can

[19] Although the Legislature amended this statute in 2009 to add gender-neutral language, this amendment does affect our analysis here.

be guilty of manufacturing, even if someone else completes the process. *Moles*, 130 Wn. App. at 466 (citing *State v. Davis*, 117 Wn. App. 702, 708, 72 P.3d 1134 (2003)).

Penland and Stone contend that the State's evidence showed only that (1) they had possessed pseudoephedrine pills *in the past* with intent to manufacture methamphetamine; (2) they had already acted upon this intent by grinding up and refining the pseudoephedrine pills in the extraction phase; and (3) without evidence of their future intent to use the three unrefined pseudoephedrine pills from the brown pouch to manufacture methamphetamine, their convictions cannot stand. They are incorrect. The State presented sufficient evidence from which a rational trier of fact could find that Penland and Stone possessed pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine: In addition to possessing the three unrefined pseudoephedrine pills, they possessed 26.3 grams of ground up pseudoephedrine in a Ziploc bag; Washington courts have held that "[g]rinding such 'pill powder' is a *preparatory step* to the meth 'cooking' process." *State v. McPherson*, 111 Wn. App. 747, 758, 46 P.3d 284 (2002) (emphasis added) (quoting *Smith v. State*, 68 Ark. App. 106, 3 S.W.3d 712, 714 (1999)). As State witnesses testified, grinding and extraction are merely the first of *three* phases in the methamphetamine manufacturing process, which commonly proceed one phase at a time.[20]

Furthermore, Penland and Stone did not merely possess pseudoephedrine in its ground-up

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[20] Thus, even if the ground up pills were evidence that an "extraction" had already taken place, this fact would not negate the reasonable inference that Penland and Stone possessed the three unrefined pills with the intent to combine them with other pills and to manufacture them in the future and, thus, were still actively engaged in the manufacturing process when the police served their warrant.

and unrefined pill forms. They also possessed numerous other materials and chemical agents commonly used in the second and third stages of the methamphetamine manufacturing process, including coffee filters, lithium batteries, caffeine, Drano Kitchen Crystals, acetone, and brake cleaner. Each of these materials was an "additional factor" suggestive of Penland and Stone's intent to manufacture methamphetamine.[21] We hold that this evidence was sufficient to support Penland's and Stone's convictions for unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine.

II. School-Bus-Stop Sentencing Enhancements

Penland and Stone next argue that the trial court erred in computing their sentences because (1) RCW 9.94A.533(6) is ambiguous about whether their school bus stop sentencing enhancements should have run concurrently with or consecutively to each other; and (2) the rule of lenity requires us to interpret the statute to provide for concurrent enhancements. The State responds that (1) we need not reach this issue because the school bus stop sentencing enhancements should not have applied to Penland's and Stone's convictions for unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine; and (2) even properly applied, controlling case law provides that the enhancements should have

[21] Compare the relative abundance of evidence here with the paucity of evidence in *Whalen* and *Brockob*, in which we held evidence insufficient to support the defendants' unlawful possession of pseudoephedrine with intent to manufacture methamphetamine convictions based on mere possession of large amounts pseudoephedrine. *State v. Whalen*, 131 Wn. App. 58, 61, 64, 126 P.3d 55 (2005) (insufficient evidence that defendant intended to manufacture methamphetamine based on stealing seven unopened packages of nasal decongestant containing pseudoephedrine to satisfy a "marijuana debt" to a third party; no mention of methamphetamine); *State v. Brockob*, 159 Wn.2d 311, 331-32, 150 P.3d 59 (2006) (insufficient evidence where defendant stole 15 to 30 packages of Sudafed but did not posses any other items used in the methamphetamine manufacturing process).

been imposed concurrently with each other, not consecutively.

Accepting the State's concession, we hold that the sentencing court erred in applying the school bus stop enhancements to Penland's and Stone's convictions for unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine, and we remand for resentencing on these two counts. Because only one school bus sentencing enhancement remains for each defendant (on the unlawful manufacturing of a controlled substance counts), we do not address the statutory interpretation issue or whether the sentencing court should have run the sentencing enhancements consecutively to or concurrently with each other.

In order to impose a 24-month school bus stop sentencing enhancement under RCW 9.94A.533(6), the predicate crime must violate RCW 9.94A.827 or RCW 69.50.435, in addition to violating chapter 69.50 RCW. Here, however, the State did not charge Penland or Stone with any crimes or sentencing enhancements under RCW 9.94A.827. Nor does RCW 69.50.435 provide a basis for imposing such sentencing enhancement: RCW 69.50.435(1)(c) provides enhanced sentencing penalties when a defendant "violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture . . . a controlled substance listed under RCW 69.50.401 or . . . violates RCW 69.50.410 by selling for profit any controlled substance" within 1,000 feet of a school bus stop. But neither RCW

69.50.401[22] nor RCW 69.50.410[23] criminalize possession of pseudoephedrine or ephedrine with intent to manufacture methamphetamine.[24] Because unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine does not violate RCW 9.94A.827 or RCW 69.50.435, such possession does not fall within the category of crimes for which the sentencing court can impose school bus stop sentencing enhancements under RCW 9.94A.533(6). Therefore, we reverse the school bus stop enhancements on Penland's and Stone's unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine convictions, and we remand for resentencing on these two convictions.

III. SAG Issues

A. Penland

In her SAG, Penland asserts that the State violated her rights under the Fourth Amendment to the United States Constitution[25] because the search warrant allowed police to

[22] RCW 69.50.401, for example, provides that it is unlawful for any person to "manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance," which includes methamphetamine and its "salts, isomers, and salts of isomers." Neither party here has argued that any of these substances Penland and Stone possessed are a "salt, isomer, or salt of isomer" of methamphetamine, even though pseudoephedrine and ephedrine are "precursors" to methamphetamine. Other statutory provisions restrict possession of pseudoephedrine and/or ephedrine and any of their "salts or isomers or salts of isomers," indicating that pseudoephedrine and ephedrine salts, isomers, and salts of isomers are different from salts, isomers, and salts of isomers of methamphetamine. *See, e.g.*, RCW 69.50.440(1).

[23] RCW 69.50.410 criminalizes the sale of counterfeit Schedule I controlled substances, which do not include ephedrine or pseudoephedrine. *See* former RCW 69.50.204 (1992).

[24] Rather, it is RCW 69.50.440(1) that criminalizes possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine.

[25] U.S. Const. amend. IV.

search "all outbuildings and vehicles," but not the house in which she and Stone lived. SAG (Penland) at 5. She is incorrect. Generally, "[a] warrant is sufficiently particular if it identifies the place to be searched adequately enough so that the officer executing the warrant can, with reasonable care, identify the place intended." *State v. Cockrell*, 102 Wn.2d 561, 569–70, 689 P.2d 32 (1984). A perfect description is not required. *State v. Smith*, 39 Wn. App. 642, 648, 694 P.2d 660 (1984). The State's amended search warrant "commanded" the police to enter and to search the following "vehicles, persons and premises, to-wit":

> *A 1,486 square-foot single story home and detached garage(s), commonly known as 25206 96 St*[.] *E*. The house is mostly blue with a red front door and a corrugated metal roof. The Pierce County Assessor/Treasurer lists the property as parcel #0619062019 and lists Reed L. Stone as the owner. The property has 2 chain-link gates securing the driveway; there are plastic strips woven vertically through the chain-link [fence] to obscure the view onto the property . . . . The property, which is a 2.87 acre lot, is littered with outbuildings and vehicles in varying stages of decomposition; this warrant asks to search any outbuilding(s) and/or trailers(s) and/or motorhome(s) which could contain a cache of methamphetamine.

CP (Stone) at 28 (emphasis added). This description was sufficiently "particular" to identify the house as one of the areas that the police could lawfully search.

Penland also asserts that the police violated her rights under the Fourth Amendment[26] by taking AN to the hospital and allowing the hospital staff to perform a urinalysis on her without first obtaining a warrant or Penland's consent. Again, she is incorrect. Because Penland has not challenged the trial court's findings of fact from the suppression hearing, they are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Nor does she assert why she

[26] U.S. Const. amend. IV.

has standing to challenge AN's urinalysis when it did not violate Penland's own privacy rights.[27] And even if Penland had standing to assert AN's privacy rights, the urinalysis was admissible under the community caretaking function exception to the warrant requirement.[28] The record supports the trial court's conclusion that the police were acting in their community caretaking function when they took AN to the hospital for an examination and that their actions were motivated to ensure AN's welfare, not to further their criminal investigation.[29] Thus, any search and seizure of evidence that resulted from AN's urinalysis was a proper exercise of the police officers' community caretaking function, a recognized exception to the warrant requirement.

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[27] *See State v. Link*, 136 Wn. App. 685, 692, 150 P.3d 610, *review denied*, 160 Wn.2d 1025 (2007) (When a defendant seeks to suppress evidence on privacy grounds, he "has the burden to establish that the search violated his *own* privacy rights.").

[28] The community caretaking function is a recognized exception to the warrant requirement. *State v. Acrey*, 110 Wn. App. 769, 774, 45 P.3d 553 (2002), *aff'd*, 148 Wn.2d 738, 64 P.3d 594 (2003). This exception allows for the "limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance or when making routine checks on health and safety." *State v. Thompson*, 151 Wn.2d 793, 802, 92 P.3d 228 (2004).

[29] The police had discovered an active methamphetamine laboratory in the house; and Penland had admitted to using and to smoking methamphetamine and that AN had been present in the house the day before Penland's arrest. The presence of dangerous chemicals used in methamphetamine laboratories had caused the police to evacuate the house immediately for "safety concerns." II VRP at 90. Furthermore, as evidenced by Penland's and Stone's earlier arrests, the police had largely stopped their criminal investigation by the time they located AN with her father, took her into "protective custody," called CPS, and transported her to the hospital. I VRP at 68. Hospital staff examined AN outside of the police officers' presence, and AN's treating physician, not the police, ordered her urinalysis for medical diagnostic and treatment purposes. That the hospital staff also provided the police with a sample from AN's urinalysis does not negate that the police were rendering aid and taking efforts to ensure AN's safety while both of her parents were incarcerated.

B. Stone

1. Ineffective assistance

In his SAG, Stone asserts that his trial counsel was ineffective in failing (1) to request an entrapment instruction, (2) to investigate his case, and (3) to examine witnesses adequately. He is incorrect. To support a claim of ineffective assistance, a defendant must show on the record before us on appeal[30] that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced him.[31] A petitioner's failure to prove either prong of the test ends our inquiry. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). If counsel's conduct "'can be characterized as legitimate trial strategy or tactics, performance is not deficient.'"[32] For the prejudice prong, the defendant must show that "the result of the proceeding would have been different but for [his] counsel's deficient representation." *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).

To demonstrate ineffective assistance based upon counsel's failure to request a particular jury instruction, the defendant must show that (1) he was entitled to the instruction, (2) counsel's performance was deficient in failing to request it, and (3) the failure to request the instruction caused prejudice. *State v. Johnston*, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007). We have

[30] On direct appeal, we cannot consider matters outside the trial court record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

[31] *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

[32] *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009)), *adhered to in part on remand*, ___Wn. App.___, 278 P.3d 225 (2012).

previously held that an entrapment instruction is not appropriate unless the defendant "admit[s] acts which, if proved, would constitute the crime." *State v. Galisia*, 63 Wn. App. 833, 837, 822 P.2d 303 (1992), *abrogated on other grounds by State v. Trujillo*, 75 Wn. App. 913, 883 P.2d 329 (1994)). Stone did not admit manufacturing a controlled substance, possessing a controlled substance, possessing pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine, or any acts that would constitute such crimes.[33] Therefore, Stone fails to show that he was entitled to an entrapment instruction and his ineffective assistance of counsel claim on this basis fails.

Stone also asserts that his trial counsel was ineffective because (1) he did not investigate "anything beneficial" to Stone's defense, (2) the only aspect of Stone's case that his counsel investigated was the "deal the prosecution was offering," and (3) he "ignored all attempts to inform [Stone] of numerous aspects of [his] case and of the existence of numerous viable witnesses." SAG (Stone) at 11. These assertions rely on facts that are outside the trial record; therefore, we do not consider them, and Stone's ineffective assistance claim on this basis fails. *McFarland*, 127 Wn.2d at 335.

Stone further asserts that his counsel was deficient in the manner in which he called and

[33] On the contrary, Stone denied any participation in the extraction of pseudoephedrine and/or ephedrine in his kitchen, and he denied possessing the chemicals that could have been used to commit such crimes. Furthermore, although Stone asserts that the CI entrapped him by pressuring him to sell her methamphetamine, the State dropped Stone's unlawful delivery charges before trial.

Stone also bases much of his assertion on facts outside the record, which we cannot consider on direct appeal. "If a defendant wishes to raise issues . . . that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition," not a direct appeal. *McFarland*, 127 Wn.2d at 335.

examined witnesses at trial. The decision whether to call a particular witness is a matter of legitimate trial tactics. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 742, 101 P.3d 1 (2004). Courts also view cross-examination decisions as tactical because "counsel may be concerned about opening the door to damaging rebuttal or because cross examination may not provide evidence useful to the defense." *In re Pers. Restraint of Brown*, 143 Wn.2d 431, 451, 21 P.3d 687 (2001). Because Stone fails to show that his counsel's decisions in calling and examining witnesses did not involve trial strategy or tactics, his ineffective assistance of counsel claim on this basis also fails.

2. Prosecutorial misconduct

Stone next asserts that the prosecutor committed prosecutorial misconduct by making several "unsupported inflammatory, prejudicial, and misleading statements" during closing argument. SAG (Stone) at 1. Again, he is incorrect. A defendant claiming prosecutorial misconduct bears the burden of proving that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.[34] A prosecutor's improper comments are prejudicial "only where 'there is a *substantial likelihood* the misconduct affected the jury's verdict.'"[35] But where a defendant failed to object and to request a curative instruction at trial, the defendant waives his prosecutorial misconduct claim unless the comment

[34] *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008); *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006).

[35] *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

"was so flagrant [and] ill-intentioned that an instruction could not have cured the prejudice."[36]

Although Stone does not specifically identify which statements he challenges as prosecutorial misconduct, his SAG includes a "Statement of the Case" section that lists several instances where the prosecutor either legitimately referenced evidence previously admitted at trial or made proper argument to the jury based on this evidence.[37] Such statements do not amount to prosecutorial misconduct.[38] Accordingly, Stone's prosecutorial misconduct claim fails.

3. Cumulative error

Stone also appears to assert that the cumulative error doctrine requires reversal of his convictions. The cumulative error doctrine applies only when several trial errors occurred, none of which alone warrants reversal, but the combined errors effectively denied the defendant his right to a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673–74, 77 P.3d 375 (2003). The doctrine does not apply where the errors are few and have little or no effect on the trial's outcome. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Because the only

[36] *State v. Corbett*, 158 Wn. App. 576, 594, 242 P.3d 52 (2010) (citing *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995)).

[37] For example, Stone contends that the prosecutor's "most consistent misconduct" involved her "numerous inflammatory statements about what was found." SAG (Stone) at 7. Stone then lists a series of statements where the prosecutor recapped the evidence that the police discovered at the home and made arguments to the jury, such as the officers' finding (1) "'lots of coffee filters with the pink residue in them that tested positive for pseudoephedrine'"; (2) "'Finished methamphetamine[,] Item no. 10[,] a couple of plastic baggies that had some methamphetamine in it'"; (3) "'pow[d]er everywhere"; (4) "a scale with [sic] more baggies on it'"; and (5) "'the baggy of meth, .7 grams, right here the scale and more and more baggies.'" SAG (Stone) at 7 (quoting IX VRP at 944, 945, 948). Stone fails to show that such statements were improper or prejudicial.

[38] *State v. Clapp*, 67 Wn. App. 263, 274, 834 P.2d 1101 (1992), *review denied*, 121 Wn.2d 1020 (1993) ("When counsel does no more than argue facts in evidence and suggest reasonable inferences from that evidence, there is no misconduct.").

discernible error in Stone's case occurred during sentencing and, therefore, did not affect the outcome of Stone's trial, the cumulative error doctrine does not apply.

We affirm Penland's and Stone's convictions and their school-bus-stop sentence enhancements for their unlawful manufacturing a controlled substance convictions. We reverse their school-bus-stop sentence enhancements and their unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine convictions and remand for resentencing on these two counts.

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 in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Worswick, C.J.

Van Deren, J.