IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RANDALL W. MONTGOMERY, Appellant.	No. 41237-3-II UNPUBLISHED OPINION

Van Deren, J. — Randall Montgomery appeals his convictions for two counts of possession with intent to manufacture or deliver marijuana (one count with a school bus route stop enhancement), one count of possession of methamphetamine, and one count of use of drug paraphernalia. Montgomery raises numerous claims, but he primarily challenges the validity of a warrant to search his residence issued after he was observed on a police video surveillance recording at an outdoor marijuana grow operation. We uphold the search warrant, reject Montgomery's other contentions, and affirm.

FACTS

On August 12, 2007, a pair of hunters on West Valley Road in Wahkiakum County, watching for bear from a ridge, saw a white pickup truck pull over to the side of the road below and observed a man leave the truck carrying some jugs. The man took the jugs up the bank from

the road, bent over, and did something they could not see in the brush next to the road.

The man left after five minutes, but the hunters heard his car make more short stops at other places along the road. The hunters reported this suspicious activity to local authorities; and Wahkiakum County Deputy Sheriff Gary Howell met with the hunters and travelled back with them to the ridge. They showed Howell the clay bank where the man had stopped with the jugs, and Howell found two marijuana plants in the brush, one planted in the ground and the other growing in a green plastic pot. More empty green plastic pots were nearby.

Howell took the hunters away from the area for their safety and returned the next week to make a more thorough search of the area. During that search and later video surveillance, nine more plants were discovered growing in the area near Second Spur Road. On September 5, video surveillance recorded a pickup truck belonging to Montgomery pulling into the area and stopping where the largest number of marijuana plants was growing. Montgomery, who Howell knew by sight, was recorded on surveillance video as he approached and plucked parts from a marijuana plant and put them in his pants pocket. The same pickup truck that Montgomery drove to the marijuana grow was observed two days later at his home at 629 East Valley Road in Wahkiakum County.

Based on the videotape recordings and his observations, Howell sought and received a search warrant to search Montgomery's car, residence, and a described outbuilding for the clothing that Montgomery was recorded wearing and for any contraband. Howell and other officers served the search warrant on Montgomery's residence on the same day, September 7, and, at the same time, they seized evidence at the site of the outdoor grow operation. Officers seized marijuana plants with root balls that were encased in a mesh covering, a bag of Miracle-

Gro fertilizer, and green pots similar to those described in the affidavit for search warrant.

While executing the warrant at Montgomery's residence, Howell detected the odor of marijuana coming from a garden shed that had not been named on the warrant. He obtained a new warrant for the shed, and when he entered the shed he found a marijuana indoor grow operation. The search of Montgomery's residence and outbuildings yielded, inter alia, methamphetamine in a glass pipe, marijuana plants with root balls encased in peat with a mesh covering, Miracle-Gro bags, and at least one green, plastic pot similar to the one found at the outdoor site. Later, at trial, both Wahkiakum County Deputy Sheriff Jeff Fithen and Pat Carpenter, a marijuana expert from the Cowlitz County Sheriff's Office, testified that cultivating marijuana by covering the root ball in mesh is unusual.

Montgomery was not at home when the warrant was served. But he was arrested nearby while officers were serving the search warrants. When questioned, he admitted but minimized his involvement in drug activities, stating that he was only aware of two plants in the marijuana outdoor grow area and that he had only been there once in the past few months. When asked about the methamphetamine found in his bedroom during the search, he said he only used methamphetamine every few weeks. And when asked about the marijuana grow operation discovered in the shed by his house, he said it was an experiment that an unnamed friend had given him.

Police measured the distance from the grow shed at Montgomery's residence to the nearest school bus stop, finding it to be less than 330 feet away. Later, at trial, this measurement was confirmed by photogrammetry. A local school bus driver and his supervisor also testified that the school bus route stop had been established years before 2007.

The State initially charged Montgomery on September 11, 2007. The State ultimately charged Montgomery by second amended information with three counts of unlawful possession with intent to manufacture or deliver marijuana (one count with a school bus route stop enhancement), one count of unlawful possession of methamphetamine, and one count of use of drug paraphernalia.

Montgomery secured a bail bond and spent the next three years out of custody on bail. During that time, he waived speedy trial nine times and he had nine publicly appointed attorneys before his tenth attorney represented him at a jury trial on August 30, 2010. A jury convicted Montgomery of two counts of unlawful possession of marijuana with intent to manufacture or distribute (one with a school bus route stop enhancement), one count of unlawful possession of methamphetamine, and one count of use of drug paraphernalia. He timely appeals.

ANALYSIS

I. Suppression Motions

Montgomery cursorily contends that "various suppression proceedings took place over almost three years in this case," but the "written findings are so inadequate as to require reversal." Br. of Appellant at 11, 12. Montgomery misrepresents the record and this general, nonspecific claim fails.

When reviewing the trial court's denial of a suppression motion, our task is to determine whether substantial evidence supports the trial court's factual findings and whether those findings support its conclusions of law. *State v. Bliss*, 153 Wn. App. 197, 203, 222 P.3d 107 (2009). To facilitate our review, the trial court is required to enter written findings of fact and conclusions of law at the conclusion of a suppression hearing. CrR 3.6(b); *see also State v. Head*, 136 Wn.2d

619, 622–23, 964 P.2d 1187 (1998) (acknowledging that entry of written findings and conclusions is necessary for a meaningful review); *State v. Cruz*, 88 Wn. App. 905, 909, 946 P.2d 1229 (1997) (stressing consistent and firm enforcement of CrR 3.6). Although we may overlook the absence of written findings, we will only do so where the trial court clearly and comprehensively states in its oral opinion the basis of its decision. *Cruz*, 88 Wn. App. at 907–08; *see also State v. Radka*, 120 Wn. App. 43, 47–48, 83 P.3d 1038 (2004).

But Montgomery fails to cite, identify, or discuss how the trial court's findings are inadequate. While a trial court's failure to enter *any* findings and conclusions could result in actual prejudice warranting dismissal, the burden of showing such prejudice falls on the defendant. *Head*, 136 Wn.2d at 624–25.

Here, the trial court conducted several hearings addressing suppression motions and related search and seizure matters. It entered written findings and conclusions, stipulated findings, or a memorandum decision following each of the noted hearings. Montgomery's general statement that the findings are inadequate, without more, does not articulate a cognizable basis to challenge the findings, and we do not further address this general challenge.

II. Search Warrant

Montgomery next contends that the search warrant was invalid and that the convictions based on the evidence derived from it must be reversed. We disagree.

A. Affidavit in Support of Search Warrant

Montgomery first argues that the search warrant affidavit was insufficient to establish probable cause to search his residence. Relying on *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999), he contends that the affidavit did not establish the requisite nexus between criminal

activity and the item to be seized, and between the item to be seized and the place to be

searched.[1]

Probable cause for a search warrant involves an issue of law, which we review de novo. *State v. Chamberlin*, 161 Wn.2d 30, 40, 162 P.3d 389 (2007). In doing so, we give great deference to the issuing judge. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). At the suppression hearing, the trial court acts in an appellate-like capacity; its review, like ours, is limited to the four corners of the probable cause affidavit. *Neth*, 165 Wn.2d at 182.

A search warrant may issue only upon a determination of probable cause, based on facts and circumstances sufficient to establish a reasonable inference that criminal activity is occurring or that contraband exists at a certain location. *State v. Smith*, 93 Wn.2d 329, 352, 610 P.2d 869 (1980). Facts that, standing alone, would not support probable cause can do so when viewed together with other facts. *State v. Garcia*, 63 Wn. App. 868, 875, 824 P.2d 1220 (1992). The application for a search warrant must be judged in the light of common sense, resolving all doubts in favor of the warrant. *State v. Partin*, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977). Probable cause requires a nexus between (1) criminal activity and the item to be seized and (2) the item to be seized and the place to be searched. *Thein*, 138 Wn.2d at 140.

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[1] *Thein* provides:

> A search warrant may issue only upon a determination of probable cause. An application for a warrant must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate. Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched. Accordingly, "probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched."

138 Wn.2d at 140 (citations omitted) (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)).

Here, *Thein*'s nexus requirement is met. The illegal activity the affidavit identifies was unlawful possession of marijuana with intent to deliver. The relevant facts averred in the affidavit state that Montgomery's vehicle was observed driving into the area of a marijuana grow operation that was under police surveillance. Officers observed Montgomery "pulling parts off of one of the plants" and placing the same "in his left pants pocket." Clerk's Papers (CP) at 14. The affidavit described the clothes Montgomery was wearing and that "a photograph" was taken of Montgomery "in that out[]fit while tending to the plants in the marijuana grow." CP at 14. The averring officer stated, "I believe the clothes and drugs are likely to be in Montgomery's residence and/or vehicle," and that he had seen Montgomery's vehicle at Montgomery's residence. CP at 14.

The affidavit and complaint then requested that a warrant be issued to search Montgomery; his residence; a single-wide mobile home on the lot near his residence; and his vehicle for items, property, or evidence of a crime in violation of the Uniform Controlled Substances Act, chapter 69.50 RCW. Evidence items could include: growing, harvested, drying or packaged marijuana; paraphernalia for using, packaging processing and distributing marijuana and equipment used in growing marijuana; personal or other books, letters, papers, documents relating identification information relating to growing, possession, processing or distribution of marijuana; currency and financial instruments and records relating to income and expenditures of money and wealth from marijuana; items of personal property which tend to identify the person(s) in residence or occupancy of the premises being searched; computers and associated data processing equipment; and "[i]tems of clothing," describing the clothes that Montgomery was observed wearing at the outdoor grow operation. CP at 15.

Thein's first required nexus, between the alleged criminal activity and the item to be seized, is met in that the affidavit describes Montgomery tending plants at the marijuana grow operation while wearing specific items of clothing, placing parts of a marijuana plant in his clothing pocket, and requesting seizure of the described clothing in the warrant. *Thein*'s second required nexus, between the item to be seized and the place to be searched, is met in that the complaint seeks authorization to search Montgomery's residence (and another living area at his residence—a single-wide mobile home) for the described items of clothing in which he placed the marijuana. *See Thein*, 138 Wn.2d at 149 n.4.

Montgomery contends that the *Thein* court held that searching a home for clothing as evidence of a drug offense committed elsewhere is not justified. But, in fact, *Thein* distinguishes between general exploratory searches, which are improper, and searches for specifically described personal items that have allegedly been used in a crime and are likely to be kept at the suspect's residence. *Thein* explained:

> [W]e emphasize that the existence of probable cause is to be evaluated on a case-by-case basis. Thus, general rules must be applied to specific factual situations. In each case, "the facts stated, the inferences to be drawn, and the specificity required must fall within the ambit of reasonableness." General, exploratory searches are unreasonable, unauthorized, and invalid.

138 Wn.2d at 149 (citations and footnote omitted) (quoting *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975)).

In a footnote, *Thein* distinguished *State v. Herzog*, 73 Wn. App. 34, 56, 867 P.2d 648 (1994) on its facts, noting that rape victims in *Herzog* had described specific clothes of the perpetrator, and that police had obtained a warrant to search a suspect's room for the items described. 138 Wn.2d at 149 n.4. The *Thein* court observed that such evidence "connected

specifically described personal items used repeatedly in the commission of multiple crimes to the defendant." 138 Wn.2d at 149 n.4. The Court held:

> We do not find it unreasonable to infer these items were in the possession of the defendant at his home. These were personal items of continuing utility and were not inherently incriminating. Under specific circumstances it may be reasonable to infer such items will likely be kept where the person lives. *See* Wayne R. LaFave, Search and Seizure § 3.7(d), at 381-85 (3d ed. 1996) ("Where the object of the search is a weapon used in the [commission of a] crime *or clothing worn at the time of the crime*, the inference that the items are at the offender's residence is especially compelling, at least in those cases where the perpetrator is unaware that the victim has been able to identify him to police.").

Thein, 138 Wn.2d at 149 n.4 (emphasis added) (alteration in original).

Here, the evidence shows that Montgomery drove his truck to a marijuana outdoor grow operation while under video surveillance, apparently unaware of the surveillance camera. In this grow area, which spanned some distance on a remote road, officers had found empty green, plastic planting pots as well as marijuana plants in similar pots, indicative of a transplanting process for the plants from one area to another. Some of the plants also had mesh around their root area, again, an indication that a person or persons tended the marijuana plants.

On camera, Montgomery is seen driving up to and stopping by the largest cluster of marijuana plants, tending them, plucking a portion from a cultivated marijuana plant and placing it in his pants pocket. Unbeknown to Montgomery, the police secured a video recording of him in the clothing he wore during this activity around the marijuana grow operation, which provided an accurate description of the clothing in the search warrant affidavit that asked for permission to search for that clothing in Montgomery's house or truck.

It was reasonable to believe that Montgomery would have those clothes at his residence, perhaps containing the marijuana or some residue of it that would indicate that the pants had

come into contact with the marijuana as seen on the video recording. Thus, under *Thein*, 138 Wn.2d at 149 n.4, the affidavit and complaint seeking permission to search for the clothing Montgomery wore—as shown on the video recording—at Montgomery's residence showed an appropriate nexus between the item to be seized and the place to be searched. Montgomery's challenge to the original search warrant fails.

B. Staleness of Information Supporting Search Warrant

Montgomery next contends that the affidavit was stale, rendering the search warrant invalid, because the pocketed marijuana was likely used or otherwise removed by the time the search warrant was executed, three days after he was observed plucking marijuana from the outdoor grow site and placing it in his pocket. We disagree.

"Common sense is the test for staleness of information in a search warrant affidavit." *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004) (citing *State v. Petty*, 48 Wn. App. 615, 621, 740 P.2d 879 (1987)). "The information is not stale for purposes of probable cause if the facts and circumstances in the affidavit support a commonsense determination that there is continuing and contemporaneous possession of the property intended to be seized." *Maddox*, 152 Wn.2d at 506 (citing *State v. Bohannon*, 62 Wn. App. 462, 470, 814 P.2d 694 (1991)). "Reviewing courts are required to give great weight to a magistrate's determination related to probable cause and all doubts are to be resolved in favor of the warrant." *State v. Chenoweth*, 127 Wn. App. 444, 455, 111 P.3d 1217 (2005), *aff'd*, 160 Wn.2d 454, 158 P.3d 595 (2007).

Again, Montgomery was unaware that he had been observed putting marijuana into his pants pocket at the grow site. It is reasonable and likely that he retained his clothing at his residence during the time period in question. It is also just as likely that even if he had used or

disposed of the marijuana during this short time period that trace elements could still be found in the pants. Resolving doubts in favor of the warrant, we reject Montgomery's staleness argument.

C. Exaggeration in Search Warrant Affidavit

Montgomery also contends, without citation to authority, that the affidavit exaggerated the evidence. This contention also fails.

First, we need not address the issue as Montgomery cites no authority. Contentions of error not supported by citation to authority will not be considered. *Krause v. McIntosh*, 17 Wn. App. 297, 304, 562 P.2d 662 (1977). We briefly address this issue in the interest of thoroughness.

The affidavit states that Montgomery was observed and recorded "tending to the plants in the marijuana grow." CP at 14. At a *Franks*[2] hearing, the trial court observed the video surveillance recording that the averring officer viewed and ruled that the recording showed "a strong indication that [Montgomery was] tending more than one plant." Report of Proceedings (RP) (May, 8, 2008) at 33. Montgomery fails to show that the affidavit exaggerated the evidence relied upon in seeking issuance of a search warrant.

D. *Franks* Hearing

Montgomery next contends that the trial court improperly considered the video recording at a *Franks* hearing, evidence that was beyond the four corners of the affidavit used to determine probable cause for issuance of the initial search warrant. We again disagree.

The trial court held a *Franks* hearing at Montgomery's request. At the *Franks* hearing, after much discussion by the parties of the video recording, defense counsel moved for its admission as evidence the issuing magistrate should have viewed. The trial court then viewed the same video recording that the averring officer viewed. Montgomery now alleges that the trial

[2] *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

court improperly considered that video recording as it was not before the magistrate who found probable cause and issued the search warrant. But Montgomery misinterprets the record both with regard to how the hearing came about and why the trial court viewed the video recording.

Montgomery contends that "[t]his Franks proceeding was entirely at the behest of the court." Br. of Appellant at 21. He also claims that the trial court erred in viewing the video recording taken at the scene of the grow operation. These assertions are incorrect.

Under *Franks*, where the defendant makes a substantial preliminary showing that the affiant in the warrant affidavit included a false statement knowingly and intentionally, or with reckless disregard for the truth, and that the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment of the United States Constitution requires that a hearing be held at the defendant's request. *See State v. Garrison*, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992) (discussing *Franks*).

"The *Franks* test for material misrepresentations applies to allegations of material omissions." *Garrison*, 118 Wn.2d at 872. The party challenging the search warrant affidavit must make allegations of deliberate falsehoods or deliberate omissions or of a reckless disregard of the truth, and the allegations must be accompanied by an offer of proof; mere allegations of negligence or innocent mistake are insufficient. *Franks*, 438 U.S. at 171; *Garrison*, 118 Wn.2d at 872; *State v. Seagull*, 95 Wn.2d 898, 908, 632 P.2d 44 (1981). "If these requirements are not met the inquiry ends. If these requirements are met, and the false representation or omitted material is relevant to establishment of probable cause, the affidavit must be examined." *Garrison*, 118 Wn.2d at 873.

> If relevant false representations are the basis of attack, they are set aside. If it is a matter of deliberate or reckless omission, those omitted matters are considered as

> part of the affidavit. If the affidavit with the matter deleted or inserted, as appropriate, remains sufficient to support a finding of probable cause, the suppression motion fails and no hearing is required. But if the altered content is insufficient, defendant is entitled to an evidentiary hearing.

Garrison, 118 Wn.2d at 873; *see also Franks*, 438 U.S. at 171–72.

At a May 5, 2008, hearing on a new defense counsel's motion for reconsideration of the court's prior order denying a defense motion to suppress, both counsel repeatedly referred to the video recording that the averring officer viewed as evidence of Montgomery's participation in criminal activity. The trial court noted that it could only consider material within the four corners of the affidavit. Both counsel acknowledged as much, but also repeatedly referred to the video recording.

The trial court indicated that the four corners of the affidavit supported the magistrate's issuance of the search warrant. Defense counsel argued that the affidavit did not explain what the affiant meant by "tending" the marijuana plants and that the video recording did not show Montgomery "tending" the marijuana plants. RP (May 5, 2008) at 26, 28, 37 (some emphasis omitted). At one point defense counsel stated, "[A]s an officer of the Court, I can tell you I've viewed this videotape. . . . There's no tending." RP (May 5, 2008) at 37.

The trial court noted it could not consider the video recording absent a motion to have it admitted as information that should have been revealed to the issuing magistrate. Defense counsel then moved to admit the video recording into evidence on the basis that it was something that should have been disclosed to the issuing magistrate because the averring officer's description of Montgomery's activities was not accurate. The trial court continued the matter to allow the parties to brief the issue and to further argue the matter at the next hearing.

At the subsequent hearing, defense counsel argued that there was an adequate preliminary showing justifying a *Franks* hearing. The trial court proceeded with a *Franks* hearing, viewing the video recording that defense counsel argued did not show Montgomery tending marijuana plants. The trial court ruled that the video recording did not show that the averring officer made any false or reckless statements on the affidavit. The record shows that the trial court properly considered the video recording for purposes of the *Franks* hearing and that it did not improperly rely on it as a basis for affirming the warrant issuance in the first instance by considering matters outside the affidavit. Thus, all of Montgomery's challenges to the validity of the search warrant fail.

III. Sufficiency of the Evidence of Outdoor Grow Operation

Montgomery contends that the evidence was insufficient to support his conviction for count II, unlawful possession of marijuana with intent to manufacture or deliver, arising from the main outdoor grow operation.[3] We disagree.

Sufficient evidence exists to support a conviction if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970, *abrogated in part on other grounds by United States v. Crawford*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). A defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. *Thomas*, 150 Wn.2d at 874. We defer to the fact-finder on issues of witness credibility, conflicting testimony, and

[3] Montgomery's brief asserts insufficient evidence regarding counts I & II. But the jury acquitted Montgomery on count I, which, as instructed, referred to the two marijuana plants on the clay bank.

persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874–75.

Count II was based on the 11 marijuana plants near Second Spur Road, the main outdoor grow operation. Montgomery reiterates his argument that the evidence in the woods was insufficient to support a search of his residence and the shed. He argues that the evidence from the residence and shed was fruit of the poisonous tree and inadmissible for any purpose. Thus, he contends, without the evidence from the residence and the shed, that the remaining evidence from the woods (presumably the video recording of him plucking a piece from a marijuana plant and placing it in his pocket) supports only a single charge of simple possession of less than 40 grams.

But, as we discussed above, the trial court properly denied Montgomery's motion to suppress the evidence from Montgomery's residence and the shed. The evidence together showed that Montgomery had a grow operation in which he grew marijuana plants in his shed, transferred them to green pots and transplanted them outside near Second Spur Road. The green plastic pots found in his shed and at the outside grow site, his distinct cultivation methods using a mesh net around the root ball, and his observed presence at the site tending the outdoor grow operation constituted sufficient evidence to support his conviction on the charge of unlawful possession of marijuana with intent to manufacture or deliver on count II. Montgomery does not convincingly argue otherwise.

IV. Admission of Montgomery's Post-*Miranda* Statements

Montgomery also contends that admission of his post *Miranda*[4] warning statements to police after his arrest, which followed the execution of the search warrant, was improper. We disagree.

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

Following his arrest and the *Miranda* warnings the police gave him, Montgomery admitted to police that he had been in the woods in the grow operation area and that he occasionally used methamphetamine. He now contends that his statements should have been suppressed as fruit of the poisonous tree because those statements to police would not have occurred but for his arrest. The arrest would not have occurred but for the search of his residence. The residence search was performed under an invalid search warrant issued without probable cause. As we discussed above, probable cause supported the search warrant and Montgomery's assertions to the contrary fail.

V. Identity and Statements of Hunters

Montgomery further contends that the trial court erred in failing to disclose the identity of the hunters who alerted police to suspicious activity in the outdoor grow area. We disagree.

Generally, the State need not disclose the identity of individuals who report criminal activity to police. *Roviaro v. United States*, 353 U.S. 53, 59, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957); *State v. Thetford*, 109 Wn.2d 392, 395–396, 745 P.2d 496 (1987). RCW 5.60.060(5) recognizes this general rule: "A public officer shall not be examined as a witness as to communications made to him or her in official confidence, when the public interest would suffer by the disclosure." CrR 4.7(f)(2) also states, in relevant part, that "[d]isclosure of an informant's identity shall not be required where the informant's identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant."

Our Supreme Court has not clearly stated whether a defendant's right to learn an informant's identity in some cases derives from the federal or state constitution, although it has determined that a defendant does not have a "*constitutional* right to disclosure" of an informant's

identity when the informant "supplied information relating *only* to probable cause, but not relevant to the issue of guilt or innocence." *State v. Casal*, 103 Wn.2d 812, 816, 699 P.2d 1234 (1985).

Montgomery further contends that if he could have questioned the hunters, such questioning might have revealed more information about other people who might have tended the marijuana grow operation. But this is merely speculative. *See State v. Blackwell*, 120 Wn.2d 822, 828, 845 P.2d 1017 (1993) (mere possibility that an item of undisclosed evidence might have helped the defense or might have affected the outcome of the trial does not establish materiality in the constitutional sense). Moreover, the hunters merely informed the police of suspicious activity in the area that led to the police discovering an outdoor marijuana grow operation and further police investigation. The trial court did not err in refusing to disclose the hunters' identities upon Montgomery's request.

Montgomery also contends that the hunters' statements to police were testimonial under *Crawford*, 541 U.S. at 54, and that the failure to exclude the statements from the trial was reversible error. But Montgomery admits that defense counsel made a "strategic decision" to not challenge the officers' reference to hearsay from the hunters so that he could argue in closing argument that the hunters' statements were actually exculpatory. Br. of Appellant at 33 n.13. In doing so, Montgomery waived his confrontation challenge. *State v. Dahl*, 139 Wn.2d 678, 687 n.2, 990 P.2d 396 (1999) (defendant's failure to object to hearsay and his own use of the hearsay during argument constitutes a waiver of any right of confrontation and cross-examination).

VI. Speedy Trial

Montgomery next argues that the trial court violated his constitutional speedy trial right. Again, this argument fails.[5]

Washington Constitution article I, section 22[6] requires the same analysis as the federal Sixth Amendment[7] and does not afford a defendant greater speedy trial rights. *State v. Iniguez*, 167 Wn.2d 273, 290, 217 P.3d 768 (2009). When a defendant's constitutional speedy trial right is violated, the remedy is to dismiss the charges with prejudice. *Iniguez*, 167 Wn.2d at 282. The constitutional right to a speedy trial is not violated by passage of a fixed time; it is violated by expiration of a reasonable time. *State v. Monson*, 84 Wn. App. 703, 711, 929 P.2d 1186 (1997).

To determine whether a delay in bringing a defendant to trial impairs the constitutional right to a speedy trial, courts examine the four factors in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). *Iniguez*, 167 Wn.2d at 282–84. As a threshold matter, however, a defendant must show that the length of delay "crossed a line from ordinary to presumptively prejudicial." *Iniguez*, 167 Wn.2d at 283. Here, the three year delay could be presumptively prejudicial, although a close examination of the record shows that Montgomery

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[5] Montgomery does not argue a court rule based speedy trial challenge. *See* CrR 3.3. And he does not argue that the trial court erred in its continuance rulings under CrR 3.3. CrR 3.3(d)(3) requires a party who objects to a trial setting on speedy trial grounds to file a motion for a new date within 10 days of the trial setting. Failure to do so precludes the right to object later. Montgomery filed no such motions.

[6] Article I, section 22 of the Washington Constitution provides in part, "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial." *See also State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009).

[7] The Sixth Amendment provides in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. Amend. VI. *See also Iniguez*, 167 Wn.2d at 282.

waived speedy trial nine times and changed defense attorneys repeatedly, until the tenth defense attorney tried the case. In this case, we conclude that the trial court did not violate Montgomery's Sixth Amendment right to a speedy trial.

When a delay is presumptively prejudicial, we determine whether a constitutional violation occurred by examining: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. *Iniguez*, 167 Wn.2d at 283–84; *see also Barker*, 407 U.S. at 530. None of the factors alone is necessary or sufficient. *Iniguez*, 167 Wn.2d at 283 (citing *Barker*, 407 U.S. at 533).

First, we consider "'the extent to which the delay stretches beyond the bare minimum required to trigger' the inquiry." *Iniguez*, 167 Wn.2d at 293 (quoting *Doggett v. United States*, 505 U.S. 647, 652, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992)). Montgomery was out of custody during the entire three year pendency of his case. Although this is a long time, much of that time was due to the defense's nine continuances and eleven motions. Where the defendant asks for the delay or agrees to the delay, the defendant is deemed to have waived his speedy trial rights as long as the waiver is knowing and voluntary. *Iniguez*, 167 Wn.2d at 284 (citing *Barker*, 407 U.S. at 529). Montgomery does not argue that his requests for continuances were not knowing or voluntary or that he disagreed with the delays his requests for continuances caused. Under these circumstances, the delay was not necessarily undue, thus, the first factor does not indicate an abrogation of Montgomery's right to speedy trial and this factor does not weigh against the State. *Iniguez*, 167 Wn.2d at 294.

Under the second factor, we look to each party's responsibilities for the delay and assign weights to those reasons. *Iniguez*, 167 Wn.2d at 294. As noted, the defense waived speedy trial

nine times, and the State sought only one continuance. This factor does not indicate that the trial court impaired Montgomery's right to speedy trial and does not weigh against the State.

The third factor is a consideration of the extent to which a defendant asserts his speedy trial right. *Iniguez*, 167 Wn.2d at 294–95. Montgomery objected to only one continuance within the speedy trial period, one the State sought on March 17, 2009, for good cause based on a conflict with a witness's availability. This factor does not weigh against the State.

Under the fourth and final factor, we examine whether prejudice resulted from the delay. *Iniguez*, 167 Wn.2d at 295. We assess prejudice in light of the interests the right to speedy trial protects: (1) preventing oppressive pretrial incarceration, (2) minimizing the defendant's anxiety and worry, and (3) limiting impairment to the defense. *Iniguez*, 167 Wn.2d at 295. A defendant makes a stronger case for a speedy trial violation if he can demonstrate prejudice. *Iniguez*, 167 Wn.2d at 295.

Montgomery does not articulate any actual prejudice. He was out of custody during the three year period, and he has not demonstrated prejudice to his ability to present his defense or to address weaknesses in the State's case when the matter finally reached trial. The trial court granted each continuance to accommodate trial preparation and scheduling conflicts.

Considering the totality of the circumstances, we hold that Montgomery suffered no violation of his federal or state constitutional right to a speedy trial that would justify dismissal of the charges with prejudice. The trial court granted each continuance for good reason and Montgomery objected only to the State's single request out of the ten continuances that extended the trial date in this matter to three years after it was charged. In doing so, it accommodated the parties' scheduling conflicts and facilitated trial preparation to secure Montgomery's

constitutional rights.

VII. Substitution of Counsel

Montgomery also argues that the trial court erred in permitting his counsel to withdraw and substituting new counsel on numerous occasions. We disagree.

Montgomery complains that the trial court should have not permitted so many of his counsel to withdraw, causing substitution of his defense counsel and delays in the trial. We review a trial court's ruling on an attorney's motion to withdraw or a motion to substitute counsel for abuse of discretion. *See State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004); *State v. Hegge*, 53 Wn. App. 345, 350, 766 P.2d 1127 (1989). The trial court must consider the following factors when deciding to grant or deny a motion to substitute counsel: (1) the reasons given for dissatisfaction with continuing with present counsel, (2) the trial court's own evaluation of counsel's performance, and (3) the effect of any substitution on the scheduled proceedings. *State v. Stenson*, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997).

The record shows numerous examples of Montgomery's defense counsel withdrawing for cause, which reasons Montgomery does not challenge. Montgomery had a total of 10 publicly appointed defense attorneys before this case got to trial. As the trial court noted at sentencing, "While there was a substantial amount of delay in [coming to trial], most of it was occasioned by the fact that the Defendant had a difficult time retaining—or continuing to have the same attorney and there was a need to replace the attorney multiple times." RP (Sept. 27, 2010) at 16. The record demonstrates that much of the delay was of Montgomery's own doing. He fails to show how the trial court abused its discretion in granting withdrawal of his counsel and substituting new counsel to represent him. This claim fails.

VIII. Prosecutorial Vindictiveness

Montgomery also contends that he was penalized by the prosecutor for exercising his right to a jury trial. We disagree.

Montgomery argues that the prosecutor committed misconduct by conditioning the possibility of release on appeal on his entering a plea and foregoing a jury trial. Citing *State v. Korum*, 157 Wn.2d 614, 627, 141 P.3d 13 (2006), he contends that the prosecutor's conduct is vindictive and thus, improper. *Korum* held that the prosecutor's decision to add charges after defendant withdrew his plea agreement was within the prosecutor's discretion. 157 Wn.2d at 627. Moreover, a defendant has no right to release pending appeal. *State v. Cole*, 90 Wn. App. 445, 447, 949 P.2d 841 (1998). Having rejected the prosecutor's plea offer, Montgomery cannot now complain that he is not receiving the benefits of that plea deal. His assertion of prosecutorial vindictiveness fails.

IX. School Bus Route Stop Sentencing Enhancement

Montgomery further contends that the evidence is insufficient to support the school bus route stop sentence enhancement. We also disagree with this assertion.

RCW 69.50.435(1)(c) provides a sentence enhancement for any person who manufactures, sells, delivers or possesses with intent to manufacture, sell, or deliver a controlled substance "[w]ithin one thousand feet of a school bus route stop designated by the school district." Montgomery contends that because the local school bus route stops are redesignated each school year, no official stop existed in the street at the front of his home when the search warrant was executed on September 7, 2007. But taking the evidence in the light most favorable to the State, the evidence showed that a school bus route stop had existed within 340 feet of

Montgomery's shed since 1999.

Montgomery also argues that the school bus route stop enhancement provision is unconstitutional as applied. He relies on *United States v. Coates*, 739 F.Supp. 146 (S.D.N.Y. 1990), but this case does not assist him. The *Coates* court held that the federal schoolhouse enhancement provision did not apply to defendants who were arrested carrying cocaine within 1,000 feet of a business school while defendants sat on a train that had stopped at the train station. "The statute cannot be meant to reach the circumstance of [defendants'] presence, undoubtedly unknowing, within a 1,000 feet of a school while ensconced in a railway car." *Coates*, 739 F.Supp. at 153.

There is no similar overreaching here. The unknowing[8] *and transient* quality of the defendants in *Coates*, who were riding public transit to Maryland is missing. The school bus route stop in front of Montgomery's house had been in existence since 1999, and he clearly knew about it since his daughter used it. Also, the grow operation in Montgomery's shed had much more permanency in relation to the school bus route stop than men carrying cocaine on their persons while travelling. *Coates*, 739 F.Supp. at 153. Application of the enhancement statute here meets the purpose of such enactments to create drug free zones where children are likely to congregate. *See State v. Coria*, 120 Wn.2d 156, 165–66, 839 P.2d 890 (1992); *Coates*, 739 F.Supp. at 152–53. Montgomery's assertion of constitutional infirmity fails.

X. Prosecutorial misconduct

Montgomery also argues that the prosecutor committed misconduct when arguing the meaning of reasonable doubt in closing argument. This argument also fails.

[8] Knowledge of the proximity of the school zone is not a requirement. *State v. Coria*, 120 Wn.2d 156, 165, 839 P.2d 890 (1992).

A defendant claiming prosecutorial misconduct bears the heavy burden of demonstrating that the conduct was improper and prejudicial. *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). An appellate court will reverse the conviction only if "there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict." *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991). But defense counsel's failure to object to prosecutorial misconduct constitutes waiver on appeal unless the misconduct is "'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice'" incurable by a jury instruction. *Gregory*, 158 Wn.2d at 841 (quoting *Stenson*, 132 Wn.2d at 719).

Here, the prosecutor said, "If you feel it in your gut that Mr. Montgomery is guilty of the charge, the State would submit that's the abiding belief standard." RP at 467–68. The defense did not object. This was a matter that could have been corrected by an appropriate objection and instruction. Indeed, the jury was instructed that:

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP at 231. The jury was also instructed on reasonable doubt:

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP at 234. "We presume that juries follow all instructions given." *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Montgomery's assertion of prosecutorial misconduct fails.

XI. Cumulative Error

Finally, Montgomery contends that cumulative error warrants reversal. This argument fails in light of our holdings that his other claims of error or abuse of discretion fail.

The cumulative error doctrine applies only when several errors occurred, which, standing alone, may not be sufficient to justify a reversal but, when combined together, may deny a defendant a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673, 77 P.3d 375 (2003). Because Montgomery has identified no errors, the cumulative error doctrine does not apply. *Hodges*, 118 Wn. App. at 674.

We affirm.

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

Van Deren, J.

We concur:

Worswick, A.C.J.

Johanson, J.