Supreme Court No. 96849-7
Court of Appeals, Division Two No. 50327-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THEOTIS LENDELL MOORE,

Petitioner.

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

Theotis Moore, Petitioner in this Court and Appellant in the Court of Appeals, asks this Court to accept review of the decision designated in Part II.

II. DECISION FOR REVIEW

Petitioner seeks review of the attached decision by the Court of Appeals filed on January 15, 2019 which affirms Mr. Moore's convictions. Appendix A.

III. ISSUE PRESENTED FOR REVIEW

A. Was trial counsel's performance deficient when she failed to move for suppression of evidence? Should counsel have challenged the legality of the search warrant for Mr. Moore's home? Did the search warrant lack probable cause? Did trial counsel's deficient performance prejudice Mr. Moore and undermine confidence in the outcome of the trial?

B. Was sufficient evidence presented to support the firearm enhancements for counts I and II? Did the State present sufficient evidence that Mr. Moore was armed during the commission of these crimes? Could a rational trier of fact have found the firearm in Mr. Moore's bedroom was easily accessible and readily available for use either offensively or defensively?

IV. WHY REVIEW SHOULD BE GRANTED

This Court should grant review in this case under RAP 13.4(b) (3) and (4). Whether Mr. Moore received effective assistance of counsel and whether sufficient evidence was presented to support the firearm enhancements for counts I and II both involve a significant question of law under the constitution of the State of Washington and of the United States. Additionally, these matters involve issues of substantial public interest applicable to other cases and should be decided by means of a published decision. This Court should accept review to address these issues.

V. STATEMENT OF THE CASE

A. Procedural History

On August 19, 2016, Mr. Moore was charged in Pierce County Superior Court No. 16-1-03352-2 with unlawful possession of oxycodone with intent to deliver (Count I), unlawful possession of methamphetamine with intent to deliver (Count II), unlawful possession of a firearm in the first degree (Count III) and unlawful use of drug paraphernalia (Count IV). CP 1-2. During pretrial motions, the State dismissed Count IV. RP 5[1]. Trial commenced in this matter on February 7, 2017. CP 115. The jury returned verdicts on February 14, 2017 finding Mr. Moore guilty of

[1] The record in this case includes six volumes of verbatim reports. All volumes are consecutively numbered. Accordingly, this brief only refers to page numbers.

unlawful possession of oxycodone with the intent to deliver with a firearm enhancement, unlawful possession of methamphetamine with a firearm enhancement and unlawful possession of a firearm in the first degree. CP 108-13; RP 365-66.

A sentencing hearing was held on March 17, 2017. CP 122-34; RP 374-86. Mr. Moore filed a timely notice of appeal on March 23, 2017. CP 142-58. After considering the briefing of the parties, the Court of Appeals affirmed his convictions on January 15, 2019. Appendix A.

B. Trial

Deputy Jesse Hotz was the first witness to testify during the State's case-in-chief. RP 78. He obtained a search warrant to search Mr. Moore's person, his apartment and his vehicle. RP 80. The search warrant was served on August 18, 2016. RP 81. Melissa Scanlan testified she and Mr. Moore were in bed when the search warrant was served. RP 148. Officers woke them up. *Id.*

The deputy spoke with Mr. Moore outside while officers searched his home. RP 82. Deputy Hotz testified Mr. Moore denied "distributing oxycodone or pills, controlled substances." RP 90. Mr. Moore also denied having any firearms when asked.

> I then asked, because even though I am new to the Special Investigations Narcotics unit, based on my experience of being a deputy for the past 15 years, I then asked him about guns, cash and

> where the drugs are at because I know, based off my experience and training, most drug dealers will have firearms to protect their profits, to protect themselves from getting ripped off, from robbery and, unfortunately to protect themselves from police intervention. He denied having any firearms.

RP 90. Mr. Moore told the deputy he had prescription medications because "he had been involved in some collisions." RP 97. Mr. Moore was prescribed oxycodone and Flexeril. RP 98. According to Deputy Hotz, Mr. Moore admitted to giving some of his pills to another person. RP 98.

Deputy Hotz testified he conducted surveillance on Mr. Moore's home as part of his investigation. RP 127-28. He did not observe activity that would indicate Mr. Moore was dealing out of his apartment. RP 128. Deputy Hotz testified surveillance was also done on Mr. Moore's car, "[t]he black Cadillac Escalade." *Id.* Mr. Moore was seen making trips to parking lots to meet up with somebody. He would return to his apartment afterwards. *Id.* Deputy Hotz admitted that when he followed Mr. Moore to parking lots, he did not have a clear view of what Mr. Moore was doing while he spoke with the other person. RP 129. The deputy did not see an exchange of money or controlled substances. *Id.*

Deputy Serio Madrigal-Mendoza also testified during the State's case-in-chief. RP 187. He assisted in searching Mr. Moore's home by searching the master bedroom. RP 188. The deputy testified he found a

digital scale either on top of the bedroom dresser or in a drawer of the dresser. RP 192. He also found money "in a sock and the pocket of a pair of pants in the top left drawer of the dresser in the master bedroom." RP 193. In the same drawer as the money, the deputy found "[t]wo boxes of .45 ammunition and then one loaded magazine with .45 ammunition in it." RP 195. In the dresser drawer, the deputy also found what was later determined to be methamphetamine. RP 196-97. The methamphetamine was in "a little sandwich Saran wrap type of packaging." RP 198. Next to the dresser, the deputy found a jar containing small "one-by-one baggies." *Id.* It was down near the floor. RP 199.

Deputy Mark Gosling testified he also assisted in searching the master bedroom of Mr. Moore's apartment. RP 212. He seized a "black flip phone found on the nightstand beside the bed in the master bedroom." RP 214. He found another phone in the top drawer of the nightstand. RP 215. Also in the top drawer of the nightstand, Deputy Gosling found "numerous empty prescription bottles, one with a label intact showing its for oxycodone in the name of Theotis Moore[.]" RP 217-18.

The deputy testified a "working digital gram scale was found in the drawer of the nightstand." RP 219. He also seized $437 in cash "found in the front right pocket of jeans. They were found on the floor that day." RP 221. A wallet "containing ID in the name of Theotis Moore" was

found in the back pocket of the jeans. RP 222. In the front pocket of the jeans, the deputy found "six 10 milligram, oxycodone, K56 pills, and three 15 milligram oxycodone, A214 pills in a prescription bottle, and 14 30 milligram oxycodone, A215, in a separate prescription bottle." RP 223-24.

On a shelf in the master bedroom closet a "Walther PPK semiauto pistol" was found. RP 225. The firearm was unloaded. RP 229. Deputy Gosling testified there were no bullets in the magazine or chamber of the gun when it was found. RP 232. The firearm was admitted as State's Exhibit 18. RP 229. Robert Scott Creek testified he works in the forensic services unit of the Pierce County Sheriff's Office. RP 255. He identified the firearm as a "Walther PPK. It's a 7.65 millimeter, which translates to a .32 caliber in the U.S." RP 259.

The defense called Douglas Hyland as its only witness. RP 282. Mr. Hyland testified Mr. Moore let him spend the night at his home occasionally in July and August of 2016. RP 284-85. "I slept on the couch. It was just a one bedroom apartment, so me and my son slept on the couch. I kept my belongings in his room at that time." RP 286. Mr. Hyland testified he was at Mr. Moore's home on August 13, 2016. RP 285.

> I was working on the food truck and the kids were playing in the car, in my car, and that's where the pistol was. So as soon as I seen that I went and grabbed it, had it on me for a second, but kind of hard to work with a pistol on you when you're crawling underneath motor homes, stuff like that. *** I went inside, placed it in the closet. My belongings are on the bottom, and I placed it on the shelf up above underneath some clothes.

RP 287. His plan was to stay the night at Mr. Moore's home but "we did not stay the night there. Later that night my sister called me and she had car issues, so we went out and saved her, me and my son, and ended up staying with her that night." *Id.* Mr. Hyland did not take his belongings with him when he went to help his sister. "I had every intention on coming back." *Id.* Mr. Hyland testified he did not tell Mr. Moore he put the firearm in his closet. RP 288. "I didn't think of it. I was just thinking that it was the safest thing at the time and the best place for it at the moment." *Id.* Mr. Hyland identified State's Exhibit 18 as his firearm. RP 289.

VI. ARGUMENT & AUTHORITY

A. MR. MOORE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO CHALLENGE THE SEARCH OF MR. MOORE'S HOME BECAUSE THE WARRANT LACKED PROBABLE CAUSE.

A defendant is guaranteed the right to effective assistance of counsel. U.S. Amend. 6 & 14; Wash. Const. Art. 1 Sect. 22. Courts presume counsel's representation was effective. *State v. McFarland*, 127

Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). "There is a strong presumption that counsel has rendered adequate assistance and has made all significant decisions by exercising reasonable professional judgment." *State v. Bauer*, 98 Wn. App. 870, 878, 991 P.2d 668 (2000).

> To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d at 334-35; *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052 (1984). "Competency of counsel is determined based upon the entire record below." *State v. McFarland*, 127 Wn.2d at 335 (*citing State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)).

Trial counsel's failure to properly execute a trial strategy may constitute ineffective assistance of counsel. *State v. Horton*, 116 Wn. App. 909, 68 P.3d 1145 (2003). This includes the failure to object to the admission of impermissible evidence.

> [W]here the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the

> defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, (2) that an objection to the evidence would likely have been sustained, and (3) that the result of the trial would have been different had the evidence not been admitted.

State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (internal citations omitted). "Failure to bring a plausible motion to suppress is deemed ineffective if it appears that a motion would likely have been successful if brought." *State v. Meckelson*, 133 Wn. App. 431, 436, 135 P.3d 991 (2006).

a. Trial Counsel's Failure to Move for Suppression of Evidence Constituted Deficient Performance.

The warrant authorizing the search of Mr. Moore's home was not supported by probable cause. There is no fathomable reason why trial counsel would strategically decline to raise a dispositive motion. All the evidence used and admitted by the State to support its charges against Mr. Moore was obtained during the search of his home. Had trial counsel challenged the legality of the warrant in this case, the trial court likely would have granted the motion. Such a ruling would have resulted in suppression of all evidence against Mr. Moore.

"Constitutional protections of privacy are strongest in the home." *State v. Ruem*, 179 Wn.2d 195, 200, 313 P.3d 1156 (2013). A person's home receives heightened constitutional protection. *State v. Young*, 123

Wn.2d 173, 185, 867 P.2d 593 (1994). "In no area is a citizen more entitled to his privacy then in his or her home." *Id.*

Both the state and federal constitutions prohibit unreasonable searches and seizures. The Fourth Amendment to the United States Constitution guarantees the right of the people to be secure in their persons, homes, papers, and effects against unreasonable searches and seizures. The due process clause of the Fourteenth Amendment extends this right to protect against intrusions by state governments. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1960). The federal constitution, however, only establishes the *minimum* level of protection for individual rights. *State v. Chrisman*, 100 Wn.2d 814, 817, 676 P.2d 419 (1984).

"It is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment." *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). The Washington Constitution has consistently provided greater protection of individual rights than its federal counterpart. *See State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999); *State v. Ferrier*, 136 Wn.2d 103, 111, 960 P.2d 927 (1998); *State v. Hendrickson*, 129 Wn.2d 61, 69 n.1, 917 P.2d 563 (1996); *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994); *State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (l984). Indeed, the scope of the protections offered by article I, section 7 is "not limited to

subjective expectations of privacy but, more broadly, protects 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.'" *Parker*, 139 Wn.2d at 494 (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)).

A search warrant may issue only upon a showing of probable cause to believe that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (*citing State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995)); *State v. Vickers*, 148 Wn.2d 91, 108-09, 59 P.3d 58 (2002). To justify issuance of a search warrant, the affidavit must establish "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." *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997) (citing Wayne R. LaFave, *Search and Seizure* § 3.7(d), at 372 (3d ed. 1996)). Accordingly, the warrant application must identify specific facts and circumstances from which the reviewing magistrate can draw the required inference that evidence of a crime will be found in the premises to be searched. *State v. Thein*, 138 Wn.2d 133, 147, 977 P.2d 582 (1999). The affidavit must be based upon more than mere suspicion or personal belief that evidence of the crime will be found at the place to be searched. *State v. Jackson*, 150 Wn.2d 251, 76 P.3d 217 (2003). If the affidavit contains none of the underlying

facts or circumstances from which the magistrate can find probable cause and is no more than a declaration of suspicion and belief, it is legally insufficient. *State v. Patterson*, 83 Wn.2d 49, 52, 515 P.2d 496, 498 (1973) (*citing Nathanson v. United States*, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159 (1933)). "Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law." *State v. Thein*, 138 Wn.2d 133, 147, 977 P.2d 582 (1999).

In this case, the affidavit for the search warrant failed to establish the requisite nexus between criminal activity and Mr. Moore's home. While Deputy Hotz's affidavit contained facts regarding alleged drug dealing by Mr. Moore including that he was observed dealing drugs out of his black Cadillac Escalade, there are insufficient facts linking illegal activity to his home. CP 163-166.

The Court of Appeals relied upon *State v. G.M.V.*, 135 Wn. App. 366, 144 P.3d 358 (2006), in holding probable cause supported the warrant to search Mr. Moore's apartment. "Moore drove from his apartment to a location where he sold controlled substances to the CI. This means that the controlled substances were in Moore's possession when he left his apartment. Therefore, it is reasonable to infer that evidence of Moore's drug dealing would be found in his apartment." *Appendix A*, p. 5. The

affidavit here, however, contained no facts to suggest Mr. Moore was seen transporting drugs to or from his apartment. CP 163-166. There were no facts in the affidavit to suggest Mr. Moore stored drugs at his apartment. *Id.* There were no facts contained in the affidavit to suggest Mr. Moore used the apartment either to conduct drug deals or to engage in illegal activity whatsoever. *Id.* The affidavit also provided no facts indicating where Mr. Moore went after he met with the confidential informant. *Id.* The affidavit simply indicated Mr. Moore was seen leaving his apartment prior to driving his Cadillac Escalade to meet the confidential informant. *Id.* Such facts would arguably support probable cause to justify a warrant for the search of Mr. Moore's Cadillac. Absent more, the facts were insufficient to support a finding that evidence of the crime would be found in his residence. To hold otherwise would allow law enforcement to establish probable cause to search a residence merely by directing an informant to call and arrange a drug deal so that the suspect could be seen leaving the place sought to be searched by officers.

Trial counsel should have moved to suppress the evidence obtained as a result of the illegal search warrant. There was no possible advantage to Mr. Moore by not challenging the admissibility of this evidence. The failure to do so constituted deficient performance.

b. Counsel's Deficient Performance Prejudiced Mr. Moore.

Counsel's performance fell below an objective standard of reasonableness and resulted in prejudice to Mr. Moore. The failure to move for suppression of evidence obtained as the result of a warrant lacking probable cause was clearly detrimental to Mr. Moore. There is no strategic justification for trial counsel's failure to act. No argument can be made that the failure to move for suppression could have furthered Mr. Moore's interests.

Mr. Moore's right to a fair trial was adversely affected by his trial counsel's deficient performance. It undermined confidence in the outcome of his trial. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984). As such, Mr. Moore's convictions must be reversed, and his case remanded.

B. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE FIREARM ENHANCEMENTS FOR COUNTS I AND II.

In this case, insufficient evidence was presented that Mr. Moore was armed during the commission of the crimes charged in counts I and II. The Washington Supreme Court has held that a person is armed "if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes." *State v. Eckenrode*, 159 Wn.2d 488,

493, 150 P.3d 1116 (2007) (quoting *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993)). The court has interpreted this to mean when a weapon is not actually used in the commission of a crime, it must be there to be used. *State v. Gurske*, 155 Wn.2d 134, 138, 118 P.3d 333 (2005).

A person is not armed simply because a weapon is present during the commission of a crime. "[M]ere presence of a deadly weapon at the scene of the crime, mere close proximity of the weapon to the defendant, or constructive possession alone is insufficient to show that the defendant is armed." *State v. Brown*, 162 Wn.2d 422, 431, 173 P.3d 245 (2007). "There must be a nexus between the defendant, the crime, and the weapon." *State v. Gurske*, 155 Wn.2d 134, 138, 118 P.3d 333 (2005). If the requisite nexus is not shown, "courts run the risk of punishing a defendant under the deadly weapon enhancement for having a weapon unrelated to the crime." *State v. Willis*, 153 Wn.2d 366, 372, 103 P.3d 1213 (2005).

The sufficiency of the evidence can be challenged for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 9, 904 P.2d 754 (1995). When considering the facts in a challenge to sufficiency of the evidence, courts will draw all inferences from the evidence in favor of the State and against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A reviewing court will reverse a conviction for insufficient

evidence only where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt. *Id.* An accused whose conviction has been reversed due to insufficient evidence cannot be retried. *State v. Anderson,* 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

Here, the State presented evidence that Mr. Moore was in the bedroom asleep when the police served the search warrant. Melissa Scanlan testified the police woke them up. RP 148. Mr. Moore was detained and taken outside. RP 234-35. Officers searched his bedroom and found methamphetamine, prescription bottles containing oxycodone, and a firearm. RP 196-97; 223-24; 225. The only ammunition found during the search was of a different caliber than the firearm. The ammunition found in the bedroom was for a .45 caliber weapon. RP 195. The firearm was identified as a .32 caliber. RP 259.

Based on the evidence presented at trial, it would not have been possible for Mr. Moore to have armed himself. There were no bullets found that could have been used in the firearm. RP 232. The firearm was not "readily available for use, either for offensive or defensive purposes." *State v. Eckenrode,* 159 Wn.2d 488, 493, 150 P.3d 1116 (2007) (quoting *State v. Valdobinos,* 122 Wn.2d 270, 282, 858 P.2d 199 (1993)).

Evidence that a firearm was present in the room, without more,

does not make Mr. Moore armed within the meaning of the deadly weapon enhancement statutes. In determining whether a nexus has been sufficiently shown, the court must analyze "'the nature of the crime, the type of weapon, and the circumstances which the weapon is found.'" *State v. Brown*, 162 Wn.2d 422, 431, 173 P.3d 245 (2007) (quoting *State v. Schelin*, 147 Wn.2d 562, 570, 55 P.3d 632 (2002)).

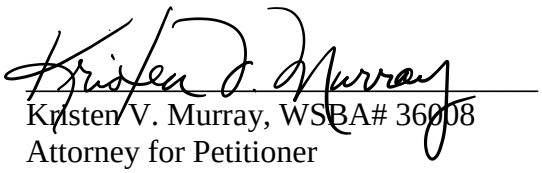
> A gun is a deadly weapon even if not loaded, although its loaded or unloaded condition is one of many factors to consider when deciding whether the defendant . . . in the crime caused the gun to be "readily available for use" during the commission of the crime.

State v. Simonson, 91 Wn. App. 874, 883, 960 P.2d 955 (1998). Even when considering this evidence in the light most favorable to the State, the evidence was insufficient to prove Mr. Moore was armed with a deadly weapon during the commission of these drug offenses. As such, the firearm enhancements for counts I and II must be vacated.

VII. CONCLUSION

For the reasons articulated above, this Court should exercise its authority and accept discretionary review in Mr. Moore's case.

Respectfully submitted this 14th day of February, 2019.



Kristen V. Murray, WSBA# 36008
Attorney for Petitioner

PROOF OF SERVICE

I hereby certify that on February 14, 2019, I filed the Petition for Discretionary Review via Electronic Filing for the Court of Appeals for Division II and caused to be delivered via E-mail the same to:

Robin Sand
Pierce County Prosecuting Attorney's Office
930 Tacoma Avenue S Rm 946
Tacoma WA 98402-2102
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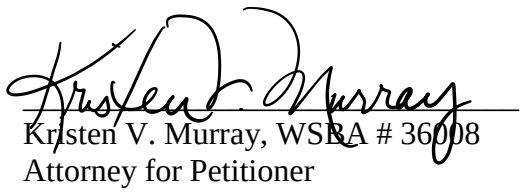
I further certify that I caused to be delivered via United States Postal Service the same to:

Mr. Theotis Moore
DOC No. 398006
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

Dated February 14, 2019.



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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

January 15, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. THEOTIS LENDELL MOORE, Appellant.	No. 50327-1-II UNPUBLISHED OPINION

MAXA, C.J. – Theotis Moore appeals his convictions of unlawful possession of a controlled substance with intent to deliver while armed with a firearm (count 1), unlawful possession of methamphetamine with intent to deliver while armed with a firearm (count 2), and first degree unlawful possession of a firearm (count 3). The drugs and firearms he was convicted of possessing were discovered in a search of his residence pursuant to a search warrant.

We hold that (1) defense counsel's failure to challenge the lawfulness of the search warrant did not constitute ineffective assistance of counsel; (2) the State presented sufficient evidence to prove that Moore was armed with a firearm at the time he committed counts 1 and 2; (3) as the State concedes, the trial court used an incorrect sentencing range on count 3; and (4) Moore's statement of additional grounds (SAG) claims have no merit. Accordingly, we affirm Moore's convictions and sentencing enhancements, but we remand for resentencing.

FACTS

In July 2016, Pierce County Sheriff's Deputy Jesse Hotz began investigating Moore. He employed a confidential informant (CI) who had previously purchased drugs for the Sheriff's Department. The CI also previously had purchased controlled substances from Moore multiple times.

In a controlled buy, the CI purchased controlled substances from Moore while under police surveillance. Another deputy observed Moore leave his apartment in a Cadillac Escalade and kept him under constant surveillance until he reached the place of the transaction.

Hotz made application for a search warrant, submitting an affidavit that recited the facts stated above and identified Moore's address. A superior court judge issued a warrant authorizing a search of Moore, his apartment, and his vehicle.

On August 18, 2016, Hotz and several deputies executed the search warrant on Moore's apartment. Moore and his girlfriend Melissa Scanlan were in bed when the deputies entered. In the master bedroom the deputies discovered multiple oxycodone pills and a baggie of methamphetamine as well as a digital scale, small plastic bags, and cash. They also found an unloaded semiautomatic handgun on a shelf in the bedroom closet.

The State charged Moore with unlawful possession of a controlled substance with intent to deliver while armed with a firearm, unlawful possession of methamphetamine with intent to deliver while armed with a firearm, and first degree unlawful possession of a firearm.

At trial, the deputies testified to finding the drugs and the firearm as discussed above. Doug Hyland testified on behalf of Moore, stating that he owned the firearm and had placed it in the closet.

The jury found Moore guilty as charged. Moore appeals.

ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Moore argues that defense counsel's failure to file a motion to suppress the results of the search of his apartment constituted ineffective assistance of counsel. He claims that nothing in the affidavit in support of the warrant application made it probable that drugs and evidence would be found in his apartment. We disagree.

1. Legal Principles

Ineffective assistance of counsel arises from the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). To prevail on an ineffective assistance claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced the defendant. *Id.* at 457-58. Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Id.* at 458. Prejudice exists if there is a reasonable probability that, except for counsel's errors, the result of the proceeding would have differed. *Id.*

In the context of failing to file a motion to suppress, defense counsel's performance will only be considered deficient if the defendant can show that the trial court likely would have granted the motion. *State v. D.E.D.*, 200 Wn. App. 484, 490, 402 P.3d 851 (2017). Accordingly, the question here is whether, had defense counsel filed a motion to suppress evidence relating to the allegedly illegal search, the trial court likely would have granted the motion.

2. Validity of Search Warrant

a. Probable Cause Requirement

Both the Fourth Amendment to the United States Constitution and article 1, section 7 of the Washington Constitution require probable cause to support the issuance of a search warrant. *See State v. Figeroa Martines*, 184 Wn.2d 83, 90, 355 P.3d 1111 (2015) (Fourth Amendment); *State v. Ollivier*, 178 Wn.2d 813, 846, 312 P.3d 1 (2013) (article 1, section 7). "Probable cause exists when the affidavit in support of the search 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 may be found at a certain location.' " *Ollivier*, 178 Wn.2d at 846–47 (quoting *State v. Jackson*, 150 Wn.2d 251, 264, 76 P.3d 217 (2003)). There must be "a nexus between criminal activity and the item to be seized and between that item and the place to be searched. *State v. Neth*, 165 Wn.2d 177, 183, 196 P.3d 658 (2008). We consider only the information contained in the affidavit supporting probable cause. *Neth*, 165 Wn.2d at 182.

A search warrant affidavit must identify specific facts and circumstances from which the magistrate can infer that evidence of the crime will be found at the place to be searched. *State v. Thein*, 138 Wn.2d 133, 147, 977 P.2d 582 (1999). If an affidavit is no more than a declaration of suspicion or belief, it is legally insufficient. *Jackson*, 150 Wn.2d at 265.

b. Analysis of Search Warrant Validity

Here, the only connection between Moore's apartment and his sale of controlled substances stated in the warrant affidavit was that Moore left from his apartment when he drove to the sale. The question is whether this connection is sufficient to establish probable cause.

Moore relies on *Thein*, where the Supreme Court addressed the State's argument that if there is sufficient evidence to believe that a person is a drug dealer, probable cause automatically exists to search the person's residence. 138 Wn.2d at 141. The court rejected the proposition that "it is reasonable to infer evidence of drug dealing will likely be found in the homes of drug dealers." *Id.* at 147. The court emphasized that probable cause to believe that a person has committed a crime does not create probable cause to search that person's home. *Id.* at 148.

However, here the State does not advocate for an automatic rule. Instead, the State relies on the fact that Moore left his house and immediately drove to meet the CI, where Moore sold him drugs. The State claims that this fact shows a nexus between Moore's drug dealing and his apartment.

The court in *State v. G.M.V.*, 135 Wn. App. 366, 144 P.3d 358 (2006), addressed a similar scenario. In that case, law enforcement obtained a search warrant of the defendant's residence based on the fact that the defendant left from the residence before and returned to it after he sold drugs. *Id.* at 372. The court stated, "The warrant was to search the place Mr. Longoria left from and returned to before and after he sold drugs. This was a nexus that established probable cause that Mr. Longoria had drugs in the house." *Id.*

We agree with *G.M.V.* Moore drove from his apartment to a location where he sold controlled substances to the CI. This means that the controlled substances were in Moore's possession when he left his apartment. Therefore, it is reasonable to infer that evidence of Moore's drug dealing would be found in his apartment. We hold that probable cause supported the warrant to search Moore's apartment.

3. Analysis of Ineffective Assistance Claim

Based on the analysis above, the trial court would not have granted a motion to suppress the evidence seized from Moore's home. Therefore, it was neither objectively unreasonable nor prejudicial for defense counsel not to challenge the validity of the search warrant. We hold that Moore's claim of ineffective assistance of counsel fails.

B. SUFFICIENCY OF THE EVIDENCE – FIREARM ENHANCEMENTS

Moore argues that the State did not present sufficient evidence that he was armed with a firearm at the time of his drug delivery and possession crimes. He claims that there was an insufficient connection between him, the firearm found in his bedroom, and his crimes. We disagree.

1. Sufficiency Standard

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). In a sufficiency of the evidence claim, the defendant admits the truth of the evidence and the court views the evidence and all reasonable inferences drawn from that evidence in the light most favorable to the State. *Id.* Credibility determinations are made by the trier of fact and are not subject to review. *Id.* at 266. Circumstantial and direct evidence are equally reliable. *Id.*

2. Legal Principles

Under RCW 9.94A.533(3), a court must add additional time to a sentence if the defendant is found to have been armed with a firearm while committing the crime. *State v. Houston-Sconiers*, 188 Wn.2d 1, 16-17, 391 P.3d 409 (2017). "To establish that a defendant was armed for the

purpose of a firearm enhancement, the State must prove (1) that a firearm was easily accessible and readily available for offensive or defensive purposes during the commission of the crime and (2) that a nexus exists among the defendant, the weapon, and the crime." *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 826, 425 P.3d 807 (2018).

Regarding the first requirement, the presence or even constructive possession of a weapon found at a crime scene is not enough to establish that the defendant was armed in this context. *Id.* On the other hand, "[t]he defendant does not have to be armed at the moment of arrest to be armed for purposes of the firearms enhancement." *State v. O'Neal*, 159 Wn.2d 500, 504, 150 P.3d 1121 (2007). "[T]he State need not establish with mathematical precision the specific time and place that a weapon was readily available and easily accessible so long as it was at the time of the crime." *Id.* at 504-05. And a drug distribution operation is a continuing crime that is ongoing even when the defendant is elsewhere. *See State v. Neff*, 163 Wn.2d 453, 464-65, 181 P.3d 819 (2008) (stating this principle in the context of a drug manufacturing operation).

Regarding the second requirement, we look to the nature of the crime, the type of firearm, and the context in which it was found to determine if there was a nexus between the defendant, the firearm, and the crime. *Sassen Van Elsloo*, 191 Wn.2d at 827. Significantly, a sufficient nexus exists if there is evidence that the firearm was present to protect an ongoing drug operation. *O'Neal*, 159 Wn.2d at 506; *State v. Eckenrode*, 159 Wn.2d 488, 494-95, 150 P.3d 1116 (2007).

3. Analysis

When the deputies served the search warrant, Moore was in his bedroom with the firearm and the drugs. The handgun was on a closet shelf where Moore easily could have armed himself. Therefore, a nexus existed between Moore and the gun.

Other evidence establishes the nexus between the gun and the drugs. The deputies recovered a digital scale, small plastic bags, empty prescription bottles, ammunition, and cash. All these items were evidence of an ongoing drug operation. Taking the evidence in a light most favorable to the State, a reasonable jury could find that Moore had the gun to facilitate his crimes or to protect his contraband. *See Neff*, 163 Wn.2d at 462.

Accordingly, we hold that the State presented sufficient evidence to establish that Moore was armed with a firearm at the time of his drug offenses.

C. INCORRECT SENTENCING RANGE

Moore argues, and the State concedes, that his judgment and sentence contains an incorrect sentencing range for his conviction of first degree unlawful possession of a firearm. The sentencing court calculated Moore's offender score as 3 but the judgment and sentence used the range applied for an offender score of 4. Moore's sentencing range should have been 31-41 months, not 36-48 months. RCW 9.94A.510. Therefore, we hold that the trial court erred in imposing Moore's sentence.

D. SAG CLAIMS

1. Probable Cause

Moore asserts that the State lacked probable cause to obtain a search warrant because it did not produce the CI or any evidence of the three alleged controlled purchases. We disagree

The State has a legitimate interest in protecting the identity of CIs. *State v. Moen*, 150 Wn.2d 221, 230, 76 P.3d 721 (2003). The ability to protect an informant's identity from disclosure is termed the "informers privilege," which is the State's right to withhold from disclosure the identity of persons who provide information to law enforcement concerning the commission of crimes. *State v. Atchley*, 142 Wn. App. 147, 155, 173 P.3d 323 (2007). The privilege is recognized by both statute and court rule. RCW 5.60.060(5); CrR 4.7(f)(2). Disclosure is only required if the failure to disclose will infringe on the defendant's constitutional rights. CrR 4.7(f)(2).

We typically balance several competing factors in determining whether to disclose a CI's identity. *Atchley*, 142 Wn. App. at 155-56. However, where the CI provided information relating only to probable cause rather than the defendant's guilt or innocence, disclosure of the CI's identity generally is not required. *Id.* at 156.

Here, the State used the CI's activities only to establish probable cause for the search of Moore's apartment, not Moore's guilt or innocence. Therefore, disclosure was not required. And information provided by an unidentified CI is sufficient to establish probable cause for a search warrant. *State v. Casto*, 39 Wn. App. 229, 233-34, 692 P.2d 890 (1984). Therefore, we reject Moore's argument that the search warrant lacked probable cause.[1]

2. Sufficiency of Evidence – Delivery

Moore claims that the State failed to prove that he delivered a controlled substance because the only drugs put into evidence at trial were validly prescribed to him. We disagree.

[1] Moore also generally claims that there was not probable cause to support the search warrant. Because we already have addressed this claim, we do not repeat it here.

The State had to prove that Moore delivered a controlled substance to another. RCW 69.50.401(1). It was undisputed at trial that Moore possessed the oxycodone with a valid prescription. At trial, the State presented evidence from Hotz that Moore admitted giving away oxycodone. And Scanlan testified that Moore had lent some oxycodone pills to a man that later paid him back once he got his own prescription filled. This was sufficient evidence to show an unlawful delivery of a controlled substance.

3. Prosecutorial Misconduct

Moore appears to claim that his trial was tainted by prosecutorial misconduct when the prosecutor implied that his possession of the oxycodone was illegal. We disagree.

To prevail on a claim of prosecutorial misconduct, a defendant must show " 'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.' " *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). We review allegedly improper arguments of the prosecutor in the context of the total argument, the evidence addressed during argument, the issues in the case, and the trial court's instructions. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

As we noted above, the State had to prove only that Moore delivered a controlled substance to another. That Moore had a valid prescription for the oxycodone did not mean that the State had no evidence of an unlawful delivery. And Moore statements to Hotz coupled with Scanlan's testimony proved that delivery. The State did not present false evidence that Moore possessed or sold illegal drugs as Moore alleges. His claim of prosecutorial misconduct based on this theory fails.

CONCLUSION

We affirm Moore's convictions of unlawful possession of a controlled substance with intent to deliver while armed with a firearm, unlawful possession of methamphetamine while armed with a firearm, and first degree unlawful possession of a firearm. But we remand for resentencing.

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.

Maxa, C.J.
MAXA, C.J.

We concur:

Melnick, J.
MELNICK, J.

Sutton, J.
SUTTON, J.

HART JARVIS MURRAY CHANG PLLC

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