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Supreme Court No. 95595-6  
COA No. 49549-0-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

KATHLEEN NICKS,

Petitioner.

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PETITION FOR REVIEW

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PETER B. TILLER  
Attorney for Petitioner

THE TILLER LAW FIRM  
Rock & Pine  
P. O. Box 58  
Centralia, Washington 98531  
(360) 736-9301

**TABLE OF CONTENTS**

	<u>Page</u>
<u>Table of Authorities</u> .....	iii
<b>A. IDENTITY OF PETITIONER</b> .....	1
<b>B. DECISION OF COURT OF APPEALS</b> .....	1
<b>C. ISSUES PRESENTED FOR REVIEW</b> .....	1
<b>D. STATEMENT OF THE CASE</b> .....	1
1. <u>Procedural history</u> .....	1
<b>E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED</b> ....	5
1. THE SEARCH WARRANT FAILS FOR LACK OF NEXUS BETWEEN THE CRIMINAL ACTIVITY AND THE HOUSE BECAUSE THERE WAS NO PROBABLE CAUSE TO BELIEVE EVIDENCE OF THE ALLEGED THEFT WOULD BE FOUND IN THE RESIDENCE .....	6
<b>F. CONCLUSION</b> .....	12

**TABLE OF AUTHORITIES**

<b><u>WASHINGTON CASES</u></b>	<b><u>Page</u></b>
<i>State v. Constantine</i> , 182 Wn. App. 635, 220 P.3d 226 (2014)....	7, 8, 9, 10, 11
<i>State v. Davis</i> , 182 Wn. App. 625, 331 P.3d 115 (2014).....	8, 9, 10, 11
<i>State v. Gebaroff</i> , 87 Wn. App. 11, 939 P.2d 706 (1997) .....	8
<i>State v. Goble</i> , 88 Wn. App. 503, 945 P.2d 263 ( 1997) .....	7, 12
<i>State v. Thein</i> , 138 Wn.2d 133, 977 P.2d 582 (1999) .....	7, 8, 10, 11, 12
<i>State v. Vickers</i> , 148 Wn.2d 91, 108, 59 P.3d 58 (2002) .....	8

<b><u>REVISED CODE OF WASHINGTON</u></b>	<b><u>Page</u></b>
RCW 9A.56.330(1).....	2
RCW 9.35.020(3).....	1
RCW 9A.56.160(1)(c) .....	1
RCW 69.50.4013(1).....	1

<b><u>COURT RULES</u></b>	<b><u>Page</u></b>
RAP 13.4(b).....	5
RAP 13.4(b)(1).....	6
RAP 13.4(b)(2).....	6

**A. IDENTITY OF PETITIONER**

Petitioner, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

**B. DECISION OF THE COURT OF APPEALS**

Nicks seeks review of the unpublished opinion of the Court of Appeals in cause number 49549-0-II, filed February 6, 2018. A copy of the decision is in the Appendix A at pages A-1 through A-22. A motion for reconsideration was not filed.

**C. ISSUES PRESENTED FOR REVIEW**

1. Law enforcement obtained a warrant permitting them to search the petitioner's house and detached garage. Does the decision below conflict with decisions of the Court when the trial court denied the motion to suppress where the warrant lacked probable cause to believe evidence of stolen property would be found in the petitioner's house?

**D. STATEMENT OF THE CASE**

**1. Procedural history:**

Kathleen Nicks was charged in Wahkiakum County Superior Court with possession of methamphetamine, (count 1; RCW 69.50.4013(1)); second degree possession of stolen property, (count 2; RCW 9A.56.160(1)(c)), and first degree identity theft (count 3; RCW 9.35.020(3)). Clerk's Papers (CP) 6-7. She was also charged in counts 4

and 5 with gross misdemeanors for possession of another's identification. (RCW 9A.56.330(1)). CP 7.

The State alleged in count 2 that Ms. Nicks knowingly possessed a fuel card belonging to DeBriae Logging Company, knowing that the card had been stolen. CP 7. The State alleged in count 3 that Ms. Nicks possessed a social security card belonging to Brandi Kuning. CP 7. In counts 4 and 5, the State alleged that she possessed two Washington State driver's licenses issued to Ms. Kuning and Lisa Williams, respectively. CP 7.

The charges originated from seizure of evidence recovered at Ms. Nicks' residence located at 2 Middle Valley Road, Skamokawa, Washington pursuant to a search warrant signed on January 30, 2015. CP 68-70.

Wahkiakum County Deputy Sheriff Michael Balch prepared an affidavit requesting a warrant to search Ms. Nicks' residence and detached garage for equipment received from Mighty Quip, distributors of commercial and industrial equipment, and for evidence pertaining to a vehicle prowl that occurred in Kelso, Washington, on June 22, 2014. CP 22-25.

The affiant, Deputy Balch, stated that Brian Tills told him on January 30, 2015, that he had sold equipment on January 28, 2015, to Tiffany Ames. CP 22. He stated that Brian Tills works for Mighty-Quip

Industries. CP 23. He stated that a person identifying herself as "Tiffany Ames" paid by check written for the amount of \$5,450.00, and that his employer told him on January 30 that the check was fraudulent. CP 23-24. Mr. Tills did not know the address where he had delivered the equipment, but had a photo of the house on his cell phone. CP 23.

Deputy Balch wrote in his affidavit that he recognized the house in the photo as 2 Middle Valley Road in Skamokawa, and that he knew that Kathleen Nicks and her children live in the house. CP 23-24. He stated that Mr. Tills told him that he contacted people at the address and asked them if they needed a diesel and gas generator that he had for sale. CP 24. They agreed and a woman wrote the check and he delivered the equipment to the address and assisted in putting the equipment in a detached garage on the property. CP 24. Mr. Tills described the woman who wrote the check as being around 40 years old, 5'4" tall, with "dirty blond/brown shoulder length hair." CP 24. Mr. Tills had a cell phone photo of the bill of sale for the items he delivered, which included a Mighty-Quip diesel generator, 200 PSI DeWalt electric air compressor, Honda 2" trash pump with hose kit, a 3100 PSI pressure washer, and Honda EU 8500 watt gas generator. CP 24.

Deputy Balch stated in his affidavit that he spoke with Harlan Wheeler, who is Mr. Tills' boss at Mighty-Quip. Mr. Wheeler told the deputy that the check received from the woman who called herself "Tiffany Ames" was reported to have been stolen in Kelso. CP 24. Deputy Balch

stated in his affidavit that after Mr. Wheeler told Mr. Tills that the check was fraudulent, Mr. Tills returned to the garage where he had unloaded the equipment and contacted the same two teenage boys who had helped him put the equipment in the garage two days earlier. CP 24. Mr. Tills asked for "Tiffany" and was told they did not know anyone with that name. He asked if the equipment was still in the garage and they stated that they did not know. CP 24.

Deputy Balch contacted Kelso police officer Ken Hochhalter, who had received a report of a vehicle prowl from Tiffany Ames in June, 2014. CP 24. Deputy Balch's affidavit states that the report of the Kelso vehicle prowl lists among the items taken include a purse with a wallet, driver's license, social security cards and a checkbook belonging to Tiffany Ames. CP 24. Deputy Balch stated that Officer Hochhalter took another statement from Ms. Ames, who said that she did not write the check in the amount of \$5,450.00 received by Mighty-Quip. CP 24.

A warrant authorizing officers to search a double wide mobile home with detached garage at 2 Middle Valley Road, Skamokawa was signed on January 30, 2015. CP 19-21. The warrant authorized search for items including large equipment including the following: Mighty-Quip Diesel Generator, 200 PSI DeWalt electric air compressor, Honda 2" trash pump with hose kit, 3100 PSI Pressure washer, EU 8500 watt Honda gas generator. CP 20. The warrant was executed on January 31, 2015. Police

found none of the equipment delivered by Mighty-Quip in the garage. Police also searched Ms. Nicks' house, and during a search of the master bedroom of the house police found a brown nylon zipped pouch containing methamphetamine on the bedroom floor, and also found two driver's licenses, a social security card, and a fuel card, all of which were issued to other persons, in a nearby desk.

Ms. Nicks moved to suppress statements and evidence obtained by law enforcement during execution of the search warrant on January 31, 2015, on the grounds that there was insufficient probable cause supporting search of the house. CP 17- 41 (Motion for Suppression of Evidence, dated 03/31/16). The trial court issued a written order that Ms. Nicks' statement to law enforcement during the search was admissible. CP 79-80. The court also entered an order denying the defense motion to suppress contraband found in the residence.

By unpublished opinion filed February 6, 2018, the Court of Appeals, Division II, affirmed the convictions. See unpublished opinion.

Ms. Nicks now petitions this Court for discretionary review pursuant to RAP 13.4(b).

#### **E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of these issues because the decision of the Court of Appeals is in



conflict with other decisions of this court and the Court of Appeals (RAP 13.4(b)(1) and (2)).

**1. THE SEARCH WARRANT FAILS FOR LACK OF NEXUS BETWEEN THE CRIMINAL ACTIVITY AND THE HOUSE BECAUSE THERE WAS NO PROBABLE CAUSE TO BELIEVE EVIDENCE OF THE ALLEGED THEFT WOULD BE FOUND IN THE RESIDENCE**

The warrant to search Ms. Nicks' residence fails for lack of nexus. The affidavit established probable cause to believe equipment would be found in the detached garage, where it was seen to be loaded, but did not establish probable cause that evidence of equipment obtained from Mr. Tills and loaded into the garage was in Ms. Nicks' house, and does not contain information that the driver's license shown to Mr. Tills when the woman identified as Ms. Nicks gave him the check stolen from Ms. Ames' check may be found in the house. The affidavit states that Mr. Tills did not obtain a copy of the identification of the woman who wrote the check, and although he asked to see identification of the person who wrote the check, he "did not look at it that closely." CP 24. Moreover, The affidavit contains no observation that any resident of the house transported the equipment obtained from Tills to Ms. Nicks' home; in fact, the reporting party not only witnessed the equipment being placed into the detached garage (rather than the house), he actually helped with carrying the equipment

into the garage. CP 24. Nothing in the affidavit shows anyone observed any of the ill-obtained equipment in Ms. Nicks' house itself. Citing *State v. Constantine*, the Court of Appeals held that Sergeant Balch's affidavit set forth specific facts to establish the items to be seized from Nicks' house. Slip. op. at 11.

Search warrants are valid only if supported by probable cause. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause to search 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." *Thein*, 138 Wn.2d at 140 (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). The affidavit in support of the warrant must set forth facts and circumstances sufficient to establish a reasonable inference that evidence of the crime can be found at the place to be searched. *Thein*, 138 Wn.2d at 140.

A warrant to search for evidence in a particular place must be based on more than generalized belief of the supposed practices of the type of criminal involved. *Id.* at 147–48. Rather, the warrant must contain specific facts tying the place to be searched to the crime. *Id.* The standard is whether there is probable cause to believe contraband will be found in the specific place to be searched. *Thein*, 138 Wn.2d at 140. "The affidavit in support of the search warrant must be based on more than suspicion or mere personal belief that evidence of the

crime will be found on the premises searched." *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002)". Here, nothing in the affidavit shows that the equipment could have been stored in the house itself; it fails to make the necessary connection between the garage and the residence as far as the equipment is concerned. The Court's opinion cites *State v. Constantine*, 182 Wn. App. 635, 220 P.3d 226 (2014) and *State v. Gebaroff*, 87 Wn. App. 11, 17, 939 P.2d 706 (1997) in support of its holding that the affidavit contains specific facts to establish a nexus with the house itself. Slip. Op. at 11.

In *Constantine*, Division Three, found the search of a house and shed based upon a marijuana grow spotted in two law enforcement flyovers did not offend *Thein's* prohibition against general assumptions of where evidence may be kept if based upon reasonable inferences about nearby land and buildings that are adequately shown to be under the defendant's control. *Constantine*, 182 Wn. App. at 647–48. Ms. Constantine's husband, Morgan Hale Davis, also appealed the denial of the motion to suppress. See, *State v. Davis*, 182 Wn. App. 625, 331 P.3d 115 (2014). The information contained in the affidavit in Nicks' case falls far short of the detailed affidavit relied upon in *Constantine* and *Davis*. There, the affidavit contained narrative information that two Task Force officers flew in a helicopter over property near Tonasket, Washington, and saw two greenhouses with approximately 20 large marijuana plants visible through the partially

uncovered roof of one of them. They noted other buildings on the property, including a small stick built house located just east of the greenhouses and a small stick built shed west of the greenhouses. The officers confirmed that the property's address was 44 Reeves Basin Road and that it was owned by Mr. Davis. A week later one of the officers flew over the property a second time and took an aerial photograph, noting the greenhouses were both covered with plastic through which he saw dark green coloring he believed to be growing marijuana plants. The officer obtained a warrant to search the two greenhouses, the house, and the shed on Reeves Basin Road for evidence of manufacturing marijuana and related items. *Constantine*, 182 Wn. App. at 639–40; *Davis*, 182 Wn. App. at 628.

The *Constantine/Davis* affidavit also included an aerial photograph with the affiant's explanation to the magistrate of its content and context.

In this photo you can clearly see the green houses to the left of the house. The larger of the two greenhouses was half opened when the initial flight was done. This is the one that I could see growing marijuana plants in. Everything in the photo including the outbuildings is on the same parcel of property. There are no other driveways or houses except for the one in the photo that have access to these marijuana plants.

*Constantine*, 182 Wn. App. at 640; *Davis*, 182 Wn. App. at 628–29.

The aerial photograph in *Constantine/Davis* “showed the residence, greenhouses, garden area, and outbuildings all within a clearly defined living compound. The compound is well separated from other structures or homes. The

residence was approximately 50 to 70 feet from the greenhouses and there were no other houses nearby. Also, only one access road approaches the property and ends there.” *Davis*, 182 Wn. App. at 629; see *Constantine*, 182 Wn. App. at 641.

Division Three determined *Thein*’s prohibition against assumptions was not implicated where “It was not unreasonable for the issuing judge to believe that evidence of the crime would be found in the house based on:

[(1)] *Mr. Davis’s ownership and control of the property* where both the observed criminal activity and the house were located, [(2)] the proximity of the home to the criminal activity, and [(3)] the type of evidence sought in the warrant.”

*Constantine*, 182 Wn. App. at 647–48 (alterations and emphasis added).

In concluding the nexus requirement was met, the court noted: The relevant facts are that officers observed at least 20 marijuana plants growing in a greenhouse on Mr. Davis’s property. Located close to the greenhouses were a home and a shed. These buildings were on a clearly defined living compound owned by Mr. Davis. *Constantine*, 182 Wn. App. at 647.

In *Davis*, the Court held:

The warrant established that the house and shed were located on the same defined parcel of land as the greenhouses and were close in proximity to one another. The parcel of land was owned by Mr. Davis. Access to both greenhouses and the home was from the same, single

driveway. The officers observed at least 20 marijuana plants in one exposed part of the greenhouses.

*Davis*, 182 Wn. App. at 633.

Similarly, the affidavit contains no facts linking Ms. Nicks' home with the evidence sought. The affidavit contains only a generalized belief that criminals keep evidence of their crimes at their residence was not enough to establish probable cause to search the residence in the absence of particular facts. In *Thein*, the Court held there was insufficient nexus between evidence that a person engaged in drug dealing and the fact that the person resided in the house that was searched. *Thein*, 138 Wn.2d at 150. The affidavit contained specific information tying the presence of narcotics activity to a certain residence, but not the address to be searched pursuant to the warrant. *Id.* at 136-138, 150. The affidavit also contained generalized statements of belief, based on officer training and experience, about drug dealers' common habits, particularly that they kept evidence of drug dealing in their residences. *Id.* at 138-39. The affidavit expressed the belief that such evidence would be found at the suspect's residence. *Id.* at 139. The Court held such generalizations do not establish probable cause to support a search warrant for a drug dealer's residence because probable cause must be grounded in fact. *Id.* at 146-47. Here, the merest thread of a link between the equipment was the fact that Nicks, whom the State contend was the person who identified herself as "Tiffany" to Mr. Tills, went inside her house and returned with a

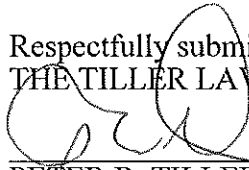
check that was reported to have been stolen from Ms. Ames. The Court found that this constituted sufficient probable cause to search the house. Slip. Op. at 10. The facts in the search warrant affidavit fail to establish a nexus between Ms. Nicks' home and evidence sought. *Thein*, 138 Wn.2d at 140 (quoting *Goble*, 88 Wn. App. at 509). Accordingly, the evidence found in the home pursuant to the search warrant should have been suppressed.

**F. CONCLUSION**

For the foregoing reasons, this Court should grant review to correct the above-referenced errors in the unpublished opinion of the Court below that conflict with prior decisions of the Court of Appeals.

DATED: March 8, 2018.

Respectfully submitted,  
THE TILLER LAW FIRM



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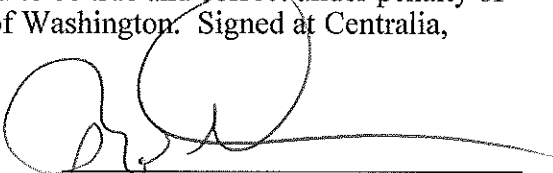
PETER B. TILLER-WSBA 20835  
[ptiller@tillerlaw.com](mailto:ptiller@tillerlaw.com)  
Of Attorneys for Kathleen Nicks

CERTIFICATE OF SERVICE

The undersigned certifies that on March 8, 2018, that this Appellant's Petition for Review was sent by the JIS link to Derek Bryne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, Daniel Bigelow, Wahkiakum Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

Daniel Bigelow Wahkiakum Prosecuting Attorney PO Box 608 Cathlamet, WA 98612-0608	Mr. Derek M. Byrne Clerk of the Court Court of Appeals 950 Broadway, Ste.300 Tacoma, WA 98402-4454
Kathleen Nicks PO Box 221 Skamokawa, WA 98647	

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 8, 2018.



PETER B. TILLER



APPENDIX A

February 6, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KATHLEEN L. NICKS,

Appellant.

No. 49549-0-II

UNPUBLISHED OPINION

LEE, J. — A jury convicted Kathleen L. Nicks of possession of methamphetamine, second degree possession of stolen property, second degree identity theft, and two counts of possession of another's identification. Nicks appeals, arguing that the evidence used against her at trial was the fruit of an illegal search of her home because the search warrant was unsupported by probable cause. Nicks also argues that the State presented insufficient evidence to show she exercised dominion and control over the items found within her home, and therefore, the State failed to prove she constructively possessed the evidence used to support her convictions.

We hold that the warrant authorizing the search of Nicks's home was supported by probable cause. We also hold that the evidence presented at trial was sufficient for the jury to conclude that Nicks exercised dominion and control over the items found during the search of her home. Accordingly, we affirm.

No. 49549-0-II

On January 28, 2015, Brian Tills, an employee for Mighty-Quip Industries, noticed a group of people standing outside a residence in Skamokawa, Washington. Tills approached the group and asked if they knew anyone who would be interested in purchasing some power equipment. A woman who identified herself as "Tiffany" responded that her mother could use the equipment and went inside the house to call her mother. Clerk's Papers (CP) at 63. The woman returned from the house with a personal check made out to "Mighty-Quip Industrial LLC" in the amount of \$5,450. CP at 60. The account information printed on the check contained the name "Tiffany Ames," along with a Kelso, Washington address. CP at 60. The signature on the check also read "Tiffany Ames." CP at 60. Tills asked the woman to sign a bill of sale and then put the power equipment into the garage.

Two days later on January 30, Tills's boss notified him that the check used to purchase the power equipment was fraudulent. Tills returned to the Skamokawa residence and spoke with two teenagers living in the house. Tills asked the teenagers if Tiffany was home and they responded that they did not know anyone named Tiffany.

Tills left the residence and contacted the Wahkiakum County Sheriff's Office. Tills informed law enforcement that he was trying to retrieve property someone had purchased with a fraudulent check. Also on January 30, Tills met in person with Sergeant Michael Balch of the Wahkiakum County Sheriff's Office. Tills explained that he had made the sale at an address on Middle Valley Road. Although Tills could not state the specific address, he provided a cell phone photograph that he had taken of the house. Sergeant Balch viewed the photo and immediately recognized the residence as 2 Middle Valley Road, Skamokawa, Washington. Sergeant Balch had visited the residence on multiple occasions over the preceding months and knew that Kathleen

No. 49549-0-II

Nicks and her children lived there. Sergeant Balch asked Tills if he had obtained identification from the woman who wrote the check. Tills responded that he had, but that he did not look at the identification closely

Tills also provided Sergeant Balch with a cell phone photograph of the bill of sale for the power equipment he sold to the woman claiming to be Tiffany. Before leaving the sheriff's office, Tills completed a written statement detailing the facts set out above. Sergeant Balch contacted Tills's boss and obtained a copy of the fraudulent check, along with an affidavit of forgery from the true Tiffany Ames.

Sergeant Balch then contacted the Kelso Police Department and obtained a police report of a vehicle prowler the true Tiffany Ames filed in June 2014. According to the report, an unidentified person stole Ames's handbag from the back of her parked vehicle in June 2014. Ames reported the following items stolen: (1) one medium purse; (2) one wallet; (3) Ames's driver's license; (4) the Social Security cards of Ames and two others; (5) her checkbook; and (6) a bag of essential oils.

#### B. THE WARRANT

On January 30, 2015, Sergeant Balch applied for a warrant to search Nicks's residence and garage for evidence of theft, identity theft, and possession of stolen property. Specifically, the warrant requested authorization to search for: (1) the power equipment listed in the bill of sale; (2) the bill of sale from Mighty-Quip; (3) Ames's driver's license; (4) the Social Security cards of Ames and two others; and (5) a book of bank checks, with "Tiffany Ames" printed on them. CP at 20.

In support of the warrant, Sergeant Balch provided an affidavit and complaint detailing the facts set out above. Sergeant Balch also provided as attached exhibits: (1) the cell phone photograph Tills took of the residence; (2) a copy of the forged check with Ames's affidavit of forgery; (3) a copy of the Kelso police report from the June 2014 vehicle prowling of Ames's car; and (4) the statement Tills provided at the sheriff's office. Sergeant Balch also stated that in his experience, "a book of bank checks or drafts comes in groups of 25." CP at 24.

The warrant was issued, which authorized the search of Nicks's residence and garage for the listed items. On January 31, Sergeant Balch, along with four other officers, executed the warrant. They did not find any of the items listed in the warrant, but did find methamphetamine and other identification cards. Specifically, the officers found a Social Security card and Washington driver's license belonging to B.N.K.,<sup>1</sup> a Washington driver's license belonging to L.D.W.,<sup>2</sup> and a fuel card belonging to DeBriar Logging Co., Inc.

The State subsequently charged Nicks with possession of a controlled substance (count 1), second degree possession of stolen property (count 2), second degree identity theft (count 3), and two counts of possession of another's identification (counts 4 and 5).

C. CRR 3.6 MOTION TO SUPPRESS

Prior to trial, Nicks moved to suppress the evidence found during the execution of the search warrant. Nicks argued that the warrant to search her home was not supported by probable cause and that the information in Sergeant Balch's supporting affidavit was stale.

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<sup>1</sup> We use initials to protect the person's privacy.

<sup>2</sup> We use initials to protect the person's privacy.

The trial court denied her motion.<sup>3</sup> In its ruling, the court stated, “All other issues raised by the Defense are not persuasive. Therefore, all evidence seized by the State during the search . . . are not suppressed.” CP at 77.

D. THE TRIAL

At trial, three of the officers who executed the search warrant testified. Sergeant Balch testified that he saw the fuel card in the master bedroom of the house. He also testified that in the master bedroom, they found a brown nylon zipper container on the floor between the bed and a nearby desk. The interior of the container tested positive for methamphetamine. The container also contained a glass smoking device, which also tested positive for the presence of methamphetamine. Deputy Mason and Deputy Hake both testified that the various cards were found in a desk drawer to the right of the bed in the master bedroom.

L.D.W. and B.N.K. also testified at trial. L.D.W. testified that she had renewed her driver’s license online, but had never received her license in the mail. L.D.W. identified the driver’s license found at Nicks’s home as her missing license, and testified that Nicks did not have permission to possess her license. B.N.K. similarly testified that her driver’s license and Social Security card were stolen in 2014 and that Nicks did not have permission to possess these items.

The State also called Dorothy Olson of DeBriae Logging Company to testify. Olson identified the fuel card found at Nicks’s home as one issued to a former employee. Olson also testified that Nicks did not have DeBriae Logging’s permission to possess the fuel card.

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<sup>3</sup> Nicks also moved to suppress police radios found in her garage during the execution of the search warrant. The trial court granted the portion of her motion addressing the police radios. This portion of the ruling is not at issue on appeal.

No. 49549-0-II

Nicks also testified at trial. Nicks testified that at the time of the search, she was in a relationship with a man named Ricky Trafelet. Trafelet moved into Nicks's home approximately two weeks before the search. The two shared the master bedroom and both utilized the furniture within the master bedroom. However, all of the furniture in the master bedroom, including the desk, belonged to Nicks.

Nicks further testified that she kept her own belongings in the desk, but that she was not aware of every item stored in the desk. When shown a picture of the desk taken on the day of the search, Nicks identified the items on or near the desk that belonged to Trafelet. These items included a hat, a cane, a red container, after-shave spray, a glass of apple juice, and a jewelry kit. Nicks also used the desk in the master bedroom and identified a coffee cup pictured on the desk as her own.

Nicks then denied ever seeing the identification cards found in the desk prior to the search. She also testified that the nylon pouch did not belong to her and that she was not previously aware of its contents.

The jury found Nicks guilty as charged. Nicks appeals.

#### ANALYSIS

##### A. VALIDITY OF SEARCH WARRANT

Nicks argues the trial court erred in denying her motion to suppress the evidence seized during the search of her house. Nicks argues that Sergeant Balch's affidavit failed to establish a nexus between the evidence to be seized (the power equipment, Ames's driver's license, and the

checkbook<sup>4</sup>) and the place to be searched (Nicks's residence). Nicks also argues that the information contained within Sergeant Balch's affidavit was stale and thus, could not support a finding of probable cause. We disagree and hold that probable cause supported the issuance of the search warrant.

1. Standard of Review

We generally review the validity of a search warrant for abuse of discretion, giving great deference to the issuing judge or magistrate. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). However, in reviewing a trial court's determination of probable cause at a suppression hearing, we review the trial court's conclusions de novo. *State v. Dunn*, 186 Wn. App. 889, 896, 348 P.3d 791, *review denied*, 184 Wn.2d 1004 (2015).

Under de novo review, we determine "whether the qualifying information as a whole amounts to probable cause." *Id.* This review is limited to the four corners of the document supporting probable cause. *Neth*, 165 Wn.2d at 182. Facts that, standing alone, do not support probable cause can support probable cause when viewed together with other facts. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). We review the supporting affidavit "in a commonsense manner, rather than hypertechnically" and resolves any doubts in favor of the warrant. *State v. Lyons*, 174 Wn.2d 354, 360, 275 P.3d 314 (2012) (quoting *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003)).

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<sup>4</sup> In addition to these items, the search warrant authorized the search for the three Social Security cards stolen from Ames's vehicle and a bill of sale from Mighty-Quip for the purchase of the power equipment. However, on appeal, Nicks only references the power equipment, Ames's driver's license, and the checkbook in arguing that there was insufficient nexus between the items to be seized and the place to be searched.



2. Nexus Between the Evidence Seized and the Place Searched

Nicks argues that the information contained within Sergeant Balch's affidavit did not establish probable cause that evidence of the power equipment, Ames's stolen checkbook, or Ames's stolen driver's license would be found in Nicks's home. Specifically, Nicks argues that "the merest thread of a link" between the power equipment loaded into the garage and Nicks's house came from Sergeant Balch's unsupported contention that "checks, in his experience, come in packets of 25." Br. of Appellant at 20. We disagree.

A search warrant may only issue upon a determination of probable cause "based upon facts and circumstances sufficient to establish a reasonable inference that criminal activity is occurring or that contraband exists at a certain location." *Cole*, 128 Wn.2d at 286. Probable cause exists as a matter of law if the affidavit in support of the search warrant contains sufficient facts and circumstances to establish a reasonable inference that the defendant probably engaged in illegal activity, and that evidence of that illegal activity is at the location to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Thus, "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." *Id.* (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)).

The nexus between the evidence to be seized and the place to be searched must be established by specific facts, not an officer's generalizations or conclusory predictions. *Id.* at 145. In *Thein*, a search of a drug dealer's residence led to evidence that Thein was the drug dealer's supplier. *Id.* at 137-38. Police subsequently obtained a warrant to search Thein's home based on the officers' general statements of belief that drug traffickers commonly store portions of their drug inventory in their homes. *Id.* at 138-39.

The *Thein* court rejected the State's argument that evidence someone is involved in drug dealing automatically establishes a nexus between the items to be seized and that person's residence. *Id.* at 141, 147. Instead, the court held that a reasonable nexus is not established unless officers present specific facts linking such illegal activity to the residence to be searched. *Id.* at 148.

In *State v. McReynolds*, Division Three of this court applied the *Thein* court's reasoning to a non-drug case. 104 Wn. App. 560, 569, 17 P.3d 608 (2000), *review denied*, 144 Wn.2d 1003 (2001). There, police caught the defendant burglarizing a construction site. *Id.* at 566. In apprehending the defendant, police also discovered a pry bar stolen from a different construction site several weeks earlier. *Id.* Based on this information, the officers obtained a warrant to search the defendant's residence for other items reported stolen in the prior construction site burglary. *Id.* at 566-67. Applying the reasoning in *Thein*, the *McReynolds* court held that the presence of the stolen pry bar at the scene of the current burglary was not enough to infer that evidence of the earlier burglary would be in the defendant's home. *Id.* at 570. The *McReynolds* court reached this holding because the arresting officers found the defendant with the pry bar at the scene of the current burglary, not at his home. *Id.*

Nicks relies on *Thein* and *McReynolds* to argue that Sergeant Balch's affidavit failed to establish a nexus between "any criminal act and the defendant's residence." Br. of Appellant at 19. However, unlike in *Thein* and *McReynolds*, Sergeant Balch presented specific facts linking illegal activity to Nicks's home. According to the affidavit, Nicks was at her residence when she presented herself as "Tiffany" to Tills. CP at 24. Nicks then went inside of her home and promptly returned with a check reported stolen by Ames. She used this stolen check to complete the sale

No. 49549-0-II

just outside of her home. Viewing these facts in a commonsense manner, the information as a whole amounted to probable cause to search Nicks's home.

Nicks primarily relies on *Thein* and *McReynolds* to challenge Sergeant Balch's general contention that checks tend to come in packets of 25. However, in viewing the four corners of the supporting affidavit, such generalization was unnecessary to find probable cause existed. Here, the issuing judge did not need to look to the officer's generalizations about checkbooks in order to conclude that one likely existed. This specific fact was presented in the supporting affidavit through the attached June 2014 police report in which Ames reported her checkbook stolen. A nexus existed between the items stolen from Ames's car and Nicks's home, not because Sergeant Balch assumed that the use of one check meant there were probably 24 others, but because Nicks falsely presented herself as Ames, went inside of her house, and returned with Ames's stolen check. Based on these facts, it was reasonable to infer that Ames's other reportedly stolen items, including her checkbook, would be in Nicks's home.

The evidence also established a nexus between the power equipment and the residence. Sergeant Balch's supporting affidavit contained Tills's statement that he filled out a bill of sale when he sold Nicks the equipment and that Till put the power equipment into Nicks's garage. The affidavit also contained the photographs Tills provided of the bill of sale for the power equipment and of Nicks's residence, as well as a copy of the fraudulent check written to pay Till for the power equipment. The combined evidence here established a reasonable inference that the power equipment, which constituted evidence of criminal activity, would be present in Nicks's residence.

Nicks also argues that Sergeant Balch's affidavit failed to establish a nexus between the equipment and her residence because the equipment was unloaded into the "detached garage," not

No. 49549-0-II

her residence. Br. of Appellant at 20. Nicks cites to no authority, aside from *Thein* and *McReynolds* to support her contention here.

We have held that “[j]udges looking for probable cause in an affidavit may draw reasonable inferences about where evidence is likely to be kept, including nearby land and buildings under the defendant’s control.” *State v. Gebaroff*, 87 Wn. App. 11, 16, 939 P.2d 706 (1997). Observation of criminal activity in one building on the suspect’s property may establish a nexus to search other nearby buildings under the suspect’s control. *State v. Constantine*, 182 Wn. App. 635, 646-47, 330 P.3d 226 (2014) (holding that marijuana observed growing in a greenhouse on defendant’s property established a nexus to search the defendant’s nearby house and shed because the house and shed were under defendant’s control).

Here, Nicks went into her home and returned with Ames’s stolen check to complete the equipment sale just outside her home. Till then put the equipment into Nicks’s detached garage. The affidavit contained a photograph showing Nicks’s residence, including the detached garage. Thus, Nicks’s argument fails because the warrant contained evidence that Nicks’s residence was near the detached garage and under her control.

Therefore, we hold that Sergeant Balch’s supporting affidavit set forth specific facts to establish a nexus between the items to be seized and Nicks’s home. The trial court did not err in finding that the search warrant was supported by probable cause.

### 3. Staleness of the Information

Nicks argues that even if the information contained in Sergeant Balch’s affidavit provided a nexus between the evidence to be seized and her residence, this information was stale and therefore, could not support a finding of probable cause. We disagree.

“It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause.” *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). A supporting affidavit establishes probable cause if it sets forth sufficient facts to persuade a reasonable person of the probability that the defendant is engaged in criminal activity, and that evidence of criminal activity can be found at the place to be searched. *Lyons*, 174 Wn.2d at 359. In making a probable cause determination, the issuing magistrate considers all circumstances set forth in the affidavit and draws commonsense inferences to make a practical, commonsense decision. *Maddox*, 152 Wn.2d at 509.

Some length of time naturally passes between initial observations of criminal activity and the presentation of an affidavit to an issuing magistrate. *Lyons*, 174 Wn.2d at 360. But when the passage of time is so prolonged that it is no longer probable that a search will uncover evidence of criminal activity, the information underlying the affidavit is deemed stale. *Id.* at 360-61.

Whether information is stale depends upon the circumstances of each case. *Id.* at 361. One factor for assessing staleness is the time between the known criminal activity and the nature and scope of the suspected activity. *Id.* For example, in *Lyons*, a confidential informant told police that he had observed marijuana growing on Lyons’s property. *Id.* at 357-58. The officers obtained a search warrant based on an affidavit stating, “Within the last 48 hours a reliable and confidential source of information . . . contacted [narcotics] Detectives and stated he/she observed narcotics.” *Id.* at 357. Our Supreme Court held that such statement did not provide the issuing magistrate with enough facts to infer that evidence could still be found at Lyons’s property. *Id.* at 361. The issuing magistrate could not determine whether the informant’s observations were stale because it was unclear whether “[w]ithin the last 48 hours” referred to the timing of the informant’s observations,

or the timing of the informant's tip to police. *Id.* at 362. Thus, the supporting affidavit did not support a finding of probable cause. *Id.* at 363.

Nicks cites to *Lyons* to argue that the information underlying Sergeant Balch's affidavit was stale because (1) the existence of more than one check was "purely hypothetical," and (2) Ames's reported vehicle theft occurred more than seven months before the search. Br. of Appellant at 22. We are not persuaded.

First, the existence of more than one check belonging to Ames was not "purely hypothetical." CP at 31. Ames reported a checkbook stolen in June 2014. This supports a reasonable inference that more than one check was stolen in June 2014. Second, the supporting affidavit only needed to establish probability of criminal activity, not a prima facie showing of criminal activity. *Maddox*, 152 Wn.2d at 505. Here, Sergeant Balch's affidavit established that Ames's checkbook had been stolen and Nicks subsequently used one of her stolen checks two days before Sergeant Balch applied for the search warrant. These facts were sufficient for the judge to draw a commonsense inference that the reportedly stolen checkbook would be in Nicks's possession.

Nicks also argues that evidence of the offense could not be found at Nicks's residence because her house "was not even involved in the crime itself." Br. of Appellant at 23. Such argument overlooks the crimes identified in the affidavit, which included second degree possession

of stolen property,<sup>5</sup> first degree identity theft,<sup>6</sup> along with first degree theft.<sup>7</sup> Though the vehicle prowl occurred in Kelso, Tills observed Nicks retrieve a stolen check from her home in Skamokawa. Nicks also identified herself as “Tiffany” outside of her home and used Ames’s financial information to obtain goods valued at \$5,450. CP at 24. Therefore, the crimes of theft, possession of stolen property, and identity theft occurred at Nicks’s residence and evidence related to those crimes was observed at Nicks’s house.

As to the timing of the observed criminal activity, Nick contends that the information was stale because Ames reported the vehicle prowl in June 2014. We disagree.

Tills and Sergeant Balch observed Nicks engaged in criminal activity between January 28 and January 30, 2015. On January 28, Nicks identified herself as “Tiffany” to Tills. CP at 64. She then purchased equipment with a check belonging to Tiffany Ames. On January 29, the true Ames provided an affidavit of forgery, stating that she did not authorize the check used to purchase the equipment. On January 30, Ames filled out a statement identifying the check as one from her checkbook stolen in June 2014. This combined information provided evidence that Nicks was in

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<sup>5</sup> A person commits second degree possession of stolen property, if “[h]e or she possesses stolen property . . . which exceeds seven hundred and fifty dollars in value but does not exceed five thousand dollars in value; or . . . possesses a stolen public record, writing or instrument kept, filed ,or deposited according to law.” RCW 9A.56.160(1)(a), (b).

<sup>6</sup> A person commits first degree identity theft by “knowingly obtain[ing], possess[ing], us[ing], or transfer[ing] a means of identification or financial information of another person” and “obtain[ing] credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars.” Former RCW 9.35.020(1), (2) (LAWS OF 2008, ch. 207, § 4).

<sup>7</sup> A person commits first degree theft by committing the theft of “[p]roperty or services which exceed(s) five thousand dollars in value” or “[p]roperty of any value, other than a firearm . . . or a motor vehicle, taken from the person of another.” RCW 9A.56.030(1)(a), (b).

possession of stolen property and had engaged in identity theft on January 28. RCW 9A.56.160; RCW 9.35.020. This evidence also implicated Nicks in the theft of Ames's vehicle because on January 28, she was in possession of one of the items reported stolen.

Thus, the evidence of criminal activity here was not solely through the June 2014 police report, but also through the observations and evidence gathered between January 28 and January 30, 2015. Given that the warrant to search Nicks's home was authorized on January 30, the passage of time was not so prolonged to make it no longer probable that the search of Nicks's home would uncover evidence of criminal activity. *Lyons*, 174 Wn.2d at 360-61. Therefore, we hold that the information within the affidavit was not stale and supported a finding of probable cause to search Nicks's residence for evidence of theft, possession of stolen property, and identity theft.

B. SUFFICIENCY OF THE EVIDENCE

Nicks argues that the State presented insufficient evidence to convict her of possession of a controlled substance, possession of stolen property, identity theft, and possession of another's identification. Her challenge to each conviction is the same—the State failed to show Nicks exercised dominion and control over the items found in her bedroom. We disagree because the State presented sufficient evidence for a jury to find that Nicks constructively possessed the items found in her bedroom.

1. Standard of Review

We review a challenge to the sufficiency of the evidence *de novo*. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). In determining whether the State presented sufficient evidence to



support a conviction, this court considers “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime *beyond* a reasonable doubt.” *Id.* (quoting *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)).

A defendant challenging the sufficiency of the evidence admits the truth of the State’s evidence and all reasonable inferences that can be drawn from that evidence. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). Such inferences “must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). Direct and circumstantial evidence are considered equally reliable. *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016). We defer to the fact finder on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. *State v. Ague-Masters*, 138 Wn. App. 86, 102, 156 P.3d 265 (2007). If the State presented insufficient evidence to prove an element of a crime, reversal is required. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

## 2. Constructive Possession of Methamphetamine

Nicks argues that the State failed to show she constructively possessed the methamphetamine found in her residence. We disagree.

Possession may be actual or constructive. *State v. Reichert*, 158 Wn. App. 374, 390, 242 P.3d 44 (2010), *review denied*, 171 Wn.2d 1006 (2011). Actual possession involves physical custody of the item, while constructive possession occurs if the defendant has dominion and control over the item. *Id.* Someone has dominion and control over an item if he or she can immediately convert it to actual possession. *Id.* Constructive possession need not be exclusive—

No. 49549-0-II

more than one person may constructively possess the same prohibited item. *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008).

Mere proximity to drugs is insufficient to prove constructive possession. *Id.* Nonetheless, proof that a defendant had dominion and control over a premises creates a rebuttable presumption that the person exercised dominion and control over items on that premises. *Reichert*, 158 Wn. App. at 390. For example, in *Reichert*, police found evidence of marijuana in a residence where Reichert was present. *Id.* at 380. The court held that the jury could infer that Reichert had dominion and control over the home because the State presented evidence that Reichert had keys to the house, retreated into the home for approximately 20 minutes, and police had found paperwork in the home, including utility bills, with Reichert's name on them. *Id.* at 390-91. Based on this evidence, the jury could infer that Reichert resided in the home, and thus infer he had constructive possession of the items found within the home. *Id.* at 390.

Here, the jury did not need to infer that Nicks exercised dominion and control over the house because she admitted that she resided there. Nicks testified that she slept in the master bedroom where the methamphetamine was found. As in *Reichert*, once Nicks admitted that she resided in the house and slept in the master bedroom, this created a rebuttable inference that she had constructive possession of the methamphetamine found in the master bedroom in her house. *Reichert*, 158 Wn. App. at 390. Also, as in *Reichert*, the jury here could infer constructive possession based on the evidence that the methamphetamine was found in a container next to her bed, along with a pipe containing residue of methamphetamine. Viewing these facts in the light

most favorable to the State, any rational trier of fact could find beyond a reasonable doubt that Nicks possessed methamphetamine.<sup>8</sup>

Nicks also argues that the State failed to show that she constructively possessed the methamphetamine because (1) the State only established Nicks's presence in the bedroom; (2) her dominion and control over the bedroom was not exclusive; and (3) the State provided no evidence as to ownership of the pouch. Nick's arguments fail.

First, the State provided evidence in addition to Nicks's presence in the bedroom. As discussed above, evidence at trial showed that Nicks exercised dominion and control over the residence, as well as the master bedroom where the methamphetamine was found. The evidence also showed that methamphetamine, along with a smoking device containing methamphetamine, was found on the floor next to where Nicks slept.

Second, constructive possession need not be exclusive. *George*, 146 Wn. App. at 920. Both Nicks and her live-in boyfriend could have constructively possessed the methamphetamine found in the master bedroom. *Id.*

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<sup>8</sup> Nicks relies on *State v. Spruell*, 57 Wn. App. 383, 788 P.2d 21 (1990) and *George*, 146 Wn. App. at 920, to argue the State failed to show she exercised dominion and control over the methamphetamine itself. However, her reliance on these cases is misplaced, as neither case involved a situation where the defendant exercised dominion and control over the premises where the evidence was found. *Spruell*, 57 Wn. App. at 388 ("where the evidence is insufficient to establish dominion and control of the premises, mere proximity to the drugs . . . is not enough to support a finding of constructive possession."); *George*, 146 Wn. App. at 922-23 (finding evidence that the defendant was the backseat passenger of a vehicle, without more, insufficient to show he constructively possessed the marijuana pipe found in the backseat).

Finally, constructive possession does not require proof of “ownership,” as Nicks contends.<sup>9</sup> *Reichert*, 158 Wn. App. at 390. As discussed above, constructive possession is established by showing someone exercised dominion and control over the item—not that they “owned” the item. *Id.*

Therefore, we hold that when viewed in the light most favorable to the State, the evidence here was sufficient to support the jury’s finding that Nicks constructively possessed the methamphetamine found in her bedroom, next to her bed.

3. Constructive Possession of the Identification Cards and Fuel Card

Nicks also argues that the State failed to present sufficient evidence that she constructively possessed the fuel card, Social Security card, and two driver’s licenses found in her desk drawer. Her argument here is similar to her challenge to the possession of methamphetamine conviction; namely, that “mere proximity is not enough to establish constructive possession.” Br. of Appellant at 30-31. We reject Nicks’s argument.

Nicks is correct that “mere proximity” to an item does not establish constructive possession of that item. Br. of Appellant at 30. However, as discussed above, proof that someone exercised dominion or control over a premises raises a rebuttable inference that the person also exercised dominion or control over the items found on that premises. *Reichert*, 158 Wn. App. at 390. Nicks

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<sup>9</sup> Nicks provides no legal authority to support her contention that the State was required to show evidence as to who owned the pouch. We decline to impose such a requirement. “Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171, *cert. denied*, 439 U.S. 870 (1978) (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

acknowledges this rebuttable inference, but argues that the State is still required to provide additional evidence for the jury to find constructive possession.

In making this argument, Nicks erroneously relies on cases concerning improper jury instructions—not sufficiency of the evidence. Br. of Appellant at 31. In particular, Nicks cites to *State v. Cantabrana*, 83 Wn. App. 204, 207-08, 921 P.2d 572 (1996) for the proposition that “[c]onstructive possession may not be conclusively established solely upon evidence of dominion and control over the premises.” Br. of Appellant at 31. *Cantabrana* does not stand for this proposition. In *Cantabrana*, the jury was instructed that constructive possession “occurs when there is no actual physical possession but there is dominion and control over the substance *or the premises* upon which the substance was found.” *Cantabrana*, 83 Wn. App. at 206-07. As written, the instruction compelled the jury to find that the defendant exercised dominion and control over the drugs if the jury found that the defendant exercised dominion or control over the premises where the drugs were found. *Id.* at 208. The *Cantabrana* court held that this instruction was erroneous because it failed to inform the jury that such inference was rebuttable. *Id.*

In its holding, the *Cantabrana* court specifically distinguished claims of instructional error and claims of insufficient evidence. *Id.* The court held, “When the sufficiency of the evidence is challenged on the basis that the State has shown dominion and control only over premises, and not over drugs, courts correctly say that the evidence is sufficient because dominion and control over premises raises a rebuttable inference of dominion and control over the drugs.” *Id.* Thus, *Cantabrana* does not support Nicks’s position and her reliance on its holding is misplaced.

Nicks further argues that her mere presence in the bedroom was insufficient for the jury to find beyond a reasonable doubt that she exercised dominion or control over the contents of the desk drawer. Nicks specifically identifies the evidence showing that Trafelet used the desk to argue that the State failed to meet its burden. This argument fails because as discussed, *supra* Section 2, Nicks admitted she resided in the home and slept in the master bedroom where the cards were found. This testimony created a rebuttable presumption that she exercised dominion or control over the items found within her bedroom. *Reichert*, 158 Wn. App. at 390-91. As to the cards found in the desk drawer, Nicks specifically testified that she owned the desk, used the desk, and stored her personal belongings in the desk. She also identified a coffee cup pictured on the desk on the day of the search as her own. Viewing this evidence in a light most favorable to the State, the jury could reasonably conclude that Nicks exercised dominion or control over the items found within the desk. Evidence that Trafelet also used the desk has no bearing on this conclusion, as constructive possession need not be exclusive. *George*, 146 Wn. App. at 920.

Therefore, we reject Nicks's argument that the State presented insufficient evidence to establish she constructively possessed the various identification cards found inside the bedroom desk drawer.

#### APPELLATE COSTS

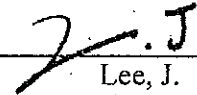
Nicks asks that we decline to impose appellate costs against her if the State prevails on this appeal and makes a request for costs. It is unclear from the State's briefing whether it intends to

No. 49549-0-II

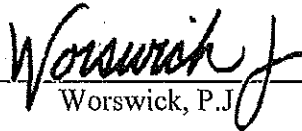
make such request.<sup>10</sup> If the State makes a request for appellate costs, Nicks may challenge that request before a commissioner of this court under RAP 14.2.

We affirm.

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.

  
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Lee, J.

We concur:

  
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Worswick, P.J.

  
\_\_\_\_\_  
Melnick, J.

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<sup>10</sup> The State addresses Nicks's request here by noting that Nicks is capable of working and stating that Washington does not "run debtors' prisons." Br. of Resp't at 23. The State then asks this court to "exercise its discretion in line with these considerations." Br. of Resp't at 23.

**THE TILLER LAW FIRM**

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