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I. ASSIGNMENTS OF ERROR

1. The State presented insufficient admissible evidence to establish that Ms. Marshall committed any crime.
2. The trial court erred in denying Ms. Marshall's Motion to Suppress.
3. Ms. Marshall was deprived of her right to a fair trial where the trial court erred in overruling Ms. Marshall's objection to Officer Bouley's hearsay testimony regarding statements made by Mr. Brown to Officer Bouley after Mr. Brown's arrest regarding an unknown person coming to Mr. Brown's home to attempt to extract ephedrine from fish food.
4. The State presented insufficient evidence to establish a nexus between the firearms found and the crimes charged.
5. The State presented insufficient evidence to establish that Ms. Marshall was an accomplice to the manufacture of methamphetamine.
6. Error is assigned to Conclusion of Law on Motion to Suppress CrR 3.6 No. III, which states:

There are sufficient facts to establish probable cause to believe that evidence of identity theft could be found at the address 9024 216th ST CT, Graham, WA.

II. ISSUES PRESENTED

1. Does the State present sufficient evidence to convict a person of a crime where all evidence presented was discovered pursuant to a warrant that was issued without probable cause? (Assignments of Error Nos. 1 & 2)
2. Did the trial court err in denying the motion to suppress the evidence discovered pursuant to the search warrant where the complaint for the search warrant contained insufficient facts to establish a link between the crime being investigated and the location to be searched? (Assignments

of Error Nos. 1, 2, & 7)

3. Was Ms. Marshall's right to a fair trial violated where the court overruled Ms. Marshall's objection to Officer Boulay's hearsay testimony regarding Mr. Brown's statements after his arrest? (Assignment of Error No. 3)
4. Is an individual armed during the commission of a crime where there is no proof that the weapon was readily accessible during the commission of the crime? (Assignment of Error No. 4)
5. Did the State present sufficient evidence to establish that Ms. Marshall was an accomplice to the manufacture of methamphetamine where the State failed to present any evidence that Ms. Marshall took any action intending to further the manufacture of methamphetamine? (Assignments of Error Nos. 1 & 5)

III. STATEMENT OF THE CASE

Factual and Procedural background

On February 20, 2006, Officer Joseph Boulay of the Sumner Police Department stopped a vehicle for driving with no taillights. RP 24-26, 8-28-07.¹ Officer Boulay discovered that the driver gave him a false name and was driving with a suspended license. CP 198. Officer Boulay arrested the driver and in the search of the vehicle incident to the driver's arrest located significant evidence that the driver was engaging in identity theft involving the identities of numerous other people including a credit card document

¹ The volumes of the report of proceedings are not numbered continuously between the volumes. Reference will be made by giving the page number followed by the date of the hearing.

indicating that a credit card in the name of Dawn Hewitt (an individual whose name was among the other items indicating identity theft) had been mailed to 9024 216th St. Ct. E., in Graham. CP 198; RP 26-27, 8-28-07.

When booked into jail, the driver of the vehicle gave 9024 216th St. Ct. E. as her home address and the Department of Licensing also listed this address as her home address. CP 198.

Officer Boulay contacted Ms. Hewitt and learned that she did not live in Graham and that her identity had been stolen. Officer Boulay learned that the Pierce County Assessor Treasurer's records listed the registered owner of the property as Marilyn McCarrell. Officer Boulay contacted Ms. McCarrell who told Officer Boulay that she did own the property but did not live at it, and that, as far as she knew, only her son lived on the property. CP 198; RP 48-49, 8-28-07.

Based on the materials found in the vehicle and his subsequent investigation, On February 23, 2006, Officer Boulay obtained a search warrant for the address in Graham. CP 198; RP 27, 8-28-07.

In February of 2006, Ms. Zoe Marshall had been living with a friend of hers, Gary Smith. RP 84-86, 9-4-07. Ms. Marshall was paying rent and helping Mr. Smith around the house. RP 89-90, 9-4-07. Ron Brown is Ms. Marshall's boyfriend. RP 90, 9-4-07. On February 19, 2006, Ms. Marshall went to Mr. Brown's home and spent several days there. She did not return

to Mr. Smith's house until after she had been arrested. RP 86-87, 9-4-07.

When the warrant was served at the Graham residence, the officers encountered and took into custody Mr. Ronald Brown and Ms. Zoe Marshall. RP 31-32, 8-28-07. Mr. Brown answered the door when the officers knocked and Ms. Marshall was found in a back bedroom. RP 31-32, 8-28-07.

During the search, the officers found a room which appeared to contain items which Officer Boulay suspected were associated with methamphetamine production. RP 33, 8-28-07. The officers found a red funnel with a white residue, a bottle labeled "toluene," buckets with unknown contents, a milk jug with unknown contents, a bucket with reddish-brown sludge, glass jars, tubing, and plastic containers. RP 33-35, 8-28-07. Inside a cardboard box in the room, police discovered several plastic containers, some with tubing taped to them, and a box of rock salt. RP 41.

In the master bedroom, police located a small piece of a plastic straw, a small glass vial with white powdery residue, two glass smoking devices, a water bong, coffee filters, coffee filters with a white residue on them, and two empty Sudafed boxes. RP 36-40, 8-28-07.

After searching the residence, police obtained an addendum to the search warrant allowing them to search for methamphetamine related items. RP 41-42, 8-28-07.

Nothing the police found in the residence indicated that Ms. Marshall

was involved in identity theft. RP 46, 8-28-07.

In a trailer on the property, police located a five gallon bucket half-full of a rusty-colored liquid, a black metal can half-full of a dark sludge, and a brown plastic bag with a white chunky material. RP 77-84, 8-28-07. In the trailer, police also discovered a black trash bag which contained used coffee filters, an empty 12 oz. can which had contained gas-line anti-freeze, some cut up lithium batteries, and four empty 18 oz. bottles of Red Devil lye. RP 84-85, 88- 8-28-07. Police also found a plastic tote which contained used coffee filters, rock salt, rubber gloves, and a length of vinyl tubing, a two-quart Mason jar containing amber and dark-colored sludge, a two-quart Mason jar three-quarters full of a tri-layered dark liquid, a plastic container half full of yellow liquid, a pint jar one-quarter full of a red sludge, a glass carafe with a white residue, a 250 milliliter Pyrex flask, a two-foot length of vinyl tubing with corroded brass fittings on each end, and four red plastic funnels with dark staining. RP 94-103, 8-28-07.

The police found a second plastic tote in the trailer which contained a one-gallon metal can holding a clear liquid, a one-gallon container of Coleman fuel, a second one-gallon container of Coleman fuel with a trace amount of liquid, a two-quart glass jar containing a tri-layer liquid, a one-quart Mason jar with a small amount of gray liquid, and a one-quart mason jar with the letter "E" written on the side of it. RP 103-107, 8-28-07.

In a shed in the back yard of the residence, police found four 12 oz. bottles of gas line antifreeze and a one gallon can labeled Coleman fuel, RP 110-112, 8-28-07. In a 50-gallon plastic barrel, police found an empty one-gallon can of acetone, an empty 12 oz. bottle of HEET, and an empty 18 oz. bottle of Red Devil lye, several blister packs labeled Tylenol Sinus, and the bottom portion of a weed sprayer. RP 112-114, 8-28-07. Police also recovered a glass bottle packaged in a Styrofoam container which was half full and labeled sulfuric acid. RP 114, 8-28-07.

On a couch in the living room, police found a duffle bag containing women's clothing and a plastic bag which contained white powder. RP 115, 8-28-07. Police also located a black purse containing a small notebook, a portion of a recipe of how to manufacture methamphetamine, a Washington ID card for Ms. Zoe Marshall, and a metal smoking pipe. RP 118-119, 8-28-07, RP 270, 8-29-07. The notebook did not contain a complete recipe, merely a description of one step of the methamphetamine manufacturing process. RP 270, 8-29-07.

In the kitchen. The police found an electric hand-held grinder with white residue. RP 121, 8-28-07. Under the kitchen sink, police found a quart can labeled acetone which was three-quarters full, a one-pint container labeled iodine which was half full, a 20 oz. container labeled Tri-Hist Granules, a one-quart container labeled mineral spirits which was half full,

and a plastic grocery bag with three bottles of HEET. RP 122, 8-28-07. In a cupboard in the kitchen police found a bag of large coffee filters. RP 126, 8-28-07.

In the bathroom, police found more unused coffee filters, a one-quart bottle three-quarters full labeled hydrogen peroxide, a one-gallon plastic jug three-quarters full and labeled muriatic acid, an 8 oz. bottle labeled iodine. RP 127-130, 8-28-07.

The police searched the master bedroom a second time and found a Pyrex baking dish with white residue, a soda bottle made into a smoking device, a coffee filter with a white crystallized residue in it, a Ziploc baggie containing white pills labeled Aleve, two empty boxes of Sudafed, documents belonging to Mr. Brown and Ms. Marshall, a baggie containing an electric blasting cap, a baggie containing a non-electric blasting cap, and an electric servo. RP 130-135, 8-28-07. The papers found in the master bedroom which were addressed to Ms. Marshall did not list the address of the Graham property where they were found. RP 202-203, 8-28-07. The documents had different addresses; one in Auburn and one in Seattle. RP 202-203, 8-28-07.

During the second search, in the same room where Officer Boulay had initially discovered the items he associated with methamphetamine manufacture, police found a plastic container with a small amount of an amber liquid with a length of black tubing coming out of the top of it. RP

145, 8-28-07. This item appeared to be an HCL generator. RP 145, 8-28-07. Police also found a small soda bottle containing a small amount of liquid and having a length of vinyl tubing coming out of the top, a medic bag with tubing running from the bag into another small plastic container which contained a small amount of liquid, to 18 oz. bottle of Drano, three empty bottles of Red Devil lye, a 16 oz bottle of household lye which was one quarter full, a blue plastic bottle with a bi-layered liquid, and a two-liter bottle with a tri-layered liquid. RP 146, 8-28-07.

In what was described as a "storage room," police discovered a black powder pistol which was loaded with a ball and powder and a rifle loaded with three rounds inside of a case. RP 149-151, 8-28-07.

Items recovered from the residence were sent to the Washington State Patrol crime lab to be analyzed and the items tested positive for methamphetamine, pseudoephedrine, and byproducts from the manufacture of methamphetamine. RP 218-243, 8-29-07.

On February 24, 2006, the Bethel School District had four school bus stops within 1,000 feet of the Graham residence searched by police. RP 279-282, 8-28-07.

Ms. Marshall's fingerprints were not recovered from any of the items discovered. RP 296, 8-29-07.

On March 27, 2006, Ms. Marshall was charged with one count of

being an accomplice to unlawful manufacturing of a controlled substance within 1,000 feet of a school bus stop. CP 1. On November 1, 2006, Ms. Marshall moved to suppress all evidence seized at Mr. Brown's home on grounds that the affidavit for the search warrant failed to establish a nexus between the identity theft being investigated by police and Mr. Brown's residence. CP 6-15.

On November 16, 2006, argument on Ms. Marshall's motion to suppress was heard. RP 1-40, 11-16-06. The trial court denied the motion and found that the affidavit for the search warrant for Mr. Brown's residence established probable cause for the search warrant to issue. RP 40, 11-16-06, CP 20-24.

On August 20, 2007, the charges were amended to one count of manufacturing a controlled substance within 1,000 feet of a school bus stop while armed or while an accomplice was armed with a pistol and a rifle, and one count of unlawful possession of a controlled substance within the intent to deliver. CP 56-57.

On August 27, 2007, the charges were again amended to add the aggravator that Ms. Marshall was on community custody at the time the offense was committed. CP 58-59.

Mr. Brown pled guilty to manufacturing methamphetamine. RP 106, 9-4-07. Mr. Brown testified at trial that he alone manufactured the

methamphetamine with help from no-one else. RP 114, 9-4-07. However, Officer Bouley testified that Mr. Brown told him that another person, who Mr. Brown would not identify, came to Mr. Brown's house and attempted to extract ephedrine from fish food. RP 14-15, 9-5-07.

The jury found Ms. Marshall guilty of the crime of unlawful manufacture of a controlled substance, but not guilty of the crime of unlawful possession of a controlled substance. CP 160-161. The jury found that Ms. Marshall or an accomplice was armed with a pistol and a rifle and that the unlawful manufacture of a controlled substance occurred within 1,000 feet of a school bus stop. CP 162-164.

Ms. Marshall stipulated that her offender score for purposes of sentencing was 2, based on the facts that she was on community custody at the time the crime was committed and that she had a prior felony conviction for storage of anhydrous ammonia. CP 173-174.

Ms. Marshall receive a sentence of 120 months. CP 175-187. Ms. Marshall received 24 months for the actual crime charged, 36 months for each firearm found at the scene, and 24 months for the school bus stop sentencing enhancement. CP 175-187. The trial court ordered all enhancements to run consecutive to each other and to the underlying offense. CP 175-187.

Notice of appeal was timely filed on November 30, 2007. CP 190.

IV. ARGUMENT

1. The State presented insufficient admissible evidence to convict Ms. Marshall of any crime.

Due process requires the State to prove beyond a reasonable doubt all the elements of the crime charged. *State v. Acosta*, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068. In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt; the reviewing court need only be satisfied that substantial evidence supports the State’s case. *State v. Galisia*, 63 Wn.App. 833, 838, 822 P.2d 303 (1992), *review denied*, 119 Wn.2d 1003, 832 P.2d 487 (1992), *abrogated on other grounds by State v. Trujillo*, 75

Wn.App. 913, 883 P.2d 329 (1994).

- A. *The trial court erred in denying the motion to suppress all evidence discovered pursuant to the initial search warrant where the affidavit for the initial search warrant contained insufficient facts to establish the necessary nexus between the crimes being investigated and the place to be searched.*

[The Court of Appeals] review[s] a trial court's denial of a motion to suppress by considering whether substantial evidence supports the challenged findings and whether those findings support the trial court's conclusions of law. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. [The Court of Appeals] review[s] conclusions of law de novo, and unchallenged findings become verities on appeal.

State v. Ague-Masters, 138 Wn.App. 86, 97, 156 P.3d 265 (2007) (internal citations omitted).

The warrant clause of the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington Constitution require that a search warrant be issued 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. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

An affidavit in support of a search warrant must set forth sufficient facts and circumstances to establish a reasonable probability that criminal activity is occurring or is about to occur. *State v. Petty*, 48 Wn.App. 615, 621, 740 P.2d 879, *review denied* 109 Wn.2d 1012 (1987). Affidavits are to

be read as a whole, in a commonsense, nontechnical manner, with doubts resolved in favor of the warrant. *State v. Casto*, 39 Wn.App. 229, 232, 692 P.2d 890 (1984), *review denied*, 103 Wn.2d 1020 (1985).

Reasonableness is the key in determining whether a search warrant should issue. *State v. Gunwall*, 106 Wn.2d 54, 73, 720 P.2d 808 (1986). While deference is to be given to the magistrate's ruling and doubts are to be resolved in favor of the warrant's validity (*State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981)), the deference accorded to the magistrate is not boundless. *State v. Maxwell*, 114 Wn.2d 761, 770, 791 P.2d 222 (1990). The review of a search warrant's validity is limited to the information the magistrate had when the warrant was originally issued. *Aguilar v. State of Texas*, 378 U.S. 108, 84 S.Ct. 1509, 1522 n.1 (1964); *State v. Stephens*, 37 Wn.App. 76, 80, 678 P.2d 832 (1984).

The affidavit must set forth more than mere conclusions. The underlying facts and circumstances leading to the conclusions must be included. Otherwise, the magistrate becomes no more than a rubber stamp for the police. *United States v. Ventresca*, 380 U.S. 102, 13 L.Ed.2d 684, 85 S.Ct. 741 (1965); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 723; *State v. Stephens*, 37 Wn.App 76, 79, 678 P.2d 832, *review denied*, 101 Wn.2d 1025 (1984).

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). An affidavit of probable cause must show “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, 977 P.2d 582. The magistrate is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit. *In re Pers. Restraint of Yim*, 139 Wn.2d 581, 596, 989 P.2d 512 (1999) (quoting *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975)). However, mere speculation or an officer's personal belief **will not** suffice. *State v. Anderson*, 105 Wn.App. 223, 229, 19 P.3d 1094 (2001).

In *Thein*, the Washington Supreme Court specifically rejected the argument made by the State that “it is reasonable to infer evidence of drug dealing will likely be found in the homes of drug dealers.” *Thein*, 138 Wn.2d at 147, 977 P.2d 582. The *Thein* court characterized this logic as “conclusory predictions” and ruled that “[b]lanket inferences of this kind substitute generalities for the required showing of reasonably specific ‘underlying circumstances.’” *Thein*, 138 Wn.2d at 147, 977 P.2d 582.

Here, in addition to summarizing the events surrounding Officer Boulay’s arrest of the driver of the vehicle and his subsequent investigation, the complaint for the search warrant also provided that the driver of the vehicle had numerous prior convictions and that Ron Brown, who was listed

in the LESA database as living at the Graham address, also had multiple convictions. CP 198.

Officer Boulay provided the following paragraph as the entire basis for his belief that evidence of identity theft would be found at the Graham residence:

Based on all the foregoing information, along with Affiant's experience in conducting Identity Theft and Financial Fraud investigations, Affiant verily believes that the illegal activity of Identity Theft and Financial Fraud exists at the above described properties and that there is probable cause to search the property located at: 9024 216th St Ct E in Graham, Washington in Pierce County to include those structures as described in the preceding section.

CP 198.

The "foregoing information" was simply an account of the arrest of the driver and the details of Officer Boulay's efforts in tracking down the owner of the Graham property. Aside from the driver giving the Graham address as her home address when booked and the DOL listing the Graham address as the driver's home address, the complaint for the search warrant failed to set out any facts establishing a nexus between the driver's identity theft and financial fraud and the Graham address.

The complaint for the search warrant establishes a nexus between the Graham address and the crimes Officer Boulay was investigating only if the court that issued the warrant made three inferences: (1) that the driver, a

person known to have false identification and to be engaging in identity theft, actually lived at the address given when she was booked and listed in the DOL database, despite the true owner of the property informing police that the driver did not live at the address; (2) that evidence of the driver's identity theft and financial fraud would be found at the driver's home despite there being no facts known to the police that any evidence relating to the identity theft was located in the home; and (3) that Officer Boulay's personal belief that evidence of the crimes would be found in the residence was sufficient to support probable cause. However, any finding of probable cause on the basis of these inferences would be erroneous.

First, the police had no reason to believe that the Graham residence was the driver's true residence. Police found multiple fake I.D.'s in the driver's car and personal identification information relating to numerous other people and the owner of the property informed Officer Boulay that the driver did not live at the Graham residence.

Second, *Thein* explicitly prohibits a finding of probable cause based on the logic that evidence of a criminal's criminal acts will always be found at that criminal's home. The inclusion in the complaint of the irrelevant and extraneous information that the driver and Mr. Brown both had prior convictions indicates that Officer Boulay was relying on the court making the exact finding prohibited by *Thein*; that, because criminals lived at the

address, evidence of crimes would be found there.

Third, mere speculation by police and recitations of an officer's personal beliefs are not sufficient to support a finding of probable cause to issue a search warrant. *Anderson*, 105 Wn.App. at 229, 19 P.3d 1094. Officer Boulay set forth no reason aside from his "experience in conducting Identity Theft and Financial Fraud investigations" and his "belie[f] that the illegal activity Identity Theft and Financial Fraud exist[ed]" at the Graham address to establish the nexus between the crime and the residence. This is insufficient to establish the required nexus.

The complaint for the search warrant failed to set forth any facts which would establish either a nexus between the identity theft being investigated or probable cause for the search warrant to issue.

B. All evidence discovered pursuant to the initial search warrant should have been suppressed.

Where a search warrant issued without probable cause, evidence gathered pursuant to the search must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *State v. Crawley*, 61 Wn.App. 29, 808 P.2d 773, *review denied*, 117 Wn.2d 1009, 816 P.2d 1223 (1991).

As discussed above, the complaint for the initial search warrant set forth insufficient facts to establish probable cause for the search warrant to

issue. Therefore, the trial court erred in denying Ms. Marshall's motion to suppress and all evidence discovered pursuant to the search warrant should have been suppressed.

C. *Even if the evidence was admissible, the State presented insufficient evidence to establish that Ms. Marshall was an accomplice to Mr. Brown's manufacture of methamphetamine.*

"A person being tried on a criminal charge can be convicted only by evidence, not by innuendo." *State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950). In cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied solely by a pyramiding of inferences. *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 932 (1999).

RCW 9A.08.020(3) provides that "A person is an accomplice of another person in the commission of a crime if: (a) with knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it;.." A defendant is not guilty as an accomplice unless he has associated with and participated in the venture as something he wished to happen and which he sought by his acts to succeed. *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993); *see also State v. Robinson*, 73 Wn. App. 851, 8972 P.2d 43

(1994).

“[I]n order for one to be deemed an accomplice, that individual must have acted with knowledge that he or she was promoting or facilitating the crime for which that individual was eventually charged.” *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). Guilt cannot be inferred by mere presence and knowledge of activity. *In re Wilson*, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979).

Washington case law has consistently stated that physical presence and assent alone are insufficient to constitute aiding and abetting. *Wilson*, 91 Wn.2d at 491, 588 P.2d 1161. *See also State v. Luna*, 71 Wn.App. 755, 759, 862 P.2d 620 (1993) (“Mere presence at the scene of a crime, even if coupled with assent to it, is not sufficient to prove complicity. The State must prove that the defendant was ready to assist in the crime.”), *citing State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951 (1981). Presence at the scene of an ongoing crime may be sufficient if a person is “ready to assist.” *Wilson*, 91 Wn.2d at 491, 588 P.2d 1161. The accomplice must do something in association with the principal to accomplish the crime. *State v. Boast*, 87 Wn.2d 447, 455-56, 553 P.2d 1322 (1976).

“One does not aid and abet unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about, and seeks by his action to make it succeed.” *State v. Amezola*, 49

Wn.App. 78, 89, 741 P.2d 1024 (1987).

Here, the evidence introduced at trial established that Mr. Brown was Ms. Marshall's boyfriend and that she occasionally spent the night or several days at his residence, despite having her own residence. The only evidence linking Ms. Marshall to the manufacture of methamphetamine in either an principal or accomplice capacity are the facts that she was present at the residence when the search warrant was executed and one page of a notebook found in her purse had a description of a portion of the methamphetamine production process. RP 270, 8-29-07.

These facts do not establish that Ms. Marshall promoted or facilitated the manufacture of methamphetamine or that she was ready to assist Mr. Brown in the manufacture of methamphetamine. RCW 69.50.101(p) defines the manufacture of a controlled substance as

the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container.

Even given the broad definition of manufacture of methamphetamine under RCW 69.50.101(p), the State presented no evidence that Ms. Marshall engaged in the manufacture of methamphetamine either as a principal or an accomplice. At best, the State's evidence established that Ms. Marshall was

present at the scene of the manufacture of methamphetamine, knew it was occurring, and assented to it. However, as discussed above, mere presence, knowledge, and assent is insufficient to establish liability for a crime as an accomplice. The State presented insufficient evidence to establish that Ms. Marshall was an accomplice to the manufacture of methamphetamine.

2. The State presented insufficient evidence to establish that either Ms. Marshall or Mr. Brown were armed during the production of methamphetamine.

Ms. Marshall was charged as being an accomplice to the unlawful manufacturing of a controlled substance while she, or an accomplice, was armed with a firearm. CP 58-59. The second amended information alleges that this crime was committed in violation of “RCW 9.94A.310/9.94A.510” and “RCW 9.94A.370/9.94A.530.” CP 58-59.

RCW 9.94A.310 has been recodified as RCW 9.94A.510. However, RCW 9.94A.510 is just the sentencing grid and does not address commission of a crime while armed with firearms.

RCW 9.94A.370 has been recodified as RCW 9.94A.530. RCW 9.94A.530(1) provides, in pertinent part, “The additional time for deadly weapon findings or for other adjustments as specified in RCW 9.94A.533 shall be added to the entire standard sentence range.”

A court may add time to a sentence if a defendant was armed with a firearm while committing a crime. RCW 9.94A.533(3). Under RCW

9.94A.602,

In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime... the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

“Whether a person is armed is a mixed question of law and fact.”

State v. Mills, 80 Wn.App. 231, 234, 907 P.2d 316 (1995). A person is armed while committing a crime if he can easily access and readily use a weapon and if a nexus connects him, the weapon, and the crime. *State v. Schelin*, 147 Wn.2d 562, 567-68, 55 P.3d 632 (2002); *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993).

This nexus requirement is critical because “[t]he right of the individual citizen to bear arms in defense of himself, or the State, shall not be impaired....” Wash. Const. art. I, § 24. The State may not punish a citizen merely for exercising this right. *State v. Rupe*, 101 Wn.2d 664, 704, 683 P.2d 571 (1984). The State may punish him for using a weapon in a commission of a crime, though, because a weapon can turn a nonviolent crime into a violent one, increasing the likelihood of death or injury. *State v. Gurske*, 155 Wn.2d 134, 138-39, 118 P.3d 333 (2005).

Here, it is undisputed that the facts of this case are sufficient to establish that Mr. Brown, and possibly Ms. Marshall, were in constructive

possession of the guns found in the residence, but the facts introduced at trial are insufficient to establish the required nexus between the guns, the crime charged, and either Ms. Marshall or Mr. Brown.

In *Valdobinos*, the police arrested the defendants and then conducted a search of their residence. During the search, officers found cocaine under a bed in “the bedroom.” *Valdobinos*, 122 Wn.2d at 273, 858 P.2d 199. They also found a rifle under “a bed in the home.” *Valdobinos*, 122 Wn.2d at 281, 858 P.2d 199. Since the police had already arrested Valdobinos, he was not present when the police discovered these items. In striking the firearm sentence enhancement, the *Valdobinos* court held that “[a] person is ‘armed’ if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes,” and that the evidence in the case was “insufficient to qualify Valdobinos as ‘armed’ in the sense of having a weapon accessible and readily available for offensive or defensive purposes.” *Valdobinos*, 122 Wn.2d at 282, 858 P.2d 199.

Similarly, a defendant was not armed with a deadly weapon by virtue of being in constructive possession of three handguns found in a bedroom during the execution of a search warrant. *State v. Call*, 75 Wn.App. 866, 880 P.2d 571 (1994). The *Call* opinion does not state where the police found the narcotics; however, it notes that Call went to his bedroom during the police investigation and returned “unarmed.” Based on these facts, the *Call* court

concluded that the evidence was insufficient to prove that Call had easy access to the guns. *Call*, 75 Wn.App. at 869, 880 P.2d 571.

The mere presence of a weapon at a crime scene in and of itself “may be insufficient to establish the nexus between a crime and a weapon,” and thus insufficient to show that the defendant was armed. Further, our holding in *Valdobinos* that the weapon must be easily accessible and readily available clearly established that mere constructive possession is insufficient to prove a defendant is armed with a deadly weapon during the commission of a crime.

Gurske, 155 Wn.2d at 138, 118 P.3d 333 (internal citations omitted).

When a crime is a continuing crime-like a drug manufacturing operation-a nexus obtains if the weapon was “there to be used,” which requires more than just the weapon's presence at the crime scene. *Gurske*, 155 Wn.2d at 138, 118 P.3d 333. This potential use may be offensive or defensive and may be to facilitate the crime's commission, to escape the scene, or to protect contraband. *Gurske*, 155 Wn.2d at 139, 118 P.3d 333.

Our cases have recognized that the mere 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. A person is armed with a deadly weapon if it is easily accessible and readily available for use for either offensive or defensive purposes. And there must be a nexus between the defendant, the crime, and the weapon. To apply the nexus requires analyzing “the nature of the crime, the type of weapon, and the circumstances under which the weapon is found.”

State v. Brown, 162 Wn.2d 422, 431, 173 P.3d 245 (2007) (internal citations omitted).

Showing that a weapon was accessible during a crime does not necessarily show a nexus between the crime and the weapon. The mere presence of a weapon at a crime scene may be insufficient to establish the nexus between a crime and a weapon. Likewise, simply constructively possessing a weapon on the premises sometime during the entire period of illegal activity is not enough to establish a nexus between the crime and the weapon. A person is not armed merely by virtue of owning or even possessing a weapon; there must be some nexus between the defendant, the weapon, and the crime.

Brown, 162 Wn.2d at 432-433, 173 P.3d 245 (internal citations omitted).

In *Mills*, a search of Mr. Mills' motel room yielded 118 grams of methamphetamine and a pistol in a gun pouch lying beside the narcotics. *Mills*, 80 Wn.App. at 233, 907 P.2d 316. Mr. Mills was found guilty of unlawful possession of a controlled substance with intent to deliver while armed with a deadly weapon. *Mills*, 80 Wn.App. at 233, 907 P.2d 316. Mr. Mills received a sentence enhancement for the pistol. *Mills*, 80 Wn.App. at 233, 907 P.2d 316.

On appeal, Mr. Mills challenged the deadly weapon sentence enhancement on grounds that evidence of his constructive possession of the gun was insufficient to prove that he was armed at the time he committed the crime. *Mills*, 80 Wn.App. at 234, 907 P.2d 316. The State disagreed and argued that Mr. Mills was "armed" because he had "exclusive possession and control of the contents of the motel room, the gun was easily accessible to him, and readily available for his use. Mills simply was not *present* at the

time.” *Mills*, 80 Wn.App. at 234, 907 P.2d 316 (emphasis in original). At oral argument, the State asserted a different theory, contending that Mr. Mills actually possessed the gun on or about the date charged, interpreting “about” to encompass a wide, undefined spectrum of time. *Mills*, 80 Wn.App. at 234, 907 P.2d 316.

The Court of Appeals rejected both of these arguments and held that “a defendant in constructive possession of a deadly weapon, even if that weapon is next to the controlled substances, is not ‘armed’ as that term is used in RCW 9.94A.125 [recodified as RCW 9.94A.602, *supra*].” *Mills*, 80 Wn.App. at 235, 907 P.2d 316.

In this case, the evidence introduced at trial established that Mr. Brown engaged in the “manufacture” of methamphetamine at his property. However, the evidence was insufficient to establish a nexus between the manufacture of the methamphetamine and the weapons found on the property. As in *Mills*, Mr. Brown or Ms. Marshall were, at most, in constructive possession of the firearms at the time the police arrested them. Also, like the defendants in *Mills*, *Call*, and *Valdobinos*, at the time of the search and their arrest, neither Ms. Marshall or Mr. Brown were in actual possession or even the same room as the firearms found in the home. Therefore, the firearms found in the home were not “easily accessible and readily available for use, either for offensive or defensive purposes” as

required by *Valdobinos*.

Further, as in *Mills*, the fact that the date the crime occurred was “on or about the 24h day of February” does not mean that Mr. Brown’s possession of the guns at any time in the past is sufficient to find that he manufactured methamphetamine while armed with a firearm.

Therefore, as in *Valdobinos*, neither Ms. Marshall nor Mr. Brown were “armed” in the sense of having a weapon accessible and readily available for offensive or defensive purposes as required by RCW 9.94A.602. At best, the State’s evidence establishes only that the firearms were present at the scene of the manufacture of methamphetamine. The State therefore presented insufficient evidence to establish that Ms. Marshall or an accomplice was armed with a firearm while manufacturing methamphetamine.

3. The trial court erred in denying Ms. Marshall’s objection to Officer Boulay’s hearsay testimony and this error deprived Ms. Marshall of her right to a fair trial.

A. The trial court abused its discretion in allowing the testimony.

A trial court's ruling on admission of evidence is reviewed for abuse of discretion. *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). A trial court abuses its discretion when its decision is “manifestly unreasonable or based on untenable grounds.” *Grandmaster Sheng-Yen Lu v. King County*,

110 Wn.App. 92, 99, 38 P.3d 1040 (2002). A court's decision is manifestly unreasonable

if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Id., 110 Wn.App. at 99, 38 P.3d 1040.

ER 801(c) defines hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Hearsay is not admissible. ER 802.

In its rebuttal case, the State recalled Officer Boulay and questioned him about statements Mr. Brown made to him after Mr. Brown was arrested.

RP 14-15, 9-5-07. The questioning was as follows:

Q: Officer, just a couple of very quick questions for you. Do you recall talking to Mr. Brown after he was arrested?

A: I do.

Q: And was that before or after he had been advised of his rights?

A: After.

Q: Did he make any statements to you about the lab-related items you had observed?

A: He did.

Q: What did he state?

A: Well, I asked him about the items.

[Trial Counsel]: Your honor, I'm going to object as hearsay.

THE COURT: Overruled. Go ahead.

A: I asked him about the items, and Mr. Brown said that the material in the buckets in the closet was leftover because some person, who he would not identify, came to his residence and attempted to extract what he called the "E," like the letter "E," which I understood to be ephedrine. Someone came to his house and tried to extract the "E" from fish food, according to Mr. Brown.

RP 14-15, 9-5-07.

This testimony was clearly hearsay. Mr. Brown made the statement out of court and the State offered it for the truth of the matter asserted. This is demonstrated by the manner in which the State made use of the testimony during closing arguments.

Previously, Mr. Brown had testified on behalf of Ms. Marshall and had testified that he alone manufactured methamphetamine at his residence and that no one else manufactured methamphetamine or assisted him in manufacturing methamphetamine at his residence. RP 114, 9-4-07. During closing argument the prosecutor relied on this inadmissible hearsay testimony to argue that Mr. Brown was not credible because he was giving inconsistent versions of events (RP 88, 9-5-07) and that the only reason Mr. Brown would offer inconsistent versions of the events would be to protect Ms. Marshall who was assisting Mr. Brown in the manufacture of methamphetamine. RP

90, 9-5-07. The obvious inference the State was asking the jury to make was that Ms. Marshall was the individual who had attempted to extract ephedrine from the fish food but who Mr. Brown would not identify.

The trial court abused its discretion in overruling Ms. Marshall's objection to the testimony because the testimony was clearly hearsay offered for the truth of the matter asserted (that Ms. Marshall had manufactured methamphetamine at Mr. Brown's home) and therefore inadmissible under ER 802.

B. The trial court's erroneous ruling deprived Ms. Marshall of a fair trial.

An irregularity in trial proceedings is grounds for reversal when it is so prejudicial that it deprives the defendant of a fair trial. *See State v. Post*, 59 Wn.App. 389, 395, 797 P.2d 1160 (1990), *affirmed*, 118 Wn.2d 596, 826 P.2d 172 (1992). In determining whether a trial irregularity deprived a defendant of a fair trial, the reviewing court examines the following factors:

(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow.

State v. Escalona, 49 Wn.App. 251, 254, 742 P.2d 190 (1987) (citing *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)).

Where a defendant is denied the right to a fair trial, the proper remedy

is reversal of the conviction and remand for a new trial. *State v. McDonald*, 96 Wn.App. 311, 979 P.2d 857 (1999), *affirmed* 143 Wn.2d 506, 22 P.3d 791 (2001).

Here, the trial court allowed Officer Boulay to offer the hearsay statements allegedly made by Mr. Brown to Officer Boulay after he was arrested. This was a trial irregularity which deprived Ms. Marshall of her right to a fair trial.

The irregularity was serious. Officer Boulay's testimony repeating Mr. Brown's statements was clearly inadmissible hearsay, but the trial court overruled the objection.

The testimony was not cumulative of other evidence because, up to that point, the evidence only linked Mr. Brown to the manufacture of methamphetamine. All the evidence was found on his property and he had testified that he, alone and unassisted, had been the one manufacturing methamphetamine. Officer Boulay's hearsay testimony was the first evidence introduced that someone other than Mr. Brown was involved in the manufacturing.

The error could not be cured by a limiting instruction because the trial court overruled the objection and the prosecutor relied on this evidence in closing to argue that Mr. Brown was not credible and, by extension, that Ms. Marshall was guilty of manufacturing methamphetamine.

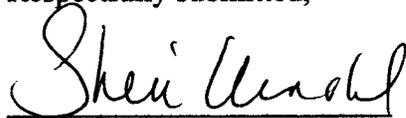
The trial court's error in overruling Ms. Marshall's objection to Officer Boulay's testimony deprived Ms. Marshall of a fair trial.

V. CONCLUSION

For the reasons stated above, this court should vacate Ms. Marshall's convictions and remand for dismissal of all charges.

DATED this 23rd day of June, 2008.

Respectfully submitted,



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Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on June 23, 2008, I delivered by U. S. Mail to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Avenue South, Tacoma, Washington 98402, and to Zoe Ann Marshall, DOC # 874293, Washington Corrections Center for Women, 9601 Bujacich Road NW, Gig Harbor, Washington 98332, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on June 23, 2008.



Norma Kinter

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