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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

SERGEY VLADIMIR KOTLYAROV, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Timothy L. Ashcraft

No. 16-1-01143-0

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was Officer Veenker's cursory search of the cabinet a valid protective sweep incident to arrest where Veenker performed the search right after defendant was brought to the ground in what Veenker termed a simultaneous detention and arrest? (Appellant's Assignments of Error 1 and 2).
2. Was there sufficient evidence to establish a nexus between the firearms and the crime of Unlawful Possession of a Controlled Substance where defendant went running back to the locked room where he kept 7.9 grams of methamphetamine, drug paraphernalia, and four firearms when he thought Kramareuskiy might access it or expose it to police? (Appellant's Assignment of Error 3).
3. Should this court remand for the criminal filing fee and the DNA collection fee to be stricken?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On March 17, 2016, the Pierce County Prosecuting Attorney's Office charged Sergey Vladimir Kotlyarov (the "defendant") in Count 1 with Unlawful Possession of a Controlled Substance with Intent to Deliver, in violation of RCW 69.50.401(1)(2)(b), while armed. CP 1. Count I was based on the defendant's possession of methamphetamine while armed with a .45 caliber Glock 21 pistol,¹ Mossberg 935 12-gauge shotgun,² SPA Luigi Franchi Brescia 20-gauge shotgun,³ and a Savage Super Sporter 30.06 rifle.⁴ CP 1. Because the defendant is a felon, he was also charged in Counts II, III, IV, and V with the Unlawful Possession of a Firearm in the Second Degree for the possession of the Glock pistol, Savage rifle, Franchi shotgun, and Mossberg Shotgun, respectively, in violation of RCW 9.41.040(2)(a). CP 1-3, 113-16; Ex. 10. Charges were dismissed without prejudice on February 6, 2017, because a key State witness was involved in an officer involved shooting and unable to testify. CP 12-13. Charges were refiled on August 2, 2017.⁵ CP 14-16.

¹ Admitted at trial as Ex. 48-A. 12-06-17 VRP 298-301. Hereinafter, "Glock pistol."

² Admitted at trial as Ex. 47-A. 12-06-17 VRP 295-97. Hereinafter, "Mossberg shotgun."

³ Admitted at trial as Ex. 46-A. 12-06-17 VRP 291-94. Hereinafter, "Franchi shotgun."

⁴ Admitted at trial as Ex. 45-A. 12-06-17 VRP 281-90. Hereinafter, "Savage rifle."

⁵ The State added a sixth count when refiled but that count was dismissed with prejudice before opening statements. CP 57-58; 12-06-17 VRP 171-74.

Pre-trial proceedings commenced before the Honorable Judge Timothy Ashcraft on December 4, 2017. 12-04-17 VRP 28. A pre-trial hearing was held to evaluate the admissibility of defendant's statements to law enforcement under CrR 3.5 and the admissibility of evidence discovered during searches of the building under CrR 3.6. *Id.* at 140-42, 156-58. The court found that the statements defendant made before he was advised of his *Miranda*⁶ rights were replies to police commands not intended to illicit a response and thus were admissible. 12-05-17 VRP 2. The court further found that the statements defendant made after he was advised his *Miranda* rights were a "knowing, voluntary, and intelligent waiver" of his right to remain silent and thus admissible under CrR 3.5. *Id.* at 4.

Regarding the CrR 3.6 motion, defendant challenged both the search of the back room generally and the search of the cabinet⁷ where multiple long guns were found. 12-04-17 VRP 157-163. The trial court found that, while the search of the back room was not consensual, it was permissible because there were exigent circumstances and because it fell under the

⁶ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

⁷ Throughout the trial, this piece of furniture is referred to in several ways. *See e.g.* 12-04-17 VRP 166 (cabinet/closet); 12-05-17 VRP 7 (cabinet/dresser). The State has elected to refer to it as a "cabinet" in this brief. From the photo exhibits admitted at trial, it is evident that the cabinet includes an area that would traditionally be used for hanging clothes and is large enough to fit a person or, as shown, multiple long guns standing vertically. Ex. 21.

community caretaking exception to the warrant requirement. 12-05-17 VRP 5-6; CP 122-23. The court also found that law enforcement lawfully opened the cabinet as part of a protective sweep and, though one is not required, they had a reasonable belief that the dresser harbored a person who posed a danger to police. 12-05-17 VRP 8-9; CP 123-24.

Trial commenced before the Honorable Judge Ashcroft on December 5, 2017. 12-05-17 VRP 41. The jury found defendant not guilty of Possession of a Controlled Substance with Intent to Deliver, instead finding him guilty of the lesser included offense of simple Possession of a Controlled Substance. CP 110-11. The jury found defendant committed that crime while armed and additionally found him guilty of four counts of Unlawful Possession of a Firearm. CP 112-16. On January 26, 2018, defendant was sentenced to 60 months in prison, 18 of which are flat time while the other 42 months are subject to good time. The court imposed mandatory legal financial obligations. 01-26-18 VRP 775-76. Defendant timely appeals. CP 142.

2. FACTS

a. Facts adjudicated at the 3.5/3.6 Hearing.

After darkness had fallen on March 11, 2016, Lakewood Police Officers Darrell Moore and Jacob Veenker responded to a 9-1-1 call reporting a potential burglary at 11304 Steele Street in Lakewood, WA. 12-

04-17 VRP 38-39, 43. The reporting party, later identified as Andrey Kramareuskiy, reported two people involved in the burglary. *Id.* at 40-41. He described one of the individuals as a white male wearing a camouflage jacket. *Id.* at 41.

As Moore and Veenker pulled up to the building and exited their patrol car, they immediately saw defendant wearing a camouflage jacket, standing in front of the ostensibly closed business. *Id.* at 42-44. They drew their weapons, keeping them at the “low-ready” position pointing downwards and not at defendant. *Id.* at 44-45. Officer Veenker began giving defendant verbal commands but defendant did not comply. *Id.* at 44-46. When Veenker told defendant to put his hands in the hair and turn in a circle so they could see if defendant had any weapons in his waistband, defendant began to continuously spin in circle. *Id.* at 46, 129; 12-06-17 VRP 198-99.⁸

Defendant continued rebuff Veenker’s commands, sometimes verbally, walking towards the officers while facing them when told to back towards the officers and dropping to his knees when told to lay flat on the ground. 12-04-17 VRP 46-47, 129; 12-06-17 VRP 199.⁹ Because the

⁸ Trial testimony cited to clarify that defendant spun in circles in response being asked to turn so officers could see his waistband, not in response to officers asking him to back towards them.

⁹ See n.8, *supra*.

original report talked of two individuals on scene and the garage door of the business was open, the officers were concerned that other potential burglars were on the scene. 12-04-17 VRP 48. Based on that risk and defendant's non-compliance, officers on scene repositioned a patrol vehicle for cover as they approached and handcuffed defendant. *Id.* at 49-50. Once detained, officers frisked defendant to check him for weapons; advised him of his *Miranda* rights, which defendant waived; and made sure there was no one else in the building. *Id.* at 52-54, 129-30.

With the scene secure, officers began investigating by interviewing defendant and Kramareuskiy. *Id.* at 51, 58. Though the exact timing is unclear, at some point after defendant was frisked and as police were investigating, defendant's handcuffs were removed. *Id.* at 74. During the investigation, defendant gave an ever-changing account of his reasons for being on the property.¹⁰ *Id.* at 56-57. At first, defendant claimed to own the business. *Id.* at 56. Kramareuskiy simultaneously claimed ownership but neither party could, or would, produce keys. *Id.* at 137; 12-06-17 VRP 203;¹¹ CP 119. Defendant then claimed he was working on the vehicles apparently being fixed inside the business but retracted the claim when

¹⁰ Though defendant speaks Russian and used interpreters at trial, Moore noted that he had no problem communicating with the defendant on scene. 12-04-17 VRP 117 (“[H]e could understand me, and he was responding to me in English.”) Moore also testified he would have sought out a translator if had trouble communicating with the defendant. *Id.*

¹¹ Trial testimony cited to clarify that neither party, not just the defendant, produced keys.

asked if he had a license to do such work. 12-04-17 VRP 56-57. Defendant then again changed his story, claiming that his mother owned the business. *Id.* at 57.

Kramareuskiy, on the other hand, presented a much simpler version of events. *Id.* at 59, 60-61. Kramareuskiy said that defendant had worked for the business and was living on-site but had been fired a week before. *Id.* at 59, 61. Both parties seemed to agree that Kramareuskiy owned the building and that, at one point, defendant lived in the back room. *Id.* at 60-62.

In the light of these contradictory accounts, the officers requested – and received – consent from both defendant and Kramareuskiy to search the building. *Id.* at 59-60. Veenker gave both parties of their *Ferrier*¹² warnings to obtain consent. *Id.* at 132-33. The officers searched most of the building and checked Vehicle Identification Numbers (VINs) to ensure that none of the cars present were stolen. *Id.* at 61-62. Officers could not access the locked back room where defendant may have lived and while defendant claimed to have keys to that room, he did not provide them. *Id.* at 61-62. After clearing the area, Moore and Veenker advised defendant

¹² *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

and Kramareuskiy that because the dispute appeared civil in nature, the police would be leaving. *Id.* at 62.

Kramareuskiy told Moore that, if Moore left, defendant would shoot him, and it would be Moore's fault. *Id.* at 58. Then, Kramareuskiy took off sprinting towards the back room and defendant quickly followed. *Id.* at 63. Moore took off after them with Veenker in-tow, worrying that Kramareuskiy's fear would be realized and there would be a physical confrontation. *Id.* at 63-64. Kramareuskiy kicked the door down but defendant shoved him aside and charged inside the room. *Id.* Moore and Veenker followed defendant, entering the room with their guns drawn. *Id.* at 66-67.

As Moore entered, he saw defendant about an arms-lengths away and noticed the room was in disarray. *Id.* at 65. Moore also saw a Glock pistol on a nearby shelf, no more than two arm's lengths away from defendant. *Id.* at 65-66. Moore ordered defendant to get on the ground multiple times. *Id.* at 67. When defendant did not comply, Moore delivered a front thrust kick which brought defendant to the ground. *Id.* at 68. Moore testified that he kicked defendant "to minimize [defendant's] capabilities to obtain any weapons or to engage us in a physical fight in an area where we know there's a firearm that's easily accessible and minimize my need to use more force." *Id.* at 67. While keeping defendant on the ground and waiting

for backup, Moore told Veenker to check a large cabinet to see if a person was possibly hiding inside. *Id.* at 68-69, 72-73. No one was inside, but the dresser was holding multiple long guns. *Id.* at 77, 96.

Mindful of the need for a warrant, Moore did not move anything or look inside any container beyond the protective sweep. *Id.* at 72-73. In plain view, Moore could see multiple IDs not belonging to defendant, ammunition and other evidence or firearms other than the Glock pistol, and drug paraphernalia including burnt glass pipes and strips of aluminum foil. *Id.* at 71-72. Based on what he saw, Moore requested, and received, a search warrant and performed a full search of the building. *Id.* at 73. Upon executing that warrant, officers seized numerous items related to firearms, drug possession, and drug distribution. *Id.* at 73; CP 122.

b. Facts adjudicated at trial.

At trial, Officers Moore and Veenker provided testimony substantively similar to – though more comprehensive than – the testimony provided at the pre-trial hearing. 12-06-17 VRP 94; 12-11-17 VRP 489. The state also called Lakewood Police Detective Darin Sale who fingerprinted and tested the recovered firearms, Washington State Crime Lab Technician Deborah Price who tested the recovered methamphetamine, and Pierce County Sheriff's Department's Forensic Investigations Manager Steven Wilkins who examined the fingerprints taken from the firearms. 12-

11-17 VRP 521, 553; 12-12-17 VRP 660. Additionally, the State provided evidence of defendant's connection to the back room including mail from the Washington Department of Licensing addressed to defendant, a Lakewood Municipal Court citation issued to defendant bearing the Steele Street address, a New York driver's license bearing defendant's name, a Washington driver's license bearing defendant's name, and a Washington identification card bearing defendant's name. 12-06-17 VRP 225-26; Ex. 19, 24, 25, 29.

The State also presented evidence on the firearms recovered, their operability, and any fingerprints lifted from them. Police recovered a Glock pistol, Savage rifle, Franchi shotgun, and Mossberg Shotgun from the back room. 12-06-17 VRP 281-90, 291-301. Multiple long guns were recovered from the cabinet. 12-11-17 VRP 511. Detective Sale was able to fire two rounds from each weapon but could only recover fingerprints from the Glock pistol and Franchi shotgun.¹³ *Id.* at 528, 531-32, 536-37, 539. Each gun was brought into the courtroom and admitted at trial. 12-06-17 VRP 281-90, 291-301.

Finally, the State presented evidence of drug use and distribution. Police recovered 7.9 grams of methamphetamine from the back room which

¹³ Mr. Wilkins determined that none of the prints recovered were of any "comparison value." 12-12-17 VRP 664.

was brought into the courtroom and admitted at trial.¹⁴ 12-06-17 VRP 305-7; 12-07-17 VRP 320-21; 12-11-17 VRP 564-65. Police also found glass pipes with burnt residue on them, strips of aluminum foil, two digital scales, and 103 small plastic baggies. 12-06-17 VRP 218; 12-07-17 VRP 321-322. Residue from one of those scales also tested positive for methamphetamine. 12-11-17 VRP 564-65. Officer Moore testified that all this evidence found together demonstrates the ability to distribute methamphetamine. 12-07-17 VRP 324.

C. ARGUMENT.

1. OFFICER VEENKER'S CURSORY INSPECTION OF THE CABINET WAS A VALID PROTECTIVE SWEEP INCIDENT TO ARREST WHERE THE SEARCH HAPPENED DURING OR SHORTLY BEFORE THE ARREST.

In Washington, an individual's right against unlawful search and seizure is protected by both the federal and state constitutions. *See* U.S. Const. amend. IV; Wash. Const. art. I, section 7. The Washington constitution offers greater protection than the federal constitution in some circumstances. *State v. Hendrickson*, 129 Wn.2d 61, 70 n.1, 917 P.2d 563 (1996). Warrantless searches are unreasonable per se under the Washington constitution. *Id.* at 70. The State bears the burden of establishing that a

¹⁴ Admitted at trial as Ex. 49-A. 12-11-17 VRP 565.

warrantless search falls into one of the jealously and carefully drawn exceptions to the warrant requirement. *Id.* at 70-71.

On appeal, defendant asserts that the protective sweep carried out by Officer Veenker was improper because the defendant had not yet been arrested. Appellant's Brief at 10. When Veenker opened the cabinet to ensure no one was inside, he saw multiple long guns. 12-11-17 VRP 511. Those guns were eventually seized pursuant to a search warrant. CP 122. Defendant does not challenge Moore and Veenker's entry into the back room, which the trial court found was permissible under both the exigent circumstances and community care taking exceptions to the warrant requirement. CP 122-23. Thus, those findings are verities on appeal. *Fuller v. Employment Sec. Dep't of State of Wash.*, 52 Wn. App. 603, 605, 762 P.2d 367 (1988) (citations omitted). Likewise, defendant does not challenge the search warrant.

In reviewing a trial court's denial of a suppression motion, this Court reviews challenged findings of fact for substantial evidence and challenged conclusions of law de novo. *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108, 1122 (2008) (citations omitted). Evidence is substantial when it is sufficient to persuade a fair-minded person of the truth of the matter. *Id.* Appellate courts defer to the trial court on issues of credibility and weight.

Id. Here, defendant appears to challenge the trial court's conclusions of law numbered 6, 7, and 8; all upholding the protective sweep. *See* CP 123-24.

- a. The validity of the protective sweep is irrelevant because the search warrant under which the firearms were seized is unchallenged and valid.

The defendant does not challenge now, nor did he challenge below, the validity of the search warrant in this case. App. Br. at 7-8. All the evidence collected in this case was seized pursuant to a valid search warrant. CP 122. Failure to raise the issue of the search warrant below precludes review on appeal. *State v. Christensen*, 40 Wn. App. 290, 297, 698 P.2d 1069 (1985). "It is established law that error predicated upon evidence allegedly obtained by an illegal search and seizure cannot be raised for the first time on appeal." *State v. Cook*, 31 Wn. App. 165, 176, 639 P.2d 863 (1982). While defendant contested the entry of the back room and opening of the cabinet at trial, he never challenged the search warrant. 12-04-17 VRP 161-64.

Here, defendant is asking this Court to suppress evidence seized pursuant a search warrant without challenging that warrant below or here on appeal. Even if this Court were to entertain such a challenge, the defendant would have to establish that without Veenker seeing long guns in the cabinet during his protective sweep, the affidavit would have been

insufficient to obtain a search warrant. To the contrary, while holding
detaining defendant and waiting for backup to arrive, Moore saw drug
paraphernalia, the Glock pistol, and ammunition indicating the presence of
other guns all in plain view. 12-04-17 VRP 71. Officer Moore “knew that
at that point [he'd] be writing an application for a search warrant.” *Id.* at 68.
Given the fact that there was evidence of two crimes (Unlawful Possession
of Firearm for the Glock pistol and Unlawful Possession of a Controlled
Substance indicated by the paraphernalia) in plain view, it would be
possible for a warrant to be issued without Veenker seeing long guns in the
cabinet, the only evidence challenged here.

The appellant bears the burden of perfecting the record for appellate
review. RAP 9.2(b); *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d
942 (2012). Appellate courts may “decline to address a claimed error when
faced with a material omission in the record.” *Sisouvanh*, 175 Wn.2d at
619. Without a sufficient record below, this Court cannot determine what
– if any – information was included in the affidavit; let alone what the
warrant judge relied on in granting the warrant. Thus, this Court should
decline to address defendant’s claim that the protective sweep was improper
because defendant would have to challenge the search warrant for this Court
to find that any evidence was improperly admitted. Defendant has not done
so here, and the record is insufficient for this Court to review that matter.

- b. This Court does not need to decide whether police can carry out a protective sweep not incident to arrest because the defendant in this case was arrested.

The Supreme Court of the United States first upheld brief intrusions in the interest of officer safety in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), when Police have reasonable, articulable belief they may be in danger. The Supreme Court recognized similar interests at play in *Maryland v. Buie*, 494 U.S. 325, 332-33, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990), and thus created the protective sweep exception. The Court specifically noted the “interest of the officers in taking steps to assure themselves that the house in which a suspect *is being, or has just been*, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack.” *Id.* at 333 (emphasis added).

In *Buie*, the Court held that a warrantless protective sweep amounting to only a “cursory inspection of those spaces where a person may be found” and lasting no longer than “necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises” was permissible in the interest of officer safety. *Id.* at 334. The protective sweep should only include spaces immediately adjoining the place of arrest but may be permitted in other areas when there are “articulable facts which, taken together with the

rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” *Id.* Washington courts have adopted this exception, using the reasoning employed in *Buie*. *State v. Hopkins*, 113 Wn. App. 954, 959, 55 P.3d 691 (2002).

Defendant contends that the protective sweep carried out by Veenker was improper because it happened when defendant was detained but before he was formally arrested.¹⁵ App. Br. at 10. Neither Washington law, Federal law, nor the logic behind the protective sweep exception supports the idea that the formal arrest must always proceed in time the initiation of protective sweep. Moreover, the record in this case shows that when officers ordered the defendant to the ground he was being arrested. On cross examination, defense counsel and Officer Veenker had the following exchange:

Q: ... there's a subsequent event where the door gets kicked in, and is Mr. Kotlyarov detained again at that point in time?

A: At that point he's being detained and arrested.

Q: And then he's also being arrested, right?

A: Yes.

¹⁵ It is worth noting that defendant does not appear to assert that the protective exceeded the proper scope in either area or time.

Q: So that's the same thing. That's the second detention and the arrest; is that right?

A: Yes.

12-11-17 VRP 510.¹⁶ After Moore brought defendant to the ground, Veenker handcuffed defendant and opened the cabinet to ensure no one was inside. 12-06-17 VRP 216. There was a short period of time, less than five minutes, when Moore and Veenker held the defendant in the room waiting for backup to arrive. 12-11-17 VRP 510-11. When it did, defendant was taken to a police car handcuffed. *Id.* at 510. This period of time is when Moore spotted drug paraphernalia and ammunition in plain view. 12-16-17 VRP 218. All indications are that the protective sweep happened after, or at the very least during, defendant's arrest.

The language in the cases defendant relies on indicate that the protective sweep exception is intended to protect officers *while* arresting someone, *not* exclusively after an arrest has been completed. *See Hopkins*, 113 Wn. App. at 959 (emphasis added) (holding protective sweep permissible “[w]hile making a lawful arrest”); *State v. Sadler*, 147 Wn. App. 97, 125, 193 P.3d 1108 (2008) (*citing Hopkins*, 113 Wn. App. at 959

¹⁶ Defendant argues that police did not have probable cause to arrest defendant at that time. App. Br. at 16. However, defense counsel did not explore that in any cross examination and the sufficiency of probable cause to arrest was not challenged at trial and has not been challenged here on appeal. Because this claim is being raised for the first time on appeal and the record is insufficient to review it, this Court should decline to do so. *See* RAP 2.5(a), 9.2(b); *Sisouvanh*, 175 Wn.2d at 619.

(emphasis added) “[p]olice may conduct a protective sweep of the premises for security purposes *as part of* the lawful arrest of a suspect”); and *State v. Boyer*, 124 Wn. App. 593, 600, 102 P.3d 833 (2004) (emphasis added) (recognizing that protective sweep exception justifies “the reasonable steps taken by arresting officers to ensure their safety *while* making an arrest” but not extending the exception to the service of a search warrant). In *Sadler*, this Court upheld a protective sweep where one officer swept the lower floor of the house while two others went upstairs with defendant who, at that time, was neither detained nor arrested. *Sadler*, 147 Wn. App. at 126.

More directly, in *State v. Blockman*, 198 Wn. App. 34, 38–39, 392 P.3d 1094 (2017) (emphasis added), *review granted*, 188 Wn.2d 1014, 396 P.3d 341 (2017), and *aff'd*, 190 Wn.2d 651, 416 P.3d 1194 (2018), Division One of this Court held that while the protective sweep often happens “after or *in the course of* making an arrest, ...nothing in the rationale of *Buie* or its progeny suggests that an arrest is an indispensable prerequisite.”¹⁷ This Court should follow this precedent as well supported not just by the law but also by logic. The danger that a hidden individual may launch an attack is

¹⁷ There is a federal circuit split where some circuits have extended the protective sweep exception beyond the context of arrest where officers have a “reasonable suspicion that the area swept harbored a person posing a danger to” police. Compare *United States v. Gould*, 364 F.3d 578, 582-84 (5th Cir. 2004), *abrogated on other grounds by Kentucky v. King*, 563 U.S. 452, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011); with *United States v. Reid*, 226 F.3d 1020, 1027 (9th Cir. 2000) (holding a protective sweep was not justified where the apparent resident was not arrested and there was no reason to suspect others were in the house).

a constant whenever police are in someone's home. *Id.* at 40. To hold that officers could not perform a cursory inspection of areas near the arrest that could clearly harbor a person would put police at risk, and running the very goal of the exception.

Defendant also relies on numerous federal cases for support. However, none of the cases defendant cited establish that arrest is a prerequisite for a protective sweep.¹⁸ Nonetheless, it is useful to look towards federal law as it is both more developed and direct in this area. *United States v. Torres-Castro*, 470 F.3d 992 (10th Cir. 2006), is particularly helpful. There, the court held that that search may proceed an arrest in time and still be "incident to arrest." *Id.* at 997. "Where the formal arrest followed quickly on the heels of the challenged search [it is not]

¹⁸ The fact that a court upheld a search that happened after arrest does not indicate that the search *must* happen after the arrest. See *United States v. Davis*, 290 F.3d 1239, 1241 (10th Cir. 2002) (holding a protective sweep was not incident to arrest where the defendant was arrested after the protective sweep, later in the day, and only after the service of a search warrant); *United States v. Smith*, 131 F.3d 1392, 1396 (10th Cir. 1997) (holding a protective sweep was valid where multiple officers carried it out while attempting to locate the defendant before, during, and after the defendant's arrest but not continuing once all officers were aware defendant was arrested); *United States v. Torres-Castro*, 470 F.3d 992, 998 (10th Cir. 2006) (holding a protective sweep was valid when carried out before and during arrest, officers had established probable cause to arrest before entering the home, and officers had reasonable suspicion under *Buie* because defendant had a weapon and had threatened to use it); *United States v. Waldner*, 425 F.3d 514, 517 (8th Cir. 2005) (emphasis added) (holding that, while the sweep exceeded the permissible scope in that case, "*Buie* authorizes protective sweeps for unknown individuals in a house who may pose a threat to officers as they effectuate an arrest"); *United States v. Reid*, 226 F.3d 1020, 1027 (9th Cir. 2000) (holding a protective sweep was not valid because the individual detained was a non-resident third party who officers had no prior knowledge of, officer testified they did *not* have probable cause for arrest, and there was no reasonable suspicion anyone else was in the home).

particularly important that the search preceded the arrest rather than vice versa.” *Torres-Castro*, 470 F.3d at 997 (quoting *Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980)). If a legitimate basis existed for the arrest and it happened shortly after, then “when the officer forms the intent to arrest is not determinative.” *Torres-Castro*, 470 F.3d at 998 (citations omitted). Federal “courts have found that a search may be incident to an arrest in cases where the search and arrest were separated by times ranging from five to sixty minutes.” *Id.*

In this case, police begun effecting an arrest when they ordered defendant to the ground. 12-11-17 VRP 510-11. Defendant had already resisted police commands, allegedly threatened to shoot Kramareuskiy, and sprinted after Kramareuskiy and pushed him aside to get in the back room. 12-04-17 VRP 58, 63-64; 12-06-17 VRP 198-99. Given their contact with defendant so far, Moore and Veenker waited for backup to safely remove the defendant from the room. 12-06-17 VRP 216. As they waited, they secured the area with a cursory inspection of one cabinet. 12-06-17 VRP 216; 12-11-17 VRP 510-11. Neither Washington nor Federal law wades into the details of when a formal arrest was effected where the events occurred so close in time. Therefore, this Court should uphold Veenker’s cursory inspection of the cabinet as valid protective sweep incident to arrest.

2. THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH A NEXUS BETWEEN THE FIREARMS AND THE CRIME OF POSSESSION OF A CONTROLLED SUBSTANCE WHERE DEFENDANT RAN TOWARDS THE LOCKED ROOM WHERE HE KEPT HIS METHAMPHETAMINE, PARAPHERNALIA, AND FIREARMS TO DEFEND IT WHEN HE THOUGHT KRAMAREUSKIY MAY GAIN ACCESS.

The State alleged that defendant committed Count I, Unlawful Possession of a Controlled Substance with the Intent to Distribute, while armed as defined in RCW 9.41.010. CP 14. Though the jury found that the defendant guilty of the lesser crime of Unlawful Possession of a Controlled Substance they also found that he was indeed armed. CP 110-112. This finding invoked an enhancement to his sentence under RCW 9.94A.530 and RCW 9.94A.533(3). A defendant is "armed" for the purposes of the sentencing enhancement when he is in the proximity of an easily and readily available firearm that may be used for offensive or defensive purposes and when a nexus is established between the defendant, the weapon, and the crime. *State v. Schelin*, 147 Wn.2d 562, 575-76, 55 P.3d 632 (2002).

A sentencing enhancement that increases the penalty for a crime beyond the statutory maximum must be proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Whether a person is armed for the purposes of a sentencing

enhancement is a mixed question of law and fact reviewed de novo. *Schelin*, 147 Wn.2d at 565-66.

To succeed on a challenge to the sufficiency of the evidence, the defendant “needs to outline evidence in its brief, point to deficiencies it contends exist, and cite to relevant authority[;] a bare conclusory allegation that evidence is insufficient will not suffice.” *Mavroudis v. Pittsburgh-Corning Corp*, 86 Wn. App. 22, 39, 935 P.2d 684 (1997). “[A]ppellate courts are not in the business of searching the record in an effort to determine the nature of any alleged deficiencies to which the challenger may be referring, and then to search the law for authority to support those same alleged deficiencies.” *Id.* at 39-40.

A challenge to the sufficiency of the evidence admits the truth of the State’s evidence and draws all reasonable inferences therefrom. *State v. O’Neal*, 126 Wn. App. 395, 424, 109 P.3d 429 (2005) (citations omitted), *aff’d*, 159 Wn.2d 500, 150 P.3d 1121 (2007). Evidence is sufficient to support a sentencing enhancement when, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the sentencing enhancement beyond a reasonable doubt. *Id.* at 424. The question is not whether the evidence could convince all rational triers of fact or even most rational triers of fact. It is whether the evidence could convince any one rational trier of fact. *See Id.*

“Circumstantial evidence and direct evidence carry equal weight” in this analysis. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004) (citations omitted). Appellate courts defer to the resolutions of the finders of fact regarding conflicting testimony, witness credibility, and the persuasiveness of the evidence. *O’Neal*, 126 Wn. App. at 424 (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

There must be a nexus between the defendant, the weapon, and the crime. *Schelin*, 147 Wn.2d at 568. In applying the nexus test, courts should “should examine the nature of the crime, the type of weapon, and the circumstances under which the weapon is found.” *Id.* at 570. In *Sassen Van Elslloo*, the court found that a nexus exists where a gun is “there to be used” during the commission of an ongoing drug operation. *State v. Sassen Van Elslloo*, 191 Wn.2d 798, 830, 425 P.3d 807 (2018).

Though the jury did not find defendant guilty of having the intent to distribute methamphetamine; the presence of strips of foil, pipe with burnt residue, 103 baggies, two electronic scales, and quantity of meth greater than most users would possess was still before the jury. 12-06-17 VRP 218; 12-07-17 VRP 324; 12-12-17 VRP 643. The truth of all this evidence is admitted and viewing it in the light most favorable to the state, this all supports the inference that the defendant was a regular and heavy user of methamphetamine. It is perfectly reasonable for the jury to find that the

firearms were there to be used and when defendant sprinted towards the back room he intended to protect his stash and conceal his crimes.

The defendant was charged by information with a sentencing enhancement for each firearm. *See* CP 14 (“[T]he defendant... was armed with a firearm, to-wit: Glock .45 pistol, to-wit: Mossberg Shotgun, to-wit: Lugi Franchi Shotgun and to-wit: 30.06 Rifle”). However, the jury was only asked once, and generally, if the defendant was armed with “a firearm” at the time he committed Count I. CP 112. Thus, while the jury had to unanimously find that the defendant was armed, they do not have to unanimously agree about which firearm specifically that finding is based on as long as each charged means, in this case each enumerated firearm, is supported by sufficient evidence. *State v. Gomez*, ___ Wn. App. 2d. ___, ___ P.3d ___, 2019 WL 442317, at *7 (2019) (citations omitted).

Each firearm was within the proximity of defendant and was easily and readily available to be used for offensive or defensive purposes. 12-06-17 VRP 281-90, 291-301. Detective Sale was able to fire two rounds from each gun, thus proving that they were all operable. 12-11-17 VRP 528, 531-32, 536-37, 539. At least one of the shotguns was loaded and there was plenty of ammunition that could have been loaded into the other guns. 12-06-17 VRP 260, 277. However, it is undeniable that the Glock pistol posed the greatest danger. Defendant went sprinting after Kramareuskiy when he

thought Kramareuskiy was going into the back room and he pushed Kramareuskiy to get in the room first. When Moore entered the back room, the Glock was no more than two arm's lengths away from the defendant, it was easily grabbable sitting on a counter, and it was loaded. *Id.* at 224. It is entirely reasonable for a jury to find that defendant – who knew the back room held methamphetamine, drug paraphernalia, and four firearms defendant could not legally possess – went into that room with the intent of defending his stash or going on the offensive against Kramareuskiy or police.

The State recognizes both 1) that mere proximity is not sufficient to establish a nexus per *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993), and others; and 2) that courts often look for specific evidence that would support the inference that the firearm was there be used for offensive or defensive purposes. *See e.g. State v. Neff*, 163 Wn.2d 453, 464, 181 P.3d 819 (2008) (where security cameras were found to support the inference firearms were there to defend a marijuana grow site); *State v. Eckenrode*, 159 Wn.2d 488, 494, 150 P.3d 1116 (2007) (where a police scanner was held to support a similar inference). However, the cameras in *Neff* and the police scanner in *Eckenrode* are each but one factor those respective court's decisions. *Neff*, 163 Wn.2d at 464; *Eckenrode*, 159 Wn.2d at 494.

Unlike in *State v. Johnson*, 94 Wn. App. 882, 894, 974 P.2d 855 (1999), where the defendant was handcuffed and “there was no realistic possibility that he could access his gun,” when Veenker and Moore first entered the back room the defendant was not detained and was looking towards the Glock pistol which was within reach. 12-06-17 VRP 215. The three guns recovered from the cabinet only serve to bolster the inference that defendant was prepared to protect his stash. 12-11-17 VRP 511. The defendant had more methamphetamine than an average user would possess and a good deal of paraphernalia behind a locked door. When Kramareuskiy ran back to that door and kicked it open, defendant knew the means to defend his stash were inside that room and he went for it. A reasonable jury can, and did, reach that same inference.

3. THIS COURT SHOULD ORDER THAT THE
IMPOSITION OF THE CRIMINAL FILING FEE
AND THE DNA COLLECTION FEE BE
STRIKEN.

In this case, the trial court found the defendant to be indigent. CP 146 - 147. The defendant’s direct appeal is still pending. House Bill 1783, effective March 27, 2018, prohibits the imposition of the \$200.00 filing fee on defendants who were indigent at the time of sentencing. As the court held in *State v. Ramirez*, ___ Wn.2d ___, 426 P.3d 714 (2018), House Bill 1783 is applicable to cases that are on appeal and therefore not yet final.

The State agrees that the criminal filing fee of \$200.00 that was imposed in this case should be stricken. The State further agrees that House Bill 1783 eliminates any interest accrual on nonrestitution legal financial obligations. The State acknowledges that this defendant was found indigent by the sentencing court, and therefore the \$200.00 criminal filing fee should be stricken.

The appellant in this case also appeals the imposition of a \$100 DNA-collection fee in the judgment and sentence, asserting that a DNA sample was previously submitted to the state as a result of a prior qualifying conviction. A legislative amendment to RCW 43.43.7541, which took effect June 7, 2018, requires imposition of the DNA-collection fee “unless the state has previously collected the offender’s DNA as a result of a prior conviction.” The amendment applies to defendants whose appeals were pending — i.e., their cases were not yet final — when the amendment was enacted. *State v. Ramirez*, ___ Wn.2d ___, 426 P.3d 714, (2018).

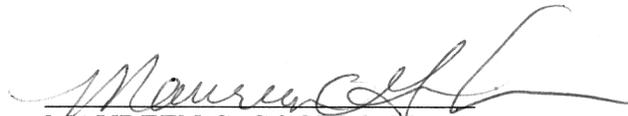
The State’s records show that this appellant’s DNA was collected and is on file with the Washington State Patrol Crime Lab. The State respectfully asks this Court to remand this case to the superior court to amend the judgment and sentence to strike the imposition of the \$100 DNA collection fee.

D. CONCLUSION.

For the above reasons, the State respectfully requests that this Court affirm the convictions and sentence below, holding that 1) the trial court properly denied the defendant's motion to suppress evidence uncovered during a valid protective sweep incident to arrest and 2) that there was sufficient evidence for a reasonable jury to find there was a nexus between the firearms and the crime of Unlawful Possession of Controlled Substance. This court should remand for the trial court to strike the imposition of the \$200.00 filing fee, the imposition of the \$100 DNA collection fee and the interest accrual provision.

DATED: February 19, 2019

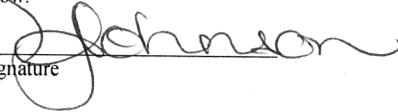
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Rule 9

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2/19/19 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

February 19, 2019 - 11:56 AM

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