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

STATE OF WASHINGTON, RESPONDENT

v.

JEANIA WATTS-DYSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Phil Sorenson, Judge

No. 17-1-01396-1

Brief of Respondent

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

1. Whether, viewing the evidence in the light most favorable to the State, there was sufficient evidence to prove defendant or her accomplice exercised dominion and control over two firearms, heroin, methamphetamine, cocaine and oxycodone that were found in her home? (Appellant's Assignment of Error 1).
2. Whether, viewing the evidence in the light most favorable to the State, there was sufficient evidence to prove defendant or her accomplice was armed with a firearm when she possessed heroin and methamphetamine? (Appellant's Assignment of Error 2).
3. Whether the trial court properly denied the defense proposed jury instruction on unwitting possession where the evidence did not support giving the instruction? (Appellant's Assignment of Error 3).

B. STATEMENT OF THE CASE.

1. PROCEDURE

On April 7, 2017, the Pierce County Prosecuting Attorney's Office charged Jeania Andrea Watts Dyson ("defendant") with one count of unlawful possession of a controlled substance—heroin—with intent to deliver while armed with a firearm; one count of unlawful possession of a controlled substance—methamphetamine—with intent to deliver while armed with a firearm; one count of unlawful possession of a controlled substance—cocaine; one count of unlawful possession of a controlled

substance—oxycodone; and two counts of unlawful possession of a firearm in the first degree. CP 1-3. Each count charged defendant as an accomplice and her husband was identified as her co-defendant.¹ CP 1-3, 17-55 (Instructions 6, 13, 15, 20, 22, 24, 26, 30, 31.)

The case proceeded to trial, where the State called City of Lakewood Detective Darin Sale, Detective Sean Conlon, Officer Ryan Hamilton, Detective Jeff Martin, and forensic scientist Maureen Dudschus to testify. RP 17, 42, 81, 129, 276. Defendant testified in her own defense. RP 322. Defendant stipulated to having been convicted of a prior serious offense. Exh. 87.

Defendant requested the court give an unwitting possession instruction to the jury, while acknowledging that no drugs were found in her actual possession. RP 423-24. The State objected. RP 425. The court denied the proposed instruction, ruling,

[T]he possession instruction talks about a situation where there's actual possession and constructive possession, and it allows for a jury to conclude that, if one is in proximity to the substance that we're talking about and has dominion and control over the area, that that satisfies the possession prong, so I am not going to give [the instruction.] I don't think that it does fit the facts of this case, and I think that the possession instruction does give the jury a framework from which to make a decision whether or not Ms. [...]Dyson-Watts, has dominion and control over the substance that we're talking about. So, I am going to deny the defense motion, although I fully understand why the argument is being made.

¹ As evident from the transcripts, the co-defendant's case proceeded separately.

RP 426.

The jury subsequently found defendant guilty of lesser included charges of unlawful possession of a controlled substance—heroin and unlawful possession of a controlled substance—methamphetamine. RP 490-492. The also jury found defendant guilty of unlawful possession of a controlled substance—cocaine; unlawful possession of a controlled substance—oxycodone; and both counts of unlawful possession of a firearm. RP 492. The jury found defendant, or her accomplice, was armed with a firearm at the time she possessed heroin and methamphetamine. RP 496.

The court imposed 12 months of incarceration and 12 months of community custody on the controlled substance convictions, 87 months on the unlawful possession of a firearm convictions, and an additional 36 months on the firearm enhancements. RP 516. The sentencing enhancements were to run consecutive to the 87-month sentence, making her total sentence 123 months in custody. CP 70-85. This timely appeal follows. CP 103.

2. FACTS

On March 31, 2017, Detective (“Det.”) Jeff Martin of the City of Lakewood Police Department arranged for a “controlled buy” of narcotics from the Watts’ residence. RP 401-03. Det. Martin directed a confidential informant to place a phone call to Marvin Watts,² defendant’s husband. RP 145, 404. The informant called Marvin and requested to purchase crack cocaine at a specific location. *Id.* Det. Martin, assisted by a team that conducted surveillance, watched defendant’s home for someone to emerge and meet the informant. *Id.* Defendant emerged from the home she shared with Marvin, met the confidential informant, and exchanged crack cocaine for money. RP 404-05.

Det. Martin used this “controlled buy” as the basis for a search warrant to be executed on defendant’s home. RP 406. Prior to executing the search, Det. Martin and his team conducted periodic surveillance of defendant’s home. RP 146. Defendant’s sister-in-law also stayed at the home, and she kept hours consistent with going to work or school. RP 146-47. Marvin’s routine was “all over the board” and “very, very sporadic.” RP 147. Based on Det. Martin’s experience, this activity was “consistent with

² Because defendant and Marvin Watts share the same last name, the State will refer to Marvin Watts by his first name. No disrespect is intended.

somebody who was potentially involved in narcotics activity.” *Id.* Defendant’s comings and goings were similarly “somewhat sporadic.” *Id.*

Officers executed the search warrant on defendant’s home on April 6, 2017, at approximately 5:20 a.m. RP 149, 151. Defendant, Marvin, and defendant’s sister-in-law were inside the home when the team entered. RP 154. The sister-in-law was in her own bedroom. *Id.* Defendant, sleeping naked next to Marvin, was on a futon in the “rec room.” RP 154-55, 196.

When officers searched the rec room, they found approximately 100 one-inch by one-inch baggies, which are generally indicative of drug trafficking. RP 157. A black pouch was also recovered from that room at the bottom of the futon. RP 157, 162; Exh. 45. The pouch contained methamphetamine, heroin, a pill bottle containing two rocks of crack cocaine, powder cocaine, and oxycodone. RP 158, 164, 166-67; Exh. 50-55. With the heroin, police found a razor blade. RP 169. Razor blades are used to “cut the product” into smaller amounts. RP 169-70. Crystal methamphetamine was located on a shelf in the rec room. RP 177-78. Police also recovered a digital scale in the rec room. RP 163. Two additional digital scales were recovered from Marvin’s Lexus. RP 181.

In the living room area, police found another bag of methamphetamine. RP 171-72. There were two firearms recovered in the home as well. RP 196; Exh. 56, 57, 65. One of the guns, a revolver, was

found within arm's reach of the futon in the rec room. RP 196-98. It was loaded with six rounds of ammunition. RP 198. Additional ammunition was on the shelf in the spare bedroom closet. RP 235-36.

The second loaded firearm was under defendant's mattress in the master bedroom. RP 200, 208. It was a Taurus Millennium 9mm semiautomatic handgun. RP 200. Documents with defendant's name, pictures of her, and her clothing were in the master bedroom as well. RP 203-04. Marvin told detectives that he shared the master bedroom with defendant and admitted to police that they would find drugs and guns inside the home. RP 222-23.

Defendant testified that, though she witnessed her husband take prescription pills not prescribed to him, she had never seen any kind of drug dealing from her home, and she did not know about the guns or drugs recovered from her home. RP 342, 384-85.

At sentencing, defendant told the court that she "wasn't oblivious to the drugs. I knew they were there." RP 513. But she maintained her story from trial that she was unaware of the guns in the home, and she was disappointed her husband had guns in the home because "he knows I've shot somebody for the same situation." RP 514.

C. ARGUMENT.

1. VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, SUFFICIENT EVIDENCE PROVED DEFENDANT OR HER ACCOMPLICE POSSESSED DRUGS AND FIREARMS WHERE POLICE FOUND THE DRUGS AND FIREARMS IN HER BEDROOM AND THE LIVING AREAS OF HER HOME, HER PERSONAL POSSESSIONS WERE IN THOSE AREAS, AND DRUGS AND THE HANDLE OF A FIREARM WERE IN PLAIN VIEW.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Evidence is sufficient to support a conviction when, viewing the evidence in the light most favorable to the State, any rational fact finder could find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at

201. Circumstantial and direct evidence are considered equally reliable. *Id.* at 201; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In considering the evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)). Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and the persuasiveness of the evidence presented. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014); *State v. Martinez*, 123 Wn. App. 841, 845, 99 P.3d 418 (2004). Therefore, when the State has produced sufficient evidence of all the elements of a crime, the decision of the trier of fact should be upheld. Sufficiency of the evidence is reviewed de novo. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

Defendant challenges her convictions for unlawful possession of a controlled substance—heroin, unlawful possession of a controlled substance—methamphetamine, unlawful possession of a controlled substance—cocaine, and unlawful possession of a controlled substance—oxycodone, and both counts of unlawful possession of a firearm. Brief of Appellant, 11. Defendant’s claim fails, because sufficient evidence proved beyond a reasonable doubt that defendant, or her accomplice, unlawfully possessed heroin, methamphetamine, cocaine, oxycodone, and two

firearms, where she sold drugs to a confidential informant (thus showing her knowledge of drug transactions associated with the residence); the drugs and guns within her home were in her bedroom, the room she slept in, or otherwise in plain view; there were packaging materials, digital scales, and razor blades used to cut the drugs present; and where evidence showed her husband knew of the drugs and guns.

To convict defendant of unlawful possession of a controlled substance, the jury must have found beyond a reasonable doubt that defendant, or her accomplice, possessed the controlled substance in the State of Washington. CP 17-55 (Instructions 15, 22, 24, 26);³ Washington Pattern Jury Instruction – Criminal (WPIC) 50.02. To convict defendant of unlawful possession of a firearm in the first degree, the jury must have found beyond a reasonable doubt that defendant or her accomplice (1) knowingly had a firearm in her possession or control, (2) had previously been convicted of a serious offense, and (3) possessed or controlled the firearm in Washington State. CP 17-55 (Instructions 30, 31);⁴ RCW 9.41.040(1)(a); WPIC 133.02. Defendant stipulated to having been previously convicted of a serious offense. Exh. 87.

³ Un-objected to jury instructions become the law of the case. *State v. Hickman*, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998). Defendant did not object to the jury instructions as given. RP 422-23.

⁴ The State charged all counts for the same date, April 6, 2017, the day the search warrant was executed. CP 1-3. Defendant is not challenging the sufficiency of the date.

Possession may be actual or constructive; actual possession occurs when the item is in the actual physical custody of the person charged with possession, where constructive possession occurs when there is no physical possession but there is dominion and control over the substance. CP 17-55 (Instruction 10). Dominion and control need not be exclusive; jurors may consider whether defendant had the ability to take actual possession of the substance, had the capacity to exclude others from possession of the substance, and whether defendant “had dominion and control over the premises where the substance was located.” *Id.* “[D]ominion and control over [the] premises raises a rebuttable inference of dominion and control over the [contraband].” *State v. Cantabrana*, 83 Wn. App. 204, 208, 921 P.2d 572 (1996).

To determine whether a defendant had constructive possession of contraband, the court examines the totality of the circumstances touching on dominion and control. *State v. Jeffrey*, 77 Wn. App. 222, 227, 889 P.2d 956 (1995). No single factor is dispositive. *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243 (1995). “Evidence of temporary residence, personal possessions on premises, *or* knowledge of presence of [contraband], without more, are insufficient to show dominion and control.” *Collins*, 76 Wn. App. at 501 (emphasis in original). However, evidence of residence,

personal possessions on the premises, *and* knowledge of the presence of contraband may suffice. *Id.*

Defendant relies on *State v. Callahan*,⁵ *State v. George*,⁶ *State v. Spruell*,⁷ and *State v. Echeverria*,⁸ to argue that the evidence here is insufficient to support a finding of actual or constructive possession. Brief of Appellant, 19-22. Defendant's reliance on those cases is misplaced.

In *Callahan*, police entered a houseboat pursuant to a search warrant and found the defendant in close proximity to drugs. 77 Wn.2d at 28. The defendant admitted that he handled the drugs earlier that day and further admitted that "two guns, two books on narcotics and a set of broken scales...belonged to him." *Id.* The defendant did not live on the houseboat but had stayed there for the preceding two or three days. *Id.*

The *Callahan* court held that the defendant's momentary handling of the drugs was insufficient to establish actual possession. *Id.* at 29. The court also held that because the defendant was only a guest on the houseboat, the circumstances did not establish dominion and control over the drugs sufficient to prove constructive possession. *Id.* at 31. The court explained,

⁵ 77 Wn.2d 27, 459 P.2d 400 (1969).

⁶ 146 Wn. App. 906, 193 P.3d 693 (2008).

⁷ 57 Wn. App. 383, 788 P.2d 21 (1990).

⁸ 85 Wn. App. 777, 934 P.2d 1214 (1997).

Although there was evidence that the defendant had been staying on the houseboat for a few days there was no evidence that he participated in paying the rent or maintained it as his residence. Further, there was no showing that the defendant had dominion or control over the houseboat. The single fact that he had personal possessions, not of the clothing or personal toilet article type, on the premises is insufficient to support such a conclusion.

...

Consequently, we find that there was insufficient evidence for the jury to find that the defendant had constructive possession of the drugs.

Id. at 31-32.

In *George*, a trooper pulled a car over and immediately smelled the strong odor of burnt marijuana coming from the vehicle. *Id.* at 912. George was in the backseat and was not the registered owner of the car. *Id.* The trooper found a large glass water pipe on the floorboard next to where George had been sitting. *Id.* The court held there was insufficient evidence to prove George possessed marijuana, because the State's evidence boiled down to "mere proximity" where George was not clearly associated with the crime, and insufficient evidence established a finding that "George either used the pipe to smoke marijuana or that he constructively possessed the pipe and its contents." *Id.* at 923.

In *Spruell*, police forced their way into a residence to execute a search warrant. 57 Wn. App. at 384. The defendant was found in the kitchen in close proximity to cocaine, and his fingerprints were on a plate containing white powder residue. *Id.* The State did not present evidence that the

defendant was an occupant of the premises or had dominion and control over the premises. *Id.* at 387. Rather, the evidence seemed to establish that the defendant was merely a visitor in the residence. *Id.* at 388. The State argued that the defendant had dominion and control over the drugs based on his proximity to the drugs and his fingerprint on the plate containing white powder residue. *Id.* at 385, 387-88.

The *Spruell* court rejected the State's argument, noting,

So far as the record shows, [the defendant] had no connection with the house or the cocaine, other than being present and having a fingerprint on a dish which appeared to have contained cocaine immediately prior to the forced entry of the police. Neither of the police officers testified to anything that was inconsistent with Hill being a mere visitor in the house. There is no basis for finding that Hill had dominion and control over the drugs. Our case law makes it clear that presence and proximity to the drugs is not enough.

57 Wn. App. at 388-89.

In *Echeverria*, the defendant was driving someone else's car without a license with multiple passengers in it, and he was on probation when he was pulled over. 85 Wn. App. at 780. When he got out of the car, officers saw the handle of a gun under the driver's seat. *Id.* A throwing star was next to the gun. *Id.* The reviewing court held the evidence was insufficient to establish the defendant "with intent to conceal such weapon, did furtively carry a metal throwing star, a dangerous weapon," where there was no finding that the throwing star was visible, there was no evidence

before the court that possession of a throwing star was prohibited, and the relevant statute did not encompass the throwing star. *Id.* at 783-84. However, the evidence was sufficient for possession of the gun, where the gun was in plain sight at his feet, giving rise to the inference that he knew the gun was there, and a trier of fact could find he possessed a gun within his reach. *Id.* at 783.

The analysis in *Echeverria* regarding the throwing star is plainly distinguishable from the present case because, in that case, the State failed to establish that defendant possessed the throwing star as the star was not in plain sight, and the evidence did not support constructive possession where he was only in close proximity to the star. 85 Wn. App. at 784. And, the State failed to establish that possession of a throwing star was prohibited. *Id.* at 783-84. These conclusions contrasted with the court's conclusion that defendant possessed the firearm in the car. *Id.* The court found sufficient evidence supported possession of the firearm because defendant had dominion and control over it: the gun was in plain sight at his feet, which gave rise to the inference he knew the gun was there. *Id.* at 783.

In contrast with the defendant in *Echeverria*, who was driving someone else's car with no reason to know what may be hidden under the driver's seat, the contraband in the present case was in defendant's home—specifically in her bedroom and the rec room where she was found sleeping.

;

Moreover, the drugs and guns could be reduced to actual possession at any time, like the gun in *Echeverria*. The evidence establishing defendant knew of the drugs and guns, and the items being in plain sight, sufficiently proves her convictions.

Callahan, George, and Spruell are similarly distinguishable from the present matter. In those cases, the State presented no evidence of defendant's dominion and control over the premises. Here, on the other hand, the evidence established that defendant lived at the residence where the drugs and guns were recovered. Defendant admitted so. RP 322. Defendant slept naked in the rec room with her husband where the drugs and the revolver were in plain view,⁹ and the other drugs and the semiautomatic handgun were recovered in the master bedroom of her home that she also shared with her husband and where her personal effects were kept. RP 154, 157, 203, 220, 265. Defendant came and went independently from the residence at all hours. RP 148. The evidence established that defendant had dominion and control over the premises and over the heroin, methamphetamine, cocaine, oxycodone, revolver, and semiautomatic handgun contained therein.

⁹ The handle of the revolver was sticking out of a t-shirt it was wrapped in, and defendant was familiar enough with guns to recognize the handle of a gun. RP 213, 358. In that room, there were also small packaging baggies, a razor blade, and a digital scale. Defendant knew scales were used to weigh drugs, and baggies of that nature were used to transfer drugs. RP 345, 386.

“Dominion and control over [the] premises raises a rebuttable inference of dominion and control over the [contraband]” on the premises. *Cantabrana*, 83 Wn. App. at 208. Defendant in this case attempted to rebut this presumption by testifying that she did not know of the drugs and guns in her home. However, the jury was not obligated to accept defendant’s testimony, and this Court should not disturb the jury’s assessment of a witness’s credibility.¹⁰ *State v. Summers*, 107 Wn. App. 373, 389-90, 28 P.3d 780 (2001). The jury did not accept defendant’s denial, as evidenced by their verdicts, where the evidence also established that defendant left her home, walked to meet a confidential informant, and furnished drugs to that individual.

Here, viewing the evidence in the light most favorable to the State and drawing all inferences against defendant, the jury had sufficient evidence to find that defendant exercised dominion and control over the heroin, methamphetamine, cocaine, oxycodone, and the two guns. Therefore, this Court should affirm defendant’s convictions.

The evidence clearly established that defendant herself possessed the heroin, methamphetamine, cocaine, oxycodone, revolver and

¹⁰ Similarly, any argument from defendant that she testified that she did not spend time at the home or enter the areas where the drugs were found plainly contradicts the standard of review—admitting the truth of the State’s evidence that placed defendant at home and in the recreation room, sleeping next to her husband—and should be rejected by this Court.

semiautomatic handgun. Moreover, defendant was charged as an accomplice to these crimes. See CP 1-3; *State v. Matson*, 22 Wn. App. 114, 587 P.2d 540 (1978) (Aiding and abetting statute applies to prosecutions under the Uniform Controlled Substances Act). The evidence clearly established that not only defendant possessed the drugs and guns, but her husband did as well.

A person is an accomplice in the commission of a crime if she, with knowledge that it will promote or facilitate the commission of the crime, either (1) solicits, commands, encourages, or requests another person to commit the crime; or (2) aids or agrees to aid another person in planning or committing the crime. CP 17-55 (Instruction 6). "Aid" means all assistance, whether given by words, acts, encouragement, support, or presence. *Id.* "A person who is present at the scene and ready to assist by her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity must be shown to establish that a person present is an accomplice." *Id.*

Here, the evidence established that defendant aided her husband in possessing the drugs and guns. The drugs and guns were throughout her bedroom and rec room, in plain view and in pouches. She and Marvin kept sporadic hours consistent with trafficking narcotics. RP 147-48. The baggies, scales, and razor blades used to cut drugs were in plain view in the

areas she occupied, and she knew these items were used for selling drugs. The evidence presented showed that her husband, Marvin, carried drugs and scales in his car. RP 181-82. He acknowledged that the police would find drugs and guns inside their home. RP 222-23. And, defendant helped her husband sell drugs to a confidential informant, proving her knowledge of the drugs and guns inside her home. The evidence proves defendant aided her husband in possessing the drugs and guns.

Moreover, for the purpose of this appeal, defendant apparently concedes this point:

Here, there was evidence that [defendant] had dominion and control over the premises with her husband, but this did not establish that she had possession of the contraband. Rather, similar to *Callahan*, [defendant]'s husband told the police where they could find the drugs and stated he knew where the guns were as well. RP 113-116. This acknowledgement from the husband is sufficient to establish, that he, not [defendant] possessed the contraband.

Brief of Appellant, 20. The evidence clearly established that, alone or as an accomplice, defendant possessed the narcotics and guns, and that she had dominion and control over the premises where the contraband was kept.

State v. Summers, 107 Wn. App. at 378, is instructive. In *Summers*, police responded to the defendant's residence to investigate a possible methamphetamine lab and to arrest the defendant for a parole violation. The defendant was arrested and admitted that he (1) lived in the basement of the residence, (2) that there was a firearm in the basement, (3) that the firearm

belonged to a friend. *Id.* On appeal, the defendant argued insufficient evidence supported his conviction for unlawful possession of a firearm in the first degree, because “he shared the basement with two other people, and one of those persons asserted ownership of the firearm.” *Summers*, 107 Wn. App. at 377, 388. The court rejected the defendant’s arguments and found sufficient evidence to support the defendant’s conviction. *Id.* at 388-90. The court explained,

Summers admits he lived in the basement, which meant he had dominion and control over the premises. This fact alone would allow the jury to infer that Summers had constructive possession of the firearm and defeat his claim of insufficient evidence.

Id. at 389. Here, as in *Summers*, defendant admitted to living at the residence. She had been seen coming and going freely at all hours from the residence. Defendant thus had dominion and control over the residence,¹¹ together with her husband who told police that they would find drugs and guns, which would allow the jury to infer that she had constructive possession of the drugs and firearms inside the home as an individual or as an accomplice. *See Summers*, 107 Wn. App. at 389. *See also, State v. Bartlett*, No. 50952-1-II, 2019 WL 2513898 (Wash. June 18, 2019) (sufficient evidence supported possession charge where briefcase containing drugs was found under the bed defendant sat on, and a hospital

¹¹ Again, defendant apparently concedes this point on appeal. Brief of Appellant, 20.

bracelet with her name was found next to the briefcase, supporting the inference that the briefcase and its contents were within the defendant's dominion and control).¹²

Viewing the evidence in the light most favorable to the State, the jury had sufficient evidence to find that defendant exercised dominion and control over the drugs and handguns. Therefore, this Court should affirm.

2. VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, SUFFICIENT EVIDENCE PROVED DEFENDANT, OR HER ACCOMPLICE, WAS ARMED WHEN SHE POSSESSED NARCOTICS.

Defendant challenges the firearm enhancements to her convictions of unlawful possession of heroin and methamphetamine. Brief of Appellant, 12. The jury was asked to find whether “defendant [], or an accomplice[, was] armed with a firearm at the time of the commission of the crime” of unlawful possession of heroin and methamphetamine. CP 58, 61.

The jury was instructed more specifically on what being armed with a firearm means. The instruction states in part,

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant or an accomplice. The State must also prove

¹² GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime and the type of weapon.

If one participant in a crime is armed with a firearm, all accomplices to that participant are deemed to be so armed, even if only one firearm is involved.

CP 17-55 (Instruction 34).¹³ The jury found beyond a reasonable doubt that defendant or her accomplice was armed with a firearm when she possessed heroin and methamphetamine. CP 58, 61.

Defendant relies on *State v. Valdobinos*,¹⁴ *State v. Call*,¹⁵ and *State v. Ague-Masters*,¹⁶ to argue that the State failed to prove she was “armed” when she possessed heroin and methamphetamine. Brief of Appellant, 14-17. Defendant’s reliance on those cases is misplaced.

In *Valdobinos*, the defendant offered to sell cocaine to an undercover agent. *Id.* at 273. Police searched the defendant’s home that he shared with another man, who he claimed brought the cocaine back from California. *Id.* The roommate had a large sum of money in his pocket, including bills from the undercover drug buy. *Id.* The home search revealed

¹³ Defendant does not challenge the instruction on appeal and did not challenge the instruction below. RP 422-23. Un-objected to jury instructions become the law of the case. *Hickman*, 135 Wn.2d at 101-02.

¹⁴ 122 Wn.2d 270, 858 P.2d 199 (1993).

¹⁵ 75 Wn. App. 866, 880 P.2d 571 (1994).

¹⁶ 138 Wn. App. 86, 156 P.3d 265 (2007).

a black bag under a bed that contained money, cocaine, and a bus ticket with the roommate's name. *Id.* at 273-74. Among other convictions, the defendant was convicted of possession of a controlled substance with intent to deliver while armed with a firearm. *Id.* at 274.

On appeal, the defendant argued the trial court erred in instructing the jury on a deadly weapon enhancement when the State only proved an unloaded .22 rifle was under a bed in the home. *Id.* at 282. The court agreed, finding that evidence of an unloaded rifle under a bed in a bedroom, without more, was insufficient to qualify the defendant as “‘armed’ in the sense of having a weapon accessible and readily available for offensive or defensive purposes.” *Id.*

In *Call*, officers obtained a search warrant and found cocaine, LSD, marijuana, and a marijuana grow operation. *Id.* at 868. Two unloaded handguns and a loaded handgun were in the defendant's bedroom inside a toolbox. *Id.* While the court found the evidence was sufficient to prove the defendant possessed the handguns, the court held the evidence was insufficient to establish he was “armed” for purposes of the sentencing enhancement, because the evidence did not establish the guns were easily accessible and readily available. *Id.* at 868-69.

In *Ague-Masters*, officers obtained a search warrant for the defendant's home based upon suspicious activity of another person who

lived there. *Id.* at 92-94. Officers found items associated with a methamphetamine lab in a shed. *Id.* at 94. The shed also contained a washing machine, dryer, freezer, shower, desk, police scanner, and a surveillance system. *Id.* at 95. Inside the home, officers found a gun safe which contained six shotguns, two rifles, four handguns, ammunition, batteries, bags of unidentified white substance, a scale, and a box of syringes. *Id.* The firearms were not loaded. *Id.*

On appeal, the defendant argued that the evidence was insufficient to support deadly weapon sentencing enhancements. *Id.* at 102-03. The court held the evidence was insufficient to support the enhancements, because the unloaded firearms were in the house 100 feet away from the methamphetamine lab, there was no evidence the defendant attempted to use the firearms for offensive or defensive purposes, and the evidence did not establish the firearms in the safe were easily accessible and readily available. *Id.* at 104. Thus, the evidence did not support the enhancements. *Id.* at 105.

Valdobinos, *Call*, and *Ague-Masters*, are all readily distinguishable from defendant's case. In *Valdobinos* and *Ague-Masters*, the guns were unloaded and kept separately from the areas where drugs were found, thus the evidence did not support a finding that the guns were easily accessible and readily available. In *Call*, the only evidence establishing the availability

of the guns was an officer's testimony that the loaded gun was in a toolbox at the foot of the bed, which did not establish the guns were easily accessible and readily available. Whereas here, the evidence established the easy accessibility and availability of the guns where both were loaded, one was within reach of the futon defendant slept on, and the other was under her mattress in her bedroom. Drugs were located in both the bedroom and the rec room. Additionally, defendant was charged under an accomplice liability theory. Thus, her husband's admission to the guns, the location of each gun being within arm's reach and the fact that both were loaded, provide the sufficient basis for the jury to conclude that the guns were easily accessible and readily available to use in a defensive or offensive measure, such that defendant or her husband were armed at the time she/he possessed heroin and methamphetamine.

Defendant attempts to distinguish her case from *State v. Schelin*, 147 Wn.2d 562, 55 P.3d 632 (2002), where the Washington Supreme Court held sufficient evidence supported a finding that the defendant was "armed" when a loaded firearm was hanging on a wall in the basement, feet away from where the defendant was standing, and one of the basement rooms contained a marijuana grow operation. *Id.* at 564. The court stated,

[T]he evidence established Schelin was in close proximity to a loaded gun which he constructively possessed to protect his marijuana grow operation. [...] Schelin admitted to being

in close proximity to an “easily accessible and readily available” deadly weapon. The jury was entitled to infer he was using the weapon to protect his basement marijuana grow operation. Schelin stood near the weapon when police entered his home and could very well have exercised his apparent ability to protect the grow operation with a deadly weapon, to the detriment of the police.

Id. at 574-75. Defendant’s case is far more analogous to *Schelin* than to the other cases she cites. Here, defendant and her husband were both in close proximity to the loaded revolver when police entered the home. The other gun was under the corner of the mattress in their bedroom—also loaded. Various drugs were present in both rooms, along with other items used in drug trafficking. And, defendant’s husband admitted to guns being in the home. Like in *Schelin*, the jury was entitled to infer defendant and/or her husband kept these weapons near the drugs, and where they slept, to protect the drugs and could have used these weapons at any time.

State v. Simonson, 91 Wn. App. 874, 960 P.2d 955 (1998), follows a similar fact pattern as *Schelin*. Following the explosion of a methamphetamine lab, police found a recently dropped loaded handgun outside the exploded lab. *Id.* at 877. In a separate trailer on the same plot of land as the exploded lab, police found two loaded guns and one unloaded gun above the bed, a loaded shotgun behind a table opposite the bed, a shotgun behind a television, and an assault rifle behind a table. *Id.* at 877-78. The defendant’s personal items were in the same area. *Id.* at 878.

The court held sufficient evidence supported the enhancement where, over the period of manufacturing methamphetamine, guns were kept on the premises in a loaded condition, and it was reasonable for the jury to infer that the purpose of so many loaded guns were to defend the site in case it was attacked. *Id.* at 883.

Defendant attempts to distinguish *Simonson* by pointing out that defendant did not manufacture narcotics, and there was no evidence of a surveillance system or other defensive or offensive system for possessing the narcotics. Brief of Appellant, 16-18. This analysis is misplaced under the holding of *Simonson*.

First, manufacturing narcotics is not necessary, where the weapons were used to defend the location of the manufacturing. As here, the weapons were used to defend the locations defendant and her husband kept their narcotics. Second, there was no evidence of a surveillance system at all in *Simonson*. Defendant seems to be conflating the facts of *Schelin* with the facts of this case. But again, the presence of a surveillance system is not dispositive in the determination of whether the guns were used to defend the drugs; the loaded nature, position of the guns near the drugs, and the fact that one gun was within reach of the futon and the other was under the corner of the mattress make clear that the guns were positioned to be readily available and easily accessible in case they were needed. *See also, e.g., State*

v. *Thomas*, No. 45101-8-II, 2015 WL 786824 (Wash. February 24, 2015) (sufficient evidence supports finding that defendant was “armed” when police located a loaded gun on the headboard of the bed defendant and co-defendant were sleeping on, gun was in the same room as the drugs, and there was evidence of a drug operation in the house).¹⁷

Therefore, in viewing the evidence in the light most favorable to the State, sufficient evidence supports the jury’s finding that defendant or her husband was armed when they possessed methamphetamine and heroin, and this Court should affirm.

3. THE TRIAL COURT PROPERLY DENIED DEFENDANT’S PROPOSED JURY INSTRUCTION ON UNWITTING POSSESSION WHERE THE EVIDENCE DID NOT SUPPORT GIVING THE INSTRUCTION.

An appellate court reviews a trial court’s refusal to give jury instructions for an abuse of discretion. *State v. Ehrhardt*, 167 Wn. App. 934, 939, 276 P.3d 332 (2012). Jury instructions are proper if they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). Here, the trial court properly declined to

¹⁷ GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

give an unwitting possession instruction where the instruction was not supported by the facts of the case.

A defendant is entitled to have her theory of the case submitted to the jury under appropriate instructions when substantial evidence in the record supports that theory. *State v. Harvill*, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010). When determining if the evidence at trial was sufficient to support the giving of an instruction, a reviewing court views the supporting evidence in the light most favorable to the party that requested the instruction. *State v. Fernandez-Medina*, 171 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). The affirmative defense of unwitting possession must be considered in light of all of the evidence presented at trial, without regard to which party presented it. *George*, 146 Wn. App. at 915. A defendant is entitled to an unwitting possession instruction only when the evidence presented at trial would permit a reasonable juror to find, by a preponderance of the evidence, that the defendant unwittingly possessed the contraband. *State v. Buford*, 93 Wn. App. 149, 151-53, 967 P.2d 548 (1998). A person unwittingly possesses contraband when she does not know the substance is in her possession or does not know the nature of the substance. *See* WPIC 52.01.

Defendant requested the court give an unwitting possession instruction to the jury as a defense to her possession charges. RP 424. From

the record, it appears that defendant only requested this instruction with regard to the lesser included possession of a controlled substance charges. *See* RP 423-425 (“...Even though I acknowledge that the – there were no drugs that were found in my client’s actual possession, I believe I have to ask the Court to instruct the jury on unwitting possession.”). On appeal, however, defendant argues that the unwitting possession instruction was relevant to both her possession of drugs and firearms. Brief of Appellant, 9-10 (“Watts Dyson presented evidence that could have allowed the jury to conclude that she did not know the illegal contraband and firearms were in the house.”).

† As an initial matter, defendant’s proposed instruction is not contained within the appellate record. An appellant bears the burden of perfecting the record for appellate review. RAP 9.2(b); *State v. Sisouvanh*, 175 Wn.2d 607, 290 P.3d (2012) (a party presenting an issue for review has the burden of providing an adequate record to establish error). *See also*, CrR 6.15(a) (“proposed instructions shall be served and filed [...]”). Because defendant has not met her burden of providing an adequate record to present her issue and for the State to adequately respond, this Court and the State are left to speculate as to the language of the proposed instruction. Thus, the State is unable to determine if the instruction even contained a correct statement of the law, or to which charges the instruction applied. Because

the parties are left to speculate, and it is unclear if defendant has preserved this issue on appeal as to her firearm convictions,¹⁸ this Court should refuse to review her claim.

But if this Court determines defendant's claim warrants review, the State's following argument assumes defendant requested the standard WPIC instruction on unwitting possession (WPIC 52.01). Assuming defendant's requested instruction accurately reflected the law on unwitting possession, defendant's claim fails where the trial court properly denied defendant's requested instruction because the evidence did not support giving the instruction.

Defendant relies on *George*, 146 Wn. App. 906, to support the claim that the court should have given an unwitting possession instruction. In *George*, the defendant was charged with possession of marijuana for marijuana found in a car in which he was a passenger. *Id.* at 912. On appeal, defendant argued the trial court erred by refusing to instruct the jury on unwitting possession, because all three occupants of the car denied knowing anything about marijuana being present, the defendant denied ownership, the defendant did not own or drive the car, and the true owner was present. *Id.* at 915-16.

¹⁸ The appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). Also, the failure to propose an instruction generally precludes review on appeal. See *State v. Strandy*, 49 Wn. App. 537, 545-46, 745 P.2d 43 (1987).

George is distinguishable from the present case. Here, the evidence did not support giving an unwitting possession instruction. Defendant's husband and accomplice admitted to knowing the drugs and guns were in the home, defendant admitted her husband illegally took prescription pills inside the home, defendant sold drugs outside her home to a confidential informant after that informant requested drugs from defendant's husband, defendant had dominion and control over her home together with her husband, the drugs and the handle of the revolver were in plain sight in her home in rooms defendant regularly occupied, and a second loaded handgun was under her mattress. Accordingly, the trial court properly determined the evidence did not support giving an unwitting possession instruction, because there was overwhelming evidence establishing that defendant knew of the drugs and guns inside her home, and her mere denial of knowledge did not meet her burden of proving unwitting possession by a preponderance of the evidence.

This Court recently held in *State v. Santos*, No. 49561-9-II, 2017 WL 6343641 (Wash. December 2, 2017),¹⁹ that evidence was insufficient to give an unwitting possession instruction. In *Santos*, the defendant was

¹⁹ GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

arrested with a pipe in his pants pocket, which the officer recognized as the type of pipe used to smoke methamphetamine. *Id.* at *1. There was residue in the pipe that tested positive for methamphetamine. *Id.* The trial court declined to give an unwitting possession instruction. *Id.* On appeal, the defendant argued that the State's expert could not tell by sight the nature of the residue, thus an inference that he would not know either was supported. *Id.* at *3. This Court affirmed, holding that there was no evidence to show where the pipe came from, whether the defendant knew it was used for smoking methamphetamine, or if he knew what methamphetamine residue looked like. *Id.* Accordingly, because no evidence was presented establishing that the defendant did not know the pipe was in his pocket or did not know its purpose, there was insufficient evidence to support the instruction. *Id.* at *4.

This Court analogized *Santos* to *Buford*, 93 Wn. App. at 150, where the court held the trial court properly declined to give an unwitting possession instruction because the only evidence supporting the defendant's instruction was that the amount of cocaine present in a pipe he possessed was small. *Id.* at 153. However, that defendant had failed to show the basic facts of where the pipe came from, how long he had it, if he was dismayed at finding it, if he knew what it was for, or if he knew what cocaine looked like. *Id.* Accordingly, giving the instruction would have invited the jury to

engage in speculation or conjecture. *Id.* Thus, the defendant had not proved unwitting possession by a preponderance of the evidence, and the trial court properly declined to give the instruction. *Id.*

Like in *Santos* and *Buford*, an unwitting possession instruction was inappropriate here, because defendant failed to prove unwitting possession by a preponderance of the evidence. Defendant admitted to knowing the items in her home—the baggies and scales—are used in conjunction with drugs (RP 344-45, 347), she knew her husband took pills illegally in her home, law enforcement observed her selling drugs to a confidential informant, and she offered no explanation for how the drugs or guns appeared in her home (RP 342-43, 343-44). Therefore, her knowledge of the contraband was established and defendant failed to present sufficient evidence to support giving an unwitting possession instruction. This Court should affirm.

Alternatively, if this Court disagrees and finds the trial court should have given the instruction, any error was harmless. Instructional error is presumed prejudicial but can be shown to be harmless. *State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984). An instructional error is harmless if, beyond a reasonable doubt, the error did not contribute the verdict obtained. *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002).

Any alleged error was harmless under a constitutional harmless error analysis, as well as under a non-constitutional analysis. A trial court's refusal to give an instruction is not grounds for reversal unless it was prejudicial. *State v. Thomas*, 110 Wn.2d 859, 862, 757 P.2d 512 (1988). "It is not prejudicial 'unless, within reasonable probabilities, had the error not occurred, the outcome ... would have been materially affected.'" *Id.* at 862 (quoting *State v. Cunningham*, 93 Wash.2d 823, 831, 613 P.2d 1139 (1980)). Here, any alleged error is harmless under both standards. As argued, the evidence proved beyond a reasonable doubt that defendant knew drugs and guns were in her home where the evidence established the contraband was in plain sight in her bedroom and the rec room she slept in, one gun was under her mattress, she admitted her husband took pills illegally in her home, and she partook in selling drugs with her husband.

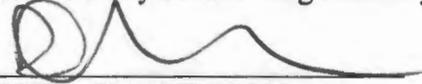
The absence of the instruction did not prevent defendant from arguing her theory of the case—that the State failed to prove possession beyond a reasonable doubt. RP 455-60. Defendant further argued that the State failed to prove accomplice liability. RP 460-62. Accordingly, defendant was able to argue that she did not possess the contraband and that the State failed to prove its case. Accordingly, any error in failing to instruct on unwitting possession was harmless. Therefore, this Court should affirm.

D. CONCLUSION.

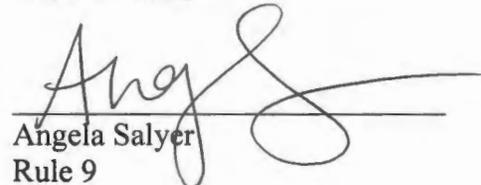
For the above stated reasons, the State requests this Court affirm defendant's conviction.

DATED: June 25, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



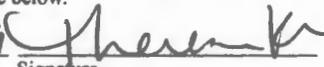
BRITTA HALVERSON
Deputy Prosecuting Attorney
WSB # 44108



Angela Salyer
Rule 9

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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. 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 the date below.

6-25-19 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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