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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON No. _____

BY _____ Court of Appeals No. 32402-4-II

DEPUTY

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FILED
AUG 28 2006
CLERK OF SUPREME COURT
STATE OF WASHINGTON
[Signature]

STATE OF WASHINGTON,

Respondent,

v.

ROY L. NEFF,

Petitioner.

PETITION FOR REVIEW

On review from the Court of Appeals, Division Two,
and the Superior Court of Pierce County

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A. IDENTITY OF PETITIONER

Petitioner Roy L. Neff, appellant below, asks this Court to grant review of the decision of the court of appeals designated in section B.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4, petitioner seeks review of the unpublished opinion of the court of appeals, Division Two, in State v. Neff (No. 32402-4-II), filed July 5, 2006.¹ Upon review, Mr. Neff asks this Court to reverse the court of appeals decision upholding his conviction for unlawful manufacture of methamphetamine and the accompanying firearm enhancement.

C. ISSUES PRESENTED FOR REVIEW

1. Where there is an agreement to submit a case for a stipulated facts trial and the prosecution has included in that agreement language indicating a waiver of the right to appeal the conviction based upon insufficiency of the evidence, does that language convert the agreement to something more akin to a guilty plea and must the protections afforded those who enter a plea be extended to the defendant to ensure that he was knowingly, voluntarily and intelligently waiving his due

¹A copy of the opinion is attached as Appendix A.

process right to be free from conviction upon less than sufficient evidence?

Further, was counsel ineffective where he 1) had his client enter into such a confusing, hybrid agreement even though it was clear there was insufficient evidence to support the firearm enhancement, 2) failed to provide the court with any support for his sufficiency argument although ample caselaw exists and 3) failed to present such caselaw after the court invited him to when the court admitted it was unaware of the law on the topic and that law would have compelled dismissal of the enhancement?

2. In State v. Valdobinos, 122 Wn.2d 270, 282-84, 858 P.2d 199 (1993), this Court held that a person is not “armed” for the purposes of committing a drug offense in a house simply because a weapon is found in that house; there must be evidence that the weapon was “accessible and readily available for offensive or defensive purposes.” More recently, in State v. Schelin, 147 Wn.2d 562, 55 P.3d 632 (2002), this Court further clarified that a person is only “armed” for an offense if there is a nexus not only between the gun and the defendant but also the gun and the crime, so that mere presence of a gun in a house where a marijuana “grow” operation or possession of drugs is occurring is not sufficient to show that

the defendant was “armed” for those crimes. And in State v. Gurske, 155 Wn.2d 134, 138, 118 P.3d 333 (2005), this Court reaffirmed Valdobinos and Schelin and again held that mere proximity or constructive possession was insufficient to support a firearm enhancement.

In this case, the court of appeals upheld imposition of a firearm enhancement for a conviction for methamphetamine manufacturing where the firearms were found in garage in which manufacturing was occurring. Two guns were in a locked safe in the floor under a desk, and another gun was in a tool belt hanging from the rafters and there was no evidence whether it could have been reached at any point or was simply too high. Should review be granted under RAP 13.4(b)(1) because the decision in this case is in conflict with Gurske, Valdobinos and Schelin?

Further, should review be granted under RAP 13.4(b)(2) because the decision in this case conflicts with the holding, in State v. Johnson, 94 Wn. App. 882, 896-96, 974 P.2d 855 (1999), review denied, 139 Wn.2d 1028 (2000), that mere presence of a weapon even in the same home where there is illegal activity is not enough to prove a defendant was “armed” during that activity?

3. The court of appeals held that the defendant must have

been armed with guns in the garage despite those guns being in a locked safe in the floor under a desk or up in the rafters and not proven to be reached, because manufacturing takes time so there must have been some time when appellant was in the garage manufacturing at the same time the guns were there. Should review be granted under RAP 13.4(b)(3) and (4) to address this improper presumption of being “armed” based upon mere proximity?

D. STATEMENT OF THE CASE

1. Procedural facts

After a motion to suppress evidence was denied, petitioner Roy Neff agreed to a stipulated facts trial on a charge of manufacturing methamphetamine with a firearm enhancement. 7RP 143², 8RP 120; CP 99-105; RCW 69.50.401(a)(1)(ii); RCW 9.41.010, RCW 9.94A.310, RCW

²The verbatim report of proceedings in this case consists of 12 volumes, which will be referred to as follows:

the proceedings of February 26, 2003, as “1RP;”
May 1, 2003, as “2RP;”
August 17, 2003, as “3RP;”
September 3, 2003, as “4RP;”
November 12, 2003, as “5RP;”
November 19, 2003, as “6RP;”
the three chronologically paginated proceedings of November 20, 24 and 25, 2003, as “7RP;”
the separate volume entitled “reporter’s supplemental transcript of proceedings,” of November 24 and 25, 2003, as “8RP;”
sentencing on October 1, 2004, as “SRP;” and
March 7, 2005, as “9RP.”

9.94A.370, RCW 9.94A.510, RCW 9.94A.530. After he was found guilty as charged, the judge ordered a standard range sentence and Mr. Neff appealed to Division Two of the court of appeals. SRP 12; CP 118-129, 136-39.

On July 5, 2006, Division Two affirmed in an unpublished opinion.

App. A. This Petition timely follows.

2. Overview of relevant facts

A Pierce County Sheriff's Department deputy smelled something as he was driving down a road, stopped his car, went to investigate, spoke to the person who lived on the property where the smell seemed to be from, saw some items which made him suspect methamphetamine manufacturing was going on, and, ultimately, entered a locked garage on the property to find evidence of manufacturing methamphetamine and, later, some guns. 7RP 84-87. The man who lived there, Roy L. Neff, was arrested and charged with various crimes. See CP 1-7.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THE COURT OF APPEALS ERRED IN UPHOLDING
THE FIREARM ENHANCEMENT AND FINDING
THAT COUNSEL WAS NOT INEFFECTIVE

Review should be granted on the issue of whether the court of

appeals erred in upholding the firearm enhancement, for six reasons. First, this Court should grant review under RAP 13.4(b)(3) and (4) in order to address whether a defendant who enters an agreement substantially akin to a guilty plea is entitled to more warnings than those given when the right to appeal and other rights are retained as in the usual stipulated facts trial.

In addition, review is appropriate under RAP 13.4(b)(3), because Mr. Neff's state and federal rights to effective assistance of counsel were violated below. Further, review is appropriate under RAP13.4(b)(1), because the court of appeals decision conflicts with this Court's holdings in Valdobinos, supra, Schelin, supra, and Gurske, supra, and under RAP 13.4(b)(2), because it conflicts with other decisions of the court of appeals. RAP 13.4(b)(2). Review should also be granted under RAP 13.4(b)(3), because the court of appeals decision involves a significant question of law under the second amendment to the U.S. Constitution and Article I, sec. 24 of the Washington constitution, and under the due process clauses to both constitutions. Finally, review should be granted because this case presents an important issue of public policy. RAP 13.4(b)(4).

a. Relevant facts

The evidence submitted at the stipulated facts trial established that

no guns were found or seen in the initial police search of the garage. CP 232-33. It was only after a more thorough search was conducted that a safe was found underneath a desk in the garage and, inside it, a .357 and a .45, both with cartridges. CP 222-23. Also in the garage was a .380 in a holster, in a “toolbelt pouch hanging in the rafters in the garage.” CP 222-23. No evidence was presented indicating the pouch could have been easily reached or even reached at all without a ladder from any part of the floor of the garage. CP 158-320. Another was found in the bedroom of the house. CP 232-33.

At the stipulated facts trial, the parties argued about the sufficiency of the evidence to support the firearm enhancement, with counsel stating that the guns were not “readily available and easily accessible.” 7RP 235. The judge found that Mr. Neff was “armed” because he was the only person with a key to the locked safe in the garage where some of the guns were, the gun in the bedroom was out and therefore “easily accessible,” and the gun in the rafters, even though the judge did not “know exactly where” it was situated, “presumably” could have been easy to get by reaching up and pulling it down. 7RP 236. The court ruled that Mr. Neff was “armed” because the guns were “readily accessible to him” as he had

the only key to the garage and the safe so “clearly those were in his control.” 7RP 237. The court indicated, however, that it was not familiar with the caselaw on the issue and that counsel could “reargue” the firearm enhancement issue later. 7RP 237.

In subsequent proceedings, counsel never made any effort to reargue the enhancement issue or present the court with any relevant law on the issue. See 9RP 1-20.

On appeal, Mr. Neff argued that the judge’s written findings were insufficient to support its conclusion that Mr. Neff was “armed,” because the court made no finding of any “nexus” between the guns and the crime, other than proximity. Brief of Appellant (“BOA”) at 16-22. He also argued that he could raise the issue despite language in the stipulated facts trial agreement indicating that he had waived a number of his rights, because there was insufficient evidence that he knowingly, voluntarily and intelligently waived his right to appeal the insufficiency of the evidence for the firearm enhancement and because of counsel’s ineffectiveness in having him sign a confusing, contradictory agreement. BOA at 22-31. Finally, he argued that, regardless whether he had actually waived his right to appeal the insufficiency, he had not waived his right to appeal counsel’s

ineffectiveness in failing to present the court with the relevant law either initially at the stipulated facts trial or later, when invited to do so, as that law would have caused the court to strike the firearm enhancement as unsupported. BOA at 28-31.

On appeal, Division Two held that Mr. Neff had waived the right to appeal the insufficiency, and that counsel could not be deemed ineffective because even if counsel had brought the caselaw to the court's attention, that caselaw would have supported the firearm enhancement in this case. App. A at 5-9. The court did not address Mr. Neff's argument that he was entitled to more of a colloquy in order to ensure that he was giving up his important rights knowingly, voluntarily and intelligently, except to declare that a defendant who "completes a plea statement and admits to reading, understanding and signing it" faces a "strong presumption" that the plea is voluntary. App. A at 5.

- d. Review should be granted to address the proper protections which should be employed to ensure a knowing, voluntary and intelligent waiver of rights in an agreement to submit a case on stipulated facts

In general, the level of protections required before a trial court may accept an agreement to proceed as a stipulated facts trial is different than the protections given before acceptance of a guilty plea, because of the

very significant differences in the two proceedings. Unlike a plea, an agreement to participate in a stipulated facts trial is not a stipulation by the defendant that he or she is guilty. See State v. Mierz, 127 Wn.2d 460, 469, 901 P.2d 286 (1995). Instead, a stipulated facts trial agreement amounts only to an agreement “that what the State presents is what the witnesses would say.” State v. Johnson, 104 Wn.2d 338, 705 P.2d 773 (1985). In distinguishing the requirements for showing the propriety of a stipulated facts trial agreement and those applicable to acceptance of pleas, this Court has specifically described the stipulated facts trial as “still” a trial of guilt or innocence, at which the “burden of proof remains upon the State,” and from which the defendant retains “the right to appeal.” Mierz, 127 Wn.2d at 469. As a result, the same protections required for entry of a guilty plea are not provided for those agreeing to a stipulated facts hearing, in part because “in a stipulated facts trial the defendant maintains his right to appeal, which is lost when a guilty plea is entered.” Johnson, 104 Wn.2d at 343.

Thus, by definition, a stipulated facts trial is not intended as a stipulation or agreement that the evidence is sufficient to support guilt. If it were, it would simply be a plea. Any agreement which amounts to a

stipulation of guilt is the same as a plea of guilty and waives “all nonjurisdictional defenses.” State v. Wiley, 26 Wn. App. 422, 425-26, 613 P.2d 549, review denied, 94 Wn.2d 1014 (1980). As a result, it is required for the court to engage in the lengthy, detailed colloquy required for waiver of all of the rights given up by the plea. Id. But where a defendant maintains a factual or legal defense to guilt, the stipulation is deemed to have “preserved legal issues for appeal.” Id. To overcome this principle here, the prosecution would have to show a knowing, voluntary and intelligent waiver of the rights this stipulation is deemed to have waived.

In this case, the defendant was deemed by the court of appeals to have waived the legal issue of the sufficiency of the evidence to support the enhancement by entering the stipulated facts agreement which included language which indicated a waiver of the right to challenge the “convictions.” App. A at 6. But the rights involved include not only the state constitutional right to an appeal but also the underlying fundamental right to be free from punishment or conviction upon anything less than sufficient evidence. That right is enshrined in both the Washington and federal constitutions as an indispensable mandate of due process. See

Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989); State v. Duran-Davila, 77 Wn. App. 701, 703, 892 P.2d 1125 (1995).

Nothing in the record proves that Mr. Neff knew that, by agreeing to a stipulated facts trial, he was waiving the right to be free from punishment or conviction based upon less than sufficient evidence, and the right to appeal any determination on that issue. To the contrary, the agreement did not list due process as one of the rights Mr. Neff was waiving. See CP 99-101. And the discussion at the hearing made it clear that Mr. Neff understood only that he was agreeing to allow the court to decide the case based upon the evidence presented by the prosecution, always retaining the possibility that the court would find insufficient evidence to support the enhancement. 7RP 222-23. In addition, during the very brief mention of the waiver of the “right to challenge sufficiency of the evidence to support the conviction on appeal,” no one addressed Mr. Neff, or asked if he understood that he was waiving that right and was doing so knowingly, voluntarily and intelligently. 7RP 224-25.

Johnson, Mierz and Wiley hold that a court accepting an agreement to proceed on stipulated facts is not required to engage in the same kind of colloquy that is required for acceptance of a guilty plea. Those holdings,

however, depend upon the belief that a stipulated facts trial is not a wholesale waiver of vital rights but rather a procedure which retains much of the safeguards of trial because it is only an agreement “that what the State presents” by documentation at the stipulated facts trial “is what the witnesses would say.” Johnson, 104 Wn.2d at 340-41. And those holdings applied only to the question of whether the defendant properly agreed to have the case decided by stipulated facts, not whether the defendant, in the same agreement, waived other very significant, important constitutional rights. Indeed, where an agreement is seen to waive such rights in relation to guilt, it is tantamount to a guilty plea and must be treated as such. Wiley, 26 Wn. App. at 425-26. If Mr. Neff was deemed to have waived his rights to appeal the sufficiency of the evidence presented at the stipulated facts trial, he was effectively waiving his due process rights to be free from conviction and punishment upon anything other than sufficient evidence.

This Court should grant review to address the question of whether a defendant who gives up such substantial rights was entitled to a colloquy similar to those given when a guilty plea is accepted, because of the nature of the rights being waived.

c. The decision conflicts with this Court's decisions

Review should also be granted because the court of appeals was simply wrong in its holding that the firearm enhancement was supported as a matter of law. Under this Court's decisions in Valdobinos, supra, Schelin, supra, and Gurske, supra, to prove its case on the firearm enhancements, the prosecution had to prove not only the mere proximity of guns to the illegal conduct or Mr. Neff's constructive possession of those guns but that the guns were easily accessible and readily available for offensive or defensive use during the crime and that there was some kind of relationship or "nexus" between the crime and the guns - more than mere presence on the same property.

In this case, however, the court of appeals ignored those plain requirements and held the firearm enhancement was supported here because even though Mr. Neff was not next to the guns when arrested, the "most likely explanation" for the guns being in the garage was to be used in relation to the manufacturing and "[t]he three loaded weapons in the garage were all easily accessible to someone inside cooking methamphetamine." App. A at 9. As noted above, however, there was no evidence whatsoever that the gun in the rafters could be accessed by

anyone short of them using a ladder. CP 158-320. Nor was there any evidence that the guns in the safe could be “easily accessed” from where they were, locked in the floor under a desk in the garage. CP 158-320.

In holding that the firearm enhancement was supported, Division Two thus converted the question into whether someone is simply in constructive possession of a gun in a place where illegal activity is occurring, rather than whether there is proof of a link between the gun and the activity. This Court should accept review, because Division Two’s decision conflicts with this Court’s decisions in Valdobinos, Schelin, and Gurske and even effectively overrules them, by holding that there was sufficient evidence of a nexus simply based upon proximity. RAP 13.4(b)(1).

d. The decision conflicts with other decisions of the court of appeals

In Johnson, supra, Division One of the court of appeals held, consistent with Valdobinos and with the later majority in Schelin, that mere presence of the weapon “on the premises some time during the entire period of illegal activity is not enough” to establish the required nexus for a firearm enhancement. Johnson, 94 Wn. App. at 895. In upholding the firearm enhancements in this case, Division Two issued a decision

conflicting with the holding of Johnson, by upholding an enhancement imposed because of the mere presence of the weapons regardless of the lack of evidence of any use of any weapons in relation to the manufacturing. This Court should grant review to address this apparent conflict between decisions of the court of appeals. RAP 13.4(b)(2).

e. Significant constitutional questions are presented

Under the due process clauses of the state and federal constitutions, defendants are entitled to be free from conviction upon anything less than sufficient evidence, and the prosecution must prove each part of its case, including enhancements, beyond a reasonable doubt. See Sandstrom v. Montana, 442 U.S. 510, 61 L. Ed. 2d 39, 99 S. Ct. 50 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Here, the court's decision effectively applied a presumption that any time there is a gun in the same building as illegal activity, by definition the person committing the illegal activity is armed for the purposes of that activity, because it is the "most likely explanation" for the presence of the guns. App. A at 9.

While the prosecution is permitted to use evidentiary presumptions to prove its case, it is not constitutionally proper for a mandatory presumption to be used to relieve it of its burden of proving its case

beyond a reasonable doubt. State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135 (1994). Division Two's holding effectively shifts the burden of *disproving* being armed to every defendant who has constructive possession of gun in the same building where illegal activity is occurring based upon an assumption that it "stands to reason" that is what the gun is for. This Court should grant review to address the significant constitutional question of the court of appeals effectively applying a mandatory presumption of being "armed" based upon the mere presence of guns in the same building as illegal activity. RAP 13.4(b)(3).

f. Significant constitutional question regarding the limits of the right to bear arms

Both the state and federal constitutions guarantee citizens the right to have guns in their home. See State v. Rupe, 101 Wn.2d 664, 706-707, 683 P.2d 571 (1984); U.S. Const. 2nd Amend.; Wa. Const. Art. I, sec. 24. As a result, it is vital that those rights be respected and used against them in a criminal proceeding only if there is sufficient evidence not just that they possessed weapons but that they used them in relation to a crime. See Johnson, supra, 94 Wn. App. at 892, 896.

With its decision, Division Two upheld a firearm enhancement where there was insufficient evidence of any link between the crime of

manufacturing methamphetamine and the guns, other than mere proximity. It effectively converted all ongoing crimes into armed crimes based upon the presence of weapons, even if there is no evidence the weapons were ever used in any way in relation to that crime. This Court should grant review to address the significant constitutional question of whether the court of appeals decision violated the court's ability to limit the right to bear arms by applying a broad, loose standard of when a person can be punished for being "armed" during a crime, such as the court of appeals did here. RAP 13.4(b)(3). Further, this Court should grant review as a matter of public policy, because the balance of the application of criminal laws and the need to honor constitutional rights is of vital interest to the public in this state. See RAP 13.4(b)(4).

Because Division Two erred in finding that the enhancement was proper, it erred in concluding that counsel was not ineffective in failing to inform the sentencing court of the relevant law. See App. A at 9. Counsel was, in fact, ineffective, the firearm enhancement was not proper, and this Court should grant review and should reverse.

F. CONCLUSION

For the foregoing reasons, this Court should accept review of the decision of Division Two of the court of appeals in this case.

DATED this 3rd day of August, 2006.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel and petitioner by depositing the same in the United States Mail, first class postage pre-paid, as follows:

To: Ms. Kathleen Proctor, Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

To: Mr. Roy L. Neff, DOC 780428, MICC, P.O. Box 1000, Steilacoom, WA. 98388-1000.

DATED this 3rd day of August, 2006.



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2006 Wash. App. LEXIS 1429, *

STATE OF WASHINGTON, *Respondent*, v. RON LEN NEFF, *Appellant*.

No. 32402-4-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

2006 Wash. App. LEXIS 1429

July 5, 2006, Filed

NOTICE: [*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

PRIOR HISTORY: Appeal from Superior Court of Pierce County. Docket No: 02-1-05356-6. Date filed: 10/01/2004. Judge signing: Hon. Ronald E Culpepper.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: The Superior Court of Pierce County, Washington, convicted defendant of unlawful manufacturing of a controlled substance-methamphetamine with a firearm sentence enhancement. Defendant was sentenced to 89 months for the manufacturing conviction with a 36-month flat time for the firearm enhancement, for a total sentence of 125 months. Defendant appealed.

OVERVIEW: On review, defendant argued, inter alia, that the trial court should have suppressed the evidence police seized in his garage because the officer's initial warrantless search tainted the search warrant. The appellate court disagreed, finding that the search warrant had independent facts sufficient to establish probable cause: another officer's observation of blister packs and a hydrochloric acid generator, the overwhelming smell of ammonia coming from the garage, defendant's attempts to distract the officers, and defendant's wife's statement that defendant was cooking methamphetamine. Substantial evidence also supported the trial court's finding that the officers would have obtained a search warrant even had they not illegally entered the garage. Thus, the independent source exception to the exclusionary rule applied, and the evidence seized from the garage where the methamphetamine lab was found was properly admitted. There was also sufficient evidence to support a finding that defendant had easy access to weapons to use (which were found in the garage) while committing the crime of manufacturing methamphetamine, even though defendant was arrested outside the garage.

OUTCOME: The judgment was affirmed.

CORE TERMS: deputy, garage, weapon, search warrant, methamphetamine, armed, lab, firearm enhancement, right to appeal, arrested, detective, smell, nexus, arrived, loaded, easily accessible, manufacturing methamphetamine, firearm, ammonia, locked, independent source, exclusionary rule, probable cause, enhancement, marijuana, handgun, waiving, waived, suppression hearing, readily available

LexisNexis(R) Headnotes ♦ [Show Headnotes](#)

COUNSEL: Counsel for Appellant(s): Kathryn A. Russell Selk, Russell Selk Law Office, Seattle, WA.

Counsel for Respondent(s): Kathleen Proctor, Pierce County Prosecuting Atty Ofc, Tacoma, WA.

JUDGES: Authored by C. C. Bridgewater. Concurring: Joel Penoyar, Christine Quinn-Brintnall.

OPINIONBY: BRIDGEWATER

OPINION: BRIDGEWATER, J. - **Roy Len Neff** appeals his conviction for unlawful manufacturing of a controlled substance-methamphetamine with a firearm sentence enhancement. We affirm.

Deputy James Jones of the Pierce County Sheriff's Department responded to a suspicious vehicle call in unincorporated Pierce County. While en route, Deputy Jones smelled ammonia coming through his defroster vent. When he stopped his cruiser and got out in an attempt to locate the smell's origin, a man came out of a nearby house and pointed Deputy Jones to Neff's house 40 yards from the road.

Deputy Jones drove his cruiser onto the Neff's property, [*2] and, seeing a woman and child in the window of the house, walked to the front door. He contacted the woman, Mrs. Neff, told her that he was concerned that there were harmful chemicals somewhere on the property, and asked her if he could look around. Mrs. Neff acknowledged the smell and consented. Deputy Jones began walking around the property trying to locate the smell's origin.

At this point, Neff approached Deputy Jones. He told Deputy Jones that the previous occupants of the house had had a methamphetamine lab on the property and that he had been disposing of various tanks he found in the sticker bushes. Deputy Jones and Neff then began looking around the property for the source of the smell and were joined by a Mr. Rowlands. The smell was strongest near a detached garage.

Eventually, Deputy Jones noticed a burn pile next to the garage. The pile contained several cold medicine blister packs, which are often used in drug labs as the source of pseudoephedrine, the main ingredient of methamphetamine. He also found a garden sprayer that he determined, from past experience with methamphetamine labs, to be a hydrochloric acid (HCL) gas generator, a device necessary for methamphetamine [*3] production. At this point, Deputy Jones believed that there was an active drug lab. Neff and Rowlands tried to leave, but other officers detained them. Officers told Mrs. Neff that she had to stay as well. While Neff was being placed in a police cruiser, he threw a set of keys under the car and Deputy Jones retrieved them.

Deputy Mark Fry from the lab responder team arrived shortly after Neff was put in the police car. Deputy Fry was concerned that they had not yet located the smell's source and moved people away from the garage. He then used Neff's keys to open the locked garage to perform a safety assessment and to make sure that there were no conditions that might cause chemical release or a fire. After entering, Deputy Fry found what appeared to be a methamphetamine manufacturing lab and a marijuana grow operation. He also found anhydrous ammonia in a wood stove venting through a chimney stack; this was causing the odor outside. Deputy Fry then left the garage.

Meanwhile, Detective John Crawford, the on-call detective, arrived at the scene. He

interviewed Mrs. Neff, and she told him that Neff was manufacturing methamphetamine in the garage. Based on the interview tape, the trial [*4] court determined that Detective Crawford obtained Mrs. Neff's statement without referring to evidence in the garage.

Detective Crawford then applied for a search warrant, including Deputy Jones's initial observations, Deputy Fry's observations from inside the garage, and Mrs. Neff's statements in his probable cause affidavit. The magistrate granted the search warrant covering both the garage and Neff's house.

The officers reentered the garage and seized more than 120 items consistent with a methamphetamine lab and marijuana grow operation. The officers also found several video surveillance cameras with a console inside the garage, allowing the occupant to observe the area surrounding the garage. In addition, the officers found two loaded handguns, a .357 caliber Smith and Wesson and a .45 caliber Colt handgun, along with several bags of marijuana and a container of methamphetamine in a safe under a desk in the garage, a loaded .380 handgun in a tool belt hanging from the garage rafters, and a shotgun in the bedroom of Neff's house.

On the basis of the evidence seized in the garage, the State charged Neff with six felony counts, including unlawful manufacture of methamphetamine and [*5] marijuana, illegal possession of anhydrous ammonia and pseudoephedrine, possession of controlled substances with intent to deliver, and unlawful possession of firearms. Five of the counts had firearm enhancements.

Neff sought to suppress the evidence from the garage because Deputy Jones entered his property without probable cause and because Deputy Fry initially entered the garage without a search warrant. The trial court found that Deputy Jones went on the property and began searching for the source of the ammonia smell under his community caretaking authority. Therefore, the trial court reasoned, the evidence that Deputy Jones observed on the burn pile and in the garden sprayer was admissible. Rejecting the State's argument that Deputy Fry entered the locked garage to deal with a possible emergency, the court found that the initial warrantless entry into the garage was improper.

Nonetheless, the trial court ruled that materials found in the garage were admissible under the independent source exception to the exclusionary rule. Excising all Deputy Fry's observations in the affidavit of probable cause, the trial court found that there was sufficient probable cause to uphold the search [*6] warrant. Because the search warrant was not tainted by the illegal search, the court determined that the seized evidence was admissible.

After the jury voir dire began, the State and Neff reached an agreement short of trial. The State agreed to charge Neff with a single count of manufacturing methamphetamine with a firearm enhancement, and Neff agreed to stipulate to the facts in the police reports and proceed with a bench trial. In addition, Neff waived his right to appeal the sufficiency of the evidence while preserving his right to appeal the suppression ruling.

At the bench trial, the trial court found Neff guilty beyond a reasonable doubt of unlawful manufacturing of a controlled substance, methamphetamine, and found that Neff was armed while committing the crime. The court sentenced Neff to 89 months n1 for the manufacturing conviction with a 36-month flat time for the firearm enhancement, for a total sentence of 125 months. Neff appealed the trial court's suppression ruling and challenged the sufficiency of the evidence for the firearm enhancement.

----- Footnotes -----

n1 The State's plea agreement initially recommended 114 months total, but Neff failed to

appear at his original sentencing hearing. In exchange for not charging him with bail jumping, the State increased its recommendation to 125 months.

----- End Footnotes----- [*7]

I. Suppression

Neff argues that the trial court should have suppressed the evidence police seized in the garage because Deputy Fry's initial warrantless search tainted the search warrant. The State urges us to hold that the independent source exception to the exclusionary rule applies.

We review a trial court's conclusions of law at a suppression hearing de novo. *State v. Carter*, 151 Wn.2d 118, 125, 85 P.3d 887 (2004). We review challenged findings of fact for substantial evidence, which is enough evidence to persuade a fair-minded rational person of the truth of the finding. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). Unchallenged findings are verities on appeal. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). The findings must support the conclusions of law. *Vickers*, 148 Wn.2d at 116.

Evidence seized during illegal searches and evidence derived from illegal searches is subject to suppression under the exclusionary rule. *State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005). Under the independent source exception to the exclusionary rule, evidence tainted by unlawful [*8] government actions is not subject to exclusion provided it is ultimately obtained under a valid warrant or other lawful means independent of the unlawful action. *Gaines*, 154 Wn.2d at 718.

In this case, the officers obtained a search warrant and validly executed it. Therefore we must determine if, without the evidence from the illegal search, there was sufficient probable cause to support the search warrant's validity.

A search warrant may be issued only upon a determination of probable cause. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that evidence of a crime will be found at the place to be searched. *State v. Jackson*, 150 Wn.2d 251, 264, 76 P.3d 217 (2003). A search warrant is not rendered invalid by the inclusion of illegally obtained information if it contains otherwise independent facts sufficient to establish probable cause. *State v. Maxwell*, 114 Wn.2d 761, 769, 791 P.2d 223 (1990).

Here, the warrant had independent facts sufficient to establish probable [*9] cause. Deputy Jones's observation of the blister packs, the HCL generator, the overwhelming smell of ammonia that seemed to come from the garage, Neff's attempts to distract Deputy Jones, and the statement by Mrs. Neff that her husband was cooking methamphetamine were sufficient to create probable cause to search the garage for an illegal methamphetamine lab. n2 Because police obtained this information independently, the trial court properly upheld the search warrant. *Maxwell*, 114 Wn.2d at 769.

----- Footnotes -----

n2 We emphasize that the trial court found, orally, that Detective Crawford obtained Mrs. Neff's statement without referring to evidence in the garage. Mrs. Neff's statement that her husband was cooking methamphetamine in the garage was therefore untainted by the illegal search.

----- End Footnotes -----

But for the independent source exception to apply, the trial court must also find that the officers would have sought the valid search warrant even had they not illegally entered the garage. State v. Spring, 128 Wn. App. 398, 405, 115 P.3d 1052 (2005). [*10] review denied, 156 Wn.2d 1032 (2006). In other words, the State must show that the officers were not prompted to obtain the search warrant by what they saw in the initial entry. Murray v. United States, 487 U.S. 533, 542, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988).

The trial court found that the responding deputies would have sought and been granted a search warrant without evidence from the initial search. We must therefore determine if there was substantial evidence to support the trial court's finding. Vickers, 148 Wn.2d at 116.

And the record contains substantial evidence to support the trial court's finding of fact. Deputy Jones believed that there was an active drug lab as soon as he found the burn pile and HCL generator. He and the other officers detained Neff, Rowlands, and Mrs. Neff because of this belief. And Deputy Jones testified at the suppression hearing that he requested a detective to begin the warrant process because he himself was unsure of proper process for getting a valid warrant. This indicates that Deputy Jones intended to get a search warrant anyway; Deputy Jones was already thinking about a warrant when he [*11] requested support. On these facts, a fair-minded rational person could conclude that the officers were going to get a search warrant regardless of what Deputy Fry found inside the garage. Spring, 128 Wn. App. at 405.

Neff argues that the record is unclear about the timing of Deputy Jones's request for a detective to begin the search warrant. Deputy Jones was unsure when Detective Crawford arrived at the scene, and he did not actually call Detective Crawford; Deputy Fry did. And Deputy Fry was the one who entered the garage. Neff suggests this means that that the officers did not begin the search warrant process until after the illegal entry and therefore the search warrant was not independent.

We disagree. Deputy Jones already believed that there was a methamphetamine lab in the garage before Deputy Fry arrived. He had, in fact, already arrested Neff. A reasonable trier of fact could infer from the context that Deputy Jones knew he needed a search warrant to enter the locked garage and that was the point at which he requested assistance in preparing the warrant. And this appears to have been before Deputy Fry arrived. Therefore, substantial evidence supports the [*12] trial court's finding that the officers would have obtained a search warrant even had they not illegally entered the garage. Thus, the trial court properly applied the independent source exception to the exclusionary rule and properly admitted evidence the police seized from the garage.

II. Waiver of Appeal of Enhancement

Neff next argues that the evidence was insufficient to support the firearm enhancement. The State argues that Neff waived his right to appeal his firearm enhancement by signing an agreement to a stipulated facts trial that included an express waiver. The State is correct.

A defendant in a criminal trial may waive his right to appeal so long as his waiver is done intelligently, voluntarily, and with an understanding of the consequences. State v. Perkins, 108 Wn.2d 212, 215, 737 P.2d 250 (1987). A waiver of the right to appeal is no more fundamental than the right to a jury trial and therefore can be waived. Perkins, 108 Wn.2d at 217. The State has the burden of showing that the waiver was voluntary, knowing, and intelligent. State v. Tomal, 133 Wn.2d 985, 989, 948 P.2d 833 (1997). When a defendant completes [*13] a plea statement and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary. State v. Smith, 134 Wn.2d 849, 852, 953 P.2d 810 (1998).

In this case, Neff signed an agreement with prosecutors to go to trial on stipulated facts. In exchange, the State reduced the charges from six felony counts to one felony count. In the Stipulation to Facts Sufficient and Stipulated Bench Trial, Neff agreed to "sufficient evidence to support a possible conviction of the defendant as charged." Clerk's Papers (CP) at 99. In addition, he agreed to waive:

the right to challenge the sufficiency of the evidence to support these convictions on appeal, while reserving the right to challenge the trial court's suppression hearing findings and conclusions of law.

CP at 101.

The agreement also contained a paragraph (g) that gave the sentencing for a conviction of this offense and included the language "plus 36 months for the Firearm Sentencing Enhancement." CP at 101.

The import of these paragraphs was that Neff was not waiving sufficiency of the evidence for purposes of the trial but was waiving sufficiency of the evidence [*14] on appeal, if the court convicted him. And this specifically included the firearm enhancement.

The trial court verified that the agreement was voluntary, and specifically warned Neff that he was stipulating to evidence that may be sufficient to prove the charged offense and firearm enhancement. The court also warned Neff that he was waiving the right to challenge the sufficiency of the evidence on appeal. Warning Neff that he was giving away several constitutional rights such as the right to a jury and to confront the witnesses, the trial court asked Neff several times if he was doing it freely and voluntarily and Neff replied, "Yes, sir." 3 Report of Proceedings (RP) (Nov. 25, 2003) at 222, 224, 227. The court also clarified that Neff went over the entire document with his attorney. And Neff's trial attorney specifically clarified that Neff was waiving the right to appeal the sufficiency of the evidence but preserving the right to appeal the suppression hearing. When asked to explain what he was doing, Neff replied, "I'm making a plea deal with the prosecutor." 3 RP at 220.

Although a stipulated trial normally preserves the right to appeal, Neff specifically waived [*15] his right to appeal the sufficiency of the evidence in this case. On the basis of this record, Neff's decision to waive his right to appeal the firearm enhancement on sufficiency of evidence grounds was voluntary, intelligent and, therefore, valid.

III. Nexus of Firearms to the Crime

Even though we have held that Neff waived any challenge to the sufficiency of the evidence on appeal for the enhancement, we address it because of his claim of ineffective assistance of counsel for negotiating a plea bargain regarding the firearm enhancement. Neff's contention is that the mere presence of a firearm is not sufficient to support his enhancement. But, we hold there was sufficient evidence to support the enhancement regardless of the waiver.

In order to show ineffective assistance of counsel, Neff must show (1) that his attorney's performance was deficient and (2) that this deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Neff has the burden of showing both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Deficient performance [*16] is that which

falls below an objective standard of reasonableness. *State v. Horton*, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). But we begin with a strong presumption that a counsel's conduct fell within the wide range of reasonable professional assistance. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If Neff counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot provide a basis for a claim of ineffective assistance of counsel. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To satisfy the prejudice prong of the ineffective assistance of counsel claim, Neff must show that counsel's performance was so inadequate that there is a reasonable probability that the result would have differed, thereby undermining our confidence in the outcome. *Strickland*, 466 U.S. at 694.

To the extent that Neff argues that his trial counsel was ineffective for negotiating a plea deal with the State waiving Neff's right to appeal, there was a legitimate trial strategy for signing such a deal. Neff was facing six felony counts, five with firearm enhancements, making [*17] them most serious offenses or strikes. Conviction on all counts would have seriously affected Neff's offender score and sentencing. Whether waiver was necessary to have the charges reduced to a single count is within the trial counsel's tactical discretion. Therefore, this claim fails.

To the extent Neff argues that competent counsel would have asked the trial court to reconsider its ruling on his firearm enhancement, Neff would first have to show that the trial court would have reconsidered its ruling and reversed its earlier ruling. Because the evidence was sufficient to support the trial court's finding that Neff was armed while manufacturing methamphetamine, his argument fails.

Whether a person is armed is a mixed question of law and fact. *State v. Schelin*, 147 Wn.2d 562, 565-66, 55 P.3d 632 (2002). Because Neff stipulated to the facts, our review of this question is de novo. *Schelin*, 147 Wn.2d at 566. The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). [*18] When the sufficiency of evidence is challenged in a criminal case, we draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

A person is armed "if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes." *State v. Gurske*, 155 Wn.2d 134, 137-38, 118 P.3d 333 (2005) (quoting *Schelin*, 147 Wn.2d at 567). In addition, the State must prove a nexus (1) between the defendant and the weapon and (2) between the crime and the weapon. *Gurske*, 155 Wn.2d at 138, 141, 142.

The nexus requirement is the primary focus of this appeal. The nexus requirement serves to place parameters on determining when a defendant is armed, especially in the instance of a continuing crime. *Gurske*, 155 Wn.2d at 140. [*19] The *Gurske* court indicated that without a nexus requirement, a defendant may be punished for having a weapon unrelated to the crime. *Gurske*, 155 Wn.2d at 141. Thus, the mere presence of a weapon at a crime scene is insufficient to show the defendant is armed. *State v. Willis*, 153 Wn.2d 366, 371-72, 103 P.3d 1213 (2005). We examine the nature of the crime, the type of the weapon, and the circumstances under which the weapon is found. *Schelin*, 147 Wn.2d at 570.

Washington courts have applied this nexus requirement in several recent cases addressing whether a defendant was armed while possessing drugs. These cases establish that the mere presence of a weapon is insufficient to prove that a defendant is armed even in cases of a

continuing crime like drug possession. In State v. Valdobinos, 122 Wn.2d 270, 858 P.2d 199 (1993), officers acting under a valid search warrant arrested the defendant in a mobile home for possession with intent to deliver cocaine. Valdobinos, 122 Wn.2d at 273. The officers subsequently discovered an unloaded .22 rifle under a bed. Valdobinos, 122 Wn.2d at 281. [*20] The opinion does not clarify whether the gun was found under the same bed as the one under which officers found \$1,875,846 worth of cocaine. Valdobinos, 122 Wn.2d at 274. The court determined that on these facts, the weapon was not easily accessible and therefore reversed the sentence enhancement. Valdobinos, 122 Wn.2d at 282.

In State v. Johnson, 94 Wn. App. 882, 974 P.2d 855 (1999), review denied, 139 Wn.2d 1028, 994 P.2d 850 (2000), the defendant was arrested trying to run into a bathroom after officers executed a search warrant looking for drugs. Johnson, 94 Wn. App. at 887. Officers placed the defendant in the living room and asked him if there were any weapons. Johnson, 94 Wn. App. at 888. The defendant then directed officers to a coffee table with a closed cabinet in which police found a weapon. Johnson, 94 Wn. App. at 888. Division One of the Court of Appeals reasoned that because the defendant was handcuffed and the gun was outside of his reach, it was not reasonably accessible. Johnson, 94 Wn. App. at 897.

In State v. Mills, 80 Wn. App. 231, 907 P.2d 316 (1995), [*21] the police arrested the defendant after officers found drugs in his car during a consent search. Mills, 80 Wn. App. at 233. The police found a motel key and, after getting a search warrant, discovered additional drugs in the motel room next to a pistol in a gun pouch. Mills, 80 Wn. App. at 233. The court reasoned that there was no evidence that the defendant had been in the room where the weapon was on the day he was arrested and, because he would have had to travel several miles to retrieve the weapon, he was not armed. Mills, 80 Wn. App. at 234, 237.

Finally, in State v. Call, 75 Wn. App. 866, 880 P.2d 571 (1994), the defendant was arrested in his home after officers saw illegal drugs. Call, 75 Wn. App. at 868. Officers also found two unloaded handguns in his bedroom and a loaded handgun in a toolbox also in the bedroom. Call, 75 Wn. App. at 868. The court determined that even though at one point the defendant entered the bedroom to get his identification and returned unarmed, the weapons were not easily accessible and readily available. Call, 75 Wn. App. at 869. [*22]

These cases stand in contrast to State v. Schelin, where the defendant was standing at the bottom of some stairs 6 to 10 feet from a loaded weapon on the wall when police executed a search warrant. Schelin, 147 Wn.2d at 564. On those facts, the Supreme Court reasoned that because Schelin was in close proximity to a loaded gun he constructively possessed to protect his marijuana grow operation, the State had established the necessary nexus between him and the weapon. Schelin, 147 Wn.2d at 574-75.

Neff argues that these cases establish that he could not be armed because he was arrested while outside of the locked garage where he kept his three loaded firearms. Accordingly, he argues, while he constructively possessed the weapons by virtue of holding the key to the locked garage, the weapons were not easily accessible or readily available. Neff argues that without some other evidence linking him to the weapon or the weapon to the drugs, there was insufficient evidence that the weapons were easily accessible or readily available.

It is possible for a defendant to be armed during the commission of a crime even if not arrested in close proximity to [*23] the weapon. We addressed such a case in State v. Simonson, 91 Wn. App. 874, 960 P.2d 955 (1998), review denied, 137 Wn.2d 1016, 978 P.2d 1098 (1999). In that case, police responded to an explosion in a methamphetamine lab where a woman, badly burned, emerged. Simonson, 91 Wn. App. at 877. Police and emergency personnel found a loaded pistol outside in the mud and six other guns, three loaded, in the lab. Simonson, 91 Wn. App. at 877-78. The defendant was actually in prison on the day of the explosion on unrelated charges, but the court reasoned that the evidence supported the conclusion that he and the burned woman had been manufacturing

methamphetamine over a six-week period and that during that time, they were armed to protect their operation. *Simonson*, 91 Wn. App. at 883.

In *Schelin*, the Washington Supreme Court noted that the *Simonson* decision had been critiqued by other divisions of the Court of Appeals, but affirmed its holding that the defendant or an accomplice must be in proximity to a deadly weapon *when the crime is committed*. *Schelin*, 147 Wn.2d at 572. In so doing, the Supreme [*24] Court has endorsed *Simonson*'s reasoning that it is possible to find that a defendant is armed even if they are not arrested in close proximity to the weapon so long as the evidence shows that they were armed during the commission of the crime.

These facts present a strong case for holding that a criminal can be armed during the commission of an offense even if arrested elsewhere. A reasonable finder of fact could infer that when Deputy Jones arrived, Neff was in the garage beginning to cook methamphetamine while armed. The anhydrous ammonia was in an open container, suggesting it was about to be used. The HCL generator was actively letting off gas, confirming that the ingredients for a cook were being prepared. Neff was not at his house initially and only came out to greet Deputy Jones when he began to look around the property leading to an inference Neff was in the garage when Deputy Jones arrived. That Neff had the keys to the locked garage indicates that it was he, not Rowlands, who was in the garage. And Mrs. Neff told police that it was her husband who made methamphetamine in the garage. The three loaded weapons in the garage were all easily accessible to someone inside [*25] cooking methamphetamine, especially because the surveillance system in the garage allowed the occupant to observe anyone approaching. The most likely explanation for these facts is that Neff was in the garage beginning to cook methamphetamine, saw Deputy Jones on the monitors, and emerged to try to dissuade Deputy Jones from investigating.

Taking all the evidence in favor of the State, a reasonable trier of fact could conclude that there was a nexus between Neff, the weapons, and the crime of manufacturing methamphetamine. Therefore, there was sufficient evidence to support the trial court's finding that Neff had easy access to weapons to use, either for offensive or defensive purposes, while committing the crime of manufacturing methamphetamine.

And, unlike the possession cases on which Neff relies, each batch of methamphetamine takes a significant time to prepare. Because it takes a period of time to cook the methamphetamine, the trial court could also have inferred a connection between the drugs and the weapons even though Neff was arrested outside the garage.

Therefore, considering the nature of the crime, the type of the weapon, and the circumstances under which the weapons [*26] were found, there was sufficient evidence to find that Neff was armed during the illegal methamphetamine manufacture. Because we hold that there was sufficient evidence to support the firearm enhancement, the outcome would not have changed even if Neff's attorney had requested that the trial court reconsider its ruling. The trial court would have reached the same conclusion by considering our decision in *Simonson*. Thus, even if there was deficient performance (of which there is no evidence), there was no prejudice.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Quinn-Brintnall, C.J.

Penoyar, J.

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