

STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals

Judges: Stephen L. Borrello, E. Thomas Fitzgerald and Donald S. Owens

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

SUZANNE FAY LAFOUNTAIN

Defendant-Appellant.

Supreme Court No. 146496

Court of Appeals No. 306858

Lower Court No.10-4267-FH-P

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ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Cheboygan County Circuit Court by jury trial or bench trial, and a Judgment of Sentence was entered on August 23, 2011. A Claim of Appeal was filed on October 4, 2011 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated September 8, 2011, as authorized by MCR 6.425(F)(3). The Court of Appeals affirmed the conviction on November 20, 2012.

This Court granted leave to appeal on May 22, 2013, ordering the parties to address “(1) whether the presence of a firearm in a room that was accessed by the defendant is sufficient to prove a charge under MCL 333.7401c for violation that ‘involves the possession, placement or use of a firearm’ if the defendant occupied another room where methamphetamine was manufactured within the residence owned and possessed by another; and (2) whether points may be assessed for prior record variable 7 (PRV 7), MCL 777.57, where the defendant was convicted by a jury of charges that were subsequently vacated by the trial court.” App 7a

STATEMENT OF QUESTIONS PRESENTED

- I. MUST MS. LAFOUNTAIN'S CONVICTION FOR OPERATING OR MAINTAINING A METHAMPHETAMINE LABORATORY INVOLVING A FIREARM BE VACATED BECAUSE IT RESTS ON CONSTITUTIONALLY INSUFFICIENT EVIDENCE OF CRITICAL ELEMENTS OF THE CHARGE, WHERE THERE WAS NO PROOF OF ANY NEXUS BETWEEN MS. LAFOUNTAIN AND THE FIREARMS, NOR BETWEEN THE FIREARMS AND THE LABORATORY?**

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

- II. SHOULD THIS COURT AFFIRM MS. LAFOUNTAIN'S CONVICTION FOR OPERATING A METHAMPHETAMINE LAB INVOLVING A FIREARM, IS SHE STILL ENTITLED TO RESENTENCING BECAUSE THE TRIAL COURT INCORRECTLY SCORED PRV-7 AT 20 POINTS, WHERE SHE HAD NO SUBSEQUENT OR CONCURRENT FELONY CONVICTIONS?**

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Procedural Background

Defendant-Appellant Suzanne Fay LaFountain was convicted of one count of Operating or Maintaining a Methamphetamine Laboratory Involving a Firearm [MCL 333.7401c(2)(e)], on July 14, 2011, after a jury trial in Cheboygan County Circuit Court, before the Honorable Scott L. Pavlich. On August 23, 2011, Ms. LaFountain was sentenced to 4 to 50 years imprisonment.¹
App 1a-2a

The charge alleged that Ms. LaFountain operated a methamphetamine laboratory from her residence in Wolverine, Michigan, where three firearms were found. She maintained that she was not involved with the operation of the laboratory, and that she did not possess the firearms, which were all located at the home owned by her boyfriend's parents and where she lived with him and members of his family.

Ms. LaFountain appealed her conviction as a matter of right. The Court of Appeals affirmed in an unpublished decision issued November 20, 2012. App 3a-6a This Court granted leave to appeal on May 22, 2013. App 7a

Motion to Quash and/or Dismiss

The prosecution filed six charges against Ms. LaFountain. App 8a The District Court dismissed one charge, operating or maintaining a laboratory involving methamphetamine, on double jeopardy grounds. App 11a The remaining charges included (1) possession of methamphetamine, (2) maintaining a drug house, and three separate violations of MCL 333.7401c, involving operating a methamphetamine laboratory – (3) operating or maintaining a

¹ The maximum sentence was doubled under MCL 333.7413 (2).

laboratory involving a firearm, (4) operating or maintaining a laboratory in the presence of a minor, and (5) operating or maintaining a laboratory involving hazardous waste. App 40a-41a

After the matter was bound over to Circuit Court, Ms. LaFountain filed a Motion to Quash and/or Dismiss any two of the three counts involving operating a methamphetamine laboratory. App 12a-16a She argued that exposing her to multiple punishments under a single statute for a single offense would violate her constitutional protection from double jeopardy.

App 13a

At the hearing, the trial court decided to permit the prosecution to present evidence of each of the three charges pertaining to operating a methamphetamine laboratory, and to permit all three charges to be submitted to the jury, in the alternative. App 25a-26a, 29a In order to address the concern regarding the potential for multiple punishments for the same offense, the court held that Ms. LaFountain would be sentenced to only one of the charges for operating a methamphetamine laboratory, and that the remaining two charges for operating a methamphetamine laboratory would, in turn, be dismissed. App 26a-27a The court was cognizant that the offense pertaining to involvement of a firearm (for which Ms. LaFountain stands convicted) carries the highest penalty, and it posited therefore that if the jury convicted on all of the offenses, the offense involving a firearm would remain intact, while the lesser offenses (involving the presence of a minor and involving hazardous waste) would ultimately be vacated.

App 26a

The jury convicted Ms. LaFountain of all three charges pertaining to operating a methamphetamine laboratory, as well as of possession of methamphetamine, but acquitted of maintaining a drug house. App 527a Ms. LaFountain was sentenced for all four conviction offenses. App 34a-35a

However, pursuant to its ruling on the motion to quash, and stipulation of counsel, the court vacated charges for operating a methamphetamine laboratory in the presence of a minor, operating a methamphetamine laboratory involving hazardous waste, and possession of methamphetamine, leaving intact only the conviction for operating a methamphetamine laboratory involving possession of a firearm. App 36a-37a, 38a; App 1a – 2a

Trial Testimony

The charges filed against Ms. LaFountain stem from an investigation by Child Protective Services. She was living with her boyfriend, Matthew Fischer, in his parents' home. App 456a In addition to her and Mr. Fischer, other occupants included Mr. Fischer's parents and grandmother. App 221a On July 13, 2010, Jason Crawford Jr., Ms. LaFountain's fourteen-year-old son, contacted the Department of Human Services, claiming that he had witnessed his mother using drugs. App 210a When caseworkers visited the home, Ms. LaFountain tested positive for amphetamine, methamphetamine, morphine, hydromorphine and Tramadol. App 212a – 213a

With the permission of Cheryl Spencer, the owner of the home, members of the Straits Area Narcotics Enforcement (SANE) team conducted a search of trash cans on the property and discovered materials consistent with the clandestine manufacture of methamphetamine. App 96a SANE officers then obtained and executed a search warrant of the home's interior. App 350a

At the time of the search, Ms. LaFountain and Mr. Fischer occupied the northwest bedroom, where officers discovered materials used during the separation and crystallization phases of methamphetamine production. App 126a-146a, App 430a Officers also collected from that same room syringes and spoons consistent with individual drug use. App 140a, App 281a Although several items tested positive for methamphetamine residue, no

methamphetamine product was recovered from the bedroom. App 346a-347a

Police also found three firearms in the southwest bedroom of the home, which the homeowner said was her husband's office. This room was also occasionally occupied by Ms. LaFountain's two children² and by Ms. LaFountain's brother, Eric LaFountain. App 288a-291a; 430a

The firearms were unloaded, and there was no indication whether they were operable. App 416a No ammunition was found or seized. App 340a Detective-Sergeant Runstrom repeatedly referred to them as "old military rifles." App 288a, 292a Additionally, Lieutenant Kenneth Mills indicated that he spoke to the owner of the guns; however, he did not recall the owner's name. App 416a None of the witnesses alleged that they had ever seen Ms. LaFountain handle any of the guns found at the residence.

Jason Crawford, Ms. LaFountain's son, testified that he witnessed his mother shake a bottle of "green stuff" in her bedroom on a single occasion. App 243a-244a However, Jason said he did not smell "anything funny." App 244a Detective-Sergeant Mitchell Stevens testified that one method of methamphetamine production involved shaking a bottle and burping it to release vapors which have an ammonia smell. App 119a, 132a With the possible exception of Jason, no witness testified to seeing Ms. LaFountain participate in the production of methamphetamine.

Ms. LaFountain took the stand in her own defense, adamantly denying any participation in methamphetamine production. App 460a, 463a At the time of her arrest, Ms. LaFountain admitted to using a mixture of prescription narcotics and illegal street drugs as a result of her physical disability and depression. App 226a; App 457a-458a She also admitted that several

² Although Ms. LaFountain did not have sole custody of her children, her son, Jason Crawford Jr. had begun living with her on June 10, 2011, and her daughter, Isabella Churches, spent weekdays with her at the residence. App 219a, 236a, 262a-263a

people were involved with methamphetamine production in a fire pit in the woods behind the home, including her brother, Eric LaFountain. App 300a-303a She recalled buying Sudafed (an ingredient which police said was used to make methamphetamine App 97a) for someone on one occasion, although she did not know what it was used for. App 468a Otherwise, she neither assisted in the production of methamphetamine nor provided any materials necessary to its creation. App 463a

Ms. LaFountain's boyfriend, Matthew Fischer, admitted that he and others were manufacturing methamphetamine in the fire pit in the woods, about 200 yards behind the house. App 443a-444a He added, however, that Ms. LaFountain was not involved with that matter. App 445a

Ms. LaFountain stands convicted and sentenced for a single count of operating or maintaining a methamphetamine laboratory involving a firearm. App 1a-2a

Sentencing Proceedings

Ms. LaFountain was sentenced to 4 to 50 years imprisonment for operating and maintaining a methamphetamine laboratory involving a firearm. App 34a-35a, 538a This sentence was premised on sentencing guidelines of 42 to 70 months (3.5 to 5.83 years). App 39a, 531a-540a In turn, these guidelines were predicated, in part, on 20 points assessed under PRV 7, for two or more subsequent or concurrent felony conviction. App 39a

After sentencing, Ms. LaFountain filed a post-conviction Motion to Correct Judgment of Sentence, requesting that PRV 7 be rescored at 10 points. It appears that defense counsel did not realize that Ms. LaFountain had been acquitted of the charge of maintaining a drug house and thus believed she had one concurrent felony conviction. App 36a-37a A hearing was held on

October 4, 2011, at which time the court ordered that “Counts 2, 3, and 4 of the Judgment of Sentence dated August 24, 2011” be vacated. App 38a However, neither the court nor the stipulated order addressed the scoring of PRV 7. Thus, the PRV 7 score remained at 20 points.

I. MS. LAFOUNTAIN'S CONVICTION FOR OPERATING OR MAINTAINING A METHAMPHETAMINE LABORATORY INVOLVING A FIREARM MUST BE VACATED BECAUSE IT RESTS ON CONSTITUTIONALLY INSUFFICIENT EVIDENCE OF CRITICAL ELEMENTS OF THE CHARGE, WHERE THERE WAS NO PROOF OF ANY NEXUS BETWEEN MS. LAFOUNTAIN AND THE FIREARMS, NOR BETWEEN THE FIREARMS AND THE LABORATORY.

Issue Preservation and Standard of Review

A claim of insufficient evidence need not be raised in the trial court to be preserved for appellate review. *People v Wolfe*, 440 Mich 508, 505; 489 NW2d 748, 751 (1992), *amended* 441 Mich 1201.

Whether a verdict is supported by constitutionally sufficient evidence is a question of law subject to *de novo* review. *People v Patterson*, 428 Mich 502; 410 NW2d 105 733 (1987).

Discussion

Ms. LaFountain was convicted of operating or maintaining a methamphetamine laboratory involving a firearm. The charge alleged that she and her boyfriend, Mr. Fischer, participated in the clandestine production of methamphetamine from their residence. Police discovered materials consistent with the manufacture of methamphetamine in the northwest bedroom, which Ms. LaFountain and Mr. Fischer occupied, and they found three firearms in the southwest bedroom, across the hall.

Ms. LaFountain's conviction must be vacated, as the prosecution failed to present any evidence tending to establish a sufficient nexus between the operation of a methamphetamine laboratory and the possession, placement, or use of the firearms, or between Ms. LaFountain and the firearms.

The United States Supreme Court held in *In Re Winship*, 397 US 358, 364; 90 SCt 1068;

25 L Ed 2d 368 (1970) that the accused's right to due process mandates the prosecutor prove each element of the charged offense beyond a reasonable doubt.

Basing its holding on *Jackson v Virginia*, 443 US 307, 315; 99 SCt 2781; 61 L Ed 2d 560 (1979), the Michigan Supreme Court, in *People v Hampton*, 407 Mich 354; 285 NW2d 284 (1979) articulated the proper standard for determining whether a conviction is based on sufficient evidence. The Court in *Hampton* rejected, as inconsistent with due process, the notion that as long as there is "some evidence" from which to infer guilt, a conviction may be sustained. Rather, the Court held that there must be sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *Id.* at 366-368.

Reviewing the substance of the case is not tantamount to second guessing the trier of fact, since this Court must view the evidence "in the light most favorable to the prosecution." *People v Wolfe, supra* at 515. If the prosecution fails to present sufficient evidence of the accused's guilt, a judgment of acquittal must be entered. *Hampton, supra* at 368.

Ms. LaFountain was convicted of violating MCL 333.7401c (1)(a), which forbids a person to "[o]wn, possess, or use a vehicle, building, structure, place, or area that he or she knows or has reason to know is to be used as a location to manufacture a controlled substance in violation of section 7401 or a counterfeit substance or a controlled substance analogue in violation of section 7402."

The subsequent subdivision, MCL 333.7401c (2), establishes the maximum sentencing requirements, based on the presence of aggravating factors that will increase the applicable sentence. Ms. LaFountain was convicted under MCL 333.7401c (2)(e), which establishes the penalty "if the violation involves the possession, placement, or use of a firearm or any other devise designed or intended to injure another person[.]" App 40a-41a

A. THE PROSECUTION FAILED TO ESTABLISH A SUFFICIENT NEXUS BETWEEN OPERATING A METHAMPHETAMINE LABORATORY AND THE PRESENCE OF FIREARMS.

Apparently, no case directly interprets or construes the meaning of MCL 333.7401c (2)(e); nevertheless, its plain language suggests that the prosecution must prove beyond a reasonable doubt that a connection exists between the defendant's alleged operation of a methamphetamine laboratory and the possession, placement, or use of a firearm. MCL 333.7401c(2)(e) describes the punishment when, in relevant part, "the violation **involves** the possession, placement, or use of a firearm or any other device designed or intended to be used to injure another person[.]" MCL 333.7401c (2)(e) (emphasis added).

The Merriam Webster Dictionary defines the term "involve" as "to require as a necessary accompaniment." *Merriam-Webster.com*, <http://www.merriam-webster.com/dictionary/involve> (2011). The definition suggests that the gun must be indispensable to the enterprise of producing methamphetamine. Under this interpretation of the statute, the mere presence of a gun is not proscribed; instead, the prosecution must demonstrate that the firearm was used to further the production of methamphetamine in some manner.

There is no evidence suggesting that the three firearms recovered from home were utilized as "necessary accompaniment" to the operation of a methamphetamine laboratory. The firearms were found in the southwest bedroom, which functioned as an office for Mr. Fischer's step-father, and was intermittently occupied by Ms. LaFountain's children and her brother, Eric. App 430a Ms. LaFountain, however, occupied the northwest bedroom. App 239a, 261a, 277a

The Court of Appeals below clearly erred in holding that the statute only requires proof that Ms. LaFountain possessed the firearm, and does not require proof that the firearm was

involved with the laboratory:

Defendant also argues ... that even if she did have constructive possession of the firearms, those firearms were not “involved” with the operation or maintenance of the methamphetamine laboratory. Defendant bases her argument on the notion the something more than possession of a firearm is required under MCL 333.7401c (2)(e), and that the prosecution is charged with establishing that the possession, placement, or use of the firearm must be a necessary accompaniment to the operation or maintenance of the methamphetamine lab. No such requirement, however, is found in the plain language of the statute. MCL 333.7401c (2)(e) prohibits the possession of a firearm as part of the operation of a methamphetamine lab, not just the use of a firearm. There is no question that a methamphetamine lab was being operated inside the house, nor is there any question that firearms were inside the house. Therefore, there was sufficient evidence to permit a rational jury to conclude that defendant was guilty of operating or maintaining a methamphetamine laboratory involving a firearm.

People v LaFountain, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2012 *2-3 (Docket No. 306858). App 4a-5a

According to the reasoning of the Court of Appeals, there is no import to the term “involves” in the statutory phrase “if the violation involves the possession, placement, or use of a firearm ...” This is contrary to traditional rules of statutory interpretation. The cardinal principle of statutory construction is that courts must give effect to legislative intent. *Morales v Auto-Owners Ins. Co. (After Remand)*, 469 Mich 487, 490; 672 NW2d 849 (2003). When reviewing a statute, courts necessarily must first examine the text of the statute. *Dressel v Ameribank*, 468 Mich 557, 562; 664 NW2d 151 (2003). If the Legislature's intent is clearly expressed by the language of the statute, no further construction is permitted. *Helder v Sruba*, 462 Mich 92, 99; 611 NW2d 309 (2000). As far as possible, effect should be given to every phrase, clause, and word in the statute. *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010). In construing statutes, the court should avoid any construction that would render a statute, or any part of it, surplusage or nugatory. *Altman v Meridian Twp.*, 439 Mich 623, 635;

487 NW2d 155 (1992), *modified* 440 Mich 1204, 487 NW2d 155 (1992).

The Court of Appeals held that it is not necessary to demonstrate that the laboratory *involves* the possession, placement or use of the firearm. This interpretation violates the principles of statutory interpretation by rendering the term “involves” a nullity. On the contrary, the inclusion of the term “involves” denotes there must be some sort of a relationship between the firearm and the lab, and furthermore, that that relationship must be proven by the prosecution.

Several other states with similar statutes, which prohibit possession of a firearm concurrent with an underlying drug offense, have looked to federal circuit courts construing the federal sentencing guidelines for guidance. *See, e.g., Murray v State*, 54 P3d 821 (AK App, 2002) (state must show that the defendant’s possession of a firearm aided, advanced, or furthered the commission of the drug offense in order to prove a violation under the statute); *State v Blanchard*, 776 So2d 1165 (Louisiana, 2001) (state must show a nexus between firearm and drugs in order to prove a violation under the statute); *Wright v Commonwealth*, 670 SE2d 772 (VA App, 2009) (holding that the statute “requires proof of a nexus between the drug offense and the firearm possession—proof that possession of the firearm somehow furthers, advances, or helps the defendant to commit the offense of possessing a controlled substance with an intent to distribute it.”).

The federal sentencing guidelines provide for sentence enhancement “if a dangerous weapon was possessed” in furtherance of a drug trafficking offense. 18 U.S.C. § 924(c)(1)(A). There are three bases for convicting under 18 U.S.C. § 924(c)(1)(A): 1) use a firearm *during and*

in relation to drug trafficking; 2) carry a firearm *during and in relation*³ to drug trafficking; or 3) possess a firearm *in furtherance* of drug trafficking. *See also United States v Nance*, 40 F App'x 59, 64 (CA 6, 2002). Federal circuit courts construing the federal statute have held that by requiring that possession be “in furtherance of” the crime, Congress intended a specific nexus between the gun and the drug selling operation. *United States v Mackey*, 265 F3d 457, 460-461 (CA 6, 2011).

Courts have ruled that this nexus requirement is necessitated by the purpose of the penalty provision -- namely, to provide heightened penalties for possessing or using a firearm in conjunction with a specified drug crime in order “to combat the dangerous combination of drugs and guns.” *United States v Timmons*, 283 F3d 1246, 1251 (CA 11, 2002).

The Michigan statute at issue, MCL 333.7401c, sets forth a number of heightened penalties for violations of section MCL 333.7401 under certain aggravating circumstances. Every one of these aggravating circumstances – the presence of a minor, the unlawful treatment of hazardous waste, proximity to a home, school, business, or house of worship, and violations involving a firearm or other weapon – is designed to combat a specific kind of “dangerous combination.” Like 18 U.S.C. § 924(c)(1)(A), requiring that at minimum the weapon must have some purpose or effect with respect to the manufacture of drugs sustains the deterrent effect intended by the legislature without lessening the statute’s purpose.

The required nexus can be established by weighing the following evidence: the accessibility of the firearm and its proximity to drugs or drug profits, whether the gun was

³ In interpreting the meaning of carrying or using a weapon “in relation to” drug trafficking, the United States Supreme Court has stated that while this requirement is “expansive,” “at a minimum, it means that ‘the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence.’” *Smith v United States*, 508 US 223, 227-228 (1993). The firearm must “facilitate, or have the potential of facilitating, the drug trafficking offense.” *Id.* (internal quotation marks and citations omitted).

loaded, the type of weapon involved, the legality of its possession, the type of drug activity conducted, and the time and circumstances under which the firearm was found. *Mackey, supra* at 462. As the *Mackey* Court explained, this non-exclusive list of factors helps a fact-finder to distinguish “possession in furtherance of a crime from innocent possession of a wall-mounted antique or an unloaded hunting rifle locked in a cupboard.” *Id.*

This nexus is illustrated in *United States v Stevens*, 380 F3d 1021, 1027 (CA 7, 2004) (adequate nexus where guns have been found in the same room with drugs and drug paraphernalia, guns were easily accessible, one weapon was loaded, and extra ammunition was found in the same drawer as eighty-two individually packaged bags of crack) and in *United States v Gaston*, 357 F3d 77, 82-831 (CA DC, 2004) (sufficient nexus found where loaded guns were illegally possessed and were found in the same room as forty small bags of heroin and a large amount of cash).

In the instant case, application of the above-mentioned factors further illustrates the lack of any connection between the three firearms and the lab. First, while the firearms were found in the southwest bedroom and thus inevitably somewhat proximate to any other activity taking place in the home, they were not found in the bedroom that contained methamphetamine cooking paraphernalia and did not appear to be strategically located for quick and easy access. Next, the guns were unloaded and not accompanied by ammunition. Moreover, Detective-Sergeant Runstrom repeatedly referred to the firearms as “old military rifles,” and there was no indication that they were even operable. App 288a, 292a Thus, it is unlikely that the guns could further production of methamphetamine in a meaningful way.

This Court established in *People v Peals*, 476 Mich 636; 720 NW2d 196 (2006) that operability is not required to show possession, yet operability remains relevant for our purposes

since inoperability diminishes the likelihood firearms were possessed in connection with, or furtherance of, methamphetamine production. Firearm possession statutes are intended to protect the public from the serious threat posed by such devices; however, there are situations in which guns may pose no threat at all. The *Peals* Court explained that there are circumstances in which the inoperability of a weapon would be probative of whether it is indeed a weapon:

While the statute does not contain an operability requirement, it is possible that a firearm could be so substantially redesigned or altered that it would cease to be a "firearm" under the statutory definition. It would no longer be a weapon whose design was such that a dangerous projectile "may be propelled" by an explosive, gas, or air. For example, an antique cannon plugged with cement on display in a park would not constitute a "firearm" under MCL 750.222(d). That is because the cannon has been converted into an ornamental display, and it is no longer the type of weapon that is used or designed to propel dangerous projectiles by an explosive or by gas or air.

Id. at 652 n 7.

Additionally, there was no evidence to suggest that the firearms were illegally possessed. Rather, Lieutenant Mills testified that he spoke to a resident of the home over the phone who indicated that they were his. App 416a Lastly, with respect to the type of drug activity conducted, the evidence strongly suggested that Ms. LaFountain and her boyfriend were manufacturing methamphetamine for personal use. Detective Sergeant Stevens testified that the home contained no evidence indicating an intention to sell, traffic, or distribute methamphetamine, App 158a, which supports the conclusion that Ms. LaFountain and Mr. Fischer did not need to use the firearms for protection or to enforce payment for drugs.

These factors weigh heavily in Ms. LaFountain's favor. There is absolutely no evidence to suggest that the guns in this case were anything more than inoperable antiques belonging to a non-party and stored behind a door in a room of the Fischer's home where no drug activity was taking place. By failing to offer any evidence confirming a nexus between the manufacturing

components and the firearms, the prosecution failed to overcome the overwhelming inference that the presence of the firearms was merely coincidental.

B. THE RECORD IS DEVOID OF EVIDENCE TENDING TO PROVE THAT MS. LAFOUNTAIN POSSESSED, PLACED, OR USED ANY OF THE THREE FIREARMS FOUND ON THE PREMISES.

The plain language of the statute does not proscribe gun ownership; rather, it prohibits the manufacturing of controlled substances and provides a sentencing enhancement if the prohibited act also “involves the possession, placement, or use of a firearm.” The discovery of inoperable, antique guns merely present in the same building as certain methamphetamine components does not violate the statute. Rather, it is necessary to show that the operation of the lab involved the *possession* of the firearm. To convict Ms. LaFountain for operating a lab involving the possession of a firearm, it was necessary for the prosecution not only to establish a sufficient nexus between the lab and the firearms, but also that Ms. LaFountain possessed, placed, or used the guns. The record, however, is devoid of any evidence tending to prove that Ms. LaFountain possessed, placed or used any of the three firearms discovered in the southwest bedroom.

MCL 333.7401c provides no definition for the term possession, and there is no case law indicating how possession should be construed in the context of this particular statute.

Nevertheless, Michigan decisions interpreting the felony-firearm prohibition, MCL 750.227b, provide some guidance on the meaning of possession. Michigan courts adopt a definition that includes both actual and constructive possession. *People v Hill*, 433 Mich 464, 470-71; 446 NW2d 140, 143 (1989); *People v Davis*, 101 Mich App 198, 202; 300 NW2d 497, 499 (1980).

“Although not in actual possession, a person has constructive possession if he ‘knowingly has

the power and the intention at a given time to exercise dominion over a thing, either directly or through another person or persons.” *Hill, supra* at 470-471, citing *United States v Burch*, 313 F2d 628 (CA 6, 1963).

In addition to this showing, frequently abbreviated as “indicia of control,” constructive possession in the felony firearm context requires that the firearm be “reasonably accessible” to the defendant at the time he committed a felony. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW 2d 645, 649 (2000).⁴ To establish some objective indicia of control, the defendant must know where the firearm was located in order to demonstrate the potential exercise of dominion over the firearm. *Hill, supra* at 470-471. Thus, knowledge of the weapon’s location is a critical element of constructive possession. *Id.*

In *Burgenmeyer, supra*, this Court provided an example of constructive possession. There, the defendant challenged his conviction of possessing a firearm during commission of a felony, namely cocaine possession (e.g. felony-firearm). *Id.* at 434. The *Burgenmeyer* Court upheld the conviction on the grounds that the prosecution had sufficiently demonstrated both proximity and some objective indicia of control. The facts of the case revealed the defendant had informed officers that cocaine was located in his bedroom. *Id.* at 439-440. Incidentally, while searching for the cocaine, officers found two handguns atop the dresser described by the defendant. *Id.* at 440. Based on the proximity of the guns to the illicit drugs found in the defendant’s own bedroom, the Court held that the jury could reasonably infer that the defendant had knowledge of the guns’ location, which would indicate some objective indicia of control. *Id.* Furthermore, the proximity between the guns and cocaine suggested the defendant possessed both at the same time, thereby providing a satisfactory basis for a felony-firearm conviction. *Id.*

⁴ In the context of drugs (rather than firearms), accessibility is not a requirement for possession. *People v Williams*, 212 Mich App 607, 609 (1995), citing *People v Hill*, 433 Mich 464, 470-471 (1989).

When applying the elements of constructive possession to the facts of this case, it becomes clear that the prosecution failed to proffer any evidence indicating that Ms. LaFountain knew or had reason to know of the weapons' location. None of the witnesses provided testimony to support a finding that Ms. LaFountain knew or had reason to know that the guns were in the home. Furthermore, the instant case is distinguishable from *Burgenmeyer*, since the methamphetamine components and the guns were found in separate rooms. App 287a-288a

Although the home was her place of residence, Ms. LaFountain did not own it, and did not occupy its entirety, and as a consequence, she exercised little to control over other residents and guests who possessed dubious scruples. Ms. LaFountain fully admitted to using a powerful mix of illicit street and prescription narcotics. Being under persistent the influence of opiates and amphetamines, her presence of mind was easily distorted and confused. There was no indication that she was aware that three encased, unloaded, and conceivably inoperable firearms had been concealed in the southwest bedroom, which she did not occupy. The prosecution provided no evidence to overcome the reasonable inference that her brother, Eric, or any other resident or guest of the residence surreptitiously hid the guns without Ms. LaFountain's knowledge.

The Court of Appeals below clearly erred in holding that there was sufficient evidence based on the inference that Ms. LaFountain had to know the guns were present because she would have seen them when she went into the room to check on her children:

In the instant case, both proximity and objective indicia of control were established by the prosecution at trial. First, the firearms were located in the bedroom across the hall from the defendant's room, which establishes proximity. Second, there was ample circumstantial evidence that defendant knew of the location of the firearms: they were in the room where defendant's children slept, defendant's boyfriend testified that the firearms had been there for some time, and defendant herself testified that she had been in the room to check on her children. Given this evidence,

there were sufficient grounds for a rational jury to conclude that defendant had constructive possession of the firearms in question.

People v LaFountain, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2012 *2 (Docket No. 306858). App 4a

Mere presence at the scene of a crime, even with knowledge that an offense is about to be committed or is being committed, is insufficient evidence to convict. *People v Wilson*, 195 Mich App 604, 614; 493 NW2d 471 (1992). Nor is mere presence near contraband sufficient to convict. *Wolfe, supra* at 520. Rather, in order to prove constructive possession, the prosecution must provide some “additional connection” between the defendant and the illicit items. *Id.* at 520-521 (“[C]onstructive possession exists where the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband.”).

The Court provided an example of an additional connection in *People v Hardiman*, 466 Mich 417; 646 NW2d 158 (2002). In the *Hardiman* case, officers discovered narcotics in an apartment that appeared to belong to the female defendant because in it they found mail addressed to her at the location. *Id.* at 419. The Court held that there was sufficient evidence to prove an additional connection between the female defendant and the contraband since contraband was found in a nightstand along with the mail bearing her name, as well as in the pocket of a dress located in a bedroom closet. *Id.* at 419-420, 422-24. Because the evidence indicated that the defendant resided in the apartment and shared the bedroom with a male companion, the reasonable trier of fact could deduce her constructive possession based on the location of the narcotics with female attire and the female defendant’s belongings. *Id.*

The record in the instant case similarly fails to indicate a connection between Ms. LaFountain and the firearms recovered from the residence. Although Ms. LaFountain resided at

the home at the time of the search, she occupied the northwest bedroom, while the guns were recovered from the southwest bedroom. Moreover, whereas in the *Hardiman* case narcotics were discovered inside one of the defendant's possessions, the record here fails to provide any similar connection between the guns and Ms. LaFountain's possessions. As previously discussed, the southwest bedroom served as Jim Spencer's office and was occasionally occupied by Ms. LaFountain's children and her brother, Eric. App 239a, 261a; App 430a It is certainly possible that Jim, Eric, or one of the other residents may have placed or hidden the guns without apprising Ms. LaFountain. For these reasons, it is impossible to establish an additional connection between the defendant and the firearms.

Although *Hardiman* involved the "additional connection" required to prove drug possession rather than gun possession, this analysis illustrates the requirement of demonstrating "power and intention" to exercise dominion and control, which is required to prove constructive possession in the felony firearm context. *Hill, supra* at 470-471. Based on this principle, there must, at the very least be some evidence that Ms. LaFountain had the "power and intention" at a given time to exercise control over the firearms. Indeed, without this requirement, a person could be considered to be in constructive possession of every firearm he or she knows to exist and could potentially or theoretically exert control over. Such a reading of "possession" within MCL 333.7401c or the felony-firearm statute omits any consideration of criminal intent and essentially creates a strict liability offense. *See People v Quinn*, 440 Mich 178, 188 (1992) (A strict liability crime "impose[s] certain penalties regardless of the actor's criminal intent and regardless of what the actor actually knew or did not know.").⁵ There is no indication that the Michigan legislature intended to omit a mens rea requirement in offenses proscribing

⁵ Even so, strict liability cannot eliminate the necessity of a voluntary act or omission to establish criminal liability. Strict liability statutes only remove the requirement of a "culpable mental state," or mens rea. 21 Am Jur 2d *Criminal Law* §132 (2009).

constructive possession of contraband. Rather, as this Court has repeatedly stated, constructive possession requires the power and intention to exert control over a given thing. *See e.g., Hill, supra* at 470-471; *People v Flick*, 487 Mich. 1, 14 (2010); *People v Minch*, 493 Mich 87, 91-92 (2012); *see also United States v Bailey*, 553 F3d 940, 945 (CA 6, 2009) (“We find it critical in this case to reiterate that the theory of constructive possession requires ‘specific intent.’”) (internal citations omitted).

Therefore, if a defendant denies any knowledge of a firearm found in an area reasonably accessible to her, as Ms. LaFountain does in this case, the prosecution must offer evidence to prove that she not only knew the thing was present, but that she intended to exercise dominion or control over it. Even assuming the prosecution presented sufficient evidence to permit a rational juror to find that Ms. LaFountain knew that there were old military firearms behind the door in the bedroom across the hall, it presented zero evidence indicating that she had the power or intention at any given time to exercise control over those firearms. Indeed, the totality of the circumstances suggests that she did not. First, she did not own the guns and neither did her boyfriend. App 516a While one can constructively possess something that someone else owns, *Wolfe, supra* at 520, the fact that these guns did not even belong to her boyfriend suggests that Ms. LaFountain did not have a right – legal or otherwise – to exert control over them. Moreover, she didn’t have exclusive control over the room; she didn’t attempt to conceal the weapons; and, as previously discussed, there was no evidence linking the weapons to her involvement in the methamphetamine lab. Lastly, the type of weapon, lack of ammunition, and suggestion that the guns may have been inoperable antiques, all further indicate that Ms. LaFountain had no intention to exert control over them.

Because the prosecution failed to prove beyond a reasonable doubt that there was a

sufficient nexus between operating a methamphetamine lab and the possession, placement or use of a firearm, or that Ms. LaFountain constructively possessed the firearms found in the southwest bedroom, Ms. LaFountain's conviction for operating a lab involving a firearm must be vacated.

**II. SHOULD THIS COURT AFFIRM MS. LAFOUNTAIN'S
CONVICTION FOR OPERATING A
METHAMPHETAMINE LAB INVOLVING A FIREARM,
SHE IS STILL ENTITLED TO RESENTENCING BECAUSE
THE TRIAL COURT INCORRECTLY SCORED PRV-7 AT
20 POINTS, WHERE SHE HAD NO SUBSEQUENT OR
CONCURRENT FELONY CONVICTIONS.**

Issue Preservation and Standard of Review

This issue was not preserved for appellate review.⁶ Notwithstanding defense counsel's failure to raise an appropriate objection at sentencing to the trial court's scoring of PRV-7, review is appropriate and relief is required because the sentence falls outside the correct guidelines range. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Unpreserved sentencing guideline errors are subject to the plain error standard of review. *Id.*

Whether the trial court correctly interpreted the statutory sentencing guidelines is a question of law subject to *de novo* review. *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006).

Discussion

Ms. LaFountain was erroneously given 20 points under PRV-7. To score 20 points under PRV-7, the defendant must have "two or more subsequent or concurrent felony conviction[.]" MCL 777.57 (1)(a). Since the trial court dismissed three of her four convictions on double jeopardy grounds, Ms. LaFountain remains convicted of one charge, operating or maintaining a methamphetamine lab involving a firearm. App 26a-27a; App 12a; App 38a; App 1a

Ms. LaFountain had no subsequent or concurrent felony convictions, and as a consequence, she should have been given a PRV-7 score of zero. MCL 777.57 (1)(c).

⁶ As indicated, trial counsel objected to the 20 points scored under PRV 7, but asserted that the correct score was 10 points, based on one concurrent conviction, having apparently forgot or overlooked that the jury had acquitted Ms. LaFountain of maintaining a drug house. App 34a-35a, 36a-37a

This Court's decision in *People v Jackson*, 487 Mich 783, 792; 790 NW2d 340 (2010), is directly on point. There, the defendant's concurrent convictions were vacated on appeal due to insufficient evidence. *Id.* at 792-793. The Court remanded for resentencing, therefore, because the points assessed under PRV-7 were based on inaccurate information. *Id.* at 793.

The same rationale applies here. The PRV-7 score was based on inaccurate information — namely, that Ms. LaFountain had concurrent convictions. Since that information is inaccurate, she is entitled to be remanded for resentencing. MCL 769.34 (10) specifically states that a remand for resentencing is mandated where the inaccurate information is relied upon in determining a sentence.

In denying Ms. LaFountain's request for resentencing on this basis, the Court of Appeals held that *Jackson* did not control the instant case because it merely stood for the narrow proposition that "sentencing courts should review sentences that were calculated with convictions in mind that were later vacated by subsequent courts." *People v LaFountain*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2012 *3 (Docket No. 306858). App 5a That interpretation is inconsistent with this Court's clear holding: where the trial court assessed points under PRV-7 for convictions vacated on constitutional grounds, the sentence was based on "inaccurate information," thus the defendant is entitled to resentencing.

Further, there is nothing in the *Jackson* opinion to suggest that this Court intended to distinguish between unconstitutional convictions vacated on appeal and unconstitutional convictions vacated by the trial court. In defense of its reading of *Jackson*, the Court of Appeals pointed to a footnote in which this Court noted that the sentencing court was free to affirm the sentence at issue on remand after considering the "new information." *Id.*, citing *Jackson, supra* at 792 n 24. However, this Court's observation that the trial court was not required to change the

sentence on remand was not intended as means of insulating trial courts from conducting resentencings under corrected guidelines when they were or should have been aware of the scoring error at the original sentencing. Rather, the context of the *Jackson* opinion indicates that this Court simply noted that the sentencing court was free to affirm the prior sentence after reconsideration because the prior sentence was still within the corrected guidelines. *See Jackson, supra* at 792 & n 24, citing *People v Francisco, supra* at 91.⁷

Ms. LaFountain's sentencing guidelines range, which was premised on a PRV-7 score of ten, was 42 to 70 months (3.5 to 5.83 years). Absent the ten points awarded under PRV-7, her sentencing guidelines range would be reduced to 27 to 45 months (2.25 to 3.75 years). As a result, her current minimum sentence of 4 years constitutes an unintended and unlawful departure from her correctly scored sentencing guidelines, entitling her to resentencing.

As this Court set forth in *People v Kimble, supra*, it is proper to review unpreserved scoring challenges where the defendant's sentence is outside the appropriate guidelines range. *Id.* at 312. Such errors are reviewed for plain error, meaning the defendant must demonstrate "1) error . . . occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.*, quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In order to satisfy the third prong, the defendant must show that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings[.]" *Id.*

The trial court's departure from the sentencing guidelines satisfies the requirements set forth by the *Kimble* Court for establishing plain error. First, Ms. LaFountain was given a PRV-7 score despite the fact that she was only convicted of one charge, as stipulated to by both parties

⁷ *See also People v Anderson*, unpublished opinion per curiam of the Court of Appeals, issued August 16, 2012 (Docket No. 301666) ("After vacating defendant's assault with intent to rob while armed conviction, defendant has only one concurrent conviction the other armed robbery. Accordingly, defendant should be scored ten points for PRV 7, as he has one concurrent conviction.").

and ordered by the trial court. App 38a

Second, the error was obvious since there was simply no subsequent or concurrent conviction upon which to predicate a PRV-7 score of 20.

Third, failing to remedy this error would have deleterious effects on Ms. LaFountain's substantive rights. The Due Process Clause of the United States Constitution requires trial courts to base sentencing on accurate information. *Townsend v Burke*, 334 US 736, 741; 68 S Ct 1252 (1948). Echoing this constitutional requirement, the Michigan Supreme Court in *People v Francisco, supra*, made clear that the defendant is entitled to challenge sentencing based on accurate information. *Id.* at 88. The trial court's sentencing calculation of 42 to 70 months relied on inaccurate information, namely that Ms. LaFountain had either a concurrent or subsequent conviction. By upholding a sentencing range of 42 to 70 months, this Court would, in effect, affirm a sentence based on an inaccuracy. Moreover, a sentence is invalid if it is predicated upon an inappropriate guidelines range. *People v McGraw*, 484 Mich 120, 131; 771 NW2d 655 (2009). As the *Kimble* Court explained, "It is difficult to imagine what could affect the fairness, integrity and public reputation of judicial proceedings more than sending an individual to prison and depriving him of his liberty for a period longer than authorized by the law." *Kimble, supra* at 313. In Ms. LaFountain's case, the existing sentence falls outside the correct guidelines range and exposes her to an onerous and undeserved sentenced.

Accordingly, Ms. LaFountain is entitled to be resentenced.

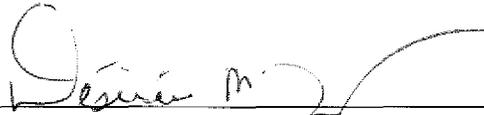
SUMMARY AND REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant Suzanne LaFountain asks that this Honorable Court reverse her conviction and/or remand for resentencing.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: _____



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