STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Borrello, P.J., and Fitzgerald and Owens, JJ.

PEOPLE OF THE STATE OF MICHIGAN	Supreme Court No. 146496
Plaintiff-Appellee,	Court of Appeals No. 306858
v	Cheboygan Circuit Court No. 10-4267-FH
SUZANNE LAFOUNTAIN,	
Defendants-Appellant. /	

BRIEF ON APPEAL OF APPELLEE PEOPLE OF THE STATE OF MICHIGAN

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The People accept LaFountain's statement of jurisdiction.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

In its May 22, 2013, order granting leave to appeal (7a) this Court asked the parties to address two issues:

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 a violation that "involves the possession, placement or use of a firearm" if the defendant occupied another room where methamphetamine was manufactured within a residence owned and possessed by another.

   Defendant's answer: No.

   The People's answer: Yes.

   Trial court's answer: Yes.

   Court of Appeals' answer: Yes.

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.

   Defendant's answer: No.

   The People's answer: It is the People's position that *if* error occurred, it was invited and therefore there is no error to review as it is well-established that a party may not complain on appeal of errors that she invited or provoked.

   Trial court's answer: Yes.

   Court of Appeals' answer: Yes.

STATUTES INVOLVED

With reference to the sufficiency claim, MCL 333.7401c(1)(a)-(c), (2)(e) provides:

> (1) A person shall not . . .
>
> (a) Own, possess, or use a vehicle, building, structure, place, or area that . . . 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.
>
> (b) Own or possess any chemical or any laboratory equipment that he or she knows or has reason to know is to be used for the purpose of manufacturing a controlled substance in violation of section 7401 or a counterfeit substance or a controlled substance analogue in violation of section 7402..
>
> (c) Provide any chemical or laboratory equipment to another person knowing or having reason to know that the other person intends to use that chemical or laboratory equipment for the purpose of manufacturing a controlled substance in violation of section 7401 or a counterfeit substance or a controlled substance analogue in violation of section 7402.
>
> (2) A person who violates this section is guilty of a felony punishable as follows . . .
>
> (e) If 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, by imprisonment for not more than 25 years or a fine of not more than $100,000.00, or both.

With reference to the sentencing issue, MCL 777.57 (PRV 7) provides:

> (1) Prior record variable 7 is subsequent or concurrent felony convictions. Score prior record variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) The offender has 2 or more subsequent or concurrent convictions.....20 points
> (b) The offender has 1 subsequent or concurrent conviction.....10 points
> (c) The offender has no subsequent or concurrent convictions... 0 points

(2) All of the following apply to scoring record variable 7:

(a) Score the appropriate point value if the offender was convicted of multiple felony counts or was convicted of a felony after the sentencing offense was committed.

INTRODUCTION

The production and use of methamphetamine is a serious threat to the health and safety of our communities. Methamphetamine production can be very dangerous and the chemicals used in its manufacture can be hazardous. The lab operations also produce highly toxic waste, which can pollute dwellings, soil, and water supplies. Meth is an addictive stimulant drug. The scourge of meth-amphetamine addiction and the insidious danger presented by clandestine meth labs located in unsuspecting communities wreaks havoc on individuals and communities.

The fight against meth is unique, and unlike more traditional narcotics, methamphetamine can literally be made anywhere at any time. Unlike heroin or cocaine, methamphetamine requires no organic plant material because meth is a synthetic drug. Meth producers can gather all the necessary ingredients from a local store.

In light of these facts, the Legislature enacted a detailed statute addressing meth. It is a 20-year felony to maintain or operate a meth lab in the presence of a minor, or if the lab generates hazardous waste, or if the lab is within 500 feet of a residence, business establishment, school property, or church. Recognizing the increased danger that results from mixing a meth lab with firearms, the Legislature made it a 25-year felony if the lab "involves the possession, placement, or use of a firearm." MCL 333.7401c(c)-(f).

Here Suzanne LaFountain was arrested along with her boyfriend, Matthew Fischer, and charged with maintaining a meth lab involving a firearm when three rifles were found right next to where LaFountain and Fischer made meth. Fischer pleaded guilty to the charge. LaFountain went to trial and was convicted by a jury.

This case tests the proposition whether a judge reviewing a jury verdict where he or she may subjectively view the evidence of an element of the crime as "thin," will nevertheless vote to affirm the conviction because the verdict was not so insupportable as to fall below the threshold of bare rationality. That is, a rational jury viewing the direct and circumstantial evidence and reasonable inferences therefrom could have found the evidence regarding the "thin" element sufficient.

This Court should affirm because there was sufficient evidence for the jury to find LaFountain guilty of manufacturing methamphetamine and that this involved "the possession, [or] placement ... of a firearm." MCL 333.7401c(2)(e).

This Court also should not reach the scoring issue because any error was waived.

COUNTER-STATEMENT OF FACTS

The Department of Human Services (DHS) received a complaint that a minor, "JC" witnessed his mother shooting up drugs (210a.) JC said LaFountain called him into her bedroom and he saw his mother with a "needle in her foot" as her boyfriend shook a pop bottle with "green stuff" in it (237a.) LaFountain's boyfriend, Matthew Fischer, did this not just in the bedroom but "anywhere; like, outside, in his room." (237a, 437a.) JC saw this "quite a few" times (243a.) JC saw his mother shaking the bottle with the "green stuff" in it once in her room while he was visiting her (243a.) JC had been at his mother's home for less than a week before the DHS was called (219a.) JC was fourteen when the complaint was made (216a, 218a.)

Child Protective Services supervisor and former police officer Bobra Johnston conducted a home visit after receiving a complaint (207a-211a.) The homeowner of 5844 Maple Street in Wolverine, Cheryl Spencer, initially denied that LaFountain and Fischer were home (215a, 428a.) However, Spencer gave police officers permission to search trash bags seen about the property and they were permitted inside the home where LaFountain and Fischer were found (215a-216a.) Papers found indicated this home was LaFountain's mailing address (277a-279a.) Cheryl Spencer confirmed LaFountain had lived with her son Matthew Fischer in her home for the last five years (429a.)

Hazardous material was found in LaFountain's upstairs bedroom

The people living in the home, including LaFountain, were: her boyfriend Matthew Fischer and his mother Cheryl Spencer, Cheryl's husband Art Spencer, and Georgina Spencer, Art's elderly mother[1] (221a-222a.) According to Lt. Kenneth Mills, there were two bedrooms upstairs and most of the evidence was found in the northwest bedroom (376a.) LaFountain acknowledged the upstairs area was where she and her children slept (466a.) LaFountain said her brother Eric had stayed there recently (222a.) However, Cheryl Spencer said Eric had stayed for a "couple days during that week" but Eric got into an argument and Fischer kicked him out (435a.)

Of the three upstairs' rooms, two appeared useable, one was not. Spencer confirmed the third upstairs room was not useable due to a former fire and that it is just used for storage (220a; 429a.) JC said the third room belonged to Fischer's parents but "there was stuff, like, out in there, so they didn't use it." (241a.) LaFountain said that JC and her daughter IC shared a bedroom immediately across the hall from the bedroom she shared with Fischer (219a.) JC confirmed he and his younger sister shared a bedroom while they stayed there and the other room upstairs right across the hall was his "mom's room" (236a-237a, 263a.) However, Cheryl Spencer said what the others described as the children's room was her husband's office (430a.) LaFountain's bedroom is "very small." (220a.) Mr. and Mrs. Spencer sleep downstairs (222a.) LaFountain and Fischer were in their

[1] Georgina Spencer is bedridden and an ambulance was called to remove her from the scene (249a.)

upstairs bedroom with IC when DHS and law enforcement arrived on July 16, 2010 (216a; 438a.)

The investigative team found evidence of different phases of meth production in LaFountain's upstairs bedroom: a muriatic acid container with a hose connected to the top, almost dry (129a-130a.) This bedroom was small, maybe eight by ten feet (132a.) The ammonia smell of meth-cooking would be detectable to people in the room (132a.) There was evidence that meth had been cooked in the bedroom more than once (132a-136a.) A filter taken from LaFountain's bedroom tested positive for methamphetamine (277a; 354a, 356a.) Evidence found at the residence was consistent with group production of methamphetamine (324a.)

According to Lt. Mills, there were two bedrooms upstairs and most of the evidence was found in the northwest bedroom (376a.) LaFountain admitted her bedroom was used for storing or using drugs on "[o]ccasion" (465a.) LaFountain admitted she recently took a morphine pill and would test positive for that, but denied ingesting methamphetamine. LaFountain also denied knowing anything about methamphetamine production (221a.)

Three firearms were found right across the hall from LaFountain's bedroom

Three firearms (rifles) were found in the children's bedroom (288a; 415a; People's Exhibits (PX) 82-84), immediately across the hall from LaFountain's bedroom (416a.) Lt. Mills found the guns, which were placed behind the door (416a.) He did not find any ammunition around the guns (416a.) Two of the three

guns were in cases (416a.) They were not loaded (416a.) Lt. Mills spoke to someone by phone who claimed the guns were his (416a.) PX 82 appeared to be an old 30-caliber military rifle. (288a; PX 82.) Sgt. Richard Runstrom did not know whether it was operable (288a-289a.) PX 83 was described as a "black case with one long rifle in it . . . a .44 mag" that was also recovered from the southwest bedroom (289a-290a.) A third firearm, PX 84, was found in the same bedroom. Counsel had no objection that this was a "firearm" and stipulated to its admission (291a.) LaFountain acknowledged during her testimony that she had been in the room with the rifles to say good night to her daughter and at other times. (466a, 468a.) Sgt. Runstrom did not know whether any ammunition was found in the same room as the guns (340a.) But, under their policy, the police would not have taken it (349a.)

Codefendant/boyfriend Matthew Fischer

Fischer denied involvement with the production of meth (442a.) Contradictorily, Fischer acknowledged pleading guilty to manufacturing methamphetamine involving a firearm (444a-446a.) He admitted using meth and testing positive for meth (449a, 454a.) LaFountain was addicted to morphine and claimed she used meth three times in June, before JC was there, then a few more times before she was tested (458a-459a.) Fischer denied LaFountain had anything to do with manufacturing meth in the residence (445a.) Fischer's drug screen tested positive for: amphetamine, methamphetamine, morphine and a high level of acetaminophen (213a.) Fischer acknowledged there were firearms in the bedroom LaFountain's children stayed in, and LaFountain's brother Eric stayed in when the

kids weren't there (446a.) Asked whether the firearms were placed where the lab was, Fischer said they "were in there prior to that, yes." (446a.)

Sgt. Runstrom's interviews of LaFountain

When Sgt. Runstrom encountered LaFountain he saw she had scabs on her arms and her face appeared very thin (317a.) She was unable to sit still, itching and picking at her scabs and biting her nails. LaFountain was moving her hands, moving her feet, and constantly looking around (318a.) She also made paranoid statements to Sgt. Runstrom, describing people in camouflage standing on the roof and outside. She said she could hear the people walking on the roof (319a.) Based on his experience and observations, Sgt. Runstrom opined that LaFountain had been using meth (321a.) However, LaFountain told Sgt. Runstrom she did not use meth and was not involved with its production (300a.) LaFountain told Sgt. Runstrom that her brother Eric used methamphetamine and usually had product (300a.)

At her request, Sgt. Runstrom interviewed LaFountain a second time after she was arrested (302a, 348a.) She told him that her brother would likely be the next meth producer in the Wolverine-Indian River area and he was already involved in its production (303a.) She said she knew this from her experience (303a.) She implicated others in meth production (304a.) LaFountain said she bought pseudoephedrine with Jeffery Burnett and gave it to him (306a.) LaFountain did not positively acknowledge that the pseudoephedrine she purchased was being used to produce meth though she assumed it could be (306a-307a.)

Contrary to her prior denial to Sgt. Runstrom, LaFountain admitted she used meth "in the beginning" apparently referring to two weeks prior (304a-305a.) LaFountain's drug test confirmed that (305a.) LaFountain's drug screen from the July 14th tested positive for: amphetamine, methamphetamine, and Tramadol (212a.) LaFountain's screen from July 16th tested positive for: amphetamine, methamphetamine, morphine and hydromorphine (213a.) LaFountain admitted she used meth and morphine in her bedroom, (476a) but denied making it or knowing how it was made (477a.)

PROCEEDINGS BELOW

The charges

The People charged LaFountain with five felonies: (1) operating or maintaining a methamphetamine laboratory involving a firearm; (2) operating or maintaining a methamphetamine laboratory in the presence of a minor; (3) operating or maintaining a methamphetamine laboratory involving hazardous waste; (4) possession of methamphetamine, and (5) maintaining a drug house.

The motion to quash

Before trial counsel filed a motion to quash. (12a-16a.) It was argued that on the basis of *People v Meshell*, 265 Mich App 616; 696 NW2d 754 (2005),[2] that it would violate double jeopardy to convict a defendant of three crimes under multiple subsections of MCL 333.7401c(2) (20a-23a.) In *Meshell*, the Court of Appeals had to decide whether convictions under MCL 333.7401c(2)(a) and MCL 333.7401c(2)(d) violated double jeopardy. However, the panel continued its analysis beyond that issue commenting in dicta that multiple convictions under the provisions of MCL 333.7401c(2)(b) to (f) would violate double jeopardy.

The prosecutor responded to the motion noting that the base charge was operating a laboratory. The subsections were (1) whether a firearm was involved, (2) whether a minor was present, and (3) whether hazardous waste was involved. Thus, the subsections were not lesser included crimes. (24a-26a.) It was agreed

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[2] As noted in *People v Petriken*, unpublished opinion per curiam, issued June 23, 2011 (Docket No. 296520), 2011 WL 2518931 n 1, "after the decision in *Meshell*, our Supreme Court disavowed the use of the broad legislative intent test employed—in part—by the Court in *Meshell*. See [*People v*] *Smith*, 478 Mich [292] [] 314–316 [;733 NW2d 351 (2007)]. After *Smith*, it is clear that "offenses do not constitute the 'same offense' for purposes of the 'successive prosecutions' strand of double jeopardy if each offense requires proof of a fact that the other does not." 478 Mich at 304. See also this Court's peremptory order in *People v Routley*, 485 Mich 1075; 777 NW2d 160 (2010) (rejecting the claim that convictions under MCL 333.7401c(2)(d) and MCL 333.7401c(2)(f) violated double jeopardy, and noting the statute had been amended post-*Meshell*.) Accord *People v Bradford*, unpublished opinion per curiam, issued December 13, 2007 (Docket No. 273540), 2007 WL 4355426 (Defendant's convictions under MCL 333.7401c(2)(c) and MCL 333.7401c(2)(f) did not violate double jeopardy.) Thus, it is now clear that double jeopardy did *not* require dismissal of LaFountain's convictions for operating or maintaining a methamphetamine laboratory in the presence of a minor, or operating or maintaining a methamphetamine laboratory involving hazardous waste.

that all the charges would be submitted to the jury, but that if a defendant was convicted of more than one subsection crime that only the conviction on the most serious offense would stand. (25a-27a.)[3]

The jury's verdict

The jury deliberated on five counts, returning guilty verdicts on four: (1) operating or maintaining a methamphetamine laboratory involving a firearm; (2) operating or maintaining a methamphetamine laboratory in the presence of a minor; (3) operating or maintaining a methamphetamine laboratory involving hazardous waste; and (4) possession of methamphetamine (TII 487.) The jury acquitted LaFountain of maintaining a drug house (TII 487.)

Sentencing

At LaFountain's sentencing, defense counsel did not challenge the scoring of PRV 7 at 20 points. (533a-535a.) The court sentenced LaFountain to 4 to 50 years for operating or maintaining a methamphetamine laboratory involving a firearm, 4 to 40 years for operating or maintaining a methamphetamine laboratory in the presence of a minor, 4 to 40 years for operating or maintaining a methamphetamine laboratory involving hazardous waste, and 4 to 20 years for possession of methamphetamine. (34a-35a.)

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[3] The maximum sentence for a first-time offender for manufacturing meth in the presence of a minor or involving hazardous waste is 20 years, but if it involves a firearm the maximum sentence is increased to 25 years. MCL 333.7401c(2)(b)-(f).

Post-sentencing

Counsel for LaFountain subsequently filed a motion to correct the judgment of sentence. (36a-37a.) The motion to correct harkened back to the pre-trial motion to quash where it had been agreed that only one conviction would stand if a defendant was convicted of multiple subsections under MCL 333.7401c(2). LaFountain's motion to correct judgment of sentence specifically asserted that PRV 7 had been scored at 20 points, but that the appropriate PRV 7 score in this matter was "10." (Appendix 9a, paragraph 4.) The motion to correct concluded as follows: "WHEREFORE, the Defendant requests that the Court . . . . Order the Presentence Report to reflect a PRV 7 score of '10'". (37a.)

In response to the motion to correct her judgment of sentence, the prosecutor stipulated to entry of an order dismissing counts 2, 3 and 4 (38a.) The court issued an amended judgment of sentence for one conviction only—operating or maintaining a methamphetamine lab involving a firearm. (1a-2a.) The amended judgment of sentence indicated the trial court sentenced LaFountain to 4 to 50 years pursuant to MCL 333.7413(2) (second or subsequent conviction). (1a.)

LaFountain appeals to the Court of Appeals

The Michigan Court of Appeals unanimously found that evidence to support LaFountain's conviction for operating or maintaining a meth laboratory involving a firearm was sufficient as both proximity and objective indicia of control of a firearm were established at trial. (3a-6a, *People v LaFountain*, unpublished per curiam

opinion of the Court of Appeals, issued November 20, 2012 (Docket No.. 306858) The panel also held that the trial court did not err in scoring Prior Record Variable 7 ("PRV 7") at ten points. (5a.)

This Court grants leave to appeal

LaFountain sought leave to appeal. This Court granted leave to appeal, asking the parties to address two issues and inviting amicus briefs. (7a, *People v LaFountain*, 494 Mich 851; 830 NW2d 139 (2013)).

SUMMARY OF ARGUMENT

LaFountain argues that this Court should reverse her conviction of operating or maintaining a meth lab involving a firearm, MCL 333.7401c(2)(e), because evidence that the meth lab involved the possession or placement of a firearm was insufficient.

Testimony established that LaFountain and her boyfriend Matthew Fischer both "cooked" meth in their upstairs bedroom. Three firearms were found placed in a bedroom immediately across the hallway. LaFountain's two children slept in that bedroom when they visited. The firearms had been in the bedroom for some time and LaFountain had been in the room to check on her children.

Contrary to LaFountain's argument, the evidence was sufficient to establish a nexus between the firearms and the lab and between LaFountain and the firearms. First, given (a) the close proximity of the firearms to the lab and to LaFountain's bedroom, (b) the ready accessibility of the firearms, (c) the length of time the firearms had been in place nearby, and (d) the fact that at least one of the

firearms was in plain sight, i.e., not in a case, a reasonable jury could conclude that both the lab and LaFountain herself were involved with the firearms. LaFountain had the ability to exercise dominion or control over a firearm and she and Fischer jointly and constructively possessed a firearm as part of their operation of a meth lab. Thus, the jury reasonably found a nexus between the firearms and LaFountain and the lab. Alternatively, evidence that the operation of the lab involved the "placement" of a firearm was sufficient. Second, the prosecution was not required to negate every reasonable theory consistent with the LaFountain's innocence.

Relief is not available for the alleged misscoring of PRV 7 because the trial court reduced PRV 7's score from 20 points to 10 points post-sentencing *at defense counsel's urging*. Thus, any alleged error was invited and the issue is waived for appeal where LaFountain has not argued defense counsel was ineffective when he asserted in a motion to correct judgment of sentence: "The appropriate PRV 7 score in this matter is '10'" and specifically requested that the Court order the Presentence Report "reflect a PRV 7 score of '10'". LaFountain's waiver extinguished any error. Consequently, this Court should decline to reach the question whether the trial court erred in scoring PRV 7 at 10 points.

Because the evidence was sufficient and the PRV scoring issue was waived, this Court should affirm LaFountain's conviction and sentence.

ARGUMENT

I. MCL 333.7401c(2)(e) prohibits a defendant from manufacturing a controlled substance such as methamphetamine if it "involves" the "possession, placement, or use of a firearm." Viewing the evidence in a light most favorable to the prosecution and drawing all reasonable inferences in support of the jury's verdict, the evidence that LaFountain's manufacture of meth involved the possession or placement of a firearm was sufficient.

A. Standard of Review

The Michigan Court of Appeals found that the evidence was sufficient. This Court reviews that finding de novo. See, e.g., *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011).

It is also the case that the jury found the evidence sufficient. With reference to the jury's verdict, "[t]he standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

B. The law regarding sufficiency of the evidence

It is beyond question that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970). But the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction is, "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v Virginia*, 443 US 307, 318; 99 S Ct 2781; 61 L Ed 2d 560 (1979). This inquiry does *not* require a court to ask itself whether it believes the evidence at

the trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 US at 319 (emphasis in original.) The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror in finding guilt beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368, 377; 285 NW2d 284 (1979) (adopting the *Jackson* standard). In doing so, the Court must make "credibility choices in support of the jury verdict," and defer to the jury's better-suited position to assess witness credibility. *Nowack*, 462 Mich at 400. "[T]he *Jackson* inquiry does not focus on whether the trier of fact made the *correct* guilt or innocence determination, but rather whether it made a *rational* decision to convict or acquit." *Herrera v Collins*, 506 US 390, 402; 113 S Ct 853; 122 L Ed 2d 203 (1993) (Emphasis in original).

Circumstantial evidence and reasonable inferences drawn from the evidence may be sufficient to prove the elements of the offense. *Id.* at 400; *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). See also *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (2006) (noting that circumstantial evidence and the reasonable inferences drawn from the evidence are sufficient to prove the elements of a crime). Accord *Holland v United States*, 348 US 121, 137-38; 75 S Ct 127; 99 L Ed 150 (1954) (holding that circumstantial evidence is no different than testimonial evidence so long as the jury is instructed on proof "beyond a reasonable doubt").

Further, "[e]ven in a case relying on circumstantial evidence, the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but need merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide." *People v Konrad*, 449 Mich 263, 273, n 6; 536 NW2d 517 (1995). Accord *United States v Spearman*, 186 F3d 743, 745 (CA 6, 1999) ("Circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt.").

Moreover, it is for the trier of fact to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002) ("if evidence is relevant and admissible, it does not matter that the evidence gives rise to multiple inferences or that an inference gives rise to further inferences."). In other words, a jury may make inferences from inferences and determine the weight to be accorded those inferences. *Id.* at 428.[4]

[4] *Hardiman* expressly overruled the prohibition against building one inference upon another from *People v Atley*, 392 Mich 298; 220 NW2d 465 (1974).

C. Analysis

The operative question is whether the evidence was sufficient for the jury to conclude that LaFountain's manufacture of meth involved the "possession" or "placement" of a firearm.[5] In deciding this question the Court must resist the natural temptation to second-guess the jury and substitute its view of a cold record for the jury's verdict. In other words, this Court must not disregard the jury's verdict on the basis of its own subjective view of the case. See *Jackson*, 443 US at 319 n 13 ("the standard announced today does not permit a court to make its own subjective determination of guilt or innocence."). "This Court does not sit as a reviewing jury and hear criminal cases de novo. Where there was competent evidence presented at trial to justify the trier of fact's verdict, that verdict is final." *People v Miller*, 49 Mich App 53, 58-59; 211 NW2d 242 (1973). Thus, the reviewing court must studiously avoid concluding that, merely because it would have acquitted had it sat in the jury box, the jury's verdict was not based on sufficient evidence.

1. The law regarding possession: it can be actual or constructive and individual or joint

Possession of a firearm may be actual or constructive. *People v Minch*, 493 Mich 87, 91–92; 825 NW2d 560 (2012); *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). Physical possession is not necessary. *People v Wolfe*, 440 Mich 508,

[5] In opening statement, the prosecutor said that the People were not arguing that the "use" of a firearm was involved. (TI 28-29.)

519-520; 489 NW2d 748 (1992), mod 441 Mich 1201; 489 NW2d 748 (1992) "[A] defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant." *Hill*, 433 Mich 471. The essential question in analyzing constructive possession is the felon's control or authority over the firearm. *Minch*, 493 Mich at 92.

A person has constructive possession where the person knowingly has the power and intent at a given time to exercise control over a thing directly or through another person or persons. *Minch*, 493 Mich at 92. Accord *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000) ("a person has constructive possession if there is proximity to the article together with indicia of control.") (citation omitted). "The essential question is whether the defendant had dominion or control over the" contraband. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995); see also *Wolfe, supra* at 520-521. Close proximity to contraband in plain view is evidence of possession, but not necessary. *Wolfe*, 440 Mich at 521.

It is also the case that "possession" of a firearm may be individual or joint. Thus, more than one person can have actual or constructive possession of an item at the same time. *Wolfe*, 440 Mich at 519-520. Joint possession of a firearm is recognized where the evidence suggests that two or more defendants acted in concert. *Hill, supra*, 471; *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011). Therefore, dominion or control over the firearm need not be exclusive to the defendant. 433 Mich at 469–470. The essential question in analyzing joint possession is the person's control or authority over the firearm. *Minch*, 493 Mich at 92.

Furthermore, it is undisputed that "possession" can be established by circumstantial evidence. *Burgenmeyer*, 461 Mich at 437; *Johnson*, 293 Mich App at 83.

2. The Court of Appeals did not err in finding the jury's verdict was supported by sufficient evidence

In analyzing and rejecting LaFountain's insufficiency argument, the Court of Appeals reasonably concluded the prosecution proved both proximity and objective indicia of control regarding a firearm:

> Under MCL 333.7401c(2)(e), a defendant guilty of operating or maintaining a methamphetamine laboratory faces an enhanced sentence "[i]f 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[.]" While the statute in question does not define "possession, placement, or use," the meaning of "possession" in firearm contexts has been extensively considered in cases involving the felony-firearm statute, MCL 750.227b. In those cases, actual dominion over the firearm need not be demonstrated, but proximity to the firearm and "some objective indicia of control" must be shown to establish constructive possession of a firearm. *People v Hill*, 433 Mich. 464, 470–471; 446 NW2d 140 (1989.) To establish such an objective indicia of control, the prosecution must show that the defendant knew where the firearm was located. *Id.*
>
> 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 defendant's room, which establishes proximity. Second, there was ample circumstantial evidence that defendant knew of the location of the firearms*: they were in a 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. (Emphasis added.)

(4a.)

The evidence adduced at trial fully supports the Court of Appeals' analysis.

Evidence found at the residence was consistent with group production of methamphetamine (424a.) LaFountain had lived in this home with her boyfriend for five years and they maintained a bedroom upstairs (429a.) In their bedroom, several components of meth production were found.

Three firearms were located in the children's bedroom (288a; 415a; PX 82), just across the hall from the LaFountain-Fischer bedroom (416a.) Lt. Mills found the firearms, which were placed behind the door (416a.) The third firearm, PX 84, was found in the same bedroom.

An individual need not literally possess an item at all times in order to be legally in possession of it. The statute at issue, MCL 333.7401c, speaks of "possession" or "placement" or "use" of a firearm. MCL 333.7401c(2)(e). LaFountain acknowledged she lived in the house. Her upstairs bedroom was immediately across the hall from the other upstairs bedroom where the firearms were placed. LaFountain testified she had been in the room with the rifles to say good night to her daughter and at other times. (466a, 468a.) Given this testimony tt is reasonable for the jury to infer that LaFountain and her boyfriend were aware of the firearms' location.

Though neither ownership nor operability of a firearm must be shown, counsel agreed below that one of the three long guns found in the upstairs bedroom was indeed a "firearm," and stipulated to its admission. Thus, counsel agreed that one of the three guns was a "firearm" (291a.)

One of the three rooms upstairs was not useable due to an earlier fire (220a, 420a.)[6] For the relatively short time he was there, JC and his sister IC shared the bedroom across the hall from the bedroom LaFountain shared with Fischer (219a, 236a-237a, 263a.) LaFountain acknowledged her children slept upstairs when they visited (466a.)

While LaFountain's bedroom was upstairs; Fischer's mother, step-father and bed-ridden grandmother stayed downstairs (222a, 249a.) LaFountain's brother, Eric had stayed in the home recently. But, Cheryl Spencer stated it had been for a "couple of days during that week" before Eric got into an argument with Fischer and before Fischer kicked Eric out of the house (435a.)

LaFountain admitted her bedroom was used on occasion for storing or using drugs (465a.) There were several items related to the production of meth found in this bedroom and it appeared as though more than one "cook" had taken place there (133a, 136a.) Fischer acknowledged there were firearms in the bedroom right across the hall (446a.) Asked whether the firearms were placed "where the lab was," Fischer said they "were in there prior to that, yes." (446a.) Fischer followed this comment up by stating he was not certain "if it was a lab. They were just components I - - I suppose." (446a.)

LaFountain boldly asserts in her Brief that the firearms were "hid" and "concealed" and that the "prosecution failed to proffer any evidence indicating that Ms. LaFountain knew or had reason to know of the weapon[]s' location." (Brief, at

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[6] The production of methamphetamine is a volatile activity and can lead to fires, explosions, injuries and death (87a-88a.)

18). First, this argument sounds like a closing argument made while viewing the facts in a light most favorable to LaFountain. Second, if one reviews the direct and circumstantial evidence in a light most favorable to the prosecution, drawing all reasonable inferences in support of the jury's verdict, as the standard of review requires, these arguments are without merit. Three firearms were placed behind a door of a bedroom that LaFountain entered when her children slept there. This hardly constitutes concealment or hiding.[7] And, the jury was free to infer from LaFountain's close proximity to the firearms and her having been in the bedroom that she knew of the firearms. The jury's verdict shows it did not regard the firearms as "uninvolved" and it was not required to so consider them.

Further, whether the recovered firearms were capable of firing is not critical to the proper analysis. In addition to counsel's acknowledgment below that one of the rifles was a firearm; the statute refers to a firearm, not its operability. For example, "it is well established that a firearm need not be operable to sustain a felony-firearm conviction." *People v Peals*, 476 Mich 636, 638; 720 NW2d 196 (2006) (firearm in disrepair nonetheless a "firearm" as defined by MCL 750.222(d)).[8] And, an antique gun is not necessarily "innocuous" as LaFountain suggests and may be

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[7] It is not as if the firearms were locked in a basement closet or gun safe. On the contrary, they were readily accessible across the hall. Although behind a door, they were in plain sight when one was in the bedroom which LaFountain had frequently been.

[8] MCL 8.3t states that "[t]he word 'firearm,' except as otherwise specifically defined in the statutes, shall be construed to include any weapon from which a dangerous projectile may be propelled by using explosives, gas or air as a means of propulsion, except any smooth bore rifle or handgun designed and manufactured exclusively for propelling BB's not exceeding .177 caliber by means of spring, gas or air."

lethal regardless of its age or collectability. See also *Peals*, 475 Mich at 673 ("That a gun is inoperable does not alleviate the extreme danger posed by its possession in these circumstances."). See further *People v Pierce*, 119 Mich App 780, 782–783; 327 NW2d 359 (1982) ("The victim [who has a gun pointed at him] is no less frightened if the gun (most likely unknown to him) just happens to be inoperable."). In fact, the United States Supreme Court has held that displaying a firearm, loaded or not, during a crime "creates an immediate danger that a violent response will ensue." *McLaughlin v United States*, 476 US 16, 17–18; 106 S Ct 1677; 90 L Ed 2d 15 (1986).[9] The prospect of LaFountain brandishing one of the firearms at someone is by no means farfetched given the testimony that she acted paranoid "seeing" people in camouflage outside of the house and hearing people walking on the roof. (319a.)

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[9] In *McLaughlin*, a unanimous Supreme Court held, in an opinion that was barely two pages long, that an un loaded handgun used to commit an assault during a bank robbery is a "dangerous weapon" under 18 USC § 2113(d), the federal bank robbery statute. The Court concluded that "[t]hree reasons, each independently sufficient " supported its conclusion:

> First, a gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law may reasonably presume that such an article is always dangerous even though it may not be armed at a particular time or place. In addition, the display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue. Finally, a gun can cause harm when used as a bludgeon.

McLaughlin, 476 US at 17–18 (footnote omitted).

The fact that others lived in the residence or that the guns may or may not have been operable, does not undermine the jury's verdict. As described by the police, it is typical to find people who know one another and work together to produce methamphetamine (115a.)

Moreover, in reaching its verdict the jury was entitled to consider that LaFountain's boyfriend Fischer had pleaded guilty to manufacturing meth involving possession or placement of a firearm (444a-446a.)

3. It is of no consequence that LaFountain occupied another room within the residence owned and possessed by another

This Court's order granting leave to appeal asked the parties to brief if the evidence was sufficient "to prove a charge under MCL 333.7401c for a violation that 'involves the possession, placement or use of a firearm' if the defendant occupied another room where methamphetamine was manufactured within a residence owned and possessed by another." (7a.) Under the facts of this case the answer is "yes" because the prosecutor had to prove no more than possession (which could be constructive and joint) or placement of a firearm was involved.

First, who "owned" the residence is not legally relevant to a sufficiency analysis. MCL 333.7401c(1)(a) speaks of a person who "owns, possess[es] or use[s]" a "building" or "structure." Thus, LaFountain's name did not have to be on the deed of the home. See *People v Rapley*, 483 Mich 1131; 767 NW2d 444 (2009), which involved a defendant who was convicted of felon in possession and felony-firearm even though he did not reside in the residence where the firearm was found, there

was no evidence that he was in control of the residence, and the firearm was not in plain view. This Court, in reversing a Court of Appeals' opinion, held that there was sufficient evidence of knowing possession based on the proximity to a controlled substance, defendant's proximity to the weapon, and the relationship between drug dealing and firearms used as protection. *Id.*

Thus, it was enough that LaFountain *used* the residence to manufacture meth. The evidence established that LaFountain had lived in the home for five years and that she shared an upstairs bedroom with her boyfriend Fischer. The evidence also showed that LaFountain had permission to be in the home and that the firearms were found in another upstairs bedroom right across from her bedroom. Thus, the firearms were placed in close proximity to LaFountain's bedroom. Although behind a door, they were in plain sight when one was in the bedroom. The jury was free to infer that LaFountain was aware of the firearms given that her children sometimes slept in the bedroom and she admitted having been in the room "regular[ly]. (468a.) The jury was free to conclude that the firearms were readily accessible and to infer that LaFountain had the ability to exercise joint dominion or control over the firearms with Fischer. As this Court stated in *Burgenmeyer, supra*, 437, "A defendant may have constructive possession of a firearm if its location is known to the defendant and if it is reasonably accessible to him." This holding is consistent with the rule that a jury may make

inferences from inferences and determine the weight to be accorded those inferences. *Hardiman*, 466 Mich at 428.[10]

The fact that the residence was "possessed" by another is also no bar to finding the evidence sufficient. To be sure several people lived in the home. But, given that possession of the firearms need not have been exclusive, i.e., the possession could have been joint, it is of no moment that others lived on the first floor of the home. Again, all the statute required the prosecutor to prove was that LaFountain used the home to manufacture meth. MCL 333.7401c(1)(a).

4. In the alternative, the evidence was sufficient to allow the jury to conclude that LaFountain's maintenance and operation of a meth lab involved the "placement" of a firearm.

Under MCL 333.7401c(2)(e) the jury was free to convict LaFountain if it was persuaded that her manufacturing of meth involved the "placement" of a firearm. That is, even if someone might question whether evidence of LaFountain's

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[10] Courts have long acknowledged that firearms are a tool of the drug trade and a "hallmark of drug trafficking." See *People v VanderVliet*, 444 Mich 52, 82, 83 n 41; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), quoting Imwinkelreid, Uncharged Misconduct Evidence, § 5:04, pp 8–9; *United States v Williams*, 512 F3d 1040, 1044 (CA 8, 2008) ("a jury may find the requisite nexus when a firearm is discovered in close proximity with drugs so as to support the inference that the firearm is for protection of the drugs."). See also *Rapley*, 483 Mich 1131, which referenced "the well-known relationship between drug dealing and the use of firearms as protection." Contrary to LaFountain's arguments, the jury cannot be held unreasonable for making the same inference in reaching its verdict that courts routinely make. The "nexus" between one or more firearms and the meth lab may be inferred given what this Court called the "well-known relationship between drug dealing and the use of firearms as protection." *Id.*

"possession" of a firearm was sufficient, the conviction must still be affirmed unless the evidence of "placement" of a firearm was also insufficient.[11]

The prosecutor's opening statement referenced the "placement" part of the statute:

> So the first charge is that -- there was not a gun used, obviously in the production of methamphetamine, but there was a gun across the hall in the kids' bedroom. [There] were three guns. And that if you're running a lab and there you've got this gun here, there's a risk that as you become paranoid there may be a problem. So *the legislature said* you -- *it's a* crime, a *different kind of crime if one of the things that happens is there is a gun placed there.* Not the person charged placed it but they knew the gun was there and they contributed something toward the process of producing the methamphetamine, such as the place that they were in possession of or encouraged somebody to make methamphetamine. (69a-70a.) (Emphasis added).

The prosecutor's closing argument also emphasized the "placement" part of the crime:

> [T]he last charge meth lab with a firearm.... That charge requires we prove ... there was a ... place or area in this house that the defendant owned, possessed or used. That she was in this area. And second, she knew that that area was being used for the purpose of manufacturing methamphetamine. Same evidence we've talked about. And that *it involved the placement* - - possession or placement of a device or a firearm.... Doesn't matter if they're working or not, those three guns. And *they're placed there.* So that the testimony is really not ... disputed by anyone. *These guns were up in that place, in those bedrooms where either the meth lab was* to start with, where Eric LaFountain was, or the children were in that same area where the meth is being produced. In the same area where [JC] testified that Matt Fischer's walking around there and walking around the whole house shaking the bottle. Same area where [JC] saw his mom shake

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[11] See *Coe v Bell*, 161 F3d 320, 348 (CA 6, 1998) (citing *Schad v Arizona*, 501 US 624; 111 S Ct 2491; 115 L Ed 2d 555 (1991), for the proposition that "it is acceptable for a first-degree murder conviction to be based on two alternative theories *even if there is no basis to conclude which one (if only one) the jury used.*") (Emphasis added).

> the bottle. Up there in this room, there's a firearm there.... Does it have to be used? Does it have to be loaded? It needs to be in there. *The legislature determined that ... in this case it's sufficient that the firearm be placed there. And there's a reason [for] that. You think about how methamphetamine affects people. Paranoid. Ms. LaFountain's paranoid.* She was seeing people in camouflage uniforms or camouflage clothing on the wood line. She was hearing them on the roof. So what's gonna happen when somebody thinks that there's somebody on their roof and there's a gun there? Why does that make that different than just a meth lab? Because it doesn't take too much imagination to find out that *the risk is increased when there's a firearm placed in that area.* . . . . And then if there's a firearm and one of the people becomes delusional and thinks there's somebody on their roof or somebody's after their meth, there's gonna be trouble.
>
> (494a-496a.) (Emphasis added).

While there do not appear to be any cases discussing the word "placement" as found in MCL 333.7401c(2)(e), the Legislature was aware that there may be cases where a firearm is not "used" or "possessed" in the operation of a meth lab, but the lab still involves the "placement" of a firearm.[12] See e.g., *Bailey v United States*, 516 US 137, 149; 116 S Ct 501; 133 L Ed 2d 472 (1995),[13] which distinguished "use" of a firearm from its "mere possession" and from "placement" "to provide a sense of security or to embolden."

No one can dispute the fact that drug traffickers often keep guns nearby to defend or protect their contraband. See, e.g., *Rapley*, 483 Mich 1131, where this Court referenced "the well-known relationship between drug dealing and the use of firearms as protection." Accord: *United States v Miller*, 227 F App'x 446 (CA 6,

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[12] Contrary to LaFountain's argument, Brief, p 16, the statutory language does not require the prosecution to prove that LaFountain herself "placed" the firearms where they were.

[13] Superseded by statute as recognized by *Abbott v United States*, __ US __; 131 S Ct 18, 25; 178 L Ed 2d 348 (2010).

2007) (unpublished table case) (numerous firearms "were strategically placed throughout her residence, easily available for use and in close proximity to methamphetamine and its components."); *United States v Martinez*, 258 F3d 760, 762 (CA 8, 2001) ("The accessible placement of the firearm easily supports the government's contention that the firearm was used to facilitate drug trafficking or intended to protect the drugs or Defendant himself based on his involvement in a drug enterprise, whether successful or failed."); *United States v Johnson*, 452 F App'x 219, 224 (CA 3, 2011) ("It was quite reasonable for the jury to conclude that the weapon was placed strategically so that Johnson could defend his drugs and money.").[14]

The fact that LaFountain, whether jointly with Fischer or not, kept or at least knew of the placement of a firearm nearby was sufficient to allow the jury to find "placement" as used in MCL 333.7401c(2)(e). The firearms were strategically located so that they were quickly and easily available. While the firearms were apparently unloaded, the mere display of a firearm can be a deterrent.[15] And, as

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[14] LaFountain argues that because the meth was being produced for personal use that she and Fischer did not need to use the firearms for protection. (Brief, p 15). But as the above cited cases recognize firearms are used to defend and protect illegal drugs. This fact exists even if LaFountain and Fischer were only operating their lab to produce meth for their own consumption.

[15] See, e.g., *United States v Gutierrez-Silva*, 983 F2d 123, 125 (CA 8, 1993) (quickly accessible firearm in close proximity to drugs violated [18 USC] section 924(c) even though gun was unloaded and no ammunition was found); *United States v Hill*, 967 F2d 902, 905-07 (CA 3, 1992) (easily accessible rifle located next to drugs violated section 924(c) even though gun was unloaded, no ammunition was present and rifle stock was separated from barrel).

stated in *Pierce, supra,* 782–783, someone who has a firearm pointed at him is no less frightened if he does not know the gun is inoperable.

Given that it was reasonable for the jury to conclude that LaFountain knew where the firearms were placed and that the placement was in close proximity to where she "cooked" meth, there was sufficient evidence for the jury to conclude that LaFountain's manufacturing of meth involved the "placement" of a firearm contrary to MCL 333.7401c(2)(e).

5. The jury's verdict was not so insupportable as to fall below the threshold of bare rationality

The *Jackson* standard "leaves juries broad discretion in deciding what inferences to draw from the evidence presented at trial, requiring only that jurors 'draw reasonable inferences from basic facts to ultimate facts.'" *Coleman v Johnson,* ___ US ___; 132 S Ct 2060, 2064; 182 L Ed 2d 978 (2012) (per curiam) (quoting *Jackson,* 443 US at 319). "[I]t is the responsibility of the jury–not the court–to decide what conclusions should be drawn from the evidence admitted at trial." *Cavazos v Smith,* ___ US ___; 132 S Ct 2, 4; 181 L Ed 2d 311 (2011) (per curiam).

The question is not what this Court might have done had it sat in the jury box, rather it is whether the jury's finding "was so insupportable as to fall below the threshold of bare rationality." *Coleman,* 132 S Ct at 2065. The question is whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson,* 443 US at 319 (italics in original). Because rational people can sometimes disagree, one of the inevitable consequences of the

deferential standard of review is that "judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold." *Cavazos v Smith*, —US —, —; 132 S Ct 2, 4; 181 L Ed 2d 311 (2011).

Accepting LaFountain's arguments would improperly require this Court to view the evidence in the light most favorable to her rather than the prosecution. Her arguments also fly in the face of the rule that the prosecution need not negate every reasonable theory consistent with the defendant's innocence. *Konrad, supra*, 273 n 6.

This Court must resist and reject LaFountain's invitation for this Court to substitute its judgment for that of the jury, i.e., to encroach on the jury's factfinding function. Viewing the direct and circumstantial evidence in the light most favorable to the prosecution, and drawing all reasonable inferences in support of the jury's verdict, there was sufficient evidence for the jury to find LaFountain guilty of manufacturing methamphetamine and that this involved "the possession, [*or*] placement . . . . of a firearm." MCL 333.7401c(2)(e).

This Court should affirm LaFountain's conviction because the jury's verdict was not so insupportable as to fall below the threshold of bare rationality. *Coleman, supra,* 2065.

II. LaFountain invited any error relating to the scoring of PRV 7 at 10 points because the trial court reduced the score from 20 points to 10 points *at defense counsel's urging*. Absent an allegation that counsel was ineffective, an argument that has not been raised, any error was invited and therefore waived.

A. Standard of Review

LaFountain argues this issue is subject to plain error review. She is wrong. This is not a situation where defense counsel simply failed to object. Rather, defense counsel specifically asked the Court to order that PRV 7 be scored at 10 points (36a-37a.) This means there is *no* standard of review because the alleged error was waived under the invited error doctrine.

"[T]he doctrine of invited error is a branch of the doctrine of waiver." *United States v Demmler*, 655 F3d 451, 459 (CA 6, 2011) (internal citation and quotation marks omitted). Under the invited error doctrine, "a party may not complain on appeal of errors that he himself invited or provoked the court to commit." *Harvis v Roadway Express, Inc*, 923 F2d 59, 60 (CA 6, 1991). Appellate review is precluded because when a party invites an error, she waives her right to seek appellate review, and any error is deemed extinguished. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000). "'Invited error' is typically said to occur when a party's own affirmative conduct directly causes the error." *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003). Accord *People v Loper*, 299 Mich App 451, 472; 830 NW2d 836 (2013) ("Defendant agreed with the trial court's PRV scoring, and

therefore waived this issue. Defendant's waiver extinguished all error for appellate review.").[16]

B. Analysis

1. *If* scoring PRV 7 at 10 points was error, it was invited and therefore waived, making it unreviewable on appeal

At sentencing, PRV 7 was scored at 20 points. Subsequently, defense counsel filed a motion seeking to correct the judgment of sentence. In paragraph 4 of the motion to correct defense counsel said: "4. The appropriate PRV 7 score in this matter is '10'." (36a). The motion to correct concluded as follows: "WHEREFORE, the Defendant requests that the Court . . . . Order the Presentence Report to reflect a PRV 7 score of '10.'" (37a.)[17]

LaFountain's brief on appeal to the Michigan Court of Appeals argued that under plain error review she was entitled to resentencing because the trial court

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[16] Accord *United States v Hanna*, 661 F3d 271 (CA 6, 2011), where the Sixth Circuit denied a defendant sentencing relief because "the district court's decision below to sentence Hanna under § 2S1.1(a)(2) was directly in response to Hanna's urging that it take that very course.... [T]he doctrine of 'invited error' therefore precludes reliance on this error as grounds for reversal." *Id.* at 293.

[17] There is a strong argument that double jeopardy did not require vacating LaFountain's convictions for operating or maintaining a methamphetamine laboratory in the presence of a minor, or operating or maintaining a methamphetamine laboratory involving hazardous waste because each count required proof of a fact the other did not. Yet, the prosecutor signed a stipulation agreeing to dismissal of those charges. The People do not argue to reinstate the vacated convictions because the People are also subject to the invited error doctrine. In the unlikely event this Court chooses to ignore the waiver that occurred here the People request that it likewise ignore the mistaken agreement that conviction of operating a meth lab involving a firearm precluded convictions for operating a meth lab involving hazardous waste or operating a meth lab in the presence of a minor. See note 3.

incorrectly scored PRV 7 at 10 points when it should have been scored at 0 points. (5/31/12 Defendant's Brief at 17-19). In response the People argued that the issue was *waived* because trial counsel had expressly urged the trial court to score PRV 7 at 10 points. (8/2/12 People's Brief at 23-27). The People argued in the alternative that LaFountain could not show plain error. (*Id.* at 28-29). The Court of Appeals did not address the People's waiver argument simply finding no error at all. (5a.)

A waiver by defense counsel can constitute ineffective assistance of counsel. *Harrington v Richter*, ___US ___ ; 131 S Ct 770, 788; 178 L Ed 2d 624 (2011) ("An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture"). But, here there is no claim that trial counsel was ineffective when he urged the trial court to score PRV 7 at 10 points.[18]

Under such circumstances, unless this Court is prepared to jettison the long-standing and well-established invited error doctrine, there is no alleged error to review because the issue was waived. *Carter, supra,* 214-215; *Jones, supra,* 352 n 6; *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (waiver extinguishes appellate review); *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998) (A defendant is not allowed to assign error to something she deemed proper below); *People v Milstead*, 250 Mich App 391, 402 n 6; 648 NW2d 648 (2002) (a defendant may not "assign error on appeal to something which his own

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[18] LaFountain concedes that her attorney requested PRV 7 be scored at 10 points and then says "it appears that defense counsel didn't realize that Ms. LaFountain had been acquitted of the charge of maintaining a drug house and thus believed she had one concurrent felony conviction." (Defendant's Brief, at 6-7). One will search LaFountain's brief in vain to find any argument that trial counsel was ineffective.

counsel deemed proper at trial."); *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003) ("error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence.").

Consequently, this Court should not reach the question whether the trial court erred in agreeing with LaFountain's request to score PRV 7 at 10 points.

CONCLUSION AND RELIEF REQUESTED

This Court should affirm LaFountain's conviction because a rational jury could conclude that LaFountain's meth lab involved "the possession, [or] placement ... of a firearm." MCL 333.7401c(2)(e). And, this Court should not reach the PRV 7 scoring issue because defendant waived any error.

Respectfully submitted,

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