No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ERNEST RAY SNOW, JR.,

Petitioner,

v.

THE STATE OF INDIANA,

Respondent.

On Petition for Writ of Certiorari to the
Indiana Court of Appeals

APPENDIX

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TABLE OF CONTENTS

Page

In the
Indiana Supreme Court

Ernest R. Snow, Jr.,
Appellant(s),

v.

State Of Indiana,
Appellee(s).

Court of Appeals Case No.
19A-CR-00949

Trial Court Case No.
32C01-1705-F5-80

Order

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, on 5/21/2020.

FOR THE COURT

Loretta H. Rush
Chief Justice of Indiana

All Justices concur, except Rush, C.J., and David, J., who vote to grant the petition to transfer.

STATE OF INDIANA
COURT OF APPEALS

ERNEST R SNOW, SR. Appellant(s), v. STATE OF INDIANA Appellee(s).	Cause No. 19A-CR-00949

CERTIFICATION

STATE OF INDIANA)
) SS:
Court of Appeals)

I, Gregory R. Pachmayr, Clerk of the Supreme Court, Court of Appeals and Tax Court of the State of Indiana, certify the above and foregoing to be a true and complete copy of the Opinion of said Court in the above entitled case.

IN WITNESS WHEREOF, I hereto set my hand and affix the seal of THE CLERK of said Court, at the City of Indianapolis, this on this the 26th day of May, 2020.

Gregory R. Pachmayr,
Clerk of the Supreme Court

ATTORNEY FOR APPELLANT

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Indianapolis, Indiana

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IN THE COURT OF APPEALS OF INDIANA

Ernest Ray Snow, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 27, 2019

Court of Appeals Case No. 19A-CR-949

Appeal from the Hendricks Circuit Court

The Honorable Dan F. Zielinski, Judge

Trial Court Cause No. 32C01-1705-F5-80

Najam, Judge.

Statement of the Case

[1] Ernest Ray Snow, Jr. appeals his convictions following a jury trial for burglary, as a Level 5 felony; theft, as a Level 5 felony; conversion, as a Level 5 felony; and auto theft, as a Level 6 felony; and his sentence enhancements for

committing a felony while a member of a criminal organization and for being a habitual offender. Snow presents three issues for our review:

1. Whether the trial court erred when it admitted evidence that law enforcement officers had seized pursuant to a search of his residence.

2. Whether the State presented sufficient evidence to support his convictions.

3. Whether the criminal organization enhancement violates the prohibition against double jeopardy.

[2] We also address *sua sponte* whether the trial court's judgment of conviction and sentencing order erroneously lists Snow's convictions.

[3] We affirm and remand with instructions.

Facts and Procedural History

[4] On May 6, 2017, a friend of Snow's introduced him to Robert Fields, a forklift operator at Ingram Micro, a company that distributes mobile devices, including Fitbits and Fitbit accessories. Snow drove a gold-colored Ford F350 truck that day. Fields was interested in buying shoes from Snow, so they exchanged phone numbers. Early the next morning, Snow called Fields, and he told Fields that he would give Fields ten pairs of shoes in exchange for information about security at an Ingram Micro warehouse. Fields described the two "older" people who provided security for the warehouse, and Fields told Snow the

"trailer number" for a trailer loaded with Fitbits parked outside the warehouse. Tr. Vol. 2 at 234.

[5] During the early morning hours of May 8, a semi-tractor was stolen from a facility in Plainfield, and that semi-tractor was used to steal the trailer full of Fitbits from Ingram Micro. When Scott Sunderman, an Ingram Micro security manager, learned of the missing trailer, he notified some "off-duty" officers with the Plainfield Police Department, and Sunderman "headed around town" to investigate himself. *Id.* at 141. The trailer was equipped with a GPS tracking device, and the company that owned the trailer accessed the data for that device, which showed that the trailer had been parked at 3524 Shadeland Avenue between 2:30 and 5:15 a.m. on May 8. The trailer was ultimately found abandoned and empty, and someone had disabled the GPS tracking device.

[6] The next morning, Sunderman drove to the area of 3524 Shadeland Avenue, and he obtained a nearby hotel's exterior surveillance video showing the semi-tractor driving the trailer full of Fitbits to that address, where several businesses are located. After watching the video, Sunderman notified law enforcement about the possible location where the Fitbits had been unloaded. And Sunderman decided to "continue to sit on the location." *Id.* at 146. Dan Marshall, the director of security for Ingram Micro, joined Sunderman.

[7] At some point, Sunderman and Marshall saw a man arrive at 3524 Shadeland Avenue in a "gold F350 pickup" truck. *Id.* The man was making several trips

between the truck and a business at that address, Caldwell Automotive, carrying boxes that looked like the ones containing the Fitbits from Ingram Micro. Plainfield police officers then obtained a search warrant for Caldwell Automotive. During their subsequent search of the premises, officers found multiple boxes containing Fitbits and Fitbit accessories. Officers also talked to Gregory Street, who leases the premises immediately adjacent to Caldwell Automotive. Street provided the officers with surveillance footage of the exterior of the building from the morning of May 8. That footage showed people moving boxes from the parked trailer into Caldwell Automotive. Street recognized one of the men on the footage as one of his employees, Randy Price. Plainfield Police Department Detective Brian Bugler interviewed Price, who stated that a man named "Snow" had organized the heist and was one of the three to five men who had moved the boxes from the trailer into Caldwell Automotive. Appellant's App. Vol. 2 at 34.

[8] After additional investigation by law enforcement implicated Snow in the theft of the Fitbits from Ingram Micro, officers obtained a search warrant for Snow's residence. When officers executed that warrant, they found seven Fitbits and Fitbit accessories. The Fitbits were identified as having been stolen from Ingram Micro. Officers also obtained warrants to search Snow's cell phone, and they read text messages implicating Snow in the heist.

[9] The State charged Snow with burglary, as a Level 5 felony; theft, as a Level 5 felony; conversion, as a Level 5 felony; and auto theft, as a Level 6 felony.[1] The State also alleged that Snow committed these offenses while he was a member of a criminal organization and that he was a habitual offender. The trial court held a trifurcated trial, and the jury found Snow guilty as charged at the conclusion of each phase.

[10] In its judgment of conviction and sentencing order, the trial court erroneously entered judgment on two counts of burglary, as Level 5 felonies; theft, as a Level 5 felony; and conversion, as a Level 5 felony. The trial court did not enter judgment of conviction on the auto theft count. And the trial court sentenced Snow as follows: concurrent five-year sentences for the two burglary convictions and the theft conviction; a two-year sentence for conversion, to be served consecutive to the other counts; five years for the criminal organization enhancement; and two years for the habitual offender enhancement. Thus, Snow's aggregate sentence is fourteen years executed. This appeal ensued.

Discussion and Decision

Issue One: Search Warrant

[11] Snow contends that the trial court erred when it admitted evidence seized by law enforcement officers during the search of his residence. Snow's argument that the search of his residence violated his constitutional rights raises

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[1] The State had charged Snow with three additional offenses, but it dismissed those charges prior to trial.

"questions of law that we review *de novo*." *Redfield v. State*, 78 N.E.3d 1104, 1106 (Ind. Ct. App. 2017) (quotation marks omitted), *trans. denied*.

[12] On appeal, Snow maintains that the search of his residence was illegal because the search warrant lacked probable cause. We cannot agree. Rather, we conclude that the evidence supports the trial court's determination that sufficient probable cause supported the search warrant. In any event, even if we assume for the sake of argument that Snow is correct and there was no probable cause to support the search warrant, "[t]he lack of probable cause does not automatically require the suppression of evidence obtained during a search conducted pursuant to a warrant." *Jackson v. State*, 908 N.E.2d 1140, 1143 (Ind. 2009). Indeed, "the exclusionary rule does not require the suppression of evidence obtained in reliance on a defective search warrant if the police relied on the warrant in objective good faith." *Id*.

[13] Accordingly, to establish reversible error, Snow must demonstrate *both* the lack of probable cause *and* the inapplicability of the good faith exception. But, in his appellant's brief, Snow only asserts that the search warrant lacked probable cause. He makes no argument that the good faith exception does not apply. And his attempt to make an argument on the good faith exception for the first time in his reply brief is unavailing. "The law is well settled that grounds for error may only be framed in an appellant's initial brief and if addressed for the first time in the reply brief, they are waived." *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 977 (Ind. 2005).

[14] There are two situations where the good faith exception does not apply. *Jackson*, 908 N.E.2d at 1143. Those include situations where "the magistrate is misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth" or situations where "the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id*. (quotation marks omitted).

[15] As Snow has not addressed good faith in his lead brief on appeal, he has not directed us to any evidence in the record, or made any argument, that the magistrate was misled by information in the affidavit that Detective Bugler knew or should have known was false. *See* Ind. Appellate Rule 46(A)(8)(a). Neither does he assert that the warrant was so lacking in indicia of probable cause as to render belief in its existence entirely unreasonable. *See id.* And it is not this Court's place to make arguments for a party on appeal. *See Thacker v. Wentzel*, 797 N.E.2d 342, 345 (Ind. Ct. App. 2003). Accordingly, Snow has not met his burden on appeal to demonstrate that the trial court erred when it admitted as evidence items seized pursuant to the search of his residence.

Issue Two: Sufficiency of the Evidence

[16] Snow next contends that the State presented insufficient evidence to support his convictions.[2] Our standard of review on a claim of insufficient evidence is well settled:

> For a sufficiency of the evidence claim, we look only at the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess the credibility of witnesses or reweigh the evidence. *Id.* We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id.*

Love v. State, 73 N.E.3d 693, 696 (Ind. 2017).

[17] To prove that Snow committed burglary, as a Level 5 felony, the State was required to show that he broke and entered the building or structure of another person, with the intent to commit a felony or theft in it. Ind. Code § 35-43-2-1 (2019). To prove that Snow committed theft, as a Level 5 felony, the State was required to show that he knowingly or intentionally exerted unauthorized control over the property of another person with the intent to deprive the other person of any part of its value or use and that the property's value was at least $50,000. I.C. § 35-43-4-2(a)(2)(A). To prove that Snow committed conversion, as a Level 5 felony, the State was required to show that he knowingly or

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[2] The parties address Snow's convictions as found by the jury, not as listed in the judgment of conviction. As we explain below, we remand to the trial court to correct the erroneous judgment of conviction and sentencing order accordingly.

intentionally exerted unauthorized control over another person's motor vehicle. I.C. § 35-43-4-3. To prove that Snow committed auto theft, a Level 6 felony, the State was required to show that he knowingly or intentionally exerted unauthorized control over the motor vehicle of another person with the intent to deprive the other person of the vehicle's value or use. I.C. § 35-43-4-2.5(b) (2017). Finally, the State alleged that Snow committed each of these offenses as an accomplice. A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, even if the other person: (1) has not been prosecuted for the offense; (2) has not been convicted of the offense; or (3) has been acquitted of the offense. I.C. § 35-41-2-4.

[18] Snow's sole contention on appeal is that the State presented insufficient evidence to prove his guilt as an accomplice "because the identity of the individuals who committed the burglary, thefts, and conversion is completely unknown." Appellant's Br. at 13. In support of that contention, Snow maintains that none of the four factors relevant to accomplice liability is satisfied here. We cannot agree.

[19] As our Supreme Court has explained,

> [a] defendant may be charged as the principal but convicted as an accomplice. *Jester v. State*, 724 N.E.2d 235, 241 (Ind. 2000); *Wise v. State*, 719 N.E.2d 1192, 1198 (Ind. 1999). Generally there is no distinction between the criminal liability of an accomplice and a principal, *Wise*, 719 N.E.2d at 1198, although evidence that the defendant participated in every element of the underlying offense

> is not necessary to convict a defendant as an accomplice. *Vitek v. State*, 750 N.E.2d 346, 352 (Ind. 2001). . . . We consider four factors to determine whether a defendant acted as an accomplice: (1) presence at the scene of the crime; (2) companionship with another at scene of crime; (3) failure to oppose commission of crime; and (4) course of conduct before, during, and after occurrence of crime. *Id.* at 352. That a defendant was present during the commission of a crime and failed to oppose the crime is not sufficient to convict [him]. *Id.* But, "presence at and acquiescence to a crime, along with other facts and circumstances" may be considered. *Id.* at 352-53.

Castillo v. State, 974 N.E.2d 458, 466 (Ind. 2012). Further, as this Court has explained,

> [t]he particular facts and circumstances of each case must be considered in determining whether a person participated in the commission of an offense as an accomplice." *Peterson v. State*, 699 N.E.2d 701, 706 (Ind. Ct. App. 1998). For [a defendant's] conviction to stand, "there must be evidence of [his] affirmative conduct, either in the form of acts or words, from which an inference of a common design or purpose to effect the commission of a crime may be reasonably drawn." *Id.* "Each participant must knowingly or intentionally associate himself with the criminal venture, participate in it, and try to make it succeed." *Cohen v. State*, 714 N.E.2d 1168, 1177 (Ind. Ct. App. 1999), *trans. denied*. That said, the State need not show that [the defendant] "was a party to a preconceived scheme; it must merely demonstrate concerted action or participation in an illegal act." *Rainey v. State*, 572 N.E.2d 517, 518 (Ind. Ct. App. 1991).

Griffin v. State, 16 N.E.3d 997, 1003-04 (Ind. Ct. App. 2014).

[20] The State presented ample circumstantial evidence to prove that Snow was involved in every step of the heist—from the planning to the execution. In particular, prior to the heist, Snow asked Fields for information about security at Ingram Micro, and he asked Fields for identifying information on the trailer containing the Fitbits. Snow sent text messages to someone offering to pay $15,000 for that person to drive a semi-truck from one side of Indianapolis to the other. And when the trailer containing the stolen Fitbits was stolen, someone transported it from the west side to the east side of Indianapolis. Before, during, and after the heist, Snow was in close contact by phone with Caldwell, who owned the business where the Fitbits were unloaded from the trailer. After the heist, someone driving the same pickup truck Snow had driven to Ingram Micro prior to the heist parked that truck outside of Caldwell's business and transported multiple boxes from Caldwell's to the truck. And officers found some of the stolen Fitbits inside Snow's residence.

[21] Snow's contentions on appeal amount to a request that we reweigh the evidence and assess witnesses' credibility, which we cannot do. We hold that the State presented sufficient evidence to prove that Snow was liable as an accomplice for each of his convictions: burglary, as a Level 5 felony; theft, as a Level 5 felony; conversion, as a Level 5 felony; and auto theft, as a Level 6 felony.

Issue Three: Criminal Organization Enhancement

[22] Finally, Snow contends that the criminal organization enhancement "violates both Snow's right to be free from double jeopardy [under the Indiana Constitution] and the common law prohibition of enhancing a sentence using

the very same behavior used to support the underlying conviction." Appellant's Br. at 14. Article 1, Section 14 of the Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." As we have explained,

> [o]ur Supreme Court has interpreted that clause to prohibit multiple convictions based on the same "actual evidence used to convict." *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999). To determine the actual evidence used to establish a conviction, we look to the "evidentiary facts" as they relate to "all" of the elements of both offenses. *Spivey v. State*, 761 N.E.2d 831, 833 (Ind. 2002). In other words, the actual evidence test requires "the evidentiary footprint for all the elements required to prove one offense" to be "the same evidentiary footprint as that required to prove all the elements of another offense." *Thrash v. State*, 88 N.E.3d 198, 208 (Ind. Ct. App. 2017) (quoting *Berg v. State*, 45 N.E.3d 506, 510 (Ind. Ct. App. 2015)).

Bradley v. State, 113 N.E.3d 742, 751 (Ind. Ct. App. 2018), *trans. denied*.

[23] The State charged Snow as follows:

> Ernest Snow was knowingly a member of a criminal organization while committing any of his charged offenses and committed the felony offense at [the] direction or in affiliation with a criminal gang or with the intent to benefit, promote, or further the interest of a criminal organization or for the purposes of increasing the person's own standing or position with the criminal organization.

Tr. Vol. 3 at 159; *see* I.C. § 35-50-2-15. Indiana Code Section 35-45-9-1 defines "criminal organization" in relevant part as a formal or informal group with at

least three members that either assists in or participates in or has as one of its goals the commission of a felony.

[24] Here, during the criminal organization enhancement phase of Snow's trial, the State did not present additional evidence. Instead, the State told the jury that it was "incorporating all of the evidence that [the jury] heard presented in the first phase of the trial and we're going to rely on that evidence." *Id.* at 163. And during closing argument, the prosecutor stated:

> In this case there is ample evidence that the State has proved this enhancement beyond a reasonable doubt. If you recall, the video that was played to you in the cab was an individual who came in and cut . . . the GPS [in the semi-truck], cut the video. Individual number one. Individual number two is an individual [who] testified to you of his involvement, Mr. Fields. Individual number three is their co-defendant sitting here in the courtroom. That's number three and there's many other people that had involvement in this case. Randy Price, you heard his name, didn't you? So, the State of Indiana is going to ask you to rely on that, rely on the fact that the evidence beyond a reasonable doubt demonstrates that both Defendant Caldwell and Defendant Snow acted in concert with at least three people, thereby constituting a criminal organization.

Id. at 168. The prosecutor concluded his argument by stating that Snow was knowingly a member of a criminal organization when he committed the burglary "[w]ith the intent to promote or further the interest of the criminal organization." *Id.* at 169.

[25] On appeal, Snow avers that "this Court is not required to speculate about what evidence guided the jury's guilty verdict on the criminal organization enhancement. The Court can be sure that the jury used the very same evidence used to support the underlying felonies." Appellant's Br. at 16. Thus, Snow concludes, "the criminal organization enhancement violated [his] right to be free from double jeopardy under the Indiana Constitution." *Id.* But Snow's argument is silent regarding whether the evidentiary footprint for *all* the elements required to prove the enhancement is the same evidentiary footprint as that required to prove *all* the elements of burglary or any of the other underlying felonies. *See Bradley*, 113 N.E.3d at 751. Indeed, in his argument, Snow does not set out the elements for either the enhancement or any underlying felony. Accordingly, Snow has not sustained his burden on appeal to show that the criminal organization enhancement violates the actual evidence test under Article 1, Section 14.

[26] Still, Snow asserts that, because "the State itself has argued that it used the same behavior to convict and enhance," the enhancement cannot stand under common law principles. Appellant's Br. at 16. As we explained in *Bradley*,

> the Indiana Supreme Court has also "long adhered to a series of rules of statutory construction and common law that are often described as double jeopardy[ ] but are not governed by the constitutional test set forth in *Richardson*." *Guyton v. State*, 771 N.E.2d 1141, 1143 (Ind. 2002) (quotation marks omitted).

113 N.E.3d at 751. As Snow points out, one such rule "'prohibit[s] conviction and punishment for an enhancement of a crime where the enhancement is

imposed for the very same behavior or harm as another crime for which the defendant has been convicted and punished.'" *Cross v. State*, 15 N.E.3d 569, 571 (Ind. 2014) (quoting *Miller v. State*, 790 N.E.2d 437, 439 (Ind. 2003); emphasis omitted).

[27] However, as our Supreme Court has explained, "[a] criminal gang enhancement . . . is fundamentally related to its underlying felony or felonies. The enhancement increases punishment based on the manner in which the defendant committed the underlying felony or felonies." *Jackson v. State*, 105 N.E.3d 1081, 1086 (Ind. 2018). Here, the State presented evidence that Snow committed four felonies. In addition, the State presented evidence that Snow committed one or more of those felonies in concert with at least two other people with the intent to promote or further the interests of the criminal organization. The underlying felonies are the foundation for the enhancement, but it is the manner in which Snow committed those felonies, namely, acting in concert with at least two other people to further their organization's interests, that supports the enhancement. Thus, the enhancement was not imposed for the "very same behavior or harm" as the underlying felonies. *See Cross*, 15 N.E.3d at 571. We reject Snow's contention on this issue.

Conclusion

[28] On appeal, both Snow and the State describe Snow's convictions as follows: burglary, as a Level 5 felony; theft, as a Level 5 felony; conversion, as a Level 5 felony; auto theft, as a Level 6 felony; criminal organization enhancement; and habitual offender enhancement. Given the discrepancy between the parties'

understanding of the convictions, which is consistent with the jury verdicts, and the trial court's judgment of conviction and sentencing order, we remand with instructions to vacate one of the burglary convictions listed on the judgment of conviction and sentencing order and to enter judgment of conviction as follows: burglary, as a Level 5 felony; theft, as a Level 5 felony; conversion, as a Level 5 felony; auto theft, as a Level 6 felony; criminal organization enhancement; and habitual offender enhancement. And the trial court shall resentence Snow accordingly.

[29] The trial court did not err when it admitted evidence seized by officers during a search of Snow's residence. The State presented sufficient evidence to support Snow's convictions. And Snow's contentions regarding the criminal organization enhancement are without merit. We affirm Snow's convictions, but we remand with instructions to enter judgment of conviction consistent with the jury's verdicts and to resentence Snow accordingly.

[30] Affirmed and remanded.

Bailey, J., and May, J., concur.

STATE OF INDIANA	)	IN THE HENDRICKS CIRCUIT COURT
	)	
COUNTY OF HENDRICKS	)	CASE NUMBER: 32C01-1705-F5-000080

STATE OF INDIANA

V.

ERNEST RAY SNOW, JR.

ORDER DENYING MOTION TO SUPPRESS

Defendant, Ernest Snow, on August 30, 2018 filed his Motion to Suppress. The Court issued a briefing schedule. The State filed its Response to Defendant's Motion to Suppress on September 25, 2018. Defendant filed his Response to State's Response to Defendant's Motion to Suppress Evidence on September 27, 2018. At the Final Omnibus/Suppression Hearing, the parties waived argument and requested the Court issue a ruling based on their respective filed briefs. Court having reviewed the briefs and the sighted case law, and having reviewed the Probable Cause Affidavit, finds that the Search Warrant and the Arrest Warrant were valid as there was sufficient Probable Cause for the search and the arrest. The Court finds that it is within the Trial Court's discretion to determine a Motion to Suppress prior to trial, and that the Trial Judge may defer resolution of those issues until the evidence in question is offered at trial, Candler vs. State, 363 N.E.2d 1233, 1240 (Ind.1977).

Therefore, having considered the excellent argument of Counsel in their briefs and after having reviewed appropriate law, the Court DENIES the Defendant's Motion to Suppress.

So ordered on this the 3rd day of October, 2018.

FILED
October 3, 2018
Dan Zielinski
Judge Hendricks Circuit Court
DZ

Dan Zielinski
Judge/Hendricks Circuit Court

Distribution: Patricia Ann Baldwin
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IN THE

COURT OF APPEALS OF INDIANA

Ernest Ray Snow, Jr.,

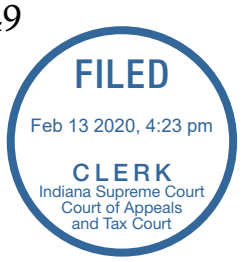
Appellant,

v.

State of Indiana,

Appellee.

Court of Appeals Cause No. 19A-CR-00949



Order

[1] Appellant, by counsel, filed an Appellant's Petition for Rehearing. Appellee, by counsel, filed a Brief in Response to Petition for Rehearing.

[2] Having reviewed the matter, the Court finds and orders as follows:

[3] Appellant's Petition for Rehearing is denied.

[4] Ordered this 2/13/2020.

[5] Najam, Bailey, May, JJ., concur.

For the Court,

Chief Judge

CASE NUMBER: 32D04-1705-MC-000247 FILED: 5/25/2017

STATE OF INDIANA)
) SS:
COUNTY OF HENDRICKS)

HENDRICKS COURT

MC #

SEARCH WARRANT

To officers and detectives of the Plainfield Police Department, Hendricks County, Indiana, and any other law enforcement officer authorized to serve warrants in the State of Indiana:

You are **AUTHORIZED** and **ORDERED**, in the name of the State of Indiana, with the necessary and proper assistance to enter into or upon 14432 Lee Stewart Ln Fishers, Indiana, and there diligently search for evidence described as follows:

I request a search warrant for 14432 Lee Stewart Ln. Fishers, IN, a tan vinyl and brick siding house with a brown roof and red door, with the numbers 14432 affixed to the house above the garage and there search for Fitbits, cash, money, bank records, financial information, brown boxes with serial number information on them, weapons, keys for semi tractors, burglary tools, and mobile electronic devices.

You are further **ORDERED** to seize such property, or any part thereof, found on such search.

Date: May 25, 2017
Time: 1:27 pm

Mark A. Smith
Judge

RETURN

I executed this Search Warrant on the 25th day of May, 17 (date) at 9:21P (time). The following items were seized, to wit:

6 phones, 7 fitbits, 2 fitbit band packs, 1 fitbit box, 2 leptops, paperwork, cash ($489.00), credit card's.

Det. Brian Bugler Plainfield PD

PROBABLE CAUSE AFFIDAVIT

I, Det. Brian Bugler, a Detective with the Plainfield Police Department, swear or affirm under the penalties for perjury that the following is true:

1. I have been a law enforcement officer for 13 years.

2. On May 8, 2017 at approx. 1:30 PM, I spoke with Jerry Nohren (W/M DOB: 7/17/51) from Venture Logistics who stated a trailer of theirs had been parked at Ingram Micro at 3100 Reeves Rd Plainfield, IN when it was taken from the lot. Venture Logistics was doing an audit of their trailers the morning of the 8th when they found the trailer missing from the lot. The person doing the audit was Jason Hunt (W/M DOB: 4/30/82). Mr. Hunt stated he did not see the trailer and had other employees also check the lot to confirm the trailer was not there. When it was confirmed the trailer was not on the lot, he checked the GPS pings of the trailer and found the trailer moving from 3100 Reeves Rd into Indianapolis. The trailer spent several hours in the area of 7020 Pendleton Pike in Indianapolis, then moved and finally came to rest at 1504 Sadler Rd Indianapolis. It was at this location IMPD found the trailer with a tractor from Black Horse Logistics. Black Horse has trucks in the area of Columbia Rd in Plainfield, but not at 3100 Reeves Rd Plainfield.

   Mr. Nohren stated Venture Logistics has trailers that Ingram Micro utilizes to move product around from warehouse to warehouse in Plainfield and do not leave town. Venture Logistics does not have a relationship with Black Horse Logistics, so it is not customary for a Black Horse Logistics to be hooked up to a Venture Logistics trailer.

   Mr. Nohren was able to provide the ping history of the trailer which showed the trailer at 3100 Reeves Rd at 1:54 AM on May 8, 2017 and begin moving. The ping history provided nearby landmarks of each ping. It showed at 1:59 AM it was in the area of S. Perimeter Rd Indianapolis. At 2:15 AM it was in the area of 2108 Emerson Ave, at 2:25 AM it was in the area of 3005 Shadeland Ave, from 2:40-5:16 AM it was in the area of 7020 Pendleton Pike, at 5:23 AM it was in the area of 6998 E 21st St and at 5:38 AM it was in the area of 1504 Sadler Rd where it was recovered.

   Upon recovery by IMPD, the trailer was found to be empty of its contents. A supplemental report will be completed by Officer Salisbury detailing what was on the trailer at the time of its theft.

   A report from Ingram Micro on the load the Venture Logistics trailer contained 52 pallets of Fitbits valued at $4,000,000.00.

   As Ingram Micro security personnel evaluated the ping locations for the trailer, they found the "nearby landmarks" were slightly off. As they evaluated the longitude and latitude

coordinates provided by the pings, they found the trailer spent the nearly 2 ½ hrs in the area of 3524 Shadeland Ave Indianapolis. Security personnel for Ingram Micro went to the area and sat in the parking lot of Shadeland Inn (3525 Shadeland Ave Indianapolis) and observed the warehouses across the street. On May 9, 2017, security personnel worked with management at Shadeland Inn to view surveillance video. While observing video, they observed the stolen tractor and trailer pull in to 3524 Shadeland Ave for the time frame the ping history indicated. While security personnel were waiting for law enforcement, they observed subjects moving boxes from the business into a brown Ford pickup truck. The building security personnel observed the boxes coming out of are from 3524 Shadeland Ave #E, which is an L-shaped tan building with 3 bay doors facing the east. The name on the business indicates "Caldwell Automotive" in red and black writing.

On May 9, 2017, I obtained a search warrant for the property of 3524 N. Shadeland Ave Indianapolis to collect boxes and pallets of Fitbits. While on the scene, we learned the stolen property was located in Suite E, which is leased by Keith Caldwell. I also spoke with an employee, Randy Price (B/M DOB: 5/31/66). I read Mr. Price his Miranda Rights and he stated he understood them and was willing to talk to me. In the interview, I advised Mr. Price I knew he was involved in an incident that occurred on the morning of the 8th. He confirmed he was involved and began to tell me that Mr. Caldwell had knocked on his door early around 2 AM on the 8th. Mr. Caldwell asked if Mr. Price wanted to work and Mr. Price obliged. Mr. Price stated he and Mr. Caldwell moved 2 vehicles that were parked on the lot to another location on the lot and when the tractor-trailer arrived, he helped unload the trailer. Mr. Price stated there were approx. 3-5 additional people unloading the truck beyond Mr. Caldwell and himself. When the truck was unloaded, he and another B/M moved the palleted merchandise into the garage bays of 3524 N. Shadeland Suite E while someone drove the tractor-trailer away. Mr. Price advised he believed they completed moving the product into the garage about 9AM.

Indianapolis Metropolitan police officers were on scene with us at 3524 N Shadeland Ave. One of the officers checked their report writing system for Mr. Caldwell and provided me with his name, date of birth, possible addresses, phone number and other identifying information. With this information, I obtained Mr. Caldwell's BMV photo. I showed Mr. Price the picture and asked him who the photograph was. Mr. Price identified the BMV photo as being Keith Caldwell. I also obtained the phone number of 317-654-54657 as being Mr. Caldwell's phone number. When I returned to the Plainfield Police Department later in the day, I contacted that phone number and was able to reach Mr. Caldwell who identified himself on the telephone.

As the investigation continued, further information was gathered. Investigators learned through speaking with management with Black Horse that two tractors were parked at 1025 Columbia Rd Plainfield, one in front of the other. The lead tractor was a single axel tractor while the second tractor, parked closer to the building, was a double axel tractor. Suspects

entered both tractors and cut cords for a "cab cam" recording device as well as a dash camera for the road. These cords were cut quickly and without hesitation after entering the tractor. The suspects also cut cords to a GPS unit stored inside the cab, difficult to see at the time of day this incident occurred without prior knowledge of its existence. The double axel tractor began driving prior to the single axel tractor moving, causing a crash between the two vehicles and damage to the front end of the double axel tractor. The single axel tractor was moved from its position in order to gain access to the double axel, which was driven off the lot and taken to 3100 Reeves Rd.

At 3100 Reeves Rd, the lot had been secured for the weekend with a lock and chain. This lock was cut and access was made by the Black Horse tractor. On surveillance video from Ingram Micro, headlights could be seen on two additional passenger vehicles outside the locked fence, which both left with the stolen tractor and eventual stolen trailer. One vehicle was the lead and the other was the chase vehicle.

It was learned on Saturday, May 6, Ingram Micro had been loading and moving trailers of Fitbits for the day attempting to clear the warehouse of Fitbits and rehouse them at another Ingram Micro location in Plainfield. The day's end was coming and, outside of usual practice; employees opted to leave a trailer, loaded with the eventual stolen product at the bay door. This trailer was in the middle of three trailers, none of which anyone could have looked at and known it was loaded. The bill of lading stated the product was "mobile electronics". Surveillance video showed the stolen Black Horse trailer drive directly to the trailer with the product on it while the other 2 trailers were both empty. The trailer was hooked up to the tractor with minimal issue or noise as a security officer was only 6 bays away at the time of the theft and did not hear anything.

This investigation is linked to a skid steer theft out of Plainfield. In that case, a skid steer was located at Sterling Contracting (845 Columbia Rd Plainfield) and was stolen. Over the investigation of this stolen skid steer, investigators learned the skid steer had been stashed at Sansings Professional Paint and Body (5104 Massachusetts Ave) prior to being removed. Surveillance video from Sansings Professional Paint and Body showed a bronze F350 with a temporary plate. The plate returned to a black GMC Denali registered to Mr. Caldwell. This Denali was parked at 3524 N Shadeland at the time of the search warrant recovery of the Fitbits on May 9, 2017. Investigators for Sterling Contracting were keeping their eyes on the 5104 Massachusetts Ave address for other heavy equipment to show up. On May 22, 2017, they observed a Kubota excavator parked there. They informed Plainfield Police Department who notified Indianapolis Metropolitan Police who were able to get an officer in the area prior to the bronze F350 leaving the area. At the time, officers arrived, the F350 had a trailer attached to it and were completing the loading process of getting the Kubota loaded on to the trailer, but they did not strap the Kubota down. The bronze F350 left the area. When officers had the opportunity, they initiated a traffic stop on the bronze F350, which then began to flee from law enforcement. Officers were able to view 2 occupants in the vehicle.

The pursuit ended in a crash, with both occupants exiting the vehicle and running. Officers were able to apprehend one of the two suspects in the vehicle and identified him as Myron Albritton (B/M DOB: 9/1/75). When Mr. Albritton's property was taken from him in the process of his arrest, he was found to have a Fitbit which was later found to be one of the stolen Fitbits from the incident on May 8, 2017. Mr. Albritton also had a silver iPhone 7S on his person. As investigators were speaking with Mr. Albritton on the scene, he had missed calls coming in from a subject in his contacts as "Snow". "Snow" is a person of interest in the Fitbit theft case.

Through the investigation on scene with Mr. Albritton, "Snow" was identified as Ernest Snow (B/M DOB: 12/12/64). In a search warrant obtained on Mr. Caldwell's phone, I found several incoming and outgoing phone calls with different phone numbers. One of the phone numbers of interest with several contacts between that number and Mr. Caldwell was 317-800-2421. I learned this was the same phone number Mr. Albritton had in his phone for Mr. Snow.

Through a Geo Location search warrant on Mr. Caldwell, I observed a location he went to was a storage unit at 7801 E 38th St Indianapolis, IN. I also found Mr. Caldwell frequented the address 5948 Tybalt Ln Indianapolis, which is believed to be where Mr. Caldwell sleeps. It was determined Mr. Snow's address is 14432 Lee Stewart Ln Fishers, IN.

In my experience with this case, tools were utilized to access the lock and chain at 3100 Reeves Rd Plainfield. Also in my training and experience frequently people who commit these types of criminal offenses carry weapons, such as handguns, on their person. Further, in my training and experience these type of highly organize crimes, with multiple individuals involved, often use mobile electronic devices to assist in carrying out the offenses.

I request a search warrant for 14432 Lee Stewart Ln. Fishers, IN, a tan vinyl and brick siding house with a brown roof and red door, with the numbers 14432 affixed to the house above the garage and there search for Fitbits, cash, money, bank records, financial information, brown boxes with serial number information on them, weapons, keys for semi tractors, and burglary tools and electronic devices.

I request a search warrant for 5948 Tybalt Ln Indianapolis, IN, a tan brick house with a red door and the numbers 5948 affixed to a placard near the garage door under the coach light and there search for Fitbits, cash, money, bank records, financial information, brown boxes with serial number information on them, weapons, keys for semi tractors, burglary tools and electronic devices.

Date: May 25, 2017

s/Brian I. Bugler
Brian I. Bugler
Plainfield Police Department

STATE OF INDIANA	)	IN THE HENDRICKS CIRCUIT COURT
	)SS:	
COUNTY OF HENDRICKS	)	CAUSE NUMBER: 32C01-1705-F5-000080
	)	
STATE OF INDIANA	)	
Plaintiff,	)	
	)	
v.	)	
	)	
ERNEST SNOW	)	
Defendant.	)	

MOTION TO SUPPRESS EVIDENCE

COMES NOW, Defendant Ernest Snow, by counsel, and hereby moves the Court to suppress evidence the Defendant contends was obtained unlawfully. Defendant offers the following in support of his motion:

1. On or about February 25, 2017, Officers with the Plainfield Police Department executed a search warrant at the Defendant's residence. Officers seized a number of cellular phones and other electronic storage devices while executing the warrant. Law enforcement then obtained warrants to search the contents of the cellular phones and storage devices.
2. The undersigned believes the State intends to offer the contents of the cellular phones and storage devices as evidence at a hearing or trial in the above captioned cause.
3. Defendant contents that law enforcement recovered such items in violation of the Fourth Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution in that the affidavit for the search warrant of the Defendant's residence fails to establish probable cause that evidence of a crime would be found at the Defendant's residence. Specifically:

a. The affidavit fails to establish how the Defendant was involved in the offense detailed in the affidavit. The affidavit merely states that "Snow" is a person of interest in the Fitbit case." Given that the affidavit fails to provide probable cause to believe that the Defendant was involved in the crime, it then follows that any probable cause to believe that evidence of said crime would be at his residence is also lacking. The affidavit likewise fails to provide any extraneous information as to why evidence of a crime would be found at Snow's residence.

b. The search warrant affidavit fails to specify why law enforcement believed that 14432 Lee Stewart Lane, Fishers, IN, was associated the Defendant. The affidavit simply states that "It was determined that Mr. Snow's address is 14432 Lee Stewart Lane, Fishers, IN." Given that Snow had not been interviewed or apprehended prior to execution of the warrant, said information about Snow's address is hearsay. I.C. 35-33-5-2 requires that when a search warrant affidavit relies upon hearsay, the affidavit must demonstrate that the source of the hearsay is credible. The affidavit does not demonstrate where the address information was obtained from or why the information source is credible.

4. Law enforcement also served an arrest warrant for the Defendant on May 25, 2017. As a result of the Defendant's arrest he was questioned by law enforcement and participated in a recorded interview. The Defendant believes that said interview will be used against him by the State in a hearing or trial in this matter.

5. The Defendant contends that the arrest warrant was not supported by probable cause in that:

a. The arrest warrant purports to identify "Snow" as a participant in the offense

through statements given by a Randy Price. I.C. 35-33-5-2 requires that when an arrest warrant affidavit relies upon hearsay, the affidavit must demonstrate that the source of the hearsay is credible. The affidavit does not demonstrate why Randy Price is a credible source.

6. The undersigned respectfully submits that review of the search warrant and arrest warrant is limited to a review of the warrant and affidavit documents themselves. As such, the Defendant is not requesting a hearing at this time. Rather, the Defendant respectfully requests that the Court set deadlines for submissions of briefs or authorities and rule upon the motion on or before the final Pretrial Hearing date of September 27, 2018 unless either party subsequent to this Motion requests a hearing or the Court deems a hearing to be necessary.
7. The Defendant stipulates to admission of the search warrant, search warrant affidavit, arrest warrant, and arrest warrant affidavit for the limited purpose of ruling on this Motion. All documents are attached to this Motion.

WHEREFORE, Defendant requests that the Court issue an Order suppressing the above named items from use by the State at trial or other hearing and for all other relief just and proper in the premises.

Respectfully Submitted,

/s/ James Metzger
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Certificate of Service

The undersigned hereby certifies that a copy of the foregoing has been served by first class US mail postage prepaid or by electronic service this 29th day of August, 2018.

Loren Delp
Hendricks County Prosecutor's Office

/s/ James Metzger
James D. Metzger, #24648-49

PRELIMINARY QUESTIONS

BY MR. METZGER:

Q Uh, Officer did - are these pictures reflective of things you saw firsthand?

A Yes, Sir they are.

Q In the residence they are?

A Yes, Sir.

MR. METZGER: Okay. Your Honor, I would object on the basis that the photos were obtained as a result of a search warrant that was in violation of the Fourth Amendment to U.S. Constitution, Article I, Section XI, of the Indiana Constitution, uh, specifically those warrants do not provide a valid nexus between, uh, the place to be searched and the items to be searched. It also relied on, uh, conclusions and there were various sources of, uh, information whose credibility was not verified. I - on behalf of Defendant Snow I'd filed a written motion along with a, uh, memorandum of law and response to the State's memorandum of law. The Court denied that motion. Uh, I would ask to incorporate the State's, or I'm sorry, the Defense's memorandum of law and response, uh, into the objection being currently lodged with the Court.

THE COURT: Response.

MR. DELP: Judge, we would renew our response that was, uh, indicated in the briefs and ask the Court to uphold its ruling.

THE COURT: Uh, I believe that I did find a nexus of the place and the items and did find it was credible, uh, for the search.

MR. PAGE: For the record, no objection from Defendant Caldwell.

THE COURT: You said no objection?

MR. PAGE: No objection from Caldwell.

THE COURT: So then as to, uh, Mr. Snow alone, uh, show that the

Defendant renews his objection and the Court having reviewed again the written motion and the law incorporated therein still finds that the, uh, it was a proper search. Overrule the objection.

MR. DELP: State would move to - I'm sorry.

THE COURT: Overrule the objection.

MR. DELP: State would move to publish 22 through 45.

THE COURT: Show they're admitted.

(State's Exhibits 22 through 45 admitted over objection)

MR. METZGER: Your Honor, if I may, uh, can I lodge a continuing objection to any testimony or evidence, uh, the officer may describe as far as observations or items found in the house on the same basis?

THE COURT: Sure.

MR. METZGER: Thank you.

THE COURT: Thank you.

MR. DELP: Now permission to publish.

THE COURT: Sure, thank you. What that does ladies and gentlemen, a continuing objection, uh, it means that every time the officer talks about these, uh, counsel doesn't have to object and give another, uh, reason why and go through all this. Uh, that's a courtesy to you. Okay?

Q Detective, I'm going to put these for ease of reference right here.

A Okay.

Q (inaudible). If you need to, I want you to feel free to step up and demonstrate what's depicted in these photographs. Can you indicate what it is that we're looking at in State's 22?

A Looking at the front of the residence.

IN THE

INDIANA COURT OF APPEALS

No. 19A-CR-949

ERNEST RAY SNOW, JR.,	)	Appeal from the
	)	Hendricks Circuit Court
Appellant (Defendant Below),	)	
	)	
v.	)	No. 32C01-1705-F5-80
	)	
STATE OF INDIANA,	)	
	)	The Honorable
Appellee (Plaintiff Below).	)	Dan Zielinski, Judge

APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

STATEMENT OF ISSUES

I. Whether the trial court should have admitted evidence seized pursuant to a warrant that was not supported by probable cause.

II. Whether the evidence is insufficient to support the conclusion that Snow aided, induced, or caused the Fitbit heist.

III. Whether the conviction on a criminal organization enhancement violates both Snow's right to be free from double jeopardy and the common law prohibition of enhancing a sentence using the very same behavior used to support the underlying conviction.

STATEMENT OF CASE

Nature of the Case

Ernest Ray Snow, Jr., is appealing a judgment of conviction entered by the Hendricks Circuit Court following a jury trial.

Course of the Proceedings and Disposition of the Issues

The State charged Snow with burglary, a Level 5 felony; theft, a Level 5 felony; conversion, a Level 5 felony; and auto theft, a Level 6 felony. App. Vol. II, pp. 25-36. To these charges, the State added criminal organization and habitual offender sentence enhancements. App. Vol. II, pp. 45-47, 59-61. There were other charges, but they were ultimately dismissed and are therefore not relevant here. App. Vol. II, pp. 25-36, 168-169; App. Vol. III, pp. 41-42.

Snow moved to suppress any evidence that he was in possession of the some of the allegedly stolen property. App. Vol. II, pp. 132-145. He argued that there was no probable cause supporting the search warrant that led to the discovery of the evidence. App. Vol. II, pp. 152-165. The trial court denied the motion to suppress, and Snow renewed his objection to the

evidence at trial. App. Vol. III, p. 18; Tr. Vol. III, pp. 22-23. The trial court overruled the objection and admitted the evidence. Tr. Vol. III, p. 23.

A trifurcated jury trial was conducted over the course of three days. App. Vol. III, pp. 31-32. At the conclusion of the first phase, a jury found Snow guilty of the underlying burglary, theft, conversion, and auto theft charges. App. Vol. III, pp. 34-340. In the second phase of the trial, neither the State nor Snow presented any evidence, but the jury still found Snow guilty of the criminal organization enhancement. App. Vol. III, p. 38; Tr. Vol. III, pp. 164-167. In the third phase, the jury found that Snow was a habitual offender. App. Vol. III, p. 40.

The trial court sentenced Snow to concurrent five-year terms of incarceration on the burglary, theft, and conversion charges, and a consecutive two-year year term of incarceration for conversion. Id. It then added a two-year habitual offender enhancement and five years for the criminal organization enhancement. Id. Thus, the court imposed 14 years of incarceration. Id. The court also ordered Snow to pay $124,740.00 in restitution. App. Vol. III, pp. 97-102. This appeal ensued.

STATEMENT OF FACTS

Ingram Micro distributes products for Fitbit, Inc., and it maintains various facilities in the Indianapolis area. Tr. Vol. II, pp. 133-134, 139-140, 174, 190. In May 2017, Ingram was in the process of moving Fitbit products from one of its warehouses ("the Reeves facility") to another warehouse nearby ("the Air Tech facility"). Tr. Vol. II, pp. 139-140, 175-176, 223. In fact, Ingram was emptying the Reeves facility, so this transfer required two shifts working Monday through Saturday for at least two weeks. Tr. Vol. II, pp. 176, 181, 222.

On Saturday, May 6, 2017, there were five Ingram employees working at the Reeves facility. Tr. Vol. II, pp. 176, 180, 221. Eric Crowe was the supervisor, and Robert Fields, Ricky

Marker, James Jarboe, and Adabehe Adalye were the material handlers. Tr. Vol. II, p. 176. While the material handlers were on a break, Sean Jones and Ernest Snow, visited the facility. Tr. Vol. II, pp. 164, 191, 227-231.

Jones worked for Ingram, though not at the Reeves facility, and he introduced Snow to Fields. Tr. Vol. II, pp. 164, 191, 229. Fields was apparently interested in purchasing some shoes, and Snow apparently had shoes to sell. Tr. Vol. II, p. 230. The two men exchanged phone numbers, and Fields went back to work. Tr. Vol. II, pp. 230-231.

By the time his shift ended on Saturday, Fields and the rest of the crew had loaded at least two trailers. Tr. Vol. II, p. 224. One of the trailers he loaded was left in the yard after the employees went home for the day. Tr. Vol. II, pp. 180-181, 244. That trailer was loaded with more than 50,000 Fitbit products valued at roughly $6.7 million. Tr. Vol. II, pp. 156, 161.

In the very early morning on Sunday, May 7, Fields received a phone call from a man that Fields claims to be Snow. Tr. Vol. II, pp. 232-233. The person on the other end offered to give Fields shoes in exchange for information. Tr. Vol. II, pp. 233-234. Fields told the man on the phone about the trailer full of Fitbits and the security at the Reeves facility. Tr. Vol. II, p. 234. There is no independent evidence that this phone conversation took place. Tr. Vol. III, p. 55.

On Monday, May 8, at approximately 1:30 a.m., someone drove the fully loaded trailer away from the Reeves facility. Tr. Vol. III, p. 58. When Ingram employees arrived at work that morning, they discovered that the chain on the gate had been cut and that the trailer was missing. Tr. Vol. II, pp. 137, 139-140, 161, 182-185. At about the same time, the equipment manager at a nearby trucking company, Blackhorse Carriers, discovered that one of their tractor units was missing. Tr. Vol. II, pp. 102-103; Tr. Vol. III, p. 38. The individual or individuals who moved

the tractor and trailer were never identified. Tr. Vol. II, pp. 116, 131, 184-185, 246; Tr. Vol. III, pp. 55-57.

However, both the tractor and trailer were discovered later that day on the east side of Indianapolis. Tr. Vol. II, pp. 105, 141. By that time, the trailer was empty, but a tracking device on the trailer indicated that it had been parked at a business known as Caldwell Automotive for several hours that morning. Tr. Vol. II, pp. 128, 141-142. Surveillance video from a nearby hotel confirmed the data obtained from the tracking device. Tr. Vol. II, pp. 142-143.

On Tuesday, May 9, Caldwell Automotive was under surveillance when someone arrived in a pickup truck. Tr. Vol. II, p. 146. This person took several boxes from the business, loaded them into the pickup truck, and left. Tr. Vol. II, pp. 146, 149. This person was never identified. Tr. Vol. II, pp. 188-189; Tr. Vol. III, p. 57. A few hours later, the police searched Caldwell Automotive, and they discovered most of the missing Fitbits still packed in shipping boxes. Tr. Vol. II, pp. 153-155, 161; Tr. Vol. III, pp. 39-43.

The police then turned their attention to Fields, and their interviews with Fields led to a warrant for obtaining Snow's phone records. Tr. Vol. III, pp. 43-45. These phone records contained text message between a number allegedly belonging to Snow and other numbers with unknown owners. Tr. Vol. III, pp. 52-53, Ex. 46. These texts referred to the possible sale of 600,000 units of something for $20 apiece. Id. They also mention someone driving a "semi truck" across town, and there is text that declares, "[W]e gone [sic] do it tomorrow." Id. Though the texts suggest that the items for sale were currently in possession of the texter, the messages were sent before the trailer was taken from Ingram. Tr. Vol. III, pp. 52-53, 58.

At some point, police officers executed a search warrant on what they believed to be Snow's home. Tr. Vol. III, pp. 21-24. During their search, the officers found seven Fitbits but

no boxes resembling those found at Caldwell Automotive. Tr. Vol. III, pp. 24-29, 33-34, Exs. 22-45. These Fitbits were allegedly a portion of the units stolen from Ingram, but, with a total of 719 units still missing, they were only a fraction of those that have still yet to be recovered. Tr. Vol. II, p. 161; Tr. Vol. III, pp. 30-31, 62.

SUMMARY OF ARGUMENT

I. The warrant to search Snow's home was not supported by probable cause. Probable cause to search a home requires a reasonable belief that evidence of a crime will be found in the home. The issuing magistrate in this case could not have had a reasonable belief that evidence of a crime would be found in Snow's home because the affidavit supporting the warrant request made no effort to explain why the home had anything to do with the crimes being investigated. Consequently, the evidence seized pursuant to the warrant should have been suppressed.

II. The State did not even attempt to prove that Snow personally engaged in the crimes, and it failed to present sufficient evidence of accomplice liability. Accomplice liability requires evidence that the defendant acted in concert with those who physically committed the crime. In this case, evidence of coordinated action was impossible because the identity of the individuals who committed the burglary, thefts, and conversion are completely unknown. Moreover, the four factors typically used to determine accomplice liability all lead to the conclusion that the evidence was insufficient. There was no evidence of presence at the crime scene or opportunity to prevent the crime. Moreover, there is no evidence Snow participated in, or was present during, the planning of the heist. Therefore, Snow's convictions are unsupported by sufficient evidence and must be reversed.

III. The criminal organization enhancement violates both Snow's right to be free from double jeopardy and the common law prohibition of enhancing a sentence using the very same behavior used to support the underlying conviction. There can be no doubt that the enhancement is problematic because the State did not even attempt to admit additional evidence during phase two of the jury trial. It specifically relied upon the evidence presented in phase one and argued that the evidence there was enough to prove the enhancement. In other words, the very same evidence of the very same behavior was used to obtain the convictions on the underlying felonies and the enhancement. The Court should vacate the criminal organization enhancement.

ARGUMENT

I. THE TRIAL COURT SHOULD NOT HAVE ADMITTED ANY EVIDENCE OBTAINED DURING THE SEARCH OF SNOW'S HOME BECAUSE THAT EVIDENCE WAS SEIZED PURSUANT TO A DEFECTIVE SEARCH WARRANT.

Standard of Review

A trial court is entrusted with "broad discretion" in the admission of evidence, but that discretion is abused when the decision to admit evidence is "clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights." *Guilmette v. State*, 14 N.E.3d 38, 40 (Ind. 2014). Moreover, when the admission or exclusion of evidence turns on the constitutionality of a search or seizure, it becomes a question of law that the appellate court considers de novo. *Carpenter v. State*, 18 N.E.3d 998, 1001 (Ind. 2014). Generally, when addressing this issue, this Court may examine both the foundational evidence given at trial and the evidence from any pre-trial suppression hearing that does not conflict with the trial testimony. *See id*.

However, when the admission of evidence is premised on the validity of a search warrant, the reviewing court examines whether there was a substantial basis to conclude that there was

probable cause supporting the warrant. *Gray v. State*, 758 N.E.2d 519, 521 (Ind. 2001). Throughout this review, the decision of the magistrate is given significant deference, but the "search for substantial basis must focus on whether reasonable inferences drawn from the totality of the evidence support the determination." *Id*. (quotation omitted). At no time, may the reviewing court consider *post hoc* justifications for the warrant but must instead consider only the evidence presented to the issuing magistrate. *Figert v. State*, 686 N.E.2d 827, 830 (Ind. 1997)

Discussion

The warrant to search Snow's home was not supported by probable cause. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend IV. The Indiana Constitution, in nearly identical language, guards the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure, shall not be violated." IND. CONST. art. I, § 11. These provisions "guarantee that a court will not issue a search warrant without probable cause." *Overstreet v. State*, 783 N.E.2d 1140, 1157 (Ind. 2003). Probable cause to search a premise will be found when there are enough facts "to permit a reasonably prudent person to believe that a search of those premises will uncover evidence of a crime." *Helsley v. State*, 809 N.E.2d 292, 295 (Ind. 2004). In this case, the affidavit used to obtain the warrant could not allow a reasonable person to believe that evidence of the Fitbit heist would be found in Snow's home.

In this way, this case is very much like this Court's decision in *Hensley v. State*, 778 N.E.2d 484 (Ind. Ct. App. 2002). In Hensley, a drug dealer identified the defendant as one of her customers. Police officers used this information to obtain a warrant to search the defendant's

home. The only thing supporting the application for the warrant was an affidavit advising the magistrate that the drug dealer had implicated the defendant in a drug deal. There was no explanation as to why there would be evidence of a drug deal at the defendant's home. The defendant attempted to suppress evidence later found in her home on the grounds that the warrant was not supported by probable cause. The trial court rejected that attempt, and this Court reversed. *Id*. at 490. According to the Court, even though the affidavit described "the place to be searched, the things to be searched for, and [claimed the officer] had cause to believe that the items to be searched for would be concealed there, the affidavit did not sufficiently set forth facts then in his knowledge to constitute probable cause to search the house." *Id*. at 488.

The affidavit in this case suffers from the same infirmity. Indeed, the affidavit is not even as good as the one used in *Hensley*, because the affidavit here barely describes why Snow is suspected of having any involvement in the crime in the first place. More importantly, as in *Hensley*, the affidavit in this case does not explain why evidence of the crime would be at Snow's home. Snow is referred to in the affidavit on only four occasions. App. Vol. II, pp. 137-140. The first mention is to a contact in an iPhone belonging to someone who was found in possession of a stolen Fitbit. App. Vol. II, p. 140. The affidavit then claims, "'Snow' is a person of interest in the Fitbit theft case." Id. It goes on to give Snow's full name, birth date, and address, and it describes the things that the applying officer expected to find. Id. Like the boilerplate language and description of the expected find in *Hensley*, none of this explains why Snow's home would contain evidence of the Fitbit heist. Without such an explanation, the affidavit cannot support a finding of probable cause to search Snow's home. Therefore, the search warrant was deficient, and the trial court should not have admitted evidence of the Fitbits found in Snow's home pursuant to that defective warrant.

II. THE EVIDENCE IS INSUFFICIENT TO PROVE THAT SNOW AIDED, INDUCED, OR CAUSED THE CRIMES.

Standard of Review

When reviewing the sufficiency of the evidence supporting a conviction, this Court neither reweighs that evidence nor reevaluates the credibility of witnesses. *Melton v. State*, 993 N.E.2d 253, 255 (Ind. Ct. App. 2013), *trans. denied*. Instead, the Court considers only the probative evidence and reasonable inferences that support the verdict. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005). A conviction must be affirmed, "if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt." *Id.* However, a conviction must be reversed "if the record does not reveal substantial evidence of probative value and there is a reasonable doubt in the minds of reasonably prudent persons." *Clark v. State*, 695 N.E.2d 999, 1002 (Ind. Ct. App. 1998), *trans. denied*.

Discussion

The State did not even attempt to prove that Snow personally engaged in the crimes,[1] and it failed to present sufficient evidence of accomplice liability. The State relied on a theory of accomplice liability, which arises when "[a] person ... knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense." Ind. Code § 35-41-2-4. Under this theory, the State need not show that the defendant "personally participated in the

[1] The State concedes that there is no evidence that Snow stole the semi-tractor or that he was even present when the trailer was taken from the Ingram facility. *See* Tr. Vol. III, p. 106 ("[The first point to make is that the State is not arguing that it has proved beyond a reasonable doubt that the individual in the Black Horse tractor put the, uh, camera or the GPS with either one of these defendants. Or that either one of these defendants was present at Ingram Micro on May eighth at the time that trailer was driven out."). Thus, the only question is whether the State proved that Snow was an accomplice.

commission of each element of the offense." *Schnitz v. State*, 650 N.E.2d 717, 721 (Ind. Ct. App. 1995), *summarily aff'd* 666 N.E.2d 919 (Ind. 1999). But the State must show that the "accomplice acted in concert with those who physically committed the elements of the crime. *Id*. There is no evidence in this case that Snow acted in concert with anyone, because the identity of the individuals who committed the burglary, thefts, and conversion is completely unknown. Tr. Vol. II, pp. 116, 131, 184-185, 188-189.

Moreover, a quick look at the factors used to determine whether a defendant acted as an accomplice demonstrate the weakness of the State's case. These factors are "(1) presence at the scene of the crime; (2) companionship with another engaged in a crime; (3) failure to oppose the commission of the crime; and (4) the course of conduct before, during, and after the occurrence of the crime." *B.K.C. v. State*, 781 N.E.2d 1157, 1164 (Ind. Ct. App. 2003). The first and third factors are simply nonexistent. With respect to the first factor, the State has admitted that there is no evidence that Snow was present at the crime scene. Tr. Vol. III, p. 106. From this admission, it follows that the third factor cannot logically be present, because one cannot oppose a crime if there is no evidence suggesting an opportunity for opposition.

The remaining two factors are also weak, though this requires additional explanation. There is *some* evidence that Snow had a relationship with the owner of Caldwell Automotive where many of the stolen Fitbits were found. Tr. Vol. II, pp. 198-200. There is also *some* evidence that Snow had an interest in the security at Ingram before the heist. Tr. Vol. II, pp. 232-234. However, neither of these evidentiary facts demonstrate that Snow participated in, or was present during, the planning of the heist, and thus cannot by themselves support the entire weight of the conviction. *See Ward v. State*, 567 N.E.2d 85, 86 (Ind. 1991) (finding the evidence insufficient to support a conviction of felony murder on a theory of accomplice liability where

there was no evidence that the defendant "participated in, or was present during, the planning of the robbery").

In fact, this limited evidence is very much like the evidence found insufficient by the Supreme Court in *Seats v. State*, 254 Ind. 457, 260 N.E.2d 796 (1970). In *Seats*, the defendant walked into a gas station and engaged the clerk in a conversation. Five minutes later, the defendant left, and the clerk was approached from the rear by a man with a gun. The gunman took some money. Minutes later, the defendant was arrested and identified by the clerk. The defendant was also in the presence of the gunman. Still, the Supreme Court found that there was not enough evidence to support a conviction of aiding and abetting robbery. *Id*. at 799-800.

The evidence that Snow was involved in the Fitbit is not even as strong as the evidence of accomplice liability in *Seats*. In *Seats*, the defendant was at the crime scene moments before the crime and in the presence of the man that committed the crime only minutes later. In this case, there is no contemporaneous presence at the crime scene, no evidence of who committed the actual heist, and no evidence of Snow in the presence of any malefactors following the crime. If the evidence in *Seats* was not enough to sustain a conviction, then the evidence here was wholly inadequate. The convictions should therefore be reversed.

III. THE CRIMINAL ORGANIZATION ENHANCEMENT VIOLATES BOTH SNOW'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY AND THE COMMON LAW PROHIBITION OF ENHANCING A SENTENCE USING THE VERY SAME BEHAVIOR USED TO SUPPORT THE UNDERLYING CONVICTION.

Standard of Review

An appellate court reviews a double jeopardy claim *de novo*. *Rexroat v. State*, 966 N.E.2d 165, 168 (Ind. Ct. App. 2012), *trans. denied*.

Discussion

The criminal organization enhancement violates Snow's right to be free from double jeopardy. The Indiana Constitution provides in relevant part, "No person shall be put in jeopardy twice for the same offense." IND. CONST. art. I, § 14. This provision prevents the State from proceeding against a person twice for the same criminal transgression. *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999). "[T]wo offenses are the 'same offense' in violation of the Indiana Double Jeopardy Clause if, 'with respect to *either* the statutory elements of the challenged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.'" *Spivey v. State*, 761 N.E.2d 831, 832 (Ind. 2002) (quoting *Richardson*, 717 N.E.2d at 49) (emphasis in the original). Here, the statutory elements are not the issue. The problem in this case is that the actual evidence used to convict Snow of the underlying felonies and the criminal organization enhancement was identical.

Because of the way the trial was conducted, this Court can be certain that the jury used the exact same evidence to convict Snow of the underlying felonies and criminal organization enhancement. To find a double jeopardy violation using the actual evidence test, this Court must be able to conclude that "there is a reasonable possibility that the evidentiary facts used by the factfinder to establish the essential elements of an offense for which the defendant was convicted or acquitted may also have been used to establish all the essential elements of a second challenged offense." *Hines v. State*, 30 N.E.3d 1216, 1222 (Ind. 2015). To determine what facts were used by the factfinder, the reviewing court may "consider the charging information, jury instructions, arguments of counsel and other factors that may have guided the jury's

determination." *Id*. In this case, the argument of the prosecutor is all that is necessary to determine that the criminal organization enhancement violated the actual evidence test.

During its opening argument in the second phase of the trial, the State all but admitted a violation of the actual evidence test. The prosecutor stated, "[T]he State is incorporating all of the evidence that you heard presented in the first phase of the trial and we're going to rely on that evidence." Tr. Vol. III, p. 163. True to its word, the State "rested" its case in the second phase without presenting a shred of evidence. Tr. Vol. III, pp. 164-167. Then, in its closing, the State simply summarized the evidence presented during phase one of the trial. Tr. Vol. III, pp. 168-169. In other words, this Court is not required to speculate about what evidence guided the jury's guilty verdict on the criminal organization enhancement. The Court can be sure that the jury used the very same evidence used to support the underlying felonies. Given the State's presentation, the jury had no other choice. Therefore, the criminal organization enhancement violated Mr. Snow's right to be free from double jeopardy under the Indiana Constitution.

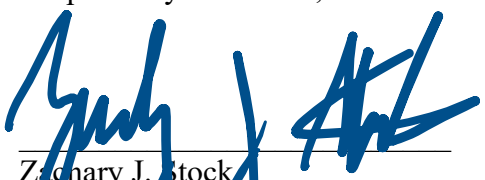
For the same reason, the enhancement also violates the common law prohibition of enhancements that rest on the very same acts used to convict a person of a crime. There are "a series of rules of statutory construction and common law that supplements the constitutional protections afforded by the Indiana Double Jeopardy Clause." *Miller v. State*, 790 N.E.2d 437, 439 (Ind. 2003). One of these rules has long prohibited "conviction and punishment for an enhancement of a crime where the enhancement is imposed for the very same behavior or harm as another crime for which the defendant has been convicted and punished." *Cross v. State*, 15 N.E.3d 569, 571 (Ind. 2014) (quotation omitted). Even if the convictions do not rise to the level of double jeopardy violations, they certainly run afoul of the common law rule.

Again, in this case, the State itself has argued that it used the same behavior to convict and enhance. The State argued, "[I]n effect there's an enhancement as a result of participating in the commission of a felony which both of the defendants have done and that you have found them guilty of." Tr. Vol. III, p. 163. This is unmistakably an invitation that the jury use the same behavior to convict on the underlying felonies and the enhancement. Again, the jury has no alternative. It was not given any new evidence that would have allowed a different method of finding guilty. The criminal organization enhancement cannot stand.

CONCLUSION

Based upon the foregoing, Appellant, Ernest Ray Snow, Jr., by counsel, respectfully asks this Court to reverse the judgment of conviction and remand with instruction to enter a judgment of acquittal. In the alternative, Appellant asks that judgment of conviction on be reversed and the cause remanded with instructions to exclude the evidence found pursuant to the defective warrant. As a third alternative, Appellant requests that the criminal organization enhancement be vacated and the cause remanded for resentencing pursuant to *Jackson v. State*, 105 N.E.3d 1081 (Ind. 2018).

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I do solemnly affirm under the penalties for perjury that on September 11, 2019, I served upon opposing counsel in the above-entitled cause one copy of the foregoing by electronic service using IEFS as follows:

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Zachary J. Stock

IN THE
INDIANA COURT OF APPEALS

No. 19A-CR-949

ERNEST SNOW JR., *Appellant-Defendant*, v. STATE OF INDIANA, *Appellee-Plaintiff*.	Appeal from the Hendricks Circuit Court, No. 32D01-1705-F5-80, The Honorable Dan Zielinski, Judge.

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE ISSUES

I. Whether the trial court erred in admitting evidence seized pursuant to a warrant.

II. Whether sufficient evidence supported Snow's convictions.

III. Whether Snow's criminal-organization sentence enhancement violated double-jeopardy principles.

STATEMENT OF THE CASE

Nature of the Case

Ernest Ray Snow, Jr. appeals his convictions for auto theft, a Level 6 felony; criminal conversion, a Level 5 felony; theft, a Level 5 felony; and burglary, a Level 5 felony, and his sentence enhancement for committing a felony as part of a criminal organization.

Course of Proceedings

On May 25, 2017, the State charged Snow with burglary, a Level 5 felony; theft, a Level 5 felony; theft, a Level 6 felony; conspiracy to commit burglary, a Level 5 felony; criminal conversion, a Level 5 felony; and two counts of auto theft, Level 6 felonies (App. Vol. II 25-31). On July 14, 2017, the State filed a motion to add a sentence enhancement for criminal organization, which was granted (App. Vol. II 45-47). On July 26, 2017, the State filed another motion to add a sentence enhancement alleging Snow to be a habitual offender, which was also granted (App. Vol. II 59-61). On September 20, 2018, the Stated motioned to dismiss the

conspiracy to commit burglary count and one count of auto theft (App. Vol. II 168-69).

On October 11, 2018, the jury found Snow guilty of auto theft, criminal conversion, theft, burglary, and the criminal-organization enhancement (Tr. Vol. III 148-49, 188). The jury also found Snow to be a habitual offender (Tr. Vol. III 213). On March 28, 2019, the trial court sentenced Snow to five years for burglary, five years for theft, five years for criminal conversion, and two years for auto theft all to run concurrent (Tr. Vol. III 230). The trial court enhanced Snow's sentence five years for criminal organization and four years for being a habitual-offender for an aggregate sentence of 14 years in the Department of Correction (Tr. Vol. III 230-31).

STATEMENT OF THE FACTS

On May 6, 2017, several employees of Ingram Micro were working overtime loading pallets of Fitbits and accessories into trailers so they could be moved to a new warehouse (Tr. Vol. II 139-40, 221-23). That day, Snow came to the Ingram warehouse with another employee of a different Ingram location who introduced Snow to a forklift operator, Robert Fields (Tr. Vol. II 164, 193, 220, 221, 229). Snow was driving a gold or bronze Ford F350 truck (State's Ex. 21). Snow and Fields discussed shoes Snow had for sale and exchanged phone numbers (Tr. Vol. II 229, 230, 231). When the employees left for the night, a trailer loaded with Fitbits and accessories was left outside the warehouse but inside locked gates along with two other empty trailers (Tr. Vol. II 135-36, 164, 225-26). Later that night, Snow called Fields and offered to give him 10 pairs of Jordan tennis shoes in exchange for

information about the security and trailers at the Ingram warehouse (Tr. Vol. II 223). Fields gave Snow information regarding the security personnel working at Ingram and the trailer number of the trailer that was full of Fitbits (Tr. Vol. II 234).

In the early morning hours of May 8, 2017, a semi-tractor was stolen from Black Horse Carriers in Plainfield, IN (Tr. Vol. II 102-03; State's Ex. 2). Shortly thereafter, a trailer owned by Venture Logistics, being leased by Ingram Micro, filled with Fitbits and accessories was stolen from Ingram Micro in Plainfield, IN (Tr. Vol. II 120, 122, 139, 140; State's Ex. 7). The lock on the gate at Ingram had been cut to gain access to the yard with the trailers (Tr. Vol. II 163; State's Ex. 47). Later in the day on May 8, 2017, the tractor and trailer were recovered on the east side of Indianapolis (Tr. Vol. II 127; State's Ex. 4-6). When recovered, no Fitbit products remained in the trailer and the cord for the dash-cam/GPS unit on the tractor had been cut (Tr. Vol. II 107-08, 141). Security personnel from Ingram reviewed the GPS tracking from the trailer and discovered that it had been parked at 3524 Shadeland Ave from 2:30 a.m. to 5:15 a.m. on May 8, 2017 (Tr. Vol. II 141-42; State's Ex. 3).

Ingram security went to 3524 Shadeland Ave and noticed a motel across the street (Tr. Vol. II 142). On May 9, 2017, Ingram security was able to view the security footage from the motel and observed the stolen tractor and trailer exit the parking lot across the street at approximately 5:19 a.m. on May 8, 2017 (Tr. Vol. II 142-43; State's Ex. 8). Ingram security contacted Plainfield Police Department with this information and continued to surveil the Shadeland address (Tr. Vol. II 145).

Ingram security observed Snow's gold or bronze F350 pickup truck arrive at 3524 Shadeland Ave, and the occupant of the vehicle make several trips from Caldwell Automotive to the truck carrying boxes that matched those used to store the Fitbit products (Tr. Vol. II 146, 200; State's Ex. 8, 9. 10). Police officers obtained a search warrant for Caldwell Automotive (Tr. Vol. II 39).

During the search of Caldwell Automotive, boxes and pallets of the stolen Fitbits and accessories were discovered (State's Ex. 13-20). Officers also spoke with Gregory Street who leases the suite next to Caldwell Automotive (Tr. Vol. III 40). Keith Caldwell was identified as the owner of Caldwell Automotive (Tr. Vol. II 196). Street was familiar with both Caldwell and Snow (Tr. Vol. II 196-97, 198). Snow regularly brought his vehicles to Caldwell for work (Tr. Vol. II 198). Street allowed officers to view his security footage from the morning of the heist (Tr. Vol. II 203; Tr. Vol. III 41). The security footage showed people pushing vehicles out of the way from the front of Caldwell Automotive, then the stolen tractor and trailer back into Caldwell, and several people moving boxes and pallets from the trailer in to Caldwell (Tr. Vol. III 41). Street was unable to download the security footage from his DVR by the time the officers finished searching Caldwell Automotive (Tr. Vol. II 203; Tr. Vol. III 41). When officers returned to Street's business the next day to retrieve the surveillance footage, Street advised that the DVR was missing from his business (Tr. Vol. II 214; Tr. Vol. III 43). An acquaintance of Caldwell's had access to Street's business after-hours (Tr. Vol. II 211-12).

On May 25, 2017, Officers obtained a search warrant for Snow's residence (Tr. Vol. III 21; App. Vol. II 136). The affidavit in support of probable cause asserted: In the early morning hours of May 8, 2017, a semi-tractor, trailer, and over $4 million worth of Fitbits and accessories were stolen from various locations in Hendricks County; GPS "pings" on the trailer showed that the trailer spent nearly 2.5-hours at 3524 Shadeland Avenue that morning before being recovered; video surveillance from a nearby inn showed the stolen tractor and trailer pull into 3524 Shadeland Avenue and remain for the same time as indicated by the trailer's GPS; a brown Ford pickup truck was seen arriving at 3524 Shadeland Avenue on May 9, 2017, and its occupants removed boxes from Suite E and loaded them into the truck; Suite E was identified as Caldwell Automotive; boxes and pallets of Fitbits were recovered from Caldwell Automotive pursuant to the execution of a search warrant; Suite E is leased by Keith Caldwell; a neighbor admitted to moving vehicles and assisting Caldwell, along with three to five others, in unloading the stolen trailer; the neighbor stated a man named "Snow" was also present during the unloading of the truck and he believed "Snow" set everything up; the neighbor received two boxes of Fitbits for his assistance; while investigating the theft of a skid steer in Hendricks County, surveillance video showed a bronze Ford F350 with a temporary plate loading the skid steer into the truck; the temporary plate returned to a black GMC Denali registered to Keith Caldwell; the black GMC Denali was parked at Caldwell Automotive during the time officers executed the search warrant for the Fitbits; on May 22, 2017, employees notified law

enforcement that the bronze F350 had returned to the site of the stolen skid steer; officers arrived to observe the occupants of the bronze F350 loading a Kubota tractor onto a trailer behind the F350; officers initiated a traffic stop on the F350 but it fled the scene; the pursuit ended in a crash with both occupants of the F350 exiting the vehicle and running; the passenger of the vehicle was apprehended in possession of one of the stolen Fitbits; while speaking with the suspect on scene, he had several calls from someone listed as "Snow"; Snow was identified as Ernest Snow; Keith Caldwell also had several incoming and outgoing calls from Ernest Snow; it was determined that Snow's address was 14432 Lee Stewart Lane, Fishers, IN (App. Vol. II 137-45). The search warrant was granted the same day (App. Vol. II 136). During the search of Snow's residence, six phones, seven Fitbits, two Fitbit band packs, one Fitbit box were recovered, two laptops, papers, cash, and credit cards were recovered (Tr. Vol. III 24-28; App. Vol. II 136; State's Ex. 22-45). The Fitbits were identified as part of those stolen from Ingram on May 8, 2017 (Tr. Vol. III 30).

Officers then obtained warrants for the phone numbers belonging to Caldwell and Snow (Tr. Vol. III 44-45; App. Vol. II 39-42). Snow's cell phone records showed he sent the following messages to an unknown individual two days before the heist: "This is E" and "Give me a call this morning when you get a chance I have something that may interest you plenty of money involved" (Tr. Vol. III 51-52;

State's Ex. 46).[1] The following exchange of messages with the same individual occurred on the day of the heist:

> Snow: "Can we work do you have an outlet a buyer"
>
> Snow: "It's not a cellphone it has turned out to be these"
>
> Unknown Individual: "No need for a lot of that maybe few of them"
>
> Snow: "I got six hundred thousand of them"
>
> Unknown Individual: "How much you selling them for?"
>
> Snow: "$20 each"
>
> Snow: "If you bomb in bulk I give them to you for $15 apiece"
>
> Snow: "That would leave you a wide range to make you a real good profit off of each one"

(Tr. Vol. III 52; State's Ex. 46). Snow had the following message exchange with another individual the day prior to the heist:

> Snow: "Can you drive semi truck?"
>
> Unknown Individual: "No i have class B"
>
> Snow: "Ok thanks . . . . i need some body that's GAME and I'm gone give them 15000 the drive this truck for me from one side of town to the other"

(Tr. Vol. III 52; State's Ex. 46). The day before the heist, Snow messaged Caldwell: "Bro we gone do it tomorrow get some rest" (Tr. Vol. III 52; State's Ex. 46). Snow also messaged another individual the day of the heist, "[c]all me later today……. it's going to be 300,000 fit bit watches" (Tr. Vol. II 52; State's Ex. 46).

[1] In all citations to the text message communications, grammar, spelling, and formatting in the original messages has been preserved.

Snow filed a motion to suppress any evidence obtained pursuant to the search warrant of his residence, alleging no probable cause supported the issuance of the search warrant (App. Vol. II 132-35). The trial court denied the motion to suppress (App. Vol. III 18). On October 11, 2018, the jury found Snow guilty of auto theft, criminal conversion, theft, and burglary (Tr. Vol. III 148-49). The trial court then proceeded to phase II of Snow's trial on the criminal-organization enhancement (Tr. Vol. III 159). The State presented no additional evidence during phase II, but incorporated all of the evidence presented in the first phase of the trial (Tr. Vol. III 163, 164). The jury found Snow guilty of the criminal-organization enhancement (Tr. Vol. III 188). The jury also found Snow to be a habitual offender (Tr. Vol. III 213).

SUMMARY OF THE ARGUMENT

I. The trial court did not err in admitting evidence seized pursuant to a search warrant because there was a substantial basis to find it was supported by probable cause. Snow was identified as being on site when the stolen merchandise was unloaded and as the possible orchestrator of the heist. Snow was connected to Keith Caldwell, the lessee of the location where the stolen merchandise was recovered. He was also connected to the theft of other heavy machinery in which Keith Caldwell and a stolen Fitbit were also connected. A reasonably prudent person could believe that Snow was involved in the heist and that evidence of such could be recovered from his home. Even if the warrant was lacking in probable

cause, the trial court still properly admitted the evidence because the officers relied on the warrant in good faith.

II. Sufficient evidence supported Snow's conviction. Snow was present at the crime scene two days prior to the crime. Snow was friends with Caldwell who was storing the stolen merchandise at his place of business. Snow and Caldwell were in regular communication during the heist. The same truck Snow was previously seen driving was seen at Caldwell's the day after the heist. Snow communicated with multiple individuals regarding the crime before, during, and after its commission. Snow was found in possession of some of the stolen merchandise. Snow's conviction should be affirmed.

III. Snow's sentence for the criminal organization enhancement does not violate the principles of double-jeopardy because Snow was not punished for the same offense twice and the legislature intended that this type of enhancement be applied directly to the underlying offenses. Snow was punished for committing burglary and for engaging in organized criminal activity in order to commit the burglary. Further, the legislature intended that a defendant be sentenced on both the underlying felony and the criminal organization enhancement. Snow's conviction and sentence enhancement for criminal organization should be affirmed.

ARGUMENT

I.
The trial court did not err in admitting evidence seized pursuant to a search warrant.

A trial court has broad discretion to admit or exclude evidence. *Thomas v. State*, 81 N.E.3d 621, 624 (Ind. 2017). Snow is appealing after a completed trial, thus the issue is whether the trial court abused its discretion in admitting the challenged evidence. *Clark v. State,* 994 N.E.2d 252, 259-60 (Ind. 2013). "Because the trial court is best able to weigh the evidence and assess witness credibility," this Court will "only reverse 'if a ruling is clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights.'" *Hall v. State,* 36 N.E.3d 459, 466 (Ind. 2015) (quoting *Carpenter v. State,* 18 N.E.3d 998, 1001 (Ind. 2014)). However, the trial court's ruling on the constitutionality of a search or seizure is reviewed de novo. *Membres v. State*, 889 N.E.2d 265, 268 (Ind. 2008).

Under the Fourth Amendment to the U.S. Constitution, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. To preserve that right, a judicial officer may issue a warrant only "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.* Article 1, Section 11 of the Indiana Constitution contains language nearly identical to its federal counterpart, and our statutory law codifies these constitutional principles requiring search-

warrant affidavits to contain information to support suspicion rising to probable cause. *See* Ind. Code § 35–33–5–2 (2008).

Probable cause to search a premises "is established when a sufficient basis of fact exists to permit a reasonably prudent person to believe that a search of those premises will uncover evidence of a crime." *Overstreet v. State,* 783 N.E.2d 1140, 1157 (Ind. 2003). The existence of probable cause is evaluated pursuant to the "totality-of-the-circumstances" test. *Illinois v. Gates,* 462 U.S. 213, 238 (1983); *see Membres*, 889 N.E.2d at 275 (quoting *Houser v. State,* 678 N.E.2d 95, 99 (Ind.1997)) ("Probable cause exists if 'based on the totality of the circumstances . . . there is a fair probability that a particular place contains evidence of a crime'").

In deciding whether to issue a search warrant, the task of the issuing magistrate is to make a practical, common sense determination whether, given all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Query v. State,* 745 N.E.2d 769, 771 (Ind. 2001) (*citing Gates,* 462 U.S. at 238). The duty of the reviewing court is to determine whether the magistrate had a "substantial basis" for concluding that probable cause existed. *Jaggers v. State*, 687 N.E.2d 180, 181-82 (Ind. 1997) (quoting *Gates*, 462 U.S. at 238-39). "[S]ubstantial basis requires the reviewing court, with significant deference to the magistrate's determination, to focus on whether reasonable inferences drawn from the totality of the evidence support the determination" of probable cause. *Houser*, 678 N.E.2d at 99.

The trial court did not err in admitting evidence seized pursuant to a search warrant because there was a substantial basis to find it was supported by probable cause. The affidavit in support of probable cause asserted that the stolen Fitbits were recovered at Caldwell Automotive and Snow was connected to Caldwell Automotive and the owner of Caldwell Automotive through phone records and eyewitness accounts before, during, and after the heist (App. Vol. II 137-45). A man referred to as "Snow" was present at Caldwell Automotive during the unloading of the stolen Fitbits and believed to have orchestrated the heist (App. Vol. II 137-45). Shortly before, during, and after the heist, the same truck that was connected to Snow was connected to Keith Caldwell, Caldwell Automotive, and another theft of heavy machinery (App. Vol. II 137-45). One of the suspects in the other theft was connected to Snow and was in possession of a stolen Fitbit (App. Vol. II 137-45).

Snow likens his situation to that in *Hensley v. State*, 778 N.E.2d 484 (Ind. Ct. App. 2002), to support his argument that the search warrant lacked probable cause (Def. Br. 10-11). Snow's reliance on *Hensley* is misplaced. In *Hensley*, the court held a probable-cause affidavit was insufficient to support a search warrant because the affidavit failed to link the house being searched to the drug sale. *Id.* at 488. This Court explained that the affidavit "merely contain[ed] a description of a home and an allegation that [the defendant] had purchased methamphetamine the previous day[,]" but did not tie the drug sale to the home to be searched. *Id*. Accordingly, "the affidavit [was] completely devoid of any information describing why [the officer] had good cause to believe that the drugs would be found in the described premises." *Id*.

Drugs are intended to be consumed; therefore, simply because one has possessed drugs in one location does not indicate that drugs are likely to be found at a separate residence at a later date. Whereas someone who has stolen a substantial amount of useable merchandise is likely to have taken, at least, some of that merchandise to their residence for personal use.

Here, unlike *Hensley* where the search warrant contained no information to indicate probable cause that the defendant was involved in anything more than possession of methamphetamine, the search warrant contained information demonstrating Snow's connection to the Fitbit heist. "'P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.'" *Eaton v. State*, 889 N.E.2d 297, 299 (Ind. 2008) (quoting *Gates,* 462 U.S. at 245 n. 13). Snow was identified as being present during the unloading of the stolen Fitbits, identified as the possible orchestrator of the heist, connected to Keith Caldwell—the lessee of the location where the stolen merchandise was recovered, and connected to the theft of other heavy machinery in which Keith Caldwell and a stolen Fitbit were also connected (App. Vol. II 137-45). A reasonably prudent person could believe that Snow was involved in the Fitbit heist and that evidence of such could be recovered from his home. Someone involved in the theft of a substantial quantity of merchandise is likely to have some evidence of such in their residence, and the amount of merchandise stolen in this heist was more than substantial. *See Eaton*, 889 N.E.2d at 300 ("The facts presented in the affidavit and the reasonable inferences therefrom show that the defendant was involved in the receipt and

unloading of a substantial quantity of illegal drugs, and that incriminating records commonly maintained by persons engaged in drug trafficking were likely to be found at the defendant's residence"). Thus, the information contained in the affidavit was sufficient to create probable cause.

Even if this Court finds the warrant lacking in probable cause, the trial court still properly admitted the evidence because the officers relied on the warrant in good faith. Pursuant to the good faith exception, evidence seized in reliance on a search warrant that is ultimately deemed invalid should not be excluded if the police relied on the warrant in objective good faith. *See* I.C. § 35-37-4-5; *Jaggers*, 687 N.E.2d at 184; *see also United States v. Leon,* 468 U.S. 897 (1984). In such cases, there is no police misconduct to deter and thus the purpose of the exclusionary rule is not achieved by the exclusion of this evidence. *Hensley,* 778 N.E.2d at 489. A police officer cannot be said to have relied in good faith on a warrant if: 1) the officer misled the magistrate by filing an affidavit that the officer knew was false or that he would have known was false but for his reckless disregard for the truth; or 2) if the affidavit was so lacking in indicia of probable cause as to render official belief in its validity unreasonable. *Jaggers*, 687 N.E.2d at 184.

In this case, there is no suggestion that the officer misled the court or provided false information in the affidavit. Further, it cannot reasonably be contended that this affidavit was so lacking in probable cause as to render belief in its validity unreasonable. At the time the officer applied for the search warrant, a

thorough investigation was being conducted and Snow was being connected to the heist throughout the investigation in several, independent ways (App. Vol. II 137-45). This was not an affidavit relying on a mere anonymous tip or other insufficient basis for finding probable cause. Rather, this affidavit included information from an identified individual stating Snow was present when the stolen merchandise was unloaded, identified as the orchestrator the heist, in regular communication with the lessee of the location where the stolen merchandise was recovered, and connected to a similar theft of other heavy machinery through another suspect, who was in possession of one of the stolen Fitbits at the time of his arrest (App. Vol. II 137-45). Therefore, the affidavit cannot be deemed so lacking in any indicia of probable cause as to put a police officer on notice that he may not rely on it. The trial court properly admitted the evidence obtained as a result of the search of Snow's residence.

II.
Sufficient evidence supported Snow's convictions.

"When reviewing the sufficiency of the evidence to support a conviction, 'appellate courts must consider only the probative evidence and the reasonable inferences *supporting* the verdict.'" *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007) (quoting *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005)) (emphasis in original). Where there is conflicting evidence, the appellate court must consider the evidence in the light most favorable to the conviction. *Id.* A conviction will be affirmed where there is sufficient probative evidence from which a reasonable trier of fact could

have found the defendant guilty beyond a reasonable doubt. *Abney v. State*, 858 N.E.2d 226, 228 (Ind. Ct. App. 2006); *Dickenson v. State*, 835 N.E.2d 542, 551-52 (Ind. Ct. App. 2005). The evidence, moreover, need not overcome every reasonable hypothesis of innocence. *See Drane*, 867 N.E.2d at 146. This Court neither reweighs the evidence nor judges the credibility of the witnesses. *Dickenson*, 835 N.E.2d at 551.

Sufficient evidence supported Snow's convictions for burglary, theft, criminal conversion, and auto theft under the State's theory of accomplice liability (Tr. Vol. III 106-07). "In Indiana, there is no distinction between the responsibility of a principal and an accomplice." *Wise v. State,* 719 N.E.2d 1192, 1198 (Ind. 1999). Thus, a defendant "may be charged as a principal yet convicted on proof that he or she aided another in the commission of a crime." *Id*. The accomplice-liability statute provides in relevant part that "[a] person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense." I.C. § 35-41-2-4. This Court considers several factors when determining if sufficient evidence showed a defendant aided another in the commission of a crime: "(1) presence at the scene of the crime, (2) companionship with another engaged in a crime, (3) failure to oppose the commission of the crime, and (4) the course of conduct before, during, and after the occurrence of the crime." *Edgecomb v. State*, 673 N.E.2d 1185, 1193 (Ind. 1996). The court in *Edgecomb* makes clear that these factors are a summary and not an exhaustive list. *Id*. at 1200 n.3. The evidence established the existence of all four factors: (1) Snow was present at the crime scene

two days prior to the crime; (2) Snow had a companionship with Caldwell who was storing the stolen merchandise at his place of business, and the same truck Snow was seen driving at Ingram was seen at Caldwell's the day after the heist; (3) Snow did not oppose the commission of the crime, and, in fact, encouraged it; and (4) Snow communicated with multiple individuals regarding the crime before, during, and after its commission, and Snow was found in possession of some of the stolen merchandise.

Two days prior to the heist Snow messaged an individual an individual about "something that may interest [him] plenty of money involved" (Tr. Vol. III 51-32; State's Ex. 46). The next day, Snow was seen at Ingram driving a gold or bronze Ford F350 pickup truck (Tr. Vol. II 229, 231; State's Ex. 21). Later that day, after visiting Ingram, Snow texted another individual asking if he or she could drive a semi-truck and offering to pay someone $15,000 to drive a truck "from one side of town to the other" (Tr. Vol. III 52; State's Ex. 46). The stolen items were, in fact, transported from the west side of Indianapolis to the east side of Indianapolis (State's Ex. 3). That night, Snow called Fields asking for information regarding Ingram's security personnel and the exact trailer that was stolen, which Fields provided (Tr. Vol. II 233-34).Video surveillance showed that that truck driver knew exactly where to go and exactly which trailer to pull even though there were two other trailers in the yard (State's Ex. 157). The night before the heist, Snow messaged Caldwell that "[b]ro we gone do it tomorrow get some rest" (Tr. Vol. III 52; State's Ex. 46). Snow and Caldwell also called one another five times in the day

leading up to the heist (State's Ex. 46). A reasonable jury could easily infer from this information that Snow orchestrated the heist by aiding or inducing the participation of Fields, Caldwell, and the truck driver.

Further, on the day of the heist Snow contacted the same individual he had offered "something that may interest [him]" asking if he were able to find an "outlet a buyer" and that "[i]t's not a cellphone it has turned out to be these" (Tr. Vol. III 52; State's Ex. 46). Ingram was also known to distribute cell phones (Tr. Vol. II 133). When the individual indicated he did not need a lot of them, Snow responded "I got six hundred thousand of them" (Tr. Vol. III 52; State's Ex. 46). The stolen trailer contained 60 pallets of Fitbits and accessories (Tr. Vol. II 140). Snow offered to sell them for $20 a piece or $15 a piece if they were purchased in bulk, and told him he could make a "real good profit off of each one" (Tr. Vol. III 52; State's Ex. 46). Snow also messaged another individual to "[c]all me later today……. it's going to be 300,000 fit bit watches" (Tr. Vol. III 52; State's Exhibit 46). The day of the heist, Snow and Caldwell called one another 10 times beginning at 12:47 a.m., just six minutes after the Black Horse tractor last pinged in the yard (Tr. Vol. II 103; State's Ex. 46). Snow and Caldwell continued to communicate with calls at 12:52 a.m., 1:22 a.m., 2:03 a.m. (State's Ex. 46). Snow and Caldwell did not communicate again until 6:15 a.m. (State's Ex. 46). The stolen trailer was parked at Caldwell Automotive from 2:30 a.m. to 5:15 a.m. (Tr. Vol. II 141-42; State's Ex. 3, 8). A jury could reasonably infer that the men did not need to communicate during that time because they were together at Caldwell Automotive while the stole merchandise

was being unloaded. Based on the evidence, a reasonable jury could, therefore, infer that Snow aided and/or induced those who participated in the Fitbit heist.

The day after the heist, the same gold or bronze truck Snow was previously seen driving at Ingram was seen at Caldwell Automotive and the occupant of the truck was observed loading boxes from Caldwell into the truck (Tr. Vol. II 146, 159; State's Ex. 8, 9, 10). Snow and Caldwell called one another 11 times that day (State's Ex. 46). The calls began at 10:56 a.m., shortly after Ingram security arrived at Caldwell inquiring about the stolen trailer and merchandise (Tr. Vol. II 152; State's Ex. 46). Snow and Caldwell continued to communicate back and forth at 11:01 a.m., 11:02 a.m., 11:06 a.m., 11:18 a.m., 11:25 a.m., 11:39 a.m., 11:42 a.m., 12:51 p.m., and 1:49 p.m. (State's Ex. 46). During this time, the police were able to obtain and execute a search warrant on Caldwell Automotive where boxes and pallets of stolen Fitbits and accessories were recovered (Tr. Vol. II 152-53; State's Ex. 13-20). The length of time of many of the calls indicate Snow and Caldwell engaged in conversation and were not simply exchanging missed calls (State's Ex. 46). During the later execution of a search warrant on Snow's residence, officers recovered several stolen Fitbits, Fitbit band packs, and a Fitbit box from Snow's residence (Tr. Vol. III 24-28; App. Vol. II 136; State's Ex. 22-45).

As the State observed at trial, Snow "was involved every step of the way. From the very beginning trying to get buyers, trying to get a driver, trying to get people together to commit these offenses. And it ends with the Fitbits found in his home" (Tr. Vol. III 110). A reasonable jury could find that Snow orchestrated, aided,

and induced the heist by procuring Fields's involvement by offering him a payout for information on Ingram security personnel and merchandise, inducing another to drive the tractor to steal the trailer full of Fitbits by offering to pay $15,000, inducing or aiding Caldwell's involvement by utilizing his business to store the stolen items, inducing others to purchase or resell the stolen merchandise, and by possessing the stolen merchandise himself. Thus, sufficient evidence existed to support Snow's convictions for burglary, theft, criminal conversion, and auto theft.

III.
Snow's sentence enhancement for criminal organization does not violate the principles of double-jeopardy.

Article I, section 14 of the Indiana Constitution provides in relevant part that "[n]o person shall be put in jeopardy twice for the same offense." A violation of double jeopardy occurs "if, with respect to *either* the statutory elements of the challenged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." *Richardson v. State,* 717 N.E.2d 32, 49 (Ind. 1999) (emphasis in original). Under the actual evidence test, reviewing courts examine the evidence at trial to determine whether each challenged offense was established by separate and distinct facts. *Garrett v. State,* 992 N.E.2d 710, 719 (Ind. 2013). A violation occurs if there is a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may have also been used to establish the essential elements of a second challenged offense. *Id.* "[U]nder the *Richardson* actual evidence test, the Indiana Double Jeopardy Clause is not violated when the

evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense." *Spivey v. State,* 761 N.E.2d 831, 833 (Ind. 2002). These principles permit convictions for multiple offense committed in a protracted criminal episode. *Garrett*, 992 N.E.2d at 720. Allegations of a double jeopardy violation are reviewed de novo. *Berg v. State*, 45 N.E.3d 506, 509 (Ind. Ct. App. 2015).

Snow's sentence for the criminal organization enhancement does not violate the principles of double-jeopardy because Snow was not punished for the same offense twice and the legislature intended that this type of enhancement be applied directly to the underlying offenses. Snow argues that the prohibition against double-jeopardy was violated in this case because the actual evidence used to convict him for the underlying offenses was the same as the evidence used to enhance his sentence for criminal organization activity (Def. Br. 16-17). While the *Richardson* rule is aimed primarily at multiple convictions, there is also a general prohibition against multiple enhancements absent explicit legislative direction. *Nicoson v. State*, 938 N.E.2d 660, 662-63 (Ind. 2010). Therefore, double jeopardy governs concerns about the elements of multiple counts and claims of multiple sentencing enhancements turn on statutory interpretation. *Id.*

The criminal organization enhancement under Section 35-50-2-15(b), for which Snow was convicted, "is fundamentally related to its underlying felony or felonies." *Jackson v. State*, 105 N.E.2d 1081, 1086 (Ind. 2018). "The enhancement increases punishment based on the manner in which the defendant committed the

underlying felony or felonies." *Id* (citing I.C. § 35-50-2-15(b)). Therefore, Snow was not punished twice for the same offense. Snow was punished once for burglary and that sentence was enhanced because of how Snow engaged in organized criminal activity to commit that burglary. Thus, Snow was punished for committing burglary and also for his method of engaging in organized criminal activity.

This Court in *Chavez v. State*, 772 N.E.2d 885, 894 (Ind. Ct. App. 2000), found that "the double jeopardy analysis employed for single-course of conduct crimes [is] not analogous to double jeopardy analysis in complex criminal enterprise cases." (internal quotations omitted). Further, Indiana courts have previously distinguished enhancements from convictions for double-jeopardy purposes. *See Cooper v. State*, 940 N.E.2d 1210, 1215 (Ind. Ct. App. 2011) (stating that under certain circumstances "sentencing enhancements are not offenses for double jeopardy purposes"). The Supreme Court has specifically distinguished the criminal-organization enhancement from the habitual-offender enhancement stating that "[b]ecause of this intrinsic connection and the basis for the enhanced punishment, the criminal gang enhancement does not experience the same potential constitutional pressures as the habitual offender enhancement," and noted that "[w]hile both enhancements increase the punishment of crimes, they differ in their aims, requirements, and results." *Jackson*, 105 N.E.2d at 1086-87.

In *Chavez*, this Court analyzed Indiana's Racketeer Influenced and Corrupt Organizations Act (RICO), a similar statute aimed at criminal organizations. *See Chavez*, 772 N.E.2d at 893-95; I.C. § 35-45-6-2. The Court held that a defendant

may be convicted of both a RICO violation and its predicate offenses. *Id*. at 895. It held that convictions under RICO were not subject to the two-part analysis under *Richardson*, and that the legislature intended to permit the imposition of cumulative sentences. *Id*. at 893-94. This Court wrote:

> [R]egardless of the standard used to determine whether a defendant has been subjected to double jeopardy, the intent of the legislature with respect to RICO remains the same: to permit cumulative punishment and to 'seek eradication of organized crime . . . by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.'

Id. at 984 (quoting *Dellenbach,* 508 N.E.2d 1309, 1315 (Ind. Ct. App. 1987). Therefore,

> to constrain Indiana law enforcement to choose either to convict on the predicate offense, thus foreclosing the possibility of a RICO charge, or to idly wait until a drug dealer has committed enough crimes to constitute a RICO violation is absurd and would frustrate the very purpose for which the statute was enacted.

Id. at 895.

Similar to the RICO statute in *Chavez*, the criminal-organization enhancement at issue in this case is aimed at eradicating organized crime by providing enhanced sanctions for those involved in criminal organization, and would become moot if a trial court could not enhance the underlying felony without violating the prohibition against double jeopardy. Due to the nature of the criminal-organization-enhancement statute, the same facts utilized to establish the underlying felony would more often than not be used to establish that the defendant engaged in a criminal organization to commit the underlying felony, as the Supreme

Court recognized in *Jackson*. *See Jackson*, 105 N.E.2d at 1086 (stating the criminal organization enhancement is "intrinsically related" and "fundamentally tied" to the underlying felonies and is, therefore, "the basis for the enhanced punishment"). Finding that a conviction for both the criminal organization enhancement and the underlying felony violates double-jeopardy principles would result in a foreclosure on the State to utilize the criminal-organization enhancement. That cannot be the legislature's intended result. Because Snow was not sentenced for the same offense twice and the legislature intended that a defendant be sentenced on both the underlying felony and the criminal organization enhancement, no violation of the prohibition against double-jeopardy occurred.

CONCLUSION

This Court should affirm Snow's convictions and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 11, 2019, the foregoing document was electronically filed using the Indiana E-filing System ("IEFS"). I also certify that on October 11, 2019, the foregoing was served upon opposing counsel, via IEFS, addressed as follows:

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IN THE

INDIANA COURT OF APPEALS

No. 19A-CR-949

ERNEST RAY SNOW, JR.,	)	Appeal from the
	)	Hendricks Circuit Court
Appellant (Defendant Below),	)	
	)	
v.	)	No. 32C01-1705-F5-80
	)	
STATE OF INDIANA,	)	
	)	The Honorable
Appellee (Plaintiff Below).	)	Dan Zielinski, Judge

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

SUMMARY OF ARGUMENT

I. By employing a classic red-herring argument, the State has essentially admitted that the affidavit used to obtain the search warrant could not have allowed a reasonable person to believe that a search of Snow's home would uncover evidence of a crime. The State would have this Court focus on the probable cause to believe that Snow was involved in the Fitbit heist because affidavit supporting the search warrant wholly fails to establish a nexus between the crime and Snow's home. Therefore, the warrant was defective, and the evidence should have been suppressed. Moreover, the good-faith exception does not apply. The police themselves were responsible for the defective affidavit. Consequently, the traditional exclusionary rule should apply.

II. The evidence was insufficient to establish accomplice liability. Of the four factors used to examine the existence of such liability, only two are arguably present, and these alone are not sufficient to sustain the conviction. Moreover, the State makes no attempt to distinguish the authority cited by Snow in Appellant's Brief. Under this authority, the evidence is insufficient to sustain the conviction.

III. The criminal organization enhancement violated the *Richardson* actual evidence test because, as the prosecution admitted, the same evidence was used to obtain both the enhancement and the underlying convictions. The State's suggestion that the actual evidence test does not apply to sentence enhancements is incorrect. Moreover, even if the test does not apply, the enhancement **in this particular case** still violates the well-established rule prohibiting punishment for an enhancement of a crime when it is imposed for the very same behavior for which the defendant has already been convicted and punished.

ARGUMENT

I. THE AFFIDAVIT USED TO OBTAIN THE SEARCH WARRANT LACKS ALL INDICIA OF PROBABLE CAUSE TO BELIEVE THAT EVIDENCE OF THE FITBIT HEIST WOULD BE FOUND IN SNOW'S HOME; THEREFORE, THE TRIAL COURT ERRONEOUSLY ADMITTED THE EVIDENCE SEIZED FROM SNOW'S HOME.

A. The affidavit did not establish probable cause to believe that evidence of a crime would be found in Snow's home.

The structure of the State's argument all but admits that the affidavit used to obtain the search warrant could not have allowed a reasonable person to believe that a search of Snow's home would uncover evidence of a crime. Of course, evidence to support a reasonable belief is what an affidavit to obtain a search warrant must contain if the warrant is to be valid. *See Helsley v. State*, 809 N.E.2d 292, 295 (Ind. 2004). And the State certainly tries to invoke the magic words when it argues that "[a] reasonably prudent person could believe that Snow was involved in the Fitbit heist." Appellee's Br. p. 17. But this is a rhetorical sleight of hand; it is a classic red herring argument. A reasonable belief that Snow was involved in the heist is not the same as a reasonable belief that evidence of the heist would be found in Snow's home. In short, the State is directing attention away from the relevant issue, *i.e.*, the reasonableness of believing that Snow's home contained evidence of a crime, to an irrelevant issue, *i.e.*, the reasonableness of believing that Snow was involved in a crime.

To further this argument, the State unpersuasively likens this case to *Eaton v. State*, 889 N.E.2d 297 (Ind. 2008). In *Eaton*, police caught the defendant at the scene of a drug deal involving a large quantity of cocaine (between 8 to 9 pounds) and a significant amount of cash ($60,000 to $100,000). A subsequent search of the defendant's home, which was not the scene of the drug transaction, revealed additional useful evidence. The defendant argued there was no probable cause to support the search of his home, and he sought the suppression of the evidence

found during the search. However, in addition to describing the events leading up to and including the drug deal, the affidavit supporting the warrant application contained a critical bit of information. The affiant, who worked for the Drug Enforcement Administration, averred "that drug traffickers commonly keep U.S. currency within quick access and maintain records in a variety of forms including ledgers, computers, cell phones, pagers, phone bills, and wire transfer receipts." *Id*. at 300 (quotations omitted). This assertion about what "drug traffickers commonly keep" allowed a majority of the Supreme Court to conclude that "the affidavit established a fair probability, that is, a substantial chance, that evidence of drug trafficking would be found at the defendant's residence." *Id*.

The affidavit in this case is nothing like the affidavit in *Eaton*. In *Eaton*, the affidavit was sufficient because it presented two facts from which an inference of probable cause could be drawn: (1) the defendant was involved in drug trafficking on a significant scale, and (2) such drug traffickers usually keep specific items in their possession. *See id*. ("The … affidavit and the reasonable inferences therefrom show that the defendant was involved in the receipt and unloading of a substantial quantity of illegal drugs, **and** that incriminating records commonly maintained by persons engaged in drug trafficking were likely to be found at the defendant's residence.") (emphasis added). Unlike the affidavit in *Eaton*, the affidavit in this case contains, at most, one fact. Arguably, the affidavit shows that Snow had some relationship to the crime.[1] However, the affidavit absolutely does not describe what the perpetrators of similar crimes "commonly keep" in their homes. A valid inference cannot be drawn from a single fact; thus, unlike the affidavit in *Eaton*, the affidavit in this case did not establish probable cause to believe that evidence would be found in Snow's home.

[1] Of course, Snow does not concede even this point.

Moreover, even if it were logically possible, the conclusion drawn by the State would not be advisable. It would obliterate the distinction between the probable cause to arrest and the probable cause to search. *See* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.1(b) (5th ed.) ("The other side of the coin is that there may be probable cause to arrest a person for an offense involving the use of certain instrumentalities without there being probable cause to search that person's residence for them."). With that distinction gone, all future search warrant applications could simply establish that the defendant was suspected of a crime, and his home, office, or vehicle could be searched on the strength of that suspicion alone. This would be perilously close to the infamous general warrants that gave rise to the Fourth Amendment. *See Harris v. United States*, 331 U.S. 145, 191 (1947), *overruled in part by Chimel v. California*, 395 U.S. 752 (1969) (Murphy, J., dissenting) ("[T]he Fourth Amendment was designed in part, indeed perhaps primarily, to outlaw such general warrants."). Consequently, it can be categorically stated that "probable cause to arrest does not automatically provide probable cause to search the arrestee's home." *United States v. Jones*, 994 F.2d 1051, 1055 (3d Cir. 1993). *See also Watkins v. State*, 85 N.E.3d 597, 603–04 (Ind. 2017) ("[A]ffidavits must show probable cause that contraband or evidence is at the place to be searched.").

This might be why the State cannot draw a meaningful distinction between this case and *Hensley v. State*, 778 N.E.2d 484 (Ind. Ct. App. 2002). As the State observes, *Hensley* stands for the proposition that a person's possession of drugs in one location says nothing about the presence of drugs in the same person's home. Appellee's Br. p. 17. According to the State, however, the theft of "a substantial amount of useable merchandise" is different. Id. In such a case, the State believes one can infer that stolen merchandise will be in the person's home. Id. In other words, for the State, *Hensley* is limited to cases involving the possession of readily

consumable contraband. Admittedly, there is a difference between drugs and stolen property, but it is not at all clear why the issuing magistrate may be allowed to assume that a person involved in the theft of a large shipment of personal electronic devices will have evidence of that theft in their home. One might just as easily assume that such a massive quantity of stolen merchandise would be secreted away in a remote location. In this case, for instance, most of the stolen property was found at a location other than Snow's home. Tr. Vol. II, pp. 153-155, 161.

Thus, there is no reason to treat the drugs at issue in *Hensley* any differently than the Fitbits at issue in this case. Under *Hensley*, even a reasonable suspicion that Snow was involved in the heist does not automatically give rise to a reasonable suspicion that stolen property would be found in Snow's home. It was an error for the trial court to conclude otherwise, and the evidence of the Fitbits found in Snow's home should have been suppressed.

B. The good-faith exception does not apply.

The good-faith exception to the exclusionary rule should not be used to affirm the judgment in this case. It is true that the exclusionary rule does not require evidence to be excluded when it is seized pursuant to the good faith execution of a search warrant. *Walker v. State*, 829 N.E.2d 591, 596 (Ind. Ct. App. 2005), *trans. denied*. *See also* Ind. Code § 35-37-4-5. However, this good-faith exception does not apply when the affidavit supporting the warrant is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *United States v. Leon*, 468 U.S. 897, 923 (1984) (quotation omitted). In this case, as discussed above and in Appellant's Brief, the affidavit utterly fails to establish probable cause to believe that evidence of a crime would be found in Snow's home. App. Vol. II, pp. 137-140. An officer cannot act in good faith on a warrant that is based on an affidavit so defective that it does not even attempt to describe the nexus between the criminal activity and the home to

be searched. *See Figert v. State*, 686 N.E.2d 827, 832 (Ind. 1997) ("The lack of any nexus is a critical point in assessing the reasonableness of the officer's reliance on the warrant."). Therefore, the exception does not apply.

The exception does not apply because its purpose would not be served in this case. The good-faith exception was created because the exclusionary rule would often serve no useful purpose – in fact, it would be affirmatively detrimental – in those cases where the police have obtained a warrant to search. As the Supreme Court put it, "In most such cases, there is no police illegality and thus nothing to deter." *Leon*, 468 U.S. at 920-21. This is particularly true when the officers themselves are not the ones responsible for the infirmity of the warrant. *Cf Leon*, 468 U.S. at 921 ("Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."). However, when the warrant is found to be defective because of the conduct of police, the deterrent effect of the exclusionary rule may once again be invoked. See *Figert*, 686 N.E.2d at 833 ("Because the warrant here was issued based solely on the officer's opinion, the officer's reliance cannot be deemed objectively reasonable under *Leon*."). Here, it is the failure of the officers that has led to the defective warrant. As a result, the good-faith exception does not apply, and the evidence seized from Snow's home should have been excluded.

II. THE EVIDENCE IS INSUFFICIENT TO PROVE THAT SNOW AIDED, INDUCED, OR CAUSED THE CRIMES.

The State provides a great deal of innuendo but did not provide direct or circumstantial evidence that Snow acted in concert with whomever it was who stole the semi-tractor and drove off with a truckload of Fitbits. There are at least four factors used to determine whether a defendant acted as an accomplice. These factors are "(1) presence at the scene of the crime; (2) companionship with another engaged in a crime; (3) failure to oppose the commission of the

crime; and (4) the course of conduct before, during, and after the occurrence of the crime." *B.K.C. v. State*, 781 N.E.2d 1157, 1164 (Ind. Ct. App. 2003). There is no dispute about the factors, but there is a significant dispute about whether there are facts that fit within each factor in this case. According to the State, all four factors are present, Appellee's Br. pp. 20-21, but this position is untenable.

With respect to the first and third factors, there is absolutely no evidence that Snow was present when the tractor-trailer was stolen and hooked up to the trailer full of Fitbits; therefore, there is no evidence of any ability to oppose the crimes. Again, the identity of the individuals who broke into the facility and drove off with the merchandise is entirely unknown. Tr. Vol. III, p. 106. Thus, the State suggests that these factors are satisfied by Snow's presence at one of the crime scenes days before the crime was committed and the simple lack of evidence that Snow attempted to stop the unknown malefactors. Appellee's Br. pp. 20-21. This cannot be. If a "defendant's presence **during** the commission of the crime or his failure to oppose the crime, standing alone, are insufficient to establish accomplice liability," *Watson v. State*, 999 N.E.2d 968, 971 (Ind. Ct. App. 2013) (emphasis added), then it would not be possible for his presence days before the crime to support an inference of accomplice liability.

With respect to the second and fourth factors, the State completely disregards the authority cited by Snow in support of his argument that the evidence was insufficient. The decision of the Supreme Court in *Seats v. State*, 254 Ind. 457, 260 N.E.2d 796 (1970), is not of recent vintage, but it is nonetheless controlling authority. In *Seats*, the defendant was present at a crime scene only minutes before an armed robbery and was caught only minutes later in the presence of the armed robber. Still, the Supreme Court found that there was not enough evidence to support a conviction of aiding and abetting robbery. *Id*. at 799-800. In this case,

there is no contemporaneous presence at the crime scene, no evidence of who committed the actual heist, and no evidence of Snow in the presence of any malefactors following the crime. Under such circumstances, it is difficult, if not impossible, to reconcile the outcome in Seats with the conviction in this case. Therefore, the convictions should be reversed. *See also Ward v. State*, 567 N.E.2d 85, 86 (Ind. 1991) (finding the evidence insufficient to support a conviction of felony murder on a theory of accomplice liability where there was no evidence that the defendant "participated in, or was present during, the planning of the robbery").

III. THE CRIMINAL ORGANIZATION ENHANCEMENT VIOLATES BOTH SNOW'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY AND THE COMMON LAW PROHIBITION OF ENHANCING A SENTENCE USING THE VERY SAME BEHAVIOR USED TO SUPPORT THE UNDERLYING CONVICTION.

As applied to Snow in this case, the criminal organization enhancement violated the double jeopardy protections guaranteed by the Indiana Constitution. Specifically, the enhancement, by the prosecution's own admission, violates the *Richardson* actual evidence test, because it was proven with precisely the same evidence that was used to prove each of the elements of the underlying crimes. Tr. Vol. III, pp. 163, 168-69. To avoid this conclusion, the State cites *Nicoson v. State*, 938 N.E.2d 660 (Ind. 2010). In *Nicoson*, the Court observed that double jeopardy protections "govern claims about the elements of multiple counts, [while] claims of multiple sentencing enhancements turn on statutory interpretation." *Id*. at 663. According to the State, this observation means that the criminal organization enhancement cannot raise double jeopardy concerns. Appellee's Br. pp. 25-26. It is not clear that *Nicoson* stands for such a broad proposition or is even applicable to this case.

Nicoson does not render double jeopardy concerns moot simply because something can be characterized as a sentencing enhancement rather than as a crime in and of itself. In *Nicoson*, the defendant pointed a firearm at his victims to threatened and detain them, and he also fired

several "warning shots" with the same gun. The State charged the defendant with multiple counts of confinement with a deadly weapon and an enhancement for the knowing or intentional use of a firearm. Following a bench trial, the court found the defendant guilty of the underlying felonies and the enhancement. On appeal, the defendant argued that the enhancement was a violation of his right to be free from double jeopardy under the Indiana Constitution because the confinement conviction had already been enhanced by the use of the same gun. The Supreme Court did indeed analyze the statutory authority for the "double enhancement," as opposed to the constitutional dimension of the issue, *Nicoson*, 938 N.E.2d at 662-665, but it only did so after finding there was no double jeopardy violation. *Id*. at 662. As the Court said, "Largely for the reasons given by the Court of Appeals, there [was] no double jeopardy violation under th[e] circumstances." *Id*. But the Court of Appeals had not found that double jeopardy principals were inapplicable. Instead, this Court found no constitutional violation because it distinguished the possession of a firearm needed to prove the confinement charge from the use of the firearm needed to obtain the enhancement. *See Nicoson v. State*, 919 N.E.2d 1203, 1206 (Ind. Ct. App. 2010), *trans. granted, and opinion vacated by* 929 N.E.2d 788 (Ind. 2010). This is hardly a renunciation of the applicability of the *Richardson* actual evidence test to sentence enhancements.

In fact, in *Cross v. State*, 15 N.E.3d 569 (Ind. 2014), a case that cites *Nicoson*, the Supreme Court did not disavow applying constitutional principles to a similar claim. In *Cross*, the issue was whether an enhancement for the possession or use of a firearm was improper when the underlying conviction was for carrying the exact same firearm. The Court found that the enhancement was improper. *Id*. at 573. It is unclear whether the holding is based upon the constitution or on the common law prohibition of enhancements that rest on the very same acts

used to convict a person of a crime. It is very clear, however, that the Court did not reject the possibility of a double jeopardy violation just because it was confronted with a sentence enhancement. Thus, Snow stands by the constitutional analysis in Appellant's Brief.

At the same time, even if a constitutional analysis is inapplicable, the criminal organization enhancement is still improper. As the Court observed in Cross, there is a well-established rule prohibiting "conviction and punishment for an enhancement of a crime where the enhancement is imposed for the very same behavior or harm as another crime for which the defendant has been convicted and punished." *Cross*, 15 N.E.3d at 571 (quotation omitted). Yet, that is exactly what occurred in this case. As the prosecution admitted, "[I]n effect there's an enhancement as a result of participating in the commission of a felony which both of the defendants have done and that you have found them guilty of." Tr. Vol. III, p. 163. This admission is a succinct statement of what the common law rule forbids.

The State's argument to the contrary is unpersuasive. It responds by suggesting that the invalidation of the enhancement in this case would undermine the legislature's attempt to eradicate organized crime. For the State, a "[f]inding that a conviction for both the criminal organization enhancement and the underlying felony violates double-jeopardy principles would result in a foreclosure on the State to utilize the criminal-organization enhancement." Appellee's Br. p. 28. This is an overstatement, and it misconstrues the breadth of Snow's argument. Snow is not arguing that it is impossible to impose a criminal organization enhancement. One can surely be convicted of burglary and be subjected to the enhancement. Snow is only asking that the State prove the enhancement with evidence other than the evidence that proved the burglary. That is, the State must show that the defendant was in a criminal organization and committed the burglary at the direction of the organization or with the intent to benefit the organization. *See*

Ind. Code § 35-50-2-15. The State did not do that in this case. It simply relied on the evidence that Snow aiding, induced, or caused the underlying crimes. In other words, in this particular case, the enhancement and the conviction rest on the same evidence, and this is a violation of the common law rule.

CONCLUSION

Based upon the foregoing, Appellant, Ernest Ray Snow, Jr., by counsel, respectfully asks this Court to reverse the judgment of conviction and remand with instruction to enter a judgment of acquittal. In the alternative, Appellant asks that the judgment of conviction on be reversed and the cause remanded with instructions to exclude the evidence found pursuant to the defective warrant. As a third alternative, Appellant requests that the criminal organization enhancement be vacated and the cause remanded for resentencing pursuant to *Jackson v. State*, 105 N.E.3d 1081 (Ind. 2018).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do solemnly affirm under the penalties for perjury that on October 28, 2019, I served upon opposing counsel in the above-entitled cause one copy of the foregoing by electronic service using IEFS as follows:

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