

NO. 43110-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON, Respondent

v.

RODNEY STEVEN MITUNIEWICZ, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-01530-1

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BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENT OF ERROR

- I. THE EVIDENCE WAS SUFFICIENT TO PROVE THAT THE DEFENDANT WAS ARMED WITH A FIREARM DURING THE COMMISSION OF THE CRIME.

B. STATEMENT OF THE CASE

On September 14, 2011 Detective Sofianos of the Clark County Sheriff's Office was conducting an investigation into possible heroin distribution. RP 293. His investigation took place at 11412 NE 49th Street, Apartment G 15, in Vancouver. RP 293. At that apartment, Detective Sofianos was working with a person to set up a drug deal, and he witnessed a phone call in which that person set up the deal. RP 296. Detective Sofianos directed the person to request \$1000 worth of heroin. RP 646. The defendant arrived at the apartment at around nine o'clock in the evening. RP 300. When the defendant knocked on the door Detective Sofianos opened the door and greeted him. RP 303. Detective Sofianos was in his police uniform at that time. RP 303. The defendant was carrying a black metal Sentry lockbox in one hand and a set of keys in the other. RP 303. The defendant was placed under arrest at that time. RP 304. Detective Sofianos took the black box from the defendant and took the keys from his hand while other officers cuffed him. RP 304. One of the keys was for the black box. RP 312.

Jennifer Thomas, the defendant's CCO, was working with Detective Sofianos' unit that day. She took the keys that were recovered from the defendant and opened the black box. RP 357. Inside, she found a handgun, a digital scale with residue on it, a magnifying glass, several syringes, several baggies containing suspected heroin, a key, a couple of spoons, a lighter, a razor blade and a knife. RP 362-64, 408, 411. During the search of the defendant the officers recovered \$2313. RP 389-90. They also recovered two golf ball sized balls of a substance they suspected was heroin wrapped in aluminum foil from his pocket. RP 395-96. One of those balls was tested and found to contain heroin. RP 468-500. Detective Yoder testified that he was the evidence officer during this arrest and when asked to take the lock box key and open the lock box for the jury, he demonstrated and testified that it only took a matter of seconds to do so. RP 408. The firearm found in the box had an unloaded magazine in it. RP 413. The firearm was an operable firearm. RP 545.

Detective Kevin Schmidt testified that one must always assume a firearm is loaded and that even though he knew the gun was unloaded as he spoke to the jury, he nevertheless would never point it at anyone. RP 551. To do so would violate "basic firearms fundamentals." RP 551.

Detective Sofianos testified that drug dealers who deal in in larger amounts will typically possess firearms so they can protect their earnings and their product from “drug rips.” RP 652-55.

The jury returned a verdict of guilty to the charge of possession of heroin with the intent to deliver, and returned a verdict finding that he was armed with a firearm during the commission of the crime. CP 49-52.

### C. ARGUMENT

#### I. THE EVIDENCE WAS SUFFICIENT TO PROVE THAT THE DEFENDANT WAS ARMED WITH A FIREARM DURING THE COMMISSION OF THE CRIME.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If “any rational jury could find the essential elements of the crime beyond a reasonable doubt”, the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences there from are drawn in favor of the State. *State v. Goodman*,

150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The appellate court's role does not include substituting its judgment for the jury's by reweighing the credibility of witnesses or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "It is not necessary that [we] could find the defendant guilty. Rather, it is sufficient if a reasonable jury could come to this conclusion." *United States v. Enriquez-Estrada*, 999 F.2d 1358 (9th Cir. 1993), (quoting *United States v. Nicholson*, 677 F.2d 706, 708 (9th Cir. 1982)).

The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

In determining whether the evidence is sufficient to uphold a jury's finding that a defendant was armed with a firearm during the commission of the crime, it is necessary to first identify whether the defendant was in actual or constructive possession of the gun. The majority of the cases which make up appellate lore in this area are constructive possession cases. *See e.g. State v. Valdobinos*, 122 Wn.2d 270, 858 P.2d 199 (1993); *State v. Williams*, 85 Wn. App. 508, 933 P.2d 1072 (1997); *State v. Simonsen*, 91 Wn. App. 874, 960 P.2d 955 (1998); *State v. Johnson*, 94 Wn. App. 882, 974 P.2d 855 (1999); *State v. Schelin*, 147 Wn.2d 562, 55 P.3d 632 (2002); *State v. Gurske*, 155 Wn.2d 134, 118 P.3d 333 (2005); *State v. Willis*, 153 Wn.2d 366, 103 P.3d 1213 (2005); *State v. Neff*, 163 Wn.2d 453, 181 P.3d 819 (2008); *State v. Brown*, 162 Wn.2d 422, 173 P.3d 245 (2007); *State v. Eckenrode*, 159 Wn.2d 488, 150 P.3d 1116 (2006).<sup>1</sup>

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<sup>1</sup> *Eckenrode* is an unusual case. The defendant had called the police to report that an intruder was at his home. He told the dispatcher that he was armed and prepared to shoot the intruder. When the police arrived, he was sitting on his front lawn in a deck chair with his housekeeper, apparently relaxing. The officers searched the home for an intruder and found evidence of a marijuana growing operation as well as several firearms. *Eckenrode* at 491-92. In affirming his firearm enhancement, which rested on his constructive possession of a loaded rifle and an unloaded pistol inside the house, the Court relied heavily on his prior *actual* possession of a gun, which he stated he was prepared to use to repel an intruder. However, the Court also relied on other factors such as his possession of a police scanner and the fact that there was "pervasive evidence that much of the house was used for drug production." *Eckenrode* at 495.



A person is “armed” if “a weapon is easily accessible and readily available for use, either for offensive or defensive purposes.” *Eckenrode*, supra, at 493 (quoting *State v. Valdobinos*, supra, at 282). In a constructive possession case there must be “a nexus between the weapon and the defendant and between the weapon and the crime.” *State v. Schelin*, supra, at 567–68 (plurality opinion); *Schelin*, 11 Wn.2d at 576–77 (Alexander, C.J., concurring); accord *State v. Gurske*, supra, at 138. Whether a defendant is “armed” presents “a particularly difficult question when the defendant had only constructive possession over a weapon.” *State v. Easterlin*, 159 Wn.2d 203, 206, 149 P.3d 366, 369 (2006).

In *State v. Easterlin*, 126 Wn. App. 170, 173, 107 P.3d 773 (2005), this Court distinguished constructive possession cases such as *Schelin*, *Willis* and *Valdobinos* (supra) and held:

In a constructive possession case, the nexus test ensures that a defendant will not face a sentencing enhancement due to the incidental presence of a firearm. As noted in *Schelin*, “[if] an assault with a beer bottle occurs in a kitchen, a defendant is not necessarily ‘armed’ with a deadly weapon because knives are kept in the kitchen.” 147 Wash.2d at 570, 55 P.3d 632. When a defendant actually possesses a weapon during the commission of a crime, the protections of the nexus requirement become irrelevant.

*Easterlin* at 173. On review of the Court of Appeal’s decision in *Easterlin* the Supreme Court held:

The State urges us to hold that in cases of actual possession of a weapon, it is never obligated to establish a connection on the theory that a person in possession of a weapon is clearly “armed” within common understanding. The Court of Appeals agreed, and we accepted review primarily to determine whether this is necessarily always correct. The State is likely correct that in actual possession cases, it will rarely be necessary to go beyond the commonly used “readily accessible and easily available” instruction. However, the instructions in a particular case must be adequate to permit the parties to argue their theory of the case. *State v. Dana*, 73 Wash.2d 533, 537, 439 P.2d 403 (1968) (citing *Smith v. McDaniel*, 53 Wash.2d 604, 610, 335 P.2d 582 (1959)). Depending on the evidence, it would not be error and would perhaps be appropriate for the court to instruct the jury there be a connection between the weapon and the crime to allow the parties to argue their theory of the case.

*State v. Easterlin*, 159 Wn. 2d 203, 209, 149 P.3d 366, 369 (2006).

This case is an actual possession case rather than a constructive possession case. The defendant had the gun in a small box that was in his hand. It could be retrieved in mere seconds by use of the key that the defendant held in his other hand. The defendant’s possession in this case is no different than a woman possessing a gun in a purse that she carries over her shoulder or zipped inside a wrist bag. The gun was readily available for offensive or defensive purposes. That the gun was unloaded is not dispositive. *Simonsen*, *supra*, at 883. The purpose of a gun is not simply to kill but to intimidate. The person staring down the barrel of a gun has no way of knowing that it isn’t loaded. As the Supreme Court noted in *Gurske*, *supra*:

The legislature has expressly recognized that armed individuals engaged in criminal conduct might use a deadly weapon for “several key reasons including: *Forcing the victim to comply with their demands*; injuring or killing anyone who tries to stop the criminal acts; and aiding the criminal in escaping.” Laws of 1995, ch. 129, § 1(1)(b) (Initiative Measure No. 159)... In the case of a possession offense, for example, a weapon could be used to obtain drugs (by theft or otherwise), to protect the drugs, or to prevent investigation or apprehension by the police at the time they discover the drugs or seek to execute a warrant. Regardless of the offense, whether the defendant is armed at the time a crime is committed cannot be answered in the same way in every case.

*State v. Gurske*, supra, at 139 (emphasis added). The jury could reasonably infer that the defendant possessed the gun in this case to protect either the two golf ball sized balls of heroin or the \$2313 in cash he carried on his person. The nexus requirement, even if it were required to be shown here in this case of actual possession, was easily met where the defendant brought a handgun to a drug deal in which he believed he would be selling \$1000 of heroin.

The evidence is sufficient to sustain the jury’s finding that the defendant was armed with a firearm during the commission of the crime.

D. CONCLUSION


The evidence is sufficient to sustain the jury's finding that the defendant was armed with a firearm during the commission of the crime.

DATED this 3<sup>rd</sup> day of April, 2013.

Respectfully submitted:

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# CLARK COUNTY PROSECUTOR

## April 03, 2013 - 1:39 PM

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