Supreme Court No. 101670-1
(COA No. 53475-4-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW LABOUNTY,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

PETITION FOR REVIEW

NANCY P. COLLINS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Matthew LaBounty, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review that affirmed the deadly weapon imposed, dated December 28, 2022. RAP 13.3(a)(2)(b); RAP 13.4(b). A copy of the decision is attached.

B. ISSUES PRESENTED FOR REVIEW

1. The mere presence of a weapon at the time a crime is occurring is legally inadequate for a deadly weapon enhancement, as this Court has repeatedly ruled. A police officer stopped Mr. LaBounty to investigate the tabs on the car he was driving. He found drugs hidden in a zippered case in the car's trunk and metal knuckles by the car's front seat. Despite the lack of evidence the knuckles were used to further any crime, and contrary to this Court's precedent, the Court of Appeals affirmed the weapon enhancement.

Should this Court grant review because the Court of Appeals decision is contrary to this Court's case law and

permits significant added punishment where a weapon is present in a car but there is no evidence connecting it to the charged crime?

2. A prosecutor may not encourage the jury to convict a person based on facts not in evidence, particularly when these arguments rest on the prosecutor's inflammatory claims about how criminals behave. The prosecution irreparably tainted the jury by thematically arguing, based on facts never offered at trial, that drug selling a dangerous business and drug sellers have to carry weapons. Should this Court grant review when the prosecution obtained a guilty verdict by encouraging the jury to rely on prejudicial assertions that are outside the record and the trial court sanctioned this argument?

C. STATEMENT OF THE CASE

A police officer stopped a car to investigate a possible traffic infraction. 1/31/19RP 105-06. Once the car stopped, the officer saw it was being driven without keys. 1/31/19RP 108. The officer verified it was not reported stolen. 1/31/19RP 110.

The driver, Mr. LaBounty, had a state identification card but no driver's license. 1/31/19RP 107-08.

The officer arrested Mr. LaBounty for driving without a license and put him in the police car. 1/31/19RP 110. A woman in the passenger seat was rummaging around the car. 1/31/19RP 111-12. The officer asked her to step outside so he could do a protective sweep. *Id.* After she stepped out, the officer saw a Ziploc bag with a few small baggies in it on the passenger floorboard and a set of brass knuckles in the front console area. 1/31/19RP 112-13, 170. He also saw an electronic scale under the driver's seat. 1/31/19RP 114. None of these items had dug residue on them. 1/31/19RP 198.

The officer impounded the car and obtained a search warrant. 1/31/19RP 115. In the passenger area of the car, the officer found a backpack that had several men's watches and another electronic scale. 1/31/19RP 120.

Inside the rear trunk and partially hidden under carpeting, the officer found a small zippered pouch. 1/31/19RP 121. Inside

the zippered pouch there was a baggie with methamphetamine and another with heroin. 1/31/19RP 123, 139, 141.

The prosecution charged Mr. LaBounty with one count of possession with intent to deliver heroin and one count of possession with intent to deliver methamphetamine based on the drugs found in the car's trunk. CP 9-10. It added deadly weapon enhancements for each count based on the brass knuckles found in the front of the car. *Id*.

After the prosecution rested its case, Mr. LaBounty moved to dismiss the deadly weapon enhancement due to the lack of evidence the metal knuckles were connected with the drug possession crimes he was charged with as legally required. 2/1/19RP 202-06. The court denied the motion to dismiss, speculating that if someone showed up to take the drugs, someone could "put on the brass knuckles and you whack the guy," and a reasonable jury could infer, as "everybody knows," that people selling drugs have to protect themselves and use weapons to do so. 2/1/19RP 204, 206.

In its closing argument, the prosecution adopted this reasoning from the court and argued Mr. LaBounty had the brass knuckles because "drug dealing is a dangerous business" and Mr. LaBounty was "the muscle" in a drug dealing operation. 2/1/09RP 241, 248-49. The prosecution also argued there was no other reason for Mr. LaBounty to be in the car other than drug selling and he should have known about the illicit drugs in the car. 2/1/19RP 269-70.

The facts are further explained in Appellant's Opening Brief, in the relevant factual and argument sections, and are incorporated herein.

D. ARGUMENT

1. A deadly weapon enhancement may not rest on pure speculation that an item could be used to further a crime based on its mere presence at the scene, contrary to the Court of Appeals decision.

a. The prosecution must prove the essential elements of a deadly weapon enhancement beyond a reasonable doubt.

It is a well-established constitutional principle that for evidence to be legally sufficient, a "modicum of evidence" on an essential element is "simply inadequate." *Jackson v. Virginia,* 443 U.S. 307, 320, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); U.S. Const. amend. XIV; Const. art. I, §§ 3, 22. Rational inferences from the evidence "must be reasonable and 'cannot be based on speculation.'" *State v. Hummel*, 196 Wn. App. 329, 357, 382 P.3d 592 (2016) (quoting *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013)).

A deadly weapon enhancement may not be imposed unless the jury finds the essential elements are proven beyond a reasonable doubt. *State v. Recuenco*, 163 Wn.2d 428, 440, 180

P.3d 1276 (2008). To prove a person is "armed" with a deadly weapon as required for the deadly weapon enhancement, the prosecution must show that a deadly weapon was readily available for offensive or defensive purposes and there is a connection between the defendant, the crime charged, and the weapon. *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 826, 425 P.3d 807 (2018).

The prosecution charged Mr. LaBounty with two deadly weapon enhancements for two counts of possession of a controlled substance with the intent to deliver resting on a single item, brass knuckles found on a car seat. These two enhancements result in mandatory punishment, even though the two underlying charges constitute the same criminal conduct. *See* Slip op. at 12.

b. This Court's precedent dictates that a deadly weapon enhancement must rest on evidence proving the weapon's use in the crime charged.

As this Court has ruled on multiple occasions, the "mere presence of a deadly weapon at the crime scene is insufficient to show that the defendant is 'armed'" as required for a deadly weapon enhancement. *State v. Willis*, 153 Wn.2d 366, 371-72, 103 P.3d 1213 (2005); *see Sassen Van Elsloo*, 191 Wn.2d at 826 ("The presence, close proximity, or constructive possession of a weapon at the scene of a crime is, by itself, insufficient to show that the defendant was armed for the purpose of a firearm enhancement.").

The nexus requirement places "parameters" on whether a person is armed for purposes of this additional punishment. *State v. Gurske*, 155 Wn.2d 134, 140, 118 P.3d 333 (2005). By requiring evidence connecting the defendant, the weapon, and the charged crime, courts may not impose a deadly weapon enhancement simply because a person possesses a weapon. *Id*.

at 141. It is not enough that the defendant knows about and has access to a weapon. *Id*.

The nexus requirement critically narrows the imposition of a deadly weapon enhancement to avoid the constitutional infirmity of punishing a person who exercises the constitutional right to bear arms. *State v. Brown*, 162 Wn.2d 422, 435, 173 P.3d 245 (2007); U.S. Const. amend. II; Const. art. I, § 24; *see State v. Schelin*, 147 Wn.2d 562, 575, 55 P.3d 632 (2002) ("Requiring a nexus between the defendant, the crime, and the weapon protects against violation of the right to bear arms.").

Being arrested near an accessible weapon does not sufficiently establish a deadly weapon enhancement. In *Gurske*, the defendant was arrested near drugs in a car and there was a gun inside a closed backpack in the backseat. 155 Wn.2d at 143-44. This Court held there was an insufficient nexus between the gun and the charged crime of drug possession because there was no evidence the defendant had used the gun during the commission of a crime, such as when he acquired the

drugs or while he had them. *Id*. at 143. Being arrested near the weapon and the drugs did not prove the defendant had the weapon accessible at the "relevant time" when committing the crime. *Id*.

In *Valdobinos,* the police searched the defendant's home after receiving information he was soliciting drug sales. *State v. Valdobinos*, 122 Wn.2d 270, 273, 282, 858 P.2d 199 (1993). They found cocaine and an unloaded rifle under a bed. *Id*. He was convicted of possession of cocaine with intent to deliver while armed with a deadly weapon. *Id.* at 274. This Court reversed the weapon enhancement because the mere possession of gun in the same room as drugs is insufficient to show the defendant was "armed" for the purpose of a deadly weapon enhancement. *Id.*

Applying similar logic, this Court affirmed a firearm enhancement in *Sassen Van Elsloo*. 191 Wn.2d at 802. In that case, the police stopped a car, the driver fled, and a passenger admitted she and the driver were selling drugs at that time. *Id*.

at 830. Inside the seating area, the police found an abundance of controlled substances in a backpack that was less than one foot from a gun with a loaded magazine. *Id*. There were other firearms in a locked safe inside the car, but these weapons were not the basis of the firearm enhancement. *Id*. Based on the passenger's admission they were involved in on-going drug delivery, and the presence of a loaded gun next to these drugs, the court found sufficient nexus for a firearm enhancement. *Id*. at 830-31. But *Sassen Van Elsloo* did not overrule *Gurske, Valdobinos*, or other cases mandating evidence proving the connection between the weapon and the drugs to establish a weapon enhancement.

c. The Court of Appeals improperly extended Sassen Van Elsloo despite critical factual differences and disregarded other controlling precedent.

The Court of Appeals disregarded *Gurske* and *Valdobinos*, instead treated *Sassen Van Elsloo* as essentially overruling their analysis. Yet *Sassen Van Elsloo* hinged on the distinct facts of that case, where there was an admitted, active

drug selling operation presently occurring, unlike this case. The Court of Appeals improperly extended this Court's precedent to hold that any time a person commits a possessory crime that is considering "on-going" in nature, any weapon present may be deemed to be used to further that on-going possessory crime. Slip op. at 6-9.

The nexus requirement exists to ensure a person is not required to serve significant, mandatory prison sentences for the presence of a weapon that is not related to the crime of conviction. 191 Wn.2d at 827 (citing *Gurske*, 155 Wn.2d at 140). The constructive possession of drugs with the intent to sell at some other time does not satisfy the nexus requirement of the firearm enhancement. *Id*.; *Gurske*, 155 Wn.2d at 140.

In Mr. LaBounty's case, no one saw or claimed he was actively selling drugs. The police found the drugs in a small zippered container buried under carpeting and hidden in the trunk. 1/31/19RP 123. While the car held a scale and some baggies that could be used to package drugs, there was no

evidence of residue on any items or other indication of current drug selling.

The police stopped Mr. LaBounty for a traffic infraction based on the car's tabs, not based on evidence he was soliciting drug sales. 1/31/19RP 104-05. Unlike the defendant in *Valdobinos*, the police had no evidence he was arranging drugs sales when conducting their search. 122 Wn.2d at 273. Like *Gurske* and *Valdobinos*, Mr. LaBounty did not use or threaten to use a weapon at any time. The officer noticed brass knuckles in the front seat or center console area after he directed Mr. LaBounty to step out of the car. 1/31/19RP 112. A later search revealed drugs in the car's trunk. As in *Gurske*, there was no evidence anyone used the weapon when acquiring or to possess the drugs in the trunk, which *Gurske* deems to be the "relevant time" for a weapon enhancement. 155 Wn.2d at 143. The "physical proximity" to a weapon and drugs does not constitute sufficient evidence for a weapon enhancement. *Id*.

The Court of Appeals diluted the nexus requirement to render it essentially meaningless when a weapon is present for a possessory crime. Its holding relieves the prosecution of its burden of proving a connection between the drugs and the weapon.

The ramifications of a weapon enhancement lead to significant prison time and significant consequences under the persistent offender accountability act. RCW 9.94A.030(32)(s); RCW 9.94A.533(4). This Court should grant review.

2. The Court of Appeals erroneously disregarded the prosecution's injection of its own experience and speculation about drug dealers' dangerousness to prove the weapon enhancement.

a. The prosecution may not inject personal experience or speculation of the accused's dangerousness into the case in closing argument.

A prosecutor is a quasi-judicial officer who must ensure an accused person receives a constitutionally fair trial. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); U.S.

Const. amend. XIV. A fair trial includes a trial where the prosecution does not use the prestige of its office or information it has gathered outside the trial record against the accused. *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956).

A prosecutor may not "convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant," because the defendant has the "right to be tried solely on the basis of the evidence presented to the jury." *United States v. Young*, 470 U.S. 1, 18, 105 S. Ct. 1038, 1048, 84 L. Ed. 2d 1 (1985). The prosecutor's opinion "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Id*. at 18-19 (citing *Berger v. United States*, 295 U.S. 78, 88-89, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)).

It is well-established that a prosecutor's comments in closing argument that "encourage" jurors "to render a verdict on facts not in evidence are improper." *State v Reed*, 102 Wn.2d

140, 147, 684 P.2d 699 (1984). When it is substantially likely these comments affected the jury's verdict, the resulting prejudice requires reversal. *State v. Stith*, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

b. The prosecution used its own experience and societal expectations of dangerous drug dealing to convict Mr. LaBounty of the weapon enhancement despite the absence of evidence.

The theme of the prosecutor's closing argument was that the only reason Mr. LaBounty would have the metal knuckles is because he is a dangerous drug dealer. 2/1/19 241 ("Why does he have these? Well, they're for protection. Okay. Because drug dealing is a dangerous business, right."). The prosecutor also informed the jury the reason Mr. LaBounty had the metal knuckles was that "[h]e's the muscle. He's the protection. Okay." 2/1/19RP 238. He further encouraged the jury to speculate about why they were in the car and told the jurors that only a criminal would find themselves in this position. 2/1/19RP 270.

Yet these arguments did not come from trial evidence. No one testified brass knuckles are associated with drug dealing. No one testified drug dealing is inherently dangerous and requires perpetrators to possess weapons. It is impermissible to encourage jurors to deem people accused of drug selling as inherently dangerous. *United States v. Solivan*, 937 F.2d 1146, 1153 (6th Cir. 1991). It is also improper to allow jurors to speculate that the defendant is a dangerous person who likely threatened others. *State v. Vazquez,* 198 Wn.2d 239, 260, 494 P.3d 424 (2021).

A prosecutor may not encourage jurors to convict a person based on a profile of how a criminal may act. *Vazquez*, 198 Wn.2d at 265. In *Vazquez*, a police officer testified that a tactical vest in the defendant's room was a tool that drug sellers use to pretend they are police and seize drugs from others. *Id*. This Court explained this testimony is profile evidence and was improperly used to portray the defendant as the type of person

who was more likely to commit the charged crime of possession with intent to sell. *Id*.

Here, the prosecution's argument that the brass knuckles were present because drug dealing is dangerous and Mr. LaBounty is "the muscle," rested only on a speculative profile about people who commit drug offenses. It likely inflamed the jury against him and encouraged jurors to rely on an unsupported profile claim of how drug dealers behave without requiring the jury to find a nexus between the brass knuckles in the front of the car and the drugs buried in the trunk. This type of argument and inference is improper. *Vazquez*, 198 Wn.2d at 265.

The prosecution's concocted argument that Mr. LaBounty was the "muscle" in a drug selling operation was purely speculative, but jurors would likely trust the prosecutor's explanation because it carries with it the imprimatur of the government. A prosecutor's "assertions of personal knowledge

are apt to carry much weight against the accused when they should properly carry none." *Berger*, 295 U.S. at 88.

The prosecution thematically insisted the jury could simply speculate Mr. LaBounty's mere presence in a car with a weapon and drugs in the trunk made him guilty based on the prosecutor's belief about how drug dealers behave. This impermissible argument likely swayed the jury and should not be condoned. Review should be granted.

c. The trial court improperly sanctioned the prosecution's speculative, inflammatory argument about the dangerousness of drug selling.

The court endorsed the prosecutor's speculative argument when it denied Mr. LaBounty's motion to dismiss the deadly weapon enhancement at the close of the prosecution's case. *State v. Cantabrana*, 83 Wn. App. 204, 208-09, 921 P.2d 572 (1996) (when defense alerted court to similar error, failure to lodge later objection excused because it "would likely have been a useless endeavor"). In response to Mr. LaBounty's motion to dismiss the weapon enhancements because due to the

lack of evidence he was dealing drugs out of the car or otherwise using the brass knuckles in connection with the drugs, the court sanctioned the very argument the prosecution made to the jury. 1/31/19RP 202, 205.

The court insisted the jury was allowed to "infer" how drug sellers behave, explaining, "when you're dealing drugs . . . everybody knows what happens if you are selling, you've got to protect yourself, right?" 1/31/19RP 206. It claimed "everybody knows" drug sellers have to "protect" themselves. *Id*.

The court's ruling authorized the prosecutor's speculative and inflammatory closing argument that directed jurors to convict Mr. LaBounty of the deadly weapon enhancement because drug dealers are dangerous and Mr. LaBounty must be the "muscle" in the operation, despite the absence of such evidence. While Mr. LaBounty did not object during the prosecution's closing argument, the court's ruling just before closing arguments authorized the prosecution's tactics and

showed it would not have sustained an objection or issued a curative instruction. *Cantabrana,* 83 Wn. App. at 208-09.

The court and prosecution failed to recognize the speculative, propensity argument on which the prosecution relied. As defense counsel correctly informed the court, there must be evidence connecting the crime and the weapon and there was no evidence in this case establishing the weapon played any role in the drugs stored in the trunk. RP 202, 205.

The prosecution's impermissible reliance on facts not in evidence, injection of improper speculation about drug dealing, and personal opinion during closing argument demonstrates the sheer speculation required for the deadly weapon finding. This Court should grant review based on the untenable nature of a weapon enhancement resting on inflammatory speculation of drug dealers' behavior that is not rooted in the evidence presented.

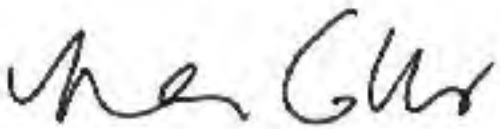
E. CONCLUSION

Based on the foregoing, Petitioner Matthew LaBounty respectfully requests that review be granted pursuant to RAP 13.4(b).

Counsel certifies this document contains 3382 words and complies with RAP 18.17(b).

DATED this 27th day of January 2023.

Respectfully submitted,



NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Petitioner
nancy@washapp.org

APPENDIX

Filed
Washington State
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MATTHEW BENJAMIN LABOUNTY, Appellant.	No. 53475-4-II UNPUBLISHED OPINION

MAXA, J. – Matthew LaBounty appeals the imposition of a deadly weapon sentencing enhancement for his two convictions of possession with intent to deliver heroin and methamphetamine. He also appeals his sentence. LaBounty's convictions arose out of an incident where a law enforcement officer stopped him for a traffic violation and discovered drugs in the trunk of the vehicle he was driving. The basis for the deadly weapon enhancement was a set of "metal knuckles" found in the front console area within LaBounty's reach.

We hold that (1) there was sufficient evidence that LaBounty was armed with a deadly weapon at the time of his offenses; (2) the prosecutor's comments were not improper, and even if they were LaBounty waived his challenge by failing to object; (3) as the State concedes, the now-vacated conviction for unlawful possession of a controlled substance should not have been included in LaBounty's offender score; (4) as the State concedes, the trial court must reevaluate the imposition of community custody as part of LaBounty's sentence under existing law; and (5)

as the State concedes, LaBounty's two convictions should be noted as the same criminal conduct on the judgment and sentence.

Accordingly, we affirm the imposition of the deadly weapon sentencing enhancement, but we remand for resentencing. The new judgment and sentence should reflect that LaBounty's two convictions constitute the same criminal conduct.

FACTS

In August 2017, Grays Harbor County Sheriff's Deputy Keith Peterson stopped the vehicle LaBounty was driving because of a traffic infraction. He arrested LaBounty for driving without a license.

After LaBounty had exited the vehicle, Peterson noticed a passenger in the car rummaging beneath her seat. Peterson conducted a protective sweep of the vehicle and saw individual plastic baggies on the passenger-side floor and a set of electronic scales on the driver-side floor. He also saw a set of metal knuckles in the front console area between the driver's seat and the passenger's seat. The metal knuckles were in a place where LaBounty easily could have reached them. After Peterson obtained a warrant, heroin and methamphetamine were found in baggies in the trunk.

LaBounty was charged with possession with intent to deliver heroin and possession with intent to deliver methamphetamine, with deadly weapon enhancements on both charges.

After the State rested at trial, LaBounty moved to dismiss the deadly weapon sentencing enhancements. The trial court denied the motion. The court ruled that there was a sufficient nexus between the drug offenses and the metal knuckles. The court stated, "So if somebody shows up and attempts to take the drugs by force, you put on the brass knuckles and you whack the guy and that goes away." Report of Proceedings (RP) at 204. The court also stated, "[W]hen

you're dealing drugs, I mean that's one of the – and then everybody knows what happens if you're selling, you've got to protect yourself, right?" RP at 206.

In closing argument, the prosecutor discussed the metal knuckles. He stated, "Why does he have these? Well, they're for protection. Okay. Because drug dealing is a dangerous business." RP at 241. The prosecutor continued, "Well, who drives around with metal knuckles? Somebody [who's] got something to protect. Somebody [who's] got a reason to use them, like 3,000 dollars worth of drugs in the trunk. Okay. These are for protection while breaking down the drugs and selling them." RP at 241-42. LaBounty did not object to these comments.

Later, the prosecutor stated, "What do you think the defendant with his metal knuckles was there for? He's the muscle. He's the protection." RP at 248. Again, LaBounty did not object.

The jury convicted LaBounty on both counts and on the deadly weapon enhancements. At sentencing, LaBounty's offender score included a prior conviction for unlawful possession of a controlled substance. The trial court apparently treated the two counts as the same criminal conduct for the purposes of sentencing, but the judgment and sentence did not reflect this ruling.[1] The court sentenced LaBounty to the statutory maximum of 120 months, which included 24 months as a deadly weapon enhancement. The judgment and sentence also stated that LaBounty would be on community custody for any early release time.

LaBounty appeals the imposition of the deadly weapon enhancement and his sentence.

[1] While both parties agree that the two counts were treated as the same criminal conduct, nothing confirms this in the record of the sentencing hearing.

ANALYSIS

A. SUFFICIENCY OF EVIDENCE – ARMED WITH A DEADLY WEAPON

LaBounty argues that there was insufficient evidence to support imposition of the deadly weapon enhancement. We disagree.

1. Standard of Review

Whether a defendant was armed with a deadly weapon is a mixed question of law and fact, and is fact-specific. *State v. Sassen Van Elsloo,* 191 Wn.2d 798, 825-26, 425 P.3d 807 (2018). The test for determining the sufficiency of evidence is whether after viewing the evidence and all reasonable inferences in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that the defendant was armed. *Id.* at 826. We decide de novo whether the facts are sufficient as a matter of law to prove that the defendant was armed. *Id.* at 825.

2. Legal Principles

Under RCW 9.94A.533(4)[2], the trial court must add time to a sentence if the defendant is found to have been armed with a deadly weapon at the time the offense was committed. RCW 9.94A.825 expressly includes "metal knuckles" in the definition of "deadly weapon."

To establish that the defendant was armed for purposes of the sentencing enhancement, the State must prove "(1) that a [deadly weapon] was easily accessible and readily available for offensive or defensive purposes during the commission of the crime and (2) that a nexus exists among the defendant, the weapon, and the crime." *Sassen Van Elsloo,* 191 Wn.2d at 826.

[2] 9.94A.533 has been amended since the events of this case transpired. Because these amendments do not impact the statutory language relied on by this court, we refer to the current statute.

Regarding the first requirement, the presence, close proximity, or constructive possession of a weapon found at a crime scene alone is not enough to establish that the defendant was armed in this context. *Id.* The weapon must be easily accessible and readily available at the time of the crime. *Id.*

Regarding the second requirement, we look to the nature of the crime, the type of weapon, and the context in which it was found to determine if there was a nexus between the defendant, the weapon, and the crime. *Id.* at 827. "[W]hen the crime is of a continuing nature, such as a drug operation, a nexus exists if the firearm is 'there to be used' in the commission of the crime." *Id.* at 828 (quoting *State v. Gurske*, 155 Wn.2d 134, 138, 118 P.3d 333 (2005)).[3] As a result, a sufficient nexus exists if there is evidence that the weapon was present to protect an ongoing drug operation. *State v. O'Neal*, 159 Wn.2d 500, 506, 150 P.3d 1121 (2007); *State v. Eckenrode*, 159 Wn.2d 488, 494-95, 150 P.3d 1116 (2007).

Consistent with this law, the trial court instructed the jury as follows:

> A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the weapon and the Defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime, and the type of weapon.

CP at 39.

[3] While *Sassen Van Elsloo* involved a firearm, *Gurske* stated that a "weapon" must be "there to be used." *Gurske*, 155 Wn.2d at 138.

3. Analysis

Here, the metal knuckles were located in the front console area next to the driver's seat. Peterson testified that they were in a place where LaBounty easily could have reached them. And LaBounty was committing the offense of possession with intent to distribute when he was stopped. Therefore, there is no question that the metal knuckles were "easily accessible and readily available for offensive or defensive purposes during the commission of the crime." *Sassen Van Elsloo*, 191 Wn.2d at 826. LaBounty does not argue otherwise.

LaBounty argues that there is an insufficient nexus among himself, the weapon, and the crime. He claims that there was no connection between the presence of the metal knuckles in the vehicle and his possession of the drugs with intent to deliver. We disagree.

The question here is whether sufficient evidence supports a finding of nexus. "So long as the facts and circumstances support an inference of a connection between the weapon, the crime, and the defendant, sufficient evidence exists." *State v. Easterlin*, 159 Wn.2d 203, 210, 149 P.3d 366 (2006).

Possession with the intent to distribute a controlled substance is a continuing offense. *Sassen Van Elsloo*, 191 Wn.2d at 827; *Gurske*, 155 Wn.2d at 140. Therefore, LaBounty was engaged in that offense when he was stopped. And the metal knuckles, defined as a deadly weapon, were within his reach. Because the offense was a continuing one and the metal knuckles were " 'there to be used' " in the commission of that offense, *Sassen Van Elsloo*, 191 Wn.2d at 828 (quoting *Gurske*, 155 Wn.2d at 138), the jury could draw an inference of a connection between the metal knuckles and possession of the controlled substances with intent to deliver. Therefore, there is sufficient evidence to support a finding that a nexus exists.

Further, the court in *Gurske* noted that in the context of an unlawful possession charge, one of the uses of a deadly weapon could be to protect the drugs. 155 Wn.2d at 139. And the possession of metal knuckles is unlawful, RCW 9.41.250(1)(a), meaning that LaBounty had no alternative legitimate reason to have them in the vehicle. Viewed in the light most favorable to the State, a reasonable inference is that the metal knuckles were there to protect the drugs in the vehicle.

This case is similar to *Sassen Van Elsloo*. In that case, a search of the defendant's car revealed controlled substances, evidence that the defendant was selling drugs, and a shotgun in the cargo hold. *Sassen Van Elsloo*, 191 Wn.2d at 802-03. There also was evidence that the defendant was selling illegal drugs from the car. *Id.* at 829-30. The court held that there was a sufficient nexus between the shotgun and the defendant's ongoing possession and distribution of the drugs because the shotgun could be easily grabbed by someone entering the car and it was less than a foot from the drugs. *Id.* at 830. This was sufficient evidence for the court to conclude that the shotgun was " 'there to be used' " in the commission of the defendant's possession and distribution offense. *Id.* (quoting *Gurske*, 155 Wn.2d at 138).

LaBounty makes several arguments, but they do not compel a different conclusion. First, he emphasizes that being arrested near a weapon is not sufficient to support a finding that a defendant was armed for purposes of the sentencing enhancement. He cites to *Gurske*, 155 Wn.2d at 143-44, and *State v. Valdobinos*, 122 Wn.2d 270, 281-82, 858 P.2d 199 (1993), both cases in which the court found insufficient evidence to support a finding that the defendant was armed. However, the basis of the holding in both cases was that the weapon was not accessible and readily available, not that there was an insufficient nexus. *Gurske*, 155 Wn.2d at 143-44 (unloaded firearm in zipped backpack was behind the defendant's seat); *Valdobinos*, 122 Wn.2d

at 282 (unloaded firearm was under the bed in the defendant's bedroom). Here it is undisputed that the metal knuckles were accessible and readily available.

Second, LaBounty argues that unlike in *Sassen Van Elsloo*, there is no evidence that he was selling drugs at the time of his arrest. He emphasizes that in *Sassen Van Elsloo*, the defendant's passenger admitted that she and the defendant were selling drugs from their car. 191 Wn.2d at 830. However, contrary to LaBounty's argument, here there was evidence that LaBounty was selling drugs from the vehicle. Officer Peterson testified that there were electronic scales on the driver-side floor and individual plastic baggies on the passenger- side floor. And there was heroin and methamphetamine in baggies in the trunk. Viewed in the light most favorable to the State, a reasonable inference is that LaBounty was selling drugs from the vehicle.

Third, LaBounty argues that there was no evidence that the metal knuckles were the type of weapon commonly used to further a drug selling operation. And he points out that there is no evidence that he ever used the metal knuckles against anyone. But whether other people use metal knuckles when selling drugs is immaterial. As noted above, a reasonable inference is that LaBounty possessed the metal knuckles to protect the drugs in the vehicle. And there is no requirement that the weapon actually be used to support the sentencing enhancement. The only requirement is that the defendant be *armed* with a deadly weapon. RCW 9.94A.533(4).

Fourth, LaBounty argues that he was not involved in ongoing drug production operations as in *O'Neal*, 159 Wn.2d at 506-07 (holding that guns present where methamphetamine was being manufactured were there to protect the drug operation), and *Eckenrode*, 159 Wn.2d at 494 (holding that guns present in a house with a large cannabis grow operation were there to protect the criminal enterprise). But although the nexus may be clearer when there is an extensive drug

production operation, an extensive operation is not required to find a sufficient nexus. As noted above, *Sassen Van Elsloo* found a nexus when the weapon and evidence of drug sales were in a single vehicle. 191 Wn.2d at 830.

We hold that the evidence is sufficient to support the jury's verdict that LaBounty was armed with a deadly weapon at the time of his offenses of possession of heroin and methamphetamine with intent to deliver.

B. PROSECUTORIAL MISCONDUCT

LaBounty argues that the prosecutor committed misconduct during closing argument by speculating about the dangerousness of drug dealing and the purpose for the metal knuckles. We disagree.

To establish prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of all the circumstances of the trial. *State v. Zamora*, 199 Wn.2d 698, 708, 512 P.3d 512 (2022). A prosecutor commits misconduct during oral argument by arguing facts not in evidence. *See In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 705, 286 P.3d 673 (2012). However, during closing argument the prosecutor is given wide latitude to assert reasonable inferences from the evidence. *State v. Slater*, 197 Wn.2d 660, 680, 486 P.3d 873 (2021).

When the defendant fails to object at trial, a heightened standard of review requires the defendant to show that the conduct was " 'so flagrant and ill intentioned that [a jury] instruction would not have cured the [resulting] prejudice.' " *Zamora*, 199 Wn.2d at 709 (quoting *State v. Loughbom*, 196 Wn.2d 64, 70, 470 P.3d 499 (2020)). The focus of this heightened standard is whether an instruction would have cured the prejudice. *State v. Crossguns*, 199 Wn.2d 282, 299, 505 P.3d 529 (2022). "In other words, the defendant who did not object must show the improper

conduct resulted in *incurable* prejudice." *Zamora*, 199 Wn.2d at 709. If a defendant fails to make this showing, the prosecutorial misconduct claim is waived.

Here, LaBounty argues that the prosecutor argued facts not in evidence by stating that "drug dealing is a dangerous business," RP at 241, that the metal knuckles were needed for protection when breaking down and selling the drugs, and that LaBounty was the "muscle" and "the protection," RP at 248. He emphasizes that there was no evidence that metal knuckles are associated with drug dealing or that drug dealing is inherently dangerous. Therefore, prosecutor's comments were based only on a speculative profile about people who commit drug offenses.

However, it is within common knowledge that drug dealing can be dangerous. A prosecutor does not commit misconduct by making statements that are within the jury's common knowledge. *See In re Pers. Restraint of Phelps*, 190 Wn.2d 155, 166-70, 410 P.3d 1142 (2018) (holding that the prosecutor could discuss the concept of "grooming" in the absence of evidence regarding grooming because the concept was within the common knowledge of jurors). In addition, in light of the wide latitude given to prosecutors, the prosecutor could reasonably infer that the metal knuckles were for the purpose of providing protection for drug dealing activities and that LaBounty was the person who provided that protection. We conclude that the prosecutor's statements were not improper.

Even if these statements were improper, LaBounty did not object to them.[4] LaBounty has not shown that the statements were so flagrant and ill-intentioned as to be incurable. Given the common knowledge about the nature of drug dealing, the statements were not particularly

[4] LaBounty argues that he was not required to object because the trial court essentially approved of similar statements when ruling on his motion to dismiss. Therefore, any objection would have been futile. We disagree.

inflammatory and the jury could have been instructed to disregard them. Therefore, we conclude that LaBounty cannot establish that the statements resulted in incurable prejudice and, as such, his prosecutorial misconduct claim is waived.

C. IMPROPER OFFENDER SCORE

LaBounty's offender score included a conviction for unlawful possession of a controlled substance. As the State concedes, we vacated this conviction in LaBounty's prior appeal pursuant to *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). *State v. LaBounty*, No. 53551-3-II, slip op. at 2 (Wash. Ct. App. May 4, 2021), https://www.courts.wa.gov/opinions/pdf/D2%2053551-3-II%20Unpublished%20Opinion.pdf [*LaBounty* I]. Therefore, LaBounty is entitled to be resentenced with a corrected offender score.

D. COMMUNITY CUSTODY FOR EARLY RELEASE TIME

The trial court sentenced LaBounty to the statutory maximum (120 months) and community custody for any early release time. As the State concedes, we held in LaBounty's prior appeal that the trial court can impose community custody for early release time only if "(1) LaBounty is subject to [Department of Corrections] supervision under RCW 9.94A.501, and (2) the court sentences him to a fixed term of community custody." *State v. LaBounty*, 17 Wn. App. 2d 576, 588, 487 P.3d 221 (2021) [*LaBounty* II]. Otherwise, the trial court is not allowed to impose a total term of confinement and community custody that exceeds the statutory maximum. RCW 9.94A.505(5)[5].

On remand, the trial court can impose community custody only if consistent with *LaBounty* II and RCW 9.94A.505(5).

[5] 9.94A.505(5) has been amended since the events of this case transpired. Because these amendments do not impact the statutory language relied on by this court, we refer to the current statute.

E. SAME CRIMINAL CONDUCT NOTATION

As the State concedes, the trial court ruled that LaBounty's possession with the intent to distribute heroin and possession with intent to distribute methamphetamine constituted the same criminal conduct. However, the judgment and sentence does not reflect this ruling. On remand, the trial court should note on the judgment and sentence that the two convictions constituted the same criminal conduct.

The trial court used a judgment and sentence form that did not include a box to indicate that the current offenses were treated as the same criminal conduct. This box is contained in section 2.1 in the current template judgment and sentence form.

CONCLUSION

We affirm the imposition of LaBounty's deadly weapon sentencing enhancement, but we remand for resentencing. The new judgment and sentence should reflect that LaBounty's two convictions constitute the same criminal conduct.

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

MAXA, J.

We concur:

GLASGOW, C.J.

CRUSER, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 53475-4-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Jason Walker, DPA
[jwalker@co.grays-harbor.wa.us]
[appeals@co.grays-harbor.wa.us]
Grays Harbor County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

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