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Court of Appeals
Division III
State of Washington

No. 31759-5-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

COURTNEY CORY ARBUCKLE,
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Annette S. Plese, Superior Court Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to support the conviction of first degree burglary.

2. The court erred in denying defense counsel's' request to instruct the jury pursuant to State v. Brown[1] as to the requirement of nexus regarding the .22 firearm allegedly stolen during the burglary.

3. The evidence was insufficient to support the special verdict finding that Mr. Arbuckle was armed with a firearm at the time of commission of the crime of first degree burglary.

4. The evidence was insufficient to support the conviction of theft of a firearm.

Issues Pertaining to Assignments of Error

1. Was Mr. Arbuckle's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the crime of first degree burglary?

2. Was Mr. Arbuckle's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth

[1] State v. Brown, 162 Wn.2d 422, 431–35, 173 P.3d 245 (2007).

Amendment violated where the State failed to prove anyone was armed with a real gun for purposes of the special verdict finding?

3. Was Mr. Arbuckle's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the crime of theft of a firearm?

B. STATEMENT OF THE CASE

The South Regal Lumberyard, located at the corner of 55th Avenue and Regal Street in Spokane WA, was burglarized in the early hours of July 23, 2012.[2] II RP 73–75, 82, 100. A movement-triggered camera showed one suspect walking through the warehouse with a gun held to his chest. II RP 81–82, 110–11.

The two suspects' entry into the store area triggered a silent alarm at the home of one of the owners, John Case Scott. II RP 72, 74, 78, 82, 85, 123, 125. Mr. Scott, who could view the camera system from his house, verified there were two people inside and had his wife call 911. II RP 74–75. Mr. Scott was about a half-block away from the lumberyard as he saw the two suspects walk in his direction and toward a van, and then take off running up the hill and into some trees. Mr. Scott later identified

the defendant, Courtney Cory Arbuckle, as one of the people he'd seen on the video camera and again when he arrived at the scene. II RP 102. Mr. Scott didn't see anything in Mr. Arbuckle's hands. Police arrived about the same time. II RP 75–78, 152–53.

Mr. Scott testified several items were taken from the store, including a CO_2 BB pellet gun and a .22 revolver/pistol that were kept under a store counter. II RP 78, 80–81, 98–99. The CO_2 BB gun is a fake or replica gun; it looks like a revolver or pistol but is not a firearm. Employees sometimes used it for target practice. II RP 122, 133–36, 144–45, 166, 169, 244. Police later recovered the CO_2 BB gun. II RP 79.

The .22 pistol had been left at the business by a former employee. Some employees also used it occasionally for target practice. The firearm used to be kept in Mr. Scott's office. Three weeks prior to the burglary Mr. Scott used it to euthanize a wounded feral cat in the neighborhood, and noticed the firearm had apparently been moved to a place under the store counter. He did not see the gun again after killing the cat. II RP 79–80, 139–43. The .22 pistol was black, and similar in size to a CO_2 BB gun. II RP 101. The .22 firearm was never recovered. II RP 91, 238–39.

[2] The report of proceedings, contained in three consecutively paginated volumes, will be referred to by volume number and page, e.g., "II RP __"..

During their investigation, police contacted Mr. Arbuckle. He admitted his and Spivey's involvement in the burglary. II RP 181, 187, 198–99; III RP 401. When asked if Spivey was armed with a gun, Mr. Arbuckle said yes. II RP 182, 190, 200. That day Spivey had made a point of showing Mr. Arbuckle and others he was carrying a black gun, possibly a revolver. II RP 183, 193, 218–19.

The gun in the video was never found. RP 231. The images captured through use of infrared cameras are not real clear because the scene itself is pretty dark. Not pitch black, but one wouldn't necessarily see movement unless it was silhouetted by outside or pop machine lighting. II RP 113, 145–46. Mr. Scott thought the gun held in the video was not a revolver, and was similar in appearance to a Lorcin but not a Glock semi-automatic handgun. II RP 116–22. Spokane County Sheriff's Deputy Aaron Myhre recalled the gun in the video appeared to be a real gun, a Glock, like the gun he carried. II RP 186, 195. If the gun were pointed at him, the deputy would respond for safety reasons as if it was a real gun. II RP 196.

Spokane County Sheriff's Detective Tami Spitzer testified it would be silly to treat "BB guns, pellet buns, air soft guns" any differently than real guns. In her opinion the gun in the video was a real gun because

Daniel Spivey[3] was displaying it like a real gun and Mr. Arbuckle told police he was intimidated by Spivey. II RP 202, 228, 230, 236, 238, 244.

Police testified it was clear Mr. Arbuckle knew they were talking about a real gun because Mr. Arbuckle never said it was a fake gun and used the word "gun" at least five times. II RP 179, 184–85, 201, 219–20, 223, 232–33. Police didn't ask if the gun was fake, if Spivey had fired the gun or if Mr. Arbuckle had seen any bullets. II RP 192, 237. When asked why she didn't ask Mr. Arbuckle if the gun were real, Detective Spitzer responded:

> There was never any question. He had referred to it as a gun. He said he was intimidated by the way Mr. Spivey displayed it. It would be as if asking him is the sky blue. It was a given. It was a gun just as the sky is blue.

II RP 230.

Tina Lyons, Mr. Arbuckle's girlfriend, testified a gun Spivey was shooting at a nearby fence, on the day of the burglary, made a not very loud quick pop and a whistle noise, like an air gun. II RP 254–55, 261–63, 266. She knew it wasn't real because it was like a dart gun, the same type of gun her dad uses for darts. II RP 263–64, 268. It wasn't a revolver because it didn't have a round cylinder that moved. II RP 264. The gun

[3] Daniel Spivey was the second suspect involved in the burglary of the South Regal Lumberyard. II RP 181, 187; III RP 401.

shown in the video looked to her like the gun Spivey was shooting that day. II RP 266.

Spokane Police Sergeant Matthew Cowles testified as a firearms expert on behalf of the defense. II RP 279–305; III RP 329–43. Air soft or replica guns are incapable of firing bullets; they use a CO_2 cartridge or some other mechanism to fire a pellet. He said the gun shown in the video was not a revolver; it has a similar profile to a Lorcin handgun but he would need more information or the actual gun to form an opinion whether it was a real firearm because there are so many realistic replicas made of fake and real guns. II RP 289–93, 295–96; III RP 335–37, 339.

Mr. Arbuckle described an incident several weeks prior to the burglary where Spivey waived what Mr. Arbuckle assumed was a firearm while yelling at some people who hadn't paid a drug debt. He didn't know if the gun was real or fake. Mr. Arbuckle was paranoid and scared of Spivey because of his own failure to pay off a drug debt. The afternoon of the burglary, Spivey came over and implied the drug dealer wanted Mr. Arbuckle to pay towards the debt by helping Spivey commit a burglary. Spivey had the gun he'd waived, and also a CO_2 pellet gun. III RP 347–54, 391, 397, 415. Mr. Arbuckle thought Spivey used the pellet gun

during the burglary. III RP 361–62, 370, 379. Mr. Arbuckle didn't see the .22 pistol in the store, and didn't take it. III RP 377.

After the State rested its case-in-chief, defense counsel brought a motion to dismiss the firearm enhancement because there was no evidence the gun in the video was capable of firing a projectile. The court reserved ruling, and let the defense proceed with its case. At continued argument the next morning, the State argued alternatively that the missing .22 firearm could form the basis for the enhancement. Ultimately the court denied the motion to dismiss the enhancement, saying it was up to the jury to decide. II RP 251–53; III RP 312– 27, 417–18.

Regarding the special verdict to support the enhancement, the court gave defense counsel's proposed nexus instruction based on State v. Brown[4], "[i]f the firearm is not used or displayed in the course of the crime, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the crime and that there was a nexus between the crime, the defendant and the firearm. For the State to prove the defendant was armed, the firearm must be easily accessible and readily available for use for either offensive or defensive purposes." III RP 322–23, 325–27, 421–22, 424. The court prefaced the instruction,

[4] State v. Brown, 162 Wn.2d 422, 173 P.3d 245 (2007).

"For the purposes of the Special Verdict Form, ….". Instruction No. 27 at CP 170.

The jury was instructed that in order to convict the defendant of the crime of burglary in the first degree,

> [E]ach of the following elements of the crime must be proved beyond a reasonable doubt:
>
> 1) Than on or about July 23, 2012, the defendant entered or remained unlawfully in a building;
>
> 2) That the entering or remaining was with intent to commit a crime against a person or property therein;
>
> 3) That in so entering or while in the building or in immediate flight from the building the defendant or an accomplice in the crime charged was armed with a deadly weapon; and
>
> 4) That any of these act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction No. 5 at CP 147.

Regarding the burglary charge, the jury was also instructed that "[a] firearm, whether loaded or unloaded, is a deadly weapon." Instruction No. 8 at CP 150. Although proposed by defense counsel, the court did not further define "deadly weapon". [5] The court refused, over defense

[5] "Deadly weapon means any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used is readily capable of causing death or substantial bodily harm." CP 33; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 2.06.01 (3d Ed).

counsel's objection, to also include the nexus/easily accessible/readily available instruction (cited *supra*) regarding the burglary charge:

> My only objection would be to not including the defense proposed instruction regarding displaying or using a weapon and having it relate specifically to the first degree burglary charge.
>
> I was hoping to argue that if the State argues the .22 allegedly stolen during the burglary [is] the deadly weapon, I still think [there] needs to be a nexus between that weapon and the burglary in order for it to be considered a deadly weapon for purposes of the first degree burglary.
>
> …
>
> I'm [] asking that [] the jury be instructed regarding the nexus relating to the first degree burglary, as well as the special verdict, because, again, I'm seeking to be allowed to argue to the jury that the .22, if it was even taken, wasn't used or wasn't readily available for offensive or defensive purposes to commit the burglary. …
>
> [THE COURT]: You're trying to argue that either of those guns won't qualify under the first degree burglary.
>
> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> [THE COURT*]: I think you can argue that, but I think there's a higher burden under the special verdict, which is why I limited it to the special verdict.*
>
> …
>
> Since I've already connected the dots about at the time of the crime the nexus between the crime and the defendant, I just left your last line out. I agree under that case that there's got to be some nexus.
>
> I think [the State] can argue, either. [sic] If the jury believe[s] that's a real gun in the video, then you've got the special verdict form or he can argue the .22, and I think you can do the same both for the burglary and for the special enhancement.

III RP 426–28 (emphasis added).

In closing, the State argued the jury could find that either gun—the gun in the video or the missing .22 pistol—was the deadly weapon for

purposes of the crime of first degree burglary and/or was the firearm for purposes of the special verdict. III RP 450–55, 459–65, 466, 480–84.

During deliberation, the jury inquired, "By law, can a pellet gun be classified as a deadly weapon?" The court responded, "Please re-read your jury instructions." CP 58.

The jury convicted Mr. Arbuckle of first degree burglary committed while armed with a deadly weapon and theft of a firearm as charged. By special verdict, the jury found he was armed with a firearm at the time of the commission of the burglary. CP 5–6, 59, 61, 63. The court imposed 151 months confinement, which included 120 months as a mandatory "doubled" firearm enhancement of 60 months, based on criminal history of a prior deadly weapons enhancement. CP 82; RP 497, 503.

This appeal followed. CP 91–92.

C. ARGUMENT

1. Mr. Arbuckle's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime of first degree burglary.

In all criminal prosecutions, due process requires that the state prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); *State v. Crediford*, 130 Wn.2d 747, 749, 927 P.2d 1129 (1996). Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* "Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)). While circumstantial evidence is no less reliable than direct

evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 491, 670 P.2d 646 (1983).

A reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, when viewing the evidence in a light most favorable to the state, could have found the elements of the crime charged beyond a reasonable doubt. *State v. Hundley*, 126 Wn.2d 418, 421–22, 894 P.2d 403 (1995).

A person may not be convicted of first-degree burglary without proof beyond a reasonable doubt that 1) the person entered or unlawfully remained in a building with intent to commit a crime against a person or property there and 2) in entering or while in the building or in immediate flight therefrom, the person or another participant was armed with a deadly weapon. RCW 9A.52.020.

Here, the evidence was insufficient to show Mr. Arbuckle or anyone else was "armed with a deadly weapon" as required by the first-degree burglary statute.

a. The State failed to prove there was a deadly weapon *per se*, a firearm. The jury was instructed that a firearm, whether loaded or unloaded, is a deadly weapon. Instruction No. 8 at CP 150. In closing, the State argued the jury could find that either gun—the gun in the video or the missing .22 pistol—was the firearm ("real" gun) for purposes of the crime of first degree burglary. III RP 450–55, 459–65, 466, 480–84. A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder." RCW 9.41.010(9).

Here, there was evidence of potentially five guns. (1) Mr. Arbuckle was unsure whether the one gun Spivey had previously used in an intimidating manner was a firearm. (2) He thought Spivey used his CO_2 pellet gun during the burglary. III RP 347–54, 361–62, 370, 379, 391, 397, 415. Ms. Lyons also described Spivey shooting an air pellet or dart gun that day, one which looked to her like the gun seen in the video. II RP 254–55, 261–64, 266, 268. (3) Police labelled the gun in the video a firearm because they would respond for safety reasons as if it was a real gun, it was displayed like a real gun, Mr. Arbuckle never said it was a fake gun and he used the word "gun" at least five times. II RP 179, 184–85, 201–02, 219–20, 223, 228, 230, 232–33, 236, 238, 244. (4) Mr. Scott

said a CO_2 BB pellet gun was taken during the burglary and (5) a .22 firearm was missing after the burglary. II RP 78, 80–81, 98–99.

Of these five, the two CO_2 pellet guns are fake guns. The State's evidence does not establish that Spivey's other gun or the gun in the video was a real gun. There was no proof that the fifth gun—the missing .22 firearm—was in the store or that it was taken in the burglary. Mr. Scott last saw the gun three weeks prior to the burglary when he'd used it to kill a cat. The gun itself was never recovered. II RP 79–80, 91, 101, 139–43, 238–39.

The State's evidence failed to establish a firearm was involved in the burglary. The conviction must be reversed for insufficient evidence.

b. <u>As instructed, the State was impermissibly relieved of its burden to prove Mr. Arbuckle was armed with the .22 firearm</u>. The jury was given an incorrect statement of the law and the State was relieved of its burden to prove Mr. Arbuckle was armed beyond a reasonable doubt.

Jury instructions are reviewed de novo, "within the context of the jury instructions as a whole." *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). Jury instructions, "taken in their entirety, must inform the jury that the State bears the burden of proving every essential element

of a criminal offense beyond a reasonable doubt." *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). When a defendant challenges the sufficiency of the evidence in light of an incomplete or incorrect jury instruction, the reviewing court determines whether sufficient evidence exists to sustain the conviction based on the given instruction. See, e.g., *Tonkovich v. Dep't of Labor & Indus.*, 31 Wn.2d 220, 225, 195 P.2d 638 (1948) ("It is the approved rule in this state that the parties are bound by the law laid down by the court in its instructions [.] ... In such case, the sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions and rules of law laid down in the charge.").

In *State v. Brown*, 162 Wn. 2d 422, 173 P.3d 245, 249 (2007), the court held that to show a participant is armed for purposes of first degree burglary, the State must prove two separate prongs: First, the weapon must be "easily accessible and readily available for use for either offensive or defensive purposes." *Id.*, 162 Wn.2d at 431 (citing, among others, *State v. Easterlin*, 159 Wn.2d 203, 208–09, 149 P.3d 366 (2006)). Second, there must be a nexus between the defendant, the crime, and the weapon. *Brown*, 162 at 431 (citing, among others, *State v. Gurske*, 155 Wn.2d 134, 138, 118 P.3d 333 (2005)). The mere presence of a deadly weapon at the scene of the crime, mere close proximity of the weapon to the defendant,

or constructive possession alone is insufficient to show that the defendant is armed. *Brown*, 162 at 431 (citations omitted).

In *Brown*, Brown and another man burglarized a house but did not remove anything. When the occupant of the house returned home, he observed his unloaded AK–47 rifle, normally kept in the closet, on his bed, along with an ammunition clip from a different rifle. Based on the rifle's location, the trial court convicted Brown of first degree burglary and applied a firearm sentence enhancement. *Brown*, 162 Wn.2d at 427. Our Supreme Court vacated the first degree burglary conviction and firearm enhancement, holding that "armed" for purposes of a first degree burglary conviction and application of a firearm sentence enhancement required a nexus among the defendant, the weapon, and the crime, and that relationship did not exist. *Brown*, 162 Wn.2d at 432, 435.

> Here, the crime was burglary and the type of weapon was a rifle at the scene. However, the circumstance under which the weapon was found does not support a conclusion that Brown was "armed" as intended by the legislature. Specifically, when the homeowner arrived, the rifle was found on the bed after Brown and his accomplice had left the scene. Also, Brown and/or his accomplice evidently had removed property from under the bed but left a pistol in that same location untouched. *No evidence exists that Brown or his accomplice handled the rifle on the bed at any time during the crime in a manner indicative of an intent or willingness to use it in furtherance of the crime*. In fact, Hill's testimony indicates that the weapon here was regarded as nothing more than valuable property.

Brown, 162 Wn.2d at 432 (footnote omitted, emphasis added).

In this case, the crime is also first degree burglary. However, the facts regarding the weapon fall significantly short of the facts found insufficient in in *Brown*: the type of weapon was a .22 firearm that was last seen three weeks before the crime, and was never recovered. There was no evidence the firearm was actually under the store counter, that it was moved during the burglary, or that Mr. Arbuckle or Spivey touched it or removed it from the scene. Even more so than in *Brown*, these circumstances fail to support a conclusion that Mr. Arbuckle was "armed" during the burglary.

Over defense objection, the trial court refused to give a "nexus" instruction in connection with the burglary "to convict" instruction. The court instead gave the "nexus" instruction based on *Brown* only as to the special verdict finding of being armed with a firearm, rationalizing illogically that "there's a higher burden under the special verdict, which is why I limited it to the special verdict." III RP 426–28. The court disregarded that the burden of proof beyond a reasonable doubt applies equally to the elements of a crime and the special verdict finding of being armed with a firearm during commission of the crime.

As a result of the court's incomplete statement of the law on the burglary charge, the jury was told only that the State must prove beyond a reasonable doubt Mr. Arbuckle was armed with a deadly weapon at the time of the crime. The State's theory was that the deadly weapon was a firearm. The only evidence of a firearm was the .22 firearm, which could not be connected to Mr. Arbuckle or the crime scene. The jury was not instructed that the State had to show a nexus beyond a reasonable doubt between Mr. Arbuckle, the crime of burglary, and the .22 firearm weapon. The jury was told to decide each count separately.[6] And although the court told defense counsel he could make the "nexus" argument regarding the burglary count in his closing (III RP 426–28), the jury was told to follow only the law set forth in the instructions.[7] The instructions as given did not require—or even allow—the jury to consider whether there was a nexus in regard to the burglary count.

Without the nexus instruction as to the burglary count, the jury was left to impermissibly speculate what "armed" with a deadly weapon meant. The jury decided guilt for the crime of first degree burglary without considering whether the State had proved a nexus beyond a reasonable doubt between Mr. Arbuckle, the crime of burglary, and the .22 firearm

[6] Instruction No. 23 at CP 165.

weapon. The State was impermissibly relieved of its burden to prove Mr. Arbuckle was armed for purposes of the first degree burglary charge. See *Brown*, 162 Wn.2d at 431, 435. The conviction must be reversed for insufficient evidence.

2. Mr. Arbuckle's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove anyone was armed with a real gun for purposes of the special verdict finding.

> Our cases involving … enhanced punishment statutes uniformly require proof beyond a reasonable doubt to establish facts which, if proved, will increase a defendant's penalty.

State v. Tongate, 93 Wn.2d 751, 754, 613 P.2d 121 (1980).

The law regarding sufficiency of the evidence is set forth above and incorporated herein.

To enhance Mr. Arbuckle's sentence in this case, the State had to prove that he or an accomplice was armed with a firearm during the burglary. As discussed in the preceding argument, two of the potential "firearms" are instead fake guns: CO_2 BB pellet guns. The State's evidence does not establish that Spivey's other gun or the gun in the video was a real gun. There was no proof that the fifth gun—the missing .22

[7] Instruction No. 1 at CP 141.

firearm—was at the crime scene and/or even taken in the burglary. Mr. Scott last saw the gun three weeks prior to the burglary when he'd used it to kill a cat. The gun itself was never recovered. II RP 79–80, 91, 101, 139–43, 238–39. The State's evidence failed to establish a "firearm" was involved.

For purposes of the special verdict, a defendant is armed with a firearm if the firearm is easily accessible and readily available for either offensive or defensive use, and there must be a nexus between the defendant, the crime, and the weapon. *Brown,* 162 Wn.2d 422, 431, 435. In *Brown*, the court determined that while the defendants had constructive possession of a rifle during the course of a burglary, there was no evidence that they intended or were willing to use the weapon to further the crime. *Brown,* 162 Wn.2d 431–32.

Here, there was no evidence the .22 firearm was in the store at the time of the burglary and/or that it was taken from the store at the time of the burglary. The firearm has last been seen three weeks prior to the crime, and was never recovered. Even if, when viewed in a light most favorable to the state, the jury could infer from circumstantial evidence the firearm was at the scene, its mere presence or close proximity to Mr. Arbuckle, or constructive possession alone is insufficient to show that he

or Spivey was armed. *Brown*, 162 at 431 (citations omitted). The State's evidence did not establish Mr. Arbuckle or anyone else intended or was willing to use the weapon to further the burglary. *Brown*, 162 Wn.2d 431–32.

In the absence of physical evidence and proof of nexus, the State's proof on the firearm enhancement fails. The enhancement must be vacated. *Brown*, 162 Wn.2d at 435.

3. Mr. Arbuckle's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the crime of theft of a firearm.

The law regarding sufficiency of the evidence is set forth above and incorporated herein.

"A person is guilty of theft of a firearm if he or she commits a theft of any firearm." RCW 9A.56.300(1). A "firearm" is "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(9); RCW 9A.56.300(5). Theft means, in relevant part, "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to

deprive him or her of such property or services[.]" RCW 9A.56.020(1)(a). Under RCW 9A.08.020(3)(a), a person is guilty as an accomplice of another person if, with knowledge that it will promote or facilitate the crime, he or she:

> (i) solicits, commands, encourages, or requests such other person to commit it; or
> (ii) aids or agrees to aid such other person in planning or committing it [.]

A fact finder is permitted to draw inferences from circumstantial evidence so long as these inferences are rationally related to the proven fact. *State v. Bencivenga,* 137 Wn.2d 703, 707, 974 P.2d 832 (1999). However, an inference is invalid " 'unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.' " *State v. Kovac*, 50 Wn. App. 117, 120, 747 P.2d 484 (1987), citing *Turner v. United States,* 396 U.S. 398, 405, 90 S.Ct. 642, 646, 24 L.Ed.2d 610 (1970) (quoting *Leary v. United States,* 395 U.S. 6, 36, 89 S.Ct. 1532, 1548, 23 L.Ed.2d 57, 82 (1969)).

Here, the State charged Mr. Arbuckle with theft of the .22 revolver. CP 6. As discussed above, there was no proof the .22 firearm was in the store at the time of the burglary. Mr. Scott last saw the gun three weeks prior to the burglary when he'd used it to kill a cat. There was no proof

the firearm was taken in the burglary. There were no eyewitnesses. There was no evidence Mr. Arbuckle and/or Spivey had ever been inside the South Regal Lumberyard store or knew a firearm was kept on the premises. The gun itself was never recovered. II RP 79–80, 91, 101, 139–43, 238–39.

At best, the State's evidence placed Mr. Arbuckle and/or Spivey in the vicinity of a counter from which employees of the lumberyard had retrieved the firearm three weeks earlier so that the owner could kill a nuisance cat. This fact does not establish guilt beyond a reasonable doubt. The State offered no proof that Mr. Arbuckle had masterminded or even aided the alleged theft in some way. It cannot be said with substantial assurance that the presumed "fact" of Mr. Arbuckle's liability as principal or accomplice for theft "more likely than not flows" from the above-referenced sparse and innocuous "proven facts". *Turner,* supra. The inference is not plainly indicated as a matter of logical probability. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). No rational trier of fact could have found the State proved beyond a reasonable doubt that Mr. Arbuckle acted with an intent to deprive the lumberyard of a firearm or that he obtained or aided another to obtain control over the firearm. There

is no proof Mr. Arbuckle committed the crime charged. The conviction must be reversed for insufficient evidence. *Baeza*, 100 Wn.2d at 491.

D. CONCLUSION

For the reasons stated, the firearm enhancement and conviction for first degree burglary and the conviction for theft of a firearm should be vacated.

Respectfully submitted on March 5, 2014.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on March 5, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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