Supreme Court No. _____
Court of Appeals No. 31759-5-III

91157-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner, Courtney Cory Arbuckle, is the appellant below and asks this Court to review the decision referred to in Section II.

II. COURT OF APPEALS DECISION

Petitioner requests review of the Court of Appeal's unpublished decision noted at *State v. Arbuckle*, No. 31759-5-III, 2014 WL 6068395 (Wash. Ct. App. Nov. 13, 2014). A copy of the slip opinion is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals' decision that Mr. Arbuckle was properly convicted of theft of a firearm that had not been seen at the scene for three weeks and was never recovered conflict with decisions of this Court and the Court of Appeals holding that permissible inferences from circumstantial evidence must be rationally related to the proven fact the gun was missing after the burglary?

2. Does the Court of Appeals' decision that for purposes of his first degree burglary conviction and firearm special verdict Mr. Arbuckle was alternatively armed with a gun held by his co-burglar in a surveillance video conflict with decisions of this Court and the Court of Appeals holding that the firearm must be genuine?

3. Does the Court of Appeals' decision that the firearm special verdict renders harmless any error in failing to require the jury to find a nexus between Mr. Arbuckle, the gun and the crime and the court's reliance on *State v. Hernandez*[1] conflict with *State v. Brown's*[2] holding that to show a participant is armed for purposes of first degree burglary, the State must prove (1) the weapon is easily accessible and readily available for use for either offensive or defensive purposes and (2) there is a nexus between the defendant, the crime, and the weapon?

IV. 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.[3] 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. Scott eventually arrived and saw the two suspects walk toward a van and then run away. He later identified Arbuckle as the person he'd seen on the video camera and again upon

[1] 172 Wn. App. 537, 290 P.3d 1052 (2012).
[2] 162 Wn.2d 422, 173 P.3d 245 (2007).

arrival at the scene. II RP 74–75, 102. Scott didn't see anything in Arbuckle's hands. II RP 75–78, 152–53.

Scott testified a CO_2 BB pellet gun (a fake gun) and a .22 revolver/pistol were missing from under the counter where they were kept. II RP 78, 80–81, 98–99, 122, 133–36, 144–45, 166, 169, 244. The CO_2 BB gun was later recovered. The functional .22 pistol was last seen at the business three weeks prior to the burglary and was never found. II RP 79–80, 91, 101, 238–39.

Arbuckle admitted his and Spivey's involvement in the burglary to police. II RP 181, 187, 198–99; III RP 401. When asked if Spivey was armed with a gun, Arbuckle said yes. II RP 182, 190, 200. That day Spivey had shown 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 shown in the video are not real clear because the scene itself was dark and almost pitch black. II RP 113, 145–46. Scott thought the gun appeared similar to a Lorcin handgun but was not a revolver or a Glock. II RP 116–22. Spokane County Sheriff's Deputy Aaron Myhre thought the gun in the video appeared to be a real gun, a Glock, like the gun he carried. II RP 186, 195.

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

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[4] displayed it in the video like a real gun and Arbuckle told police he was intimidated by Spivey. II RP 202, 228, 230, 236, 238, 244.

Police testified it Arbuckle knew they were talking about a real gun because he 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 Arbuckle had seen any bullets. II RP 192, 237. When asked why she didn't ask him 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, Arbuckle's girlfriend, testified the 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 in the video looked like the fake 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 in the video was not a revolver; it had 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.

Arbuckle described an incident several weeks prior to the burglary where Spivey waived what he assumed was a firearm while yelling at some people who hadn't paid a drug debt. Arbuckle didn't know if the gun was real or fake. He 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 Arbuckle to pay towards the debt by helping Spivey commit a burglary. Spivey had the gun he'd waived and

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

also a CO_2 pellet gun. III RP 347–54, 391, 397, 415. Arbuckle thought Spivey used the pellet gun during the burglary. III RP 361–62, 370, 379.

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 the defense proceeded with its case. At continued argument the next morning, the State argued alternatively the missing .22 firearm could form the basis for the enhancement. Ultimately the court denied the motion to dismiss the enhancement and said 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*[5], "[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

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

RP 322–23, 325–27, 421–22, 424. The court prefaced the instruction, "For the purposes of the Special Verdict Form,...". Instruction No. 27, CP 170.

The jury was instructed that in order to convict the defendant of the crime of burglary in the first degree, the State had to prove 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;
> ...

Instruction No. 5 at CP 147.

Regarding the burglary charge, the jury was also instructed "[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".[6] Over defense counsel's objection the court refused to include the burglary charge in the nexus instruction:

> 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

[6] "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).

> [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 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 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.

V. ARGUMENT IN SUPPORT OF REVIEW

Review should be granted under RAP 13.4(b)(1) and (2) because the decision of the court below is in conflict with decisions of this Court and other divisions of the Court of Appeals.

1. The Court of Appeals' decision that Mr. Arbuckle was properly convicted of theft of a firearm that had not been seen at the scene for three weeks and was never recovered conflicts with decisions of this Court and the Court of Appeals holding that permissible inferences from circumstantial evidence must be rationally related to the proven fact the gun was missing after the burglary.

"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 Arbuckle with theft of the .22 revolver. CP 6. There was no proof the .22 firearm was in the store at the time of the burglary. 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 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 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 Arbuckle had masterminded or even aided the alleged theft in some way. It cannot be said with substantial assurance that the presumed "fact" of 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 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 Arbuckle committed the crime charged.

2. The State failed to prove the essential elements of the crime of first degree burglary and to support the firearm special verdict.

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 Arbuckle or anyone else was "armed with a deadly weapon" as required by the first-degree burglary statute.

> a. The Court of Appeals' decision that for purposes of his first degree burglary conviction and firearm special verdict Mr. Arbuckle was alternatively armed with a gun held by his co-burglar in a surveillance video conflict with decisions of this Court and the Court of Appeals holding that the firearm must be genuine.

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) Arbuckle was unsure whether a gun Spivey had intimidated him with several weeks later 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 said the gun in the video looked like the pellet gun Spivey was shooting that day. 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, 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) 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 the fifth gun—the missing .22 firearm—was in the store at the time of the burglary or that it was taken in the burglary. Scott last saw the gun three weeks prior to the burglary when

he'd used it to kill a cat and the gun itself was never recovered. II RP 79–80, 91, 101, 139–43, 238–39. The State's evidence failed to establish a real gun was involved in the burglary.

> b. The Court of Appeals' decision that the firearm special verdict renders harmless any error in failing to require the jury to find a nexus between Mr. Arbuckle, the gun and the crime and the court's reliance on *State v. Hernandez*[7] conflict with *State v. Brown's*[8] holding that to show a participant is armed for purposes of first degree burglary, the State must prove (1) the weapon is easily accessible and readily available for use for either offensive or defensive purposes and (2) there is a nexus between the defendant, the crime, and the weapon.

Firearm special verdict. To enhance 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 firearm—was at the crime scene and/or even taken in the burglary. 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.

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[7] 172 Wn. App. 537, 290 P.3d 1052 (2012).

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. *State v. Brown,* 162 Wn.2d 422, 431, 435, 173 P.3d 245 (2007). 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 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 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

[8] 162 Wn.2d 422, 173 P.3d 245 (2007).

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

Failure to include burglary charge in nexus jury instruction.

Division Three of the Court of Appeals determined the firearm special verdict rendered harmless any error in failing to require the jury to find a nexus between Arbuckle, the gun and the crime. *Slip Opinion* at 7–8. Division III's reasoning that theft of a firearm ipso facto yields a firearm enhancement and reliance upon *Hernandez*, 172 Wn. App 537, supra, is deficient and contrary to this Court's decision in *State v. Brown*, supra.

In *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 and a firearm special verdict , 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)), 435. 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)), 435. 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. This 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

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

In this case, the crime is also first degree burglary and the jury also returned a firearm special verdict. 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 it was never recovered. There was no evidence the firearm was actually under the store counter, that it was moved during the burglary or that 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 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 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 genuine firearm was the .22 firearm, which could not be connected to Arbuckle or the crime scene. The jury was not instructed the State had to show a nexus beyond a reasonable doubt between Arbuckle, the crime of burglary, and the .22 firearm weapon. The jury was told to decide each count separately.[9] And although the court stated defense counsel could make the "nexus" argument regarding the burglary count in his closing (III RP 426–28), the jury was instructed to follow only the law set forth in the instructions.[10] 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 the required nexus beyond a reasonable doubt. The State was impermissibly relieved of its burden to

[9] Instruction No. 23 at CP 165.

prove Arbuckle was armed for purposes of the first degree burglary. See *Brown*, 162 Wn.2d at 431, 435.

VI. CONCLUSION

For the reasons stated, Petitioner respectfully asks this Court to grant review.

Respectfully submitted on December 15, 2014.

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[10] Instruction No. 1 at CP 141.

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on December 15, 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 Mr. Arbuckle's petition for review and Appendix A:

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CASE # 317595
State of Washington v. Courtney Cory Arbuckle
SPOKANE COUNTY SUPERIOR COURT No. 121028622

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:ko
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. COURTNEY CORY ARBUCKLE, Appellant.	)	No. 31759-5-III UNPUBLISHED OPINION

KORSMO, J. — Courtney Arbuckle appeals his convictions for first degree burglary, with accompanying special verdict finding that he was armed with a firearm, and theft of a firearm. We conclude that the defendant was not prejudiced by an alleged instructional error and the evidence was sufficient. The convictions are affirmed.

FACTS

The noted charges arose from the burglary of a lumber yard that was largely captured on surveillance cameras. Mr. Arbuckle and Daniel Spivey triggered a silent alarm when they broke into the lumber yard. When the two entered the store area, they were recorded by security cameras. The business owner was alerted and, observing on the cameras that one of the men in the video was armed with a gun, called the police and drove to his store. The owner and an officer arrived at the same time the two men were leaving. The two men fled on foot from the officer, leaving a van behind.

A pellet gun and several stolen items were found near the van. The business owner reported that additional items were missing, including a .22 caliber pistol. A detective located Mr. Arbuckle after discovering the van was registered to Arbuckle's girl friend. After his arrest, Mr. Arbuckle gave a detailed statement to the detective and identified Mr. Spivey as his confederate. He told the detective that Spivey was armed with a gun during the burglary.

The case was tried to a jury. Mr. Arbuckle testified that Spivey had been armed with only a fake gun (the pellet gun) and that the .22 pistol was not present and had not been stolen. The court instructed the jury that in order to answer "Yes" to the firearm special verdict, it must find a nexus between the burglary and the firearm. The court, however, declined the defense request to similarly instruct the jury about a nexus requirement on the burglary charge.

The jury convicted Mr. Arbuckle as charged, rejecting his contention that he was only guilty of lesser offenses because no gun was stolen. He then timely appealed to this court from a standard range sentence.

ANALYSIS

Mr. Arbuckle challenges the sufficiency of the evidence to support the firearm finding and the burglary and theft of a firearm convictions, as well as the absence of a "nexus" instruction on the burglary charge. We address the sufficiency arguments together before turning to the instructional claim.

Sufficiency of the Evidence

Mr. Arbuckle argues that the evidence did not support the jury's verdicts that he committed the two offenses or that he was "armed" with a firearm during the commission of the burglary. Specifically, he argues that the evidence was insufficient to establish that the .22 pistol was stolen or that either of the burglars was armed with a genuine firearm.

Very well settled standards govern review of these claims. Evidence is sufficient to support a conviction if it permits the trier-of-fact to find beyond a reasonable doubt each element of the offense. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). In reviewing such challenges, an appellate court will construe the evidence in the light most favorable to the prosecution. *Id.* "All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The reviewing court does not reweigh evidence. *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009).

Theft of a Firearm

As charged and instructed here, the State was required to prove that Mr. Arbuckle wrongly obtained or exercised unauthorized control over a firearm with the intent to deprive the owner of that firearm. Clerk's Papers (CP) at 157. Mr. Arbuckle's argument

on this count is that no firearm was taken during the burglary. He denied that one was taken and notes that the owner had last seen the weapon three weeks before the burglary.

Properly viewed, the evidence supports the conviction. The victim testified that a functional .22 caliber pistol was stored behind the counter at the lumber yard and was missing after the burglary. The two burglars were seen on camera in the area where the gun had been stored. Mr. Arbuckle admitted to taking a chisel that had been stored in the same location as the gun, and other items from that same area also were reported stolen. On this evidence, the jury could conclude that the .22 caliber pistol was taken with the intent to deprive the owner of the gun. Accordingly, the evidence justified the jury's verdict.

First Degree Burglary

Mr. Arbuckle, consistent with his claim that the firearm was not stolen, argues that the evidence did not support the burglary verdict due to lack of proof that a weapon was possessed during the crime. First degree burglary, as charged here, required the State to prove that the defendant entered or remained unlawfully in a building with the intent to commit a crime against person or property therein while he or an accomplice was armed with a deadly weapon. CP at 147. The State argued that either the .22 caliber pistol stolen in the burglary or the gun seen in Mr. Spivey's possession on the video was the deadly weapon with which the burglars were armed.

Our decision on the firearm theft largely controls the result on this challenge. The burglars were armed when the .22 caliber pistol was stolen and taken from the store, making

it available to them during the crime and flight therefrom. In addition, the surveillance evidence also showed that Spivey was armed throughout the course of the proceedings. The jury could see the weapon and several witnesses identified it as a genuine firearm. Mr. Arbuckle's statement to the detective likewise admitted that Spivey was armed with a gun.

This evidence again supported the jury's determination.

Special Verdict

For similar reasons, Mr. Arbuckle argues that the evidence did not support the jury's affirmative finding on the firearm special verdict. He contends that the State did not prove that the .22 caliber pistol was stolen or that the gun in Spivey's possession was a genuine firearm. To return the special verdict, the jury had to unanimously find beyond a reasonable doubt that the defendant was armed with a firearm during the burglary and there was a connection between the firearm, the defendant, and the crime. CP at 170.

Once again, the theft of the firearm largely resolves the analysis of this claim. The thief was armed when he took that gun, effectively arming both burglars. There certainly was a connection between the defendant and the weapon and the burglary—the stolen gun was one of the fruits of the burglary.

Similarly, the evidence relating to Spivey's possession of a firearm also supported the special verdict. The video showed him carrying a weapon and several witnesses identified it as a genuine gun. Mr. Arbuckle's admission to the detective likewise stated Spivey possessed a gun. Finally, we have no difficulty concluding that a burglar displaying

a firearm in the course of committing his crime establishes the necessary connection between the crime, the gun, and the suspect.

As with the charged counts, the evidence supported the jury's special verdict. Sufficient evidence supported each of the three challenged verdicts.

Nexus Instruction

Additionally, Mr. Arbuckle contends that the court erred in failing to include the burglary charge in its nexus instruction. The court expressly instructed the jury that it needed to find a nexus between the defendant, the gun, and the burglary in order to return an affirmative finding on the special verdict form. The court declined to include the burglary charge in its nexus instruction. On the facts of this case, the failure to give the instruction was, at worst, harmless error. [1]

Appellant bases his argument on *State v. Brown*, 162 Wn.2d 422, 173 P.3d 245 (2007). There the court applied the nexus requirement to both the firearms enhancement and the first degree burglary charge at issue there. *Id.* at 431-35. Although *Brown* dealt with the sufficiency of the evidence rather than a jury instruction, it is suggestive that the nexus instruction should probably have extended to the burglary charge as well as the special verdict. Division Two of this court, however, reached a contrary result in *State v. Hernandez*,

[1] The defendant's proposed definitional instruction is not in the record of this case. However, there is a fairly clear discussion of the instruction and the court indicated that it gave all but the last sentence of the proposed defense instruction. Report of Proceedings at 426-28. The State does not contest appellant's ability to present this argument.

172 Wn. App. 537, 543-44, 290 P.3d 1052 (2012), in part relying on the discussion in *In re Personal Restraint Petition of Martinez*, 171 Wn.2d 354, 366-68, 256 P.3d 277 (2011).

We need not weigh in on this debate because Mr. Arbuckle was not harmed by the failure to extend his requested definitional instruction. Typically, courts are afforded broad discretion in the wording of jury instructions. *Petersen v. State*, 100 Wn.2d 421, 440-41, 671 P.2d 230 (1983). Instructional error is presumed prejudicial, but can be shown to be harmless. *State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984). A nonconstitutional error such as this one[2] is harmless if it did not, within reasonable probability, materially affect the verdict. *State v. Zwicker*, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986). Even constitutional error, such as the omission of an element from a "to convict" instruction, is harmless error if it is clear beyond a reasonable doubt that the error did not contribute to the verdict. *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (citing *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)); *State v. Thomas*, 150 Wn.2d 821, 840-41, 83 P.3d 970 (2004). Under either standard, the alleged error was harmless.

The jury found a connection between the defendant, the gun, and the crime when it returned the properly instructed special verdict. The same connection necessarily existed for the charged burglary offense as it did for the special verdict. Having found the one

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[2] Only instructional errors involving the burden of proof or the elements of a crime constitute constitutional error. *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009).

connection, any error in failing to expressly require the jury to find the connection on the burglary offense was harmless because the jury was considering the same offense and the same facts on both the charged crime and the underlying enhancement.

There was no prejudice from the alleged error. Accordingly, Mr. Arbuckle is not entitled to any relief.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Siddoway, C.J.

Fearing, J.

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December 15, 2014 - 12:02 PM

Transmittal Letter

Document Uploaded:	317595-Petition for Review 12-15-14 Arbuckle, Courtney.pdf
Case Name:	State v. Courtney Cory Arbuckle
Court of Appeals Case Number:	31759-5
Party Respresented:	petitioner
Is This a Personal Restraint Petition?	☐ Yes ☑ No
	Trial Court County: ____ - Superior Court # ____

Type of Document being Filed:

- ☐ Designation of Clerk's Papers
- ☐ Statement of Arrangements
- ☐ Motion: ____
- ☐ Response/Reply to Motion: ____
- ☐ Brief
- ☐ Statement of Additional Authorities
- ☐ Affidavit of Attorney Fees
- ☐ Cost Bill
- ☐ Objection to Cost Bill
- ☐ Affidavit
- ☐ Letter
- ☐ Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ____ Hearing Date(s): _____
- ☐ Personal Restraint Petition (PRP)
- ☐ Response to Personal Restraint Petition
- ☐ Reply to Response to Personal Restraint Petition
- ☑ Other: petition for review

Comments:

No Comments were entered.

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Transmittal Letter

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Case Name:	State v. Courtney Cory Arbuckle
Court of Appeals Case Number:	31759-5
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- ☐ Reply to Response to Personal Restraint Petition
- ☑ Other: petition for review Appendix A

Comments:

No Comments were entered.

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