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COURT OF APPEALS

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STATE OF WASHINGTON

BY YM  
CITY

NO. 34556-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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STATE OF WASHINGTON,  
Respondent,

vs.

JASON V. POWELL,  
Appellant.

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STATEMENT OF ADDITIONAL GROUNDS

FOR REVIEW

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**CERTIFICATE OF SERVICE**  
I certify that I mailed  
2 copies of this  
to Laura Riddell  
& John Hays  
10/23/11  
Date Signed

UCC 1-207 without prejudice Jason Powell  
Jason V. Powell # 892413

I. THE TRIAL COURT DENIED THE DEFENDANT BOTH THE RIGHT TO A FAIR TRIAL SECURED BY THE DUE PROCESS CLAUSE OF THE WASHINGTON CONSTITUTION ARTICLE I, § 3 AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION: AND THE RIGHT OF TRIAL BY JURY GUARANTEED BY WASHINGTON CONSTITUTION, ARTICLE I, § 21 AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT GAVE INSTRUCTION No. 5 WHICH DIRECTED THE JURY TO INFER INTENT IN THE ATTEMPTED BURGLARY CASE AT BAR.

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**Instruction No. 5** reads, "Evidence has been introduced in this case on the subject of threats made against Amber Williams, on dates other than October 13, 2005, on the limited issue of the defendant's intent on October 13, 2005. You must not consider this evidence for any other purpose."

**Washington Constitution Article I, § 21** states: "The right of trial by jury shall remain inviolate..."

**Washington Constitution Article I, § 3** states: "No person shall be deprived of life, liberty, or property without due process of law."

The due process clause is "[T]he constitutional provision that prohibits the government from unfairly or arbitrarily depriving a person of life, liberty, or property." Black's Law Dictionary, 539 Eighth Edition (2004).

""Due process prohibits the use of conclusive or irrebuttable presumption to find an element of a criminal offense, because such use of a conclusive presumption" would 'conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime', and would 'invade [the] factfinding function' which in a criminal case the law assigns solely to the jury." Savage, 94 Wn.2d at 573 (alteration in original)(quoting Sandstrom v. Montana, 442 U.S. 510, 523, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979))." State v. Mertens, 148 Wn.2d 820, 64 P.3d 633 (2003).

The defendant was not charged with burglary; but, rather, attempted burglary. The record contains no evidence of unlawfully entering or unlawfully remaining in a building. "Thus, there is no evidentiary basis for the operation of an inference as provided by RCW 9A.52.040. An instruction on an issue or theory unsupported by the evidence is improper. State v. Golladay, 78 Wn.2d 121, 470 P.2d 191 (1970); State v. Upton, 16 Wn.App. 195, 556 P.2d 239 (1976)." State v. Ogden, 21 Wn.App. 44, 49, 584 P.2d 957 (1978).

"An instruction on inferring intent in a burglary case cannot be given without evidence that the defendant was within a building. ...[T]he trial court cannot instruct the jury, where the charge is attempted burglary, that it may infer the defendant acted with intent to commit a crime within a building, where the evidence is that the defendant may have attempted entrance into a building, but there exist other equally reasonable conclusions which follow from the circumstances." State v. Jackson, 112 Wn.2d 867,868, 870, 774 P.2d 1211 (1989).

"In order to give an instruction that an inference of an intent to commit a crime existed in a burglary case, there must be evidence of entering or remaining unlawfully in a building. The instruction of intent cannot be given without evidence to support it and that must place the defendant within a building. State v. Ogden, 21 Wn.App. 44, 49, 584 P.2d 957 (1978)." State v. Jackson, 112 Wn.2d 867, 877, 774 P.2d 1211 (1989).

The trial court allowed the State to seek and access the aid of an inference of intent instruction in the attempted burglary case at bar. First of all, as stated in State v. Bergeron, 105 Wn.2d 1, 19, 711 P.2d 1000 (1985); "We do not have recourse to the inference of intent in burglary case statute (RCW 9A.52.040) in this case, however, because the defendant neither entered nor remained in the house." "Secondly, RCW 9A.52.040 authorizes an inference of intent only if a person 'enters or remains unlawfully in a building...' The instruction as drafted enabled the jury to draw the inference from an attempted entry.

The statute does not authorize such an instruction, and therefore comprises error of law." State v. Ogden, 21 Wn.App. 44, 49, 584 P.2d 957 (1978). "[T]he Legislature has adopted a permissive inference to establish the requisite intent whenever the evidence shows a person enters or remains unlawfully within a building." State v. Grimes, 92 Wn.App. 973, 980 n. 2, 966 P.2d 394 (1988) (citing RCW 9A.52.040; State v. Brunson, 128 Wn.2d 98, 107, 905 P.2d 346 (1995))." State v. Stinton, 121 Wn.App. 569, 573, 89 P.3d 717 (2004).

An objection/exception was not placed on instruction no. 5 at trial. "However, where an instruction invades a constitutional right of the accused (such as the right to a jury trial), it is not necessary, in order to have such error reviewed, that an exception be taken and called to the attention of the trial court. State v. Lowe, supra; State v. Suleski, 67 Wn.2d 45, 406 P.2d 613 (1965); State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956); State v. Reader, 46 Wn.2d 888, 285 P.2d 884 (1955); State v. Marsh, 126 Wash. 142, 217 Pac. 705 (1923); State v. Warwick, 105 Wash. 634, 637, 178 Pac. 977 (1919)." State v. Peterson, 73 Wn.2d 303, 306, 438 P.2d 183 (1968).

"When an error occurs in the instructions. the jury will be presumed to have relied upon it in the reaching their guilty verdict, unless the error affirmatively appears to be harmless. State v. Golladay, supra. Here there is no evidence that the error was harmless and it therefore constitutes reversible error." State v. Ogden, 21 Wn.App. 44, 49, 584 P.2d 957 (1978).

Instruction no. 5 directs the verdict. This error in the jury instructions is of constitutional magnitude and it structurally damages the integrity of the trial. As stated in Neder v. United States, 119 S.Ct. 1827, 1828, 527 U.S. 1, 144 L.Ed.2d 35 (1999): "Criminal Law key 1162. Constitutional errors affecting framework within which trial proceeds, rather than simply an error in trial process itself, infect entire trial process and necessarily render

trial fundamentally unfair, so as to preclude harmless error review. **Fed. Rules Cr. Proc. Rule 52(a), 18 U.S.C.A.** "Thus the State is excluded from arguing harmless error on this issue.

This error is constitutional in nature; therefore, it is considered and presumed to be prejudicial. Furthermore, under the facts of the attempted burglary case at bar, this constitutional error was and is prejudicial by any standard. This Court should reverse the conviction and remand for new trial under proper instruction.

II. THE TRIAL COURT DENIED THE DEFENDANT BOTH THE RIGHT TO A FAIR TRIAL SECURED BY THE DUE PROCESS CLAUSE OF WASHINGTON CONSTITUTION ARTICLE I, § 3 AND THE UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, AND THE RIGHT OF TRIAL BY JURY GUARANTEED BY WASHINGTON CONSTITUTION ARTICLE I, § 21 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT WHEN IT GAVE INSTRUCTION No. 17 WHICH IS INADEQUATE AS IT FAILS TO CLEARLY NECESSITATE THE USE OF THE WEAPON AS AN ELEMENT OF THE ENHANCEMENT.

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**Instruction No. 17** reads, "For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Count One.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm 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 firearm and the defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether this connection existed, you should consider the nature of the crime, the type of firearm, and the circumstances under which the firearm was found.

A 'firearm' is a weapon or device from which a projectile may be fired by an explosive such as gunpowder."

**Washington Constitution, Article I, § 3** states: "No person shall be deprived of life, liberty, or property without due process of law."

The **due process clause** is "[T]he constitutional provision that prohibits the government from unfairly or arbitrarily depriving a person of life, liberty, or property." Black's Law Dictionary, 539 Eighth Ed. (2004)

**Washington Constitution, Article I, § 21** states: "The right of

trial by jury shall remain inviolate..."

**Washington Constitution, Article I, § 24** states: "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired..."

**Washington Constitution, Article I, § 29** states: "The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise."

From The American Heritage Dictionary, Fourth Ed. (2001)

Definition of **bear**: v.2 To carry on one's person. 5. To have or exhibit.

**carry**: v.1 To hold while moving; bear.

**have**: v.1 To possess; own.

**exhibit**: v. To show or display, especially to public view.

**impaired**: adj. 1. Diminished; weakened. 2. Functioning poorly or incompetently.

**mandatory**: adj. 1. Required or obligatory. 2. Of or containing a mandate.

**mandate**: n. 1. An authoritative command or instruction.

**use**: v. 1. To put into service; employ.

**employ**: v. 1. To engage the services of; put to work. 2. To put to use or service.

"To constitutionally construe and apply this statute, the State must prove a nexus between the defendant, the crime, and the firearm by proving beyond a reasonable doubt not only that the defendant was in actual or constructive possession thereof, **State v. Mills**, 80 Wn. App. 231, 236, 907 P.2d 316 (1995), but also that the defendant or, in the alternative, an accomplice actually used that firearm to aid the commission of the crime charged. The State must prove both elements to satisfy former **RCW 9.9A.125** in a manner consistent with Washington Constitution." **State v. Schelin**, 147 Wn.2d 562,595, 55 P.3d 632 (2002).

"In **Schelin**, four judges stated that '[r]equiring a nexus between the defendant, the crime, and the weapon protects against

violation of the right to bear arms.' (opinion of Ireland, J.) But this was a mere plurality. I stated that allowing the imposition of a firearms sentence enhancement for other than the use of the 'firearm to aid in the commission of the crime charged' violated the state constitution. *Id* at 595 (opinion of Sanders, J.)" State v. Gurske, 155 Wn.2d 134, 150 (2005).

"[A] person may not be penalized for the mere fact of possession of a deadly weapon in a trial for a crime unrelated to any use of the weapon." State v. Johnson, 94 Wn. App. 882, 884, 974 P.2d 885 (1999).

The former statute RCW 9.94A.125 defines further a deadly weapon: For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death...

The State delivered no evidence that the defendant used the handgun in any way at all, let alone in a manner likely to produce death. In the case at bar, the State's argument was possibility. This argument is not valid. "[A] defendant's potential to use a firearm in connection with a criminal enterprise is also not enough to apply former RCW 9.94A.125." State v. Schelin, 147 Wn.2d 562, 586, 55 P.3d 632 (2002), referencing State v. Call, 75 Wn. App. 866, 869, 880 P.2d 571 (1994). The statute demands evidence of use in a manner likely or easily and readily producing death.

Without question, "[C]onstitutionally protected behavior cannot form the basis for criminal punishment, nor can it be used to infer the basis for criminal punishment. Rupe, 101 Wn.2d 704 (citing Hess v. Indiana, 414 U.S. 105, 107, 94 S.Ct. 326, 38 L.Ed2d 303 (1973); Stanely v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). Rupe held (1) 'the State can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right' and (2) 'the State may not draw adverse inferences from the exercise of a constitutional right.' Rupe at 705 (citing United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209,

20 L.Ed.2d 138 (1968))." State v. Schelin, 147 Wn.2d 562, 596, 55 P.3d 632 (2002).

It is understood that "...the right to keep and bear arms does not include the right to engage in criminal activity, cf. State v. Russell, 25 Wn. App. 933, 611 P.2d 1320 (1980)." State v. Schelin, 147 Wn.2d 562, 596. However, the State has fallen short of proving that the gun in the case at bar was ever used period. This failure to prove the statutory nexus, which is constitutionally necessary under Washington Constitution, Article I § 24, is a direct violation of the provisions set forth by it. Here is why: **First**, keep in mind that Washington Constitution, Article I § 29 clearly states, "The provisions of this Constitution are mandatory unless by express words they are declared to be otherwise." **Second**, Washington Constitution, Article I § 24 blatantly guarantees that, "The right of the individual citizen to bear arms in defense of himself or the state shall not be impaired..." **Third**, "Appropriate constitutional analysis begins with the text and, for most purposes, should end there as well. Maylon v. Pierce County, 131 Wn.2d 779, 799, 935 P.2d 1272 (1997)." State v. Schelin, 147 Wn.2d 562, 587, 55 P.3d 632 (2002).

And now to clarify the text of Washington Constitution, Article I § 24, by reference of The American Heritage Dictionary, Fourth Edition (2001), this accurate discussion continues.

Since "[T]he provisions of this Constitution are mandatory...", **Washington Constitution, Article I § 29**, this means that they are required. The State is obligated to uphold these mandates. A mandate is an authoritative command or instruction. The State is not at liberty to disobey or disregard this authority.

Specifically granted is "[T]he right of the individual citizen to bear arms in defense of himself, or the state...", **Washington Constitution, Article I § 24**. To bear is to carry on one's person and to have or exhibit. To carry is to hold while moving; bear. To have is to possess; own. To exhibit is to show or display; especially to public view.

This right is absolute within its scope and "...shall not be impaired...", **Washington Constitution, Article I § 24**. To be impaired is to be diminished or weakened and to function poorly. Therefore, it is essentially requisite of the State to insure the literal strength of this right; which is declared affirmatively by the text of Washington Constitution. As always, "[T]he provisions of this Constitution are mandatory...", **Washington Constitution, Article I § 29**.

In summary, and by definition, this right to bear arms gives the individual citizen the freedom to possess and/or own and/or carry and/or display arms defensively.

This right does not include criminally offensive use. However, the use of the weapon in the crime charged is statutorily and constitutionally imperative to the appropriate application of the weapon enhancement. "Mandate of the Washington Constitution requires the State to show any use - whether by the defendant or his or her accomplice - was outside the scope of Article I, § 24." **State v. Schelin, 147 Wn.2d 562, 597, 55 P.3d 632 (2002)**. If the State is unable to show use, then the State is unable to prove a nexus between the weapon and the crime. The specifics must point to use. No use means no nexus.

An objection/exception was not placed on Instruction No. 17 at trial. "However, where an instruction invades a constitutional right of the accused (such as the right to jury trial), it is not necessary, in order to have such error reviewed that an exception be taken and called to the attention of the trial court. **State v. Lowe, supra; State v. Suleski, 67 Wn.2d 45, 406 P.2d 613 (1965); State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956); State v. Reeder, 46 Wn.2d 888, 285 P.2d 884 (1955); State v. Marsh, 126 Wash. 142, 217 Pac. 705 (1923); State v. Warwick, 105 Wash. 634, 637, 178 Pac. 977 (1919)." **State v. Peterson, 73 Wn.2d 303, 306, 438 P.2d 183 (1968)**.**

When an error occurs in the instructions, the jury will be presumed to have relied upon it in reaching their guilty verdict, unless the error affirmatively appears to be harmless. State v. Golladay, supra. Here, there is no evidence that the error was harmless, and it, therefore, constitutes reversible error." State v. Ogden, 21 Wn. App. 44, 49, 584 P.2d 957 (1978).

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This error is constitutional in nature; therefore, it is considered and presumed to be prejudicial. Furthermore, under the facts of the attempted burglary case at bar, this constitutional error was and is prejudicial by any standard. This court should reverse the conviction and remand for new trial under proper instruction.

III. THE TRIAL COURT DENIED THE DEFENDANT THE RIGHT TO BEAR ARMS GUARANTEED BY THE WASHINGTON CONSTITUTION, ARTICLE I, § 24 AND UNITED STATES CONSTITUTION, SECOND AMENDMENT WHEN IT FAILED TO SHOW ANY USE OF THE WEAPON AT ALL.

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"The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired..."

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"In Schelin, four judges stated that '[r]equiring a nexus between the defendant, the crime, and the weapon protects against violation of the right to bear arms.' (opinion of Ireland, J.). But this was a mere plurality. I stated that allowing the imposition of a firearms sentence enhancement for other than the use of the 'firearm to aid the commission of the crime charged' violated the state constitution. Id at 595 (opinion of Sanders, J.)." State v. Gurske, 155 Wn.2d 134, 150.

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(citing Hess v. Indiana, 414 U.S. 105, 107, 94 S.Ct. 326, 38 L.Ed.2d 542 (1969). Rupe held (1) "the State can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right" and (2) the State may not draw adverse inferences from the exercise of constitutional right. Rupe 101 Wn.2d 705 (citing United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968))." State v. Schelin, 147 Wn.2d 562, 596, 55 P.3d 632 (2002).

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In summary, and by definition, this right to bear arms gives the individual citizen the freedom to possess and/or own and/or carry and/or display arms defensively.

This right does not include criminally offensive use. However, the use of the weapon in the crime charged is statutorily and constitutionally imperative to the appropriate application of the enhancement. "Mandate of the Washington Constitution requires the State to show any use - whether by the defendant or by his accomplice - was outside the scope of Article I § 24." **State v. Schelin**, 147 Wn.2d 562, 597, 55 P.3d 632 (2002). If the State is unable to show use, then the State is unable to prove a nexus between the weapon and the crime. The specifics must point to use. No use equals no nexus.

This error is constitutional in nature; therefore it is considered and presumed to be prejudicial. This court should

reverse the weapon enhancement and remand for resentencing unless the State can prove that the error was harmless beyond a reasonable doubt. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002); Neder v. United States, 527 U.S. 1, 15, 119 S.Ct 1827, 144 L.Ed.2d 35 (1999). Under the facts of the attempted burglary case at bar, this constitutional error was and is prejudicial by any standard.