

NO. 35589-2 II

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

STATE OF WASHINGTON
BY _____
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JUDGE OF APPEALS



STATE OF WASHINGTON,
RESPONDENT,
v.
JOSE SOLTERO,
APPELLANT.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. There was insufficient evidence to support a special verdict conviction for a firearm enhancement because Mr. Soltero was not armed as a matter of law.

2. On September 5, 2006, the trial court erred in allowing Mr. Soltero to proceed pro se.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Since the special verdict required that Mr. Soltero was “armed”, as a matter of law, was there sufficient evidence that Mr. Soltero was “armed”? (AoE 1)

2. Did the trial court err in failing to revoke Mr. Soltero’s decision to continue pro se due to insufficient investigation, Mr. Soltero’s obvious equivocating and/or Mr. Soltero’s questionable English fluency? (AoE 2)

C. STATEMENT OF THE CASE

1. Overview

After executing a search warrant issued on behalf of Child Protective Services, the executing Officers discovered evidence that lead the State of Washington to charge Mr. Soltero with possession with intent to deliver contrary to RCW 69.50.040. The State also charged Mr. Soltero with the firearm sentencing enhancement RCW 9.94A.310/9.94A.510, RCW 9.94A.370/9.94A.530 and the school enhancement since Mr. Soltero was within 1000 of the perimeter of a school contrary to RCW 69.50.435. RP 35

Prior to calling the jury, the trial judge allowed Mr. Soltero to proceed pro se. RP 4-6 The trial judge also allowed Mr. Soltero to dismiss his interpreter. RP 8-11

In its case in chief, the State called nine witnesses. Mr. Soltero cross-examined most of the witnesses. The State rested after its case in chief. RP 243

After the State's case in chief, Mr. Soltero declined to testify on his own behalf. Furthermore, Mr. Soltero was unable to call any witnesses on his behalf. Mr. Soltero summarily rested his case. RP 244

The jury was provided with possession instructions, firearm enhancement instructions, and school enhancement instructions. RP 253-266 The Prosecutor argued the State's theory on all three charges. RP 266-278. The jury returned a verdict of guilty on all three charges. RP 303-306.

2. Substantive Facts-Execution of the Search Warrant

Mr. Soltero did not put forward any evidence. Therefore, the jury only heard evidence from the State's witnesses. The State did not significantly provide evidence about the moments immediately leading up to service of the search warrant on Mr. Soltero's residence, nor did the State provide significant evidence about the moment of contact with Police, finally the State did not provide significant evidence about the moments immediately after contact. In addition, Mr. Soltero did not adequately cross-examine the State's witnesses about these three critical time periods.

The relevant information that the jury heard about these three critical time periods, if any, is reviewed witness by witness. Other salient testimony is included, also witness by witness.

a. Detective Dean Dumais' Testimony

On the morning May 31, 2006, Detective Dean Dumais ("Dumais") conducted a search of a residence located at 10302 10th Avenue Court South, Parkland, Washington pursuant to a warrant. RP 71. Dumais testified that Mr. Soltero was at the residence when the officers arrived. RP 72

Dumais stated that, from the inside, the garage was accessed from the back by a door leading to the residence. Dumais searched the garage. He stated upon first glance there was nothing unusual about the garage. However, it was cluttered. RP 73

Dumais stated that a couple items, on top of a toolbox, when taken together, peaked [sic] his interest. RP 74. Dumais describes these intriguing items as a lighter, card, knife and an 8 by 8 square piece of marble. RP 74. Dumais described the toolbox as large and the type that would sit in the back of a pickup truck. RP 74. Dumais stated that the toolbox was located approximately ten feet to the left of the door and was pushed up against the wall. RP 77-78.

Dumais searched the toolbox and found a rifle laying inside. RP 75. The rifle had a magazine inside. However, the gun did not have a bullet in the chamber. RP 75-76. The toolbox also contained other items which, in part, the State predicated its charge of possession with intent to

distribute. These items were bags and measuring devices. RP 77.
Dumais then searched cabinets in the garage and found a “decent size
quantity of white powder in a plastic bag.” RP 79

Dumais states that he did search mostly by himself until he found
the incriminating evidence. Dumais then called another officer to assist
him. RP 94.

b. Forensic Investigator Loree Barnett

For appeal purposes, the only salient evidence that Forensic
Investigator Loree Barnett (“Barnett”) provided is that Barnett arrived at
around 8:00 a.m. in the morning. RP 98-99.

c. Detective Brian Lund

Detective Brian Lund (“Lund”) testified that he was “involved” in
the service of the search warrant. Lund testified that personal service
occurred at about 7:19 a.m. Seven officers arrived with Lund. RP 116.

Lund testified that when he arrived at the house, Lund approached
the door and with another Detective in full uniform. Lund knocked on the
door, announced that Police had arrived with a search warrant. Mr.
Soltero answered the door. RP 116. It also appears as if Lund read Mr.
Soltero the search warrant without incident. RP 137.

Ms. Soltero was also in the house. After making contact with the Soltero's, Lund read them the search warrant. RP 117.

Lund also participated in the search, by searching the bedroom and the downstairs living area. Lund described the house as having a garage on the first floor. The first floor also has a living area and a bedroom. The second floor had more bedrooms, kitchen, and living area. Lund states that to access the garage from the inside one must go through an "interior room" and a "living area downstairs." RP 117-18. Lund also testified that he saw small baggies, a pestle, and measuring scoops. RP 121.

Lund also provides that the narcotics items were not instantly apparent upon entering the house or known about beforehand. In fact, Dumais alerted Lund to this fact by stating "I found what I think are illegal items." RP 131-32.

d. Detective Lynelle Kern's Testimony

Detective Lynelle Kern ("Kern") simply testified that she was involved in the service of a search warrant at Mr. Soltero's address on May 31, 2006. Kern stated that she "was asked simply to assist with the service of the warrant itself, to just go there, gather some specific items, and help log those in." Kern additionally testified that she searched the

upstairs of the home and the bottom living area. RP 156. Ms. Kern also testified that she found a \$100 bill and receipts for money orders. RP 157. However, Kern was never asked, nor did she ever testify to Mr. Soltero's location at the time the warrant was served.

e. Detective Todd Karr

Detective Todd Karr ("Karr") testified he was present at Mr. Soltero's residence when the search warrant was served. RP 184. Karr stated that he assisted searching the lower level of the house. Karr described the lower level of the house had "a kind of family room." Karr also stated that he "spent time" in the garage. After the second search warrant was served, Karr went back in the garage, in that room, and also in a Cadillac that was also parked at the residence. In the Cadillac, Karr found bullets and a \$100 bill. RP 185-86. Karr offered no other information about Mr. Soltero's at the moment of encounter with Police.

f. Forensic Investigator Marie Oberg, Property Room Officer Richard Kennedy, Forensic Investigator Brenda Lawrence & Forensic Scientist Franklin Boshears

Property Room Officer Richard Kennedy (“Kennedy”) was not present at the search warrant’s execution. Therefore, Kennedy did not offer any information at trial about the search warrant. Kennedy primarily provided evidence about the chain of custody. RP 166-176.

Forensic Investigator Marie Oberg (“Oberg”) was not present at the search warrant’s execution. Therefore, Oberg did not offer any information at trial about the search warrant execution. Oberg provided primarily evidence about the fingerprint analysis. RP 199-219.

Forensic Investigator Brenda Lawrence (“Lawrence”) was not present at the search warrant’s execution. Therefore, Lawrence did not offer any information at trial about the search warrant’s execution. Lawrence provided primarily evidence about the firearm testing. RP 220-235.

Forensic Investigator Franklin Boshears (“Boshears”) was not present at the search warrant’s execution. Therefore, Boshears did not offer any information at trial about the search warrant’s execution. Boshears provided primarily about the testing of the substance to establish that it was narcotics. RP 235-243.

3. Procedural Facts at Trial

a. Pro Se Determination

On September 5, 2006 the trial began of State of Washington v. Jose De Jesus Soltero, the following colloquy occurred.

THE COURT: Now, the State is represented by Ms. Ludlow. And you are representing yourself?

THE DEFENDANT: Yes, I am, Your Honor. I was granted a stand-by public attorney. Me, not knowing of anything, the public defender, he was dismissed without me not being notified of any situation – of that particular situation on any other hearing. So, when I requested my stand-by, I was told that he was – the individual was dismissed under some hearing that I was not of knowledge of. I didn't have no knowledge whatsoever under that and they dismissed him.

THE COURT: What is the State's response? If I understand correctly, the stand-by attorney that was requested was dismissed. Is that correct, Ms. Ludlow?

MS. LUDLOW: That is correct, Your Honor, and that was done at Mr. Soltero's request. In fact, if the Court takes a look at – I had it

marked – there was an order that was signed by Judge Worswick on July 5th. I will find my copy here.

THE DEFENDANT: On July 5th I was not in any kind of –

THE COURT: Just wait. I will hear from Ms. Ludlow.

MS. LUDLOW: It was an order entered by Judge Worswick on July 5th that granted Mr. Soltero leave to proceed pro se, making the specific finding that the requisite colloquy had been engaged in and Mr. Soltero was unequivocal in his desire to proceed pro se. In fact, a D.A.C. attorney was present at that hearing, as I recall, when Mr. Soltero made that request. He has chosen to proceed pro se without stand-by counsel.

THE COURT: So it is the State's position that the record would reflect that the matter is resolved and it would be untimely now to seek stand-by counsel, is that what you're saying.

MS. LUDLOW: That's correct, Your Honor. And I would double-check the record. I believe the D.A.C. attorney was there

that the day the request was made, but I do remember writing out an order that Judge Worswick signed that made it very clear that Mr. Soltero's waiver had been unequivocal and knowing and voluntarily made.

THE COURT: Mr. Soltero, are you asking now for a stand-by attorney?

THE DEFENDANT: No. I was given the option earlier by Your Honor Lisa Worswick.

THE COURT: So you want to go forward representing yourself, then?

THE DEFENDANT: Yes, I do, but yet, I mean I wanted to make a statement how my public defender was dismissed without me knowing of the action taken upon the court. I do not have any records of July 5th, being here – June 5th, being here on any court matters. I do have records of all my court hearings and everything, and I'm pretty sure I do not have June 5th hearing where the Honorable Lisa Worswick signed the motion to dismiss by me

allegedly granting the motion to be dismissed of the public defender. Earlier I requested a copy of the motion and the prosecutor responded to my affidavit, to my Knapstad hearing, even though it was dismissed as of what day she did file it, because in a previous hearing she was questioned as when did she file it.

THE COURT: Well, I have a memorandum of a journal entry that was entered on July 5th, 2:52 p.m.; This matter comes before the Court on the defendant's motion to proceed pro se and for a continuance. Deputy prosecutor, attorney Dione Ludlow present; defendant present out of custody and with counsel Linda King. Spanish interpreter Mindy Baade present, interpreting. Colloquy regarding whether defense counsel Linda King is counsel of record or whether she is stand by-counsel. Defendant makes motion to proceed pro se. Court questions the defendant regarding whether defense counsel Linda King is counsel of record or whether she is stand-by counsel. Defendant makes motion to proceed pro se. Court questions the defendant regarding his understanding of waiving his right to an attorney. The court finds that the defendant knowingly waives his right to an attorney and grants his motion to proceed pro se.

3:15 p.m, court hears motion to continue and the matter was set for – from the 19th of July continued to August 8th. And then there was a motion for a bill of particulars. That was denied. An order denying the Knapstad motion was signed today, also.

So, unless I'm incorrect, it appears all the motions have been heard and we're ready to call a jury up to go to trial.

Is that correct, Ms. Ludlow?

MS. LUDLOW: We are, essentially, Your Honor....

RP 6-7

b. Interpreter Determination

After a discussion about motions in limine, the court engaged in the following colloquy about an interpreter.

THE COURT: And also my understanding is that you don't need an interpreter. Is that correct?

THE DEFENDANT: I choose not to go with an interpreter. I can pretty much understand the vocabulary at this point since I've been here for quite a few months now.

THE COURT: And that has been decided also in the past, is that not correct, Ms. Ludlow?

MS. LUDLOW: It's not, Your Honor. It has not been decided in the past. I know that Mr. Soltero has gone back and forth on the issue of an interpreter. He's indicated previously that he does understand English. He's also indicated that he has some difficulty with legal terms. Throughout the course of a number of motions that have been filed and heard, Mr. Soltero has responded to the court without the assistance of an interpreter, but, as of this stage, he has never unequivocally said that "I do not need an interpreter."

THE COURT: I think he just said that. You said that just now, didn't you?

THE DEFENDANT: Yes, I did.

MS. LUDOW: Then that's fine.

THE DEFENDANT: The reason I'm going with that decision is I asked the interpreter to read a section of a particular item from argument for me, and at hearings the judges in those particular matters had refused—would not allow the interpreter to read the literature to the court due to the fact that they were stating that an interpreter's job in court is only to interpret what Your Honor says to me or the prosecutor says to me, but yet I stated on numerous times that I do have a little bit of problem reading, so – I read a little slow and I mumble through some nice-sized words and certain literature that I'm not aware of due to little vocabulary. And yet I was not granted that. And the State explained the whole proceeding of translator. And I countered by asking, the translator is here to translate for me, as well, due to the fact that I do not know some terminologies or I need her to say something in my behalf and not say something on her behalf, yet everything she is stating on my behalf is being said to me through her. And I mentioned and I said to the court by her, but for some reason they keep on mentioning, saying that nay comments by her are irrelevant to this case. The comments she is stating of course are the translations that she's placing on record for me in my behalf in order for me to sometimes communicate certain arguments.

THE COURT: But I want to ask you this: Is it the bottom line that you do not want an interpreter? Is that correct?

THE DEFENDANT: No, I do not. I no longer wish an interpreter. If I'm going to be denied any kind of need for me to have an interpreter at this point, I would just then request to dismiss the interpreter and I will just proceed to conduct—

THE COURT: And if you have any question about what's been said, then you will – I assume you will let us know?

THE DEFENDANT: Yes, I will.

RP 8-11

c. Issues With Mr. Soltero's Proficiency In English

Throughout the trial Mr. Soltero had trouble communicating with witnesses because he did not speak fluent English. There are many

examples of this disadvantage. Appellant some of the following instances.
RP 89, 128, 130-1, 135, 149, 164, 165, 172, 187, 189-90, 193-94, 197,
219, 233.

d. Jury Instruction

The State provided the jury with the firearm enhancement instruction:

For purposes of the 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 charged in Count I. The State must prove beyond a reasonable doubt that there is a connection between the firearm and the defendant and between the firearm and the crime. 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 purposes. A firearm is a weapon or device from which a projectile may be fired from which a projectile may be fired from by an explosive such as gun powder.

RP 264.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A SPECIAL VERDICT CONVICTION FOR A FIREARM ENHANCEMENT BECAUSE MR. SOLTERO WAS NOT ARMED AS A MATTER OF LAW

a. The Washington State Supreme Court Case *Gurske*, and its antecedents, clearly govern Appellant's Case At Bar.

The evidence presented at trial demonstrates that officials encountered Mr. Soltero immediately upon serving the warrant at the front door. At this location, Mr. Soltero was far away from the garage where the predicate firearm was located inside a closed toolbox covered with various items. Officials only found one firearm without any direct evidence as to as to the firearm's use. Nevertheless, the State charged Mr. Soltero with a firearm enhancement; the prosecutor argued that evidence was sufficient, and the jury convicted Mr. Soltero.

Whether a person is armed is a mixed question of law and fact. Thus, the court must determine whether, as a matter of law, the facts are

sufficient to prove that Mr. Soltero was armed. This is a question this of law reviewed de novo. State v. Mills, 80 Wn. App. 231, 234-35, 907 P.2d 316 (1995),

To support the deadly weapon sentencing enhancement, the evidence viewed in the light most favorable to the State, must be sufficient for any rational trier of fact to find that the defendant was armed with a deadly weapon at the time of the commission of the crime. State v. Gurske, 155 Wn.2d 134, 143, 118 P.3d 333 (2005) *quoting* State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). In the case at bar, the State did not offer sufficient evidence, even in view of the light most favorable to the State, to find Mr. Soltero “armed” within the definition of the firearm enhancement as a matter of law.

Gurske, Johnson, Mills and Valdobinos govern the case at hand. Gurske, supra , State v. Johnson, 94 Wn. App. 882, 974 P.2d 855 (1999), State v. Mills, supra (1995); State v. Valdobinos, 122 Wn.2d 270, 858 P.2d 199 (1993). Whether one is armed for the purposes of a “firearm enhancement” is fact specific. Hence, each of the aforementioned cases is reviewed in detail.

The facts of *Gurske* are as follows: Police stopped Mr. Gurske for a traffic infraction and learned that Mr. Gurske’s driver’s license was

suspended. They arrested, handcuffed, searched and placed Mr. Gurske in the back of the patrol car. Gurske at 136.

Before impoundment, the Officers conducted an inventory search. An Officer began on the driver's side , and seeing nothing on the driver's seat, he pulled the front seat forward and saw a backpack sitting behind the driver's seat. The backpack was within arm's reach of the driver's position. However, the backpack was not removable by the driver without first either exiting the vehicle or moving into the passenger seat. Id.

The Officer unzipped the backpack and found a torch. Underneath the torch was a gun holster and a gun. The Officer also found a fully loaded magazine in the backpack. In addition to this, inside the backpack, the Officer found three grams of methamphetamine and Mr. Gurske's wallet. The trial court found Mr. Gurske guilty of possession of a controlled substance while armed with a deadly weapon. Id.

Mr. Gurske argued that the facts only showed that the pistol was in close proximity to him, not that it was easily accessible and readily available. Furthermore, Mr. Gurske argued that proximity or constructive possession alone is insufficient to establish that he was armed. Id. at 138.

The *Gurske* court agreed, stating that mere proximity or mere constructive possession is insufficient to establish that a Defendant was armed at the time the crime was committed. The court that re-affirmed

Gurske held the previous case *Valdobinos* stood for the proposition that “mere constructive possession is insufficient to prove a defendant is “armed’ with a deadly weapon during the commission of a crime.” Id. at 138.

The *Gurske* court went to great lengths to explicitly define the accessibility and availability requirement stating, “The accessibility and availability requirement also means that the weapon must be easy to get to for use against another person, whether a victim, a drug dealer (for example), or the police.” Id. at 139 The *Gurske* case also related that a plurality in *Schein* “declined to state an absolute rule regarding the time when the defendant must be armed during the commission of the crime, i.e., when the crime is being committed or when police discover the crime is being committed.” Id. at 139 quoting State v. Schelin, 147 Wn.2d 562, 572-73, 55 P.3d 632 (2001).

The *Gurske* court emphasized the backpack was behind the driver's seat which the police pulled forward before accessing the backpack. Mr. Gurske could not have removed the backpack without either exiting the truck or moving into the passenger seat. Furthermore, the backpack was zipped and a torch was on top of the pistol. Also, it noted that the facts failed to indicate whether Mr. Gruske made any movement toward the gun, or if he even could have reached it at the time of stop. Id. at 143.

It is also noteworthy that the *Gurske* Court also rejected the State's argument that the trier of fact could infer that Mr. Gurske would be able to reach over or around the driver's seat and obtain the weapon and stated nothing in the stipulated facts gave rise to "the inference that Mr. Gurske could reach over or around the driver's seat and access the weapon from the driver's seat." Id.

Appellant argues that *Gurske* governs the case at bar. Officers arrived at Mr. Soltero's house for a reason unrelated to narcotics or firearms. They arrived early in the morning and encountered Mr. Soltero immediately upon entrance. Like *Gurske*, the record entirely fails to indicate whether Mr. Soltero made any movement toward the gun. Furthermore, because of the items atop the toolbox where Mr. Soltero stored the gun, the rooms between the front door and the garage, and the gun's position' laying inside a closed toolbox ten feet inside the garage, it is obvious that the State could not even argue that Mr. Soltero made any realistic true movement to get to the gun.

Thus, like the evidence in *Gurske*, the State was solely left with a gun in a closed container within proximity to narcotics and conjecture as to how Mr. Soltero could have possibly been armed. *Gurske* rebuked the State for this threadbare offering and held it insufficient as a matter of law. Gurske at 143. Appellant urges this Court to find likewise.

Furthermore, Appellant notes that *Gurske* analyzed and synthesized many prior Washington decisions to reach its holding. Therefore, it is seminal for its comprehensive scope.

Gurske specifically distinguished itself from a disharmonic plurality decision in *Schelin* with these salient facts: When Officers executed a search warrant at defendant's home, they encountered the defendant in the basement standing six to ten feet from a loaded revolver hanging from a nail on a wall. Schelin at 563-64. The plurality in *Schelin* thus held that the weapon was easily accessible and readily available for use against the police in an escape attempt, to protect the contraband or to prevent apprehension for possession of the marijuana. *Gurske* distinguished *Schelin* and *Gurske's* identified antecedents by stating: "In *Schelin*, however, the defendant was close to the easily accessible and readily available weapon at the time the police entered the house." Gurske at 141.

As mentioned earlier, Washington case precedent guided *Gurske's* conclusion. Thus, Appellant urges this Court to additionally consider the cases girding *Gurske* and to apply them to the case at bar. Johnson, supra, Mills, supra; Valdobinos, supra.

The facts of *Johnson* follow: When Police entered Mr. Johnson's apartment, Mr. Johnson was running toward the bathroom. After the

police handcuffed Mr. Johnson, they "took him into the living room," and sat him down. Police inquired if any weapons were in the residence, Mr. Johnson replied that there was a weapon inside the cabinet compartment of a coffee table in front of the couch. At that time, the handgun was "within five to six feet of him." Johnson at 887-88, 891-92. Police found indicia of heroin distribution, including a large amount of cash and heroin in a balloon. Id at 887.

The State charged Mr. Johnson with a deadly weapon sentencing enhancement. However, the *Johnson* Court disagreed, stating "Police found Johnson's weapon in a cabinet compartment five to six feet away from him, and Johnson was handcuffed at the time. Because there was no realistic possibility that he could access his gun." Id. at 894. The Court held that the jury should not have been allowed to consider whether Mr. Johnson "was armed" because Mr. Johnson was handcuffed and the gun was well outside his reach, the gun was not easily accessible and the required nexus between the crime and the weapon was absent. Id. at 896-97.

Appellant argues that *Johnson*, a case *Gurske* found "instructive", presents far more incriminating evidence to both indicate that Mr. Johnson made an attempt to arm himself and that Mr. Johnson possessed with the

intent to deliver.¹ Toward the former, the Officers heard movement on the other side of the door and "felt the individuals in the apartment were either destroying evidence or possibly arming themselves", upon entrance the Officers caught Mr. Johnson running away. Johnson at 887. However, the *Johnson* court declined to find Mr. Johnson "armed" as a matter of law. Id. at 896-97.

In the case at bar, no evidence exists that Mr. Soltero tried to escape from officers. Furthermore, the gun was found significantly farther than "five or six feet" and after the police had already secured Mr. Soltero in their presence. If this significant possibility of armament and current delivery in *Johnson* did not suffice, it hardly seems that the case at bar—with no furtive movement and less indicia of distribution—should overrule Appellant's challenge in the case at bar.

The facts of *Mill's* are as follows: A sheriff conducted a search of Mr. Mills, found methamphetamine, and placed him in the back of the patrol car. Mr. Mills' behavior in the car aroused the sheriff's suspicions. The sheriff discovered that Mr. Mills had tried to hide a motel key in the back seat. A search warrant was obtained for the motel room that yielded a pistol lying beside 118 grams of methamphetamine. Mr. Mills was found

¹ Gurske at 141-42, stating "Cases decided by the Court of Appeals are also instructive."

guilty of possession with intent to deliver and a deadly weapon enhancement. Mills at 233.

Mills interpreted the phrase "armed with a deadly weapon," and held that a defendant in constructive possession of a deadly weapon, even if that weapon is next to controlled substances, is not "armed." Mills at 235. *Mills* chastised the lower court for concluding "that the potential for Mills to have been in the motel room was the same as if Mills had been there when the police arrived to execute the search warrant," stating "While guns always pose a potential danger, the trial court's reasoning does not accord with the clear mandate that the weapon be readily available and easily accessible to the Defendant." Id. at 236-37.

Mills referenced *Valdobinos* and *Call* stating that neither Defendant was "armed although their guns were in the next room and, presumably, they could have obtained their weapons simply by taking a few steps." Valdobinos, supra, State v. Call, 75 Wash. App. 866, 880 P.2d 571 (1994). Thus, despite the firearm was found near a significant amount of drugs, *Mills* stated that Mr. Mills was not "armed" for purposes of the enhancement statute. Mills at 237.

Appellant argues that *Mills*, another case that *Gurske* found "instructive," again stands for the mandate that more than proximity and

conjecture must exist to find a Defendant armed.² Accordingly, Appellant urges this Court to strongly consider *Mills*' rebuke of the trial court's conjecture about the "potential" of armament. Supra In the case at bar, the State proffered less than this normal rationale for Mr. Soltero.

Gurske also reviewed *Valdobinos* which facts follow: Undercover agents went to a tavern where Mr. Valdobinos offered to sell them narcotics by introducing them to co-defendant Mr. Garibay. Three days later, a search warrant was executed for the home of Mr. Valdobinos and Mr. Garibray. The police arrested, questioned, and searched the Defendants. Then, the police took them to jail. Next, the home was cleared. Valdobinos at 273.

The Officers found a black bag containing \$1,875, 846 grams of cocaine; and a bus ticket bearing Mr. Garibay's name under Mr. Valdobinos bed. Officers also found a rifle under "a bed in the home." After a jury trial, Mr. Valdobinos was convicted, among other things, of possession of a controlled substance with intent to deliver while armed with a deadly weapon.³ Valdobinos at 274, 281.

Valdobinos stated that, on this record, evidence that an unloaded rifle was found under the bed in the bedroom, without more, was

² Footnote 2, supra

³ "While it is unclear whether these two items were found under the same bed, the appellate briefs in *Valdobinos* suggest that both gun and drugs were in Valdobinos' bedroom." Mills at 235

insufficient to qualify Mr. Valdobinos as "armed" in the sense of having a weapon accessible and readily available for offensive or defensive purposes. Id. at 282.

Appellant argues that *Valdobinos*, like *Johnson* and *Mills*, gives far more credence to show that Mr. Valdobinos was "armed" and conducted a serious distribution operation as opposed to the case at bar. Mr. Valdobinos and Mr. Garibay engaged in a conspiracy to sell narcotics in a public location. Officers, arriving specifically to execute a narcotics warrant, found the gun in Mr. Valdobinos' bedroom laying next to the narcotics and a significant amount of cash. Nevertheless, *Valdobinos* held that this was insufficient for a showing of be armed. Again, the Appellant argues that, if this weightier evidence of distribution and armament did not suffice, then the State's evidence against Mr. Soltero must likewise fail.

b. Appellant's Case Is Distinguishable From Two Recently Published Cases Which Purportedly Rely On *Gurske* and Its Antecedents

Preemptively, the case at bar must be immediately distinguished from the recent 2007 suite of sister cases *O'Neal*, *Eckenrode*, and

Easterlin. State v. O'Neal, 150 P.3d 1121, (No. 76950-8) (2007), State v. Eckenrode, 150 P.3d 1116, (76100-1) (2007).

The facts of *O'Neal* are as follows: Authorities received a tip that a mobile home owned by Ms. O'Neal might be the site of methamphetamine manufacture. A warrant was executed and the officers found "considerable" manufacturing evidence. The Officers also seized more than 20 guns (along with body armor, a police scanner, and night vision goggles). Most of the weapons were in two gun safes, one locked, one unlocked. A loaded AR-15 was found in one bedroom and a loaded semiautomatic pistol was found under a mattress in a different bedroom that at least two members of the household slept in. O'Neal at ¶ 3, 5.

In addition, other evidence abounded that this continuous methamphetamine operation was guarded with weapons. An informing accomplice testified that the loaded pistol was under his mattress because "[i]f I needed it, it was there." This accomplice also testified that he had kept that rifle in an open closet in the bedroom for more than a year, as well as admitting that he had been helping the O'Neal's manufacture drugs for several months. Evidence existed that another co-defendant had stood watch during critical points during the methamphetamine production. Id. at Id. at ¶ 12

O'Neil posited “A jury could infer from this testimony there were guns readily available and easily accessible to one or more of the accomplices to protect the drug manufacturing operation.” Id.

Appellant urges this Court to note that *O'Neil* cites *Gurske* positively twice. Importantly, *O'Neil*, citing *Gurske*, mentions that it is not mandatory to prove that the Defendant was armed at time of arrest, stating the “armed” time need not be established with “mathematical precision.” Id. at ¶ 10. However, Appellant urges this Court to recognize the incongruity of this reference and although *Gurske* and *O'Neil* are both recent Washington Supreme Court Cases, they do not exist side by side without palpable tension.⁴

Gurske's factual analysis questions the very proposition for which *O'Neil* cites *Gurske*. As *Gurske* analyzed:

“The backpack was not removable by the driver unless he exited the truck or moved into the passenger seat. The backpack was zipped, and a torch was on top of the pistol. The facts do not indicate whether *Gurske* could unzip the backpack, remove the torch, and remove the pistol from the driver's seat where he was sitting at the time he was

⁴ Appellant mentions the interposed cite to the plurality decision in *Schelin*, only to note that “A plurality opinion has limited precedential value and is not binding on the courts.” In re Isadore, 151 Wash. 2d 294, 302, 88 P.3d 390 (2004) *citing* State v. Gonzalez, 77 Wash. App. 479, 891 P.2d 743 (1995).

stopped by the police officer. They do not state that he made any movement toward the backpack. Nor is there any evidence whatsoever that Gurske had used or had easy access to use the weapon against another person at any other time, i.e., when he acquired or was in possession of the methamphetamine.”

Gurske at 143.

Furthermore, as to the State’s attempted argument that “that the trier of fact could infer that Gurske could reach over or around the driver's seat and obtain the weapon,” *Gurske* responded that “While there was physical proximity of the pistol, the methamphetamine, and Gurske, there is simply nothing in the stipulated facts here giving rise to the inference that Gurske could reach over or around the driver's seat and access the weapon from the driver's seat.” Gurske at 143.

This excerpt, along with *Gurske’s* foundational antecedents, demonstrate that the State must prove something beyond mere proximity and inferential conjecture. To this point, though *O’Neil* ruled that sufficient facts existed to find the defendant armed, Appellant

distinguishes the case at bar because the amount of evidence falls far short of *O'Neil*.

In *O'Neil*, an informant specifically tipped authorities that a significant drug manufacturer operated out of *O'Neil's* home. Appellant distinguishes the instant case by noting that authorities arrived to execute a warrant unrelated to narcotics. The narcotics discovery was an unexpected find and, because of this unexpected find, the reporting authorities had to get a subsequent search warrant to fully execute a search for narcotics.

Second, the authorities seized over 20 weapons and a sundry of high-tech surveillance devices from *O'Neil*. Appellant distinguishes the case at bar by noting that only one weapon was seized. The one discovered weapon was not out in the open, nor was it easily accessible. It was in a closed toolbox in a garage. Without the other weapons and high-tech surveillance items in *O'Neil* that proved that the narcotics operation was seriously and vigilantly guarded, only speculations can be made to allege that the Defendant was "armed" at any specific time.

Third, in *O'Neil*, significant evidence existed that an elaborate multi-party conspiracy operation continued for an extensive amount of time. Testimony existed as to how the weapons were used. Appellant distinguishes the case at bar by noting the State presented no direct

evidence for how the recovered rifle was actually used at any given time. The State only circumstantially conjectures that the Defendant was “armed” at one time. However, the State failed to establish that Mr. Soltero’s participated in a multi-party distribution operation that lasted for a significant period of time which would force the conclusion that guns were certainly used at one point.

These differences significantly demonstrate *O’Neil* presented a quantum of evidence far beyond a solitary gun and circumstantial conjecture. This amount of evidence clearly distinguishes *O’Neil* from the instant case. Thus, Appellant urges this Court to find *Gurske* more applicable to the case at bar. In *Gurske*, there was a single gun found in a backpack with methamphetamine and nothing more. This evidence was insufficient to show that the pistol was easily accessible and readily available for use for offensive or defensive purposes. Likewise, in the instant case, a single gun was found in a box with narcotics indicia. The Appellant urges this court to find, like *Gurske*, that no rational trier of fact could find that Mr. Soltero was armed at any given point with the requisite specificity.

The facts of *Eckenrode* follow: 911 dispatch received a frantic call from Mr. Eckenrode, reporting that an intruder was in his house. Mr. Eckenrode also alerted the dispatcher that he himself was armed and was

prepared to shoot the intruder. Deputies responded within minutes. Mr. Eckenrode and his housekeeper were sitting on lawn chairs in his front yard. The Deputies swept the house and found methamphetamine, dried marijuana, a loaded rifle, an unloaded Ruger pistol. On the strength of these observations, a warrant was obtained and the home was searched more vigorously. Mr. Eckenrode was then arrested. Eckenrode at ¶ 5-6

Eckenrode held that there was sufficient evidence to uphold the jury's conclusion that a weapon was easily accessible and readily available, stating plainly "Eckenrode himself told the 911 operator that he had a loaded gun in his hand and that he was prepared to shoot an intruder." Id. at ¶ 13.

Eckenrode distinguished *Gurske* stating "All the State proved was that the defendant possessed an inaccessible weapon. The State did not attempt to prove that the weapon found in *Gurske* was readily accessible at any relevant time or that there was any connection between the weapon and the crime. As we had said before, it is simply not enough to prove possession." Id. at ¶ 15 *citing* Gurske at 144, Valdobinos at 282.

Appellant urges this Court to summarily distinguish the case at bar. In *Eckenrode*, like *O'Neal*, there was a confession that the Defendant was armed. The *Eckenrode* court seized upon this in its analysis. Eckenrode at ¶ 13. In the case at bar, no such admission exists. Thus, this Court can

immediately distinguish *Eckenrode*. Furthermore, like *O'Neal*, Mr. Eckenrode possessed far more substantial weaponry to protect a far more substantial narcotics operation—to wit, a loaded rifle, a Ruger pistol, 55 marijuana plants, a ledger of marijuana sales a police scanner—than what the State puts forward in the case at bar.

In conclusion, Appellant Soltero urges this Court to distinguish *O'Neal* and *Eckenrode*, apply *Gurske* and its antecedents to the facts of this case, and dismiss the firearm enhancement against Mr. Soltero as a matter of law.

2. THE TRIAL JUDGE ERRED IN FAILING TO REVOKE MR. SOLTERO'S DECISION TO GO PRO SE BECAUSE THERE WAS INSUFFICIENT INVESTIGATION, CONSIDERABLE EQUIVOCATION, AND QUESTIONABLE ENGLISH FLUENCY.

Though there may have been an earlier finding in the minutes by Judge Worswick on July 5, 2006 noting that Mr. Soltero had adequately received the requisite pro se warnings, the transcript on September 5, 2006 draws into serious doubt whether Mr. Soltero's waiver of counsel retained its validity and thus whether Judge Fleming should have allowed Mr. Soltero to proceed pro se.

The Sixth and Fourteenth Amendments of the United States Constitution afford a criminal defendant both the right to assistance of counsel and the right to reject that assistance and to represent himself. These rights are also explicit guarantees of Article I, Section 22 of the Washington State Constitution. State v. Silva, 108 Wn. App. 536, 539 31 P.3d 729 (2001).

However, because a tension exists between the right to represent oneself and the right to adequate assistance of counsel, a defendant desiring to proceed pro se must make the request unequivocally. Silva at 539. The waiver of right to counsel must be determined by facts and circumstances of each case. Snyder v. Maxwell, 66 Wn.2d 115, 117, 401 P.2d 349 (1965) *citing* In re Ritchie v. Rhay, 63 Wn.2d 508, 387 P.2d 967 (1963) Whether the waiver is valid lies within the sound discretion of the trial court, which should indulge every presumption against a valid waiver. State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002), Silva, at 539, State v. Chavis, 31 Wn. App. 784, 787, 789, 644 P.2d 1202 (1982).

A Defendant's desire to try his case pro se does not occur by mere announcement. *Fritz*, a seminal case, establishes eight basic principles by which judges must vet a Defendant's assertion of the right to proceed pro se. State v. Fritz, 21 Wn. App. 354, 358, 585 P.2d 173 (1978). Appellant

urges this Court to give special consideration to Principle Number Three and Principle Number Four that have particular bearing on the case at bar.

Fritz states Principle Number 3 as follows:

“When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forego those relinquished benefits.”

Fritz at 359.

Fritz states Principle Number 4 as follows:

“A demand to defend pro se must be stated unequivocally. This is because of the seriousness of the decision and the important rights which a defendant waives by asserting the right to defend pro se.”

Fritz at 360, (internal cites omitted).

A later case, *Chavis*, describes the trial court's "protective duty" as "serious and weighty," and then states "To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long as and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility." *Chavis* at 789. The Supreme Court of Washington later recited this language in *Acrey*. *Bellevue v. Acrey*, 103 Wash. 2d 203, 210, 691 P.2d 957 (1984).

Crucial to the instant case, even a previous unequivocal assertion to proceed pro se may be determined not to be valid at a later date. "Even when the right is unequivocally asserted, however, it may still be subsequently waived by words or conduct." *Fritz* at 360.

The aforementioned case law, places a great burden on the justice system to determine whether a defendant can continue to proceed pro se. The judge bears the responsibility to conduct a thorough investigation and must indulge every presumption against a waiver. Furthermore, the defendant's unequivocal assertion must stay unequivocal.

The conversation between Mr. Soltero, the trial judge and the deputy prosecutor that occurred on September 5, 2006, provides only

muddled confusion. Thus, whether the trial judge undertook a sufficiently thorough investigation and indulged every presumption, or whether Mr. Soltero still remained unequivocal in his desire to proceed pro se, remains in serious doubt.

The Court asked Mr. Soltero if he represented himself. Mr. Soltero replied:

THE DEFENDANT: Yes, I am, Your Honor. I was granted a stand-by public attorney. Me, not knowing of anything, the public defender, he was dismissed without me not being notified of any situation – of that particular situation on any other hearing. So, when I requested my stand-by, I was told that he was – the individual was dismissed under some hearing that I was not of knowledge of. I didn't have no knowledge whatsoever under that and they dismissed him.

The trial judge then undertook a discussion with the State about a hearing occurring on July 5th. Mr. Soltero interjected to say something, and the trial judge cut him off. The State then proceeded to point out that Mr. Soltero had made an unequivocal waiver. Then, the following exchange ensued.

THE COURT: Mr. Soltero, are you asking now for a stand-by attorney?

THE DEFENDANT: No. I was given the option earlier by Your Honor Lisa Worswick.

THE COURT: So you want to go forward representing yourself, then?

THE DEFENDANT: Yes, I do, but yet, I mean I wanted to make a statement how my public defender was dismissed without me knowing of the action taken upon the court. I do not have any records of July 5th, being here – June 5th, being here on any court matters. I do have records of all my court hearings and everything, and I'm pretty sure I don't have June 5th hearing where the Honorable Lisa Worswick signed the motion to dismiss by me allegedly granting the motion to be dismissed of the public defender.

After this, the trial judge summarily reviewed the court docket and stated:

THE COURT: So, unless I'm incorrect, it appears all the motions have been heard and we're ready to call a jury up to go to trial.

Is that correct, Ms. Ludlow?

MS. LUDLOW: We are, essentially, Your Honor....

From review of the transcript, Appellant argues three concerns become readily apparent. First, Mr. Soltero's answers were equivocal. Second, the judge did not conduct a sufficiently thorough inquiry into Soltero's circumstances. Three, Mr. Soltero did not speak English fluently.

Unequivocal is defined in *Black's Law Dictionary* as "Unambiguous; clear; free from uncertainty." Black's Law Dictionary (8th ed. 2004). Mr. Soltero did not provide unambiguous, clear answers to the trial judge, nor did he provide answers free from uncertainty. On September 5, 2006 the trial court asked Mr. Soltero three times, in various forms, if Mr. Soltero represented himself. The first and last responses were complete equivocations. One cannot discern any semblance of Mr. Soltero's true preference, let alone a clear answer. Mr. Soltero answered these questions by continually referring to the fact that Mr. Soltero felt

denied of proper procedure. These type of responses clearly fall short of unequivocal statements and thus fail to satisfy Principle 4 delineated in *Fritz* and enshrined in subsequent caselaw.

To that end, *Chavis* and *Acrey* clearly place a burden on a trial court to conduct a thorough investigation. In the instant case, Mr. Soltero obviously attempted to contest a procedural flaw affecting his decision to go pro se. However, the trial judge merely read aloud the memorandum of the July 5, 2006 journal entry and then summarily began the case. Since no thorough investigation occurred, let alone any true investigation, one cannot predict what a comprehensive investigation would have revealed. However, Appellant urges this court to dispense with the conjecture and rule that the investigation was not thorough enough to meet the “serious and weighty” standard of a “protective duty”. Consequently, serious doubts remain as to whether Mr. Soltero should have been allowed to proceed pro se.

Finally, Mr. Soltero’s responses demonstrate not only confusion, but also highlight Mr. Soltero’s difficulties speaking English. In this State, the right of a defendant in a criminal case to have an interpreter is based upon the Sixth Amendment constitutional right to confront witnesses and “the right inherent in a fair trial to be present at one’s own trial.” It is also the declared policy of this state under RCW 2.43.010.

State v. Gonzales-Morales, 138 Wn.2d 374, 379, 979 P.2d 826 (1999). As *Teshome* states, “to secure the rights, constitutional or otherwise, of persons who, because of a non-English speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.” State v. Teshome, 122 Wn. App. 705, 710, 94 P.3d 1004 (2004).

Appellant urges this Court to consider the propriety of allowing a defendant who does not speak English fluently proceed pro se without an interpreter. This certainly preordains the return of a guilty verdict. Thus, Appellant argues that, as a matter of law, a defendant can never truly “knowingly” or “intelligently” elect to proceed pro se without an interpreter or command of the English language. Or, in the alternative, Appellant argues that this Court must rule as a matter of law that judges must specifically caution defendants of the added danger of proceeding pro se with limited grasp of the Court’s and jury’s language, so that defendants may actually proceed “knowingly” and “intelligently.” Either ruling will ensure that *Fritz’s* guiding principles apply for safeguarding those individuals who do not speak English fluently.

Although Mr. Soltero had an interpreter when he motioned to proceed pro se, he did not have an interpreter during his trial when he

proceeded pro se. As pointed out, the record is replete with Mr. Soltero's limited grasp of the English language. Mr. Soltero's level of fluency left witnesses—and no doubt the jury—confused. Regardless of any previous ostensible waiver, justice was hampered twofold by allowing Mr. Soltero to proceed without counsel and without an interpreter.

Finally, Appellant argues that, if the lack of thorough investigation, the lack of an unequivocal demand, or the lack of English fluency do not qualify individually to vitiate the ability to proceed pro se, then all three concerns, collectively achieve this vitiating. The integrity of the justice system requires trial courts to “indulge every presumption against a valid waiver.” Vermillion, supra; Silva, supra; Chavis, supra.

Appellant asserts that the case at bar presents this Court with three concerns that merit far more than a begrudging indulgence. These concerns require a complete reconsideration of the trial judge's September 5, 2006 determination that Mr. Soltero's waiver of right to counsel remained valid. This case should be remanded for a proper determination.

E. CONCLUSION

For the reasons stated above, the firearm enhancement should be reversed and dismissed; and the remaining convictions should be reversed and remanded for a new trial.

DATED this 28th day of March, 2007

Respectfully Submitted,

Nicholas George

NICHOLAS GEORGE, WSB# 20490

Attorney for Appellant

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COURTS OF APPEALS, DIVISION II
STATE OF WASHINGTON

JOSE SOLTERO,)	Case No.: 35589-2-II
Appellant	}	AFFIDAVIT OF SERVICE
v.	}	
STATE OF WASHINGTON,	}	
Respondent.	}	

I, Theresa L. Zalewski, paralegal to Nicholas George, declare under the penalty of perjury under the laws of the State of Washington that on March 30, 2007, I served a true and correct copy of the Brief of Appellant in the above-referenced matter, by placing a copy of said documents to be sent via courier to all parties and counsel of record.

State of Washington
Pierce County Superior Court
Prosecuting Attorney
930 Tacoma Ave.
Tacoma, WA 98402

DATED this 30th day of March, 2007.

[Signature]
Theresa L. Zalewski
Paralegal

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SUBSCRIBED AND SWORN TO BEFORE ME on this 30th day of March, 2007.

Nicholas George

NOTARY PUBLIC in and for the
State of Washington, residing in

Lakewood, Washington.

My commission expires: 5/26/08

NICHOLAS GEORGE

ATTORNEY AND COUNSELOR AT LAW, P.S., INC.

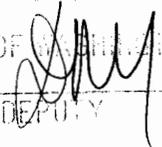
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PIERCE COUNTY SUPERIOR COURT STATE OF WASHINGTON

JOSE SOLTERO,) Case No.: 35589-2 II
Appellant,) CERTIFICATE OF SERVICE
vs.)
STATE OF WASHINGTON)
Respondent.)

The undersigned declares under penalty of perjury that the following facts are true and correct:

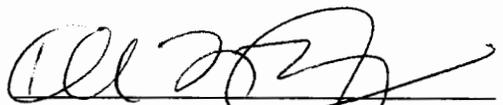
I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the above-entitled case.

On the 28th of March, 2007, I caused copies to be mailed to the appropriate parties listed.

The following parties were served personally by me:

Jose Soltero
c/o Elizabeth Soltero
10302 - 10th Ave. Ct. S.
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Dated this 5th day of April, 2007.


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