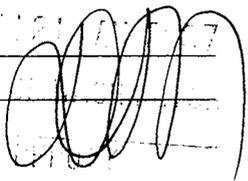


NO. 35589-2

07/11/2017  
STATE OF WASHINGTON  
BY: 

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOSE DE JESUS SOLTERO, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Frederick W. Fleming

No. 06-1-02437-2

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. After defendant entered a valid Faretta waiver and proceeded to represent himself, did the trial court properly respect that decision by not reappointing counsel *sua sponte*?
2. Was sufficient evidence adduced to support the jury's finding of a firearm enhancement?

B. STATEMENT OF THE CASE.

1. Procedure

On June 1, 2006, the Pierce County Prosecutor's Office filed an information charging appellant, JOSE JESUS SOLTERO ("defendant") with on count of a controlled substance with intent to deliver (cocaine). CP 1-2, 3-4. The State also alleged a firearm enhancement and a school zone enhancement. Id. The information was later amended but it did not affect the nature of the charge. CP 77-78.

Four days later, the defendant filed a pleading that contained notice of appearance indicating he was representing himself, an objection to his arraignment, a jury demand, a demand for discovery, and a demand for a bill of particulars. CP 5-10. On June 12, defendant filed a pro se pleading making a Knapstad motion to dismiss. CP 11-23. On June 28, this was followed by a request for a CrR 3.5 hearing. CP 24-26.

On July 5, the court entered an order indicating that it had engaged in a colloquy with the defendant and found that defendant's request to proceed pro se was made "unequivocally, freely, voluntarily and with full advise [sic] of the consequences." CP 135. The memorandum of journal<sup>1</sup> entry indicated that there was also a discussion about whether a public defendant would remain as stand-by counsel. CP 28-29. The court granted defendant's motion to proceed pro se. CP 135. Defendant continued to file pleadings seeking a Franks hearing and a motion to dismiss. CP 31-55, 58-72. The court denied his motion for return of property, his request for a bill of particulars, the Knapstad motion, his motion for a CrR 3.5 hearing, a Franks hearing and a discovery motion. CP 73-74, 75, 76, 107-108, 109-110, 111-113.

On September 5, 2006, the matter came on for jury trial before the Honorable Frederick W. Fleming. RP 1. After hearing the evidence the jury convicted defendant as charged, including both enhancements. RP 303-307; CP 103, 136, 137.

Prior to sentencing, an attorney was substituted in on defendant's behalf. CP 104.

At sentencing the court imposed a standard range sentence on 51 months, plus 36 months for the firearm enhancement and 24 months for

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<sup>1</sup> There is no verbatim report of proceeding for this hearing in the record on review.

the school zone enhancement for a total sentence of 111 months. CP 117-130.

Defendant filed a timely notice of appeal from entry of this judgment. CP 131-132.

## 2. Facts

Detective Dumais testified that he is employed by the Pierce County Sheriff's Department and that on May 31, 2006 he was assisting Detective Lund in the service of a search warrant at a residence located at 10302 10<sup>th</sup> Avenue Court South, in Parkland, Washington. RP 69-71. Defendant was present at the residence at the time the warrant was served. RP 71-72. Det. Dumais searched the garage pursuant to the warrant. RP 71. He testified that it was a two car garage approximately 20 feet by 20 feet; inside were some shelving units, a washer and dryer, a large tool box, and some other items. RP 72-73. There was a door at the back corner of the garage which led to the interior of the home. RP 73.

Det. Dumais notice some items sitting on top of the tool box that attracted his interest; there was a pen tube, a couple of lighters, a card, a knife, and a square of marble. RP 74. Based upon his training and experience, Det. Dumais recognized that these are items associated with drug activity. RP 74. Inside the tool box he found a SKS rifle, a black card file containing 32 tiny plastic baggies ("nickel bags"), and a box or two of plastic sandwich bags, ammunition for the rifle, two measuring

spoons, a glass bowl, and a pestle. RP 75, 77-78, 82. The gun (Exhibit 30) was loaded but there was not a round in the chamber; the slide was locked back so a round could have been chambered easily. RP 75-77, 85. There were 20 rounds in the magazine (Exhibit 22). RP 77, 84-85. Det. Dumais testified that nickel bags are used to store and transport narcotics. RP 78. Det. Dumais indicated that the tool box was about 10 feet from the door which led to the house, pushed up against a wall. RP 78-79. Inside a cabinet in the garage, Det. Dumais found a plastic bag with a “decent size quantity of white powder.” RP 79. This was admitted as Exhibit 26. RP 86. Det. Dumais and a forensic investigator testified that Exhibits 2 through 16, photographs taken during the execution of the search warrant, accurately depicted how the garage looked the day of the search and where the items described were found. RP 80-84, 97-99.

Detective Brian Lund described defendant’s residence at 10302 10<sup>th</sup> Avenue Court South as being on the west side of a cul-de-sac in a residential neighborhood. Christensen Elementary school was located directly behind the houses that were on the east side of the cul-de-sac. RP 115-116. Det. Lund indicated that he and approximately seven other officers were involved in serving a search warrant on the residence on May 31, 2006, at 7:19 a.m. RP 115-117. Defendant answered the door; the only other person in the house was his wife Elizabeth Soltero. RP 116-117. Det. Kern testified that she also assisted on the service of the warrant on defendant’s residence. In the downstairs living room area, she

found a hundred dollar bill, a checkbook cover containing a receipt for the SKS rifle, numerous money order receipts, and two note pads that appeared to be financial ledgers with numbers written on them. RP 156-158. Det. Lund gathered the items of evidence, including the white powdery substance found in the garage, that had been seized under the warrant by various officers and transported the items back to the County-City Building and checked them in to the property room. RP 118-125. A custodian for the property room testified that the evidence was stored in a secured facility and maintained in the same condition. RP 166-171. The suspected drugs, Exhibit 26, were sent to the crime lab for analysis as was the gun, magazine, and bullets, Exhibits 22 and 30. RP 170

Detective Karr testified that he had in the course of his career had over 250 cases involving controlled substance violations. RP 178-179. He testified that powder cocaine is usually sold on the streets in grams or smaller amounts; usually it is sold in a baggie, but it might be wrapped in cellophane or inside of a balloon. RP 179-180. The most common amount sold is a gram or slightly less and that sells for about a hundred dollars. RP 180. An ounce, or 28 grams, goes for between \$600-700. RP 181. A person who buys an ounce of cocaine then repackages it into grams for sale will make about \$2,800 in profit. RP 181. In his experience, finding a person with 54 grams of cocaine in his possession is more consistent with street level sales than with personal use. RP 181. Det. Karr testified that he would also expect such a person to possess

baggies, something to partition the cocaine and something to measure the amount. RP 181-182. The baggies and measuring spoon found during the search of the garage are consistent with street level sales. RP 182-183. A pestle is sometimes used to break down cocaine that has been purchased in a brick form in to a powder. RP 184. Det. Karr was present at the search, and found a hundred dollar bill and some bullets for a rifle inside a Cadillac that was parked at the residence. RP 185. Det. Karr testified that drug dealers use guns for protection from people purchasing drugs from them and also as protection when they are buying large amounts of drugs from other to prevent robbery. RP 186.

A forensic specialist trained in fingerprint comparisons testified that she processed the gun and the magazine for the gun (Exhibits 22 and 30) for latent fingerprints. RP 209-210. She was able to locate and lift partial latent fingerprints off of the magazine. RP 210. She was not able to make a conclusive match between these prints and the defendant's inked prints, but she was also not able to exclude defendant either. RP 210, 215. The prints were too smudged for her to able to make a positive match. RP 210.

A firearm examiner employed by the Washington State Patrol Crime Lab testified that she examined the gun found at defendant's house and test fired it twice to determine whether it was functional. RP 220-226. The gun did not malfunction. RP 226-227. Based upon her expertise, she

testified that the gun seized at defendant's home was capable of firing a projectile using an explosive such as gunpowder. RP 227.

A forensic scientist employed by the Washington State Patrol Crime Lab and specializing in chemical analysis testified that he analyzed the white powder admitted as Exhibit 26 and found that it contained cocaine. RP 235-241. The total weight of this substance was 54.1 grams. RP 239. This expert also testified that he tested the residue found on one of the measuring spoons that had been found in defendant's garage and that the residue contained cocaine. RP 241-242.

The residence searched was located across the street from a school. RP 99, 115-116. The garage door of this residence was 216 feet from the fence of the school yard. RP 100, 125-127.

The defendant did not call any witnesses. RP 244.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY RESPECTED DEFENDANT'S FARETTA WAIVER AND DID NOT REAPPOINT COUNSEL WHEN DEFENDANT DID NOT REQUEST REPRESENTATION.

The United States Supreme Court recognizes a constitutional right of a criminal defendant to waive assistance of counsel and to represent himself at trial. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The Washington Constitution similarly provides that the accused in criminal prosecutions shall have the right to appear and

defend in person. Const. art. 1, § 22 (amend. 10). State v. Barker, 75 Wn. App. 236, 881 P.2d 1051, 1053 (1994). However, the assertion of the right to proceed pro se must be unequivocal. State v. Luvene, 127 Wn.2d 690, 698, 903 P.2d 960 (1995).

A defendant who chooses to waive this right must do so knowingly and intelligently. State v. DeWeese, 117 Wn.2d 369, 377, 816 P.2d 1 (1991). Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that “he knows what he is doing and his choice is made with eyes open.” Adams v. United States ex rel. McCann, 317 U.S., 63 S. Ct. 236, 143 A.L.R. 435, 87 L. Ed. 268 (1942).

In interpreting Faretta, our State Supreme court held that a colloquy between the defendant and the court must at a minimum consist of informing the defendant of the nature and classification of the charge, the maximum penalty upon conviction, and that technical rules exist which will bind defendant in the presentation of his case. Bellevue v. Acrey, 103 Wn.2d 203, 233, 691 P.2d 957 (1984).

A criminal defendant’s right to counsel under the Sixth Amendment does not encompass a right to name the advocate of his choice. Wheat v. United States, 486 U.S. 153, 159, n. 3, 108 S. Ct. 1692, 100 L. Ed. 2d. 140 (1988). Frequently a criminal defendant will voice dissatisfaction with his

court –appointed counsel. A defendant’s desire not to be represented by a particular court-appointed counsel does not by itself constitute an unequivocal request by the defendant for self-representation. State v. Garcia, 92 Wn.2d 647, 655, 600 P.2d 1010 (1979).

The trial court is given the discretion to decide whether an indigent defendant’s dissatisfaction with his court-appointed counsel is meritorious and justifies the appointment of new counsel. State v. Sinclair, 46 Wn. App. 433, 730 P.2d 742 (1986), review denied, 108 Wn.2d 1006 (1987). When an indigent defendant fails to provide the court with legitimate reasons for the assignment of substitute counsel, the trial court may require the defendant to: 1) either continue with current appointed counsel; or, 2) to represent himself. Sinclair, at 437-38. If a defendant chooses not to continue with appointed counsel, requiring such a defendant to proceed pro se does not violate the defendant’s constitutional right to be represented by counsel, and may represent a valid waiver of that right. State v. Staten, 60 Wn. App. 163, 802 P.2d 1384 (1991).

Once a trial court obtains a valid Faretta waiver of counsel, the trial court is not obliged to appoint, or reappoint, counsel on the demand of the defendant; this decision is left to the trial court’s discretion. State v. Deweese, 117 Wn.2d at 379.

Self-representation is a grave undertaking, one not to be encouraged. Its consequences, which often work to the defendant’s detriment, must nevertheless be borne by the defendant. When a criminal defendant chooses to represent

himself and waive the assistance of counsel, the defendant is not entitled to special consideration and the inadequacy of the defense cannot provide a basis for a new trial or an appeal.

State v. Deweese, 117 Wn.2d at 379, citing State v. Hoff, 31 Wn. App. 809, 644 P.2d 763, review denied, 97 Wn.2d 1031 (1982).

Trial court must be careful when a criminal defendant unequivocally requests the right to represent himself; the unjustified denial of this right requires reversal. State v. Breedlove, 79 Wn. App. 101, 111, 900 P.2d 586 (1995).

- a. This court must presume that Judge Worswick's finding that defendant unequivocally, freely, and knowingly waived his right to an attorney is correct as appellant has failed to provide the necessary record on review to challenge this ruling.

The party seeking review has the burden of perfecting the record so that the appellate court has before it all of the proceedings relevant to the issue. RAP 9.2(b). Allemeier v. University of Washington, 42 Wn. App. 465, 472, 712 P.2d 306 (1985). An appellate court need not consider alleged error when the need for additional record is obvious, but has not been provided. Marriage of Ochsner, 47 Wn. App. 520, 528, 736 P.2d 292 (1987). While the Rules of Appellate Procedure allow for the court to correct or supplement the record, they do not impose a mandatory obligation upon the appellate court to order preparation of the record in order to substantiate a party's assignment of error. Heilman v.

Wentworth, 18 Wn. App. 751, 754, 571 P.2d 963 (1977). In Heilman, the appellant assigned error to the trial court's decision to deny his request for a continuance in order to obtain some medical testimony, but did not provide the relevant report of proceedings. The appellate court refused to consider the assignment of error stating:

We decline the implied invitation to search through an incomplete record, order that which should be obvious to support an assignment of error, and then make a decision.

Heilman, 18 Wn. App. at 754. An appellate court errs when it decides an issue on the merits when the necessary record for review is missing. State v. Wade, 138 Wn.2d 460, 979 P.2d 850 (1999).

In this case, defendant has assigned error to the trial court allowing him to proceed pro se on September 5, 2006. Brief of Appellant at p.1, Assignment of Error 2. The record before this court clearly shows that the defendant waived his right to an attorney and decided to go pro se on July 5, 2006. CP 56-57, 135; RP 4-7. However, the record on review does not contain the verbatim report of proceedings for July 5, 2006, when defendant executed his Faretta waiver. This court does not have the necessary record to review the decision of the defendant to proceed pro se. This court must presume that the trial court acted properly in accepting defendant's Farretta and allowing him his right to proceed pro se. Any review of this issue must be limited to whether the record on review shows

that the trial court abused its discretion in failing to reappoint counsel at the request of the defendant.

- b. As defendant never asked the court to reappoint an attorney to represent him, the trial court did not abuse its discretion in continuing to honor defendant's *Faretta* waiver.

As noted earlier, it is also reversible error for a court to deny a defendant his right to self-representation once a criminal defendant unequivocally requests the right to represent himself. State v. Breedlove, 79 Wn. App. 101, 111, 900 P.2d 586 (1995). Nor is a trial court obliged to appoint, or reappoint, counsel on the demand of the defendant, after he has given a valid Faretta waiver of counsel. State v. Deweese, 117 Wn.2d at 379. Putting these two legal principles together, it becomes clear there must be a clear request by defendant for reappointment of counsel in order for the court to act without violating the defendant's right to represent himself. As noted by the United States Supreme Court:

Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to "harmless error" analysis. The right is either respected or denied; its deprivation cannot be harmless.

McKaskle v. Wiggins, 465 U.S. 168, 177, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984). Thus, once a trial court has determined the existence of a valid Faretta waiver, it runs the risk of committing reversible error by forcing legal assistance onto an unwilling recipient.

In this case defendant fails to show where he ever asked the court to reappoint counsel to assist him in his defense. The record from the hearing on September 5, 2006, demonstrates defendant's continued desire to represent himself.

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

DEFENDANT: No. I was given the option earlier by [the judge that accepted his Faretta waiver].

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

DEFENDANT: Yes, I do...

RP 6.

The Faretta waiver in defendant case was accepted by a judge handling preliminary matters in defendant's case. CP 28-29, 135. This judge had determined that defendant was making an unequivocal, knowing and voluntary decision to represent himself and entered an order reflecting that determination. CP 135. The judge who would preside over the trial verified defendant's decision to represent himself at trial, with out stand-by counsel. These actions show a proper respect toward the defendant and the execution of his right self representation. There was no abuse of discretion in failing to reappoint counsel when defendant was not asking for this to occur. In fact, to impose counsel on this defendant would have been reversible error as it would have denied defendant his right of self representation.

2. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDING OF THE FIREARM ENHANCEMENT.

When the Legislature enacted the “Hard Time for Armed Crime Act of 1995” (Initiative 159), it expressly recognized that “[a]rmed criminals pose an increasing and major threat to public safety and can turn any crime into serious injury or death.” Laws of 1995, ch. 129, §1(1)(a)(Initiative Measure No. 159). Armed individuals engaged in criminal conduct might use a deadly weapon for “several key reasons including: Forcing the victim to comply with their demands; injuring or killing anyone who tries to stop the criminal acts; and aiding the criminal in escaping.” *Id.* As a result, the Legislature authorized an enhanced sentence if the defendant was armed with a firearm during commission of the crime. See, RCW 9.94A.533 (former RCW 9.94A.310 (2000)). In order to prove a firearm or weapon enhancement, the State must prove that the defendant was “armed” during the commission of the crime. RCW 9.94A.533(3). Being armed is not confined to those defendants with a deadly weapon actually in hand or on their person. State v. Gurske, 155 Wn.2d 134, 139, 118 P.3d 333 (2005). Rather, a person is “armed” for purposes of the enhancement statute if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes. State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). The “easily accessible and readily available” requirement means that where the

weapon is not actually used in the commission of the crime, it must be there “to be used” and it “must be easy to get to for use against another person.” Gurske, 155 Wn.2d at 138. The use may be to facilitate the commission of the crime, escape from the scene of the crime, protect contraband or the like, or prevent investigation, discovery, or apprehension by the police. Gurske, 155 Wn.2d at 139; See, State v. Schelin, 147 Wn.2d 562, 572-73, 55 P.3d 632 (2002)(plurality).

When determining the sufficiency of the evidence in a case where the defendant does not actually possess the weapon during the commission of the crime, the State must prove that there is a nexus between the weapon and the defendant and between the weapon and the crime. State v. Schelin, 147 Wn.2d 562, 567-68, 55 P.3d 632 (2002). In order to establish this nexus, courts have examined the nature of the crime, the type of weapon and the circumstances under which the weapon is found (e.g., whether in the open, in a locked or unlocked container, in a closet on a shelf, or in a drawer). Gurske, 155 Wn.2d at 142 (citing Schelin, 147 Wn.2d at 570). “[W]hether the defendant is armed at the time a crime is committed cannot be answered in the same way in every case.” Gurske, 155 Wn.2d at 139.

For example, in State v. Sabala, 44 Wn. App. 444, 723 P.2d 5 (1986), the court expressly found that a gun which was under the defendant’s seat in a car he was in and was easily visible was “easily accessible and readily available for use by the defendant for either

offensive or defensive purposes.” Sabala, 44 Wn. App. at 448. The court reached this decision even though there was no evidence that Sabala ever reached for or handled the gun during the commission of the crime or the stop. Sabala, 44 Wn. App. at 445.

In State v. Taylor, 74 Wn. App. 111, 872 P.2d 53 (1994), the court found that the defendant was armed where an unloaded gun was found in a leather bag lying on a table near where defendant was sitting and where the narcotics were found. Taylor, 74 Wn. App. at 125. In Taylor, the defendant was in possession of narcotics and near the gun when officers executed the search warrant and arrested him.

In Schelin, supra, the plurality held the evidence sufficient to support the jury’s verdict finding the defendant armed with a deadly weapon. Schelin, 146 Wn.2d at 574. There, police found a loaded revolver in a holster hanging from a nail in a basement wall, about six to ten feet from where the defendant was standing when the police entered his house. Schelin, 147 Wn.2d at 564. Even though the defendant testified that he could remove the gun from the holster quickly if need be, there was no evidence that the defendant tried to access the gun. Schelin, 147 Wn.2d at 564, 574. In addition, at the time officers located the weapon, the defendant had already been taken out of the basement and handcuffed. Schelin, 147 Wn.2d at 564.

In Valdobinos, supra, this court ruled that a defendant charged with delivery of controlled substances was not armed simply because there was

an unloaded rifle under a bed in the bedroom. Valdobinos, 122 Wn.2d at 274. The court reasoned that, at the time the weapon was discovered, the defendant had already been arrested and removed from the scene, with no indication that he had been near the bed or bedroom or had been heading toward the bedroom when the officers arrived to affect the arrest and execute the search warrant. Valdobinos, 122 Wn.2d at 282.

As these cases illustrate, and as this court recently recognized in Gurske, Washington courts have not stated 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 the police discover the crime is being committed. See, Gurske, 155 Wn.2d at 139 (citing Schelin, 147 Wn.2d at 572-73). The Schelin court correctly noted that stating an absolute rule would be misdirected “as there is no reason to believe the Legislature intended the statute to solely protect police. It is equally likely that the statute is intended to deter armed crime and to protect victims from armed crimes, as well as to protect police during investigations of crimes.” Schelin, 147 Wn.2d at 572-73.

While the outcomes of cases that discuss the sufficiency of evidence for firearm enhancements vary greatly, this court has determined that, when read together, the cases provide the following standard that the State must meet in order to meet its burden on a firearm allegation: The State must establish that the defendant was within the proximity of an easily and readily available firearm for offensive or defensive purposes,

and that a nexus exists between the defendant, the crime, and the firearm. State v. Barnes, 153 Wn.2d 378, 383, 103 P.3d 1219 (2005). Jury instructions need not, however, expressly contain “nexus” language. Id. (citing State v. Willis, 153 Wn.2d 366, 103 P.3d 1213 (2005)).

In this case, the State presented sufficient evidence to establish that defendant was “armed” within the standard set forth above. When analyzing a sufficiency of the evidence claim, the applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). Also, a challenge to the sufficiency of the evidence admits the truth of the State’s evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988)(citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)). 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).

Circumstantial and direct evidence are considered equally reliable. Id.; State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” State v. Camarillo, 115 Wn.2d

60, 71, 794 P.2d 850 (1990)(citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

In this case the jury was given the following instruction regarding the firearm enhancement:

For the 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 charged in Count I. *The State must also prove beyond a reasonable doubt that there is a connection between the firearm and 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 by an explosive such as gunpowder.

CP 82-102, Instruction 15 (emphasis added). The court should note that the italicized portion of this instruction required the jury to find a nexus between the defendant weapon and crime. See, State v. Schelin, 147 Wn.2d 562, 575-76, 55 P.3d 632 (2002).

The evidence adduced at trial showed that a searched of defendant’s residence revealed a loaded SKS rifle and ammunition in a toolbox in the garage; a bag containing over 54 grams of cocaine was found on a nearby shelf in the small garage. RP 75-77, 79, 85. Also inside the toolbox were numerous small baggies commonly used for drug transactions, measuring spoons with residue that tested positive for

cocaine and a glass pestle which could be used for breaking up brick cocaine. RP 75, 77-78, 82. The reasonable inference from this evidence was that this was a tool kit containing equipment, including the firearm, was used in the distribution of cocaine. The pestle would be used to break up brick cocaine into powder; the spoons would be used to measure the powder into small quantities for resale; the measured powder would be put into the small baggies for ease of sale. Det. Karr testified that it was common for drug dealers to arm themselves to prevent being “ripped off” either by their customers or by their suppliers. RP 186. It is a reasonable inference that the defendant kept his loaded weapon with the other tools of his trade that he used in the distribution of cocaine. Therefore, the weapon was readily available and easily accessible any time someone came to his door to purchase cocaine or anytime he might decide to take his wares out on the street for delivery. This evidence is sufficient to provide the connection between the weapon and the crime. Inside of defendant’s house they found a receipt for the rifle found with items belonging to the defendant. This provides a connection between the defendant and the weapon.

Defendant challenges the State’s proof showing that defendant was armed *at the time* of the crime. In State v. O’Neal, 159 Wn.2d 500, 504, 150 P.3d 1121 (2007), the Washington Supreme Court clarified that a “defendant does not have to be armed at the moment of arrest to be armed for the purposes of the firearms enhancement.” The court agreed that it

was not necessary to “establish with mathematical precision the specific time and place that a weapon was readily available and easily accessible, so long as it was at the time of the crime.” Id. at 504-505. Looking at the evidence in the light most favorable to the State, the evidence supported the inference that defendant had purchased a larger amount of cocaine, perhaps a kilo brick, with the intent to resell it, that he had broken the brick down using the pestle and measured out smaller amounts for resale in the nickel bags then sold it, leaving slightly more than 54 grams in reserve supply for additional future sales. Thus, his possession with intent to deliver occurred on or about May 31, 2006, but was not limited to just that day. The jury could conclude from this evidence that during this period of possession of cocaine with the intent to deliver, the firearm was readily available and easily accessible for use for offensive and defensive purposes. The enhancement should be upheld.

D. CONCLUSION.

For the foregoing reasons the State asks this court to affirm the judgment below.

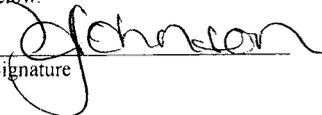
DATED: June 20, 2007.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LM1 delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/20/07   
Date Signature

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TACOMA, WA

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STATE OF WASHINGTON  
BY  DEPUTY