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DIVISION II

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STATE OF WASHINGTON
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NO. 37520-6-II

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

STATE OF WASHINGTON,

Respondent,

vs.

JOEL P. REESMAN,

Appellant.

AMENDED BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court's verdict that the defendant was armed with a firearm while constructively possessing methamphetamine residue violated due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, because there is no substantial evidence of a nexus between the defendant's constructive possession of methamphetamine residue and his possession of a firearm.

2. The trial court erred when it found the defendant's Oregon conviction for second degree robbery comparable to a Washington conviction for second degree robbery.

Issues Pertaining to Assignment of Error

1. Does a court's verdict that a defendant was armed with a firearm while constructively possessing methamphetamine residue violate due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when there is no substantial evidence of a nexus between the defendant's constructive possession of the methamphetamine residue and the defendant's possession of the firearm?

2. Does a trial court err if it finds that a foreign conviction for second degree robbery is comparable to a Washington second degree robbery when the foreign robbery statute includes conduct that would not be a robbery in Washington and when the state fails to present any factual background as to the conduct constituting the foreign conviction?

STATEMENT OF THE CASE

Factual History

Sometime during November or December of 2006, the ubiquitous “Confidential Informant” usually known as “X” once again found himself¹ in trouble with the law.² CP 70. Having prior convictions for forgery, illegal possession of a controlled substance, theft, negligent driving, driving while suspended, and possession of marijuana, and having absolutely no desire to pay the price of his new criminal conduct, he contacted Officer Neil T. Martin of the Vancouver Police Department in order to “work out a deal.” *Id.* Being a regular user and sometimes seller of methamphetamine and being thoroughly acquainted with the milieu of methamphetamine abuse, he offered to provide information to Officer Martin concerning his fellow users and dealers in the drug community in return for leniency on his pending charges. *Id.* Officer Martin accepted this offer. *Id.*

With this acceptance in hand, the “CI” told Officer Martin that on at

¹The informant to which Officer Martin referred in his affidavit might well have been a “herself” as opposed to the “himself” noted above. The use of the masculine pronoun herein is not intended as a slight to any of the female informants in this state. Rather, it is simply used as a method to avoid the rather cumbersome references to “he/she” and “himself/herself.”

²Actually, Officer Martin refers to “X” as the “Confidential Reliable Informant” or “CRI,” this person apparently being a new and improved version of the usual “Confidential Informant” or “CI.” In spite of Officer Martin’s new title for “X,” appellant herein will use the latter designation.

least 10 occasions over the previous month he had been in the defendant Joel Reesman's residence at 4701 NE 72nd Avenue, Apartment Y-285, and had seen the defendant repeatedly dealing large quantities of methamphetamine, including "as little as an 'eight ball' or 3.5 grams and as much as ¼ ounce or approximately 7.0 grams". CP 70-71. The "CI" also claimed that the defendant was a convicted felon who kept a .45 ACP handgun and a "sawed off shotgun" in his apartment, and that each time the "CI" had been in the apartment, he had seen the defendant use methamphetamine. *Id.* Based upon this information, Officer Martin obtained a warrant to search the defendant's apartment for guns and drugs. CP 66-73.

During the evening of January 9, 2007, Officer Martin and numerous other members of law enforcement in Clark County went to the defendant's apartment to serve the warrant. RP 53-56.³ However, being concerned about the claims of weapons, they decided to first perform surveillance. RP 108-109. During this surveillance, they saw the defendant come out and talk to someone in a vehicle, and later saw a person by the name of Amber

³The record in this case includes the four volumes of verbatim reports of hearings and an aborted stipulated facts trial held on 8/3/07, 12/3/07, 12/11/07, and 3/12/08. They are referred to herein as "RP [date] [page #]." The record in this case also includes three volumes of verbatim reports of the combined 3.5 hearing, bench trial, and sentencing hearing held on 3/17/08, 3/18/08, and 3/19/08. The latter three volumes are continuously numbered and are referred to herein as "RP [page #]."

Blanchard enter the apartment carrying a purse and two bags. RP 108-111, 126-129. About an hour after Ms. Blanchard entered, a number of the officers went up to the front door of the defendant's apartment, knocked loudly, and announced their identity and purpose. RP 53-56, 87-89, 110-111. Getting no reply, the lead officer opened the door, which was unlocked, and a second officer threw in a grenade referred to as a "flash bang," which emits a loud noise and a bright burst of light to disorient anyone close to the explosion. *Id.* As the two officers looked inside before the grenade went off, they saw the defendant run from the kitchen area of the apartment through the living room and down the hall. RP 87-89, 98-100. He was followed by a number of females, one of whom was Amber Blanchard. *Id.* Neither officer saw a gun in the defendant's hand. *Id.*

At the same time the officers walked up to the front door to begin executing the warrant, a number of other officers stationed themselves at the bedroom windows. RP 77, 240-241. Upon hearing the officers' actions at the front door, the officer at the window to the master bedroom broke it out and threw in his own "flash-bang" grenade. RP 92-93, 240-241. After it went off he saw the defendant and two or three females enter the bedroom. RP 94, 240-241. As he saw this, he immediately ordered them to the floor on their stomachs at gunpoint. RP 240-241. They all complied, although the defendant wiggled around a little. RP 245-246. During this time, the officer

at the window kept his eyes on the defendant's hands and verified that he was not holding a weapon. RP 149-150, 242, 250. Within a few seconds, a number of officers from the front door entry team ran down the hall and found the defendant, Amber Blanchard, and two other females on the floor on their stomachs. RP 58-60, 76-78, 90-91, 101-104. As they entered the bedroom, the officers saw a silver 9mm pistol on the floor in the area of the defendant's feet. *Id.*

Once the officers had the defendant, Amber Blanchard, and the other females in custody, they began their search proper. *Id.* They found the following items in the locations indicated: (1) a 12 gauge shotgun with a barrel under 16 inches in length leaning in the corner of the kitchen, (2) a picture on the living room wall showing Amber Blanchard's brother holding the shotgun while standing next to the defendant, (3) a loaded .40 Glock pistol in one of the bags Amber Blanchard brought into the apartment, (4) live 9mm ammunition in another bag Amber Blanchard brought into the apartment, (5) two small digital scales in a dresser in the master bedroom, one of which had methamphetamine residue on it, (6) an ice tea can in the bathroom with methamphetamine residue on it, and (7) a baggie in the west bedroom on a bookcase with methamphetamine residue in it. RP 115-118, 131, 191-196, 231-232, 266-267. However, of .45 ACP handguns and ¼ ounce baggies of methamphetamine they apparently found none. RP 1-316.

During the search, Officer Martin sat down and spoke with the defendant. RP 301-303. During this conversation, the defendant stated that he was a methamphetamine user, that the .40 caliber Glock and the 9mm pistol belonged to Amber Blanchard, although he had handled the 9mm pistol that evening, that the shotgun belonged to his roommate, and that both he and Amber Blanchard had injected methamphetamine during the past hour. RP 304-307, 334-336.

Procedural History

By information filed January 16, 2007, the Clark County Prosecutor charged the defendant Joel Paul Reesman with two counts of first degree unlawful possession of a firearm for the shotgun and 9mm pistol found in his apartment, possession of an illegal firearm for the shotgun, and possession of methamphetamine for the methamphetamine residue found in the apartment while armed with the 9mm pistol. CP 1-2. In the same information, the prosecutor charged Amber Blanchard with possession of the same methamphetamine while armed with the .40 Glock pistol and second degree unlawful possession of a firearm for the same .40 Glock. *Id.* Initially, the court appointed an attorney to represent the defendant. CP 15. However, by August 30, 2007, following a number of continuances and speedy trial waivers, the defendant retained his own attorney to represent him. CP 12-15; RP 8-30-07.

On December 3, 2007, the court called the case for trial before a jury. RP 12-3-07 1. At that time, the defendant's retained attorney and the prosecutor informed the court that the defendant would waive his right to a jury and the parties would try the case upon stipulated facts. RP 12-3-07 1-15. At that time, the defense filed a written jury waiver signed by the defendant. CP 39. Following the acceptance of this waiver, the court and the parties spent a great deal of time stipulating to the admission of a number of exhibits in the case. RP 12-3-07 6-32. The court then adjourned until the next day. RP 12-3-07 32. However, because of seasonal flooding on Interstate 5, the defendant's attorney was not able to drive from Olympia to Vancouver on either December 4th or 5th. CP 18. By the time the court reconvened on December 11th, 2007, the defendant had changed his mind about wanting to waive jury, wanting to try the case on stipulated facts, and wanting to continue with his retained attorney. RP 12-11-07 1-23; CP 24-25. Consequently, the court allowed the defendant to withdraw his jury waiver, allowed the defendant's retained counsel to withdraw, and appointed a new attorney to represent the defendant. *Id.*

On March 12, 2008, the defendant appeared before the court with his new court-appointed attorney. RP 3-12-08. At that time, defense counsel filed a new written jury waiver that the defendant had signed. CP 101. Upon receiving this written waiver, the trial court engaged in a colloquy with the

defendant and accepted the waiver. RP 3-23-08 6-7.

Finally, on March 17, 2008, the parties appeared in this case for trial before the bench. CP 103-107. During the trial, the state called 14 witnesses, including 12 police officers and a forensic chemist. CP 103-104. They testified to the facts contained in the preceding factual history. *See Factual History*. During this testimony, the state also introduced certified copies of the defendant's 1993 and 1994 Oregon convictions for Second Degree Robbery and First Degree Robbery. Trial Exhibits 24, 39, 40. In addition, the state called Amber Blanchard, who by the time of the trial, had entered into an agreement with the state to testify against the defendant in return for a significant reduction in her charges. RP 144-185.

In her testimony, Amber Blanchard admitted that the .40 Glock was her gun, that she had brought it into the defendant's apartment on the night the police executed the warrant, and that prior to the police entering the house she had injected methamphetamine with the defendant. RP 153-155. However, she stated that the shotgun belonged to the defendant, that the silver 9mm belonged to the defendant, that the defendant carried it constantly, that prior to the police entering the apartment the defendant had the silver 9mm either in his hand or in his waistband, and that when the police had announced their presence, she and the defendant and two other females had run from the kitchen into the defendant's bedroom, where the defendant

threw the pistol down onto the floor. RP 148-149, 157-158. She also testified that the defendant made statements about the police not taking him alive. RP 148-149. On cross-examination, she stated that she had no idea how live 9mm ammunition got into one of the bags she carried into the apartment. RP 178.

Following the state's evidence in this case, the defendant took the stand as the sole witness for the defense. RP 326-350. During his testimony, he reiterated what he had said to the police and claimed that the silver 9mm belonged to Amber and that the shotgun belonged to his roommate. *Id.* Following his testimony, the defense rested its case. RP 365. Counsel then presented closing argument to the court, which rendered a verdict of guilty on all counts. RP 365-393, 393-399. The court also found that the defendant possessed the methamphetamine residue while armed with a firearm. RP 397-399.

After rendering its verdict, the court held a short recess. RP 405. The court then called the case for sentencing. *Id.* As part of the sentencing hearing, the state offered certified copies of the defendants 1992 and 1993 Lane County, Oregon, convictions for Second Degree Robbery and Third Degree Robbery into evidence. *See* Sentencing Exhibits 1 & 2. The defense responded that even if proven to be prior convictions, they were not comparable to robbery under Washington law. RP 402-406. Based upon

these convictions and its finding that they were both comparable to second degree robbery under Washington law, the court found them both to be strike offenses. RP 405-428. The court also found that the firearm enhancement to Count IV constituted a strike. *Id.* Consequently, the court sentenced the defendant to life in prison without possibility of release on the possession of methamphetamine charge. CP 123. The court also imposed standard range sentences on Counts I, II, and III. CP 120. The defendant thereafter filed timely notice of appeal. CP 133.

ARGUMENT

I. THE TRIAL COURT'S VERDICT THAT THE DEFENDANT WAS ARMED WITH A FIREARM WHILE CONSTRUCTIVELY POSSESSING METHAMPHETAMINE RESIDUE VIOLATED DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, BECAUSE THERE IS NO SUBSTANTIAL EVIDENCE OF A NEXUS BETWEEN THE DEFENDANT'S CONSTRUCTIVE POSSESSION OF METHAMPHETAMINE RESIDUE AND HIS POSSESSION OF A FIREARM.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with

guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence 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.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

The due process requirement that the state prove every element of an offense charged beyond a reasonable doubt also requires the state to prove all charged sentencing enhancements beyond a reasonable doubt. *State v. Gunther*, 45 Wn.App. 755, 727 P.2d 261 (1986). Originally, this requirement inured from the fact that the court’s considered some enhancements so significant that they were treated as if they were an element of the offense that had to be pled and proved beyond a reasonable doubt. *In re Hunter*, 106

Wash.2d 493, 723 P.2d 431 (1986). Later, under the decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the United States Supreme court held that (1) “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt,” and (2) “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” Thus, in the case at bar, the defendant may attack the firearm enhancement added to Count IV on the basis that it is not supported by substantial evidence.

Under RCW 9.94A.602, a sentence may be enhanced upon a finding that the defendant was “armed with a deadly weapon” during the commission of the underlying offense. The first paragraph of this section states as follows:

In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

RCW 9.94A.602.

For the purposes of this statute, a person is “armed” at the time of the offense “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). While this definition sounds as if the state need merely prove possession in order to obtain the enhancement, this interpretation is incorrect. Under the statute, the legislature has used the phrase “armed with a deadly weapon at the time of the offense,” instead of “possessed a deadly weapon at the time of the offense.” Thus, more than mere “possession” is necessary and a firearm enhancement also requires proof that a nexus existed between the defendant, the weapon, and the crime. *State v. Schelin*, 147 Wn.2d 562, 55 P.3d 632 (2002). The determination whether or not a nexus exists requires analyzing “the nature of the crime, the type of weapon, and the circumstances under which the weapon is found.” *Schelin*, 147 Wash.2d at 570

For example, in *State v. Holt*, 119 Wn.App. 712, 82 P.3d 688 (2004), the Court of Appeals examined the sufficiency of jury instructions that purported to set out a firearm enhancement. In this case, the two defendants were charged with manufacture of methamphetamine while armed with a firearm, and one of the two was also charged with illegal possession of a firearm. Following conviction, the defendant’s appealed, arguing that the

trial court erred when it failed to instruct the jury that in order to find the firearm enhancement the state had the burden of proving beyond a reasonable doubt that there was a “nexus” between the defendant, the weapon, and the crime. The court had instructed the jury that “armed with” meant that the firearm was “readily available or easily accessible for use”, but it had not included the nexus requirement.

In addressing this argument, the Court of Appeals first reviewed the Washington Supreme Court’s decision in *State v. Schelin, supra*. In that case, the defendant made a substantial evidence challenge to a firearms enhancement, arguing that (1) there was a nexus requirement between the defendant, the firearm, and the commission of the underlying offense, and (2) the state failed to present substantial evidence on the issue. The court agreed with the defendant’s first argument, but disagreed with the second and affirmed the conviction. In a concurring opinion, Justice Alexander noted that if the law did require a “nexus,” then that requirement constituted an element of the offense on which the court should instruct the jury.

After its review of the *Schelin* decision, the Court of Appeals in *Holt* noted the following concerning Justice Alexander’s concurrence:

Justice Alexander’s position suggests that a nexus between the defendant, the crime, and the weapon is neither an idle trial formality nor solely an appellate standard for ensuring justly imposed firearm enhancements. The nexus is, instead, an element of the enhancement requiring supportive proof beyond a reasonable doubt. Were this

untrue, appellate courts would have no cause to inquire on the sufficiency of the evidence supporting the nexus. *See State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (A sufficiency of the evidence challenge requires proof of only the crimes essential elements). But because appellate courts often perform that precise inquiry, we see no reason to deny the nexus requirement its status as an element of the enhancement.

We conclude that, as an element of the firearm enhancement, the nexus requirement must be set forth in the jury instructions. Because the enhancement instructions in this case did not, they inaccurately stated the law.

State v. Holt, 119 Wn.App. at 728.

The decision in *State v. Brown*, 162 Wn.2d 422, 173 P.3d 245 (2007), illustrates this rule. In this case, the state convicted the defendant of burglary after he and an accomplice entered a home without permission and stole items of property. The state obtained a firearm's enhancement upon the homeowner's testimony that during the burglary, either the defendant or his accomplice had moved a rifle from a bedroom closet and placed it on a bed a few feet away. The defendant then appealed, arguing that substantial evidence did not support the enhancement because there was not evidence from which to find a nexus between him, the offense committed, and the firearm. Specifically, the defendant argued that while the evidence was sufficient to prove that he or the accomplice temporarily exerted control over the rifle, there was not evidence from which to conclude that either one of them intended to use the firearm to facilitate the burglary.

In reviewing the defendant's arguments, the court first noted mere possession of a firearm at the time of the commission of an offense, whether that possession is actual or constructive, does not constitute proof that a defendant was "armed" with the firearm. The court then held:

Our analysis in *Schelin* underscores that proximity alone does not establish a nexus between the crime and the weapon. In *Schelin*, the defendant hung a loaded pistol from a basement wall near where defendant had a marijuana grow operation. When police arrived they found *Schelin* standing near the pistol. The "direct evidence concerning *Schelin's* location at the time police officers entered the home" supported both a finding "that *Schelin* had constructive possession of an easily accessible and readily available deadly weapon." However, as a separate matter, "[w]hether *Schelin* was 'armed' ... requires the court to establish that a nexus existed." *Schelin*, 147 Wn.2d at 574, 55 P.3d 632. To establish the nexus between the crime and a weapon one should examine the nature of the crime, the type of weapon or weapons, and the circumstances under which the weapon is found. Applied to the facts of this case, this analysis shows why it is not determinative that the defendant or his accomplice merely touched a weapon in the course of a crime.

State v. Brown, 162 Wn.2d at 433.

In the case at bar, the state added a firearm enhancement to a charge of possession of methamphetamine. Although there was direct evidence that the defendant had actual possession of a firearm at the time the police entered his house, he did not have actual possession of the methamphetamine residue found in the house. Rather, the residue was found in various locations such as on a set of scales in the dresser drawer and on an iced tea can found in the bathroom. Thus, while there was substantial evidence that the defendant

directly possessed a firearm, there was no evidence of a nexus between the defendant's possession of that firearm and his constructive possession of the methamphetamine residue.

As our Supreme Court has clarified, the determination as to the existence of a nexus between the defendant, the crime and the firearm possession is uniquely a function of "the nature of the crime, the type of weapon, and the circumstances under which the weapon is found." *Schelin*, at 570. The phrase "the nature of the crime" strongly suggests that the court should look at more than just the elements of the underlying offense. Rather, in the context of a possession charge, the court should look to the actual facts that constituted the crime. For example, if a defendant had traveled to a drug dealer's home while armed with a pistol, purchased a large quantity of drugs, and then returned to his own residence, the "nature of the crime" as well as the "type of weapon" would lead to a reasonable inference that the defendant possessed the firearm in order to facilitate his possession of drugs. Thus, there would be substantial evidence to support the finding of a sufficient nexus to support a firearm enhancement.

However, under circumstances such as those in the case at bar, in which a defendant is in his own home while armed with a firearm, the mere fact that he constructively possesses methamphetamine residue does not support a conclusion that he was using the firearm to facilitate his possession

of the residue. Rather, the only reasonable inference to be drawn is that the defendant had no interest in the residue itself, and certainly was not possessing a firearm to protect that residue or prevent his apprehension on a charge of possession of that residue. Under these circumstances, the evidence does not support a finding of a sufficient nexus between the defendant, the crime, and the firearm. Thus, in the case at bar, the trial court violated the defendant's right to due process when it found that the state had proved beyond a reasonable doubt that the defendant was "armed" with a firearm when he constructively possessed the methamphetamine residue in this case.

II. THE TRIAL COURT ERRED WHEN IT FOUND THE DEFENDANT'S OREGON CONVICTION FOR SECOND DEGREE ROBBERY COMPARABLE TO A WASHINGTON CONVICTION FOR 2° ROBBERY.

The calculation of offender points assigned to foreign convictions for a defendant sentenced on a Washington offense is governed by RCW 9.94A.525(3). This section states:

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

RCW 9.94A.525(3).

Washington case law interpreting this statute indicates that in determining the effect of a foreign conviction, the sentencing court must first compare the elements of the foreign conviction to elements of any comparable Washington statute. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). If the elements are identical, then the analysis ends. *State v. Bush*, 102 Wn.2d 372, 9 P.3d 219 (2000). However, if the foreign statute defines the offense in broader terms, the sentencing court must then look to the actual conduct to determine the equivalent Washington offense. *State v. Morley*, 134 Wn.2d 588, 952 P.2d 167 (1998).

Evidence setting out the conduct that led to the foreign conviction can be found in supporting documents such as the Indictment, the Statement of Defendant on Plea of Guilty (if the defendant pled guilty), the Jury Instructions (if the defendant went to a jury trial), or the Judgment and Sentence. Upon determining the conduct proven, the court should then determine what crime, if any, it would constitute under Washington law. *State v. Morley, supra*. The state has the burden of producing sufficient evidence to prove by a preponderance of the evidence that the actual conduct constituted a particular offense in Washington. *State v. Ford, supra*. The appellate courts conduct a de novo review of this determination by the trial court. *State v. McCraw*, 127 Wn.2d 281, 898 P.2d 838 (1995).

For example, in *State v. Cameron*, 80 Wn.App. 374, 909 P.2d 309

(1996), the defendant pled guilty to delivery of heroin. At sentencing, the defendant stipulated that he had a prior federal conviction for conspiracy to possess marijuana with intent to deliver. However, he argued that it had washed because he subsequently spent more than five consecutive years in the community crime free. The state agreed with the defendant's factual assertion, but argued that the conviction counted toward the defendant's offender score because (1) a ten year wash out period applied, and (2) the defendant had not spent ten years crime free (which fact the defendant conceded). The trial court agreed with the state's analysis, counted the prior federal conviction as three points, and sentenced the defendant to 36 months on a range of 36 to 48 months. The defendant then appealed, arguing that the correct range was from 21 to 27 months in prison.

In its analysis, the Court of Appeals first noted that in determining the applicability of a foreign conviction under former RCW 9.94A.360(3), now RCW 9.94A.525(3), the court was required to analyze the elements of the foreign offense and compare it to the comparable Washington crime. Upon doing this, the court held that the federal conviction had the same elements as conspiracy to possess marijuana with intent to deliver under RCW 69.50.401(a)(1)(ii), which is a class C felony with a maximum term of five years in prison.

The Court of Appeals then addressed the state's argument that the

prior federal conviction was a second drug offense, and that under RCW 69.50.408, the maximum applicable term was doubled to ten years in prison. The Court of Appeals responded that it agreed with the state's legal analysis. However, it disagreed with the state's factual analysis, finding that the record indicated that the prior federal conviction had not been treated as a subsequent offense. Thus, the court held that the trial court should have applied the five year period, thus washing out the federal conviction. As a result, the court reversed and remanded for resentencing.

In the case at bar, the defendant's disputed foreign conviction was for Second Degree Robbery under ORS 164.405, which states:

(1) A person commits the crime of robbery in the second degree if the person violates ORS 164.395 and the person:

(a) Represents by word or conduct that the person is armed with what purports to be a dangerous or deadly weapon; or

(b) Is aided by another person actually present.

(2) Robbery in the second degree is a Class B felony.

ORS 164.405.

Third Degree Robbery in Oregon under ORS 164.395, as referenced in this statute, provides as follows:

(1) A person commits the crime of robbery in the third degree if in the course of committing or attempting to commit theft the person uses or threatens the immediate use of physical force upon another person with the intent of:

(a) Preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking; or

(b) Compelling the owner of such property or another person to deliver the property or to engage in other conduct which might aid in the commission of the theft.

(2) Robbery in the third degree is a Class C felony.

ORS 164.395.

In this case, the sentencing court found this offense comparable to Second Degree Robbery under RCW 9A.56.210. This statute states: “A person is guilty of robbery in the second degree if he commits robbery.” The term “robbery” is defined in RCW 9A.56.190 as follows:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190.

Under the Oregon statute, the crime of robbery can be broken down into the following alternative elements:

(1) a person “in the course of committing or attempting to commit a theft or unauthorized use of a vehicle as defined in ORS 164.135,” and

(2) “the person uses or threatens the immediate use of physical

force upon another person with the intent of,”

(a) “preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking; or

(b) “Compelling the owner of such property or another person”

(i) “to deliver the property or”

(ii) “to engage in other conduct which might aid in the commission of the theft or unauthorized use of a vehicle.”

Under this definition, there is no requirement that the person being threatened with the immediate use of physical force actually have possession of the property that is taken as part of the theft. For example, assume that defendant “D” and his accomplice “A” decide to steal a car that victim “V” keeps at a beach house which is part of a gated community in a neighboring state. “A” then goes to the beach house in the neighboring state in order to steal the car. However, knowing that “A” will be questioned by the security guard as he tries to drive “V’s” vehicle through the security gate, “D” goes to “V’s” place of business, and orders him at gunpoint to call the security guard in the neighboring state, and tell him that later that day “A” will be driving “V’s” vehicle from his beach house with his permission.

Under this hypothetical, “D” would be guilty of robbery under the Oregon statutes because (1) in the course of a theft (2) “D” threatened the immediate use of physical force on another person, (3) with the intent to

compel the owner of the property (4) to engage in conduct that would aid in the commission of the theft. The fact that the victim was not in possession of the property at the time of the robbery, and that the defendant or his accomplice was not yet in possession of that property, and the fact that the property was in another state, would be completely irrelevant. Under the Oregon law, the conduct that constituted the robbery would be the act of compelling the owner of the property by force to participate in conduct that facilitated the theft.

By contrast under Washington law the conduct would constitute any number of serious felonies, including theft and assault, but it would not constitute the crime of robbery because under Washington law a robbery only occurs if a person by force or threatened use of force takes or retains property “from the person of another or in his presence.” Thus, under the Washington statute, unlike the more general Oregon statute, the taking or retaining of the property must occur “from the person of another or in his presence.” Absent a taking or retaining of the property “from the person of another or in his presence against his will,” there is no robbery under the Washington Statute.

In this case, the state may argue that this issue has been foreclosed by this court’s decision in *State v. McIntyre*, 112 Wn.App. 478, 49 P.3d 151 (2002). In this case, the defendant argued that his Oregon conviction for third degree robbery was not comparable to a second degree robbery under

Washington law. In rejecting this argument, the court held as follows:

When the Washington Legislature amended the robbery statute in 1975, it deleted the phrase that using force “merely as a means of escape ... does not constitute robbery.” *State v. Manchester*, 57 Wn.App. at 770, 790 P.2d 217. Adopting the transactional view of robbery, the Manchester court observed: “This change indicates the Legislature’s intent to broaden the scope of taking, for purposes of robbery, by including violence during flight immediately following the taking.” 57 Wn.App. at 770, 790 P.2d 217.

In *Handburgh*, the court adopted *Manchester*’s reasoning in a case in which the defendant rode off on a bicycle while the owner was inside a recreational center. Several minutes later, the owner came out, saw *Handburgh* on her bicycle, and demanded its return. But *Handburgh* refused. Instead he took her bicycle, rode it into an alley, and dropped it into a ditch. When the owner went to retrieve it, *Handburgh* threw rocks at her. After a fistfight ensued, the owner left, leaving the bicycle behind. *Handburgh*, 119 Wn.2d at 285-86, 830 P.2d 641. On appeal from his second degree robbery conviction, *Handburgh* made the same argument that McIntyre makes here; namely, that because the initial taking was not in the owner’s presence, it was a theft and the subsequent behavior would be an assault.

The Court disagreed and, after discussing *Manchester* with approval, observed:

The plain language of the robbery statute says the force used may be either to obtain or retain possession of the property. We hold the force necessary to support a robbery conviction need not be used in the initial acquisition of the property. Rather, the retention, via force against the property owner, of property initially taken peaceably or outside the presence of the owner, is robbery.

Handburgh, 119 Wn.2d at 293, 830 P.2d 641.

State v. McIntyre, 112 Wn.App. at 482.

What the court in *McIntyre* failed to recognize, was that under

Washington law as recognized in *Handburg*, robbery requires a nexus at some point between the property, the owner, and the defendant's use or threatened use of force. If that nexus does not exist at the initial taking, it must none the less exist at the time of the retention. In *Handburg*, this nexus existed at the time the owner tried to retrieve the property, which was the point at which the defendant used or threatened to use the force. Thus, the fact that the nexus didn't exist at the time of the taking did not prevent the defendant from being convicted of robbery. By contrast, under Oregon law, the nexus does not need to exist at all because it is not necessary that the taking or retaining be done in the presence of the owner. Thus, contrary to the holding in *McIntyre*, there are robberies under Oregon law that would not be robberies under Washington law.

Under comparability analysis, the fact that there are Oregon robberies that do not constitute Washington robberies does not foreclose the use of an Oregon robbery conviction, if the state presents sufficient fact from which to prove that the actual conduct committed in Oregon would have been a robbery in Washington. However, the state bears the burden of proving these facts. In the case at bar, the state did not present any facts underlying the defendant's conviction for second degree robbery. Rather, the state presented the defendant's original indictment for first degree robbery and did not present the defendant's statement of defendant on plea of guilty to the lesser

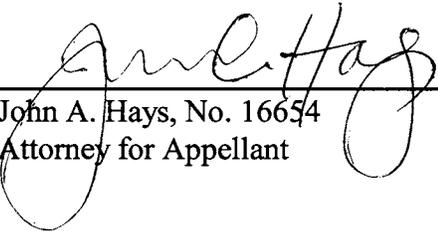
included offense of second degree robbery. Thus, this court is without facts from which to determine whether the conduct that underlies the defendant's second degree robbery conviction would constitute a Washington robbery. As a result, the trial court erred when it found that the defendant's Oregon second degree robbery conviction was comparable to second degree robbery in Washington.

CONCLUSION

Substantial evidence does not support a finding that the defendant was armed with a firearm at the time he possessed methamphetamine. In addition, the record in this case fails to support a conclusion that the defendant's two Oregon robbery convictions constituted strike offenses in Washington. Consequently, the court should vacate the sentence, and remand for resentencing without the firearm enhancement, and without considering the defendant's Oregon robbery convictions as strike offenses.

DATED this 16TH day of February, 2009.

Respectfully submitted,



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APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

ORS 164.395
Robbery in the Third Degree

(1) A person commits the crime of robbery in the third degree if in the course of committing or attempting to commit theft or unauthorized use of a vehicle as defined in ORS 164.135 the person uses or threatens the immediate use of physical force upon another person with the intent of:

(a) Preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking; or

(b) Compelling the owner of such property or another person to deliver the property or to engage in other conduct which might aid in the commission of the theft or unauthorized use of a vehicle.

(2) Robbery in the third degree is a Class C felony.

ORS 164.405
Robbery in the Second Degree

(1) A person commits the crime of robbery in the second degree if the person violates ORS 164.395 and the person:

(a) Represents by word or conduct that the person is armed with what purports to be a dangerous or deadly weapon; or

(b) Is aided by another person actually present.

(2) Robbery in the second degree is a Class B felony.

RCW 9.94A.360(3)

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

RCW 9.94A.525(3)

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

RCW 9.94A.602

Deadly Weapon Special Verdict – Definition

In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

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 following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

RCW 9A.56.190
Robbery – Definition

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.210
Robbery in the Second Degree

- (1) A person is guilty of robbery in the second degree if he commits robbery.
- (2) Robbery in the second degree is a class B felony.

