

COURT OF APPEALS
DIVISION TWO

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NO. 41707-3-II

STATE OF WASHINGTON
BY 

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

STATE OF WASHINGTON,

Respondent,

v.

JASON DELACRUZ,

Appellant.

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

The Honorable Frederick Fleming, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred in denying appellant's motion to dismiss the first-degree burglary charge for insufficient evidence. RP 730.

Issue Pertaining to Assignment of Error

Under State v. Brown,¹ did the State fail to prove appellant was armed for purposes of the first-degree burglary statute, RCW 9A.52.020, when a shotgun in a case was stolen from a home as loot without any evidence of intent or willingness to use it?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pierce County prosecutor charged appellant Jason Delacruz with two counts of first-degree burglary, three counts of residential burglary, three counts of first-degree theft, two counts of theft of a firearm, two counts of first-degree unlawful possession of a firearm, one count of possession of a stolen firearm, one count of possession of stolen property, and one count of first-degree trafficking in stolen property. CP 527-33. The State also alleged firearm enhancements on the several of the charges. CP 527-33.

The court granted Delacruz's motion to dismiss the firearm enhancements because the evidence was insufficient to show he was armed.

¹ State v. Brown, 162 Wn.2d 422, 431-35, 173 P.3d 245 (2007).

RP 728. However, the court denied Delacruz's motion to dismiss the first-degree burglary charges on the same grounds. RP 730.

The jury found Delacruz not guilty of one first-degree burglary charge and one unlawful possession of a firearm charge. CP 647, 651. The jury also acquitted Delacruz on one of the first-degree theft charges but found him guilty of the lesser-included offense of second-degree theft. CP 649-50. It found Delacruz guilty of the remaining counts. CP 643-646, 648, 652-58.

At sentencing, the court found several of the remaining counts merged and entered judgment on: one count of first-degree burglary, two counts of residential burglary, two counts of first-degree theft, one count of second-degree theft, two counts of theft of a firearm, one count of possession of a stolen firearm, one count of unlawful possession of a firearm, and one count of first-degree trafficking in stolen property. CP 661-62. The court imposed statutorily required consecutive standard range sentences on the theft of a firearm, possession of a stolen firearm, and unlawful possession of a firearm charges for a total of 300 months. CP 666. Standard range sentences on the other counts were to run concurrently. CP 665. The court also imposed 18 months community custody on the first-degree burglary count. CP 666. Notice of appeal was timely filed. CP 673.

2. Substantive Facts

Over the course of June 8 and 9, 2009, three homes were burglarized. Gerardo Marin-Andres and Gregorio Smith Escalante pled guilty and testified against Delacruz, Enrique Rivera, and Nelson Hernandez. RP 564-65, 672-73.

Delacruz testified he never met Marin-Andres until the day Rivera called and asked for assistance selling some gold at the B&I Coin Shop. RP 752-53. Delacruz agreed because he had previous experience with this type of transaction and Rivera agreed to give him a portion of the proceeds. RP 753. Delacruz admitted he ignored his suspicions that the items were stolen and told Rivera, "The less I know, the better." RP 754. Delacruz testified he was allowed to keep \$75 of the \$400 proceeds. RP 754.

a. Spencer Burglary

The morning of June 8, 2009, school bus driver Susan Pernell noticed a small black SUV with two men in it. RP 1110-11. Waiting to pick up children, she watched as the SUV pulled off into the gravel in front of a home. RP 112. She then saw three young men come out from around the bushes in front of the home. RP 113. They were carrying bags, which they loaded into the back of the SUV. RP 113. Pernell was suspicious, so she wrote down the license number and gave it to the police. RP 115-16.

Sarah Spencer was at work when she received a phone call from her son's daycare, located across the street from her Lakewood home. RP 123, 126. The daycare employee informed her a school bus driver had seen someone taking boxes out of Spencer's house. RP 126. Spencer returned home immediately to find her front door kicked in. RP 127. She was missing two video game systems, at least 13 games for the game systems, a box set of DVDs of the television program "Sex and the City," a digital camera, two memory cards for the camera, a package of 24 batteries, a laptop computer, two packages of cigarettes, and a 12-pack of Mountain Dew soda. RP 138-46.

Marin-Andres testified he picked up Delacruz, Rivera, and Hernandez before proceeding to a home in Lakewood on June 8, 2009. RP 566-67. He testified he and Delacruz acted as lookouts while the other three² went inside. RP 568. He testified he heard a loud bang, but did not know how they broke down the door. RP 568. After receiving a cell phone call, he testified, he and Delacruz returned to the house to find the other three already outside with bags. RP 569-70. The others loaded the bags into the back. RP 570. Sometime later, Marin-Andres testified, he saw inside the bags, which contained video games, a Wii gaming system, a laptop, and Mountain Dew soda, which they all drank. RP 571-72.

² Marin-Andres testified his cousin Gregorio Andres was involved as well. RP 560-61.

b. Menza Burglary

Iolani Menza's Lakewood home was also burglarized on June 8, 2009. RP 160. When he returned from breakfast at a local restaurant, he found his door had been kicked in. RP 162. He was missing his video game systems, several video games, an i-pod, a Coach brand purse, a 20-gauge shotgun in a soft green case, a cell phone, a computer tower hard drive, and a ukulele. RP 164-70, 172-74.

Marin-Andres testified that after the first burglary, he and Delacruz accompanied Rivera and the others to "hit" a second house. RP 572-74. Again, he and Delacruz remained in the car. RP 574. After about 20 minutes, the phone rang, and they returned to pick up Rivera and the others who had kicked in the door and gone inside. RP 575. They came out with bags, which Marin-Andres later saw to contain video gaming systems and games, a computer tower, and a shotgun. RP 576. That evening, Marin-Andres testified he took Delacruz and Rivera to Tukwila to sell the gaming systems. RP 579.

c. Kraut Burglary

On June 9, 2009, Joseph Kraut's neighbor Stephen Burns, who was caring for Kraut's pets while Kraut was on vacation, noticed another neighbor talking to someone in a dark colored SUV. RP 186. He wrote

down the license number because he had not seen the car in the neighborhood before. RP 186. Burns then saw another unfamiliar tan car parked in another neighbor's driveway and wrote down that license number as well. RP 188-89. He saw two people, a young male and female in the SUV and noticed only one person in the tan car. RP 186-88. He could not identify any of them, but he notified the police. RP 183, 187. The license number of the SUV was the same as the one Pernell noted at the Spencer burglary and matched a vehicle driven by Marin-Andres. RP 186, 386-88.

Neighbor Kiersten Gramps testified she noticed the SUV and asked the driver if he was lost or needed help. RP 202, 205. The driver responded that they were waiting to meet someone. RP 205. She also noticed the tan car, but she testified it was packed with five people, all male. RP 205. She identified Hernandez as the driver of the SUV. RP 207, 208-10.

When Burns went to Kraut's house to feed the pets, he found the whole house had been sprayed with pepper spray. RP 189. He also saw something heavy had been thrown through the bedroom window out onto the patio and assumed it was Kraut's safe. RP 189. The pedestrian door from the outside to the garage was kicked in. RP 192.

Neighbor Katie Livolsi was home sick from school that day and noticed a lot of people in front of Kraut's house. RP 225. She saw five people, one of them female, and two cars, a dark Blazer and a tan compact

car. RP 225-26. She testified that after the cars left, two of the men tried to open Kraut's front door and then jumped over the fence toward the side of the house. RP 228. She identified Delacruz, Rivera, & Hernandez as the men she saw at Kraut's house. RP 231-33. However, previously, when the police showed her pictures only two or three days after the incident, she could not identify any of them. RP 235.

When Kraut returned, he found his safe (containing seven firearms, a taser, jewelry, a stamp collection, a social security card, and car keys) was missing. RP 259-61. The safe was locked and required both the combination and a key to be opened. RP 292. The key was in his other safe, which was not missing. RP 295. Nothing on the outside of the safe would have alerted anyone it contained firearms. RP 297. The jewelry included a diamond heart pendant. RP 267-68. Also missing was a Green Bay Packers coat autographed by Matt Hasselbeck, and some baseball cards. RP 275-77.

Marin-Andres testified that, the day after the two Lakewood burglaries, he participated in another burglary in Graham. RP 581. The group, including Delacruz, Rivera, and Smith Escalante left in two cars, three people in each. RP 581-83. Marin-Andres drove his Blazer. RP 583. Delacruz followed in a brown car. RP 582-83. Marin-Andres testified Rivera, Hernandez, and Smith Escalante went into the back yard. RP 586-87. After dropping them off, Marin-Andres lost cell phone contact and did

not go back to the house. RP 587-89. He claimed Delacruz picked up the group after the burglary, and Marin-Andres met them back at his cousin's home in Auburn. RP 589. There he saw jewelry, a taser, and three pistols. RP 590. He testified Delacruz, Rivera, and Smith Escalante went with him to pawn some of the items at B&I, and they all split the proceeds, about \$400. RP 594. He also testified Delacruz said he sold some of the guns. RP 596-97.

Smith Escalante testified he was also involved in the burglary in Graham. RP 641. He claimed Marin-Andres, his cousin, and Delacruz discussed having a house they could "hit up." RP 650-51. He testified Delacruz picked him up and they followed Marin-Andres to the house. RP 648. After seeing a fully marked Washington State Patrol car parked in front, Delacruz initially sped away. RP 257, 651-52. But then he received a call that the others had already broken down the door, so he returned and dropped off Smith Escalante along with Rivera and Hernandez. RP 653. Escalante testified he did not want to get out, but Delacruz threatened him. RP 653-54. He testified Rivera took the safe out through the bedroom window, and Delacruz picked them up. RP 658. Later that evening, the safe was opened to reveal the guns and jewelry, and everyone, including Delacruz, began grabbing for the guns. RP 661, 671. Smith Escalante testified he went with Marin-Andres and the others to sell the jewelry at

B&I, and he heard Delacruz and Hernandez discussing selling the guns. RP 663.

Like Marin-Andres and Smith Escalante, Rivera admitted involvement in the Kraut burglary, but he denied Delacruz was there. RP 735, 741. He testified Delacruz only became involved when he (Rivera), called Delacruz to meet them at B&I. RP 741.

d. Police Investigation

Police found Menza's shotgun and Kraut's pistols and taser in the crawl space under a trailer in Auburn where Marin-Andres' cousin lived. RP 346-48, 350. In the cousin's bedroom, police found an autographed Green Bay Packers coat, some 20-gauge shotgun shells, and Kraut's social security card. RP 418-19. At Marin-Andres' Tacoma home, police found a laptop, a computer tower, several shotgun shells,³ and a receipt for the sale of jewelry at B&I on June 9, 2009. RP 241-44, 333.

The owner of the B&I Coin Shop testified he purchased a diamond heart pendant and several other items of jewelry from a group of men, including Marin-Andres. RP 356-57. He provided the police with photographs of the transaction from his surveillance camera. RP 359. Police noted one person in the photographs had a large tattoo on his back. RP 501.

³ The shells found at Marin-Andres' home were 12 gauge, which could not be fired from a 20-gauge shotgun. RP 332, 339.

A photograph of Delacruz's back with a large tattoo was admitted into evidence. RP 507-08.

e. Verdict

Delacruz was convicted of residential burglary and second-degree theft for the Spencer burglary. CP 648-50. The jury also found him guilty of first-degree burglary, first-degree theft, and theft of a firearm for the Menza burglary. CP 643, 645-46. The jury found him guilty of residential burglary, first-degree theft, and theft of a firearm for the Kraut burglary. CP 652-53, 655. Additionally, Delacruz was convicted of possession of stolen property, possession of a stolen firearm, first-degree trafficking in stolen property, and unlawful possession of a firearm. CP 654, 656-58.

C. ARGUMENT

THE GUN TAKEN AS LOOT WAS INSUFFICIENT TO ELEVATE RESIDENTIAL BURGLARY TO FIRST-DEGREE.

A person may not be convicted of first-degree burglary without proof beyond a reasonable doubt that 1) the person entered or unlawfully remained in a building with intent to commit a crime against a person or property therein and 2) in entering or while in the building or in immediate flight therefrom, the person or another participant was armed with a deadly weapon. RCW 9A.52.020. To show that a person is armed under the first-degree burglary statute, the State must show a nexus between the firearm and

the crime. See State v. Brown, 162 Wn.2d 422, 431-35, 173 P.3d 245 (2007) (reversing both firearm enhancement and first-degree burglary conviction for lack of a nexus); see also State v. Hall, 46 Wn. App. 689, 694, 732 P.2d 524 (1987) (applying definition of “armed” from firearm enhancement in first-degree burglary case). When a firearm is not used, there must be evidence that it was there to be used. Brown, 162 Wn.2d at 434.

A conviction must be reversed for insufficient evidence when, viewing the facts in the light most favorable to the state, no rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Id. at 428. Sufficiency challenges hinging on statutory interpretation are reviewed de novo. State v. Bainard, 148 Wn. App. 93, 199 P.3d 460 (2009) (citing, among others, City of Redmond v. Moore, 151 Wn.2d 664, 668, 91 P.3d 875 (2004)); see also State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009) (sufficiency challenge turned on whether yard was a fenced area; if not, burglary not proved as a matter of law). Here, the evidence was insufficient to show Delacruz or anyone else was “armed,” as required by the first-degree burglary statute, during the Menza burglary. See Brown, 162 Wn.2d at 432.

a. The State Failed to Prove Delacruz Was Armed Because There was No Evidence of Intent or Willingness to Use the Shotgun.

“A person is not armed merely by virtue of owning, or even possessing a weapon.” State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007). The mere presence of a weapon at a crime scene is also insufficient to prove a participant is armed. Brown, 162 Wn.2d at 431 (citing, among others, State v. Barnes, 153 Wn.2d 378, 383, 103 P.3d 1219 (2005)). Courts tread “especially careful[ly]” in this area to avoid penalizing or chilling the constitutional right to bear arms. Eckenrode, 159 Wn.2d at 493.

To show that a participant is armed, the State must prove two separate prongs: First, the weapon must be “easily accessible and readily available for use for either offensive or defensive purposes.” Brown, 162 Wn.2d at 431 (citing, among others, State v. Easterling, 159 Wn.2d 203, 208–09, 149 P.3d 366 (2006)). Second, there must be a nexus between the defendant, the crime, and the weapon. Brown, 162 Wn.2d at 431 (citing, among others, State v. Gurske, 155 Wn.2d 134, 138, 118 P.3d 333 (2005)).

The nexus analysis requires examination of “the nature of the crime, the type of weapon, and the circumstances under which the weapon is found.” Brown, 162 Wn.2d at 431 (quoting State v. Schelin, 147 Wn.2d 562, 567, 570, 55 P.3d 632 (2002)). No nexus exists when there is no

evidence anyone involved in the burglary handled the weapon in a manner indicating intent or willingness to use it. Brown, 162 Wn.2d at 432.

In Brown, a rifle was found on the homeowner's bed after the burglars had departed. Id. at 431. The homeowner testified it had been moved from a closet and placed on the bed, which was six or seven feet from the closet. Id. at 430. A friend overheard Brown and his cousin saying they had been caught in the middle of the burglary. Id. at 426. The trial court concluded the burglars were armed because the rifle was accessible for their use during the burglary. Id. at 430.

But the Washington Supreme Court rejected this conclusion. Id. at 432. Although the weapon had been moved during the burglary, there was no evidence anyone "handled the rifle on the bed at any time during the crime in a manner indicative of an intent or willingness to use it in furtherance of the crime." Id. The court reversed not only the firearm enhancement, but also the conviction for first-degree burglary. Id. at 435.

Here, the evidence was insufficient to show any participant in the Menza burglary was armed because there was no evidence of willingness or intent to use the shotgun. See id. at 342. The shotgun was taken from Menza's home while still in its green case. RP 576. There was no testimony it was ever removed from that case. Marin-Andres testified only bags were removed from the home. RP 575. At some point after the group departed,

Marin-Andres saw the shotgun, which was still in its case. RP 576. Although Menza testified the shotgun was loaded, there was no testimony that any participant in the burglary knew that at the time. RP 171. The shotgun was stolen along with numerous other valuable items including video game systems, a computer tower, and a ukulele. RP 164-70. After the burglary, the shotgun was apparently placed in the crawl space under the trailer where it remained until police found it. RP 346-47.

As in Brown, the evidence in this case shows the intent was not to use the shotgun in the burglary, but to profit from it as valuable loot. 162 Wn.2d at 432. In Brown, one of the accomplice's girlfriends testified she overheard them discussing the fact that they wished they could have gotten the firearm because they could have gotten a lot of money for it. Id. at 426. Marin-Andres testified Delacruz and the group discussed finding a buyer for the firearms they had acquired and that Delacruz and others left on an errand to sell them. RP 596-97. There was no evidence the shotgun was stored so as to be available during the burglary. No ammunition was stolen except for what was already in the shotgun. RP 164-71. There was no evidence anyone in the group knew if the weapon was loaded. The only evidence was that it was regarded as loot. Delacruz was not armed because the shotgun was "an object of crime" not "a facilitator of crime." Brown, 162 Wn.2d at 436 (Sanders, J., concurring).

b. Completed, Rather than Attempted, Theft of a Firearm Does Not Alter the *Brown* Analysis; Removing the Shotgun from the Home Is Not Evidence of Intent to Use It.

Merely having possession of a firearm, as demonstrated by moving it from one place to another, is not sufficient to show a person is armed. Brown, 162 Wn.2d at 432. Therefore, the fact that in this case the firearm was actually removed from the home, rather than left behind, does not significantly distinguish this case from Brown. See id. at 432-34. In a footnote, the Brown court distinguished two cases where firearms were actually removed from the homes. Id. at 434 n.4 (discussing Hall, 46 Wn. App. 689, and State v. Faille, 53 Wn. App. 111, 766 P.2d 478 (1988)). But the overall reasoning of Brown does not indicate the court was creating an exception based on Hall and Faille.

First, the Brown court expressly rejected the reasoning of Hall and Faille. The Hall court reasoned that where a firearm is concerned, “no analysis of willingness or present ability to use a firearm as a deadly weapon is needed.” 46 Wn. App. at 695. Similarly, the Faille court concluded Faille was armed solely because the weapon was “readily accessible” during the burglary. 53 Wn. App. at 114-15. But the Brown court declared, “Showing that a weapon was accessible during a crime does not necessarily show a nexus between the crime and the weapon.” 162 Wn.2d at 432.

Second, the concurring justices in Brown recognized that, under certain circumstances, a firearm “as an object of a crime” may “blossom into a firearm as a facilitator of crime.” 162 Wn.2d at 436 (Sanders, J., concurring). Hall and Faille both illustrate such circumstances, but this case does not. In Hall, the defendants indicated a willingness to use the weapon by stealing not only a firearm, but ammunition as well. 46 Wn. App. at 695-96. In Faille, the gun was unloaded, but the defendants hid the gun in the bushes outside the home during the robbery, indicating an intent to have it readily available for use, potentially for intimidation purposes. 53 Wn. App. at 112, 115.

By contrast, in this case no additional facts indicate any willingness to use Menza’s rifle in the course of the burglary. The object of crime does not “blossom into” a facilitator of crime merely because the theft is completed (as in this case) rather than attempted (as in Brown). Completed theft does not show any greater intent or willingness to use than attempted theft. The intent required for theft and attempted theft is the same. See RCW 9A.28.020 (“A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.”).

Washington statutes already punish theft of a firearm very harshly. A person who steals a firearm may be convicted of theft of a firearm,

possession of a stolen firearm, and unlawful possession of a firearm as three separate offenses. RCW 9A.04.040(6).⁴ Additionally, by law, the court must, as it did in this case, impose consecutive sentences for each of these three offenses. RCW 9A.04.040(6). Under the burglary anti-merger statute, there is no danger that theft of a firearm in the course of a burglary will go unpunished. RCW 9A.52.050 (“Every person who, in the commission of a burglary shall commit any other crime, may be punished therefore as well as for the burglary, and may be prosecuted for each crime separately.”). The goals of deterring armed burglaries, and the dangers to life and limb that such crimes represent, do not require permitting elevation of burglary to first-degree based solely on theft of a firearm, without any evidence showing the required nexus between the firearm and the crime.

“Where the weapon is not actually used . . . “it must be there to be used.” Brown, 162 Wn.2d at 434. When the only evidence is that the weapon was viewed as “merely loot,” the burglars are not armed. Id. at 434-

⁴ RCW 9A.04.040(6) provides:

Nothing in chapter 129, Laws of 1995 shall ever be construed or interpreted as preventing an offender from being charged and subsequently convicted for the separate felony crimes of theft of a firearm or possession of a stolen firearm, or both, in addition to being charged and subsequently convicted under this section for unlawful possession of a firearm in the first or second degree. Notwithstanding any other law, if the offender is convicted under this section for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, then the offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection.

35. The trial court in this case dismissed the firearm enhancement charges for insufficient evidence of a nexus between the firearm and the crimes. RP 728. For the same reason, it should have also dismissed the first-degree burglary charges. This Court should reverse Delacruz's conviction for first-degree burglary.

D. CONCLUSION

Delacruz requests this Court reverse his reverse his first-degree burglary conviction because the State failed to establish a nexus between the firearm and the crime.

DATED this 22^d day of August, 2011.

Respectfully submitted,

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

STATE OF WASHINGTON)
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 Respondent,)
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 vs.)
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JASON DELACRUZ,)
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 Appellant.)

COA NO. 41707-3-II

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION TWO
CLERK OF COURT
JULY 27 2011
BY: [Signature]

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22ND DAY OF AUGUST 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF AUGUST 2011.

x *Patrick Mayovsky*