

NO. 41707-3-II

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE STATE FAILED TO PROVE DELACRUZ WAS ARMED
BECAUSE THE SHOTGUN WAS NOT EASY TO ACCESS FOR
USE AGAINST ANOTHER PERSON.

As a preliminary matter, this Court should reject the State's argument suggesting the nexus requirement is less important in cases of actual as opposed to constructive possession. Brief of Respondent at 7-8 (citing State v. Easterlin, 159 Wn.2d 203, 206-07, 149 P.3d 366 (2006)). Easterlin notes constructive possession makes it particularly difficult to determine when someone is armed, but it does not imply there is a different test other than that the weapon must be easily accessible and readily available. Easterlin, 159 Wn.2d at 206-07. Nor does it negate the requirement of a nexus in actual possession cases. Id. In State v. Brown, 162 Wn.2d 422, 432-33, 173 P.3d 245 (2007), the court specifically rejected the proposition that actual possession always proves a nexus:

The dissent is essentially arguing that any actual possession of a deadly weapon during an ongoing crime shows a nexus between the weapon and the crime.

...

“[A] person is not armed merely by virtue of owning or even possessing a weapon; there must be some nexus between the defendant, the weapon, and the crime.

162 Wn.2d at 432-33 (quoting State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007)).

The nexus inquiry is highly fact-specific, and Easterlin is utterly unlike this case. As the court noted, “Easterlin had a gun on his lap and cocaine in his sock when he was approached by the police.” Easterlin, 159 Wn.2d at 206 (emphasis added). Delacruz and his group had no such easy access to the shotgun at issue. This case is on all fours with Brown, in which there was circumstantial evidence of actual possession, but insufficient evidence of the required nexus to the crime. 162 Wn.2d at 431.

Nor does State v. Gurske, 155 Wn.2d 134, 139, 118 P.3d 333 (2005) support the State’s position. Gurske emphasized a person is not armed unless the weapon is “easy to get to” for use against another person:

The accessibility and availability requirement also means that the weapon must be easy to get to for use against another person, whether a victim, a drug dealer (for example), or the police. The use may be for either offensive or defensive purposes, whether 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.

Id. In Gurske, the gun was in a zipped backpack, much like the green case at issue here. The court distinguished between whether the pistol itself, or merely the backpack it was in, was in arm’s reach. Id. at 143. “Here, the stipulated facts state the backpack was within arm’s reach, but not whether the pistol was within Gurske’s reach.” Id. The court specifically noted the backpack was zipped and implied it would have been awkward if not

impossible for Gurske to reach behind the driver's seat and unzip the backpack from where he was sitting. Id.

It would have been just as difficult for anyone to access the shotgun in this case. According to the testimony, the gun was inside the green case, which was inside a bag as the group left Iolani Menza's home. RP 576. The trial court specifically relied on the presence of the shotgun during the group's flight from the burglary. CP 679-80. But at that time the shotgun was inside a case, inside a bag, in the trunk of the car. RP 436. There was no evidence it was at all accessible to the occupants of the car. Even assuming flight refers to exiting the house, rather than driving away, the evidence showed only that the shotgun was in its case, in a bag. RP 576. It was not easily accessible or readily available for use.

Even if this Court were to look at the time the group was in the building, rather in flight, there is no evidence the shotgun was easily accessible or readily available for use against a person as required under Brown. The State argues this case is distinguishable from Brown because in Brown there was no evidence anyone handled the weapon. Brief of Respondent at 9. But the evidence that someone handled the firearm during the burglary in Brown was analogous to this case. In neither case did anyone actually see one of the alleged burglars handle the weapon inside the building. Brown, 162 Wn.2d at 432. That fact could be inferred from other

circumstances such as the fact that the weapon was moved. Id. As in Brown, merely moving the weapon, particularly given the evidence of intent to sell and the lack of any evidence it was ever easily accessible for use, was insufficient to prove any participant in the burglary was armed. Id.

The State argues a firearm may be both available for use and also serve as loot. Brief of Respondent at 9. That may be true, but those are not the facts of this case. The State presented no evidence that, at any time during the burglary or the flight therefrom, the weapon itself (as opposed to the case or the bag it was in) was easily accessible or readily available for use against a person. Brown, 162 Wn.2d at 431. Delacruz's conviction for first-degree burglary must be reversed for insufficient evidence.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Delacruz requests this Court reverse his first-degree burglary conviction.

DATED this 15th day of March, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, reading "Jennifer J. Sweigert", written over a horizontal line.

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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 15TH DAY OF MARCH 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JASON DELACRUZ
DOC NO. 319869
MONROE CORRECTIONS CENTER
P.O. BOX 777
MONORE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF MARCH 2012.

x *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

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