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No. 50590-8-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

WESLEY W. REICHMAND,
Appellant.

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

The Honorable Karena Kirkendoll, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. A CONVICTION FOR FIRST DEGREE BURGLARY REQUIRES PROOF THAT A PERPETRATOR WAS ARMED WITH A DEADLY WEAPON

Mr. Reichmand was charged in Count 1 with first degree burglary for allegedly taking items from storage unit B-83. Clerk's Papers 1-3. RCW 9A.52.020(1)(a) provides in part as follows:

Burglary in the first degree. (1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a dwelling and if, in entering or while in the dwelling or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person therein.

The definition of "deadly weapon" is as follows:

"Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm[.]

RCW 9A.04.110(6).

Mr. Reichmand leased unit B-79. Report of Proceedings (RP) at 305, 370. Krystal Zinn also had access to the unit and to the storage facility. RP at 370. The State alleged that between August 19, 2016 and August 21, 2016, Krystal Zinn and Mr. Reichmand went to the storage

facility several times and broke into several adjoining units and then then took the stolen items to unit B-79. CP 1. The State alleged in Count 1 that Mr. Reichmand and Ms. Zinn and a third person broke into unit B-83. RP at 263, 375. The State presented testimony by Ms. Zinn and other witnesses that a locked gun safe was taken from unit B-83 and was put in unit B-79, and then pried open using a crowbar while inside their storage unit. RP at 375-76. The record does not indicate when the safe was pried open. The State alleged that Mr. Reichmand took the guns from the safe and had Ms. Zinn write down the model number from a handgun from the safe. RP at 377. The owner of the safe, Danielle Anderson, said the safe contained approximately seven firearms. RP at 274. Ms. Zinn said that there were approximately five guns in the safe. RP at 376.

In Washington, for purposes of first degree burglary, defendants are armed with a deadly weapon if a firearm is easily accessible and readily available for use by the defendants for either offensive or defensive purposes. *State v. Brown*, 162 Wn.2d 422, 431, 173 P.3d 245 (2007); *State v. Gotcher*, 52 Wash.App. 350, 353, 759 P.2d 1216 (1988) (citing *State v. Randle*, 47 Wash.App. 232, 235, 734 P.2d 51 (1987), review denied, 110 Wash.2d 1008 (1988)). Our Supreme Court has held that mere proximity or constructive possession is insufficient to show that a defendant was armed at the time the crime was committed. *State v.*

Gurske, 115 Wn.2d 134, 138, 118 P.3d 333 (2005). See also *State v. Valdobinos*, 122 Wash.2d 270, 282, 858 P.2d 199 (1993) (In *Valdobinos*, the Court held that “[a] person is ‘armed’ if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes.” *Id.* Applying this test, the *Valdobinos* Court ruled that evidence of an unloaded rifle under a bed “without more” was insufficient to show a defendant is “‘armed’ in the sense of having a weapon accessible and readily available for offensive or defensive purposes.” *Id.*) See also *State v. Johnson*, 94 Wn. App. 882, 974 P.2d 855 (1999) (not “armed” simply because a weapon is present during the commission of a crime), rev. denied, 139 Wn.2d 1028 (2000); *State v. Mills*, 80 Wn. App. 231, 907 P.2d 316 (1995) (there was no physical proximity to the weapon at a time when availability for use for offensive or defensive purposes was critical).

In this case, the guns in the locked safe were not accessible to the defendant or his accomplices during the course of the alleged burglary, when the safe was moved from B-83 to their unit B-79. Moreover, no evidence in the record demonstrates that Mr. Reichmand nor Ms. Zinn were even aware that guns were in the safe when it was taken.

In *Gurske*, *supra*, the Supreme Court vacated a deadly weapons enhancement when the defendant's truck was stopped because of a traffic infraction and a backpack with a gun and methamphetamine was found

directly behind the driver's seat. *Gurske*, 155 Wn.2d at 136. While there was evidence the backpack was within reach, there was no evidence whether the defendant could have unzipped it, removed the torch which was on top of the gun and grabbed the gun from where he sat. *Gurske*, 155 Wn.2d at 136-37. In addition, there was no evidence the defendant had made any motions towards the backpack when stopped, nor was there any evidence he had used a gun when acquiring the drugs found in the backpack or in other way relating to them. *Id.* The Court held that the evidence was insufficient to support the firearm enhancement. *Id.*

Just as in *Gurske*, in this case there was no evidence that Mr. Reichmand or an accomplice could have pried open the safe and reached the guns during the course of the burglary.

In the Brief of Respondent (BR), the State relies on *State v. Sabala*, 44 Wash.App. 444, 723 P.2d 5 (1986). *Sabala*, however, is inapposite. In *Sabala*, the defendant was stopped in his car after having made a controlled drug buy from the Yakima police department. *Id.* at 445. A consent search of his car revealed a handgun under the driver's seat. *Id.* There was no dispute the gun belonged to the defendant, and that it was within easy and actual reach when he sat in the driver's seat. *Id.* at 448. The Court concluded that a defendant in constructive possession of a deadly weapon under the driver's seat of the car he was driving is armed

because the defendant has an “easily accessible and readily available weapon” at his or her disposal. *Id.* at 448.

In this case, the weapons were in a locked safe and unobtainable by Mr. Reichmand or an accomplice during the burglary or in the immediate flight from the burglary.

The State argues that Mr. Reichmand was in “close physical proximity to the guns” and also states, in an internally contradictory assertion, that the guns were “easily accessible with a crowbar.” BR at 17. The State’s argument strains the meaning of “easily accessible” to the breaking point. If it is necessary to use a crowbar to pry open the safe, it is *a priori* not “easily accessible.”

After a thorough search of Washington case law, appellate counsel has been unable to find reported decisions involving the burglary of a locked gun safe. Few courts in other states have troubled to define “armed” while construing their burglary statutes. Rather, they have simply held that certain conduct during a burglary constitutes being armed with little or no discussion as to the meaning of that term within the confines of the particular statute and without regard to the principles of statutory construction. A review of these decisions reveals a consensus to consider a defendant to be armed if the weapon is “easily accessible and readily available for use by the defendant for either offensive or defensive

purposes.” See *People v. Loomis*, 857 P.2d 478, 482 (Colo. App. 1992), cert. denied (1993); *State v. Merritt*, 247 N.J.Super. 425, 589 A.2d 648, 650 (App. Div. 1991); *State v. Padilla*, 122 N.M. 92, 920 P.2d 1046, 1049 (Ct. App. 1996), cert. denied (1996); *State v. McCaskill*, 321 S.C. 283, 468 S.E.2d 81, 82 (Ct. App. 1996). See also *State v. Romero*, 135 Ariz. 102, 659 P.2d 655, 658 (Ct. App. 1982) (person is armed when weapon is within immediate control and available for use.)

Case law in several states, however, echo the holding in *Brown* in which although the burglars had handled a rifle at some point during a burglary, this was insufficient to establish the requisite nexus and the facts suggested that the weapon was “merely loot” and not present to use. *Brown*, 162 Wn.2d at 432-33, 434-35. In *State v. McHenry*, 74 N.E.3d 577, 581 (Ind. Ct. App. 2017) the court stated that “a defendant who obtains a handgun as loot during the course of a burglary has not ‘armed’ him or herself as that term is used in *Indiana Code section 35-43-2-1(3)(A)*.”

In *Barrett v. State*, 983 So.2d 795, 796 (Fla. Dist. Ct. App. 2008), the Florida District Court of Appeals concluded that the defendant, who had stolen a safe and later found a gun inside, was not “armed,” under Florida's first-degree burglary statute. *Id.* at 796-97. The Florida statute at issue in *Barrett* provides in pertinent part that burglary is a felony of the

first degree if the offender “[i]s or becomes armed within the dwelling ... with ... a dangerous weapon.” Fla. Stat. § 810.02(2)(b) (2013).

A Kentucky case addressed a similar situation to the case in bar. In *Wilson v. Commonwealth*, 438 S.W.3d 345 (Ky. 2014), the defendants argued that the Commonwealth failed to prove that they were “armed,” for first-degree burglary purposes, because it failed to show “access” to any of the stolen firearms. In *Wilson*, the Kentucky Supreme Court qualified the general rule that “[a] person may become ‘armed with a deadly weapon’ for the purposes of first-degree burglary when he enters a building or dwelling unarmed and subsequently steals a firearm therein.” 438 S.W.3d at 354 (quoting *Hayes v. Commonwealth*, 698 S.W.2d 827, 830 (Ky. 1985)). That rule applies, the Court held in *Wilson*, where the thief has access to the deadly weapon, but not to the theft of a locked fire safe containing a handgun, since the thief, in the four or five minutes it took to complete the burglary and leave the scene, had no remotely realistic chance of gaining access to the gun and using it as a weapon. *Wilson v. Commonwealth*, 438 S.W.3d 345, 354 (Ky. 2014).

See also, *Buchannon v. State*, 554 So.2d 477 (Ala.Crim.App.1989) (mere possession of weapon as loot does not equate armed); *State v. Befford*, 148 Ariz. 508, 715 P.2d 761 (1986) (prosecution must show defendant had willingness or present ability to use weapon).

In this case, it stretches the concept of “armed” too far to suggest that an individual who has a locked safe with no key is “armed” or “equipped with” the guns contained therein. The weapons would only be accessible when the box was pried opened. There is no credible argument or inference that Mr. Reichmand accessed the guns and thus was armed with a weapon for purposes of first-degree burglary while in or leaving unit B-83.

2. THE STATE FAILED TO PROVE THE ELEMENT THAT MR. REICHMOND OR AN ACCOMPLICE WAS ARMED WITH A DEADLY WEAPON BECAUSE THERE WAS NO EVIDENCE OF INTENT OR WILLINGNESS TO USE THE WEAPONS IN FURTHERANCE OF THE CRIME.

Even assuming arguendo that the weapons were accessible, the evidence is insufficient to show that the locked guns were available for offensive or defensive purposes. “The term ‘armed’, as used in RCW 9A.52.020, means that the weapon is readily available and accessible for use.” For purposes of first degree burglary, defendants are armed with a deadly weapon if a firearm is easily accessible and readily available for use by the defendants for either offensive or defensive purposes. *State v. Brown*, 162 Wn.2d 422, 431, 173 P.3d 245 (2007). A perpetrator can be “armed” for purposes of elevating crimes to the first degree even where the perpetrator did not bring the firearm to the scene. Thus, in the Court of

Appeals' decision in *State v. Hernandez*, the defendants committed residential burglaries while armed with deadly weapon, as required to support their conviction for first-degree burglary, even if the firearms were part of the "loot" acquired during the burglary, where one of defendants carried victim's stolen, fully operational shotgun to a waiting vehicle. *State v. Hernandez*, 172 Wn. App. 537, 290 P.3d 1052, review denied, 177 Wn.2d 1022, 303 P.3d 1064 (2012). But in *Brown*, the Supreme Court stated that, both for purposes of elevating crimes to a higher degree, and for purposes of firearm enhancements, a gun that was discovered, and moved by the perpetrators, during the course of the crime, does not establish that the perpetrators were armed. *Brown*, at 431-32; see *Hernandez*, 172 Wn. App. at 544 (noting that *Brown* involved both an elevator and an enhancement) (citing *Brown*, 162 Wn.2d at 434 n.4). There must be "a nexus between the defendant, the crime, and the weapon." *Brown*, 162 Wn.2d at 431. In Washington, "the defendant's intent or willingness to use the [weapon] is a condition of the nexus requirement." *Id.* at 434. Importantly, the State must present evidence that the defendant or his accomplice handled the weapon "in a manner indicative of an intent or willingness to use it in furtherance of the crime." *Id.* at 432; see also *Id.* at 433-34 (rejecting dissent's view that evidence of intent to use weapon is not a requirement).

Here, as in *Brown*, the State presented no evidence of intent or willingness to use the weapon in furtherance of the crime. Instead, just as in *Brown*, “the facts suggest that the weapon was merely loot.” *Id.* at 434.

3. REICHMAND AND ZINN WERE NOT IN “IMMEDIATE FLIGHT” FROM THE ALLEGED BURGLARY WHEN THE GUN SAFE WAS PRIED OPEN IN THEIR STORAGE UNIT

In its response, the State argues that Mr. Reichmand and Ms. Zinn had not “effected their escape” until he or an accomplice had pried open the safe and left with the guns. BR at 20. The evidence shows that the burglaries took place over a long intervening period between August 19 and 21, 2016. The evidence shows that unit B-79 was the ultimate depository for the items, and that Mr. Reichmand and Ms. Zinn returned to their storage unit repeatedly and used it as a warehouse, sometimes rearranging the items in the unit to make room for more things taken from other units.

The State relies on *State v. Manchester*, 57 Wn.App. 765, 790 790 P.2d 217 (1990). The state’s reliance on *Manchester*, however, is misplaced. Washington courts have adopted a “transactional” analysis of robbery, whereby the force or threat of force need not precisely coincide with the taking, *Manchester*, 57 Wash.App. at 770. The taking is ongoing until the assailant has effected an escape. *Manchester*, 57 Wash.App. at

770, 790 P.2d 217. The definition of robbery thus includes “violence during flight immediately following the taking.” *Manchester*, 57 Wash.App. at 770. In *Manchester*, the defendant was convicted of two counts of first degree robbery. He had been observed taking cigarettes from two different stores and on each occasion, as he attempted to leave the store, an employee tried to stop him and recover the cigarettes. In both instances, Manchester displayed a weapon when he was approached. In one instance, he threatened that he had a gun and would shoot the employee. 57 Wash.App. at 766. The defendant took cigarettes from a grocery store and left without paying. *Manchester*, 57 Wn.App. at 766. Outside the store, Manchester flashed a knife at a security guard who attempted to stop him. *Manchester*, 57 Wn.App. at 766. The court rejected Manchester's argument that he did not take property in a person's presence because the store employees were a significant distance away, and that he did not use force against anyone until after the taking was completed. *Manchester*, 57 Wn.App. at 768. The court held that the transactional view of robbery “does not consider the robbery complete until the assailant has effected his escape.” *Manchester*, 57 Wn.App. at 770.

The State's reliance on *Manchester* is misplaced. As an initial matter, *Manchester* involves a robbery instead of a burglary. In order to establish that Mr. Reichmand committed burglary, the State had to prove

two elements: (1) that he entered or remained unlawfully in a building, and (2) that he intended to commit a crime against a person or property therein. *State v. Stinton*, 121 Wash.App. 569, 573, 89 P.3d 717 (2004). A person enters or remains unlawfully if he does so without license, invitation, or privilege. RCW 9A.52.010(3); *State v. Lopez*, 105 Wash.App. 688, 694–95, 20 P.3d 978 (2001).

The act of breaking into unit B 83 constitutes a completed burglary. It is not necessary to even leave the premises with stolen items to constitute a burglary. Therefore, the act of later removing the guns from the safe or the act of transporting them from unit B-79 to Ms. Zinn's property cannot reasonably be said to be in the course of "entering or while in the building or *immediate flight therefrom*." RCW 9A.52.020 (emphasis added). Webster's Third New International Dictionary 1129 (1976), defines 'immediately' as 'without interval of time: without delay: straightway.' It cannot reasonably be said that Mr. Reichmand or Ms. Zinn were in "immediate flight" from the burglaries when the items were moved out of B-79 days after the burglaries occurred.

4. THE REMEDY IS REVERSAL OF THE CONVICTION FOR FIRST- DEGREE BURGLARY

In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt Mr. Reichmand committed first degree

burglary, the judgment may not stand. *State v. Spruell*, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence. U.S. Const. amend. V; *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969)). The first-degree burglary charges must therefore be dismissed with prejudice.

B. CONCLUSION

For the reasons stated herein and in the appellant's opening brief, this Court should grant the relief previously requested.

DATED: July 25, 2018.

Respectfully submitted,
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CERTIFICATE

I certify that on July 25, 2018, a reply brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and to Michelle Hyer, Pierce County Prosecutor and copies were mailed by U.S. mail, postage prepaid, to the following Appellant:

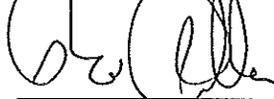
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