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NO. 51096-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

NICHOL BLACKWELL,

Appellant.

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

The Honorable Shelly K. Speir, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State violated its discovery obligations by failing to disclose key firearm evidence until one court day before trial.
2. The State violated its discovery obligations by failing to disclose a key witness until one day after the jury trial began.
3. The trial court erred in denying appellant's motion to exclude the State's late-disclosed evidence and witness.
4. The State failed to prove appellant was armed with a firearm for purposes of the firearm enhancements imposed.¹

Issues Pertaining to Assignments of Error

1. Appellant was charged in part with unlawful possession of methamphetamine with intent to distribute while armed with a firearm and first degree unlawful possession of a firearm, for incidents alleged to have happened on June 23, 2016. The State did not disclose the name of the police officer who tested the firearm, or a copy of the report that was generated detailing the testing and operability of the firearm, until the day before trial. The trial court concluded there was "no question" that the

¹ Whether the State presented sufficient evidence that the defendant in a controlled substances case was armed with a firearm for purposes of a firearm enhancement where a loaded shotgun with the defendant's DNA on it was present in the cargo area of the car next to a backpack containing controlled substances, but out of reach of the driver, is currently pending before the Washington State Supreme Court in State v. Sassen-Vanelstloo (No. 94325-7). Oral argument in that case was heard on January 9, 2018.

untimely discovery disclosure violated several provisions of CrR 4.7 and that the violation prejudiced appellant. RP² 117-20. Despite the trial court's finding, and defense counsel's motion to exclude admission of the firearm evidence, the trial court refused to exclude the evidence. The police officer then testified about the operability of the firearm for purposes of the both the underlying firearm charge and the firearm enhancement. Did the trial court err in denying appellant's motion to exclude the firearm evidence and witness where the late-disclosed evidence was unquestionably prejudicial to appellant and impacted her entire trial strategy?

2. A person is armed for firearm enhancement purposes when she is within proximity of an easily and readily available firearm and when a nexus is established between the accused, the weapon, and the crime. Appellant was the alleged owner of a safe which contained several items, including a car title, cash, methamphetamine, and a collector's type, single shot pistol, in a holding case. The pistol was out of appellant's reach at the time police entered her house and arrested her. Must the firearm enhancement be dismissed for insufficient evidence where the State failed

² This brief refers to the consecutively paginated verbatim report of proceedings as follows: RP – September 27, 28, October 4, 5, 9, 10, 11, and 20, 2017.

to prove that appellant was within proximity of the inaccessible pistol and where there was no nexus between appellant, the weapon, and the crime?

B. STATEMENT OF THE CASE

1. Procedural History.

The Pierce county prosecutor charged appellant Nichol Blackwell with one count each of possession of methamphetamine with intent to distribute, first degree unlawful possession of a firearm, unlawful use of a building for drug purposes, and bail jumping. CP 20-22. The State further alleged that Blackwell was within 1,000 feet of a school bus stop route and armed with firearm during the possession with intent to distribute charge charges. CP 20.

A jury found Blackwell guilty as charged. CP 59, 62-64; RP 446-49. The jury also returned special verdict forms finding that Blackwell was armed with a firearm during the unlawful possession of a controlled substance with intent to distribute charge. CP 61; RP 446. The jury further found that the unlawful possession with intent to distribute charge was committed within 1,000 feet of a school bus stop route. CP 60; RP 446.

The trial court sentenced Blackwell to a total concurrent standard range prison sentence of 60 months for each of the four convictions. CP 69-80; RP 463. The trial court also imposed a consecutive 36 month

firearm enhancement and a consecutive 24 month school bus route stop enhancement for the unlawful possession of methamphetamine with intent to distribute. Blackwell was sentenced a total prison term of 120 months. CP 69-80; RP 464.

Blackwell timely appeals. CP 92. The trial court appointed appellate counsel and ordered that the costs associated with appellate review to be prepared at public expense. CP 93-94.

2. Trial Testimony.

Blackwell moved into a home owned by her father in 2005. RP 361. Blackwell and her father lived alone on the property until 2009 when Blackwell's friend Missy and her son, Edward Tieden, moved into a separate trailer on the property. RP 361-62. In May 2016, Blackwell's father was killed in a fire which also destroyed the inside of the main house. RP 309, 363. Shortly thereafter, Blackwell's friend, Steven Tankersley, brought a second trailer onto the property and began living in it. RP 158-59, 163-64, 369. Blackwell lived in a hotel while the house was being restored. RP 261-62, 362-63.

Blackwell was at the house cleaning and doing fire restoration work when police broke down her front door on June 23, 2016 to serve a search warrant. RP 142, 364. Police suspected that Blackwell was selling methamphetamine. RP 166, 180. Police encountered Blackwell

immediately upon entering the home. She was handcuffed and taken outside. RP 142-43, 294-95. Police also found Tieden inside a bathroom in the house. RP 181, 224, 245-46, 265, 274-75, 289-90.

When police searched Blackwell they found keys and \$160 in her bra cups. RP 149-50, 229-31, 237. Blackwell explained that she had found the keys while cleaning the home. RP 233, 365, 368. Blackwell told police that one key opened a bank bag and the other key a craftsman toolbox in the shed. RP 230-31, 234-35. Blackwell did not know where the bank bag was located. RP 233. Police could not open the toolbox with either key. RP 232.

Police searched the house and found it mostly empty because of the fire restoration work. RP 146-47, 164. Inside one of the bedrooms police found documents in Blackwell's name, empty Ziploc bags, a plastic cup containing methamphetamine residue, a digital scale, and a glass pipe. The bedroom contained no beds. RP 146, 246-52. Inside a different bedroom police found a black garbage bag which contained a Ziploc bag with a crystalline substance inside. RP 219-22. The driveway of the house was 406 feet from the intersection where a school bus stop was located. RP 190-94, 222-24.

A search of a detached garage outside the main house revealed two unlocked lockboxes. RP 276-79, 286-87. Inside one lockbox was a glass

pipe, empty Ziploc bags, a gram scale, and a plastic cup containing a crystalline residue. RP 280-85. The residue was not tested. RP 282, 291. Inside the second lockbox was a glass pipe, empty Ziploc bags, a measuring spoon, and digital scale. RP 286-88, 296.

Tankersley was inside the trailer when police searched it. RP 181, 224, 297, 309. Police found a locked safe inside the trailer. RP 147. Police opted to pry open the safe instead of trying to utilize the biometric fingerprint sensor. RP 148, 168-70, 297-98. The keys found on Blackwell also opened the safe. RP 149-50, 234, 298-99. Inside the safe were two bank bags. RP 299, 304. The keys found on Blackwell were used to open the bank bags. RP 234-25, 300, 305. Inside one bag was \$3,821 in cash and 170 grams of a substance that tested positive for methamphetamine. Inside the other bank bag was \$1,883 in cash. RP 300-05. The safe also contained eight grams of a substance that tested positive for methamphetamine, prescription medication in Blackwell's father's name, a title for a truck in Blackwell's name, and a single shot .22 caliber Colt pistol. RP 149-50, 306-09. The gun was contained in a case with the Colt firearm symbol and "appear[ed] to be [an] older in nature" "collector's" edition pistol. No ammunition was found on Blackwell's property. RP 344-45, 383-84; Ex. 34.

Pierce County sheriff deputy, Adam Anderson, shot the .22 pistol and found that it fired without malfunction. RP 339-40. He opined that a bullet fired from the gun could kill a person. RP 343.

Blackwell explained that she kept some of her father's personal items in the safe, including the .22 pistol for which she had no ammunition. RP 380, 383-84. Tankersley's thumbprint opened the safe's biometric lock. Blackwell was unaware whether Tankersley kept anything in the safe. RP 366-67. Blackwell acknowledged that both she and Tankersley were personal users of methamphetamine. RP 372-74. She did not know however, that the safe contained cash or methamphetamine. RP 367, 384.

Blackwell acknowledged that she did not appear for a scheduled court date on April 28, 2017. RP 331-33, 383. She later had the arrest warrant issued as a result quashed. RP 385.

C. ARGUMENT

1. BLACKWELL'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE TRIAL COURT DENIED HER MOTION TO EXCLUDE FIREARM EVIDENCE AND TESTIMONY AFTER THE STATE INEXCUSABLY FAILED TO DISCLOSE THE KEY EVIDENCE UNTIL ONE COURT DAY BEFORE TRIAL.

The State did not disclose Anderson as a witness until one court day before trial. As the prosecutor acknowledged, Anderson's reports concerning firearm operability "were available back in March and for one reason or

another, they did not get distributed. So, no, I don't have a good explanation for that." RP 107. This inexcusable delay violated the State's discovery obligations under CrR 4.7. The trial court then refused to exclude Anderson as a witness. This left Blackwell's counsel inadequately prepared for trial, given the significance of Anderson's testimony. As a result, Blackwell was denied her right to due process and a fair trial. This Court should reverse and remand for a new trial.

CrR 4.7(a)(1)(i) requires the prosecutor to disclose to the defense, no later than the omnibus hearing, "the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial." The purpose of this rule "is to prevent a defendant from being prejudiced by surprise, misconduct, or arbitrary action by the government." State v. Cannon, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996).

The U.S. Supreme Court has explained the philosophy behind such discovery rules: "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970), quoted in State v. Coe, 101 Wn.2d 772, 783, 684 P.2d 668 (1984).

Due process requires the prosecution to "comport[] with prevailing notions of fundamental fairness such that [the accused is] afforded a

meaningful opportunity to present a complete defense.” State v. Greiff, 141 Wn.2d 910, 920, 10 P.3d 390 (2000) (quoting State v. Lord, 117 Wn.2d 829, 867, 822 P.2d 177 (1991)). The Washington Supreme Court has recognized:

[I]f the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible either a defendant’s right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced. Such unexcused conduct by the State cannot force a defendant to choose between these rights.

State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980). Therefore, the State’s failure to comply with a discovery rule can violate the accused’s right to due process. Greiff, 141 Wn.2d at 920.

CrR 4.7(h)(7) outlines available sanctions for the State’s discovery violations: “the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.” Failure to identify witnesses in a timely manner is “appropriately remedied by continuing trial to give the nonviolating party time to interview a new witness or prepare to address new evidence.” State v. Hutchinson, 135 Wn.2d 863, 881, 959 P.2d 1061 (1998); see also State v. Linden, 89 Wn. App. 184, 196, 947 P.2d 1284 (1997) (holding the trial court

properly granted the defense a continuance after the prosecution's late disclosure of information).

Exclusion of evidence is also an appropriate remedy when it isolates the prejudice. State v. Garza, 99 Wn. App. 291, 295, 994 P.2d 868 (2000); State v. Marks, 114 Wn.2d 724, 730-32, 790 P.2d 138 (1990). Courts consider four factors in deciding whether to exclude evidence as a discovery sanction: (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the defense will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith. Hutchinson, 135 Wn.2d at 882-83. A trial court's discovery decisions based on CrR 4.7 are reviewed for abuse of discretion. Id. at 882.

In Blackwell's case, the omnibus hearing was held on October 4, 2016. Supp. CP ____ (Order on Omnibus Hearing, filed 10/4/16). The omnibus order required the State to disclose all trial witnesses no later than two weeks prior to trial. The State did not disclose Anderson on witness lists filed on January 24, 2017, February 28, 2017, June 1, 2017, or June 14, 2017. The State maintained that it had had disclosed all discovery and all trial witnesses in the trial readiness conference order filed on July 21, 2017. Supp. CP ____ (Scheduling Order, filed 8/8/17).

A scheduling order filed on August 18, 2017, set an omnibus hearing for August 29, 2017 with trial scheduled to begin September 27, 2017. Pursuant to the dates set forth in the scheduling order, the State also did not disclose Anderson on its witness list filed on August 29, 2017. The first time the State disclosed Anderson as a witness was on a supplemental witness list filed September 28, 2017. RP 99-100; Supp. CP ____ (Supplemental List of Witnesses, filed 9/27/17).

Trial began on September 27, 2017 with the trial court holding a CrR 3.6 hearing on that date. No testimony was taken and the trial court denied defense counsel's motion to suppress. RP 25-27; CP 86-91. The following day, the court heard testimony related to the CrR 3.5 hearing. The State did not call Anderson as a witness. CP 83-85.

Later that same afternoon, the trial court addressed defense counsel's motions in limine. Defense counsel objected to the State's late disclosure of evidence related to Anderson's testing of the operability of the .22 caliber pistol, explaining that because Anderson's report was not disclosed to the defense until September 26, 2017, they had not had an opportunity to review the report or prepare a defense about anything contained therein. RP 73-74. Defense counsel asked that evidence concerning testing of the pistol, as well as, Anderson's testimony be excluded. CP 16-19; RP 75-78.

In response, the State did not dispute the report's late disclosure, but argued the gun was mentioned throughout the discovery otherwise. As the prosecutor maintained, "the fact that it was test fired is not something that really is material in the fact that it's a big surprise that the gun is part of the case." RP 76.

Defense counsel explained that the entire trial strategy around the gun would now have to be altered, as the operability of the gun affected the flat prison time for the firearm enhancement. RP 77. Counsel explained:

The gun is a 1914 antique gun that's enclosed in a case for collection purposes. So at the day of trial to find out the gun is an operational gun with a casing included, which means it fires, is a definite big thing. And yes, we would need time to hire our own expert to make a determination of that gun.

It was my understanding -- I was aware of a gun, but it was my understanding that it belonged to her father and was something that he collected. That's a totally different ball game from a gun that fires and is found to have a bullet in its chambers. And to give me that information on the day of trial -- this case is not a new case. In fact, the Court has ordered that there would be no more continuances, which means all of the discovery should have been done and provided. There have been three lawyers prior to me. This was never disclosed to them. I'm the fourth attorney on this case.

So I do feel it severely prejudices us. There is a big difference between a gun that fires and a gun that is there for collection purposes. And it affects entirely the defense of our case.

.....

So it is a big deal to my client and the warrant says guns, but finding an antique gun and finding a gun that

actually fires, that's totally different for us. And they've charged it in the Information, the Amended Information, and so it must be addressed. So the argument can work both ways. If the State was aware that there was a gun just like the defense was at the beginning, then the State should have been aware that they should have provided an expert in their witness list, which has been done two or three times to test the gun and even just to preserve it even if they weren't, and they didn't do that. And so now is not the time to tell me that I need to come out now because they are too late and prepare my case entirely different because they're allowed to add this evidence. I would thoroughly object to that. It's not just a minor prejudice. It's a big prejudice and it changes the posture of this case tremendously.

RP 76-78.

The trial court noted that defense counsel was the fourth counsel on the case and "the Court has been told not to grant any more continuances due to the age of the case." RP 78. The trial court denied the motion to exclude without prejudice, noting that counsel had until the following Wednesday "to do whatever you think is necessary to respond to the reports." RP 79.

Defense counsel renewed the motion to exclude the firearm evidence and Anderson's evidence at the next court hearing on October 4, 2017. RP 93-94, 99-102. The following day, counsel again reiterated that the late disclosure of Anderson as a witness, and his report regarding firearm operability, had prevented her from cross-examining Anderson or hiring a separate expert to investigate whether the gun was in fact operable. RP 101-02, 108. Counsel also explained why the time between court dates was

insufficient to interview Anderson and remedy the prejudice caused by the late discovery and witness disclosure:

I had two days in between to do anything. And unfortunately, in order to do those types of things, I need to get approval from DAC, since I am a conflict counsel. I can't just go out and do everything. So my preference would have been to speak with an investigator or somebody with ballistic experience as opposed to just speaking with Deputy Anderson. So I was not able to do that, no.

RP 104.

In response, the prosecutor acknowledged he did not have an explanation as to why Anderson's report concerning firearm operability was not disclosed sooner, explaining, "The reports that were provided to counsel were a dot nine, ten and eleven, which means not only were they prepared, they were available back in March and for one reason or another, they did not get distributed. So, no, I don't have a good explanation for that." RP 107. The prosecutor maintained however that Blackwell had suffered no prejudice as a result of the late disclosure because counsel did not articulate anything that would have been done differently had the evidence about operability been disclosed sooner. RP 106.

The trial court concluded, "There's no question that Mr. Anderson's name and contact information was not disclosed until trial. Apparently there are reports that were also not disclosed. And so I think that all three

of these rules³ were violated. I think that the prosecutor had a duty to turn that information over in a timely manner and that didn't happen here." RP 118. The trial court likewise found that the late disclosure prejudiced Blackwell because "[defense counsel] has been unable to prepare effectively for her defense, especially cross-examination of Mr. Anderson. I think that has been impacted." RP 119.

Despite finding that the State had failed to timely disclose discovery, list Anderson as a witness, and that the discovery violations had prejudiced Blackwell, the trial court nonetheless denied Blackwell's motion to exclude Anderson as a witness.⁴ RP 119-23. Instead, the trial court allowed the State to call Anderson as the last witness in its case-in-chief and ordered the prosecutor to assist defense counsel in interviewing him. RP 120. The trial court explained its ruling as follows, "I know this is not ideal, but I think because we do have a jury that is now empanelled [*sic*] and they've already heard opening statements, we need to keep going and respect their time as well. So we will be moving forward." RP 120.

Defense counsel responded that given the trial court's discovery violation and prejudice findings, the appropriate sanction was suppression of

³ CrR 4.7(a)(II); CrR 4.7(h)(II); CrR 4.7(5)(I)(X). RP 117-18.

⁴ The trial court did exclude several other separate photographic exhibits explaining that it "need[ed] to draw a line somewhere[.]" as there had "obviously been a problem with getting discovery to the defense." RP 196-97.

Anderson's testimony. As counsel explained, any other ruling would circumvent the purpose of the discovery rules. RP 121-23. Counsel reiterated that she would now have to change her entire trial strategy in the middle of trial to prepare for evidence concerning the operability of the pistol and that she could not provide "effective assistance of counsel." RP 122.

Anderson testified during the next court date on October 9, 2017. Anderson explained that the pistol found in the safe was a single shot .22 caliber pistol. RP 339-40, 344. Anderson shot the pistol and it fired without malfunction. RP 339-40, 342. Anderson opined the pistol could kill a person. RP 343.

There can be no dispute that the State violated its discovery obligation under CrR 4.7 by failing to disclose Anderson as a witness until one court day before trial, well past the omnibus hearing. The prosecutor did not dispute this fact. RP 107.

As the trial court properly recognized, this discovery violation also prejudiced Blackwell. Anderson was the only witness at trial who testified as to the pistol's operability. He was also the only witness who opined as to the pistol's ability to cause death. Anderson's testimony was therefore the only evidence introduced by the State which satisfied the statutory criteria required to prove both the unlawful possession of a firearm charge and the firearm enhancement. See CP 43 (instruction 14); CP 44 (instruction 15);

CP 48 (instruction 18); CP 56 (instruction 26); RCW 9.41.010(10); RCW 9.94A.825; RCW 9.94A.533.

The State's late disclosure of Anderson as a witness was fundamentally unfair and deprived Blackwell's counsel a meaningful opportunity to present a complete defense. As Blackwell's counsel repeatedly asserted, she had no opportunity to adjust her trial strategy based on the State's late disclosure that the collector's pistol was in fact operable. Even the trial court acknowledged that the late disclosure prejudiced Blackwell's ability to prepare to cross examine Anderson. Having time to prepare cross-examination of the State's key witness is undoubtedly one of the most important aspects of an adequate defense.⁵

State v. Salgado-Mendoza, 189 Wn.2d 420, 403 P.3d 45 (2017), is instructive by way of contrast. Before Salgado-Mendoza's trial for driving under the influence, the Washington State Patrol disclosed to the defense the names of nine toxicologists, indicating that it would call one of them as a witness at trial. Despite defense demands for discovery, the State did not shorten the witness list to three names until the day before trial. On the morning of trial, the State finally identified the toxicologist who would

⁵ See Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.").

testify, contending that it had just received the name that morning. Salgado-Mendoza, 189 Wn.2d at 425.

The trial court denied Salgado-Mendoza's motion to suppress the toxicologist's testimony based on the late disclosure, finding no actual prejudice. Salgado-Mendoza, 189 Wn.2d at 425-26. Salgado-Mendoza appealed to the superior court, which found the district had abused its discretion. This Court affirmed, reasoning that the delayed disclosure violated the discovery rules and caused prejudice. Id. at 426.

The Supreme Court agreed that the State's failure to narrow the list of possible toxicology witnesses constituted mismanagement, and therefore, misconduct, within the meaning of the discovery rules. As the Court noted, a discovery violation need not be willful, simple mismanagement will suffice. Salgado-Mendoza, 189 Wn.2d at 428, 431, 433-35.

The Court disagreed however, that Salgado-Mendoza could show prejudice warranting suppression of the toxicologist's testimony. The Supreme Court agreed with the trial court that Salgado-Mendoza had ample time to prepare to examine each potential witness given that discovery about their anticipated testimony and professional backgrounds was timely provided five months ahead of trial. Salgado-Mendoza, 189 Wn.2d at 435-37. Furthermore, the Court noted that any of the toxicologist testimony would likely have been similar. Id. at 428, 437. The Court concluded that

preparing to cross-examine multiple witnesses and the possibility of needlessly wasting hours falsely equated the risk of prejudice with actual prejudice. Id. at 436.

The Court was careful to draw a distinction however, between 'fungible' type witnesses such as toxicologists and other circumstances "in which it would be appropriate to infer actual prejudice from delayed disclosures." Salgado-Mendoza, 189 Wn.2d at 437. The Court noted "for example, late disclosure of a key witness presenting unique testimony -- such as an investigating officer -- is likely to prejudice the defense." Id.; Compare State v. Brooks, 149 Wn. App. 373, 203 P.3d 397 (2009) (trial court did not abuse discretion in dismissing charges where State failed to provide a 60–page victim's statement until the day before trial; to provide defendant's statement to police on the night of the incident; to provide the lead detective's report, which likely would have revealed other witnesses that needed to be interviewed, and; to subpoena the victim for trial).

Unlike Salgado-Mendoza, Blackwell's case presents the type of "actual prejudice" the Supreme Court cautioned against. This was not the type of situation Salgado-Mendoza's attorney faced in needling wasting time whittling down too much discovery provided months before trial. Here the State's inexcusable discovery violation significantly prejudiced Blackwell's defense. The State's entire case regarding the firearm enhancement and the

unlawful possession of a firearm revolved around Anderson's testimony and his testimony that the pistol was in fact operable. And whereas Salgado-Mendoza was presented with a list of 'fungible' witnesses and their backgrounds five months ahead of time, here Anderson's report about the pistol's operability was not disclosed to Blackwell until one day before trial. Moreover, Anderson was not even disclosed as a witness until one day after trial had already started. Without exclusion of Anderson's testimony, Blackwell's counsel was deprived of an opportunity to adequately prepare for trial. See State v. Brush, 32 Wn. App. 445, 455, 648 P.2d 897 (1982) (“The potential prejudice resulting from the prosecutor’s noncompliance with the discovery rules lies in [defense counsel’s] inability to properly anticipate and prepare, i.e., surprise.”).

Prosecutorial mismanagement cases provide further useful analogies of the actual prejudice suffered by Blackwell from the delayed discovery disclosure. In State v. Sherman, the Court of Appeals affirmed the trial court’s finding of misconduct. 59 Wn. App. 763, 772, 801 P.2d 274 (1990). There, the State failed to produce Internal Revenue Service (IRS) records of the complaining witness by the court-imposed deadline. Id. at 765-66. Although the records were not in the State’s possession, they were available to the State’s chief witness, who failed to find them in his files. Id. at 768-69. The State neither followed up to ensure the records would be available

for trial, nor requested them from the IRS until long after the deadline. Id. The State further waited until after the trial date to seek reconsideration of the omnibus order obligating it to produce the records. Id. This mismanagement compromised defense counsel's ability to adequately prepare for trial. Id. at 771-72.

Likewise, in State v. Dailey, the trial court dismissed a charge of negligent homicide after finding numerous instances of prosecutorial mismanagement violated due process. 93 Wn.2d 454, 459, 610 P.2d 357 (1980). For instance, the State failed to timely comply with the omnibus order and failed to disclose its witness list until one day before trial. Id. The Supreme Court found this and other mismanagement "amply support[ed]" the trial court's decision to dismiss the charge. Id.

Conversely, the Supreme Court held in State v. Blackwell that a prosecutor's failure to produce personnel records did not amount to misconduct. 120 Wn.2d 822, 832, 845 P.2d 1017 (1993). There, the trial court ordered the State to produce the service records and personnel files of two police officers. Id. at 825. The State objected because it did not have access to or control over the documents. Id. The court held the prosecutor acted reasonably: he attempted to obtain the records, advised both the court and defense counsel of his efforts, and suggested that the court issue a subpoena duces tecum. Id. Thus, "[t]here was no showing of 'game

playing,' mismanagement, or other governmental misconduct on the part of the State that prejudiced the defense." Id. at 832.

Like Sherman and Dailey, here the State's inexcusable discovery violation significantly prejudiced Blackwell's defense. This error violated Blackwell's right to due process and to a fair trial and the only adequate remedy is a new trial. Greiff, 141 Wn.2d at 920. This Court should reverse.

2. THE STATE FAILED TO PROVE BLACKWELL WAS ARMED WITH A FIREARM FOR PURPOSES OF THE FIREARM ENHANCEMENT.

Defendants "armed" with a deadly weapon or firearm at the time of the commission of their crimes receive an enhancement to their standard range sentence. RCW 9.94A.825; RCW 9.94A.533(3), (4). Due process requires that the prosecution prove every part of an enhancement. State v. Williams-Walker, 167 Wn.2d 889, 898, 225 P.3d 913 (2010). A person is not armed simply because he owns or possesses a weapon. State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007). Rather, a person is "armed" when he is within proximity of an easily and readily available firearm for offensive or defensive purposes and when a nexus is established between the accused, the weapon, and the crime. State v. Houston-Sconiers, 188 Wn.2d 1, 17, 391 P.3d 409 (2017) (quoting State v. O'Neal, 159 Wn.2d 500, 503-04, 150 P.3d 1121 (2007)).

Courts are particularly careful when reviewing a challenge to a firearm enhancement because of the constitutional right to bear arms. Eckenrode, 159 Wn.2d at 493. Whether a person is armed is a mixed question of law and fact that this Court reviews de novo. State v. Ague-Masters, 138 Wn. App. 86, 102, 156 P.3d 265 (2007). This Court reviews a jury's special verdict that a defendant was armed to determine whether any rational trier of fact could so find. Eckenrode, 159 Wn.2d at 494. A claim that the evidence is insufficient admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Illegal sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

The definition of what is required to prove someone is "armed" has evolved over time, from just the requirement that a gun be "easily accessible and readily available for offensive or defensive purposes," to a requirement that there also be a "nexus" between the defendant, the weapon and the crime, to adding another requirement that there must be proof the defendant had the intent to use the weapon in furtherance of the crime. Compare, State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993) (applying "easily accessible" test); with State v. Schelin, 147

Wn.2d 562, 563-64, 570, 55 P.3d 632 (2002) (adding “nexus” evaluation); with State v. Brown, 162 Wn.2d 422, 431, 173 P.3d 245 (2007) (adding the “intent to use” test). Under any of those standards, the firearm enhancement fails here.

Here, the single shot pistol that is the basis of the firearm enhancement was found in a locked safe in the trailer on the property where Blackwell was arrested. CP 20. Blackwell was ordered to the ground and handcuffed inside the main house as soon as police breached the door. RP 293-95. The locked safe containing the pistol was found in a separate trailer on the property. RP 147-50. The gun was a single shot .22 caliber derringer pistol. RP 306-07, 310-11, 339-40, 344. There is no evidence the gun was loaded or that any ammunition was found nearby. RP 344-45, 383-84. The gun was "contained in sort of a holding case[.]" RP 310. As the police officer who found the gun acknowledged, "I would say that due to the box, [the pistol] appears to be older in nature, would say probably a collector's[.]" RP 311. Based on these facts, the State failed to show that the collector's pistol, which was out of Blackwell's reach, was easily accessible and readily available.

Courts have repeatedly held that mere proximity or constructive possession is insufficient to show that a defendant was armed at the time the crime was committed. See e.g. State v. Gurske, 115 Wn.2d 134, 138,

118 P.3d 333 (2005) (pistol found in a backpack in truck that was out of reach of driver was not readily available, and therefore defendant was not armed at the time of the commission of the crime of possession of a controlled substance); Valdobinos, 122 Wn.2d at 181-83 (unloaded rifle under the bed; defendant not “armed” for the crime in the house); 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). Several cases are instructive in this regard.

In State v. Johnson, police obtained a search warrant for Johnson’s apartment. When police entered the apartment they saw Johnson running toward the bathroom and his roommate running toward the bedroom. Police saw the roommate throw a plate containing heroin residue out the window. Police found heroin, several thousand dollars, and jewelry inside a safe. Johnson, 94 Wn. App. at 887, 891-92.

Police handcuffed Johnson and took him into the living room where they asked if he had any weapons inside the apartment. Johnson replied there was a loaded handgun inside a cabinet that was five to six feet away from him. Johnson, 94 Wn. App. at 887-88, 892. On the basis

of this information, the State included a deadly weapon sentence enhancement in its charge. Id.

The Court of Appeals concluded that because Johnson was handcuffed and the gun outside his reach, and therefore not easily accessible, the required nexus between the crime and the gun was absent. Johnson, 94 Wn. App. at 894, 896-97. Accordingly, the Court of Appeals reversed the deadly weapon sentence enhancement. Id. at 897.

In State v. Mills, Mills was arrested near his home, and while in custody, officers found a motel key Mills had tried to hide in the police car. During a search of the motel room, police found methamphetamine and a pistol in a pouch lying next to the drugs. Mills, 80 Wn. App. at 233. Mills was charged with possessing methamphetamine with intent to deliver while being armed with a deadly weapon. Id. at 232. Mills admitted he was in constructive possession of the pistol lying next to the drugs. Id. at 234.

The Court of Appeals reversed the deadly weapon enhancement. Although it found a nexus between the weapon and the drugs, the required nexus between the defendant and the weapon was not present; there was no physical proximity to the weapon at a time when availability for use for offensive or defensive purposes was critical. Mills, 80 Wn. App. at 236-37.

Finally, in State v. Gurske, Gurske was stopped for making an illegal turn and then arrested for driving with a suspended license. Police handcuffed Gurske, searched him, and placed him in the back of his patrol car. Gurske, 155 Wn.2d at 136. Officers conducted an inventory search before impounding Gurske's truck. One of the officers pulled the front seat forward and saw a backpack behind the driver's seat. The pack was within arm's reach of the driver's position, but removable only by either getting out of the truck or moving into the passenger seat. The officer unzipped the main portion of the backpack and saw a torch. Under the torch was a holster containing an unloaded pistol. A fully loaded magazine for the pistol was also found in the backpack. After removing the backpack from the truck, the officer found three grams of methamphetamine inside. Id.

The Court observed that use for offensive or defensive purposes could be to facilitate commission of the crime, escape, protect contraband, or prevent investigation, discovery, or apprehension by the police. Gurske, 155 Wn.2d at 139. The Court found the evidence did not show whether Gurske could unzip the backpack, remove the torch, and remove the pistol from the driver's seat where he was sitting when he was stopped by police. Nor was there evidence that Gurske moved toward the backpack. Finally, there was no evidence Gurske had used or had easy

access to use the weapon against another person when he acquired or was in possession of the methamphetamine. Gurske, 155 Wn.2d at 143. The Supreme Court concluded there was insufficient evidence to show that the firearm was easily accessible and readily available for use because Gurske would have had to exit the vehicle or move into the passenger seat to reach the gun. Id.

As in Johnson, Mills, and Gurske, Blackwell constructively possessed the pistol found inside the locked safe. And, like Johnson, Mills, and Gurske, there was no physical proximity between Blackwell and the pistol when availability for use for offensive or defensive purposes was critical. Significantly, as in Johnson, the pistol was not easily accessible as Blackwell was handcuffed, and removed from the house, whereas the gun was found in a locked safe inside a separate building on the property. The required nexus between Blackwell and the pistol was absent. Thus, the State failed to prove that Blackwell was armed with the pistol at the time of the commission of the alleged crime of possession with intent to distribute. Compare, State v. Sabala, 44 Wn. App. 444, 445, 448, 723 P.2d 5 (1986) (driver was “armed” where loaded handgun lay beneath the driver’s seat with the grip easily accessible to the driver).

Also absent is the required nexus between the crime and the gun. Despite Blackwell’s inability to easily access the pistol, the State may

argue that possession of the gun was part of a continuing crime to sell the methamphetamine. When a crime is continuing crime, a nexus exists if the gun is “there to be used.” Gurske, 155 Wn.2d at 138. The nexus requires more than just the weapon’s presence at the crime scene, however. Id. The defendant must be shown to have “intent or willingness to use” the weapon during the specific crime. Brown, 162 Wn.2d at 431.

To apply the nexus requirement, this Court examines the “nature of the crime, the type of weapon, and the circumstances under which the weapon is found.” Schelin, 147 Wn.2d at 570. Although the State need not establish “with mathematical precision the specific time and place that a weapon was readily available and easily accessible,” it must establish the required nexus between the defendant and the weapon by presenting evidence that the weapon was easily accessible and readily available at the time of the crime. O’Neal, 159 Wn.2d at 504-05. Whether a defendant is armed is a fact specific decision. Gurske, 155 Wn.2d at 139.

A careful comparison of cases in which courts have found a sufficient nexus between a firearm and its use to protect a continuing crime of possession, distribution, or manufacture of drugs, demonstrates why the present situation is different. In Schelin, police found a loaded revolver stored in a holster hanging from a nail on a wall in the basement of a house. Prior to his arrest, Schelin was standing no more than 10 feet

from the revolver. The basement contained 120 marijuana plants, large amounts of harvested marijuana, dried marijuana leaves, scales, packaging materials, weapons, a militia handbook, \$50,000 in gold coins, and cash. Schelin admitted to living in the home, growing marijuana, and owning the gold, cash, and revolver. Schelin, 147 Wn.2d at 564.

In a four justice plurality opinion, the Court concluded that the jury was entitled to infer that Schelin was using the revolver to protect his marijuana grow. Schelin, 147 Wn.2d at 574. The Court found Schelin stood near the revolver when police entered his home and could “very well have exercised his apparent ability to protect the grow operation with a deadly weapon, to the detriment of the police.” Schelin, 147 Wn.2d at 574-75. Significant to the Court’s determination that Schelin was “armed” for purposes of a sentencing enhancement, was Schelin’s own admission that the revolver was easily accessible and readily available. Schelin testified that the gun was used to protect his home from invasion by his wife’s estranged ex-husband and that he kept the gun near his bedroom in the event the home was broken into at night. Schelin, 147 Wn.2d at 573-74.

In Eckenrode, the defendant called police, alerting them to an intruder in his house. He told the 911 operator he was armed and ready to shoot the intruder. Eckenrode, 159 Wn.2d at 491. Police arrived and

swept the house, finding a loaded rifle, unloaded pistol, and evidence of a marijuana growing operation inside the home. Police arrested Eckenrode in his front yard, “far from his weapons.” Eckenrode, 159 Wn.2d at 492,

The Court concluded there was sufficient evidence to uphold the jury’s determination that a weapon was easily accessible and readily available because Eckenrode himself told the 911 operator that he had a loaded gun in his hand was prepared to shot the intruder. Eckenrode, 159 Wn.2d at 494. The Court also found sufficient evidence of a connection between Eckenrode, the weapon, and his drug manufacturing operation. The Court noted the rifle was loaded and Eckenrode also had a police scanner, “which together with his manufacturing operation raises the inference that he was monitoring police activity against the chance he might be raided.” Id. at 494-95.

In O’Neal, police searched a house. 159 Wn.2d at 502. In addition to evidence of methamphetamine manufacturing, police found over 20 guns, body armor, night vision goggles, and a police scanner inside the house. Most of guns were found in two gun safes, one locked and the other unlocked. A loaded AR–15 was found in one bedroom and a loaded pistol was found under a mattress in a different bedroom where one of O’Neal’s co-defendants slept. O’Neal, 159 Wn.2d at 503.

The Court concluded there was sufficient evidence for a jury to find that deadly weapons were easily accessible and readily available to defendants, and that there was a connection between the weapons, the crimes, and the defendants. O’Neal, 159 Wn.2d at 505-06. The Court focused on the fact that O’Neal’s accomplice testified the loaded pistol was under his mattress because “[i]f I needed it, it was there.” O’Neal, 159 Wn.2d at 505. There was also evidence that the AR-15 was readily accessible to the co-defendant who pleaded guilty to manufacturing methamphetamine. The co-defendant also testified that he had been helping the O’Neals manufacture drugs for several months and had stood watch during critical points during the methamphetamine production. O’Neal, 159 Wn.2d at 506. Based on this evidence, the Court concluded a jury could infer the guns readily available and easily accessible to one or more of the accomplices to protect the drug manufacturing operation. Id.

Finally, in State v Neff, 163 Wn.2d 453, 181 P.3d 819 (2008), police investigated an ammonia odor coming from Neff’s house. Neff accompanied the officer as he walked around the house and unattached garage. Neff, 163 Wn.2d at 456. Neff held the keys to the garage. Neff, 163 Wn.2d at 464. In the garage, the officer observed a methamphetamine manufacturing laboratory and a marijuana growing operation. Officers also found two loaded revolvers in a locked safe under a desk on the

garage's wall. A third loaded pistol was found hanging from the garage rafters. Police also found two surveillance cameras covering the yard and driveway, and a monitor in the garage on which the feed from the cameras could be viewed. Neff, 163 Wn.2d at 457, 464.

The Court concluded the trial judge was allowed to infer from the security cameras that Neff used the guns to protect his drug operation. Neff, 163 Wn.2d at 464. Because the record was silent as to whether Neff could reach the pistol hanging from the rafters, the Court construed that fact in the State's favor. Id.

In each of these cases, the Court was presented with specific facts, including defendant admissions, police monitoring equipment, and proximity of the defendant to an easily accessible and readily available gun, which allowed the Court to infer that the defendants were using the guns to protect contraband as part of a continuing crime. No such facts exist here.

First, as described above, Blackwell could not have accessed the pistol at the time she was arrested. There is also no evidence that Blackwell ever indicated an intent to use the pistol to protect the drugs. Indeed, there is no evidence the single-shot pistol was loaded or that any ammunition was nearby. As Blackwell explained, the pistol was owned by her father who had recently passed away. As police readily

acknowledged, the pistol was in a case and appeared to be a collector's item. There was also no police or surveillance monitoring equipment found on the property.⁶

The "mere presence" of a gun at the crime scene, "mere close proximity of the gun to the defendant, or constructive possession alone is not enough to show the defendant is armed." Brown, 162 Wn.2d at 431. That is all the State showed here. The State failed to prove sufficient evidence to show that the pistol was easily accessible and readily available to Blackwell. There is likewise insufficient evidence to establish a nexus between Blackwell's constructive possessions of the pistol and the drugs because cases involving a continuing crime are factually distinguishable from the present situation. The jury's firearm enhancements finding must be reversed, and Blackwell's 36 month firearm enhancement should be stricken.

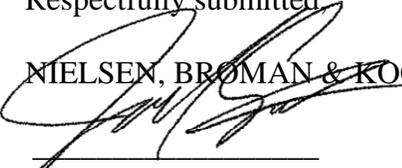
⁶ Although the State mentioned the presence of surveillance recording equipment at the house during opening statements, this evidence was explicitly excluded by the trial court. RP 113, 115-16, 117. Moreover, the jury was instructed that "the lawyers' statements are not evidence." CP 29 (instruction 1). Jurors can be presumed to have followed the court's instructions. State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982).

D. CONCLUSION

For the reasons discussed above, this Court should reverse Blackwell's convictions and remand for a new trial. Alternatively, this Court should strike Blackwell's firearm enhancement for insufficient evidence.

DATED this 29th day of June, 2018.

Respectfully submitted


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