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Court of Appeals
Division II
State of Washington
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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 Speir, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

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

The State does not dispute that it failed to timely 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. Brief of Respondent (BOR) at 11. Nor could it. See RP 107. The trial court correctly concluded there was "no question" that the untimely discovery disclosure violated several provisions of CrR 4.7 and that the violation prejudiced Blackwell. Brief of Appellant (BOA) at 14-15 (citing RP 117-20).

Instead, the State maintains that the discovery violation did not prejudice Blackwell because "neither the firearm enhancement nor unlawful possession of a firearm requires the weapon be operable." BOR at 11, 14-16. For reasons discussed below, the State's argument misses the mark.

RCW 9.41.010(10)¹ requires that the device "may be fired" in order to constitute a firearm. State v. Padilla, 95 Wn. App. 531, 534-35, 978 P.2d

¹ RCW 9.41.010(10) defines "firearm" as a "weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." The

1113, rev. denied, 139 Wn.2d 1003, 989 P.2d 1142 (1999). As such, a gun-like object incapable of being fired is not a “firearm.” State v. Jussila, 197 Wn. App. 908, 933, 392 P.3d 1108 (2017), rev. denied, 191 Wn.2d 1019, 428 P.3d 1188 (2018). For example, a nondeadly toy gun is not a firearm per the statutory definition. Id. But an unloaded firearm that can be loaded or a malfunctioning firearm that can be fixed are both firearms under the statute. Id. Thus, while the firearm need not be immediately operable at the time of the offense, the State must prove the firearm is a “gun in fact” rather than a toy gun. State v. Raleigh, 157 Wn. App. 728, 734, 238 P.3d 1211 (2010), rev. denied, 170 Wn.2d 1029, 249 P.3d 624 (2011).

Case law provides guidance as to when the State has sufficiently proved a firearm is a “gun in fact.” In Padilla, the court held a gun rendered permanently inoperable is not a firearm under the statutory definition. 95 Wn. App. at 535. But a “disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time period is a firearm within the meaning of [the statute].” Id. There was sufficient evidence that Padilla possessed a firearm where the pistol was disassembled but could be reassembled in a matter of seconds. Id. at 536; See also State v. Releford, 148 Wn. App. 478, 492-93, 200 P.3d 729, rev. denied, 166 Wn.2d

definition of a firearm in RCW 9.41.010(10) applies to several other statutes, including the firearm sentencing enhancement authorized in RCW 9.94A.533(3).

1028, 217 P.3d 336 (2009); State v. Faust, 93 Wn. App. 373, 381, 967 P.2d 1284 (1998).

In Raleigh, the State proved the firearm at issue was a gun in fact where the officer who executed the search warrant found two “toy” guns and one “real” gun. 157 Wn. App. at 734. The real gun held a magazine, was loaded with a round of ammunition in the chamber, and had a working safety and slide. Id. The gun’s firing pin needed some repair, but it could be made quickly operable with everyday tools. Id.

In Jussila, “[n]o one explicitly declared that a gun was real or operable.” 197 Wn. App. at 934. However, a police officer testified he found soft rifle cases with rifles inside, and the owner of the stolen guns identified them as his. Id. at 933. Witnesses repeatedly referred to the stolen items as guns, shotguns, firearms, weapons, and rifles. Id. at 934. The State also presented evidence that some of the guns were loaded with ammunition. Id. at 933-34.

Evidence that a device appears to be a real gun and is wielded during the commission of a crime may also be sufficient circumstantial proof that the device is a firearm. For instance, in State v. Tasker, Tasker pointed the gun at the complainant and demanded her purse. 193 Wn. App. 575, 595, 373 P.3d 310, rev. denied, 186 Wn.2d 1013, 380 P.3d 496 (2016). The

complainant testified it was a gun and she heard a “clicking noise,” which “was consistent with Mr. Tasker’s use of a real gun.” Id.

The State relies heavily on similar cases in its response brief. See BOR at 14-15 (citing Jussila, 197 Wn. App. at 933; Tasker, 193 Wn. App. at 575; Releford, 148 Wn. App. at 492-93; Padilla, 95 Wn. App. at 534-35). Tasker can be quickly dispensed with because unlike there, here is there is no evidence that the gun was wielded in the commission of the offense. The remaining cases relied on by the State demonstrate why Anderson's testimony, and the evidence related to the operability of the firearm introduced through him, were so crucial to the State's case.

No other State's evidence established the single shot .22 caliber Colt pistol was a "gun in fact" within the meaning of RCW 9.41.010(10). The pistol was contained in a case with the Colt firearm symbol and "appear[ed] to be [an] older in nature" "collector's" edition pistol. RP 344-45, 383-84; Ex. 34. There is no evidence the pistol was loaded or that any ammunition was found nearby. Indeed, no ammunition was found on Blackwell's property. RP 344-45, 383-84; Ex. 34. The appearance of the "collector's" pistol therefore itself did not establish it was currently capable of being fired or could be made to be fired “with reasonable effort and within a reasonable time period.” Padilla, 95 Wn. App. at 535.

Deputy Anderson was the sole State witness who testified to any detail regarding operability of the "collector's" pistol. He 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. As discussed fully in the opening brief, 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.

Put simply, absent Anderson's testimony, the State would have produced a "collectors" pistol like object, but would have failed to prove the pistol, in fact, met the definition of a firearm under RCW 9.41.010(10). As the trial court properly recognized, because this evidence was crucial, the discovery violation prejudiced Blackwell.

Despite the prejudicial discovery violation, the State also argues that the prejudice was "cured" by the fact that twelve days elapsed between the discovery violation and Anderson's testimony. See BOR at 12-13. The State speculates that "twelve days was ample time for [the] defendant to interview Anderson and prepare to counter his evidence." BOR at 13. Contrary to the State's assertion however, the prejudice here stems not only from counsel's

reduced time to interview Anderson in preparation for cross-examination, but also, because the late disclosure prevented defense counsel from hiring a separate expert to investigate whether the gun was in fact operable. RP 73-74, 76-78, 101-02, 108, 122. No State witness could say what year the "collector's" pistol was from. RP 310, 344. Thus, as defense counsel acknowledged the late disclosure prevent her from hiring her own expert to make a determination as to whether the "collector's" pistol was actually operable or whether it qualified perhaps as an "antique firearm" under RCW 9.41.010(1). RP 76-78. As defense counsel freely acknowledged, the late disclosure prevented her from providing effective assistance of counsel. RP 122.

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. State v. Greiff, 141 Wn.2d 910, 920, 10 P.3d 390 (2000).

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

In the opening brief, Blackwell argued the State failed to prove she was armed with a firearm during the possession with intent to distribute

offense. Citing State v. Mills², State v. Gurske³, and State v. Johnson⁴ as support, Blackwell maintains the State failed to prove that the unloaded .22 "collector's" pistol -- found in a display case, in a locked safe, in a building separate from the one in which Blackwell was arrested -- was easily accessible and readily available for purposes of the firearm enhancement. BOA at 22-34.

As an initial matter, the State argues that the fact Blackwell was handcuffed and arrested before the .22 "collector's" pistol was found, should not factor into this Court's analysis. BOR at 26-28. As discussed fully in the opening brief however, in State v. Johnson, the Court of Appeals found the absence of a nexus between the crime and the gun where Johnson was handcuffed prior to a loaded handgun being discovered in a cabinet that was five to six feet away from him. BOA at 25-26 (citing Johnson, 884 Wn. App. at 887-88, 892-97). The State's response brief fails to address, much less cite to Johnson. Where, as here, the State fails to respond to arguments made by Blackwell, the State concedes those issues. See In re Det. of Cross, 99 Wn.2d 373, 379, 662

² 80 Wn. App. 231, 907 P.2d 316 (1995).

³ 115 Wn.2d 134, 138, 118 P.3d 333 (2005).

⁴ 94 Wn. App. 882, 974 P.2d 855 (1999), rev. denied, 139 Wn.2d 1028 (2000).

P.2d 828 (1983) (“Indeed, by failing to argue this point, respondents appear to concede it.”).

The State also cites to State v. Sassen Van Elsloo, 191 Wn.2d 798, 425 P.3d 807 (2018), in support of its argument that the unloaded "collector's" pistol was easily accessible and readily available. BOR at 32-33. Sassen Van Elsloo is distinguishable from what occurred here, however.

A search of the cargo hold of Sassen Van Elsloo's car revealed a shotgun with a shell in the magazine. The shotgun was less than one foot away from a backpack which contained several different types of drugs, which led to three charges of possession with intent to distribute. Sassen Van Elsloo, 191 Wn.2d at 802, 826. The Supreme Court found there was sufficient evidence to find a nexus between the shotgun and Sassen Van Elsloo's ongoing possession and distribution of the drugs for purposes of the firearm enhancement. Id. at 826.

In concluding that the evidence was sufficient to support a finding that the shotgun was "there to be used" in the commission of the drug crimes, the Supreme Court considered several additional facts. First, the gun was placed in the car with its grip facing at an angle toward the passenger compartment of the car, making it easy for someone entering the car to quickly grab the gun. Second, the gun had a shell in the

magazine that could have been readily chambered and fired at another person. Sassen Van Elsloo, 191 Wn.2d at 826. Third, a sock containing eight additional shotgun shells was found in the car. Id. at 803. And fourth, the shotgun was kept out of a locked safe inside the car, unlike two other guns, which were not the subjects of the firearm enhancements. Id. at 826.

Unlike Sassen Van Elsloo, here not only was the single shot .22 pistol found in a locked safe, but it was also unloaded, no ammunition was found nearby, and it was contained in a separate collector's type case. Despite the absence of any of these facts which were critical to the Court's analysis in Sassen Van Elsoo, the State maintains that the "even though the gun was in a case, it could be easily removed and possessed or brandished during a drug deal." BOR at 25. The State cites nothing in the record which allows it to make this inference. Nor could it. There was no testimony about the steps involved in removing the "collector's" pistol from its display case, or how easily or quickly those steps could be completed.

In short, there is insufficient evidence to show the "collector's" pistol was easily accessible and readily available, and that there was a nexus between Blackwell, the "collector's" pistol, and the commission of the possession with intent to distribute. The jury's firearm enhancements

finding must be reversed, and Blackwell's 36 month firearm enhancement should be stricken.

As a final matter, this Court should reach the merits of Blackwell's argument concerning the sufficiency of the firearm enhancement regardless of its conclusion as to Blackwell's challenge to the discovery violation argument set forth in argument one, supra.

Justice Gordon McCloud's concurrence in Sassen Van Elso properly recognized that reviewing courts are obligated to address insufficiency of the evidence claims concerning crimes or elements because insufficient evidence bars retrial. 191 Wn.2d at 832 (Gordon McCloud, J. concurring). Recently, in State v. Allen, the Supreme Court concluded that double jeopardy barred retrial on aggravating circumstances under RCW 10.95.020, which increased the mandatory minimum for Allen's conviction for first degree murder. ___ Wn.2d ___, 431 P.3d 117, 125-26 (2018). As the Court concluded, aggravating circumstances are "elements" of the "offense" of aggravated first-degree murder for double jeopardy purposes. Id. The same rationale applies here. Because the firearm enhancement increased the mandatory minimum for Blackwell's conviction, it is akin to an element of the crime and is therefore subject to double jeopardy.

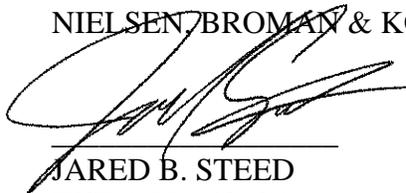
B. CONCLUSION

For the reasons discussed above, and in the opening brief, this Court should reverse Blackwell's convictions and remand for a new trial. This Court should also vacate Blackwell's firearm enhancement for insufficient evidence.

DATED this 22ND day of January, 2019.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line.

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