FILED
Court of Appeals
Division II
State of Washington
11/20/2018 2:32 PM

NO. 51096-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

NICHOL MARIE BLACKWELL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Shelly K. Speir, Judge

No. 16-1-02608-9

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
Michelle Hyer
Deputy Prosecuting Attorney
WSB # 32724

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Did the trial court properly cure the State's late disclosure of a witness, said witness's reports, and any prejudice stemming therefrom by giving defendant extra time to interview the witness and ordering the State to assist defendant in every way possible by making the witness available? (Appellant's Assignments of Error #1-3). 1

2. Viewing the evidence in the light most favorable to the State; where defendant's gun was stored in her safe with a large amount of methamphetamine and cash, was there sufficient evidence for a reasonable jury to find that the firearm was easily and readily accessible for offensive and defensive purposes during the defendant's continuing drug distribution enterprise? (Appellant's Assignment of Error #4). 1

B. STATEMENT OF THE CASE..... 1

1. FACTS 1

2. PROCEDURE..... 7

C. ARGUMENT. 11

1. THE TRIAL COURT PROPERLY CURED THE STATE'S LATE DISCLOSURE AND THERE IS NO PREJUDICE TO DEFENDANT BECAUSE NEITHER THE FIREARM SENTENCING ENHANCEMENT NOR UNLAWFUL POSSESSION OF A FIREARM REQUIRE THE WEAPON BE OPERABLE. 11

2. THERE WAS SUFFICIENT EVIDENCE SUPPORTING THE FIREARM SENTENCING ENHANCEMENT WHERE DEFENDANT WAS CONVICTED OF POSSESSION OF A CONTROLLED SUBSTANCE WITH THE INTENT TO DELIVER WHEN SHE WAS FOUND WITH KEYS TO A SAFE LOCATED IN HER RESIDENCE CONTAINING (A) THE GUN, (B) $5,704.00 OF CASH, (C) 164.6 GRAMS OF METHAMPHETAMINE, AND (D) THE TITLE TO HER TRUCK. 17

D. CONCLUSION. 28

Table of Authorities

State Cases

Mavroudis v. Pittsburgh-Corning Corp, 86 Wn. App. 22, 39, 935 P.2d 684 (1997) 17

State v. Ague-Masters, 138 Wn. App. 86, 156 P.3d 265 (2007) 20

State v. Brown, 162 Wn.2d 422, 173 P.3d 245 (2007) 25, 26

State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) 18

State v. Eckenrode, 159 Wn.2d 488, 150 P.3d 1116 (2007) 21, 26

State v. Faust, 93 Wn. App. 373, 381, 967 P.2d 1284 (1998) 15

State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004) 18

State v. Gurske, 155 Wn.2d 134, 138, 118 P.3d 333 (2005) 20, 26, 27

State v. Hernandez, 172 Wn. App. 537, 542, 290 P.3d 1052 (2012) 26

State v. Hutchinson, 135 Wn.2d 863, 881, 959 P.2d 1061 (1998) 11, 12

State v. Jussila, 197 Wn. App. 908, 933, 392 P.3d 1108 (2017) 15

State v. Mills, 80 Wn. App. 231, 234-36, 907 P.2d 316 (1995) 23

State v. Neff, 163 Wn.2d 453, 181 P.3d 819 (2008) 24, 26

State v. Neff, 163 Wn.2d 453, 464, 181 P.3d 819 (2008) 9

State v. O'Neal, 126 Wn. App. 395, 424, 109 P.3d 429 (2005) 18, 26

State v. Padilla, 95 Wn. App. 531, 534, 978 P.2d 1113 (1999) 15

State v. Releford, 148 Wn. App. 478, 492-93, 200 P.3d 729 (2009) 15

State v. Sassen Van Elsloo, ___ Wn.2d ___, 425 P.3d 807, 824 (2018) 19, 20, 21, 22, 23, 25, 26, 27

State v. Schelin, 104 Wn. App. 48, 51, 14 P.3d 893 (2000) 17

State v. Schelin, 147 Wn.2d 562, 55 P.3d 632 (2002) 19, 21, 26

State v. Tasker, 193 Wn. App. 575, 594, 373 P.3d 310 (2016), *review denied*, 186 Wn.2d 1013, 380 P.3d 496 (2016),..... 15

State v. Yates, 111 Wn.2d 793, 797, 765 P.2d 291 (1988)..... 11

Federal and Other Jurisdictions

Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)..... 17

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966) 4

Statutes

RCW 9.41.010 7

RCW 9.41.010(1)..... 14

RCW 9.41.010(11)..... 14, 15

RCW 9.41.040 14

RCW 9.94A.533(3)..... 7, 14

Rules

CrR 4.7(a)(II) 9

CrR 4.7(h)(II)..... 9

CrR 7.4(5)(I)(IX) 9

CrR 8.3 10

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly cure the State's late disclosure of a witness, said witness's reports, and any prejudice stemming therefrom by giving defendant extra time to interview the witness and ordering the State to assist defendant in every way possible by making the witness available? (Appellant's Assignments of Error #1-3).

2. Viewing the evidence in the light most favorable to the State; where defendant's gun was stored in her safe with a large amount of methamphetamine and cash, was there sufficient evidence for a reasonable jury to find that the firearm was easily and readily accessible for offensive and defensive purposes during the defendant's continuing drug distribution enterprise? (Appellant's Assignment of Error #4).

B. STATEMENT OF THE CASE.

1. FACTS

a. Background.

Appellant Nichol Blackwell (the "defendant") resided in a modular home at 19011 81st Avenue East in Puyallup, Washington with three other individuals. 4 VRP 134-36.[1] Melissa "Missy" Tieden moved into the house in 2009 to help the defendant care for her ailing father; Edward "Ed" or

[1] The verbatim record of proceedings (VRP) is consecutively paginated, for convenience the State has included the volume number in citations. There appears to be a scrivener's error on the cover sheet of Volume 6. The cover sheet is labeled "Volume XI," the roman numeral for 11, whereas the Table of Contents is labeled "Volume VI," the roman numeral for 6. As of this writing, there is no Volume 11, only Volume 6.

"Eddy" Tieden eventually followed his mother Melissa, living on the property for about three years; and Steven Tankersley, the defendant's longtime boyfriend and co-defendant in this case, moved into the house in 2012. 6 VRP 361.

All told, there were three dwellings on the property, one modular home which once served as the primary residence and two travel trailers. 6 VRP 362. There was also a small outbuilding or shed. 4 VRP 161. On May 2, 2016, there was fire in the modular home that claimed the life of Criss Blackwell, the defendant's father. 5 VRP 308; 6 VRP 362-363. Because of the fire damage, the defendant started renovations. 6 VRP 364. Melissa and Edward[2] began living in a travel trailer they parked at the back of the lot and Tankersley began living in a travel trailer he parked closer to the modular house. 6 VRP 362. The defendant presumably resided with Tankersley during this time.[3] 5 VRP 253.

b. Execution of the Search Warrant

Under the cover darkness at dawn on June 23, 2016, the Special Investigations Unit (SIU) of the Pierce County Sheriff's Department approached two structures on the defendant's property in south Puyallup. 4

[2] To avoid confusion, the State refers to the Tiedens by their first names. No disrespect is intended.

[3] The defendant claims she was staying in a hotel while she renovated the modular home, only occasionally sleeping on the property and never in the trailer. 6 VRP 362.

VRP 129, 134-35; 5 VRP 213. One team approached the modular home. 4 VRP 140-41. Deputies pounded on the door and loudly announced, "Police. Search warrant. Open the door." 4 VRP 141. As the entry team announced their presence, a uniformed deputy activated the emergency lights of a marked patrol car parked behind the team. 4 VRP 139. When there was no response, deputies broke through the door. 4 VRP 142.

As the deputies entered the modular home, audible announcements rang out from the PA system of the marked patrol car, "Police. Search Warrant. Get on the ground." Deputy Hotz observed the defendant almost immediately upon entry. 4 VRP 142. He secured her with hand restraints and escorted her outside. 4 VRP 143. As the remainder of the team cleared the modular home, they found Edward Tieden in a bathroom and removed him from the residence. 5 VRP 274-75.

A separate team of deputies approached Tankersley's trailer. 5 VRP 215. They knocked and announced their presence when they heard the first team do so. *Id.* A male voice told them he was a trying to secure a pit bull before opening the door. 5 VRP 215-16. When the door opened, Detective Darrin Rayner secured Tankersley[4] with flex cuffs and handed him off to Lieutenant Cropp. 5 VRP 216.

---

[4] While Detective Rayner does not identify the male removed from the trailer by name, the context—including the fact that it was Tankersley's trailer—clearly indicates that the male was Tankersley.

After Deputy Hotz changed out of his tactical gear he went to question the defendant. 4 VRP 142. Pierce County Detective Elizabeth Reigle accompanied Deputy Hotz. 4 VRP 144. Deputy Hotz asked defendant if she had anything on her and defendant replied that she did. *Id.* Deputy Hotz then advised defendant of her ***Miranda***[5] rights from a prepared card and Detective Reigle searched defendant. *Id.* Detective Reigle found keys in defendant's left and right bra cups. 5 VRP 230. Reigle noticed one set of keys were barrel keys, a type of key often used to open safes. *Id.* Defendant claimed the barrel keys went to a Craftsmen toolbox in the garage but Reigle looked at defendant's Craftsmen toolbox and it took a flat toothed key, not a barrel key. 5 VRP 230-31, 232. Detective Reigle, who used to work for a bank, identified the other set of keys as the small gold keys that open bank bags. 5 VRP 231.

Reigle left after she conducted the search, but Detective Shaun Darby was present for Hotz's interview of the defendant. 4 VRP 145. Defendant claimed she did not know what was in the travel trailer but told Deputy Hotz that he could start his search in the modular-house bedroom

---

[5] *See generally* ***Miranda v. Arizona***, 384 U.S. 436, 86 S. Ct. 1602 (1966).

with a large TV in it. 4 VRP 146. Defendant said there was methamphetamine in that room. *Id.* When defendant requested an attorney, Deputy Hotz ended the interview. *Id.*

Deputy Hotz walked through Tankersley's trailer where Hotz found a locked safe. 4 VRP 147-48. Deputy Hotz brought the safe to Detective Robert Shaw and asked him to open it by force. 5 VRP 297. The safe had a biometric lock that opened with a thumb or fingerprint. 5 VRP 298. Detective Shaw pried open the safe with a pry bar. *Id.* Once it was open, Shaw realized that there was keyhole on the outside of the safe concealed by a name plate. *Id.* Detective Shaw located the barrel keys that Detective Reigle had recovered from defendant and found that it unlocked the safe. *Id.*

Inside the safe were two bank bags, successfully unlocked with the other set of keys found in defendant's bra cup. 5 VRP 230, 300. In one of the bank bags, labeled 336, law enforcement found 164.6 grams of methamphetamine and $3,821.00 of cash in large denominations. 5 VRP 300-3, 306. The other bag, labeled 553, contained $1,883.00 of cash in small denominations and a single oxycodone pill. 5 VRP 305-6. Detective Shaw also recovered a small single-shot .22-caliber Colt handgun stored in a case from the safe. *Id.* The bottom of the safe was covered in approximately eight grams of methamphetamine and Detective Shaw also found a vehicle

title for a 2005 Ford F-150 listing the registered owner as "Nichol M. Blackwell" residing at 19011 81st Avenue East, in Puyallup, Washington. 5 VRP 307-8. Finally, the safe contained a significant amount of prescription medication belonging to defendant's deceased father, Criss Blackwell. 5 VRP 308.

Many law enforcement officers worked together to search the property. The modular home was largely vacant and there were no beds. 4 VRP 147. Detective Rayner found a clear plastic bag with methamphetamine residue on the inside in a black garbage bag in the south bedroom of the modular home. 5 VRP 219-22. In Tankersley's trailer, deputies recovered mail addressed to defendant including utilities bills as well as a working digital gram scale. 4 VRP 155-56. In the shed, Detective Darby found a lock box containing an orange plastic cup with methamphetamine residue, a glass smoking pipe with residue, numerous Ziploc style baggies commonly used to package narcotics, and a working gram scale. 5 VRP 276-88. Detective Darby also found another lock box that contained more plastic baggies, a measuring spoon and digital scale, and numerous glass smoking pipes coated with residue. 5 VRP 286

2. PROCEDURE

The original information was filled on June 24, 2016. CP 1. Multiple prosecutors and four defense attorneys would handle the case during the intervening year. 2 VRP 78. The final Omnibus Hearing was held on October 2, 2016. CP 97-99. On the Omnibus Order from that hearing, the parties noted that discovery was not complete because they were waiting on lab results. CP 98. On September 27, 2017, the State notified the defendant that the State was adding Adam Anderson as a witness and gave the defendant Anderson's reports. 1 VRP 11. This case came before the Honorable Judge Shelly K. Speir in Pierce County Superior Court for pretrial matters on September 27, 2017. 1 VRP 3. Defendant was charged in Count I with Unlawful Possession of a Controlled Substance with intent to deliver while armed[6] and within 1,000 feet of a school bus stop. CP 20. Defendant was further charged in Count III with Unlawful Possession of a Firearm in the First Degree, in Count V with Unlawful Use of Building for Drug Purposes, and in Count VI with Bail Jumping. CP 20-22.

On September 28, 2017, defendant moved to exclude Anderson's reports and testimony because the defendant only received the reports and

[6] RCW 9.94A.533(3) allows for time to be added to the standard range sentence for a felony crime if a defendant is armed with a firearm as defined in RCW 9.41.010. A "firearm" is "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010.

notice that Anderson would be testifying the day before. 2 VRP 75. The State immediately let the court know that it would not object to any continuance giving the defendant time to interview the witness and prepare. *Id.* The defendant asserted that she previously believed the gun was a collector's item, thus evidence that it was operable affected the defense strategy. 2 VRP 76-77. Defendant did not request a continuance, instead she pointed out that the court had previously ordered there be no more continuances. 2 VRP 77. The court denied defendant's motion at that time. 2 VRP 78.

On October 4, 2017, trial commenced and defendant renewed her objection to evidence about the gun's operability before and after the State's opening. 3 VRP 91, 93. On October 5, 2017, the trial court—having reviewed materials presented by defendant—heard further argument on the admissibility of evidence regarding the gun's operability. 4 VRP 99. Defendant claimed she did not request any additional lab results because she believed the Omnibus order was referring to drug testing results. 4 VRP 103. When the trial court inquired if defendant had made any attempt to talk to the witness, defense counsel told the court—for the first time—that as conflict counsel she needed approval from the Department of Assigned Counsel (DAC) to do such a thing. 4 VRP 105. Defense counsel did not say whether she sought that approval. *Id.* During argument defendant

moved for a mistrial. 4 VRP 109. The court denied the motion for a mistrial. 4 VRP 113.

It is clear from the trial court's rulings on other evidence, and its well-reasoned ruling on this issue, that the court was not ignorant to the available remedies for late disclosed evidence. Quite the opposite, the trial court excluded other late-discovered evidence offered by the State. 4 VRP 117, 196-97. Following opening statements, the trial court excluded any mention of the surveillance system that defendant had set up on the property.[7] This evidence would have helped establish a nexus between the gun and the crime,[8] bolstering the State's case. Additionally, the State stipulated to the exclusion of a late disclosed cell phone and the trial court excluded late disclosed photos that the State thought would be helpful with Deputy Hotz's testimony. 2 VRP 74-75; 4 VRP 196-97.

The trial court found that the State violated CrR 7.4(5)(I)(IX), 4.7(a)(II), and 4.7(h)(II). 4 VRP 117-18. The trial court also found that the defendant was prejudiced by these violations. 4 VRP 119. However, the

---

[7] Due to an apparent disagreement about the scope of one of defendant's motions in limine, the State mentioned the existence of the system during opening statements. 4 VRP 109. The State thought the content of the surveillance videos was excluded, not the existence of the system. 4 VRP 114. Defendant moved for a mistrial, the trial court chose instead to preclude any further mentions of the system. 4 VRP 116-17.

[8] *See* ***State v. Neff***, 163 Wn.2d 453, 464, 181 P.3d 819 (2008).

trial court held that—notwithstanding defendant's failure to interview the witness in preparation between September 26 - October 4, 2017—the problem could be properly cured by ordering the prosecution to call Anderson last and assist the defendant in every possible way by making Anderson available. 4 VRP 120. The court noted that there was no speedy trial issue and dismissal under CrR 8.3 was not proper. 4 VRP 121. Defendant maintained her objection, asserting that making the defendant do additional work was a sanction on the defendant, not on the State. 4 VRP 123. She did not address whether the extension gave her enough time to prepare.

Anderson testified as the State's last witness on October 9, 2017. 5 VRP 200, 337. There is no record of whether defendant took the opportunity to interview Anderson in advance, but defendant did cross examine him. 5 VRP 343. The jury found the defendant guilty of all counts, including enhancements to Count I for being within one-thousand feet of a school bus stop and for being armed. CP 59-64. The court sentenced defendant to 120 months of confinement, 36 months of which was based on the firearm sentencing enhancement. CP 74. Defendant timely appeals. CP 92.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY CURED THE STATE'S LATE DISCLOSURE AND THERE IS NO PREJUDICE TO DEFENDANT BECAUSE NEITHER THE FIREARM SENTENCING ENHANCEMENT NOR UNLAWFUL POSSESSION OF A FIREARM REQUIRE THE WEAPON BE OPERABLE.

Discovery rulings are within the sound discretion of the trial court and should not be reversed on appeal absent a manifest abuse of discretion. ***State v. Yates***, 111 Wn.2d 793, 797, 765 P.2d 291 (1988). The trial court can cure the late disclosure of a witness by granting a continuance giving the other party time to interview the late disclosed witness and prepare to counter the new evidence. ***State v. Hutchinson***, 135 Wn.2d 863, 881, 959 P.2d 1061 (1998). This is preferable to the "[e]xclusion or suppression of evidence [which] is an extraordinary remedy and should be applied narrowly." *Id.* at 882. Criminal proceedings are a search for the truth. The discovery rules exist to aid in this search for truth, ensuring that judgments are not based on partial or speculative understandings of the facts. ***Yates***, 111 Wn.2d at 798-99 (quotation marks and citations are omitted).

When considering whether to exclude evidence the court may consider: "(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 prosecution 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 883 (citations omitted). These factors are explored in-depth below.

a. The trial court properly cured the State's late disclosure of Anderson and his reports by giving defendant extra time to interview Anderson, so she would not be surprised or prejudiced by the witness.

The trial court in this case properly cured the State's late disclosure of Anderson by giving the defendant more time to interview Anderson. The court can cure the late disclosure of a witness by granting a continuance to give the other party time to interview the late disclosed witness and prepare to counter any new evidence. ***Hutchinson***, 135 Wn.2d at 881. Because this does not prevent evidence from being presented, it is a less severe sanction than excluding the evidence entirely.

When defendant objected to the timing of the disclosure, the State immediately noted that it would not object to any kind of recess or continuance. 2 VRP 75. The defendant did not request a continuance, instead reminding the court that there was an order saying there would be no more

continuances. 2 VRP 77. The trial court refused to grant a continuance on Thursday September 28, 2017, noting that under the current schedule defendant would have until Wednesday October 4, 2017, to interview the witness and review the reports. 2 VRP 78. Defense counsel did not mention that any problem with utilizing that time. 2 VRP 79.

On October 5, 2017, defense counsel stated that she did not interview Anderson over the recess and that, as conflict counsel, she needed approval from the Department of Assigned Counsel (DAC) to do such an interview. 4 VRP 105. Defense counsel did not say whether she requested such approval from DAC. *Id.* The court found that more time for defendant to interview Anderson would cure the problem and ordered the State call Anderson as their last witness and assist defendant in "every way possible in making Mr. Anderson available for interview." 4 VRP 120. Factoring in the additional time resulting from the trial court's schedule, there were twelve days between the disclosure of the witness on September 27th and Anderson testifying on October 9th. 1 VRP 11; 5 VRP 337. Twelve days was ample time for defendant to interview Anderson and prepare to counter his evidence. In fact, there is no evidence in the record that defendant was unable to interview Anderson or otherwise prepare in this time.

b. There is no prejudice to the defendant because neither the firearm enhancement nor unlawful possession of firearm requires the weapon be operable.

There is no prejudice to the defendant because the defendant knew the weapon was possible evidence since she was charged with the enhancement on June 24, 2016, the weapon does not fit the legal definition of an antique firearm, and a gun does not have to be proven operable for either the sentencing enhancement nor the unlawful possession of a firearm charge. Defendant claims she was prejudiced by the admission of evidence that the gun was operable because she believed it was a "collector's pistol."[9] Appellant's Brief at 17. However, the fact that the pistol was operable does not preclude the defendant from arguing that she did not *believe* it was operable. Regardless, the argument is moot. "[A]n unloaded firearm that can be loaded or a malfunctioning firearm that can be fixed are both firearms under the statutes."[10] ***State v. Jussila***, 197 Wn. App. 908, 933, 392 P.3d

[9] It should be noted that RCW 9.41.010(1) defines "antique firearms" and the defendant's gun does not qualify. "'Antique firearm' means a firearm or replica of a firearm not designed or redesigned for using rim fire or conventional center fire ignition with fixed ammunition and manufactured in or before 1898, including any matchlock, flintlock, percussion cap, or similar type of ignition system and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade." RCW 9.41.010(1).

[10] Both RCW 9.41.040, Unlawful Possession of a Firearm, and RCW 9.94A.533(3), the Firearm Sentencing Enhancement, cite to RCW 9.41.010(11) to define the term "firearm."

1108 (2017) (*citing* ***State v. Faust***, 93 Wn. App. 373, 381, 967 P.2d 1284 (1998)).

This principle has been reaffirmed by Washington courts time and time again. In ***State v. Releford***, 148 Wn. App. 478, 492-93, 200 P.3d 729 (2009), Division 1 of this Court found that a replica antique flintlock pistol missing the flint, leather piece that wraps around the flint, gunpowder, projectile, and wadding was a firearm for the purposes of a charge of unlawful possession of a firearm.

In ***State v. Tasker***, 193 Wn. App. 575, 594, 373 P.3d 310 (2016), *review denied*, 186 Wn.2d 1013, 380 P.3d 496 (2016), Division 3 of this Court held that a firearm must be capable or being fired instantly or with reasonable effort and time. The ***Tasker*** court held that evidence that a device *appears* to be a real gun and was being wielding in the commission of a crime is sufficient circumstantial evidence that it is a firearm. ***State v. Tasker***, 193 Wn. App. at 594.

In ***State v. Padilla***, 95 Wn. App. 531, 534, 978 P.2d 1113 (1999), Division 1 of this Court found that "may be fired" language of RCW 9.41.010(11) is ambiguous. The ***Padilla*** further held that a disassembled gun that could be quickly reassembled was a firearm for the purposes of the enhancement. ***Padilla***, 95 Wn. App. at 536. Because the State was not

required to prove operability, there can be no prejudice to the defendant from testimony that establishes operability.[11]

There is no evidence in the record supporting defendant's assertion that evidence of operability impacted her defense strategy. In fact, there is no evidence in the record that explains whether defendant even took the additional time to interview the witness. As stated above, Anderson's testimony does not preclude the defendant from arguing that she believed the weapon to be inoperable.

c. There was no bad faith by the State.

There is no evidence in the record of—and no apparent argument of—bad faith by the State. The prosecutor identified the oversight and disclosed the evidence shortly after he was assigned to take over the case. 2 VRP 75-76. The prosecutor admitted "this should have gone out a long time ago and I don't know why it didn't." 2 VRP 76. There was no bad faith behind the State's late disclosure of Anderson. Additionally, the prosecutor did not object to the defendant being given additional time to prepare. 2 VRP 75.

[11] It is also true that precluding the witness from testifying would not have had a great effect on the State's case. However, the defendant indicated during pre-trial motions that she prepared her defense thinking that the gun was an inoperable antique. 4 VRP 102. This defense would beg the question of operability to the jury. Proving operability eliminated any gaps in knowledge the defense would have created for the jury.

2. THERE WAS SUFFICIENT EVIDENCE SUPPORTING THE FIREARM SENTENCING ENHANCEMENT WHERE DEFENDANT WAS CONVICTED OF POSSESSION OF A CONTROLLED SUBSTANCE WITH THE INTENT TO DELIVER WHEN SHE WAS FOUND WITH KEYS TO A SAFE LOCATED IN HER RESIDENCE CONTAINING (A) THE GUN, (B) $5,704.00 OF CASH, (C) 164.6 GRAMS OF METHAMPHETAMINE, AND (D) THE TITLE TO HER TRUCK.

A sentencing enhancement that increases the penalty for a crime beyond the statutory maximum must be proven beyond a reasonable doubt. ***Apprendi v. New Jersey***, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Whether a person is armed for the purposes of a sentencing enhancement is a mixed question of law and fact reviewed de novo. ***State v. Schelin***, 104 Wn. App. 48, 51, 14 P.3d 893 (2000) (citations omitted), aff'd, 147 Wn.2d 562, 55 P.3d 632 (2002).

To succeed on a challenge to the sufficiency of the evidence, the defendant "needs to outline evidence in its brief, point to deficiencies it contends exist, and cite to relevant authority[;] a bare conclusory allegation that evidence is insufficient will not suffice." ***Mavroudis***, 86 Wn. App. at 39. "[A]ppellate courts are not in the business of searching the record in an effort to determine the nature of any alleged deficiencies to which the challenger may be referring, and then to search the law for authority to support those same alleged deficiencies." *Id.* at 39-40.

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and draws all reasonable inferences therefrom. ***State v. O'Neal***, 126 Wn. App. 395, 424, 109 P.3d 429 (2005) (citations omitted), aff'd, 159 Wn.2d 500, 150 P.3d 1121 (2007). Evidence is sufficient to support a sentencing enhancement when, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the sentencing enhancement beyond a reasonable doubt. *Id.* at 424. The question is not whether the evidence could convince all rational triers of fact or even most rational triers of fact. It is whether the evidence could convince any one rational trier of fact. *See Id.*

"Circumstantial evidence and direct evidence carry equal weight" in this analysis. ***State v. Goodman***, 150 Wn.2d 774, 781, 83 P.3d 410 (2004) (citations omitted). Appellate courts defer to the resolutions of the finders of fact regarding conflicting testimony, witness credibility, and the persuasiveness of the evidence. ***O'Neal***, 126 Wn. App. at 424 (*citing* ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

a. <u>The pistol was stored and positioned to be easily accessible and readily available whenever defendant accessed her stash of methamphetamine and cash; therefore, there is a nexus between the gun and the predicate charge for the firearm enhancement.</u>

A defendant is "armed" for the purposes of the sentencing enhancement when she is in the proximity of an easily and readily available firearm

that may be used for offensive or defensive purposes and when a nexus is established between the defendant, the weapon, and the crime. ***Schelin***, 147 Wn.2d at 575–76. "[W]hen the crime is of a continuing nature, such as a drug operation, a nexus exists if the firearm is 'there to be used' in the commission of the crime." ***State v. Sassen Van Elsloo***, ___ Wn.2d ___, 425 P.3d 807, 824 (2018).

Here, defendant's gun was found in defendant's locked safe with $5,704.00 in cash, 164.6 grams of methamphetamine, and the title to defendant's truck. 5 VRP 300-3, 305-8. The safe was in defendant's residence and defendant had the keys to the safe hidden in her bra cup when she was arrested. 4 VRP 135, 154-55; 5 VRP 230, 298. The jury necessarily found that the defendant had constructive possession of the safe and its contents when they found her guilty of Unlawful Possession of a Controlled Substance with Intent to Deliver, and that she had constructive possession of the gun when they found her guilty of Unlawful Possession of a Firearm. CP 59, 62. The questions in this case are 1) was the gun easily accessible and readily available; and 2) is there a nexus between the defendant, the gun, and the crime.

i. The defendant's gun was easily accessible and readily available because it was there to be used whenever she accessed the methamphetamine to sell it.

If a weapon was not used in the charged crime or when the charged crime is a continuing offense like a drug operation, the weapon is easily accessible and readily available if it is "there to be used" during the commission of the crime. ***State v. Gurske***, 155 Wn.2d 134, 138, 118 P.3d 333 (2005); ***Sassen Van Elsloo***, 425 P.3d at 824. The intent to distribute the drugs is an essential element of the offense the defendant was found guilty of. CP 39. Whenever defendant sold the methamphetamine she would have needed to open the safe to retrieve the methamphetamine and deposit the money. Every time defendant opened the safe she had access to the gun.

Defendant relies on ***Gurske***, 155 Wn.2d 134. App. Br. at 27. While the gun in ***Gruske*** was found in the backpack with the methamphetamine, the defendant was only charged with possession, not possession with intent to distribute. ***Gurske***, 155 Wn.2d at 136. The ***Gurske*** court also found that the driver could not access the gun without getting out of the car. *Id.* at 143. In ***State v. Ague-Masters***, 138 Wn. App. 86, 104-5, 156 P.3d 265 (2007), this Court held that a defendant was not "armed" for the purposes of a deadly weapon enhancement when 12 unloaded firearms were found in a safe along with drug paraphernalia. However, the safe did not contain any

drugs and it was in a house 100 feet away from a methamphetamine lab housed in a detached garage. *Id.*

This case is more akin to other cases where the defendant possessed a firearm to protect their drug operation. *See*, ***Schelin***, 147 Wn.2d 562; ***State v. Eckenrode***, 159 Wn.2d 488, 150 P.3d 1116 (2007); ***State v. Sassen Van Elsloo***, 425 P.3d at 824 (2018). In ***Schelin***, defendant was found in his basement standing six to ten feet from a loaded revolver hanging in a holster on the wall. ***Schelin***, 147 Wn.2d at 564. The basement also contained 120 marijuana plants and in Schelin's bedroom police found "large amounts of harvested marijuana, dried marijuana leaves, scales, packaging materials, weapons, a militia handbook, $50,000 in gold coins, and cash." *Id.* The Washington Supreme Court found that the evidence—including defendant's testimony—established that the defendant "was in close proximity to a loaded gun which he constructively possessed to protect his marijuana grow operation." *Id.* at 574. In all, the evidence supported the conclusion that defendant was "armed." *Id.*

In ***Eckenrode***, the defendant called 911 to report that an intruder was in his house and that he was armed and prepared to shoot the intruder. ***Eckenrode***, 159 Wn.2d at 491. When police arrived, they found Eckenrode on his lawn playing a video game. *Id.* Within the house, police found methamphetamine, dried and growing marijuana, a ledger that appeared to record

marijuana sales, an unloaded pistol, and a loaded rifle. *Id.* at 492-93. The Washington Supreme Court found that there was "considerable circumstantial evidence that the weapons were there to protect the criminal enterprise and that they were readily accessible and available." *Id.* at 495.

In ***Sassen Van Elsloo***, 425 P.3d at 812, the defendant fled when police tried to initiate a traffic stop. When police caught up with the car Sassen Van Elsloo was gone. *Id.* Police recovered a shotgun in the cargo hold; "a locked bank bag holding controlled substances separated and packaged in a style consistent with personal use and sales; numerous burner cell phones, glassine envelopes, small 'baggies,' and a digital scale of the style often used in the sale of controlled substances [in a] backpack; and a locked safe [the key to which was found in the passenger console] containing a roll of $1 bills, a revolver, and a small semiautomatic handgun" from Sassen Van Elsloo's car. *Id.* at 825-26. The shotgun in question was found less than a foot from the backpack, grip facing the passenger compartment, loaded magazine, with Sassen Van Elsloo's DNA on it. *Id.* at 826. The Washington Supreme Court found that "taking the evidence in the light most favorable to the State, there is sufficient evidence to demonstrate that the shotgun was easily accessible and readily available, and that there was a nexus between Sassen Van Elsloo, the shotgun, and the commission of the drug crimes." *Id.* Just as in the preceding cases, defendant stored her

weapon with her stash of methamphetamine and cash so it would readily available whenever she sold the drugs.

> ii. The proximity of the defendant's gun to the methamphetamine and cash and the circumstances under which the gun was stored permitted a reasonable jury to find that gun was easily accessible and readily available for offensive or defensive purposes whenever defendant carried out a drug deal.

There must be a nexus between the defendant, the weapon, and the crime. ***Schelin***, 147 Wn.2d at 568. In applying the nexus test, courts should "should examine the nature of the crime, the type of weapon, and the circumstances under which the weapon is found." *Id.* at 570. In ***Sassen Van Elsloo***, the court found that a nexus exists where a gun is "there to be used" during the commission of an ongoing drug operation. ***Sassen Van Elsloo***, 425 P.3d at 824.

Defendant relies heavily on ***State v. Mills***, 80 Wn. App. 231, 234-36, 907 P.2d 316 (1995), which held that there was no nexus on the charging date where the gun was found next to the drugs in defendant's hotel room. However, there was no evidence that Mills was in the hotel room on the date charged and Mills was arrested several miles away. ***Mills***, 80 Wn. App. at 234. In this case, the safe in defendant's residence and defendant was arrested on the property. 4 VRP 135, 147, 154-55. It would be reasonable for a jury to assume that defendant was living in the trailer where deputies

found her mail and her safe. It would also be reasonable for a jury to assume that defendant was inside her residence on the date she was arrested. Thus, viewing the evidence in the light most favorable to the State a temporal nexus was established.

Defendant also relies on ***State v. Neff***, 163 Wn.2d 453, 181 P.3d 819 (2008). In ***Neff***, police discovered a methamphetamine manufacturing operation paired with a marijuana grow operation in Neff's garage. ***State v. Neff***, 163 Wn.2d at 457. The police also found three handguns in the garage, one hanging from the rafters. *Id.* The other two were found in a locked safe which also contained four bags of marijuana. *Id.* at 457, 464. The Washington Supreme Court held that there was sufficient evidence for the jury to find a nexus based on the positioning of the guns, Neff's access to the garage, and security cameras Neff had set up for a live counter-surveillance feed on a monitor in the garage. *Id.* at 464.

In ***Neff***, the security cameras were but one factor considered in finding that there was a nexus between the gun and the crime. *Id.* The ***Neff*** court held that the security cameras allowed the judge to infer that Neff used the guns to protect his ongoing drug enterprise. *Id.* Here, the gun's proximity to $5,704.00 in cash and 164.6 grams of methamphetamine inside a locked safe give rise to that same inference. Viewing the evidence in the light most favorable to the State, the gun was stored with

the drugs and money so the gun was easily retrieved to be used for offensive or defensive purposes during drug deals. Even though the gun was in a case, it could be easily removed and possessed or brandished during a drug deal. It is entirely reasonable that jurors find that the gun was not in the same safe as methamphetamine or cash through sheer coincidence, but rather for offensive or defensive purposes.

iii. This Court should not rely on or even consider defendant's subjective intent.

Courts should not wade into subjective waters by attempting to assess the defendant's intent in possessing a firearm during the commission of a crime. Defendant argues that ***State v. Brown***, 162 Wn.2d 422, 173 P.3d 245 (2007), holds that the defendant must have an "intent or willingness" to use the firearm. This argument fails to recognize three key points. First, the ***Brown*** Court found that "intent or willingness" was a component of the nexus analysis, not a stand-alone requirement. *Id.* at 433. Second, ***Brown*** is a burglary case where the weapon in question was already in the home and merely moved by the defendant.[12] ***Brown***, 162 Wn.2d at 432. Finally, ***Brown*** can be distinguished because it was not a continuing offense thus

[12] It should be noted Washington Courts have declined to follow ***Brown*** in other circumstances. *See,* ***State v. Hernandez***, 172 Wn. App. 537, 542, 290 P.3d 1052 (2012) (holding that where defendants carried a stolen shotgun from a house they were burglarizing they committed the burglary while armed); ***Sassen Van Elsloo***, 425 P.3d at 824-25 (not considering intent).

the test was not whether the firearm was "there to be used." *Id.* at 434-35. Accordingly, the ***Sassen Van Elsloo*** court did not require any specific evidence of the defendant's subjective intent. ***Sassen Van Elsloo***, 425 P.3d at 824. This case involves a continuing drug distribution offense and the firearm is defendant's, just like ***Sassen Van Elsloo***. The firearm was not merely burgled loot as in ***Brown***.

iv. The fact that defendant was handcuffed when the weapon was found should not factor into this Court's analysis.

This Court should not allow the mere fact that a defendant was handcuffed when the firearm was found preclude a firearm sentencing enhancement.[13] In adopting the "easily accessible and readily available" test, courts "recognized that being armed is not confined to those defendants with a deadly weapon actually in hand or on their person." ***Gurske***, 155 Wn.2d at 138. In ***O'Neal***, 159 Wn.2d at 504, the Washington Supreme Court held that "[t]he defendant does not have to be armed at the moment of arrest." Nor does the State have to "establish with mathematical precision the specific time and place that a weapon was readily available and easily accessible, so long as it was at the time of the crime." *Id.*

---

[13] For selected examples of firearm sentencing enhancements being upheld where the gun was not recovered from defendant's person *see e.g.*, ***State v. Schelin***, 147 Wn.2d 562, 55 P.3d 632 (2002); ***State v. Eckenrode***, 159 Wn.2d 488, 491-93, 150 P.3d 1116 (2007); ***State v. Neff***, 163 Wn.2d 453, 464, 181 P.3d 819, 825 (2008); ***State v. Sassen Van Elsloo***, ___ Wn.2d ___, 425 P.3d 807 (2018).

The very purpose of the easily accessible and readily available test is to assess the use of a firearm sentencing enhancement when a firearm was *not* found on the defendant. The question is whether defendant was armed at the time of the crime, not at the time of arrest. *See* ***Gurske***, 155 Wn.2d at 138; *see also*, ***Sassen Van Elsloo***, 425 P.3d at 812 (upholding a firearm sentencing enhancement where defendant fled the vehicle containing the firearm and was arrested three months later). "This is consistent with the legislature's obvious intent to punish those who are armed during the commission of a crime more severely than those who are unarmed because the risk of serious harm to others is greater." ***Gurske***, 155 Wn.2d at 138.

The "easily accessible and readily available" test would be wholly unnecessary if it could only be applied when a firearm is recovered from defendant's person. Surely a firearm stashed anywhere on one's person is easily accessible and readily available. The courts should not support a construction of the law that penalizes law enforcement for securing a suspect before searching the surrounding area. Such practices protect law enforcement and citizens alike.

On June 23, 2016, the defendant was arrested on her property with the keys to a safe hidden in her bra cup. 4 VRP 134-35, 142-43; 5 VRP 230, 298. That safe was found inside a travel trailer where defendant was living. 4 VRP 147, 154. Inside that locked safe, defendant stored $5,704.00

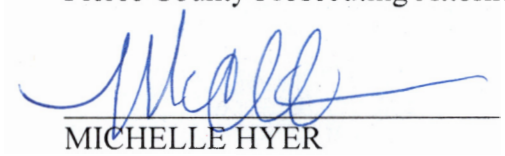
in cash, 164.6 grams of methamphetamine, the title to her truck, and her gun. 5 VRP 300-3, 305-8. Viewing this evidence in the light most favorable to the State, a reasonable jury can, and did, find that defendant was armed as she possessed and sold methamphetamine.

D. CONCLUSION.

For these reasons, the State respectfully requests that this Court affirm the sentencing enhancement imposed below. In affirming the sentencing enhancement, the State respectfully requests that this Court hold: 1) the trial court properly cured the late disclosure of Anderson by granting the defendant time to interview and Anderson and prepare for any new evidence; 2) the State presented sufficient evidence for a reasonable jury to impose the sentencing enhancement.

DATED: November 20, 2018.

MARK LINDQUIST
Pierce County Prosecuting Attorney



MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

EVAN BOESHANS
Rule 9

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11.20.12 Theresa Ka

Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

November 20, 2018 - 2:32 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51096-1
Appellate Court Case Title:	State of Washington, Respondent v. Nichol M. Blackwell, Appellant
Superior Court Case Number:	16-1-02608-9

The following documents have been uploaded:

- 510961_Briefs_20181120143216D2499923_7389.pdf
  This File Contains:
  Briefs - Respondents
  The Original File Name was Blackwell Response Brief.pdf

A copy of the uploaded files will be sent to:

- jason.ruyf@piercecountywa.gov
- mgoodma@co.pierce.wa.us
- steedj@nwattorney.net

Comments:

Sender Name: Therese Kahn - Email: tnichol@co.pierce.wa.us
Filing on Behalf of: Michelle Hyer - Email: PCpatcecf@co.pierce.wa.us (Alternate Email:)

Address:
930 Tacoma Ave S, Rm 946
Tacoma, WA, 98402
Phone: (253) 798-7400

Note: The Filing Id is 20181120143216D2499923