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Court of Appeals
Division II
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No. 51399-4-II

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

STATE OF WASHINGTON, Respondent

v.

JAKE BELANGER, Appellant

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
THE HONORABLE BRYAN E. CHUSHCOFF

REPLY BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR AND ISSUES RELATED TO
ASSIGNMENTS OF ERROR.

Mr. Belanger relies on the assignments of error and related legal issues as presented in appellant's opening brief.

II. STATEMENT OF FACTS

Mr. Belanger relies on the statement of facts presented in appellant's brief and corrects some of the fact statements presented in the State's response brief in the argument portion of this brief.

III. ARGUMENT

A. Substantial Evidence Fails To Support The Trial Court's
Written Findings Of Fact 60 And 61.

An appellate Court reviews finding of fact for substantial evidence and the trial court's conclusions of law are reviewed *de novo*. *State v. Fuentes*, 183 Wn2d 149, 157, 352 P.3d 152 (2015). Substantial evidence is evidence sufficient to persuade a fair-minded rational person of the finding's truth. *State v. Solomon*, 114 Wn.App. 781, 789, 60 P.3d 1215 (2002). A trial court's findings of

fact of fact will be reversed if not supported by substantial evidence.

Miles v. Miles, 128 Wn.App. 64,71,114 P.3d 671 (2005).

The State urges this Court to find that undisputed fact 60¹ is supported by substantial evidence while conceding the words “knives” and “brass knuckles” are nowhere in the record. (Br. Of Resp. at 11-12). The State contends the vague statement “things of that nature” should be extrapolated by this Court to mean knives and brass knuckles.

Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a rational, fair-minded person of the truth in the finding. *State v. Halstien*, 122 Wn.2d 109, 129, 857 P.2d 270 (1993). The evidence is not sufficient to persuade a fair-minded person of the truth of the finding because there is nothing in the record to support the finding.

The State has not answered the second assignment of error in appellant’s opening brief: substantial evidence does not support finding of fact 61: “Officer Grabski believed, based on his training and experience, that given the defendant’s behavior of reaching towards the driver’s floorboard of his vehicle during the initial

¹ “Officer Grabski knows, based on his training and experience, that offenders will keep weapons such as knives, guns, and brass knuckles on or near their persons”. CP 254.

struggle, there was possibly a weapon the defendant was prohibited from possessing in that location”. CP 254. As discussed in appellant’s opening brief, Officer Grabski testified he was *not* thinking there was a weapon on the floorboard of the car. RP 41. The finding is not based on substantial evidence and the State has not presented argument otherwise.

B. The Search of The Vehicle Was Unlawful Because There Was Not A Sufficient Nexus Between The Probation Violation Of Failure To Report And The Search of The Vehicle.

In its response brief, the State contends the search of Belanger’s vehicle was lawful. The State makes the same argument made by the dissent and rejected by the majority in *State v. Cornwell*, 190 Wn.2d 296, 302, 306, 412 P.3d 1265 (2018).

In *Cornwell*, the dissent cited the fact Cornwell ignored officer’s directives to stay in the car, disobeyed the instruction to get on the ground, and his flight from the police as additional bases for a search of Cornwell’s car. *Id.* at 308. The dissent also pointed to the large amount of cash recovered from Cornwell’s person, and officer knowledge that the car he drove had been

seen at a known drug house, as objective evidence to establish “reasonable cause to believe that Cornwell had violated the condition of his probation that prohibited his possession of controlled substances.” *Id.* at 308-309.

The *Cornwell* majority declined to adopt such reasoning. Instead, the Court held there must not be a “fishing expedition” to look for further violations of probation; to do otherwise violated Article I, s.7 of the Washington Constitution. *Cornwell*, 190 Wn.2d at 307.

The State also attempts to distinguish *Cornwell* from the current case by stating, “There was no allegation that Cornwell actively fought with law enforcement, unlike the defendant.” (Br. Of Resp. at 15). The State mischaracterized the evidence admitted at the suppression hearing. Grabski specifically testified:

He kept trying to stand up. He wanted to get away. **He wasn't fighting with us, throwing punches at us, or anything crazy like that**, but he just did not want to be there. He was trying to do anything possible to get away from there.

RP 43.

Q. And how would you compare the struggle with the defendant as to the struggles with other individuals? Was it more violent? Less violent? About the same?

A. I have had more violent -- my concern was him reaching, you know. I want to get him into custody. **He wasn't**

throwing punches or elbows or anything. He was just fighting in the sense that I do not want to be taken into custody. You are not doing this. You are not going peacefully.

RP 43.

The defendant in *Cornwell*, made similar attempts to flee from officers as Mr. Belanger did². Our Supreme Court did not find the attempts to flee, or not be taken into custody were of any relevance in the analysis of whether the vehicle search was a lawful one. Nor should Mr. Belanger's flailing and wiggling around be considered as relevant in whether the search was a lawful one.

The State cites to pre-*Gant* cases to legitimize the unlawful search. (Br. Of Resp, at 15-16). As argued in appellant's opening brief, an automobile search incident to arrest exception to the Fourth Amendment's warrant requirement applies only when an arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search and when it is reasonable to believe evidence relevant to the crime of arrest

² At trial, CCO Supervisor Poston stated:
"Basically, he was flailing back and forth quite a bit at the time. He was going down, and then he's come up...**He was just flailing. He wasn't striking us or anything like that.**"

RP 697.

might be found in the car. *Arizona v. Gant*, 556 U.S. 332, 12 S.Ct. 1710, 173 L.Ed.2d 485 (2009). That is not the case here.

Once an arrestee is secured and removed from the automobile, he poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile. The arrestee's presence does not justify a warrantless search under the search incident to arrest exception. *State v. Valdez*, 167 Wn.2d 761,777, 224 P.3d 751 (2009). There is no "automobile exception" recognized under article I, § 7. *State v. Snapp*, 174 Wn.2d 177,192, 275 P.3d 289 (2012).

Lastly, the State's response brief added a rationalization which was not considered by the officers or the trial court: "The defendant's furtive movements give rise to additional suspicion." (Br. Of Resp. at 16). A dictionary definition of "furtive" means "done in a quiet and secretive way to avoid being noticed"³. The reports from the officers at the suppression hearing was that Mr. Belanger was wiggling around in the car, attempting to avoid being removed from it and arrested. His movements were not furtive and

³ Merriam-Webster online dictionary, <https://www.merriam-webster.com/dictionary/furtive>

do not rise to the level of providing additional suspicion to legitimize a warrantless car search.

The trial court wrongfully denied the motion to suppress.

The convictions must be reversed and dismissed with prejudice.

C. The State Failed To Prove Belanger Was Armed With a Firearm For Each Of The Four Sentence Enhancements Imposed By The Court.

For purposes of a firearm enhancement, mere proximity to or constructive possession of a firearm is insufficient to show that the defendant was armed when the crime was committed. *State v. Schelin*, 147 Wn.2d 562, 567, 55 P.3d 632 (2002). To establish a defendant was armed the State must prove (1) the firearm was easily accessible and readily available for offensive or defensive purposes during the commission of the crime, and (2) a nexus exists between the defendant, the weapon and the crime. *State v. Eckenrode* 159 Wn.2d 488, 493, 150 P3d 1116 (2007).

In applying the nexus requirement, the Court must examine the nature of the crime, the weapon, and the circumstances under which the weapon is found (e.g., whether in the open, in a locked or unlocked container, in a closet on a shelf, or in a drawer.)

Schelin, 147 Wn.2d at 570; *State v. Ague-Masters*, 138 Wn.App. 86, 104, 156 P.3d 265 (2007).

Here, two weapons were retrieved from Mr. Belanger's car. The first was in a safe, which officers collectively could not remember if it was locked or unlocked. RP 49, 60, 118. The second weapon was found inside of a backpack in the backseat. RP 62. One officer testified he himself had long arms, so he could reach it, but did not know or think Mr. Belanger could have reached it. RP 673. There was nothing in the record to determine whether the backpack was unzipped at the time it was seized, and the backpack was not entered as evidence. CP 106-108.

As argued in appellant's opening brief, this case is factually similar to *State v. Gurske*, 155 Wn.2d 134, 118 P.3d 333 (2005). There, the firearm was close in proximity to the defendant, as it was in a zippered backpack behind the driver's seat. The gun was not easily accessible. The Court found there was no evidence that Gurske had used or had easy access to use the weapon against another when he acquired or was in possession of methamphetamine. *Id.* at 143.

The nexus requirement between the weapon and the commission of the crime "serves to place 'parameters ...on the

determination of when a defendant is armed, especially in the instance of a continuing crime such as constructive possession' of drugs." *Gurske*, 155 Wn.2d at 140.

Gurske and *Van Elsloo* stand for the principle that a weapon being in close proximity is not the same as a weapon being easily accessible for use. In *State v. Van Elsloo*, 191 Wn.2d 798, 425 P.3d 807 (2018), officers arrested the defendant, who sold drugs from his vehicle. The State argues that "[T]he Court in *Van Elsloo* upheld the firearm enhancements and specifically found that the firearms in that case were easily accessible and readily available." (Br. of Resp. at 20).

However, careful reading of *Van Elsloo* shows that officers recovered three guns in that search: a revolver, a semiautomatic handgun, and a loaded shotgun. The revolver and handgun were found in a safe. The loaded shotgun, which was the subject of the firearm enhancement was found near the passenger seat, angled in such a way as to make it easy for someone entering the car to grab it. *Id.* at 826. The Court distinguished the firearm enhancement for possession of the shotgun from the "revolver and semiautomatic handgun **which were not the subjects of the firearm enhancements.**" *Id.* at 830.

Based on the facts and circumstances of this case, the trial court erred when it denied Belanger's motion to dismiss because the evidence was insufficient to sustain the firearm enhancements. Without the nexus between Belanger, the guns, and the crime, the firearm enhancements must be dismissed. See *Gurske*, 155 Wn.2d at 138, 144.

D. The Trial Court Abused Its Discretion When It Doubled The Maximum Sentence Length For the Unlawful Possession With Intent To Deliver Controlled Substances Because The Practical Effect Was To Impose A Clearly Excessive 20 Years' Time For Firearm Enhancements.

RCW 69.50.408 authorizes a trial court to exercise its discretion to double the maximum incarceration term for individuals who have been convicted of a second or subsequent offense. *State v. Mayer*, 120 Wn.App. 720, 86 P.3d 217 (2004). A judge is not required to impose a doubled sentence, but the option is available. *State v. Roy*, 147 Wn.App. 309, 315, 195 P.3d 967 (2008).

Here, the trial court sentenced Mr. Belanger to 100 months for the drug offenses, the lowest end of the standard range. CP 227. However, because the court agreed to double the maximum statutory for the drug offenses, it was then automatically authorized

to impose 60 months for each firearm enhancement rather than the statutorily authorized 36 months for a Class B felony. RP 894-895. The effect of doubling the maximum sentence for the drug offenses was to sentence Mr. Belanger to an additional 20 years of flat time. CP 230.

The State contends in its response brief that because Mr. Belanger had a prior qualifying drug offense, the court had discretion to double the statutory maximum. (Br. Of Resp. at 25). This is correct. However, where the court abused its discretion in imposing the doubler option, is overlooking one of the primary purposes of The Sentencing Reform Act: to ensure that punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history. RCW 9.94A.010(1). The practical effect of imposing the doubler was to increase the firearm enhancements to 60 months each.

In *State v. McFarland*, 189 Wn.2d 47, 399 P.3d 1106 (2017), the Court held that "in a case in which standard range consecutive sentencing for multiple firearm- related convictions 'results in a presumptive sentence that is clearly excessive in light of the purpose of [the SRA],' a sentencing court has discretion to impose an exceptional, mitigated sentence by imposing concurrent firearm-

related sentencings.” *Id.* at 55; RCW 9.94A.535(1)(g). The concept of clearly excessive was addressed in appellant’s opening brief under the Hard Time for Armed Crime discussion. (Br. Of App. at 31-32).

At the sentencing hearing, defense counsel argued exactly that point, requesting the court to consider imposing an exceptional downward sentence on the firearm enhancements because the punishment was unjust. RP 903. The court’s reasoning in doubling and not allowing the firearm enhancements to be limited to 36 months each, or to run concurrently was because of Mr. Belanger’s prior criminal history. RP 913-14.

Mr. Belanger has a criminal history. CP 226. His prior drug convictions were a 2006 conviction for unlawful possession of a controlled substance with intent to deliver, and a 2014 unlawful possession of a controlled substance. He has no prior firearm convictions. The harsh 30-year sentence for non-violent crimes is disproportionate to his crimes, most significantly because 20 years of the sentence is ineligible for goodtime credit.

The court expressed its regret at imposition of the 356 month stating it was “an awfully heavy sentence” but imposed it because Mr. Belanger needed structure because he appeared to resist

authority. RP 914. Needing structure and appearing to resist authority are not a reasonable basis to exercise discretion to double the statutory maximum and impose 20 years of firearm enhancements in non-homicide, non-assault crimes.

A trial court abuses its discretion when it relies on unsupported facts, takes a view that no reasonable person would take, applies an incorrect legal standard, or bases its ruling on an erroneous legal view. *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). Punishing Mr. Belanger with 20 years of firearm enhancements is excessive in light of the SRA, the nature of the crimes, and his criminal history. It is an abuse of discretion, as no reasonable person would, under these facts, take the view that he should be incarcerated for 20 years beyond his base sentence.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Belanger respectfully asks this Court to reverse the convictions based on an illegal search of the vehicle and an insufficiency of the evidence for the firearm enhancements. In the alternative, he asks this Court to remand with instructions to sentence him within the standard range for a Class B felony, and reduce the firearm enhancements to 36

months from 60 months and run them concurrently.

Respectfully submitted this 15th day of April 2019.

A handwritten signature in black ink that reads "Marie Trombley". The signature is written in a cursive style and is enclosed within a thin black rectangular border.

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on April 15, 2019, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Pierce County Prosecuting Attorney at pcpatcecf@co.pierce.wa.us and to Jake Belanger/DOC#895545 Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.



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