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Division II
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NO. 51464-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH ETHEREDGE,

Appellant.

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

The Honorable John C. Skinder, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State failed to prove that appellant was armed with a deadly weapon.

2. Trial counsel's failure to object to irrelevant and highly prejudicial propensity evidence denied appellant effective assistance of counsel.

Issues pertaining to assignments of error

1. Appellant was found with a knife when he was arrested for first degree robbery, and the State alleged he was armed with a deadly weapon during the commission of the crime. Where there was no evidence he used or threatened to use the knife to commit the crime, and instead the undisputed evidence shows that he never displayed the knife, referred to it, gestured toward it, or gave any indication that he had it, must the deadly weapon sentence enhancement be vacated?

2. The State alleged that appellant committed the charged offense shortly after being released from incarceration, and his community corrections officer was called to testify to the date of release. The officer also testified, without objection from the defense, regarding appellant's noncompliance with community custody conditions. Where this propensity evidence served no legitimate purpose, an objection would

have been sustained, and the testimony likely affected the jury's verdict, did trial counsel's failure to object constitute ineffective assistance of counsel?

B. STATEMENT OF THE CASE

On November 6, 2017, Kenneth Etheredge walked into the Olympia Branch of US Bank, stopped briefly at the check-writing stand, then approached the next available teller. RP 56-58. He handed her a note that said "Robbery. Large bill. No alarm. 30 sec." RP 65, 68. The teller handed Etheredge some money from her top drawer as well as a GPS tracking device, and 20 seconds later Etheredge was back outside. RP 68-69, 71, 100. He did not say anything to the teller, he seemed uncomfortable and nervous rather than angry or aggressive, and he did nothing to indicate he had a weapon. RP 62, 66, 96-97, 127-28. When Etheredge was located via the tracking device less than ten minutes later, police found a fixed blade knife in the waistband of his pants. RP 160, 202, 209, 255, 260. Etheredge was charged with first degree robbery and second degree theft, with deadly weapon allegations on both counts. CP 2-3.

The State also alleged that the offenses were aggravated in that Etheredge committed them shortly after being released from incarceration.

CP 2-3. Etheredge told police in a taped statement after his arrest that he had been released from prison two days earlier and he committed the crime because he needed money. RP 27, 300, 302, 305. The defense agreed that Etheredge's statement was admissible, that those facts were part of the story the defense would present, and that there was no need to bifurcate the recidivism issue from the charges for trial. RP 28-29, 38. A Department of Corrections community corrections officer was therefore called to testify that Etheredge had been released from prison two days before the charged incident. RP 367.

In addition, the CCO testified that upon release offenders are required to report for a supervision intake within 24 hours, but Etheredge had not reported as required. RP 367-68. In fact, although he conducts the community custody intakes for Cowlitz County, and Etheredge was under supervision with his office prior to his most recent term of incarceration, the CCO had never met Etheredge in person before. RP 368-69. And finally, when the prosecutor asked whether a person on community custody is allowed to carry a fixed blade knife, the CCO answered, "Absolutely not." RP 368.

The prosecutor reminded the jury of that testimony during his closing argument, using it to argue that Etheredge had the knife available

to use if the teller did not cooperate and he was therefore armed with a deadly weapon:

> Who decided to bring the knife to the crime? He did. He got to make all the decisions in this case, didn't he? He brought the knife. Guess what? He's not supposed to have a knife. He just got out of prison. He's not a good rule-follower as you already heard.

RP 451. The prosecutor continued with this theme in rebuttal, pointing out that not only did Etheredge fail to report for community custody as required after his recent release from prison, but he also failed to report the last time he was on community custody. RP 472. The prosecutor argued, "What does that say? It says Mr. Etheredge does what he wants, right? He doesn't want to play by society's rules." RP 472. Defense counsel did not object to either the CCO's testimony or the prosecutor's use of that testimony in closing argument.

C. ARGUMENT

1. THE EVIDENCE FAILS TO ESTABLISH THAT ETHEREDGE WAS ARMED, AND THE DEADLY WEAPON ENHANCEMENT MUST BE VACATED.

A criminal defendant's sentence may be enhanced if a special allegation is made and the jury finds beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime. RCW 9.94A.825; RCW 9.94A.533(4). The jury in this case found by special verdict that Etheredge was armed with a deadly weapon,

and the court imposed a deadly weapon sentence enhancement. CP 141-42, 163.

The term "armed" is not defined by statute, but after much consideration, the Washington Supreme Court has developed a two pronged approach for determining whether a defendant was armed: "The weapon must have been readily accessible and easily available, and there must have been some connection between the defendant, the weapon, and the crime." *State v. Easterlin*, 159 Wn.2d 203, 205, 149 P.3d 366 (2006). The mere presence and access to a weapon is insufficient to establish that a defendant is armed. *State v. Schelin*, 147 Wn.2d 562, 568, 55 P.3d 632 (2002). Rather, the State must also show a nexus between the weapon and the defendant and between the weapon and the crime. *Id*.; *State v. Brown*, 162 Wn.2d 422, 430, 432, 173 P.3d 245 (2007).

While this question has mostly been addressed in the context of constructive possession, the Supreme Court has rejected the notion that the defendant is necessarily armed whenever there is actual possession. *Eaterlin*, 159 Wn.2d at 209. Although the State will rarely have to show more than actual possession to establish the necessary nexus, the Court recognized that in some cases, a defendant in actual possession may not be armed as required for a sentence enhancement. *Id*. Even when the defendant is in actual possession of a weapon, the evidence must support

an inference of a connection between the weapon, the crime, and the defendant. *Id*. at 210.

When the evidence fails to establish this nexus, the court cannot impose a weapon enhancement. For example, in *Brown*, the defendants moved a rifle from a closet to a bed during a burglary but then fled the home empty-handed when the homeowner returned unexpectedly. *Brown*, 162 Wn.2d at 426. The Supreme Court concluded that the evidence was insufficient to establish that the defendant was armed, since there was no nexus between the firearm, the defendant, and the crime. *Id*. at 423, 435.

The Court recognized that "the mere presence of a deadly weapon at the scene of the crime, mere close proximity of the weapon to the defendant, or constructive possession alone is insufficient to show that the defendant is armed." *Id*. at 431 (citing *State v. Barnes*, 153 Wn.2d 378, 383, 103 P.3d 1219 (2005); *Schelin*, 147 Wn.2d at 567; *State v. Gurske*, 155 Wn.2d 134, 138, 118 P.3d 333 (2005)). Rather, a person is armed only if the deadly weapon is easily accessible and readily available for use, and "there must be a nexus between the defendant, the crime, and the weapon." *Brown*, 162 Wn.2d at 431. For this nexus to exist, there must be evidence of the defendant's or an accomplice's intent or willingness to use the weapon in furtherance of the crime. *Id*. at 432, 434.

The Court specifically rejected the idea that any actual possession of the weapon during the crime necessarily establishes a nexus. It is not enough simply to show that the weapon was accessible. Thus, the fact that Brown or an accomplice moved the rifle to the bed in preparation for stealing did not establish that Brown was armed. *Id*. at 432-33. Because the facts suggested that "the weapon was merely loot, and not there to be used," the fact that the weapon was briefly in the burglar's possession did not make Brown armed. *Id*. at 434-35. Brown makes it clear that actual possession of a weapon at the scene of the crime is not enough to establish that the defendant was armed. There must be a nexus between the defendant, the weapon, and the circumstances of the crime which establishes an intent or willingness to use the weapon in the commission of the crime. *Id*.

Without a nexus between the crime and the weapon, courts run the risk of punishing the defendant under a deadly weapon enhancement for having a weapon unrelated to the crime. *State v. Willis*, 153 Wn.2d 366, 372, 103 P.3d 1213 (2005) (citing *State v. Johnson*, 94 Wn. App. 882, 895, 974 P.2d 855 (1999)). Merely showing that a weapon was readily available to the defendant does not tie that weapon to the crime. *Schelin*, 147 Wn.2d at 570. If the weapon is not actually used in the commission

of the crime, the evidence must establish that it was there to be used. *Gurske*, 155 Wn.2d at 138.

In this case, the State failed to establish a nexus between the knife in Etheredge's possession at the time of his arrest and the robbery charge. Although the evidence would support an inference that Etheredge had the knife with him in the bank, it is undisputed that he never displayed the knife, referred to it, gestured toward it, or gave any indication that he had it. RP 96-97, 112, 127-28. The teller reported to 911 that no weapons were involved. RP 112.

The knife was not actually used in the commission of the crime, nor does the evidence establish that it was there to be used. The detective who interviewed Etheredge testified that there was no evidence Etheredge used the knife inside the bank and no evidence he intended to use it. RP 326. One of the things he was hoping to learn from Etheredge during the interview was what he intended to do with the knife. Etheredge responded that he had planned to cut his outer pants off afterwards and throw them away so that he would not be recognized. RP 307, 329. The evidence fails to establish any intent or willingness on Etheredge's part to use the knife in the commission of the robbery.

At most the State proved that the knife was present at the time of the offense. But the mere presence of the weapon, without a nexus

between the weapon and the crime, is insufficient to establish that Etheredge was armed. The deadly weapon enhancement therefore must be vacated.

2. TRIAL COUNSEL'S FAILURE TO OBJECT TO IRRELEVANT AND HIGHLY PREJUDICIAL PROPENSITY EVIDENCE CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment to the United States Constitution guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." U.S. Const. amend. VI. The Washington State Constitution similarly provides "[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...." Wash. Const. art. I, § 22 (amend.10). This constitutionally guaranteed right to counsel is not merely a simple right to have counsel appointed; it is a substantive right to meaningful representation. *See Evitts v. Lucey*, 469 U.S. 387, 395, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) ("Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits."); *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ("The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to

counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled.") (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435 (1942)) .

A defendant is denied his right to effective representation when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (citing *Strickland*, 466 U.S. at 687-88), *cert. denied*, 510 U.S. 944 (1993). Only legitimate trial strategy or tactics constitute reasonable performance. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

In this case, trial counsel's failure to object to irrelevant and highly prejudicial testimony by the community corrections officer, and the prosecutor's use of that testimony in closing argument, constituted deficient performance which prejudiced the defense. Where a defendant claims ineffective assistance of counsel based on counsel's failure to challenge the admission of evidence, the defendant must show (1) the absence of a legitimate strategic reason for failing to object, (2) that an objection to the evidence would likely have been sustained, and (3) that the result of the trial would have been different had the evidence not been

admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (citing *State v. McFarland*, 127 Wn.2d 322, 336-37, 899 P.2d 1251 (1995); *State v. Hendrickson*, 129 Wn.2d 61, 80, 917 P.2d 563 (1996)).

In *Saunders*, the defendant was charged with possession of methamphetamine and heroin. He testified at trial, and defense counsel elicited on direct examination that he had a prior conviction for possession of methamphetamine. *Saunders*, 91 Wn. App. at 578. On appeal this Court held that trial counsel was ineffective. First, there was no strategic or tactical reason to offer the evidence. *Id*. at 578-79. The evidence had not been ruled admissible pretrial, and there was no reason not to object to such damaging evidence if offered by the State. Second, evidence of the prior conviction would have been ruled inadmissible if challenged, since it was not probative of credibility and it was inherently prejudicial, as it tended to shift the jury's focus from the merits of the charge to the defendant's general propensity for criminality. *Id*. at 579-80. Finally, the error was prejudicial in light of the fact that the evidence against the defendant was not overwhelming. *Id*. at 580-81.

Here, as well, there was no legitimate strategic reason for trial counsel's failure to object to irrelevant and inherently prejudicial evidence. Although there had been agreement by the parties that there was no need to bifurcate the trial for separate consideration of guilt and

recidivism, and therefore the CCO could testify at trial as to Etheredge's release date, the court had not ruled that additional testimony about Etheredge's supervision history was admissible. RP 28-29, 38. Testimony from the CCO that Etheredge violated the terms of supervision by failing to report, both after his most recent incarceration and during his previous term of supervision, and by carrying a fixed blade knife could not benefit the defense in any way. RP 367-69.

Moreover, the testimony could not legitimately be introduced at trial because it was irrelevant to the issues before the jury. It did not establish any element of the charged offenses or the deadly weapon allegations. Nor did it establish that Etheredge had recently been released from confinement, the sole purpose for which the witness was called. An objection to this testimony most certainly would have been sustained. ER 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); ER 402 ("Evidence which is not relevant is not admissible.").

Finally, there is a reasonable probability that the outcome of the trial was affected. Introduction of evidence of Etheredge's noncompliance with conditions of supervision served only to focus the jury away from the merits of the charge to Etheredge's propensity for criminality. And the

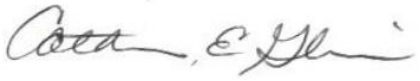
prosecutor encouraged this focus in closing argument, reminding the jury that Etheredge does not play by society's rules. RP 451, 472. In order to convict Etheredge and impose a deadly weapon enhancement, the State had to prove Etheredge used or threatened force or fear of injury and that he was armed with a deadly weapon during the commission of the offense. RCW 9A.56.200(1)(b); RCW 9.94A.825. The State's case was not overwhelming on this issue. In fact, the evidence showed that Etheredge never used, displayed, mentioned, or indicated he was carrying a weapon when he was in the bank. RP 96-97, 112, 127-28. There is a reasonably probability that the jury was swayed by testimony and argument about Etheredge's criminal propensity and convicted him despite the lack of evidence that he was armed. Counsel's failure to object to this damaging testimony constitutes ineffective assistance of counsel, and Etheredge is entitled to a new trial.

D. CONCLUSION

The State failed to establish that Etheredge was armed with a deadly weapon during the commission of the crime, and the deadly weapon sentence enhancement must be vacated.

DATED August 22, 2018.

Respectfully submitted,



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Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant in *State v. Kenneth Etheredge,* Cause No. 51464-8-II as follows:

Kenneth Etheredge DOC# 278562
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

_____
Catherine E. Glinski
Done in Manchester, WA
August 22, 2018

GLINSKI LAW FIRM PLLC

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