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Division II
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COA No. 53171-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRANDON RYAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY

The Honorable KITTY-ANN van DOORNINCK

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR 1

C. STATEMENT OF THE CASE..... 4

 1. Arrest and trial. 4

 2. Charges and sentencing. 8

D. ARGUMENT 9

 1. The evidence was insufficient to prove possession of methamphetamine with intent to deliver, rather than mere simple possession. 9

 2. The evidence was insufficient to enter judgment on the jury’s answer of “yes” to the special allegation that Mr. Ryan was armed with a firearm. 15

 (a). *A jury’s finding that a person is “armed” with a firearm requires more than mere proximity to the gun at the time of the offense.* 16

 (b). *There was also no “nexus.”* 19

 (c). *Reversal and dismissal are required.* 22

 3. Detective Hotz opined on the defendant’s guilt, running afoul of the defense objection that no expert testimony was necessary under ER 702, and that Mr. Ryan had a constitutional right to have the facts and the question of guilt determined solely by the jury. 23

E. CONCLUSION 33

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>State v. Ague-Masters</u> , 138 Wn. App. 86, 156 P.3d 265 (2007)	21
<u>State v. Avendano-Lopez</u> , 79 Wn. App. 706, 904 P.2d 324 (1995) . .	26
<u>State v. Black</u> , 109 Wn.2d 336, 745 P.2d 12 (1987).	27
<u>State v. Blackwell</u> , No. 51096-1-II, 2019 WL 2809132 (Wash. Ct. App. July 2, 2019)	22
<u>State v. Brown</u> , 162 Wn.2d 422, 173 P.3d 245 (2007).	19,20
<u>State v. Brown</u> , 68 Wn. App. 480, 842 P.2d 1098 (1993).	15
<u>State v Campos</u> , 100 Wn. App. 218, 998 P.2d 893, <u>review denied</u> , 142 Wn.2d 1006 (2000).	11
<u>State v. Carlin</u> , 40 Wn. App. 698, 700 P.2d 323 (1985).	23
<u>State v. Cobelli</u> , 56 Wn. App. 921, 788 P.2d 1081 (1989)	14
<u>State v. Cruz</u> , 77 Wn. App. 811, 894 P.2d 573 (1995).	25,26
<u>State v. Darden</u> , 145 Wn.2d 612, 41 P.3d 1189 (2002).	10
<u>State v. Demery</u> , 144 Wn.2d 753, 30 P.3d 1278 (2001).	23
<u>State v. Eckenrode</u> , 159 Wn.2d 488, 150 P.3d 1116 (2007). . .	16,17,18
<u>State v. Farr-Lenzini</u> , 93 Wn. App. 453, 970 P.2d 313 (1999)	28
<u>State v. Goodman</u> , 150 Wn.2d 774, 83 P.3d 410 (2004)	11,12
<u>State v. Gurske</u> , 155 Wn.2d 134, 118 P.3d 333 (2005)	16,17
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).	9
<u>State v. Haga</u> , 8 Wn. App. 481, 507 P.2d 159, <u>review denied</u> , 82 Wn.2d 1006 (1973).	24
<u>State v. Harris</u> , 14 Wn. App. 414, 542 P.2d 122 (1975).	10,13
<u>State v. Hutchins</u> , 73 Wn. App. 211, 868 P.2d 196 (1994).	10
<u>State v. Kirkman</u> , 159 Wn.2d 918, 936, 155 P.3d 125 (2007).	31
<u>State v. Montgomery</u> , 163 Wn.2d 577, 183 P.3d 267 (2008).	29
<u>State v. Neff</u> , 163 Wn.2d 453, 181 P.3d 819 (2008)	16
<u>State v. Notaro</u> , 161 Wn. App. 654, 255 P.3d 774 (2011).	24
<u>State v. O’Neal</u> , 159 Wn.2d 500, 150 P.3d 1121 (2007)	21
<u>State v. Quaale</u> , 182 Wn.2d 191, 340 P.3d 213 (2014)	23
<u>State v. Sanders</u> , 66 Wn. App. 380, 832 P.2d 1326 (1992)	23,26
<u>State v. Sassen Van Elsloo</u> , 191 Wn.2d 798, 425 P.3d 807 (2018).17,20	
<u>State v. Smissaert</u> , 41 Wn. App. 813, 706 P.2d 647 (1985)	28
<u>State v. Strandy</u> , 49 Wn. App. 537, 745 P.2d 43 (1987), <u>review denied</u> , 109 Wn.2d 1027 (1988).	26
<u>State v. Schelin</u> , 147 Wn.2d 562, 55 P.3d 632 (2002).	20
<u>State v. Thomas</u> , 68 Wn. App. 268, 843 P.2d 540 (1992), <u>review denied</u> , 123 Wn.2d 1028 (1994)	12

<u>State v. Thompson</u> , 90 Wn. App. 41, 950 P.2d 977 (1998)	23
<u>State v. Zunker</u> , 112 Wn. App. 130, 48 P.3d 344 (2002), <u>review denied</u> , 148 Wn.2d 1012, 62 P.3d 890 (2003)	10

UNITED STATES SUPREME COURT CASES

<u>Burks v. United States</u> , 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).	15
<u>Chapman v. California</u> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)	31
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)	9,15
<u>Tibbs v. Florida</u> , 457 U.S. 31, 102 S.Ct. 2211, 2217, 72 L.Ed.2d 652 (1982)	15

CASES FROM OTHER STATE JURISDICTIONS

<u>State v. Vilalastra</u> , 207 Conn. 35, 540 A.2d 42, 47 (1988)	30
---	----

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. Const. amends. VI	9,23
U.S. Const. amends. XIV	9
Const. art. I § 3.	9
Const. art. I § 22.	9
RCW 9.94A.533(3)	15,23
RCW 9.41.010	15
RCW 69.50.401(1)(2)(b).	9
ER 702	27

TREATISES

5A K. <u>Tegland, Wash. Prac., Evidence</u> (3d ed.1989)	27
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A. ASSIGNMENTS OF ERROR

1. In Brandon Ryan's trial on charges of possession of methamphetamine with intent to deliver, and unlawful possession of a firearm by a felon, the evidence was insufficient to prove possession of methamphetamine with intent to deliver.

2. The evidence was insufficient to prove that Mr. Ryan was "armed" with a firearm while in commission of the methamphetamine offense.

3. The trial court abused its discretion in allowing the testimony of Detective Jesse Hotz, who had no involvement in the case, to testify as a drug and gun crime expert under ER 702 and in violation of the Sixth Amendment.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Sheriff's deputies, driving an unmarked car, saw Mr. Ryan leaning into the passenger side window of a Dodge Durango in a Fred Meyer parking lot at 7 a.m. in the morning. The deputies believed that Ryan had conducted a hand-to-hand transaction with the driver of the Dodge, although they saw nothing in anyone's hands at any time. The deputies testified that Ryan appeared startled or shocked to see their car; he then

walked quickly to a Chevy Blazer parked nearby and entered the front passenger side. Upon arresting Mr. Ryan, the deputies saw two safes in the Chevy. One was in the console area between the front seats, and one was behind the front passenger seat.

In a warrant search of the first safe, which had a combination lock, the Sheriff's Office located 38 grams of methamphetamine, a digital scale, and multiple small plastic baggies, two of which had small amounts of methamphetamine inside. Also located in the safe was a spoon with both black and white residue on it, that could be used for 'free-basing' drugs including heroin, and was thus indicative of use of a non-methamphetamine substance. Various law enforcement witnesses also stated that persons who deliver drugs generally receive money in exchange. Yet no money, whatsoever, was found anywhere. Was the evidence insufficient?

2. In the second safe, a Honeywell key-lock type which was found behind the front passenger seat, the deputies located a 9mm handgun, a magazine, and 9mm ammunition. No key was ever located or admitted. The defendant, if he did possess

and then deliver drugs to a Dodge twenty-five yards away, certainly did not do so with a gun reasonably available or at the ready. Was the evidence insufficient to prove that Mr. Ryan was “armed” during the commission, if any, of the drug offense, under the requirements for being armed, including, *inter alia*, accessibility of the firearm, and the “nexus” requirements, where the gun was in a locked safe, for which the defendant had no key, in a discrete, different location from the locked-up drugs, and played no part in the crime of delivery or possession of drugs but was merely constructively possessed, albeit unlawfully, by a person who was committing another offense?

3. Did the trial court abuse its discretion in allowing Detective Jesse Hotz, who had no involvement in the case, to testify as an expert that drug possessors who carry certain items have the intent to sell, and to testify that drug possessors carry firearms for use in, and as part of, intended crimes of delivery, overruling the defense objection that no specialized expert testimony was necessary under ER 702 and that Hotz’s testimony violated the Sixth Amendment, invading the province

of the jury by opining on Mr. Ryan's guilt, requiring reversal of the drug conviction and reversal of the firearm enhancement?

C. STATEMENT OF THE CASE

1. Arrest and trial.

On June 20, 2017, Pierce County Sheriff's deputies Jason Bray and Seth Huber entered a Fred Meyer parking lot at around 7 am. While driving through the lot in their unmarked car, they observed Brandon Ryan, who they recognized. 3RP 196-97. The Deputies suspected, and then confirmed, that Ryan had a DOC arrest warrant. 3RP 204-08 (the jury was told merely that Mr. Ryan was arrested in connection with an independent investigation).

At the time, Mr. Ryan was allegedly leaning into the passenger side window of a Dodge Durango. He appeared to make a "hand-to-hand instruction" with the Dodge's driver. 3RP 201. Deputy Bray felt that Mr. Ryan seemed "shocked" to see the deputies driving by, after he moved away from the Dodge's window. 3RP 196-97. Bray stated that he "felt like somebody had said the police were coming, they saw us." 3RP 197. Mr. Ryan then walked briskly about twenty-five yards to a red

Chevy Blazer, and entered the front passenger side door. 1RP 197, 203.

Deputy Bray asserted that he had observed a hand-to-hand transacted drug deal, which he said was “pretty common” at stores. 3RP 201. He repeatedly stated that he had observed a “transaction,” although the deputies did not see what, if anything, was being exchanged. 3RP 198, 199, 201, 202.

Deputy Seth Huber drafted a search warrant after Mr. Ryan’s arrest and after speaking with the driver, Ms. Kelsey Kittleson, who was Ryan’s long-time girlfriend. Mr. Ryan was handcuffed and transported to the Pierce County Jail. 3RP 204-08.

The search warrant, for “firearms and narcotics,” was issued, authorizing a search of the Chevy including two (2) safes seen inside the vehicle. 3RP 210. In the first safe, which was combination-operated and was located between the two front seats, methamphetamine was found, along with a digital scale, which Deputy Bray said was something commonly used in narcotics transactions. Two packages, and “a bunch of empty

baggies,” were also inside this safe. 3RP 212-15, 302; Exhibits 15, 16, 17, 18, 27, 29 (exhibits/photographs).¹

The plastic bags of methamphetamine included a large bag containing approximately 38 grams of the drug, and two small bags, one containing 0.3 and one containing 1.8 grams of methamphetamine. 3RP 223-25; see also 3RP 262, 273-74 (testimony of laboratory analyst Martin McDermot); Exhibits 28A, 28B. Deputy Bray opined that the digital scale from the first safe appeared to have “maybe some brown residue on it.” 3RP 220.

A second safe - a black Honeywell safe with a key-type lock - was located in the back seat of the Chevy, within arm’s reach of the front passenger seat. It contained a 9mm handgun, which was a type that Deputy Bray had “seen in your [his, Bray’s] many years of experience dealing with narcotics investigations.” 3RP 215-17, 230-32, 302; Exhibits 19, 20, 21,

¹ This briefing notes the exhibit numbers of multiple trial exhibits including photographs/documents, and also drug evidence and firearm evidence. The photographs/documents, and testimony, adequately attest to the firearm and drug evidence; only exhibits which are non-contraband have been designated for purposes of transfer from the Superior Court to the Court of Appeals. See RAP 9.8(b).

22, 24, 25, 27, 32, 34; see 3RP 292-99 (testimony of firearms examiner, stating that gun was operable but neither it nor the associated ammunition/case had any fingerprints of the defendant).

There were pry marks on the door of the Honeywell safe when Deputy Bray logged it into evidence, and he noted that the safe would have been breached in this manner if the Sheriff's Office had no way to open it. 3RP 248, 249. Also located inside the Honeywell were a holster, a magazine, and several 9mm bullets. 3RP 216-18, 226-29; Exhibits 28, 31, 33, 35, 36. Mr. Ryan was not found to have any safe key on him, and no safe key was otherwise found in the search of the Chevy. 3RP 247-48.

The Washington State Patrol Crime Laboratory tested for, but detected no fingerprints of Mr. Ryan on either of the safes - not the key-locked Honeywell that contained the gun and related items, nor the combination safe that contained the drug items. 3RP 302-04. The Honeywell safe containing the firearm and firearm-related items was also tested for DNA, because that particular safe was deemed a "high priority" piece of

evidence. 3RP 313. Yet, no DNA of Mr. Ryan was located on it.
3RP 309-12.

2. Charges and sentencing.

Mr. Ryan was charged with possession of methamphetamine with intent to distribute, while armed with a firearm, and while within a school zone, along with a charge of unlawful possession of a firearm. CP 3-4, 104-05. The jury was given a lesser-included offense instruction on on mere simple possession of methamphetamine, and an instruction on the affirmative defense of unwitting possession. CP 164, 166.

Following the jury's verdicts of guilty to possession with intent and possession of a firearm, and the jury's "yes" answers to the firearm and school zone allegations, he was sentenced to 120 months incarceration based on an agreed criminal history and offender score. 6RP 582-99; CP 234-38. He timely appeals. CP 249.

D. ARGUMENT

1. The evidence was insufficient to prove possession of methamphetamine with intent to deliver, rather than mere simple possession.

The Due Process Clauses of the federal and state constitutions require the State to prove every element of the crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I §§ 3, 22. Here, in count 1, Mr. Ryan was charged with possession of a controlled substance (methamphetamine) with intent to deliver. See CP 3, 104. The statutory elements of possession of a controlled substance with intent to deliver are: (1) unlawful possession of (2) a controlled substance with (3) intent to deliver. RCW 69.50.401(1)(2)(b). See CP 158-64 (jury instructions 7-11).

In a sufficiency challenge, the evidence is viewed in the light most favorable to the State, and the Court of Appeals asks whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

The evidence in this case failed to prove beyond a reasonable doubt that Mr. Ryan intended to deliver methamphetamine. Mere possession of a controlled substance, unless accompanied by other substantially corroborating facts and circumstances, will not support a conviction for intent to deliver. State v. Harris, 14 Wn. App. 414, 418, 542 P.2d 122 (1975). The evidence must establish that Mr. Ryan intended to deliver the substance presently or at some future time. State v. Zunker, 112 Wn. App. 130, 136, 48 P.3d 344 (2002), review denied, 148 Wn.2d 1012, 62 P.3d 890 (2003); State v. Darden, 145 Wn.2d 612, 624, 41 P.3d 1189 (2002).

The fact of possession of a large quantity of drugs, as is admittedly the case here, is insufficient on its own to establish possession with intent to deliver. State v. Hutchins, 73 Wn. App. 211, 216, 868 P.2d 196 (1994). Similarly, officer opinion that a defendant possesses drug material of a nature not normal for personal use is not sufficient to establish intent. Hutchins, 73 Wn. App. at 216.

During the search of the Chevy and the safes contained therein, the Pierce County deputies located approximately 38

grams of methamphetamine, a scale, and packaging materials. But none of the more strongly corroborative indicia of possession with intent to deliver were found: no cell phone with drug-sales related messages or lingo was admitted, and there was no buy/sell record book. See State v Campos, 100 Wn. App. 218, 998 P.2d 893, review denied, 142 Wn.2d 1006, 34 P.3d 1232 (2000).

Importantly, although the deputies claimed to have seen some sort of “hand-to-hand transaction,” neither deputy saw any actual items or items being transferred one to the other or otherwise. Of course, delivery of drugs as an offense in itself need not involve “sale” in exchange for money or value, but as a practical matter, the absence of money carries real-world inconsistency with delivery. In State v. Goodman, 150 Wn.2d 774, 783, 83 P.3d 410 (2004), police searched Goodman’s bedroom and seized six baggies of methamphetamine, a scale, and additional baggies. This was deemed marginal proof, but in Goodman, there were physical, evidentiary links between a controlled buy (in the form of an exchange of actual drugs for

certain money), and the drug items seized in Goodman's room. Goodman, at 783.

No such link exists in this case. For further example, in State v. Thomas, 68 Wn. App. 268, 843 P.2d 540 (1992), review denied, 123 Wn.2d 1028 (1994), officers saw Thomas engaging in multiple apparent drug transactions where people approached Thomas, spoke with him, and then Thomas reached into his jacket pocket, removed a pill bottle, and shook small rocks of apparent cocaine out of the bottle, which he exchanged for currency. Thomas, 68 Wn. App. at 270-71. When apprehended, Thomas had the very same pill bottle, containing the very same suspected rocks of cocaine, along with more than \$400 in cash (and a drug-dealer's-type pager). Thomas, at 271.

Here, there was no showing of an actual delivery, and not even circumstantial evidence of a delivery, such as money carried away from the encounter, that would link Ryan's interaction with the Dodge driver to a showing of intent to deliver the drugs found in the Chevy. Deputy Bray did not see anything in Mr. Ryan's hands at the time he had been at the Dodge, and did not see him giving anything, such as a plastic

baggy, or being given anything, such as money. 3RP 241-42.

Mr. Ryan was not carrying anything in his hands when he walked away from the Dodge to the Chevy. 3RP 240-41.²

Deputy Bray stated that the metal spoon the deputies located in the drug safe, though it could be used to scoop quantities of drugs from a large container to a smaller one, could also be used to “free base” drugs as a method of heating in preparation for ingestion. 3RP 222-23; 252-53; Exhibit 31. The absence of evidence of implements for personal use of drugs might tend to show intent to sell – yet here, implements of personal usage, and evidence of their recent use for that very purpose, were discovered.

For comparison, in State v. Zunker, the defendant was arrested in possession of 2.0 grams of methamphetamine, and a scale, and Zunker did have cash, namely \$220. Zunker, 112 Wn. App. at 135-36. The Court in that case would have deemed the

² The drug-sales expert, Detective Jesse Hotz, also stated that persons who intend to deliver drugs generally receive money in exchange for the drugs. 3RP 316-17, 319-21. Mr. Ryan argued below and argues here that no special drug sales expert was necessary, or admissible, and that Hotz’s testimony invaded the Sixth Amendment province of the jury, infra. But again, as noted no money was found. 3RP 247.

evidence inadequate, but Zunker also had notebooks and a cell phone with names and inculpatory financial numbers, and a key to the trunk of his vehicle that contained drug making materials. Zunker, at 136.

Here, there was no showing that Mr. Ryan had any customer logs, and the sale-quantity amounts of methamphetamine and related items that were recovered, including a firearm, were found in safes to which Mr. Ryan was not shown to have the combination or key. Indeed, there were pry marks on the door of the Honeywell safe (the one that contained drugs), and Deputy Bray noted that this safe seemingly had to have been “breached” for the Sheriff’s Office to access it. 3RP 248, 249. Mr. Ryan was not found to have any key on him, and no key was found in the search of the Chevy. 3RP 247-48.

The evidence as a whole was insufficient. See also State v. Cobelli, 56 Wn. App. 921, 923-25, 788 P.2d 1081 (1989) (evidence that defendant engaged in a series of short conversations with several “clusters” of people in a known high-drug area and was carrying several baggies containing a total of

1.4 grams of marijuana on his person was no more indicative of an intent to deliver than indicative of mere possession).

Convictions for possession with intent to deliver are highly fact specific, and require substantial corroborating evidence. State v. Brown, 68 Wn. App. 480, 483, 842 P.2d 1098 (1993). The evidence in this case did not pass Due Process muster, and the jury's verdict cannot be upheld.

Because the evidence was insufficient to prove possession with intent to deliver under Jackson v. Virginia, 443 U.S. at 890, Mr. Ryan's conviction must be reversed, and dismissed with prejudice. Tibbs v. Florida, 457 U.S. 31, 41, 102 S.Ct. 2211, 2217, 72 L.Ed.2d 652 (1982); Burks v. United States, 437 U.S. 1, 18, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). Accordingly, the attached firearm and school zone enhancements must also be reversed and dismissed.

2. The evidence was insufficient to enter judgment on the jury's answer of "yes" to the special allegation that Mr. Ryan was armed with a firearm.

RCW 9.94A.533(3) provides, in part: "[A]dditional times shall be added to the standard sentence range for felony crimes . . . if the offender . . . was armed with a firearm." RCW 9.41.010

does not define the term “armed,” but the Washington courts have addressed what factual circumstances can support a finding that a defendant was armed.

(a). A jury’s finding that a person is “armed” with a firearm requires more than mere proximity to the gun at the time of the offense.

For purposes of RCW 9.94A.533(3), a person is “armed with a firearm” during the commission of an offense if the person could both (1) easily access and readily use a weapon, and (2) a nexus connects the person, the weapon, and the crime. State v. Eckenrode, 159 Wn.2d 488, 490-91, 150 P.3d 1116 (2007). A person can easily access and readily use a weapon when it is easy to get to for use against another person, whether for offensive or defensive purposes, to facilitate the commission of the crime or to protect contraband. State v. Neff, 163 Wn.2d 453, 462, 181 P.3d 819 (2008) (plurality opinion); State v. Gurske, 155 Wn.2d 134, 139, 118 P.3d 333 (2005) (enhancement reversed where State proved only the fact of possession but not that the weapon was accessible at a relevant time or connected to the crime).

It is true that the question of whether a defendant is armed is a fact-specific decision. Gurske, 155 Wn.2d at 139 (“Regardless of the offense, whether the defendant is armed at the time a crime is committed cannot be answered in the same way in every case.”). However, Washington cases have required that both accessibility and nexus be proved, beyond a reasonable doubt. And importantly, whether a person is armed for the purposes of a firearm enhancement is a mixed question of law and fact that the Court of Appeals reviews *de novo*. State v. Sassen Van Elsloo, 191 Wn.2d 798, 825, 425 P.3d 807 (2018).

The requirements for being deemed “armed” may often be interrelated. In the present case, first, there was no ready accessibility for use. Merely being in possession of a gun, while committing a crime, does not constitute being “armed.” The present case is like Gurske, where the police found a zipped-up backpack on the back seat of the defendant’s truck that contained an unloaded pistol, a loaded magazine, and drugs. Gurske, 155 Wn.2d at 143. Our Supreme Court determined that the firearm in that case was not easily accessible and readily available at the time of the crime. Gurske, at 143-44. The

backpack containing the firearm was zipped and the defendant could not remove the firearm for offensive or defensive purposes unless he exited the truck. Id.

In contrast, in State v. Eckenrode, the police arrived at Mr. Eckenrode's house after he called 911, but during a search of his home officers found several weapons, drugs, and evidence of drug manufacturing. Eckenrode, at 491-92. Eckenrode was convicted of possessing and manufacturing controlled substances, along with a firearm sentencing enhancement. Eckenrode, at 494-96.

The Court upheld the enhancement, contrasting Eckenrode's case from Gurske. In Eckenrode's instance, his call to 911 contained evidence that he had wielded at least one gun, and there was a connection between Mr. Eckenrode, the weapons, and the possession and manufacturing of the controlled substances. The weapons were loaded, Mr. Eckenrode had a police scanner to evade detection of his manufacturing operation, and evidence of the illicit drug business pervaded the house. Eckenrode, at 494-95.

Here, Mr. Ryan was arrested for possession of drugs with intent to deliver, but the firearm and ammunition were located in locked, separate safe. The gun found inside the safe was not readily accessible to him even while in the Chevy, and certainly was not accessible at all during the supposed interaction with the Dodge that the State contended showed possession with intent to deliver. Further, the evidence of drug possession was not littered about the vehicle, intermingled with a firearm readily on hand to protect a drug operation from theft by potential sellers.

(b). There was also no “nexus.”

For similar reasons, the required showings of nexus were not made out. As noted, to be deemed armed while committing a crime, there must be more than accessibility – there must also be a nexus connecting the person, the weapon, and the crime. Neff, 163 Wn.2d at 462. Mere constructive possession of a weapon - even at the same time as a crime - does not establish sufficient nexus for an enhancement. State v. Brown, 162 Wn.2d 422, 432, 173 P.3d 245 (2007).

Rather, for a firearm enhancement to apply, there must be a nexus between “ ‘the nature of the crime, the type of weapon, and the circumstances under which the weapon is found.’ “ State v. Brown, 162 Wn.2d at 431 (quoting State v. Schelin, 147 Wn.2d 562, 570, 55 P.3d 632 (2002)). The nexus requirement serves to place limiting parameters on the determination of when a defendant is armed, especially in the instance of an ongoing crime such as constructive possession of drugs. Sassen Van Elsloo, *supra*, 191 Wn.2d at 827 (quoting Gurske, 155 Wn.2d at 140).

When the crime is of a continuing nature, such as a drug operation, a nexus exists only if the firearm is there to be used in the commission of the crime. Sassen Van Elsloo, at 828 (citing Gurske, 155 Wn.2d at 138). The Gurske Court noted that “[t]he accessibility and availability requirement also means that the weapon must be easy to get to for use against another person, whether a victim, a drug dealer (for example), or the police.” Gurske, at 138.

Here, without proof of nexus, a defendant has had his sentence enhanced simply because he constructively possessed a

gun at the same time as an ongoing offense was being committed. In the present case, although there was physical proximity of the firearm, Mr. Ryan did not have easy access to the gun for use against any other person during the offense. Simply put, the gun was locked in a safe, the key to which was nowhere in evidence.

Firearms locked in safes have not typically been deemed readily available and easily accessible for offensive or defensive purposes. See, e.g., Sassen Van Elsloo, 191 Wn.2d at 830 (firearms locked in a safe were not a proper basis of a sentencing enhancement); State v. O'Neal, 159 Wn.2d 500, 503, 150 P.3d 1121 (2007) (same); State v. Ague-Masters, 138 Wn. App. 86, 104-05, 156 P.3d 265 (2007) (concluding there was insufficient evidence to support a firearm enhancement where 12 unloaded firearms were locked in a safe that was 100 feet away from methamphetamine lab in a shed on the property); cf. Neff, 163 Wn.2d at 464-65 (concluding there was sufficient evidence to support a firearm enhancement where two guns were locked in a safe -- but a third was not).

In addition, here, the showing of nexus is even more inadequate than in Gurske and the foregoing decisions. The gun was in a distinctly different, separately secured container than the drug supply that the defendant allegedly possessed to act as a seller. This was the only gun – and it was locked in a safe. It was not shown to be present or accessible for use in the crime, and absent nexus, Brandon Ryan was not “armed.”

(c). Reversal and dismissal are required.

There was no accessibility, and no nexus. The enhancement was not proved beyond a reasonable doubt. U.S. Const. amend. XIV. This Court should reverse the firearm sentencing enhancement, with prejudice, and therefore remand for the trial court to vacate the enhancement and resentence Mr. Ryan. See State v. Blackwell, No. 51096-1-II, 2019 WL 2809132, at *5–11 (Wash. Ct. App. July 2, 2019) (cited pursuant to GR 14.1 for persuasive purposes only).

3. Detective Hotz opined on the defendant's guilt, running afoul of the defense objection that no expert testimony was necessary under ER 702, and that Mr. Ryan had a constitutional right to have the facts and the question of guilt determined solely by the jury.

The Sixth Amendment to the United States Constitution and Washington Const. art. 1, § 22 (amend. 10) guarantee the accused the right to trial by jury. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10). But when witnesses regale the jury with their direct opinions on the defendant's guilt – here, that Mr. Ryan had an intent to sell drugs, and that his constructive possession of a gun was the conduct of a drug dealer keeping it readily accessible, and for use in the crime - this violates the defendant's constitutional right to have the jury determine his guilt or innocence based on its independent evaluation of the facts. State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014); State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); State v. Thompson, 90 Wn. App. 41, 46, 950 P.2d 977 (1998); State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992); State v. Carlin, 40 Wn. App. 698, 700-01, 700 P.2d 323 (1985).

In particular, law enforcement officers' opinion testimony – like that of like Detective Jesse Hotz, here - is uniquely

invasive of the jury's province. Courts have found testimony that a defendant is guilty particularly egregious when expressed by any government official, because the jury is more likely to be influenced by it. State v. Carlin, 40 Wn. App. at 703; see also State v. Haga, 8 Wn. App. 481, 492, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973). Where the witness is also a highly credentialed and respected law officer, lay juries are apt to accord even greater weight to the opinions the witness expresses. See, e.g., State v. Notaro, 161 Wn. App. 654, 661, 255 P.3d 774 (2011).

Here, prior to trial, the court initially granted the defense motion to exclude the testimony of Detective Hotz, an officer who had no involvement with the case, but whom the State wished to testify about the "general behaviours [of] people who are in possession of drugs with intent to deliver." 1RP 11 (defense, arguing that the testimony did not meet the two criteria for expert testimony, and that it invaded the province of the jury), 1RP 15 (court, ruling excluding witness).

The court rejected the prosecutor's wrong contention that Hotz was proper as an expert to help "prove that element [of]

intent to deliver,” and rejected the notion that the “jury may not understand . . . all of these moving parts with all of these pieces,” such as the fact of “hand-to-hand transactions” being common in drug sales. 1RP 11-15.

Subsequently, however, the trial court reversed its ruling for the defense, and held that the State could proffer limited testimony from Hotz if it were narrowed in terms of his experience, and testimony as to typicality. 1RP 117-18. Over standing defense objection, 3RP 318, the prosecutor called and questioned Hotz, who testified, as an expert, about the dramatic sequences of events in the countless “controlled buys” he had participated in, using “confidential informants” and “buy money.” 3RP 316-17. Hotz testified that scales and bags, along with “containers” such as “lock boxes” -- including as the “lock box” safe found in the Chevy Chevy with drugs in it -- were the common “tools of the trade” used by possessors engaged in “selling” the narcotics. 3RP 319-21.

In this case, Hotz’s testimony was impermissible as improper opinion on the guilt of the defendant. See State v. Cruz, 77 Wn. App. 811, 894 P.2d 573 (1995). Older cases have

allowed expert testimony under ER 702 about the topics of drug dealing, in scenarios where the cases concerned arcane drug crime facts, compared to highly simple matters which, further, are now more commonly understood by the lay public.

Thus in State v. Cruz, the court permitted an officer who had participated in many undercover drug operations to testify regarding his knowledge of complex heroin transactions. Cruz, 77 Wn. App. at 815. Courts viewed this type of expert testimony as helpful to the trier of fact in explaining the “arcane world of drug dealing and certain drug transactions.” State v. Avendano-Lopez, 79 Wn. App. 706, 711, 904 P.2d 324 (1995) (citing State v. Sanders, 66 Wn. App. 380, 832 P.2d 1326 (1992)); State v. Strandy, 49 Wn. App. 537, 543-44, 745 P.2d 43 (1987), review denied, 109 Wn.2d 1027 (1988).

These cases did involve arcane aspects of drug dealing that were outside the common knowledge of jurors. For example, in Cruz, the drugs were located in a potted plant in a tunnel. A specialized drug interdiction officer provided testimony that explained how heroin dealers would typically use middlemen who arranged the sale without being in any

possession of the drugs, where the actual seller never himself physically gives the drugs to the buyer, and where the drugs are located in an outdoor location for later pickup – testimony that would help the jury understand how a person, as the defense would make much of, could be a drug dealer and yet not be a physical transactor or even in the area at the time. Cruz, 77 Wn. App. at 812-15.

That is not this case. The Cruz court distinguished that type of testimony from simple cases where expert witnesses testified regarding the typical characteristics of a perpetrator and left the jury with only one possible inference: because the defendant fit within a profile of conduct, he was guilty of the offense. See, e.g., State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

In this case, expert testimony was not needed under ER 702, and even it was, where the defendant objects, opinion testimony is improper, including where uttered by experts, if the testimony constitutes opinions on guilt, *even by inference*.

The issues are related - where the jury simply needs no expert help to understand a contention by the State that

multiple plastic baggies showed a plan to distribute, or to decide, on the other hand, if the defendant carried his own drugs with a spoon to consume quickly or easily, so-called expert testimony was merely window dressing designed to add a frisson of police television drama to a case that, as many modern drug crime cases are, relatively banal.

This uncomplex criminal case did not entitle the State to create a false need to ‘explain’ an “arcane” world of drugs – as counsel argued, this was simply window dressing to allow the witness invade the province of the jury. 1RP 11; see 5A K. Tegland, Wash. Prac., Evidence sec. 292, at 397 (3d ed.1989) (citing State v. Smissaert, 41 Wn. App. 813, 815, 706 P.2d 647 (1985) (there is no need for expert testimony where everyday persons are capable of forming a correct judgment in a simple, if disputed case).

State v. Farr-Lenzini, 93 Wn. App. 453, 970 P.2d 313 (1999), is instructive. Farr-Lenzini was charged with attempting to elude a pursuing police vehicle, and a police officer was permitted to testify that defendant driving the vehicle was “attempting to get away from me.” Farr-Lenzini, 93

Wn. App. at 458. On appeal, Farr-Lenzini argued that the trooper's opinion as to her state of mind violated her federal and state constitutional right to trial by an impartial jury. Farr-Lenzini, 93 Wn. App. at 459. The Court of Appeals agreed, holding, in part, that the trooper's opinion was not necessary to aid the jury in understanding "complex or arcane medical, psychological or technical evidence, rather, the jury could rely on its common experience to decide if Farr-Lenzini was attempting to elude." Id. at 461-62. The present case is analogous. The jury could use its common sense to determine if all the facts showed that Mr. Ryan planned to sell the drugs he possessed. No expert witness was needed – and where witnesses utter improper opinions on guilt, even expert status properly granted – contrary to here, where the matter was not specialized - does not prevent the testimony from being constitutional error. "No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d at 348. Simply put, expressions of personal belief as to guilt are "clearly inappropriate" testimony in criminal trials. State v.

Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008); see also State v. Vilalastra, 207 Conn. 35, 43, 540 A.2d 42, 47 (1988) (improper to inquire whether in expert's opinion the defendant was a drug seller).

Yet here, Hotz was permitted to testify explicitly as to his opinion that Mr. Ryan had the intent that rendered a person guilty – and to testify that drug dealers have firearms to be at the ready, for the purpose of accessing them in commission of the crime, Black and Montgomery forbid this sort of opinion testimony.

This case is like Farr-Lenzini, where the Court of Appeals held that “[w]here the opinion relates to a core element that the state must prove, error and resulting prejudice occurred where a trooper’s opinion related directly to a core issue.” Farr-Lenzini, at 463. Considering (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact, this was error – both as to the issue of intent to deliver, and the issue of whether the defendant was the sort of person who

would purposefully have a gun accessible, to use in the offense. State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007)

This was highly prejudicial, and the drug conviction, and the enhancement, must be reversed. Hotz was a “certified peace officer,” former undercover officer, current member of “the special assault unit,” marine rescue diver, and current “S.W.A.T. Team” operator who was inherently authoritative in the eyes of the jury, to personally opine as to the guilt of the defendant based on un-extraordinary facts that the lay jurors were fully capable of assessing on their own. 3RP 314-15. Opinions from such an impressive individual are ones, Washington case law recognizes, that lay jurors are all too eager, if unconsciously, to credit. State v. Notaro, *supra*.

Hotz was in fact something of a ‘super-officer’ - his improper opinions on guilt were deeply prejudicial constitutional error that violated Brandon Ryan’s right to a jury trial. State v. Quaale, 182 Wn.2d at 201; Montgomery, 163 Wn.2d at 589-91; Carlin, at 701. Such errors are presumed prejudicial; the State must prove beyond a reasonable doubt that they were harmless. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17

L.Ed.2d 705 (1967) (the reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to the defendant's conviction). The State cannot satisfy that burden here, particularly where the competent evidence was far from overwhelming.

Detective Hotz's improper testimony was lengthy, with the prosecutor showing pieces of actual collected evidence from the present case, *including the handgun*, and eliciting Hotz's expert opinion that each was "very common" if the person caught with drugs was in fact a "dealer." 3RP 320-25. He testified that "**everything that is sitting right there** is common trade craft of a narcotics dealer" and stated,

You're going to have the product, the baggies, the scale, **possibly a firearm**, either on the individual or within close proximity. Narcotics, the baggies, the scale, **that's intent to distribute**.

3RP 326. Hotz repeatedly opined that the asserted facts of this case, including "hand-to-hand transactions" and allegedly "work[ing] in conjunction with another individual" were significant to show that Mr. Ryan was a "seller." 3RP 324-26.

This Court should reverse the conviction for possession with intent to deliver, and therefore also reverse the attached firearm and school zone enhancements, and should also independently reverse the firearm enhancement for this error.

E. CONCLUSION

Based on this Appellant's Opening Brief, Mr. Brandon Ryan respectfully requests that this Court reverse the judgment and sentence of the Superior Court.

Respectfully submitted this 24th day of October, 2019.

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

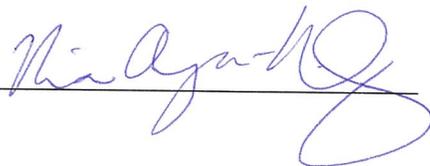
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 53171-2-II
)	
BRANDON RYAN,)	
)	
Appellant.)	

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