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STATE OF WASHINGTON

BY CRG
DEPUTY

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

STATE OF WASHINGTON,)	No. 53203-4-II
Respondent,)	
v.)	STATEMENT OF ADDITIONAL GROUNDS
JOHN TRUONG,)	FOR REVIEW PURSUANT TO RAP 10.10
Appellant.)	

I, John Truong, have received and reviewed the opening brief prepared by my attorney. Summarized below are additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

ADDITIONAL GROUNDS

1. Insufficient evidence supported the conviction of unlawful possession of a firearm or the firearm sentencing enhancement finding on count I - unlawful possession of methamphetamine with intent to deliver.
 - a. The State's reliance on Torey Petersen's testimony to prove Truong "knowingly had a firearm in his possession or control" is insufficient to prove count II- unlawful possession of a firearm in the first degree beyond a reasonable doubt because the trier of fact found Truong not guilty of count III - harrassment.
 - b. In the alternative, such evidence is insufficient to prove, beyond a reasonable doubt, that: (1) the firearm was easily

accessible and readily available for offensive or defensive use during the commission of the unlawful possession of methamphetamine with intent to deliver, and (2) a nexus exists among Truong, the weapon, and the unlawful possession of methamphetamine with intent to deliver, in order to prove that Truong was "armed" for the purposes of the firearm enhancement on count I.

In determining the sufficiency of the evidence, an appellate court views the evidence in light most favorable to the State and determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A defendant claiming insufficiency of the evidence "admits the truth of the State's evidence." *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997). It makes no difference whether the evidence is direct, circumstances, or a combination of the two, so long as the evidence is sufficient to convince a jury of the defendant's guilt beyond a reasonable doubt. *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999).

To establish that a defendant was armed for the purposes of a firearm enhancement, the State must prove (1) that a firearm was easily accessible and readily available for offensive or defensive purposes during the commission of the crime and (2) that a nexus exists among the defendant, the weapon, and the crime. *State v. Eckenrode*, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007). The presence, close proximity, or constructive possession of a weapon at the scene of the crime is, by itself, insufficient to show that the defendant was armed for the purpose of a firearm enhancement. *State v. Barns*, 153 Wn.2d 378, 383,

103 P.3d 1219 (2005); **State v. Schelin**, 147 Wn.2d at 563-64, 55 P.3d 632; **State v. Gurske**, 155 Wn.2d 134, 138, 118 P.3d 333 (2005). Rather, for a person to be armed during the commission of a crime, the weapon must be easily accessible and readily available for use for either offensive or defensive purposes. **Barns**, 153 Wn.2d at 383; **Gurske**, 155 Wn.2d at 137. A defendant "does not have to be armed at the moment of arrest to be armed for purposes of a firearm enhancement," and the State "need not 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." **State v. O'Neal**, 159 Wn.2d 500, 504-05, 150 P.3d 1121 (2007).

In addition to proving that a weapon was readily available and easily accessible, so long as it was at the time of the crime, the State must offer sufficient evidence that there exists a nexus between [the defendant], the gun, and the commission of the drug crimes. The requirement of a nexus between the defendant, the weapon, and 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 (quoting **Schelin**, 147 Wn.2d at 568). Without this nexus, there is a risk that a defendant will be punished under the firearm enhancement for having a gun unrelated to the crime. **Id.** To determine whether there was a nexus between the defendant, the weapon, and the crime, the court looks at the nature of the crime, the type of weapon, and the circumstances under which it was found. **Schelin**, 147 Wn.2d at 570; see also **State v. Sassen Van Elsloo**, 191 Wn.2d 798, 826-27, 425 P.3d 807 (2018).

Herein, the State relied on Torey Petersen's testimony to meet their burden of proof regarding count II - unlawful possession of a firearm in the

first degree and the firearm enhancement on count I - unlawful possession of methamphetamine. For instance, the State argued:

"So I have to show that he knew that that firearm was there and it was in his possession or his control as I have to show that he had previously been convicted of a serious offense. We know that because the parties agreed to it.

So I just realized I need to go back and talk about the special verdict forms again. I'll get there in a minute.

So to show that the defendant knowingly had a firearm in his possession or control, again, all of those same factors that I talked about with the drugs, with constructive possession, those are all a part of this as well.

We also know from Torey Petersen's testimony that the defendant had the firearm in his possession because he was holding it when he was pacing around and saying we're going to get this figured out. And that's why Torey Petersen was afraid, because he had this black revolver out, it was loaded, it was a scary situation. So based on all of the evidence about the drugs in the safe as well as Torey Petersen's testimony, we know that the defendant knowingly had this firearm in his possession. We know that he had previously been convicted of a serious offense because that was agreed to, and we know that this occurred in the State of Washington because it happened in Longview.

The judge read a definition of a firearm. I just want to make sure to point out that this firearm is in fact a firearm because Officer Panah took it out to the range and it fired a bullet through it. So it is an operable firearm and the defendant was in possession of it on August 23rd."

Citing RP at 229-30.

"So we've gone through all of the elements. We know that the defendant had dominion and control over the garage. We know that he had dominion and control over the safe. And we know that he threatened Torey Petersen.

I made a mistake when I was discussing the special verdict form earlier as to the firearm enhancement, and I just want to clear that up so we make sure we're all on the same page.

Special Verdict Form B, the question is, was the defendant armed with a firearm at the time of the commission of the crime charged in Count I, that's the possession with intent. So the question you have to answer is whether or not he was armed with the firearm. And you may say, well, if he's charged with possession with intent of the drugs in the safe and the gun was also in the safe, how was he armed with it at the time of the possession.

The final instruction says that a person is armed with a firearm is at the time of the commission of the crime the firearm was easily accessible and readily available. So in this case a person can be armed with a firearm if -- it doesn't have to be on them, but if it's readily accessible. In this case the safe with the gun in it was readily accessible to the defendant. The evidence in fact shows that he put the

gun in the safe so he could then therefore get the gun out if he needed. He was also inside the garage alone with Lashaia for a number of minutes before he came out when the residence was surrounded. So at any point during that he could have gotten the bag down from the rafters and acquired that firearm. So the firearm was easily accessible, it was readily accessible for him to use if need be. In fact, he had used it earlier that morning.

There also must be a connection between the firearm and the crime. Now, Officer Mortensen testified that drug-dealing is a dangerous business. The drug world is not safe. You can get robbed. Anything could happen. So the defendant would then want to protect his business. He would want to protect his drugs and his livelihood. So he has a firearm that he uses, he keeps in his safe with his drugs. He can use it for protection against being robbed, against something going wrong with his drug-dealing. So there is a connection between the gun and the drugs, and we know that he was in possession of both of those items because of the dominion control that I spoke about earlier.

So at this point when you go back into the jury room, I want you to look through all the photos, look through all the evidence, and look through the instructions. The State's position is that through the evidence we have shown that the defendant possessed methamphetamine with intent to deliver it. He was absolutely 1,000 feet within a school zone, school bus stop. He was armed with a firearm for purposes of Washington law at the time of the possession. He also was not allowed to possess that firearm because he was convicted of a serious offense, he knowingly threatened and harassed Torey Petersen with the firearm because he thought he stole his drugs. And we will ask that you find the defendant guilty of all three charges. Thank you."

Citing RP at 232-34.

Since the State intertwined the drug and firearm possession crimes with the harassment crime, the State assumed the risk of failing to meet its burden to prove each of the elements of the crimes charged in count I and II beyond a reasonable doubt, if the State failed to prove the elements of the crime charged in count III. This is because Torey Petersen's allegations is what connected Truong to the firearm. Therefore, because the jury did not find Truong guilty of the harassment charged in count III, there is no connection between Truong and the firearm during the charging period. Torey Petersen's testimony is no longer sufficient to connect Truong to the firearm possession, thus, it is insufficient to prove, beyond a reasonable doubt, that Truong

"knowingly had a firearm in his possession or control" or that he was "armed" with a firearm on or about August 23rd.

Without Torey Petersen's testimony, the State only proved dominion control of the firearm, which does not prove the "knowledge" element in count II or the "armed" element of the firearm enhancement allegation in count I. As indicated in the above portion of the State's closing argument, it was Torey Petersen's testimony, in which, the State heavily relied upon to prove Truong "knowingly" had a firearm in his possession on or about August 23rd, that was also readily available and easily accessible for offensive or defensive use during the commission of the crime, i.e., being "armed." RP at 230, 233. There is no other evidence, for which, the finder of fact could draw a reasonable inference from to connect Truong to the firearm in order to prove the elements charged in count I and II as previously addressed above.

However, in the alternative, even if the State was able to prove the "knowledge" element in count II, the State still failed to prove that Truong was "armed" with the firearm for purposes of the firearm enhancement charged in count I. This is because dominion and control is insufficient, by itself, to prove being "armed" with the firearm. *State v. Barns*, 153 Wn.2d at 383. Under the circumstances, the firearm and drugs were found in a locked safe in the rafters of the garage during a search conducted by DOC on an unrelated crime. The safe belonged to Truong's girlfriend, who testified that the firearm was hers. RP at 173. The contents of the safe supported such because all documents found in the safe belonged to Ms. Avila and her daughter. RP at 173. She testified that she bought the gun from a private party six months prior to the incident, and was in the safe for personal protection reasons. RP at 173-74. There was no evidence that connected Truong to the contents of the

safe, or the firearm for that matter.

In order to prove that Truong was "armed," i.e., the firearm was readily available and easily accessible, the State relied on the Torey Petersen's testimony that "[Truong] had used it earlier that morning." RP at 233. However, Torey Petersen's testimony is insufficient because the jury found Truong not guilty of the harassment allegations associated with his claims that Truong threatened him with the firearm over stolen drugs. The State never presented any other evidence that Truong had, or could easily access, the locked safe belonging to his girlfriend. He did not have the combination, or key, that was required to open the locked safe. Therefore, just because the State proved dominion and control over the locked safe, it is insufficient to prove Truong was "armed" with the firearm during the commission of the unlawful possession of methamphetamine with intent to deliver.

Furthermore, the State did not prove, beyond a reasonable doubt, the complete nexus required by law, which is necessary to justify imposition of the firearm enhancement charged in count I. In their own words, the State informed the jury that they only had to prove "a connection between the firearm and the crime." RP at 233. While the State used Officer Mortensen's testimony to prove such a connection, they failed to prove the connection between Truong and the weapon and the crime. The evidence clearly shows that Ms. Avila bought a gun for her own protection and placed it in her safe. Just because the presence of drugs, in close proximity of the gun, was in the safe does not automatically mean the two items were connected to each other for purposes of a firearm enhancement. The complete nexus was not proved by the State, beyond a reasonable doubt, in this case.

For these reasons, this court should dismiss count II - unlawful

possession of a firearm in the first degree, or the firearm enhancement charged in count I - unlawful possession of methamphetamine with intent to deliver; and remand for resentencing.

2. The impermissible double counting of the firearm special verdict finding violates Double Jeopardy principles.

- a. The firearm special verdict finding was used to increase the seriousness level and the standard sentence range for count I pursuant to RCW 9.94A.517, and was also used to increase the standard sentence range for count I a second time pursuant to RCW 9.94A.533(3)(b). This constitutes impermissible double counting.

Double counting violates the Double Jeopardy clause of the Fifth Amendment of the United States Constitution. Double counting occurs when one part of the [Sentencing Reform Act] guidelines is applied to increase a defendant's punishment with two upward enhancements premised on the same conduct. See, e.g., *State v. Salamanca*, 69 Wn.App. 817, 851 P.2d 1242 (1993).

Here, Truong's standard sentence range was increased twice premised on the same firearm special verdict finding. Compare RCW 9.94A.517 and RCW 9.94A.533, which state in relevant part:

RCW 9.94A.517

TABLE 4 - Drug offenses included within each seriousness level
III Any felony under chapter 69.50 RCW with a deadly weapon special verdict under RCW 9.94A.602

II Deliver or possess with intent to deliver methamphetamine (RCW 69.50.4012)

Seriousness level III, offender score 6 to 9 or more, 100+ to 120 months

Seriousness level II, offender score 6 to 9 or more, 60+ to 120 months

RCW 9.94A.533(3)(b)

The following additional times shall be added to the standard sentence range for felony crimes ..., if the offender ... was armed with a firearm (b) Three years for any felony defined under any law as a class B felony

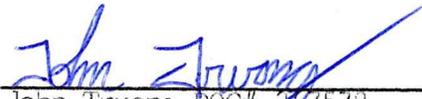
In viewing these statutes together, it is unquestionable that an

impermissible double counting anomaly exists within the SRA's sentencing scheme, which is based on the same special verdict finding. The standard sentence range is increased by 40+ months when a defendant possess methamphetamine with intent to deliver while armed with a firearm because the seriousness level is increased from a level II to a level III. Then an additional 36 month increase is added to the standard sentence range for the same special verdict finding. Therefore, Truong's sentence is unlawful because it violates Double Jeopardy principles.

For this reason, this court should vacate the 36 month increase to his standard range sentence pursuant to RCW 9.94A.533(3)(b) because his standard range sentence was already increased based on the same firearm special verdict finding pursuant to RCW 9.94A.517; and remand for resentencing.

Dated: February 18, 2020

Respectfully submitted,



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STATE OF WASHINGTON

BY _____
DEPUTY

John Truong

Defendant,

vs.

State of Washington

Respondent.

PROOF OF SERVICE

I, John Truong, pro se, do declare that on this date, the 19th
day of Feb., 2020. I have served the enclosed Statement of

Additional Grounds, (SAG)

on every other person required to be served, by presenting an envelope to state prison officials at the Clallam Bay Corrections Center, containing the above documents for U.S. mailing properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

The Court of Appeals, Div. 2
Atty. Clerk
950 Broadway, Suite 300
Tacoma, WA 98402-4454

I declare under penalty of perjury under the laws of the State of Washington, pursuant to RCW 9A.72.085, and the laws of the United States, pursuant to Title 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed on this 19 day of February, 2020.

John Truong, Pro Se
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723