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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34881-4-III

STATE OF WASHINGTON, Respondent,

v.

TOMMY D. CANFIELD, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Tommy Canfield proceeded to a jury trial on charges that he unlawfully possessed a firearm, which was stolen, possessed methamphetamine with a firearm enhancement, and obstructed a law enforcement officer. During trial, Canfield's attorney contended that the State failed to prove conduct on Canfield's part that obstructed the arresting officers, only that he gave a false name. The State then argued that Canfield tried to pull away from police when he was initially arrested, and later obstructed police by attempting to hide contraband in his possession inside the police car. The trial court did not give a unanimity instruction or limit the State from arguing that Canfield's false identification constituted the crime of obstructing, and the jury convicted him. Because the jury was not required to unanimously agree on the act that constituted the crime, and because insufficient evidence supports one of the acts argued by the State, the conviction must be reversed.

With respect to the firearm, the State failed to prove that there was a nexus between Canfield's constructive possession of the gun and his actual possession of two baggies of methamphetamine at the same time. In arguing that Canfield knew the firearm was stolen, the prosecuting attorney repeatedly drew attention to Canfield's exercise of his 5th Amendment privilege by repeating Canfield's pretrial statements to police

and commenting that the jury did not hear any testimony explaining those statements, at some points even proffering hypothetical defense testimony in the first-person and asking the jury if it had heard any testimony like that. These errors require reversal of the stolen firearm conviction and the firearm enhancement.

Finally, at sentencing, the State failed to prove Canfield's offender score when it offered only its own assertions of his prior history, which with the exception of one prior offense from Idaho introduced at trial, were not acknowledged or proven, nor shown to be comparable to Washington offenses. And the trial court imposed nearly \$5,000 in LFOs, not including restitution, on top of a 15 year sentence, with no inquiry into Canfield's debts, assets, education, or employment history. As a result of these errors, resentencing is required.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in failing to give a unanimity instruction on the charge of obstructing.

ASSIGNMENT OF ERROR 2: The prosecuting attorney committed flagrant misconduct in his closing argument by improperly asking the jury to draw adverse inferences from the defendant's decision not to testify.

ASSIGNMENT OF ERROR 3: Insufficient evidence supports the firearm enhancement.

ASSIGNMENT OF ERROR 4: The State failed to prove Canfield's offender score.

ASSIGNMENT OF ERROR 5: The trial court erred in imposing discretionary legal financial obligations (LFOs) without an adequate inquiry.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: When the State argues that three separate acts by the defendant constitute the charge of obstructing, one of which is legally insufficient as a matter of law, and the jury is not required to unanimously determine which criminal act occurred, has the defendant's right to a unanimous jury verdict on the charge been impaired?

ISSUE 2: When the State proffers hypothetical testimony using first-person examples of things the defendant might have said on the stand to explain how he came into possession of a stolen firearm, and then asks the jury whether it heard anything like that, has the State improperly commented on the defendant's Fifth Amendment privilege not to testify?

ISSUE 3: Is argument by the State that purports to place words in the defendant's mouth and then draws the jury's attention to the defendant's silence at trial flagrant and ill-intentioned?

ISSUE 4: When the defendant is found to constructively possess a firearm while handcuffed in the back seat of a police car while the defendant is in actual possession of methamphetamine, has the State established an adequate nexus between the firearm and the drug crime to support a firearm enhancement when it has not shown the defendant had the ability or purpose to use the firearm in any manner associated with the drugs?

ISSUE 5: When the State does not provide any proof beyond bare assertion of the defendant's prior criminal history, and the defendant does not acknowledge or stipulate to it, has the State met its burden to prove the asserted offender score?

ISSUE 6: Was the trial court's inquiry adequate to impose \$3,010 in discretionary legal financial obligations (LFOs) when it merely asked whether Canfield was able to work and did not consider his debts, lack of assets, and the effects of a 15 year prison sentence?

ISSUE 7: Was the trial court's implicit finding that Canfield had the ability to pay discretionary LFOs clearly erroneous in light of the evidence in the record of Canfield's ongoing indigency?

IV. STATEMENT OF THE CASE

On April 18, 2016, police contacted Tommy Canfield inside his pickup to serve a warrant for his arrest. A RP 8-11. Canfield appeared to be sleeping, and appeared to wake up when an officer yelled, "Hey, Tommy!" A RP 12, 25. Denying he was Tommy Canfield, the man reached for the ignition keys in contravention of orders to keep his hands up. A RP 12, 26. One of the officers drew his gun and took the keys, and Canfield then got out of the truck. A RP 13, 26-27. He continued to deny that he was Tommy Canfield and gave the police a false name. A RP 13, 20, 26, 41. Upon confirming his identity, police placed him under arrest for the warrant. A RP 14, 27, 42.

While transporting Canfield to the jail, the officer saw Canfield moving around a lot and became suspicious he was trying to hide something in the car. A RP 42-43. Upon arriving at the jail, officers searched his pockets and found two packets of suspected drugs, as well as eight shell cartridges. A RP 45, 46, 134. They asked Canfield where the gun was, and he said he had the bullets for another reason. A RP 48.

Police then searched the police car and found a large gun under the divider. A RP 48. The gun was loaded with bullets of the same caliber as those found in Canfield's pockets. A RP 51, 77-78. It also matched the description of a gun that was stolen a few days before. A RP 98, 100.

The State charged Canfield with possessing methamphetamine, unlawful possession of a firearm in the second degree, possessing a stolen firearm, and obstructing a law enforcement officer. CP 23-26. It also charged a firearm enhancement as to count one, possessing methamphetamine. CP 23. On all three felony counts, the State gave notice of its intention to seek an exceptional sentence based upon "free crimes" and "rapid recidivism" aggravators. CP 20.

At trial, State witnesses testified that of the 14 bullets recovered, six were reloads. B RP 212, 225. The owner of the gun confirmed that his father in law did his own reloading, and was able to show police reloaded bullets he brought from home that matched the ones recovered. A RP 103. At the time of recovery, the gun was fully loaded with six bullets. A RP 151-52. However, the jail staff who recovered the items placed all of the recovered ammunition in a single container; as a result, the bullets found in Canfield's pockets could not be distinguished from the bullets found in the gun. A RP 77, 141. In addition, two police officers

testified that Canfield delayed the arrest process when he gave them a false name. A RP 21, 41. Otherwise, police generally conceded that Canfield did not resist detention or struggle with officers. A RP 19.

After the State rested, Canfield moved to dismiss the obstructing charge, arguing that obstructing could not be established by speech alone and that the State failed to establish conduct that hindered the police in the execution of their duties. B RP 241. The court denied the motion. B RP 244. Thereafter, the State argued to the jury that Canfield obstructed in three ways when he tried to pull away from police, gave a false name, and hid the gun in the police car. B RP 275, 291-92. The trial court did not give a unanimity instruction, nor any instruction that the false name alone could not be the sole basis for convicting Canfield. B RP 250-62.

The trial court also denied Canfield's motion to dismiss the charge of possessing a stolen firearm, rejecting Canfield's argument that the State failed to present evidence that Canfield knew the gun was stolen. B RP 244-45. Canfield did not testify. B RP 248. In its closing argument, the State urged the jury to consider Canfield's statement at the jail that he had the bullets for another reason, and asked, "Ladies and gentlemen, did you hear any testimony, did you see any evidence, did you see -- hear any explanation from any of the witnesses that testified as to another reason

for those bullets to be there?" B RP 265. The State also argued that Canfield did not explain how he came into possession of the firearm or why he had it, stating:

Basically, that means if I find a stolen firearm and I go, oh, my gosh, I've got to get this back to whoever it belongs to, that's an excuse. That's, yes, I possessed a firearm and, yes, I knew it was stolen, but I was trying to get it back to the person who it really belonged to. Did you hear any testimony like that today or yesterday? No.

B RP 274. Finally, in rebuttal, the State repeated this argument:

Mr. Bottomly said there's no link between the eight bullets that were in my client's pockets. He admits he -- what -- what is this other reason? Did you hear any testimony at all about why someone just happens to have eight .357 Magnum bullets in their pocket, if it doesn't go to the gun that they have in their pants? What is that other reason? Oh, I collect bullets. My father just gave me these bullets. There is no other explanation for the bullets. Definitely not that you heard today.

B RP 294.

The jury convicted Canfield of all charges, and returned affirmative verdicts on the firearm enhancement as well as the rapid recidivism aggravator. CP 109-14, B RP 297-98, 316-17. At sentencing, the State alleged ten prior felonies; however, it presented no proof of those convictions besides a prior judgment and sentence introduced at trial to establish that Canfield could not legally possess a firearm. A RP 52, B RP 325. Canfield did not object to the State's assertions about his history,

stating only that the standard range was correctly calculated. B RP 328-29. The court declined to impose an exceptional sentence, but imposed 174 months reflecting the high end for offender scores of 13 and 12, together with seven months on the obstructing charge run consecutive to the felonies, for a total incarceration term of 181 months. CP 121, 129, B RP 337, 339.

The trial court also imposed \$4,910 in legal financial obligations consisting of a \$500 victim assessment, \$200 criminal filing fee, \$260 Sheriff's service fees, \$750 fees for court appointed counsel, \$1,000 fine, \$100 DNA collection fee, \$2,000 VUCSA fine, and \$100 crime lab fee. CP 127. The only inquiry into Canfield's ability to pay the assessments consisted of the following exchange:

THE JUDGE: Mr. Canfield, imposing the fines, fees, and assessments, I don't see anything that would prevent you from working if you were out and available to do so; is that accurate?

MR. CANFIELD: That's true.

THE JUDGE: You look like a healthy person.

MR. CANFIELD: No. Actually, you want to know what I really do? (Inaudible) train horses, so it really don't matter.

THE JUDGE: You train horses?

MR. CANFIELD: Yeah. I just -- I've got a gun problem and a dope problem I guess. Shows right there on paper; you know what I mean?

THE JUDGE: You have a pretty clear trail.

MR. CANFIELD: Thank you.

B RP 339-40. Canfield now appeals, and has been found indigent for that purpose. CP 136, 151-52.

V. ARGUMENT

A. Reversal of the obstructing conviction is required when the State argued multiple acts that comprised the offense, the jury was not given a unanimity instruction, and one of the acts was legally insufficient to establish the charge.

By all appearances, in its case in chief, the State sought to prove that Canfield obstructed the police when he gave them a false name. Only after resting, when the defense correctly argued that speech could not support a charge for obstructing, did the State point to other acts by Canfield that might have delayed the arrest process. But it did not request, and the trial court did not give, an instruction requiring the jury to agree unanimously on which act constituted the crime. It compounded the error by arguing that Canfield's false statement was one of the acts the jury could rely upon to convict. As a result, the jury was not required to unanimously agree upon a specific act by Canfield that was legally sufficient to support the charge.

The court reviews the adequacy of jury instructions *de novo* as a question of law. *State v. Boyd*, 137 Wn. App. 910, 922, 155 P.3d 188 (2007). When the State presents evidence of multiple distinct acts to support a single charge, it must either elect which act it relies upon to support the charge, or the jury must be instructed that it must unanimously agree that the same underlying act has been proven beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Because the instruction implicates the constitutional right to a unanimous jury verdict, failure to give a *Petrich* instruction when required can be raised for the first time on appeal. *Boyd*, 137 Wn. App. at 922-23; *see also State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991).

“Failure to give the *Petrich* instruction, when required, violates the defendant's constitutional right to a unanimous jury verdict and is reversible error, unless the error is harmless.” *State v. Bobenhouse*, 166 Wn.2d 881, 894, 214 P.3d 907 (2009) (*citing State v. Camarillo*, 115 Wn.2d 60, 64, 794 P.2d 850 (1990)). In evaluating whether the error is harmless, the court presumes the error was prejudicial and only affirms the conviction if no rational juror could have a reasonable doubt as to any one of the events alleged. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

A *Petrich* instruction is not required when the evidence presented shows a continuing course of conduct rather than distinct acts. *Crane*, 116 Wn.2d at 326 (citing *Petrich*, 11 Wn.2d at 571). To determine whether the conduct may be charged as a continuous offense rather than distinct acts, the court must evaluate the facts in a commonsense manner. *Petrich*, 101 Wn.2d at 571.

To prove the crime of obstructing a law enforcement officer, the State was required to prove that Canfield willfully hindered, delayed, or obstructed a law enforcement officer in the discharge of his official duties. RCW 9A.76.020. Additionally, obstructing cannot be established based on the defendant's speech alone. In *State v. Williams*, 171 Wn.2d 474, 251 P.3d 877 (2011), the Washington Supreme Court determined that the obstructing statute, RCW 9A.76.020, did not permit the criminalization of pure speech. In reaching this conclusion, the *Williams* Court reviewed the jurisprudential history of obstructing charges and concluded that precursor statutes allowing conviction for simply speaking falsely were unconstitutionally vague. *Id.* at 478-83. As a result, the legislature created a separate crime to knowingly make a false and misleading statement to a public official, knowing that obstruction charges require proof of conduct besides speech to avoid constitutional infirmity. *Id.* at 485.

Among the factors courts consider in evaluating whether a continuing course of conduct exist include whether the conduct occurred at different times and in different places, whether there are single or multiple victims of the acts, and whether the defendant's actions are taken to secure the same objective. *State v. Fiallo-Lopez*, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995). Here, the State argued to the jury that Canfield committed three acts that comprised the obstructing charge: He tried to pull away from police during the arrest, he gave a false name, and he tried to hide the gun in the patrol car. B RP 275, 291-92. These acts were not part of a continuous course of conduct because they occurred at different points of time, arose from different motivations, and were presented by the State as independent acts rather than a singular course of conduct.

The lack of temporal and spatial proximity between the acts supports the conclusion that they were separate and distinct, requiring a unanimity instruction. Canfield's initial actions in reaching for his keys and giving a false name occurred inside his truck at the very outset of the arrest, immediately after he appeared to be woken up by the police approaching his truck. A RP 12-13, 24-26. The efforts to hide the gun only occurred much later, after he had exited the truck and was handcuffed, his identity was confirmed by dispatch by comparing his

tattoos, he was searched, and he was on the way to the jail in the back of the patrol car. A RP 13-14, 25-28, 41-43. Different officers were affected by the different acts.

Moreover, the acts reflect different motivations based upon changing circumstances. The initial acts were taken to avoid being identified and arrested at all. The attempt to hide the gun only occurred after those actions failed, in an effort to dispose of contraband before it was discovered when Canfield arrived at the jail.

Lastly, the State itself presented the acts as separately and independently supporting the obstructing charge, not as a continuing course of conduct in which all the acts collectively comprised obstructing. In its closing argument, it identified the three acts and identified them as “at least three things that he absolutely did.” B RP 292. It further argued that “Mr. Canfield obstructed law enforcement officers in at least three different ways,” identifying each of the acts and arguing that they each hindered the police. B RP 275. In so arguing, the State did not seek to persuade the jury that Canfield’s actions, taken as a whole, obstructed and delayed the police, consistent with a continuous course of conduct. Instead, it argued that each act independently supported the charge,

consistent with separate and distinct acts that require a unanimity instruction.

Accordingly, it was error to fail to give a *Petrich* instruction on juror unanimity. This error was of constitutional significance because “some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” *Kitchen*, 110 Wn.2d at 411. The error is presumed prejudicial and is only harmless if no rational juror could have a reasonable doubt as to any of the incidents alleged. *Id.*

In the present case, not only could the jury have had a reasonable doubt about one of the incidents, it could have relied solely on the false statement that is legally insufficient under *Williams*. First, the jury could have had reasonable doubt that Canfield hindered police by leaving the firearm in the patrol car because the arresting officer testified that she searches the car after every transport. A RP 50. As such, she would have searched the car regardless of what Canfield did, and Canfield’s actions in the back seat did not cause her to take any additional steps that she would not have taken anyway by her own admission. That her practice was to search the car after every transport further indicates that it is not an unusual occurrence for items and contraband to be left in the back of the

car, and anticipating such actions is an ordinary part of her duties, not a deviation from or expansion of them.

Second, and perhaps more significantly, the jury could have convicted Canfield solely on the basis of the false identification. Of all the acts argued by the State, only the false identification was specifically identified by the testifying officers as a cause of delay and police generally characterized Canfield as otherwise cooperative. A RP 19, 21, 41, 58. But under *Williams*, Canfield's false statement alone is legally insufficient to support a conviction, and the jury was not informed that it could not convict based only on the false statement. As such, the error is not harmless because it is reasonably likely that the jury convicted Canfield based on evidence that does not establish all the essential elements of the obstructing charge.

After the State rested and the defense challenged the proof on the obstructing charge, the State had several options to proceed. It could have elected to rely upon one of the legally sufficient acts, obviating the need for a unanimity instruction. Alternatively, it could have proffered the instruction and refrained from arguing that the false statement comprised grounds to convict. Its failure to follow one of these options renders the

verdict constitutionally suspect. Accordingly, the conviction for obstructing cannot stand and the court should reverse and vacate.

B. The State's closing argument willfully and flagrantly directed the jurors to draw adverse inferences from Canfield's decision not to testify.

Courts review claims of prosecutorial misconduct for abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). In doing so, it considers the prosecutor's remarks in "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). "A defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt." *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996).

The defendant bears the burden of showing that a prosecuting attorney's arguments are both improper and prejudicial. *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009). Failure to object to the misconduct at the time of trial waives the issue, unless the misconduct is so flagrant and ill-intentioned that it could not be cured by an appropriate instruction. *State v. Walker*, 164 Wn. App. 724, 730, 265

P.3d 191 (2011) (citing *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)). Employing arguments that have been deemed improper in prior published opinions can be deemed flagrant and ill-intentioned. *Fleming*, 83 Wn. App. at 214.

A prosecuting attorney violates a defendant's Fifth Amendment rights when he argues in a manner that the jury would naturally and necessarily accept the argument as a comment on the defendant's decision not to testify. *Fiallo-Lopez*, 78 Wn. App. at 728; *see also Griffin v. California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) ("the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."). A prosecutor may refer to testimony as undenied or evidence as undisputed, so long as the comments are "so brief and so subtle that they do not emphasize the defendant's testimonial silence" and do not refer to who could have denied it. *State v. Ramirez*, 49 Wn. App. 332, 336, 742 P.2d 726 (1987).

In *Fiallo-Lopez*, the State argued that there was no evidence to explain the defendant's presence at two locations at the time of anticipated drug deals or why he had contact with a drug dealer at both places. 78 Wn. App. at 729. The State further contended that the defendant did not

attempt to rebut its evidence of his involvement in a drug deal. *Id.* There, the court held that the argument highlighted the defendant's silence because no one besides the defendant "could have offered the explanation the State demanded." *Id.* Accordingly, the argument constituted misconduct, although the error was determined harmless in light of the evidence of guilt. *Id.*

In another case, the Court of Appeals found improper an argument by the State that had another person besides the defendant had a motive to kill the victim, the defense would have found out about it and said something about it. *State v. Sargent*, 40 Wn. App. 340, 346, 698 P.2d 598 (1985). Because the argument drew attention to the defendant's failure to testify and the remaining evidence was not overwhelming, the argument in *Sargent* was both erroneous and harmful. *Id.* at 347.

The prosecuting attorney here employed the kinds of arguments that directly highlight the defendant's failure to testify and to provide the answers he demanded to support its argument that Canfield knew he possessed a stolen firearm. After initially referring to Canfield's statement at the jail about having the bullets for another reason, he asked the jury if they heard any explanation from any of the witnesses as to why the bullets would be there. B RP 265. Considered in context, it is unclear who could

have explained Canfield's statement besides Canfield. But the State did not leave the matter there; it then proceeded to engage in a hypothetical first-person explanation by a person who found a stolen firearm and asked the jury if it had heard any testimony like that. B RP 274. Clearly, the only person who could offer an explanation as to what "I" was doing with a stolen firearm was Canfield. Finally, the prosecutor continued this theme in his rebuttal, asking why a person would have bullets in their pockets, identifying hypothetical reasons "I" could have given, and reminding the jury that it had not heard such an explanation. B RP 294. Again, the argument served only to draw attention to what Canfield might have said had he testified, and then pointed out that Canfield had not in fact testified as a means of suggesting that there was no other explanation besides the State's.

As in *Fiallo-Lopez* and *Sargent*, only Canfield could have provided the testimony and evidence whose absence was highlighted by the State as a reason to convict. This argument not only directly undermined Canfield's Fifth Amendment rights, it shifted the burden of proof from the State to the defense. As in *Fiallo-Lopez*, Canfield had no burden to explain his possession of the bullets, yet the State highlighted his silence as a reason to believe that he knew the firearm was stolen. 78 Wn. App. at 728-29.

Finally, the proscription against prosecutorial comments on the defendant's silence was ruled upon by the U.S. Supreme Court more than 50 years ago in *Griffin*, and repeatedly in published Washington state cases thereafter. The prosecutor could not reasonably contend that it was unaware that these arguments are improper. As recognized in *Fleming*, "trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." 83 Wn. App. at 216. As such, the only reasonable conclusion is that the prosecutor knew the argument was inappropriate and made it anyway. This is the kind of ill-intentioned and malicious argument that taints a trial and cannot be cured even with a timely objection.

Even a flagrant error does not require reversal if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *Fiallo-Lopez*, 78 Wn. App. at 729 (*quoting State v. Ng*, 110 Wn.2d 32, 37, 750 P.2d 632 (1988)). Here, the evidence that Canfield knew the firearm was stolen was scant. The record reflects that the gun was taken by an unknown person from the owner's home a few days before. A RP 98, 170-72. The owner did not know Canfield. A RP 187. Moreover, other property taken during the

same incident was later recovered from other individuals in Lewiston. A RP 181. A reasonable jury that had not been coached to demand an explanation from Canfield could certainly have concluded that the State failed to adequately link Canfield to the initial burglary, and that Canfield could have acquired it from the original thief without knowing it was stolen.

Because the prosecutor's argument flagrantly and improperly undermined Canfield's right not to testify about his acquisition of the firearm, and because it cannot be said beyond a reasonable doubt that the argument did not affect the jury's verdict, the conviction for possession of a stolen firearm must be reversed.

C. The State failed to show a nexus between the crime of possessing methamphetamine and Canfield's possession of the firearm to support the firearm enhancement.

The State charged Canfield with possessing methamphetamine and alleged by special allegation that he committed the crime while armed with a firearm. CP 23. But the State never presented any evidence of a connection between the possession of methamphetamine and the possession of a firearm. Absent such a showing, the evidence is insufficient to support the firearm enhancement.

To support a firearm enhancement, the State must show that the defendant is armed, meaning that the weapon is easily accessible and readily available for offensive or defensive use. *State v. Mills*, 80 Wn. App. 231, 235, 907 P.2d 316 (1995). Whether a defendant is armed is a mixed question of law and fact, reviewed *de novo* on appeal. *State v. Johnson*, 94 Wn. App. 882, 892, 974 P.2d 855 (1999).

In addition, a firearm or deadly weapon enhancement requires proof of a nexus between the defendant and the firearm as well as the firearm and the crime. *State v. Schelin*, 147 Wn.2d 562, 568, 55 P.3d 632 (2002). The mere presence of a firearm at the scene, without more, does not establish that the defendant is “armed” for purposes of an enhancement. *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993); *Schelin*, 147 Wn.2d at 570; *Johnson*, 94 Wn. App. at 892. As the Washington Supreme Court has stated, “If an assault with a beer bottle occurs in a kitchen, a defendant is not necessarily ‘armed’ with a deadly weapon because knives are kept in the kitchen.” *Schelin*, 147 Wn.2d at 570. Instead, the court must consider the nature of the crime, the type of weapon, and the circumstances under which it was found. *Id.* Moreover, the defendant’s intent and willingness to use the firearm are a necessary condition of the nexus requirement. *State v. Brown*, 162 Wn.2d 422, 434, 173 P.3d 245 (2007); *see also State v. Gurske*, 155 Wn.2d 134, 138, 118

P.3d 333 (2005) (“[W]here the weapon is not actually used in the commission of the crime, it must be there to be used.”).

In *Schelin*, police searched the defendant’s residence and located him initially standing within a few feet of a loaded firearm stored in a holder hanging on the wall. 147 Wn.2d at 563-64. They also found a large marijuana grow operation as well as the defendant’s bedroom, which contained harvested marijuana, scales, and packaging materials. *Id.* at 564. There, the court held that the jury could properly infer that the defendant was using the weapon to protect the marijuana grow operation, in light of its location and the defendant’s proximity to it when police entered. *Id.* at 574-75.

But by contrast, in *Brown*, a homeowner discovered his home had been burglarized and found his rifle lying on the bed, next to an ammunition clip for a different rifle. 162 Wn.2d at 425-26. The rifle was ordinarily kept in the closet, and had evidently been moved to the bed by the burglar. *Id.* at 426, 431. There, the Supreme Court noted, “No evidence exists that Brown or his accomplice handled the rifle on the bed at any time during the crime in a manner indicative of an intent or willingness to use it in furtherance of the crime.” *Id.* at 432. Where it appeared that the burglars regarded the firearm as “loot” rather than an

instrumentality of the burglary, the court held that Brown was not armed within the meaning of the enhancement statute even though he was briefly in possession of it during the commission of the crime. *Id.* at 434-35.

Similarly, in *Gurske*, police originally arrested the driver of a vehicle for having a suspended license. 155 Wn.2d at 136. An inventory search of the car located a backpack behind the driver's seat, within arm's reach of the driver. The backpack contained a holstered pistol, a fully loaded magazine for the pistol, and three grams of methamphetamine as well as the driver's wallet and a Coleman torch. *Id.* The *Gurske* Court, emphasizing the potential use of the weapon as a requirement to find it accessible and available, noted that in a possession case, potential uses of the weapon could be "to obtain drugs (by theft or otherwise), to protect the drugs, or to prevent investigation or apprehension by the police at the time they discover the drugs or seek to execute a warrant." *Id.* at 139. But the Court also acknowledged the role of the nexus requirements in avoiding the risk of "punishing a defendant under the deadly weapon enhancement for having a weapon unrelated to the crime." *Id.* at 141 (*quoting State v. Willis*, 153 Wn.2d 366, 372, 103 P.3d 1213 (2005)). Ultimately, the *Gurske* Court concluded that even though the backpack was within the defendant's reach, it was unclear that he could have removed the firearm from the backpack, and he did not make any movement toward the

backpack when he was stopped. *Id.* at 143. Under these facts, the facts failed to establish the enhancement beyond a reasonable doubt. *Id.* at 144.

Lastly, in *Johnson*, police found the defendant sleeping in his room when they searched his apartment. 94 Wn. App. at 888. Police found heroin in the apartment, and the defendant subsequently informed them that a gun was in a drawer in the coffee table, a few feet from where he was sitting handcuffed. *Id.* Based on those facts, the *Johnson* court concluded there was no realistic possibility he could access the gun, and held it was error to submit the enhancement to the jury. *Id.* at 894.

The present case is most similar to *Gurske*. The firearm was found inside the patrol car Canfield had been riding in. A RP 48. It had not been located during Canfield's initial search incident to his arrest, and the record is devoid of any hint as to where the gun was until it was discovered in the car. A RP 42. Without knowing where the gun was, it is impossible to ascertain how accessible the firearm was when police approached him; it may have been necessary for him to remove or undo clothing to get to it, which it is not at all clear he could have done from the seat of his truck. Canfield was handcuffed immediately after getting out of his truck, precisely in order to limit his ability to access weapons to use against police. A RP 27, 41. With his hands restrained, and again without

knowing where the gun was located until it was found on the floor, it is impossible to conclude beyond a reasonable doubt that Canfield could have reached the gun in a manner that would allow him to use it. As to these facts, *Johnson* is also directly on point.

Moreover, as in *Gurske*, the record is devoid of any evidence that Canfield's purpose in possessing the firearm had any connection with his contemporaneous possession of methamphetamine. No witness suggested that Canfield ever reached for the weapon during the course of the confrontation with police; to the contrary, when it appeared inevitable that the firearm would be discovered, Canfield did not seek to use it but rather tried to abandon it. These acts belie the argument that Canfield intended to use the gun to protect the methamphetamine in his possession or to prevent his arrest by police.

Under these facts, the State failed to prove that there was any connection between Canfield's possession of methamphetamine and his possession of the firearm. Penalizing Canfield in addition to his substantive crimes with the firearm enhancement serves to increase the punishment for his drug crime for having an unrelated weapon, precisely the injustice contemplated by the *Gurske* Court. Absent sufficient proof of a nexus between the drug possession crime and the possession of a

firearm, including the ability and purpose to use the gun to further the crime, the enhancement fails and must be reversed.

D. The State failed to present sufficient evidence to support of the alleged offender scores of 13 and 12.

The trial court sentenced Canfield using offender scores of 13 and 12 based solely upon the representations of the prosecuting attorney. CP 126, B RP 325. Canfield did not acknowledge or stipulate to any prior criminal history. B RP 328-31. The State presented evidence of one prior conviction from Idaho at trial, but otherwise did not present any evidence supporting its allegations of his criminal history. A RP 52. Because the score is unsupported by evidence in the record, the sentence must be reversed.

Offender score error may be raised for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). When a court imposes a sentence based on an improperly calculated offender score, it acts without statutory authority. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002).

The court of appeals reviews the calculation of an offender score *de novo*. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). In determining whether the offender score is supported by the record, the reviewing court considers that “the trial court may rely on no more information that is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” RCW 9.94A.530.

The burden of providing sufficient evidence to support the offender score rests squarely on the State. In *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012), the Washington Supreme Court evaluated the State’s burden of proof to establish the offender score, stating:

It is well established that the State has the burden to prove prior convictions at sentencing by a preponderance of the evidence. Bare assertions, unsupported by evidence, do not satisfy the State’s burden to prove the existence of a prior conviction. While the preponderance of the evidence standard is “not overly difficult to meet,” the State must at least introduce “evidence of some kind to support the alleged criminal history.” Further, unless convicted pursuant to a plea agreement, the defendant has “no obligation to present the court with evidence of his criminal history.” (Internal citations omitted.)

Thus, while evidence of prior convictions need not be substantial, there must be some evidence beyond the assertions of the prosecutor,

which are not evidence but are mere argument. *Hunley*, 175 Wn.2d at 911-12.

Moreover, a defendant's failure to object to the State's assertions of criminal history does not constitute an affirmative acknowledgment of the history sufficient to satisfy the State's burden. *Id.* at 913 (citing *State v. Mendoza*, 165 Wn.2d 913, 925, 205 P.3d 113 (2009); *State v. Weaver*, 171 Wn.2d 256, 260, 251 P.3d 876 (2001)). This is because the defendant has no burden of proof on the issue; as such, silence cannot operate as a waiver of the defendant's right to hold the State to its evidentiary burden.

Here, the record is devoid of any evidentiary proffer or any acknowledgment of criminal history by the defendant that would relieve the State of proving the score. "[F]undamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record." *Ford*, 137 Wn.2d at 481. Because the State's calculation of Canfield's offender score is not supported by an evidentiary foundation in the record, the sentence imposed does not comport with minimal due process requirements and must be reversed.

The remedy for the error is to vacate Canfield's sentence and remand the case for resentencing. *State v. Wilson*, 170 Wn.2d 682, 691,

244 P.3d 950 (2010). The State should be permitted to present evidence substantiating the offender score on remand. RCW 9.94A.530(2); *State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014).

E. The trial court failed to comply with RCW 10.01.160 when it imposed discretionary costs without conducting an adequate inquiry into Canfield's ability to pay them, rendering the imposition clearly erroneous.

Courts may not impose discretionary legal financial obligations (LFOs) on convicted defendants unless the defendant has the present or future ability to pay them. RCW 10.01.160(3). A sentencing court's finding that a defendant has the ability to pay LFOs is reviewable under a "clearly erroneous" standard. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011); *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991). In applying the clearly erroneous standard, the reviewing court reverses when substantial evidence does not support the finding, meaning that there is an insufficient quantum of evidence to persuade a fair-minded person of the truth of the finding. *State v. Jeannotte*, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997).

In the present case, the trial court imposed \$260 in Sheriff's service fees, \$750 for the cost of public defense services, and a \$2,000 VUCSA fine. CP 127. The Sheriff's fee and attorney fee are

discretionary costs that may not be imposed unless the defendant has the ability to pay them, as determined by the trial court after considering the financial resources of the defendant and the burden the payment requirement will impose. RCW 10.01.160(3); *State v. Clark*, 191 Wn. App. 369, 374, 362 P.3d 309 (2015). The VUCSA fine is discretionary, as the authorizing statute allows the court to suspend or defer it if it finds the defendant to be indigent. RCW 69.50.430. Canfield was represented by appointed counsel throughout the trial and was also found indigent for purposes of appeal. CP 147-52.

In *State v. Blazina*, 182 Wn.2d 827, 838-39, 344 P.3d 680 (2015), the Washington Supreme Court instructed sentencing courts to seriously question the ability to pay of a person who meets the GR 34 standard for indigency. Here, the record shows that Canfield has no assets, no income, is not employed, and owes an unknown amount in court fines. CP 149-50. He therefore meets the GR 34 standard.

The colloquy at sentencing did not address the required *Blazina* factors, such as the existence of other debt and the effects of incarceration. *Id.* at 838. Instead, the court determined that Canfield was employable based upon its observation that he appeared to be “a healthy person” and Canfield’s statement that he trains horses. B RP 339-40. But the court

failed to address Canfield's unemployment, his outstanding LFO debt, and the effect of a 15 year prison term on his financial status. Nor did the court evaluate Canfield's employment history and earning potential, or any other factors that would tend to demonstrate his ability to earn enough to pay his necessary expenses upon release. In light of his qualification under GR 34, the substantial fines and mandatory LFOs imposed, and the prospect of Canfield being released from jail many years later with no job, the finding that he had the ability to pay discretionary financial obligations is unsupported by sufficient evidence to justify a reasonable person in reaching the same conclusion.

Because the record does not support the imposition of discretionary financial obligations, the judgment and sentence should be vacated and remanded for resentencing or, in the alternative, the discretionary obligations should be ordered stricken.

VI. CONCLUSION

For the foregoing reasons, Canfield respectfully requests that the court REVERSE his convictions for obstructing a law enforcement officer and possessing a stolen firearm, VACATE the firearm enhancement, and REMAND the case for resentencing.

RESPECTFULLY SUBMITTED this 10th day of May, 2017.

A handwritten signature in black ink, appearing to read "Andrea Burkhart". The signature is written in a cursive style with a large initial 'A' and a long horizontal stroke at the end.

ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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

Signed this 10 day of May, 2017 in Walla Walla, Washington.


Breanna Eng

BURKHART & BURKHART, PLLC
May 10, 2017 - 11:02 AM
Transmittal Letter

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Court of Appeals Case Number: 34881-4

Party Respresented: Tommy D. Canfield, Appellant

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Appellant's Brief

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