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No. 75338-5

Court of Appeals No. 237761

IN THE
SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

MICKEY WILLIAM BROWN,
Petitioner.

Appellant's Brief

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A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The superior court erred in convicting the defendant of intimidation of a witness. Report of Proceeding (RP) at 193.¹ See Issue No. 1.
2. The superior court erred in finding that “[t]he defendant removed a gun, a 7.62 mm rifle, from the closet and placed the rifle on the bed in the master bedroom.” Clerk’s Papers (CP) at 15. See Issue No. 2.
3. The superior court erred in finding that “[t]he defendant placed a gun clip near the rifle.” CP at 15. See Issue No. 2.
4. The superior court erred in finding that “[t]he rifle was accessible to the defendant and his accomplice during the course of the burglary, particularly while the defendant sorted through the dresser drawers of the bedroom.” CP at 15. See Issue No. 2.
5. The superior court erred in concluding that “the defendant or an accomplice was armed with a deadly weapon during the course of the burglary.” CP at 17. See Issue No. 2.

¹ “RP” designates the consecutively-paginated transcript of the bench trial of February 11 & 12, 2002 and sentencing of June 5, 2002. “RP2” designates the transcript of the hearing held before the Honorable Richard J. Schroeder on July 22, 2003. “RP3” designates the consecutively-paginated transcript of hearings held before the Honorable Tari S. Eitzen from October 15, 2003 through March 10, 2004.

6. The superior court erred in concluding that “the defendant is guilty of First Degree Burglary.” CP at 17-18. See Issue No. 2.

7. The superior court erred in imposing a 60-month sentence enhancement for being armed with a deadly weapon. CP at 24 & 28. See Issue No. 2.

8. The superior court erred in finding that the witness “had seen [defendant] beat his wife in the past.” CP at 16. See Issue No. 3.

9. The superior court erred in finding that at the time of the defendant’s conversation with the witness, the witness “was concerned about [defendant’s] behavior . . . in that he pounded his fist against the wall.” CP at 16. See Issue No. 3.

10. The superior court erred in finding that at the time of the defendant’s conversation with the witness the defendant “had to be restrained . . . in order to protect [the witness] from physical harm.” CP at 16. See Issue No. 3.

11. The superior court erred in including defendant’s “washed out” juvenile convictions in his offender score. CP at 24. See Issue No. 4.

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13. The superior court erred in limiting defendant's issues in his posttrial motions to ineffective assistance of counsel, police misconduct and victim/witness recantation. CP at 200. See Issue No. 5.

14. The superior court erred in allowing the defendant to be tried and sentenced in violation of his constitutional right to counsel. RP. See Issue No. 6.

15. The superior court erred in finding that "even if the defendant's 17 adult and juvenile felony convictions were calculated incorrectly, with all the changes occurring based on State v. Cruz, 139 Wn.2d 186, 985 P.2d 384 (1999) et al, this alone would not constitute ineffective assistance of counsel." CP at 229-30. See Issue No. 6.

16. The superior court erred in finding that trial counsel was excused from filing posttrial motions because of the defendant's absence: "The trial attorney did not file any post-trial motions, and due to the defendant's flight from the courtroom during trial the attorney could not consult with his client regarding filing post-trial motions." CP at 229. See Issue No. 6.

17. The superior court erred in concluding that trial counsel was not ineffective. CP at 230-31. See Issue No. 6.

Issues Pertaining to Assignments of Error

1. When the information tracked the language of former RCW 9A.72.110(1) in charging that defendant threatened “a person the defendant had reason to believe was about to be called as a witness in an official proceeding”; this language requires that an official proceeding be pending at the time of the threat; the information alleges threats occurring on or about August 29, 2001; and the information was filed August 31, 2001; did the superior court err in finding defendant guilty of the crime charged in the information? This issue pertains to Assignment of Error No. 1.

Whether threats occurring prior to the institution of an official proceeding are sufficient to sustain a conviction under former RCW 9A.72.110(1) is a question of law subject to de novo review. See State v. Bright, 129 Wn.2d 257, 265, 916 P.2d 922 (1996) (en banc) (holding statutory interpretation question of law subject to de novo review) (citation omitted).

2. When the evidence showed that the weapon involved in the crime was one that the defendant or his accomplice moved from the homeowner’s closet to the homeowner’s bed in preparation for taking it; that it was, in fact, no more than a potential object of the burglary, and that it would only have been accessible while the defendant was in the bedroom, was there insufficient evidence

a) of burglary in the first degree while armed with a deadly weapon under RCW 9A.52.020(1) and

b) to support a sentence enhancement for being armed with a deadly weapon under former RCW 9.94A.310

when to find a defendant to be “armed” the weapon must be readily accessible, there must be a nexus between the defendant and the weapon and there must be a nexus between the weapon and the crime? This issue pertains to Assignments of Error Nos. 2-7.

Whether a person is armed is a mixed question of law and fact which courts review de novo. State v. Johnson, 94 Wn. App. 882, 974 P.2d 855 (1999) (citation omitted).

3. When a witness testified that she took the defendant’s remark to her – that she would “pay” if she spoke to the police – seriously, having seen the defendant angry and seen him “hit” his wife before, but denied that the defendant was hitting walls during that conversation and also denied that a third party had to physically restrain defendant from harming her, did the superior court err in entering Findings of Fact which stated that the witness had seen the defendant “beat” his wife, that the defendant “pounded his fist against the wall,” and that he

had “to be restrained . . . to protect [her] from physical harm”? This issue pertains to Assignments of Error Nos. 8-10.

This Court reviews findings of fact to determine whether they are supported by substantial evidence. See State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (en banc) (discussing standard of review in context of suppression decision).

4. Did the superior court err in calculating defendant’s offender score when it
 - a) applied the 2002 Sentencing Reform Act amendments when the alleged crimes were committed before the effective date of those amendments to include defendant’s “washed out” juvenile convictions in his offender score and
 - b) included Class C convictions in defendant’s offender score when five years had elapsed between the date of his last conviction and the current alleged offenses,

resulting in a higher sentencing range? This issue pertains to Assignments of Error Nos. 11 & 12.

This is a question of law subject to de novo review. See State v. Bright, 129 Wn.2d 257, 265, 916 P.2d 922 (1996) (en banc) (citation omitted) (holding statutory interpretation question of law subject to de novo review).

5. When the superior court allowed defendant to bring posttrial motions under CrR 7.8 and CrR 8.3, and defendant challenged his offender score under CrR 7.8, did the court err in disallowing the challenge to his offender score? This issue pertains to Assignment of Error No. 13.

This is a question of law subject to de novo review. See State v. Bright, 129 Wn.2d 257, 265, 916 P.2d 922 (1996) (en banc) (citation omitted) (holding statutory interpretation question of law subject to de novo review).

6. Was Defendant's trial counsel ineffective when he failed to perform the following key tasks: a) Present to the trial court the law regarding the intimidation count as charged in the information, b) present to the court the law regarding what is required to be armed with a deadly weapon under RCW 9A.52.020(1) and former RCW 9.94A.125, c) object to the erroneous Findings of Fact and Conclusions of Law, d) contest the inclusion of defendant's "washed out" juvenile and Class C convictions in his offender score, and e) file posttrial motions? This issue pertains to Assignments of Error Nos. 14-17.

A claim of ineffective assistance of counsel is reviewed de novo. State v. S.M., 100 Wn. App. 401, 409, 996 P.2d 1111 (2000) (citation omitted).

B. STATEMENT OF THE CASE

Procedural History

In a two-count information filed on August 31, 2001, the State charged the Petitioner in this case, Mickey William Brown, with first degree burglary in violation of RCW 9A.52.020(1)(a), committed as follows: That on August 6, 2001, Mr. Brown, with the intent to commit a crime against a person or property therein, did enter and remain unlawfully in the building of Craig L. Ambacher and in entering and while in the building and in immediate flight therefrom, Mr. Brown or an accomplice was armed with a 7.62 mm semi-automatic rifle, a deadly weapon and a firearm under RCW 9.94A.125 and 9.94A.310(3). CP at 1.

Count II charged Mr. Brown with intimidating a witness in violation of former RCW 9A72.110(1), committed as follows: That on or about August 29, 2001, Mr. Brown directed a threat to Melissa Hill, a person Mr. Brown had reason to believe was about to be called as a witness in an official proceeding and attempted to influence Ms. Hill. CP at 1-2.

Mr. Brown waived his right to a jury trial. See RP at 1-2. The Honorable James M. Murphy presided over the bench trial. During the afternoon of the trial, Mr. Brown left the courtroom and could not be located. RP at 120. The trial was

concluded in his absence and Mr. Brown was convicted on both counts.² RP at 190-93 & 196-97. The court later entered Findings of Fact and Conclusions of Law. CP at 14-18.

At sentencing, the court imposed 160 months in prison on the burglary charge and 18 to 36 months' community custody. RP at 211-12; CP at 28. This sentence included a 60-month enhancement for the firearm. CP at 28. It imposed the maximum sentence of 102 months on Count II and 9 to 18 months' community custody. RP at 211-212; CP at 28. The sentences are to be served concurrently. RP at 214; CP at 28. In addition, the court imposed a \$500 victim assessment fee, \$110 in court costs, and a \$37 fee for service of the warrant. RP at 212; CP at 26. It also imposed a no-contact order with the victim. RP at 212.

Immediately following sentencing on June 5, 2002, Mr. Brown's counsel withdrew. RP at 213; CP at 19. Mr. Brown began filing pro se motions seeking various forms of posttrial relief and the appointment of counsel to assist him with these motions. See CP at 35-41, 42-43, 44-45, 46-52, and 53-55.

On June 14, 2002, the court (Eitzen, J.) entered an order appointing counsel. CP at 56-57. Noting that private counsel withdrew on June 5, the order

² A warrant was issued for Mr. Brown's arrest. He was back in jail by May 6, 2002.

directed the Spokane County Public Defender's Office "to assist the defendant in preparing and filing a Notice of Appeal and an Order of Indigency." CP at 56-57.

Despite the appointment of counsel for his appeal, Mr. Brown continued to represent himself in superior court on posttrial matters. He also continued to request an attorney to assist him with his those matters. See CP at 58-61, 62-65, 66, and 67-69.

On June 24, noting that the defendant requested an attorney "specifically to assist him in the presentation of post-sentencing issues, in the absence of his private counsel who has withdrawn from the case," the court entered another order appointing the Spokane County Public Defender's Office to represent Mr. Brown (Murphy, J.). CP at 70.

On June 26, 2002, the superior court forwarded to the Court of Appeals Mr. Brown's pro se "Notice of Appeal to Superior Court and Arrest of Judgment CrR 7.4." CP at 89. This Notice was apparently the only notice of appeal filed in this case in 2002. The appeal was docketed in the Court of Appeals under case number 21226-2-III. CP at 112.

On July 2, 2002, the court appointed another attorney to represent Mr. Brown (Eitzen, J.). CP at 90. This was the third attorney appointment since June 14. This attorney was not given specific instructions as to the scope of representation. CP at 90. The attorney was permitted to withdraw on July 19,

2002. CP at 111. Mr. Brown requested his dismissal as the attorney attempted to file a notice of appeal of Mr. Brown's judgment and sentence. CP at 113-14.

Mr. Brown continued to pursue posttrial relief on a pro se basis. See CP at 71-88 and 91-109. Although represented by the Spokane County Public Defender's Office at this point, on August 9, 2002, Mr. Brown's pending appeal was dismissed, in part on the basis of a pro se letter he sent to the Court of Appeals. The commissioner ruled:

Having considered this Court's motion to dismiss, the record and file, and in light of Mr. Brown's failure to pay the filing fee or obtain an order of indigency, and his letter to the Clerk of this Court received on July 16, 2002 in which he states 'I don't wish to appeal at this date and time,' this appeal is hereby dismissed."

CP at 116. The mandate in the case was entered September 19, 2002. CP at 117-18.

Mr. Brown's counsel renewed his motions for posttrial relief on June 4, 2003. CP at 119-20. These motions were made pursuant to CrR 7.4(a)(3); 7.5(a)(2), (3), (5), (7) & (8); 7.6; 7.8(b)(1), (2), (3), (4) & (5); and 8.3(b). At the same time, counsel also renewed and amended Mr. Brown's pro se motion filed June 19, 2002. CP at 121-197. The next day, Mr. Brown filed another motion, this one challenging the calculation of his offender score pursuant to CrR 7.8(b)(1), (4) & (5). CP at 198-99. The State challenged the timeliness of the motions brought under CrR 7.4 & 7.5.

On July 22, 2003, the court held a hearing on the timeliness of the motions (Schroeder, J.). See RP2. It held that the claims under CrR 7.4 and CrR 7.5 were time-barred. However, the court permitted Mr. Brown to proceed to a fact-finding hearing on the basis of his claims under CrR 7.8 and CrR 8.3. RP2 at 17-19; CP at 200. It entered an order permitting claims brought under CrR 7.8 and CrR 8.3, but limited those claims to ineffective assistance of counsel, police misconduct, and victim/witness recantation. CP at 200. It neglected to mention the challenge to the offender score in its order, and that claim was never directly heard by the superior court.

Following hearings on various matters related to the upcoming evidentiary hearing, RP3 at 1-52, the court conducted the hearing on Mr. Brown's posttrial motions on February 10 and 11, 2004 (Eitzen, J.). RP3 at 57-414. It denied Mr. Brown's claims by order entered March 29, 2004. CP at 226-31. That order was the final ruling encompassing all Mr. Brown's posttrial claims.

On March 10, 2004, Mr. Brown's attorney filed an amended notice of appeal to the Court of Appeals. CP at 201-25. While that appeal was pending and while Mr. Brown was represented by counsel, he filed, inter alia, a pro se "Notice of Appeal to the Supreme Court." This Court docketed the case, causing the Court of Appeals to stay its action until completion of the instant proceedings.

Substantive Facts

Introduction

Mickey Brown was convicted of first degree burglary and witness intimidation. In addition, his sentence was enhanced by sixty months as he was found to be armed with a deadly weapon. On appeal, Mr. Brown challenges his conviction on the witness intimidation count and argues that he was not armed with a deadly weapon so as to support a conviction for first degree burglary or the sentence enhancement. If his convictions are upheld, he also argues that his offender score was incorrectly calculated. If his convictions or sentence is upheld, he argues that the ineffective assistance of his trial counsel requires a new trial.

Witness Intimidation

At the time of the burglary, Melissa Hill was living with Mr. Brown; his wife, Kim Brown, Ms. Hill's cousin; and their two children. RP at 83. Ms. Hill was at the Brown's home during part of the day of the burglary, August 6, 2001. RP at 84-86. After the burglary, she witnessed certain events and discussed the burglary with Mickey Brown, Kim Brown and Lenny Brown, Mickey's cousin who was also involved in the burglary. RP at 87-93, 101 & 105-09.

The State charged Mr. Brown with intimidating Hill to prevent her from testifying against him in court: “[O]n or about August 29, 2001, by use of a threat directed to Melissa Hill, a person the defendant had reason to believe was about to

be called as a witness in an official proceeding, [Mr. Brown] did attempt to influence the testimony of such person.” CP at 1-2.

However, at the time Mr. Brown threatened Hill, the information in the case had not yet been filed. The conversation between Brown and Hill occurred after the burglary and before Hill spoke to detectives. RP at 97. The investigating detective spoke with Hill on August 29, 2001. RP at 128. Following his interview with Hill, the detective prepared a charging document to be submitted to the prosecutor’s office. RP at 130. The information was filed on August 31, 2001. CP at 1-2.

Although called as a prosecution witness, Hill was declared a hostile witness by the State and the court permitted it to ask her leading questions. RP at 98-100. Hill testified that Mr. Brown told her she would “pay” if she spoke to the police, RP at 101. It was a statement Hill took seriously at the time, having seen Mr. Brown angry and seen him hit his wife before. RP at 101-02 & 118-19.

Ms. Hill did not remember telling the prosecutor prior to trial that Mr. Brown was hitting walls when he told her not to speak to the police. RP at 103. She only remembered telling the prosecutor that Mr. Brown was mad and yelling. Id. She also did not recall telling the prosecutor or the detective that Lenny had to throw Mickey to the ground to keep him from hitting her. RP at 103-04 & 112-

13. Instead, she testified that Lenny was defending her and he told Mickey to quit yelling and calm down. RP at 103-04 & 113.

The Findings of Fact and Conclusions of Law state the following findings regarding this issue:

Mickey Brown told Melissa Hill that if she told anyone about his role in the burglary, that she would pay. Melissa Hill took this to be a credible threat against her personal safety, and a threat of violence. She had seen Mickey beat his wife in the past. She was concerned about Mickey's behavior while making this threat to her, in that he pounded his fist against the wall, and at some point had to be restrained by Lenny Brown in order to protect Melissa Hill from physical harm.

CP at 16. The court made no conclusions of law regarding this issue. See CP at 14-18.

Armed with a Deadly Weapon³

The homeowner, Craig Ambacher, returned to his residence the day of the burglary to find that every room had been ransacked. RP at 29 & 16-19. As he walked around the bi-level house, he saw, among other things, that his unloaded AK 47 had been moved from the closet to a bed a short distance from the closet. RP at 18-20, see RP at 43. The rifle used 7.62 caliber ammunition. RP at 20. A

³ Because Mr. Brown contests only the "armed with a deadly weapon" aspect of the burglary conviction, only those facts are presented.

clip belonging to another rifle was also lying on the bed next to the gun. RP at 31-32. No one was in the house and nothing had been taken. RP at 28-29.

At the Brown residence after the burglary, Melissa Hill heard Mickey and Lenny Brown discuss the guns they saw during the burglary. RP at 89. She recalled one of the men saying that the guns were nice and he wished they could have gotten them. RP at 89-90, see RP at 101; 107-08 & 113. She remembered Mickey Brown saying that he could have gotten a lot of money for the guns. RP at 104.

The court asked for briefing on what is required to be armed with a deadly weapon and reserved ruling on that issue. RP at 182. The State submitted a brief, but Mr. Brown's attorney did not, failing, in fact, to make any argument on the issue. RP at 195. Relying on a case cited by the State, State v. Faille, 53 Wn. App. 11, 766 P.2d 478 (1988), the Court held that "the gun lying on the bed would make the gun readily accessible to those who were in the process of ransacking this room looking for bounty." RP at 196. The court found Mr. Brown guilty of first degree burglary and made a specific finding that he was armed with a firearm under the relevant statutes. RP at 196-97.

The Findings of Fact and Conclusions of Law state the following findings regarding this issue:

The defendant removed a gun, a 7.62 mm rifle, from the closet and placed the rifle on the bed in the master bedroom, a distance of six to seven feet from the closet. The defendant placed a gun clip near the rifle, although the clip did not match the rifle. The gun was not loaded at any time during the burglary. The rifle was accessible to the defendant and his accomplice during the course of the burglary, particularly while the defendant sorted through the dresser drawers of the bedroom.

CP at 16.

Sentencing

The State's calculation of Mr. Brown's offender score included all juvenile convictions, including those occurring before Mr. Brown turned 15. CP at 24. On information and belief, Mr. Brown turned 15 on January 17, 1991.

Factoring in all Mr. Brown's prior adult and juvenile convictions, he was determined to have an offender score of 16.5 for the burglary count and 9.5 for the witness intimidation count. CP at 24. Factoring in the seriousness levels, Mr. Brown's sentencing range was 87 to 116 months on the burglary count, plus a 60-month deadly-weapon enhancement, and 77 to 102 months on the intimidation count. Id.

Mr. Brown's counsel did not contest the calculation of Mr. Brown's offender score. See RP at 200-15. While Mr. Brown refused to sign the Understanding of Defendant's Criminal History, his attorney signed it. CP at 20-

21. Nor did the attorney challenge the imposition of the 60-month enhancement for being armed with a deadly weapon. See RP at 200-15.

The court imposed a 160-month sentence on the burglary count and 102 months on the intimidation count, to be served concurrently. RP at 211; CP at 28. Mr. Brown's counsel withdrew directly after the sentencing hearing, without having filed any posttrial motions. RP at 213; CP at 19.

C. ARGUMENT

I. The Superior Court Erred in Finding Mr. Brown Guilty of Witness Intimidation When the Information Charged That He Threatened "A Person the Defendant Had Reason to Believe Was about to Be Called as a Witness in an Official Proceeding"; and No Official Proceeding Was Pending at the Time of the Threat.

When the proof at trial did not meet the elements of the crime charged in the information, Mr. Brown's conviction for intimidation cannot stand. The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of the crime charged beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (*en banc*) (citation omitted). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Id. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Id.

According to the information the State filed, Mr. Brown intimidated Hill in the following manner: “[O]n or about August 29, 2001, by use of a threat directed to Melissa Hill, a person the defendant had reason to believe was about to be called as a witness in an official proceeding, [Mr. Brown] did attempt to influence the testimony of such person.” CP at 1-2. This language tracked certain following language from former RCW 9A.72.110(1) which stated:

A person is guilty of intimidating a witness if a person . . . by use of a threat directed to a current witness or a person he or she has reason to believe is about to be called as a witness in any official proceeding or to a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child, he or she attempts to:
(a) Influence the testimony of that person; or . . .

RCW 9A.72.110(1) (1994).

Because the State charged Mr. Brown with conduct identical to that prohibited by the former statute, the charging language must be interpreted in the same manner as the language of the former statute. In order to convict a person for threatening “a current witness or a person [the defendant] has reason to believe is about to be called as a witness in any official proceeding,” an official proceeding must be pending at the time the threat was made. State v. Pella, 25 Wn. App. 795, 797, 612 P.2d 8 (1980) (interpreting same language in earlier statute); State v. Wiley, 57 Wn. App. 533, 535, 789 P.2d 106 (1990) (superceded by statute) (citing Pella with approval and interpreting 1982 amendment which

broadened scope of statute to include threats to witness in criminal investigations). In Pella, the court held that because an information had not been filed at the time of the threat, no official proceeding was pending and the defendant could not be guilty of witness intimidation. 25 Wn. App. at 797.

Similarly, in this case, Mr. Brown cannot be guilty of witness intimidation because the information had not been filed at the time of the threat alleged in the information. The information charged Mr. Brown with threatening Hill “on or about August 29, 2001.” The information, however, was not filed until August 31, 2001. CP at 1-2. Moreover, the “on or about” language in the information cannot be construed broadly to mean a date after the information was filed: The evidence at trial showed that the threat occurred sometime after the burglary but before the investigating detective spoke to Ms. Hill. RP at 97. The detective spoke with Hill on August 29, two days before the information was filed. RP at 128. Thus, the evidence at trial also reveals that no official proceeding was pending at the time of the threat alleged in the information and the State failed to prove the elements of the charged crime.

Because the State did not prove the elements of the crime with which it charged Mr. Brown, his conviction cannot stand. The State is required to prove the crime charged in the information. Const. art. 1, § 22 (amend. 10); U.S. Const. Amend. VI; State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988) (en banc)

(holding defendant could not be convicted of felony murder when charged only with aggravated first degree murder). For this reason, the problem is not cured either with a reference to the statute as it existed at the time of the alleged crime, which required only that the threat be directed against “a current or prospective witness,” or with a different portion of the statute, which criminalizes threats made to a person the defendant believes “may have information relevant to a criminal investigation.” RCW 9A.72.110(1) (2000). As the State did not charge Mr. Brown with intimidation in either of these manners, to allow it to obtain a conviction through satisfying these distinct elements would violate Mr. Brown’s constitutional rights.

For all these reasons, the superior court erred in convicting Mr. Brown of witness intimidation and this Court should reverse his conviction.

Further, the findings entered by the superior court do not support a conviction for the crime charged in the information. This Court reviews conclusions of law de novo to determine whether the findings of fact support the conclusions. See State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (discussing standard of review in context of suppression decision).⁴ In this case, the findings of fact detail the threat and its circumstances (incorrectly, as Mr.

⁴ Although the court neglected to enter conclusions of law on this issue, see CP at 14-18, the conviction is clear from the court’s oral findings. RP at 193.

Brown contends, see Point III, below), but make no mention of the date of the threat or the date that the official proceeding began. See CP at 16. As explained above, the pendency of an official proceeding is a necessary element of the charged crime. The failure of the factual findings to support the conviction provides yet another reason the conviction for intimidation should be reversed.

II. The Court's Conclusion That Mr. Brown Was Armed with a Deadly Weapon Was Not Supported by Evidence of Accessibility, Evidence Showing a Nexus Between the Weapon and the Defendant or Evidence Showing a Nexus Between the Weapon and the Crime.

The State failed to prove that Mr. Brown was armed with a deadly weapon for purposes of the first degree burglary statute and the sentence enhancement when it failed to show that Mr. Brown was armed. The first degree burglary statute provides that:

A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon .

RCW 9A.52.020. The relevant sentence enhancement provision requires an enhanced sentence "if the offender or an accomplice was armed with a firearm." Former RCW 9.94A.310(3).

To prove that an individual is "armed" within the meaning of the these statutes, the State must satisfy a three-pronged test: First, the State must prove

that the weapon is “easily accessible and readily available for use, either for offensive or defensive purposes.” State v. Schelin, 147 Wn.2d 562, 576, 55 P.3d 632 (2004) (en banc) (plurality opinion), quoting State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). Next the State must prove a nexus between the defendant and the weapon. Finally, it must prove a nexus between the weapon and the crime. Schelin, 147 Wn.2d at 576-78. The tests for sufficiency of the evidence are those set forth in Point I, above. Because the State did not prove that Mr. Brown was armed under these tests, his conviction cannot stand.⁵

Applying the three-pronged test for finding a defendant was “armed” to the instant case compels the conclusion that Mr. Brown was not armed. First, the gun was not readily accessible to Mr. Brown. Although a general rule on accessibility is difficult to discern from the precedent, the cases may be grouped into three general types of fact patterns where accessibility has been found. First, courts have held a weapon to be accessible when it was within reach of the defendant at the time of his arrest. Schelin, 147 Wn.2d at 574 (gun hanging near door in defendant’s bedroom, which was next to room in which he grew

⁵ Although two different statutes are at issue, they both employ the word “armed.” See RCW 9A.52.020 and former RCW 9.94A.310(3). Accordingly, the tests for determining when an individual is armed should be the same. See e.g., State v. Hall, 46 Wn. App. 689, 694, 732 P.2d 524 (1987) (using interpretation of “armed” from sentence enhancement case to define “armed” for purposes of first degree burglary statute).

marijuana plants and near where he stood at time police found him); State v. Gurske, 120 Wn. App. 63, 65-66, 83 P.3d 1051 (2004) (gun in a backpack within reach in car when defendant was arrested); State v. Taylor, 74 Wn. App. 111, 125, 872 P.2d 53 (1994) (gun in bag near defendant at time of arrest); State v. Sabala, 44 Wn. App. 444, 723 P.2d 5 (1986) (gun under driver's seat of car defendant was driving when arrested) ; cf. Valdobinos, 122 Wn.2d at 281-82 (gun not accessible when under a bed in a bedroom); State v. Call, 75 Wn. App. 866, 869, 880 P.2d 571 (1994) (guns not accessible when two in bedroom dresser drawer and one in tool box at foot of bed and at time of arrest defendant went into bedroom and returned unarmed).

Second, guns have been held accessible when kept in the defendant's house for the protection of a drug operation conducted on the same property. State v. Simonson, 91 Wn. App. 874, 883, 960 P.2d 955 (1998). Third, guns have been held accessible when moved during a burglary to a location generally accessible to the defendant. State v. Hall, 46 Wn. App. 689, 695-96, 732 P.2d 524 (1987) (guns removed from house and placed in trunk of defendant's car); State v. Faille, 53 Wn. App. 111, 114-15, 766 P.2d 478 (1988) (guns removed from house and stored in bushes outside house). As the gun in this case was nowhere near Mr. Brown's reach at the time of his arrest, and this was not a drug crime, only the

final line of cases applies here. Those cases are readily distinguished from the instant one.

The commonality in the two burglary cases dealing with accessibility is the movement of the weapons from the house to a location easily accessible to the defendants, a factor which distinguishes them from the instant case. In both cases, guns were moved to a centralized location where the defendants were storing other booty as well. In Hall, the defendant and his accomplice took some guns, ammunition and a stereo from a home and put them in the trunk of their car. 46 Wn. App. at 690, 695. In Faille, the defendants took four guns and other property from a residence and stored all the items taken outside the residence in nearby bushes. 53 Wn. App. at 112. Thus, in those cases, the weapons would have been nearly continually accessible as the defendants walked back and forth between the storage locations and the residences.⁶

By contrast, in the instant case, Mr. Brown or his accomplice merely took the rifle and ammunition from a closet and put them a few feet away on the bed in

⁶ Notably, both Hall and Faille were decided before the nexus tests were required to show that a defendant was armed. Thus, those cases concluded the defendant was armed on the basis of accessibility to the gun alone. The first nexus test, the nexus between the defendant and the gun, has been required since at least 1995. State v. Mills, 80 Wn. App. 231, 235-36, 907 P.2d 316 (1995) (articulating nexus test from synthesis of precedent). Thus, these earlier cases can in no way be deemed dispositive of this issue. See RP at 195-96.

a bedroom. RP at 19-20.⁷ This movement did not make the weapon much more accessible to them than it was in the closet: It was still away in one bedroom of a two-story house that was being searched for loot. There is no evidence that the defendant or his accomplice spent a significant amount of time near the weapon. Indeed, the evidence showed that they did not focus on any particular room but instead searched every room of the house. RP at 29. In addition, there was no evidence that the gun ever left the room where the homeowner kept it: It was discovered just a few feet from the closet in which it was stored. RP at 19-20. Accordingly, the only time the rifle was “easily accessible and readily available for use” would have been when the defendant or his accomplice was actually in the same room with the gun. For these reasons, the State failed to prove that the gun was accessible to Mr. Brown during the burglary and he was not armed for purposes of the burglary or sentence enhancement statutes.

Not only was the gun not accessible, but Mr. Brown was also not armed because there was an insufficient nexus between him and the weapon. “[A] person is not armed simply because a weapon is present during the commission of a crime; there must be some nexus between the defendant and the weapon.” State

⁷ In this regard, Mr. Brown notes that the record is inconclusive as to whether he or his accomplice actually moved the weapon and ammunition. Accordingly, Assignments of Error Nos. 2 and 3 should be sustained, although these errors do not affect the outcome of the case.

v. Johnson, 94 Wn. App. 882, 892, 974 P.2d 855 (1999) (emphasis in original) (citation omitted); accord Schelin, 147 Wn.2d at 570. Of the cases applying this nexus test, the nexus has been found only where the defendant apparently owned the gun or it was actually within reach at the time of arrest. Schelin, 147 Wn.2d at 574 (gun in defendant's home, near where he stood at time police found him); Gurske, 120 Wn. App. at 65-66 (gun in a backpack within reach in car when defendant was arrested); Taylor, 74 Wn. App. at 125 (gun in bag near defendant at time of arrest); Simonson, 91 Wn. App. at 883 (gun kept in defendant's residence for the protection of a drug operation conducted on his property); cf. State v. Mills, 80 Wn. App. 231, 907 P.2d 316 (1995) (nexus test not satisfied when defendant possessed key to motel room containing drugs and gun, defendant miles from motel room at time of arrest).

The facts of the instant case fall far short of what these cases require to establish the nexus between Mr. Brown and the gun. Obviously, he and his accomplice did not own the gun. Moreover, the gun was within their reach only during the brief instant of time that they were in the one bedroom of the two-story house. Indeed, when the homeowner returned home, Mr. Brown and his accomplice fled both the scene and the gun. For these reasons, the State failed to establish a nexus between Mr. Brown and the gun and he was not armed for purposes of the burglary or sentence enhancement statutes.

Not only did the State fail to prove the first two prongs of the test for what it means to be “armed,” it also failed to establish a nexus between the gun and the crime. In Johnson, the court found no nexus between the gun and the crime when the defendant owned the gun and stored it in a cabinet in his home. 94 Wn. App. at 896-97. He also stored balloons of heroin and bundles of cash in his home. Id. at 887. Despite this relatively close connection between the gun and the drug crime, and the inferences which may be drawn, no nexus was found. Id. at 896-97.

In Schelin, a case where both nexus tests were satisfied, the gun was available to play a much larger role in the crime than in the instant case, including the possible injury of the arresting officers:

When we apply the nexus test, as expressed in Johnson, the inferences support a conclusion that [the defendant] was “armed.” [The defendant] admitted to being in close proximity to an “easily accessible and readily available” deadly weapon. The jury was entitled to infer he was using the weapon to protect his basement marijuana grow operation. [The defendant] stood near the weapon when police entered his home and could very well have exercised his apparent ability to protect the grow operation with a deadly weapon, to the detriment of the police.

Schelin, 147 Wn.2d at 574-75.

In the instant case, the facts present even less ground for finding a nexus between the gun and the crime than they did in Johnson. Here, the crime was a burglary. The only weapon at issue was an object of the burglary. The gun was

not used in preparing for the crime, committing the crime or fleeing from the crime. It was merely taken out of a closet and tossed onto a bed. It was left on the bed from that moment until the crime ended with the homeowner's arrival, at which point Mr. Brown fled without taking the gun or attempting to confront the homeowner with the gun. Under these circumstances, no meaningful connection between the weapon and the crime can be inferred.

The situation here is not much different than the one where a person robs a house in which guns are stored in plain sight. If the Court finds that Mr. Brown was armed with this gun, any person who attempts to commit a burglary in a house where guns are openly stored will also be deemed armed with the homeowner's weapons. Such an interpretation of the term "armed" expands its definition beyond sense or reason.

Indeed, to find a nexus between the gun and the crime in this situation, where the gun was merely the object of the crime, would expand the definition of "armed" far beyond what could have been intended by the Legislature. It would require a finding that the defendant was armed whenever a gun is the object of a crime, for example, during the unlicensed sale of a gun or the purchase of a stolen gun. Clearly, these situations do not present a heightened level of danger requiring a heightened sentence. Accordingly, for the term "armed" to have any meaning at all, it must mean something more than having a firearm as the object

of the crime. For these reasons, the State failed to establish the nexus between the gun and the crime and Mr. Brown was not armed for purposes of the burglary or sentence enhancement statutes. Accordingly, this Court should reverse Mr. Brown's conviction for first degree burglary and vacate the sentence enhancement imposed in the judgment and sentence. See Assignments of Error Nos. 2-7.

Further, the written Findings of Fact in this case fail to support the conclusion that Mr. Brown was armed with a gun. This Court reviews conclusions of law de novo to determine whether the findings of fact support the conclusions. See State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (discussing standard of review in context of suppression decision).

In this case, the court's findings address only the alleged accessibility of the weapon:

The defendant removed a gun, a 7.62 mm rifle, from the closet and placed the rifle on the bed in the master bedroom, a distance of six to seven feet from the closet. The defendant placed a gun clip near the rifle, although the clip did not match the rifle. The gun was not loaded at any time during the burglary. The rifle was accessible to the defendant and his accomplice during the course of the burglary, particularly while the defendant sorted through the dresser drawers of the bedroom.

CP at 16. As explained above, the conclusion that an individual was armed requires a nexus between the weapon and the defendant and between the weapon and the crime, in addition to a finding of accessibility. Because the court failed to

consider the other two tests, the findings of fact failed to support the legal conclusions that Mr. Brown was armed for purposes of the burglary or sentence enhancement statutes. This error provides yet another reason this Court should reverse Mr. Brown's conviction for first degree burglary and vacate the sentence enhancement imposed in the judgment and sentence.

III. The Superior Court Erred in Entering Findings of Fact That Erroneously Stated That Melissa Hill Had Seen Mr. Brown "Beat" His Wife, That Mr. Brown "Pounded His Fist Against the Wall," and That He Had "To Be Restrained . . . to Protect Melissa Hill from Physical Harm."

The superior court entered Findings of Fact regarding the witness intimidation charge that are not supported by the record. Although correcting these facts will not change the outcome of the case, in the interest of accuracy and a fair rendering of what occurred at trial, and because findings not challenged on appeal become verities, State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) (en banc) (citations omitted), Mr. Brown asks that the errors be corrected. At trial, Ms. Hill was declared a hostile witness and the State was permitted to ask leading questions. Three errors arising in part from this tactic must be rectified.

First, Hill never testified that Mr. Brown "beat" his wife, only that he "hit" her. RP at 118-19. While this issue might appear merely semantical, "beat" is a far more pejorative term than "hit," the term used in court. RP at 118-19. The findings must accurately reflect the trial proceedings.

Next, Hill outright denied the prosecutor's statement that Mr. Brown "was hitting walls." RP at 103:

Q: Do you recall telling me he was hitting walls?

A: I don't . . . remember that. I remember telling you that he was mad and that he was yelling and stuff like that.

RP at 103. Accordingly, the finding that "Hill was concerned about Mickey's behavior while making this threat to her, in that he pounded his fist against the wall," CP at 16, directly contradicts the testimony. To find as the court did requires that the court accept the prosecutor's leading question as testimony and disregard the witness's actual answer.

Finally, Hill also unconditionally disagreed with the prosecutors' statement that Mr. Brown had to be physically restrained so that he would not harm her:

Q: Do you recall telling me that Lenny Brown grabbed Mickey Brown and threw him down to keep him from hitting you?

A: No. Lenny had told Mickey to quit yelling and calm down and let me . . . explain but that was before I'd said anything about me talking to the detectives.

RP at 103-04, see also RP at 112-13. Thus, the finding that "at some point [Mickey Brown] had to be restrained by Lenny Brown in order to protect Melissa Hill from physical harm" was also not supported by the evidence.

For these reasons, this Court should remand the case for the correction of the Findings of Fact.

IV. The Superior Court Erred in Applying the 2002 SRA Amendments to this Case and in Including Class C Felonies in Mr. Brown's Offender Score When Five Years Had Elapsed Between the Last Conviction and the Current Offense.

A. Mr. Brown's juvenile convictions committed before he turned fifteen should not have been included in his criminal history.

In sentencing Mr. Brown for a crime committed August 6, 2001, the superior court erroneously applied SRA Amendments effective June 13, 2002, to include in his offender score Mr. Brown's "washed out" juvenile convictions committed before he turned age fifteen. The 2002 SRA Amendments apply retroactively to require courts to include previously "washed out" juvenile convictions in a defendant's offender score. State v. Varga, 151 Wn.2d 179, 183, 86 P.3d 139 (2004) (en banc). However, as the 2002 Amendments did not take effect until after the alleged crimes were committed in this case, the court erred in including Mr. Brown's washed out convictions in his offender score. See Varga, 152 Wn.2d at 183.

Prior to the 1997 amendment to the SRA, juvenile convictions were not part of a defendant's criminal history if they were committed before the defendant turned 15. RCW 9.94A.030(12)(b) (1996). In 1997, the Legislature amended the definition of criminal history to include all juvenile convictions, regardless of the age of the defendant at the time of the conviction. RCW 9.94A.030(12)(b) (1997). However, this Court held this amendment did not have retroactive effect.

State v. Smith, 144 Wn.2d 665, 674-75, 30 P.3d 1245 (2001) (en banc). Thus, it held juvenile offenses committed when two defendants were under the age of fifteen, 144 Wn.2d at 669, should not be counted as part of those defendants' criminal history, even though their current crimes occurred after the effective date of the amendment, 144 Wn.2d at 685-86 (Madden, dissenting).

The law was amended again in 2002. That amendment, effective June 13, 2002, retroactively included all prior juvenile convictions in a defendant's criminal history. Varga, 151 Wn.2d at 183. However, because the law in effect at the time of the crime governs at sentencing, these amendments have no effect on the current case. Thus, the law as it existed post-Smith and prior to the 2002 amendment applies and Mr. Brown's juvenile convictions committed before he turned fifteen should not have been counted as part of his criminal history.

When Mr. Brown's juvenile convictions dating from before he turned fifteen are removed, his offender score for the burglary drops from 16.5 to 10 as to the burglary and from 9.5 to 6 as to the witness intimidation. See CP at 24. With the correction of the errors regarding the Class C felonies, his offender scores drop even lower.

B. Mr. Brown's Class C felonies should not have been included in his criminal history.

The court also erred in including prior Class C felonies in Mr. Brown's criminal history when five years had elapsed from the date of his last conviction to the date of the current alleged crimes. Class C prior felonies are not part of an offender score under these circumstances:

Class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525 (2000). The date of Mr. Brown's last convictions prior to the instant offenses was July 10, 1996. CP at 24. The instant offenses were allegedly committed over five years later, in August, 2001. CP at 22-23.⁸

The record below does not reveal whether Mr. Brown served any time in confinement on the July 10, 1996 convictions. All that is in evidence are the Understanding of Defendant's Criminal History (which Mr. Brown refused to sign), CP at 20-21, and the criminal history calculation in the Judgment and Sentence. CP at 24. These documents are silent as to actual sentences served.

⁸ The Class C felonies: 1996 Taking motor vehicle without permission, RCW 9A.56.070(2) (2001); 1994 second degree possession stolen property, RCW 9A.56.160(2) (1993).

Given the amount of time elapsing between the last conviction and the current alleged offenses, however, it was essential for the court to determine whether the Class C should be counted in the offender score. If the court had made the determination that the Class C felonies should not be counted, coupled with the determination that Mr. Brown's juvenile offenses while under the age of fifteen should not be counted, his offender scores would have been 8 (rounded down from 8.5) as to the burglary and 4 (rounded down from 4.5) as to the witness intimidation. His sentence range would have been 77-102 months for the burglary and 67-89 months for the witness intimidation.

For all of these reasons, the superior court erred in including Mr. Brown's "washed out" juvenile convictions and his prior Class C felonies in his offender score and this Court should vacate and remand Mr. Brown's erroneous sentence.

V. The Superior Court Erred in Disallowing Mr. Brown's Posttrial Challenge to His Offender Score When the Challenge Was Brought Under CrR 7.8 and the Court Had Held That Claims Under that Provision Were Timely Filed.

The superior court erred in failing to permit Mr. Brown to bring a posttrial challenge to his offender score under CrR 7.8. Motions pursuant to CrR 7.8 must be brought within a reasonable time and if pursuant to CrR 7.8(1) or (2), within one year after the judgment or order was entered. CrR 7.8. Mr. Brown filed his posttrial challenge to his offender score calculation on June 5, 2004, one year after

he had been sentenced. CP at 188-89. Indeed, the superior court held that his claims under CrR 7.8 were permissible and not time barred. RP2 at 17-19; CP at 200. However, when it entered an order permitting claims brought under CrR 7.8 and CrR 8.3, the court, without explanation, limited those claims to ineffective assistance of counsel, police misconduct, and victim/witness recantation. CP at 200. Its failure to include Mr. Brown's challenge to his offender score in that list resulted in the loss of his claim. Consequently, his challenge to his offender score was never directly addressed by the superior court (although the court did address it in terms of its impact on Mr. Brown's ineffective assistance of counsel claim, see RP3 at 412-13; CP at 229-30). Because Mr. Brown timely brought the challenge to his offender score calculation, the superior court erred in never ruling on the challenge. Mr. Brown requests this Court to consider his challenge to his offender score through the appeals process (see Point IV, supra) or, alternatively, to remand for resolution by the superior court.

VI. Mr. Brown's Trial Counsel Was Ineffective Both for Myriad Individual Reasons and When His Errors are Considered Cumulatively, Depriving Mr. Brown of His Right to Counsel and Requiring Reversal.

Mr. Brown's constitutional right to effective counsel was violated when counsel's performance was deficient both overall and in regard to certain key particulars. U.S. Const. amend. VI; Const. art. 1 § 22. Specifically, counsel's

performance was both deficient and prejudicial when he failed to perform the following essential tasks: a) Present to the trial court the law regarding the intimidation count as charged in the information, b) object to the erroneous Findings of Fact and Conclusions of Law, c) Present to the court the law regarding what is required to be armed with a deadly weapon under RCW 9A.52.020(1) and former RCW 9.94A.310, d) contest the inclusion of defendant's "washed out" juvenile and Class C convictions in his offender score, and e) file posttrial motions. Moreover, all of these errors, taken together, compel the conclusion that counsel was ineffective.

This Court reviews a claim of ineffective assistance of counsel de novo. State v. S.M., 100 Wn. App. 401, 409, 996 P.2d 1111 (2000). To prove ineffective assistance, the defendant must first show that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987) (en banc). Next, the defendant must show that he was prejudiced by the deficient representation. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991) (en banc) (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984)). To prove prejudice, the defendant must show a "reasonable probability" that but for counsel's error, the outcome would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999) (en banc). If defense

counsel's conduct can be characterized as legitimate trial strategy or tactics, then it cannot constitute ineffective assistance. Strickland, 466 U.S. at 687, 104 S. Ct. 2052, 80 L. Ed.2d 674; State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (en banc) (quoting State v. Renfro, 96 Wn.2d 902, 909, 630 P.2d 737 (1982)). Because both prongs of the ineffective assistance test are met in this case and counsel's actions cannot be explained as legitimate trial strategy, Mr. Brown was denied his constitutional right to counsel and this Court should reverse the conviction.

Counsel's first error was his absolute failure to inform the court of the law regarding the intimidation count as charged in the information. At no point during the trial did counsel argue that the State needed to show that an official proceeding had been pending at the time of the alleged threat in order to prove the charge of witness intimidation. See RP. Yet this was the law that should have been applied to the case. See Point I, supra. By failing to raise an argument that would have required the court to find his client not guilty of the witness intimidation count as charged, the attorney's performance fell below any objective standard of reasonableness. Moreover, that deficient performance was prejudicial as it resulted in a conviction on the witness intimidation charge that should never have been entered. For these reasons, Mr. Brown's trial counsel was ineffective and this Court should reverse his conviction as to the witness intimidation.

Counsel's next error was his utter failure to present to the trial court the law regarding what is required to be armed with a deadly weapon under RCW 9A.52.020(1) and former RCW 9.94A.310. In his closing arguments, without supporting his assertion with any law, Mr. Williams submitted that to be "armed" with the gun, Mr. Brown would have had to have possession of it. RP at 181. The court offered a case which it found relevant, State v. Chiariello, 66 Wn. App. 241, 831 P.2d 1119 (1992), which it explained addresses accessibility of the weapon. Id. The court gave Mr. Williams the cite for the case and suggested he might Shepardize it to find additional law. RP at 182.

Mr. Williams also argued that the lack of bullets presented another issue, although he was unclear as to what that issue was:

The other – the other – the other issue, your Honor – and I did some research on this – the availability of bullets for the gun, not whether it was loaded or not but the availability of bullets has never been ruled on by any court higher than – by any court.

RP at 181. The court reserved its ruling on what is required to be armed with a deadly weapon and asked for briefing on the issue. RP at 182.

The next day, the court was ready to hear arguments on the issue. The State apparently submitted a brief, but Mr. Brown's attorney did not, failing, in fact, to make any argument whatsoever on the issue:

Your Honor, I found nothing. The only thing I found was – well, I don't know if I found anything. There was one case that shrank a

bit as far as the holding in regards to whether bullets were available or not or whether the gun could be loaded or not, but nothing else that seemed to do anything to aid [our case].

RP at 195. Accordingly, the court relied on the case it had referred the defendant to and on a case cited by the State, State v. Faille, 53 Wn. App. 11, 766 P.2d 478 (1988), to hold that Mr. Brown was armed for purposes of the first degree burglary statute. RP at 195-96. The court found Mr. Brown guilty of first degree burglary and made a specific finding that he was armed with a firearm under the relevant statutes. RP at 196-97.

When the most serious charge Mr. Brown faced required a finding that Mr. Brown was “armed” and such finding also mandated in a 60-month sentence enhancement, counsel’s performance was clearly deficient when he failed to make any argument at all regarding the State’s failure to prove that his client was “armed.” He also apparently failed to research the issue, as he seemed ignorant that the existing law supported a finding that his client was not armed. See Point II, supra. Given the paramount importance of this issue to Mr. Brown and counsel’s absolute lack of effort, counsel’s performance fell below any objective standard of reasonableness in this matter.

Counsel’s deficient performance was prejudicial in that it resulted in both the conviction for burglary and the enhanced sentence. The U.S. Supreme Court has noted that “any amount of actual jail time has Sixth Amendment

significance.” Glover v. United States, 531 U.S. 198, 203, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001). Accordingly, an increase in any amount of jail time due to ineffective assistance is prejudicial. For these reasons counsel was ineffective and this Court should remand for a new trial.

Counsel’s third error was his failure to correct any of the court’s erroneous findings of fact or conclusions of law. As explained earlier, the findings of fact were rife with misstatements. See Points II & III, supra. In addition, the findings of fact failed to support the conclusions as to both the witness intimidation charge and the burglary charge. See Points I & II, supra. When counsel’s timely objections would have cleared up these problems and, possibly, resulted in acquittals on the charges, his performance was both deficient and prejudicial to Mr. Brown and this Court should reverse Mr. Brown’s convictions.

Next, trial counsel was ineffective when he did not object to the calculation of Mr. Brown’s offender score. First, counsel’s performance was clearly deficient when he allowed the court to apply the 2002 SRA Amendments to the calculation and the alleged crimes were committed before the effective date of those amendments. See Point IV(A), supra. This error resulted in a 6.5-point increase in Mr. Brown’s offender score as to the burglary and a 3.5-point increase in Mr. Brown’s offender score as to the witness intimidation count.

The superior court heard arguments on the ineffectiveness of trial counsel regarding Mr. Brown's offender score and the 2002 SRA Amendments, but held that no ineffectiveness could be found when the issue was uniformly confusing to both courts and counsel. RP3 at 412-13; CP at 229-30. But the issue in this case was much simpler than that, as it had to do with the effective date of the 2002 amendments. Prior to those amendments, the law had been settled. It was only with those amendments that the law was again open to question. As the amendments did not apply at all to the case given their effective date, counsel was only required to apply settled law to the calculation of Mr. Brown's offender score. Requiring counsel to determine that a more punitive sentencing provision does not apply to his client's case, given nothing more complicated than the law's effective date, is surely asking the bare minimum.

Next, counsel's performance was deficient when he allowed the court to include the Class C felonies in Mr. Brown's offender score when more than five years had elapsed between his prior conviction and the alleged current conviction. See Point IV(B), supra. This error resulted in a two-point increase in Mr. Brown's offender score as to both convictions.

These sentencing errors, taken together, prejudiced Mr. Brown as they resulted in a higher sentence than he otherwise would have received. For these

reasons, Mr. Brown's counsel was ineffective and this court should remand for resentencing.

Moreover, counsel was ineffective in failing to file any posttrial motions. Although Mr. Brown attempted to file pro se posttrial motions, his motions were all filed after sentencing in June, 2002, months after the February verdict in the case. Motions pursuant to CrR 7.4 and CrR 7.5 must be brought within 10 days of the verdict or decision. CrR 7.4(b); CrR 7.5(b). Thus, counsel's failure to timely file posttrial motions directly resulted in the loss of Mr. Brown's right to bring motions pursuant to CrR 7.4 and CrR 7.5.

The superior court ruled on this argument, holding that it was somehow excusable that counsel made no further efforts on his client's behalf because his client was troublesome:

I think Mr. Williams got out of this as fast as he could. I don't think anyone can blame him for that. It is not really relevant to the issue of whether or not Mr. Brown had ineffective assistance of counsel at trial because Mr. Brown was still running the show.

RP3 at 412. This ruling is clearly contrary to the law. Counsel is not entitled to abandon a client because he is difficult to work with or insists on being involved in all decisions. No separate standard of objectively reasonable performance applies to attorneys representing demanding clients.

The court also suggested that Mr. Brown's absence from the court precluded counsel from consulting with him. CP at 229. While Mr. Brown did leave the court, his absence did not excuse his trial counsel from effectively representing him. Counsel is required to represent his client and preserve his client's rights regardless of where the client happens to be. While an attorney's duties may become more difficult in the absence of his client, his responsibilities to his client do not evaporate merely because the client has absconded. To hold otherwise would suggest that the client should be punished for his flight by denying him his constitutional right to counsel.

Here, counsel's failure to bring the posttrial motions resulted in Mr. Brown being precluded from arguing the sufficiency of the evidence in his posttrial motions. When the sufficiency arguments would have resulted in the reversal of Mr. Brown's convictions, see Points I & II, supra, counsel's performance was both deficient and prejudicial. For these reasons, this Court should reverse Mr. Brown's convictions.

Finally, all these errors, taken together, compel the conclusion that Mr. Brown's counsel was ineffective. The cumulative error doctrine applies when individual trial errors may not be sufficient to compel a new trial, but taken together, deprived the defendant of a fair trial. See, e.g., State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (en banc). The doctrine applies by analogy

here. Thus, if this Court finds that the attorney's errors, taken individually, are insufficient to hold trial counsel ineffective, it should nevertheless hold that the cumulative errors in this case deprived Mr. Brown of adequate representation. The cumulative errors in this case portray an attorney so utterly deficient in his representation that he damaged Mr. Brown's overall case and caused manifest prejudice. For this reason also, this Court should reverse Mr. Brown's convictions and vacate his sentence.

D. CONCLUSION

For all of these reasons, Mickey W. Brown respectfully requests this Court to reverse his convictions or, in the alternative, to vacate his sentence and remand for resentencing.

Dated this 1st day of October 2004.

Respectfully submitted,

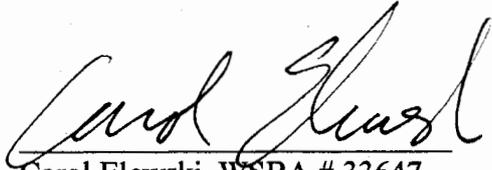


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CERTIFICATE OF SERVICE

I certify that on October 1, 2004, I mailed one copy of the attached brief, postage prepaid, to the attorney for the Respondent, Kevin Michael Korsmo, Deputy Prosecuting Attorney, 1100 W. Mallon, Spokane, Washington, 99201, and one copy of the brief, postage prepaid, to Mr. Mickey W. Brown, DOC No. 722991, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA, 99362-1065.

DATED this 1st day of October 2004



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