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IN THE
SUPREME COURT
OF THE STATE OF WASHINGTON

MICKEY WILLIAM BROWN,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

PETITION FOR REVIEW
of Case No. 23776-1 from Division III

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A. Identity of Petitioner

Petitioner, Mickey William Brown, asks this Court to accept review of the court of appeals decision terminating review designated in Part B of this petition.

B. Court of Appeals Decision

Mr. Brown seeks this Court's review of the unpublished decision of the Court of Appeals of the State of Washington, Division III, No. 23776-1-III, filed August 18, 2005. That court denied reconsideration on September 27, 2005.

A copy of Division III's decision is attached to this petition as Appendix A; the order denying reconsideration is attached as Appendix B.

C. Issues Presented for Review

1. When the information tracked the language of former RCW 9A.72.110(1) in charging that Mr. Brown threatened "a person the defendant had reason to believe was about to be called as a witness in an official proceeding" did the appellate court err in holding that this language was mere surplusage such that Mr. Brown could be convicted under the current statute which merely requires a threat against a current or prospective witness?

2. When the weapon at issue was no more than a potential object of the burglary, accessible to the perpetrators only when in the bedroom of the victim's multi-level residence, did the appellate court err in finding that the nexus test this

Court recognized in *State v. Willis*, 153 Wn.2d 266, 103 P.3d 1213 (2005), was satisfied so as to support findings of burglary in the first degree while armed with a deadly weapon under RCW 9A.52.020(1) and a sentence enhancement for being armed with a deadly weapon under former RCW 9.94A.310?

3. Incorporated herein by reference are the issues Mr. Brown raised in his Statement of Additional Grounds for Review.

D. Statement of the Case

Procedural History

In a two-count information filed on August 31, 2001, the State charged Mr. Brown with first degree burglary in violation of RCW 9A.52.020(1)(a) and intimidating a witness in violation of former RCW 9A72.110(1). 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, convicting Mr. Brown on both counts. RP at 190-93 & 196-97. The court imposed 160 months in prison on the burglary charge, including a 60-month enhancement for the firearm. CP at 28. It imposed the maximum sentence of 102 months on the witness intimidation charge. RP at 211-212; CP at 28.

Mr. Brown appealed his convictions and sentence. The court of appeals affirmed his convictions but remanded for resentencing. See Appendix A.

Substantive Facts

Incorporated herein by reference are the facts Mr. Brown set forth in his Statement of Additional Grounds for Review.

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. 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.

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 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.

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

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.

Armed with a Deadly Weapon

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. A 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 saying that he could have gotten a lot of money for the guns. RP at 104.¹

¹ In his *pro se* capacity, Mr. Brown disagrees with his counsel's statement that "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 a bedroom. RP at 19-20." Petitioner's Brief at 25-26. He would like the Court to understand that his position from the beginning was that he did not commit this burglary. Counsel asks the Court to consider the trial evidence independently and draw its own conclusions without relying upon this or other similar statements of counsel. See Appendix A at 10.

Relying on *State v. Faille*, 53 Wn. App. 11, 766 P.2d 478 (1988), the sentencing 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.

Division III's Decision

Division III held that while the information set forth outdated language regarding witness intimidation, the information also properly charged Mr. Brown under a provision of the current statute. Appendix A at 5. It held that the additional language was not a new element of the crime, but a factual allegation that could be considered mere surplusage. Appendix A at 6. It supported its

conclusion with the fact that the case had been heard by a judge, who is presumed to know and apply the correct law. Appendix A at 6.

Acknowledging that the nexus test this Court recently reiterated in *State v. Willis*, 153 Wn.2d 366, 103 P.3d 1213 (2005), is the applicable test, Division III found that the lower court's findings established that Mr. Brown was armed:

Significantly, Mr. Brown concedes that he or his accomplice placed the rifle and clip on the bed. The gun was moved from the closet to a bed and was readily available to Mr. Brown while he was in the residence. Of equal importance, the burglary was interrupted by the homeowner's return. Here, there was a nexus between Mr. Brown, the crime of burglary and the weapon.

Appendix A at 10. The court found the nexus test was satisfied despite the fact that the trial court did not apply the test. Appendix A at 10-11.

Division III additionally held that Mr. Brown's sentence should be vacated and remanded for a recalculation of his offender score. Appendix A at 11-12.

The lower court further held that Mr. Brown had not established ineffective assistance of counsel and that none of his *pro se* arguments merited reversal. Appendix A at 12-15. In particular, regarding Mr. Brown's claim for a new trial based on Ms. Hill's recantation, the court held that Mr. Brown failed to challenge the lower court's finding that Ms. Hill had not perjured herself at trial and that the recantation testimony was not credible. Appendix A at 14-15.

E. Argument Why Review Should be Accepted

Point I: The Court of Appeals Decision Regarding Witness Intimidation Stretches the Doctrine of Surplusage Beyond any Credible Limit, Creating an Issue of Substantial Public Interest That this Court Should Decide

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) (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) (emphasis added).

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.

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). When the State failed to prove the charged crime, Mr. Brown’s conviction must be reversed.

There is no evidence in the record that Mr. Brown knew what the current law was or that he went to trial on the basis of the current law rather than on the basis of the crime charged in the information. The appellate court held that the trial court must have known what the correct statute was and applied the correct law. Appendix A at 6. While this may be true, that is not sufficient to protect Mr. Brown’s rights. He also had to be informed of the elements of the statute he was charged with violating.

At trial, there was no discussion of the current statute. Nothing in the

record indicates that any of the parties knew that they were dealing with language different from that which appeared in the information. From the silence in the record, it seems likely that the judge, the prosecutor, and the defendant all thought they were dealing with a statute as charged in the information. As witness intimidation is not a highly common crime, their joint misconception is understandable. However, for the court of appeals to hold that the State actually meant to prove a different crime from the one charged constitutes manifest injustice that this Court should rectify.

In particular, the appellate court erred in finding that the language at issue in the information was mere surplusage. Appendix A at 6. When the language constituted an actual element of the former witness intimidation statute, it strains credulity to hold that the language is now merely factual surplusage. Because the State charged the defendant with violating a real, prior statute, the confusion that error wrought is of a different kind than the confusion produced by mere surplus facts in an information. Here it is the manner in which the crime itself was committed: “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.” CP at 1-2.

Although the appellate court stated that the requirement of a pending

official proceeding was surplusage, it did not explain what part of the information itself should be considered surplusage. If the term “official proceeding” is mere surplusage, the crime is still different from that in the current statute. Then the State would have to have proven that Mr. Brown “had reason to believe” Ms. Hill was “about to be called as a witness.” That language implies an immediacy not present in the current statute. “About to be called as a witness” by itself should be interpreted to mean that the proceeding is pending and the witness is imminently going to be called.

Accordingly, the State does not escape from the requirement of a pending proceeding unless the entire phrase, “about to be called as a witness in an official proceeding,” is deemed surplusage. But without that phrase, the information no longer charges all the elements of witness intimidation: “Mr. Brown directed a threat to Melissa Hill, . . . and attempted to influence Ms. Hill.” Because the additional language cannot properly be called surplusage, the appellate court erred in upholding Mr. Brown’s conviction for witness intimidation.

For all these reasons, Division III erred in holding that Mr. Brown’s conviction for witness intimidation was supported by the evidence and this Court should reverse his conviction.

Point II: The Court of Appeals Failed Correctly to Apply the Nexus Test as this Court Mandated in *Willis*

The court of appeals failed to correctly apply the nexus test to the issue of whether Mr. Brown was armed with a deadly weapon for purposes of the first degree burglary statute and the sentence enhancement. To prove that an individual is armed within the meaning of these statutes, the State needed to establish that the defendant was within the proximity of an easily and readily available firearm for offensive or defensive purposes, and that a nexus existed between the defendant, the crime, and the firearm. *Willis*, 153 Wn.2d at 375.

Setting aside the proximity issue for a moment, a nexus between Mr. Brown, the crime and the gun simply cannot be found when the gun did not belong to either the defendant or his accomplice, the gun was not used during the burglary, in preparation for the burglary, or in flight from the burglary. Instead, the gun was an object of the burglary. In that regard, it was more like a TV or a stereo or cash than a weapon. It was a valuable item that would be desirable merely for its value. Accordingly, the requisite nexus cannot be established here.

The purpose underlying the sentence enhancement statute supports this position. In *State v. Schelin*, 147 Wn.2d 562, 55 P.3d 632 (2004), this Court stated that that statute was likely intended to deter armed crime and to protect victims from armed crimes, as well as to protect police during investigations of

crimes. *Schelin*, 147 Wn.2d at 573. Considering the structure of the statute, it seems evident that the legislature imposed such stringent punishments because it wishes to protect the lives and safety of its citizens, not to deter the theft of weapons. Accordingly, the statutes at issue in this case are not directed at people who steal deadly weapons, but at people who use deadly weapons to commit their crimes. Proper application of the nexus tests ensures that the statutes reach only the acts intended.

Indeed, of the cases applying the nexus test, a nexus between the defendant and the gun has been found only where the defendant apparently owned the gun or it was actually within reach at the time of arrest. *See Willis*, 153 Wn.2d at 368-69 (defendant drove car used during burglary and handled gun before and after crime); *Schelin*, 147 Wn.2d at 574 (gun in defendant's home, 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. Simonson*, 91 Wn. App. 874, 883, 960 P.2d 955 (1998) (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 far 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.

In addition, there was not a nexus between the gun and the crime in this case. In *State v. Johnson*, 94 Wn. App. 882, 892, 974 P.2d 855 (1999), 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 between the gun and crime. *Id.* at 896-97.

By contrast, in *Willis*, this Court found that the nexus between the gun and the crime was established when the crime was a burglary and the defendant both

participated in the crime and handled the gun on the way to commit the crime.

153 Wn.2d at 375. In that case, the gun was owned by the perpetrators, brought to the scene of the crime, and handled by the defendant before and after the crime.

See id. and *id.* at 369.

In the instant case, the facts present less ground for finding a nexus between the gun and the crime than in *Willis* or *Johnson*. Here, the only weapon at issue was an object of the burglary, owned and possessed by the victim, not the perpetrators. The gun 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 nexus test was not satisfied and the lower court erred in upholding Mr. Brown’s sentence and conviction on these issues.

Moreover, the gun in this case 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. *Willis*, 153 Wn.2d at 369 (defendant handed gun to accomplice when police stopped his vehicle); *Schelin*, 147 Wn.2d at 574 (gun hanging near door in defendant’s bedroom, which was next to room in which he grew marijuana plants and 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); *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. *Simonson*, 91 Wn. App. at 883. 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); *Faille*, 53 Wn. App. at 114-15 (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.

By contrast, in the instant case, the rifle was merely removed from a closet and put a few feet away on the bed in a bedroom. RP at 19-20. This movement did not make the weapon much more accessible to the perpetrators 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. For these reasons, the gun was not

accessible and Division III erred in upholding Mr. Brown's conviction and sentence on these matters.²

F. Conclusion

For the reasons indicated in Part E, Mr. Brown respectfully asks this Court to reverse his convictions for witness intimidation and first degree residential burglary, vacate his sentence, and remand for resentencing.

Dated this 24th day of October, 2005.

Respectfully submitted,

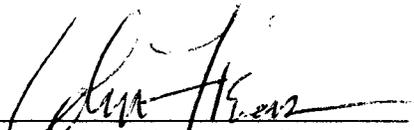


Carol Elewski, WSBA # 33647
Attorney for Petitioner *ryc t*

² Mr. Brown's arguments in his Statement of Additional Grounds for Review are incorporated herein by reference. In addition, in regard to the lower court's decision regarding the witness recantation, Mr. Brown points out that he fully challenged the superior court's finding that there was no perjury. Further, he challenged the superior court's finding that the recantation testimony was not credible. If his challenges to these findings are not clear to the Court, he asks the Court to consider the *pro se* nature of those challenges. A *pro se* defendant should not be penalized for having failed to articulate the challenges as clearly as would be expected from an attorney. In any event, since the crux of his argument rests on the perjury of the witness at trial, his challenge to the superior court's findings to the contrary should be obvious. Because Mr. Brown argued in his Statement of Additional Grounds for Review that Ms. Hill's testimony at trial was perjury, the appellate court should not have held that he did not challenge the court's findings that there was no perjury and that the recantation testimony was not credible.

CERTIFICATE OF SERVICE

I certify that on October 24, 2005, I mailed one copy of the attached
Petition for Review, postage prepaid, to the attorney for the Respondent, Andrew
J. Metts, Deputy Prosecuting Attorney, 1100 W. Mallon, Spokane, Washington,
99201.


~~Carol Elewski, WSBA # 33647~~
~~Attorney for Petitioner~~
CELIN A. FIELDIN

APPENDIX A

FILED

AUG 18 2005

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 23776-1-III
)	
Respondent,)	
)	Division Three
v.)	Panel Nine
)	
MICKEY WILLIAM BROWN,)	UNPUBLISHED OPINION
)	
Appellant.)	

KURTZ, J. – At the conclusion of a bench trial, Mickey Brown was convicted of first degree burglary and intimidating a witness. He was also found to be armed with a deadly weapon and received a sentence enhancement. On appeal, Mr. Brown contends the evidence was insufficient to support his conviction for witness intimidation. He also asserts that he was not armed for the purposes of first degree burglary and the deadly weapon enhancement. Mr. Brown further maintains that the court erred in calculating his offender score and that he received ineffective assistance of counsel.

We affirm Mr. Brown's convictions, vacate his sentence, and remand to the trial court for resentencing.

FACTS

When Craig Ambacher returned to his residence on August 6, 2001, he noticed a green Taurus parked across the street. Once inside the house, Mr. Ambacher discovered that his house had been burglarized. He also noticed that the rear sliding door was open. Mr. Ambacher theorized that the burglars went out the rear door while he came in the front door.

While walking through his house, Mr. Ambacher noticed that his unloaded AK 47 had been removed from the closet and placed on a bed a short distance from the closet. Mr. Ambacher was certain that the rifle had been in the closet when he went to work that morning. This rifle used 7.62 caliber ammunition, but there was a clip belonging to another rifle lying on the bed next to the AK 47. Nothing was missing from the house.

The court found that Mr. Brown moved the rifle from the closet and placed it on the bed with a gun clip that did not match the rifle. Mr. Brown concedes that he or his accomplice took the rifle and clip and put them on the bed.

At the time of the burglary, Melissa Hill was living with her cousin, Kim Brown, and Mickey Brown (Mr. Brown). The day of the burglary, Ms. Hill heard Mr. Brown and Lenny Brown (Lenny) discuss the guns they saw during the burglary. Ms. Hill recalled one man saying that the guns were nice and that he wished they could have gotten them. She recalled Mr. Brown saying that he could have gotten a lot of money for the guns.

After this conversation, Ms. Hill spoke to detectives, who initiated criminal charges against Mr. Brown.

At trial, Ms. Hill was called as a prosecution witness. At the prosecutor's request, she was declared a hostile witness. Ms. Hill testified that Mr. Brown told her she would "pay" if she spoke to the police. Report of Proceedings (RP) (Feb. 11, 2002) at 101. And, Ms. Hill took this statement seriously because she had seen Mr. Brown angry and observed him hit his wife. Ms. Hill also testified that she did not remember telling the prosecutor that Mr. Brown was hitting walls when he told her not to speak to the police or that Lenny had to throw Mr. Brown to the ground to keep him from hitting her. She did remember telling the prosecutor that Mr. Brown was mad and yelling, and that Lenny was defending her and telling Mr. Brown to stop yelling and calm down.¹

Mr. Brown left in the middle of the trial and was found and arrested several weeks later. At the conclusion of a bench trial, the court found Mr. Brown guilty of both charges. The court concluded 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 (Feb. 12, 2002) at 196.

¹ Mr. Brown asks this court to remand the case for correction of three findings of fact related to his witness intimidation conviction, but he concedes that these errors do not affect the outcome of the case. We need not address these arguments as an erroneous finding of fact not material to the conclusions of law are not prejudicial. See State v. Caldera, 66 Wn. App. 548, 551, 832 P.2d 139 (1992).

Motions for Post-Trial Relief. Mr. Brown filed motions for relief from judgment, including a request for a retrial under CrR 7.8 and a request for dismissal under CrR 8.3. The court heard argument and testimony related to three claims (1) recantation of a material witness, (2) ineffective assistance of counsel, and (3) police misconduct. The court denied the motions.

Appeal. On appeal, Mr. Brown contends that the evidence was insufficient to support his conviction for intimidating a witness. He also asserts that he was not armed for the purposes of first degree burglary and the deadly weapon enhancement. Mr. Brown further maintains that the court erred in calculating his offender score and that he received ineffective assistance of counsel.

Lastly, in a statement of additional grounds for review, Mr. Brown raises many of the same issues raised by his appellate counsel. Furthermore, Mr. Brown contends that the court abused its discretion by failing to grant a new trial in light of Ms. Hill's offer of testimony recanting her prior trial testimony.

ANALYSIS

Was there sufficient evidence to support Mr. Brown's conviction for the crime of intimidating a witness?

The information charged Mr. Brown with one count of witness intimidation. The information contained outdated language from former RCW 9A.72.110(1) (1994).² The information read as follows:

That the defendant, MICKEL WILLIAM BROWN, in the State of Washington, on or about August 29, 2001, by use of a threat directed to Melissa Hill, a person that the defendant had reason to believe was about to be called as a witness in an official proceeding, did attempt influence [sic] the testimony of such person.

Clerk's Papers (CP) at 1-2.

While the information contains outdated language requiring that "the defendant had reason to believe was about to be called as a witness in an official proceeding," the information also properly charges Mr. Brown under a provision of the current statute.

RCW 9A.72.110 reads, in part:

- (1) A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to:
 - (a) Influence the testimony of that person[.]

² Former RCW 9A.72.110(1) read, in part: "A person is guilty of intimidating a witness if a person directs a threat to a former witness because of the witness' testimony in any official proceeding, or if, 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." (Emphasis added.)

Hence, in addition to the language from the outdated statute, the information does properly charge Mr. Brown under the current statute.

Mr. Brown argues that his conviction is invalid because the State did not prove the elements of the crime charged in the information. Mr. Brown's argument is based on the underlying assumption that the inclusion of the words "official proceeding" in the information creates an additional element of the crime.

Because the requirement of a pending official proceeding has been abandoned, these words constituted a factual allegation, not a new element of the crime. Factual allegations in the information that exceed the elements of the crime are surplusage unless the defendant is prejudiced. See State v. Stritmatter, 102 Wn.2d 516, 524, 688 P.2d 499 (1984). Significantly, Mr. Brown does not contend that he was confused or misled by the information. Equally important, this case was tried before a judge, not a jury, and a judge is presumed to know and apply the correct law. See State v. Adams, 91 Wn.2d 86, 93, 586 P.2d 1168 (1978).

We conclude the evidence was sufficient to support Mr. Brown's conviction for the crime of intimidating a witness.

Was the evidence sufficient to support the court's conclusion that Mr. Brown was armed with a deadly weapon?

The question of whether a person is armed is a mixed question of law and fact that this court reviews de novo. State v. Johnson, 94 Wn. App. 882, 892, 974 P.2d 855 (1999).

Mr. Brown was convicted of first degree burglary. RCW 9A.52.020(1) provides that a person may be convicted of first degree burglary if:

[W]ith 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[.]

The relevant sentence enhancement provision requires an enhanced sentence “if the offender or an accomplice was armed with a firearm.” Former RCW 9.94A.510(3) (2001).

Initially, the test to determine whether a person was “armed” was limited to an inquiry into whether the weapon or firearm was easily accessible and readily available for use, either for offensive or defensive purposes. State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). After this test was adopted in Valdobinos, the Washington Supreme Court approved the nexus test in State v. Schelin, 147 Wn.2d 562, 567-68, 55

P.3d 632 (2002).³ The nexus test requires that there must be a relationship between the defendant, the crime, and the deadly weapon in order to establish that the defendant was “armed” for purposes of the deadly weapon enhancement statute. Id.

Here, Mr. Brown and the State make their arguments under the two different tests. Mr. Brown contends that the nexus test applies and that insufficient evidence exists to support the conclusion that he was armed. In contrast, the State contends that the nexus test is limited to constructive possession cases, that the accessible and available test applies, and that the court’s conclusion that Mr. Brown was armed is supported by the findings.

Previously, there may have been some confusion because the nexus test was developed in cases where the underlying offense was a crime of possession. However, in a recent case, the Washington Supreme Court explains the application of the two tests in a case involving first degree burglary and other charges. State v. Willis, 153 Wn.2d 366, 371-74, 103 P.3d 1213 (2005).

In Willis, a couple heard noises and observed a woman, who appeared to be keeping watch, standing outside a nearby apartment. A man later came out of the

³ State v. Faille, 53 Wn. App. 111, 766 P.2d 478 (1988), a pre-Schelin case, also has facts similar to this case. In Faille, the defendants took unloaded guns from the house they were burglarizing and placed the guns in the bushes outside the home. Id. at 112. The court concluded that the guns were readily accessible to the defendants during the burglary. Id. at 115.

apartment carrying what appeared to be electronic equipment and the two were joined by a third man, who placed the items in the trunk of a car, and the three drove off. Based on information given to police, the three occupants of the car were detained by police and the couple identified Mr. Willis as the man carrying the equipment out of the apartment. A search of the car uncovered ammunition and a loaded handgun under the backseat. Mr. Willis admitted that he handled the gun in the car on the way to the apartment. Mr. Willis denied involvement in the burglary, but another witness testified that he was the one who kicked in the door and carried out the electronic equipment. Id. at 368-69.

Mr. Willis challenged the firearm enhancements to his sentences for first degree burglary, second degree theft, and unlawful possession of a firearm. Id. at 369. He maintained that the jury instruction was improper because it failed to inform the jury of the nexus test. Id. at 369-70. Noting the development of the nexus test after Valdobinos, Willis explains that “the mere presence of a deadly weapon at the crime scene is insufficient to show that the defendant is ‘armed.’” Id. at 371-72. Willis restates the conclusion that “there must be a nexus between the defendant, the crime, and the deadly weapon in order to find that the defendant was ‘armed’ under the deadly weapon enhancement statute.” Id. at 373. The court also noted that the nexus test developed as a more refined analysis. Id. at 372. Applying the nexus test, the court determined that the evidence was sufficient and that the jury instruction in question was proper. Id. at 373.

Significantly, the court also concluded that the jury instruction was proper even though it did not contain express nexus language. Id. at 373-74.

Here, Mr. Brown argues that the court's findings as to the accessibility of the weapon fail to support the court's conclusion that he was armed. But the court found that:

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.

The defendant and accomplice were interrupted during the course of the burglary by the sound of the homeowner's return, and the opening of his electric garage door.

CP at 15.

Applying the nexus test here, the findings are sufficient to establish that Mr. Brown was armed. Significantly, Mr. Brown concedes that he or his accomplice placed the rifle and the clip on the bed. The gun was moved from the closet to a bed and was readily available to Mr. Brown while he was in the residence. Of equal importance, the burglary was interrupted by the homeowner's return. Here, there was a nexus between Mr. Brown, the crime of burglary, and the weapon.

Moreover, this court should reject Mr. Brown's suggestion that the findings are insufficient because they do not expressly apply the nexus test. As in Willis, here, we

can discern that the court found a relationship between Mr. Brown, the crime, and the deadly weapon. We need not require express “nexus” language here.

We also note that the Willis case is in direct conflict with the State’s position that the defendant need only touch the weapon during the burglary to be “armed.” The State contends that the nexus test does not apply as long as the defendant was in actual possession of the gun during the burglary. But in Willis, the court applied the nexus test even though Mr. Willis admitted touching the weapon in the car on the way to the apartment and another witness testified that he handled the weapon in the car when the police pulled the car over. Willis, 153 Wn.2d at 369.

We conclude there was sufficient evidence to support the court’s conclusion that Mr. Brown was armed with a deadly weapon.

Did the court err in calculating Mr. Brown’s offender score?

Mr. Brown contends the trial court erred by disallowing his post-trial challenge to the offender score. He further contends the court erred when calculating his offender score by (1) including juvenile convictions, and (2) including his prior class C felonies when five years had elapsed from the date of his last conviction to the date of the current alleged crimes.

In response, the State concedes that Mr. Brown’s offender score should not include juvenile criminal history with offense dates prior to Mr. Brown reaching age 15.

The State contends the sentencing record is incomplete and, for that reason, this court cannot determine whether the class C felonies should have been included in Mr. Brown's offender score. Finally, the State agrees that this case should be remanded for resentencing.

Mr. Brown challenges the calculation of his offender score and the State concedes that a mistake was made. We vacate Mr. Brown's sentencing and remand for resentencing.

Was Mr. Brown denied effective assistance of counsel?

To prove ineffective assistance of counsel, Mr. Brown must demonstrate deficient representation and resulting prejudice. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

When examining the first prong, the presumption runs in favor of effective representation, and the defendant must show the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). The first prong must be met by showing counsel's conduct fell below an objective standard of reasonableness. In re Pers. Restraint of Rice, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992).

Mr. Brown first contends that trial counsel failed to inform the court of the law regarding witness intimidation. In his view, trial counsel should have presented arguments related to the State's failure to prove that there was a pending official proceeding at the time Mr. Brown threatened Ms. Hill. However, under the applicable statute, the existence of a pending official proceeding is no longer required.

Mr. Brown also argues that trial counsel failed to object to the erroneous findings of fact and conclusions of law and failed to inform the court of case law related to the issue of whether Mr. Brown was "armed." Even if we assume that the representation was deficient, Mr. Brown can show no prejudice as this court has determined that the findings in question were not material and that, applying the appropriate standard, Mr. Brown was armed.

Next, Mr. Brown argues that trial counsel failed to object to the calculation of his offender score and failed to file post-trial motions related to the calculation of the offender score. The State concedes that Mr. Brown's offender score was not calculated properly and, on remand, Mr. Brown will receive the relief he sought in post-trial motions.

Mr. Brown has failed to establish a claim for ineffective assistance of counsel.

Statement of Additional Grounds for Review. In his statement of additional grounds for review, Mr. Brown contends his representation was deficient because defense counsel failed to interview Ms. Hill before the trial.

However, as the court concluded when considering Mr. Brown's post-trial motions, there were sound reasons for trial counsel's decision not to interview Ms. Hill. The court found that Mr. Brown and his wife had assured defense counsel that Ms. Hill would not testify because she was on an Indian reservation in Idaho and would not be available to testify. When trial counsel advised Mr. Brown that interviewing Ms. Hill was important, Mr. Brown and his wife assured counsel that this was not necessary.

Apart from his pro se argument alleging ineffective assistance of counsel, Mr. Brown contends the court abused its discretion by failing to grant a new trial based on Ms. Hill's offer of testimony recanting her trial testimony. The court's denial of Mr. Brown's request for a new trial was based on its findings that Ms. Hill's recantation testimony during the motion hearing was not credible and that her testimony at the original trial was not perjured.

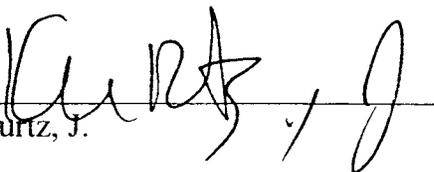
Mr. Brown's argument is that, assuming Ms. Hill's testimony at the first trial constituted perjury, a new trial is required because the independent evidence does not justify Mr. Brown's conviction. In short, Mr. Brown makes no attempt to challenge the court's findings that there was no perjury and that the recantation testimony was not

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credible. Based on these findings, we conclude that the court correctly denied the motion for a new trial.

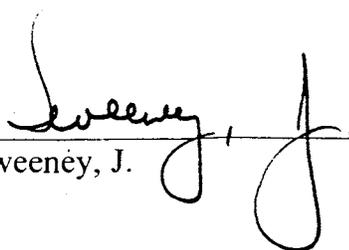
In summary, we affirm Mr. Brown's convictions, vacate his sentence, and remand for resentencing.

The majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Kurtz, J.

WE CONCUR:


Kato, C.J.


Sweeney, J.

APPENDIX B

FILED

SEP 27 2005

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

**COURT OF APPEALS, DIVISION III, STATE OF
WASHINGTON**

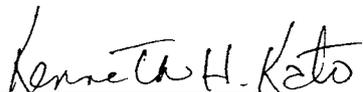
STATE OF WASHINGTON,)	No. 23776-1-III
)	
Respondent,)	
)	ORDER DENYING
v.)	MOTION FOR
)	RECONSIDERATION
MICKEY WILLIAM BROWN,)	
)	
Appellant.)	

The court has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's decision of August 18, 2005, is hereby denied.

DATED: September 27, 2005

FOR THE COURT:



KENNETH H. KATO
CHIEF JUDGE

