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SUPREME COURT NO. 94325-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN SASSEN VANELSLOO

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Deborra Garrett, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES PRESENTED IN SUPPLEMENTAL BRIEF

1. Was a sitting juror improperly removed where the record fails to support a finding of manifest unfitness based on either the juror's oral answers or other nonverbal conduct?

2. Does insufficient evidence exist to support each of the five firearm enhancements where Sassen-Vanelosloo was not within physical proximity of the shotgun and where there was no nexus between Sassen-Vanelosloo, the shotgun, and the controlled substances?

B. SUPPLEMENTAL STATEMENT OF THE CASE

The Court of Appeals rejected Sassen-Vanelosloo's arguments that the trial court improperly dismissed a seated a juror, and that there was insufficient evidence of the five firearm enhancements. State v. Sassen-Vanelosloo, 2017 WL 480712 (noted at 197 Wn. App. 1060). Relevant facts are set forth in Sassen-Vanelosloo's petition for review.¹ Additional facts are set forth in the argument section of this brief.

C. SUPPLEMENTAL ARGUMENT

1. THE RECORD DOES NOT SUPPORT A FINDING THAT JUROR 12 DEMONSTRATED ANY UNFITNESS WARRANTING HER REMOVAL.

The state and federal constitutions protect an accused person's right to participate in the selection of a jury and to receive a fair trial by

¹ A statement of facts is also presented in the Brief of Appellant (BOA), at pages 3-22.

that selected jury. Batson v. Kentucky, 476 U.S. 79, 85, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); State v. Irby, 170 Wn.2d 874, 884-85, 246 P.3d 796 (2011), U.S. Const. amends. 6, 14; Wash. Const. art. I, section 22. Washington expressly guarantees the inviolate right to a 12-person jury and unanimous verdict in a criminal prosecution. Irby, 170 Wn.2d at 884; see also Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980) (once state guarantees right to jury trial, Fourteenth Amendment guards against its arbitrary denial); State v. Williams-Walker, 167 Wn.2d 889, 896 n.2, 225 P.3d 913 (2010) (“greater protection” for jury trial rights under article I, sections 21 and 22 than federal constitution).

A court does not have unbridled discretion to remove a sitting juror. See e.g., Miller v. State, 29 P.3d 1077, 1083-84 (Ok. Crim.App. 2001) (court’s discretion to dismiss selected juror for good cause “ought to be used with great caution”); People v. Bowers, 87 Cal.App.4th 722, 729 (Cal.App. 2001) (court’s discretion to dismiss juror is “bridled to the extent” that juror’s inability to perform his or her functions must appear in the record as a “demonstrable reality, and court[s] must not presume the worst of a juror.”). CrR 6.5 provides that a juror shall be excused only after the court has “found” she is “unable to perform the duties” of a juror. RCW 2.36.110 explains that the court shall excuse a juror if she has

“manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention, or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.”

Juror 12 did not manifest unfitness to serve as required by RCW 2.36.110, and the trial court did not find demonstrable unfitness based on her oral answers or other nonverbal conduct. On the contrary, Juror 12's answers to repeated questioning show she was fit to continue serving as a juror.

Juror 12 recognized the defense witness, Sharon Burton, during her trial testimony. Juror 12 knew Burton "slightly" because of Burton's involvement with the Lummi Business Council. In that role, Burton had helped facilitate an intervention and treatment for Juror 12's nephew's substance abuse issues. 17RP² 852-56. As a result, Juror 12 had met with Burton twice, two years previously. Juror 12 did not personally participate in the intervention with her nephew however. Juror 12 had not seen Burton since and did not socialize with her. 17RP 854-57.

Juror 12 assured the bailiff that “her knowledge of Ms. Burton would not affect her assessment of the testimony in any way.” 17RP 853. When questioned by the trial court, Juror 12 made clear that her passing contact with Burton was neither a positive or negative experience. 17RP

² The index to the citations to the record is found in the BOA at 4, n.4.

857-59. Juror 12 was indifferent towards Burton. When questioned by the prosecutor, Juror 12 explained only that she was pleased her "community" and "tribe" provided assistance in getting her nephew the necessary treatment. She denied that the State's cross-examination of Burton concerned her. Juror 12 made clear that if she saw Burton out in the community again, she likely would not recognize her. 17RP 858-59.

The State sought to excuse Juror 12, explaining that Burton was a critical alibi witness and if the jury were to believe Burton, "that means my case goes nowhere." The State maintained that Burton "had some good feelings," about what Burton or the community had done for her family. The State acknowledged it could not "absolutely put a finger on that she [Juror 12] can't be fair[.]" but that Juror 12's continued service as a juror "just didn't feel fair." 17RP 860.

The trial court acknowledged it was a "close case," but concluded over defense objection that Juror 12 should be excused. The trial court explained, "Counsel points out correctly that Ms. Burton is a critical witness and even though there is not a real strong relationship between the juror and the witness I think given the importance of the witness's role in the case it's appropriate for Juror 12 to be excused[.]" 17RP 861-62.

Juror 12 did not show that she was unable to perform her function. As the State has conceded, and the Court of Appeals properly recognized,

"[S]he did not state that she could not be fair or impartial. In fact, she suggested that her interactions with Burton were minimal and unimportant." Sassen-Vanelstloo, 2017 WL 480712 at *3; Brief of Respondent at 19 (BOR) (recognizing that "Juror #12 did not verbally express obvious bias[.]").

The trial court did not find Juror 12 demonstrated a "manifest unfitness" to serve. Rather, the trial court decided to dismiss her, over defense objection, for what amounted to an abundance of caution based on Burton's importance to the defense. But this is not the legal standard for dismissing a sitting juror over a party's objection.

To remove a juror for bias, the record must show that the juror was unable to "try the issue impartially and without prejudice to the substantial rights of the party challenging." Hough v. Stockbridge, 152 Wn. App. 328, 340, 216 P.3d 1077 (2009) (quoting RCW 4.44.170(2)), rev. denied, 168 Wn.2d 1043 (2010). Actual bias must be established by proof. State v. Noltie, 116 Wn.2d 831, 838, 809 P.2d 190 (1991). The challenging party must prove that the challenged juror has formed or expressed an opinion which would prevent her from trying the case impartially. RCW 4.44.190. Even then, such an opinion itself is insufficient to sustain the challenge unless the trial court is satisfied, from all the circumstances, that the juror

cannot disregard the opinion in order to try the case fairly and impartially. RCW 4.44.190.

A court abuses its discretion to remove a juror when such decision stems from application of the wrong evidentiary standard or rests on facts unsupported by the record. State v. Depaz, 165 Wn.2d 842, 858, 204 P.3d 217 (2009); State v. Elmore, 155 Wn.2d 758, 774-75, 781, 123 P.3d 72 (2005).

In Depaz, for example, a juror improperly communicated with her husband about the case during deliberations, but this Court concluded that this “bare misconduct” did not provide legal basis to dismiss her without further evidence of inability to serve. 165 Wn.2d at 858. This Court construed RCW 2.36.110 to require that a trial court find a seated juror’s actual inability to serve as a fair juror before removing them. Id. at 857-58.

In Elmore, the trial court failed to apply a heightened evidentiary standard when weighing conflicting evidence about whether a juror was participating in deliberations or was refusing to do so. 155 Wn.2d at 779. Because the trial court had not applied the correct evidentiary standard, this Court held that the trial court had improperly dismissed the juror. Id. at 780.

These cases make clear that removal of a juror should only occur upon a determination that removal is necessary to avoid prejudice to one

of the parties. Depaz, 165 Wn.2d at 858. This is consistent with this Court's recognition that a trial court must err on the side of caution by protecting the defendant's constitutional right to ensure that a juror is not dismissed for his views of the evidence. Id. at 854 (citing Elmore, 155 Wn.2d at 777-78).

Juror 12 did not show she was unable to impartially perform her function, on the contrary, she made clear that "her knowledge of Ms. Burton would not affect her assessment of the testimony in any way." 17RP 853. She was indifferent towards Burton and had no fixed bias or prejudice. 17RP 861.

The Court of Appeals has held that a sitting juror is properly retained where that juror gave no indication they could not be fair or impartial. In Hough, the trial court received a note from a sitting juror which read:

Your Honor: Has Mr. Hough been evaluated by a mental health professional? There is little doubt that this man is delusional & would be diagnosed with obsessive compulsive disorder (OCD). Does the court have the authority to order such an evaluation? (No need to respond to this).

152 Wn. App. at 335.

Hough moved to dismiss the juror who wrote the note on the basis that the juror had already reached a decision before hearing all the

evidence. The trial judge denied the motion because she was not convinced that the juror had in fact already reached a decision in the case. Id. at 335-36.

On appeal, Hough argued the note was a sufficient showing of the juror's unfitness to warrant his dismissal. Division Two concluded the record supported the trial judge's refusal to dismiss the juror because, "The juror's note did not say that the juror could not be fair or impartial. It suggested personality traits that Mr. Hough ultimately agreed with -- that he was compulsive." Id. at 341. The converse must also be true; where as here, Juror 12 did not indicate that her passing contact with Burton would cause her to be unfair or biased, she was improperly dismissed. See also State v. Kloepper, 179 Wn. App. 343, 353, 317 P.3d 1088, rev. denied, 180 Wn.2d 1017 (2014) (acquaintance with complaining witness did not reveal bias warranting removal where juror indicated it would not affect his ability to serve); State v. Tingdale, 117 Wn.2d 595, 601, 817 P.2d 850 (1991) (social relationship between prosecutor and juror not grounds for disqualification), cert. denied, 475 U.S. 1112 (1986)).

The Court of Appeals purported to abide by Hough by asserting that as in that case, here the record provided a "tenable reason" supporting the trial court's decision. This makes little sense. The trial court did not find Juror 12 demonstrated a "manifest unfitness" to serve. Nonetheless,

the State's argument in this case, accepted by the Court of Appeals, was that factual determinations were deferred to the trial judge who, "was in the best position to gauge juror 12's demeanor, facial expressions, and other nonverbal communications to assess whether she was biased." Sassen-Vanelstoo, 2017 WL 480712 at *3 (citing State v. Jorden, 103 Wn. App. 221, 226, 11 P.3d 866 (2000), rev. denied, 143 Wn.2d 1015 (2001)).

While a trial judge may be best placed to assess the demeanor of a juror, here the trial court's ruling was not predicated on Juror 12's demeanor or other non-verbal communication. The State argued that Juror 12's answers to repeated questioning, though "appropriate," were designed to deceive the court and allow her to remain on the jury. BOR at 19-20. In support of this contention, the State points only to the trial court's remark that Juror 12 would not be pleased at being excused. What the trial court recognized however, was that no juror would be pleased about being excused "after a week-and-a-half being on the jury." 17RP 863.

Contrary to the State's suggestion, the trial judge did not claim her observations underlied her decision to dismiss Juror 12. She did not indicate Juror 12 seemed less than forthright. The trial court made no findings about Juror 12's demeanor, tone of voice, and mannerisms which would support a finding of bias. The judge's decision to disqualify Juror

12 was based on her words alone and no deference is due the court's opportunity to observe her demeanor.

Because Juror 12 did not indicate she could not be fair and impartial, the trial court erred in dismissing her based solely on her prior passing contact with Burton. The court applied the wrong standard and unreasonably removed a qualified juror who had been selected and sworn without evidence of her manifest unfitness to serve, over defense objection. The Court of Appeals opinion is not supported by the record and conflicts with precedent from this Court and Division Two's opinion in Hough.

The only remaining question is prejudice. There is no right to be tried by a particular juror. State v. Gentry, 125 Wn.2d 570, 615, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995). But removing a qualified, seated juror, without properly applying the legal standard necessary for dismissal requires reversal. Elmore, 155 Wn.2d at 781. As this Court explained when addressing the remedy that follows the improper dismissal of prospective jurors,

It is no answer to say that the 12 jurors who ultimately comprised Irby's jury were unobjectionable. Reasonable and dispassionate minds may look at the same evidence and reach a different result. Therefore, the State cannot show beyond a reasonable doubt that the removal of several potential jurors in Irby's absence had no effect on the verdict.

Irby, 170 Wn.2d at 886-87.

The same is true here. The State cannot show that Juror 12's dismissal had no effect on the verdict.

2. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE REQUIRED NEXUS BETWEEN SASSEN-VANELSLOO, THE SHOTGUN, AND THE DRUGS FOR PURPOSES OF EACH OF THE FIVE FIREARM ENHANCEMENTS

Due process requires that the prosecution prove every part of an enhancement, including that the accused committed the offenses while "armed" with a firearm. Williams-Walker, 167 Wn.2d at 898. A person is not armed simply because he owns or possesses a weapon. State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007). Rather, a person is "armed" when he is within proximity of an easily and readily available firearm for offensive or defensive purposes and when a nexus is established between the accused, the weapon, and the crime. State v. Houston-Sconiers, 188 Wn.2d 1, 17, 391 P.3d 409 (2017) (quoting State v. O'Neal, 159 Wn.2d 500, 503-04, 150 P.3d 1121 (2007)). Whether a person is armed is a mixed question of law and fact that this Court reviews de novo. State v. Ague-Masters, 138 Wn. App. 86, 102, 156 P.3d 265 (2007).

The definition of what is required to prove someone is "armed" has evolved over time, from just the requirement that a gun be "easily

accessible and readily available for offensive or defensive purposes,” to a requirement that there also be a “nexus” between the defendant, the weapon and the crime, to adding another requirement that there must be proof the defendant had the intent to use the weapon in furtherance of the crime. Compare, State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993) (applying “easily accessible” test); with State v. Schelin, 147 Wn.2d 562, 563-64, 570, 55 P.3d 632 (2002) (adding “nexus” evaluation); with State v. Brown, 162 Wn.2d 422, 431, 173 P.3d 245 (2007) (adding the “intent to use” test). Under any of those standards, the firearm enhancements fail here.

Each of the five firearm enhancements was based on Sassen-Vanelosloo’s alleged possession of a Mossberg 12-gauge shotgun. CP 3-5; 17RP 743-44, 746-47, 1004-05. The shotgun was found in the “rear cargo area” of the Kia that Sassen-Vanelosloo was allegedly driving. The shotgun was underneath other items on the floor. 17RP 315, 337, 562.

A red backpack was one foot from the barrel of the shotgun. 17RP 296, 316-17, 565-66. The backpack contained several other containers, including a locked bank bag. Inside the bank bag were two camera bags. 17RP 337. One camera bag contained a digital scale, methamphetamine, and five blue morphine pills. 17RP 300-01, 318-19, 324, 337, 567, 660-62, 667. A second camera bag contained small plastic bags and heroin. 17RP

302, 318-19, 330, 337, 669-70. Also found inside the bank bag was a pipe, butane torch, 30 alprazolam pills, and 67 clonazepam pills. 17RP 337, 566-67, 576, 659, 662-64.

Someone in the back seat of the Kia could reach the shotgun. 17RP 563. The backpack however, was “beyond the reach of the driver in the driver’s seat.” 17RP 337. Based on these facts the State failed to show that the shotgun, which was out of reach of the driver, was easily accessible and readily available.

This Court has held that mere proximity or constructive possession is insufficient to show that a defendant was armed at the time the crime was committed. State v. Gurske, 115 Wn.2d 134, 138, 118 P.3d 333 (2005); Valdobinos, 122 Wn.2d at 181-83 (unloaded rifle under the bed; defendant not “armed” for the crime in the house); see also State v. Johnson, 94 Wn. App. 882, 974 P.2d 855 (1999) (not “armed” simply because a weapon is present during the commission of a crime), rev. denied, 139 Wn.2d 1028 (2000); State v. Mills, 80 Wn. App. 231, 907 P.2d 316 (1995) (there was no physical proximity to the weapon at a time when availability for use for offensive or defensive purposes was critical).

Gurske was stopped for making an illegal turn and then arrested for driving with a suspended license. Police handcuffed Gurske, searched him, and placed him in the back of his patrol car. Gurske, 155 Wn.2d at

136. Officers conducted an inventory search before impounding Gurske's truck. One of the officers pulled the front seat forward and saw a backpack behind the driver's seat. The pack was within arm's reach of the driver's position, but removable only by either getting out of the truck or moving into the passenger seat. The main portion of the backpack contained a torch, under which, was a holster containing an unloaded pistol. A fully loaded magazine for the pistol was also found in the backpack. The backpack also contained three grams of methamphetamine. Id.

This Court observed that use for offensive or defensive purposes could be to facilitate commission of the crime, escape, protect contraband, or prevent investigation, discovery, or apprehension by the police. Gurske, 155 Wn.2d at 139. This Court concluded however, there was insufficient evidence to show that the firearm was easily accessible and readily available for use because Gurske would have had to exit the vehicle or move into the passenger seat to reach the gun. Id.

The Court found the evidence did not show whether Gurske could unzip the backpack, remove the torch, and remove the pistol from the driver's seat where he was sitting when he was stopped by police. Nor was there evidence that Gurske moved toward the backpack. Finally, there was no evidence Gurske had used or had easy access to use the weapon against another person when he acquired or was in possession of the

methamphetamine. Id. at 143. This Court concluded there was insufficient evidence to show that the firearm was easily accessible and readily available for use because Gurske would have had to exit the vehicle or move into the passenger seat to reach the gun. Id.

As in Gurske, there was no physical proximity between Sassen-Vanelstoo and the shotgun when availability for use for offensive or defensive purposes was critical. Significantly, as in Gurske, here the shotgun was out of Sassen-Vanelstoo's reach as the alleged driver of the car. Sassen-Vanelstoo would have had to exit the Kia or move into the rear seat to reach the shotgun. Additionally, Sassen-Vanelstoo had already left the car before the officers arrived, opened the rear-cargo hold area, saw the shotgun, and searched the backpack which led to discovery of the locked bank bag containing the drugs.

Despite Sassen-Vanelstoo's inability to easily access the shotgun, the Court of Appeals purported to distinguish Gurske by asserting that the shotgun was part of a continuing crime related to the drug possession. Sassen-Vanelstoo, 2017 WL 480712 at *5-7. When a crime is continuing crime, a nexus exists if the gun is "there to be used." Gurske, 155 Wn.2d at 138. But, "[s]howing that a weapon was accessible during a crime does not necessarily show a nexus between the crime and the weapon." Brown, 162 Wn.2d at 432. The defendant must be shown to have "intent or

willingness to use” the weapon during the specific crime. Id. at 431. This potential use may be offensive or defensive and may be to facilitate the crime’s commission, to escape the scene, or to protect contraband. Gurske, 155 Wn.2d at 139. Whether a defendant is armed is a fact specific decision. Id. at 139.

To apply the nexus requirement, this Court examines the “nature of the crime, the type of weapon, and the circumstances under which the weapon is found.” Schelin, 147 Wn.2d at 570. Although the State need not establish “with mathematical precision the specific time and place that a weapon was readily available and easily accessible,” it must establish the required nexus between the defendant and the weapon by presenting evidence that the weapon was easily accessible and readily available at the time of the crime. O’Neal, 159 Wn.2d at 504-05.

The Court of Appeals’ reliance on O’Neal, Eckenrode, and State v. Easterlin, 159 Wn.2d 203, 149 P.3d 366 (2006), to support its conclusion that, “[w]hen Sassen Vanelstloo was near or in possession of the drugs, he was necessarily near and in possession of the firearm[.]” is misplaced for two reasons. Sassen-Vanelstloo, 2017 WL 480712 at *7.

First, Gurske is not distinguishable on this basis. In Gurske, the backpack containing the methamphetamine also contained the pistol and magazine. 155 Wn.2d at 136. Thus, Gurske had access to the gun and

ammunition anytime he opened the backpack to access the methamphetamine. But, that fact was not what was significant to this Court. Rather, the Court noted that while there was physical proximity of the pistol, the methamphetamine, and Gurske, there was “simply nothing” which gave rise to an inference that Gurske could reach over or around the driver’s seat and access the weapon from the driver’s seat. Id. at 143. Nor was there any evidence that Gurske had used the weapon against another person at any other time, such as when he acquired or was in possession of the methamphetamine. Id.

Second, a careful comparison of the cases on which the Court of Appeals relies to conclude a sufficient nexus exists between the shotgun and its use to protect the drugs, demonstrates why Sassen-Vanelslloo's case is different. In O’Neal, police searched a house and found evidence of methamphetamine manufacturing, over 20 guns, body armor, night vision goggles, and a police scanner. 159 Wn.2d at 502-03. Most of guns were found in two gun safes, one locked and the other unlocked. A loaded AR-15 was found in one bedroom and a loaded pistol was found under a mattress in a different bedroom where one of O’Neal’s co-defendants slept. Id. at 503.

In concluding a jury could infer the guns were readily available and easily accessible to one or more of the accomplices to protect the drug

manufacturing operation, this Court focused on O’Neal’s accomplice who testified the loaded pistol was under his mattress because “[i]f I needed it, it was there.” Id. at 505-06. There was also evidence that the AR-15 was readily accessible to the co-defendant who pleaded guilty to manufacturing methamphetamine. The co-defendant also testified that he had been helping the O’Neals’ manufacture drugs for several months and had stood watch during critical points during the methamphetamine production. Id. at 506.

In Eckenrode, the defendant called police, alerting them to an intruder in his house. He told the 911 operator he was armed and ready to shoot the intruder. 159 Wn.2d at 491. Police arrived and found a loaded rifle, unloaded pistol, and evidence of a marijuana growing operation inside the home. Police arrested Eckenrode in his front yard, “far from his weapons.” Id. at 492.

This Court concluded there was sufficient evidence to uphold the jury’s determination that a weapon was easily accessible and readily available because Eckenrode himself told the 911 operator that he had a loaded gun in his hand and was prepared to shoot the intruder. Id. at 494. The Court also found sufficient evidence of a connection between Eckenrode, the weapon, and his drug manufacturing operation. The Court noted the rifle was loaded and Eckenrode also had a police scanner,

“which together with his manufacturing operation raises the inference that he was monitoring police activity against the chance he might be raided.” Id. at 494-95.

Finally, Easterlin was found asleep in a car with a gun on his lap and cocaine in his sock. Easterlin, 159 Wn.2d at 207. In his Statement of Defendant on Plea of Guilty, Easterlin acknowledged that, “I possessed a controlled substance and I had a firearm with me.” Id. at 207.

This Court held these facts constituted sufficient evidence that Easterlin was armed to protect the cocaine. Id. at 210. It noted that, “[s]o long as the facts and circumstances support an inference of a connection between the weapon, the crime, and the defendant, sufficient evidence exists” to support a finding that the defendant was armed. Id.

In each of these cases, this Court was presented with specific facts, including, defendant admissions, police monitoring equipment, and proximity of the defendant to an easily accessible and readily available gun, which allowed the Court to infer that the defendants were using the guns to protect contraband as part of a continuing crime. Compare also Schelin, 147 Wn.2d at 564, 573-75 (determination that Schelin was “armed” for purposes of a sentencing enhancement based on Schelin’s admission that gun was easily accessible and readily available and intended to protect his home); State v Neff, 163 Wn.2d 453, 464, 181 P.3d

819 (2008) (being armed for enhancement purposes could be inferred from the presence of security cameras and absence of record as to whether Neff could reach the pistol hanging from the rafters).

No such facts exist here. Sassen-Vanelstoo was not arrested at the scene and would have been unable to access the shotgun as the driver. There was also no evidence that Sassen-Vanelstoo ever had, or indicated an intent to use, the shotgun to protect the drugs. The shotgun was not operational until a round from the magazine was racked. 17RP 744-46. Athena Aardema testified that she had never witnessed Sassen-Vanelstoo use the shotgun or take it into any car. 17RP 441-42. There was also no police or surveillance monitoring equipment found in the car.

The "mere presence" of a gun at the crime scene, "mere close proximity of the gun to the defendant, or constructive possession alone is not enough to show the defendant is armed." Brown, 162 Wn.2d at 431. That is all the State showed here. This is not a case where Sassen-Vanelstoo could have grabbed the gun simply by reaching down to the floorboard. See State v. Sabala, 44 Wn. App. 444, 448, 723 P.2d 5 (1986) (driver was "armed" where the loaded handgun lay beneath the driver's seat with the grip easily accessible to the driver). To the extent that Brown or Gurske conflict with O'Neal, Eckenrode, or Easterlin, Brown and Gurske control here.

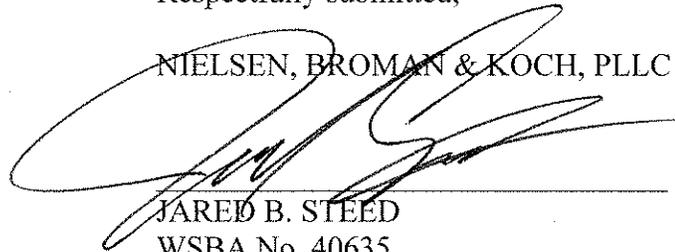
D. CONCLUSION

For the reasons stated, Sassen-Vanelstoo respectfully requests that this Court reverse the Court of Appeals.

DATED this 27th day of October, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A large, stylized handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line.

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NIELSEN, BROMAN & KOCH P.L.L.C.

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