

71305-1

71305-1

NO. 71305-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JORGE BENITEZ,

Appellant.

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

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence that Mr. Benitez or an accomplice was “armed” with a firearm; therefore, the court erred in imposing the firearm enhancement.

2. The court erred when it refused to give the special verdict jury instruction requested by the defense (Requested Defense Instruction 15).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Before a court may impose a firearm enhancement under RCW 9.94A.533, the State must prove beyond a reasonable doubt that a person was armed with a firearm in the commission of an offense. Where the State’s proof is based upon a theory of constructive possession, the State must prove a nexus between the weapon and the defendant or an accomplice, as well as a nexus between the weapon and the crime. Where there was insufficient evidence presented to establish these connections, must the special verdict be vacated?

2. A trial court must give jury instructions that allow the defense to argue its theory of the case. Here, was the court’s refusal to give the defendant’s proposed instructions as to the special verdict, which included

language taken from the Pattern Instructions, a violation of due process requiring reversal?

C. STATEMENT OF THE CASE

During the first week of November, 2012, Jorge Benitez and his girlfriend, Chelsea,¹ had been staying at the Extended Stay Deluxe Hotel in Bothell for approximately one week. RP 213-14.² Mr. Benitez and Chelsea had been using heroin for several days. RP 213-16, 219-22. They both participated in this lifestyle; Mr. Benitez chose to smoke his heroin, and a number of pipes and similar paraphernalia were later found in their hotel rooms. RP 166-69, 219-20. Chelsea preferred to inject her narcotics, and several syringes were found in the rooms and bathrooms of their shared rooms, including a syringe already loaded with heroin. RP 201, 219-20.

¹ Mr. Benitez's girlfriend is only referred to by first name in the record; no disrespect is intended. RP 214.

² The verbatim report of proceedings consists of three consecutively-paginated volumes of transcripts from the trial, conducted from November 18-20, 2013, which is referred to as "RP." The sentencing hearing was conducted on December 19, 2013, and is referred to as "2RP." An earlier trial, conducted from October 28 to 29, 2013, resulted in a mistrial, and is referred to by date for a portion of testimony which was read to the jury due to the officer's unavailability at the retrial, on consent. RP 6.

On November 4, 2012, the hotel desk clerk called the police due to her impression that Mr. Benitez and Chelsea were letting people in and out of the hotel without authorization, which made the clerk suspicious. RP 91-93.

The City of Bothell Police officers responded, along with officers from the Snohomish County Regional Drug and Gang Task Force. RP 31, 33-34, 107-08. Officer Erik Martin and Detective Steve Kerzman reported to the Extended Stay desk clerk, who made them a copy of the key card to gain entry to Mr. Benitez's hotel room. RP 33-34. The officers knocked on the door, heard voices, and announced, "Bothell Police, open the door." RP 35. When the door remained closed, the officers used the key card to gain admission. RP 35.

The officers saw two individuals – later identified as Aaron Singleton and Abigail Woods -- sitting on a couch. RP 36-40. Mr. Benitez was in the bathroom; the officers could only see his reflection in the bathroom mirror and could hear a splash as a then-unknown object was apparently dropped into the toilet. RP 37-39. The officers also saw an array of items displayed on a table in the kitchen portion of the room, including suspected narcotics and drug paraphernalia. RP 36; 10/28/13 RP 35-38. Perceiving that the object in the toilet bowl was "likely not

produced by a human being,” officers quickly retrieved the item, which they suspected to be heroin. 10/28/13 RP 44; RP 38-39.³

While the officers were awaiting a search warrant to process the room, Mr. Benitez waived his Miranda⁴ rights and engaged in some conversation with the officers. RP 42-45. The officers determined that the other two individuals, Aaron Singleton and Abigail Woods, would be released, and the officers attempted to determine which personal property belonged to each of them. RP 45-46. Singleton asked for his bag, and Officer Martin stated that he came back into the hotel room where Mr. Benitez was detained, to ask Mr. Benitez which bag belonged to Singleton. RP 46. Officer Martin said that Mr. Benitez told him, unprompted, that Singleton’s bag was “the one with the gun in it.” RP 46.

In fact, a black leather bag containing a loaded semi-automatic handgun was later recovered from the couch where Singleton had been

³ At trial, Mr. Benitez admitted the object was, in fact, his personal supply of heroin, and that he had mistakenly dropped it into the toilet when the police had entered his hotel room. RP 222.

⁴ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

sitting earlier. RP 143-47.⁵ Singleton's bag also contained an extra magazine for the handgun and a number of bullets. RP 147.

There was no evidence that Jorge Benitez ever touched the handgun or was near the bag containing the handgun; the State conceded only Singleton's fingerprints were on the handgun recovered from the bag on the couch. RP 294; Ex. 2. Although the State claimed that Mr. Benitez had admitted Singleton was selling heroin for him, Mr. Benitez denied this at trial. RP 219-20.

Mr. Benitez was charged with possession of a controlled substance with intent to manufacture or deliver, and unlawful involvement of a person under eighteen in a transaction to manufacture, sell, or deliver a controlled substance. CP 122-22.⁶ The information also charged, pursuant to RCW 9.94A.533, that Mr. Benitez was armed at the time of the offense.

⁵ Officer Martin admitted to feeling "disappointment in myself," upon realizing the officers had remained in the hotel room with three suspects for a fairly protracted period of time, "and there was a gun in the room that I didn't know about. That's a problem." RP 74.

⁶ Count II related to Abigail Woods, who was just under 17 years old when she was found using heroin in the presence of Mr. Benitez; this count was dismissed on a motion at the close of the State's case. RP 209, 230-31.

Following a jury trial, Mr. Benitez was convicted of possession with intent to deliver a controlled substance. RP 331; CP 20. The jury also returned a special verdict that “the defendant or an accomplice” was armed with a firearm. RP 331-32; CP 19.

Mr. Benitez appeals. CP 2.

D. ARGUMENT

1. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. BENITEZ OR AN ACCOMPLICE WAS ARMED WITH A FIREARM AT THE TIME OF THE OFFENSE.

The State alleged and the jury returned a special verdict finding Mr. Benitez or an accomplice was armed with a firearm at the time of the commission of the offense. RP 331-32; CP 19. RCW 9.94A.533 permits the imposition of such an enhancement if the jury finds beyond a reasonable doubt the person was armed at the time of the commission of the offense. The State’s evidence did not permit the jury to make such a finding in this case.

- a. The State was required to prove Mr. Benitez or an accomplice was armed at the time of the offense.

A person is “armed” with a firearm “if the weapon is 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). Where the weapon is constructively possessed, in addition to proving the weapon is readily available, the State must also prove beyond a reasonable doubt a “nexus between the weapon and the defendant and between the weapon and the crime.” State v. Schelin, 147 Wn.2d 562, 567-68, 55 P.3d 632 (2002). The nexus requirement “means that where the weapon is not actually used in the commission of the crime, it must be there to be used.” State v. Gurske, 155 Wn.2d 134, 138, 118 P.3d 333 (2005).

- b. The State did not prove Mr. Benitez or an accomplice was armed in the commission of the offense.

With respect to an enhancement, the jury’s special verdict is the sum of its findings and a court may not look to facts which may be implicit in the jury’s verdict on the substantive offenses. State v. Williams-Walker, 167 Wn.2d 889, 899-900, 225 P.3d 913 (2010). Nor may a reviewing court look to the concluding instruction regarding the special verdict form. Id. at 899, n.7 (overruling State v. Pharr, 131 Wn.

App. 119, 126 P.3d 66 (2006)). The Washington Supreme Court concluded:

For purposes of sentence enhancement, the sentencing court is bound by special verdict findings, regardless of the findings implicit in the underlying guilty verdict. Where a firearm is used in the commission of a crime, the only way to determine which enhancement is authorized is to look at the jury's special findings.

Williams-Walker, 167 Wn.2d at 900.

Here, the special verdict form specifically states that the jury found “the defendant or an accomplice” to be armed at the time of the commission of the crime. CP 19. Thus, there must be sufficient proof in the record to establish that finding beyond a reasonable doubt. Because the special verdict specifically requires – not only a nexus between the firearm and Mr. Benitez, but a nexus between an alleged accomplice and Mr. Benitez -- this Court should not look to evidence regarding Singleton to sustain the jury’s special verdict, due to the lack of evidence regarding accomplice liability, thus any nexus between the two men. See Williams-Walker, 167 Wn.2d at 899-900. Nor does it matter that the concluding instruction pertaining to the special verdict form stated that “if one participant in a crime is armed with a firearm, all accomplices to that participant are deemed armed.” CP 39.

Because there was insufficient evidence to establish a connection between the firearm and the crime, as well as the alleged accomplice, Mr. Singleton, and Mr. Benitez, the jury's finding cannot be sustained upon evidence that Singleton was armed. Williams-Walker, 167 Wn.2d at 899, n.7.

For purposes of the enhancement, it is not enough that the State prove that a firearm was found at the hotel room, or even that the two men knew each other. Instead, the firearm must have been accessible at the scene and also have a connection to the crime. See CP 39 (“the weapon is easily accessible and readily available” ... and proof of “a connection between the weapon and the crime”).

There is insufficient evidence to support the jury's finding. The State did not prove Mr. Benitez was armed in the commission of the crime, and should therefore strike the firearm enhancement.

2. THE TRIAL COURT ERRED WHEN IT REFUSED TO GIVE THE SPECIAL VERDICT JURY INSTRUCTION REQUESTED BY THE DEFENSE.

- a. A trial court must give instructions that permit the defense to argue its theory of the case.

A trial court's refusal to give a proposed instruction is reviewed for abuse of discretion. State v. Castle, 86 Wn. App. 48, 62, 935 P.2d

656 (1997). Jury instructions are sufficient only if they properly inform the jury of the applicable law without misleading the jury, and if they permit each party to argue its theory of the case. Id. (citing State v. LeFaber, 128 Wn.2d 896, 903, 913 P.2d 369 (1996)); Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 632 (1986) (“the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’”) (internal citations omitted); U.S. Const. Amends. VI, XIV. In general, a trial court must instruct on a party’s theory of the case if the law and the evidence support the requested instruction; the failure to do so is reversible error. State v. May, 100 Wn. App. 478, 482, 997 P.2d 956 (2000), citing State v. Birdwell, 6 Wn. App. 284, 297, 492 P.2d 249 (1972).

b. Mr. Benitez was entitled to his requested special verdict jury instruction.

Here, Mr. Benitez specifically requested a special verdict instruction in order to argue his theory of the case. RP 272, 280. The requested instruction was consistent with the special verdict language from the Washington Pattern Jury Instructions (WPIC), Section

2.07.02,⁷ although Mr. Benitez included “mere presence” language similar to controlled substance instruction given to the jury. RP 272-73; CP 36 (Instruction 12: “Mere presence of a controlled substance does not allow you to infer that an intent to deliver a controlled substance has been proved beyond a reasonable doubt.”).

The special verdict instruction requested by the defense read, in relevant part:

For purposes of a special verdict the State must prove beyond a reasonable doubt that the Defendant or accomplice was armed with a deadly weapon at the time of the commission of the crime in Count 1.

A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a nexus between the weapon and the Defendant or an accomplice and the crime. Mere presence of a deadly weapon at the scene is insufficient to establish a nexus between the crime and the weapon. In determining whether a nexus existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime.

⁷ Although the state must prove that the defendant is “armed” with a deadly weapon, a firearm is considered a deadly weapon whether loaded or unloaded. See 11 WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 2.07.02, at 37 (3d ed.2011).

CP 64 (Defendant's Proposed Instruction 15) (citing WPIC 2.07.02 (3d. ed. 2011), State v. Schelin, 147 Wn.2d 562 (2002)) (emphasis added).

In contrast, the special verdict instruction given by the trial court used the word "connection," rather than "nexus." CP 39. More importantly, the court declined to instruct the jury that the "mere presence" of a deadly weapon at the scene was insufficient to establish a nexus between the weapon and the crime, as Mr. Benitez requested. RP 280.

In refusing to instruct the jury as Mr. Benitez proposed, the trial court not only denied Mr. Benitez the opportunity to argue his theory of defense, but denied the jury the prospect of making a crucial connection amongst their several sets of instructions. After all, it is not only the possession of a controlled substance instruction that incorporates "mere presence" language, but the accomplice liability instruction includes it as well. Compare CP 36 ("mere presence of a controlled substance does not allow you to infer that an intent to deliver a controlled substance has been proved"), and CP 41 ("more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice").

Moreover, the lack of the defense instruction limited Mr. Benitez's ability to argue his theory -- that regardless of whether Aaron Singleton arrived with a gun that day, Mr. Benitez had no control over him, nor over Singleton's weapon, and therefore Mr. Benitez should not be punished under the firearm enhancement where the State failed to prove he possessed the firearm or used it to facilitate the possession charge.

The sole evidence presented of any nexus between the firearm and Mr. Benitez was provided by uncorroborated police hearsay. RP 114-15, 189. Although the detectives claimed that Mr. Benitez told them that Singleton worked for him as a "runner," neither detective recorded, nor kept notes of any of their interviews, claiming security concerns. RP 122-24. Neither detective even wrote a report including their conversations with Mr. Benitez. Id. Although Mr. Benitez admitted at trial that he possessed heroin for his own use, he denied that Singleton worked for him or that he had ever told the detectives anything of the sort. RP 217, 219-20.

Since the alleged accomplice, Singleton, did not testify at trial, and the State did not present evidence of a conviction for Singleton, it was essential that the jury be properly instructed as to how to assess the

nexus -- if any -- between the gun and the crime, and between the gun and Mr. Benitez, and/or his alleged accomplice, Aaron Singleton.⁸

Aaron Singleton was sitting on the couch when the police entered the hotel room, and according to officers, never moved or even looked up from his shoes until he was ordered to stand by police. RP 35, 39-40. Other than Mr. Benitez's purported statements, there was simply no evidence presented to establish that Singleton was an accomplice of Mr. Benitez, and not, as Mr. Benitez told police, merely

⁸ The jury was instructed on accomplice liability, in relevant part:

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(i) solicits, commands, encourages, or requests another person to commit the crime; or

(ii) aids or agrees to aid another other person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice. CP 41 (Instruction 17) (emphasis added).

at the hotel to buy heroin to use with his own girlfriend, Abigail Woods. RP 225-26.

Mr. Benitez testified that he had seen Singleton's gun before, and that he knew Singleton to carry one because "he was military." RP 226. The State presented no evidence, however, that this gun was ever held, used, removed from its bag in the hotel room, or that there was any "connection between the weapon and the crime." CP 39; Schelin, 147 Wn.2d at 570; State v. Johnson, 94 Wn. App. 882, 895, 974 P.2d 855 (1999). As this Court held in Johnson, "Simply constructively possessing a weapon on the premises sometime during the entire period of illegal activity is not enough to establish a nexus between the crime and the weapon." 94 Wn. App. at 895.

Because there was insufficient evidence presented of these connections -- between the firearm and the crime, and between Singleton and Mr. Benitez, the failure to give the defense instruction deprived Mr. Benitez of his opportunity to argue his theory of the case. This error therefore requires reversal. Schelin, 147 Wn.2d at 570; Castle, 86 Wn. App. at 62.

c. The instructional error was an abuse of discretion; therefore, reversal should be granted.

A trial court's refusal to give a proposed jury instruction is reviewed for an abuse of discretion. A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1997). A court may also abuse its discretion if it bases its ruling on an erroneous interpretation of the law. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

The trial court's failure to give the requested special verdict instruction deprived Mr. Benitez of an opportunity to argue his theory of the case, and as a result, the jury found Mr. Benitez was "armed" based upon the mere presence of a weapon at the crime scene. The trial court's refusal to give the specified instruction as requested by counsel deprived the jury of an adequate explanation of the law, and deprived Mr. Benitez of a fair opportunity to argue his theory of the case. Schelin, 147 Wn.2d at 570; Johnson, 94 Wn. App. at 895; Castle, 86 Wn. App. at 62.

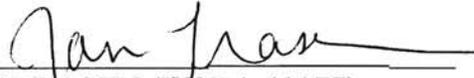
Because the trial court's failure to give the instruction requested by the defense was an abuse of discretion, reversal should be granted.

E. CONCLUSION.

For the foregoing reasons, Mr. Benitez respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 29th day of July, 2014.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Jan Traasen", written over a horizontal line.

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STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 71305-1-I
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JORGE BENITEZ,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JULY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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