NO. 37984-1-III

100233-5

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,
v.
ROY B. BOSWELL, JR.

Appellant.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Roy Boswell, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Boswell seeks review of the unpublished opinion of the Court of Appeals in cause number 37984-1-III, 2021 WL 3737194, filed August 24, 2021. A copy of the decision is in the Appendix A at pages A-1 through A-10.

C. ISSUES PRESENTED FOR REVIEW

1. Should this Court grant review where Mr. Boswell was denied the right to effective assistance of counsel where his trial attorney failed to request a limiting instruction?

2. Should this Court grant review where the State failed to present sufficient evidence to prove Mr. Boswell committed second degree assault as alleged in Count 2?

3. Should this Court grant review where the State failed

to present sufficient evidence to prove beyond a reasonable doubt that Mr. Boswell was armed with a gun in the commission of Counts 1 and 2, where the evidence established that a handgun was found by the tire of parked car driven to the scene by Mr. Boswell, but neither of the two alleged victims testified that they were aware of a gun during the alleged assaults?

D. STATEMENT OF THE CASE

1. Procedural history:

Roy Boswell was charged by information in Pierce County Superior Court with two counts of second degree assault (Counts 1 and 2), and one count of second degree unlawful possession of a firearm (Count 3). Clerk's Papers (CP) 3-5. The State alleged firearm enhancements in Counts 1 and 2. CP 3-5.

At the conclusion of the State's case in chief, defense counsel moved to dismiss the charge of assault involving Mr. Buie, arguing that Mr. Buie had denied that Mr. Boswell displayed or pointed a weapon at him. 7RP at 937. The prosecutor argued that in her petition for a protection order, Ms. Power wrote that Mr. Boswell "pulled a gun out on my friend who was standing

there." 7RP at 938. The prosecutor also argued that the video showed Mr. Boswell extending his arm toward Mr. Buie and "Mr. Buie began to back up and wanted nothing to do with Mr. Boswell" and then "reach into his jacket pocket, presumably putting away whatever had scared Mr. Buie off, then walking over and assaulting Ms. Power again, right in front of Mr. Buie." 7RP at 938-39. The prosecutor argued that the video also shows Mr. Boswell go to the red car and reach down next to the driver's side tire, where a gun was later located by police. 7RP at 939-40. After hearing argument of counsel, the court denied the motion to dismiss Count 2. 7RP at 940.

2. Trial testimony

Kristen Power, her three-year-old son, and Ryan Buie were outside Ms. Power's apartment building, the Guadalupe Vista apartments in Tacoma, Washington, at about 4:20 a.m. on November 21, 2017. 3RP at 374.

Ms. Power and Roy Boswell had dated for a few months until their relationship ended in November 2017. 3RP at 370-371. While outside the Guadalupe Vista apartments with Mr. Buie, Ms.

Power saw Mr. Boswell approaching in a car. 3RP at 373. The car stopped and Ms. Power talked briefly with Mr. Boswell while he was sitting in the car. 3RP at 373. After talking with Mr. Boswell, Ms. Power and Mr. Buie walked back to the nearby apartment building. 3RP at 375. Ms. Power testified that as she walked to her building, "someone ran up behind" her and attacked her. 3RP at 375. She said that the attacker hit her face "a few" times. 3RP at 375. Ms. Power stated that she did not know who hit her. 3RP at 375, 429.

After being hit, Ms. Power ran with her son to the front door of the building and Mr. Buie used the code to open the door. 3RP at 376. After Ms. Power, her son, and Mr. Buie were inside the building they called 911. 3RP at 376.

Ms. Power testified that following the assault her jaw was broken and she could not close her mouth. 3RP at 377. Ms. Power was taken to the hospital and had emergency surgery to her jaw, which was broken in several places. 3RP at 377-78. Ms. Power said at the hospital they pulled "a couple" teeth but that she did not think "that was because of what happened." 3RP at 378.

Mr. Buie stated that he was with Ms. Power and her child at 4:20 a.m. on November 21, 2017 but denied that he saw an assault and said that he was probably inside the apartment building at that time. 4RP at 542-43. He said that they remained inside the building for the most part except to smoke a cigarette in the back alley behind the apartments. 4RP at 543. He said that while they were in the alley, a red car pulled up and someone "confronted" them, and that they both walked back inside the building. 4RP at 544. Mr. Buie said that he could not describe the person in the car other than that "they were black". 4RP at 544. Mr. Buie said that the confrontation had "nothing to do with me" and so he walked to the front of the building and then waked away. 4RP at 545. As he was leaving, Mr. Buie said that he heard screaming and Ms. Power yelled his name and he returned to see what was happening. 4RP at 546. He said that he saw "[s]ome blood" and Ms. Power's son was crying, and he "grabbed a male" and threw him on the ground. 4RP at 546. Ms. Power, her son and Mr. Buie then went inside, and Ms. Power called 911 and was later taken to the hospital. 4RP at 547.

Mr. Buie testified that he did not remember talking to Officer Hannity and telling the officer that Mr. Boswell drew a handgun and aimed it at him or that Mr. Boswell punched Ms. Power four times. 4RP at 548-49.

Tacoma police officer Steven Butts took a key fob he received to the apartment parking area and, when he pushed the lock button, the lights on a Hyundai came on. 4RP at 525. The car was a four door Hyundai Sonata with Nevada license plate 7NP WMX. 4RP at 528. Tacoma police officer found a gun with serial number 3163258 on the ground next the front driver's side tire of the car. 4RP at 511, 512. Officer Hannity testified that Mr. Buie said that he, Ms. Power, her son, and Mr. Boswell were present during the incident. 5RP at 733-34. Officer Hannity testified that Mr. Buie said that Mr. Boswell drove up to the apartments in a red four-door car, got out the vehicle and demanded that he be allowed to enter the building, and then when refused entry, Mr. Boswell punched Ms. Power four times before Mr. Buie could intervene. 5RP at 735. Officer Hannity stated that Mr. Buie told him that after the assault, he grabbed Mr. Boswell

and pulled him away and that Mr. Boswell reached with his left hand inside his jacket and pulled out a semi-automatic pistol and then aimed at it Mr. Buie and said "well, [N word], I'm going to have to shoot you, bitch." 5RP at 736.

Officer Hannity stated that Ms. Power had blood around her mouth and that the shape of her jaw was deformed, and she had difficulty talking and appeared to be in pain. 5RP at 737. A photo of Ms. Power was entered as Exhibit 28. 5RP at 737.

Officer Hannity stated that Ms. Power told him that she used to be in a relationship with Mr. Boswell and that he kept trying to contact her. 5RP at 738. He stated that Ms. Power told her that Mr. Boswell drove up the apartment building in a red car. 5RP at 739. He stated that Ms. Power told him that Mr. Boswell insisted on being allowed into the building and that he then punched her several times in the face, injuring her, and that Mr. Buie intervened and when he did, Mr. Boswell reached inside his jacket and produced a pistol which he aimed at Mr. Buie. 5RP at 739-40. A limiting instruction regarding the hearsay statements introduced through Officer Hannity was provided to the jury.

Instructions 5 and 6. CP 167, 168.

Ms. Power had swelling or bruising on the right side of her face and had blood inside her mouth and had a fracture on the right and left sides of her jaw. 6RP at 840-42. A doctor operated to repair her jaw later that morning. 6RP at 843-44. Plates were placed in her jaw and then her jaw was wired shut and she was put on a course of antibiotics. 6RP at 844. Five teeth on the right side of her jaw were damaged and were extracted during the surgery. 6RP at 844.

The State sought to introduce Exhibit 7, the petition for protection order against Mr. Boswell dated November 22, 2017. 3RP at 421-22. The court found the statement in the petition was admissible after redaction. 3RP at 422-23. The court clarified that the statement could not be read into the record, but that "it's impeachment of the prior inconsistent statement." 3RP at 425. Ms. Power was called to testify and stated that she recalled her testimony from earlier that she did not know who hit her, and then was directed to read the portion of the petition which states:

At about 4 a.m. November 22 (this morning) I went outside to smoke a cigarette. Roy pulled up to my home in his car. Roy

ran up to me and began to punch me in my face. I tried to fight him off me, but he kept punching me. Once Roy stopped punching, he pulled a gun out on my friend who was standing there. He then punched me in the face again and ran away leaving his car.

3RP at 430. Exhibit 7A.

Following argument, the court permitted the prosecutor to elicit testimony from Officer Hannity regarding statements made to him by Mr. Buie and Ms. Power but allowed a limiting instruction. 5RP at 712. Following an offer of proof regarding his testimony, the court instructed the jury that they are to consider the statement of Officer Hannity was not offered for the truth of the matters asserted, but only in regard to the credibility of the declarants. 5RP at 731. The court also instructed the jurors that questions reagarding identification are not for the purpose of assessing credibility. 5RP at 733.

The jury found Mr. Boswell guilty as charged of two counts of second-degree assault, second degree unlawful possession of a firearm, and bail jumping. The jury found firearm enhancements in Counts 1 and 2. 8RP at 1053-54; CP 152, 153, 154, 155, 156,

157, 158, 159.

Boswell appealed his convictions and sentence on the basis that (1) admission of a protection order petition as substantive evidence; (2) defense counsel provided ineffective assistance; (3) that he is entitled resenting under ***State v. Blake***; and (3) that the trial court erred in imposing certain legal financial obligations (LFOs) and interest on his non-restitution LFOs.

By unpublished opinion filed August 24, 2021, the Court of Appeals, Division II, affirmed the convictions. See unpublished opinion. The court remanded to the trial court to resentence Boswell with a new offender score of 1, comprised only of the 2017 UPFA in the second degree conviction, and also remanded to the trial court to strike certain LFOs. ***State v. Boswell***, No. 379841-III, 2021 WL 3737194 (August 24, 2021)(unpublished).

Boswell now petitions this Court for discretionary review pursuant to RAP 13.4(b).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review

are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of these issues because the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; is in conflict with a published decision of the Court of Appeals, and involves a significant question of law under the Constitution of the State of Washington or of the United States is involved. RAP 13.4(b)(1), (2), and (3).

1. Trial counsel's failure to request a limiting instruction regarding use of impeachment evidence denied Mr. Boswell effective assistance of counsel

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. ***Strickland v. Washington***, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Thomas***, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. ***Strickland***, 466 U.S. at 687; ***Thomas***, 109 Wn.2d at

225-26. ***State v. Grier***, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011).

To establish the first prong of the ***Strickland*** test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." ***Thomas***, 109 Wn.2d at 229-30.

To establish the second prong, the defendant, "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. ***Thomas***, 109 Wn.2d at 226. Only a reasonable probability of such prejudice is required. ***Strickland***, 466 U.S. at 693; ***Thomas***, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. ***Strickland***, 466 U.S. at 694; ***Thomas***, 109 Wn.2d at 226.

A reviewing court begins its analysis with a strong presumption that counsel's performance was reasonable. ***Grier***,

171 Wn.2d at 33. To rebut this presumption, the defendant must establish the absence of any "'conceivable legitimate tactic explaining counsel's performance.'" *Id.* (quoting ***State v. Reichenbach***, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

a. Defense counsel failed to request a limiting instruction on impeachment testimony

"Impeachment evidence affects a witness' credibility and is not proof of the substantive facts encompassed in such evidence." ***State v. Johnson***, 40 Wn. App. 371, 377, 699 P.2d 221 (1985) (citing ***In re Noble***, 15 Wn. App. 51, 60, 547 P.2d 880 (1976); ***State v. Fliehman***, 35 Wn.2d 243, 212 P.2d 794 (1949)). "Where such evidence is admitted, an instruction cautioning the jury to limit its consideration of the statement to its intended purpose is both proper and necessary." ***Johnson***, 40 Wn. App. at 377 (citing ***State v. Pitts***, 62 Wn.2d 294, 297, 382 P.2d 508 (1963)).

The State propounded the statement contained in Ms. Power's petition for protection order filed November 22, 2017. Following argument, the court permitted use of the statement to

impeach her testimony that she did not remember making statements to law enforcement about the alleged assaults. When the court overruled his objection, defense counsel did not request a limiting instruction.

The statement was read into evidence by the prosecution. The jury heard the following:

> Roy ran up to me and began to punch me in my face. I tried to fight him off me, but he kept punching me. Once Roy stopped punching me, he pulled a gun out on my friend who was standing there. He then punched me in the face again and ran away leaving his car.

3RP at 430.

Because the evidence was presented without limitation, the jury could consider this evidence for any purpose. See ***State v. Myers***, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997) ("[A]bsent a request for a limiting instruction, evidence admitted as relevant for one purpose is deemed relevant for others."). Given this, the State used Ms. Power's prior statement as substantive evidence in closing argument and in its PowerPoint presentation at closing.

CP 130.

b. Trial counsel's deficient performance prejudiced Mr. Boswell's right to a fair trial

An attorney's failure to propose an appropriate jury instruction can constitute ineffective assistance. ***State v. Cienfuegos***, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001). An attorney's failure to request a jury instruction that would have aided the defense constitutes deficient performance. See ***Thomas,*** 109 Wn.2d at 226-29 (failure to propose voluntary intoxication instruction). Legitimate trial strategy or tactics generally cannot serve as the basis for a claim that the defendant received ineffective assistance of counsel. ***State v. Adams***, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

In this case, defense counsel's failure to request a limiting instruction allowed the jury to consider the highly prejudicial evidence without being instructed that Ms. Power's impeachment testimony could only be considered for the limited purpose of

assessing Ms. Power's credibility and for no other purpose. The error was compounded when the defense moved to dismiss Count 2 due to failure to make prima facie case during the "half-time" motion. The State, recognizing that the failure to obtain a limiting instruction allowed the prosecution to use Ms. Power's statement as substantive evidence that a gun was used to assault Mr. Buie, successfully refuted the defense motion to dismiss.

In this case there was no possible tactical reason for defendant's counsel to refrain from requesting a limiting instruction, particularly given the dearth of evidence that Mr. Boswell was armed at the time of the alleged assaults. Thus, counsel's failure to object denied the defendant effective assistance of counsel.

The record substantiates that defense counsel's performance was deficient and that Mr. Boswell was prejudiced by the effect of defense counsel's error where defense counsel failed to request a limiting instruction for impeachment

testimony. Accordingly, this Court should grant review of the reverse and remand for new trial.

2. The evidence was insufficient to prove that Mr. Boswell committed second degree assault as alleged in Count 2 and to prove a nexus between Mr. Boswell, a firearm and the assaults alleged in Counts 1 and 2

In every criminal prosecution, the State must prove all elements of a charged crime beyond a reasonable doubt. U.S. Const, amend. 14; Const, art. 1, § 3; ***In re Winship***, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); ***State v. Crediford***, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Therefore, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. ***State v. Hickman***, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); ***State v. Green***, 94 Wn. 2d 216, 616 P.2d 628 (1980).

The test for determining the sufficiency of the evidence is

whether "after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***Jackson v. Virginia***, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979). Further, when the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the prosecution and interpreted against the defendant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. ***State v. Aten***, 130 Wn.2d 640, 927 P.2d 210 (1996).

a. To prove second degree assault, the State had to prove that Mr. Boswell had the intent of causing fear and apprehension of bodily injury in Mr. Buie through the use of a deadly weapon

In this case, the State charged Mr. Boswell in Count 2 with second degree assault under RCW 9A.36.021(1). The statute

does not define "assault"; thus, the courts must resort to the common law definition. ***State v. Byrd***, 125 Wash.2d 707, 712, 887 P.2d 396 (1995). Washington recognizes three common law definitions of "assault": "(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm." ***State v. Elmi***, 166 Wn.2d 209, 215, 207 P.3d 439 (2009).

The court provided the jury with two different definitions of assault in jury instruction 12. Jury instruction 12 defined assault as:

> [(1)] an intentional touching or striking of another person, with unlawful force, that is harmful or offensive[,]
>
> [(2)] an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 175.

Assault by an attempt to cause fear and apprehension of

injury requires proof that, with intent to cause a reasonable apprehension of immediate bodily harm, though not to inflict such harm, the accused performs some act that causes such apprehension. ***Byrd***, 125 Wn.2d at 713. "Intent is rarely provable by direct evidence, but may be gathered, nevertheless, from all of the circumstances surrounding the event." ***State v. Gallo***, 20 Wn.App. 717, 729, 582 P.2d 558 (1978). To obtain conviction for second degree assault with a deadly weapon against Mr. Buie, the State was required to prove Mr. Boswell committed assault by apprehension with a deadly weapon. CP 175. Assault by apprehension has two elements: (1) intent to create apprehension and fear of bodily injury in another person, and (2) the creation of reasonable apprehension and imminent fear in fact in a specific person. ***State v. Toscano***, 166 Wn. App. 546, 551, 271 P.3d 912 (2012).

b. The State failed to prove that Mr. Boswell caused fear and apprehension of bodily injury in Mr. Buie as alleged in Count 2

There was no evidence which would support a finding that Mr. Boswell was armed with a firearm during the altercation with Mr. Buie. A gun was found near the tire of the Hyundai, but Mr. Buie denied that he remembered talking to Officer Hannity, and denied that he was assaulted, and denied that a weapon was pointed at him, or that a weapon was even visible. 4RP at 548, 549, 559. Accordingly, the conviction for assault in Count 2 must be reversed and dismissed with prejudice for insufficient evidence to assault Mr. Buie.

As noted above, the due process clause of the Fourteenth Amendment requires the State to prove all necessary facts of the crime beyond a reasonable doubt. ***In re Winship***. 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Evidence is insufficient to support a conviction unless viewed in the light most favorable to the State, any rational trier of fact could find each essential element of the crime beyond a reasonable doubt. ***State v. Chapin***, 118 Wn.2d 681, 691, 826 P.2d 194 (1992).

Under RCW 9.94A.533(3), the State is permitted to enhance an offender's sentence if the offender or an accomplice was armed with a firearm during the commission of the crime. "A person is 'armed' if a 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)). "But a person is not armed merely by virtue of owning or even possessing a weapon; there must be some nexus between the defendant, the weapon, and the crime." ***State v. Eckenrode***, 159 Wn.2d 488, 493, 150 P.2d 116 (2007). Where a defendant challenges the sufficiency of the evidence that he was "armed" to support his firearm sentencing enhancement, "the State must show that '[he] [wa]s within proximity of an easily and readily available [firearm] for offensive or defensive purposes and [that] a nexus is established between the defendant, the weapon, and the crime.' " ***State v. Houston–Sconiers***, 188 Wn.2d 1, 17, 391 P.3d 409 (2017) (internal quotation marks omitted). There is

sufficient evidence of a nexus where there is a close proximity between the defendant and the firearm at the relevant time and "'[s]o long as the facts and circumstances support an inference of a connection between the weapon, the crime, and the defendant.'" ***Houston–Sconiers***, 188 Wn.2d at 17 (quoting ***State v. Easterlin***, 159 Wn.2d 203, 210, 149 P.3d 366 (2006)). The "mere presence" of a firearm at a crime scene, however, is not enough to establish a nexus. ***State v. Brown***, 162 Wn.2d 422, 432, 173 P.3d 245 (2007) (quoting ***State v. Schelin***, 147 Wn.2d 562, 570, 55 P.3d 632 (2002).

In determining whether a defendant is armed, the court "should examine 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," ***State v. O'Neal***, 159 Wn.2d 500, 504-05, 150 P.3d 1121 (2007), 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. Id. at 504.

Here, both of the firearm enhancements were based on the allegation that Mr. Bowell took out a handgun when confronting Mr. Buie, and that this occurred in the presence of Ms. Power. CP 1-2, 3-5. A Ruger handgun was found near the tire of the parked Hyundai and the State introduced a surveillance video showing Mr. Boswell walking to the parked car following the incident and a jail call in which he acknowledged putting a gun "in the car." Neither Mr. Buie nor Ms. Power testified at trial that they saw a gun. There is no mention of a gun in the 911 call. The State introduced Ms. Power's statement that Mr. Boswell took out a gun when he confronted Mr. Buie. When considering the statement admitted as Exhibit 7A, Ms. Power testified that she did not see a gun and that she received the information about a gun from Mr. Buie. 3RP at 433.

A person is not armed merely because a firearm is present during the commission of the crime. ***Schelin***, 147 Wn.2d at 570 (mere presence of weapon is not sufficient to impose a firearm enhancement). There must also be a nexus between the defendant, the firearm, and the crime. ***State v. Eckenrode***, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007). Without this necessary nexus between Mr. Boswell, the gun, and the crime, the firearm enhancement must be dismissed. See ***State v. Gurske***, 155 Wn.2d 134, 138, 144, 118 P.3d 333 (2005) (where the weapon is not actually used in the commission of the crime, it must be there to be used). Consequently, the firearm enhancements must be reversed and dismissed.

The defense conceded that Mr. Boswell possessed a gun at one point and that he admitted to his mother than he put the gun in his car. 7RP at 1025. The "mere presence" of the gun in the parking lot near the crime scene alone is not enough to show he was armed for purposes of the assault charged in Count 2 and both

firearm enhancements. Washington courts have found that a defendant is not "armed" even though he, presumably, could have obtained a weapon by taking a few steps. ***State v. Valdobinos***, 122 Wn.2d at 270, 282, 858 P.2d (1993); ***State v. Johnson***, 94 Wn.App. 882, 894-895, 897, 974 P.2d 855 (1999); ***State v. Call***, 75 Wn. App. 866, 867-69, 880 P.2d 571 (1994). Here, the evidence shows the gun was found near the car in the parking lot. The State failed to provide sufficient evidence to show that the gun was easily accessible and readily available to Mr. Bowsell. The jury's firearm enhancements findings should be reversed, and Mr. Boswell's firearm enhancements should be stricken.

F. CONCLUSION

For the foregoing reasons, this Court should grant review to correct the above-referenced errors in the unpublished opinion of the court below that conflict with prior decisions of this Court and the courts of appeals.

DATED: September 22, 2021.

Certificate of Compliance with RAP 18.17:

This petition for review is in 14 point font and contains 4757 words, excluding the parts of the petition exempted from the word count by RAP 18.17.

PETER B. TILLER-WSBA 20835
September 22, 2021

Respectfully submitted,
THE TILLER LAW FIRM

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CERTIFICATE OF SERVICE

The undersigned certifies that on September 22, 2021, that this Appellant's Petition for Review was sent by the JIS link to Renee Townsley, Clerk of the Court, Court of Appeals, Division III, 500 N Cedar St Spokane, WA 99201, and copies were mailed by U.S. mail, postage prepaid, to the following:

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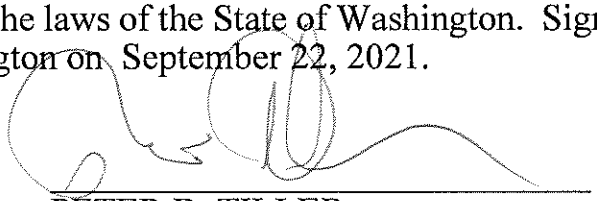
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on September 22, 2021.



PETER B. TILLER

APPENDIX A

FILED
AUGUST 24, 2021
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
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. ROY BRENT BOSWELL, JR., Appellant.	)	No. 37984-1-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — Roy Boswell appeals after being convicted of unlawful possession of a firearm in the second degree and two counts of second degree assault. He raises several argument that we reject. We affirm his convictions but remand for resentencing in light of *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

FACTS

Kristin Power made a call to 911 after being attacked from behind by Roy Boswell. She had been out with her youngest son and her friend, Ryan Buie, at the time when Boswell pulled up in a car. Boswell and Power had dated for a time in 2017 before recently breaking up.

Patrol officer Matthew Arasim arrived approximately 15 minutes after the call. He saw a red Hyundai Sonata parked in the alley behind Power's apartment building. There

was a loaded firearm under the left front tire of the Hyundai. The firearm was tested and functioned properly.

Power's jaw was broken from the assault and she had to go to the emergency room to get her jaw wired shut. While there, Power was asked routine questions about what happened from the doctor. She said she was punched on the right side of her face four times and threatened with a weapon.

The day after the assault, Power filed a petition for a protection order. In the petition, Power described Boswell punching her in the face repeatedly and pulling a gun on her friend Buie before running away and leaving his car. Power signed the petition under penalty of perjury.

The State charged Boswell with unlawful possession of a firearm in the second degree and two counts of assault in the second degree, one count for punching Power in the face and breaking her jaw and the other count for pointing a firearm at Buie. In addition, the State alleged a firearm enhancement and an aggravator for the charge related to Power and a firearm enhancement for the charge related to Buie. The State subsequently added a bail jumping charge after Boswell absconded to California.

While awaiting trial, Boswell made a number of jail calls to Power and to his mother. In these calls, he told Power he was "not taking that gun because that shit was

not on me when I got caught." Ex. 98. He also told his mother he left the gun in the car. Power told Boswell she hoped he would beat it, referring to the charges.

At trial, Power and Buie denied that Boswell was the attacker. The State offered testimony from Officer Robert Hannity as impeachment evidence. Officer Hannity testified that Buie and Power both told him that Boswell had punched Power four times and had pulled a gun on Buie.

The State also had Power's petition for a protection order admitted as impeachment evidence. Boswell objected and argued that the petition was not relevant and cumulative. The trial court overruled the objection and noted that the petition contained key evidence pertinent to the charges.

After the State concluded its case, Boswell moved to dismiss the second degree assault charge related to Buie. He argued the State presented insufficient evidence to sustain the charge because Buie denied he was assaulted or that he saw a weapon. Boswell argued that Power's petition had been admitted only for impeachment purposes. The State argued there had been no limiting instruction and the petition was signed under penalty of perjury so it was not hearsay under ER 801(d)(1). The trial court denied Boswell's motion to dismiss and noted that the petition was a sworn statement and thus admissible as substantive evidence.

The parties submitted the case to the jury. It returned guilty verdicts on all counts and found that the State had proved the firearm enhancements and an aggravator beyond a reasonable doubt. The court sentenced Boswell to 129 months in prison, which included 72 months for the firearm enhancements. The sentence was based on a prior offense score of 3, comprised of three King County convictions. One was a 2016 unlawful possession of controlled substance (UPCS) conviction, another was a 2016 attempted unlawful possession of a firearm (UPFA) in the second degree conviction, and the other was a 2017 UPFA in the second degree conviction. The court imposed a mandatory $500 crime victim assessment fee, a $200 criminal filing fee, and a community custody supervision fee.

Boswell timely appeals.

ANALYSIS

PETITION AS SUBSTANTIVE EVIDENCE

Boswell contends the trial court abused its discretion in allowing Power's petition for an order of protection to be admitted as substantive evidence under ER 801(d)(1), prior statement of witness. He argues the State did not show that the petition had a minimum level of trustworthiness. We decline to address this argument.

At trial, Boswell objected to admission of Power's petition as substantive evidence on two bases—lack of relevancy and cumulative. He did not argue that the petition lacked a minimal level of trustworthiness.

Generally, this court does not review an issue raised for the first time on appeal. RAP 2.5(a). There are three exceptions to this general rule: (1) the trial court lacked jurisdiction, (2) there was a failure to establish facts on which relief could be granted, or (3) there was a manifest error affecting a constitutional right. RAP 2.5(a)(1)-(3). Because the first two are clearly not at issue, we focus only on the third exception.

Under this exception, a defendant raising the error for the first time bears the burden of showing "(1) the error is manifest and (2) the error is truly of constitutional dimension." *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Boswell has failed to make such a showing here. Admission of hearsay sometimes implicates the constitutional confrontation clause rights of a defendant. *State v. Hieb*, 107 Wn.2d 97, 105-06, 727 P.2d 239 (1986). But because Power was a witness at the trial and subject to cross-examination, the confrontation clause rights of Boswell were not violated. *See State v. Makela*, 66 Wn. App. 164, 177, 831 P.2d 1109 (1992). Because Boswell cannot show that the unpreserved issue he seeks to raise qualifies as an exception under RAP 2.5(a), we decline to review the unpreserved claim of error.

INEFFECTIVE ASSISTANCE OF COUNSEL

Boswell contends his trial counsel was ineffective. He argues that his attorney performed deficiently when he failed to request a limiting instruction be given advising the jury that Power's petition was admitted only for impeachment. We disagree.

A criminal defendant is guaranteed effective assistance of counsel. WASH. CONST. art. I, § 22; U.S. CONST. amend. VI. Counsel is deemed ineffective if counsel's representation was deficient and there was resulting prejudice stemming from this deficiency. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Boswell argues that a limiting instruction would have been both appropriate and necessary for the jury's consideration of Power's petition. This argument shows a misunderstanding of hearsay. A prior inconsistent statement admitted under ER 613 solely for the purpose of impeaching the credibility of a witness is not substantive evidence and a limiting instruction is appropriate. However, statements admitted under ER 801(d)(1)(i) ("given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition") are not hearsay and are thus admissible as substantive evidence. Power's petition was given under oath subject to the penalty of perjury and was therefore admissible as substantive evidence.

A limiting instruction would be neither required nor appropriate here where the statement was admissible as substantive evidence. Defense counsel cannot be deficient for failing to request an inappropriate limiting instruction. *See State v. Bradley*, 96 Wn. App. 678, 685, 980 P.2d 235 (1999), *aff'd*, 141 Wn.2d 731, 10 P.3d 358 (2000). We reject Boswell's ineffective assistance of counsel argument.

SUFFICIENCY OF THE EVIDENCE

Boswell contends there was insufficient evidence to support the second degree assault conviction related to Buie and the two firearm enhancements. He argues the evidence does not show beyond a reasonable doubt that he was armed with a firearm during the confrontation with Power and Buie. We disagree.

Due process requires that the State prove each element of the crime beyond a reasonable doubt. *O'Hara*, 167 Wn.2d at 105. This standard also applies to any charged enhancement. *See State v. Dyson*, 189 Wn. App. 215, 225, 360 P.3d 25 (2015) (Any fact that, by law, increases the penalty for a crime is an element that must be submitted to the jury and found beyond a reasonable doubt.). 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 could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits

the truth of all of the State's evidence. *Id.* All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. *Id.*

Boswell's argument presupposes that Power's petition was not admissible as substantive evidence. As noted above, he is incorrect. Power's petition names Boswell as her attacker, describes the attack against her, and describes him pointing a gun and threatening Buie. This evidence sufficiently supports the second degree assault conviction related to Buie and both firearm enhancements. Yet additional evidence was admitted at trial supporting these verdicts.

The State admitted Boswell's jail telephone calls in which he discussed getting rid of the gun by his car. The State also showed a video of Power's attacker pointing something at Buie, causing him to back away. We conclude the State presented more than sufficient evidence to sustain the challenged conviction and enhancements.

LEGAL FINANCIAL OBLIGATIONS

Boswell contends the trial court erred in imposing certain legal financial obligations (LFOs) and interest on his nonrestitution LFOs. He argues the $200 criminal filing fee and the supervision fee are inappropriate because he is indigent. The State does not object to remanding for the trial court to strike the $200 criminal filing fee and the community supervision fee, but correctly notes that the interest provision of the judgment

explicitly exempts interest on nonrestitution obligations, consistent with RCW 10.82.090.

We accept the State's concessions and remand for the trial court to strike those two fees. *See State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018) (criminal filing fee not imposable against indigent defendant); *State v. Dillon*, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (waivable community supervision fee struck where the record shows trial court intended to strike nonmandatory costs and fees), *review denied*, 195 Wn.2d 1022, 464 P.3d 198 (2020).

OFFENDER SCORE UNDER *BLAKE*

The parties addressed the recent case of *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021) in supplemental briefing. There, the Supreme Court declared Washington's UPCS statute unconstitutional.

Boswell requests that we remand for the trial court to vacate his 2016 UPCS King County conviction and direct the trial court not to count that conviction and a 2004 UPCS California conviction in his offender score. The State responds that the Pierce County Superior Court lacks the authority to vacate a King County Superior Court judgment, agrees that the 2016 UPCS conviction should not count in the offender score, and asserts that the 2004 UPCS California conviction was not counted because it had washed out. It

further responds that the 2016 UPFA second degree conviction should not have counted because it was an *attempt* and thus not a felony.

Our review of the record confirms the State's positions. And while the Pierce County Superior Court lacks the authority to vacate the 2016 King County Superior Court UPCS conviction, we direct it not to count that conviction in Boswell's amended offender score and to enter a notation in the amended judgment explaining that it was not counted in light of *Blake*.

In conclusion, we remand for the trial court to resentence Boswell with a new offender score. Assuming no intervening convictions, we agree with the State that Boswell's prior offense score should be a 1, comprised only of the 2017 UPFA in the second degree conviction.

Affirm the convictions but remand for resentencing.

A 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.

Lawrence-Berrey, J.

WE CONCUR:

Pennell, C.J.

Staab, J.

THE TILLER LAW FIRM

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