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June 29, 2015
Court of Appeals
Division I
State of Washington

Supreme Court No. 91946-1

(Court of Appeals No. 71305-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent

v.

JORGE BENITEZ,
Petitioner.

PETITION FOR REVIEW

JAN TRASEN
Attorney for Petitioner
WSBA # 41177

WASHINGTON APPELLATE PROJECT
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A. IDENTITY OF PETITIONER

Jorge Benitez, appellant below, seeks review of the Court of Appeals decision designated in Part B. Appendix.

B. COURT OF APPEALS DECISION

Mr. Benitez appealed from a Snohomish County Superior Court verdict. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUES PRESENTED FOR REVIEW

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 there was insufficient evidence presented to establish constructive possession, should the special verdict have been vacated, and was the Court of Appeals decision affirming the conviction thus in conflict with this Court's decisions, and with other decisions of the Court of Appeals, requiring review? RAP 13.4(b)(1), (2).

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 a violation of due process, and was the Court of Appeals decision thus in conflict with this Court's decisions, and with other decisions of the Court of Appeals, requiring review under RAP 13.4(b)(1), (2)?

D. 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.

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

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.

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 an object was apparently dropped into the toilet. RP 37-39. The officers also saw 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 spoke with the officers. RP 42-45. The officers determined that the other two people in the room,

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).

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 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 Mr. Benitez ever touched the handgun or was near the bag containing the handgun; the State conceded the only fingerprints recovered from the handgun belonged to Singleton. 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. CP 122-22. The information also

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.

charged, pursuant to RCW 9.94A.533, that Mr. Benitez was armed at the time of the offense.⁶

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 appealed his conviction, raising similar issues to those raised herein. On June 1, 2015, the Court of Appeals affirmed his conviction. Appendix.

He seeks review in this Court. RAP 13.4(b)(1),(2).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT, AND WITH OTHER DECISIONS OF THE COURT OF APPEALS. RAP 13.4(b)(1), (2).

1. There was insufficient evidence 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

⁶ Mr. Benitez was also charged with unlawful involvement of a person under eighteen in a transaction to manufacture, sell, or deliver a controlled substance: this count related to Abigail Woods, who was using heroin in the hotel room; this count was dismissed on a motion at the close of the State’s case. RP 209, 230-31.

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 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).

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)). This 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, therefore the lack of 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 should not have been 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. There was insufficient evidence that Mr. Benitez was armed in the commission of the crime, and therefore the firearm enhancement should have been stricken. Review should be granted. RAP 13.4(b)(1).

2. Because the trial court refused to give the special verdict instruction requested by the defense, this Court should grant review.
 - 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

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).

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.

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.

⁸ The jury was instructed on accomplice liability. CP 41 (Instruction 17).

Benitez, and not, as Mr. Benitez told police, merely 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. Because of this error, Mr. Benitez's case should have been reversed; therefore, review should be granted. RAP 13.4(1), (2); Schelin, 147 Wn.2d at 570; Castle, 86 Wn. App. at 62.

- c. The instructional error puts the Court of Appeals decision in conflict with decisions of this Court and with other decisions of the Court of Appeals; therefore, review 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 have been granted.

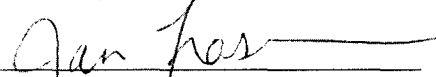
Accordingly, because the Court of Appeals decision is in conflict with decisions of this Court, and with other decisions of the Court of Appeals, this Court should grant review. RAP 13.4(b)(1), (2).

F. CONCLUSION

For the above reasons, the Court of Appeals decision should be reviewed, as it is in conflict with decisions of this Court, as well as with other decisions of the Court of Appeals. RAP 13.4(b)(1), (2).

DATED this 29th day of June, 2015.

Respectfully submitted,



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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 71305-1-I
Respondent,)	
)	DIVISION ONE
v.)	
)	
JORGE ANTONIO BENITEZ,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: June 1, 2015
_____)		

BECKER, J. — At the scene of his arrest for possession with intent to deliver, appellant Jorge Benitez made a comment showing he knew there was a gun in an open bag belonging to his accomplice. This was sufficient evidence of nexus to prove that Benitez was armed for purposes of a sentencing enhancement.

This case arose from events that occurred on November 6, 2012, when police officers responded to a call from a hotel reporting suspicious activity related to a vacant room. The officers found three people in the hotel room. Appellant Benitez was in the bathroom trying to flush heroin down the toilet. Aaron Singleton and a minor were sitting on the couch next to each other with a bag between them. A responding officer observed a firearm magazine inside the bag while searching Singleton and the minor.

Benitez admitted to one of the officers that he sold drugs and that Singleton was his employee. According to the testimony of one officer, Benitez was asked which bag was Singleton's. Benitez pointed and replied, "the one with the gun in it." Both a firearm and a magazine were found in the bag.

A jury convicted Benitez of possession of a controlled substance with intent to deliver and returned a special verdict that Benitez or his accomplice was armed with a firearm. Benitez appeals, challenging both the instruction for the special verdict and the sufficiency of the evidence to support it.

The trial court gave the following special verdict instruction:

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Count I.

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 connection between the weapon and the defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether these connections 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 the type of weapon.

If one participant to a crime is armed with a deadly weapon, all accomplices to that participant are deemed to be so armed, even if only one deadly weapon is involved.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

Benitez proposed an instruction that was substantially identical, except that he wanted to add the following sentence in the second paragraph: "Mere presence of a deadly weapon at the scene is insufficient to establish a nexus between the crime and the weapon." This sentence is a correct statement of law.

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State v. Johnson, 94 Wn. App. 882, 891-96, 974 P.2d 855 (1999), review denied, 139 Wn.2d 1028 (2000). Benitez argues that the trial court's refusal to give his instruction with the sentence about "mere presence" was an abuse of discretion because it deprived him of the ability to argue his theory of the case. According to Benitez, he needed that sentence to defend against the firearm allegation. His theory was that he had no control over the firearm and the State proved no more than the mere presence of the weapon at the crime scene.

Jury instructions are appropriate if they allow the parties to argue their theories of the case, do not mislead the jury, and do not misstate the law. State v. Stevens, 158 Wn.2d 304, 308, 143 P.3d 817 (2006). It is not error to refuse to give a specific instruction when a more general instruction adequately explains the law and allows each party to argue its theory of the case. State v. Schulze, 116 Wn.2d 154, 168, 804 P.2d 566 (1991). Refusal to give a proposed instruction is reviewed under an abuse of discretion standard. State v. Castle, 86 Wn. App. 48, 62, 935 P.2d 656, review denied, 133 Wn.2d 1014 (1997).

The instruction directed the jury to consider whether there was a connection between the weapon and the defendant or an accomplice, and a connection between the weapon and the crime. The instruction explained the factors to consider in doing so. The instruction allowed Benitez to argue in closing that the evidence did not connect the weapon to him or to Singleton:

So question number two is, was Mr. Singleton armed. Because it's clear that Mr. Benitez was not armed by the definition you've been given. So was Aaron Singleton armed? I would argue under the definition and the law you've been given, it's clear that Mr. Singleton wasn't armed either. *There has to be a connection between the crime and the weapon and the person and the*

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accomplice. And there really isn't. What we just had is it was there next to him and that's it.

(Emphasis added.) Thus, the instruction permitted Benitez to argue that if the State had merely proved a weapon was present, he was not armed. The court did not abuse its discretion by refusing to give Benitez's proposed instruction.

Benitez also argues that the State presented insufficient evidence that he or an accomplice was armed with a firearm at the time of the offense.

Challenges to the sufficiency of the evidence are reviewed in the light most favorable to the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The instruction given correctly stated the law. To establish that a defendant or an accomplice was armed for purposes of the sentencing enhancement, the State must prove that a weapon was easily accessible and readily available for use and that there was a nexus or a connection between the defendant or an accomplice, the crime, and the weapon. State v. Eckenrode, 159 Wn.2d 488, 490-91, 150 P.3d 1116 (2007).

In an interview after his arrest, Benitez told a detective that Singleton was "one of his runners or somewhat of an employee of his." A jury could infer from this statement and the circumstances of the crime that Singleton and Benitez were accomplices in the crime of possession with intent to deliver.

Benitez argues, however, that the State presented insufficient evidence of a connection between the weapon and the crime.

"The theory behind the deadly weapon enhancement is that a crime is potentially more dangerous to the victim, bystanders, or the police if the

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defendant is armed while he is committing the crime because someone may be killed or injured. . . . The underlying rationale can apply only where there is a possibility the defendant would *use* the weapon.” Johnson, 94 Wn. App. at 896. That possibility existed here. The weapon was in an open leather bag that was readily available for Singleton's use when the police entered the room. The fact that Benitez was Singleton's employer and that Benitez was aware that Singleton had a gun strengthens the inference that the gun was present as part of their drug operation. Benitez' remark that Singleton's bag was “the one with the gun in it” is evidence of the connection between Benitez and Singleton and the gun and the crime.

The State presented more than the “mere presence” of a weapon at the crime scene. We conclude the evidence was sufficient to support the special verdict.

In a statement of additional grounds for review under RAP 10.10, Benitez claims the trial court abused its discretion by holding a sidebar with law enforcement “curtailing a voir dire” in violation of State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). Voir dire was not transcribed as part of the appellate record. And the remainder of the record reflects no sidebars. Accordingly, this claim does not warrant additional review.

Benitez also claims it was unlawful to give him a sentence of 87 months and to give Singleton a sentence of only 17 months when it was Singleton who owned and possessed the firearm. This issue involves facts or evidence about Singleton that is not in the record and cannot be addressed in a statement of

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additional grounds. State v. Calvin, 176 Wn. App. 1, 26, 302 P.3d 509, 316 P.3d 496 (2013).

Affirmed.

Becker, J.

WE CONCUR:

Trickey, J

Scheldens, J

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71305-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent John Juhl, DPA
[jjuhl@snoco.org]
Snohomish County Prosecutor's Office
- petitioner
- Attorney for other party



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