No. 32808-2

WASHINGTON STATE COURT OF APPEALS
DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

LYNN L. JACKSON,

Appellant.

# APPELLANT'S REPLY BRIEF

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## I. INTRODUCTION

Throughout most of its response, the State mischaracterizes exactly how Asotin County Sheriff's Office Detective Jackie Nichols violated Washington's Privacy Act, RCW 9.73.010 -.260 2015 ("Privacy Act"). When informed of the allegations against Mr. Jackson, Det. Nichols arranged to meet with the alleged victim and her mother at the Lewiston, Idaho police department, despite knowing the specific incident she was investigating took place in Washington. During the course of the meeting, it was suggested that Ms. Mellick make a recorded phone call to Mr. Jackson, a procedure that was illegal in Washington without a warrant. Contrary to the State's representation, it was not the fact that the phone call was recorded, but the fact that Det. Nichols eavesdropped on the call that violated the Privacy Act. Armed with what she overheard, Det. Nichols then proceeded back to Washington to interrogate Mr. Jackson again and obtain his confession.

The State similarly mischaracterizes the presence of the .22 caliber pistol in Mr. Jackson's bedroom. It argues that because the gun was present in the bedroom, Mr. Jackson intended to use it in furtherance of the alleged attempt. The State's argument is a gross over-simplification of the legal standard for imposing a firearm enhancement and fails to account for the nexus requirement between the gun and the crime.

## II. RESPONSE TO STATE'S STATEMENT OF THE CASE

The State's statement of the case conflates and misstates a number of facts to bolster the State's position. First, the State makes it appear that choosing to conduct the interview in Idaho was based on certain allegations of inappropriate behavior that allegedly took place while "M.M. and her mother were living in Lewiston, Idaho." (Br. of Resp't at 3 (citing Report of Proceedings (hereinafter RP) 49)) The incidents cited by the State, however, were not described at trial as occurring in Lewiston. (See, Br. of Resp't at 3) (citing RP 75-79)) Ms. Mellick and M.M. testified they were living in Pullman at the time of the March incident.[1] (RP 48:18-20, 49:14-19, 86:11-16)

Moreover, it was clear from her report that Det. Nichols was contacted about a "sex offense that had occurred in the City of Clarkston . . . at 1012 Benjamin Street . . ." (Clerk's Papers (hereinafter CP) 003; see also, RP 127:21-128:4) It was not clear whether other incidents had occurred in Pullman and Lewiston, but Det. Nichols nonetheless arranged to meet M.M. in Lewiston. (CP 003-4) During the meeting in Lewiston, Det. Nichols learned that some unrelated incidents may have occurred in Lewiston. (CP 004)

[1]No testimony was admitted establishing how long M.M. and Ms. Mellick had lived in Pullman.

Second, although the State claims Det. Nichols took no role in the decision to have Ms. Mellick call Mr. Jackson, both M.M. and Ms. Mellick testified they understood **both** detectives wanted Ms. Mellick to make the call. (Br. of Resp't at 6-7; RP 51:24-52:11, 69:7-10, 121:15-20) Ms. Mellick denied receiving any instructions from Det. Nichols regarding topics she should not discuss with Mr. Jackson during the recorded call. (RP 51:7-13) To the contrary, she testified that Det. Leavitt was passing her notes asking for specific details about incidents which were alleged to have occurred in Washington and Idaho.[2] (RP 70:1-11)

Det. Nichols testified she was able to listen to the telephone call from outside the interview room and following the telephone call went with Lewiston Police Department Det. Jason Leavitt to Mr. Jackson's home in Clarkston, where she interrogated Mr. Jackson, obtained his confession, and arrested him for an attempted rape alleged to have occurred in Clarkston. (RP 162:24-163:3, 164:19-165:1-9)

The State cannot adequately explain why a Washington law enforcement officer investigating a specific incident alleged to have taken place in Washington would arrange an interview with the victim in a

[2]No evidence was presented regarding an investigation into crimes committed in Idaho other than the telephone call made at the direction of Det. Leavitt and Det. Nichols and the interview of Mr. Jackson by both detectives. Nor is there anything in the record to suggest that Mr. Jackson was ever charged with crimes alleged to have been committed in Idaho.

neighboring state, tell the victim's mother to call the suspect, and then listen to the phone call, all while knowing the same conduct was illegal in Washington. Nor can the State explain why the illegal act of listening to the phone call did not taint the subsequent confession.

## III. ARGUMENT

Mr. Jackson's confession to Det. Nichols was improperly admitted into evidence at trial. Det. Nichols exploited the information she illegally overheard at the Lewiston Police Department by immediately proceeding to interrogate Mr. Jackson without Miranda warnings. The subsequent lack of a CrR 3.5 hearing resulted in a violation of Mr. Jackson's constitutional right against self-incrimination.

Additionally, the trial court imposed a sixty-month firearm enhancement based on an incorrect legal standard. The fact that Mr. Jackson kept a firearm in his bedroom and asked M.M. to shoot him does not establish a nexus between the firearm and the crime of attempted rape.

### 3.1 The State mischaracterized the Privacy Act violation.

In its brief, the State focuses only on whether recording the phone call was illegal. (Br. of Resp't at 14, 16-20) The State even goes so far as to say, "it was not the fact of the phone call but the recording thereof that would have been illegal under Washington's Privacy Act . . ." (Br. of

Resp't at 24 n.9) While the State is correct that recording the phone call would have been illegal under the Privacy Act, the State fails to grasp that intercepting the phone call was also illegal. See, RCW 9.73.030 ("*intercept*, or record"). Thus, Det. Nichols could not listen to the phone conversation without Mr. Jackson's consent, which she did not receive.

The State does not cite or explain State v. Faford, 128 Wn.2d 476, 488-89, 910 P.2d 447 (1996), State v. Christensen, 153 Wn.2d 186, 194-96, 102 P.3d 789 (2005), or State v. Roden, 179 Wn.2d 893, 904, 321 P.3d 1183 (2014), all of which clearly indicate that intercepting a phone call is a violation of the Privacy Act. Det. Nichols admitted to listening to the phone conversation from outside the interview room, (RP 162:24-163:3, 164:19-165:1), and in doing so admitted to violating the Privacy Act.

#### 3.1.1 Detective Nichols actively assisted in arranging the recorded phone conversation.

The State concedes that had the recording taken place in Washington, it would have been a violation of the Privacy Act. (Br. of Resp't at 17) The State also concedes that had Det. Nichols instructed, assisted, or otherwise directed the recording of the phone call, doing so would have violated the Privacy Act. (Br. of Resp't at 18) Relying on State v. Fowler, 157 Wn.2d 387, 396, 139 P.3d 342 (2006), the State then argues that because the recording was made in Idaho, and Det. Nichols did

not request the call be placed or recorded, there was no violation of the Privacy Act.

Setting aside the distinction between intercepting and recording, the State mischaracterizes Fowler. In Fowler, phone calls from Oregon to Washington were placed and recorded solely at the direction of Oregon law enforcement. 157 Wn.2d at 389-90. Oregon, like Idaho, allows one party to consent to recording phone calls. Id. at 388. The critical, distinguishing fact is that the recorded phone calls were placed without a request or encouragement from Washington State law enforcement and before Washington had opened an investigation. Id. at 390.

Here, the State claims Det. Nichols had no role in the decision to call Mr. Jackson. (Br. of Resp't at 18-19 (citing RP 132-33)) The trial testimony, however, shows differently. Det. Nichols testified she arranged to meet the alleged victim and her mother in Lewiston, despite having been informed that the incident took place in Clarkston. (CP 003; RP 127:22-128:4)

Det. Nichols conducted the interview at the Lewiston Police Station without Idaho law enforcement in the room. (Br. of Resp't at 6; RP 163) While Det. Nichols testified she had no involvement in the decision to call Mr. Jackson, (RP 132-33), Ms. Mellick and M.M. testified they thought **both** officers wanted Ms. Mellick to call Mr. Jackson. (RP 51:24-

52:11, 69:7-10, 121:15-20) Det. Nichols then proceeded to listen to the phone call from another room. (RP 164) Throughout this entire process, Det. Nichols was aware that she was engaging in a law enforcement tactic that was a direct violation of Washington law and required a warrant. (RP 133:9-10, 164:13-18)

#### 3.1.2 Prohibiting Washington law enforcement officers from participating in Privacy Act violations would not impair Idaho law enforcement from conducting legitimate criminal investigations.

The State concedes that Washington law enforcement cannot cross state lines to avoid the application of Washington law. (Br. of Resp't at 18, 20 n.8) The cases cited by the State actually support Mr. Jackson. In State v. Brown, the Court specifically stated that no state interest would be advanced by suppressing the recording made in California by California law enforcement because "[n]o Washington state officer violated RCW 9.73." 132 Wn.2d 529, 590, 940 P.2d 546 (1997). Similarly, in Fowler, Washington law enforcement had not even opened a criminal investigation at the time the phone calls were recorded. 157 Wn.2d at 390.

Here, Washington law enforcement was involved in every aspect of the phone call. While Det. Nichols claims she asked Mr. Mellick to focus on events that took place in Idaho, Det. Nichols remained at the Lewiston Police Station during the call, listened to Mr. Jackson's answers

to questions prompted by law enforcement, and based on the information she learned, proceeded to Mr. Jackson's residence to question him again.

The State agrees Washington law enforcement officers must abide by Washington law when conducting investigations into alleged criminal activity in Washington, even if the Washington law enforcement officer is physically in Idaho. (Br. of Resp't at 17-20) Nevertheless, the State claims "[t]he proposition espoused by the Appellant would make it illegal for an Idaho police officer to conduct an otherwise lawful investigation under Idaho law, simply because a Washington State Officer was present for the purposes of investigating crimes in Washington." (Br. of Resp't at 19-20) Mr. Jackson makes no such proposition.

Mr. Jackson has no issues with how Det. Leavitt handled his investigation, although it should be noted that Idaho did not file any charges against Mr. Jackson. Mr. Jackson only takes issue with the fact that Det. Nichols violated the Privacy Act when she eavesdropped on the phone call. To allow Washington law enforcement officers to simply cross state lines to violate the Privacy Act in concert with out-of-state police would encourage Washington law enforcement to entangle themselves in "sham" investigations in an attempt to skirt Washington law. (See, Br. of Resp't at 20 n.8)

### 3.1.3 Detective Nichols knowingly exploited the information she overheard on the phone call.

The State argues that because Mr. Jackson may not have been aware of the fact that the phone call was recorded, law enforcement could not have exploited the fact of the recording. (Br. of Resp't at 23) First, there is no evidence in the record to suggest that Mr. Jackson was **unaware** police listened to the phone call. The only evidence in the record that touches on that issue is Det. Nichols's testimony that Mr. Jackson said he was expecting them. (RP 133:18-19)

Second, the State's argument only addresses a situation where law enforcement informs the suspect of what they heard and leverages that fact to get the suspect to repeat himself. Illegally listening to Mr. Jackson's responses to questioning directed by law enforcement gave Det. Nichols a trial run at the interrogation. Exploiting the illegal collection of Mr. Jackson's statements by immediately interrogating him again in Washington renders Mr. Jackson's statements to Det. Nichols inadmissible. See, United States v. Shelter, 665 F.3d 1150, 1160 (9th Cir. 2011) (exploiting an illegal search rendered defendant's subsequent statements to law enforcement inadmissible as fruit of the poisonous tree).

The State's other argument is that even if law enforcement had not recorded the phone call, they would have spoken with Ms. Mellick about it

and then interviewed Mr. Jackson regarding the substance of the conversation. (Br. of Resp't at 23-24) This argument is indistinguishable from the inevitable discovery exception to the exclusionary rule, which has been expressly rejected in Washington. See, State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009).

The bottom line is that Det. Nichols knowingly elected to proceed with conduct she knew was illegal in Washington. Under these circumstances, Mr. Jackson's confession to Det. Nichols was fruit of the poisonous tree and admitting his statements to Det. Nichols into evidence violated Mr. Jackson's right against self-incrimination.

### 3.2 The Privacy Act violation violated Mr. Jackson's state constitutional right to privacy.

The State relies on two principal cases, State v. Clark, 129 Wn.2d 211, 221, 916 P.2d 384 (1996) and State v. Sengxay, 80 Wn. App. 11, 13-15, 906 P.2d 368 (1995), to argue that a violation of the Privacy Act is never a constitutional violation.[3] Neither of those cases resolve whether law enforcement's intentional violation of RCW 9.73.030 can simultaneously be a constitutional violation.

[3]The State posits that Mr. Jackson supported his state constitutional argument "[i]n a footnote and without citation to any authority . . ." (Br. of Resp't at 14) That is simply not true; an entire section of Mr. Jackson's brief is devoted to the constitutional issue and traces the history of the principle that a Privacy Act violation is not constitutional to its genesis. See, Br. of App. at 29-33.

In Clark, the defendants were surreptitiously recorded while making drug purchases inside an automobile; however, the police department obtained permission from the court to record the conversations pursuant to RCW 9.73.090(5). 129 Wn.2d at 216-17. The Clark court relied on State v. Corliss, 123 Wn.2d 656, 663-64, 870 P.2d 317 (1994), and State v. Salinas, 119 Wn.2d 192, 197, 829 P.2d 1068 (1992), to conclude that no state constitutional violation occurred when one party consented to the recording. Clark, 129 Wn.2d at 221.

As noted in Mr. Jackson's opening brief, Corliss did not involve a violation of the Privacy Act. (Br. of App. at 30) Nevertheless, the defendant then argued law enforcement violated his Const. Art. I, §7 privacy rights—i.e., that the state constitution provided broader protection than the Privacy Act. 123 Wn.2d at 663. The court disagreed. Id. at 664.

Similarly, in Salinas, law enforcement did not violate the defendant's constitutional rights or the Privacy Act when it "scrupulously" followed the procedure in RCW 9.73.230. See, 119 Wn.2d at 199. Clark, Salinas, and Corliss essentially upheld the constitutionality of certain narrow exceptions within the Privacy Act that allow law enforcement to listen to and record conversations with only one party's consent. They did not hold that intentional violations of RCW 9.73.030, like the one at issue here, by law enforcement could never be a constitutional violation.

State v. Courtney, also cited by the State, focused on an entirely different provision of the Privacy Act pertaining to recording suspects during custodial interrogations. 137 Wn. App. 376, 382, 153 P.3d 238 (2007). In denying the defendant's constitutional argument, the court was careful to point out that suspects have no reasonable expectation of privacy while undergoing custodial interrogation. Id.

Sengxay, is also inapplicable. In that case, the defendant went to a police station in *California* where his interview was secretly recorded after he was read his Miranda[4] rights. Sengxay, 80 Wn. App. at 13. The defendant then proceeded to confess to a crime that occurred in Washington. Id. at 14. Washington law enforcement was not physically present at the police station. Id. at 13.

In sum, none of the cases cited by the State involved Washington law enforcement directly, knowingly, and intentionally violating the Privacy Act as Det. Nichols did here. Mr. Jackson's confession to Det. Nichols was obtained by exploiting illegal police behavior and should not have been admitted into evidence. See, Brown v. Illinois, 422 U.S. 590, 598-99, 95 S. Ct. 2254, 2259, 45 L. Ed. 2d 416 (1975). Had Mr. Jackson received a mandatory CrR 3.5 hearing, his statements to Det. Nichols would have been properly excluded from evidence.

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

### 3.3 The Privacy Act violation followed by police questioning without Miranda warnings warranted a CrR 3.5 hearing.

Based on the illegal manner in which Det. Nichols obtained Mr. Jackson's confession, it was imperative for the court to hold a CrR 3.5 hearing prior to admitting Det. Nichols's testimony.

While the failure to hold a CrR 3.5 hearing, in certain circumstances, does not render a defendant's statements inadmissible, those circumstances are not present here. For example, in State v. Kidd, 36 Wn. App. 503, 508, 674 P.2d 674 (1983), the court held no CrR 3.5 hearing was necessary because the defendant's statements that were admitted related to a previous arrest and were not the product of "any interrogation whatsoever." Id. at 509. In State v. Mustain, the defendant was "twice advised of his Miranda rights" and still elected to speak with law enforcement. 21 Wn. App. 39, 43, 584 P.2d 405 (1978). Similarly, in State v. Vandiver, the defendant's statements to law enforcement came after he was advised of his right to avoid self-incrimination. 21 Wn. App. 269, 272, 584 P.2d 978 (1978). Mr. Jackson was not advised of his Miranda rights prior to making incriminating statements.[5] Further, Mr. Jackson was interrogated immediately after Det. Nichols violated the Privacy Act and overheard Mr. Jackson incriminate himself. The

[5]Even if law enforcement had Mirandized Mr. Jackson, it would not be a "cure-all" for the illegal police conduct. See, Brown v. Illinois, 422 U.S. at 602-03.

proximity between the Privacy Act violation and the self-incrimination mandated some sort of procedural protections. While Mr. Jackson may have voluntarily agreed to talk with law enforcement, that alone did not obviate the need for a CrR 3.5 hearing.

Finally, the State's explanation for the local procedure in Asotin County does not excuse the lack of a mandatory CrR 3.5 hearing. CrR 3.5 requires the judge to hold or set a hearing for the purpose of determining whether a statement of the accused is admissible. Requiring a defendant to ask for a CrR 3.5 hearing does not satisfy the rule or precedent. See, State v. Talpin, 66 Wn.2d 687, 691-92, 404 P.2d 469 (1965). Thus, the "local practice" of placing the onus of requesting a hearing on criminal defendants further contributed to the prejudice suffered by Mr. Jackson.

### 3.4 The trial court applied the wrong legal standard when it failed to determine whether Mr. Jackson intended to use the firearm for offensive or defensive purposes during the March incident.

In response to the paucity of evidence of Mr. Jackson's intent to use a firearm during the March incident, the State argues it was not required to satisfy the nexus requirement because Mr. Jackson had actual possession of a firearm. (Br. of Resp't at 25-26) This is error. Even if Mr. Jackson's passing contact with the holstered pistol rose to the level of actual possession, the supreme court specifically rejected the State's same

argument in State v. Easterlin, 159 Wn.2d 203, 209, 149 P.3d 366 (2006), and again in State v. Brown, 162 Wn.2d 422, 432, 173 P.3d 245 (2007). One year later, the supreme court affirmed that application of a firearm enhancement requires the fact finder to first determine beyond a reasonable doubt that the firearm is not merely accessible, but that it is present because the defendant intends to use it. State v. Neff, 163 Wn.2d 453, 462, 181 P.3d 819 (2008).

This court should reject the State's invitation to disregard governing law and should hold that the trial court applied the wrong legal standard when it failed to find an intent or willingness to use the firearm. Alternatively, this court should hold that the State failed to present evidence from which a reasonable fact finder could determine beyond a reasonable doubt that Mr. Jackson intended to use the firearm for offensive or defensive purposes.

#### 3.4.1 The State misstates Washington law by claiming the nexus requirement never applies to cases of actual possession.

The State invites this court to disregard the supreme court's holding in Brown and instead rely upon an analysis by Division II in Easterlin. The issue before the Easterlin court was whether Mr. Easterlin's plea was invalid because he did not understand that the State had to prove a connection between the weapon and his crime. Easterlin, 159 Wn.2d at

206. The supreme court accepted review primarily to address the Court of Appeals' holding that in an actual possession case, the protections of the nexus requirement became redundant. State v. Easterlin, 126 Wn. App. 170, 174, 107 P.3d 773 (2005).

The State argued (just as it does here) that in cases of actual possession, the State need never satisfy the nexus requirement. Easterlin, 159 Wn.2d at 209. The supreme court rejected this argument. Id. Instead, the Easterlin court held that, although in some cases a nexus may be obvious from the circumstances, it must nonetheless be present in order to impose a firearms enhancement. Id. at 206. Because Easterlin admitted to simultaneous possession of both cocaine on his person and a gun on his lap, the trial court could reasonably infer for purposes of accepting his plea that the firearm was in Easterlin's lap to defend the cocaine. Id. at 210. The Easterlin court thus affirmed Easterlin's conviction, while still rejecting the Court of Appeals' holding the State relies on here. Id. at 211.

The supreme court further clarified the nexus requirement in Brown. The Brown court explained the nexus analysis balanced the right to possess firearms against the legislative policy to reduce violence by requiring the State to prove that the firearm was present at the scene because the defendant intended to use it either offensively or defensively. 162 Wn.2d at 435. Regardless of whether the possession was constructive,

fleeting, or actual, the definition of "armed" requires the State to present facts showing beyond a reasonable doubt that the firearm was present because the defendant intended to use it. Brown, 162 Wn.2d at 432-33 (citing State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007)).

The Brown court relied on seven prior cases in which Washington courts looked to the facts and circumstances to determine whether the weapon at issue was present at the scene of the crime so that it could be used in furtherance of the crime. Id. at 431-34 (internal cites omitted). The majority thus concluded that "the defendant's intent or willingness to use the [firearm] is a condition of the nexus requirement that does, in fact, appear in Washington cases." Id. at 434.

Evidence that the firearm was briefly handled by the defendant at the time of the crime (as was the case here) without more is insufficient to create a nexus between the firearm and the crime. Id. at 435. Because individuals have a right to possess firearms and because the sentencing enhancement applies to a broad array of felonies, a defendant is not armed unless the gun is readily accessible and readily available, **and** the defendant intends or is willing to use the firearm during the commission of the crime. Id. at 434-35 (emphasis added).

The dissent in Brown (like the State here) argued no finding of intent to use a firearm was necessary where the defendant had removed the

firearm from a closet and placed it on the bed with the purpose of placing it in a location where it was more easily accessible and available for use during the burglary. Brown, 162 Wn.2d at 442 (Madsen, J., dissenting). Essentially, the dissent argued it was enough that the defendant moved the firearm into the "field of play." The majority characterized this argument as suggesting any possession during an ongoing crime establishes a nexus. Id. at 432. Like the State here, the dissent "relie[d] too heavily on evidence that either Brown or his accomplice moved the rifle on the bed." Id.

The trial court's exclusive reliance on the holstered pistol's presence at the scene and its failure to determine whether the State had proven beyond a reasonable doubt that the firearm was present so that it could be used is an error of law.

#### 3.4.2 Hernandez is distinguishable because the Court of Appeals did not consider whether intent was required to find a nexus for purposes of imposing a firearms enhancement.

The State's reliance on State v. Hernandez is misplaced. 172 Wn. App. 537, 290 P.3d 1052 (2012). Hernandez examined whether there was sufficient evidence to support a first degree burglary charge, not whether the trial court had properly imposed a firearms enhancement. Id. at 542.

"A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or

remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime ... is armed with a deadly weapon." RCW 9A.52.020 (2015). The jury found the defendants were guilty of first degree robbery based upon the actual possession of firearms stolen during the burglaries as the defendants left the burglarized homes. Hernandez, 172 Wn.2d at 540-41.

In affirming the convictions, the Hernandez court examined only whether a defendant was armed for purposes of first degree burglary. Id. at 543-44. Case law defining "armed" for purpose of RCW 9A.52.020 specifically holds no intent to use the firearm is required. Id. at 542-43. The defendants argued Brown required the State to prove intent, but the Hernandez court concluded that the nexus requirement applied only to firearm enhancements and not to the elements of first degree burglary. Id. at 537. Hernandez does not (and indeed, cannot) overrule or abrogate Brown. This court should therefore reject the State's claim that the nexus requirement does not apply to this case.

### 3.4.3 The evidence showed Mr. Jackson had only fleeting possession of a holstered firearm during the March incident.

The State attempts to distinguish Brown, arguing that in Brown the defendant's handling of the rifle and moving it from the closet to the bed was mere "fleeting possession." (Br. of Resp't at 27) A passing control that is only a momentary handling is not actual possession. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

The possession described in Brown is no less fleeting than that of this case. Mr. Jackson's fleeting possession of the firearm is documented in the photographs submitted by the State, which show Mr. Jackson holding the firearm in only one of the six hundred photographs of the scene submitted by the State. Mr. Jackson tossed the holstered pistol onto a bed, did not use it, did not remove it from its holster, and only touched the firearm again when he pushed it toward M.M. and asked her to shoot him. (RP 89:1-5, 101:8-18, 112:1-24)

Thus, even if the State were correct in arguing the protections of the nexus analysis do not apply to cases of actual possession, the evidence fails to establish Mr. Jackson's possession was anything more than passing.

### 3.4.4 The evidence is inconsistent with a finding that the firearm was present so that it could be used offensively or defensively.

The evidence presented at trial was insufficient to establish Mr. Jackson's intent or willingness to use the firearm either offensively or defensively during the March incident. The evidence submitted by the State established Mr. Jackson had brief contact with the firearm twice during the March incident: (1) when he tossed the holstered pistol onto the bed after M.M. discovered it under the bed; and (2) when he pushed the still-holstered pistol toward M.M. and asked her to shoot him. (RP 88:7-8; 101:8-13) The State presented no other evidence relating to Mr. Jackson's intent or willingness to use the firearm.

M.M. testified affirmatively that the holstered pistol played no further role in her physical struggle with Mr. Jackson during the March incident. (See, RP 111:10-17, 22-112:24) The trial court specifically found that "there was no testimony from the victim that she was assaulted by the firearm, placed in fear by the firearm or that it was used in any kind of offensive manner against her." (RP 260:12-17) This is precisely why the trial court did not find Mr. Jackson guilty of second degree assault. (RP 260)

The testimony and photographs admitted at trial establish that even when M.M was resisting Mr. Jackson, he never brought the handgun into

play. The only evidence in the record relating to the reason Mr. Jackson placed the holstered pistol on the bed was his own testimony stating he normally kept his pistol on his bed because his home had been broken into. (RP 191:11-22) Det. Nichols confirmed that when she and Det. Leavitt interrogated Mr. Jackson at his home, the pistol was indeed on his bed. (RP 143:22-24)

As to Mr. Jackson's brief contact with the still-holstered pistol when he asked M.M. to shoot him, the only evidence in the record suggests that Mr. Jackson was willing to allow *M.M.* to use the pistol against him. This is consistent with M.M.'s testimony describing Mr. Jackson as being extremely upset by his actions, both during the March incident and two weeks later when he instructed M.M. to tell her mother he would rape M.M. if he married Ms. Mellick. (RP 101:7-11; 111:2-17; 115:5-8; 118:8) Ms. Mellick also testified that Mr. Jackson was remorseful and provided no testimony suggesting Mr. Jackson's grief over his actions was not genuine. (See, RP 57:12-14; 63:1-3) The State's speculation that Mr. Jackson was attempting to manipulate M.M. by passing her a loaded handgun and asking her to shoot him is inconsistent with all other evidence of Mr. Jackson's state of mind.

Based on these facts, a rational trier of fact could not find beyond a reasonable doubt that Mr. Jackson intended or was even willing to use the

holstered firearm either offensively or defensively during his struggle with M.M. Because the trial court failed to properly apply the nexus analysis and because the State failed to present sufficient evidence of Mr. Jackson's intent or willingness to use his holstered pistol during the March incident, this court should vacate Mr. Jackson's firearm enhancement.

### 3.5 The State's brief highlights additional evidence of ineffective assistance of counsel.

Mr. Jackson filed a Statement of Additional Grounds, claiming he received ineffective assistance of counsel. While claiming the record provides insufficient evidence to support his claim, the State repeatedly notes Mr. Jackson's counsel's failure to object at key points in the proceedings, including: (1) the defense's failure to insist the trial court comply with CrR 3.5 (Br. of Resp't at 13, 24 n.10); and (2) the defense's failure to object to the testimony of Det. Nichols. (Br. of Resp't at 13, 14 n.5, 25) According to the State's own briefing, the defense counsel's performance was deficient and prejudiced Mr. Jackson by allowing key testimony to be admitted at trial that was obtained through violation of the Privacy Act.

This court should therefore consider the failings highlighted by the State in considering Mr. Jackson's Statement of Additional Grounds, and

hold Mr. Jackson's conviction should be reversed for ineffective assistance of counsel.

## IV. CONCLUSION

Det. Nichols knowingly engaged in illegal behavior and exploited the illegality to obtain Mr. Jackson's confession. The confession was then admitted into evidence through Det. Nichols's testimony without Mr. Jackson receiving a mandatory CrR 3.5 hearing. The entire process resulted in a violation of Mr. Jackson's constitutional right against self-incrimination. Therefore, Mr. Jackson's conviction should be reversed.

Additionally, the trial court applied the wrong legal standard when it imposed the sixty-month sentencing enhancement. Mr. Jackson never intended to use a firearm against M.M. and the firearm was not present for use in the alleged attempt. Because there was no nexus between the firearm and the alleged attempt, the Court should vacate the enhancement.

DATED this 6th day of July, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on July 7, 2015, I caused the foregoing document to be served on the following counsel in the manner indicated:

| | |
|---|---|
| Benjamin Curler Nichols | **VIA REGULAR MAIL** ☒ |
| Asotin County Prosecutor's Office | **VIA CERTIFIED MAIL** ☐ |
| P.O. Box 220 | **HAND DELIVERED** ☐ |
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| | **VIA FEDERAL EXPRESS** ☐ |

DATED on July 7, 2015, at Spokane, Washington

Janel Martindale

Janel Martindale