

Supreme Court No. 926045-0

Court of Appeals No. 32808-2

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
SPokane, Washington

WASHINGTON STATE SUPREME COURT

STATE OF WASHINGTON,

Respondent,

vs.

LYNN L. JACKSON,

Petitioner.

FILED CRF
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WASHINGTON STATE
SUPREME COURT

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The petitioner is Lynn Lee Jackson, the individual appellant in the case below.

II. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals, Division III, issued a decision on November 19, 2015 affirming the trial court's verdict finding Mr. Jackson guilty of attempted second degree rape of a child and imposing a firearms enhancement under RCW 9.94A.533(3).

III. ISSUES PRESENTED FOR REVIEW

1. Was the trial court required to find a nexus between the firearm and assaultive behavior before imposing the firearms enhancement under RCW 9.94A.533(3).

2. Was there sufficient evidence to find a nexus between the firearm and the assaultive conduct where testimony and photographic evidence established only that Mr. Jackson tossed the firearm on the bed prior to the assaultive conduct?

IV. STATEMENT OF THE CASE

On April 7, 2014, Lynn L. Jackson was charged by Information with Count One: attempted rape of a child in the second degree, in violation of RCW 9A.44.076 and .28.020; and Count Two: assault in the second degree, in violation of RCW 9A.36.021(1)(c) (assault with a

deadly weapon). (CR 012-13) On July 16, 2014, the State amended the Information to add a firearms enhancement (RCW 9.94A.533(3)) to both counts and a sexual motivation enhancement (RCW 9.94A.533(8) and .835(1)) to Count Two. (CR 44-45)

Following a one-day bench trial, Judge Scott D. Gallina found Mr. Jackson guilty of Count One, reduced Count Two to assault in the fourth degree, and found Mr. Jackson was armed with a firearm at the time of the attempted rape. (CR 106-10) On Count Two, Judge Gallina explained he could find no nexus between the weapon which was alleged to have been used and the assaultive behavior and so found Mr. Jackson guilty of the lesser included offense of fourth degree assault. (RP 260:8-12, 261:2-5) Judge Gallina imposed the firearms enhancement relying solely on Mr. Jackson's act of placing his holstered handgun on the bed prior to struggling with M.M. (RP 269:11-17)

A. Mr. Jackson was alleged to have attempted to force his affections on a minor in March 2014.

The charges against Mr. Jackson arose from an incident involving his long-time girlfriend's daughter, M.M., on or about March 15, 2014. Mr. Jackson had known M.M. since he and her mother began dating when M.M. was approximately seven years old. (RP 41:3-7; 73:17-18) In the

spring of 2014, Mr. Jackson and M.M.'s mother became engaged to be married. (RP 40:23-24) M.M. was then 13-years-old. (RP 74:1-2)

That same spring, Mr. Jackson began teaching M.M. to drive. (RP 109:4-7) On or about March 15, 2014, Mr. Jackson took M.M. driving on some country roads between her home in Pullman and Mr. Jackson's home in Clarkston, Washington. (RP 86:8-87:2) After they had finished driving, they stopped by Mr. Jackson's home, so that Mr. Jackson could get some aspirin. (RP 86:18-21, 188:2-10)

Mr. Jackson was in the middle of remodeling his home and only his bedroom was furnished. (RP 188:17-189:2) M.M. went into Mr. Jackson's bedroom to use his computer. (RP 87:21-23) Mr. Jackson, complaining of a headache, lay down crosswise on the bed. (RP 87:8-11) Mr. Jackson asked M.M. to lie down with him, so she lay down on the bed next to Mr. Jackson while she played on her phone. (RP 87:11-13)

M.M. rolled off the bed and fell on the floor, where she noticed a holstered pistol under Mr. Jackson's bed. (RP 88:7-8, 96:17-20) Mr. Jackson tossed the gun onto the bed where he testified he usually kept it. (RP 224:20-24) He did not remove the pistol from its holster. (See, RP 223:23-24) Mr. Jackson then pushed M.M. onto the bed. (RP 97:5)

Mr. Jackson began kissing M.M. below her collar bone and on her neck. (RP 97:8, 100:14) Mr. Jackson told M.M. "I didn't plan on [sic]

anything to you today, but I couldn't help myself." (RP 97:15-16) M.M. struggled with Mr. Jackson, but was unable to get up off the bed. (RP 99:7-100:3) Approximately six minutes after Mr. Jackson pushed M.M. onto the bed, Mr. Jackson stopped. (RP 224:7-19, 228:14-17) M.M. had become distraught; Mr. Jackson expressed his remorse, pulled the pistol out from under the bedsheets, and pushed the pistol toward M.M., telling her to shoot him. (RP 100: 19-24, 101:8-13, 111:5-18, 191:11:10-192:4) After M.M. refused to shoot Mr. Jackson, she got up from the bed and left the room. (RP 113:1-24)

The pistol was still in its holster. (RP 101:11-12; 158:23-159:6)

B. Evidence at trial established Mr. Jackson did not use the pistol to coerce, intimidate, or threaten M.M.

At trial, testimony by M.M. and Mr. Jackson established that the only time Mr. Jackson touched the pistol during the March incident was when he tossed it onto the bed and when he asked M.M. to shoot him. (RP 111:15-112:4, 192:1-12) M.M.'s testimony established that at no time did Mr. Jackson use, threaten, or attempt to use the pistol during his struggle with M.M. at his home. (RP 112:8-23)

M.M. testified:

Q: Okay. So he told you to shoot him?

A: Yes.

....

Q: Was that the first time that he had the gun, when he pushed it towards you?
A: Well, he had taken out from under his bed and set it on the bed, and then I – he had got on top of me, I tried to get away, he threw me on the bed, and then he pushed the gun towards me and said, “I want you to shoot me.”
Q: Okay. So you remember that he had touched the gun earlier –
A: Yes.
-- in this exchange. Did he point it at you?
A: No.
Q: He didn’t wave it front of you or anything like that?
A: No.
Q: He didn’t threaten, “you better do what I tell you--”
A: No.
Q: “—or,” nothing like that? So when he handed you the gun was he pointing the barrel of it, where the bullets come out, was he pointing that at you?
A: He didn’t hand it to me, he pushed it to me.
Q: Pushed it to you. So it wasn’t facing you?
A: No.

(RP 111:10-17, 22-112:24)

In fact, the only testimony indicating any reaction by M.M. to the presence of the pistol was her explanation of why she pushed the gun away from herself when Mr. Jackson asked her to shoot him. (See, RP 111:12-14)

C. The trial court found a nexus based solely on Mr. Jackson’s act in tossing the gun onto the bed.

The following day, the trial court gave its ruling. Judge Gallina first addressed Count 2, assault with a deadly weapon. Judge Gallina stated:

In order to make that finding, I have to find that there was a nexus between the weapon which was alleged to have been used and the assaultive behavior. I can't find that nexus on that charge. Although there was a firearm present, there was no testimony from the victim that she was assaulted with a firearm, placed in fear by the firearm or that it was used in any kind of offensive manner against her.

(RP 260:8-17) The trial court therefore reduced Count Two to the lesser included offense of assault in the fourth degree. (RP 260:2-4)

The trial court found there was "sufficient evidence" to support the firearms enhancement. (RP 268:21-24) The trial judge ruled that placing the pistol on the bed immediately before the assaultive conduct began was sufficient to create a nexus between Mr. Jackson, the gun, and the crime. (RP 269:8-11) Contrary to statements by M.M. and its own ruling on Mr. Jackson's assault charge, the trial court concluded the placement of the gun on the bed was "another act contributing to the total domination of this young girl." (RP 269:13-14)

On October 3, the trial court entered a Judgment and Sentence, sentencing Mr. Jackson to 120 months to life on Count One (including the 60 month firearm enhancement), to run concurrently with a 364 day sentence on Count 2. (CR 144)

V. ARGUMENT

Review should be accepted by the supreme court if: (1) the decision of the court of appeals conflicts with decisions of Washington

Supreme Court or other appellate courts; or (2) if a significant question of law under the U.S. or Washington Constitution is involved. RAP 13.4(b).

Division III held the trial court was not required to find a nexus between Mr. Jackson, his firearm, and the crime before imposing a firearms enhancement. As such, this case concerns the interplay between RCW 9.94A.533(3) and an individual's right to own and bear firearms under article I, §24 and the Second Amendment. This case also asks this court to determine whether Division III's holding conflicts with the holding of this court in State v. Brown, 162 Wn.2d 422, 432, 173 P.3d 245 (2007).

Division III erred in holding the trial court was not required to find a nexus between Mr. Jackson, his firearm, and the crime. State v. Jackson, No. 32808-2-III, slip op. at 11 (Nov. 19, 2015). In Brown, this court held that intent or willingness to use a firearm in the commission of a crime is part of the nexus analysis that must be conducted before imposing a firearms enhancement under RCW 9.94A.533(3)—even where there is evidence in the record that the defendant handled the firearm during the crime. 162 Wn.2d at 431, 432. The Court of Appeals also erred by concluding that, in the event a nexus analysis is required, there was sufficient evidence of a nexus, despite an absence in the record of any

intent or willingness by Mr. Jackson to further his actions against M.M. Id. at 12.

A. The Court of Appeals' holding that it was not required to find a nexus between the defendant, weapon, and crime is contrary to this court's precedent.

“To protect the integrity of constitutional rights, the courts have developed two related propositions. The State can take no action which will unnecessarily ‘chill’ or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right.” State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984); (citing United States v. Jackson, 390 U.S. 570, 581, 88 S. Ct. 1209 (1968)). The Court of Appeals' holding violates both principles by denying Mr. Jackson is entitled to a nexus analysis and by inferring intent solely from proximity and momentary handling of the pistol in this case.

Because it violates the Washington Constitution to draw an adverse inference from a defendant's mere possession of a weapon during the commission of a crime, trial courts must find more than possession or proximity before concluding a defendant was “armed” for purposes of the firearms enhancement. Rupe, 101 Wn.2d at 707; State v. Brown, 162 Wn.2d at 431; State v. Barnes, 153 Wn.2d 378, 383, 103 P.3d 1219 (2005); State v. Schelin, 147 Wn.2d 562, 567, 570, 55 P.3d 632 (2002); State v. Gurske, 155 Wn.2d 134, 138, 118 P.3d 333 (2005). The State

must establish a nexus between the defendant, the weapon, and the crime, which includes evidence of intent or willingness to use a firearm. Id. at 434-35.

“Though the use of a weapon in the commission of a crime is not constitutionally protected, adherence to the nexus analysis is ... important in harmonizing the mandatory sentence enhancements with the constitutional right to bear arms.” Brown, 162 Wn.2d at 435. So also is inclusion in the nexus analysis of an analysis of whether the defendant intended or was willing to use the firearm during the commission of the crime. Id. at 434-35. The weapon’s presence at the scene of a crime—and even the defendant’s brief handling of a firearm—are insufficient without evidence that the weapon was present for the purpose of being used in the commission of a crime. Id. at 434-35.

Although the Court of Appeals claims a nexus analysis is required only in cases of constructive possession, this is incorrect. In Brown, the court’s analysis was based on its assumption that the defendants had actual possession of the firearms during the course of the burglary, based upon testimony that the homeowner believed the firearms had been moved from a closet to a bed. See, 162 Wn.2d at 431-32, 434-35. Testimony established that the homeowner’s AK 47 rifle had been moved from the closet to a bed. Id. at 431. A witness overheard the defendants discussing

the burglary and complaining that they should have taken the firearms. Id. The trial court imposed the firearms enhancement, concluding that the placement of the rifle on the bed made it readily accessible to the defendants during the burglary. Id. at 427.

The Brown majority's responses to the dissent, specifically address the defendants' presumed handling of the firearms during the burglary. Id. Despite evidence that the defendants had actually possessed the firearms during the course of the burglary, the Brown court held, "Evidence that the rifle was briefly in a burglar's possession, without more, does not make Brown armed within the meaning of the sentencing enhancement statutes." Id. at 435.

The Court of Appeals also cites its own holding in State v. Hernandez, 172 Wn. App. 537, 544-54, 290 P.3d 1052 (2012), review den'd, 177 Wn.2d 1022 (2013), for proof that the holding of Brown has been limited to cases of constructive possession. Jackson, No. 32808-2-III at 11. Hernandez is distinguishable. 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. 172 Wn. App. at 542. 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. The Brown court was also careful to distinguish between those cases in which courts analyzed whether a defendant was armed for the purposes of a first degree robbery conviction from those in which firearms enhancement was at issue. 162 Wn.2d at 434 n.4. “This means none of those decisions involved the application of a nexus requirement between the gun and the crime. Hence, they do not support the view that possession of a firearm alone during an ongoing crime establishes the nexus between the gun and the crime.” Id.

Brown strongly rejects any claim that the nexus analysis is not required anytime a defendant handles a firearm during the commission of the crime. Brown has not been overruled or abrogated by this court. Thus, regardless of whether Mr. Jackson’s possession was constructive, fleeting, or actual, in considering the imposition of the firearms enhancement, the trial court was required to determine that the firearm was present because Mr. Jackson *intended* to use it in the commission of a crime. Brown, 162 Wn.2d at 432-33 (citing State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007)).

B. The evidence was not sufficient to support a finding that Mr. Jackson intended to use the firearm during the commission of the crime.

Sufficient evidence to support a firearms enhancement exists if a rational trier of fact could have found the required elements beyond a

reasonable doubt. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). To determine whether the nexus requirement is met, the court must analyze 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 facts must be viewed in the light most favorable to the State, the court may not draw adverse inferences from Mr. Jackson's exercise of his constitutional right to possess a firearm. Brown, 162 Wn.2d at 431; Rupe, 101 Wn.2d at 705.

The Brown court defined the issue in that case as "whether, under these facts, where a weapon was moved during a burglary, if that evidence is sufficient to establish that a defendant is armed." 162 Wn.2d at 431. Evidence that a weapon was briefly in the defendant's possession during the commission of a crime is not determinative. Brown, 162 Wn.2d at 435. The Brown court found that there was insufficient evidence to support a firearms enhancement because there was no evidence that Mr. Brown or his accomplices handled the rifle in question in a manner that indicated their intent or willingness to use it in the commission of the burglary. Id. at 432. The fact that the defendants could have used the firearm if they chose to do so was judged insufficient. Id. The court soundly rejected the dissent's contention that any actual possession of a firearm during the

commission of a crime is sufficient to establish a nexus between the weapon and the crime. Id.

In this case, notably, the trial judge found no nexus between Mr. Jackson and the assaultive behavior for purposes of determining whether Mr. Jackson was guilty of second degree assault. (RP 260:8-12) “Although there was a firearm present, there was no testimony from the victim that she was assaulted with 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) In fact, M.M. specifically disclaimed such actions or fears.

The Court of Appeals sought to distinguish the trial court’s inconsistent ruling, by noting that “in order to commit second degree assault with a weapon, he [Mr. Jackson] had to use the weapon as an instrument of the assault . . . In contrast, the weapon only needed to be readily available to constitute being “armed” with the weapon for enhancement purposes.” Jackson, No. 32808-2-III at 11 n.9. This distinction is not in accordance with this court’s holding in Brown or Mr. Jackson’s right to own and bear arms under the Second Amendment. The mere fact that the firearm was legally present in the home, was accessible to Mr. Jackson, and could have been used by Mr. Jackson had he chosen to do so, is insufficient to demonstrate the necessary nexus

required to show that he was “armed” for purposes of a weapons enhancement our precedent.

Furthermore, although the Court of Appeals argues the simple fact that the holstered pistol was placed on the bed facilitated the crime, this is contrary to the facts in the record and the ruling of the trial court on the charge of second degree assault. It cannot be contested that M.M. resisted Mr. Jackson’s advances. Yet, if Mr. Jackson had intended to facilitate his crime, he could have removed the pistol from its holster; he could have verbally threatened M.M. with use of the pistol; he could have held the gun or ensured it remained visible to M.M. rather than under the bedsheets; he could have pointed the gun at M.M. instead of himself when his efforts at seduction failed. Instead, it is undisputed that none of these things occurred; further demonstrating Mr. Jackson’s lack of intent or willingness to use the pistol in the commission of the attempted conduct.

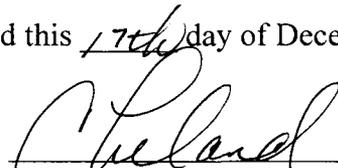
Mr. Jackson never used the gun to place M.M. in fear or coerce her in any way. He never removed the pistol from its holster or even touched it again until he stopped his advances on M.M. and urged M.M. to shoot him with the pistol. (See, RP 101:5-18, 111:12-112:4) Even then, Mr. Jackson pushed the holstered gun toward M.M. with the barrel of the gun facing away from M.M. (RP 112:16-23). Just as this court did in Brown, it should hold here that the mere fact that a defendant has moved a

firearm to a location where it is more easily accessible is not determinative of whether there is a nexus between the weapon and the crime. See, 162 Wn.2d at 432. Mr. Jackson's actions showed a distinct lack of any inclination to use the pistol against M.M. Against M.M.'s testimony and Mr. Jackson's own regarding his actual interaction with the firearm, the Court of Appeals' speculation as to why the pistol was present is insufficient. See, id.

VI. CONCLUSION

This court should accept review because the Court of Appeals' decision in this matter directly contradicts the holding in Brown and violates settled principles designed to protect an individual's right to bear arms under the Second Amendment. Mr. Jackson, therefore, asks this court to accept his petition, reverse the Court of Appeals, and vacate Mr. Jackson's firearm enhancement.

Respectfully submitted this 17th day of December, 2015.



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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington as follows: That on December 18, 2015, I served a copy of the foregoing document by causing a true and correct copy of said document to be delivered to counsel and the party named below at the addresses shown below in the manner(s) indicated:

Benjamin Curler Nichols	VIA REGULAR MAIL	<input checked="" type="checkbox"/>
Asotin County Prosecutor's Office	VIA EMAIL	<input checked="" type="checkbox"/>
P.O. Box 220	HAND DELIVERED	<input type="checkbox"/>
Asotin, WA 99402-0220	BY FACSIMILE	<input type="checkbox"/>
	VIA FEDERAL EXPRESS	<input type="checkbox"/>

Lynn Jackson, 376397	VIA REGULAR MAIL	<input checked="" type="checkbox"/>
Coyote Ridge Correction Center	VIA EMAIL	<input type="checkbox"/>
1301 N. Ephrata Ave.	HAND DELIVERED	<input type="checkbox"/>
P.O. Box 769	BY FACSIMILE	<input type="checkbox"/>
Connell, WA 99326	VIA FEDERAL EXPRESS	<input type="checkbox"/>

DATED at Spokane, Washington, on December 18, 2015.


Janel Martindale

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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,)	
)	No. 32808-2-III
Respondent,)	
)	
v.)	
)	
LYNN L. JACKSON,)	UNPUBLISHED OPINION
)	
Appellant.)	

KORSMO, J. — Lynn Jackson appeals his conviction for attempted second degree rape of a child while armed with a firearm, arguing that recording of a phone call placed from Idaho violated his rights under the Privacy Act, chapter 9.73 RCW. No evidence derived from that telephone call was offered at trial and his effort to raise a derivative evidence argument for the first time on appeal is not properly before us. We affirm the conviction.

FACTS

Mr. Jackson was engaged to marry DM. She had a 13-year-old daughter, MM. The charged incident occurred on March 15, 2014. That day Mr. Jackson drove MM from her mother’s house in Pullman to a house he owned in Clarkston. The house was one that he had purchased to repair and re-sell. Only two rooms were furnished. MM went in the bedroom to use the computer.

Mr. Jackson came in and laid down on the bed, saying that he had a headache. He asked MM to join him on the bed. She got on the bed and played a game on her telephone. He started tickling her and she fell off the bed to the floor. There she saw a handgun. Mr. Jackson got up, locked the door to the bedroom, and picked the gun up. He threw¹ the child onto the bed and put the gun next to her. He climbed into the bed and started kissing her chest and put his hand under her shirt. She objected and tried to push him off; he told her that he had not planned on doing anything, but he could not help himself. He then asked how she would react if he raped her. MM continued to struggle. Mr. Jackson started crying and got off her. He took the gun and handed it to MM, asking her to shoot him. She refused and pushed the gun back at him. After both calmed down, they left the house to shop. MM did not report the incident because she knew it would prevent her mother from marrying Mr. Jackson.

Mr. Jackson had set a game camera up in the bedroom to periodically take pictures of activities on the bed. Much of the encounter with MM was captured by the camera and downloaded to a computer. At trial, MM described what was happening in the pictures.²

¹ The trial judge later described this as a “body-slam.” Report of Proceedings at 265. The judge also noted that the entire incident lasted nearly an hour.

² The camera also captured sexual encounters between Mr. Jackson and three women, one of whom was DM. None of those photographs were used at trial.

DM, MM, and Mr. Jackson went to Las Vegas for the older couple to marry on April 1. That morning, Mr. Jackson was alone with MM and told her that if he married DM, he would end up raping MM and encouraged her to tell that to her mother. The child then told her mother at breakfast about the threat and disclosed information about a series of sexual encounters over the years. The wedding was called off and DM returned to Pullman with her daughter on April 3. Prior to leaving Las Vegas, she called attorneys on the advice of her sisters. One of the attorneys then arranged for the two to have a joint meeting with both Idaho and Washington detectives in Lewiston, Idaho, on April 4.³

Present to meet with the pair were Detective Jackie Nichols of the Asotin County Sheriff's Office, a victim advocate from Asotin County, and Lewiston Police Department Detective Jason Leavitt. MM preferred to talk solely with the female detective, so Detective Nichols interviewed her while Detective Leavitt spoke with DM. Leavitt requested that DM call Mr. Jackson to talk about the incidents when MM was younger in Lewiston and record the conversation in the detective's presence. Detective Nichols was advised about the plan and told DM to avoid any discussion of incidents in Washington. DM and Mr. Jackson spoke with Leavitt listening in and passing notes to DM suggesting questions to ask. Detective Nichols in the other room could "basically hear" what was going on. Report of Proceedings (RP) at 164-165.

³ The disclosures indicated that some of the encounters occurred in Lewiston where the family had lived when MM was younger. Clerk's Papers at 3.

After the telephone conversation and the interview with MM were complete, the two detectives went to Mr. Jackson's house in Clarkston and spoke with him. He agreed to allow the interview to be recorded. He told the detectives that he had fallen in love with MM and had asked her on March 15 what she would do if he attempted to rape her. When she began crying, he let go of her wrists and handed her a gun and asked her to shoot him. She threw it away. He also discussed earlier incidents in Washington and Idaho that MM had discussed with the detective.

Charges of attempted second degree child rape and second degree assault, both alleged to have been committed while armed with a firearm, were filed in Asotin County Superior Court. Mr. Jackson waived his right to a jury trial and the matter was set for bench trial. Prior to the trial, the defense filed several motions in limine. Included in the motions were requests that the recording of the conversation between DM and Mr. Jackson not be played at trial because it was made in violation of RCW 9.73.030 and that the State's witnesses not discuss the contents of the conversation. The parties debated whether DM was acting as an agent of the State of Washington when she placed the phone call. The court reserved its ruling on those two motions to trial, although the prosecutor indicated he would not be playing the recording because it was too long.

DM testified at trial concerning the circumstances of the phone call she made to Mr. Jackson. When the prosecutor asked for a preliminary ruling that DM could testify to the contents of the conversation, the trial judge indicated not "at this time." The State

then ceased its questioning of DM and did not call Detective Leavitt. The contents of the conversation were not admitted at trial.

Detective Nichols did testify concerning her interviews of both MM and Mr. Jackson. She was the third and final witness for the State. Mr. Jackson took the stand in his own defense as the sole defense witness. He admitted asking the rape question of MM and pushing her onto the bed, but denied that anything else occurred. When he saw that she was crying, he pulled the loaded gun out from under the covers and asked her to shoot him. He also confirmed that the incident ended after he realized that he just could not go forward with it. "I could not hurt her." RP at 204.

The trial court convicted Mr. Jackson as charged of attempted second degree child rape while armed with a firearm. The court also convicted him of the included offense of fourth degree assault. Findings of fact and conclusions of law were entered in support of the bench verdict. CP at 106-110. A standard range minimum term sentence was imposed. Mr. Jackson then timely appealed to this court.

ANALYSIS

Mr. Jackson presents multiple challenges to the admission of his statements to the detectives during the interview at his house. We treat those challenges as one and decline

to consider them. We then consider Mr. Jackson's remaining challenge to the evidence supporting the firearm enhancement.⁴

Law Enforcement Interview

Mr. Jackson argues that his interview with the two detectives should have been excluded from evidence. He points out that there was no CrR 3.5 hearing and also contends that Detective Nichols eavesdropped on the telephone call in violation of RCW 9.73.030 and violated his rights under the Privacy Act. He did not seek this relief in the trial court nor make any of these arguments. There is no manifest constitutional issue presented by his challenges, nor is there a factual basis to consider them in this court.

RAP 2.5(a) sets forth the general policy of this state—appellate courts will not consider arguments not first presented to the trial court. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). However, RAP 2.5(a)(3) permits a party to raise initially on appeal a claim of “manifest error affecting a constitutional right.” This authority is permissive; an appellate court will refuse to consider constitutional issues if the record is not sufficient to permit review of the claim. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995).

⁴ Mr. Jackson also submitted a letter complaining about his trial counsel that has been treated as a statement of additional grounds. The document, however, contains evidence outside the record that is inappropriate for our review. RAP 10.10(c). Mr. Jackson's remedy is to file a personal restraint petition if he desires consideration of evidence outside the trial record. *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995).

Mr. Jackson's primary problem is that he did not challenge the admission of the interview at trial. Indeed, much of his cross-examination of Detective Nichols was designed to elicit his own statements from that interview. RP at 166-171. Thus, even without considering issues of invited error, he can only obtain review of this issue if he can establish a manifest constitutional error in the admission of the statements.⁵ He is unable to do so.

Mr. Jackson points out that there was no CrR 3.5 hearing and no evidence that he was afforded his *Miranda*⁶ warnings at the interview. However, CrR 3.5 was designed to implement the constitutional right to challenge an involuntary statement; compliance with the rule is not itself a constitutional issue. *State v. Williams*, 137 Wn.2d 746, 749-755, 975 P.2d 963 (1999). Thus, the failure to hold a CrR 3.5 hearing does not make a defendant's statement inadmissible. *State v. Vandiver*, 21 Wn. App. 269, 272, 584 P.2d 978 (1978); *State v. Mustain*, 21 Wn. App. 39, 42-43, 584 P.2d 405 (1978). As *Williams* also noted, a CrR 3.5 hearing is not required in bench trials since a judge presumably will

⁵ In light of Mr. Jackson's decision to testify, the interview statements would have been usable to impeach any contrary testimony even if they had been suppressed in the State's case-in-chief. *Harris v. New York*, 401 U.S. 222, 225, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971). Accordingly, it is difficult to imagine that any error here could have harmed Mr. Jackson.

⁶ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

only consider admissible evidence. 137 Wn.2d at 752 (citing and quoting *State v. Wolfer*, 39 Wn. App. 287, 292, 693 P.2d 154 (1984)).

Accordingly, the failure to conduct a CrR 3.5 hearing does not alone present a constitutional issue. Although the State should schedule and hold a hearing whenever it desires to use a defendant's statement at trial, the failure to conduct such a hearing is not a basis for challenging on appeal the admission of a defendant's statement that was not challenged at trial.⁷

Mr. Jackson's remaining arguments fare no better. As both derive from alleged violations of the Privacy Act, neither presents a manifest constitutional issue. Moreover, he has not shown that any violation of the Privacy Act occurred or that his interview with the officers was itself the poisoned fruit of his earlier telephone call with DM. We need only summarily note the problems with his arguments.

First, Detective Nichols did not violate the Privacy Act merely by overhearing from the other room portions of the telephone call between DM and Mr. Jackson. Our court has previously determined that even the intentional listening in on a telephone conversation by an officer does not violate the Privacy Act, nor does it violate the

⁷ There also is no basis for believing that the statement was not voluntarily given. The rights afforded by *Miranda* apply only to a person undergoing custodial interrogation. A person is in custody when his freedom of action is curtailed to the degree associated with a formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). That did not happen here. Mr. Jackson was interviewed at his home and was not arrested. His situation cannot be likened to a formal arrest.

constitution. *E.g., State v. Corliss*, 123 Wn.2d 656, 662-664, 870 P.2d 317 (1994).⁸

There is even less of an argument under these facts because Detective Nichols was not intentionally listening to the conversation, even though she could hear much of it from the other room while she was attending to her own duties.

Second, while appellant properly recognizes that the scope of the exclusionary rule flowing from the Privacy Act is greater than that afforded by the constitution, that fact does not help him here. He can only get review of this issue if it is of constitutional magnitude. He presents no basis for considering a violation of RCW 9.73.030 for the first time on appeal. If there was a constitutional violation, then the constitutional exclusionary rule would apply. He cannot claim a violation of the constitution in order to raise an issue for the first time on appeal and then claim a statutory remedy that is not before the court. His attempt to meld these two approaches into one is utterly without merit.

Accordingly, we decline to consider his contention that his statements to the two detectives should not have been admitted at trial. He did not challenge them below, offered many of them himself during cross-examination of Detective Nichols, and has not

⁸ Even after the adoption of the Privacy Act, our court noted that the constitutional issue had been settled in a series of cases in the 1960s. One party to a conversation may consent to have another person listen to the conversation without violating the constitutional right to privacy. *See State v. Salinas*, 119 Wn.2d 192, 197, 829 P.2d 1068 (1992) (discussing *State v. Goddard*, 74 Wn.2d 848, 447 P.2d 180 (1968); *State v. Wright*, 74 Wn.2d 355, 444 P.2d 676 (1968); *State v. Jennen*, 58 Wn.2d 171, 361 P.2d 739 (1961)).

shown any manifest constitutional question is presented by his belated arguments. The trial court did not err in allowing the statements into evidence.

Sufficiency of Evidence Supporting Firearms Enhancement

Mr. Jackson's other argument is more substantial. He contends that the evidence did not support the bench verdict concluding that he was armed with a firearm during the commission of the attempted second degree child rape. Properly viewed, the evidence supported the trial judge's determination.

Familiar standards govern this inquiry. We review such challenges to see if there was evidence from which the trier of fact could find each element of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Jackson*, 443 U.S. at 319; *Green*, 94 Wn.2d at 221-222. Reviewing courts also must defer to the trier of fact "on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-875, 83 P.3d 970 (2004).

Mr. Jackson does not challenge the attempted rape conviction itself, but only the firearms enhancement. The enhancement applies when a felony offense is committed by a person "armed" with a firearm. RCW 9.94A.533(3). A person is armed when "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). There should be little question but that placing a loaded gun next to the victim at the time of the assault showed that the weapon was “readily available” to the defendant. It was easily accessible to him.

However, Mr. Jackson contends that there needed to be a showing of a nexus between his possession of the firearm and the crime. He is mistaken. Nonetheless, the evidence also amply demonstrated the connection between the gun and the attempted rape.⁹

Whenever a firearm enhancement is based on constructive possession of the weapon, there must be a showing of a nexus between the gun, the crime, and the defendant. *E.g.*, *State v. Brown*, 162 Wn.2d 422, 431-432, 173 P.3d 245 (2007); *State v. Schelin*, 147 Wn.2d 562, 567-568, 55 P.3d 632 (2002). That rule does not apply to situations of actual possession of a firearm during a crime. *See, State v. Hernandez*, 172 Wn. App. 537, 544-545, 290 P.3d 1052 (2012), *review denied*, 177 Wn.2d 1022 (2013) (discussing cases). Even if there were a nexus requirement in this case, however, it was

⁹ Mr. Jackson argued in his initial brief that the acquittal on the second degree assault count was inconsistent with the finding that he was armed with the firearm. It was not. To commit second degree assault with a weapon, he had to use the weapon as the instrument of the assault. RCW 9A.36.021(1)(c). He did not point the gun at MM or otherwise menace her with it, thus the judge acquitted him on that count. In contrast, the weapon only needed to be readily available to constitute being “armed” with the weapon for enhancement purposes. That was the case here.

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easily satisfied. Throwing a child on a bed and placing a loaded firearm beside her prior to commencing his sexual assault is ample evidence of a nexus between the defendant, the weapon, and the crime. He had no need to retrieve the gun from its location (either under the bed, according to the victim, or under his pillow, according to the defendant) and place it beside the victim other than to show her its presence and intimidate her into complying with his advances. The weapon was used to facilitate the crime. The trial judge correctly concluded that the weapon was used in the commission of the offense.

The evidence supported the determination that Mr. Jackson was armed with a firearm when he attempted to rape MM. There was no error.

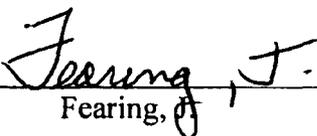
The conviction is affirmed.

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.

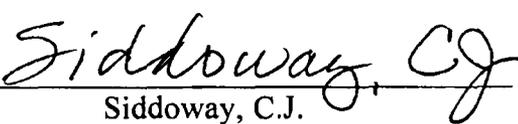


Kotsmo, J.

WE CONCUR:



Fearing, J.



Siddoway, C.J.