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72251-4

NO. 72251-4-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

HOWARD ROSS,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA INVEEN

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**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED.

1. Whether collateral estoppel principles are inapplicable to inconsistent verdicts resulting from the same proceeding, because no "relitigation" has occurred.

2. Whether, even if collateral estoppel principles applied in this case, the court was not collaterally estopped from finding Ross guilty because the jury's acquittal on assault did not necessarily find that Ross did not possess a firearm on the date in question.

3. Whether, in light of appellate court deference to the credibility determinations of lower courts, substantial evidence supports the trial court's finding that Ross is guilty of unlawful possession of a firearm.

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Howard Ross was charged by information with assault in the first degree (Count 1) and unlawful possession of a firearm in the first degree (Count 2). CP 1. Count 1 proceeded to jury trial, and the defendant waived his right to a jury trial on Count 2. CP 26; RP 206-08. Trial commenced, and the evidence was presented simultaneously to the jury and to the court as to both crimes. The

jury returned a verdict of not guilty as to Count 1, and also answered no to the special verdict as to whether Ross was armed with a firearm "at the time of commission of the crime in Count 1." CP 51-52. The next day, the trial court found the defendant guilty of Count 2. RP 910-14; CP 70-73. Ross was sentenced to a standard range sentence of 75 months of confinement. CP 82.

## 2. FACTS OF THE CRIME.

On January 22, 2014, at approximately 2:00 a.m., 36-year-old Kenneth Jones was shot once in the chest. RP 258, 298-99, 584, 608-09, 655. The bullet traversed Jones's lung, fractured his spine, and passed very close to his heart before lodging in Jones's body. RP 655, 658. Jones nearly died at the scene. RP 303. Police called to the scene found him lying on the ground near the street at 808 16<sup>th</sup> Ave, in the Central District of Seattle, unresponsive with difficulty breathing. RP 314-15. He was taken to Harborview Hospital and survived after undergoing surgery. RP 303, 655. The bullet was never removed from his body. RP 660.

Jones underwent multiple surgeries, and is paralyzed below his arms due to the spinal cord injury caused by the bullet. RP 462-66, 587. Jones was in a coma for two weeks following the shooting. RP 587. When he first awoke from the coma, he had no

memory of what happened to him. RP 591. Three weeks after the shooting, Detective Dana Duffy visited Jones in the hospital, at which time he could not remember the shooting. RP 735-36. However, nine weeks after the shooting, Jones called Detective Duffy and told her that he now remembered who shot him. RP 767. Jones identified the shooter as an acquaintance he had known for many years, but whom he knew only by the nickname "Coconut." RP 598, 769. Jones picked Howard Ross from a photo montage as the person he had long known as "Coconut." RP 773.

Neighbors living next door to the scene of the shooting heard the shooting. RP 226, 231-32, 747-79. Immediately prior to hearing the gunshot, those neighbors heard the familiar and distinctive sound of a red Corvette they had seen often visiting the house at 808 16<sup>th</sup> Avenue. RP 229, 747-48. After hearing the gunshot, they looked out the window and saw the red Corvette driving away and Kenneth Jones collapsed on the sidewalk. RP 231-32, 757. They identified Howard Ross as the only person they had seen driving the red Corvette prior to the shooting. RP 230, 749.

Police found a red Corvette, registered to Howard Ross, parked two blocks away from the shooting scene. RP 282, 357.

When police found the car at approximately 3:00 a.m., the hood of the car was warm and the ground underneath the car was wet from the rain, indicating the car had just recently been parked there. RP 357, 564-65.

Prior to finding the red Corvette, police had already had contact with Howard Ross at the crime scene. RP 348-49. Upon arriving at the crime scene at 2:38 a.m., Detectives Edward Hagerty and Michael Freese saw Howard Ross and another man, Donny Greer, entering the crime scene by crossing the police tape. RP 349-50, 547. The detectives briefly questioned the two men, who said they were staying at the house located at 808 16<sup>th</sup> Avenue. RP 349-50, 548-51. Ross told the detectives that he did not know anything about a shooting. RP 349, 551.

After finding Ross's Corvette, detectives returned to the scene to interview him. RP 361, 565. The interview was recorded on police car video and played for the jury. RP 596; Ex. 23. The detectives first asked Greer where he had come from before he arrived on the scene, and Greer responded, "I just got out of a cab celebratin' my brother's birthday." Ex. 23, at 8. He said he had come from Seward Park. Ex. 23, at 8. Detectives asked Greer, "Does anybody who lives here or visit here ever drive a red

Corvette?" Ex. 23, at 9. Greer responded, "I don't know. I just got dropped off right here." Ex. 23, at 9. Detectives then asked Ross where he had come from before he arrived on the scene. Ex. 23, at 10. Ross stated he had come from downtown. Ex. 23, at 10. He then said, "I jumped in a green car with Donnie. That's how I—that's how I got—walked up here with Donnie." Ex. 23, at 10. Greer protested, "You didn't jump in no car with me." Ex. 23, at 11. Ross then admitted to parking his red Corvette a couple of blocks away. Ex. 23, at 11. He claimed he parked a couple of blocks away due to the crime scene tape. Ex. 23, at 13.

Ross was arrested the day after the shooting and was again interviewed by the police. RP 521, 715. That interview was recorded and played at trial. RP 715; Ex. 29. Ross at first denied any knowledge of the shooting, claiming that he knew "nothing." Ex. 29, at 4. He then said he was high, but did not "do anything to anybody." Ex. 29, at 4. Ross had apparently heard that neighbors reported seeing his car on the street at the time of the shooting, and did not deny being there, but stated, "I heard like a little pop or something, but I didn't – I don't be payin' attention. I be playin' my music so loud that—you know what I'm sayin', I don't know—I—I didn't even hear it." Ex. 29, at 4. He denied owning a gun. Ex. 29,

at 7. When asked again to explain where he had been coming from when he entered the crime scene the night before, Ross was unable to answer, stating "you would have to ask them what I told them where I was comin' from cause I don't remember now."

Ex. 29, at 11.

Kenneth Jones testified at trial that he was out with a friend downtown before the shooting occurred. RP 586. At a bar downtown, he drank alcohol and used cocaine. RP 595. He then left the bar and saw Ross driving his red Corvette. RP 601. Ross, who Jones had known for many years, offered him a ride. RP 602. The two then smoked a rock of cocaine together. RP 603. Jones saw that Ross had a chrome gun stored in the console of the car, "either between a 9mm or a .45 mm." RP 603.<sup>1</sup> Jones asked to see the gun, and Ross said no. RP 603. Ross then moved the gun from the console to a storage pocket in the driver's door. RP 603-04. The two drove around for a while, and then Ross drove to a house to get more cocaine. RP 605. Ross went into the house, with his gun, while Jones stayed in the car. RP 606. When Ross returned to the car, Jones told him that he could let him out, and

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<sup>1</sup> Presumably, Jones meant to say a ".45 caliber." .45 is a common inch caliber with a typical bullet diameter of .45 inches, which would be 11.43 millimeters. <https://en.wikipedia.org/wiki/Caliber>.

without warning or provocation, Ross pointed the gun at Jones and shot him. RP 609. Ross then pushed him out of the car and drove off. RP 609. Jones testified that he remembered who the shooter was when his aunt prompted him that "someone" said the shooter was someone who had received "a settlement." RP 593. He knew that Ross had received a settlement, and that triggered his memory of the incident. RP 593, 634-35.

Police searched Ross's red Corvette pursuant to a search warrant. RP 419. No weapons or shell casings were located in the Corvette. RP 426. No shell casings were found at the scene, or between the scene and where the Corvette was parked after the shooting. RP 495, 498-500.

3. FACTS REGARDING THE TRIAL COURT'S FINDING OF GUILT.

The trial court made detailed factual findings in finding Ross guilty of unlawful possession of a firearm in the first degree. RP 910-15; CP 70-73. The court found Jones's testimony credible that he had seen the defendant with a gun in his car on the date in question. RP 911. The court found that Jones had known Ross for many years, and was on good terms with Ross, and had no reason to fabricate his account of being driven around by Ross prior to the

shooting. RP 922. Moreover, Jones's testimony was corroborated by the neighbors' observations of seeing Ross's Corvette at the scene of the shooting, and Ross's own admission to being near the scene of the shooting and hearing a "pop." RP 912. The court explained that its finding was not inconsistent with the jury's verdict: "The jury could easily have found reasonable doubt as to who actually was the shooter of Mr. Jones given his inconsistency with the actual shooting details and the physical evidence which included the direction of the bullet." RP 914. The court clarified that the jury's acquittal on the assault charge was logical and "not inconsistent with this Court's finding that Mr. Ross was observed in possession of a firearm earlier in the evening." RP 914.

C. ARGUMENT.

1. ROSS'S CONVICTION DOES NOT VIOLATE DOUBLE JEOPARDY PRINCIPLES BECAUSE COLLATERAL ESTOPPEL DOES NOT APPLY TO INCONSISTENT VERDICTS RENDERED IN THE SAME PROCEEDING.

Ross contends that the jury's acquittal collaterally estopped the trial court from finding him guilty of unlawful possession of a firearm in the first degree. Ross is mistaken. Collateral estoppel principles incorporated into the guaranty against double jeopardy prevent the relitigation of the same facts after acquittal. However,

inconsistent verdicts from the same proceeding do not implicate double jeopardy or collateral estoppel because there is no relitigation. Collateral estoppel principles do not apply to inconsistent verdicts rendered in the same proceeding. And inconsistency in verdicts is not a basis for reversal of a conviction supported by substantial evidence.

Both the federal and state constitutions protect a defendant from multiple trials for the same crime. Specifically, the federal constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Washington constitution reads, "No person shall . . . be twice put in jeopardy for the same offense." Wash. Const. art. I, § 9. The two clauses provide identical protections. State v. Womac, 160 Wn.2d 643, 650, 160 P.3d 40 (2007).

The guarantee against double jeopardy incorporates the doctrine of collateral estoppel. In re PRP of Moi, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2015 WL 6549160 (2015). In Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), the United States Supreme Court held that collateral estoppel applies to criminal convictions such that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue

cannot be relitigated between the same parties in further proceedings. The party asserting collateral estoppel bears the burden of proof, and must show that four requirements have been met:

- (1) the issue decided in the prior adjudication is identical with the one presented in the second action;
- (2) the prior adjudication must have ended in a final judgment on the merits;
- (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and
- (4) application of the doctrine does not work an injustice.

Thompson v. Dep't of Licensing, 138 Wn.2d 783, 790, 982 P.2d 601 (1999); see also State v. Williams, 132 Wn.2d 248, 253-54, 937 P.2d 1052 (1997).

For example, in Ashe, several masked men robbed six people who were playing poker at the time of the robbery. 397 U.S. at 443. Ashe was charged with robbing one of the victims, and was acquitted. Id. at 438-39. The State then charged Ashe with robbing another victim. Id. at 439. Upon reviewing the evidence and argument presented in the first trial, the Supreme Court concluded that the only issue in dispute was whether Ashe was one of the robbers, not whether a robbery had occurred. Id. at 445-46. For that reason, the jury's acquittal necessarily decided that Ashe was not one of the robbers, and thus the State was collaterally

estopped from trying to prove that Ashe was one of the robbers in a second trial. Id.

Collateral estoppel principles apply not only to separate cases, as in Ashe, but also to attempts to relitigate issues in the same case after the jury has failed to reach a verdict as to some counts. In Yeager v. United States, 557 U.S. 110, 129 S. Ct. 2360, 174 L. Ed. 2d 78 (2009), the defendant was indicted for securities fraud, conspiracy, insider trading and money laundering. 557 U.S. at 113-14. In all, there were 165 counts. Id. at 114. The jury acquitted on some counts, but failed to reach a verdict on other counts, and a mistrial was declared as to those counts. Id. at 115. Yeager sought to preclude the government from retrying him on the counts for which the jury had hung, asserting collateral estoppel. Id. at 115. The Court relied on Ashe in holding that the government should be precluded from relitigating any issue that was necessarily decided by the jury's acquittal in the retrial. Id. at 122-23. However, the Court remanded to the lower court to engage in the fact-intensive analysis of whether the jury necessarily resolved in Yeager's favor an issue of ultimate fact the government needed to prove to convict him of the remaining counts. Id. at 125-26.

The Washington Supreme Court's recent decision In re PRP of Moi is procedurally similar to Yeager. In Moi, the defendant was charged with murder in the first degree and unlawful possession of a firearm. He waived his right to jury trial on the firearm charge. The first jury to hear the evidence was unable to reach a verdict. The trial court then disposed of the firearm charge, acquitting Moi by finding that the State had failed to prove beyond a reasonable doubt that Moi was the shooter. The State then convened a second jury to decide the murder charge, without objection. The second jury convicted Moi of murder. The state supreme court held that the murder conviction that resulted from the retrial was barred by collateral estoppel principles. The court found that the elements of collateral estoppel had been met: (1) the issue decided by the trial court's acquittal was identical to a necessary issue to be relitigated to the second jury (whether Moi shot the victim); (2) the prior adjudication ended in a final judgment; (3) the parties were the same; and (4) application of collateral estoppel would not work an injustice.

However, Ashe, Yeager and Moi do not control the outcome of Ross's case, because there was no relitigation attempted by the State, or barred by collateral estoppel. Instead, there was a single

trial in which the two counts were submitted to different fact-finders because of the defendant's waiver of jury on count 2.

State v. Knight, 266 Conn. 658, 835 A.2d 47 (2003), is directly on point. In that case, the defendant was charged with three crimes: murder, carrying a pistol without a permit, and criminal possession of a firearm by a convicted felon. The first two crimes were submitted to a jury, but the defendant waived his right to a jury on the criminal possession. Id. at 661. The trial court and jury heard all of the evidence and arguments concurrently, with the exception of evidence of a prior felony, and the trial court agreed to render its verdict after the jury returned its verdicts on the other counts. Id. at 661-62. The jury acquitted the defendant of the two counts presented to it. Id. at 662. The trial court found the defendant guilty of criminal possession of a firearm. Id. The court explained that it found credible a State's witness who testified to seeing the defendant carrying a pistol on the date in question. Id.

Knight claimed that the trial court was collaterally estopped by the jury's acquittals from finding him guilty of criminal possession. Id. at 663. The Connecticut Supreme Court reasoned that the principles enunciated in Ashe are triggered by the

relitigation of factual issues. The court held that collateral estoppel does not apply absent relitigation. The court explained:

The state was given only one opportunity to present its case against the defendant, and the defendant was required to present his case but a single time. Both the jury and the trial court *simultaneously* were presented with the arguments and the evidence, with the exception of the evidence of the defendant's prior convictions that was withheld from the jury. Moreover, both triers reached their decisions in *simultaneous* deliberations, and those decisions were announced within the same proceeding, with the verdict of the trial court immediately following that of the jury. Accordingly, we conclude that the defendant's criminal trial was a single proceeding, and therefore that the doctrine of collateral estoppel does not apply.

Id. at 665-66 (emphasis in original). See also United States v. Powell, 469 U.S. 57, 64-68, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984) (rejecting claim that collateral estoppel applies to inconsistent verdicts rendered by a single jury).

The court also rejected the claim that the trial court's finding of guilt was impermissibly inconsistent with the jury's acquittals. Knight, 266 Conn. at 671-74. The United State Supreme Court has long held that inconsistent verdicts are allowed, recognizing that verdicts may be the result of compromise, lenity or mistake on the part of the jury. Dunn v. United States, 284 U.S. 390, 52 S. Ct. 189, 76 L. Ed. 2d 356 (1932). "Verdicts cannot be upset by

speculation or inquiry into such matters.” Id. at 394. Relying on Dunn, Washington courts have also held that where a guilty verdict is supported by substantial evidence, it will not be reversed on the ground that it is inconsistent with an acquittal on another count. State v. Goins, 151 Wn.2d 728, 737, 92 P.3d 181 (2004); State v. Ng, 110 Wn.2d 32, 48, 750 P.2d 632 (1988).

Ross claims that the rule allowing inconsistent verdicts should not be applied to verdicts rendered by the trial court rather than a jury. Ross relies on United States v. Maybury, 274 F.2d 899 (2<sup>nd</sup> Cir. 1960). In that case, the two counts were tried to the court, rather than a jury, and the court rendered inconsistent verdicts, convicting the defendant of one count and acquitting him of the other. In a divided decision, the Second Circuit found that the evidence was sufficient to support the guilt finding, but reversed that conviction based on inconsistency with the acquittal, and *remanded for retrial on that count*, holding that, “The government’s inability to appeal an acquittal on one count in a criminal case should not render this res judicata where the defendant has successfully appealed a conviction on another count, at least when the appeal was for inconsistency. Such a result would convert the guarantee of double jeopardy from a shield into a sword.” Id. at

905.<sup>2</sup> Thus, Maybury is inapposite. It applies to cases where the court, as the sole trier of fact, has rendered verdicts that are inconsistent with each other. However, the “special considerations relating to the role of the jury” recognized in Maybury that underlie the acceptance of inconsistent jury verdicts applies with equal force when a claimed inconsistency is based in part on a jury verdict. Id. at 902.

Moreover, the reasoning of Maybury has been explicitly rejected by the United States Supreme Court. In Harris v. Rivera, 454 U.S. 339, 102 S. Ct. 460, 70 L. Ed. 2d 530 (1981), three defendants were indicted for burglary, robbery and theft and the case was tried to the court without a jury. The judge acquitted the defendants of some counts and convicted on others. Id. at 340. At issue was “the constitutionality of inconsistent verdicts in a nonjury criminal trial.” Id. The Court affirmed the convictions, explaining, “we hold that there is no federal requirement that a state trial judge explain his reasons for acquitting a defendant in a state criminal trial; even if the acquittal rests on an improper ground, that error would not create a constitutional defect in a guilty verdict that is

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<sup>2</sup> Judge Hand, dissenting in part and concurring in part, wrote, “I do not see why otherwise a person should escape punishment for a crime of which he is found guilty, because he was acquitted of another crime of which he was also guilty.” Id. at 908.

supported by sufficient evidence and is the product of a fair trial.”

Id. at 344.

In sum, collateral estoppel principles do not apply in this case because there was only a single litigation. There was no relitigation to be barred by collateral estoppel. The jury and the trial court heard evidence in a single trial and rendered their decisions. To the extent that those decisions could be viewed as inconsistent, Washington courts have long held that inconsistency in verdicts is not a basis for reversal. Ross has cited to no binding authority that an inconsistency between a jury verdict and a court verdict would require a different result.

2. EVEN IF COLLATERAL ESTOPPEL PRINCIPLES APPLIED IN THIS CIRCUMSTANCE, THE JURY'S VERDICT DID NOT NECESSARILY DECIDE THAT ROSS DID NOT POSSESS A FIREARM ON THE NIGHT IN QUESTION.

Even if collateral estoppel principles were to apply to inconsistent verdicts that have resulted from the same proceeding without any relitigation of the facts, the issue decided by the jury in regard to the assault count was not identical to the issue presented to the court in regard to the unlawful possession of a firearm count, as the trial court recognized. The verdicts are not logically inconsistent in light of the evidence presented at trial. Thus, Ross

has failed to meet his burden of showing that the elements of collateral estoppel are met.

In deciding whether an issue has necessarily been decided by a prior acquittal, and thus the issues decided are identical, the court must “examine the record of the prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.” Ashe, 397 U.S. at 444. This inquiry “must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.” Id. The defendant has the burden of demonstrating that the issue was necessarily decided in the prior proceeding. State v. Eggleston, 164 Wn.2d 61, 72, 187 P.3d 233 (2008).

By acquitting Ross of assault in the first degree, the jury did not necessarily determine that Ross did not possess a firearm on the night in question. The jury’s verdict likely reflects the jury’s reasonable doubt that Jones had an accurate memory of the shooting itself, considering the extent of the injuries that he suffered. However, as the trial court explained, that conclusion does not necessarily mean that Jones did not have an accurate

memory of the hours preceding the shooting. And indeed, Jones's recollection of being with Ross in his red Corvette prior to the shooting was corroborated by the neighbors' observations of Ross's Corvette near the shooting scene at the time of the shooting, and Ross's own admission to being present at the time of the shooting and hearing a "pop." The trial court found Jones's testimony credible that he had been driven around by Ross prior to the shooting and had observed a chrome gun in Ross's possession. RP 911.

The jury's verdict on the special verdict does not undermine the trial court's reasoning. The question asked of the jury was whether Ross was armed with a weapon "at the time of commission of the crime in Count 1." CP 51-52. Having found that Ross had not committed the assault, the jury could not have found that he was armed with a firearm while committing assault. Indeed, the jury was instructed that the State was required to prove beyond a reasonable doubt that there was a connection between the firearm and the crime. CP 48.

By their verdicts, the jury necessarily determined that the State had not proven beyond a reasonable doubt that Ross shot Jones. However, they did not necessarily decide that Ross and

Jones were not together on the night of the shooting, nor did they necessarily decide that Jones did not see Ross with a firearm on the night of the shooting. The issue decided by the jury's verdicts as to Count 1 is not identical to the issue presented to the trial court in regard to Count 2. Thus, even if collateral estoppel principles applied without any relitigation of the facts, Ross cannot demonstrate that the elements of collateral estoppel have been met in this case.

3. **SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S CONCLUSION THAT ROSS IS GUILTY OF UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE.**

Ross contends that the evidence was insufficient to prove that the item in his possession on the night in question was a real gun meeting the definition of "firearm" set forth in RCW 9.41.010. This claim is without merit. The trial court found Kenneth Jones's testimony about seeing Ross with a chrome gun to be credible. Drawing all reasonable inferences from that testimony in favor of the State, there was substantial circumstantial evidence that the gun was a real gun.

The test for determining the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the

State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State. Id. A claim of insufficiency admits the truth of the State's evidence. Id. Credibility determinations are reserved for the trier of fact. State v. Rafay, 168 Wn. App. 734, 843, 285 P.3d 83 (2012). The appellate court must defer to the trier of fact on issues of credibility. Id.

Pursuant to RCW 9.41.040, a person is guilty of unlawful possession of a firearm in the first degree if he possesses a firearm after being previously convicted of a serious offense.<sup>3</sup> For purposes of that statute, a firearm is defined as “a weapon or device from which a projectile . . . may be fired by an explosive such as gunpowder.” RCW 9.94A.010(9).

The State need not introduce the actual firearm into evidence in order to prove that the item in possession was a firearm. State v. McKee, 141 Wn. App. 22, 30, 167 P.3d 575 (2007). The State need not prove that a firearm was loaded. State v. Releford, 148 Wn. App. 478, 490-91, 200 P.3d 729 (2009).

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<sup>3</sup> Ross stipulated that he had a prior conviction for residential burglary. RP 208; CP 70. Residential burglary is a serious offense as defined by RCW 9.41.010(3) and (21).

Eyewitness testimony that the item in question appeared to be a real gun and providing a description of it is sufficient to prove a firearm as defined in RCW 9.41.010. State v. Bowman, 36 Wn. App. 798, 678 P.2d 1273 (1984) (evidence sufficient to prove firearm where victim described gun in detail); State v. Mathe, 35 Wn. App. 572, 581-52, 668 P.2d 599 (1983) (circumstantial evidence sufficient to prove firearm where victims to robbery described gun in detail).

Jones testified that he saw Howard Ross with a gun in his possession on January 22, 2014. RP 603, 607. The trial court found this testimony to be credible. RP 911; CP 71. Jones's testimony was sufficient, drawing all reasonable inferences in favor of the State, to prove that Ross possessed a real firearm. Jones described the gun as being a chrome gun, possibly a 9mm. RP 603. When Jones asked to see the gun, Ross refused. RP 603. This strongly indicates that the gun was real, the reason why Ross did not want Jones handling it. After Jones asked about the gun, Ross moved it out of Jones's reach, a precaution that would be unnecessary unless the gun was real. RP 603-04. Ross then took the gun with him when he exited the car to buy drugs, again strongly indicating that it was a real gun which had value and could

be used for his protection. RP 607. As the trial court concluded in its findings:

Based on Jones' observation of the gun, and the manner in which the defendant handled it, taking it with him when leaving his vehicle, and refusing to let Jones' handled [sic] it, the court finds the gun was a firearm, capable of being fired.

CP 72. Thus, even assuming there was insufficient evidence that the gun was used by Ross to shoot Jones, there was sufficient evidence, drawing all reasonable inferences in favor of the State and deferring to the trial court's credibility determination, that Ross was in possession of a real gun on the night in question.

D. CONCLUSION.

Ross's conviction was not precluded by the jury's verdicts as to Count 1, is supported by substantial evidence, and should be affirmed.

DATED this 8th day of December, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Travis Stearns, the attorney for the appellant, at [travis@washapp.org](mailto:travis@washapp.org), containing a copy of the Brief of Respondent, in State v. Howard Lee Ross, Cause No. 72251-4, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 8 day of December, 2015.

  
Name:  
Done in Seattle, Washington