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COURT OF APPEALS

NO. 33855-6-II

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

STEVEN ANTHONY HAGGARD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable LISA WORSWICK

No. 04-1-04489-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the State adduce sufficient evidence to establish defendant was armed with a firearm when he possessed methamphetamine where a .22 caliber gun was located in an open hole in the driver's door of a truck defendant was driving, and matching .22 caliber ammunition was located with the methamphetamine in a bag next to the defendant that contained documents belonging to defendant?

2. Has defendant shown his counsel's performance was constitutionally deficient where he failed to propose an "unwitting possession" instruction on the firearm offense, but the State proved beyond a reasonable doubt defendant's knowledge of the firearm and where counsel's performance was a legitimate trial strategy not resulting in any prejudice?

3. Did the trial court err when it sentenced the defendant on his drug offense?

B. STATEMENT OF THE CASE.

1. Procedure

On September 22, 2004, the State charged the defendant by information with unlawful possession of a firearm in the first degree,¹ (Count I), unlawful possession of a controlled substance,² (Count II), and making a false statement to a police officer, (Count III).³ CP 1-4. The State further alleged a firearm sentencing enhancement for the drug

¹ RCW 9A.040(1)(a).

² RCW 69.50.401.

³ RCW 9A.76.175.

charge.⁴ CP 1-4. On June 8, 2005, the State amended count II of the information, charging unlawful possession of a controlled substance with intent to deliver. CP 9-12.

On July 7, 2005, the trial commenced before the Honorable Lisa Worswick. RP 26. The jury convicted the defendant as charged on counts I and III. On count II, the jury returned a verdict of guilty on the lesser offense of unlawful possession of a controlled substance. By special verdict, the jury found that defendant was armed with a firearm at the time he possessed the methamphetamine. CP 106.

On September 23, 2005, the court sentenced the defendant to 87 months incarceration on count I, 42 months plus 18 months for the firearm sentencing enhancement on II. CP 116, RP 257. In addition, the court ordered 9 to 12 months community custody on count II. CP 116, RP 257. The court ran all counts concurrently except for the 18 month firearm enhancement, which the court ran consecutive to all other confinement. CP 116, RP 257. The court further ordered the defendant's sentence to run consecutive to his 120 month sentence under Pierce County Cause No. 04-1-01936-4. CP 116, 119, RP 257, 257. The court suspended the sentence on count III. CP 123-124, RP 257.

Defendant's timely appeal followed. CP 109.

⁴ RCW 9.94A.510/530.

2. Facts

On September 20, 2004, at approximately 10:30 p.m., Pierce County Sheriff's Deputies Richard Scaniffe and Scott Mock were on routine patrol when they observed a gray Mazda pickup with only one operational headlight. RP 30, 79. After stopping the vehicle, Mock contacted the driver, defendant Steven A. Haggard. Deputy Scaniffe contacted the sole passenger, Brenton Metzger, and arrested him on an outstanding warrant. RP 31-32, 79.

Mock asked the defendant for his driver's license and proof of insurance. RP 79. Defendant claimed that he did not have his driver's license with him. RP 80. When asked to identify himself, defendant said his name was "Brian Russell Hempstead" with a date of birth of March 20, 1971. RP 80. The defendant was fidgeting, shaking, and appeared to be nervous. RP 33-34. Based on defendant's behavior, Mock did not believe the defendant. RP 80-81. Mock told the defendant that he would run records check to verify the defendant's information, but would charge him with making a false statement if the information was false. RP 81. At that point, the defendant stated his true name and date of birth. RP 81. Defendant said he lied because he had a warrant out for his arrest. RP 35, 81.

While Scaniffe secured the defendant and Metzger in the patrol car, Mock searched the Mazda truck. RP 82. Mock found two handguns, one in each truck door. RP 84-86. An AMT .22 was located in an open

speaker hole in the driver's door panel. CP ____,⁵ RP 85-86. The butt end of the gun handle was sticking up and was visible with the aid of a flashlight. RP 84-85, 94. A Ruger .22 caliber was located in an open speaker hole in the passenger door panel. RP 38, 86, Exhibit 9. Both guns were loaded. RP 40.

Mock located a black bag on the bench seat of the truck. RP 83. The bag was partially opened and was lying between where the defendant and Metzger had sat. RP 41. Inside the bag, Mock found paperwork belonging to the defendant,⁶ two plastic baggies containing a white crystalline powder,⁷ and a box with twelve .22 caliber cartridges. RP 41-42, 83, 136. The cartridges in the box were of the same brand and bullet style as the cartridges that were in both handguns. RP 139. Behind the truck seat, Mock found a digital scale in a bag. RP 58, 87.

Mock testified that the speaker hole in the driver's door was approximately six and half inches in diameter and about three and a half to four inches deep. RP 86. Mock diagramed the door and speaker hole

⁵ Mathew Noedel indicated in his report this firearm was an AMT brand semiautomatic pistol. State's Exhibit No. 9. Because the State has included this exhibit in its Designation of Clerk's Papers, filed contemporaneously with this brief, the corresponding page number has not been assigned.

⁶ This paperwork included the following: 1) two Radio Shack receipts dated 09/19/04, a vehicle registration to defendant's Honda Civic, a Schuck's receipt dated 08/20/04, a Pull-A-Part receipt dated 09/19/04, and an order revoking defendant's bench warrant dated 09/14/04. These items are contained in State's Exhibit 3. CP ____.

⁷ Jane Boysen, a forensic scientist with the Washington State patrol tested the substance in one of these baggies and determined it contained methamphetamine. RP 157. The combined weight for the substance in both baggies was approximately 3 grams. RP 156.

location on paper for the jury.⁸ RP 85. The deputies did not document the name of the registered owner of the truck and could not recall if the defendant was the owner. RP 64-65, 88.

Kathryn Haggard, the defendant's mother, testified that Metzger had visited her residence earlier that day and showed her two guns. RP 181-83. Mrs. Haggard said that Metzger had one gun in his pocket and the other gun "down his pants." RP 184. While Metzger was at her residence, the gun in his pants misfired creating a hole in Metzger's pant leg and the floor. RP 187-88. She testified that she gave a court document to Metzger to give to the defendant. RP 184. Mrs. Haggard told the jury that Metzger drove a gray Mazda pickup, which she believed his mother owned. RP 184. She stated that the defendant owns a "monster truck", a Honda Civic, and a Mazda pick-up. RP 186.

C. ARGUMENT.

1. THE STATE ADDUCED SUFFICIENT EVIDENCE SHOWING THE DEFENDANT WAS ARMED AT THE TIME HE POSSESSED METHAMPHETAMINE.

In order to prove a firearm or weapon enhancement, the State must prove that the defendant was "armed" during the commission of the crime.

⁸ This Exhibit was used for illustrative purposes only. RP 85.

RCW 9.94A.533(3).⁹ Whether a person is armed is a mixed question of law and fact that the appellate court reviews de novo. State v. Johnson, 94 Wn.App. 882, 892, 974 P.2d 855 (1999). Being armed is not confined to those defendants with a deadly weapon actually in hand or on their person. State v. Gurske, 155 Wn.2d 134, 139, 118 P.3d 333 (2005). Rather, a person is “armed” for purposes of the enhancement statute if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes. State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). The “easily accessible and readily available” requirement means that where the weapon is not actually used in the commission of the crime, it must be there “to be used” and it “must be easy to get to for use against another person.” Gurske, 155 Wn.2d at 138. The use may be to facilitate the commission of the crime, escape from the scene of the crime, protect contraband or the like, or prevent investigation, discovery, or apprehension by the police. Gurske, 155 Wn.2d at 139; See State v. Schelin, 147 Wn.2d 562, 572-73, 55 P.3d 632 (2002) (plurality).

Mere proximity or mere constructive possession is insufficient to establish that a defendant is armed. See State v. Willis, 153 Wn.2d 366, 372, 103 P.3d 1213 (2005)(constructive possession of a deadly weapon,

⁹RCW 9.94A.533(3) provides, in pertinent part that “[t]he following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 ...”

even if that weapon is next to controlled substances, is not “armed” as that term is used in the enhancement statute); State v. Gurske, 155 Wn.2d 134, 138, 118 P.3d 333 (2005); Valdobinos, 122 Wn.2d at 281-82; State v. Taylor, 74 Wn. App. 111, 125, 872 P.2d 53, *review denied*, 124 Wn.2d 1029, 883 P.2d 327 (1994); State v. Sabala, 44 Wn. App. 444, 723 P.2d 5 (1986).

When determining the sufficiency of the evidence in a case where the defendant does not actually possess the weapon during the commission of the crime, the State must prove that there is a nexus between the weapon and the defendant, and between the weapon and the crime. State v. Schelin, 147 Wn.2d 562, 567-68, 55 P.3d 632 (2002). The purpose of the nexus requirement is to place “parameters . . . on the determination of when a defendant is armed, especially in the instance of a continuing crime such as constructive possession” of drugs. Gurske, 155 Wn.2d at 140 (citing Schelin, 147 Wn.2d at 568). Without such a nexus requirement, courts run the risk of punishing a defendant for having a weapon unrelated to the crime. State v. Willis, 153 Wn.2d 366, 372, 103 P.3d 1213 (2005)(citing State v. Johnson, 94 Wn. App. 882, 886-87, 974 P.2d 855 (1999)). As noted in Schelin, “[if] an assault with a beer bottle occurs in a kitchen, a defendant is not necessarily ‘armed’ with a deadly weapon because knives are kept in the kitchen.” Schelin, 147 Wn.2d at 570.

In order to establish this nexus, courts have examined the nature of the crime, the type of weapon and the circumstances under which the weapon is found (e.g., whether in the open, in a locked or unlocked container, in a closet on a shelf, or in a drawer). Gurske, 155 Wn.2d at 142 (citing Schelin, 147 Wn.2d at 570). “[W]hether the defendant is armed at the time a crime is committed cannot be answered in the same way in every case.” Gurske, 155 Wn.2d at 139.

For example, in State v. Sabala, 44 Wn. App. 444, 723 P.2d 5 (1986), the court expressly found that a visible loaded gun which was under the defendant’s seat in a car that he was driving was “easily accessible and readily available for use by the defendant for either offensive or defensive purposes.” Sabala, 44 Wn. App. at 448. The court reached this decision even though there was no evidence that Sabala ever reached for or handled the gun during the commission of the crime or during the stop. Id. at 445.

In State v. Taylor, 74 Wn. App. 111, 872 P.2d 53 (1994), the court found that the defendant was armed where he possessed narcotics and an unloaded gun was found in a bag lying on a table where he was sitting. Taylor, 74 Wn.App. at 125. There, police executed a search warrant at defendant’s residence and found narcotics, cash, packaging materials, scales and a pager. Id. at 115. At the time the warrant was executed, the defendant was sitting on his living room couch with his aunt. Id. On a coffee table near where they were sitting, police found a leather bag

containing an unloaded handgun with a clip containing ammunition. Id. The court found that the defendant was armed at the time he possessed the narcotics and that the gun and the crime were sufficiently connected. Id. at 125. The court reasoned that because the gun was on the table next to the defendant, the jury was entitled to conclude that it was readily and accessible to his use. Id. at 126.

In Schelin, supra, the plurality held the evidence sufficient to support the jury's verdict finding the defendant armed with a deadly weapon. Schelin, 146 Wn.2d at 574. There, police found a loaded revolver in a holster hanging from a nail in a basement wall, about six to ten feet from where the defendant was standing when the police entered his house. Schelin, 147 Wn.2d at 564. Even though the defendant testified that he could remove the gun from the holster quickly if need be, there was no evidence that the defendant tried to access the gun. Id. at 564, 574. In addition, at the time officers located the weapon, the defendant had already been taken out of the basement and handcuffed. Id. at 564.

In Valdobinos, supra, the court ruled that a defendant charged with delivery of controlled substances was not armed simply because there was an unloaded rifle under a bed in the bedroom. Valdobinos, 122 Wn.2d at 274. The court reasoned that, at the time the weapon was discovered, the defendant had already been arrested and removed from the scene, with no indication that he had been near the bed or bedroom, or had been heading

toward the bedroom when the officers arrived to affect the arrest and execute the search warrant. Valdobinos, 122 Wn.2d at 282.

As these cases illustrate, and as the Washington Supreme Court recently recognized in Gurske, Washington courts have not stated an absolute rule regarding the time when the defendant must be armed during the commission of the crime, i.e., when the crime is being committed or when the police discover the crime is being committed. See Gurske, 155 Wn.2d at 139 (citing Schelin, 147 Wn.2d at 572-73). The Schelin court correctly noted that stating an absolute rule would be misdirected “as there is no reason to believe the Legislature intended the statute to solely protect police. It is equally likely that the statute is intended to deter armed crime and to protect victims from armed crimes, as well as to protect police during investigations of crimes.” Schelin, 147 Wn.2d at 572-73.

While the outcomes of cases that discuss the sufficiency of evidence for firearm enhancements vary greatly, the Washington Supreme court has determined that, when read together, the cases provide the following standard that the State must meet in order to meet its burden on a firearm allegation: The State must establish that the defendant was within the proximity of an easily and readily available firearm for offensive or defensive purposes, and that a nexus exists between the defendant, the crime, and the firearm. State v. Barnes, 153 Wn.2d 378, 383, 103 P.3d 1219 (2005). Jury instructions need not, however, expressly contain

“nexus” language. Id. (citing State v. Willis, 153 Wn.2d 366, 103 P.3d 1213 (2005)).

In this case, the State presented sufficient evidence to establish that defendant was “armed” within the standard set forth above. When analyzing a sufficiency of the evidence claim, the applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. Id.; State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The court must give deference to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. State v. Walton, 64 Wn.App. 410, 415-16, *review denied*, 119 Wn.2d 1011 (1992). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be

reviewed upon appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

In the present case, the court instructed the jury, in pertinent part:

Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item, and such dominion and control may be immediately exercised.

CP 81; Jury Instruction No.10.

For purposes of the special verdict on count II, the court further instructed the jury as follows:

The State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime charged in Count II. The State must also prove beyond a reasonable doubt that there is a connection between the firearm and defendant and between the firearm and the crime. A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive purposes.

CP 100; Jury Instruction No. 29.

It is undisputed that defendant was driving the Mazda truck at the time the police conducted the traffic stop. There is no question that Defendant was in dominion and control over the truck and the handguns inside the truck. Evidence shows constructive possession if it supports an inference that the defendant had dominion and control over the firearm or the vehicle in which the firearm was found State v. Turner, 103 Wn. App. 515, 520-21, 13 P.3d 234 (2000); State v. Echeverria, 85 Wn. App. 777,

783, 934 P.2d 1214 (1997); see also State v. Huff, 64 Wn. App. 641, 653-54, 826 P.2d 698 (vehicle constitutes premises for purposes of constructive possession), *review denied*, 119 Wn.2d 1007, 833 P.2d 387 (1992)).

Moreover, the defendant was in constructive possession of the open black bag and its contents that the police found on the seat between him and Metzger. The contents of the bag revealed the bag was associated with the defendant, not Metzger. The contents included a court order revoking the defendant's bench warrant and a vehicle registration for his Honda Civic. Thus, it is reasonable for a jury to conclude that the defendant possessed the methamphetamine and the unfired .22 cartridges in that bag. This ammunition was the same brand (American Eagle/Federal) and the same bullet type (copper top hollow point) as the ammunition found in both handguns. RP 138-139. This fact established a connection between the defendant and the firearms. In addition, defendant was seated between the door that partially concealed the AMT and the bag containing the drugs and ammo. The speaker hole contained only the AMT and the handle of the gun was sticking up for easy access. RP 84. During the traffic stop, the defendant was fidgeting, shaking, and appeared nervous. Drawing all reasonable inferences most favorably for the State, there is sufficient evidence showing a nexus between the defendant, the gun, and his methamphetamine possession.

Defendant contends that State failed to prove a nexus between the gun in the door and the methamphetamine in the bag. In support of this contention, defendant points to his mother's testimony that the truck did not belong to defendant, and Metzger had possessed the guns prior to the traffic stop. The jury was not required to accept Mrs. Haggard's version of the events that transpired before the defendant drove the truck. Her testimony lacks merit. It seems highly doubtful Metzger would show Ms. Haggard two handguns, even shoot one gun in Haggard's home, but fail to mention the guns to the defendant as they are driving around town.

Moreover, the jury convicted defendant of first degree unlawful possession of a firearm and unlawful possession of a controlled substance, providing the "nexus" or relationship between defendant and these offenses. This is also a clear indication that the jury did not find Ms. Haggard credible. As previously stated, the jury's credibility determinations are not subject to review. Camarillo, 115 Wn.2d at 71. The State established the defendant was armed at the time he committed the drug offense.

2. DEFENDANT DID NOT MEET HIS BURDEN IN SHOWING INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE DID NOT SATISFY EITHER PRONG OF STRICKLAND: DEFICIENT PERFORMANCE OR ACTUAL PREJUDICE

The Sixth Amendment and Article I, Section 22 of the Washington Constitution require that criminal defendants have effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Cienfuegos, 144 Wn.2d, 226, 25 P.3d 1011 (2001). To establish counsel was constitutionally deficient, a defendant bears the burden of showing that his attorney's performance fell below an objective standard of reasonableness and that the deficiency prejudiced him. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

If either part of the test is not satisfied, the inquiry need go no further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Defendant must show that trial counsel is deficient based on the entire record. State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003). In determining whether counsel's performance was deficient, there is a strong presumption of adequacy. McFarland, 127 Wn.2d at 335. This presumption will only be overcome by a clear showing of incompetence. State v. Piche, 71 Wn.2d 583, 590-91, 430 P.2d 522 (1967); State v. Sherwood, 71 Wn. App. 481, 483, 860 P.2d 407 (1993). Competency is not measured by the result. State v. Early, 70 Wn. App. 452, 461, 853 P.2d 964 (1993)(citing State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242

(1972), *review denied*, 123 Wn.2d 1004, 868 P.2d 872 (1994)). “[T]he court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel’s conduct constituted sound trial strategy.” In re PRP of Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086, *cert. denied*, 506 U.S. 958, 113 S. Ct. 421, 121 L. Ed. 2d 344 (1992) (citing Strickland, 466 U.S. at 689).

To demonstrate prejudice, a defendant must establish that “counsel’s errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable.” Strickland, 466 U.S. at 687. “This showing is made when there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.

The Court of Appeals, Division Three, has articulated a three-step process for determining whether counsel was prejudicially deficient for failing to offer a jury instruction. State v. Kruger, 116 Wn. App. 685, 690-91, 67 P.3d 1147 (2003). First, the court determines “whether the defendant was entitled to the instruction[.]” Id. (citing State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979)(counsel not ineffective for failing to present a defense not warranted by the facts)). Second, the court determines “whether it was appropriate not to ask for the instruction. Id. (citing State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)(requiring defendant to show absence of legitimate strategic or tactical rationales for challenged attorney conduct)). Third, the court determines whether the defendant was prejudiced. Id. (citing State v.

Cienfuegos, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001)(rejecting argument that failure to propose an instruction to which defendant was entitled under the law constitutes per se ineffective assistance of counsel)).

Instructions are sufficient if they permit each party to argue his or her theory of the case, are not misleading and, when read as a whole, properly inform the jury of the applicable law. State v. Picard, 90 Wn. App. 890, 902, 954 P.2d 336, *review denied*, 136 Wn.2d 1021 (1998); *see also* State v. Linehan, 147 Wn.2d 638, 643, 56 P.3d 542 (2002).

First, the defendant was not entitled to the instruction. Knowledge is an element the State must prove to convict the defendant of unlawful possession of a firearm. State v. Anderson, 141 Wn.2d 357, 359, 5 P.3d 1247 (2000). The court instructed the jury as follows:

To convict the defendant of the crime of unlawful possession of a firearm in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 20th day of April, 2004 the defendant knowingly had a firearm in his possession or control;
- (2) That the defendant had previously been convicted of a felony; and
- (3) That the possession or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a Verdict of not guilty.

CP 83; Instruction No. 12.

The court further instructed the jury on the definition of knowledge, in pertinent part, as follows:

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstances or result, which is described by law as being a crime, whether or not the person is aware that the fact, circumstances or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

CP 82; Instruction No. 11.

Contrary to the defendant's assertion, the State did bear the burden of proving "knowledge" as an element of the first degree possession of a firearm. CP 82, 83. (Instruction Nos. 11 and 12). Therefore, the failure to give an "unwitting possession" was harmless. Even if the defendant was entitled to an unwitting possession instruction, counsel employed a legitimate trial tactic by not proposing this instruction.

Second, it was appropriate for trial counsel to not request the instruction. The defendant offered evidence that he did not possess the firearms through his mother's testimony. Mrs. Haggard's testimony was not credible, as discussed above. In order to bolster her testimony, the defendant would have to present additional evidence. Defendant attempted to call Metzger as a witness but failed to secure his attendance at trial. RP 72, 179. Thus, the defendant would have had to convince

the jury of his unwitting possession theory of the case by testifying in his own defense. Based on the number of crimes of dishonesty contained in defendant's criminal past, taking the stand would have been a strategic blunder.¹⁰

Trial counsel served his client well by proposing the unwitting instruction on the drug offense which enabled the defendant to argue that Metzger was responsible for the drugs and other contents in the bag, which cast doubt on the nexus between the gun and the methamphetamine. RP 222-24. In closing argument, counsel focused on reasonable doubt and sufficiency of the State's evidence regarding defendant's possession and lack of knowledge of the guns in the truck. RP 218. Trial counsel competently argued that the State did not prove defendant knowingly possessed the firearm, even though the jury ultimately convicted the defendant. Therefore, trial counsel's failure to request the instruction did not fall below an objective standard of reasonableness. Counsel's action was a reasonable strategy, not deficient performance.

Moreover, the unwitting instruction does not instruct the jury regarding constructive possession. CP 90, Instruction No. 19. The trial court properly instructed the jury regarding constructive possession. CP 85, Instruction No.14. As previously discussed, the State proved the

¹⁰ Defendant's criminal history included two convictions for second degree burglary and convictions for possession of stolen property and first degree vehicle prowling. CP 113.

defendant was in constructive possession of the firearm. Because the State had to prove the defendant knowingly possessed the AMT, there could be little benefit to the defendant to instruct the jury that the State has to also disprove unwitting possession. “A requested instruction need not be given if the subject matter is adequately covered elsewhere in the instructions.” State v. Ng, 110 Wn.2d 32, 41, 750 P.2d 632 (1988). Contrary to appellant’s claim, the jury was not misinformed of the State’s burden of proof.

Finally, even if counsel was deficient in failing to propose an unwitting possession, defendant fails to demonstrate resulting prejudice. He argues that the main issue for the firearm offense was whether defendant knowingly constructively possessed the gun. As discussed above, the court’s to convict instruction included the element of knowledge. The State proved this element beyond a reasonable doubt. CP 102. The only evidence presented that defendant was unaware of the firearms was his mother’s testimony that Metzger had these guns earlier that day. The jury chose not to believe her testimony and convicted the defendant.

Furthermore, the unwitting possession instruction would likely confuse the jury and would not likely have changed the result of the trial on this count. See Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 165-67, 876 P.2d 435 (1994)(The trial court possesses discretion to refuse a proposed instruction if it will confuse the jury, even if it is an accurate

statement of the law). As previously stated, the State has to prove the element of “knowledge” for the firearm offense. An unwitting possession instruction would serve only to confuse the jury on that issue.

This is not true for unlawful possession of a controlled substance, where knowledge is not an element of that crime.¹¹ In the latter context, “unwitting possession” raises the issue of knowledge and can create reasonable doubt. Defendant has the burden to prove by preponderance that defendant unwittingly possessed the methamphetamine.¹² In the context of the firearm offense where “knowledge” is an element, the State would have the burden to disprove defendant’s unwitting possession.¹³ Accordingly, trial counsel appropriately included the unwitting possession instruction on the drug offense and not the firearm offense. Here, the State was held to its burden of proof. An unwitting possession instruction would not likely have changed the result of the trial on this count. Accordingly, defendant cannot establish prejudice.

¹¹ RCW 69.50.401(1). State v. Johnson, 119 Wn.2d 143, 146, 829 P.2d 1078 (1992); State v. Sims, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992).

¹² See State v. Riker, 123 Wn.2d 351, 368, 869 P.2d 43 (1994) (“Generally, an affirmative defense which does not negate an element of the crime charged, but only excuses the conduct, should be proved by a preponderance of the evidence.”)

¹³ State v. Carter, 127 Wn.App. 713, 717, 112 P.3d 561 (2005).

3. DEFENDANT’S SENTENCE ON HIS DRUG CONVICTION IS NOT UNLAWFUL WHERE DEFENDANT CAN SERVE HIS SENTENCE WITHOUT EXCEEDING THE STATUTORY MAXIMUM FOR THE DRUG CRIME.

In the instant case, defendant challenges his judgment and sentence for his drug possession offense (Count II). Defendant asserts that the sentencing court “exceeded its authority” in sentencing petitioner outside the statutory maximum making his sentence pursuant to State v. Zavala-Reynoso, 127 Wn. App. 119, 110 P.3d 827 (2005), which vacated Zavala-Reynoso’s sentence after finding the defendant’s community custody term plus his standard range sentence exceeded the defendant’s ten year statutory maximum term. Id. at 124. Defendant contends that because his 60 month prison sentence plus his 9 to 12 month community custody sentence exceeds the statutory maximum, this court should reverse¹⁴ his sentence. This contention fails because the defendant is not obligated to serve his community custody time over his statutory maximum sentence.

The present case is distinguishable from Zavala-Reynoso because defendant’s drug sentence is concurrent with his firearm sentence, which carries a ten year maximum.¹⁵ The maximum number of months for defendant’s total confinement would be 105 months. RP 116. If this

¹⁴Brief of Appellant at 15.

¹⁵ RCW 9.41.040(1)(b) and RCW 9A.20.021(b).

court affirms both of defendant's convictions, there is not a chance that the defendant will serve his community custody sentence outside his statutory maximum of the firearm offense.

Even if this court reverses the firearm conviction, defendant will either not earn early release time and be released after serving his time without further obligation, or he will earn early release time and serve that time in lieu of community custody. In either scenario, he will serve no more than his statutory maximum. However, to avoid any uncertainty regarding the imposition of defendant's sentence on his drug offense, the State agrees that this court should vacate the defendant's sentence and remand for resentencing to avoid any confusion.

Except as relates to collection of restitution, a sentence may not exceed the statutory maximum set by the legislature." State v. Sloan, 121 Wn. App. 220, 222, 87 P.3d 1214 (2004), citing RCW 9.94A.505(5). Methamphetamine is a controlled substance. RCW 69.50.206(d)(2). The statutory maximum for possession of methamphetamine is 60 months. RCW 9A.20.021(c), RCW69.50.4013.¹⁶ When serving time for more than one offense, the firearm enhancement is added to the total period of

¹⁶ Defendant's drug conviction is classified as a level III offense because of his firearm sentencing enhancement. RCW 9.94A.518. With his offender score of 9+, defendant's standard range sentence is 100+ to 120 months under the drug offense sentencing grid. RCW 9.94A.517. However, this range is limited by the 60 month statutory maximum for defendant's drug offense. Thus, the standard range of 51 to 68 months listed on defendant's judgment and sentence is incorrect. RCW 9.94A.517. CP 113.

confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. RCW 9.94A.533(3). Defendant serves this term in total confinement. RCW 9.94A.533(3)(e). RCW 9.94A(1) provides, in pertinent part:

When a court sentences a person to the custody of the department for a ...felony offense under chapter 69.50... the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer. The community custody shall begin: (a) Upon completion of the term of confinement; (b) at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.728 (1) and (2). ...

The Sentencing Reform Act defines community custody as follows:

‘Community Custody’ means that portion of an offender’s sentence of confinement in lieu of earned release time or imposed pursuant to ...RCW 9.94A.715, served in the community subject to controls placed on the offender’s movement and activities by the department.

RCW 9.94A.030(5).

Under the SRA the defendant can earn up to fifty percent of aggregate earned release time for each of his felony convictions. RCW 94A.728((1)(b)(ii)). Thus, it is possible for the defendant to receive up to 21 months earned release time on his drug conviction, and 43.5 months on the firearm possession conviction. These terms of confinement run concurrently. Regardless of how much time defendant serves on the

substantive offenses, the 18 month sentence on the firearm enhancement is also consecutive to the firearm offense, which is a class B felony and carries a ten year maximum for confinement. Accordingly, the defendant cannot serve his community custody sentence until he completes the longer term of confinement on that offense. As discussed below, it is doubtful he would serve the community custody portion of his sentence.

For example, defendant could serve the term on his firearm enhancement before serving his term on the underlying offense. If defendant earns his maximum early release time on both convictions he would serve an additional 43.5 months for a total of 61.5 months confinement. Under this scenario, it is not likely the Department of Corrections (DOC) would transfer the defendant to community custody status in lieu of earned early release because defendant would have served his maximum term on the drug offense, and the firearm offense does not carry community custody time. RCW 9.94A.715 and RCW 9.94A.728(2)(b).

Ultimately, DOC will determine the defendant's earned early release to which he is entitled, if any. A sentencing court has no control over whether a defendant will or will not receive earned early release, as that is entirely within the province of the Department of Corrections. In re Pers. Restraint of Mota, 114 Wn.2d 465, 478, 788 P.2d 538 (1990). As long as the combination of confinement time and community custody does not exceed the statutory maximum, defendant has not received an

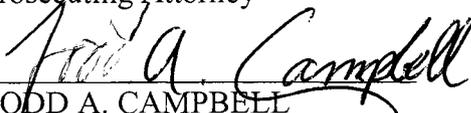
unlawful sentence. Sloan, 121 Wn. App at 223, *citing State v. Vanoli*, 86 Wn. App. 643, 937 P.2d 1166 (1997). Because it is difficult to discern how DOC will construe defendant's sentence, remand for resentencing is appropriate to avoid confusion. The proper remedy should be a notation on the judgment and sentence that states the term of confinement plus the term of community custody shall not exceed the statutory maximum for each offense consistent with State v. Sloan, 121 Wn. App. 220, 223-24, 87 P.3d 1214 (2004).

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this court affirm the defendant's convictions for first degree unlawful possession of a firearm and unlawful possession of methamphetamine. The State agrees with defendant that remand for resentencing on his drug offense is appropriate to clarify any uncertainty regarding the imposition of his community custody sentence.

DATED: May 18, 2006

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/22/06 Theresa R
Date Signature