

NO. 36203-1

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

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL FLETCHER KNAUS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas P. Larkin

No. 06-1-03361-4

BRIEF OF RESPONDENT

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

1. Was the evidence presented at trial sufficient to support a firearm enhancement when the nexus between the defendant, the weapon, and the crime is merely definitional and defendant had actual possession of the weapon and the methamphetamine?

B. STATEMENT OF THE CASE.

1. Procedure

On July 1, 2006, the Pierce County Prosecutor's Office filed an information in Cause No. 06-1-03361-4, charging MICHAEL FLETCHER KNAUS, hereinafter "defendant," with two counts of first degree assault, one count of first degree burglary, one count of unlawful possession of a firearm, and one count of unlawful possession of a controlled substance. CP 4-5. The matter proceeded as a bench trial before the Honorable Thomas P. Larkin on March 1, 2007. 1RP 23.¹ After the evidence was presented, defendant stipulated to his guilt regarding the first degree burglary with a firearm enhancement, unlawful possession of a firearm, and unlawful possession of a controlled substance. 1RP 202-03. The court also dismissed one of the first degree assault

¹ There are three (3) volumes of verbatim report of proceedings: 1RP – 2/28/07, 3/1/07, 3/5/07; 2RP – 3/23/07; 3RP - 4/6/07.

charges. 1RP 207. The court found the defendant guilty as charged on one count of first degree assault with a firearm enhancement, and added a firearm enhancement to the unlawful possession of a controlled substance charge. 1RP 216-18; CP 49-60. Defendant's only argument against the firearm enhancement on the drug charge was that there was insufficient evidence that defendant possessed the gun and the drugs at the same time. 1RP 213.

The court proceeded to sentence defendant to 229 months on the first degree assault charge plus 60 months for the firearm enhancement, 102 months on the first degree burglary charge, plus 60 months for the firearm enhancement, 54 months on unlawful possession of a firearm charge, and 18 months on the unlawful possession of a controlled substance charge, plus 12 months for the firearm enhancement, to run concurrently except for the enhancements and to be served in the Department of Corrections, and nine to 12 months of community custody upon release. 3RP 16-17; CP 49-60.

From entry of this judgment, defendant filed a timely notice of appeal. CP 61. Defendant only challenges the firearm enhancement on the unlawful possession of a controlled substance charge. Appellant's Assignment of Error 1.

2. Facts²

Robert and Frances Blakely were asleep in their bedroom the morning of July 20th, 2006, when Mrs. Blakely was awoken by noises in the bedroom. 1RP 132. The noises grew louder, and Mrs. Blakely eventually sat up in her bed and looked to see what was causing them. 1RP 132-33. She saw a shadow of someone on all fours, at which point she woke up her husband to let him know someone was in their house. 1RP 133, 171. Mr. Blakely looked up and saw defendant, who was down low at the time. 1RP 172, 178-79. Mr. Blakely then saw that on the ground right next to defendant was a pistol; it was the pistol that Mr. Blakely kept in the house. 1RP 173, 174, 175-76.

As defendant started to get up, Mr. Blakely moved across the bed, leapt out, and tackled him. 1RP 178-79, 180. The gun went off, firing one shot. 1RP 180-81. Mr. Blakely and defendant then fought over the gun, and the gun fired a second time. 1RP 182-83. Mr. Blakely was able to hit the release for the cylinder of the pistol, and eventually unloaded the remaining ammunition onto the floor, save one bullet. Id. During the struggle, defendant attempted to put the ammunition back into the pistol. 1RP 182-83, 187. Defendant also held the gun in his right hand with the hammer pulled back as he fought with Mr. Blakely. 1RP 183, 186.

² The trial court entered findings of fact and conclusions of law regarding the bench trial on March 23, 2007. CP 11-48. Defendant does not challenge these findings and conclusions on appeal.

During the struggle, Mrs. Blakely, who had run out of the bedroom and into the kitchen, found a cordless phone, returned to the bedroom doorway, and called 911. 1RP 135-36.

Mr. Blakely was eventually able to get the gun away from defendant, at which point defendant pulled out a butterfly knife. 1RP 185-86. Mr. Blakely was also able to get the knife away from defendant, and threw it away from the struggle. 1RP 186. Mr. Blakely was eventually able to subdue defendant. 1RP 189. The police arrived and arrested defendant. 1RP 34. The police searched defendant and pulled a glass pipe and plastic baggie of methamphetamine from a pouch on defendant's belt. 1RP 52-53.

C. ARGUMENT.

1. THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO SUPPORT A FIREARM ENHANCEMENT BECAUSE THE NEXUS BETWEEN THE DEFENDANT, THE WEAPON, AND THE CRIME IS MERELY DEFINITIONAL AND DEFENDANT HAD ACTUAL POSSESSION OF THE WEAPON AND THE METHAMPHETAMINE

Evidence is sufficient to support a conviction if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

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. Anderson, 72 Wn. App. 453, 458, 864 P.2d 1001, review denied, 124 Wn.2d 1013 (1994). An appellate court defers to the trier of fact on matters of witness credibility. State v. Chapman, 78 Wn.2d 160, 164, 469 P.2d 883 (1970).

In addition, circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.3d 634, 638, 618 P.2d 99 (1980). 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)). This is because the written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations. The trier of fact, who is best able to observe the witnesses and evaluate their testimony, should make these determinations. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial courts factual findings. In re Sego, 82 Wn.2d 736, 513 P.2d 831 (1973); Nissen v. Obde, 55 Wn.2d 527, 348 P.2d 421 (1960). It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

Therefore, when the State has produced evidence of all elements of a crime, the decision of the trier of fact should be upheld.

“A person is ‘armed’ if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes,’ and there is a connection between the defendant, the weapon, and the crime.” State v. Easterlin, 159 Wn.2d 203, 208-209, 149 P.3d 366 (2006) (quoting State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993)). This connection, or “nexus”, is definitional, and “is not an element the State must explicitly plead or prove.” Easterlin, 159 Wn.2d at 209. Furthermore, “The State does not have to produce direct evidence of a defendant’s intent.” Id. at 210. It is the defendant’s burden to establish, against all inferences in favor of the State, that this nexus did not exist. State v. Eckenrode, 159 Wn.2d 488, 496, 150 P.3d 1116 (2007). If the facts and circumstances support the inference that there is a nexus, that is sufficient evidence to support a finding that the defendant was armed. Easterlin, 159 Wn.2d at 210.

The present case is most similar to Easterlin. Officers found Easterlin asleep in his vehicle with a gun in his lap and a loaded magazine on the passenger seat. Id. at 207. Easterlin also had cocaine in his sock. Id. Easterlin pled guilty to unlawful possession of cocaine with a firearm enhancement and unlawful possession of a firearm, and specifically conceded that he possessed a controlled substance and that he had a firearm with him. Id.

On appeal, Easterlin argued that there was not sufficient evidence to support the enhancement. Id. at 210. The Supreme Court upheld the firearm enhancement, citing defendant's admission that he was armed and possessed cocaine as supporting the inference that a nexus existed between the cocaine, the defendant, and the gun: "There was also ample evidence from which a trier of fact could find Easterlin was armed to protect the drugs... Easterlin's statement on plea of guilty specifically admitted, in his own words, that he was armed and that he possessed a controlled substance." Id. The court expressed one concern regarding actual possession cases, that a restrictive jury instruction may limit the defendant's ability to argue his theory of the case, a concern the court repeated in Eckenrode. Id. at 209; Eckenrode, 159 Wn.2d at 496. Otherwise, "The State is likely correct that in actual possession cases, it will rarely be necessary to go beyond the commonly used 'readily accessible and easily available' instruction." Id.

In the present case, defendant has not rebutted the inference that his actual possession of the Blakely's gun was in part to protect his methamphetamine. Defendant has not established that the nexus does not exist between himself, the gun, and the drugs. Instead, defendant limits the support of his argument to the assertion that "his only intent in picking up the Blakely's gun was to place it where it could not be used." Br. of Appellant at 8. Defendant, though, did not testify at trial, and Mr. Blakely testified that defendant attempted to reload the gun during their struggle. 1RP 197-199; 182-83, 187. This evidence alone supports the trial court's finding that defendant was "armed" while possessing the drugs.

Beyond that, defendant asserts that the nexus is an element of the crime the State must prove beyond a reasonable doubt, and rests its argument on this assertion. Br. of Appellant at 7-8. Defendant further argues that "there is no evidence that he had any intent to use the firearm to defend the drugs." *Id.* at 8. However, as stated before, the nexus is definitional, and "is not an element the State must explicitly plead or prove," nor does the State "have to produce direct evidence of a defendant's intent." Easterlin, 159 Wn.2d at 209, 210.

Additionally, there were no jury instructions as this was a bench trial, so defendant was free to present his theory regarding the connection between the methamphetamine and the gun. Defendant had the opportunity to challenge the existence of a nexus between himself, the

gun, and his possession of methamphetamine. Instead, defense counsel argued against the firearm enhancement because he claimed that the prosecution had failed to prove, beyond a reasonable doubt, that defendant had possessed the methamphetamine and the gun at the same time. 1RP 213. Defendant's theory was never compromised by a jury instruction, and he freely chose not to challenge the nexus between himself, the gun, and the methamphetamine.

Defendant has not met his burden establishing that the trial court could not have reasonably inferred there was a nexus between defendant, the gun, and his possession of methamphetamine. This nexus is not an element of the crime, but merely definitional. Defendant was also not hindered at the trial court level from presenting his theory regarding the connection between the gun and the methamphetamine, which was the Supreme Court's lone expressed concern in actual possession cases where the nexus between the weapon and the crime was challenged. Considering this and the other evidence cited above, defendant's argument fails.

D. CONCLUSION.

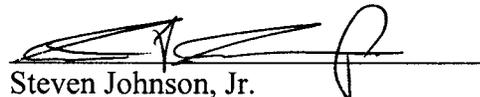
For the foregoing reasons, the State respectfully requests that this Court affirm defendant's convictions and sentence.

DATED: November 28, 2007.

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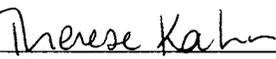
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Steven Johnson, Jr.
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Certificate of Service:

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.

11-29-07 
Date Signature

STATE OF WASHINGTON
COUNTY OF PIERCE
CLERK OF SUPERIOR COURT
TACOMA, WASHINGTON
11/29/07