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COURT OF APPEALS
DIVISION II

10 MAR 31 PM 1:07

STATE OF WASHINGTON

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No. 39578-9-II

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

STATE OF WASHINGTON
Respondent,

v.

DAVID LANDER,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY
The Honorable Richard D. Hicks, Judge.
cause No. 09-1-00341-0 and 09-1-00342-8

APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS

David Lander
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Walla Walla, Washington 99362.

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A. Assignment of Error

1. The trial court erred in not dismissing the firearm enhancement on count III, trafficking stolen property in the first degree, where there is two convictions violated the constitutional prohibition against double jeopardy.

2. The court erred in not dismissing the firearm enhancement on count II, theft in the second degree, as the legislature did not intend a gun enhancement for this purpose.

B. Issues Pertaining to Assignment of Error

1. Did the trial court error in not dismissing the firearm enhancement on count III, trafficking stolen property in the first degree, where there is two convictions violated the constitutional prohibition against double jeopardy.

2. Did the trial court error in not dismissing the firearm enhancement on count II, theft in the second degree, where the legislature did not intend a firearm enhancement for this purpose.

C. STATEMENT OF THE CASE

01. Procedural Facts

David Lee Lander (Lander) was charged by information filed in Thurston County Superior Court on February 23, 2009, under cause number 09-1-00341-0, with theft of a firearm, count I, theft in the second degree while armed with a firearm, count II, trafficking in stolen property in the first degree while armed with a firearm, count III, and unlawful possession of a firearm in the second degree, count IV, contrary to RCWs 9.41.040(2)(a), 9.94A.533(3), 9.9.94A.602, 9A.56.021(1)(a), 9A.56.300(1), 9A.82.020(19) and 9A.82.050(1). [CP 2-3].¹ Lander was also charged by information filed in the same court on the same day, under cause number 09-1-00342-8, with theft in the first degree, count I, theft in the second degree, count II, and trafficking in stolen property in the first degree, count III, contrary to RCWs 9A.52.020(1)(a), 9A.56.030(1)(a), 9A.56.040(1)(c), 9A.82.010(19) and 9A.82.050(1). [CP 2 under cause number 09-1-00342-8]. The cases were consolidated for trial. [CP 8].

The court denied Lander's pretrial motion to suppress statements pursuant to CrR 3.5. [CP 43-45; RP 06/22/09 52-54].

¹ All clerk's papers referenced herein are to those filed under Thurston County cause number 09-1-00341-0 unless otherwise indicated.

Trial to a jury commenced on June 30, the Honorable Richard D. Hicks presiding. The parties stipulated that Lander had previously been convicted of a felony offense. [RP 75].² Neither exceptions nor objections were taken to the jury instructions. [RP 92].

The jury returned verdicts of guilty as charged, Lander was sentenced within his standard range and timely notice of this appeal followed. [CP 90-95, 98-108; CP 6-19 under cause number 09-1-00342-8].

02. Substantive Facts: CrR 3.5 Hearing

On December 17, 2008, while investigating a vehicle prowl case, Detective Eugene DuPrey interviewed Chris Lander, the defendant's brother, about a stolen Music 6000 gift card belonging to Carol Roden that Chris had cashed. [RP 06/22/09 6-8]. Chris explained that his brother had given him the card as a gift, in addition to giving their mother a gift of a black powder muzzle loaded rifle, which had also been stolen during a vehicle prowl. [RP 06/22/09 8-9].

The next day, at approximately 9:30 in the morning, Detective Eugene DuPrey received a telephone call from Lander saying he wanted to talk to the detective about his involvement in some local vehicle prowl

² Unless otherwise noted, all references to the Report of Proceedings are to the transcript entitled Jury Trial.

cases. [RP 06/22/09 8-9]. They agreed to meet later that afternoon at Lander's mother's house. [RP 06/22/09 9].

It was "snowing quite heavily" when DuPrey and Deputy Snaza arrived at the residence, and they "were invited into the home to speak to (Lander)(,)" whose grandmother and sister were also there. [RP 06/22/09 10, 16, 22-23].

Upon entry into the residence, DuPrey explained to Lander that he was investigating the theft of a Music 6000 gift card and a black powder rifle. [RP 06/22/09 10].

(Lander) proceeded to tell me that these items he purchased from an individual out of the Centralia area, tried to give me directions. At that point, I stopped (Lander) and I explained to him that I didn't believe his story and I advised him of his Miranda³ rights.

[RP 06/22/09 10-11].

Lander acknowledged that he understood his rights and agreed to speak to DuPrey. [RP 06/22/09 12, 24]. Lander "again tried to elaborate" on his initial story; DuPrey again told him he didn't believe him.

We then began talking about the Music 6000 card, and he admitted that he did steal that item from a vehicle prowler, and then he agreed to help us recover the black powder rifle, at which point Deputy Snaza and him went outside. He stated it was out in the

³ Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

vehicle or some of the items he had were out in his vehicle.

[RP 06/22/09 13].

Snaza had asked Lander if he could speak to him outside, and he said yes. [RP 06/22/09 25, 32]. While outside, the deputy explained to

Lander

.... that my intent is not to take you to jail today, we're investigating vehicle prowls and we want to get that - - we want to find that black powder rifle and that I'm sure that he does not want his mother being in trouble for being in possession of that.

[RP 06/22/09 26].

I said that, you know, you're embarrassing yourself by lying and that your family knows you're lying, and if you're (sic) family knows, then I know, and, you know, it's time to do the right thing. So it was in that context.

[RP 06/22/09 32].

When Snaza and Lander came back inside, Lander retrieved the black powder rifle from behind the refrigerator in the kitchen and turned it over to the officers. [RP 06/22/09 14, 26].

Lander then agreed to go with the officers to the police station where he gave a recorded statement. [RP 06/22/09 14, 26-27].

Lander's grandmother and sister claimed that the two officers had accused Lander of committing crimes and told him that they would take

him to jail if he didn't tell them what they wanted to know [RP 06/22/09 35-37, 39-41], a claim both DuPrey and Snaza denied. [RP 06/22/09 18, 31]. Lander repeated the last claim, saying he was a "little intimidated" before he turned over the rifle because he did not want to go to jail. [RP 06/22/09 44-46].

03. Substantive Facts: Trial⁴

At its essence, this case flowed from two instances of alleged unlawful conduct on Mr. Lander's part, which resulted in the seven counts and two concomitant firearm enhancements.

03.1 Count I-IV: Theft of Firearm, Theft Second Degree Armed with Firearm, Trafficking First Degree Armed with Firearm, Unlawful Possession Firearm

On December 1 or 2, 2008, a firearm and other property were stolen (counts I-II, IV) from a truck belonging to Matthew Ware. [RP 16-17]. At trial, Ware identified the firearm, which he had fired on numerous occasions. [RP 16]. Lander was responsible for taking the firearm and giving it to his mother as a gift (count III). [RP 30, 45, 58, 60-61].

03.2 Count V-VII: Theft First Degree, Theft Second Degree, Trafficking First Degree

⁴ By order, the seven counts under both cause numbers were sequentially numbered for trial purposes, beginning with the four counts under cause number 09-1-00341-0. [CP 5 under cause number 09-1-00342-8].

D. ARGUMENT

1. Count III, trafficking stolen property in the first degree, while armed with a firearm, violates the constitutional prohibition against double jeopardy.

Article 1, section 9 of the Washington state Constitution and the Fifth Amendment to the United States Constitution provides that no person should twice be put in jeopardy for the same offense. A double jeopardy argument may be raised for the first time on appeal because it is a manifest error effecting a constitutional right. State v. Turner, 102 Wn.App. 202, 206, 6 P.3d 1226, review denied, 143 Wn.2d 1009 (2001)(citing RAP 2.5(a) and State v. Adel, 136 Wn.2d 629, 631, 965 P.2d 1072 (1998). Also see, State v. Frohs, 83 Wn.App. 803, 811, 924 P.2d 384 (1996). The issue is whether the legislature intended to authorize multiple punishments for criminal conduct that violates more than one criminal statute. State v. Calle, 125 Wn.2d at 772.

It is clearly stated in the Washington sentencing Guidelines manual 2008 at I-20, Firearm and deadly weapon enhancements, Initiative 159, Hard time for armed crimes, that enhancements apply to all felonies except where the use of a firearm is an element of the offense. Two of the crimes onto state for the example are theft of a firearm and possession of a stolen firearm. if the legislature didn't intend it for stealing the firearm or for possession of a stolen firearm, how could they of intended on for trafficking a stolen firearm. One of the elements in trafficking stolen property is the stolen property. In this case the stolen property is the firearm, which would make the use of the firearm an element of the crime. If we take the fire arm away from this crime, we could not establish there was a crime. I believe I have proven that the legislature did not intend a firearm

enhancement for this crime because it is barred by double jeopardy.

2. Does the crime of theft in the second, where the weapon is one of the items at the same time warrant a gun enhancement?

The record does not reflect any testimony or evidence given at trial or in the police reports that at anytime anyone was threatened or intimidated at any time during the course of the crime or could have been. this was just a theft in the second (the property was never identified at trial or even proven to of ever been owned) where a muzzle loader was also stolen from unlocked car parked out side. this was a property crime were there was no one around to be hurt.

In State v. Brown, 162 Wn.2d 422, 173 P.3d 245 (2007), the test for determining whether the defendant was armed with a deadly weapon was easily accessible and readily available to the defendant (or an accomplice) for offensive or defensive purposes and whether a nexus existed between the defendant (or an accomplice), the weapon, and the crime. The requirement is determined by considering the nature of the crime, the type of weapon, the circumstances under which the weapon was found. The intent or willingness of the defendant to use the weapon is also a condition of the nexus requirement.

The crime is theft, the nature of the crime is a property crime, not a crime against a person, (State v. Befford, 148 Ariz. 508, 715 P.2d 761 (1986)(prosecution must show that the defendant had the willingness or the present ability to use the weapon). To examine our firearm enhancement jurisprudence suffice to say:

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the theory behind the deadly weapon enhancement is that a crime is potentially more dangerous to the victim, bystanders or police if the defendant is armed while he is committing the crime because someone may be killed or injured. Thus, the crime is more serious than it would have been without the weapon. Where no officer, victims or bystanders are present, the potential danger is also absent, and the rationale for greater punishment based on greater danger to others does not apply. The underlying rationale can apply only where there is a possibility the defendant would use the weapon. (State v. Johnson, 94 Wn.App. 882, 896, 974 P.2d 855 (1999)).

The weapon is a muzzle loader, one of the items stolen. The circumstances under which the weapon was found does not support a conclusion that Lander was "armed" as intended by the legislature. The legislature cited several "key reasons" for sentencing armed individuals more harshly, including, "forcing the victim to comply with their demands; injury or killing anyone who tries to stop the criminal act; and aiding the criminal in escaping." Laws of 1995, ch.129, § sec.1-1(b)(Initiative 159). no evidence exists that Lander handled the weapon at any time during the crime in a manner indicative of an intent or willingness to use it in furtherance of the crime. in fact, it is nothing nothing more than valuable property.

Eckenrode, 159 Wn.2d at 494 (emphasis added). Likewise, in Schelin, we said that the nexus test "as expressed in Johnson, "would enable a jury to infer that Schelin "was using the weapon to protect his basement marijuana grow operation." 147 Wn.2d at 574. These cases demonstrate that the defendant's intent or willingness to use the rifle is a condition of the nexus requirement that does, in fact, appear in Washington cases.

The dissent states, but does not apply, the principle that "where the weapon is not actually used in the commission of the crime, it must be there to be used.'" dissent at 442 (quoting Gursky, 155 Wn.2d at 138). Here the

facts suggest that the weapon was merely loot, and not there to be used.

There is not testimony or evidence at trial regarding the theft that Lander handled the gun in a manner indicative of an intent or willingness to use it in furtherance of the crime. Similar as in State v. Brown, 162 Wn.2d at 432. The sentencing enhancement applies to a broad array of felonies, RCW 9.94A.533(3). Requiring both that the weapon be readily available and easily accessible, as well as a nexus based on the facts of the case, limits the definition of being "armed" to those situations statutes are aimed at controlling. None of the statutory concerns are implicated under these facts. In Lander's case, like in State v. Brown, at 426, a firearm was found at the crime and not brought to the crime. The court found the gun to be no more than loot, it was not used in the furtherance of the crime.

In finding a special verdict finding for use of a firearm, you use RCW 9.94A.602, 9.94A.533. In RCW 9.94A.602, it states for purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. Then it goes on to say that "the following instruments are included in the term deadly weapon: Black jack, Sling shot, billy, sand club, sand bag, metal knuckles, any dirk, dagger, Pistol, revolver, or any other firearm..." This RCW refers to the manner in which it is used, implicating that the legislature did intend for use to be taken into account when sentencing for a weapon enhancement. There is no way to justify using this term for on weapon and not another.

Schelim and Gurske, both show that the manner in which it is used and a use of the firearm are used in cases to determine if they are guilty of a firearm enhancement. In Schelim, 147 Wn.2d at 595 (opinion of Sanders, J.) It

states that allowing the imposition of a firearm sentence enhancement for other than use of the (firearm to aid the commission of the crime charged" violated the state constitution. In Gurske, 155 Wn.2d at 154-155 it states," I would take this opportunity to reaffirm that the state must explicitly prove to the trier of fact that there was in fact a nexus between the weapon, the crime and the defendant, and that the weapon was there to be used, not merely there.

I believe I have proven that the legislature did not intend for a gun enhancement for a crime where there was no risk of any person being hurt and where the weapon was no more than loot.

E. CONCLUSION

Based on the above, Lander respectfully requests this court to reverse and dismiss his convictions and remand for a resentencing consistent with the arguments presented herein.

Submitted this 26 day of March, 2010.



David Lander