

NO. 45058-5-II

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

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STATE OF WASHINGTON,

Respondent,

v.

SOEUN SUN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable James Orlando, Judge

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BRIEF OF APPELLANT

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## **TABLE OF CONTENTS**

A.	ASSIGNMENTS OF ERROR.....	1
	Issues pertaining to assignments of error.....	1
B.	STATEMENT OF THE CASE.....	4
	1. Procedural History .....	4
	2. Substantive Facts .....	6
C.	ARGUMENT.....	17
	1. EVIDENCE SEIZED AS RESULT OF THE UNLAWFUL STOP SHOULD HAVE BEEN SUPPRESSED. ....	17
	2. THERE WAS INSUFFICIENT EVIDENCE THAT SUN WAS ARMED WITH A FIREARM, AND HIS CONVICTIONS FOR BURGLARY, CONSPIRACY TO COMMIT BURGLARY, AND THE FIREARM SENTENCE ENHANCEMENTS MUST BE VACATED. ....	23
	3. EVEN IF THERE WAS SUFFICIENT EVIDENCE TO PRESENT THE BURGLARY AND CONSPIRACY CHARGES TO THE JURY, THE COURT’S FAILURE TO INSTRUCT THE JURY ON THE NEXUS REQUIREMENT REQUIRES REVERSAL...	30
	4. THE TRIAL COURT DENIED SUN A FAIR TRIAL BY REFUSING TO INSTRUCT THE JURY ON SECOND DEGREE BURGLARY AND CONSPIRACY TO COMMIT SECOND DEGREE BURGLARY.....	32
	5. THE TRIAL COURT’S REFUSAL TO GIVE THE REQUESTED INSTRUCTION LIMITING THE USE OF STEARMAN’S RECORDED STATEMENT DENIED SUN A FAIR TRIAL.....	37
	6. DEFENSE COUNSEL’S FAILURE TO EXAMINE THE STATE’S EXHIBITS AND OBJECT TO THE PROSECUTOR’S	

MISREPRESENTATION DURING CLOSING ARGUMENT CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL. .....	44
7. IMPOSITION OF THE PERSISTENT OFFENDER SENTENCE DEPRIVED SUN OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A JURY TRIAL.....	49
a. Due process requires that a jury find beyond a reasonable doubt any fact that increases the defendant’s maximum possible sentence. ....	49
b. Sun had the constitutional right to have a jury determine beyond a reasonable doubt that he committed the two prior “strike” offenses because they increased his maximum sentence. ....	51
c. Because the sentence of life without parole was not authorized by the jury’s verdict, the case should be remanded for resentencing within the standard range. ....	55
d. In the alternative, under the traditional Mathews procedural due process analysis, proof to a jury beyond a reasonable doubt is required to confine an accused to life without parole under our State constitution. ....	55
8. CLASSIFICATION OF THE PERSISTENT OFFENDER FINDING AS AN “AGGRAVATOR” OR “SENTENCING FACTOR,” RATHER THAN AN “ELEMENT,” VIOLATES SUN’S RIGHT TO EQUAL PROTECTION.....	58
D. CONCLUSION.....	63

## TABLE OF AUTHORITIES

### Washington Cases

<u>In re Pers. Restraint of Martinez</u> , 171 Wn.2d 354, 256 P.3d 277 (2011)	28, 29
<u>State v. Allen</u> , 89 Wn.2d 651, 574 P.2d 1182 (1978)	33
<u>State v. Barnes</u> , 153 Wn.2d 378, 103 P.3d 1219 (2005)	26
<u>State v. Benn</u> , 120 Wn.2d 631, 663, 845 P.2d 289, <u>cert. denied</u> , 510 U.S. 944 (1993)	40, 46
<u>State v. Broadnax</u> , 98 Wn.2d 289, 654 P.2d 96 (1982)	19
<u>State v. Brown</u> , 147 Wn.2d 330, 58 P.3d 889 (2002)	32
<u>State v. Brown</u> , 162 Wn.2d 422, 432, 173 P.3d 245 (2007)	25, 26, 27, 30, 31, 36
<u>State v. Chambers</u> , 157 Wn. App. 465, 237 P.3d 352 (2010)	60
<u>State v. Chapin</u> , 118 Wn.2d 681, 826 P.2d 194 (1992)	24
<u>State v. Clinkenbeard</u> , 130 Wn. App. 552, 123 P.3d 872 (2005)	41
<u>State v. Crediford</u> , 130 Wn.2d 747, 927 P.2d 1129 (1996)	24
<u>State v. Dickenson</u> , 48 Wn. App. 457, 740 P.2d 312, <u>review denied</u> , 109 Wn.2d 1001 (1987)	41
<u>State v. Doughty</u> , 170 Wn.2d 57, 239 P.3d 573 (2010)	20, 23
<u>State v. Duncan</u> , 146 Wn.2d 166, 43 P.3d 513 (2002)	18, 20
<u>State v. Easterlin</u> , 159 Wn.2d 203, 149 P.3d 366 (2006)	31
<u>State v. Fernandez-Medina</u> , 141 Wn.2d 448, 6 P.3d 1150 (2000)	34, 35
<u>State v. Gallgher</u> , 112 Wn. App. 601, 51 P.3d 100 (2002), <u>review denied</u> , 148 Wn.2d 1023 (2003)	43
<u>State v. Garcia</u> , 125 Wn.2d 239, 883 P.2d 1369 (1994)	22
<u>State v. Green</u> , 94 Wn. 2d 216, 616 P.2d 628 (1980)	24
<u>State v. Gurske</u> , 155 Wn.2d 134, 118 P.3d 333 (2005)	26
<u>State v. Hancock</u> , 109 Wn.2d 760, 748 P.2d 611 (1988)	43
<u>State v. Hardesty</u> , 129 Wn.2d 303, 915 P.2d 1080 (1996)	24
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996)	19
<u>State v. Hernandez</u> , 172 Wn. App. 537, 290 P.3d 1052 (2012), <u>review</u> <u>denied</u> , 177 Wn.2d 1022 (2013)	28, 30
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998)	24
<u>State v. Hoffman</u> , 116 Wn.2d 51, 804 P.2d 577 (1991)	47
<u>State v. Kennedy</u> , 107 Wn.2d 1, 726 P.2d 445 (1986)	20
<u>State v. Kinzy</u> , 141 Wn.2d 373, 5 P.3d 668 (2000)	19
<u>State v. Ladson</u> , 138 Wn.2d 343, 979 P.2d 833 (1999)	19
<u>State v. Larson</u> , 93 Wn.2d 638, 611 P.2d 771 (1980)	20
<u>State v. Martinez</u> , 135 Wn. App. 174, 143 P.3d 855 (2006)	22
<u>State v. McDonald</u> , 123 Wn. App. 85, 96 P.3d 468 (2004)	34
<u>State v. McDonald</u> , 96 Wn. App. 311, 979 P.2d 857 (1999)	45

<u>State v. McKague</u> , 159 Wn. App. 489, 246 P.3d 558 (2011) .....	54
<u>State v. Nava</u> , 177 Wn. App. 272, 311 P.3d 83 (2013), <u>review denied</u> , 179 Wn.2d 1019 (2014) .....	39, 40
<u>State v. Newbern</u> , 95 Wn. App. 277, 975 P.2d 1041, <u>review denied</u> , 138 Wn.2d 1018 (1999) .....	42
<u>State v. Oster</u> , 147 Wn.2d 141, 52 P.3d 26 (2002) .....	59, 60
<u>State v. Peterson</u> , 133 Wn.2d 885, 948 P.2d 381 (1997) .....	34
<u>State v. Pitts</u> , 62 Wn.2d 294, 382 P.2d 508 (1963) .....	43
<u>State v. Roswell</u> , 165 Wn.2d 186, 196 P.3d 705 (2008) .....	60, 62
<u>State v. Schelin</u> , 147 Wn.2d 562, 55 P.3d 632 (2002) .....	25, 26
<u>State v. Smith</u> , 117 Wn.2d 263, 814 P.2d 652 (1991) .....	59
<u>State v. Smith</u> , 131 Wn.2d 258, 930 P.2d 917 (1997) .....	32
<u>State v. Smith</u> , 150 Wn.2d 135, 143, 75 P.3d 934 (2003), <u>cert. denied</u> , 541 U.S. 909 (2004) .....	61, 62
<u>State v. Speece</u> , 56 Wn. App. 412, 783 P.2d 1108 (1989), <u>affirmed</u> , 115 Wn.2d 360, 362, 798 P.2d 294 (1990) .....	36
<u>State v. Tharp</u> , 96 Wn.2d 591, 637 P.2d 961 (1981) .....	40
<u>State v. Thompson</u> , 93 Wn.2d 838, 613 P.2d 525 (1980) .....	19
<u>State v. Thorne</u> , 129 Wn.2d 736, 921 P.2d 514 (1994) .....	58, 61
<u>State v. Tili</u> , 139 Wn.2d 107, 985 P.2d 365 (1999) .....	33
<u>State v. Williams</u> , 79 Wn. App. 21, 902 P.2d 1258 (1995) .....	42
<u>State v. Williams-Walker</u> , 167 Wn.2d 889, 225 P.3d 913 (2010) .....	55
<u>State v. Witherspoon</u> , 171 Wn. App. 271, 286 P.3d 996 (2012), <u>review granted</u> by 177 Wn.2d 1007, 300 P.3d 416 (2013) .....	54

### **Federal Cases**

<u>Adams v. United States ex rel. McCann</u> , 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435 (1942) .....	45
<u>Addington v. Texas</u> , 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) .....	57
<u>Ake v. Oklahoma</u> , 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 3 (1985) .....	56
<u>Alleyne v. United States</u> , ___ U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) .....	50, 52, 53
<u>Almendarez-Torres v. United States</u> , 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) .....	51, 53
<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) .....	49, 51, 52, 62
<u>Arkansas v. Sanders</u> , 442 U.S. 753, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979) .....	19
<u>Beck v. Alabama</u> , 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980) .....	35

<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).....	54
<u>Bush v. Gore</u> , 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000).....	58
<u>Cunningham v. California</u> , 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007).....	54
<u>Descamps v. United States</u> , ___ U.S. ___, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013).....	50
<u>Dunaway v. New York</u> , 442 U.S. 200, 99 S.Ct. 2248, 2254, 60 L.Ed.2d 824 (1979).....	19
<u>Evitts v. Lucey</u> , 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).....	44
<u>Georgia v. Brailsford</u> , 3 U.S. 1, 3 Dall. 1, 1 L. Ed. 483 (1794).....	57
<u>Hamdi v. Rumsfeld</u> , 542 U.S. 507, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004).....	56
<u>In re Winship</u> , 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970)....	24
<u>Mathews v. Eldridge</u> , 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) .....	56, 58
<u>Neder v. United States</u> , 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) .....	32
<u>Powell v. Alabama</u> , 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) .....	45
<u>Shepard v. United States</u> , 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005).....	52
<u>Skinner v. Oklahoma</u> , 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed.2d 1655 (1942).....	62
<u>Strickland v. Washington</u> , 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).....	44, 46
<u>Terry v. Ohio</u> , 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968)..	18, 20
<u>Turner v. Rogers</u> , ___ U.S. ___, 131 S.Ct. 2507, 180 L.Ed.2d 452 (2011)..	56
<u>United States v. Gaudin</u> , 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).....	49
<u>United States v. Ruiz-Gaxiola</u> , 623 F.3d 684 (9th Cir. 2010) .....	57
<u>Washington v. Recuenco</u> , 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).....	50

**Statutes**

RCW 10.61.003 .....	34
RCW 26.50.110(5).....	59
RCW 9.41.040(1)(a) .....	5
RCW 9.68.090 .....	61
RCW 9.94A.030(37).....	53, 59, 62
RCW 9.94A.510.....	51
RCW 9.94A.570.....	53, 59, 62
RCW 9A.04.110(6).....	24, 28

RCW 9A.28.040.....	5, 24
RCW 9A.52.020.....	24, 51
RCW 9A.52.020(1)(a) .....	5
RCW 9A.56.020.....	5
RCW 9A.56.300(1)(a) .....	5
RCW 9A.82.050(1).....	5

**Constitutional Provisions**

U.S. Const. amend. V.....	33, 44
U.S. Const. amend. VI.....	33, 44, 49
U.S. Const. amend XIV .....	24, 33, 49, 58
U.S. Const. amend. IV .....	19
Wash. Const. art. I § 21.....	33
Wash. Const. art. I § 3.....	24, 33, 44
Wash. Const. art. I, § 22 (amend.10) .....	44
Wash. Const., art. 1, § 7.....	19
Wash. Const., art. I, § 12.....	58

**Rules**

ER 105 .....	43
ER 607 .....	41
ER 613 .....	41
ER 803(a)(5) .....	40, 41

**Other Authorities**

1 McCormick on Evidence § 34, at 114 (4 <sup>th</sup> ed. 1992).....	42
Schaefer, Federalism and State Criminal Procedure, 70 Harv. L.Rev. 1, 8 (1956).....	45

A. ASSIGNMENTS OF ERROR

1. Evidence seized as a result of an unlawful detention should have been suppressed.

2. The State failed to prove that appellant was armed with a firearm for the purposes of the burglary and conspiracy charges and the firearm enhancements.

3. The court failed to instruct the jury on the nexus requirement for first degree burglary.

4. The trial court's refusal to instruct the jury on the lesser offense of second degree burglary denied appellant a fair trial.

5. The trial court's refusal to give a limiting instruction for impeachment evidence denied appellant a fair trial.

6. Appellant received ineffective assistance of counsel.

7. Imposition of a persistent offender sentence deprived appellant of his Sixth and Fourteenth Amendment rights to a jury trial and due process.

8. Classification of appellant's prior convictions as sentencing factors rather than elements deprived him of equal protection guaranteed by the state and federal constitutions.

Issues pertaining to assignments of error

1. Appellant was detained based on his proximity to a car connected to a burglary committed 11 days earlier. Where there was no reasonable, articulable suspicion that appellant was involved in criminal activity, should the evidence obtained as a result of the unlawful detention have been suppressed?

2. Appellant was convicted of first degree burglary and conspiracy to commit first degree burglary, and firearm sentence enhancements were imposed on those offenses as well as convictions for trafficking in stolen property and conspiracy to commit trafficking. The case involved the theft and sale of firearms from a sporting goods store. Where there was no evidence that anyone involved in these offenses intended to or was willing to use the firearms to facilitate the crimes, but rather the evidence showed only that the firearms were the object of the offenses, did the State fail to prove that appellant was “armed?”

3. The trial court instructed the jury that it did not need to find a nexus between appellant, the crime, and the gun in order to find he was armed with a firearm for the purposes of first degree burglary. Does this erroneous instruction require reversal?

4. Where the evidence would support a jury finding that appellant was guilty of only second degree burglary and conspiracy to

commit second degree burglary, rather than first degree, did the court's refusal to instruct the jury on the lesser offenses deny appellant a fair trial?

5. When a witness testified inconsistently with his prior statement to police, a recording of the prior statement was played to assist the jury in assessing his credibility. Defense counsel requested a jury instruction limiting use of the prior statement to impeachment, but the court refused. Did the court's failure to provide the necessary limiting instruction deny appellant a fair trial?

6. Defense counsel failed to examine one of the State's exhibits and as a result failed to object when the prosecutor made misrepresentations about the evidence during closing argument. Where defense counsel lost the opportunity to undercut the State's theory of the case, did appellant receive ineffective assistance of counsel?

7. Were appellant's Sixth and Fourteenth Amendment rights to a jury trial and due process violated when a judge, not a jury, found by a preponderance of the evidence that he had two prior most serious offenses, elevating his punishment from the otherwise-available statutory maximum to life without the possibility of parole?

8. The Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. In certain instances the prior convictions are labeled "elements," requiring they be proven to a

jury beyond a reasonable doubt, and in other instances they are termed “aggravators” or “sentencing factors,” permitting the judge to find the prior convictions by a preponderance of the evidence. Where no rational basis exists for treating similarly situated recidivist criminals differently, does the arbitrary classification deny appellant equal protection?

B. STATEMENT OF THE CASE

1. Procedural History

Appellant Soeun Sun was arrested on a Department of Corrections warrant on December 28, 2011. 10RP<sup>1</sup> 60. On January 5, 2012, the Pierce County Prosecuting Attorney charged Sun with one count of unlawful possession of a firearm and one count of possession of a stolen firearm. CP 1-2. The information was amended on August 20, 2012, adding 41 counts of theft of a firearm, one count of trafficking in stolen property, one count of conspiracy to commit first degree burglary, and one count of conspiracy to commit trafficking in stolen property. CP 3-12. The information was amended again on June 4, 2013, charging one count of unlawful possession of a firearm, one count of theft of a firearm, one count of first degree burglary, one count of conspiracy to commit first

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<sup>1</sup> The Verbatim Report of proceedings is contained in 15 volumes, designated as follows: 1RP—3/11/12; 2RP—6/4/12; 3RP—8/20/12; 4RP—9/14/12; 5RP—10/3/12; 6RP—12/13/12; 7RP—1/24/13; 8RP—4/22/13; 9RP—4/23/13; 10RP—5/7, 14, 16, 20, 28/13 (corrected); 11RP—5/29/13; 12RP—5/30/13; 13RP—6/3/13; 14RP—6/4-5/13; 15RP—6/6, 7, 27/13.

degree burglary, one count of trafficking in stolen property, and one count of conspiracy to commit trafficking in stolen property. CP 79-81; RCW 9A.41.040(1)(a); RCW 9A.56.020; RCW 9A.56.300(1)(a); RCW 9A.52.020(1)(a); RCW 9A.28.040; RCW 9A.82.050(1). The State also alleged that Sun was armed with a firearm during the burglary, conspiracy to commit burglary, trafficking, and conspiracy to commit trafficking. CP 79-8.

Sun remained incarcerated for more than a year while the case was pending. The trial was delayed numerous times while the State continued to investigate, add charges, charge other defendants, and negotiate plea agreements with the other defendants. Sun repeatedly objected to the continuances and filed pro se motions to dismiss for violation of his speedy trial rights. 3RP 3, 6; 5RP 2; 6RP 1; 7RP 6-8; CP 23-26, 32-33, 35-41, 48-52. The case proceeded to trial on April 23, 2013, when the Honorable James Orlando granted a motion to exclude witnesses and then recessed until May 7. 9RP 16. On May 7, the court granted an additional continuance until May 14. 10RP 29.

Following trial, the jury returned guilty verdicts on all counts and affirmative findings on the special verdicts. CP 246-55. At sentencing, the court found Sun to be a persistent offender and sentenced him to life without the possibility of early release on the burglary, trafficking, and

conspiracy charges. It imposed high end standard range sentences on the remaining two charges. CP 262. Sun file this timely appeal. CP 268.

2. Substantive Facts

Around 3:20 a.m. on December 17, 2011, the Sportco store in Fife was burglarized. 11RP 124-25. Police responded after alarms were set off inside the building near the gun counter. 11RP 126. When they arrived at 3:32 a.m. the burglars were no longer present. 11RP 133. A glass door was shattered, the gun counter was damaged, and 42 firearms were missing. 11RP 135, 141-42, 202. Detectives viewed the store surveillance video, but no attempt was made to collect identifying physical evidence because it appeared from the video that the burglars were wearing gloves. 11RP 210, 217.

The surveillance video showed a white vehicle drive past the front of the building and a similar vehicle drive past in the other direction a few minutes later. 11RP 239-40. This happened again a few minutes after that. 11RP 241-42. The white car next came into view in the parking lot and stopped, and shapes could be seen moving from the car to the area of the break in. The car moved away and a few minutes later was again seen stopped in front of the store briefly before driving off at 3:38 a.m. 11RP 242-43. The next thing the video showed was the police responding at 3:33 a.m. 11RP 243-44.

Detectives noticed that when the white car drove past the building about 20 minutes before the burglary, it was followed shortly thereafter by a Fife police car. 11RP 175, 184, 221. The police officer had come up behind the car at a stop light and run the license plate as part of a routine traffic patrol. 11RP 177. Police used the video and computer information from the police car to obtain the license plate number of the car. 11RP 182. The car, a white Honda, was registered to Phalay Soeung at a house on Yakima Avenue in Tacoma. 11RP 184-85. Over the next 10 days police located and set up surveillance on the white Honda. 11RP 226.

On December 20, 2011, police obtained information which caused them to suspect that David Bunta was involved in the burglary. 11RP 225-26. They set up surveillance of his home, workplace, and car. 11RP 226-28. On December 28, 2011, Bunta was arrested. His vehicle was seized and searched, and Bunta was interviewed about the Sportco burglary. 11RP 248-50. In the car police found a 9mm pistol, a Santa Claus suit, a GPS unit, two rolls of duct tape, two black masks, and four pairs of gloves. 12RP 292-92. Bunta admitted participating in the burglary and eventually pled guilty to charges stemming from that event. 13RP 590.

That same day, police conducted surveillance on the white Honda at the Yakima Avenue address. 11RP 250; 12RP 318. From a distance of

three blocks, the surveillance officer saw a man, later identified as Soeun Sun, walk into the alley behind the house where the car was parked. 12RP 369, 371. He was carrying something small in his hands, similar in size to a laptop computer. 12RP 371. When Sun got to the car he looked both directions down the alley before opening the trunk and putting the object inside. 12RP 369. Sun then got in the car and drove off. 12RP 370.

Officers followed Sun to a gas station about a mile from the house. 12RP 320. When Sun got out of the car, two officers approached him with guns drawn and took him into custody. 12RP 332, 373. Sun did not immediately identify himself because he had an outstanding DOC warrant, but a Tacoma police officer who was familiar with Sun identified him. Sun then provided his date of birth. 12RP 374; 14RP 701; CP 83. Sun was transported to the police station, and the Fife police contacted Sun's community corrections officer, who arrested him on the warrant. 12RP 343-44. The corrections officer looked through Sun's cell phone and noticed some text messages and photographs relating to firearm transactions. 12RP 346-47. He passed that information along to the police, who then obtained a warrant to search the phone. 11RP 255-56.

When police searched the white Honda that Sun had been driving, they found a handgun inside a backpack in the trunk. 11RP 252, 268. The gun was one of the firearms stolen from Sportco. 14RP 624. A round of

.40 caliber ammunition was found in the front center console, and some gloves and a GPS unit were found on the front floorboard. 11RP 268. Various documents were found in the glove compartment and on the floorboard, some containing Sun's name, and they were placed in evidence. 11RP 269; 14RP 625.

Police also searched the Yakima Avenue house, where Sun said he was living. 11RP 254. Sun lived at the house with his girlfriend, Phalay Soeung, and several members of her family. 13RP 544-45. One 9mm gun was located in the bedroom used by Sovannarith (Eddie) Soeung, Phalay's younger brother. 12RP 306; 13RP 514. A red Santa hat was found in the same room. 12RP 308.

During the investigation, Fife police learned that some of the firearms stolen from Safeco were being discovered by law enforcement in other jurisdictions. Ultimately nine of the 42 stolen guns were recovered, and police attempted to interview anyone associated with the guns. 11RP 263-64. In March, Wenatchee police contacted the Fife police with information about a gun. Based on that information the Fife detective interviewed Wayland Witten. That interview led to Alix Harris and Andrew Stearman, who were subsequently arrested. 11RP 261-63.

Stearman testified at trial that he had been charged with unlawful possession of a firearm and possession of a stolen firearm. 12RP 397. He

said he knew Sun and that the circumstances of his arrest involved Sun, but he did not recall seeing Sun in possession of any firearms. 12RP 396-98. Stearman acknowledged that he had spoken to law enforcement extensively, but he could not remember exactly what he said. 12RP 398. He admitted that he had told law enforcement that Sun had brought a bunch of firearms to his house on December 17, 2011, but he said that he never personally saw Sun with any guns. He got that information from his brother. 12RP 399.

Stearman also acknowledged several text conversations with Sun regarding money he had lent Sun, but he denied that those conversations had anything to do with guns. 12RP 400-01. He explained that he texted Sun on December 28, trying to find out when Sun would pay him. 12RP 409. He did not recall asking Sun for a gun. 12RP 409. He acknowledged referring to a gun in his texts, but he said he just wanted his money. 12RP 410, 413-14.

Next Stearman testified that he remembered a specific gun with the Second Amendment etched on it, and he said Sun brought that gun to his house on December 17, 2011. 12RP 401. Stearman said that Sun had given him that gun but then took it back. 12RP 411. He did not know why Sun gave him the gun, and he did not remember if Sun brought any other guns to his house that day. 12RP 402, 412.

Stearman testified that Sun did not contact him before coming to his house on December 17, and he did not know if he was there when Sun came to the house or when Witten came to pick up the guns. 12RP 405. He then said he did not remember Witten coming over to pick up any guns because he was not there. 12RP 406.

Stearman could not remember if he told detectives that Sun brought over a bag with six or seven guns a couple of days later. But he testified that he never saw a bag of guns at his house. He then acknowledged telling law enforcement that he had seen ten to 15 guns, but he explained that he was referring to what his brother had told him. 12RP 406.

After portions of Stearman's tape recorded statement to law enforcement were played at trial, Stearman acknowledged that he had told police that Sun said he had just stolen a bunch of guns. 12RP 417-18. Stearman then testified that Sun and two younger men brought a bunch of guns to his house, and he told the detectives that they were laughing and saying they stole the guns. 12RP 421-22. He believed that was the same time frame that Sun sold a bunch of guns to Witten. 12RP 424.

Stearman acknowledged that he had told the detective that Sun brought a duffle bag with guns in it to his house to sell to other people. He

testified, however, that he never personally saw the bag or the guns. 12RP 428-28.

On cross exam Stearman testified that he only saw Sun at his house one time, around December 27, 2011. He testified that he was not home on December 17, and he did not see Sun come to his house with a bag of guns that day. 13RP 464-65. The only gun he saw was the one with the etching. He had that gun for a day, and then Sun came and retrieved it. 13RP 465-66. Stearman further testified that he never saw Witten pick up any guns or bags at his house, and he never heard anyone say anything about guns being stolen. 13RP 466.

Although Stearman had initially testified that Sun sent him a photograph of a bunch of guns laid out on a bed, on cross exam he testified that the photograph in evidence was not the one Sun had sent. 12RP 402-03; 13RP 467. On redirect Stearman acknowledged that his testimony had changed since direct exam. 13RP 469. He had had a chance to talk with his lawyer and defense counsel, he went over dates and text messages, and he realized that his earlier testimony was incorrect. 13RP 469-70.

He also realized after talking to his lawyer and defense counsel that he had seen Sun on December 27 and not December 17. 13RP 472. He had been texting Sun about needing some kind of payment, and he

wanted a gun. He knew Sun would have a gun because he had sent a picture of about ten guns. 13RP 473-75. Sun drove to his house and gave him the gun, but the next day he took it back. Stearman said he did not know why Sun took the gun back, since he had already paid for it by loaning Sun money. 13RP 476-78.

Stearman acknowledged that he said in his statement that Sun and the others showed up at his house with guns they said they stole, and they wanted to sell the guns to Witten. Stearman did not know why he described these events as if he had witnessed them, however, because he was not present when those things happened. 13RP 479. He said it was true that Sun brought the guns to his house, because he saw a picture of them, but he did not see the actual guns. 13RP 490-91. He believed Sun dropped guns off at his house for Witten, but he did not see that happen, he did not see any guns, and he did not see Witten pick any guns up. 13RP 492-93.

Next, Phala Soeung testified that he was incarcerated in the Pierce County Jail from September 2011 through March 2012. At some point after December 2011 he was incarcerated in the same area as Sun. 13RP 497. He testified that he never had a conversation with Sun about guns. He had heard that Sun was a suspect, but he did not know why Sun was in

custody. He denied telling a detective or anyone that Sun had bragged about committing the Sportco burglary. 13RP 498.

Eddie Soeung was in custody at the time of trial, serving a sentence for unlawful possession of a firearm, based on the gun found in his room when the Yakima Avenue house was searched. 13RP 504, 514. He testified that he did not remember telling police that Sun and Bunta were hanging out together around that time. 13RP 511. He testified that he did not know how the gun came to be in his room, and he did not remember saying that Sun gave him the gun. 13RP 515. His guilty plea statement indicates that he knew the gun was stolen from Sportco, but he said he learned that information from the police. 13RP 517, 533.

Phalay Soeung testified that she has been romantically involved with Sun for nine or ten years, and they have a child together. 13RP 543-44. In December 2011 they both lived at her parents' house on Yakima Avenue, along with her children and her brothers and sisters. 13RP 544-45. She owns the white Honda that Sun was driving when he was arrested. 13RP 546. Sun also used the car, as did other members of her household, and she considered it a community car. 13RP 546, 549-51.

The State presented testimony from a gun salesman who was working at Sportco around the time of the burglary. He testified that the day before the burglary he had seen some suspicious people at the gun

counter. They were all wearing dark clothing with hoods over their heads, and they kept their heads down and their hands in their pockets. When he asked if they needed any help, they did not make eye contact but just moved down the length of the gun counter. 14RP 680-81. The witness testified that he had seen a number of tattoos on their necks and described a tattoo similar to one that Sun had. 14RP 682-83. These people left Sportco without any trouble. 14RP 683. Sun had told the police when he was interviewed that he had been to Sportco a couple of times with a couple of different people. 14RP 699-700.

The State also attempted to present testimony from Alix Harris, Wayland Witten, and David Bunta, after granting each of them transactional immunity.

Harris tried to “plead the Fifth,” and when he was told he could not, he testified that he could not remember anything. 13RP 556-562. The State then played his tape recorded interview with law enforcement over defense objection. 13RP 563, 565-66, 570, 575. The court instructed the jury that the recorded statement was admitted only for impeachment of Harris. CP 209.

Witten testified that he had pled guilty to possession of a stolen firearm but he refused to answer any questions about the circumstances of that offense. 13RP 581-84.

Bunta testified that he was convicted of first degree burglary, conspiracy to commit first degree burglary, trafficking in stolen property, and conspiracy to commit trafficking in stolen property. 13RP 590. He admitted that he burglarized Sportco on December 17, 2011, but he said did not recall any of the circumstances surrounding that offense. 13RP 590-93.

Following this testimony, the lead detective testified that he had interviewed Stearman, Harris, Bunta, Witten, and Phala and Eddie Soeung, and none of them had any significant trouble recalling events. 14RP 645-48. He testified that Eddie Soeung had said he got the gun found in his room from Sun. The detective also testified that Phala Soeung had told him that Sun bragged about committing the Sportco burglary. 14RP 649. The court instructed the jury that the detective's testimony could be used only for impeachment of those witnesses. CP 211-12.

The detective testified that the data retrieved from Sun's cell phone showed that several calls were made to and from Sun's phone within the timeframe of the burglary, which accessed cell phone towers near Sportco. 14RP 661-64. There were 20 calls to Bunta's phone on December 17, 2011, and five calls to Stearman on that same date. 14RP 698-99. Several

calls were made on December 24, 25, and 27, in the White Center area of Seattle, near the home of Stearman and Harris. 14RP 665-66.

Finally, the detective testified that although several of the guns that were recovered, including the one found in the white Honda, were tested for fingerprints, Sun's fingerprints were not found on any of them. 14RP 669.

C. ARGUMENT

1. EVIDENCE SEIZED AS RESULT OF THE UNLAWFUL STOP SHOULD HAVE BEEN SUPPRESSED.

The first police knew of Sun was when he was seen approaching the white Honda in the alley behind the Yakima Avenue house on December 28, 2011. 10RP 49, 51. Bunta had been arrested that same day. He admitted participating in the Sportco burglary and said others were involved, but he did not identify them. 10RP 52.

The case detective acknowledged that the police did not have probable cause to believe Sun was involved in the burglary. 10RP 53. Instead, police considered him a person of interest because of his proximity to the Honda 11 days later. 10RP 53, 65. Sun was seen placing a bag in the trunk of the car, but the officers had no idea what was in the bag and nothing about the bag indicated it was connected to the burglary. 10RP 66. Although police had conducted ongoing surveillance on the car,

which was moved several times, they had never identified a driver prior to Sun's arrest. 10RP 67.

Prior to trial defense counsel argued that Sun was arrested without probable cause, and all evidence and statements obtained as a result of that unlawful seizure should be suppressed. 10RP 76-77; CP 59-67. The court ruled, however, that police conducted a lawful Terry stop. It noted that police interview with Bunta, who said that two others were involved in the burglary with him, occurred almost contemporaneously with the police observation of Sun putting something in the car. 10RP 80. The court reasoned that while it had been 11 days since the burglary, the events of that day were "pretty fresh," and everything learned from Bunta went into creating an articulable suspicion that Sun was involved in criminal activity and connected to the burglary. 10RP 81. The court found this was a sufficient basis for the initial stop of the vehicle to identify the driver, and it denied the motion to suppress. 10RP 81-82.

An appellate court reviews the trial court's conclusions of law pertaining to a motion to suppress evidence de novo. State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002).

Both the federal and state constitutions prohibit unreasonable police seizures. Terry v. Ohio, 392 U.S. 1, 16-19, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968); State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833

(1999); U.S. Const., amend. IV; Wash. Const., art. 1, § 7. “All seizures of the person, even those involving only brief detentions, must be tested against the Fourth Amendment guaranty of freedom from unreasonable searches and seizures.” State v. Thompson, 93 Wn.2d 838, 840, 613 P.2d 525 (1980). Warrantless searches and seizures are unreasonable unless they fall within one of the “jealously and carefully drawn exceptions” to the warrant requirement. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979)). The State has the burden of proving that an exception to the warrant requirement applies. State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000), cert. denied, 531 U.S. 1104 (2001).

Generally, an official seizure of a person must be supported by probable cause, even if no formal arrest is made. Dunaway v. New York, 442 U.S. 200, 208, 99 S.Ct. 2248, 2254, 60 L.Ed.2d 824 (1979); State v. Broadnax, 98 Wn.2d 289, 293, 654 P.2d 96 (1982), abrogated on other grounds by Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). Exceptions to this general rule are narrowly drawn and carefully circumscribed. Broadnax, 98 Wn.2d at 293.

One such exception is a brief investigative detention, a Terry stop. Such a stop, although less intrusive than an arrest, is nevertheless a seizure and therefore must be reasonable under the Fourth Amendment and article

1, § 7 of the Washington Constitution. State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986); State v. Larson, 93 Wn.2d 638, 641, 611 P.2d 771 (1980). To justify a seizure on less than probable cause, Terry requires a well-founded suspicion, based on specific and articulable facts, that the person seized has or is about to engage in criminal activity. Terry, 392 U.S. at 21-22; Duncan, 146 Wn.2d at 172. The purpose of the Terry rule is to stop police from acting on mere hunches when interfering in people's lives. State v. Doughty, 170 Wn.2d 57, 63, 239 P.3d 573 (2010).

In Doughty, police detained the defendant on suspicion of drug activity after he approached a suspected drug house, stayed for two minutes, then drove away. Doughty, 170 Wn.2d at 59. When a license check showed that Doughty was driving with a suspended license, the officer arrested him and searched his car incident to arrest, finding methamphetamine. Doughty was charged with possession of a controlled substance, and he moved to suppress evidence obtained as a result of an unlawful investigative detention. Id. at 60. The trial court denied the motion, and the Court of Appeals affirmed. Id. at 61. The Supreme Court reversed, however, concluding that there was no legal basis for the Terry stop. Id. at 65.

The facts cited by the State to support the seizure included identification of the house as a drug house, complaints from neighbors,

Doughty visited the house at 3:20 a.m., and his visit lasted less than two minutes. Id. at 63. The Court noted that there was no informant's tip specific to Doughty, the officer observed no furtive movements, and there was no indication that he interacted with anyone at the house. Id. at 64. The Court concluded that these facts "fall short of the reasonable and articulable suspicion required to justify an investigative seizure under both the Fourth Amendment and article I, section 7." Id. at 62-63.

Here, as in Doughty, the circumstances did not give rise to a reasonable and articulable suspicion that Sun was engaged in criminal activity. Police saw Sun walk from the house to the car, carrying something small in his hands. He looked both directions in the alley as he put the object he was carrying into the trunk, and then he got into the car and drove to the gas station. The police officer was too far away to identify the object Sun was carrying, and, although police suspected the car was used in the burglary, the burglary had occurred 11 days earlier, and there was no reason to suspect that the object Sun was carrying was related to the burglary. There was also no information from Bunta or anyone else that Sun participated in the burglary. Certainly the police officer had a hunch that Sun was involved in the burglary, but that mere hunch is not sufficient to justify an investigative seizure.

Similarly, in State v. Martinez, 135 Wn. App. 174, 143 P.3d 855 (2006), the Court of Appeals found a Terry stop unlawful and reversed the conviction. There, an officer was patrolling an apartment complex in a high crime area where vehicle prowling had been reported in the past. He saw Martinez near some parked cars, and when Martinez spotted the officer he appeared nervous and walked quickly away. The officer asked Martinez if he lived there, and when he said he did not, the officer detained and frisked him. Martinez, 135 Wn. App. at 177. In reversing the conviction, the court noted that presence in a high crime area is not enough to justify a detention. “The circumstances must suggest a substantial possibility that the particular person has committed a specific crime or is about to do so.” Id. at 180 (citing State v. Garcia, 125 Wn.2d 239, 242, 883 P.2d 1369 (1994)). Without that particularized suspicion, the stop was unwarranted. Martinez, 135 Wn. App. at 181-82.

The officers in this case had no particularized suspicion that Sun was involved in criminal activity. The first they knew of him was when they saw him near the car. His actions were innocuous. He merely carried a small object to the car and placed it in the trunk. And this was far enough removed in time from the burglary that his proximity to a vehicle connected to the burglary was not sufficient to give rise to suspicion that Sun was involved.

If a Terry stop is unlawful, the fruits of that stop must be suppressed. Doughty, 170 Wn.2d at 65. All evidence and information obtained as a result of the unlawful stop in this case should be suppressed, including the gun found in the car and information obtained from Sun's cell phone. Sun's convictions must be reversed and the case remanded for a new trial without the unlawfully obtained evidence.

2. THERE WAS INSUFFICIENT EVIDENCE THAT SUN WAS ARMED WITH A FIREARM, AND HIS CONVICTIONS FOR BURGLARY, CONSPIRACY TO COMMIT BURGLARY, AND THE FIREARM SENTENCE ENHANCEMENTS MUST BE VACATED.

Defense counsel filed motions to dismiss the charges of first degree burglary and conspiracy to commit first degree burglary, which required the State to prove Sun or an accomplice was armed with a firearm. He also moved to dismiss the firearm sentence enhancement allegations. Counsel argued that case law requires a nexus between the weapon, the defendant, and the crime being committed, and thus, because there was no evidence that Sun was prepared to use a firearm during the commission of any of the charged offenses, the State had failed to prove he was armed. 14RP 709-11; CP 143-50. The trial court denied the motion, ruling that the evidence was sufficient to present the issue to the jury. 14RP 721, 724.

In every criminal prosecution, the State must prove all elements of a charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Therefore, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992); State v. Green, 94 Wn. 2d 216, 616 P.2d 628 (1980).

To convict Sun of first degree burglary as charged in this case, the State had to prove that Sun unlawfully entered or remained in a building with intent to commit a crime therein, and that in entering, while in the building, or in immediate flight therefrom, Sun or an accomplice was armed with a deadly weapon. See RCW 9A.52.020. The conspiracy charge required proof of an agreement to commit first degree burglary and a substantial step toward that end. See RCW 9A.28.040.

There was evidence here that the Sportco store was broken into at night and firearms were stolen. A firearm is a deadly weapon. RCW 9A.04.110(6). The issue in this case is whether the State proved that

anyone involved in the burglary was armed. The mere presence and access to a weapon is insufficient to establish that a defendant is armed. State v. Schelin, 147 Wn.2d 562, 568, 55 P.3d 632 (2002). Rather, the State must also show a nexus between the weapon and the defendant and between the weapon and the crime. Id.; State v. Brown, 162 Wn.2d 422, 430, 432, 173 P.3d 245 (2007).

In Brown, the Court applied the nexus requirement to both a first degree burglary charge and a firearm sentence enhancement. Brown, 162 Wn.2d at 430, 432. In that case, the defendants moved a rifle from a closet to a bed but then fled the home empty-handed when the homeowner returned unexpectedly. Id. at 426. Brown was charged with first degree burglary based on the allegation that he was armed with a deadly weapon, the rifle found on the bed. Id. at 427. After a bench trial the court concluded that the gun lying on the bed was readily accessible to anyone committing the burglary. It found Brown guilty of first degree burglary and imposed a firearm sentence enhancement. Id. The conviction and enhancement were affirmed on appeal. Id.

The Supreme Court reversed both the first degree burglary conviction and the firearm enhancement. It concluded that the evidence was insufficient to establish that the defendant was armed, since there was

no nexus between the firearm, the defendant, and the crime. Id. at 423, 435.

The Court noted that the only evidence supporting the burglary charge and firearm enhancement was that the rifle was moved from the closet to the bed during the burglary. It then examined whether moving a weapon during a burglary is sufficient to establish that the defendant was armed. Id. at 431. The Court recognized that “the mere presence of a deadly weapon at the scene of the crime, mere close proximity of the weapon to the defendant, or constructive possession alone is insufficient to show that the defendant is armed.” Id. at 431 (citing State v. Barnes, 153 Wn.2d 378, 383, 103 P.3d 1219 (2005); Schelin, 147 Wn.2d at 567; State v. Gurske, 155 Wn.2d 134, 138, 118 P.3d 333 (2005)). Rather, a person is armed only if the deadly weapon is easily accessible and readily available for use, and “there must be a nexus between the defendant, the crime, and the weapon.” Brown, 162 Wn.2d at 431. For this nexus to exist, there must be evidence of the defendant’s or an accomplice’s intent or willingness to use the weapon in furtherance of the crime. Id. at 432, 434.

The Court specifically rejected the idea that any actual possession of the weapon during the crime necessarily establishes a nexus. It is not enough simply to show that the weapon was accessible. Thus, the fact that Brown or an accomplice moved the rifle to the bed in preparation for

stealing did not establish that Brown was armed. Id. at 432-33. Because the facts suggested that “the weapon was merely loot, and not there to be used,” the fact that the weapon was briefly in the burglar’s possession did not make Brown armed. Id. at 434-35. As the concurrence pointed out, calling a defendant armed when the gun is not used to facilitate the crime but is instead merely the object of the crime robs the term “armed” of any meaningful nexus between the defendant, the crime, and the weapon. It also robs the term of its actual meaning. Brown, 162 Wn.2d at 436 (Sanders, J., concurring).

Here, there was no evidence that anyone involved in the Sportco burglary intended or was willing to use the stolen firearms in furtherance of the crime. Instead, the evidence establishes only that the firearms were the object of the crime. Without this nexus between the defendants, the firearms, and the crime, the evidence is insufficient to sustain the convictions for first degree burglary and conspiracy to commit first degree burglary or the firearm enhancements associated with those offenses. Similarly, there was no evidence that anyone involved in trafficking the stolen firearms intended or was willing to use the firearms to facilitate the trafficking, and the evidence was insufficient to sustain the firearm enhancement on that offense.

The court below ruled that there was sufficient evidence that Sun was armed to present the issue to the jury, relying on State v. Hernandez, 172 Wn. App. 537, 290 P.3d 1052 (2012), review denied, 177 Wn.2d 1022 (2013). In Hernandez, this Court held that the defendants were armed for the purposes of the first degree burglary conviction because one of the defendants carried the gun they were stealing to the waiting vehicle. Hernandez, 172 Wn. App. at 542. The Court examined the statutory definition of “deadly weapon,” noting that there are two categories of deadly weapons: deadly weapons per se, and deadly weapons in fact. By statute, a firearm is a deadly weapon per se, while other weapons are considered deadly based on the circumstances under which they are used, attempted to be used, or threatened to be used. Id. at 543; RCW 9A.04.110(6). Thus, when the first degree burglary involves a firearm, there is no need to analyze the willingness or present ability to use the firearm in determining whether the deadly weapon element is established. Hernandez, 172 Wn. App. at 543 (citing In re Pers. Restraint of Martinez, 171 Wn.2d 354, 367, 256 P.3d 277 (2011)).

The question addressed in Martinez was whether the weapon involved in the burglary was a deadly weapon. Martinez carried a knife in a sheath on his belt during a burglary. Martinez did not dispute that he was “armed” but instead argued that the evidence was insufficient to

support the “deadly weapon” element of first degree burglary. Martinez, 171 Wn.2d at 364. Noting the statutory distinction between a deadly weapon per se and a deadly weapon in fact, the court concluded that the knife did not constitute a deadly weapon in that case because there was no evidence Martinez used, attempted to use, or threatened to use it in a deadly manner. Id. at 364-69.

In Hernandez, relying on the fact that the case involved a firearm, a deadly weapon per se, this Court concluded that because the defendants had actual possession of a firearm when one of them carried it out of the house to their vehicle, there was sufficient evidence to support the first degree burglary conviction, even though there was no evidence that they intended to use the gun. Hernandez, 172 Wn.2d at 544.

But determining that the weapon present at the scene was in fact a deadly weapon does not answer the question posed here: whether the defendant was armed with that weapon. That is the question addressed in Brown. Brown makes it clear that actual possession of a firearm at the scene of the crime is not enough to establish that the defendant was armed. There must be a nexus between the defendant, the firearm, and the circumstances of the crime which establishes an intent or willingness to use the firearm in the commission of the crime.

Hernandez distinguished the Brown holding that a nexus is required, stating that “the Brown analysis encompasses both first degree burglary and firearm sentence enhancements and that Brown’s nexus requirements pertained to firearm sentence enhancements.” Hernandez, 172 Wn. App. at 544. But in Brown, the defendant argued that the nexus test should have been applied to determine whether he was armed for both the first degree burglary conviction and the firearm sentence enhancement, and the Supreme Court agreed. Brown, 162 Wn.2d at 430. It vacated not only the deadly weapon enhancement but the first degree burglary conviction as well, because the facts did not establish a nexus between the weapon, the defendant, and the crime. Brown, 162 Wn.2d at 433-35.

Like Brown and unlike Hernandez, this case involves both a first degree burglary conviction and firearm enhancements, and thus the nexus requirement applies. Because the evidence did not establish a nexus between the defendant, the firearms, and the charged offenses, the convictions for first degree burglary and conspiracy to commit first degree burglary and all the firearm sentence enhancements must be vacated.

3. EVEN IF THERE WAS SUFFICIENT EVIDENCE TO PRESENT THE BURGLARY AND CONSPIRACY CHARGES TO THE JURY, THE COURT’S FAILURE TO INSTRUCT THE JURY ON THE NEXUS REQUIREMENT REQUIRES REVERSAL.

The trial court instructed the jury that to convict Sun of first degree burglary, it had to find that he or an accomplice was armed with a firearm. CP 228. It then instructed the jury that

“Armed with a firearm”, for the charge of Burglary in the First Degree only, means that the defendant or an accomplice had a firearm in his possession or control and that the firearm, whether loaded or not, was readily available for his offensive or defensive use.

CP 230 (Instruction No. 25(a)). Defense counsel objected to this instruction, because it does not include the nexus requirement. 15RP 761.

As discussed above, the State proves that a defendant is armed with a deadly weapon only when the evidence establishes a nexus between the defendant, the weapon, and the crime. Possession and accessibility alone are not sufficient; instead, there must be evidence of intent or willingness to use the firearm. Brown, 162 Wn.2d at 432-34. The trial court’s definition of “armed with a firearm” omitted this nexus requirement, and thus it failed to inform the jury of this necessary component of the State’s proof. See State v. Easterlin, 159 Wn.2d 203, 206, 149 P.3d 366 (2006) (the connection between the weapon, the defendant, and the crime is definitional, a component of what the State must prove to establish that the defendant was armed while committing the crime). Worse than leaving the term undefined, the court actually defined it incorrectly.

Instructional error is presumed prejudicial unless the record affirmatively shows it was harmless beyond a reasonable doubt. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). “In order to hold the error harmless, we must ‘conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.’” State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). Here, if there was any evidence from which the jury could find that the burglars intended or were willing to use the firearms to facilitate the burglary, that evidence cannot be characterized as uncontroverted. In fact, defense counsel argued in closing that the guns taken from Sportco were nothing more than the fruits of the burglary, not weapons to be used in the commission of the crime. 15RP 834. That argument might have carried some sway with the jury if it were not for the court’s erroneous instruction. The erroneous instruction cannot be deemed harmless, and Sun’s convictions of first degree burglary and conspiracy to commit first degree burglary must be reversed.

4. THE TRIAL COURT DENIED SUN A FAIR TRIAL BY REFUSING TO INSTRUCT THE JURY ON SECOND DEGREE BURGLARY AND CONSPIRACY TO COMMIT SECOND DEGREE BURGLARY.

The constitutional right to due process of law provides all defendants the right to a fair trial. U.S. Const. amends. V, XIV; Wash. Const. art. I § 3. Defendants are also constitutionally entitled to a trial by jury. U.S. Const. amend. VI; Wash. Const. art. I § 21. Jury instructions are designed to “furnish guidance to the jury in its deliberations, and to aid it in arriving at a proper verdict, ...to point out the essentials to be proved on the one side or the other, and to bring into view the relation of the particular evidence adduced to the particular issues involved.” State v. Allen, 89 Wn.2d 651, 654, 574 P.2d 1182 (1978). Instructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case. State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). A defendant is entitled to jury instructions embodying his theory of the case if there is evidence to support that theory. State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997). A trial court’s refusal to so instruct the jury constitutes reversible error. Warden, 133 Wn.2d at 564.

Trial counsel proposed instructions on second degree burglary and conspiracy to commit second degree burglary, because the evidence did

not establish that anyone involved in the burglary was armed<sup>2</sup>. 14RP 712; CP 138-42. The court ruled that the evidence did not support these instructions. It reasoned that if the jury determined that Sun was responsible for stealing the guns, it could only find him guilty of first degree burglary. 14RP 735. Defense counsel took exception to the court's refusal to instruct the jury on the lesser included offenses. 15RP 760.

Under RCW 10.61.003, a defendant is entitled to an instruction on an inferior degree offense when (1) the statutes for both the charged offense and the proposed inferior degree offense “proscribe but one offense”; (2) the information charges an offense that is divided into degrees and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense. State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (citing State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)). The Legislature has defined burglary as a single offense divided into three degrees, and second degree burglary is an inferior degree of the charged offense. Thus the first two elements are established. See State v. McDonald, 123 Wn. App. 85, 90, 96 P.3d 468 (2004).

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<sup>2</sup> Second degree burglary does not require proof that any of the participants was armed: “A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.” RCW 9A.52.030.

The factual prong is established when the evidence in the case supports an inference that only the lesser offense was committed to the exclusion of the greater offense. Fernandez-Medina, 141 Wn.2d at 455. Specifically, an inferior degree offense instruction should be given "if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." Id. at 456 (quoting Warden, 133 Wn.2d at 563 (citing Beck v. Alabama, 447 U.S. 625, 635, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980))). When determining whether the evidence at trial warranted an inferior degree offense instruction, the appellate court must view the evidence in the light most favorable to the party requesting the instruction. Fernandez-Medina, 141 Wn.2d at 455-56.

Considering the evidence in the light most favorable to Sun, the jury could find from the evidence that no one involved in the burglary was armed. First, there was no evidence indicating a willingness or intent to use the stolen guns. Moreover, as defense counsel argued, the surveillance video showed two people carrying guns from the store in bags held under their arms, from which position the guns were not readily available for offensive or defensive use. 15RP 834.

The trial court declined to give the requested instructions, however, reasoning that since there was no evidence that anything other than firearms were stolen, the only crime that could have been committed

was first degree burglary. The only question for the jury was whether Sun was involved. 14RP 735. The court's reasoning assumes that where guns are stolen, the defendant is necessarily armed with a firearm. The court relied on State v. Speece, 56 Wn. App. 412, 783 P.2d 1108 (1989), affirmed, 115 Wn.2d 360, 362, 798 P.2d 294 (1990), wherein the Court of Appeals held that where the defendant takes guns during a burglary, the evidence supports a finding that the defendant was armed, and no analysis of the defendant's willingness or ability to use the guns is necessary. Speece, 56 Wn. App. at 418. Thus where defendant testified that he did not commit the burglaries, but did not challenge the fact that guns were taken, the evidence did not support instructions on second degree burglary. Id. at 419-20.

The problem with the trial court's ruling in this case, as well as the holding in Speece, is the assumption that a defendant who takes guns during a burglary is necessarily armed. But Speece predates Brown, where the Supreme Court clarified what must be proved in order to establish that the defendant was armed. The Brown Court rejected the idea that mere possession of a gun taken during a burglary is sufficient to establish that a defendant is armed, because "[s]howing that a weapon was accessible during the crime does not necessarily show a nexus between the crime and the weapon." Brown, 162 Wn.2d at 432.

A defendant is entitled to jury instructions embodying his theory of the case if there is evidence to support that theory. Warden, 133 Wn.2d at 563. Where the evidence supports an inference that the lesser offense was committed, the defendant has the right to have the jury consider that lesser offense. Warden, 133 Wn.2d at 564. Because the evidence, viewed in the light most favorable to Sun, supported an inference that he committed second degree burglary rather than first degree burglary as charged, he had the right to have the jury consider the lesser offense. See Warden, 133 Wn.2d at 564.

A court commits reversible error when it refuses to instruct the jury on an inferior degree offense where the evidence supports such instructions. Warden, 133 Wn.2d at 563-64. There was evidence in this case to support an inference that Sun committed only second degree burglary. The court's refusal to instruct the jury the lesser offense denied Sun a fair trial and requires reversal.

5. THE TRIAL COURT'S REFUSAL TO GIVE THE REQUESTED INSTRUCTION LIMITING THE USE OF STEARMAN'S RECORDED STATEMENT DENIED SUN A FAIR TRIAL.

When he was arrested, Andrew Stearman gave a recorded statement to police saying that Sun and two younger men brought a bag of guns to his house on December 17, 2011. The men were laughing and

saying they stole the guns. 12RP 421-22. These guns were later picked up by Wayland Witten, who was going to sell them. 12RP 426. When the State asked Stearman about these events at trial, Stearman said that he never actually saw Sun, the other men or the guns, and he never saw Witten pick the guns up. 12RP 427-29. He explained that everything he told police in his statement was information he learned from his brother. 12RP 399, 406, 425.

The State asked Stearman about specific statements made to the police. Several times Stearman said he did not remember making the statements, but when the State played portions of the recording, he acknowledged the statements and offered explanations. 12RP 417-18, 422, 424-25, 427. Stearman specifically acknowledged that he never told police that the information he was providing came from his brother, and his recorded statement sounded as if he was talking about something he had personally witnessed. 12RP 426; 13RP 479. He repeated, however, that he did not see Sun on December 17, and he never saw a bag of guns. 13RP 465-66, 489-92.

During the course of Stearman's testimony, most of his recorded interview was played for the jury. At the close of evidence, defense counsel requested an instruction limiting the jury's use of the recorded statement to impeachment. 14RP 636. Counsel argued that the recorded

statements were hearsay and served only to impeach Stearman's trial testimony, and there was no basis for admitting them as substantive evidence. 14RP 727.

The court disagreed. It stated that since the video was played to refresh Stearman's recollection and he answered questions in response, it was substantive evidence. 14RP 637. The court explained that Stearman admitted making some of the statements in the recorded interview, and he expressed confusion as to others. He was also subject to cross exam regarding the statements, and he attempted to clarify them in contravention of what he said in the recorded interview. The court did not believe the prior statements were merely impeachment because several times Stearman tried to help Sun by saying he had never seen Sun with guns. 14RP 732. The court said the jury needed to filter the various statements to determine Stearman's credibility and the weight of his testimony, and it refused to limit the prior statements to impeachment. 14RP 732. Defense counsel took exception to the court's refusal to give a limiting instruction as to Stearman's recorded statements. 15RP 760.

A recorded statement to police is inadmissible hearsay unless it falls within an exception to the hearsay rule. State v. Nava, 177 Wn. App. 272, 290, 311 P.3d 83 (2013), review denied, 179 Wn.2d 1019 (2014). The court below concluded that Stearman's recorded statements qualified

for admission as substantive evidence as a recorded recollection. A record qualifies as a recorded recollection if it is

[a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.

ER 803(a)(5). A recorded recollection is admitted as substantive evidence. Nava, 177 Wn. App. at 290.

The proponent of evidence has the burden of proving that a foundation for admission exists. State v. Benn, 120 Wn.2d 631, 653, 845 P.2d 289 (1993) (citing State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981)). Before evidence may be admitted under the recorded recollection exception, the proponent must establish four foundational elements: “(1) the record pertains to a matter about which the witness once had knowledge, (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony, (3) the record was made or adopted by the witness when the matter was fresh in the witness's memory, and (4) the record reflects the witness's prior knowledge accurately.” Nava, 177 Wn. App. at 290.

The State did not establish this foundation. There is no indication in the record that Stearman lacked sufficient memory about the events in question to testify about them. While Stearman did not remember exactly

what he said to police in his recorded statement, he never claimed that he did not remember the events being described. He simply testified inconsistently with his prior statements. When he spoke to police he claimed to have firsthand knowledge of the events he was describing, while at trial he said he learned about the events from his brother. Moreover, Stearman did not talk to the police until April 2012, several months after those events. 13RP 467. Thus there is no indication that the record was made when the events were fresh in his mind. Stearman's recorded statements were not admissible as substantive evidence under ER 803(a)(5).

Instead, the record establishes that Stearman's recorded statements were properly admitted to impeach his credibility. A witness may be impeached with prior out of court statements of material fact that are inconsistent with his testimony in court. ER 607; ER 613; State v. Clinkenbeard, 130 Wn. App. 552, 569, 123 P.3d 872 (2005); State v. Dickenson, 48 Wn. App. 457, 466, 740 P.2d 312, review denied, 109 Wn.2d 1001 (1987). Because such impeachment evidence goes only to the witness's credibility, it may not be considered as proof of the substantive facts encompassed by the evidence. Clinkenbeard, 130 Wn. App. at 569; State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985).

Prior inconsistent statements are not admitted under the assumption that the trial testimony is false and the earlier statements are true. Rather, the theory is that if a person says one thing on the witness stand, having said something else previously, there is a doubt as to the truthfulness of both statements. State v. Williams, 79 Wn. App. 21, 26, n. 14, 902 P.2d 1258 (1995) (citing 1 McCormick on Evidence § 34, at 114 (4<sup>th</sup> ed. 1992)). "These inconsistencies are important, not because one version of the events is more believable than the other, but because they raise serious questions about [the declarant's] credibility and perceptions." State v. Newbern, 95 Wn. App. 277, 295, 975 P.2d 1041, review denied, 138 Wn.2d 1018 (1999).

The court's explanation for its ruling demonstrates that this evidence was indeed impeachment. The court noted that there was a whole variety of statements out there for the jury to filter. Stearman admitted making some prior statements that were inconsistent with what he said on the stand, and he attempted to explain the differences, making his trial testimony more helpful to the defense. The court stated that the jury needed to determine Stearman's credibility and the weight to give his trial testimony. 14RP 731-32. What the court failed to recognize is that the issue of Stearman's credibility could be decided without allowing the jury to consider the substance of his prior statements. The information

that was relevant to credibility was the fact that Stearman had said different things at different times. The questionable credibility of the State's witness does not allow the State to bolster its case by relying on hearsay as substantive evidence.

When evidence is admissible for one purpose but not another, the court must give a limiting instruction on request by either party. ER 105; State v. Gallagher, 112 Wn. App. 601, 611, 51 P.3d 100 (2002), review denied, 148 Wn.2d 1023 (2003). Thus, where prior inconsistent statements are admitted to impeach a witness, "an instruction cautioning the jury to limit its consideration of the statement to its intended purpose is both proper and necessary." Johnson, 40 Wn. App. at 377 (citing State v. Pitts, 62 Wn.2d 294, 297, 382 P.2d 508 (1963)).

It can be difficult for a jury to grasp "the subtle distinction between impeachment and substantive evidence." State v. Hancock, 109 Wn.2d 760, 764, 748 P.2d 611 (1988). The court's refusal to give the limiting instruction requested by the defense ensured that the jury would consider the substance of Stearman's prior statements as proof of Sun's guilt. It was Stearman's prior statements which tied Sun to the burglary, to Bunta, to the guns, and to the plan to sell the guns through Witten. Without the proper and necessary limiting instruction, those statements unfairly bolstered the State's case and led to Sun's convictions.

While due process does not guarantee a perfect trial, both the state and federal constitutions guarantee all criminal defendants a fair trial. U.S. Const. amend V; Wash. Const. art. I § 3. The court's failure to give the requested limiting instruction made it impossible for Sun to receive a fair trial, and reversal is required.

6. DEFENSE COUNSEL'S FAILURE TO EXAMINE THE STATE'S EXHIBITS AND OBJECT TO THE PROSECUTOR'S MISREPRESENTATION DURING CLOSING ARGUMENT CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment to the United States Constitution guarantees “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.” U.S. Const. amend. VI. The Washington State constitution similarly provides “[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. art. I, § 22 (amend.10). This constitutionally guaranteed right to counsel is not merely a simple right to have counsel appointed; it is a substantive right to meaningful representation. See Evitts v. Lucey, 469 U.S. 387, 395, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (“Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits.”); Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct.

2052, 80 L.Ed.2d 674 (1984) (“The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.”) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435 (1942)) .

The primary importance of the right to counsel cannot be overemphasized: “[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.” State v. McDonald, 96 Wn. App. 311, 316, 979 P.2d 857 (1999) (quoting Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L.Rev. 1, 8 (1956)). Left without the aid of counsel, the defendant “may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.” McDonald, 96 Wn. App. at 316 (quoting Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 55, 77 L.Ed. 158 (1932)).

A defendant is denied his right to effective representation when his attorney’s conduct “(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney’s conduct.” State v. Benn, 120

Wn.2d 631, 663, 845 P.2d 289 (citing Strickland, 466 U.S. at 687-88), cert. denied, 510 U.S. 944 (1993). In this case, trial counsel's failure to examine the State's exhibit and object to the prosecutor's misrepresentation of the evidence during closing argument constituted deficient performance which prejudiced the defense.

The case detective testified at trial that when he searched the white Honda, he found several documents in the car, some of which had Sun's name on them. 11RP 269; 14RP 624. He picked up all the documents in the car with identifying information, and he placed them in evidence. 14RP 666. The court admitted these documents over defense objection that they were unduly prejudicial. 14RP 638-40.

Then, during closing argument, the prosecutor addressed the documents found in the car. He argued that Sun was driving the car that was connected to the burglary and in which the gun was found. He attempted to dismiss any contention that someone else could have been involved in the burglary and trafficking by arguing that the only names on the documents found in the car were Sun's and Phalay's. 15RP 802. Defense counsel did not object to this argument.

After closing arguments, the attorneys were going through the exhibits and discovered that the documents removed from the white Honda in fact contained other names as well. The prosecutor

acknowledged that the fact that there were other names in the documents undercut his argument that only Sun and Phalay drove the car. 15RP 867-69. Both the prosecutor and defense counsel were under the mistaken impression that the detective had testified that there were no other names on the documents, and they admitted they had not gone through the documents earlier. 15RP 870-71. Defense counsel moved for a mistrial on the grounds that the detective had provided inaccurate testimony which had gone unchallenged, and counsel had not had the opportunity to call the jury's attention to it. 15RP 872. After discussing several options, the court denied the motion for mistrial and ruled that the exhibit would go to the jury without further evidence or argument. 15RP 877.

The error that occurred was not inaccurate testimony by the detective, as defense counsel posited. The error was a misrepresentation of the evidence by the prosecutor to which defense counsel failed to object. A prosecutor's closing argument must be confined to the trial evidence and reasonable inferences therefrom. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). The evidence here was that Sun's name was on some of the documents found in the car. It was not a reasonable inference that only Sun's and Phalay's names were on the documents; indeed, that was not the truth, and the prosecutor's claim to that effect during closing argument constituted misconduct. But trial

counsel did not object to the prosecutor's misrepresentation of the evidence. Nor did he examine the exhibit which would have clearly contradicted the prosecutor's erroneous claim. This was not a strategic decision by trial counsel. His representations to the court after closing arguments made it clear that he was under the mistaken impression that the prosecutor's claim was correct. 15RP 870-72. In this respect counsel's performance was deficient.

Moreover, this deficient performance was prejudicial. No one testified at trial that Sun was involved in the burglary, and he could not be identified from the surveillance video. The State's case against Sun on the burglary charge rested on connecting him to the white Honda shown in the video. That car was registered to Phalay at the address on Yakima Avenue where she lived with several members of her family, as well as Sun. Phalay testified that the car was a community car, that she kept the keys hanging in the hallway, that anyone in the house could use it, and that her brothers and father often drove the car. 13RP 549-51. The State needed to show that Sun was driving the car on the night of the burglary, and it tried to do so by arguing that no one but Phalay and Sun used the car. A proper objection to the prosecutor's misrepresentation about the documents in the car would have seriously undercut the State's theory of

the case. There is a reasonable probability that counsel's error affected the outcome of the case, and Sun's convictions must be reversed.

7. IMPOSITION OF THE PERSISTENT OFFENDER SENTENCE DEPRIVED SUN OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A JURY TRIAL.

a. **Due process requires that a jury find beyond a reasonable doubt any fact that increases the defendant's maximum possible sentence.**

The Fourteenth Amendment to the United States Constitution provides that no person shall be deprived of liberty without due process of law. U.S. Const., amend XIV. The Sixth Amendment also guarantees a criminal defendant the right to a jury trial. U.S. Const., amend. VI. The constitutional rights to due process and a jury trial "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (quoting United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)). Together these constitutional clauses guarantee the right to have a jury find beyond a reasonable doubt, every fact essential to punishment, regardless of whether that fact is labeled an "element." Apprendi, 530 U.S. at 490. It violates the constitution "for a legislature to remove from the jury the assessment of

facts that increase the prescribed range of penalties to which a criminal defendant is exposed.” Id.

An accused’s constitutional rights to a jury trial and due process require the government to submit to a jury and prove beyond a reasonable doubt any “fact” upon which it seeks to rely to increase punishment above the maximum sentence otherwise available for the charged crime. Descamps v. United States, \_\_\_ U.S. \_\_\_, 133 S.Ct. 2276, 2285-86, 186 L.Ed.2d 438 (2013); Alleyne v. United States, \_\_\_ U.S. \_\_\_, 133 S.Ct. 2151, 2155, 186 L.Ed.2d 314 (2013).

[A]ny possible distinction between an “element” of a felony offense and a “sentencing factor” was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding. Accordingly, we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt.

Washington v. Recuenco, 548 U.S. 212, 220, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). Here, the prior convictions found by the court increased Sun’s sentence to life without the possibility of parole and were thus elements of the offense which were required to be proved to a jury beyond a reasonable doubt. Alleyne, 133 S.Ct. at 2155 (“Any fact that, by law, increases the penalty for a crime is an ‘element’ that must be submitted to the jury and found beyond a reasonable doubt.”).

- b. Sun had the constitutional right to have a jury determine beyond a reasonable doubt that he committed the two prior “strike” offenses because they increased his maximum sentence.**

Absent the court’s finding, by a preponderance of the evidence, that Sun committed two prior strike offenses, he would not have been subject to a sentence of life without the possibility of parole. The jury verdict for first degree burglary, the most serious offense he was convicted of, does not support this sentence standing alone. RCW 9A.52.020 (first degree burglary is a class A felony); RCW 9.94A.510 (sentencing grid). Because the facts used to impose the sentence of life without parole were not found by a jury beyond a reasonable doubt, Sun’s Sixth and Fourteenth Amendment rights were violated.

Any argument that there is a “prior conviction exception” to the rule overlooks important distinctions and developments in United States Supreme Court jurisprudence. See Apprendi, 530 U.S. at 489.

First, the Supreme Court has implicitly overruled the case on which this supposed exception was based, Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). In Apprendi, the Court recognized that “it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested.”

Apprendi, 530 U.S. at 489. The Court therefore treated Almendarez-Torres as a “narrow exception” to the rule that a jury must find beyond a reasonable doubt any fact that increases the statutory maximum sentence for a crime. Id.

A member of the 5-justice majority in Almendarez-Torres, Justice Thomas, has since retreated from the majority holding. His Apprendi concurrence noted extensively the historical practice of requiring the State to prove every fact, “of whatever sort, including the fact of a prior conviction,” to a jury beyond a reasonable doubt. Apprendi, 530 U.S. at 501 (Thomas, J., concurring). As Justice Thomas noted, “a majority of the Court now recognizes that Almendarez-Torres was wrongly decided.” Shepard v. United States, 544 U.S. 13, 27, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (Thomas, J., concurring). Moreover, although the continuing validity of Almendarez-Torres was not before the Court in Alleyne, Justice Thomas further emphasized his retreat from the holding in authoring Alleyne. Alleyne, 133 S.Ct. at 2155, 2160 n.1.

Even if Almendarez-Torres has precedential value, it is distinguishable on several grounds. First, in Almendarez-Torres, the defendant had admitted the prior convictions. Apprendi, 530 U.S. at 488. Sun did not admit his prior convictions. Second, the issue in Almedarez-Torres was the sufficiency of the charging document not the right to a jury

trial or proof beyond a reasonable doubt. See Apprendi, 530 U.S. at 488; Almendarez-Torres, 523 U.S. at 247-48. Third, Almendarez-Torres dealt with the “fact of a prior conviction.” Apprendi, 530 U.S. at 490. Here, the simple “fact” of the prior convictions did not increase Sun’s punishment; rather, it was the “types” of prior convictions that mattered. To impose a life sentence under the POAA, the State must prove the defendant has been convicted of “most serious” offenses on two prior occasions. RCW 9.94A.030(37); RCW 9.94A.570. Fourth, the Almendarez-Torres court noted the fact of prior convictions triggered an increase in the maximum permissive sentence: “[T]he statute’s broad permissive sentencing range does not itself create significantly greater unfairness” because judges traditionally exercise discretion within broad statutory ranges. 523 U.S. at 245. Here, in contrast, the alleged prior convictions led to a mandatory sentence of life without the possibility of parole, a sentence much higher than the top of the permissive standard range. RCW 9.94A.570. Thus, the constitutional concern here resembles Alleyne, in which the Court held that any fact that increases a mandatory minimum sentence must be proved as an element, more than Almandarez-Torres. Alleyne, 133 S.Ct. at 2155. Accordingly, even if Almandarez-Torres were still good law, it would not apply here.

Judge Quinn-Brintnall of this Court has recognized that Supreme Court precedent requires the State to prove prior “strike” offenses to a jury beyond a reasonable doubt. State v. Witherspoon, 171 Wn. App. 271, 308-15, 286 P.3d 996 (2012), review granted by 177 Wn.2d 1007, 300 P.3d 416 (2013) (argued Oct. 22, 2013); State v. McKague, 159 Wn. App. 489, 246 P.3d 558 (2011) (Quinn-Brintnall, J., concurring in part and dissenting in part), aff’d on other grounds, 172 Wn.2d 802 (2011). Although the Washington Supreme Court has rejected the argument Sun makes here, Judge Quinn-Brintnall has noted that subsequent United States Supreme Court cases clarified the meaning of the Sixth and Fourteenth Amendment rights set forth in Apprendi and invalidated our State’s intervening case law. McKague, 159 Wn. App. at 530 (Quinn-Brintnall, J., dissenting) (citing Blakely v. Washington, 542 U.S. 296, 303-04, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Cunningham v. California, 549 U.S. 270, 281-88, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007)). Under recent United States Supreme Court Cases, the “prior conviction exception does not apply in cases where the trial court wishes to impose a sentence in excess of the statutory maximum without a supporting jury verdict.” Id. at 535. This Court should follow United States Supreme Court precedent and hold that prior “strike” offenses must be proved to a jury beyond a reasonable doubt.

- c. Because the sentence of life without parole was not authorized by the jury's verdict, the case should be remanded for resentencing within the standard range.**

The imposition of a sentence not authorized by the jury's verdict requires reversal. State v. Williams-Walker, 167 Wn.2d 889, 900, 225 P.3d 913 (2010) (reversing sentence enhancement where jury not asked to find facts supporting it, even though overwhelming evidence of firearm use was presented). The jury did not find beyond a reasonable doubt the facts necessary to support the sentence of life without the possibility of parole imposed upon Sun. His sentence should be reversed and remanded for the imposition of a standard range sentence.

- d. In the alternative, under the traditional Mathews procedural due process analysis, proof to a jury beyond a reasonable doubt is required to confine an accused to life without parole under our State constitution.**

In the alternative, this Court should hold that a procedural due process analysis under Mathews v. Eldridge requires that a POAA sentence be imposed only if the prior serious offenses are found by a jury beyond a reasonable doubt. The government may not deprive a person of life, liberty, or property without due process of law. U.S. Const. amend XIV; Const. art. I, § 3. A procedural due process claim requires the court to balance three factors. Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893,

47 L.Ed.2d 18 (1976). First, the court must consider private interest at stake. Second, the court looks to the risk of erroneous deprivation under the existing procedure and the probable value of additional or substitute procedures. Third, the court regards government's interest in maintaining the existing procedure. Id.

Under the first factor, the accused has a strong private interest at stake in persistent offender proceedings. Where a proceeding may result in confinement, the private interest at stake is the most elemental of liberty interests—liberty. This interest is “almost uniquely compelling.” Hamdi v. Rumsfeld, 542 U.S. 507, 530, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004); Ake v. Oklahoma, 470 U.S. 68, 78, 105 S.Ct. 1087, 84 L.Ed.2d 3 (1985). The unparalleled importance of this interest is demonstrated by the significant procedural safeguards required when a person's freedom is at issue. For example, a court may not impose confinement for failure to pay in a civil contempt case absent (1) notice that ability to pay is critical to the proceeding; (2) a form eliciting relevant financial information; (3) an opportunity to respond to questions about financial status; and (4) an express judicial finding regarding that the defendant has the ability to pay. Turner v. Rogers, \_\_\_ U.S. \_\_\_, 131 S.Ct. 2507, 180 L.Ed.2d 452 (2011). Similarly, a person may not be subject to involuntary civil commitment

absent proof by clear and convincing evidence. Addington v. Texas, 441 U.S. 418, 433, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

The private interest in avoiding a term of life without parole—the harshest punishment except for death—is greater than in most situations involving loss of freedom. Thus, the punishment at issue here weighs heavily in favor of additional procedural safeguards. Nonetheless, the current procedure—judicial fact finding by a preponderance of the evidence—creates a significant risk of error. A preponderance of the evidence is a mere more likely than not finding. A standard greater than a preponderance of the evidence is required when significant interests are at stake. *E.g.*, United States v. Ruiz-Gaxiola, 623 F.3d 684, 691-692 (9th Cir. 2010) (requiring a clear and convincing standard to protect the “significant liberty interests” implicated by an involuntary medication order); Addington, 441 U.S. at 433. Furthermore, “it is presumed, that juries are the best judges of facts.” Georgia v. Brailsford, 3 U.S. 1, 4, 3 Dall. 1, 1 L. Ed. 483 (1794). Juries are well-equipped to evaluate documentary evidence, witness testimony, and expert opinion. The possibility of even occasional error under the current procedure argues in favor of a higher standard of proof and the empanelment a jury.

Such additional procedures would also benefit the government. The State has two significant interests in ensuring the accuracy of

persistent offender sentencing proceedings. First, prosecutors have a duty to act in the interest of justice, and thus cannot seek the wrongful imposition of life without parole. Second, the State's scarce resources should not be wasted incarcerating people for life if they do not qualify as persistent offenders.

In sum, the balancing test in Mathews shows that prior strike offenses must be proved to a jury beyond a reasonable doubt in POAA cases to comport with article I, section 3. Mathews, 424 U.S. at 333. On this alternative basis, Sun's sentence of life without parole should be vacated and the case remanded for a new sentencing hearing. Id.

8. CLASSIFICATION OF THE PERSISTENT OFFENDER FINDING AS AN "AGGRAVATOR" OR "SENTENCING FACTOR," RATHER THAN AN "ELEMENT," VIOLATES SUN'S RIGHT TO EQUAL PROTECTION.

The equal protection clauses of the state and federal constitutions require that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. U.S. Const., amend. XIV; Wash. Const., art. I, § 12; Bush v. Gore, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); State v. Thorne, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994). A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless the classification also involves a semi-suspect class. Thorne, 129 Wn.2d at 771. The

Washington Supreme Court has held that “recidivist criminals are not a semi-suspect class,” and therefore the rational basis test applies. Id

Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation. The classification must be “purely arbitrary” to overcome the strong presumption of constitutionality applicable here.

State v. Smith, 117 Wn.2d 263, 279, 814 P.2d 652 (1991).

The classification at issue here violates the Equal Protection Clause because it is not rationally related to a legitimate government interest.

Our legislature has determined that the government has an interest in punishing repeat criminal offenders more severely than first time offenders. For example, defendants who have twice previously violated no-contact orders are subject to significant increase in punishment for a third violation. RCW 26.50.110(5); State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). Likewise, defendants who have twice previously been convicted of “most serious” (strike) offenses are subject to a significant increase in punishment (life without parole) for a third violation. RCW 9.94A.030(37); RCW 9.94A.570. However, courts treat prior offenses that cause the significant increase in punishment differently simply by labeling some “elements” and others “sentencing factors.”

Where prior convictions that increase the maximum sentence available are classified as “elements” of a crime, they must be proved to a jury beyond a reasonable doubt. For example, a prior conviction for a felony sex offense must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for communicating with a minor for immoral purposes as a felony. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Similarly, two prior convictions for violation of a no-contact order must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for violation of a no-contact order as a felony. Oster, 147 Wn.2d at 146. And the State must prove to a jury beyond a reasonable doubt that a defendant has four prior DUI convictions in the last ten years in order to punish a current DUI conviction as a felony. State v. Chambers, 157 Wn. App. 465, 475, 237 P.3d 352 (2010). In none of these examples has the legislature labeled these facts as elements; the courts have simply treated them as such.

Where, as here, prior convictions that increase the maximum sentence available are classified as “sentencing factors,” our state only requires they be proved to the judge by a preponderance of the evidence. State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003) (two prior strike offenses need only be proved to judge by a preponderance of the evidence in order to punish current strike as third strike), cert. denied, 541 U.S. 909

(2004). Just as the legislature has never labeled the facts at issue in Oster, Roswell, or Chambers “elements,” the legislature has never labeled the fact at issue here a “sentencing factor.” Instead, in each instance it is an arbitrary judicial construct. This classification violates equal protection because the government interest in either case is exactly the same: to punish repeat offenders more severely. See RCW 9.68.090 (elevating “penalty” for communication with a minor for immoral purposes based on prior offense); RCW 46.61.5055 (person with four prior DUI convictions in last ten years “shall be punished under RCW ch. 9.94A”); Thorne, 129 Wn.2d at 772 (purpose of POAA is to “reduce the number of serious, repeat offenders by tougher sentencing”).

If anything, there might be a rational basis for requiring proof of prior convictions to a jury beyond a reasonable doubt in the “three strikes” context but not in other contexts, because the punishment in the “three strikes” context is the maximum possible (short of death). Thus, it might be reasonable for the Legislature to determine that the greatest procedural protections apply in that context but not in others. However, it makes no sense to say that the greater procedural protections apply where the necessary facts only marginally increase punishment, but need not apply where the necessary facts result in the most extreme increase possible.

As an example, if a person is alleged to have a prior conviction for first-degree rape, the State must prove that conviction to a jury beyond a reasonable doubt in order to use the conviction to increase the punishment for a current conviction for communicating with a minor for immoral purposes—even if the prior conviction increases the sentence by only a few months. Roswell, 165 Wn.2d at 192. But if the same person with the same alleged prior conviction for first-degree rape is instead convicted of rape of a child in the first degree, the State need only prove the prior conviction to a judge by a preponderance of the evidence in order to increase the punishment for the current conviction to life without the possibility of parole. RCW 9.94A.030(37)(b) (two strikes for sex offenses); RCW 9.94A.570; Smith, 150 Wn.2d at 143.

As the United States Supreme Court explained in Apprendi, “merely using the label ‘sentence enhancement’ to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently.” Apprendi, 530 U.S. at 476. “The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn.” Skinner v. Oklahoma, 316 U.S. 535, 542, 62 S.Ct. 1110, 86 L.Ed.2d 1655 (1942). This Court should hold that the imposition of a sentence of life without parole, based on the trial court’s finding of the necessary facts by a preponderance of the evidence, violated Sun’s

right to equal protection. This case should be remanded for sentencing within the standard range.

D. CONCLUSION

For the reasons addressed above, this Court should order suppression of unlawfully seized evidence, vacate the burglary and conspiracy convictions and the sentencing enhancements, and remand for a new trial and for sentencing within the standard range.

DATED April 28, 2014.

Respectfully submitted,



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Certification of Service by Mail

Today I mailed copies of the Brief of Appellant and Designation of Exhibits in *State v. Soeun Sun*, Cause No. 45058-5-II as follows:

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Washington State Penitentiary  
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Walla Walla, WA 99362

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



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Catherine E. Glinski  
Done in Port Orchard, WA  
April 28, 2014

**GLINSKI LAW OFFICE**

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