

NO. 47002-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

SUSAN ANN CHRISTOPHER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON

Superior Court No. 14-1-00368-2

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Could a reasonable jury have found that the defendant was armed for the purposes of the sentencing enhancement on count four based on the evidence presented?

2. Should the case be reversed for prosecutorial misconduct when the prosecutor's misstatement of the facts was not objected to, nor prejudicial?

3. Should the forfeiture order be vacated when it unilaterally orders all property forfeited?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Susan Ann Christopher was charged by amended information filed in Kitsap County Superior Court with two counts of Delivery of Methamphetamine, and one count of Delivery of Methamphetamine with a firearm enhancement, from the various dates of the controlled buys. A search warrant was obtained and from the date it was served, the defendant was charged with one count of Possession of Methamphetamine with Intent to Deliver and a firearm enhancement, and two counts of Possession of a Controlled Substance, to wit Alprazolam and Carisoprodol, respectively. CP 13-17. She was convicted of all counts, and the jury found by special verdict that the Defendant was armed on count

four. CP 61-64. The defendant was sentenced and ordered not to own firearms on December 12, 2014, and filed notice of appeal the same day. CP 83-95. All seized property was ordered forfeited. CP 89.

B. FACTS

On August 28th, November 20th, and December 16th in 2013, Detective Grant with the aid of Melody Marvel conducted controlled buys of methamphetamine from the Defendant, at the Defendant's residence. RP (11/19) 84, 93-94, 102, 118. Following the third buy, a search warrant was obtained for the Defendant's home. *Id.* at 142-3. The search warrant was executed on December 31, 2013, between 6:30 and 7:00 am. *Id.* at 144. During that search, Detectives located methamphetamine, several items of drug paraphernalia, and three firearms, which form the bases of Count IV and the subject of this appeal.

Upon search of the home, Detectives discovered a Savage 22 caliber rifle standing up to the right side of the entry to the door, just inside the master bedroom. *Id.* at 247-500. It was immediately visible upon entry to the bedroom. *Id.* at 255. To the left, on a dresser, were two magazines for the rifle. RP (11/20) 268. About six feet away, at the foot of a bed (RP (11/21) 302) they also recovered a Beretta nine-millimeter semi-automatic pistol with the barrel sticking out of a fanny-pack, on top

of a suitcase and pile of clothes. RP (11/19) 250-252. A loaded magazine for that gun was found on top of the fanny-pack. *Id* at 253.

On the other side of the room, in an unlocked safe was a scale, some paperwork, and a loaded Taurus .357 Magnum pistol. RP (11/20) 410, 413-14, 417, 309-310.

The evidence supporting the charge of possession of methamphetamine for the count in question, on December 31st, included two baggies that were found on the Defendant's person, one of which was tested by forensics scientist Donna Wilson and determined to contain the drug, and a baggie found on the kitchen table containing a white powdery substance also tested and determined to contain the drug. RP (11/20) 419-420, 460, RP (11/21) 515-18. There were two additional baggies found between the bed and the dresser which were not tested, but also contained a white crystal like substance which Detective Grant testified according to his training and experience was consistent with methamphetamine. RP (11/21) 300-01. The bags located on the Defendant's person and in the bedroom were marked with symbols both Detective Ejde and Grant testified indicated weight measurements used by drug dealers according to their training and experience. RP (11/20) 288-289, 300-01, 421-22.

Additional evidence tending to show intent to sell included a portable case found on the bed containing a digital scale, dime bags, a

scoop, and a ledger. *Id.* at 282-87. Detective Grant testified that the contents of the ledger were consistent with a pay and owe ledger for keeping track of drug transactions, and the prices listed were consistent with the value of methamphetamine at the time and within the range of what Melody Marvel purchased the drug from the Defendant for. *Id.* at 287-90. Detective Ejde also located a second digital scale in the unlocked safe that contained the Magnum firearm. *Id.* at 410.

Detective Grant testified that based on his training and experience, he knows that people carry firearms to keep from getting ripped off and that people who sell drugs usually have large amounts of drugs or money that would need protecting. RP (11/20) 312-13. He testified that the presence of a firearm can be a latent source of discouragement for potential threats. *Id.* at 313. Detective Ejde also testified that based on his training and experience people selling drugs more often than not have a firearm to protect themselves from other drug dealers or their customers so they do not get their money or their product stolen. *Id.* at 423.

In closing argument, the prosecutor argued that; “You’ll notice in the definition it doesn’t say it has to be loaded, though at least in Count 4 on the possession with intent, each of those firearms was actually loaded.” RP (11/24) 624.

III. ARGUMENT

A. EVIDENCE TO CONVICT THE DEFENDANT OF BEING ARMED WITH A DEADLY WEAPON IS SUFFICIENT BECAUSE A RATIONAL TRIER OF FACT COULD HAVE FOUND A NEXUS BETWEEN THE FIREARM(S), THE DEFENDANT AND THE CRIME.

Christopher argues that in reference to count four, “there was insufficient evidence to establish that either weapon was loaded” and that “regardless of whether the weapons were loaded, the state failed to establish the required nexus between the weapons and possession with intent to deliver”. *Appellant’s Brief* at 6. These claims are without merit because the evidence presented showed that a loaded Magnum was found in an unlocked safe with a digital scale, and in the same room as an unloaded rifle, unloaded pistol, ammunition, baggies of methamphetamine, and several items of paraphernalia used to distribute drugs. This evidence would allow a rational trier of fact to infer a nexus between the firearms and the commission of the crime possession with intent, and find the Defendant was armed beyond a reasonable doubt.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational fact finder could have found guilt beyond a reasonable doubt. *Ague-Masters*, 138 Wn. App. at 102, *citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). An insufficiency claim admits the truth of

the State's evidence and any will draw all inferences from the evidence in favor of the State and most strongly against the Defendant. *Id.*, and see *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993). It is not for the reviewing court to determine whether *it* is satisfied beyond a reasonable doubt, instead, "deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and persuasiveness of material evidence". *State v. Green*, 94 Wn.2d 221, 616 P.2d 628 (1980), citing *Jackson v. Virginia*, 443 U.S. 318-19, 99 S. Ct. 2781 (1979) (emphasis added).

In *State v. Eckenrode*, where "the defendant told a 911 operator that he was holding a loaded weapon, a police scanner was found in the home, and there was pervasive evidence that much of the house was used for drug production", the Court held that "the jury, as the trier of fact, is in the best position to determine whether there is a connection." 159 Wn.2d 488, 495, 150 P.3d 1116 (2007), citing *Schelin*, 147 Wn.2d at 573. They further held that "in a sufficiency of the evidence challenge, the burden is on the defendant to establish that the evidence was insufficient." *Id.*

Whether a person is armed is a mixed question of law and fact. *State v. Mills*, 80 Wn. App. 231, 234-35, 907 P.2d 316 (1995). Whether the facts are sufficient as a matter of law to prove that the Defendant was armed is a question of law, and review should be de novo. *State v. Schelin*, 147 Wn.2d 562, 566, 55 P.3d 632 (2002). A person is 'armed' for the purposes of the enhancement if a weapon is easily accessible for use, either for offensive or defensive purposes, and there is a connection

between the defendant, the weapon, and the crime. *State v. Easterlin*, 159 Wn.2d 203, 208, 149 P.3d 366 (2006) citing *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993), and *State v. Barnes*, 153 Wn.2d 378, 383, 103 P.3d 1219 (2005). Subsequent cases have refined the nexus required in a constructive possession case and held that there must be a nexus between the weapon and the defendant, and between the weapon and the crime. *Schelin*, 147 Wn.2d at 636.

When determining the nexus between the weapon and the crime, the court must examine the nature of the crime, the type of weapon, and the circumstances under which the weapon is found (e.g., whether in the open, in a locked or unlocked container, in a closet on a shelf, or in a drawer). *State v. Ague-Masters*, 138 Wn. App. 86, 104, 156 P.3d 265 (2007), citing *State v. Gurske*, 155 Wn.2d 134, 142, 118 P.3d 333 (2005) and *Schelin*, 147 Wn.2d at 570. Although proximity of the defendant to the weapon has played into the nexus analysis, it is possible for a defendant to be armed even if not arrested in close proximity to the weapon. *Ague-Masters* at 103, see also *State v. Simonson*, 91 Wn. App. 874, 877, 882-83, 960 P.2d 955 (1998).

In *State v. Easterlin*, where the Defendant was found in a car with a 9 mm pistol on his lap, a loaded 9 mm magazine on the seat next to him, and cocaine in his sock, the Defendant contended that “there was no evidence that the weapon was there to protect his drug possession as opposed to mere self-protection”. 159 Wn.2d 203, 210, 149 P.3d 366 (2006). The Supreme Court in that case held that “the State does not have

to produce direct evidence of a defendant's intent. So long as the facts and circumstances support an inference of a connection between the weapon, the crime, and the defendant, sufficient evidence exists." *Id.*

In this case, the facts and circumstances support an inference of a connection between the weapons, the crime of possession with intent to distribute, and the Defendant. The Defendant has cited no case law which requires a firearm to be loaded in order to prove the enhancement. The Defendant cites case law which instructs that a weapon must be accessible and readily available for offensive or defensive purposes. *See Appellant's brief at 5, citing State v. Valdobinos, 122 Wn.2d at 282.* Although testimony supported the fact that one pistol *was* in fact loaded, even unloaded guns could lead to the permissible inference that they were weapons intended for the use of offensive or defensive purposes, when viewed in the light most favorable to the State. It is conceivable that since a person would not immediately know whether or not a weapon was loaded, it could readily be used to threaten or defend simply by being brandished in a threatening manner. This is in accordance with the type of use Deputies Grant and Ejde described they were familiar with in the context of drug cases.

The firearms were all located in the Defendant's room and within close proximity of several items with clear utility for distributing drugs, as

well as two baggies of methamphetamine. In the light most favorable to the State, it would be permissible for the jury to infer that since the three guns were stored in the same location as the distribution items were stored, that the Defendant would prepare the firearms on the occasions that she would prepare drugs for sale.

Because the jury could have reasonably concluded that the firearms, whether loaded or not, were readily accessible for offensive or defensive purposes based on the evidence provided, the claim of insufficient evidence is without merit, and the Court should therefore affirm the conviction.

B. THE PROSECUTOR'S CLOSING ARGUMENT DOES NOT MERIT A REVERSAL BECAUSE IT WAS NOT SO FLAGRANT OR ILL INTENTIONED THAT A CURATIVE INSTRUCTION COULD NOT HAVE ABSOLVED ANY PREJUDICE.

Christopher next claims that the prosecutor committed misconduct by telling the jury that the weapons were loaded in count four. This claim is without merit because the Defendant did not object to the misstatement and the misstatement was not so flagrant or ill-intentioned that a curative instruction could not have cured any potential prejudice.

A defendant claiming prosecutorial misconduct 'bears the burden of establishing the impropriety of the prosecuting attorney's comments

and their prejudicial effect'. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221, *citing State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Prejudice will only be found where the defendant shows a *substantial likelihood* that the misconduct affected the jury verdict. *Id.* The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation, but by considering the context of the total argument, the issues in the case, the evidence addressed, and the instructions given to the jury. *Id.* Where the defendant does not object to a comment during the trial, any error is considered waived unless the misconduct is so flagrant and ill intentioned that an instruction could not have cured the prejudice. *Id. and see State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

In this case, the misconduct alleged was that the prosecutor stated that the guns involved in count four were loaded. However, statements must be analyzed by looking at the *context* of the argument. The entire statement was, "*You'll notice in the definition it doesn't say it has to be loaded*, though at least in Count 4 on the possession with intent, each of those firearms was actually loaded." RP (11/24) 624. This is the only statement the Defendant points to in support of the claim of misconduct. In this context, it is clear that the statement was not prejudicial, since the prosecutor was actually arguing that whether or not the guns were loaded

was *immaterial*. If the jury gave weight to that statement, they therefore would not have based their decision on whether or not the guns were in fact loaded. If they did not give that statement any weight, then there is no prejudice.

The context of the statement also makes it clear that the statement was not ill intentioned, since the prosecutor did not use it to support any argument. Instead and to the contrary, the argument was that it *was not* required that the jury find either way on the issue of whether or not the guns were loaded. Similarly, it is not a flagrant violation since it was not a point that was repeated multiple times, and the prosecutor's primary point was that it did not matter.

Finally, the judge in this case explicitly instructed the jury that

“The lawyers’ remarks, statement, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers’ statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence”. CP at 33.

This instruction further mitigated any risk of prejudice by the statement because it very clearly told the jurors not to consider the statement as evidence. Although a curative instruction in this instance could have aided *if* there were any prejudice, it would have been cumulative and unnecessary. Therefore, this claim is without merit and the Court should

affirm the conviction.

C. THE TRIAL COURT'S ORDER TO FORFEIT ALL SEIZED PROPERTY SHOULD BE AMENDED.

Christopher next claims that the trial court violated her due process rights when it ordered forfeiture of property without any statutory authority. The State agrees that the *Roberts* case cited by the Defendant is controlling and that the blanket forfeiture order by the trial court in this case should be amended.

The Court does have the authority to forfeit firearms used in the crime, RCW 9.41.098, any contraband, RCW 69.50.505(11), and any property subject to a lawful forfeiture proceeding initiated by a law enforcement agency. RCW 69.50.505. The order should be vacated, and amended to include only property falling within one of these specific categories.

IV. CONCLUSION

For the foregoing reasons, Christopher's conviction and sentence should be affirmed, but the order regarding seized property should be vacated and amended by the trial court.

DATED November 3, 2015.

Respectfully submitted,
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A handwritten signature in black ink, appearing to read "E. Jarchow". The signature is written in a cursive, flowing style.

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