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Less Is Not More: Evidence of Mere Proximity in *State v. Gurske* Does Not Render the Defendant Armed under Washington's Deadly Weapon Special Verdict Statute

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LESS IS NOT MORE: EVIDENCE OF MERE PROXIMITY IN *STATE V. GURSKE* DOES NOT RENDER THE DEFENDANT ARMED UNDER WASHINGTON'S DEADLY WEAPON SPECIAL VERDICT STATUTE

Kelly B. Fennerty

Abstract: In *State v. Gurske*, Division III of the Washington State Court of Appeals affirmed the application of Washington State's Deadly Weapon Special Verdict statute to Samuel Gurske's conviction for possession of methamphetamine. The Deadly Weapon Special Verdict statute enhances the sentence of a defendant who commits a crime while "armed" with a deadly weapon. In *Gurske*, the parties stipulated that a backpack holding Gurske's pistol and drugs lay within arm's reach of the driver's position. From this fact, the trial judge determined that Gurske was armed while he was in possession of methamphetamine. Under Washington State Supreme Court precedent, however, a court must apply two tests in constructive possession cases like *Gurske* to determine whether the defendant is armed. First, the weapon must be easily accessible and readily available for use (the "easily accessible" test). Second, there must be a nexus between the weapon and the defendant (weapon–defendant nexus) and between the weapon and the crime (weapon–crime nexus). The *Gurske* court determined that Gurske's proximity to the weapon satisfied the easily accessible test. Again relying on the proximity between the defendant, the weapon, and the drugs, the *Gurske* court determined that proximity also satisfied the nexus test. Although proximity may satisfy the easily accessible test and the weapon–defendant nexus, a plurality of the Washington State Supreme Court in *State v. Schelin* explicitly required more than proximity to satisfy the weapon–crime nexus. According to *Schelin*, courts should consider three factors: the nature of the crime, the type of weapon, and the circumstances under which police discovered the weapon. These three factors identify evidence that may permit an inference that a defendant used a weapon in furtherance of the commission of a crime. Assuming that the State also presented evidence satisfying the easily accessible test and the weapon–defendant nexus, the addition of this inference establishes a defendant as armed. In light of the three *Schelin* factors, the *Gurske* evidence does not support the inference that Gurske used the weapon in furtherance of his drug crime. The trial judge, therefore, mistakenly found a weapon–crime nexus, and Division III erroneously affirmed the trial judge's application of the sentence enhancement. On appeal, the Washington State Supreme Court should reverse the application of the Deadly Weapon Special Verdict statute to Gurske's conviction for possession of methamphetamine.

Samuel Gurske made an illegal left turn while driving through Pullman, Washington.[1] An officer stopped Gurske, arrested him for driving with a suspended license, and impounded his truck.[2] Behind the

1. State v. Gurske, 120 Wash. App. 63, 64, 83 P.3d 1051, 1052 (2004) *review granted*, 152 Wash. 2d 1013, 101 P.3d 108 (2004).

2. *Id.*

driver's seat,[3] police later found a zipped-closed backpack,[4] which contained three grams of methamphetamine, an unloaded pistol in a holster, a loaded magazine, and Gurske's wallet.[5] Because the backpack lay within arm's reach of the driver's position, the trial judge applied Washington State's Deadly Weapon Special Verdict statute (Deadly Weapon Enhancement) to Gurske's conviction and enhanced his sentence for possession of a controlled substance.[6]

The Deadly Weapon Enhancement permits a prosecutor to seek a special verdict that enhances a defendant's sentence if the defendant committed the underlying crime while "armed" with a deadly weapon.[7] In 1986, the Washington State Supreme Court held that a defendant is armed if a weapon is easily accessible and readily available for use (the "easily accessible" test).[8] However, if the evidence establishes only that a defendant constructively possessed a deadly weapon, he or she is not armed merely because the weapon was easily accessible.[9] In *State v. Schelin*,[10] a plurality of the Washington State Supreme Court held that defendants who constructively possess a deadly weapon are not armed for purposes of the Deadly Weapon Enhancement unless the State proves a nexus between both the weapon and the defendant (the weapon–defendant nexus) and the weapon and the crime (the weapon–crime nexus).[11] The *Schelin* plurality further explained that the weapon–crime nexus exists where the evidence entitles the trier of fact to infer that the defendant was using the weapon in a manner connecting it to

3. *Id.*

4. *Id.* at 67, 83 P.3d at 1054 (Schultheis, J., dissenting).

5. *Id.* at 65–66, 83 P.3d at 1052–53.

6. *Id.* at 64–65, 83 P.3d at 1052.

7. *See* WASH. REV. CODE § 9.94A.602 (2004) (formerly codified at WASH. REV. CODE § 9.94A.125).

8. *See* State v. Valdobinos, 122 Wash. 2d 270, 282, 858 P.2d 199, 206 (1993) (construing Deadly Weapon Enhancement under its former codification at RCW 9.94A.125). The *Valdobinos* court adopted the "easily accessible and readily available" test from *State v. Sabala*, 44 Wash. App. 444, 448, 723 P.2d 5, 8 (1986). *See Valdobinos*, 122 Wash. 2d at 282, 858 P.2d at 206.

9. State v. Schelin, 147 Wash. 2d 562, 567, 55 P.3d 632, 635 (2002) (plurality opinion) (citing *Valdobinos*, 122 Wash. 2d at 282, 858 P.2d at 206).

10. 147 Wash. 2d 562, 55 P.3d 632 (2002).

11. *See id.* at 567–68, 55 P.3d at 636. This is a holding because, in addition to the plurality, Chief Justice Alexander, Justice Sanders, and Justice Chambers agreed that the State should have to prove this two-part nexus beyond a reasonable doubt to render a defendant armed. *See id.* at 577, 55 P.3d at 640 (Alexander, C.J., concurring); *id.* at 586, 55 P.3d at 644 (Sanders, J., dissenting); *id.* at 602, 55 P.3d at 652 (Chambers, J., dissenting). At trial, the jury found the defendant was armed with a deadly weapon pursuant to former RCW 9.94A.125. *Id.* at 565, 55 P.3d at 634.

commission of the crime.[12] The trier of fact's entitlement to make the inference hinges on three factors: the nature of the crime, the type of weapon, and the circumstances under which the weapon was found.[13] The Supreme Court of Washington has since affirmed the nexus requirement by holding that the mere presence of a deadly weapon at the crime scene does not establish that a defendant was armed.[14]

In *Gurske*, Division III of the Washington State Court of Appeals upheld the application of the Deadly Weapon Enhancement to Gurske's sentence for possession of methamphetamine.[15] Limiting its analysis to the proximity between Gurske, the gun, and the drugs, Division III found that this proximity alone satisfied both the easily accessible test and each part of the nexus test.[16] The court agreed with the trial judge's determination that Gurske was armed because the backpack containing the gun, the drugs, and Gurske's wallet lay within arm's reach of the driver's seat.[17]

This Note argues that the *Gurske* court misinterpreted *Schelin* and failed to apply the weapon–crime nexus test when considering whether Gurske was armed. *Schelin* requires a court to apply two separate tests in constructive possession cases like *Gurske*: the easily accessible test and the two-part nexus test.[18] The *Gurske* court effectively collapsed the two tests into a single test of proximity by relying solely on the close proximity between the defendant, the weapon, and the drugs to find Gurske armed.[19] While proximity between the defendant and the weapon alone may satisfy the easily accessible test and the weapon–defendant nexus requirement,[20] mere proximity between the defendant, the weapon,

12. *See id.* at 574–75, 55 P.3d at 639.

13. *See id.* at 570, 55 P.3d at 637.

14. *See* State v. Barnes, No. 74408-4, 2005 WL 66458, at *2 (Wash. Jan. 13, 2005) (challenging jury instructions for Deadly Weapon Enhancement); State v. Willis, No. 74561-7, 2005 WL 20516, at *4 (Wash. Jan. 6, 2006) (challenging jury instructions for Deadly Weapon Enhancement). *Barnes* and *Willis* affirmed *Schelin*'s nexus requirement and considered the nexus test in the context of jury instructions. *See Barnes*, 2005 WL 66458 at *2; *Willis*, 2005 WL 20516 at *4.

15. State v. Gurske, 120 Wash. App. 63, 64, 83 P.3d 1051, 1052 (2004), *review granted*, 152 Wash. 2d 1013, 101 P.3d 108 (2004).

16. *See id.* at 66, 83 P.3d at 1053.

17. *See id.* at 64–66, 83 P.3d at 1052–53.

18. *See Schelin*, 147 Wash. 2d at 567–68, 55 P.3d at 635–36.

19. *See Gurske*, 120 Wash. App. at 64, 83 P.3d at 1052 (affirming trial judge's conclusion that defendant was armed for purposes of Deadly Weapon Enhancement because backpack, which contained defendant's wallet, drugs, and pistol, was within arm's reach).

20. *See, e.g.*, *Schelin*, 147 Wash. 2d at 574, 55 P.3d at 639 (concluding direct evidence of Schelin's close proximity to weapon when police officers entered his home satisfied easily

and the drugs in a narcotics possession case does not satisfy the weapon–crime nexus requirement.[21] Based on the nature of Gurske's crime, the type of weapon, and the circumstances under which police found the weapon, the *Gurske* court should have determined that the evidence did not establish a weapon–crime nexus. Thus, the evidence did not entitle the trial judge to infer that Gurske was using the weapon in connection with the crime.[22] By failing to satisfy both parts of the nexus test and by affirming the Deadly Weapon Enhancement on the basis of mere constructive possession,[23] the *Gurske* court erred in affirming the trial judge's finding that Gurske was armed.

Part I of this Note describes Washington State's Deadly Weapon Enhancement. Part II examines the interpretation by Washington State courts of the term "armed" under the Deadly Weapon Enhancement. Part III discusses the *Gurske* court's application of the Deadly Weapon Enhancement and its failure to apply both of the required tests. Part IV argues that Division III erred in failing to apply both tests. It further argues that proper application of the weapon–crime nexus and the three *Schelin* factors would not support an inference that Gurske was using his weapon in connection with the crime. This Note concludes that the Washington State Supreme Court should reverse the trial judge's finding that Gurske was armed. The Deadly Weapon Enhancement should not apply to Gurske's sentence.

I. WASHINGTON LAW ENHANCES SENTENCES FOR CRIMES COMMITTED WHILE ARMED WITH A DEADLY WEAPON

Washington State's Deadly Weapon Enhancement increases the sentence associated with a criminal defendant's conviction when the defendant committed a crime while armed with a deadly weapon.[24] The

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accessible test and weapon–defendant nexus).

21. *See id.* at 569–70, 55 P.3d at 637 (concluding State must prove existence of nexus between weapon, crime, and defendant, in addition to proving proximity to weapon).

22. *Cf. id.* at 574–75, 55 P.3d at 639 (concluding jury was entitled to infer defendant was using weapon in furtherance of crime because evidence established defendant constructively possessed weapon to protect marijuana-growing operation).

23. *See Gurske*, 120 Wash. App. at 65–66, 83 P.3d at 1053. *But see Schelin*, 147 Wash. 2d at 575–76, 55 P.3d at 639–40 (stating Deadly Weapon Enhancement authorizes court to find defendant armed only when evidence satisfies both easily accessible test and nexus test). "The requirement of a nexus . . . guards against a deadly weapon enhancement being found whenever constructive possession is established." *Id.* at 575, 55 P.3d 639.

24. *See* WASH. REV. CODE § 9.94A.602 (2004). The statute states, in relevant part, that

[i]n a criminal case wherein there has been a special allegation and evidence establishing that

Deadly Weapon Enhancement requires the State to allege specifically that the accused committed the crime while armed with a deadly weapon;[25] the State must then prove this allegation beyond a reasonable doubt.[26] The statute provides a nonexclusive list of instruments that constitute "deadly weapons,"[27] which includes loaded and unloaded firearms.[28] However, the statute does not define the term "armed."[29] Therefore, Washington courts have set forth tests to establish whether a defendant is armed for purposes of the Deadly Weapon Enhancement.[30]

The Washington State Legislature added the Deadly Weapon Enhancement to Washington State's sentencing reform act in 1983.[31] It intended to enhance the sentences of those defendants who commit crimes while armed because a defendant's use of a weapon makes a crime more dangerous and thus more serious.[32] Lacking a statutory definition of the term "armed," Washington courts construe the term in light of the statute's purpose.[33] The statute's underlying rationale applies when evidence shows that a defendant was using the weapon in

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the accused . . . was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused . . . was armed with a deadly weapon at the time of the commission of the crime.

Id. The enhancement does not constitute a separate crime. Rather, the enhancement increases the underlying sentence for the substantive offense based on the manner in which the defendant committed the crime. *See* 13A SETH A. FINE & DOUGLAS J. ENDE, WASHINGTON PRACTICE, CRIMINAL LAW § 109 (2d ed. 1998) ("The possession or use of a deadly weapon can greatly increase the punishment for many crimes. . . . [B]eing armed with a deadly weapon while committing a felony enhances the sentence for that felony.").

25. *See* WASH. REV. CODE § 9.94A.602.

26. *See* State v. Pam, 98 Wash. 2d 748, 755–56, 659 P.2d 454, 458 (1983) (citing State v. Tongate, 93 Wash. 2d 751, 754–55, 613 P.2d 121, 123 (1980)).

27. *See* WASH. REV. CODE § 9.94A.602.

28. *See Schelin*, 147 Wash. 2d at 567 n.2, 55 P.3d at 635 n.2 (citing Washington Pattern Jury Instructions: Criminal 2.07.02 at 37 (2d ed. 1994); *State v. Sullivan*, 47 Wash. App. 81, 85, 733 P.2d 598, 600 (1987)).

29. *See* State v. Mills, 80 Wash. App. 231, 235, 907 P.2d 316, 317 (1995) (citing WASH. REV. CODE § 9.94A.125 (current version at WASH. REV. CODE § 9.94A.602 (2004)).

30. *See, e.g., Schelin*, 147 Wash. 2d at 567, 55 P.3d at 635 (discussing meaning of armed). On appeal, whether a defendant was armed is a mixed question of law and fact. *See id.* at 565–66, 55 P.3d at 634–35. Assuming the truth of the underlying facts, the determination of whether the facts establish that a defendant was armed is reviewable de novo. *See id.* at 566, 55 P.3d at 635.

31. *See* Violent Offense Category Expanded—Exceptional Sentences for Certain Felonies—Deadly Weapon Special Verdict—Sentencing Guidelines—Report on Sentencing Reform Act, ch. 163, § 3, 1983 Wash. Laws 713, 717.

32. *See* State v. Johnson, 94 Wash. App. 882, 896, 974 P.2d 855, 862 (1999).

33. *See* State v. Sullivan, 143 Wash. 2d 162, 174–75, 19 P.3d 1012, 1019 (2001); State v. Wilson, 125 Wash. 2d 212, 216–17, 883 P.2d 320, 322–23 (1994).

connection with a crime.[34] The word "armed" therefore requires a connection between the weapon and the crime itself.[35] The Washington State Legislature did not intend to impose an absolute prohibition on weapon possession by enhancing a defendant's sentence merely because he or she commits a crime on premises containing a weapon.[36] Rather, to prove that a defendant was armed, the State must present evidence showing more than mere constructive possession of a weapon.[37]

II. IN CONSTRUCTIVE POSSESSION CASES, THE STATE MUST SATISFY TWO TESTS TO PROVE A DEFENDANT WAS ARMED

The Washington State courts' definition of "constructive possession" relates to the legal ownership of property and an individual's corresponding right to the immediate actual possession of that property.[38] In the context of the Deadly Weapon Enhancement, the Washington State Supreme Court has limited the definition of constructive possession of a deadly weapon to the potential to exercise immediate or spontaneous dominion and control over it.[39] Where a defendant constructively possesses a deadly weapon, the Washington State Supreme Court requires the State to satisfy two distinct tests to prove that the defendant is armed under the Deadly Weapon Enhancement.[40] First, the State must prove that a deadly weapon was easily accessible and readily available for use, either for offensive or defensive purposes.[41] Mere constructive possession of a weapon, regardless of the weapon's easy accessibility, is insufficient to prove that a defendant is armed within the meaning of the statute.[42] Second, the

34. *See, e.g., Johnson*, 94 Wash. App. at 895–96, 974 P.2d at 862.

35. *See Schelin*, 147 Wash. 2d at 575, 55 P.3d at 639 (holding nexus requirement connects weapon to crime, thereby "guard[ing] against a deadly weapon enhancement being found whenever constructive possession is established").

36. *See Johnson*, 94 Wash. App. at 896–97, 974 P.2d at 862.

37. *See Schelin*, 147 Wash. 2d at 575, 55 P.3d at 639.

38. *See* State v. Parent, 123 Wash. 624, 627, 212 P. 1061, 1062 (1923).

39. *See* State v. Rieger, 26 Wash. App. 321, 325, 613 P.2d 163, 166 (1980) (construing WASH. REV. CODE § 9.41.025), *overruled on other grounds by* State v. McKim, 98 Wash. 2d 111, 653 P.2d 1040 (1982).

40. *See Schelin*, 147 Wash. 2d at 567–68, 55 P.3d at 635–36.

41. *See* State v. Valdobinos, 122 Wash. 2d 270, 282, 858 P.2d 199, 206 (1993).

42. *See id.*

State must also satisfy an independent "nexus" test.[43] The nexus test requires the State to prove that a nexus existed between the deadly weapon and the defendant as well as between the deadly weapon and the crime.[44]

A. *A Defendant Is Armed if a Deadly Weapon Is Easily Accessible During Commission of a Crime, but Mere Constructive Possession Is Insufficient*

In *State v. Valdobinos*,[45] the Washington State Supreme Court held that a defendant is armed during the commission of a crime if a deadly weapon is easily accessible and readily available for use, either for offensive or defensive purposes.[46] Valdobinos challenged the application of the Deadly Weapon Enhancement to his sentence for possession of cocaine with intent to deliver.[47] After arresting Valdobinos, national guardsmen discovered an unloaded rifle and a black bag containing a large sum of cash and 846 grams of cocaine under a bed in his mobile home.[48] The *Valdobinos* court concluded that the defendant was not armed during the commission of his crime because the unloaded rifle under his bed was not easily accessible and readily available.[49] Thus, when the evidence shows only that a defendant, like Valdobinos, has constructive possession of a deadly weapon,[50] the defendant is not armed under the Deadly Weapon Enhancement.[51]

A defendant possesses a weapon when he or she owns, has custody of, or controls the weapon.[52] Possession may amount to either actual possession or constructive possession.[53] Actual possession consists of "actual physical possession."[54] On the other hand, constructive

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43. *See Schelin*, 147 Wash. 2d at 575–76, 55 P.3d at 639–40.

44. *See id.* at 568, 55 P.3d at 636.

45. 122 Wash. 2d 270, 858 P.2d 199 (1993).

46. *See id.* at 282, 858 P.2d at 206 (citing State v. Sabala, 44 Wash. App. 444, 448, 723 P.2d 5, 8 (1986)).

47. *Id.* at 281, 858 P.2d at 206.

48. *Id.* at 274, 858 P.2d at 202. The bag contained $1,875. *Id.*

49. *See id.*

50. *See id.* at 282, 858 P.2d at 206.

51. *See* State v. Schelin, 147 Wash. 2d 562, 567, 55 P.3d 632, 635 (2002) (plurality opinion); *Valdobinos*, 122 Wash. 2d at 282, 858 P.2d at 206.

52. *See* State v. Simonson, 91 Wash. App. 874, 881, 960 P.2d 955, 959 (1998).

53. *See id.*

54. *See id.*

possession exists when the defendant lacks actual physical possession but has "dominion and control" of the weapon and may "immediately exercise" such control.[55] Though he lacked actual physical possession of the deadly weapon under his bed, Valdobinos constructively possessed the rifle while possessing cocaine.[56] Despite this constructive possession, the court determined that he was not armed within the meaning of the Deadly Weapon Enhancement.[57] Therefore, even when a defendant has the ability to exercise immediate control over a deadly weapon, constructive possession alone does not render the defendant armed under the Deadly Weapon Enhancement.[58]

After *Valdobinos*, the Washington State Court of Appeals grappled with the application of the Deadly Weapon Enhancement in constructive possession cases.[59] Although the *Valdobinos* court established that constructive possession alone does not render a defendant armed,[60] it did not identify what additional facts would suffice.[61] Thus, under the easily accessible test, lower courts lacked clear direction as to what evidence would render a defendant armed under the Deadly Weapon Enhancement in constructive possession cases.[62]

B. *In Addition to the Easily Accessible Test, the State Must Satisfy a Two-Part Nexus Test to Prove a Defendant Was Armed*

In *Schelin*, the Washington State Supreme Court upheld the easily accessible test and articulated a second, independent test for constructive

55. *See id.*; *see also* State v. Call, 75 Wash. App. 866, 868, 880 P.2d 571, 571 (1994) (noting defendant's dominion and control over premises, established by numerous documents in house, demonstrated constructive possession of handguns therein).

56. *See Schelin*, 147 Wash. 2d at 567, 55 P.3d at 635 (discussing *Valdobinos*, 122 Wash. 2d at 282, 858 P.2d at 206).

57. *See Valdobinos*, 122 Wash. 2d at 282, 858 P.2d at 206.

58. *See Schelin*, 147 Wash. 2d at 567–68, 55 P.3d at 635–36.

59. *See, e.g.*, State v. Johnson, 94 Wash. App. 882, 894–95, 974 P.2d 855, 861 (1999) (disagreeing with decision of Division II in State v. Simonson, 91 Wash. App. 874, 960 P.2d 955 (1998)); State v. Mills, 80 Wash. App. 231, 235–36, 907 P.2d 316, 318 (1995) (recognizing differing outcomes in various court of appeals decisions applying Deadly Weapon Enhancement).

60. *See Valdobinos*, 122 Wash. 2d at 282, 858 P.2d at 206 (holding mere constructive possession, established by "evidence that an unloaded rifle was found under [a bed], *without more*, is insufficient to qualify [a defendant] as 'armed'" under easily accessible test (emphasis added)).

61. *See id.* (noting insufficient evidence, but refraining from identifying what additional evidence would have sufficed).

62. *See Johnson*, 94 Wash. App. at 893, 974 P.2d at 860.

possession cases.[63] Police found Schelin in his basement, standing next to a loaded gun that hung on the wall near his marijuana-growing operation.[64] To determine whether Schelin was armed, the *Schelin* plurality, after reviewing the decisions of the Washington State Court of Appeals, imposed a "nexus" requirement in constructive possession cases.[65] The *Schelin* plurality explained the nexus test as a two-part test requiring a nexus between the deadly weapon and the defendant as well as between the deadly weapon and the crime.[66] Requiring this nexus protects the right to bear arms.[67] Specifically, the requirement of a two-part nexus guards against application of the Deadly Weapon Enhancement whenever mere constructive possession exists.[68]

1. The Weapon–Defendant Nexus Test Requires Proximity Between the Weapon and the Defendant

Proximity between a deadly weapon and a defendant satisfies the weapon–defendant nexus test.[69] Because proximity may demonstrate that a weapon is easily accessible,[70] facts that satisfy the easily accessible test

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63. *See Schelin*, 147 Wash. 2d at 567–70, 55 P.3d at 636–37. Although *Schelin* is a plurality opinion, a majority of the court agreed that the State must prove a nexus between the defendant, the crime, and the deadly weapon. Justices Smith, Bridge, and Owens joined Justice Ireland's plurality opinion. *Schelin*, 147 Wash. 2d at 576, 55 P.3d at 640. Chief Justice Alexander wrote a separate concurring opinion to clarify that the jury instruction in *Schelin* should have required the State to prove this nexus. *See id.* at 576–77, 55 P.3d at 640 (Alexander, C.J., concurring). Justice Sanders filed a dissenting opinion that agreed that a nexus test was required, but disagreed as to whether the evidence was sufficient to satisfy this test. *See id.* at 579–601, 55 P.3d at 640–52 (Sanders, J., dissenting). Justice Johnson, joined by Justice Madsen, agreed with Justice Sanders that the evidence was insufficient to satisfy the requirements of the Deadly Weapon Enhancement. *See id.* at 577–79, 55 P.3d at 652 (Johnson, J., concurring in dissent). Justice Chambers also agreed with Justice Sanders that the State proved nothing more than constructive possession, which was insufficient to support the application of the Deadly Weapon Enhancement. *See id.* at 601–02, 55 P.3d at 652 (Chambers, J., dissenting).

64. *Id.* at 564, 55 P.3d at 634.

65. *See id.* at 567–70, 55 P.3d at 636–37 (approving *Valdobinos*, 122 Wash. 2d 270, 858 P.2d 199; *Johnson*, 94 Wash. App. 882, 974 P.2d 855; State v. Mills, 80 Wash. App. 231, 907 P.2d 316 (1995); State v. Call, 75 Wash. App. 866, 880 P.2d 571 (1994); State v. Taylor, 74 Wash. App. 111, 872 P.2d 53 (1994); State v. Sabala, 44 Wash. App. 444, 723 P.2d 5 (1986)).

66. *See id.* at 568, 55 P.3d at 636.

67. *See id.* at 575, 55 P.3d at 639.

68. *See id.*

69. *See id.* at 568–69, 55 P.3d at 636; *see also Mills*, 80 Wash. App. at 236–37, 907 P.2d at 318 (concluding defendant was not armed for purposes of Deadly Weapon Enhancement where he was several miles from weapon).

70. *See Valdobinos*, 122 Wash. 2d at 282, 858 P.2d at 206 (noting that in *Sabala*, 44 Wash. App.

may also satisfy the weapon–defendant nexus test.[71] In articulating the evidentiary requirements for the weapon–defendant nexus, the *Schelin* plurality examined the analyses in several appellate court cases.[72] First, in *State v. Taylor*,[73] a weapon–defendant nexus existed where the defendant's unloaded gun and ammunition clip were inside a bag that sat on the table directly next to him.[74] In contrast, this nexus did not exist in *State v. Mills*,[75] where police arrested the defendant several miles from the motel room that contained his weapon and illegal narcotics.[76] In *Schelin*, the plurality concluded that a weapon–defendant nexus existed where the defendant stood within feet of his loaded gun when police entered his home.[77] Thus, the *Schelin* plurality agreed with the lower courts that proximity satisfies the weapon–defendant nexus requirement.[78]

2. *The Weapon–Crime Nexus Test Requires Analysis of Three Factors*

To determine the existence of a nexus between the weapon and the crime, courts must examine the nature of the crime, the type of weapon, and the circumstances under which the weapon was found.[79] The *Schelin* plurality adopted the weapon–crime nexus requirement after reviewing the decision of Division I of the Washington State Court of Appeals in *State v. Johnson*.[80] The *Schelin* plurality agreed with the *Johnson* court's conclusion that the mere presence of a weapon at a crime scene does not establish a weapon–crime nexus.[81] Rather, the State must present

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at 448, 723 P.2d at 8, a gun within reach of defendant was considered easily accessible).

71. *See, e.g.*, *Schelin*, 147 Wash. 2d at 574, 55 P.3d at 639 (determining direct evidence that defendant stood within feet of loaded gun hanging on wall established "close proximity" of weapon to defendant, which satisfied both easily accessible test and nexus between weapon and defendant).

72. *See id.* at 568–69, 55 P.3d at 636.

73. 74 Wash. App. 111, 872 P.2d 53 (1994).

74. *See id.* at 124–26, 872 P.2d at 60–61 (finding no violation of defendant's constitutional rights because "the gun and the crime were sufficiently connected").

75. 80 Wash. App. 231, 907 P.2d 316 (1995).

76. *See id.* at 237, 907 P.2d at 318.

77. *See Schelin*, 147 Wash. 2d at 574, 55 P.3d at 639.

78. *See id.*

79. *See id.* at 570, 55 P.3d at 637.

80. 94 Wash. App. 882, 974 P.2d 855 (1999); *see Schelin*, 147 Wash. 2d at 569–70, 55 P.3d at 636–37.

81. *See Schelin*, 147 Wash. 2d at 570, 55 P.3d at 637 (citing *Johnson*, 94 Wash. App. at 895, 974 P.2d at 861).

additional evidence that entitles the trier of fact to infer that a defendant was using a weapon in furtherance of the crime.[82] A weapon–crime nexus thus exists when a defendant maintained or protected the illegal possession, manufacture, or delivery of narcotics by constructively possessing a deadly weapon.[83] The three *Schelin* factors—nature of the crime, type of weapon, and the circumstances under which the weapon is found—frame this inference.[84] The weapon–crime nexus exists if the evidence entitles the trier of fact to make the necessary inference.[85]

The *Schelin* plurality derived the three factors from appellate court decisions that required a nexus between the weapon and the crime.[86] In *State v. Sabala*,[87] Division III affirmed the trial court's finding that Sabala was armed.[88] Sabala contended that he was denied his constitutional right to bear arms because no nexus existed between the weapon and the crime.[89] The *Sabala* court determined that the facts supported the trial court's finding of a weapon–crime nexus:[90] by placing his fully loaded semi-automatic pistol on the floorboard directly under his seat, the defendant intentionally positioned it to be easily accessible during the delivery of twenty-five grams of heroin.[91] Evidence regarding the location and position of the gun, the fact that it was fully loaded, and the fact that it was available for the defendant's use while driving supported the trial court's finding that Sabala was armed.[92] Similarly, in *State v. Taylor*,[93] evidence that the defendant sat next to a gun in the midst of a host of illegal narcotics, implements commonly used for measuring and packaging, and a significant amount of cash supported the finding of a weapon–crime nexus.[94] In *State v. Simonson*,[95] Division

82. *See id.* at 574–75, 55 P.3d at 639 (approving State v. Mills, 80 Wash. App. 231, 235, 907 P.2d 316, 317 (1995)); *see also Mills*, 80 Wash. App. at 235, 907 P.2d at 317 ("[A] defendant in constructive possession of a deadly weapon, *even if that weapon is next to controlled substances*, is not 'armed.'" (emphasis added)).

83. *See Schelin*, 147 Wash. 2d at 572, 55 P.3d at 638.

84. *See id.* at 570, 55 P.3d at 637.

85. *See id.* at 574, 55 P.3d at 639.

86. *See id.* at 567–70, 55 P.3d at 636–37.

87. 44 Wash. App. 444, 723 P.2d 5 (1986).

88. *Id.* at 449, 723 P.2d at 8.

89. *Id.* at 448–49, 723 P.2d at 8.

90. *Id.* at 448, 723 P.2d at 8.

91. *Id.* at 445–46, 723 P.2d at 6.

92. *See id.* at 449, 723 P.2d at 8.

93. 74 Wash. App. 111, 872 P.2d 53 (1994).

94. *See id.* at 123–25, 872 P.2d at 59–60 (finding no violation of defendant's constitutional rights

II also found a weapon–crime nexus where police discovered a gun in the mud next to the defendant's methamphetamine laboratory, in addition to several guns in a nearby trailer, after the lab exploded.[96] This evidence permitted an inference that the defendant arranged the weapons to allow easy access to them in order to defend the laboratory.[97]

After reviewing these cases, the *Schelin* plurality acknowledged that courts in earlier cases had considered three factors—the nature of the crime, the type of weapon, and the circumstances under which the weapon was found—to determine whether the evidence permitted an inference that the defendant was using the weapon in connection with the crime.[98] Under the first factor, the extent of the narcotics operation, including narcotics manufacture or transport,[99] coupled with a significant quantity of narcotics[100] supported an inference that, even though the

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because "the gun and the crime were sufficiently connected"). Police found approximately fifteen grams of powdered and rock cocaine, heroin, and forty-six diazepam pills. *Id.* at 115, 872 P.2d at 55. Police also found baggies commonly used for packaging cocaine and heroin, a cocaine grinder, scales, a pager, and $5,737. *Id.*

95. 91 Wash. App. 874, 960 P.2d 955 (1998).

96. *Id.* at 877, 960 P.2d at 957.

97. *See id.* at 883, 960 P.2d at 960.

98. *See* State v. Schelin, 147 Wash. 2d 562, 574, 55 P.3d 632, 639 (2002) (plurality opinion).

99. *See, e.g., id.* at 563, 55 P.3d at 633 (noting defendant was arrested with weapon while manufacturing marijuana with intent to deliver); State v. Valdobinos, 122 Wash. 2d 270, 274, 858 P.2d 199, 202 (1993) (noting defendant was arrested with weapon while in possession of cocaine with intent to deliver); State v. Holt, 119 Wash. App. 712, 715, 82 P.3d 688, 690 (2004) (noting defendant was arrested with weapon while manufacturing methamphetamine); State v. Johnson, 94 Wash. App. 882, 888, 974 P.2d 855, 858 (1999) (noting defendant was arrested with weapon for possession of heroin with intent to deliver); *Simonson*, 91 Wash. App. at 876, 960 P.2d at 957 (noting defendant convicted of manufacturing methamphetamine); State v. Williams, 85 Wash. App. 508, 510, 933 P.2d 1072, 1074 (1997) (noting defendant was arrested with weapon for delivery of cocaine), *rev'd on other grounds*, 135 Wash. 2d 365, 957 P.2d 216 (1998); State v. Mills, 80 Wash. App. 231, 233, 907 P.2d 316, 317 (1995) (noting defendant was arrested with weapon while possessing methamphetamine with intent to deliver); State v. Samaniego, 76 Wash. App. 76, 78, 882 P.2d 195, 196 (1994) (noting defendant was arrested with weapon while in possession of cocaine with intent to deliver); State v. Call, 75 Wash. App. 866, 868, 880 P.2d 571, 571 (1994) (noting defendant was arrested with weapon while in possession of marijuana with intent to manufacture); State v. Taylor, 74 Wash. App. 111, 125, 872 P.2d 53, 60 (1994) (noting defendant was arrested with weapon while in possession of narcotics and other materials indicating an intent to deliver); State v. Sabala, 44 Wash. App. 444, 445, 723 P.2d 5, 6 (1986) (noting defendant was arrested with weapon while in possession of heroin with intent to deliver).

100. *See, e.g., Schelin*, 147 Wash. 2d at 564, 55 P.3d at 634 (noting defendant had seventy rooted marijuana plants, fifty starter plants, large amounts of harvested marijuana, and dried marijuana leaves worth at least $240,000); *Valdobinos*, 122 Wash. 2d at 274, 858 P.2d at 202 (noting federal authorities found 846 grams of cocaine); *Simonson*, 91 Wash. App. at 878, 960 P.2d at 958 (noting police found 10,000 pseudoephedrine pills in defendant's trailer and the prosecutor presented evidence at trial that a manufacturer had shipped at least 30,000 pills to Simonson or his

defendant did not actually possess the weapon, he or she was using it in connection with the possession of narcotics. Under the second factor, courts have not explained how the type of weapon might itself demonstrate a connection between the weapon and the crime, but courts have identified the weapon at issue in their analysis.[101] Finally, under the third factor, courts relied on two "circumstances" to support an inference that the defendant was using the weapon in relation to the crime: first, whether the defendant intentionally positioned and prepared the weapon in a particular manner, [102] and second, whether the defendant intentionally maintained a substantial number of weapons.[103]

Applying this three-factor analysis, the *Schelin* plurality determined that the evidence entitled the jury to infer that Schelin used his weapon to protect his basement marijuana-growing operation, creating a weapon–crime nexus. [104] Under the first factor, the *Schelin* plurality considered the nature of the crime.[105] Schelin operated a marijuana-growing operation in his basement, which involved 120 marijuana plants in various growth stages, harvested marijuana, measuring and packaging tools, and significant amounts of cash.[106] This extensive drug operation represented a significant asset that warranted the protection of a deadly weapon.[107] Under the second factor, the plurality considered the type of

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accomplices); *Mills*, 80 Wash. App. at 233, 907 P.2d at 317 (noting defendant had 118 grams of methamphetamine); *Call*, 75 Wash. App. at 868, 880 P.2d at 571 (noting officers found cocaine, LSD, marijuana, and a marijuana-growing operation); *Taylor*, 74 Wash. App. at 115, 872 P.2d at 55 (noting officers found fifteen grams of cocaine, one gram of black tar heroin, and forty-six diazepam pills); *Sabala*, 44 Wash. App. at 445, 723 P.2d at 6 (noting defendant was attempting to deliver more than twenty-five grams of heroin).

101. *See, e.g.*, *Simonson*, 91 Wash. App. at 877–78, 960 P.2d at 957–58 (holding defendant in constructive possession of seven weapons, including two semi-automatic pistols and an assault rifle, was armed); *Sabala*, 44 Wash. App. at 445, 723 P.2d at 6 (determining defendant who had constructive possession of semi-automatic gun was armed).

102. *See, e.g.*, *Sabala*, 44 Wash. App. at 445, 723 P.2d at 6 (determining defendant positioned fully loaded semi-automatic gun under seat for easy access).

103. *See, e.g.*, *Simonson*, 91 Wash. App. at 877–78, 960 P.2d at 957–58 (determining defendants maintained at least seven weapons, including at least four loaded weapons, on premises of methamphetamine operation).

104. *See Schelin*, 147 Wash. 2d at 574, 55 P.3d at 639.

105. *See id.* at 574–75, 55 P.3d at 639 (noting right to bear firearms which further commission of crime, such as Schelin's marijuana-growing operation and intent to deliver, is not constitutionally protected).

106. *Id.* at 564, 55 P.3d at 634.

107. *See id.* at 574, 55 P.3d at 639. Police found $50,000 in gold coins and cash. *Id.* at 564, 55 P.3d at 634. Police also found seventy rooted plants, fifty starter plants, large amounts of harvested marijuana, and dried marijuana leaves. *Id.* Based on a detective's testimony that one marijuana plant

weapon: a loaded revolver.[108] Finally, under the third factor, the plurality considered the circumstances under which police found the weapon.[109] Schelin testified that he intentionally hung the weapon near the door to facilitate its use if necessary.[110] The gun hung in the midst of the narcotics operation,[111] and Schelin stood near this weapon when police entered.[112] Therefore, his choice and the positioning of the weapon permitted the jury to infer that he was using the weapon to protect the narcotics operation.[113] The plurality's three-factor analysis highlighted evidence showing Schelin's "*apparent ability* to protect [his] grow operation with a deadly weapon," which supported the jury's finding of a weapon–crime nexus and rendered Schelin armed.[114]

In sum, a court must apply two tests to determine whether a defendant is armed in constructive possession cases.[115] First, a court must determine whether the evidence shows that the weapon was easily accessible.[116] Second, a court must apply a two-part nexus test.[117] The State may satisfy the weapon–defendant nexus requirement by showing proximity.[118] Then a court must consider three weapon–crime nexus factors to determine whether the evidence entitles the fact-finder to infer that the defendant was using the weapon in connection with the crime.[119] If the three-factor analysis supports this inference, then the trier of fact may conclude that the defendant was armed for purposes of the Deadly Weapon Enhancement.[120] Without support for this inference, however, the trier of fact cannot find a defendant armed as a matter of law.

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has a street value of up to $2,000, *id.* at 564 n.1, 55 P.3d at 634 n.1, Schelin's operation was worth at least $290,000.

108. *See id.* at 564, 55 P.3d at 634.

109. *See id.* Police officers found in the basement a loaded revolver stored in a holster, which hung from the wall six to ten feet from where Schelin stood. *Id.*

110. *Id.* at 573–74, 55 P.3d at 638–39.

111. *Id.* at 564, 55 P.3d at 634.

112. *Id.* at 573, 55 P.3d at 638.

113. *See id.* at 574, 55 P.3d at 639.

114. *Id.* at 574–75, 55 P.3d at 639 (emphasis added).

115. *See id.* at 567–68, 55 P.3d at 636.

116. *See id.*

117. *See id.*

118. *See id.* at 573–74, 55 P.3d at 638–39.

119. *See id.* at 570, 55 P.3d at 637.

120. *See id.* at 574–75, 55 P.3d at 639 (affirming conclusion that defendant was armed when proper application of weapon–crime nexus permitted inference that defendant "was using the weapon to protect his basement marijuana-growing operation").

III. THE *GURSKE* COURT FAILED TO APPLY BOTH OF THE REQUIRED TESTS

In *State v. Gurske*, Division III affirmed the application of the Deadly Weapon Enhancement to Gurske's sentence for possession of methamphetamine. [121] After arresting Gurske for driving with a suspended license, the police inventoried his truck and found a zipped-closed backpack behind the driver's seat.[122] After opening the backpack, the police found three grams of methamphetamine, [123] an unloaded pistol in a holster, a loaded magazine, and Gurske's wallet.[124] At trial, the parties stipulated that the driver could not remove the backpack without either exiting the truck or moving into the passenger seat, even though the backpack was within arm's reach of the driver's position.[125] The trial judge applied the Deadly Weapon Enhancement to Gurske's sentence for possession of a controlled substance because the backpack was within arm's reach, even though it could not be accessed immediately.[126] Division III affirmed on the same basis.[127]

Before concluding that Gurske was armed, Division III acknowledged that constructive possession cases like *Gurske* require the State to satisfy both the easily accessible and the two-part nexus test.[128] Applying the easily accessible test, the court noted that the proximity between Gurske and the backpack containing the pistol rendered the weapon "easily accessible."[129] Turning to the nexus test, the *Gurske* court found that this proximity also established both the weapon–defendant nexus and the weapon–crime nexus.[130] In his dissent, Judge Schultheis noted that this mere proximity, without further evidence, fails to render a defendant

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121. State v. Gurske, 120 Wash. App. 63, 64, 83 P.3d 1051, 1052 (2004), *review granted*, 152 Wash. 2d 1013, 101 P.3d 108 (2004).

122. *Id.* at 67, 83 P.3d at 1054 (Schultheis, J., dissenting).

123. The most recent case considering the value of methamphetamine noted that in 2000, police estimated that 0.9 grams of methamphetamine had a street value between $70 and $150. State v. Ceglowski, 103 Wash. App. 346, 348–49, 12 P.3d 160, 161–62 (2000).

124. *Gurske*, 120 Wash. App. at 65–66, 83 P.3d at 1052–53.

125. *See id.* at 64–65, 83 P.3d at 1052.

126. *See id.*

127. *See id.*

128. *See id.* at 65–66, 83 P.3d at 1053.

129. *See id.* at 65, 83 P.3d at 1053.

130. *See id.* at 66, 83 P.3d at 1053 (noting backpack contained pistol, narcotics, and Gurske's wallet).

armed.[131] In addition, the *Gurske* court relied on the presence of Gurske's wallet in the backpack with the pistol and the narcotics to satisfy the nexus test.[132] The *Gurske* court never referred to the three weapon–crime nexus factors, nor to the potential inference that Gurske was using his weapon in furtherance of his possession of methamphetamine.[133] Instead, the court acknowledged that the pistol was not as easily accessible as the fully loaded weapon positioned directly under the driver's seat in *Sabala*, but was nonetheless accessible like the weapon that sat on a table beside the defendant in *Taylor*.[134] The *Gurske* court thus affirmed the trial court's determination on the basis of accessibility and proximity and failed to apply the nexus test.[135]

IV. THE EVIDENCE IN *GURSKE* DOES NOT SATISFY THE WEAPON–CRIME NEXUS TEST

Under a proper application of the weapon–crime nexus test, the *Gurske* evidence shows nothing more than constructive possession and cannot support the critical inference that the weapon was related to the commission of the crime.[136] Therefore, Gurske was not armed for purposes of the Deadly Weapon Enhancement, and the *Gurske* court erred in affirming the trial court's ruling.[137] Under *Schelin*, close proximity between a defendant and a weapon during commission of a crime does not render a defendant armed within the meaning of the Deadly Weapon Enhancement.[138] Without additional evidence that establishes more than mere proximity in cases of constructive possession, a trier of fact may not infer that a defendant was using a deadly weapon in connection with the crime.[139] In contrast, the *Gurske* court's determination that a nexus existed turned on the trial judge's finding that the backpack containing the weapon, the drugs, and the wallet lay close

131. *See id.* at 67, 83 P.3d at 1054 (Schultheis, J., dissenting).

132. *See id.* at 65–66, 83 P.3d at 1053.

133. *See id.* at 66, 83 P.3d at 1053.

134. *See id.* at 66, 83 P.3d at 1053.

135. *See id.* at 67–68, 83 P.3d at 1053–54 (Schultheis, J., dissenting).

136. *See* State v. Schelin, 147 Wash. 2d 562, 570, 55 P.3d 632, 637 (2002) (plurality opinion) (citing with approval State v. Johnson, 94 Wash. App. 882, 895, 974 P.2d 855, 861 (1999)).

137. *See Gurske*, 120 Wash. App. at 67, 83 P.3d at 1053 (Schultheis, J., dissenting).

138. *See Schelin*, 147 Wash. 2d at 570, 55 P.3d at 637 (describing framework for identifying additional facts relevant to this inquiry).

139. *See id.*

to Gurske.[140] The *Gurske* court thus erred in relying on evidence of mere proximity, which fails to satisfy the weapon-crime nexus requirement.[141] The *Gurske* court further erred because application of the *Schelin* factors demonstrates Gurske's mere constructive possession of a weapon that lay in close proximity, which fails to support the inference that a weapon–crime nexus exists.[142]

A. The Gurske *Court Erred In Allowing Mere Proximity to Satisfy Both Parts of the Nexus Test*

By interpreting both parts of the nexus test to require mere proximity,[143] the *Gurske* decision frustrates the purpose of the *Schelin* decision by effectively rendering the nexus test indistinguishable from the easily accessible test.[144] The *Schelin* court intended to adopt a second, independent test to clarify those facts necessary to allow the trier of fact to infer that a constructively possessed weapon was in fact connected to a crime.[145] The trial judge concluded that Gurske was armed because the backpack and the weapon lay in close proximity to him.[146] Concluding that this fact satisfied both the easily accessible test and the nexus test, Division III affirmed the trial judge's conclusion on the same basis.[147] The proximity between the pistol and Gurske supported the *Gurske* court's determination that the State satisfied the easily accessible test and the weapon–defendant nexus test.[148] Mere proximity does not, however, satisfy the weapon-crime nexus test.[149] By relying on the proximity between Gurske and the backpack to satisfy both tests, the *Gurske* court

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140. *See Gurske*, 120 Wash. App. at 64, 83 P.3d at 1052.

141. *See Schelin*, 147 Wash. 2d at 570, 55 P.3d at 637.

142. *See id.* at 574, 55 P.3d at 639.

143. *See Gurske*, 120 Wash. App. at 64–66, 83 P.3d at 1052–53.

144. *See Schelin*, 147 Wash. 2d at 570, 55 P.3d at 637 (noting court was asked to review "seemingly inconsistent applications of nexus tests by the court of appeals concerning the deadly weapon sentence enhancement").

145. *See id.* (agreeing with *Johnson* court that mere presence of weapon at crime scene does not establish weapon–crime nexus and identifying three factors that court should consider to move beyond mere proximity, State v. Johnson, 94 Wash. App. 882, 895, 974 P.2d 855, 861 (1999)).

146. *See id.*

147. *See id.* ("The trial judge concluded from [the stipulation that the backpack holding the pistol was within arm's reach] that Gurske was armed . . . .").

148. *See id.* at 574, 55 P.3d at 639 (concluding Schelin's "close proximity" to loaded gun satisfied easily accessible test and established weapon–defendant nexus).

149. *See id.* at 570, 55 P.3d at 637.

failed to apply the weapon–crime nexus test.[150]

The *Gurske* court attempted to distinguish its application of the nexus test from the easily accessible test by noting that Gurske's wallet also lay in the bag.[151] The presence of Gurske's wallet, however, simply establishes his constructive possession of the weapon.[152] Mere constructive possession does not satisfy the separate nexus requirement and precludes a finding that Gurske was armed absent a weapon-crime nexus.[153] The *Gurske* court therefore erred in finding Gurske armed based on his mere constructive possession of the backpack that lay in close proximity to him.[154]

B. *Gurske Was Not Armed Because the Evidence Fails to Satisfy the Three* Schelin *Factors*

A proper analysis of the *Gurske* evidence under the weapon–crime nexus test shows that Gurske was not armed under the Deadly Weapon Enhancement because the evidence fails to show more than mere proximity between the weapon and the drugs forming the basis of Gurske's crime.[155] Gurske's weapon and drugs lay within reach of the driver's seat.[156] This proximity may satisfy both the easily accessible test[157] and the weapon–defendant nexus test,[158] but fails to satisfy the

150. *See* State v. Gurske, 120 Wash. App. 63, 64–66, 83 P.3d 1051, 1052–53 (2004), *review granted*, 152 Wash. 2d 1013, 101 P.3d 108 (2004).

151. *See id.* at 66, 83 P.3d at 1053.

152. *See* State v. Valdobinos, 122 Wash. 2d 270, 282, 858 P.2d 199, 206 (1993) (concluding presence of defendant's personal effects, including bus ticket bearing his name lying next to 846 grams of cocaine did not render defendant armed even in presence of unloaded rifle); State v. Simonson, 91 Wash. App. 874, 881–82, 960 P.2d 955, 959 (1998) (concluding presence of defendant's personal effects, including wallet, only established constructive possession of weapons); State v. Call, 75 Wash. App. 866, 868–69, 880 P.2d 571, 571–72 (1994) (holding documents found in house established defendant's constructive possession of handguns, but such constructive possession did not render him armed).

153. *See Schelin*, 147 Wash. 2d at 574, 55 P.3d at 639 (concluding evidence establishing constructive possession of easily accessible deadly weapon did not show defendant was armed absent additional satisfaction of nexus test).

154. *See id.* at 570, 55 P.3d at 637.

155. *See id.*

156. *See Gurske*, 120 Wash. App. at 65, 83 P.3d at 1052.

157. *See id.* at 65, 83 P.3d at 1053 (stating proximity between backpack and driver's seat satisfies easily accessible and readily available test).

158. *See id.* at 66, 83 P.3d at 1053 (explaining proximity between weapon and Gurske satisfies weapon–crime nexus).

weapon–crime nexus test.[159] The totality of the circumstances, including the nature of Gurske's crime, the type of weapon, and the circumstances under which police found the weapon, do not entitle a trier of fact to infer that the gun was in fact related to the drug possession.[160] Without this inference, Gurske was not armed, despite the fact that the backpack lay within arm's reach from the driver's seat.[161]

1. *Gurske's Possession of a Small Amount of Drugs Does Not Support an Inference that Gurske Was Using His Gun to Protect the Drugs*

First, the nature of the crime and the small quantity of drugs found in Gurske's possession do not support the finding of a weapon–crime nexus.[162] The weapon–crime nexus requires a connection between the weapon and the crime, and a court must consider whether evidence relating to the nature of the crime implicates this connection.[163] In other drug possession cases, the significant value of the narcotics involved supported an inference that the defendant was using the weapon in connection with the narcotics.[164] In addition, evidence that the defendant

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159. *See Schelin*, 147 Wash. 2d at 570, 55 P.3d at 637 (agreeing with *Johnson* court that mere presence of weapon at crime scene does not establish defendant as armed without additional evidence, State v. Johnson, 94 Wash. App. 882, 895, 974 P.2d 855, 861).

160. *Compare id.* at 574–75, 55 P.3d at 639 (concluding jury was entitled to infer Schelin "was using the weapon to protect his basement marijuana grow operation" on basis of evidence establishing that when police entered home defendant stood near weapon he had intentionally loaded and hung on wall in midst of marijuana-growing operation to permit easy access to weapon), *with Gurske*, 120 Wash. App. at 64–65, 83 P.3d at 1052 (disregarding evidence that Gurske could not access backpack containing weapon and drugs as driver without taking additional steps, failed to access or attempt to access backpack when pulled over while driving, and police did not even discover pistol or methamphetamine until they arrested Gurske, impounded truck, and inventoried contents at station).

161. *See Gurske*, 120 Wash. App. at 64, 83 P.3d at 1052.

162. *See id.* at 66, 83 P.3d at 1053. Gurske was convicted of possession of three grams of methamphetamine. *Id.* In 2000, police estimated that 0.9 grams of methamphetamine had a street value between $70 and $150. State v. Ceglowski, 103 Wash. App. 346, 348–49, 12 P.3d 160, 161–62 (2000). Under this estimation, Gurske possessed methamphetamine with a street value of at least $210 to $450. In contrast, in *Schelin*, the defendant's operation at the time of his arrest was worth at least $290,000. *See supra* note 107.

163. *See Schelin*, 147 Wash. 2d at 574–75, 56 P.3d at 639 (noting marijuana-growing operation might warrant protection).

164. *See, e.g., id.* at 564, 55 P.3d at 634 (noting defendant had seventy rooted marijuana plants, fifty starter plants, large amounts of harvested marijuana, and dried marijuana leaves worth at least $240,000); State v. Valdobinos, 122 Wash. 2d 270, 274, 858 P.2d 199, 202 (1993) (noting federal authorities found 846 grams of cocaine); State v. Simonson, 91 Wash. App. 874, 878, 960 P.2d 955, 958 (1998) (noting police found 10,000 pseudoephedrine pills in defendant's trailer and the prosecutor presented evidence at trial that a manufacturer had shipped at least 30,000 pills to

was producing or transporting these drugs, particularly if the defendant was engaged in this activity when law enforcement officers discovered the weapon, implicates the weapon–crime nexus.[165] For example, the weapon–crime nexus existed in *Sabala*, where the defendant was arrested while transporting more than twenty-five grams of heroin.[166] This nexus also existed in *Taylor*, where the defendant possessed fifteen grams of cocaine, one gram of heroin, and forty-six diazepam pills.[167] Similarly, the nexus existed in *Simonson*, where police found 10,000 pseudoephedrine pills, used for manufacturing methamphetamine,[168] and in *Schelin*, where police found 120 marijuana plants, large amounts of harvested marijuana, and marijuana leaves.[169] Thus, such evidence supports the *inference* that the weapon–crime nexus existed in constructive possession cases.[170] In contrast, Gurske possessed only three grams of methamphetamine.[171] The evidence does not show that

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Simonson or his accomplices); State v. Mills, 80 Wash. App. 231, 233, 907 P.2d 316, 317 (1995) (noting defendant had 118 grams of methamphetamine); State v. Call, 75 Wash. App. 866, 868, 880 P.2d 571, 571 (1994) (noting officers found cocaine, LSD, marijuana, and a marijuana-growing operation); State v. Taylor, 74 Wash. App. 111, 115, 872 P.2d 53, 55 (1994) (noting officers found fifteen grams of cocaine, one gram of black tar heroin, and forty-six diazepam pills); State v. Sabala, 44 Wash. App. 444, 445, 723 P.2d 5, 6 (1986) (noting defendant was attempting to deliver more than twenty-five grams of heroin).

165. *See, e.g.*, *Schelin*, 147 Wash. 2d at 563, 55 P.3d at 633 (noting defendant was arrested with weapon while manufacturing marijuana with intent to deliver); *Valdobinos*, 122 Wash. 2d at 274, 858 P.2d at 202 (noting defendant was arrested with weapon while in possession of cocaine with intent to deliver); State v. Holt, 119 Wash. App. 712, 715, 82 P.3d 688, 690 (2004) (noting defendant was arrested with weapon while manufacturing methamphetamine); State v. Johnson, 94 Wash. App. 882, 888, 974 P.2d 855, 858 (1999) (noting defendant was arrested with weapon for possession of heroin with intent to deliver); *Simonson*, 91 Wash. App. at 876, 960 P.2d at 957 (noting defendant convicted of manufacturing methamphetamine); State v. Williams, 85 Wash. App. 508, 510, 933 P.2d 1072, 1074 (1997) (noting defendant was arrested with weapon for delivery of cocaine), *rev'd on other grounds*, 135 Wash. 2d 365, 957 P.2d 216 (1998); *Mills*, 80 Wash. App. at 233, 907 P.2d at 317 (noting defendant was arrested with weapon while possessing methamphetamine with intent to deliver); State v. Samaniego, 76 Wash. App. 76, 78, 882 P.2d 195, 196 (1994) (noting defendant was arrested with weapon while in possession of cocaine with intent to deliver); *Call*, 75 Wash. App. at 868, 880 P.2d at 571 (noting defendant was arrested with weapon while in possession of marijuana with intent to manufacture); *Taylor*, 74 Wash. App. at 125, 872 P.2d at 60 (noting defendant was arrested with weapon while in possession of narcotics and other materials indicating an intent to deliver); *Sabala*, 44 Wash. App. at 445, 723 P.2d at 6 (noting defendant was arrested with weapon while in possession of heroin with intent to deliver).

166. *See Sabala*, 44 Wash. App. at 445, 723 P.2d at 6.

167. *See Taylor*, 74 Wash. App. at 123, 872 P.2d at 59.

168. *See Simonson*, 91 Wash. App. at 877–78, 960 P.2d at 957–58.

169. *See Schelin*, 147 Wash. 2d at 564, 55 P.3d at 634.

170. *See id.* at 572, 55 P.3d at 638.

171. State v. Gurske, 120 Wash. App. 63, 66, 83 P.3d 1051, 1053 (2004), *review granted*, 152

Gurske intended to deliver these narcotics or that he maintained a narcotics operation, and the State refrained from charging him with a crime more serious than possession of narcotics.[172] Further, the evidence does not show that the narcotics represented either a significant asset for Gurske or a manufacturing operation.[173] Rather, the State presented evidence showing only that the weapon lay next to the narcotics.[174] Absent evidence showing more than this proximity, the nature of Gurske's crime does not support the inference that he was using his weapon to further his crime of possession.[175]

2. *The Circumstances Surrounding the Discovery of Gurske's Gun Do Not Support a Weapon–Crime Nexus*

Neither Gurske's choice of weapon,[176] nor the circumstances under which police later found the weapon,[177] implicates the weapon–crime nexus. Gurske's choice of weapon, a pistol, does not demonstrate a relationship with the crime of narcotics possession.[178] The circumstances surrounding the discovery of Gurske's weapon similarly fail to support a connection between the weapon and the crime.[179] In previous cases addressing the weapon–crime nexus, courts relied on two "circumstances" to support an inference that the defendant was using the weapon in relation to the crime: first, whether the defendant intentionally positioned and prepared the weapon in a particular manner,[180] and

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Wash. 2d 1013, 101 P.3d 108 (2004).

172. *See id.* at 65, 83 P.3d at 1052 (affirming Gurske's conviction for possession of methamphetamine).

173. *See id.* at 66, 83 P.3d at 1053 (noting Gurske had only three grams of methamphetamine).

174. *See id.*

175. *See id.*

176. *See id.* at 65, 83 P.3d at 1052 (finding Gurske's backpack contained a nine millimeter pistol in a holster).

177. *See id.* at 64–65, 83 P.3d at 1052. Police found the weapon after impounding and inventorying Gurske's truck. *Id.* Inside the truck, police found the unloaded pistol inside a zipped-closed backpack. *See id.* at 67, 83 P.3d at 1054 (Schultheis, J., dissenting). Division III cited the parties' stipulation at trial that the driver could not remove the backpack without first either exiting the vehicle or moving into the passenger seat location. *See id.* at 64, 83 P.3d at 1052.

178. *But see, e.g.*, State v. Simonson, 91 Wash. App. 874, 877–78, 960 P.2d 955, 957–58 (1998) (holding defendant in constructive possession of seven weapons, including two semi-automatic pistols and an assault rifle, was armed); State v. Sabala, 44 Wash. App. 444, 445, 723 P.2d 5, 6 (1986) (determining defendant who had constructive possession of semi-automatic gun was armed).

179. *See Gurske*, 120 Wash. App. at 67, 83 P.3d at 1054 (Schultheis, J., dissenting) (noting pistol remained in backseat of Gurske's truck at all times inside holster inside zipped backpack).

180. *See, e.g.*, *Sabala*, 44 Wash. App. at 445, 723 P.2d at 6 (determining defendant positioned

second, whether the defendant intentionally maintained a substantial number of weapons.[181]

First, the evidence fails to show that Gurske intentionally positioned his weapon or loaded it in preparation for use—in fact, it shows he did not load it.[182] In contrast, the intentional positioning and preparation of a weapon permits the finding of a weapon–crime nexus.[183] For example, the defendant in *Sabala* prepared his gun by fully loading it before placing it beneath the driver's seat with the grip easily accessible to anyone sitting above; this evidence entitled the trier of fact to infer a connection between the weapon's placement and the intended delivery of twenty-five grams of heroin.[184] Evidence entitled the trier of fact to make a similar inference in *Schelin*, where the defendant stood near a weapon that he intentionally hung fully loaded and ready for use outside his basement marijuana-growing operation.[185] Also, in *Taylor*, the evidence permitted a nexus inference where the defendant placed his weapon on a table next to the couch where he was sitting in the midst of a significant quantity of narcotics and measuring and packaging implements.[186]

In *Gurske*, the State presented no evidence that Gurske specifically placed his unloaded weapon to allow for easy access, nor did it show more than mere proximity between the weapon and the small quantity of narcotics.[187] The evidence in Gurske's case does not demonstrate the intentional preparation evident in *Sabala* or *Schelin*. In fact, Gurske placed the backpack containing the weapon in such a manner that it was less accessible to him as the driver—he could not reach his weapon

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fully loaded semi-automatic gun under seat for easy access).

181. *See, e.g.*, *Simonson*, 91 Wash. App. at 877–78, 960 P.2d at 957–58 (determining defendants maintained at least seven weapons, including at least four loaded weapons, on premises of methamphetamine operation).

182. *See Gurske*, 120 Wash. App. at 64–65, 83 P.3d at 1052. According to the *Gurske* opinion, the parties stipulated that Gurske's backpack was not removable by the driver without first either exiting the vehicle or moving into the passenger seat location. *Id.* at 65, 83 P.3d at 1052.

183. *See, e.g.*, *Sabala*, 44 Wash. App. at 446–48, 723 P.2d at 6–8 (holding location and position of weapon, fully loaded and accessible to driver, demonstrated nexus between weapon and commission of crime); *see also* State v. Schelin, 147 Wash. 2d 562, 573–74, 55 P.3d 632, 638–39 (2002) (plurality opinion) (determining defendant stood near weapon he had loaded and placed on the wall, which he testified enabled him to remove gun quickly when necessary).

184. *See Sabala*, 44 Wash. App. at 446, 723 P.2d at 6.

185. *See Schelin*, 147 Wash. 2d at 574, 55 P.3d at 639.

186. *See* State v. Taylor, 74 Wash. App. 111, 125, 872 P.2d 53, 60 (1994).

187. *See Gurske*, 120 Wash. App. at 65–66, 83 P.3d at 1052.

without taking additional steps.[188] Moreover, he left the weapon unloaded, further demonstrating a lack of preparation.[189] When police pulled him over, Gurske remained in the driver's seat, where he lacked immediate access to the weapon.[190] Although Gurske sat in proximity to the weapon, as the defendant did in *Taylor*, he did not sit in the midst of narcotics materials, nor was he in the process of packaging narcotics with the intent to deliver.[191] While he placed the weapon in the same backpack as the narcotics and a loaded magazine, evidence shows that he left the gun unloaded,[192] zipped up the backpack,[193] and placed it in a location that did not permit immediate access to the driver.[194]

Gurske's failure to maintain a significant number of weapons further shows a lack of connection between the weapon and the crime beyond mere proximity.[195] The *Simonson* court considered the substantial number of weapons maintained by the defendants, including the storage of seven guns, at least four of which were loaded, on the premises of their methamphetamine-manufacturing site; this evidence supported an inference that the defendants were using the guns to defend the site.[196] In contrast, Gurske possessed only one unloaded gun that he stored in the backseat of his truck.[197]

If one considers Gurske's case in light of the three *Schelin* factors, one cannot infer that Gurske was armed. Gurske's mere narcotics *possession* does not correspond to the substantial narcotics operations, including manufacture and delivery, that supported the finding of a weapon–crime nexus in *Schelin*, *Simonson*, and *Taylor*.[198] Similarly,

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188. *See id.* at 65, 83 P.3d at 1052.

189. *See id.*

190. *See id.*

191. *See id.* (convicting Gurske of mere possession).

192. Although the *Gurske* court cited *Schelin* for the proposition that an unloaded gun satisfies the Deadly Weapon Enhancement's requirements, *id.* at 64, 83 P.3d at 1052, the *Schelin* court noted only that both loaded and unloaded firearms are deadly weapons for purposes of the Deadly Weapon Enhancement. *See* State v. Schelin, 147 Wash. 2d 562, 567 n.2, 55 P.3d 632, 635 n.2 (2002) (plurality opinion). As the *Schelin* court noted, however, evidence of an *unloaded* rifle under a bed was insufficient to show a defendant was armed in *Valdobinos*. *See id.* at 567, 55 P.3d at 635 (citing State v. Valdobinos, 122 Wash. 2d 270, 282, 858 P.2d 199, 206 (1993)).

193. *See Gurske*, 120 Wash. App. at 67–68, 83 P.3d at 1054 (Schultheis, J., dissenting).

194. *See id.* at 65, 83 P.3d at 1052.

195. *See id.*

196. *See* State v. Simonson, 91 Wash. App. 874, 883, 960 P.2d 955, 960 (1998).

197. *See Gurske*, 120 Wash. App. at 64, 83 P.3d at 1052.

198. *See, e.g.*, *Schelin*, 147 Wash. 2d 562, 563–64, 55 P.3d 632, 633–34 (2002) (plurality

Gurske merely possessed a single, unloaded weapon,[199] in contrast to the small arsenal found in *Simonson*.[200] Rather than placing a fully loaded weapon beneath the driver's seat with the pistol grip immediately accessible to him, as the defendant did in *Sabala*,[201] Gurske placed his unloaded weapon and drugs inside a backpack behind his seat in a manner not immediately accessible to him.[202] Police did not even discover the existence of the weapon or the methamphetamine until after they had arrested Gurske, impounded his truck, and inventoried its contents.[203] Without more, these facts do not permit a court to find anything more than proximity,[204] and they certainly do not allow a trier of fact to infer that Gurske was using the weapon in furtherance of his crime.[205] Notably, the *Gurske* court failed to consider all of the relevant evidence; the dissent detailed the full circumstances surrounding the police's discovery of the weapon, including the fact that the backpack remained zipped-closed.[206] The evidence in Gurske's case fails to support an inference that Gurske was using the weapon in connection with his possession of methamphetamine. Thus, the *Gurske* court erred in finding him armed under the Deadly Weapon Enhancement.

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opinion) (noting defendant, who had seventy rooted marijuana plants, fifty starter plants, large amounts of harvested marijuana, and dried marijuana leaves worth at least $240,000, was arrested with weapon while manufacturing marijuana with intent to deliver); *Simonson*, 91 Wash. App. at 876, 878, 960 P.2d at 957, 958 (noting police found 10,000 pseudoephedrine pills in defendant's trailer, prosecutor presented evidence at trial that manufacturer had shipped at least 30,000 pills to Simonson or his accomplices, and defendant was convicted of manufacturing methamphetamine); State v. Taylor, 74 Wash. App. 111, 115, 125, 872 P.2d 53, 55, 60 (1994) (noting defendant was arrested with weapon while in possession of fifteen grams of cocaine, one gram of black tar heroin, forty-six diazepam pills, and other materials indicating an intent to deliver).

199. *See Gurske*, 120 Wash. App. at 64, 83 P.3d at 1052.

200. *See Simonson*, 91 Wash. App. at 877–78, 960 P.2d at 957–58 (noting police found six guns in bedroom, as well as two shotguns and an assault rifle stashed around house).

201. *See* State v. Sabala, 44 Wash. App. 444, 445, 723 P.2d 5, 6 (1986).

202. *See Gurske*, 120 Wash. App. at 64–65, 83 P.3d at 1052.

203. *Id.* at 64, 83 P.3d at 1052.

204. *See* State v. Mills, 80 Wash. App. 231, 235, 907 P.2d 316, 317 (1995) ("[A] defendant in constructive possession of a deadly weapon, *even if that weapon is next to controlled substances*, is not 'armed.'" (emphasis added)).

205. *See* State v. Schelin, 147 Wash. 2d 562, 575, 55 P.3d 632, 639 (2002) (plurality opinion) (stating defendant has no constitutional right to bear arms when weapons further the commission of a crime).

206. *See Gurske*, 120 Wash. App. at 67–68, 83 P.3d at 1053–54 (Schultheis, J., dissenting).

C. *The* Gurske *Court Failed to Consider Gurske's Possession of the Gun in Light of the Deadly Weapon Enhancement's Purpose*

Without applying the weapon–crime nexus test to the evidence in Gurske's case, the *Gurske* court failed to construe the term "armed" in light of the purpose of the Deadly Weapon Enhancement. When construing ambiguous terms within a statute, it is a court's duty to ascertain and give effect to the intent and purpose of the language chosen by the legislature.[207] In the criminal context, this requires courts to apply a literal and strict interpretation to the language at issue.[208] The Washington State Legislature explicitly stated that the Deadly Weapon Enhancement should apply only where a defendant armed himself or herself with a deadly weapon during commission of a crime.[209] The legislature did not criminalize mere possession, and the underlying purpose of the statute is to implicate a defendant only where there is a possibility the defendant would *use* the weapon in connection with the crime.[210] Thus, in *Sabala*, Division III found that, even though the defendant was not technically armed, his intentional positioning of the weapon permitted an inference that he armed himself to further his heroin delivery.[211] In contrast, the *Gurske* court determined that Gurske was armed simply because the backpack lay within reach of the driver's seat.[212] Unlike the State in *Sabala*, the State in *Gurske* presented no evidence that Gurske took steps to arm himself.[213] Rather, the State presented evidence that Gurske left the weapon unloaded, put it in a backpack, zipped the backpack closed, and placed it behind the driver's seat, where he could not remove it while driving.[214] Lacking evidence that Gurske took steps like the *Sabala* defendant to "arm" himself, the State proved only that Gurske had constructive possession of a weapon while he possessed methamphetamine.[215] In light of the legislature's choice to punish defendants who actually arm themselves, the *Gurske*

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207. *See* State v. Wilson, 125 Wash. 2d 212, 216–17, 883 P.2d 320, 322–23 (1994).

208. *See id.*

209. WASH. REV. CODE § 9.94A.602 (2004).

210. *See* State v. Johnson, 94 Wash. App. 882, 896, 974 P.2d 855, 862 (1999).

211. *See id.*; State v. Sabala, 44 Wash. App. 444, 448–49, 723 P.2d 5, 8 (1986).

212. *See* State v. Gurske, 120 Wash. App. 63, 64, 83 P.3d 1051, 1052 (2004), *review granted*, 152 Wash. 2d 1013, 101 P.3d 108 (2004).

213. *See id.* at 67, 83 P.3d at 1054 (Schultheis, J., dissenting).

214. *See id.*

215. *See id.* at 66, 83 P.3d at 1053.

court erred in extending the Deadly Weapon Enhancement's application to mere constructive possession.

V. CONCLUSION

The *Gurske* court should not have affirmed the trial judge's conclusion that Gurske was armed and should have reversed the application of the Deadly Weapon Enhancement to his conviction for methamphetamine possession. In Gurske's case, the State presented evidence establishing only that the backpack holding the weapon and the drugs lay within arm's reach of the driver's seat.[216] Although the *Gurske* court acknowledged both the easily accessible and nexus tests, it limited its analysis to proximity between the weapon, Gurske, and the drugs and failed to apply the weapon–crime nexus.[217] Even if the *Gurske* court had considered the three *Schelin* factors, the evidence does not support an inference that Gurske was using the unloaded pistol in connection with his crime of possession.[218] Without this inference, the *Gurske* court erred in finding him armed and affirming the trial judge's enhancement of his sentence.[219] The Washington State Supreme Court should therefore reverse the application of the Deadly Weapon Enhancement to Gurske's sentence for possession of narcotics.

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216. *See id.* at 64, 83 P.3d at 1052.

217. *See id.* at 66, 83 P.3d at 1053.

218. *See* State v. Mills, 80 Wash. App. 231, 235–36, 907 P.2d 316, 317–18 (1995) (concluding defendant in mere constructive possession of deadly weapon, even if weapon lies next to controlled substances, is not armed within meaning of Deadly Weapon Enhancement).

219. *See id.*