IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 32869-4-III

STATE OF WASHINGTON, Respondent,

v.

JOHN MARK CROWDER, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

A jury convicted John Mark Crowder of first degree rape with a firearm enhancement, as well as two counts of delivering a controlled substance to a minor. During voir dire, the trial court held an off-the-record, unreported sidebar conference before ruling on a challenge to a juror for cause. Because the sidebar prevented public scrutiny of the jury selection process and rendered the process secret, the conference violated Crowder's right to a public trial.

During trial, the State presented evidence that Crowder furnished two juvenile males with a substance that they believed to be marijuana and from which they reported experiencing effects. However, the State did not provide any evidence that would tend to show that the effects reported correlated with any particular quantum of THC. Because the statute defining "marijuana" requires proof that the substance contains no less than .3% THC on a dry weight basis, the State failed to present sufficient evidence that the substance furnished to the juveniles met the statutory definition of marijuana.

Lastly, the State contended that Crowder used a firearm in the commission of the rape and charged him with a firearm enhancement under RCW 9.94A.533(3). At trial, the State presented evidence that it

recovered multiple guns during a search of Crowder's home. But the State presented no evidence at any point that any of the guns recovered had been test-fired or otherwise determined to be operable. Because the State failed to show that the items recovered were capable of firing a projectile as required by the statutory definition of a "firearm," insufficient evidence supports the sentence enhancement.

Based upon these errors, Crowder requests a new trial.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court violated Crowder's right to a public trial when it held a closed, unrecorded conference during jury selection while considering a challenge for cause.

ASSIGNMENT OF ERROR 2: Insufficient evidence supports the conclusion that the substance at issue in the case meets the legal definition of "marijuana."

ASSIGNMENT OF ERROR 3: Insufficient evidence supports the firearm enhancement.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Where a trial court considers a challenge to a juror for cause during an unreported bench conference, is the public trial right violated?

ISSUE 2: In the absence of scientific evidence that a substance contains greater than .3% THC concentration, is evidence that the substance was consumed in the belief that it was marijuana sufficient to establish the substance's identity as marijuana?

ISSUE 3: In the absence of evidence that a firearm was operable at the time of its use, can a firearm enhancement be imposed?

IV. STATEMENT OF THE CASE

The State charged John Mark Crowder with first degree rape with a firearm enhancement and a special allegation that the victim was under the age of 15, or, in the alternative, third degree rape of a child, and two counts of distributing a controlled substance to minors. CP 56-58. The charges arose from allegations that Crowder forcibly raped 14 year old I.D. by holding a gun to her head and forcing her into the back of a Jeep. 2 RP 129-30, 140-42, 144-45. According to the State's witnesses, the rape occurred while I.D. and two teenage male friends were at a bonfire with Crowder, drinking and smoking marijuana. 2 RP 215, 217-19. The boys

passed out at the fire when I.D. testified she tried to leave and was stopped by Crowder pointing the gun at her. 2 RP 139-40. She described the gun as a revolver. 2 RP 143.

One of the boys, 15 year old S.I., testified that he was hanging out with 16 year old Z.H. that night. 2 RP 215, 218, 274. Z.H. had some marijuana and some vodka, as well as two BB guns in his bag. 2 RP 218-19, 232. While they were walking, they encountered Crowder, who asked if they wanted to light fireworks. 2 RP 219. They accompanied Crowder to a bonfire at a friend's house. 2 RP 220. Crowder asked them if they smoked marijuana and took them back to his house and smoked marijuana with them out of a bong. 2 RP 221-24. S.I. stated that he took at least 5 hits from the bong and estimated how high he was on a 1-10 scale as 5 or 6. 2 RP 226-27.

After smoking, they returned to the bonfire where Z.H. took out the vodka and they all began to drink it. 2 RP 229-31. Z.H. also took out one of the BB guns at some point and shot it. 2 RP 232. Z.H. then asked if they should invite I.D. so S.I. texted her, and Crowder went with Z.H. to pick her up. 2 RP 235. After Z.H. passed out, S.I. checked on Crowder and I.D. a couple of times but she did not appear scared, and he went to

sleep by the fire. 2 RP 236-38. S.I. did not see Crowder with any gun at any point that night. 2 RP 251.

Z.H. agreed that he was hanging out with S.I. that day but claimed he had one BB gun in his backpack and S.I. had the other. 2 RP 276-78. Z.H. also described Crowder asking them if they smoked pot and taking them back to his house and smoking from a bong. 2 RP 281-85. Z.H. claimed that S.I. took out his BB gun when they were back at the fire but Z.H.'s BB gun – a black revolver – never came out of the bag. 2 RP 293. Z.H. claimed that I.D. had been texting with S.I. and S.I. and Crowder went to pick her up. 2 RP 295, 297. Z.H. passed out and when he woke up the next morning, the backpack pocket where his BB gun had been stored was open. 2 RP 301.

During a search of Crowder's home about a week after the incident, police located several firearms in his house including a revolver that matched the description of the gun from I.D. 3 RP 330, 334-37, 339-40, 359-60. Police also recovered suspected marijuana from a bag inside Crowder's garage. 3 RP 338-39. A forensic scientist analyzed the substance and testified that it was marijuana, but did not testify to the amount of THC present in the sample. 3 RP 447. Forensic scientists also located stains inside Crowder's Jeep that were consistent with I.D.'s blood

as well as mixed DNA with a male contributor, from which Crowder was excluded. 4 RP 491-96.

Before trial began, during jury selection, Juror No. 73 responded to the State's inquiry whether the subject matter of trial would be difficult. Defense counsel moved to excuse the prospective juror for cause and the State, while stating it had no objection, requested to approach the bench. A conference was held off the record and unreported, and upon going back on the record, the trial court excused the juror. 1 RP 36.

The jury convicted Crowder of first degree rape and found both special allegations to be true. The jury also convicted Crowder of both counts of delivering a controlled substance to minors. 4 RP 601-02. The court sentenced Crowder to a term of 360 months to life. CP 217-18. Crowder now appeals. CP 231.

V. ARGUMENT

A. The trial court violated Crowder's right to a public trial by considering a challenge to a juror for cause in an unreported bench conference.

Both the Sixth Amendment to the U.S. Constitution and Article 1, Section 22 of the Washington State Constitution guarantee a criminal defendant a public trial. *State v. Strode*, 167 Wn.2d 222, 225, 217 P.3d

310 (2009). This right extends to the process of jury selection. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (*quoting Press–Enter. Co. v. Superior Court,* 464 U.S. 501, 505, 104 S. Ct. 819, 78 L.Ed.2d 629 (1984)). While administrative excusals of prospective jurors need not be conducted in open court on the record, this exception merely underscores the rule that excuses for cause, occurring during voir dire, are part of the trial process that must be open to the public. *See State v. Wilson*, 174 Wn. App. 328, 344, 298 P.3d 148 (2013). "[O]penness of courts is essential to the court's ability to maintain public confidence in the fairness and honesty of the judicial branch of government." *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009).

In describing the importance of holding trial proceedings openly and publicly, the U.S. Supreme Court has observed:

> The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.
>
> This openness has what is sometimes described as a "community therapeutic value." Criminal acts, especially violent crimes, often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and desire to have justice done. Whether this is

> viewed as retribution or otherwise is irrelevant. When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected.

Press–Enter. Co., 464 U.S. at 508-09 (internal citations omitted).

Privately questioning and challenging prospective jurors for cause in chambers, outside of the courtroom, violates the public trial guarantee even when the process is recorded and transcribed. *State v. Frawley*, 181 Wn.2d 452, 460, 334 P.3d 1022 (2014); *State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (2012); *State v. Wise*, 176 Wn.2d 1, 7-8, 288 P.3d 1113 (2012). While the public trial right is not absolute, certainly it is of sufficient significance that a compelling interest must be shown to justify it, such that courts should resist closing proceedings to the public except in the most unusual circumstances. *Wise*, 176 Wn.2d at 10-11.

Not all actions in the course of jury selection implicate the public trial right. For example, exercising peremptory challenges by sidebar conference does not implicate the public trial right. *See State v. Marks*, 184 Wn. App. 782, 339 P.3d 196 (2014). Nor does exercising hardship challenges at sidebar. *See State v. Schumacher*, __ Wn. App. __, 347 P.3d

494 (2015). However, at least one appellate court has held that challenges for cause may not be conducted at sidebar without running afoul of the public trial guarantee. *State v. Anderson*, 187 Wn. App. 706, 350 P.3d 255 (2015). The Washington Supreme Court has since held that exercising challenges for cause at a sidebar conference that was held on the record in the presence of the court reporter does not violate the right to a public trial. *State v. Love*, __ Wn.2d __, __ P.3d __, 2015 WL 4366419 (July 16, 2015).

In the present case, in contrast to *Love*, the trial court permitted an unreported, off-the-record sidebar conference in the midst of a challenge for cause. In *Love*, the Court acknowledged that challenges for cause "can raise questions about a juror's neutrality and a party's motivation for excusing the juror that implicate the core purpose of the right," such that the public trial right is implicated. 2015 WL 4366419, at 3. But the *Love* Court held that the process of exercising peremptory and for-cause challenges through a reported sidebar conference did not constitute a closure because:

> [O]bservers could watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel exercise challenges at the bench and on paper, and ultimately evaluate the empaneled jury. The transcript of the discussion about for cause challenges and the struck juror sheet showing the peremptory challenges

> are both publically available. The public was present for and could scrutinize the selection of Love's jury from start to finish, affording him the safeguards of the public trial right missing in cases where we found closures of jury section.

Id. at 4.

Unlike the process in *Love*, however, the sidebar for-cause challenge in the present case "actually impeded public scrutiny" because the content of the conversation was deliberately concealed from the public, both those present at the time and those who would review the entire process at a later date. *Anderson*, 187 Wn. App. at 258 ("[T]he entire purpose of a sidebar conference is to prevent anyone other than those present at the sidebar—an audience typically limited to the judge, counsel, and perhaps court staff—from hearing what is being said."). While the process in *Love* permitted review of the recorded transcript, no such record of the conference is available here. Consequently, there is no record whatsoever of what was discussed, how long the discussion took, whether or to what extent it affected the trial court's ruling on the challenge, or whether it implicated subsequent challenges by either party.

This omission from the public record strongly implicates the public trial right on a matter of fundamental significance to the conduct of the trial. The public has "a vital interest in determining whether parties are

making, and the trial court is ruling on, challenges for cause for legitimate reasons." *Anderson*, 187 Wn. App. at 261. The unreported sidebar conference concerning the for-cause challenge in this case squarely undermines that interest.

Under these authorities, exercise of for-cause challenges of prospective jurors implicates the public trial right. While *Love* stands for the proposition that such challenges are not conducted out of public view when they occur during a reported sidebar in open court, the present case does not satisfy these requirements because the lack of reporting eliminates the opportunity for public scrutiny and renders the content of the bench conference, quite literally, secret. Accordingly, the conference constitutes a closure of the court that violates the constitutional public trial guarantees.

Denial of a public trial is deemed to be a structural error that presumptively prejudices the defendant. *Strode*, 167 Wn.2d at 231. Accordingly, the appropriate remedy is remand for retrial. *Id.* (*quoting Orange*, 152 Wn.2d at 814).

B. Insufficient evidence supports the convictions for delivering a controlled substance to a minor because the State failed to present sufficient evidence that the substance contained at least .3% THC

The State charged Crawford with violating RCW 69.50.406 by distributing marijuana to S.I. and Z.H. CP 58. Under the statute in effect at the time, to prove the substance in question was marijuana, the State was required to prove that it fit the following definition:

> [A]ll parts of the plant Cannabis, whether growing or not, with a THC concentration greater than 0.3 percent on a dry weight basis; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. The term does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination.

RCW 69.50.101(t); *see also* CP 149 (jury instruction defining marijuana). Under this definition, then, the State is required to prove a specific quantitative THC content to establish that a substance is marijuana.

The State failed to meet its burden at trial. First, the State failed to prove that the substance found in Crowder's garage approximately one week after the charged events was the same substance that the jury found

Crowder furnished to S.I. and Z.H. Second, the State failed to present adequate circumstantial evidence to prove that the substance furnished to S.I. and Z.H. met the statutory definition of "marijuana." In its opposition to Crowder's motion for a new trial, the State argued that circumstantial evidence supported the verdict because S.I. and Z.H. testified to the effect the substance they smoked with Crowder had on them. CP 184. But at no point did the State present any evidence sufficient to link the perceived effect on S.I. and Z.H. with any quantitative level of THC, such as testimony from any of its forensic experts describing what, if any, effect ingesting substances with different amounts of THC would have on the user.

Because the State failed to prove that the marijuana it sent to the lab was the same substance furnished to S.I. and Z.H. on the night at issue and because it failed to establish that the effects reported by S.I. and Z.H. correlated with a particular quantum of THC, its evidence at trial was insufficient to prove the essential elements of counts three and four. Accordingly, the convictions should be reversed and counts three and four dismissed. *See State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) ("Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy.").

C. Insufficient evidence supports the firearm enhancement because there was no evidence that the firearm found in Crowder's home was operable.

The State charged Crowder with a firearm enhancement under RCW 9.94A.533(3). CP 57. To establish the enhancement, the State is required to prove that the firearm is operable, meaning that it is capable of firing a projectile. *State v. Pierce*, 155 Wn. App. 701, 714-15, 230 P.3d 237 (2010) (*citing State v. Recuenco*, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008), *State v. Pam*, 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), *overruled in part on other grounds in State v. Brown,* 111 Wn.2d 124, 761 P.2d 588 (1988)). This is because a "firearm" is defined by statute as a device from which a projectile may be fired by an explosive such as gunpowder. RCW 9.41.010(9); *see also* CP 159 (jury instruction). Thus, "A gun-like object incapable of being fired is not a 'firearm' under this definition." *Pam*, 98 Wn.2d at 754.

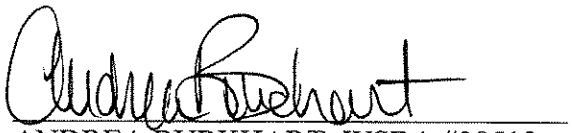
In the present case, the State presented evidence that a number of guns were located during a search of Crowder's home. However, no evidence was presented that any of the guns were ever test-fired or otherwise determined to be operable. In the absence of such proof, the State fails to establish that the object meets the definition of a "firearm" for purposes of imposing a sentencing enhancement.

Because insufficient evidence supports the firearm enhancement, the case should be remanded for the enhancement to be dismissed and for Crowder to be resentenced accordingly. *Pierce*, 155 Wn. App. at 715.

VI. CONCLUSION

For the foregoing reasons, Crowder respectfully requests that the court REVERSE his convictions and REMAND the case for a new trial.

RESPECTFULLY SUBMITTED this 8th day of September, 2015.



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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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

Signed this 8th day of September, 2015 in Walla Walla, Washington.

Donelda Todorovich