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 REPLY BRIEF

Andrea Burkhart, WSBA #38519
Burkhart & Burkhart, PLLC
6 ½ N. 2nd Avenue, Suite 200
PO Box 946
Walla Walla, WA 99362
Tel: (509) 529-0630
Fax: (509) 525-0630
Attorney for Appellant

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I. ARGUMENT

A. The State fails to demonstrate that the unreported sidebar conference concerning a challenge for cause to a prospective juror does not implicate the public interest.

The State fails to acknowledge in its response that the Washington Supreme Court has already held that jury selection, including challenges for cause, are portions of the trial to which the public trial right attaches. *State v. Love*, 183 Wn.2d 598, 605, 354 P.3d 841 (2015). As such, the State fails to address the critical shortcoming in this case that was not present in *Love* – the fact that the discussion about the cause challenge occurred at sidebar, in private, and off the record. Because this process removes a critical portion of jury selection from public oversight, it constitutes a courtroom closure just as effectively as if the conversation took place in chambers.

As such, at issue in *Love* was not whether the public trial right attaches to jury selection – the *Love* Court acknowledged that this right was already "well settled" – but whether conducting challenges during reported sidebars constitutes a closure. 183 Wn.2d at 605 (*quoting State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005)). The *Love* Court, accordingly, recognized that closures occur when a portion of the trial is

held somewhere inaccessible to the public. *Id.* at 606. And in *Love*, the Court expressly noted, "The transcript of the discussion about for cause challenges and the struck juror sheet showing the peremptory challenges are both publicly available." *Id.* at 607. The unreported sidebar held in this case does not provide the safeguards of the public right that the *Love* Court held to "comport with the minimum guarantees of the public trial right." *Id.*

Accordingly, apart from the State's speculation as to what transpired during the sidebar, there is simply no opportunity for the public to inspect the portion of the trial process concerning the for-cause challenge. This is a *de facto* closure, and a structural error. *State v. Strode*, 167 Wn.2d 222, 231, 217 P.3d 310 (2009).

B. The State fails to present a non-speculative basis for concluding that Crowder furnished S.I. and Z.H. with a substance having a THC concentration exceeding .3 percent on a dry weight basis.

The State contends that the jury found the substance S.I. and Z.H. testified was provided to them by Crowder was the same substance that police recovered from Crowder's house approximately a week later and submitted to the lab for analysis. But the jury did not make any such finding, and the detective who seized it acknowledged that he had no idea

how long it had been at Crowder's house. 3 RP 345. Moreover, the State crime lab analyst testified that she tested the contents of only one of the two containers. 3 RP 447. At no point was the jury given sufficient evidence, circumstantial or otherwise, to conclude that the substance Crowder provided was the same substance in the particular container that the analyst chose to test. Although the State certainly could have presented the tested container to S.I. and Z.H. and asked them to identify it on the stand as the container from which Crowder provided them marijuana, she chose not to do so.

Furthermore, the State's effort to make up for this shortcoming by pointing to the testimony about the effects S.I. and Z.H. reported from consuming the substance fails to provide sufficient evidence from which the jury could conclude that the substance provided contained a specific quantum of THC, as required by law. Again, the State could have asked the crime lab analyst or any number of its law enforcement witnesses to testify to any known correlation between effects of consumption and THC percentage, but did not do so. As such, the jury had no way of knowing from the testimony presented about the reported effects whether the substance met the required THC quantum or not.

These shortcomings were sufficiently evident that the trial court initially granted Crowder's motion to dismiss at the close of the State's case before reversing itself moments later. 4 RP 516. The evidence has not changed since that time. The State simply failed to present adequate evidence to satisfy an essential element of the crime charged.

C. The State wrongly contends that it had no burden to prove the firearm at issue in the enhancement was operable, when multiple precedents hold to the contrary.

The State relies on *State v. Raleigh*, 157 Wn. App. 728, 238 P.3d 1211 (2010) involving a conviction for unlawful possession of a firearm, to contend that it need not show the firearm was operable to support the enhancement. *Raleigh* is of nominal relevance here because Crowder was not charged with unlawfully possessing a firearm; he was charged with a firearm enhancement. Washington courts have expressly and repeatedly held that to constitute a firearm for enhancement purposes, the object must be capable of firing a projectile. *State v. Pam*, 98 Wn.2d 748, 753-54, 659 P.2d 454 (1983), *overruled in part on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988); *State v. Recuenco*, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008); *State v. Pierce*, 155 Wn. App. 701, 230 P.3d 237 (2010).

The State's effort here to reduce its obligation to simply proving that the gun at issue was not a toy gun misstates the express holdings set out in these cases. Moreover, the State fails to acknowledge that two toy BB guns were also present on the night in question, which could have been confused with an operable firearm but would not meet the statutory definition to prove the enhancement. 2 RP 194, 232, 277-78, 293, 315, 3 RP 379.

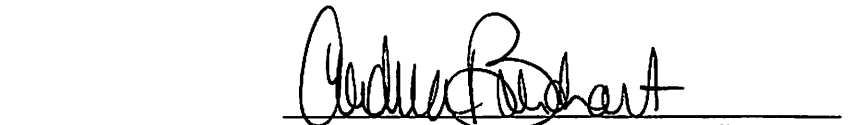
D. The State has failed to respond to any of the arguments raised in Crowder's Statement of Additional Grounds.

Crowder timely filed a Statement of Additional Grounds pursuant to RAP 10.10. Several of those issues raised are not repetitive of the opening briefing, and the State has declined to respond to those allegations of error. Crowder's arguments are supported by citations to the record adequate to identify the basis for the alleged errors and should, therefore, be addressed by the court.

II. 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 February, 2016.



ANDREA BURKHART, WSBA #38519
Attorney for Appellant

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 Reply Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Andrew Kevin Miller
Benton County Prosecuting Attorney's Office
7122 W. Okanogan Pl Bldg A
Kennewick, WA 99336

John Mark Crowder, DOC #377539
Airway Heights Corrections Center
Airway Heights, WA 99001-2049
Living Unit R-B-25, PO Box 2049

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 February, 2016 in Walla Walla, Washington.

Breanna Eng