NO. 94712-1

THE SUPREME COURT OF

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

EDWARD LEON NELSON,
Appellant/Petitioner.

ANSWER TO PETITION FOR REVIEW BY YAKIMA COUNTY

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3. The trial court should have given his requested lesser included offense instruction on the crime of unlawful display of a firearm...
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A. INTRODUCTION.

This was a bifurcated trial. The defendant was found guilty of attempted first degree robbery – by special verdict the jury found Nelson to be armed with a deadly weapon at the time of the commission of this crime and, attempt to elude a pursuing police vehicle. In the second portion of this trial Nelson was acquitted by the same jury of first degree unlawful possession of a firearm.

The Court of Appeals upheld the actions of the trial court and jury and affirmed the convictions. Nelson then filed a Motion for Reconsideration which on June 6, 2017 was denied by the Court of Appeals Division III. The order denying that motion also amended the original opinion deleting a portion of the opinion and inserting a new section addressing the allegation regarding the alleged error regarding Nelson's for a lesser included offense.

ISSUES PRESENTED BY PETITION

1. The trial court failed to instruct the jury on all the essential elements of the crime, pursuant to State v. Richie, 191 Wn. App. 916, 365 P.3d 770 (2015).
2. Insufficient evidence supported the firearm enhancement when the State did not prove it was operable, and the jury's verdict on the enhancement conflicted with its subsequent acquittal of Nelson for unlawfully possessing a firearm in a bifurcated trial.
3. The trial court should have given his requested lesser included offense instruction on the crime of unlawful display of a firearm...
4. From Nelson's Statement of Additional Grounds, that a 17-month

delay in bringing him to trial violated his speedy trial rights.

ANSWER TO ISSUES PRESENTED BY PETITION

1. The Court of Appeals opinion does not conflict with any prior cases from this or any other court.
2. The State proved each element of the crime charged beyond a reasonable doubt, there was no conflict in verdicts.
3. The trial court properly instructed the jury.
4. The State was not requested to respond to Nelson's Statement of Additional Grounds (SAG) therefore did not brief this issue in the direct appeal. However, the decision of the Court of properly applied the law which controls this type of issue. Therefore, there is no basis for review under RAP 13.4(b)The State proved each element of the crime charged beyond a reasonable doubt.

B. STATEMENT OF THE CASE

The facts have been set out by all of the parties on numerous occasions. The State in this Answer shall merely set forth the facts as the Court of Appeals did in its opinion;

Ms. Meinhold told Mr. Nelson she did not have access to the oxycodone and had to get the pharmacist. Ms. Meinhold had the pharmacist, Thomas Newcomer, quickly come to the counter.

Mr. Newcomer glanced at Mr. Nelson's note, and Mr. Nelson asked him for oxy-30s, meaning 30 milligram oxycodone pills. Mr. Newcomer believed the note was some sort of fake prescription. He did not see Mr. Nelson's gun and was not aware that Mr. Nelson even had a gun. He began to walk toward the secured oxycodone, paused, and decided he did not want to supply oxycodone to someone without a valid

prescription. He then told Mr. Nelson the store was out of oxycodone.

Mr. Nelson next demanded cash. Only then did Mr. Newcomer realize Mr. Nelson intended to rob the store. Mr. Newcomer said he did not have access to cash, and said he would call the manager. Mr. Nelson immediately fled the store with the paper towels.

The facts leading to Mr. Nelson's arrest are known to the parties and need not be recited because they do not bear on the issues raised on appeal.

Procedural facts

By third amended information, the State charged Mr. Nelson with attempted first degree robbery of Ms. Meinhold and/or Mr. Newcomer, attempting to elude a pursuing police vehicle, and first degree unlawful possession of a firearm. Because the third charge required introducing evidence of Mr. Nelson's prior convictions, the parties agreed to bifurcate that charge from the first two.

The State presented the evidence recited above to the jury. The State also sought to present a videotaped interview between Mr. Nelson and law enforcement. Mr. Nelson objected. The trial court excused the jury to hear and consider Mr. Nelson's objections. Mr. Nelson objected to several parts of the video and argued those parts were substantially more prejudicial than probative. After careful review of the transcript, the

parties agreed to excise certain portions of the interview so that the jury would not see the unduly prejudicial parts of the interview. The trial court admitted the remainder of the videotape without objection.

After the State rested, the trial court asked Mr. Nelson if he had anything to address. Mr. Nelson responded that he did. First, Mr. Nelson moved to dismiss the portion of the attempted first degree robbery charge that listed Mr. Newcomer as a victim. Mr. Nelson argued there was insufficient evidence that Mr. Newcomer was threatened with the use of force. After the State responded, the trial court granted Mr. Nelson's first motion.

Second, Mr. Nelson moved to dismiss the portion of the attempted first degree robbery charge that listed Ms. Meinhold as a victim. Mr. Nelson argued there was insufficient evidence that Ms. Meinhold had access to the oxycodone. Mr. Nelson, citing State v. Richie[1] and State v. Latham,[2] also argued there was insufficient evidence Ms. Meinhold had an ownership, representative, or possessory interest in the oxycodone. The State responded, "That might be a good argument if he had been charged with a completed crime, but he's been charged with the attempt. The legal and factual impossibility is not a defense." RP at 404. Mr. Nelson

[1] 191 Wn. App. 916, 365 P.3d 770 (2015).
[2] 35 Wn. App. 862, 670 P.2d 689 (1983).

responded that classifying the crime as an attempt does not negate the State's obligation to prove that Ms. Meinhold had a representative interest in the oxycodone. The trial court concluded that Ms. Meinhold's status as an employee was sufficient for her to have a representative interest in the property under Richie and denied Mr. Nelson's second motion. The trial court directed the bailiff to bring the jury back. Once back, Mr. Nelson rested his case.

The parties then discussed jury instructions. Mr. Nelson's proposed to-convict instruction for attempted first degree robbery required the jury to find that Ms. Meinhold had a possessory, ownership, or representative interest in the property sought to be taken. The trial court, consistent with its earlier ruling, rejected that instruction.

Mr. Nelson also requested the trial court to instruct the jury on a lesser included offense, unlawful display of a firearm. The trial court rejected that instruction, too.

The trial court determined it would give the following to-convict instruction:

> To convict the defendant of the crime of Attempted First Degree Robbery in Count 1, each of the following_ elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about August 15, 2014, the defendant did an act that was a substantial step towards unlawfully taking personal property from the person or in the presence of another, Myung B. Meinhold;
> (2) That Myung B. Meinhold was an employee of the owner of the

property;
(3) That the defendant intended to commit theft of the property;
(4) That the attempt to take was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person;
(5) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking or to prevent knowledge of the taking;
(6)(a) That in the commission of these acts or in immediate flight therefrom the defendant was armed with a deadly weapon; or
(b) That in the commission of these acts or in the immediate flight therefrom the defendant displaced what appeared to be a firearm; and
(7) That any of these acts occurred in the State of Washington.

Clerk's Papers (CP) at 67.

Mr. Nelson objected to the instruction. He also took exception to the trial court's failure to give his requested instructions, as discussed previously.

The trial court also instructed the jury on the definition of a firearm so the jury could answer the special verdict on count I-whether Mr. Nelson was armed with a firearm when he committed attempted robbery:

> For purposes of the special verdict as to Count One, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime of Attempted First Degree Robbery. A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

CP at 83.

The jury found Mr. Nelson guilty of attempted first degree robbery and, by special verdict, found that Mr. Nelson was armed with a firearm

when he committed the crime. The jury also found Mr. Nelson guilty of attempting to elude a pursuing police vehicle. In the bifurcated trial, the same jury acquitted Mr. Nelson of first degree unlawful possession of a firearm. This appeal timely followed.

ARGUMENT

A petition before this court arising from an opinion issued by the Court of Appeals is governed by RAP 13.4(b). This rule sets forth the manner and mechanism for review of a decision by the Court of Appeals terminating review.

Petitioner claims the Court of Appeals opinion merits review under sections (b) (1), (2) and (3). The opinion in Nelson's case does not meet any of the criterion set forth in RAP 13.4(b) Considerations Governing Acceptance of Review. The Court of Appeals opinion does not **1**) Conflict with any decision by this court; **2**) The opinion does not conflict with any opinion of this court or the Court of Appeals and **4**) The issues raise in this petition for review do not involve any issues of substantial public interest that this court should address.

It must be noted that Nelson lists four issues that he wishes this court to address. However, in his petition he does not address all of these arguments. State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990)

"He neither briefs the issue nor cites to authority. The issue will not be reviewed. See Smith v. King, 106 Wn.2d 443, 722 P.2d 796 (1986)."

As expressed by the Eighth Circuit, "naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." United States v. Phillips, 433 F.2d 1364, 1366 (8th Cir.1970).

Answer to Allegation A – Defective "to convict" jury instructions.

The Court of Appeals opined that the trial court had failed to include the essential nonstatutory element "…the victim has an ownership, representative, or possessory interest in the property taken" in the to-convict robbery instruction. The Court of Appeals, all three jurists on the panel, however agreed with the State that this omission was harmless beyond a reasonable doubt. All three jurists "…agree that the trial court's instructions did not accurately recount the standard for whether a robbery victim has representative capacity over a piece of property." However, Judge Pennell in her concurrence wrote, "I write separately because I disagree that this flaw in the instructions went to an essential element of the crime charged." (Slip concurrence pg. 1)

Nelson's argues that the analysis of the Court of Appeals is "highly counter-intuitive." (Petition at 8) The reasoning of the court is common-sense and based on long standing case law. The court's analysis does

address the original allegation head on however, the final analysis was that at the end of the case this error was literally harmless beyond a reasonable doubt because of the facts before the trial court. The court stated:

The "to convict" instructions at issue was determined to be flawed by the Court of Appeals. Two jurists found the error to be of an "essential nonstatutory element" one found it not to be "essential." All three jurist found that error to be harmless beyond a reasonable doubt. The distinguishing factor in Nelson's case is that the State charged out and proved this crime as an ***attempt*** not the completed crime as was the case in State v. Richie, 191 Wn. App. 916, 365 P.3d 770 (2015). The court cited long standing law to support this conclusion;

> ""[A]n erroneous jury instruction that omits an element of the charged offense or misstates the law is subject to harmless error analysis "*State v. Thomas,* 150 Wn.2d 821, 844, 83 P.3d 970 (2004). "[A]n instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 3 5 (1999). "The Neder test for determining the harmlessness of a constitutional error is 'whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Thomas*, 150 Wn.2d at 845 (internal quotation marks omitted). (Slip at 9)

Nothing within the totality of the original opinion which would allow this court to accept review pursuant to RPA 13.4(b). Not a single word of this opinion conflicts with a decision of the Supreme Court or is in conflict

with another decision of the Court of Appeals or is a significant question of law under the Constitution of the State of Washington or of the United States.

While no doubt Nelson believes that he case meets all three criteria that simply is not true. The case Nelson primarily relies on, Richie, is distinguishable. Richie was charged and proven as a completed crime. Nelson's case was plead and proven as an **attempt** this critical to the State's original argument and the Court of Appeals ruling.

The Court of Appeals, once again citing well settled law, State v. Luther, 157 Wn.2d 63, 78, 134 P.3d 205 (2006) (citing State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002)) opined;

> The State also argues Mr. Nelson was charged and convicted of attempted first degree robbery. The trial court defined the State's burden for proving an anticipatory offense: "A person commits the crime of Attempted First Degree Robbery when, with intent to commit that crime, he does any act that is a substantial step toward the commission of that crime." CP at 63. A substantial step is an act that is "strongly corroborative" of the actor's criminal purpose.
> (Slip at 10-11)
> …
> Unlike *State v. Richie*, 191 Wn. App. 916, 365 P.3d 770 (2015), this case does not involve a charge of first degree robbery. Instead, Mr. Nelson was charged with attempted first degree robbery. Attempted first degree robbery only has two elements: (1) the defendant intended to commit the crime of robbery, and (2) in furtherance of that intent, the defendant took a substantial step toward the commission of the crime of robbery. RCW 9A.28.020(1); *State v. Kier*, 164 Wn.2d 798, 807, 194 P.3d 212 (2008). Neither of these elements requires

> the State to prove the victim of the attempted robbery had ownership or representative capacity over the property the defendant intended to steal. (Concurrence at 2)

Nelson has presented this court with nothing which meets the edicts of RAP 13.4(b) which would support this court granting his petition.

The law governing criminal charges which are plead and proven as an attempt is not in flux. The law cited by the Court of Appeals regarding both its determination that there was error regarding the jury instruction and the harmlessness of that error are not significant questions of law or of substantial public interest nor are these prior rulings in conflict with any case of this court or any other court of review.

Answer to Allegation B - Firearm allegation

When the State filed the Respondent's brief Tasker was before this court by way of a Petition for Review. This court determined prior to the Court of Appeals issuance of the opinion in this case denied review of Tasker. State v. Tasker, 193 Wn. App. 575,594,373 P.3d 310, review denied, 186 Wn.2d 1013, 380 P.3d 496 (2016). See also, Appendix A.

Nelson argued in the Court of Appeals that that court should overturn its ruling in Tasker, the court politely declined. Nelson now comes before this court stating that Division III's ruling in Tasker set up a conflict with State v. Recuenco, 163 Wn.2d 428, 437, 180 P.3d 1276

(2008), In State v. Pam, 98 Wn.2d 748, 751, 659 P.2d 454 (1983), overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989) and State v. Pierce, 155 Wn. App. 701, 23 P.3d 237(2010).

That is not true. This court had Tasker before it and determined that review was not necessary. Clearly this court would not allow a conflict in the law to exist, that is one of the primary tasks of this court.

The Court of Appeals addresses the requirement of proof using long standing case law, this issue while clearly of great moment to Nelson is neither one of constitutional magnitude or great public interest.

This court should not grant review; Nelson has presented this court with nothing which meets the edicts of RAP 13.4(b).

Answer to Allegation C – Presumptive prejudice due to a 17 month pretrial dely.

A brief recitation facts pertaining to this case is needed to address this allegation

Nelson was charged with attempted first degree robbery with a firearm enhancement, attempting to elude a police vehicle with an endangerment enhancement, and first degree unlawful possession of a firearm. CP 31-32. The information set forth the charge in the alternative alleging that Nelson committed the attempted robbery against Meinhold and/or Newcomer. CP 31. The State agreed to bifurcate the unlawful

possession of a firearm charge to because of the need to present Nelson's prior criminal history to prove that conviction. I RP 27. The State alleged after the first amended information and subsequently proved that Nelson had prior criminal history that required the court to sentence him as a persistent offender. RP 536-41, CP 14-15, 26-27, 31-32. Nelson was convicted of attempted first degree robbery and attempting to elude a pursuing police vehicle, and returned affirmative special verdicts on the enhancements. CP 84-87, VI RP 488-89. The jury returned a verdict of not guilty on the bifurcated count. CP 1 12, VII RP 532. Because of Nelson's criminal history he was found to be a persistent offender and sentenced him to life without the possibility of parole. CP 146-49, 153.

There is no verbatim report of proceedings for the continuances that appear in the record. The first continuance was requested by defense counsel this was contested by the State. That order states "Mr. Dalan is involved in a murder trial. CP 7.

The second was once again requested by defense counsel, it too was contested by the State. That order reads "Additional time necessary to prepare for trial…3rd strike case." CP 8.

The third continuance was requested by defense counsel and contested by the State, that order reads "case is related to 14-1-01209-3, two counts of Robbery 1st degree, which requires additional time to

prepare for trial. CP 9.

The fourth continuance was requested by defense counsel and contested by the State. That order reads "additional time necessary to prepare." CP 11.

The next continuance was agreed to by the parties CP 12. The next continuance was requested by the State and contested by the defendant. That order reads "severance of cases has put trial date past speedy trial." CP 20.

The next continuance was agreed. CP 21. The last and final continuance was requested by the State and contested by the defendant. That order reads "Essential State witnesses are unavailable during the time frame of Aug 10 and Sept per motion to continue. CP 23

The last continuance was requested by the State and contested by the defendant. That order reads "Off. J. Gonzalez an essential State witness is unavailable from 11-27-15 until 12-28-15. DPA unavailable from 12-28-15 to 1-4-16 due to scheduled vacations for the officer and DPA." CP 30.

The State cannot find the original trial date in the record. The first date set after the first continuance was November 17, 2014. The trail began on January 4, 2016.

The period of time from the first recorded trial date to the last

defense requested or agreed order of continuance is from November 17, 2014 to August 10, 2015. The vast majority of the time which elapsed from charging to trial was due to actions of the defendant or by agreement of the defendant. Only five months elapsed between the time of the last agreed trial date and the time trial occurred due to issues related to the State.

The only "record" that Nelson personally did not agree to these actions is the one line from his SAG that states that he was "coersd" by his counsel to waive his 6th Amendment rights.

The State must also note that this allegation was before the Court of Appeals by way of Nelson's Statement of Additional grounds. The sum total of information before that court and now this court regarding this alleged violation was raised as an ineffective assistance claim wherein Nelson states "[i]neffective counsel. State appointed attorney's performance was deficient and didn't function as the counsel guaranteed by the VI Amendment. In fact, my counsel continually coersd (sic) me to waive my 6th Amendment Right, which became a conflict of interest."

The vast majority of the time between charging and trial was due to Nelson's own actions. His one sentence statement that he was coerced to take these actions is not supported by the record which was before the court of appeals and now this court. The invited error doctrine precludes a

party from setting up an error at the trial court and then complaining of it on appeal. State v. Henderson, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). "Mr. Chenoweth requested the continuance he now attacks. Under the doctrine of invited error, Mr. Chenoweth cannot set up an error at the trial court and then complain of it on appeal. In re Pers. Restraint of Thompson, 141 Wash.2d 712, 713, 10 P.3d 380 (2000)" State v. Chenoweth, 63 P.3d 834, 115 Wn.App. 726 (2003).

State v. Rafay, 168 Wn.App. 734, 285 P.3d 83, (2012);

> In assessing the reasons for the delay, a court considers, among other things, " 'whether the government or the criminal defendant is more to blame for th[e] delay.' " Vermont v. Brillon, __ U.S. __, 129 S.Ct. 1283, 1290, 173 L.Ed.2d 231 (2009) (alteration in original) (quoting Doggett, 505 U.S. at 651, 112 S.Ct. 2686). "A defendant's claim that the government violated [his] right to a speedy trial is seriously undermined when the defendant, and not the government, is the cause of the delay." United States v. Blanco, 861 F.2d 773, 778 (2d Cir.1988); see also Brillon, 129 S.Ct. at 1290 (defendant's speedy trial rights not violated where delays were properly attributable to defense counsel).

This court specifically ruled that there is no fixed period of time that can be used to as a determinative of a violation of the Sixth Amendment right to a speedy trial. Because Nelson argued that his constitutional right to a speedy trial, which is by nature less clearly delineated than the rule-based right. This court in State v. Iniguez, 167 Wn.2d 273, 290, 217 P.3d 768 (2009), as cited by the Court of Appeals in

its decision, held that the rights to a speedy trial secured by the Sixth Amendment to the United States Constitution and by article I, section 22 of the Washington State Constitution are coextensive.

In analyzing constitutional speedy trial claims, our courts have followed the multi-factor analysis of Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), while recognizing that its factors are not exclusive. Iniguez, 167 Wn.2d at 283.

The first step in the analysis is the determination of whether the delay was presumptively prejudicial. Iniguez, 167 Wn.2d at 283. If it was, then the remaining factors are examined. Id. Those factors include the length and reason for the delay, whether the defendant has asserted his right, and the ways in which the delay caused prejudice to the defendant. Id. Iniguez rejected use of a fixed period of time beyond which delay is presumptively prejudicial, noting Barker's holding that the inquiry necessarily depends on the circumstances of the case. Id. at 292.

Iniguez, however, surveyed other decisions viewing delay ranging from eight months to one year as presumptively prejudicial and concluded that under the circumstances of the case, the delay of over eight months was presumptively prejudicial. Id. 291-92.

Whether a delay is presumptively prejudicial is a fact-specific inquiry dependent on the circumstances of each case. Iniguez, 167 Wn.2d

at 291. The defendant bears the burden of showing that the length of the delay crossed a line from ordinary to presumptively prejudicial. Iniguez, 167 Wn.2d at 283.

The Court of Appeals, determined that Nelson had not met the first factor, ruling "Here, Mr. Nelson does not surpass the initial showing that the delay was presumptively prejudicial. Although there was a delay of approximately 17 months between arrest and trial, Mr. Nelson was charged with a very serious offense, as well as attempting to elude a police vehicle after an extensive pursuit. He also faced life imprisonment without the possibility of parole, as this was his third serious violent felony.

The decision to grant or deny a trial continuance rests within the sound discretion of the trial court. State v. Kenyon, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009). A court of review will not disturb a trial court's decision on that issue unless there is a clear showing the trial court's decision was manifestly unreasonable, or that it based its decision on untenable grounds or reasons. Id.

Once again there was literally nothing in the record before the Court of Appeals and there is nothing in the record here that would meet the standards set forth in Kenyon, supra.

The Court of Appeals opined "[g]iven the severity of both the charges and the potential sentence, 17 months is a reasonable amount of

time for Mr. Nelson and the State to prepare for trial. Because Mr. Nelson does not meet his burden in showing a presumptively prejudicial delay, this court need not consider the factor test."

The Court of Appeals opinion regarding Nelson's speedy trial allegation raised in his SAG does not merit review by this court under RAP 13.4(b). This court should not grant review of this issue.

D. CONCLUSION

The Court of Appeals opinion does not merit review by this court under RAP 13.4 and therefore this court should deny review.

Respectfully submitted this 23rd day of August 2017,

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Appendix A

The State would direct this court, pursuant to GR 14.19(a) to consider as nonbinding authority and accord such persuasive value as this court deems appropriate, State v. English, Unpublished Opinion, 46921-9-II, 47001-2-II (WACA), March 21, 2017;

D. Sufficiency of the Evidence for Firearm Enhancements

English and Quichocho argue that the State presented insufficient evidence for each of the firearm enhancements because the State did not prove that the firearm was operable.[11] We disagree.

We review sufficiency of the evidence claims for whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A sufficiency challenge admits the truth of the State's evidence and all inferences reasonably drawn therefrom. Id. We defer to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. State v. Ague-Masters, 138 Wn.App. 86, 102, 156 P.3d 265 (2007).

The premise of English's and Quichocho's argument is that the State is required to prove that the firearm was operable to meet the statutory definition of a firearm. English and Quichocho cite State v. Recuenco[12] and State v. Pierce, 155 Wn.App. 701, 230 P.3d 237 (2010), to support their argument that in order to prove a firearm enhancement, the State must present sufficient evidence to find a firearm operable. We reject this argument.

The same argument raised by English and Quichocho was addressed and rejected by our court in State v. Raleigh, 157 Wn.App. 728, 734-36, 238 P.3d 1211 (2010) and by Division Three of this court in State v. Tasker, 193 Wn.App. 575, 581-82, 373 P.3d 310, review denied, 186 Wn.2d 1013 (2016). Both the court in Raleigh and the court in Tasker held that the language in Recuenco relied on by the appellant "was not part of Recuenco's holding and is nonbinding dicta." Raleigh, 157 Wn.App. at 735; Tasker, 193 Wn.App. at 592. The Tasker court also rejected Pierce,

holding that "we disagree with the suggestion in Pierce that the State must always present evidence specific to operability at the time of the crime. And five months after Pierce, another panel of Division Two reached a diametrically different result in Raleigh." Tasker, 193 Wn.App. at 593-94. Thus, both Division Three in Tasker and this court in Raleigh have "characterized Recuenco's statement about the requirement of 'sufficient evidence to find a firearm operable' as nonbinding dicta, pointing out that it was 'merely to point out that differences exist between a deadly weapon sentencing enhancement and a firearm sentencing enhancement.'" Id. at 591 (quoting Raleigh, 157 Wn.App. at 735-36).

The relevant inquiry is whether the firearm was a gun in fact or a toy gun or gun-like object incapable of being fired. State v. Faust, 93 Wn.App. 373, 379-81, 967 P.2d 1284 (1998). Evidence that the firearm appears to be a real gun is sufficient. Tasker, 193 Wn.App. at 594; Raleigh, 157 Wn.App. at 735-36.

Here, three people testified that Quichocho was armed with a gun, that Quichocho threatened Bondy, Horn, and Lujan with the gun to effectuate the robbery, and that they believed they were going to die as a result. Bondy testified that the gun had a "revolving chamber, " that Quichocho told him that "that bullet was for [him], " and that he was scared. 4 VRP at 444-45. Horn testified that the gun had a "round cylinder" where bullets are loaded and that when Quichocho pointed the gun at her she thought she was going to die. 5 VRP at 560. Lujan also testified that Quichocho drew a gun on Bondy, then pointed the gun at him and ordered him to lay down on the floor, at which point, he thought, "I'm dead." 7 VRP at 845. Collectively, the evidence was sufficient to establish that the gun used was a gun "in fact" and not a toy gun or gunlike object incapable of being fired. Thus, sufficient evidence supports the firearm enhancements.

DECLARATION OF SERVICE

I, David B. Trefry, state that on August 23, 2017, I emailed a copy of the State's Answer to: Andrea Burkhart at Andrea@BurkhartandBurkhart.com.

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

DATED this 23rd day of August, 2017 at Spokane, Washington.

s/ David B. Trefry

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