NO. 97445-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

_____

STATE OF WASHINGTON,
Respondent,

v.

TAMMY JO STEWART,
Appellant.

_____

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

_____

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BY: _____
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A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent.

B. COURT OF APPEALS DECISION

In an unpublished decision, the Court of Appeals rejected all but one of the Defendant's assignments of error and affirmed her conviction. *See State v. Stewart*, Court of Appeals No. 51286-6-II (filed June 18, 2019.) The Court of Appeals remanded the case to the Grays Harbor Superior Court for the sole reason of reconsideration of the Felony Firearm registration requirement imposed by the Court.

The Defendant now asks this Court to review the assignments of error rejected by the Court of Appeals.

C. ISSUES PRESENTED FOR REVIEW

Stewart asks that this Court review the Court of Appeals' decision finding that 1) the evidence was sufficient for the jury to find that two of the five stolen rifles found in the Defendant's possession were "firearms" as defined by law; 2) there was no possible prejudice from the prosecutor using an illustrative example of the legal definition of "firearm" that included the term "gang banger;" 3) the jury instructions did not constitute a comment on the evidence; and 4) a bullet that an investigating officer

found near the Defendant's vehicle created a nexus to search the Defendant's vehicle for firearms.

The Court of Appeals' decision was correct. The jury was properly instructed on the definition of "firearm," and the firearms were received into evidence for examination by the jury, and there was no evidence the firearms were permanently disabled.

The Defendant did not object to the prosecutor's allegedly improper remark, so she was required to show prejudice, which she could not do.

The jury instructions were in fact carefully crafted to avoid any comment on the evidence, and the Court of Appeals correctly recognized the difference between instructions that did make a comment, and the instructions which prevented any such comment here.

And finally, the Court of Appeals was correct in recognizing the significance of the bullet that the investigating officer found, which led him, like a trail of bread crumbs, to the Defendant's car and justified the search warrant he served upon it.

D. STATEMENT OF THE CASE

Deputy Paul Logan went to 39 Prairie Gardens Road in Humptulips to contact the Defendant and her son. RP 8/31/2018 at 136.

He was invited in and walked down a hallway calling for the Defendant. RP 8/31/2018 at 137. The Defendant's bedroom smelled of fresh cigarette smoke, and Deputy Logan suspected someone had just been there, but the room was empty. RP 8/31/2018 at 138. As Deputy Logan turned to leave, he spotted four guns in the Defendant's room.[1] RP 8/31/2018 at 143.

Deputy Logan called for backup so he could apply for a search warrant. RP 8/31/2018 at 146. As he was waiting, he saw the Defendant sneaking away. RP 8/31/2018 at 147. She was detained. RP 8/31/2018 at 149.

While Deputy Logan was speaking with the other residents of the house, waiting for another officer, he found a live .22 bullet by the Defendant's car. RP 8/31/2018 at 152. He believed that the bullet was not old, and that the bullet meant there would be evidence of firearms in the Defendant's vehicle. RP 8/31/2018 at 152-53. Deputy Logan applied for a search warrant for the car as well. RP 8/31/2018 at 153. Deputy Logan found more firearms in the trunk of the Defendant's car. RP 8/31/2018 at 180.

[1] The Defendant stipulated at trial that she had previously been convicted of a serious offense and was ineligible t possess firearms. *See* CP at 62.

The firearms in question were stolen from Mr. Michael Hume, Sr. The State charged the Defendant with seven counts of Unlawful Possession of a Firearm in the First Degree, six counts of Possession of a Stolen Firearm and Possession of Methamphetamine.

Mr. Hume testified about each of the firearms recovered by Deputy Logan in detail, explaining how he knew it was his rifle, what custom work he had done on it, and how the firearm had come into his possession.

In reference to one of the firearms, an SKS rifle admitted as Exhibit 31, Mr. Hume testified that it was a gift from his son, it was sentimental, and he had never fired it, but had no reason to believe that it wouldn't fire because it was "right off the showroom floor." RP 8/31/2018 at 229-32.

With regards to Exhibit 25, a shotgun, Mr. Hume testified that when the police first contacted him about the weapon, he was unsure it was his, but then realized that it was his son's shotgun,[2] and his son had been working on it. Mr. Hume explained that a spring was missing from the weapon, and it couldn't currently be fired, but any gunsmith could fix it.

[2] Mt. Hume, Sr.'s inability to identify this weapon to the police explains why there was one more count of Unlawful Possession of a Firearm than Possession of a Stolen Firearm.

All the guns were admitted into evidence, and the jury convicted the Defendant of all counts.

E. ARGUMENTS WHY REVIEW SHOULD NOT BE GRANTED

1. The Defendant challenged the sufficiency of the evidence that two of the rifles she was charged with possessing were "firearms" as defined by law.

In relevant part, the Defendant was charged with seven counts of Unlawful Possession of a Firearm in the First Degree and six counts of Possession of a Stolen Firearm.[3] CP at 66-71. The firearms that formed the basis of the charges were admitted into evidence. The Defendant now claims the evidence was insufficient to prove two of the rifles, exhibits 25 and 31 were "firearms."

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068, 1074 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220–22, 616 P.2d 628 (1980).) "When the sufficiency of the evidence is challenged in a

[3] The Defendant was ultimately convicted of six counts of Unlawful Possession of a Firearm in the First Degree and five counts of Possession of a Stolen Firearm after the State dismissed one count each after testimony established the firearm was permanently inoperable.

criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id*.

(citing *State v. Partin,* 88 Wn.2d 899, 906–07, 567 P.2d 1136 (1977).) "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id*. (citing *State v. Theroff,* 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd,* 95 Wn.2d 385, 622 P.2d 1240 (1980).)

Appellate courts "defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence." *State v. Homan,* 181 Wn. 2d 102, 106, 330 P.3d 182, 185 (2014) (citing *State v. Jackson,* 129 Wn.App. 95, 109, 117 P.3d 1182 (2005).)

In the instant case, the Court of Appeals deferred to the finder of fact, the jury. The Court of Appeals noted that, "The shotgun was admitted at trial, and the jury could inspect to determine that it was a gun in fact, rather than a toy gun or gun like object permanently incapable of firing."

As to Exhibit number 31, the Court of Appeals noted that the firearm was brand new, and the only claim that there was no evidence that

the firearm was capable of being fired, came from the fact that the victim, Mr. Hume, testified that he had never had occasion to fire it.

The Court of Appeals did not disregard the definition of firearm, but simply ruled that the evidence was sufficient. This Court should not revisit this factual dispute and deny the Defendant's Petition for Review.

2. The Court of Appeals recognized that the prosecutor's use of the word, "gang-banger" was simply an example when discussing the statutory definition of firearm, and could not have prejudiced the Defendant.

In closing, the prosecutor illustrated the language, "may be fired" in the statutory definition of RCW 9.41.010(11), as follows:

> But the law doesn't say can be fired, it says may be fired, and there is a good reason. *What if I am some gang-banger with a felony on my record*, who is not allowed to have a firearm. And I have got a Glock in my pocket, but I have taken out a part and put that part in my pocket, a spring, a firing pin, something that it doesn't work if it's out, but that I can just slip back in in a moment and make it work. When I walk around with that Glock 45 missing the firing pin in my waistband, and say, hey, its's not a firearm under state law, can't be arrested for it, cant take it. No, because may be fired, right? Because all I have to do is pop that firing pin, or that little spring, or whatever it is right back into that weapon and it's fully operational. It

> was written that way on purpose, because we don't want a little minor thing like that to create escape routes for criminals. Okay.

9/1/2018 RP at 28 (emphasis added.) The Defendant did not object.

Failure to object to a comment is a waiver of any error, "…unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Thorgerson,* 172 Wn.2d 438, 442, P.3d 43 (2011) (*citing State v. Hoffman,* 116, Wn.2d 51, 804 P.2d 577 (1991).

The Court of Appeals recognized that, "[E]ven assuming that the prosecutor's argument was improper, Stewart cannot demonstrate any resulting prejudice . . ." because "the prosecutor's use of gang imagery . . . was restricted to discussing the statutory definition of firearm." The Court of Appeals also recognized that the prosecutor did not suggest that the Defendant was a member of the gang, or that the jury should convict the Defendant for reasons outside the evidence at trial.

Because the Defendant failed to object, any objectionable statements by the prosecutor in closing argument must be so "flagrant and intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury" in order to

constitute reversal on appeal. Here, where the allegedly inflammatory term was only used to illustrate a phrase in a definition, there was little chance of prejudice, and the Court of Appeals correctly recognized this. This Court should deny to review the Court of Appeals' decision.

3. The Court of Appeals correctly found that the trial court did not comment on the evidence.

The Defendant next claims that the court improperly commented on the evidence when it instructed the jury on which firearm constituted the firearm in question for each individual count. The Defendant cites to the case of *State v. Levy*, 156 Wn.2d 709, 132 P.3d 1076 (2006) for this claim. In *Levy*, the Court inserted descriptions into what is commonly called the, "to convict" or "elemental" instruction. *Levy* at 716.

The *Levy* instructions inserted a description of words used in the elements of the crime into the instruction, for example:

> To convict the defendant of the crime of burglary in the first degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 24th day of October, 2002, the defendant, or an accomplice, entered or remained unlawfully in a building, to-wit: the building of Kenya White, located at 711 W. Casino Rd., Everett, WA;
>
> ....

> (3) That in so entering or while in the dwelling or in immediate flight from the dwelling the defendant or an accomplice in the crime charged was armed with a deadly weapon, to-wit: a .38 revolver or a crowbar; and
>
> (4) That the acts occurred in the State of Washington.

Levy at 716.

This case presented a particularly confusing set of charges because the Defendant was charged with six counts of Unlawful Possession of a Firearm in the First Degree and five counts of Possession of a Stolen Firearm, all for six separate weapons. In order for the jury to understand which firearm corresponded to each count, the instructions enumerated each count in a separated instruction, which read:

INSTRUCTION No. 2.

The Defendant has been charged by Information with six counts of Unlawful Possession of a Firearm in the First Degree, five counts of Possession of a Stolen Firearm and one count of Possession of Methamphetamine.

The Defendant has been charged in Count 1 with Unlawful Possession of a Firearm in the First Degree, to-wit: a 12 gauge shotgun, serial # 26134;

The Defendant has been charged in Count 2 with Unlawful Possession of a Firearm in the First Degree, to-wit: a J. Stevens Arms 12 gauge pump action shotgun;

The Defendant has been charged in Count 3 with Unlawful Possession of a Firearm in the First Degree, to-wit: a Remington Model 700 rifle, serial #373809;

The Defendant has been charged in Count 5 with Unlawful Possession of a Firearm in the First Degree, to-wit: a Remington Rifle 300 M-700, serial #S6499498;

The Defendant has been charged in Count 6 with Unlawful Possession of a Firearm in the First Degree, to-wit: a Mossburg 12 gauge shotgun;

The Defendant has been charged in Count 7 with Unlawful Possession of a Firearm in the First Degree, to-wit: an SKS 7.62 rifle, serial #21000 2010;

> The Defendant has been charged in Count 8 with Possessing a Stolen Firearm, to-wit: a J. Stevens Arms 12 gauge pump action shotgun;
>
> The Defendant has been charged in Count 9 with Possessing a Stolen Firearm, to-wit: a Remington Model 700 rifle, serial #373809;
>
> The Defendant has been charged in Count 11 with Possessing a Stolen Firearm, to-wit: a Remington Rifle 300 M-700, serial #S6499498;
>
> The Defendant has been charged in Count 12 with Possessing a Stolen Firearm, to-wit: a Mossburg 12 gauge shotgun;
>
> The Defendant has been charged in Count 13 with Possessing a Stolen Firearm, to-wit: an SKS 7.62 rifle, serial #21000 2010;
>
> The Defendant has been charged in Count 14 with Possession of Methamphetamine.

CP at 56 – 57. Instruction number one also instructed the jury that, "a charge is only an accusation" and that "the filing of a charge is not evidence that the charge is true."

The jury instructions then gave a separate "elemental" or "to-convict" instruction for each count of Unlawful Possession of a Firearm in the First Degree as follows:

> To convict the Defendant of the crime of Unlawful Possession of a Firearm in the First Degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> **(1)** That on or about June 23, 2017, the Defendant knowingly had a firearm in her possession or control;
>
> **(2)** That the Defendant had previously been convicted of a serious offense; and
>
> **(3)** That the possession or control occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instructions for all five counts of Possession of a Stolen Firearm were similarly drafted, for example:

To convict the Defendant of the crime of Possession of a Stolen Firearm as charged in Count 8, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about June 23, 2017, the Defendant possessed or was in control of a stolen firearm;

(2) That the Defendant acted with knowledge that the firearm had been stolen;

(3) That the Defendant withheld or appropriated the firearm to the use of someone other than the true owner or person entitled thereto; and

(4) That this act occurred in the State of Washington.

The Court of Appeals correctly found these jury instructions were distinguishable from the erroneous instructions in *Levy*, and "did not remove that factual issue from the jury's consideration." Court of Appeals Opinion 51286-6-II at 14.

Rather than repeating the error in *Levy*, these instructions solved the problem of how to enumerate so many duplicative charges in a way to avoid a comment on the evidence. The Court of Appeals was correct to find there was no error here. This Court should decline review.

4. The Court of Appeals did not expand the State's power to search; the Defendant simply disagrees about the significance about a piece of evidence that led the police to her vehicle.

Finally, the Defendant again challenges the search warrant that was issued, allowing the police to search her vehicle, where many stolen guns were recovered. The warrant was issued after a police officer, having discovered firearms in the Defendant's bedroom in a remote area, found a bullet near her car and concluded that she must be using the vehicle to transport the weapons.

The issuing magistrate, the trial court, and the Court of Appeals all found that the bullet created a nexus, that is, probable cause to believe that evidence of the Defendant possessing stolen guns would be found in the Defendant's car. The Defendant's claims that this was an expansion of the State's power to search, because it does away with the nexus requirement enunciated in *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582 (1999).

"In determining whether probable cause exists to issue a search warrant, the magistrate must make a practical, common sense decision whether… there is a fair probability that evidence of a crime will be found in a particular place." *State v. Kuberka*, 35 Wn. App. 909, 912–13, 671 P.2d 260, 262 (1983). "The duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." *Id*. (*citing Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).)

Appellate courts accord great deference to the issuing magistrate. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). Any doubts concerning the existence of probable cause are resolved in favor of the warrant being valid. *Id*. at 108-09.

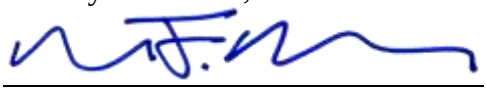
The Defendant claims that the Court of Appeals did away with the nexus requirement. This is not the case. This is a case where the

Defendant simply disputes the evidentiary value of the bullet found outside the Defendant's car.

This Court reviews decisions of the Court of Appeals only if the decision is (1) in conflict with a decision of this court; (2) in conflict of a published decision of the Court of Appeals; (3) is a significant question of law under the federal or state constitution's; or (4) contains an issue of substantial public interest. RAP 13.4(b). The Defendant is simply making a factual dispute. For that reason, this Court should decline to accept review and leave the Court of Appeals' decision undisturbed.

DATED this __19th_ day of August, 2019.

Respectfully Submitted,

BY: 

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