NO. 43932-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MATTHEW DAVID AHO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Beverly G. Grant

No. 11-1-00546-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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2. Whether the defendant waived the issue of whether a "separate and distinct act" instruction should have been given where he failed to propose such an instruction and, even if that issue were preserved, whether such an instruction was unnecessary where the State properly elected the acts upon which it was relied for conviction in counts IV, V, and VIII.

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B. STATEMENT OF THE CASE.

1. Procedure

On January 31, 2011, Matthew David Aho, hereinafter referred to as "Defendant," was charged by information with residential burglary in count III, theft of a firearm in count IV, second degree unlawful possession of a firearm in counts V and VIII, unlawful possession of a controlled substance in count VI, and unlawful use of drug paraphernalia in count VII[1]. CP 1-3. Jillian Nicole Newkirk was listed as a co-defendant. CP 1.

The defendant was arraigned on January 31, 2011, and trial was scheduled for March 29, 2011. CP 111.

On March 17, 2011, the defendant brought a successful motion to continue the March 29, 2011 trial to May 24, 2011 to allow for "additional discovery" and investigation. CP 113.

[1] The information did not include a count I or II, which presumably pertained to the co-defendant. *See* CP 1-3 (information), 4-5 (declaration for determination of probable cause).

On April 28, 2011, the court continued the May 24, 2011 trial date to June 15, 2011 upon the written agreement of the parties. CP 114.

On June 2, 2011, the June 15, 2011 trial was continued to July 18, 2011, to match court dates with the co-defendant and allow for continued negotiation. CP 115.

On June 29, 2011, the defendant successfully moved to continue the July 18, 2011 to August 24, 2011 to allow the co-defendant's attorney time to prepare for trial. CP 116.

On August 3, 2011, the defendant brought a successful motion for continuance of the August 24, 2011 trial to October 18, 2011. CP 117.

On October 18, 2011, the State moved to continue the trial until November 8, 2011, because the assigned deputy prosecutor was then trying another case. CP 118.

On October 27, 2011, the defendant successfully moved to continue the November 9, 2011 trial to January 19, 2012 because his co-defendant had a new attorney. CP 119. The court also set a December 14, 2011 omnibus hearing. CP 119

On December 14, 2011, the defendant failed to appear for that omnibus hearing and a bench warrant was issued for his arrest. CP 120-21.

On January 20, 2011, the court continued the trial date to February 29, 2012 upon written agreement of the parties, because of the courthouse's closure due to snowfall on January 18 and 19, 2012. CP 122.

However, the defendant failed to appear for that trial date, and another bench warrant was issued. CP 123-24.

On March 20, 2012, when Defendant next appeared in court, the court set a trial date for May 10, 2012. CP 125.

On May 10, 2012, the trial was assigned to a judge, but Defendant filed an affidavit of prejudice against that judge, CP 126, and the trial was continued to May 14, 2012 as a result. CP 127.

On May 14, 2012, the court continued the trial one day to May 15, 2012 because there were no available courtrooms to hear the case. CP 128.

On May 15, 2012, the trial was continued to June 26, 2012 because there were no courtrooms available and because of a "possible defense witness issue." CP 129. The defendant signed the order continuing the trial. CP 129.

On June 26, 2012, the defendant successfully moved to continue the trial until July 26, 2012 because there were no courtrooms available and the defense attorney had a scheduled vacation of July 2, 2012 to July 10, 2012. CP 130. The defendant signed the order continuing the trial. CP 130.

On July 26, 2012, the court continued the case to August 2, 2012 because the prosecuting attorney was recovering from surgery and several witnesses were unavailable. CP 131. *See* RP 5.

On August 2, 2012, the case was called for trial, CP 132, and on August 6, 2012, the court heard the parties' motions *in limine*. RP 4, 14-29. *See* CP 6-7.

The parties stipulated that "[o]n November 7, 2010 and on January 28, 2011, the defendant, Matthew David Aho, had previously been convicted of a felony." CP 54; RP 32-33.

The trial was then recessed until August 20, 2012 upon agreement of the parties. RP 10-11.

On August 20, 2012, the parties conducted voir dire of the venire in open court. 08/20/2012 RP 24-35, 48-102. The defendant challenged venire member 4 for cause and the court granted that motion. 08/20/2012 RP 40-41. The parties jointly moved to excuse venire members 18 and 35 for cause, and that motion was granted. 08/20/2012 RP 43-44, 47-48.

During a sidebar, the deputy prosecutor challenged venire member 23 for cause. 08/20/2012 RP 102-03; CP 134 (original jury panel selection list), and during a subsequent sidebar, the parties exercised their peremptory challenges by writing them on a paper titled "Peremptory Challenges," which was filed with the court the same day. 08/20/2012 RP

103; CP 133-34. The defendant did not object to this procedure. *See* 08/20/2012 RP 102-03. The State exercised 4 peremptory challenges and the defendant exercised 6. CP 133 (Peremptory Challenges). The court then seated the jury as selected by the parties, administered the oath, and read initial instructions. 08/20/2012 RP 104-05.

The parties gave their opening statements. RP 65-66; 08/21/2012 RP 138-42 (State's opening statement); 08/21/2012 RP 142-44 (Defendant's opening statement).

The State called Bruce Gambill, RP 66-141, 174-95, Phillip Newkirk, RP 154-71, Jillian Nicole Newkirk, also known as Martinez, RP 195-241, Brandi Snow, RP 242-82, 291-301, Pierce County Sheriff's Deputy Anthony Filing, RP 301-400, Pierce County Sheriff's Deputy Lucas Baker, RP 400-37, Forensic Scientist Maureena Dudchus, RP 442-66, and Forensic Investigator Clarence Mason, RP 466-77.

The State rested, but then immediately moved to re-open its case to allow for the segregated admission of the 9-millimeter ammunition from the 9-millimeter pistol, and to allow the court to read into the record a stipulation that the defendant had on November 7, 2010 and January 28, 2011, been previously convicted of a felony. RP 477-81. *See* CP 54. The defendant did not object to this. RP 480.

After the State again rested, the defendant moved to dismiss the residential burglary and theft of a firearm counts for insufficient evidence, RP 482-83. With respect to the theft of a firearm count, the defendant argued that the original information charged theft of a .357-caliber revolver whereas the evidence indicated that "[n]o 357 was even taken." RP 483.

The State moved to amend the theft of a firearm count to allege a 10-millimeter handgun, instead of a .357 revolver, noting that there was no prejudice to the defendant's case because the specific firearm alleged would not have changed how that charge was defended. RP 484, 86-88; CP 55-57.

The defendant objected, noting that his defense was based on the fact that he was "charged as an individual and not as an accomplice" and that his "cross-examination was developed and pursued based on the charge." RP 485.

The Court denied the defendant's motion to dismiss and granted the State's motion to amend. RP 488.

The defendant then moved to dismiss count VIII, second degree unlawful possession of a firearm for insufficient evidence. RP 488-89. The State noted that possession need not be exclusive, and argued that the facts that 9 mm ammunition was found in a box addressed to the defendant, the

9 mm pistol was found on the passenger floorboard of the defendant's girlfriend's car, that the defendant's girlfriend testified that she had purchased the pistol for the defendant, that this pistol belonged to the defendant, and that she and the defendant shot the pistol constituted sufficient evidence that the defendant had possessed that pistol. RP 489-90.

The court denied defendant's motion to dismiss the second degree unlawful possession of a firearm count. RP 493.

The defendant rested. RP 493; 521

The court considered the State's proposed jury instructions and the defendant took exception to five instructions because of their inclusion of language regarding accomplice liability. RP 496-500.

The defendant had no objection to what became the court's instruction number 19 defining "a 'firearm'" as "a weapon or device from which a projectile may be fired by an explosive such as gunpowder." CP 8-49. However, he objected to an instruction which stated

> A firearm need not be operable during the commission of a crime to constitute a 'firearm' as defined in previous instructions. Instead, the relevant question is whether the firearm is a gun in fact rather than a toy gun or gun like object which is incapable of being fired.

CP 8-49 (instruction no. 25). RP 500-04.

The defendant did not object to the lack of a unanimity instruction not did he propose such an instruction himself. *See* RP 496-521; CP 50-53.

The court read its instructions to the jury. RP 521.

The parties gave their closing arguments. RP 522-41 (State's closing argument); RP 543-65, (Defendant's closing argument); RP 565-71 (State's rebuttal argument).

During her closing argument, the deputy prosecutor stated that the ***10-millimeter pistol*** was the subject of count IV, the November 7, 2010 theft of a firearm. RP 529-31. She argued that this same 10-millimeter pistol was the subject of count V, the November 7, 2010 second degree unlawful possession of a firearm. RP 531-33. With respect to count VIII, the January 28, 2011 second degree unlawful possession of a firearm, the deputy prosecutor argued that "we are talking about Exhibit No. 48, the ***9-millimeter firearm*** that was found inside of Jillian Newkirk's vehicle." RP 533, 541 (emphasis added).

The defendant adopted this same election of the 10-millimeter pistol for counts IV and V and the 9-millimeter for count VIII in his closing argument, as well. RP 556-60.

At no point during their arguments did either party assert that a different election of firearms to counts existed or should exist. *See* RP 522-71. Neither party asserted that the .357 revolver owned by Mr.

Gambill was the basis for any of the counts, and neither party so much as mentioned the Enfield Model 1917 rifle. *See* RP 522-71.

On August 29, 2012, the jury submitted a question which read, "Do both exhibits 48 + 49 (either / or) apply to count VIII?"[2] CP 58, 65; 08/29/2012 RP 4[3]. The court replied, "you should follow the instructions as given to you along with your recollections of the testimony & your notes." CP 65; 08/29/2012 RP 4. Both parties ultimately agreed to this response, and the jury heard no other. 08/29/2012 RP 4. *See* CP 58, 65.

The jury subsequently returned verdicts of guilty as charged in the amended information. 08/29/2012 RP 5-8; CP 59-64.

On September 14, 2012, the court sentenced the defendant to 72 months on count III, 90 months on count IV, 60 months on count V, 24 months on count VI, and 60 months on count VIII, with the confinement on counts IV, V, and VIII served consecutively for a total of 210 months in total confinement. RP 574-85 CP 69-82, 83-87. The court also imposed 12 months in community custody. CP 83-87; RP 574-85.

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[2] Exhibit 48 was the 9 mm pistol and exhibit 49 was the Enfield rifle. *See, e.g.*, CP 91-94 (the exhibit record mislabels exhibit 49, a rifle, as a shotgun).

[3] The verbatim report of proceedings consists of four consecutively paginated volumes referenced as RP [Page Number], one volume pertaining to 08/29/2012, referenced as 08/29/2012 RP [Page Number], and one volume pertaining to the 08/20 to 08/21, 2012 jury selection and openings, herein referenced as 08/20/2012 RP [Page Number] and 08/21/2012 RP [Page Number].

The defendant filed a timely notice of appeal the same day. CP 88; RP 585.

2. Facts

November 7, 2010 was Bruce Gambill's birthday. RP 186. At the time, he was living at 32502 Benbow Drive East in Pierce County, Washington, on Lake Whitman, and had spent the day working on a car. RP 66-67. Late that night, he came inside his residence to start a fire and prepare something to eat. RP 67-70, 114.

As he was at his wood stove, he heard knocking on a sliding glass door, which faces the lake. RP 70. When he turned, he saw "two young ladies" waving him over to the door. RP 70.

They indicated that their car, which was at a nearby boat launch, wouldn't start. RP 71-72. Gambill agreed to help them, instructing them to get in his van, so that he could give them a ride back to the boat launch, and jumpstart their vehicle. RP 73.

When he left with the young ladies, Gambill left the gate from the road to his property open. RP 99.

When he arrived at the boat launch, he parked next to the women's vehicle, and began trying to jumpstart it. RP 74. Gambill testified that he could not get the vehicle started immediately, and ultimately asked the woman who was trying to start the vehicle why she was trying to start it was using "short little starts." RP 74.

One of the women indicated that their vehicle's fuel gauge read empty. RP 75. So, Gambill left to get them a gallon of gas. RP 76, 181. As he was departing the scene to return to his residence for the gas, one of the women, whom he identified as Ms. Snow, was talking on her telephone. RP 181-82, 77-78.

Ultimately, Gambill himself tried to start the car, and succeeded in doing so, although he noticed that "the ignition switch was dangling down below the dashboard." RP 74-75.

He testified that it was not possible to see his residence from the boat launch, RP 73, 100-01, and estimated that the entire process took 20 to 30 minutes. RP 77.

After getting the women's vehicle started, Gambill returned to his residence. RP 78-79. As he was parking his van, he saw the women's car "zoom" past the front gate of his house. RP 78-79. He then walked to the sliding glass door, because he had left that door unlocked. RP 80.

When he entered the home, he found comic books, which had been placed on a table, scattered all over the floor. RP 80. He then noticed that his laptop computer and a pistol were gone. RP 80. Two rings, a pair of binoculars, some prescription pills, $1,000 in cash, and some cigarettes were also missing. RP 84-88.

Gambill testified that the missing pistol was a 10 millimeter semi-automatic. RP 80. When the prosecutor asked him to clarify whether the handgun was a semi-automatic or a revolver, Gambill testified as follows

> First I thought it was a [.]357 but they are very close to the same size. But it was a 10. I hadn't spent a lot of time looking at that gun.

RP 81. He testified that he had left the 10 mm pistol sitting on top of a desk when he left his residence. RP 82.

Gambill testified that he had fired that pistol previously and that it functioned normally, describing it as "a good gun." RP 82. He testified that there was a magazine inserted in the pistol at the time it was stolen and a second magazine, which was also missing. RP 87. Both magazines were fully loaded. RP 87.

The defendant's attorney elicited for the first time from Gambill that Gambill had indicated in a prior written statement that it was a .357-caliber revolver that was stolen. RP 117-19. *See* RP 376, 395-96.

Gambill testified that he was confused when he wrote in that statement that a .357 revolver that had been taken, RP 118, and indicated that he had made a mistake. RP 189, 193. He explained that both the .357 revolver and the 10 mm pistol were silver or a stainless-steel color, and that a .357-caliber cartridge is similar in size to a 10 mm-caliber cartridge.[4] RP 118. Gambill testified that he called the sheriff's deputy who responded to tell him that the stolen weapon was actually a 10 mm pistol. RP 120, 189.

Moreover, Gambill was clear in his testimony that he continued to own the .357 revolver, and the only firearm stolen from him that night was the 10 mm pistol. RP 119-20, 189, 191-94.

With respect to the stolen rings, Gambill testified that he had paid $5,000 for one of the rings 30 years before and estimated that the second ring had a value of between 300 to 400 dollars. RP 85-86.

Gambill assumed that those who stole his property entered his home through the sliding glass door that he left unlocked because he had locked the remaining doors. RP 183-84, 183.

After finding his home burglarized, he drove to a residence off of Canyon Road to contact some people with whom his son had previously associated. RP 88. He was apparently able to make contact, and described the two young women he had encountered that evening and the vehicle they were driving. RP 89-90. The young people with whom Gambill spoke gave him the name of the person who owned or drove the vehicle he described. RP 90.

The following day, Gambill entered this name in Facebook and confirmed that Brandi Snow was the driver. RP 91-92. He found a

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[4] 0.357 in (25.4 mm / in) = 9.0678 mm (for a difference of 0.9322 mm or about 0.0367 in. between a .357- and a 10 mm-caliber cartridge).

photograph of the other young lady on Ms. Snow's Facebook page, and learned that her name was Jill Newkirk. RP 92.

Gambill asked more people to find out where Snow was staying. RP 93-94. He then contacted Snow and was able to get his laptop computer back from her. RP 94, 176, 178-79. Snow did not provide him with any of the other items that had been taken. RP 94.

Gambill testified that he reported the crimes a few days later. RP 175. He indicated that he first investigated the matter himself because he had had previously been a victim of theft and had little success in recovering his property. RP 175, 184-85. In fact, he testified that he was still owed $88,000 in restitution from that prior theft. RP 176.

Phillip Newkirk is Jill Newkirk's father. RP 156, 217.

He testified that, in January 2011, he lived at 50th Avenue East, and that there was a "fifth-wheel trailer" on the property in which his oldest daughter, Jill, resided with the defendant. RP 155-56.

Phillip Newkirk testified that he had known the defendant since the defendant had been in grade school. RP 156.

He testified that, on January 28, 2011, Pierce County Sheriff's Deputies Baker and Filing came to his residence. RP 158. About one month earlier, the defendant had given him a rifle as a payment for letting the defendant stay in the trailer. RP 160-63. So, when the deputies came to

the property to search the trailer in which Jill and the defendant had been living, Phillip[5] gave them this rifle. RP 160.

Phillip, who had undergone firearms training, testified that he examined the rifle by working the action, and found it to be inoperable, which he defined as being unable to fire. RP 168-70. He described the weapon as a "real firearm" and not a toy, but testified that it was "out of commission." RP 170.

Phillip Newkirk testified that he had never seen his daughter, Jill, with a handgun. RP 164.

Jill Newkirk, also known as Jill Martinez at the time of the trial, testified that she was living with the defendant in the fifth-wheel trailer on her parents' property. RP 195-97, 217. Jill also testified that she knew Brandi Snow and Nate Rolfe. RP 197-98.

On November 7, 2010, she was with the defendant when Rolfe came to the property with the idea of going to a house on the lake to "come up with some quick cash." RP 199-201. To get this cash, the defendant, Rolfe, Newkirk, and Snow devised a plan in which she and Snow would lure the victim away from his house while the defendant and

[5] Because Mr. Newkirk and his daughter share a surname, for clarity both will, at times, be referred to by their given names. No disrespect it intended.

Rolfe entered that house. RP 201-02. Jill testified that the defendant went along with that plan. RP 236.

To execute the plan, they drove Snow's car to the boat launch, and walked to Gambill's residence. RP 202-04. Newkirk and Snow then split up from the defendant and Rolfe. RP 238. Newkirk and Snow jumped over the fence onto Gambill's property, and went to his sliding glass door. RP 202-04. There, they told Gambill they "broke down," and he came out to help them. RP 202-04.

Rolfe had a backpack with him. RP 204.

After Gambill started their vehicle, Snow and Newkirk drove back to the main road, where they picked up Rolfe and the defendant about a half mile to a mile down the street. RP 205. Newkirk testified that Rolfe and the defendant were together, at the same location, when they picked them up. RP 239.

When they got back to the trailer, Newkirk observed a laptop computer she had not previously seen. RP 205-06.

Newkirk testified that she purchased a 9 mm handgun for the defendant, and that police found this handgun on the passenger-side floorboard of her vehicle during a subsequent search. RP 212, 220, 233-34. She then testified that it was a gift for the defendant. RP 220-21. Although she testified at one point that she had not yet given it to him, RP

220-21, when Pierce County Sheriff's Deputy Filing asked Newkirk about that pistol, she told him that she got the gun for the defendant and said, "we just take it out and go shooting and stuff." RP 233-34. When asked to whom she was referring when she said "we... go shooting," Newkirk testified, "Me and Matt," the defendant. RP 234.

Jill Newkirk testified that police also found methamphetamine inside her vehicle. RP 221-22. When Deputy Filing asked her about that methamphetamine, she told him she "didn't even know we had any left." RP 234-35.

Jill indicated that she had pleaded guilty to residential burglary and theft of a firearm for her role in the crimes. RP 213-14.

Brandi Snow had known Jill for about six months before the incident. RP 243. On November 7, 2010, she drove to Jill's residence in a maroon Nissan Ultima, where she also found the defendant and Rolfe. RP 245-47. Snow testified that the defendant and Jill were dating at the time, but that that was the first time she had met Rolfe. RP 244-45.

Snow testified that she started the vehicle with a screwdriver, but that otherwise, there was nothing mechanically wrong with it. RP 247. She testified that she drove this same vehicle when they went to Gambill's residence, and that Newkirk, Rolfe, and the defendant were passengers in that car. RP 247. She testified that they parked at the boat launch. RP 248.

Snow and Newkirk planned to knock on Gambill's door to lure him out of his house so that the defendant and Rolfe could "[g]et the stuff out of the house." RP 249. Snow confirmed that Rolfe had a backpack with him at the time. RP 295-96.

Snow and Newkirk had to climb over Gambill's fence to gain access to his property. RP 250. They knocked on his door, told him that their car had broken down, and he agreed to help them. RP 251. Snow testified that Gambill drove them back to the boat launch in his van. RP 251. He left briefly to return to his residence for gasoline. RP 252. Snow confirmed that she and Newkirk "were pretending not to be able to get the car started." RP 253.

After they started the car, they picked up the defendant and Rolfe down the road. RP 254, 295. Snow told detectives that they were carrying items from Gambill's house in a backpack. RP 258. She testified that the four of them then returned to Newkirk's residence, where Rolfe and the defendant showed her a laptop computer taken from Gambill's house. RP 254, 263. Snow testified that she also recalled seeing some pills, binoculars, a handgun, and some jewelry. RP 255. She testified that these items seemed to have come from the backpack, and that everyone there was going through them. RP 274-75, 297.

Although Snow testified that she was not familiar with guns, RP

256, she described the handgun as looking "kind of old" and being silver and black in color. RP 264.

On cross-examination, the defense asked Snow if she was "familiar with the type of guns that are usually in old time western movies." RP 269. Snow responded, "[t]hey just look old." RP 270. The defense attorney later asked if the gun in the trailer looked "like one of those old western type guns, or did it look like maybe something you see in the most modern cop type shows," to which Snow responded that it looked "[l]ike an older western type but small." RP 270. Yet when the defense attorney then asked Snow if she "kn[e]w the difference between a revolver and a semi-automatic handgun," she replied, "No." RP 270. However, Snow did not recall seeing any loose cartridges. RP 275.

Regardless of its type, Snow testified that she saw the defendant handling the gun, and that the defendant was the last person she saw handling it. RP 265.

Snow testified that they split up the pills, which she thought contained morphine, between themselves. RP 265. She testified that she paid Rolfe for the laptop computer, and that the jewelry went to "a gold guy," RP 265, by which she meant a business which trades in gold. RP 283. Snow indicated that she later had someone return the laptop to Gambill because she was contacted by Gambill. RP 266-67, 270.

She indicated that both Rolfe and the defendant had walkie-talkies during the commission of the burglary. RP 281.

Pierce County Sheriff's Sergeant Heishman and Deputies Filing, Lucas Baker, and Eldridge served a search warrant on Jill Newkirk's trailer on January 28, 2011. RP 312-13, 336, 355, 401-. They knocked and announced their presence and purpose, and when they received no response, entered the trailer. RP 404-05, 425-27. Deputies found the defendant and Jill Newkirk inside. RP 404-05.

Deputies took photos of the exterior and interior of the trailer. RP 318-19.

During the search, Deputies seized 13 items. RP 356. Deputy Filing found a box from the sporting goods store Cabelas in a cupboard, which was addressed to the defendant, and contained .22 caliber magazines, 9 millimeter caliber magazines, and some 9 millimeter cartridges. RP 320-21, 328. He found a .223 caliber magazine and a 9 millimeter magazine in a cash box in the kitchen area. RP 322-23.

Inside a backpack in the trailer, Filing found a Crown Royal bag that contained several 9 millimeter cartridges and rubber gloves. RP 329, 331. He found a nylon holster in that backpack, as well. RP 333, 353-54, 359.

Filing also discovered a single .45-caliber round inside a heating vent in the trailer. RP 331-34.

Filing found an electronic scale of the type commonly used for weighing illegal drugs on the kitchen table. RP 342, 362-63. Deputy Baker found a glass pipe on the mattress inside the trailer and a cigarette package that contained a baggie with a white crystal substance inside. RP 407. The pipe contained what appeared to be burnt methamphetamine residue. RP 433-36. The substance, which weighed 2.7 grams, was found to contain methamphetamine. RP 363-64, 383-93, 407-11, 436, 446-52. Deputy Baker also found a lighter. RP 436.

Deputy Filing found items of mail addressed to the defendant inside the trailer, RP 331-34, and also observed both male and female clothing. RP 357.

Deputy Filing also searched a Pontiac motor vehicle registered to Jill Newkirk. RP 344. He found a handgun case on the passenger floorboard of that car. RP 344-45. Inside that case was a 9-millimeter semi-automatic pistol, with a fully-loaded magazine and a chambered round. RP 351-52, 376, 393.

Clarence Mason, a forensics investigator for the Sheriff's Department, identified this firearm as a 9-millimeter semi-automatic pistol manufactured by Charles Daily. RP 467, 470-72. Its associated magazine

held 15 cartridges and was fully loaded. RP 472. Mason test-fired the pistol and found it to be operable, testifying that it "fired as designed." RP 472-73. He therefore agreed that it was "capable of firing a projectile by means of an explosive such as gunpowder." RP 472-73

Mason also examined the rifle Phillip Newkirk had given the Sheriff's Department. RP 473. He identified that weapon as a Model 1917 Enfield .30-06 bolt-action rifle. RP 473-74. However, Mason also testified that there was a four-round magazine bolted into the weapon. RP 474-75. Mason agreed that this weapon was a real gun and not a toy gun or "gun-like object," but testified that because of a hole drilled into the chamber of the weapon, the weapon itself was inoperable. RP 475-76. A round could not be chambered in the rifle. RP 476.

The parties stipulated that on November 7, 2010 and January 28, 2011, the defendant had been previously convicted of a felony. RP 481; CP 54.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ALLOWED THE STATE TO AMEND THE INFORMATION AFTER IT RESTED ITS CASE-IN-CHIEF BECAUSE THAT AMENDMENT DID NOT CHANGE THE CRIME CHARGED AND DID NOT PREJUDICE THE DEFENDANT.

"The Sixth Amendment to the United States Constitution, and article I, section 22 (amen[dment] 10) of the Washington Constitution, require that a charging document include all essential elements of a crime, statutory and non-statutory, so as to inform the defendant of the charges against him and to allow him to prepare his defense." ***State v. Phillips***, 98 Wn. App. 936, 991 P.2d 1195 (2000); ***State v. Kjorsvik***, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); ***State v. Tresenriter***, 101 Wn. App. 486, 491, 4 P.3d 145 (2000). *See* RCW 10.37.052; ***State v. Ralph***, 85 Wn. App. 82, 84, 930 P.2d 1235 (1997).

An information may be amended "at any time before the verdict or finding if substantial rights of the defendant are not prejudiced." CrR 2.1(d).

However, "[a] criminal ***charge*** may not be amended after the State has rested its case-in-chief unless the amendment is to a lesser degree of the same charge or a lesser included offense." ***State v. Pelkey***, 109 Wn.2d 484, 491, 745 P.2d 854 (1987) (emphasis added). "In ***Pelkey*** the State

sought to amend the information from a charge of bribery to the charge of trading in special influence, two crimes which have different elements." ***State v. Debolt***, 61 Wn. App. 58, 61, 808 P.2d 794 (1991); ***Pelkey***, 109 Wn.2d at 486. The ***Pelkey*** Court drew a bright line rule that any amendment from one crime to a different crime after the State has rested its case is *per se* prejudicial error unless the change is to a lesser included or lesser degree crime. ***State v. Vangerpen***, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995).

Nevertheless, because ***Pelkey*** deals specifically with amendments from one crime to a different crime,

> [t]he rule announced in ***Pelkey*** is not applicable to all amendments to informations. It is not applicable, for instance, to amendments which 'merely specif[y] a different manner of committing the crime originally charged.

State v. DeBolt, 61 Wn. App. 58, 808 P.2d 794 (1991) (*quoting* ***Pelkey***, 109 Wn.2d at 490). *See* ***State v. Downing***, 122 Wn. App. 185, 93 P.3d 900 (2004).

In ***DeBolt***, the Court considered an amendment made after the defendant had testified which altered the charging period of one count. ***DeBolt***, 61 Wn. App. at 60-62. It noted that "[c]ases involving amendment of the charging date in an information have held that the date is usually not a material element of the crime," and thus found that "amendment of the

date is a matter of form rather than substance, and should be allowed absent an alibi defense or a showing of other substantial prejudice to the defendant." *Id.* at 62. The Court held that whereas "***Pelkey*** refers to a 'criminal charge' being amended," the date as alleged in ***DeBolt*** "was not a material part of the 'criminal charge,'" and therefore, that the "case f[ell] outside the ambit of ***Pelkey***." *Id.*

"Where the ***Pelkey*** rule does not apply, the defendant has the burden of demonstrating prejudice under CrR 2.1(d)." ***Ziegler***, 138 Wn. App. at 809 (*citing* ***State v. Haner***, 95 Wn.2d 858, 864, 631 P.2d 381 (1981)).

"A trial court's decision to allow the State to amend the charge is reviewed for abuse of discretion." ***State v. Ziegler***, 138 Wn. App. 804, 808, 158 P.3d 647 (2007).

In the present case, although the information was amended after the State rested its case-in-chief, the criminal charge remained unchanged. The defendant was charged in count IV with theft of a firearm before the amendment, and he was charged in count IV with theft of a firearm after the amendment. CP 1-3; CP 6-8.

Rather than changing the charge, the amendment in this case changed only a phrase in count IV from "a .357 revolver" to "a 10 mm handgun." *Compare* 1-3 *with* CP 55-57. Under both the original and the

amended information, the defendant was alleged to have, on November 7, 2010, "unlawfully, feloniously, and wrongfully obtain[ed] or exert[ed] unauthorized control over ***a firearm... belonging to Bruce Gambill***, with intent to deprive said owner of such property." CP 1-3, CP 55-57 (emphasis added). In other words, both informations charged the defendant with the same crime: the November 7, 2010 theft of Bruce Gambill's firearm.

Moreover, Bruce Gambill testified that only one firearm was stolen from him on November 7, 2010, and that this was the 10 mm pistol. RP 119-20, 189, 191-94. Therefore, even in the context of this case, the amended information did not change the charge from theft of one firearm to a second theft of a different firearm. It alleged the same theft. Therefore, the "criminal charge" itself was not amended, and ***Pelkey***, does not apply.

Although the defendant argues that by changing the description of the firearm stolen, the amendment charged a "new crime," Brief of Appellant (BOA), p. 19, his argument is unsustainable.

A description of the firearm alleged to have been stolen does not appear to be a necessary element of the crime of theft of a firearm. *See* ***State v. Tresenriter***, 101 Wn. App. 486, 493-94, 4 P.3d 145 (2000). Therefore, changing that description could not have changed the essential

elements of the crime charged in this case, and, thus, could not have converted the originally charged crime, which is nominally and factually the same as that in the amended information, to a completely new crime. Although the defendant cites several cases as support for the opposite conclusion, none of those cases are apposite.

The defendant first cites ***State v. Stephens***, 93 Wn.2d 186, 607 P.2d 304 (1980), for the proposition that "a new crime is charged when the prosecution, by amendment and/or jury instructions, changes the identity of the subject property." BOA, p. 19. ***Stephens*** did hold that where "a defendant is charged with one count of assault against two victims conjunctively," it is *not* harmless error "to phrase an instruction to the jury with the names of the victims in the disjunctive." *Id.* at 189-90. It so held because "[t]he instruction, in effect, split the action into two separate crimes... while the information charged only one." *Id.* at 190. However, ***Stephens***, did not involve the crime of theft of a firearm, and more important, did not involve a motion to amend an information. Its finding that a jury instruction is improper by naming the victims in the disjunctive is simply irrelevant to an analysis of whether an amendment to an information results in a new criminal charge.

The defendant next cites ***State v. Phillips***, a 1902 decision, for the same proposition. 27 Wn. 364, 67 P. 608 (1902). ***Phillips***, however, also

dealt exclusively with an err in instructing the jury. There, the defendant was charged with theft of American currency, but the jury was instructed that it could find guilt based on the theft of Canadian currency. *Id.* at 366-67. The Court held that the instruction was err because it allowed the jury to convict "upon a charge outside the information." *Id.* at 368. Again, the present case involves an amendment to the information not an improper jury instruction pertaining to that information. It is therefore distinguishable from ***Phillips*** and ***Stephens***.

Finally, the defendant cites ***State v. VanCleve***, 5 Wn. 642, 32 P. 461 (1893) an 1893 decision in which the trial court, during trial, allowed the State to amend an information charging theft of "17 head of horses" to alter the name of the victim from "Wm. Burbank" to "Walter Burbank." ***VanCleve***, 5 Wn. at 642. The Supreme Court found that because the horses were identified in the original information only by ownership and not by distinguishing marks or location, a change in the identification of the owner resulted in a change in a material allegation of the charge. ***VanCleve***, 5 Wn. at 643.

In the present case, by contrast, the firearm alleged to have been stolen by the defendant on November 7, 2010, was always alleged to have been stolen *from the same owner*: Bruce Gambill. CP 1-3, 55-57. Because Gambill only had one firearm stolen from him that day, RP 119-20, 189,

191-94, further description of that firearm was not a material allegation of the charge.

Both the original information and the amended information charged the defendant with the same crime: the November 7, 2010 theft of Bruce Gambill's firearm. As a result, although the information was amended after the State rested its case-in-chief, the criminal charge remained unchanged[6], and the ***Pelkey*** rule does not apply.

Therefore, the defendant has the burden of demonstrating prejudice under CrR 2.1(d). ***Ziegler***, 138 Wn. App. at 809.

The defendant has made no such demonstration nor can he. As noted above, both the original and amended informations charged the defendant with the same crime, theft of Bruce Gambill's firearm on November 7, 2010. CP 1-3, 55-57. The defendant indicated that his defense at trial would be general denial, and, at least as to the burglary count, alibi. CP 135. Neither defense could in any way have been affected by changing the description of the firearm alleged to have been stolen in count IV. If the defendant was to deny the allegations in their entirety, it would be irrelevant to that denial that the firearm alleged to have been stolen was actually a semi-automatic rather than a revolver. Similarly, if the defendant's claim had been alibi, that is, that he had been somewhere

else at the time of the theft of the firearm, his claim would not be diminished by an amendment to the description of the firearm stolen.

In fact, the only way in which the amendment could have prejudiced the defendant is if his defense was that he had stolen a .357 revolver from Mr. Gambill, but not a 10 millimeter semi-automatic. This, of course, could not have been his defense, given his plea of not guilty to the original information.

While the defendant argues that he was not given an "opportunity such as in [***State v.***]***Shaffer***[, 120 Wn.2d 616, 845 P.2d 281 (1993)] to address the subject matter of the new charges during the State's case," BOA, p. 22-23, if his defense was general denial or alibi, he would have no need to address the specific description of the firearm stolen.

Moreover, the defendant did have the opportunity "to address the subject matter of the new charges during the State's case." BOA, p. 22. Specifically, as the defendant admits, he was able to elicit from Brandi Snow that the firearm she saw in the trailer after the burglary was "like one of those old western type guns," RP 270, BOA, p. 24-25. In other words, the defendant was able to elicit testimony from a State's witness that the stolen firearm appeared to be a revolver rather than a semi-

[6] It is for this reason that, contrary to Defendant's assignment of error 4 and his argument at BOA, p. 26, the defendant was convicted of the crime specified in the information.

automatic pistol. Thus, contrary to Defendant's contention that the amendment caused his cross-examination to support the theft of a firearm charge, BOA, p. 24-25, it actually caused his cross-examination to effectively undercut that charge. Although such testimony would have been inculpatory under the original information, which alleged that the stolen firearm was a revolver, it was exculpatory under the amended information, which eliminated reference to a revolver. *Compare* CP 1-3 *with* 55-57. In other words, contrary to the defendant's present assertion, the amendment assisted rather than prejudiced his case.

Hence, the defendant has failed to show that the amendment caused any prejudice to his substantial rights under CrR 2.1(d).

Because the amended information did not change the crime charged and did not prejudice the defendant, the trial court's decision to allow that amendment after the State rested its case-in-chief was proper.

Therefore, the defendant's conviction should be affirmed.

2. THE DEFENDANT WAIVED THE ISSUE OF WHETHER A SEPARATE AND DISTINCT ACT INSTRUCTION SHOULD HAVE BEEN GIVEN BECAUSE HE FAILED TO PROPOSE SUCH AN INSTRUCTION AND, EVEN IF THE ISSUE HAD BEEN PRESERVED, SUCH AN INSTRUCTION WAS UNNECESSARY BECAUSE THE STATE PROPERLY ELECTED THE ACTS UPON WHICH IT WAS RELIED FOR CONVICTION IN COUNTS IV, V, AND VIII.

"When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected," ***State v. Petrich***, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), *overruled on other grounds by*, ***State v. Kitchen***, 110 Wn.2d 403, 756 P.2d 105 (1988), in that the jury must unanimously agree on which incident constituted the crime. ***State v. Kitchen***, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

To protect this unanimity in such cases, "[t]he State may, in its discretion, elect the act upon which it will rely for conviction," or the court must instruct the jury "that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt." ***Petrich***, 101 Wn.2d at 572. That is, "either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury

to agree on a specific criminal act." ***State v. Kitchen***, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).

The defendant here makes two arguments in this regard. First, he contends that the trial court violated his rights by failing to give a "unanimity instruction" informing the jury that it must unanimously agree on the same criminal act for conviction on counts IV and V. BOA, p. 27-31. Second, he argues that because there was no unanimity instruction, there is no assurance that the conviction in count VIII was based on unlawful possession of the 9 millimeter pistol, which was a firearm, instead of the then-inoperable Enfield rifle, which he argues was not. BOA, p. 35-47.

The defendant, however, waived these arguments by failing to propose a unanimity instruction below. *See* RP 496-521; CP 50-53.

Proposed jury instructions must be served and filed when a case is called for trial, CrR 6.15(a), and "[n]o error can be predicated on the failure of the trial court to give an instruction where no request for such an instruction was ever made." ***State v. Kroll***, 87 Wn.2d 829, 843, 558 P.2d 173 (1977); ***State v. Lucero***, 140 Wn. App. 782, 787, 167 P.3d 1188 (2007) (*quoting* ***McGarvey v. City of Seattle***, 62 Wn.2d 524, 533, 384 P.2d 127 (1963), for the proposition that if a party fails to propose a

desired jury instruction, that party "cannot predicate error on its omission."); RAP 2.5(a).

Indeed, in ***Petrich*** itself, the Supreme Court held that the defendant's failure to request an instruction informing the jury that it must unanimously agree on the same criminal act for conviction on each charge, did not waive the issue on appeal *only because* defendant "made a proper motion before the trial court, fully apprising the court of his argument and its legal basis." ***Petrich***, 101 Wn.2d 566, 571-72, 683 P.2d 173 (1984).

Here, the defendant argues that the trial court should have given an instruction which stated that the jury must find separate and distinct acts to support its conviction in counts IV, V, and VIII. BOA, p. 27-34, 35-47. However, he neither objected to the lack of a unanimity instruction in the trial court nor proposed such an instruction himself. *See* RP 496-521; CP 50-53.

Because a party which fails to propose a desired jury instruction, "cannot predicate error on its omission," ***Lucero***, 140 Wn. App. at 787, the defendant here has waived the issue of whether the trial court erred in failing to instruct the jury that it must find 'separate and distinct acts' to support its convictions in counts IV and V. *See* ***Kroll***, 87 Wn.2d at 843; ***McGarvey***, 62 Wn.2d at 533. *Cf.* ***State v. Corbett***, 158 Wn. App. 576, 591-92, 242 P.3d 52 (2010).

Therefore, Defendant's convictions should be affirmed.

Even had the issue been preserved, however, a unanimity instruction would not have been necessary because the State elected the acts upon which it was relying for conviction in counts IV, V, and VIII. ***Petrich***, 101 Wn.2d at 572; ***Kitchen***, 110 Wn.2d at 409.

Specifically, during her closing argument, the deputy prosecutor stated that the ***10-millimeter pistol*** was the subject of count IV, the November 7, 2010 theft of a firearm. RP 529-31. She elected this same 10-millimeter pistol as the subject of count V, the November 7, 2010 second degree unlawful possession of a firearm. RP 531-33. Finally, with respect to count VIII, the January 28, 2011 second degree unlawful possession of a firearm, the deputy prosecutor argued that "we are talking about Exhibit No. 48, the ***9-millimeter firearm*** that was found inside of Jillian Newkirk's vehicle." RP 533, 541 (emphasis added).

The defendant adopted this same election of the 10-millimeter pistol for counts IV and V and the 9-millimeter for count VIII in his closing argument, as well. RP 556-60.

At no point during their arguments did either party assert that a different election of firearms to counts existed or should exist. *See* RP 522-71. Neither party asserted that the .357 revolver owned by Mr. Gambill was the basis for any of the counts, and neither party so much as

mentioned the Enfield Model 1917 rifle. *See* RP 522-71. Nor were either of these firearms mentioned in either information filed in this case or in any of the court's instructions. CP 1-3, 55-57, 8-49. Hence, the issues of whether the Enfield rifle was owned or controlled by the defendant on January 28, 2011, or whether it was in fact a "firearm," *see* BOA, p. 37-40, are simply irrelevant.

Instead, State properly elected the acts upon which it was relying for conviction in counts IV, V, and VIII, and even were the issue properly before this Court, a unanimity instruction was not necessary. *See* ***Petrich***, 101 Wn.2d at 572; ***Kitchen***, 110 Wn.2d at 409.

Therefore, the trial court did not err in failing to give one, and the defendant's convictions in these counts should be affirmed.

The defendant also seems to argue that because there was no unanimity instruction, there must have been substantial evidence of each of the alternative means of committing the crime charged in count VIII, and that here, there was not. BOA, p. 35-47. He specifically asserts that "[t]he alternatives 'owns a firearm' and 'controls a firearm'... were not supported" by substantial evidence as to count VIII. BOA, p. 40-46. The record shows otherwise.

"Second degree unlawful possession of a firearm is an alternative means offense committed when a convicted felon (1) owns, (2) possesses,

or (3) controls a firearm." ***State v. Holt***, 119 Wn. App. 712, 718, 82 P.3d 688 (2004), *overruled on other grounds by* ***State v. Willis***, 153 Wn.2d 366 (2005).

However, it is well established "that when the crime charged can be committed by more than one means, the defendant does not have a right to a unanimous jury determination as to the alleged means used to carry out the charged crime or crimes should the jury be instructed on more than one of those means." ***State v. Smith***, 159 Wn.2d 778, 783, 154 P.3d 873 (2007).

Still, "to safeguard the defendant's constitutional right to a unanimous verdict as to the alleged crime, substantial evidence of each of the relied-on alternative means must be presented." ***Smith***, 159 Wn.2d at 783; ***Petrich***, 101 Wn.2d at 569.

Here, there was an instruction which required unanimity in the jury's verdict to count VIII, *see* CP 8-49 (instruction no. 22), and substantial evidence supported each of the alternative means that the defendant "(1) own[ed], (2) possesse[d], or (3) control[ed] a firearm" on or about January 28, 2011. ***Holt***, 119 Wn. App. at 718; CP 8-49 (instruction no. 20).

Specifically, the defendant's girlfriend, Jill Newkirk testified that she purchased the 9 millimeter handgun, which was the subject of count

VIII, for the defendant, and on January 28, 2011, sheriff's deputies found this handgun on the passenger-side floorboard of her vehicle where the defendant would likely have sat as a passenger. RP 212, 220, 233-34. When Deputy Filing asked Newkirk about that pistol, she also told him that she got the gun for the defendant and said, "we just take it out and go shooting and stuff." RP 233-34. When asked to whom she was referring when she said "we... go shooting," Newkirk testified, "Me and Matt," the defendant. RP 234. There were 9-millimeter caliber magazines and some 9-millimeter cartridges found inside the trailer in which the defendant was residing, in a box addressed to the defendant. RP 320-21, 328. No other witness disputed any of this testimony. *See* RP 66-477.

Because there was undisputed evidence that the pistol was purchased for the defendant before January 28, 2011, that the defendant had actually fired that pistol before that date, that the defendant had ammunition and magazines for this pistol on that date, and that this pistol was located in an area to which the defendant likely had access on that date, there was substantial evidence to support each of the alternatives that the defendant owned, possessed, or controlled that pistol or about January 28, 2011. ***Holt***, 119 Wn. App. at 718; CP 8-49 (instruction no. 20).

Because substantial evidence of each of the relied-upon alternative means was presented, the defendant's constitutional right to a unanimous

verdict as to count VIII was safeguarded. ***Smith***, 159 Wn.2d at 783; ***Petrich***, 101 Wn.2d at 569.

Given that the State properly elected the acts upon which it was relying for conviction in counts IV, V, and VIII, even were the issue properly before this Court, a unanimity instruction was not necessary. *See* ***Petrich***, 101 Wn.2d at 572; ***Kitchen***, 110 Wn.2d at 409.

Therefore, the trial court did not err in failing to give such an instruction, and the defendant's convictions in counts IV, V, and VIII should be affirmed.

3. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE MEANING OF THE TERM "FIREARM" IN ITS INSTRUCTIONS 19 AND 25, AND EVEN HAD INSTRUCTION 25 BEEN GIVEN IN ERROR, SUCH ERROR WOULD HAVE BEEN HARMLESS.

"Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case and, when read as a whole, properly inform the jury of the applicable law." ***State v. Fleming***, 155 Wn. App. 489, 503-04, 228 P.3d 804 (2010) (*citing* ***State v. Clausing***, 147 Wn.2d 620, 626, 56 P.3d 550 (2002)); ***State v. Mills***, 154 Wn.2d 1, 109 P.3d 415 (2005); ***State v. Riley***, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

The standard for review applied to a challenge to a trial court's instructions depends on whether the trial court's decision is based upon a matter of law or of fact. ***State v. Walker***, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). "[A] trial court's choice of jury instructions," is reviewable only "for abuse of discretion." ***Fleming***, 155 Wn. App. at 503; ***State v. Lucky***, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by* ***State v. Berlin***, 133 Wn.2d 541, 544, 947 P.2d 700 (1997); ***Walker***, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). However, "an alleged error of law in jury instructions" is reviewed *de novo*, ***Fleming***, 155 Wn. App. at 503, and in the context of the instructions as a whole. ***State v. Woods***, 143 Wn.2d 561, 590, 23 P.3d 1046 (2001) (*quoting* ***State v. Benn***, 120 Wn.2d 631, 654-55, 845 P.2d 289 (1993)).

In a criminal case, "[j]ury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every element of a criminal offense beyond a reasonable doubt." ***State v. Pirtle***, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). *See* ***In re Winship***, 397 U.S 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); ***State v. Byrd***, 125 Wn.2d 707, 713, 887 P.2d 396 (1995).

In the present case, the trial court gave the following instruction defining the term "firearm":

> A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

CP 8-49 (instruction no. 19).

The court also gave the following instruction

> A firearm need not be operable ***during the commission of a crime*** to constitute a "firearm" as defined in previous instructions. Instead, the relevant question is whether the firearm is a gun in fact rather than a toy gun or gun like object which is incapable of being fired.

CP 8-49 (instruction no. 25) (emphasis added).

Although the defendant argues that instruction 25 was "wrong" in that it failed to properly inform the jury of the applicable law, BOA, p. 48-49, statutory and case law shows otherwise.

RCW 9.41.010 provides that a "firearm" is "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(7) (2011 version); RCW 9.41.010(9) (2013 version).

This Court considered this definition of "firearm" under the 2001 version of RCW 9.41.010(1), which is nearly identical to the current RCW 9.41.010 definition in ***State v. Raleigh***, 157 Wn. App. 728, 733-36, 238 P.3d 1211 (2010), *review denied*, ***State v. Raleigh***, 170 Wn.2d 1029, 249 P.3d 624 (2011). In that case, the defendant was challenging the sufficiency of the evidence for his unlawful possession of a firearm

conviction where the firearm the defendant was found to have possessed was not operable on the date he possessed it. *Id.* at 733-34. This Court held that while under RCW 9.41.010, "[a] ''firearm'' is 'a weapon or device from which a projectile may be fired by an explosive such as gunpowder,'"

> A firearm need not be operable during the commission of a crime to constitute a "firearm" within the meaning of former RCW 9.41.010(1). [***State v.***] ***Faust***, 93 Wash.App. 373, 381, 967 P.2d 1284[(1998)]. Instead, the relevant question is whether the firearm is a "gun in fact" rather than a "toy gun."

Id. at 734.

Because the current version of RCW 9.41.010(9), only adds the words "or projectiles" to the former definition, it is virtually identical to the 2001 version of RCW 9.41.010(1) interpreted by ***Raleigh***. Therefore, this Court's holding in ***Raleigh*** is equally applicable to the current definition of firearm found in RCW 9.41.010(9).

Hence, the trial court's instruction 25, which was virtually identical to this Court's language in ***Raleigh*** "properly inform[ed] the jury of the applicable law." ***Fleming***, 155 Wn. App. at 503-04.

This instruction is not in conflict with the court's earlier instruction 19 or with the RCW 9.41.010 definition, *see* BOA, p. 49, because "[a] firearm... not... operable during the commission of a crime" under

instruction 25 may still later be made capable of firing "a projectile... by an explosive such as gunpowder" pursuant to instruction 19.

Nor can it be said that the language taken from ***Raleigh*** as instruction 25 was *dictum*. This Court relied on that language in holding that "Raleigh possessed a firearm as defined by former RCW 9.41.010(1)." ***Raleigh***, 157 Wn. App. at 737.

Although the defendant contends that instruction 25 is in conflict with ***State v. Padilla***, 95 Wn. App. 531, 978 P.2d 1113 (1999), and ***State v. Pierce***, 155 Wn. App. 701, 230 P.3d 237 (2010), he does not express why this is the case. *See* BOA, p. 49.

Pierce did not concern itself with whether a firearm needs be operable during the commission of the crime of unlawful possession of a firearm. *See* ***Pierce***, 155 Wn. App. 701. It held that "the sentencing court exceeded its authority by entering a sentence that does not reflect the jury's findings" where "the trial court instructed the jury on deadly weapon enhancements and not firearm enhancements," but sentenced on firearm enhancements. *Id.* at 713-14. Therefore, neither instruction 25 nor this Court's holding in ***Raleigh*** upon which it is based, is in conflict with ***Pierce***. ***Pierce*** is simply inapposite to the instant case.

Although ***Padilla*** did "hold that a disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time

period is a firearm within the meaning of RCW 9.41.010(1)," this is not inconsistent with instruction 25. CP 8-49. Again, "[a] firearm... not... operable during the commission of a crime" under instruction 25 may still "be rendered operational with reasonable effort and within a reasonable time period is a firearm within the meaning of RCW 9.41.010" and ***Padilla***.

Thus, instruction 25 was consistent with statutory and case law, and "properly inform[ed] the jury of the applicable law." ***Fleming***, 155 Wn. App. at 503-04. As a result, the trial court did not error in using it to instruct the jury, and the defendant's convictions should be affirmed.

However, even were instruction 25 given in error, such error was harmless.

"[A] jury instruction that relieves the prosecution of its burden of proof is subject to harmless error analysis." ***State v. Jennings***, 111 Wn. App. 54, 62, 44 P.3d 1 (2002); ***Neder v. United States***, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

"An error is harmless if it appears beyond a reasonable doubt that it did not contribute to the verdict. ***State v. L.B.***, 132 Wn. App. 948, 954, 135 P.3d 508 (2006). "'Applied to an element omitted from, or misstated in, a jury instruction, the error was harmless if that element is supported by uncontroverted evidence.'" ***L.B.***, 132 Wn. App. at 954 (*quoting* ***State v.***

Eaker, 113 Wn. App. 111, 120, 53 P.3d 37 (2002) (*quoting* ***State v. Jennings***, 111 Wn. App. 54, 64, 44 P.3d 1 (2002)).

In the present case, each of the firearm counts, IV, V, and VIII, were based on firearms which were found to be operable. As described above, the State elected the 10-millimeter pistol as the firearm at issue in counts IV and V, RP 529-31, and the 9-millimeter pistol as the firearm at issue in count VIII. RP 533, 541. There was uncontroverted evidence in the record that both the 10-millimeter and 9-millimeter pistols were operable. RP 82, 472-73. Bruce Gambill testified that he had fired the 10-millimeter pistol previously and that it functioned normally, describing it as "a good gun." RP 82. Forensics Investigator Mason test-fired the 9-millimeter pistol and found that it was "capable of firing a projectile by means of an explosive such as gunpowder." RP 472-73. No one disputed this testimony. *See* RP 66-477. The fact that the Enfield rifle may be considered a "firearm" under instruction 25 is simply irrelevant.

The element of possession of a "firearm" as defined in RCW 9.41.010 was "'supported by uncontroverted evidence.'" ***L.B.***, 132 Wn. App. at 954, and any error in giving instruction 25 was harmless.

Therefore, the defendant's convictions should be affirmed.

4. THE DEFENDANT WAIVED HIS RIGHT TO CLAIM A VIOLATION OF THE TIME FOR TRIAL PROVISIONS OF CRIMINAL RULE 3.3 BY FAILING TO OBJECT TO THE NOW CONTESTED CONTINUANCES BELOW AND EVEN HAD HE NOT WAIVED THIS RIGHT, THE TRIAL COURT PROPERLY GRANTED THESE CONTINUANCES PURSUANT THE TIME FOR TRIAL PROVISIONS OF CRIMINAL RULE 3.3.

Under the time for trial provisions of Criminal Rule (CrR) 3.3,

> A defendant who is detained in jail shall be brought to trial within the longer of
> (i) 60 days after the commencement date specified in this rule, or
> (ii) the time specified under subsection (b)(5).

CrR 3.3(b)(1).

> A defendant who is not detained in jail shall be brought to trial within the longer of
> (i) 90 days after the commencement date specified in this rule, or
> (ii) the time specified under subsection (b)(5).

CrR 3.3(b)(2).

Although CrR 3.3 "protect[s] a defendant's constitutional right to a speedy trial," ***State v. Kenyon***, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009), "the constitutional right to a speedy trial does not mandate trial within 60 days." ***State v. Torres***, 111 Wn. App. 323, 330, 44 P.3d 903 (2002). ***State v. Silva***, 72 Wn. App. 80, 863 P.2d 597 (1993).

Indeed, "[u]nder CrR 3.3(e) certain periods are excluded when computing the time for a speedy trial." ***Kenyon***, 167 Wn.2d at 136. "Continuances" or "[d]elay granted by the court pursuant to section (f)," are among these excluded periods. CrR 3.3(e)(3).

CrR 3.3(f) provides that

> Continuances or other delays may be granted as follows:
>
> (1) Written Agreement. ***Upon written agreement of the parties, which must be signed by the defendant or all the defendants, the court may continue the trial date to a specified date.***
>
> (2) Motion by the Court or a Party. On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. ***The bringing of such a motion by or on behalf of any party waives that party's objection to the requested delay.***

(Emphasis added).

> A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. ***A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.***

CrR 3.3(d)(3) (emphasis added).

"[T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court," ***State v. Saunders***, 153 Wn. App. 209, 216, 220 P.3d 1238 (2009); ***State v. Downing***, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004); ***State v. Cannon***, 130 Wn.2d 313, 326, 922 P.2d 1293 (1996). Therefore, a trial court's grant or denial of a motion for a continuance is reviewed on a manifest abuse of discretion standard. ***State v. Campbell***, 103 Wn.2d 1, 14, 691 P.2d 929 (1984). An abuse of that discretion occurs only where the court exercised discretion on untenable grounds or for untenable reasons, ***State v. Silva***, 72 Wn. App. 80, 863 P.2d 597 (1993), and thus, an appellate court "will not disturb the trial court's decision unless the appellant or petitioner makes 'a clear showing... [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" ***State v. Flinn***, 154 Wn.2d 193, 199, 110 P.3d 748 (2005) (*citing* ***Downing***, 151 Wn.2d at 272 (*quoting* ***State ex rel. Carrol v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971))) (emphasis added).

"Common law has clarified that '[i]n exercising its discretion to grant or deny a continuance, the trial court is to consider all relevant factors." ***Flinn***, 154 Wn.2d at 199.

A trial court does not abuse its discretion by granting a continuance "to allow defense counsel more time to prepare for trial, even over the

defendant's objection, to ensure effective representation and a fair trial." ***State v. Williams***, 104 Wn. App. 516, 523, 17 P.3d 648 (2001) (*citing* ***State v. Campbell***, 103 Wn.2d 1, 15, 691 P.2d 929 (1984)); ***Flinn***, 154 Wn.2d at 200.

Similarly, "the unavailability of a key witness is a valid reason for a continuance." ***State v. Iniguez***, 167 Wn.2d 273, 294, 217 P.3d 768 (2009). A continuance because a material witness is unavailable due to a medical condition is reasonable. ***State v. Lillard***, 122 Wn. App. 422, 93 P.3d 969 (2004).

A continuance to accommodate the arresting officer's mandatory training is not unreasonable, where there is a valid reason for the unavailability, the witness will become available within a reasonable time, and the defendant is not substantially prejudiced. ***State v. Jones***, 117 Wn. App. 721, 729, 72 P.3d 1110 (2003).

A continuance granted due to a prosecutor's unavailability is not an abuse of discretion, ***Williams***, 104 Wn. App. at 523 (*citing* ***Cannon***, 130 Wn.2d at 326), and "scheduling conflicts may be considered in granting continuances." ***Flinn***, 154 Wn.2d at 200 (*citing* ***State v. Heredia-Juarez***, 119 Wn. App. 150, 153-55, 79 P.3d 987 (2003) (valid continuance granted to accommodate prosecutor's reasonably scheduled vacation)).

Moreover, a trial court does not abuse its discretion in granting a continuance to accommodate the planned vacation of a prosecutor or an arresting officer because otherwise such personnel may not be able to take vacations. ***State v. Kelley***, 64 Wn. App. 755, 767, 828 P.2d 1106 (1992); ***State v. Grilley***, 67 Wn. App. 795, 799, 840 P.2d 903 (1992).

Finally, the Supreme Court has held that a trial court may continue a trial beyond the time-for-trial deadline for "court congestion," but that when doing so, "the trial court must document the available courtrooms and judges." ***Kenyon***, 167 Wn.2d at 135-39. *See* ***Flinn***, 154 Wn.2d at 200; ***State v. Silva***, 72 Wn. App. 80, 84-85, 863 P.2d 597 (1993); ***State v. Mack***, 89 Wn.2d 788, 793, 576 P.2d 44 (1978).

"When scheduling a hearing after finding good cause for a continuance, the trial judge can consider known competing conflicts on the calendar." ***Flinn***, 154 Wn.2d at 201. Thus, once the court finds a valid basis justifying the continuance, it has discretion as to how long a period to grant for the continuance. *See Id.*

Moreover, Subsection (b)(5) provides that "[i]f any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period. CrR 3.3(b)(5). Hence, once a court has granted a continuance under CrR

3.3(e)(3) & (f), the allowable time for trial does not expire until 30 days after the new trial date.

In the present case, although the defendant argues that he "waited well over 500 days for his trial," BOA, p. 51, 316 of those days were the result of his own motions for continuance, another 96 days were the result of continuances in which he joined, and 71 of those days were the result of his failure to appear at the February 29, 2012 trial, for a total of 483 days of delay caused at least in part by the defendant. *See* CP 112-32. In fact, the State only brought two motions for continuance in which the defendant did not join, one because the assigned prosecutor was already trying another case and one because that prosecutor was recovering from surgery. CP 118, 131. These continuances resulted in a total delay of only 29 days. *See* CP 118, 131. The defendant objected to none of the continuances, and entered into a written agreement for all of them. *See* CP 113-19, 122, 127-31.

Although the defendant now contends that the court abused its discretion in granting two of these continuances, one on May 15, 2012 and one on June 26, 2012, BOA, p. 51-53, he waived any objection to these continuances by failing to object or in any way raise the issue below. Even had he not waived the issue, the continuances at issue were properly granted.

First, with respect to the May 15, 2012 continuance, the parties entered into a written agreement to continue the then-current trial date of May 15, 2012 to June 26, 2012 due to the fact that "no courtrooms [were] available" and because of a "[p]ossible defense witness issue." CP 129. The deputy prosecuting attorney, defense counsel, and defendant all signed that order. CP 129.

The defendant did not object to that continuance. Indeed, when the trial court later asked the parties if there was "a speedy trial problem here," the defendant was silent. RP 10. Because under CrR 3.3(d)(3), a "party who fails, for any reason, to make such a motion shall lose the right to object that a trial... is not within the time limits prescribed by this rule," the defendant here has waived the right to claim that the May 15, 2012 trial was continued to a date past the time for trial. As a result, his convictions should be affirmed.

However, even had he not waived this issue, the record shows that the May 15, 2012 continuance was properly granted as a "written agreement" under CrR 3.3(f)(1).

Under that rule "the court may continue the trial date to a specified date" upon "written agreement of the parties, which must be signed by the defendant or all the defendants." CrR 3.3(f)(1).

Here, the defendant, his attorney, and the State's attorney all signed the written agreement continuing the May 15, 2012 to June 26, 2012. CP 129.

Therefore, the court properly continued that trial date upon the written agreement of the parties.

However, even were the May 15, 2012 continuance not considered to be a continuance on written agreement of the parties, case law makes clear that the court did not abuse its discretion in granting the continuance.

A defense witness was unavailable, and defense counsel felt it appropriate to sign an order continuing the May 15 trial to June 26, at least in part, on this basis. CP 129.

Because a trial court does not abuse its discretion by granting a continuance "to allow defense counsel more time to prepare for trial, even over the defendant's objection," ***Williams***, 104 Wn. App. at 523, and because "the unavailability of a key witness is a valid reason for a continuance," ***Iniguez***, 167 Wn.2d at 294, the trial court here did not abuse its discretion in granting the May 15, 2012 continuance to June 26, 2012.

Although the defendant also now objects to the continuance of the June 26, 2012 trial to July 26, 2012. BOA, p. 52-53, he waived his right to object to that continuance for at least two reasons.

First, that motion for continuance was brought by the defendant himself. CP 130. The order itself clearly states that "[t]his motion for continuance is brought by defendant." CP 130. Because the bringing of a motion for continuance "by or on behalf of any party waives that party's objection to the requested delay," CrR 3.3(f)(2), the defendant can not now object to the continuance he himself brought.

Second, the defendant, not surprisingly, did not object to his own motion to continue. *See* CP 130. Because under CrR 3.3(d)(3), a "party who fails, for any reason, to make such a motion shall lose the right to object that a trial... is not within the time limits prescribed by this rule," the defendant here has waived the right to claim that the June 26, 2012 trial was continued to a date past the time for trial.

However, even had he not waived this right, the record shows that the June 26, 2012 continuance was properly granted for at least two reasons.

First, under 3.3(b)(5), "[i]f any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period." Under CrR 3.3(e)(3) & (f), delay granted by the court pursuant to a continuance is an excluded period.

Hence, when the court here properly continued the May 15, 2012 trial date to June 26, 2012, the allowable time for trial expired on July 26,

2012. *See* CP 129. As a result, the June 26, 2012 continuance to July 26, 2012 was within the time for trial allowed by CrR 3.3.

Second, the record shows that the June 26, 2012 continuance was properly granted as a "written agreement" under CrR 3.3(f)(1).

Under that rule "the court may continue the trial date to a specified date" upon "written agreement of the parties, which must be signed by the defendant or all the defendants." CrR 3.3(f)(1).

Here, the defendant, his attorney, and the State's attorney all signed the written agreement continuing the June 26, 2012 trial to July 26, 2012. CP 130.

Therefore, the court properly continued that trial date upon the written agreement of the parties.

Hence, the defendant waived his right to claim a violation of the time for trial provisions of Criminal Rule 3.3, and even had he not waived this right, the trial court properly granted these continuances pursuant to the time for trial provisions of Criminal Rule 3.3.

Therefore, his convictions should be affirmed.

5. THE COURT PROPERLY ORDERED THE DEFENDANT TO SERVE HIS SENTENCES FOR HIS CONVICTIONS OF SECOND DEGREE UNLAWFUL POSSESSION OF A FIREARM AND THEFT OF A FIREARM IN COUNTS IV, V, AND VIII CONSECUTIVELY UNDER RCW 9.41.040(6).

The defendant argues that the court improperly ordered his sentences in counts IV, V, and VIII to run consecutively. BOA, p. 53-57. His argument is premised on his reading of RCW 9.94A.589(1)(c). BOA, p. 53-57. His argument is misguided.

Any ambiguity in the mandate of RCW 9.94A.589(1)(c) that an "offender shall serve consecutive sentences for each conviction" of the crimes of second degree unlawful possession of a firearm and theft of a firearm, is resolved by RCW 9.41.040.

RCW 9.41.040 provides, in relevant, part that

> Notwithstanding any other law, if the offender is convicted under this section for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, then the offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection.

RCW 9.41.040(6).

The plain language of this statute demonstrates that for the crimes of second degree unlawful possession of a firearm and theft of a firearm, the sentences must run consecutively rather than concurrently. Indeed,

State v. McReynolds considered RCW 9.41.040(6) and held that

> [t]his provision clearly and unambiguously prohibits concurrent sentences for the listed firearms crimes. ***State v. Murphy***, 98 Wn. App. 42, 48–49, 988 P.2d 1018 (1999), *review denied*, 140 Wn.2d 1018[, 5 P.3d 10] (2000). Although [the defendant] urges this court to apply various rules of statutory construction, there is no need for such an analysis because the statute is unambiguous. *See*, ***State v. Smith***, 117 Wn.2d 263, 270–71,814 P.2d 652 (1991).

State v. McReynolds, 117 Wn. App. 309, 343, 71 P.3d 663 (2003).

In the present case, the defendant was "convicted under [RCW 9.41.040] for unlawful possession of a firearm in the... second degree and for the felony crime[] of theft of a firearm." RCW 9.41.040(6); CP 59-64, 69-82.

Thus, under RCW 9.41.040(6), the court was required to order that Defendant's sentences for the two counts of second degree unlawful possession of a firearm and one count of theft of a firearm be served consecutively. ***McReynolds***, 117 Wn. App. at 343.

As a result, the court properly ordered the defendant to serve his sentences for his second degree unlawful possession of a firearm and theft of a firearm convictions in counts IV, V, and VIII consecutively under RCW 9.41.040(6).

Therefore, the defendant's sentences should be affirmed.

6. THE DEFENDANT'S RIGHT TO A PUBLIC TRIAL WAS SUSTAINED BECAUSE THE ***SUBLETT*** EXPERIENCE AND LOGIC TEST CONFIRMS THAT THE TRIAL COURT DID NOT CLOSE THE COURTROOM BY HEARING THE CHALLENGE FOR CAUSE OR PEREMPTORY CHALLENGES AT SIDEBAR.

A criminal defendant's right to a public trial is found in article I, section 22 of the Washington State constitution, and the Sixth Amendment to the United States Constitution; both provide a criminal defendant the right to a "public trial by an impartial jury."

The state constitution also provides that "[j]ustice in all cases shall be administered openly." Wash. Const. article I, section 10. This provision grants the public an interest in open, accessible proceedings, similar to rights granted in the First Amendment of the federal constitution. ***State v. Lormor***, 172 Wn.2d 85, 91, 257 P.3d 624 (2011); ***Seattle Times Co. v. Ishikawa***, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); ***Press–Enter. Co. v. Superior Court***, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

The public trial right "serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." ***State v. Sublett***, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). "There is a strong presumption that courts are to be open at all trial stages." ***Lormor***, 172 Wn.2d at 90. The right to a public trial includes

voir dire. ***Presley v. Georgia***, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010). However, "case law does not hold that a defendant's public trial right applies to every component of the broad 'jury selection' process," but "only to a specific component of jury selection –i.e., the 'voir dire' of prospective jurors who form the venire." ***State v. Wilson***, 174 Wn. App. 328, 338, 298 P.3d 148 (2013). *See* ***State v. Love***, ___Wn. App. ___, 309 P.2d 1209, 1213, fn 5 (2013).

The right to a public trial is violated when: (1) the public is fully excluded from proceedings within a courtroom, ***State v. Bone–Club***, 128 Wn.2d 254, 257, 906 P.2d 325 (1995) (no spectators allowed in courtroom during a suppression hearing), ***State v. Easterling***, 157 Wn.2d 167, 172, 137 P.3d 825 (2006) (all spectators, including codefendant and his counsel, excluded from the courtroom while codefendant plea-bargained); (2) the entire voir dire is closed to all spectators, ***State v. Brightman***, 155 Wn.2d 506, 511, 122 P.3d 150 (2005); (3) and is implicated when individual jurors are privately questioned in chambers, *see* ***State v. Momah***, 167 Wn.2d 140, 146, 217 P.3d 321 (2009), and ***State v. Strode***, 167 Wn.2d 222, 224, 217 P.3d 310 (2009) (jury selection is conducted in chambers rather than in an open courtroom without consideration of the ***Bone–Club*** factors). In contrast, conducting individual voir dire in an

open courtroom without the rest of the venire present does not constitute a closure. ***State v. Erickson***, 146 Wn. App. 200, 189 P.3d 245 (2008).

"The right to a public trial, however, is not absolute, and a trial court may close the courtroom under certain circumstances." ***Wilson***, 174 Wn. App. at 334. "To protect the public trial right and to determine whether a closure is appropriate, Washington courts must apply the ***Bone-Club*** factors and make specific findings on the record to justify the closure." *Id.* at 334-35.

The ***Bone–Club*** factors are as follows:

> 1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
> 4. The court must weigh the competing interests of the proponent of closure and the public.
> 5. The order must be no broader in its application or duration than necessary to serve its purpose.

State v. Wilson, 174 Wn. App. 328, 335, fn 5, 298 P.3d 148 (2013) (*quoting* ***State v. Bone-Club***, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) (*quoting* ***Allied Daily Newspapers of Wahsington v. Eikenberry***, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

"Failure to conduct a ***Bone-Club*** analysis before closing a proceeding required to be open to the public is a structural error warranting a new trial." ***Wilson***, 174 Wn. App. at 335.

However, "not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public." ***Sublett***, 176 Wn.2d at 71. Rather, as this Court has noted, the Supreme Court's decisions in ***State v. Paumier***, 176 Wn.2d 29, 288 P.3d 1126 (2012), ***State v. Wise***, 176 Wn.2d 1, 288 P.3d 1113 (2012), and ***State v. Sublett***, 176 Wn.2d 58, 292 P.3d 715 (2012),

> appear to articulate two steps for determining the threshold issue of whether a particular proceeding implicates a defendant's public trial right, thereby requiring a ***Bone–Club*** analysis before the trial court may "close" the courtroom: First, does the proceeding fall within a specific category of trial proceedings that our Supreme Court has already established implicates the public trial right? Second, if the proceeding does not fall within such a specific category, does the proceeding satisfy ***Sublett***'s "experience and logic" test?

The ***Sublett*** "experience and logic" test, first formulated by the United States Supreme Court in ***Press–Enterprise Co. v. Superior Court***, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986), proceeds as follows:

> The first part of the test, the experience prong, asks "whether the place and process have historically been open to the press and general public." The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." If the answer to both is yes, the public trial right attaches and the

> ***Waller*** or ***Bone–Club*** factors must be considered before the proceeding may be closed to the public.

Sublett, 176 Wn.2d at 73.

Applying that test, the ***Sublett*** Court held that no violation of the right to a public trial occurred when the trial court considered a jury question in chambers. *Id.* at 74–77. "None of the values served by the public trial right is violated under the facts of this case.... The appearance of fairness is satisfied by having the question, answer, and any objections placed on the record." *Id.* at 77.

The defendant has the burden to satisfy the "experience and logic" test. *See* ***In re Personal Restraint of Yates***, 177 Wn.2d 1, 29, 296 P. 3d 872 (2013); ***State v. Love***, ___ Wn. App. ___, 309 P.3d 1209, 1214 (2013).

"Whether a defendant's constitutional right to a public trial has been violated is a question of law, which [appellate courts] review de novo on direct appeal." ***State v. Wilson***, 174 Wn. App. 328, 298 P.3d 148 (2013); ***State v. Momah***, 167 Wn.2d 140, 147, 217 P.3d 321 (2009). When faced with a claim that a trial court has improperly closed a courtroom, the Washington Supreme Court has held that the reviewing court determines the nature of the closure by the presumptive effect of the plain language of the court's ruling, not by the ruling's actual effect. ***In re PRP of Orange***, 152 Wn.2d 795, 807-8, 100 P.3d 291 (2004).

In the present case, the defendant argues that "[t]he trial court violated [his] constitutional right to a public trial by taking for-cause challenges to prospective jurors by [an] off-the-record chambers conference." Supplemental Opening Brief of Appellant (SOBOA), p. 1-8. The record shows otherwise.

After the conclusion of the parties' voir dire of the venire, the following exchange occurred:

> THE COURT: All right. Thank you. Ladies and gentlemen, I am going to ask you to hold the yellow placards in your lap so the attorneys can look at them and make a decision.
>
> [DEPUTY PROSECUTOR]: ***Your honor, I do have one challenge for cause.***
>
> THE COURT: All right. Why don't we do this. I am going to have you come back to chambers. I don't whisper well. So Mr. [Defense attorney] and Ms. [Deputy Prosecutor], if you would come back briefly and then we'll put it on the record later.
>
> (***WHEREUPON, sidebar was had.***)
>
> THE COURT: All right. Juror No. 23, we thank you and you are excused from this panel. Thank you and report downstairs. Thank you.
>
> (WHEREUPON, juror leaves the courtroom.)
>
> THE COURT: And if you would continue to hold up your placards. Thank you.
>
> [DEFENSE ATTORNEY]: Your honor, may we have a sidebar? I have a question.
>
> THE COURT: Excuse us.
>
> (***WHEREUPON, sidebar was had.***)
>
> THE COURT: Counsel, if you would please approach.
>
> [DEFENSE ATTORNEY]: The Court's numbering is off but we are in agreement.
>
> THE COURT: Okay. Let me see this. That's my copy and you're in agreement?
>
> [DEPUTY PROSECUTOR]: Yes.

> THE COURT: Okay. All right. Thank you. All right. Ladies and gentlemen, please listen attentively and I will call your current number.

08/20/2012 RP 102-03. The court then seated the jury as selected by the parties, administered the oath, and read instructions. 08/20/2012 RP 104-05.

Hence, although the trial judge initially referred to the parties "com[ing] back to chambers," the record makes clear that the challenge for cause of venire member 23 was conducted at sidebar in an open courtroom. 08/20/2012 RP 102-03. *See* CP 134 (original jury panel selection list). Moreover, the result of that challenge for cause was immediately put on the record by the judge. 08/20/2012 RP 103.

While the defendant argues that "[e]ven if the challenge process had occurred by side-bar, it by definition occurred privately... and thus violated [his] right to a fair and public trial," SOBOA, p. 7, the sidebar was not, "by definition" private. It took place in a courtroom filled with a venire, open to the public, and perhaps attended by spectators that were arguably partial to the defendant. *See* RP 32-34. The defendant does not point to any ruling of the court that excluded spectators or any other person from the courtroom during voir dire proceedings. The record indicates that of all voir dire was conducted in open court. 08/20/2012 RP. Challenges for cause were made in open court and peremptory challenges

were made by the attorneys in open court in writing. 08/20/2012 RP 102-03; CP 133.

The defendant must do more than baldy assert that the sidebar constituted a closure of the courtroom, he must prove it under the ***Sublett*** "experience and logic" test. ***Love***, ___ Wn. App. ___, 309 P.3d 1209, 1214 (2013). This is something he has not and cannot do.

Division Three of this Court has very recently considered and rejected the same argument made by the defendant here. In ***State v. Love***, ___ Wn. App. ___, 309 P.3d 1209 (2013). The Court there applied the "experience and logic" test of ***Sublett*** and held "that the trial court did not erroneously close the courtroom by hearing the defendant's for cause challenges at sidebar, nor would it have been error to consider the peremptory challenge in that manner if the court had done so." ***Love***, at 1213-1214.

With respect to the experience prong of the ***Sublett*** test, the Court found no authority to require challenges for cause to be conducted in public. Indeed, it found that "there is no evidence suggesting that historical practices required these challenges to be made in public." ***Love***, 309 P.3d at 1213. Hence, the Court concluded that "[o]ur experience does not require the exercise of these challenges," whether for cause or peremptory, "be conducted in public." *Id.* at 1214.

With respect to the logic prong, the Court found that the purposes of the public trial right

> [s]imply are not furthered by a party's actions in exercising a peremptory challenge or in seeking a cause challenge of a potential juror. The first action presents no questions of public oversight, and the second typically presents issues of law for the judge to decide.

Love, 309 P.3d at 1214.

Thus, as the Court in ***Love*** concluded, "[n]either prong of the experience and logic test suggests that the exercise of cause or peremptory challenges must take place in public." *Id.* Therefore, "the experience and logic test confirms that the trial court did not erroneously close the courtroom by hearing the defendant's for cause challenges at sidebar." *Id.*

However, the history underlying this conclusion extends even further back than explored in ***Love***. Seven years after statehood, the Washington Supreme Court issued its opinion in ***State v. Holedger***, 15 Wash. 443, 448, 46 Pac. 652 (1896). Holedger had complained that his attorney was asked in open court and in front of the jury panel whether there was any objection to the jury being allowed to separate. The Supreme Court did not find any evidence that Holedger was prejudiced by this action, but did indicate that the better practice would be for the court to ask this question in a sidebar so as to avoid incurring the displeasure of juror who might be upset if there was an objection.

The decision in ***Holedger*** was authored by Justice Dunbar and concurred with by Chief Justice Hoyt. Chief Justice Hoyt was the president of the 1889 constitutional convention, and Justice Dunbar was a delegate to the constitutional convention. *See* B. Rosenow, The Journal of the Washington State Constitutional Convention, at 468 (1889; B. Rosenow ed. 1962); C. Sheldon, The Washington High Bench: A Biographical History of the State Supreme Court, 1889-1991, at 134-37 (1992). Thus, at least two of the justices signing this opinion had considerable expertise in the protections given under the state constitution, yet neither found certain trial functions being handled in a sidebar to be inconsistent with the public's right to open proceedings.

In 1904, the Court upheld the actions of a trial court that utilized the "best-practice" recommended in ***Holedger***. ***State v. Stockhammer***, 34 Wash. 262, 264, 75 P. 810 (1904) (noting that consent for the jury to separate was given by defense counsel at the bench out of the hearing of the defendant and the jury).

There is some authority that the public announcement of a peremptory challenge in open court by the party exercising the challenge is not a widespread practice. When the United States Supreme Court decided that it was just as improper for a criminal defendant to excuse a potential juror for an improper reason as it was for a prosecutor to do so, the court commented that "it is common practice not to reveal the identity of the challenging party to the jurors and potential jurors[.]" ***Georgia v.***

McCollum, 505 U.S. 42, 53 n.8, 112 S. Ct. 2348 (1992) (*citing* Underwood, Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?, 92 Colum.L.Rev. 725, 751, n. 117 (1992)).

Thus, as the Court in ***Love*** concluded, "our experience does not require that the exercise of these challenges be conducted in public." ***Love***, 309 P.3d at 1214. The defendant has failed to make any showing to the contrary. Although he cites a case from California to support his argument, ***People v. Harris***, 10 Cal. App. 4th 672, 12 Cal.Rptr.2d 758 (1992), SOBOA, p. 5, even were this case otherwise authoritative, it would be distinguishable.

In ***Harris***, the peremptory challenges were exercised in chambers then announced in open court. This is not what happened here. *See* 08/20/12 RP 102-03.

Here, as in ***Love***, the experience and logic test of ***Sublett*** confirms that the trial court did not close the courtroom by hearing the challenge for cause or the peremptory challenges at sidebar. *See* ***Love***, 309 P.3d at 1214. Hence, the public trial right did not attach, ***Sublett***, 176 Wn.2d at 73, and no violation of that right occurred when the court heard either the challenge for cause or the peremptory challenges at sidebar.

Therefore, the defendant's convictions should be affirmed.

7. THE DEFENDANT WAIVED ANY CHALLENGE BASED ON HIS RIGHT TO BE PRESENT AT SIDEBAR WHERE PEREMPTORY CHALLENGES WERE TAKEN BECAUSE HE FAILED TO CHALLENGE THE PROCEDURE IN THE TRIAL COURT, AND EVEN HAD HE NOT WAIVED THIS CHALLENGE, HIS RIGHT TO BE PRESENT WAS NOT VIOLATED.

The due process provisions of "[t]he state and federal constitutions guarantee a defendant the 'fundamental right to be present at all critical stages of a trial.'" ***Wilson***, 174 Wn. App. at 347; ***Love***, ___ Wn. App. ___, 309 P.3d at 1214 (*citing* ***State v. Irby***, 170 Wn.2d 874, 246 P.3d 796 (2011)).

"The right to be present, however, is not absolute." *Id.* Rather, "'the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence.'" ***Wilson***, 174 Wn. App. at 347 (*quoting* ***State v. Irby***, 170 Wn.2d 874, 881, 246 P.3d 796 (2011)). Hence, "a defendant has the right to be present ''whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defense against the charge,'''' but "he 'does not have a right to be present when his...' presence would be useless, or the benefit but a shadow." *Id.* at 347-48 (*quoting* ***State v. Irby***, 170 Wn.2d at 881).

Although the defendant now alleges that "[t]he trial court violated [his] due process right to be present by having the parties exercise juror challenges during an off-the-record conference," SOBOA, p. 9, he made

no challenge or objection to the procedure utilized below. *See* 08/20/2012 RP 102-03.

Appellate courts will generally not consider "challenges that were not presented to the trial court." ***Love***, 309 P.3d at 1214-15; RAP 2.5(a). While "[a]n exception is made for issues of 'manifest error affecting a constitutional right,'" *Id.* at 1215 (*citing* RAP 2.5(a)(3)), "[s]uch issues may be raised [only] if the record is sufficient to adjudicate them." *Id.* (*citing* ***State v. McFarland***, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)). Moreover, "[t]he alleged error must both be of constitutional nature and be 'manifest' in the sense that it actually prejudiced the defendant." *Id.*

The defendant here, like that in ***Love***, "has not established that the alleged constitutional error was manifest because he has not shown that he was prejudiced by the process." *Id.* As the Court in ***Love*** stated, the defendant

> was present beside his counsel during the information gathering phase of voir dire and apparently had the opportunity to provide any input necessary to whether to pursue challenges for cause.

Id.; 08/21/2012 RP 24-102. The defendant, through his attorney, then successfully challenged three venire members for cause, 08/20/2012 RP 40-44, 47-48, and six by peremptory challenge. CP 133-34 (Peremptory Challenges).

Apparently none of the peremptory challenges were contested and there was no need for the court to make any decisions on the peremptory

challenges. *See* CP 133; 08/20/2012 RP 102-03. The record offers no basis to assume that anything occurred during this process other than the written communication, between counsel and to the court, of the names of the prospective jurors each counsel had decided to excuse by the right of peremptory challenge. *See Id.*

Moreover, the parties carefully recorded the names of the prospective jurors who were removed by peremptory challenge, as well as the order in which each challenge was made and the party who made it. CP 133. This document is easily understood, and it was made part of the open court record, available for public scrutiny. CP 133. Anyone, whether the defendant or a member of the public, can look at the peremptory challenge sheet and see exactly which party exercised which peremptory against which prospective juror and in what order. CP 133. That sheet was filed in open court the same day the challenges were made. CP 133.

The defendant makes no argument to the contrary. *See* SOBOA, p. 1-12. Nor does he in any way demonstrate that he was prejudiced by this process. Therefore, any error he alleges was not "manifest," and the defendant may not pursue a claim on its basis for the first time here. *See* RAP 2.5(a)(3); ***Love***, 309 P.3d at 1214-15.

However, even were the court to consider the defendant's claim, it cannot be sustained.

Given that the peremptory challenges were taken at sidebar in the same courtroom in which defendant was sitting, there is absolutely

nothing to indicate that defendant could not communicate with his attorney and otherwise be involved in the process of making peremptory challenges. *See* 08/20/2012 RP 102-03. Indeed, the defense made six successful peremptory challenges utilizing the procedure below. CP 133.

Because a defendant only "has the right to be present ''whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge,''" ***Wilson***, 174 Wn. App. at 347, and the defendant's opportunity to defend against the charge was not compromised here, his right to be present was not violated.

Therefore, his convictions should be affirmed.

D. CONCLUSION.

The trial court properly allowed the State to amend the information after it rested its case-in-chief because that amendment did not change the crime charged and did not prejudice the defendant.

The defendant waived the issue of whether a "separate and distinct act" instruction should have been given because he failed to propose such an instruction.

However, even if that issue had been preserved, such an instruction was unnecessary because the State properly elected the acts upon which it was relying for conviction in counts IV, V, and VIII.

The trial court properly instructed the jury as to the meaning of the term "firearm" in its instructions 19 and 25, and even had instruction 25 been give in error, such error was harmless.

The defendant waived his right to claim a violation of the time for trial provisions of Criminal Rule 3.3 by failing to object to the now-contested continuances below.

However, even had he not waived this right, the trial court properly granted these continuances pursuant to the time for trial provisions of Criminal Rule 3.3.

The court properly ordered the defendant to serve his sentences for his convictions of second degree unlawful possession of a firearm and theft of a firearm in counts IV, V, and VIII consecutively under RCW 9.41.040(6).

The defendant's right to a public trial was sustained because the ***Sublett*** experience and logic test confirms that the trial court did not close the courtroom by hearing the challenge for cause or the peremptory challenges at sidebar.

The defendant waived any challenge based on his right to be present at a sidebar where peremptory challenges were taken because he failed to challenge the procedure in the trial court.

Even had he not waived this challenge, his right to be present was not violated.

Therefore, the defendant's convictions and sentence should be affirmed.

DATED: November 22, 2013

MARK LINDQUIST
Pierce County
Prosecuting Attorney

BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/22/13
Date Signature

PIERCE COUNTY PROSECUTOR

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