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Court of Appeals
Division III
State of Washington

94042-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 32869-4-III

STATE OF WASHINGTON, Respondent,

v.

JOHN MARK CROWDER, Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

John Mark Crowder requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on December 1, 2016, affirming Crowder's special verdict on a firearm enhancement and holding that an unreported sidebar conversation concerning a juror challenge for cause was not a court closure. A copy of the Court of Appeals' partially published opinion is attached hereto.

III. ISSUES PRESENTED FOR REVIEW

1. When a juror is challenged for cause and the State does not object, but requests an unreported sidebar conversation before the challenge is granted, has the courtroom been closed during a portion of the trial at which the public trial right attaches?
2. When the State fails to prove that a firearm is capable of firing a projectile, has it failed to present sufficient evidence to support a firearm enhancement?

IV. STATEMENT OF THE CASE

John Mark Crowder was tried by a jury on charges that he raped 14 year old I.D. in the first degree using a firearm. CP 56-58, 2 RP 129-30, 140-42, 144-45. Despite Crowder being excluded as a contributor to the male DNA recovered from the scene, he was convicted and sentenced to 360 months to life. 4 RP 491-96, 4 RP 601-02, CP 217-18.

During jury selection, the defense moved to challenge for cause a prospective juror who expressed discomfort with the subject matter of the trial. The State, while stating it did not object to the challenge, nevertheless requested to approach the bench for an unreported sidebar conversation. At the conclusion of the conversation, the trial court granted the challenge and excused the juror for cause. 1 RP 36.

At trial, the State presented evidence that a number of guns were recovered from Crowder's residence and I.D. identified one of them as the gun used during the assault. 2 RP 143, 3 RP 330, 334-37, 339-40, 359-60. At no point, however, did the State show that the gun had been test-fired or examined in any way to determine its operability. A young man who was present the night of the incident also possessed a BB gun that resembled the description of the gun given by I.D. 2 RP 293.

In the published portion of its opinion, the Court of Appeals held that no closure occurred, reasoning that the challenge was complete before the unreported sidebar conversation occurred even though the judge had not ruled on the challenge at that point. *Opinion*, at 5. The Court further held that sufficient evidence supported the firearm enhancement because the use of the firearm during the commission of the crime is circumstantial evidence that it meets the statutory requirements. *Opinion*, at 13. Crowder now seeks review of those rulings.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Court's determination that no closure occurred when the court held an unreported bench conference before ruling on a for-cause challenge to a prospective juror fails to comport with the limitations imposed on voir dire proceedings in *State v. Love*.

In *State v. Love*, 183 Wn.2d 598, 354 P.3d 841 (2015), this Court harmonized the practice of conducting portions of jury selection at the bench with its public trial jurisprudence. There, the court considered arguments relating to challenges for cause at a sidebar bench conference, visible to observers and reported in the record. *Id.* at 603. In holding that the proceeding did not constitute a “closure,” the court evaluated whether the jury challenges occurred “someplace ‘inaccessible’ to spectators.” *Id.* at 606. Because the public was present in the courtroom during

questioning, and the transcript of the bench conferences as well as the struck jury sheet were publically available, the *Love* Court held that written jury challenges “do not amount to a courtroom closure because they are made in open court, on the record, and subject to public scrutiny.” *Id.* at 607.

The present case differs from *Love* distinctly in that the bench conversation at issue occurred off the record, with no transcript publically available, and no opportunity for public scrutiny. In a circular manner, the Court of Appeals reasons that because the courtroom was closed (and that portion of the proceeding rendered inaccessible), Crowder cannot show a closure occurred. But it is without question that before the judge ruled on the challenge, it engaged in a private conversation with the attorneys, the contents of which cannot be examined.

Similarly, the Court of Appeals treats the challenge as complete when the State declined to object to it, without acknowledging that the trial court was under no obligation to accept the challenge. Notably, when the juror first stated that he did not believe he could be fair and impartial, the trial court did not excuse him at that time. 1 RP 19. The State questioned him further about his reaction to the case, and he attributed his discomfort to the age of I.D. 1 RP 21. Again, he was not excused at that

time. Finally, the juror responded affirmatively to a question from the State that the subject matter of the trial would make him uncomfortable. At this time, defense counsel moved to challenge the juror because “we’re putting him in a very difficult position.” 1 RP 36. At no point did any party explore or inquire into the juror’s ability to put his feelings aside and decide the case on the basis of the evidence at trial and the law provided by the court. *See State v. Rupe*, 108 Wn.2d 734, 748, 743 P.2d 210 (1987) (quoting *State v. Mak*, 105 Wn.2d 692, 707, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986)). While the trial court’s decision to grant or deny a challenge for cause is discretionary, it would arguably abuse that discretion by accepting a stipulation to actual bias that has not been established through questioning, and would have been justified here in denying the challenge on the record presented. Because the trial court has the responsibility to consider whether the jury is fair and impartial in considering the parties’ challenges, the Court of Appeals is incorrect to treat the challenge as concluded after the parties stated their positions, rather than after the court exercised its discretion in ruling on the challenge. Because the challenge was ongoing when the trial court held the unreported bench conference, a closure should have been found.

The Court of Appeals’ ruling that no closure occurred even though the conference was unreported and unreviewable by the public conflicts

with the Supreme Court's ruling in *Love* that upheld private conversations during jury selection so long as the proceedings remain reviewable by the public. Review should be granted under RAP 13.4(b)(1) to clarify whether bench conferences must be held on the record to ensure the proceedings are truly open to and reviewable by the public.

B. The Court of Appeals' holding that the State presents sufficient evidence to support a firearm enhancement when a witness testifies to a belief that a firearm was used conflicts with published decisions of the Supreme Court and another division of the Court of Appeals.

In *State v. Pam*, 98 Wn.2d 748, 751, 659 P.2d 454 (1983), *overruled on other grounds by State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989), witnesses identified Pam as a robber carrying a shotgun that fell apart as he fled the scene. The jury was not instructed that it had to find the elements of the deadly weapon and firearm enhancements beyond a reasonable doubt. Observing that a "gun-like object incapable of being fired is not a 'firearm'," the court reversed the special verdicts because "a rational jury could have a reasonable doubt as to the operability of the weapon." *Id.* at 754-55.

Pam recognized that the statutory definition of a "firearm" required some evidence to establish that it was actually capable of firing a

projectile by use of an explosive. Notably, *Pam* itself appeared to involve a real shotgun, in that police recovered the wooden forestock. 98 Wn.2d at 751. At issue, then, was not whether the item was originally manufactured to be able to fire an explosive projectile, but whether it was capable of doing so at the time the crime was committed. *See also State v. Faust*, 93 Wn. App. 373, 967 P.2d 1284 (1998); *State v. Padilla*, 95 Wn. App. 531, 978 P.2d 1113 (1999) (both Divisions One and Two holding that the firearm in question must be operable at the time of the commission of the crime).

This Court has since affirmed that reading of *Pam*, stating, “We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement.” *State v. Recuenco*, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008). And following *Recuenco*, Division Two of the Court of Appeals agreed, holding that evidence of operability is necessary to uphold a firearm enhancement even when there is no question that the items in question are real, i.e. not toy, guns. *State v. Pierce*, 155 Wn. App. 701, 23 P.3d 237 (2010).

Division Three created a conflict with Division II’s ruling in *Pierce* and the Supreme Court’s rulings in *Pam* and *Recuenco* when it

decided *State v. Tasker*, 193 Wn. App. 575, 373 P.3d 310 (2016). In *Tasker*, the Court of Appeals held that the use of something appearing firearm-like to a witness is itself circumstantial evidence that the item is an operable firearm. *Id.* at 592. Accordingly, the *Tasker* court accepted as sufficient evidence of an operable firearm testimony that the item was used in the course of a robbery and kidnapping, the victim saw the item at close range and was positive it was a gun, the victim was old enough to have seen guns, and the victim heard a clicking noise behind her head that was consistent with the use of a real gun. *Id.* at 595.

The *Tasker* court's reasoning is problematic in several respects. It serves to reduce the State's burden of proof from the standard established by the statutory definition of a "firearm" and acknowledged in *Pam* and *Recuenco* as a real, operable gun, to proving only that something that looks like a gun was used in the manner that one might use a real gun. This reduction in the State's burden of proof is in direct conflict with the *Pam* Court's express recognition that "a gun-like object incapable of being fired is not a 'firearm'." 98 Wn.2d at 754.

The *Tasker* standard is also troublingly circular, conflating evidence that is sufficient to show probable cause to charge the firearm enhancement with evidence sufficient to prove the enhancement beyond a

reasonable doubt. Certainly a witness's observation and belief that a firearm was used to perpetrate a crime warrants charging the enhancement, but under *Tasker*, the use of something gun-like is independent evidence beyond a reasonable doubt that the gun-like thing is a gun. This shoehorning of facts sufficient to charge into facts sufficient to convict cannot be reconciled with *Pam*'s distinction between items used as guns, and items that actually are guns. Moreover, the standard effectively presumes guilt from the fact of the charge – an enhancement will not be charged without some evidence that a gun-like object is used to further criminal activity, yet under *Tasker*, this evidence is also sufficient to convict.

Lastly, the *Tasker* standard introduces unworkably subjective considerations into the evidentiary standard of proof by creating a heavily fact-dependent evaluation of the witness's age, experience with firearms, and surrounding circumstances. Unlike in *Tasker*, the facts in the present case involve a 14-year-old girl who not only displayed little familiarity with firearms (e.g., describing how the gun was used by saying, "And he also pulled the thing back on it," 2 RP 142), but gave multiple inconsistent statements about the offense, including a statement that another witness approached as the defendant was holding the gun at her that the other witness denied (2 RP 176, 236-38, 251). The facts are further complicated

by the fact that one of the witnesses present at the time was in possession of a BB gun that looked just like the revolver allegedly used in the crime, a fact which was entirely ignored through the opinion notwithstanding the court's purported evaluation of the "totality of the circumstances." *Opinion*, at 13; 2 RP 194, 232, 249-51. These circumstances are sharply different from the facts in *Tasker*, where the witness's observations of the firearm went largely unchallenged and the witness was consistent in her accounts. Yet *Tasker* provides no mechanism for distinguishing between cases when circumstantial accounts are sufficient evidence and when they are not. Read to its extreme, *Tasker* could be understood to hold that evidence is sufficient to find an operable firearm anytime a witness claims to see a gun. This would further entrench the divide with Division Two's ruling in *Pierce*, which recognized that although circumstantial evidence could tend to establish operability, acceptable circumstantial evidence would include bullets found, gunshots heard, or muzzle flashes observed – in other words, evidence that tends to corroborate a witness's observations, not the observations themselves. 155 Wn. App. at 714 n. 11.

In relying exclusively on its *Tasker* decision, the Court of Appeals' decision in this case directly conflicts with the Supreme Court's rulings in *Pam* and *Recuenco*, as well as the decision of Division Two of the Court of Appeals in *Pierce*. Acceptance of review should therefore be granted

under RAP 13.4(b)(1) and (2) to resolve the conflict. Because *Tasker* and the present case reflect a substantial departure from the jurisprudence deriving from *Pam* and *Recuenco*, and because the different divisions of the Court of Appeals are governed by sharply different interpretations of what the State is required to prove, this Court should take the opportunity to reevaluate its precedents and announce whether they remain viable and controlling, or expressly overrule them.

VI. CONCLUSION

For the foregoing reasons, Crowder respectfully requests that the Court GRANT the petition for review, REVERSE the Court of Appeals' ruling that Crowder was not denied a public trial, REVERSE the Court of Appeals' ruling that the State presented sufficient evidence to support the firearm enhancement and DISMISS the enhancement, and REMAND the cause for a new trial.

RESPECTFULLY SUBMITTED this 3rd day of January, 2017.



ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

DECLARATION OF SERVICE

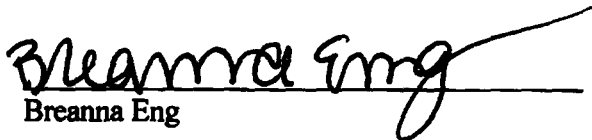
I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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

Signed this 3rd day of January, 2017 in Walla Walla, Washington.


Breanna Eng

APPENDIX

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,)	No. 32869-4-III
)	
Respondent,)	
)	
v.)	OPINION PUBLISHED
)	IN PART
)	
JOHN MARK CROWDER,)	
)	
Appellant.)	

PENNELL, J. — John Crowder raped a 14-year-old girl at gunpoint after supplying her two friends with a substance purported to be marijuana. He was convicted after a jury trial. The State’s evidence at trial, while strong, lacked an essential component: proof the substance distributed by Mr. Crowder was in fact marijuana. Based on this error, we reverse Mr. Crowder’s two convictions for distribution of controlled substances. Mr. Crowder’s rape conviction is affirmed in full.

FACTS¹

Two juvenile males, S.I. and Z.H., met Mr. Crowder while out walking on a July night. Mr. Crowder initially invited the two males to join him in setting off some

¹ Because Mr. Crowder’s challenge goes to the sufficiency of the evidence, we construe the facts in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 892 P.2d 1068 (1992).

fireworks. They then attended a nearby bonfire. While at the bonfire, Mr. Crowder asked S.I. and Z.H. if they wanted to smoke some marijuana. Both said yes.

Mr. Crowder took S.I. and Z.H. to his house to obtain marijuana. All three went inside the garage. Once inside, Mr. Crowder retrieved a substance believed to be marijuana from prescription bottles located in a wooden cabinet. Mr. Crowder and the two young men then smoked the apparent marijuana. When they finished, all three got into Mr. Crowder's Jeep and headed back to the bonfire.

After returning to the bonfire, Mr. Crowder and the two boys drank vodka shots. Z.H. then suggested inviting 14-year-old I.D. to join the group. After exchanging text messages, I.D. agreed to come out. She snuck out of her house through a window and Mr. Crowder picked her up in his Jeep. I.D. had never met Mr. Crowder before.

Back at the bonfire, S.I. fell asleep and Z.H. passed out. I.D. was starting to get tired when Mr. Crowder came up behind her, pulled her head back, and tried to pour vodka down her throat. Angered, I.D. got up and started to head home. As she walked by the Jeep, Mr. Crowder grabbed I.D. and turned her around. I.D. told Mr. Crowder to let her go. He did not. Mr. Crowder removed a gun from his pocket and ordered I.D. to undress and get into the back of his Jeep. He held the gun up against I.D.'s head and pulled back the trigger. At this point, I.D. complied with Mr. Crowder's demands.

Once inside the Jeep, Mr. Crowder raped I.D. The assault lasted approximately an hour. Eventually I.D. was able to get up, clothe herself, and run home. She snuck back in through the window and disclosed the rape several days later. At this point, the police began an investigation.

Five days after the assault, law enforcement executed a search warrant at Mr. Crowder's house. During the search, police found several firearms, including a revolver. Police also recovered prescription bottles containing a leafy substance from Mr. Crowder's garage. One of the bottles was tested for its tetrahydrocannabinol (THC) content and determined to contain marijuana. An officer showed the revolver seized from Mr. Crowder's house to I.D. She identified it as the same gun used by Mr. Crowder. The gun was never test fired.

Mr. Crowder was charged with rape in the first degree with a firearm enhancement and a special allegation that the victim was under the age of 15, or in the alternative, rape of a child in the third degree, as well as with two counts of distribution of a controlled substance to a person under the age of 18. The matter proceeded to trial. During voir dire, a prospective juror indicated he had been a child sex abuse victim. Defense counsel moved to strike the juror for cause. The State indicated it had no objection, but asked to

approach the bench. A bench conference occurred off the record. When the conference ended the court excused the juror.

The jury convicted Mr. Crowder of the offenses against him as charged. He received a sentence of 360 months to life. Mr. Crowder appeals.

ANALYSIS

Mr. Crowder's appeal proposes three bases for reversal: First, he claims the trial court's off-the-record discussion during voir dire violated his public trial right. Second, he argues the State presented insufficient evidence the substance distributed to S.I. and Z.H. met the legal definition of marijuana. Finally, he contends insufficient evidence supports the State's claim that he used an actual firearm while raping I.D. Mr. Crowder's second claim is persuasive. We reject the other two.

Public trial right

The right to a public trial is guaranteed by article I, sections 10 and 22 of the state constitution. *State v. Love*, 183 Wn.2d 598, 604-05, 354 P.3d 841 (2015), *cert. denied*, 136 S. Ct. 1524 (2016). When reviewing a public trial claim, we follow a three-step analysis, asking: (1) whether the public trial right attaches to the proceeding at issue, (2) if so, whether the courtroom was closed, and (3) whether the closure was justified. *Id.* at 605. "The appellant carries the burden on the first two steps; the proponent of the closure

carries the third.” *Id.*

Mr. Crowder claims the trial court violated his right to a public trial when it engaged counsel in an off-the-record discussion during a juror challenge. While we agree with Mr. Crowder that the public trial right attaches to this aspect of jury selection, *see id.* at 605-06, we do not agree there was a closure. No part of the juror challenge took place outside of direct public hearing and view. While in open court, the juror was questioned, Mr. Crowder’s counsel made his motion for cause, and the State concurred. At this point, the challenge was complete. There was nothing further to make public. Although the parties engaged the judge in an unrecorded side bar prior to the court entering its formal ruling, this interruption does not change the fact that the substance of juror challenge occurred entirely in open court.

Mr. Crowder’s public trial argument would only have traction if he could show something substantive occurred during the off-the-record side bar. Our courts utilize the “experience and logic” test to determine whether a particular court procedure implicates the public trial right. *Id.* at 605. Side bar conferences generally do not meet this test because they historically have been closed to the public and because public access would not positively enhance the proceedings. *State v. Smith*, 181 Wn.2d 508, 511, 334 P.3d 1049 (2014). Mr. Crowder fails to meet his burden of establishing that the side bar in his

case falls outside the general rule. The State proffers the side bar discussion simply addressed non-substantive procedural matters regarding the trial court's motions practice. Mr. Crowder does not contest this proffer and nothing in the record suggests it is inaccurate. While it would have been preferable for the court to have ensured the side bar was recorded, *see id.* at 518, we are satisfied the present circumstances do not permit Mr. Crowder's public trial challenge.

Insufficient evidence of marijuana

Mr. Crowder argues the State failed to meet its burden of proof for the two counts of distributing a controlled substance to a person under the age of 18. Specifically, he maintains there is no evidence that the substance he provided to S.I. and Z.H. contained a THC content of 0.3 percent as required by statute.²

Evidence is sufficient to support a conviction where, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When an appellant challenges the sufficiency of the evidence, he "admits the truth of the State's evidence and all inferences that reasonably

² At the time of trial, the applicable statute was codified at RCW 69.50.101(t). The same statutory definition applies today, but is now found at subsection (v).

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can be drawn therefrom.” *Id.* Appellate courts defer to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). Circumstantial evidence carries the same weight as direct evidence. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

The parties do not dispute the elements the State was required to prove at trial. Under RCW 69.50.406(2), the State must prove the defendant was a person over the age of 18 and that he distributed a controlled substance, including marijuana, to a person under 18 who is at least three years his junior. For purposes of this crime, “[m]arijuana” . . . means all parts of the plant Cannabis, whether growing or not, with a THC concentration greater than 0.3 percent on a dry weight basis” Former RCW 69.50.101(t) (2014).

While the parties agree the State must prove distribution of a controlled substance and that, in the case of marijuana, the State must prove a THC concentration of greater than 0.3 percent, the dissent does not accept this premise. Under the dissent’s construction, the statute governing distribution of a controlled substance to a minor differs materially from the crime of distribution of a controlled substance in that the latter requires proof of the identity of the controlled substance, but the former does not. We

find no such distinction. The statute governing distribution to minors (RCW 69.50.406) incorporates the distribution statute (RCW 69.50.401) and simply adds elements regarding the age of the distributor and recipient. *Compare* RCW 69.50.401 *with* RCW 69.50.406. Given the State must prove the presence of a controlled substance in a normal distribution case, the same is necessarily true in a case alleging distribution to a minor.

The requirement that marijuana, to qualify as a controlled substance, must have a THC content of at least 0.3 percent is not something that can be dismissed as an unimportant definition. Again, the parties do not dispute this point. Nor should they. The difference between a definitional statutory requirement and an element is generally pertinent to issues such as the adequacy of an information or the court's "to convict" instructions. *See State v. Porter*, 186 Wn.2d 85, 375 P.3d 664 (2016) (allegation of charging error regarding definition of possession); *State v. Johnson*, 180 Wn.2d 295, 325 P.3d 135 (2014) (allegation of charging error regarding definition of "restrain"); *State v. Allen*, 176 Wn.2d 611, 294 P.3d 679 (2013) (allegation of charging error and omission of "true threat" definition from jury's "to convict" instruction); *State v. Lorenz*, 152 Wn.2d 22, 93 P.3d 133 (2004) (allegation of omission of "sexual gratification" definition from jury's "to convict" instruction). But the same is not true when it comes to a sufficiency challenge. The State is obliged to present sufficient evidence to establish that a

defendant's conduct falls within the scope of a criminal statute, regardless of whether the statute's requirements are elemental or definitional. *See State v. Stevens*, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006) (characterization of a statutory requirement as definitional does not relieve State of burden of proof). *See also State v. Rich*, 184 Wn.2d 897, 365 P.3d 746 (2016) (analyzing whether State presented sufficient evidence to meet statutory definition of recklessness); *State v. McKague*, 172 Wn.2d 802, 805, 262 P.3d 1225 (2011) (analyzing whether State presented sufficient evidence to meet statutory definition of "substantial bodily harm"). In sum, no matter which label applies, the State was obliged to present sufficient evidence of 0.3 percent THC in order to sustain Mr. Crowder's conviction.

Although the parties agree about the State's evidentiary burden, there was little discussion at trial about THC. On cross-examination, the State's toxicology expert testified that to classify a substance as marijuana, it must contain more than 0.3 percent THC. The expert also testified on direct examination that she had examined one of the containers seized from Mr. Crowder's home and determined it contained marijuana. Read in total, the expert's testimony was sufficient to establish the substance found inside the container met the legal definition of marijuana. But the testimony did not establish the marijuana tested by the toxicologist had the same THC content as the substance

provided to S.I. and Z.H.

As pointed out by the dissent, a toxicologist can sometimes provide random sampling testimony, indicating a tested substance was most likely similar to an untested substance. *See State v. Caldera*, 66 Wn. App. 548, 832 P.2d 139 (1992). However, such testimony must be based on the foundation that the tested and untested materials appeared similar. *Id.* No such foundation was established in this case. Because the State's toxicologist was not in a position to compare the substance tested in the lab to that consumed by S.I. and Z.H., random sampling did not provide the State an avenue of proof.³

The testimony of S.I. and Z.H. also failed to establish a link between the tested substance and the substance that was consumed. At the time of the police search, at least four pill bottles⁴ were located inside Mr. Crowder's garage. Two bottles were amber-colored and located in the wooden cabinet described by S.I. and Z.H. Two more were

³ While the foundation for random sampling testimony was not met in this case, such testimony would be unlikely by itself to establish THC content. When the fact to be established is not merely the identity of a drug, but the purity or toxicity level, visual similarity would not appear to be sufficient to permit extrapolation. Instead, further testimony, explaining why similar toxicity can be assumed from similar appearance would need to be presented.

⁴ In his testimony, S.I. described seeing "bottles" of marijuana. 2 Verbatim Report of Proceedings (VRP) (Sept. 17, 2014) at 223. The State never clarified the number of bottles observed by S.I.

taken from a satchel. These bottles appeared to be clear in color and bore marijuana labels. All four bottles were potential sources of the substance distributed by Mr. Crowder. Yet only one was tested. During trial, neither S.I. nor Z.H. described the color of the bottle utilized by Mr. Crowder. Nor did they specify whether the bottle had a label. The boys were never shown a bottle to confirm whether it appeared similar to the one used by Mr. Crowder. Given the multiple possible sources of the substance distributed by Mr. Crowder, the State's theory that it tested a representative sample is too speculative to meet the substantial evidence requirement.

The testimony from S.I. and Z.H. also did not establish the potency of the substance provided to them by Mr. Crowder. The two juveniles testified they were familiar with marijuana and that the substance provided to them by Mr. Crowder made them "feel high." But because the boys did not test the substance provided to them, their use of the term "marijuana" does not carry the same technical meaning as the term utilized by the toxicologist. Nor were the boys' experiences with marijuana sufficient to establish potency. There was no testimony about the meaning of the 0.3 percent THC cut-off level or whether a substance with less than 0.3 percent THC would be capable of producing the psychological effects recounted by the two young men. There was not

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even any testimony about whether 0.3 percent is a high, low, or average amount of THC.⁵

Given this lack of context, testimony from the juveniles that they received a good “high” from the substance provided to them by Mr. Crowder does not help the State satisfy its burden.

Proof of THC content would not have been difficult, let alone impossible. Apart from establishing a link between the bottle tested for THC and the one observed by S.I. and Z.H.,⁶ the State could have introduced expert testimony regarding the nature of THC. Information about the typical THC content of marijuana and the type of potency required to produce sensations associated with being “high” could have provided the jury sufficient evidence to conclude that the substance distributed by Mr. Crowder must have had a THC content of at least 0.3 percent. But this was not done. The State did not give the jury any information about the significance of a 0.3 percent THC level. Based on this lack of information, the State failed to meet its burden. Mr. Crowder’s marijuana delivery

⁵ These are not matters amenable to judicial notice. *See State v. Barringer*, 32 Wn. App. 882, 888, 650 P.2d 1129 (1982) (court erred in taking judicial notice, through jury instruction, that valium is also known as diazepam when only diazepam was listed in the statutory schedule of controlled substances), *overruled on other grounds by State v. Monson*, 113 Wn.2d 833, 849-50, 784 P.2d 485 (1989).

⁶ Had the State produced such testimony, the evidence may still have been insufficient. Given the marijuana had been consumed, the State’s best evidence regarding THC content would appear to have been expert testimony from a toxicologist or law enforcement officer.

convictions must be reversed with prejudice.

Sufficiency of the firearm enhancement

Mr. Crowder contends insufficient evidence supports his firearm sentencing enhancement because the State did not prove the firearm was operable as required by RCW 9.41.010(9). We disagree for the reasons we recently set forth in *State v. Tasker*, 193 Wn. App. 575, 373 P.3d 310, *review denied*, 186 Wn.2d 1013 (2016).

As explained in *Tasker*, evidence that a device appears to be a real gun and is wielded during commission of a crime is sufficient circumstantial proof that the device is an actual firearm, as defined by RCW 9.41.010. *Tasker*, 193 Wn. App. at 594. I.D.'s testimony provided sufficient circumstantial proof in this case. She testified Mr. Crowder threatened her with a gun and placed it to her head. She described the gun as having a "spinning barrel," 2 Verbatim Report of Proceedings (Sept. 17, 2014) at 143, and later identified the gun as a revolver seized from Mr. Crowder's house. The totality of these circumstances sufficiently established that Mr. Crowder was armed with a real gun as required by RCW 9.94A.533(3) and 9.41.010(9).

CONCLUSION

Mr. Crowder's conviction for first degree rape with a firearm enhancement is affirmed. His convictions for distribution of controlled substances are reversed with

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prejudice. This matter is remanded to superior court. In the unpublished portion of this opinion, we reject the arguments set forth by Mr. Crowder in his statement of additional grounds for review.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder having no precedential value shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

STATEMENT OF ADDITIONAL GROUNDS

Mr. Crowder makes several additional arguments for reversal in his statement of additional grounds (SAG). The majority of his complaints pertain to facts outside the current record. They include: allegations that the State manipulated witness testimony, allegations that the State failed to investigate, allegations that defense counsel provided ineffective assistance, and arguments regarding jury selection. We will not address facts outside the record in the context of a direct appeal. Instead, the appropriate avenue for relief is a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

What follows is an examination of the claims of error that can be reviewed from the record. None are meritorious.

Allegations of prosecutorial misconduct

Mr. Crowder complains the State engaged in misconduct by: withholding witness interviews, making improper statements during closing argument, offering inflammatory photographs into evidence, excluding information from law enforcement reports, and improperly referring to his “rap sheet.” SAG at 4.

The record does not suggest any misconduct or gamesmanship with respect to the witness interviews. The prosecutor facilitated witness interviews without requiring court

order. Although the interviews did not take place until shortly before trial, this is not a basis for finding misconduct. *State v. Wilson*, 149 Wn.2d 1, 65 P.3d 657 (2003).

None of Mr. Crowder's claims regarding closing argument warrant reversal. The vast majority of Mr. Crowder's complaints did not generate an objection.⁷ In this context, appellate review is waived unless Mr. Crowder can establish the prosecutor's misstatements were so "flagrant and ill intentioned" that a curative instruction would not have cured the resultant prejudice. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). This standard has not been met. Only two objections to the prosecutor's closing were preserved by defense objection.⁸ In both cases, the defense objected that the prosecutor failed to accurately restate the record. We agree with the trial court that the prosecutor's statements were merely arguments regarding what could be inferred from the record. There was no misconduct.

⁷ These include: the prosecutor's statement that the victim "swore to tell the truth. And she did." 4 VRP (Sept. 19, 2014) at 547. Requesting jurors not "give in to that smoke screen." *Id.* at 555. The prosecutor's statement, "This is what happened." *Id.* at 557. The statement, "the man that did this to her." *Id.* at 564. The statement, "It's time for justice to be served." *Id.* And the prosecutor's statement "don't get fooled." *Id.* at 595.

⁸ These include the prosecutor's statements regarding the juveniles' response to Mr. Crowder's invitation to smoke marijuana and the prosecutor's statement that Mr. Crowder could not be ruled out as the contributor to a trace amount of DNA (deoxyribonucleic acid).

Mr. Crowder also contends the prosecutor committed misconduct by offering inflammatory photographs and physical evidence. Again, no objection was made and Mr. Crowder has not shown that a curative instruction would not have offset any alleged prejudice. *Id.*

Mr. Crowder claims the State withheld evidence based upon information allegedly excluded from law enforcement reports. To the degree Mr. Crowder claims error, he cannot show prejudice. The omitted fact that Detective Runge had attempted to contact child witnesses bore little relevance. The issue of whether Mr. Crowder expressed shock or excitement when confronted with the allegations against him were covered in cross-examination. The remainder of the excluded information was adequately remedied by the trial court's order, restricting testimony from the State's witnesses.

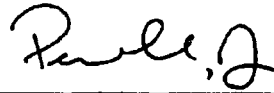
Finally, Mr. Crowder complains the State's witness improperly referenced his "rap sheet" in testimony. Defense counsel successfully objected to this testimony, but refused a curative instruction. No further issue was made of this fact. Given this context, there was no prejudicial error.

Sufficiency of evidence

Apart from his misconduct allegations, Mr. Crowder claims the State failed to present sufficient evidence to justify his convictions. The published portion of our

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opinion addresses Mr. Crowder's contentions with respect to the marijuana convictions and firearm enhancement. As to the rape conviction, the victim's testimony was sufficient to justify the jury's verdict. Corroboration was not required. RCW 9A.44.020(1).



Pennell, J.

I CONCUR:



Siddoway, J.

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KORSMO, J. (dissenting) — For several reasons, I respectfully dissent from the majority's ruling concerning the sufficiency of the evidence to support the two counts of delivery of marijuana to a child. First, the majority mistakenly adds an element to the delivery statute by incorporating a definition into the elements instruction. It then compounds the error by making the new element impossible to prove by (1) rejecting random sampling of any existing controlled substances, and (2) requiring proof of the quantity of THC¹ given a child in a case where the controlled substance in question has already been consumed. This approach conflicts with numerous cases from this court and the Washington Supreme Court.

The elements of the crime are found in RCW 69.50.406(2), which makes it a class B felony for a person to deliver a controlled substance to a person under 18. Those elements were properly incorporated into jury instructions 20 and 21 that told the jury it had to decide whether Mr. Crowder knowingly delivered a controlled substance to each of the victims.² Clerk's Papers at 154, 155. Notably, neither the statute nor the jury instruction

¹ Tetrahydrocannabinol.

² In many respects, this situation is similar to charging felony murder. While the predicate felony needs to be alleged, the elements of that felony are not themselves elements of the murder charge. *E.g.*, *State v. Kosewicz*, 174 Wn.2d 683, 692, 278 P.3d 184 (2012).

required the State to prove the identity of the controlled substance.³ Accordingly, the State never undertook to prove the identity of the controlled substance. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

The majority's error is one that is recurring of late, largely because appellants frequently argue that the definitional components of an element are themselves elements of the charged crime. Some courts have failed to make the distinction, but appellate courts have regularly rejected these arguments. *E.g.*, *State v. Porter*, 186 Wn.2d 85, 375 P.3d 664 (2016) (definition not element of offense); *State v. France*, 180 Wn.2d 809, 818-20, 329 P.3d 864 (2014) (definitions do not create new elements or alternative means of committing offenses); *State v. Lorenz*, 152 Wn.2d 22, 93 P.3d 133 (2004) (definition not an element of charged offense). We should be doing the same.

Due process simply requires evidence from which the jury could find each element of the crime was proven beyond a reasonable doubt. *E.g.*, *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). There was ample evidence that the defendant delivered a *controlled substance* to the two boys. First, they both told jurors that they had been given

³ In most instances, the identity of the controlled substance is proven at trial because the punishment will differ depending on the identity and classification of the substance. That is not a concern for RCW 69.50.406(2), which applies to any controlled substance. RCW 69.50.406(1) treats delivery of narcotic drugs, methamphetamine, and flunitrazepam, as a class A felony.

marijuana, a substance with which they had some prior limited experience, and which the instructions informed jurors was a controlled substance. Indeed, they had obtained a “five sack of weed” shortly before encountering Crowder. 2 Verbatim Report of Proceedings (Sept. 17, 2014) (VRP) at 277. The defendant himself told them the names of the varieties of “medical” marijuana he had in his collection, supplied the bong used, and prepared and shared the marijuana with the boys. The jury could reasonably take him at his own word. The boys described the effect of the marijuana on them, with at least one of the boys describing it as being more powerful than his previous experience. 2VRP at 287. The boys knew what they were smoking and the jury was free to credit the evidence that they consumed potent marijuana. Whether this court finds that evidence persuasive is an irrelevancy.

While that was sufficient for proving this charge, there was more evidence. The crime laboratory witness explained that one of the marijuana containers retrieved from the defendant’s collection was tested and determined to constitute marijuana. The majority agrees the testimony satisfied its new potency requirement, but then discounts the information because of concerns that the sample utilized for testing was not shown to be similar to the one given the boys by the defendant. This argument was long ago rejected by this court:

During an undercover operation, Caldera delivered several plastic bags containing a white powdery substance believed to be cocaine to undercover officers. A forensic expert visually inspected the substance in

each of the plastic bags and testified that the bags all appeared alike and each contained a similar amount of the white powdery substance. She randomly selected one bag for scientific testing. It tested positive as cocaine. . . . Caldera argues that random sampling is insufficient to identify the entire quantity as an illegal drug. We disagree and hold that the scientific testing of a random portion of a substance that is consistent in appearance and packaging is reliable and supports a finding that the entire quantity is consistent with the test results of the randomly selected portion. Other state and federal courts have held likewise.

State v. Caldera, 66 Wn. App. 548, 550, 832 P.2d 139 (1992) (extensive footnote listing supporting authority deleted). The sampling here easily satisfied this standard. The boys testified that the containers were similar to the one that the marijuana they smoked came from, and the forensic witness indicated that the containers were similar. The majority's complaint goes to the weight the jury would have given the testing, not its admissibility, if the argument had even been raised at trial. There being (understandably) no objection to the testimony at trial, this court does not get to discount the evidence. Even under the majority's revised test, the evidence was sufficient.


Finally, the majority creates (and appears to admit that it has) an impossible standard to meet in delivery cases where the substance has been consumed. In a typical case, there is no remaining sample to be tested. Even if the victims had undergone urinalysis testing, it would not have provided any evidence of the drug's potency.

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Indeed, the fact that the boys had smoked marijuana previously⁴ would limit the ability of testing to confirm that they had used marijuana during their evening with Crowder.

This is one of the strongest cases of this type one will ever see, with the victims able to testify about what had happened and additional samples of the same drug found at the place the victims told officers the sample they had consumed had originated. The majority is asking for an impossible standard of proof, even if one assumes that there are experts who can link the THC level of a drug to particular effects on the user, a fact not demonstrated in this record.

The delivery to a minor convictions should be affirmed.


Korsmo

⁴ Z.H. consumed the “five sack” after he had consumed the marijuana supplied by the defendant, thus preventing any testing from linking the results specifically to Crowder. 2VRP at 321.