SUPREME COURT NO. 96278-2

NO. 34730-3-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GLENDA TUCKER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Salvatore F. Cozza, Judge
The Honorable Michael P. Price, Judge

PETITION FOR REVIEW

MARY T. SWIFT
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

Page

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION 1

B. ISSUE PRESENTED FOR REVIEW 1

C. STATEMENT OF THE CASE 1

1. Trial Evidence 1

2. Appellate Proceedings 6

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED 7

THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER A GUN INTRODUCED INTO EVIDENCE IS, BY ITSELF, SUFFICIENT MEET THE STATUTORY DEFINITION OF A FIREARM. 7

E. CONCLUSION 15

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Anderson
Wn. App. 151, 971 P.2d 585 (1999)
reversed on other grounds, 141 Wn.2d 357 (2000) 13

State v. Bowman
36 Wn. App. 798, 678 P.2d 1273 (1984) 11

State v. Crowder
196 Wn. App. 861, 385 P.3d 275 (2016) 11

State v. Goforth
33 Wn. App. 405, 655 P.2d 714 (1982) 11

State v. Hickman
135 Wn.2d 97, 954 P.2d 900 (1998) 8

State v. Jussila
197 Wn. App. 908, 392 P.3d 1108 (2017). 9, 10

State v. Mathe
35 Wn. App. 572, 668 P.2d 599 (1983) 11

State v. McKee
141 Wn. App. 22, 167 P.3d 575 (2007) 11, 13

State v. Padilla
95 Wn. App. 531, 978 P.2d 1113 (1999). 9, 12, 14

State v. Raleigh
157 Wn. App. 728, 238 P.3d 1211 (2010) 9, 10, 13

State v. Tasker
193 Wn. App. 575, 373 P.3d 310 (2016) 11

State v. Vasquez
178 Wn.2d 1, 309 P.3d 318 (2013) 8

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Bailey v. Alabama
219 U.S. 219, 31 S. Ct. 145, 55 L. Ed. 191 (1911) 8

In re Winship
397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 8

RULES, STATUTES AND OTHER AUTHORITIES

RAP 13.4 ..... 1, 8, 15

RCW 9.41.010 9

RCW 9.41.040 ..... 9, 15

RCW 9.94A.533 10

WASH. PRACTICE: WASH. PATTERN INSTRUCTION:
CRIMINAL 133.01 (4th ed. 2016) 9

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Glenda Tucker asks this Court to grant review of the court of appeals' unpublished decision in State v. Tucker, No. 34730-3-III, filed August 21, 2018 (attached as an appendix).

B. ISSUE PRESENTED FOR REVIEW

Is this Court's review warranted under RAP 13.4(b)(3) to determine whether a gun introduced into evidence is, by itself, sufficient to establish the gun is a firearm, within the statutory definition, as required to prove unlawful possession of a firearm?

C. STATEMENT OF THE CASE

The State charged Tucker with one count of unlawful imprisonment and one count of first degree unlawful possession of a firearm. CP 37. A jury found Tucker guilty as charged. CP 210-11.

1. Trial Evidence

Caryn Crandall, also known as Mantese, testified she became acquainted with Derek Williams in October of 2015. 5RP 106-09. Tucker knew Williams from church and called him her "god brother." 6RP 272. Crandall testified that on October 23, 2015, she took Williams's van without asking to find drugs. 5RP 106-09. She got in an accident on her way home and ran from the scene. 5RP 110.

The next day, Crandall was at a friend's house when Williams and Tucker showed up, with Tucker driving her four-door Hyundai Sonata. 5RP 111, 162. Crandall testified Williams grabbed her and threw her in the backseat of Tucker's car. 5RP 112. Williams threatened to "tie [Crandall] up in the basement and force [her] to work off the money that the van cost that [she] recked [sic]." 5RP 112. Crandall explained, however, that Tucker "was just driving the car. She didn't say anything. She didn't do anything. She was just the driver." 5RP 113. Crandall further explained Tucker did not assist Williams in retraining her: "[Tucker] was just there, wrong place, wrong time." 5RP 121-22.

When they were two or three blocks away from the house, Crandall jumped out of the moving car, which ran over her ankle. 5RP 114, 118. Williams got out of the car and strangled Crandall after Tucker came to a stop. 5RP 119. Tucker called 911. 5RP 119-20. Police arrived at the scene shortly thereafter. 5RP 120. Crandall thought the reason Tucker called 911 was to turn her in for stealing the van, but acknowledged, "I really didn't know and I can't say for sure what the reason was." 5RP 125. Crandall testified, however, "indirectly, I would say Ms. Tucker saved my life by calling 911." 5RP 119.

Several officers responded, but only Officers Michael Huffman and Anthony Guzzo testified at trial. 5RP 123. Looking through the windows of

Tucker's car with flashlights, the officers could see a tan case "consistent with what a case would be for a rifle" and "a possible rifle strap." 5RP 158, 174-75. Tucker initially objected to the police searching her car because her purse was inside, but subsequently offered to let them search it. 5RP 153-54, 171; 6RP 232, 240-41. However, the police determined Tucker was a convicted felon, so they seized her vehicle and obtained a warrant to search it. 5RP 159. In the middle of the backseat floorboard, Huffman testified he found a tan rifle case with a rifle inside. 5RP 160-62; CP 216. The rifle was introduced into evidence at trial. 5RP 163.

Huffman acknowledged "[t]here was quite a bit of stuff" in Tucker's car. 5RP 175. He further admitted the trunk was "completely full" and the backseat was "quite full," except for a space where a passenger could sit. 5RP 176. Crandall, too, testified there was "a bunch of crap stacked up" in the backseat. 5RP 123. Huffman explained there were "items on top of the center of the rifle but you could still see the butt end of the case." 5RP 188. No photos were taken of the car's interior before the police removed several items to find the rifle. 5RP 180-82. However, subsequent photos showed the backseat was still very full, with items including speakers and a large garbage bag. 5RP 180-82; Exs. D120, D138.

Christieann Schuchman testified she used to live with Williams, who was "real good friends" with Tucker. 5RP 199-200. Schuchman said that,

on October 24, she saw Williams and Tucker outside transferring clothes and luggage from the backseat of Tucker's car to the trunk. 6RP 207, 214-16. Schuchman explained her boyfriend had given Williams a surround sound system to sell in exchange for methamphetamine, which Williams put in the backseat of Tucker's car. 6RP 214-15.

Schuchman testified she later saw Tucker when they were both in jail. 6RP 209, 216. Regarding the incident with Crandall, Schuchman claimed Tucker told her "she put a gun to Ms. Caryn's head and told her to get into the car." 6RP 209. Schuchman also claimed Tucker told her "she had just came up on a brand new pretty gun. She said that the numbers of the guns were a 30-30 or a 30-11." 6RP 209. Schuchman testified this was a different gun than the one Tucker held to Crandall's head. 6RP 219.

Schuchman admitted she looked at Tucker's paperwork and knew Tucker was charged with unlawful possession of a firearm. 6RP 218-19. Schuchman further explained that she wrote a letter to the State offering to testify against Tucker because Schuchman was pregnant and wanted to get out of jail into a drug treatment program. 6RP 211-13. In exchange for her testimony, the State helped Schuchman get into drug court. 6RP 216-18.

The State introduced evidence that Tucker had been convicted of conspiracy to deliver cocaine, which is classified as a serious offense and prohibits her from possessing a firearm. 5RP 142-43; CP 206.

Tucker testified that on October 24, she loaded her car with her belongings and her ex-boyfriend's clothes because she was moving to another house. 6RP 263-64, 276-77. Williams arrived at her house and wanted her to drive him to find Crandall, who had stolen his van. 6RP 264. Williams moved most of Tucker's belongings to the trunk of her car and piled his own belongings in the backseat: "I don't know what all he had in there but he had a lot of stuff." 6RP 266, 276-77; Ex. D111.

When they found Crandall, Crandall got in the backseat of Tucker's car. 6RP 267-68, 298. Crandall and Williams began arguing inside the car, so Tucker "started screaming and telling them to be quiet." 6RP 269. Tucker recalled Williams threatened to lock Crandall in his basement, which prompted Tucker to call 911. 6RP 270-71. Crandall then told Tucker to let her out of the car, but Tucker explained "[t]here was nowhere to pull and park and I said hold on, let me find somewhere to park." 6RP 270. As Tucker slowed around a corner, Crandall jumped out of the car. Tucker pulled over within half a block, as soon as it was safe to do so. 6RP 270.

Tucker testified Crandall then attempted to run away, but Williams grabbed and restrained her, while Tucker remained on the phone with the 911 dispatcher. 6RP 271-72. Tucker was concerned for Crandall because "Derek can be pretty violent." 6RP 272. Tucker explained she did not try to assist Williams or restrain Crandall in any way. 6RP 273, 276.

With regards to the rifle, Tucker explained she had never seen it before and did not know it was in her car. 6RP 263, 285. Tucker testified she did not help Williams load his items into the backseat, and the photos demonstrated the rifle was mostly covered. 6RP 284-85, 307-08; Exs. D120, D138. She believed it would have been very difficult for her to reach the rifle behind her, given that she is a self-described "big woman" and the rifle was mostly covered with Williams's belongings. 6RP 307-08. Finally, Tucker explained, "I don't allow guns around me or my kids," because her son was shot and killed by a firearm four years prior. 6RP 262.

2. Appellate Proceedings

On appeal, Tucker argued there was insufficient evidence to sustain her conviction for unlawful possession of a firearm. 2nd Am. Br. of Appellant, 13-18. The State introduced the rifle into evidence. 5RP 163. However, no witness testified the gun was capable of being fired, at the time or within a reasonable amount of time. Nor did any witness inspect the gun and testify it was a gun in fact.

Tucker asserted that, simply introducing the gun into evidence, without more, is not enough. 2nd Am. Br. of Appellant, 18. And, Tucker contended, it would be speculation to say the jury examined the gun and determined it was capable of being fired, because the jury was not instructed

on the definition of a firearm. 2nd Am. Br. of Appellant, 14. Tucker asserted the gun could have been a replica, a toy, or permanently inoperable, which does not meet the statutory definition of a firearm. 2nd Am. Br. of Appellant, 18.

The court of appeals rejected Tucker's argument, holding that "[a]lthough there was no testimony regarding operability or whether the rifle was loaded, the jury was able to view the rifle and assess whether it looked like a real firearm, as opposed to a plastic toy or a flimsy assortment of component parts." Opinion, 3. The court explained it "independently reviewed the rifle and affirmed that its appearance was sufficient to justify a jury determination that it was a gun in fact." Opinion, 3-4. The court held "Ms. Tucker's sufficiency challenge therefore fails." Opinion, 4.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER A GUN INTRODUCED INTO EVIDENCE IS, BY ITSELF, SUFFICIENT MEET THE STATUTORY DEFINITION OF A FIREARM.

The question presented by this case is whether a gun introduced into evidence is, by itself, sufficient to meet the statutory definition of a firearm. It does not appear that a Washington court has previously considered this issue, either in a reported or unreported decision. Because sufficiency of the

evidence is an issue of due process, this Court's review is warranted under RAP 13.4(b)(3) as a significant question of constitutional law.

In every criminal prosecution, due process requires the State prove beyond a reasonable doubt every fact necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A reviewing court must reverse a conviction for insufficient evidence where no rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt, viewing the evidence in the light most favorable to the State. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

"[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." Id. at 16. Such inferences must "logically be derived from the facts proved, and should not be the subject of mere surmise or arbitrary assumption." Bailey v. Alabama, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 191 (1911). When there is insufficient evidence to support a conviction, the remedy is to reverse the conviction and dismiss the charge with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

A person is guilty of first degree unlawful possession of a firearm "if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted . . . in this state or elsewhere

of any serious offense as defined in this chapter." RCW 9.41.040(1)(a); see also CP 208 (to-convict instruction). RCW 9.41.040(10) defines "firearm" as a "weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." Notably, the jury was not instructed on this definition. See CP 191-209; 11 WASH. PRACTICE: WASH. PATTERN INSTRUCTION: CRIMINAL 133.01 (4th ed. 2016) (WPIC) (specifying to define firearm for the jury); WPIC 2.10 (defining firearm).

RCW 9.41.040(10) requires that the device "may be fired" in order to constitute a firearm. State v. Padilla, 95 Wn. App. 531, 534-35, 978 P.2d 1113 (1999). As such, a gun-like object incapable of being fired is not a "firearm." State v. Jussila, 197 Wn. App. 908, 933, 392 P.3d 1108 (2017). For example, a nondeadly toy gun is not a firearm per the statutory definition. Id. But an unloaded firearm that can be loaded or a malfunctioning firearm that can be fixed are both firearms under the statute. Id. Thus, while the firearm need not be immediately operable at the time of the offense, the State must prove the firearm is a "gun in fact" rather than a toy gun. State v. Raleigh, 157 Wn. App. 728, 734, 238 P.3d 1211 (2010).

Case law provides guidance as to when the State has sufficiently proved a firearm is a "gun in fact."[1] In Padilla, the court held a gun rendered

[1] The definition of a firearm in RCW 9.41.010(10) applies to several other statutes, including the firearm sentencing enhancement authorized in RCW

permanently inoperable is not a firearm under the statutory definition. 95 Wn. App. at 535. But a "disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time period is a firearm within the meaning of [the statute]." Id. There was sufficient evidence that Padilla possessed a firearm where the pistol was disassembled but could be reassembled in a matter of seconds. Id. at 536.

In Raleigh, the State proved the firearm at issue was a gun in fact where the officer who executed the search warrant found two "toy" guns and one "real" gun. 157 Wn. App. at 734. The real gun held a magazine, was loaded with a round of ammunition in the chamber, and had a working safety and slide. Id. The gun's firing pin needed some repair, but it could be made quickly operable with everyday tools. Id.

In Jussila, "[n]o one explicitly declared that a gun was real or operable." 197 Wn. App. at 934. However, a police officer testified he found soft rifle cases with rifles inside, and the owner of the stolen guns identified them as his. Id. at 933. Witnesses repeatedly referred to the stolen items as guns, shotguns, firearms, weapons, and rifles. Id. at 934. The State also presented evidence that some of the guns were loaded with ammunition. Id. at 933-34.

9.94A.533(3). The discussed case law is therefore relevant, even though not all specifically addresses unlawful possession of a firearm.

Evidence that a device appears to be a real gun and is wielded during the commission of a crime may also be sufficient circumstantial proof that the device is a firearm. State v. Crowder, 196 Wn. App. 861, 872-73, 385 P.3d 275 (2016). For instance, Crowder threatened the complainant with a gun and placed it to her head; the complainant described the gun as having a "spinning barrel," and later identified the gun as a revolver seized from Crowder's house. Id. at 873.

Similarly, in State v. Tasker, 193 Wn. App. 575, 595, 373 P.3d 310 (2016), Tasker pointed the gun at the complainant and demanded her purse. The complainant testified it was a gun and she heard a "clicking noise," which "was consistent with Mr. Tasker's use of a real gun." Id.

The State relied heavily on similar cases in its response brief. Br. of Resp't, 7-8 (citing State v. McKee, 141 Wn. App. 22, 30-31, 167 P.3d 575 (2007); State v. Bowman, 36 Wn. App. 798, 803, 678 P.2d 1273 (1984); State v. Mathe, 35 Wn. App. 572, 581-82, 668 P.2d 599 (1983); State v. Goforth, 33 Wn. App. 405, 410-12, 655 P.2d 714 (1982)). But each of these cases can be quickly dispensed with because they all involved evidence that the gun was wielded in the commission of the offense.

There was no evidence whatsoever that Tucker used the rifle in the commission of the unlawful imprisonment. Crandall did not say Tucker used a gun. See 5RP 106-27. Schuchman testified Tucker said she put a gun

to Crandall's head and told Crandall to get in the car. 6RP 209. But Schuchman testified this was a different gun than the "pretty shotgun" she claimed Tucker had just acquired. 6RP 219. Thus, there was no evidence that Tucker wielded the rifle during the unlawful imprisonment that would suggest it was a real gun. The rifle was simply found in the backseat of Tucker's vehicle, unused and buried beneath Williams's belongings.

No other evidence established the rifle found in Tucker's backseat was a gun in fact. The rifle was found in a soft, tan case and was admitted as an exhibit. CP 216 (stating "Rifle .30/.30"); 5RP 159-62; 5RP 162-63. Photographs of the rifle in evidence show it has a serial number, manufacturer name, and model number, which are required under the Code of Federal Regulations. Exs. D116-D119. Schuchman testified Tucker told her "she had just come up on a brand new pretty gun," and believed the "numbers" of the gun were "30-30 or a 30-11." 6RP 209, 219. But such evidence does not establish the gun was currently capable of being fired or could be made to be fired "with reasonable effort and within a reasonable time period." Padilla, 95 Wn. App. at 535.

Officer Huffman was the sole witness who testified to any detail regarding the gun. 5RP 159-64. He testified only that he found a rifle and rifle case in the backseat of Tucker's vehicle. 5RP 159-64. Huffman explained the rifle was in substantially the same condition as when he found

it, satisfying the foundational requirements for its admission into evidence, but offered no other observations about the rifle itself. 6RP 162-63. He did not testify the rifle was "real," nor did any other witness. Nor did he describe any examination of gun, other than its location in the vehicle and the case in which it was found. 6RP 162-63.

Huffman also did not testify to his familiarity with firearms, which might suggest his ability to identify the rifle as a real gun. See 5RP 146-50 (briefly discussing his training and experience). This, again, distinguishes Tucker's case from those where there is some type of evidence demonstrating the gun was real. In McKee, for instance, the victim testified she "knew the gun was real because of the weight and feel of the steel," and the defendant held the gun to her head during the rape. 141 Wn. App. at 31. In State v. Anderson, two officers testified the firearm "appeared to be a real gun," based on their training in handling and identifying firearms. 94 Wn. App. 151, 159, 971 P.2d 585 (1999), reversed on other grounds, 141 Wn.2d 357 (2000).

Ammunition in or near the gun likewise suggests the firearm is real and capable of being fired. Raleigh, 157 Wn. App. at 734; Anderson, 94 Wn. App. at 163 ("That the weapon was loaded leads to an inference that it was either operable or could be made operable within a reasonable period of time—why else would it have been loaded?"). But the State did not

introduce any evidence of ammunition inside the rifle, or even that there was ammunition found near the rifle, in the rifle case, or in the car.

In Tucker's case, there was no evidence the rifle was ever test-fired. Nor did any witness testify the rifle could be fired, was in working order, or could be made operable with relative ease. None of the rifle's component parts were tested or examined. No eyewitness testified the gun was real or used in a manner consistent with it being real. Nor was there even any discussion among the parties about securing the rifle before sending it back to the jury room, which might suggest it was capable of being fired.

Put simply, the State produced a rifle-like object but did not prove it was, in fact, a real rifle. Unlike the case law discussed above, there was no evidence establishing the gun was capable of being fired, at the time or within a reasonable amount of time. Simply introducing the gun into evidence, without more, is not enough. It would be speculation to say the jury examined the gun and determined it was capable of being fired, because the jury was not instructed on the definition of a firearm. It is not enough that the rifle "looked like a real firearm," as the court of appeals concluded, because a real gun "rendered permanently inoperable is not a firearm under the statutory definition." Opinion, 3; Padilla, 95 Wn. App. at 535. The gun could have been a replica, a toy, or permanently inoperable, which does not meet the statutory definition of a firearm.

Contrary to the court of appeals' decision, the State failed to prove Tucker unlawfully possessed a firearm, as defined by RCW 9.41.040(10). This Court should grant review under RAP 13.4(b)(3).

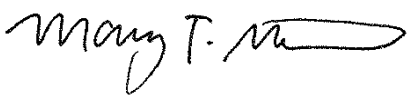
E. CONCLUSION

For the reasons discussed above, Tucker respectfully requests that this Court grant review, reverse the court of appeals and Tucker's conviction, and remand for dismissal of the charge with prejudice.

DATED this 28th day of August, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



MARY T. SWIFT
WSBA No. 45668
Office ID No. 91051

Attorneys for Petitioner

Appendix

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

STATE OF WASHINGTON, Respondent, v. GLENDA SHERRYETTA TUCKER, Appellant.	)))))))))	No. 34730-3-III UNPUBLISHED OPINION

PENNELL, J. — Glenda Tucker appeals her conviction for unlawful possession of a firearm, arguing the State failed to present sufficient evidence that the device found in her possession was an actual firearm as defined by former RCW 9.41.010(9) (2013). We affirm.

FACTS

The underlying facts are known to the parties and need not be recounted in detail. Pertinent to this appeal, police seized a .30-.30 rifle from the back seat of Ms. Tucker's car. At the time of the seizure, the rifle was contained in a soft, tan case. The rifle was offered by the State and admitted into evidence at trial, along with photographs of the rifle that had been taken by law enforcement. The photographs reveal the rifle was

marked with a serial number. A cooperating witness testified that Ms. Tucker had admitted to possessing a "brand new pretty gun" that bore the numbers "30-30." Report of Proceedings (July 26, 2016) at 209. The jury convicted Ms. Tucker of unlawfully possessing the firearm.

ANALYSIS

In a sufficiency challenge, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence carry equal weight. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). This court's role is not to reweigh the evidence and substitute its judgment for that of the trier of fact. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

A person is guilty of unlawful possession of a firearm in the first degree if she owns, or has in her possession or control, a firearm, and has previously been convicted of a felony. *See* RCW 9.41.040(1)(a); former RCW 9.41.010(21) (2015). A firearm is defined as a "weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." Former RCW 9.41.010(9). Ms. Tucker argues the State presented insufficient evidence that the rifle met this statutory definition. We disagree.

To prove that a device meets the statutory definition of a firearm, the State must produce evidence that the weapon at issue was a gun "'in fact' rather than a 'gunlike, but nondeadly, object.'" *State v. Tasker* 193 Wn. App. 575, 595, 373 P.3d 310 (2016) (quoting *State v. Fowler*, 114 Wn.2d 59, 62, 785 P.2d 808 (1990)). To meet this burden, the State need not show that the gun was operable at the time of the offense. Instead, it is sufficient that the device was "capable of being fired, either instantly or with reasonable effort and within a reasonable time." *Tasker* 193 Wn. App. at 594. In cases where the State does not introduce the gun into evidence, lay witness testimony can be sufficient to establish that a device possessed by the defendant was a gun in fact. Testimony that a device appeared to be a real gun and was wielded in the course of a crime "is sufficient circumstantial evidence that it is a firearm." *Id.*

Here, the State presented straightforward evidence that the device possessed by Ms. Tucker qualified as a gun "in fact" as required by statute. This is not a case where the State's evidence was limited to lay witness descriptions. At trial, the State introduced the rifle into evidence, along with corresponding photos. Although there was no testimony regarding operability or whether the rifle was loaded, the jury was able to view the rifle and assess whether it looked like a real firearm, as opposed to a plastic toy or a flimsy assortment of component parts. This court has independently reviewed the rifle

and affirmed that its appearance was sufficient to justify a jury determination that it was a gun in fact. Ms. Tucker's sufficiency challenge therefore fails.

CONCLUSION

The judgment of conviction is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Korsmo, J.

NIELSEN, BROMAN & KOCH P.L.L.C.

August 29, 2018 - 3:14 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	34730-3
Appellate Court Case Title:	State of Washington v. Glenda Sherryetta Tucker
Superior Court Case Number:	15-1-04072-4

The following documents have been uploaded:

- 347303_Petition_for_Review_20180829151230D3656304_5483.pdf
  This File Contains:
  Petition for Review
  The Original File Name was PFR 34730-3-III.pdf

A copy of the uploaded files will be sent to:

- bobrien@spokanecounty.org
- lsteinmetz@spokanecounty.org
- scpaappeals@spokanecounty.org

Comments:

Copy mailed to: Glenda Tucker 892867 Washington Corrections Center For Women 9601 Bujacich Rd NW Gig Harbor, WA 98332

Sender Name: John Sloane - Email: Sloanej@nwattorney.net
Filing on Behalf of: Mary Swift - Email: swiftm@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20180829151230D3656304