

65427-7

65427-7

NO. 64527-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

DARNELL DAVIS,

Appellant.

FILED  
COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
2010 SEP 28 PM 1:39

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

---

**BRIEF OF RESPONDENT**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

KRISTIN A. RELYEA  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

TABLE OF CONTENTS

	Page
A. <u>ISSUES</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. PROCEDURAL FACTS.....	2
2. FACTS OF THE CRIME.....	3
C. <u>ARGUMENT</u> .....	6
1. DAVIS WAIVED ANY ALLEGED ERROR IN INSTRUCTION 20.....	6
2. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON THE DEFINITION OF A FIREARM.....	9
D. <u>CONCLUSION</u> .....	17

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

City of Seattle v. Rainwater, 86 Wn.2d 567,  
546 P.2d 450 (1976)..... 7

City of Spokane v. County of Spokane, 158 Wn.2d 661,  
146 P.3d 893 (2006)..... 15

State v. Bailey, 114 Wn.2d 340,  
787 P.2d 1378 (1990)..... 8

State v. Becker, 132 Wn.2d 54,  
935 P.2d 1321 (1997)..... 11, 13

State v. Berrier, 110 Wn. App. 639,  
41 P.3d 1198 (2002)..... 10

State v. Bunker, No. 81921-1,  
2010 WL 3341262 (Wash. Aug. 26, 2010) ..... 14

State v. Eaker, 113 Wn. App. 111,  
53 P.3d 37 (2002)..... 13

State v. Eisner, 95 Wn.2d 458,  
626 P.2d 10 (1981)..... 11, 12

State v. Jackman, 156 Wn.2d 736,  
132 P.3d 136 (2006)..... 12

State v. Jacobsen, 78 Wn.2d 491,  
477 P.2d 1 (1970)..... 11

State v. Levy, 156 Wn.2d 709,  
132 P.3d 1076 (2006)..... 11, 12, 13

State v. Meneses, No. 837126,  
2010 WL 3341263 (Wash. Aug. 26, 2010) ..... 14

<u>State v. Moultrie</u> , 143 Wn. App. 387, 177 P.3d 776, <u>review denied</u> , 164 Wn.2d 1035 (2008).....	14
<u>State v. Noel</u> , 51 Wn. App. 436, 753 P.2d 1017, <u>review denied</u> , 111 Wn.2d 1003 (1988).....	14
<u>State v. Padilla</u> , 95 Wn. App. 531, 978 P.2d 1113, <u>review denied</u> , 139 Wn.2d 1003 (1999).....	10, 12
<u>State v. Raleigh</u> , No. 39221-6-II, 2010 WL 3490230 (Wn. App. Sept. 8, 2010).....	10
<u>State v. Releford</u> , 148 Wn. App. 478, 200 P.3d 729 (2009).....	10, 12
<u>State v. Salas</u> , 127 Wn.2d 173, 89 P.2d 1246 (1995).....	7, 8

### Constitutional Provisions

#### Washington State:

Const. art. IV, § 16 .....	1, 11
----------------------------	-------

### Statutes

#### Washington State:

RCW 9.41.010.....	10
-------------------	----

## Rules and Regulations

### Washington State:

CR 51 .....	8
CrR 6.15.....	7

**A. ISSUES**

1. A defendant may not challenge a jury instruction on appeal if he either proposed the instruction or failed to object to the instruction at trial. Here, the trial court requested that the State and defense counsel propose jury instructions that addressed the temporary inoperability of the firearm at issue. Defense counsel did not propose such an instruction. Defense counsel took exception to the trial court providing a definition of a temporarily inoperable firearm to the jury, but approved of the language in the State's proposed definition. Did Davis waive the right to challenge the language in the definition on appeal?

2. Article IV, section 16 of the Washington State Constitution prohibits judges from conveying their personal opinions about the merits of a case or instructing a jury that matters of fact have been established as matters of law. In Jury Instruction 20, the trial court defined a temporarily inoperable firearm as a firearm that "can be rendered operational with reasonable effort and within a reasonable time period." Has Davis failed to show that the trial court's definition of a firearm constituted a comment on the evidence?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS.**

The State charged Darnell Davis with three counts of Robbery in the First Degree and one count of Unlawful Possession of a Firearm in the Second Degree for conduct alleged to have occurred on September 8, 2008.<sup>1</sup> CP 15-17. During the commission of two of the robberies, the State alleged that Davis was armed with a firearm. Id.

The jury convicted Davis of three counts of Robbery in the First Degree and found that Davis was armed with a firearm during one of the two robberies. CP 142-45, 148-49, 150-51. Davis waived his right to a jury trial on the unlawful possession of a firearm charge and the trial court found him guilty of that charge. CP 91, 176-78. The trial court sentenced Davis within the standard range on all four counts: 150 months for each count of Robbery in the First Degree and 51 months for Unlawful Possession of a Firearm in the Second Degree. CP 167-75. Additionally, the trial

---

<sup>1</sup> At the time of filing, the State charged Davis and co-defendant Sheriann Pam with one count of Robbery in the First Degree and two counts of Robbery in the Second Degree. CP 1-3. Additionally, the State charged Davis with Unlawful Possession of a Firearm in the Second Degree. Id. Pam pled guilty to three counts of Robbery in the Second Degree. 5RP 67.

court sentenced Davis to serve 60 months, consecutive to his underlying sentence, based on the firearm enhancement. Id.

## **2. FACTS OF THE CRIME.**

On September 8, 2008, Edward Page was walking home from his niece's fifth birthday party when Davis robbed him at gunpoint. 5RP 20-21, 26.<sup>2</sup> Davis pointed a black revolver at Page's chest and demanded, "give me your shit." 5RP 26, 30. Page complied by squatting and lying down on his back while Davis rifled through his pockets. 5RP 27, 70-71.

After getting only a dollar and mostly expired debit cards from Page's wallet, Sheriann Pam drove Davis to Seattle's Lower Queen Anne neighborhood where Davis robbed Emily Eberhart. 5RP 21-22, 71-72. According to Eberhart, Davis "sucker-punched" her on the left side of her head and then "ripped" off her purse from her shoulder. 6 RP 38-41. Eberhart had only five dollars on her at the time of the robbery. 6RP 42. Eberhart, however, did not see a gun on Davis. 6RP 36.

---

<sup>2</sup> The Verbatim Report of Proceedings consists of eleven volumes. The State has adopted the following reference system: 1RP (8/28/09), 2RP (9/24/09), 3RP (9/29/09), 4RP (9/30/09), 5RP (10/1/09), 6RP (10/12/09), 7RP (10/13/09), 8RP (10/14/09), 9RP (10/15/09), 10RP (11/20/09), and 11RP (1/5/10).

Pam and Davis then headed to Upper Queen Anne, where Davis robbed Emily Burton. 5RP 72-75; 6RP 94-98. Davis pushed Burton to the ground and then snatched her purse and got into Pam's car. 5RP 73-75; 6RP 98, 100-01. Burton ran after Davis and called 911 to report what had happened and to provide the police with Pam's license plate number. 6RP 100-02.

Police stopped Pam's car soon thereafter and Davis ran from the car and was apprehended in the stairwell of a nearby condominium building. 5RP 75-76; 7RP 134. According to police, Davis exclaimed "something to the effect of 'you got me'" when apprehended. 5RP 61. Inside Pam's car, police found Page's debit card, Eberhart's and Burton's purses, and a black .38 caliber revolver under Davis's seat. 6RP 77-81. At trial, Davis admitted to robbing Eberhart, but claimed that "another guy," whom he could not name, robbed Page and Burton. 7RP 124, 128-31. Davis denied ever having or seeing a gun in Pam's car. 7RP 129-30.

Washington State Patrol Laboratory Firearm Technician Kathy Geil testified at trial that Davis's revolver was operable. 7RP 54. Although rust and debris in the gun's hammer mechanism initially prevented Geil from successfully test-firing the gun, Geil

rendered the revolver operable by adding a small amount of lubricant. 7RP 56, 58-59.

Based on Geil's testimony, the trial court requested that the State and defense counsel draft a jury instruction addressing the temporary inoperability of Davis's gun. 8RP 2, 4. The State proposed the same firearm definition for both robbery counts involving the firearm enhancement: "A temporarily inoperable firearm or a disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time period is a 'firearm.'" CP 209, 211. Davis did not propose any additional instructions.

Davis took exception to Jury Instruction 19, resulting in the following colloquy between the trial court and defense counsel:

Judge: Well you, I would suggest the State did what I asked both of you to do, which was come up with . . .

Defense: I understand that.

Judge: some language that could modify WPIC 2.10 for the circumstances of this case.

Defense: Right. And **it is not that I have an objection to the language, I guess I would be asking for no additional language.**

8RP 4 (emphasis added). Davis took no other exceptions to the trial court's instructions, including Instruction 20. 8RP 5. The Court adopted the State's proposed language and incorporated it as Jury Instructions 19 and 20.<sup>3</sup> CP 132-33. Although the jury convicted Davis of three counts of Robbery in the First Degree, the jury found that Davis was armed with a firearm only when he robbed the first victim, Edward Page. CP 142-45, 148-49, 150-53.

**C. ARGUMENT**

**1. DAVIS WAIVED ANY ALLEGED ERROR IN INSTRUCTION 20.**

Davis argues that the trial court improperly commented on the evidence in Instruction 20 by instructing the jury that "[a] temporarily inoperable firearm . . . is a firearm." *App. Br.* at 4.<sup>4</sup> Davis contends that Instruction 20 "required the jury to find the inoperable gun in this case was a firearm." *App. Br.* at 8-9. Davis's

---

<sup>3</sup> Instructions 19 and 20 are identical in language, except that they refer to different counts of robbery. CP 132-33.

<sup>4</sup> Although Davis took exception only to Instruction 19 at trial, he challenges Instruction 20 on appeal. This discrepancy bears little consequence because the instructions are identical in relevant part. Instruction 20 refers to Count II, involving victim Eberhart, which the jury convicted Davis of committing. The jury, however, acquitted Davis of using a firearm to commit this crime. CP 152-53. Davis should have more properly alleged a claim of error to Instruction 19 because he objected to it at trial and it refers to the robbery count for which he was convicted of being armed with a firearm.

argument must be rejected because he did not object to the State's definition of a temporarily inoperable firearm and Instruction 20 accurately states the law. The Court should reject Davis's strained reading of Instruction 20 and give the instruction its ordinary, common-sense meaning.

Davis waived the right to challenge Instruction 20's definition of a temporarily inoperable firearm by failing to object to the language of the proposed definition at trial. To claim error on appeal, an appellant challenging a jury instruction must first show that he took exception to that instruction in the trial court. State v. Salas, 127 Wn.2d 173, 181, 89 P.2d 1246 (1995). The purpose of requiring objections or exceptions is "to afford the trial court an opportunity to know and clearly understand the nature of the objection" so that "the trial court may have the opportunity to correct any error." City of Seattle v. Rainwater, 86 Wn.2d 567, 571, 546 P.2d 450 (1976).

The objecting party must indicate the instruction objected to and the reasons for the objection. CrR 6.15(c). Our Supreme Court has held:

It is well-settled law that before error can be claimed on the basis of a jury instruction given by the trial court, an appellant must first show that an exception

was taken to that instruction in the trial court. That rule is not a mere technicality. As we have explained clearly and often: "CR 51(f)<sup>5</sup> requires that, when objecting to the giving or refusing of an instruction, "[t]he objector shall state distinctly the matter to which he objects and the grounds of his objection." The purpose of this rule is to clarify, at the time when the trial court has before it all the evidence and legal arguments, the exact points of law and reasons upon which counsel argues the court is committing error about a particular instruction. [*citations omitted*].

Therefore, the objection must apprise the trial judge of the precise points of law involved and when it does not, those points will not be considered on appeal. [*citations omitted*]."

Salas, 127 Wn.2d at 181-82 (quoting State v. Bailey, 114 Wn.2d 340, 345, 787 P.2d 1378 (1990)).

Here, Davis failed to apprise the trial court of his objection to the language of the definition of a temporarily inoperable firearm. Although Davis objected to any "additional language" defining a firearm, he essentially approved of the State's definition of a temporarily inoperable firearm by stating, "it is not that I have an

---

<sup>5</sup> CR 51(f) states:

**Objections to Instruction.** Before instructing the jury, the court shall supply counsel with copies of its proposed instructions which shall be numbered. Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. The objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made.

objection to the language, I guess I would be asking for no additional language." 8RP 4. By failing to object to the actual definition of a temporarily inoperable firearm at trial, Davis deprived the trial court of the opportunity to correct any alleged error and waived his right to challenge the language of the definition on appeal. Davis cannot stand by at trial, make no objection to specific language in a jury instruction, and then once he is convicted object to the language on appeal. The Court should reject Davis's efforts to challenge language in a jury instruction that he failed to object to at trial.

**2. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON THE DEFINITION OF A FIREARM.**

Contrary to Davis's claims, the trial court did not require the jury to find that his temporarily inoperable revolver was a firearm. Instruction 20 accurately states the law and should be upheld. The Court should apply a common-sense approach to reading Instruction 20 and reject Davis's efforts to change the instruction's meaning by deleting essential words from the instruction to argue that the trial court commented on the evidence.

By statute, 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). Washington courts have interpreted the ambiguous "may be fired" to include temporarily inoperable or disassembled firearms that "can be rendered operational with reasonable effort and within a reasonable time period." E.g., State v. Padilla, 95 Wn. App. 531, 535, 978 P.2d 1113, review denied, 139 Wn.2d 1003 (1999) (handgun recovered in three pieces that could be reassembled within five seconds qualified as a firearm); State v. Raleigh, No. 39221-6-II, 2010 WL 3490230 at 20 (Wn. App. Sept. 8, 2010) (temporarily inoperable pistol repaired in a short amount of time by adding penetrating oil, a hammer, and punch is a "firearm"); State v. Releford, 148 Wn. App. 478, 491-93, 200 P.3d 729 (2009) (antique pistol missing firing flint, leather piece, gunpowder, projectile ball, and wadding qualified as a "firearm"); State v. Berrier, 110 Wn. App. 639, 645, 41 P.3d 1198 (2002) (unloaded firearm missing bullets is a "firearm").

Here, the trial court properly instructed the jury in accordance with the case law that a "temporarily inoperable firearm or a disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time period is a 'firearm.'" CP 133 (Jury Instruction 20); 8RP 15. Nevertheless, Davis contends that this instruction amounts to a comment on the

evidence because it instructs the jury that "[a] temporarily inoperable firearm . . . is a firearm." *App. Br.* at 4. Davis's strained reading of Instruction 20 should be rejected.

Article IV, section 16 of the Washington State Constitution prohibits judges from conveying their personal attitudes about the merits of a case or instructing a jury that matters of fact have been established as matters of law. Const. art. IV, § 16; State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). The prohibition exists to prevent juries from being unduly influenced by the judge's assessment of the credibility, weight, or sufficiency of the evidence. State v. Eisner, 95 Wn.2d 458, 462, 626 P.2d 10 (1981). A judge need not expressly convey his or her personal feelings, it is sufficient if they are merely implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

A judicial comment in a jury instruction is an error of constitutional magnitude that may be raised for the first time on appeal. Id. at 719-20. The reviewing court evaluates the facts and circumstances of the case to determine whether the trial court's conduct or remarks amounted to a comment on the evidence. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). A judicial comment on the evidence is "presumed to be prejudicial,

and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted." Levy, 156 Wn.2d at 725.

For example, Washington courts have found Article IV, § 16 violations where the trial judge has remarked on a witness's credibility or given a jury instruction that resolved a contested fact. E.g., Eisner, 95 Wn.2d at 462-63 (reversible error for judge to "enter into the fray of combat" by questioning the victim in a manner that bolstered, rather than clarified, the witness's testimony); State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006) (article IV, § 16 violation where the "to convict" instructions referenced the victims' birth dates, a critical element of the crime).

Here, the trial court did not expressly comment on a witness's credibility, give a jury instruction that resolved a question of fact, or make any remarks that conveyed the judge's opinion of the evidence. On the contrary, the trial court correctly instructed the jury that a temporarily inoperable firearm that "can be rendered operational with reasonable effort and within a reasonable time period is a 'firearm.'" Padilla, 95 Wn. App. at 535; Releford, 148 Wn. App. at 491.

Davis's attempts to liken this case to other cases where a trial court's jury instructions resolved an issue of fact are misplaced. *App. Br.* at 6-8. In State v. Eaker, the trial court improperly commented on the evidence in a "to convict" jury instruction by stating that an undisputed fact occurred, specifically that a babysitter watched the victim during a certain time period. 113 Wn. App. 111, 118, 53 P.3d 37 (2002). Similarly, in State v. Levy, the trial court improperly suggested in a "to convict" instruction that the victim's apartment was a "building" and that a crowbar was a "deadly weapon" as a matter of law. 156 Wn.2d at 721-22. In State v. Becker, the trial court's special verdict form expressly stated that the youth program at issue was a school. 132 Wn.2d at 65. In each of these cases, the trial court explicitly removed an issue of fact from the jury's consideration and relieved the State of its burden to prove all elements of the crime beyond a reasonable doubt.

Here, the trial court did not resolve a disputed issue of fact. Rather, the trial court provided the jury with an accurate statement of the law that allowed the jury to decide whether Davis's temporarily inoperable revolver could be rendered operational with

"reasonable effort and within a reasonable time period." CP 133.

Contrary to Davis's claims, Jury Instruction 20 did not "require" the jury to find that Davis's revolver was a firearm.

Jurors are presumed to take a normal, common-sense approach to reading jury instructions and to give words their ordinary meaning. See, e.g., State v. Meneses, No. 837126, 2010 WL 3341263 at 7 (Wash. Aug. 26, 2010) (average juror interprets jury instructions according to their ordinary meaning); State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776, review denied, 164 Wn.2d 1035 (2008) (an ordinary juror gives jury instructions their ordinary meaning, rather than a "strained reading"); State v. Noel, 51 Wn. App. 436, 440, 753 P.2d 1017, review denied, 111 Wn.2d 1003 (1988).

The only way in which Davis's proposed reading of Instruction 20 is possible is if the jury applied the "last antecedent rule," which states that "qualifying or modifying words and phrases refer to the last antecedent." State v. Bunker, No. 81921-1, 2010 WL 3341262 at 15 (Wash. Aug. 26, 2010). As a corollary to this rule, the presence of a comma before a qualifying phrase suggests that the qualifying phrase applies to all antecedents rather than the

immediately preceding antecedent. Id. (citing City of Spokane v. County of Spokane, 158 Wn.2d 661, 673, 146 P.3d 893 (2006)).

Courts have applied the last antecedent rule to questions of statutory interpretation.<sup>6</sup> Id. Courts do not apply the rule if "other factors, such as context and language in related statutes, indicate contrary legislative intent or if applying the rule would result in an absurd or nonsensical interpretation." Id.

Although not explicitly referring to this rule, Davis relies implicitly on it to argue that the qualifying phrase in Instruction 20 - "that can be rendered operational with reasonable effort and within a reasonable time period" - applies only to "a disassembled firearm," the preceding antecedent. CP 133. Davis's suggested reading of Instruction 20 does not make sense in light of the ordinary meaning of the language used in the instruction and the evidence presented at trial.

Instruction 20 provides, in relevant part, "A temporarily inoperable firearm or a disassembled firearm **that can be rendered operational with reasonable effort and within a reasonable**

---

<sup>6</sup> A Washington case law search by the State revealed no published opinions that specifically address the application of the "last antecedent rule" to jury instructions.

**time period** is a 'firearm.'" CP 133 (emphasis added). An ordinary juror reading this instruction would interpret the qualifying phrase to apply to both a "temporarily inoperable firearm" and a "disassembled firearm," particularly because "operational" and "inoperable" share the same root word. Further, there was no evidence at trial that Davis's revolver was anything but "temporarily inoperable." No witnesses testified that Davis's revolver was "disassembled."

Using context and the ordinary meaning of the language used, a reasonable juror would conclude that the qualifying phrase applied to both a temporarily inoperable and a disassembled firearm. This Court should decline to apply a technical rule of statutory construction to a jury instruction that is intended to be read with ordinary, common sense.<sup>7</sup>

---

<sup>7</sup> If the Court adopts Davis's proposed reading of Instruction 20, then a constitutional violation exists and Davis was prejudiced, warranting the vacation of the 60 months firearm sentencing enhancement. A separate analysis of Davis's second claim of error alleging a directed verdict is unnecessary.

**D. CONCLUSION**

For the foregoing reasons, the Court should affirm Davis's conviction.

DATED this 28<sup>th</sup> day of September, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
KRISTIN A. RELYEA, WSBA #34286  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory C. Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DARNELL DAVIS, Cause No. 64527-7-1, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame

Name

Done in Seattle, Washington

9/28/10

Date