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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY

DEPUTY

COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

NO. 37389-1-II

STATE OF WASHINGTON,

Respondent.

vs.

GORDON HAMMOCK
Appellant.

RESPONSE BRIEF

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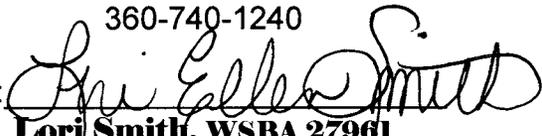

Lori Smith, WSBA 27961

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STATEMENT OF THE CASE

ARGUMENT

A. THE WEAPON USED TO FIRE A BULLET INTO THE HEAD OF WILLY FORD IS A "FIREARM" WITHIN THE MEANING OF RCW 9.41.010 AND SUPPORTS HAMMOCK'S CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM.

Hammock argues that there was insufficient evidence produced to support his conviction for Unlawful Possession of a Firearm because, according to him, the device used to shoot the bullet into the head of Willy Ford does not meet the statutory definition of a "firearm." This argument is without merit.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). An attack on the sufficiency of the evidence "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. State v. Delamarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court must defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the

evidence. State v. Walton, 64 Wn.App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

To convict Hammock of Unlawful Possession of a Firearm the State had to prove that the weapon he possessed was a "firearm" as defined in RCW 9.41.010(1). "Firearm" is defined as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(1). An unloaded or even inoperable firearm is still a firearm under RCW 9.41.010(1). State v. Berrier, 110 Wn.App. 639, 645, 41 P.3d 1198(2002); and see State v. Padilla, 95 Wn.App. 531, 535, 978 P.2d 1113(published in part), *review denied*, 139 Wn.2d 1003 (1999). A gun rendered *permanently* inoperable is not a "firearm." Padilla, supra. However, 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 Unlawful Possession of a Firearm statute. Id. The law does not require that a gun be test-fired in order to prove it is a firearm under the statute. State v. Anderson, 94 Wn.App. 151, 159, 971 P.2d 585 (1999), *review granted, rev'd on other grounds*, 141 Wn.2d 357, 5 P.3d 1247 (2000)(a real gun that is either not loaded or broken at the time of arrest is, nonetheless, a firearm). It is clear that a gun that

is temporarily malfunctioning, requires assembly, or lacks bullets meets the statutory definition of a firearm. State v. Padilla, at 535; State v. Berrier, 110 Wn.App. 639, 645, 41 P.3d 1198(2002) State v. Faust, 93 Wn.App. 373, 381, 967 P.2d 1284 (1998). For example, a gun with the firing pin broken or temporarily removed, while not immediately operable, can be restored to working order in a relatively short time and thus meets the definition of a firearm. Anderson, 94 Wn.App. at 162.

In Padilla, supra, the Court discussed the intent of the Legislature when it amended the firearms statutes in 1994, stating that the Legislature's intent, was among other things, to reduce violence. Padilla at 534. To this end, penalty enhancements were added to crimes specifically involving firearms. See e.g. "Hard Time for Armed Crime Act," LAWS OF 1995, ch. 129 (Initiative Measure No. 159)(codified at RCW 9.94A.310). The Padilla Court emphasized that

[t]he plain language of the prohibitions in RCW Chapter 9.41 demonstrates the Legislature's clear goals of keeping all firearms out of the hands of certain individuals. . . . '[i]t begs reason to assume that our Legislature intended to allow convicted felons to possess firearms so long as they are unloaded or so long as they are temporarily in disrepair, or so long as they are temporarily disassembled, or so long as for any other reason they are not immediately

operable.' Such a result would allow convicted felons to escape an unlawful possession charge simply by keeping a gun disassembled."

Padilla at 534, 535 quoting, State v. Anderson, 94 Wn.App. 151, 971 P.2d 585, (1999)(emphasis added). In light of this purpose, the Padilla Court held that "a disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time period is a firearm within the meaning of RCW 9.41.020(1). *Cf. State v. Faust*, 93 Wn.App. 373, 967 P.2d 1284 (1998)(emphasis added). In making this decision, the Padilla Court also quoted with approval a Wisconsin case where that Court found that a "firearm" is defined as a weapon that acts by force of gunpowder to fire a projectile-- *regardless of whether it is inoperable due to disassembly*. Specifically, the Wisconsin Court noted, "[t]his conclusion furthers the legislature's intention that those convicted of a felony not be allowed to possess *any* firearms --operable, inoperable, assembled or disassembled. To reach the opposite conclusion could lead to potentially absurd results[.]" Padilla, at 536, quoting Wisconsin v. Rardon, 185 Wis.2d 701, 518 N.W.2d 330, 330-31(1994). An absurd result is exactly what Hammock is arguing for here because the end result would allow him "to escape

an unlawful possession charge simply by keeping a gun disassembled." Padilla at 534.

Hammock argues with an apparent straight face that the homemade "zip gun" in his possession which, with little effort, was quickly and successfully assembled into a weapon which fired a deadly bullet into Willy Ford's head is not a "firearm." At the risk of making a circular argument, one cannot resist the temptation to observe that at its most basic level, Hammock's argument is simply wrong because, *obviously*, the weapon used to shoot the bullet into Willy Ford's head here was a firearm because it did shoot a projectile into Willy Ford's head.

Hammock's argument that the device used to fire the bullet is not a "firearm" is illogical and is totally at odds with the intent of our firearms statutes. Padilla, supra. The Uniform Firearms Act defines a "firearm" as "a weapon or device from which a projectile may be fired by an explosive such as gunpowder." former RCW 9.41.025. The word "device" is defined in pertinent part as "a thing made for a particular purpose; an invention or contrivance, esp. a mechanical or electrical one. . . . something elaborately or fancifully designed." Random House Webster's Unabridged Dictionary, 543 (1998). The word "gun" is defined, in part as "a

weapon consisting of a metal tube, with mechanical attachments, from which projectiles are shot by the force of an explosive." Id. at 851 (emphasis added). The word "hammer" is defined, in pertinent part, as "*Firearms*, the part of a lock that by its fall or action causes the discharge, as by exploding the percussion cap or striking the primer or firing pin." Id. at 861 (emphasis in original). The device at issue in the present case was comprised of a "metal tube" (the bolt), a .22 cartridge (projectile), and the "hammer" (literally) used to detonate the device.

Here, the bullet lodged in Willy Ford's skull is positive proof that the device used to put the bullet there was "a weapon or device from which a projectile" was "fired by an explosive such as gunpowder." Id. In this way, the "thing" speaks for itself. *Res Ipsa Loquitur*.

Here, the device used to shoot the bullet into the head of Willy Ford functioned exactly the same as a conventional firearm would, and Hammock should not be able to escape the consequences of his actions by simply keeping the device conveniently disassembled. Indeed, our case law holds that a disassembled gun *is* a firearm if the device can be readily

assembled in a reasonable period of time. See e.g., Padilla, supra.

That happened here. And so it was here.

Hammock argues that in order to qualify as a firearm that the "device" must be entirely self-contained and in only one "piece." There is no authority for this proposition. Again, the statute defines "firearm" as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(1). There is nothing in this definition that says the "device" must be made of only one piece, or that the device must be entirely self-contained. That is likely because any firearm can be taken apart --as attested to by the cases discussing disassembled weapons. Padilla, supra . For even a "conventional" firearm is made up of component parts--including for instance a barrel, a "hammer," and the ammunition. Likewise, the "zip gun" used here was composed of the "barrel" (the hollowed-out bolt), the .22 cartridge, and a "hammer" (literally)-- which was used to detonate the bullet. 2/13/08 RP 70 (defense expert discussing a zip gun). Thus, the only difference between an ordinary pistol and Hammock's contraption is that here the "hammer" was at some times disconnected from the barrel (until it was "connected" to the barrel by tapping it to get it to fire). However, this does not change

the fact that Hammock had in his possession a "disassembled" weapon which, with minimum effort, became the firearm used to shoot Willy Ford. A disassembled device that can be assembled in a reasonable amount of time is still a firearm. Padilla, supra. To follow Hammock's argument that this device made of more than one piece is not a "firearm," would be to "allow convicted felons to escape an unlawful possession charge simply by keeping a gun disassembled." Padilla at 534, 535 quoting, State v. Anderson, 94 Wn.App. 151, 971 P.2d 585, (1999), *review granted, rev'd on other grounds*, 141 Wn.2d 357, 5 P.3d 1247 (2000). This is an absurd result. Indeed, allowing Hammock to escape this charge because he possessed the weapon in separate parts before he put it together to form the gun would be to ignore the purposes behind all of our firearms laws. Id.

As this case proves, when the component parts of a gun can be readily assembled into a deadly firearm--as happened here--the felon must be held accountable for possessing it. The evidence here overwhelmingly supports the finding that Hammock possessed a "disassembled firearm" (the bolt/barrel, the bullet and the hammer) which was quickly assembled into a functioning zip gun used to shoot Willy Ford. 2/12/09 RP 104, 120, 121 (medical

examiner confirms existence of gunshot wound and bullet found in victim's skull); 2/15/08 RP 61-69. Specifically, the threaded, hollowed-out bolt (Ex. 9) was loaded with a .22 shell which contained an explosive which, when struck with the hammer, fired the projectile into the head Willy Ford. 2/15/08 RP 60-69. In this way the assembled device was clearly "a weapon or device from which a projectile. . . [was] fired by an explosive such as gunpowder." RCW 9.41.010(1).

The State here put on uncontroverted evidence to show how easily the bolt (Exhibit 9), cartridge and hammer could be made fully operational as a firearm with minimal effort. That this could be done was proven by the ease with which the parts were assembled to make the whole, and was further evidenced by the fact that the State's firearms expert was also able to assemble these parts into a working firearm. 2/13/08 RP 134-138. With apparently minimal effort, State's firearm's expert Ms. Lawrence was able to detonate the loaded bolt by hitting it with a hammer and aiming it into a tub of water. Id. Upon doing so Lawrence said, "[i]t fired without any problem." 2/13/09 RP 137.

Similarly, the ease at which the bolt could be turned into a deadly firearm was further demonstrated by the testimony of both

Melissa McKee and witness Kip Baudry. According to McKee, Defendant Hammock had been working on building a weapon for a while and at one point the weapon had other pieces that were connected to it. 2/15/08 RP 61. McKee noted she had seen it fired before with other pieces attached to it. Id. At the time of this crime Hammock loaded the device for McKee and told her to "just shoot" Willy Ford. 2/15/08 RP 62. Hammock handed McKee the bolt device and McKee walked over to where Willy Ford was sitting and she struck the bolt's end with the ball peen hammer. 2/15/08 RP 62. Upon being struck by the hammer, the device made a "pow" sound and Willy hit the floor. 2/15/08 RP 62-69. Again, McKee simply took the "loaded" bolt, walked over to Ford, held the tube towards his head and then hit the end of the bolt with a hammer, and BANG--the "chamber" emptied the bullet into Ford's head. 2/7/08 RP 132. Witness Kevin Boudry also witnessed the shooting.

Kevin Boudry saw McKee fire the weapon. Boudry said that McKee simply walked "up and puts this long poker thing just like this quick to his [Willy's] head. And next thing I see is a little hammer go tap and a big loud explosion and Willy is grabbing his ears and starts screaming what happened, what happened and next thing I know he's laying on the side of the bed." 2/7/08 RP

132-133. Baudry repeated that McKee had a "long metal tube" in her hands that she put up to Willy's head, and that she also she had a "little ball peen hammer--tapping, various tapping," on the tube and then it exploded. 2/7/08 RP 135. After the explosion, Baudry saw Willy's hat fall off and then saw a pool of blood on the side of Willy's hat. 2/7/08 RP 138. Willy's hat had a bullet hole in it and what looked like gunshot residue. 2/13/08 RP 87 (Exhibit 179).

The testimony about the shooting matched the physical evidence in the case. The medical examiner's findings regarding the gunshot wound were further corroborated by the finding of the "zip gun" --a "tubular device with a hexagon head on it--" together with expended .22 shell casings found at the scene. 2/12/08 RP 120-125; 2/7/08 RP 45, 60, 67. In sum, the State proved that the loaded, tube-like device that McKee detonated with a hammer into the skull of Willy Ford was a "firearm" within the meaning of RCW 9.4.010. It is simply uncontested that the "bolt" in this case-- when loaded and hit with the hammer-- was made into a crude firearm used to fire a bullet into the head of Willy Ford. Nothing in the case law or in the statutory definitions instruct that the "device" must consist of only one part or be entirely self-contained--as apparently argued by Hammock. In fact, an "ordinary" firearm itself is

obviously made up of several different parts --not the least of which are the barrel (here, the bolt) and a "hammer" (literally the ball peen hammer used to detonate the bullet) and the bullet. Moreover, the case law is clear: a disassembled firearm is still a "firearm" for purposes of our unlawful possession laws, and providing the firearm can be assembled in a reasonable amount of time. Padilla, supra. That was shown here and Hammock's arguments to the contrary are not persuasive.

Deadly Weapon Finding.

In another odd argument Hammock inexplicably claims that the jury's special finding regarding the "deadly weapon finding" must be vacated. Brief of Appellant 34. This argument, like his argument that the device used here was not a firearm, is without merit.

A "deadly weapon" was described for the jury in pertinent part as "an implement or instrument that has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death." CP 144. Obviously, the bolt, bullet and hammer when assembled as they were here and "from the manner in which it" was used, was likely to and did in fact cause, the eventual death of Willy Ford. The medical examiner

testified about the bullet and its path in Ford's head. 2/12/08 RP 122-125. And it is simply undisputed that Willy Ford was shot in the head with a weapon that discharged a .22 caliber bullet into Ford's skull. 2/7/08 RP 132, 133; 2/12/08 RP 103-119. The shooting was witnessed by Kip Baudry, Hammock himself and Melissa McKee-- who shot Ford at Hammock's direction. 2/7/08 RP 132, 133; 2/15/08 RP 60. The medical examiner testified about finding the bullet in Ford's skull and about the likelihood that the bullet wound was fatal. 2/12/08 RP 120-125. All of these facts support the finding that the zip gun as used here was a deadly weapon.

Here, the jury properly found Hammock guilty of Unlawful Possession of a Firearm for possessing the disassembled component parts of the zip gun. In turn, these parts were quickly assembled into the firearm that fired the bullet into the head of Willy Ford, which is one reason for the rule that a disassembled gun is still a "firearm" Padilla, supra. All of this evidence, when viewed in the light most favorable to the State, was sufficient to prove that the device possessed here was a "firearm" because the component parts of the zip gun were readily assembled into the gun that fired the bullet into the head of Willy Ford. Likewise, the manner in which the zip gun was used to shoot Ford also made the zip gun a

"deadly weapon" as correctly found by the jury in this case.

Accordingly, the jury's findings and Hammock's convictions should be affirmed in all respects.

B. THE VAGUE, FLEETING REFERENCES TO HAMMOCK'S "CRIMINAL PAST" WERE NOT UNFAIRLY PREJUDICIAL, BUT EVEN IF SUCH EVIDENCE WAS IMPROPERLY ADMITTED, ANY ERROR WAS HARMLESS BECAUSE OVERWHELMING EVIDENCE SUPPORTS THE CONVICTIONS.

Hammock also claims that evidence regarding Hammock's criminal past was improperly admitted. This argument is not persuasive.

ER 403 provides, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." State v. Lord 161 Wash.2d 276, 302, 165 P.3d 1251, 1263 (2007). A trial court exercises broad discretion when making evidentiary rulings. Cox v. Spangler, 141 Wn.2d 431, 439, 5 P.3d 1265, 22 P.3d 791 (2000). We will uphold a ruling on the admissibility of evidence unless the trial court's decision is manifestly unreasonable or based on untenable grounds. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d

615 (1995); State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). While the jury ultimately decides the weight of the evidence, it is the court that determines its admissibility. ER 104(a).

Relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value. ER 403. Relevant evidence is presumed admissible, and the burden is on the Defendant to show it should have been excluded. State v. Burkins, 94 Wn.App. 677, 692, 973 P.2d 15 (1999). “The trial court has broad discretion in administering the rule, and its judgment in the balancing process will be rarely disturbed” on appeal. State v. Brown, 48 Wn.App. 654, 660, 739 P.2d 1199 (1987) (quoting 5 K. Teglund, Wash. Prac., Evidence sec. 105, at 246 (2d ed.1982)). An error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal. Brown v. Spokane County Fire Protection Dist. No. 1, 100 Wash.2d 188, 196, 668 P.2d 571 (1983). Because the error here resulted from violation of an evidentiary rule, not a constitutional mandate, we do not apply the more stringent “harmless error beyond a reasonable doubt” standard. See *State v. Cunningham*, 93 Wash.2d 823, 831, 613 P.2d 1139 (1980); *State v. Tharp*, 96 Wash.2d 591, 599, 637 P.2d 961 (1981). Instead, we apply “the rule that error is not prejudicial

unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *Tharp*, 96 Wash.2d at 599, 637 P.2d 961; accord *State v. Halstien*, 122 Wash.2d 109, 127, 857 P.2d 270 (1993). The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. *Nghiem v. State*, 73 Wash.App. 405, 413, 869 P.2d 1086 (1994).

Hammock claims that when witness Kip Baudry made a passing reference to "when Gordon was in the joint" that this was a prejudicial error pertaining to Hammock's serving jail time. Brief of Appellant 25. Hammock further complains that Officer Reynolds committed prejudicial error when he said "I had dealt with Mr. Hammock before, so I was familiar with him on a first name basis." Id. Hammock finds further error when Melissa McKee said of Hammock that "[h]e was supposed to check in with the Department of Corrections for the first time, so he . . . walked across the street to Department of Corrections to check in." Brief of Appellant 26.

None of these minor, inadvertent references were "conviction" evidence *per se*--as claimed by Hammock when he cites to State v. Hardy, 133 Wn.2d 701, 946 P.2d 1175 (1997).

And, the prosecutor here in good faith admonished the State's witnesses they were not to mention anything about Hammock's criminal past. 2/15/08 RP 2,3. But these remarks were not likely to affect the jury for another reason. That is because the jury was already going to hear that Hammock had a prior felony conviction because the State had to prove that Hammock had a prior felony conviction in order to prove the charge of Unlawful Possession of a Firearm. The trial court agreed, stating, "I can't possibly see the prejudice here given that there is, at some point there is going to be a stipulation entered that he has a conviction for a . . . serious felony." 2/19/08 RP 70. The trial court was correct.

Hammock further bases his argument on his claim that "jurors should never had heard about Hammock's conviction for a serious offense" because the firearm possession charge "should have been" dismissed pursuant to State v. Knapstad. Brief of Appellant 39. However, a defendant who goes to trial cannot appeal the denial of a Knapstad motion. State v. Jackson, 82 Wn.App. 594, 608, 918 P.2d 945 (1996), *rev. denied* 131 Wn.2d 1006 (1997)(footnote omitted). Accordingly, Hammock's arguments regarding the trial court's denial of his Knapstad motion are without merit.

In any event, because the jury was going to hear about Hammock's prior felony conviction through the presentation of the State's case in chief regarding the Unlawful Possession of a Firearm charge, the effect of a couple of vague, fleeting references to Hammond's "criminal past" was mitigated by the fact that the jurors were correctly going to hear about it anyway. Thus, the trial court did not abuse its discretion when it denied Hammock's motion for a mistrial regarding this evidence.

However, should this Court find that these references were unfairly admitted, any error should be deemed harmless because-- as set out in the previous section of this brief--overwhelming evidence supports the convictions.

Accordingly, Hammock's convictions should be affirmed.

CONCLUSION

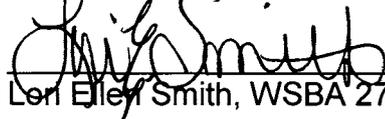
The zip gun used to successfully fire a bullet into the head of Willy Ford in this case was a "firearm," and properly formed the basis of Hammock's Unlawful Possession of a Firearm conviction. Furthermore, because the firearms possession charge necessarily meant that the jury would hear that Hammock had a prior felony conviction, the effect of any other fleeting reference to Hammock's criminal past was mitigated. On the other hand, if admission of

such minor references was error, any error was harmless because
overwhelming evidence supports Hammock's convictions.
Accordingly, Hammock's convictions should be affirmed in all
respects.

RESPECTFULLY SUBMITTED this 17 day of February,
2009.

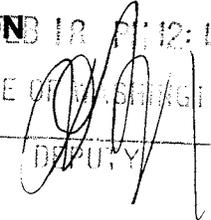
MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

By:


Lori Ellen Smith, WSBA 27961

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DIVISION II

**COURT OF APPEALS FOR THE STATE OF WASHINGTON
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STATE OF WASHINGTON,)
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Appellant.)
_____)

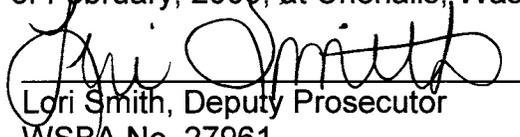
NO. 37389-1-IPY

DECLARATION OF MAILING

LORI SMITH, Deputy Prosecutor for Lewis County, Washington, on behalf of Respondent State of Washington, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On 2/17/09, I served a copy of the RESPONSE BRIEF upon the Appellant by depositing the same in the United States Mail, postage pre-paid, addressed to the attorney for the Appellant addressed as follows:

David B. Koch
Nielsen Broman & Koch
1908 E. Madison St.
Seattle, WA 98122-2842

Dated this 17 day of February, 2009, at Chehalis, Washington.



Lori Smith, Deputy Prosecutor
WSBA No. 27961
Attorney for the Respondent
Lewis County Prosecuting Attorney's Office