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NO. 51286-6-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TAMMY JO STEWART,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

A jury convicted Ms. Stewart of unlawful possession of firearms and possession of stolen firearms for possession of six guns, two of which the State failed to prove beyond a reasonable doubt met the statutory definition of firearm. In addition, in explaining the “may be fired” element of a firearm, the prosecutor committed misconduct when he argued to the jury the law permitted temporarily inoperable guns to qualify as firearms because it was necessarily to thwart “gang-banger[s]” and “criminals” trying to evade prosecution on a technicality. The court compounded the error and impermissibly commented on the evidence by including in the jury instructions a factual description that effectively told the jury the objects in question were firearms. In addition, police seized three of the guns from a car pursuant to search warrants issued without probable cause to search the car.

The convictions related to the guns seized without probable cause to search the car must be reversed and dismissed, the convictions supported by insufficient evidence must be reversed and dismissed, and the constitutional errors require reversal and retrial of the remaining convictions.

B. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to prove beyond a reasonable doubt every element of the unlawful possession of and possession of stolen firearm counts.
2. The prosecutor's closing argument contained comments that were improper and prejudicial, constituting misconduct that violated Ms. Stewart's constitutional right to a fair trial.
3. The prosecutor committed misconduct in his closing argument by commenting on dismissed counts.
4. The court erred in impermissibly commenting on the evidence in jury instructions 2 and 4 through 14 by instructing the jury that the objects Ms. Stewart was charged with possessing were firearms.
5. The court erred in concluding there was probable cause to support search warrants of the car and in denying the motion to suppress evidence seized from the car pursuant to the warrants.
6. The court erred in imposing the felony firearm offender registration without considering the mandatory factors.
7. The imposition of the criminal filing and DNA collection fees is erroneous under the recent amendments to the legal financial obligation statutes.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. State and federal due process require the State present sufficient evidence to prove beyond a reasonable doubt every element of a charged offense. “Firearm” is an element of both unlawful possession of a firearm and possession of a stolen firearm. “Firearm” requires proof a projectile “may be fired” from the object, which courts have interpreted to mean the object could be made to fire with reasonable effort and time. Where the State’s own evidence establishes the objects admitted as Exhibit Nos. 25 and 31 did not fire and no other evidence was offered on that issue, did the State prove the element of “firearm” beyond a reasonable doubt?

2. In closing arguments, prosecutors may not make improper and prejudicial comments unsupported by the evidence. Here, in explaining the definition of firearm, the prosecutor made reference to gang-bangers and criminals evading the law on a technicality. In a case not involving gang activity or members of a greater criminal network, did the State’s inflammatory comments unrelated to the evidence deprive Ms. Stewart of a fair trial, requiring reversal?

3. Article IV, § 16 prohibits courts from commenting on the evidence or instructing jurors that a factual issue is a settled matter of law. The factual issue of whether the objects in question were firearms was an

element of the firearm offenses and an issue Ms. Stewart contested. Here, the court's instructions to the jury referred to the objects in question as shotguns and rifles with their make, model, and sometimes serial number, indicating the court had already found the objects were firearms. Did the jury instructions so identifying the objects resolve a factual element the State was required to prove beyond a reasonable doubt and constitute a judicial comment on the evidence requiring reversal?

4. Courts may only issue search warrants based on probable cause, which requires a reasonable person to believe not only that the item sought is contraband or evidence of a crime but also that the item sought is likely to be found at the place searched. Here, the search warrant affidavits stated that the deputy observed firearms inside the bedroom believed to be Ms. Stewart's, that he observed a single bullet in the gravel near a car he believed to be Ms. Stewart's, and that the car was parked in front of the house. Where the search warrant affidavits lacked a nexus between the car to be search and evidence of a crime, did the court err in concluding the search warrants were based on probable cause and in denying the motion to suppress items recovered from the car?

5. RCW 9.41.330 requires that courts sentencing defendants convicted of firearm offenses consider several mandatory factors in deciding whether to impose the firearm offender registration requirement.

The court did not consider all of the mandatory factors but imposed the registration requirement. Did the court abuse its discretion when it imposed the firearm offender registration requirement without considering the mandatory factors required by statute?

6. Recent amendments prohibit courts from imposing certain costs where a person is found to be indigent, including criminal filing fees and DNA collection fees if the State previously collected a person's DNA following sentence. Here the court found Ms. Stewart to be indigent but imposed both fees. Should this Court strike the criminal filing and DNA collection fees from the judgment and sentence?

D. STATEMENT OF THE CASE

While attempting to serve unrelated warrants at a residence, Deputy Logan observed four guns in a bedroom in the house.¹ CP 87-89; 8/17/17 RP 136, 143. Residents of the house informed Deputy Logan that the room belonged to Ms. Stewart. CP 88; 8/17/17 RP 111, 137. Deputy Logan also observed a bullet on the ground outside of a car residents told him Ms. Stewart drove. CP 88; 8/17/17 RP 152. On this basis, Deputy Logan obtained a search warrant to search both the bedroom and the car. CP 87-91. While executing the first warrant, Deputy Logan observed

¹ Colloquial use of the term "guns" or "firearms" in the brief does not concede that the objects met the statutory definition of firearm.

suspected methamphetamine and stolen property and secured a second warrant to search the same locations but to seize this additional suspected contraband. CP 92-96; 8/17/17 RP 168-69, 174.

Police seized four guns, a small amount of methamphetamine, and stolen property from the bedroom and three guns and tools from the car, in addition to miscellaneous items identifying Ms. Stewart. 8/17/17 RP 155-89. The State charged Ms. Stewart with possession of the methamphetamine as well as seven counts of unlawful possession of a firearm and six counts of possession of a stolen firearm. CP 66-71. Each gun resulted in one charge of unlawful possession of a firearm as well as one charge of possession of a stolen firearm except for one gun which the owner failed to identify as his to the police. CP 66-71; 8/31/17 RP 244. For that gun, Ms. Stewart was charged only with unlawful possession of a firearm. CP 66-71. The owner did, however, identify that gun as his at trial. 8/31/17 RP 244.

The below chart summarizes the guns by exhibit number, count, and jury instruction.²

EX. NO.	COUNT NOS.	JURY INSTRUCTION NOS.	DESCRIPTION IN JURY INSTRUCTION	LOCATION FOUND
25	1	2, 4	“12 gauge shotgun, serial # 26134”	bedroom
26	2, 8	2, 5, 10	“J. Stevens Arms 12 gauge pump action shotgun”	bedroom
27	3, 9	2, 6, 11	“Remington Model 700 rifle, serial # 373809”	bedroom
28³	4, 10	N/A	N/A	<i>bedroom</i>
29	5, 11	2, 7, 12	“Remington Rifle 300 M-700, serial # S6499498”	car trunk
30	6, 12	2, 8, 13	“Mossberg 12 shotgun”	car trunk
31	7, 13	2, 9, 14	“SKS 7.62 rifle, serial # 21000 2010”	car trunk

At trial Ms. Stewart contested the issue of whether several of the guns met the statutory definition of firearm. The owner testified that one

² The original exhibits containing the actual objects were released after the jury verdict and substituted with photographs of the objects, admitted as Exhibit No. 39. CP ___, sub. no. 74; Ex. 39.

³ Following the defense’s motion at the close of evidence, the State moved to dismiss counts 4 and 10, corresponding to Exhibit No. 28, and the Court granted the motion. 8/31/17 RP 253-55. Therefore, the court did not instruct the jury on any charges relating to Exhibit No. 28.

gun, admitted as Exhibit No. 25, has a trigger that “won’t lock into position” and that it was “not fireable.” 8/31/17 RP 244. He testified another gun, admitted as Exhibit No. 28, has “never fired.” 8/31/17 RP 241. Finally, he testified that he had “never fired” the gun admitted as Exhibit No. 31 and suggested it would need to be adapted in order to fire. 8/31/17 RP 229-30.

In response to the defense motion for a directed verdict, the State moved to dismiss counts 4 and 10 relating to the gun admitted as Exhibit No. 28. 8/31/17 RP 253-255. The court denied the motion to dismiss on the remaining counts relating to Exhibit Nos. 25 and 31, ruling whether the objects qualified as firearms under the statute was “a question of fact” that must go to the jury. 8/31/17 RP 257, 253-58.

In closing arguments, the State addressed the question of whether the objects admitted as Exhibit Nos. 25 and 31 qualified as firearms. 9/1/17 RP 27-35. The prosecutor argued to the jury the reason for the “may be fired” requirement was to prevent “escape routes for criminals” who might temporarily disassemble or disable a gun from firing in order to avoid criminal liability. 9/1/17 RP 27-28. The State used as his example “some gang-banger with a felony on my record.” 9/1/17 RP 28. The State also informed the jury, over defense counsel’s objection, that he had dismissed charges relating to Exhibit No. 28 because the owner said it

“didn’t fire.” 9/1/17 RP 27-28. Defense counsel argued in closing that the State failed to prove that the objects admitted as Exhibit Nos. 25 and 31 met the definition of firearm. 9/1/17 RP 45-47.

The court instructed the jury that “firearm” is an element of both unlawful possession of a firearm and possession of a stolen firearm and read the statutory definition of firearm. CP 57-62. In the instructions, the court itemized each count and included “to-wit” followed by a description of the make, model, and sometimes serial number of the object in question. CP 56-57 (Instruction No. 2). The court incorporated by reference that description in each instruction explaining the individual counts. CP 57-61 (Instruction Nos. 4-14).

The jury found Ms. Stewart guilty on all counts. CP 42-53; 9/1/17 RP 68-70. At sentencing, the court found Ms. Stewart indigent but nonetheless imposed criminal filing and DNA fees. CP 14-15; 12/1/17 RP 99-100. The court sentenced Ms. Stewart to a total of 159 months imprisonment⁴ and imposed the discretionary firearm offender registration requirement. CP 11-14, 18, 21; 12/1/17 RP 100-04.

⁴ Ms. Stewart received a sentence of 87 months on each of the six unlawful possession of a firearm counts to be served concurrently to each other, a sentence of 72 months on each of the five possession of stolen firearm counts to be served concurrently to each other, and a sentence of 12 months +1 day on the possession of a controlled substance count. CP 12. The court ordered the set of unlawful possession of firearm sentences run consecutively to the set of possession of stolen firearm sentences. CP 12.

E. ARGUMENT

1. The State presented insufficient evidence that the objects admitted as Exhibit Nos. 25 and 31 were capable of firing, requiring reversal of counts 1, 7, and 13.

The State must prove every element of the charged crimes beyond a reasonable doubt. U.S. Const. amends. 5, 6, 14; Const. art. I, §§ 3, 21, 22; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). Where the State fails to prove every element beyond a reasonable doubt at trial, the evidence is insufficient to sustain the conviction and reversal is required. *State v. Jussila*, 197 Wn. App. 908, 920-21, 392 P.3d 1108 (2017) (citing *State v. Hickman*, 135 Wn.2d 97, 102-03, 954 P.2d 900 (1998)). In reviewing a sufficiency of the evidence challenge, appellate courts must consider whether “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).

a. The element of “firearm” requires proof beyond a reasonable doubt that the object is capable of being fired.

Both unlawful possession of a firearm and possession of a stolen firearm require proof that the object possessed constitutes a firearm under the statute. RCW 9.41.040(1)(a), 9A.56.310(1). RCW 9.41.010(11)

defines firearm as “a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.” By the very language of the statute, to qualify as a firearm the object must be capable of being fired. RCW 9.41.010(11). The meaning of “may be fired” has been the subject of much litigation. Courts do not require proof of contemporaneous operability. However, courts do require proof that the object is capable of being fired. An object not capable of being fired fails to meet the statutory definition of firearm.

In *State v. Padilla*, Division One held “may be fired” required proof the object “can be rendered operational with reasonable effort and within a reasonable time period.” 95 Wn. App. 531, 535, 978 P.2d 1113 (1999). In *Padilla*, the gun was disassembled into three pieces. The State presented “unrefuted testimony” that the object could be reassembled within seconds. *Id.* at 532. They did this through expert testimony from a firearms instructor who testified he (1) successfully reassembled the gun, (2) did so in a matter of seconds, (3) tested the gun and it successfully fired, and (4) offered an opinion as to how and why the gun became momentarily disassembled. *Id.* at 533. The *Padilla* court noted a gun that is permanently inoperable could not meet the definition of “may be fired” because such a gun would never be capable of being fired. *Id.* at 535.

Divisions Two and Three followed suit in *State v. Berrier* and *State v. Tasker*, respectively. *State v. Berrier*, 110 Wn. App. 639, 41 P.3d 1198 (2002); *State v. Tasker*, 193 Wn. App. 575, 373 P.3d 310 (2016). In *Berrier*, in finding the partially disassembled and unloaded object met the definition, the court noted the gun was, in fact, operational, the police described the object, and the defendant admitted he modified the object so it would shoot as he desired. *Berrier*, 110 Wn. App. at 646-47. Likewise, in *Tasker* the court held “a device must be capable of being fired, either instantly or with reasonable effort and within a reasonable time.” *Tasker*, 193 Wn. App. at 594. Therefore, objects may meet the statutory definition of firearm even when they are not instantly capable of firing at the moment of the offense if they can be made capable of firing. *See, e.g.*, *State v. Releford*, 148 Wn. App. 478, 489-93, 200 P.3d 729 (2009) (holding unloaded pistol qualifies as firearm); *State v. Wade*, 133 Wn. App. 855, 873, 138 P.3d 168 (2006) (inoperable gun was firearm); *State v. Anderson*, 94 Wn. App. 151, 162-63, 971 P.2d 585 (1999), *rev'd on other grounds*, 141 Wn.2d 357, 5 P.3d 1247 (2000) (testimony guns were loaded and appeared to be real sufficient to establish “may be fired” prong of firearm element).

b. The State presented testimony that Exhibit Nos. 25 and 31 were not capable of firing and presented insufficient evidence that reasonable time and efforts could make them capable of firing.

Michael Hume Sr., the owner of the objects recovered from the bedroom and the car, testified with respect to Exhibit No. 25, “[the] trigger won’t lock into position to fire” and “right now it’s not fireable.” 8/31/17 RP 244. He opined that it could be fixed “if a gunsmith . . . can fix it.”⁵ *Id.* Exhibit No. 25 is the basis of count 1. He explained “you take it apart and the spring goes, you can’t find it, and then you don’t get it back together. Well, that’s what happened to this one. It can’t be cocked, the trigger won’t lock into position to fire and – it can be fixed if a gunsmith – take it to – any gunsmith can fix it, but right now it’s not fireable.” *Id.* With respect to Exhibit No. 31, which is the basis for counts 7 and 13, Mr. Hume testified:

I haven’t even really fired it. It was a gift from my son. And the only thing I can tell you that might be a little different than this gun from most of the SKS’s is most of them have a 20 to 30 shot clip. I have one at home, but I’ve adapted this to it. I haven’t really fooled with it, because you have to take this whole section apart, take this whole assembly out. And then the wooden stock sometimes you have to carve along the side to do with it.

⁵ Interestingly, in response to Ms. Stewart’s motion to dismiss at the close of the evidence, the State moved to dismiss counts 4 and 10 relating to Exhibit No. 28. As to that object, Mr. Hume testified, “its [sic] never fired” and added “I’m not saying that it can’t be [fired] with a good gunsmith.” 8/31/17 RP 241. What relevant distinction the State gleaned between Mr. Hume’s testimony as to Exhibit 25 versus 28 is a mystery.

And like I said, it's – it's a – something that my son got to me. It's sentimental value and I have never fired it, so . . .

8/31/17 RP 229-30. He did, however, also testify that despite having never shot it or cocked it, he had no reason to believe it would not fire.

8/31/17 RP 231-32.

Here, the sort of evidence offered by the State in *Padilla*, *Berrier*, and *Tasker* is entirely lacking. The owner testified that, to his knowledge, the guns did not fire. He thought perhaps a gunsmith could fix the guns, but he did not explain on what he based this opinion or suggest he knew this because he had done it with other guns. He offered no time frame in which the gun could theoretically be fix and rendered capable of firing. With the absense of this information in Mr. Hume's testimony and the lack of any other evidence on this issue, the State falls short of proving the "may be fired" element of firearm with respect to Exhibit Nos. 25 and 31.

Although the State need not present affirmative testimony of a gun's operability, here the State affirmatively presented evidence the guns could *not* be fired. The owner testified the objects did not fire, and nothing in evidence permits the inference that the objects could be made fireable. In fact, the inference from the testimony is the opposite – that the guns were not capable of firing, and no reliable evidence establish they had been or could be made that way with reasonable effort and time.

Mere speculation is never sufficient to prove an element. *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

The State's own witness put the objects's ability to fire in question and then failed to introduce evidence to prove the objects were, in fact, capable of firing. The State offered no additional evidence to establish whether, by what means, and how quickly this defect could be cured. Viewing the evidence in the light most favorable to the State, once the State's witness testified the objects were presently incapable of firing, without additional evidence, no rational juror could have found beyond a reasonable doubt that these objects were capable of being fired.

Therefore, this Court must dismiss the counts of conviction (counts 1, 7, 13) relating to those objects (admitted as Exhibit Nos. 25 and 31).

2. The prosecutor's improper and prejudicial comments in closing arguments deprived Ms. Stewart of a fair trial and require reversal.

a. Ms. Stewart has a constitutional right to a fair trial.

People accused of crimes have the right to a fair trial. U.S. Const. amends. 5, 6, 14; Const. art. I, §§ 3, 22; *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012) (citing *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976)). Improper and prejudicial comments unsupported by the evidence deprive defendants of that constitutional right and constitute prosecutorial misconduct. *State v.*

Lindsay, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). Where a defendant demonstrates “a substantial likelihood that the prosecutor’s statements affected the jury’s verdict,” prejudice is established. *Id.* at 440. Even without an objection, reversal is required if the comments are “so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice.” *Id.* at 430; *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

b. The prosecutor’s comments about gang-bangers and criminals were unsupported by the evidence and improper.

In explaining the “may be fired” requirement of a firearm in closing argument, the prosecutor made several irrelevant, improper, and inflammatory comments that prejudiced Ms. Stewart. First, rather than simply explain a part temporarily missing from a gun may still qualify the object as a firearm, the prosecutor described “criminals” and “gang-banger[s]” for no reason other than to invoke prejudice. 9/1/17 RP 28. These references served no legitimate purpose and were simply a fear-mongering attempt to conjure up stereotypical images of criminals with guns.

The prosecutor told the jury the legislature wrote the “may be fired” language “on purpose” so that a gun missing a piece such that it was momentarily inoperable would not **“create escape routes for criminals.”**

9/1/17 RP 28 (emphasis added). He also explicitly referenced a “gang-banger” in his explanation.

But the law doesn't say can be fired, it says may be fired, and there is a good reason. **What if I am some gang-banger with a felony on my record**, who is not allowed to have a firearm. And I have got a Glock in my pocket, but I have taken out a part and put that part in my pocket, a spring, a firing pin, something that it doesn't work if it's out, but that I can just slip back in in a moment and make it work. When I walk around with that Glock 45 missing the firing pin in my waistband, and say, hey, its's not a firearm under state law, can't be arrested for it, cant [sic] take it. No, because may be fired, right? Because all I have to do is pop that firing pin, or that little spring, or whatever it is right back into that weapon and it's fully operational. **It was written that way on purpose, because we don't want a little minor thing like that to create escape routes for criminals.** Okay.”

9/1/17 RP 28 (emphasis added). The prosecutor's comments concerning “gang-banger[s]” and “criminals” were utterly unrelated to any fact or issue in the trial. They served only to prejudice the jury against Ms. Stewart by appealing to the jury's fears and inflaming them with issues unrelated to her case.

Further, the record is devoid of any evidence that Ms. Stewart – analogous to the “gang-banger” or “criminals” in the prosecutor's closing argument – is the one who acted to make the objects incapable of firing, whether temporarily or permanently. The owner himself testified the guns were in that condition when they were in his possession, and no evidence

supported the inference that Ms. Stewart altered the guns. *See generally* 8/31/17 RP 229-46. The prosecutor’s explanation including a “criminal” altering a gun for his own nefarious purposes is clearly inapplicable and served only to inflame the jury and to disparage Ms. Stewart by suggesting she possessed the sort of guns common to gang-bangers and criminals. In the context of the contested issue as to whether the objects admitted as Exhibit Nos. 25 and 31, in particular, could be made capable of firing, the improper comments served to dilute the State’s burden of proving that element and to dilute the legal standard. These prejudicial comments unsupported by the record were particularly improper.

“Prosecutors have a duty to seek verdicts free from appeals to passion or prejudice.” *State v. Perez-Mejia*, 134 Wn. App. 907, 915, 143 P.3d 838 (2006) (citing *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988)). “Accordingly, a prosecutor engages in misconduct when making an argument that appeals to jurors’ fear and repudiation of criminal groups . . . as a reason to convict.” *Id.* at 916. References to gangs, in particular, are extremely inflammatory and courts highly control permissible references to avoid unfair prejudice even in cases actually involving gangs. *See, e.g., Id.* at 920-21 (finding prosecutor’s comments to send message to gang members deprived defendant of fair trial and reversing conviction and remanding for retrial); *In re Pers. Restraint of*

Sandoval, 189 Wn.2d 811, 832-33, 408 P.3d 675 (2018) (finding comments regarding defendant's OG status improper but not prejudicial where defendant admitted to being gang member and involvement in gang meetings). Given the care with which courts act in cases where gangs are relevant, no such reference should be permitted in a case entirely devoid of any gang presence.

In addition to being unsupported by the evidence and inflammatory, the comments were wholly unnecessary. The prosecutor could have explained the concept of "may be fired" using neutral language. However, the legislative intent behind the statute was irrelevant to the charges. By appealing to the legislature's intent behind the law and explaining the need to keep the public safe from criminals and their clever efforts to avoid prosecution through a technical interpretation of the law, the prosecutor invoked the specter of armed gang-bangers and criminals at large. The comments signaled this case was bigger than Ms. Stewart and had a larger public safety impact. The comments operated as a "deliberate appeal to the jury's passion and prejudice," and encouraged the jury to convict based not on the evidence but on the State's reference to criminals and gang-bangers. *See Belgarde*, 110 Wn.2d at 507-08; *Glasmann*, 175 Wn.2d at 710.

c. The prosecutor's improper comments prejudiced Ms. Stewart.

A substantial likelihood exists that these improper and prejudicial comments influenced the jury's verdict. First, the prosecutor immediately followed his improper comments with a discussion of the exhibits to which the "may be fired" element was at issue. 9/1/17 RP 27-35. Second, the jury sent a note to the court, inquiring about the "may be fired" language. CP 40 ("Could you please clarify the term/word 'may' in instruction 18 [defining firearm as "a weapon or device from which a projectile may be fired by an explosive such as gunpowder.?""]), 62. The note demonstrates the jury was focused on the very issue on which the prosecutor directed his prejudicial and inflammatory language.

A major point of contention in the case was whether two of the objects (admitted as Exhibit Nos. 25 and 31) constituted firearms under the statutory definition. Ms. Stewart moved to dismiss these three counts following the close of evidence and argued the State failed to prove beyond a reasonable doubt the objects satisfied the "may be fired" element of firearm. 8/31/17 RP 253-58. The Court denied the motion following arguments, finding it to be an issue of fact for the jury. 8/31/17 RP 257-58. Given this, the prosecutor was well aware of this contested issue. He also highlighted the issue by impermissibly commenting on the dismissed

counts.⁶ 9/1/17 RP 27- 28. *See State v. Boehing*, 127 Wn. App. 511, 522, 111 P.3d 899 (2005) (holding dismissed charges were not evidence for jury to consider and were irrelevant to case, requiring reversal).

Here, where a legitimate issue exists as to the sufficiency of at least three counts, these prejudicial comments targeting those three counts in particular cannot be overlooked. Further, references to gang-bangers and criminals unsupported by the evidence and unrelated to the case are exactly the sort of inflammatory comments that ensure prejudice. *See, e.g., Glasmann*, 175 Wn.2d at 712 (holding inflammatory images of defendant with “guilty” unrelated to evidence “contaminated the entire proceeding” and created substantial likelihood they affected verdict). Although Ms. Stewart’s attorney failed to object, these comments were “so flagrant and ill-intentioned that [they] cause[d] an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

⁶ “Remember counts four and ten dismissed? . . . This, folks, is a boat anchor, it’s a paper weight, right? I am holding in my hands what has been admitted as Exhibit 28. And this is that double-barreled shotgun that Mr. Hume, the elder, said didn’t fire, and maybe some gunsmith could get it working, but forget it, okay? This thing has use, only I guess, sentimental value to Mr. Hume, or as a paper weight; it can’t fire, so by law, it’s not a firearm.” 9/1/17 RP 27-28. The court overruled defense counsel’s objection to this argument. 9/1/17 RP 27.

The improper and prejudicial comments deprived Ms. Stewart of a fair trial, which requires the Court reverse the convictions and remand the case for a new trial.

3. The court violated Ms. Stewart’s constitutional rights by impermissibly commenting on the evidence in the jury instructions pertaining to the firearm offenses.

a. Jury instructions may not comment on the evidence or resolve factual disputes.

Article IV, § 16 provides, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Therefore, jury instructions may not contain a judge’s comments on the evidence, and they may not resolve factual disputes or instruct jurors on the facts. Const. art. IV, § 16. A jury instruction improperly comments on the evidence if it resolves a disputed issue of fact that should be decided by the jury. *State v. Becker*, 132 Wn.2d 54, 63-65, 935 P.2d 1321 (1997). Jury instructions containing comments on the evidence that remove an element of the offense from the jury’s consideration violate this constitutional prohibition. *Id*; *State v. Levy*, 156 Wn.2d 709, 719-27, 132 P.3d 1076 (2006).

A court’s impermissible comment on the evidence is a manifest constitutional error which appellate courts review de novo. *See State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006); *Levy*, 156 Wn.2d at 719-21. Moreover, prejudice is presumed. “Judicial comments are

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 723. Although counsel raised no objection to the instructions, these comments on the evidence are “explicitly prohibited by the Washington Constitution” and constitute manifest constitutional error that may be heard for the first time on appeal. *Id.* at 719-20; *State v. Dent*, 123 Wn.2d 467, 478, 869 P.2d 392 (1994); RAP 2.5(a)(3).

b. The jury instructions contained an impermissible comment on the evidence.

In Instruction No. 2, the court itemized each count of the information and, for the firearm offenses, specifically included the make, model, and sometimes serial number following the “to-wit” language. CP 56-57.⁷ The counts contained in Instruction No. 2 corresponded to the

⁷ The Defendant has been charged by Information with six counts of Unlawful Possession of a Firearm in the First Degree, [and] five counts of Possession of a Stolen Firearm. ...

The Defendant has been charged in Count 1 with Unlawful Possession of a Firearm in the First Degree, to-wit: a 12 gauge shotgun, serial #26134;

The Defendant has been charged in Count 2 with Unlawful Possession of a Firearm in the First Degree, to-wit: a J. Stevens Arms 12 gauge pump action shotgun;

The Defendant has been charged in Count 3 with Unlawful Possession of a Firearm in the First Degree, to-wit: a Remington Model 700 rifle, serial #373809;

The Defendant has been charged in Count 5 with Unlawful Possession of a Firearm in the First Degree, to-wit: a Remington Rifle 300 M-700, serial #S6499498;

The Defendant has been charged in Count 6 with Unlawful Possession of a Firearm in the First Degree, to-wit: a Mossburg 12 gauge shotgun;

The Defendant has been charged in Count 7 with Unlawful Possession of a Firearm in the First Degree, to-wit: an SKS 7.62 rifle, serial #21000 2010;

Information. CP 56-57, 66-71. Then, in each individual to convict instruction, the court referred back to the counts as described in Instruction No. 2.⁸ CP 57-61. Read in conjunction, the jury instructions effectively informed the jury that the objects in questions were firearms. For example, in Instruction No. 4, the court instructed the jury:

To convict the Defendant of the crime of Unlawful Possession of a Firearm in the First Degree as charged in Count 1 [Unlawful Possession of a Firearm in the First Degree, to-wit: a 12 gauge shotgun, serial #26134], each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about June 23, 2017, the Defendant knowingly had a firearm in her possession or control;
- (2) That the Defendant had previously been convicted of a serious offense; and
- (3) That the possession or control occurred in the State of Washington.

The Defendant has been charged in Count 8 with Possessing a Stolen Firearm, to-wit: a J. Stevens Arms 12 gauge pump action shotgun;

The Defendant has been charged in Count 9 with Possessing a Stolen Firearm, to-wit: a Remington Model 700 rifle, serial #373809;

The Defendant has been charged in Count 11 with Possessing a Stolen Firearm, to-wit: a Remington Rifle 300 M-700, serial #S6499498;

The Defendant has been charged in Count 12 with Possessing a Stolen Firearm, to-wit: a Mossburg 12 gauge shotgun;

The Defendant has been charged in Count 13 with Possessing a Stolen Firearm, to-wit: an SKS 7.62 rifle, serial #21000 2010; . . .

⁸ As summarized in the chart at Section D *supra*, Instruction No. 4 referred to Count 1; Instruction No. 5 referred to Count 2; Instruction No. 6 referred to Count 3; Instruction No. 7 referred to Count 5; Instruction No. 8 referred to Count 6; Instruction No. 9 referred to Count 7; Instruction No. 10 referred to Count 8; Instruction No. 11 referred to Count 9; Instruction No. 12 referred to Count 11; Instruction No. 13 referred to Count 12; and Instruction No. 14 referred to Count 13. CP 57-61.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 56-57.

By instructing the jury in Instruction No. 2 that each object described was a rifle or a shotgun, the judge impermissibly commented on the evidence and essentially told the jury these items were firearms, relieving the State from their burden of proving this element beyond a reasonable doubt. In so doing, the court removed from the purview of the jury consideration of this disputed fact: whether or not the objects qualified as firearms under the statute.

“Firearm” is a necessary element of both unlawful possession of a firearm and possession of a stolen firearm. RCW 9A.040(1)(a), 9A.56.310. Whether the objects constituted firearms under the statutory definition is an element of the firearm counts. The jury instructions were an endorsement from the court that the objects met the statutory definition of firearm. The court’s to-wit language communicated to the jury that the objects were, in fact, firearms. However, this was a question of fact for the jury to determine, not a statement of law on which the court should instruct the jury.

In *Becker*, the State sought a sentence enhancement that required proof a drug sale occurred within one thousand feet of a school grounds. 132 Wn.2d 54. The parties contested whether a particular program, the Youth Employment Program (YEP), qualified as a school. The court instructed the jury they had to determine whether the defendants were “within 1000 feet of the perimeter of school grounds, to-wit: Youth Employment Program School” at the time of the sale. *Id.* at 64. The Washington Supreme Court found that in identifying YEP as a school in the special verdict form, “the trial court literally instructed the jury that YEP was a school.” *Id.* at 65. Such an instruction “amounted to an impermissible comment on the evidence in violation of art. IV, § 16.” *Id.* “By effectively removing a disputed issue of fact from the jury’s consideration, the special verdict form relieved the State of its burden to prove all elements of the sentence enhancement statute.” *Id.*

Similarly, in *Levy*, the Court found that a jury instruction referring to as fact elements that the State had to prove constituted an impermissible comment on the evidence. 156 Wn.2d at 721-23. In *Levy*, the court instructed the jury that the apartment in question was a building and that the crowbar in question was a deadly weapon, both of which were elements the State was required to prove. The Court held such instructions were impermissible judicial comments on the evidence which

improperly suggested to the jury that the apartment was a building and the crowbar was a weapon as a matter of law.

Here, as in *Levy*, the court instructed the jury the objects in question were firearms and thereby removed the factual determination of that element from the jury's consideration. The court should have instructed the jury the State was required to prove beyond a reasonable doubt the objects identified in Instruction No. 2 constituted firearms. It should have instructed that the State needed to prove not only that Ms. Stewart possessed the object, but that the object was a firearm. Here, the court essentially told the jury each object was a firearm and made the question only whether or not Ms. Stewart possessed it.

Much as *Becker* held the verdict form "impermissibly commented on the evidence by removing an element of the charge from the jury's consideration, i.e., whether YEP is a school," here the court's instructions impermissibly commented on the evidence by removing an element of the charge from the jury's consideration, i.e., whether the objects itemized in the instructions are firearms. *Becker*, 132 Wn.2d at 60. This left the jury to decide only whether Ms. Stewart possessed the object itemized in each count, not whether each object was, in fact, a firearm. *See also State v. Brush*, 183 Wn.2d 550, 553-57, 353 P.3d 213 (2015) (holding court "essentially resolved a factual question for the jury and thereby constituted

an improper comment on the evidence” where it defined “prolonged period of time” to “essentially resolved a contested factual issue” and “effectively relieved the prosecution of its burden of establishing an element.”).

Much like a crowbar is only a deadly weapon if the State can prove it was used in a way that meets the statutory definition, an object is only a firearm if it “may be fired” as required in the statutory definition. *See Levy*, 156 Wn.2d at 721-23. By referring to the objects in Instruction No. 2 as firearms by their make, model, and serial numbers, and by incorporating by reference Instruction No. 2 into Instruction Nos. 4-14, the court impermissibly commented to the jury they need not consider whether the State proved these objects met the definition of firearm under the statute as defined in Instruction No. 18. CP 56-61, 62. Rather than simply copy the language from the information, the court could have referred to the objects by their exhibit numbers.

c. The jury instructions prejudiced Ms. Stewart.

The State bears the burden of proving judicial comments on the evidence were harmless. *Levy*, 156 Wn.2d at 725. They cannot sustain their burden here, where Ms. Stewart specifically contested the very issue on which the court commented: whether the objects in question met the statutory definition of firearm.

First, the objects' owner testified that one of them did not fire and he did not know if another one fired. 8/31/17 RP 229-32, 244. Second, the State highlighted the issue in closing arguments by explaining the element of "firearm" and the definition of "may be fired" to the jury. The prosecutor also noted he dismissed two counts relating to one of the objects that could not meet the statutory definition. 9/1/17 RP 27-28. In doing so, the prosecutor implied that if the objects were not firearms, the State would dismiss them outright. Third, defense counsel moved to dismiss counts relating to three of the objects for this very reason – the fact that some of the objects were not capable of firing and, therefore, did not meet the firearm element of the charged offenses. 8/31/17 RP 253-57. Against this backdrop, the State cannot prove the court's instructions containing the impermissible comments lacked prejudice.

In *Levy*, although the Court found the instructions qualified as impermissible comments on the evidence, it declined to find prejudice because the defendant never challenged the elements on which the court impermissibly commented and no reasonable person could conclude to the contrary. *Levy*, 156 Wn.2d at 726-27. Here, the issue of whether or not two of the objects qualified as firearms under the statutory definition was at the center of the case. The State cannot affirmatively show no prejudice resulted.

The jury instructions identified each object as a firearm by including a description of shotgun or rifle and a make, model, and sometimes serial number for each object. CP 56-57, 66-71. This factual explanation told the jury the objects were firearms and revoked from their consideration an element the State was required to prove beyond a reasonable doubt. Therefore, the jury instructions constituted an improper comment on the evidence. This Court should reverse and remand for retrial with proper jury instructions.

4. The police lacked probable cause to search the car; therefore, the court erred in denying the motion to suppress items recovered from the search.

The court erred in denying the motion to suppress the evidence recovered from the car.⁹ The affidavits in support of the search warrants did not establish a reasonable belief the car contained evidence of a crime. Without a nexus between the location to be searched and criminality, the search warrants were not based on probable cause. Because the police had no probable cause to search the car, the court erred in denying Ms. Stewart's motion to suppress the items recovered from the car pursuant to the search warrants. Therefore, this Court must reverse the convictions on

⁹ The chart at Section D *supra* summarizes which items formed the basis for which counts and from where they were recovered.

counts 5, 6, 7, 11, 12, and 13, and remand with a directive to suppress and for resentencing.

a. Courts require probable cause to issue search warrants.

Courts may only issue search warrants upon probable cause. U.S. Const. amends. 4, 14; Const. art. I, § 7; CrR 2.3(c); *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause requires the existence of facts “sufficient to establish a reasonable inference that criminal activity is occurring or that contraband exists at a certain location.” *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). In addition, “[P]robable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.” *Thein*, 138 Wn.2d at 140 (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). This nexus must be “established by specific facts.” *Id.* at 145. Absent a specific factual basis to believe that evidence of criminal activity can be found in the place to be searched, an application is insufficient as a matter of law. *Id.* at 147.

Whether a search warrant is based on probable cause is a question of law appellate courts review de novo. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

b. The affidavits fail to establish a nexus between the criminality and the place to be searched.

In this case, the affidavits established no nexus between the items to be seized (firearms) and the place to be searched (the car). The court erred in its conclusion of law to the contrary and in denying the motion to suppress.¹⁰ Ms. Stewart properly preserved this error. *See* Defense Motion to Suppress (CP 97-99); Suppression Hearing (8/17/17 RP 4-16).

The court issued two search warrants in the case based on two affidavits from Deputy Logan. CP 87-96. Each search warrant authorized the search of the same two places: a bedroom and a car. CP 90, 95. In the first warrant affidavit, Deputy Logan swore he believed “[f]irearms, long rifles, shotguns, pistols, [and] ammunition” were located in a bedroom and a car parked in front of the house. CP 87-89. Deputy Logan’s stated reasons for this belief included that he observed four guns in what other residents of the house told him was Ms. Stewart’s room, that two other residents of the house denied knowledge of the guns, and that he observed “an unfired 22 caliber bullet in the gravel near the driver’s side” of a car he was told was Ms. Stewart’s. CP 88. Based on this affidavit, a

¹⁰ The court did not issue written findings of fact or conclusions of law as required by CrR 3.6(b). The State relied on and the court decided the motion to suppress solely on the basis of the search warrant affidavits. 8/17/17 RP 5, 15. Ms. Stewart does not challenge the facts contained in the affidavits but argues as a matter of law that the facts fail to establish a nexus between the car and the searched for contraband. Therefore, the court erred in denying the motion to suppress.

judge issued a search warrant authorizing the search of the bedroom and car and the seizure of “[f]irearms, long rifles, shotguns, pistols, ammunition, indicia.” CP 90-91. When Deputy Logan began searching the bedroom, he found suspected methamphetamine, drug paraphernalia, stolen property, and clothing related to a burglary. CP 93; 8/17/17 RP 167-77. Deputy Logan obtained a second search warrant based on this additional information. CP 92-96. The second warrant authorized the search of the same two locations – the bedroom and the car – and the seizure of the additionally requested items that Deputy Logan observed while executing the original warrant. CP 95-96.

Deputy Logan’s affidavits presented no reason to believe the car contained firearms, drugs, stolen property, or other evidence of criminality. Neither affidavit provides sufficient information to establish a reasonable inference that the car contained evidence of the suspected criminality. Absent such a nexus, no probable cause existed for the search of the car.

The affidavits do not assert, for example, Deputy Logan had knowledge Ms. Stewart used the car for criminal activity, that the car, like the room, contained contraband, or that the car contained evidence of either. There was no evidence the bullet found was of the same sort used by any of the firearms found in the house, nor was there evidence as to

how long the bullet had been there. Ms. Stewart did not admit she possessed firearms in the car, nor did anyone suggest that. In addition, because the police were not searching for a specific number of firearms or searching for firearms at all – they were executing unrelated warrants – they had no reason to believe additional firearms would be found.

Importantly, the issuing court had no information that the discovered bullet matched or was in any way connected to the firearms Deputy Logan discovered in the bedroom, a fact Deputy Logan acknowledged at trial. 8/17/17 RP 152. A bullet on the ground near a rural home indicates nothing criminal. Washington citizens enjoy a strong right to bear arms, and Washington law does not prohibit citizens from possessing bullets, even convicted felons. U.S. Const. amend. 2; Const. art. I, § 24. And, as Deputy Logan and the issuing court were aware, other individuals lived at that location, and nothing about the bullet suggested a connection to either Ms. Stewart or the guns found in the room. A random bullet discarded on the ground in a rural area is not so unique or uncommon that it provides a connection between a car in the area and criminal activity, particularly because a bullet itself is not illegal.

Viewing the believed firearms in the bedroom arguably gave Deputy Logan probable cause to search the bedroom. However, having probable cause to believe a person committed a crime in their house does

not automatically confer probable cause to search a vehicle arguably connected to them under the theory that they must have at some point used the car during their criminal activity. Particularity requires specific facts.

In *Thein*, the Court specifically rejected the generalized notion that drugs were likely to be found anywhere suspected drug dealers were. 138 Wn.2d at 147-49 (holding no probable cause to search house); *see also Goble*, 88 Wn. App. at 511-12 (finding no probable cause for issuance of warrant to search suspected drug dealer's house where affiant presented reasonable belief individual was drug dealer but no connection to house). The Court found, "Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law." *Thein*, 138 Wn.2d at 147.

Here, there was no substantial probability the items sought to be seized would be in the car. Nothing about the suspected criminal activity – possession of guns in the home – suggested evidence of that activity would be found in the car. For example, in *State v. Kuberka*, the court found the affidavit established a "a fair probability that evidence of a crime will be found in a particular place" where the police were looking for something in particular – fraudulently obtained traveler's checks or their receipts – based on the specific crime they were investigating – two

thefts. 35 Wn. App. 909, 912-13, 671 P.2d 260 (1983). Where the police did not find these specific things they sought on the person of the defendant, the court found it was reasonable to search the car given its proximity to one of the two crime scenes and the recentness of the crime.

Here, unlike *Kuberka*, the police were not looking for a particular number of firearms. In fact, they had no reason to believe more firearms were present anywhere. It was not a situation, for example, where they were specifically investigating the theft of ten firearms, had only found four, and had reason to believe the remaining firearms must be in the car. Deputy Logan happened upon the four guns in the bedroom in the course of attempting to execute unrelated warrants – he was not investigating a crime. CP 87-88. The police had no reason to believe more evidence of any crime existed.

c. The court erred in concluding the affidavits established probable cause and in denying the motion to suppress the items seized from the car.

Deputy Logan's affidavits did not establish a reasonable belief that the car he sought to search contained evidence of a crime; therefore, the judge issued the search warrants without probable cause. The trial court erred in denying Ms. Stewart's motion to suppress the evidence seized from the car including the three objects – Exhibit Nos. 29, 30, and 31 which resulted in convictions of counts 5, 6, 7, 11, 12, and 13, as well as

the other items seized from the car.¹¹ This Court must reverse those counts of conviction and remand with a directive to suppress and for resentencing.

5. The court erred in imposing the firearm offender registration requirement without considering the mandatory factors required by statute.

When sentencing defendants convicted of firearm offenses, courts must decide whether to impose felony firearm offender registration. RCW 9.41.330. The sentencing court has discretion to impose the registration or not. *Id.* Here the court abused its discretion by imposing the registration requirement but failing to consider all the factors required by statute.

The statute requires courts consider three mandatory factors in deciding whether to impose the registration requirement: (1) criminal history; (2) prior findings of not guilty by reason of insanity; and (3) “[e]vidence of . . . propensity for violence that would likely endanger persons.” RCW 9.41.330(2) (“In determining whether to require the person to register, the court **shall** consider all relevant factors, including, but not limited to . . .”) (emphasis added). While the statute permits courts

¹¹ Police also seized several tools and medical papers, admitted at trial as Exhibits 20-23 (8/17/17 RP 184-87), and an ammunition belt, admitted at trial as Exhibit 33 (8/17/17 RP 183). The State used these items to argue proof of the stolen element of possession of stolen firearms, as well as to connect Ms. Stewart to the car. 9/1/17 RP 39-41. Ms. Stewart moved to suppress all items recovered from the search of the car. CP 97.

to consider more than the itemized factors (“including, but not limited to”), it requires courts to consider at least those factors itemized in the statute (“shall”). *Id.*

The court imposed the felony firearm offender registration requirement. CP 11, 18, 21; 12/1/17 RP 100-04. However, the Judgment and Sentence reflects the court considered only some of the mandatory factors. The court only checked off “The Defendant’s criminal history” while leaving the other two mandatory factors blank. CP 11. Further, nothing in the sentencing hearing indicates the court otherwise considered the remaining two mandatory factors; rather, the court focused on Ms. Stewart’s criminal history and her conviction for unlawful possession. 12/1/17 RP 100-04. The court did not state that it considered the mandatory factors outlined in the statute and did not express concern over the number or types of guns, the manner in which they were possessed, or anything related to Ms. Stewart’s propensity for violence or lack thereof.

The court abused its discretion in ordering Ms. Stewart to register as a felony firearm offender without considering all of the mandatory factors required by statute. Therefore, this Court should strike the registration requirement.

6. Recent amendments to the legal financial obligation statutes require this Court strike the imposition of the criminal filing and DNA collection fees imposed against Ms. Stewart.

a. The court found Ms. Stewart indigent but imposed costs.

The court found Ms. Stewart indigent. 12/1/17 RP 99-100. The court imposed \$200 of court costs for the criminal filing fee pursuant to RCW 36.18.020(2). CP 14. The court also imposed a \$100 DNA collection fee pursuant to RCW 43.43.7541. CP 14. The legislature enacted the statute mandating collection of DNA samples from adults convicted of any felony in 2002. Laws of 2002, ch. 289, §2; *State v. Shelton*, 194 Wn. App. 660, 667, 378 P.3d 230 (2016) (noting amendments requiring all adults convicted of any felony provide DNA sample became effective in 2002). Ms. Stewart has previously been convicted of five felony offenses after the 2002 enactment date. CP 8-9. It stands to reason that the State has previously collected Ms. Stewart's DNA as a result of one of those prior qualifying convictions pursuant to the mandatory statute.

b. Recent amendments to the statutes prohibit imposition of criminal filing and DNA collection fees on defendants found indigent.

The legislature recently amended the statutes to more clearly prohibit courts from imposing costs if the defendant is indigent. Laws of

2018, ch. 269, § 6. In doing so, the legislature removed from a court's discretion the nebulous determination of whether a defendant "is or will be able to pay" costs and instead unequivocally mandated that if a person is indigent under the statute, courts may not impose costs. As amended, RCW 10.01.160(3) now reads, "The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)." Laws of 2018, ch. 269, § 6.

The legislature also amended the criminal filing fee statute, making such fees subject to RCW 10.01.160(3). Laws of 2018, ch. 269, § 17(2)(h) (amending RCW 36.18.020). RCW 36.18.020(2) now provides that upon conviction in a criminal case, "Clerks . . . shall collect the following fees" including "a fee of two hundred dollars, **except** this fee **shall not be imposed** on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c)." (emphasis added). Therefore, under the recently amended statute, if the court finds an individual indigent under RCW 10.101.010(3)(a)-(c), it may not impose the criminal filing fee under RCW 36.18.020. Laws of 2018, ch. 269, §§ 6, 17(2)(h).

Finally, the legislature amended the statute governing collection of the DNA fee. RCW 43.43.7541 requires the collection of a one hundred dollar fee for sentences imposed for every adult felony conviction. RCW 43.43.754(1)(a). Section 18 amended the statute to exempt the fee and

collection of DNA from people who already had their DNA collected due to a prior conviction and specifically identified the DNA collection fee as a legal financial obligation. RCW 43.43.7541.

Therefore, under the recently amended statutes, once a court determines a defendant is indigent, it may not impose either the criminal filing fee or the DNA collection fee where the defendant's DNA was already collected following sentencing for a prior specified offense. Applying the amended statutes, a court could not impose either fee on Ms. Stewart because the court found her to be indigent.

c. The recent amendments apply to Ms. Stewart.

Amendments to statutes generally apply prospectively unless the statute states otherwise. *See State v. Humphrey*, 139 Wn.2d 53, 57, 983 P.2d 1118 (1999); *State v. Blank*, 131 Wn.2d 230, 248, 930 P.2d 1213 (1997). This includes application “prospectively to all cases pending on direct review or not yet final.” *State v. Hanson*, 151 Wn.2d 783, 789, 91 P.3d 888 (2004); *Blank*, 131 Wn.2d at 249 (applying LFO amendments to case where conviction was still on appeal and therefore not final). Ms. Stewart's case is pending on direct appeal. Thus, this Court may apply the

amendments to RCW 10.01.160(3), 36.18.020, and 43.43.7541 prospectively to her appeal and strike the now-prohibited costs.¹²

Alternatively, the amendments are remedial in nature and therefore apply retroactively. Remedial amendments may be applied retroactively. *Blank*, 131 Wn.2d at 248-50; *see also State v. Pillatos*, 159 Wn.2d 459, 473, 150 P.3d 1130 (2007) (“Remedial statutes are an exception to the general rule that statutes operate prospectively.”). Remedial amendments are those that apply “to practice, procedure, or remedies” but do not “affect a substantive or vested right.” *Blank*, 131 Wn.2d at 248 (holding statute permitting appellate costs was procedural and did not affect substantive rights and, therefore, could be applied retroactively). Changes that reduce penalties are also remedial. *Compare State v. Heath*, 85 Wn.2d 196, 198, 532 P.2d 621 (1975) (holding statute permitting treatment is remedial, reduces penalty, and applies retroactively) *with Humphrey*, 139 Wn.2d at 62 (holding amendment increasing victim penalty assessment created new liabilities and was not remedial, and, therefore, could not apply retroactively).

¹² The Washington Supreme Court granted review in *State v. Ramirez*, 1 Wn. App.2d 1001 (2017) (not reported), to consider whether the recent amendments to the LFOs statutes apply to cases either pending on direct appeal or retrospectively. 190 Wn.2d 1001, 413 P.3d 13 (2018). The Court heard oral arguments on June 26, 2018, and the issue is pending. *State v. Ramirez*, 95249-3 (June 26, 2018), *video recording by* TVW, Washington State’s Public Affairs Network, <http://www.tvw.org>.

Here, the amendments to the LFO statutes prohibit the imposition of costs where courts deem defendants indigent. The statutes create no new liability and clarify that courts may not impose certain specified costs against indigent individuals. These amendments are remedial and should apply retroactively.

d. The Court should strike the imposition of the criminal filing and DNA collection fees.

The court found Ms. Stewart indigent but imposed the criminal filing fee. The court also imposed the DNA collection fee even though the State previously collected Ms. Stewart's DNA pursuant to sentencing for prior adult felony convictions. Under the recently amended statutes, courts may not impose either of these fees against indigent individuals. The recent amendments apply to Ms. Stewart because her case is still on direct appeal. Alternatively, the amendments are remedial and therefore apply retroactively. Therefore, this Court should strike the imposition of both the criminal filing and DNA collection fees.

F. CONCLUSION

The convictions related to the guns seized without probable cause to search the car must be reversed and dismissed, the convictions supported by insufficient evidence must be reversed and dismissed, and the constitutional errors require reversal and retrial of the remaining

convictions. Alternatively, the Court should strike the imposition of the firearm offender registration requirement and the criminal filing and DNA collection fees.

DATED this 14th day of August 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', written in a cursive style.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 51286-6-II
)	
TAMMY JO STEWART,)	
)	
APPELLANT.)	

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