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Division II
State of Washington
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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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. The State presented insufficient evidence that the objects admitted as Exhibit Nos. 25 and 31 were capable of firing as required by the statutory definition of firearm.

“Firearm” is an essential element of both unlawful possession of a firearm and possession of a stolen firearm. RCW 9.41.040(1)(a), 9A.56.310(1). To qualify as a firearm under these statutes, the State must present proof beyond a reasonable doubt that the object in question is “a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.” RCW 9.41.010(11). Here, the State presented insufficient evidence that the objects admitted as Exhibit Nos. 25 and 31 constituted firearms in that the State presented affirmative evidence suggesting the objects were not capable of firing. Brief of Appellant at 10-14.

The State does not dispute that the “may be fired” element of firearm requires proof that the object is operational or may be rendered operational with reasonable efforts within a reasonable time. However, it argues this requirement is limited to ruling out a single possibility: permanent inoperability. *See* Brief of Respondent at 3-4. While the State is correct that a temporarily malfunctioning or unloaded firearm may still constitute a firearm under the statutory definition, that fact fails to support the State’s claim that anything short of a permanently inoperable firearm

necessarily meets the statutory requirement of “may be fired.” *Padilla* and its progeny require more. *State v. Padilla*, 95 Wn. App. 531, 978 P.2d 1113 (1999).

In *Padilla* this Court found a disassembled gun was capable of firing and, therefore, met the statutory definition of firearm. 95 Wn. App. at 535. In that case, the court found the “may be fired” element satisfied through expert testimony explaining what one could do and how long it would take to reassemble the gun in question to make it capable of firing. *Id.* It took the State’s expert five seconds to reassemble the gun and render it operable. *Id.* at 533.

But the *Padilla* court did not hold that *only* a permanently inoperable gun could fail to meet the statutory element of “may be fired.” Rather, the court simply recognized that a permanently inoperable gun could not meet the definition of firearm because such a gun could never be capable of being fired. *Id.* at 535. Contrary to the State’s assertions, *Padilla* supports Ms. Stewart’s argument that, where evidence suggests the objects in question cannot be fired, testimony such as the efforts and time required to reassemble the object or otherwise return it to a condition in which it may fire a shot is required to satisfy this element.

In this case, the State’s own evidence casts doubt on the “may be fired” element. The owner testified one gun could not be fired (Exhibit

25) and the other he had never fired (Exhibit 31). *See, e.g.*, 8/31/17 RP 244 (Ex. 25: “right now it’s not fireable”); 8/31/17 RP 230 (Ex. 31: “I have never fired it”). In the face of such evidence questioning the guns’ abilities to fire, sufficient evidence fails to prove the guns “may be fired.”

Further, this is a case unlike *State v. Anderson* in which witnesses testified the guns were loaded and appeared to be real. 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). Under such circumstances, where no evidence suggests the guns were incapable of firing, no more may be required. But here, where the owner affirmatively indicated his doubt about whether the objects could be fired, and where the State offered nothing to counter this evidence or demonstrate reasonable efforts and time could render the objects capable of firing, the State failed to satisfy the “may be fired” element of firearm. Therefore, the State offered insufficient evidence to prove the objects in question were firearms, and counts related to those objects should be dismissed.

The State misses the point in attempting to distinguish between Exhibit Nos. 25 and 28 in explaining why they conceded Exhibit No. 28 failed to meet the statutory element of “may be fired” but submitted Exhibit No. 25 met this requirement. Whether the object in question could be “used in a threatening manner” is irrelevant to its identity as a firearm.

Brief of Respondent at 6-7. The manner in which the object is or may be used is not an element of the definition of firearm or either firearm offense. Rather, mere possession of a qualifying object is the requirement. RCW 9.41.040(1)(a), 9A.56.310(1). What matters is only whether the object is a firearm under the statute. And the statute defining firearm specifically requires the object “may be fired” to qualify as a firearm. RCW 9.41.010(11). Whether or not one could use the object in a threatening manner is not the issue in determining whether it meets the definition of firearm.

Likewise, the State’s explanation that the object in Exhibit No. 28 is old falls short. Brief of Respondent at 6. The owner testified a gunsmith may be able to make this old, disassembled object capable of firing. 8/31/17 RP 241. And yet, the State dismissed the charges related to this object. The age of the object does not defeat its classification as a firearm, nor, necessarily, does the fact it is in pieces. An old or a disassembled weapon may constitute a firearm but only if it can be reassembled and made capable of firing with reasonable time and effort. Neither the age of the object nor the fact it was not currently assembled can be the relevant difference.

Finally, the State argues a gun-in-fact, as opposed to other devices, will be presumed a firearm under the statute and the State need present no

additional testimony establishing its firing ability. Brief of Respondent at 7-8. Accurate or not, that is not the issue before this Court. As Ms. Stewart argued in her opening brief, this is not a case where the record merely shows the object was a gun-in-fact. Instead, the State introduced affirmative evidence disputing the ability of the objects in question to fire a projectile. In this case, where the State's own evidence, introduced through the owner of the objects, puts this essential element in question, more is required.

The issue is not whether the State must always introduce evidence of "may be fired." But here, where the State introduced evidence placing this essential element in doubt, additional evidence is required before this element is satisfied. Here, the State presented no such evidence, and the evidence viewed in the light most favorable to the State is that Exhibit Nos. 25 and 31 were not capable of firing. Therefore, the counts of conviction pertaining to these objects – counts 1, 7, and 13 – are based on insufficient evidence, and this Court should reverse and dismiss.

2. The State's improper and prejudicial arguments constitute prosecutorial misconduct and deprived Ms. Stewart of a fair trial.

The prosecutor committed misconduct and prejudiced Ms. Stewart when it argued to the jury that the legislature intended to encompass temporarily inoperable guns within the definition of firearm because it was

necessary to prevent “gang-banger[s] with a felony” from avoiding criminal liability. 9/1/17 RP 28. In addition, the prosecutor’s argument that the legislature wrote the statute “that way on purpose, because we don’t want a little minor thing like that to create escape routes for criminals” constitutes prejudicial misconduct. 9/1/17 RP 28. *See* Brief of Appellant at 15-22.

In attempting to defend the prosecutor’s closing argument comparing Ms. Stewart to a “gang-banger with a felony” and urging the jury not to “create escape routes for criminals,” the State focuses primarily on the prejudice prong, arguing no prejudice could have resulted from these comments because the jurors could not reasonably have believed the prosecutor was implying Ms. Stewart was a gang member. 9/1/17 RP 28.

First, the State appears to base this response on its own assumptions of who may or may not be a gang member. Whether the jurors shared the writing prosecutor’s same assumptions is certainly not established, nor does the State offer any evidence in the record to support its argument that gang members are strictly young urban men and therefore no reasonable juror would consider Ms. Stewart a gang-member. *See* Brief of Respondent at 11-12 (arguing reference “could have possibly been prejudicial” if case involved “a young man caught with a pistol in an urban environment” but could not be prejudicial here because “No rational

person could ever believe that the prosecutor was implying the Defendant . . . a middle aged woman . . . in a remote rural area . . . was a ‘gang-banger’”). Simply because Ms. Stewart does not fit the State’s image of a stereotypical “gang-banger” does not mean its example comparing her to a “gang-banger” did not create such an image for the jury.

Second, to prejudice Ms. Stewart, the State need not have accused Ms. Stewart of being a gang member herself (although that is certainly one way prejudice could be established). Rather, whether the jury understood (reasonably or not) the State’s reference to gang-bangers and criminals to be a reference to Ms. Stewart, the reference was irrelevant, improper, and prejudicial. The prosecutor’s comments are certainly improper and prejudicial to the extent they had the ability to persuade the jury to believe Ms. Stewart herself was a “gang-banger.” But even if they did not, the State also committed prejudicial misconduct by comparing Ms. Stewart’s charged possession to possession by a “gang-banger” and by warning the jury of the parade of horrors that will befall society. The State’s argument informed the jury that, unless it accepted an interpretation of “may be fired” to include the objects Ms. Stewart possessed, not only would Ms. Stewart get off on a technicality but it would “create escape routes for criminals.” The prosecutor’s argument suggested Ms. Stewart’s case and the jury’s verdict were bigger than Ms. Stewart and was a

deliberate appeal to the passions and prejudice of the jury to protect society from other crime in general by invoking the specter of gang-banging criminals.

In addition to disputing the resulting prejudice, the State argues the comments on gang-bangers and criminals are not improper because they are consistent with *Anderson*, 94 Wn. App. 151. Brief of Respondent at 11. *Anderson* is inapposite. *Anderson* is a statutory interpretation case, not a case outlining permissible arguments to the jury. *Anderson* did not consider the permissible bounds of a prosecutor's explanation to the jury.

Further, as explained in Ms. Stewart's Opening Brief, the legislative intent in defining firearm is not relevant to the jury's consideration of whether the State proved all of the essential elements. Brief of Appellant at 19. The fact that *Anderson* contains statements outlining the legislative history and intent used by the court to interpret the meaning of the element does not mean it offers a guide of permissible statements for the purposes of closing arguments.

No legitimate purpose supports the prosecutor's inflammatory and impermissible comments. They serve only to inflame the passions and invoke the prejudices of the jury. The comments also directly address a hotly contested issue and are so flagrant and ill intentioned as to establish

prejudice. The comments deprived Ms. Stewart of a fair trial. This Court should reverse.

3. The court impermissibly commented on the evidence in the jury instructions pertaining to the firearm offenses.

The State argues the court's jury instructions including the make, model, and sometimes serial number of the specific objects were not a comment on the evidence because the to convict instructions themselves did not contain the descriptions of the specific objects and because the court needed to refer to the specific objects in order to avoid confusion. The State is wrong on both claims.

First, the State's response that the to-convict instructions did not include the descriptions of the specific objects is misleading. Brief of Respondent at 15. Each to-convict jury instruction includes, in its very language, reference to the jury instruction containing a description of the specific objects. Each to-convict instruction contains the phrase, "To convict the Defendant of the crime . . . as charged in Count 1." CP 57-61. And Jury Instruction No. 2 itemized every single count of the information, including a description of the make, model, and sometimes serial number of each specific object. CP 56-57. Read together, the to-convict instructions directly and explicitly incorporated by reference the

instructions containing the specific objects' descriptions. *See* Brief of Appellant at 23-25.

Second, Ms. Stewart agrees the multiple objects and multiple charges stemming from the multiple objects offers the potential for confusion. However, this potential for confusion does not permit a judicial comment on the evidence. As argued in her opening brief, one permissible alternative would have been to refer to the specific objects by exhibit number. Instead, by referring to the specific objects as shotguns and rifles, the instruction eliminated from the jury's consideration whether the objects possessed qualified as firearms under the statute and instead made the only issue whether the objects met the definition of possession.

Courts must presume prejudice from judicial comments on the evidence. *State v. Lampshire*, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). Reviewing courts must reverse the conviction and remand for a new trial unless the State affirmatively proves no error resulted from judicial comments on the evidence. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006); *State v. Bogner*, 62 Wn.2d 247, 256, 382 P.2d 254 (1963).

Here, where the defense consistently and aggressively challenged this element – through motions to dismiss and in closing argument – the court's impermissible action in directly commenting on this evidence and

instructing the jury in a way that removed this factual issue from their consideration prejudiced Ms. Stewart. The State fails to rebut the presumption of prejudice. Therefore, this Court should reverse and remand.

4. Where there was no nexus between the criminality and the location to be searched, the police lacked probable cause to search the car, and the items recovered from the search must be suppressed.

Police recovered three of the guns from a search of a car pursuant to a search warrant. However, the search warrant affidavits presented no reason to believe the car contained firearms, drugs, stolen property, or evidence of criminality. Therefore, the police lacked probable cause to search the car, and the court erred in denying the motion to suppress the objects recovered from the car pursuant to the search warrant. Brief of Appellant at 30-37.

The State argues the bullet police found on the ground near the car was “a bread crumb” justifying the search because “it was reasonable to assume the four rifles [police] saw in the Defendant’s room were transported there *somehow*.” Brief of Respondent at 20. Under the State’s logic, any time any contraband or evidence of a crime is found in a house, probable cause would exist to search the owner’s car because the owner

must have transported the contraband or evidence to the house somehow.

Surely this is not what particularized suspicion means.

This case lacks the nexus between the item found (the bullet) and the location searched (the car) that is present in other cases such as *State v. Kuberka*, 35 Wn. App. 909, 671 P.2d 260 (1983). In *Kuberka*, the defendant had a set of car keys in his pocket, and the police were searching for a specific stolen check known to exist. *Id.* at 913.

Therefore, there was a connection between the physical evidence (the key in the defendant's pocket) and that particular defendant, as well as the location searched (the car). Here, conversely, there is no connection between the physical evidence (the bullet on the ground) and the particular defendant (Ms. Stewart) or the location search (the car). Further, unlike *Kuberka*, the police had no reason to believe additional firearms would be found anywhere, much less in the car.

For all these reasons, the police lacked probable cause to search the car, and the court erred in denying the motion to suppress the evidence recovered from the car. Therefore, counts 5-7 and 11-13 should be dismissed.

5. The court erred when it imposed the firearm offender registration requirement without following the mandatory statutory scheme.

In sentencing Ms. Stewart, the court imposed the firearm offender registration requirement without complying with the mandatory statutory scheme. CP 11, 18, 21; 12/1/17 RP 100-04. The plain language of the statute requires the court to consider certain mandatory factors. RCW 9.41.330(2)(a)-(c) (“In determining whether to require the person to register, the court **shall consider** all relevant factors, **including** but not limited to . . .”) (emphasis added). By imposing the requirement without considering the itemized factors that, at minimum, the statute requires a court to consider, the court applied the wrong legal standard and abused its discretion. *See generally State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (applying wrong legal standard constitutes abuse of discretion).

The State confuses the fact that a trial court possesses the discretion to impose the firearm registration in circumstances where defendants meet the statutory requirements with a court’s obligation to only exercise that discretion in circumstances where the statutory requirement is met. Brief of Respondent at 21-23. The fact it is within a court’s discretion to impose the requirement does not mean a court may impose it whenever it wants. A court may only exercise its discretion in

circumstances where the statutory requirements are met. Likewise, the fact the statute permits courts to consider additional relevant factors does not relieve the court from the statutory requirement to consider the mandatory itemized factors.

The State argues the court's paramount consideration of Ms. Stewart's criminal history does not demonstrate the court disregarded the other factors. Ms. Stewart agrees. What demonstrates the court disregarded the necessary factors is the court's failure to find those factors or consider them, either in the written judgment and sentence, in the oral rulings, or in any other way. Because the court failed to consider the factors mandated by statute, the court applied the wrong legal standard and abused its discretion. Therefore, the imposition of the firearm offender registration requirement should be reversed.

F. CONCLUSION

For all these reasons, and the reasons presented in her Opening Brief, Ms. Stewart requests this Court reverse and dismiss counts 1, 7, and 13 for insufficient evidence, and reverse and dismiss counts 5-7 and 11-13 because the police seized the guns without probable cause to search the car. In addition, the State's prosecutorial misconduct in closing argument and the court's impermissible comment on the evidence in the jury instruction both create prejudicial constitutional error and require reversal

of the convictions on all counts and remand for a new trial. Finally, this Court should strike the imposition of the firearm offender registration requirement because the court failed to follow the mandatory statutory scheme.

DATED this 31st day of January 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', with a long horizontal flourish extending to the right.

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

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

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