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Division II
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NO. 51286-6-II

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

STATE OF WASHINGTON,
Respondent,

v.

TAMMY JO STEWART,
Appellant.

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

THE HONORABLE MICHAEL SPENCER, JUDGE PRO TEM

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

1. **The firearms in question were real guns, and the evidence was sufficient for the jury to conclude they were "firearms" as defined by statute.**

2. **The prosecutor's remarks were consistent with case law, and so dissimilar to the case at bar that they could not have possibly been prejudicial.**

3. **The jury instructions did not comment on the evidence, as the description of the firearms was only included in a section informing the jury of what the Defendant had been charged with.**

4. **The court properly denied the defense motion to suppress the evidence because physical evidence led Deputy Logan to believe there was evidence in the Defendant's car.**

5. **The trial court properly exercised its broad discretion in imposing the felony firearm registration requirement.**

6. **All discretionary legal financial obligations have been stricken since the brief of appellant was filed.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

The State is satisfied with the Defendant's recitation of the case.

ARGUMENT

1. The evidence was sufficient to prove that the SKS rifle and the 12-gauge shotgun were firearms.

The Defendant first challenges the jury's finding that two of the guns, a 12 gauge shotgun and an SKS rifle, admitted as exhibits nos. 31 and 25, respectively, were "firearms." The Defendant claims insufficient evidence to find them "firearms" as defined by statute because the 12 gauge's trigger would not lock and the owner had never had occasion to fire the SKS. However, the jury made its decision after being correctly instructed by the court, after both sides argued operability, and after examining the actual weapons, which were admitted as exhibits.

Standard of review for sufficiency of the evidence challenges.

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068, 1074 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220–22, 616 P.2d 628 (1980).) "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id*.

(citing *State v. Partin,* 88 Wn.2d 899, 906–07, 567 P.2d 1136 (1977).) "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id*. (citing *State v. Theroff,* 25 Wash.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).) Appellate courts "defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence." *State v. Homan*, 181 Wn. 2d 102, 106, 330 P.3d 182, 185 (2014) (citing *State v. Jackson,* 129 Wash.App. 95, 109, 117 P.3d 1182 (2005).)

Exhibit No. 31, an SKS rifle, was a brand-new firearm.

There is no reason to believe that the SKS rifle admitted as exhibit no. 31 is inoperable. The owner, Michael Hume Sr., testified that the weapon came "right off the showroom..." to his gun safe, and that he had no reason to believe it wouldn't fire. 8/31/2018 RP at 232. Mr. Hume went on to explain that he takes precautions when storing his firearms, making sure that the weight is off the firing pin before putting the gun away, implying he had operated this rifle to some extent. *Id*. This testimony was unchallenged. *See* 8/31/20018 RP at 247. Given this, the jury were certainly entitled to believe that, as essentially a brand-new firearm, the SKS would fire as Mr. Hume Sr. said he believed it would.

Because the SKS was essentially a new firearm, right off the showroom floor, the jury's decision that this was a "firearm" as defined by statute was supported by ample evidence. This court should leave that finding undisturbed.

Malfunctioning guns, like unloaded guns, are still "firearms."

A firearm is "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(11). A malfunctioning firearm that can be fixed is a "firearm" under the statutes. *State v. Jussila*, 197 Wn. App. 908, 392 P.3d 1108, 1120 (2017), *review denied*, 428 P.3d 1188 (Wash. 2018) (citing *State v. Faust*, 93 Wash.App. 373, 381, 967 P.2d 1284 (1998).)

However, "a gun rendered permanently inoperable is not a firearm under the statutory definition here at issue because it is not ever capable of being fired." *State v. Padilla*, 95 Wn. App. 531, 535, 978 P.2d 1113, 1115 (1999). Likewise, a nondeadly toy gun is not a "firearm" as defined by state law. *State v. Jussila*, 197 Wash.App. 908, 392 P.3d 1108 (2017) (citing *State v. Pam*, 98 Wn.2d at 753, 659 P.2d 454 and *State v. Tongate*, 93 Wn.2d 751, 755, 613 P.2d 121 (1980).

As Division 1 of this court has observed,

> It 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.

State v. Anderson, 94 Wn.App 151, 162, 91 P.2d 585 (1999) (overruled on other grounds by *State v. Anderson*, 141 Wn.2d 357, 5 P.3d 1247 (2000).).

Exhibit No. 25, a 12 gauge shotgun, was only missing a part, as opposed to exhibit no. 28, which was in pieces.

As for the 12 gauge shotgun that was admitted as exhibit no. 25, Mr. Hume testified that a part had fallen out of it while his son was working on it, and as a result the trigger would not lock into place. *Id*. at 244. He likened it to a spring falling out of a fishing reel. *Id*. However, "[o]perability is not required for a gun to be a 'firearm.'" *State v. Wade*, 133 Wn. App. 855, 873, 138 P.3d 168, 176 (2006). It was indisputably a shotgun, not a toy or a gun-like object. Apparently, all the weapon needed to be operable is a missing part. Again, there is no reason to believe the weapon was <u>permanently</u> inoperable.

Because these guns were real firearms, and there is no evidence to suggest that they were permanently inoperable, this court should find that the evidence was sufficient to uphold the jury's finding, and leave their decision undisturbed.

Evidence regarding repairing a firearm is not required.

The Defendant argues that testimony regarding how quickly the firearm can be repaired is required to establish that a malfunctioning shotgun is a "firearm," and cites to *State v. Padilla* for this proposition. But *Padilla* simply held that the evidence in that case was sufficient in that case; it did not establish a minimum standard.

In *Padilla*, the Defendant was accused of unlawfully possessing a pistol that had been recovered in three pieces. *Id* at 533. The arresting officer testified that it had been assembled in the defendant's hand, but the defendant claimed that it was in three pieces when it was handed to him. *Id*. at 532. A police firearms instructor later testified that the firearm could be reassembled in seconds. *Id*. at 533. The jury could not decide whether the firearm was assembled when the Defendant possessed it or not, but found that it was a firearm. *Id*.

Padilla did not hold that testimony regarding the effort required to render the weapon fully functional was necessary; it simply held that the evidence was sufficient to uphold the jury's verdict, regardless of whether the defendant possessed the firearm while it was assembled or not. *Id*. at 536.

The gun that formed the basis for the dismissed count was in pieces,

The Defendant, in her brief, calls it a "mystery" what the difference between exhibit no. 28, the double barreled shotgun that formed the basis for dismissed counts 4 and 10, and no. 25, the 12 gauge with a missing part. The State invites this court to view the photographs of these exhibits to solve this conundrum.[1] Exhibit no. 28, a shotgun, is in pieces,[2] and rusted to the point that the metal is nearly indistinguishable from the wooden stock. *See* Exhibit 39. Mr. Hume Sr., who was 74 when he testified, told the jury that the shotgun belonged to his great-grandfather, and he received it from his grandfather when he was 14, implying that it is much more than 60 years old. 8/31/2017 RP at 241. Further, Mr. Hume testified that "it has never fired" and, even though he believed it could be repaired, he would be afraid to shoot modern ammunition in it. *Id*.

This is clearly different from exhibit no. 25, which is an intact weapon, capable of being used in a threatening manner. The jury was able to examine this shotgun in the jury room, after hearing Mr. Hume testify about it, and their decision was that it was a firearm as defined by their

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[1] The actual firearms were substituted after the trial by order of the court for digital photographs, admitted on a CD as Exhibit #39. CP at 116-117.

[2] Also *see* 8/31/2017 RP at 255.

instructions. That decision was supported by the evidence, and should be upheld.

The Defendant correctly points out that the definition of "firearm" has been the subject of much litigation. Most cases involving a gun-in-fact, i.e. a manufactured firearm, typically hold that the evidence is sufficient to uphold a jury's finding. The exception appears to be *State v. Pam*, where the object alleged to be a firearm fell apart as the defendant fled, and all that was admitted into evidence was described as "the wooden forestock of what appeared to be a shotgun." *Pam*, 98 Wn.2d 748, 755-56, 659 P.2d 454 (1983) (overruled on other grounds by *State v. Brown*, 113 Wn.2d 520, 782 P.2d1013 (1989).) In this case, exhibit no. 25 is more similar to what was entered into evidence in *Pam*, explaining why that charge was dismissed.

The State argues that the body of case law on the definition of "firearm" indicates that a gun-in-fact will be presumed a "firearm" unless it is so far beyond repair that it appears to no longer be operable when examined, or has obviously been rendered useless.

In the instant case, the jury was properly instructed on the definition of what constituted a "firearm" under state law. Much of both the State and the defense's closing argument focused on whether the SKS

and the 12-gauge were "firearms" under the definition. After that argument, the jury were given the guns, which were admitted exhibits, and decided that they were firearms based upon the law they were given, the arguments, and their examination of the exhibits. This court should not second-guess that determination, but should instead affirm the jury's decision and uphold the conviction.

2. The prosecutor's hypothetical examples were intended to contextualize the ambiguous definition of "firearm" and are consistent with case law.

The Defendant next claims, for the first time on appeal, that the term "gangbanger" is so prejudicial that its utterance demands an immediate reversal. No case holds as much. In the context of this case, which is completely dissimilar to any involving criminal youth gangs, the term was used in a hypothetical used to illustrate and contextualize the defnintion of "firearm," and no prejudice could reasonably have resulted.

Standard of review for prosecutorial misconduct.

"To prevail on a claim of prosecutorial misconduct, the defendant must establish 'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'" *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43, 46 (2011) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008).) To

establish prejudice, a defendant must "prove that "there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict.'" *Id*. (quoting *Magers*.)

"Allegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *State v. Russell*, 125 Wn.2d 24, 85–86, 882 P.2d 747, 785 (1994) (citing *State v. Graham*, 59 Wash.App. 418, 798 P.2d 314 (1990).) Even if statements of the prosecutor were improper, the remarks are not grounds for reversal "if they were invited or provoked by defense counsel and are in reply to his or her acts and statements." *Id*. (citing *State v. Dennison*, 72 Wn.2d 842, 849, 435 P.2d 526 (1967).)

Even if the statements were improper, they do not merit reversal.

Failure to object to a comment is a waiver of any error, "…unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Thorgerson*. (citing *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991).)

In this case the Defendant did not object below. Even if this court finds the term to constitute prosecutorial misconduct, it cannot rise to the

level of "flagrant and ill intentioned." The State asks this court to leave the judgment undisturbed.

No reasonable person would believe that the prosecutor was implying the Defendant was a gang member.

The portion of the argument in which the State said "gang-banger" involved whether the firearms in question were operable enough to be considered "firearms" under the definition of RCW 9.41.010(11). The passage in question is,

> 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 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.

9/1/2018 RP at 28 (emphasis added.) This argument was meant to illustrate the use of the word "may," which the courts have found to be ambiguous. *See State v. Faust*, 93 Wn. App. 373, 376, 967 P.2d 1284, 1286 (1998) (citing *State v. Sunich*, 76 Wash.App. 202, 884 P.2d 1 (1994) and *State v. Garrison*, 46 Wash.App. 52, 728 P.2d 1102 (1986).) This argument is essentially identical to the afore-mentioned sentence from *State v. Anderson*, *supra* where the court opined,

> It 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.

Anderson, 94 Wn.App 151, 162, 91 P.2d 585 (1999).

The prosecutor simply used himself as the example, and substituted "gang-banger" for "felon."

The prosecutor's use of "gang-banger" could have possibly been prejudicial had this been a case where the defendant was a young man caught with a pistol in an urban environment, because in such a case it might seem that the prosecutor was implying or inviting the jury to speculate that such a defendant is a member of a criminal street gang. But

the Defendant here is a middle aged woman caught with old hunting rifles in her bedroom in a remote, rural area. This case is as dissimilar to a case involving criminal youth gangs as can be. No rational person could ever believe that the prosecutor was implying that the Defendant was a "gangbanger." Rather, the prosecutor simply substituted "gang-banger" instead of "felon," which the Defendant is.

The Defendant, paradoxically, argues that because this case had nothing to do with criminal youth gangs, use of the term is somehow even more prejudicial (than it presumably would if it involved defendants who might appear to be members of a youth gang.)

Further, the prosecutor used himself as the example, not the Defendant, or even an unspecified person. Clearly, the Defendant herself was not implicated or disparaged by the example. It was simply an illustration of the *Anderson* court's point.

Simply saying "gang-banger" is not *per se* prejudicial, even though it could be so, in certain cases. This case is not one of those because it is not plausible that any juror thought the prosecutor was implying the Defendant was a "gang-banger."

If this court rules that such a term will warrant reversal whenever it is used, undoubtedly the court will next be asked to rule on the use of the

word “gangster.” Is it prejudicial? Or is it now too historical to be prejudicial, reminiscent of movies portraying 1930s bootleggers as folk heroes? What about “bank robber”? Are Bonnie and Clyde romantic enough figures to erase any undue prejudice from this term?

The arguments alleged to constitute misconduct were intended to illustrate the ambiguous definition and were consistent with *Anderson*. There was no possible prejudice to the jury. This court should reject the Defendant’s claim and uphold the jury’s verdict.

3. The jury instructions informed the jury of the allegations, but did not comment on the evidence.

The Defendant next assigns error to the court’s enumeration of the charges in the instructions, claiming that it constituted a comment on the evidence. But the instructions are clear that the enumeration the Defendant complains of is only an accusation, and not to be considered as evidence, and was drafted carefully to avoid being a comment on the evidence.

The instructions were drafted specifically to avoid a comment on the evidence.

Appellate courts “review challenged jury instructions de novo, examining the effect of a particular phrase in an instruction by considering the instructions as a whole and reading the challenged portions in the

context of all the instructions given." *State v. Gerdts*, 136 Wn. App. 720, 150 P.3d 627, 631 (2007) (citing *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996).)

At the time the instructions were given, the Defendant was charged with fourteen counts; six of them Unlawful Possession of a Firearm in the First Degree, and seven of them Possessing a Stolen Firearm. Clearly, linking each charge to a specific firearm was necessary, given how many identical charges there were.

Instruction No. 2 lists each charge, (identifying it as "charge,") then lists a description of the firearm that forms the basis of the charge. CP at 56-57. Instructions 4 – 15 then list what the jury was required to find to convict on that charge.[3] CP at 57 – 61.

In *State v. Levy* the Supreme Court of Washington held that the trial court made an impermissible comment on the evidence by specifying in the "to-convict" instruction that a building was a building and a crowbar or a .38 was a deadly weapon. *Levy*, 156 Wn.2d 709, 132 P.3d 1076 (2006). The instructions in *Levy* read,

[3] These instructions are commonly referred to the "to-convict" instruction, or the "elemental" instruction.

> (1) That on or about the 24th day of October, 2002, the defendant, or an accomplice, entered or remained unlawfully in a building, to-wit: the building of Kenya White, located at 711 W. Casino Rd., Everett, WA;
>
> ....
>
> (3) That in so entering or while in the dwelling or in immediate flight from the dwelling the defendant or an accomplice in the crime charged was armed with a deadly weapon, to-wit: a .38 revolver or a crowbar; and
>
> (4) That the acts occurred in the State of Washington.

Id. at 716. The instructions in this case are substantively dissimilar to the instructions in *Levy* because these instructions do not include a description of the firearms in the "to-convict" (or "elemental") instructions. CP at 57 – 61.

Instead, in this case, Instruction No. 1 instructs the jury that "a charge is only an accusation" and that "[t]he filing of a charge is not evidence that the charge is true."[4] CP at 55. Then, Instruction No. 2

[4] Instruction No. 1 also tells the jury that the order of the instructions is of no importance. CP at 56.

informs the jury that the following list are charges, then lists those charges with the firearms that form the basis for each. CP at 56 – 57.

Because instructions are read as a whole, these instructions correctly inform the jury that the charges are only accusations, what those accusations are, and what weapons correspond to those accusations. The "to-convict" or "elemental" instructions that becomes the law of the case,[5] do not mention the firearms' description, and therefore do not comment on the evidence.

Without specifying which firearm related to each charge there is a high probability, if not a certainty, that the jury would have been confused. The instructions had to specify which count related to which gun. The court's instructions did so in a way that did not comment on the evidence, and in no way was prejudicial to the Defendant. This court should find that there was no comment on the evidence, and uphold the convictions.

4. The trial court properly denied the motion to suppress evidence gleaned from the search warrant service on the Defendant's car.

The Defendant moved to suppress evidence seized from her car pursuant to a search warrant before trial, and the court denied the motion. She now asks this court to review that same warrant again, still citing to

[5] *See State v. Johnson*, 188 Wn.2d 742, 399 P.3d 507 (2017) (citing *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998.)

State v. Thein. But the trial court denied a motion to suppress on the same grounds raised here, and decided that there was probable cause to search the Defendant's car.

Standard of review for challenged search warrants.

"In determining whether probable cause exists to issue a search warrant, the magistrate must make a practical, common sense decision whether… there is a fair probability that evidence of a crime will be found in a particular place." *State v. Kuberka*, 35 Wn. App. 909, 912–13, 671 P.2d 260, 262 (1983). "The duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." *Id*. (*citing Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).)

Appellate courts accord great deference to the issuing magistrate. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). Any doubts concerning the existence of probable cause are resolved in favor of the warrant being valid. *Id*. at 108-09.

The warrant for the vehicle was based upon a physical clue linking the firearms to the vehicle.

As she did in the trial court, the Defendant claims there was no "nexus" between the firearms and the car, despite the fact that Deputy Logan found a bullet near the car in question. CP at 88.

As she did below, the Defendant relies upon *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582 (1999) for the proposition that no "nexus" existed between the car and the crimes the Defendant was suspected of. The Defendant seems to misunderstand *Thein*.

In *Thein*, the Defendant was convicted of possession of marijuana with intent to deliver and defrauding a public utility after the police searched his home and discovered a marijuana grow operation. *Thein* at 136. The affidavit for the search warrant "contained generalized statements of belief regarding the common habits of drug dealers." *Id*. At 138. For example, the officer said he knew from his training and experience that drug traffickers store a portion of their inventory, as well as paraphernalia and records, at their residences. *Id*. At 138-39. Therefore, the police believed that the defendant's residence should be searched. However, the Supreme Court found that the general statements regarding common habits of drug dealers did not establish probable cause, and reversed the lower court. *Id*. At 150.

The key difference in this case is that physical evidence led Deputy Logan to believe that there was evidence of the guns in the Defendant's vehicle: the unfired bullet. As the trial court observed when the Defendant attempted to have the evidence suppressed citing to *Thein*, "wouldn't the

corollary to that in this case be that since they found firearms in her bedroom, that they could… search the vehicle without any further proof? Because if she possessed firearms in her bedroom, she must possess firearms every other place that she occupies[?]" RP 8/17/2017 at 13. The Defendant's trial counsel allowed that was so. *Id*.

The Defendant claims that this case is dissimilar to *State v. Kuberka*. The State disagrees. In *State v. Kuberka*, the defendant obtained $500 in traveler's checks from a Longview bank under a false name. *Kuberka* at 913. About 45 minutes later, the defendant tried to obtain another $500 in traveler's checks from a Kelso bank using a different false name. *Id*. When the police caught him, the Defendant had a set of Chrysler car keys in his pocket that fit a car about two blocks from the Kelso bank. *Id*. Using this information, the police obtained a search warrant for the car. *Id*. At 910. The trial court denied a motion to suppress. *Id*. On appeal, this court found that there was a fair probability that evidence of the crime would be in the Chrysler. *Id*. At 913.

Like *Kuberka*, the police located a piece of physical evidence leading them to believe physical evidence was located in a car. In *Kuberka* it was a car key. In the instant case it was a bullet. In *Kuberka* the police assumed that the defendant had driven himself from one bank to

the other, and therefore reasoned that evidence would be found in his car. In this case, the bullet led Deputy Logan to believe that guns had been carried between the car and the Defendant's room, therefore leading him to believe that evidence of the guns would be found in the car. Although Deputy Logan did not know, at the time of the warrant, that the firearms had been stolen from another location, it was reasonable to assume that the four rifles he saw in the Defendant's room were transported there *somehow*.

Unlike the search warrant in *Thein*, Deputy Logan's affidavit contained no generalizations about the habits of felons who illegally possess firearms in their bedrooms in rural areas, or any generalizations at all. Deputy Logan's search warrant was based upon a piece of physical evidence; a bullet that was a bread crumb that led Deputy Logan to locate the second stash of Mr. Hume's purloined rifles.

The Defendant claims that it is not unusual to find unfired bullets in rural areas. There is no requirement that the police disprove such alternate theories in order to establish probable cause to search. Rather, this appears to be a generalized statement of belief about rural areas.

The bullet was a bread crumb, leading Deputy Logan from the Defendant's cache of firearms in her bedroom to the vehicle she had used

to transport them to her house. Probable cause existed to search the vehicle based on this bullet, and this court should uphold the trial court's decision to deny the motion to suppress.

5. The Court properly exercised its discretion in imposing the registration requirement.

The Defendant claims that the trial court abused its discretion in imposing a felony firearm registration requirement. But the court has considerable discretion in imposing the requirement, and need not expressly articulate its consideration of every factor when deciding whether to impose the registration requirement.

Imposition of the requirement is discretionary.

The trial court's decision to require felony firearm registration is discretionary. RCW 9.41.330. "A court abuses its discretion when an order is 'manifestly unreasonable or based on untenable grounds.'" *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009) (quoting *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).) An order is manifestly unreasonable or based on untenable grounds if it results from either applying the wrong legal standard, or is unsupported by the record. *Rafay*, 167 Wn.2d at 655. The use of the term "including, but not limited to" in the statute affords the

court latitude in the registration determination. *State v. Miller*, 195 Wash.App. 1026, 2016 WL 4087307 (2016), unpublished, citing *State ex rel. Graham v. Northshore Sch. Dist. No. 417*, 99 Wn.2d 232, 238, 662 P.2d 38 (1983).)

The Defendant claims that, because the court only checked one box out of three, indicating three factors for courts to consider in imposing the felony firearm registration, the trial court abused its discretion because consideration of all three factors is mandatory. However, RCW 9.41.330 does not require the sentencing court to expressly articulate its consideration of each factor. See *Miller*, *supra*, and RCW 9.41.330.

Further, the fact that the court found the Defendant's criminal history an overriding factor to consider in requiring the Defendant to register does not mean that the court did not consider the other factors. Initially, the court was not going to require the Defendant to register. 12/1/2018 RP at 98-99. After a brief recess, the court reconsidered, and decided to require the Defendant to register because of her criminal history. *Id*. at 102. The fact that the court considered this of paramount importance in requiring the registration requirement does not mean that all other factors were disregarded.

Trial courts have considerable latitude to impose the felony firearm registration requirement. The Defendant was caught with seven stolen firearms after having lost her right to possess firearms decades earlier. This court properly exercised its discretion in imposing the requirement on the Defendant, and the decision was far from "manifestly unreasonable." This court should uphold the trial court's decision.

6. All discretionary legal financial obligations have been stricken.

Since the Brief of Appellant was filed, the State agreed to strike all discretionary legal financial obligations, pursuant to Laws of 2018, ch. 269, § 17, *State v. Ramirez*, ____ Wn.2d _____, 426 P.3d 714 (Sept. 20, 2018) and RAP 7.2(i). An agreed order was entered on October 29, 2018. CP at _____. Therefore, this Court should not consider this issue, as it is moot.

CONCLUSION

A paramount issue in this case is whether two of the guns in this case were "firearms" as defined by statute. These were real guns, commercially manufactured weapons, one of which was "straight off the showroom floor" but had never been fired, and another of which was missing a part. The jury found, after being properly instructed, and

operability being argued, that these weapons were firearms as defined by law.

In that argument, the prosecutor used a hypothetical straight out of a published appellate court opinion. But instead of "felon" he said "gang-banger" and invited the jury to imagine he, not the Defendant, was that "gang-banger." That example was to illustrate the principle of law expressed in *State v. Anderson*, and could not have conceivably prejudiced a defendant whose situation was so dissimilar to a gang case.

The trial court and the State worked together, with the limitations of *State v. Levy* in mind, to craft complicated jury instructions that delineated fourteen counts, including seven counts of Unlawful Possession of a Firearm in the First Degree and six counts of Possessing a Stolen Firearm. In the end, the jury was properly instructed, and there was no comment on the evidence.

Three of the firearms in question were recovered from a search of the Defendant's car pursuant to a search warrant. Two judges have already found that probable cause existed to search the vehicle, and this court should uphold their decisions.

After the Defendant was convicted, the court properly exercised its discretion and ordered the Defendant to register as a felony firearm

offender. This was not an abuse of discretion simply because some boxes on a standardized form were not ticked. The law is not ruled by forms.

Finally, all discretionary legal financial obligations have been cancelled since sentencing, so that issue is now moot.

This court should uphold the jury's finding, the trial court's decisions, and affirm the judgment in this case.

DATED this _29th_ day of November, 2018.

Respectfully Submitted,

BY: _____
JASON F. WALKER
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WSBA # 44358

GRAYS HARBOR PROSECUTING ATTORNEY

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