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Court of Appeals
Division II
State of Washington
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NO. 51531-8-II

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

STATE OF WASHINGTON,
Respondent,

v.

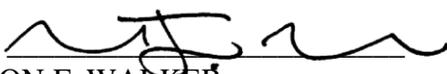
MICHAEL SHAWN OLSEN,
Appellant.

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

THE HONORABLE F. MARK McCAULEY, JUDGE

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

1. **A trial court has broad discretion to order a defendant to register as a felony firearm offender, and the trial court here did not abuse that discretion.**
2. **The alleged improper statements were consistent with case law, a response to the defense, and are not so prejudicial to require reversal.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

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

ARGUMENT

1. **The Court did not abuse its discretion in requiring the Defendant to register as a felony firearm offender.**

The trial court properly exercised its broad discretion in requiring the Defendant to register as a felony firearm offender.

Standard of review.

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.

A sentencing court has broad discretion to order the registration requirement.

The crime the Defendant was convicted of, Unlawful Possession of a Firearm in the First Degree, RCW 9.41.040(1)(b), is a felony firearm offense because any violation of Chapter 9.41 RCW is a felony firearm offense. RCW 9.41.010(1)(a).

Under the statutory scheme, the court is to...

...consider all relevant factors including, but not limited to:

- (a) The person's criminal history;
- (b) Whether the person has previously been found not guilty by reason of insanity of any offense in this state or elsewhere; and
- (c) Evidence of the person's propensity for violence that would likely endanger persons.

RCW 9.41.330(2) (emphasis added.) The fact that the legislature made the enumerated factors non-exclusive indicates that the court's discretion is extremely broad.

The Defendant argues that the court abused its discretion because of his youth at the time of the Defendant's sex offense, the age of the violent offense, and the lack of any prior firearm offenses. The statute

does not require the court to consider any of these factors, so there is no evidence the court imposed the wrong legal standard. Rather, this is an argument against registration, but does not show that the court abused its discretion.

The Defendant also argues that the State never disproved his claim that he thought the revolver was a BB gun, or that it actually belonged to Jessie Cude. These arguments, even if believed, are arguments against registration, but does not mean that the reasons the court decided to impose the requirement are not supported by the record.

The Defendant has been convicted of a serious sex offense, a violent offense, and a long list of criminal convictions resulting in an offender score of 8. CP at 60-61. The Defendant was found in contempt of court at his first appearance on this charge. RP 6/20/2017 at 2. The Defendant has been a convicted felon for most of his life. He knows it is his obligation to avoid firearms, and it would be exceedingly reckless for him to walk around Aberdeen with anything that even resembles a firearm. The Defendant demonstrates a continuing disdain for his legal obligations, both by his continuous failures to register as a sex offender and his possession of a firearm.

The court made its decision based upon the instant offense and the Defendant's history. It was not manifestly unreasonable or based on untenable grounds to require the Defendant to register as a firearm offender. This court should leave the trial court's decision undisturbed.

2. The prosecutor made arguments that were in response to the defense and consistent with case law.

The Defendant next complains of the prosecutor's closing argument, claiming it constitutes misconduct. The entire defense in this case was that the Ruger revolver might not be a "firearm" as defined by law. The arguments the Defendant complains of were designed to explain and contextualize the words "may be fired" in the definition of "firearm," and why a conviction was possible, even though the firearm was never recovered. But even assuming the alleged improper arguments were improper, they do not rise to a level that would require reversal.

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 Wash.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*.)

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.” *Id.* (citing *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991).) In this case, the Defendant did not object to the allegedly improper arguments at trial. 11/1/17 RP at 147 & 159.

“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 is statements of the prosecutor are 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 Wash.2d 842, 849, 435 P.2d 526 (1967).)

The arguments of the prosecutor were in response to the defense, and were not so prejudicial as to warrant reversal.

In Washington, 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).¹ That definition is ambiguous. *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).) However,

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 Wash. App 151, 162 91 P.2d 585 (1999).

There was a lengthy discussion between the parties as to whether to give additional instructions on the definition of “firearm” to clarify the issue of operability. 11/1/2017 RP at 101-10; *and see* CP at 42-43.

However, the trial court was concerned that additional instructions might be construed as comments of the evidence, and decided that only the standard WPIC instruction would be given, and that “all of the arguments could be made” by the parties. 11/1/2017 at 114-15.

Since the defense’s argument to the jury was that lack of definitive proof of operability could render the revolver not a firearm, the State was

¹ A subsequent amendment, not relevant here, excludes flare guns and powder-actuated constructions devices from the definition.

entitled to respond. *See State v. Calvin*, 176 Wn. App. 1, 16, 316 P.3d 496, 503 (2013), *as amended on reconsideration* (Oct. 22, 2013), *review granted in part, cause remanded*, 183 Wn.2d 1013, 353 P.3d 640 (2015). The arguments alleged to constitute misconduct were designed to explain and contextualize the phrase “may be fired.”

When the prosecutor argued that firearms encountered in real-life situations are a concern, operable or not, he then argued that the phrase “may be fired” was to make sure a firearm is still legally a firearm regardless of whether “[t]he firing [pin]² [is] perfectly working when the person gets caught.” RP 11/1/2017 at 145. This is consistent with *Faust*.

In rebuttal, the prosecutor argued,

How many pistols, guns, firearms, you think have been tossed over the Chehalis River bridge? The Hoquiam River bridge? Over on the Wishkah? Somebody committed a crime with a gun and they needed to get rid of it. Do you really think that people who wrote these laws wanted all of those people to get away with it just because they got rid of that gun so well that nobody could ever find it? Of course not.

The Defendant says this example is dissimilar to the case at bar, and prejudicial, without explaining how. The firearm in this case was

² The Report of Proceedings transcribe this word as “firing *arm*, clearly either a mis-transcription or a misstatement, as the discussions all concerned the firing *pin*.”

never found. The example of throwing it off a bridge is arguably less prejudicial than the Defendant transferring it to Jessie Cude, a person who lives in a tent down by the river who is ineligible to possess firearms. *See* RP 10/31/2017 at 56.

The State's example was intended to illustrate why recovery of the firearm was not a bar to convicting the Defendant, since the defense had raised this in closing argument. RP 11/1/2017 at 155. Again, the State was entitled to respond to the defense, and so the argument was not improper.

Even assuming, *arguendo*, that the arguments highlighted were improper, the Defendant fails to meet his burden of showing "an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." The evidence was overwhelming. The jury was shown a video of the Defendant with a revolver, including reloading it before concealing it under his coat. The clerk took a photo of the Defendant's identification and identified him on the stand. The Defendant stipulated to his prior serious offense. The crime was proven beyond a reasonable doubt, and this court should uphold the conviction.

CONCLUSION

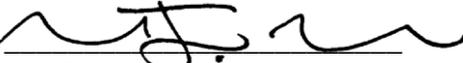
Sentencing courts have broad discretion to impose the felony firearm registration requirement. That discretion was properly exercised below.

The prosecutor's statements were consistent with case law, a proper response to the Defense, and do not give cause for reversal.

For those reasons, this court should affirm the Defendant's conviction.

DATED this 11th day of September, 2018.

Respectfully Submitted,

BY: 

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Chief Criminal Deputy
WSBA # 44358

JFW/jfw

GRAYS HARBOR PROSECUTING ATTORNEY

September 11, 2018 - 4:00 PM

Transmittal Information

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