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Division III
State of Washington
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NO. 34730-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

GLEND A TUCKER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Salvatore F. Cozza, Judge
The Honorable Michael P. Price, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE RECORD IS DEVOID OF ANY EVIDENCE THAT THE GUN IN TUCKER'S VEHICLE WAS REAL OR CAPABLE OF BEING FIRED, NECESSITATING DISMISSAL.

In responding to Tucker's argument, the State cites numerous cases where Washington courts found sufficient evidence that a gun met the statutory definition of a firearm because it was wielded in the commission of the offense. Br. of Resp't, 7-8 (citing State v. McKee, 141 Wn. App. 22, 30-31, 167 P.3d 575 (2007); State v. Bowman, 36 Wn. App. 798, 803, 678 P.2d 1273 (1984); State v. Mathe, 35 Wn. App. 572, 581-82, 668 P.2d 599 (1983); State v. Goforth, 33 Wn. App. 405, 410-12, 655 P.2d 714 (1982)). "Evidence that a device appears to be a real gun and is being wielded in committing a crime is sufficient circumstantial evidence that it is a firearm." State v. Tasker, 193 Wn. App. 575, 594, 373 P.3d 310 (2016); Br. of Appellant, 16 (discussing the case law on this point).

But each and every one of these cases can be quickly dispensed with because they are not analogous to Tucker's case. As Tucker emphasized in her opening brief, there was no evidence whatsoever that she used the rifle in the commission of the unlawful imprisonment. Br. of Resp't, 16. Nor does the State contend that there is any such evidence in the record. The rifle was simply found in the backseat of Tucker's vehicle, unused and buried beneath

Williams's belongings. The cited cases do not support the State's argument because Tucker did not use or wield the gun.

The State also relies on several federal cases to claim it sufficiently proved the rifle in Tucker's vehicle was a firearm within the meaning of RCW 9.41.040(10). Br. of Resp't, 11-13 (citing United States v. Kirvan, 997 F.2d 963, 966-67 (1st Cir. 1993); United States v. Dobbs, 449 F.3d 904, 910-11 (8th Cir. 2006); United States v. Roberson, 459 F.3d 39, 47-48 (1st Cir. 2006); United States v. Taylor, 54 F.3d 967, 976 (1st Cir. 1995)). Again, however, the defendant in each of those cases brandished the firearm in committing the offense. No such evidence exists in Tucker's case.

Furthermore, the federal cases are of dubious value because the federal definition of a firearm differs from Washington's definition. Under federal law, a firearm includes "any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive[.]" 18 U.S.C. § 921(a)(3)(A) (emphasis added). A firearm that was designed to be fired but has since been rendered permanently inoperable may meet this definition. By contrast, in Washington, a gun must be capable of being fired within some reasonable amount of time in order to constitute a firearm. State v. Padilla, 95 Wn. App. 531, 534-35, 978 P.2d 1113 (1999). "[A] gun rendered permanently inoperable is not a firearm under the statutory definition." Id. at 535.

In sum, there is no evidence in the record that the gun in Tucker's vehicle was used in a manner suggesting it was a real gun. This leaves only the rifle itself, which was introduced into evidence. 5RP 163. The State emphasizes the gun had a serial number, manufacturer name, and model number, which are required under the Code of Federal Regulations. Br. of Resp't, 9-10 & n.5. But such evidence does not establish the gun was currently capable of being fired or could be made to be fired within a reasonable amount of time.

Officer Huffman was the sole witness who testified to any detail regarding the gun. 5RP 159-64. Huffman explained the rifle was in substantially the same condition as when he found it, satisfying the foundational requirements for its admission into evidence, but offered no other observations about the rifle itself. 6RP 162-63. At no point did he testify that he believed the rifle was "real" based on his training and experience. Nor did he describe any examination of gun, other than its location in the vehicle and the case in which it was found. 6RP 162-63.

This, again, distinguishes Tucker's case from those where courts find sufficient evidence. All the cases discussed in both Tucker's and the State's brief have some type of evidence demonstrating the gun was real. In Tasker, for instance, the gun made a clicking sound consistent with a real gun. Tasker, 193 Wn. App. at 595; see also Dobbs, 449 F.3d at 911 (eyewitness

heard the gun click when the defendant chambered a round). In McKee, the victim testified she “knew the gun was real because of the weight and feel of the steel,” and the defendant held the gun to her head during the rape. 141 Wn. App. at 31. In State v. Anderson, two officers testified the firearm “appeared to be a real gun,” based on their training in handling and identifying firearms. 94 Wn. App. 151, 159, 971 P.2d 585 (1999), reversed on other grounds, 141 Wn.2d 357 (2000). Ammunition in or near the gun likewise suggests the firearm is real and capable of being fired. State v. Raleigh, 157 Wn. App. 728, 734, 238 P.3d 1211 (2010).

In Tucker’s case, no one with training or experience testified the gun was real, test fired the gun, or examined its component parts to determine whether it was reasonably capable of being fired. No eyewitness testified the gun was real or used in a manner consistent with it being real. There was no ammunition found inside the gun or the vehicle. Schuchman’s testimony established only that Tucker had recently acquired the gun. 6RP 209. And, even if the gun was real, there was no evidence it was operable or could be made operable “with reasonable effort and within a reasonable time period.” Padilla, 95 Wn. App. at 535.

The case law demonstrates more than just the gun itself is required, particularly where, as in Tucker’s case, the jury is not given the definition of a firearm. See CP 191-209. This Court cannot presume the jury considered

and followed the instruction that a firearm is a device that “may be fired,” because it was not so instructed. RCW 9.41.040(10). The State’s argument to the contrary should be rejected. See Br. of Resp’t, 11 (“Jurors had the opportunity to determine whether the weapon was a firearm ‘in fact’ because the weapon was entered into evidence.”).

In one final attempt to persuade this Court that sufficient evidence supports Tucker’s conviction, the State claims “there was no evidence the firearm was defective or damaged so that it lost its character as a firearm.” Br. of Resp’t, 13. This argument amounts to impermissible burden shifting. The State, not Tucker, bore the burden of proving beyond a reasonable doubt that the purported firearm was a gun in fact and capable of being fired. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 713, 286 P.3d 673 (2012) (“Due process requires the prosecution to prove, beyond a reasonable doubt, every element necessary to constitute the crime with which the defendant is charged.”); State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (“[T]he State bears the burden of proving its case beyond a reasonable doubt, and the defendant bears no burden.”). The State failed to do so. Dismissal with prejudice is necessary.

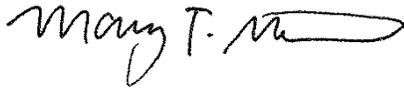
B. CONCLUSION

For the reasons articulated here and in the opening brief, this Court should dismiss Tucker's unlawful possession of a firearm conviction for insufficient evidence.

DATED this 26th day of February, 2018.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Mary T. Swift", with a stylized flourish at the end.

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