NO. 32869-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

JOHN MARK CROWDER, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 14-1-00869-8

BRIEF OF RESPONDENT

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II. STATEMENT OF FACTS

On July 19, 2014, 15-year-old S.I. and 16-year-old Z.H. had been hanging out with friends and were walking to back to S.I.'s house in the dark. RP[1] at 215-19, 274-80. Z.H. had some marijuana and vodka. RP at 219, 232. While they were walking, they encountered an adult male, later identified as the defendant, who asked if they wanted to light fireworks. RP at 219-20, 276, 280. The boys agreed and accompanied the defendant to a bonfire at a friend's house of the defendant. RP at 220, 280. At the bonfire, the defendant asked the boys if they wanted to smoke some pot. RP at 221, 281. The boys said yes and they drove to the defendant's house a short distance away. RP at 221, 227. They went into the defendant's garage and the defendant pulled out a "bong." RP at 222-24. The

[1] Unless otherwise indicated, RP refers to the verbatim report of proceedings of the jury trial dated September 16, 17, 18, 19, and 22, 2014.

defendant put marijuana in the bong that he retrieved from a prescription bottle in a cabinet. RP at 223-24. The marijuana the defendant gave them had different names to it. RP at 224-25. Both boys were experienced pot smokers. RP at 225-27.

After smoking the marijuana, all three got back into the defendant's Jeep and returned to the bonfire down the street. RP at 227. At the bonfire, the defendant loaded a pipe with marijuana and provided it to the boys. RP at 228. Z.H. took out the vodka he brought and Z.H., S.I., and the defendant began to take shots. RP at 231. Both boys were high and drunk. RP at 234.

Z.H. suggested to S.I. that they should go get 14-year-old I.D. RP at 235. The boys texted S.I. and asked her if she wanted to hang out. RP at 133. Around midnight, I.D. checked her cell phone and saw the message and texted back, "yeah, sure." *Id.* The boys texted that they were over at the middle school and that we were going to go over to a friend's house for a fire. RP at 134. Fourteen-year-old I.D. snuck out of her bedroom window to meet the boys. *Id.*

I.D. began walking toward the school and she was picked up by the defendant in his Jeep. RP at 134. I.D. said S.I. was in the car along with the defendant. *Id.* I.D. had never met nor seen the defendant before. RP at 135. The defendant drove them back to the house with the bonfire which

was not far from I.D.'s house. *Id.* When I.D. got to the bonfire, the defendant gave more marijuana to Z.H. in a pipe and smoked it with him. RP at 136. I.D. did not smoke any marijuana. RP at 138. Z.H. and the defendant continued to drink vodka. RP at 136-37. I.D. did not want to drink any vodka. RP at 138. At the bonfire, the defendant asked I.D. her age and she replied that she was 14. RP at 137. The defendant told her she looked like she was 17. *Id.* The defendant then got in front of her as she was sitting and pulled her up to give her a hug. RP at 138. I.D. did not want to give him a hug. RP at 138, 300.

At some point, Z.H. began to vomit and passed out. RP at 138-39. S.H. was also passed out. RP at 139. I.D. was staring at the fire and the defendant came up behind her, pulled her head back, and tried to get her to drink some vodka. *Id.* I.D. became angry, got up, and started to walk home. RP at 140. She walked by the defendant's Jeep and the defendant grabbed her arm, turned her around, and said no. *Id.* The defendant then took a gun from his pocket and told 14-year-old I.D. to get naked and get in the back of his Jeep. RP at 140-41. The gun was pointed up against her forehead. RP at 142. I.D. said the defendant also "pulled the thing back" on the gun. *Id.* The defendant opened the back door of the Jeep and told her to get naked. RP at 144. The defendant then raped 14-year-old I.D. vaginally and digitally. RP at 144. I.D. cried and asked him to stop. RP at

145. The rape ended with I.D. vomiting outside of the back door. *Id.* The defendant then stopped and I.D. got dressed and ran home. *Id.*

I.D. crawled back in through her window and went to the bathroom. RP at 146. There, she noticed she was bleeding. *Id.* She believed she had started menstruating. RP at 147. Several days later, I.D. told a friend and the investigation began. RP at 150. I.D. drove officers to the location of the rape and pointed out the defendant's Jeep. RP at 207, 351-52.

On July 24, 2014, officers conducted a search warrant on the defendant's house. RP at 330. During the search of the defendant's home about a week after the incident, police located several firearms in his house, including a revolver that matched the description of the gun I.D. had given to the police. RP at 330, 334-37, 339-40, 359-60. Police also recovered prescription bottles with marijuana from a messenger-style bag in the defendant's garage. RP at 338-39. A forensic scientist analyzed the leafy substance and testified that the substance was in fact marijuana. RP at 447. Police also documented a cabinet that contained several prescription bottles. *See* Ex. 24. One of the prescription bottles matched the style found in the messenger-style bag. *See* Exs. 10, 24, and 26.

The defendant's Jeep was also seized and forensically examined by the Washington State Crime Laboratory. RP at 367-68, 377. Eight sections

of the back seat area tested presumptive positive for blood. RP at 462-74. Those spots were tested and found to be consistent with blood and found to contain I.D.'s DNA. RP at 489-96.

The defendant, John Mark Crowder, was charged with Rape in the First Degree with a firearm enhancement and a special allegation that the victim was under the age of 15, or in the alternative, Rape of a Child in the Third Degree; and two counts of Distribution of a Controlled Substance to a Person under the Age of 18. CP 56-58.

On September 16, 2014, this matter proceeded to trial. During jury selection, Juror No. 73 responded to the State's inquiry of whether anyone felt that they would not be able to be a fair and impartial juror in the case. RP at 19, 21. Juror No. 73 indicated he would not be able to be fair and impartial because of the age of the victim in this case. RP at 21. The juror further explained that the victim in this case was the same age as he was when he was a victim of sexual abuse. RP at 21-22. During the State's questioning of the panel, defense counsel made a motion for cause for Juror No. 73 and the State, while stating it had no objection, requested to approach the bench. RP at 36-37. A conference was held off the record and unreported, and upon going back on the record, the trial court excused the juror. RP at 36.

On September 22, 2014, the jury convicted the defendant of Rape in the First Degree and answered "yes" to both special allegations. CP 168, 171-72. The jury also convicted the defendant of both counts of Delivery of a Controlled Substance to a Person under the Age of 18. CP 169-70; RP at 601-02. The court sentenced the defendant to a term of 360 months to life. CP 217-18. The defendant now appeals.

III. ARGUMENT

A. The trial court did not violate the defendant's right to a public trial by considering a challenge to a juror for cause in an unreported bench conference.

The Sixth Amendment to the U.S. Constitution and Article 1, Section 22 of the Washington State Constitution guarantees a criminal defendant a public trial. *State v. Strode*, 167 Wn.2d 222, 225, 217 P.3d 310 (2009). The public trial right protected by both our state and federal constitutions is designed to "ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (citing *Peterson v. Williams*, 85 F.3d 39, 43 (2d Cir. 1996)). The right to a public trial extends to the process of jury selection. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quoting *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d (1984)).

Whether a defendant's constitutional right to a public trial has been violated is a question of law, subject to a de novo review on direct appeal. *Brightman*, 155 Wn.2d at 514.

The right to a public trial is not absolute, and the trial court may close the courtroom under certain circumstances. *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009), *cert. denied*, 562 U.S. 837, 131 S. Ct. 160, 178 L. Ed. 2d 40 (2010); *State v. Easterling*, 157 Wn.2d 167, 174-75, 137 P.3d 825 (2006). To determine whether a closure is appropriate, Washington courts must apply the *Bone-Club* factors and make specific findings on the record to justify a closure. *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995); *Momah*, 167 Wn.2d at 148-49. Failure to conduct a *Bone-Club* analysis before closing a proceeding is a structural error warranting a new trial. *State v. Paumier*, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012).

In *Paumier* and *Wise*, the trial courts had closed their courtrooms by questioning prospective jurors in chambers without first conducting a *Bone-Club* analysis. *See Paumier*, 176 Wn.2d at 35-37; *State v. Wise*, 176 Wn.2d 1, 11-13, 288 P.3d 1113 (2012). Our Supreme Court held that such courtroom closures were structural error requiring reversal of these defendants' convictions. *Id.*

While the voir dire excusal of Juror No. 73 falls within the category of proceedings that the Supreme Court has already established implicates the public trial right, the facts in this case are distinct from *Paumier* and *Wise*. Unlike *Paumier* and *Wise*, the trial court here questioned Juror No. 73 in the courtroom while in presence of the prospective jurors. RP at 21-22. The colloquy between both parties and Juror No. 73 were open to the public, on the record, and transcribed. *Id.* Defense counsel had already moved to strike Juror No. 73, on the record, prior to the sidebar. RP at 36.

As our Supreme Court has also recognized, "not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public." *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). To determine whether there was a violation of the defendant's right to a public trial, the Court must first consider "whether the proceeding at issue implicates the public trial right, thereby constituting closure at all." *Id.* Whether or not a particular portion of a proceeding is required to be held in public is determined by the use of the "experience and logic" test. *Id.* at 141. Jury selection is considered part of the public trial right and is typically open to the public. *Strode*, 167 Wn.2d at 227.

The "experience and logic" test requires courts to assess the necessity by consideration of both history (experience) and the purpose of the open trial provision (logic). *Sublett*, 176 Wn.2d at 73. The experience prong asks whether the practice in question has historically been open to the public. *Id.* The logic prong asks whether public access is significant to functioning of the right. *Id.* If both prongs are answered affirmatively, then the *Bone-Club* test must be applied before the court can close the courtroom. *Id.*

The experience prong requires that the court look at historic practices. *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209 (2013). In *Love*, the defendant argued that because cause and peremptory challenges are part of jury selection, a process that is normally open, the exercise of those challenges must be done openly rather than at a sidebar. *Id.* at 917. The *Love* Court stated:

> The history review confirms that in over 140 years of cause and peremptory challenges in this state, there is little evidence of the public exercise of such challenges, and some evidence that they are conducted privately. Our experience does not require that the exercise of these challenges be conducted in public.

Id. at 919.

Similarly, the logic prong does not indicate that the challenges need to be conducted in public. *Id.* The purpose of the public trial right is

not furthered by a party's actions in exercising a peremptory challenge or seeking a cause challenge of a potential juror. *Id.* A party seeking a cause challenge of a potential juror typically presents issues of law for the judge to decide. *Id.*

Applying the experience and logic test in this case, it is clear that neither prong of the experience and logic test suggests that the exercise of cause or peremptory challenges must take place in public. Under the experience prong, analogous to *Love*, defense counsel exercised a challenge for cause upon learning that Juror No. 73 had experienced some sort of sexual abuse as a child. RP at 19, 21-22, 36. Under the logic prong, the colloquy between both parties and Juror No. 73 on the record and in front of the prospective jurors satisfies the public's interest in the case and assures that the for cause strike was appropriate. Additionally, considering one of the purposes of the public trial right is to ensure a fair trial, defense counsel's challenge for cause was appropriate in light of the charges the defendant was facing.

The experience and logic test confirms that the trial court did not erroneously close the courtroom by conducting a sidebar following the defendant's exercise of a for cause challenge of Juror No. 73. Arguably, when looking at the questioning of Juror No. 73 at the various points, it is clear the State had no objection but just wanted to clarify the process in

which the parties were to conduct their "for cause" challenges. RP at 19-37. Defense counsel interrupted the State's questioning of the panel and made a motion for cause. RP at 36. Such interruptions could possibly be an attempt to curry favor with the panel. These types of interruptions can be very frustrating to the flow of questioning. Clearly, the State intended to speak to Juror No. 73 at a later point in their questioning. RP at 21, 36. If the State did not, defense counsel could have made the motion during their questioning of the panel. Nonetheless, the sidebar conference did not close the courtroom and the defendant's right to a public trial was not violated. Accordingly, the convictions should be affirmed.

B. The jury had sufficient evidence to find that the marijuana used by the minors had a THC concentration of .03 or greater.

The defendant was convicted on two counts of Delivery of a Controlled Substance to a Person Under the Age of 18, pursuant to RCW 69.50.406(2), for providing marijuana to two persons under the age of 18. CP 56, 169-70. Under the statute in effect at the time, to prove the substance in question was marijuana, the State was required to prove that it fit the following definition:

> [A]ll parts of the plant Cannabis, whether growing or not, with a THC[2] concentration greater than 0.3 percent on a dry weight basis; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt,

[2] Tetrahydrocannabinol ("THC").

> derivative, mixture, or preparation of the plant, its seeds or resin. The term does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of any plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination.

RCW 69.50.101(t) (footnote added); *see also* CP 149 (jury instruction defining marijuana). The defendant suggests that because the State was unable to test the marijuana S.I. and Z.H. used, it cannot prove the THC concentration was over .03. Br. Appellant at 12-13. The State met its burden at trial as evidenced by the verdict of the jury.

First, the State proved that the substance found in the defendant's garage approximately one week after the charged events was the same substance that the jury found the defendant furnished to S.I. and Z.H. At trial, S.I. testified that the defendant retrieved the marijuana and a bong which were located inside a cabinet in the defendant's garage. RP at 222-24. S.I. stated that the marijuana S.I. and Z.H. smoked was contained in a prescription bottle. RP at 224. The defendant told S.I. and Z.H. the names of the different kinds of marijuana. RP at 224-25. Z.H. also testified that the defendant retrieved the marijuana from a cabinet located in the defendant's garage, and that the marijuana was located inside what looked to be a pill bottle. RP at 285. During a search of the defendant's garage,

Detective Justin Gerry discovered a substantial amount of marijuana stored inside prescription bottles, located inside a bag. RP at 338-39; *see* Ex. 24. The jury found that the State provided sufficient evidence to prove the marijuana the defendant provided to S.I. and Z.H. was the same substance seized in the defendant's garage.

Second, the State presented adequate circumstantial evidence to prove that the substance furnished to S.I. and Z.H. met the statutory definition of "marijuana." The jury was instructed that marijuana must have a THC concentration of .03 or greater to convict, and they convicted the defendant. Looking at the evidence admitted at trial, it is clear that such a verdict is sound. S.I. and Z.H. testified that they smoked the defendant's marijuana with the defendant in his garage and that the marijuana came out of prescription bottles. RP at 224-25, 285. They testified to the substantial effect marijuana had on them and S.I. described the marijuana having special names. RP at 224-27; 287-88. S.I., admitting prior marijuana use, stated that on a scale of one to ten of how high he was, he was "probably a five or a six" on the night in question. RP at 226-27. Z.H., also admitting prior marijuana use, stated that he was stoned "up until [he] passed out." RP at 287. The marijuana found in prescription bottles inside the defendant's garage read, "Qualifying patient use only. Medical Cannabis. Produced in Washington per RCW 69.51 A, do not

deliver to another person." RP at 344. At trial, a Washington State Crime Laboratory forensic scientist testified that this marijuana was found to have a higher THC concentration than .03. RP at 447. All the evidence suggested that the marijuana the defendant provided to the two minors was from prescription bottles that he retrieved from a cabinet in his garage. The marijuana that was tested at trial came from prescription bottles found in the defendant's garage.

While the State had no direct evidence, it does not need direct evidence in every case. "Circumstantial evidence is as reliable as direct evidence." *State v. Jackson*, 145 Wn. App. 814, 818, 187 P.3d 321 (2008). In this instance, there was an extraordinary amount of circumstantial evidence which all pointed to the marijuana as meeting the legal definition. No admissible evidence suggested otherwise. "A trier of fact may rely exclusively upon circumstantial evidence to support its decision. We defer to the trier of fact in matters of witness credibility and weight of evidence." *Id.* In this instance, the jury clearly found that the weight of the evidence suggested that the marijuana met the legal definition. There was sufficient circumstantial evidence to support that conclusion. The court must defer to their evaluation of the credibility and weight to be given to any and all of the evidence.

Because the State proved that the marijuana it sent to the crime lab was the same substance furnished to S.I. and Z.H. and because it established that the effects reported by S.I. and Z.H. correlated with a particular quantum of THC, its evidence at trial was sufficient to prove the essential elements of counts three and four. Accordingly, the convictions should be affirmed.

C. Sufficient evidence supports the firearm enhancement because a firearm need not be operable to meet the legal definition of a firearm.

The defendant was convicted of a firearm enhancement under RCW 9.94A.533(3). CP 172, 214. The defendant is incorrect that the State must prove that the firearm is operable for the purposes of the firearm enhancement. The firearm enhancement indicates:

> The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime.

RCW 9.94A.533(3).

Therefore, in order for the State to prove a firearm enhancement under RCW 9.94A.533(3), a gun must meet the standard of being a "firearm." The standard of being a "firearm" depends on RCW 9.41.010, and the case law interpreting it.

Here, the defendant was convicted of one of the crimes eligible for a firearm enhancement; therefore, the only issue is whether the revolver was a "firearm" because the revolver was not test-fired or otherwise determined to be operable. Whether an object is a "firearm" within the meaning of former RCW 9.41.010(1) is a question of statutory interpretation that is reviewed de novo. *State v. Hunter*, 147 Wn. App. 177, 182-83, 195 P.3d 556 (2008), *review granted*, 169 Wn.2d 1005, 236 P.3d 206 (2010), *rev'd on other grounds*, 173 Wn.2d 199, 265 P.3d 890 (2011); *State v. Faust*, 93 Wn. App. 373, 376, 967 P.2d 1284 (1998).

In *State v. Raleigh*, 157 Wn. App. 728, 238 P.3d 1211 (2010), the defendant argued that the State failed to prove that he possessed a firearm because the firearm was not operable on the date in question. *Id.* at 733.

> A "'firearm'" is "a weapon or a device from which a projectile or projectiles may be fired by an explosive such as gunpowder." Former RCW 9.41.010(1). A firearm need not be operable during the commission of a crime to constitute a "firearm" within the meaning of former RCW 9.41.010(1). *Faust*, 93 Wash.App. at 381, 967 P.2d 1284. Instead, the relevant question is whether the firearm is a "gun in fact" rather than a "toy gun." *Faust*, 93 Wash.App. at 380, 967 P.2d 1284. The *Faust* court found persuasive that a malfunctioning or unloaded gun (1) can create the same apprehension in a victim as a properly functioning or loaded one; and (2) has potential to inflict violence because it can be fixed or loaded. *Faust*, 93 Wash.App. at 381, 967 P.2d 1284.

Raleigh, 157 Wn. App. at 734.

In *Raleigh*, the firearm at issue was a gun in fact, not a toy gun. *Id.* at 734. The firearm held a magazine, was loaded with a round of ammunition in the chamber, and had a working safety and slide. *Id.* The Court determined that a firearm need not be operational during the commission of a crime to constitute a "firearm" within the meaning of former firearms and dangerous weapons statutes. *Id.*

While the passage in *Raleigh* refers to former RCW 9.41.010(1), it does so because the codification of the statutory definition of firearm has changed. In 2001, it read: "(1) 'Firearm' means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(1) (2001). The statute currently reads: "(9) 'Firearm' means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(9). The definitions are identical, indicating that the case law interpreting the former definitions remains applicable. The legislature simply wished to alphabetize the definitions section of the statute.

In the present case, the revolver, for purposes of the firearm enhancement, need not be operable. The question is: Was the weapon in question a "toy gun" or a "gun in fact"? At trial, I.D. testified that the gun used by the defendant was a revolver. RP at 143. Detective Runge testified that a firearm was located in the defendant's residence, matching the

description I.D. had provided. RP at 359-60. Detective Runge brought I.D. to his office to conduct a gun identification, and I.D. identified the revolver recovered as being the weapon used by the defendant. RP at 376. The revolver recovered was definitely a real gun. Detective Runge stated that the firearm appeared to be a working firearm. RP at 363. However, there was no need to determine if it was operable or not.

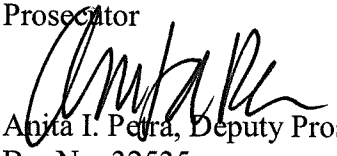
Because there was no need to determine whether the revolver was operable, evidence at trial was sufficient to support the firearm enhancement. Accordingly, the sentencing enhancement should be affirmed.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the convictions and firearm enhancement.

RESPECTFULLY SUBMITTED this 11th day of January, 2016.

ANDY MILLER
Prosecutor



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on January 11, 2016.

Courtney Alsbury
Appellate Secretary