

NO. 47255-4

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ASKIA R. WILLIAMS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Gretchen Leanderson

No. 14-1-04253-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was the loaded revolver defendant had holstered on his hip while talking to himself near a family center constitutionally admitted at trial with its purchase receipt when they were taken from his person after he responded to a social contact by spontaneously admitting that he was a felon while illegally possessing a firearm?

2. Is defendant's claim the prosecutor erroneously portrayed unlawful possession of a firearm as a strict liability offense in rebuttal argument meritless since the challenged remark addressed the definition of a firearm not the *mens rea* element, which the prosecutor repeatedly identified as a critical fact he must prove?

B. STATEMENT OF THE CASE

1. Procedure

The State charged defendant with unlawful possession of a firearm in the second degree ("UPOF") for openly carrying a loaded .44 caliber pistol, having been previously convicted of a felony. CP 1-2; 2RP 77, 79, 84, 102-04. He was found competent to stand trial. CP 75. The underlying evaluation was conducted approximately one month after his arrest for the

charged offense. CP 1, 10. At that time, defendant was not manifesting the "delusional belief system" previously observed and tentatively attributed to his history of substance abuse. CP 12-14, 73-75.¹ Five months earlier he had been diagnosed with "Unspecified Schizophrenia Spectrum and Other Psychotic Disorder", which did not "limi[t] his factual or rational understanding of legal proceedings...." CP 12, 73-75.

A CrR 3.6 hearing was held, wherein, defendant's motion to suppress the firearm, its purchase receipt and the incriminating statements he made about them was denied. RP 55-56; CP 52-53. That ruling is challenged on appeal. The trial mostly consisted of testimony from the arresting officer, the State Patrol analyst who determined the firearm was operable, and defendant. 2RP 67, 97, 119. Eight exhibits were admitted. CP 76-77. Defendant stipulated to the predicate-felony element of the charge. 2RP 66.

The jury was accurately instructed on the law, to include the *mens rea* element of a "knowingly" possessed firearm. On appeal, defendant alleges the prosecutor erroneously treated that element as non-existent during rebuttal argument notwithstanding the fact the prosecutor's closing explicitly identified the knowledge element as the central issue in dispute,

¹ Citations to Clerk's Papers above 71 reflect an estimate of how supplemental designations will be numbered.

and the challenged rebuttal was exclusively directed at the firearm element of the offense. CP 39 (Inst.5); App.Br. at 14; 2RP 126-30, 139. Defendant was convicted as charged. CP 48. He had an offender score of three due to three prior convictions for unlawfully possessing firearms. CP 57; RP (2/17/15) 10-11. The court imposed a low-end sentence despite expressing concern about that recidivism. CP 60; RP (2/17/15) 10-11. A notice of appeal was timely filed. CP 67.

2. Facts

At approximately 12:49 PM, October 25, 2014, Deputy Stewart was dispatched to the Sprinker Recreational Center² for a 911 report of a man walking around the parking lot talking to himself with a gun on his hip. 2RP 69-70, 87; Ex. 1-2, 7. Defendant appeared calm at first, but started looking around, caught sight of a woman on the sidewalk, identified her as his ex-wife and claimed she worked for the FBI. 2RP 72. The woman had no connection to defendant. 2RP 72. He responded to Stewart's request for his name by spontaneously divulging his felony conviction. 2RP 73, 90. He also spontaneously identified the pistol as "a black powder gun". 2RP 74, 89-90. A records check confirmed the

² ER 201(d), (f); <http://www.co.pierce.wa.us/index.aspx?nid=1310> ("Sprinker Recreation Center is your community recreation headquarters. Nowhere in Pierce County will you find more family activities").

conviction. 2RP 74, 90. Defendant was detained for UPOF. 2RP 75. The pistol was taken from his holster. 2RP 75. A cursory examination revealed it to be a loaded revolver, later classified as an operable .44 caliber handgun. 2RP 77, 79, 84, 102-04; Ex. 4-5, 10.

A receipt for the revolver was recovered from defendant's pocket after his detention, but with his consent. 2RP 75, 90; Ex.3. It was issued from a nearby pawn shop. 2RP 76, 109. At trial, defendant admitted to buying the gun, calling it an "antique novelty of ... a[] percussion style revolver." 2RP 110. He attributed his alleged failure to recognize it as a firearm to the salesperson's failure to run a background check. 2RP 110-11, 116. A similar excuse was made to account for the loaded ammunition. 2RP 116. During cross-examination defendant perhaps inadvertently revealed knowing the so called "novelty" was actually a firearm:

[I] know those are percussion caps, but I do not recall putting those on my gun, no - - my alleged gun, I do not.

2RP 117. Defendant conceded loading the "gun" "very much" added to the "*excitement of having it.*" 2RP 119 (emphasis added). He was also impeached with a prior conviction for making a false statement. 2RP 114.

C. ARGUMENT

1. THE LOADED .44 CALIBER PISTOL DEFENDANT WORE ON HIS HIP WHILE TALKING TO HIMSELF NEAR A FAMILY CENTER WAS PROPERLY ADMITTED WITH ITS RECEIPT AS BOTH WERE CONSTITUTIONALLY TAKEN FROM HIS PERSON AFTER HE RESPONDED TO A SOCIAL CONTACT BY SPONTANEOUSLY ADMITTING HE WAS A FELON WHILE ILLEGALLY POSSESSING A FIREARM.

The community expects police to be "more than mere spectators." *State v. Young*, 135 Wn.2d 498, 511-12, 957 P.2d 681 (1998). "[I]t is well established ... effective law enforcement techniques ... necessitate ... interaction with citizens on the streets." *Id.* It is in those necessary interactions officers expose themselves to the greatest risk for the common good. "[I]n the last decade, more than half a million ... were assaulted in the line of duty. More than 160,000 were injured, and 536 were killed—the vast majority while performing routine ... tasks" *Gonzalez v. City of Anaheim*, 747 F.3d 798, 803-04 (9th Cir.2014) (citing *Mattos v. Agarano*, 661 F.3d 433, 453 (9th Cir. 2011) (Kozinski, concurring and dissenting in part)).

Police are rightly presumed to legally fulfill their responsibilities absent evidence to the contrary. *State v. Hodge*, 11 Wn. App. 323, 330, 523 P.2d 953 (1974)(citing *Ledgering v. State*, 63 Wn.2d 94, 101, 385 P.2d 522 (1963)). They are empowered to respond to potential threats through means ranging from social contacts to seizures as circumstances demand. *See Young*, 135 Wn.2d at 511; *State v. Smith*, 165 Wn.2d 511,

517, 199 P.3d 386 (2009); U.S. Const. amend. IV; Wash.Const. art I, § 7. Washington's article I, section 7 has been interpreted to provide greater privacy protections than the Fourth Amendment, yet defendants invoking the former still bear the burden of proving a warrantless disruption of their private affairs. *Young*, at 509-11. Only then will courts call upon the State to prove the disruption was lawful. *Young*, at 510-11; *State v. Vrieling*, 144 Wn.2d 489, 492, 28 P.3d 762 (2010).

Appellate court's review the denial of a CrR 3.6 motion to ascertain whether substantial evidence supports the findings of fact. *State v. Bliss*, 153 Wn. App. 197, 203, 222 P.3d 107 (2009). Unchallenged findings are verities on appeal. *State v. Hoang*, 101 Wn. App. 732, 738, 6 P.3d 602 (2000)(citing *State v. Hill*, 123 Wn.2d 641, 644-47, 870 P.2d 313 (1994)). Review is limited to a *de novo* assessment of whether the conclusions were properly derived therefrom. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997)). Trial courts should facilitate review by filing written findings and conclusions; however, failure to do so will be pardoned where their reasoning is clear. *See* CrR 3.6(b); *State v. Head*, 136 Wn.2d 619, 622-23, 964 P.2d 11 (1998); *State v. Radka*, 120 Wn. App. 43, 48, 83 P.3d 1038 (2004).

Written CrR 3.6 findings and conclusions were not filed in this case; however, the court's reasoning clearly appears in the order, the oral ruling and the CrR 3.5 findings and conclusions, which were incorporated into the CrR 3.6 ruling by reference. CP 49-53; 1RP 32-33, 56-57.

Defendant only challenges the court's conclusions. App.Br.,p. 1-2, 10-13.

The incorporated CrR 3.5 findings are summarized below:

- F1.** Deputy Stewart was dispatched to the Sprinker Recreation Center regarding a suspicious male talking to himself with a gun on his hip;
- F2.** Stewart made a social contact with defendant, informing him Washington is an open-carry state, so the holstered firearm was not a problem;
- F3.** Defendant placed his hands on his head without being asked to do so. He spontaneously volunteered his firearm was a black powder gun;
- F4.** Defendant spontaneously revealed he had a prior felony;
- F5.** Stewart confirmed the prior conviction; and
- F6.** Defendant was arrested for UPOF.

CP 50. Each of these verities is amply supported by the record.

Deputy Stewart was dispatched around noon to a report of a suspicious male walking near the Sprinker Center talking to himself with a gun on his hip. 1RP 10, 17. Stewart investigated the call to ensure public safety—alert to the possibility the subject was mentally unstable. 1RP 17. Stewart arrived in a patrol car with deactivated emergency equipment to find defendant in the parking lot across the street. 1RP 10, 17. Defendant spontaneously placed both hands on his head. 1RP 11, 23, 26. Stewart invited defendant to lower them, explaining it was okay to openly carry a firearm, but requested defendant not draw it "during the contact." 1RP 11.

Defendant started looking around, and identified a nearby woman as an ex-wife employed by the FBI; deputies confirmed she was a random passerby. 1RP 12. Stewart asked defendant for his name as defendant stood unrestrained in the lot. 1RP 12. Defendant responded by spontaneously volunteering the fact of his prior felony conviction. 1RP 12-13. At trial, Stewart testified defendant also spontaneously described the pistol as a "black powder gun." 2RP 74. During the CrR 3.5 argument defendant conceded this statement was made during the "initial investigation", but later characterized it as a paraphrase, then disputed ever referring to the revolver as a "gun." 1RP 29-31.

Stewart confirmed through South Sound 911 that defendant had a felony conviction for unlawfully possessing a firearm. 1RP 13. Stewart detained defendant in handcuffs to investigate the then-corroborated prior felony through a more comprehensive records check. 1RP 13. While waiting for the result, Stewart secured the firearm. An associated examination confirmed it to be a loaded black powder revolver. 1RP 13-15, 20-21. Defendant said he had a receipt for it in his pocket. 1RP 13, 19. After asking for defendant's permission, Stewart retrieved the receipt, which documented the \$120 purchase of a .44 caliber black powder revolver. 1RP 13-14, 15. Stewart took defendant to jail after confirming the pistol qualified as a firearm under the applicable statute. 1RP 13.

Defendant testified at the CrR 3.5 hearing. He admitted a prior conviction for making a false statement. 1RP 25. He acknowledged

Stewart's testimony was "pretty much accurate", but claimed he did not feel free to leave during their contact. 1RP 24. Defendant alleged Stewart was accompanied by four or five other officers, claiming they surrounded him. 1RP 24. None of those facts were credited by the trial court.

- a. Defendant failed to prove his private affairs were disturbed through the social contact he responded to by spontaneously alerting police to facts that at least raised a reasonable suspicion his openly carried pistol was unlawfully possessed.

Police do not transform social contacts into seizures by engaging a defendant in conversation at a public place and asking for identification. *Young*, 135 Wn.2d at 511 (citing *State v. Armenta*, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997)). Characterizing such encounters as seizures would impose wholly unrealistic restrictions on a variety of legitimate police activities without enhancing any interest secured by the constitution. *Id.* (citing *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870 (1980)); *State v. Thorn*, 129 Wn.2d 347, 354, 917 P.2d 108 (1996).

Encounters between civilians and police are consensual if a reasonable civilian would feel free to leave. *State v. Harrington*, 167 Wn.2d 656, 663-64, 222 P.3d 92 (2009). Such encounters *may* become "seizures" if accompanied by:

- (1) The *threatening* presence of several officers;
- (2) The display of a weapon by an officer;
- (3) Physical touching of the defendant by the officer;

- (4) Language or tone indicating mandatory compliance; or
- (5) A progressive intrusion culminating in a request to frisk.

Id. at 664 (citing *Young*, 135 Wn.2d at 512, which adopted the factors identified by *Mendenhall*, 446 U.S. at 554-55); *Harrington*, 167 Wn.2d at 669.

Defendant failed to prove he revealed the detention supporting facts about his pistol and prior conviction while seized. None of the circumstances indicative of "seizure" were present. There is no evidence of the *threatening* presence of several officers. Defendant's claim of being surrounded was not credited. A second officer assisted by speaking with the woman defendant misidentified as an ex-wife employed by the FBI. *E.g.*, 1RP 11-12; 2RP 72. If one assumes more arrived, defendant did not adduce sufficient detail about their timing or proximity to prove their presence was threatening during the social contact.

With respect to timing, defendant did not establish the additional officers were present when he announced himself to be a felon. He only claims they arrived after he was *Mirandized*. But that warning was given at the end of the contact, not at the beginning when defendant admitted to the detention authorizing fact of a felony conviction while openly possessing a firearm. 1RP 15-16, 24-25. So there is no evidence defendant was surrounded when the admission gave police reason to suspect he was

committing UPOF. The evidentiary void prevents him from proving he was illegally seized before being lawfully detained.

A similarly fatal evidentiary void results from his failure to provide any information about the additional officers' proximity to him. His description leaves open the possibility they were several blocks away, loosely scattered in a configuration indicative of an unobtrusive safety precaution. Yet proof of immediate encirclement would still fall short of establishing a seizure. Although Washington has not set the number of officers required to be "threatening", other jurisdictions wisely hold the mere presence of multiple officers is not enough to trigger a seizure, even when ostensibly threatening. *Harrington*, 167 Wn.2d at 666 (citing *State v. Buchanan*, 72 F.3d 1217, 1224 (6th Cir. 1995)(no seizure despite three additional officers with "blazing" emergency lights); *United States v. Jones*, 523 F.3d 1235, 1237, 1242 (10th Cir. 2008)(no seizure where three officers hovered nearby); *People v. Robinson*, 391 Ill.App.3d 822, 909 N.E.2d 232, 243, 330 (2009).

Any conceivable threat projected by the alleged reinforcements would have been dispelled by Stewart's exceedingly cordial approach to the encounter. He invited defendant to resume a relaxed posture. 1RP 11, 23, 26. He reassured defendant of the apparent lawfulness of his conduct. Stewart's only request was that defendant refrain from drawing the pistol

"during the contact." 1RP 11. Disarmament is indicative of seizure. *See State v. Byrd*, 178 Wn.2d 611, 618, 310 P.3d 793 (2013). Allowing defendant to remain armed symbolically emphasized the social quality of the contact by leaving both men cable of resorting to deadly force. Asking an armed man not to draw on an officer is also far less intrusive than the already established social request of asking a person to refrain from reaching into a pocket. *Harrington*, 167 Wn.2d at 666-67 (citing *State v. Nettles*, 70 Wn. App. 706, 712, 855 P.2d 699 (1993)). By expressly limiting the request to the contact, Stewart further implied his expectation of a brief encounter that would end with both men parting ways. 1RP 11.

None of the other *Mendenhall-Harrington* factors are present. No weapons were drawn. 1RP 11. No officer addressed defendant with commanding tone or language, nor touched him until his crime was evident. *E.g.*, 1RP 11-13, 24. The record is equally devoid of the *Harrington* "request to frisk following progressive intrusion" factor despite defendant's claim to the contrary. Stewart's request to remove the receipt from defendant's pocket was not made during the social contact. It was made after the spontaneously revealed illegality of the firearm possession prompted a detention. CP 50; 1RP 13-15, 20-21. For this reason, it was not a factor that escalated the social contact to a seizure. Defendant's statements were properly admitted at trial.

- b. The firearm was lawfully secured after the revelation of defendant's prior felony authorized an investigative detention.

An investigative detention occurs when police briefly seize an individual based on specific and articulable facts supporting a reasonable suspicion the individual has been, or is about to be, involved in crime. *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868 (1968); *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). Only a founded suspicion is necessary, meaning some basis from which to determine the detention was not arbitrary or harassing. *State v. Belieu*, 112 Wn.2d 587, 601-02, 773 P.2d 46 (1989)(quoting *Wilson v. Porter*, 361 F.2d 412, 415 (9th Cir. 1966)); *State v. McKinnon*, 88 Wn.2d 75, 91 n.2, 558 P.2d 781 (1977).

- i. **The gun was lawfully secured when there was reason to suspect it was unlawfully possessed.**

Officers may typically search for and at least temporarily secure firearms if there is reason to suspect they are dealing with an armed and dangerous detainee. *State v. Perez*, 41 Wn. App. 481, 485, 704 P.2d 625 (1985); *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). It is "clearly unreasonable to deny [an] officer the power ... to neutralize the threat of physical harm." *State v. Rodriquez-Torres*, 77 Wn. App. 687, 691, 893 P.2d 650 (1995). A firearm may also be seized from a felon's

person incident to arrest. *Byrd*, 178 Wn.2d at 618; *State v. Smith*, 102 Wn.2d 449, 453, 688 P.2d 146 (1984). Arrest is permissible where there is evidence sufficient to warrant a reasonable belief a felony has been committed. *Smith*, 102 Wn.2d at 453; RCW 10.31.100.

Deputy Stewart lawfully secured the openly carried pistol once defendant's revelation about his felony conviction gave Stewart reason to suspect it was unlawfully possessed. This is not a stop and frisk case. Stewart arrived to find defendant openly carrying what appeared to be a firearm. 1RP 10-11, 17. That "open view" observation did not implicate any constitutional right. *State v. Carter*, 151 Wn.2d 118, 126, 85 P.3d 887 (2004). By introducing himself as a convicted felon, defendant vested Stewart with lawful authority to detain him long enough to reasonably investigate the legality of his conduct. The revelation further empowered Stewart to temporarily secure the pistol to neutralize any threat it posed and assess whether it was a firearm the law forbids felons like defendant from possessing. Once the felonious nature of his conduct was confirmed, the pistol was lawfully seized incident to arrest.

- ii. **The brief detention was lawfully limited to the time required to confirm the conviction and ensure the pistol qualified as a firearm.**

An investigative detention is limited in scope and duration by its investigative purpose. The scope may be extended and the duration prolonged if initial suspicions are confirmed or further aroused. No rigid time limit applies. *United States v. Sharpe*, 470 U.S. 675, 685, 105 S. Ct. 1568 (1985); *Adams v. Williams*, 407 U.S. 143, 92 S. Ct. 1921 (1972). *Michigan v. Summers*, 452 U.S. 692, 700, n.12, 101 S. Ct. 2587 (1981); *Sharpe*, 470 U.S. at 686 (rejecting *per se* 20-minute limit). "Such a limit would undermine the ... important need to allow authorities to graduate ... responses to the demands of any ... situation." *United States v. Place*, 462 U.S. 696, 709, n.10, 103 S. Ct. 2637 (1983).

A detention's duration is lawful to the extent the attending investigation is pursued by means likely to quickly confirm or dispel suspicions. *Sharpe*, 470 U.S. at 686. Courts must take care "[n]ot [to] indulge in unrealistic second-guessing." *Id.* Establishing "[p]rotection of the public might, in the abstract, have been accomplished by less intrusive means does not, itself, render [a detention] unreasonable." *See Id.* at 686-

87 (citing *Cady v. Dombrowski*, 413 U.S. 433, 447, 93 S. Ct. 2523 (1973); see also *United States v. Martinez-Fuerte*, 428 U.S. 543, 557, n.12, 96 S. Ct. 3074 (1976)). "The question is not simply whether some other alternative was available, but whether ... police acted unreasonably in failing to ... pursue it." *Id.*

There is no merit to defendant's claim the seizure occurred too late to be covered by *Terry*. The seizure prompting admission occurred at the outset of the social contact when Stewart lawfully asked for defendant's name. The pistol was promptly secured thereafter and kept safe while Stewart confirmed the existence of the admitted conviction through dispatch, and reviewed the applicable statute to ensure the pistol was a "firearm" supporting UPOF arrest. There was nothing in the seizure's duration or intrusiveness unbecoming constitutional detention. *E.g.*, *Belieu*, 112 Wn.2d at 594 (burglary investigation justified 10-minute stop where suspects were frisked, handcuffed and separated); *State v. Cunningham*, 116 Wn. App. 219, 228-29, 65 P.3d 219 (2003)(45-minute handcuffed detention). Defendant's motion to suppress was properly denied. See *State v. Kelly*, 64 Wn. App. 755, 764, 828 P.2d 1106 (1992) (rulings supportable on any basis will be affirmed).

- iii. **It would also have been lawful to briefly secure the firearm in order to conduct a mental health and safety check under the community caretaking exception.**

Police fulfilling their community caretaking responsibilities may briefly disturb a person's private affairs to check on the person's mental health and safety when: (1) there is reason to believe immediate assistance is required to protect life or property; (2) the intrusion is not *primarily* motivated by an intent to arrest or seize evidence, and (3) there is probable cause to associate the emergency with the privacy interest disturbed. *See State v. Smith*, 177 Wn.2d 533, 541, 303 P.3d 1047 (2013)(citing *State v. Acrey*, 148 Wn.2d 738, 748, 64 P.3d 594 (2003)).

"These long-recognized concerns for the safety of police ... and the public have taken on ... greater urgency by recurrent tragedies triggered by gun violence in public spaces. To prevent such tragedies, police are properly given sufficient freedom of action to investigate circumstances that reasonably suggest an immediate risk to ... safety." *Barker v. Smiscik*, 49 F.Supp.3d 489, 498 (E.D. Mich. 2014). Those tragedies proved citizen reports warning of armed men behaving suspiciously near recreational centers while manifesting symptoms of

mental instability warrant a police response. *E.g.*, *McKown v. Simon Property Group, Inc.*, 182 Wn.2d 752, 758, 344 P.3d 661 (2015)(indiscriminate mass-shooting in the Tacoma mall); *Smiscik*, 49 F.Supp.3d at 498, n.5 (12 shot dead, 58 injured in theater during Batman premier). Such environments make it possible for a single gunman to inflict massive casualties with little restraint and even less forewarning. *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 771 (5th Cir. 2007).

Police in this case were responding to a presumptively reliable citizen's report of a man with a gun talking to himself across the street from a family center. 2RP 69-70, 87. Deputy Stewart investigated the call to ensure public safety—alert to the possibility the subject was mentally unstable. 1RP 17. Defendant appeared calm at first, but started looking around, caught sight of a woman on the sidewalk, identified her as his ex-wife and claimed she worked for the FBI. 2RP 72. A brief contact with the woman revealed the claim to be false, and likely a paranoid delusion.

The totality of these circumstances justified temporarily securing the firearm to ensure defendant would not respond to the delusion by opening fire on the woman he had fixated on or another in the family center. Although unknown to the officers at the time, defendant's history of delusional thinking, proclivity for firearms, and expressed belief that it is *exciting* to have them, particularly when loaded, aggregate into a poignant reminder of why limited intrusions are permitted under the

community caretaking exception, which "reflects the reality that the Constitution is not a suicide pact." *State v. Finch*, 137 Wn.2d 792, 829, 975 P.2d 967, 990 (1999)(quoting *Kennedy v. Mendoza–Martinez*, 372 U.S. 144, 160, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)). The rash of mass shootings recently perpetrated by mentally unstable individuals has made the human cost of failing to timely intervene unforgettable.

- c. The receipt was properly seized with defendant's consent during a lawful detention or incident to lawful arrest.
 - i. **Defendant consented to the receipt being removed from his pocket during a lawful detention.**

No warrant is necessary when a defendant consents to a search. *McKinnon*, 88 Wn.2d at 91, n.2 (citing *Bumper v. North Carolina*, 391 U.S. 543, 88 S. Ct. 1788 (1968); *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507 (1967)). Consent searches are standard investigatory techniques. Circumstances prompting the request may quickly develop or extend from leads developed at a crime scene. *Schneckloth v. Bustamonte*, 412 U.S. 218, 232, 93 S. Ct. 2041 (1973). There is nothing suspect in consent. The community has a real interest in encouraging it, for the search it authorizes may yield evidence necessary for the solution of crime—evidence that may ensure an innocent person is not wrongly

pursued. *Id.* at 243 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 488, 91 S. Ct. 2022 (1971)).

Valid consent is proved by the State when three requirements are met: (1) the consent was voluntary; (2) it was obtained by a person authorized to consent; and (3) the search did not exceed the consent. *State v. Thompson*, 151 Wn.2d 793, 803, 92 P.3d 228 (2004); e.g., *United States v. Chaney*, 647 F.3d 401, 407 (1st Cir. 2011)(voluntary consent to search pocket despite coercive atmosphere); *United States v. Dinwiddie*, 618 F.3d 821, 831 (8th Cir. 2010)(voluntary consent to search during investigative detention).

Defendant voluntarily consented to a search of his pocket for the receipt. Each of the three requirements for valid consent are present. The consent was voluntarily given. There is no evidence of coercion as it was not obtained through will-overbearing threats, promises, or misrepresentations. As our Supreme Court stated in upholding another consensual search: "Bowling to events, even if one is not happy with them, is not the same ... as being coerced." *State v. Cherry*, ___ Wn.App. ___, ___ P.3d ___ (Div.II, No. 45396-7-II, p. 14-15)(quoting *State v. Lyons*, 76 Wn.2d 343, 346, 458 P.2d 30 (1969). Informed by defendant's trial strategy, it appears the consent was motivated by a misguided belief the illegal possession might be forgiven if it was blamed on the salesperson's

failure to conduct a background check before selling the gun. It is equally plausible defendant sought to establish he was the gun's rightful owner even if not a lawful owner. As for the remaining two requirements, defendant was plainly the person authorized to consent to a search of his own pocket and the search was limited to that place.

Defendant's challenge to the receipt's admissibility is predicated on mischaracterizing the request for consent as a *Harrington* request that combined with other *Mendenhall* factors to prematurely transform the social contact into a seizure. But the request was actually made after the incriminating admissions combined with the openly-carried firearm to authorize the detention, making the request a legitimate component of the attending investigation.

ii. The receipt was otherwise lawfully seized incident to arrest.

An arrestee's person may be searched by virtue of lawful arrest. *Byrd*, 178 Wn.2d at 617 (citing *United States v. Robinson*, 414 U.S. 218, 224, 94 S. Ct. 467 (1973); *Chimel v. California*, 395 U.S. 752, 89, S. Ct. 2034 (1969)). *Chimel* concerns for officer safety and evidence preservation are always implicated. *Id.* at 618; *Virginia v. Moore*, 533 U.S. 164, 176-77, 128 S. Ct. 1598 (2008).

The search of defendant's pocket and the attending seizure of his receipt could also be upheld under the search incident to arrest exception irrespective of consent. At the time the request was made, Stewart already confirmed the previously admitted felony conviction, placed defendant in handcuffs, secured the openly-carried pistol, and recognized it to be a loaded revolver. A valid search incident to arrest might be found even though the rapidly unfolding facts more closely conform to the consent search during an investigative detention paradigm.

iii. Admitting the receipt was harmless if error because it was not necessary to convict defendant of the offense and corroborated his defense.

An erroneous failure to suppress evidence is harmless beyond a reasonable doubt if the State proves any jury would reach the same result regardless of the error. *State v. McReynolds*, 117 Wn. App. 309, 326, 71 P.3d 663 (2003). The burden can be met where the evidence was cumulative or any prejudice was neutralized by the evidence's utility to the defense. *E.g., State v. Saunders*, 132 Wn. App. 592, 604, 132 P.3d 743 (2006); *United States v. Hager*, 721 F.3d 167, 200 (4th Cir. 2013).

Defendant's theory of the case was that he did not *knowingly* possess a firearm because he was mistaken about the nature of the pistol he purchased. According to defendant, the salesperson's act of selling the

pistol without running a background check misled defendant into believing it was an item felons could possess. *E.g.*, 2RP 110-11, 116. The receipt was further proof of defendant's crime, but it also corroborated his defense. This is why, contrary to the position taken on appeal, defendant rightly treated it as harmlessly cumulative below:

Your Honor, some of those the jury is going to learn about anyway. The pawn shop – the fact that [defendant] purchased it at a pawn shop. I can tell you that in talking to [defendant] ... I don't think [defendant] referred to the gun at issue here as a gun, and I think that ... statement is probably not admissible.... The other things, Your Honor, I think the jury's going to hear about anyway. So, I mean, it's, you know, kind of like not a battle worth fighting.

1RP 31. Any error in admitting the receipt was harmless. *E.g.* 2RP 135-36.

2. THE PROSECUTOR DID NOT ERRONEOUSLY PORTRAY UPOF AS A STRICT LIABILITY CRIME IN REBUTTAL AS THE CHALLENGED REMARK ONLY ADDRESSED THE DEFINITION OF A FIREARM, MEANWHILE THE PROSECUTOR REPEATEDLY IDENTIFIED THE *MENS REA* ELEMENT OF KNOWLEDGE TO BE THE CENTRAL ISSUE IN THE CASE AND PROPERLY ARGUED PROOF OF THAT ELEMENT FROM THE COURT'S INSTRUCTIONS.

Defendant must prove the prosecutor's argument was improper and prejudicial. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (citing *State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993)); *State v. Hoffman*, 116 Wn.2d 51, 93-95, 804 P.2d 577 (1991). Alleged misstatements of law are reviewed in the context of the total argument, the

issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994); *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986); *State v. Warren*, 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008); *State v. McChristian*, 158 Wn. App. 392, 400, 241 P.3d 468 (2010).

The prosecutor began his closing by arguing the evidence according to UPOF's elements:

The three things the State must prove are one, ... defendant knowingly had a firearm in his possession or concern; two, ... defendant had previously been convicted of a felony; and three, ... the possession ... occurred in ... Washington.

E.g., 2RP 124-126 (emphasis added); CP 39 (Inst.5). The knowledge element defendant strangely claims the State treated as non-existent, was actually singled out by the prosecutor as *the issue* in dispute:

So what's the issue[?]. What are we all here for? It's to determine a part of element No. 1, whether defendant knowingly pos[ses]sed or had in his control a firearm.

I submit to you that essentially what we're here for is to determine that knowingly ... element of the to convict instruction. Did the defendant know it was a firearm[?].

2RP 127-28 (emphasis added). And the evidence proving that element was painstakingly argued from the instructions. 2RP 128-30.

Defendant's closing focused on the pawn shop's allegedly misleading act of selling him a gun without conducting a background check while referring to the gun as an "antique novelty item" instead of a firearm. 2RP 134-36. The challenged rebuttal recalled the jury to the

elements. 2RP 138. It then responded to defendant's argument by pointing out the immateriality of background checks to those elements. 2RP 238. The prosecutor then responded to defendant's use of the word "antique" to describe the gun by illustrating how "antiques" are firearms when they function as such. 2RP 139 (emphasis added). Following an objection, the remark was rephrased to a simple request for the jury to evaluate the evidence according to UPOF's elements. 2RP 139 (Inst.5).

- a. Defendant's challenge to the prosecutor's rebuttal blatantly mischaracterizes proper treatment of the firearm element as misstatement of the knowledge element, which was not being addressed.

Prosecutors are afforded wide latitude to argue inferences from the evidence during summation, to include reasons a witness is unworthy of belief. *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006); *State v. Militate*, 80 Wn. App. 237, 250, 908 P.2d 374 (1995) (citing *Hoffman*, 116 Wn.2d at 94-95); *State v. Munguia*, 107 Wn. App. 328, 337, 26 P.3d 1017 (2001); *Brett*, 126 Wn.2d at 175. The burden of proof does not insulate a defendant's exculpatory theory from attack. *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990). "A prosecutor is entitled ... to point out [its] improbabilities or ... lack of evidentiary support...." *State v. Killingsworth*, 166 Wn. App. 290-92, 269 P.3d 1064, review denied, 174 Wn.2d 1007, 278 P.3d 1112 (2012)(citing *Russell*, 125 Wn.2d at 87; *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005)).

Even improper remarks are not grounds for reversal when invited or provoked by the defense, unless impertinent or incurably prejudicial. *Russell*, 125 Wn.2d at 86 (citing *State v. Dennison*, 72 Wn.2d 842, 849, 435 P.2d 526 (1967)).

Defendant challenges the last sentence of the following rebuttal remark, wrongly claiming it trivializes UPOF's knowledge element:

What is before you is that defendant bought a gun, a firearm. Antique, so what [?]. Antique firearms, as I'm sure you're aware using your common sense and life experiences know that they still go bang and they shoot projectiles. Replica of a Civil War piece. So what[?] It could be a black powder muzzle loader that still went bang and shot a projectile, and it would still be a firearm. October 11 through the 25th did the gun fire? Who cares [?] What's before you is not whether the firearm that the defendant had that he used it and fired it. What's before you is that the defendant had a firearm. Period.

2RP 139 (emphasis added). The prosecutor logically refrained from mentioning the knowledge element because it was not the subject being addressed. Rather, the argument responds to defendant's description of his gun as an "antique" by illustrating why that description is immaterial to whether the *firearm* element was proved. Instruction No. 6 defined a firearm as "a weapon or device from which a projectile may be fired by an explosive such as gunpowder." CP 40 (Inst.6)(emphasis added). Each of the challenged remark's illustrations invoked the operative components of the definition, *i.e.*, "powder" short for "gunpowder", "bang[s]" descriptive of explosive events, "projectile[s]", and "shooting" for the firing of them.

2RP 139. All of which responded to defendant's description of the gun as an "antique" by reminding the jury "firearms", like the one defendant possessed, are defined according to their function not their historical significance or appearance.

The alleged misconduct is predicated on a mischaracterization of the prosecutor's plain meaning. Instruction No. 5 combined three facts the State must prove in one element: "That ... defendant knowingly had a firearm in his possession" CP 39 (Inst.5)(emphasis added). Each was *separately* explained in the instructions. CP 35 (Inst. 1), 40 (Inst.6—"firearm"), 42 (Inst. 8—"Possession"), 43 (Inst.9—"Knowingly"). There is likewise nothing improper about a prosecutor discretely addressing them in argument similarly aimed at achieving clarity through precision. The challenged rebuttal was not misconduct.

b. The challenged rebuttal was harmless if error.

A defendant only proves prejudice when he or she establishes that there is a substantial likelihood a prosecutor's erroneous argument affected the verdict. *Brett*, 126 Wn.2d at 175; *McChristian*, 158 Wn. App. at 400.

Defendant cannot demonstrate prejudice even if one unjustifiably adopts his untenable interpretation of the challenged remark. The jury was accurately instructed on the State's burden to prove knowledge, which was reinforced by the definitional instruction. CP 39 (Inst.5), 43 (Inst. 9). It is presumed those instructions were followed. *State v. Hanna*, 123 Wn.2d

704, 711, 871 P.2d 135 (1994). And it is while arguing the evidence from those instructions the prosecutor explicitly identified the knowledge element to be the principal issue the jury was being called upon to decide:

So what's the issue[?]. What are we all here for? It's to determine a part of element No. 1, whether defendant knowingly pos[ses]sed or had in his control a firearm.

I submit to you that essentially what we're here for is to determine that knowingly ... element of the to convict instruction. Did the defendant know it was a firearm[?].

2RP 127-28 (emphasis added). It is preposterous to assume the jurors were so dull as to be beguiled out of their recollection of the knowledge element so clearly identified as indispensable in the instructions and the prosecutor's closing by his decision to refrain from redundantly readdressing it in rebuttal while explaining proof of a different element.

The knowledge element was also too amply proved for the verdict to be called into doubt by any ambiguity capable of being read into the challenged remark. Defendant was shown to have spontaneously identified his pistol as a "black powder gun", which he disquietingly acknowledged loading because it "very much" added to the "excitement of having it." 2RP 74, 116. 119. The jury was free to infer he impliedly conceded awareness the gun's operability again at trial by suspiciously referring to it as "my gun, no -- my alleged gun...." 2RP 117. The probative value of that tell was enhanced by the reasonably drawn inference that one with

defendant's demonstrated obsession with guns would recognize his obviously loaded revolver as an operable firearm. 2RP 77, 79, 84; Ex. 4-5, 10. Defendant failed to prove a prejudicial misstatement of law.

D. CONCLUSION

Defendant was lawfully detained and disarmed when his spontaneous revelation of a prior felony conviction gave police reason to suspect he was committing UPOF. The gun's receipt was seized from his person by consent, or incident to arrest. And the mischaracterization of the State's proper rebuttal remark about the firearm element was not a prejudicial misstatement of the knowledge element as defendant claims, so his well proven conviction should be affirmed.

RESPECTFULLY SUBMITTED: December 21, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by  U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12.22.15 

Date Signature

PIERCE COUNTY PROSECUTOR

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