

64527-7

64527-7

NO. 64527-7-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DARNELL DAVIS,

Appellant.

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

BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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A. ASSIGNMENT OF ERROR.

Instruction 20 impermissibly told the jury the handgun in this case was a firearm.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

1. Article IV, section 16 of the Washington Constitution prohibits judges from commenting on evidence. A jury instruction is a comment on the evidence when it suggests to the jury the court's attitudes toward the evidence or resolves a matter of fact as a matter of law. Mr. Davis was alleged to have used a firearm in the commission of one of the robbery counts in this case. The State's evidence established the gun was inoperable at the time of the offense. Instruction 20, however, told the jury that the gun nonetheless was a firearm. Did Instruction 20 comment on the evidence?

2. The constitutional right to trial by jury, as guaranteed by the Sixth Amendment to the United States Constitution and Article I, §sections 21 and 22 of the Washington Constitution, bars trial judges from directing verdicts of conviction or otherwise interfering with jurors' independent judgment contrary to the interests of an accused person. Did the trial court violate Mr. Davis's right to jury trial by instructing the jury that the gun was a firearm?

C. STATEMENT OF THE CASE.

Darnell Davis, along with Sheriann Pam, was accused of committing three robberies in Seattle on the evening of September 8, 2008 and the early morning of September 9, 2008. 10/1/09 RP 68-73. The victim of one of those robberies testified Mr. Davis had pointed a handgun at him during the robbery. 10/1/09 RP 24-28. When police stopped the car driven by Ms. Pam, in which Mr. Davis was a passenger, they found a handgun under the front seat. 10/12/09 RP 77.

The handgun was submitted to the Washington State Patrol Crime Laboratory for testing. Kathy Geil, a lab employee, found the gun was initially inoperable. 10/13/09 RP 58. Only after lubricating the gun was Ms. Geil able to fire it. Id.

Over Mr. Davis's objection, the court instructed the jury that a gun was a firearm even if temporarily inoperable. 10/14/09 RP 4, CP 133. The jury found the gun was a firearm. CP 151.

D. ARGUMENT.

1. THE TRIAL COURT IMPERMISSIBLY
COMMENTED ON THE EVIDENCE
SUPPORTING THE FIREARM
ENHANCEMENT.

a. A court's instructions may not comment on the evidence. Article IV, section 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Since a comment on the evidence violates a fundamental constitutional prohibition, a criminal defendant may raise this issue on appeal even if not objected to below. State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006).

An instruction improperly comments on the evidence if it resolves a disputed issue of fact that should have been left to the jury. State v. Becker, 132 Wn.2d 54, 64-65, 935 P.2d 1321 (1997). Article IV, section 16 prohibits a judge from "conveying to the jury his or her personal attitudes toward the merits of the case or instructing a jury that matters of fact have been established as a matter of law." Levy, 156 Wn.2d at 721. The court's personal feelings need not be expressly conveyed to the jury to violate this constitutional provision; it is sufficient if they are merely implied.

Levy, 156 Wn.2d at 721. “[A]ny remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment.” Id.

b. Instruction 20 impermissibly commented on the evidence supporting the firearm allegation. The State’s evidence established the gun recovered from Ms. Pam’s car was not immediately operable when received by the Washington State Patrol Crime Laboratory. 10/13/09 RP 58. Instead, only after the technician lubricated the gun did it become operable. Id.

The enhancement is an element of the offense which the State must prove beyond a reasonable doubt. Washington v. Recuenco, 548 U.S. 212, 216, 126 S.Ct. 2546, 165 L.ed.2d 466 (2006). As set forth by the jury instructions, an essential element of the firearm enhancement was that Mr. Davis possessed a “firearm that was operable at the time of the commission of the crime.” CP 133 (Instruction 20). The instructions further defined “firearm” as “capable of firing a projectile by an explosive such as gunpowder.” Id. This definition coincides with the statutory definition of “firearm.” RCW 9.41.010(1). However, the instruction went further to tell the jury that “[a] temporarily inoperable firearm . . . is a firearm.” Id.

A gun that is inoperable, may not be readily made operable, or is not an actual firearm, does not meet the definition of firearm under the statute. State v. Padilla, 95 Wn.App. 531, 534, 978 P.2d 1113, review denied, 139 Wn.2d 1003 (1999). In Padilla, the firearm at issue was found in three pieces. Id. at 535. A firearms instructor offered “unrefuted” testimony the gun could be reassembled in a matter of seconds, and test-fired the gun to confirm its operability. Id. Because the gun could be made operable with an easy effort and in a minimal amount of time, the Padilla Court found the weapon qualified as a firearm under the statutory definition. Id. at 532; RCW 9.41.010(1).

Similarly, an unloaded and otherwise working gun is a “firearm” because it is “easily loaded during the commission of a crime.” State v. Sullivan, 47 Wn.App. 81, 84, 733 P.2d 598 (1987). When officers trained in handling and identifying weapons give their opinions that the firearm is not an imitation gun, say the gun has the touch and feel of a working firearm, describe its serial number, and admit the firearm into evidence as an exhibit, the jury may infer the weapon is a statutorily prohibited firearm even without test-firing. State v. Anderson, 94 Wn.App. 151, 160-61, 971 P.2d

585 (1999), reversed on other grounds, 141 Wn.2d 357, 5 P.3d 1247 (2000).

What these cases establish is that a gun may be found to be a firearm even if it is not presently operable but can be readily made so, but nothing in those cases requires that finding. That is apparent from the fact that the pattern instruction does not include the language from Instruction 20 at issue here. Compare, 11 Washington Practice, Washington Pattern Jury Instructions – Criminal, 2.10.01 (2008). Instruction 20 removes that question from the jury telling them they must find the a temporarily inoperable gun is a firearm.

In State v. Eaker, 113 Wn.App. 111, 118, 53 P.3d 37 (2002), review denied, 149 Wn.2d 1003 (2003), the jury was told that to convict the defendant, it had to find:

That on or between the 1st day of January, 1990 and the 31st day of December, 1991, the defendant had sexual intercourse with [M.F.] while [M.F.'s] parents were on vacation on the day that Judy Russel [sic] was babysitting [M.F.] and took him to his house at 1325 Isaacs Street, Walla Walla . . .

Id. This Court found the instruction was an impermissible comment on the evidence as it “assumes as an undisputed fact” that Judy

Russell babysat for M.F. sometime between the dates in question and took him to the house on Isaacs Street. Id.

The prosecution argued in Eaker that the court was merely identifying the specific act in question. Id. at 119. This Court rejected that reasoning, as the instruction did not make clear exactly what the jury needed to find and instead implied that necessary facts had already been established. Id. Thus the Court found the instruction violated Art. 4, section 16 because it commented on the corroborating facts and reversed the conviction since the comment at least bolstered the complainant's version of events, if not taking an issue of fact away from the jury. Id. at 120-21.

Similarly, in Becker, the jury was supposed to decide whether the crime occurred within 1000 feet of a school. 132 Wn.2d at 65. The court's special verdict form asked the jury to decide whether the defendants were "within 1000 feet of the perimeter of school grounds, to wit: Youth Employment Education Program School at the time of the commission of the crime." Id. at 64. The Supreme Court found this instruction resolved the question of whether the building in questioned housed a school and

“effectively remov[ed] a disputed issue of fact from the jury’s consideration. Id. at 65.

In Levy, the defendant contested several “to wit” comments made in the jury instructions. 156 Wn.2d at 716-17. The Levy Court found that these references suggested to the jury that those issues were settled as a matter of law and the jury need not consider those issues. Id. at 720-21. In the burglary to-convict instruction, the court told the jury to decide whether the defendant “entered or remained unlawfully in a building, *to-wit: the building of Kenya White. . . .*” Id. at 716 (emphasis in original). The same instruction also asked the jury to decide whether the defendant was armed with a deadly weapon, *to-wit: a .38 revolver or a crowbar. . . .*” Id. (emphasis in original).

Whether the apartment was a building and whether a crowbar was a deadly weapon were issues of fact the jury was required to decide and the court’s remarks seemingly resolved those issues and constituted improper comments on the evidence. Id. at 721-22.

Here, while a jury could reasonably conclude a temporarily inoperable firearm “may be fired,” there is no case law that requires them to reach such finding. Instruction 20, nonetheless, required

the jury to find the inoperable gun in this case was a firearm. That instruction impermissibly commented on the evidence.

2. INSTRUCTION 20 DIRECTED THE JURY'S VERDICT IN VIOLATION OF PROVISIONS OF THE STATE AND FEDERAL CONSTITUTIONS.

a. A court may not direct a jury's verdict in a criminal case. Both the Sixth Amendment and Article I, sections 21 and 22 guarantee the right to a trial by jury. Given this constitutional right to a jury trial, "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelming the evidence may point in that direction." United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73, 97 S.Ct. 1349, 1355, 51 L.Ed.2d 642 (1977) (citing Sparf & Hansen v. United States, 156 U.S. 51, 15 S.Ct. 273, 39 L.Ed. 243 (1895); Carpenters v. United States, 330 U.S. 395, 408, 67 S.Ct. 775, 91 L.Ed.2d 973 (1947)); see also Rose v. Clark, 478 U.S. 570, 578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (recognizing "rule stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases"). The jury must always be given the opportunity to acquit a defendant of criminal accusation. Sparf & Hansen, 156 U.S. at 106. Trial courts are thus "barred from

attempting to override or interfere with the juror's independent judgment in a manner contrary to the interests of the accused." Martin Linen, 430 U.S. at 573.

b. Instruction 20 directed the jury's verdict on the firearm enhancement. In Becker, the Court found that the special verdict form "effectively remov[ed] a disputed issue of fact from the jury's consideration." 132 Wn.2d at 65. The Court reversed the conviction due to the instruction's reference to the education program as a "school," holding, "The special verdict form was tantamount to a directed verdict and was error." Id.

By telling the jury there was no question that a temporarily inoperable gun was a firearm, Instruction 20 was tantamount to a directed verdict and thus violated Mr. Davis's constitutional rights to a trial by jury. The trial court interfered with the jury's independent judgment by instructing the jury that the gun was a firearm.

"No matter how strong the evidence may be" an appellate court may not sustain a directed verdict. Carpenters, 330 U.S. at 408. Thus, this Court must reverse Mr. Davis's enhancement.

E. CONCLUSION.

For the reasons above, this Court must reverse Mr. Davis enhancement.

Respectfully submitted this 28st day of June 2010.

A handwritten signature in black ink, appearing to read "Gregory C. Link", written over a horizontal line.

GREGORY C. LINK – 25228
Washington Appellate Project
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 64527-7-I
v.)	
)	
DARNELL DAVIS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF JUNE, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> DARNELL DAVIS 304290 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF JUNE, 2010.

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COURT OF APPEALS
STATE OF WASHINGTON
FILED

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710