

COURT OF APPEALS NO. 69552-5-I

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
COUNTY OF KING

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STATE OF WASHINGTON,

Respondent,

v.

LIBAN ADEM,

Appellant.

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

The Honorable Hollis R. Hill, Judge

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REPLY BRIEF OF APPELLANT

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I. SUPPLEMENTAL ASSIGNMENTS OF ERROR<sup>1</sup>

1. Finding of fact “b” is not supported by substantial evidence.
2. Finding of fact “f” is not supported by substantial evidence.
3. The court’s findings of fact do not support the court’s conclusions of law numbers II(a)(6)m, II(b), II(c), II(c)(3) and III.
4. The court’s findings do not support the conclusion that the defendant was armed with a firearm.

II. ISSUES IN REPLY

1. In seeking to uphold the firearm enhancement and conviction for unlawful possession of a firearm, the State argues that it is only required to prove that the defendant possessed a “real gun” rather than a “toy gun.” In making this argument, the State disregards decisions from this Court and the Washington Supreme Court. Should this Court reject the State’s argument and reaffirm that the firearm must be operational?

2. The purported handgun was never fired and never recovered. Nor did the evidence establish that the weapon was in

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<sup>1</sup> The trial court signed CrR 6.1 findings of fact and conclusions of law after appellant’s opening brief had been submitted.

working order, or even that it could be made operational within a reasonable period of time. Must a firearm enhancement and the conviction for unlawful possession of a firearm be reversed based on the insufficiency of the evidence?

III. ISSUES PERTAINING TO THE SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. Where the evidence did not establish that the weapon was a working firearm, did the court err in referring to the weapon as a handgun in finding of fact “b” and “f”?

2. The two brief mentions of the purported handgun in the court’s findings of fact do not establish the purported gun was operational, or that it could have been made operational with reasonable effort. Given the lack of findings as to this essential element, should the court’s conclusions of law that appellant possessed a “firearm” be stricken?

IV. ARGUMENT

A. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE FIREARM ENHANCEMENT AND THE CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM.

**1. An inoperable gun does not constitute a firearm.**

In 2008, the Supreme Court examined the definition of a firearm and stated, “a jury must be presented with sufficient evi-

dence to find a firearm operable under this definition in order to uphold the enhancement.” *State v. Recuenco*, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008). Despite this unequivocal statement from Washington’s highest court, the State nevertheless argues that a firearm need not be operable. BOR at 32. Rather, the State argues, “it was sufficient to show that Adem used a real gun.” *Id.* In support of this position, the State cites to three court of appeals decision, two of which were decided a decade prior to *Recuenco*. BOR at 32-33. The only post-*Recuenco* decision cited by the State is *State v. Raleigh*, 157 Wn. App. 728, 238 P.3d 1211 (2010). In *Raleigh*, Division Two concluded that the language in *Recuenco* was dicta and need not be followed. *Id.* at 732-33.

Anticipating the State’s reliance upon this case, Adem addressed the *Raleigh* decision in his opening brief. At pages 28 to 31 of that brief, there is an extensive discussion as to why the language in *Recuenco* was not dicta, but rather, was essential to the Court’s holding. The State did not respond to this argument in its response brief.

Even within Division Two, the position taken by the *Raleigh* decision is not shared by the opinions from other panels within that Division. For instance, in *State v. Pierce*, 155 Wn. App. 701, 714-

15, 230 P.3d 237 (2010), the Court found that *Recuenco* requires the State to demonstrate the gun was operable and capable of being fired. Citing to *Recuenco*, the *Pierce* court reversed a conviction where the instructions failed to inform the jury that it must find the gun operable in order to convict. *Pierce*, 155 Wn. App. at 714.

Division Two reached a similar conclusion in *In re Pers. Restraint of Delgado*, 149 Wn. App. 223, 237, 204 P.3d 936 (2009). This case involved an instructional error relating to the firearm enhancement. In vacating the firearm enhancement, the court explained: "Because the jury here did not find that Meza and Delgado were armed with operable firearms, the sentencing court exceeded its authority by entering a sentence that does not reflect the jury's findings." *Id.* at 237 (emphasis added).

Our own division had an opportunity to squarely address the operability issue in a post-*Recuenco* case. See *In re Pers. Restraint of Rivera*, 152 Wn. App. 794, 218 P.3d 638 (2009). In *Rivera*, the trial court imposed a firearm enhancement, even though the jury had not made a specific finding that a firearm was used in the commission of the offense. In describing the law on this issue, *Rivera* explained "there must be sufficient evidence to find a firearm operable to uphold a firearm enhancement." *Id.* at 803 & n.22.

The *Rivera* Court then looked at whether this was a harmless error. The Court noted that the defendant was convicted of murder based on shooting the victim with the gun in question.

Thus, the jury's general verdict finding guilt on the murder charge together with its finding that the crime was committed with a deadly weapon necessarily supports a finding that the handgun used in the shooting was in fact operable and a firearm.

*Id.* at 802 (emphasis added).

Additionally, the State's reliance upon *Raleigh* is mistaken because of the extreme stance that decision takes. As noted, *Raleigh* held that in order to qualify as a firearm under RCW 9.41.010 a gun need only be a "gun in fact" as opposed to a toy gun. *Id.* at 734. In other words, operability plays no role in the inquiry as to whether a gun is a "firearm." But this position stands in contrast to a decision made by this Court even prior to the issuance of *Recuenco*. A case in point is *State v. Padilla*, 95 Wn. App. 531, 978 P.2d 1113 (1999). In that pre-*Recuenco* case, this Court found that in order for a weapon to meet the operability requirement of a firearm, the weapon had to be capable of being made operational with reasonable effort within a reasonable time. *Id.* at 533-34. In that case, because the undisputed testimony was that the gun could have been assembled within a matter of seconds, it qualified as

firearm. *Id.* at 535. This contrasts sharply with limited inquiry under *Raleigh* as to whether the gun was a real gun or a toy.

*Recuenco* marked a return to the much earlier rule in *State v. Pam*, 98 Wn.2d 748, 659 P.2d 454 (1983), that a gun needs to be operational in order for it to qualify as a firearm.

**2. The State presented insufficient evidence that the purported handgun gun was a “firearm.”**

In determining the sufficiency of the evidence, the existence of a fact cannot rest upon guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). Here, there was no evidence that the gun was operable. Even applying the pre-*Recuenco* test from *State v. Padilla*, there is no evidence that the gun could have been made operable with little effort and within a reasonable time.

As an initial matter, it does not appear that trial prosecutor was attempting to prove the gun was operable. Rather, the focus appeared to be on whether it was a toy. See RP 247, 256. That is the same approach taken by the State on appeal. The State argues that it was a real gun because the victim said it looked real. In support, the State cites to *State v. McKee*, 141 Wn. App. 22, 167 P.3d 575 (2007). BOR at 30. In that pre-*Recuenco* case, the vic-

tim was able to testified as to the weight and feel of the gun. *Id.* at 31. Further, an operational gun was found in the defendant's possession. *Id.* By contrast, here Ms. Hunyh specifically testified that she "did not look at the gun" and never touched the gun. RP 170. More telling, she acknowledged that she had never seen a gun, except in a movie. *Id.*

In arguing that the victim's subjective belief should be sufficient to establish an operational firearm, the State blurs the distinction between first degree robbery and the firearm enhancement. A robbery is elevated to first degree when the defendant "displays what appears to be a firearm or an other deadly weapon." RCW 9A.56.200(1)(a)(ii). For this, the State does not need to prove an operable firearm. Rather the State need only prove that the defendant displayed something that looked like a gun. In our case, the State argues that because Ms. Hunyh believed it was a gun, it must have been gun. But under this line of reasoning, there is no distinction between what a victim believes and what is an actual, working firearm.

Significantly, Adem is not challenging Hunyh's credibility. Hunyh may very well entertain an honest belief that the gun was a real working firearm. But without a factual basis for that belief, this

honest belief cannot satisfy the State's burden. The court's decision in *State v. Colquitt*, 133 Wn. App. 789, 137 P.3d 892 (2006) helps demonstrate this point. In that case, an officer searched the defendant and found a small plastic bag with several white, rock-like items in his pants pocket. *Id.* at 792. The officer believed it was rock cocaine and so conducted a field test, which revealed the presence of cocaine. The defendant stipulated to the police report and was found guilty.

On appeal, the defendant challenged the sufficiency of the evidence. The State argued that it was for the trial court, not the court of appeals, to evaluate the circumstantial evidence and the credibility of the officer's opinion. The Court of Appeals agreed that credibility is for the trier of fact, but explained "the problem here is the paucity of information supporting the officer's identification of the white rock-like items." *Id.* at 800. The court further explained:

The evidence here only demonstrates that the officer's visual identification of the items was based on his conjecture, at best. *[citations omitted]*. The record is devoid of evidence of the officer's experience and training that would allow him to properly identify the items as cocaine.

*Id.* at 801.

Similarly, the record in our case is devoid of any evidence that would demonstrate Hunyh's ability to recognize an operational

firearm. In fact, the evidence presented shows that she was completely unqualified to make that determination, having never seen a gun before and having made a point of not looking at the gun. Her opinion, which the State relies upon on in this appeal, is conjecture at best.

The State's reliance upon Mr. Crimp's testimony suffers the same fate. Crimp briefly saw what he believed to be a gun skid across the ground. He acknowledged, however, that he was "not too familiar" with pistols. RP 105. While the metallic sound Crimp heard on the ground may establish that the purported gun was not a plastic toy, that hardly answers the question as to whether the purported handgun, was a real, working firearm.

In arguing that the standard for proving an operational firearm is a low one, the State cites to a few different cases. BOR at 29. For instance, the State relies upon *State v. Faust*, 93 Wn. App. 373, 967 P.2d 1284 (1998) for this proposition. But *Faust* specifically did not require the State to prove that the gun was operational; they only had to prove that the gun was not a toy. *Id.* at 380. As such, *Faust* provides no guidance for what constitutes sufficient proof of a working firearm.

All challenges to the sufficiency of the evidence are fact specific. *State v. Hernandez*, 85 Wn. App. 672, 678, 935 P.2d 623(1997). As such, prior cases are not always helpful in determining what is sufficient evidence of operability. This is particularly true as to the older sufficiency of the evidence challenges cited by the State, where the focus was upon whether a gun was real or not. And while a few of those older cases give passing reference to operability, they contain no discussion as to how a fact finder could actually determine whether the gun was in working condition. See *e.g. State v. Goforth*, 33 Wn. App. 405, 411-412, 655 P.2d 714 (1982).

The State points to the testimony of the primary officer who reviewed the video of the robbery. BOR 30-31. In watching the video the officer observed what he believed a racking motion with the slide of the gun. Under questioning from the prosecutor, the officer agreed that a toy would not have a slide on it that could be racked. RP 256. Those with children interested in that type of thing might disagree with the officer's conjuncture as to what features are found on toys. But putting that aside, again the issue is not whether it is a toy, but whether it is an operational firearm. Finally, it is worth noting that the trial judge did not cite to the officer's

testimony in her findings of fact and conclusions of law. See CP 126-130.

The test is whether the proof of operability rose to the level of proof beyond a reasonable doubt. For the reasons set forth here and in appellant's opening brief, appellant suggests the State's evidence falls short of that standard. Reversal of the firearm enhancement and the conviction for unlawful possession of a firearm is required.

**B. FINDINGS OF FACT "B" AND "F" ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**

Findings of fact must be supported by substantial evidence. *State v. Hutton*, 7 Wn. App. 726, 728, 505 P.2d 1037 (1972). The evidence "must attain that character which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *Id.* Findings of fact that are not supported by substantial evidence must be stricken.

Finding of fact "b" relates to the testimony of Ms. Huynh. That finding states in relevant part, "The defendant was armed with a semiautomatic pistol." CP 126. Finding of fact "f" relates to the observations of Mr. Crimp. That finding states in relevant part, "The defendant dropped the handgun and it slid by Mr. Crimp's feet. Mr.

Crimp was able to see and hear the handgun as it slid on the pavement.” CP 127. To the extent that the trial court is finding that Huynh and Crimp saw what they believed to be a handgun, those findings are supported by substantial evidence. But to the extent that the trial court is making a finding that what the witnesses observed was an actual, functional handgun, that finding is not supported by substantial evidence. The reasons why the evidence does not support those findings was set forth above and in appellant’s opening brief. The argument will not be repeated here.

C. THE FINDINGS DO NOT SUPPORT THE COURT’S CONCLUSION THAT THE APPELLANT POSSESSED A FIREARM.

In a criminal case, the trial court must set forth each of the elements separately, “indicating the factual basis for each of these factual conclusions.” *State v. Russell*, 68 Wn.2d 748, 750, 415 P.2d 503 (1966). Here, the trial court concluded that the defendant possessed a firearm, and was therefore guilty of the unlawful possession of a firearm and the firearm enhancement. See Conclusions of Law numbers II(a)(6), II(b), II(c), II(c)(3) and III.

As discussed above, the definition of a firearm requires that the weapon be operable. At the very least, it requires that the weapon can be made workable with reasonable effort and within a

reasonable period of time. See *State v. Padilla*, 95 Wn. App. at 533-34. The question becomes whether the court's findings support that conclusion of law.

Within the entire set of written findings, the trial court only made mention of the gun twice. Finding of fact "b" states:

The defendant was armed with a semiautomatic pistol. During the course of the robbery the defendant held the handgun to Ms. Huynh's head in order to intimidate her into turning over \$20,000 to \$30,000 worth of jewelry.

CP 126.

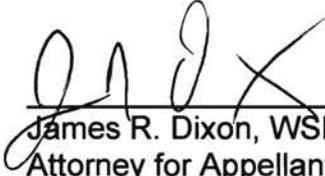
The other finding that mentions the gun is finding "f". The portion of the finding relating to the handgun states: "The defendant dropped the handgun and it slid by Mr. Crimp's feet. Mr. Crimp was able to see and hear the handgun as it slid on the pavement." CP 127.

As described above, the testimony of Huynh and Crimp do not establish the existence of a working firearm. As such, these two findings cannot support the trial court's conclusion that Adem possessed a firearm. Accordingly, the firearm enhancement and the unlawful possession of a firearm conviction should be reversed and the charges dismissed.

V. CONCLUSION

For the reasons set forth here and in appellant's opening brief, the firearm enhancement and weapons conviction cannot stand. Reversal is required.

Respectfully Submitted on this 13<sup>th</sup> day of December, 2013

  
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