IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANTHONY LESHAWN PALMER, Appellant.	No. 39349-2-II UNPUBLISHED OPINION

Van Deren, J. — Anthony Leshawn Palmer appeals his Pierce County conviction of first degree unlawful possession of a firearm. He argues that the evidence was insufficient to support the conviction and the prosecutor's closing arguments constituted prejudicial misconduct.[1] We affirm.

FACTS

On November 21, 2008, Tacoma Police officers observed Palmer and his companions enter a school yard after hours. When the officers tried to talk to the men, Palmer fled. One officer pursued him on foot, and another officer followed in the patrol car. They ultimately caught and arrested him. The officer who pursued Palmer on foot believed that he was holding a

[1] A commissioner considered this matter pursuant to RAP 18.14, and referred it to a panel of judges.

gun at his waist as he ran. Accordingly, after the arrest, the officers retraced the path of the pursuit and found a 9mm handgun in a bush. The magazine was sticking out perhaps one quarter or one half inch from the magazine well and was not loaded.

The officers sent the weapon to the Washington State Patrol crime laboratory in Tacoma, where firearms and toolmark expert, Johan Schoeman, examined it for operability. Schoeman found that the gun was incapable of firing ammunition because the slide would not rack fully to the rear. When he field stripped the gun, he discovered that the sear, which formed part of the frame, had been inserted backward. He could not perform alone the maneuvers necessary to lower the sear and remove the slide. His supervisor assisted him; the two worked for one half hour to reinstall the sear in the correct position. After Schoeman reassembled the weapon, he was able to fire it. The entire process took him one and one half hours.

The State charged Palmer with first degree unlawful possession of a firearm. He denied that the gun was his, but then argued that one and one half hours was not a reasonable amount of time to make it operable; therefore, it was not a "firearm," as contemplated by the statute. The jury convicted him as charged, and he appeals.

ANALYSIS

Palmer contends that the evidence is insufficient to prove that the handgun involved here satisfies the statutory definition of a firearm. We view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Scoby*, 117 Wn.2d 55, 61, 810 P.2d 1358, 815 P.2d 1362 (1991); *State v. Rangel-Reyes,* 119 Wn. App. 494, 499, 81 P.3d 157 (2003). A claim of insufficiency admits the truth of the State's evidence and all reasonable

inferences therefrom. Circumstantial evidence is as reliable as direct evidence. *State v. Turner*, 103 Wn. App. 515, 520, 13 P.3d 234 (2000).

The State had to prove that Palmer had a prior conviction for a serious offense, and thereafter, possessed "any firearm." Former RCW 9.41.040(1)(a) (2005). "'Firearm' means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." Former RCW 9.41.010(1) (2001). We have repeatedly held that this definition does not limit firearms to only those guns capable of being fired at the time of the crime. *State v. Wade,* 133 Wn. App. 855, 873, 138 P.3d 168 (2006); *State v. Berrier,* 110 Wn. App. 639, 645, 647, 41 P.3d 1198 (2002); *State v. Faust*, 93 Wn. App. 373, 380-81, 967 P.2d 1284 (1998).

Palmer argues that these cases were wrongly decided because we did not apply the rule of lenity, adopting the interpretation most favorable to him, although we found former RCW 9.41.010(1) ambiguous. We apply the rule of lenity only when the legislature's intent is insufficiently clear to resolve the ambiguity. *See In re Post Sentencing Review of Charles,* 135 Wn.2d 239, 250, n.4, 955 P.2d 798 (1998). That is not the case with regard to former RCW 9.41.010(1) and we decline to revisit this issue.

In the alternative, Palmer argues that we must apply the standard established in *State v. Padilla*, 95 Wn. App. 531, 533, 978 P.2d 1113 (1999) to determine whether this firearm could be rendered operational with reasonable effort and within a reasonable time period, making it a firearm within the meaning of the statute. In *Padilla*, it took an officer "about five seconds to reassemble the [defendant's] gun." 95 Wn. App. at 533. Palmer argues that the time and effort needed to make this gun operable was beyond that contemplated by *Padilla*.

But *Padilla* does not require that the gun be capable of being made operable immediately.

The *Padilla* court observed that it would be unreasonable to assume that the legislature intended to allow convicted felons to possess firearms as long as they kept them unloaded or disassembled, or while they were temporarily in disrepair. *Padilla,* 95 Wn. App. at 535. In *State v. Releford*, 148 Wn. App. 478, 200 P.3d 729, *review denied*, 166 Wn.2d 1028 (2009), the firearm at issue was a replica flintlock pistol. The gun was missing its firing flint, the leather piece that wraps around the flint, gunpowder, a projectile ball, and wadding. The court held that the pistol satisfied the definition of "firearm," because those parts, which comprised the ammunition, could be obtained at a specialty gun shop in a reasonable time, with reasonable effort. Here, Palmer could have taken his gun to a repair shop with little more effort or time than that involved in *Releford*. Thus, we hold that, within a reasonable time and with reasonable effort, Palmer could have rendered the gun operable, thereby making it a firearm under former RCW 9.41.010(1).

Palmer next asserts that the deputy prosecutor's rebuttal argument constituted misconduct. He challenges the following remarks:

> And what I'm asking you to do -- what the Court asks you to do, what jury instructions ask you to do at the end is to deliver a verdict. And that comes from the Latin, by the way, "veritas dictum," statement of the truth.
>
> Why did I tell you that? To show that I actually did go to law school if you probably have your doubts? No. Because of the bookends of this process. Okay. This voir dire actually means "to speak the truth" or "speak with a true heart," something like that. And the other end of the verdict, the statement of the jury -- you don't realize it when you're in law school, but afterwards you come to realize that these are communal[i]ties. These are what this process is about. It's about the truth, okay?
>
> And if you use these jury instructions carefully, okay, and do . . . what the Court's asking you to do, which is apply this law to the facts, I suggest to you there is plenty here and that you'll know the truth. And when you know the truth unanimously, I'll ask you to render a verdict, a veritas dictum, a statement of that truth.
>
> And that truth is that on November 21st of 2008, in the state of Washington, this pistol came out of Anthony Palmer's hand into those bushes. And that on that day, he had previously been convicted of a serious offense.

Report of Proceedings (May 12, 2009) at 161-162.

Palmer relies on three federal cases, all of which involved jury instructions that used language similar to the prosecutor's remarks, not the prosecutor's oral argument. *See United States v. Shamisdeen,* 511 F.3d 340, 347 (2nd Cir. 2008); *United States v. Gonzalez-Balderas,* 11 F.3d 1218, 1223 (5th Cir. 1994); *United States v. Pine,* 609 F.2d 106, 108 (3rd Cir. 1979). The court's jury instructions carry more weight than a prosecutor's argument. Nevertheless, in two of the federal cases, the courts found harmless error on the basis of the other instructions given. *See Gonzalez-Balderas,* 11 F.3d at 1223; *Pine,* 609 F.2d at 109. We hold that, considered in the context of the surrounding proceedings and the totality of the jury instructions and the prosecutor's closing argument, any improper comment was harmless.

Palmer must establish that the prosecutor's conduct was both improper and prejudicial. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). We consider the allegedly improper statements in the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. *Dhaliwal*, 150 Wn.2d at 578. Prejudice occurs only where "'there is a substantial likelihood the instances of misconduct affected the jury's verdict.'" *Dhaliwal*, 150 Wn.2d at 578 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). Moreover, failure to object to alleged improper statements constitutes a waiver unless the statement is "'so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.'" *Dhaliwal*, 150 Wn.2d at 578 (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

Palmer did not object to the prosecutor's argument, but he asserts that it was flagrant

misconduct that misstated the jury's role and the burden of proof and denied him a fair trial. This argument is not persuasive. The prosecutor repeatedly told the jury that it could not convict unless it found that the State had proved its case beyond a reasonable doubt. In addition, the court instructed the jury that "[t]he State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt." Clerk's Papers at 47. The jury is presumed to have followed the trial court's instructions. *State v. Davenport*, 100 Wn.2d 757, 763-64, 675 P.2d 1213 (1984).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Quinn-Brintnall, J.

Penoyar, C.J.