67509-5

67509-5

NO. 67516-8-I
CONSOLIDATED NO. 67509-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

DARA KHANN,

Appellant.

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

The Honorable John P. Erlick, Judge

BRIEF OF APPELLANT

ERIC J. NIELSEN
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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FEDERAL CASES

RULES, STATUTES AND OTHER STATUTES

A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's motion to suppress the evidence found by police as a result of an illegal seizure.

2. The court erred in entering conclusions of law B. 3 and 4. CP 138-139 (Written Findings of Fact and Conclusions of Law on CrR 3.6 Motion to Suppress).

3. The court erred in denying appellant's motion to sever his trial from his co-defendants' trial.

4. There was insufficient evidence to support the firearm special verdicts.

Issue Pertaining to Assignments of Error

1. Police may not stop and detain individuals without a warrant unless they have particularized reasonable suspicion of criminal conduct. Following the report of a crime, police broadcasted a very vague description of the suspects. The description described the suspects as Asian males in their mid-20's wearing dark clothes. Hours later a police officer stopped a car in which appellant was a passenger because the car's occupants stared at the officer and they were Asian males wearing dark clothes although they appeared younger than the mid-20's. Was the seizure unsupported by particularized reasonable suspicion of criminal activity?

3. Did the court err when it denied appellant's motion to sever his trial from his co-defendants' trial where appellant's right to a fair trail was prejudiced by the disparity in evidence?

4. Where there was no evidence the gun allegedly used in the commission of the crimes was operable was there sufficient evidence to support the jury's firearm special verdicts?

B. STATEMENT OF THE CASE[1]

1. Procedural History

The King County Prosecutor charged Dara Khann, Kevin Volante and Michael Martinez-Copol[2] each by amended information with one count of first degree burglary (Count I), one count of first degree rape (Count II) and one count of first degree robbery (Count III). CP 123-125. Each count also alleged each defendant was armed with a firearm. CP 124-125. All three were jointly tried.

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[1] There are 26 volumes of the verbatim report of proceedings. The verbatim report of proceedings are cited as follows: 1RP refers to the verbatim report of proceedings for 2/11/2011; 2RP--2/18/2011; 3RP--3/1/2011; 3RP—3/4/2011; 4RP—3/4/2011; 5RP—3/25/2011; 6RP—6/7/2011; 7RP—6/8/2011; 8RP—6/9/2011; 9RP—6/13/2011; 10RP—6/14/2011; 11RP—6/15/2011; 12RP—6/16/2011; 13RP—6/17/2011; 14RP—6/20/2011; 15RP—6/21/2011; 16RP—6/27/2011; 17RP—6/28/2011; 18RP—6/29/2011; 19RP—6/30/2011; 20RP—7/5/2011; 21RP—7/6/2011; 22RP—7/7/2011; 23RP—7/11/2011; 24RP—7/12/2011; 25RP—7/13/2011; 26RP—7/14/2011 and 7/29/2011.

[2] Martinez-Copol is also known as Juan Machado and he will be referred to as Machado here as he was at trial.

A jury found Khann guilty as charged. It also found by special verdict he was armed with firearm during the commission of each crime. CP 167-171.

The court found the first degree burglary and the first degree robbery was the same course of conduct for sentencing purposes. Khann was sentenced to a total of 291 months. CP 293-304. Based on an offender score of 2, Khann was ordered to serve concurrent standard range sentences of 34 months for the burglary, 54 months for the robbery and a minimum of 111 months for the rape. Id. In addition, Khann was ordered to serve 60 months for each of the firearm verdicts, which the court ran consecutive with each other and the sentences for the underlying crimes. Id.

2. Substantive Facts

a. State's Case

C. H.[3] lived in a house located at the end of a dirt road. 18RP 119. In the three months C.H. lived in the house it had been broken into twice while she was away and her car was stolen. 18RP 112-113, 117; 19RP 90. C.H. hired a man named Gunn and his helper to make the house more secure, including installing metal doors and changing the hardware on the

[3] The victim is referred to by her initials.

doors. 18RP 113-115, 19RP 88. Because of the work being done to the house its alarm system was not operational. 18RP 114.

In the finished basement of the house there was a bedroom, living room and bathroom. 18RP 121. Early in the morning on August 11, 2010, C.H. was asleep in the basement bedroom when she heard the sound of glass breaking upstairs. 18RP 124, 132. She then heard someone running down the stairs and a man, who she described at trial as a stocky built Asian about 22 years old with brown or black hair pulled back in a ponytail, dressed in black and wearing a hooded sweat shirt, came into the room and pointed a silver and black gun in her face. 18 RP 134-137, 139. Another man soon appeared, who was about 18 years old and slim with short hair and lighter skin than the first man. 18 RP 138. The second man also had a gun that C.H. described as black and larger than the first man's gun. 18RP 139.

C.H. started to yell and the men told her to shut up. 18RP 136, 143. The second man jumped on the bed, grabbed her neck and pushed her head into the bed's headboard. 18RP 142. The man immediately duct taped her face, including her eyes, so she could not see anything. 18RP 143-144, 146. C.H. panicked and screamed. She then heard footsteps and was hit on the head with a gun. Id. She believed a third man hit her. 18RP 145.

After she was hit with the gun C.H. felt "woozy" and her hands and feet were then taped as well. The tape slipped off her hands so the men tied her hands with a cell phone charger cord. 18RP 149-150. C.H. thought she heard the man with the ponytail say, "we finally got her." She also heard movement upstairs. 18RP 152-153. One of the men asked C.H. about her other house in Kent, but she had never lived in Kent. 21RP 106.

The younger man, whom she identified as the one who taped her, told C.H. he had to check her for weapons and he commented that she looked good. 18RP 154-155. The man put his hand under her shirt, touched her breasts, and then touched her genitals inside her panties. 18RP 155-156. The man told C.H. if she cooperated they would not kill her. 18RP 160. He stopped when she heard one of the other men tell him to shut up. Id.

One of the men then asked C.H. if she had any drugs or money. 18RP 161. She told him she had two hundred dollars in her purse and a hundred dollars in a drawer. 18RP 161-162. When the men could not find the money in the drawer, she told them to look in her eyeglass case. There they found the money. Id. C.H. testified at trial that in addition to the money, the men took two cell phones, a Playstation 3 game system and a Louis Vuitton travel bag. 19RP 48. Although C.H. had a number of

valuable items in the house, including jewelry, and another $1,000 in cash, the men did not take any of that, which C.H. thought was strange. 21RP 105-107.

At some point the man who previously touched C.H. said he had to check her for weapons again. 18RP 163. C.H. was on her side. The man laid down behind her and began rubbing her breasts and touching her underneath her panties. When she told him to stop he asked if she thought he was going to rape her. 18RP 164-165, 168. Although one of the other men said "let's go" the man on the bed got up, pulled C.H.'s shirt over her head, and her panties down. C.H., who was now on her stomach, felt someone on top of her and what she thought was one person's hands spreading her butt cheeks while someone else put their fingers inside her vagina. 18RP 169-172. She also said it felt like a different person also put his fingers inside her. 18RP 173-174. One of the men told her not to move or they would kill her. The man with the ponytail took her knife, which she had close by, and told her he did not want her to get any ideas. 18RP 175-177.

The men then left. About a minute later C.H. was able to look down through the tape on her eyes. She saw her knife, cut her legs free, pulled the tape down from her eyes onto her neck and ran out the back door. 18RP 178-181. When she got outside she saw her car, a BMW,

drive away. The man she described as having the short hair, was sitting in the backseat. He turned and looked at her. 18 RP 183-185.

At trial C.H. identified Khann as the man with the short hair. 19RP 37, 50. She identified Volante as the man with the ponytail wearing a hooded sweatshirt. 19RP 37-38, 139. She said Volante was the first man that came into her room with the silver and black gun and was the man who later picked up the knife. 19RP 64,71.

When C.H. was shown a photograph of Khann taken when he was arrested later that morning, and the photograph showed Khann had a ponytail, C.H. admitted she might have been wrong about Volante being the man with the ponytail. She maintained, however, Volante was the first man who came into her room with the gun. 19RP 70-71, 92, 108. Also, although she previously testified the second man who came into her room had short hair and that was the man she saw sitting in the back seat of her car, she said that man was Khann. 19RP 92, 100, 136-137. C.H. admitted she told police and the defense investigator she was positive the man who sexually assaulted her had short hair. 19RP 135-136, 143.

C.H. ran to her neighbor's house after the men drove off in her car. 18RP 187. The neighbor, Albert Williams, was leaving for work and he saw C.H.'s car leave with three people inside. 16RP 165-166. C.H. ran towards him. She was naked and had duct tape on her hands and round

her neck. 16RP 168-169. She told him three men had robbed and raped her. 16RP 170. Williams woke his wife and gave C.H. his phone to call 911. 16RP 171.

Williams' wife, Pamela Williams, stayed with C.H. until police arrived. 17RP 41. After her call to 911, C.H. made another phone call and was screaming to the person on the phone to help her. 17RP 44. C.H. admitted that after she spoke with the 911 operator she called a friend and her boyfriend. 19RP 121.

At about 2:55 a.m., deputies Travis Thomas and Mark Silverstein arrived at C.H.'s house. 12RP 34-36. Silverstein met Albert Williams outside C.H.'s house then he and Thomas went inside and down the basement to C.H.'s bedroom where they found her sitting on a couch. 12RP 45, 20RP 80. Silverstein did not remember having any contact with Pamela Williams. 20RP 84.

Thomas and Silverstein removed the duct tape from C.H.'s neck and on the floor found more duct tape, a roll of duct tape and a knife, which was near the couch. 20RP 84-85, 90. C.H. told the officers that three Asian males came into her room with guns. 12RP 51-52. C.H. described the men as about 25 years old. One had short hair and the other was heavier set with a ponytail. Both were wearing dark clothing. 12 RP 80, 20RP 96. She said she did not see the third man. 12RP 80, 20RP 95,

99. That vague description of C.H.'s assailants was broadcast to other officers. 12RP 55, 16RP 38,75.

Shortly before 4:00 a.m. that same morning, police were dispatched to a gas station about 15 minutes from C.H.'s house. The station's clerk reported a car had been abandoned at one of the pumps. The car was C.H.'s stolen BMW. 14RP 18-19, 47. At 3:16 a.m. a man gave the clerk a twenty-dollar bill for gas, pumped gas into the car and then left, leaving the car at the pump. 14RP 24,37,41,51; 16RP 118-119. The clerk described the man as in his late 20's or early 30's with medium length hair, medium build and wearing a long sleeved jacket. 16RP 138-139, 148.

Police looked at the station's surveillance video but it did not show a clear image of the man. A tracking dog was brought to the gas station but the dog was unable to locate a scent. 14RP 24,68, 19RP 184-85. Police did not try to obtain fingerprints from the gas pump. 14RP 42, 44, 46.

Deputy Daniel Murphy was on patrol and driving through the area near the gas station. He began looking for men who matched the vague description that was broadcast earlier. 16RP 40-42. A few blocks from the gas station, on S. 118th St. and Des Moines Memorial Drive, Murphy saw a Cadillac waiting a stop sign. 14 RP 20; 16 RP 42. He noticed three

Asian or Pacific Island looking males in the car wearing dark clothes. 16RP 46. As the car passed, its occupants stared at Murphy so he made a U-turn and followed the car. While following the car he saw the occupants moving around inside. The car eventually rolled through a stop sign and Murphy stopped it. 16RP 46-49, 51-55.

Machado was the driver and Volante and Khann were passengers. 16RP 57-59. On the back seat Murphy saw a Kitchen knife. 16RP 56, 73. Another officer who arrived to assist Murphy saw the butt of a gun under the front passenger seat. 16RP 59-60; 19RP 129. Machado, Volante and Khann were handcuffed and placed in separate patrol cars. Machado only had about $74 in his pockets; Volante had no money, and Khann only a few dollars. 14RP 104, 129, 137.

In the meantime, Pamela Williams was outside C.H.'s house with officers Travis and Silverstein when they were contacted and asked to bring C.H. to where Khann, Volante and Machado were stopped for a one-on-one showup. One of the officers appeared happy, they gave each other a "high five", and Williams heard one say, "we got them." 17RP 66. Williams accompanied the officers back into the house. One of them told C.H. they "got the three dudes." 17RP 67.

Both C.H. and the gas station clerk were brought in separate patrol cars to where the Cadillac was stopped. 16RP 60-61. Machado, Khann

and Volante were each taken out of the patrol cars they were in, one at a time, and a light was shined on them while C.H. and the gas station clerk viewed them from inside another patrol car. 12RP 72; 14RP 30-31; 16 RP 61-62. The clerk could not identify any of them as the man who paid for gas and left the BMW. 16RP 128. At trial the clerk also testified none of the three looked like the man. 16 RP 157-158.

Volante was the first person C.H. was shown. 18 RP 200; 21RP 94. Khann, who was 17 years old, had a ponytail, and was the thinnest of the three, was the third one shown to C.H. 12 RP 97-98. C.H. was unable to identify Volante but she identified Khann and Machado as two of the assailants. 12RP 77-78; 15RP 153; 18 RP 200; 21RP 94. C.H. was certain about her identification based on the men's clothing. 12RP 87. Although C.H. testified the man with the ponytail was wearing a hooded sweatshirt, Khann was not wearing a hooded sweatshirt. 19RP 70.

At trial, however, C.H. identified Volante and Khann as the assailants, despite her failure to identify Volante at the showup. She now said Volante was the man with the ponytail, even though Khann was the only one with a ponytail when the men were stopped. 19RP 37-38. When confronted by her inconsistent identifications, C.H. said at the showup she asked police repeatedly if they would let her hear Machado, Volante and

Khann's voices because she was convinced she could identify her assailants' voices. Police denied her request. 19RP 85-86.

Police did not find Khann, Volante or Machado's fingerprints in C.H.'s house, on the duct tape or in her BMW. 20RP 23-25, 61, 68-69. Although C.H. told police her assailants took money from an eyeglass case and from her purse, and that the man with the ponytail grabbed the knife in her room, police did not check the knife or eyeglass case for fingerprints and did not take the purse into evidence. 21RP 66-68, 70. The twenty-dollar bill given to the gas station clerk by the man who bought gas for the BMW likewise was not checked for fingerprints. 21RP 73.

C.H. said the black and silver gun found in the Cadillac looked like the gun carried by one of her assailants. 19RP 47. None of the items C.H. told police were taken from her house, however, were found in the Cadillac. 21RP 91. In the Cadillac was a Victoria Secret bag, some women's clothes, and some doorknobs. C.H. did not mention to police she was missing any clothes or doorknobs but at trial she testified the bag and clothes looked like hers and the doorknobs looked like the hardware that was being installed in her house. 19RP 41-46.

Khann, Volante and Machado's hands and clippings from their fingernails were swabbed and checked for DNA. C.H.'s DNA was found

on Volante's fingernail clippings. 17RP 140-141. Machado and C.H.'s DNA was found on Volante's fingers and hand. 17RP 128, 154. The scientist who performed the DNA tests opined it was possible Machado touched C.H. and then transferred her DNA to Volante or visa versa or that one of the officer's that touched C.H. transferred the DNA to Volante. 17RP 175-180.

In addition to police not finding Khann's fingerprints in C.H's house or on any of the physical evidence, none of C.H.'s DNA was found on Khann's hands, fingers or fingernails. 17 RP 119-120, 161. Moreover, none of Khann's DNA was found on the silver and black gun. 17RP 183.

After he was arrested, Machado initially told police he did not know there was a gun in his car or how it got there. He also denied he was at C.H.'s house. 15RP 118. After he was told evidence would show he was at the house, he admitted he was there and that he took the gun inside the house. 15RP 119-120-121. He said he went inside to get a television but instead took some video games. He claimed when he first saw C.H. she was lying on the floor. He denied hitting her with the gun, pointing a gun at her or sexually assaulting her. 21RP 37-56. He told police he was sorry he had gone into her house. 21RP 61.

b. Machado's Defense Case

Machado is 21 years old. 21RP 129. On August 10, 2010, Machado worked until early afternoon then went to a family barbeque at a park. 21RP 130-131. Later, he got a call from his son's mother asking for ride home from work so he left with his son to pick her up. He first took her grocery shopping and then he took her back to her house where he stayed. 21RP 131-132.

A few hours later Volante called Machado and asked Machado if he would drive him to a party. 21RP 132. Machado got to Volante's house at about 8:00 p.m. and took Volante and Khann, who was with Volante, to the party. 21RP 133. Machado was tired so he stayed at the party for about 15 minutes then went back home to sleep. 21RP 134.

Later, Machado got a call from his friend Big who also needed a ride. 21RP 134. Machado met Big, who was with another friend, Red, at a Walgreens in White Center. 21RP 135. Both Big and Red are Asian, between 20 and 26 years old. Machado said Big wears his hair in a ponytail. 21RP 135-136. The two had Machado drive them to the Skyway neighborhood. Machado stopped the car where Big and Red asked and the two got out and told Machado to wait. 21RP 137. The two men then walked down a dirt road. 21RP 138. Machado believed they

were on a quest to buy marijuana because they told Machado he would get a television for his trouble. 21RP 148-149.

A short time later Machado heard what sounded like breaking glass. He became impatient so he walked down the same road to look for his friends. 21RP 138. When he got to the house at the end of the road he saw the glass door was broken so he poked his head inside and asked what was going on. Big came out running with what looked like a black gun in his hand. Machado stopped him and Big said he was going back inside and downstairs to get Red. Then Red came upstairs carrying a silver or chrome gun. Machado told Red he was going to leave so Red went back downstairs presumably to get Big. 21RP 139-140. After a few minutes, Machado shouted for his friends and Red came back upstairs. Red said Big would catch up with them and Red and Machado left. 21RP 141.

As they were leaving Machado got a call from Volante and Khann and they asked if he would come back to the party and give him and Volante a ride home. Machado told them he would pick them up at the nearby North Seatac Park. When Machado arrived Khann and Volante got into the back seat. Machado then dropped Red off where he asked. 21RP 141-143. Machado, Volante and Khann were driving to Khann's house when Murphy stopped Machado's car. 21RP 144-145.

On cross examination by the State, Machado admitted that in his initial statements to police he did not tell them about Red and Big. 22RP 150. Machado admitted he initially told police Khann and Volante were the ones that went to C.H.'s house with him and that Khann had the gun. 22RP 117-124; 23RP 112 (stipulation). He said he did not mention Red and Big to police because he was afraid of them. He implicated Khann and Volante because they were not involved so he did not believe they would get into trouble. 22RP 150. He decided to testify because he felt bad for implicating Khann and Volante and he wanted to clear things with them. 22RP 115.

Machado's father testified he retrieved Machado's Cadillac from the impound lot. He identified the hardware in the Cadillac as hardware he purchased at a yard sale. The clothes he identified as belonging to Machado's girlfriend. 22RP 158-160.

c. Volante's Defense Case

Volante testified he immigrated with his family to the United States from the Philippines when he was 11 years old. 23RP 34-37. He lives with his parents and works part-time for his father and as a cashier at a Walgreens. 23RP 38. Volante and his mother both testified Khann stays with them frequently because of Khann's family problems. 23RP 20, 41-42, 47.

The evening before the incident Volante cooked dinner for his family, Khann and a couple of other friends. 23RP 44-45. Volante, who does not drive, called Machado at about 9:00 p.m. and asked Machado for a ride to a party. 23RP 51. Machado drove Volante and Khann to the party. At about 2:00 a.m., when Khann and Volante were ready to leave, Volante realized Machado had not stayed so he called Machado for a ride home. 23RP 59. He and Khann walked to a nearby park where Machado asked them to meet him. 23RP 60, 89. When Machado arrived there was someone else in the car so Volante and Khann got into the back seat. 23RP 62. Volante fell asleep and when he woke up the other person in the car was leaving so Volante got into the front seat. 23RP 63. Volante fell asleep again and woke up when Murphy stopped them. 23RP 63-65. When questioned by police Volante told them were he had been. He denied he was at C.H.'s house. 23RP 72-73.

Volante's mother also testified Volante cooked dinner the night before the incident and that he left with Khann at about 9:00 p.m. to go to a party. 23RP 18-19, 22, 24. She also said Volante does not drive because he scared of driving. 23RP 22

d. CrR 3.6 Hearing

Deputy Murphy was on patrol when at 2:55 a.m. he received a call on his radio that an Asian man, 25 to 30 years old, had stolen a car. 6RP

54-62; CP 133-134 (findings of fact 1-2). Later, Murphy heard from another deputy that three Asian men with a black and silver gun were involved in an assault associated with the car and all were dressed in black. 6RP 64; CP 134 (findings of fact 3).

At about 3:46 a.m. Murphy learned the car, a BMW, was abandoned at about 3:16 a.m., at a Chevron gas station at 805 S. 112th street in Burien, about 10 minutes from where it was stolen. 6RP 65-68, 121. The station's clerk was unsure how long the car had been there. 6RP 68; CP 134 (findings of fact 4).

Murphy was advised to look for men walking in the area and matching the vague description. 6RP 114-115, 139. Murphy searched for the men who he believed were on foot because there was no information about a car other than C.H's stolen and abandoned BMW. 6RP 69. While stopped at a stop sign on S. 188th street and Des Moines Memorial Drive, facing east, Murphy saw a Cadillac traveling southbound on Memorial Drive. 6RP 72. The car turned right onto S. 188th street within three to five feet of Murphy. Id. Murphy said he saw three Asian or Pacific Islander men in the car wearing dark clothes. Id. As the car passed the men stared at Murphy. Id.; CP 134-135 (findings of fact 5). Murphy testified the men looked to be in their late teens or perhaps 20 years old. 6RP 110-111.

Murphy made a U-turn and began following the Cadillac. 6RP 73. The car did not exceed the speed limit, although it sped up. It then made a turn onto S. 116th street. 6RP 76. Murphy thought the driver might be trying to evade him. 6RP 82-84. As he got closer to the car he saw the occupants moving around and he could read its license plate number. Murphy called in the plate number to dispatch and was told there were no problems with the car. 6RP 77; CP 135 (findings of fact 6).

At S. 116th street and 14th Ave. S., the car "rolled through" a stop sign. Murphy admitted in his report he stated the stop sign was at S. 116th street and 12th Ave. S. but he claimed he made a mistake when he wrote the report and only realized the mistake after his interview with defense counsel. 6RP 77, 149. Murphy testified he decided to stop the car regardless of its "rolling through" the stop sign based on the time of the morning, what he perceived as suspicious behavior and the driver's attempt to evade him. 6RP 99, 110, 124; CP 135 (findings of fact 7).

Murphy stopped the car. As he approached the car he saw the men "moving around" inside and through its back window he saw a knife on the back seat. 6RP 85. Murphy ordered the men to put their hands on

their head and he called for backup. Id.; CP 134-135 (findings of fact 8)[4]. Machado was the driver and Khann and Volante were the passengers. 6RP 90; 7RP 25. Machado told Murphy he was just returning from picking up his friends. 6RP 87.

When other officers arrived, the three men were handcuffed and placed in separate patrol cars. 6RP 86-87. One of the officers then saw a black and silver gun sticking out from under the right front passenger seat. 6RRP 87. They men were kept at the scene until C.H. and the gas station clerk were brought to see if either could identify the men. 6RP 94-96; CP 134-135 (findings of fact 8).

Khann argued the stop was illegal and he moved to suppress the evidence discovered as a result of the stop. CP 19-76; 9RP 126-157. The court denied the motion. In its written conclusions of law the ruled the stop was a valid investigative seizure. 10RP 17; CP 136 (conclusion of law 4). The court reasoned Murphy had a well founded suspicion the men were engaged in criminal activity based on the time of day, the car's location when Murphy first saw it, which was about 10 blocks from the gas station where 30 minutes earlier police were notified that C.H.'s car was abandoned, the men's behavior staring at Murphy when they passed

[4] The court's written findings have two findings of fact identified as number 8. CP 134-135. The second finding with the number 8 is the court's finding that Murphy's testimony was credible. CP 135.

and moving around in the car, the driver's attempt to evade Murphy and the men's similarity to the vague description of the men who assaulted C.H. 10RP 14-17; CP 135-136 (conclusion of law 3 and 4).

C. ARGUMENTS

1. THE UNLAWFUL SEIZURE REQUIRED THE COURT TO SUPPRESS ALL EVIDENCE OBTAINED AS A RESULT OF THE SEIZURE.

As a general rule, a warrantless seizure is per se unreasonable under both the Fourth Amendment and article I, section 7, of the Washington Constitution unless it falls within one or more specific exceptions to the warrant requirement. State v. Gatewood,163 Wn.2d 534, 539, 182 P.3d 426 (2008); State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). One exception to the warrant requirement is where a police officer makes a brief investigatory stop. Terry v. Ohio, 392 U.S. 1, 21 22, 88 S.Ct. 1868, 20 L. Ed.2d 889 (1968); State v. Doughty, 170 Wn.2d 57, 62-63, 239 P.3d 573 (2010). This is commonly referred to as a "Terry stop." State v. Day, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007).

A police officer may conduct a "Terry stop" if the officer has a reasonable suspicion that there is a substantial possibility that criminal activity has occurred or is about to occur based on specific and articulable objective facts and the rational inferences from those facts. Brown v. Texas, 443 U.S. 47, 51, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); Doughty, 170 Wn.2d at 63; Gatewood, 163 Wn.2d at 539; Day, 161 Wn.2d at 895. The officers' actions must be justified at their inception. State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

The facts justifying a "Terry stop" must be more consistent with criminal than with innocent conduct. State v. Pressley, 64 Wn. App. 591, 596, 825 P.2d 749 (1992). While an officer is not required to rule out all possibilities of innocent behavior before detaining someone, the detention must be based on more than an "inarticulable hunch." State v. Tarica, 59 Wn. App. 368, 375, 798 P.2d 296 (1990). Any evidence obtained in connection with an illegal "Terry stop" is suppressed as fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471, 487 88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Doughty, 170 Wn.2d at 65.

Challenged findings entered after a CrR 3.6 suppression hearing are reviewed for substantial evidence. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Substantial evidence exists where there is sufficient quantity of evidence in record to persuade fair-minded, rational person of the truth of the finding. Id. Unchallenged findings of fact following a suppression hearing are accepted as verities on appeal. Id. Whether the trial court's findings of fact regarding an order denying suppression of evidence support its conclusions of law is a legal question this Court reviews de novo. State v. Levy, 156 Wn.2d 709, 733, 132 P.2d 1076 (2006); State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004).

Here, the State failed to show Murphy had a reasonable suspicion that there is a substantial possibility that the men in the Cadillac were

involved in C.H.'s assault. The court erred in denying Khann's suppression motion.

When Murphy saw the Cadillac at 4:13 a.m., it was only a few blocks from the gas station where C.H.'s BMW was abandoned and the gas station was only about a 10 minute drive from C.H.'s house. Murphy was notified of the assault at about 2:55 a.m. and that the BMW was abandoned at about 3:16 a.m. It was not reasonable to believe that C.H.'s assailants would still be in the area that long after the assault and the car was abandoned

The court found it significant that the men in the Cadillac stared at Murphy when they passed his patrol car and were moving around inside the Cadillac. There is nothing particularly suspicious about people starring at a police officer or moving around in a car. See, Gatewood, 163 Wn.2d at 537, 540 (looking at a police car when it passes and then leaving the area is not suspicious behavior). Moreover, Murphy did not describe the movements in the car as furtive but rather as heads moving and turning around looking back. 6RP 119. Startled reactions to seeing the police do not amount to reasonable suspicion. See, State v. Henry, 80 Wn.App. 544, 552, 910 P.2d 1290 (1995) (nervousness is not sufficient for "Terry stop").

Murphy admitted, and the court found, the description of C.H.'s assailants as three Asian males wearing dark clothing was extremely

vague.[5] In addition, the only description Murphy had related to age was that the men were 25 to 30 years old. He admitted that none of the men in the car appeared that age and they looked considerably younger. Murphy was also looking for the suspects travelling on foot because he had no information to believe the assailants might be in a car. The only commonality between the vague description of C.H.'s assailants and the men in the car were they appeared to be Asian and wearing dark clothes. Those facts do not support a reasonable suspicion the men were involved in the assault on C.H.

Murphy also claimed the driver of the car was attempting to evade him, which the court reasoned was another factor that justified the stop. Murphy admitted, and the court found, however, the car never exceeded the speed the limit. There was no evidence the driver of the car was weaving through streets in an attempt to elude Murphy. The driver made just two turns the entire time Murphy was following the car. 6RP 104-107. Although Murphy testified he believed the driver was attempting to evade him, that belief and the court's finding is unsupported by the facts. See, Gatewood, 163 Wn.2d at 537, 540 (walking away from police even

[5] In its findings of fact the court states the car "was the only vehicle that matched the "vague vague" description provided by C.H." CP 135 (finding of fact 5). It is assumed the court meant the men in the car matched the "vague vague" description provided by C.H. because there was no evidence she saw any car other than her own BMW and Murphy used the term "vague" to refer to the description of the assailants. 6RP 114-115.

when told to stop does not support a finding the defendant was fleeing or justify a "Terry stop").

On these facts, the State failed to meet its burden to show the stop was based on a reasonable suspicion, rather than a hunch, the men in the Cadillac were involved in the C.H. assault. The court's conclusions of law that the stop was constitutional are unsupported by the facts. Because Khann was seized in violation of his state and federal constitutional rights, all evidence obtained as a result should have been suppressed. This Court should reverse the trial court's denial of the suppression motion. Gatewood, 163 Wn.2d at 542.

2. THE COURT'S FAILURE TO GRANT KHANN'S MOTION TO SEVER HIS TRIAL FROM THE CODEFENDANTS' TRIAL DENIED KHANN HIS RIGHT TO A FAIR TRIAL.

Prior to trial Khann twice moved to sever his trial from Volante and Machado's trial on speedy trial grounds. 5RP 5-6; 10RP 204-205. The motions were denied. During trial but before the State rested, Khann moved to sever based on the disparity of evidence against him as opposed to the other the defendants. 16RP 18-19. The court denied the motion on that ground at that time but indicated it could be renewed at the end of the case. 16RP 26.

On the afternoon of July 6, 2011, the State rested. Khann advised the court he would not present any witnesses and he rested as well. 21RP 127-128. Machado indicated he would testify. 21RP 124-125. Volante also informed the court he intended to present witnesses in his defense. 21RP 165. It was decided that for the sake of convenience Machado would begin his testimony and that all half-time motions, including Khann's renewed severance motion, would be heard the following morning. 21RP 124-125. The court informed the parties that in ruling on the motions it would only consider the evidence presented in the State's case-in-chief. 21RP 125. The day ended with Machado's partial testimony. 21RP 129-164.

The next morning, Khann formally made his half-time motions. He moved to dismiss arguing the State failed to present sufficient evidence of his guilt and he moved to sever his trial based on the disparity in evidence in the State's case against him as opposed to its case against the other co-defendants. 22RP 4-13. Khann pointed out that because both he and the State rested before Machado put on any evidence the court was required to base its ruling on the State's evidence at the time the parties rested. 22RP 14-15.

The court asked the other parties if it was appropriate for it to wait until the co-defendants presented their defense before ruling on Khann's

severance motion. 22RP 16. Volante too responded that because both Khann and the State rested, there was no defense case as to Khann so it was inappropriate for the court to wait and rule on Khann's severance motion until after the co-defendants presented their defense. 22RP 23-24. The State responded that the court could wait to rule on the motion at the end of the co-defendants' cases. 22RP 24-25.

The court reserved ruling on the motions. Machado resumed his testimony and the remainder of his defense case. 22RP 51-164. The jury was then released for the day. 22RP 164-165. After releasing the jury the court ruled on Khann's dismissal and severance motions.

The court recognized that identification was Khann's defense and C.H.'s testimony "was impeached, successfully by the parties and counsel at the time of the in-court testimony of the victim." 22RP 168. But, because C.H. identified Khann at the showup, the court reasoned the jury could give whatever weight it deemed appropriate to that identification. 22RP 168. It denied the motion to dismiss. Id.

In ruling on Khann's severance motion the court reasoned that if it only viewed the evidence up to the point Khann made the motion, after both the State and Khann rested but before Machado put on his defense, "I think that there is evidence of disparity in the evidence under the severances cases that would warrant severance." 22RP 172. It recognized

that in contrast to the evidence against Volante and Machado, the only evidence against Khann when the State and Khann rested was C.H.'s impeached identification testimony. Id. The court found, however, that under CrR 4.4 it could consider whether severance is appropriate "at any time during the trial." Id. It concluded that Machado's subsequent testimony provided further evidence against Khann and the disparity in evidence "is no longer extant." 22RP 172-173. It denied the motion. Id.

At the end of the case, after Volante testified and presented his evidence, Khann renewed his motion on the same grounds---the disparity in evidence---and he joined in Volante's argument that because Machado testified he initially told police he went to C.H.'s home with Khann and Volante, severance was warranted because of inconsistent defenses. 23RP 119-122. The court denied the motion. 23RP 125. It found Machado's testimony incriminated Khann and Volante so there was no longer "such disparity of evidence" as to warrant severance. Id.

Khann's severance motion was made after both he and the State rested. The court's ruling on the motion should have been based only on the evidence presented at that time. And, based on that evidence, as the court found, severance was appropriate. The court improperly considered Machado's testimony in determining whether Khann's case should be severed.

Generally, a court should sever the trials of joined defendants where severance is necessary to promote a fair determination of guilt. A trial court's denial of a motion to sever is reviewed under the abuse of discretion standard. State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d 577 (1991); State v. Phillips, 108 Wn.2d 627, 640, 741 P.2d 24 (1987). Where a defendant is prejudiced by a joint trial, it is an abuse of discretion to deny a severance motion. State v. Alsup, 75 Wn.App. 128, 131, 876 P.2d 935 (1994).

The policy that favors joint trials rests on the rationale that it conserves judicial resources and public funds. State v. Bythrow, 114 Wn.2d 713, 723, 790 P.2d 154 (1990). A defendant's trial should be severed from the co-defendant's trial if the prejudice resulting from a joint trial outweighed the concerns for judicial economy. State v. Grisby, 97 Wn.2d 493, 507, 647 P.2d 6 (1982)), cert. denied sub nom., Frazier v. Washington, 459 U.S. 1211, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983). Prejudice may be demonstrated by:

> (1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculpating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.

State v. Larry, 108 Wn.App. 894, 911-12, 34 P.3d 241 (2001) (quoting State v. Canedo-Astorga, 79 Wn.App. 518, 528, 903 P.2d 500 (1995) (quoting United States v. Oglesby, 764 F.2d 1273, 1276 (7th Cir.1985)).

CrR 4.4 governs motions to sever. That rule reads in part:

> (a) Timeliness of Motion; Waiver.
>
> (1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.
>
> ...
>
> (c) Severance of Defendants.
>
> (1) A defendant's motion for severance on the ground that an out-of-court statement of a codefendant referring to him is inadmissible against him shall be granted unless:
>
> (i) the prosecuting attorney elects not to offer the statement in the case in chief; or
>
> (ii) deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.
>
> (2) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (i), should grant a severance of defendants whenever:
>
> (i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or
>
> (ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.
>
> (3) When such information would assist the court in ruling on a motion for severance of defendants, the court may order the prosecuting attorney to disclose any

> statements made by the defendants which he intends to introduce in evidence at the trial.
>
> (4) The assignment of a separate cause number to each defendant of those named on a single charging document is not considered a severance. Should a defendant desire that the case be severed, the defendant must move for severance.
>
> (d) Failure to Prove Grounds for Joinder of Defendants.
>
> If, pursuant to section (a), a defendant moves to be severed at the conclusion of the prosecution's case or of all the evidence, and there is not sufficient evidence to support the grounds upon which the moving defendant was joined or previously denied severance, the court shall grant a severance if, in view of this lack of evidence, failure to sever prejudices the moving defendant.

C.H.'s identification of Khann at the showup as one of the assailants was the only evidence linking Khann to the crimes. As the court recognized her identification was successfully impeached at trial.

C.H. described the first man who came into her room as a stocky built Asian about 22 years old with brown or black hair pulled back in a ponytail, dressed in black and wearing a hooded sweat shirt. She described the second man who came into room as younger than the first man, slimmer and with short hair. When C.H. identified Khann at the showup his hair was in a ponytail and he was only 17 years old and thinner than Volante or Machado. C.H. admitted at trial she identified Khann based his clothes. Khann, however, was not wearing a hooded sweatshirt that C.H. testified was worn by the man with the ponytail.

Then, at trial, C.H. identified Khann as the shorthaired man and Volante as the man with the ponytail, even though Volante had short hair and no ponytail and even though she failed to identify him at the showup.

In contrast to the confusing and impeached identification evidence against Khann, when the State rested its case the evidence linking Volante and Machado to the crimes was considerably different and stronger. C.H. identified the gun found in Machado's car as similar to the gun wielded by the first man that came into her room. She identified other items found in Machado's car as hers. Machado admitted to police he was at C.H.'s house that night. And, C.H.'s DNA was found on both Volante and Machado's hands.

Based on C.H.'s less than reliable and impeached testimony identifying Khann as one of her assailants and the much stronger evidence linking Machado and Volante to the crimes, the court correctly found that up to the point the State and Khann rested, the disparity in the evidence warranted severing Khann's trial. See, State v. Jones, 93 Wn. App. 166, 968 P.2d 888, 891 (1998) (prejudice may be inferred if the quality and complexity of evidence makes it impossible for the jury to relate it to each defendant, or if there is a gross disparity in the weight of evidence against each defendant).

The court's decision to deny the severance motion, however, based on its reasoning that CrR 4.4 allowed it to consider the motion "at any time during trial" does not legally support its conclusion that it could consider the co-defendant's defense evidence presented after the motion was made and the parties to the motion rested.

In City of Seattle v. Hollfield, 170 Wn.2d 230, 236-237, 240 P.3d 1162 (2010) the Washington Supreme Court held:

> We review a lower court's interpretation of a court rule de novo. Spokane County v. Specialty Auto & Truck Painting, Inc., 153 Wn.2d 238, 244, 103 P.3d 792 (2004) (citing City of Seattle v. Guay, 150 Wn.2d 288, 76 P.3d 231 (2003)). Our interpretation of a court rule relies upon principles of statutory construction. Id. at 249, 103 P.3d 792. To interpret a statute, we first look to its plain language. State v. Gonzalez, 168 Wn.2d 256, 271, 226 P.3d 131 (2010) (citing State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007)). If the plain language is subject to one interpretation only, our inquiry ends because plain language does not require construction. Id.

A trial court may grant discretionary severance during trial if "it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant." CrR 4.4(c)(2)(ii). Under CrR 4.4(d) "If, pursuant to section (a), a defendant moves to be severed at the conclusion of the prosecution's case or of all the evidence, and there is not sufficient evidence to support the grounds upon which the moving defendant was joined or previously denied severance, the court shall grant a severance if,

in view of this lack of evidence, failure to sever prejudices the moving defendant."

Here, Khann's renewed severance motion was made after both the State and defense rested. At the time the motion was made, before Machado presented his defense, the court found the disparity of the evidence prejudiced Khann's right to a fair determination of guilt or innocence. Thus, the court was required to grant the motion.

The court deferred ruling on the motion until after Machado presented his defense and then it considered the Machado's testimony in denying the motion. In doing so, the Court reasoned that under CrR 4.4(c)(2)(ii) it could rule on a severance motion at any time during trial and the trial was still proceeding even though Khann rested.

While the rule gives the court has the authority to grant severance "during trial" upon "application" by the prosecutor or the defendant, there is nothing in the rule that gives the court the discretion to defer a decision on a severance motion until after the co-defendant presents his defense evidence and then consider that evidence in ruling on the motion, where the motion was made after both the State and moving defendant rest. Although there is nothing prohibiting the court from deferring ruling on the severance motion until the following day so as not to disrupt the trial, it erroneously considered evidence presented by the co-defendants in

making its ruling where Khann and the State had both rested and Khann made the motion before the co-defendants' evidence was submitted to the jury. Based on the disparity of evidence at the time Khann made the motion, after both he and State rested, and the court's finding that at that time the disparity in the evidence justified severing Khann's trial, the court erred in denying Khann's severance motion.

Alternatively, even if the court properly considered Machado's testimony, his testimony did not change the disparity in the evidence and the court's conclusion that severance was appropriate.

Prior to trial Machado's statements to police implicating Khann and Volante were redacted to comply with Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). 3RP 4-8. Machado then testified on direct that he was at C.H.'s house the night of the incident with Red and Big and that he picked up Khann and Volante from the park later that evening. On cross examination the State impeached Machado's testimony with his initial statements to police implicating Khann and Volante. Because that impeachment evidence was the only evidence that further implicated Khann it was necessarily the evidence the court relied when it found there was no longer such a disparity in evidence to warrant severing Khann's trial. 22RP 172-173; 23RP 125.

Impeachment evidence is not substantive evidence.

> "A witness may be impeached with a prior out-of-court statement of a material fact that is inconsistent with his testimony in court, even if such a statement would otherwise be inadmissible as hearsay. State v. Dickenson, 48 Wn.App. 457, 466, 740 P.2d 312 (1987). Impeachment evidence affects the witness's credibility but is not probative of the substantive facts encompassed by the evidence. State v. Johnson, 40 Wn.App. 371, 377, 699 P.2d 221 (1985)." State v. Clinkenbeard, 130 Wn.App.552, 569, 123 P.3d 872 (2005).

Impeaching and contradictory statements are admitted only to destroy the credit of the witnesses, to annul and not to substitute their testimony. Johnson, 40 Wn.App. 379 (citations omitted).

The evidence the court relied on in denying Khann's severance motions made after he and the State rested and at the conclusion of the co-defendant's cases was the evidence used to impeach Machado. Because that evidence was not substantive evidence against Khann it did not change the disparity in evidence. The court erroneously considered this non-substantive evidence in its analysis on whether to grant the severance motion. If the court had not considered the impeachment evidence as substantive evidence, the record shows it would have granted the motion. Thus, the court erred in denying the motion even if it properly considered Machado's testimony.

Moreover, because Khann was tried with Machado, the impeachment evidence prejudiced him. The court did not instruct the jury it was only to consider Machado's statements to police in determining his credibility and not as substantive evidence against Khann. Because the only evidence implicating Khann was C.H.'s weak and impeached identification testimony and Khann's presence in Machado's car hours after the incident, the State encouraged the jury to use Machado's statement to police as substantive evidence against Khann. In its closing argument the prosecutor told the jury "the reason that we know it was these three involved is because Mr. Machado said so" and she told the jury "he (Machado) put Dara Khann there (at C.H.'s home) as well." 24RP 123. She also told the jury Machado was specific about who did what: "It was ... Kevin Volante's idea to hit the house" ... "Khann had a gun." 24RP 133-134.

In sum, the court correctly concluded, and the facts support the conclusion, that the disparity in evidence necessitated Khann's trial be severed from the co-defendants' trial. The court, however, improperly considered evidence presented by the co-defendants in its determination on whether to grant Khann's severance motion where the motion was made after both Khann and the State rested. Even if it was proper for the court to consider evidence presented by the co-defendants, the only

additional evidence implicating Khann was the evidence used to impeach Machado's testimony. That was not substantive evidence against Khann. It did not change the disparity in the evidence against Khann as opposed to the evidence against the other co-defendants. Khann was prejudiced by the court's failure to grant his severance motions because that evidence was used by the State to convince the jury Khann committed the offenses and the court never gave the jury a limiting instruction so it was free to use the evidence as argued by the State. See, Johnson, 40 Wn. App. at 377, ("[w]here such evidence is admitted, an instruction cautioning the jury to limit its consideration of the statement to its intended purpose is both proper and necessary.").

The court erred in failing to grant Khann's severance motions. Khann's conviction should be reversed.

3. THE FIREARM SENTENCING ENHANCEMENTS SHOULD BE VACATED BECAUSE THE STATE FAILED TO PROVE THE GUN FOUND WAS OPERABLE

A " 'firearm' " is defined as a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(7). A firearm sentencing enhancement is imposed if the defendant or an accomplice was armed with a firearm. RCW 9.94A.533(3).

The State must prove beyond a reasonable doubt that the weapon meets the definition of a firearm. To meet its burden there must be sufficient evidence to find the firearm is operable. State v. Recuenco, 163 Wn.2d 428, 437, 180 P3d 1276 (2008); State v. Pam, 98 Wn.2d 748, 659 P3d 454 (1983), overruled on other grounds, State v. Brown, 111 Wn.2d 124,761 P.2d 588 (1988); see, State v. Pierce, 155 Wn.App. 701, 714 n. 11, 230 P.3d 237 (2010) (Where the firearm is not presented as evidence, there must be "other evidence of operability, such as bullets found, gunshots heard, or muzzle flashes.").

In State v. Raleigh, 157 Wn.App. 728, 238 P.3d 1211 (2010), review denied, 170 Wn.2d 1029 (2011), the court held the language in Recuenco, that the State is required to show a firearm is operable, was dicta. The Raleigh court ruled a firearm need not be operable during the commission of a crime to constitute a firearm. Id. at 734–35. The language the Raleigh court described as dicta, however, was central to the Court's holding in Recuenco. See, In re Marriage of Roth, 72 Wn. App. 566, 570, 865 P.2d 43 (1994) (dicta is language that is not necessary to the decision in a given case).

The issue in Recuenco was whether the harmless error analysis applies when the State fails to submit a firearm enhancement to the jury. Recuenco, 163 Wash.2d at 433. The Court's holding in Recuenco, that the error could not be harmless, was predicated in part on its finding that the State failed to show the gun in that case met the definition of a firearm because it failed to show the gun was operable. Recuenco, 163 Wn.2d at 437. The operability language in Recuenco was not dicta.

Due process under the Fourteenth Amendment of the United States Constitution requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P. 3d 559 (2005). Evidence is insufficient to support a conviction unless viewed in the light most favorable to the State, any rational trier of fact could find each essential element of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992). In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

Here, the State failed to prove the gun found in the Cadillac, that C.H. said looked like the assailant's gun, was operable. Police testified the gun was a Smith and Wesson handgun. 15RP 67. In the gun was a loaded magazine containing 16 nine-millimeter bullets. 15RP 58, 68-71. There was no evidence the gun had ever been fired or that it was capable of firing a bullet or projectile.[6] Given the evidence presented, a finding the gun was operable necessarily rests on speculation. There was insufficient evidence to show the gun was a firearm because there was no evidence the gun was operable. Khann's firearm enhancements should be vacated.

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[6] After the Sate rested, Khann and Volante moved to dismiss the firearm allegation on the grounds the State failed to prove the gun was operable. 22RP 22-24, 35, 41-43. The motion was denied but the court allowed the State to reopen its case to present evidence of operability. 22RP 170-171. The State did not do so.

D. CONCLUSION

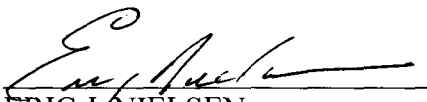
The evidence police gathered as a result of the illegal seizure of the car in which Khann was the passenger should have been suppressed. In addition, Khann's trial should have been severed from his co-defendants' trial because the disparity in evidence prejudiced Khann's right to a fair trail. For these reasons, Khann's convictions should be reversed.

Alternatively, there was insufficient evidence to support the firearm special verdicts. Thus, the firearm sentence enhancements should be vacated.

DATED this 16 day of April, 2012.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC



ERIC J. NIELSEN
WSBA No. 12773
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON Respondent, v. DARA KHANN, Appellant.	)))))))))	COA NO. 67516-8-I CONSOLIDATED NO. 67509-5-I

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 14TH DAY OF APRIL 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SUZANNE ELLIOT
HOGE BUILDING
705 2ND AVENUE, SUITE 1300
SEATTLE, WA 98104

[X] SUSAN WILK
WASHINGTON APPELLATE PROJECT
1511 3RD AVENUE
SUITE 701
SEATTLE, WA 98101

[X] DARA KHANN
DOC NO. 651967
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIR WAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF APRIL 2012.

x Patrick Mayovsky