

SUPREME COURT 90518-5  
COURT OF APPEALS NO. 69552-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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LIBAN ADEM

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

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

The Honorable Hollis R. Hill, Judge

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2014 JUL -2 PM 12:56

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PETITION FOR REVIEW

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JUL 22 2014  
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STATE OF WASHINGTON

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A. IDENTITY OF PETITIONER

Petitioner, Liban Adem, asks this Court to review the decision of the Court of Appeals referred to in Section B.

B. COURT OF APPEALS DECISION

On June 2, 2014, in *State v. Adem*, Slip Op. No. 69552-5-I, the Court of Appeals affirmed Liban Adem's convictions for robbery in the first degree with a deadly weapon enhancement, and unlawful possession of a firearm by a felon.

C. ISSUES PRESENTED FOR REVIEW

1. This Court in *State v. Recuenco*, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008) held that a firearm must be operable for the firearm enhancement to apply. Since that time, however, some courts have adhered to this rule, while other courts have written off the operability language in *Recuenco* as dicta. As a result, there is no uniform understanding in Washington courts as to what constitutes a firearm for purposes of the firearm enhancement. In the present case, Division One tried to strike a compromise, but in doing so, applied a watered down test for operability. Should this Court accept review of this case so as to clarify the requirements of operability for purposes of the firearm enhancement?

2. Is review appropriate under RAP 13.4(b)(3), where the State failed to present proof beyond a reasonable doubt that Mr. Adem was armed with a working firearm at the time of this offense?

3. Where the judge in a bench trial never entered written findings of fact that the gun was operable, are the findings and conclusions of law inadequate?

D. STATEMENT OF FACTS

**1. Procedural History**

The State charged Liban Adem with one count of robbery in the first degree and one count of unlawful possession of a firearm, both alleged to have occurred on February 9, 2012. CP 1-8; RCW 9A.56.200; RCW 9.41.040(1). Over Mr. Adem's objections, his appointed defense attorney continued the omnibus and trial date on five occasions. On September 28, 2012, the State amended the information to add a firearm enhancement as to the robbery charge. CP 31-32; RCW 9.94A.533(3).

On October 4, 2012, Mr. Adem waived his right to a jury trial and proceeded by means of a bench trial before the Honorable Hollis Hill. CP 36. On October 25, 2012, the court found Mr. Adem guilty of robbery in the first degree while armed with a firearm. RP 574-75. The court issued a lengthy oral ruling and asked the prosecutor to prepare written findings.

RP 575. Those findings were not filed until after Mr. Adem had filed his opening brief.

On November 9, 2012, the court sentenced Mr. Adem to a standard range sentence on both offenses, plus an additional five years for the firearm enhancement. CP 107-115. Mr. Adem filed a timely appeal. On June 2, 2014, the court of appeals issued a decision affirming the convictions and the firearm enhancement. This timely petition for review did follow.

## **2. Trial Testimony**

On February 9, 2012, three suspects with bandanas across their face entered a small grocery and jewelry repair shop. Ms. Lang Huynh owned and operated the repair shop portion of the store. RP 149. There was a security camera that captured the incident on tape. RP 156.

The suspects pushed Ms. Huynh and told her to keep her head down. RP 154. She did as she was told. RP 155. Someone pushed what Ms. Huynh believed to be a gun against her head. RP 169. Ms. Huynh then added, "But, I did not look at the gun, you know?" RP 170. Ms. Huynh added that she had never actually seen a real gun except in a movie. She did not touch the gun. *Id.*

According to the security camera, the person with the gun was wearing a green hoodie. Because the suspects were all wearing hoods and

bandanas, Ms. Huynh could not identify any of the men who came into her shop. RP 168. Other than bumping into a display case, Ms. Huynh did not suffer any injuries. RP 170-71.

After scooping up trays of jewelry from the display counter and the safe, the robbers ran out to a van in the back alley. As chance would have it, Nicholas Crimp, an employee from a nearby business, was at that same time parking his car in the alley. As he parked the car, he noticed a gray van parked in the alley with a driver hiding part of his face. RP 97. A moment later, masked men came running out of the jewelry store. As the fleeing suspects sprinted towards the awaiting van, jewelry spilled onto the ground. RP 98. It was not until Crimp saw what appeared to be a gun skid across the ground towards his car that prudence won out over curiosity. Crimp ran away and hid. RP 98. When the van drove away, Crimp called the police. RP 107. Crimp admitted that he is not very familiar with handguns, but he did think he heard a metallic sound when it hit the pavement. RP 105-06. The gun was never recovered. RP 251.

While the gun was never located, the van was discovered a short while later. After a description of the van was broadcasted to other police units, an officer saw the van in a parking lot of a housing project where one of the co-defendants lived. RP 138. Crimp identified it as the same van. RP 110-111. Nobody was in the van but the police did find various



items of jewelry inside. RP 140, 213. Neither the inside of the van, nor the contents of the van, were ever tested for fingerprints. RP 250

Police spoke to Ms. Rivera, a resident at the housing project who lived near where the van was parked. She testified that she been looking out her window when she saw three people run by. RP 174. A moment later, a fourth person, who was not running, tossed something into the dumpster. *Id.* Ms. Rivera told police that this fourth person had long hair (which Liban Adem did not have at that time). RP 181. The police retrieved the item and determined that it was a green multi-patterned hooded sweatshirt worn by the suspect with the gun in the robbery video. RP 207-08, 238.

The police spoke to Hassan Warfa. Hassan is the older brother of Liban Warfa, one of the men the police suspected of committing the robbery. RP 317. Hassan testified at trial about what he recalled of the incident.

Hassan works at the Port of Seattle, a job he has held for close to three years. RP 373-374. In the early morning hours of February 9, 2012, Hassan arrived home from work and saw his brother Liban Warfa with their cousin, Liban Adem. RP 322-23, 326, 337. Hassan went to bed while they were still up. The next morning, Hassan's brother woke him up and asked for the keys to the van. Hassan did not see Liban Adem with

his brother at that time. Hassan gave him the keys and went back to sleep. RP 325-326, 359-361.

It was shortly after noon when Hassan next saw the van. RP 327. He had been outside the apartment working on his car, when the van pulled up. Hassan watched as the van door slid open, and four people began running away. Id. Concerned that something untoward had occurred, he ran after the occupants, yelling at them to stop. RP 330. They did not. He could identify some of the occupants. He saw his brother (Liban Warfa), as well as a long time friend, Nate. He also saw a short Mexican guy he did not recognize. RP 328. There was a guy in a green sweatshirt that was running. Initially Hassan had assumed this was Liban Adem, but he later learned that this was not correct. RP 328, 345.

The State questioned Hassan extensively about his earlier statements implicating Liban Adem, but Hassan steadfastly maintained that he had made incorrect assumptions and that the police had pressured him to name Liban Adem as a participant. The police told him that because he drives the van he could be charged and deported. RP 371-73. They also threatened to contact his employer and cause him to lose his job. RP 371. He felt intimidated. The police had seized Hassan's wallet, demanding to know how come he had \$1,663 in his wallet. He tried explaining it was from his paycheck. RP 369-70. The police kept his money for the four to

five hours he was detained. RP 363, 369. The police made Hassan very anxious to cooperate. RP 373.<sup>1</sup>

The only person at trial who actually identified Liban Adem as a participant in the robbery was a juvenile co-defendant, Antonio Ortiz. Mr. Ortiz explained that he really had little choice in the matter. RP 67. He was 16 years old, and told that he would be tried as an adult on felony charges unless he pled guilty and specifically named the co-defendants in his plea. RP 70, 73, 83, 90. There were three charged co-defendants in superior court, and Mr. Ortiz obediently complied by listing all three. RP 73. As an adult, he would have received more than eight years in prison as an accomplice to an armed robbery. By accepting the State's offer, he received a three-month sentence. RP 75.

Ortiz testified that when he got into the van, the person in the green hood was in the front passenger seat, facing forward. RP 87. He never saw anyone with a gun. RP 80. He hardly knows Liban Adem. RP 81. In fact, when shown a photomontage by the police, he told the police he was unable to recognize Liban Adem. RP 65. Nevertheless, following his plea deal, Mr. Ortiz stated that he did in fact recognize Liban Adem as the

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<sup>1</sup> The court admitted Hassan's prior statements for purposes of impeachment only. RP 574. The court did indicate that his statement that he chased after Liban Adem could be considered as a recollection recorded, but that this fact was not central to the court's decision. RP 574.

person in the green hoodie, and that he had lied to the police when he said he could not identify him. RP 65, 69.

Inside a dumpster, police located jewelry trays taken from the heist. RP 226. One the trays contained a live round of ammo. RP 229; EX 40. One of the police officers speculated that the live round might have been ejected from the gun used in the robbery if the suspect had attempted to chamber a bullet when one was already in the chamber. RP 247. The officer believed that in the video it looked like the slide of a gun being pulled back and a bullet ejecting from the gun. No testing was conducted on the bullet.

At trial, the State also introduced DNA evidence intended to connect Liban Adem to the green hooded sweatshirt recovered from the trash dumpster. The lab technician testified that the likelihood of two people chosen at random in the United States sharing the same DNA profile was 1 in 7.9 quadrillion. RP 281, 293. But in this case, at least one of the other suspects was not a random person. Rather, one of the known participants was Liban Warfa, who was Liban Adem's cousin. RP 348. The lab technician failed to test the DNA from the hoodie against Liban Warfa's DNA, nor did she offer any statistics regarding the likelihood of two cousins sharing similar characteristics.

Further questioning of the DNA technician revealed that there was additional DNA found on the sweatshirt not attributed to Liban Adem. RP 278-279. The crime lab made no effort to determine to whom that DNA belonged. Nor could the DNA technician offer any opinion as to how long the DNA would have remained on the clothes, if for example, Liban Adem had worn his cousin's sweatshirt at some point in the past. RP 299. The technician further acknowledged that items can be extremely sensitive to contamination at the crime scene, and that while she can protect against contamination in the lab, she has no control over the crime scene and the taking of the subject's DNA. RP 283-84, 286, 298.

Mr. Adem did not testify. Following the trial, the court found Mr. Adem guilty of robbery and the firearm enhancement. RP 574-75.

### **3. The Appeal**

On appeal, Mr. Adem challenged the sufficiency of the evidence supporting the firearm enhancement and the conviction for being a felon in possession of a firearm. Mr. Adem did not challenge the sufficiency of the evidence as to the robbery conviction, as there was evidence from which the finder of fact could have found that Mr. Adem displayed what appeared to be a firearm. Mr. Adem focused upon the lack of evidence that the gun was operable. As described below, the court of appeals disagreed.

Mr. Adem also argued that the trial court had not complied with CrR 6.1(d), when the judge failed to enter findings of fact as to each element of the offense. Following the opening brief, the State produced the findings of fact, which had apparently been presented to the trial court but never filed. The newly submitted findings of fact did not include a finding that the gun was in working order or that it was operable. The court of appeals did not order remand for additional findings.<sup>2</sup>

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. **This Court should resolve the controversy over whether the State must prove operability of a firearm, and if so, the measure of proof required to establish operability.**

A firearm enhancement may be imposed if the defendant or an accomplice was armed with a firearm. RCW 9.94A.533 (3). This section incorporates the definition of a firearm found in RCW 9.41.010. That provision provides the following definition: "'Firearm' means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." See RCW 9.41.010 (7).

In *Recuenco*, this Court reaffirmed that the firearm enhancement applies only to working firearms:

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<sup>2</sup> On appeal, Mr. Adem also raised a speedy trial violation based on the repeated continuances of the trial date over his specific objection. After Mr. Adem filed the opening brief, this Court decided *State v. Ollivier*, 178 Wn.2d 813, 825, 312 P.3d 1 (2013). As that case appears to be controlling, Mr. Adem has not raised the speedy trial violation in this Petition for Review.

We have held that a jury must be presented with sufficient evidence 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) (citing *State v. Pam*, 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), *overruled in part on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988)). Published cases decided by the court of appeals after *Pam* but prior to *Recuenco* took the position that *Pam* allowed the enhancement even in the case of an inoperable gun, as long as it was a "real" gun. *See, e.g., State v. Faust*, 93 Wn. App. 373, 967 P.2d 1284 (1998). But *Recuenco* clarified that *Pam* prohibited the enhancement unless the State established that the gun was operable. *Recuenco*, at 437.

This language is unequivocal and should have resolved the question of operability. Unfortunately, it did not. For instance, in *State v. Raleigh*, 157 Wn. App. 728, 238 P.3d 1211 (2010), the court of appeals characterized the "operability language" in *Recuenco* as dicta. The court in that case 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*.

As a result of cases like *Raleigh*, Mr. Adem devoted three pages of his opening brief to a discussion as to why the *Recuenco* language was not dicta and was essential to the court's ultimate holding. BOA at 28-31. Mr. Adem also cited to other cases requiring proof of operability. *See In re Delgado*, 149 Wn. App. 223, 237, 204 P.3d 936 (2009).

(“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.” (emphasis added)); *In re Pers. Restraint of Rivera*, 152 Wn. App. 794, 803, n.22, 218 P.3d 638 (2009) (“there must be sufficient evidence to find a firearm operable to uphold a firearm enhancement”); *State v. Pierce*, 155 Wn. App. 701, 714-15, 230 P.3d 237 (2010) (reversible error where the jury was not instructed that a gun must be operable in order for it to meet the definition of a firearm under RCW 9.41.010).

Not surprisingly, the State argued in response that the gun need only be a real gun, and that the State does not need to prove it was currently capable of being fired. See Slip Op at 8 describing State’s argument. In doing so, the State highlights one of the reasons why this Court should accept review. Without a clear understanding of whether operability is required, the parties are destined to repeatedly re-litigate this issue rather than focusing upon whether operability has been proven beyond a reasonable doubt.

Unfortunately, the court of appeals decision in the current case does little to alleviate the uncertainty surrounding this issue. For purposes of the appeal, the court accepted that operability is required, but then applied a meaningless test to determine operability. The court



held that “operability may be inferred from evidence showing a threat to use a real gun.” Slip Op. at 8. The difficulty with this test is that in virtually every case where a gun is used in a crime there is going to be a threat, whether direct or implied. By holding that a threat to use a gun proves the gun was capable of being fired, the court of appeals effectively eliminates the operability requirement.

The court of appeals also claims that there is sufficient proof of operability if the victim says that it looked like a real gun. But this is not a test for operability. This is just a test as to whether the defendant had a real gun or a toy gun.<sup>3</sup>

In support of this watered-down test for operability, the court of appeals relies upon *State v. Faust, supra* for establishing what constitutes an operable gun. Slip Op. at 9. But *Faust* was one of the pre-*Recuenco* cases in which the appellate court specifically found that operability was not required. *State v. Faust*, 93 Wn. App. at 380 (language in *Pam* on operability refers to the difference between a toy gun and a gun in fact; a gun incapable of being fired due to a mechanical defect is still a firearm). The court of appeals’ reliance upon *Faust* fur-

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<sup>3</sup> As discussed below, even if this test was the standard to be applied, the evidence in this case did not rise to the requisite level of proof to support the gun enhancement.

ther demonstrates the confusion surrounding this issue of what constitutes an operable firearm.

Review is necessary in this case. While this Court's decision in *Recuenco* should have resolved this dispute, questions remain at the lower levels. There is no commonly accepted definition as to what is meant by operability, and what type of proof satisfies the operability requirement on appeal. For these reasons, Mr. Adem respectfully requests that this Court accept review under RAP 13.4(b)(1)-(3).

2. **Review is appropriate under RAP 13.4(b)(3), as the State presented insufficient proof that Mr. Adem was armed with a firearm for purposes of the firearm enhancement.**

This definition of a firearm applies to both the charge of unlawful possession of a firearm as well as the firearm enhancement added to the robbery conviction. In each instance, due process requires the State to prove the existence of an operable firearm with proof 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). 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). Evidence is insufficient to support a conviction unless, viewed in the light most favorable to the State, a

rational trier of fact could find each essential element of the crime beyond a reasonable doubt. *State v. Chapin*, 118 Wn.2d 681, 691-92, 826 P.2d 194 (1992).

Here, there was little to no evidence that the gun was operable. Even applying the pre-*Recuenco* test from *State v. Padilla*, 95 Wn. App. 531, 978 P.2d 1113 (1999), there is no evidence that the gun could have been made operable with little effort and within a reasonable time. In *Padilla*, the court of appeals 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.

As an initial matter, it does not appear that the 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 court of appeals in our case, finding that it was a real gun because the victim said it looked real. Slip Op. at 9.

In holding that the victim's subjective belief should be sufficient to establish an operational firearm, the court of appeals 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 court of appeals found that because Ms. Hunyh believed it was a gun, it must have been a gun. But under this reasoning, there is no real distinction between a weapon for purposes of the robbery statute and one for the firearm enhancement.

Ms. 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) demonstrates 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 evidence that would demonstrate Ms. 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 court of appeals relied upon on in this appeal, is conjecture at best.

The court of appeals’ reliance upon Mr. Crimp’s testimony suffers the same fate. Slip Op. at 9. Mr. 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, operational firearm.

The court of appeals points to the testimony of an officer who reviewed the video of the robbery, and a live round found in a dumpster. Slip Op at 9. In watching the video the officer observed what he believed to be 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.

While the State may be able to point to some evidence suggesting an operational gun, there is a great chasm separating "some evidence" from proof beyond a reasonable doubt. Here, the totality of the evidence fails to rise to the requisite high level. The gun was never fired nor recovered. At most, the State established it was not a *plastic* toy. But whether the handgun was a toy is not the dispositive issue. The question is whether the gun was operational. The State did not come close to meeting that burden. The enhancement and the unlawful possession of a firearm should have been dismissed. Because a conviction based on insufficient

proof violates the state and federal constitutions, review is appropriate under RAP 13.4(b)(3).

**3. Review is appropriate under RAP 13.4(b)(1), as the State failed to enter findings of fact as to each element supporting the firearm enhancement and the weapons charge.**

Civil Rule 6.1(d) requires entry of written findings of fact and conclusions of law at the conclusion of a bench trial. *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). The trial court and the prevailing party share the responsibility to see that appropriate findings and conclusions are entered. *State v. Vailencour*, 81 Wn. App. 372, 378, 914 P.2d 767 (1996). "Without comprehensive, specific written findings, the appellate court cannot properly review the trial court's resolution of the disputed facts and its application of the law to those facts." *State v. Greco*, 57 Wn. App. 196, 204, 787 P.2d 940, *review denied*, 114 Wn.2d 1027 (1990). The written factual findings should therefore address the elements of the crimes separately and state the factual basis for the legal conclusions as to each element. *State v. Denison*, 78 Wn. App. 566, 570, 897 P.2d 437, *rev. denied*, 128 Wn.2d 1006 (1995).

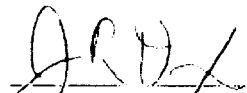
Mr. Adem raised this issue in his opening brief, when there were no findings in the file. The findings were filed after the opening brief, but the findings still did not address whether the gun was operable and what

evidence the court relied upon in finding operability. CP 126-130. Accordingly, the court of appeals decision affirming the conviction without remand to the trial court for additional findings is at odds with this Court's decision in *State v. Head, supra*. Review is appropriate under RAP 13.4(b)(1).

F. CONCLUSION

As set forth above and in Mr. Adem's opening and rely briefs, petitioner asks this Court to accept review.

Respectfully Submitted on this 2<sup>nd</sup> day of July, 2014.

  
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Attorney for Petitioner



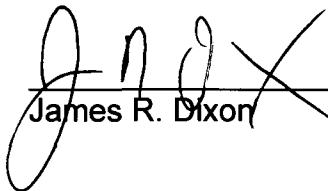
CERTIFICATE OF SERVICE

I, James R. Dixon, certify that on July 2, 2014, I caused a true and correct copy of this Petition for Review to be served on the following in the manner indicated below:

Counsel for State of Washington  
King County Prosecutor's Office  
Appellate Unit  
516 3<sup>rd</sup> Avenue,  
Seattle, WA 98104

(X) ABC Legal Messenger

Dated this 2<sup>nd</sup> Day of July, 2014, in Seattle, WA

  
James R. Dixon

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 69552-5-1
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	UNPUBLISHED OPINION
LIBAN HASSAN ADEM,	)	
	)	
Appellant.	)	FILED: June 2, 2014

2014 JUN -2 AM 9:42  
COURT OF APPEALS DISTRICT  
STATE OF WASHINGTON

SCHINDLER, J. — In this prosecution for the armed robbery of a jewelry store, Liban Hassan Adem contends the trial court violated his right to a speedy trial under CrR 3.3, and the evidence does not support the determination that he was armed with a firearm.<sup>1</sup> We affirm.

FACTS

The State charged Liban Hassan Adem with first degree robbery with a firearm enhancement and first degree unlawful possession of a firearm. The State alleged Adem robbed a jewelry store while armed with a firearm.

On February 28, 2012, the court held an arraignment hearing. Over the course of the next six months, the court granted six continuances.

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<sup>1</sup> After filing his appeal, Adem moved to withdraw the argument that he received ineffective assistance of counsel, and we granted the motion to withdraw that assignment of error.

Adem agreed to the first two continues requested by his attorney. On June 1, 2012, defense counsel requested a third continuance to interview witnesses. Over Adem's objection, the court granted the continuance. The court scheduled July 16, 2012 as the new trial date with an expiration date of August 15, 2012.

On July 13, 2012, defense counsel requested an eight-day continuance to July 25, 2012 to arrange for a Vietnamese interpreter to be present at the interview of the victim. The prosecutor requested a 30-day continuance because the forensic laboratory testing on the items found at the crime scene, including a green sweatshirt, had not been completed due to a backlog at the lab.

Defense counsel stated that Adem objected to the longer continuance. Defense counsel said she had promised Adem a continuance would be short and "arguably, the State has had a significant amount of time to have those tests completed."

The prosecutor responded that forensic testing had been requested "months ago." The prosecutor also noted that Adem was being held on separate burglary charges and that a third burglary charge was going to be filed. The prosecutor also stated that the other cases had later trial dates.

The court granted a 30-day continuance of the trial. The written order prepared by defense counsel states that the continuance was requested by the defense in order to interview the victim and was "required in the administration of justice." The order set a new trial date of August 13, 2012 with an expiration date of September 12, 2012.

On August 3, 2012, the parties informed the court that laboratory testing had been completed and Adem's DNA<sup>2</sup> was found on the sweatshirt. Defense counsel

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<sup>2</sup> (Deoxyribonucleic acid.)

requested a continuance to September 5, 2012 to review the test results. The attorney told the court, "I feel that it's absolutely critical to effectively be prepared for this case."

Over Adem's objection to the continuance, the court granted the continuance as required in the administration of justice, stating, "There is good cause for continuing the trial date to allow [defense counsel] to be adequately prepared to represent [Adem]."

The court scheduled a trial date for September 5, 2012 with an expiration date of October 5, 2012.

On August 16, 2012, defense counsel moved to continue the trial to October 1, 2012. Defense counsel stated the additional time was necessary to explore whether a DNA defense expert would be utilized. Defense counsel also stated that she was in trial on another case that would last for two more weeks. Over Adem's objection, the court granted the continuance "in the interest of justice," setting a new trial date for October 1, 2012 with an expiration date of October 30, 2012.

The trial commenced on October 4, 2012. Adem waived his right to a jury. The evidence at trial established that around noon on February 9, 2012, Lang Huynh was working at Ty Kim Huong Jewelry Store in White Center when four men entered the store wearing hooded sweatshirts and bandanas over their faces. Store surveillance cameras showed a man in a green hooded sweatshirt wielding what appeared to be a semiautomatic gun. The man held the gun to Huynh's head and forced her to turn over \$20,000 to \$30,000 worth of jewelry. At one point, the man pulled back the slide on the gun and it appeared to eject a bullet from the chamber. The men took almost everything in the store and then ran out the back of the store to a gray van.

The driver of the van Antonio Ortiz testified at trial. Ortiz identified Adem at trial as one of the robbers. Ortiz testified that Adem was wearing a bright green hooded sweatshirt before and after the robbery. After viewing the security video, Ortiz said that Adem was the person in the green sweatshirt with the gun.

Nick Crimp worked near the jewelry store and parked behind the store on the day of the robbery. Crimp testified that he saw a gray van parked in the alley and noticed the driver was hiding part of his face. Crimp watched as three or four people wearing bandanas over their faces ran from the back of the jewelry store carrying trays. One of the men dropped a gun that skidded across the pavement and "sounded like metal sliding across pavement." Crimp testified that the gun was a black semiautomatic pistol. After seeing the gun, Crimp hid behind a truck. After the robbers left in the van, Crimp called the police.

Ortiz said that he drove the van to an apartment complex where a codefendant and Adem's cousin Liban Warfa lived with his family. The van belonged to the Warfa family. Police located the van near a dumpster in the apartment complex parking lot. Within an hour of calling police, Crimp identified the van at the complex, noting distinct characteristics such as damage to the front driver's side and a missing rearview mirror. Police found stolen jewelry and a pistol holder in the van. They found more jewelry and five display trays in a Crown Victoria owned by the Warfa family.

Hassan Warfa told police that he saw several males, including his brother Liban and his cousin Adem, exit the van.<sup>3</sup> Hassan chased Adem around the corner and saw all the males leave in a separate car. Hassan testified that Liban and Adem were

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<sup>3</sup> We refer to Liban Warfa and Hassan Warfa by their first names for purposes of clarity.

together at his family's apartment on the evening before the robbery and that he gave Liban the van keys around 10:30 a.m. on the morning of the robbery.

Ortiz testified that when they got out of the van, he saw Adem take off his green hooded sweatshirt. A resident of the apartment complex also saw three people running through the parking lot and a fourth man throwing a green article of clothing into a dumpster.

Police found a jewelry tray, a round of ammunition on the tray, and a green sweatshirt in the dumpster next to the van. Forensic testing identified Adem's DNA on the green sweatshirt. The evidence also established the ammunition found in the dumpster was designed for the type of gun used in the robbery.

When arrested, Adem gave police a false name. In a phone call from jail, Adem admitted that he mouthed a threat of physical harm to Ortiz during his testimony at trial. The court convicted Adem as charged. Adem appeals.

#### ANALYSIS

Adem contends the trial court violated CrR 3.3 by granting continuances requested by the defense attorney over his objection without a sufficient inquiry and a finding of good cause.

Under CrR 3.3(b)(1)(i), an individual held in custody pending trial must be tried within 60 days of arraignment. Certain time periods, including continuances, are excluded from the 60-day requirement. CrR 3.3(e). A continuance sought "by or on behalf of any party waives that party's objection to the requested delay." CrR 3.3(f)(2).<sup>4</sup> Recently, our supreme court held that a continuance sought to enable counsel to

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<sup>4</sup> (Emphasis added.)

investigate or prepare for trial is “binding” on the defendant even if the defendant objects to the continuance. State v. Ollivier, 178 Wn.2d 813, 825, 312 P.3d 1 (2013).

The State contends, and Adem does not dispute, that Ollivier and CrR 3.3(f)(2) are controlling here.<sup>5</sup> All of the challenged continuances were requested by defense counsel, and all but one were sought in order to prepare for trial. The one exception was a continuance to pursue a global resolution of the charges in this case and another case, and Adem expressly agreed to that continuance. Thus, any objections to the continuances requested by defense counsel were waived.

Adem also contends the court abused its discretion in granting the request made by the State on July 13, 2012 for a 30-day continuance. Adem suggests in passing that defense counsel’s simultaneous request for a one-week continuance did not waive his objection to the longer 30-day continuance requested by the State. Adem fails, however, to cite any authority supporting that proposition.<sup>6</sup> But even assuming objections to the State’s continuance were not waived, Adem has not demonstrated a violation of his speedy trial right.

Before the court granted the continuance on July 13, 2012, the speedy trial expiration date was August 15, 2012. On August 3, 2012, well before the August 15 expiration date, the DNA test results became available and the defense moved for a

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<sup>5</sup> Ollivier was decided after Adem filed his opening brief. In its response brief, the State relied heavily on Ollivier, stating that it “controls this case.” Adem does not address Ollivier or the speedy trial issue in his reply brief.

<sup>6</sup> The two cases Adem cites, State v. Saunders, 153 Wn. App. 209, 220 P.3d 1238 (2009), and State v. Kenyon, 167 Wn.2d 130, 216 P.3d 1024 (2009), were distinguished in Ollivier and are inapposite. In Saunders, the continuances were granted over the defendant’s objection to permit plea negotiations. Ollivier, 178 Wn.2d at 824-25. In Kenyon, the record failed to document the reasons for the continuances. Ollivier, 178 Wn.2d at 825. Further, Kenyon involved continuances to accommodate missing judges and not continuances to allow the defense to prepare for trial. Ollivier, 178 Wn.2d at 825.

continuance for additional time to review the results. On August 16, 2012, the defense moved for another continuance to explore retention of an expert.

Because the trial commenced before the new speedy trial expiration date, there was no violation of the speedy trial time limit.

Adem also contends the firearm enhancement and conviction for unlawful possession of a firearm were not supported by sufficient evidence that he was armed with a firearm.

Evidence is sufficient to sustain a conviction or enhancement if, when viewed in a light most favorable to the State, it permits a rational trier of fact to find the elements of the crime or enhancement beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. McKee, 141 Wn. App. 22, 30, 167 P.3d 575 (2007). A defendant challenging the sufficiency of the evidence admits the truth of the evidence and all rational inferences that may be drawn from it. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Circumstantial and direct evidence are equally probative, and we defer to the trier of fact on conflicting testimony, witness credibility, and the persuasiveness of the evidence. State v. Raleigh, 157 Wn. App. 728, 736-37, 238 P.3d 1211 (2010), review denied, 170 Wn.2d 1029, 249 P.3d 624 (2011).

To convict Adem of unlawful possession of a firearm or impose a firearm enhancement, the State had the burden of proving that Adem or an accomplice was armed during commission of the crime with a "firearm," i.e., "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(9). Citing State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008), and several other cases, Adem contends this burden required the State to prove the



firearm was “operable.” See Recuenco, 163 Wn.2d at 437 (“We have held that a jury must be presented with sufficient evidence to find a firearm operable . . . in order to uphold the enhancement.”); State v. Pam, 98 Wn.2d 748, 754, 659 P.2d 454 (1983) (“A gun-like object incapable of being fired is not a ‘firearm.’ ”); 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.”).

The State disagrees, arguing sufficient evidence shows Adem or an accomplice used a real gun. See Raleigh, 157 Wn. App. at 734-35 (firearm need not be operable during commission of crime to constitute a firearm; language in Recuenco is dicta); State v. Padilla, 95 Wn. App. 531, 535, 978 P.2d 1113 (1999) (“a disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time period is a firearm”), review denied, 139 Wn.2d 1003, 989 P.2d 1142 (1999); State v. Faust, 93 Wn. App. 373, 380, 967 P.2d 1284 (1998) (language in Pam on operability refers to the difference between a toy gun and a gun in fact; a gun incapable of being fired due to a mechanical defect is still a firearm).

But even if we assume proof of operability is required, we have previously held that operability may be inferred from evidence showing a threat to use a real gun. In State v. Mathe, 35 Wn. App. 572, 668 P.2d 599 (1983), affirmed, 102 Wn.2d 537, 688 P.2d 859 (1984), we held that the State proved the defendant “used a real and operable gun” because eyewitnesses described the guns and the defendant’s express or implied threat to use them. Mathe, 35 Wn. App. at 581-82. Similarly, in State v. Bowman, 36 Wn. App. 798, 678 P.2d 1273 (1984), review denied, 101 Wn.2d 1015 (1984), we held

that eyewitness testimony describing a “real” gun and recounting a threat to use it was sufficient to establish “the existence of a real, operable gun in fact.” Bowman, 36 Wn. App. at 803;<sup>7</sup> see also State v. Goforth, 33 Wn. App. 405, 410-12, 655 P.2d 714 (1982) (evidence was sufficient to support inference that “gun was operable in fact” where witnesses who were familiar with shotguns testified that the defendant used a real shotgun); McKee, 141 Wn. App. at 31 (evidence was sufficient to support firearm enhancement given victim's description of the weight and feel of the gun, the way in which defendant wielded it, and evidence that defendant had a real gun and access to other guns); Faust, 93 Wn. App. at 381 n.6 (“eyewitness testimony to a real gun that is neither discharged nor recovered is sufficient to support deadly weapons and/or firearms penalty enhancements”).

Here, the victim testified that the gun “was pointed at me, and I know it was a gun. It was right in my face.” Nick Crimp testified that he can tell the difference between a revolver and a semiautomatic handgun, that the gun dropped by the robbers was a semiautomatic, that it slid across the pavement right in front of him, and that it made a sound “like metal sliding across pavement.” A detective who had used a semiautomatic pistol for 15 years testified that the firearm in the store video was a semiautomatic pistol. The detective based his conclusion on the gun’s shape, and the fact that the suspect “racked” the slide and ejected a round from the chamber. Further, other evidence established that the police found a pistol holder in the van and a live round of ammunition designed for a semiautomatic pistol in a jewelry tray in the dumpster. Viewed in a light most favorable to the State, this evidence is sufficient to support an inference that Adem was armed with a real and operable gun.

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<sup>7</sup> (Emphasis in original.)

In his reply brief, Adem also challenges the findings that he was “armed with a semiautomatic pistol,” that he “dropped the handgun” by Crimp’s feet, and that “Crimp was able to see and hear the handgun as it slid on the pavement.”<sup>8</sup> Adem contends the evidence was insufficient to infer that the witnesses observed an actual handgun. For the reasons previously set forth, this argument fails.

In addition, Adem contends the written findings do not support the conclusion that he was guilty of unlawful possession of a firearm and the firearm enhancement. But Adem overlooks the oral findings that the court expressly incorporates by reference. The court’s oral ruling, together with the written findings, support the court’s conclusions of law. The written findings state, in pertinent part:

a. On February 9, 2012, while Ms. Lang Huynh was working in her jewelry store in White Center neighborhood of Seattle, she was robbed by Liban Adem and three other individuals who entered her store wearing hoods and jackets. Several of the individuals were also wearing bandanas to hide their identities.

b. 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.

The court’s oral ruling states, in pertinent part:

Eyewitness testimony to a real gun that is discharged and not recovered is sufficient to support a firearms enhancement under the law. Here, Ms. Hunyh testified that a gun was held to her head. She was confident that it was, in fact, a gun.

The video of the robbery showed an article that was identified by Detective Magan as a semiautomatic pistol with the slide racked. If the slide were racked when a live round was in the chamber, that round would be ejected. A live round was identified as being found in one of the stolen jewelry trays that was found in the dumpster at the apartment complex, where the gray van was parked after the robbery.

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<sup>8</sup> Adem contends the court erred in failing to enter findings of fact and conclusions of law as required by CrR 6.1(d). But after Adem filed his opening brief, the court filed findings and conclusions that it had signed at sentencing but failed to enter.

Finally, the witness, Nick Crimp, saw the gun dropped in the alley, and heard the sound of metal hitting pavement as the robbers fled the scene of the crime. These facts establish that the Defendant committed the crime while armed with the firearm.

The evidence supports the trial court's determination that Adem was armed with a firearm.

We affirm.

Scheirale, J.

WE CONCUR:

Jay, J.

Cox, J.