SUPREME COURT NO. 89535-0
NO. 67509-5-I
Consolidated w/ 67516-8-I and 675567-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DARA KHANN,

Petitioner.

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

The Honorable John Erlick, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Dara Khann, the appellant below, asks this Court to accept review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Khann requests review of the unpublished decision in State v. Khann, Court of Appeals No. 67516-8-I (consolidated with 67509-5-I and 67556-7-I) (slip op. filed September 9, 2013), attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the State met its burden of proof that the seizure of the occupants of the car was supported by reasonable suspicion where there was only a vague description of the suspects as three Asian males and the car's occupants stared at the officer as their car passed the officer's car in the vicinity of the crime but over one hour after the crime was committed?

2. When petitioner moved to sever his trial from his codefendants' trial at the conclusion of the State's case the trial court ruled severance was warranted but deferred ruling on the motion until the codefendants' presented their defense case. The court then denied the motion based on the evidence presented by the codefendants. Did the court erroneously consider the codefendants' evidence in denying petitioner's severance motion?

D. STATEMENT OF THE CASE

Dara Khann, Kevin Volante and Michael Martinez-Copol (also known as Juan Machado) were each charged 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. 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.

1. Facts Relevant To Issue 1

Early in the morning on August 11, 2010, C. H. was asleep in the basement bedroom of her home when she heard the sound of glass breaking upstairs. 18RP 124, 132. A man, who C.H. described as a stocky 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 then appeared. That man was about 18 years old, slim, had 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 second 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.

The younger man, whom C.H. identified as the one who taped her, told C. H. he had to check her for weapons. 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.

At some point the man who previously touched C.H. said he had to check her for weapons again. 18RP 163. The man laid down behind her and began rubbing her breasts and touching her underneath her panties. 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 put his fingers inside her. 18RP 173-174. 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 cut her legs free and pull the tape down from her eyes. She ran out the back door. 18RP 178-181. When she got outside she saw her car, a BMW, drive away. 18 RP 183-185.

Deputy Daniel Murphy was on patrol when at 2:55 a.m. he received a 911 call that an Asian man, 25 to 30 years old had stolen a car. 6RP 54- 62; CP 133-134. Later, Murphy heard from another deputy that three Asian men with a black and silver gun were involved and all were dressed in black. 6RP 64; CP 134.

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.

Murphy was advised to look for men walking in the area and matching the vague description. 6RP 114-115, 139. Murphy believed the

men 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 facing east Murphy saw a Cadillac traveling southbound. 6RP 72. The car turned right 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. 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. Although the car did not exceed the speed limit, 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.

The car rolled through a stop sign. Murphy stopped the car 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. As he approached the car Murphy 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. Copol was the driver and Khann and Volante

were the passengers. 6RP 90; 7RP 25. Copol 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. The 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. The gas station clerk could not identify any of the men as the men associated with C.H.'s abandoned BMW. C.H. identified Copol and Khann but not Volante as her assailants. 12RP 77-78; 15RP 153; 18 RP 200; 21RP 94.

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. On appeal Khann, Volante and Copol again argued the stop was illegal because it was based on a mere hunch and on the racial appearance of the car's occupants. The Court of Appeals rejected that argument. Slip. Op. at 9-10.

2. Facts Relevant To Argument 2.

When C.H. was brought to where the car was stopped 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. identified Khann and Copol as two of the assailants 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 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. C.H. identified Khann as the man with the short hair. 19RP 37, 50. 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. Although C.H. previously testified the second man who came into her room had short hair she still insisted that man was Khann. 19RP 92, 100, 136-137.

C.H.'s DNA was found on Volante s fingernail clippings. 17RP 140-141. Copol and C.H.'s DNA was found on Volante s fingers and hand. 17RP 128, 154. None of C.H.'s DNA was found on Khann's hands, fingers or fingernails. In addition police did not find Khann s fingerprints in C.H's house or on any of the physical evidence. 17 RP 119-120, 161.

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 but indicated it could be renewed at the end of the State's case. 16RP 26.

On the afternoon of July 6, 2011, the State rested. Khann advised the court he would not present any evidence and he rested as well. 21RP 127-128. Copol indicated he would testify. 21RP 124-125. Volante informed the court he intended to present witnesses in his defense. 21RP 165. It was decided that for the sake of convenience Copol 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 Copol's partial testimony. 21RP 129-164.

Copol testified Volante called him and asked if Copol would drive him to a party. 21RP 132. Copol took Volante and Khann, who was with Volante, to the party but Copol went back home to sleep. 21RP 133-134.

Later, Copol got a call from his friend Big who also needed a ride. 21RP 134. He 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. Big wears his hair in a ponytail. 21RP 135-136. The two

had Copol drive them to the Skyway neighborhood. Copol stopped the car where Big and Red asked and the two got out and told Copol to wait. 21RP 137. The two men then walked down a dirt road. 21RP 138.

A short time later Copol 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 inside and asked what was going on. Big came out running with what looked like a black gun in his hand. Big said he was going back inside to get Red. Then Red came upstairs carrying a silver or chrome gun. Copol told Red he was going to leave so Red went back downstairs presumably to get Big. 21RP 139-140. After a few minutes, Red came back upstairs and said Big would catch up with them. Red and Copol left. 21RP 141.

As they were leaving Copol got a call from Volante and Khann and they asked if he would come back to the party and give them a ride home. Copol picked them up at the nearby North Seatac Park. Copol then dropped Red off where he asked. 21RP 141-143. Copol, Volante and Khann were driving to Khann's house when police stopped them. 21RP 144-145.

The next morning, following Copol's partial testimony, Khann moved to sever his trial based on the disparity in evidence. 22RP 4-13.

Khann pointed out that because both he and the State rested before Copol 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 codefendants presented their defense. 22RP 23-24. The State responded that the court could wait to rule on the motion after the codefendants presented their evidence. 22RP 24-25.

The court reserved ruling on the motions. Copol resumed his testimony and the remainder of his defense case. 22RP 51-164. Copol admitted that in his initial statements to police he did not tell them about Red and Big. 22RP 150. He 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. He said 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.

The jury was then released for the day. 22RP 164-165. After releasing the jury the court ruled on Khann's severance motion.

The court recognized that identification was Khann's defense and C.H.'s identification testimony was impeached successfully. 22RP 168. The court reasoned that if it only viewed the evidence up to the point Khann made the severance motion, after both the State and Khann rested but before Copol put on his defense, evidence of disparity would warrant severance. 22RP 172. It recognized that in contrast to the evidence against Volante and Copol, 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(a)(1) it could consider whether severance is appropriate at any time during the trial. Id. It concluded that Copol's subsequent testimony, where he admitted he initially told police Volante and Khann where the two who with him, provided further evidence against Khann and there was no longer such a disparity in evidence that severance was warranted. 22RP 172-173.

On appeal Khann argued because his 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 the court improperly considered the evidence impeaching Copol's testimony. Based on that evidence, as the court found, severance was warranted. The

Court of Appeals rejected that argument. It held that if the court rule governing severances contemplated the trial court base its decision on the record at the time of the severance motion, the rule would have included that requirement. Slip. Op. at 13-14.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. WHETHER THE WARRANTLESS SEIZURE WAS LEGALLY JUSTIFIED OR BASED ON IMPROPER FACTORS IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

a. The Officer Lacked Reasonable Suspicion To Justify Petitioner's Seizure.

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, commonly referred to as a "Terry stop." Terry v. Ohio, 392 U.S. 1, 21 22, 88 S.Ct. 1868, 20 L. Ed.2d 889 (1968); 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); State v. Doughty, 170 Wn.2d 57, 63, 239 P.3d 573 (2010); 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).

Here, when officer 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 in another car that long after the assault and the BMW was abandoned. Indeed, 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 trial court found it significant that the men in the Cadillac stared at Murphy when they passed his patrol car. There is nothing particularly suspicious about people starring at a police officer. 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. 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 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 is unsupported by the facts. But, even if factually supported it would not justify the stop. See, Gatewood, 163 Wn.2d at 537, 540 (walking away from police even when told to stop does not support a finding the defendant was fleeing or justify a Terry stop).

The only commonality between the vague description of C.H.'s assailants and the men in the Cadillac were they appeared to be Asian and were wearing dark clothes. Those facts do not support a reasonable suspicion the men were involved in the assault. Mere racial similarity cannot justify a Terry stop. See, State v. Barber, 118 Wn.2d 335, 823 P.2d 1068 (1992) (racial incongruity is not a sufficient basis for forming s a suspicion of criminal activity).

Review is warranted because the issue raises a significant question of constitutional law. RAP 13.4(b)(3). Under the totality of the circumstances, which consists of factors this Court has determined do not justify a Terry stop, it is important for this Court to clarify for law enforcement and the lower courts if those circumstances warrant an intrusion into a person's private affairs. In this case they do not. Khann was seized in violation of his state and federal constitutional rights, and all evidence obtained as a result of that seizure should have been suppressed.

2. WHETHER IN RULING ON A PETITIONER'S SEVERANCE MOTION MADE AFTER BOTH THE STATE AND THE PETITIONER RESTED THE COURT IMPERMISSIBLY CONSIDERED EVIDENCE IMPEACHING A CODEFENDANT'S TESTIMONY IS AN ISSUE OF FIRST IMPRESSION THAT SHOULD BE DECIDED BY THIS COURT.

b. The Court's Failure To Grant Petitioner's Motion To Sever Denied Petitioner His Right To A Fair Trial.

Khann's severance motion was made after both he and the State rested. The trial 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 the evidence impeaching codefendant Copol's testimony in determining whether Khann s case should be severed.

A trial court's denial of a motion to sever is reviewed under the abuse of discretion standard. State v. Sublett, 176 Wn.2d 58, 69, 292 P.3d 715 (2012); State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d 577 (1991). 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 codefendant'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).

This Court reviews 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)). Interpretation of a court rule relies upon principles of statutory construction. Id. at 249, 103 P.3d 792. To interpret a statute, this Court first looks 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)).

CrR 4.4 governs motions to sever.[1] Under the rule, a motion for severance "may be made before or at the close of the all the evidence if the interests of justice require." CrR 4.4(a)(1). "If, pursuant to section (a), a defendant moves to be severed at the conclusion of the prosecution's

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[1] CrR 4.4(c)(2) provides in part:

> (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.

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." CrR 4.4(d).

Based on C.H.'s unreliable and impeached testimony identifying Khann as one of her assailants, and the much stronger evidence linking Copol and Volante to the crimes, the trial 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 there is a gross disparity in the weight of evidence against each defendant). The court denied the severance motion reasoning that CrR 4.4(a)(1) allowed it to consider the motion at any time during trial, including after both parties rested but based on the evidence presented in the codefendant's case. The Court of Appeals agreed. It reasoned that "Had the rule's author intended to require that the trial court make its decision based solely on the evidentiary record at the time of the motion, rather that all the evidence to be considered by the jury, it could have included this requirement." Slip. Op. at 14.

Although CrR 4.4(a)(1) provides that a severance motion be made "before or at the close of all the evidence" it does not state the trial court can defer ruling on severance motion until after a codefendant's case where the motion is made under CrR 4.4(d). That provision plainly states that where the motion is made at the conclusion of the State's or of all the evidence severance is required if warranted. There is no language in the rule that gives the court the discretion to defer a decision on a severance motion until after the codefendant's case, and then consider evidence in that case in ruling on the motion, where the motion was made after both the State and moving defendant rest. If the trial court has the discretion to defer ruling on severance motion until after a codefendant presents his or her evidence, CrR 4.4(d) is superfluous. See, State v. George, 160 Wn.2d 727, 738, 158 P.3d 1169 (2007) ("An must be construed as a whole, considering all provisions in relation to one another and harmonizing all rather than rendering any superfluous.").

While judicial economy favors joint trials, it cannot trump the right to a fair trial. A defendant should not be forced to defend against both the State and a codefendant. By authorizing a defendant to move for severance at the conclusion of the State's case CrR 4.4(d) contemplates a defendant only need defend against the State's evidence and not a

codefendant's evidence, or as in this case evidence impeaching a codefendant's testimony.

The interpretation of CrR 4.4 is an issue of substantial pubic importance that this Court should determine. RAP 13.4(b)(4). Whether under CrR 4.4 a trial court can consider a evidence in a codefendant's case in ruling on a severance motion brought after the conclusion of the State and the defendant's case is an issue of first impression that this Court should decide. Here, Khann was denied his right to a fair trial where the trial court denied his severance motion when at the conclusion of the State's case severance was warranted.

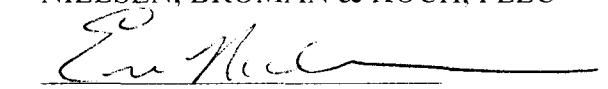
F. CONCLUSION

Khann respectfully requests that this Court grant his petition for review.

DATED THIS 20 day of September, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KEVIN ISAJAH VOLANTE, Appellant.	No. 67509-5-I (Consolidated with Nos. 67516-8-I and 67556-7-I) DIVISION ONE UNPUBLISHED OPINION
STATE OF WASHINGTON, Respondent, v. DARA KHANN, Appellant.	FILED: September 9, 2013
STATE OF WASHINGTON, Respondent, v. MICHAEL MARTINEZ COPOL AKA JUAN MIGUEL MACHADO, Appellant.	

LEACH, C.J. — Appellants Kevin Volante, Michael Copol (aka Juan Machado), and Dara Khann appeal their convictions for first degree robbery and burglary. Volante and Khann also appeal their convictions for first degree rape. All appellants challenge the admission of evidence seized by the arresting deputy during a warrantless search of their vehicle, claiming that the initial stop of their vehicle was unlawful. They also challenge the court's imposition of a firearm enhancement on each count, arguing that the State did not present sufficient evidence that the gun used was operable. Separately, Khann challenges the court's denial of his motion to sever his trial from the codefendants. In a statement of additional grounds, he alleges that the court erred when instructing the jury about the need for unanimity regarding the firearm special verdicts.

Because the deputy had a reasonable, articulable suspicion that the appellants had been involved in criminal activity, the court correctly denied the suppression motion. The State presented sufficient evidence of operability to support the firearm special verdicts. The court properly denied Khann's motion because, at the close of evidence, the weight of the evidence was not so disparate as to justify severance. Because our Supreme Court has overruled the authority relied upon by Khann to challenge the special verdicts, the court properly instructed the jury regarding the special verdicts. Therefore, we affirm.

FACTS

At 2:55 a.m. on the morning of August 11, 2010, C.H.[1] called the King County Sheriff's Office to report a home invasion and rape. When deputies arrived, she told them that three men had bound her hands and mouth with tape and that at least two of them penetrated her vagina with their fingers. The assailants stole C.H.'s BMW and drove away in it.

About an hour later, deputies received a report that someone had abandoned a BMW at a Chevron station near C.H.'s house. The station's surveillance footage did not show a clear photo of the driver, but a witness reported seeing three males with medium complexions near the vehicle.[2]

Deputy Daniel Murphy heard the original 911 dispatch call, which described the assailant as an Asian male, aged 25-30 years old, and another deputy's updated description of three "younger" Asian males. He began searching the area for the suspects. Shortly after 4:00 a.m., while stopped at a stop sign, Murphy saw a beige Cadillac approach. As the car passed him, Murphy noticed the three occupants, who all appeared to be Asian males in their late teens or early 20s. He reported that all three of them stared at him as they passed his marked patrol car.

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[1] The victim is referred to by her initials to protect her privacy.

[2] Through an interpreter, the gas station clerk testified that the people he saw were not black, white, or Mexican.

Finding this behavior suspicious and believing the men matched C.H.'s description of her attackers, Murphy made a U-turn and began to follow the Cadillac. He stated that the car sped up after it went through the stop sign, but that it was not speeding, and that the driver made a quick left turn into a neighborhood. Suspecting that the car was attempting to "duck" him, Murphy decided to execute a traffic stop. As the car made a "rolling stop" at the next stop sign, Murphy activated his emergency lights and stopped the vehicle. He testified that by this point, based on his suspicions that the occupants participated in the home invasion, he intended to stop them regardless of the traffic infraction.

As he walked up to the driver's side window, Murphy noticed a large kitchen knife on the backseat. After Murphy's backup arrived, they had the suspects exit the vehicle, handcuffed them, and placed them under arrest. Another officer then spotted the butt of a gun underneath the front passenger seat of the Cadillac. Officers then conducted a showup identification. C.H. identified Khann and Copol as the men who had broken into her house. She did not identify Volante.

The State charged all three with first degree robbery, first degree burglary, and first degree rape. In each count, the State alleged that the defendants were

armed with a firearm at the time. After the State concluded its case in chief, Khann's counsel rested without presenting any evidence. At the same time, based on the asserted disparity of evidence linking Khann and the other defendants to the crime, he moved to sever. The judge deferred ruling on Khann's motion until Copol and Volante had both presented their cases. At the close of all evidence, the court determined that the disparity in evidence against the three defendants did not warrant severance. The jury found all three defendants guilty on the robbery and burglary counts. It also found Volante and Khann guilty on the rape charge. The jury found that the defendants were armed with a firearm during the commission of all counts. The court imposed standard range sentences plus firearm enhancements. All defendants appeal.

STANDARD OF REVIEW

We review the denial of a motion to suppress evidence by determining whether substantial evidence supports the trial court's findings of fact and whether those findings support the trial court's conclusions of law.[3] Substantial evidence exists if it is sufficient to persuade a fair-minded, rational person of the truth of the matter asserted.[4] Unchallenged findings of fact become verities on appeal.[5] We review conclusions of law de novo.[6]

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[3] State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001).
[4] State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).
[5] State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the State and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[7] By challenging the sufficiency of the evidence, the defendant admits the truth of the State's evidence and all reasonable inferences drawn from it.[8]

Lastly, we review a trial court's severance ruling under CrR 4.4(c)(2) for a manifest abuse of discretion.[9] "A manifest abuse of discretion is a decision manifestly unreasonable or exercised on untenable grounds or for untenable reasons. It is one that no reasonable person would have made."[10]

ANALYSIS

In this consolidated appeal, all three appellants challenge the validity of the initial stop of their vehicle and the sufficiency of the evidence to support the firearm special verdicts. Volante and Khann assign error to various findings and conclusions in the court's decision on the CrR 3.6 hearing. Because Copol does not assign error to these findings or conclusions, the findings are verities for purposes of his appeal. Additionally, Khann appeals the denial of his motion to sever his trial from the codefendants'. He alone filed a statement of additional

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[6] State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).
[7] State v. Lord, 117 Wn.2d 829, 881, 822 P.2d 177 (1991).
[8] State v. Pedro, 148 Wn. App. 932, 951, 201 P.3d 398 (2009).
[9] State v. Larry, 108 Wn. App. 894, 911, 34 P.3d 241 (2001).
[10] In re Marriage of Tower, 55 Wn. App. 697, 700, 780 P.2d 863 (1989).

grounds challenging the court's instruction on jury unanimity for each special verdict.

First, the appellants contend that the arresting officer did not have reasonable suspicion, supported by specific, articulable facts, to stop their vehicle. Article I, section 7 of the Washington Constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Warrantless seizures are presumptively unconstitutional unless they fall into one of several carefully defined categories.

A brief investigative detention, commonly known as a Terry[11] stop, is one accepted exception to the warrant requirement.[12] A Terry stop occurs when the police briefly seize an individual for questioning based on "specific and articulable," objective facts that give rise to a reasonable suspicion that the individual has been or is about to be involved in a crime.[13] When reviewing a Terry stop's validity, we consider the totality of the circumstances,[14] including factors such as the officer's training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, the amount of physical

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[11] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).
[12] State v. Hendrickson, 129 Wn.2d 61, 71, 917 P.2d 563 (1996).
[13] Terry, 392 U.S. at 21-22; State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997).
[14] State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

intrusion upon the suspect's liberty, and the length of time the suspect is detained.[15]

The appellants contend that Murphy's stated reasons for the stop were pretextual and his only real justification was a hunch based on their racial appearance. A pretextual traffic stop is one made to "accomplish an impermissible ulterior motive."[16] The appellants rely on State v. Barber[17] to argue that race is an insufficient basis to justify an investigatory stop. There, the court noted that "racial incongruity, i.e., a person of any race being allegedly 'out of place' in a particular geographic area, should never constitute a finding of reasonable suspicion of criminal behavior."[18] But the Barber court also noted that in some cases, "appearance, including race and other physical attributes of a suspect, may be relevant in forming a suspicion of criminal activity."[19] Racial incongruity was not the reason for Murphy's suspicion. Indeed, the deputy

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[15] Acrey, 148 Wn.2d at 747.

[16] State v. Ladson, 138 Wn.2d 343, 354, 979 P.2d 833 (1999). Under Ladson, "a traffic infraction may not be used as a pretext to stop to investigate for a sufficient reason to search even further." Ladson, 138 Wn.2d at 353. Murphy's unchallenged testimony was that he would have stopped the vehicle regardless of the driver's failure to stop fully at the stop sign. Because this was an investigative stop for suspected criminal activity, not merely a traffic violation stop, Ladson's specific prohibition against the pretextual use of traffic infractions to conduct warrantless stops and searches does not apply.

[17] 118 Wn.2d 335, 346, 823 P.2d 1068 (1992).

[18] Barber, 118 Wn.2d at 346.

[19] Barber, 118 Wn.2d at 348.

testified that seeing Asian American males in that area was not unusual. Instead, Deputy Murphy identified the occupants' resemblance to the suspect description as a primary reason for the stop. Given the victim's description of her attackers as young Asian American males, the race of the car's occupants was a legitimate factor for Murphy to consider.

Further, we review the evidence as a whole and do not evaluate the facts on a piecemeal basis. Murphy also identified the defendants' behavior within the car as a factor in his decision to execute the stop. He described seeing their shadows in the car moving around suspiciously after he began tailing them, and he felt from his driving behavior that the driver was attempting to elude him. Washington courts afford police officers substantial deference in their interpretation of potentially suspicious circumstances. As this court noted in State v. Marcum,[20] an officer may "'draw on [his or her] own experience and specialized training to make inferences from and deductions about cumulative information available to [him or her] that might well elude an untrained person.'"

Given the severity of the suspected crime, Deputy Murphy's experience in law enforcement, the suspects' proximity to the abandoned BMW, and their erratic, suspicious behavior, specific, articulable facts support Murphy's

[20] 149 Wn. App. 894, 908 n.5, 205 P.3d 969 (2009) (alterations in original) (internal quotation marks omitted) (quoting United States v. Arvizu, 534 U.S. 266, 273, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002)).

reasonable suspicion that the appellants may have been involved in the home invasion. Because his observations led to a reasonable suspicion that the suspects were involved in the home invasion, the Terry stop was valid and the trial court correctly denied the defendants' suppression motion.

Alternatively, the appellants assert that the State failed to present sufficient evidence to support the firearm enhancement special verdicts. Evidence is sufficient if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find each element proved beyond a reasonable doubt.[21] We consider circumstantial and direct evidence equally reliable and defer to the trier of fact on conflicting testimony, witness credibility, and the persuasiveness of the evidence.[22]

To enhance an appellant's sentence in this case, the State had the burden of proving that he or an accomplice committed the crime while armed with a "firearm," i.e., "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder."[23] Appellants contend this burden required the State to prove the firearm was operable, even though the applicable statutes do not use this word. Thus, because the State never proved that the

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[21] State v. Montgomery, 163 Wn.2d 577, 586, 183 P.3d 267 (2008).

[22] State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), abrogated in part on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[23] RCW 9.94A.533(3); RCW 9.41.010(7).

firearm was capable of firing shots, the State did not meet its burden. The State disagrees, asserting that it met its burden by showing that Volante or an accomplice used a real gun.

We do not need to resolve the parties' disagreement about the State's burden because, even if the law requires proof of operability, this may be inferred without any direct evidence of operability.[24] In State v. Mathe,[25] we held that the State proved the defendant used "a real and operable gun" with the testimony of two robbery eyewitnesses who described the guns and the defendant's express or implied threat to use them. Similarly, in State v. Bowman,[26] we held eyewitness testimony describing a "real" gun and describing a threat to use it was sufficient to establish "the existence of a real, operable gun in fact."

At trial, the State admitted the handgun found in Volante's car at the time of his arrest and presented evidence that it was loaded, had a serial number, and was engraved "Smith and Wesson." This gun matched the victim's description of the weapon used as a black-and-silver semiautomatic pistol. Copol told the police the gun belonged to him and that he had purchased it about one week before for personal protection. Viewed in the light most favorable to the State,

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[24] State v. Mathe, 35 Wn. App. 572, 581-82, 668 P.2d 599 (1983), aff'd, 102 Wn.2d 537, 688 P.2d 859 (1984).

[25] 35 Wn. App. 572, 581-82, 668 P.2d 599 (1983), aff'd, 102 Wn.2d 537, 688 P.2d 859 (1984).

[26] State v. Bowman, 36 Wn. App. 798, 803, 678 P.2d 1273 (1984).

this evidence sufficiently supports an inference that one of the appellants was armed with a firearm during each of the offenses.

Appellant Khann contests the court's refusal to sever his trial from his codefendants'.[27] To avoid unduly burdening administration of justice, Washington law disfavors separate trials,[28] and severance under CrR 4.4(c) is at the discretion of the trial court.[29]

CrR 4.4(c)(2) provides in part,

> (2) The court . . . should grant a severance of defendants whenever:
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> (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.

This court reviews a trial court's denial of a motion under an abuse of discretion standard.[30] A defendant must demonstrate undue prejudice from a joint trial to

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[27] Khann moved twice for severance on speedy trial grounds. However, on appeal, he only challenges the court's denial of his motion to sever for disparity of evidence at the close of the State's case.

[28] State v. Grisby, 97 Wn.2d 493, 506-07, 647 P.2d 6 (1982); State v. Ferguson, 3 Wn. App. 898, 906, 479 P.2d 114 (1970).

[29] Larry, 108 Wn. App. at 911.

[30] State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d 577 (1991).

establish an abuse of discretion.[31] To do this, the defendant "'must be able to point to specific prejudice.'"[32] Specific prejudice may be established by showing

> "(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."[33]

To justify a severance, the claimed prejudice must outweigh the court's concern for judicial economy.[34] Khann moved for severance based upon the disparity of the evidence against him and his codefendants. At the time the State rested, the only evidence linking Khann to the crime was the victim's showup identification, and the court noted that Khann successfully impeached her related testimony at trial. Since Khann did not present any evidence in his own defense, he argues that the court should have granted his severance motion based on the facts in evidence at the time the State rested.

CrR 4.4(a)(1) plainly states that a severance motion may be made "before or at the close of all the evidence" in a consolidated case. Khann's motion was

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[31] State v. Alsup, 75 Wn. App. 128, 131, 876 P.2d 935 (1994).

[32] Larry, 108 Wn. App. at 911 (quoting State v. Wood, 94 Wn. App. 636, 641, 972 P.2d 552 (1999)).

[33] 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)).

[34] Hoffman, 116 Wn.2d at 74.

timely but, contrary to his argument, the rule does not require the judge to rule on the motion immediately. A rule discussing severance of multiple defendants' trials necessarily contemplates that multiple parties may be presenting evidence. Had the rule's author intended to require that the trial court make its decision based solely on the evidentiary record at the time of the motion, rather than all the evidence to be considered by the jury, it could have included this requirement. But such a requirement would not address the pertinent problem, the risk of one defendant being convicted based upon the strength of the evidence against codefendants.

The State correctly notes that Khann seeks to benefit from forcing the judge to ignore probative evidence about Khann's guilt by requiring the court to rule before hearing all the evidence. This negates the principle of judicial economy that consolidated trials serve. If the court had severed Khann's trial, then the State could call Copol and Volante as the State's witnesses in Khann's subsequent trial. Because the court waited until after Copol and Volante presented their defense evidence, which also provided more evidence against Khann, the court determined that the disparity in the weight of the evidence did not warrant severance.

Khann additionally argues that Copol's statements were impeachment evidence and the court improperly considered them as substantive evidence against him. "[A]bsent a request for a limiting instruction, evidence admitted as relevant for one purpose is deemed relevant for others."[35] Because Khann did not object to Copol's testimony and did not request a limiting instruction, the jury properly considered it as substantive evidence against Khann.

In his statement of additional grounds, Khann alleges that the court's instruction that the jury must be unanimous to return a special verdict violates the nonunanimity rule established in State v. Bashaw.[36] However, in State v. Guzman Nuñez,[37] our Supreme Court reconsidered and overruled Bashaw. The court concluded that the challenged jury instructions, which required a unanimous "yes" or "no" decision on the special verdict form, were correct. Here, based on Guzman Nuñez, the trial court did not err with the special verdict form. Khann's argument fails.

CONCLUSION

The court did not abuse its discretion by denying the appellants' suppression motion. The State presented sufficient evidence of operability to

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[35] State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).
[36] 169 Wn.2d. 133, 146-47, 234 P.3d 195 (2010).
[37] 174 Wn.2d 707, 709-10, 285 P.3d 21 (2012).

support the firearm special verdicts. And the court did not abuse its discretion by denying Khann's motion to sever. Therefore, we affirm.

Leach, C.J.

WE CONCUR:

Cox, J.

Becker, J.

IN THE SUPREME COURT THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. DARA KHANN, Petitioner.	)))))))))	SUPREME COURT NO. _____ COA NO. 67509-5-I CONSOLIDATED NO. 67516-8-I & 67556-7-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 23RD DAY OF SEPTEMEBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DARA KHANN
DOC NO. 351967
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIR WAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF SEPTEMEBER 2013.

x Patrick Mayovsky