67509-5

67509-5

CONSOLIDATED NO. 67509-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

KEVIN ISAJAH VOLANTE, MICHAEL MARTINEZ COPOL, aka JUAN MIGUEL MACHADO, and DARA KHANN,

Appellants.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN ERLICK

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# BRIEF OF RESPONDENT

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## A. ISSUES

1. An officer may briefly stop and detain an individual without a warrant when the officer reasonably suspects that person is engaged in criminal activity. An officer stopped the appellants based on their physical similarity to the suspects' description, their suspicious behavior, and their close proximity to the scene of an armed robbery, rape, and burglary within an hour and a half of the crimes. Are these specific and articulable facts that, taken together, reasonably warranted stopping the appellants?

2. Properly joined defendants may be severed if a joint trial would result in specific prejudice to a defendant outweighing the need for judicial economy. The State charged the appellants with the same crimes involving the same victim, witnesses, and evidence. Khann moved for severance after the State and he rested alleging that a gross disparity of evidence existed against him compared to the co-defendants. The trial court denied Khann's motion based on statements admitted during a co-defendant's cross-examination identifying Khann as one of the perpetrators of the crimes. Khann did not object to the statements' admission, nor seek a limiting instruction restricting their use. Given this record, has Khann failed to show that the trial court erred by considering

the statements substantive evidence against Khann when denying the motion to sever?

3. Evidence is sufficient to support a sentencing enhancement if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the enhancement beyond a reasonable doubt. To obtain a firearm enhancement, the State must prove that the defendant was armed with a firearm capable of firing a projectile during the commission of a crime. At trial, the State presented evidence that one of the appellants admitted to bringing a loaded, 9mm Smith and Wesson handgun to the victim's house and that he had purchased the gun for protection after being shot. Police recovered the gun and entered it into evidence without test firing it. Is this sufficient evidence to demonstrate that the firearm was operable?

## B. STATEMENT OF THE CASE

### 1. PROCEDURAL FACTS

The State charged Kevin Isajah Volante, Michael Martinez Copol,[1] and Dara Khann with Burglary in the First Degree, Rape in

[1] Although Michael Martinez Copol is also known as Juan Miguel Machado, and used that name at trial, the State will refer to him as Copol given his use of that name on appeal.

the First Degree, and Robbery in the First Degree. VCP 44-46; CCP 8-10; KCP 123-25.[2] For each count, the State alleged that the defendants were armed with a firearm. VCP 44-46; CCP 8-10; KCP 123-25. At a joint trial, the jury convicted Volante and Khann as charged, and convicted Copol of first-degree burglary and first-degree robbery. VCP 87-89; CCP 81, 249; KCP 169-71; 26RP 6-10.[3] The jury found the firearm enhancement on every count. VCP 84-86; CCP 80, 248; KCP 166-68; 26RP 6-10. The court imposed standard-range sentences of 309 months for Volante, 161 months for Copol, and 291 months for Khann.[4] VCP 218-30; CCP 203-10; KCP 293-304; 26RP 71-79, 90-91, 100-01.

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[2] The State adopts the following reference system for the clerk's papers designated by each defendant: Volante (VCP), Copol (CCP), and Khann (KCP).

[3] The Verbatim Report of Proceedings consists of 26 volumes designated as follows: 1RP (2/11/11), 2RP (2/18/11), 3RP (3/1/11), 4RP (3/4/11), 5RP (3/25/11), 6RP (6/7/11), 7RP (6/8/11), 8RP (6/9/11), 9RP (6/13/11), 10RP (6/14/11), 11RP (6/15/11), 12RP (6/16/11), 13RP (6/17/11), 14RP (6/20/11), 15RP (6/21/11), 16RP (6/27/11), 17RP (6/28/11), 18RP (6/29/11), 19RP (6/30/11), 20RP (7/5/11), 21RP (7/6/11), 22RP (7/7/11), 23RP (7/11/11), 24RP (7/24/11), 25RP (7/13/11), and 26RP (7/14/11 and 7/29/11).

[4] At sentencing, the court found that the defendants' burglary and robbery convictions constituted the same criminal conduct. 26RP 51-54. The court declined to exercise its discretion to score the crimes separately under the anti-merger statute. 26RP 71, 90-91, 100-01.

## 2. SUBSTANTIVE FACTS

### a. State's Case-In-Chief.

In the early morning hours of August 11, 2010, C.H.[5] awoke to the sound of breaking glass and people running downstairs into her bedroom. 18RP 132, 134. C.H. sat upright in bed and saw a young Asian male enter the room carrying a handgun that was "completely silver" on top, and black on the bottom.[6] 18RP 133-36, 141. The man had a long ponytail, "slanted eyes," and a "short stocky" build. 18RP 135, 137. The man pointed his gun within two inches of C.H.'s face, as another young Asian male came into the room carrying a black handgun. 18RP 137, 141. The second man had a slimmer build with "really short hair." 18RP 137-38. Both men appeared to be dressed in all black, with the first man wearing a hooded sweatshirt. 18RP 138-39.

The second man who came in grabbed C.H.'s neck and threw her down onto the bed, causing C.H. to hit her head on the headboard. 18RP 141-42. Ordering C.H. to "shut up," this man began taping C.H.'s eyes and mouth shut with duct tape.

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[5] To protect her privacy, the victim is referred to by her initials.

[6] Although unfamiliar with the term "revolver," C.H. indicated that the suspect's gun did not have a circular shaped "spin thing" with bullets inside, similar to a revolver. 18RP 136.

18RP 143. When C.H. began to panic and scream, a third man hit her over the head with a gun. 18RP 143-49. C.H. fell and these men began taping her wrists, hands, legs, and feet together. 18RP 149-50. Although her eyes had been taped over, C.H. could still look downward and see the assailants' legs. 18RP 147-48. C.H. never saw the third man's face. 19RP 91.

At some point, the second man said "damn, she look[s] good," and told C.H., "let me check you for weapons," although C.H. was only wearing a T-shirt and underwear. 18RP 154-55. The suspect touched C.H.'s breasts, butt, and "private area." 18RP 155-56. When the touching stopped, C.H. heard the suspects rummaging through different rooms of her home. 18RP 157-61. C.H. told the suspects where she kept her money, but denied having any drugs. 18RP 161. Throughout the incident, the third man gave directions, including ordering the other suspects to tape, silence, and quit talking to C.H. 18RP 169.

The second man returned to touching C.H. and proceeded to pull off C.H.'s shirt. 18RP 170. Although C.H. pleaded, "please don't," the second man said "I could just do this," and pulled down C.H.'s underwear and flipped her onto her stomach. 18RP 170. C.H. felt one of the men lay down on her back and spread open her

butt cheeks, while another one penetrated her vagina with his fingers. 18RP 170, 173. C.H. thought that she felt the first man's ponytail on her back, but she could not tell for sure which man penetrated her, or whether more than one did it. 18RP 173-75; 19RP 145. C.H. estimated that she was digitally penetrated three to four times within a couple minutes. 18RP 175.

The third intruder ordered C.H. not to move and threatened to kill her. 18RP 175-76. C.H. remained on her bed until she no longer heard the suspects rummaging around upstairs. 18RP 179-80. C.H. wiggled her hands free and used a knife that she had in her bedroom to cut her legs free. 18RP 176, 180. C.H. ran outside and saw the suspects inside her car, a silver 2003 BMW. 18RP 122, 181-82. The short-haired, second intruder was sitting in the back seat and looked directly at C.H. 18RP 183-85. C.H. was "100 percent" certain that she saw the second intruder sitting in the back of her car. 18RP 184. C.H. ran around the back of her house and waited for the suspects to leave. 18RP 185. The car drove away quickly, kicking up dust and gravel as it went. 18RP 186.

At the same time, Albert Williams, C.H.'s neighbor, was outside getting ready for work. 16RP 165. Williams saw C.H.'s car "zoom[] by" a little before 3 a.m. with three men inside. 16RP 165,

168, 181. Williams could not identify the race of the men. 16RP 168. Within moments, Williams saw C.H. running toward him crying, terrified, and wearing only her underwear and pieces of duct tape stuck to her hands and neck. 16RP 168-69, 187.

C.H. used Williams's phone to call 911, and police were dispatched to her house at 2:55 a.m. 12RP 33-34; 16RP 168; 20RP 77. After speaking with C.H., the responding deputies broadcasted a suspect description of three, "younger" Asian males.[7] 12RP 51-52, 55; 16RP 39; 20RP 85-86.

At 3:16 a.m., video surveillance captured a male suspect filling C.H.'s BMW with gas at a Chevron gas station 10 minutes from her home. 14RP 20, 22-24; 16RP 149-51; 21RP 23-24. The suspect abandoned C.H.'s BMW at the station. The gas station clerk did not call the police to report the abandoned car until half an hour later when another customer mentioned it. 16RP 114; 19RP 170-71. Police attempts to locate the suspect with a canine track were unsuccessful. 19RP 184-85.

King County Sheriff's Deputy Daniel Murphy started searching the area in his vehicle and saw a beige Cadillac with

[7] An initial description based on the 911 call was of a single Asian male aged 25-30 years old. 16RP 74.

three "Asian/Pacific Islander" or Hispanic males inside. 16RP 41-42, 46. The men were dressed in dark clothing and stared at Murphy as they passed by. 16RP 46-47. When Murphy turned around to follow them, the Cadillac immediately "sped up" and took "an abrupt left turn." 16RP 48-50. The Cadillac rolled through a stop sign, and Murphy saw the car's occupants "looking at each other, looking back at [him], moving around inside the car." 16RP 51.

Murphy stopped the Cadillac at 4:13 a.m. and identified Copol as the driver. 16RP 56, 58-59, 106. Volante was sitting in the front passenger seat with a 9mm Smith and Wesson handgun sticking out from underneath the front of his seat. 14RP 71-72; 15RP 66-67. The handgun matched C.H.'s description of a silver-topped gun with a black bottom. 18RP 136, 141; Ex. 101-02. Khann was seated in the back seat of the Cadillac next to a large kitchen knife. 16RP 55-56. Police arrested all three men. 16RP 64.

C.H. identified Khann and Copol as the men who had broken into her house, at a show-up identification held shortly after the incident. 15RP 119, 153; 18RP 202. C.H. identified both of them

"right off the bat" with "110 percent" certainty.[8] 12RP 77-78, 103. C.H. did not identify Volante. 21RP 94.

At trial, C.H. identified Khann and Volante as two of the intruders, but could not identify Copol. 19RP 37. C.H. identified Volante as having a ponytail on the night of the attack, although Volante actually had short hair, and Khann had the ponytail. 19RP 38, 70-73. Despite being confused about the defendants' hair, C.H. maintained that she got a "good look" at Khann's face during the attack, and that she recognized him at trial based on his face. 19RP 70-72, 120-21. C.H. testified that Khann was the "second suspect" who touched her breasts, butt, and vagina. 19RP 37, 50. C.H. identified clothing of hers and hardware taken from her house that was inside Copol's Cadillac at the time of his arrest. 15RP 71-75; 19RP 42-43, 45.

Forensic testing revealed that Volante had C.H.'s DNA on his hands and fingernails following his arrest. 14RP 131-32; 17RP 128, 140. Volante also had Copol's DNA on his hands. 17RP 128. A forensic scientist testified at trial that there were many possible explanations for such a result, including one suspect inadvertently

[8] Prior to the show-up identification, Thomas instructed C.H. to "make sure" that she was "110 percent" certain when identifying someone to prevent "an innocent person going to jail." 12RP 98.

obtaining another suspect's DNA while sexually assaulting the same victim. 17RP 181. Police did not locate the defendants' fingerprints in either C.H.'s house or car. 20RP 22-23, 44.

Following his arrest, Copol admitted that he drove to C.H.'s house with the intent to commit burglary. 15RP 118-19; 21RP 52. Although Copol denied sexually assaulting C.H., he admitted that he entered C.H.'s house, saw her on the floor, and stole her video games. 21RP 39-40, 50, 56. Copol also admitted that he brought a black and silver gun with him that he had previously purchased "for protection." 15RP 120-21, 143; 21RP 54-56. Copol made other incriminating statements specifically implicating Khann and Volante that were not admitted in the State's case-in-chief.

**b. Defendants' Case.**

Khann did not present any evidence or witnesses on his behalf at trial. 21RP 124, 129.

Copol testified that he dropped Volante and Khann off at a party on the night of the incident and then returned home. 21RP 133-34. Around 2 a.m., Copol awoke to a phone call from an acquaintance named "Big," who needed a ride. 21RP 134-35; 22RP 54, 56. Copol picked up Big, an Asian male with a long ponytail, and "Red," a shorter, Asian male, and drove them to

C.H.'s house. 21RP 136-37; 22RP 60-61. Big and Red told Copol that he might "get a TV" for taking them to the house. 21RP 148-49. Copol knew neither man's "real name," nor address. 21RP 55, 59.

When they arrived, Copol testified that he waited in his car while Big and Red walked down the road to C.H.'s house. 21RP 138. Copol heard the sound of breaking glass, went to investigate, and found both Big and Red inside C.H.'s house and armed with black and silver guns, respectively. 21RP 138-40. When Copol insisted on leaving, Red joined him while Big stayed downstairs. 21RP 141. Copol denied going downstairs or seeing a woman inside the house. 21RP 141.

As Copol was leaving, Volante called asking for a ride home. 21RP 141-42. Copol picked up Volante and Khann around 3:30 a.m., and dropped off Red shortly thereafter. 21RP 142-43; 22RP 83. Dep. Murphy stopped Copol on the way to Volante's house. 21RP 144. Copol admitted to owning the black and silver handgun found under Volante's seat. 21RP 145. He purchased it a week earlier for $250 after being shot at. 21RP 145; 22RP 65-66. Contrary to C.H.'s testimony, Copol testified that the clothing in his

car belonged to his girlfriend, and the hardware came from Home Depot. 21RP 149-51.

On cross-examination by the State, Copol admitted that he never told the police about Big and Red. 22RP 104, 112, 133. Copol admitted that he told the police that Khann and Volante broke into C.H.'s house while armed with handguns, and stole her BMW. 22RP 115, 117. Copol suggested that he lied and "set up" his "good friends," Khann and Volante, because he feared reprisal from Big and Red. 22RP 115, 117-18, 150.

The State further cross-examined Copol by introducing his tape-recorded statement to police taken on the morning of the incident. 22RP 130-32. Neither Khann nor Copol objected to the statement's admission. 22RP 131-32. Although Volante objected to the statement's admission, the court overruled the objection. 22RP 132. Prior to playing the statement, the court instructed the jury that the detective's questions were "not evidence against any of the defendants," but that Copol's answers "may be considered by the jury as evidence against the defendants." 22RP 131.

In his taped statement, Copol insisted that he was "just the driver," and that Volante came up with the idea to rob C.H.'s house.

Ex. 232 at 2; Ex. 233.[9] When Copol heard Khann and Volante smash C.H.'s window, he went inside after them and told them to leave. Ex. 232 at 4-5. Copol found Khann and Volante downstairs taping C.H. Id. at 14, 19-20, 32. Although Copol said "let's go," Khann and Volante continued what they were doing. Id. at 15-20, 32. Copol denied sexually assaulting C.H. Id. at 7-8, 19-20. Volante and Khann ultimately left in C.H.'s BMW. Id. at 23-24. Copol picked them up later after they "got stuck" and called for a ride. Id. at 27-28.

Copol's father also testified at trial. He identified the clothing in the Cadillac as belonging to Copol's girlfriend, and indicated that he bought the hardware at a yard sale. 22RP 159-60. Copol's girlfriend did not testify at trial.

Volante testified at trial that Copol dropped Khann and him off at a party on the night of the incident. 23RP 53-54. When Copol returned to pick them up, another Asian male was in the front passenger seat. 23RP 62, 90. Volante did not know the passenger's name, and fell asleep as they were driving. 23RP 63, 91. Volante woke up when they dropped off the passenger and

[9] Exhibit 232 is a transcript of Copol's tape-recorded statement, exhibit 233. 22RP 129. It has been designated to this Court to simplify references to the statement's content.

climbed into the front passenger seat. 23RP 63. Volante denied seeing either the large knife in the back seat, or the gun under the front passenger seat. 23RP 62. Volante also denied having met C.H., despite having her DNA on his hands and fingernails. 23RP 98.

**c. Rebuttal.**

In rebuttal, the State called Jason Brunson, an investigator with the King County Sheriff's Office, to testify about what Copol told him on the day of the incident. 15RP 111-12; 23RP 105. Copol said that Khann and Volante entered C.H.'s house, and that he went inside after them and urged them to leave when they began making too much noise. 23RP 105-06. Although Copol admitted to seeing one of them duct taping C.H., he did not identify who he saw. 23RP 107. Copol admitted that they took multiple items from C.H.'s house, including cash and video games. 23RP 106. Volante drove C.H.'s BMW away from the house. Id. Copol never mentioned Big and Red, nor anyone else, as being involved in the incident. 23RP 105. None of the appellants objected to Brunson's rebuttal testimony, or asked for a limiting instruction.

The parties stipulated that the lead detective, Christopher Knudsen, would testify that Copol admitted to driving to C.H.'s house. 23RP 112. Although Copol initially said that Khann, Volante, and "other people" were in the house, Copol later said that Khann and Volante were the only other people in the house. 23RP 112. Copol asked that "people not find out that he talked about what Khann and Volante had done." 23RP 112-13. After reading this stipulation, the court instructed the jury: "This is evidence that you will evaluate and weigh with all of the other evidence." 23RP 113.

## C. ARGUMENT

### 1. THE TRIAL COURT PROPERLY DENIED THE MOTION TO SUPPRESS.

The appellants argue that Deputy Murphy lacked a reasonable and articulable suspicion to stop them. They contend that Murphy unlawfully seized them based on their race and innocent behavior. The appellants' argument fails. Murphy lawfully stopped them based on their physical similarity to the suspects' description, suspicious conduct, close proximity to C.H.'s house where the crimes had occurred an hour and a half earlier, and in light of the seriousness of the crimes being investigated. Specific

and articulable facts exist that reasonably warranted the appellants' detention.

**a. Relevant Facts.**

At a pretrial hearing, Murphy testified that he heard dispatch report an armed robbery and rape in Skyway at 2:55 a.m. 6RP 60-63. Although dispatch initially broadcast that the suspect was an Asian male aged 25 to 30 years old, King County Sheriff's Deputy Mark Silverstein updated the description after speaking with C.H. at her home. 6RP 62-64, 111. Murphy heard Silverstein broadcast an updated suspect description of three "Asian Pacific Islander males," "dressed in all black," and carrying two handguns.[10] 6RP 64-65.

At 3:46 a.m. Murphy started searching the area surrounding the Chevron station where he knew C.H.'s BMW had been abandoned a half hour earlier. 6RP 113, 121. Murphy drove "block to block" looking for suspects who matched the updated

[10] Volante assigns error to the trial court's finding that Deputy Silverstein "broadcast" that C.H.'s stolen BMW was "likely associated with three Asian males." Assignment of Error Two. The parties stipulated that Silverstein, based on his report, would have testified that C.H. reported seeing two Asian males and a third male of unknown race, even though Murphy's memory was that Silverstein broadcast an updated suspect description of three "Asian Pacific Islander males." 6RP 64-65; 9RP 125-26. Further, the computer assisted dispatch (CAD) log of the incident reveals that Silverstein reported that the stolen BMW "may be associated with three Asian males." 10RP 17-19; Trial Ex. 211 (formerly Pretrial Ex. 2). Thus, substantial evidence exists in the record to support the trial court's finding.

description. 6RP 69, 112-13. Murphy did not see any foot or vehicle traffic until 4:13 a.m. when Copol drove by in a Cadillac. 6RP 74, 79-81. As the Cadillac passed within three to five feet of his patrol car, Murphy got a close look at the three "Pacific Islander Asian males" inside dressed in dark clothing.[11] 6RP 72. All three occupants stared at Murphy as they drove by, raising his concern because "rarely" had he seen a car full of people all "staring, glued" to him. 6RP 122. Murphy first saw the Cadillac 10 blocks away from where C.H.'s BMW had been abandoned. 6RP 100.

Murphy immediately suspected that the occupants might have been involved in the rape, and turned around to follow them. 6RP 73, 115. The Cadillac "very quickly sped up" when Murphy turned around. 6RP 73. As soon as Murphy got within 100 feet of the Cadillac, it made an abrupt left-hand turn off of the main road and "duck[ed]" into a neighborhood while accelerating quickly. 6RP 76, 84, 168. Murphy's headlights illuminated the occupants who were "all moving around inside the car" and looking back at him. 6RP 77, 119. The Cadillac "rolled through" a stop sign and Murphy activated his emergency lights to stop it. 6RP 77. Murphy

[11] Although Murphy believed that all three occupants were "Pacific Islander Asian," Copol is actually Hispanic. 21RP 145.

estimated that 30 seconds elapsed between when he first saw the Cadillac and when he pulled it over. 6RP 79.

Although Murphy did not stop the vehicle until after it ran the stop sign, he testified that he would have stopped it regardless because the occupants matched the suspect description, acted suspiciously by staring at him and speeding up, at a time of night when there were "very, very, very few people out," and while in close proximity to C.H.'s house and the Chevron station.[12] 6RP 99, 124.

Khann's defense investigator, Robert Edgmon, also testified at the suppression hearing. 9RP 18. Edgmon attempted to recreate the lighting and circumstances of Murphy's stop by following a 2010 Volkswagen Jetta at the same distance on the same streets at night. 9RP 30-31. Edgmon determined that it was "extremely difficult" to see what was happening inside the Jetta because of the car's "blinding" taillights, the darkness, and

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[12] Volante also assigns error to the trial court's finding that Copol's Cadillac was "the only vehicle that matched the 'vague vague' description provided by C.H." Assignment of Error Three. The court's written finding appears to summarize, incompletely, its oral finding, incorporated by reference, that the Cadillac "was the only vehicle Deputy Murphy had observed on the road . . . *The occupants* matched what Deputy Murphy described as the 'vague, vague description.'" 10RP 8 (emphasis added); VCP 63. The court's oral finding is supported by the record and should be read to clarify the court's incomplete written finding. See 6RP 72, 124 (Murphy testifying that the Cadillac was the only car on the road, and that the people inside "match[ed]" the suspects' physical description).

shadows. 9RP 31-32. Additionally, Edgmon stood on the corner where Murphy first saw the Cadillac and determined that it was "practically impossible" to see inside the vehicles driving by. 9RP 33. On cross-examination by the State, Edgmon admitted that he had never conducted such an experiment before, and that the experiment was on a different day and time of night than the actual stop. 9RP 37, 42.

The appellants moved to suppress the evidence against them, arguing that Murphy had unlawfully detained them. VCP 8-11; KCP 19-76; 9RP 157. The court denied the motion, finding that Murphy lawfully stopped the Cadillac based on the occupants' similar physical appearance to the suspects' description, suspicious behavior, close proximity to C.H.'s car within an hour of it being abandoned, and the early morning hour, and lack of other cars on the roadway. 10RP 14-15; VCP 62-63. The court found Murphy's testimony credible based on his demeanor, memory, and manner while testifying. 10RP 10; VCP 61.

Although the court also found Edgmon's testimony credible, the court gave it little weight because Edgmon lacked the same experience and training as Murphy who was a "trained observer" accustomed to observing vehicles traveling at night. 10RP 11;

VCP 61. Further, Edgmon conducted the experiment at a different time of night and day of the year, with different cars and no evidence of the similarities or differences in weather and lighting conditions. 10RP 11-12; VCP 61-62.

**b. Murphy Lawfully Stopped The Appellants.**

Both the state and federal constitution guard against unreasonable searches and seizures. U.S. Const. amend. IV; Const. art. I, § 7; State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). Warrantless searches are unlawful unless a "jealously and carefully drawn" exception to the warrant requirement exists. Id. (quoting State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984)). A Terry[13] stop is an exception that allows an officer to briefly stop and detain an individual without a warrant when the officer reasonably suspects that the person is engaged in criminal conduct. State v. Day, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007).

To survive constitutional scrutiny, a Terry stop requires that an officer "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Although probable cause is not required, there must

[13] 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

be "a substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

When reviewing the merits of a Terry stop, the court must consider the "totality of the circumstances" presented to the investigating officer. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). The court examines the information provided to the officer, the officer's observations, and the inferences drawn by the officer based on training and experience. Id.; United States v. Cortez, 449 U.S. 411, 418, 101 S. Ct. 690, 66 L. 3d. 2d 621 (1981).

Following a suppression hearing, a trial court's findings of fact are reviewed for substantial evidence, while its conclusions of law are reviewed de novo. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); Day, 161 Wn.2d at 893. Unchallenged findings are verities on appeal. Hill, 123 Wn.2d at 644.

Considering the totality of the circumstances, the trial court properly denied the appellants' motion to suppress. Murphy articulated multiple specific facts which, taken together, reasonably warranted the detention. The appellants were nearly identical to the suspects in terms of race, gender, number, and clothing. Compare 6RP 64-65 (describing the suspects as three "Asian

Pacific Islander males" "dressed in black"), with 6RP 72 (describing the appellants as three "Pacific Islander Asian males" in "dark clothing"). The only discrepancy between the suspects' description and the appellants' appearance, was Copol's ethnicity, which Murphy mistakenly identified as "Pacific Islander Asian." 6RP 72; 21RP 145. Setting aside that singular inconsistency, the appellants closely matched the suspects' description.

The appellants also engaged in suspicious behavior. All of the appellants stared at Murphy, with their eyes "glued" to him, as they passed within feet of his marked patrol car. 6RP 72, 122. Murphy testified that based on his experience working nights, "most people . . . don't look over at you," and that "rarely," if "ever" had he "seen a car with three or more people in it where all of them [were] just staring." 6RP 122. After Murphy started following them, the appellants "very quickly sped up" and tried to "duck" into a neighborhood, while looking back at him and "all moving around inside the car." 6RP 76-77, 168. The appellants' continuous and escalating suspicious behavior, from initially staring at Murphy to accelerating and trying to evade him, while shuffling around inside the Cadillac, provided Murphy with additional reason to suspect that the appellants were engaged in criminal activity.

The late hour, combined with the appellants' close proximity to the Chevron station and absence of any other people in the area, further raised Murphy's reasonable suspicion. Murphy first encountered the appellants at 4:13 a.m., after driving "block to block" for nearly half an hour looking for foot and vehicle traffic, and seeing no one. 6RP 74, 79, 81, 113. The appellants were 10 blocks away from where C.H.'s car had been abandoned, within half an hour of it being reported. 6RP 67, 100. Further, the appellants were a 10-minute drive from C.H.'s house. 6RP 67-68. The appellants' nearness in both time and place led Murphy to reasonably infer that there was a "substantial possibility" that criminal conduct had occurred. Kennedy, 107 Wn.2d at 6.

Finally, the violent nature of the crimes being investigated – a gun point, home-invasion rape, robbery, and burglary – afforded Murphy more leeway in determining whether to stop the appellants.[14] See State v. Thierry, 60 Wn. App. 445, 448, 803 P.2d 844 (1991) ("Officers may do far more if the suspect conduct endangers life or personal safety than if it does not."); State v.

[14] First-degree rape is classified as a "serious violent" offense under the Sentencing Reform Act, while first-degree robbery and first-degree burglary are both considered "violent" offenses. RCW 9.94A.030(45)(vii), (54)(a)(i); RCW 9A.52.020(2)(a); RCW 9A.56.200(2)(a).

Randall, 73 Wn. App. 225, 229, 868 P.2d 207 (1994) (recognizing the nature of the suspected crime is an "important factor" in the Terry analysis).

C.H. reported being raped and robbed in her home, at gunpoint, by three strangers who stole her car and "left in an unknown direction." 6RP 60-63. Given the serious threat posed to the community by three armed suspects, at large and alleged to have committed serious and violent offenses, Murphy reasonably chose to stop the appellants who matched the physical description of the suspects, were acting suspiciously, and were in close proximity to where the crimes had occurred less than two hours after they happened.

The appellants argue that Murphy unlawfully stopped them based on their race and otherwise innocent behavior. The appellants are only partially correct. Murphy stopped the appellants based in part on his belief, albeit mistaken, that the appellants were "Pacific Islander Asian," consistent with the suspects' description. 6RP 64-65, 72. Murphy properly considered the appellants' race as one of the factors leading him to conclude that the appellants had engaged in criminal activity because it was consistent with the suspects' description. State v. Barber, 118 Wn.2d 335, 348, 823

P.2d 1068 (1992) (recognizing that "race and other physical attributes of a suspect" are relevant in forming a suspicion of criminal activity). There is no evidence to suggest that Murphy stopped the appellants based solely on their race, nor do any of the appellants make such a claim.

Rather, the appellants raise the issue of race as one of the multiple, specific facts articulated by Murphy that they argue is insufficient *alone* to support a reasonable suspicion of criminal activity. The appellants' approach to this issue is fundamentally flawed because the critical issue is whether the "*totality of the circumstances*" reasonably warranted the appellants' detention. Glover, 116 Wn.2d at 514 (emphasis added).

The United States Supreme Court has specifically rejected the "divide-and-conquer" approach taken by the appellants, which considers each fact in isolation and then concludes that the stop was unlawful because each individual fact is susceptible to an innocent explanation. See United States v. Arvizu, 534 U.S. 266, 274-75, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002) (criticizing the reviewing court for failing to consider the "totality of the circumstances," and for affording "no weight" to facts that may have an innocent explanation).

Since its inception, the Terry exception has recognized that a series of potentially innocent acts may collectively form the basis of a lawful detention. 392 U.S. at 22 (holding the defendant's "series of acts, each of them perhaps innocent in itself . . . taken together warranted further investigation."). In Terry, the officer observed the defendant and his companions repeatedly stroll back and forth, look into a store window, and talk with each other. Id. Although each of the acts could have an innocent explanation, the Court held that their combined effect justified the officer's decision to stop the defendant and investigate further. Id.

The Supreme Court has repeatedly reaffirmed this principle, and even acknowledged that "Terry accepts the risk that officers may stop innocent people." Illinois v. Wardlow, 528 U.S. 119, 126, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000); see also Arvizu, 534 U.S. at 277-78 (holding that certain facts individually consistent with innocence collectively amounted to a reasonable suspicion); United States v. Sokolow, 490 U.S. 1, 9, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989) (same).

Washington courts have followed suit and recognized that potentially innocent behavior may form the basis of a lawful detention. See State v. Anderson, 51 Wn. App. 775, 780, 755 P.2d

191 (1988) ("An officer is not required to rule out all possibilities of innocent behavior before initiating a brief stop and request for identification."); Kennedy, 107 Wn.2d at 6 (acknowledging that actions "consistent with noncriminal activity" may justify a "brief detention"); Thierry, 60 Wn. App. at 448 (holding officer was not required to ignore behavior consistent with the initial stages of a drive-by shooting, even though it might also be "innocuous").

The fact that certain individual aspects of the appellants' behavior might have had an innocent explanation, does not obviate the fact that the totality of the circumstances – the violent nature of the crimes reported, the appellants' physical similarity to the suspects, the proximity in time and place – justified Murphy's decision to briefly stop and detain the appellants.

None of the cases relied on by the appellants involve a similar factual scenario where a victim reported multiple violent felonies having occurred within the last hour and a half by armed suspects who matched the defendants' physical appearance, and were located within a 10-minute drive of the crime scene.[15] See

[15] To a certain extent, comparing the facts of this case to other cases is inherently problematic because the concept of reasonable suspicion is difficult to articulate, and the cases are "not readily, or even usefully, reduced to a neat set of legal rules." Arvizu, 534 U.S. at 274 (citation omitted).

Doughty, 170 Wn.2d at 6 (stop based on defendant's two-minute visit to a suspected drug house at 3:20 a.m.); State v. Gatewood, 163 Wn.2d 534, 540, 182 P.3d 426 (2008) (stop based on defendant's surprised look, apparent effort to hide something, walking from a bus shelter, and crossing the street mid-block); State v. Young, 167 Wn. App. 922, 931, 275 P.3d 1150 (2012) (stop based on defendant's "awkward" behavior, lack of identification, and walking behind a closed business while talking on a cell phone); State v. Henry, 80 Wn. App. 544, 910 P.2d 1290 (1995) (stop based on defendant's "nervousness").

The trial court properly denied the appellants' motion to suppress based on the totality of the circumstances.

**2. THE TRIAL COURT PROPERLY DENIED KHANN'S MOTION TO SEVER.**

Khann argues that the trial court erroneously denied his motion to sever based on the disparity of the weight of evidence against him compared to the weight of evidence against the co-defendants. He contends that the trial court improperly considered Copol's testimony when determining whether a gross disparity of evidence existed, warranting severance. Alternatively, Khann argues that, in weighing the evidence, the court erred by

considering Copol's statements against him as substantive rather than impeachment evidence.

Khann's argument fails. Although there is no case law specifically addressing whether a trial court can consider evidence presented in a defendant or co-defendant's case when considering a motion to sever, the text and underlying principles of CrR 4.4 indicate that the court can consider all of the evidence presented at trial when deciding a severance motion. The trial court (and the jury) properly considered Copol's testimony incriminating Khann as substantive evidence because Khann failed to object to the evidence's admission or to request a limiting instruction.

Moreover, once Copol testified, Copol's prior statements identifying Khann and Volante as the people he saw inside C.H.'s house, taping up C.H. and later driving away in her BMW, were admissible, substantive evidence against Khann and Volante. Khann's identification as one of the assailants was the central issue in the case against Khann. Copol's identification of Khann was admissible against Khann without limitation. Given the record and the weight of the evidence against him, Khann cannot show that the trial court's denial of his severance motion constituted a manifest abuse of discretion.

### a. Relevant Facts.

Prior to trial, Khann joined in Volante's motion to sever, or in the alternative, to redact the co-defendants' statements.[16] 1RP 5-6. Rather than grant separate trials, the court proposed redactions to the co-defendants' statements to which all the parties agreed. 3RP 6-13; 4RP 7. During the State's case-in-chief, King County Sheriff's Office investigator Jason Brunson, testified to redacted versions of statements that Copol made to police the morning of the crimes. 15RP 119-22. With the parties' agreement, the court instructed the jury "not to consider any statement made out of court by [Copol] as evidence against either or both of the other co-defendants." 15RP 140-41.

Following Brunson's testimony, Khann and Volante moved for a mistrial alleging that three of Copol's statements recounted by Brunson on cross-examination, violated their Sixth Amendment right to confrontation under Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). 16RP 6. A defendant's right to cross-examine the witnesses against him is violated when a

[16] Khann also moved pretrial for severance based on an alleged "speedy trial" violation under CrR 4.4(c)(2)(i). 5RP 4-9; KCP 11-17. The court denied the motion, finding that "judicial efficiency" required that the cases be tried to together. 5RP 13-14; KCP 18.

non-testifying, co-defendant's statement is admitted that incriminates the defendant. Bruton, 391 U.S. at 126. The trial court denied Khann and Volante's motion, finding that none of the challenged statements violated Bruton because they were either "clearly exculpatory," or too "vague and amorphous" to incriminate Khann and Volante. 16RP 9-12. The court noted that if Copol testified, then the issue would be moot. 16RP 12.

Having lost the motion for mistrial, Khann alternatively moved to sever the counts against him based on an alleged "discrepancy of the evidence." 16RP 18. The court denied Khann's motion based on the "evidence thus far," and found that the co-defendants' defenses were "not mutually exclusive or irreconcilable," that the evidence was not sufficiently complex or overwhelming to prevent the jury from considering the evidence separately against each defendant, and that none of the co-defendants' statements incriminated another defendant. 16RP 26. The court reserved ruling on whether a "gross disparity" of evidence against Khann existed. Id.

Khann did not renew his motion to sever until after the State and he rested. 22RP 6-8. The court inquired whether it could consider all of the evidence presented at trial, or only the evidence

presented in the State's case-in-chief, when determining whether a disparity existed that warranted severance. 22RP 16. Khann argued that the court was limited to the evidence presented in the State's case-in-chief, although he could not provide any authority to that effect. 22RP 15-16. The State argued that the court could consider all of the evidence presented based on CrR 4.4(a)(1), which allows the court to consider a severance motion "at the close of all the evidence if the interests of justice require." 22RP 24-25.

The court denied Khann's motion, reasoning that the text of CrR 4.4 implied that it could consider all of the evidence presented when determining the motion to sever. 22RP 172-73. Although the court found that a disparity of evidence that existed at "halftime" would have warranted severance, it concluded that the disparity no longer existed after Copol testified. 22RP 172. The court noted that in contrast to the other defendants, the "most compelling" evidence against Khann at the end of the State's case-in-chief was C.H.'s identification, which the court believed was successfully impeached at trial. 22RP 166-68, 172-73. Copol's testimony, however, provided "more direct evidence" incriminating Khann. 22RP 172-73.

Khann briefly renewed his motion to sever at the close of all the evidence. 23RP 119. The court denied the motion, reiterating that a disparity of evidence did not exist warranting severance, and that the co-defendants' defenses were not inconsistent. 23RP 125.

**b. The Trial Court Properly Considered All Of The Evidence Presented.**

CrR 4.3(b)(1) permits joining two or more defendants in the same charging document when the defendants are each charged with each offense. The State jointly charged these appellants with the same three offenses, first-degree rape, robbery, and burglary, and alleged the firearm enhancement on all counts. VCP 44-46; CCP 8-10; KCP 123-25. The charges all stemmed from the same incident, and thereby involved the same victim, witnesses, and evidence.

In general, "[s]eparate trials are disfavored in Washington." State v. Emery, 174 Wn.2d 741, 752, 278 P.3d 653 (2012). Federal courts have long taken the same view. See Zafiro v. United States, 506 U.S. 534, 537, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993) (joint trials promote efficiency and avoid inconsistent verdicts); United States v. Gaines, 563 F.2d 1352, 1355 (9th Cir. 1977) (a joint trial "expedites the administration of justice, reduces

the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens to sacrifice time and money to serve on juries, and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once.").

Nonetheless, a trial court has "broad discretion" to sever a defendant when it is necessary to achieve a fair determination of the defendant's guilt or innocence. Emery, 174 Wn.2d at 752; CrR 4.4(c)(2)(i)-(ii). The defendant bears the burden of producing sufficient facts to warrant severance. Emery, 174 Wn.2d at 752. A trial court's decision to grant or deny a severance is upheld on appeal unless it constitutes a "manifest abuse of discretion." Id.

The defendant must move for severance before trial, unless "the interests of justice require" that the motion be made "before or at the close of all the evidence." CrR 4.4(a)(1). When a defendant moves for severance at the conclusion of the State's case, or at the close of all the evidence, and there is insufficient evidence to support joinder of the defendants, then the court must sever the case if the lack of evidence prejudices the moving defendant. CrR 4.4(d).

To obtain reversal on appeal, the defendant must show that a joint trial was "so manifestly prejudicial as to outweigh the

concern for judicial economy." State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d 577 (1991). To meet this burden, the defendant must show "specific prejudice," such as (1) mutually antagonistic defenses that conflict to the point of being irreconcilable, (2) evidence that is so massive and complex that it is nearly impossible for the jury to keep the evidence separate against the defendants, (3) a co-defendant's statements that incriminates the defendant, or (4) a "gross disparity" in the weight of evidence against the defendant. State v. Jones, 93 Wn. App. 171, 171, 968 P.2d 888 (1998) (citation omitted). "[I]t is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." Zafiro, 506 U.S. at 540.

Although CrR 4.4 does not directly address whether the trial court can consider the evidence presented by a defendant or co-defendant when considering a severance motion, the text and underlying principles of the rule indicate that the court can consider all of the evidence presented. The text contains no limitation on the evidence that the trial court can consider when determining a motion to sever.

An interpretation of the rule restricting the court's review to the State's evidence alone would render the exceptions allowing a defendant to move for severance "at the close" or "conclusion" of all the evidence superfluous. See City of Seattle v. Holifield, 170 Wn.2d 230, 236-37, 240 P.3d 1162 (2010) (applying the rules of statutory construction to interpret a court rule); Rivard v. State, 168 Wn.2d 775, 783, 231 P.3d 186 (2010) (courts "interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous"). If the trial court was limited to considering only the evidence presented in the State's case-in-chief, then there would be no need for an exception allowing defendants to bring late-brought severance motions at the conclusion of the evidence when the "interests of justice require." CrR 4.4(a)(1), (d).

Forcing the trial court to turn a blind eye to the evidence presented by the defendant would frustrate the underlying principles of CrR 4.4, and the court rules in general – providing for a fair trial and the efficient administration of justice. See CrR 1.2 (court rules are construed to secure "fairness in administration, effective justice, and the elimination of unjustifiable expense and delay"); CrR 4.4(c)(2)(i)-(ii), (d) (severance required when necessary "to promote a fair determination" of the defendant's guilt

or innocence, and when prejudice would result from continued joinder).

If the court had granted Khann's severance motion, then the State would have sought to introduce all of the same evidence and witnesses at a second trial against Khann. The State would have subpoenaed the same 23 witnesses who testified at the first trial, and the court would have incurred the expense of impaneling a second jury and conducting another multi-week trial. Depending on the outcome of the first trial, the State would have subpoenaed Copol to testify as a witness against Khann. 22RP 24-26; see Emery, 174 Wn.2d at 754 (recognizing a co-defendant's testimony is available and admissible against a defendant upon severance); Zafiro, 506 U.S. at 540 (same).

Requiring the trial court to disregard all of the evidence presented after the State rested would have particularly undermined the goals of CrR 4.4 in this case, where the critical issue before the court was whether a gross disparity of evidence existed that required severance, and the evidence presented in the defense case extinguished whatever disparity existed. Khann fails to provide any rationale for why a trial court would limit its consideration of the evidence to the State's evidence alone when

tasked with the specific inquiry of whether a gross disparity of evidence existed. Based on the text and underlying principles of CrR 4.4, the trial court properly considered all of the evidence presented.

### c. Copol's Testimony Incriminating Khann Was Substantive Evidence.

For the first time on appeal, Khann argues that the trial court erred by considering Copol's testimony incriminating him as substantive evidence. He contends that the testimony was solely impeachment evidence, despite his failure to object to the evidence's admission or seek a limiting instruction. Khann's argument fails because Copol's prior statements identifying him as being inside C.H.'s house, taping C.H., and later driving away in her car, were properly admitted as substantive evidence. Given the record and the weight of the evidence against him, Khann cannot show that the trial court's refusal to sever his case constituted a manifest abuse of discretion.

None of Copol's statements incriminating Khann and Volante were admitted until Copol took the stand and was available for cross-examination, eliminating any potential constitutional violation. See Hoffman, 116 Wn.2d at 76 (no Bruton violation when a

co-defendant testified and the defendant had a full opportunity to cross-examine him); Nelson v. O'Neil, 402 U.S. 622, 629-30, 91 S. Ct. 1723, 29 L. Ed. 2d 222 (1971) (same).

Prior to admitting Copol's taped statement to police from the morning of the incident, the court instructed the jury that Copol's answers should be considered "as evidence against the defendants." 22RP 131. Copol did not object to the statements' admission, or seek a limiting instruction. 22RP 131-32. Evidence admitted at trial without objection is not subject to review on appeal. See State v. Guloy, 104 Wn.2d 412, 422-23, 705 P.2d 1182 (1985) (defendant waived the opportunity to challenge admission of hearsay evidence by failing to object to its admission). Khann cannot rely on Volante's objection to the statements' admission to preserve his claim of evidentiary error on appeal. State v. Davis, 141 Wn.2d 798, 849-50, 19 P.3d 977 (2000).

Further, evidence admitted for one purpose is considered relevant for other purposes absent a limiting instruction.[17] State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997); State v. Hancock, 109 Wn.2d 760, 767, 748 P.2d 611 (1988) ("if counsel wishes to

[17] A trial court has no duty to give a limiting instruction *sua sponte*. State v. Russell, 171 Wn.2d 118, 123, 249 P.3d 604 (2011).

restrict the jury's use of evidence it must request an appropriate limiting instruction"). Khann cannot claim that the trial court erred by considering Copol's statements against him substantive evidence when he never objected to the statements' admission, or sought a limiting instruction restricting their use.

Additionally, Khan stipulated that if the case detective, Knudsen, was recalled to testify on rebuttal, then he would testify that Copol admitted to driving to C.H.'s house and seeing Khann and Volante inside. 23RP 112-13. As part of the stipulation, the court instructed the jury, "[t]his is evidence that you will evaluate and weigh with all of the other evidence." 23RP 113. Khann did not seek to limit the court or the jury's consideration of this evidence to impeachment purposes only. Having failed to seek a limiting instruction and agreed by way of stipulation to the admission of certain statements placing him at the scene of the crime, Khann cannot now claim that the trial court erred by considering Copol's statements substantive evidence.

Moreover, the trial court properly considered Copol's statements incriminating Khann as substantive evidence. Once Copol took the stand, the State was able to cross-examine him on his prior statements of identification. See ER 801(d)(1)(iii)

(witness's prior statement identifying a person is not hearsay); State v. Powell, 126 Wn.2d 244, 265, 893 P.2d 615 (1995) (witness's testimony "on the basis of her or his own observation . . . is not hearsay"). Copol identified Khann and Volante as the people he saw taping C.H. inside her house and later driving away in the BMW. Ex. 232 at 14, 19-20, 23-24, 32. Copol's statements of identification were admissible substantive evidence that linked Khann to the crimes.

Given the admissibility of Copol's prior statements of identification, and the record as a whole, Khann cannot show that the trial court's refusal to sever his case amounted to a manifest abuse of discretion. The trial court properly instructed the jury to consider the evidence against the defendants separately, and not to convict one defendant based on the evidence against another defendant. KCP 199, 202-04, 223-25, 239-44; Emery, 174 Wn.2d at 741 (jury instructions requiring the jury to consider the evidence against each co-defendant separately weighs in favor of denying defendant's motion for severance). Jurors are presumed to follow the court's instructions. State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). The jury's verdicts here, acquitting Copol of first-degree rape while convicting Khann and Volante of the crime,

demonstrated that the jury considered the evidence separately against the appellants. VCP 88; Supp. CCP __ (sub. 59, Verdict Form B1); KCP 170; State v. Philips, 108 Wn.2d 627, 641, 741 P.2d 24 (1987). The trial court properly denied Khann's motion to sever.

### 3. SUFFICIENT EVIDENCE SUPPORTS THE FIREARM ENHANCEMENT.

The appellants argue that the State failed to prove the firearm enhancement beyond a reasonable doubt. Specifically, they contend that the State produced insufficient evidence that Copol's loaded, 9mm Smith and Wesson handgun was "operable" because it was never test fired. Although courts have recently divided over whether the State must prove operability, the State produced sufficient evidence to support the enhancement even assuming that operability is required.[18]

At trial, the State must prove every element of a sentencing enhancement beyond a reasonable doubt. State v. Tongate, 93

[18] In 2010, two different panels of Division Two of the Court of Appeals reached opposite conclusions about whether the State is required to prove operability following the Washington Supreme Court's singular statement in State v. Recuenco, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008), that "a jury must be presented with sufficient evidence to find a firearm operable." See State v. Raleigh, 157 Wn. App. 728, 735-36, 238 P.3d 1211 (2010) (holding that proof of operability is not required because the court's statement is "non-binding dicta" that did not overrule prior precedent *sub silencio*); State v. Pierce, 155 Wn. App. 701, 714, 230 P.3d 237 (2010) (holding that proof of operability is required).

Wn.2d 751, 754-55, 613 P.2d 121 (1980). Evidence is sufficient to support an enhancement if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the enhancement beyond a reasonable doubt. State v. McKee, 141 Wn. App. 22, 30, 167 P.3d 575 (2007). "A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000).

A reviewing court must defer to the trier of fact regarding witness credibility, conflicting testimony, and persuasiveness of the evidence. Id. at 719. The reviewing court need not be convinced that the defendant is guilty beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

To obtain a firearm enhancement, the State must prove that the defendant was armed during the commission of the crime with a "firearm," defined as a "weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(7); RCW 9.94A.533(3).

Courts have interpreted this definition to include loaded, unloaded, malfunctioning, and even disassembled firearms that can be repaired or reassembled within a reasonable timeframe and with reasonable effort. See State v. Anderson, 94 Wn. App. 151, 162-63, 971 P.2d 585 (1999), rev'd on other grounds, 141 Wn.2d 357, 5 P.3d 1247 (2000) (loaded firearm); State v. Berrier, 110 Wn. App. 639, 645, 41 P.3d 1198 (2002) (unloaded firearm); State v. Faust, 93 Wn. App. 373, 380-81, 967 P.2d 1284 (1998) (malfunctioning firearm); State v. Padilla, 95 Wn. App. 531, 535, 978 P.2d 1113 (1999) (disassembled firearm). The critical distinction is whether the firearm is a "gun in fact" or a "toy gun." Faust, 93 Wn. App. at 380.

There is no requirement that the State produce the actual firearm at trial. Tongate, 93 Wn.2d at 754. A firearm enhancement may be imposed if the firearm was not discharged or recovered. State v. Goforth, 33 Wn. App. 405, 412, 655 P.2d 714 (1992). Eyewitness testimony alone is sufficient to support a firearm enhancement. McKee, 141 Wn. App. at 30.

The appellants argue that the firearm enhancement should be vacated because the State failed to produce any evidence that Copol's 9mm Smith and Wesson "had ever been fired or that it was

capable of firing a bullet or projectile." Khann Br. at 42. Even assuming that the State is required to prove operability, the State produced sufficient circumstantial evidence for a rational trier of fact to conclude that the firearm was operable.

Police recovered a 9mm Smith and Wesson handgun sticking out from underneath the front passenger seat of Copol's Cadillac. 15RP 58, 60-61, 67. The gun was loaded with a 16-bullet magazine, and had the words "SMITH & WESSON" engraved on the slide along with a serial number. 15RP 68-70; Ex. 101-02. Although there was not a bullet in the chamber, a detective testified that one could be loaded by "[p]ulling back" the slide. 15RP 68. Photographs of the gun admitted at trial displayed that the slide was in working condition. Ex. 101-03, 133-34.

Copol admitted to police that he entered C.H.'s house with the gun, and that he purchased it a week earlier "for protection." 15RP 120-21, 143; 21RP 56. Copol said that he bought the gun loaded in case he ran into somebody that did not like him. 21RP 55. At trial, Copol testified that he purchased the gun for $250 after being shot at while driving his car. 21RP 145; 22RP 66.

Viewing this evidence in the light most favorable to the State, and drawing all reasonable inferences therefrom, there is sufficient

circumstantial evidence from which a rational trier of fact could find that Copol's loaded, 9mm Smith and Wesson handgun was operable. The fact that Copol admitted to buying the gun "for protection" – after being shot at – strongly suggests that the gun was real "in fact" and not a "toy gun." Faust, 93 Wn. App. at 380. Further, the fact that Copol bought the gun loaded indicates that he believed the gun would fire those bullets. There is no evidence in the record to suggest that anyone involved in the case, including Copol, thought that the gun was fake. See 22RP 67 (Copol stating "I hope it was a real gun.").

The appellants appear to argue that to prove operability, the State must present evidence that the gun was fired. See Khann's Br. at 42 ("There was no evidence the gun had ever been fired . . ."); Copol's Br. at 11 ("The State . . . never tried to fire the weapon."). The case law is to the contrary. See Anderson, 94 Wn. App. at 159 (rejecting defendant's argument that a loaded gun was not a "firearm" because it was never test-fired); Faust, 93 Wn. App. at 374-75 (affirming firearm enhancement despite evidence that the gun malfunctioned during test firing); McKee, 141 Wn. App. at 30-31 (affirming firearm enhancement based on eyewitness testimony although the gun was never fired).

This case is analogous to Anderson, where this Court held that a loaded handgun satisfied the definition of a "firearm" where it was admitted at trial, displayed a serial number, and looked like a "real gun" according to two experienced police officers. 94 Wn. App. at 162-63. The fact that the gun had never been test fired was irrelevant. Id. at 159. The court reasoned that a loaded gun "leads to an inference that it was either operable or could be made operable within a reasonable period of time," because "why else would it have been loaded?" 94 Wn. App. at 163.

Here, the evidence is equally as strong if not stronger. The State admitted the handgun at trial and produced evidence that it was loaded, had a serial number, was engraved "SMITH & WESSON," and purchased by Copol for protection. Admitting the truth of the witnesses' testimony and drawing all reasonable inferences in favor of the State, there is sufficient evidence from which a rational trier of fact could find that the firearm was operable.

## D. CONCLUSION

For the reasons stated above, the Court should affirm the appellants' convictions and sentences.

DATED this 24th day of September, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
KRISTIN A. RELYEA, WSBA #34286
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Suzanne Lee Elliott, the attorney for the appellant, at 1300 Hoge Building, 705 Second Avenue, Seattle, WA 98104, containing a copy of the Brief of Respondent, in STATE V. MICHAEL MARTINEZ COPOL (AKA JUAN MIGUEL MACHADO), Consolidated Cause No. 67509-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

Date 09-24-12

Done in Seattle, Washington

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric J. Nielsen, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. DARA KHANN, Consolidated Cause No. 67509-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

09-24-12

Date

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan F. Wilk, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. KEVIN VOLANTE, Consolidated Cause No. 67509-5-I, in the Court of Appeals, Division I, for the State of Washington.

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