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WASHINGTON STATE
SUPREME COURT

Supreme Court No. 930269
(COA No. 72251-4-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

HOWARD ROSS,
Petitioner.

FILED ^E
Aug 30, 2016
Court of Appeals
Division I
State of Washington

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Howard Ross, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Howard Ross seeks review of the Court of Appeals decision dated August 1, 2016, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court was collaterally estopped from issuing a verdict contrary from the final verdict issued by the jury.
2. Whether allowing an inconsistent verdict to be issued by a trial judge in a hybrid trial after the jury has issued its final verdict undermines the historic role of the jury as the final arbiter of questions put to it.
3. Whether the State presented sufficient evidence of possession of a firearm.

D. STATEMENT OF THE CASE

From the time Howard Ross was charged with possession of a firearm and assault in the first degree, there was never a suggestion there was more than one firearm possessed by Mr. Ross or used to assault Kenneth Jones. The jury found Mr. Ross not guilty of assault in the first degree and also endorsed the special verdict form finding he was not armed. Despite these clear final verdicts, the trial court issued a contrary and inconsistent verdict finding Mr. Ross guilty of unlawful possession of a firearm. The Court of Appeals affirmed the trial court's conviction. Mr. Ross seeks review.

1. Mr. Ross was charged with a single count of possession of a firearm.

Mr. Ross was originally charged with assault in the first degree and unlawful possession of a firearm. CP 1-2.¹ The State also made the special allegation Mr. Ross was armed with a firearm at the time of the offense. CP 1-2. The charging instrument did not allege distinct periods or allege the possession was distinct from the assault CP 1-2.

¹ The record consists of eight volumes of transcripts and the clerk's papers. The clerk's papers will be referred to by referencing CP. The transcript will be referenced by volume number and then page. E.g., 1 RP 12.

2. *Severance from the assault was denied because all of the testimony of the assault was “admissible and necessary” to prove unlawful possession of a firearm.*

Mr. Ross moved to sever the assault and firearm charges to avoid the potential prejudice which might result from the jury discovering he has prior felony convictions. 1 RP 20. The prosecutor argued against severance, stating “It is clear that all of the testimony pretty much for one -- for Count 1 would satisfy the testimony for Count 2.” 1 RP 20.

The court denied the severance motion, finding “all of the evidence that would be admissible in the assault charge would be admissible and necessary for proof of the firearm charge.” 2 RP 75. Mr. Ross subsequently waived his right to a jury on count two. 3 RP 206. The court then conducted a hybrid trial, where the jury determined whether Mr. Ross was guilty of assault, while the court was charged with determining Mr. Ross’ guilt for the possession charge. CP 26.

3. *The only evidence presented at trial was that the firearm alleged to have been possessed by Mr. Ross was “the mechanism of the injury” to Mr. Jones.*

No theory was presented to either the judge or the jury that Mr. Ross possessed a different firearm or that there was a second shooter. In arguing Mr. Ross was guilty of assault, the State argued to the jury

that the “firearm pretty much is the crime here because it’s the mechanism of injury, the way that he [Mr. Ross] assaulted Ken Jones.” 7 RP 861. In her rebuttal, the State reaffirmed this theory, telling the jury

And so I’ll ask you to find him [Mr. Ross] guilty because beyond a reasonable doubt he is guilty of the crime of assault in the first degree. He did shoot Ken Jones. I’ll ask you to answer yes on that special verdict form. Yes, he did use a firearm to assault Ken Jones.

7 RP 894.

The State made this argument because no other reasonable argument could be made regarding the evidence presented at trial. The State’s only witness with regard to the possession and assault was Mr. Jones. While he alleged Mr. Ross was in possession of the firearm he used to assault him, Mr. Jones also told the jury he had no memory of the incident until his aunt told him the person who had assaulted him was the person who “got a settlement for, like, 250,000” and he “only knew one person that got this type of settlement out of all my friends.” 6 RP 592-93, 634. Jones also testified he had been consuming alcohol and using cocaine the night he was assaulted. 6 RP 594. He admitted he had lied to the hospital personnel about his drug use because he was “ashamed” and he didn’t know if it “plays a big difference in

anything.” 6 RP 618. Mr. Jones claimed that, without warning or provocation, Mr. Ross shot him with the gun Mr. Jones had seen Mr. Ross handling all evening. 6 RP 609.

Other than Mr. Jones testimony, the only other evidence tying Mr. Ross to the crimes were his ownership of a car similar to the one seen shortly after Mr. Jones was assaulted and his proximity to the scene. 8 RP 840. No other persons could testify Mr. Ross was in possession of a firearm. 8 RP 840. There was no physical evidence tying Mr. Ross to the possession charge. 8 RP 845. There was no forensic evidence linking him to the possession. 8 RP 847-48.

The State made clear to the court the evidence of the assault established Mr. Ross’ guilt with regard to the unlawful possession of a firearm charge. 7 RP 895. The State argued to the court “the crime of this crime is that it was committed with a firearm.” 7 RP 895. The State’s argument to the court focused on the testimony of Mr. Jones, highlighting conversations Mr. Ross was alleged to have had with Mr. Jones, observations Mr. Jones had made and the fact that Mr. Jones was “shot and injured” by Mr. Ross. 7 RP 895. The only additional evidence the court heard concerned the stipulation made by the parties that Mr. Ross had previously been convicted of a felony.

4. *The jury's final verdict acquitted Mr. Ross of assault and found he was not armed with a firearm.*

The jury found Mr. Ross not guilty of the assault charge. 8 RP 907.

We, the jury, find the defendant HOWARD LEE ROSS NOT GUILTY (write in "not guilty" or "guilty") of the crime of Assault in the First Degree as charged in Count I.

6/12/2014
Date

[Signature]
Presiding Juror VICTORIA STICKNEY

CP 50.

The jury also found Mr. Ross was not armed with a firearm at the time of the commission of the crime charged. 8 RP 907, CP 51.

QUESTION: Was the defendant HOWARD LEE ROSS armed with a firearm at the time of the commission of the crime in Count 1?

ANSWER: NO (Write "yes" or "no")

6/12/2014
Date

[Signature]
Presiding Juror VICTORIA STICKNEY

CP 51. Once the verdicts were rendered, the jury was discharged having completed their work. 8 RP 907.

5. *After the final verdict had been rendered, the trial court found Mr. Ross guilty of possession of a firearm.*

The trial court issued its ruling after the jury had rendered its final verdict. 8 RP 910. The trial court found Mr. Ross guilty of unlawful possession of a firearm. 8 RP 913-14; CP 70-73.

In defending the inconsistent verdict, the court stated the jury could have found reasonable doubt as to who was actually the shooter. 8 RP 914. The court declined to enter a finding the firearm Mr. Ross was guilty of possessing was the one used to assault Mr. Jones. Mr. Ross moved for reconsideration and an arrest of judgment, which was denied by the court.

E. ARGUMENT

1. REVIEW IS NECESSARY TO ANSWER WHETHER THE TRIAL JUDGE WAS COLLATERALLY ESTOPPED FROM ISSUING A VERDICT CONTRARY TO THE JURY'S FINAL VERDICT OF NOT GUILTY.

When the jury issued a not guilty verdict on the assault charge, they also endorsed the firearm enhancement form finding Mr. Ross was not in possession of a firearm. CP 51. When the court denied Mr. Ross' severance motion it was because the evidence of the assault was admissible and necessary for proof of the firearm charge. 2 RP 75. This was in accord with the State's theory at trial, which was that the "crux" of the possession charge was that Mr. Ross had used a firearm to assault Mr. Jones. 8 RP 895.

a. This decision on collateral estoppel is in conflict with In Re Moi.

While Mr. Ross' case was pending, this Court analyzed the question of when collateral estoppel applies in hybrid trials. *See In re Moi*, 184 Wn.2d 575, 579, 360 P.3d 811 (2015). This Court recognized that both the State and federal constitutions require that "No person shall ... be twice put in jeopardy for the same offense." Const. art. I, § 9; U.S. Const. amend. 5. Among many other things, "the Double Jeopardy Clause incorporates the doctrine of collateral estoppel."

Dowling v. United States, 493 U.S. 342, 347, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990) (citing *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970)).

This Court also held that under the collateral estoppel doctrine, “when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit,” including a criminal prosecution. *Moi*, 184 Wn.2d at 579 (quoting *Ashe*, 397 U.S. at 443, 90 S.Ct. 1189).

Moi is in conflict with this decision. See RAP 13.4(b). In *Moi*, the court heard evidence of unlawful possession of a weapon while a jury was asked to determine whether Mr. Moi was guilty of murder. *Moi*, 184 Wn.2d at 577. When the jury was unable to reach a verdict, the court issued its verdict, finding Mr. Moi not guilty. *Id.* at 578. This Court reversed Mr. Moi’s conviction under the collateral estoppel doctrine. *Id.* at 585.

b. The question of when collateral estoppel applies in a hybrid trial is a significant question under state and federal law.

This Court should also take review because the issue presented to the Court is a significant question of law under both the federal and state constitutions. RAP 13.4(b). While *Moi* clearly answers the

question of what happens when the trial judge enters an acquittal for the unlawful possession charge, the Court of Appeals decision here makes clear the question of what a trial judge should do when a jury enters a final judgment may still be open.

Taking review would allow this Court to settle the question of when a trial court should apply the “realism and rationality” required by the U.S. Supreme Court. *Ashe*, 397 U.S. at 444. Both the trial court and the prosecutor recognized the evidence of the firearm possession was dependent upon the evidence of the assault. When the trial court denied Mr. Ross’ motion for severance, it was because the evidence of the assault was “admissible and necessary” for proof of the firearm charge. 2 RP 75. Likewise, the only theory the State presented to both the trial judge and the jury was that the evidence of the assault proved the possession of the firearm, describing the firearm as the “mechanism” of the injury. 7 RP 861.

Under the “realism and rationality” test, there is no plausible theory which supports these two verdicts. It is only by using the “hyper technical” analysis which the Supreme Court rejects in *Ashe* that the trial court could separate the evidence of the assault from the possession offense. The only witness to testify regarding the firearm

possession made clear it was the same weapon he claimed Mr. Ross had been handling during their time together. 6 RP 609. There was never a suggestion a second firearm ever existed, not only in the State's theory, but also in the evidence presented. *See, e.g.* 7 RP 861.

There were many reasons why the jury rejected this evidence. Mr. Jones only claimed to remember it was Mr. Ross who shot him after he realized it was his friend who had received "a settlement for, like, 250,000." 6 RP 592-93. Mr. Jones also admitted he had been consuming alcohol and cocaine the night he was assaulted. 6 RP 594. He then told the jury he had lied to the hospital personnel. 6 RP 618. Finally, Mr. Jones was unable to provide a motive for the assault, claiming Mr. Ross shot him without warning or provocation. 6 RP 609.

The trial court's decision creates a result inconsistent with the rationality and realism of the evidence presented at trial. Mr. Ross either assaulted Mr. Jones with the firearm he possessed or he did not. When the trial court made a finding contrary to the final verdict of the jury, it applied a hyper technical analysis unsupported by the evidence presented at trial.

c. This Court should accept review of whether collateral estoppel applies in a bifurcated trial when a jury has issued its final verdict.

Taking review of this case is necessary to answer the question of when a jury's final verdict should be respected. No injustice is served by creating consistent verdicts between the jury and the trial judge. *See, Moi*, 184 Wn.2d at 581. Review should be granted under RAP 13.4(b).

2. REVIEW SHOULD BE GRANTED TO ANSWER THE QUESTION OF WHETHER A TRIAL COURT MAY ISSUE A VERDICT INCONSISTENT WITH THE FINAL VERDICT RENDERED BY A JURY IN A BIFURCATED TRIAL.

Unlike jurors, there is no need to permit judicial officers to issue inconsistent verdicts. *United States v. Maybury*, 274 F.2d 899, 903 (2d Cir. 1960). This Court should accept review to make clear the experience and logic test requires judicial officers to not “indulge in ‘vagaries’ in the disposition of criminal charges” and that the justifications for allowing inconsistent verdicts by juries do not apply when the fact finder is a judge. *Marbury*, 274 F.2d at 903. Review is necessary because this is a significant question of law under the federal and state constitutions, involves an issue of substantial public interest which should be determined by this Court, and is in conflict with another decision of this Court. RAP 13.4(b).

a. *Whether trial judges may issue inconsistent verdicts is a significant question of law under the federal and state constitutions and involves an issue of substantial public interest.*

While this Court has not had an opportunity to answer the question of whether a trial judge may issue an inconsistent verdict from a jury, other courts have. In Maryland, the Court of Appeals found reversal is required where the trial court renders a verdict inconsistent with the jury's verdict. *Galloway v. State*, 371 Md. 379, 416, 809 A.2d 653, 675 (2002). Other courts have also adopted this analysis. *See, e.g., U.S. v. Duz-Mor Diagnostic Laboratory, Inc.*, 650 F.2d 223, 226 (9th Cir.1981); *Haynesworth v. United States*, 473 A.2d 366, 368 (D.C.1984); *People v. Vaughn*, 409 Mich. 463, 295 N.W.2d 354 (1980); *People v. Williams*, 99 Mich.App. 463, 297 N.W.2d 702 (1980).

In *Galloway*, the court made clear that to approve an inconsistent verdict issued by a judicial officer in a bifurcated trial “would undermine the historic role of the jury as the arbiter of questions put to it.” 371 Md. at 406. Respect for the law or for the court is not enhanced by allowing a judge to indulge in the same compromises a jury may make in rendering its verdict. *Maybury*, 274 F.2d at 903. Instead, *Galloway* cautions that approving inconsistent

verdicts rendered by a trial judge in a bifurcated trial would authorize “a practice that would permit the State to achieve a judgement of conviction that overrides a jury’s finding of acquittal. 371 Md. at 676. Upon receiving the jury’s verdict, the trial court should have dismissed the possession of a firearm charge.

The Court of Appeals decision found the verdicts were not inconsistent. Slip. Op. at 4. The Court observed Mr. Ross could have reasonably shot Mr. Jones for any number of reasons. *Id.* Again, this is a hyper technical analysis which discounts the jurors’ rejection of the testimony of Mr. Jones, the only witness who testified regarding the shooting and the possession charges. The only additional evidence presented to the court and which required an independent finding was whether Mr. Ross had previously been convicted of a felony. 8 RP 819-20. All of the other evidence presented to the trial court was identical to the evidence presented to the jury. The only way for the trial court to find Mr. Ross possessed a firearm is to rely upon the same testimony the jury rejected, which was the testimony of Mr. Jones.

b. The Court of Appeals ruling is inconsistent with Supreme Court precedence, including In Re Moi.

The Court of Appeals also rejected Mr. Ross' appeal because the charges, assault and unlawful possession of a weapon, are distinct. Slip Op. at 4. This ruling is in conflict with this Court's precedent, including *In Re Moi*. Like Mr. Ross, Mr. Moi was charged with unlawful possession of a firearm and then the more serious charge of murder. *Moi*, 184 Wn.2d at 577. The analysis by the Court of Appeals conflicts with this Court's precedence, which does not draw the distinction the Court of Appeals relies upon to reject Mr. Ross' appeal.

c. This Court should accept review to answer the question of whether a trial court may issue a verdict inconsistent with a jury's final verdict.

Review should be granted to answer the question of what weight should be provided to a jury's verdict and whether their decisions on the credibility of witnesses and the State's proof have integrity when a trial court is listening to the same evidence in a bifurcated trial. This Court should accept review because this is a significant question of law under the federal and state constitutions, involves an issue of substantial public interest which should be determined by this Court and because this decision is in conflict with Supreme Court precedence. RAP 13.4(b).

3. REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS DECISION FINDING THE STATE PRESENTED SUFFICIENT EVIDENCE OF POSSESSION OF A FIREARM IS CONTRARY TO ESTABLISHED PRECEDENT AND INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

The Court of Appeals found there was sufficient evidence Mr. Ross possessed a firearm, despite the lack of testimony regarding its operability or whether the item alleged to have been possessed by him was in fact a firearm or whether a second firearm ever existed. Slip Op. at 7. Mr. Ross requests review of this issue under RAP 13.4(b) because it involves an issue of substantial public interest that should be determined by the Supreme Court and is in conflict with other decision issued by this Court.

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Evidence is only sufficient where a rational trier of fact could find the essential elements of the crime charged beyond a reasonable doubt. *State v. Longshore*, 141 Wn.2d 414, 420, 5 P.3d 1256, 1259 (2000). There must be substantial evidence to support the court's findings of fact in order for them to be sufficient. *State v. Mewes*, 84 Wn. App. 620, 622, 929 P.2d

505 (1997) (citing *Rae v. Konopaski*, 2 Wn. App. 92, 95, 467 P.2d 375 (1970)).

An essential element of possession of a firearm is that it is a weapon or device from which a projectile may be fired by an explosive such as gunpowder. RCW 9A.01.010(9). Sufficient evidence must be presented to the fact finder for it to determine that the object is a true firearm and not a gun-like object incapable of being fired. *State v. Pam*, 98 Wn.2d 748, 755, 659 P.2d 454 (1983), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988).

This Court has consistently required the State to prove “operability”. *See, Pam*, 98 Wn.2d at 755 (Not harmless error to fail to instruct the jury on whether it could have reasonable doubt on operability), *see also State v. Pierce*, 155 Wn. App. 701, 714, 230 P.3d 237 (2010); *State v. Recuenco*, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008). The State must introduce facts which prove beyond a reasonable doubt the weapon in question falls under the definition of “firearm.” *Recuenco*, 163 Wn.2d at 437. Failure to do so requires reversal.

The findings of the trial court are insufficient to establish Mr. Ross was in possession of a firearm on the night in question. CP 60.

The only testimony regarding a firearm was used in the assault was rejected by jury and cannot be used to analyze whether there is otherwise sufficient evidence to establish Mr. Ross possessed a firearm.

The only witness to testify regarding the firearm possession made clear it was the same weapon he claimed Mr. Ross had been handling during their time together. 6 RP 609. Importantly, the trial court did not parse the evidence rejected by the jury when finding Mr. Ross guilty of the possession charge. Instead, the court declined to make a finding the firearm it found Mr. Ross to be in unlawful possession of was the one used to shoot Mr. Jones. CP 72.

Without this evidence, this Court cannot be confident sufficient evidence was presented to the fact finder. No firearm was ever recovered, there was no evidence presented that a “second firearm” was ever discharged, and there was no testimony that would indicate a “second firearm” was capable of being discharged, let alone existed at all. CP 60-61.

Mr. Ross’ sufficiency argument meets the criteria for review under RAP 13.4(b). The question of whether a firearm observed but not operated or otherwise demonstrated to be real involves an issue of substantial public interest that should be determined by this Court.

Because this decision is also in conflict with other decisions issued by this Court which requires proof beyond a reasonable doubt of operability and whether the instrument in question was in fact a firearm, review should also be granted.

F. CONCLUSION

Based on the foregoing, petitioner Mr. Ross respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 30th day of August, 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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Washington Appellate Project (91052)
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APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 72251-4-1
Respondent,)	
)	DIVISION ONE
v.)	
)	
HOWARD LEE ROSS,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: August 1, 2016
_____)	

BECKER, J. — After a trial where the jury and court heard the evidence simultaneously, the jury acquitted Howard Ross of assault and found that he was not armed with a firearm at the time of the assault. The next day, the trial court found him guilty of unlawful possession of a firearm. Because the trial court based its verdict on testimony that Ross possessed a gun earlier in the night, before the assault, the verdicts were not inconsistent and the issues were not identical. We affirm.

FACTS

On January 22, 2014, around 2 a.m., Kenneth Jones was in the Central District of Seattle when someone shot him. Jones was in a coma for about two weeks. When he awoke, he had no memory of the shooting.

Two months later, on March 26, Jones's aunt visited him in the hospital. She told him she heard that the shooter was someone who had received a big settlement. According to Jones, this information triggered his memory of the shooting and enabled him to identify Howard Ross as the shooter.

The next day, March 27, the State charged Ross with assault in the first degree and alleged that at the time of the assault, he was armed with a firearm. The State also charged Ross with unlawful possession of a firearm in the first degree.

Ross waived his right to a jury trial on the charge of unlawful possession of a firearm. The assault charge proceeded to jury trial. The court and the jury heard the evidence simultaneously.

On June 12, 2014, the jury found Ross not guilty on the assault charge. The jury had been given a special verdict form which asked, "Was the defendant HOWARD LEE ROSS armed with a firearm at the time of the commission of the crime in Count 1?" Although this question was superfluous after the jury found Ross not guilty on count 1, the jury answered it with a "no."

The next day, the court found Ross guilty on the charge of unlawful possession of a firearm.

Ross moved to arrest judgment, arguing there was insufficient evidence to conclude that he possessed a firearm within the meaning of the statute. The court denied the motion.

On July 25, 2014, the court sentenced Ross and entered findings of fact and conclusions of law supporting the conviction. Ross appeals.

INCONSISTENT VERDICTS AND COLLATERAL ESTOPPEL

Ross argues that the court's conclusion of guilt on the charge of unlawful possession of a firearm was barred by collateral estoppel and inconsistent with the jury's verdict of not guilty on the assault charge.

The party asserting collateral estoppel must show that the issue decided in the prior adjudication is identical with the one presented in the second action. State v. Williams, 132 Wn.2d 248, 253-54, 937 P.2d 1052 (1997). Examination of the trial testimony and court's findings reveals that the issues were not identical, nor was the court's decision inconsistent with the jury's acquittal.

At trial, Jones testified that on the night of the shooting he was at a bar in downtown Seattle drinking and using cocaine. He left the bar in pursuit of more cocaine. As he was walking down the street, he ran into Ross, a person he had known since childhood. Ross was driving a red Corvette. Jones got into the car. He testified that Ross had a "chrome gun" in the center car console. He said he asked to see the gun, but Ross refused to show it to him and moved the gun from the center console to a pocket on the driver's side door.

Jones testified that Ross drove around downtown and eventually parked the car at a house in the Central District, where Ross said he was going to get more cocaine. Jones said that Ross took the gun into the house while he waited in the car, and when Ross returned, he had the gun on his hip. He testified that he was getting out of the car when Ross shot him, pushed him out of the car, and drove off. Jones was found lying on the ground near a street in the Central District, almost dead. He has a spinal cord injury caused by the bullet.

The court's conclusion of guilt was not based on a finding that Ross shot Jones or was armed at the time of the shooting. The court's conclusion that Ross unlawfully possessed a gun was based on its finding that Jones was credible when he testified that Ross possessed a gun earlier in the evening, *before the shooting*. The trial court found:

Kenneth Jones testified that on January 22, 2014 he was driven around that evening by the defendant in a red corvette with black interior, and that he observed the defendant Ross to be in possession of a chrome gun, which he described as a 9mm or 45 mm. He said the defendant periodically moved the gun around in the car, as well as placed it on his person when leaving the car. He also would not allow Jones to look at it when he asked.

...
... The court finds Jones to be credible.

The jury could have reasonably doubted that Ross shot Jones for any number of reasons. Whether Ross possessed a gun earlier in the evening is a different question, one the jury was not asked to decide. For this reason, the court's decision was not inconsistent with the jury's acquittal on the assault charge or with the special verdict that Jones was not armed with a firearm at the time of the shooting. Ross could have possessed a firearm that night before the assault, as described by Jones, yet not have been the person who later shot Jones.

For much the same reason, the issues are not identical. The elements of the two crimes—assault and unlawful possession of a firearm—are distinct. Compare RCW 9A.36.011 (assault in the first degree), with RCW 9.41.040(1) (unlawful possession of a firearm in the first degree). The jury's verdict determined that the State had not proven beyond a reasonable doubt that Ross

shot Jones or that Ross was armed with a firearm when the shooting occurred. But the verdict did not rule out the possibility that Ross possessed a firearm earlier that night. Whether Ross shot Jones, or whether Ross was armed at the time of the shooting, is not an identical issue to whether Ross possessed a firearm earlier that night. This is not a “hypertechnical” approach but reflects “realism and rationality.” Ashe v. Swenson, 397 U.S. 436, 444, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970).

Ross appears to argue the court was estopped from finding him guilty because the State at no time alleged or argued that the firearm used in the assault was different from the firearm Ross possessed in the car. But Ross cites no authority for the proposition that a trial court acting as a fact finder is confined by the prosecutor’s presentation or theory. The conviction is supported by the evidence.

We conclude the conviction is not barred either by collateral estoppel or by inconsistency with the jury verdict of acquittal on the assault charge.

SUFFICIENCY OF THE EVIDENCE

Ross contends there was insufficient evidence that he possessed a firearm as defined by RCW 9.41.010(9). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). An appellant claiming insufficiency of the evidence admits the truth of the State’s evidence and all inferences reasonably drawn from it. State v.

Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable, and we defer to the trier of fact on witness credibility and persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

A firearm is defined as “a weapon or device from which a projectile . . . may be fired by an explosive such as gunpowder.” RCW 9.41.010(9). Ross argues there was insufficient evidence to establish the operability of the firearm.

A firearm need not be operable during the commission of a crime to constitute a “firearm” within the definition of RCW 9.41.010(9). State v. Faust, 93 Wn. App. 373, 376, 967 P.2d 1284 (1998); State v. Raleigh, 157 Wn. App. 728, 734, 238 P.3d 1211 (2010), review denied, 170 Wn.2d 1029 (2011); State v. Wade, 133 Wn. App. 855, 873, 138 P.3d 168 (2006), review denied, 160 Wn.2d 1002 (2007). Instead, the relevant question is whether the firearm is a “gun in fact,” or a real gun, rather than a “toy gun.” Faust, 93 Wn. App. at 380; Raleigh, 157 Wn. App. at 734.

The State need not introduce the actual firearm into evidence at trial; witness testimony alone may provide sufficient evidence. State v. McKee, 141 Wn. App. 22, 30-32, 167 P.3d 575 (2007), review denied, 163 Wn.2d 1049 (2008). The evidence was sufficient to support the finding that the defendant had a real gun when the victim described the gun in detail, said there was no question in her mind that it was a real gun, and said the defendant threatened to use the gun. State v. Bowman, 36 Wn. App. 798, 803, 678 P.2d 1273, review denied, 101 Wn.2d 1015 (1984). Circumstantial evidence was also sufficient to

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support a finding that the defendant had a real gun where robbery victims described the gun in detail. State v. Mathe, 35 Wn. App. 572, 581-82, 668 P.2d 599 (1983), affirmed, 102 Wn.2d 537 (1984).

Here, the trial court entered a specific finding of fact that Ross possessed a real gun: "Based upon Jones' observation of the gun, and the manner in which the defendant handled it, taking it with him when leaving the vehicle, and refusing to let Jones handle it, the court finds the gun was a firearm, capable of being fired." The trial court found Jones credible. We conclude the evidence was sufficient to satisfy the definition of "firearm."

STATEMENT OF ADDITIONAL GROUNDS

Ross claims that the standard of proof beyond a reasonable doubt was not met because the trial court did not know whether or not the gun that was the basis of his conviction was the same gun used to shoot Jones. He similarly claims that the charging document was insufficient because it did not make him aware of any allegation of a second gun, and that his right to due process was violated because the court convicted him of possessing a gun which may not have been the one used to shoot Jones.

These arguments do not warrant review. The State was not required to prove that different guns were used in the two crimes. Whether the gun Ross was convicted of possessing was used to shoot Jones is not an element of the crime. See RCW 9.41.010 (elements of unlawful possession of a firearm in the first degree do not specify that firearm must be different from firearm allegedly used in another charged incident).

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Ross alleges that the prosecutor and the judge let their personal beliefs about the shooting overtake their duties as court officers. He has not pointed to any part of the record that supports this claim.

Affirmed.

Becker, J.

WE CONCUR:

Leach, J.

Steindler, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72251-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: August 30, 2016