72553-0

NO. 72553-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN SASSEN VANELSLOO

Appellant.

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

The Honorable Deborra Garrett, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when, at the State's urging, it discharged a qualified juror during trial.

2. Insufficient evidence supports each of the five firearm enhancements because the State failed to prove the shotgun was operable.

3. The State failed to prove appellant was armed with a firearm for each of the five sentence enhancements imposed.

4. The trial court erred in denying appellant's motion to dismiss the firearm enhancements for insufficient evidence.

5. The trial court exceeded its statutory authority when it imposed discretionary legal financial obligations (LFOs) without making an individualized inquiry into appellant's current and future ability to pay.

6. Defense counsel was ineffective for failing to object to the trial court's imposition of discretionary LFOs.

Issues Pertaining to Assignments of Error

1. Trial courts may not remove a sitting juror without first conducting an adequate investigation and only after determining that the juror is no longer fit to serve. During appellant's trial, the State sought to remove a juror who had minimal contact with a defense witness two years prior. Despite assurances from the juror that the contact with the witness was neither positive nor negative, and that it would not affect her ability to

be fair and impartial, the State succeeded in getting the juror removed. Did the trial court err in dismissing the juror where the record fails to support its findings on unfitness?

2. The State charged the appellant with firearm enhancements on five counts based on his alleged possession of a shotgun. To prove a firearm enhancement, the State must introduce facts from which the jury may find beyond a reasonable doubt that the item in question falls under the definition of a "firearm," that is, a weapon or device from which a projectile may be fired by an explosive such as gunpowder. This requires proof that the weapon or device is operable. Where the State presented no evidence the shotgun had ever been fired, did the State present sufficient evidence that an operable firearm was used in commission of the crimes?

3. A person is armed for firearm enhancement purposes when he is within proximity of an easily and readily available firearm and when a nexus is established between the accused, the weapon, and the crime. Appellant was the alleged driver of a car which contained a shotgun in the rear cargo hold. The shotgun was out of reach of the driver. Did the trial court err in denying appellant's motion to dismiss the firearm enhancements for insufficient evidence where the State failed to prove that appellant was within proximity of the inaccessible shotgun and where there was no nexus between appellant, the weapon, and the crime?

4. Did the trial court exceed its statutory authority under RCW 10.01.160(3) when it imposed discretionary LFOs without first considering appellant's current and future ability to pay, making the LFO order erroneous?

5. Was appellant's trial counsel ineffective for failing to object to the imposition of discretionary LFOs?

B. STATEMENT OF THE CASE

1. Procedural History.

The Whatcom county prosecutor charged appellant Adrian Sassen-Vanelsloo with nine felony counts, including: three counts of first degree unlawful possession of a firearm;[1] three counts of unlawful possession of a controlled substance with intent to deliver;[2] two counts of unlawful possession of a controlled substance;[3] and one count of attempting to elude a pursuing police vehicle. CP 3-5. The State further alleged that Sassen-Vanelsloo was armed with firearm during each of the unlawful

[1] The State alleged Sassen-Vanelsloo possessed a pistol grip Mossburg shotgun, a Raven Arms .25 caliber automatic pistol, and a Sportsarms .38 caliber revolver. CP 3-5.

[2] The State alleged Sassen-Vanelsloo possessed with intent to deliver, alprazolam, clonazepam, and heroin. CP 3-5.

[3] The State alleged Sassen-Vanelsloo possessed methamphetamine and morphine. CP 3-5.

possession of a controlled substance and unlawful possession of a controlled substance with intent to distribute charges. CP 3-5.

The charges at issue were originally filed under Whatcom County Superior Court cause No. 12-1-01051-2. Those charges were dismissed without prejudice on March 4, 2014 when the State was unable to secure the presence of a critical witness. Supp. CP ___ (sub no. 106, Order of Dismissal and Order Releasing Defendant from Custody on this Matter Only, dated 3/4/14); 12RP[4] 46-47. On May 22, 2014, the charges were re-filed under Whatcom County Superior Court cause No. 14-1-00602-3, which is the basis of this appeal. CP 3-5.

A jury found Sassen-Vanelsloo guilty as charged. CP 66-67; 17RP 1051-52, 1055-59. The jury also returned special verdict forms finding that Sassen-Vanelsloo was armed with a shotgun during each of the unlawful possession of a controlled substance and unlawful possession of a controlled substance with intent to distribute charges. CP 68, 70-73. The jury further found that during the attempting to elude, one or more

[4] This brief refers to the verbatim report of proceedings as follows: 1RP – September 5, 2013; 2RP – September 9, 2013; 3RP – September 30, 2013; October 1, 2013; 5RP – October 3, 2013; 6RP – October 10, 2013; 7RP – October 24, 2013; 8RP – October 30, 2013; 9RP – November 13, 2013 & May 29, 2014; 10RP – January 30, 2014; 11RP – February 19, 2014; 12RP – March 3, 2014; 13RP – June 5, 2014; 14RP – June 17, 2014; 15RP – June 19, 2014; 16RP – July 21, 2014; 17RP – July 22, 23, 24, 28, 29, 30, and 31, 2014 & August 14, 2014 & September 17 and 30, 2014; 18RP – August 18, 2014.

persons were threatened with physical injury or harm. CP 69; 17RP 1052-59.

The trial court sentenced Sassen-Vanelsloo to a total concurrent standard range prison sentence of 120 months for each of the nine convictions. CP 100-11, 125; Supp. CP ___ (sub no. 123, Order to Modify Judgment and Sentence, dated 2/23/15). The trial court also imposed a total consecutive 144 months imprisonment for each of the five unlawful possession convictions where Sassen-Vanelsloo was alleged to be armed with a shotgun. CP 100-111, 125; 17RP 1133.

The court also imposed $7,050 in LFOs. CP 103-05. In doing so, it did not meaningfully consider Sassen-Vanelsloo's ability to pay. The judgment contains the following boilerplate language:

> 2.5 LEGAL FINANCIAL OBLIGATIONS/ RESTITUTION. The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). The court makes the following specific findings:

CP 103.

The trial court did not check the box which states, "the defendant has the present means to pay costs of incarceration, RCW 9.94A.760." CP 103. Section 4.3 of the judgment and sentence explains however, "the

defendant shall pay to the clerk of this court," before setting forth the specific LFOs to be paid by Sassen-Vanelsloo. CP 104-05.

Sassen-Vanelsloo timely appeals. CP 112-24. The trial court appointed appellate counsel and ordered that the costs associated with appellate review to be "prepared at public expense." Supp. CP ___ (sub no. 110, Order Authorizing Appeal in Forma Pauperis, Appointment of Counsel, and Preparation of Record, dated 10/1/14).

2. Trial Testimony.

Bellingham police officer Lewis Leake, was on his motorcycle monitoring traffic on the morning of September 7, 2012. 17RP 534-35. At about 11:42 a.m., Leake noticed a black Kia Sorrento SUV at the intersection he was watching. 17RP 536-37, 584-85. The driver side window of the Kia was down, and Leake made eye contact with the driver. 17RP 537-39, 583-84. The driver had a shaved head and dark complexion. He was wearing a white t-shirt. 17RP 584.

Right turns against red lights were prohibited at the intersection. Leake saw the Kia turn right against a red light and decided to stop the Kia. 17RP 85-89, 538-40. The Kia sped up when Leake turned on his emergency lights. The Kia passed other cars as it drove 50 miles-per-hour in the posted 25 mile-per-hour speed zone. Other cars braked to avoid hitting the Kia as it entered another intersection. 17RP 541-42.

Leake continued following the Kia as it made a left turn. Leake drove 70 miles-per-hour but did not gain on the Kia. Leake saw the Kia drive through stop signs without stopping and travel over speed bumps at a speed that caused the Kia's axle to come off the ground. 17RP 542-44.

As the Kia drove through another intersection, Leake stopped to let traffic clear before continuing the chase. 17RP 546. After going through the intersection, Leake saw the Kia stopped in the middle of the road. The driver door of the Kia was open. The driver of the Kia was gone. 17RP 90, 546-48. Athena Aardema was seated in the front passenger seat. 17RP 90-91, 550-51, 684. Aardema told Leake the driver of the Kia was named "J.R.," which she believed was short for "Jesse." 17RP 91-92, 475, 490, 551-52, 626. Aardema explained that she was being given a ride home from the courthouse. 17RP 80-84, 117-19, 475, 625-28. Aardema asked the driver to stop the Kia so she could get out. 17RP 89.

Aardema's phone rang while she was being questioned by Leake. 17RP 94, 553. Leake and police officer Jeremiah Smith heard the person on the other end of the phone panting. 17RP 95, 553, 638, 687-89. Aardema told the caller that it was not a good time to talk. 17RP 638. Leake and Smith could not hear any part of the conversation between Aardema and the caller. 17RP 638, 687, 691. Leake did not record the caller's phone number or take the phone from Aardema. 17RP 639, 652.

Aardema handed the phone to Smith when he told her to. 17RP 95, 688. The caller hung up when Smith asked who they were. 17RP 688.

Leake continued questioning Aardema. He was "persistent" in his attempt to get Aardema to identify the driver of the Kia. 17RP 95-96, 134, 552-54. Eventually Aardema broke down crying and identified the driver as Sassen-Vanelsloo. 17RP 554-56. At Aardema's urging, Leake's written police reported omitted her identification of Sassen-Vanelsloo as the driver. 17RP 557-58, 629-30. Leake also did not provide a description of the Kia driver to police dispatch. 17RP 623, 633-34.

Smith obtained a photo of Sassen-Vanelsloo based on Aardema's identification of him to Leake. 17RP 689. Leake confirmed that the picture of Sassen-Vanelsloo "b[ore] similarities" to the person he saw driving the Kia, including closely cropped hair, dark complexion, and rounded face. 17RP 556-58, 646. Sassen-Vanelsloo is Caucasian. 17RP 400.

A witness told police which direction the driver of the Kia had run. 17RP 684-86. In response, police brought in a dog to track the driver. 17RP 637, 686-87. The dog track led "really close," to a house where Wade Hardenbrook lived. 17RP 733. In fact, the Kia had been rented by Hardenbrook several weeks before. 17RP 559, 711, 731. Police went to

Hardenbrook's house to speak with him. 17RP 729-30. Hardenbrook refused to give a written statement to police. 17RP 734.

Initially, Hardenbrook had difficulty identifying the driver of the Kia on the day of the incident. 17RP 712, 720, 731-33. Eventually, Hardenbrook said he let Sassen-Vanelsloo borrow the Kia in exchange for Sassen-Vanelsloo's payment of the rental bill. 17RP 711-12, 717, 722, 732-34. Hardenbrook denied he was the driver of the Kia on the day of the incident. 17RP 726. He acknowledged however, that it was in his best interest not to be associated with the Kia because he was prohibited from possessing firearms pursuant to a prior criminal conviction. 17RP 719. Leake did not believe Hardenbrook was the person he had seen driving the Kia. 17RP 889-90.

Police eventually decided to let Aardema leave the scene. 17RP 97-98, 556-57. Aardema asked to get some belongings from the cargo hold of the Kia. 17RP 96-98, 557-58. Leake saw a pistol grip handle of a shotgun when he opened the cargo hold. 17RP 97, 148, 558-59, 563, 640. Leake impounded the Kia as a result. 17RP 560.

Police searched the Kia several days later. 17RP 560-61, 641. The Kia was registered to a rental car company. 17RP 559. Police obtained no identifiable fingerprints from the Kia. 17RP 251-52. A pump action 12-gauge shotgun was found in the cargo hold. 17RP 315-16, 337, 562, 635.

The shotgun had a round in the magazine. 17RP 328, 563. Leake opined the shotgun was an authentic firearm capable of firing. 17RP 316, 568. Leake said someone in the back seat of the Kia could have accessed the shotgun. 17RP 563.

A red backpack was in the cargo hold about one foot away from the barrel of the shotgun. 17RP 316-17, 565-66. The backpack was "beyond the reach of the driver in the driver's seat." 17RP 296, 337. The main compartment of the backpack contained several items, including: a watch, personal hygiene items, a flashlight, a small black case with latch, a locked bank bag, and an energy drink container with a hallowed out false bottom. 17RP 297-98, 303, 306-07, 329, 337, 566-67. No loose items containing Sassen-Vanelsloo's name were found in the backpack. 17RP 340.

Police opened the bank bag with a key found in the center console of the Kia. 17RP 298-99, 566-67. No identifiable fingerprints were found on the bank bag. 17RP 337. Inside the bank bag were two camera bags. 17RP 337. One camera bag contained a digital scale, a crystalline substance that tested positive for methamphetamine, and five blue pills that tested positive for morphine. 17RP 300-01, 318-19, 324, 337, 567, 660-62, 667. A second camera bag contained small plastic bags and a substance that tested positive for heroin. 17RP 302, 318-19, 330, 337,

669-70. Also found inside the bank bag was a pipe, butane torch, 30 pills that tested positive for alprazolam, and 67 pills that tested positive for clonazepam. 17RP 337, 566-67, 576, 659, 662-64.

The black case contained a receipt from April 2012 and purchase and bill of sale receipts with Sassen-Vanelsloo's name on them. 17RP 304-05, 340, 348-49. Envelopes addressed to Sassen-Vanelsloo were found inside a green satchel. 17RP 577. One of the envelopes had a return mailing address for Nick Turner. 17RP 342, 634-35. The black case also contained Walgreen receipts for four prepaid cell phones purchased on August 25, 2012. 17RP 305. None of the Walgreen receipts contained Sassen-Vanelsloo's name. 17RP 340.

Behind the driver seat of the Kia was a locked safe. 17RP 308-09, 341, 569-70. The safe contained several items, including a box with gold jewelry and 20 one dollar bills inside. 17RP 310-11, 330, 341. The safe also contained an Ipad with the name Rudy Peralez inscribed on it, title for a 1990 Lincoln Town Car registered to Steve and Linda Street, a .38 revolver with four bullets in the cylinder, and a .22 pistol with a magazine containing five bullets. 17RP 310-15, 330, 341-43, 570-72, 634-35. Six .22 ammunition rounds and a sock containing eight 12-gauge shotgun shells were found in a gun case on the floor behind the driver's seat of the Kia. 17RP 303, 317, 322, 572, 575.

DNA testing was done on .38 revolver, .22 pistol, and 12-gauge shotgun. 17RP 356, 359, 362-63, 365. The revolver contained DNA from four different people, including at least one male. Sassen-Vanelsloo could neither be included nor excluded as a contributor to the DNA found on the revolver. 17RP 362-64. The pistol contained DNA from three different people, including at least one male. Sassen-Vanelsloo's DNA had a statistical match of approximately 1 in 2,100 to the male DNA found on the pistol. 17RP 365-67. The shotgun contained DNA from three different people, including at least one male. Sassen-Vanelsloo's DNA had a statistical match of approximately 1 in 170 million to the partial male DNA found on the shotgun. 17RP 359-60. No fingerprints were obtained from any of the guns. 17RP 250.

A blonde wig was found in the center of the rear passenger seat of the Kia. 17RP 295, 307-08, 567-68. No DNA testing was done on the wig. 17RP 343. Seven cell phones were found in the Kia, including four in the center console area. 17RP 331, 568-69, 646. One phone received eight incoming text messages on September 6, 2012 from a number belonging to Seth Alexander that referred to "Athena" in a disparaging manner. 17RP 406-08, 426-30. Sassen-Vanelsloo's name was not present anywhere in that phone. 17RP 432. A second phone contained an incoming text message from July 13, 2012 that said "Hey Adrian." 17RP

430-32, 436-37. A third phone referred to someone named "Preston," and mentioned buying "black." 17RP 433.

Police had no contact with Sassen-Vanelsloo on the day of the incident, or for several months afterward. 17RP 573-74. In December 2012 however, Leake stopped Sassen-Vanelsloo while he was driving a 1990 Lincoln Town Car. The VIN number of the town car matched the town car title that was found inside the Kia. 17RP 236-37, 240-43, 573-74. Police found a wig and stocking cap in the town car. 17RP 217-18, 223, 238-39. Sassen-Vanelsloo was not wearing a wig when contacted by Leake that day. 17RP 243.

During the December 2012 contact, Leake described the September incident to Sassen-Vanelsloo. 17RP 574-75. Leake told Sassen-Vanelsloo that he was the motorcycle officer who chased the Kia on September 7. Sassen-Vanelsloo responded that he had heard it was a 19-year-old man who was driving the Kia, "but you and I know who was driving." 17RP 575. Leake told Sassen-Vanelsloo that he knew he had been driving the Kia. 17RP 575.

Aardema's explanation of the incident was mostly consistent with Leake's description. 17RP 80-95, 117-20, 133-34, 137. Aardema said that Sassen-Vanelsloo was wearing a wig at the time of the incident. 17RP 86-87, 106-07, 118, 129. Aardema was addicted to

methamphetamine and heroin at the time of the incident. 17RP 101, 112. In fact, Aardema had used heroin on the day of the incident. 17RP 112. Aardema acknowledged that her drug use had caused her to have memory problems about the incident. 17RP 140-41.

Aardema testified that Sassen-Vanelsloo was the driver of the Kia during the incident. 17RP 81-84, 99, 104, 117-19, 139. In exchange for her testimony, the Whatcom Prosecutor's Office agreed to a stipulated order of continuance for several of her pending drug possession charges. 17RP 114-16, 142, 149-51.

Aardema started dating Sassen-Vanelsloo in April 2012. 17RP 77-78. Both Aardema and Sassen-Vanelsloo sold methamphetamine and heroin. 17RP 106. On prior occasions Sassen-Vanelsloo had kept the drugs in a safe in the car. 17RP 105, 440-41, 447. Aardema was uncertain whether there was a safe in the Kia that morning. 17RP 105. According to Aardema, Sassen-Vanelsloo also kept a revolver and electronic items that he received in exchange for drugs in the safe. 17RP 440, 444, 447. Aardema did not recognize the other guns found in the Kia. She had never seen Sassen-Vanelsloo bring a shotgun into any car he was driving. 17RP 441-43.

Aardema spoke with Sassen-Vanelsloo while he was in jail through letters and telephone calls. 17RP 444-46, 452, 459-61, 473.

Some of the letters asked Aardema to contact other potential witnesses. 17RP 454-56. Aardema believed some of the letters conveyed Sassen-Vanelsloo's expectation that Aardema would corroborate his account of the incident. 17RP 446, 465-66. Aardema admitted however, that Sassen-Vanelsloo never "outright ask[ed] me to lie for him[.]" 17RP 446, 465-66. Aardema disclosed the letters to the prosecutor's office. 17RP 447-48. Aardema explained that she left the State of Washington for several months because she feared Sassen-Vanelsloo. 17RP 154-56, 480-85, 492.

Several other witnesses' testimony contradicted Aardema's account of the incident. Seth Alexander testified that Sassen-Vanelsloo called him in September 2012 and asked him to pick him up at Cornwall park. 17RP 195-96, 205. Sassen-Vanelsloo explained that he and Aardema had been arguing so he got out of the car as a result. 17RP 196-98. Alexander had picked up Sassen-Vanelsoo before under similar circumstances. 17RP 204-05. Alexander denied that Sassen-Vanelsloo was out of breath on this particular day. 17RP 203-04. Sassen-Vanelsloo was not wearing a wig. 17RP 197, 201. Sassen-Vanelsloo was not in a hurry and stayed with Alexander at his house for about 20 minutes until Sassen-Vanelsloo's friend "Matt" came and picked him up. 17RP 197-200, 206. Alexander did not recall Sassen-Vanelsloo ever driving a black SUV. 17RP 200.

Sharon Burton had cataract surgery the day of incident. 17RP 775. When she arrived home between 9:30 and 10:30 a.m., her son Matt Burton, and Sassen-Vanelsloo were at the house. 17RP 776-78, 799-801, 810-12, 881-83. Aardema was not at the house. 17RP 779. Sassen-Vanelsloo remained at the house until late into the evening. 17RP 780-81, 816, 823. Burton noted it was about a 45 minute drive from her house to the courthouse. She did not believe that Sassen-Vanelsloo could have left the house and returned without her knowing. 17RP 776-77, 782, 789.

Burton did not see a black Kia Sorrento at her house that day, or on any other occasion. 17RP 781, 793. Burton did notice that a white Volvo and blue Lincoln Town Car that were sometimes kept at her house had been moved that day. Burton was concerned that her son, who did not have a license, was driving the cars. 17RP 778, 822, 882-83. Burton knew that the Volvo belonged to Aardema. 17RP 803, 810. Sassen-Vanelsloo was trying to sell the town car. 17RP 793, 810, 813.

Sassen-Vanelsloo received a telephone call around noon that upset him. Burton believed Sassen-Vanelsloo was talking to Aardema. 17RP 780, 806. When Burton learned about the allegations involving Sassen-Vanelsloo she told him he was no longer welcome at her house. 17RP 795, 807.

Defense investigator Cheri Mulligan interviewed Nathaniel Huckaby in May 2013.[5] 17RP 867-68, 884. Huckaby was a friend of Sassen-Vanelsloo's and spent the night of September 6 with him and Aardema at a hotel in Burlington. The next morning Huckaby drove Aardema to district court in a black SUV. 17RP 870-71, 887. Huckaby believed the car belonged to Hardenbrook. 17RP 887.

Huckaby saw a motorcycle officer while driving Aardema from court to her father's house. 17RP 872. Huckaby was high at the time, driving without a license, and had made an illegal right turn at a red light. 17RP 872-73, 885. As a result, Huckaby drove quickly to get away from the officer. 17RP 872. He drove about two blocks before turning onto Cornwall Street and jumping out of the car. Huckaby ran for about 20 minutes before calling someone to come pick him up. 17RP 872-74, 886-87. He denied calling Aardema. Huckaby was wearing jeans, a white jacket, and a blonde wig on the day of the incident. 17RP 873.

3. Juror Dismissal.

After Burton's testimony, Juror 12 informed the bailiff that she knew Burton "slightly" from her work with one of Juror 12's family

[5] Because Huckaby invoked his 5th Amendment right at trial, the trial court admitted Huckaby's statements to Mulligan as a statement against penal interest under ER 804(b)(3). 17RP 843-52.

members. 17RP 852-53. Juror 12 told the bailiff she did not know Burton well and that "her knowledge of Ms. Burton would not affect her assessment of the testimony in any way." 17RP 853.

At the State's urging, the trial court brought Juror 12 into the courtroom for questioning. 17RP 853. Juror 12 explained that she recognized Burton during her testimony because of Burton's involvement with the Lummi Business Council. Burton had helped facilitate an intervention and treatment for Juror 12's nephew's substance abuse issues. Juror 12 had met with Burton twice about two years previously. She had not seen Burton since and did not socialize with her. 17RP 854-56.

Juror 12 explained that she had not personally participated in the intervention with her nephew. 17RP 857. The State questioned Juror 12 as to whether her interaction with Burton was a positive experience. Juror 12 responded, "Do I believe she was a positive person for him? I can't say that because I think what was more positive for my nephew is when he finally went to treatment." 17RP 857. The State pressed Juror 12 further on whether her interaction with Burton was a positive experience. Juror 12 replied, "I am not really sure. I can't say that because I've worked with, you know, she was only the first CARE program in Washington and I know the director of the CARE program." 17RP 857-58.

The State then asked Juror 12 whether her contact with Burton was a negative experience. The following exchange occurred:

Juror 12:	No, there was no good or bad, it was just all, you know, normal as it would be trying to get the help I wanted for my family member.
Prosecutor:	Well, you're pretty, it sounds to me like your nephew did get the help he needed?
Juror 12:	Yes.
Prosecutor:	You're pretty happy about that?
Juror 12:	Yes.
Prosecutor:	So that's kind of a positive thing or a positive felling that you're having about Ms. Burton; is that right?
Juror 12:	Well it's not Ms. Burton, it's my nephew I'm more positive with. She wasn't inter-reacting with my nephew while he was gone or when he came back. It's more what he did for himself.
Prosecutor:	I understand that, but it sounds like you kind of intellectualized it. I mean you're talking about, I mean you had a pretty good feeling, you must have a pretty good feeling about Ms. Burton and how she helped you; isn't that fair?
Juror 12:	I guess. It's not, I wouldn't call it from her. I'd call it from our own community for the help so that's what your tribe is for is to try and help so that's what your tribe is for is to try to help the funds with our community people that need the assistance.
Prosecutor:	What do you think about me cross-examining her, is that something that concerned you?

Juror 12:	No, I just brought it up that I think I knew her. I don't socialize with her or anything. I just kind of recognize her. I don't know her by name, or first name.
Prosecutor:	Okay.
Juror 12:	I can tell you that if I was to see her again out on the road I probably won't remember her again any way.

17RP 858-59.

After questioning the State sought to excuse Juror 12. The State argued that Burton was a critical alibi witness and if the jury were to believe Burton, "that means my case goes nowhere." 17RP 860. The State maintained that Burton "had some good feelings," about what Burton or the community had done for her family. 17RP 860. The State acknowledged it could not "absolutely put a finger on that she [Juror 12] can't be fair[,]" but that Juror 12's continued service as a juror "just didn't feel fair." 17RP 860.

Defense counsel objected to the excusal of Juror 12. Counsel noted that Juror 12's interaction with Burton was minimal. Juror 12 did not indicate her limited interaction with Burton was necessarily a positive experience. Counsel argued that Juror 12 did not indicate she could not be fair nor had "any feeling one way or another." 17RP 860-61.

The trial court acknowledged it was a "close case," but concluded that Juror 12 should be excused. The trial court explained, "Counsel

points out correctly that Ms. Burton is a critical witness and even though there is not a real strong relationship between the juror and the witness I think given the importance of the witness's role in the case it's appropriate for Juror 12 to be excused[.]" 17RP 861-62.

4. Insufficient Firearm Enhancements.

After the State rested, Sassen-Vanelsloo brought a motion to dismiss each of the five firearm enhancements for insufficient evidence. 17RP 734, 738-40. Defense counsel noted that Sassen-Vanelsloo was only in constructive possession of the shotgun which was not within reach of the driver of the Kia. 17RP 739.

Citing State v. O'Neal, 159 Wn.2d 500, 150 P.3d 1121 (2007), the State argued that the shotgun was part of a continuing criminal enterprise. 17RP 742, 746. The State maintained the shotgun could be used to protect the drugs because it was easily accessible from the back hatch of the Kia and could be made operational by racking a round from the magazine. 17RP 744-46.

Relying on O'Neal, the trial court concluded there was sufficient evidence to analogize Sassen-Vanelsloo's charges to a continuing operation of selling drugs. The trial court explained, "I think that there is sufficient evidence that there was an ongoing sale of drugs and that the

shotgun, although it was not immediately accessible, was immediately accessible at other points during that continuing operation." 17RP 748.

Defense counsel later renewed the motion to dismiss the firearm enhancements, arguing that there was not a sufficient nexus. 17RP 967-68. Counsel noted that Aardema testified she had never seen the shotgun in the Kia and did not know it was there. Aardema also provided no testimony that Sassen-Vanelsloo ever sold drugs while armed with a firearm. 17RP 968. Counsel noted that according to Aardema's testimony she and Sassen-Vanelsloo were on their way back from court, and not out dealing drugs, on the day of the incident. 17RP 969.

The State maintained that the evidence was sufficient to allow the jury to conclude that possession of the shotgun was part of a continuing criminal enterprise. 17RP 968-69. The trial court upheld its prior ruling denying the defense motion to dismiss. 17RP 969-70.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT GRANTED THE STATE'S MOTION TO EXCUSE JUROR 12.

Dismissal of a sitting juror is limited by statute:

> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention, or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.110.

Actual bias is "the existence of a state of mind on the part of the juror in reference ... to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). Actual bias must be established by proof. State v. Noltie, 116 Wn.2d 831, 838, 809 P.2d 190 (1991). The challenging party must prove that the challenged juror has formed or expressed an opinion which would prevent him or her from trying the case impartially. RCW 4.44.190. The opinion itself is insufficient to sustain the challenge unless the trial court is satisfied, from all the circumstances, that the juror cannot disregard the opinion in order to try the case fairly and impartially. RCW 4.44.190.

A court's decision to remove a juror is reviewed for abuse of discretion. State v. Jorden, 103 Wn. App. 221, 226, 11 P.3d 866 (2000), rev. denied, 143 Wn.2d 1015 (2001). A court abuses its discretion when its decision rests on facts unsupported by the record. State v. Depaz, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). While there is no mandatory procedure for investigating accusations of juror unfitness, a chosen method that fails to produce an adequate and balanced investigation will not suffice. See State v. Elmore, 155 Wn.2d 758, 774-75, 781, 123 P.3d

72 (2005) (court erroneously employed wrong standard and based decision on "very limited evidence"); Jorden, 103 Wn. App. at 229 (no "mandatory format" for trial courts).

Here, at the State's urging, the trial court dismissed juror 12, explaining, "counsel points out correctly that Ms. Burton is a critical witness and even though there is not a real strong relationship between the juror and the witness I think given the importance of the witness's role in the case it's appropriate for juror 12 to be excused so." 17RP 861-62.

Contrary to the court's ultimate conclusion that juror 12 was no longer fit to serve, her answers to repeated questioning show the contrary to be true. Juror 12 made clear that her passing contact with Burton two years previously was neither a positive or negative experience. Juror 12 was indifferent towards Burton. She denied that the State's cross-examination of Burton concerned her. Juror 12 made clear that if she saw Burton out in the community again, she likely would not recognize her. As defense counsel pointed out, Juror 12 did not state she could not be a fair juror, "or that she had any feeling one way or another." 17RP 861. Indeed, Juror 12 told the bailiff that "her knowledge of Ms. Burton would not affect her assessment of the testimony in any way." 17RP 853.

Courts have held that a seated juror is properly retained where that juror gave no indication they could not be fair or impartial. See Hough v.

Stockton, 152 Wn. App. 328, 340-41, 216 P.3d 1077 (2009) (trial court did not error by refusing to dismiss juror who wrote a note suggesting that Hough had mental or emotional problems and should be evaluated where note did not say that the juror could not be fair or impartial), rev. denied, 168 Wn.2d 1043 (2010). The converse must also be true; where as here, Juror 12 did not indicate that her passing contact with a witness would cause her to be unfair or impartial, she was improperly dismissed.

The trial court recognized that Juror 12's relationship with Burton was not "real strong" and therefore whether to dismiss Juror 12 was a "close case." 17RP 861. Even the prosecutor acknowledged he could not "absolutely put a finger on," whether Juror 12 could be fair and impartial. 17RP 860. Nonetheless, the trial court dismissed Juror 12 because Burton was a "critical witness." 17RP 861-62. But, even a juror's acquaintance with a party, by itself, is not grounds for disqualification. State v. Tingdale, 117 Wn.2d 595, 601, 817 P.2d 850 (1991) (citing Wise v. Commonwealth, 230 Va. 322, 337 S.E.2d 715 (1985) (social relationship between prosecutor and juror not grounds for disqualification), cert. denied, 475 U.S. 1112 (1986)). Because Juror 12 did not indicate she could not be fair and impartial, the trial court erred in dismissing her based solely on her prior passing contact with Burton.

The only remaining question is prejudice. There is no right to be tried by a particular juror. State v. Gentry, 125 Wn.2d 570, 615, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995). However, "reasonable and dispassionate minds may look at the same evidence and a reach a different result." State v. Irby, 170 Wn.2d 874, 886-87, 246 P.3d 796 (2011). In Irby, the Supreme Court concluded the State could not show beyond a reasonable doubt that removal of several potential jurors in Irby's absence had no effect on the verdict. Id. The same is true here. The State cannot show that Juror 12's dismissal had no effect on the verdict. The trial court improperly dismissed a qualified juror. Sassen-Vanelsloo's convictions should be reversed.

2. INSUFFICIENT EVIDENCE SUPPORTS EACH OF THE FIVE FIREARM ENHANCEMENTS BECAUSE THE STATE FAILED TO PROVE THE SHOTGUN WAS OPERABLE

Insufficient evidence supports each of the five firearm enhancements because the State failed to prove the shotgun that was the basis of the firearm enhancements was operable.

Due process under the Fourteenth Amendment of the United States Constitution requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P.

3d 559 (2005). Evidence is insufficient to support a conviction unless viewed in the light most favorable to the State, any rational trier of fact could find each essential element of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992). In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

"[T]o prove a firearm enhancement, the State must introduce facts upon which the jury could find beyond a reasonable doubt the weapon in question falls under the definition of a 'firearm': 'a weapon or device from which a projectile may be fired by an explosive such as gunpowder.'" State v. Pierce, 155 Wn. App. 701, 714, 230 P.3d 237 (quoting State v. Recuenco, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008) (quoting 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 2.10.01 (Suppl. 2005)). The State must present the jury with sufficient evidence to find a firearm operable under this definition. Recuenco, 163 Wn.2d at 437 (citing State v. Pam, 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), overruled in part on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988)). see, Pierce, 155 Wn. App. at 714 n. 11 (where the firearm is not presented as evidence, there must be "other evidence of operability, such as bullets found, gunshots heard, or muzzle flashes.").

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

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

Here the State failed to prove that the shotgun found in the cargo hold of the KIA was operable. Police identified the gun as a "Mossberg Pistol Grip Pump Action 12-gauge shotgun." 17RP 562. Officer Leake opined the shotgun was a "real authentic firearm capable of firing." 17RP 568. Officer Vodopich testified the shotgun "appear[ed]" to be functional.

17RP 316. In the magazine was a single cartridge. 17RP 563. Eight 12-gauge shells were found in the locked safe. 17RP 322. There was no evidence however, that the gun had ever been fired. None of the witnesses described any tell-tale characteristics of an operable firearm, such as spent bullets, gunshots, or muzzle flashes. Pierce, 155 Wn. App. at 714 n.11.

Given the evidence presented, a finding the gun was operable necessarily rests on speculation. There was insufficient evidence to show the shotgun was a firearm because there was no evidence the gun was operable. Sassen-Vanelsloo's firearm enhancements should be vacated.

3. THE STATE FAILED TO PROVE SASSEN-VANELSLOO WAS ARMED WITH A FIREARM FOR EACH OF THE FIVE SENTENCE ENHANCEMENTS IMPOSED.

Defendants "armed" with a deadly weapon or firearm at the time of the commission of their crimes receive an enhancement to their standard range sentence. RCW 9.94A.825; RCW 9.94A.533(3), (4). "A person is 'armed' if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes." State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993)). "But a person is not armed merely by virtue of owning or even possessing a weapon; there must be some nexus between the defendant, the weapon, and the crime." State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.2d 116 (2007). Mere proximity or

constructive possession is insufficient to show that a defendant was armed at the time the crime was committed. State v. Gurske, 115 Wn.2d 134, 138, 118 P.3d 333 (2005).

To apply the nexus requirement, this Court examines the "nature of the crime, the type of weapon, and the circumstances under which the weapon is found." State v. Schelin, 147 Wn.2d 562, 570, 55 P.3d 632 (2002). Although the State need not establish "with mathematical precision the specific time and place that a weapon was readily available and easily accessible," State v. O'Neal, 159 Wn.2d 500, 504-05, 150 P.3d 1121 (2007), it must establish the required nexus between the defendant and the weapon by presenting evidence that the weapon was easily accessible and readily available at the time of the crime. Id. at 504.

Courts are particularly careful when reviewing a challenge to a firearm enhancement because of the constitutional right to bear arms. Eckenrode, 159 Wn.2d at 493. Whether a person is armed is a mixed question of law and fact that this Court reviews de novo. State v. Ague-Masters, 138 Wn. App. 86, 102, 156 P.3d 265 (2007). This Court reviews a jury's special verdict that a defendant was armed to determine whether any rational trier of fact could so find. Eckenrode, 159 Wn.2d at 494. A claim that the evidence is insufficient admits the truth of the State's

evidence and all reasonable inferences drawn from that evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Here, each of the five firearm enhancements was based on Sassen-Vanelsloo's alleged possession of the Mossberg 12-gauge shotgun. CP 3-5; 17RP 743-44, 746-47, 1004-05. The shotgun was found in the "rear cargo area" of the Kia underneath other items on the floor. 17RP 315, 337, 562. The red backpack was one foot from the barrel of the shotgun. 17RP 296, 316-17, 565-66. Someone in the back seat of the Kia could reach the shotgun. 17RP 563. The backpack however, was "beyond the reach of the driver in the driver's seat." 17RP 337. Based on these facts the State failed to show that the shotgun, which was out of reach of the driver, was easily accessible and readily available. State v. Mills[6] and Gurske are instructive in this regard.

Mills was arrested near his home, and while in custody, officers found a motel key Mills had tried to hide in the police car. During a search of the motel room, police found methamphetamine and a pistol in a pouch lying next to the drugs. Mills, 80 Wn. App. at 233. Mills was charged with possessing methamphetamine with intent to deliver while being armed with a deadly weapon. Id. at 232. Mills admitted he was in constructive possession of the pistol lying next to the drugs. Id. at 234.

[6] 80 Wn. App. 231, 907 P.2d 316 (1995).

The Court of Appeals reversed the deadly weapon enhancement. Although it found a nexus between the weapon and the drugs, the required nexus between the defendant and the weapon was not present; there was no physical proximity to the weapon at a time when availability for use for offensive or defensive purposes was critical. Mills, 80 Wn. App. at 236-37.

Gurske was stopped for making an illegal turn and then arrested for driving with a suspended license. Police handcuffed Gurske, searched him, and placed him in the back of his patrol car. Gurske, 155 Wn.2d at 136. Officers conducted an inventory search before impounding Gurske's truck. One of the officers pulled the front seat forward and saw a backpack behind the driver's seat. The pack was within arm's reach of the driver's position, but removable only by either getting out of the truck or moving into the passenger seat. The officer unzipped the main portion of the backpack and saw a torch. Under the torch was a holster containing an unloaded pistol. A fully loaded magazine for the pistol was also found in the backpack. After removing the backpack from the truck, the officer found three grams of methamphetamine inside. Id.

The Court observed that use for offensive or defensive purposes could be to facilitate commission of the crime, escape, protect contraband, or prevent investigation, discovery, or apprehension by the police.

Gurske, 155 Wn.2d at 139. The Court found the evidence did not show whether Gurske could unzip the backpack, remove the torch, and remove the pistol from the driver's seat where he was sitting when he was stopped by police. Nor was there evidence that Gurske moved toward the backpack. Finally, there was no evidence Gurske had used or had easy access to use the weapon against another person when he acquired or was in possession of the methamphetamine. Gurske, 155 Wn.2d at 143. The Supreme Court concluded there was insufficient evidence to show that the firearm was easily accessible and readily available for use because Gurske would have had to exit the vehicle or move into the passenger seat to reach the gun. Id.

As in Mills and Gurske, Sassen-Vanelsloo constructively possessed the shotgun found inside the cargo hold of the Kia. Like Mills and Gurske, there was no physical proximity between Sassen-Vanelsloo and the shotgun when availability for use for offensive or defensive purposes was critical. Significantly, as in Gurske, here Sassen-Vanelsloo would have had to exit the Kia or move into the rear seat to reach the shotgun. Thus, the State failed to prove that Sassen-Vanelsloo was armed with the shotgun at the time of the commission of the crimes. Compare, State v. Sabala, 44 Wn. App. 444, 445, 448, 723 P.2d 5 (1986) (driver was

"armed" where the loaded handgun lay beneath the driver's seat with the grip easily accessible to the driver).

Despite Sassen-Vanelsloo's inability to easily access the shotgun, the trial court denied his motion to dismiss finding that his possession of the shotgun was part of a continuing crime to sell the clonazepam, alprazolem, and heroin. 17RP 748, 969-70. When a crime is continuing crime, a nexus exists if the gun is "there to be used." Gurske, 155 Wn.2d at 138. This potential use may be offensive or defensive and may be to facilitate the crime's commission, to escape the scene, or to protect contraband. Id. at 139. The nexus requires more than just the weapon's presence at the crime scene, however. Id. at 138. Whether a defendant is armed is a fact specific decision. Id. at 139.

A careful comparison of cases in which courts have found a sufficient nexus between a firearm and its use to protect a continuing crime of possession, distribution, or manufacture of drugs, demonstrates why the present situation is different. In Schelin, police found a loaded revolver stored in a holster hanging from a nail on a wall in the basement of a house. Prior to his arrest, Schelin was standing no more than 10 feet from the revolver. The basement contained 120 marijuana plants, large amounts of harvested marijuana, dried marijuana leaves, scales, packaging materials, weapons, a militia handbook, $50,000 in gold coins, and cash.

Schelin admitted to living in the home, growing marijuana, and owning the gold, cash, and revolver. Schelin, 147 Wn.2d at 564.

In a four justice plurality opinion, the Court concluded that the jury was entitled to infer that Schelin was using the revolver to protect his marijuana grow. Schelin, 147 Wn.2d at 574. The Court found Schelin stood near the revolver when police entered his home and could "very well have exercised his apparent ability to protect the grow operation with a deadly weapon, to the detriment of the police." Schelin, 147 Wn.2d at 574-75. Significant to the Court's determination that Schelin was "armed" for purposes of a sentencing enhancement, was Schelin's own admission that the revolver was easily accessible and readily available. Schelin testified that the gun was used to protect his home from invasion by his wife's estranged ex-husband and that he kept the gun near his bedroom in the event the home was broken into at night. Schelin, 147 Wn.2d at 573-74.

In Eckenrode, the defendant called police, alerting them to an intruder in his house. He told the 911 operator he was armed and ready to shoot the intruder. Eckenrode, 159 Wn.2d at 491. Police arrived and swept the house, finding a loaded rifle, unloaded pistol, and evidence of a marijuana growing operation inside the home. Police arrested Eckenrode in his front yard, "far from his weapons." Eckenrode, 159 Wn.2d at 492,

The Court concluded there was sufficient evidence to uphold the jury's determination that a weapon was easily accessible and readily available because Eckenrode himself told the 911 operator that he had a loaded gun in his hand and was prepared to shot the intruder. Eckenrode, 159 Wn.2d at 494. The Court also found sufficient evidence of a connection between Eckenrode, the weapon, and his drug manufacturing operation. The Court noted the rifle was loaded and Eckenrode also had a police scanner, "which together with his manufacturing operation raises the inference that he was monitoring police activity against the chance he might be raided." Id. at 494-95.

In O'Neal, police searched a house. 159 Wn.2d at 502. In addition to evidence of methamphetamine manufacturing, police found over 20 guns, body armor, night vision goggles, and a police scanner inside the house. Most of guns were found in two gun safes, one locked and the other unlocked. A loaded AR–15 was found in one bedroom and a loaded pistol was found under a mattress in a different bedroom where one of O'Neal's co-defendants slept. O'Neal, 159 Wn.2d at 503.

The Court concluded there was sufficient evidence for a jury to find that deadly weapons were easily accessible and readily available to defendants, and that there was a connection between the weapons, the crimes, and the defendants. O'Neal, 159 Wn.2d at 505-06. The Court

focused on the fact that O'Neal's accomplice testified the loaded pistol was under his mattress because "[i]f I needed it, it was there." O'Neal, 159 Wn.2d at 505. There was also evidence that the AR-15 was readily accessible to the co-defendant who pleaded guilty to manufacturing methamphetamine. The co-defendant also testified that he had been helping the O'Neals' manufacture drugs for several months and had stood watch during critical points during the methamphetamine production. O'Neal, 159 Wn.2d at 506. Based on this evidence, the Court concluded a jury could infer the guns were readily available and easily accessible to one or more of the accomplices to protect the drug manufacturing operation. Id.

Finally, in State v Neff, 163 Wn.2d 453, 181 P.3d 819 (2008), police investigated an ammonia odor coming from Neff's house. Neff accompanied the officer as he walked around the house and unattached garage. Neff, 163 Wn.2d at 456. Neff held the keys to the garage. Neff, 163 Wn.2d at 464. In the garage, the officer observed a methamphetamine manufacturing laboratory and a marijuana growing operation. Officers also found two loaded revolvers in a locked safe under a desk on the garage's wall. A third loaded pistol was found hanging from the garage rafters. Police also found two surveillance cameras covering the yard and

driveway, and a monitor in the garage on which the feed from the cameras could be viewed. Neff, 163 Wn.2d at 457, 464.

The Court concluded the trial judge was allowed to infer from the security cameras that Neff used the guns to protect his drug operation. Neff, 163 Wn.2d at 464. Because the record was silent as to whether Neff could reach the pistol hanging from the rafters, the Court construed that fact in the State's favor. Id.

In each of these cases, the Court was presented with specific facts, including, defendant admissions, police monitoring equipment, and proximity of the defendant to an easily accessible and readily available gun, which allowed the Court to infer that the defendants were using the guns to protect contraband as part of a continuing crime. No such facts exist here.

First, as described above, Sassen-Vanelsloo was not arrested at the scene and would not have been able to access the shotgun as the driver of the Kia. There was no evidence that Sassen-Vanelsloo ever indicated an intent to use the shotgun to protect the possession or distribution of the drugs. Indeed, Aardema testified that she had never witnessed Sassen-Vanelsloo use the shotgun or take it into any car. 17RP 441-42. Rather, Aardema had only ever seen the shotgun inside of the shop owned by Alex

Martinez. 17RP 442-43. There was also no police or surveillance monitoring equipment found in the Kia.

This case is more analogous to this Court's decision in State v. Johnson, 94 Wn. App. 882, 974 P.2d 855 (1999), rev. denied, 139 Wn.2d 1028 (2000). Police obtained a search warrant for Johnson's apartment. When police entered the apartment they saw Johnson running toward the bathroom and his roommate, Washington, running toward the bedroom. Police saw Washington throw a plate containing heroin residue out the window. Police found heroin, several thousand dollars, and jewelry inside a safe. Johnson, 94 Wn. App. at 887, 891-92.

Police handcuffed Johnson and took him into the living room where they asked if he had any weapons inside the apartment. Johnson replied there was a loaded handgun inside a cabinet that was five to six feet away from him. Johnson, 94 Wn. App. at 887-88, 892. On the basis of this information, the State included a deadly weapon sentence enhancement in its charge. Id.

This Court concluded that because Johnson was handcuffed and the gun outside his reach, and therefore not easily accessible, the required nexus between the crime and the gun was absent. Johnson, 94 Wn. App. at 894, 896-97. Accordingly, this Court reversed the deadly weapon sentence enhancement. Id. at 897.

As in Johnson, here the "mere presence" of the shotgun at the crime scene, and Sassen-Vanelsloo's constructive possession alone is not enough to show he was armed. State v. Brown, 162 Wn.2d 422, 431, 173 P.3d 245 (2007). The State failed to prove sufficient evidence to show that the shotgun was easily accessible and readily available to Sassen-Vanelsloo. There is likewise insufficient evidence to establish a nexus between Sassen-Vanelsloo's constructive possessions of the shotgun and the drugs because cases involving a continuing crime are factually distinguishable from the present situation. The jury's five firearm enhancements findings should be reversed, and Sassen-Vanelsloo's firearm enhancements totaling 144 months should be stricken.

4. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN FAILING TO CONSIDER SASSEN-VANELSLOO'S CURRENT AND FUTURE ABILITY TO PAY BEFORE IMPOSING LEGAL FINANCIAL OBLIGATIONS.

Trial courts may order payment of LFOs as part of a sentence. RCW 9.94A.760. However, RCW 10.01.160(3) forbids imposing LFOs unless "the defendant is or will be able to pay them." In determining LFOs, courts "shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

The trial court imposed three mandatory LFOs: $500 victim assessment, $200 criminal filing fee, and a $100 DNA database fee. CP 103-05; State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). But the other $4,250 imposed for court appointed attorney fees ($3000), jury demand fees ($250), drug enforcement fund ($1,000), and crime lab fees ($100) are not mandatory. The court has the discretion not to impose lab work fees and a jury demand fee. Lundy, 176 Wn. App. at 107 (jury demand fee is discretionary); RCW 36.18.016(3)(b) (court *may* require a defendant to pay jury demand fee) (emphasis added); RCW 43.43.690 (court may suspend payment of all or part of a crime lab fee if it finds that the person does not have the ability to pay the fee). Similarly, court costs are discretionary. RCW 10.01.160(1), (2); State v. Smits, 152 Wn. App. 514, 521-22, 216 P.3d 1097 (2009) (recognizing courts costs are discretionary).

The trial court failed to make an individualized inquiry into Sassen-Vanelsloo's present and future ability to pay before it imposed these discretionary LFOs. Sassen-Vanelsloo qualified as indigent, reporting no income and no assets. Supp. CP ___ (sub no. 109, Motion and Affidavit for Order of Indigency, dated 10/1/14, at 2). In failing to make an individualized inquiry, the court exceeded its statutory authority, and the discretionary LFO order should be vacated.

The Washington Supreme Court recently recognized the "problematic consequences" LFOs inflict on indigent criminal defendants. State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). LFOs accrue at a 12 percent interest rate so that even those "who pay[] $25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed." Id. This, in turn, "means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs." Id. at 836-37. "The court's long-term involvement in defendants' lives inhibits reentry" and "these reentry difficulties increase the chances of recidivism." Id. at 837.

The Blazina court thus held that RCW 10.01.160(3) requires trial courts to first consider an individual's current and future ability to pay before imposing discretionary LFOs. Id. at 837-39. This requirement "means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." Id. at 838. Instead, the "record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." Id. The court should consider such factors as length of incarceration and other debts, including restitution. Id.

The Blazina court further directed courts to look to GR 34 for guidance. Id. at 838. This rule allows a person to obtain a waiver of filing fees based on indigent status. Id. For example, courts must find a person indigent if he or she receives assistance from a needs-based program such as social security or food stamps. Id. If the individual qualifies as indigent, then "courts should seriously question that person's ability to pay LFOs." Id. at 839. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. at 834.

At sentencing, the court failed to make any individualized inquiry into Sassen-Vanelsloo's current or future ability to pay $4,250 in discretionary LFOs. Indeed, as previously noted, the section of the judgment indicating Sassen-Vanelsloo has "the present means to pay costs of incarceration," was not checked. CP 103. Blazina holds this is insufficient to justify discretionary LFOs. 182 Wn.2d at 838. This court should accordingly vacate the LFO order and remand for resentencing. Id. at 839.

The State may ask this court to decline review of the erroneous LFO order. The Blazina court held that the Court of Appeals "properly exercised its discretion to decline review" under RAP 2.5(a). 182 Wn.2d at 834. The court nevertheless concluded that "[n]ational and local cries

for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." Id. Asking this court to decline review would essentially ask this court to ignore the serious consequences of LFOs. This court should instead confront the issue head on by vacating Sassen-Vanelsloo's discretionary LFOs and remanding for resentencing. Compare State v. Diaz-Farias, ___ Wn. App. ___, 362 P.3d 322, 2015 WL 7734279 (No. 32583-1-II, filed December 1, 2015), *4 (recognizing judicial economy favored remanding all LFO issues to the sentencing court to engage in the individualized inquiry into the defendant's current and future ability to pay that is required by RCW 10.01.160(3)) ; State v. Clark, ___ Wn. App. ___, 362 P.3d 309, 2015 WL 7354717 (No. 32928-3-III, filed November 19, 2015), *4 (declining to review discretionary LFOs for first time on appeal where the "understated LFO discussion was by design"); State v. Munoz-Rivera, 190 Wn. App. 870, 894-95, 361 P.3d 182 (2015) (declining to exercise discretion to review whether discretionary LFOs were properly imposed and instead remanding issue to the trial court for it to make an adequate inquiry as discussed above); State v. Lyle, 188 Wn. App. 848, 852, 355 P.3d 327 (2015) (declining to review discretionary LFOs for first time on appeal).

5. SASSEN-VANELSLOO's COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO OBJECT TO THE IMPOSITION OF ALL DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

Every accused person enjoys the right to effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Ineffective assistance claims are reviewed de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when there is a reasonable probability the outcome would have been different had the representation been adequate. Id. at 705-06.

Counsel's failure to object to all discretionary LFOs fell below the standard expected for effective representation. There was no reasonable strategy for not requesting the trial court comply with the requirements of RCW 10.01.160(3) regarding all discretionary financial liabilities. See,

e.g., State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009) (counsel was deficient for failing to recognize and cite appropriate case law).

Counsel's failure in this regard constitutes deficient performance. Lyle, is instructive in this regard. During sentencing, Lyle presented some evidence of his financial situation, alleged disabilities, and prior work history. Lyle, 188 Wn. App. at 850-51. The trial court imposed LFO's but did not consider on the record, Lyle's ability or future ability to pay them. Lyle's judgment and sentence contained a written boilerplate finding indicating he had the ability or future ability to pay. Id.

On appeal, Lyle argued that his attorney was ineffective for failing to challenge the LFOs. This Court agreed that Lyle had arguably shown deficient performance since Lyle's sentencing hearing occurred after this Court's opinion in State v. Blazina, 174 Wn. App. 906, 301 P.3d 492 (2013), reversed and remanded by 182 Wn.2d 827, 344 P.3d 680 (2015). Thus, Lyle's "counsel should have been aware that to preserve any issue related to the LFOs he was required to object." Lyle, 188 Wn. App. at 853.

Like Lyle, Sassen-Vanelsloo's sentencing occurred after the Court of Appeals opinion in Blazina, and thus, trial counsel was deficient for failing to object and preserve the issue.

Counsel's failure to object to discretionary LFOs was also prejudicial. As discussed above, the hardships that can result from LFOs are numerous. Blazina, 182 Wn.2d at 835-37. Even without legal debt, those with criminal convictions have a difficult time securing stable housing and employment. LFOs exacerbate these difficulties and increase the chance of recidivism. Id. at 836-37. Furthermore, in a remission hearing to set aside LFOs, Sassen-Vanelsloo will bear the burden of proving manifest hardship, and he will have to do so without appointed counsel. RCW 10.01.160 (4); State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999).

Blazina demonstrates there is no strategic reason for failing to object. Sassen-Vanelsloo incurs no possible benefit from LFOs. Given his indigency (as established by undersigned counsel's appointment on appeal) there is a substantial likelihood the trial court would have waived discretionary LFOs had it properly considered Sassen-Vanelsloo's current and future ability to pay. Sassen-Vanelsloo's constitutional right to effective assistance of counsel was violated. Therefore, this court should

also vacate the LFO order and remand for resentencing on this alternative basis.

6. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Sassen-Vanelsloo to be "unable by reason of poverty to pay any of the expenses of appellate review," and therefore appointed appellate counsel at public expense. Supp. CP ___ (sub no. 110, Order Authorizing Appeal in Forma Pauperis, Appointment of Counsel, and Preparation of Record, dated 10/1/14). If Sassen-Vanelsloo does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. State v. Sinclair, II, __ Wn. App. __, __ P.3d __, 2016 WL 393719 *2 (slip op. filed January 27, 2016) (slip op. filed January 27, 2016) (recognizing it is appropriate for this court to consider appellate costs when the issue is raised in the appellant's brief). RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) Under RCW 10.73.160(1), this Court has ample discretion to deny the State's request for costs. State v. Sinclair, II, __ Wn. App. __, __ P.3d __, 2016 WL 393719 *4 (slip op. filed January 27, 2016).

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by

conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. Accordingly, Sassen-Vanelsloo's ability to pay must be determined before discretionary costs are imposed. As discussed in argument four, supra, here the trial court made no such finding. "The Rules of Appellate Procedure establish a presumption of continued indigency throughout review[.]" State v. Sinclair, II, __ Wn. App. __, __ P.3d __, 2016 WL 393719 *7 (slip op. filed January 27, 2016).

Without a basis to determine that Sassen-Vanelsloo has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

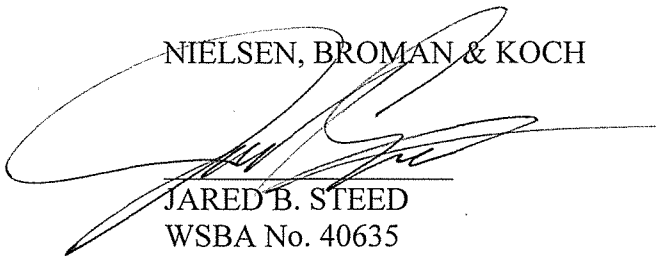
D. CONCLUSION

For the reasons discussed above, this Court should reverse Sassen-Vanelsloo's convictions and remand for a new trial. This court should also vacate the LFO order and remand for resentencing. Finally, this Court should exercise its discretion and deny appellate costs.

DATED this 9th day of February, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 72553-0-I
	)	
ADRIAN SASSEN VAN-ELSLOO,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

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

THAT ON THE 9TH DAY OF FEBRUARY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ADRIAN SASSEN VAN-ELSLOO
DOC NO. 837829
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF FEBRUARY 2016.

X Patrick Mayovsky