72553-0

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Court of Appeals
Division I
State of Washington

No. 72553-0-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

v.

ADRIAN SASSEN-VANELSLOO, Appellant.

BRIEF OF RESPONDENT

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B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court acted within its discretion pursuant to RCW § 2.36.110 and CrR 6.5, to dismiss a sitting juror mid-trial who disclosed she knew a material alibi witness for Sassen-VanElsloo, after that witness had testified because the witness had assisted the juror's family in getting a family member into much needed chemical dependency treatment, where the trial court determined in an abundance of caution after limited questioning regarding potential bias, that dismissing this juror and replacing the juror with an alternate juror, would ensure the parties obtained a fair trial by an impartial jury.

2. Whether looking at the evidence most favorable to the state, the evidence supports the firearm enhancements imposed in this case where testimony sufficiently demonstrated Sassen-VanElsloo was armed with a fully functional shotgun, readily accessible and available to him in the rear hatch area of the Kia Sassen-VanElsloo was driving, in the same location as a backpack that contained various controlled substances Sassen-VanElsloo possessed and was selling in an on going drug trade.

3. Whether this court should remand this matter back to the trial court for reconsideration of Sassen-VanElsloo's ability to pay legal financial obligations where the sentencing court failed to inquire into Sassen-Vanelsloo's ability to pay and Sassen-Vanelsloo's attorney failed to object to the imposition of LFO's.

C. FACTS

Substantive facts

On the morning of September 7, 2012, Officer Leake of the Bellingham Police Department observed a black Kia Sorrento SUV at an intersection in Bellingham that did not permit a driver to take a right on a red light. Leake noticed the driver had a shaved head and a dark complexion. 17 RP 584. After observing the Kia make an unlawful right hand turn, Leake followed and initiated a traffic stop. 17 RP 86-88. Instead of stopping, the Kia accelerated in an effort to elude Officer Leake. Id at 540. The Kia sped through a red light at the next intersection, blew through additional stop signs, causing other traffic at these intersections to take evasive action. 17 RP 540-542. The Kia driver, later identified as Sassen-VanElsloo, reached speeds upward of 70 m.p.h. in a 25 m.p.h. zone and almost lost control of the car when it hit speed bumps on one of the residential streets in the area. 17 RP 540-547.

When Officer Leake finally came upon the Kia, it was stopped mid-street, the driver's door was open, a cell phone lay in the street and a scared passenger remained seated in the passenger seat. 17 RP 547-551. This passenger was identified as Athena Aardema, was Sassen-VanElsloo's girlfriend at this time. 17 RP 78. Athena, who was scared spitless from Sassen-VanElsloo's driving and afraid to say who was really

driving, eventually named her boyfriend, Sassen-VanElsloo as the driver of the Kia. 17 RP 556.

Athena explained she was in court the morning of September 7, 2012 and Sassen-VanElsloo took her and picked her up because she didn't have a license. 17 RP 82-84. Sassen-VanElsloo had been driving the black Kia for approximately the past month or two prior to September 7, 2012, even though the vehicle had been rented by Wade Hardenbrook. 17 RP 78-79, 559, 711, 731. Athena's phone rang while she was talking to Officer Leake and while Leake could not hear the conversation, he could hear someone out of breath and Athena repeatedly telling the caller it was not a good time to talk. 17 RP 95, 553, 638.

A police track dog was brought in to locate the driver. 17 RP 686-7, 637. A dog search led officers near Wade Hardenbrook's apartment. 17 RP 733. Hardenbrook eventually informed investigators he let Sassen-VanElsloo borrow the Kia in exchange for Sassen-VanElsloo paying a rental bill. 17 RP 711-12, 717, 722, 732-34. Hardenbrook was not willing to write out a statement. Leake identified Sassen-VanElsloo and not Wade Hardenbrook as the driver who eluded him on September 7, 2012. 17 RP 889-90.

When Athena was free to leave the scene of the abandoned Kia, she requested to retrieve personal items from the Kia first. 17 RP 557.

When Leake opened the rear hatch of the Kia so Athena could retrieve a red backpack, he immediately noticed the backside of a pistol grip of a shotgun that was immediately accessible. Id at 558-9. Leake immediately impounded the car. Id.

A subsequent search of the Kia pursuant to a search warrant revealed a loaded pistol grip pump action 12 gauge shotgun in the hatch area of the Kia underneath a red backpack. 17 RP 315-16, 337, 562, 635. Leake, experienced and trained with firearms, testified the shotgun appeared to be in working order, was an authentic, fully functional firearm, capable of firing. 17 RP 316, 568. The shotgun's position, in the rear hatch area, while outside the reach of the driver, was readily accessible and ready for use, for anyone accessing the red backpack or the back area of the vehicle. 17 RP 563, 316-7, 565-66. Sassen-VanElsloo's DNA was recovered from the shotgun. Id at 254, 359-60.

In the red backpack, investigators found many items including a locked bank bag and a small black case with a latch. 17 Rp 297-98, 303, 306-07, 329, 337, 566-67. The bank bag was opened via a key found in the center console of the Kia. Id at 298-99, 566-67. Inside were camera bags and inside one of those bags was a digital scale, methamphetamine and five blue pills later identified as morphine. Id at 300-01, 318-19, 324, 337, 567, 660-62, 667. Another camera bag, found within the bank bag in

the red backpack, contained many small plastic bags of various sizes containing heroin. Id at 302, 318-19, 330, 337, 669-770. Also included in this camera bag was a pipe, a butane torch and 30 pills that tested positive for alprazolam and 67 pills that tested positive for clonazepam. Id 337, 566-67, 576, 569, 662-64. Investigators also found in the black latched container, receipts/bill of sales with Sassen-VanElsloo's name on them. 17 RP 3-4-5, 340, 348-49. In this same black box, investigators found receipts for multiple cell phones purchased in August of 2012. 17 RP 305.

In the backseat area of the Kia, investigators also found a locked safe that contained gold jewelry, a bindle of twenty $1.00 bills, an iPad, title for a 1990 Lincoln Town car, a .38 revolver loaded with four bullets and a .22 pistol with a magazine containing five bullets. 17 RP 310-15, 330, 341-43, 570-72, 634-35. Six more ammunition rounds and a sock containing eight 12-gauge shotgun shells were also found in a gun case on the floor behind the driver's seat of the Kia. 17 RP 303, 317, 322, 572, 575. A wig and seven 'burner' cell phones were also located within the Kia. Id at 295, 307-08, 331, 567-68, 646. At least one phone had text messages on it disparaging Athena, another one had a text that stated: "hey Adrian" and another mentioned a "Preston" and buying "black." 17 RP 433.

In December 2012, Sassen-VanElsloo, then driving the 1990 Lincoln Town car who's registration was found in the black Kia, was pulled over by Officer Leake. 17 RP 236-37, 240, 573-74. Leake told Sassen-VanElsoo they had met before. Id at 573. Sassen-VanElsoo responded, "oh, ya. I heard it was a nineteen year old guy but you and I know who was driving." 17 RP 575.

While awaiting trial, Sassen-VanElsloo reached out to Athena asking her to check and make sure his friend 'Matt' was on the same page as him regarding the events of September 7th 2012. 17RP 458. Athena was afraid of Sassen-VanElsloo and explained that was why she was relunctant initially to name him as the driver and why she previously left the area. 17 RP 157. Sassen-VanElsloo was recorded asking Athena during jail phone calls whether she "had his back." Id at 157-58. Athena interpreted these messages as trying to get her to reach out to witnesses and ensure they would corroborate his account of the incident, that he wasn't the driver. Id 446, 465-66.

At trial, Athena testified she knew Sassen-VanElsloo to have weapons but had never seen the shotgun found in the Kia. 17RP 441-43. Athena additionally acknowledged she was a drug user and that she and Sassen-VanElsloo had been selling methamphetamine and heroin from the Kia Sorrento vehicle. 17 RP 105. Athena testified that after she left

investigators on September 7, 2012, she had a friend pick her up and take her to her meet Sassen-VanElsloo at a mutual friend, Matt Burton's home. 17 RP 98. In contrast, defense investigator Cheri Mulligan testified that one of Sassen-VanElsloo's friends, Matt Huckaby told her *he* was the one who was driving the Kia and picked up Athena on September 7, 2012. 17 RP 870-71. Huckaby asserted his 5th Amendment rights and declined to testify at trial. Officer Leake however, testified it was Sassen-VanElsloo, not Huckaby, driving the black Kia on September 7, 2012. 17 RP 889.

Matt Burton's mother also testified for the defense. Sharon Burton recalled she had cataract surgery on September 7, 2012 and came home early from work between 9:30 and 10:30 a.m. to find both her son, Matt and Sassen-VanElsloo at her home. 17 RP 776-78. Sharon Burton testified she was a patient coordinator for Journey to Wellness program, a drug and alcohol counselor for Lummi Nation and a CCT team member for the children's consultation program. Id RP 770. According to Sharon, her home on Northshore of Lake Whatcom, is a forty-five minute drive from where the Kia elude took place in Bellingham and neither her son Matt, nor his good friend Sassen-VanElsloo left her house that day. 17RP 780-81. During questioning, Sharon acknowledged she came home in the morning to lay down because she wasn't feeling well. Even though Sharon was lying down and resting, she didn't believe Sassen-VanElsloo could

have left her home without her knowing. 17 RP 776-77. Sharon never went to the police with this alleged alibi information. Id at 818. Prior to testifying but during the investigation, Sharon Burton told defense investigators a different story. She initially told them she wasn't sure when she got home, advising them then that she came home either late morning or early afternoon on September 7, 2012. 17 RP 881. Following a jury trial, the jury rejected Sassen-VanElsloo's contention that he wasn't the driver on September 7, 2012 or that the drugs, weapons and drug sales weren't connected to him.

Procedural facts

Adrian Sassen-VanElsloo was charged with three counts of unlawful possession of a firearm, three counts of possession of a controlled substance (morphine, methamphetamine), three counts unlawful possession of a controlled substance with intent to deliver (alprazolam, clonazepam and heroin) and one count of attempting to elude a police vehicle. CP 3.5. Sassen-VanElsloo was also charged with being "armed with a firearm during the commission of the unlawful possession and possession with intent to deliver controlled substances. CP 3.5. Following a jury trial, Sassen-VanElsloo was convicted as charged and, the jury returned special verdicts finding Sassen-VanElsloo was armed with a firearm as charged. CP 66-67, CP 68, 70-3. The jury additionally

determined Sassen-VanElsloo attempt to elude a police officer threatened with physical injury or harm one or more persons. CP 69.

Sassen-VanElsloo was sentenced to 120 months, to be served concurrently and to an additional 144 months to be served consecutively on the five firearm enhancements. CP 100-111. The trial court imposed standard legal financial obligations but did not inquire as to Sassen-VanElsloo's ability to pay. CP 104-5. Sassen-VanElsloo timely appeals. CP 112-24.

D. ARGUMENT

1. The trial court acted well within its discretion to excuse a juror who, mid-way through trial following the testimony of a material defense witness, disclosed that she had previously met this witness when she actively assisted her family member in obtaining much needed chemical dependency treatment.

Sassen-VanElsloo contends the trial court erred dismissing a juror mid-way through trial after learning the juror was familiar with a witness critical to Sassen-VanElsloo's defense. Br. of App. at 22. After listening to juror's revelation and responses to questions by the parties, the trial court determined within its discretion and in an

abundance of caution in ensuring a fair trial by impartial jury, this juror was unfit to continue serving on the jury.

The Sixth Amendment and Wa. Const. art. I, § 22 guarantees the right to a fair trial "by an impartial jury." U.S. Const. amend. VI; WASH. CONST. art.I, sec.22. This right is compromised when the trier of fact is unable to render a disinterested, objective judgement. United States v. Thompson, 744 F.2d 1065, 1068 (4th Cir. 1984).

RCW § 2.36.110 States:

> 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.

CrR 6.5 additionally provides:

> If at any time before submission of the case to the jury a juror is found unable to perform the duties the court **shall** order the juror discharged, and the clerk shall draw the name of an alternate who shall take the juror's place on the jury.

(Emphasis added).

These provisions, in conjunction with the constitutional protections, collectively place a continuing obligation on the trial court to excuse any juror who is unfit or unable to perform the duties of a juror and replace that juror with an appropriate alternate. State v. Jorden, 103 Wn. App. 221, 227, 11 P.3d 866 (2000). A trial court's

decision to excuse a juror is reviewed for an abuse of discretion. State v. Jorden, 103 Wn. App. 221, 11 P.3d 866 (2000) A court abuses its discretion only "when its decision adopts a view that no reasonable person would take or that is based on untenable grounds or reasons." State v. Boyle, 183 Wn. App. 1, 13, 335 P.3d 954 (2014), review denied, 184 Wn.2d 1002, 357 P.3d 666 (2015).

Sassen-VanElsloo contends the record fails to sufficiently demonstrate the juror in this case was 'actually' biased such that the trial court had the discretion to excuse her 'for cause'. Br. of App. at 24. The applicable standard in this case however, is governed by RCW § 2.36.110 not RCW § 4.44.170, because the alleged juror bias came to light after the juror was empaneled, prior to deliberations and at a time when the full ability to explore potential juror bias with the protections of peremptory and for cause challenges, had passed.

The plain language of RCW § 2.36.110 provides a great deal of deference to the trial court in weighing the credibility of a sitting juror in determining whether the juror is actually or impliedly biased. Related but different considerations are at play in vetting a sitting juror for bias, than a potential juror during voir dire. Moreover, CrR 6.5 enables a trial court to seat an alternate juror when a sitting juror is found unable to perform the duties of a juror, ensuring the dismissal of one

juror, will not result in any prejudice to either parties right to a fair trial by impartial jury.

CrR 6.5 does not explicitly require a specific hearing or colloquy to remove a juror after the jury is empaneled but before the case has been given to the jury but instead leaves it to the trial judge to determine how best to resolve issues pertaining to sitting jurors. Jorden, 103 Wn. App. 221. Requiring a colloquy or extensive questioning by either party to a sitting juror regarding fitness to serve, could serve to prejudice a party's ability to get a fair trial and maintain an impartial jury. Id. Thus, deference is given to the trial judge to best determine how to proceed.

In Jorden, the trial court dismissed a juror mid trial pursuant to RCW § 2.36.110, because the juror fell asleep several times during the trial. The court concluded this juror was compromised and the trial court was required to dismiss her pursuant to RCW § 2.36.110 and CrR 6.5. State v. Jorden, 103 Wn. App. 221, 230, 11 P.3d 866 (2000). Moreover, because this juror was removed and replaced prior to deliberations with a previously vetted alternative juror, the court on review noted, Jorden could make no argument the trial court's decision was prejudicial. The same should be said here.

In making a determination pursuant to RCW § 2.36.110, the trial court acts as both an observer and decision-maker. Jorden, 103

Wn. App. 221. Whether a juror has demonstrated bias is a determination that falls within the discretion of the trial court. Jorden, 103 Wn. App. 221, State v. Elmore, 155 Wn.2d 758, 778, 123 P.3d 72 (2005). The question pertaining to alleged bias *during* voir dire, is whether in the trial court's opinion, the challenged juror can set aside the conflict or preconceived ideas and try the case fairly and impartially. Hough v. Stockbridge, 152 Wn.App. 328, 216 P.3d 1077, *review denied*, 168 Wn.2d 1043 (2009). Bias may be 'actual' or 'implied.'

Pursuant to RCW § 4.44.170, actual bias during voir dire is 'the existence of a state of mind on the part of the juror in reference… to either party, which satisfied the court that the challenged juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging said juror. Implied bias on the other hand, exists when conditions or relationships from which a bias for or against a party may be inferred based on a relationship between the juror and the parties sufficient enough to create in the juror, consciously or unconsciously, a special interest in the success of either party. RCW § 4.44.180.

Implied bias may extend to circumstances not described within the statute, such as when a prospective juror withholds information during voir dire in hopes of getting seated on the jury. State v. Cho, 108 Wn. App. 315, 30 P.3d 496 (2001). Where implied bias of juror exists, it is

conclusively presumed from facts shown, but where actual bias of juror is claimed during voir dire, it must be established by proof. State v. Noltie, 116 Wn.2d 831, 809 P.2d 190 (1991).

In this case, the trial court determined the juror at issue should be removed in an abundance of caution for bias but did not conclude whether the bias was implied based on the circumstances that presented or actual based on the jurors demeanor and responses to inquiries during the limited mid-trial examination had by the parties. This does not constitute error pursuant to RCW § 2.36.110. It is evident from the record this juror was relieved and happy with the assistance this witness provided in getting a family member into drug treatment, whether she was willing to acknowledge that or not. Additionally, the trial court was well aware, the defense witness this juror revealed that she knew and had previous interactions with, was a material alibi witness for Sassen-VanElsloo. Under these circumstances, the trial court reasonably determined this juror no longer was fit to continue to serve on the jury due to the prejudice to the prosecution. As stated in Nolte:

> Considerable light will be thrown on the fairness of a juror by the juror's character, mental habits, demeanor, under questioning and all other data which may be disclosed by the examination. A judge with some experience in observing witnesses under oath becomes more or less experienced in character analysis, in drawing conclusions from the conduct of witnesses. The way they use their hands, their eyes, their facial expression, their frankness or

> hesitation in answering, are all matters that do not appear in the transcribed record of the questions and answers. They are available to the trial court in forming its opinion of the impartiality and fitness of the person to be a juror. The supreme court, which has not had the benefit of this evidence recognizes the advantageous position of the trial court and gives it weight in considering any appeal from its decision. Unless it very clearly appears to be erroneous, or an abuse of discretion, the trial court's decision on the fitness of the juror will be sustained.

Noltie, 116 Wn. 2d 831.

While mere acquaintance with someone, standing alone, is generally insufficient to disqualify a juror *during voir dire* pursuant to RCW § 4.44.170, an acquaintance in addition to an interaction the acquaintance may have had with the juror or jurors family that implicates that juror's conscious or unconscious bias, should be enough to disqualify a sitting juror, particularly where parties are unable to fully explore any potential bias during voir dire. See, State v. Tingdale, 117 Wn.2d 595, 817 P.2d 850 (1991).

A juror may not be conscious of a bias that is apparent to others on examination. State v. Wilcox, 11 Wash. 215, 39 P. 368 (1895). Thus, a juror's declaration that he or she would hear the evidence and be controlled by that and the jury instructions are not conclusive evidence there exists no bias. Id. The trial court is in the best position to determine whether a juror has the ability to be fair

and impartial because the trial court can observe the demeanor of the juror and evaluate and interpret their responses. Noltie, 116 Wn. 2d 831.

Similar to CrR 6.5, Federal Rule of Criminal Procedure 24(c)(1) allows courts to replace jurors unable to perform or who are disqualified from performing their duties to be replaced by alternate jurors. Federal cases interpreting this rule provide guidance in the context of excusing a juror *during* trial. In United States v. Thompson, 744 F.2d 1065, 1068 (4th Cir. 1984) the court found a trial court abused its discretion by failing to dismiss a sitting juror who had become upset after seeing a photo of a deceased victim. When questioned about the juror's fitness to serve with an open mind, the juror gave equivocal responses. Under these circumstances, the reviewing court determined the right to an impartial jury outweighed all other considerations and the equivocal responses necessitated removal of this sitting juror. Thus, when a sitting juror shows even the possibility of bias, trial courts are required to remove that juror with an unbiased alternative.

Similarly, in United States v. Bolden, 596 F.3d 976, 981 (8th Cir. 2010) the court held the trial court's action dismissing a possibly biased juror in an effort to err on the side of caution, was appropriate. There, the defendant's girlfriend had approached and spoke with two

jurors mid-trial outside the courtroom. One of the jurors conversation with Bolden's girlfriend was personal in nature, inquiring about the juror's husband's car accident. The government was concerned about the potential bias from the girlfriends contact as either a threat or attempt at sympathy in making the juror aware she was the defendant's girlfriend. As in this case, Bolden argued on appeal nothing learned from questioning after this contact was disclosed to the parties, revealed a legitimate basis to justify dismissal of this juror. The revieiwing court disagreed, noting the trial court concern with the potential bias and the possibility that this interaction could prejudice the juror was appropriate in light of the ultimate goal of ensuring a fair trial by impartial jury.

Here, juror #12 disclosed to the court's bailiff, following the testimony of a key defense alibi witness, Ms. Sharon Burton, that juror #12 knew the witness because Ms. Burton had worked with her family in getting a family member chemical dependency treatment. 5RP 853, 856. During this time, this juror had met Ms. Burton twice. When asked directly whether juror #12's interaction with Ms. Burton in assisting her family in getting treatment for her nephew was a positive experience, juror #12 responded equivocally:

> I am not really sure. I can't say 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.

5RP 858. The prosecutor repeatedly asked if juror #12's experience was positive, trying to explore whether the juror was actually or implicitly bias and repeatedly, juror #12 would not answer the question directly. RP 858-859. Finally, after several attempts to ask this question, juror #12 responded that she 'guessed' she had a pretty good feeling about Ms. Burton and that her feelings stemmed from her community for the help so that's what your tribe is for is to try to help the funds with our community people that need the assistance.

7RP 859.

Following this colloquy, the prosecutor explained to the trial court that juror #12's interaction and relationship with a material alibi witness for the defense, was a concern for the State and that it did not feel fair to keep her on the jury. 5RP 800. The trial court, having listened and observed the demeanor of juror #12, agreed. The defense witness juror #12 knew was a material alibi witness, someone who knew the defendant well through her son and also, juror #12 knew of her independent of trial, all of which could interfere with this juror's ability to fairly and impartially weigh the credibility of this witness. RP 770.

While acknowledging this was a 'close case' the trial court determined that the witness juror #12 interactions with a material alibi defense witness, however limited, were critical and while not a strong relationship, the relationship between juror #12 and Ms. Burton was strong enough, in light of Ms. Burton's role as an alibi witness, that in the trial courts discretion, it was appropriate to dismiss her. 5 RP 861.

It was therefore well within the trial court's discretion to dismiss juror #12 with a vetted unbiased juror. Both the state and the defendant have a right to an impartial jury. State v. Hughes, 106 Wn.2d 176, 721 P.2d 902 (1986). Moreover, Sassen-VanElsloo has no right to be tried by a jury that includes a particular juror. State v. Gentry, 125 Wn.2d 570, 615, 888 P.2d 1105 (1991). While juror #12 did not verbally express obvious bias, the trial court remained concerned about the conflict of interest between this juror's ability to remain impartial in light of her relationship with a critical witness. The trial court is in the best position to weigh not only juror #12's verbal responses but also her demeanor, tone of voice and mannerisms. Both the trial court and Sassen-VanElsloo's attorney understood from the tone and answers juror #12 gave, that juror #12 would not be pleased at being excused. 5 RP 863. This observation, of which Sassen-VanElsloo's attorney affirmately acknowledged prior to her dismissal, reveals juror #12, while somewhat appropriately answering

questions, may have been trying to answer questions in a manner that enabled her to stay on the jury. These facts further reveal what juror #12 was unwilling to allow the parties to meaningfully explore whether her experiences with Sharon Burton resulted in any actual or implied bias that would disqualify her from serving as a juror. The presence of a biased juror would not be harmless error and could have required a new trial even where no prejudice is demonstrated if the trial court had not appropriately excersized its discretion. State v. Irby, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015), review denied (Feb. 10, 2016). Given these circumstances, the trial court reasonably replaced this tainted juror with an alternate juror pursuant to RCW § 2.36.110 and CrR 6.5.

2. Looking at the light most favorable to the state, there is sufficient evidence in the record to support the jury's determination that Sassen-VanElsloo was armed with a 'firearm' during the commission of the controlled substance violations where investigators testified the shotgun found near the drugs was an authentic, fully functional loaded firearm.

Next, Sassen-VanElsloo asserts there is insufficient evidence in the record to support the firearm enhancements in this case. Br. of App. at 26. Specifically, he contends the state failed to produce sufficient evidence that the Mossberg Pistol Grip Pump action 12 gauge shotgun found in the rear of the KIA SUV Sassen-VanElsloo was driving, was an 'operable

firearm' because there was no evidence presented that the gun had ever been fired. Br. of App. at 29.

The State bears the burden of proving every element of a sentencing enhancement element beyond a reasonable doubt. State v. Tongate, 93 Wn.2d 751, 754-55, 613 P.2d 121 (1980). Evidence is sufficient to support an enhancement if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the enhancement beyond a reasonable doubt. State v. Tasker, __ Wn.App. __, __P.3d __ (2016), *citing*, State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

A defendant claiming insufficiency admits the truth of the State's evidence and all reasonable inferences are drawn in favor of the State and interpreted strongly against the defendant. State v. Salinas, 119 Wn.2d at 201. Circumstantial evidence and direct evidence may be used to establish the required elements and are considered equally reliable under a sufficiency of the evidence analysis. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000).

The reviewing court must defer to the trier of fact regarding witness credibility, conflict testimony and the persuasiveness of the evidence. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). The reviewing court need not be convinced of the defendant's guilt beyond a

reasonable doubt, but only that there is substantial evidence in the record to support the jury's finding. Id.

To convict Sassen-VanElsloo of a firearm enhancement, the State was required to prove that he was armed during the commission of a crime with a 'firearm' defined as a 'weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.' RCW § 9.41.010(9); RCW § 9.94A.533(3). To meet this definition, the evidence must show the defendant possessed a 'gun in fact' rather than a toy. State v. Tongate, 93 Wn.2d 751, 755, 613 P.2d 121 (1980), State v. Raleigh, 157 Wn.App. 728, 734, 238 P.3d 1211 (2010), *review denied*, 170 Wn.2d 1029 (2011). Whether a weapon or device qualifies as a firearm may be proved by circumstantial evidence. State v. Bowman, 36 Wn.App. 798, 803, 678 P.2d 1273, *review denied*, 101 Wn.2d 1015 (1984), State v. McKee, 141 Wn.App. 22, 31-32, 167 P.3d 575 (2007), *review denied*, 163 Wn.2d 1049 (2008). Sufficient evidence in this record supports the jury's determination Sassen-VanElsloo was armed with a real authentic fully functioning firearm, readily available to him when he got out of his vehicle that was loaded and ready for use during Sassen-VanElsloo's ongoing possession and sales of controlled substances from his vehicle.

Relying on State v. Pierce, 155 Wn. App. 701, 714, 230 P.3d 237 (2010), Sassen-VanElsloo argues nonetheless, that the state failed to prove

the shotgun found in the rear of the Kia was "operable" beyond a reasonable doubt because the State did not provide evidence that the allegedly operable firearm "had ever been fired." Br. of App. at 322.

Pierce relying dicta within the opinion in State v. Recuenco, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008), held the state must present evidence of 'operability' to prove to the jury that the firearm qualifies as a weapon or device from which a projectile may be fired by an explosive such as gun powder. Pierce, 155 Wn. App. at 714.

In Recuenco, the court said:

> The dissent appears to argue that because the only deadly weapon discussed at trial was a handgun, it was appropriate to ask for a firearm enhancement at sentencing rather than the charged and convicted deadly weapon enhancement. The dissent overlooks here that in order to prove the 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." 11 WASHINGTON PRACTICE; WASHINGTON PATTERN JURY INSTRUCTIONS; CRIMINAL 2.10.01 (Supp. 2005) (WPIC) *We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement.*

Recuenco, 163 Wn. 2d at 437 (emphasis added).

Pierce is not instructive or applicable to this case. There, the court found the eye witness testimony that Pierce 'appeared' to have a handgun when he burglarized a home was insufficient, without more, to support a

firearm enhancement because the jury was given the definition of a deadly weapon enhancement, not a firearm enhancement. Consequently, the jury verdict on the firearm enhancement predicated on the wrong definition did not require the jury to make any finding as to the operability of the alleged firearm. And while Sassen-VanElsloo cites to the language in Pierce to argue that where a weapon is not presented to the jury, there must be 'other evidence of operability, such as bullets found, gunshots heard, or muzzle flashes' Pierce did not hold this list as an exclusive means required to support a finding of an operability. Pierce does not require reversal of Sassen-VanElsloo's firearm enhancements.

In Raleigh, the court considered the same argument presented here and touched upon in Pierce, regarding whether Recuenco requires a firearm be 'operable' in order to support a conviction for a firearm enhancement. Raleigh, 157 Wn. App. at 735. The Raleigh court reflected that the issue in Recuenco was whether a harmless error analysis applied when the state failed to submit a firearm enhancement to the jury. In that context, the language Pierce relied on from Recuenco was non-binding dicta because it was cited only to point out the difference between a deadly weapon sentencing enhancement and a firearm enhancement. Raleigh, 157 Wn. App. at 735. The Recuenco decision did not hold or reasonably infer that evidence of operability required more than previous

cases had held. Thus, the Raleigh court rejected the analysis set forth in Pierce and upheld the firearm enhancements in that case based on a firearm that with little effort, could be rendered operational.

More recently in, State v. Tasker, --Wn.App. __, ___ P.3d ___ (2016 WL 1701530), the court again rejected the argument Sassen-VanElsloo relies on, that Recuenco requires evidence of operability as set forth in Pierce, to uphold a firearm enhancement. In Tasker, the court concluded the language in Recuenco was consistent with earlier Washington cases that held evidence that a defendant was armed with a firearm that appears 'real' is sufficient evidence of operability. Id.

In State v. Faust, 93 Wn. App. 373, 380, 967 P.2d 1284 (1998) for example, the court held the legislatures intent in defining a firearm was to distinguish between a 'toy gun' and a gun 'in fact.' Thus, aiming a *real gun*, however inoperable, was sufficient proof of operability for sentence enhancement purposes. Consistent with this analysis, a weapon or device historically included within this definition includes loaded, malfunctioning and even disassembled firearms that can be repaired or reassembled within a reasonable timeframe and with reasonable effort. Faust, 93 Wn. App. 373 *See also*, State v. Anderson, 94 Wn.App. 151, 162-3, 971 P.2d 585 (1999), *rev'd on other grounds*, 141 Wn.2d 357, 5 P.3d 1247 (2000) (court rejected defendant's argument that a loaded gun was not a 'firearm'

because it was never test fired.), State v. Padilla, 95 Wn. App. 531, 535, 978 P.2d 1113 (1999) (disassembled firearm operable).

The Tasker court held that a firearm is a device capable of being fired if it may be fired instantly or with reasonable effort and within a reasonable time, consistent with the reasoning set forth in Faust, 93 Wn. App. 373 and Padilla, 95 Wn. App. 531. Id. Evidence that a device appears to be a real gun and is being wielded in committing a crime is sufficient circumstantial evidence that the weapon is an operational firearm." Id at 44.

Sassen-VanElsloo's assertion that the State was required to prove operability by showing the shotgun had previously been fired should be rejected. The jury in this case, unlike Pierce found the shotgun Sassen-VanElsloo was armed with a firearm within the meaning of the statute. See, CP 21-64, Instruction 23. The jury's finding is supported by substantial evidence in the record. According to investigators trained and experienced in firearms, the shotgun found in the Kia Sassen-VanElsloo was driving was a real, authentic fully functioning weapon, in working order, loaded with appropriate ammunition and readily available for use. Pictures of the shotgun were presented to the jury and detailed testimony was given as to the make, model and operability of this weapon. RP 568. This evidence circumstantially supports the jury's determination that the

shotgun was operable within the definition of a firearm given to them for purposes of determining whether the defendant was 'armed with a firearm during the commission' of the applicable offenses. Operability may be inferred from the evidence presented by investigators. See, State v. Bowman, 36 Wn.App. 798, 803, 678 P.2d 1273 (1984), (The court held eyewitness testimony describing a 'real' gun and the defendant's threat to use it was sufficient to establish the "existence of a real, operable gun in fact."). Sassen-VanElsloo's argument should be rejected.

3. Examining the evidence in the light most favorable to the State there is sufficient evidence that Sassen-VanElsloo was 'armed' with a firearm during the commission of his controlled substance offenses where the loaded shotgun was readily accessible for use with its pistol grip sticking out, sitting just below the backpack containing the drugs Sassen-VanElsloo possessed and was selling out of his vehicle.

Next, Sassen-VanElsloo contends the record fails to support the jury's determination that he was 'armed' with a firearm, predicated on the loaded shotgun found in the rear of the Kia SUV he was driving, based on the weapon being sufficiently accessible and readily available for use, for either offensive or defensive purposes during the ongoing course of the applicable crimes. Br. of App. at 29.

Under a sufficiency of the evidence analysis, the test is "whether, after viewing the evidence in a 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. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). In applying this test, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Joy, 121 Wn. 2d at 339. Such a challenge admits the truth of the State's evidence and all reasonable inferences therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is as reliable as direct evidence. State v. Cross, 156 Wn. App. 568, 581, 234 P.3d 288 (2010), as amended (July 1, 2010), review granted, cause remanded, 172 Wn.2d 1009, 260 P.3d 208 (2011).

The appellate court defers to the trier of fact on issues of credibility of witnesses and persuasiveness of evidence. State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989). "The jury is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference." State v. Bencivenga, 137 Wn.2d 703, 707, 974 P.2d 832 (1999) (quoting State v. Jackson, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989)). The question on appeal is whether there is evidence in the record from which the jury could find the required element

beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980).

A person is 'armed' for purposes of a sentencing enhancement if the weapon is easily accessible and readily available for offensive or defensive use during the time of the crime. State v. Brown, 162 Wn.2d 422, 173 P.3d 245 (2007). A defendant does not have to be armed however, at the moment of arrest to be armed for purposes of the firearm enhancement. State v. O'Neal, 159 Wn.2d 500, 150 P.3d 1121 (2007). Additionally, whenever a firearm is based on constructive possession of a weapon, there must be a nexus between the defendant, the crime and the weapon. Brown, 162 Wn. 2d 422. Mere close proximity of the weapon to the defendant or constructive possession alone is insufficient to show a defendant is armed with a firearm during the commission of an offense. State v. Schelin, 147 Wn.2d 562, 567, 55 P.3d 632 (2002).

Sassen-VanElsloo argues, the loaded shotgun found in the rear hatchback of the Kia, underneath the backpack containing his controlled substances, out of his reach as the driver, was not sufficiently easily accessible and readily available to him to support imposing a firearm enhancement. Sassen-VanElsloo relies on State v. Mills, 80 Wn. App. 231, 907 P.2d 316 (1995) and State v. Gurske, 155 Wn.2d 134, 118 P.3d 333 (2005), to support his argument. Br. of App. at 31.

In Mills, the defendant was arrested following a vehicle stop and a motel room was later searched after officers found Mills trying to hide a motel key inside a police car. At the motel officers found controlled substances lying next to a weapon. On review, the weapon enhancement was overturned because although there was a nexus between the gun and the drugs, there was insufficient evidence to support the nexus between the defendant and the weapon because there was no evidence to show Mills' proximity to the weapon at a time when the weapon could have been used for offensive or defensive purposes. Mills, 80 Wn. App. 231. Mills is distinguishable.

Here, Sassen-VanElsloo was driving the Kia SUV while in constructive possession of both the loaded shotgun and drugs. The issue is not whether Sassen-VanElsloo could have reached his weapon while he was driving but instead whether the weapon was sufficiently tied to his possession and sales of controlled substances. Given that Sassen-VanElsloo had a large quantity of various controlled substances and was using the car in an ongoing effort to sell drugs, this weapon found near the drugs and in a position (with the pistol grip sticking out for quick access) to be easily accessible to protect the drugs, reflects facts to sufficiently support a nexus to and between Sassen-VanElsloo and the applicable crimes.

In Gurske, an officer pulled the defendant over for a traffic stop and determined he was driving with a suspended license. An inventory search revealed Gurske was also driving with a backpack in the backseat that contained a pistol and drugs. The Washington Supreme Court reversed the weapon enhancement on the possession of a controlled substance charge because the evidence did not show Gurske could reach the pistol from where he was sitting or that he made any movement to obtain his weapon or had previously used or accessed the weapon. The pack that was found behind the driver's seat was within reach but the weapon was only removable by unzipping the backpack and reaching under a torch, also located within the backpack. The 'fact of possession' is not enough to demonstrate a weapon is readily accessible and available during the commission of a crime for purposes of imposing a weapon enhancement.

Similar to Gurske, the State provided evidence to show the controlled substances were in Sassen-VanElsloo's constructive possession at the time of and prior to Officer Leake's attempt to stop Sassen-VanElsloo. Sassen-VanElsloo was loaned the black Kia car to drive and use in the month prior and leading up to September 7, 2012.

In contrast to Gurske however, Sassen-VanElsloo had readily accessible access to his weapon whenever he accessed his drugs as well

as, when he stopped the KIA and fled the scene. The pistol grip of the loaded shotgun was readily available from the hatchback area of the KIA had Sassen-VanElsloo chosen to grab it. Additionally, receipts found in the vehicle had Sassen-VanElsloo's name on them, his girlfriend Athena confirmed Sassen-VanElsloo was driving and selling drugs out of this vehicle and there was DNA evidence directly linking Sassen-VanElsloo to the shotgun. Moreover, the trial court upheld the firearm enhancement because there was substantial evidence in the record demonstrating Sassen-VanElsloo's possession of the loaded shotgun was part of his continuing crime of unlawfully possessing controlled substances, and possessing controlled substances with intent to deliver.

The passenger, Sassen-VanElsloo's girlfriend at the time, testified she had previously seen Sassen-VanElsloo with a firearm. RP 442. The State presented evidence that Sassen-VanElsloo's DNA was on the loaded weapon found in the Hatchback underneath the backpack in which Sassen-VanElsloo's various controlled substances were found. RP 359. The controlled substances found in the backpack were packaged in a manner or in a quantity suggestive of sales. Additionally, a roll of dollar bills were found in the center console of the KIA further suggesting and corroborating Athena's testimony that Sassen-VanElsloo was selling controlled substances out of this vehicle. The location, easy and ready

(loaded) of Sassen-VanElsloo's loaded shotgun to the controlled substances, further suggests Sassen-VanElsloo used it to protect, defend or intimidate anyone purchasing drugs from him. As such, the court was entitled to infer that the jury could find the loaded shotgun was part of Sassen-VanElsloo's continuing crimes.

In State v. Eckenrode, 159 Wn.2d 488, 150 P.3d 1116 (2007), the police arrived at the defendant's home after he called 911 and said he was armed and ready to shoot an intruder in the house. While Eckenrode was in his front yard, officers searched his home and found several weapons, drugs and evidence of drug manufacturing. In upholding a weapon enhancement the Eckenrode court distinguished Gurske, concluding the jury could infer from the circumstantial evidence that there was a connection between Eckenrode, the weapons and the ongoing possession and manufacturing of controlled substances. The weapons were loaded and evidence of the illegal drug manufacturing pervaded the house.

In the companion case of O'Neal, 159 Wn. 2d 500, the court also determined there was sufficient evidence in the record to support the imposition of a firearm enhancement based on the ongoing drug manufacturing enterprise. As in O'Neal and Eckenrode, the jury in this case shows Sassen-VanElsloo was committing a continuing offense. Sassen-VanElsloo had multiple weapons, drugs, money, scales and

numerous burner phones in the Kia he was using and selling drugs from. The location of a loaded shotgun, strategically placed in a position making it readily available for use, when accessing the bulk of the controlled substances packaged for sale, infers this weapon was for the protection, defensive or offensive, of Sassen-VanElsloo's ongoing drug possession and sales. Moreover, this weapon had Sassen-VanElsloo's DNA on it. Under these circumstances, there is substantial circumstantial evidence to support the jury's verdict finding Sassen-VanElsloo was 'armed' with a firearm during the commission of his ongoing controlled substance offenses.

4. Whether this case should be remanded back to the trial court for consideration of Sassen-VanElsloo's ability to pay legal financial obligations where the trial court failed to make any inquiry of the defendan't abililty to pay.

State v. Blazina, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Thus, where defendants fail to object to the LFOs at sentencing, it may be appropriate for appellate courts to decline review. Blazina, 182 Wn. 2d at 834. While Sassen-VanElsloo did not object to the legal financial obligations imposed at sentencing and the trial court made no inquiry regarding his ability to pay, the State agrees asserts remand on this issue is appropriate. The State therefore has no objection to remanding this matter

back to the trial court for reconsideration of legal financial obligations following a hearing on Sassen-VanElsloo's ability to pay.

E. CONCLUSION

The State respectfully requests this Court to affirm Sassen-VanElsloo's conviction and firearm enhancements. The State additionally requests this Court remand this matter back to the trial court for the limited purpose of reconsideration of the imposition of legal financial obligations following a hearing on the defendant's ability to pay.

Respectfully submitted this 17th day of June, 2016.

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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

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Ann Stromberg
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June 17, 2016
Date