94325-7

SUPREME COURT NO. _____

NO. 72553-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN SASSEN-VANELSLOO,

Petitioner.

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

The Honorable Deborra Garrett, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Adrian Sassen-Vanelsloo, the appellant below, asks this Court to grant review pursuant to RAP 13.4 of the Court of Appeals' unpublished decision in State v. Sassen-Vanelsloo, 2017 WL 480712 (No. 72553-0-I, filed February 6, 2017).[1]

B. ISSUES PRESENTED FOR REVIEW

1. 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. Where the trial court's dismissal of this juror for bias is unsupported by the record, should review should be granted under RAP 13.4(b)(2) because the Court of Appeals opinion conflicts with other Court of Appeals precedent?

2. 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. Sassen-Vanelsloo 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. Is review of the firearm enhancements warranted under RAP 13.4(b)(1)

[1] A copy of the opinion is attached as an appendix.

because the Court of Appeals decision conflicts with precedent from this Court?

C. STATEMENT OF THE CASE[2]

1. Trial Proceedings

The Whatcom county prosecutor charged Sassen-Vanelsloo with nine felony counts, including: three counts of first degree unlawful possession of a firearm;[3] three counts of unlawful possession of a controlled substance with intent to deliver;[4] two counts of unlawful possession of a controlled substance;[5] 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 possession of a controlled substance and unlawful possession of a controlled substance with intent to distribute charges. CP 3-5.

Evidence at trial revealed the following. Bellingham police officer Lewis Leake, was on his motorcycle monitoring traffic on the morning of

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[2] Sassen-Vanelsloo presented a more detailed statement of facts in his Brief of Appellant (BOA), at pages 3-22, which he incorporates herein by reference.

[3] 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.

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

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

September 7, 2012. 17RP[6] 534-35. 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. As the Kia drove through an 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.

Leake questioned 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 identified the driver as Sassen-Vanelsloo. 17RP 554-56. At Aardema's urging, Leake's written police reported omitted her

[6] The index to the citations to the record is found in the Brief of Appellant (BOA) at 4, n.4.

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.

Another officer 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.

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.

Police impounded and 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. 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.

Behind the driver seat of the Kia was a locked safe. 17RP 308-09, 341, 569-70. The safe contained several items, including a 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.

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.

Aardema testified that Sassen-Vanelsloo was the driver of the Kia during the incident. 17RP 81-84, 99, 104, 117-19, 139. 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.

Several other witnesses' testimony contradicted Aardema's account of the incident, including Sharon Burton. Burton had cataract surgery the day of incident. 17RP 775. When she arrived home between

9:30 and 10:30 a.m., her son, 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. 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. Sassen-Vanelsloo received a telephone call around noon that upset him. Burton believed Sassen-Vanelsloo was talking to Aardema. 17RP 780, 806.

2. 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 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.

During questioning, Juror 12 explained that she recognized Burton from her 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. When questioned 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. When pressed 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.

The State argued Juror 12 should be dismissed because 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, noting the juror'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.

3. 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, 967-68.

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, 969-70.

4. Court of Appeals

On appeal, Sassen-Vanelsloo challenged the trial court's dismissal of a qualified juror. Relying in part on Hough v. Stockbridge, 152 Wn. App. 328, 216 P.3d 1077 (2009), Sassen-Vanelsloo argued the trial court abused its discretion by dismissing Juror 12 because she did not indicate

that her passing contact with Burton would cause her to be unfair or impartial. Brief of Appellant (BOA) at 22-26. Sassen-Vanelsloo further argued the State cannot show that Juror 12's dismissal had no effect on the verdict. BOA at 26; Reply Brief of Appellant (RBOA) at 1-7. The Court of Appeals concluded the trial court did not abuse its discretion in dismissing Juror 12 because it was in the best position to gauge Juror 12's nonverbal communication. Appendix at 6.

Sassen-Vanelsloo also argued the evidence was insufficient to prove each of the five firearm sentencing enhancements because the State had failed to prove the gun was easily and readily accessible or that there was a nexus between Sassen-Vanelsloo, the shotgun, and the drugs. BOA at 29-40; RBOA at 7-10. The Court rejected the sufficiency challenges to the firearm enhancements, concluding there was sufficient evidence that the weapon was easily accessible and readily available at the time of the drug crimes. Appendix at 15. Sassen-Vanelsloo now asks this Court to accept review and reverse the Court of Appeals.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW OF THE TRIAL COURT'S DISMISSAL OF A QUALIFIED JUROR IS APPROPRIATE UNDER RAP 13.4(b)(2).

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.

Here, Juror 12's answers to repeated questioning show she was fit to continue serving as a juror. 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. 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.

The Court of Appeals acknowledged that "Juror 12 did not state that she could not be fair or impartial. In fact, she suggested that her interactions with Burton were minimal and unimportant." Appendix at 6. But, the Court went on to conclude that it would defer to the trial court's factual determinations because it was "in the best position to gauge Juror 12's demeanor, facial expressions, and other nonverbal communications to assess whether she was biased." Appendix at 6. Contrary to the Court's conclusion however, the trial court made no mention or factual findings about Juror 12's demeanor, tone of voice, mannerisms, or other nonverbal communications which would support a finding of either actual or implied bias. In fact, as the trial court recognized, Juror 12's relationship with Burton was not "real strong" and therefore whether to dismiss Juror 12 was a "close case." 17RP 861. Because the Court of Appeals opinion is not supported by the record and conflicts with this Court's prior precedent, review is appropriate under RAP 13.4(b)(2).

2. REVIEW OF THE SUFFICIENCY OF THE EVIDENCE ON THE FIREARM ENHANCEMENTS IS APPROPRIATE UNDER RAP 13.4(b)(1).

In criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). For purposes of sentence enhancements, the State must prove beyond a reasonable doubt that a defendant committed the offenses charged while armed with a firearm. State v. Williams-Walker, 167 Wn.2d 889, 898, 225 P.3d 913 (2010). A person is "armed" when he is within proximity of an easily and readily available firearm for offensive or defensive purposes and when a nexus is established between the accused, the weapon, and the crime. State v. O'Neal, 159 Wn.2d 500, 503-04, 150 P.3d 1121 (2007); State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993).

In Sassen-Vanelsloo's case, the State failed to show the shotgun that was found in the "rear cargo area" of the Kia underneath other items on the floor, and which was out of reach of the driver, was easily accessible and readily available. BOA at 31.

The Court of Appeals' conclusion that the evidence was sufficient to prove the gun was easily accessible and readily available conflicts with this Court's opinion in State v. Gurske, 155 Wn.2d 134, 118 P.3d 333 (2005). A police officer stopped Gurske for making an illegal turn, learned his license

was suspended, and arrested him for driving with a suspended license. He handcuffed Gurske, searched him, and placed him in the back of his patrol car. 155 Wn.2d at 136. A second officer arrived, and the 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. 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 at the time he was stopped by the police officer. 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. 155 Wn.2d at 143. It concluded the State failed to prove the pistol was easily accessible and readily available for use. Id.

As in Gurske, Sassen-Vanelsloo constructively possessed the shotgun that was out of his reach as the alleged driver of the car. 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.

The "mere presence" of a gun at the crime scene, "mere close proximity of the gun to the defendant, or constructive possession alone is not enough to show the defendant is armed." State v. Brown, 162 Wn.2d 422, 431, 173 P.3d 245 (2007). That is all the State showed here. This is not a case where, for example, the accused could have grabbed the gun simply by reaching down to the floorboard. See State v. Sabala, 44 Wn. App. 444, 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).

Citing O'Neal, the Court of Appeals nonetheless concluded there was a sufficient nexus because when Sassen-Vanelsloo was in possession of the drugs, he was also necessarily in possession of the shotgun.

Appendix at 15. In O'Neal, police searched a house and found evidence of methamphetamine manufacturing, over 20 guns, body armor, night vision goggles, and a police scanner. O'Neal, 159 Wn.2d at 502-03. 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.

In concluding 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, this Court focused on O'Neal's accomplice who testified the loaded pistol was under his mattress because "[i]f I needed it, it was there." O'Neal, 159 Wn.2d at 505-06. 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.

In O'Neal, this Court was presented with specific facts, including, defendant admissions, police monitoring equipment, and proximity of the co-defendants to an easily accessible and readily available gun, which allowed the Court to infer the guns were present to protect contraband as

part of a continuing crime. No such facts exist here. 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. Aardema testified that she had never witnessed Sassen-Vanelsloo use the shotgun or take it into any car. 17RP 441-42. There was also no police or surveillance monitoring equipment found in the Kia.

Because the Court of Appeals decision finding sufficient evidence to support the firearm enhancements is not supported by the record and conflicts with this Court's prior precedent, review is appropriate under RAP 13.4(b)(1).

E. CONCLUSION

For the reasons stated above, appellant respectfully asks this Court to grant review and reverse the Court of Appeals.

DATED this 14th day of March, 2017.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ADRIAN G. SASSEN VANELSLOO, Appellant.	No. 72553-0-I DIVISION ONE UNPUBLISHED OPINION FILED: February 6, 2017

APPELWICK, J. — Sassen Vanelsloo argues that the dismissal of a sitting juror was error requiring a new trial. He contends that he must be resentenced, because the firearm enhancements are not supported by sufficient evidence. He argues that the State failed to prove that the shotgun was operable or that he was armed, where the shotgun was found in the rear cargo area of the car. We affirm but remand for a hearing on legal financial obligations.

FACTS

On September 7, 2012, Athena Aardema had a court date. Her boyfriend, Adrian Sassen Vanelsloo, drove her to the courthouse in a black Kia sport utility vehicle (SUV). He picked her up afterward. They were on their way to Aardema's father's house when Sassen Vanelsloo took a right turn at a traffic light where no right turns were permitted on red lights.

Bellingham Police Officer Lewis Leake was monitoring traffic that morning. He observed the black Kia SUV turn right on the red light. Officer Leake activated his lights to pull over the Kia. However, as soon as he turned to follow the Kia, the Kia began moving very rapidly, trying to elude him. He followed the Kia through several intersections, as it moved erratically, forcing other cars to stop abruptly to avoid a collision.

In the middle of an intersection, Sassen Vanelsloo stopped the car, jumped out, and ran. When Officer Leake arrived at the car, he asked Aardema who had been driving the car. At first, she told him a man named Jesse was driving, because it was an alias Sassen Vanelsloo sometimes used. Eventually, Aardema admitted to Officer Leake that Sassen Vanelsloo was the driver of the car.

Officer Leake allowed Aardema to leave the scene. As he was helping her collect her personal belongings from the car, he noticed a gun in the rear cargo area. At that point, he decided to impound the car and request a search warrant. When the police officers later executed a search warrant of the Kia, they found several firearms, a backpack containing bags with controlled substances in them, drug paraphernalia, and multiple cell phones.

Bellingham police encountered Sassen Vanelsloo again on December 11, 2012. Sassen Vanelsloo was charged with unlawful possession of a controlled substance, attempting to elude a pursuing police officer, three counts of unlawful possession of a firearm in the first degree, and four counts of unlawful possession of a controlled substance with intent to deliver. The State also alleged that Sassen Vanelsloo was armed with a firearm—specifically, a 12 gauge shotgun—when he

committed the unlawful possession of a controlled substance and unlawful possession with intent to deliver offenses.

The jury found Sassen Vanelsloo guilty as charged. And, it found that he was armed with a firearm. The trial court imposed five firearm sentence enhancements. Sassen Vanelsloo appeals.

DISCUSSION

Sassen Vanelsloo makes multiple arguments on appeal. He contends that the trial court erred in dismissing a sitting juror. He challenges the firearm enhancements, asserting that the State failed to prove that the shotgun was operable and that he was armed. He asserts that the trial court failed to inquire into his ability to pay before imposing legal financial obligations. In a statement of additional grounds, he argues that the convictions were supported by insufficient evidence, the prosecutor committed misconduct, the trial court erred by admitting portions of letters and telephone calls, and that cumulative error deprived him of a fair trial.

I. Dismissal of a Sitting Juror

Sassen Vanelsloo argues that the trial court erred in dismissing juror 12 based solely on her limited prior contact with a witness, Sharon Burton. He asserts that juror 12 did not indicate an inability to be fair and impartial, so she was fit to serve.

This court reviews a trial court's decision to dismiss a juror for an abuse of discretion. State v. Jorden, 103 Wn. App. 221, 226, 11 P.3d 866 (2000). RCW 2.36.110 provides,

> 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 similarly states, "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." Together, these provisions impose an ongoing duty on the trial court to excuse any juror who is unfit. Jorden, 103 Wn. App. at 227.

The trial court has discretion to hear and resolve issues regarding whether a sitting juror should be dismissed. Id. at 229. In acting in this capacity, the trial court has fact finding discretion. Id. This means that the judge may rely on his or her own observations in assessing the juror's credibility. Id.

Sharon Burton testified on Sassen Vanelsloo's behalf. Burton is the in-patient coordinator and drug and alcohol counselor for the Lummi Nation. Burton's testimony was critical to Sassen Vanelsloo's defense, because it placed him at her house during the morning of the chase.

After Burton's testimony, juror 12 told the bailiff that she was previously acquainted with Burton. The court brought juror 12 into the courtroom for questioning. Juror 12 revealed that Burton helped stage an intervention and find treatment for juror 12's nephew. The State asked juror 12 whether she had a

positive experience with Burton. Juror 12 recognized that Burton assisted her family in helping her nephew to go into treatment. But, she was unsure whether she would classify her interactions with Burton as a positive experience, stating, "[T]here was no good or bad, it was just all, you know, normal as it would be trying to just get the help I wanted for my family member." When the State pressed her on this, saying it sounds like she had a positive feeling about Burton, juror 12 resisted, ultimately saying, "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 to help the funds with our community people that need the assistance." Juror 12 also stated that she never socialized with Burton and probably would not remember her if she saw her again.

After this questioning, the court ruled,

> It's a close case, but I think I'm going to rule that the juror should be let go. Counsel points out correctly that Ms. Burton is a critical witness[. E]ven 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.

Sassen Vanelsloo compares this case to Hough v. Stockbridge, 152 Wn. App. 328, 216 P.3d 1077 (2009). There, the trial court denied a motion to dismiss a sitting juror who wrote a note suggesting that Hough had mental or emotional problems and should be evaluated. Id. at 340. On appeal, the court held that the record supported the judge's decision not to dismiss this juror, because the juror's note did not state that the juror could not be fair and impartial. Id. at 341.

Therefore, the trial court did not abuse its discretion in refusing to dismiss the juror. Id.

Sassen Vanelsloo argues that under Hough, a juror must suggest an inability to be fair and impartial before the trial court can dismiss the juror. We disagree. The Hough court was focused on whether the record supported the trial court's decision. Id. Because the record provided a tenable reason to deny the motion to dismiss the juror, the trial court did not abuse its discretion. Id.

Here too, we must focus on the record before the trial court. Juror 12 did not state that she could not be fair or impartial. In fact, she suggested that her interactions with Burton were minimal and unimportant. However, she also acknowledged that her tribe's support in helping her nephew get treatment had a positive effect on her. The trial court was in the best position to gauge juror 12's demeanor, facial expressions, and other nonverbal communications to assess whether she was biased. This court defers to the trial court's factual determinations. Jorden, 103 Wn. App. at 229. We conclude that the trial court did not abuse its discretion in dismissing juror 12.

II. Operability of the Shotgun

Sassen Vanelsloo argues that there was insufficient evidence that the shotgun was operable, as necessary to support the firearm enhancements. He asserts that the State failed to produce evidence that the gun had ever been fired.

When faced with a sufficiency of the evidence challenge, this court asks whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas,

119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence are drawn in favor of the State. Id.

Sassen Vanelsloo's argument rests on State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008). The issue in Recuenco was whether a harmless error analysis was appropriate when the State did not submit a firearm enhancement to the jury. Id. at 433. The State charged Recuenco with a deadly weapon enhancement, and the jury found that Recuenco was armed with a deadly weapon. Id. at 431-32. But, the trial court imposed a firearm enhancement. Id. at 432. The Supreme Court vacated the firearm enhancement, because it was not charged, sought at trial, or found by the jury. Id. at 442. In reaching this holding, the majority responded to the dissent's argument that the State could seek the firearm enhancement at sentencing, because the only deadly weapon discussed at trial was a handgun. Id. at 437. The court rejected this argument:

> The dissent overlooks here that in order to 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." 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 2.10.01 (2d ed. 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. 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).

Id.

Other divisions of this court have interpreted this language. In State v. Pierce, 155 Wn. App. 701, 713, 230 P.3d 237 (2010), the appellant was charged

with a deadly weapon enhancement, but the trial court sentenced him to a firearm enhancement. Division Two held that this was error, because under Recuenco, the State must present the jury with sufficient evidence to find a firearm operable. Id. at 714. Without evidence that the firearm was capable of firing a projectile, there was insufficient evidence that the firearm was operable.[1] Id.

In State v. Raleigh, 157 Wn. App. 728, 733, 238 P.3d 1211 (2010), the appellant argued that the State failed to prove he possessed a firearm, because it was not operable on the date the crime was committed. Division Two rejected Raleigh's argument, holding that the quoted language from Recuenco was nonbinding dicta. Id. at 735. The Raleigh court concluded that a firearm need not be operable during the commission of a crime to constitute a firearm. Id. at 734. The relevant question is rather whether the firearm is a gun in fact or a toy gun. Id.

Mostly recently, Division Three agreed that the statement from Recuenco is nonbinding dicta. State v. Tasker, 193 Wn. App. 575, 592, 373 P.3d 310 (2016). The Tasker court ruled that in order to be a firearm for purposes of RCW 9.41.010, "a device must be capable of being fired, either instantly or with reasonable effort and within a reasonable time. Evidence that a device appears to be a real gun and is being wielded in committing a crime is sufficient circumstantial evidence that it is a firearm." Id. at 594.

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[1] Notably, the State in Pierce did not contend that it had presented sufficient proof of operability, arguing instead that it did not need to present the firearm itself. 155 Wn. App. at 714 n.11. The court noted that the firearm itself may not be necessary "when there is other evidence of operability, such as bullets found, gunshots heard, or muzzle flashes." Id.

We follow Raleigh and Tasker and conclude that a firearm must be capable of being fired instantly or with reasonable effort within a reasonable time. Here, the shotgun itself was introduced into evidence at trial. Officer Leake, who originally discovered the shotgun, testified. Officer Leake examined the shotgun and verified that it was a Mossberg Pistol Grip Pump Action 12 gauge shotgun. He explained that when he found the shotgun, it had a 12 gauge shell in the magazine, but not in the firing chamber. So, if someone wanted to use the shotgun, they would have to grab the weapon and pull the pistol grip forward to rack a shell into the firing chamber. Officer Leake also stated that based on his experience around firearms, having received stringent law enforcement training, that the shotgun is "a real authentic firearm capable of firing."

Officer Bernard Vodopich, who assisted in searching the Kia, also testified. He also identified the shotgun as the one that was found in the Kia. The State asked Officer Vodopich whether the shotgun appeared to be a fully functional firearm, and he responded that it did. He also confirmed that it is an object that is designed to propel a projectile through the explosion of gunpowder.

From this testimony, the jury could infer that the shotgun was capable of being fired with minimal effort. It was a real firearm, not a toy. While the State did not introduce evidence that the shotgun had been fired before, such evidence is not necessary to support a firearm enhancement.[2] We conclude that the finding that the shotgun was a firearm is supported by sufficient evidence.

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[2] In fact, even if we were to adopt Pierce's interpretation of Recuenco, Pierce does not suggest that operability turns on whether the gun had ever been fired before. Rather, Pierce suggests that evidence such as spent bullets,

III. Armed with a Firearm

Sassen Vanelsloo also asserts that this court should vacate the firearm enhancements, because the State failed to show that he was armed with a firearm.

Whether a person is armed is a mixed question of law and fact. State v. Schelin, 147 Wn.2d 562, 565-66, 55 P.3d 632 (2002). When the court determines whether the facts are sufficient as a matter of law to prove that the defendant was armed, it is a question of law reviewed de novo. Id. at 566.

A person is armed for the purposes of a sentencing enhancement if the weapon is easily accessible and readily available for offensive or defensive purposes during the time of the crime. State v. Brown, 162 Wn.2d 422, 431, 173 P.3d 245 (2007); State v. O'Neal, 159 Wn.2d 500, 503-04, 150 P.3d 1121 (2007). But, a person is not armed simply because he or she owns or possesses a weapon. State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007). Instead, there must be a nexus between the defendant, the weapon, and the crime. Id. In examining this nexus, courts look at the nature of the crime, the type of weapon, and the circumstances under which it is found, such was whether it was out in the open, in a locked container, or in a closet. State v. Ague-Masters, 138 Wn. App. 86, 104, 156 P.3d 265 (2007).

Sassen Vanelsloo argues that the shotgun was too far away from him to qualify as easily accessible and readily available. The shotgun was found in the rear cargo area of the Kia, which was behind the backseat area. For Sassen

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gunshots, or muzzle flashes can help prove operability when the gun itself is not offered into evidence. 155 Wn. App. at 714 n.11. Here, the shotgun was offered into evidence.

Vanelsloo to reach the shotgun, he would have had to exit the car or move into the backseat.

Sassen Vanelsloo compares this case to State v. Gurske, 155 Wn.2d 134, 118 P.3d 333 (2005) and State v. Mills, 80 Wn. App. 231, 907 P.2d 316 (1995). Gurske was arrested after a traffic stop, and police officers conducted an inventory search of his truck. Gurske, 155 Wn.2d at 136. In the backseat of the truck was a backpack. Id. The backpack contained an unloaded pistol, a fully loaded magazine, and three grams of methamphetamine. Id. The trial court imposed a deadly weapon enhancement. Id. at 136-37. On appeal, the Supreme Court held that there was insufficient evidence to show that the pistol was easily accessible and readily available for offensive or defensive use. Id. at 143. The court reasoned that to meet this test, the weapon must be easy to access for use against another person, and it may be used to facilitate the commission of a crime, escape, protect contraband, or prevent police investigation. Id. at 139. But, the facts of that case did not indicate whether the gun was within Gurske's reach. Id. at 143. Gurske would have had to unzip the backpack and remove other objects to access the pistol. Id. And, there were no facts to suggest that Gurske had used the pistol or had access to it at another time. Id.

In Mills, the defendant was arrested and put in a patrol car. 80 Wn. App. at 233. The officer noticed Mills's furtive movements in the patrol car and discovered a motel key in the seat cushions. Id. A search of the motel room revealed methamphetamine and a pistol. Id. The Court of Appeals held that these facts constituted insufficient evidence that Mills was armed. Id. at 234, 237. There was

no evidence that Mills, the gun, and the drugs were all in the hotel room together on the date charged as the date of the crime. Id. at 234. Instead, Mills would have had to travel several miles to retrieve the gun. Id. at 237.

But, the Washington Supreme Court has applied the nexus analysis to find that sufficient evidence supported firearm enhancements where the defendants were not armed at the time of arrest. See O'Neal, 159 Wn.2d at 504-05, 507; Eckenrode, 159 Wn.2d at 492, 496. Police officers arrived at Eckenrode's home after he called 911 saying that there was an intruder in his home and he was armed and ready to shoot. Eckenrode, 159 Wn.2d at 491. The police swept his house and found drugs, a rifle, and a pistol. Id. at 491-92. A search warrant revealed signs of a marijuana grow operation in the house. Id. The rifle was loaded. Id. at 494. Eckenrode had a police scanner which he could use to protect against police investigation. Id. Evidence of the drug manufacturing operation pervaded the house. Id. Officers arrested Eckenrode in his front yard, far from the weapons in his home. Id. at 492. But, the Supreme Court nonetheless held that there was sufficient evidence of a connection between Eckenrode, the guns, and the drug manufacturing operation. Id. at 494. From this evidence, the jury could have found that the weapons were present to protect the ongoing criminal enterprise.[3] Id.

Similarly, in O'Neal, none of the defendants were holding weapons when they were arrested. 159 Wn.2d at 502. But, a search of their mobile home

[3] In reaching this conclusion, the Supreme Court distinguished Gurske, because in that case the State never tried to prove that the weapon was readily accessible at a relevant time or that there was a connection between the weapon and the crime. Eckenrode, 159 Wn.2d at 494-95. Instead, the State proved only possession, which was not enough. Id.

revealed extensive evidence of drug use and manufacturing, over 20 guns, body armor, a police scanner, and night vision goggles. Id. at 503. The Supreme Court held that there was sufficient evidence for the jury to find that the deadly weapons were easily accessible and readily available to the defendants, and that there was a nexus between the weapons, the crimes, and the defendants. Id. at 507. The court reasoned that the defendant need not be armed at the moment of arrest to be armed for purposes of a firearm enhancement. Id. at 504. Where an AR-15 was found leaning against a wall and a pistol under a mattress, the State's theory that the weapons were easily accessible and readily available to protect the continuing criminal enterprise was appropriate. Id. at 504-05.

We further note that firearm enhancements have been upheld on unlawful possession offenses, not merely drug manufacturing or delivery crimes. See, e.g., State v. Easterlin, 159 Wn.2d 203, 207, 210, 149 P.3d 366 (2006). In Easterlin, the defendant was found asleep in a car with a gun on his lap and cocaine in his sock. Id. at 207. The court held that these facts constituted sufficient evidence that Easterlin was armed to protect the drugs. Id. at 210. It noted that, "[s]o long as the facts and circumstances support an inference of a connection between the weapon, the crime, and the defendant, sufficient evidence exists" to support a finding that the defendant was armed. Id. The court affirmed the firearm enhancement on Easterlin's conviction for unlawful possession of cocaine. Id. at 206-07, 210.

In this case, the State's theory was that Sassen Vanelsloo was conducting an ongoing criminal operation. Aardema testified that both she and Sassen

Vanelsloo were dealing drugs at that time, usually methamphetamine and heroin. A shotgun found in the rear cargo area was admitted into evidence. Officer Leake testified that its grip was facing at an angle toward the passenger compartment of the car, so someone entering the car could easily grab the gun. The backpack was admitted. Officer Leake testified that the backpack was found just a foot away from the barrel of the shotgun. Officers testified that within this backpack, they found a locked bank bag. This bank bag was unlocked with keys found in the center console of the car. The bank bag contained pills suspected to be controlled substances. The bank bag also contained substances suspected to be heroin and methamphetamine.[4] It contained a digital scale, an item often used in the sale of controlled substances. There was a packet of small glassine envelopes in the bag as well. And, a pouch in the bank bag contained multiple small plastic baggies. There were seven cell phones in the car. There were two prepaid phone cards in the center console.

Additionally, there was evidence that connected Sassen Vanelsloo to the drug operation in the Kia. Aardema testified that Sassen Vanelsloo was driving the Kia on September 7, 2012. The officers found a locked safe on the floorboard behind the driver's seat of the vehicle. The safe contained a box containing a roll of $1 bills, totaling $20. It also contained a vehicle title for a 1990 Lincoln Town Car. And, a revolver and a small semiautomatic handgun were found in the safe.[5]

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[4] Later tests of these pills and substances confirmed that they were clonazepam, alprazolam, methamphetamine, and heroin.

[5] The State specified that the firearm enhancement was based solely on the shotgun, which was easily accessible and readily available, while the guns found in the safe were not.

Aardema testified that this safe belonged to Sassen Vanelsloo, and he took it everywhere with him. The backpack contained several receipts with Sassen Vanelsloo's name on them. Sassen Vanelsloo's DNA was found on the shotgun. When Officer Leake came into contact with Sassen Vanelsloo again on December 11, 2012, Sassen Vanelsloo was driving the Lincoln Town Car to which the title belonged. And, Officer Leake spoke with him about the pursuit of the Kia on September 7, 2012. Officer Leake stated that Sassen Vanelsloo responded, " 'Oh, yeah, I heard it was a 19-year old guy, but you and I know who was driving.' "

We conclude that there was sufficient evidence to demonstrate that the shotgun was easily accessible and readily available, and that there was a nexus between Sassen Vanelsloo, the shotgun, and the drugs. The State charged the firearm enhancements on only the unlawful possession and possession with intent to deliver offenses, not the attempting to elude a police officer offense. The State also based the firearm enhancements solely on the shotgun found in the rear cargo hatch, not the two other firearms found in the locked safe. Under O'Neal, the State does not have to prove that the firearm was easily accessible and readily available at a specific time and place. 159 Wn.2d at 504-05. It is enough that the State establishes the weapon was easily accessible and readily available at the time of the crime. Id. Here, the backpack was the sole source of the drug charges. It was in close proximity to the shotgun. When Sassen Vanelsloo was near or in possession of the drugs, he was necessarily near and in possession of the firearm. The shotgun had a shell in the magazine and could have been easily chambered and fired against another person.

Additionally, from Aardema's testimony, the numerous cell phones, digital scale, glassine envelopes, and the small baggies, a reasonable person could have concluded that Sassen Vanelsloo was selling drugs out of the Kia. Unlike the firearms found in the locked safe, the shotgun was found just one foot away from the backpack containing the controlled substances. When Sassen Vanelsloo sold the drugs, the shotgun would have been easily accessible and readily available for him to protect the ongoing criminal enterprise. We affirm the firearm enhancements.

IV. Legal Financial Obligations

Sassen Vanelsloo argues that the trial court failed to consider his ability to pay before imposing discretionary legal financial obligations (LFOs). Sassen Vanelsloo also asserts that his trial counsel provided ineffective assistance by failing to object to the imposition of discretionary LFOs.

The trial court imposed mandatory and discretionary LFOs. The record does not show that the trial court inquired into Sassen Vanelsloo's current and future ability to pay before it imposed any LFOs.

Under RCW 10.01.160(3), trial courts must conduct an individualized inquiry on the record about a defendant's current and future ability to pay before imposing LFOs. State v. Blazina, 182 Wn.2d 827, 838-39, 344 P.3d 680 (2015). The Blazina court reached this issue, even though the appellants did not object to the imposition of discretionary LFOs at sentencing. Id. at 831-32, 834-35. It did so because RAP 2.5(a) permits the appellate courts to exercise discretion to accept review of claimed errors not appealed as a matter of right. Id. at 834-35.

The need for reform of the LFO systems demanded that the court exercise its discretion to do so. Id.

Here, the record does not show that Sassen Vanelsloo objected to the imposition of discretionary LFOs. However, the State agrees that remand is proper. Because the State concedes that it would be appropriate to remand this case for the trial court to reconsider the LFOs, we exercise our discretion to address this issue. And, because the record does not contain an individualized inquiry into Sassen Vanelsloo's current or future ability to pay discretionary LFOs, we remand for the trial court to perform such an inquiry.[6]

V. Substantial Evidence to Support Convictions

In a statement of additional grounds, Sassen Vanelsloo makes a number of arguments. First, he argues that he is actually innocent of the crimes of which he was convicted. We review this argument as a challenge to the sufficiency of the evidence.

Sassen Vanelsloo contends that several weaknesses in the State's case prove his innocence. He points to the testimony of Cheri Mulligan, the defense investigator. Mulligan testified about her interview of Nathaniel Huckaby. Huckaby told her that he was the one who was driving the car that was involved in the police chase on September 7, 2012. And, Sassen Vanelsloo points to the testimony of

[6] As a result, we decline to reach Sassen Vanelsloo's ineffective assistance of counsel claim. Any prejudice that resulted as a result of counsel's failure to object to the imposition of LFOs will be cured by an inquiry into Sassen Vanelsloo's ability to pay.

his alibi witness, Burton. Burton testified that Sassen Vanelsloo was at her house on September 7, 2012.

This evidence does not conclusively demonstrate that Sassen Vanelsloo was not the driver of the Kia. Instead, this evidence required the jury to decide which version of events to believe. Credibility determinations are for the trier of fact. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court does not disturb them on appeal. Id. We hold that sufficient evidence supports Sassen Vanelsloo's convictions.

VI. Prosecutorial Misconduct

Sassen Vanelsloo further contends that the State committed prosecutorial misconduct by (1) vouching for a witness's credibility, (2) offering false testimony, and (3) failing to disclose Brady[7] material.

To succeed on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was improper and prejudicial in light of the entire record and the circumstances at trial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). The failure to object to an improper remark waives any error, unless the remark is so flagrant and ill-intentioned that the resulting prejudice could not have been cured by an admonition to the jury. Id. at 443.

The prosecutor improperly vouches for a witness by expressing a personal belief in the truthfulness of the witness or indicating that evidence not presented at trial supports the witness's testimony. Id. Sassen Vanelsloo argues that the prosecutor improperly vouched for Aardema during opening statement by saying,

[7] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

"You will hear that Ms. Aardema has previously been convicted of a crime and she is facing charges at the present. You will be advised that she has been offered a resolution of those charges in exchange for testifying truthfully before this Court." But, the State is permitted to address the expected evidence during opening statement. Id. at 444. Rather than guarantee that Aardema's testimony will be truthful, this statement previewed the evidence that would come before the jury. Namely, that Aardema was testifying in accordance with a plea deal. The prosecutor did not commit misconduct in doing so.

The State has a duty not to elicit perjury or present false evidence. State v. Finnegan, 6 Wn. App. 612, 616, 495 P.2d 674 (1972). If State witnesses testify falsely, the prosecutor must correct them. Id. To succeed on a claim that the prosecutor presented false evidence, Sassen Vanelsloo must show (1) the testimony was actually false, (2) the prosecutor knew or should have known that the testimony was actually false, and (3) the false testimony was material. See United States v. Zuno-Arce, 339 F.3d 886, 889 (9th Cir. 2003).

Sassen Vanelsloo argues that the prosecutor knew or should have known that Aardema and Officer Leake testified falsely. He contends this is so, because Officer Leake claimed to have identified the driver yet failed to communicate this description to his fellow officers via dispatch, did not include Sassen Vanelsloo's description in the police report, and was contradicted by Officer Vodopich. And, he argues that the prosecutor knew Aardema was testifying falsely, because she was biased as a result of the plea agreement.

But, Sassen Vanelsloo has alleged only that Aardema's bias and Officer Leake's contradictions demonstrate that their testimony was false. Conflicting testimony is not evidence of falsity, but rather a matter of credibility for the jury to resolve. See Camarillo, 115 Wn.2d at 71. The prosecutor informed the jury of Aardema's plea deal and acknowledged the arguable mistakes made by the police officers in this case. Therefore, the record does not support Sassen Vanelsloo's allegations that the prosecutor relied on false testimony.

Under Brady v. Maryland, the prosecutor violates due process by suppressing favorable evidence where the evidence is material to guilt or punishment. 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). To establish a Brady violation, the defendant must show: (1) the evidence is favorable to him or her, because it is either exculpatory or impeaching, (2) the evidence was willfully or inadvertently suppressed by the State, and (3) the evidence is material. State v. Davila, 184 Wn.2d 55, 69, 357 P.3d 636 (2015).

However, Sassen Vanelsloo has not produced evidence that the State willfully or inadvertently suppressed any favorable evidence to him. He alleges that the State was aware that Aardema wanted Andrea Kohler to lie on the stand, and that it suppressed this evidence by opting not to call Kohler. But, Sassen Vanelsloo provided a memorandum from the defense investigator to defense counsel dated June 13, 2014—over a month before trial began. This document reveals that the defense team had been contacted by Kohler, who informed them that Aardema wanted her to lie to the police. Sassen Vanelsloo also alleges that the State did not disclose that Huckaby admitted to being the driver. But, the

defense interviewed Huckaby, and the defense investigator testified as to this conversation at trial. Thus, the record does not support Sassen Vanelsloo's claims of a Brady violation. We conclude that Sassen Vanelsloo has not established that the prosecutor committed misconduct.

VII. Admitted Letters and Phone Calls

Sassen Vanelsloo also asserts that the trial court erred by admitting pieces of letters and phone calls, in violation of the rule of completeness. After several lengthy conversations, the court decided to admit two portions of phone calls Sassen Vanelsloo made in jail. And, the court admitted a number of letters Sassen Vanelsloo wrote to Aardema while he was in jail.

Sassen Vanelsloo has the burden of providing an adequate record to establish error. State v. Siouvanh, 175 Wn.2d 607, 619, 290 P.3d 942 (2012); RAP 9.2(b). This court may decline to address a claimed error when faced with a material omission in the record. State v. Ward, 138 Wn.2d 460, 465, 979 P.2d 850 (1999). The letters and phone calls Sassen Vanelsloo challenges were not made part of the record on appeal. As such, we decline to consider this issue.

VIII. Cumulative Error

Sassen Vanelsloo further argues that the doctrine of cumulative error warrants reversal. He alleges that the trial court erred in imposing the firearm enhancements when the State did not prove that he physically held the firearm on the day of the incident. And, he contends that the trial court erred in not suppressing Officer Leake's and Aardema's testimony considering the inconsistencies in their stories.

The cumulative error doctrine applies only in circumstances where there were several trial errors that standing alone may not be sufficient to justify reversal, but viewed together may deny the defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). As discussed above, sufficient evidence supports the firearm enhancements in this case. And, the fact that Officer Leake and Aardema contradicted each other is not a trial error. This was a matter of credibility for the jury to weigh. See Camarillo, 115 Wn.2d at 71. Sassen Vanelsloo has not alleged any errors that combined to deny him a fair trial.

IX. Appellate Costs

Sassen Vanelsloo asks this court not to impose costs of appeal. He cites State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). In that case, the trial court made findings in support of an order of indigency. 192 Wn. App. at 393. The Court of Appeals presumed that where there was no trial court order finding that his financial condition had improved or was likely to improve, Sinclair remained indigent. Id. As a result, the court exercised its discretion to rule that an award of appellate costs to the State was improper. Id.

Here, Sassen Vanelsloo filed a motion and affidavit for order of indigency. The court granted this motion, finding that Sassen Vanelsloo was unable by reason of poverty to pay any of the expenses of appellate review. As a result, the court appointed appellate counsel and ordered preparation of the record at public expense. The State has not presented any evidence that Sassen Vanelsloo's financial condition has changed since this order was entered. We presume that

Sassen Vanelsloo remains indigent and decline to award appellate costs to the State.

We affirm the convictions and remand for reconsideration of Sassen Vanelsloo's ability to pay LFOs.

WE CONCUR:

Trickey, ACJ

Leach, J

NIELSEN, BROMAN & KOCH, PLLC
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Court of Appeals Case Number: 72553-0

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Comments:

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Sender Name: John P Sloane - Email: sloanej@nwattorney.net

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