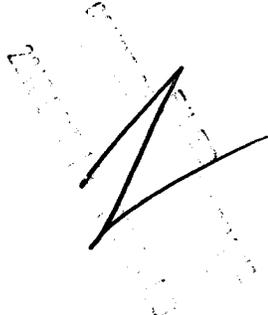


65165-0

65165-0

No. 65165-0-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE



STATE OF WASHINGTON,
Respondent,
v.
SHANE ROCHESTER,
Appellant.

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

The Honorable Richard D. Eadie

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Shane Rochester's CrR 3.6 motion to suppress where he was subjected to an illegal Terry¹ detention that was unsupported by reasonable suspicion.

2. The court erred in denying Mr. Rochester's motion to suppress where he was subjected to an illegal weapons frisk, unsupported by reasonable grounds to believe he was armed and dangerous.

3. The court erred in denying Mr. Rochester's motion to suppress where the weapons frisk was impermissibly extended beyond its legal scope when the officer removed bullets from the defendant's pocket, which were not a dangerous weapon within the authority of the officer to search for.

4. The trial court erred in entering CrR 3.6 finding of fact 1 at p. 1, lines 19-20,² finding that the attempted robbery victim had any relationship with the defendant, where the defendant's name was not known to police or communicated to the victim until after the vehicle stop was effected.

¹See Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

²The CrR 3.6 findings of fact are presented in mostly narrative form, with multiple paragraphs of findings within each numbered section.

5. The trial court erred in entering CrR 3.6 finding of fact 1 at p. 1, lines 22-23, finding that the car was owned by a “heavy set female,” where the finding implicitly indicates a similarity to the description of the white female perpetrators, but the detaining officers had the driver’s license information and image of the registered owner, a Hispanic female.

6. The trial court erred in entering CrR 3.6 finding of fact 1 at p. 2, lines 12-15, finding that Mr. Rochester lived in the victim’s house in the past and that Mr. Rochester was in the car waiting for the female perpetrators to return.

7. The trial court erred in entering CrR 3.6 finding of fact 1 at p. 3, lines 13-15, finding that the frisking officer knew that Mr. Rochester was involved with the female perpetrators of the robbery and that he was in the car waiting for them to return after committing the attempted robbery.

8. The trial court erred in entering CrR 3.6 finding of fact 3(1) at p. 4, lines 13-21, finding that the stop was lawful based on the circumstances.

9. The trial court erred in entering CrR 3.6 finding of fact 3(1) at pp. 4-5, lines 22-24 and 1-4, finding that there were facts

justifying a weapons frisk.

10. The trial court erred in entering CrR 3.6 finding of fact 3(2) at p. 5, lines 6-10, finding that there was a reasonable safety concern warranting a weapons frisk.

11. The trial court erred in entering CrR 3.6 finding of fact 3(3) at pp. 5-6, finding that the bullets that the police officer felt in Mr. Rochester's pocket were within the scope of a weapons frisk.

12. Manifest constitutional error occurred where the interrogating officer repeatedly commented that the defendant was lying when stating he had no scheme to plan a robbery and that he was unaware the women had guns at the scene, requiring reversal of the conviction and the enhancement.

13. Cumulative error requires reversal.

14. Mr. Rochester's sentencing enhancement for being armed with a firearm at the time of the offense must be vacated, where the jury was improperly instructed with regard to the unanimity requirement in a manner that overstated by a dozen-fold the circumstances required before the jury could reject the special allegation.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Rochester was a passenger in a car that had been sitting parked with its engine running on a Spring afternoon, near a city park, and then was observed pulling away upon entry of the defendant and the driver. The men had earlier been seen “slouching” in the front seats, and the vehicle was some few blocks distant from a recent armed house robbery attempt, which the drug-dealer victim claimed had been perpetrated by two heavy set women. Where a police computer check revealed that the registered owner of the vehicle was a short female who weighed 200 pounds, did the police officers possess the “reasonable suspicion” that was constitutionally required to conduct an investigatory stop of the car?

2. Was it improper for the trial court, in support of its denial of the defense CrR 3.6 motion, to supplement the facts and reasonable inferences pointed to by the detaining officers as supporting the stop at its inception by supplying its own additional, hindsight-enabled factual supposition that the men were plainly waiting for robbery perpetrators to return to their getaway car, where the officers at the scene never reached, much less relied on,

any such inference as a basis for the investigative detention?

3. Even if the investigative stop was supported by reasonable suspicion, was the weapons frisk of Mr. Rochester justified under the constitutional requirement of a reasonable belief that he was “armed and dangerous?”

4. Even if the stop was supported, and even if the frisk of Mr. Rochester was justified, did the detaining officer exceed the bounds of a frisk search, and the limitations of the “plain feel” doctrine, where this intrusion is strictly limited by its purpose to a search for weapons rather than a fishing expedition for physical evidence of involvement in crime, and where the officer admitted he immediately recognized that the items he felt in Mr. Rochester’s pocket were bullets he could collect as evidence connecting the defendant to the armed robbery attempt?

5. The evidence of Mr. Rochester’s possession of the bullets played a pivotal part of the State’s proof, in a case in which his lack of knowledge that the female perpetrators brought a compatible-caliber firearm to the location of the victim’s house was a close and sharply litigated issue. Indeed the defendant explained to a Seattle detective that the women’s secret robbery scheme was completely

without his knowledge, and departed radically from the originally-conceived plan for the women to persuade the drug-dealing victim into “fronting” them marijuana which they would falsely promise to sell on his behalf. In addition, the illegal stop led to all the information produced regarding the female attempted robbery perpetrators.

Under the constitutional error standard that requires this Court to be convinced beyond a reasonable doubt that the illegally seized evidence and the fruit of the stop played no material part in securing the jury’s verdicts, must the Court reverse Mr. Rochester’s conviction, and the special firearm finding, as fruit of the illegal Terry detention and resulting weapons frisk?

6. Did manifest constitutional error occur where the interrogating officer repeatedly commented that the defendant was lying when stating he had no scheme to plan a robbery and that he was unaware the women had guns at the scene?

Is reversal required under the constitutional error standard where among other factors of prejudice, in closing argument, the State repeated almost verbatim the detective’s direct improper statement in the videotaped and recorded interrogation denouncing

Mr. Rochester's credibility ("I don't think there is a jury in the world that would believe you" about the guns), by arguing to the jury: "And no jury in the world is going to believe that the defendant had no idea that there was a possibility that guns could be used in this crime." 1/22/10RP at 691.

7. Is reversal required under the cumulative error doctrine, considering the fruit of the stop and the devastating comments on credibility?

8. Under the recent case of State v. Bashaw,³ Mr. Rochester's jury was improperly instructed that all twelve members of the panel were required to agree before the jury could reject the allegation that he was "armed" with a firearm. This instruction was incorrect – the law requires the jury to answer the special verdict form in the negative if even a sole juror concludes the allegation was not proved.

Considering the State's burden in this case of proving that the evidence below was so impenetrably overwhelming and so completely uncontroverted that not even one single juror could possibly have entertained a reasonable doubt on the allegation,

³See State v. Bashaw, Supreme Court No. 81633-6 (2010).

must the judgment entered on the special verdict be reversed, and the firearm enhancement vacated?

C. STATEMENT OF THE CASE

The victim of the alleged robbery attempt was a drug dealer who maintained an address near Powell Barnett Park in Seattle. 1/20/10RP at 316-21. He claimed to police that the perpetrators, who invaded and then fled the premises after striking him on the head with a gun, were two “heavy set” women who said Mr. Bauer owed someone money. 1/20/10RP at 310-12. Almost an hour passed. The Seattle police learned that the registered owner of a car seen idling in the area of a nearby park was short, but weighed 200 pounds, and they stopped the car despite the fact that two men returned to it and drove away. 1/6/10RP at 21, 37. Neither the owner, a Yakima resident, or any female individuals, were inside, nearby, or in the area of where the vehicle was parked.

Samuel Harvey, the driver of the car, was questioned and made statements suggesting he knew of the women’s activities.⁴ 1/19/10RP at 265-66. Mr. Rochester was arrested after police

⁴The jury was correctly not told that Mr. Harvey said to the police officer that he and Mr. Rochester were involved in any activity with the perpetrators of the robbery attempt.

frisked him for weapons and felt bullets in his pocket, which later matched a handgun carried by one of the robbers that had gone off during a struggle at the scene of the attempted robbery.

1/12/10RP at 85.

In a Mirandized interrogation conducted by a Seattle police detective which was played by audiotape to the jury, Mr. Rochester indicated he had a former relationship with the drug dealer, Paul Bauer, and knew he would likely have drugs at the premises.

1/20/10RP at 470-79; 1/21/10RP at 556; Supp. CP ____, Sub # 46 (Exhibit list, trial exhibit 50, CD of defendant's interrogation).⁵ Mr.

Rochester stated that he and his three friends, including Penny Green and Carla Smith, had concocted a plan whereby the two women would go to the drug house and "hustle" Mr. Bauer to "front" them free marijuana, upon their promise that they would sell the drugs and then come back and split the proceeds with him.

Unfortunately, and without Mr. Rochester's knowledge, Green and Smith apparently had devised their own side-scheme to actually rob the dealer. State's exhibit 50.

Additionally at trial, Mr. Rochester also explained that he

⁵The State did not provide the court or jury with a written transcription of the defendant's interrogation.

was aware the women owned firearms, which they had stowed in the car; however, he did not see the women remove the guns from the trunk before they proceeded to the dealer's address to propose the "fronted" drug selling plan. 1/21/10RP at 595-99, 603-04. Mr. Rochester did not have any plan or any awareness that the women would rob Mr. Bauer, or that either of them were armed. 1/21/10RP at 606-08.

Following the denial of his CrR 3.5 and CrR 3.6 motions, the latter challenging the Terry investigative stop of the car in which he was a passenger and the officer's weapons frisk of his person, Mr. Rochester proceeded to a jury trial and was convicted as charged on both the substantive offense of attempted first degree robbery, charged in the jury instructions as attempted robbery elevated to the first degree by being armed with or displaying a firearm, and the firearm enhancement. CP 78, CP 87. The trial court instructed the jury it must be unanimous before it could reject the firearm allegation. CP 86.

Mr. Rochester was sentenced to a term of 73 months, including 36 months on the firearm enhancement, and he timely appeals. CP 20, CP 3.

D. ARGUMENT

1. THE TERRY STOP OF SAMUEL HARVEY'S CAR WAS NOT SUPPORTED BY REASONABLE SUSPICION TO BELIEVE THE APPELLANT, A PASSENGER, WAS INVOLVED IN ANY CRIMINAL ACTIVITY.

- a. Appellate scrutiny of the legality of the Terry

detention first requires that the trial court's factual findings be distilled down to those actually supported by police testimony at the CrR 3.6 hearing. The facts with regard to the investigative stop conducted by the police in the present case are limited. The driver, Samuel Harvey, and his passenger, Mr. Rochester, were sitting in a car that was legally parked and had its engine running. It was a routine Spring afternoon. 1/6/10RP at 37-38. The two men seemed to be slouching in their seats when the vehicle was initially spotted. Id. A computer check indicated that the registered owner of the car was a woman. 1/6/10RP at 21-22.

The vehicle turned out to be parked some blocks distant from a house-invasion robbery occurring a short time later, which was broadcast over police radio. 1/6/10RP at 39-40. According to the complainant, the robbery attempt had been perpetrated by two

“heavy set” women. 1/6/10RP at 39-41. The records check conducted by the police officers who first spotted the car indicated that the height and weight of the female registered owner of the vehicle fit a similar description. 1/6/10RP at 34-35, 39. The officer had the entire license information and there was an assertion that the owner was a white female, but the owner of the vehicle was Hispanic. Supp. CP ____, Sub # 46 (Exhibit list, pre-trial exhibit 8); 1/12/10RP at 115.

Almost an hour later, the car was observed parked and unoccupied at a slightly different location. However, no women of any description were ever seen anywhere near the car; in fact, when the car was observed the second time, the two men were then seen entering the vehicle. 1/6/10RP at 22. The car then drove away at an apparently unremarkable rate of speed, whereupon it was followed by police and pulled over. 1/6/10RP at 23.

This was the entire extent of the court-credited testimony introduced at the suppression hearing with regard to the initial investigative stop. However, the prosecutor-drafted findings of fact, presented to the court post-trial some weeks after the CrR 3.6

hearing, are infused with matters not actually known to any officers until after the vehicle stop was effected. The trial court's CrR 3.6 factual findings pertaining to the initial stop of the car are reproduced below, with the unsupported, erroneous findings indicated by strike-through:

~~Defendant Shayne Rochester had a relationship with the victim, Paul Bauer, for a number of years. That relationship was terminated several years prior to the incident date.~~

At around 1400 hours on May 20, 2009, two Seattle Police Department SWAT officers working patrol in Seattle by Powell Barnett Park noticed a car which stood out to them as being suspicious. They ran the car and determined that it was owned by a heavy set female. They saw two males in the car at the time. The car was idling, and the parking lights were on. They noted that the males had their seats reclined, as though they were trying to not stand out or be noticed. They broadcast over radio dispatch some information about the car,

On [the same day,] May 20, 2009 at about 1403 hours, 9-1-1 was contacted by a neighbor of Paul Bauer's. He reported an attempted Robbery at the house of Paul Bauer at 544 26th Ave. Officers responded and the victim told them that two heavy set white females had entered his [Bauer's] house and told him that they were there for the money he owed them. Bauer had never seen either of them before nor was he originally sure of what they were referring to. He attempted to force them out of the house. They both had guns. One of them struck him with a gun. A gun went off during the altercation. The females fled the residence without taking any property and were at large in the area shortly after the crime. Much of this information was broadcast to officers

and detectives in the area.

~~Bauer indicated to Seattle Police Department officers that Shayne Rochester lived at his house for ten years and that he had not seen him for two years. (Rochester did not enter the house with the women. He was in a car with Samuel Harvey waiting for their return after the robbery.)~~

An on duty Seattle Police Department officer saw the vehicle previously seen by the SWAT officers in the same general area about 45 minutes after when the crime occurred and radioed that information in. He stood by keeping watch on the car. After a short period of time, two males came to the car, and started to leave, the SWAT officers, and the officer who was keeping watch on the car, followed it, and a stop of the vehicle occurred. This was a Terry stop.

CP 10-11 (CrR 3.6 Findings of Fact).⁶

The indicated factual findings are unsupported by any pertinent officer testimony at the suppression hearing. A trial court's factual findings entered following a CrR 3.6 suppression hearing must be supported by substantial evidence. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Of particular importance is the finding that the occupants of the car appeared to

⁶One officer testified that the nearby Powell Barnett Park was a "bad" and "violent" area, in which narcotics dealers would park their cars and sell drugs. 1/6/10RP at 17, 20. However, the trial court did not enter any finding in this regard and the description of the area as such properly plays no part in this Court's assessment whether the Terry stop was supported by reasonable suspicion. The appellate court will presume that the State has failed to prove any factual issue upon which it had the burden of proof if the trial court fails to make a factual finding on that issue. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

be waiting for someone to return. CP 11. The trial court in a later portion of its findings again repeated this suggestion that the constitutional justification for the police stop of the vehicle included the 'fact' that "its two occupants [were] seemingly waiting for additional passengers." CP 14.

None of this was believed by police prior to or at the time the vehicle was pulled over. No officer ever testified that she or he observed the men "waiting" for anyone to "return" to the car, or stated that she or he believed, suspected, or even speculated that this was what they were doing.⁷ The trial court therefore erred in entering these CrR 3.6 findings of fact.

The trial court is not permitted, under the rules of fact finding and sufficiency on review, to supply by inference a fact of its own. Pursuant to established case law, it is the police officer at the scene, before the stop is initiated who must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." State v. Day, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007). Facts

⁷In fact, the police testimony at the CrR 3.6 hearing suggests that the suspicions of the various officers who spotted the car were based on suspected activity relating to the vehicle's adjacency to Powell Barnett Park, a violent area of drug crime, and the slouching of the occupants. See 1/6/10RP at 17, 20.

may support a wide range of many inferences, but only those inferences actually reached or made by the actual officers may contribute to articulable suspicion.

Only the supported facts stated by the trial court in its written findings in this case constitute the “facts found” by the court at the CrR 3.6 hearing in support of its conclusions of law, and those findings must support the court’s legal conclusions. State v. Kull, 155 Wn.2d 80, 85, 118 P.3d 307 (2005) (agreeing that trial court's findings did not support conclusion of law that contraband was discovered in “plain view”).

b. The supported factual findings fail to establish legal grounds for an investigative detention of Mr. Rochester. The police stop of the vehicle in which Mr. Rochester was a passenger was without authority of law. The Fourth Amendment to the federal constitution and article I, section 7 of the Washington Constitution prohibit unreasonable searches and seizures. Terry v. Ohio, 392 U.S. 1, 16-19, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Parker, 139 Wn.2d 486, 527, 987 P.2d 73 (1999); see U.S. Const. amend. 4; Wash. Const. art. 1 § 7. Warrantless searches and seizures, such as the stop of the car in this case, are per se

unreasonable and violate constitutional protections, absent an exception to that rule. State v. Ladson, 138 Wn.2d 343, 350-51, 979 P.2d 833 (1999).

There is no debate that Mr. Rochester was subjected to a seizure of his person by the Seattle police officers in this case when the car driven by Mr. Harvey was stopped. See CP 10-11. A seizure occurs if "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." State v. Aranguren, 42 Wn. App. 452, 455, 711 P.2d 1096 (1985) (citing United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980)). It is virtually categorical that passengers in a vehicle are seized if the police stop the car. See State v. Larson, 93 Wn.2d 638, 642, 611 P.2d 771 (1980).

This presumption of illegality applied to a warrantless seizure as occurred in Mr. Rochester's case can be rebutted only if the State can establish one of the jealously-guarded exceptions to the warrant requirement. State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000). One of these is an investigatory detention, or so-called Terry stop, if the stop is supported by articulable suspicion.

State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994) (citing State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986)). This sort of brief detention of a person for investigative purposes is legal only where an officer has "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." State v. Larson, 93 Wn.2d at 644 (citing Brown v. Texas, 443 U.S. 47, 51, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357 (1979)); see also Kennedy, 107 Wn.2d at 5.

Here, two males, including the defendant who was the front seat passenger, were in a vehicle sitting parked with its engine running on a Spring afternoon. This was some blocks distant from an immediately recently reported home robbery attempt made by persons described as "heavy-set" women, like the height and weight of the woman that dispatch told officers was the registered owner of the vehicle. The men were observed to be slouching in their car seats when the vehicle was initially spotted, even though it was later seen at a slightly different location and the men were seen returning to it and pulling away.

This is not enough. Compare the facts of the recent case of State v. Doughty, --- P.3d ----, 2010 WL 3705223, Wash.,

September 23, 2010 (NO. 82852-1). There, the defendant approached a house whose occupants police suspected of selling drugs. After the defendant appeared to be unsuccessful contacting the occupants, he left the area in the vehicle he had arrived in. Police stopped the vehicle and a records search revealed the defendant's license was suspended, and upon arrest of the defendant, located narcotics in the car. State v. Doughty (Slip Op. at pp. 1-2.).

The Doughty Court found the stop to be unsupported by articulable suspicion. State v. Doughty (Slip Op. at p. 4). The Court stated:

Bishop merely saw Doughty approach and leave a suspected drug house at 3:20 a.m. Bishop had no idea what, if anything, Doughty did at the house. The totality of these circumstances does not warrant intrusion into Doughty's private affairs.

State v. Doughty (Slip Op. at p. 3). The facts in the present case are even less compelling than those in Doughty. Here, the men were simply sitting in a vehicle near a park. The defendant, unlike the suspect in Doughty who actually approached an area where police believed illegal conduct was occurring, was never seen near the house where the robbery attempt occurred, and was never

seen having any contact with the suspected female perpetrators.

CP 10-12.

The State must show by clear and convincing evidence that the Terry stop was justified. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). That standard is not met in the present case. In fact, the men's return to the car and departure in it, was a diminishment of any cause – the victim's early and correct description of the failed robbery perpetrators was that they were women. Even if the officers had actually suspected the males were waiting for someone, when the car drove away without any new or additional persons having entered the vehicle, it became at that point completely unsupportable to even have a hunch that the males were somehow involved in the reported robbery.

2. EVEN IF THE INVESTIGATIVE STOP WAS SUPPORTABLE, THERE WAS NO BASIS TO FRISK THE DEFENDANT FOR WEAPONS, AND IN ANY EVENT THE FRISK EXCEEDED ITS LEGAL BOUNDARIES.

Even if there was a basis to detain Mr. Rochester, no reasonable police officer would have believed the defendant was armed and dangerous, which was required to conduct a frisk search of the suspect, as occurred here. CP 11. In addition, the

officer's frisk search went beyond a search for weapons, and the bullets located, which were critical evidence in a case in which the defendant denied knowing the female perpetrators were carrying guns with them, must be suppressed on that alternative basis.

a. There was no basis to conduct a frisk search of Mr.

Rochester. Generalized suspicion and a mere invocation of an "officer safety" justification is insufficient to justify a weapons search. State v. Walker, 66 Wn. App. 622, 630, 834 P.2d 41 (1992); Terry, 391 U.S. at 20. The officer must be able to articulate specific facts which indicate that the particular suspect was armed and dangerous. State v. Lennon, 94 Wn. App. 573, 580, 976 P.2d 121 (1999); State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993). The suspicion must be specific to the particular suspect. State v. Galbert, 70 Wn. App. 721, 725, 855 P.2d 310 (1993).

As previously discussed, there was no viable indication that Mr. Rochester had been independently involved in the robbery attempt. Cf. State v. Vermillion, 112 Wn. App. 844, 864, 51 P.3d 188 (2002) (finding that, in addition to other factors, the suspect's proximity to a violent crime that poses a threat to others, justified a search and frisk). There was certainly no evidence that Mr.

Rochester himself was armed and dangerous. No officer made any statements that he felt threatened by Mr. Rochester. Mr. Rochester did not make any furtive gestures or threatening comments, and he made no attempt to flee. See State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984) (concluding that an inference cannot be made that the suspect was dangerous where suspect made no furtive movements and did not threaten the police).

The police had no reason to believe that Mr. Rochester was armed and dangerous at the time he was frisked, thus the protective frisk was invalid. 1/12/10RP at 85. Since there was no evidence that Mr. Rochester was dangerous, or that he was generally threatening, any safety concern based on the fear that he would attempt to access a weapon lacked an objective basis and was therefore unreasonable. Galbert, at 726.

b. The permissible scope of a weapons frisk was exceeded when the officer retrieved the bullets from Mr. Rochester's pocket. The frisking police officer must be able to articulate specific facts which indicate that the particular suspect was armed and dangerous. State v. Lennon, 94 Wn. App. at 580;

State v. Collins, 121 Wn.2d at 173. If a weapons frisk is warranted, the frisking officer must nevertheless stay within the proper scope of a frisk search – a search for weapons.

For a permissible Terry stop, the State must show (1) the initial stop is legitimate, (2) a reasonable safety concern exists to justify the protective frisk for weapons, and (3) the scope of the frisk is limited to the protective purposes. State v. Duncan, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002); see also Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).

Here, the police officer testified he recognized that the items in Mr. Rochester's pocket were bullets, and he then removed them. 1/12/10RP at 86-87. In doing so, he exceeded the permissible scope of a limited Terry stop-and-frisk. "Without probable cause and a warrant, an officer is limited in what he can do. He cannot arrest a suspect; he cannot conduct a broad search." State v. Setterstrom, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008) (citing State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994)).

Removal of the bullets from Mr. Rochester's pocket exceeded the scope of a weapons frisk. The officer may briefly frisk the individual for weapons if she reasonably believes her

safety or that of others is endangered. Terry, 392 U.S. at 20-27.

But bullets are not weapons. The officer testified that a bullet contains explosive powder that could be a danger to the police; however, he admitted that Mr. Rochester had no firearm or means of causing the bullet to fire. 1/12/10RP at 98. In fact, what he did do was immediately recognize the evidentiary value of the bullets, based on the post-stop development of belief that the men were involved in the nearby robbery attempt. 1/12/10RP at 87. The evidence was located in a search that exceeded the scope of a Terry weapons frisk, and must be suppressed.

3. THE EVIDENCE LOCATED AS A PRODUCT OF THE ILLEGAL STOP AND FRISK MUST BE SUPPRESSED, AND THE CHARGE OF ATTEMPTED ARMED ROBBERY AND THE FIREARM ENHANCEMENT MUST BE DISMISSED.

The results of the illegal stop and the illegal frisk search must be suppressed.

First, because the bullet evidence played a highly significant part in the State's proof of both the substantive charge – attempted first degree robbery with a firearm – and the firearm enhancement, the trial court's entry of judgment on the jury's verdicts must be

reversed.

Evidence which is the product of an unlawful search or seizure is not admissible. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Evidence will be excluded as fruit of the illegal seizure unless the illegality is not the “but for” cause of the discovery of the evidence, and suppression is required where the challenged evidence is in some sense the product of illegal governmental activity. Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599, 615 (1984) (citing United States v. Crews, 445 U.S. 463, 471, 100 S.Ct. 1244, 1249, 63 L.Ed.2d 537 (1980)).

Here, it is clear that the bullets would not have been discovered but for the police officer’s illegal detention, or his illegal frisk search, of Mr. Rochester. That evidence must be suppressed, and the charges based thereon dismissed because they played a central part in the securing of the jury’s verdicts. A constitutional error, including the admission of illegally seized evidence, is harmless only if the reviewing court is satisfied the untainted evidence was so overwhelming as to necessarily result in a guilty verdict. State v. Brandenburg, 153 Wn. App. 944, 947, 223 P.3d

1259 (2009); State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). Importantly, although Mr. Rochester did not confess to any plan to rob Mr. Bauer, and testified that he had no knowledge that the female perpetrators would engage in their own unilateral plan to do so, this was not a confession to attempted robbery. State's exhibit 50. The State's case was premised on the admission by Mr. Rochester during his interrogation that he sent the women to Bauer's address in order to secure "fronted" drugs, along with Bauer's testimony that the women told him he owed "someone" money.

The bullets allowed the jury to disbelieve the defendant, and based on circumstantial evidence, conclude that Mr. Rochester's plan was in fact to send the women to commit an armed robbery. As the deputy prosecuting attorney stated in closing argument, urging the jury to find guilt based on accomplice liability,

Use your common sense with regard to whether or not the defendant thought, or reasonably believed there was a possibility that the firearms could get used in this crime. What do you know? Well, you know that when the defendant was arrested, he had eight .45 bullets on his person.

1/22/10RP at 663. The deputy prosecutor went on to connect those bullets to the guns and to argue that this physical evidence

showed guilt as to the substantive offense, and the firearm enhancement. 1/22/10RP at 664-65. Because the bullets were retrieved in an illegal Terry detention and weapons search, the defendant's conviction and enhancement must be reversed.

Additionally, the fruits of the illegal stop included all the information about the actual robbery perpetrators. The information regarding Carla Smith and Penny Green comes from Mr. Rochester's interrogation. Supp. CP ____, Sub # 46 (Exhibit list, State's exhibit 50, CD of defendant's interrogation).

Derivative evidence may be admissible only if it was obtained by means sufficiently distinguishable to be purged of the primary taint. Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).

Here, (1) the temporal proximity of the arrest and Mr. Rochester's statement was very short; (2) there were no significant intervening circumstances between the arrest and the statement; (3) the purpose and flagrancy of the official misconduct was high since the police stopped the vehicle without cause to obtain evidence on a hunch; and (4) the giving of Miranda warnings fails to insulate the illegal stop and the statement. See Brown, 422 U.S.

at 603-04; State v. Armenta, 134 Wn.2d 1, 17, 948 P.2d 1280 (1997). The Miranda warnings given to Mr. Rochester are not sufficient to purge the primary taint. State v. Avila-Avina, 99 Wn. App. 9, 15, 991 P.2d 720 (2000). The giving of Miranda warnings alone was not dispositive. Avila-Avina, 99 Wn. App. at 15. The interrogation was the unattenuated fruit of the illegal stop.

Absent this information, the State could have produced no information about these individuals Green and Smith at trial. They played a critical part of the State's claims about the defendant's activities on the day in question. Reversal is required.

4. MANIFEST CONSTITUTIONAL ERROR OCCURRED WHEN THE INTERROGATING OFFICER TOLD MR. ROCHESTER THAT THERE WAS NO WAY ANY JURY WOULD BELIEVE HIS STORY AND REPEATEDLY SAID HE WAS LYING.

The defendant's trial was marked by the interrogating officer's announcement to the defendant that "You gotta quit lying" and "You need to be honest" about where the guns came from. Supp. CP ____, Sub # 46 (Exhibit list, trial exhibit 50, CD of defendant's interrogation). The detective said to Mr. Rochester, "I don't think there is a jury in the world that would believe you" about

not knowing about the guns and why he actually came from Yakima. Supp. CP ____, Sub # 46 (Exhibit list, trial exhibit 50, CD of defendant's interrogation).

This type of comment including exhortations that the defendant was not being honest and that the officer needed the "real truth" pervaded the entire interrogation ("all that is not true" and "tell us the truth") and was an ongoing manifest error affecting a constitutional right. RAP 2.5(a). It was completely improper, and devastatingly prejudicial in this case.

Pursuant to the protections of the Sixth Amendment and the Fourteenth Amendment's Due Process Clause, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant, because such testimony "invades the exclusive province of the [jury]." City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (citing State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) ("No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference"); State v. Garrison, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967) (whether a defendant is guilty is a question "solely for the jury and [is] not the proper subject of either

lay or expert opinion."); State v. Farr-Lenzini, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999) ("Because it is the jury's responsibility to determine the defendant's guilt or innocence, no witness, lay or expert, may opine as to the defendant's guilt, whether by direct statement or by inference."); see U.S. Const., amend. 6; U.S. Const., amend. 14.

Of course, the Washington Rules of Evidence strongly disapprove of witness opinions on credibility. See ER 608 (Comment). These constitutional, and evidentiary rules apply where a police officer offers his opinion on the credibility of a defendant's claims and defense. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

For example, in State v. Barr, 123 Wn. App. 373, 378, 98 P.3d 518 (2004), review denied, 154 Wn.2d 1009, 114 P.3d 1198 (2005), a police officer who interrogated the defendant testified that "it was obvious to me [the defendant] was afraid he was going to go to prison for this." The Court deemed this improper opinion testimony on credibility and as to guilt. Barr, 123 Wn. App. at 382.

The error was "manifest." Opinion testimony that directly comments on another witness' credibility and opines about a

defendant's guilt is manifest constitutional error because it violates the defendant's constitutional right to a jury trial, which includes independent determination of the credibility of the witness and of the facts by the jury. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

Generally, the appellate courts will not consider an evidentiary issue that is raised for the first time on appeal, because failure to properly object deprives the trial court of the opportunity to prevent or cure any error. RAP 2.5(a)(3); Kirkman, 159 Wn.2d 926. A narrow exception, however, exists for "manifest error[s] affecting a constitutional right." RAP 2.5(a)(3); Kirkman, 159 Wn.2d at 936. A "manifest" error under RAP 2.5(a)(3) requires a showing of actual prejudice, which requires " 'a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.' " Kirkman, 159 Wn.2d at 935 (quoting State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).

Under these circumstances, a manifest error requires "an explicit or almost explicit witness statement" that the defendant is lying or guilty. Kirkman, 159 Wn.2d at 936; see also State v.

Madison, 83 Wn. App. 754, 763, 770 P.2d 662 (1989) (an opinion on credibility that is direct, rather than implied, constitutes manifest constitutional error).

These comments were both manifest, and reversible error, as they were extraordinarily improper. And the State's closing argument makes clear that the conviction and special verdict were secured by arguing that Mr. Rochester, in his videotaped interrogation, told the detective and the jury an untruthful story about his plans that day that under-represented the scheme as a con, as opposed to what the State said it was - a robbery plan. 1/22/10RP at 663-64. During trial, the interrogating officer's recorded denunciations of the defendant's story as an untrue 'minimization' of what was planned that day, led directly to the defendant's conviction for an armed robbery, including the special verdict. The prosecutor saw to that when, in closing, she almost verbatim repeated the detective's statement in the interrogation denouncing Mr. Rochester's credibility – the prosecutor argued: “And no jury in the world is going to believe that the defendant had no idea that there was a possibility that guns could be used in this crime.” 1/22/10RP at 691. This was devastatingly prejudicial and

improper, exacerbating the comments on credibility, and reversal is required.

In addition, reversal in this case is required under the cumulative error doctrine, when this error is considered with the error in admission of the evidence deriving from the illegal stop. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

5. BASHAW ERROR MAY BE DISMISSED BY THE APPELLATE COURT AS HARMLESS BEYOND A REASONABLE DOUBT ONLY IN THE IMPROBABLE CIRCUMSTANCE WHERE THE PROSECUTION'S CASE IS SO WATERTIGHT THAT NOT A SINGLE JUROR COULD HAVE ENTERTAINED REASONABLE DOUBT.

The jury instructions regarding the special firearm verdict were erroneous and require reversal of the firearm enhancement to Mr. Rochester's sentence. The jury in the present case was told, with regard to whether the defendant was armed with a firearm, as follows: "If you unanimously have a reasonable doubt as to this question, you must answer 'was not.'" CP 86 (jury instruction no. 18). However, the special verdict form was faulty under State v. Bashaw, Supreme Court No. 81633-6, (decided July 1, 2010). The enhancement must be reversed because the jury was erroneously informed that it had to be unanimous as to a negative answer on

the special verdict form.

In Bashaw the Supreme Court makes clear that a non-unanimous negative jury decision on a special finding is a final determination that the State has not proved that finding beyond a reasonable doubt – thus, a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's sentence. State v. Bashaw, Supreme Court No. 81633-6, at pp. 12-14.

Although unanimity is required to find the presence of a special finding, see Bashaw, unanimity is not required to find the absence of such a special finding. The instructions stated that unanimity was required for either determination. As a whole, the instructions failed to make the applicable legal standard apparent. See State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007). That was error, also violating the defendant's right have charges resolved by a particular tribunal. State v. Wright, 165 Wn.2d 783, 792-93, 203 P.3d 1027 (2009); Arizona v. Washington, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978).

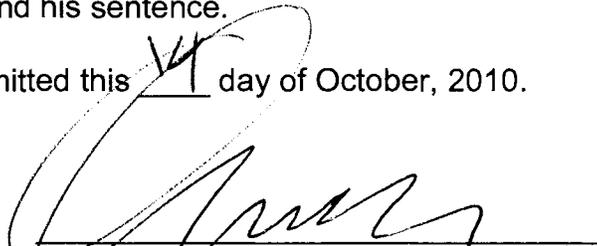
As in Bashaw, the constitutional error cannot be concluded to be harmless beyond a reasonable doubt under State v. Brown,

147 Wn.2d 330, 341, 58 P.3d 889 (2002), because it is impossible to speculate what a jury in such a case did, or might have done or not done in terms of unanimity or mere disagreement among jurors caused by a sole juror (either of which circumstance would equally defeat the finding) if the jury had been properly instructed. State v. Bashaw, at pp. 15-17. Reversal is mandated.

E. CONCLUSION

Based on the foregoing, Mr. Rochester requests that this Court reverse the trial court's denial of his CrR 3.6 motion, and reverse his conviction, and his sentence.

Respectfully submitted this 14 day of October, 2010.



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65165-0-I
v.)	
)	
SHANE ROCHESTER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF OCTOBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> SHANE ROCHESTER 795982 WASHINGTON STATE PENITENTIARY 1313 N 13 TH AVE WALLA WALLA, WA 99362-1065	(X) () ()	U.S. MAIL HAND DELIVERY _____

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