

NO. 41005-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

DEVAN IDRIS HOPSON,

Appellant.

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

The Honorable Linda CJ Lee, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. By excluding extrinsic evidence of the key prosecution witness's bias, the court denied appellant his constitutional right of confrontation.

2. The evidence was insufficient to prove beyond a reasonable doubt that appellant was guilty of attempted robbery.

3. The special verdict instruction misstated the unanimity requirement.

Issues pertaining to assignments of error

1. Appellant was charged with first degree assault and attempted first degree robbery, both with firearm allegations. Although the State presented varying testimony from several witnesses, only a former co-defendant who pleaded guilty testified that appellant was carrying a gun. When the defense offered evidence that this crucial prosecution witness had offered another witness money to say that the guns were not his, the court excluded the testimony as hearsay. Did the court's improper exclusion of extrinsic evidence of a prosecution witness's bias deny appellant his constitutional right of confrontation?

2. Where there was no evidence appellant knew of or was ready to assist in any plan to commit first degree robbery, must his conviction be reversed for insufficient evidence?

3. Where the special verdict instruction incorrectly required the jury to be unanimous to answer the special verdicts “no,” must the firearm enhancements be vacated?

B. STATEMENT OF THE CASE

1. Procedural History

The Pierce County Prosecuting Attorney charged appellant Devan Hopson and co-defendant Oziel Suarez with first degree assault and attempted first degree robbery, alleging that one or both were armed with a firearm during the commission of the crimes. CP 18-19; RCW 9A.36.011(1)(a); RCW 9A.28.020; RCW 9A.56.190 and RCW 9A.56.200(1)(iii). The case proceeded to jury trial before the Honorable Linda CJ Lee, and the jury returned guilty verdicts. CP 103, 105. The jury also answered the special verdict forms in the affirmative. CP 104, 106. The court imposed standard range sentences plus consecutive firearm enhancements, for a total confinement of 270 months. CP 114-16. Hopson filed this timely appeal. CP 122.

2. Substantive Facts

At around 10:30 p.m. on June 27, 2009, several gunshots were fired at 702 South Huson Street in Tacoma. 3RP¹ 167, 174. Devan

¹ The Verbatim Report of Proceedings is contained in 11 volumes, designated as follows 1RP—6/8/10; 2RP—6/9/10; 3RP—6/14/10, 4RP—6/15/10; 5RP—6/16/10; 6RP—

Hopson called 911 to report the shooting, and police met him and Oziel Suarez around the corner from the shooting. 3RP 169, 174. Hopson had a grazing bullet wound to the head, and Suarez had been shot in the abdomen. 3RP 171. Both were transported to the hospital. 3RP 175.

Upon entering the house where the shooting occurred, police found Roshawn Laster-Cobb lying on a mattress in a back bedroom. 3RP 213. He had been shot, and he was transported to the hospital. 3RP 215. Police located a Glock semiautomatic pistol in the bedroom with Laster-Cobb, and six shell casings fired from that gun were found in the living room. 3RP 220; 6RP 657, 685. Police found crack cocaine and marijuana in Laster-Cobb's bedroom and a large brown purse with \$595 in cash between the kitchen and living room. 6RP 682-84.

Police also found a .45 caliber semiautomatic pistol and an assault rifle in a recycling can down the street from where the shooting occurred. 4RP 281. Two shell casings that had been fired from the .45 caliber pistol were found in the house. 6RP 657, 685. An unfired rifle cartridge was found in the driveway. 4RP 456. Police found a steady trail of blood from in front of the house to where Hopson and Suarez were found. 6RP 693-95. Although there was blood on top of the recycling can, police did not examine the rifle or pistol for blood. 6RP 706, 722. A latent print

6/22/10, 7RP—6/23/10, 8RP—6/24/10; 9RP—6/25/10; RP (Verdict)—6/28/10, 10RP—7/23/10

lifted from the left side of the rifle matched Suarez's inked fingerprints. 8RP 1043, 1047-48. No fingerprints were found on the .45. 8RP 1036.

Derrick Cleary had also called 911, and he approached an officer at the scene about 30 minutes after the initial 911 call was made, saying a man had shot his friends. 3RP 177, 180; 4RP 320. Cleary was uninjured, so he was transported to police headquarters for an interview. 3RP 255. After Hopson's injury was treated, he too was transported to headquarters for an interview and then released. 3RP 263-64; 4RP 279. Cleary was brought in for a second interview after the guns were found in the recycling can, and he was taken into custody afterwards. 4RP 289.

At the initial stages of their investigation, police did not know who the suspects were, who the victims were, and who the witnesses were. 3RP 257. They eventually determined that Cleary, Hopson, and Suarez had arrived together and that Laster-Cobb and another person, Jeremy Patchell, were associated with the house. 3RP 257-58. Cleary, Hopson, and Suarez were charged with first degree assault and first degree robbery. Cleary entered a plea agreement, reducing his potential sentence from 30 years to 53 to 70 months. 7RP 853, 862, 937.

There were at least five, and possibly six, people at house at the time of shooting. 4RP 329. Of the five people police talked to, each gave a different account of the shooting, and some gave more than one story.

Laster-Cobb testified that when he returned home around 8:30 or 9:00 that evening, his roommate, Patchell, told him he had arranged a drug deal. 4RP 349. Laster-Cobb denied that he was involved in the deal, insisting he learned of it only five to ten minutes before the shooting. 4RP 349, 352. Although he said he was not concerned about his safety, Laster-Cobb said he waited in a recliner facing the front door with a pistol on the side of his chair. 4RP 352, 356. He claimed that Patchell had given him the gun. 4RP 411. Laster-Cobb testified that he did not have a large amount of money for the drug deal but that Patchell had a book bag. 4RP 413.

Laster-Cobb heard a car pull up as Patchell gave directions on his cell phone. 4RP 355. He had the loaded gun next to him because there was going to be a drug transaction. 4RP 358-59. Cleary walked in and sat down. 4RP 425. Patchell asked Cleary about one of his guys carrying a rifle, and Cleary responded it was just to be safe. 4RP 360, 362. Hopson then walked inside. 4RP 365. Patchell was about to close the door when Suarez stuck his foot inside. 4RP 364. Suarez was holding a rifle, and he said, "Where the fuck is the money, white boy?" 4RP 346, 360, 364, 366. Laster-Cobb said he then grabbed his gun, and Suarez told him not to reach. 4RP 360. He heard a shot, so he started firing, and he emptied his clip. 4RP 360. He was shot in the arm and the leg. 4RP 361. Laster-

Cobb testified that he saw the second shot that was fired, and he was confident it came from the rifle. 4RP 370. He never saw anyone holding a .45. 4RP 428.

After describing this scenario, Laster-Cobb testified on cross examination that there was a fourth person in the group that came to the house. 4RP 399. Laster-Cobb said that Cleary entered the house first, and he stayed on the couch the whole time. 4RP 377, 425. Another person came in with him and sat in a chair by the door. 4RP 398. Then Hopson and Suarez entered, and Suarez was holding the rifle. Laster-Cobb did not see any other gun. 4RP 346-47.

Patchell dove into the kitchen when the shooting started. 4RP 378. The whole incident lasted eight or nine seconds, and when it was over, Laster-Cobb was alone in the house. 4RP 375, 378. He locked the front door and turned out the lights, then headed to his bedroom, where he called a friend for a ride to the hospital. 4RP 380-81. Police were already in the area, however, and Laster-Cobb was eventually contacted by them. 4RP 383, 448. Laster-Cobb lied, saying his name was Anthony and that he was sleeping when he was shot. 4RP 419, 448-49.

While Laster-Cobb testified he had nothing to do with the drug transaction that was supposed to take place, Patchell testified that he arranged the drug deal at Laster-Cobb's request. 4RP 391; 5RP 494.

Acting as the middleman, he called Cleary and asked to buy a large quantity of Oxycontin, about \$8000 to \$10,000 worth. 5RP 488-89. Although Patchell typically did not deal pills, he arranged the deal with Cleary as a favor to Laster-Cobb. 5RP 494, 496. Patchell said he never had the cash, but he believed Laster-Cobb had the money because he asked Patchell to make the call. 5RP 499.

Patchell testified that Cleary kept changing the location where the transaction was going to happen, and they finally agreed that Cleary would bring the drugs to Patchell's house. 5RP 500-01. Patchell stood on the porch waiting for Cleary to arrive. 5RP 508. When Cleary's truck pulled up, there were four people inside. 5RP 509. Cleary and one other person, who Patchell identified as Hopson, got out of the truck and went inside with Patchell. 5RP 515, 577. Cleary sat on the couch, and Hopson sat in a chair. 5RP 515, 577.

Patchell did not see either Cleary or Hopson with a gun. 5RP 585. Before the truck pulled up, however, Patchell saw Laster-Cobb with a gun in his hand. 5RP 522-23. There was also a backpack next to Laster-Cobb's chair, which Patchell assumed held the money for the transaction. 5RP 518.

After Cleary and Hopson entered the house, Patchell saw one of the men in the truck holding a big gun, and he asked Cleary if they drove

around like that. 5RP 529. When Patchell turned to walk into the house, suddenly there was a gun in his face, and the man from the truck told him to put his hands up. 5RP 530-31. Patchell identified the man with the gun as Suarez. 5RP 532. Patchell immediately dove into the kitchen, then he crawled into the bedroom, punched out a window and ran. 5RP 531-32. He heard gunshots as he was falling through the window. 5RP 534. Patchell also said he saw the fourth man get out of the truck and run away. 5RP 550.

Patchell chose not to call 911 because he had warrants for his arrest. Instead, he went to a neighbor's house and called his mother to pick him up, and he hid for a few days. 5RP 543. Ultimately he was arrested and interviewed by police. 5RP 548.

Cleary testified that Patchell had called him early in the day to arrange a drug deal, and he acted as middleman. 6RP 788. Cleary called a contact, trying to locate the amount of Oxycontin Patchell wanted, and his contact gave him Suarez's number. 6RP 790. Cleary was familiar with Suarez, but this was the first time they dealt with each other. 6RP 789. He asked Suarez for \$5000 to \$8000 of Oxycontin, and Suarez said he could get it. 6RP 794. Cleary then made several calls to Patchell trying to arrange a meeting time and place both he and Suarez would agree to. 6RP 801.

Around 8:00 Cleary met Suarez at his apartment, and Hopson was with him. They drove around for two to three hours trying to arrange a meeting with Patchell. 6RP 803. Cleary denied that there was a fourth person in the truck. 6RP 805. He testified that he did not have a weapon, and he did not see either Suarez or Hopson with a gun. 6RP 803.

Cleary said that although he never saw drugs in the truck, he assumed Suarez and Hopson had them. 7RP 833, 951. Cleary admitted on cross exam that he said in an earlier interview that he heard what sounded like pills in a metal container when they were in the truck. 7RP 953, 964.

Finally they agreed to meet at Patchell's house. Cleary thought the transaction would go as planned. He had no concerns there would be a shooting, and neither Suarez nor Hopson had talked about a robbery. 6RP 805-06.

Cleary testified that when they drove up to the house, Patchell was on the porch, and he and Hopson got out of the truck. 6RP 807-08. Cleary went inside the house, was introduced to Laster-Cobb, and sat down. 6RP 810. Hopson stayed at the door. 6RP 816. At that point, Patchell asked Cleary if he let his boys ride around with assault rifles, and Cleary saw Laster-Cobb raise a gun and start shooting toward the front door. 6RP 819-20. Cleary testified that he ducked after the first shot was

fired. He tried to jump out the window, and when he was unable to, he took off running. 7RP 830-31.

Cleary said that when he got outside, he saw Suarez and Hopson come out of the house, but he did not remember seeing a gun. 7RP 843. He said Suarez asked for the keys to the truck, but Cleary had left them in the house. 7RP 844. He did not notice that either of them was injured. 7RP 845.

Cleary ran to a neighbor's house and asked to use the phone. 7RP 838. He said there was a shooting and one of his buddies was shot. Cleary testified that he did not know if anyone was shot, but he assumed someone had been. 7RP 840-41. Even though Cleary testified that the only person he saw fire a gun was Laster-Cobb, he said he was not referring to Suarez and Hopson as his buddies but to Patchell and Laster-Cobb. 7RP 841. Cleary testified that he did not know Suarez and Hopson had been shot. 7RP 842.

Although the police officer who responded to the scene testified that Cleary arrived about a half hour later, Cleary claimed that after calling 911 he stayed at the neighbor's house for about five minutes, then he walked to where the police were. 7RP 848. Cleary told the police what happened, but he did not mention a drug transaction. 7RP 849. Cleary also gave a statement at the police station shortly after the incident, again

failing to mention the drug deal. 7RP 857. Cleary gave more information a few months later when he was interviewed prior to entering his guilty plea. 7RP 857-59.

On cross examination, Cleary changed his story and said he had seen Suarez holding a rifle in the doorway of the house. 7RP 909. He continued to deny that the rifle was his, saying he never traveled with guns and did not need them for protection in his drug transactions. 7RP 911-12. Cleary denied telling Patchell, “that’s the way we roll,” when Patchell asked about his boys carrying assault rifles. 7RP 923. Cleary admitted he had a prior conviction for robbery that involved a gun, however. 7RP 934.

On redirect, Cleary tried to explain why he changed his story about seeing Suarez with a gun, saying he might have misunderstood the prosecutor’s question when he testified on direct exam. 7RP 971. Cleary said that he saw Suarez with a rifle, but he did not see either Hopson or Suarez with a handgun. 7RP 972. Cleary then admitted that he had given earlier statements saying he saw Hopson pull out a gun. 7RP 973.

Cleary admitted that when he talked to the police on the morning after the shooting, he did not mention seeing Suarez or Hopson with guns. 7RP 978. Cleary was interviewed by the police again when he was seeking a plea agreement, and then he was interviewed by the defense. In those interviews he said he saw both Suarez and Hopson with guns. 7RP

975. By that time he had seen discovery materials saying how many guns were involved and what types. 7RP 981. He assured the prosecutor that he had not made up the story to make himself more valuable, however. 7RP 983.

When Suarez was questioned at the hospital after coming out of surgery, he said he went to the house on Huson to sell some pills and marijuana, and he was shot. 5RP 479-80. In another interview, Suarez said he had been with Hopson and Cleary, and Cleary was trying to kill him. 6RP 732. Suarez explained that he had been involved in a dispute a month earlier with someone named Rocco, and Cleary contacted him on the day of the shooting saying he could set up a meeting with Rocco to settle the problem. 6RP 733. Cleary then picked them up and took them to the house where the shooting occurred. Suarez said he was shot as soon as he got out of the truck. He and Hopson then fled on foot and ran until he collapsed. 6RP 734.

Suarez told police he did not have a gun and he did not see Hopson with a gun. He knew that Cleary had a rifle in the truck, and he also believed Cleary was carrying a handgun. 6RP 735. Suarez said he might have touched the rifle, but he denied having it in his hand when he got out of the truck. He also denied going to the house for a drug deal or a robbery. 6RP 735.

At trial Suarez testified that he had seen Cleary around his apartment complex a few times, and he agreed to go with Cleary to a club where he was promoting something. 8RP 1102, 1106. He, Hopson, and another friend, Courtland Young, went with Cleary that night. 8RP 1106.

Suarez got into Cleary's truck while Hopson was still upstairs in the apartment. He saw a rifle under the seat, and Cleary handed it to him. Suarez looked at it, then put it back. 8RP 1108. Cleary next showed him a pistol he carried in his waistband. 8RP 1109. Hopson and Young then joined them in the truck, and Cleary drove off. 8RP 1110.

Cleary was on the phone as they were driving, and he said he had to stop somewhere to pick something up. 8RP 1119. When they pulled up to the house on Huson Street, Patchell walked up to the truck and spoke with Cleary for a second. Cleary then asked Hopson to go inside with him. 8RP 1120.

Once they were inside, Suarez heard gunshots. He and Young stepped out of the truck, and Suarez was shot in the back. 8RP 1122. Hopson then came out of the house holding his head. He was bleeding and screaming. Hopson helped Suarez up, and they ran away from the house. 8RP 1123-25. Suarez did not remember much after that. 8RP 1126. Suarez testified that neither he nor Hopson had a gun. 8RP 1128.

He said he did not know anything about a drug deal and that Cleary was lying. 8RP 1132-33.

Hopson did not testify at trial, but his statements to police were admitted in evidence. In his interview with detectives Hopson initially said he just happened to be walking in the area when he was shot by unknown persons. 4RP 276. The detective told him that story was ridiculous and pressed him to be more truthful. 4RP 278. Hopson then said that he and others had been driving around with Cleary, when Cleary said he needed to stop at Patchell's house. Hopson said he headed inside but only made it as far as the front door before the shooting began. 4RP 278. He saw a black man who he did not recognize coming from the living room shooting at them. Hopson said he was not armed and no one he was with was armed. 4RP 278.

C. ARGUMENT

1. BY EXCLUDING EXTRINSIC EVIDENCE OF THE KEY PROSECUTION WITNESS'S BIAS, THE COURT DENIED HOPSON HIS CONSTITUTIONAL RIGHT OF CONFRONTATION.

Following testimony from Cleary, Suarez called Traniece Armstrong as a witness. Armstrong was Suarez's girlfriend of seven years, and they have two children together. 8RP 1063. She testified that Cleary had approached her after the incident and offered her money to say

that the guns were not his. 8RP 1068. The State objected that the statement was hearsay, and the court sustained the objection. 8RP 1068.

When the jury was excused from the courtroom, the prosecutor argued that the testimony was not proper impeachment, because Cleary had not been confronted with the evidence. 8RP 1072. After reviewing Cleary's testimony and the evidence rules, the court ruled that the testimony from Armstrong was not impeachment on a collateral matter, but it was still inadmissible as hearsay. 8RP 1077, 1081. At the State's request, the court instructed the jury to disregard Armstrong's testimony about Cleary. 8RP 1081, 1088.

A criminal defendant has a constitutional right to impeach a prosecution witness with evidence of bias. Davis v. Alaska, 415 U.S. 308, 316-18, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); State v. Spencer, 111 Wn. App. 401, 408, 45 P.3d 209 (2002), review denied, 148 Wn.2d 1009 (2003). The bias of a witness is always relevant to discredit that witness's testimony. Davis, 415 U.S. at 316. Not only must the defendant be allowed to cross examine the prosecution witness about statements indicating bias, the defense must also be permitted to introduce extrinsic evidence of such bias through the testimony of other witnesses. Spencer, 111 Wn. App. at 408; State v. McDaniel, 37 Wn. App. 768, 772-73, 683

P.2d 231 (1984); State v. Jones, 25 Wn. App. 746, 751, 610 P.2d 934 (1980).

In this case, the court denied the defense the opportunity to establish Cleary's bias through testimony from Armstrong. Although Hopson's trial attorney did not participate in the discussion of this issue below, Hopson may nonetheless raise the issue on appeal. An appellant may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3). It is error of constitutional magnitude to deny an accused the right to establish the chief prosecution witness's bias through the testimony of another witness. Spencer, 111 Wn. App. at 408.

This Court's decision in Spencer is directly on point. In Spencer, the defendant offered testimony from an independent witness to establish the bias of the key prosecution witness. The State's witness, McMullen, had testified that Spencer asked her to provide a false alibi for him. Spencer, 111 Wn. App. at 405. Spencer then called Schmidt to testify that McMullen had told her the police coerced and intimidated her, that McMullen had told her Spencer was not guilty, that McMullen had said she was afraid CPS would take her children away, and that McMullen was angry that Spencer had a second girlfriend. Spencer, 111 Wn. App. at 405-06.

The prosecutor argued that Schmidt's testimony was hearsay and that to admit McMullen's statements, Spencer would have needed to first confront her with them. The trial court excluded Schmidt's testimony, ruling that because the defense had not questioned McMullen about her alleged statements when she testified, the proper foundation had not been laid to impeach her with Schmidt's testimony. The court denied Spencer's request to recall McMullen to ask her about the statements. Spencer, 111 Wn. App. at 406.

On appeal, this Court first noted that a defendant has a constitutional right to impeach a prosecution witness with evidence of bias, and denying a defendant that right is reversible error. Spencer, 111 Wn. App. at 408. The Court explained that exclusion of Schmidt's testimony was reversible error.

First, the trial court's determination that Schmidt's testimony about McMullen's statements was hearsay was incorrect, because those statements were not offered for the truth of the matter asserted. The statements were offered to show McMullen's state of mind and were relevant for that purpose regardless of whether the police actually threatened that CPS would take her children away. They were not inadmissible hearsay and should not have been excluded on that basis. Spencer, 111 Wn. App. at 408-09.

Next, this Court explained that no foundation is required for extrinsic evidence of a witness's bias. A witness must be given the chance to agree with or refute a prior statement only when that statement is offered as inconsistent with the witness's testimony. A prior statement that shows the State's witness is biased against the defendant is merely extrinsic evidence of bias, however. Because that statement is not being compared with what the witness said on the stand, there is no need to confront the witness with the statement before it is offered. Spencer, 111 Wn. App. at 409-10.

Schmidt's testimony was not offered to contradict what McMullen said on the stand. Rather, it was offered to show that McMullen may have had motives and biases when speaking to the police which did not involve telling the truth. Spencer should have been afforded broad latitude in exposing McMullen's bias. Because her testimony was crucial to the State, and because the jury may not have convicted if it learned of her possible biases and motives in testifying, the court's error in excluding Schmidt's testimony was not harmless. Spencer, 111 Wn. App. at 411.

In this case, as in Spencer, the court wrongly excluded extrinsic evidence of a key prosecution witness's bias, concluding it was inadmissible hearsay. Armstrong's testimony that Cleary said he would give her money to say the guns used in the shooting were not his was not

offered to prove the truth of the matter asserted. Regardless of whether Cleary would have paid Armstrong, the fact that he offered her money showed his state of mind. His attempt to purchase favorable testimony was relevant to show his bias against Suarez and Hopson.

Moreover, Armstrong's testimony was not offered as a prior statement inconsistent with Cleary's testimony at trial, and thus there was no need to confront him with the evidence. Instead, the evidence was offered to show that Cleary was motivated by a desire to avoid criminal liability, rather than a desire to tell the truth, when he claimed that Hopson and Suarez were carrying guns. When the policy of laying a foundation for prior inconsistent statements does not apply, as here, "the defendant should be afforded broad latitude in showing the bias of opposing witnesses." Spencer, 111 Wn. App. at 411.

The defense theory was that Cleary made up the story about Hopson having a gun in order to receive a favorable plea agreement. 9RP 1241-42, 1273. Evidence that he tried to purchase testimony to corroborate his story demonstrates his bias and supports the defense. The jury was entitled to have that evidence before them so they could make an informed decision as to the weight to put on his testimony. See Davis, 415 U.S. at 317-18.

Cleary was the only witness to testify that Hopson had a gun, and his testimony was crucial to the State. Because the jury might not have convicted Hopson if it was permitted to consider the evidence of Cleary's bias, the court's error in excluding Armstrong's testimony cannot be considered harmless. Hopson's convictions must be reversed and the case remanded for a new trial. See Spencer, 111 Wn. App. at 411.

2. THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT HOPSON WAS GUILTY OF ATTEMPTED ROBBERY.

In every criminal prosecution, the State must prove all elements of a charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Evidence is sufficient to support a conviction only if, viewing the evidence in the light most favorable to the State, a rational jury could find all the elements of the crime beyond a reasonable doubt. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). "It is critical that our criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned." DeVries, 149 Wn.2d at 849 (citing Winship, 397 U.S. at 364. For this reason, the reasonable doubt standard is "indispensable." It "impresses on the trier of fact the

necessity of reaching a subjective state of certitude on the facts in issue.”

Id.

The State charged Hopson with attempted first degree robbery, which required it to prove that he or an accomplice, with intent to commit first degree robbery, took a substantial step toward committing that crime. CP 96; RCW 9A.28.020; RCW 9A.56.190 and RCW 9A.56.200(1)(iii). There was evidence that Suarez brandished a rifle and demanded money as he entered the house, and the jury could infer from that evidence that he was attempting to rob Patchell or Laster-Cobb. There was no evidence that Hopson made any such attempt, however, so to convict him of the offense, the jury had to conclude he was acting as Suarez’s accomplice.

A person is an accomplice to a crime if, with knowledge that it will promote or facilitate the crime, he solicits, commands, encourages, requests, aids or agrees to aid another other person in planning or committing it. RCW 9A.08.020(3)(a). To be an accomplice, the defendant must associate himself with the undertaking, participate in it as something he desires to bring about, and seek by action to make it succeed. State v. J-R Distributors Co., 82 Wn.2d 584, 592-93, 512 P.2d 1049 (1973).

Here, the State presented no evidence whatsoever that Hopson was aware of any plan to commit robbery, much less that he solicited,

commanded, encouraged, requested, or agreed to assist in the planning or commission of that crime. Even Cleary, the only witness to testify that Hopson was armed, testified that there was no discussion of any robbery. 7RP 970.

The State's evidence would support findings that Cleary arranged a drug transaction with Suarez, that Suarez did not have the drugs with him when Cleary picked him up for the transaction, and that Suarez entered the house saying "Where...is the money." But the fact that Hopson was with Suarez when Cleary picked him up, or even that he was armed as Cleary claimed, does not establish that Hopson knew of and intended to aid in the commission of any robbery Suarez might have attempted to commit. See State v. Asaeli, 150 Wn. App. 543, 568, 208 P.3d 1136, review denied 167 Wn.2d 1001 (2009).

In Asaeli, this Court reversed a co-defendant's conviction as an accomplice to murder. Although the evidence showed that the co-defendant was present at the park where the shooting occurred, he drove several people including another co-defendant to the park, and he knew that members of his group were looking for the victim, the evidence failed to show that he knew of and was ready to assist in the commission of the crime. Asaeli, 150 Wn. App. at 568. There was evidence that the co-defendant spoke to several people involved in the crime before driving to

the park and again at the park, but, importantly, there was no evidence that any of these conversations related in any way to a plan to shoot the victim. Asaeli, 150 Wn. App. at 568-59. The co-defendant's mere presence at the scene with knowledge that others were looking for the victim was insufficient to establish his complicity in the shooting. Because the record contained no evidence, direct or indirect, that the co-defendant was even aware of any plan to shoot the victim, the State failed to prove he was an accomplice to that crime. Asaeli, 150 Wn. App. at 569-70.

Similarly, here, the mere fact that Hopson was riding around with Suarez and Cleary, that he walked to the house with one or the other of them, or that he might have been carrying a gun does not prove beyond a reasonable doubt that he was an accomplice to attempted robbery. As in Asaeli, there was no evidence of any conversations relating to a plan to commit robbery, and no evidence that Hopson was ready to assist in any such plan, if it existed, merely by being present.

The jury might be able to infer that Hopson knew of the drug transaction, although there was no direct evidence of that, and that by being armed and going into the house he intended to aid in that transaction. But accomplice liability attaches only for the crime that the accomplice knowingly promoted or facilitated, and not for any unrelated crime committed by the principal. “[T]he fact that a purported accomplice

knows that the principal intends to commit a crime does not necessarily mean that any accomplice liability attaches for any and all offenses ultimately committed by the principal.” State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). Thus, evidence that Hopson accompanied Suarez and Cleary to the house where the drug transaction was to occur, and even evidence that he was armed at the time, was insufficient to establish his complicity in any attempt to rob Laster-Cobb, an offense of which the State has failed to show he had any foreknowledge.

The evidence was insufficient to support Hopson’s conviction for attempted first degree robbery, and that conviction must be reversed and the charge dismissed. See Asaeli, 150 Wn. App. at 570.

3. THE ERRONEOUS INSTRUCTION REQUIRING JURY UNANIMITY TO ANSWER “NO” ON THE SPECIAL VERDICTS REQUIRES VACATION OF THE FIREARM ENHANCEMENTS.

It is manifest constitutional error to instruct a jury that it must be unanimous in order to find the State failed to prove the facts supporting a sentencing enhancement. State v. Bashaw, 169 Wn.2d 133, 145-48, 234 P.3d 195 (2010); State v. Ryan, 160 Wn. App. 944, ___ P.3d ___ (2011), Slip Op. at 1. Washington requires unanimous verdicts in criminal cases. Wash. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). For special verdicts, jurors must be unanimous to find that the

State has proven the special finding beyond a reasonable doubt. State v. Goldberg, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). Jury unanimity is not required to answer a special verdict “no,” however. Bashaw, 169 Wn.2d at 145; Goldberg, 149 Wn.2d at 893. Where the jury is deadlocked or cannot decide, the answer to the special verdict is “no.” Id.

Here, the jury was given special verdict forms asking whether Hopson was armed with a deadly weapon (defined by the court as a firearm) during the commission of counts 1 and 2. CP 101, 104, 106. The jury was also instructed how to fill out the special verdict forms:

You will also be given special verdict forms for the crimes of assault in the first degree and attempted robbery in the first degree....Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no.”

CP 100 (Instruction No. 26).

This is an incorrect statement of law. “[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 maximum allowable sentence. A nonunanimous jury decision is a final determination that the State has not proved the special finding beyond a reasonable doubt.” Bashaw, 169 Wn.2d at 146. The State’s burden is to

prove to the jury beyond a reasonable doubt that the special verdict allegations are established. “If the jury cannot unanimously agree that the State has done so, the State has necessarily failed in its burden. To require the jury to be unanimous about the negative—to be unanimous that the State has not met its burden—is to leave the jury without a way to express a reasonable doubt on the part of some jurors.” Ryan, Slip Op. at 2 (citing Bashaw, 169 Wn.2d at 145).

Although Hopson did not object to the court’s special verdict instruction below, he may challenge this error for the first time on appeal because it is a manifest error affecting a constitutional right. Ryan, Slip Op. at 2; RAP 2.5(a)(3); cf State v. Nunez, 160 Wn. App. 150, 248 P.3d 103, 107-08 (2011) (Division III held error not of constitutional magnitude). In Ryan, the trial court gave a special verdict instruction similar to the one given in this case, and the defendant did not object at trial. Ryan, Slip Op. at 1. The Court of Appeals rejected the State’s argument that the instructional error could not be raised for the first time on appeal, holding that the Supreme Court’s decision in Bashaw demonstrates that the error is of constitutional magnitude:

The Bashaw court strongly suggests its decision is grounded in due process. The court identified the error as “the procedure by which unanimity would be inappropriately achieved,” and referred to “the flawed deliberative process” resulting from the erroneous instruction. The court then concluded the error could not be

deemed harmless beyond a reasonable doubt, which is the constitutional harmless error standard. The court refused to find the error harmless even where the jury expressed no confusion and returned a unanimous verdict in the affirmative.

Ryan, Slip Op. at 2 (citing Bashaw, 169 Wn.2d at 147-48).

The fact that the defendant in Bashaw did not challenge the special verdict instruction at trial but the Supreme Court nonetheless addressed the issue and applied the constitutional harmless error standard demonstrates that the issue is of constitutional magnitude. Hopson can raise the issue in this appeal.

In this case, the jury answered the special verdict questions in the affirmative, and the court imposed firearm enhancements based on those verdicts. CP 104, 106, 112-14. The procedural error by which unanimity on these verdicts was “inappropriately achieved” cannot be dismissed as harmless. See Bashaw, 169 Wn.2d at 147.

In Bashaw, the Supreme Court held that the instructional error was not harmless beyond a reasonable doubt because, given a proper special verdict that did not require unanimity, the jury may have returned a different special verdict. Bashaw, 169 Wn.2d at 147. The Court stated,

We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly

instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

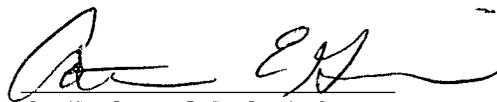
Bashaw, 169 Wn.2d at 147-48. The same holds true here. Given the “flawed deliberative process” by which the special verdicts were reached, this Court cannot say beyond a reasonable doubt that the error was harmless. A jury instruction that requires unanimity when unanimity is not necessary cannot be harmless, and Hopson’s firearm sentence enhancements must be vacated. See Bashaw, 169 Wn.2d at 148.

D. CONCLUSION

The trial court denied Hopson his constitutional right of confrontation by excluding evidence of a key prosecution witness’s bias, and Hopson is entitled to a new trial. In addition, the State failed to prove beyond a reasonable doubt that Hopson committed attempted first degree robbery, and that charge must be dismissed with prejudice. Finally, the erroneous special verdict instruction requires that the firearm enhancements be vacated.

DATED this 22nd day of June, 2011.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in

State v Devan Hopson, Cause No. 41005-2-II, directed to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
June 22, 2011

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STATE OF WASHINGTON
BY _____