

NO. 41005-2

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

OZIEL SUAREZ, APPELLANT
DEVAN HOPSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda CJ Lee

No. 09-1-03112-8

No. 09-1-03111-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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5. Should Suarez's case be remanded for resentencing when his sentence was improperly calculated?

B. STATEMENT OF THE CASE.

1. Procedure

On June 29, 2009, the Pierce County Prosecutor's Office charged codefendants Devan Hopson ("Hopson"), Oziel Suarez ("Suarez"), and Derrick Cleary ("Cleary") with firearm enhanced first degree assault and firearm enhanced first degree robbery.¹ HCP 1-2;² SCP 1-2³

Prior to trial Cleary pleaded guilty to second degree robbery pursuant to an agreement with the State. RP 888-1000. Defendants were tried jointly in a trial presided over by the Honorable Linda CJ Lee. RP 2. The trial commenced with a hearing pursuant to CrR 3.5. RP 29-130. Hopson testified at the hearing but Suarez did not. RP 111-130. The trial court concluded the defendants' statements were admissible. RP 145-154.⁴

The State filed an amended information reducing both defendants' first degree robbery charges to attempted first degree robbery and presented its case. RP 157; HCP 18-19; SCP 16-17. Hopson made a half-time motion to dismiss, arguing the State failed to present a prima facie

¹ Hopson's charges were filed under Pierce County Cause No. 09-1-03111-0; Suarez's charges were filed under Pierce County Cause No. 09-1-03112-9; Cleary's charges were filed under Pierce County Cause No. 09-1-03110-1.

² Hopson's Clerks Papers ("HCP").

³ Suarez's Clerks Papers ("SCP").

⁴ The trial court's oral findings of fact and conclusions of law are at RP 145-154. Written findings and conclusions were only filed under Suarez's cause number. CP 91-94.

case of his guilt. RP 1054. The trial court found that a rational jury could find Hopson guilty beyond a reasonable doubt and denied his motion. RP 1060. Hopson rested without presenting evidence. RP 1053. Suarez called Traniece Armstrong as a witness before testifying in his own defense. RP 1053, 1062, 1098. The jury found both defendants guilty as charged. HCP 103-106; SCP 18-21. Hopson's sentence included 270 months in the Department of Corrections while Suarez received 282 months. HCP 109-121; SCP 24-36. Each defendant filed a timely notice of appeal. HCP 122; SCP 37.

2. Facts

In the early afternoon hours of June 27, 2009, Jeremy Patchell ("Patchell") contacted Derrick Cleary ("Cleary") to arrange an unlawful purchase of several thousand dollars worth of Oxycontin for his roommate Roshawn Laster-Cobb ("Cobb"). RP 350, 391, 488-489, 495, 501, 793, 795. Cleary, acting as a "middleman,"⁵ contacted defendants to sell the Oxycontin to Patchell; Suarez confirmed that they would make the sale. RP 788-789,⁶ 794-795, 800.

⁵ Cleary testified that as a "middleman" he was compensated for connecting people looking to purchase drugs with sellers in possession of the desired amounts. RP 788-789, 793, 800, 893, 902, 906, 913, 917.

⁶ Hopson is also referred to in the record as "D"; Suarez is referred to as "Ozzy."

Cleary picked defendants up in his truck around eight o'clock. RP 801-802, 804. Suarez testified that Cleary handed him a "MAK 90" assault rifle and displayed a black pistol when Suarez first stepped into the truck. RP 1108-1109. Defendants then rode around for several hours as Cleary negotiated a meeting place over a series of telephone conversations with Patchell. RP 499-503, 506-507, 803-804, 803-804, 906, 1108-1110, 1119, 1133.⁷ Patchell reluctantly agreed to meet at his house in Tacoma, but told Cleary to arrive alone. RP 501-503, 506-507, 587, 676.

Cleary pulled up with the defendants while Patchell was smoking a cigarette on his front porch. RP 507, 806. Patchell voiced immediate concern about the unexpected number of people. RP 512. Cleary assured Patchell there was no cause for alarm. *Id.* Patchell then led Cleary and Hopson to the house. RP 511-512, 598, 808-809, 1108-1109, 1120-1121. Suarez remained in the truck. *Id.* Hopson stopped just outside the front door as Patchell took Cleary inside to meet Cobb. RP 358, 515, 576-577, 810, 816. Cobb met Cleary in a room located on the other side of the open front door.⁸ RP 358, 515, 576-577, 810, 816. Patchell returned through the front door to finish his cigarette on the porch. RP 515, 816.

⁷ There is discrepant testimony regarding the number of people in Cleary's vehicle; Suarez testified to a fourth person, Courtland Young, being present in the vehicle. RP 509, 918, 1108. Patchell also testified that a fourth person was in Cleary's truck. RP 510.

⁸ Cobb is also referred to in the record as "G." RP 811.

Moments later Suarez walked toward the house with the assault rifle. RP 300-301, 360, 529-530, 532, 578, 648-649, 658, 681, 685, 692, 817-818, 1048. When Patchell brought the rifle to Cleary's attention, Cleary said: "Yeah, that's how we ... do it." RP 530. Patchell then tried to close the front door; however Hopson quickly blocked the door with his foot. RP 345-346, 360, 364-365, 426-427, 533, 1142. Suarez stepped into the house with Hopson, pointed the assault rifle at Patchell and said: "Freeze, put your hands up, don't move." RP 345-346, 360, 364-365, 376, 531, 534. Suarez then demanded the Oxycontin-purchase money as Hopson stood beside him with a .45 caliber pistol in his hand. RP 346, 360, 657, 662, 685, 909, 922, 983-984, 994-995, 1003. Cobb responded by reaching for his 10 millimeter pistol. RP 85, 177, 221, 247, 277-278, 287, 343-344, 347, 356-357, 360, 364, 367, 369-370, 429, 479-480, 531, 534, 536, 648-649, 658, 662, 681, 692, 715, 819-820, 838, 845-846, 881, 887, 931, 1126-1128, 1131, 1135.

The evidence shows that Hopson reacted by firing two .45 caliber bullets at Cobb. *Id.* Cobb was shot three times as he fired six bullets back in the defendants' direction: one bullet passed through his right arm, another shattered his femur, and a third struck his hip. *Id.* Cobb testified that defendants shot him, although he did not see Hopson's firearm. RP 345-346, 364, 412-413. Cobb later stated Hopson was standing beside

Suarez when Suarez fired the rifle. RP 364, 429. There were no assault rifle casings found at the scene; whereas police found two .45 caliber casings inside Patchell's house. RP 85, 177, 287, 648-649, 658, 681-685, 692, 838, 845-846, 881, 887, 1126-1128, 1131. Police found the pistol that fired the .45 caliber casings beside Suarez's assault rifle in a location accessible to Hopson and circumstantially inaccessible to Cleary. *Id.*

Cleary eventually ran to the neighboring house and waited for police after calling 911. RP 177, 287, 361, 381-382, 838, 845-846, 881.⁹ Defendants fled in the opposite direction. RP 325, 887, 1126-1128, 1131. Police found defendants down the street from the crime scene. RP 167-171, 281-287, 688, 693-697, 705, 843, 1126-1227, 1131. Hopson was holding a graze wound on his head while Suarez lay bleeding from a bullet in his abdomen. *Id.* Police also found a blood trail near Patchell's driveway which continued toward defendants' location. *Id.* Police discovered a blood-marked recycling bin along the trail that contained defendants' firearms. RP 281-285, 287, 312-314, 648-649, 657-658, 662, 681, 685, 688, 692-697, 705, 710, 722, 1048. No Oxycontin was found. *Id.*

Both defendants were interviewed by police. RP 247, 277-278, 476-482, 732-734. Hopson initially denied being shot at Patchell's house,

claiming he was randomly struck by a bullet while waiting for a ride. RP 247, 277-278. Hopson later admitted that he was shot in Patchell's doorway after traveling to the house with Cleary. RP 247, 277-278. Suarez told police he was shot when he went to Huson Street to sell some pills and marijuana. RP 476-482. Suarez later told police Cleary was trying to kill him and said he was shot in the course of a dispute with a man named Rocco. RP 732-734.

Suarez presented evidence at trial; Hopson did not. RP 1053-1175. Suarez called his girlfriend, Traniece Armstrong ("Armstrong"), as a witness before testifying in his own defense. RP 1062-1174. Armstrong generally described her seven year dating relationship with Suarez, to include their children, and acknowledged that Suarez went out with Cleary on the night of the incident. RP 1063, 1067-1068, 1093, 1097. Armstrong later claimed that she never asked Suarez how he was shot that night notwithstanding her curiosity about his subsequent hospitalization. RP 1095. Armstrong testified that Cleary approached her to discuss Suarez's case before trial. RP 1068.

Suarez testified after Armstrong. RP 1098. Suarez claimed that he was inexplicably shot outside a house Cleary drove to on their way to a night club. RP 1106-1107, 1119-1122. Suarez said Cleary went there to

⁹ Cleary's 911 call was played for the jury. Ex. 42

pick something up. *Id.* Saurez stated that Cleary handed him a “MAK 90” assault rifle and showed him a black pistol while he was seated in Cleary’s truck. RP 1108-1109. Suarez also admitted to seeing Patchell at the house and stated that Hopson went up to the house with Cleary just before the shooting began. RP 1121.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY FOUND THAT SUAREZ’S THREE *MIRANDA* WAIVERS WERE UNAFFECTED BY HIS MEDICAL CONDITION BECAUSE SUAREZ UNDERSTOOD THE *MIRANDA* WARNINGS READ TO HIM BEFORE EACH OF HIS THREE VOLUNTARY INTERVIEWS WITH POLICE.

The validity of a *Miranda* rights waiver is reviewed de novo.

State v. Campos-Cerna, 154 Wn. App. 702, 708, 226 P.3d 185 (2010) (Citing *United States v. Connell*, 869 F.2d 1349, 1351 (9th Cir. 1989));¹⁰ *State v. Johnson*, 94 Wn. App. 882, 897, 974 P.2d 855 (1999). The trial court’s “findings of fact ... will be verities on appeal if unchallenged; and, if challenged, they are verities if supported by substantial evidence” *Campos-Cerna*, 154 Wn. App. at 708 FN 4 (citing *State v. Broadway*, 133

¹⁰ The Washington Constitution article I, section 9 is coextensive with the right provided by the Fifth Amendment of the United States Constitution. *State v. Campos-Cerna*, 154 Wn. App. 702, 709, 226 P.3d 185 (2010) (citing *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008)).

Wn.2d 118, 131, 942 P.2d 363 (1997)); *see also State v. Gardner*, 28 Wn. App. 721, 723-724, 626 P.2d 56 (1981); *State v. McDonald*, 89 Wn.2d 256, 264, 571 P.2d 930 (1977). “The State bears the burden of showing a knowing, voluntary, and intelligent waiver of *Miranda* rights by a preponderance of the evidence.” *Id.* at 709 (citing *State v. Athan*, 160 Wn.2d 354, 380, 158 P.3d 27 (2007); *State v. Aten*, 130 Wn.2d 640, 643, 927 P.2d 210 (1996); *State v. Rupe*, 101 Wn.2d 664, 679, 683 P.2d 571 (1994). “The voluntariness of a confession is determined from a totality of the circumstances ... Factors considered include a defendant’s physical condition, age, mental abilities, physical experience, and police conduct.” *Id.* at 663-664 (citation omitted); *State v. Ortiz*, 104 Wn.2d 479, 484, 706 P.2d 1069 (1985); *see also State v. Cuzzetto*, 76 Wn.2d 378, 457 P.2d 204 (1969) (intoxicated defendant thrown from a car traveling 60 to 80 miles an hour capable of waiving *Miranda* rights after sustaining broken ribs, a leg injury, two lumps on his head and severe shock.); *State v. Turner*, 31 Wn. App. 843, 644 P.2d 1224 (1982).

In *United States v. George*, 987 F.2d 1428 (9th Cir. 1993), George was unconscious in an emergency room suffering from a drug overdose when police initiated questioning; his condition did not stabilize until approximately four hours after the interview was complete. 987 F.2d at 1430. Concluding “a defendant can voluntarily waive his *Miranda* rights

even when he [or she] is in the hospital, on medication, and in pain,” the 9th Circuit upheld George’s *Miranda* waiver. *Id.* at 1431. (The court also found the officer never “sought to take advantage of George’s weakened condition: he asked simple questions, kept the interview short, and did not receive any indication ... George ... wanted a lawyer...” “Although George was ... in critical condition ... his injuries did not render him unconscious or comatose.”); *see also United States v. Martin*, 781 F.2d 671, 673-674 (9th Cir. 1985) (waiver upheld where defendant just returned from surgery, suffered from pain, and recently received a general anesthetic.”); *compare George and Martin with Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) (*Miranda* violation where defendant was interrogated despite his confused and near comatose condition.).

Suarez cannot be faulted for failing to assign error to specific findings since the court’s findings were not available when his brief was filed. CP 91. It is nonetheless clear from Suarez’s brief that he is challenging the trial court’s finding that Suarez’s “injuries and medical situation did not affect his ability ... [to make a] knowing, intelligent, and voluntary decision ... to waive his *Miranda* rights” Suarez’s Brief at i.

The evidence establishing Suarez’s *Miranda* waivers was undisputed at the CrR 3.5 hearing. SCP 91-94; RP 29-130. Suarez was

alert three days after being admitted to Harborview when he waived his rights following proper advisement and participated in a several minute police interview. SCP 91-93; RP 85-90, 146-150. Suarez waived his *Miranda* rights a second time following advisement four hours later when he participated in a thirty minute follow up interview; prior to this interview medical personnel verified that Suarez was coherent and capable of being interviewed. CP 92-93; RP 100-103, 146-150. Suarez waived his *Miranda* rights a third time after proper advisement when he initiated a conversation with his guard the following day. RP 72-77, 81, 148-150.¹¹

There was substantial evidence that Suarez's *Miranda* waivers were unaffected by his medical condition. Suarez was advised of his *Miranda* rights three times in twenty four hours, yet he never attempted to assert his rights. SCP 92; RP 72-77, 85-90, 146-150. The waivers occurred three days after the shooting when Suarez was convalescing and coherent. SCP 92-93; RP 76, 81, 149. These waivers emerged from circumstances considerably less dire than those surrounding the waiver upheld in *George*, which took place several hours before George's drug induced medical condition had stabilized. 987 F.2d at 1430-1431. The

¹¹ In its oral rulings, the Court made specific findings regarding Suarez's third advisement of rights; however, those findings did not appear in the trial court's written findings. RP 145-154

officers who advised Suarez of his *Miranda* rights were also very similar to the police in *George*, for they asked simple questions about his injury, limited their interviews to approximately thirty minutes, and ended the interviews whenever Suarez's treatment needs required. SCP 92; RP 90, 146-150. Suarez's out-of-court statements were lawfully obtained and the trial court's ruling should be upheld.

2. THE TRIAL COURT PROPERLY EXCLUDED EXTRINSIC EVIDENCE OF CLEARLY'S OUT-OF-COURT STATEMENT BECAUSE SUAREZ OFFERED IT AS A PRIOR INCONSISTENT STATEMENT BUT FAILED TO LAY THE FOUNDATION REQUIRED BY ER 613.

A trial court's exclusion of evidence will not be reversed absent an abuse of discretion, which occurs when the court's decision is based on untenable grounds for untenable reasons. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008); *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002); *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651, review denied, 120 Wn.2d 1022 (1992); *United States v. Larson*, 495 F.3d 1094, 1101 (9th Cir. 2007).

A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). A defendant may only appeal a

non-constitutional issue on the same grounds that he or she objected on below. RAP 2.5(a); *State v. Hettich*, 70 Wn. App 586, 592, 854 P.2d 1112 (1993); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987).

Cleary testified that he acted as a middleman in a drug transaction in which Patchell was to buy several thousand dollars worth of Oxycontin from defendants. RP 804, 893, 902, 906, 913, 917, 922, 983-984, 994-995. Cleary further testified that Suarez entered Patchell's house with an assault rifle as Hopson stood near the front door with a pistol in his hand. RP 817-818, 909, 922, 983-984, 994-995. Defendants extensively cross-examined Cleary about his drug dealing, dishonesty, criminal history, and plea agreement. RP 888-1000.¹² When Suarez asked Cleary about Traniece Armstrong ("Armstrong"), Cleary identified her as Suarez's girlfriend, admitted to speaking with her before trial, but denied talking about the case. RP 931-932. Defendants did not ask any follow up questions about the conversation. RP 932-971.

¹² The only State's objection during Suarez's cross-examination came when defense counsel asked about the price Patchell was willing to pay for the Oxycontin; defense withdrew the question before the trial court ruled. RP 913, 988-1000. The State was later overruled when it objected to a defense question characterized as outside the scope of redirect. RP 996-999.

Suarez's counsel subsequently called Armstrong to recount the content of her pretrial conversation with Cleary. RP 1053, 1062-1068. Before being interrupted by the State's objection, Armstrong said: "[Cleary] ... offered me money to write a statement saying that the guns weren't his and that they were." RP 1068. Suarez answered the State's objection by arguing Armstrong's testimony was admissible to rebut Cleary's testimonial statement that he did not talk to Armstrong about the case. RP 1069. The State argued Armstrong's testimony was improper impeachment, as counsel had not confronted Cleary with the statement during cross-examination. RP 1070-1072. Suarez's counsel responded by stating, "I asked [Cleary] a specific question, he denied it, and I put a witness up there to rebut that." RP 1073. Suarez never sought to introduce Armstrong's testimony as evidence of bias. RP 1068-1088. Hopson briefly cross-examined Armstrong but did not join in Suarez's attempt to offer the challenged evidence. RP 1068 -1099. The trial court sustained the State's objection and instructed the jury to disregard Armstrong's testimony about the guns. RP 1077-1088. The court did allow Cleary to be impeached with Armstrong's testimony that Cleary had spoken to her about the case before trial. RP 1088.

- a. The excluded testimony was only offered as a prior inconsistent statement at trial; it cannot be offered as evidence of bias on appeal.

“A witness may be impeached with a prior out-of-court statement of a material fact that is inconsistent with his [or her] testimony in court. *State v. Dickenson*, 48 Wn. App. 457, 466, 740 P.2d 312 (1987) *citing* ER 607; ER 613; *State v. Carver*, 37 Wn. App. 122, 125, 678 P.2d 842 (1984), *review den’d*, 101 Wn.2d 1019 (1984). “A prior inconsistent statement is a comparison of something the witness said out of court with a statement the witness made on the stand.” *State v. Spencer*, 111 Wn. App. 401, 409, 45 P.3d 209 (2002). Pursuant to ER 613, “[e]xtrinsic evidence of a prior inconsistent statement ... is not admissible unless the witness is afforded an opportunity to explain or deny the same ... or the interests of justice otherwise require.”

Hopson waived any objection to the trial court’s exclusion of the evidence at issue because he did not join in Suarez’s efforts to offer that evidence at trial. RP 1068-1088; *State v. Davis*, 141 Wn.2d 798, 849-850, 10 P.3d 977 (2000) (“[An] [a]ppellant cannot rely upon the objection of a co-defendant’s counsel to preserve an evidentiary error on appeal.”); *see also State v. Latham*, 35 Wn. App. 862, 866-867, 670 P.2d 689 (1983).

Suarez is similarly barred because he is appealing a non-constitutional evidentiary ruling on a different ground than he preserved below. RAP 2.5; *Hettich*, 70 Wn. App. at 592. Suarez’s counsel argued for the admission of the out-of-court statement stating: “I asked [Cleary] a specific question, he denied it, and I put a witness up there to rebut that.” RP 1073. It is unmistakable that Suarez sought to impeach Cleary’s trial testimony with an out-court-statement Suarez perceived to be inconsistent.¹³ RP 1068-1074. The evidence at issue is therefore correctly viewed as a prior inconsistent statement controlled by ER 613 and was properly excluded on account of Suarez’s failure to comply with the foundational requirement of that rule.¹⁴

Suarez relies on *Spencer* to claim the trial court’s evidentiary ruling impermissibly excluded extrinsic evidence of bias. *Spencer*¹⁵ is procedurally distinguishable from Suarez’s case because Suarez never offered the excluded testimony as evidence of bias. RP 1081-1082. *Spencer* is also substantively distinguishable from Suarez’s case. Suarez offered the out-of-court statement at bar to prove Cleary had discussed

¹³ In Washington “[i]nconsistency is to be determined, not by individual words or phrases alone, but by the whole impression or effect of what has been said or done [, e.g.,] [d]o the two expressions appear to have been produced by inconsistent beliefs?” *Dickenson*, 48 Wn. App. at 467 (citing K. Tegland, Wash.Prac § 256 (1982) (quoting *Sterling v. Radford*, 126 Wash. 372, 218 P. 205 (1923)).

¹⁴ Washington’s appellate courts “can affirm on any grounds supported by the record. *State v. Hynh*, 107 Wn. App. 68, 74, 26 P.3d 290 (2001).

incident-related facts differently than he had while testifying. RP 1068-1074. Whereas the out-of-court statements in *Spencer* described ancillary events that may have induced a state's witness to lie. 111 Wn. App. at 409-411. Spencer was prevented from impeaching a state's witness with her out-of-court statement that she was going to testify falsely because of her fear of law enforcement and her resentment toward Spencer. *Id.* The *Spencer* court also found that the out-of-court statements before it were not prior inconsistent statements because they were "not being compared with ... statement[s] the witness... made on the stand." 111 Wn. App. at 410.

The evidence at issue differs from the evidence in *Spencer* as it does not reveal some external pressure or personal grudge which may have motivated Cleary to lie. Cleary testified the firearms were not his and, according to Suarez, Cleary previously suggested that they were. RP 931-932, 1068. Suarez intended to use that out-of-court statement to "rebut" Cleary's testimonial claim. RP 1073. Defendants were free to recall Cleary in order to perfect the foundation necessary to impeach him with his out-of-court statement, but neither pursued that option. Suarez was also allowed to impeach Cleary with Armstrong's contradictory testimony that a case-related conversation between she and Cleary

¹⁵ See *Spencer*, 111 Wn. App. at 410.

occurred, as the foundation for that impeachment had been laid. RP 1088.

The trial court's evidentiary ruling should be affirmed.

- b. The exclusion of Cleary's out-of-court statement did not violate the Confrontation Clause because it did not impair defendants' right to cross-examine witnesses.

"The Confrontation Clause ... guarantees the right of an accused ... to be confronted with the witnesses against him." *Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

"[C]onfrontation Clause cases fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions ... on the scope of cross-examination." *Delaware v. Fensterer*, 474 U.S. 15, 18, 106 S. Ct. 292, 295, 88 L. Ed. 2d 15 (1985).

The second category of cases address instances "in which ... some cross-examination ... was allowed [but] the trial court did not permit defense counsel to expose ... facts from which jurors ... could ... draw inferences relating to the reliability of the witnesses." *Delaware v. Fensterer*, 474 U.S. at 19; *see also Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1975); *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct.

1354, 158 L. Ed. 2d 177 (2004).¹⁶ “[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. *Van Arsdall*, 475 U.S. at 679 (citing *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S. Ct. 292, 295, 88 L. Ed. 2d 15 (1985)); see also *United States v. Larson*, 495 F.3d at 1103.

Defendants were able to exhaustively expose Cleary’s credibility problems to the jury through cross-examination and emphatically reemphasize them without objection in closing argument. RP 888-1000, 1240-1243, 1246, 1253, 1260, 1263, 1270, 1271, 1274, 1277. Defendants were also free to confront Cleary with his out-of-court statement, but neither defendant exercised that option. Argument that defendants’ rights to confrontation were nonetheless violated is flawed because it erroneously conflates cross-examination with impeachment by extrinsic evidence. This flaw is manifest in the defendants’ reliance on cases where a defendant’s ability to cross-examine a state’s witness was materially limited by the trial court. See *Davis*, 415 U.S. at 318 (trial court refused to allow cross-examination of a key prosecution witness to show bias);

¹⁶ Article I, section 22 of the Washington State Constitution is coextensive with the Sixth Amendment of the Federal Constitution. See generally *State v. Medlock*, 86 Wn. App. 89, 97, 935 P.2d 693, review denied, 133 Wn.2d 1012 (1997).

Darden, 145 Wn.2d at 624 (defendant prevented from challenging the accuracy of an officer's observations.).¹⁷ The evidentiary ruling at issue should be affirmed as it was a proper exercise of the trial court's discretion.

3. THE EVIDENCE WAS SUFFICIENT TO SUPPORT HOPSON'S ATTEMPTED FIRST DEGREE ROBBERY CONVICTION BECAUSE IT PROVED DEFENDANTS ATTEMPTED TO STEAL SEVERAL THOUSAND DOLLARS FROM TWO MEN AT GUNPOINT.

Sufficiency of the evidence is reviewed to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt when the evidence is viewed in the light most favorable to the State. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); *Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987),

¹⁷ As discussed in detail above, the defendants also mistakenly compare their cases to *Spencer* for that case addressed a defendant's right to establish a witness's bias through an independent witness, but neither defendant offered Armstrong's testimony as evidence of bias at trial. RP 1068-1088.

review denied, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)). The foregoing recognizes that the written record is an inadequate basis on which to decide issues based on witness credibility. On this issue, the Washington Supreme Court has said: “great deference ... is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.” *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted); *see also State v. Suleiman*, 158 Wn.2d 280, 291, n. 3, 143 P.3d 795 (2006). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

In the instant case the jury was instructed that to convict Hopson of attempted robbery in the first degree it had to find the following elements:

“(1) That on or about the 27th day of June, 2009, the defendant or an accomplice did an act that was a substantial step toward the commission of robbery in the first degree; (2) That the act was done with the intent to commit robbery in the first degree; and (3) That the act occurred in the State of Washington.”

HCP 97 Instruction No. 23. The jury was further instructed that “A person is ... an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate ... the crime, he or she ... aids ... another person in ... committing the crime. “[A]id” means all assistance whether given by words, acts, encouragement, support, or presence....” HCP 84 Instruction No. 10. The trial court also properly instructed the jury on the definitions of first degree robbery,¹⁸ robbery,¹⁹ and substantial step.²⁰

The evidence adduced at trial supported Hopson’s attempted first degree robbery conviction. It was undisputed that the attempted robbery occurred in Tacoma on June 27, 2009,²¹ and the evidence showed Hopson was an active participant in its preparation. Cleary testified that he

¹⁸ HCP 92 Instruction No. 18: “A person commits the crime of robbery in the first degree when in the commission of a robbery or in immediate flight therefrom he or she displays what appears to be a firearm or other deadly weapon.”

¹⁹ HCP 93 Instruction No. 19: “A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person’s will by the use or threatened use of immediate force, violence, or fear of injury to that person. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial.”

²⁰ HCP 96 Instruction No. 22: “A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation.”

²¹ RP 331, 486, 587, 676.

discussed the terms of the Oxycontin deal with Hopson before Suarez confirmed that he and Hopson could make the sale. RP 788-789, 794-795, 800. Hopson then set out with Suarez and Cleary to complete the deal in a truck carrying an assault rifle and a loaded .45 caliber pistol. RP 281-285, 287, 312-314, 499-503, 648-649, 657-658, 662, 681, 685, 688, 692-697, 705, 710, 722, , 803-804, 803-804, 906, 1048, 1108-1110, 1119, 1133. It can be inferred from the fact that no Oxycontin was ever found that defendants left in the truck knowing they did not have the Oxycontin they agreed to sell. *Id.*

Hopson's accomplice liability was also established through the evidence of his activities during the attempted robbery. Hopson conveniently positioned himself by Patchell's front door moments before Suarez approached with his assault rifle. RP 345-346, 358, 360, 364-365, 426-427, 515, 533, 576-577, 810, 816, 1142. Hopson then facilitated Suarez's armed entry into the house by using his foot to keep the front door open against Patchell's will. *Id.* It can be reasonably inferred that Hopson contributed to the atmosphere of intimidation when he remained in the doorway with a pistol in his hand as Suarez stood by him with an assault rifle demanding money. RP 345-346, 360, 364-365, 376, 531, 534, 657, 662, 685, 909, 922, 983-984, 994-995, 1003. *Id.* It is also reasonable to infer that Hopson fired the two .45 caliber bullets at Cobb when Cobb

attempted to defend against the robbery. RP 85, 177, 221, 247, 277-278, 287, 343-344, 347, 356-357, 360, 364, 367, 369-370, 429, 479-480, 531, 534, 536, 648-649, 658, 662, 681, 692, 715, 819-820, 838, 845-846, 881, 887, 931, 1126-1128, 1131, 1135. The jury's verdict should be affirmed.

4. DEFENDANTS' OBJECTION TO THE TRIAL COURT'S SPECIAL VERDICT INSTRUCTION SHOULD BE REJECTED ON APPEAL BECAUSE THEY FAILED TO PRESERVE THEIR OBJECTION BELOW AND THE INSTRUCTION DID NOT RESULT IN MANIFEST CONSTITUTIONAL ERROR.

"Before instructing the jury, the court shall ... afford ... each counsel an opportunity ... to object to the giving of any instructions" CrR 6.15(c). Thereafter, "[a]n objection to a jury instruction cannot be raised ... on appeal unless the instructional error is of constitutional magnitude." *State v. Dent*, 123 Wn.2d 467, 477, 869 P.2d 392 (1994) (citing *State v. Fowler*, 114 Wn.2d 59, 69, 785 P.2d 808 (1990)). If the instructional error is not of a constitutional magnitude, then "whether the instruction was rightfully or wrongfully given, it [i]s binding and conclusive upon the jury, and constitutes ...the law of the case." *State v. Hickman*, 135 Wn.2d 97, 102 n. 2, 954 P.2d 900 (1998) (quoting *Pepper v. City Park Transit Co.*, 15 Wash. 176, 180, 45 P. 743, 46 p. 407 (1896));

see also RAP 2.5 (a);²² *State v. Hames*, 74 Wn.2d 721, 725, 446 P.2d 344 (1968). “[T]he law of the case doctrine benefits the system by encouraging trial counsel to review all jury instructions to ensure their propriety before the instructions are given to the jury.” *Hickman*, 135 Wn.2d at 105.

The defendants independently filed proposed jury instructions at trial, but neither proposed an instruction regarding the special verdict form. HCP 58-60; SCP 82-90; RP 1202. When given an opportunity to object to the court’s instructions, Suarez’s counsel told the trial court: “I don’t have any objections or exceptions to the instructions.” RP 1202. Hopson counsel stated: “No exceptions, Your Honor.” *Id.* The jury subsequently received the following special verdict instruction:

“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.”

HCP 100; SCP 69; Instruction No. 26.

Defendants waived any objection to this instruction when they agreed to it at trial. Defendants are also unable to establish that the

²² “The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right....”

instruction resulted in manifest constitutional error because the constitution does not require nonunanimous acquittal of penalty-enhancing facts. *See generally State v. Bashaw*, 169 Wn.2d 145-148, 234 P.3d 195 (2010).

The *Bashaw* court reaffirmed that jury unanimity is required to find the presence of a penalty-enhancing fact but is not required to find its absence. *Id.* at 146-147 (citing *State v. Goldberg*, 149 Wn.2d 888, 893, 72 P.3d 1083 (2003)). *Bashaw* justified this rule as a means of advancing several policy objectives such as judicial economy. *Id.* at 146 n. 7 (“This rule is not compelled by constitutional protections against double jeopardy ...but rather by the common law precedent of this court, as articulated in *Goldberg*.”); *see also State v. Nunez*, 160 Wn. App. 150, 162-163, 248 P.3d 103 (2011) *contra State v. Ryan*, 160 Wn. App. 944, 252 P.3d 895 (2011). The Court’s limited view of *Bashaw*’s authority is well justified. A right to a nonunanimous acquittal of a special finding is without textual support in either the State or Federal Constitution. *See* Wash. Const. Art I § 21; U.S. Const. Amend. 6; U.S. Const., Amend 14. And the *Goldberg* rule is not implicit in constitutional due process for there is no reason to maintain that a fact decided by a divided jury is more likely to be accurate than a fact that emerges from a jury’s deliberative process with each juror convinced of its truth beyond a reasonable doubt. *See generally In re*

Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). *Bashaw* can be fairly read as implying as much about the *Goldberg* rule's status when it reaffirmed that "general verdicts in criminal cases, of course, must still be unanimous to convict or acquit." *Id.* at 145 n. 5 (citing Wash. Const. Art I § 21; *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); see also *State v. Labandowski*, 117 Wn.2d 405, 816 P.2d 26 (1991) (it is a common law rule, and not the constitution, that permits Washington juries to reject higher degree offenses less than unanimously). Finally, if the reversal of a sentencing enhancement was mandated despite a defendant's agreement to a *Bashaw* instruction at trial, there would be a near irresistible incentive for defendants to hold their objections until appeal in order to turn an easily corrected drafting error into an automatic reduction of sentence.

Notwithstanding *Bashaw*'s express reliance on *Goldberg*'s common law authority, the defendants claim their special verdict instruction amounted to constitutional error by relying on *Ryan*, 160 Wn. App. at 944. *Ryan* concludes the *Bashaw* court "strongly suggests its decision is grounded in due process, because the Court "identified the error as the procedure by which unanimity would be inappropriately achieved, ... referred to "the flawed deliberative process resulting from the erroneous instruction," and applied the constitutional harmless error

standard. *Ryan*, 252 P.3d at 897.²³ Defendants' argument should fail because *Ryan* was incorrectly decided. See *State v. Morgan*, ___ Wn. App. ___ No. 67130-8-I (2011) (Division I, Court of Appeals disagreed with its decision in *Ryan*, holding Morgan waived a *Bashaw* error by failing to preserve his objection at trial.). *Ryan* primarily errs in finding constitutional significance in *Bashaw*'s recitation of the procedural problems that may follow a *Goldberg* error. The Supreme Court's mere recognition of the ways in which a jury's deliberative process might confound the Court's policy objectives does not invest that rule with constitutional force. And there is no principled rationale for interpreting "due process" as vesting penalty-enhancing facts with greater constitutional protection than the underlying offense; it is the underlying offense that often carries the more burdensome punishment and fundamentally alters a defendant's legal status. See generally *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). As for *Bashaw*'s use of the constitutional error standard, the Supreme Court is always free to apply a more protective harmless error standard than necessary to ensure the efficacy of its judicially created rules. *Nunez*, 160 Wn. App. at 164-165. In this instance the Court cleared up any confusion that might otherwise have resulted from its decision to do so by

²³ *Ryan* was not paginated in the Washington Reporter at the time the Response was drafted. Consequently, pinpoint citations will reference the Pacific Reporter.

expressly stating that its decision was not compelled by the constitution.
169 Wn.2d at 146 n. 7.

Assuming a *Bashaw* error has constitutional significance, the instructional error at bar was not manifest since the evidence in support of the jury's special findings eliminated the possibility of prejudice. For similar reasons the error was also harmless beyond a reasonable doubt. *Bashaw* applied the constitutional harmless error standard instead of requiring automatic reversal; accordingly, its decision to reverse *Bashaw*'s sentence must have been made in relation to the facts before it. In *Bashaw* the special finding was whether *Bashaw*'s controlled substance delivery occurred within 1,000 feet of a bus stop. 169 Wn.2d at 137. At trial the distance between the delivery and the bus stop was proved through testimonial estimates and a measurement device the Court determined to have been erroneously admitted "with no showing whatsoever that [it] w[as] accurate." *Id.* at 143. The evidence proving the delivery was also independent of the evidence proving the location of that delivery in relation to a bus stop. *Id.* Consequently, the jury's verdict on the underlying drug offense provided little insight into how the jury would have decided the bus stop enhancement had the special verdict instruction been properly drafted.

These concerns are not present in the defendants' case. There is overwhelming evidence that defendants attempted an armed robbery with two firearms. The firearm enhancements at issue are also so interrelated

with the elements of the underlying offenses that it is nearly impossible to envision a rational jury that could find the defendants guilty as charged yet conclude they were not armed with firearms at the time. It is therefore clear that the special verdicts would not had been answered differently had the jury been properly instructed.

5. SUAREZ'S CASE SHOULD BE REMANDED FOR RESENTENCING BECAUSE HIS SENTENCE WAS IMPROPERLY CALCULATED.

Pursuant to RCW 9.94A.589 it is the general rule that “whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current ... convictions ... for the purpose of the offender score... [and] [s]entences imposed under this section shall be served concurrently....” RCW 9.94A.589(1)(a). However, a consecutive sentence may be imposed if a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct. RCW 9.94A.589(1)(b). Assault in the first degree is a serious violent offense under RCW 9.94A.030(34) potentially subject to the consecutive exception in RCW 9.94A.589(1)(b). Whereas attempted robbery in the first degree is a violent offense under RCW 9.94A.030(41) so sentence should be imposed according to the general rule set forth in RCW 9.94A.589(1)(a). Additionally, attempted robbery in the first degree is an anticipatory

offense under RCW 9.94.595, so “the presumptive sentence is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the crime, and multiplying the range by 75 percent.” Although the sentencing scheme described above is true of underlying offenses, the sentences imposed for multiple firearm enhancements run consecutive to each other as well as to the sentence imposed for the underlying offenses. RCW 9.94A.510; *State v. Thomas*, 150 Wn.2d 666, 671-672, 80 P.3d 168 (2003).

Suarez’s 54 month base sentence for attempted first degree robbery was not correct. The correct range is calculated as follows: $(.75)(41-54)$ months or 30.75 – 38.25 months. Suarez sentence is also inaccurate in that it ran the base sentence for the first degree assault consecutive to the base sentence for the attempted first degree robbery when they should have run concurrently. SCP 31-32. Suarez correct sentence is 228 months, which consists of 132 months of base sentences plus 96 months for firearm enhancements. Consequently, Suarez case should be remanded for correction of sentence.

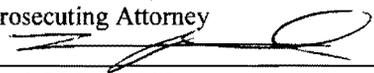
D. CONCLUSION.

The jury’s verdicts should be affirmed because they are supported by evidence appropriately admitted at trial. Suarez’s case should be

remanded so the miscalculations in his judgment and sentence can be corrected.

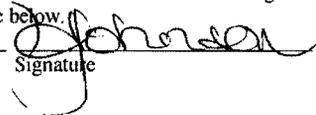
DATED: SEPTEMBER 9, 2011

MARK LINDQUIST
Pierce County
Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:
The undersigned certifies that on this day she delivered by ^{refiled} ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/12/11 
Date Signature

PIERCE COUNTY PROSECUTOR

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