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NO. 64892-6-1

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

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CLERK OF COURT

STATE OF WASHINGTON,

Respondent,

v.

CAMANO O. GAHAGAN,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. When the trial court instructed the jury that in order to answer the special verdict form all twelve jurors must agree. It did not instruct the jury that it need not be unanimous on a "no" vote.

a. Has the defendant identified a manifest constitutional error which would permit review even though the defendant did not object to this instruction at trial?

b. If the Court considers this issue and reverses the special verdict is the proper remedy a new trial on the firearms enhancement?

2. Police received information from two citizen informants which largely formed the basis to conduct an investigatory detention of the victim's vehicle in which the defendant was riding as a passenger.

a. Is the proper standard for assessing the sufficiency of the citizen informants' tip a totality of the circumstances?

b. Did the police possess sufficient information to conclude that there was substantial possibility that criminal conduct was occurring so as to justify the investigatory detention?

II. STATEMENT OF THE CASE

On December 29, 2008 Mallory Brixey was living with Devin Durand in a hotel room at the Days Inn in Everett, Washington on Everett Mall Way. Brixey used Oxycontin at the time while Durand sold that drug. Laura Pearson, a long time friend of Brixey's, also used Oxycontin. In the early morning hours of December 29 Pearson came over to visit Brixey after having a fight with her boyfriend. 1 RP 64-65, 71, 75-77, 109-110, 119; 2 RP 219-224.

Robert Koppel was acquainted with, and regularly bought drugs from, Durand. At some point during the course of the evening of December 28, Koppel was at home with the defendant, Camano¹ Gahagan. They were low on money and drugs so they discussed robbing Durand for both. 2 RP 322-331.

Koppel called Durand in the early morning hours of December 29. Durand instructed Koppel to come to the Days Inn and call him when Koppel arrived. The defendant called a woman named Courtney for a ride to the Days Inn where Koppel knew Durand was staying. Koppel and the defendant equipped

¹ The Information named the defendant as Camino Gahagan. The defendant spelled his name Camano Gahagan in his statement of additional grounds for review. There is no issue regarding the identity of the defendant. Because the defendant appears to have confirmed the correct spelling of his first name the State will adopt that spelling on appeal.

themselves with disguises and restraints. In addition Koppel had a gun. Courtney and another male gave Koppel and the defendant a ride to the Days Inn. When Koppel and the defendant got to the Days Inn they prepared to commit the robbery. Before Koppel had the chance to call Durand, Koppel saw Durand walking across the parking lot. Durand saw Koppel and greeted him by his nickname, RK. When Durand saw Koppel was wearing a mask, Koppel pulled out his gun, and Durand ran to the hotel lobby. Durand stayed there for about 15 minutes while Koppel and the defendant ran off to where Courtney moved her car. 1 RP 114-117; 2 RP 322-338.

After the unsuccessful robbery attempt, the male who had driven the defendant and Koppel to the Days Inn agreed to set up another drug deal with Durand in a second attempt to rob him. Durand directed the man to Top Foods. Courtney drove the car over to a Jack in the Box restaurant nearby. 3 RP 344-348.

Brixey and Pearson drove to Top Foods in Pearson's car while Durand walked over. Durand conducted the drug deal and then met Brixey and Pearson in the store. While they were in the store the defendant and Koppel were in Courtney's car at the restaurant discussing what to do next. The defendant and Koppel decided to hide in the back seat of Pearson's car in a second

attempt to rob Durand. They went to the car where they carried out the plan, still armed with the restraints and the gun. 1 RP 77-79, 120-122; 2 RP 226-227; 3 RP 348-353.

After they paid for the groceries Durand, Brixey, and Pearson returned to Pearson's car. Pearson got in the car first, while Brixey and Durand waited for her to unlock the passenger side door. Koppel grabbed Pearson and pointed the gun at her head. Koppel and the defendant both ordered Durand to get in the car. Durand and Brixey ran into the store. The defendant counted down and then Koppel fired the gun near Pearson's head. The shot left a hole in Pearson's windshield. 1 RP 80-87, 123-127; 2 RP 232-235, 240-242, 189; 3 RP 354-358.

When Brixey and Durand went back in the store Pearson was told to get them away from there. Pearson drove out of the parking lot and turned right onto Everett Mall Way. As she was driving, the defendant and Koppel asked her about Durand. They were irritated when Pearson did not know the answers to their questions. 2 RP 235 – 237; 3 RP 360-361.

When Brixey got in the store she asked Stephanie Rigger, a checker at the store, to call 911. Rigger noted that Brixey was panicked and frightened. Brixey stated that a man had a gun to her

friend's head. While Rigger called 911 she asked her co-worker Tanya Schmidt to go outside and see what was going on. Rigger called 911 while Schmidt ran outside. Schmidt saw the car leaving. She then went back in the store and spoke with the 911 operator, giving details as to what she had been told and what she saw. 1 RP 28-34, 39-41; 1 CP 147-151.

John Gelzer was also shopping in the store about the same time Brixey, Person, and Durand were there. He saw Brixey and Durand when they came back in the store. He talked to Durand who was panicked and excited. Durand told Glezer that a friend was in her car and she had a gun to her head. Glezer noticed there were few cars in the parking lot at that time of the morning. Durand told Glezer that a white Dodge Intrepid parked in the lot was the car in which Pearson was being held at gun point. 1 RP 44-46.

Glezer saw the car leave the parking lot going right on Everett Mall Way. Glezer called 911 and reported what he had been told and what he saw. Glezer then got in his car and followed the Intrepid. He stayed on the phone with the 911 operator telling her the Intrepid's direction of travel. Glezer continued to follow the Intrepid after disconnecting with the operator. He called back a short time later to report the Intrepid's location again. Within a few

minutes police located the Intrepid where Glezer said it was. Police conducted a felony stop. When the Intrepid pulled over Pearson as the driver was ordered out first. Koppel and the defendant were then removed from the vehicle. 1 RP 48-54, 148-154, 159-163; 2 RP 176-185; 1 CP 151-158.

The defendant was patted down after he was removed from the car. During the pat down police found a .45 expended shell casing which dislodged from the defendant's pant leg near his ankle. Pearson gave police consent to search her car. During the search police found a Glock 38 .45 caliber semiautomatic hand gun. In a second search of the car police found restraints on the rear passenger floorboards1 RP 163-164, 188; 2 RP 216-217, 298.

The defendant was charged by second amended information with count I kidnapping first degree with a firearm, count II second degree assault with a firearm, count III attempted first degree robbery with a firearm alleging Durand as the victim, and count IV attempted first degree robbery with a firearm alleging Pearson as the victim. 1 CP 137-138. The jury was unable to reach a verdict on count I. It found the defendant guilty of counts II and III. As to those counts the jury found the defendant or an accomplice was

armed with a firearm at the time of the commission of the offenses.

The jury acquitted the defendant of count IV. 1 CP 60, 62-66.

III. ARGUMENT

A. THE COURT'S INSTRUCTION ON THE SPECIAL VERDICT FORM IS NOT A MANIFEST CONSTITUTIONAL ERROR.

The jury instructions regarding the firearm enhancements stated:

You will also be given special verdict forms for the crimes charged in counts I, II, III, and IV. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of these crimes, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "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".

1 CP 68.

The defendant argues for the first time on appeal that this instruction was error which entitles him to an order vacating the special verdict findings and sentence enhancements. He relies on State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010) and State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). Bashaw relied on Goldberg to hold that a unanimous jury decision is not

required to find the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. Bashaw, 169 Wn.2d at 146. The Court in Bashaw overturned a special verdict where the jury had been given the same instruction given in this case, stating the instruction erroneously required the jury agree on their answer to the special verdict even if they did not unanimously find the presence of the special finding. Id. at 147.

The defendant did not object to the special verdict instruction at trial. 3 RP 410, 426. Generally, appellate courts do not consider issues raised for the first time on appeal. RAP 2.5(a), State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). An error which was not objected to at the trial level may be considered by the court if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3), State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). Whether the Court will consider an asserted error under these circumstances is determined by a four part analysis set out in Lynn.

First, reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing

by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

Lynn, 67 Wn. App. at 345.

This Court should decline to consider the issue because the defendant has not identified any constitutional provision implicated by the instruction given in this case. The rule which the Court in Bashaw relied on to find the special verdict instruction in that case was erroneous is not compelled by double jeopardy protections. Bashaw, 169 Wn.2d at 146, n. 7. Since it is not readily apparent that issue raised by the defendant here implicates the constitution, the Court should decline to consider this issue for the first time on appeal.

This Court has recognized that “instructional errors may implicate constitutional due process.” Lynn, 67 Wn. App. at 343. Even if due process is implicated by the instruction given the jury here², no manifest error exists. “Manifest” within the meaning of RAP 2.5(a)(3) requires the defendant to show that he was actually

prejudiced. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009), State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). The actual prejudice standard differs from the harmless error standard in that under the former test the focus is on "whether the error is so obvious on the record that the error warrants appellate review." O'Hara, 167 Wn.2d at 99-100.

To show actual prejudice the defendant must show that the error had a practical and identifiable consequence in the trial of the case. Id. "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." McFarland, 127 Wn.2d at 333. Only after the Court concludes that manifest constitutional error has occurred does the Court then engage in a harmless error analysis. O'Hara, 167 Wn.2d at 99. Any error in this case does not satisfy the manifest requirement to justify review.

The uncontradicted evidence established that Koppel was armed with a firearm during the crime. Koppel's testimony regarding the firearm was corroborated by Brixey and Pearson, and

² The State does not concede that the defendant's due process rights were violated by the special verdict instruction. However, it is addressed for the sake of argument.

by the physical evidence. 1 RP 83-84, 153, 164; 2 RP 189, 233, 240; 3 RP 354.

In closing argument the defendant conceded that Koppel was armed with a firearm at the time of the attempted robbery. He further conceded that he was guilty of the attempted robbery of Durand. He focused his argument on the charged crimes involving Pearson, arguing she was not credible and therefore the evidence was insufficient to convict him of those counts. However he did not suggest that if the jury found him guilty of any crime involving Pearson that the evidence did not support the additional firearms finding. 3 RP 479,483, 491-97, 502.

In light of the forgoing circumstances the defendant cannot show that he was prejudiced by the special verdict jury instruction. In Goldberg the jury was actually hung on the aggravating factor before it reached a unanimous verdict. Goldberg, 149 Wn.2d at 894. Here the jury did not initially come back without a unanimous verdict on the firearm allegation. 3 RP 524-527

In Bashaw there was conflicting evidence regarding the school zone enhancement. Bashaw, 169 Wn.2d at 138-39. One or more jurors may not have been convinced that the facts supporting the enhancement were credible. However here there was no

contradictory evidence that Koppel was armed with a firearm during the commission of the offenses, and that Koppel and the defendant were accomplices in the crimes. Where there is no evidence the jury was actually hung on the firearms question, or that there would have been a basis for disagreement on that finding, the defendant cannot show that he was prejudiced by the instruction.

In addition, the nature of the charges here forecloses the conclusion that the special verdict instruction had any practical and identifiable affect on the outcome of the case. Both the second degree assault and robbery charges included an element that the defendant committed the offense with a deadly weapon. The jurors were required to find the State proved all of the elements beyond a reasonable doubt in order to find the defendant guilty of either charge. 1 CP 58, 64. The jury was also instructed that it was required to be unanimous in order to return a verdict. 1 CP 70. Thus a unanimous verdict on the underlying offenses necessarily reflects a unanimous determination that the defendant committed second degree assault and attempted first degree robbery with a deadly weapon. The only deadly weapon at issue here was a firearm.

The jurors were then instructed not to use the special verdict form unless they found the defendant guilty of the assault and robbery charges. 1 CP 68. Thus the jury had already unanimously found the defendant or his accomplice possessed a deadly weapon before it considered the special verdict. Since the only evidence of a deadly weapon was a firearm, there is no rational basis on which to conclude that the jury may have been split at any point in their deliberations on the special verdict.

The defendant's failure to object deprived the trial court of the opportunity to prevent the instructional error he now raises. Kirkman, 159 Wn.2d at 935. Had the defendant argued the holding in Goldman applied to the special verdict instruction in this case the court could have easily modified the instruction to ensure jurors were not required to be unanimous on a "no" vote. This Court should decline to consider the issue for the first time on appeal because the special verdict instruction does not raise an issue of manifest constitutional error.

Finally, even if the Court considers the issue and reverses the special verdict, the Court should decide what the appropriate remedy should be. The usual remedy for erroneous jury instructions is remand for a new trial. See, e.g., State v. Jackman,

156 Wn.2d 736, 745, 132 P.2d 136 (2008); State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006). This reflects fundamental considerations of justice:

Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction

United States v. Tateo, 377 U.S. 463, 466, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964).

This observation is particularly applicable to the present case, where no objection was raised to the alleged error and the evidence was overwhelming. Here the base sentence was 40.5 months. The firearm enhancements added an additional 72 months to the defendant's term of confinement. It would be unfair to stand by silently and obtain an outright dismissal of the weapon enhancement when that result could not be obtained from a rational jury. 1 CP 6.

In Bashaw, the court set out policy reasons why a weapon enhancement should not be retried after a jury fails to agree on the special verdict. The court said that allowing retrials would violate

the “policies of judicial economy and finality.” Bashaw, 163 Wn.2d at 146-47. When, however, a defendant successfully challenges his conviction, he loses any right to have that conviction treated as final. See State v. Ervin, 158 Wn.2d 746, 147 P.3d 567 (2006). As for “judicial economy,” it is not a waste of time for a court to determine whether a person deserves a sentence of 112.5 months or 40.5 months. Any conclusion that re-trial is an excessive “burden” can only rest on overt hostility to the “Hard Time for Armed Crime” statute.

B. THE TRIAL COURT PROPERLY CONCLUDED THAT THE INVESTIGATIVE DETENTION WAS VALID.

The defendant next assigns error to the trial court’s decision denying the defendant’s motion to suppress evidence as a result of an asserted unlawful seizure. The defendant does not challenge any of the findings of fact entered by the trial court. They are therefore verities on appeal. State v. Broadaway, 133 Wn.2d 118, 130, 942 P.2d 363 (1997). Conclusions of law are reviewed de novo. State v. Shufelen, 150 Wn. App. 244, 252, 208 P.3d 1167, review denied, 220 P.3d 210 (2009).

The defendant made a motion to suppress all evidence because the police lacked probable cause to stop the vehicle in

which the defendant was riding. 1 CP 163. The State responded that the police made a Terry stop. After the stop police gained information which gave them probable cause to arrest the defendant. 1 CP 142-144. The trial court concluded that the police made a valid investigatory detention of Pearson's vehicle based on the nature of the crime reported and the specific facts related to them by named citizen informants. 1 CP 185.

To justify a warrantless investigatory detention police "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968). The level of articulable suspicion necessary to support an investigatory stop is "a substantial possibility that that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). That possibility may be satisfied by information provided by an informant. State v. Lesnick, 84 Wn.2d 940, 943, 530 P.2d 243, cert. denied, 423 U.S. 891, 96 S.Ct. 187, 46 L.Ed.2d 122 (1975).

When an investigative detention is based on information supplied by an informant, the information must bear some indicia of reliability. Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32

L.Ed.2d 612 (1972). The legal standard for considering the reliability of an informant's tip is the totality of the circumstances. State v. Marcum, 149 Wn. App. 894, 903, 205 P.3d 969 (2009), State v. Lee, 147 Wn. App. 912, 199 P.3d 445 (2008), review denied, 166 Wn.2d 1016, 210 P.3d 1019 (2009), State v. Randall, 73 Wn. App. 225, 230, 868 P.2d 207 (1994), Kennedy, 107 Wn.2d at 7. Under that standard an informant's reliability is assessed considering whether the circumstances suggest the informant is reliable or if there are some corroborative observations which suggest either the presence of criminal activity or that the informer's information was obtained in a reliable fashion. State v. Seiler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980).

Police are entitled to give more credence to informants who are citizen witnesses or victims. Lee, 147 Wn. App. at 919, Kennedy, 107 Wn.2d at 8. Multiple reports which corroborate each other likewise supports the conclusion that the information is sufficiently reliable to justify an investigatory detention. Kennedy, 107 Wn.2d at 8. Where the report concerns a crime of violence with the potential for injury to police or the public this Court has stated that police "should be able to rely on the reliability of information disseminated by police dispatch, and when his or her

observations corroborate the information.” Randall, 73 Wn. App. at 230.

Here the information from the citizen informants was sufficiently reliable to justify the initial investigatory detention. The store clerks identified themselves by name, phone number, and place of business. The second clerk gave specific details regarding what happened; “she said that guy has a gun to her friend’s head.” The clerk gave specific information about the kind of vehicle the victim and assailant were travelling, and what direction they were travelling. The clerk also gave police information that another customer was following the suspect vehicle. Both clerks reported the eyewitnesses to the robbery and kidnapping were in a highly emotional state. That is consistent with those witnesses observing the violent abduction which was reported to dispatch. 1 CP 148-151

John Gelzer corroborated much of what the two store clerks reported to the police. Like the clerks he was a citizen informant who gave information which identified himself. He confirmed that two people reported a third person had been abducted at gunpoint. He also confirmed the description of the vehicle and its direction of travel. Mr. Gelzer’s decision to follow the suspect vehicle suggested that the circumstances were sufficiently reliable to

convince him that there was a real emergency unfolding and to take action on that emergency. Mr. Gelzer's report regarding which roads the vehicle was currently travelling on was corroborated by police when they observed the suspect vehicle where Mr. Gelzer reported it to be at about the same time Mr. Gelzer reported its location. 1 CP 151-157, 170-71.

Under these circumstances police were reasonably justified in stopping Pearson's vehicle to investigate whether she really was kidnapped at gunpoint. Absent some emergency there was no reason for the store clerks and Gelzer to call 911. They each reported hearing the same information from the eye-witnesses. Like the circumstances in Russell, because there was a report of violence and a situation which was rapidly developing police were entitled to rely on the information relayed to them by the callers through dispatch.

The defendant argues that while the standard for assessing whether an informant's tip is reliable for a Terry stop is the totality of the circumstances under the Fourth Amendment, the standard under Article 1, §7 of the Washington constitution is different. He

argues the Aguilar-Spinelli³ test is the correct standard. Under that test there must be evidence that (1) the manner in which the informant obtained the information was reliable, and (2) the informant was credible or his information was reliable. State v. Jackson, 102 Wn.2d 432, 435, 688 P.2d 136 (1984). The defendant then argues the informants here did not satisfy either prong of this test, and therefore the police were not justified in conducting the stop.

The defendant asserts generally that article 1, § 7 provides greater protection for automobile passengers than the Fourth Amendment, citing State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999), and State v. Gatewood, 163 Wn.2d 534, 182 P.3d 426 (2008). Neither of these cases addressed the standard for assessing the reliability of an informant's report of contemporaneously occurring criminal conduct when considering the validity of a Terry stop. A "determination that a given state constitutional provision affords enhanced protection in a particular context does not necessarily mandate such a result in a different context." State v. Russell, 125 Wn.2d 24, 58, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005

³ Aguillar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 732 (1964),

(1995). Neither Parker nor Gatewood sheds any light on the standard required for assessing the reasonableness of an investigatory detention based on an informant's tip under the State Constitution.

To support his position the defendant relies on the holdings in Jackson and Selier. The defendant in Lee raised this same argument and relied on the same authorities that the defendant here relies on. This Court noted that Jackson was inapposite to the issue raised because that case considered the necessary showing for an informant's tip that supplied probable cause for a search warrant of an individual's home. Lee, 147 Wn. App. at 921-22. Kennedy, Sieler, and Lesnick were the three Washington Supreme Court cases which had considered this issue. Each case relied on the decision in Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). Adams employed the totality of the circumstances test for Terry stops based primarily on information from a citizen informant. Had the Adams court employed the Aguillar-Spinelli test the seizure would not have been upheld because the informant's tip would not have satisfied that test. Lee, 919-20.

Spinelli v. U.S., 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

Here the defendant does not discuss the analysis in Lee except insofar as he argues that it failed to follow what he characterizes as binding precedent. BOA at 17. Nor does he discuss the holding in Kennedy wherein the Court did address the test applied to informant's tips in the context of a Terry stop. Instead he points to other authority which he argues used the two step Aguillar-Spinelli test in this context. Three of the cases the defendant cites are State v. Hopkins, 128 Wn. App. 855, 117 P.3d 377 (2005), State v. Jones, 85 Wn. App. 797, 934 P.2d 1224, review denied, 133 Wn.2d 1012, 946 P.2d 402 (1997), and State v. Hart, 66 Wn. App. 1, 830 P.2d 696 (1992). BOA at 14. As this Court noted those cases do not support the defendant's position because Kennedy is the last word from the Supreme Court on this issue. Hart did not discuss the holding in Kennedy, and Hopkins and Jones do not even cite Kennedy. Lee at 920.

The defendant also relied on State v. Vandover, 63 Wn App. 754, 822 P.2d 784, review denied, 120 Wn.2d 1018, 844 P.2d 436 (1992) and State v. Wakeley, 29 Wn. App. 238, 628 P.2d 835, review denied, 95 Wn.2d 1032 (1981). Like Hart the Court in Vandover did not discuss the holding in Kennedy. Wakeley was decided before the Kennedy opinion was issued. Neither case

supplies any more authority for employing the Aguillar-Spinelli test to tips supporting investigatory detentions than Hart, Jones, or Hopkins or does.

This Court's analysis in Lee clearly explains why the totality of the circumstances test is the appropriate means by which Courts assess whether police had sufficient articulable suspicion to conduct a Terry stop based on a citizen informant's tip under both the Fourth Amendment and Article 1, §7. As discussed above the trial court correctly concluded that under the totality of the circumstances that standard was met when Pearson's car was stopped. The trial court's ruling denying the motion to suppress should be affirmed.

IV. CONCLUSION

For the forgoing reasons the State requests the Court find the trial court did not err when it denied the motion to suppress evidence and affirm the defendant's convictions. Further, the State asks the Court to find the defendant has not identified a manifest constitutional error arising from the aggravating factor jury instruction. The State asks the Court deny the defendant's request to overturn the special verdicts that the defendant or an accomplice was in possession of a firearm at the time he committed the

attempted robbery and second degree assault. If the Court does grant the relief requested by the defendant then the State asks the Court to remand the matter for a new trial on the firearm enhancement.

Respectfully submitted on October 29, 2010.

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