67509-5

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No. 67509-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KEVIN VOLANTE,

Appellant.

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

The Honorable John Erlick

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. In violation of the Fourth Amendment and article I, section 7, the trial court erred in refusing to suppress evidence acquired as a result of a warrantless seizure.

2. In the absence of substantial evidence in the record, the trial court erred in entering Finding of Fact 4 regarding CrR 3.6, which states in pertinent part, "Deputy Silverstein, who was one of the officers who responded to C.H.'s residence, broadcast that this vehicle was likely associated with three Asian males. . ."

3. In the absence of substantial evidence in the record, the trial court erred in entering Finding of Fact 5 regarding CrR 3.6, which states in pertinent part, "The vehicle . . . was the only vehicle that matched the 'vague vague' description provided by C.H." CP 59-60.

4. The trial court erred in entering Conclusion of Law 3 regarding CrR 3.6.

5. The trial court erred in entering Conclusion of Law 4 regarding CrR 3.6.

6. The State presented insufficient evidence to prove operability, as required to support the special verdicts that the crimes were committed while armed with a firearm.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. One of the narrow exceptions to the warrant requirement of the Fourth Amendment and article I, section 7 is an investigative detention. To be constitutional, the State must prove by clear and convincing evidence that the detention was supported by specific, articulable facts creating a reasonable suspicion of criminal activity. Where an officer conducted a traffic stop because of the vehicle's occupants' race, the time of day, and the fact that the occupants stared at him and then drove down a side street, did the State fail to establish that Volante's seizure was supported by the requisite reasonable suspicion? (Assignments of Error 1-5)

2. Where the State presented no evidence to establish that the gun allegedly used in the commission of the charged offenses was operable, was the evidence insufficient to support the jury's special verdicts? (Assignment of Error 6)

C. STATEMENT OF THE CASE[1]

At 2:55 a.m. on August 11, 2010, police in Skyway, in unincorporated King County, received a report that a young woman, C.H., had been raped and her home burglarized. CP 58; 6/7/11 RP 60.[2] The suspect description initially radioed was of an Asian male, between 25 and 30 years of age, who had also stolen her vehicle, a BMW. CP 58; 6/7/11 RP 62.

At 3:03 a.m., King County Sheriff's deputies arrived at C.H.'s residence and issued an updated description of her assailants over dispatch. 6/7/11 RP 63. According to Deputy Daniel Murphy, an officer involved in the effort to locate the suspects, this report described C.H.'s assailants as three Asian males, dressed all in black, armed with a black-and-silver handgun. 6/7/11 RP 63-64. Detective Mark Silverstein, one of the officers who responded to C.H.'s residence, in fact reported that C.H. told him she saw two

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[1] Volante's co-defendant, Dara Khann, supplies a detailed description of the substantive allegations and the defense evidence at trial in his opening brief at 3-21. The cases have been consolidated on appeal and thus, in the interest of brevity, only those facts necessary to Volante's arguments are included in this statement of the case.

[2] The verbatim report of proceedings is cited herein by date followed by page number.

Asian males and one male of unknown race.[3] 6/13/11 RP 126.

At 3:46 a.m., the clerk of a Chevron station at S. 112th and 8th Avenue South reported that the BMW had been abandoned; apparently, after paying for gasoline the vehicle's occupants had left the car at the gas pump without pumping gasoline, and departed. 6/7/11 RP 66. Murphy was one of the officers who responded to the gas station. 6/7/11 RP 66. A K-9 track was attempted but was unsuccessful. Officers then began the process of setting up a perimeter around the station. 6/7/11 RP 69.

Murphy set out on his own in his patrol car. He initially looked for individuals on foot. 6/7/11 RP 71. At 118th and Des Moines Memorial Drive (approximately 10 blocks from the Chevron station), he was stopped at a stop sign when a Cadillac drove within three to five feet of him. 6/7/11 RP 72, 100. Although it was dark outside, Murphy claimed he was able to see all three occupants, whom he

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[3] Detective Silverstein was not called as a witness because he was on emergency medical leave at the time of trial. The parties entered a stipulation regarding the testimony he would have provided. 6/13/11 RP 126.

believed to be "Asian Pacific Islander" males. 6/7/11 RP 72. All of the occupants were looking at him, which Murphy found unusual. 6/7/11 RP 122.

When the car had moved about 30 feet past his vehicle, Murphy executed a U-turn, at which point the car appeared to speed up. 6/7/11 RP 73. Murphy acknowledged that the car did not exceed the speed limit. 6/7/11 RP 126.

Murphy followed the car as it made a left turn westbound. 6/7/11 RP 76-77. He got close enough to the car to see the occupants moving around inside and to read its license plate, which he provided to dispatch. 6/7/11 RP 77. The license plate came back clear. CP 60. At this time it was 4:13 a.m. 6/7/11 RP 80.

As the vehicle approached a stop sign at South 116th and 12th, it rolled through but did not stop. 6/7/11 RP 81-82. Murphy, however, had already made the decision to stop the car. Indeed, he acknowledged that he would "absolutely" have pulled the vehicle over irrespective of whether he had ever seen it commit a traffic infraction. 6/7/11 RP 99, 110.

Murphy conceded that he "never" had any information that a beige or gold Cadillac was involved in the investigation. 6/7/11 RP 122-23. Nevertheless, he summarized his reasons for stopping the car as follows:

> The match of the physical description that they have, the fact that it was -- the hour of the day that it was, there was very, very, very few people out, the fact that . . . it wasn't far at all from where the victim's car turned up, it really wasn't that far from where the incident took place. All of these things, the fact that they passed me, you know, within three to five feet, they're all staring at me as if -- uh-oh -- and as soon as I turned around, yeah. They tried to take off. All of those factors were -- were going to be the reason for the stop, regardless.

6/7/11 RP 123-24.

Murphy said "the biggest thing was the three Asian Pacific Islander males" and the Cadillac's proximity to the stolen BMW and C.H.'s house. 6/7/11 RP 125. He admitted that it was not unusual for Asian Pacific Islanders to be in that area. 6/7/11 RP 143.

Murphy was able to stop the vehicle without incident. When he shined a flashlight into the back seat, he was able to see a large knife, at which point he radioed for backup and executed a full felony stop. 6/7/11 RP 85-86.

Appellant Kevin Volante and his co-defendants, Dara Khann and Michael Martinez Copol,[4] were the occupants of the Cadillac. Following a show-up identification procedure, the three men were arrested and ultimately prosecuted in connection with the burglary and sexual assault.[5]

A private investigator, Robert Edgmon, subsequently attempted to recreate the circumstances of Murphy's stop. 6/13/11 RP 30. He determined that at nighttime it would have been extremely difficult to tell what was going on inside another vehicle, even from a close distance. 6/13/11 RP 31. He stated that while he could see the face of someone who was right up against a window, he otherwise could not discern between movement and shadow. 6/13/11 RP 31, 33, 39. From behind, he was unable to see almost anything inside the vehicle in front of him because its taillights were blindingly bright. 6/13/11 RP 32.

The trial court denied a motion to suppress evidence arising from Murphy's stop of the Cadillac. CP 58-64.

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[4] At the trial, Copol was referred to by another name, Machado.

[5] Volante, Khann, and Copol were each charged with burglary in the first degree, robbery in the first degree, and rape in the first degree, each with firearm enhancements. CP 44-46.

Following a jury trial, Volante was convicted of all counts as charged. CP 84-89. This appeal follows. CP 231-247.

D. ARGUMENT

1. **Deputy Murphy lacked the reasonable suspicion to stop the Cadillac required by article I, section 7 and the Fourth Amendment.**

a. Warrantless searches are presumptively unreasonable

Under article I, section 7 and the Fourth Amendment to the United States Constitution, warrantless seizures are presumptively unreasonable. Terry v. Ohio, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). An investigative detention based on a reasonable articulable suspicion of criminal activity is one of the "jealously and carefully drawn" exceptions to the warrant requirement, and is constitutionally authorized only if (1) "the officer's action was justified at its inception," and (2) "it was reasonably related in scope to the circumstances which justified the interference in the first place." Terry, 392 U.S. at 20. A traffic stop is a seizure under article I, section 7 and the

Fourth Amendment. State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

For a Terry stop to be justified, an officer must have a well-founded suspicion, based upon specific, articulable facts, that criminal activity is afoot. Doughty, 170 Wn.2d at 62; State v. White, 97 Wn.2d 92, 105, 800 P.2d 1061 (1982). These facts, taken together with rational inferences from the facts, must reasonably warrant the intrusion into privacy rights. Terry, 392 U.S. at 21.

The Court considers the totality of the circumstances presented to the investigating officer in determining a stop's constitutionality. Doughty, 170 Wn.2d at 62. The State bears the burden of proving by clear and convincing evidence that a Terry stop was justified. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). A trial court's conclusions of law following a motion to suppress evidence are reviewed *de novo*. State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

b. Deputy Murphy's observations consisted of innocuous facts and failed to support the requisite reasonable suspicion of criminal activity.

Murphy cited the following reasons for stopping the Cadillac: the occupants' race, which loosely "matched" the description of the race of the perpetrators of the burglary and assault; the car's proximity to C.H.'s home and the Chevron station where the BMW was abandoned; the fact that few vehicles were out at that hour of the day; and the fact that the occupants of the vehicle stared at him, after which the vehicle drove down a side street. None of these reasons, considered individually or in conjunction with one another, point to a reasonable suspicion of criminal activity. The trial court's ruling was incorrect, and the order denying suppression should be reversed.

Courts generally abjure the use of race as a justification for a Terry stop. State v. Barber, 118 Wn.2d 335, 346, 823 P.2d 1068 (1992) ("racial incongruity" is never a sufficient basis for forming a suspicion of criminal activity); State v. Gleason, 70 Wn. App. 13, 17, 851 P.3d 731 (1993) (same). "Distinctions between citizens solely because of their

ancestry are odious to a free people whose institutions are founded upon the doctrine of equality." Barber, 118 Wn.2d at 346-47.

The Court in Barber noted that in some instances, appearance, "including race and other physical attributes," may be a relevant factor in forming a suspicion of criminal activity. 118 Wn.2d at 348. Here it was not. Murphy believed that the crime involved three Asian males. Murphy's belief conflicted with the description of the suspects broadcasted over dispatch by Detective Silverstein, who responded to C.H.'s residence. Silverstein reported that C.H. believed two of her assailants were Asian males and she did not know the race of her third assailant.[6] 6/13/11 RP 126.

Murphy conceded that the presence of "Asian Pacific Islanders" in the area was not, in and of itself, an unusual fact. 6/7/11 RP 143. In light of the conflict between

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[6] In Finding of Fact 4, the trial court noted that Detective Silverstein broadcast that the BMW was likely associated with three Asian males. This finding conflicts with the parties' stipulation regarding Silverstein's testimony. See 6/13/11 RP 126. Likewise, no broadcast ever associated the suspects in the rape and burglary with a Cadillac, as erroneously noted in Finding of Fact 5. The findings are unsupported by the evidence and must be stricken. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994) ("A trial court's erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal").

Murphy's observations and Silverstein's actual dispatch, the fact that Murphy believed the individuals in the Cadillac were "Asian Pacific Islanders"[7] is not an adequate rationalization for Murphy's race-based stop.[8]

Further, Silverstein broadcasted that the suspects in question were associated with a BMW, not a Cadillac. 6/13/11 RP 126. In considering the totality of the circumstances, the fact that Murphy saw the "Asian Pacific Islander" males in a vehicle that was never reported as associated with the crime is a factor that must be weighed against the State.

With regard to the Cadillac's proximity to the crime and the gas station, Murphy made the stop approximately one-and-one-half hours after C.H. initially reported the crime and approximately half an hour after the clerk at the Chevron station reported the abandoned BMW. Given these not insubstantial lapses of time and the inherent mobility of

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[7] In fact, Volante is Filipino. Copol is Hispanic. Khann is Cambodian.

[8] As Copol notes in his brief on appeal, if race alone were deemed a sufficient justification for a stop, "it would give the police the ability to simply stop anyone who matched the race of a perpetrator of any crime." Brief of Appellant Copol at 7.

vehicles, the vehicle's "proximity" to the crime and the gas station does not lend support to a reasonable suspicion of criminal activity.

The key fact cited by Murphy as his reason to stop the vehicle was that the occupants of stared at him as he drove past. This fact was also emphasized by the trial court in its Findings of Fact and Conclusions of Law as significant to the court's determination that the stop was supported by the requisite reasonable suspicion. See CP 60, Finding of Fact 5 ("[Murphy's] suspicions were aroused because all three stared at him as they passed. In seven years with the Sheriff's Office, Deputy Murphy has never had occupants of a vehicle stare at him in this fashion"); CP 62, Conclusion of Law 3 (stating that the behavior of the persons in the vehicle was "contrary" to "what Deputy Murphy had observed in his seven years of law enforcement experience" and noting "the way they started at him [sic]").

It is not illegal to stare at a police officer.[9] Gatewood, 163 Wn.2d at 540 ("Startled reactions to seeing the police do

[9] "[A] cat may look on a king, ye know!" The Proverbs and Epigrams of John Heywood (1562).

not amount to reasonable suspicion"); State v. Young, __ Wn. App. __, 275 P.3d 1150, 1152 (2012)[10] (woman's "deer in the headlights look" and action in leaving supermarket upon seeing police did not give rise to a reasonable suspicion of criminal activity). Nor is it illegal to turn left down a side street after seeing a police car. The fact that the men in the Cadillac "stared" at Murphy cannot support a reasonable suspicion of criminal activity.

While Murphy believed that the car increased its speed after its occupants saw him, it never exceeded the speed limit. 6/7/11 RP 126. Indeed, Murphy was unwilling to testify that he ever was "in pursuit" of the Cadillac. 6/7/11 RP 146. It is unreasonable to assume that just because a car turns down a side street in a residential neighborhood late at night, its occupants are attempting to avoid police.[11] However, even assuming that this is a reasonable inference from the evidence, both Gatewood and Young confirm that

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[10] At the time of this writing, pin citations to the Washington Reporter of Decisions were not available on Westlaw.

[11] Although the car later rolled through a stop sign, Murphy testified he would have stopped the car even if he had not witnessed an infraction, and the trial court noted this fact in its Findings of Fact and Conclusions of Law. 6/7/11 RP 99, 110; CP 60 (Finding of Fact 7).

startled responses to police followed by "evasive" action do not give rise to a reasonable suspicion of criminal activity. Gatewood, 163 Wn.2d at 540; Young, 275 P.3d at 1155.

In short, none of the facts identified by Murphy, considered independently or in conjunction with one another, supported a reasonable suspicion of criminal activity. The fact that a serious crime had been committed did not relax the constitutional requirement that Murphy's seizure of Volante be supported by specific, articulable facts giving rise to "a substantial possibility that criminal conduct [had] occurred or [was] about to occur." State v. Martinez, 135 Wn. App. 174, 180, 143 P.3d 855 (2006) (citation omitted). Here, the seizure was justified by nothing more than an "inchoate hunch." Id. The order denying suppression must be reversed.

c. The remedy is suppression of all after-acquired evidence.

Whenever the rights protected by article I, section 7 are violated, the exclusionary remedy must follow. State v. Winterstein, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009); White, 97 Wn.2d at 110. The exclusionary rule demands

suppression of all evidence obtained as a result of the warrantless seizure. "The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means." Garvin, 166 Wn.2d at 254.

This Court should reverse the order denying Volante's CrR 3.6 motion, and remand with direction that all after-acquired evidence be suppressed.

2. **The firearm sentencing enhancements should be vacated because the State failed to prove the gun found was operable.**

Pursuant to RAP 10.1(g), Volante adopts by reference argument 3 in co-appellant Dara Khann's brief, at 39-42, concerning the State's failure to prove the operability of the firearm relied upon for the firearm sentencing enhancements.

E. CONCLUSION

Deputy Murphy's seizure of Volante was not supported by specific, articulable facts giving rise to a reasonable suspicion of criminal activity. All evidence derived from the unconstitutional seizure must be suppressed. In the alternative, this Court should conclude that the State presented insufficient evidence to support the jury's special verdicts. The special verdicts should be vacated.

DATED this 26th day of June, 2012.

Respectfully submitted:

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DIVISION ONE

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	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF JUNE, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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