Supreme Court No. 89535-0
Court of Appeals No. 67509-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN VOLANTE,

Petitioner.

PETITION FOR REVIEW

SUSAN F. WILK
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

Washington Constitutional Provisions

United States Supreme Court Decisions

United States Constitutional Provisions

Rules

A. IDENTITY OF MOVING PARTY AND DECISION BELOW

Petitioner Kevin Volante, the appellant below, asks this Court to accept review of the Court of Appeals opinion, No. 67509-5-I, filed September 9, 2013. A copy of the Court's slip opinion is attached as an Appendix.

B. ISSUES PRESENTED FOR REVIEW

1. A police officer conducted a stop of a car in which petitioner was a passenger because (a) of the occupants' race; (b) the time of day; and (c) the fact that the occupants "stared" at the officer, which he found unusual. Should this Court review the Court of Appeals opinion finding that the seizure was supported by the requisite reasonable suspicion under Fourth Amendment and article I, section 7? RAP 13.4(b)(3); RAP 13.4(b)(4).

2. Where the State presented no evidence whatsoever that the gun used to support the imposition of three firearm enhancements was operable, should this Court review the Court of Appeals decision finding that sufficient evidence supported the enhancements based solely on the Court's assumption that the gun was a "real" gun? RAP 13.4(b)(3); RAP 13.4(b)(4).

3. Should this Court review the Court of Appeals opinion which failed to follow this Court's opinion in State v. Recuenco, 163 Wn.2d 428,

180 P.3d 1276 (2008) regarding the State's obligation to affirmatively prove that a firearm was operable for a firearm sentencing enhancement to be imposed? RAP 13.4(b)(1).

C. STATEMENT OF THE CASE

At 2:55 a.m. on August 11, 2010, police in Skyway received a report that a young woman, C.H., had been raped and her home burglarized. CP 58; 6/7/11 RP 60.[1] 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 in black, armed with a black-and-silver handgun. 6/7/11 RP 63-64. The detective who responded to C.H.'s residence in fact reported that C.H. told him she saw two Asian males and one male of unknown race.[2] 6/13/11 RP 126.

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

[2] 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.

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 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,[3] 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.[4]

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.

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

[4] 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.

The trial court denied a motion to suppress evidence arising from Murphy's stop of the Cadillac. CP 58-64. At trial, the State admitted evidence of a handgun found in the car at the time of arrest and presented evidence that it was loaded, had a serial number, and was engraved "Smith and Wesson," but otherwise did not attempt to prove that the gun was in fact operable. Slip Op. at 11. This gun was used to impose a firearm enhancement on each charged class A felony, for a total of an additional 180 months confinement.

On appeal, Division One rejected Volante's claims that the officers lacked a reasonable suspicion to stop the vehicle, and held that the evidence was sufficient to support the firearm enhancement. As set forth below, this Court should grant review.

D. ARGUMENT

1. **This Court should grant review and hold that 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 together, point to a reasonable suspicion of criminal activity.

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.[5] 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. Given the conflict between Murphy's observations and Silverstein's actual dispatch, the fact that Murphy believed the individuals in the Cadillac were "Asian Pacific Islanders"[6] is not an adequate rationalization for Murphy's race-based stop.

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

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[5] 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").

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

with the crime weighs against the conclusion that a reasonable suspicion of criminal activity supported the stop.

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 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]").

As this Court has emphasized, it is not illegal to stare at a police officer, and where a determination of a reasonable suspicion to conduct a stop rests on how the suspect looked at the officer, a stop is not constitutional. Gatewood, 163 Wn.2d at 540 ("Startled reactions to seeing the police do not amount to reasonable suspicion"). 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.[7] However, even assuming that this is a reasonable inference from the evidence, Gatewood confirms that 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.

c. Neither the seriousness of the offense under investigation nor the officer's general "experience" are bases to relax the constitutional requirement of a reasonable suspicion.

[7] 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).

The Court of Appeals upheld the trial court's ruling, holding, "Given the severity of the suspected crime, Deputy Murphy's experience in law enforcement, the suspects' proximity to the abandoned BMW, and their erratic, suspicious behavior," a reasonable suspicion supported the stop. Slip Op. at 9-10. But the fact that a serious crime had been committed does 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). And the reference to Murphy's "experience in law enforcement" is another way of saying that it was reasonable for Murphy to be suspicious of the occupants of the vehicle because they stared at him. Because the seizure was not supported by a reasonable suspicion and the Court of Appeals opinion finding otherwise is contrary to this Court's decisions, this Court should grant review.

2. **This Court should grant review and hold that the State must prove that a firearm was operable for a firearm enhancement to be imposed.**

The State bears the burden of proving the essential elements of a criminal charge beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Byrd, 125 Wn.2d 707,

713, 887 P.2d 796 (1995); U.S. Const. amend. XIV; Const. art. I § 3. A challenge to the sufficiency of the evidence requires the appellate court to view the evidence in the light most favorable to the prosecution and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

This Court has long held that:

> in order to prove a firearm enhancement, the State must introduce facts upon which the jury could find beyond a reasonable doubt the weapon in question falls under the definition of a "firearm:" "a weapon or device from which a projectile may be fired by an explosive such as gunpowder." ... We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement.

Recuenco, 163 Wn.2d at 437 (internal citation omitted).

Relying on its own decisions in which it concluded that this language was dicta and the Court did not have to follow it, the Court of Appeals determined that proof of operability was established simply because the gun was loaded, had a serial number, and was engraved "Smith and Wesson." Slip Op. at 11. No one test-fired the gun, and no evidence otherwise established that the gun was operable.

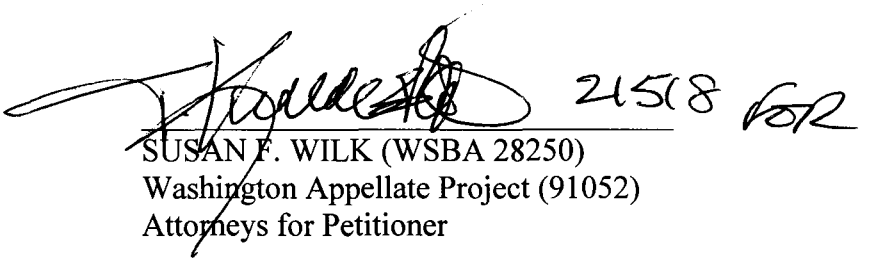
This Court should grant review of the Court of Appeals decision which failed to follow Recuenco, and hold that insufficient evidence was presented to prove operability.

E. CONCLUSION

For the foregoing reasons, this Court should grant review.

DATED this 9th day of October, 2013.

Respectfully submitted:



SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Petitioner

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KEVIN ISAJAH VOLANTE, Appellant.	No. 67509-5-I (Consolidated with Nos. 67516-8-I and 67556-7-I) DIVISION ONE UNPUBLISHED OPINION
STATE OF WASHINGTON, Respondent, v. DARA KHANN, Appellant.	FILED: September 9, 2013
STATE OF WASHINGTON, Respondent, v. MICHAEL MARTINEZ COPOL AKA JUAN MIGUEL MACHADO, Appellant.	

LEACH, C.J. — Appellants Kevin Volante, Michael Copol (aka Juan Machado), and Dara Khann appeal their convictions for first degree robbery and burglary. Volante and Khann also appeal their convictions for first degree rape. All appellants challenge the admission of evidence seized by the arresting deputy during a warrantless search of their vehicle, claiming that the initial stop of their vehicle was unlawful. They also challenge the court's imposition of a firearm enhancement on each count, arguing that the State did not present sufficient evidence that the gun used was operable. Separately, Khann challenges the court's denial of his motion to sever his trial from the codefendants. In a statement of additional grounds, he alleges that the court erred when instructing the jury about the need for unanimity regarding the firearm special verdicts.

Because the deputy had a reasonable, articulable suspicion that the appellants had been involved in criminal activity, the court correctly denied the suppression motion. The State presented sufficient evidence of operability to support the firearm special verdicts. The court properly denied Khann's motion because, at the close of evidence, the weight of the evidence was not so disparate as to justify severance. Because our Supreme Court has overruled the authority relied upon by Khann to challenge the special verdicts, the court properly instructed the jury regarding the special verdicts. Therefore, we affirm.

FACTS

At 2:55 a.m. on the morning of August 11, 2010, C.H.[1] called the King County Sheriff's Office to report a home invasion and rape. When deputies arrived, she told them that three men had bound her hands and mouth with tape and that at least two of them penetrated her vagina with their fingers. The assailants stole C.H.'s BMW and drove away in it.

About an hour later, deputies received a report that someone had abandoned a BMW at a Chevron station near C.H.'s house. The station's surveillance footage did not show a clear photo of the driver, but a witness reported seeing three males with medium complexions near the vehicle.[2]

Deputy Daniel Murphy heard the original 911 dispatch call, which described the assailant as an Asian male, aged 25-30 years old, and another deputy's updated description of three "younger" Asian males. He began searching the area for the suspects. Shortly after 4:00 a.m., while stopped at a stop sign, Murphy saw a beige Cadillac approach. As the car passed him, Murphy noticed the three occupants, who all appeared to be Asian males in their late teens or early 20s. He reported that all three of them stared at him as they passed his marked patrol car.

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[1] The victim is referred to by her initials to protect her privacy.

[2] Through an interpreter, the gas station clerk testified that the people he saw were not black, white, or Mexican.

Finding this behavior suspicious and believing the men matched C.H.'s description of her attackers, Murphy made a U-turn and began to follow the Cadillac. He stated that the car sped up after it went through the stop sign, but that it was not speeding, and that the driver made a quick left turn into a neighborhood. Suspecting that the car was attempting to "duck" him, Murphy decided to execute a traffic stop. As the car made a "rolling stop" at the next stop sign, Murphy activated his emergency lights and stopped the vehicle. He testified that by this point, based on his suspicions that the occupants participated in the home invasion, he intended to stop them regardless of the traffic infraction.

As he walked up to the driver's side window, Murphy noticed a large kitchen knife on the backseat. After Murphy's backup arrived, they had the suspects exit the vehicle, handcuffed them, and placed them under arrest. Another officer then spotted the butt of a gun underneath the front passenger seat of the Cadillac. Officers then conducted a showup identification. C.H. identified Khann and Copol as the men who had broken into her house. She did not identify Volante.

The State charged all three with first degree robbery, first degree burglary, and first degree rape. In each count, the State alleged that the defendants were

armed with a firearm at the time. After the State concluded its case in chief, Khann's counsel rested without presenting any evidence. At the same time, based on the asserted disparity of evidence linking Khann and the other defendants to the crime, he moved to sever. The judge deferred ruling on Khann's motion until Copol and Volante had both presented their cases. At the close of all evidence, the court determined that the disparity in evidence against the three defendants did not warrant severance. The jury found all three defendants guilty on the robbery and burglary counts. It also found Volante and Khann guilty on the rape charge. The jury found that the defendants were armed with a firearm during the commission of all counts. The court imposed standard range sentences plus firearm enhancements. All defendants appeal.

STANDARD OF REVIEW

We review the denial of a motion to suppress evidence by determining whether substantial evidence supports the trial court's findings of fact and whether those findings support the trial court's conclusions of law.[3] Substantial evidence exists if it is sufficient to persuade a fair-minded, rational person of the truth of the matter asserted.[4] Unchallenged findings of fact become verities on appeal.[5] We review conclusions of law de novo.[6]

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[3] State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001).
[4] State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).
[5] State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the State and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[7] By challenging the sufficiency of the evidence, the defendant admits the truth of the State's evidence and all reasonable inferences drawn from it.[8]

Lastly, we review a trial court's severance ruling under CrR 4.4(c)(2) for a manifest abuse of discretion.[9] "A manifest abuse of discretion is a decision manifestly unreasonable or exercised on untenable grounds or for untenable reasons. It is one that no reasonable person would have made."[10]

ANALYSIS

In this consolidated appeal, all three appellants challenge the validity of the initial stop of their vehicle and the sufficiency of the evidence to support the firearm special verdicts. Volante and Khann assign error to various findings and conclusions in the court's decision on the CrR 3.6 hearing. Because Copol does not assign error to these findings or conclusions, the findings are verities for purposes of his appeal. Additionally, Khann appeals the denial of his motion to sever his trial from the codefendants'. He alone filed a statement of additional

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[6] State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).
[7] State v. Lord, 117 Wn.2d 829, 881, 822 P.2d 177 (1991).
[8] State v. Pedro, 148 Wn. App. 932, 951, 201 P.3d 398 (2009).
[9] State v. Larry, 108 Wn. App. 894, 911, 34 P.3d 241 (2001).
[10] In re Marriage of Tower, 55 Wn. App. 697, 700, 780 P.2d 863 (1989).

grounds challenging the court's instruction on jury unanimity for each special verdict.

First, the appellants contend that the arresting officer did not have reasonable suspicion, supported by specific, articulable facts, to stop their vehicle. Article I, section 7 of the Washington Constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Warrantless seizures are presumptively unconstitutional unless they fall into one of several carefully defined categories.

A brief investigative detention, commonly known as a Terry[11] stop, is one accepted exception to the warrant requirement.[12] A Terry stop occurs when the police briefly seize an individual for questioning based on "specific and articulable," objective facts that give rise to a reasonable suspicion that the individual has been or is about to be involved in a crime.[13] When reviewing a Terry stop's validity, we consider the totality of the circumstances,[14] including factors such as the officer's training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, the amount of physical

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[11] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).
[12] State v. Hendrickson, 129 Wn.2d 61, 71, 917 P.2d 563 (1996).
[13] Terry, 392 U.S. at 21-22; State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997).
[14] State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

intrusion upon the suspect's liberty, and the length of time the suspect is detained.[15]

The appellants contend that Murphy's stated reasons for the stop were pretextual and his only real justification was a hunch based on their racial appearance. A pretextual traffic stop is one made to "accomplish an impermissible ulterior motive."[16] The appellants rely on State v. Barber[17] to argue that race is an insufficient basis to justify an investigatory stop. There, the court noted that "racial incongruity, i.e., a person of any race being allegedly 'out of place' in a particular geographic area, should never constitute a finding of reasonable suspicion of criminal behavior."[18] But the Barber court also noted that in some cases, "appearance, including race and other physical attributes of a suspect, may be relevant in forming a suspicion of criminal activity."[19] Racial incongruity was not the reason for Murphy's suspicion. Indeed, the deputy

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[15] Acrey, 148 Wn.2d at 747.

[16] State v. Ladson, 138 Wn.2d 343, 354, 979 P.2d 833 (1999). Under Ladson, "a traffic infraction may not be used as a pretext to stop to investigate for a sufficient reason to search even further." Ladson, 138 Wn.2d at 353. Murphy's unchallenged testimony was that he would have stopped the vehicle regardless of the driver's failure to stop fully at the stop sign. Because this was an investigative stop for suspected criminal activity, not merely a traffic violation stop, Ladson's specific prohibition against the pretextual use of traffic infractions to conduct warrantless stops and searches does not apply.

[17] 118 Wn.2d 335, 346, 823 P.2d 1068 (1992).

[18] Barber, 118 Wn.2d at 346.

[19] Barber, 118 Wn.2d at 348.

testified that seeing Asian American males in that area was not unusual. Instead, Deputy Murphy identified the occupants' resemblance to the suspect description as a primary reason for the stop. Given the victim's description of her attackers as young Asian American males, the race of the car's occupants was a legitimate factor for Murphy to consider.

Further, we review the evidence as a whole and do not evaluate the facts on a piecemeal basis. Murphy also identified the defendants' behavior within the car as a factor in his decision to execute the stop. He described seeing their shadows in the car moving around suspiciously after he began tailing them, and he felt from his driving behavior that the driver was attempting to elude him. Washington courts afford police officers substantial deference in their interpretation of potentially suspicious circumstances. As this court noted in State v. Marcum,[20] an officer may "'draw on [his or her] own experience and specialized training to make inferences from and deductions about cumulative information available to [him or her] that might well elude an untrained person.'"

Given the severity of the suspected crime, Deputy Murphy's experience in law enforcement, the suspects' proximity to the abandoned BMW, and their erratic, suspicious behavior, specific, articulable facts support Murphy's

[20] 149 Wn. App. 894, 908 n.5, 205 P.3d 969 (2009) (alterations in original) (internal quotation marks omitted) (quoting United States v. Arvizu, 534 U.S. 266, 273, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002)).

reasonable suspicion that the appellants may have been involved in the home invasion. Because his observations led to a reasonable suspicion that the suspects were involved in the home invasion, the Terry stop was valid and the trial court correctly denied the defendants' suppression motion.

Alternatively, the appellants assert that the State failed to present sufficient evidence to support the firearm enhancement special verdicts. Evidence is sufficient if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find each element proved beyond a reasonable doubt.[21] We consider circumstantial and direct evidence equally reliable and defer to the trier of fact on conflicting testimony, witness credibility, and the persuasiveness of the evidence.[22]

To enhance an appellant's sentence in this case, the State had the burden of proving that he or an accomplice committed the crime while armed with a "firearm," i.e., "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder."[23] Appellants contend this burden required the State to prove the firearm was operable, even though the applicable statutes do not use this word. Thus, because the State never proved that the

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[21] State v. Montgomery, 163 Wn.2d 577, 586, 183 P.3d 267 (2008).

[22] State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), abrogated in part on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[23] RCW 9.94A.533(3); RCW 9.41.010(7).

firearm was capable of firing shots, the State did not meet its burden. The State disagrees, asserting that it met its burden by showing that Volante or an accomplice used a real gun.

We do not need to resolve the parties' disagreement about the State's burden because, even if the law requires proof of operability, this may be inferred without any direct evidence of operability.[24] In State v. Mathe,[25] we held that the State proved the defendant used "a real and operable gun" with the testimony of two robbery eyewitnesses who described the guns and the defendant's express or implied threat to use them. Similarly, in State v. Bowman,[26] we held eyewitness testimony describing a "real" gun and describing a threat to use it was sufficient to establish "the existence of a real, operable gun in fact."

At trial, the State admitted the handgun found in Volante's car at the time of his arrest and presented evidence that it was loaded, had a serial number, and was engraved "Smith and Wesson." This gun matched the victim's description of the weapon used as a black-and-silver semiautomatic pistol. Copol told the police the gun belonged to him and that he had purchased it about one week before for personal protection. Viewed in the light most favorable to the State,

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[24] State v. Mathe, 35 Wn. App. 572, 581-82, 668 P.2d 599 (1983), aff'd, 102 Wn.2d 537, 688 P.2d 859 (1984).

[25] 35 Wn. App. 572, 581-82, 668 P.2d 599 (1983), aff'd, 102 Wn.2d 537, 688 P.2d 859 (1984).

[26] State v. Bowman, 36 Wn. App. 798, 803, 678 P.2d 1273 (1984).

this evidence sufficiently supports an inference that one of the appellants was armed with a firearm during each of the offenses.

Appellant Khann contests the court's refusal to sever his trial from his codefendants'.[27] To avoid unduly burdening administration of justice, Washington law disfavors separate trials,[28] and severance under CrR 4.4(c) is at the discretion of the trial court.[29]

CrR 4.4(c)(2) provides in part,

> (2) The court . . . should grant a severance of defendants whenever:
>
> (i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or
>
> (ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.

This court reviews a trial court's denial of a motion under an abuse of discretion standard.[30] A defendant must demonstrate undue prejudice from a joint trial to

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[27] Khann moved twice for severance on speedy trial grounds. However, on appeal, he only challenges the court's denial of his motion to sever for disparity of evidence at the close of the State's case.

[28] State v. Grisby, 97 Wn.2d 493, 506-07, 647 P.2d 6 (1982); State v. Ferguson, 3 Wn. App. 898, 906, 479 P.2d 114 (1970).

[29] Larry, 108 Wn. App. at 911.

[30] State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d 577 (1991).

establish an abuse of discretion.[31] To do this, the defendant "'must be able to point to specific prejudice.'"[32] Specific prejudice may be established by showing

> "(1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculpating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants."[33]

To justify a severance, the claimed prejudice must outweigh the court's concern for judicial economy.[34] Khann moved for severance based upon the disparity of the evidence against him and his codefendants. At the time the State rested, the only evidence linking Khann to the crime was the victim's showup identification, and the court noted that Khann successfully impeached her related testimony at trial. Since Khann did not present any evidence in his own defense, he argues that the court should have granted his severance motion based on the facts in evidence at the time the State rested.

CrR 4.4(a)(1) plainly states that a severance motion may be made "before or at the close of all the evidence" in a consolidated case. Khann's motion was

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[31] State v. Alsup, 75 Wn. App. 128, 131, 876 P.2d 935 (1994).

[32] Larry, 108 Wn. App. at 911 (quoting State v. Wood, 94 Wn. App. 636, 641, 972 P.2d 552 (1999)).

[33] State v. Canedo-Astorga, 79 Wn. App. 518, 528, 903 P.2d 500 (1995) (quoting United States v. Oglesby, 764 F.2d 1273, 1276 (7th Cir. 1985)).

[34] Hoffman, 116 Wn.2d at 74.

timely but, contrary to his argument, the rule does not require the judge to rule on the motion immediately. A rule discussing severance of multiple defendants' trials necessarily contemplates that multiple parties may be presenting evidence. Had the rule's author intended to require that the trial court make its decision based solely on the evidentiary record at the time of the motion, rather than all the evidence to be considered by the jury, it could have included this requirement. But such a requirement would not address the pertinent problem, the risk of one defendant being convicted based upon the strength of the evidence against codefendants.

The State correctly notes that Khann seeks to benefit from forcing the judge to ignore probative evidence about Khann's guilt by requiring the court to rule before hearing all the evidence. This negates the principle of judicial economy that consolidated trials serve. If the court had severed Khann's trial, then the State could call Copol and Volante as the State's witnesses in Khann's subsequent trial. Because the court waited until after Copol and Volante presented their defense evidence, which also provided more evidence against Khann, the court determined that the disparity in the weight of the evidence did not warrant severance.

Khann additionally argues that Copol's statements were impeachment evidence and the court improperly considered them as substantive evidence against him. "[A]bsent a request for a limiting instruction, evidence admitted as relevant for one purpose is deemed relevant for others."[35] Because Khann did not object to Copol's testimony and did not request a limiting instruction, the jury properly considered it as substantive evidence against Khann.

In his statement of additional grounds, Khann alleges that the court's instruction that the jury must be unanimous to return a special verdict violates the nonunanimity rule established in State v. Bashaw.[36] However, in State v. Guzman Nuñez,[37] our Supreme Court reconsidered and overruled Bashaw. The court concluded that the challenged jury instructions, which required a unanimous "yes" or "no" decision on the special verdict form, were correct. Here, based on Guzman Nuñez, the trial court did not err with the special verdict form. Khann's argument fails.

CONCLUSION

The court did not abuse its discretion by denying the appellants' suppression motion. The State presented sufficient evidence of operability to

[35] State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).
[36] 169 Wn.2d. 133, 146-47, 234 P.3d 195 (2010).
[37] 174 Wn.2d 707, 709-10, 285 P.3d 21 (2012).

support the firearm special verdicts. And the court did not abuse its discretion by denying Khann's motion to sever. Therefore, we affirm.

Leach, C.J.

WE CONCUR:

Cox, J.

Becker, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 67509-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Kristin Relyea, DPA
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☒ Eric Nielsen - Attorney for other party

☒ Suzanne Elliott - Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

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