

NO. 40611-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

NORBERTO SERRANO,

Appellant.

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COURT OF APPEALS
DIVISION II
BY APPOINTMENT
BY APPOINTMENT

File 2-18-11

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 09-1-01513-7

BRIEF OF RESPONDENT

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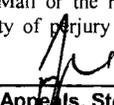
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED February 18, 2011, Port Orchard, WA 
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in denying Serrano's claim that the traffic stop in the present case was pretextual when the trial court's finding (that Sergeant Endicott lawfully and reasonably pulled Youngker over because he saw him committing the crime of driving with a suspended license) was supported by substantial evidence?

2. Whether Serrano's claim that his school zone enhancement must be vacated because the trial court's concluding instruction improperly required the jury to reach a unanimous verdict on the sentence enhancement must be rejected when Serrano failed to object to the instruction below and when error of this sort may not be raised for the first time on appeal as it does not constitute manifest constitutional error?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Norberto Serrano was charged by amended information filed in Kitsap County Superior Court with one count of possession of methamphetamine with intent to manufacture or deliver. CP 38. The charged also contained a special allegation that the offense took place in a school zone. CP 38. A jury found Serrano of the charged offense and the school zone enhancement. CP 72, 73. The trial court then imposed a standard range sentence. CP 212. This appeal followed.

B. FACTS

Prior to trial, Serrano filed a CrR3.6 motion to suppress, arguing that the stop of a vehicle in which Serrano was a passenger was an unlawful pretext stop. CP 12. The State filed a written response arguing that the stop was not pretextual. CP 24. A hearing was held on the motion, and at the end the trial court denied Serrano's motion to Suppress.

At the suppression hearing, Bremerton Police Sergeant William Endicott testified that based on information from numerous sources, the Bremerton Police Department was investigating possible narcotics and stolen property activity at a residence at 13th and Broadway in Bremerton, and officers were performing surveillance on the residence as time allowed. RP (2/8) 6-7.

In November of 2009, one of the tenants of the residence was in jail, and Bremerton officers had been keeping an eye on the residence because it was very common, especially in cases involving drug activity, for associates of an inmate to come to the inmate's residence and break into it while the inmate is incarcerated. RP (2/8) 7-8. Sergeant Endicott explained that these associates often break into the inmate's home looking for drugs or money. RP (2/8) 7-8.

On November 11th, another Bremerton officer had been watching the residence and had observed some people prowling around the residence. RP

(2/8) 7. Sergeant Endicott responded to the scene and the officers contacted two people outside the house. RP (2/8) 7-8. The two people were Shawn Youngker and a female. RP (2/8) 8. The female gave a false name to the officers, but Sergeant Endicott recognized her and she was eventually arrested on an outstanding felony warrant. RP (2/8) 8. The officers also found that Mr. Youngker had a misdemeanor warrant and had a suspended driver's license, but Mr. Youngker was released at the scene. RP (2/8) 8-9.

The following night, November 12, Sergeant Endicott parked his patrol car in a parking lot across the street from the residence and watched the residence. RP (2/8) 7-8. Sergeant Endicott had not been there long when he saw Serrano exit the house and saw a vehicle pull up in front of the residence. RP (2/8) 8. Sergeant Endicott recognized the car as belonging to Mr. Youngker, and Sergeant Endicott also saw that Youngker was driving the car. RP (2/8) 8. Serrano got in the passenger side of the car. RP (2/8) 8. Sergeant Endicott explained that it was "notable" to him that Youngker was driving because when the officers had run Youngker's name the previous night they had learned that he had a suspended license. RP (2/8) 8-9. Thus, when Sergeant Endicott saw Youngker driving the car he immediately recognized him as a person driving on a suspended license. RP (2/8) 9.

Youngker drove the car westbound on 13th street, and Sergeant Endicott began driving as well and got behind Youngker's car. RP (2/8) 9.

Sergeant Endicott explained that because it was conceivable that that Youngker could have had his license reinstated since his contact with the police the previous night, he decided to run Youngker's information to confirm that his license was still suspended. RP (2/8) 9. Sergeant Endicott then contacted central communications (CENCOM) and within a minute he had confirmed that Youngker's license was still suspended. RP (2/8) 9.

Sergeant Endicott then activated his lights and pulled Youngker over. RP (2/8) 10. Sergeant Endicott walked up to the car, contacted Youngker who was driving, and had Mr. Youngker step out of the car. RP (2/8) 10. While he was doing this, Sergeant Endicott saw that Serrano had pushed the backpack that he had been carrying into the back seat of the car. RP (2/8) 10. Sergeant Endicott had Youngker walk back to the patrol car where and he told Youngker that he was under arrest for driving with a suspended license. RP (2/8) 10.

Sergeant Endicott eventually asked Youngker if he would consent to a search of his car, and Youngker gave his consent. RP (2/8) 10. Sergeant Endicott then went to the car and had Serrano get out of the car and Sergeant Endicott told Serrano that he was free to go. RP (2/8) 11. Serrano wanted to know what was happening to Youngker, so Sergeant Endicott told him that Youngker was under arrest for driving with a suspended license, but explained again that Serrano was free to go. RP (2/8) 11.

Serrano, however, explained that he would remain at the scene. RP (2/8) 11. Sergeant Endicott was concerned about Serrano remaining at the scene during the search, since Sergeant Endicott has recently investigated an incident where Serrano was reported to have threatened a woman with a gun. RP (2/8) 11. As Sergeant Endicott was the only officer present with Youngker and Serrano, Sergeant Endicott told Serrano that if he was going to remain at the scene during the search of the car then he was going to pat him down for weapons. RP (2/8) 11-12. During the patdown Sergeant Endicott found no weapons, but did find several pills that Serrano said were aspirin. RP (2/8) 12. Sergeant Endicott had no reason to disbelieve Serrano, so he again told Serrano that he was free to go, but Serrano decided to stay. RP (2/8) 12.

Sergeant Endicott then discussed the search of the car with Serrano and asked him if there was anything in the car that he wanted the officer to take out of the car prior to the search. RP (2/8) 12. Serrano said that nothing in the car was his. RP (2/8) 12. Sergeant Endicott then asked Serrano numerous times about the backpack and Serrano specifically stated that it was not his. RP (2/8) 12-13.

At the suppression hearing Sergeant Endicott specifically testified that if Serrano had wanted to leave the scene, and if he had claimed that the backpack was his and wanted to take it with him, that Sergeant Endicott

would have let him leave as he “had no reason to stop him,” and that he “could have left at any time and carried the backpack off with him.” RP (2/8) 13.

Serrano, however, chose to remain at the scene and continued to tell Sergeant Endicott that the backpack was not his. RP (2/8) 12-13. Sergeant Endicott also asked for consent to search the backpack, and Serrano repeatedly responded by saying such things as, “Yeah. Go ahead, search, I don’t care, nothing in there is mine.” RP (2/8) 12-13. Based on these conversations Sergeant Endicott felt that Serrano was consenting to a search of the backpack. RP (2/8) 14.

Sergeant Endicott also spoke to Youngker about the backpack, and he also claimed that it was not his and said that the officer could search it. RP (2/8) 16.

Sergeant Endicott eventually searched the backpack and found approximately ten bags of packaged methamphetamine, some prescription pills and marijuana, scales with methamphetamine residue, and a police scanner tuned to the Bremerton police department frequency. RP (2/8) 14. Further investigation showed that the prescription pills were tied to a prescription that had been filled that same day, and the third party who obtained the pills stated that he had given the pills to Serrano in exchange for

money that he had owed him. RP (2/8) 14. It was also later determined that the pills that Serrano had on him and the he had claimed were aspirin were actually a controlled substance. RP (2/8) 16.

Serrano was arrested, and after initially denying any knowledge of the backpack and its contents, Serrano later admitted that the backpack and the drugs did, in fact, belong to him. RP (2/8) 16-17.

At the conclusion of the CrR 3.6 hearing, the trial court denied the motion to suppress. RP (2/23 3.6 hearing¹) 61. The trial court specifically found the testimony of Sergeant Endicott to be “credible.” RP (2/23 3.6 hearing) 57. The trial court then went on to state that,

[N]ot only do I have to consider the subjective intent of the officer, I have to consider the objective reasonableness of his actions. Now the *Ladson* case involved – I believe it was a traffic infraction as to whether or not that was a pretext. In this instance, the underlying reason and intent of the officer was to stop Youngker based upon a criminal act of driving with license suspended which takes it somewhat outside of the facts of the *Ladson* case. Given that driving with license suspended in the third degree is a crime, I don’t recall if it’s a misdemeanor or gross misdemeanor, but I believe it is a crime. And as such, one must ask one’s self, was it objectively reasonable for the officer to want to investigate a crime that was apparently occurring in his presence which he confirmed at that moment in time.

I do find it’s objectively reasonable for the officer to investigate a crime occurring, that being driving with license

¹ There are two transcripts dated February 23, 2010. One is labeled as the “3.6 Hearing/3.5 Hearing” and one is labeled as the “Afternoon Session.” Citations to “RP (2/23 3.6 hearing)” refer to the transcript labeled “3.6 Hearing/3.5 Hearing.”

suspended. And I even ask myself, would it be objectively unreasonable for the officer not to investigate a driving-with-license-suspended offense he was aware of.

In other words, if the officer knew that the driver was driving with license suspended, would it be reasonable for him to just let the driver drive away knowing that there was that criminal act occurring.

So when I look at the *Ladson* case and the case law as to whether or not this was a ruse for the officer to get other evidence, I cannot find based on the totality of the circumstances that this was a ruse. It was – I'm persuaded that the intent of the officer was to investigate the driving with license suspended, and it was objectively reasonable, and that is largely also taking into account that he reiterated to Serrano a couple – at least two times that Serrano was free to leave. Had it been a ruse, certainly Serrano would have been required to remain.

RP (2/23 3.6 hearing) 57-59. The trial court also entered written findings of fact and conclusions of law consistent with its oral ruling. CP 121.

After the CrR 3.6 hearing, Serrano proceeded to a jury trial on the charged offense. The only issue on appeal arising from the trial itself involves one of the court's instructions to the jury: specifically, instruction number 18. When the trial court went through the jury instructions with the parties, however, Serrano failed to object to any of the court's instructions. RP 164. Furthermore, the State is unaware of anything in the record that would demonstrate that Serrano ever objected to Instruction 18, and Serrano's brief on appeal does not claim or otherwise assert that an objection to Instruction 18 was raised below.

III. ARGUMENT

- A. **THE TRIAL COURT DID NOT ERR IN DENYING SERRANO'S CLAIM THAT THE TRAFFIC STOP IN THE PRESENT CASE WAS PRETEXTUAL BECAUSE THE TRIAL COURT'S FINDING (THAT SERGEANT ENDICOTT LAWFULLY AND REASONABLY PULLED YOUNGKER OVER BECAUSE HE SAW HIM COMMITTING THE CRIME OF DRIVING WITH A SUSPENDED LICENSE) WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.**

Serrano argues that Sergeant Endicott's stop of Youngker's vehicle was a "pretext stop." App.'s Br. at 4. This claim is without merit because the trial court's finding that Sergeant Endicott pulled Youngker over, not because of a pretext, but because he had personally observed Youngker committing the crime of driving with a suspended license was supported by substantial evidence and there was no evidence that the traffic stop was used a pretext to investigate a criminal matter unrelated to Youngker's driving.

To review a trial court's ruling on a suppression motion, an appellate court examines whether substantial evidence supports the challenged findings and whether those findings support the trial court's conclusions of law. *State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001), *review denied*, 145 Wn.2d 1016, 41 P.3d 483 (2002). Substantial evidence is "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises." *State v. Jeannotte*, 133 Wn.2d 847, 856, 947 P.2d 1192

(1997) (*quoting Olmstead v. Dep't of Health*, 61 Wn. App. 888, 893, 812 P.2d 527 (1991) (*quoting Green Thumb, Inc. v. Tiegs*, 45 Wn. App. 672, 676, 726 P.2d 1024)). An appellate court does not review credibility determinations on appeal, leaving them to the fact finder. *State v. Frazier*, 82 Wn. App. 576, 589 n. 13, 918 P.2d 964 (1996) (*citing Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990)).

Pretextual traffic stops are warrantless seizures that violate article I, section 7 of the Washington State Constitution. *State v. Ladson*, 138 Wn.2d 343, 358, 979 P.2d 833 (1999).² The essence of every pretextual traffic stop is that “the police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving.” *Ladson*, 138 Wn.2d at 349. The Washington Supreme has recently reaffirmed this principle when it stated that,

A pretextual stop occurs when an officer stops a vehicle in order to conduct a speculative criminal investigation unrelated to the driving, and not for the purpose of enforcing the traffic code.

State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007), *citing Ladson*, 138 Wn.2d at 349. Furthermore, when determining whether a given stop is pretextual, the court should consider “the totality of the circumstances,

² Pretext is a “false reason used to disguise a real motive.” *Ladson*, 138 Wn.2d at 359 n. 11, 979 P.2d 833 (internal quotations and citations omitted).

including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior.” *Ladson*, 138 Wn.2d at 358-59.

Most cases of pretextual traffic stops decided by Washington courts follow the pattern of an arresting officer having a suspicion of nontraffic related criminal activity and subsequently following an arrestee's vehicle until a traffic infraction occurs, initiating the stop, and discovering evidence of an unrelated crime during a subsequent search. *State v. Johnson*, 155 Wn. App. 270, 280, 229 P.3d 824 (2010). For instance, in *Ladson*, two police officers working on proactive gang patrol admitted that, although they did not make routine traffic stops while on gang patrol, they used traffic infractions as a means to pull people over in order to initiate contact and questioning regarding unrelated criminal activity; indeed, they followed people who aroused their suspicions, hoping to see a traffic infraction in order to have a legal reason to pull them over. *Ladson*, 138 Wn.2d at 346, 979 P.2d 833. The trial court in *Ladson* specifically found that one of the officers selectively enforced traffic violations depending on whether he believed there was a potential for intelligence-gathering in such stops. *Id.* In *Ladson* the police followed a vehicle being driven by an individual the officers believed might be involved in drug dealing, and after a number of blocks the officers found a legal reason to pull the vehicle over: the license tabs had expired. *Id.* Upon stopping the vehicle, the officers learned that the driver of the vehicle had a

suspended driver's license. They arrested the driver, and searched the vehicle incident to that arrest. *Id.* Finding a handgun under a jacket belonging to the passenger, the officers arrested him and searched him, finding several baggies of marijuana. *Id.* at 346-47. The trial court, finding the stop to have been pretextual, suppressed the evidence. *Ladson*, 138 Wn.2d at 347. The Court of Appeals reversed. *Id.* The Supreme Court reversed the Court of Appeals, reinstating the trial court's ruling. *Ladson*, 138 Wn.2d at 360, 979 P.2d 833.

Similarly, in *State v. DeSantiago*, 97 Wn. App. 446, 983 P.2d 1173 (1999), a police officer followed a car he had observed in a known drug area because he suspected that the driver had purchased drugs and he wanted an excuse to stop the car to investigate his suspicions. The court found that the stop was pretextual and suppressed the drug evidence because (1) the officer was not on routine traffic patrol when he followed the defendant's vehicle; and (2) he followed the vehicle solely to find an excuse to stop the vehicle and to conduct a narcotics investigation. *DeSantiago*, 97 Wn. App. at 452-53. *See also*, *State v. Myers*, 117 Wn. App. 93, 69 P.3d 367 (2003) (officer who suspected driver's license was suspended stopped vehicle for traffic citations while awaiting record check on license status), *review denied*, 150 Wn.2d 1027, 82 P.3d 242 (2004); *State v. Meckelson*, 133 Wn. App. 431, 135 P.3d 991 (2006) (counsel ineffective for not challenging stop where officer who suspected vehicle might have been stolen made traffic stop for infractions),

review denied, 159 Wn.2d 1013, 154 P.3d 919 (2007).

Washington courts, however, have been careful to note that, even under *Ladson*, officers whose suspicions have been aroused may still enforce the traffic code, so long as enforcement of the traffic code is the actual reason for the stop. *State v. Nichols*, 161 Wn.2d 1, 11, 162 P.3d 1122 (2007), citing *State v. Hoang*, 101 Wn. App. 732, 742, 6 P.3d 602 (2000), *review denied*, 142 Wn.2d 1027, 21 P.3d 1149 (2001). What an officer may not do is to utilize his or her authority to enforce the traffic code as a pretext to avoid the warrant requirement for an unrelated criminal investigation. *Hoang*, 101 Wn. App. at 742, *citing Ladson*, 138 Wn.2d at 357-58.³

³ In *Nichols*, an officer saw a car pull into a parking lot, slowly drive around, and then returned to the street. In doing so, the car crossed over to the far lane instead of into the closest lane. Suspecting that the driver did not want to drive in front of the patrol car, the officer went in pursuit and activated his lights immediately upon catching up to the car. *Nichols*, 161 Wash.2d at 4-5. The court concluded that there was no basis for finding a pretext stop and that it was objectively reasonable for the officer to stop to investigate the turning violation. *Id.* at 12-13. The fact that the officer did not cite for the infraction also did not turn the stop into a pretext. *Id.* at 14.

The *Hoang* Court reached a similar result. In that case an officer was observing a neighborhood known for drug transactions. *Hoang*, 101 Wn. App. at 734-35. At 4:00 a.m., the defendant drove up in a car, briefly stopped and talked to one group of people standing near the street, and then drove forward to do the same with another group. Suspecting that the driver was attempting to purchase drugs, but seeing no evidence that any drugs had been exchanged, the officer waited. The car stopped for a stop sign, but then turned without signaling. The officer immediately turned on his lights and made a traffic stop. *Id.* at 734-735. The trial court found that the officer would have made the stop even if he had not observed the suspicious behavior and determined that it was not a pretext. The Court of Appeals affirmed and expressly noted:

Under *Ladson*, even patrol officers whose suspicions have been aroused may still enforce the traffic code, so long as enforcement of the traffic code is the actual reason for the stop. What they may not do is to utilize their authority to enforce the traffic code as a pretext to avoid the warrant requirement for an unrelated criminal investigation.

In a more recent case, the Court of Appeals reaffirmed the holding of *Hoang*. *State v. Weber*, ___ Wn. App. ___, ___ P.3d ___ (Div III, February 3, 2011)(Attached as Appendix A).⁴ In *Weber*, a trooper saw the defendant pull out of an apartment complex at 2:53 am and noticed that the car entered the street without stopping before crossing a sidewalk. The trooper then paced the car for about three blocks and observed the defendant drive 47 m.p.h. in a 35 m.p.h. zone. The trooper then pulled the car over and the defendant was eventually arrested for DUI. The defendant moved to suppress the evidence obtained following the stop, arguing that the traffic stop was a pretext to investigate a possible DUI. *Weber*, ___ Wn. App. ___ (App. A., page 1). At the suppression hearing the trooper testified that it was “very common” for people to be drinking and driving late at night and that admitted that was always looking for DUIs and had been looking for DUIs at the time of the stop. The trial court found that the stop was pretextual. On a RALJ appeal, however, the Superior reversed the suppression order. The Court of Appeals then affirmed the Superior Court, noting that,

The trooper was doing his job as a patrol officer. While he was always on the lookout for lawbreaking, including people driving while under the influence, that fact does not mean that everyone Trooper Shiflett stops is the subject of a pretext stop. It is expected that patrol officers are looking out for

Hoang, 101 Wn. App. at 742.

⁴ Further citations to the *Weber* decision will list the page number corresponding to the page numbers found on the decision as it is found in Appendix A.

improper activity. Under petitioner's theory, any officer who came upon a car weaving all over the road would be making a pretext stop simply because the officer expected to find an impaired driver behind the wheel. That theory turns training and experience into a basis for not enforcing the law.

As in both *Nichols* and *Minh Hoang*, the trooper was not conducting an investigation unrelated to traffic offenses. It was objectively reasonable for him to stop a car driving through a residential area at 48 m.p.h. in the middle of the night. Thus, even if we go further than the trial court and infer that a factual finding had been made that Trooper Shiflett was not enforcing the traffic code, it is not sufficient to find a pretext stop. Under *Ladson*, both the subjective intent of the officer and the reasonableness of the stop must be considered before finding a pretext. *Ladson*, 138 Wn.2d at 359, 979 P.2d 833. This was a reasonable stop. In light of the nonexistence of an improper motive, there is no basis for finding that this traffic stop was a pretext.

Weber, __ Wn. App. __ (App. A., page 5). *See also, Johnson*, 155 Wn. App. at 278-79, 281 (where the Court: (1) rejected a claim that an officer act of stopping the defendant for driving with a suspended license was merely a pretext used to allow the officer to search the driver incident to arrest; and, (2) further noted driving with a suspended license is a criminal offense and that criminal offenses and that an officer having probable cause for such an offense may arrest a driver for this crime without a warrant).

The facts of the present case are distinguishable from *Ladson* and the typical pretext case. Unlike the officers in *Ladson*, Sergeant Endicott explained that when he saw Youngker driving the car he immediately recognized him as a person driving on a suspended license and he

immediately confirmed through central communications that Youngker's license was still suspended. RP (2/8) 9. Furthermore, unlike the officers in *Ladson*, Sergeant Endicott never stated that he seized on traffic code violations as a means to pull people over for questioning or otherwise use a traffic violation as an excuse to investigate suspected criminal activity.

Similarly, the present case is also distinguishable from *DeSantiago* where, as in *Ladson*, the officer suspected criminal activity and followed the defendant's vehicle waiting for the commission of a traffic infraction so that the vehicle could be stopped. In the present case, however, there was no testimony from Sergeant Endicott that he followed Youngker waiting for him to commit a traffic violation in order to facilitate a narcotics investigation or some other criminal investigation. Nor did Sergeant Endicott testify that he selectively enforced traffic regulations to facilitate investigation of other potential crimes. Rather, Sergeant Endicott pulled Youngker over after he personally saw him committing a crime.

In the present case the trial court specifically found the testimony of Sergeant Endicott to be "credible." RP (2/23 3.6 hearing) 57. In addition, the trial court found that Sergeant Endicott's intent was to investigate the driving with license suspended, that this was objectively reasonable, and that the stop of the car was not a pretext. RP (2/23 3.6 hearing) 57-59, CP 124. The trial court's findings in this regard were supported by substantial evidence, as

Sergeant Endicott testified that he saw Youngker driving the car and he immediately recognized him as a person driving on a suspended license and confirmed this fact prior to making the actual stop. RP (2/8) 9.

The mere fact that Sergeant Endicott first saw Youngker and Serrano while he was watching a house that had been associated with other criminal activity does not make the stop a pretext. Rather, the mere fact that an officer is aware that a driver who commits a traffic violation might potentially be involved in other criminal activity does not mean that an officer cannot still pull the driver over for when that driver is seen committing a crime (and not just a mere traffic infraction). In short, an officer need not blind himself to the commission of one crime merely because the driver might also be a potential suspect in unrelated criminal activity. Rather, society should expect that the police should always be mindful of such possibilities

In short, the trial court did not err in denying Serrano's suppression motion. Rather, the trial court's findings were supported by substantial evidence and the court's findings supported its ultimate conclusion that the traffic stop in the present case was not pretextual.⁵

⁵ In addition, an appellate court may sustain a trial court on any correct ground, even though the trial court did not consider that ground. *State v. Costich*, 152 Wash.2d 463, 477, 98 P.3d 795 (2004); *Nast v. Michels*, 107 Wash.2d 300, 308, 730 P.2d 54 (1986). In the present case it is unclear why Serrano would have standing to even allege that the stop of Youngker was pretextual. First, the seizure of the driver does not automatically result in the seizure of the vehicle's passengers. *State v. Mendez*, 137 Wn.2d 208, 222, 970 P.2d 722 (1999). Because a traffic stop does not diminish the privacy rights of the passengers, they remain free to stay or

B. SERRANO'S CLAIM THAT HIS SCHOOL ZONE ENHANCEMENT MUST BE VACATED BECAUSE THE TRIAL COURT'S CONCLUDING INSTRUCTION IMPROPERLY REQUIRED THE JURY TO REACH A UNANIMOUS VERDICT ON THE SENTENCE ENHANCEMENT MUST BE REJECTED BECAUSE SERRANO FAILED TO OBJECT TO THE INSTRUCTION BELOW AND BECAUSE ERROR OF THIS SORT MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL AS IT DOES NOT CONSTITUTE MANIFEST CONSTITUTIONAL ERROR.

Serrano next claims that the trial court's instructions to the jury included a concluding instruction that improperly required the jury to reach a unanimous verdict on the sentence enhancement. App.'s Br, at 10. This claim, however, must be rejected because Serrano failed to object to the instruction below and because any error associated with the instruction at issue is not manifest constitutional error. The error, therefore, may not be raised for the first time on appeal.

In the present case the trial court provided the jury with special verdict form for the school zone enhancement. The trial court's concluding instruction addressed the special verdict form and stated in pertinent part:

leave the scene of a traffic stop. *See City of Spokane v. Hays*, 99 Wn.App. 653, 658, 995 P.2d 88 (2000). Secondly, even if in some cases a passenger could be said to be collaterally detained when a driver is pulled over, this was not true in the present case as the trial court specifically found that Sergeant Endicott told Serrano on at least two occasions that he was free to leave. CP 122. Thus, while Youngker was certainly detained, it is equally clear that Serrano was not detained. Thus, it is unclear why Serrano has standing to argue that there was a pretext stopped when he was not even detained at all, but rather, was specifically told

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no”.

CP 71 (Instruction No. 18). This instruction is identical to WPIC 160.00. At trial, the court asked the parties whether they had any objections or exceptions to the court’s instructions, and Serrano’s attorney replied that she did not. RP 164. Furthermore, the State is not aware of any part of the record that shows Serrano objecting the language in the concluding instruction regarding unanimity with respect to the school zone enhancement.

RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). As pointed out in *Scott*, the general rule has specific applicability with respect to claimed errors in jury instructions in criminal cases through CrR 6.15(c), requiring that timely and well stated objections be made to instructions given or refused “in order that the trial court may have the opportunity to correct any error.” *Scott*, 110 Wn.2d. at 686 (*quoting City of Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976)). An appellate court may, however, consider an issue raised for the first time on appeal when it involves a “manifest error affecting a

that he was free to go.

constitutional right.” RAP 2.5(a)(3). In order to raise an error for the first time on appeal under this rule, an appellant must demonstrate that (1) the error is manifest, and (2) the error is truly of constitutional dimension. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). “‘Manifest’ in RAP 2.5(a)(3) requires a showing of actual prejudice.” *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

In *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010) the Washington Supreme Court addressed a challenge to a concluding instruction directing the jury that in deciding whether the defendant committed the aggravating factor of selling a controlled substance within 1,000 feet of a school bus route stop, “all twelve of you must agree on the answer to the special verdict”- an instruction that Bashaw contended wrongly required unanimous agreement in order to answer “no.” The Supreme Court ultimately held that:

[A] unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. A nonunanimous jury decision is a final determination that the State had not proved the special finding beyond a reasonable doubt.

Bashaw, 169 Wn.2d at 146.

There is no dispute that the concluding instruction given by the trial court in the present case, Instruction No. 18, contained the language

disapproved of by the *Bashaw* Court. The record in the present case, however, also unquestionably demonstrates that Serrano failed to object to the concluding instruction at trial. Thus, pursuant to RAP 2.5, Serrano may only raise this issue for the first time on appeal if the error rose to the level of a manifest constitutional error.

The *Bashaw* opinion itself, however, makes it clear that the use of the instruction at issue does not constitute an error of constitutional dimension. In *Bashaw*, the Supreme Court held that the instruction was incorrect because it told the jury that they had to be unanimous to answer "no." *Bashaw*, 169 Wn.2d at 145-47, citing *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003), the court held that "a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence." *Bashaw*, 169 Wn.2d at 146. In so holding, the court acknowledged that this rule was not of constitutional dimension, noting that,

This rule is not compelled by constitutional protections against double jeopardy, cf. *State v. Eggleston*, 164 Wn.2d 61, 70-71, 187 P.3d 233 (stating that double jeopardy protections do not extend to retrial of noncapital sentencing aggravators), *cert. denied*, ___ U.S. ___, 129 S. Ct. 735, 172 L. Ed. 2d 736 (2008), but rather by the common law precedent of this court, as articulated in *Goldberg*.

Bashaw, 169 Wn.2d at 146 n.7. Instead, the court cited policy justifications

for this common law rule:

The rule we adopted in *Goldberg* and reaffirm today serves several important policies.... The costs and burdens of a new trial, even if limited to the determination of a special finding, are substantial. We have also recognized a defendant's “valued right’ to have the charges resolved by a particular tribunal.” [Citation omitted]. Retrial of a defendant implicates core concerns of judicial economy and finality. Where, as here, a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality.

Bashaw, 169 Wn.2d. at 146-47.

Furthermore, the Washington Court of Appeals recently addressed the issue of whether a defendant waives the right to raise a *Bashaw* claim on appeal by failing to object to the jury instruction below. In *State v. Enrique Guzman Nunez*, __ Wn. App. __, __ P.3d __ (Div III, Feb 15, 2011)(attached as Appendix B)⁶ the trial court gave the jury an instruction that, like the instruction in *Bashaw*, erroneously required unanimity to acquit Nunez of the aggravating factor of possessing and delivering a controlled substance within 1000 feet of a school bus route stop. *Nunez*, __ Wn. App. __ (App. B., page 2). Nunez, however, did not object to this instruction in the trial court. The Court of Appeals thus looked at whether the instructional error constituted a “manifest error affecting a constitutional right.” The Court of Appeals found

⁶ Further citations to the *Nunez* decision will list the page number corresponding to the page numbers found on the decision as it is found in Appendix B.

that the trial court's failure to instruct the jury that it could acquit Mr. Nunez of the aggravating factor nonunanimously was "not an error of constitutional dimension." *Nunez*, ___ Wn. App. ___ (App. B., page 4). The *Nunez* Court also pointed out that the Supreme Court did not cite a constitutional basis for its decision in *Bashaw*. To the contrary, the *Bashaw* Court noted that it was a common law rule, not the constitution, that permits Washington juries to reject sentence enhancements or higher degree offenses less than unanimously. *Nunez*, ___ Wn. App. ___ (App. B., page 4). The *Nunez* Court then went on to state that,

In short, the aggravating factors in Mr. Nunez's case were imposed following a deliberative procedure to which he did not object; which no court, state or federal, has found to be unconstitutional or unfair; which has been acknowledged to have procedural advantages; and which, in the lesser included crime context, is preferred by a number of jurists and courts. This is not constitutional error.

Nunez, ___ Wn. App. ___ (App. B., page 5). Furthermore, the *Nunez* Court went on to explain that even if the error was constitutional, it would still not be manifest constitutional error, noting that,

The giving of the challenged instruction in Mr. Nunez's case had no practical and identifiable consequences on the record that should have been apparent to the trial court. The instruction used conformed, in material respects, to the pattern concluding instruction then recommended for deliberations on the aggravating factors for controlled substance crimes. See 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS CRIMINAL 50.60,

at 986 (3d ed.2008). The jury was able to make all of the findings required, applying the proper burden of proof, under the instructions given. *See O'Hara*, 167 Wn.2d at 108. Without an affirmative showing of actual prejudice, an asserted error is not “manifest” and thus not reviewable under RAP 2.5(a)(3). *McFarland*, 127 Wn.2d at 334.

Nunez, ___ Wn. App. ___ (App. B., page 5-6). Thus the *Nunez* court ultimately held that it was “satisfied that the claimed instructional error was not manifest constitutional error,” and thus refused to review the issue for the first time on appeal. *Nunez*, ___ Wn. App. ___ (App. B., page 6).

The facts of the present case are indistinguishable from *Nunez*. Thus, given the clear holding of *Nunez* and the language of the *Bashaw* opinion itself, Serrano has failed to show that the trial court’s use of the flawed concluding instruction was a manifest constitutional error. Thus, as Serrano failed to object to the instruction below and has failed to show manifest constitutional error, he may not raise this issue for the first time on appeal and his claims in this regard should be denied pursuant to *Nunez*.

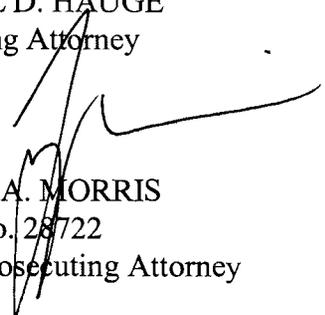
IV. CONCLUSION

For the foregoing reasons, Serrano’s conviction and sentence should be affirmed.

DATED February 18, 2011.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



JEREMY A. MORRIS
WSBA No. 28722
Deputy Prosecuting Attorney

DOCUMENT1

Appendix A

State v. Bryan Weber, __ Wn.App. __, __ P.3d __ (Div III, February 3, 2011)

--- P.3d ----, 2011 WL 479881 (Wash.App. Div. 3)
(Cite as: 2011 WL 479881 (Wash.App. Div. 3))

Only the Westlaw citation is currently available.

Court of Appeals of Washington,
Division 3.
STATE of Washington, Respondent,
v.
Bryan J. WEBER, Petitioner.

No. 28192-2-III.
Feb. 3, 2011.

Background: Defendant in prosecution for driving under the influence (DUI) moved to suppress evidence obtained following stop by state patrol trooper. Following a hearing, the District Court granted suppression motion. State appealed, and the Benton Superior Court, Jerri Graham Potts, J., reversed. The Court of Appeals granted discretionary review.

Holding: The Court of Appeals, Korsmo, A.C.J., held that stop of defendant's vehicle, for speeding and failing to stop before crossing over sidewalk, was reasonable and therefore did not constitute a pretext stop to investigate whether defendant was DUI.

Superior court ruling affirmed.

Sweeney, J., filed a dissenting opinion.

Appeal from Benton Superior Court; Honorable Jerri Graham Potts, J.Douglas Dwight Phelps, Phelps & Associates, P.S., Spokane, WA, for Petitioner.

Andrew Kelvin Miller BrendanMichael Siefken, Terry Jay Bloor, Benton County Prosecutors Office, Kennewick, WA, for Respondent.

PUBLISHED OPINION

KORSMO, A.C.J.

*1 ¶ 1 The district and superior courts disagreed on the legal conclusion to be drawn from the trial court's findings on a suppression hearing. This court

granted discretionary review to determine if the superior court applied the appropriate standard in its appellate review. While we are uncertain what standard was applied, we agree with the superior court's determination that the evidence did not support the district court's legal conclusion that a pretext stop occurred and affirm.

FACTS

¶ 2 Washington State Patrol Trooper Steve Shiflett saw Bryan J. Weber drive his car out of an apartment complex at about 2:53 a.m. He noticed that the car entered the street without stopping before crossing over a sidewalk. Trooper Shiflett then paced Mr. Weber's car for about three blocks. Mr. Weber drove 47 m.p.h. in a 35 m.p.h. zone.

¶ 3 Trooper Shiflett pulled the car over. Mr. Weber's eyes were bloodshot and watery and he smelled like alcohol. Mr. Weber agreed to perform field sobriety tests, but did not perform them well. The trooper arrested him for driving under the influence (DUI) and transported him to the jail. Breath tests showed Mr. Weber's breath alcohol level to be .115 and .118. Trooper Shiflett cited Mr. Weber for DUI, but did not cite him for the traffic infractions.

¶ 4 Mr. Weber moved to suppress the evidence obtained following the stop. He argued that the traffic stop for speeding and failure to stop was a pretext to investigate his possible driving under the influence. The matter was heard before a judge *pro tempore*. Trooper Shiflett was the only witness called by the prosecution at the hearing.^{FNI} The trooper testified that he stopped Mr. Weber's vehicle for traffic infractions but is always on the lookout for DUIs when on duty:

JOHNSON [prosecutor]: What was the reason for the stop?

....

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SHIFLETT: The combination of traffic violations. The failing to stop before the sidewalk and the speeding.

....

PHELPS [defense attorney]: What time of night was this.

SHIFLETT: I don't recall, oh, yeah, it was right before I was going home. 2:53 is when the stop happened.

PHELPS: A.M.?

SHIFLETT: Yes.

PHELPS: Was there any people out on the street as far as pedestrians?

SHIFLETT: I didn't indicate but there's not very many at 3:00 in the morning in that area.

PHELPS: Alright. Were there very many cars on the street?

SHIFLETT: I don't recall any other cars on the street.

....

PHELPS: And part of your duties is DUI enforcement?

SHIFLETT: Yes.

PHELPS: Were you working a special detail [the] night of this incident?

SHIFLETT: No.

PHELPS: And were you looking for DUI's?

SHIFLETT: Yes.

PHELPS: And it's not uncommon for people to be drinking and driving late at night, is it?

SHIFLETT: Very common.

PHELPS: And part of what you do as a state trooper is look for DUI's.

SHIFLETT: Yes.

*2 PHELPS: Did that play a part in stopping this particular defendant?

....

SHIFLETT: I would have stopped him for those violations if it was at noon. The hour didn't make any difference, no.

....

JOHNSON: ... was DUI the basis for this stop?

SHIFLETT: I guess I don't know how to clarify that. *I'm always looking for DUI's at all hours every time I work. I'm always on the look out for that, but, the reason for the stop was traffic violations.*

Clerk's Papers (CP) at 38-45 (emphasis added).

¶ 5 The district court took the matter under advisement. The court subsequently issued a written ruling that concluded that the stop was pretextual and granted the suppression motion. The district court entered five findings of fact: (1) the trooper ^{FN2} testified he was looking for DUIs at the time he observed Mr. Weber; (2) the trooper testified that he observed Mr. Weber fail to stop at the crosswalk while leaving an apartment complex in violation of RCW 46.61.365; (3) the trooper did not immediately stop Weber; (4) the trooper paced him for three blocks at 48 m.p.h. in a 35 m.p.h. zone before stopping him; (5) the officer did not cite for the traffic infractions, but did cite for DUI. CP at 2, 34.

¶ 6 From these findings, the court entered four conclusions of law: (1) the trooper "was not motivated by a perceived need to make a community care-taking stop aimed at enforcing the traffic code," (2) "the traffic violations were not the real reason for the stop," (3) "the stop was an unlawful pretext stop," and (4) the motion to suppress was granted and all

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evidence was suppressed. CP at 3, 35.

¶ 7 The district court entered an order that the practical effect of the suppression order was to terminate the case. The State then appealed the ruling to the superior court pursuant to the Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ). The superior court reviewed the district court transcript and the briefing of the parties. After hearing argument, the superior court reversed the district court. Its oral remarks discussed the factual basis for the stop before deciding that a pretext stop had not occurred. The written superior court ruling simply stated that there was “sufficient evidence introduced to reverse the Findings of Fact entered October 17, 2008,” and reversed the district court order suppressing the evidence. CP at 56.

¶ 8 Mr. Weber sought discretionary review from this court on the issue of whether or not the superior court applied the appropriate standard of review in the RALJ process. One of this court's commissioners denied review. A divided panel modified that ruling and accepted discretionary review.

ANALYSIS

RALJ Standards

[1] ¶ 9 Mr. Weber contends that the superior court applied the wrong legal standard of review. He argues that the proper test is whether substantial evidence supports the district court's findings, not whether substantial evidence supported reversal. His argument is correct as far as it goes.

*3 [2] ¶ 10 RALJ 9.1 governs appellate review by a superior court of a decision of a district court. State v. Ford, 110 Wash.2d 827, 829-830, 755 P.2d 806 (1988); State v. Brokman, 84 Wash.App. 848, 850, 930 P.2d 354 (1997). RALJ 9.1(a) states that the superior court reviews the lower court ruling to determine if there are any errors of law. In the course of its review, the superior court “shall accept those factual determinations supported by substantial evidence in the record (1) which were expressly made by the court of limited jurisdiction, or (2) that may reasonably be inferred from the judgment of the court of limited jurisdiction.” RALJ 9.1(b). The superior court does not consider the evidence *de novo*. State v. Basson, 105 Wash.2d 314, 317, 714 P.2d 1188 (1986).

[3][4] ¶ 11 These rules likewise apply to appel-

late courts that grant discretionary review of a superior court's RALJ decision. Ford, 110 Wash.2d at 829, 755 P.2d 806; State v. Jim, 156 Wash.App. 39, 41, 230 P.3d 1080, review granted, 170 Wn.2d 1001 (2010). Appellate courts also will treat mislabeled findings or conclusions in accord with what they actually are. Willener v. Sweeting, 107 Wash.2d 388, 394, 730 P.2d 45 (1986).

¶ 12 We consider Mr. Weber's challenge with these standards in mind. He rightly complains that the focus of the superior court should have been on whether the evidence supported the district court's findings. The superior court's written ruling is not very helpful. To the extent it can be read as determining its own facts, the ruling would run afoul of RALJ 9.1(b). We are not sure that is what actually happened however. Part of the problem is that the district court made only a few factual findings and they do not squarely touch on why this was a pretext stop. It appears from the first two conclusions of law that the district court did not accept the trooper's testimony that he stopped the car because of the observed violations. The trial court did not make any express statement about the trooper's credibility, nor did it squarely find what motivated him to make the traffic stop. While we have an obligation to reasonably infer facts from the trial court's judgment, it is difficult to determine what should be inferred here. Perhaps it could be inferred that the officer was motivated by something other than enforcing the speeding law, although there is not much in the record to support such an inference. To go any further and infer a specific motivation, however, fails on two accounts. First, nothing in the record would support such an inference, and a reviewing court must only infer facts that have substantial evidentiary support in the record.^{FN3} RALJ 9.1(b). Second, it is a long-recognized logical fallacy to draw an affirmative conclusion from a negative premise. I. Copi & C. Cohen, *Introduction to Logic*, at 277-278 (10th ed., Prentice Hall, 1998); J. Brennan, *A Handbook of Logic*, at 79-81 (2d ed., Harper & Row, 1961). Thus, even if a reviewing court infers that the trial court factually found the trooper was not motivated to enforce the traffic law, it is not in a position to infer what the motive actually was.

*4 ¶ 13 In light of the court's oral remarks, a more plausible interpretation is that the superior court concluded that the factual findings did not support

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the legal conclusion that a pretext stop occurred. Our commissioner read the record that way.^{FN4} While that reading is a fair one for the oral remarks, it is hard to square with the written ruling's statement that there was "sufficient evidence to reverse" the suppression order.

[5][6] ¶ 14 This court sits in the same position as the superior court in review of the district court decision. Ford, 110 Wash.2d at 829, 755 P.2d 806. The parties have argued the merits of the pretext ruling throughout the appeal process. In that circumstance, this court is able to review the merits of the suppression ruling. There is no reason to further interpret the superior court decision because the merits must ultimately be addressed.

Pretextual Stop

[7][8][9] ¶ 15 The issue, then, is whether the district court correctly concluded that the stop was pretextual. Pretextual traffic stops violate the Washington State Constitution's article I, section 7. State v. Ladson, 138 Wash.2d 343, 348, 979 P.2d 833 (1999). "A pretextual stop occurs when an officer stops a vehicle in order to conduct a speculative criminal investigation unrelated to the driving, and not for the purpose of enforcing the traffic code." State v. Nichols, 161 Wash.2d 1, 8, 162 P.3d 1122 (2007). If a stop is pretextual, all evidence following the stop must be suppressed. State v. Montes-Malindas, 144 Wash.App. 254, 259, 182 P.3d 999 (2008).

[10][11][12][13] ¶ 16 The court should consider "the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior." Ladson, 138 Wash.2d at 359, 979 P.2d 833. The failure to issue a citation for a traffic infraction is one factor to be considered but is not dispositive. State v. Minh Hoang, 101 Wash.App. 732, 742, 6 P.3d 602 (2000), *review denied*, 142 Wash.2d 1027, 21 P.3d 1149 (2001). An officer need not issue a citation. Nichols, 161 Wash.2d at 14, 162 P.3d 1122. An officer's candid admission to pretextual conduct is more probative than the denial of the conduct. Montes-Malindas, 144 Wash.App. at 261, 182 P.3d 999.

¶ 17 Mr. Weber relies nearly exclusively upon Montes-Malindas, a case that involved a classic pretextual traffic stop. There, the arresting officer saw a van with three occupants parked outside of a Wal-

green's store. 144 Wash.App. at 257, 182 P.3d 999. The officer immediately suspected nontraffic criminal activity. *Id.* He surveyed the van and its occupants from an adjacent parking lot. *Id.* When the van exited the parking lot without turning on its headlights, the officer followed and later stopped the van. *Id.* The officer admitted that the suspicions of criminal activity were probably on his mind when he decided to stop the van. *Id.* at 261, 182 P.3d 999. This court concluded that the stop was pretextual after considering the totality of the circumstances, including both the subjective intent of the officer and the objective reasonableness of his behavior. *Id.* at 262, 182 P.3d 999.

*5 ¶ 18 Montes-Malindas was similar to the other cases where pretext stops have been found—police officers suspecting criminal behavior used a stop for a traffic infraction to investigate a possible crime rather than the noncriminal traffic infraction. *E.g.*, Ladson, 138 Wash.2d at 345-347, 979 P.2d 833 (gang detectives stopped vehicle for traffic infraction in order to investigate drug dealing); State v. DeSantiago, 97 Wash.App. 446, 983 P.2d 1173 (1999) (officer watching narcotics trafficking building stopped car to identify driver who left the location); State v. Myers, 117 Wash.App. 93, 69 P.3d 367 (2003) (officer who suspected driver's license was suspended stopped vehicle for traffic citations while awaiting record check on license status), *review denied*, 150 Wash.2d 1027, 82 P.3d 242 (2004); State v. Meckelson, 133 Wash.App. 431, 135 P.3d 991 (2006) (counsel ineffective for not challenging stop where officer who suspected vehicle might have been stolen made traffic stop for infractions), *review denied*, 159 Wash.2d 1013, 154 P.3d 919 (2007).

[14] ¶ 19 In contrast, a patrol officer who makes a traffic stop in the course of his patrol duties does not commit a pretext stop merely because there is reason to believe that other criminal activity is afoot. In Nichols, an officer saw a car pull into a parking lot, slowly drive around, and then returned to the street. In doing so, the car crossed over to the far lane instead of into the closest lane. Suspecting that the driver did not want to drive in front of the patrol car, the officer went in pursuit and activated his lights immediately upon catching up to the car. 161 Wash.2d at 4-5, 162 P.3d 1122. The court concluded that there was no basis for finding a pretext stop. There was no evidence that the officer was perform-

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ing anything other than routine patrol duties when he observed what he thought were traffic infractions. *Id.* at 12, 162 P.3d 1122. It was objectively reasonable for the officer to stop to investigate the turning violation. *Id.* at 12-13, 162 P.3d 1122. The fact that the officer did not cite for the infraction also did not turn the stop into a pretext. *Id.* at 14, 162 P.3d 1122.

¶ 20 An earlier case reached a similar result. *Minh Hoang*, 101 Wash.App. 732, 6 P.3d 602. There a patrol officer was observing a neighborhood known for drug transactions. At 4:00 a.m., the defendant drove up in a car, briefly stopped and talked to one group of people standing near the street, and then drove forward to do the same with another group. Suspecting that the driver was attempting to purchase drugs, but seeing no evidence that any drugs had been exchanged, the officer waited. The car stopped for a stop sign, but then turned without signaling. The officer immediately turned on his lights and made a traffic stop. *Id.* at 734-735, 6 P.3d 602.

¶ 21 The trial court found that the officer would have made the stop even if he had not observed the suspicious behavior and determined that it was not a pretext. The Court of Appeals affirmed. The court expressly noted:

*6 Under *Ladson*, even patrol officers whose suspicions have been aroused may still enforce the traffic code, so long as enforcement of the traffic code is the actual reason for the stop. What they may not do is to utilize their authority to enforce the traffic code as a pretext to avoid the warrant requirement for an unrelated criminal investigation.

Id. at 742, 6 P.3d 602.

[15] ¶ 22 This case most closely fits the *Nichols* fact pattern. The trooper was on traffic patrol, which is the normal job description of most troopers. He had not seen Mr. Weber before and had no specific suspicion of criminal activity by Mr. Weber. As in *Nichols*, traffic violations were committed in the trooper's presence during the dark of night and he promptly acted upon seeing those violations.^{EN5} These are not the facts of a pretext stop.

¶ 23 The trooper was doing his job as a patrol officer. While he was always on the lookout for law-breaking, including people driving while under the

influence, that fact does not mean that everyone Trooper Shiflett stops is the subject of a pretext stop. It is expected that patrol officers are looking out for improper activity. Under petitioner's theory, any officer who came upon a car weaving all over the road would be making a pretext stop simply because the officer expected to find an impaired driver behind the wheel. That theory turns training and experience into a basis for not enforcing the law.

¶ 24 As in both *Nichols* and *Minh Hoang*, the trooper was not conducting an investigation *unrelated to traffic offenses*.^{EN6} It was objectively reasonable for him to stop a car driving through a residential area at 48 m.p.h. in the middle of the night. Thus, even if we go further than the trial court and infer that a factual finding had been made that Trooper Shiflett was not enforcing the traffic code, it is not sufficient to find a pretext stop. Under *Ladson*, both the subjective intent of the officer and the reasonableness of the stop must be considered before finding a pretext. *Ladson*, 138 Wash.2d at 359, 979 P.2d 833. This was a reasonable stop. In light of the nonexistence of an improper motive, there is no basis for finding that this traffic stop was a pretext.

¶ 25 The traffic stop was valid. We affirm the superior court ruling that remanded the case for trial.

¶ 26 Affirm.

I CONCUR: BROWN, J.

SWEENEY, J., (dissenting).

¶ 27 The decision that a traffic stop is pretextual turns on a couple of factors, including the officer's subjective motive for the stop—was his true motive a traffic stop or did he suspect, and want to investigate, other criminal activity. Here, the district court found “[t]hat the traffic violations were not the real reason for the stop” and suppressed the evidence gathered following that stop. Clerk's Papers (CP) at 35. The superior court found that the officer was motivated to stop the defendant because of traffic infractions and there was then “sufficient evidence introduced to reverse the Findings of Facts” and reversed the district court's decision to suppress. CP at 56. I would conclude that the superior court applied the wrong standard of review; improperly weighed the evidence; and I would reverse and reinstate the decision of the district court suppressing the evidence.

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*7 ¶ 28 Here the district court judge entered what was labeled a conclusion of law that the traffic violations were not the real reason the trooper stopped Mr. Weber. CP at 35. The court also found that the trooper “was not motivated by a perceived need to make a community caretaking stop aimed at enforcing the traffic code.” CP at 3.

PRETEXTUAL STOP

¶ 29 A pretextual stop, as the name implies, “occurs when an officer stops a vehicle in order to conduct a speculative criminal investigation unrelated to the driving, and not for the purpose of enforcing the traffic code.” State v. Nichols, 161 Wash.2d 1, 8, 162 P.3d 1122 (2007). A warrantless traffic stop based on a pretext does not fall within any exception to the general requirement of a warrant, violates article I, section 7 of the Washington Constitution and, therefore, lacks the authority of law. Id. at 8-9, 162 P.3d 1122.

¶ 30 The court must consider “ ‘both the subjective intent of the officer as well as the objective reasonableness of the officer’s behavior.’ ” State v. Montes-Malindas, 144 Wash.App. 254, 260, 182 P.3d 999 (2008) (quoting State v. Ladson, 138 Wash.2d 343, 359, 979 P.2d 833 (1999)). The failure to issue a citation for a traffic violation is a factor ^{FN1} and, appropriately so, since it bears upon the officer’s subjective intent.

STANDARD OF REVIEW

¶ 31 The superior court sat in an appellate capacity when it reviewed the decision of a district court and therefore reviews for errors of law only. RALJ 9.1. The superior court was not then privileged to revisit the district court’s findings of fact. City of Seattle v. Hesler, 98 Wash.2d 73, 79, 653 P.2d 631 (1982). Indeed, “[t]he superior court shall accept those factual determinations supported by substantial evidence in the record (1) which were expressly made by the court of limited jurisdiction, or (2) that may reasonably be inferred from the judgment of the court of limited jurisdiction.” RALJ 9.1(b). We, likewise, sit in an appellate capacity. Spokane County v. Bates, 96 Wash.App. 893, 896, 982 P.2d 642 (1999). That means that we will review for errors of law only and defer to the district court’s assessment of the evidence, including the credibility of the witnesses who testified. RALJ 9.1(a); State v. Camarillo,

115 Wash.2d 60, 71, 794 P.2d 850 (1990).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

¶ 32 To apply the proper standard of review, it is important to identify what findings of fact the district court made and what conclusions of law it made. In doing so, we can, and do, ignore the district court’s characterization of a finding or a conclusion, as such, and instead apply the proper analytical criteria. State v. Marcum, 24 Wash.App. 441, 445, 601 P.2d 975 (1979).

¶ 33 A finding is any assertion that something happened, or exists, or was done or was thought; a finding is independent of any legal effect or consequence. State v. Anderson, 51 Wash.App. 775, 778, 755 P.2d 191 (1988). A conclusion of law, on the other hand, follows a process of legal reasoning from the findings. Id. It represents the legal consequences that follow those facts. Lanzce G. Douglass, Inc. v. City of Spokane Valley, 154 Wash.App. 408, 418, 225 P.3d 448 (2010).

DISTRICT COURT’S FINDINGS AND CONCLUSIONS

*8 ¶ 34 The district court judge here sat as the trier of fact. That means that the credibility of witnesses was a matter vested in the district court judge, not the superior court and not us. Camarillo, 115 Wash.2d at 71, 794 P.2d 850.

¶ 35 The judge found “[t]hat the traffic violations were not the real reason for the stop of Bryan Weber.” CP at 35. That finding is denominated a conclusion of law, but it is not. Anderson, 51 Wash.App. at 778, 755 P.2d 191; State v. Minh Hoang, 101 Wash.App. 732, 741, 6 P.3d 602 (2000). From this, the judge concluded, as a matter of law, that “the stop of Bryan Weber was an unlawful pretext stop.” CP at 35. The court’s finding supports the court’s conclusion of law that the stop was “an unlawful pretext stop.” The State invites us to review the conclusion “pretextual stop” de novo. But the question instead is whether the court’s finding as to the trooper’s real motive for this stop-DUI (driving under the influence of an intoxicant) investigation is supported by substantial evidence. State v. Johnson, 115 Wash.App. 890, 898, 64 P.3d 88 (2003).

¶ 36 Mr. Weber contends the superior court

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impermissibly substituted its own findings of fact for those of the district court. He argues that it was the court's substitution of the wrong standard of review (de novo) that resulted in the court putting itself in the position of the trier of fact.

¶ 37 Specifically, the district court found that the traffic violations were not the real reason for the stop. The superior court concluded that there was "sufficient evidence introduced to reverse the Findings of Facts entered October 17, 2008 ." CP at 56. But that is not the test. And the superior court's discussion suggests that it disagreed with the district court's finding, not its conclusion, and went on to make its own finding:

[W]hile I'm bothered that the uh underlying infractions were not actually cited ... that's discretionary. And uh as I read the transcript, while the officer testified that he was looking for DUI's, he did not indicate that he was assigned a particular special detachment to look for DUI's that evening uhm, he was not in an area where, that in fact he testified that he would be looking for DUI's whether it was noon or any other time of the day. That he had witnessed or observed the defendant pull out of a parking lot that uh he did not stop at the crosswalk, and then most troubling is that he paced him and found him to be uh exceeding the speed limit by twelve or thirteen miles an hour. *And it was because of that that he actually uh stopped the defendant.* Nowhere in his testimony did he indicate that while he's always looking for traffic infractions, he's always looking for DUI's, that's his obligation as a law enforcement officer. So I uh will grant the prosecutor's motion and remand this back for further proceedings.

Report of Proceedings (April 22, 2009) at 6 (emphasis added). The superior court's finding as to the trooper's motive for the stop here is contrary to the finding made by the court charged with making that finding-the district court. The superior court then overstepped its proper role as a court of review. *Camarillo*, 115 Wash.2d at 71, 794 P.2d 850.

*9 ¶ 38 The trooper testified that he was always on the lookout for DUI's, which he considered part of his general duties. He did not cite Mr. Weber for the infractions he saw. The test is not whether we would have found a different motive for the stop. The ques-

tion is whether there is sufficient evidence, which if believed, would support the district court's finding on the factual question of motive. *Nw. Pipeline Corp. v. Adams County*, 132 Wash.App. 470, 475, 131 P.3d 958 (2006). The standard is modest, and, of course, that standard is met here.

¶ 39 I would then reverse the decision of the superior court and affirm the district court's suppression order.

FN1. Mr. Weber testified briefly at the hearing that he did stop before turning onto the street, but did not know how fast he traveled. Clerk's Papers (CP) at 40-41.

FN2. The trooper was identified as "Officer Shiflett" in the district court's ruling.

FN3. It is possible that the superior court's written ruling referring to the facts was a determination that the record did not support the district court's factual findings, although that appears to be a stretch on this record.

FN4. *See* Commissioner's Ruling, at 5 (Wash.Ct.App., July 27, 2009).

FN5. Mr. Weber argues that he was followed for three blocks before the traffic stop. The trooper testified he was pacing Mr. Weber to determine his speed. Traveling three blocks at nearly 50 m.p.h. does not take a great deal of time. A mere three-block pace is not evidence that the stop was a pretext.

FN6. That would be the case even under Mr. Weber's theory since the DUI statutes are found in the traffic code, chapter 46.61 RCW.

FN1. *State v. Minh Hoang*, 101 Wash.App. 732, 742, 6 P.3d 602 (2000).

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END OF DOCUMENT

Appendix B

State v. Enrique Guzman Nunez, ___ Wn.App. __, __ P.3d __ (Div III, February 15, 2011)

--- P.3d ---, 2011 WL 505335 (Wash.App. Div. 3)
(Cite as:)

STATE OF WASHINGTON, Respondent,
v.
ENRIQUE GUZMAN NUNEZ, Appellant.

No. 28259-7-III

Court of Appeals of Washington, Division 3.

OPINION PUBLISHED

IN PART

Siddoway, J. **FACTS AND PROCEDURAL HISTORY** On March 10, 2009, the State charged Mr. Nunez with delivery of a controlled substance and possession of a controlled substance. He was detained on the charges and arraigned on March 23. In May, the State amended the information to add a special allegation that each of the crimes took place within 1,000 feet of a school bus zone or school. At arraignment, the court noted that speedy trial expired on May 22, 2009. On April 22, the court set the trial date for May 28 based on a defense request for a continuance. The court recalculated speedy trial at June 29, 2009. On May 26, the parties indicated they were ready for trial on May 28. The trial did not begin on May 28. On June 3, the court reset the trial for June 11. On June 8, the parties informed the court they were ready for trial on June 11. On June 18, trial was continued to June 25. The trial did not occur on June 25. There is no record of a hearing on that date. However, minutes from a June 29 hearing indicate that the case was continued due to the State's involvement in another trial. Clerk's Papers (CP) at 78. In its motion for a continuance, the prosecutor explained:

- Enrique Nunez appeals following his conviction of possession and delivery of a controlled substance and the imposition of a 24-month sentencing enhancement based on a jury finding that he committed his crimes within 1,000 feet of a school bus route stop. He asks us to vacate the school zone enhancement in light of *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010) because the jury in his case was in-

structed that unanimity was required to acquit him of the aggravating factor—the same type of instruction given in *Bashaw*. He also assigns error to the trial court's refusal to dismiss charges against him for violation of his CrR 3.3 speedy trial rights and, in a statement of additional grounds, asserts a number of additional challenges to proceedings below. We refuse to review Mr. Nunez's challenge to the jury instruction under RAP 2.5(a) because he failed to object to the instruction in the trial court and we are satisfied that any error is not manifest constitutional error. We also reject his other claims of error and therefore affirm.

The State was involved in a trial last week, which I indicate[d] ultimately settled, but it didn't settle until the jury was here.... I've been handling the prosecution throughout in that case, and so this matter had to have been bumped as a result of my schedule conflict.

Report of Proceedings (RP) (June 29, 2009) at 3.

Over Mr. Nunez's objection, the court continued the trial to July 1, stating:

[T]he Court believes that as the prosecution was involved in a trial last Thursday when Mr. Nunez was scheduled to go to trial, that case had been pending for about a year.... [I]t was the type of case that, by statute, the Court can't continue as a result of the child victim, and Mr. Biggar, who's the Prosecutor in both cases, was involved. So, under the circumstances, the Court believes that there is good cause to continue a minimal time, which is [the] day after tomorrow, his speedy trial into Wednesday.

Id. at 3-4.

When defense counsel asked the court to calculate the new speedy trial date, the judge responded:

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Well, I'm not sure. As I understand the statute, as he's incarcerated, the Court has another 14 days under [ER] 3.3(g). And, candidly, I haven't even really looked at his file to see if there's other reasons to continue under 3.3(e), but under 3.3(g), the Court has 14 days.

Id. at 4.

On July 1, the day of trial, defense counsel again objected to the continuance based on a speedy trial expiration date of June 29. RP (July 1, 2009) at 47. The court overruled the objection and the case proceeded to trial. *Id.* A jury found Mr. Nunez guilty of both charges as well as the special verdicts. At sentencing, the court dismissed the special verdict on count 1.

After this appeal had been fully briefed, the Washington Supreme Court issued its decision in *Bashaw*, holding that it was error to instruct a jury that its decision as to the existence of an aggravating sentencing factor must be unanimously "yes" or "no." Because a similar instruction had been given with respect to the school bus route stop enhancements imposed in this case, Mr. Nunez moved to supplement his brief in order to raise this additional assignment of error. The motion was granted.

ANALYSIS

I. ALLEGED INSTRUCTIONAL ERROR

Mr. Nunez asks us to vacate his sentencing enhancement based on the Supreme Court's decision in *Bashaw*, 169 Wn.2d 133.

Bashaw reversed this court's decision in *State v. Bashaw*, 144 Wn.App. 196, 201, 182 P.3d 451 (2008), in which we addressed a challenge to a concluding instruction directing the jury that in deciding whether the defendant committed the aggravating factor of selling a controlled substance within 1,000 feet of a school bus route stop, " 'all twelve of you must agree on the answer to the special verdict' " - an instruction that Ms. Bashaw contended wrongly required unanimous agreement in order to answer "no," contrary to *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003). We held that the instruction in Ms. Bashaw's case, like the pattern instruction then in use, correctly required unanimity to convict or acquit a defendant of an aggravating factor, clarifying *Gold-*

berg as we understood it; alternatively, we held that the error was harmless. The Supreme Court accepted review and reversed, stating the rule of *Goldberg* as follows:

[A] unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. A nonunanimous jury decision is a final determination that the State had not proved the special finding beyond a reasonable doubt.

Bashaw, 169 Wn.2d at 146.

The concluding instruction in Mr. Nunez's case, like the instruction in *Bashaw*, erroneously required unanimity to acquit Mr. Nunez of the aggravating factors of possessing and delivering a controlled substance within 1,000 feet of a school bus route stop.^{FN1} But Mr. Nunez did not object to the concluding instruction given by the trial court. RP (July 1, 2009) at 241-43.

FN1. Instruction 15 explained that the jury would be given special verdict forms, to be completed if it found Mr. Nunez guilty of the crimes charged and stated, in pertinent part:

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".

CP at 30.

RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). As pointed out in *Scott*, the general rule has specific applicability with respect to claimed errors in jury instructions in criminal cases through CrR 6.15(c), requiring that timely and well stated objections be

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made to instructions given or refused “ ‘in order that the trial court may have the opportunity to correct any error.’ ” *Id.* at 686 (quoting *City of Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976)).

Mr. Nunez does not suggest an exception to RAP 2.5(a) that warrants raising the form of special verdict in his case for the first time on appeal. He generally cites Washington Const. art. I, §§ 21 and 22 in support of his assignment of error, however. In addition, the Supreme Court's decision in *Bashaw* applied constitutional harmless error analysis, a matter we discuss below. “[M]anifest error affecting a constitutional right” is one of the exceptions that can be raised for the first time on appeal. RAP 2.5(a)(3). We therefore consider whether the giving of an instruction that requires a jury to deliberate to unanimity in order to acquit a defendant of an aggravating factor constitutes manifest constitutional error.

To demonstrate that an error qualifies as manifest constitutional error an appellant must “ ‘identify a constitutional error and show how the alleged error actually affected the [appellant's] rights at trial.’ ” *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (alteration in original) (quoting *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)). We do not assume that an error is of constitutional magnitude. *Id.* (citing *Scott*, 110 Wn.2d at 687). We look to the asserted claim and assess whether it implicates a constitutional interest as compared to another form of trial error. *See id.*

If the claimed error is of constitutional magnitude, we determine whether the error is manifest. “ ‘Manifest’ in RAP 2.5(a)(3) requires a showing of actual prejudice.” *Id.* at 99 (internal quotation marks omitted) (quoting *Kirkman*, 159 Wn.2d at 935). To demonstrate actual prejudice there must be a “ ‘plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.’ ” *Id.* (internal quotation marks omitted) (quoting *Kirkman*, 159 Wn.2d at 935). In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. *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.’ ” *Id.* (quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

The determination whether the error is manifest and actual prejudice has been shown is a different question from whether the error was harmless; harmless error analysis takes place only after it has been determined that the trial court committed manifest constitutional error. As explained in *O'Hara* :

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at the time, the court could have corrected the error.

Id. at 99-100 (citations and footnote omitted).

We first look at Mr. Nunez's asserted claim and assess whether, if correct, it implicates a constitutional interest as compared to another form of trial error. His claim is that the trial court's giving of the challenged instruction denied him the chance that the jury would refuse to find the aggravating factors had it suspended its deliberations short of reaching unanimous agreement.

Instructional error is not automatically constitutional error. In *O'Hara*, the Supreme Court held that the failure of the trial court to provide a complete definition of “malice”—with the trial court excluding the aspect of malice arguably most supportive of Mr. O'Hara's theory of self-defense (*see id.* at 110 (Sanders, J., dissenting))—did not constitute an error of constitutional dimension. *Id.* at 105. Mr. O'Hara did not point to an explicit constitutional provision. *Id.* He argued that the instruction generally violated his due process rights by relieving the State of its burden of proof, but the court observed that “ ‘the constitution only requires the jury be instructed as to each element of the offense charged, and the failure of the trial court to further define one of those elements is not within the ambit of the constitutional rule.’ ” *Id.* (quoting *State v. Fowler*, 114 Wn.2d 59, 69-70, 785

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P.2d 808 (1990) (citing *Scott*, 110 Wn.2d at 689), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991)).

The trial court's failure to instruct the jury that it could acquit Mr. Nunez of the aggravating factor nonunanimously is likewise not an error of constitutional dimension. Mr. Nunez has not identified a constitutional provision violated by the trial court's use of the concluding instruction. While he makes a general reference to Washington Const. art. I, §§ 21 and 22, there is no textual support in either provision for a right to nonunanimous acquittal of any criminal charge or consequence. Washington Const. art. I, § 21, providing that "[t]he right of trial by jury shall remain inviolate," preserves the right to a jury trial as it existed at common law when section 21 was adopted, which includes, in criminal cases, a right to a unanimous jury verdict in order to convict. *See, e.g., State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Washington Const. art. I, § 22 is comparable to the Sixth Amendment of the United States Constitution and adds nothing with respect to the extent of agreement required for acquittal, providing with respect to jury trial only that "[i]n criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed."

No constitutional issue is raised under the Sixth or Fourteenth Amendments to the United States Constitution. *See Johnson v. Louisiana*, 406 U.S. 356, 363, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (noting that when a jury in a federal court, which operates under a unanimity rule, cannot agree unanimously upon a verdict the defendant is not acquitted-which he would be, if nonunanimity could operate as acquittal-but is given a new trial); *id.* at 395 (Brennan, J., dissenting) (expressing concern about nonunanimous decisions, where jurors often enter deliberations with strong opinions on the merits and "[i]f at that time a sufficient majority is available to reach a verdict, those jurors in the majority will have nothing but their own common sense to restrain them from returning a verdict before they have fairly considered the positions of jurors who would reach a different conclusion").

Our Supreme Court did not cite a constitutional basis for its decision in *Bashaw*, 169 Wn.2d 133; to

the contrary, both *Bashaw* and the court's earlier decision in *State v. Labanowski*, 117 Wn.2d 405, 816 P.2d 26 (1991) recognize that it is common law rule, not the constitution, that permits Washington juries to reject sentence enhancements or higher degree offenses less than unanimously. *Labanowski* involved a choice as to the procedure to be followed by juries considering lesser included or lesser degrees of charged crimes: How should a trial judge instruct a jury regarding its ability to render a verdict on a lesser offense when it is unable after due deliberation to agree on a verdict for the greater offense? 117 Wn.2d at 418. The court considered two predominant forms of instruction given in other jurisdictions: the "acquittal first" instruction, by which a jury is required to reach unanimous agreement on the charged crime before considering a lesser crime as an alternative, and the "unable to agree" instruction, by which a jury, after full and careful consideration, is allowed to quit deliberating toward unanimity on the charged crime and proceed to agreement on the lesser offense. *Id.* at 418-20.

The defendants in the consolidated cases decided in *Labanowski* argued that an "acquittal first" instruction "has a significant impact on a defendant's right to trial by jury and on the reasonable doubt standard," and the court ultimately rejected "acquittal first" instruction, concluding that the "unable to agree" type of instruction correctly stated the law in Washington and should be used in the future. *Id.* at 423. The court nonetheless rejected defense arguments that an "acquittal first" instruction violated any constitutional right. It noted that "[n]umerous cases ... have held that the 'acquittal first' instruction does not impinge on a defendant's constitutional rights." *Id.* It concluded that each instruction had potential advantages and disadvantages and that neither was wrong as a matter of law. *Id.* at 424. ^{FN2}

FN2. Federal courts have similarly and consistently held that any error in instructing a jury to deliberate to unanimity on a greater offense before moving on to a lesser offense is not of constitutional dimension; it is therefore not subject to appeal unless it was timely objected to in the trial court. *See Catches v. United States*, 582 F.2d 453, 459 (8th Cir.1978); *United States v. Harvey*, 701 F.2d 800, 806 (9th Cir.1983), *overruled on other grounds by United States v. Chapel*,

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55 F.3d 1416 (9th Cir.1995); United States v. Cardinal, 782 F.2d 34, 36-37 (6th Cir.), cert. denied, 476 U.S. 1161 (1986); Zuern v. Tate, 101 F.Supp.2d 948, 985 (S.D. Ohio 2000), rev'd in part on other grounds, 336 F.3d 478 (6th Cir.2003), cert. denied, 540 U.S. 1198 (2004).

Bashaw did not identify a constitutional provision violated by the concluding instruction challenged in that case. Rather, it noted that the rule that a jury can reject an aggravating factor less than unanimously is not compelled by constitutional provisions against double jeopardy, “but rather by the common law precedent of this court, as articulated in *Goldberg*.” 169 Wn.2d at 146 n.7. The court characterized the rule adopted in *Goldberg* and reinforced in *Bashaw* as serving policies of judicial economy and finality, as with the procedural instruction for the jury arrived at in *Labanowski*. Id. at 146-47.

As we reviewed the decisions for any constitutional mooring for the rule announced in *Goldberg*, we find, at most, the statement in *Goldberg* that “[t]he right to a jury trial includes the right to have each juror reach his or her own verdict ‘uninfluenced by factors outside the evidence, the court’s proper instructions, and the arguments of counsel,’ ” *Goldberg*, 149 Wn.2d at 892 (quoting *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978)), and the statement in *Bashaw* that the court has “recognized a defendant’s ‘valued right’ to have the charges resolved by a particular tribunal.” *Bashaw*, 169 Wn.2d at 146 (quoting *State v. Wright*, 165 Wn.2d 783, 792-93, 203 P.3d 1027 (2009) (quoting *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978))). But *Goldberg* and *Bashaw* explicitly did not turn on any finding of jury coercion. *Bashaw*, 169 Wn.2d at 146 (“In resolving the appeal in *Goldberg*, we rejected the parties’ framing of the issue as one of jury coercion.” (citing *Goldberg*, 149 Wn.2d at 893)). They turned on a policy choice that the court acknowledged could be reasonably resolved either way. In short, the aggravating factors in Mr. Nunez’s case were imposed following a deliberative procedure to which he did not object; which no court, state or federal, has found to be unconstitutional or unfair; which has been acknowledged to have procedural advantages; and which, in the lesser included crime context, is preferred by a number of jurists and courts.^{FN3} This is not constitu-

tional error.

FN3. In the context of a jury’s deciding aggravating factors, we found no case outside of the *Bashaw* decisions in which the issue of whether jurors should or should not deliberate to unanimity in order to acquit has been considered.

Were the error constitutional, it would not be manifest constitutional error. Instructional errors do not automatically constitute manifest constitutional error. In *O’Hara*, the Supreme Court identified the following instructional errors as examples of manifest constitutional error: directing a verdict, shifting the burden of proof to the defendant, failing to define the “beyond a reasonable doubt” standard, failing to require a unanimous verdict, and omitting an element of the crime charged. 167 Wn.2d at 103. It contrasted these with instructional errors that are not manifest constitutional error: failing to instruct on a lesser included offense and failure to define individual terms. Id. It abrogated the suggestion in *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996), repeated in several decisions from the Court of Appeals, that error in instructing on self-defense is automatically manifest constitutional error. 167 Wn.2d at 101.^{FN4}

FN4. *O’Hara* reinforces confidence that the statement in *State v. Davis*, 141 Wn.2d 798, 866, 10 P.3d 977 (2000) that “[t]he proposition is well-settled that an alleged instructional error in a jury instruction is of sufficient constitutional magnitude to be raised for the first time on appeal,” was not intended to suggest that every claimed instructional error falls within the RAP 2.5(a)(3) exception. We understand the assertion in *Davis* as implicitly limited to challenges that are based upon apparent constitutional grounds, as was the case in *State v. Deal*, 128 Wn.2d 693, 698, 911 P.2d 996 (1996), which *Davis* cites for the proposition.

The giving of the challenged instruction in Mr. Nunez’s case had no practical and identifiable consequences on the record that should have been apparent to the trial court. The instruction used conformed, in material respects, to the pattern concluding instruction then recommended for deliberations on the aggravating factors for controlled substance crimes. *See*

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11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 50.60, at 986 (3d ed.2008). The jury was able to make all of the findings required, applying the proper burden of proof, under the instructions given. *See O'Hara*, 167 Wn.2d at 108. Without an affirmative showing of actual prejudice, an asserted error is not "manifest" and thus not reviewable under RAP 2.5(a)(3). *McFarland*, 127 Wn.2d at 334.

Finally, we recognize that it might be asked why, if this instructional error was not manifest constitutional error, the issue was reviewed in *Bashaw*^{FN5} and subjected by the Supreme Court to constitutional harmless error analysis. With respect to the former, it is enough to note that Ms. Bashaw's appeal called into question a pattern instruction and thereby an issue of public interest. The application of RAP 2.5(a) (which provides that the appellate court "may" refuse to review any claim of error not raised in the trial court) is ultimately a matter of the reviewing court's discretion. *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990). It was our prerogative to hear and resolve the issue in Ms. Bashaw's case notwithstanding her failure to preserve the error and the Supreme Court's prerogative to accept review and correct this court when we misapprehended *Goldberg*.

FN5. Ms. Bashaw had not objected to the instruction given in her case, either. *See* 144 Wn.App. at 199.

With respect to the constitutional harmless error analysis applied by the Supreme Court in *Bashaw*, we point out that the fact that constitutional harmless error analysis was applied—the fourth step in what is ordinarily a four-step analysis—is, in the end, no more compelling than the fact that the first three steps were not. *See State v. Lynn*, 67 Wn.App. 339, 345, 835 P.2d 251 (1992).^{FN6} We view our conclusion that any instructional error is not constitutional error, and certainly not manifest constitutional error, as compellingly supported by the rationale of *Labanowski*, *Goldberg*, *Bashaw*, and the well-established meaning of RAP 2.5(a)(3). Therefore, while we have carefully considered that aspect of the court's decision, we are ultimately not deterred by the fact that constitutional harmless error analysis was applied, although arguably not required, in *Bashaw*, 169 Wn.2d 133.

FN6. Recommending the following four-step analysis: "First, the 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.

Because we are satisfied that the claimed instructional error was not manifest constitutional error, we will not review it for the first time on appeal.

Mr. Nunez's judgment and sentence is affirmed.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions. RCW 2.06.040.

II. SPEEDY TRIAL ISSUE

The issue is whether Mr. Nunez's right to a speedy trial was violated. The time for trial rule in superior court sets a specific number of days in which a criminal defendant must be brought to trial. When a defendant is in custody while awaiting trial, the time for trial is 60 days. CrR 3.3(b)(1), CrR 3.3(c)(1) establishes that the initial commencement date is the date of arraignment. The rule excludes certain periods from the computation of the 60-day period and provides that the last allowable time for trial is extended to 30 days beyond the end of any such period. CrR 3.3(b)(5), (e). If more than 60 days elapses after arraignment and there has been no excluded period or event resetting the commencement date, then time for trial is not timely under the rule and the charges must be dismissed with prejudice. CrR 3.3(h).

"The determination of whether a defendant's time for trial deadline has passed requires an application of court rules to particular facts ... and is re-

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viewed de novo.” *State v. Swenson*, 150 Wn.2d 181, 186, 75 P.3d 513 (2003). The decision to grant or deny a motion for continuance rests within the sound discretion of the trial court and will not be disturbed unless there is a clear showing it is based on untenable grounds or on untenable reasons. *State v. Flinn*, 154 Wn.2d 193, 199, 110 P.3d 748 (2005); *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004).

Mr. Nunez contends his right to a speedy trial was violated and the criminal charges therefore should have been dismissed. He argues the court improperly continued the case beyond the June 29 speedy trial expiration date under CrR 3.3(g) because it failed to make the required finding that he would not be prejudiced by the delay. He also argues the court erred in applying CrR 3.3(g) because this provision does not apply until after the time for trial has expired. Finally, Mr. Nunez maintains that none of the other provisions under CrR 3.3 apply here.

The State concedes that the court's reliance on CrR 3.3(g) was misplaced but contends the continuance from June 25 to July 1 was proper as an unavoidable circumstance under CrR 3.3(e)(8) or required under the administration of justice under CrR 3.3(f)(2).

The State correctly concedes the issue. CrR 3.3(g) provides in part:

Cure Period. The court may continue the case beyond the limits specified in section (b) on motion of the court or a party made within five days after the time for trial has expired. Such a continuance may be granted only once in the case upon a finding on the record or in writing that the defendant will not be substantially prejudiced in the presentation of his or her defense.

This provision gives the State a single opportunity to “cure” the expiration of a speedy trial period. It does not apply here because the speedy trial period had not expired when the State requested a continuance on June 29.

However, a trial court may be affirmed on any basis supported by the record and the law. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027, cert. denied, 493 U.S. 814 (1989). We find the June 25 to July 1 continuance was proper under CrR 3.3(e)(8).

CrR 3.3(e)(8) permits a court to extend the time for trial if there are “unavoidable or unforeseen circumstances.” Our courts have consistently held that the unavailability of counsel may constitute unforeseen or unavoidable circumstances to warrant a trial extension. *State v. Carson*, 128 Wn.2d 805, 814, 912 P.2d 1016 (1996) (citing cases); see also *State v. Cannon*, 130 Wn.2d 313, 326-27, 922 P.2d 1293 (1996) (holding two extensions proper where deputy prosecutor occupied in another trial); *State v. Heredia-Juarez*, 119 Wn.App. 150, 155, 79 P.3d 987 (2003) (valid continuance granted to accommodate prosecutor's reasonably scheduled vacation).

Here, although the conflict in trial dates may not have been unforeseen, the court had the discretion to grant the continuance based on the prosecutor's unavailability. Thus, when the prosecutor was unavailable for trial on June 25, the last available date for trial was July 25.^{FN7} The trial date of July 1 was well within the speedy trial limit. Although the court should have granted the continuance under CrR 3.3(e)(8), it did not abuse its discretion in granting the continuance.

FN7. As indicated above, CrR 3.3(b)(5) provides for a 30-day buffer period, such that whenever a period of time is excluded from computing the time for trial, the time for trial period “shall not expire earlier than 30 days after the end of that excluded period.” See *Flinn*, 154 Wn.2d at 199 (explaining changes in time for trial rules).

III. STATEMENT OF ADDITIONAL GROUNDS (SAG) ISSUES

1. Excessive Sentence

In his pro se statement of additional grounds, Mr. Nunez first contends that his sentence, 44 months of confinement followed by 12 months of community custody, exceeds the 20-month statutory maximum, which he maintains is the high end of the standard range.

The Sentencing Reform Act of 1981, chapter 9.94A RCW, prohibits a sentence wherein the combined terms of confinement and community custody

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exceed the statutory maximum allowable under the statute. RCW 9.94A.505(5); State v. Zavala-Reynoso, 127 Wn.App. 119, 124, 110 P.3d 827 (2005). Mr. Nunez's error is in assuming that the statutory maximum sentence is the top end of the standard range. In Washington, the maximum sentence remains that specified by the legislature in chapter 9A.20 RCW. See State v. Toney, 149 Wn.App. 787, 795-96, 205 P.3d 944 (2009) (listing cases and explaining that "statutory maximum" is not the high end of the presumptive standard range, but the maximums as provided in RCW 9A.20.021), review denied, 168 Wn.2d 1027 (2010).

The statutory maximum for delivery of a controlled substance, a class B felony, is 10 years. See RCW 9A.20.021(b) (providing no person convicted of a class B felony shall be punished in excess of 10 years' confinement in a state correctional facility); RCW 69.50.401(1), (2)(a) (defining delivery of a controlled substance as a class B felony). Here, the trial court was well within its discretion in imposing a sentence of 44 months' confinement, followed by 12 months' community custody.

2. Evidence of Uncharged Crime

Next, Mr. Nunez argues that the trial court abused its discretion in admitting evidence of an uncharged crime. We cannot address this contention because Mr. Nunez fails to provide the court with any authority or argument about this alleged error. RAP 10.10(c).

3. Improper School Zone Enhancement

Mr. Nunez contends the trial court erred when it denied his motion to dismiss one of the two school bus zone enhancements. Citing State v. Clayton, 84 Wn.App. 318, 927 P.2d 258 (1996), he contends the State failed to prove that the crime took place within 1,000 feet of a school bus route stop because "there was no measurement taken to the exact location where Mr. Nunez allegedly possessed controlled substances." SAG at 4.

The State must prove each element of the enhancement beyond a reasonable doubt. State v. Hennessey, 80 Wn.App. 190, 194, 907 P.2d 331 (1995). We review to see whether a rational trier of fact could have found the facts needed for the enhance-

ment beyond a reasonable doubt, viewing the evidence in the light most favorable to the State. *Id.*

RCW 69.50.435(1)(c) creates a sentencing enhancement for anyone who possesses cocaine "[w]ithin one thousand feet of a school bus route stop designated by the school district." This requires a showing that the distance from the school bus route stop to the location of the drugs was less than 1,000 feet, according to some type of accurate, objective, and verifiable measuring device such as a map with a measuring scale, measuring tape, pacing, or other commonly accepted method. Clayton, 84 Wn.App. at 321; Bashaw, 169 Wn.2d at 142-43. It is not enough that the property on which a house is located was within 1,000 feet. Clayton, 84 Wn.App. at 321-22. Instead, the measurement must extend to the location of the offense. *Id.* at 322; accord State v. Jones, 140 Wn.App. 431, 437-38, 166 P.3d 782 (2007).

In Clayton, the officer measured from the school grounds perimeter to the edge of Clayton's property line and found the distance to be 962 feet and 4 inches, just 38 feet less than the statutorily required 1,000 feet for triggering the sentencing enhancement. Clayton, 84 Wn.App. at 322. This court reversed the school zone enhancement, noting it was possible that the crime occurred outside the 1,000-foot radius. *Id.* at 323.

Our facts are distinguishable from Clayton. The trial court found:

[T]he testimony was that the measurement was to the front porch or the front door, was 264 feet.... There's a whole lot of feet left in this house. The testimony was the house was about a 1,200 square foot house.... So, I'm certainly going to find in that particular case that there was evidence beyond a reasonable doubt that the enhancement applies to that.

RP (July 13, 2009) at 296.

An officer testified that he used a Rolotape to measure the distance between the school bus route stop and Mr. Nunez's residence. He stated that the distance from the bus stop to Mr. Nunez's front porch was 264 feet. The officer also testified that although he did not measure the distance from the front door to the room where the controlled substance was found,

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he could estimate that the distance was 10 to 12 feet. Thus, in contrast to *Clayton*, it was not possible that the crime occurred outside the 1,000-foot radius. Here, the measured distance was 264 feet, leaving some 736 feet to cover the area in Mr. Nunez's residence in which the drugs were found. Viewing the evidence in the light most favorable to the State, there is no reasonable doubt that the crime occurred within 1,000 feet of a school bus route stop. We therefore uphold the enhancement.

4. *Prosecutorial MiscDP1 Mr. Nunez also contends that prosecutorial misconduct during closing arguments deprived him of a fair trial. He alleges that prejudicial misconduct occurred when the prosecutor asked the jury to disbelieve Mr. Nunez. Mr. Nunez objects to the following comment by the prosecutor, contending it was inherently prejudicial and elicited to inflame the jury:*

[T]he Defendant's explanation to at least explain to you why he was with the confidential informant in this case, but when you analyze every aspect of it, it just doesn't make sense. It's just not credible.
RP (July 1, 2009) at 268.

A defendant claiming prosecutorial misconduct must establish the impropriety of the prosecution's comments and their prejudicial effect. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Comments are prejudicial only where "there is a substantial likelihood the misconduct affected the jury's verdict." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). But a defendant who fails to object to an improper comment waives the error unless the comment is "so flagrant and ill-intentioned" that it causes an enduring prejudice that a curative instruction could not have neutralized. *Id.* Defense counsel's failure to object to a prosecutor's statement "suggests that it was of little moment in the trial." *State v. Rogers*, 70 Wn.App. 626, 631, 855 P.2d 294 (1993), *review denied*, 123 Wn.2d 1004 (1994). Furthermore, a defendant cannot remain silent, speculate on a favorable verdict, and when it is adverse, use the alleged misconduct to obtain a new trial on appeal. *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

Prosecutors may argue inferences from the evidence, and prejudicial error will not be found unless

it is "clear and unmistakable" that counsel is expressing a personal opinion. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). Additionally, prosecutors may argue inferences as to why the jury would want to believe one witness over another. The same rule has been applied as to credibility of a defendant. *State v. Copeland*, 130 Wn.2d 244, 290-91, 922 P.2d 1304 (1996); *State v. Millante*, 80 Wn.App. 237, 250, 908 P.2d 374 (1995), *review denied*, 129 Wn.2d 1012 (1996). "[P]rejudicial error does not occur until it is clear that the prosecutor is not arguing an inference from the evidence, but is expressing a personal opinion." *Swan*, 114 Wn.2d at 664.

In *Millante*, for example, the defendant initially lied to the police when questioned about his involvement in the victim's death. *Millante*, 80 Wn.App. at 251. During closing arguments, the prosecutor argued that Millante's prior untruthful behavior indicated he was not a credible witness and could have lied on the stand. *Id.* The court found no evidence of prosecutorial misconduct even though the prosecutor repeatedly used the word "lie" because, in context, the prosecutor was commenting on a witness's credibility based on evidence in the record. *Id.*

Like *Millante*, the prosecutor in this case was commenting on Mr. Nunez's credibility based on evidence in the record, not expressing an opinion about Mr. Nunez's credibility. During closing arguments, the prosecutor summarized Mr. Nunez's testimony as to why he was with a confidential informant and then, based on this testimony, stated that Mr. Nunez was not a credible witness. RP (July 1, 2009) at 267-68. In this context, it is not "clear and unmistakable" that the prosecutor was expressing an opinion about Mr. Nunez's credibility.

In any event, credibility of the witnesses is precisely what a jury must consider. *State v. Alexis*, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980). The trial court instructed the jurors that they "are the sole judges of the credibility of each witness." CP at 14. We presume that the jury follows the court's instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

Even if we were to find that the prosecutor's statement was improper, Mr. Nunez fails to demon-

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strate that the comment was flagrant and ill intentioned, or that a curative instruction could not have neutralized the prejudice. Thus, he fails to demonstrate reversible error.

5. Trial Court Jurisdiction

Mr. Nunez finally contends that a Kittitas County judge exceeded his jurisdictional authority in granting a search warrant to search property in Douglas County. We are unable to review this alleged error because Mr. Nunez fails to provide us with an adequate record for review and the issue appears to concern matters outside the trial record. *McFarland*, 127 Wn.2d at 338. Although a defendant is not required to cite to the record in his SAG, he must nevertheless “inform the court of the nature and occurrence of [the] alleged errors.” RAP 10.10(c). When he fails to do so, we are not

required to search the record to find support for his claims. See *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

Mr. Nunez's judgment and sentence is affirmed.

Siddoway, J.

WE CONCUR:

Korsmo, A.C.J.

Sweeney, J.

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