IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 65165-0-I
Respondent,	)	DIVISION ONE
v.	)	
SHANE LYLE ROCHESTER,	)	UNPUBLISHED
Appellant.	)	FILED: September 12, 2011

Cox, J.—When police have a reasonable suspicion, grounded in specific and articulable facts, that occupants of a car have been involved in a nearby recent armed robbery, a Terry[1] stop is justified.[2] Here, Shane Rochester argues that the trial court should have suppressed all evidence obtained after police stopped the car in which he was a passenger. The stop was based on the presence of the car in the area of a recent armed robbery. It was also based on the general similarity between certain physical characteristics of the registered owner of the car and the two robbery suspects, despite the fact that the robbery suspects were obviously not in the car. The initial stop was reasonable under the circumstances and the subsequent actions of the police were within the proper scope of a Terry stop. We also reject Rochester's challenge to the admission of opinion evidence, raised for the first time on appeal because he fails to demonstrate prejudice. We affirm the conviction. However, we reverse

[1] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).
[2] State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003).

the firearm enhancement of his sentence under State v. Ryan,[3] and remand for further proceedings.

At 2:00 p.m. on May 20, 2009, while patrolling the central area of Seattle around Powell Barnett Park in an unmarked police car, Seattle Police Officers Raphael Martinez and Rick Nelson observed a silver Chrysler 300 parked on East Alder Street next to the park. The car was running and occupied by two males who were slouched down with their seats leaning back in a manner the officers interpreted to be an attempt to avoid being seen. Officer Nelson entered the Chrysler's license plate number into his computer and discovered that the car was registered to a female approximately 5'4" tall and over 200 pounds with an address in Yakima. Because he knew the area as a place for narcotics dealing and violence, Officer Martinez intended to drive around the block and then approach the Chrysler to investigate further. Instead, the officers received a call to assist with a matter in Tukwila.

As the officers began to leave the area, a broadcast on their radio reported a home invasion robbery with shots fired and indicated that two heavyset white females were last seen running on East Alder Street in the direction of the park and the Chrysler. Because they were only two and a half blocks from where they had seen the Chrysler, and because the car was registered to a heavyset woman, the officers circled back to see if they could

[3] 160 Wn. App. 944, 252 P.3d 895, review granted, __ P.3d __, 2011 WL 3523833 (2011).

either catch the suspects or locate the car. When they found nothing, the officers continued to Tukwila, advising the dispatcher that they had observed the Chrysler and suspected that it may possibly have some connection to the robbery.

While Officers Martinez and Nelson completed their task in Tukwila and returned to the area less than an hour later, Officer Eric Faust announced on the radio that he had located the Chrysler, parked and unoccupied, on the north side of the park, on East Jefferson Street. Officer Faust watched the Chrysler for about 10 minutes and then observed two males come out of the park, get into the car and drive away. Officers Martinez and Nelson stopped the Chrysler on 26th Avenue and East Cherry Street shortly thereafter. Officer Martinez asked the driver what he and his friend were doing. The driver said that they had dropped off some friends and planned to meet them at the park. He described the friends as two heavyset females and admitted that he drove away from the park because of all the police activity and because he was afraid that the women had done something wrong or bad. The officers then asked both men to get out of the car. While performing a pat-down, Officer Faust found a 45-caliber round in a pocket of the passenger, Shane Rochester. Rochester later admitted that he had lived at the house where the robbery occurred and that he had directed the women to “hustle” the homeowner for marijuana.

The State charged Rochester as an accomplice to first degree attempted

robbery while armed with a firearm. Pursuant to CrR 3.6, Rochester moved to suppress all evidence against him, claiming that the police lacked authority to seize and search him. At a hearing on the suppression motion, Officer Martinez testified that he initially suspected that the occupants of the Chrysler may have been involved in drug trafficking and that he intended to investigate their purpose in the area. When he heard that the robbery suspects were heavyset women last seen running toward the area where he had seen the Chrysler, which he knew to be registered to a heavyset woman, he thought the car was "possibly involved" with the robbery. Officer Nelson also testified that it "seemed rather suspicious or coincidental" that (1) at the time of the robbery, two males were nearby sitting in a running car registered to a woman matching the description of one of the robbery suspects; (2) within minutes of the robbery report the car was gone; and (3) a short time later, officers observed the same car "in the area still, possibly indicating that these females weren't able to find them, or maybe they were waiting for them." Officer Nelson testified that they decided to conduct a Terry stop to determine whether there was a connection between the car and the robbery. After the driver admitted to waiting for two heavyset women, Officer Martinez believed that the occupants of the car were involved in the robbery and asked the driver to "step away from the vehicle so he couldn't flee." Following Officer Martinez's lead, Officer Nelson asked the passenger to get out of the car and directed him to Officer Faust, who was

standing near the back of the car. Officer Faust testified that while patting down the passenger for weapons, he found a metal object that he believed to be ammunition in the passenger's pocket. He removed the object and discovered it was a 45-caliber round.

The trial court denied the motion to suppress and entered written findings of fact and conclusions of law incorporating by reference its oral findings and conclusions.

During trial, the State presented the testimony of two detectives who interrogated Rochester at the police station. The State also presented an audio recording of the interview, which includes several statements by the detectives to Rochester including: "tell the truth," "stop lying," and "I don't think there is a jury in the world that would believe you." Rochester did not object to admission of this evidence.

The trial court also instructed the jury on the special verdict regarding use of a firearm as follows:

> In order to answer the special verdict form "was" you must unanimously be satisfied beyond a reasonable doubt that "was" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "was not".[4]

Rochester appeals.

TERRY STOP

Rochester challenges the Terry stop, arguing that the stop was not

[4] Clerk's Papers at 86.

supported by reasonable suspicion that he was involved in criminal activity. He also argues that the officers had no basis to frisk him for weapons and in any event exceeded the permissible scope of a weapons frisk. He challenges several of the trial court's findings of fact. We hold that the trial court properly denied the motion to suppress.

Challenged Findings of Fact

We first address Rochester's challenges to certain of the trial court's findings of fact at the CrR 3.6 hearing. We hold that they are all either supported by substantial evidence or are not prejudicial.

Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.[5] We do not review on appeal the trial court's credibility determinations.[6]

Rochester challenges the following actual findings:

> Defendant Shayne Rochester had a relationship with the victim, Paul Bauer, for a number of years. That relationship was terminated several years prior to the incident date.
> …
> They ran the car and determined that it was owned by a heavy set female.
> …
> Bauer indicated to Seattle Police Department officers that Shayne Rochester lived at his house for ten years and that he had not seen him for two years. (Rochester did not enter the house with the women. He was in a car with Samuel Harvey waiting for their return after the robbery.).

[5] State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).
[6] State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

> …
> They knew the men were involved with the women who committed the crime, and likely were waiting for them to return to the car after they committed the crime.[7]

Rochester contends that the findings describing his relationship with Bauer, the victim of the charged crime, are not supported by the record because the officers did not know this information before making the stop. The trial court did not find this information was known to the officers before the Terry stop or justified the Terry stop. Thus, it is unnecessary to decide whether these findings are supported by substantial evidence because they had no material bearing on the denial of the motion.

Rochester also challenges the findings regarding the description of the owner of the Chrysler, claiming that the owner of the car was Hispanic, and therefore did not match the description of the heavyset white women suspected in the robbery. He bases his claim regarding the ethnicity of the car owner on a transcript of a police interview with Tracy Foster, who claimed to own the car even though it was registered in the name of her friend, Sharie Ramirez. But no testimony presented at the hearing indicated that the officers considered the name of the registered owner or learned whether she was Hispanic before conducting the Terry stop. Officer Martinez testified that he and Officer Nelson learned from the registration information that the Chrysler was registered to "a heavy set white female." He also testified that the physical description was

[7] Clerk's Papers at 10-12.

central to their suspicious about the occupants of the Chrysler, while the name of the registered owner was "irrelevant." Officer Nelson testified, "The registered owner came back to a female, approximately 5'4", over two hundred pounds. The vehicle was registered out of Yakima, to an address in Yakima. I don't recall the address and I don't recall the actual registered owner's name, but it was female." Officer Nelson testified that when he heard the robbery call, "And two suspects in the call were described as white females, short and heavy set. And it clicked in my head that there was a possibility that these could be associated." Thus, the trial court's findings regarding the officers' understanding of the physical description of the owner of the Chrysler are supported by substantial evidence.

Rochester also claims that no officer testified to suspecting that the men in the Chrysler were waiting for anyone to return. He is mistaken. Officer Nelson testified that the behavior he observed and the fact that the men returned to the park within an hour of the robbery possibly indicated "that these females weren't able to find them, or maybe they were waiting for them." Based on this testimony, the trial court did not err by finding that the officers suspected that the men were possibly waiting for the women who had been involved in the robbery.

Justification for Terry Stop

Rochester claims that the police stopped the Chrysler without authority of law. We disagree.

We review de novo the court's conclusions of law following a motion to suppress.[8]

Warrantless searches and seizures are per se unreasonable under the Fourth Amendment to the United State Constitution and article 1, section 7 of the Washington constitution.[9] Evidence obtained in violation of these constitutional provisions must be suppressed, and evidence obtained as a result of any subsequent search must also be suppressed as fruit of the poisonous tree.[10] However, evidence will not be excluded if it falls within the scope of one of the narrowly drawn exceptions to the warrant requirement.

A Terry stop is one of the narrowly drawn exceptions to exclusion of evidence.[11] It allows officers to briefly seize a person if specific articulable facts, in light of the officers' training and experience, give rise to reasonable suspicion that the person is involved in criminal activity.[12] The rule also allows police to conduct certain types of limited searches, such as a frisk of the person, but only if the officer has reasonable grounds to believe the person is armed and presently dangerous.[13] The proper scope of a weapons frisk is limited to a pat-

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[8] Acrey, 148 Wn.2d at 745.

[9] State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000); State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999).

[10] State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986) (citing Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)).

[11] Terry, 392 U.S. at 21, 30.

[12] Id.; State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

[13] State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994).

down search of outer clothing to discover and remove weapons or possible weapons that might be used to assault the officer.[14]

We examine the totality of the circumstances to determine whether a Terry stop and frisk were justified.[15] A court may consider factors such as the officer's training and experience, the location of the stop, and the conduct of the person detained.[16]

Here, the trial court concluded that the following facts justified the Terry stop: (1) police observed a car, which was registered to a heavyset woman but occupied by two males who appeared to be avoiding being seen, with the engine running, parked next to a park in a high crime area;[17] (2) minutes later an armed robbery with shots fired occurred nearby and involved two women who generally matched the physical description of the Chrysler's owner and were last seen running in the direction of where the officers had seen the car; (3) officers did not see the car or the women when they returned to the park immediately after the robbery report; and (4) less than an hour later, while "the robbery suspects were still at large," an officer observed the same car parked on another street

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[14] Id.

[15] Glover, 116 Wn.2d at 514.

[16] State v. Pressley, 64 Wn. App. 591, 596, 825 P.2d 749 (1992).

[17] Rochester claims in a footnote that the trial court did not enter any finding regarding Officer Martinez's testimony that the area was known for drug trafficking and violence. But the written findings incorporate by reference the trial court's oral ruling that the officers described the park as "a fairly high crime area."

bordering the park for 10 minutes before two males walked out of the park, got into the car and began to drive away. We hold that, under the totality of the circumstances, the officers had a reasonable suspicion that the two males in the Chrysler were initially waiting for the armed robbery suspects near the park and were still looking for them inside the park less than an hour later. The investigatory stop of the car was reasonable.

Scope of Terry Stop

Rochester also argues that because no reasonable police officer would have believed that he was armed and dangerous, the frisk for weapons was improper. But the driver of the car admitted to Officer Martinez that they had dropped off two heavyset women and were intending to meet them again. This admission provided reasonable grounds for the police to extend the duration and the scope of the Terry stop. Because the officers knew that the robbery suspects were armed with guns, and reasonably suspected that the driver was referring to the robbery suspects when he described the women, the police had an objective reasonable basis to suspect that the men in the car were involved in the robbery and armed.[18]

Rochester also contends that Officer Faust exceeded the proper scope of a frisk for weapons by removing the bullet from his pocket. Officer Faust

[18] See, e.g., State v. Belieu, 112 Wn.2d 587, 602-03, 773 P.2d 46 (1989) (nature of criminal activity of which detainees are suspected may justify specific fear that particular persons detained are armed).

testified that during the pat-down, he was concerned about "Things that will hurt me," such as "Guns, knives, needles, pens, ammunition." Officer Faust also testified that he considered ammunition a danger to himself because:

> A bullet has powder in it. Powder is an explosive. So, anytime somebody can manipulate that, turn it into an incendiary device, I am not an expert, but that is dangerous to me. If you hit the end of it just right with an amount of force, they can fire that. That's dangerous to me. That's putting my life in harm's way.[19]

The trial court found Officer Faust's testimony credible, stating, "So, the officer considered the bullet to be a weapon." Rochester fails to identify any authority for a bright line rule, as he proposes, that a bullet is not a weapon and cannot be removed during a weapons frisk. Given the trial court's determination that Officer Faust believed the bullet was a threat to his safety and the reluctance of reviewing courts to substitute their judgment for that of officers in the field, we hold that the weapons frisk here did not exceed its proper purpose.[20]

OPINION TESTIMONY OF DETECTIVES

For the first time on appeal, Rochester next contends that the detectives' statements during the interrogation challenging his honesty constituted improper opinion testimony and manifest constitutional error that requires reversal. We disagree.

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[19] Report of Proceedings (January 12, 2010) at 95.

[20] State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (legitimate and compelling concerns for officer safety justifies exception to warrant requirement for weapons frisk).

It is improper for a witness to offer an opinion regarding the guilt or veracity of a defendant.[21] Admission of improper opinions may be challenged for the first time on appeal if it is a manifest constitutional error affecting the defendant's constitutional right to a jury trial.[22] To demonstrate a manifest error, "[t]he defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial."[23] "Important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed."[24]

Even assuming that the identified statements constitute improper opinions on his guilt or veracity, Rochester fails to identify actual prejudice or practical and identifiable consequences requiring reversal here. The trial court instructed the jury, "You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness." Given the lack of any written jury inquiry or any other evidence that the jury was unfairly influenced or disregarded the instructions, we presume the jury followed the court's instructions.[25]

Moreover, it appears from the record that defense counsel had a strategic purpose for not objecting to this evidence. During closing argument, defense

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[21] State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).
[22] See RAP 2.5(a)(3).
[23] State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).
[24] State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008).
[25] Id. at 596.

counsel explained his request to have the jury watch the entire interrogation on video, despite the fact that the State was "happy to give the jury an incomplete account of [Rochester's] statement." He argued that Rochester was consistent during the interrogation, repeatedly stating that he did not know the women had guns with them when they left the car, even when "[t]hey tried to trip him up and say you knew they had guns." Under these circumstances, reversal is not required.

SPECIAL VERDICT

Rochester also argues his firearm enhancement must be reversed because the jury instruction for the special verdict was faulty under State v. Bashaw.[26] We agree.

The trial court here used the exact language that we recently held amounted to constitutional error in State v. Ryan.[27] In that case, the jury convicted Ryan of second degree assault and felony harassment, and found Ryan committed the crimes with the aggravating circumstances of a pattern of abuse and domestic violence.[28] We held the instruction relieved the State of its burden to prove its allegations beyond a reasonable doubt:

> The State's burden is to prove to the jury beyond a reasonable doubt that its allegations are established. If the jury cannot unanimously agree that the State has done so, the State has necessarily failed in its burden. To require the jury to be unanimous about the negative—to be unanimous that the State

[26] 169 Wn.2d 133, 234 P.3d 195 (2010).
[27] 160 Wn. App. 944, 252 P.3d 895 (2011).
[28] Id. at 946.

> has not met its burden—is to leave the jury without a way to express a reasonable doubt on the part of some jurors.[29]

Here, the State contends any error is not of constitutional magnitude, and as such, cannot be raised for the first time on appeal. We disagree.

As a panel of this division held in Ryan, our supreme court's decision in Bashaw, "compels the conclusion the [instructional] error is both manifest and constitutional" and can be raised for the first time on appeal.[30] As the panel stated in Ryan, it was aware of but disagreed with Division Three's decision in State v. Nunez.[31] Likewise, and for the same reasons, this panel disagrees with a recent decision of another panel of this court in State v. Morgan.[32] In sum, Rochester is entitled to raise the instructional error for the first time in this appeal. And the State has failed to demonstrate that the error is harmless beyond a reasonable doubt. We reverse the sentence and remand for further proceedings.

In sum, we affirm in part, reverse in part, and remand for further proceedings.

Cox, J.

WE CONCUR:

[29] Id. at 947.
[30] Id. at 948.
[31] 160 Wn. App. 150, 248 P.3d 103 (2011).
[32] No. 67130-8 (Wash. August 29, 2011).

Leach, A.C.J.

Lau, J.