No. 94938-7

COA # 45611-7-II
Consolidated with #45491-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GERARDO HERNANDEZ,

Petitioner.

ON REVIEW FROM
THE COURT OF APPEALS OF
THE STATE OF WASHINGTON, DIVISION TWO
AND THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

PETITION FOR REVIEW

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RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. IDENTITY OF PARTY

Gerardo Hernandez, appellant below, is the Petitioner herein.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4.(b)(1) and (2), Mr. Hernandez seeks review of the decision of the court of appeals, Division Two, issued August 1, 2017, in State v. Hernandez __ P.3d __ (2017 WL 3267937). A copy is attached hereto as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Where the aggravating factor of a "Major Violation of the Uniform Controlled Substances Act" is applied to an accomplice, must it be clear that the jury was informed that it has to find the defendant's own conduct supported that aggravator as this Court held in State v. Hayes, 182 Wn. 2d 556, 342 P.3d 1144 (2015)?

   Did the court of appeals err in holding that the jury was properly so informed when jurors were given an instruction which allowed them to enter the special verdict based on the nature of the crime, not the defendant's conduct?

   Further, was counsel prejudicially ineffective in failing to address the issue?

2. When the state chooses to amend an information and delete a charged aggravating factor, does the amended information control as this Court held in State v. Theroff, 95 Wn.2d 385, 622 P.3d 1240 (1980), and its antecedents, or, as Division Two here held, does State v. Siers, 174 Wn.2d 269, 274 P.3d 358 (2012), control, even though that case only dealt with constitutional issues of notice and did not overturn Theroff?

   Further, was counsel prejudicially ineffective in failing to address the issue?

3. Did the state fail to present insufficient evidence to prove actual or constructive possession of the drugs?

4. Is a dog "sniff" of the outside of a car a search under Article

1, § 7, because the dog is a tool used to gather evidence the officer could not gain without a tool or aid?

5. Is dog "sniff" evidence so inherently unreliable in general and in this particular case that it cannot support probable cause?

D. STATEMENT OF THE CASE

a. Procedural posture

Petitioner Gerardo Hernandez was charged by an amended information with unlawful possession of methamphetamine with intent to deliver and unlawful possession of heroin with intent to deliver, both with a school bus route stop enhancement. CP 91-92; RCW 9.94A.533(6); RCW 69.50.401(1)(2)(a) and (b); RCW 69.50.435. Also accused were several others, including Javier Espinoza and Guadaupe Cruz Camacho. CP 91.[1] An earlier-filed information had alleged the aggravating factor that the crimes were "Major Violations of the Uniform Controlled Substances Act," and that factor was submitted to the jury without objection by the defense.[2] CP 202-207. The jury entered a finding of "yes" on that factor for the crimes and Hernandez was sentenced to an exceptional sentence of 156 months plus a 24-month bus stop enhancement, for a total of 180 months, far above the standard range of 44-84 months. CP 202-207, 236-49; 10RP 18.

Hernandez appealed and, on August 1, 2017, Division Two of the

[1]The verbatim report of proceedings in this case is extensive and unfortunately not chronologically paginated. The trial and sentencing dates of September 5, 9, 10, 11, 12, 16, 17, 18 and 19, and October 18, 2013, are marked as separate volume numbers and will be referred to as such (i.e., 1RP - volume "1," September 5, 2013). The other volumes will be referred to by their dates (i.e., 3/8RP for the volume containing March 8, 2013).

[2]This error is discussed in more detail, *infra.*

court of appeals, affirmed in part and reversed in part in an unpublished opinion. See App. A. This Petition timely follows.

b. Overview of facts regarding incident

It was alleged that Hernandez was one of several men seen carrying unidentified things in or out of an apartment where police suspected drug dealing was going on due to an informant's tip and police observation. See App. A. A "drug dog" walked around the car in the parking lot from which the men were seen carrying items and "alerted." App. A. Shortly thereafter, several cars were stopped, including one which Hernandez was driving, in which he and his wife and child were. 3RP 31-32, 4RP 45.

The "drug dog," Barney was said to have "jumped" onto the driver's side window and thus "alerted" on the car Hernandez was in. App. A. Despite that "alert," an officer admitted, when the car was in a secured, clean environment, Barney was again brought to the vehicle and had no "alert." 4RP 55-5, 69. No drugs were found in the car. 3RP 44. There were no hidden compartments. 3RP 31-32, 4RP 44-45.

Drugs were found in the apartment, however, in significant amounts. 4RP 38-39, 6RP 17. No fingerprints linked Hernandez to having handled them. 4RP 38-49, 6RP 17, 21-39. The great bulk of the drugs found were not in any area where a normal visitor would have seen them. 4RP 38-39, 6RP 17, 31-39. Hernandez did not have a key to the apartment and nothing of his was found inside. 3RP 38, 6RP 68-70. The only ID found in the apartment belonged to codefendant Camacho, who had the apartment key in his pocket when arrested. 6RP 77-78. It was Camacho who was seen

outside the apartment working on cars with California license plates and who was driving a car with a hidden compartment when the group was pulled over. 3RP 38, 6RP 68-70.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. REVIEW SHOULD BE GRANTED UNDER RAP 13.4(B)(1) TO REAFFIRM HAYES

Under RCW 9A.08.020, a person may be found guilty for the crime of another as an accomplice if that person engages in a specific "accomplice act" with the knowledge that, in so doing, he will be furthering the crime. See, State v. Pineda-Pineda, 154 Wn. App. 653, 661, 226 P.3d 164 (2010). The statute allows conviction of a crime even if the prosecution does not prove that a defendant committed all of the essential elements of the crime herself. See State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000). But it does not authorize a court to impose an exceptional sentence on a person found guilty as an accomplice. Hayes, 182 Wn.2d at 182-83. RCW 9A.08.020 contains no "triggering device for penalty enhancements[.]" State v. McKim, 98 Wn.2d 111, 115-16, 653 P.2d 1040 (1982). As a result, when the state seeks to impose an exceptional sentence on someone who has been convicted as an accomplice, the Court must look at the statute defining the relevant aggravator in order to determine whether it explicitly applies. Hayes, 182 Wn.2d at 183. If not, then "any sentence enhancement must depend on the accused's own misconduct," under our current accomplice liability statute. McKim, 98 Wn.2d at 115-16.

In this case, Division Two first recognized these principles, then

failed to properly apply them - or follow Hayes - by upholding an exceptional sentence for an aggravator where the jury instructions did not clearly require the jurors to rely on the defendant's own misconduct, rather than the general nature of the crime. In Hayes, this Court struck down imposition of an exceptional sentence based on the aggravating factor that the crime was a "major economic offense." 182 Wn.2d at 559-60. That factor required jurors to find either 1) the crime involved multiple victims or multiple incidents per victim or 2) the crime involved a high degree of sophistication or planning or occurred over a long period of time. Id. The special verdict forms only asked the jury to find whether the crime was "a major economic offense or series of offenses," and jurors were informed to find one of the alternatives beyond a reasonable doubt. 182 Wn.2d at 559-60. But there was no interrogatory asking which factor the jury had found and no instruction to the jury that it had to "look to the defendant's own misconduct to satisfy the operative language[.]" 182 Wn.2d at 563-64.

Here, the same error occurred. The amended information *did not* charge the "major violation" aggravating factor - an issue assigned as error, *infra*. CP 91-93. But the jury was instructed on that factor, specifically that the offense was a "Major Violation of the Uniform Controlled Substances Act," under RCW 9.94A.535(3)(e). That statute defines that factor as requiring proof that the crime was "more onerous than typical," and further provides, in relevant part:

The presence of any of the following may identify a current offense

as a major VUCSA:

> . . .
> (ii) **The current offense** involved an attempted or actual sale of transfer of controlled substances in quantities substantially larger than for personal use;
> . . .
> (iv) The **circumstances of the current offense reveal the offender** to have occupied a high position in the drug distribution hierarchy;
> (v) The **current offense** involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement[.]

(Emphasis added).

After correctly holding that the relevant statute did not clearly authorize the imposition of the aggravator on an accomplice, Division Two then then failed to follow Hayes, instead upholding instructions markedly similar to those struck down by the Hayes Court. The instruction on the aggravator, Instruction 19, asked jurors to decide "[w]hether **the crime** was a major violation of the Uniform Controlled Substances Act," not whether Hernandez' own conduct supported that aggravator. CP 183 (emphasis added). Instruction 20 told jurors that they had to be unanimous to answer the special verdict form, and Instruction 21 told jurors they had to unanimously agree on "the aggravating circumstances" - but said nothing about the specific conduct of Hernandez himself. CP 183-84. Instruction 23 defined the aggravator and used the same language as the statute, referring to whether "the offense" involved a substantially larger amount of controlled substances, but also the scenario where the circumstances of the offense reveal that the defendant occupied a high position in the drug distribution hierarchy[.]" CP 187. The special verdict forms provided:

> We, the jury, having found the defendant guilty of unlawful possession of a controlled substance with the intent to deliver as charged in Count I, return a special verdict by answering as follows:
>
> QUESTION [1]:
>
> Was **the crime** a major violation of the Uniform Controlled Substances Act?
>
> ANSWER: YES (Write "yes" or "no").

CP 204-205 (emphasis added).

Thus, the jury was not told it had to "look to the defendant's own misconduct to satisfy the operative language" of the aggravator, as required in Hayes. 182 Wn.2d at 563-64. Notably, during closing argument, the prosecutor specifically relied on accomplice liability and argued the jury should find the aggravators based on the nature of the crime, not individual culpability. See 8RP 29 (amount of "substances substantially larger than for personal use" even "with three people"; "high level" position of "Defendants," testimony about "dealers" in general), 8RP 30 (crime involved "broad geographic area," that this was "typical trafficking" with I-5 as "a conduit"), 8RP 31, 34-35.

Division Two appears to have concluded that, because the instructions included *one* possible reference to the defendant's conduct (i.e., the "high position in the hierarchy" scenario), that was enough. App. A at 34-35, citing, State v. Weller, 185 Wn. App. 913, 917, 344 P.3d 695 (2015), review denied, 183 Wn.2d 1010 (2015). The case on which it relied, however, Weller, had jury instructions without the same defect. 185 Wn. App. at 917-18 (jury was instructed to determine "[d]id **the**

defendant's conduct during the commission of the crime manifest deliberate cruelty to the victim?") (emphasis added).

This Court should grant review under RAP 13.4(b)(1). The issue of accomplice liability and the proper imposition of punishment under that theory is often an issue this Court has had to address. See Hayes, 182 Wn.2d at 559-60; State v. Allen, 182 Wn.2d 364, 341 P.3d 269 (2015); State v. Silva-Baltazar, 125 Wn.2d 472, 886 P.2d 138 (1994); State v. Davis, 101 Wn.2d 654, 658, 682 P.2d 883 (1984). Requiring the jury to be properly instructed to ensure a defendant is only punished for *his* conduct is was the central purpose holding of Hayes. 182 Wn.2d at 563-64. Further, the Court declared, allowing a more broad interpretation of the sentencing factors "would undermine the aims of" the Sentencing Reform Act itself. Hayes, 182 Wn.2d at 566.

Those aims were seriously undermined when the court of appeals here failed to follow Hayes. Mr. Hernandez received a lengthy exceptional sentence as a result. CP 236-49. This Court should grant review under RAP 13.4(b)(1), and should reaffirm the holding of Hayes that jurors must be properly instructed that any aggravating factor finding must be based on the defendant's own conduct.

Because the court of appeals found no error, it did not address whether counsel was ineffective in failing to object or propose proper instructions below. See App. A. Counsel *was* found ineffective in failing to notice that the crimes were "same criminal conduct" for sentencing and raise the issue even though this Court had explicitly so held more than 20

years before. App. A at 42. On review, this Court should find counsel was also prejudicially ineffective on this issue as well. Both the state and federal constitutions guarantee the accused the right to effective assistance of appointed counsel. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel is ineffective despite a strong presumption of effectiveness if his performance falls below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that deficient performance affected the outcome of the trial. Strickland, 466 U.S. at 688. This does not require proof that the defendant would have been acquitted, but simply a reasonable probability that the outcome could have been different had counsel's errors not affected the verdict. Id.

Here, there is more than such a reasonable probability, given the weakness of the state's case. Mr. Hernandez had no drugs or secret compartments in his car. 3RP 38, 6RP 68-70. The vast majority of drugs in the apartment were not in any area where a normal visitor would have seen them, instead well hidden from easy view. 4RP 38-39, 6RP 17, 31-39. Hernandez did not have a key to the apartment and nothing of his was found inside. 3RP 38, 6RP 68-70. The only ID found in the apartment belonged to codefendant Camacho, who had the apartment key in his pocket when arrested. 6RP 77-78. It was Mr. Camacho who was driving a car with a hidden compartment when the group was pulled over. 3RP 38, 6RP 68-70. While he had several Ids in different names and money in his car, those

things and proximity alone might well have been deemed insufficient for jurors to find that Hernandez' conduct itself supported the aggravating factor. This Court should grant review and, upon review, reverse.

2. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE STATE MUST BE BOUND TO ITS DECISION TO AMEND AN INFORMATION AS THIS COURT HELD IN THEROFF OR WHETHER SIERS CONTROLS

In Theroff, this Court held that, with the state's filing of an amended information, that new information controls. Theroff, 95 Wn.2d at 393. This is a long standing principle of criminal filing - that a second information filed in the same proceeding "manifestly supersede[s]" the first. State v. Navone, 180 Wn.2d 121, 123-24, 39 P.2d 384 (1934). In the past, the courts of appeals have followed this principle, holding that an earlier filed information no longer holds force once another was later filed. See State v. Alferez, 37 Wn. App. 508, 514-15, 682 P.2d 859, review denied, 102 Wn.2d 1003 (1984); see also, State v. Kinard, 21 Wn. App. 587, 589-90, 585 P.2d 836 (1978), review denied, 92 Wn.2d 1002 (1979).

Thus, in Kinard, the court of appeals reversed a conviction for assault a drug possession where the defendant, who was arrested and charged with first-degree assault, was brought to trial on an amended information which charged only possession of cocaine. 21 Wn. App. at 589. The Kinard Court also rejected the idea that the second information "merely supplemented the first." Id. Here, however, Division Two departed from this well-settled line of cases and affirmed the imposition of an exceptional sentence upon Petitioner based on the "Major Violation of

the Uniform Controlled Substances" aggravating factor. That factor was charged in the first information but not in the amended information the prosecutor filed which added the school bus route stop enhancement. Compare CP 1-2 (charging the aggravating factor) (filed May 21, 2012); CP 91-92 (removing the aggravating factor and adding a bus stop route enhancement). In affirming the subsequent exceptional sentence based on the enhancement, Division Two relied on Siers, supra, as if the only issue in this situation is the right to notice. See App. A at 31-32. It did not mention Theroff.

But Siers did not involve an exceptional sentence based on an aggravator which was charged and then deleted by the State. 174 Wn.2d at 276-77. Instead, in Siers, the defendant argued his constitutional rights to notice were violated when the state did not ever charge the aggravator but gave more than ample notice and tried to add the aggravator to the information but was denied. Id. Siers did not involve a case where, as here and in Theroff, the State chose to file an information alleging crimes with a very specific, lengthy aggravator set forth, then chose to delete that aggravator and add a "school bus route stop" aggravator in an amended information - and then seeks and gets punishment for *both*.

This Court should grant review and should hold that Theroff, instead controls. In Theroff, this Court held to the requirement that the State must include all of its allegations in its current information, a rule it declared "clear and easy to follow." 95 Wn.2d at 392. In fact, in Theroff, this Court dismissed an enhanced penalty despite the defendant clearly having notice,

"[b]ecause the prosecutor here did not follow the rule" that the current information controls. 95 Wn.2d at 392-93. Plainly put, this Court said, because of the prosecutor's failure to follow the simple filing rule, "he may not now ask the court to impose the rigors of our enhanced penalty statutes upon the defendant." Theroff, 95 Wn.2d at 393.

Division Two's decision is in conflict with Theroff and further raises the question of whether Theroff or Siers now controls and whether this Court's longstanding rule about amending the charging document retains any currency. Further, until this case, the courts of appeals were following this plain rule. See Alferez, 37 Wn. App. at 514-15; Kinard, 21 Wn. App. at 589-90. Theroff presents a clear, practical and vital rule for what information controls in filings in courts across the state, and this Court should grant review and reaffirm that rule. Further, the Court should examine or order Division Two on remand to examine the ineffective assistance of counsel in relation to this issue, too. Counsel is prejudicially ineffective despite a strong presumption of reasonableness in failing to be aware of or investigate the relevant matters of potential defense for her client. See State v. Jury, 19 Wn. App. 256, 264-65, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978). Theroff was decided years ago. And it is difficult to conceive how not being aware of the very charges against your client at the time of trial could be deemed "effective" or the norm for a reasonable attorney. Hernandez was ordered to serve a standard range 72 months *greater* than the top of the standard range as a result of the state being allowed to rely on an aggravating factor the prosecutor chose to

delete in amending the information. CP 236-49; 10RP 18. This Court should grant review and should reverse.

3. DIVISION TWO ERRED IN HOLDING THE STATE PROVED HERNANDEZ HAD CONSTRUCTIVE POSSESSION OF THE DRUGS

Review should also be granted because the convictions were based upon insufficient evidence to prove actual or constructive possession of the drugs, either as a principal or accomplice. Both the state and federal constitutions mandate that a conviction must be based upon sufficient evidence to prove every element of the offense, beyond a reasonable doubt. See State v. Rose, 175 Wn.2d 10, 14, 282 P.3d 1087 (2012). To prove guilt for unlawful possession, the prosecution must show either actual physical possession or sufficient proof of "constructive" possession of the forbidden thing. State v. Raleigh, 157 Wn. App. 728, 736-37, 238 P.3d 1212 (2010), review denied, 170 Wn.2d 1029 (2011).

In affirming, Division Two found the evidence sufficient because the dog alerted on *Espinoza's* car (*not* Hernandez') while in the parking lot, Hernandez had his car parked in the same lot for awhile that day, Hernandez left with and was pulled over with Espinoza, a large amount of drugs were found in Espinoza's apartment and Hernandez had been inside for awhile, Hernandez admitted being involved in drug dealing and was found with thousands of dollars in his car. App. A at 44-45. That was not sufficient to establish that Hernandez was guilty of possessing the huge quantities of drugs found hidden in Espinoza's apartment. This Court has described the relevant test as showing that "under the totality of the circumstances, the defendant exercised dominion and control over the item in question." State v. Nelson, 182 Wn.2d 222, 227, 340 P.3d 8210 (2015).

Further, the fact that the defendant was near something or even

briefly handled it does not establish dominion and control. State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002); Nelson, 182 Wn.2d at 227. Thus, in State v. Callahan, 77 Wn.2d 27, 31, 459 P.2d 400 (1969), there was insufficient evidence of "dominion and control" over drugs found on a houseboat even though the defendant was temporarily living there, admitted to handling the drugs momentarily and was in close proximity to them, that was insufficient to establish "dominion and control." Similarly, in Nelson, where the defendant briefly handled a gun to put in a bag for someone to take with them when leaving, such "momentary or passing control" was insufficient to prove actual or constructive possession, as she did not exert any interest of her own in the gun. Nelson, 182 Wn.2d at 234-35.

Here, Hernandez was not found with drugs, had no "trap" in his car and was simply suspected but not positively identified to have helped carry unspecified items from or to a car in the parking lot. A drug dog alerted on a car *other* than the defendant's in the parking lot. Nothing in the apartment tied Hernandez to those drugs. Hernandez confessed only to being a small time dealer and explained the money and his wife's presence. And the drug dog's "alert" on his car turned out to be false as later the dog did *not* alert to the car in a controlled environment. At most, the evidence showed Hernandez was a small time dealer who had been in an apartment, was probably seen putting things into a car later found to have no contraband, and was in a car later with his wife, children and a lot of money which he said was for a real estate transaction. This Court should grant review, because the state and federal due process clauses require the state to prove guilt beyond a reasonable doubt and failed in that endeavor.

4. THE EVIDENCE SEIZED BASED ON THE DOG "SNIFF" "TESTIMONY" SHOULD HAVE BEEN SUPPRESSED

Before trial, Hernandez moved to suppress the evidence seized from

the cars and the apartment during the execution of the search warrant. CP 17. He argued that the application for the warrant was constitutionally insufficient, in part because it was based on an "illegal search by the drug detection dog, in violation of Article 1, Section 7." CP 17-29. The trial judge found that the sniffs of the cars, both in the parking lot of the apartment where there was a "hit" on Espinoza's car and later, at the stop, when the dog alerted on the car Hernandez was driving, were not "searches" and that the evidence would not be suppressed because the dog and officer team was "a valid instrument to detect drugs or can be." 6/7RP 10.

On appeal, Hernandez argued that "dog sniff" evidence was not sufficiently trustworthy to support probable cause, not just in this case but overall. Brief of Appellant ("BOA") at 33-35. In its decision, the court of appeals did not address the arguments that the drug dog "alert" is, in general, unreliable "testimony" and improper evidence in a criminal trial. App. at at 23-24. Instead, Division Two just cited a case from 20 years ago in which the court of appeals held that an alert by a "trained drug dog" was sufficient to establish probable cause for controlled substances. App. A at 23-24; citing, State v. Jackson, 82 Wn. App. 594, 606, 918 P.2d 945 (1996), review denied, 131 Wn.2d 1006 (1997). The Court also held that having officers run the dog around Espinoza's car in the apartment parking lot and using the evidence of the dog "alerting" as evidence was not a problem because those actions were not a "search." App. A at 25-26.

This Court should grant review on both of those questions. First, it

is time for this Court to address the continuing myth of the reliability of drug sniffing dogs. Research shows that drug dogs like Barney give **false positive** indications of contraband up to 85% of the time. See Lisa Lit et. al., *Handler beliefs affect scent detection dog outcomes*, 14 ANIMAL COGNITION 387 (2011). Further, as relevant to this case, drug dogs are more likely to falsely alert when the case involves a Hispanic man. See Dan Hinkel et al., *Drug sniffing dogs in traffic stops often wrong- high number of fruitless searches of Hispanics' vehicles cited as evidence of bias*, Chicago Tribune (Jan. 6, 2011).

Illinois v. Caballes, 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 842 (2005) and cases in this state rely on the idea that a trained narcotics dog will only alert on contraband - a theory now shown to be untrue. See, e.g., State v. Wolohan, 23 Wn. App. 813, 598 P.2d 421 (1979); see also State v. Hartzell, 153 Wn. App. 137, 221 P.3d 928 (2009); see Kenneth G. Furton, *Identification of Odor Signature Chemicals in Cocaine Using Solid-Phase Microextraction-Gas Chromatography and Detector-Dog Response to Isolated Compounds Spiked on U.S. Paper Currency*, 40 JOURNAL OF CHROMATOGRAPHIC SCIENCE 154 (2002) (noting the scent training for canines involves linking to a compound or class of compounds within an item, not the item itself). Courts in other jurisdictions have noted the errors and false positives, especially on currency. See e.g., United States v. Limares, 269 F. 3d 794, 797 (2001) (noting false positives between 7 and 38 percent of the time).

Further, the warrantless sniff of Espinoza's car and the sniff of the

cars while the men were detained after the stop violated Article 1, § 7. Our state give greater protection for cars and their contents than under the federal constitution. See State v. Snapp, 174 Wn.2d 177, 275 P.3d 289 (2012). The U.S. Supreme Court has recognized that employing a device not in public use to get information which would have been "unknowable without physical intrusion" is a search, even under the less protective Fourth Amendment. See Kyllo v. United States, 533 U.S. 27, 40, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001). A Washington court of appeals has held that a drug dog's "sniff" of a home is a search, requiring a warrant. See State v. Dearman, 92 Wn. App. 630, 635, 962 P.2d 850 (1998). One of the justices on the U.S. Supreme Court would also have found drug dogs to be "specialized devices" for discovering what officers could not without enhancement. See Florida v. Jardines, __ U.S. __, 133 S. Ct. 1490, 1418, 185 L. Ed. 2d 495 (2013) (Kagan, J., concurring).

In affirming, Division Two held that there was no reasonable expectation of privacy in "the odors that emanate from the car" when a dog sniffs from a lawful vantage point in the parking lot. App. A at 27. It did not address the "sniff" at the point of detention. But this holding mistakes the law. If an officer uses a tool from a public place, such as an infrared device or unit used to record sound, that does not necessarily make the intrusion into a home without a warrant lawful - it is when the officer uses *no* such enhancement and the person is deemed to have laid open their own "personal affairs" if they can be seen by unaided public view. See State v. Young, 123 Wn.2d 173, 181, 867 P.2d 593 (1994). The use of a dog is

undeniably to get evidence an officer cannot get without aid. This Court should grant review and grant Mr. Hernandez relief.

F. CONCLUSION

For the reasons stated herein, this Court should grant review.

DATED this 31st day of August, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel at Piece County Prosecutor's Office via email at pcpatcecff@ao.pierce.wa.us, and caused a true and correct copy of the same to be sent to appellant by deposit in U.S. mail, with first-class postage prepaid at the following address: Gerardo Hernandez, DOC 846105, Stafford Creek CC, 191 Constantine Way, Aberdeen, WA. 98520.

DATED this 31st day of August, 2017.

/s/ Kathryn Russell Selk
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Division Two

August 1, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAVIER ESPINOZA, Appellant.	No. 45491-2-II Consolidated with:
STATE OF WASHINGTON, Respondent, v. GUADALUPE CRUZ CAMACHO, Appellant	No. 45511-1-II
STATE OF WASHINGTON, Respondent, v. GERARDO RAFAEL HERNANDEZ, Appellant.	No. 45611-7-II
In re the Personal Restraint of JAVIER ESPINOZA, Petitioner.	No. 46486-1-II UNPUBLISHED OPINION

LEE, J. — Javier Espinoza, Gerardo Hernandez, and Guadalupe Cruz Camacho were tried together and now appeal their convictions for two counts of unlawful possession of a controlled

substance with intent to deliver, along with an aggravator and a sentencing enhancement for each of the convictions.

On appeal, all three argue that (1) there was no probable cause to issue a search warrant because dog sniffs are unreliable; (2) the dog sniff itself was a warrantless search; (3) their respective exceptional sentences must be reversed because (a) the aggravator for a major violation of the Uniform Controlled Substances Act was not charged in the amended information, (b) there is insufficient evidence to support applying that aggravator to each individual; and (c) defense counsel were ineffective in failing to argue that the major violation of the Uniform Controlled Substances Act aggravator did not apply; (4) their respective attorneys were ineffective in failing to argue that the two convictions constituted the same criminal conduct; and (5) the sentencing court erred in assigning legal financial obligations (LFOs) without first inquiring into each defendant's ability to pay.

Espinoza and Hernandez also argue (1) there was insufficient evidence to establish that they exercised dominion and control over the drugs, and (2) the trial court did not have authority to order forfeiture of their respective property. Additionally, Espinoza argues that he was denied his right to present a defense when the trial court denied his motion to sever his trial, and that there was insufficient evidence to establish the *corpus delicti*[1] of his possession of a controlled substance with intent to deliver.

[1] "'*Corpus delicti*' literally means 'body of the crime.'" *State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210 (1996).

In a separate personal restraint petition, Espinoza argues that (1) the sentencing court erred in failing to consider his convictions as part of the same criminal conduct, (2) the sentencing court erred in counting his out of state conviction without conducting a comparability test, (3) his out of state conviction washed out, (4) there was insufficient evidence to impose a school zone enhancement, and (5) the trial court abused its discretion in imposing an exceptional sentence.

We hold that the three appellants received ineffective assistance of counsel when their respective attorneys did not argue that the two convictions constituted the same criminal conduct for sentencing purposes. We also hold that the sentencing court erred when it imposed discretionary LFOs without inquiring into the ability to pay. Further, the sentencing court erred in ordering the forfeiture of the Espinoza's and Hernandez's property. Finally, if the State makes a request for appellate costs, a commissioner of this court will determine whether to award appellate costs under RAP 14.2. The remainder of the appellants' arguments on appeal fail. Accordingly, we affirm the appellants' convictions, reverse their sentences, and remand for resentencing consistent with this opinion.

FACTS

A. EVENTS PRIOR TO BEING CHARGED

1. Investigation

In May 2012, the Tacoma Police Department (TPD) was investigating Alfredo Flores for drug trafficking. As part of the TPD's investigation, they observed Flores spending a significant amount of time at an apartment complex located at 9621 10th Avenue East in Tacoma. On May

17, TPD officers arrested Flores during a traffic stop and, pursuant to his arrest, discovered several pounds of methamphetamine and heroin and more than $10,000 in cash.

The TPD was also investigating apartment 9 in the apartment complex located at 9621 10th Avenue East in Tacoma as a "narcotics stash house," based on information officers had received from an informant. Clerk's Papers (CP) (Espinoza) at 72.[2] Once Flores was arrested, the TPD began focusing its surveillance on the 9621 10th Avenue East complex.

2. Surveillance of Apartment Complex

On the evening of Flores's arrest, and during its surveillance of the apartment complex, TPD officers observed a Nissan with Oregon license plates, a white pickup truck with California license plates, and a Nissan with California license plates in the apartment complex's parking lot. The officers saw Cruz Camacho, who the informant had identified by name as a drug trafficker, working on a light blue Nissan and the white pickup truck. The officers also saw a group of three to five individuals of Hispanic ethnicity, coming and going, and carrying packages between apartment 9 and the vehicles. Two of the individuals matched the descriptions of Cruz Camacho and Hernandez.

Officer Henry Betts and his police dog, Barney, are a team with the TPD K-9 unit. Officer Betts and Barney arrived and began surveilling apartment 9 between 7:30 and 8:00 PM. About an

[2] Each appellant designated clerk's papers independently before the appeals were consolidated. As a result, each appellant's citations to the clerk's papers were unique to that appellant. The State cited to the clerk's papers without indication as to which set of clerk's papers it was referring. In this opinion, citations to clerk's papers include the name of the appellant whose clerk's papers the citation refers.

hour after arriving, Officer Betts and Barney began investigating some of the vehicles in the apartment complex's parking lot, with "Barney working the exterior of the vehicles." 4 Verbatim Report of Proceedings (VRP) at 28. While doing so, Barney gave "a sit response"[3] to "a [Nissan] Altima with California plates" at the trunk and passenger door. 4 VRP at 28, 30. As they were leaving the parking lot, Barney pulled towards a white pickup truck, "sniffed intently," and casted his head up.[4] 4 VRP at 30. Fearful of being seen, Officer Betts led Barney away from the parking lot.

At approximately 10:10 PM, a number of people exited apartment 9, got into the Nissan with Oregon license plates, the white pickup truck, and the Nissan with California license plates, and attempted to leave the parking lot. Law enforcement stopped all three vehicles in different locations before they left the parking lot.

Espinoza was driving the Nissan with California license plates. He was arrested after being stopped.

Cruz Camacho was driving the white pickup. Officer Betts and Barney went to the white pickup truck. Barney gave a sit response, alerting to the smell of drugs, upon sniffing the tailgate near the passenger side brake light. The tailgate had a panel secured to it by well-worked rivets with scratch marks at the edges that indicated the panel had been popped off several times. Cruz

[3] Barney's "sit response" signals the location where he has detected the source of drug odors he has been trained to recognize. 4 VRP at 24.

[4] Officer Betts defined "casting" as where the dog "lifts his nose up in the air very high and sniffs intensely and moves his head back and forth." 4 VRP at 30-31.

Camacho was arrested. At the time he was arrested, Cruz Camacho had the key to apartment 9 in his possession.

Hernandez was driving the Nissan with Oregon license plates. Hernandez and the other occupants were removed from the vehicle. Hernandez provided identification that identified him as Miguel Salto Aleman. When Officer Betts and Barney went to the Nissan with Oregon license plates, Barney jumped up at the driver's window, sniffed, and then immediately did a sit response. On the floorboard in the passenger compartment, was a grocery bag filled with U.S. currency that totaled $56,544.

Hernandez was arrested and secured in the back of a police car at the scene. While in the back seat, he volunteered to an officer, "No drugs; just money. No drugs; just money." 4 VRP at 74. In the Nissan with Oregon license plates, the police found several forms of identification that identified Hernandez by several other names.

3. Affidavit for Search Warrant

Officer Kenneth Smith then went back to the police station to apply for a search warrant for the three vehicles and apartment 9. The affidavit for the search warrant stated that an informant had identified apartment 9 as a "narcotics stash house" where the informant had seen large amounts of heroin and methamphetamine packaged for resale about six months before, and had identified Cruz Camacho and Hernandez[5] as the sources of the drugs that were previously seized in the arrest of Alfredo Flores. CP (Espinoza) at 72. The affidavit also stated that apartment 9 was under surveillance; Cruz Camacho and Hernandez used the apartment; the Nissan with California license

[5] At the time, the TPD knew Hernandez as a Miguel Salto Aleman.

plates, the white pickup truck, and the Nissan with Oregon license plates were parked in front of apartment 9 around 7:30 PM; and four to five Hispanic individuals, including two who matched the descriptions of Cruz Camacho and Hernandez, were observed moving packages that police believed to be drugs or money into the Nissan with California license plates. After police saw the people moving packages into the Nissan with California license plates, Barney alerted to the Nissan with California license plates and the white pickup truck in the parking lot. After, at about 10:10 PM, when people were attempting to leave in the three vehicles, each vehicle was stopped. Barney then alerted to the presence of drugs at each of the three vehicles. The affidavit noted that there was a "'trap' panel" with "suspicious rivets" on the white pickup truck and a plastic grocery bag "full of money individually wrapped" in one of the Nissans. CP (Espinoza) at 73.

The affidavit also described the experience and training of Officer Betts and Barney. Barney was trained to detect the odor of marijuana, crack cocaine, powder cocaine, heroin, and methamphetamine. Officer Betts and Barney were certified by the Washington State Criminal Justice Training Center and the Washington Police Canine Association in 2010; had recorded over "20 'Finds' (2012) year to date" which included marijuana, powder cocaine, crack cocaine, heroin and methamphetamine; and trained weekly with the Narcotics Detention Team. CP (Espinoza) at 76. Weekly training included training with vehicles, boats, trailers, parcels, storage areas, motels, and residences. Weekly training also included using varying quantities of drugs, using distracting and masking odors, using "controlled negative (blank) testing in which all objects or locations have no contraband/narcotics present," and teaching the dog to not alert to common items associated with controlled substances "such as plastic bags etc." CP (Espinoza) at 76.

Based on this affidavit, Officer Smith obtained search warrants for the three vehicles that were stopped and for apartment 9.

4. Execution of Search Warrant

Officer Betts and Barney responded to the apartment complex to help execute the search warrant on apartment 9. In the apartment, TPD officers found over 8,500 grams of heroin and over 2,300 grams of methamphetamine. In addition, the officers found a scale next to some of the methamphetamine, Saran wrap and plastic packaging commonly used to wrap drugs, and handwritten notes commonly kept in association with drug distribution. Identification materials for Cruz Camacho were also found in the apartment. ~~6 VRP at 45-46~~.

The three vehicles were impounded. Officer Betts and Barney assisted in searching the impounded Nissan with the California license plates that Espinoza had been driving. Barney went to the front passenger compartment, "pressed his nose against cellophane wrapped up currency and then jumped in the car and gave [Officer Betts] an immediate sit response." 4 VRP at 34. Barney is not trained to locate currency, but is trained to differentiate between currency that has, and has not, been around drugs. The currency wrapped in cellophane totaled $42,000. Also in the car, police discovered a car rental agreement for Espinoza.

5. In-custody Interviews

Detective Jason Catlett interviewed Hernandez and Cruz Camacho. Hernandez told Officer Catlett "that he was an ounce dealer and nothing more, that he only dealt in ounce amounts or smaller." 5 VRP at 28. Detective Catlett knew Hernandez by several names from previous contacts.

Special Agent Erin Jewell interviewed Espinoza. Espinoza told Agent Jewell that he was from California visiting a friend and that he had gone into apartment 9 but did not know the other guys. He said he came to Tacoma in a truck, and when asked what was in the truck, he responded, "'[W]hat do you think was in there?'" 5 VRP at 37.

B. PRE-TRIAL PROCEDURE

1. Charges

The State charged Espinoza, Hernandez, and Cruz Camacho each with two counts of possession of a controlled substance with intent to deliver—one count each for the methamphetamine and the heroin seized from apartment 9. The information charged each as accomplices and alleged a major violation of Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), aggravator.[6]

The State amended the information against each defendant, charging the same crimes—two counts of possession of a controlled substance with intent to deliver for the methamphetamine and heroin, respectively—but alleging a school bus route stop enhancement for being within 1,000 feet of school bus route stop. The amended information made no mention of the VUCSA aggravator alleged in the initial information.

2. Motion to Suppress

The defendants moved to suppress the physical evidence obtained with the search warrant, arguing that Barney's conduct constituted an unconstitutional search and that the results of the dog sniff should not have been considered as a basis to support the search warrant. The trial court

[6] RCW 9.94A.535(3)(e).

denied the motion to suppress. The trial court concluded that Officer Betts and Barney's certification, training, and experience made them sufficiently reliable for a judge to rely on in issuing a search warrant, and that the entirety of the facts and circumstances presented in the search warrant affidavit made it reasonable for the signing judge to believe that probable cause existed that drugs or proceeds from drug trafficking would be found in the locations where the searches were requested. The trial court also concluded that Barney's sniffing of the outside of the cars was not an intrusion into an individual's private affairs and, thus, not a search.

3. Motion to Sever

Espinoza moved to sever his case for trial. Espinoza submitted a declaration from Hernandez stating that Hernandez was willing to testify that he "purchased some real estate in Mexico from Mr. Espinoza's family," that "[o]n May 17, 2012, I met with Mr. Espinoza and paid him cash for that property," and that "[i]f Mr. Espinoza's case is severed from mine and proceeds after my own trial, I am willing to testify to these facts on behalf of Mr. Espinoza." CP (Espinoza) at 342. Also attached to Espinoza's motion was a Spanish document allegedly evidencing the sale.

Hernandez and Cruz Camacho objected to any continuances of the July 9 trial date and supported Espinoza's motion to sever if it avoided a continuance from the July 9 trial date. Hernandez added that he would not testify at his trial and consequently could not testify on Espinoza's behalf if the trials were joined. The court decided to not rule on the motion until July 9 because it was more appropriate for the assigned trial judge to make the ruling.

On July 9, the assigned trial judge denied the severance motion. The trial court reasoned that the defense had not exhausted the other means by which evidence of the alibi could be

produced, such as having Espinoza's mother or uncle, who were the family members listed on the alleged bill of sale, testify, and that the alleged real estate transaction did not appear credible. After speaking with Espinoza, Espinoza's counsel asked the trial court to reconsider based on Espinoza saying that his mother would be unable to testify because she was undergoing dialysis and lived in New Mexico and that his uncle had memory and mental health issues and lived in Mexico. The trial court denied the motion to reconsider, stating it did not regard Espinoza's statements as sufficient proof. The trial was continued until September.

Espinoza renewed the motion to sever at trial in September. The trial court again denied the motion.

C. TESTIMONY AT TRIAL

Officer Betts testified that Barney is trained to detect the odor of marijuana, powder cocaine, crack cocaine, heroin, and methamphetamines, but not to differentiate between the odors or the amount of the drug producing the odor. Officer Betts and Barney underwent a training and certification process before being allowed to become a team with the K-9 unit. Officer Betts had more than 200 hours of initial training before being paired with a dog. Officer Betts and Barney were certified as a team in early October 2010, and had worked together exclusively since that time.

To be certified, the team passed a testing process that put the handler and the dog in a controlled environment where neither knew where drugs were hidden, and the team had to find a certain number of the hidden drugs to pass the test. Barney is trained to signal to Officer Betts when he gets as close as he can to the source. Officer Betts is trained to identify Barney's signals.

Barney signals that he has detected the odor of drugs with a change in behavior, including becoming more excited and focused on a specific area, increasing tail wags, a tensing of muscles, breathing harder and louder, and sitting and staring at Officer Betts when he reaches the point closest to the source.

Where the dog signals the presence of drugs and there are no drugs there, that is called a "false response," and Officer Betts and Barney participate in training designed to minimize the number of false responses. 4 VRP at 25. The team trains with only actual drugs, they do not use other substances that are similar or produce similar scents. In the field, when a dog signals but no drugs are found, it is not considered a false response. The reason is that no one knows whether drugs were there at some point, whereas the presence or absence of drugs in a training or testing environment is known.

Detective Catlett testified about his experience as a member of the Drug Enforcement Agency Task Force in Tacoma. He described the hierarchy in the drug trafficking trade. Specifically, he testified that higher-level dealers transport the drugs from California in various ways, including secret compartments in cars. Also, higher-level dealers often store large quantities of drugs, pounds or kilograms, at homes of friends or family. They tend to sell to mid-level dealers, and the mid-level dealers supply drugs to "runner[s]," who supply the street-level drug dealers. 5 VRP at 13. Detective Catlett also testified that having multiple identifications with different names is indicative of a higher-level dealer. Street-level drug dealers will typically carry 25-28 grams of heroin or methamphetamine at a time, and one to two grams would be the typical amount carried for personal use.

Detective Catlett further testified about the street prices associated with heroin and methamphetamine. Typically, when large amounts of cash proceeds from drug sales are discovered, the cash is wrapped in plastic to avoid detection by police K-9 units. Detective Catlett opined that the volume of drugs and the manner in which the drugs were wrapped in this case was indicative of higher-level dealers who had recently transported the drugs and had not yet had the opportunity to transfer it to mid-level dealers.

Andrew Meyers is the transportation director for the Franklin Pierce School District. He testified that he met with Officer Smith at the apartment complex to show him where the Franklin Pierce school bus stop was and to measure the distance from apartment 9 to the Franklin Pierce school bus stop.

Officer Smith testified that apartment 9 was separated from the Franklin Pierce school bus stop by a sidewalk 3 to 4 feet wide, a parking spot 8 to 9 feet wide, a cement walkway approximately 9 steps long, and a driveway approximately 35 feet long. Officer Smith also testified that the distance from apartment 9 to the Franklin Pierce school bus stop identified by Meyers was significantly less than 1,000 feet.

Espinoza called Benito Cervantes, a private investigator, to testify. Cervantes testified that he obtained a legal real estate contract from a Mexican notary. Cervantes verified that the Mexican notary's name and license number existed in other articles and references that Cervantes had located. He further testified that the real estate contract listed Marcelino Mendoza Rodriguez as the seller and Gerardo Rafael Hernandez Sandoval as the buyer, the document appeared to have

been executed on November 13, 2011, and the document stated that the financial obligations of the contract were agreed to be completed within about six months.

D. CONVICTIONS AND SENTENCING

The State and the defendants stipulated to the jury instructions. The jury instructions included a to-convict instruction for each possession of a controlled substance with intent to deliver charge. The jury instructions also included an instruction explaining when an individual is legally accountable for the conduct of another as an accomplice. Also, the trial court gave instructions related to the special verdict forms for the VUCSA aggravator and the school bus route stop sentencing enhancement for each of the two counts.

The jury found each defendant guilty of two counts of possession of a controlled substance with intent to deliver—one count for the methamphetamine and the other count for the heroin. The jury also entered special verdict forms finding a school bus route stop enhancement violation with respect to each count, and that the VUCSA aggravator applied to each count.

At sentencing, Espinoza and Hernandez stipulated to their respective offender scores. Cruz Camacho stipulated to the imposition of an exceptional sentence above the standard range.

The trial court sentenced Espinoza and Cruz Camacho to 96 months in custody for each count, to be served concurrently, and 24 months for the school bus route stop enhancement. It sentenced Hernandez to 156 months for the underlying offenses, to be served concurrently, and 24 months for the school bus route stop enhancement. Without inquiring into the defendants' separate abilities to pay LFOs, the trial court ordered each defendant to pay $5,800 in LFOs. The trial court

also determined that the defendants' property was subject to forfeiture. The trial court then signed and entered orders of indigency for each defendant.

Espinoza, Hernandez, and Cruz Camacho each appeal. We consolidated their appeals for review.

ANALYSIS

A. JAVIER ESPINOZA

Espinoza argues: (1) the trial court denied his right to present a defense by denying his motion to sever his case, (2) the State provided insufficient evidence to establish he had dominion and control over the drugs and insufficient evidence to establish the *corpus delicti*, (3) the search warrant was not supported by probable cause because dog sniffs are unreliable, (4) the dog sniff constituted a warrantless search, (5) his counsel was ineffective in failing to argue that the two convictions constituted the same criminal conduct; and (6) the trial court erred in imposing LFOs without first inquiring into Espinoza's ability to pay.

Espinoza also adopts Hernandez's arguments that (1) the exceptional sentence must be reversed because (a) the VUCSA aggravator was not charged in the amended information, (b) there is insufficient evidence to support applying that aggravator to him; and (c) his counsel was ineffective in failing to make arguments (a) and (b) above; and (2) the trial court did not have authority to order forfeiture and seize Espinoza's property.

In a separate personal restraint petition, Espinoza argues: (1) the sentencing court erred in failing to consider that his convictions constituted the same criminal conduct, (2) the sentencing court erred in counting his out of state convictions without conducting a comparability test, (3) his

out of state conviction washed out, (4) there was insufficient evidence to impose a school zone enhancement, and (5) the trial court abused its discretion in imposing an exceptional sentence. We affirm Espinoza's convictions, reverse his sentence, and remand for resentencing.

1. Severance Motion

Espinoza argues that the trial court denied his right to present a defense by denying his motion to sever. Espinoza claims that his defense hinged on the jury believing that he was merely meeting with Hernandez to complete a real estate purchase, and that by refusing to sever his trial from Hernandez's, the trial court prevented Hernandez from testifying on behalf of Espinoza, thereby denying Espinoza the right to present his defense. We hold that the trial court did not abuse its discretion in denying Espinoza's motions to sever.

While Espinoza frames his argument as a constitutional violation, he actually challenges the trial court's order denying this motion to sever his trial. We review a trial court's decision on a severance motion for manifest abuse of discretion. *State v. Sublett*, 176 Wn.2d 58, 68-69, 292 P.3d 715 (2012). Separate trials are generally disfavored in Washington. *State v. Dent*, 123 Wn.2d 467, 484, 869 P.2d 392 (1994).

Under CrR 4.4(c), a trial court should sever trials when severance "is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant." CrR 4.4(c)(2)(i). "The defendant has the burden of demonstrating that a joint trial was so manifestly prejudicial as to outweigh the concern for judicial economy." *State v. Canedo–Astorga*, 79 Wn. App. 518, 527, 903 P.2d 500 (1995), *review denied*, 128 Wn.2d 1025 (1996). The defendant must demonstrate a specific prejudice to meet his burden. *Id.* Defendants may demonstrate specific prejudice through

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

Id. at 528 (quoting *United States v. Oglesby*, 764 F.2d 1273, 1276 (7th Cir.1985)).

Here, none of the instances enumerated in *Canedo–Astorga* exist. Espinoza's defense was not antagonistic to, nor did it conflict with, the defenses proffered by Hernandez and Cruz Camacho. The evidence presented was extensive, but not complex, and it was not of a character that would create difficulties for a jury in determining what evidence related to which defendant. Neither of Espinoza's co-defendants made statements that would inculpate Espinoza. And although the weight of the evidence against each defendant might not have been identical, there was not a "'gross disparity in the weight of the evidence against the defendants.'" *Id.* (quoting *Oglesby*, 764 F.2d at 1276). Accordingly, we hold that the trial court did not abuse its discretion in denying a motion to sever.

Espinoza alternatively argues that the law in Washington should be broadened. Specifically, Espinoza argues that severance to permit a co-defendant's testimony should be required under CrR 4.4 whenever the evidence would be exculpatory and it is demonstrated that the co-defendant will actually testify at a separate trial because the plain language of CrR 4.4(c)(2)(i) "focuses on fairness." Br. of Appellant (Espinoza) at 20. Espinoza acknowledges that the rule he advocates for is not the law in Washington. We decline Espinoza's invitation to broaden the severance rule.

As a second alternative, Espinoza argues we should adopt the analysis set forth in *United States v. Cobb*, 185 F.3d 1193, 1197 (11th Cir. 1999). *Cobb* provides a two-step and eight-prong analysis for motions to sever where a defendant argues for severance on the ground that it will permit the exculpatory testimony of a co-defendant. *Id.* But *Cobb* is factually distinguishable.

Cobb's co-defendant was the only person, other than Cobb himself, who could directly rebut the government's evidence against Cobb. *Id.* at 1198. Under the particular facts of the case, the court held that Cobb suffered significant prejudice to his ability to present his defense. *Id.* Importantly, the court noted that a co-defendant's offer to testify conditioned on having his trial held first does not satisfy the requirement that he "would indeed have testified at a separate trial." *Id.* Because Cobb's co-defendant did not condition his testimony on his own case being tried first, and the other factors weighed in favor of, "or at least did not weigh against," severance, the *Cobb* court held that the Florida district court abused its discretion in refusing to sever the trial. *Id.* at 1199.

Here, even if we were to adopt the federal law applied in *Cobb*, Espinoza's argument would still fail. Hernandez explicitly conditioned his testimony on his own case being tried before Espinoza's. Hernandez's declaration stated, "If Mr. Espinoza's case is severed from mine *and proceeds after my own trial*, I am willing to testify." CP (Espinoza) at 342 (emphasis added). Therefore, even if we were to adopt the analysis set forth in *Cobb*, Espinoza's claim would fail.

Espinoza fails to demonstrate specific prejudice and his alternative arguments fail. Therefore, we hold that the trial court did not abuse its discretion in denying Espinoza's motion to sever.

2. Sufficiency of the Evidence

a. Dominion and control

Espinoza argues that the State presented insufficient evidence to establish that he had constructive possession of the drugs. We hold that, when viewed in the light most favorable to the State, a rational fact finder could conclude that Espinoza had dominion and control over the heroin and methamphetamine.

When evaluating the sufficiency of evidence for a conviction, the test is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). In challenging the sufficiency of the evidence, the defendant necessarily admits the truth of the State's evidence. *Id.* at 106. All reasonable inferences drawn from the evidence is viewed in a light most favorable to the State and most strongly against the defendant. *Id.* We also defer to the trier of fact's resolution of conflicting testimony and evaluation of the persuasiveness of the evidence. *Id.*

Constructive possession is established where the defendant has "dominion and control" over the drugs. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). "Dominion and control means that the object may be reduced to actual possession immediately." *Id.*

The trial court instructed the jury on constructive possession as follows:

> Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.
>
> In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors

> that you may consider, among others, include whether the defendant had the ability to take actual possession of the substance, whether the defendant had the capacity to exclude others from possession of the substance, and whether the defendant had dominion and control over the premises where the substance was located. No single one of these factors necessarily controls your decision.

CP (Espinoza) at 470 (Jury Instruction 16). Espinoza did not object to this instruction, and therefore, it is the law of the case. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998); *State v Johnson*, No. 93453-3, slip op. at 25 (Wash. Jul. 13, 2017), http://www.courts.wa.gov/opinions/pdf/934533.pdf (affirming the "law of the case" doctrine as described in *Hickman*, 135 Wn.2d at 102, remains good law in Washington). Looking at the relevant circumstances in the light most favorable to the State, the evidence presented at trial was sufficient for a rational trier of fact to find that Espinoza exercised dominion and control over the heroin and methamphetamine. Over 8,500 grams of heroin and over 2,300 grams of methamphetamine were found throughout apartment 9. Espinoza admitted to being in the apartment. The TPD officers observed the Nissan with California license plates in the parking lot of the apartment complex for several hours before Espinoza got in and was subsequently stopped. During their surveillance, the officers observed a group of three to five Hispanic individuals carrying packages they believed were drugs or money to and from apartment 9 and the Nissan with California license plates. After that, Barney gave a sit response to the Nissan with California license plates, indicating he sensed the presence of drugs in the vehicle. A while later, Espinoza left apartment 9 and entered the Nissan with California plates. The officers stopped the vehicle. After the officers stopped the vehicle, Barney gave a sit response to the $42,000 wrapped in

cellophane found during a search of the vehicle. Also, police discovered Espinoza's car rental agreement for the Nissan with the California license plates.

Given this evidence, a rational trier of fact could find that Espinoza was at apartment 9 for at least the few hours that TPD observed his rented Nissan with California license plates in the parking lot; during that time, his co-defendants helped move drugs or money to and from apartment 9 and the Nissan with California license plates; Espinoza was stopped while driving the Nissan with California license plates and a large amount of money was found in the vehicle; and Barney sensed the presence of drugs in the vehicle. Thus, a rational trier of fact could find beyond a reasonable doubt that Espinoza had dominion and control over the drugs found in apartment 9. We hold that sufficient evidence supports the jury's verdict that Espinoza exerted dominion and control over the heroin and methamphetamine that was found in apartment 9.

b. *Corpus Delicti*

Espinoza argues that aside from his admission to the police that he had been in apartment 9, the State failed to present any evidence that he had been in the apartment; therefore, the State had failed to prove the *corpus delicti* of his possession charges. We disagree.[7]

Espinoza argues that without his admission to the police that he had been in apartment 9, the State could not sustain a conviction for possession of a controlled substance because there was no independent evidence that he possessed the drugs. However, proof of identity of the person

[7] Espinoza argues in the alternative that if his *corpus delicti* argument was not preserved for appeal, then his counsel provided ineffective assistance for failing to preserve the argument. Because we hold that Espinoza's *corpus delicti* argument fails, his argument for ineffective assistance of counsel also fails.

who committed the crime of possession of a controlled substance is not an element of the *corpus delicti*. *State v. Solomon*, 73 Wn. App. 724, 728, 870 P.2d 1019, *review denied*, 124 Wn.2d 1028 (1994). Instead, the State's burden in satisfying the *corpus delicti* in this type of case is only to show that *someone* possessed the controlled substance. *Id.* As the *Solomon* court stated:

> A defendant may satisfy a jury at trial that the drugs did not belong to him, but that issue is separate from the initial question of whether the body of the crime has been established. Thus, contrary to Solomon's contention, the State did not need to present independent proof that Solomon, in particular, possessed the cocaine.

Id. at 728–29 (footnote omitted).

The State in this case satisfied the *corpus delicti* requirement by presenting evidence that large amounts of heroin and methamphetamine were discovered in apartment 9. The State also presented evidence that four or five individuals of Hispanic ethnicity had gone back and forth between the vehicles and apartment 9, then they left apartment 9 and got into separate vehicles, the vehicles were stopped by police, and Espinoza was in one of the stopped vehicles. From that evidence, it is logical to deduce that someone who was in apartment 9 possessed the drugs. Therefore, we hold that Espinoza's *corpus delicti* argument fails.

3. Probable Cause to Issue Warrant

Espinoza argues that there was insufficient probable cause to support the issuance of the search warrant because Barney's alerts at the cars did not provide the "reasonably trustworthy" information necessary to establish the probable cause. Br. of Appellant (Espinoza) at 29. We disagree.

a. Standard of review

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, a search warrant must be based on probable cause. "Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). There must be a "nexus between criminal activity and the item to be seized and between that item and the place to be searched." *State v. Neth*, 165 Wn.2d 177, 183, 196 P.3d 658 (2008). "Probable cause requires more than suspicion or conjecture, but it does not require certainty." *State v. Chenoweth*, 160 Wn.2d 454, 476, 158 P.3d 595 (2007).

We generally review the issuance of a search warrant for an abuse of discretion, giving great deference to the issuing judge or magistrate. *Neth*, 165 Wn.2d at 182. Although great deference is given to the judge or magistrate, we review the probable cause determination de novo. *Id.* We consider only the information within the four corners of the supporting affidavit. *Id.* All doubts are resolved in favor of the warrant's validity. *Chenoweth*, 160 Wn.2d at 477.

b. Probable cause

Espinoza argues that dog sniffs are not sufficiently trustworthy to constitute probable cause sufficient to support a search warrant. We hold that the affidavit for search warrant set forth probable cause to search Espinoza's rental car.

"Generally, an 'alert' by a trained drug dog is sufficient to establish probable cause for the presence of a controlled substance." *State v. Jackson*, 82 Wn. App. 594, 606, 918 P.2d 945 (1996),

review denied, 131 Wn.2d 1006 (1997). In *State v. Flores–Moreno*, 72 Wn. App. 733, 741, 866 P.2d 648, *review denied*, 124 Wn.2d 1009 (1994), we determined that an affidavit similar to the one in this case was sufficient to establish probable cause. In *Flores-Moreno*, the affidavit stated that the drug dog had received 525 hours of training, had been certified by the Washington State Police Canine Association for narcotics detection, and had participated in 97 searches where narcotics were found. *Id.*

Here, the affidavit stated that Barney alerted to Espinoza's rental car when it was in the parking lot outside of apartment 9. The affidavit also stated that Barney was trained to detect the odor of marijuana, crack cocaine, powder cocaine, heroin, and methamphetamine. The affidavit further stated that Officer Betts and Barney were certified by the Washington State Criminal Justice Training Center in October 2010; were certified by the Washington Police Canine Association in December 2010; had recorded over 20 "'Finds'" that year that included finds of all five types of drugs that they were trained to find; and trained weekly with the Narcotics Detention Team. CP (Espinoza) at 76. The affidavit explained that the weekly testing includes training with vehicles, boats, trailers, parcels, storage areas, motels, and residences; with varying quantities of drugs; using distracting and masking odors; using "controlled negative (blank) testing"; and using "[e]xtinction training." CP (Espinoza) at 76.

Pursuant to *Jackson*, 82 Wn. App. at 606, and *Flores-Moreno*, 72 Wn. App. at 741, we hold that Barney's alert and the information provided about his training and experience with Officer Betts was sufficient to establish probable cause. Therefore, the issuing judge did not abuse his discretion in signing the search warrant.

Furthermore, the remainder of the affidavit, even without the dog sniff information, independently supports probable cause. The affidavit for the search warrant stated that a reliable informant identified apartment 9 in the apartment complex as a "narcotics stash house," where large amounts of heroin and methamphetamine had been seen, and where suspected drug traffickers Cruz Camacho and Hernandez were known to frequent. CP (Espinoza) at 72. The affidavit stated that the Nissan with California license plates, the white pickup truck, and the Nissan with Oregon license plates were parked in front of apartment 9 from 7:30 PM until 10:10 PM, when all three vehicles left at the same time. Before the three vehicles left, four to five Hispanic individuals moved suspected drugs or money into the Nissan with California license plates. Finally, TPD saw a panel on the tailgate of the white pickup truck that they believed was a "trap" compartment, and TPD saw a grocery bag full of money in one of the Nissans. CP (Espinoza) at 73. Based on the entirety of the information contained in the affidavit for the search warrant, we hold that the issuing judge did not abuse his discretion in signing the search warrant for Espinoza's rental car.

4. Dog Sniff as a Warrantless Search

Espinoza argues that Barney's sniff of his rental car in the parking lot outside of the apartment complex constituted a warrantless search. We hold Barney's sniff of Espinoza's rental car in the parking lot was not unlawful.

Article I, section 7 of the Washington State Constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision

serves to protect against warrantless searches. Article, I, section 7 is not implicated if there is no search. *State v. Hartzell*, 156 Wn. App. 918, 928-29, 237 P.3d 928 (2010).

"To determine if there was a search, the court asks whether the State unreasonably intruded into a person's 'private affairs. '" *Id.* at 929 (quoting *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994)). If there was an unreasonable intrusion, then either a warrant or a warrant exception is required to make the search valid. *Id.* In general, there is no search when a law enforcement officer is able to detect something "using one or more of his senses from a nonintrusive vantage point." *Id.*

Whether a dog sniff is a search under article I, section 7 depends on the circumstances of the sniff itself. *State v. Boyce*, 44 Wn. App. 724, 729, 723 P.2d 28 (1986); *State v. Wolohan*, 23 Wn. App. 813, 820, 598 P.2d 421 (1979), *review denied*, 93 Wn.2d 1008 (1980); *State v. Stanphill*, 53 Wn. App. 623, 630, 769 P.2d 861 (1989); *Hartzell*, 156 Wn. App. at 929. As such, each case requires "an inquiry into the 'nature of the intrusion into the defendant's private affairs that is occasioned by the canine sniff.'" *Stanphill*, 53 Wn. App. at 630 (quoting *Boyce*, 44 Wn. App. at 729-30).

Generally, a dog sniff of an object—in contrast to a dog sniff of a person or the effects on that person—is not an unreasonable intrusion into a person's private affairs. *Boyce*, 44 Wn. App. at 730, 730 n.4. Similarly, a dog sniff of a place where the defendant does not have a reasonable expectation of privacy does not constitute a search. *Id.* at 729.

In *Boyce*, the dog sniffed a bank safe deposit box. *Id.* at 730. The dog handler had permission to be in the area, the defendant could not control who was there, and there was no

seizure of the safety deposit box. *Id.* The court found it was not a search. *Id.* Similarly, in *Wolohan*, the court held that a dog sniff of a sealed package in a baggage area was not a search because the defendant did not have a reasonable expectation of privacy in the odor emanating from the package and that the dog sniff took place a semi-public area. 23 Wn. App. at 820. And in *Stanphill*, the court concluded a dog sniff was not a search when the dog sniffed the outside of a package at a post office that officers had reasonable suspicion to believe contained drugs. 53 Wn. App. at 630. Finally, in *Hartzell*, the court concluded that a dog sniff of air through the open window of a parked car did not constitute a search because there is no reasonable expectation of privacy for the air coming from the open window and the dog was at a lawful vantage point outside the vehicle. 156 Wn. App. at 929-30. *Cf. State v. Dearman*, 92 Wn. App. 630, 637, 962 P.2d 850 (1998) (holding that under article I, section 7, a dog sniff of the front door of a private dwelling was so intrusive that it was an illegal search absent a warrant), *review denied*, 137 Wn.2d 1032 (1999).

Here, Barney sniffed the outside of Espinoza's rental car in the parking lot of the apartment complex. Thus, unlike in *Dearman*, the dog sniff occurred in a parking lot, not at the door into a private dwelling. *Id.* And just as in *Hartzell* and *Wolohan*, Espinoza does not have a reasonable expectation of privacy in the odors that emanate from the car when Barney sniffed from a lawful vantage point in the parking lot. 156 Wn. App. at 929-30; 23 Wn. App. at 820. Barney's sniff was conducted from a lawful vantage point and was only minimally intrusive. *Hartzell*, 156 Wn. App. at 929-30. Therefore, we hold that Barney's sniff of Espinoza's rental car in the parking lot was not a search.

5. Ineffective Assistance of Counsel: Same Criminal Conduct

Espinoza argues that his two convictions for possession of a controlled substance with intent to distribute should have been considered the same criminal conduct for sentencing purposes, and that he received ineffective assistance of counsel because his attorney did not bring that issue to the sentencing court's attention. The State concedes that the two convictions should have been considered the same criminal conduct and that remand and resentencing is necessary. We accept the State's concession, reverse Espinoza's sentence, and remand for resentencing.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution grants criminal defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685–86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). To show prejudice, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 337.

When a defendant is convicted of multiple crimes, each conviction is treated like a prior conviction for purposes of calculating the defendant's offender score unless the crimes constitute the same criminal conduct. RCW 9.94A.589(l)(a). A sentencing court must find that two or more

crimes constitute the same criminal conduct if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.* "'If any one element is missing, multiple offenses cannot be said to encompass the same criminal conduct, and they must be counted separately in calculating the offender score.'" *State v. Garza–Villarreal*, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993) (quoting *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992)).

"[W]hen a person possesses two drugs with the intent to deliver, the defendant still has a single mental state." *State v. Vike*, 125 Wn.2d 407, 412, 885 P.2d 824 (1994). In *Garza–Villarreal*, 123 Wn.2d at 44, the State charged the defendant with possession of two substances—heroin and cocaine—with intent to deliver. The defendant had not yet delivered either drug, but because the defendant intended to deliver both drugs in the future, he had the same objective criminal intent for both. *Id. at* 49.

Similarly here, Espinoza was charged with possession of two substances—methamphetamine and heroin—with intent to deliver. Espinoza had not yet delivered either drug, but under *Garza–Villarreal*, 123 Wn.2d at 49, his possession of those two drugs with intent to deliver constituted a single mental state. *See also Vike*, 125 Wn.2d at 412 (holding the same).

Where an offender score is miscalculated, remand is necessary unless the record makes clear that the court would have imposed the same sentence. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). Here, as Espinoza argues, and the State concedes, it is not clear from the record that the sentencing court would have imposed the same sentence had it applied the correct offender score. Thus, we hold that Espinoza has demonstrated that his attorney provided ineffective assistance. Accordingly, we reverse Espinoza's sentence and remand for resentencing.

6. Inquiry into Ability to Pay LFOs

Espinoza argues that the sentencing court erred in ordering him to pay $5,800 in LFOs without first inquiring into his ability to pay.[8] Because we remand Espinoza's case for resentencing, we do not address this issue. On remand, the sentencing court shall inquire into Espinoza's current and future ability to pay before imposing any discretionary LFOs. *See State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015).

7. Major Violation of the Uniform Controlled Substances Act (VUCSA) Aggravator

Espinoza adopts by reference Hernandez's arguments that the exceptional sentence must be reversed. Order Granting Espinoza's Mot. to Adopt (Nov. 30, 2015), *see* court spindle. Specifically, he argues that (a) the amended information did not charge the VUCSA aggravator, (b) insufficient evidence exists to support the VUCSA aggravator, and (c) defense counsel provided ineffective assistance by failing to argue that the VUCSA aggravator did not apply. We address this issue with respect to all three defendants because the issue may arise at resentencing.

a. The VUCSA aggravator was not charged in the amended information

The defendants argue that they cannot be sentenced to exceptional sentences based on the VUCSA aggravator because that aggravator was not charged in the amended information. We disagree.

[8] The trial court ordered Espinoza and Cruz Camacho to pay the following LFOs: $500 for the Crime Victim Assessment, $100 for the DNA database fee, $2,500 for court-appointed attorney and defense costs, $200 for the criminal filing fee, and a $2,500 fine. The trial court ordered Hernandez to pay the following LFOs: $500 for the Crime Victim Assessment, $100 for the DNA database fee, $200 for the criminal filing fee, and a $5,000 fine.

In *State v. Siers*, 174 Wn.2d 269, 276-77, 274 P.3d 358 (2012), our Supreme Court held that a defendant's rights under article I, section 22 of the Washington Constitution, the Sixth Amendment to the United States Constitution, and due process are not violated where the charging information does not allege an aggravating circumstance, "so long as [the] defendant receives constitutionally adequate notice of the essential elements of [the] charge." To receive constitutionally adequate notice of an aggravating circumstance, the court held that the defendant need only "receive notice prior to the proceeding in which the State seeks to prove those circumstances to a jury." *Id.* at 277. Because the State had notified Siers prior to trial of its intent to rely on the same aggravating circumstance that the trial court actually submitted to the jury, the *Siers* court held that an aggravator did not need to be included in the charging information for it to be applied to a defendant. *Id.* at 272-73, 276-77.

Thus, we reject the defendants' argument that the VUCSA aggravator must be dismissed simply because the State did not include it in the amended information. However, the question remains whether the defendants had sufficient notice that the State would seek an exceptional sentence based on the VUCSA aggravator when the State failed to include that aggravator in the amended information.

Here, the record shows that the defendants did have notice that the State would be seeking an exceptional sentence based on the VUCSA aggravator before the jury instructions were given. First, after the defendants' amended information was presented and filed, but before trial, the State told the trial court and defendants during arguments on motions in limine that

> in the jury instructions that I proposed in regard to the aggravator, one of the things that I have to prove is that for this to be a major violation of the Controlled

> Substances Act, I have to prove that this case is more onerous than the typical offense, so I will be drawing some distinctions between a typical drug offense and this offense . . . I did provide copies of the instructions, but I'm not sure if Defense Counsel has read that or had any experience with that particular aggravator before.

2 VRP at 22-23. After a response to that point from Espinoza's defense counsel, the State again directed everyone's attention to its proposed instruction on the VUCSA aggravator, stating:

> [T]urning again to my Proposed Instruction No. 23, as a major violation of one of the factors the jury can consider is whether the offense involved a high degree of sophistication or planning, occurred over a lengthy period of time or involved a large geographic area of distribution. . . .
>
> . . . .
>
> . . . There are five different factors that the instruction points out for the jury. I intend to focus on three of them, one of which would include involving a broad geographic area of distribution, specifically because in this case, Mr. Espinoza drove a car, a rented car, from California.

2 VRP at 24-25. The trial court ruled, in part, that the State could argue "that there was a car rented in California and it was driven up here, if you can prove it, by Mr. Espinoza, and that will get you your geographic area." 2 VRP at 25.

Second, the defendants received the State's proposed instructions before trial, and, on the day before the State rested, each defendant told the trial court that it would not be offering any additional instructions. And none of the defendants took exception to the jury instructions, which included instructions on the VUCSA aggravator.

The defendants had notice and knew of the State's intent to prove the application of the VUCSA aggravator. Accordingly, their argument regarding the VUCSA aggravator not being included in the amended information fails.

b. Application of the VUCSA aggravator to accomplices

The defendants argue that sufficient evidence does not support the application of the VUCSA aggravator to their convictions because they were convicted as accomplices. We disagree.

RCW 9.94A.535(3), which includes the VUCSA aggravator at issue here,[9] does not contain the "express triggering language" that extends its application to convictions based on accomplice

[9] RCW 9.94A.535(3)(e) defines the VUCSA aggravator at issue here as:

> The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:
>
> (i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;
>
> (ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;
>
> (iii) The current offense involved the manufacture of controlled substances for use by other parties;
>
> (iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;
>
> (v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or
>
> (vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

liability. *State v. Hayes*, 182 Wn.2d 556, 563, 342 P.3d 1144 (2015). Therefore, the VUCSA aggravator does not automatically apply to convictions based on accomplice liability.

However, a court may impose an exceptional sentence for an aggravating factor based on the defendant's own conduct. *Id.* at 564. Therefore, if the accomplice's own conduct or knowledge of the principle's conduct provides the basis for the aggravating factor, the VUCSA aggravating factor can be applied to an accomplice. *Id.* at 566.

In *State v. Weller*, 185 Wn. App. 913, 917, 344 P.3d 695 (2015), *review denied*, 183 Wn.2d 1010 (2015), the Wellers were convicted of multiple offenses. For those offenses, a jury answered "yes" to the question, "'Did the defendant's conduct during the commission of the crime manifest deliberate cruelty to the victim?'" *Id.* at 921 (quoting the record). The *Weller* court concluded the exceptional sentence was justified because the jury expressly found that each of the Wellers's own conduct, and not the Wellers's joint conduct, supported the exceptional sentence. *Id.* at 928.

Consistent with *Weller*, the jury here specifically found the VUCSA aggravator applied to each defendant individually and independently. The trial court instructed the jury that "[a] major trafficking violation of the Uniform Controlled Substances Act is one which is more onerous than the typical offense." CP (Hernandez) at 187; CP (Espinoza) at 478; CP (Cruz Camacho) at 90. The trial court also instructed the jury that if "the circumstances of the offense revealed that *the defendant* occupied a high position in the drug distribution hierarchy," then the offense may be a major trafficking violation. CP (Hernandez) at 187 (emphasis added); CP (Espinoza) at 478 (emphasis added); CP (Cruz Camacho) at 90 (emphasis added).

And the record here supports the jury's application of the VUCSA aggravator to each defendant. Detective Officer Catlett testified that higher-level drug dealers often transport drugs in multiple pounds or kilogram quantities from California and store them in homes rented by friends or family before selling the drugs to "runner[s]," who supply the street-level dealers. 5 VRP at 13. He also testified that higher-level drug dealers often have multiple identifications with different names and that higher-level drug dealers often transport drugs in secret compartments in vehicles. With respect to each of the three defendants, Detective Catlett testified that the volume of drugs found in apartment 9 and manner in which the drugs and money were packaged, indicated that the higher-level dealers still possessed the drugs and money at the time the evidence was seized.

Also, Hernandez admitted to Detective Catlett that he was an "ounce dealer," and was known to Officer Catlett by several names based on previous contacts. 5 VRP at 28. Espinoza told Agent Jewell he was from California visiting friends in apartment 9 and came to Tacoma in a truck. And Cruz Camacho and Hernandez were seen by police going between apartment 9 and the Nissan with California license plates, moving packages the police believed to be drugs or money.

In addition, each defendant had an individualized special verdict form in which each defendant's name was the only name included in the caption. Under the caption on each defendant's individualized special verdict form, the text identified that individual defendant in the singular. *See, e.g.*, CP (Espinoza) at 498 (stating on the special verdict form captioned for Espinoza independently, "having found the *defendant* guilty of unlawful possession of a controlled substance with the intent to deliver") (emphasis added); CP (Hernandez) at 206 (stating the same

on the special verdict form captioned for Hernandez independently); CP (Cruz Camacho) at 109 (stating the same on the special verdict form caption for Cruz Camacho independently). Each individualized special verdict form, had "yes" handwritten as the answer to the special verdict question and was signed and dated by the presiding juror. CP (Espinoza) at 498; CP (Hernandez) at 206; CP (Cruz Camacho) at 109.

Thus, the individual defendant's own conduct provided the basis for jury finding the VUCSA aggravator applied to each defendant. Therefore, we hold that the VUCSA aggravator applied to each defendant.

c. Ineffective assistance of counsel

Espinoza, Hernandez, and Cruz Camacho argue that their attorneys' respective failures to object to the application of the VUCSA aggravator at sentencing constituted ineffective assistance. We disagree.

As discussed in Section A.5., *supra*, to establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. *McFarland*, 127 Wn.2d at 334-35. Here, as explained in Section A.7.b., *supra*, the VUCSA aggravators applied to each defendant based on their own individual conduct. Therefore, we hold that each defendant's respective trial counsel was not deficient for failing to argue the inapplicability of the VUCSA aggravators to the defendants as accomplices.

8. Authority to Order the Forfeiture of Property

Espinoza adopts by reference Hernandez's argument that the sentencing court erred in ordering the forfeiture of property. Order Granting Espinoza's Mot. to Adopt (Nov. 30, 2015), *see*

court spindle. Specifically, he argues that the sentencing court did not cite to any statutory authority when it ordered the forfeiture, nor do any of the forfeiture statutes authorizing the action the sentencing court took. We hold that the sentencing court erred in ordering the forfeiture of Espinoza's property.

Sentencing courts do no not have inherent power to order property forfeitures in connection with a criminal conviction. *State v. Alaway*, 64 Wn. App. 796, 801, 828 P.2d 591, *review denied*, 119 Wn.2d 1016 (1992). The authority to order property forfeitures in connection with a criminal conviction is purely statutory. *State v. Roberts*, 185 Wn. App. 94, 96, 339 P.3d 995 (2014). "We review de novo whether the trial court had statutory authority to impose a sentencing condition." *Id.*

In *Roberts*, we considered an appeal from a sentencing court's order of forfeiture where the sentencing court ordered forfeiture of "'any items seized by law enforcement.'" *Id.* (quoting the record). The court reversed the forfeiture provision in the defendant's judgment and sentence because the State failed to provide statutory authority for the forfeiture and the sentencing court lacked statutory authority to order the forfeiture. *Id.* at 97. The court held that State has the burden to prove that the sentencing court had statutory authority to include a forfeiture provision in the defendant's judgment and sentence. *Id.* Therefore, it is the State's burden to produce a record that factually supports its claim.

Here, the State did not cite any authority for the sentencing court to order the forfeiture. And the sentencing court failed to cite any statutory authority for ordering the forfeiture.

Therefore, we strike the forfeiture order and remand to the sentencing court to determine whether there is statutory authority to order forfeiture.

9. Personal Restraint Petition

In a separate personal restraint petition, Espinoza argues: (1) the sentencing court erred in failing to consider his convictions as part of the same criminal conduct, (2) the sentencing court erred in counting his out of state conviction without conducting a comparability test, (3) his out of state conviction washed out, (4) there was insufficient evidence to impose a school zone enhancement, and (5) the trial court abused its discretion in imposing an exceptional sentence. We disagree.[10]

a. Legal Principles

"When considering a timely personal restraint petition, courts may grant relief to a petitioner only if the petitioner is under an 'unlawful restraint,' as defined by RAP 16.4(c)." *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 16, 296 P.3d 872 (2013) (quoting RAP 16.4(a)). The collateral relief afforded under a personal restraint petition is limited and requires the petitioner to show prejudice by the alleged error of the trial court. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 819, 650 P.2d 1103 (1982). There is no presumption of prejudice on collateral review. *Id.* at 823. The petition does not serve as a substitute for appeal; nor can the petition renew an issue that was raised and rejected on appeal, unless the interests of justice so require. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 671, 101 P.3d 1 (2004).

[10] Because we reverse Espinoza's sentence and remand for resentencing, we do not address his issues relating to sentencing.

The petitioner must make a prima facie showing of either a constitutional error that, more likely than not, constitutes actual and substantial prejudice, or a nonconstitutional error that inherently constitutes a complete miscarriage of justice. *In re Pers. Restraint of Stockwell*, 161 Wn. App. 329, 334, 254 P.3d 899 (2011), *aff'd*, 179 Wn.2d 588, 316 P.3d 1007 (2014); *Hagler*, 97 Wn.2d at 826; *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 810, 812, 792 P.2d 506 (1990). Without either such showing, this court must dismiss the petition. *Cook*, 114 Wn.2d at 810, 812; *see also In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). However, when the petitioner has not had a previous opportunity to obtain judicial review, such as on claim for ineffective assistance of appellate counsel, this heightened standard does not apply. *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 132, 267 P.3d 324 (2011).

The petitioner's allegations of prejudice must present specific evidentiary support. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992). Such support may come in a variety of evidentiary forms, but it must be competent and admissible and establish a factual basis for the allegations. *Id.* Bald assertions and conclusory allegations are not sufficient. *Id.* If a petitioner makes a prima facie showing of actual and substantial prejudice, but the merits of his assertions cannot be determined on the record before us, we will remand for a hearing pursuant to RAP 16.11(a) and RAP 16.12. *Hews*, 99 Wn.2d at 88.

b. Sufficient evidence to impose a school bus route enhancement

Espinoza contends there was insufficient evidence presented for the jury to find he was subject to the school bus route enhancement. We disagree.

We review a jury's verdict on a sentencing enhancement for substantial evidence just as we do when evaluating the sufficiency of the evidence supporting the necessary elements of a crime. *State v. Yarbrough*, 151 Wn. App. 66, 96, 210 P.3d 1029 (2009). Accordingly, on review, we consider whether, when viewing the evidence in the light most favorable to the State, a rational trier of fact could find the elements of the enhancement beyond a reasonable doubt. *Id.*

The jury found by special verdict that Espinoza had "possess[ed] a controlled substance within one thousand feet of a school bus route stop designated by a school district with intent to deliver the controlled substance at any location," in violation of former RCW 69.50.435(1). CP (Espinoza) at 496 (Count I), 497 (Count II). Former RCW 69.50.435(1) stated,

> Any person who violates RCW 69.50.401 . . . :
>
> . . .
>
> (c) Within one thousand feet of a school bus route stop designated by the school district
>
> . . .
>
> (j)(i) . . . may be punished . . . by imprisonment of up to twice the imprisonment otherwise authorized by this chapter, but not including twice the imprisonment authorized by RCW 69.50.406.

LAWS OF 2003, ch. 53, § 346.

The first element of the enhancement requires that a person violate RCW 69.50.401. Former RCW 69.50.435(1). This element is satisfied here as there was sufficient evidence presented at trial to convict Espinoza of possession of a controlled substance with intent to distribute in violation of RCW 69.50.401. Section A.2, *supra.*

The second element of the enhancement requires that the violation of RCW 69.50.401 occur within one thousand feet of a school bus route stop designated by a school bus district. Former RCW 69.50.435(1). At trial, the Franklin Pierce School District transportation director testified that there was a school bus stop for the school district located at 9621 10th Avenue East at the time of the arrest. He testified that the school bus stop is directly in front of the apartment complex and that he accompanied Officer Smith to the location of the school bus stop when Officer Smith measured the distance. Officer Smith testified that he met with the school district transportation director, who directed him to the location of the school bus stop in front of the apartment complex. Officer Smith also testified that between the door to apartment 9 in the apartment complex and the school bus stop identified by the school district transportation director, there was a breezeway to the apartment door approximately 9 walking steps long, a lane of travel in the parking lot approximately 35 feet wide, a parking stall approximately 8-9 feet long, and then a curb approximately 3-4 feet wide. The distance was "significantly" less than 1,000 feet from the door of the apartment to the school bus stop. 7 VRP at 22.

Based on the foregoing testimony, we hold there was sufficient evidence presented for a rational trier of fact to find that the elements of the school bus route stop enhancement were established beyond a reasonable doubt. Accordingly, we hold Espinoza's challenge to the sufficiency of the evidence for the school bus route stop enhancement fails. Thus, we deny his petition.

B. GERARDO HERNANDEZ

Hernandez argues that (1) his exceptional sentence must be reversed because (a) the VUCSA aggravator was not charged in the amended information, (b) there was insufficient evidence to support applying that aggravator to Hernandez, and (c) his counsel was deficient in failing to make the two arguments above, (2) his counsel was deficient in failing to argue that Hernandez's convictions consisted of the same criminal conduct, (3) the State provided insufficient evidence to establish he had dominion and control over the drugs, (4) there was no probable cause to issue a search warrant because dog sniffs are unreliable,[11] (5) the dog sniff was a warrantless search,[12] (6) the trial court did not have authority to order forfeiture and seize Hernandez's property, and (7) the sentencing court erred in assigning LFOs without first inquiring into Hernandez's ability to pay.

We hold that Hernandez received ineffective assistance of counsel because his two convictions constituted the same criminal conduct, the sentencing court erred in ordering the forfeiture of Hernandez's property, the sentencing court erred in failing to consider Hernandez's ability to pay discretionary LFOs, and the remainder of Hernandez's claims fail. Accordingly, we affirm Hernandez's convictions, reverse his sentence, and remand for resentencing.

[11] For this assignment of error, Hernandez adopts the related arguments made by Espinoza and Cruz-Camacho.

[12] For this assignment of error, Hernandez adopts the related arguments made by Espinoza and Cruz-Camacho.

1. VUCSA Aggravator

Hernandez argues that his exceptional sentence must be reversed because (a) the VUCSA aggravator was not charged in the amended information, (b) insufficient evidence was presented to find that the VUCSA aggravator applied, and (c) defense counsel was ineffective in failing to argue that the VUCSA aggravator did not apply. Espinoza adopted these arguments, and this opinion addressed the merits of these arguments in Section A.7., *supra*.

Based on the analysis in Section A.7.a., *supra*, we hold that Hernandez received constitutionally sufficient notice that the State would try to prove the application of the VUCSA aggravator. Also, based on the analysis in Section A.7.b., *supra*, we hold that the jury expressly found that Hernandez's own conduct supported the application of the VUCSA aggravators. And, based on the analysis in Section A.7.c., *supra*, we hold that the ineffective assistance of counsel argument relating to the aggravator fails.

2. Ineffective Assistance of Counsel: Same Criminal Conduct

Hernandez argues that his two convictions for possession of a controlled substance with intent to deliver should have been considered as the same criminal conduct for sentencings purposes, and that because his attorney did not bring that to the sentencing court's attention, he received ineffective assistance of counsel. Based on the analysis in Section A.5., *supra*, we accept the State's concession that the two counts should have been scored as the same criminal conduct, reverse Hernandez's sentence, and remand for resentencing.

Additionally, Hernandez requests that new counsel be appointed at resentencing "to ensure that Mr. Hernandez is not again denied effective assistance in this case." Br. of Appellant

(Hernandez) at 27. Because we remand for resentencing, we leave this decision to the resentencing court.

3. Sufficiency of the Evidence to Prove Dominion and Control

Hernandez argues that insufficient evidence was presented to convict him of possessing the drugs found in apartment 9. Specifically, Hernandez argues the evidence was insufficient to establish that he exercised dominion or control over the drugs. We disagree.

We address this argument in resolving Espinoza's direct appeal. Section A.2.a., *supra*. We set forth the law relating to the sufficiency of the evidence to prove dominion and control above, and do not repeat it here. *See* Section A.2.a., *supra*.

As with Espinoza, the evidence presented at trial was sufficient for a rational trier of fact to find beyond a reasonable doubt that Hernandez exercised dominion and control over the heroin and methamphetamine. Over 8,500 grams of heroin and over 2,300 grams of methamphetamine were found throughout apartment 9 of the apartment complex. The Nissan with Oregon license plates that Hernandez was stopped in had been in the parking lot of the apartment complex for several hours before Hernandez and his family got in and were subsequently stopped. While the Nissan with Oregon plates was sitting in front of apartment 9, Barney gave a sit response to the trunk and passenger door of the Espinoza's rented Nissan with California license plates, indicating the presence of drugs in the vehicle. Barney also indicated the possibility of drugs in the white pickup truck in which Cruz Camacho was stopped. TPD observed a group of three to five Hispanic

individuals, including one who matched Hernandez's description, carrying packages to and from the vehicles in the parking lot. Hernandez left the apartment complex in the Nissan with Oregon plates at the same time as Espinoza left in his rented Nissan with California license plates and Cruz Camacho left in the white pickup truck. The Nissan with Oregon plates did not leave the parking lot of the apartment complex before the traffic stop of all three vehicles was conducted.

The identification Hernandez provided to TPD when he was stopped in the Nissan with Oregon license plates identified him by a different name. In the passenger compartment of his vehicle, the police saw a grocery bag with folded-up U.S. currency inside. The currency totaled $56,544. After removing Hernandez from the vehicle, Officer Betts and Barney worked the exterior. Barney jumped at the window and gave a sit response. As Hernandez was sitting in the back of the patrol car, he volunteered: "No drugs; just money. No drugs; just money." 4 VRP at 74.

When police interviewed Hernandez, he admitted to being a drug dealer, but claimed to only deal in smaller quantities. The police found at least three different driver's licenses with his picture but with different names. A police narcotics expert testified that multiple identifications with different names was consistent with someone occupying a higher position in the drug trade.

Based on the evidence presented, a rational trier of fact could find beyond a reasonable doubt that Hernandez had dominion and control over the heroin and methamphetamine because the rational fact finder could conclude Hernandez had been in apartment 9 where a large quantity of heroin and methamphetamine were found for at least a few hours, had helped move drugs out

of the vehicles and into apartment 9, left apartment 9 with his co-defendants, was stopped with a large amount of money from the transport of drugs, and occupied a higher position of power within the drug trafficking trade. Thus, we hold that sufficient evidence supports the jury's verdict that Hernandez exerted dominion and control over the heroin and methamphetamine found in apartment 9.

4. Probable Cause to Issue Warrant

Hernandez adopts Espinoza's argument that Barney's alert to the cars did not provide the "reasonably trustworthy" information necessary to establish the probable cause required to issue the search warrant. Br. of Appellant (Espinoza) at 29. We disagree.

The law pertinent to this discussion is discussed above in Section A.3., *supra*. Considering the relevant circumstances based on Officer Betts' and Barney's training and discoveries, discussed in Section A.3.b., *supra*, along with the remainder of the affidavit, we hold that the issuing judge did not abuse his discretion in signing the search warrant.

The affidavit for the search warrant stated that an informant identified apartment 9 as a "narcotics stash house," where large amounts of heroin and methamphetamine had been seen and where suspected drug traffickers Cruz Camacho and Hernandez were known to frequent. CP (Espinoza) at 72. The affidavit stated that a Department of Licensing database search for Hernandez revealed that he has three separate licenses under the names Miguel Salto Alemen, Gerardo Rafael Hernandez, and Angel Villegas Herrerra, all with the same photo. The affidavit also stated that the informant told the police that Hernandez was from California and was now running a large drug operation in Pierce County.

The affidavit stated that Barney had alerted to the two cars that drove out of the parking lot of the apartment complex at the same time as Hernandez. The affidavit also stated that the Nissan with California license plates, the white pickup truck, and the Nissan with Oregon license plates were parked in front apartment 9 from about 7:30 PM until 10:10 PM, when all three vehicles left at the same time. Before the three vehicles left, the affidavit stated that four to five Hispanic individuals, including one who matched Hernandez's description, moved suspected drugs or money into the Nissan with California license plates. Finally, the affidavit noted that after the three vehicles were stopped, Barney again alerted to the presence of drugs in the vehicles, TPD saw a panel on the tailgate of the white pickup truck that they believed was a "trap" compartment, and TPD saw a grocery bag full of money in one of the Nissans. CP (Espinoza) at 73. Based on the entirety of the information contained in the affidavit for the search warrant, including evidence from, and independent of, Barney's alerts, we hold that the issuing judge did not abuse his discretion in signing the search warrant.

5. Dog sniff as a Warrantless Search

Hernandez adopts Espinoza's argument that Barney's sniff of the Nissan with California license plates and the white pickup truck in the parking lot outside of the apartment complex constituted a warrantless search under article I, section 7 of the Washington State constitution. For the same reasons explained in Section A.4., *supra*, we hold Barney's sniff of the cars in the parking lot was not unlawful.

6. Authority to Order the Forfeiture of Property

Hernandez argues that the sentencing court erred in ordering the forfeiture of property. For the same reasons explained in Section A.8., *supra* we hold that the sentencing court erred in ordering the forfeiture of Hernandez's property, strike the forfeiture order, and remand for the resentencing court to determine whether there is statutory authority to order forfeiture.

7. Inquiry into Ability to Pay LFOs

Hernandez argues that the sentencing court erred in ordering him to pay LFOs without first inquiring into his ability to pay. As in Section A.6., *supra*, because we remand Hernandez's case for resentencing, we do not address this issue. On remand, the sentencing court shall inquire into Hernandez's current and future ability to pay before imposing any discretionary LFOs. *Blazina*, 182 Wn.2d at 839.

C. GUADALUPE CRUZ CAMACHO

Cruz Camacho argues: (1) the dog sniff was a warrantless search; (2) there was no probable cause to issue a search warrant because dog sniffs are unreliable; (3) his counsel was ineffective in failing to argue that the two convictions constituted the same criminal conduct; and (4) the sentencing court erred by imposing LFOs without first inquiring into Cruz Camacho's ability to pay. Cruz Camacho also adopts Hernandez's argument that the exceptional sentence must be reversed because (a) the VUCSA aggravator was not charged in the amended information, (b) there was insufficient evidence to support applying that aggravator to Cruz Camacho, and (c) his

counsel was deficient in failing to make the two arguments above.

We hold that Cruz Camacho received ineffective assistance of counsel because his two convictions constituted the same criminal conduct for sentencing purposes, and that the sentencing court should have considered Cruz Camacho's ability to pay before imposing discretionary LFOs. We also hold that the remainder of Cruz Camacho's claims fail. Accordingly, we affirm Cruz Camacho's convictions, reverse his sentence, and remand for resentencing.

1. Dog sniff as a Warrantless Search

Cruz Camacho argues that Barney's sniff of the Nissan with California license plates and the white pickup truck in the parking lot outside of the apartment complex constituted an illegal search under article I, section 7 of the Washington State constitution.[13] For the same reasons explained in Section A.4., *supra*, we hold Barney's sniff of the cars in the parking lot was not unlawful.

2. Dog Sniff was Sufficient to Establish Probable Cause

Cruz Camacho argues that "[w]ithout the evidence of Barney's alerts, Officer Smith's affidavit does not establish probable cause to issue a warrant to search the vehicles and the 10th Avenue apartment." Br. of Appellant (Cruz Camacho) at 20, 23. Cruz Camacho's argument fails because it hinges on the excising of the evidence related to Barney's alerts, and Cruz Camacho has not identified a reason why the evidence from Barney's alert should have been excised. We hold that the issuing judge did not abuse his discretion in signing the search warrant because the entirety

[13] Cruz Camacho also adopts Espinoza's argument on this issue.

of the relevant circumstances contained in the affidavit for the search warrant was sufficient to establish probable cause.

The law pertinent to this discussion is recited above in Section A.3., *supra*. For the same reasons as discussed in Section A.3.b., *supra*, we hold that the warrant was sufficient to with respect to Officer Betts and Barney's training, experience, and discoveries.

The affidavit for the search warrant stated that an informant identified apartment 9 as a "narcotics stash house," where large amounts of heroin and methamphetamine had been seen, and where suspected drug traffickers Cruz Camacho and Hernandez were known to frequent. CP (Espinoza) at 72. The affidavit also stated that a confidential informant arrested earlier that day identified Cruz Camacho as the source of the drugs that TPD seized during that arrest. And the affidavit stated that Cruz Camacho and Hernandez had been the subject of extensive drug investigations by TPD and the DEA.

The affidavit also stated that Barney had alerted to the white pickup truck that Cruz Camacho was driving when he was stopped. The affidavit further stated that the Nissan with California license plates, the white pickup truck, and the Nissan with Oregon license plates were parked in front apartment 9 from 7:30 PM until 10:10 PM, when all three vehicles left at the same time. Before the three vehicles left, four to five Hispanic individuals, including one that matched Cruz Camacho's description, carried packages believed to be drugs or money back and forth between apartment 9 and the Nissan with California license plates. The affidavit noted that after the three vehicles were stopped, Barney alerted to the presence of drugs in the vehicles, TPD saw a panel on the tailgate of the white pickup truck Cruz Camacho was driving that they believed was

a "trap" compartment, and TPD saw a grocery bag of money in one of the Nissans. CP (Espinoza) at 73. Based on the relevant circumstances contained in the affidavit for the search warrant, including evidence from, and independent of, Barney's alerts, we hold that the issuing judge did not abuse his discretion in signing the search warrant.

3. Ineffective Assistance of Counsel: Same Criminal Conduct

Cruz Camacho argues that his two convictions for possession of a controlled substance with intent to distribute should have been considered as the same criminal conduct for sentencings purposes, and that because his attorney did not bring that to the sentencing court's attention, he received ineffective assistance of counsel.[14] As discussed in Section A.5., *supra*, we accept the State's concession that the two counts should have been scored as the same criminal conduct, reverse Cruz Camacho's sentence, and remand for resentencing.

4. Inquiry into Ability to Pay LFOs

Cruz Camacho argues that the sentencing court erred in ordering him to pay LFOs without first inquiring into his ability to pay. As explained in Section A.6., *supra*, because we remand Cruz Camacho's case for resentencing, we do not address this issue. On remand, the sentencing court shall inquire into Cruz Camacho's current and future ability to pay before imposing any discretionary LFOs. *Blazina*, 182 Wn.2d at839.

[14] Cruz Camacho also adopts Espinoza's argument on this issue.

5. VUCSA Aggravator

Cruz Camacho adopts Hernandez's argument that the exceptional sentence must be reversed. Order Granting Cruz Camacho's Mot. to Adopt (Nov. 4, 2015), *see* court spindle. Hernandez's argument is that the (a) the VUCSA aggravator was not charged in the amended information, (b) insufficient evidence was presented to find that the VUCSA aggravator applied, and (c) defense counsel was prejudicially deficient in failing to argue that the VUCSA aggravator did not apply. Espinoza also adopted this argument, and this opinion addressed the merits of the argument in Section A.7., *supra*.

First, based on the analysis in Section A.7.a., *supra*, we hold that Cruz Camacho received constitutionally sufficient notice that the State would try to prove the application of the VUCSA aggravator. Second, based on the analysis in Section A.7.b., *supra*, we hold that the jury expressly found that Cruz Camacho's own conduct supported the application of the VUCSA aggravators. Finally, based on the analysis in Section A.7.c., *supra*, we hold that the ineffective assistance of counsel argument relating to the aggravator fails.

D. APPELLATE COSTS

Espinoza and Cruz Camacho ask that we not impose appellate costs against them if the State prevails on this appeal. A commissioner of this court will consider whether to award appellate costs in due course under RAP 14.2 if the State files a cost bill and an objection to that cost bill is filed.

E. CONCLUSION

In conclusion, we affirm the convictions, reverse the sentences, and remand each case for resentencing consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, P.J.

Sutton, J.