No. 96926-4
COA No. 49601-1-II
(consolidated with COA No. 49633-0-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MIGUEL A. TRUJEQUE-MAGANA,

Petitioner.

On Appeal from Clark County Superior Court
The Honorable Robert Lewis, Presiding

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Miguel A. Trujeque-Magana asks this Court to accept review of the Court of Appeals' decision terminating review set out in Part B.

B. COURT OF APPEALS' DECISION

Mr. Trujeque seeks review of the Court of Appeals' decision in *State of Washington v. Miguel A. Trujeque-Magana*, No. 49601-1-II, an unpublished opinion issued on Feb. 6, 2019, attached in App. A (consolidated with *State v. Molina Rios*, No. 49633-0-II).

C. ISSUES PRESENTED FOR REVIEW

1. Whether someone who is under arrest can be "armed" with a firearm discovered the next day at a different location?

2. Whether someone who signs a rental agreement for an apartment with two others and whose shirt is found in a bedroom six months later has dominion and control over contraband in the bedroom's closet?

3. Should this Court extend its holding in *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998), to require the police on the street to inform someone of the right to refuse to consent to a search?

4. Was there was sufficient evidence that Mr. Trujeque was in possession of heroin found in another person's purse during a traffic stop?

5. Was there a reasonable suspicion for the police to have stopped Mr. Trujeque's car?

6. Was Mr. Trujeque improperly convicted based upon inadmissible opinion and conclusion testimony?

7. Was the State's refusal to turn over exculpatory evidence is harmless given the State's theory of the case?

8. Should the trial court have ordered disclosure of a confidential informant who could have testified that Mr. Trujeque was not involved in the co-defendant's drug business?

9. Is the alien in possession of a firearm statute unconstitutional because it gives preferences to Canadian nationals?

10. Were various counts the same criminal conduct?

11. Is the maximum term of imprisonment that is doubled under RCW 69.50.435 the statutory maximum or the top end of the standard range?

D. STATEMENT OF THE CASE

A confidential informant gave information to law enforcement that Luciano Molina Rios was involved in drug dealing. On November 4, 2015, the police followed Molina to the Seattle area, where he ultimately met Mr. Trujeque and Juana Santiago-Santos. The police observed the three engaged

in innocuous behavior, including going to a shopping mall, although at one time Mr. Molina and Mr. Trujeque were seen doing something together in the front seat of Molina's car. Slip Op. at 3-4. The police followed Molina and Trujeque (with Santiago) as they drove to Clark County in separate cars, and pulled both cars over. Santiago agreed to the search of her purse (without being told she did not have to consent), and police found heroin inside. Slip Op. at 4-5. This heroin was the basis for Count 1.

Early the next morning (on 11/5/15), using a key found on Molina, RP VI 634-36, the police searched an apartment in Vancouver. In one bedroom, tied to Molina, the police found cocaine and guns. In the closet of another bedroom, tied to Ms. Santiago, the police found a bag of cocaine and two guns, one loaded.[1] There was some male clothing found in Santiago's bedroom, including a shirt that was similar to one worn by Trujeque on Santiago's Facebook page. Slip Op. at 5; BOA at 15-17. Also found in Molina's room was a rental agreement signed on May 17, 2015, by the agent of the owner of the apartment, Miguel Trujeque, Sandy Gongora Chi, and Luciano Molina. Although the document refers to a "lease term" of 11

[1] The Court of Appeals mistakenly described both guns as being "loaded." Slip Op. at 22. One gun's magazine was "half-hanging" out, RP VII 717, 784, but there was testimony the other was not loaded. RP VII 785; RP VIII 849.

months and 13 days (beginning on 5/19/15), the document itself is not a "lease" and actually was signed subject to approval by the owner. Ex. 115 (App. B). Counts 4 (possession of cocaine while armed within 1000 feet of a school bus route stop), counts 6 and 7 (felon in possession) and count 8 (alien in possession of a firearm, based on Mr. Trujeque's status as not being a U.S. citizen) all related to what was found in Santiago's bedroom closet.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. *Mr. Trujeque Was Not Armed With Firearms*

When someone is placed under arrest and jailed on one day, and the police find guns the next day in boxes and bags in a closet in an apartment miles away, the person is not armed with those firearms. This result is compelled by this Court's precedent, beginning with *State v. Valdobinos*, 122 Wn.2d 270, 858 P.2d 199 (1993), and *State v. Gurske*, 155 Wn.2d 134, 118 P.3d 333 (2005), extending to the recent case *State v. Van Elsloo*, 191 Wn.2d 798, 826, 425 P.3d 807 (2018). The key issue is whether at the time of a drug offense "(1) that a firearm was easily accessible and readily available for offensive or defensive purposes during the commission of the crime and (2) that a nexus exists among the defendant, the weapon, and the crime." *Van Elsloo*, 191 Wn.2d at 826.

Here, the State specifically charged that Count 4 took place on Nov. 5, 2015, the date given to the jury in the "to convict" instructions. CP 114, 316. There was no dispute but that when Mr. Trujeque was arrested the day before he was not in close proximity to any guns such that they would be "readily accessible" either in the car on the highway or at any earlier time. Although the Court of Appeals recounted this Court's "armed" jurisprudence extensively, Slip Op. at 19-21, the Court of Appeals failed to cite to any case where this Court affirmed a firearm enhancement where the defendant was not even present at the time the gun was discovered.[2] Thus, there was insufficient evidence as a matter of due process to support a conviction for the two firearm enhancements tied to Count 4.[3]

The only case cited by the Court of Appeals on this precise issue was *State v. Simonson*, 91 Wn. App. 874, 960 P.2d 955 (1998), Slip Op. at 22, an old case where the defendant was in jail at the time guns were found. *Simonson*, though, involved a continuing offense, the manufacture of meth charged over a specified six-week period of time. This is very different than

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[2] "The defendant does not have to be armed at the moment of arrest to be armed for purposes of the firearms enhancement." *State v. O'Neal*, 159 Wn.2d 500, 504, 150 P.3d 1121 (2007). But even there, the defendants were in the same location as the guns. *See State v. O'Neal*, 126 Wn. App. 395, 404, 109 P.3d 429 (2005), *aff'd supra*.

[3] U.S. Const. amends. XIV; Const. art. 1,§ 3; *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L Ed. 2d 560 (1979).

the situation here, a possession case, charged on a specific date (11/5/15), with no evidence or allegation of an offense that stretched backwards into time. Moreover, *Simonson* is an outlier, and stands in contrast to Division Two's own decision in *State v. Mills*, 80 Wn. App. 231, 907 P.2d 316 (1995),[4] where the court held that a defendant was not armed with gun found at motel room after his arrest: "[W]e find no evidence proving that Mills, the gun and drugs were in the motel room together on May 26. Due process requires that the charging document contain specific allegations, including dates." *Id*. at 234.

In the end, there was insufficient evidence that Mr. Trujeque was armed on November 5, 2015, and it violates due process under the Fourteenth Amendment and article I, section 3, to ignore the very specific date charged in the information and jury instructions. This Court should accept review under RAP 13.4(b)(1), (2) and (3), resolve any conflict between *Mills* and *Simonson* and reverse.

2. *Mr. Trujeque Did Not Have Dominion and Control Over Contraband in Ms. Santiago's Closet*

At most the State could prove that Mr. Trujeque had signed a letter of intent to rent an apartment, with two other people in May, and that a shirt

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[4] Cited with approval by *Gurske*, 155 Wn.2d at 141.

he wore in a photo with Ms. Santiago was in her room at the time of the raid. No other evidence of dominion and control over the contraband found in Santiago's closet was admitted at trial. The Fourteenth Amendment's and article I, section 3's Due Process Clauses require more than a "mere modicum" of evidence, requiring the factfinder to reach a "subjective state of near certitude" of the guilt of the accused. *Jackson*, 443 U.S. at 315 & 320. Under this test, there was insufficient evidence to sustain the convictions in Counts 4, 6, 7 and 8.

Past cases have repeatedly recognized that legal ownership is different than occupancy,[5] and that even the right to access some areas of premises does not give the person the right to access (and thus dominion and control) over even a roommate's bedroom.[6] Moreover, simply storing a personal item in someone else's residence or being present in the residence in proximity to contraband is not sufficient for dominion and control over everything found therein.[7] The Court of Appeals' conclusion here to the contrary, Slip Op. at

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[5] *See State v. Schneider*, 36 Wn. App. 237, 241, 673 P.2d 200 (1983) (owner could be convicted of burglarizing home she did not occupy).

[6] *See State v. Morse*, 156 Wn.2d 1, 12, 123 P.3d 832 (2005); *State v. Rio*, 38 Wn.2d 446, 450-51, 230 P.2d 308 (1951).

[7] *See State v. Callahan,* 77 Wn.2d 27, 31, 459 P.2d 400 (1969); *State v. Spruell*, 57 Wn. App. 383, 387, 788 P.2d 21 (1990).

17-18, conflicts with these principles, and justifies review under RAP 13.4(b)(1), (2), and (3).[8]

3. *There Was Insufficient Evidence that Mr. Trujeque Was Ms. Santiago's Accomplice*

The Court of Appeals affirmed Mr. Trujeque's conviction for Count 1, related to the heroin in Ms. Santiago's purse, on an accomplice theory, stressing that Santiago, Trujeque and Molina were seen together. Slip Op. at 16-17. Yet, the court also noted that Santiago was doing things unrelated to what Molina and Trujeque were doing, Slip Op. at 17, which actually demonstrates their *lack* of involvement in *her* possession of heroin in her private purse. The Court of Appeals here failed to apply the protective standard of *Jackson v. Virginia*, *supra*, properly. There was insufficient evidence under the Fourteenth Amendment's and article I, section 3's Due Process Clauses that Trujeque was Santiago's accomplice when she possessed heroin in her purse. The Court should accept review under RAP 13.4(b)(3) and reverse.

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[8] The Court of Appeals stated that Trujeque did not challenge sufficiency of the evidence for Count 8, alien in possession of a firearm. Slip Op. at 14 n.3, 32 n.5. This is wrong. *See* BOA at 1 (Assignment of Error 4), BOA 17-13 (arguing insufficient evidence for Count 8 in addition to other counts related to apartment).

4. *The Court Should Extend Ferrier*

In *State v. Ferrier*, *supra*, this Court held that article 1, section 7, requires the police to advise a homeowner of his or her right to refuse consent to a search. While *Ferrier* has never been explicitly been extended to a traffic stop and the search of a purse, in practice, many officers give *Ferrier* warnings in such circumstances.[9] Moreover, two judges from Division Three have taken the position that *Ferrier* should be extended to traffic stops. [10]

In light of the practice that already exists, there is no reason to have a different rule at someone's house than at a traffic stop. This Court should accept review under RAP 13.4(b)(3) & (4) and hold that under article I, section 7, before the police search someone's purse during a traffic stop, they need to tell the person of their right to refuse such a search.[11]

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[9] *See State v. Mayfield*, ___ Wn.2d ___, ___ P.3d ___ (No. 95632-4, 2/7/19), Slip Op. at 5 & n. 1 (officer gave *Ferrier* warnings before search of trunk, with Court noting "Mayfield's case does not require us to determine whether *Ferrier* warnings are required where police seek consent to search a car, rather than a home, and we do not purport to do so."); *State v. Lee*, ___ Wn. App.2d ___, ___ P.3d ___ (No. 77038-1-I, 2/25/19), Slip Op. at 3 (noting officer gave car passenger *Ferrier* warnings before searching purse).

[10] *See State v. Witherrite*, 184 Wn. App. 859, 864-65, 339 P.3d 992 (2014) (Lawrence-Berry, J. & Fearing, J, concurring).

[11] Mr. Trujeque has automatic standing to object to the search of the purse. *See State v. Jones*, 146 Wn.2d 328, 331-35, 45 P.3d 1062 (2002).

5. *There Was Not Reasonable Suspicion to Stop Mr. Trujeque*

The police pulled Mr. Trujeque over based upon his association with Molina during a time that they believed Molina was going to make a purchase of drugs. However, for all the time that they saw Molina and Trujeque in the Seattle area, they never saw them do anything consistent with purchasing drugs, and simply offered their opinions that the two men were doing something illicit when they leaned over the console a car. There was not reasonable suspicion to detain, without a warrant, Mr. Trujeque under the Fourth and Fourteenth Amendments, article I, section 7, and *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

The Court of Appeals' rejected this argument, Slip Op. at 9-13, but its opinion conflicts with *State v. Weyand*, 188 Wn.2d 804, 399 P.3d 530 (2017), and *State v. Fuentes*, 183 Wn.2d 149, 352 P.3d 152 (2015). In *Weyand* and in the portion of *Fuentes* addressing the consolidated defendant Sandoz, this Court reversed convictions based on stops justified simply because of the defendants' association with others suspected of drug dealing and based upon vague conclusions about "furtive" activities. The Court should accept review under RAP 13.4(b)(1) & (3) and reverse.

6. *Mr. Trujeque Was Unconstitutionally Convicted Based upon Improper Conclusion Testimony*

In a case where there was no evidence that Mr. Trujeque was in possession of drugs and guns (either as a principle or accomplice), the officers gave far-reaching conclusion testimony to the jury – that Molina and Trujeque were preparing for a drug deal by counting money or packaging drugs in the car, that they were engaged in counter-surveillance, that they were middle to upper-level drug dealers, that the police did not request forensic testing as there was enough evidence that they were guilty, and that in other cases people told them that men hide drugs with women's clothing and makeup. BOA at 33-35. Trujeque argued that these conclusions and opinions violated ER 401-403, due process and the right to a jury trial, protected by the Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22, as well as containing testimonial evidence in violation of the Confrontation Clauses of the Sixth Amendment and article I, section 22. BOA at 35-39.

The Court of Appeals rejected Trujeque's arguments. First, the court held that the officers' observations about counting money and packaging drugs or their conclusions that drug dealers store drugs in items connected to those of the opposite gender consisted simply of the officers' opinions and

was not inadmissible under ER 701. Slip Op. at 28-29. But an officer's opinion that someone was counting money before engaging in a drug deal or packaging drugs is not relevant under ER 401-403 and does in fact constitute an improper opinion about guilt – i.e. that Trujeque was doing something illegal in Molina's car. Additionally, the Court of Appeals ignored the Sixth Amendment violation under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) – i.e. that other drug dealers told the officer that they stored items in objects associated with opposite genders.

The Court of Appeals also rejected Trujeque's challenge to the most egregious of the statements (that Trujeque and Molina were middle or upper-level drug dealers, RP IX 966, or that the police did not need DNA or fingerprint evidence because they had sufficient evidence already, BOA at 35 n.20) because of the lack of objection below. Slip Op. at 29 (citing RAP 2.5(a) and *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015)).[12] Yet, *Kalebaugh* addressed, not conclusion testimony, but a comment about reasonable doubt during jury selection (actually concluding the issue could be raised on appeal). *Id*. at 581-85. In fact, this Court has held that improper

[12] The court also held that it would not review opinions about there being sufficient evidence or testimony that the police had probable cause because the testimony was elicited by defense counsel. Slip Op. at 29. While that was correct as to one instance, RP VII 697, that was incorrect for the other three instances. RP VI 636 (prosecutor); RP VII 695 (co-defendant's lawyer): RP IX 927 (prosecutor).

opinion or conclusion testimony is manifest constitutional error that can be raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). Thus, the Court of Appeals decision directly conflicts with a decision of this Court, and should have reviewed the issue.

This Court should accept review under RAP 13.4(b)(1) and (3) and reverse. A police officer cannot be allowed to testify that in his opinion the defendant was a middle to upper level drug dealer, and the admission of such improper testimony, along with the other examples of conclusions about guilt, violated Mr. Trujeque's aforementioned state and federal constitutional rights.

7. *The State Should Have Turned Over Exculpatory Evidence*

During the trial, the State refused to turn over to Trujeque's lawyer a bag in the trunk of the seized car so that Trujeque could use it as evidence that he was shopping in the Seattle area rather than being involved in a drug deal. Slip Op. at 7. Mr. Trujeque argued below that this conduct violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Division Two rejected this claim because "even if he did buy something at the mall, Trujeque-Magana does not explain how the shopping bag would prove that he was not involved with a drug transaction." Slip Op. at 25.

Yet, the entire State's case was based on a series of innuendos – that because Mr. Trujeque was leaned over in Molina's car, supposedly counting money, or because Molina and Trujeque drove "in tandem," he was guilty of being involved in a drug deal. Evidence that Trujeque was actually shopping would counter the improper police opinions about his motives. Accordingly, there was a *Brady* violation and Mr. Trujeque's due process rights under the Fourteenth Amendment and article I, section 3, were violated. This Court should accept review under RAP 13.4(b)(3) and reverse.

8. *The CI Should Have Been Disclosed*

A police informant described Mr. Molina as his sole dealer, never mentioning Mr. Trujeque. BOA at 5-6. In a case where Mr. Trujeque was convicted by his association only with others, and there was no direct evidence of his involvement, the informant would have been a powerful witness for Mr. Trujeque. Yet, the courts below denied disclosure of the informant's identity, thereby violating the requirements of *Brady* to disclose exculpatory evidence and interfering with Mr. Trujeque's ability to call an

exculpatory witness at trial, in violation of his federal and state constitutional rights.[13]

The Court of Appeals held that Mr. Trujeque "does not explain how the CI's testimony regarding the controlled buys would show that Molina Rios was operating his drug business alone or that Trujeque-Magana did not participate on another date." Slip Op. at 26. But again, the State's entire case was based on a pyramiding of inferences – that Trujeque was guilty because of a shirt found in Santiago's bedroom or because he was in a car doing something over a console with Molina. Where the State's evidence was so weak, any little evidence that Trujeque was not involved in the drug deals between Molina and the informant would be material. This Court should accept review under RAP 13.4(b)(3) and reverse due to the violation of the aforementioned constitutional rights.

9. *The Alien Possession of Firearms Statute is Unconstitutional*

The Court of Appeals recognized that RCW 9.41.171 - .175 gives preferences to Canadians over people from other countries – that citizens of other countries need to have a valid passport, visa and special alien firearm

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[13] *See* Compulsory Process, Confrontation and Due Process Clauses. U.S. Const. amends. VI & XIV; Const. art. I, §§ 3 & 22; *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); *Brady v. Maryland*, *supra*.

license before possessing firearms, but Canadians do not. Slip Op. at 29-32. However, the Court of Appeals held that the statute did not violate equal protection under the Fourteenth Amendment and article I, section 12, because there was no evidence the defendants "had valid documentation for entry into the United States as required in RCW 9.41.175(2)(a) or that they had a hunting license from another state or an invitation to a trade show or event as required in RCW 9.41.175(2)(c). Therefore, RCW 9.41.171(3) and RCW 9.41.175 treated them the same regardless of whether they were Mexican or Canadian citizens." Slip Op. at 32.

But, the issue is not whether the defendants could prove they had proper documentation, but whether the State proved they did not. Here there was an absence of such evidence -- there was only a stipulation that Trujeque was not a citizen of the United States; not a citizen of Canada; was not a lawful permanent U.S. resident; and did not have a valid visa. RP VII 757.[14] There was no evidence that he lacked valid documentation for entry into the U.S. In any case, Mr. Trujeque argued that the statute was *facially invalid* in violation of equal protection under the Fourteenth Amendment and article I,

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[14] The Court of Appeals noted that Mr. Trujeque did not assign error to the stipulation. Slip Op. at 30 n.4. However, Trujeque noted how the stipulation applied to Counts 6 and 7, in addition to Count 8, simply to show how these other two counts need to be reversed if Count 8 was reversed. BOA at 42 n.28.

section 12. This Court should accept review under RAP 13.4(b)(3) & (4) and reverse the convictions in Counts 6, 7 and 8.

10. *Counts 1, 4, 6, 7 and 8 were the Same Criminal Conduct*

The Court of Appeals concluded that Counts 1 and 4 (the two VUCSA charges) were not the "same criminal conduct" under RCW 9.94A.589(1)(a) because they were supposedly committed at different times and places. Slip Op. at 34. But this conclusion contradicts the court's earlier finding that Trujeque's "possession with intent to deliver the drugs in the apartment was a continuing offense." Slip Op. at 22. While this conclusion was adopted to get around the problem that Count 1 was charged with a different date than Count 4, once reached, this conclusion requires a finding that Counts 1 and 4 took place at the same time. In this sense, the Court of Appeals decision conflicts not with another opinion of the Court of Appeals but with itself. Finally, given the police control over when and where the traffic stop would take place, the two counts should be considered the same criminal conduct. Otherwise, such sentencing manipulation violates due process under the Fourteenth Amendment and article I, section 3.[15]

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[15] *See generally United States v. McLean*, 199 F. Supp. 3d 926, 929-34 (E.D. Pa. 2016) (citing cases), *aff'd* 702 Fed. Appx. 81 (3d Cir. 2017).

Counts 6, 7 and 8 were also the same criminal conduct as Count 4. The firearms that were allegedly illegally possessed in Counts 6, 7 and 8 were the same firearms that were the basis for the firearm enhancements in Count 4. While one can certainly "possess" firearms and not be "armed," one cannot be "armed" without possessing the weapon. Thus, the act of being armed in Count 4 is intimately tied in place, time and intent to and furthered by Counts 6, 7 and 8, the offenses taking place simultaneously.

The Court of Appeals rejected this argument based on its earlier decision in *State v. McGrew*, 156 Wn. App. 546, 234 P.3d 268 (2010). Slip Op. at 34-35. But *McGrew* was based on the premise that "a sentencing enhancement is not a 'crime' and because "same criminal conduct" is defined to apply only to the analysis of 'two or more *crimes*." 156 Wn. App. at 553 (emphasis in original). This analysis is no longer viable after *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), which makes it clear that a sentence enhancement is in fact a separate crime for Sixth and Fourteenth Amendment purposes.[16] This Court should accept review under RAP 13.4(b)(1), (3) and (4) and reverse the sentences.

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[16] *See also State v. Allen*, 192 Wn.2d 526, 431 P.3d 117 (2018) (aggravating circumstances were functional equivalents of elements of crimes, and were not just "sentence enhancers").

11. *Doubling of the Maximum Should Have Meant Doubling the Top End of the Standard Range*

Based on the school zone allegation in Count 4, RCW 69.50.435(1) authorizes punishment "by imprisonment of up to twice the imprisonment otherwise authorized by this chapter." The trial court used this language to double the maximum term for Count 4 to 20 years, thereby allowing for the imposition of five (rather than three) years for each firearm and 24 months for the school zone and a total sentence of 240 months, rather than 136 or 200 months, depending on what counts were the same criminal conduct.

Mr. Trujeque argued below that the term of imprisonment authorized for those convicted of violations of RCW 69.50 is set out in RCW 9.94A.517 - .518. These statutes establish a standard range based upon the criminal history of the offender and the seriousness of the offense. The "imprisonment otherwise authorized" for someone convicted under RCW 69.50.401(2)(a) is the standard range in the Sentencing Reform Act, not the 10 years set out as the statutory maximum for a Class B felony.

The Court of Appeals rejected this argument, citing to *State v. Blade*, 126 Wn. App. 174, 107 P.3d 775 (2005), and *In re Cruz*, 157 Wn.2d 83, 89-90, 134 P.3d 1166 (2006). Slip Op. at 36. But neither of those decisions analyzed the issue under the rubric of the Sixth and Fourteenth Amendments

as construed by *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), where the Supreme Court held that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (Emphasis in original). In other words, the maximum sentence is the top end of the range, not the "statutory maximum."

In light of *Blakely*, this Court should accept review under RAP 13.4(b)(3) and (4), and reverse for resentencing with a maximum of 3 years for each firearm count and a maximum sentence of 136 or 200 months, depending on the resolution of the same criminal conduct issues.

F. CONCLUSION

The Court should accept review and reverse the convictions and/or sentences and remand either for dismissal, a new trial or resentencing.

DATED this 7th day of March 2019.

Respectfully submitted,

s/ Neil M. Fox
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Attorney for Petitioner

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

February 6, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MIGUEL A. TRUJEQUE-MAGANA, aka JORGE RICARDO GONGORA-CHI, Appellant.	No. 49601-1-II consolidated with No. 49633-0-II UNPUBLISHED OPINION
STATE OF WASHINGTON, Respondent, v. LUCIANO MOLINA RIOS, Appellant.	

MAXA, C.J. – In a consolidated case, Miguel Trujeque-Magana and Luciano Molina Rios appeal their convictions of multiple drug and firearm offenses. The convictions arose out of an investigative traffic stop during which officers found a large amount of heroin in a purse belonging to Trujeque-Magana's passenger, Juanna Santiago-Santos, and a subsequent search of an apartment leased to Trujeque-Magana and Molina Rios that revealed cocaine, methamphetamine, several handguns, and cash. The stop occurred after officers observed

Molina Rios and Trujeque-Magana engage in activities that they believed were consistent with trying to set up a drug purchase.

We hold that (1) the trial court erred in failing to enter written findings of fact and conclusions of law after denying a motion to suppress evidence obtained because of the investigative stop, but the error is harmless because the court gave a detailed oral ruling; (2) the trial court did not err in denying the suppression motion because officers had reasonable suspicion to conduct an investigative stop and Santiago-Santos consented to a search of her purse; (3) the State presented sufficient evidence to prove that both Trujeque-Magana and Molina Rios were accomplices to Santiago-Santos's possession; (4) the State presented sufficient evidence to prove that Trujeque-Magana constructively possessed the cocaine and firearms in the apartment; (5) the State presented sufficient evidence to prove that both Trujeque-Magana and Molina Rios each were armed with two firearms for purposes of sentencing enhancements for possession of cocaine and methamphetamine; (6) the trial court did not err in denying Trujeque-Magana's motion to dismiss based on the failure to disclose evidence because the evidence was not exculpatory; (7) the trial court did not err in ruling that the State was not required to disclose the identity of the confidential informant (CI) who assisted law enforcement; (8) the trial court did not abuse its discretion in admitting the officers' opinion testimony; (9) RCW 9.41.171(3) and RCW 9.41.175, the statutes governing the offense of alien in possession of a firearm, do not violate equal protection under the facts of this case; (10) the trial court did not err in ruling that several of Trujeque-Magana's convictions did not constitute the same criminal conduct; (11) the trial court did not err in applying the double penalty provisions of RCW 69.50.435(1); and (12) the criminal filing fee imposed on Molina Rios as a mandatory legal financial obligation (LFO) must be stricken.

Accordingly, we affirm Trujeque-Magana's and Molina Rios's convictions and sentences, but we remand for the trial court to strike the criminal filing fee imposed on Molina Rios and amend his judgment and sentence.

FACTS

Surveillance of Molina Rios

In October 2015, Oregon law enforcement received information from a CI that a person, later identified as Molina Rios, was selling drugs. Oregon officers, including Detective Joshua Zwick, Deputy Kevin Jones, and Deputy Matt Ferguson, and Vancouver officers, including Detective Shane Hall, began an investigation. Working with the CI, they conducted two controlled buys from Molina Rios at his apartment in Clark County. Trujeque-Magana initially was not involved in this investigation.

The CI later told officers that Molina Rios was going to the Seattle area to obtain drugs. On November 4, Jones and Ferguson followed a gray Scion that they recognized as Molina Rios's car to the Everett area. Jones and Ferguson were in separate vehicles. Molina Rios went to a train station parking lot and parked and re-parked in different spaces, but did not get out of his car. While he was there, a person walked up to the car and then left. Molina Rios then drove to a strip mall and parked. In the parking lot, Molina Rios met up with two people, later identified as Trujeque-Magana and Santiago-Santos, who were in a white Honda. They all went in to a restaurant.

When they left the restaurant, Molina Rios and Trujeque-Magana got into the same car and sat together for a long period of time. At first they were talking on their cell phones. Then they had their heads down toward the center console area. Although Jones could not see any money, he believed based on his training and experience that they were counting money. After

that, Molina Rios and Trujeque-Magana moved their cars so they were parked next to each other. They did not interact with anyone else in the parking lot. Santiago-Santos slept in the Honda during part of this time.

Next, Molina Rios and Trujeque-Magana left in tandem and drove to a store parking lot a few blocks away. They parked and met outside their cars and talked with each other, but did not meet with anyone else or go into the store.

Molina Rios and Trujeque-Magana then followed one another to a shopping mall, where they parked on opposite sides of the mall. They went into the mall together and stayed inside for a few hours before exiting together. They went to their separate cars, met in a central driveway, and exited the mall parking lot together. The officers lost track of them when both vehicles ran a red light and it was unsafe for the officers to follow.

People parking in parking lots, seemingly not doing anything, and moving to other parking lots was something that Ferguson had observed during drug investigations. A suspect might park to see if they are being followed and might be directed to different buy locations that change repeatedly to avoid being followed by police. Running red lights or other erratic driving also is a way that suspects attempt to avoid being followed.

Jones and Ferguson relayed their observations of Molina Rios and Trujeque-Magana to Zwick, who in turn discussed them with Hall.

Investigative Stop and Search

Jones and Ferguson next observed the two cars a few hours later travelling southbound on Interstate 5 in the Chehalis area. The two vehicles appeared to be driving in tandem, with the Scion in front and the Honda directly behind with no cars in between. The officers followed the

cars southbound on Interstate 5 back to Clark County. After receiving reports from Jones and Ferguson, Zwick and Hall decided to conduct a traffic stop of the vehicles.

Under Hall's direction, patrol cars stopped the two vehicles in Clark County for an investigative search. Trujeque-Magana and Santiago-Santos gave consent for the officers to search the Honda. Santiago-Santos took her purse with her when she got out of the car and placed it on the ground. Hall asked Santiago-Santos if he could search her purse and she consented. Hall found a large bag of heroin inside the purse.

Apartment Search

Hall obtained a search warrant for the apartment. Inside the apartment, officers found a document signed by Molina Rios, Trujeque-Magana, and a third person stating that they had leased the apartment. The lease term was from May 19, 2015 through April 30, 2016.

In one bedroom, officers found an identification card belonging to Molina Rios. In that bedroom were bags of methamphetamine and cocaine. Officers also found a handgun (9 mm Walther) under the pillow at the head of the bed and a semiautomatic pistol (.45 caliber Taurus) in a dresser drawer.

In another bedroom, officers found a bag on the floor of the closet that contained cocaine. They also found two handguns: a 9 mm Glock with a loaded magazine and a 9 mm Ruger. That bedroom also contained male clothing. One of the shirts in the bedroom was a blue and white, long sleeve plaid shirt. Detective Hall later found a photograph on Facebook in which Trujeque-Magana was wearing that shirt.

Drug and Firearm Charges

The State charged Trujeque-Magana with possession with intent to deliver heroin as both a principal and an accomplice (count 1), possession with intent to deliver cocaine while armed

with a firearm and within 1000 feet of a school bus route stop (count 4), two counts of first degree unlawful possession of a firearm (counts 6 and 7), and being an alien in possession of a firearm without an alien firearm license (count 8).

The State also charged Molina Rios with possession with intent to deliver heroin as both a principal and an accomplice (count 1), possession with intent to deliver methamphetamine while armed with a firearm and within 1,000 feet of a school bus route stop (count 2), possession with intent to deliver cocaine while armed with a firearm and within 1,000 feet of a bus stop (count 3), and being an alien in possession of a firearm without an alien firearm license (count 9).[1]

Motion to Suppress Evidence

Trujeque-Magana filed a motion to suppress all evidence obtained after the investigative stop on the basis that the police did not have reasonable suspicion to conduct the stop. He also argued that Santiago-Santos's consent to search her purse was invalid. He sought to suppress the heroin found in Santiago-Santos's purse and all evidence discovered in the search of the apartment.

The trial court held a CrR 3.6 hearing on Trujeque-Magana's suppression motion. The court concluded that the State had reasonable suspicion to conduct an investigative stop on both of the cars and that the State's search of Santiago-Santos's purse was lawful. As a result, the court denied Trujeque-Magana's motion to suppress. The court did not enter written findings of fact and conclusions of law. But the court's oral ruling included a detailed narrative of the facts regarding the officers' reasonable suspicion to conduct the investigative stop and probable cause.

[1] The State also charged Molina Rios with possession of a stolen firearm, but that charge eventually was dismissed.

Motion to Identify CI

Trujeque-Magana filed a pretrial motion seeking to compel the State to disclose the identity of the CI. He argued that because the CI had provided information regarding Molina Rios, the CI would be able testify as to whether Trujeque-Magana was involved in Molina Rios's drug business.

The trial court found that Trujeque-Magana had not shown that the CI had information that would bear on his innocence and ruled that the State was not required to disclose the CI's identity.

Motion to Dismiss for Brady *Violation*

During the trial, Trujeque-Magana filed a motion to dismiss based on a claim that the State had refused to provide potentially exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In the supporting declaration, defense counsel stated that he had learned that a shopping bag that Trujeque-Magana allegedly was carrying when he left the mall might be in the trunk of Trujeque-Magana's car in a police impound lot. He noted that the officers following Trujeque-Magana and Molina Rios had testified at the suppression hearing that the defendants had been in a shopping mall but were not carrying any shopping bags when they left. Defense counsel requested that the State retrieve the shopping bag, but the State had refused.

The trial court denied Trujeque-Magana's motion, stating that even if the State had the shopping bag and had known about the shopping bag, it was not material exculpatory evidence.

Convictions and Sentences

The jury found both defendants guilty of all counts. With regard to Trujeque-Magana's conviction of possession with intent to deliver cocaine and Molina Rios's convictions of

possession with intent to deliver cocaine and methamphetamine, the jury found by special verdicts that they each were armed with two handguns at the time of the commission of the crimes. The jury also found by special verdict that the possession of cocaine with intent to deliver by both defendants and the possession of methamphetamine with intent to deliver by Molina Rios occurred within 1,000 feet of a school bus stop.

The trial court found that Trujeque-Magana's convictions of two counts of first degree unlawful possession of a firearm and being an alien in possession of a firearm were the same criminal conduct. The court determined that Trujeque-Magana's convictions of possession of heroin and possession of cocaine were not the same criminal conduct and that the firearm enhancement for possession of cocaine was not the same criminal conduct as the two convictions of unlawful possession of a firearm.

Based on the school bus route stop special verdict, the trial court doubled the maximum term for Trujeque-Magana's possession of cocaine conviction to 20 years. This meant that under RCW 9.94A.533(3)(a), the sentence for each firearm enhancement was five years rather than three years.

The trial court sentenced Trujeque-Magana to 240 months of confinement, and Molina Rios to 332 months of confinement.

Trujeque-Magana and Molina Rios appeal their convictions and sentences.

ANALYSIS

A. MOTION TO SUPPRESS EVIDENCE

Trujeque-Magana argues that the trial court erred in denying his motion to suppress the evidence obtained as the result of the investigative stop of his vehicle. He claims that (1) the trial court failed to enter written findings of fact and conclusions of law regarding its denial of

the suppression motion, (2) the evidence should have been suppressed because officers did not have reasonable suspicion to conduct the investigative stop, and (3) Santiago-Santos's consent to search her purse was invalid because the officers did not inform her of her right to refuse consent. We agree that the trial court erred in failing to enter written findings and conclusions but hold that the error was harmless. We reject the other two arguments.

1. Failure to Enter Written Findings and Conclusions

CrR 3.6(b) requires the trial court to enter written findings of fact and conclusions of law following a suppression hearing. Failure to enter written findings of fact and conclusions of law is error, but the error is harmless if the trial court's oral decision is sufficient to permit appellate review. *State v. Weller*, 185 Wn. App. 913, 923, 344 P.3d 695 (2015).

Here, the State concedes that the trial court erred by failing to enter written findings of fact and conclusions of law for its denial of the motion to suppress. However, we hold that the error is harmless. The record of the evidentiary hearing and the trial court's oral ruling is sufficiently comprehensive for us to adequately review Trujeque-Magana's claim.

2. Validity of Investigative Stop

Trujeque-Magana argues that the investigative stop of his vehicle was invalid because officers did not have reasonable suspicion to conduct the stop. We disagree.

a. Legal Principles

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, a law enforcement officer generally cannot seize a person without a warrant. *State v. Fuentes*, 183 Wn.2d 149, 157-58, 352 P.3d 152 (2015). If a seizure occurs without a warrant, the State has the burden of showing that it falls within one of the carefully drawn exceptions to the warrant requirement. *State v. Z.U.E.*, 183 Wn.2d 610, 617, 352 P.3d 796

(2015). One established exception is a brief investigative detention of a person, known as a *Terry*[2] stop. *Id.*

For an investigative stop to be permissible, a police officer must have had a "reasonable suspicion" based on specific and articulable facts that the detained person was or was about to be involved in a crime. *Id.* A "generalized suspicion that the person detained is 'up to no good' " is not enough; "the facts must connect the particular person to the particular crime that the officer seeks to investigate." *Id.* at 618 (italics omitted).

We determine the propriety of an investigative stop – the reasonableness of the officer's suspicion – based on the "totality of the circumstances." *Fuentes*, 183 Wn.2d at 158. "The totality of circumstances includes the officer's training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, and the amount of physical intrusion on the suspect's liberty." *Id.* The focus is on what the officer knew at the inception of the stop. *Id.*

Significantly, an officer can rely on his or her experience to identify seemingly innocent facts as suspicious. *State v. Moreno*, 173 Wn. App. 479, 492, 294 P.3d 812 (2013). Facts that appear innocuous to an average person may appear suspicious to an officer in light of past experience. *Id.* at 493. And "officers do not need to rule out all possibilities of innocent behavior before they make a stop." *Fuentes*, 183 Wn.2d at 163.

In evaluating a denial of a motion to suppress evidence, we review the trial court's findings of fact for substantial evidence and review de novo the trial court's conclusions of law based on those findings. *Id.* at 157.

[2] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

b. Analysis

The trial court concluded that the officers had reasonable suspicion necessary to conduct an investigative stop. In its oral ruling, the court relied on the following facts: (1) the officers had recently conducted a controlled buy in which the CI purchased drugs from Molina Rios, (2) the officers received information from the CI that Molina Rios would be going to the Seattle area to obtain drugs, (3) the officers followed Molina Rios to the Everett area in a car associated with the controlled buy, (4) Molina Rios met up with Trujeque-Magana, (5) Trujeque-Magana had two prior convictions for drug distribution, (6) Molina Rios and Trujeque-Magana stopped in places where they did not do anything and spent a lot of time talking on their phones, (7) it appeared to the officers that Molina Rios and Trujeque-Magana were counting money, (8) Molina Rios and Trujeque-Magana engaged in what the officers perceived as a countermeasure to lose the officers, and (9) Molina Rios and Trujeque-Magana were driving in a way that suggested that they were driving in tandem and working together.

We conclude that substantial evidence supported the trial court's oral findings. Jones and Ferguson testified to all of these facts. And Trujeque-Magana does not challenge the court's findings. The question here is whether these findings are sufficient to support the conclusion that the officers had a reasonable suspicion that Trujeque-Magana had been or was involved in a crime.

Trujeque-Magana argues that the officers had no basis for suspecting that he, as opposed to Molina Rios, was involved in criminal activity. The CI identified only Molina Rios as being involved in drug activity. Although Trujeque-Magana spent time with Molina Rios doing innocuous things, none of the surveillance showed Trujeque-Magana doing anything illegal. Trujeque-Magana emphasizes that a stop is not justified merely because a person is in proximity

to someone who is suspected of criminal activity. *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). He also argues that his prior criminal history by itself was not sufficient to stop him.

However, the undisputed evidence shows that Molina Rios went to the Everett area to obtain drugs, and that throughout the day Trujeque-Magana and Molina Rios were working closely together. They met, talked on their cell phones in Molina Rios's car, drove their cars together to a store parking lot and then to the mall, and drove in tandem back to Clark County. This evidence supports the conclusion that Trujeque-Magana was not merely in proximity to Molina Rios; he was actively assisting in Molina Rios's effort to obtain drugs.

Further, although the evidence showed activity that could have been innocuous, that activity also was consistent with setting up a meeting to purchase drugs and trying to avoid being followed by law enforcement. Molina Rios and Trujeque-Magana moved from place to place. They talked on their cell phones. The officers thought that they counted money. And Molina Rios and Trujeque-Magana took actions to evade law enforcement. Based on their extensive experience, Jones and Ferguson suspected that these seemingly innocuous activities were associated with a drug exchange.

Finally, Trujeque-Magana is correct that his criminal record standing alone would not have been sufficient to justify an investigative stop. But his two prior drug distribution convictions could be considered with all the other factors to support a reasonable suspicion of criminal activity. *See State v. Neth*, 165 Wn.2d 177, 185-86, 196 P.3d 658 (2008) (holding that a prior criminal history of similar crimes is not enough on its own, but with other evidence may meet the higher probable cause standard).

The totality of the circumstances were sufficient to establish a reasonable suspicion that Trujeque-Magana was engaged in illegal drug activity. Accordingly, we hold that the trial court

did not err in concluding that the investigative stop was justified and in denying Trujeque-Magana's suppression motion.

3. Consent to Search Purse

Trujeque-Magana argues that Santiago-Santos's consent to search her purse was invalid because the officers did not inform her of her right to refuse consent. We disagree.

One of the recognized exceptions to the warrant requirement is lawful consent. *State v. Blockman*, 190 Wn.2d 651, 658, 416 P.3d 1194 (2018). The Supreme Court has set out three requirements for a valid consensual search: "(1) the consent must be voluntary, (2) the consent must be granted by a party having authority to consent, and (3) the search must be limited to the scope of the consent granted." *Id.*

The trial court found that Santiago-Santos's consent to search her purse was voluntary. Trujeque-Magana does not challenge this finding. Instead, he argues that as a matter of law, the officers were required to inform her that she had the right to refuse consent to a search.

When police are investigating a home using the "knock and talk" method, article 1, section 7 of the Washington Constitution requires the police to advise the homeowner of his or her right to refuse consent to a search. *State v. Ferrier*, 136 Wn.2d 103, 118, 960 P.2d 927 (1998); *see also State v. Budd*, 185 Wn.2d 566, 572-74, 374 P.3d 137 (2016). But the Washington constitution does not require *Ferrier* warnings for searches pursuant to a valid *Terry* stop. *State v. Witherrite*, 184 Wn. App. 859, 864, 339 P.3d 992 (2014); *State v. Tagas*, 121 Wn. App. 872, 876-78, 90 P.3d 1088 (2004). Like here, *Tagas* involved the search of a purse during a *Terry* stop on the side of a highway. 121 Wn. App. at 875. The court stated, "When the subject of the search is not in custody and the question is whether consent is voluntary,

knowledge of the right to refuse consent is not a prerequisite of voluntary consent." *Id.* at 876-77.

Trujeque-Magana acknowledges that courts have refused to require *Ferrier* warnings for searches outside of people's homes, but asks this court to extend the principles of *Ferrier* to searches pursuant to *Terry* stops. He refers to a concurring opinion in *Witherrite* that suggested that *Ferrier* should be extended to vehicle searches. 184 Wn. App. at 864-65 (Lawrence-Berrey, J., concurring). However, Trujeque-Magana does not provide any compelling reason to disregard existing precedent and to extend the scope of *Ferrier* when the Supreme Court has not chosen to do so. And even the concurring opinion in *Witherrite* was addressing searches of vehicles, not personal possessions.

We hold that the officers were not required to inform Santiago-Santos of her right to refuse to consent to a search of her purse. Accordingly, we hold that the trial court did not err in denying Trujeque-Magana's motion to suppress the heroin found in the purse.

B. SUFFICIENCY OF EVIDENCE

Trujeque-Magana argues that the State did not present sufficient evidence to prove that (1) he possessed the heroin discovered in Santiago-Santos's purse (count 1), (2) he possessed the cocaine discovered in the apartment (count 4), (3) he possessed the two handguns found in the apartment (counts 6 and 7), and (4) he was armed with two handguns when he committed the crime of possession with intent to deliver cocaine. Molina Rios also asserts the first and fourth arguments.[3] We reject all of these arguments.

[3] Neither appellant argues that the evidence is insufficient on count 8, alien in possession of a firearm.

1. Standard of Review

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). In a sufficiency of the evidence claim, the defendant admits the truth of the evidence and the court views the evidence and all reasonable inferences drawn from that evidence in the light most favorable to the State. *Id.* at 265-66. Credibility determinations are made by the trier of fact and are not subject to review. *Id.* at 266. Circumstantial and direct evidence are equally reliable. *Id.*

2. Possession of Drugs and Guns

Trujeque-Magana and Molina Rios argue that there was insufficient evidence to prove that they possessed the heroin in Santiago-Santos's purse, and Trujeque-Magana argues that there was insufficient evidence to prove that he possessed the cocaine and handguns in the apartment. We disagree.

a. Legal Principles – Possession

A person can have actual possession or constructive possession of an item. *State v. Reichert*, 158 Wn. App. 374, 390, 242 P.3d 44 (2010). Actual possession requires physical custody of the item. *Id.* Constructive possession occurs when a person has "dominion and control" over an item. *Id.* Dominion and control exists when the person can immediately convert the item to his or her actual possession. *Id.* A person can have possession without exclusive control; more than one person can be in possession of the same item. *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008). But possession involves actual control, not merely a momentary handling of the item. *Id.*

A person's dominion and control over a premises "creates a rebuttable presumption that the person has dominion and control over items on the premises." *Reichert*, 158 Wn. App. at 390. Therefore, a jury can infer constructive possession of items on the premises from a person's dominion and control over the premises. *See State v. Shumaker*, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007). A vehicle is considered a "premises." *George*, 146 Wn. App. at 920.

b. Heroin in Purse

The State argues that Trujeque-Magana and Molina Rios had constructive possession of the heroin in Santiago-Santos's purse. Alternatively, the State argues that both Trujeque-Magana and Molina Rios were accomplices to Santiago-Santos's actual possession. We agree that under the specific facts of this case, both Trujeque-Magana and Molina Rios were accomplices to Santiago-Santos's possession.

Under RCW 9A.08.020(3)(a), a person can be guilty as an accomplice if:

> [w]ith knowledge that it will promote or facilitate the commission of the crimes, he or she:
> (i) Solicits, commands, encourages, or requests such other person to commit it; or
> (ii) Aids or agrees to aid such other person in planning or committing it.

The to-convict jury instruction for count 1 stated that the jury had to find that Trujeque-Magana and Molina Rios *or their accomplice* possessed heroin.

Evidence that a person is merely present at the scene of a crime, even with knowledge of the crime, is insufficient to prove accomplice liability. *State v. Jameison*, 4 Wn. App. 2d 184, 205, 421 P.3d 463 (2018). The accomplice must "associate himself with the principal's criminal undertaking, participate in it as something he desires to bring about, and seek by his action to make it succeed." *Id.*

Here, the evidence supports a finding of accomplice liability. A reasonable inference from the evidence is that Trujeque-Magana and Molina Rios obtained the heroin, and gave it to

Santiago-Santos to transport back to Clark County. All three were involved in the criminal undertaking – possession of the heroin with intent to deliver it. In particular, the State presented evidence that Molina Rios and Trujeque-Magana were possibly counting money together and driving in tandem. Further, there was no evidence that Santiago-Santos was actively involved in any of these efforts. She was asleep while Molina Rios and Trujeque-Magana apparently were making calls and counting money.

This evidence supports an inference that both Trujeque-Magana and Molina Rios had helped obtain the heroin found in Santiago-Santos's purse and therefore knew about it, and were aiding her in transporting it to Clark County.

Molina Rios argues that the State failed to prove that he was an accomplice because there was no *direct* evidence that he knew the heroin was in Santiago-Santos's purse. However, in a sufficiency challenge we view circumstantial evidence and direct evidence as equally reliable. *Cardenas-Flores*, 189 Wn.2d at 266. Here, the circumstantial evidence supports a reasonable inference that Molina Rios was aware of and actively aided in Santiago-Santos's possession of the heroin.

We hold that sufficient evidence supports Trujeque-Magana's and Molina Rios's convictions of possession with intent to deliver heroin.

c. Drugs and Guns in Apartment

The issue here is whether Trujeque-Magana had dominion and control over the bedroom in the apartment where officers found cocaine and two handguns, which would invoke the presumption that he constructively possessed those items. Trujeque-Magana emphasizes that the State presented no direct evidence that he had any connection with the apartment at the time the cocaine and guns were discovered.

However, the State presented a document signed by Trujeque-Magana showing that he had leased the apartment. Although this evidence does not conclusively prove that he lived there, it supports a reasonable inference that Trujeque-Magana had some control over the apartment. In addition, the bedroom in which the cocaine and guns were found contained men's clothes, including a shirt that Trujeque-Magana was seen wearing in a Facebook photograph. This evidence, along with the lease document, supports a reasonable inference that he was living in that bedroom and had dominion and control of at least that bedroom. Therefore, the evidence supports the conclusion that Trujeque-Magana had constructive possession of the cocaine and guns in the bedroom.

Accordingly, we hold that sufficient evidence supports Trujeque-Magana's convictions of possession with intent to deliver cocaine and unlawful possession of the two firearms.

3. Armed with Firearms

Trujeque-Magana and Molina Rios argue that there was insufficient evidence to prove that they were armed with the handguns found in the apartment when they committed the possession of cocaine (Trujeque-Magana) and cocaine/methamphetamine (Molina Rios) crimes. We disagree.

a. Legal Principles

Under RCW 9.94A.533(3), a court must add additional time to a sentence if the defendant is found to have been armed with a firearm while committing the crime. *State v. Houston-Sconiers*, 188 Wn.2d 1, 16-17, 391 P.3d 409 (2017). The additional time is five years for a class A felony or a felony with a statutory maximum sentence of at least 20 years, and three years for a class B felony or a felony with a statutory maximum sentence of at least 10 years. RCW 9.94A.533(3)(a)(b).

"To establish that a defendant was armed for the purpose of a firearm enhancement, the State must prove (1) that a firearm was easily accessible and readily available for offensive or defensive purposes during the commission of the crime and (2) that a nexus exists among the defendant, the weapon, and the crime." *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 826, 425 P.3d 807 (2018).

Regarding the first requirement, the presence or even constructive possession of a weapon found at a crime scene alone is not enough to establish that the defendant was armed in this context. *Id.* at 824. On the other hand, "[t]he defendant does not have to be armed at the moment of arrest to be armed for purposes of the firearms enhancement." *State v. O'Neal*, 159 Wn.2d 500, 504, 150 P.3d 1121 (2007). "[T]he State need not establish with mathematical precision the specific time and place that a weapon was readily available and easily accessible so long as it was at the time of the crime." *Id.* at 504-05. The court in *Sassen Van Elsloo* confirmed these principles. 191 Wn.2d at 826-27. And a drug distribution operation is a continuing crime that is ongoing even when the defendant is elsewhere. *See State v. Neff*, 163 Wn.2d 453, 464-65, 181 P.3d 819 (2008) (stating this principle in the context of a drug manufacturing operation).

Regarding the second requirement, we look to the nature of the crime, the type of firearm, and the context in which it was found to determine if there was a nexus between the defendant, the firearm, and the crime. *Sassen Van Elsloo*, 191 Wn.2d at 827. Significantly, a sufficient nexus exists if there is evidence that the firearm was present to protect an ongoing drug operation. *O'Neal*, 159 Wn.2d at 506; *State v. Eckenrode*, 159 Wn.2d 488, 494-95, 150 P.3d 1116 (2007).

The Supreme Court has considered whether the State presented sufficient evidence to support a firearm enhancement for drug crimes in several cases. In *Sassen Van Elsloo*, the

defendant had a loaded shotgun in a car that also contained various types of drugs. 191 Wn.2d at 802-03. The court held that the State had presented sufficient evidence that the shotgun was readily accessible and connected to the possession of the drugs. *Id.* at 829-31.

In *Neff*, police found two loaded guns in a locked safe and a loaded gun in a tool belt hanging from the rafters of a garage where methamphetamine was being manufactured. 163 Wn.2d at 457. Police also discovered two surveillance cameras and a monitor in the garage. *Id.* The court held that the evidence was sufficient to prove that the defendant was armed with a firearm. *Id.* at 464-65. The court noted that the mere presence and constructive possession of a gun was not sufficient to support the enhancement without evidence linking the gun to the crime, but stated that the presence of the security cameras and monitor provided that proof. *Id.* at 464. And the court rejected the defendant's argument that he could not be armed with the guns because he was not in the garage at the time of the arrest, emphasizing that the drug operation was a continuing crime. *Id.* at 464-65.

In *O'Neal*, police found more than 20 guns along with body armor, a police scanner, and night goggles at a mobile home where methamphetamine was being manufactured. 159 Wn.2d at 503. The defendants were arrested at the time of the search, but they were not holding guns when arrested. *Id.* at 502. Most of the guns were in two safes; however, a loaded semiautomatic rifle and a loaded semiautomatic pistol were found in two bedrooms. *Id.* at 503. The court held that the two loaded weapons were readily accessible and that a reasonable jury could infer that the guns were there to protect the drug operation. *Id.* at 506. The court cited with approval this court's decision in *State v. Simonson*, 91 Wn. App. 874, 883, 960 P.2d 955 (1998), which held that it was reasonable to infer that the presence of at least four loaded guns at a

methamphetamine manufacturing operation was for the purpose of defending the operation and therefore was sufficient to support a deadly weapon enhancement. *O'Neal*, 159 Wn.2d at 505.

In *Eckenrode*, law enforcement searching a house discovered a large marijuana grow operation and a loaded rifle and an unloaded pistol along with a police scanner. 159 Wn.2d at 491-92, 494. The defendant was outside and far away from the guns when he was arrested. *Id.* at 492. The court stated that the legislative purpose of the deadly weapons enhancement was "to recognize that armed crime, including having weapons available to protect contraband, imposes particular risks of danger on society." *Id.* at 493. The court held that based on the evidence of a drug manufacturing operation, a police scanner to monitor police activity and the weapons, "[a] jury could readily have found that the weapons were there to protect the criminal enterprise." *Id.* at 494.

The court reached the opposite conclusion in *State v Gurske,* where the defendant had a pistol in a zipped backpack stuffed behind the driver's seat of his truck. 155 Wn.2d 134, 136, 118 P.3d 333 (2005). The court held that the stipulated facts were insufficient to prove that the pistol was readily accessible for the purpose of the firearms enhancement. *Id.* at 143-44. The court stated that the evidence was insufficient because the facts did not indicate whether the defendant could have reached the backpack, unzipped it, removed items on top of the pistol, and accessed the pistol from where he was sitting when he was stopped by a police officer. *Id.*

The court in *State v. Valdobinos* also found insufficient evidence to support a firearm enhancement where an unloaded rifle was found under a bed in a house where cocaine was discovered. 122 Wn.2d 270, 274, 282, 858 P.2d 199 (1993). The court held that there was no evidence showing that the unloaded rifle was accessible and readily available for offensive or defensive use. *Id.* at 282.

b. Analysis

Here, the State presented evidence that loaded guns were found in a closet very close to a bag of cocaine (Trujeque-Magana) and under a pillow and in a dresser drawer in a room with large amounts of drugs (Molina Rios). A reasonable jury could conclude that these guns were readily accessible and available to people in the apartment. Under *O'Neal*, the State was not required to show that Trujeque-Magana and Molina Rios were armed at the time of their arrests or establish with mathematical certainty the specific time and place that the guns were accessible and available regarding their continuing possession with intent to deliver offenses. 159 Wn.2d at 504-05. And a reasonable jury could infer from the proximity of the guns to the drugs that the guns were used to protect the ongoing drug operation.

Gurske does not apply here because in that case, the firearm clearly was not accessible to the driver of a vehicle. 155 Wn.2d at 143. Here, the guns were easily accessible to anyone who was near the seized drugs. *Valdobinos* does not apply here because in that case, the firearm was unloaded and the court did not indicate that it was near the cocaine that officers discovered. 122 Wn.2d at 282. Here, the guns were loaded and were in close proximity to the seized drugs.

Trujeque-Magana argues that the firearms could not have been readily accessible because he was in custody at the time the guns were discovered. He cites this court's decision in *State v. Mills*, which held that the defendant was not armed with a firearm when he was arrested several miles from a hotel room where the firearm and drugs were found. 80 Wn. App. 231, 234-37, 907 P.2d 316 (1995).

However, Trujeque-Magana's possession with intent to deliver the drugs in the apartment was a continuing offense. In *Simonson*, one of the defendants was in jail when officers discovered drugs and firearms in his trailer. 91 Wn. App. at 877-78. This court held that the

evidence was sufficient to support a deadly weapon enhancement. *Id.* at 883. The court stated that the defendants were committing a continuing offense over a six-week period, and during some or all of that time they kept guns on the premises that could be inferred were used to defend their drug operation. *Id.* *Simonson*, not *Mills*, is applicable here.

Further, *Mills* was decided long before the series of cases discussed above that further explained the evidence required to prove that a defendant was armed with a firearm. These cases have established that RCW 9.94A.533(3) requires that the defendant was armed during the commission of the offense, but does not require that the defendant be armed at the time the guns were discovered or at the time he or she was arrested. *O'Neal*, 159 Wn.2d at 504.

In addition, the information stated that Trujeque-Magana committed the intent to deliver cocaine offense "on or about" November 5, 2015. When an offense is charged using "on or about" or similar language, the proof that the offense was committed is not limited to the specified date. *State v. Yallup*, 3 Wn. App. 2d 546, 553, 416 P.3d 1250, *review denied* 191 Wn.2d 1014 (2018). Therefore, the State was not required to prove that Trujeque-Magana was armed with a firearm specifically on November 5.

Molina Rios argues that the State did not present evidence of a nexus between himself, the guns, and his constructive possession of the drugs. However, the State presented evidence that a loaded handgun was under the pillow in Molina Rios's bedroom. The State also presented evidence of drugs in Molina Rios's bedroom. A jury reasonably could have inferred that Molina Rios had the gun nearby to defend the drugs in his room.

Accordingly, we hold that sufficient evidence supports the firearm enhancements for both Trujeque-Magana and Molina Rios.

C. DISCLOSURE OF EXCULPATORY EVIDENCE

Trujeque-Magana argues that the trial court erred in denying his motion to dismiss based on his claim that the State failed to produce exculpatory evidence – a shopping bag in the car he was driving – in violation of the *Brady* rule. We disagree.

1. Legal Principles

Under *Brady* and its progeny, the State is required to turn over all potentially exculpatory evidence or evidence that could be used as impeachment evidence. *State v. Mullen*, 171 Wn.2d 881, 894, 259 P.3d 158 (2011). "The state due process clause extends the same protection regarding this right as does its federal counterpart." *State v. Armstrong*, 188 Wn.2d 333, 344, 394 P.3d 373 (2017).

The defendant bears the burden of proving three elements of a successful *Brady* claim: (1) the evidence must be favorable to the defendant, either as exculpatory or impeachment evidence; (2) the State must have withheld the evidence; and (3) the evidence must be material to the defense. *State v. Davila*, 184 Wn.2d 55, 69, 357 P.3d 636 (2015).

Evidence is material if there is a reasonable probability that the result of the proceeding would have been different if the evidence had been disclosed to the defendant. *Id.* at 73. A defendant need not demonstrate that he would be acquitted if suppressed evidence had been disclosed. *Id.* Under the reasonable probability standard, the defendant must show only that the State's suppression undermines confidence in the trial's outcome. *Id.* We evaluate the effect of the State's failure to disclose favorable evidence cumulatively and in the context of the entire record. *Id.* at 78.

Our review of *Brady* claims involves a mixed question of fact and law. *Id.* at 74. We review underlying factual findings by the trial court for substantial evidence. *Id.* at 74-75. But

we review de novo the ultimate constitutional question of whether the State's failure to disclose certain information resulted in a due process violation. *Id.* at 75.

2. Analysis

Trujeque-Magana argues that the shopping bag in the car he was driving was material because it could have been used to impeach the officers' testimony suggesting that he was doing nothing while under surveillance. However, he admits that the officers did not testify about a lack of a shopping bag in their trial testimony (as they did in the suppression hearing). Therefore, it is unclear how the presence of the shopping bag in the impounded car would undermine their credibility.

In addition, the officers' testimony that doing nothing suggested involvement in a drug transaction was an issue at the suppression hearing, not at trial. So impeachment on this issue would be immaterial. And even if he did buy something at the mall, Trujeque-Magana does not explain how the shopping bag would prove that he was not involved with a drug transaction.

Accordingly, we hold that the potential shopping bag is not material evidence and therefore that the State's failure to produce it to Trujeque-Magana was not a *Brady* violation.

D. IDENTIFICATION OF CI

Trujeque-Magana argues that the trial court erred in refusing to require the State to disclose the identity of the CI involved in the investigation of Molina Rios. We disagree.

1. Legal Principles

Under the so-called "informer's privilege," the State generally is not required to disclose the identity of a CI, in order to encourage citizens to safely provide information on criminal activity to law enforcement. *State v. Atchley*, 142 Wn. App. 147, 155, 173 P.3d 323 (2007). CrR 4.7(f)(2) provides that the State is not required to reveal the identity of a CI if "a failure to

disclose will not infringe upon the constitutional rights of the defendant." The trial court must weigh the possible significance of the informant's testimony and the possible defenses against the State's interest in protecting the identity of its informant. *Atchley*, 142 Wn. App. at 155-56. "When 'disclosure of an informer's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.' " *State v. Petrina*, 73 Wn. App. 779, 783, 871 P.2d 637 (1994) (quoting *Rovario v. U.S.*, 353 U.S. 53, 60-61, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957)).

We review a trial court's decision on a request to disclose the CI's identity for an abuse of discretion. *State v. Bauer*, 98 Wn. App. 870, 878, 991 P.2d 668 (2000). A court abuses its discretion when it acts on untenable grounds or its decision is manifestly unreasonable. *Id.*

2. Analysis

Trujeque-Magana argued in his motion to the trial court that the CI would be able to testify that Trujeque-Magana was not involved in the drug operation because only Molina Rios had participated in the controlled buy with the CI. The trial court ruled that even if the CI could testify that Trujeque-Magana was not involved in the controlled buys, such testimony would not be material to Trujeque-Magana's involvement in the alleged drug transaction in Everett, the traffic stop, or the evidence found in the apartment.

Trujeque-Magana now argues that evidence that Molina Rios was acting alone during the controlled buys could have rebutted the circumstantial evidence that Trujeque-Magana was involved in the drug operation. However, he does not explain how the CI's testimony regarding the controlled buys would show that Molina Rios was operating his drug business alone or that Trujeque-Magana did not participate on another date. Trujeque-Magana has not shown that the trial court's ruling was untenable or unreasonable.

Accordingly, we hold that the trial court did not abuse its discretion in denying Trujeque-Magana's motion to disclose the identity of the CI.

E. OPINION TESTIMONY OF OFFICERS

Trujeque-Magana argues that the trial court erred in allowing officers to provide opinion testimony regarding various observations. He argues that the officers' testimony improperly stated opinions on issues of fact to be determined by the jury. We disagree.

1. Legal Principles

We review a trial court's decision to admit evidence for an abuse of discretion. *State v. Quaale*, 182 Wn.2d 191, 196, 340 P.3d 213 (2014). A trial court has considerable discretion in determining the admissibility of evidence. *Id.* An abuse of discretion occurs only where a trial court's decision is manifestly unreasonable or based on untenable grounds or reasons. *Id.* at 197. There is no abuse of discretion if reasonable persons could disagree regarding admissibility of evidence. *Id.* at 196.

Under ER 701, a witness not testifying as an expert can offer opinions that are (1) rationally based on the witness's perceptions, (2) helpful to the trier of fact in understanding the witness's testimony or determining a fact in issue, and (3) not based on scientific, technical, or other specialized knowledge covered by ER 702. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008).

However, witnesses may not give opinions on personal beliefs of the defendant's guilt, the intent of the accused, or the veracity of another witness. *Quaale*, 182 Wn.2d at 200. Such opinion testimony is unfairly prejudicial to the defendant because determining the defendant's guilt is the jury's exclusive province. *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009). "A law enforcement officer's improper opinion testimony may be particularly prejudicial

because it carries 'a special aura of reliability.' " *State v. Winborne*, 4 Wn. App. 2d 147, 177, 420 P.3d 707 (2018) (quoting *King*, 167 Wn.2d at 331). The inclusion of opinion testimony regarding a defendant's guilt may be reversible error. *King*, 167 Wn.2d at 329-30.

While a witness may not give testimony on their personal beliefs regarding the evidence, a witness may testify that certain evidence is "consistent with" a particular conclusion. *Montgomery*, 163 Wn.2d at 592-93.

2. Analysis

Trujeque-Magana challenges the admissibility of four areas of testimony. First, Deputy Jones testified that he believed that Trujeque-Magana and Molina Rios were counting money even though he could not see their hands and could not see any money. Jones also testified that many times as a drug investigator he had observed suspects spend long periods of time doing nothing.

Similarly, Detective Ferguson testified that he believed that Trujeque-Magana and Molina Rios could have been counting money. In addition, Ferguson testified that based on his experience, Trujeque-Magana and Molina Rios were preparing to conduct a drug deal or secret the drug deal from police; that Trujeque-Magana and Molina Rios were engaged in counter surveillance driving; and that in his experience people would move the location multiple times when they are trying to conduct a drug deal.

However, this testimony involved the officers' opinions based on their observations and their experience. These type of opinions generally are admissible under ER 701. And the officers did not express any opinions regarding Trujeque-Magana's guilt.

Second, Detective Hall testified about the presence of makeup, brushes, and a Victoria's Secret bag in the room officers associated with Trujeque-Magana. He stated that suspects and

witnesses had told him that drugs belonged to them even though they were contained in materials generally attributed to the opposite gender. Once again, this testimony involved Hall's observations and experience and were admissible under ER 701.

Third, Detective Hall testified that the amount of cash officers discovered in the apartment was more cash than typically seen in drug cases, and that the cash showed that "[t]hey are at least middle, most likely upper-level drug dealers." Report of Proceedings (RP) at 966. Hall also testified that based on the three types of drugs present and the firearms that were found, "I say definitely this is signature of a middle to upper-level drug dealing organization." RP at 966. However, Trujeque-Magana did not object to this testimony at trial. Therefore, he cannot raise this issue for the first time on appeal. RAP 2.5(a); *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015).

Fourth, Trujeque-Magana asserts that officers testified that they did not perform DNA or fingerprint testing because they already had enough evidence to prove the defendants' guilt. However, defense counsel elicited this testimony on cross-examination and did not object to or move to strike their answers. Therefore, Trujeque-Magana cannot raise this issue for the first time on appeal. RAP 2.5(a); *Kalebaugh*, 183 Wn.2d at 583.

Accordingly, we reject Trujeque-Magana's claim that officers provided improper opinion testimony.

F. EQUAL PROTECTION CHALLENGE TO RCW 9.41.171

Trujeque-Magana and Molina Rios argue that RCW 9.41.171(3) and RCW 9.41.175 violate equal protection because the statutes treat noncitizens from Canada differently than noncitizens from other countries regarding the possession of firearms. We disagree.

1. Statutory Provisions

Under RCW 9.41.171, it is unlawful "for any person who is not a citizen of the United States to carry or possess any firearm, unless the person: (1) Is a lawful permanent resident; (2) has obtained a valid alien firearm license pursuant to RCW 9.41.173; or (3) meets the requirements of RCW 9.41.175." In other words, it is unlawful for a noncitizen to carry or possess a firearm unless one of three exceptions applies. The State concedes that in order to convict for violation of this statute, it has the burden of proving the absence of these three exceptions.

The State presented evidence that Trujeque-Magana and Molina Rios did not satisfy RCW 9.41.171(1) or (2). Trujeque-Magana stipulated that he was not a United States citizen and was not a lawful permanent resident.[4] And the State presented evidence that Molina Rios was not a United States citizen and was not a lawful permanent resident. The State also presented evidence that there was no record of either Trujeque-Magana or Molina Rios having a license to possess a firearm.

Trujeque-Magana and Molina Rios challenge RCW 9.41.171(3), which provides an exception for a person that meets the requirements of RCW 9.41.175. As Trujeque-Magana and Molina Rios note, RCW 9.41.175 distinguishes between nonimmigrant aliens and citizens of Canada in addressing when a noncitizen can carry or possess a firearm without obtaining a firearm license. RCW 9.41.175(1) states that a nonimmigrant alien who is not a Washington resident or Canadian citizen must possess:

[4] Trujeque-Magana claims that the court erred in instructing the jury that it could consider his stipulation that he was not a lawful permanent resident of the United States regarding counts 6 and 7. However, he does not assign error to this instruction and does not provide any meaningful argument regarding the alleged error. Therefore, we do not address this issue.

> (a) A valid passport and visa showing he or she is in the country legally;
>
> (b) If required under federal law, an approved United States department of justice ATF-6 NIA application and permit for temporary importation of firearms and ammunition by nonimmigrant aliens; and
>
> (c)(i) A valid hunting license issued by a state or territory of the United States; or (ii) An invitation to participate in a trade show or sport shooting event being conducted in this state, another state, or another country that is contiguous with this state.

For Canadian citizens, the requirements are identical except for subsection (a). The statute does not specify that Canadian citizens must have passports and visas, but states that Canadian citizens must possess "[v]alid documentation as required for entry into the United States." RCW 9.41.175(2)(a).

Under these provisions, citizens of all countries other than Canada must have a visa showing that they are in the United States legally plus meet the requirements of (b) and (c) to lawfully carry or possess a firearm. But Canadian citizens who meet the (b) and (c) requirements do not need to have a visa or prove that they are in the United States legally to lawfully carry or possess a firearm; they only need a passport as valid documentation as required for entry.

2. Legal Principles – Equal Protection

The Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution guarantee equal protection under the law. "Equal protection requires that similarly situated individuals receive similar treatment under the law." *Harris v. Charles*, 171 Wn.2d 455, 462, 256 P.3d 328 (2011). Equal protection is a constitutional issue, which we review de novo. *Madison v. State*, 161 Wn.2d 85, 92, 163 P.3d 757 (2007).

The threshold requirement of an equal protection challenge is that a defendant "must establish that he received disparate treatment because of membership in a class of similarly

situated individuals and that the disparate treatment was the result of intentional or purposeful discrimination." *State v. Osman*, 157 Wn.2d 474, 484, 139 P.3d 334 (2006).

Trujeque-Magana and Molina Rios appear to be making a facial rather than an as applied challenge to RCW 9.41.171(3) and RCW 9.41.175. To prevail in a facial challenge, a defendant must show that " 'no set of circumstances exists in which the statute, as currently written, can be constitutionally applied.' " *City of Seattle v. Evans*, 184 Wn.2d 856, 862, 366 P.3d 906 (2015) (quoting *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004)).

3. Analysis

Trujeque-Magana and Molina Rios are correct that RCW 9.41.175 establishes different treatment for Canadian citizens on its face. However, they cannot show that there are no circumstances under which the statutes can be constitutionally applied. In fact, as applied to them under the facts of this case, RCW 9.41.171(3) and RCW 9.41.175 do not violate equal protection because Trujeque-Magana and Molina Rios would have been in violation of RCW 9.41.171(3) even if they were Canadian.

Trujeque-Magana and Molina Rios have not shown or even alleged that they had valid documentation for entry into the United States as required in RCW 9.41.175(2)(a) or that they had a hunting license from another state or an invitation to a trade show or event as required in RCW 9.41.175(2)(c). Therefore, RCW 9.41.171(3) and RCW 9.41.175 treated them the same regardless of whether they were Mexican or Canadian citizens.

We hold that RCW 9.41.171(3) and RCW 9.41.175 do not violate equal protection under the facts of this case.[5]

[5] Trujeque-Magana also claims in an assignment of error that the evidence was insufficient to support this conviction. However, he does not present any argument to support this claim, and therefore we do not address it. *State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012).

G. SENTENCING ISSUES

Trujeque-Magana argues that in sentencing him, the trial court made erroneous same criminal conduct rulings and applied five-year instead of three-year firearm enhancements based on a misinterpretation of RCW 69.50.435(1). We disagree.

1. Same Criminal Conduct

For purposes of calculating a defendant's offender score, multiple offenses that encompass the same criminal conduct are counted as one offense. RCW 9.94A.525(5)(a)[6]. Under RCW 9.94A.589(1)(a), two or more offenses constitute the "same criminal conduct" when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." If any of these elements is not present, the offenses are not the same criminal conduct. *State v. Aldana Graciano*, 176 Wn.2d 531, 540, 295 P.3d 219 (2013).

Multiple offenses will be treated as occurring at the same time if they are "part of a continuous, uninterrupted sequence of conduct over a very short period of time." *State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997). On the other hand, multiple offenses do not occur at the same time if the defendant fails to show that they were continuous, simultaneous, or occurred in a short time frame. *Aldana Graciano*, 176 Wn.2d at 541.

The defendant bears the burden of establishing that two or more offenses encompass the same criminal conduct. *Id.* at 539-40. "[E]ach of a defendant's convictions counts toward his offender score *unless* he convinces the court that they involved the same criminal intent, time, place, and victim." *Id.* at 540.

[6] RCW 9.94A.525 was amended in 2017. However, these amendments do not materially affect the statutory language relied on by this court. Accordingly, we do not include the word "former" before RCW 9.94A.525.

We review a trial court's determination of whether two offenses encompass the same criminal conduct for an "abuse of discretion or misapplication of law." *Id*. at 537. Under this standard, a trial court abuses its discretion if the record supports only the opposite conclusion. *Id.* at 537-38. "But where the record adequately supports either conclusion, the matter lies in the court's discretion." *Id.* at 538. In addition, a trial court abuses its discretion by applying the wrong legal standard. *State v. Johnson*, 180 Wn. App. 92, 100, 320 P.3d 197 (2014).

Here, the trial court ruled that Trujeque-Magana's convictions on counts 1 and 4 – the possession of heroin and cocaine convictions – were not the same criminal conduct. The court also ruled that counts 6, 7, and 8 – the possession of firearm convictions – were the same criminal conduct. However, the court did not find that counts 6, 7, and 8 were the same criminal conduct as the firearm enhancement associated with count 4.

Trujeque-Magana argues that counts 1 and 4 should constitute the same criminal conduct. He claims that although the two drug violations occurred at different times and at different places, his intent was the same and they occurred over a short time frame. However, by Trujeque-Magana's own admission, counts 1 and 4 took place at different times and places. Under RCW 9.94A.589(1)(a), the crimes must have been committed at the same time and place to constitute the same criminal conduct. Therefore, Trujeque-Magana's argument fails.

Trujeque-Magana also argues that counts 6, 7, and 8 were the same criminal conduct as the firearm enhancement associated with count 4. He claims that being armed for the purpose of the firearm enhancement was intimately tied to possessing the guns, and therefore should have been considered the same criminal conduct.

However, the criminal intent element of the firearm enhancement for possession with intent to distribute cocaine is different than for first degree unlawful possession of a firearm or

for alien in possession of a firearm. *State v. McGrew*, 156 Wn. App. 546, 555, 234 P.3d 268 (2010). For the possession with intent to deliver cocaine and firearm enhancement charge, the State was required to prove Trujeque-Magana intended to deliver the cocaine while armed with a firearm. *Id.* But for the unlawful firearm possession charges and the alien in possession of a firearm charge, the State was required to prove only that Trujeque-Magana knowingly possessed the firearms. *See McGrew*, 156 Wn. App. at 555. As noted above, to constitute the same criminal conduct two offenses must have the same criminal intent. *Aldana Graciano*, 176 Wn.2d at 540. Therefore, this argument also fails.

Accordingly, we hold that the trial court did not abuse its discretion in ruling that Trujeque-Magana's convictions on counts 1 and 4 were not the same criminal conduct and that his convictions on counts 6, 7, and 8 and the firearm enhancement associated with count 4 were not the same criminal conduct.

2. Effect of RCW 69.50.435(1) on Firearm Enhancement

Under RCW 69.50.435(1), a sentencing court may impose "imprisonment of up to twice the imprisonment otherwise authorized by this chapter" for a violation of RCW 69.50.401 involving possession with the intent to deliver a controlled substance if the defendant committed the offense within 1,000 feet of a school bus route stop or 1,000 feet of school grounds. RCW 69.50.401(2)(a) states that violations of that section for schedule I or II narcotics are punishable by up to 10 years imprisonment. Former RCW 69.50.101(dd)(5) (2015) states that cocaine is a narcotic drug, and cocaine is listed as a schedule II controlled substance under RCW 69.50.206(b)(4).

Here, the jury found that Trujeque-Magana had committed possession with intent to distribute cocaine within 1,000 feet of a school bus stop. The trial court therefore concluded that

the maximum term for count 4 was 20 years. The significance of this ruling was that under RCW 9.94A.533(3)(a), the sentence for each firearm enhancement was five years rather than three years.

Trujeque-Magana argues that the trial court should have applied the enhancement by doubling the *standard range* sentence listed in RCW 9.94A.517-.518 rather than to the statutory maximum sentence under RCW 69.50.401(2)(a). But RCW 69.50.435(1) specifically references "imprisonment otherwise authorized *by this chapter*." (Emphasis added.) The term of imprisonment listed in chapter 69.50 RCW that can be doubled is the statutory maximum listed in RCW 69.50.401(2)(a) – 10 years imprisonment.

This court held that under RCW 69.50.435(1), the maximum sentence is doubled to create a new maximum sentence for purposes of calculating the firearm sentencing enhancement. *State v. Blade*, 126 Wn. App. 174, 179-80, 107 P.3d 775 (2005). While addressing a different statute, the Supreme Court cited *Blade* with approval and confirmed that RCW 69.50.435(1) has the effect of doubling the maximum sentence, not the standard range sentence. *In re Pers. Restraint of Cruz*, 157 Wn.2d 83, 89-90, 134 P.3d 1166 (2006).

Accordingly, we hold that the trial court did not exceed its authority under RCW 69.50.435(1) in sentencing Trujeque-Magana.

3. Criminal Filing Fee

Molina Rios argues in a supplemental brief that under *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), we should vacate the criminal filing fee imposed on him as part of his sentence because he is indigent. The State did not respond to this argument.

The trial court imposed as a mandatory LFO a $200 criminal filing fee. In 2018, the legislature amended RCW 36.18.020(2)(h), which now prohibits imposition of the criminal filing

fee on an indigent defendant. The Supreme Court in *Ramirez* held that this amendment applies prospectively to cases pending on direct appeal. 191 Wn.2d at 747-50.

Here, the trial court found that Molina Rios was indigent at the time of sentencing. Therefore, under the current version of RCW 36.18.020(2)(h) the criminal filing fee imposed on Molina Rios must be stricken.

H. APPELLATE COSTS

Molina Rios requests that we decline to impose appellate costs because he is indigent. The State has represented that it would not seek costs if it prevails. Therefore, we accept the State's representation and deny the award of costs against Molina Rios.

CONCLUSION

We affirm Trujeque-Magana's and Molina Rios's convictions and sentences, but we remand for the trial court to strike the criminal filing fee imposed on Molina Rios and amend his judgment and sentence.

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.

Maxa, C.J.
MAXA, C.J.

We concur:

J.
LEE, J.

Sutton, J.
SUTTON, J.

APPENDIX B

WELCOME TO EVERGREEN PARK

Resident Copy

MOVE IN MAY 19, 2015

Future Resident(s):	Date
MIGUEL TRUJEQUE MAGANA, SANDY GONGORA-CHI, and LUCIANO MOLINA RIOS	May 19, 2015
Address:	Lease Term:
4619 NE 112th Avenue #V102, Vancouver, WA 98682	11 months and 13 days (5/19/2015 - 4/30/2016)

Future Resident has deposited, with Owner's, funds as specified to secure the rental of the below described Leased Premises, subject to the following conditions:

1. In the event the application is approved by the Owner and Applicant meets all other conditions of occupancy, executes a Residential Lease Contract with Owner as and when required by Owner, the Application Deposit shall be credited towards the security deposit or the first month's rent identified in the Residential Lease Contract.
2. Application Deposit/Holding Fee (if applicable) shall be fully refunded (not application fee) in case of denial of application.
3. Application Deposit/Holding Fee (if applicable) shall be retained by Owner as liquidated damages; in which all further obligations to lease the premises to the Applicant shall be terminated if (i) the Application is withdrawn, for any reason after 72 hours from signing the Application, or (ii) the Application is accepted, with or without conditions, such as a co-signer or increased deposit, but the Applicant does not sign a Lease Contract as and when required by Owner; or (iii) if Applicant has provided false or misleading information within the Application. For the purposes of this provision, if the Applicant is required to pay an additional Application Deposit in order to qualify for occupancy, the Application shall be deemed conditionally accepted prior to the originally paid Application Deposit, even if the Application is subsequently rejected by the Applicant's failure to pay the required additional Application Deposit.
4. Future Resident agrees to take financial responsibility of the premises on May 19, 2015 and pay the balance of rent due and additional deposits in full, on that date.
5. A non-refundable application processing fee is required to prepare the Residential Lease Contract and to verify applicant's credit history, rental reference and employment.
6. If said Leased Premises is not vacated by present Resident on proposed move-out date and the present Resident is still in possession, the application deposit/holding fee will be returned, in full, to Applicant. The payment of the non-refundable fee does not guarantee occupancy.
7. Resident(s) understands the amounts listed below are based upon application approval. Should the application be approved with an additional deposit or last month's rent, the amount due at move in will be adjusted accordingly.
8. Special Needs Housing: Should you find that you require special accommodation to make your apartment more accessible for you or any member of your household, please contact the rental office.

Important Comact Information:

Leasing Office: 360 260-4635
TTD Relay: TDD/TTY dial 711
Fax: 360 260-4635
E-Mail: EVERGREEN.PARK@FPMGT.COM

Thank you for joining our community!
Welcome Home!

Miguel Trujeque 5/17/15
MIGUEL TRUJEQUE MAGANA (Resident) Date

5/17/15
SANDY GONGORA-CHI (Resident) Date

5/17/15
LUCIANO MOLINA RIOS (Resident) Date

5/17/15
(By FPI Management, Inc. on behalf of, and as designated operator, Owner) Date

15

STATUTORY APPENDIX

Relevant Statutory Provisions and Rules

ER 401 provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 402 provides:

> All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

ER 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

RAP 2.5(a) provides in part:

> Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. . . .

RAP 13.4 provides in part:

> (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RCW 9.41.171 provides:

> It is a class C felony for any person who is not a citizen of the United States to carry or possess any firearm, unless the person: (1) Is a lawful permanent resident; (2) has obtained a valid alien firearm license pursuant to RCW 9.41.173; or (3) meets the requirements of RCW 9.41.175.

RCW 9.41.175 provides:

> (1) A nonimmigrant alien, who is not a resident of Washington or a citizen of Canada, may carry or possess any firearm without having first obtained an alien firearm license if the nonimmigrant alien possesses:
>
> (a) A valid passport and visa showing he or she is in the country legally;
>
> (b) If required under federal law, an approved United States department of justice ATF-6 NIA application and permit for temporary importation of firearms and ammunition by nonimmigrant aliens; and
>
> (c)(i) A valid hunting license issued by a state or territory of the United States; or
>
> (ii) An invitation to participate in a trade show or sport shooting event being conducted in this state, another state, or another country that is contiguous with this state.
>
> (2) A citizen of Canada may carry or possess any firearm so long as he or she possesses:
>
> (a) Valid documentation as required for entry into the United States;
>
> (b) If required under federal law, an approved United States department of justice ATF-6 NIA application and permit for temporary importation of firearms and ammunition by nonimmigrant aliens; and
>
> (c)(i) A valid hunting license issued by a state or territory of the United States; or
>
> (ii) An invitation to participate in a trade show or sport shooting event being conducted in this state, another

state, or another country that is contiguous with this state.

(3) For purposes of subsections (1) and (2) of this section, the firearms may only be possessed for the purpose of using them in the hunting of game while such persons are in the act of hunting, or while on a hunting trip, or while such persons are competing in a bona fide trap or skeet shoot or any other organized contest where rifles, pistols, or shotguns are used. Nothing in this section shall be construed to allow aliens to hunt or fish in this state without first having obtained a regular hunting or fishing license.

RCW 9.94A.589 provides in part:

(1)(a) Except as provided in (b), (c), or (d) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

RCW 69.50.401 provides in part:

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled

substance.

(2) Any person who violates this section with respect to:

(a) A controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam, including its salts, isomers, and salts of isomers, classified in Schedule IV, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine . . . .

RCW 69.50.435 provides in part:

(1) Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 or who violates RCW 69.50.410 by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana to a person:

(a) In a school;

(b) On a school bus;

(c) Within one thousand feet of a school bus route stop designated by the school district;

(d) Within one thousand feet of the perimeter of the school grounds;

(e) In a public park;

(f) In a public housing project designated by a local governing authority as a drug-free zone;

(g) On a public transit vehicle;

(h) In a public transit stop shelter;

(i) At a civic center designated as a drug-free zone by the local governing authority; or

(j) Within one thousand feet of the perimeter of a facility designated under (i) of this subsection, if the local governing authority specifically designates the one thousand foot perimeter may be punished by a fine of up to twice the fine otherwise authorized by this chapter, but not including twice the fine authorized by RCW 69.50.406, or 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, or by both such fine and imprisonment. The provisions of this section shall not operate to more than double the fine or imprisonment otherwise authorized by this chapter for an offense.

U.S. Const. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. XIV, § 1 provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Const. art. I, § 3 provides:

> No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. I, § 7 provides:

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Wash. Constr. art. I, § 12 provides:

> No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Wash. Const. art. I, § 21 provides:

> The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. art. I, § 22 (amend. 10) provides in part:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases.

CERTIFICATE OF SERVICE

I, Alex Fast, certify and declare as follows:

On March 7, 2019, I served a copy of the PETITION FOR REVIEW on counsel for the Respondent and all other parties by filing this pleading through the Portal and thus a copy will be delivered electronically.

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 7th day of March 2019, at Seattle, Washington.

s/ Alex Fast
Legal Assistant to Neil Fox

LAW OFFICE OF NEIL FOX PLLC

March 07, 2019 - 10:52 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	49601-1
Appellate Court Case Title:	State of Washington, Respondent v Miguel A. Trujeque-Magana and Luciano Rios, Appellants
Superior Court Case Number:	15-1-02180-0

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