70518-1

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NO. 70518-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SAY KEODARA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH, JUDGE

BRIEF OF RESPONDENT

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A. ISSUES

1. Whether Keodara waived any challenge to the particularity or scope of the search warrant for his cell phone where he did not challenge the warrant on this basis below, and whether the warrant was supported by probable cause and was sufficiently particular in any event.

2. Whether Keodara's sentences for four separate convictions based on four separate crimes that he committed at age 17, which total 831 months and which provide a presumption of release after 20 years, are constitutional under the Eighth Amendment.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Say Sulin Keodara was charged by Second Amended Information with Murder in the First Degree (Count I), three counts of Assault in the First Degree (Counts II, III, IV), and Unlawful Possession of a Firearm in the First Degree (Count V). Counts I-IV each included a firearm allegation. The State alleged that, in the early morning hours of September 12, 2011, Keodara and two companions confronted four persons who were drinking at a bus stop on Rainier Avenue South in Seattle. Apparently angry

that none of these persons had money to buy drugs, Keodara shot and killed Victor Parker, and seriously wounded Sharon McMillon, Archie Henderson and Hassan Arr. CP 1-10, 73-75, 179-81.

A jury found Keodara guilty as charged, including the four firearm allegations. CP 251-59. The trial court imposed a low-end, standard-range sentence of 831 months. CP 295, 297. Keodara, who was born on March 3, 1994, was within six months of his 18th birthday when he committed these crimes. CP 294, 299.

2. SUBSTANTIVE FACTS

Even at 2:30 in the morning on that September night in 2011, the bus shelter at Rainier Avenue South and South McClellan Street was not deserted. Four people – three men and a woman – were hanging out in the shelter, laughing, talking, and drinking beer. 6RP[1] 121-23.

Sharon McMillon had taken the bus to the Chevron station across the street to buy a beer, and was waiting in the bus shelter for a bus that would take her home. 6RP 117, 121. Rounding out

[1] The verbatim report of proceedings consists of 12 separately-paginated volumes, and will be referred to in this brief as follows: 1RP (April 24, 2013); 2RP (May 2, 2013); 3RP (May 6, 2013); 4RP (May 7, 2013); 5RP (May 8, 2013 – opening statements); 6RP (May 8, 2013 – testimony); 7RP (May 9, 2013); 8RP (May 13, 2013); 9RP (May 14, 2013); 10RP (May 15, 2013); 11RP (May 16, 2013); 12RP (May 6, 10 & 20, 2013, and June 14, 2013).

the group were Victor Parker (aka "New Orleans"), Archie Henderson and Hassan Arr. 6RP 57-59; 7RP 39; 8RP 136-37.

The impromptu party would end in violence. Victor Parker, 54 years old and with a blood alcohol content ("BAC") of 0.23, would die of a gunshot wound to the head. 7RP 41, 59, 61. Sixty-eight-year-old Archie Henderson (BAC .172) and twenty-nine-year-old Hassan Arr (BAC .262) would receive serious gunshot wounds, but they would live. 8RP 12-19. Forty-three-year-old Sharon McMillon (BAC .09) was lucky – she sustained only soft tissue damage from a gunshot wound to her thigh. 8RP 20-23.

The first sign of the trouble to come was a car pulling up to the bus shelter. 6RP 125. Victor Parker walked over to the car and spoke with an occupant through the rear passenger-side window. 6RP 125, 131. Someone in the car asked Parker if he wanted "soft" (cocaine). 6RP 128-29. Then the car drove off. 6RP 129.

Several minutes later, three men came around the corner of the auto parts store on foot.[2] 6RP 129. One held a bag and asked, "Who said that they wanted to get this?" 6RP 129. The other three pointed to Parker, as he was the only one who had spoken with the

[2] There is an O'Reilly Auto Parts store adjacent to the bus shelter. 8RP 113-14.

men in the car. 6RP 130, 132. Parker admitted that he had no money. 6RP 133-34.

At this point, the man with the bag pulled out a gun, saying, "Somebody better have some motherfucking money." 6RP 132, 134. He told the group to "bunny up" (empty their pockets). 6RP 132-33. It soon became clear that no one in the group at the bus shelter had any money. 6RP 132-33.

The man holding the gun began shooting, and mayhem ensued. The first shot dropped Victor Parker to the ground, his femur fractured. 6RP 135-36; 7RP 54. Hassan Arr, who took off running, was shot multiple times in the chest. 6RP 136; 8RP 12-13. Archie Henderson, sitting next to Sharon McMillon on the bench, was shot through the knee. 6RP 136; 8RP 16-17. McMillon was shot in the thigh. 6RP 136, 137; 8RP 20-21. Once he had taken care of the others, the killer turned his attention back to Parker, shooting him point blank in the middle of the forehead as he lay on the ground. 6RP 136-37; 7RP 46-48.

As soon as the first shot was fired, the two men who had arrived with the shooter took off running back the way they had come. 6RP 138. Once the shooter was satisfied that no one was moving, he too took off. 6RP 138-39. When McMillon was sure

that the three men were gone, she called 911, and police arrived within minutes. 6RP 139-40.

McMillon was able to describe the shooter. She put his age at anywhere from 17 to 23, and his height at about five feet three inches. 6RP 152-54. His hair was short, and he wore a light blue sleeveless jersey with lettering on it. 6RP 154, 156. She did not recall any facial hair or tattoos.[3] 6RP 154-55.

McMillon recalled that the second man was a little taller than the shooter, had short hair, and wore a black t-shirt with no lettering. 6RP 152, 156, 157. He may have been Asian, like the shooter, or possibly Mexican. 6RP 156-58. The third man was the shortest, and appeared to be the youngest; except for his short hair, McMillon had scant recollection of him. 6RP 158-59.

Police retrieved video from the Chevron station across the street to the east of the bus shelter, the O'Reilly Auto Parts store adjacent to the bus shelter, and the Rite Aid store on the northwest corner of the intersection. 6RP 96-107, 110-14; 8RP 80-81.

The Chevron video showed a car pull up to the gas pumps at about 2:27 a.m. 8RP 85-87. An Asian-looking male wearing a light

[3] Keodara has a tattoo on his right arm. Ex. 62. The shooter held the gun in his right hand. 6RP 159. Focus on the gun might well have caused McMillon to miss the tattoo.

blue jersey got out of the back seat. 8RP 88, 93. The jersey appeared to be an NBA jersey with the number "3" on it.[4] 8RP 89. A second Asian male who emerged from the front passenger side of the car was taller, and wore a dark-colored shirt. 8RP 90-91, 93. The driver did not get out of the car. 8RP 93-94.

The car pulled away from the Chevron station at about 2:31 a.m. 8RP 91-92. The Chevron video showed the car stopping for a couple of minutes on Rainier in the area of the bus shelter, and pulling away from there at 2:33 a.m. 8RP 95-98.

At 2:34 a.m., video from the Rite Aid store at the intersection of Rainier and McClellan showed a car consistent in appearance with the one from the Chevron station pulling into the Rite Aid parking lot. 8RP 106-08. That car left the parking lot at just short of 2:44 a.m.; no other cars came or went in the interim. 8RP 109, 134-36.

Video from the O'Reilly Auto Parts store showed two or three people walking toward the bus shelter at 2:37 a.m. (real time).[5] 8RP 114-16. The same camera showed two people running from

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[4] Police later determined that the color scheme fit the Hornets basketball team, and that number 3 was a very popular number for that team. 8RP 89-90.

[5] The O'Reilly's video was about seven minutes behind real time. 8RP 112.

south to north (toward Rite Aid), followed shortly by a third person, at approximately 2:44 a.m. (real time). 8RP 115, 117-20.

The "shots fired" call went out to police at approximately 2:45 a.m. 6RP 20-21, 52, 74. The first patrol car pulled into the Chevron station at 2:46 a.m. 8RP 104.

Detectives showed Sharon McMillon stills from the Chevron video. 8RP 120-21. McMillon said that the car in the video appeared to be the one that had stopped at the bus shelter just before the shooting. 8RP 121-22; Ex. 17. She said that the person in the blue basketball jersey appeared to be the person who had shot at the group in the bus shelter. 8RP 122-23; Ex. 18. McMillon also recognized the male in the black T-shirt.[6] 8RP 124; Ex. 19.

Detectives also showed stills from the Chevron video to Lacana Long, an ex-girlfriend of Keodara's. 8RP 129, 131-32, 143, 145-46. They told Long that they were investigating a theft of a candy bar from the gas station, and asked her if she could identify

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[6] Neither Archie Henderson nor Hassan Arr testified at trial. Since the shooting, Arr had been injured in an unrelated incident and was receiving full-time care in an assisted-living home; while he knew that he had been shot, he had no memory of the incident itself. 8RP 136-37. Detectives had been unable to locate Archie Henderson, who was a transient. 8RP 137.

the person in the still photograph. 8RP 132-34, 145-46. Long identified Say Keodara without hesitation.[7] 8RP 132, 134.

At trial, Long testified that she had been somewhat doubtful in her identification at the time the detectives showed her the photo. 8RP 146. However, she acknowledged that she had told a defense investigator that she had no doubt that the person in the photo was Keodara. 8RP 146-47. Long admitted that, at the time of her trial testimony, she had no doubt that it was Keodara. 8RP 147, 150.

Police also received information about the identity of the shooter from another source. Approximately a week after the shootings, Nathaniel Smallbeck provided information to Wenatchee Police about a shooting in Seattle. 7RP 22-25, 27-29. This information was passed on to Seattle Police, who interviewed Smallbeck independently. 7RP 26-27, 29-30.

Smallbeck testified at Keodara's trial. Smallbeck and Keodara had met at a youth camp in Eastern Washington in January 2011. 8RP 28. From there, they went together to Camp

[7] Long said that the police had asked her if she recognized Keodara in the photograph. 8RP 146.

Outlook, a military-style boot camp, where they remained from February until June 2011.[8] 8RP 29, 32.

Smallbeck and Keodara were in the same platoon, and became close friends. 8RP 30, 32. The two remained close after leaving Camp Outlook, Keodara going to Seattle and Smallbeck to Wenatchee, and stayed in regular touch through phone conversations and text messages. 8RP 33.

Smallbeck recalled getting a phone call from Keodara on September 12, 2011. 8RP 34. Keodara said that he was in trouble, that he had just shot at a bus station and he wanted to come and stay with Smallbeck. 8RP 34-35. Smallbeck turned his friend down, saying that he did not want to get in trouble, and that police would find out anyway. 8RP 35. Smallbeck remembered looking at the time on his phone – he recalled that the screen said 3:18 a.m.[9] 8RP 36.

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[8] Both of these facilities were juvenile detention facilities. Reference to these places was "sanitized" by agreement of the parties. 7RP 65-71.

[9] Phone records showed no *phone call* from Keodara's phone (206-501-8364) to Smallbeck's phone (509-881-9636) on September 12, 2011 at 3:18 a.m. However, the records showed that Smallbeck's phone had received a *text message* from Keodara's phone on September 12, 2011 at 3:17:41 a.m. 8RP 47, 54; 9RP 7-8, 27-28, 97, 105.

Smallbeck said that he and Keodara talked on the phone at around 11:00 that morning.[10] 8RP 36. Keodara mentioned that he had a "9 mm," and that he knew he had hit someone. 8RP 36. He said that he had shot multiple people, that they were homeless, that the shooting was over a crack deal, and that someone had been acting "tasky" (suspicious). 8RP 37. Keodara also mentioned that this had happened on "Rainier Street" or "Rainier Avenue."[11] 8RP 39. It was not until later that Smallbeck learned from television news that someone had died. 8RP 38.

On September 19, 2011, Smallbeck sought out a Wenatchee police officer on a different matter, and he brought up what Keodara had told him. 7RP 23-25; 8RP 40. He was concerned about his own safety and well-being; in addition, the matter was on his conscience and he thought he should report it. 8RP 41. In a follow-up conversation with the same police officer, Smallbeck answered more pointed questions, and identified a photograph of Keodara. 8RP 42-43. Smallbeck subsequently gave a taped statement to Seattle police. 8RP 44.

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[10] Phone records did not show a phone call between Keodara and Smallbeck on September 12 at around 11:00 a.m. 9RP 32. However, records showed a phone call from Keodara to Smallbeck on September 13 at 11:08 a.m. lasting 188 seconds. 9RP 33, 160.

[11] Smallbeck was not familiar with the Seattle area. 8RP 39.

Smallbeck admitted that he had prior convictions for residential burglary and theft, and that he had a pending charge in Okanogan County for escape from work crew. 8RP 48. He read into the record a letter that the prosecutor in Keodara's case had sent to the Okanogan County court in Smallbeck's own case. 8RP 48-50. The letter informed the Okanogan court that Smallbeck was cooperating with law enforcement and prosecutors in Keodara's case; the prosecutor explicitly made no request as to the sentence in Smallbeck's case. 8RP 49-50. Other than that letter, Smallbeck had been promised nothing for his cooperation in Keodara's case. 8RP 50. Both Wenatchee and Seattle police confirmed that Smallbeck had neither asked for nor been promised anything for his cooperation. 7RP 25, 29-29; 9RP 139-40.

Further corroboration of Keodara's involvement in the shootings was provided by cell phone records, which Detective Steiger obtained via a search warrant. 9RP 140. These records placed Keodara near the scene of the bus shelter shootings at the time in question. Specifically, the records showed that Keodara's phone made a call at 2:30 a.m. on September 12, 2011 using the north side of a tower located at 3211 Martin Luther King Way South in Seattle. 8RP 47; 9RP 23-25, 142-43. This meant that the phone

was likely within a 130-degree arc around due north from the tower. 9RP 14-15, 25. The tower is located a few blocks south of the murder scene. 9RP 142-43. Records also showed that the phone traveled south after the shootings, in the direction of Keodara's residence in Renton.[12] 9RP 141-43.

Finally, information learned in a separate investigation linked Keodara to a blue Hornets jersey. Renton Police Detective Scott Barfield, pursuant to an arrest of Keodara on October 14, 2011 in a separate investigation, obtained a warrant to search his cell phone. 10RP 5, 9. The phone contained a photograph of Keodara wearing a Hornets baseball cap, a text message from "Lacana babe," and text messages confirming that Keodara had worn a blue Hornets jersey at a party. 10RP 20-23; Ex. 62 (B-G). In addition, a photograph of Keodara taken by police at the time of this arrest showed him with short hair.[13] 10RP 18-19; Ex. 62(A).

Keodara did not testify at his trial.

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[12] Keodara appears to attribute this information to the cell phone search warrant obtained by Detective Barfield (which he challenged below and challenges on appeal). AOB at 6. This is incorrect. Detective Steiger obtained a wholly separate warrant to obtain the location records; this warrant has never been challenged. 9RP 140-41.

[13] Keodara mistakenly attributes this photo to the search of his cell phone. AOB at 6.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OBTAINED FROM THE SEARCH OF KEODARA'S CELL PHONE.

Keodara argues on appeal that the search warrant obtained by Detective Barfield to search his cell phone was "overbroad" and should have been more "particularized in its scope." But Keodara never challenged the search warrant on this basis in the trial court. Rather, he focused solely on whether there was probable cause to issue the warrant at all. Thus, he waived any objection to the particularity or breadth of the warrant.

In any event, his arguments fail. The trial court correctly exercised its discretion in finding that Detective Barfield's extensive training in and long experience with gang habits and culture established probable cause to believe that evidence of the crimes of unlawful possession of a firearm, assault, and possession with intent to deliver a controlled substance would be found on the cell phone that Keodara kept with him in his backpack. It was not possible to set out with greater specificity exactly where on the cell phone that photographs and text messages relating to those crimes might be found.

Finally, in light of eyewitness testimony, Keodara's confession to a friend, and the corroborating evidence obtained from surveillance video and cell phone location records, any error in admitting evidence that Keodara had once worn a Hornets basketball jersey was harmless beyond a reasonable doubt.

a. Relevant Facts.

On October 20, 2011, Renton Police Officer Scott Barfield and members of the South King County Violent Gang Initiative Task Force were looking for Say Keodara. CP 165. There was a warrant out for Keodara's arrest. CP 165. Officer Barfield knew Keodara as a "violent gang member," specifically a member of the Rollin 60's Crip gang. CP 165-67.

Police located Keodara in the front passenger seat of a silver-colored 2000 Mitsubishi Galant, a car that police associated with Keodara and with various crimes that he had committed, specifically a shooting in Tukwila on October 14, 2011. CP 166-67. After Keodara and three other Asian males were removed from the car, Barfield looked through the left rear window and saw a black pistol on the floorboard. CP 166. None of the four occupants of the car could legally possess a firearm, as all were either under 18 and/or convicted felons. CP 167. Since the other three occupants

of the Mitsubishi either refused to speak to police or denied ownership of the car, Barfield called for a tow truck to impound the vehicle pending issuance of a search warrant. CP 166-67.

In the Affidavit in support of a warrant, Barfield detailed his training and experience with gangs:

> I am the current Gang Information Officer for the Renton Police Department and a member of the South King County Violent Gang Initiative Task Force. I have been the Gang Information Officer since 2008 and a member of the Task Force since August of 2011. Prior to being employed by the Renton Police Department I was employed by the Department of Defense as a Detective where I investigated gangs. I have attended and instructed gang training since 2002 for [a] total of over 500 hours. I have traveled around the Country attending gang conferences where I learn the current trends of gang members that are widely used. I am currently on the Board of Directors for the International Latino Gang Investigators Association. I have held this position since 2006 and prior to this position I was the regional representative for the Pacific Northwest. I have interviewed over 400 gang members and have identified over 100 gang members residing in the City of Renton, over the last 5 years.

CP 167.

A search warrant for the Mitsubishi Galant was signed by Judge John Erlick on October 21, 2011, based on probable cause to believe that evidence of the crimes of assault in the fourth degree and unlawful possession of firearms would be found therein,

along with documents of dominion and control. CP 163-64. A backpack belonging to Keodara was found in the front right passenger area of the Mitsubishi, where Keodara had been seated.[14] CP 170. A BlackBerry cell phone was found in the backpack. CP 175. Police also found several bags of mushrooms in the car, along with a digital scale, a pipe, and materials used to package and distribute drugs. CP 175.

Barfield sought a second, separate search warrant for the BlackBerry cell phone, based on probable cause that evidence of the crimes of assault in the fourth degree, unlawful possession of firearms, and possession with intent to deliver or sell narcotics would be found in the phone.[15] CP 174. In support, Barfield averred in his Affidavit:

> It is this Officer's belief that there is significant evidence contained within the cell phone seized. Based off of my training and experience I know it to be common for gang members to take pictures of themselves where they pose with firearms. Gang members also take pictures of themselves prior to, and after they have committed gang related crimes. Additionally, it appears likely there is evidence of firearms contained within said electronic devices. I believe there is evidence of gang affiliation

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[14] Keodara had been detained less than two days prior to this arrest with this same backpack in his possession. CP 175.

[15] Barfield also sought and received permission to seize from the Mitsubishi drug paraphernalia and mushrooms. CP 174-75.

> contained within their electronic devices, as this shooting was gang involved. Additionally, criminals often text each other or their buyers photographs of the drugs intended to be sold or recently purchased. Gang members will often take pictures of themselves or fellow gang members with their cell phones which show them using drugs.

CP 175. The Affidavit, which was labeled "First Addendum," pointed out that "[t]he previously signed and authorized warrants, #11-1259 (King County Superior Court) [warrant issued on 10/21/11] explain the initial details of this case, *which are attached for your review and are incorporated by reference*." CP 174 (italics added). The Affidavit further noted that "[c]opies of the original search warrant and affidavit are attached." CP 175.

A second search warrant was signed on October 27, 2011 by Judge Brian Gain. CP 172-73. Under this warrant, the court found probable cause to believe that the crimes of assault in the fourth degree, unlawful possession of firearms, and possession with intent to deliver or sell narcotics had been committed, and that evidence of those crimes would be found in the BlackBerry cell phone recovered from Keodara's backpack. CP 172. In relevant part, the warrant authorized the seizure of the following:

> Stored phone contact numbers, all call history logs, all text messages, all picture messages, chat logs, voicemail messages, photographs, and information

> contained in any saved address databases or SIM cards within the cell phone, pictures, videos, a forensic image of the storage media, all documents, chat and internet activity and electronic data that identifies the owner or users of the cellular phone.
>
> *Any and all other evidence suggesting the crimes listed above* [Assault in the Fourth Degree, Unlawful Possession of Firearms, Possession with Intent to Deliver or Sell Narcotics].

CP 172 (italics added).

b. Law Governing Search Warrants.

The Fourth Amendment provides that "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. IV. Both the warrant clause of the Fourth Amendment and article I, section 7 of the Washington Constitution require that a determination of probable cause be based on facts and circumstances sufficient to establish a *reasonable inference* that criminal activity is occurring or that contraband exists at a specific location. State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). Facts that would not alone support probable cause may do so when viewed together with other facts. State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995).

A magistrate's determination that a warrant should issue is an exercise of judicial discretion that is reviewed for abuse of that discretion. Id. This determination is generally given great deference by the reviewing court. Id. Although the trial court's legal conclusion as to whether evidence meets the probable cause standard is subject to *de novo* review, that review nevertheless gives great deference to the issuing judge's assessment of probable cause. State v. Powell, 181 Wn. App. 716, 723, 326 P.3d 859, rev. denied, 181 Wn.2d 1011 (2014).

"An application for a search warrant should be judged in the light of common sense with doubts resolved in favor of the warrant." Cole, 128 Wn.2d at 286; *see* State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (affidavit should be evaluated "in a commonsense manner, rather than hypertechnically"). The judge issuing the warrant "is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit." Powell, 181 Wn. App. at 723 (quoting State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004)).

The affidavit in support of the search warrant must be based on more than "mere suspicion or personal belief" that evidence of a crime will be found at the place to be searched. Neth, 165 Wn.2d

at 182-83. Probable cause requires "a nexus between criminal activity and the item to be seized and between that item and the place to be searched." Id. at 183.

c. There Was Probable Cause To Issue The Warrant To Search Keodara's Cell Phone.

Keodara relies primarily on State v. Thein, 138 Wn.2d 133, 977 P.2d 582 (1999) for his argument that the search warrant lacked the requisite nexus between photos and texts documenting his criminal activity, and his cell phone. Thein is distinguishable.

In Thein, police were investigating marijuana sales out of a house on South Brandon Street in Seattle. Thein, 138 Wn.2d at 136. After identifying Thein as the supplier of the drugs sold at that location, police obtained a search warrant to search his residence on Southwest Austin Street. Id. at 137-40. In support of the second warrant, a police officer affiant averred that "[b]ased on my experience and training, as well as the corporate knowledge and experience of other fellow law enforcement officers, I am aware that it is generally a common practice for drug traffickers to store at least a portion of their drug inventory and drug related paraphernalia in their common residences." Id. at 138-39. The affiant continued that it is "generally a common practice" for drug

traffickers to maintain records related to such trafficking in their residences, as well as large sums of money and evidence of drug-related financial transactions. Id. at 139. The affiant stated that "I know from previous training and experience" that drug traffickers commonly keep firearms and ammunition in their residences. Id.

Noting that the only evidence linking Thein's residence to the locus of the drug dealing was a box of nails addressed to Thein at his Austin Street address and Thein's vehicle registration, the court found that these facts and the affiant's general statements regarding the common habits of drug dealers were not sufficient to furnish probable cause to search the Austin Street residence. The facts simply did not establish the requisite nexus between evidence of illegal drug activity and Thein's residence. Id. at 137, 148-51.

The affidavits in support of the search warrant for Keodara's cell phone provided a far stronger basis to search for photos and texts that would evidence Keodara's connection to illegal drugs and firearms.[16] The issuing judge learned from the affidavits that

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[16] The information contained in both affidavits (10/21/11 (car) and 10/27/11 (phone)) may be considered in determining probable cause to search the cell phone. CP 165-67, 174-76. The second affidavit (for the cell phone) explicitly "attached" the "original search warrant and affidavit" and "incorporated [them] by reference," and the judge signing the second warrant had both affidavits before him. CP 174-75; 2RP 23-24, 27-28. The trial court found that "together they do provide sufficient basis for searching the phones [sic]." CP 28.

Keodara, for whom police had an arrest warrant, had been apprehended in a car associated with a gang-related shooting that had taken place during the previous week. CP 165-67, 175. Police had recovered from the car a firearm, mushrooms, and evidence of drug distribution. CP 166, 175. Police knew that none of the occupants of the car was eligible to possess a firearm. CP 167.

Police also recovered a backpack from the front passenger seat area, where Keodara had been sitting when apprehended. CP 175. Police had detained Keodara with this same backpack within 24 hours prior to this arrest. CP 175. In the backpack was a BlackBerry cell phone, which was the subject of the second request for a search warrant ("First Addendum"). CP 174-75.

Officer Barfield knew that Keodara was a "violent gang member who is known to carry firearms and a member of the Rollin 60's Crip gang." CP 166. Keodara had been a member of the gang for at least four years, regularly wore clothing with its signature blue color, and had "RSC" tattooed on his arm. CP 167.

In his two affidavits, Barfield outlined his training and experience with gang culture and habits:

> I am the current Gang Information Officer for the Renton Police Department and a member of the South King County Violent Gang Initiative Task Force.

> I have been the Gang Information Officer since 2008 and a member of the Task Force since August of 2011. Prior to being employed by the Renton Police Department I was employed by the Department of Defense as a Detective where I investigated gangs. I have attended and instructed gang training since 2002 for total of over 500 hours. I have traveled around the Country attending gang conferences where I learn the current trends of gang members that are widely used. I am currently on the Board of Directors for the International Latino Gang Investigators Association. I have held this position since 2006 and prior to this position I was the regional representative for the Pacific Northwest. I have interviewed over 400 gang members and have identified over 100 gang members residing in the City of Renton, over the last 5 years.

CP 167. After the cell phone was discovered, Barfield related more specific knowledge:

> It is this Officer's belief that there is significant evidence contained within the cell phone seized. Based off of my training and experience I know it to be common for gang members to take pictures of themselves where they pose with firearms. Gang members also take pictures of themselves prior to, and after they have committed gang related crimes. Additionally, it appears likely there is evidence of firearms contained within said electronic devices. I believe there is evidence of gang affiliation contained within their electronic devices, as this shooting was gang involved. Additionally, criminals often text each other or their buyers photographs of the drugs intended to be sold or recently purchased. Gang members will often take pictures of themselves or fellow gang members with their cell phones which show them using drugs.

CP 175.

The generalized, conclusory statements of the affiant in Thein do not compare to the wealth of specific experience and training related by Officer Barfield. Rather than simply attributing his knowledge to generalized "experience and training," as the affiant in Thein did, Barfield demonstrated that his knowledge was based on many years of training, teaching, and work experience that apprised him of "the current trends of gang members that are widely used." CP 167.

Rather than seeking to search a remote location that had no demonstrable connection to illicit drug activity, as occurred in Thein, Barfield was seeking to search the phone that Keodara *had with him* when he was found in a car that contained illegal firearms and evidence of illegal drug distribution. And rather than simply alleging that evidence of drug activity is typically kept in the residence, as the affiant in Thein did, Barfield explained specifically *how the phone was likely used* in the illicit drug activity ("criminals often text each other or their buyers photographs of the drugs intended to be sold or recently purchased"). CP 175.

Judged, as it must be, in the light of common sense, and drawing all reasonable inferences from the information alleged in Barfield's two affidavits, the warrant for search of the cell phone

was supported by probable cause, in that there was a nexus established between evidence of the crimes of unlawful possession of a firearm and possession with intent to deliver or sell narcotics, and photos and text messages on the cell phone. Giving proper deference to the issuing judge's assessment of probable cause, the search warrant should be upheld.

d. Keodara Waived Any Challenge That The Search Warrant Was Overbroad.

As a general rule, an appellate court will not consider an issue raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). Exception is made for "manifest error affecting a constitutional right." RAP 2.5(a)(3). The exception, however, is a "narrow one." State v. Kirkman, 159 Wn.2d 918, 934, 155 P.3d 125 (2007) (quoting State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988)). The exception is not intended to afford a criminal defendant a means to obtain a new trial whenever he can identify a constitutional issue that was not litigated below. Scott, 110 Wn.2d at 687. The purpose underlying issue preservation rules is to encourage efficient use of judicial resources by ensuring that the trial court has the opportunity to correct any errors, thereby

avoiding unnecessary appeals. State v. Robinson, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011).

The term "manifest" as used in RAP 2.5(a)(3) requires a showing of *actual prejudice*. Kirkman, 159 Wn.2d at 935. The asserted error must have had "practical and identifiable consequences in the trial of the case." Id. (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)). "If the trial record is insufficient to determine the merits of the constitutional claim, the error is not manifest and review is not warranted." Kirkman, 159 Wn.2d at 935. *See also* McFarland, 127 Wn.2d at 333 ("If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest."); State v. Kirkpatrick, 160 Wn.2d 873, 880-81, 161 P.3d 990 (2007) (finding no manifest constitutional error where record was insufficient to establish actual prejudice), *overruled on other grounds by* State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2012).

While Keodara challenged the search warrant for his cell phone in the trial court, and moved to suppress evidence obtained pursuant to the warrant, he did not challenge the warrant as overbroad; his sole challenge was to the probable cause to issue the warrant, specifically to the *nexus* between the criminal activity

alleged and his cell phone. Thus, he waived any overbreadth claim on appeal. *See* State v. Higgs, 177 Wn. App. 414, 423, 311 P.3d 1266 (2013) (even where defendant objects to introduction of evidence at trial, he may assign error on appeal only on specific ground raised below), rev. denied, 179 Wn.2d 1024 (2014).

Keodara moved in the trial court to suppress all evidence obtained from his cell phone:

> The defense moves to exclude all evidence seized from a cell phone believed to belong to the defendant pursuant to a search warrant issued following the 10/20/11 arrest *because the warrant failed to establish probable cause* to seize all evidence in the phone. The Affidavit for the search warrant authorizing the search of the phone was based solely on generalized statements of common behavior of gang members and no particularized information tying this particulary [sic] phone to the items being sought.

CP 83 (italics added).

The only language from the Affidavit for Search Warrant that Keodara referenced in his briefing in the trial court was the language supporting a connection between drug- and firearm-related crimes committed by gang members and their cell phones, based on the officer's training and experience. CP 83-84. Quotation of that language is followed in the trial brief by the argument that "[t]here was no particularized information in the

warrant as to why the officer believed that Say Keodara would have such information on that cellphone." CP 84.

Nowhere in Keodara's argument is there even any *mention* of the language in the search warrant that he now challenges on appeal (describing the specific types and locations of information that may be seized from the cell phone). CP 172; AOB at 12. While Keodara included the particularity requirement in his recitation of general search warrant law (CP 83), he made absolutely no argument on this issue. While he cited a case for the proposition that "[t]he fourth amendment also contains a particularity requirement that prevents general searches and 'the issuance of warrants on loose, vague, or doubtful bases of fact,'" he followed that only with a nexus argument ("In this particular case, there were no facts and circumstances sufficient to establish that evidence of the crimes of misdemeanor assault or unlawful possession of a firearm, or possession with intent to deliver narcotics as it relates to Say Keodara would be found on Keodara's cellphone."). CP 84.

Keodara followed more than two pages of citations to cases requiring a specific *nexus* between the items to be seized and the place to be searched (CP 84-86) with a summary of his argument:

"The search warrant in this matter was based on a conclusory, generalized affidavit that *did not establish a particularized nexus between the crimes and the phone* believed to belong to Say Keodara, and as such all information obtained from the phone should be suppressed." CP 87 (italics added).

Nor did Keodara replace or augment his nexus argument with a particularity or overbreadth challenge at oral argument in the trial court. When invited by the trial court to present argument on his suppression motion, Keodara's counsel stated that she would "stand on [her] brief on this one too." 2RP 23. Counsel then reiterated her challenge to Officer Barfield's basis for searching the cell phone at all, arguing that "there's no link whatsoever" between the cell phone and the evidence sought. 2RP 26-27.

The trial court, responding to the specific challenge raised, found only that the two affidavits for the two search warrants together provided "sufficient basis for searching the phones [sic]," and denied the motion to suppress.[17] 2RP 27-28. Having never been presented with any argument that the search warrant was overbroad with respect to the locations on the cell phone that could

[17] There were no written findings entered under CrR 3.6, because no evidentiary hearing was requested or held pursuant to the suppression motion.

be searched or the data that could be seized, the trial court made no findings and no ruling on that issue.

Because he failed to raise this issue below, Keodara has waived the issue for appeal unless he can show manifest constitutional error, i.e., "practical and identifiable consequences in the trial of the case." *See* Kirkman, 159 Wn.2d at 935. Because the trial record here is insufficient to determine the merits of his claim of overbreadth, Keodara cannot establish manifest constitutional error.[18] *See* Kirkman, 159 Wn.2d at 935; McFarland, 127 Wn.2d at 333; Kirkpatrick, 160 Wn.2d at 880-81.

Had the issue been raised, the trial court could have considered whether any parts of the search warrant that were overbroad could have been severed from other, valid parts of the warrant. Under the severability doctrine, an infirmity in one part of a search warrant requires suppression of any evidence seized under that portion of the warrant, but *does not* require suppression of evidence seized under valid parts of the warrant. State v. Temple, 170 Wn. App. 156, 163, 285 P.3d 149 (2012). One of the

[18] In Higgs, where the defendant in the trial court raised only a challenge to probable cause for issuance of the search warrant, the Court of Appeals found that he had not preserved an overbreadth claim for review. 177 Wn. App. at 422-23. The court did not address RAP 2.5(a), however, because the defendant argued ineffective assistance of counsel. Id. at 423-24.

factors used in determining whether any invalid portions of a search warrant may be severed is that "the searching officers must have found and seized the disputed items while executing the valid part of the warrant." Id.

Keodara argues on appeal that because the search warrant "did not limit the State's access to information from the cell phone," but rather authorized a search of virtually all storage areas of the phone, the warrant was overly broad. AOB at 12. But because he did not raise this objection below, there is no testimony from Officer Barfield regarding which part of the warrant the photo and text messages at issue were seized under.[19] Thus, the record is not sufficient for review of this claim, and this Court should decline to address the claim on the merits.

[19] Even on appeal, Keodara makes only the most general of claims as to overbreadth. He never specifies which parts of the warrant were invalid, or what limits he believes should have been placed on the search of the cell phone. Assuming that there was a sufficient nexus between the crimes alleged in the search warrant affidavit and Keodara's cell phone such that the warrant was supported by probable cause, it appears that, at a minimum, a search of text messages and photographs (i.e., the very items seized) would have been valid.

e. The Search Warrant Was Not Overbroad.[20]

The Fourth Amendment requires that a search warrant particularly describe the place to be searched and the things to be seized. U.S. Const. amend. IV. In determining whether a warrant meets the particularity requirement, the reviewing court asks whether a police officer executing the warrant would reasonably know what items are to be seized. United States v. Kimbrough, 69 F.3d 723, 727 (5th Cir. 1995).

Where detailed particularity is not possible, generic language is permissible if it particularizes the *types* of items to be seized. Id. The degree of specificity required is flexible; it varies depending on the crime at issue and the types of items sought. United States v. Richards, 659 F.3d 527, 537 (6th Cir. 2011). A warrant will be valid if it is as specific as the circumstances and the nature of the criminal activity under investigation permit. Id. "[I]n the end, there may be no practical substitute for actually looking in many (perhaps

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[20] The specificity requirement of the Fourth Amendment "has two aspects: particularity and breadth. Particularity is the requirement that the warrant must clearly state what is sought. Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based." United States v. Towne, 997 F.2d 537, 544 (9th Cir. 1993) (citation omitted); *see also* United States v. SDI Future Health, Inc., 568 F.3d 684, 702 (9th Cir. 2009) ("particularity and overbreadth remain two distinct parts of the evaluation of a warrant for Fourth Amendment purposes"). Keodara's brief does not distinguish between the two concepts, using them interchangeably. The State believes that its argument responds on both points.

all) folders and sometimes at the documents contained within those folders, *and that is true whether the search is of computer files or physical files.*" Id. at 539 (italics added). *See* United States v. Triplett, 684 F.3d 500, 502 (5th Cir. 2012) ("We agree with our sister circuits to have addressed the issue that 'a computer search may be as extensive as reasonably required to locate the items described in the warrant based on probable cause.'" (quoting Richards, 659 F.3d at 538)); United States v. Burgess, 576 F.3d 1078, 1092 (10th Cir. 2009) (same); United States v. Schesso, 730 F.3d 1040, 1043, 1046 (9th Cir. 2013) (finding warrant authorizing search of "[a]ny computer or electronic equipment or digital data storage devices" capable of being used for possession and distribution of child pornography not overly broad where government had no way of knowing where illicit files might be stored).

A search warrant that specifies the crimes for which evidence may be sought will generally be found to be sufficiently particular. For example, in Hedgepath v. Commonwealth, the defendant was under investigation in the beating death of his girlfriend. 441 S.W.3d 119, 122 (Ky. 2014). Police obtained a search warrant for Hedgepath's apartment and his vehicle. Id. at

126-27. The warrant specifically authorized seizure of any cell phones found in those locations. Id. at 127, 130 ("all personal property including but not limited to all electronic equipment, computers, and cell phones"). Videos found on the cell phone were highly incriminating. Id. at 122-23.

Hedgepath argued that the warrant lacked particularity as to the search of his cell phone. Id. at 130. The Kentucky Supreme Court, noting that the warrant authorized seizure of "any and all items that *may have been used to aid in the assault*," found the warrant sufficiently particular. Id. at 130 (italics added), 131. The court reasoned that, "though the warrant did not limit the parts of the cell phone that could be searched, or the types of files or data that were to be sought, the clear thrust of the warrant was for evidence related to the physical and sexual assaults committed on Mary Reyes." Id. at 130.

The Nebraska Supreme Court's decision in State v. Henderson, 289 Neb. 271, 854 N.W.2d 616 (2014), provides a useful contrasting scenario. Police, who were investigating Henderson in a shooting death, obtained a search warrant for the cell phone taken from him at the time of his arrest. Id. at 276. The

warrant,[21] which authorized a search of "any and all information," did not refer to the specific crime being investigated or to the type of information encompassed by the authorization. Id. at 289-90. The court found that the warrant did not meet the particularity requirement of the Fourth Amendment. Id. at 290.

The search warrant for Keodara's cell phone was sufficiently particular. The warrant did not authorize a search for "any and all" evidence or information, but rather authorized police to search for evidence of the specific crimes of Fourth Degree Assault, Unlawful Possession of Firearms, and Possession with Intent to Deliver or Sell Narcotics.[22] CP 172. This language sufficiently limited, for Fourth Amendment purposes, the discretion of a police officer searching the phone under the warrant. *See* United States v. Upham, 168 F.3d 532, 536 n.1 (1st Cir. 1999) (language limiting seizure to images "of minors engaging in sexually explicit conduct" left little latitude to executing officers and was sufficiently particular to satisfy Fourth Amendment).

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[21] Police actually obtained two search warrants for the cell phone, but they contained identical language as relevant to particularity. Henderson, 289 Neb. at 289-90.

[22] Because there was no proper challenge below, and thus no evidentiary hearing, the record does not show whether police found any photos or texts evidencing these crimes. Nor does it show at what point Officer Barfield may have recognized the photo and the texts admitted in this case as incriminating.

Nor could the warrant reasonably have limited the areas of the cell phone to be searched. Pictures of firearms, or text messages relating to the sale of narcotics, could have been located in any area of the cell phone. *See* United States v. Hay, 231 F.3d 630, 636-37 (9th Cir. 2000) (search and seizure of Hay's entire computer system, as authorized by the warrant to search for evidence relating to the sexual exploitation of children, was proper because government "had no way of knowing where the images were stored").

Other than proposing a time limitation, Keodara makes no attempt to specify *how* the search warrant in his case lacked particularity or was overly broad.[23] He does not identify which areas of his phone should not have been available for search. He does not say how the police could have more specifically identified which areas of the phone were likely to contain photos, text

[23] Keodara suggests that the search should have been limited to "information generated close in time to the incidents for which the police had probable cause." AOB at 13. He fails to explain why, e.g., a photo of himself holding the firearm that was found in the car he was riding in, even if taken a year earlier, should not have been seizable under the warrant.

messages, or voicemails relating to illegal firearms, illicit drugs, or the assault referenced in the affidavit (CP 167).[24]

Keodara also challenges the search warrant on First Amendment grounds, citing to case law holding that "[b]eing affiliated with a gang is protected First Amendment activity." AOB at 14. He fails to explain how photos, text messages, etc. *that evidence crimes* (illegal firearms possession, narcotics sales, assault) are protected under the First Amendment, simply because they also evidence affiliation with a gang. They are not. *See* State v. Scott, 151 Wn. App. 520, 526, 213 P.3d 71 (2009) (evidence of gang affiliation relevant and admissible where there is a connection between the crime and the gang), rev. denied, 168 Wn.2d 1004 (2010); State v. Campbell, 78 Wn. App. 813, 822-23, 901 P.2d 1050 (same), rev. denied, 128 Wn.2d 1004 (1995); State v. Johnson, 124 Wn.2d 57, 67-69, 873 P.2d 514 (1994) (same).

Keodara nominally relies on the Washington Constitution, citing to article I, section 7. Most of his references to this provision

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[24] Keodara makes brief reference to "search protocols," citing to a Ninth Circuit decision. AOB at 13. But many courts have rejected this approach. *See, e.g.*, Richards, 659 F.3d at 538 ("the majority of federal courts have eschewed the use of a specific search protocol") (citing cases). And the dismissive reference to "government agency protocols" in Riley v. California, __ U.S. __, 134 S. Ct. 2473, 2491, 189 L. Ed.2d 430 (2014) was a response to the government's argument that such protocols might obviate the need for a search warrant. This is hardly an endorsement of the need for "search protocols" where, as here, a search warrant has been obtained.

are coincident with his reliance on the Fourth Amendment, and make no attempt to differentiate between the two. *E.g.*, AOB at 1, 2, 17, 18. He discusses only State v. Hinton, 179 Wn.2d 862, 319 P.3d 9 (2014) in support of a separate analysis of the particularity requirement under the Washington Constitution. But Hinton considered "whether a text message conversation was 'a private affair[ ]' protected from *a warrantless search* by article I, section 7 of our state constitution." Id. at 865 (italics added). The court found that a warrant was required, but did not set out a separate approach under the state constitution for assessing the validity of a search warrant. Id.

f. Any Error In Admitting Evidence Derived From The Search Of The Cell Phone Was Harmless.

Even if the photo of Keodara in the Hornets baseball cap and the text messages referencing his turquoise Hornets jersey should have been suppressed, any error was harmless.[25] In light of other strong evidence of Keodara's guilt, this Court can be convinced beyond a reasonable doubt that the outcome would have been the same even without this evidence.

[25] The text message referencing "Lacana babe" was surely harmless, as Keodara did not dispute that Lacana Long was his ex-girlfriend. Ex. 62(C); 8RP 149.

Error of constitutional magnitude can be harmless if it is proved to be harmless beyond a reasonable doubt. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). Such error is harmless if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. Id.

The evidence before the jury of Keodara's guilt was very strong. First and foremost was eyewitness identification. Sharon McMillon, one of the victims who survived the shooting at the bus shelter, gave a description of the shooter that, while not a perfect match, generally fit Say Keodara. She said that the shooter was an Asian male (Keodara is Asian), between 17 and 23 years old (Keodara was 17 at the time), about 5'3" tall (Keodara is 5'6"), with short hair and no facial hair (Keodara had short hair and no facial hair when he was arrested one month later). 6RP 152-57; 10RP 5, 12; CP 10, 299; Ex. 62(A). While McMillon did not recall seeing any tattoos on the shooter, Keodara's "RSC" tattoo is on his right arm – the arm that held the gun pointed at McMillon; it would thus not be surprising if the tattoo did not command her attention. 6RP 155, 159; CP 167; Ex. 62(B).

McMillon also recalled that the shooter wore a light blue sleeveless jersey with some type of lettering on it. 6RP 154. A video from the Chevron station across the street from the bus shelter showed a male who appeared to be Asian, wearing a light blue jersey, get out the same car that was seen pulling up to the bus shelter several minutes later. 8RP 85-88, 91-92, 95-98. McMillon said that the car in the Chevron video appeared to be the same one that had stopped at the bus shelter moments before the shooting, and that the male in the blue basketball jersey appeared to be the same person who shot at the group in the bus shelter. 8RP 121-23; Ex. 17, 18.

And there was a second "eyewitness." While Lacana Long, Keodara's ex-girlfriend, did not witness the shooting, she too was shown a still photo of the male in the light blue jersey from the Chevron station video. 8RP 143, 145-46. Detectives told Long that they were investigating Keodara for stealing a candy bar, and asked if she recognized him. 8RP 145-46. Long told them that she did recognize Keodara. 8RP 146. While Long hedged a little at trial, saying that she had not been sure at the time, she acknowledged that she had previously said that she was certain of

her identification, and she ultimately admitted that she had no doubt that Keodara was the person depicted in the photo. 8RP 146-47.

Additional evidence placed Keodara at the scene of the shootings. Cell phone records revealed that a phone with a number associated with Say Keodara's address in Renton made a call at 2:30 a.m. on September 12, 2011 (the date of the shootings); the call bounced off the north side of a cell phone tower located several blocks south of the bus shelter where the shootings occurred. 9RP 140-43; CP 4.

Finally, Nathaniel Smallbeck, a friend of Keodara's who lived in Wenatchee, testified that Keodara had contacted him shortly after 3:00 a.m. on September 12, 2011, asking if he could come stay with Smallbeck.[26] 8RP 34-35. Keodara, who was "amped up," told Smallbeck that he was "in some hot shit" – that he had just "shot at a bus station." 8RP 35.

In a later phone call with Smallbeck, Keodara said that he knew he had hit someone, and he mentioned a "9mm" that he planned to get rid of. 8RP 36-37. Keodara said that the shooting

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[26] The phone that Keodara used to contact Smallbeck (206-501-8364) was the same one that had bounced a signal off the north side of the cell phone tower located only blocks south of the bus shelter, right around the time of the shootings. 8RP 47; 9RP 18, 23-25, 97, 105, 142-43.

was over a crack deal, and that the victims were homeless people. 8RP 37. He mentioned that the shooting had occurred on "Rainier." 8RP 39.

In light of all of this evidence, both direct and circumstantial, the photo of Keodara with the "Hornets" cap[27] (Ex. 62(B)) and the text messages mentioning the blue or turquoise "Hornets" jersey (Ex. 62(D)-(G)), while clearly relevant, added little to the State's proof. There are undoubtedly many Hornets fans. Moreover, based on Detective Kasner's internet research, a number "3" Hornets jersey is "a very common NBA jersey." 8RP 89-90. Any reasonable jury would have reached the same result even without this evidence. Admission of the evidence from the cell phone, even if error, was thus harmless beyond a reasonable doubt.

2. KEODARA'S SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT.

Keodara contends that his standard-range sentence of 831 months is the equivalent of the mandatory life without parole sentence that the Supreme Court has proscribed as violative of the Eighth Amendment when imposed on juvenile offenders. This is

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[27] This photo would have been properly seized even had the scope of the search warrant been drastically narrowed; as an obvious "selfie," it showed Keodara's dominion and control over the cell phone. Since the photo evidenced Keodara's allegiance to the Hornets, it would have made the text messages even less important to the State's proof.

incorrect. The Eighth Amendment applies to an individual sentence, not to a sentence like Keodara's, under which he is punished for four separate convictions for shooting four different persons. Moreover, under the current version of the SRA,[28] Keodara's sentence includes an opportunity for release after he has served 20 years. His sentence is not unconstitutional.

a. Keodara's Sentence Does Not Violate The Eighth Amendment.

As a preliminary matter, the rule announced in Miller v. Alabama does not apply to Keodara's sentence. The Court in Miller held that a mandatory sentence of *life without parole* for one who was under the age of 18 at the time of the crime violates the Eighth Amendment's prohibition on cruel and unusual punishment. __ U.S. __, 132 S. Ct. 2455, 2460, 183 L. Ed.2d 407 (2012). Keodara's sentence of 831 months, the result of four separate standard-range sentences for shooting four persons and killing one of them, is admittedly (and justifiably) lengthy, but it is not a sentence of life without possibility of parole ("LWOP").

The fact that Keodara is not serving a single lengthy sentence for a single conviction, but four separate sentences for

[28] Sentencing Reform Act of 1981.

four separate convictions for crimes against four different victims, is relevant to the Eighth Amendment analysis.[29] The Eighth Amendment applies to each individual sentence, not to the cumulative result of consecutive sentences for wholly separate crimes. *See* Lockyer v. Andrade, 538 U.S. 63, 74 n.1, 123 S. Ct. 1166, 155 L. Ed.2d 144 (2003) (rejecting, in context of federal habeas review, dissent's argument that two consecutive sentences of 25 years to life for two separate crimes were equivalent, for Eighth Amendment purposes, to a single sentence of life without parole for 37-year-old defendant); Pearson v. Ramos, 237 F.3d 881, 886 (7th Cir. 2001) (sentences are treated separately, not cumulatively, for Eighth Amendment purposes); United States v. Aiello, 864 F.2d 257, 265 (2nd Cir. 1988) ("Eighth amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence."); People v. Gay, 960 N.E.2d 1272, 1279 (Ill. App. 2011) ("The eighth amendment allows the State to punish a criminal for each crime he commits, regardless of the number of convictions or the duration of sentences he has already accrued.").

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[29] Keodara was also convicted of and sentenced for a fifth crime, Unlawful Possession of a Firearm in the First Degree. CP 300. However, because his sentence on this crime runs concurrently with the sentences for the other four, it does not contribute to his overall term of years of confinement. CP 297.

This rule has been applied more recently by some courts specifically to claims that consecutive terms imposed upon a defendant for crimes committed as a juvenile violate the Eighth Amendment. *See* State v. Kasic, 228 Ariz. 228, 265 P.3d 410 (2011) (finding that cumulative sentence of 139.75 years for juvenile non-homicide offender, based on consecutive term-of-years sentences for multiple crimes with multiple victims, did not violate Eighth Amendment); Walle v. State, 99 So.3d 967 (Fla. Dist. Ct. App. 2012) (consecutive sentences of 65 years for 18 offenses, consecutive to 27-year sentence in separate case, did not violate Eighth Amendment when imposed on juvenile non-homicide offender); Bunch v. Smith, 685 F.3d 546 (6th Cir. 2012) (denying habeas relief under Eighth Amendment to juvenile non-homicide offender who received separate consecutive sentences for separate crimes against the same victim totaling 89 years).

While Keodara's consecutive sentences amount to a lengthy term of years, he was not sentenced to LWOP, the sentence that Miller specifically prohibits. Under the analysis set out above, Keodara's consecutive sentences for separate crimes against separate victims do not violate the Eighth Amendment.

In any event, even if one accepts the argument that a lengthy cumulative term of years for separate crimes should be treated as LWOP for purposes of the Miller rule, Keodara's sentence under the current SRA does not run afoul of Miller. After serving 20 years of his current sentence, Keodara may petition for release. RCW 9.94A.730(1). The Indeterminate Sentence Review Board "*shall*" order his release unless it determines by a preponderance of evidence that he is likely to commit new criminal violations despite conditions that may be imposed.[30] RCW 9.94A.730(3). Thus, Keodara's sentence includes the "meaningful opportunity for release" that the Eighth Amendment requires in the case of juvenile offenders. *See* Miller, at 2469 (quoting Graham v. Florida, 560 U.S. 48, 75, 130 S. Ct. 2011, 176 L. Ed.2d 825 (2010)) ("'A State is not required to guarantee eventual freedom,' but must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'").

Keodara contends that this statute "does not correct the constitutional invalidity of the sentence." AOB at 30. This argument puts the cart before the horse. The sentence necessarily

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[30] Keodara's dismissal of this statute on the basis that "parole eligibility is an act of 'grace'" (AOB at 30) ignores this language that *presumes* release after 20 years.

encompasses all provisions of the SRA that apply, including RCW 9.94A.730. Keodara's sentence was constitutional *at the time it was imposed*, because it includes a meaningful opportunity for release. *See* In re Personal Restraint of McNeil, __ Wn.2d __, 334 P.3d 548 (2014) (dismissing petitions under RAP 16.4(d) because the "Miller fix" legislation provides an adequate alternative remedy, in that it provides possibility of release during petitioners' lifetimes).

Keodara's claim under article I, section 14 of the state constitution fails because it is premised on the assumption that Keodara has been sentenced to a lifetime in prison *without* possibility of release. AOB at 28-29. The provisions of RCW 9.94A.730, which mandate a presumption of release after 20 years, represent a legislative judgment that comports with both the federal and state constitutions. This Court should not disturb this balance. *See* State v. Campbell, 103 Wn.2d 1, 34-35, 691 P.2d 929 (1984) (rejecting facial challenge to death penalty on grounds that community values are best determined through legislative acts).

Keodara's reliance on People v. Gutierrez, 58 Cal. 4th 1354, 324 P.3d 245, 171 Cal. Rptr. 3d 421 (2014) is misplaced. California's sentencing statute for juveniles 16 or 17 years old who committed murder with "special circumstances" carried a

presumption in favor of LWOP. 324 P.3d at 249. California's "Miller fix" statute did not eliminate that presumption, even upon resentencing. Id. at 265-66. By contrast, RCW 9.94A.730(3) carries a presumption of release after 20 years. Keodara's sentence is constitutional.

b. Trial Counsel Was Not Ineffective.

Keodara contends that his trial attorney was ineffective because she did not ask the sentencing court to impose an exceptional sentence below the standard range. To prevail on this claim, Keodara must demonstrate that: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) Keodara was prejudiced, meaning that there is a reasonable probability that the result of the proceeding would have been different had the alleged error not occurred. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); McFarland, 127 Wn.2d at 334-35. If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

Keodara cannot show deficient performance. At the time of his sentencing, counsel had no basis to request an exceptional

sentence. Under the SRA, an exceptional sentence may not be based on factors personal in nature to a particular defendant. State v. Law, 154 Wn.2d 85, 97, 110 P.3d 717 (2005). Specifically, "age is not alone a substantial and compelling reason to impose an exceptional sentence." State v. Ha'mim, 132 Wn.2d 834, 847, 940 P.2d 633 (1997). Moreover, Miller repeatedly and explicitly prohibits only *mandatory life imprisonment without parole*. 132 S. Ct. at 2460, 2464, 2469.

There was thus no basis under either the SRA or Miller to request a sentence below the low-end, standard-range sentence that counsel requested and the court imposed. 12RP 38, 41-42, 44-45; CP 295, 297. Counsel was not ineffective in failing to request a lower sentence. *See* In re Personal Restraint of Benn, 134 Wn.2d 868, 939, 952 P.2d 116 (1998) (counsel cannot be faulted for failing to anticipate a change in the law); Lilly v. Gilmore, 988 F.2d 783, 786 (7th Cir. 1993) (Sixth Amendment does not require counsel to forecast changes or advances in the law); Elledge v. Dugger, 823 F.2d 1439, 1443 (11th Cir. 1987) (effective representation does not include requirement to make arguments based on predictions of how the law may develop).

Nor can Keodara show prejudice. There is nothing in the record, other than his age (17.5 years old at the time of these crimes), to show that the trial court would even have considered a mitigated exceptional sentence. Given the unprovoked nature of these crimes against defenseless persons, the sheer brutality of the crimes, and the complete absence of any expression of remorse or even empathy on Keodara's part,[31] there is no reasonable probability that the trial court would have imposed a sentence below the standard range had one been requested. Keodara has not met his burden to show ineffective assistance of counsel.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm the judgment and sentence.

DATED this 12th day of December, 2014.

Respectfully submitted,

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[31] While Keodara maintained his innocence at sentencing, he expressed no sorrow whatsoever over the deaths of four persons. 12RP 42-44.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Nancy P. Collins,** the attorney for the appellant, at **Washington Appellate Project**, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **Brief of Respondent**, in **STATE V. SAY KEODARA**, Cause No. **70518-1-I**, in the Court of Appeals for the State of Washington, Division I.

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

Name

12-12-14
Date

Done in Seattle, Washington