

65942-1

NO. 65942-1-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

CARLOS BENITEZ, JR.,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable David R. Needy, Judge

RESPONDENT'S BRIEF

SKAGIT COUNTY PROSECUTING ATTORNEY
RICHARD A. WEYRICH, PROSECUTOR

By: ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Office Identification #91059

Courthouse Annex
605 South Third
Mount Vernon, WA 98273
Ph: (360) 336-9460

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TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY OF ARGUMENT	1
II. ISSUES.....	2
III. STATEMENT OF THE CASE.....	2
1. STATEMENT OF PROCEDURAL HISTORY	2
2. STATEMENT OF FACTS.....	6
i. Summary of Trial Testimony.....	6
ii. Summary of Sentencing Proceedings	23
IV. ARGUMENT	29
1. WHERE THE DEFENSE WAS ON NOTICE FROM THE START OF THE CASE, THAT THE STATE INTENDED TO PROCEED TO TRIAL ON THE MULTIPLE CHARGES, THERE WAS NO PROSECUTORIAL VINDICTIVENESS IN THE AMENDMENT OF THE INFORMATION.	29
2. WHERE A DEFENDANT IS IN POSSESSION OF OTHER RECENTLY STOLEN PROPERTY AND ENGAGED IN TRADING DRUGS FOR STOLEN PROPERTY, THERE WAS SUFFICIENT EVIDENCE FOR A RATIONAL TRIER OF FACT TO FIND THE DEFENDANT GUILTY OF POSSESSION OF STOLEN FIREARM.	34
3. THE PROXIMITY OF THE FIREARMS TO THE DRUG DEALING OPERATION AND TO THE DEFENDANT SUFFICIENTLY ESTABLISHED THAT HE WAS ARMED WITH A FIREARM AT THE TIME OF THE OFFENSES OF POSSESSION WITH INTENT TO DELIVER CONTROLLED SUBSTANCES.	37
4. WHERE THE DEFENDANT FAILED TO CHALLENGE THE JURY INSTRUCTION REGARDING THE FIREARM ENHANCEMENTS BELOW, THE DEFENDANT SHOULD BE PRECLUDED FROM CHALLENGING THE JURY INSTRUCTIONS SINCE THE ERROR IS NOT MANIFEST.	41
5. SINCE THE COURT IS REQUIRED TO IMPOSE CONSECUTIVE SENTENCES FOR POSSESSION OF STOLEN FIREARM AND UNLAWFUL POSSESSION OF	

FIREARM, THE DEFENDANT’S TRIAL COUNSEL WAS NOT INEFFECTIVE FOR
SEEKING EXCEPTIONAL SENTENCES DOWNWARD FOR THE MULTIPLE
FIREARMS POSSESSED RATHER THAN SEEKING A SAME CRIMINAL CONDUCT
DETERMINATION..... 43

6. WHERE THE DEFENDANT FAILED TO RAISE A SUPPRESSION MOTION FOR
A CLAIMED UNLAWFUL SEARCH OF HIS PERSON IN THE TRIAL COURT, HE IS
PRECLUDED FROM RAISING THE ISSUE FOR THE FIRST TIME ON APPEAL..... 47

V. CONCLUSION 50

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>WASHINGTON SUPREME COURT</u>	
<u>State v. Arndt</u> , 87 Wn. 2d 374, 553 P.2d 1328 (1976).....	44
<u>State v. Bencivenga</u> , 137 Wn.2d 703, 974 P.2d 832 (1999).....	35
<u>State v. Blight</u> , 89 Wn.2d 38, 569 P.2d 1129 (1977).....	46
<u>State v. Brett</u> , 126 Wn.2d 136, 892 P.2d 29 (1995).....	46
<u>State v. Camarillo</u> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	36
<u>State v. Couet</u> , 71 Wn.2d 773, 430 P.2d 974 (1967).....	36
<u>State v. Crane</u> , 116 Wn.2d 315, 804 P.2d 10, <i>cert. denied</i> , 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991).....	46
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	35
<u>State v. Eckenrode</u> , 159 Wn.2d 488, 150 P.3d 1116 (2007).....	40, 42
<u>State v. Elmore</u> , 154 Wn. App. 885, 228 P.3d 760 <i>rev. denied</i> , 169 Wn. 2d 1018, 238 P.3d 502 (2010).....	32
<u>State v. Gilmore</u> , 76 Wn.2d 293, 456 P.2d 344 (1969).....	46
<u>State v. Haddock</u> , 141 Wn.2d 103, 3 P.3d 733 (2000).....	48
<u>State v. Kirwin</u> , 165 Wn.2d 818, 203 P.3d 1044 (2009).....	49
<u>State v. Kitchen</u> , 110 Wn.2d 403, 756 P.2d 105 (1988).....	44
<u>State v. Korum</u> , 157 Wn.2d 614, 141 P.3d 13 (2006).....	passim
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	46
<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984).....	43
<u>State v. Reichenbach</u> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	52
<u>State v. Robinson</u> , 171 Wn.2d 292, 253 P.3d 84 (2011).....	49
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	35
<u>State v. Schelin</u> , 147 Wn.2d 562, 55 P.3d 632 (2002).....	39, 40, 41
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	50
<u>State v. Silvers</u> , 70 Wn.2d 430, 423 P.2d 539 (1967).....	49
<u>State v. Smith</u> , 117 Wn.2d 263, 814 P.2d 652 (1991).....	47
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	45, 52
<u>State v. Valdobinos</u> , 122 Wn.2d 270, 858 P.2d 199 (1993).....	39
<u>State v. White</u> , 81 Wn.2d 223, 500 P.2d 1242 (1972).....	45
 <u>WASHINGTON COURT OF APPEALS</u>	
<u>State v. Brown</u> , 36 Wn. App. 549, 676 P.2d 525 (1984).....	42
<u>State v. Hudson</u> , 56 Wn. App. 490, 784 P.2d 533, 535 (1990).....	37

<u>State v. McPhee</u> , 156 Wn. App. 44, 230 P.3d 284 <i>rev. denied</i> , 169 Wn. 2d 1028, 241 P.3d 413 (2010)	35
<u>State v. McReynolds</u> , 117 Wn. App. 309, 71 P.3d 663 (2003), <i>rev. denied</i> , 144 Wn.2d 1003, 29 P.3d 719 (2001)	46
<u>State v. Medley</u> , 11 Wn.App. 491, 524 P.2d 466 (1974).....	37
<u>State v. Murphy</u> , 98 Wn. App. 42, 988 P.2d 1018 (1999), <i>rev. denied</i> , 140 Wn.2d 1018, 5 P.3d 10 (2000)	46
<u>State v. Ra</u> , 144 Wn. App. 688, 175 P.3d 609, 617 (2008).....	32
<u>State v. Sabala</u> , 44 Wn. App. 444, 723 P.2d 5 (1986).....	38
<u>State v. Simonson</u> , 91 Wn. App. 874, 960 P.2d 955 (1998).....	41, 46

UNITED STATES SUPREME COURT

<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).....	44, 50
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WASHINGTON STATUTES

RCW 9.41.040	45
RCW 9.41.060	47
RCW 9.94A.533	42
RCW 9.94A.825	42
RCW 9A.04.110	38

WASHINGTON COURT RULES

RAP 2.5.....	42, 47
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I. SUMMARY OF ARGUMENT

Carlos Benitez appeals from his convictions of multiple charges related to drug delivery, firearms and stolen property. Benitez was discovered hiding in a garage surrounded by drugs, growing marijuana, packaging and manufacturing equipment and illegal firearms.

Benitez's claim the prosecutor was vindictive in amending the information fails because there is no presumption of vindictiveness. Benitez's claim there was insufficient evidence he knowingly possessed a stolen firearm fails because of his possession of other stolen property, the dealing of drugs and firearms including multiple illegal firearms.

Benitez argues that there was insufficient evidence to find he was armed and that the jury unanimously found him guilty based upon the same firearm. But there was direct testimony of the use of firearms in drug dealing to protect the dealing and the evidence supported the jury's determination since the firearms were close proximity to Benitez.

Finally Benitez claims his counsel was ineffective for failing to argue unlawful possession of multiple firearms were same criminal conduct and for not pursuing a suppression motion of property located on his person. The consecutive sentence for multiple firearms is required by statute. The failure to contest the search was not manifest error and since the matter was not raised below, there is not full record permitting review.

II. ISSUES

1. Is the amendment of an information to add charges for trial presumptively vindictive?
2. Was there sufficient evidence to support that the defendant knowingly possessed a stolen firearm?
3. Where the defendant was in close proximity to multiple firearms used to protect drug dealing, was there sufficient evidence for a rational trier of fact to find he was armed?
4. Is juror unanimity for an enhancement implicated where a defendant is in close proximity to multiple firearms?
5. Where the statute and case law requires a consecutive sentence, was counsel ineffective for failing to argue for same criminal conduct?
6. Was counsel ineffective in failing to raise a search issue?
7. Does the present status of the record permit review of the search issue?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On October 28, 2009, Carlos Benitez was charged with seven counts related to drugs and weapons located where he was residing. The charges were Conspiracy to Deliver Controlled Substance, Possession with Intent to Manufacture or Deliver a Controlled Substance with Firearm and School Zone Enhancements, two counts of Possession with Intent to Manufacture or

Deliver, Unlawful Possession of a Firearm in the First Degree and Possession of Stolen Firearm. CP 1-4. The offenses were alleged to have occurred on October 25, 2009. CP 1-4. On November 5, 2009, prior to arraignment, the State amended the information. CP ____ (Sub. No. 13, Amended Information filed 11/5/2009, Supplemental Designation of Clerk's Papers pending). The information clarified the school zone and firearm enhancements on count 2 and changed the firearm named in counts 5 and 6.

On May 21, 2010, the second amended information was filed. It alleged Conspiracy to Deliver Controlled Substance, three counts of Possession with Intent to Manufacture or Deliver a Controlled Substance with Firearm and School Zone Enhancements, Manufacture of Marijuana, Criminal Impersonation in the First Degree, Identity Theft in the First Degree, seven counts of Unlawful Possession of a Firearm in the First Degree, Possession of Stolen Firearm, and two counts of Unlawful Possession of Short-Barreled Shotgun or Rifle. CP 10-17.

This information added the school zone and firearm enhancement to possession with intent to deliver charges in counts 3 and 4. CP 12-13. It also added counts of Manufacture of Marijuana in count 5, Criminal Impersonation in the First Degree in count 6, Identity Theft in the First Degree in count 7, added Unlawful Possession of Firearm in counts 10, 11, 12, 13, 15 and 17, and two counts of Unlawful Possession of Short-Barreled

Shotgun or Rifle in counts 14 and 16. CP 14-17.

Benitez's counsel had a discussion with trial court at the time of the arraignment of the amended information in which they acknowledged that they had been aware the amended information would be filed. Counsel indicated, "we are well aware that his exposure on this is very great" and "we were working on this have notice that these charges were potentially going to be added." 5/21/10 RP 2-3. No objection was made to the filing of the information. The third amended information filed June 28, 2010, corrected clerical errors in the information. CP 27-34.

On June 9, 2010, at the 3.5 hearing, the State noted that the State had provided notice of the intent to amend the information in advance. 6/9/10 RP 82. Benitez's counsel noted that they had not sought the identity of the confidential informant so that they could pursue the possibility of a plea. 6/9/10 RP 82. Because the plea agreement could not be reached, Benitez's counsel noted that they would be requesting the identity of the informant if the informant was going to be used, but wanted to consult further with her client at that time to make sure that was what he wanted. 6/9/10 RP 82-3.

On June 28, 2010, the case proceeded to trial. 6/28/10 RP 3.¹

¹ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

5/21/11 RP	Arraignment on Second Amended Information
6/9/10 RP	3.5 Hearing

On July 2, 2010, the jury returned guilty verdicts on all seventeen counts and the two enhancements on three counts. CP 98-121.

On August 25, 2010, the trial court sentenced Benitez to an exceptional sentence downward of 368 months. CP 356. The exceptional sentence was on the seven counts of Unlawful Possession of a Firearm in the First Degree. The sentence reduced from a standard range of 87 to 116 months consecutive to 24 months consecutive. CP 355-6. Benitez's standard range resulted from criminal history including four prior adult and four prior juvenile convictions and being on community custody at the time of the offense. CP 353-4.

On August 25, 2010, Benitez timely filed a notice of appeal. CP 365-6.

On December 8, 2010, the trial court entered written findings of fact and conclusions of law on an exceptional sentence. 12/8/10 RP 5, CP ____ (Sub no 123, Findings of Fact to Support Exceptional Sentence Downward filed 12/8/2010, Supplemental Designation of Clerk's Papers pending). The

6/24/10 RP	Trial confirmation and stipulations
6/28/10 RP	Pretrial matters and trial testimony day 1 (Volume 1)
6/29/10 RP	Trial testimony day 2 (volume 2)
6/30/10 RP	Trial testimony day 3 (volume 3)
7/1/10 RP	Trial testimony day 4 (volume 4)
7/2//10 RP	Trial testimony day 5 and closing (volume 5)
7/2/10 RP	Trial testimony day 5 (volume 5)
8/11/10 RP	Sentencing - continuance
8/25/10 RP	Sentencing.
12/8/10 RP	Entry of findings regarding exceptional sentence.

State objected to the trial court's factual findings. 12/8/10 RP 4.

2. Statement of Facts

i. Summary of Trial Testimony

David Shepherd was a Whatcom County detective working for the Northwest Regional Drug Task force. 7/1/10 RP 622. Shepard received tips of drug dealing from the Cherry Street address and a confidential informant came forward. 7/1/10 RP 624-5. He notified the Skagit County Interlocal Drug Enforcement Unit and involved them in the controlled buys. 7/1/10 RP 624, 648-9. Shepherd was the person who handled dealing with the informant. 7/1/10 RP 649-50.

Detective Dave Floyd was detective at the Skagit County Interlocal Drug Enforcement Unit who worked with Shepherd and was the lead detective. 6/28/10 RP 22. Floyd testified about using confidential informants to set up drug transactions to introduce officers to dealers. 6/28/10 RP 25-9. Floyd testified that drug dealing is a dangerous business because the people are criminals who arm themselves with firearms and use security to protect profits. 6/28/10 RP 30-1.

Floyd became part of surveillance of suspected drug activity at 216 Cherry Street in Burlington, Washington. 6/28/10 RP 32-3, 6/29/10 RP 55. Floyd observed a high volume of traffic to the residence and people waiting outside before apparently being signaled into the residence. 6/28/10 RP 33-

4, 6/29/10 RP 224. Floyd then saw those waiting proceeding into the garage.
6/28/10 RP 34.

Randy Hess was a Border Patrol agent assisting with the local task forces. 6/30/10 RP 446. Hess became involved with the investigation by the Skagit County task force of the Cherry Street operation. 6/30/10 RP 448.

Shepherd and Floyd arranged to conduct drug purchases with an informant on two occasions. 6/28/10 RP 35. The first occasion was September 4, 2009. 6/28/10 RP 35, 6/29/10 RP 58-61, 220. Hess worked with the confidential information to try to get an introduction with Able Cantu. 6/30/10 RP 448. Hess drove the informant and parked outside. 6/30/10 RP 448-9. H They had an informant enter the garage who then exited with methamphetamine. 6/28/10 RP 35. The undercover officer was not introduced to the sellers at that time. 6/28/10 RP 36. After debriefing of the informant, Floyd had concerns about firearms which affected the investigation. 6/28/10 RP 37. Detective Richardson and Kading of the Skagit County task force conducted surveillance on the residence during the transaction. 6/29/10 RP 220-1. At one point Richardson and Kading saw a school bus stopped close by and dropped off a young child. 6/29/10 RP 222, 258, 6/30/10 RP 282. Richardson also saw a vehicle engaged in what appeared to be counter-surveillance. 6/29/10 RP 224-5. Hess also expressed concern about heavy counter-surveillance. 7/1/10 RP 631. Kading saw a

young man come out and while on a phone began looking intently at everything and every vehicle. 6/29/10 RP 248. Kading also observed activity consistent with purchases of drugs by customers. 6/29/10 RP 248-51. During debriefing after the transaction, the informant told Shepherd that Benitez was present. 7/1/10 RP 632. The informant also said that two of those present were armed with handguns while he observed them cutting a kilo of cocaine into smaller amounts. 7/1/10 RP 632-3.

The second transaction occurred on September 17, 2009. 6/28/10 RP 37. Hess also transported the informant and parked outside. 6/30/10 RP 452-4. The transaction was planned to involve purchase of both drugs and a machine gun that had been previously discussed. 6/28/10 RP 37, 6/30/10 RP 453. After purchasing the methamphetamine, the informant discussed the machine gun with the seller and the undercover officer. 6/28/10 RP 37-8. The officer was not allowed in the residence, but the informant was fronted the machine gun and allowed to take the gun to the undercover officer outside. 6/28/10 RP 38, 6/30/10 RP 457, 7/1/10 RP 635. The gun appeared to be fully automatic. 6/28/10 RP 39. Despite the high price, the officers arranged for the purchase through the informant to get the firearm. 6/28/10 RP 40, 7/1/10 RP 637. The investigation at that point was trying to determine the volume and type of narcotics, the involvement of firearms and the location of drug supplies. 6/28/10 RP 41. After the transaction, the

informant described to Shepherd the weapons he observed including two rifles, a couple shotguns and pistols. 7/1/10 RP 641.

On September 23, 2009, Detective Kading did surveillance of the residence and observed both Carlos Benitez and Able Cantu outside. 6/29/10 RP 254. After what appeared to be a drug transaction, Kading followed a person appearing to be under the influence of narcotics and took pictures of him. 6/29/10 RP 257.

While the task forces were investigating, Burlington Police happened onto the residence. 6/29/10 RP 58-9. Burlington Officers Goss and Sergeant Rogge were looking for a suspect on October 24, 2009, and saw Able Cantu. 6/29/10 RP 60-2, 64, 149. Goss was given consent to search for the suspect in the residence and while inside saw numerous firearms and a known convicted felon. 6/29/10 RP 65-7. Officers obtained a search warrant for weapons from the residence and garage. 6/29/10 RP 68-70.

Goss and Rogge went to search the garage first. 6/29/10 RP 70, 153. The search of the garage began about an hour and a half after officers first arrived. 6/29/10 RP 61, 180, 191. Goss knocked numerous times but there was no answer. 6/29/10 RP 71. He went around to a partially open window and saw four men sitting in chairs in a semi-circle in the room smoking and drinking beer. 6/29/10 RP 71, 128, 154. The men had been inside for an hour while officers were at the house with marked units outside. 6/29/10 RP

200-1. Goss ordered Able Cantu to open the door and he complied. 6/29/10 RP 71, 155. Goss identified the four men as Able Cantu, Geraldo Alvarado, Noel Melindrez and John Butler. 6/29/10 RP 130. It appeared to Officer Rogge that those in the garage had been moving things around out of view. 6/29/10 RP 201. Guns, paraphernalia and packaging materials had been moved out-of-sight. 6/29/10 RP 204. After the men left the garage, officers searched the garage. 6/29/10 RP 72.

The garage had no working garage door. 6/29/10 RP 73. Photographs of the garage and a security camera were admitted. 6/29/10 RP 57-8. It was cluttered, but there was a bed and dresser. 6/29/10 RP 72-3. There were TVs and video game systems. 6/29/10 RP 72. There was also red and blue gang graffiti on the walls. 6/29/10 RP 73. A nylon shoulder holster was on a bed post holding an airsoft pistol that looked like a real gun. 6/29/10 RP 74. Because it appeared to be a real firearm, Officer Rogge was concerned that other guns might be located. 6/29/10 RP 156. Goss found a large digital scale with brown residue on the plate. 6/29/10 RP 75, 114. Under the mattress officers found four guns which included two illegally shortened shotguns. 6/29/10 RP 75-6, 158. There were also three rifles behind the headboard. 6/29/10 RP 77, 159. The firearms located under the mattress and behind the headboard were admitted. 6/29/10 RP 94-99. There was a bag of suspected narcotics on the floor by the bed. 6/29/10 RP 77-8.

159.

After officers had been inside 20 minutes finding these items, they saw the defendant, Carlos Benitez, hiding under a blanket with a laundry basket pulled up to him. 6/29/10 RP 79-81, 163-4. He was sitting with his knees pulled up to his chest, hugging his knees. 6/29/10 RP 80. It appeared to Officer Goss that Benitez was faking being asleep. 6/29/10 RP 139. Goss and Rogge said when Benitez was discovered, he had access to and was within arm's reach of the guns and ammunition in the garage. 6/29/10 RP 143-4, 203. Goss was concerned about Benitez's proximity to the guns. 6/29/10 RP 143-4. Benitez initially said his name was Carlos Mejia, but later admitted his true name was Carlos Benitez. 6/29/10 RP 83, 140-1, 164.

After officers detained him, they located a wallet with identification of another older white male in his pocket. 6/29/10 RP 81. Benitez said he found the wallet but the cash was his. 6/29/10 RP 81, 167. The wallet had \$700 in cash but cards of someone else. 6/29/10 RP 82, 114-5. Benitez claimed he intended to return the wallet. 6/29/10 RP 167. Officers found out Benitez had warrants and placed him under arrest. 6/29/10 RP 83-4.

The Burlington officer continued their search. There was a scanner in the garage which had the numbers for law enforcement frequencies attached. 6/29/10 RP 89. There was ammunition in the garage, including a 357 Magnum ammunition and factory boxed ammunition of various calibers

in a shelf found above where Benitez was hiding. 6/29/10 RP 91-2. There was a bag of syringes by the ammunition. 6/29/10 RP 101-2. By the foot of the bed was a little plastic cabinet, which had Ziploc bags and coffee creamer. 6/29/10 RP 104. There was a Ziploc bag labeled baking soda, a known drug-manufacturing ingredient, and a cardboard box with loose and bagged syringes along with bits of cotton known to be associated with drug use. 6/29/10 RP 104-5, 107, 244. On a white cabinet was a bag with another Ziploc with white powder and a dirty mixing bowl with white residue. 6/29/10 RP 109. In a refrigerator in the garage were Ziploc bags containing a brown substance. 6/29/10 RP 111, 172. On a desk by the computer was a small pocket digital scale with residue. 6/29/10 RP 112. Once officers realized the amount of drug materials involved, the patrol officers realized there were not enough personnel to handle it, so they contacted detectives. 6/29/10 RP 176. After patrol officers found out about the task force investigation, they turned over the garage and residence for them to complete the investigation. 6/29/10 RP 142, 176.

Trooper Knott from the State Patrol was called in to have his drug detection dog, Moto, search the residence and garage. 6/29/10 RP 205-8. The garage appeared to be a criminal den to Trooper Knott. There was every type of narcotic that Moto was trained to detect, marijuana plants growing up to the ceiling, property that appeared to be stolen property and a place to

sleep. 6/29/10 RP 209. In the garage, Moto alerted on numerous suspected paraphernalia and drugs including heroin, cocaine methamphetamine, and marijuana. 6/29/10 RP 210. Trooper Knott told Detective Richardson that due to the number of alerts in the garage, that detectives would need to do a hand search. 6/29/10 RP 227. After finding numerous items in the garage, Knott and Moto went over to the residence. 6/29/10 RP 211. The only alert locations in the residence of the odor of controlled substances were in a linen closet in the area of the master bedroom and a location upstairs. 6/29/10 RP 210-1. Moto alerted on currency in the master bedroom. 6/29/10 RP 218. Upstairs Knott found firearms and prescription drugs that Moto is not trained to detect. 6/29/10 RP 211-2.

Detective Kading testified that his hand search of the garage turned up numerous drugs and paraphernalia. 6/29/10 RP 259-61. Paraphernalia included burnt spoons for cooking heroin. 6/29/10 RP 261. Marijuana plants in the garage included a very large one that almost touched the ceiling and other small starter plants. 6/29/10 RP 264. There were seeds, pots, fertilizer, scissors for trimming, and garden tools. 6/29/10 RP 267. Kading located a "go" bag containing bags for packaging, money rolled to flash, gift cars, and Ecstasy in the garage. 6/30/10 RP 285-9. Floyd testified that the camera in the bag contained pictures of Carlos Benitez. 7/2/10 RP 730-1. The pictures included a picture of Benitez in the garage with a holster

containing the airsoft pistol. 7/2/10 RP 731-2. There was also a picture taken October 19, 2009, of Benitez standing next to the marijuana plant located in the garage. 7/2/10 RP 734. There were materials for processing cocaine in the garage. 7/2/10 RP 700-2. Shepherd testified that the scale at the garage was larger and consistent with weighing larger amounts of drugs and small bags consistent with dealing drugs. 7/1/10 RP 644, 703, 706. Floyd testified that there was a bag of sugar in the garage and caramelized sugar in the refrigerator consistent with the product used to cut heroin to reduce purity. 7/2/10 RP 7-4.

Kading testified that in his training and experience that drug dealers have a high level of paranoia due to concerns about being ripped off and losing their drugs or money. 6/30/10 RP 291. As a result, they use and display firearms for offensive and defensive purposes. 6/30/10 RP 291-2.

Detective Floyd also testified about his search of the garage. Floyd identified a sheet of paper recovered from the garage with person information and credit card numbers for Donald Albright. 7/1/10 RP 512. Floyd testified that in the world of drug users and dealers, it is common to find person information of others that is used for fraudulent purposes. 7/1/10 RP 512-3. The paper had a credit card number, expiration dates, full name, date of birth, driver's license number and expiration, address and social security number. 7/1/10 RP 513. With the information, someone would be

able to make purchases by telephone. 7/1/10 RP 513. This matched the information in the wallet. 7/1/10 RP 514. The wallet also contained a photograph dated August 24, 2009, of Carlos Benitez standing in the garage of 216 Cherry Street beside a marijuana plant. 7/1/10 RP 516-8. The paper backers from the gift cards located in the wallet and purchased at K-Mart were located in the garage. 7/1/10 RP 520-2. The wallet contained a card for activation of Boost mobile for a phone of a type commonly purchased by drug dealers to conduct business. 7/1/10 RP 522-3. The wallet contained a Quest public assistance card, which are frequently traded as currency for small user level amounts of drugs. 7/1/10 RP 523-4. There was also a business card for a horticultural supply store that is well known as a locale frequented by individuals purchasing supplies for indoor marijuana growing operations. 7/1/10 RP 526. Detective Floyd identified the guns retrieved from various areas of the house as well as those located in the garage. 7/1/10 RP 558-9. Floyd also testified that the two AR-15 rifles located in the house were stamped with a warning stating they were restricted military, law enforcement, export use only. 7/1/10 RP 559-60.

Floyd testified that the small marijuana plants in the garage appeared to be cloned from the larger plant. 7/1/10 RP 564-5. There was also marijuana processed for consumption. 7/1/10 RP 565. A forensic report indicating that the plants found in the garage were chemically and

microscopically determined to be marijuana was admitted by stipulation. 7/1/10 RP 556-7, 671. The lab results were admitted indicating that the item purchased by the informant on September 4, 2009, and September 17, 2009, contained methamphetamine. 7/1/10 RP 672-3. In addition, the lab results indicating the items in the garage included heroin, cocaine and ecstasy were admitted. 7/2/10 RP 714-8, 724-8. Floyd testified that the quantities of ecstasy were consistent with dealer amounts. 7/2/10 RP 720.

Floyd testified that in the garage there were ledgers consistent with customer names, amounts of product purchased or fronted and debts owed. 7/1/10 RP 678, 7/2/10 RP 691, 694. Ledgers commonly uses street names for drugs with black being heroin, white being cocaine and yellow being methamphetamine. 7/2/10 RP 692-3. There were notations about stereos being traded for drugs in the ledgers. 7/2/10 RP 693. The ledger was consistent with information that the drugs were being traded for stolen property. 7/2/10 RP 693-4. One ledger had Carlos Benitez's name printed on it. 7/2/10 RP 694-5. The ledger contained different pages for different names. 7/2/10 RP 695. Floyd testified that the garage contained car stereos that had cord or wires which were cut. 7/2/10 RP 697.

Detective Hofkamp of the task force handled the investigation into stolen property found at the residence. 6/30/10 RP 351-2. Hofkamp located the owner of a wallet, with credit cards, driver's license and social security

card found at the scene by the name of Donald Albright. 6/30/10 RP 354, 356. A Sears credit card stolen from Albright was located. 6/30/10 RP 354. The card was used at the K-Mart in Burlington. 6/30/10 RP 354. Hofkamp located the transaction where the card was used. 6/30/10 RP 358-9. Hofkamp located property that matched the stolen property in the residence including a video game and video cable. 6/30/10 RP 361. Hofkamp located gift cards purchased with the Sears card in the wallet that Benitez possessed. 6/30/10 RP 362-5. Hofkamp also identified the large chunks of crystallized heroin located in the refrigerator in the garage. 6/30/10 RP 370-1.

Donald Albright testified that he lost his wallet in the fall of 2009. 7/1/10 RP 496. Shortly after it was lost, he found out his card had been used for suspicious purchases and contacted the Burlington Police. 7/1/10 RP 496-7. Albright identified a wallet, which was not likely his but had his driver's license, social security card and Sears credit card. 7/1/10 RP 499-500, 504. He testified no one had permission to use these. 7/1/10 RP 500. He had about \$40 in his wallet when it came up missing. 7/1/10 RP 499. Albright identified the purchases he did not do on the Sears card, which was in the wallet. 7/1/10 RP 498. Albright indicated a number of cards and papers had been added to his wallet. 7/1/10 RP 300-3.

Darryl Little of Sears loss control testified about his work for K-mart as an affiliate. 7/1/10 RP 527. Little located transactions on a Sears card

belonging to Albright. 7/1/10 RP 528. Little identified that there was an unusual spending pattern with the card of over \$3,000 done in two transactions within less than an hour of each other on two days. 7/1/10 RP 530-1. Little identified the gift card purchases as well as other purchases on the receipts. 7/1/10 RP 532-7.

John Olson testified that he had five firearms, jewelry, military records, a passport and a camera stolen from his residence on a burglary on November 3, 2008. 7/1/10 RP 492. In November of 2009, Olson was contacted by Detective Floyd about a Ruger .32 caliber magnum with holster that was recovered. 7/1/10 RP 492-3. The gun was traced to him because it had been registered. 7/1/10 RP 493-4. Olson also recognized the holster. 7/1/10 RP 494.

Alexander Liwinski of the Bureau of Alcohol Tobacco and Firearms testified as to his inspection of firearms recovered from the Cherry Street address. 7/1/10 RP 538-9. He has training and expertise in firearms including illegal, modified firearms and machine guns. 7/1/10 RP 540. Liwinski went to the scene and viewed the firearms. 7/1/10 RP 540. He also was present when the machine gun located was test fired. 7/1/10 RP 541. He indicated that the machine gun was capable of fully automatic burst. 7/1/10 RP 541. Liwinski identified that shotgun had been modified so as to be illegal by shortening of barrel and the stock. 7/1/10 RP 542-4. A

second shotgun was also modified to be illegal by shortening of the barrel. 7/1/10 RP 546-7. Liwienski identified the other firearms located from the garage at Cherry street as firearms. 7/1/10 RP 547-3.

Nancy Angel of the Burlington bus garage testified that she works for the Burlington Edison school district transportation department. 7/1/10 RP 506. As part of her duties, she and the supervisor identify school bus stops. 7/1/10 RP 506-7. The school district has a bus stop for 216 South Cherry Street in Burlington for a child riding out of that address as well as other kids on the block. 7/1/10 RP 508. Angel identified a photograph of the bus making a stop at the regularly designated bus stop. 7/1/10 RP 510. Angel testified that the distance from the bus stop to the actual house was within 1,000 feet and probably less than 100 feet. 7/1/10 RP 510-1. Benitez also stipulated that the bus stop was within 1,000 feet of the residence. 7/2/10 RP 735.

The State called the informant who had conducted the two transactions at Cherry Street. The informant got to know Able Cantu, Jr. in the Spring of 2009. 6/30/10 RP 380. The informant testified Cantu was living at the Cherry Street address. 6/30/10 RP 381. The informant had driven friends to the Cherry Street address to buy drugs from Able Cantu. 6/30/10 RP 381-2. After about four such transactions, the informant was able to start buying drugs from Able Cantu. 6/30/10 RP 382-3. Most of the

transactions occurred in the garage. 6/30/10 RP 384. The informant saw surveillance by those dealing drugs. 6/30/10 RP 385-6, 395-6. He testified that they traded drugs for merchandise including guns, stereos and things from stores. 6/30/10 RP 386.

The informant testified that guns and drugs go hand in hand and that it did not matter if the guns were stolen because the people dealing already have felonies and they are already in trouble for having a gun. 6/30/10 RP 388. The informant testified he saw different guns. 6/30/10 RP 392, 416-8. The informant testified that Benitez took care of the garage for Cantu and did small transactions for Cantu. 6/30/10 RP 389-90, 406. Benitez knew where things were and knew where to find Able. 6/30/10 RP 389-90. The informant saw Benitez cooking drugs by the bed and was aware that he fronted drugs to people. 6/30/10 RP 391-2. The informant was aware that if guns had big firepower, his friends got the best price for them there. 6/30/10 RP 392. The informant said he had friends who felt unsafe and that he was aware that there was a small machine gun at the residence and wanted to get it off the streets. 6/30/10 RP 393-4. The informant testified that he felt this was a well organized gang with dangerous weapons. 6/30/10 RP 425. He said that a buyer would not feel that they could rip them off because of the firearms that were there. 6/30/10 RP 425-6.

It appeared to the informant like the garage was Benitez's area at

Cantu's place, which Benitez kept clean and knew where things were. 6/30/10 RP 419. Benitez had gotten a bed in the garage and kept his personal property there. 6/30/10 RP 420-1.

The informant testified that the first transaction was in the beginning of September of 2009. 6/30/10 RP 397. At the time, the informant saw a kilogram of cocaine being broken into chunks. 6/30/10 RP 398. There were also weapons displayed. 6/30/10 RP 399-401. The informant spoke with Cantu about purchasing firearms. 6/30/10 RP 403.

A couple of weeks later the second transaction occurred. 6/30/10 RP 407. The informant purchased methamphetamine from Cantu. 6/30/10 RP 408. While there, the informant saw Benitez trade drugs in a syringe in exchange for property. 6/30/10 RP 410. The informant appeared to prepare a speed ball mixture of marijuana and cocaine for one man in exchange for property and for a couple. 6/30/10 RP 410-1. The informant arranged to get a machine gun from Cantu which he could test out and purchase. 6/30/10 RP 412-3. Benitez actually went with the informant and got a missing piece for the machine gun because Benitez knew where the piece was inside the house. 6/30/10 RP 413. Cantu was asking Benitez where the parts to the firearm were located. 6/30/10 RP 414. The informant turned over the machine gun and the methamphetamine he purchased to officers. 6/30/10 RP 415.

Jessica Gonzales was living at 216 South Cherry Street in Burlington in October of 2009. 6/30/10 RP 314-5. At the time, she was an electrician working for Nordic Tugs and her fiancée was Able Cantu, Jr. 6/30/10 RP 315. She shares a child with Cantu. 6/30/10 RP 315. Gonzales stated that Benitez started staying over in the garage when he was working on a truck that belonged to Benitez's father. 6/30/10 RP 317-8. Benitez resided in the garage and stayed in the garage in the summer of 2009. 6/30/10 RP 319. Gonzales did not go into the garage. 6/30/10 RP 321. Benitez moved his bed into the garage in September. 6/30/10 RP 323. Gonzales stated he was staying in the garage because of warrants and would run inside to avoid being seen by law enforcement. 6/30/10 RP 324-5. Benitez did not have mail delivered to the residence. 6/30/10 RP 326. Gonzales observed a lot of visitors going to the garage, often at times when Cantu was not home. 6/30/10 RP 322.

On the night of the search of her house, Gonzales let officers inside her residence to look for a person on warrants. 6/30/10 RP 326. She saw Benitez in the garage after he was handcuffed and he asked her to take his wallet, which officers prevented her from doing. 6/30/10 RP 328-30. After Benitez was arrested, he sent letters to Gonzales asking her not to blame him for the number of people coming over to the house and to have her say that he did not live at the house. 6/30/10 RP 331.

Benitez stipulated to the admission of the laboratory reports pertaining to the drugs. 7/1/10 RP 630. Benitez stipulated to the fact he had a prior serious felony conviction for the strategic decision not to admit his prior conviction to the jury. 6/24/10 RP 9-10. Benitez also stipulated that his conviction constituted recent recidivism for the purpose of an exceptional sentence under RCW 9.94A.535(3). 6/24/10 RP 11-3

Carlos Benitez did not testify on his behalf.

ii. Summary of Sentencing Proceedings

On August 11, 2010, the case first came on for sentencing. 8/11/10 RP 2. The trial court indicated surprise at the possibility that Benitez was facing a lengthy sentence and asked to continue the case and receive additional information. 8/11/10 RP 3-4.

At sentencing on August 25, 2010, the State sought to have Benitez's community corrections officer testify as to Benitez being on community custody at the time of the offense and that Benitez was unwilling, unable or incapable of complying with supervision. 8/25/10 RP 5, 7. After Benitez stipulated he was on community custody and performed poorly on supervision, the trial court precluded the State from calling the community corrections officer. 8/25/10 RP 7-8.

The State agreed that Benitez's three convictions for possession with intent to deliver were same criminal conduct resulting in the three school

zone enhancements running concurrently and the three firearm enhancements running concurrently. 8/25/10 RP 9-10.

The prosecutor opposed the trial court comparisons with the co-defendants because as opposed to Able Cantu who had no prior felony history, Carlos Benitez had prior felony convictions and as a result “an unlawful possession of a firearm here brings him into a range that Able Cantu never was even looking at.” 8/25/10 RP 10. “It was not unlawful for Cantu or his girlfriend to possess those in and of itself....” 8/25/10 RP 11. The prosecutor noted that Able Cantu pled guilty to the firearm enhancement and the guns that were stolen and that “going from a 0 offender score, never having been arrested for a felon to 96 months in prison on a firearm enhancement is an extreme jump.” 8/25/10 RP 12. The prosecutor also noted that the first degree charge flowed from a prior assault in the second degree charge where he sent the mother of his children to the hospital. 8/25/10 RP 12-3. The prosecutor also noted that Benitez ran the operation when the other person was not there and was aware of where the machine gun parts were located. 8/25/10 RP 14-5.

Benitez sought the trial court to give an exceptional sentence under RCW 9.94A.535(1)(g) based upon the multiple offense policy resulting in a sentence that was clearly excessive. 8/25/10 RP 23. Benitez contended that

an exceptional sentence downward was appropriate because one co-defendant got four years and the other one got eight years. 8/25/10 RP 26.

Benitez sought that instead of the trial court imposing an 87 to 116 month sentence on each firearm offense to run consecutive, that the trial court impose 12 months on each of the seven counts to run consecutive resulting in a net sentence of 26 to 30 years. 8/25/10 RP 30.

The trial court asked Benitez's counsel whether she agreed that the sentences on the firearms had to run consecutive to one another. 8/25/10 RP 30. Defense counsel responded:

I looked through everything back and forth, and I think that - - as far as what I can tell, they have to be consecutive. They cannot be concurrent with anything else. Unlawful possession of a firearm and possession of a stolen firearm, as far as my reading, it has to be consecutive. Enhancements have to be consecutive. I don't think you have any basis to mitigate the enhancements, as far as my reading on 9.94A.533, I believe that's the enhancements.

Anyway, I looked carefully at that, and the RCW says the Court shall impose and they have to be consecutive. So, yes. I'm asking to you mitigate down the Unlawful Possession of Firearm, First Degree, the consecutive nature of that.

8/25/10 RP 30-1.

The trial court began by explaining the sentence by comments pointing out that the prosecutor's credibility was "beyond reproach" and "she has an excellent representation through the court system." 8/25/10 RP 35. The court went on to describe the importance of the prosecutor's office

and the fact that criticism is made of charging decisions. 8/25/10 RP 35-6. The court described that the case involved a “very brazen and open operation was being conducted in a neighborhood community square in the center of Burlington, Washington.” 8/25/10 RP 36. The court noted “that one could bring in stolen property for drugs, one could bring in money for drugs and one could even bring in sex for drugs – all openly conducted – after one passed the surveillance cameras and was waived into the garage where Mr. Benitez was temporarily residing.” 8/25/10 RP 36-7. The court noted.

Mr. Benitez voluntarily participated, I believe, knowing full well the extent of the operation. In fact, I think he was proud of his involvement, much like a groupie might be to a rock star. He liked to have his picture taken. He posed, albeit with a plastic gun. But he wanted to be part of the group. He didn’t have to work a regular job. He hid from the Department of Corrections, and he got, I’m sure, a certain amount of status and self worth from his role in the operation.

8/25/10 RP 37. But the trial court went on to note that it did not perceive that Benitez was a major participant and that when officers arrived on another case he hid rather than “play muscle or henchman for anyone.” 8/25/10 RP 38-9. The trial court also evaluated the number of charges and sentence faced by what the trial court perceived was the major participant and another individual involved. 8/25/10 RP 39-40.

The trial court noted that the different sentence flowed in great part from different criminal history. 8/25/10 RP 40-1. But the trial court opined

that the difference in the number of counts flowed from the fact that Benitez went to trial. 8/25/10 RP 41.

That history is very important and on similar charges gets him a much greater sentence. The only reason, in my mind, that I can justify 17 counts against Mr. Benitez and the other number of counts agins the other codefendants is because he chose to exercise his constitutional right to go to trial.

8/25/10 RP 41. The trial court stated that in his sixteen years as a prosecutor and his fourteen years on the bench, he did not believe the sentence was appropriate or fair under the circumstances. 8/25/10 RP 42. The trial court compared Benitez's sentence to what was imposed for a multiple strike offender of for horrendous acts which receive sentences from 10 to 25 years. 8/25/10 RP 42. The court stated: "[t]hat doesn't mean he hasn't earned the points and the range that Ms. Johnson has brought, but I have trouble believing that proper discretion was exercised in filing 17 counts to get us to 82.66 years." 8/25/10 RP 42-3.

After the comments, the trial court ordered an exceptional sentence downward based upon a sentence on the seven counts of Unlawful Possession of a Firearm in the First Degree being reduced from a standard range of 87 to 116 months to 24 months each to run consecutive to one another. 8/25/10 RP 44-6, CP 355-6. The trial court sentenced Benitez to 368 months. CP 356.

On August 25, 2010, Benitez timely filed a notice of appeal. CP 365-6.

On December 8, 2010, the trial court entered written findings of fact and conclusions of law on the exceptional sentence. 12/8/10 RP 5, CP ____ (Supplemental Designation of Clerk's Papers Pending Sub no 123, Findings of Fact to Support Exceptional Sentence Downward filed 12/8/2010. The trial court's findings including a finding that "The only reason I can explain 17 counts against Mr. Benitez and the other number against the co-defendants is because he chose to exercises his constitutional right to go to trial." CP ____ (Supplemental Designation of Clerk's Papers Pending Sub no 123, Findings of Fact to Support Exceptional Sentence Downward filed 12/8/2010 (finding number 19). The court also held "The State did not have to file all those charges go make its point, to be consistent, to seek fairness and justice at some level across the board for the three participants charged in this operation." CP (finding number 20). The court also determined "This Court has a duty to attempt to balance fairness and justice across the board." CP ____ (Supplemental Designation of Clerk's Papers Pending Sub no 123, Findings of Fact to Support Exceptional Sentence Downward filed 12/8/2010 (finding number 21).

IV. ARGUMENT

- 1. Where the defense was on notice from the start of the case, that the State intended to proceed to trial on the multiple charges, there was no prosecutorial vindictiveness in the amendment of the information.**

Benitez claims the trial court's finding imposing the exceptional sentence downward suggesting that charges resulting in the extensive sentence resulted from Benitez exercising his constitutional right to trial amounted to actual prosecutorial vindictiveness. Brief of Appellant at page 9. As a result, Benitez contends that he was deprived of due process and as a result the four enhancements added and the eight additional charges requiring mandatory exceptional sentences must be dismissed.

The State contends the trial court's finding used in imposing an exceptional sentence downward was not a finding of actual vindictiveness. In addition, Benitez never objected to amendment of the information and the record does not support a finding of actual vindictiveness of the prosecutor.

Benitez relies primarily on State v. Korum, 157 Wn.2d 614, 141 P.3d 13 (2006) to support his claim of prosecutorial vindictiveness. In Korum, the defendant had entered a plea agreement in which the State dismissed numerous of the sixteen counts initially filed and agreed not to file counts for other home invasion robberies and agreed to a sentence of 132 months. State v. Korum, 157 Wn.2d at 620-1, 141 P.3d 13 (2006). After the defendant successfully moved to withdraw the guilty plea, the State amended the

information to 32 counts and firearm enhancements. State v. Korum, 157 Wn.2d at 621, 141 P.3d 13 (2006). The defendant was convicted on 30 counts. Id. As a result of the offenses, the defendant was facing a standard range of 1,208 to 1,410 months based on a 608 to 810 month standard range plus 600 months in firearm enhancements. State v. Korum, 157 Wn.2d at 622, 141 P.3d 13 (2006). The trial court imposed 1,208 months. Id.

The Court of Appeals dismissed the charges added after the defendant withdrew his guilty plea based upon prosecutorial vindictiveness. Id. The Supreme Court reversed the Court of Appeals finding that the addition of the charges did not support a finding of prosecutorial vindictiveness. State v. Korum, 157 Wn.2d at 620-1, 141 P.3d 13 (2006).²

The present situation has fewer facts suggesting vindictiveness than in Korum. The original information was filed three days after the arrest and additional investigation resulted facts supporting additional charges, such as the owner of the stolen credit card. There is no evidence in the record of the content in the plea negotiations. There was no increase of charges in response to a withdrawal of a guilty plea and the comments of the prosecutor and defense counsel indicated the State's intent to pursue the greater charges

² The four justice lead opinion found insufficient evidence to establish prosecutorial vindictiveness while the concurrence would hold that there can be no prosecutorial vindictiveness claims in pretrial proceedings and concurred in the judgment. State v. Korum, 157 Wn.2d at 655, 141 P.3d 13 (2006) (concurrence of Justice J.M. Johnson, J.).

at trial from early on. 5/6/10 RP 4, 5/21/10 RP 2-3, 8/21/10 RP 4-5. In addition, the trial court's holding regarding the exceptional sentence that the only reason it could conceive the seventeen counts were pursued against Mr. Benitez as opposed to the co-defendants was as a result of exercise of the right to go to trial, is the same presumption of vindictiveness determination that the Supreme Court held in Korum cannot be done.

Therefore, we conclude that the mere filing of additional or more serious charges after the withdrawal of a plea agreement, without proving additional facts, does not give rise to a presumption of vindictiveness.

State v. Korum, 157 Wn.2d at 631, 141 P.3d 13, 23 (2006).

In fact, the Court of Appeals correctly noted that “[u]nderlying this exponential increase in sentencing, in part, was the State's doubling the number of charges after Korum withdrew his guilty plea and requested a trial.” Korum, 120 Wn. App. at 711, 86 P.3d 166. **However, neither Korum nor the Court of Appeals ever contended that the prosecutor lacked probable cause for the additional charges, or that the added charges exceeded the 16 additional charges that the prosecutor had promised to file if Korum did not plead guilty.** The charges added after Korum withdrew his plea agreement involved three additional home invasions in which Korum was a personal participant and that the prosecution was investigating concurrently with the plea negotiations. Clerk's Papers (CP) at 187, 1056–57. **We conclude that the increased number and the consequent severity of the collective charges caused the discrepancy in the sentences, not prosecutorial vindictiveness.**

State v. Korum, 157 Wash. 2d at 632-33, 141 P.3d 13, 23-24 (2006)

(emphasis added).

Similarly here, there is no record supporting that the prosecutor lacked probable cause. In addition, Benitez acknowledged that the prosecutor had long indicated the intent to try the case on greater charges and did not object to the amended information. 5/6/10 RP 4, 5/21/10 RP 2-3. Subsequent case law has affirmed the core of Korum's decision that the defendant must establish fact separate and apart from charging decisions to establish prosecutorial vindictiveness. State v. Gamble, 168 Wn.2d 161, 186-87, 225 P.3d 973 (2010) (record did not support vindictiveness in reversal of conviction following decision in Andress resulting in State re-evaluating how to pursue homicide case), State v. Elmore, 154 Wn. App. 885, 907, 228 P.3d 760 *rev. denied*, 169 Wn. 2d 1018, 238 P.3d 502 (2010) (circumstances supported the State's claim that it sought the amendments simply to better reflect the defendant's alleged criminal conduct rather than to punish her for appealing), State v. Ra, 144 Wn. App. 688, 707, 175 P.3d 609, 617 (2008) (filing of additional charges did not give rise to presumption of vindictiveness).

In addition, this Court can evaluate the status of the case prior to amendment of the information and what happened after trial. Given the multiple counts that Benitez was initially charged with and his criminal history of four prior adult felonies and four prior juvenile felonies, Benitez was facing an offender score exceeding 9 on the original information as

filed. CP 1-4, 353-4. As charged initially Benitez's potential sentence would have been 243 to 296 months. His sentence would have resulted from 72 to 96 months on the Unlawful Possession of a Firearm in the First Degree in count 5, consecutive to the 87 to 116 months to the Possession of Stolen Firearm in count 6, consecutive to the firearm and school zone enhancements in count 2. CP 1-4, CP 354. The actual sentence imposed by the trial court after the exceptional sentence downward was 72 months higher. CP 356.

The amended information added charges of Manufacture of Marijuana, Criminal Impersonation in the First Degree, Identity Theft in the First Degree and two counts of Unlawful Possession of Short-Barreled Shotgun or Rifle which went unpunished due to high offender score. CP 14, 16-17, CP 356. Of the added charges, the six added counts of Unlawful Possession of Firearm in counts 10, 11, 12, 13, 15 and 17 had the potential to increase Benitez's sentence significantly due to his high offender score and the multiple charges. CP 15-17.³ Thus, Benitez was facing a standard range of 765 to 992 after trial⁴. CP 354-5. His increase of triple the potential sentence was not nearly as large as the ten times increase of Korum.

³ The charge of Unlawful Possession of Stolen Firearm was filed in the Original Information. CP 4.

⁴ Benitez was facing consecutive sentences on each of the Unlawful Possession of a Firearm in the First Degree counts (87-116) consecutive to the charge of a Possession of Stolen Firearm (72-96) which ran consecutive to the firearm and school zone enhancement in counts 2-4 of 84 months. CP 354-5.

Finally, the Court in Korum noted that while the prosecutor has discretion to file charges, the trial court has the discretion to reduce the sentence based upon an exceptional sentence.

Just as the prosecuting attorney has the discretion to determine the number and severity of charges to bring against a defendant, the sentencing court has the discretion to determine whether the circumstances warrant an exceptional sentence downward. Here, the sentencing court determined that the circumstances did not warrant an exceptional sentence downward, and we cannot say that was error.

State v. Korum, 157 Wn.2d at 637, 141 P.3d 13, 26 (2006). Benitez's 368 month sentence was based upon an exceptional sentence downward of 24 months consecutive on each of the 7 counts of Unlawful Possession of Firearm and Possession of Short Barreled Shotgun or Rifle consecutive to the 116 months on the charge of Unlawful Possession of Firearm in count 8, consecutive to the. CP 356. The trial court's determination in doing so, does not support the claim of prosecutorial vindictiveness.

2. Where a defendant is in possession of other recently stolen property and engaged in trading drugs for stolen property, there was sufficient evidence for a rational trier of fact to find the defendant guilty of possession of stolen firearm.

Benitez claims there was insufficient evidence for a rational trier of fact to find that he knowingly possessed a stolen firearm. The State contends that his possession of other recently stolen property along with his

possession of multiple firearms at the time of his involvement in drug dealing and marijuana growing was sufficient for a jury to find him guilty.

We review a challenge to the sufficiency of the evidence by viewing the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. Bencivenga, 137 Wn.2d 703, 706, 974 P.2d 832 (1999). A defendant's claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from it. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We must draw all reasonable inferences in favor of the State and most strongly against the defendant. Salinas, 119 Wn.2d at 201, 829 P.2d 1068. Both circumstantial evidence and direct evidence are equally reliable. Bencivenga, 137 Wn.2d at 711, 974 P.2d 832; State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

State v. McPhee, 156 Wn. App. 44, 62, 230 P.3d 284, 295 *rev. denied*, 169 Wn. 2d 1028, 241 P.3d 413 (2010).

Bare possession of stolen property is insufficient to justify a conviction. *See* State v. Couet, 71 Wn.2d 773, 775, 430 P.2d 974 (1967). “However, possession of recently stolen property in connection with other evidence tending to show guilt is sufficient.” Couet, 71 Wn.2d at 775, 430 P.2d 974.

Id.

The jury was properly informed in the knowledge instruction that if “a person has information that would lead a reasonable person to believe that a fact exists, the jury is permitted but not required to find that he or she acted

with knowledge of the fact.” CP 46 (Instruction No. 8.) This defined constructive knowledge. Given that knowledge is a person’s state of mind, that can only be established by circumstantial evidence. Otherwise stated, constructive knowledge is simply actual knowledge, proven by circumstantial evidence. Here the State contends there was sufficient evidence of constructive knowledge.

The firearm located in the garage was identified as being stolen by the owner just under a year before it was located near Benitez. 7/1/10 RP 492-4. Benitez was established to be part of a drug trafficking operation where property, including other stolen property, was located in the garage in which he was staying. In his wallet, he was in actual possession of a credit card, social security card and identification of another person. 6/29/10 RP 81, 167. That card had recently been used to purchase property and the gift cards used as well as their packaging was located in the garage. 6/30/10 RP 358-9, 7/1/10 RP 496-7. The informant testified it was known that the drug transactions included stolen property. 6/23/10 RP 386, 388. There were car stereos in the garage which had cord or wires which were cut. 7/2/10 RP 697. In addition, ledgers showing drug trafficking activity of Benitez done in exchange for property were located in the garage. 7/1/10 RP 678, 7/2/10 RP 691-4. A trained narcotics task force detective testified the ledger was consistent with stolen property traded for drugs. 7/2/10 RP 694-5.

In addition Benitez was hiding in the garage. Flight can also be a sufficient corroborating circumstance of knowledge of stolen property. *See State v. Hudson*, 56 Wn. App. 490, 495, 784 P.2d 533, 535 (1990), *State v. Medley*, 11 Wn.App. 491, 494, 524 P.2d 466 (1974). Likewise, concealment can be evidence of guilty knowledge. Benitez also gave an implausible explanation about the wallet being recently found and his intent to return it. 6/29/10 RP 167.

There was sufficient evidence for a rational trier of fact to find that Benitez knowingly possessed a stolen firearm.

3. The proximity of the firearms to the drug dealing operation and to the defendant sufficiently established that he was armed with a firearm at the time of the offenses of Possession with Intent to Deliver Controlled Substances.

Benitez claims there was insufficient evidence to support a finding by the jury that he was armed with the firearms at the time of the possession with intent to deliver. Brief of Appellant at page 13. However, Benitez was hiding within arm's reach of firearms at the time he was located in a garage full of heroin, cocaine, methamphetamine, ecstasy, and growing marijuana as well as manufacturing tools. This evidence along with Benitez's drug manufacturing seen by the informant and the testimony of both officers and the informant that the weapons at the residence were used to protect the drug activity is sufficient for a jury to find he was armed.

A person is “armed” if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes. See State v. Sabala, 44 Wn. App. 444, 723 P.2d 5 (1986) (defendant was armed with a deadly weapon under 9A.04.110(6) when the gun was under his seat in the car he was in, within reach, and thus easily accessible). On this record, evidence that an unloaded rifle was found under the bed in the bedroom, without more, is insufficient to qualify Valdobinos as “armed” in the sense of having a weapon accessible and readily available for offensive or defensive purposes.

State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993).

In evaluating proof of whether a person is armed, the charge to which the enhancement applies must be considered.

In addition to the test announced in Valdobinos, subsequent cases have refined the nexus required in a constructive possession case. Under a two-part analysis, there must be a nexus between the weapon and the defendant and between the weapon and the crime.

State v. Schelin, 147 Wn.2d 562, 567-68, 55 P.3d 632 (2002).

We agree that the mere presence of a weapon at a crime scene may be insufficient to establish the nexus between a crime and a weapon. If an assault with a beer bottle occurs in a kitchen, a defendant is not necessarily “armed” with a deadly weapon because knives are kept in the kitchen. **One should examine the nature of the crime, the type of weapon, and the circumstances under which the weapon is found** (e.g., whether in the open, in a locked or unlocked container, in a closet on a shelf, or in a drawer).

State v. Schelin, 147 Wn.2d 562, 570, 55 P.3d 632, 637 (2002). The jury was instructed in these factors.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offense or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. **In determine whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surround the commission of the crime, including the location of the weapon at the time of the crime and the type of weapon.**

If one participant in a crime is armed with a firearm, all accomplices to that participant are deemed to be so armed, even if only one firearm is involved.

CP 93 (Excerpt from Instruction No. 55) (Emphas added).

Possession with Intent to Deliver was the charge upon which the firearm enhancement applied. CP 11-13. Although the multiple firearms here were not located on Benitez's person, they were located in the same garage as the drug dealing operation. The informant testified that guns and drug dealing go hand-in-hand and that people dealing often have felonies and are already in trouble for having a gun. 6/30/10 RP 388. Firearms supported the drug dealing operation by deterring others from trying to steal drug, property and money from the operation. There was direct testimony from both the narcotics task force detective and the informant that the firearms were a deterrent. 6/29/10 RP 30-1, 6/30/10 RP 392, 416-8, 425-6.

The Courts in State v. Schelin and State v. Eckenrode applied this same analysis in drug cases.

Turning to the facts here, the evidence established Schelin was in close proximity to a loaded gun which he constructively possessed to protect his marijuana grow operation. When we apply the nexus test, as expressed in Johnson, the inferences support a conclusion that Schelin was “armed.” **Schelin admitted to being in close proximity to an “easily accessible and readily available” deadly weapon. The jury was entitled to infer he was using the weapon to protect his basement marijuana grow operation.** Schelin stood near the weapon when police entered his home and could very well have exercised his apparent ability to protect the grow operation with a deadly weapon, to the detriment of the police.

State v. Schelin, 147 Wn.2d 562, 574-75, 55 P.3d 632 (2002) (emphasis added).

There was also sufficient evidence of a connection between Eckenrode, the weapon, and his drug manufacturing operation to uphold the verdict. The rifle was loaded at the time, and Eckenrode testified that the pistol was as well. Eckenrode also had a police scanner, which together with his manufacturing operation raises the inference that he was monitoring police activity against the chance he might be raided. Finally, evidence of the drug manufacturing operation pervaded the house. **A jury could readily have found that the weapons were there to protect the criminal enterprise.** See State v. Simonson, 91 Wn. App. 874, 883, 960 P.2d 955 (1998) (holding that a nexus exists if the weapons were there to protect an active methamphetamine manufacturing operation).

State v. Eckenrode, 159 Wn.2d 488, 494-96, 150 P.3d 1116 (2007) (emphasis added).

Benitez has not established his burden of proving the evidence was in fact insufficient, with all inferences from the evidence drawn in favor of the State, to support the jury's finding he was armed

4. Where the defendant failed to challenge the jury instruction regarding the firearm enhancements below, the defendant should be precluded from challenging the jury instructions since the error is not manifest.

Benitez claims for the first time on appeal that the jury instructions were insufficient to establish unanimity as to which firearms were the basis for the enhancement. Brief of Appellant at page 17. However, Benitez failed to raise the issue at the trial court. The Stat's argument of being armed was for the firearms in the garage and given the multiple firearms in close proximity to Benitez any error is harmless beyond a reasonable doubt.

At trial, the State maintained that Benitez was armed with the firearms in the garage. Benitez argues that some jurors might have found that he was armed with firearms in the house. 7/2/10 RP 809-10.

Benitez cites no relevant authority suggesting that a jury must be unanimous as to the specific weapon used when returning a deadly weapon special verdict. Benitez also fails to show how the general jury unanimity analysis applies to the firearm enhancement, which is not a crime. RCW 9.94A.825 and RCW 9.94A.533, the deadly weapon and firearm enhancement statutes, do not indicate that the State must specify a specific

weapon, and Benitez has not challenged the deadly weapon instruction in this case, which did not designate a specific weapon.

Generally, the courts generally will not review an alleged error raised for the first time on appeal unless the appellant demonstrates a “manifest error affecting a constitutional right.” RAP 2.5(a). Under the circumstances, he has not demonstrated that the alleged instructional error resulted in actual prejudice.

Even if this court were to entertain this analysis, the unanimity and “multiple acts” analysis applies at all to this situation because the firearm enhancement is not a crime. See State v. Brown, 36 Wn. App. 549, 554, 676 P.2d 525 (1984) (deadly weapon enhancement). A unanimity instruction is required, whether requested or not, when a jury could find from the evidence that the defendant committed a single charged offense on two or more distinct occasions. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). If the instructions read as a whole permit some jurors to find that the defendant committed the offense on one occasion, and other jurors to find that the defendant committed the offense on a different occasion, the instructions do not require a unanimous verdict, and they violate the right to a unanimous jury. Petrich, 101 Wn.2d at 570, 683 P.2d 173 (1984).

But in this case, there was evidence of the possession with intent to deliver occurred on one date. Merely because the evidence was that Benitez

had multiple firearms does not mean the jury was required to be unanimous as to the firearm used. In any case, the jury would find that he was armed with a firearm.

Employing an analogy with an “alternative means” case is instructive. A unanimity instruction is not required merely because a jury could find from the evidence that the defendant committed the charged offense by more than one of several alternative means. State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988); State v. Arndt, 87 Wn. 2d 374, 376-77, 553 P.2d 1328 (1976). If each juror finds that the defendant committed the crime by any one of such means, each juror finds that the defendant committed the crime, and the jury verdict is unanimous.

Benitez has not established instructional error in the firearm enhancement meriting reversal.

- 5. Since the court is required to impose consecutive sentences for possession of stolen firearm and unlawful possession of firearm, the defendant’s trial counsel was not ineffective for seeking exceptional sentences downward for the multiple firearms possessed rather than seeking a same criminal conduct determination.**

Benitez claims his trial counsel was ineffective in not asking the trial court to hold the multiple counts of Unlawful Possession of Firearm in the First Degree along with a count of Possession of Stolen Firearm were same

criminal conduct. Brief of Appellant at page 21. Given directly contrary case law, Benitez cannot establish his counsel was ineffective.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) **defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances;** and (2) **defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.** State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). Competency of counsel is determined based upon the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing* State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)).

State v. McFarland, 127 Wn.2d 322, 334-5, 899 P.2d 1251 (1995) (emphasis added).

Courts engage in a strong presumption counsel's representation was effective. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); Thomas, 109 Wn.2d at 226, 743 P.2d 816. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. State v. Crane, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); State v. Blight, 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977).

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (emphasis added).

Trial counsel agreed with the State before the trial court that the sentences for Unlawful Possession of a Firearm in the First Degree must run

consecutive to one another given the conviction for Possession of Stolen Firearm.

Unlawful possession of a firearm and possession of a stolen firearm, as far as my reading, it has to be consecutive. Enhancements have to be consecutive. I don't think you have any basis to mitigate the enhancements, as far as my reading on 9.94A.533, I believe that's the enhancements.

Anyway, I looked carefully at that, and the RCW says the Court shall impose and they have to be consecutive. So, yes. I'm asking to you mitigate down the Unlawful Possession of Firearm, First Degree, the consecutive nature of that.

8/25/10 RP 30-1. Contrary to the position taken at the trial court, Benitez now claims that the Unlawful Possession of Firearm in the First Degree can be found to be same criminal conduct. This is contrary to the language of RCW 9.41.040(6) which provides as follows:

Notwithstanding any other law, if the offender is convicted under this section for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, then the offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection.

This provision has been determined by the Court of Appeals to result in the requirement that the offenses not be applied as same criminal conduct.

This provision clearly and unambiguously prohibits concurrent sentences for the listed firearms crimes. State v. Murphy, 98 Wn. App. 42, 48–49, 988 P.2d 1018 (1999), *review denied*, 140 Wn.2d 1018, 5 P.3d 10 (2000). Although Randy McReynolds urges the court to apply various rules of statutory construction, there is no need for such an analysis because the statute is unambiguous. *See State v. Smith*, 117

Wn.2d 263, 814 P.2d 652 (1991). Other cases on which Randy McReynolds relies are not applicable because they did not interpret the statutory language quoted above. See State v. Haddock, 141 Wn.2d 103, 3 P.3d 733 (2000); State v. Simonson, 91 Wn. App. 874, 960 P.2d 955 (1998), *rev. denied*, 137 Wn.2d 1016, 978 P.2d 1098 (1999).

State v. McReynolds, 117 Wn. App. 309, 342-43, 71 P.3d 663 (2003), *rev. denied*, 144 Wn.2d 1003, 29 P.3d 719 (2001).

Benitez contends that the Court in Haddock had considered the same language as in the Court in McReynolds to a different conclusion. Brief of Appellant at page 24. However, the Court in Haddock was dealing with offense occurring in 1995, prior to the 1998 amendment which provided that convictions for Unlawful Possession of Stolen Firearm and Possession of Stolen Firearm are required to be served consecutively. State v. Haddock, 141 Wn.2d 103, 115, 3 P.3d 733, 738 (2000). The McReynolds did have the issue before it and decided contrary to Benitez's position. The Supreme Court denied review of McReynolds.

Benitez has failed to establish his counsel was ineffective or that the same criminal conduct determination precludes the requirement of consecutive sentences as required by RCW 9.41.060(6).

6. Where the defendant failed to raise a suppression motion for a claimed unlawful search of his person in the trial court, he is precluded from raising the issue for the first time on appeal.

Benitez claims that, despite his failure to seek a suppression motion in the trial court, the seizure of his wallet when he was placed into custody just before being arrested is a manifest error involving a constitutional right permitting him to raise the claim on appeal. Brief of Appellant at page 27-8. He also contends that the record in the trial court is fully developed permitting the unlawfulness of the search. Brief of Appellant at page 28.

The general rule is that a party must raise an issue at trial to preserve the issue for appeal, unless the party can show the presence of a “ ‘manifest error affecting a constitutional right.’ ” “ RAP 2.5(a), State v. Robinson, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (*quoting* State v. Kirwin, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009)). The principle also predates RAP 2.5(a). *See, e.g., State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967) (“Failure to challenge the admissibility of proffered evidence constitutes a waiver of any legal objection to its being considered as proper evidence by the trier of the facts.”) The purpose of issue preservation is to “encourage ‘the 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 at 304–05, 253 P.3d 84 (2011) (*quoting* State

v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)). But “in a narrow class of cases,” insisting on issue preservation “would be counterproductive to the goal of judicial efficiency.” State v. Robinson, 171 Wn.2d at 305, 253 P.3d 84 (2011). The Supreme Court has held that issue preservation does not apply when the following four conditions are met: (1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation. Sate v. Robinson, 171 Wn.2d at 305, 253 P.3d 84 (2011). The rationale underpinning this exception is that a “contrary rule would reward the criminal defendant bringing a meritless motion to suppress evidence that is clearly barred by binding precedent while punishing the criminal defendant who, in reliance on that binding precedent, declined to bring the meritless motion.” State v. Robinson, 171 Wn.2d at 305, 253 P.3d 84 (2011).

The present case does not fall within any of the provisions allowing issues which were not preserved because the case law relied upon by Benitez is not a function of any change in interpretation of the law.

In addition, since Benitez did not raise an unlawful search claim at the trial court, the State was not given the opportunity to question the officers

as to the timing of his detention shortly, his identification of himself, the seizure of the wallet and the subsequent arrest on outstanding warrants.

On June 9, 2010, the trial court held hearing on admissibility of statements. 6/9/10 RP 2. Officer testified relating to the statements that Benitez made. 6/9/10 RP 26-8, 30-1, 55-6, 59. While officer were conducting a search for weapons pursuant to a warrant, they noticed a number of different narcotics and located seven weapons under a mattress in the garage. 6/9/10 RP 16-21. After they located the narcotics, they found Benitez in a fetal position hiding under a blanket in the garage. 6/9/10 RP 22-3. Benitez failed to come out when requested after numerous orders and the weapons were found in close proximity. 6/9/10 RP 23. Benitez was placed in handcuffs and patted down. 6/9/10 RP 25. Officers tried to identify Benitez who first gave a name of Carlos Mejia. 6/9/10 RP 54. A wallet was found in his rear pocket with identification of another. 6/9/10 RP 25, 54. Shortly thereafter, Benitez was found to have outstanding warrants and placed under arrest as well as for offenses at the residence due to the fact that he had been staying there. 6/9/10 RP 29-30, 66. The trial court held the statements were admissible. 6/9/10 RP 78-9. Although the testimony had significant detail given that Benitez was hiding in the garage amongst both guns and drugs, the testimony at the hearing was not directed toward a

suppression hearing. Therefore, the State did not have the benefit of asking questions of the officers to address suppression issues which Benitez raises.

Because Benitez cannot show that he would have prevailed on the issue if there had been a full hearing he cannot establish that his counsel's performance was below the objective standard of reasonableness or that he was prejudiced. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). *See also* State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (*adopting test from* Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Because Benitez has not established a manifests error affecting a constitutional right, or that his counsel was ineffective in failing to pursue the motion, his request to have this Court consider a suppression motion for the first time on appeal must be denied.

V. CONCLUSION

For the foregoing reasons, Carlos Benitez's convictions and sentence must be affirmed.

DATED this 16th day of December, 2011.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059