

No. 49601-1-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MIGUEL TRUJEQUE-MAGANA,

Appellant.

OPENING BRIEF OF APPELLANT

On Appeal From Clark County Superior Court
The Hon. Robert Lewis, Presiding

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TABLE OF CONTENTS

	<u>Page</u>
A. <u>ASSIGNMENTS OF ERROR</u>	1
B. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	2
C. <u>STATEMENT OF THE CASE</u>	3
D. <u>ARGUMENT</u>	5
1. <i>The Trial Court’s Suppression Ruling Should Be Reversed</i>	5
a. Relevant Facts.....	5
b. The Absence of Written Findings and Conclusions Regarding the CrR 3.6 Hearing Requires Reversal or a Remand.....	8
c. The Stop of Mr. Trujeque Was Illegal.....	9
d. The Search of the Purse Was Illegal.....	13
2. <i>There Was Insufficient Evidence To Sustain All Convictions and the Firearm Allegation in Count 4</i>	14
a. Pertinent Facts.....	14
b. There Was Insufficient Evidence of Mr. Trujeque’s Dominion and Control Over Drugs or Guns, and Insufficient Evidence for Accomplice Liability on Count 1.....	17

c.	There Was Insufficient Evidence that Mr. Trujeque Was Armed with Firearms on November 5, 2015.	23
3.	<i>The Court Erred By Not Dismissing the Case When the State Refused to Turn Over Exculpatory Evidence (a Shopping Bag) It Had in Its Possession.</i>	26
a.	Pertinent Facts.	26
b.	Argument.	28
4.	<i>The Trial Court Should Have Ordered Disclosure of the Identity of the Informant.</i>	30
a.	Pertinent Facts.	30
b.	Argument.	31
5.	<i>The Trial Court Erred When Admitting Opinion and Conclusion Evidence.</i>	33
a.	Pertinent Facts.	33
b.	Argument.	35
6.	<i>RCW 9.41.171 Violates Equal Protection.</i>	39
a.	Pertinent Facts.	39
b.	Argument.	40
7.	<i>The Sentences Should Be Reversed.</i>	43
a.	Pertinent Facts.	43
b.	All Four Counts Were the Same Criminal Conduct.	44

c.	Doubling of the Maximum Should Have Meant Doubling the Top End of the Standard Range.	48
E.	<u>CONCLUSION</u>	50

TABLE OF CASES

	Page
<i>Washington Cases</i>	
<i>In re Cruz</i> , 157 Wn.2d 83, 134 P.3d 1166 (2006).	50
<i>In re Davis</i> , 142 Wn.2d 165, 12 P.3d 603 (2000).	46
<i>In re Stenson</i> , 174 Wn.2d 474, 276 P.3d 286 (2012).	29
<i>In re Wilson</i> , 91 Wn.2d 487, 588 P.2d 1161 (1979).	22
<i>State v. Afana</i> , 169 Wn.2d 169, 233 P.3d 879 (2010).	13,14
<i>State v. Aldana Graciano</i> , 176 Wn.2d 531, 295 P.3d 219 (2013).	44
<i>State v. Allred</i> , 2017 Wash. App. LEXIS 954, No. 48696-2-II (4/25/17) (unpub).	20
<i>State v. Atchley</i> , 142 Wn. App 147, 173 P.3d 323 (2007).	31,32
<i>State v. Black</i> , 109 Wn.2d 336, 745 P.2d 12 (1987).	36
<i>State v. Blade</i> , 126 Wn. App. 174,107 P.3d 775 (2005).	50
<i>State v. Broadnax</i> , 98 Wn.2d 289, 654 P.2d 96 (1982).	11,12
<i>State v. Brown</i> , 162 Wn.2d 422, 173 P.3d 245 (2007).	24,25
<i>State v. Callahan</i> , 77 Wn.2d 27, 459 P.2d 400 (1969).	21
<i>State v. Cannon</i> , 130 Wn.2d 313, 922 P.2d 1293 (1996).	8
<i>State v. Cantabrana</i> , 83 Wn. App. 204, 921 P.2d 572 (1996).	18

<i>State v. Cardenas-Muratalla</i> , 179 Wn. App. 307, 319 P.3d 811 (2014).	10
<i>State v. Christopher</i> , 114 Wn. App. 858, 60 P.3d 677 (2003).	36
<i>State v. Cruz</i> , 88 Wn. App. 905, 946 P.2d 1229 (1997).	9
<i>State v. Demery</i> , 144 Wn. 2d 753, 30 P.3d 1278 (2001).	36
<i>State v. Doughty</i> , 170 Wn.2d 57, 239 P.3d 573 (2010).	10,11,12
<i>State v. Eckenrode</i> , 159 Wn.2d 488, 150 P.3d 1116 (2007).	24
<i>State v. Farr-Lenzini</i> , 93 Wn. App. 453, 970 P.2d 313 (1999).	36
<i>State v. Ferrier</i> , 136 Wn.2d 103, 960 P.2d 927 (1998).	13
<i>State v. Gantt</i> , 163 Wn. App. 133, 257 P.3d 682 (2011).	10
<i>State v. Garrison</i> , 71 Wn. 2d 312, 427 P.2d 1012 (1967).	36
<i>State v. Garza-Villarreal</i> , 123 Wn.2d 42, 864 P.2d 1378 (1993).	46
<i>State v. Grantham</i> , 84 Wn. App. 854, 932 P.2d 657 (1999).	44
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).	18
<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201(2006).	29
<i>State v. Gurske</i> , 155 Wn.2d 134, 118 P.3d 333 (2005).	26
<i>State v. Harris</i> , 91 Wn.2d 145, 588 P.2d 720 (1978).	31,32
<i>State v. Head</i> , 136 Wn.2d 619, 964 P.2d 1187 (1998).	8,9
<i>State v. Hernandez-Mercado</i> , 124 Wn.2d 368, 879 P.2d 283 (1994).	41
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994).	9

<i>State v. Hescok</i> , 98 Wn. App. 600, 989 P.2d 1251 (1999).....	8
<i>State v. Ibrahim</i> , 164 Wn. App. 503, 269 P.3d 292 (2011).....	41
<i>State v. Houston-Sconiers</i> , 188 Wn.2d 1, 391 P.3d 409 (2017).	25
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	39
<i>State v. Jones</i> , 146 Wn.2d 328, 45 P.3d 1062 (2002).	13,18,21
<i>State v. J-R Distribs., Inc.</i> , 82 Wn.2d 584, 512 P.2d 1049 (1973).....	22
<i>State v. Lyons</i> , 174 Wn.2d 354, 275 P.3d 314 (2012).	20
<i>State v. McGrew</i> , 156 Wn. App. 546, 234 P.3d 268 (2010).	46,47,48
<i>State v. Mills</i> , 80 Wn. App. 231, 907 P.2d 316 (1995).	19,25,26
<i>State v. Montgomery</i> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	37,38
<i>State v. Partin</i> , 88 Wn.2d 899, 567 P.2d 1136 (1977).....	20
<i>State v. Petrina</i> , 73 Wn. App. 779, 871 P.2d 637 (1994).	32
<i>State v. Rotunno</i> , 95 Wn.2d 931, 631 P.2d 951 (1981).	22
<i>State v. Sanders</i> , 66 Wn. App. 380, 832 P.2d 1326 (1992).....	37
<i>State v. Sargent</i> , 40 Wn. App. 340, 698 P.2d 598 (1985).	36
<i>State v. Schelin</i> , 147 Wn.2d 562, 55 P.3d 632 (2002).....	24
<i>State v. Sieyes</i> , 168 Wn.2d 276, 225 P.3d 995 (2010).....	41
<i>State v. Sims</i> , 119 Wn.2d 138, 829 P.2d 1075 (1992).	47
<i>State v. Spruell</i> , 57 Wn. App. 383, 788 P.2d 21 (1990).....	18

<i>State v. Staley</i> , 123 Wn.2d 794, 872 P.2d 502 (1994).....	18
<i>State v. Stith</i> , 71 Wn. App. 14, 856 P.2d 415 (1993).....	38
<i>State v. Tadeo-Mares</i> , 86 Wn. App. 813, 939 P.2d 220 (1997).....	19,20
<i>State v. Tagas</i> , 121 Wn. App. 872, 90 P.3d 1088 (2004).	8,13
<i>State v. Thompson</i> , 93 Wn.2d 838, 613 P.2d 525 (1980).	11
<i>State v. Tili</i> , 139 Wn.2d 107, 985 P.2d 365 (1999).....	44
<i>State v. Valdobinos</i> , 122 Wn.2d 270, 858 P.2d 199 (1993).....	25
<i>State v. Vike</i> , 125 Wn.2d 407, 885 P. 2d 824 (1994).	44
<i>State v. Williams</i> , 102 Wn.2d 733, 689 P.2d 1065 (1984).....	10
<i>State v. Williams-Walker</i> ,167 Wn.2d 889, 225 P.3d 913 (2010).....	24
<i>State v. Winterstein</i> , 167 Wn.2d 620, 220 P.3d 1226 (2009).....	9
<i>State v. Witherrite</i> , 184 Wn. App. 859, 339 P.3d 992 (2014).	13
<i>State v. W.R.</i> , 181 Wn.2d 757, 336 P.3d 1134 (2014).....	29
<i>Warren v. Hart</i> , 71 Wn.2d 512, 429 P.2d 873 (1967).....	38
<i>Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).	44

Federal Cases

<i>Alleyne v. United States</i> , ___ U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).....	24,47
<i>Bernal v. Fainter</i> , 467 U.S. 216, 104 S. Ct. 2312, 81 L. Ed. 2d 175 (1984).....	41

<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004).....	49,50
<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).....	27,30,31
<i>Brown v. Texas</i> , 443 U.S. 47, 51, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979).....	10
<i>Crane v. Kentucky</i> , 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986).....	31
<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).....	38
<i>District of Columbia v. Heller</i> , 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).....	41
<i>Graham v. Richardson</i> , 403 U.S. 365, 376, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971).....	40,41
<i>Kyles v. Whitley</i> , 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).....	28
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).	18,23
<i>Nyquist v. Mauclet</i> , 432 U.S. 1, 97 S. Ct. 2120, 53 L. Ed. 2d 63 (1977).....	41
<i>Roviaro v. United States</i> , 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957).....	31,32
<i>Strickler v. Greene</i> , 527 U.S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).....	28
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)..	10,29

<i>United States v. Kohring</i> , 637 F.3d 895 (9th Cir. 2011).	28,30
<i>United States v. Laughrin</i> , 438 F.3d 1245 (10 th Cir. 2006).	12
<i>United States v. McLean</i> , 199 F. Supp. 3d 926 (E.D. Pa. 2016).	45
<i>United States v. Reyes Vera</i> , 770 F.3d 1232 (9th Cir. 2014).	36
<i>United States v. Sandoval</i> , 29 F.3d 537 (10th Cir. 1994).	12
<i>United States v. Sprinkle</i> , 106 F.3d 613 (4 th Cir. 1997).	11
<i>Wearry v. Cain</i> , 577 U.S. ___, 136 S. Ct. 1002, 194 L.Ed.2d 78 (2016).	28
<i>Ybarra v. Illinois</i> , 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979).	12

Statutes, Constitutional Provisions, Rules and Other Authority

CrR 3.6.	1,2,8,9,29
CrR 4.7(f).	31
CrR 8.3.	30
ER 401-403.	36
RAP 2.5.	39,40,49
RCW 5.60.060(5).	31
RCW 9.41.040.	17,48
Former RCW 9.41.170.	41
RCW 9.41.171.	2,17,39,42

RCW 9.41.175.....	40
RCW 9.94A.517.	49,50
RCW 9.94A.518.	49,50
RCW 9.94A.533.	24,43,47,50
RCW 9.94A.589(1).	44
RCW 69.50.	49
RCW 69.50.401(2)..	49
RCW 69.50.435.	43,48
U.S. Const. amend. II.....	24,41
U.S. Const. amend. IV.....	9,12,13
U.S. Const. amend. V.....	45
U.S. Const. amend. VI.....	31,36,38
U.S. Const. amend. XIV.	<i>passim</i>
Wash. Const. art. I, § 3.....	<i>passim</i>
Wash. Const. art. I, § 7.....	9,13,14
Wash. Const. art. I, § 12.....	40
Wash. Const. art. I, § 21.....	24
Wash. Const. art. I, § 22.....	24,31,36,38
Wash. Const. art. I, § 24.....	24

A. ASSIGNMENTS OF ERROR

1. Appellant Miguel Trujeque-Magana (“Mr. Trujeque”) assigns error to the entry of all verdict forms, CP 337-44, and the judgment and sentence. CP 432-45.

2. The trial court erred by failing to enter written findings of fact and conclusions of law regarding the CrR 3.6 hearing.

3. The trial court erred when it failed to suppress evidence obtained as a result of an illegal detention of Mr. Trujeque and an illegal search of the purse belonging to his passenger.

4. There was insufficient evidence to sustain the convictions in Counts 1, 4, 6, 7 and 8.

5. There was insufficient evidence that Mr. Trujeque was “armed” at the time he allegedly committed Count 4.

6. The trial court erred by not dismissing the case when the State refused to turn over a shopping bag in the back of the car that Mr. Trujeque was driving when the police arrested him.

7. The trial court erred when it declined to order the State to reveal the identity of the confidential informant.

8. The trial court erred and Mr. Trujeque's rights were violated when police officers gave improper opinion and conclusion testimony.

9. RCW 9.41.171 violates equal protection of the laws.

10. The trial court erred when not finding that Counts 1, 4, 6, 7 and 8 were the same criminal conduct. CP 433.

11. The trial court erred by determining that the maximum sentence for Count 4 was 240 months. CP 434, § 2.3.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should the trial court have entered written findings and conclusions after the CrR 3.6 hearing?

2. Was there a reasonable suspicion to pull over Mr. Trujeque?

3. Did the passenger in Mr. Trujeque's car properly consent to the search of her purse?

4. Was there sufficient evidence to show that Mr. Trujeque had constructive possession over the drugs found in someone else's purse, that he was an accomplice to the owner of the purse, or that he had constructive possession over drugs and guns found in an apartment's closet?

5. Was Mr. Trujeque "armed" with a firearm during Count 4?

6. Should the State have turned over to the defense a shopping bag in the car that Mr. Trujeque was driving at the time of his arrest?

7. Should the trial court have ordered disclosure of an informant's identity where he would have given exculpatory evidence?

8. Was it error for various police officers to give opinion and conclusion testimony?

9. Does the alien in possession of a firearm statute illegally promote national origin discrimination?

10. Did Counts 1, 4, 6, 7 and 8 constitute the same criminal conduct?

11. Is the maximum term of imprisonment that is doubled under RCW 69.50.535 the statutory maximum or the top end of the standard range?

C. STATEMENT OF THE CASE

In the fall of 2015, Oregon police conducted a drug investigation in Vancouver, Washington. Their attentions focused on a man named "Pedro" (Luciano Molina Rios) and their informant purchased drugs from him near an apartment. On November 4, 2015, the Oregon officers followed Mr. Molina around the Seattle/Everett area. Mr. Trujeque and Juana Santiago Santos were seen with Mr. Molina. Police stopped Mr. Trujeque's car and

Mr. Molina's car as they returned to Vancouver. Ms. Santiago had heroin in her purse. RP I 73-77; RP II 127-46, 182-94; RP II 234-36, 243-46. The police obtained a search warrant for the apartment, CP 517-20, and found drugs, guns, and cash.¹

By a Third Amended Information, filed in Clark County Superior Court, the State charged Mr. Trujeque and Mr. Molina with a series of drug and firearm offenses. CP 112-16.² The trial court (the Hon. Robert Lewis, presiding) orally denied a defense motion to suppress evidence under CrR 3.6. RP III 334-40. A jury trial was held between June 27 and June 30, 2016, with the jury returning verdicts of guilty on all charged counts. CP 337, 339,

¹ More specific facts will be discussed as they relate to each argument.

² As for Mr. Trujeque, the State charged him as follows:

Count 1 -- Possession with Intent to Deliver Heroin, 11/4/15
(including as accomplice)

Count 4 -- Possession with Intent to Deliver Cocaine, 11/5/15, while
armed with two firearms (Ruger and Glock), and within 1000
feet of a school bus stop

Count 6 -- Unlawful Possession of a Firearm 1st Degree (Ruger), 11/5/15

Count 7 -- Unlawful Possession of a Firearm 1st Degree (Glock), 11/5/15

Count 8 -- Alien in Possession of a Firearm (Glock and Ruger), 11/5/15

CP 112-16.

343-44.³ The jury returned special verdicts that Mr. Trujeque was armed with two different firearms during Count 4, and that the offense in Count 4 occurred within 1000 feet of a school bus stop. CP 340-41.

Judge Lewis sentenced Mr. Trujeque to serve 60 months in prison for Count 1, 240 months on Count 4, 48 months on Count 6, 48 months on Count 7 and 12 months on Count 8, the time to run concurrently. CP 432-45. This appeal then timely followed.

D. ARGUMENT

1. *The Trial Court's Suppression Ruling Should Be Reversed*

a. Relevant Facts

In the fall of 2015, Multnomah County deputies (Joshua Zwick, Kevin Jones and Matt Ferguson) were involved in a drug investigation in Washington. A confidential informant made a series of purchases of drugs from a man ("Pedro") who turned out to be Luciano Molina Rios. "Pedro" was associated with an apartment in Vancouver, Washington, but the deals took place outside, in the parking lot in a "Scion" car. The informant only

³ The State also alleged that Counts 1 and 4 were both major VUCSA offenses, and the jury returned a special verdict of "yes" for Count 4 on this basis. Supp. CP _____. The trial court did not impose an exceptional sentence on Count 4, RP XI 1293, so issues related to that special verdict are moot.

mentioned “Pedro” to his handlers as being involved, Mr. Trujeque’s name never came up, and “Pedro” never mentioned being part of an organization or that he was working with anyone else. RP I 73-77, 90-94; RP II 121-26, 147-51, 195-96; RP III 227; CP 70-72. Supp. CP ____ (sub. no. 101-102).

According to evidence at the suppression hearing, on November 4, 2015, the Oregon deputies heard from the informant that “Pedro” was going to the Seattle area to purchase more drugs. RP I 76; RP II 126, 180; RP III 228-29. The deputies drove to the Everett area and saw Mr. Molina driving the Scion (registered to a “Juana Santiago-Santos”) to various innocuous locations (a train station parking lot, a business parking lot, a mall, a restaurant). They lost track of him on multiple occasions, but at one time they saw Molina meet an unknown pedestrian by the train station. Later, at the restaurant and mall, they saw Mr. Molina in the company of Mr. Trujeque and the woman later identified as Ms. Santiago. Mr. Trujeque and Ms. Santiago were driving in a separate car, a white Honda, that the deputies had not seen before. The deputies never actually saw anything that looked like a drug transaction during the entire day, and law enforcement in the mall even said that Mr. Trujeque and Ms. Santiago appeared to be “window shopping.”

RP I 77-83, 101; RP II 127-31, 134-40, 158-65, 169-70, 183-91, 202-06; RP III 220, 224, 228-32.

The deputies learned that the Honda was registered to “Sandy Gongora-Chi.” The utilities at “Pedro’s” apartment were registered in her name. A photo of a “Jorge Gongora-Chi” appeared to match with the male meeting with Mr. Molina (Mr. Trujeque). “Jorge Gongora-Chi” had been convicted of drug offenses and once deported. No further information was mentioned at the suppression hearing about his current immigration status.

RP I 78, 80-84; RP II 134-37; RP III 228, 230-32.

At one point, Mr. Trujeque and Mr. Molina were seen in the Scion on their phones. The Scion had tinted windows. Deputy Jones thought they were looking at something by the console, “maybe them counting money,” although he could not see their hands and did not see any money. He also agreed that it was possible they playing cards. RP II 132-34, 165-69, 174, 187-88. Later, the Scion and Honda were seen driving south on I-5 together. RP II 141-42, 194.

In conjunction with Washington officers, both cars were pulled over on the highway near Vancouver. RP III 234-36. Vancouver Police Det. Shane Hall justified the stop of both cars to “find out their involvement in

drug activity.” RP III 234. Mr. Trujeque was driving the Honda, with Ms. Santiago as a passenger. Both got out of the car, and Ms. Santiago placed her purse on the ground. An officer asked if he could search her purse and she agreed, and he found a kilo of heroin inside. RP III 238-46. All three people were arrested, and Vancouver Police Department Det. Shane Hall then obtained a search warrant for “Pedro’s” apartment. CP 67-81, 517-20.

b. The Absence of Written Findings and Conclusions Regarding the CrR 3.6 Hearing Requires Reversal or a Remand

The trial court must enter written findings of fact and conclusions of law after a hearing on a motion to suppress evidence. CrR 3.6(b); *State v. Tagas*, 121 Wn. App. 872, 875, 90 P.3d 1088 (2004). The purpose of written findings and conclusions is to ensure efficient and accurate appellate review. *State v. Cannon*, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996). Oral findings are not a suitable substitute for written findings under CrR 3.6(b). “A court’s oral opinion is not a finding of fact,” *State v. Hescock*, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999), and an oral opinion is not binding. *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998).

Here, the trial court failed to enter written findings of fact and conclusions of law regarding the suppression motion, making full review of

this issue impossible. The convictions should be reversed and the case dismissed. *See State v. Cruz*, 88 Wn. App. 905, 909, 946 P.2d 1229 (1997) Alternatively, the case should be remanded for entry of findings and conclusions. *Sate v. Head*, 136 Wn.2d at 624.

c. The Stop of Mr. Trujeque Was Illegal

The trial court orally denied the suppression motion finding that there was a reasonable suspicion to stop Mr. Trujeque because (1) he spent a lot of time with Mr. Molina near Seattle, going to a mall, being in a car and looking at something by the console, and driving in “tandem” with him back to Vancouver, (2) a confidential informant had told the police that Mr. Molina was going to Seattle to get more drugs, and (3) Mr. Trujeque had a criminal history involving drugs. RP III 334-39. This was legal error.⁴

The Fourth Amendment (applied to the states through the Fourteenth Amendment) and article I, section 7, prevent the police from arbitrarily stopping and searching people just “to find out their involvement in drug activity,” as Det. Hall testified. RP III 234. “[W]henver a police officer

⁴ A reviewing court will treat as verities the trial court’s factual findings following a CrR 3.6 hearing if they are supported by substantial evidence. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). The trial court’s legal conclusions are reviewed *de novo*. *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009). Here, even if the trial court’s oral rulings are treated as “findings,” there are really no factual disputes. The issues are therefore reviewed *de novo*.

accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.” *Terry v. Ohio*, 392 U.S. 1, 16, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Here, the seizure occurred when the officers pulled Mr. Trujeque over on the highway. See *State v. Gantt*, 163 Wn. App. 133, 141, 257 P.3d 682 (2011). Because the police lacked a warrant, the general rule is their actions were per se unreasonable and hence unconstitutional. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). The burden is on the State to show that the particular search or seizure fell within one of “a few jealously and carefully drawn exceptions” to the warrant requirement. *Id.*

One such exception to the warrant requirement is a temporary investigative stop under *Terry v. Ohio, supra*. However, under this narrow exception, the State still must show that the officer had “reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.” *Brown v. Texas*, 443 U.S. 47, 51, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979). “The officer must have some suspicion of a particular crime or a particular person, and some connection between the two.” *State v. Cardenas-Muratalla*, 179 Wn. App. 307, 312, 319 P.3d. 811 (2014). “The State must show by clear and convincing evidence that the *Terry* stop was justified.” *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010).

In this case, the officers lacked a reasonable suspicion that Mr. Trujeque was involved in any criminal activity. They admitted as much when they justified pulling over the white Honda to “find out their involvement in drug activity.” RP III 234. Indeed, the officers had no basis to conclude that Mr. Trujeque was doing anything wrong at the time he was pulled over. Not only did the confidential informant fail to claim that anyone other than Mr. Molina was involved in criminal activity, RP I 73-77, 90-94; RP II 148-49; Supp. CP __ (sub. no. 101-102), but none of the police surveillance in the Seattle area showed that Mr. Trujeque was doing anything illegal. Being in a car and doing something by the console is not sufficient. *See United States v. Sprinkle*, 106 F.3d 613, 616 (4th Cir. 1997) (huddling in a car doing something with hands by a console is not sufficient for reasonable suspicion).

At most, Mr. Trujeque was seen with Mr. Molina, who spent a lot of time traveling around the state by himself, meeting an unknown person at the train station, but that does not provide reasonable suspicion that *Mr. Trujeque* committed a crime. A person’s “mere proximity to others independently suspected of criminal activity does not justify the stop.” *State v. Thompson*, 93 Wn.2d 838, 841, 613 P.2d 525 (1980).⁵ In *State v. Doughty, supra*, the

⁵ *See also State v. Broadnax*, 98 Wn.2d 289, 295, 654 P.2d 96 (1982) (“A
(continued...)”)

Supreme Court held that a stop was illegal because it was based on an officer's observations of the defendant hanging out at a suspected drug house in the early morning hours. *Doughty*, 170 Wn.2d at 62-64. Here, the stop was similarly based on Mr. Trujeque's proximity to others (Mr. Molina) suspected of criminal activity.

Mr. Trujeque's prior criminal history was also not a basis to detain him. Although a prior criminal history can be considered with other factors, by itself it is insufficient to create reasonable suspicion. *United States v. Sandoval*, 29 F.3d 537, 542 (10th Cir. 1994). "To find reasonable suspicion in this case could violate a basic precept that law-enforcement officers not disturb a free person's liberty solely because of a criminal record. Under the Fourth Amendment our society does not allow police officers to 'round up the usual suspects.'" *United States v. Laughrin*, 438 F.3d 1245, 1247 (10th Cir. 2006).

The fact that Mr. Trujeque had a history and was seen with Mr. Molina doing innocuous things – shopping, eating at a restaurant, talking on the phone, sitting in a car doing something by the console – is not sufficient

⁵(...continued)
person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.") (quoting *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979)).

to detain him under the Fourth and Fourteenth Amendments and article I, section 7. All evidence flowing from this stop, including the searches of Ms. Santiago’s purse and of the apartment, should be suppressed. *See State v. Afana*, 169 Wn.2d 169, 179-84, 233 P.3d 879 (2010).

d. The Search of the Purse Was Illegal

Even if Mr. Trujeque was properly detained, the search of Ms. Santiago’s purse was illegal. Officer Hall agreed that he lacked any basis to search the purse. RP III 276. Although Ms. Santiago supposedly “consented” to the search, there was no evidence that the police ever told her that she could refuse “consent.” Under *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998), the search of the purse therefore violated article I, section 7.⁶

The Court of Appeals has declined to extend *Ferrier* to searches outside of people’s homes, although two judges on Division Three would extend *Ferrier* to searches beyond the home.⁷ Mr. Trujeque asks this Court to follow the Judge Lawrence-Berry’s position in *Witherrite* and hold that where the police failed to inform Ms. Santiago of her right to decline to

⁶ The trial court properly found that Mr. Trujeque had automatic standing to object to the search of the purse. RP III 339. *See State v. Jones*, 146 Wn.2d 328, 331-35, 45 P.3d 1062 (2002).

⁷ *State v. Witherrite*, 184 Wn. App. 859, 339 P.3d 992 (2014); & 184 Wn. App. at 864-65 (Lawrence-Berry, J. & Fearing, J, concurring); *State v. Tagas*, 121 Wn. App. at 877-78.

consent to the search of her purse, the search violated article I, section 7. All fruits, including the search of the apartment, should have been suppressed.

State v. Afana, supra.

2. *There Was Insufficient Evidence To Sustain All Convictions and the Firearm Allegation in Count 4*

a. Pertinent Facts

Generally, at trial, the testimony tracked the suppression hearing testimony about what took place in Seattle/Everett. At trial, however, the State did not introduce information from the informant, the reasons why the police followed Mr. Molina, and some other collateral information that was used to justify the stop. RP V 540-62; RP VI 575-95, 606-17; RP IX 910-16, 969-72.

As noted, there was a kilo of heroin discovered inside Ms. Santiago's purse. RP IX 915-19. This formed the basis of Count 1, with Mr. Trujeque being charged as an accomplice. CP 112, 305. When the police arrested Mr. Trujeque, though, he had no drugs on him personally, and there were no drugs or significant money on his person or in the Honda. *See* RP IX 971-72.

The police obtained a warrant and then searched the Vancouver apartment in the early morning hours of November 5, 2015. RP IX 911. The

apartment was within 1000 feet of a few unmarked school bus stops. RP VII 763-65, 775.

Mr. Molina had the key to the apartment when he was arrested. RP VI 634-36. The police then located various personal items associated with Mr. Molina, a large quantity of methamphetamine and cocaine, several guns, a large quantity of cash, and “drug notes” in the master bedroom and closet (Rooms “4” and “5”). RP VI 596-601, 626-34, 637-66; RP VII 713-16, 720-21, 780-81. Also found in the apartment in the closet connected to Mr. Molina’s room was noscapine, an alkaloid in the opium poppy that appeared to be heroin. This is not actually a controlled substance, but is used to cut heroin. RP VI 642; RP IX 1008-09. Two large scales were found in kitchen drawers in a common area of the apartment. RP VII 719; RP IX 930-33.

The police testified they found cocaine (Ex. 122) and two guns – a Glock (Ex. 117) and a Ruger (Ex. 118) -- in bags and in a box in a closet (Room “8”) next to the apartment’s other bedroom (Room “7.”) RP VII 712-13, 716-18, 725-29, 781-86; RP VII 797-812; RP IX 996. These items were the basis for the charges against Mr. Trujeque as a principle only in Counts

4, 6, 7 and 8.⁸ The Glock had a loaded magazine “half-hanging” in the gun. RP VII 717, 784. There was no testimony that the Ruger was loaded with ammunition, and the testimony was that it was not loaded when it was inspected. RP VII 785; RP VIII 849.

Det. Hall testified that he knew that Ms. Santiago lived in the apartment and stayed in Room 7. RP IX 978. An insurance company letter addressed to Ms. Santiago (with a different address) was located in Room “8.” RP VI 729-30, 734. Mr. Trujeque’s driver’s license found in the Honda also had a different address. RP IX 922-23, 958-59. Mr. Trujeque’s signature, though, was on an 11-month, 13-day lease agreement for the apartment, dated May 19, 2015. Also on the lease, found in Room “4” were Mr. Molina’s signature and the signature of “Sandy Gongora-Chi.” RP VI 640-41; RP VII 678-80; RP IX 957-60.

The State proffered no DNA or fingerprint evidence that would have linked Mr. Trujeque either to the guns or the drugs, and Mr. Trujeque’s prints were not on the cocaine packaging found in Room “8.” RP VII 695; RP VIII 870-71; RP IX 925-26, 1015-17. Personal items stereotypically associated

⁸ The State made it clear below that it was not seeking to charge or convict Mr. Trujeque for items found in Mr. Molina’s room, only basing the charges in Counts 4, 6, 7 and 8 on what was in Rooms “7” and “8” (the closet). RP X 1120-35, 1145-46, 1148-57. The State made this decision to avoid disclosure of the identity of the confidential informant. RP I 42-46.

with both men and women were found in Rooms “7” and “8,” as well as one shirt that looked like one that Mr. Trujeque was wearing in a Facebook posting on Ms. Santiago’s account. RP VII 732-34; RP IX 936-41, 949-50.

b. There Was Insufficient Evidence of Mr. Trujeque’s Dominion and Control Over Drugs or Guns, and Insufficient Evidence for Accomplice Liability on Count 1

The State offered no evidence that Mr. Trujeque personally possessed or even touched any of the drugs or guns in this case. The State’s allegations were based either on accomplice liability for Count 1 or constructive possession for Counts 4, 6, 7 and 8.⁹ In either case, there was a failure of proof.

When reviewing a challenge to the sufficiency of the evidence, under the Due Process Clauses of the Fourteenth Amendment and article I, section 3, the test is whether, after viewing the evidence in the light most favorable

⁹ The State below conceded there was no evidence of actual possession. *See* RP IX 1037 (“[N]obody is indicating that this is an actual possession type case. The drugs weren’t found on either defendant. This is a constructive possession case.”); RP X 1118-19 (“neither of these defendants . . . were in actual possession of any of the substances or any of the firearms. That has not been alleged . . . what’s being alleged here is constructive possession of both, of both the drugs and the firearms.”).

RCW 9.41.040(1)(a) provides for conviction based upon possession, control or “ownership,” while RCW 9.41.171 provides for conviction based upon “carry[ing]” or possess[ion]” of a firearm. There was no evidence that either of the two guns were “owned” or “carried” by Mr. Trujeque and the State’s case was based only on dominion and control.

to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). This is a restrictive standard of review designed to protect people from being wrongfully convicted based upon a mere “modicum” of evidence and is a standard that requires the finder of fact to “to reach a subjective state of near certitude of the guilt of the accused.” *Jackson v. Virginia*, 443 U.S. 307, 315, 320, 99 S. Ct. 2781, 61 L Ed. 2d 560 (1979).

Possession may be actual or constructive. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Actual possession requires physical custody. *State v. Cantabrana*, 83 Wn. App. 204, 206, 921 P.2d 572 (1996). A person has constructive possession if he or she has dominion and control over the item. “Dominion and control means that the object may be reduced to actual possession immediately.” *State v. Jones*, 146 Wn.2d 328 at 333.

While the ability to immediately take actual possession of an item can establish dominion and control, mere proximity to the item by itself cannot. *See State v. Jones*, 146 Wn.2d at 333; *State v. Spruell*, 57 Wn. App. 383, 387, 788 P.2d 21 (1990). Factors supporting dominion and control include ownership of the item and, in some circumstances, ownership of the premises. But, having dominion and control over the premises containing the

item does not, by itself, prove constructive possession. *State v. Tadeo-Mares*, 86 Wn. App. 813, 816, 939 P.2d 220 (1997).

With regard to the heroin in the purse, Count 1, and the cocaine and firearms in the apartment closet, Counts 4, 6, 7 and 8, Mr. Trujeque was clearly not in “actual possession” of any of these objects, which, as noted, the State conceded below.

As for constructive possession of the drugs and guns in the closet to Room “7” at the apartment on November 5, 2015 (the charging date in the information and jury instructions, CP 114; CP 316), Mr. Trujeque was arrested on November 4, 2015, and the police seized the key to the apartment from Mr. Molina and raided the apartment the next day. Thus, Mr. Trujeque had no ability to reduce any of the items inside the closet to his actual possession immediately, and could not be in constructive possession of the cocaine and guns on November 5, 2015. *See State v. Mills*, 80 Wn. App. 231, 234, 907 P.2d 316 (1995) (defendant not armed with gun found at motel room after his arrest: “[W]e find no evidence proving that Mills, the gun and drugs were in the motel room together on May 26. Due process requires that the charging document contain specific allegations, including dates.”).

Moreover, while the State was able to show that Mr. Trujeque's name was on a rental agreement for the apartment signed in May 2015, along with Mr. Molina's and Ms. Gongora-Chi's, and the State proved that one shirt found in the closet of Room 7 appeared to be the shirt that Mr. Trujeque once wore in a Facebook posting on Ms. Santiago's site, the State provided no other evidence of dominion and control over the items in the closet next to Room 7. There was no evidence even that Mr. Trujeque actually resided in the apartment on November 5, 2015. As with Ms. Gongora-Chi, whose name also appeared on the rental agreement, simply signing a rental agreement for an apartment in May 2015 does not prove dominion and control over *items* in a closet of a bedroom in the apartment six months later.¹⁰

The absence of fingerprints or DNA on the cocaine and guns should also be viewed in light of the absence of any forensic evidence connecting Mr. Trujeque to other objects in the apartment – i.e., a toothbrush in the

¹⁰ Compare *State v. Partin*, 88 Wn.2d 899, 907, 567 P.2d 1136 (1977), *overruled on other grounds* by *State v. Lyons*, 174 Wn.2d 354, 275 P.3d 314 (2012) (constructive possession found where defendant regularly parked his motorcycle on the premises, received phone calls there, stored personal documents and effects on the premises, gave out that address to others and acted as vice president of a club operating on the premises); *State v. Allred*, 2017 Wash. App. LEXIS 954, No. 48696-2-II (4/25/17) (unpub) (defendant in constructive possession when she was arrested in trailer with drugs, and State presented evidence that she lived in trailer and considered it her home); *State v. Tadeo-Mares*, 86 Wn. App. at 815-17 (dominion and control established when defendant arrested inside apartment, a photo of him was in the apartment and manager testified that he not only was on the lease and paid the rent but that he had lived there for five weeks before warrant served).

bathroom, fingerprints on the bed or door handle to Room “7,” DNA on the clothing – or evidence from neighbors or the landlord as to whether they ever saw Mr. Trujeque at the apartment in recent history. In short, while there was a modicum of evidence that Mr. Trujeque had some tie to the apartment at some point, there was insufficient evidence to establish subjective certitude that he had dominion and control over the drugs or guns in the closet next to Room “7.” Simply having a shirt in an apartment does not mean the person has dominion and control over contraband located therein. *See State v. Callahan*, 77 Wn.2d 27, 31, 459 P.2d 400 (1969) (being a guest on a houseboat not sufficient to constitute dominion and control, even with admission by defendant that he handled drugs earlier that day).

As for the heroin in Ms. Santiago’s purse in Count 1, there was no evidence of actual possession or even constructive possession. There was no indication that Mr. Trujeque had any control over the purse at any time. *See State v. Jones*, 146 Wn.2d at 337 (passenger’s purse was not under control of driver). The only basis for liability in Count 1 is if the State showed that Mr. Trujeque somehow was an accomplice to Ms. Santiago’s possession of the heroin.

To show accomplice liability, the State had to show more than mere presence, and even more than assent. *In re Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). To prove that one present at the commission of a crime is an accomplice, the State must establish that one is ready to assist in the commission of the crime. *State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951 (1981); *Wilson*, 91 Wn.2d at 491. Stated differently, “[o]ne does not aid and abet unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about, and seeks by his action to make it succeed.” *State v. J-R Distribs., Inc.*, 82 Wn.2d 584, 593, 512 P.2d 1049 (1973).

There is no such evidence in this case. Notably, the State itself presented evidence that Ms. Santiago was sleeping during the periods of time that the police observed Mr. Molina and Mr. Trujeque on their phones, and doing something in the Scion car. RP VI 587. Whatever they were doing, Santiago was not involved with them. Without any evidence that Mr. Trujeque had knowledge that heroin was in Santiago’s purse, or that she was involved in some drug deal at which Mr. Trujeque was present and willing

to assist, there simply is not sufficient evidence that he was Ms. Santiago's accomplice in possession of heroin with intent to deliver it in Count 1.¹¹

Accordingly, there was insufficient evidence to support conviction under the protective standard of the Due Process Clauses of the Fourteenth Amendment, article I, section 3, and *Jackson v. Virginia, supra*, for Counts 1, 4, 6, 7 and 8. All convictions should be reversed and the charges dismissed.

c. There Was Insufficient Evidence that Mr. Trujeque Was Armed with Firearms on November 5, 2015

Mr. Trujeque was sentenced to serve ten additional years in prison for Count 4 because of the two guns (one unloaded) found in the closet next to Room 7 of the apartment on November 5, 2015. At the time the police raided the apartment, Mr. Trujeque was nowhere near the apartment, having been arrested the previous day. Under such circumstances, even if the State could prove constructive possession, there was insufficient evidence that Mr. Trujeque was "armed" while committing the crime of possession with the intent to deliver.

¹¹ The fact that there was noscapine – a cutting agent for heroin – in Room 5 of the apartment (Mr. Molina's room), RP VI 642; RP IX 1008-09, also strongly suggests that *Mr. Trujeque* was not an accomplice to the possession with intent to deliver heroin.

RCW 9.94A.533(3)(a) imposes a severe mandatory sentence of imprisonment based on a defendant being “armed” with a firearm. Under the Sixth and Fourteenth Amendments and under article I, sections 3, 21 and 22, the mandatory increase in penalty attached to RCW 9.94A.533(3) must be proven, beyond a reasonable doubt, to a unanimous jury. *Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013); *State v. Williams-Walker*, 167 Wn.2d 889, 896-97, 225 P.3d 913 (2010).

Whether a person is armed is a mixed question of law and fact. *State v. Schelin*, 147 Wn.2d 562, 565, 55 P.3d 632 (2002). When the court determines whether the facts are sufficient as a matter of law to prove that the defendant was armed, it is a question of law reviewed *de novo*. *Id.* at 566.

Because of the constitutional right to bear arms, under the Second and Fourteenth Amendments and article I, section 24, the mandatory sentence for possession of controlled substance with intent to deliver while armed must not be based upon mere proximity between weapons and drugs in some location, but, rather, requires a connection between the firearm, the crime and the defendant.¹² To prove a defendant was “armed,” the State must show that

¹² See *State v. Eckenrode*, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007) (“But a person is not armed merely by virtue of owning or even possessing a weapon; there must be some nexus between the defendant, the weapon, and the crime. . . . Courts are especially careful in this area because of the constitutional right to bear arms.”); *State v.*
(continued...)

he or she was within proximity of an easily and readily available weapon for offensive or defensive purposes and that a nexus is established between the defendant, the weapon, and the crime. Such a nexus exists when the defendant and the weapon are in close proximity at the relevant time. *State v. Houston-Sconiers*, 188 Wn.2d 1, 16-17, 391 P.3d 409 (2017).

In this case, the State claimed that Mr. Trujeque was involved in a drug deal near Seattle on November 4, 2015. Yet, he was clearly not armed at that time, which strongly supports the conclusion that the firearms in the closet had no relationship to buying or selling drugs. In any case, by the time the apartment was searched on November 5th, Mr. Trujeque was under arrest and had no access to any guns in a closet located far away.

In *State v. Valdobinos*, 122 Wn.2d 270, 858 P.2d 199 (1993), police officers arrested the defendant in a mobile home and found a large quantity of drugs and an unloaded rifle under the bed. 122 Wn.2d at 273, 281. The Supreme Court reversed the deadly weapon enhancement because the defendants could not be “armed” with an unloaded rifle that was not accessible and readily available for offensive or defensive use. *Id.* at 282. Similarly, in *State v. Mills, supra*, this Court held that a defendant was not

¹²(...continued)
Brown, 162 Wn.2d 422, 437, 173 P.3d 245 (2007) (Sanders, J., concurring).

“armed” when he was arrested several miles from motel room where drugs and gun were located. 80 Wn. App. 233-37.¹³

Here, where two guns (one unloaded) were found in a closet in an apartment after Mr. Trujeque was arrested in another location, there was insufficient evidence under the Due Process Clauses of the Fourteenth Amendment and article I, section 3, to support the two 5-year sentences for being “armed” with two firearms. Those findings and sentences should be vacated.

3. *The Court Erred By Not Dismissing the Case When the State Refused to Turn Over Exculpatory Evidence (a Shopping Bag) It Had in Its Possession*

a. Pertinent Facts

The State’s case against Mr. Trujeque depended, in part, on testimony that Mr. Trujeque was observed hanging out near Seattle supposedly waiting for a drug deal. In furtherance of this theory, the State introduced conclusion testimony from the officers about their interpretation of Mr. Trujeque’s and Mr. Molina’s actions, inferring they were involved in drug dealing – waiting for long periods of time, supposedly counting money in the car, driving in a certain way. *See infra* § D(5). Moreover, at the suppression hearing, the

¹³ *See also State v. Gurske*, 155 Wn.2d 134, 136-43, 118 P.3d 333 (2005) (evidence insufficient to support deadly weapon enhancement where unloaded gun was found in backpack in backseat of truck along with magazine and drugs).

Oregon deputies testified that, although Mr. Trujeque went into a mall, they did not see him walk out with any shopping bags. RP II 140, 191.

In the middle of trial, defense counsel learned that there was a shopping bag in the trunk of car that Mr. Trujeque was driving at the time of his arrest. This bag would support the conclusion that Mr. Trujeque was actually shopping at the mall, as opposed to just hanging out waiting for a drug deal. The police and the prosecutor did not deny that such a bag existed and was in the Honda – they simply refused to retrieve the bag because they were busy, and the prosecutor told Mr. Trujeque’s lawyer to go back to Oregon. CP 276-79, 347-49.¹⁴

Mr. Trujeque moved to dismiss based upon *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), noting the failure of the State to turn over the shopping bag. CP 276-79. The trial court denied the motion. The court assumed that there was a shopping bag in the back of the car, but concluded that because no one testified that Mr. Trujeque was or was not shopping at the mall, there was “no need to present evidence just to prove that there’s an indication they were shopping. Even if they were shopping,

¹⁴ Det. Hall stated in his declaration: “It should be noted that I had no recollection of any bag in Ms. GONGORA’s vehicle, or the possible existence of such an item until Mr. ENGLE made the request for me to search her vehicle during the court recess on 6/28/2016.” CP 349. Thus, Det. Hall conceded the shopping bag’s existence.

that doesn't exculpate them in the sense that that would be true." RP 1076.
This ruling is erroneous.

b. Argument

The Due Process Clauses of the Fourteenth Amendment and article I, section 3, prohibit the Government from suppressing exculpatory or impeaching evidence: "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). Prejudice is the same as materiality, *United States v. Kohring*, 637 F.3d 895, 902 n.1 (9th Cir. 2011), and the "touchstone of materiality is a 'reasonable probability' of a different result." *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

"Reasonable probability" does not entail an analysis of the sufficiency of the evidence, only "that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. Confidence can be undermined, even if "the undisclosed information may not have affected the jury's verdict." *Wearry v. Cain*, 577 U.S. ___, 136 S. Ct. 1002, 1006 & n.6, 194 L.Ed.2d 78

(2016). There is a reasonable probability if “one juror” might have had reasonable doubt if the withheld evidence had been introduced at trial. *See In re Stenson*, 174 Wn.2d 474, 493, 276 P.3d 286 (2012).

Here, at the CrR 3.6 hearing, two deputies testified that they did not recall seeing Mr. Trujeque exit the mall with shopping bags. RP II 141, 191. This testimony was part of picture presented to the trial court as to justify the *Terry* stop of Mr. Trujeque. While this testimony was not repeated before the jury, the fact that there was a shopping bag that the deputies conveniently “forgot” would have been impeachment evidence at trial as to their bias and credibility.¹⁵

Moreover, because the State’s case was based largely on opinion and conclusion testimony that Trujeque was acting like he was involved in a drug deal, testimony that he actually had shopped that day would have been important evidence that he was engaged in normal activities and was not hanging out for a drug deal to take place, particularly if there was a dated receipt in the bag.

¹⁵ *See State v. Gregory*, 158 Wn.2d 759, 798-99, 147 P.3d 1201(2006), *overruled on other grounds State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014) (witness’ lie in interview in current case is admissible under ER 608).

Reversal is required. The evidence was exculpatory, it was intentionally suppressed by the State, and there was prejudice. Confidence in the verdict and the suppression ruling is undermined, and there is a reasonable probability that one juror would have had a reasonable doubt had the State turned over the shopping bag. Mr. Trujeque's rights to due process under the Fourteenth Amendment and article 3 were violated. While reversal for a new trial and suppression hearing might be a remedy, reversal and dismissal should be the result in this case under CrR 8.3(b), given the intentional *Brady* violation.¹⁶

4. *The Trial Court Should Have Ordered Disclosure of the Identity of the Informant*

a. Pertinent Facts

As noted above, the informant who purchased drugs from Mr. Molina never claimed that anyone else was involved Molina's drug business. *See supra* at pp. 5-6. Prior to trial, the defense sought disclosure of the informant's name. RP I 40-50; CP 43-49. The trial court denied the motion, ruling "assuming that the confidential reliable informant were to say everytime I dealt with Mr. Molina Rios, I never saw Mr. Trujeque Magana,

¹⁶ *See Kohring*, 637 F.3d at 913-14 (Fletcher, B, J., concurring and dissenting in part) (dismissal is proper remedy for flagrant *Brady* violations).

that doesn't really bear on whether or not they're acting in concert on the day in question by possessing all this stuff in their common apartment." RP I 61.

b. Argument

The trial court's ruling denying the defense access to the informant was error.¹⁷ The informant would have been a powerful witness for Mr. Trujeque at trial.

As noted above, the State must disclose exculpatory evidence.¹⁸ Additionally, an accused person has the right to call an exculpatory witness at trial.¹⁹ On the other hand, the State is generally privileged to refuse to disclose the identity of informants who provide information of criminal violations, and the "informer's privilege" is intended to further effective law enforcement and to encourage citizens to report their knowledge of criminal activities *Roviaro v. United States*, 353 U.S. 53, 59, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957); *State v. Harris*, 91 Wn.2d 145, 148-49, 588 P.2d 720 (1978). This privilege is codified at CrR 4.7(f)(2) and RCW 5.60.060(5).

¹⁷ The trial court made no factual findings, so its legal ruling is reviewed *de novo*. *State v. Atchley*, 142 Wn. App 147, 154, 173 P.3d 323 (2007).

¹⁸ *Brady v. Maryland*, *supra*; U.S. Const. amend. XIV; Const. art. I, § 3.

¹⁹ This right arises under the Compulsory Process, Confrontation and Due Process Clauses. U.S. Const. amends. VI & XIV; Const. art. I, §§ 3 & 22; *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986).

Yet, the informer's privilege is limited by the aforementioned rights of an accused person to a fair trial, to due process and the right to call witnesses on his or her behalf: "When 'disclosure of an informer's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.'" *State v. Petrino*, 73 Wn. App. 779, 783-84, 871 P.2d 637 (1994) (quoting *Roviaro*, 353 U.S. at 60-61). In deciding whether to allow disclosure, the court must "balance 'the public interest in protecting the flow of information against the individual's right to prepare his defense.'" *State v. Harris*, 91 Wn.2d at 150 (quoting *Roviaro*, 353 U.S. at 62). When defendant seeks an informant's identity solely for purposes of challenging a probable cause determination rather than during the guilt phase of the trial, disclosure of the informant's identity is not necessarily required. *State v. Atchley*, 142 Wn. App at 156.

Mr. Trujeque was not seeking disclosure of the informant's identity to assist in a suppression motion. Rather, he sought disclosure so he could rebut the State's insinuations that he was involved in Mr. Molina's drug business. Because the State had no direct evidence of Mr. Trujeque's involvement, the State's case was based entirely on a pyramid of inferences – that Trujeque was tied to Rooms "7" and "8" because he once wore a shirt that resembled one thrown on the bed during the search; that because Mr.

Trujeque signed a rental agreement in May, he had control over items in the closet in November, or just testimony about the general “habits” of drug dealers. *See infra* § D(5). If Mr. Trujeque was convicted because an officer opined that the residents of the apartment “were at least middle, most likely upper-level drug dealers,” RP IX 966, then evidence that Mr. Molina was conducting his drug business by himself, without an accomplice, would be significant evidence to rebut the police conclusions.

The ruling denying disclosure violated Mr. Trujeque’s aforementioned federal and state constitutional rights. Given the circumstantial nature of the allegations against Mr. Trujeque, the error cannot be written off as harmless. All convictions should be reversed.

5. *The Trial Court Erred When Admitting Opinion and Conclusion Evidence*

a. Pertinent Facts

Due to the lack of direct evidence that Mr. Trujeque possessed any controlled substances or firearms, or that he was involved in any way in dealing drugs, the State premised its case on conclusory opinion testimony from various police officers.

Deputy Jones testified, over defense objection, that based on his experience in other cases, he believed that Mr. Trujeque and Mr. Molina were

“counting money” in the Scion even though the car had tinted windows, he did not see their hands and did not see any money. RP V 546, 556, 559. He also testified, again over objection, that, as a drug investigator, he had “many times” observed individuals he was surveilling spend long periods of time doing nothing. RP V 549.

Deputy Ferguson testified, again over objection, that based upon his experience as a drug investigator, he believed the two men were:

preparing to either conduct a drug deal or try to secret that drug deal from observation by the police, they kind of hide their activities in the car, or, in this case, I believe that they could have been counting money, because they were going back and forth together, or potentially packaging drugs in the car. . . . It’s hard to tell exactly what is happening, but it took a long time for them to do what they were doing and they were keeping it very secretive, it appeared.

RP VI 585-86. Ferguson also testified, over objection, about his experiences in drug cases with “counter-surveillance” driving (what he called a “tail shake”), and that this is what he saw Mr. Trujeque and Mr. Molina do. RP VI 592-93. He stated, “Because in my experience, what we’ve seen is that when people are trying to conduct drug deals, they will move the location of the deal multiple times.” RP VI 593.

Det. Hall testified, without objection, that given the amount of cash in the apartment, “[t]hey are at least middle, most likely upper-level drug

dealers,” and with the presence of the different drugs, “I say definitely this is [a] signature of a middle to upper-level drug dealing organization.” RP IX 966.

Because of the suggestion of the presence of makeup, brushes and a bag from Victoria’s Secret in Room “7,” RP VII 732-33, over defense objection, Det. Hall testified:

I have interviewed both suspects and or witnesses who have told me that the drugs that were in a particular case belonged to them even though the case or whatever it was, clothing, was of the opposite gender.

RP IX 934.

Finally, various officers testified that they did not request DNA or fingerprint testing of the drugs or guns because they believed they already had sufficient probable cause or evidence that the defendants were guilty.²⁰

b. Argument

A witness’ testimony which either directly or by inference gives his or her opinion that the person on trial is guilty is inadmissible. The

²⁰ See RP VI 636 (“Detective Hall had developed probable cause for a search warrant.”); RP VII 695 (no prints because “[i]n this case, there was no need to do that”); RP VII 697 (not send items out for testing for DNA or prints because “the drugs were found in a residence that we knew who the occupant was. We found resident ID in there, in the same bedroom where the guns were, the drugs were, and there was no need to send that stuff to the lab for fingerprinting”); RP IX 927 (“I had gathered articulable facts that I think would lead a reasonable person to believe that they were in violation of a drug crime.”).

determination of guilt or innocence is strictly a question for the jury.²¹ “No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Particularly when given by a law enforcement officer, opinions on the ultimate issue of guilt deprive a defendant of a fair trial. This is because testimony by the police may carry a special aura of trustworthiness. *State v. Demery*, 144 Wn. 2d 753, 763, 30 P.3d 1278 (2001). Accordingly, opinion and conclusion testimony is irrelevant and prejudicial under ER 401-403 and violates due process and the right to a jury trial, protected by the Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22. Moreover, when an officer’s testimony is based on testimonial statements of witnesses and defendants in other cases, the testimony violates the Confrontation Clauses of the Sixth Amendment and article I, section 22.²²

²¹ See *State v. Garrison*, 71 Wn. 2d 312, 315, 427 P.2d 1012 (1967); *State v. Christopher*, 114 Wn. App. 858, 862-63, 60 P.3d 677 (2003); *State v. Farr-Lenzini*, 93 Wn. App. 453, 459-64, 970 P.2d 313 (1999); *State v. Sargent*, 40 Wn. App. 340, 351, 698 P.2d 598 (1985).

²² See *United States v. Reyes Vera*, 770 F.3d 1232, 1237 (9th Cir. 2014) (“[A]n expert exceeds the bounds of permissible expert testimony and violates a defendant’s Confrontation Clause rights when he is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation.”) (internal quotes and citation omitted).

Some courts have approved of conclusion testimony by police officers in drug cases. Such testimony is admissible because of the lack of a direct comment about the guilt of the defendant.²³ In contrast are cases where the officers were allowed to testify to direct opinions about the guilt of the defendant, testimony which is reversible. In *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008), the detective followed the defendants from store to store where they purchased various ingredients that could be used to manufacture methamphetamine, and the detective was allowed to testify that, based on his experience in other cases, he felt “very strongly that they were, in fact, buying ingredients to manufacture methamphetamine.”*Id.* at 588. Another detective testified that ““those items were purchased for manufacturing.”” *Id.* Later, the State’s forensic chemist looked at the combined purchases and testified that ““these are all what lead me toward this pseudoephedrine is possessed with intent.”” *Id.*

The Supreme Court held that all of this testimony was an improper opinion on Mr. Montgomery’s guilt. *Id.* at 595. The Court stated that the opinions went to the core issue of Mr. Montgomery’s intent, used explicit

²³ See, e.g., *State v. Sanders*, 66 Wn. App. 380, 384-87, 832 P.2d 1326 (1992) (upholding testimony that “lack of items associated with the smoking of crack cocaine indicates that that house is not used for that purpose and the persons within do not do so frequently at all.”).

expressions of personal belief, once even parroting the legal standard, and although the opinions contained an “aura of reliability,” police officers’ opinions on guilt actually have low probative value. *Id.* at 594-95.²⁴

Here, as in *Montgomery*, the officers’ testimony was little more than an accumulation of personal opinions and conclusions that they believed that Mr. Trujeque was guilty – that Trujeque’s actions in the Seattle area were typical of being involved in a drug deal (waiting, secretly “counting money,” “tail shake”), that the officers had probable cause to get a warrant and did not need forensic testing,²⁵ or that defendants or witnesses in other cases made testimonial statements to them that people hide drug items in articles of clothing associated with other genders. This last category of testimony (about gender) was not just improper opinion evidence, but it also violated the Confrontation Clauses. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), U.S. Const. amends. VI & XIV, Const. art. I, § 22.

²⁴ The Court then held that *Montgomery* could not establish actual prejudice, given his lack of objections, but then reversed on another basis. 163 Wn.2d at 596, 600.

²⁵ Regarding conclusions about probable cause, *see Warren v. Hart*, 71 Wn.2d 512, 514, 429 P.2d 873 (1967) (fact of citation by officer is inadmissible opinion testimony); *State v. Stith*, 71 Wn. App. 14, 17-22, 856 P.2d 415 (1993) (misconduct to argue that “the question of probable cause is something the judge has already determined before the case came before you today.”). As the trial court properly ruled in pretrial motions, “I’ve already ruled that the prior investigation led to reasonable suspicion and probable cause So that’s not anything the jury has to worry about.” RP V 521.

The conclusion testimony here exceeded the bounds of what is permitted. When asked what he believed Mr. Trujeque and Mr. Molina were doing in the Scion car, Dep. Ferguson explicitly opined that they were acting consistently with people who were trying to secret a drug deal from the police. RP VI 585-86. Det. Hall bluntly told the jury that Mr. Trujeque was a drug dealer: “They are at least middle, most likely upper-level drug dealers. . . . I say definitely this is signature of a middle to upper-level drug dealing organization.” RP IX 966. Given the paucity of direct evidence and the circumstantial nature of the case, the admission of this conclusion testimony cannot be written off as harmless. Reversal for a new trial is required.²⁶

6. *RCW 9.41.171 Violates Equal Protection*

a. Pertinent Facts

In Count 8, the State accused Mr. Trujeque of being an alien in possession of a firearm (RCW 9.41.171). CP 115. Mr. Trujeque stipulated that he was not a citizen of the United States; not a citizen of Canada; was not a lawful permanent U.S. resident; and did not have a valid visa. RP VII 757. A representative from the Department of Licensing testified that there was no

²⁶ Most of the testimony was objected to, but in any case the issues are constitutional and thus can be raised under RAP 2.5(a)(3). *See State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

record of Mr. Trujeque having a license or permit to possess a firearm. RP VII 700-02.

b. Argument

Even though Mr. Trujeque was not a U.S. citizen, was not a lawful permanent resident, and had no special license, but yet was still an immigrant and a resident of Washington, he would not necessarily commit a crime under RCW 9.41.171 if he possessed a firearm. To be guilty, one must not fit into the exception under RCW 9.41.175(2) that allows Canadian nationals to possess firearms if they are hunting, are part of trade shows, or other special circumstances. The statute therefore gives special preference to people based upon their national origin – Canadians have special privileges over Mexican nationals. This national origin discrimination violates equal protection, guaranteed under the Fourteenth Amendment, and Washington’s special immunities’ provision of article I, section 12. This is a constitutional issue that can be raised for the first time on appeal under RAP 2.5(a)(3).

Classifications based on alienage are “suspect” for purposes of analyzing a violation of the Equal Protection clause, and are subject to “strict judicial scrutiny whether or not a fundamental right is impaired.” *Graham v. Richardson*, 403 U.S. 365, 372, 376, 91 S. Ct. 1848, 29 L. Ed. 2d 534

(1971).²⁷ “In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available.” *Bernal v. Fainter*, 467 U.S. 216, 219, 104 S. Ct. 2312, 81 L. Ed. 2d 175 (1984) (holding that a Texas statute requiring a notary public be a U.S. citizen did not withstand strict scrutiny). Additionally, layered on top of the equal protection issue is an individual’s right to bear arms, protected by the Second and Fourteenth Amendment and article I, section 24. *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008); *State v. Sieyes*, 168 Wn.2d 276, 291, 225 P.3d 995 (2010).

There is no basis for the special preference that RCW 9.41.175(2) gives to Canadian nationals. “There is nothing in the ‘statutory scheme’ which establishes that the status of being foreign-born of itself creates ‘dangerous hands’ in the context of firearms control. . . . [former] RCW 9.41.170 is not necessary to safeguard the State’s interest in keeping ‘firearms out of dangerous hands.’” *State v. Hernandez-Mercado*, 124 Wn.2d 368, 377-78, 879 P.2d 283 (1994). There is no reason to think that Canadians are any more careful with firearms than those from Belarus, China, South Africa,

²⁷ See also, e.g., *Nyquist v. Mauclet*, 432 U.S. 1, 7, 97 S. Ct. 2120, 53 L. Ed. 2d 63 (1977) (“[C]lassifications by a State that are based on alienage are ‘inherently suspect and subject to close judicial scrutiny.’”); *State v. Ibrahim*, 164 Wn. App. 503, 510-15, 269 P.3d 292 (2011) (striking down version of alien in possession statute that discriminated against lawful permanent residents).

Germany or Mexico. There is no basis to give Canadians preferential treatment.

Accordingly, RCW 9.41.171 is unconstitutional. The conviction in Count 8 should be reversed. Because the cautionary instruction that was read to the jury at the time of the stipulation told the jurors that they could consider the stipulation about Mr. Trujeque's immigration status when determining whether he was guilty also of Counts 6 and 7, RP VII 757,²⁸ those two counts should be reversed as well. In the current climate of hysteria about immigration, absent evidence about Mr. Trujeque's immigration status, one juror may have had a reason to doubt that Trujeque was in possession of the two firearms which were the basis of the charges in Counts 6 and 7.

Counts 6, 7 and 8 should be reversed; Count 6 should be dismissed and Counts 7 and 8 remanded for a new trial.

²⁸ The stipulation read to the jury stated in part:

You may consider this stipulation as evidence, only of the -- in consideration of whether the State has proven the elements of Count VI, Count VII, and Count VIII, unlawful possession of a firearm and alien in possession of a firearm, and for no other purpose, including character.

RP VII 757. Thus, the Court specifically told the jurors that they could consider Mr. Trujeque's immigration status when determining whether he committed unlawful possession of a firearm in counts 7 and 8.

7. *The Sentences Should Be Reversed*

a. Pertinent Facts

The trial court found that Counts 6, 7 and 8 were the same criminal conduct, but determined that those three counts and Counts 1 and 4 were not the same criminal conduct. Because Mr. Trujeque had two prior convictions, the court determined that his offender score was “4,” and that the standard ranges were 20+ to 60 months confinement for Count 1, 68 to 100 months for Count 4, 36 to 48 months for Counts 6 and 7, and 0 to 12 months for the unranked offense in Count 8. RP XI 1279.

The State alleged that Mr. Trujeque committed Count 4 within 1000 feet of a school bus stop. The jury verdict on the school bus stop allegation (CP 340) allowed the trial court to double the statutory maximum sentence for Count 4 to 240 months under RCW 69.50.435(1), and thus allowed for the imposition of an extra 144 months in prison – five (rather than three) years for each of the two guns and 24 months for the school zone allegation. RCW 9.94A.533(3)(a) & (6). Because the total time would exceed what the court concluded was the maximum of 20 years, the court imposed 240 months confinement on Count 4, with the time on the other counts running concurrently. RP XI 1278-79, 1294-95; CP 432-45.

b. All Four Counts Were the Same Criminal Conduct

RCW 9.94A.589(1)(a) defines “same criminal conduct” as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” “The relevant inquiry for the intent prong is to what extent did the criminal intent, when viewed objectively, change from one crime to the next.” *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). The objective intent of a defendant can be determined by whether one crime furthered the other. *State v. Vike*, 125 Wn.2d 407, 411, 885 P. 2d 824 (1994). Where crimes are “sequential, not simultaneous or continuous,” a defendant is generally deemed to have sufficient time to form a new criminal intent. *State v. Grantham*, 84 Wn. App. 854, 859, 932 P.2d 657 (1999).

The trial court determined that Counts 1 and 4 were not the same criminal conduct, but that Counts 6, 7 and 8 were. This was a legal error and thus an abuse of discretion.²⁹

²⁹ Review of “same criminal conduct” is with an “abuse of discretion” standard.” *State v. Aldana Graciano*, 176 Wn.2d 531, 533, 295 P.3d 219 (2013). Here, the trial judge made no factual findings and simply made a legal ruling. RP XI 1278-79. To the extent this legal ruling was incorrect, it was an abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

As for Counts 1 and 4, the time between when the Honda was stopped on I-5 and when the apartment was raided was fairly brief and it cannot be said that Mr. Trujeque's intent could possibly have changed during that time period. In any case, although purportedly separated in time and location, these were factors controlled by the police, not Mr. Trujeque. The police could have allowed the two cars to continue on to the apartment complex and the police could have either detained the cars outside the apartment or obtained a search warrant after the three people arrived at the apartment. Given the police control over the time and location of the "offense," it is appropriate to consider the crimes as being the same criminal conduct to avoid a sentencing factor manipulation.³⁰

Indeed, the evidence supporting the intent to deliver the heroin at the base of the charge in Count 1 was, in part, the contents of the apartment, including the scales, RP IX 930-333, and, more importantly, the noscapine, an alkaloid in the opium poppy used to cut heroin. RP IX 1008-09. It was apparent that the heroin found in Ms. Santiago's purse was destined to be cut

³⁰ Sentencing factor manipulation occurs when the government unfairly exaggerates the defendant's sentencing range, in some cases by engaging in a longer-than-needed investigation and, thus, increasing the drug quantities for which the defendant is responsible," constituting a violation of the Due Process Clause under the Fifth and Fourteenth Amendments (and article I, section 3). *See generally United States v. McLean*, 199 F. Supp. 3d 926, 929-34 (E.D. Pa. 2016) (citing cases). Here, the manipulation would be based on stopping the cars before they arrived at the apartment.

with noscapine, therefore making the two counts – Count 1 and Count 4 – the same criminal conduct, even though they addressed different substances.³¹

Counts 6, 7 and 8 were also the same criminal conduct as Count 4. The firearms that were allegedly illegally possessed in Counts 6, 7 and 8 were the same firearms that were the basis for the firearm enhancements in Count 4. While one can certainly “possess” firearms and not be “armed,” *see* § D(2)(c), *supra*, one cannot be “armed” without possessing the weapon. Thus, the act of being armed in Count 4 is intimately tied in place, time and intent to and furthered by Counts 6, 7 and 8, the offenses taking place simultaneously.

Mr. Trujeque recognizes that this Court rejected a similar argument in *State v. McGrew*, 156 Wn. App. 546, 234 P.3d 268 (2010), based, in part, on the conclusion that the firearm enhancements were not separate crimes. *Id.* at 553 (“a sentencing enhancement is not a ‘crime’ and because “same criminal conduct” is defined to apply only to the analysis of ‘two or more crimes.’”). With all due respect, *McGrew* should not be followed. It does not

³¹ *See State v. Garza-Villarreal*, 123 Wn.2d 42, 49, 864 P.2d 1378 (1993) (“The fact that the two charges involved different drugs does not by itself evidence any difference in intent. The possession of each drug furthered the overall criminal objective of delivering controlled substances in the future.”). *Compare In re Davis*, 142 Wn.2d 165, 12 P.3d 603 (2000) (two grow operations, run separately, were not part of same unit of prosecution).

matter what Washington *calls* the mandatory penalty imposed through the operation of RCW 9.94A.533(3). It is irrelevant “whether the statute calls them elements of the offense, sentencing factors, or Mary Jane..” *Ring v. Arizona*, 536 U.S. 584, 610, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (Scalia, J., concurring).

The U.S. Supreme Court has made this clear in *Alleyne v. United States*, *supra*, which post-dates *McGrew*. There, the Supreme Court held that a sentence “enhancer” was simply a new crime: “[T]he core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury.” 133 S. Ct. at 2161. Under *Alleyne*, “possession of a controlled substance with intent to deliver” is a different “crime” than “possession of a controlled substance with intent to deliver while armed with a firearm,” and the new, aggravated “crime” can be the same “criminal conduct” as other counts.

The Court in *McGrew* also concluded that possession of a firearm while delivering drugs did not share the same intent as unlawful possession of a firearm. 156 Wn. App. at 555. But here, possession of a controlled substance with intent to deliver does not require proof of “guilty knowledge” of the nature of the substance one intends to deliver. *State v. Sims*, 119 Wn.2d 138, 829 P.2d 1075 (1992). Thus, this basis for concluding that the

VUCSA offense while armed and unlawful possession of firearm are not the same criminal conduct does not apply to possession with intent to deliver.

Finally, the *McGrew* court pointed out that anyone could commit the crime of possession with intent to deliver while armed with a firearm while “only certain qualifying persons may violate RCW 9.41.040(2)(a)(i).” *McGrew*, 156 Wn. App. at 555. But, no element of Counts 6, 7 or 8 required Mr. Trujeque to have any *mens rea* with regard to prohibitions on him either as a felon or a non-U.S. and non-Canadian citizen possessing a firearm. CP 318, 319, 324. The *mens rea* for Counts 6, 7 and 8 was simply the knowing possession of a firearm and such knowledge is inherent in the concept of being “armed” which is required for conviction of the offense of possession of a controlled substance with intent to deliver while armed with a firearm in Count 4.

Accordingly, all four counts encompassed the same criminal conduct. Mr. Trujeque’s offender score was only “2” for each count and thus the standard range was only 51 to 68 months for Count 4.

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

Based on the school zone allegation in Count 4, RCW 69.50.435(1) authorizes punishment “by imprisonment of up to twice the imprisonment

otherwise authorized by this chapter.” The trial court used this language to double the maximum term for Count 4 to 20 years, thereby allowing for the imposition of five (rather than three) years for each firearm and 24 months for the school zone. This was error – the proper doubling was the top end of the standard range.³²

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

This construction is consistent with *Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), where the Supreme Court held that “the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” (Emphasis in original). In other words, the maximum sentence is the top end of the range, not the

³² This is a constitutional and sentencing issue properly raised for the first time on appeal under RAP 2.5(a).

“statutory maximum.”³³ Thus, the doubling authorized by RCW 69.50.435 is not the increase from a 10 year to a 20 year maximum sentence. Rather the pertinent doubling is the increase of the standard range from 51-68 months (or 68 + to 100 months, depending on same criminal conduct), as set out in RCW 9.94A.517 and RCW 9.94A.518.

The imposition of a 240 month sentence in this case was error, the maximum being 136 or 200 months, depending on what counts were the same criminal conduct. Moreover, if the maximum was not 20 years, but at most 200 months, then it was error to impose five years per firearm, rather than the three years per firearm set out in RCW 9.94A.533(3)(b). The case should be remanded for resentencing.

E. CONCLUSION

The Court should reverse the convictions, dismiss some or all of the counts, and/or remand for a new trial or for resentencing.

Dated this 30th day of June 2017.

Respectfully submitted,

s/ Neil M. Fox
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³³ *In re Cruz*, 157 Wn.2d 83, 134 P.3d 1166 (2006) and *State v. Blade*, 126 Wn. App. 174, 107 P.3d 775 (2005), are not dispositive because they fail to analyze the statute in the rubric required by *Blakely*.

STATUTORY APPENDIX

Relevant Statutory Provisions and Rules

CrR 3.6(b) provides:

(b) Hearing. If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

CrR 4.7(f)(2) provides:

(2) Informants. Disclosure of an informant's identity shall not be required where the informant's identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant. Disclosure of the identity of witnesses to be produced at a hearing or trial shall not be denied.

CrR 8.3(b) provides:

(b) On Motion of Court. The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

RAP 2.5(a) provides in part:

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

RCW 5.60.060(5) provides:

(5) A public officer shall not be examined as a witness as to communications made to him or her in official confidence, when the public interest would suffer by the disclosure.

RCW 9.41.040(1)(a) provides:

(1)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

RCW 9.41.171 provides:

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

RCW 9.41.175 provides:

(1) A nonimmigrant alien, who is not a resident of Washington or a citizen of Canada, may carry or possess any firearm without having first obtained an alien firearm license if the nonimmigrant alien possesses:

(a) A valid passport and visa showing he or she is in the country legally;

(b) If required under federal law, an approved United States department of justice ATF-6 NIA application and

permit for temporary importation of firearms and ammunition by nonimmigrant aliens; and

(c)(i) A valid hunting license issued by a state or territory of the United States; or

(ii) An invitation to participate in a trade show or sport shooting event being conducted in this state, another state, or another country that is contiguous with this state.

(2) A citizen of Canada may carry or possess any firearm so long as he or she possesses:

(a) Valid documentation as required for entry into the United States;

(b) If required under federal law, an approved United States department of justice ATF-6 NIA application and permit for temporary importation of firearms and ammunition by nonimmigrant aliens; and

(c)(i) A valid hunting license issued by a state or territory of the United States; or

(ii) An invitation to participate in a trade show or sport shooting event being conducted in this state, another state, or another country that is contiguous with this state.

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

RCW 9.94A.517 & 9.94A.518 are attached separately.

RCW 9.94A.533 provides in part:

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. If the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection; . . .

. . .

(e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be: (i) Granted an extraordinary medical placement when authorized under RCW 9.94A.728(1)(c); or (ii) Released under the provisions of RCW 9.94A.730 . . .

. . . .

(6) An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.827. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

RCW 9.94A.589 provides in part:

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

committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

RCW 69.50.401 provides in part:

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

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

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

RCW 69.50.435 provides in part:

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

(a) In a school;

- (b) On a school bus;
- (c) Within one thousand feet of a school bus route stop designated by the school district;
- (d) Within one thousand feet of the perimeter of the school grounds;
- (e) In a public park;
- (f) In a public housing project designated by a local governing authority as a drug-free zone;
- (g) On a public transit vehicle;
- (h) In a public transit stop shelter;
- (i) At a civic center designated as a drug-free zone by the local governing authority; or
- (j) Within one thousand feet of the perimeter of a facility designated under (i) of this subsection, if the local governing authority specifically designates the one thousand foot perimeter may be punished by a fine of up to twice the fine otherwise authorized by this chapter, but not including twice the fine authorized by RCW 69.50.406, or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter, but not including twice the imprisonment authorized by RCW 69.50.406, or by both such fine and imprisonment. The provisions of this section shall not operate to more than double the fine or imprisonment otherwise authorized by this chapter for an offense.

U.S. Const. amend. II provides:

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

U.S. Const. amend. IV provides:

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

U.S. Const. amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI provides:

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

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

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

Wash. Const. art. I, § 3 provides:

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

Wash. Const. art. I, § 7 provides:

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

Wash. Const. art. I, § 12 provides:

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

Wash. Const. art. I, § 21 provides:

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

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

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

Wash. Const. art. I, § 24 provides:

The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.

RCW 9.94A.517**Table 3—Drug offense sentencing grid. (Effective until July 1, 2018.)**

(1)

TABLE 3
DRUG OFFENSE SENTENCING GRID

Seriousness Level	Offender	Offender	Offender
	Score 0 to 2	Score 3 to 5	Score 6 to 9 or more
III	51 to 68 months	68 + to 100 months	100 + to 120 months
II	12 + to 20 months	20 + to 60 months	60 + to 120 months
I	0 to 6 months	6 + to 12 months	12 + to 24 months

References to months represent the standard sentence ranges. 12+ equals one year and one day.

(2) The court may utilize any other sanctions or alternatives as authorized by law, including but not limited to the special drug offender sentencing alternative under RCW [9.94A.660](#) or drug court under chapter [2.30](#) RCW.

(3) Nothing in this section creates an entitlement for a criminal defendant to any specific sanction, alternative, sentence option, or substance abuse treatment.

[[2015 c 291 § 8](#); [2013 2nd sp.s. c 14 § 1](#); [2002 c 290 § 8](#).]

NOTES:

Expiration date—[2015 c 291 § 8](#): "Section 8 of this act expires July 1, 2018." [[2015 c 291 § 15](#).]

Conflict with federal requirements—[2015 c 291](#): See note following RCW [2.30.010](#).

Application—Recalculation of earned release date—[2013 2nd sp.s. c 14](#): "Pursuant to RCW [9.94A.729](#), the department shall recalculate the earned release date for any offender currently serving a term in a facility or institution either operated by the state or utilized under contract. The earned release date shall be recalculated whether the offender is currently incarcerated or is sentenced after July 1, 2013, and regardless of the offender's date of offense. For offenders whose offense was committed prior to July 1, 2013, the recalculation shall not extend a term of incarceration beyond that to which an offender is currently subject." [[2013 2nd sp.s. c 14 § 4](#).]

Declaration—[2013 2nd sp.s. c 14 § 4](#): "The legislature declares that section 4 of this act does not create any liberty interest. The department is authorized to take the time reasonably necessary to complete the recalculations of section 4 of this act after July 1, 2013." [[2013 2nd sp.s. c 14 § 6](#).]

Compilation of sentencing information—Report—[2013 2nd sp.s. c 14](#): "(1)(a) The department must, in consultation with the caseload forecast council, compile the following information in summary form for the two years prior to and after July 1, 2013: For offenders sentenced under RCW [9.94A.517](#) for a seriousness level I offense where the offender score is three to five: (A) The total number of sentences and the average length of sentence imposed, sorted by sentences served in state versus local correctional facilities; (B) the number of current and prior felony convictions for each offender; (C) the estimated cost or cost savings, total and per offender, to the state and local

RCW 9.94A.518**Table 4—Drug offenses seriousness level.**

TABLE 4	
DRUG OFFENSES INCLUDED WITHIN EACH SERIOUSNESS LEVEL	
III	<p>Any felony offense under chapter 69.50 RCW with a deadly weapon special verdict under *RCW 9.94A.602</p> <p>Controlled Substance Homicide (RCW 69.50.415)</p> <p>Delivery of imitation controlled substance by person eighteen or over to person under eighteen (RCW 69.52.030(2))</p> <p>Involving a minor in drug dealing (RCW 69.50.4015)</p> <p>Manufacture of methamphetamine (RCW 69.50.401(2)(b))</p> <p>Over 18 and deliver heroin, methamphetamine, a narcotic from Schedule I or II, or flunitrazepam from Schedule IV to someone under 18 (RCW 69.50.406)</p> <p>Over 18 and deliver narcotic from Schedule III, IV, or V or a nonnarcotic, except flunitrazepam or methamphetamine, from Schedule I-V to someone under 18 and 3 years junior (RCW 69.50.406)</p> <p>Possession of Ephedrine, Pseudoephedrine, or Anhydrous Ammonia with intent to manufacture methamphetamine (**RCW 69.50.440)</p> <p>Selling for profit (controlled or counterfeit) any controlled substance (RCW 69.50.410)</p>
II	Create, deliver, or possess a

counterfeit controlled
substance (RCW
69.50.4011)

Deliver or possess with intent to
deliver methamphetamine
(RCW **69.50.401(2)(b)**)

Delivery of a material in lieu of a
controlled substance (RCW
69.50.4012)

Maintaining a Dwelling or Place
for Controlled Substances
(RCW **69.50.402(1)(f)**)

Manufacture, deliver, or possess
with intent to deliver
amphetamine (RCW
69.50.401(2)(b))

Manufacture, deliver, or possess
with intent to deliver
narcotics from Schedule I or
II or flunitrazepam from
Schedule IV (RCW
69.50.401(2)(a))

Manufacture, deliver, or possess
with intent to deliver
narcotics from Schedule III,
IV, or V or nonnarcotics from
Schedule I-V (except
marijuana, amphetamine,
methamphetamines, or
flunitrazepam) (RCW
69.50.401(2) (c) through (e))

Manufacture, distribute, or
possess with intent to
distribute an imitation
controlled substance (RCW
69.52.030(1))

I Forged Prescription (RCW
69.41.020)

Forged Prescription for a
Controlled Substance (RCW
69.50.403)

Manufacture, deliver, or possess
with intent to deliver
marijuana (RCW
69.50.401(2)(c))

Possess Controlled Substance
that is a Narcotic from
Schedule III, IV, or V or

Nonnarcotic from Schedule
I-V (RCW **69.50.4013**)

Possession of Controlled
Substance that is either
heroin or narcotics from
Schedule I or II (RCW
69.50.4013)

Unlawful Use of Building for
Drug Purposes (RCW
69.53.010)

[**2003 c 53 § 57; 2002 c 290 § 9.**]

NOTES:

Reviser's note: *(1) RCW **9.94A.602** was recodified as RCW **9.94A.825** pursuant to **2009 c 28 § 41.**

****(2)** cf. **2002 c 134 § 1.**

Intent—Effective date—2003 c 53: See notes following RCW **2.48.180.**

Effective date—2002 c 290 §§ 7-11 and 14-23: See note following RCW **9.94A.515.**

Intent—2002 c 290: See note following RCW **9.94A.517.**

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	}	NO. 49601-1-II
Respondent,	}	
v.	}	CERTIFICATE OF SERVICE
MIGUEL TRUJEQUE-MAGANA,	}	
Appellant.	}	

I, Neil Fox, certify and declare as follows:

On June 30, 2017, I served a copy of the OPENING BRIEF OF APPELLANT on counsel for the Respondent, Anne Mowry Crusier, by filing this brief through the Portal and thus a copy will be delivered electronically.

I am also serving a copy of this brief on the appellant, by having a copy deposited into the U.S. Mail in an envelope with proper first class postage affixed addressed to:

Miguel Trujeque-Magana
#393119
Airway Heights Corrections Center
PO Box 2049
Airway Heights, WA 99001-2049

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

Dated this 30th day of June 2017, at Seattle, Washington.

s/ Neil M. Fox

WSBA No. 15277

LAW OFFICE OF NEIL FOX PLLC

June 30, 2017 - 10:04 AM

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