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Division II
State of Washington
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NO. 49601-1-II (consolidated)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

MIGUEL A TRUJEQUE-MAGANA and
LUCIANO MOLINA-RIOS, Appellants

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-02180-0

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR.....	1
I. The trial court erred when it did not enter written findings and conclusions following the CrR 3.6 hearing but the error is harmless because the trial court’s oral findings are sufficient to permit review of the suppression issues.	1
II. The trial court properly concluded that the stop of Trujeque was lawful because there was a reasonable suspicion that he was, or had been, engaged in criminal activity.	1
III. The passenger in Trujeque’s car validly consented to the search of her purse, which contained heroin.	1
IV. Sufficient evidence established that the defendants were accomplices to the owner of the purse and maintained constructive possession over its contents and that they had constructive possession over the drugs and guns found in their respective bedrooms and closets in their apartment.	1
V. Sufficient evidence established that the defendants were armed with firearms during counts 2 and 3 (Molina) and count 4 (Trujeque).	1
VI. No <i>Brady</i> violation occurred regarding the purported shopping bag allegedly present in the trunk of Trujeque’s car.	1
VII. The trial court properly denied defendants’ motion to disclose the identity of the informant.	1
VIII. Testifying officers provided proper opinion and inferential testimony based on their training and experience.	1
IX. As applied to the defendants, the alien in possession of a firearm statute is lawful.	1
X. The trial court did not abuse its discretion when it determined that Trujeque’s drug crimes were not the same criminal conduct as each other and the firearm crimes.	2
XI. The maximum term of imprisonment that is doubled under RCW 69.60.535 is the statutory maximum and not the standard range.	2

XII. In the event the State substantially prevails on appeal it will not seek appellate costs.	2
STATEMENT OF THE CASE.....	2
A. Procedural History.....	2
B. Statement of Facts	4
ARGUMENT.....	13
I. The trial court erred when it did not enter written findings and conclusions following the CrR 3.6 hearing but the error is harmless because the trial court’s oral findings are sufficient to permit review of the suppression issues.	13
II. The trial court properly concluded that the stop of Trujeque was lawful because there was a reasonable suspicion that he was, or had been, engaged in criminal activity.....	14
III. Santiago, the passenger in Trujeque’s car, validly consented to the search of her purse.....	20
IV. Sufficient evidence established that the defendants were accomplices to the owner of the purse and maintained constructive possession over its contents and that they had constructive possession over the drugs and guns found in their respective bedrooms and closets in their apartment.	22
V. Sufficient evidence established that the defendants were armed with firearms during counts 2 and 3 (Molina) and count 4 (Trujeque).....	30
a. <i>Standard of Review</i>	30
b. <i>Nexus</i>	31
VI. No <i>Brady</i> violation occurred regarding the purported shopping bag allegedly present in the trunk of Trujeque’s car.	39
VII. The trial court properly denied defendants’ motion to disclose the identity of the informant.....	43
VIII. Testifying officers provided proper opinion and inferential testimony based on their training and experience.	47
IX. As applied to the defendants the alien in possession of a firearm statute is lawful.....	53

X.	The trial court did not abuse its discretion when it determined that Trujeque’s drug crimes were not the same criminal conduct as each other and the firearm crimes.	61
	<i>a. Criminal Intent – Statutory and Objective</i>	62
	<i>b. Same Time and Place</i>	65
XI.	The maximum term of imprisonment that is doubled under RCW 69.60.535 is the statutory maximum and not the standard range.	67
XII.	In the event the State substantially prevails on appeal it will not seek appellate costs.	69
	CONCLUSION.....	69

TABLE OF AUTHORITIES

Cases

<i>Alleyne v. U.S.</i> , 570 U.S. 99, 133 S.Ct. 2151, 2162, 186 L.Ed.2d 314 (2013).....	64
<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).....	64, 68
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).....	64, 68
<i>City of Bellevue v. Lorang</i> , 140 Wn.2d 19, 992 P.2d 496 (2000).....	55
<i>Graham v. Richardson</i> , 403 U.S. 365, 91 S.Ct. 1848 (1971) .	56, 57, 58, 60
<i>Henderson v. U.S.</i> , --- U.S. ----, 135 S.Ct. 1780, 191 L.Ed.2d 874 (2015)	25, 26
<i>Hsieh v. Civil Serv. Comm'n</i> , 79 Wn.2d 529, 488 P.2d 515 (1971).....	56
<i>In re Benn</i> , 134 Wn.2d 868, 952 P.2d 116 (1998).....	40
<i>In re Hutchinson</i> , 147 Wn.2d 197, 53 P.3d 17 (2002).....	41
<i>In re Rangel</i> , 99 Wn.App. 596, 996 P.2d 620 (2000).....	63
<i>Island County v. State</i> , 135 Wn.2d 141, 955 P.2d 377 (1998).....	54
<i>Jensen v. Hennesford</i> , 185 Wn. 209, 53 P.2d 607 (1936).....	55
<i>Johnson v. United States</i> , 195 F.2d 673 (8th Cir. 1952).....	24
<i>Michigan v. Summers</i> , 452 U.S. 692, and n. 12, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981).....	16
<i>New York v. Ferber</i> , 458 U.S. 747, 102 S.Ct. 3348 (1982).....	55
<i>Pasado's Safe Haven v. State</i> , 162 Wn.App. 746, 259 P.3d 280, 285 (2011).....	55
<i>Rovario v. U.S.</i> , 353 U.S. 53, 77 S.Ct. 623 (1957).....	44
<i>Seattle v. Heatley</i> , 70 Wn.App. 573, 854 P.2d 658 (1993).....	47
<i>Seattle v. Shepherd</i> , 93 Wn.2d 861, 613 P.2d 1158 (1980).....	54
<i>State v. Acrey</i> , 148 Wn.2d 738, 64 P.3d 594 (2003).....	16
<i>State v. Anderson</i> , 51 Wn.App. 775, 755 P.2d 191 (1988).....	15, 55
<i>State v. Atchley</i> , 142 Wn.App. 147, 173 P.3d 323 (2007).....	45
<i>State v. Avendano-Lopez</i> , 79 Wn.App. 706, 904 P.2d 324 (1995).....	48, 49
<i>State v. Aver</i> , 109 Wn.2d 303, 745 P.2d 479 (1987).....	54
<i>State v. Barajas</i> , 88 Wn.App. 387, 960 P.2d 940 (1997).....	68
<i>State v. Barber</i> , 118 Wn.2d 335, 823 P.2d 1068 (1992).....	13
<i>State v. Barnes</i> , 153 Wn.2d 378, 103 P.3d 1219 (2005).....	63
<i>State v. Bauer</i> , 98 Wn.App. 870, 991 P.2d 668 (2000).....	44
<i>State v. Blade</i> , 126 Wn.App. 174, 107 P.3d 775 (2005).....	68
<i>State v. Blake</i> , 172 Wn.App. 515, 298 P.3d 769 (2012).....	47, 49
<i>State v. Bustamante-Davila</i> , 138 Wn.2d 964, 981, 983 P.2d 590 (1999)	20

<i>State v. Callahan</i> , 77 Wn.2d 27, 459 P.2d 400 (1969)	25
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	23
<i>State v. Cantabrana</i> , 83 Wn. App. 204, 921 P.2d 572 (1996).....	25
<i>State v. Casal</i> , 103 Wn.2d 812, 699 P.2d 1234 (1985).....	44, 45
<i>State v. Chavez</i> , 163 Wn.2d 262, 180 P.3d 1250 (2008)	54
<i>State v. Chenoweth</i> , 185 Wn.2d 218, 370 P.3d 6 (2016)	62, 66
<i>State v. Chouinard</i> , 169 Wn.App. 895, 282 P.3d 117 (2012).....	25, 26
<i>State v. Cleppe</i> , 96 Wn.2d 373, 635 P.2d 435 (1981).....	44, 45, 46
<i>State v. Collins</i> , 76 Wn. App. 496, 501-02, 886 P.2d 243 (1995), <i>review denied</i> , 126 Wn.2d 1016, 894 P.2d 565 (1995)	24, 49
<i>State v. Cruz</i> , 77 Wn.App. 811, 894 P.2d 573 (1995)	48, 49, 68
<i>State v. Cunningham</i> , 116 Wn.App 219, 65 P.3d 325 (2003).....	13
<i>State v. Day</i> , 161 Wn.2d 889, 168 P.3d 1265 (2007)	14
<i>State v. Delmarter</i> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980)	23
<i>State v. Demery</i> , 144 Wn.2d 753, 30 P.3d 1278 (2001)	48
<i>State v. Eckenrode</i> , 159 Wn.2d 488, 150 P.3d 1116 (2007).....	30, 31, 33
<i>State v. Enriquez</i> , 45 Wn.App. 580, 725 P.2d 1384 (1986).....	45
<i>State v. Ferrier</i> , 136 Wn.2d 103, 960 P.2d 927 (1998)	20, 21, 22
<i>State v. French</i> , 157 Wn.2d 593, 141 P.3d 54 (2006).....	61
<i>State v. Fuentes</i> , 183 Wn.2d 149, 352 P.3d 152 (2015) ..	14, 15, 16, 17, 18, 19, 20
<i>State v. Galista</i> , 63 Wn. App. 833, 838, 822 P.2d 303 (1992)	23
<i>State v. Garnier</i> , 52 Wn.App. 657, 763 P.2d 209 (1988)	66
<i>State v. George</i> , 146 Wn.App. 906, 193 P.3d 693 (2008)	25
<i>State v. Gladstone</i> , 76 Wn.2d 306, 313, 474 P.2d 274 (1970).....	24
<i>State v. Glover</i> , 116 Wn.2d 509, 806 P.2d 760 (1991).....	15
<i>State v. Graciano</i> , 176 Wn.2d 531, 295 P.3d 219 (2013).....	61
<i>State v. Grantham</i> , 84 Wn.App. 854, 932 P.2d 657 (1999).....	63
<i>State v. Gurske</i> , 155 Wn.2d 134, 118 P.3d 333 (2005).....	30, 31, 32, 33
<i>State v. Guzman-Cuellar</i> , 47 Wn.App. 326, 734 P.2d 966 (1987)	16
<i>State v. Harris</i> , 91 Wn.2d 145, 588 P.2d 720 (1978)	44, 45, 56, 59
<i>State v. Hayes</i> , 81 Wn.App. 425, 914 P.2d 788 (1996)	29, 38
<i>State v. Hayes</i> , 81 Wn.App. 425, 914 P.2d 788 (1996) <i>rev. denied</i> 130 Wn.2d 1013 (1996).....	23
<i>State v. Heritage</i> , 152 Wn.2d 210, 95 P.3d 345 (2004).....	16
<i>State v. Hernandez</i> , 95 Wn.App. 480, 976 P.2d 165 (1999).....	62, 63
<i>State v. Hernandez-Mercado</i> , 124 Wn.2d 368, 879 P.2d 283 (1994) 54, 56, 57, 58	
<i>State v. Houston-Sconiers</i> , 188 Wn.2d 1, 391 P.3d 409 (2017)	30, 31
<i>State v. Howerton</i> , 187 Wn.App. 357, 348 P.3d 781 (2015)	14
<i>State v. Hughes</i> , 154 Wn.2d 118, 110 P.3d 192 (2005).....	56

<i>State v. Ibrahim</i> , 164 Wn. App. 503, 269 P.3d 292 (2011)	54, 56, 58, 60
<i>State v. Jorgenson</i> , 179 Wn. 2d 145, 312 P.3d 960 (2013)	54, 57
<i>State v. Kennedy</i> , 107 Wn.2d 1, 726 P.2d 445 (1986)	16, 17, 20
<i>State v. Khounvichai</i> , 149 Wn.2d 557, 69 P.3d 862 (2003).....	21
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007)	48, 50, 51
<i>State v. Krantz</i> , 24 Wn.2d 350, 164 P.2d 453 (1945)	57, 58
<i>State v. Laskowski</i> , 88 Wn.App. 858 , 950 P.2d 950 (1997).....	15
<i>State v. Lee</i> , 147 Wn.App. 912, 199 P.3d 445 (2008)	15
<i>State v. Lessley</i> , 118 Wn.2d 773, 827 P.2d 996 (1992)	61
<i>State v. Lord</i> , 161 Wn.2d 276, 165 P.3d 1251 (2007)	40
<i>State v. Lua</i> , 62 Wn.App. 34, 813 P.2d 588 (1991).....	68
<i>State v. Massey</i> , 68 Wn.2d 88, 411 P.2d 422 (1966)	43, 46
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	41
<i>State v. McGrew</i> , 156 Wn.App. 546, 234 P.3d 268 (2010)	64, 66
<i>State v. Mercer</i> , 45 Wn.App. 769, 727 P.2d 676 (1986)	14
<i>State v. Mills</i> , 80 Wn.App. 231, 907 P.2d 316 (1995).....	29, 38
<i>State v. Montgomery</i> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	49, 50, 51
<i>State v. Mullen</i> , 171 Wn.2d 881, 259 P.3d 158 (2011).....	39, 40, 41
<i>State v. Myers</i> , 133 Wn.2d 26, 941 P.2d 1102 (1997)	55
<i>State v. Neff</i> , 163 Wn.2d 453, 181 P.3d 819 (2008) ...	30, 31, 32, 33, 34, 37
<i>State v. O'Neal</i> , 159 Wn.2d 500, 150 P.3d 1121 (2007) ..	30, 31, 32, 33, 38
<i>State v. Petrina</i> , 73 Wn.App. 779, 871, P.2d 637 (1994)	43, 44, 46
<i>State v. Polk</i> , 187 Wn.App. 380, 348 P.3d 1255 (2015).....	62, 63
<i>State v. Porter</i> , 133 Wn.2d 177, 942 P.2d 974 (1997).....	65
<i>State v. Price</i> , 103 Wn.App 845, 14 P.3d 841 (2000).....	62, 65, 66
<i>State v. Quaale</i> , 177 Wn.App. 603, 312 P.3d 726 (2013)	47
<i>State v. Raleigh</i> , 157 Wn.App. 728, 238 P.3d 1211 (2010).....	25
<i>State v. Reichert</i> , 158 Wn. App. 374, 242 P.3d 44 (2010).....	26, 29
<i>State v. Rodriguez</i> , 61 Wn.App. 812, 812 P.2d 868 (1991).....	62, 63
<i>State v. Ruem</i> , 179 Wn.2d 195, 313 P.3d 1156 (2013)	21, 22
<i>State v. Russell</i> , 180 Wn.2d 860, 330 P.3d 151 (2014).....	20, 21
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)	23
<i>State v. Samsel</i> , 39 Wn.App. 564, 694 P.2d 670 (1985).....	14
<i>State v. Sanders</i> , 66 Wn.App. 380, 832 P.2d 1326 (1992)	48
<i>State v. Santacruz</i> , 132 Wn.App. 615, 133 P.3d 484 (2006)	14
<i>State v. Schelin</i> , 147 Wn.2d 562, 55 P.3d 632 (2002)	31, 32, 33
<i>State v. Shoemaker</i> , 85 Wn.2d 207, 533 P.2d 123 (1975)	20, 21
<i>State v. Silva-Baltazar</i> , 125 Wn.2d 472, 886 P.2d 138 (1994)	68
<i>State v. Simonson</i> , 91 Wn.App. 874, 960 P.2d 955 (1998) 32, 33, 35, 37, 38	
<i>State v. Sims</i> , 119 Wn.2d 138, 829 P.2d 1075 (1992).....	65
<i>State v. Smith</i> , 67 Wn.App 81, 834 P.2d 26 (1992)	13

<i>State v. Staley</i> , 123 Wn.2d 794, 872 P.2d 502 (1994)	25
<i>State v. Stockmyer</i> , 136 Wn.App. 212, 148 P.3d 1077 (2006).....	66
<i>State v. Strandy</i> , 49 Wm.App. 537, 745 P.2d 43 (1987).....	48
<i>State v. Summers</i> , 107 Wn.App. 373, 28 P.3d 780, 43 P.3d 526 (2001) .	26,
29	
<i>State v. Tagas</i> , 121 Wn.App. 872, 90 P.3d 1088 (2004)	21, 22
<i>State v. Thein</i> , 138 Wn.2d 133, 977 P.3d 582 (1999).....	15
<i>State v. Thetford</i> , 109 Wn.2d 392, 745 P.2d 496 (1987)	45
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004)	40, 42
<i>State v. Tili</i> , 139 Wash.2d 107, 985 P.2d 365 (1999)	63, 64
<i>State v. Toennis</i> , 52 Wn.App. 176, 758 P.2d 539 (1988).....	50
<i>State v. Valdobinos</i> , 122 Wn.2d 270, 858 P.2d 199 (1993).....	33
<i>State v. Vargas</i> , 58 Wn.App 391, 793 P.2d 455 (1990).....	45, 46
<i>State v. Vazquez</i> , 66 Wn.App. 573, 832 P.2d 883 (1992).....	45, 46
<i>State v. Vike</i> , 125 Wn.2d 407, 885 P.2d 824 (1994)	61, 63
<i>State v. Vlacil</i> , 645 P.2d 677, 28 A.L.R. 4 th 1086 (Utah 1982)	57, 58
<i>State v. Walton</i> , 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).....	23
<i>State v. We</i> , 138 Wn.App. 716, 158 P.3d 1238 (2007)	41
<i>State v. Williams</i> , 102 Wn.2d 733, 689 P.2d 1065 (1984).....	15
<i>State v. Williams</i> , 144 Wn.2d 197, 26 P.3d 890 (2001).....	55, 59
<i>State v. Wilson</i> , 136 Wn.App 596, 150 P.3d 144 (2007)	62
<i>State v. Witherrite</i> , 184 Wn.App. 859, 33 P.3d 992 (2014).....	21, 22
<i>State v. Young</i> , 62 Wn.App. 895, 802 P.2d 829 (1991)	50
<i>Strickler v. Greene</i> , 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)	
.....	39
<i>Tunstall ex. rel. Tunstall v. Bergeson</i> , 141 Wn.2d 201, 5 P.3d 691 (2000)	
.....	54
<i>United States ex rel. Turner v. Williams</i> , 194 U.S. 279, 24 S.Ct. 719	
(1904).....	57, 58, 60
<i>United States v. Al-Rekabi</i> , 454 F.3d 1113, 1118 (10th Cir. 2006).....	25
<i>Wash. State Republican Party v. Pub. Disclosure Comm'n</i> , 141 Wn.2d	
245, 282 n.14, P.3d 808 (2000).....	55
Statutes	
RCW 5.60.060(5).....	43
RCW 69.50.401	67
RCW 69.50.401(a)	67
RCW 69.50.435	67, 68, 69
RCW 69.50.435(1).....	67
RCW 69.60.535	67
RCW 9.41.171	53, 54, 57, 58, 59, 60

RCW 9.41.171(1) and (2)	60
RCW 9.41.171(3).....	54, 57, 59, 60
RCW 9.41.175	54, 57, 59, 60
RCW 9.94A.[589](1)(a).....	62, 66
RCW 9.94A.533(3).....	30
RCW 9.94a.533(6).....	68
RCW 9.94A.589 (1)(a)	61
RCW 9A.08.020(3)(a)	24
RCW 9A.080.020(2)(c)	23

Other Authorities

Deon J. Nossel, Note: the Admissibility of Ultimate Issue Expert Testimony by Law Enforcement Officers in Criminal Trials, 93 COLUM. L.REV. 231, 244 (1993)	50
<i>Washington House Bill Report</i> , 2009 Reg. Sess. H.B. 1052 (February 17, 2009)	57, 59

Rules

CrR 3.6.....	13
CrR 4.7.....	43
CrR 4.7(f)(2)	43
ER 701	47
GR 14.1(a).....	29, 38, 62

Constitutional Provisions

First Amendment	55
Fourteenth Amendment	56

Unpublished Cases

<i>State v. Baza</i> , 197 Wn.App. 1072, 2017 WL 589189 at 2 FN 8.....	62
<i>State v. McCabe</i> , 174 Wn.App. 1080, 2013 WL 2246306 at 3-4	29, 38
<i>State v. Ohnemus</i> , 194 Wn.App. 1039, 2016 WL 3514165 at 3.....	62
<i>State v. Sadler</i> , 198 Wn.App. 1023, 2017 WL 1137116 at 5.....	62

RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court erred when it did not enter written findings and conclusions following the CrR 3.6 hearing but the error is harmless because the trial court's oral findings are sufficient to permit review of the suppression issues.
- II. The trial court properly concluded that the stop of Trujeque was lawful because there was a reasonable suspicion that he was, or had been, engaged in criminal activity.
- III. The passenger in Trujeque's car validly consented to the search of her purse, which contained heroin.
- IV. Sufficient evidence established that the defendants were accomplices to the owner of the purse and maintained constructive possession over its contents and that they had constructive possession over the drugs and guns found in their respective bedrooms and closets in their apartment.
- V. Sufficient evidence established that the defendants were armed with firearms during counts 2 and 3 (Molina) and count 4 (Trujeque).
- VI. No *Brady* violation occurred regarding the purported shopping bag allegedly present in the trunk of Trujeque's car.
- VII. The trial court properly denied defendants' motion to disclose the identity of the informant.
- VIII. Testifying officers provided proper opinion and inferential testimony based on their training and experience.
- IX. As applied to the defendants, the alien in possession of a firearm statute is lawful.

- X. The trial court did not abuse its discretion when it determined that Trujeque's drug crimes were not the same criminal conduct as each other and the firearm crimes.**
- XI. The maximum term of imprisonment that is doubled under RCW 69.60.535 is the statutory maximum and not the standard range.**
- XII. In the event the State substantially prevails on appeal it will not seek appellate costs.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Miguel Trujeque-Magana (Trujeque) and Luciano Molina-Rios (Molina) were charged by a Third Amended information with multiple drug and firearm crimes. CP 112-16.¹ Both defendants were charged in count 1 with Possession of a Controlled Substance with Intent to Deliver (Heroin), which included accomplice liability language. CP 112. Trujeque was further charged in count 4 with Possession of a Controlled Substance with Intent to Deliver (Cocaine), which included two firearm enhancements and a school bus stop enhancement, and in counts 6, 7, and 8 with two counts of Unlawful Possession of a Firearm in the First Degree and one count of Alien in Possession of Firearm respectively. CP 112-16. Molina was further charged in count 2 with Possession of a Controlled

¹ The State intends to cite to Trujeque's Clerk's Papers except where noted and to cite Trujeque's Report of Proceedings since it contains all the relevant hearings within one file, which is appreciated.

Substance with Intent to Deliver (Methamphetamine), in count 3 with Possession of a Controlled Substance with Intent to Deliver (Cocaine), and in counts 5 and 9 with Possession of a Stolen Firearm and Alien in Possession of a Firearm. CP 112-16. Both counts 2 and 3 included two firearm enhancements and a school bus stop enhancement. CP 112-13. Additionally, all of the drug crimes charged included the aggravator that alleged that the offense was a major violation of the Uniform Controlled Substances Act. CP 112-14.

Prior to trial the defendants filed CrR 3.6 motions seeking to suppress the drug evidence found as a result of the stops of the defendants' vehicles to include the drugs, guns, and cash money found in their respective bedrooms in their apartment pursuant to a search warrant. CP 27-36; CP 12-14 (Molina). The trial court, the Honorable Robert Lewis, in an oral ruling denied the defendants' motions but failed to enter written findings and conclusions. RP 334-42. The defendants also filed motions seeking disclosure of the confidential informant's identity and an *in camera* hearing with informant. CP 43-49; CP 13-14 (Molina). The trial court denied these motions as well. RP 58-62.

The parties proceeded to a jury trial beginning on June 27, 2016 and concluding with jury verdicts on June 30, 2016. Towards the end of the trial Trujeque filed a motion to dismiss pursuant to what he alleged

was a *Brady* violation. RP 1072-76; CP 276-79. The trial court denied the motion. RP 1076. The jury found the defendants guilty on all counts, save count 5,² and found all of the firearm enhancements as well as the aggravating circumstance on counts 2, 3 and 4. CP 337-344, 594; CP 106-116 (Molina). After arguments concerning same criminal conduct, the trial court concluded that for Trujeque counts 6, 7, and 8 were the same criminal conduct and that for Molina counts 2 and 3 were the same criminal conduct. RP 1271-79; CP 359-366, 433; CP 191 (Molina). The trial court then sentenced each defendant to standard range sentences with counts running concurrently and enhancements running consecutively³ with Trujeque receiving 240 months and Molina receiving 332 months. RP 1292-95; CP 431-442, 444-45; CP 190-200, 203-04 (Molina). Each defendant filed a timely notice of appeal. CP 449; CP 205 (Molina).

B. STATEMENT OF FACTS

In the early morning hours of November 5, 2016, as part of a continuing investigation and following a traffic stop of the defendants, the Clark-Vancouver Regional Drug Task Force (DTF) executed a search warrant at the two-bedroom apartment in which Trujeque, Molina, and Juana Santiago-Santos (Santiago) resided. RP 624-26, 910-11, 950, 957-

² This count was dismissed at the close of the State's case as it did not present evidence that the firearm at issue was stolen. RP 1033-34.

³ Molina's school bus stop enhancements were run concurrently. CP 194, 204 (Molina).

60, 978, 1198-99,⁴ 1206, 1218-19;⁵ CP 67-81; Ex. 115. Inside the apartment⁶ the DTF located over \$180,000, 4 loaded,⁷ operational firearms, 1 inoperable AR-style rifle, 2 pound-size digital scales, drug notes, 1,518 grams (3.35 lbs) of cocaine, 3,144 grams (6.9 lbs) of methamphetamine, and 1,807 grams (4.12 lbs) of noscapine, a naturally-occurring alkaloid of the opium poppy that is used as a cutting agent to provide volume to a controlled substance like heroin. RP 599-601, 642-43, 660-61, 713, 715-720, 783-86, 929-933, 962-63, 966-67, 1007-09, 1011; Ex. 60, Ex. 61, Ex. 115, Ex. 134, Ex. 135.

The investigation that led to the execution of a search warrant at the apartment of Trujeque and Molina began in the fall of 2015 and involved the Multnomah County Sheriff's Office. CP 67-81. As part of this investigation, Multnomah County deputies used a confidential informant (CI) to conduct two controlled buys of drugs in Clark County, Washington from a person who was later identified as Molina. RP 73-74, 87-93, 122-25, 147-48, 178-79, 195-96; CP 70-72. In conducting and

⁴ Trujeque conceded that he resided in the apartment and that the bedroom (#7) associated with him throughout trial was in fact his.

⁵ Molina conceded that he resided in the apartment.

⁶ Aside from the heroin found in Santiago's purse at the stop of the vehicles, each defendant was charged based on the contraband located in their respective bedroom and closet. These specific facts will be discussed below as they relate to each defendant's argument.

⁷ One of the firearms found in Trujeque's closet had a loaded magazine half-hanging in it at the time of discovery. RP 717, 784; Ex. 117.

observing the controlled buys the Multnomah deputies were able to associate Molina with a specific apartment in Vancouver and a Toyota Scion, which Molina was driving and utilizing to sell drugs.⁸ RP 73-78, 87-93, 122-25, 147-49, 178-79, 181, 195-96; CP 70-72. Next, Multnomah deputies learned from their CI that on November 4, 2015 Molina would be heading up to the Seattle area to obtain a new supply of drugs.⁹ RP 76-77, 127, 179-180; CP 73. The deputies decided they would follow Molina up north and surveil him. RP 77, 127, 180-81. Additionally, the deputies contacted Detective Shane Hall with the DTF to inform him about what they knew and would later inform him of the observations made during their surveillance. RP 74-76, 84-85, 226-234.

On November 4, 2015, when the deputies arrived at the defendants' apartment the Scion was not present so they decided to drive north on I-5 with the hope of finding it on the freeway. RP 126-27, 153-54, 180-82. Molina was spotted by deputies driving the Scion in the area north of Joint Base Lewis-McChord and they began surveillance of him by

⁸ Power records for the apartment were associated with a Sandy Gongora-Chi. RP 80-84, 134-35. Meanwhile, the Scion was registered to Santiago. RP 7779, 82-84, 104.

⁹ The jury did not hear about the controlled buys, any information the CI provided to law enforcement, or any of the incriminating statements made by Santiago and Molina following the stop of the vehicles. RP 55-56. Instead, the jury learned that there was an investigation and it heard testimony regarding the surveillance of defendants beginning with law enforcement encountering Molina while he was driving on I-5 north. RP 55-56. Additionally, the law enforcement testimony at the CrR 3.6 hearing regarding the surveillance largely mirrored the testimony on the same at trial.

tailing him up to the Everett area. RP 128, 154-55, 181-82. Molina first pulled into a train station in Everett. RP 128-29, 158-59, 183-84. There Molina was observed parking in a parking spot before re-parking in another spot. RP 184. Molina waited in the Scion and never got out, but a deputy did observe a person walk towards the car and maybe exchange words with Molina. RP 184-185, 202, 221. Molina left from the train station less than 30 minutes later and parked in a business park where he stayed parked for more than an hour. RP 128-29, 158-59, 183-86, 202. In that business park was an IHOP restaurant in which deputies observed someone who looked like Molina seated with a male and female (later identified as Trujeque and Santiago). RP 129-130, 186. The three then exited the IHOP and went to the Scion while Trujeque and Santiago went to a white Honda that the deputies had not seen before.¹⁰ RP 131-32, 187. Trujeque then left the Honda and joined Molina in the Scion by entering the front passenger side. RP 132, 187.

The two men were in the Scion for a period of time before Trujeque exited, moved the Honda right next to the Scion, and then rejoined Molina in the Scion. RP 132, 187-88. While in the Scion together, and for over an hour, deputies observed Trujeque and Molina on and off of cell phones and at one point observed what both deputies believed, based

¹⁰ Sandy Gongora-Chi was the registered owner of the Honda. RP 80-84, 134-35.

on their training and experience, was the men counting money. RP 81, 83-84, 133-34, 137, 168-69, 174, 187-88, 205-06. Santiago appeared to be sleeping in the Honda during the time period Trujeque and Molina were together in the Scion. RP 587 (trial testimony)

Contemporaneous to these observations, deputies sent a picture of Trujeque back to another deputy to see if he could be identified. RP 81-82, 134-35. Trujeque was positively identified as a person who had gone by a different name¹¹ and as someone who had an Oregon state conviction for distribution of controlled substances, a Federal conviction for the same, and had been deported. RP 83,135-137, 231-32. Next, Trujeque and Molina, in the Honda and Scion respectively, left at the same time and drove together to a Safeway where they were parked for about 10 to 15 minutes. RP 137-39, 190, 216-17. The men met outside the car and spoke, but they did not go inside the store or meet anyone else. RP 190, 216-17.

The defendants next went to a mall where they parked apart before meeting up and entering the mall together with Santiago. RP 137, 139, 170, 190-91. The three subjects remained in the mall for one to two hours and came out together. RP 139-140, 191. Deputies observed Molina on a bench in a common area using a phone and Trujeque and Santiago doing what appeared to be window shopping. RP 140, 170. Deputies did not

¹¹ Jorge Gongora-Chi. RP 82-83, 230-32.

believe that any one of the three entered or exited the mall with a shopping bag. RP 139-40, 191.

Upon exiting the mall, each individual went to the vehicle with which they were previously associated and the vehicles met up and drove out of the mall together. RP 140-41, 192. Deputies attempted to continue to follow Trujeque and Molina, but both the Scion and Honda ran a red light, which prevented the deputies from following. RP 141, 191, 218. At that point, the deputies lost surveillance. RP 141. Officers described the running of the light as well as the behavior observed in the parking lots as consistent with the behavior of suspects who are attempting to avoid being followed by police or who are attempting to see if they are being followed by police. RP 192-93, 233, 237-38, 592-93 (trial testimony).¹²

The deputies next saw the Scion and Honda about two to three hours later driving southbound on I-5 near the Chehalis area. RP 141, 170-71, 194. The Scion was in front, the Honda following right behind, and for the most part the vehicles were travelling in the fast lane. RP 142, 194. Officers described this behavior as driving “in tandem” a tactic drug traffickers use wherein if the lead car gets pulled over as part of a speed

¹² One surveilling deputy testified at trial that he did not observe the defendants engage in what was referred to as “counter-surveillance.” RP 552.

trap or other traffic enforcement the second car, which contains the drugs, can continue on to its destination. RP 85, 234, 238.

Based on the probable cause from the controlled buys and the additional information obtained through the above described surveillance the Multnomah deputies and the DTF decided to conduct a vehicle interdiction on I-5 as the vehicles entered Clark County. RP 84-85, 234-35, 265-66. Thus, at about 8 PM the DTF with the assistance of Clark County deputies pulled over the Scion and Honda as they traveled southbound I-5 in Clark County. RP 235, 268. Det. Hall of the DTF, contacted the driver of the white Honda, Trujeque, who presented him with a Washington driver's license in the name of Miguel Trujeque-Magana. RP 235, 269. His passenger presented an Oregon identification card in the name of Juana Santiago-Santos. RP 242, 269. Each remained in the Honda while contacted by Det. Hall and they gave consent to search the vehicle. RP 241-42. At that point, Det. Hall asked that they exit the vehicle so that it could be searched and he noticed that Santiago exited with a purse that he described as "bulky" and placed it on the ground. RP 243.

After re-contacting Trujeque and getting few answers from him, Det. Hall mirandized and spoke with Santiago. RP 244, 279. After

Santiago agreed to speak with Det. Hall he asked if he could search her purse. RP 245. She said yes. RP 245. Det. Hall searched the purse and found a large bag at the base of the purse that looked like, and was eventually confirmed to be, 1 kilogram of heroin (2.2 lbs). RP 245, 915-16, 1006; Ex. 121. Det. Hall estimated based on his training and experience that a kilogram of heroin would cost between \$24,000 and \$28,000 and when broken down in user amounts and sold on the street that the street sales value of a kilogram of heroin was over \$100,000. RP 960-62. Santiago then told Det. Hall that she went up to Seattle with Trujeque and Molina to obtain the heroin and that Trujeque placed the heroin in her purse for safekeeping. RP 246. Santiago indicated that both Trujeque and Molina lived in the relevant apartment, that she stayed there at times, and that there were drugs, guns, and money at the apartment. RP 101-02, 250-51. After receiving Santiago's statement and discovering the heroin Trujeque was placed under arrest.

Later, Det. Hall spoke to Molina who was already outside of the Scion and had been arrested. RP 247-52, 281-82. Molina acknowledged that the police were going to find drugs, guns, and money at the apartment and that he and Trujeque traveled north to pick up drugs that they intended to bring back to the apartment. RP 252-53, 283-84. Molina also claimed

that he and Trujeque were street dealers and not the big guys. RP 253-54.¹³

Following the transport of the defendants to jail, Det. Hall authored a search warrant for their apartment. RP 254-260. The DTF, which searched the apartment pursuant to the search warrant, entered the apartment utilizing a key taken from Molina. RP 634-37, 681; Ex. 27. In executing the warrant the DTF found substantial drug, gun, and cash money evidence as catalogued above. In addition, the officers found a welcome letter as part of a lease agreement from the relevant apartment complex that listed and was signed by the defendants and Sandy Gongora-Chi on May 17, 2015 and which noted the lease term ran until April 30, 2016, mail addressed to Molina and to Santiago, Molina's Identification card, a shirt with a plaid pattern and multiple shades of blue, which appears to be the same shirt Trujeque is wearing in a photograph he is in with Santiago, and other numerous other items of male clothes in Trujeque's room. RP 637-641, 678-680, 712-718, 725-730, 734-35, 936-941, 949-951, 959-960; Ex. 114, Ex. 115, Ex. 161, Ex. 162, Ex. 163. Notably, the officers did not find any evidence of drug use occurring in the apartment, e.g., no paraphernalia used to ingest drugs was found. RP 966-67.

¹³ Molina's statements were only admitted at the CrR 3.6 hearing.

ARGUMENT

I. The trial court erred when it did not enter written findings and conclusions following the CrR 3.6 hearing but the error is harmless because the trial court’s oral findings are sufficient to permit review of the suppression issues.

A trial court’s failure to submit written findings of fact and conclusions of law following a CrR 3.6 hearing is considered harmless error “where the trial court’s oral findings are sufficient to permit appellate review.” *State v. Smith*, 67 Wn.App 81, 87, 834 P.2d 26 (1992); *State v. Cunningham*, 116 Wn.App 219, 226, 65 P.3d 325 (2003). Oral findings are sufficient to permit appellate review of a *Terry* stop when they are “specific” enough to “determine whether the stop was based on legally permissible and adequate reasons.” *State v. Barber*, 118 Wn.2d 335, 345, 823 P.2d 1068 (1992).

Here, Trujeque properly complains that the trial court failed to enter written findings of fact and conclusions of law as required. Br. of App. (Trujeque) at 8. Nonetheless, the error in this case is harmless as the trial court provided expounded at length on facts considered and the reasons why he concluded the stop of Trujeque was legally permissible. RP 334-341. Because of the comprehensiveness of the trial court’s oral ruling the legal issue is sufficiently presented for this court to review.

II. The trial court properly concluded that the stop of Trujeque was lawful because there was a reasonable suspicion that he was, or had been, engaged in criminal activity.

It is well-settled that “[o]fficers may briefly, and without warrant, stop and detain a person they reasonably suspect is, or is about to be, engaged in criminal conduct.” *State v. Day*, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007). “[R]easonableness is measured not by exactitudes, but by probabilities.” *State v. Samsel*, 39 Wn.App. 564, 571, 694 P.2d 670 (1985). Moreover, while an “inchoate hunch” is not sufficient to justify a stop, experienced officers are not required to ignore arguably innocuous circumstances that arouse their suspicions.” *State v. Santacruz*, 132 Wn.App. 615, 619–20, 133 P.3d 484 (2006). Similarly, “officers do not need to rule out all possibilities of innocent behavior before they make a stop.” *State v. Fuentes*, 183 Wn.2d 149, 163, 352 P.3d 152 (2015). In fact, “the courts have repeatedly encouraged law enforcement officers to investigate suspicious situations.” *State v. Howerton*, 187 Wn.App. 357, 365, 348 P.3d 781 (2015) (quoting *State v. Mercer*, 45 Wn.App. 769, 775, 727 P.2d 676 (1986)).

In determining whether the grounds for which an officer decided to stop someone were well-founded, courts must look at “the totality of circumstances known to the officer at the inception of the stop.” *State v.*

Lee, 147 Wn.App. 912, 917, 199 P.3d 445 (2008) (quotation omitted); *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). The totality of the circumstances can include “the officer’s training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, . . . the amount of physical intrusion on the suspect’s liberty” and other relevant factors to include the suspect’s criminal history and the people with whom the suspect is interacting. *Fuentes*, 183 Wn.3d at 158, 162-64; *State v. Laskowski*, 88 Wn.App. 858, 859-861, 950 P.2d 950 (1997); *State v. Thein*, 138 Wn.2d 133, 148, 977 P.3d 582 (1999) (noting that a suspect’s prior convictions “may be used in determining probable cause, particularly when a prior conviction is for a crime of the same general nature”) (citations omitted).¹⁴

The development of reasonable, articulable suspicion entitles the officer to “maintain the status quo momentarily while obtaining more information.” *State v. Williams*, 102 Wn.2d 733, 737, 689 P.2d 1065 (1984) (quotation omitted). Accordingly, the state of the law countenances that police officers investigating crime are “permitted to act before their reasonable belief is verified.” *State v. Anderson*, 51 Wn.App. 775, 780, 755 P.2d 191 (1988) (citation omitted). In addition, the “detaining officer

¹⁴ If a suspect’s prior convictions are a proper factor in determining probable cause it would be proper to utilize the same for the lesser standard of a reasonable suspicion. Trujeque properly does not dispute this point, but correctly asserts that standing alone a suspect’s criminal history cannot provide a lawful basis to stop. Brief of Appellant at 12.

may ask a moderate number of questions . . . to confirm or dispel the officer's suspicions without rendering the suspect 'in custody.'" *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004). "If the results of the initial stop dispel an officer's suspicions, then the officer must end the investigative stop." *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003).

But "[t]he scope of an investigatory stop . . . may be enlarged or prolonged as required by the circumstances if the stop confirms or arouses further suspicions." *State v. Guzman-Cuellar*, 47 Wn.App. 326, 332, 734 P.2d 966 (1987). This is unsurprising as the Supreme Court has acknowledged that "[i]f the purpose underlying a *Terry* stop—investigating possible criminal activity—is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief time period involved in *Terry*." *Michigan v. Summers*, 452 U.S. 692, 700, and n. 12, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981).

State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986) and *State v.*

Fuentes, supra, are instructive. In *Kennedy* an officer:

went to investigate neighbor complaints about short-stay foot traffic going in and out of the "Smith house." The officer had information from a reliable informant that Smith used this house to sell drugs. The officer saw Kennedy leave the house and get into a maroon car, but the officer did not see anything in Kennedy's hands or see other suspicious activity. Nevertheless, the officer stopped

Kennedy on suspicion of purchasing marijuana. Although the informant told the officer that Kennedy bought marijuana from Smith in the past, only went to Smith's house to buy drugs, and drove a maroon car, the officer had no specific information that Kennedy bought drugs or intended to buy drugs that particular morning. Nevertheless, we held that reasonable suspicion supported the stop based on the present information about possible ongoing drug activity that morning—the short visits—and information about past drug transactions at Smith's house.

Fuentes, 183 Wn.2d at 161-62 (summarizing *Kennedy*) (internal citations omitted). In *Fuentes* officers pulled over the defendant's car after she departed an apartment they were surveilling. *Id.* at 156-57, 162-63. They suspected she had been involved in drug activity because they:

knew about past drug activity at [the] apartment. Police made controlled buys from [the resident of the apartment] and conducted a search of the apartment 11 months before and found drugs. The officers also testified they had recent information from individuals arrested on drug-related charges that [the resident of the apartment] was still dealing drugs. Additionally, officers observed short-stay foot traffic that morning (10 visits between 10 p.m. and midnight) that suggested ongoing drug transactions. . . .

Id. at 162. Furthermore, the defendant in *Fuentes* entered the apartment carrying a plastic bag, was inside for only a brief amount of time (approximately 5 minutes), and then left carrying a bag that contained noticeably less content. *Id.* at 156-57, 162-63. Based on the above, *Fuentes*, mindful that “officers do not need to rule out all possibilities of innocent behavior before they make a stop,” concluded that the officers

had a reasonable suspicion that the defendant was involved in drug activity. *Id.* at 163. *Fuentes* also rebutted the defendant's argument that her mere proximity to another independently suspected of criminal activity (the resident of the apartment) was what was used to justify the stop by noting that it was not *just* her proximity to that individual but her short-stay visit to *his* apartment while carrying a bag that appeared altered at her departure. *Id.*

Here, the trial court correctly denied Trujeque's motion to suppress because based on the totality of circumstances known to the officers at the time of the stop there was a reasonable suspicion that Trujeque was, or had been, involved in criminal drug activity. The CI's recent controlled buys with Molina that involved both the Scion and the relevant apartment combined with the information from the CI that on that very day, November 4, 2015, Molina would be heading to Seattle to pick up a new supply of drugs was more than enough information to support a suspicion that when deputies encountered Molina driving northbound on I-5 not far from the Seattle area that he was on his way to pick up drugs.

Once Trujeque showed up with Santiago, the registered owner of the Scion, in a Honda registered to Sandy Gongora-Chi, the person registered for power at Molina's apartment, he was not just in proximity to someone believed to be involved in criminal activity but associated with

him. Once officers learned that Trujeque had twice been convicted of drug distribution crimes it was reasonable to assume that the two were working together. While the activities that Molina and Trujeque individually and collectively engaged in while in the Everett area all could have been innocuous, “officers do not need to rule out all possibilities of innocent behavior before they make a stop.” *Fuentes*, 183 Wn.2d 149, 163. Instead, a reasonable inference, enlightened by the opinions and observations of experienced police officers, is that the two men were driving around the area stopping at multiple locations to avoid detection and waiting for their source of the drug supply to be ready for them. RP 100-02, 236-238. As the trial court concisely concluded, “it seems like a reasonable inference that if a person is going to the Seattle area to get . . . their supply of drugs, they’re going to try to meet somebody in the Seattle area and re-up their supply of drugs.” RP 336.

The above inferences are buttressed by other observations of the surveilling deputies to include their reasonable belief based on their training and experience that, sometime while seated next to each other in the parked Scion for over an hour, the two were counting money, the two drove their cars through a red light in case they were being followed by police, and the two drove “in tandem” on I-5 southbound in an attempt to make sure the car with the drugs did not get pulled over. RP 81, 83-85,

133-34, 137, 141, 168-69, 174, 187-88, 191-93, 205-06, 233-34, 237-38.

Thus, like in *Kennedy* and *Fuentes*, the reasonable suspicion that Trujeque was involved in criminal activity was based on more than his proximity to a criminal.

III. Santiago, the passenger in Trujeque’s car, validly consented to the search of her purse.

“[C]onsent to a warrantless search is one of the narrow exceptions to the warrant requirement” and the State has the burden to show that the consent was voluntarily given. *State v. Ferrier*, 136 Wn.2d 103, 111, 960 P.2d 927 (1998); *State v. Russell*, 180 Wn.2d 860, 871, 330 P.3d 151 (2014) (citing *State v. Bustamante–Davila*, 138 Wn.2d 964, 981, 983 P.2d 590 (1999)). Simply put, the “[p]olice do not need a warrant for searches if they have valid consent.” *Russell*, 180 Wn.2d at 871. The validity of a defendant’s consent to search is “a *question of fact* dependent on the totality of the circumstances.” *Id.* (emphasis added) (citation omitted); *State v. Shoemaker*, 85 Wn.2d 207, 211-12, 533 P.2d 123 (1975).

In employing this totality of the circumstances test, the court should consider “(1) whether Miranda warnings had been given prior to obtaining consent; (2) the degree of education and intelligence of the consenting person; and (3) whether the consenting person had been advised of his right not to consent” as well as any express or implied

claims of police authority to search. *Id.* at 872-73 (quoting *Shoemaker*, 85 Wn.2d at 212); *State v. Ruem*, 179 Wn.2d 195, 207, 313 P.3d 1156 (2013). No single factor, however, is dispositive. *Ruem*, 179 at 207; *Russell*, 180 Wn.2d at 872.

When a search does not involve the inside of someone's home, "Ferrier warnings need not be given prior to obtaining consent." *State v. Witherrite*, 184 Wn.App. 859, 864, 33 P.3d 992 (2014). Thus, for example, the validity of a suspect's consent "to the search of her purse d[oes] not depend on the officer advising her of her right to refuse consent to search" or of her other *Ferrier* rights (the right to limit the scope of the search and the right to terminate the search). *State v. Tagas*, 121 Wn.App. 872, 878, 90 P.3d 1088 (2004). The Court of Appeal's decisions, *supra*, declining to extend the *Ferrier* to consent searches outside the home are consistent with our Supreme Court's continuous reiterations that *Ferrier* "warnings 'are required *only* when police seek entry [(into the home)] to conduct a consensual search for contraband or evidence of a crime.'" *Ruem*, 179 Wn.2d at 205-06 (emphasis added) (quoting *State v. Khounvichai*, 149 Wn.2d 557, 559, 69 P.3d 862 (2003)).

Trujeque claims that the search of Santiago's purse was unlawful because she was not told she could refuse to consent and asks this court to hold that in order to obtain lawful consent a person must be informed of

their *Ferrier* rights. Br. of App. at 13 (Trujeque). As noted above, and as Trujeque properly concedes, the Court of Appeals in *Witherrite* and *Tagas* has expressly declined to extend *Ferrier* to searches outside of people's homes. *Id.*; 184 Wn.App. 859; 121 Wn.App. 872. That the Court of Appeals would so conclude is compelled by our Supreme Court's continuous reiterations that *Ferrier* "warnings 'are required *only* when police seek entry [(into the home)] to conduct a consensual search for contraband or evidence of a crime.'" *Ruem*, 179 Wn.2d at 205-06 (emphasis added). Thus, despite Trujeque's invitation for this Court to hold differently, *Ruem, et al.*, are controlling on this issue.

Furthermore, here, consent was lawfully obtained. Det. Hall mirandized Santiago before seeking her consent and when asked if he could search the purse she replied yes. RP 244-45, 279. Consequently, the trial court, after hearing all the testimony, properly concluded that Santiago "voluntarily consented to the search of her purse." RP 339.

IV. Sufficient evidence established that the defendants were accomplices to the owner of the purse and maintained constructive possession over its contents and that they had constructive possession over the drugs and guns found in their respective bedrooms and closets in their apartment.

Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the prosecution, it permits any rational trier of fact

to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Furthermore, “specifics regarding date, time, place, and circumstance are factors regarding credibility . . .” and, thus, matters a jury best resolves. *State v. Hayes*, 81 Wn.App. 425, 437, 914 P.2d 788 (1996) *rev. denied* 130 Wn.2d 1013 (1996). In order to determine whether the necessary quantum of proof exists, the reviewing court “need not be convinced of the defendant’s guilt beyond a reasonable doubt but only that substantial evidence supports the State’s case.” *State v. Gallagher*, 112 Wn.App. 601, 613, 51 P.3d 100 (2002) (citations omitted).

Under RCW 9A.080.020(2)(c), “[a] person is legally accountable for the conduct of another person when ... [h]e or she is an accomplice of

such other person in the commission of a crime.” A person is an accomplice of another if:

(a) [w]ith knowledge that it will promote or facilitate the commission of the crime, he or she:

(i) [s]olicits, commands, encourages, or requests such other person to commit it; or

(ii) [a]ids or agrees to aid such other person in planning or committing it ...

RCW 9A.08.020(3)(a).

In order to find a person guilty as an accomplice, it must be proven that the person “shared in the criminal intent of the principal.” *State v. Gladstone*, 78 Wn.2d 306, 313, 474 P.2d 274 (1970) (quoting *Johnson v. United States*, 195 F.2d 673 (8th Cir. 1952)). An accomplice “assumes some participation in the criminal act in furtherance of the common design, either before or at the time the criminal act is committed.” *Gladstone*, 78 Wn.2d at 313 (quoting *Johnson*, 195 F.2d 673). Evidence is insufficient to prove complicity if a person is “merely present” at the scene of a crime; however, evidence is sufficient to prove complicity if that person is “present and ready to assist.” *State v. Collins*, 76 Wn. App. 496, 501-02, 886 P.2d 243 (1995), *review denied*, 126 Wn.2d 1016, 894 P.2d 565 (1995).

Possession of a controlled substance or firearm can be actual or constructive. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Actual possession requires physical custody of, or direct physical control over, the item. *State v. Cantabrana*, 83 Wn. App. 204, 206, 921 P.2d 572 (1996); *Henderson v. U.S.*, --- U.S. ----, 135 S.Ct. 1780, 1784, 191 L.Ed.2d 874 (2015). Constructive possession, on the other hand, “is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object.” *Henderson*, 135 S.Ct. at 1784 (citation omitted); *State v. Callahan*, 77 Wn.2d 27, 31 459 P.2d 400 (1969) (holding constructive possession requires dominion and control over the item). “The idea of constructive possession is designed to preclude,” for example, a felon from having control of guns while another person keeps physical custody, i.e., the idea “allow[s] the law to reach beyond puppets to puppeteers.” *Henderson* 135 S.Ct. at 1785 (quoting *United States v. Al-Rekabi*, 454 F.3d 1113, 1118 (10th Cir. 2006)). Exclusive control is not necessary to establish constructive possession as possession can be joint amongst individuals but proximity to the contraband, while a factor, is insufficient by itself to establish constructive possession. *State v. Chouinard*, 169 Wn.App. 895, 899, 282 P.3d 117 (2012); *State v. Raleigh*, 157 Wn.App. 728, 737, 238 P.3d 1211 (2010); *State v. George*, 146 Wn.App. 906, 920, 193 P.3d 693 (2008). The same

can be said for mere knowledge of the presence of contraband. *Chouinard*, 169 Wn.App. at 899 (citation omitted).

“Courts have found sufficient evidence of constructive possession, and dominion and control, in cases in which the defendant was either the owner of the premises or the driver/owner of the vehicle where contraband was found.” *Id.* at 899-900 (citing cases). In fact, when a person has dominion and control over premises, it creates a rebuttable presumption that the person has dominion and control over items on the premises. *State v. Reichert*, 158 Wn. App. 374, 390, 242 P.3d 44 (2010) (citing *State v. Summers*, 107 Wn.App. 373, 389, 28 P.3d 780, 43 P.3d 526 (2001)).

Here, both Trujeque and Molina claim that insufficient evidence supports their convictions for Count 1 – Possession of a Controlled Substance with Intent to Deliver (Heroin) based on the heroin found in Santiago’s purse. Br. of App. at 17, 21-23; Br. of App. at 7-11 (Molina). Contrary to their claims when viewing the evidence in the light most favorable to the State both defendants exercised constructive possession over the heroin found in Santiago’s purse and were accomplices to her possession. This case is a good example of how constructive possession “allow[s] the law to reach beyond puppets to puppeteers.” *Henderson* 135 S.Ct. at 1785 (quotation omitted). Based on the surveillance evidence in the Everett area it appears straightforward that Trujeque and Molina were

working together and arranging a drug deal—they were the ones together in the Scion while parked, constantly on and off their phones, and purportedly counting money in addition to doing the driving.

There is additional clarity that the defendants were in the Everett area securing drugs based on the trial evidence since at that point the surveillance evidence can viewed with the knowledge that back at the apartment there was over \$180,000, 4 loaded, operational firearms, 1 inoperable AR-style rifle, 2 pound-size digital scales, drug notes, 1,518 grams (3.35 lbs) of cocaine, 3,144 grams (6.9 lbs) of methamphetamine, and 1,807 grams (4.12 lbs) of noscapine, a substance that is used as a cutting agent to provide volume to a controlled substance like heroin. RP 599-601, 642-43, 660-61, 713, 715-720, 783-86, 929-933, 962-63, 966-67, 1007-09, 1011; Ex. 60, Ex. 61, Ex. 115, Ex. 134, Ex. 135. Additionally, the potentially innocuous explanations for Trujeque's and Molina's actions become almost implausible as it makes little sense for the three roommates to drive from Vancouver to north of Seattle to park at various parking lots, eat at an IHOP, and window shop at a mall.

Moreover, while the defendants were working in the Scion, Santiago was sleeping in the Honda. RP 587. As Trujeque concludes “[w]hatever they were doing, Santiago was not involved with them.” Br. of App. (Trujeque) at 22. That's precisely the point; Trujeque and Molina

secure the drugs, store them in Santiago's purse, and when they arrive home they reclaim the drugs. Trujeque and Molina are the puppeteers and Santiago is the puppet. Substantial evidence supports this conclusion when taking the evidence in the light most favorable to the State and establishes the defendants' constructive possession of the heroin as well as their accomplice liability.

Trujeque also claims that the State presented insufficient evidence of constructive possession to support his convictions for counts 4, 6, 7, and 8.¹⁵ Br. of App. (Trujeque) at 17-20. But Trujeque already conceded that he resided at the apartment in question and that the rooms associated with him (#7 the bedroom and #8 the closet within the bedroom) were in fact his. RP 1198-99 ("Okay he is living there. You got two separate rooms and evidence has been provided to you that Miguel Trujeque lived in one."). This was not a foolhardy concession given the evidence of the lease agreement, the photographic evidence regarding the blue shirt, the rooms (#7 and #8) filled with male clothes and clearly occupied, and the indisputable evidence that Molina lived in the other bedroom.

Additionally, he was travelling down I-5 with his roommates, one of which had the key to the apartment on his keyring while the other, in Trujeque's car, had heroin. It was reasonable for the jury to infer that the

¹⁵ Possession of a Controlled Substance with Intent to Deliver (Cocaine), 2 counts of Unlawful Possession of a Firearm, and Alien in Possession of a Firearm.

trio was headed back to their apartment especially in light of the fact that located inside the apartment was pounds of cutting agent that is used to cut heroin.

Because Trujeque lived there, and had a bedroom, he is fairly judged to have dominion and control over the premises to include the common areas and his room. And when a person has dominion and control over premises, it creates a rebuttable presumption that the person has dominion and control over items on the premises. *State v. Reichert*, 158 Wn. App. 374, 390, 242 P.3d 44 (2010) (citing *State v. Summers*, 107 Wn.App. 373, 389, 28 P.3d 780, 43 P.3d 526 (2001)). This presumption has not been rebutted. Thus, there was sufficient evidence for a jury to conclude that Trujeque had constructive possession of the drugs and guns found in his rooms.¹⁶

¹⁶ *State v. Mills*, 80 Wn.App. 231, 234, 907 P.2d 316 (1995) cited by Trujeque, does not change the analysis or result as the conviction there was affirmed and the analysis, which pertained whether the defendant was armed, has been cabined by subsequent decisions of our Supreme Court as discussed *infra*; See *State v. McCabe*, 174 Wn.App. 1080, 2013 WL 2246306 at 3-4; GR 14.1(a) provides that unpublished cases may be cited as non-binding authorities; See also *State v. Hayes*, 81 Wn.App. 425, 432-33, 914 P.2d 788 (1996) (concluding the “on or about” language allows the State to offer evidence the defendant committed the crime anytime within the statute of limitations period where here, the date is not an essential element of the crime and the defendant raises no alibi at the trial court).

V. Sufficient evidence established that the defendants were armed with firearms during counts 2 and 3 (Molina) and count 4 (Trujeque).

The firearm enhancement statute increases the sentence for an underlying felony “if the offender or an accomplice was armed with a firearm” during the course of that crime. RCW 9.94A.533(3). To prove that a defendant is “armed,” “the State must show that ‘he or she is within proximity of an easily and readily available [firearm] for offensive or defensive purposes and [that] a nexus is established between the defendant, the weapon, and the crime.’” *State v. Houston-Sconiers*, 188 Wn.2d 1, 17-18, 391 P.3d 409 (2017) (second alteration in original) (quoting *State v. O’Neal*, 159 Wn.2d 500, 503-04, 150 P.3d 1121 (2007)).

a. Standard of Review

“As long as any rational trier of fact could have found that [the defendant] was armed, viewing the evidence in the light most favorable to the State, sufficient evidence exists.” *State v. Eckenrode*, 159 Wn.2d 488, 494, 150 P.3d 1116 (2007). In other words, the sufficiency of the evidence standard for reviewing whether a defendant is armed is the same standard used to determine whether there was sufficient evidence to support a conviction for a crime. *State v. Gurske*, 155 Wn.2d 134, 143, 118 P.3d 333 (2005); *State v. Neff*, 163 Wn.2d 453, 464-65, 181 P.3d 819 (2008);

O'Neal, 159 Wn.2d at 504-05; *Houston-Sconiers*, 188 Wn.2d at 14-18.¹⁷

This makes sense because the issue of whether a defendant is armed is “fact specific.” *Neff*, 163 Wn.2d at 462; *Gurske*, 155 Wn.2d at 139. Thus, in determining whether a nexus exists between the defendant, the weapon, and the crime it is “[t]he jury, as the trier of fact, [that] is in the best position to determine whether there is a connection.” *Eckenrode*, 159 Wn.2d at 494.

b. Nexus

“[T]he mere presence of a weapon at a crime scene *may* be insufficient to establish the nexus between a crime and a weapon.” *Schelin*, 147 Wn.2d at 570 (emphasis added). Similarly, a defendant’s “mere proximity or mere constructive possession” of a firearm is insufficient to establish a nexus between the defendant, the firearm, and the relevant crime. *Gurske*, 155 Wn.2d at 138. Whether a nexus exists “cannot be answered the same way in every case.” *Id.*

¹⁷ Both Appellants cite *State v. Schelin* for the propositions that “[w]hether a person is armed is a mixed question of law and fact” and whether the undisputed facts are sufficient to prove a person is armed is “a question of law to be reviewed *de novo*.” 147 Wn.2d 562, 565-66, 55 P.3d 632 (2002) (plurality opinion); Brief of Appellant (Trujeque) at 24; Brief of Appellant (Molina) at 12 n. 5. Since *Schelin*, and as recently as this year, however, our Supreme Court in answering the question of whether a defendant was “armed” has consistently continued to utilize the traditional sufficiency standard and has not described the review of the determination of whether a defendant was “armed” as *de novo*. Moreover, the concurring opinion to the *Schelin* plurality did not adopt its standard of review, but instead employed the traditional sufficiency standard. 147 Wn.2d at 576 (Alexander, C.J., concurring) (“Viewing the evidence most favorably to the State, it is readily apparent that the State produced sufficient evidence that Schelin was ‘armed’ . . .”).

Accordingly, the factors for determining whether a nexus exists for a crime that is a continuing crime like a drug sales operation or drug manufacturing operation are different than a crime that occurs at a very distinct moment in time. *Neff*, 163 Wn.2d at 462-63 (citing *Gurske*, 155 Wn.2d at 138-39); *O'Neal*, 159 Wn.2d at 504-05. For one, a “nexus obtains” if, during a continuing crime, the firearm “was ‘there to be used.’” *Neff*, 163 Wn.2d at 462 (quoting *Gurske*, 155 Wn.2d at 138). “This *potential use* may be offensive or defensive and may be to facilitate the crime’s commission, to escape the scene or to protect contraband. *Id.* (emphasis added) (citing *Gurske*, 155 Wn.3d at 139). In other words, “[t]he defendant does not have to be armed at the moment of arrest to be armed for purposes of the firearms enhancement.” *O'Neal*, 159 Wn.2d at 504; *Schelin*, 147 Wn.2d at 572–73. Indeed, when a continuing crime is at issue “the State need not establish with mathematical precision the specific time and place that a weapon was readily available and easily accessible, so long as it was at the time of the crime.” *O'Neal*, 159 Wn.2d at 504-05; *State v. Simonson*, 91 Wn.App. 874, 883, 960 P2d 955 (1998) (holding that a jury could infer from the presence of loaded guns at the site of an active methamphetamine manufacturing site that the weapons were there to protect drug production).

Factors other than the nature of the crime that must be examined include “the type of weapon, and the circumstances under which the weapon is found (e.g., whether in the open, in a locked or unlocked container, in a closet on a shelf, or in a drawer)” and if the weapon is a firearm, whether it was loaded or unloaded. *Gurske*, 155 Wn.2d at 142 (quoting *Schelin*, 147 Wn.2d at 570); *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). Additionally, a gun that is unlawfully possessed supports an inference that there is a nexus between the gun and the crime. *O’Neal*, 147 Wn.2d at 506. This inference makes sense and is permissible because a convicted felon is not exercising his or her constitutional right to bear arms when he or she unlawfully possesses a firearm. *See Eckenrode*, 159 Wn.2d at 490, 493.

Neff and *Simonson*¹⁸ are instructive as each involves a continuing drug crime with firearms proximate to the drugs and evidence sufficient to establish that the defendants used the firearms to protect the drug operation. 163 Wn.2d 453; 159 Wn.2d 500; 91 Wn.App. 874. In *Neff*, an officer investigating a strong ammonia odor and aware of its dangers ended up at the defendant’s home. The defendant appeared from behind the home and was eventually detained and placed in a police car. After he was detained, officers discovered a methamphetamine laboratory and

¹⁸ The holding and analysis in *Simonson* has been cited approvingly by the Supreme Court in *Schelin* and *O’Neal*. 147 Wn.2d at 570-72; 159 Wn.2d at 505.

marijuana grow in an unattached garage on his property. In addition to the drug evidence, officers searching the garage found two loaded handguns with 4 bags of marijuana in a locked safe under a desk and a third loaded firearm in a tool belt, which was hanging from the garage rafters. Finally, officers noticed two surveillance cameras that covered the defendant's yard and driveway as well as a monitor inside the garage on which the feeds from the cameras could be viewed. *Neff* concluded that "[t]hese facts, together with all inferences favoring the State, are enough for a rational person to find beyond a reasonable doubt that Neff was armed." 163 Wn.2d at 464.

The defendant argued, however, that the evidence did not link the guns to the crime, rather there was just "mere presence and . . . constructive possession." *Id.* at 464. Our Supreme Court disagreed concluding that the nexus was established by "the security cameras and video monitor," which allowed the inference "that Neff used the guns to protect his drug operation." *Id.* Finally, *Neff* reiterated that a "defendant does not have to be armed at the moment of arrest to be armed for purposes of the firearms enhancement." *Id.* Supporting that conclusion it noted:

Neff's drug operation was a continuing crime. Manufacturing is unlike, say, robbery, which happens once. The manufacturing operation is a crime, even if the

defendant is elsewhere when the police arrive. . . . Sufficient evidence supports the finding that Neff had manufactured methamphetamine in the past and did so with guns at hand and countersurveillance cameras watching for approaching cars.

Id. at 464-65.

In *Simonson*, the defendant and his girlfriend lived in a silver trailer on some property that they rented. In February of 1996 they placed a green travel trailer on the property they rented. The defendant was arrested on March 11, 1996 and remained in custody when on March 14, 1996 the green trailer exploded. A gun was found near the exploded trailer. The defendant's girlfriend was also found on the property after the explosion and she was burned. The police determined that the green trailer was being used to manufacture methamphetamine and discovered six firearms located in the silver trailer at least four of which were loaded. The silver trailer also contained documents and clothing that linked the defendant to it as well as some additional drug evidence. The defendant was charged with manufacturing methamphetamine between February 1 and March 15, 1996, which included a weapon enhancement.¹⁹ In rebutting the defendant's contention that the evidence was insufficient to support the enhancement *Simonson* held that:

¹⁹ It appears that the to-convict instruction for the substantive crime contained accomplice language while the enhancement did not. *See* 91 Wn.App. at 880.

Taken in the light most favorable in the State, the evidence here shows that [the defendant and his girlfriend] were committing a continuing offense, manufacturing methamphetamine, over a six-week period of time. During some or all of that time, they kept seven guns on the premises. It is reasonable to infer that not less than four were kept in a loaded condition. . . . It is also reasonable to infer that the purpose of so many loaded guns was to defend the manufacturing site in case it was attacked. We conclude that the evidence is sufficient to support the deadly weapon enhancement.

91 Wn.App. at 883

Here, the evidence introduced by the State was sufficient for a jury to conclude that there was a nexus between each defendant and their guns and the guns and their crimes. Trujeque's loaded handguns were found in his small, "clothes-width" closet in his bedroom which also contained a grocery bag on the floor with 748 grams of cocaine (approximately a pound and a half) inside of it.²⁰ RP 784-86, 797-800, 804; Ex. 42, Ex. 53, Ex. 56, Ex. 58. One gun was found in a red Nike box while the other was found in a green bag and both were on the shelf above the clothes. RP 784-86, 797-800, 810-12; Ex. 42, Ex. 53. Molina's loaded handguns and inoperable AR-style rifle were found in his own room along with substantial quantities of methamphetamine and cocaine. RP 645-656; Ex. 28, Ex. 29. Bags of cocaine and methamphetamine were found in locations

²⁰ The bag of cocaine was originally obscured by a clothes hamper. RP 806-07. That is, the detective moved the hamper out of the way and discovered the drugs. This amount of cocaine would have a street value of over \$50,000. RP 963-965.

to include in multiple dresser drawers, under the bed, in the closet, and in a hamper. RP 645-56. The AR-style rifle was located in its case in Molina's closet. RP 630-31. One loaded handgun was found in a dresser drawer in Molina's bedroom while the other loaded handgun was found underneath the pillow on the bed. RP 597-601, 658-661. Cash money was also found in a dresser drawer and in a drawstring bag in the clothes hamper. RP 663-64, Ex. 36, Ex. 45.

The evidence suggests the defendants were armed and possessed the firearms to protect their drugs and money when taking into account the obvious continuing nature of their drug distribution enterprise and that the firearms were multiple, were loaded, were all either in the open (under Molina's pillow) or in unsecured containers, were proximate to substantial amounts of drugs worth at least multiple tens of thousands of dollars,²¹ and in Molina's case were in a bedroom with over \$180,000 and unlawfully possessed due to his alienage, and in Trujeque's case were unlawfully possessed by virtue of a past conviction for a serious offense and his alienage. Thus, these cases are like *Neff* and *Simonson* where there was evidence additional to the drugs and guns being proximate that allowed the inference that the defendants were armed and constituted sufficient evidence to support the enhancements.

²¹ A pound of methamphetamine or cocaine has an approximate street sales value of about \$45,000 to \$60,000 RP 963-965.

Moreover, the fact that the charging document and to-convict instruction for the drug counts with the firearm enhancements is on *or about* November 5, 2015—the day after the defendants were arrested—does not change the analysis. Br. of App. (Trujeque) at 25-26 (citing *Mills*, 80 Wn.App. at 234) CP 113-14. Post-*Mills*²² our Supreme Court has been clear, especially in the cases of continuing drug offenses that “[t]he defendant does not have to be armed at the moment of arrest to be armed for purposes of the firearms enhancement” and that “the State need not establish with mathematical precision the specific time and place that a weapon was readily available and easily accessible, so long as it was at the time of the crime.” *O’Neal*, 159 Wn.2d at 504-05; *Schelin*, 147 Wn.2d at 572–73. *State v. Simonson*, 91 Wn.App. 874, 883, 960 P.2d 955 (1998). The on or about language lawfully references a time prior to the arrest of the defendants. *See State v. McCabe*, 174 Wn.App. 1080, 2013 WL 2246306 at 3-4; GR 14.1(a) provides that unpublished cases may be cited as non-binding authorities; *See also State v. Hayes*, 81 Wn.App. 425, 432–33, 914 P.2d 788 (1996) (concluding the “on or about” language allows the State to offer evidence the defendant committed the crime anytime within the statute of limitations period where here, the date is not an

²² *Mills* has also been cited approvingly by our Supreme Court, but the reasoning of the specific portion relied on by Trujeque is incompatible with, for example, *O’Neal*, *supra*.

essential element of the crime and the defendant raises no alibi at the trial court).

VI. No *Brady* violation occurred regarding the purported shopping bag allegedly present in the trunk of Trujeque's car.

To establish a *Brady* violation a defendant must “demonstrate the existence of each of three necessary elements: “[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.” *State v. Mullen*, 171 Wn.2d 881, 895, 259 P.3d 158 (2011) (alterations in original) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). If a defendant fails to demonstrate any one element, his *Brady* claim fails. *Strickler*, 527 U.S. at 281-82.

Under the second element, where “a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government.” *Mullen*, 171 Wn.2d at 896 (citation omitted), 902 (stating “there is no *Brady* violation when a defendant possessed the information that he claims was withheld or where he possesses the salient facts regarding the existence of the [evidence] that he claims [was] withheld”) (alterations in original) (citation omitted).

Furthermore, since “suppression by the Government is a necessary element of a Brady claim, if the means of obtaining the exculpatory evidence has been provided to the defense, the *Brady* claim fails.” *Id.* (citation omitted). Simply put, evidence that could have been discovered but for a lack of due diligence by the defense is not a *Brady* violation. *Id.* at 896, 902-03; *State v. Lord*, 161 Wn.2d 276, 293, 165 P.3d 1251 (2007); *In re Benn*, 134 Wn.2d 868, 916-18, 952 P.2d 116 (1998).

The third element, whether prejudice ensued, requires the defendant to bear the burden of showing a reasonable probability that the result of the proceeding would have been different if the State had disclosed the evidence to the defense. *State v. Thomas*, 150 Wn.2d 821, 850, 83 P.3d 970 (2004).

Here, in the middle of trial Trujeque alleged that there was a shopping bag in the trunk of his car and he wanted the bag retrieved. CP 276-79, 347-49. The State did not agree to search for the bag and Trujeque filed a motion to dismiss claiming a *Brady* violation. CP 276-79, 347-49. First, whether such a bag exists is unclear. In the hearing on the motion the State remarked “[t]here is no knowledge of the State or the State’s agents of such a shopping bag or the evidence that [Trujeque] claims to be present in the vehicle.” RP 1074. This conclusion is not inconsistent with Det. Hall’s declaration in which he states “I had no recollection of any bag

in Ms. GONGORA's vehicle, or the possible existence of such an item until [Trujeque] made the request for me to search. . . ." CP 347-49. In the context of the declaration, it's clear that Det. Hall never did search the trunk for the bag and unclear whether at the time of the declaration he has a recollection of ever seeing one.

When a defendant's claim "rests on 'evidence or facts not in the existing trial record,' filing a personal restraint petition is the appropriate step." *In re Hutchinson*, 147 Wn.2d 197, 206-07, 53 P.3d 17 (2002) (quoting *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). In other words, the "proper avenue for bringing claims based on evidence outside the record is through a personal restraint petition, not an appeal." *State v. We*, 138 Wn.App. 716, 729, 158 P.3d 1238 (2007) (citation omitted). Because the existence of the bag is not settled and facts outside the trial record are necessary to resolve this claim it should be brought through a personal restraint petition.

Second, even assuming the existence of the bag, however, the argument that the failure to physically turn it over should be considered a *Brady* violation and result in dismissal is dubious. This is because Trujeque "ha[d] enough information to be able to ascertain the supposed *Brady* material on his own" and thus the State could not have "suppressed" the existence of the bag, i.e., kept its existence secret from

the defense. *Mullen*, 171 Wn.2d at 896. At all times Trujeque had all the salient facts regarding the existence of a shopping bag. Moreover, during trial the Multnomah deputies who conducted the surveillance of the defendants did not assert that defendants were not carrying shopping bags nor did Trujeque inquire of them on that issue, e.g., “isn’t it true that Trujeque left the mall with a shopping bag?” RP 550-51, 553-561, 589-591, 606-615, 1076. Additionally, nobody asked Det. Hall if he found a shopping bag in the Honda. *See generally* RP.

Consequently, even assuming suppression by the State, Trujeque cannot meet his “burden of showing a reasonable probability that the result of the proceeding would have been different if the State had disclosed the evidence to the defense. *State v. Thomas*, 150 Wn.2d at 850. The trial court who had viewed all the evidence at trial, which did not include evidence that defendants did or did not shop while in the mall, concluded that actual existence of the bag was of such minute importance it was not even “exculpatory evidence.” RP 1076. While that conclusion is arguable, there is not a reasonable probability that the introduction of a shopping bag would have changed the result at trial. The evidence presented allowed for a straightforward inference that the defendants went to the Everett area to purchase drugs. That one of them also picked up something at the mall while they waited for their supply would not change

that inference especially in light of the fact that they actually did get stopped with a substantial amount of heroin. Given all the evidence no reasonable juror would believe that the group went to Everett for the purposes of visiting a mall. Furthermore, the trial court also noted that whether any of the persons “actually shopped or didn’t shop there or bought or didn’t buy anything. It had nothing to do with my ruling [on the motion to suppress].” RP 1076. The trial court should be affirmed.

VII. The trial court properly denied defendants’ motion to disclose the identity of the informant.

The “informer’s privilege” is, in general, the rule by which the government may refuse to disclose the identity of informants. *State v. Petrina*, 73 Wn.App. 779, 783, 871, P.2d 637 (1994). The privilege is recognized by court rule and statute. CrR 4.7; RCW 5.60.060(5). CrR 4.7(f)(2) provides in part that “[d]isclosure of an informants identity shall not be required where the informants identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant.” RCW 5.60.060(5) directs that 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.” Accordingly, disclosure is an exception to the general rule of nondisclosure. *State v. Massey*, 68 Wn.2d 88, 92, 411 P.2d 422 (1966). A

trial court's denial of a request to disclose an informant's identity is reviewed for abuse of discretion. *State v. Bauer*, 98 Wn.App. 870, 878, 991 P.2d 668 (2000) (citation omitted). If a trial court does abuse its discretion when denying the disclosure of an informant's identity the remedy is a new trial. *State v. Harris*, 91 Wn.2d 145, 149-150, 588 P.2d 720 (1978); *State v. Cleppe*, 96 Wn.2d 373, 383, 635 P.2d 435 (1981)

“The importance of an ‘informer’s privilege’ has long been recognized as an aid to law enforcement.” *State v. Casal*, 103 Wn.2d 812, 815, 699 P.2d 1234 (1985). The purpose of the privilege is to “further effective law enforcement and to encourage citizens to report their knowledge of criminal activities.” *Petrina*, 73 Wn.App at 783 (citing *Rovario v. U.S.*, 353 U.S. 53, 59, 77 S.Ct. 623 (1957)). Without an ‘informer’s privilege’ many people would not come forward to the police with information about crimes because “the typical informer will make it a condition of cooperation that his identity remain confidential.” *Casal*, 103 Wn.2d at 815 (internal quotation omitted).

Nonetheless, in cases where the informant “is a material witness on the question of a defendant’s guilt or innocence” *and* the trial court “determines that defendant’s interest in disclosure outweighs the public interest in nondisclosure” the State must disclose the identity of the informant. *Id.* at 815-16. More specifically, “[e]ven if the informant is a

material witness, disclosure may not be necessary unless knowledge of the informant's identity would be relevant and helpful to the defendant in light of the 'crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.'" *State v. Vazquez*, 66 Wn.App. 573, 581, 832 P.2d 883 (1992) (quoting *State v. Enriquez*, 45 Wn.App. 580, 583, 725 P.2d 1384 (1986)); *Harris*, 91 Wn.2d at 151. Simply put, disclosure is required if the use "informer's privilege" will deny the defendant a fair trial. *State v. Thetford*, 109 Wn.2d 392, 396, 745 P.2d 496 (1987); *Cleppe*, 96 Wn.2d at 381 (noting that privilege of nondisclosure "must yield where such disclosure is . . . essential to a fair trial") (emphasis added); *State v. Vargas*, 58 Wn.App 391, 394, 793 P.2d 455 (1990).

Where the informant provided information relating only to probable cause, however, "Washington courts have held that . . . disclosure of the identity of an informant is not required." *State v. Atchley*, 142 Wn.App 147, 156, 173 P.3d 323 (2007); *Casal*, 103 Wn.2d at 817 ("The Courts of Appeals in Washington have similarly held that where the issue is probable cause only, rather than guilt or innocence, disclosure of a secret informant is not required; such disclosure has generally been denied.").

Regardless of the type of information provided by the informant, the party “who seeks disclosure of the identity of an informant has the burden of showing a justification for an exception to the rule of nondisclosure.” *Massey*, 68 Wn.2d at 92; *Petrina*, Wn.App. at 784 (“The burden is on the defendant to overcome the privilege.”). In order to meet that burden, the defendant must show “(1) an in camera hearing is necessary and (2) disclosure of the informant’s identity is warranted in order to insure the defendant a fair trial.” *Vazquez*, 66 Wn.App. 73 at 581 (citing *Vargas*, 58 Wn.App at 395). “Bare assertions or conclusory allegations by a defendant that a witness is needed to establish his innocence will not suffice. Instead he must show a basis in fact to establish that his demand does not have an improper motive and is not merely an angling in desperation for possible weaknesses in the prosecution’s investigation.” *Id.*; *Cleppe*, 96 Wn.2d at 382 (holding that a defendant’s speculation as to what an informant may say is insufficient to warrant a hearing or disclosure).

Here, Trujeque argues that the trial court erred when it denied his motion to disclose the informant asserting that the informant would have provided “evidence that Mr. Molina was conducting his drug business by himself, without an accomplice. . . .” Br. of App. (Trujeque) at 33. But this assertion assumes too much. While the CI’s controlled buys in the prior

month(s) only involved Molina, as the trial court astutely remarked in rebutting Trujeque's argument: "[i]f I go up to the counter in a store, and there's only one person at the counter, does that mean that's the only person who works at the store because every time I go to the store there's only one person at the counter?" RP 48-49. More specifically, however, the trial court did not abuse its discretion when it concluded that Trujeque did not meet his burden since, based on the information provided, the CI would not be able to provide evidence that "would bear on the innocence" of Trujeque at the traffic stop or at the apartment since the CI was not, and had not been, present at either location and would not be able to provide information "on whether or not they're acting in concert on the day in question by possessing all this stuff in their common apartment." RP 60-62. The trial court should be affirmed.

VIII. Testifying officers provided proper opinion and inferential testimony based on their training and experience.

ER 701 allows testimony in the form of opinions or *inferences*²³ that are "rationally based on the perception of the witness" and "helpful to a clear understanding of the witness" testimony or the determination of a

²³ *State v. Blake*, 172 Wn.App. 515, 526, 298 P.3d 769 (2012) (recognizing that the terms "opinions" and "inferences" in ER 701 are not synonyms and that "allowable testimony as to inferences or fact-based observations" is not the same as opinion testimony).

fact in issue.” *State v. Quaale*, 177 Wn.App. 603, 611, 312 P.3d 726 (2013); *Seattle v. Heatley*, 70 Wn.App. 573, 578, 854 P.2d 658 (1993) (“[T]estimony that is not a direct comment on the defendant's guilt . . . , is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony.”) Similarly, expert testimony is admissible when the expert’s “specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. . . .” ER 702. A witness can be “qualified as an expert by knowledge, skill, experience, training, or education, [and] may testify thereto in the form of an opinion or otherwise.” *Id.*²⁴ A trial court’s decision to admit opinion testimony or expert testimony is reviewed for abuse of discretion. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).

Washington courts have repeatedly held that expert testimony explaining “the arcane world of drug dealing and certain drug transactions” is admissible because it is “helpful to the trier of fact in understanding the evidence.” *State v. Avendano–Lopez*, 79 Wn.App. 706, 711, 904 P.2d 324 (1995); *State v. Cruz*, 77 Wn.App. 811, 813–14, 894 P.2d 573 (1995); *State v. Sanders*, 66 Wn.App. 380, 832 P.2d 1326

²⁴ “Under ER 703 and 705, expert opinions can be admitted ‘without foundation except for testimony establishing the expert’s qualifications.’” *State v. Sanders*, 66 Wn.App. 380, 386, 832 P.2d 1326 (1992) (quoting 5A K. Tegland, Wash.Prac., Evidence § 311, at 482 (3d ed. 1989)).

(1992); *State v. Strandy*, 49 Wn.App. 537, 543–44, 745 P.2d 43 (1987) (an officer could testify that numbers found on a paper in the victim’s wallet were consistent with those commonly made in narcotics transactions.). Thus, in *Avedano-Lopez*, it was proper for an officer who had been investigating drug crimes for two years to testify “about certain characteristics or behaviors of a typical drug dealer.” 79 Wn.App. at 709-710. That officer permissibly testified that drug dealers:

usually receive money from the users; often have a lot of money and/or narcotics on their person; carry both very small and large quantities of drugs; often keep drugs in their mouths; are often users themselves; and that heroin is often wrapped in small balloons that resemble party balloons. He also explained how middlemen are used to complete drug transactions.

Id. at 710. Likewise, in *Cruz* a detective permissibly testified about his knowledge “of typical heroin transactions and typical heroin users gained from his involvement in 500 to 600 undercover investigations involving that drug.” 77 Wn.App. at 815. Notably, the fact that an opinion “supports a finding of guilty . . . does not make the opinion improper.” *Blake*, 172 Wn.App. at 523 (alteration in original) (quoting *State v. Collins*, 152 Wn.App. 429, 436, 216 P.3d 463 (2009)).

On the other hand, improper opinion testimony includes “expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses.” *State v. Montgomery*, 163

Wn.2d 577, 591, 183 P.3d 267 (2008). Essentially, an expert may go as far as to testify to “the likely drug transaction-related significance of each piece of physical evidence” and his or her observations so long as the expert does not opine on the three categories above, as the permissible testimony leaves the jury “competent to draw its own conclusion as to [the defendant’s] involvement in the” alleged crimes. *Montgomery*, 163 Wn.2d at 595 (quoting Deon J. Nossel, Note: the Admissibility of Ultimate Issue Expert Testimony by Law Enforcement Officers in Criminal Trials, 93 COLUM. L.REV. 231, 244 (1993)) (alterations in original). For example, a witness may testify that based on his or her training and experience that evidence or “certain assumptions are ‘consistent’ with a conclusion” without impermissibly opining on a defendant’s guilt, e.g. a large amount of drugs separated into baggies is consistent with a person dealing drugs. *Id.* at 592-593; *Kirkman*, 159 Wn.2d at 931-933; *State v. Toennis*, 52 Wn.App. 176, 185, 758 P.2d 539 (1988); *State v. Young*, 62 Wn.App. 895, 905-07, 802 P.2d 829 (1991) (Opinion Modified in Part on Reconsideration by 817 P.2d 412 (1991)).

Here, Trujeque argues the opinion and inference testimony by officers exceeded the bounds of what is permitted by the law. Br. of App.

(Trujeque) at 39.²⁵ But on the contrary, the officers who testified, based on their training and experience, about drug transaction-related significance of the evidence and their observations never offered direct “expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses.” *Montgomery*, 163 Wn.2d at 591, 183 P.3d 267 (2008). *See* RP 546-47, 549-550, 585-86, 592-93. In doing so, the officers at times explained that the behavior they observed was “‘consistent’ with a conclusion,” which is permissible testimony *Montgomery* 163 Wn.2d at 592-593; *Kirkman*, 159 Wn.2d at 931-933.

In particular, Trujeque complains about a part of Det. Hall’s testimony regarding “upper-level drug dealers.” Br. of App. (Trujeque) at 39. In context, after Det. Hall testified about the street value of drugs and that over \$180,000 was found in the apartment the following exchange occurred:

Q: Okay. And so when we’re talking about drug amounts of over several pounds for each type of drug or we’re talking about cash amounts of over \$180,000, what level -- are these low-level drug dealers?

[Det. Hall]: No.

²⁵ As part of this argument Trujeque asserts the officers improperly testified about “probable cause” and the lack of need for forensic testing. Br. of App. (Trujeque) at 35, 38. But this testimony only came in a result of the defendants’ trial strategy in which they complained of a poor investigation and a lack of DNA and finger print testing of the guns and drugs. In large part defense asked the questions that led to the testimony about which Trujeque now complains and to which they did not object. *See* RP 695-699, 816-822, 824-26, 830-31, 834-36, 884-890, 972-77, 981, 1043-1051.

Q: Who [sic] level are they?

[Det. Hall]: They are at least middle, most likely upper-level drug dealers.

Q: And why is that?

[Det. Hall]: Well, you've got a lot of money, you have \$180,000 worth of cash. We don't see that very often. In fact, since I've been in the drug task force, we've never seen \$180,000 or more in one location. Also, you have large amounts, we're dealing with large amounts. And not only that, we're dealing with different types of drugs. It's rare that we see all three different types of drugs in that amount in one place. And that coupled with the firearms that we found, looking at it all together, I say definitely this is signature of a middle to upper-level drug dealing organization.

RP 960-68. The above, under the case law, is a permissible discussion of the drug transaction-related significance of the evidence.²⁶ Det. Hall may permissibly opine as whether a person or persons who possess that much money and drugs is involved in a drug dealing organization provided he does not directly opine that Trujeque specifically possessed these items and is part of a drug dealing organization. Notably, though Trujeque objected frequently and to much of what he contends is improper opinion evidence, he did not object to the above testimony by Det. Hall.

²⁶ Importantly, the State alleged aggravators in the charged drug crimes, which required the State to prove that the offenses “involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use” and/or that “[t]he circumstances of the current offense[s] reveal *the offender to have occupied a high position in the drug distribution hierarchy.*” CP 112-14 (emphasis added).

Nonetheless, even if any of the complained testimony was improperly admitted the error in admitting the evidence was harmless. The discovery of the heroin in Santiago's purse on the way back from the Everett area and of the substantial amount drugs, guns, and cash money evidence (and lack of drug use evidence) back at the apartment made it evident that the defendants were not simply users in possession of drugs but dealers of large quantities. Once the totality of the evidence was presented even just common sense would indicate the defendants were higher up in the drug trade than simple users or small dealers.

IX. As applied to the defendants the alien in possession of a firearm statute is lawful.

Trujeque stipulated at trial that he was not a citizen of the United States, he was not a citizen of Canada, he was not a lawful permanent resident, and he did not have a valid visa. RP 757. Testimony was presented that Trujeque never received an alien firearm license from the Department of Licensing. RP 701-02; Ex. 156. Testimony was also presented that Molina never received an alien firearm license from the Department of Licensing nor were there ever any records of Molina purchasing a firearm in the State. RP 703-05; Ex. 154. Molina was not a United States citizen, a lawful permanent resident, nor did he ever have a valid visa to show he was in the country legally. RP 746

Molina and Trujeque claim that RCW 9.41.171 violates the equal protection clause. They argue that the statute impermissibly treats Canadians and citizens of other countries differently based on their national origin and without a compelling government justification for the difference. RCW 9.41.171, however, is not unconstitutional as applied to Molina and Trujeque. They were not lawfully in the United States and they did not have valid alien firearm licenses, thus violating the portions of RCW 9.41.171 independent of RCW 9.41.171(3) and RCW 9.41.175 which they both argue is unconstitutional. Molina and Trujeque's claims fail.

Whether or not a statute violates the state or federal constitutions is reviewed de novo. *State v. Ibrahim*, 164 Wn. App. 503, 510, 269 P.3d 292 (2011) (citing *State v. Chavez*, 163 Wn.2d 262, 267, 180 P.3d 1250 (2008)). A statute is presumed constitutional unless its unconstitutionality is proven beyond a reasonable doubt. *State v. Hernandez-Mercado*, 124 Wn.2d 368, 380, 879 P.2d 283 (1994) (citing *Seattle v. Shepherd*, 93 Wn.2d 861, 865, 613 P.2d 1158 (1980); *State v. Aver*, 109 Wn.2d 303, 307, 745 P.2d 479 (1987)). This is a "demanding standard of review." *Tunstall ex. rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 5 P.3d 691 (2000) (citing *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998)). Courts afford great deference to the Legislature's judgment,

because the Legislature is assumed to have considered the constitutionality of its enactments. *Id.*

A challenge to the constitutionality of a statute can be either facial or as applied to a particular defendant; however “a facial challenge must be rejected if there are any circumstances where the statute can constitutionally be applied.” *State v. Jorgenson*, 179 Wn. 2d 145, 150-51, 312 P.3d 960 (2013) (quoting *Wash. State Republican Party v. Pub. Disclosure Comm’n*, 141 Wn.2d 245, 282 n.14, P.3d 808 (2000)). “The traditional rule is that a person challenging a statute may not challenge the statute on the ground it may conceivably be applied unconstitutionally to others in situations not before the court.” *State v. Myers*, 133 Wn.2d 26, 31 941 P.2d 1102 (1997) (citing *New York v. Ferber*, 458 U.S. 747, 767, 102 S.Ct. 3348 (1982)). There is an exception to this rule where the challenge involves overbreadth and the First Amendment. *Myers*, 133 Wn.2d at 31 (citing *Ferber*, 458 U.S. at 768).

If part of a statute is found to be unconstitutional, it does not automatically invalidate the entire statute. An entire statute will be found to be unconstitutional only if the unconstitutional portion is unseverable or if the remaining part of the statute no longer accomplishes the legislative intent of the statute. *State v. Williams*, 144 Wn.2d 197, 212, 26 P.3d 890 (2001) (citing *State v. Anderson*, 81 Wn.2d 234, 236, 501 P.2d 184

(1972)); *City of Bellevue v. Lorang*, 140 Wn.2d 19, 27, 992 P.2d 496 (2000). The remedy of partial statutory invalidation is not possible when the provisions of a statute “are so connected and interdependent in their meaning and purpose that it could not be believed that the legislature would have passed one without the other.” *Pasado’s Safe Haven v. State*, 162 Wn.App. 746, 754, 259 P.3d 280, 285 (2011) (quoting *Jensen v. Henneford*, 185 Wn. 209, 220, 53 P.2d 607 (1936)). “There is a presumption of severability, and courts determining severability should refrain from invalidating more of the statute than is necessary so as to not frustrate the intent of the Legislature.” *State v. Harris*, 123 Wn.App. 906, 918, 99 P.3d 902, 907 (2004), *review granted in part, cause remanded*, 154 Wn.2d 1032, 119 P.3d 852 (2005) (abrogated on other grounds by *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005)).

The Fourteenth Amendment to the United States Constitution entitles citizens and aliens to equal protection of the law. *Ibrahim*, 164 Wn.App. at 513 (citing *Graham v. Richardson*, 403 U.S. 365, 371, 91 S.Ct. 1848 (1971)); *Hsieh v. Civil Serv. Comm’n*, 79 Wn.2d 529, 531–32, 488 P.2d 515 (1971). “State action violates equal protection rights if it separates individuals into discrete classes based on citizenship and subjects those individuals to disparate treatment.” *Ibrahim*, 164 Wn.App. at 513 (citing *Graham v. Richardson*, 403 U.S. at 371, 377). “A

classification based on an individual's status as an alien is ‘inherently suspect and subject to close judicial scrutiny.’” *Ibrahim*, 164 Wn. App. at 513 (quoting *Graham v. Richardson*, 403 U.S. at 372). “The State must establish that the discriminatory classification is necessary to promote a compelling government interest.” *Hernandez-Mercado*, 124 Wn.2d at 380.

Citizens and aliens legally residing in the United States are entitled to the protections of the Constitution, while illegal aliens are not. *Ibrahim*, 164 Wn. App. at 513 (citing *Graham v. Richardson*, 403 U.S. at 371); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292, 24 S.Ct. 719 (1904). A non-citizen does not have the right to possess firearms in the United States. *Hernandez-Mercado*, 124 Wn.2d at 375. The State can regulate who can possess firearms as a legitimate exercise of the State’s police powers. *Hernandez-Mercado*, 124 Wn.2d at 375 (citing *State v. Vlacil*, 645 P.2d 677, 679-80, 28 A.L.R. 4th 1086 (Utah 1982)); *State v. Krantz*, 24 Wn.2d 350, 353, 164 P.2d 453 (1945) (citations omitted).

Molina and Trujeque appear to argue that RCW 9.41.171 is unconstitutional in its entirety thus making their challenge a facial one²⁷.

²⁷ Molina and Trujeque argue that RCW 9.41.175 is unconstitutional because it discriminates in favor of Canadian citizens and does not pass strict scrutiny. RCW 9.41.175 is listed in RCW 9.41.171(3) as an exception to the prohibition of nonimmigrant aliens possessing firearms. RCW 9.41.175 provides exemptions from the normal firearm permitting process for aliens with valid passports or Canadian citizens legally in the United States who possess firearms for hunting trips or organized firearm contests. A stated purpose of the exemption is to remove barriers for hunting guide businesses in Washington. *Washington House Bill Report*, 2009 Reg. Sess. H.B. 1052 (February 17,

However, if RCW 9.41.171 can be applied constitutionally in certain circumstances then a facial challenge must be rejected. *Jorgenson*, 179 Wn. 2d at 150-51 (citations omitted). RCW 9.41.171 can be applied constitutionally, and more specifically, it can be applied constitutionally to Molina and Trujeque.

Only citizens and aliens legally in the United States are entitled to equal protection of the laws under the Fourteenth Amendment, but those illegally in the Country are not entitled to those same protections. *Ibrahim*, 164 Wn. App. at 513 (citing *Graham v. Richardson*, 403 U.S. at 371); *Turner*, 194 U.S. at 292. Neither Molina and Trujeque were legally present in the United States nor did they have valid firearm licenses at the time they committed the current offenses, and as such they are not entitled to claim RCW 9.41.171 is unconstitutional as applied to them. RP 700-704, 745-46, 757. The State has the authority to regulate who can possess firearms, and restricting illegal aliens from possessing firearms is a legitimate exercise of the State's police powers. *Hernandez-Mercado*, 124 Wn.2d at 375 (citing *Vlacil*, 645 at 679-80; *Krantz*, 24 Wn.2d at 353

2009). This exemption is based on alienage and thus must be "necessary to promote a compelling government interest." *Hernandez-Mercado*, 124 Wn.2d at 380. The State concedes that this is not likely a compelling government interest, however this Court does not need to reach the issue. Even assuming RCW 9.41.175 is unconstitutional, it does not invalidate the remaining portions of RCW 9.41.171 because the statute is not unconstitutional as applied to Molina and Trujeque since they were both in the United States illegally and did not possess valid alien firearm licenses.

(citations omitted). Trujeque and Molina were charged and convicted under RCW 9.41.171, because they were nonimmigrant aliens in possession of firearms within the State. This is a constitutional application of the statute, and therefore RCW 9.41.171 is not unconstitutional as applied to Molina and Trujeque.

If RCW 9.41.175 is found to be unconstitutional²⁸ it would only invalidate RCW 9.41.171(3), but it would not invalidate the entirety of RCW 9.41.171. There is a presumption of severability, and RCW 9.41.171 is easily severable in the present case. *Harris*, 123 Wn. App. at 918 (citations omitted). RCW 9.41.171(3) is an exception to the general prohibition on illegal aliens possessing firearms and it allows for legal aliens (including persons from Canada legally in the State) to possess firearms while on hunting trips or at an organized firearm contest. RCW 9.41.175. This portion of the statute can be severed, because the intent of this statute was to prohibit a non-citizen's possession of firearms without a license if that person is a nonimmigrant alien. *Washington House Bill Report*, 2009 Reg. Sess. H.B. 1052 (February 17, 2009). This shows that RCW 9.41.171(3) can be severed from the rest of statute, and the statute

²⁸ As argued in footnote 27, this Court does not need to reach the constitutionality of RCW 9.41.175, because it is inapplicable to the current case. Furthermore, RCW 9.41.175 is not an exception for a Canadian, or any foreign citizen, if they are in the United States illegally. Since Trujeque and Molina were in the country illegally, they would be in the same position as a Canadian citizen who is illegally in the country. This further shows that RCW 9.41.175 does not apply to this case.

can still have its desired effect: to prohibit illegal aliens from possessing firearms without licenses. *Williams*, 144 Wn.2d at 212. This portion is also severable because taking this exception out does not prevent the other portions of the statute from functioning, since any lawful permanent resident or non-citizen who has obtained an alien firearm license is still exempt from criminal penalties. *Id.*

The remaining exemptions in RCW 9.41.171(1) and (2) do not run afoul of the Equal Protection Clause, because they only differentiate between legal aliens and illegal aliens, which is a constitutional distinction. *Ibrahim*, 164 Wn. App. at 513 (citing *Graham v. Richardson*, 403 U.S. at 371); *Turner*, 194 U.S. at 292. Trujeque and Molina were charged and convicted of being in possession of firearms while not being lawful permanent residents nor having valid alien firearm licenses. CP 5-8. This conduct is criminalized under the portions of RCW 9.41.171 that are severable from RCW 9.41.171(3). Therefore, even if RCW 9.41.175 and RCW 9.41.171(3) are unconstitutional, the remaining portions of the statute are not and Molina and Trujeque's convictions should be affirmed.

RCW 9.41.171 is not unconstitutional as applied to Molina and Trujeque. If RCW 9.41.175 and RCW 9.41.171(3) are unconstitutional, they are severable from the remaining portions of RCW 9.41.171 and do

not invalidate Molina and Trujeque's convictions. Molina and Trujeque's claims fail.

X. The trial court did not abuse its discretion when it determined that Trujeque's drug crimes were not the same criminal conduct as each other and the firearm crimes.

When a defendant is convicted of two or more crimes the sentencing court "may enter[] a finding that some or all of the current offenses encompass the same criminal conduct." RCW 9.94A.589 (1)(a). That said, because a finding of same criminal conduct "favors the defendant, it is the defendant who must establish the crimes constitute the same criminal conduct," i.e., the defendant bears the burden "of production and persuasion" on the issue of same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 539-540, 295 P.3d 219 (2013) A trial court's conclusion that offenses did not encompass the "same criminal conduct" will be reversed by an appellate court only when there is a clear abuse of discretion or misapplication of the law. *Id.* at 533, 535-38; *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006).

Two or more crimes may constitute the "same criminal conduct" if they: (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. RCW 9.94A.589(1)(a). The absence of any one of the prongs prevents a finding of "same criminal

conduct.” *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). Courts “must narrowly construe RCW 9.94A.[589](1)(a) to disallow most assertions of same criminal conduct.” *State v. Price*, 103 Wn.App 845, 855, 14 P.3d 841 (2000); *Graciano*, 176 Wn.2d at 540; *State v. Wilson*, 136 Wn.App 596, 613, 150 P.3d 144 (2007). If the sentencing court finds that the crimes encompass the same criminal conduct, however, “then those . . . offenses shall be counted as one crime.” RCW 9.94A.589(1)(a).

a. Criminal Intent – Statutory and Objective

The first step in determining whether crimes require the same criminal intent is examining the relevant criminal statutes. *State v. Chenoweth*, 185 Wn.2d 218, 221-24, 370 P.3d 6 (2016); *State v. Polk*, 187 Wn.App. 380, 396, 348 P.3d 1255 (2015); *State v. Rodriguez*, 61 Wn.App. 812, 816, 812 P.2d 868 (1991). If the statutorily required intents are different then the analysis is over and the offenses shall count as separate crimes. *Chenoweth*, 185 Wn.2d at 223-25²⁹; *Polk*, 187 Wn.App. at 396-97, *Rodriguez*, 61 Wn.App. at 816; *State v. Hernandez*, 95 Wn.App. 480, 484, 976 P.2d 165 (1999). Similarly, “[w]here one crime has a statutory intent

²⁹ Unpublished cases addressing same criminal conduct arguments post-*Chenoweth* have readily applied the *Chenoweth* statutory analysis in determining whether offenses require the same criminal intent. See *State v. Baza*, 197 Wn.App. 1072, 2017 WL 589189 at 2 FN 8; *State v. Sadler*, 198 Wn.App. 1023, 2017 WL 1137116 at 5; *State v. Ohnemus*, 194 Wn.App. 1039, 2016 WL 3514165 at 3. GR 14.1(a) provides that unpublished cases may be cited as non-binding authorities.

element and the other does not, the two crimes, as a matter of law, cannot constitute the same criminal conduct.” *Hernandez*, 95 Wn.App. at 485-86.³⁰ On the other hand, where the statutory intents are the same or there are multiple counts of the same crime courts are to look objectively at the facts useable at sentencing to determine whether a defendant’s intent was the same or different for each offense. *Polk*, 187 Wn.App. at 396; *Rodriguez*, 61 Wn.App. at 816; *Hernandez*, 95 Wn.App. at 484.

The relevant question when viewing the facts useable at sentencing in determining whether the relevant offenses require the same criminal intent 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) (citations omitted). This, in part, can be determined by whether one crime furthered the other. *Vike*, 125 Wn.2d at 411. 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); *In re Rangel*, 99 Wn.App. 596, 600, 996 P.2d 620 (2000). This is because when a defendant has time to “pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act[, he] form[s] a new intent to commit the second act.” *Grantham*, 84 Wn.App. at 859.

³⁰ Worth noting is that a firearm enhancement does not contain a statutory intent element. *State v. Barnes*, 153 Wn.2d 378, 383-87, 103 P.3d 1219 (2005).

Conversely, a defendant’s criminal intent may not have changed when he or she engages in an “unchanging pattern of conduct, coupled with an extremely close time frame” *Tili*, 139 Wn.2d at 125.

State v. McGrew is instructive and controlling on the issue of criminal intent. 156 Wn.App. 546, 234 P.3d 268 (2010). In *McGrew* the defendant was convicted of unlawful delivery of a controlled substance with a firearm enhancement and unlawful possession of a firearm. The firearm that the defendant unlawfully possessed was the same one that he used to facilitate the delivery of the controlled substance. *Id.* at 551. On appeal, the defendant argued that those two convictions were the same criminal conduct and should have been counted as one crime. *McGrew*, however, disagreed and applied the appropriate statutory analysis to conclude the offenses did not have the same criminal intent.³¹ *Id.* at 555.

As the court noted:

the requisite objective intents for McGrew’s relevant charged crimes of unlawful delivery of a controlled substance and second degree unlawful possession of a

³¹ *McGrew* also concluded that the offenses were not the same criminal conduct because “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*. . . .” *Id.* at 553 (emphasis in original). In so holding *McGrew* rejected the defendant’s reliance on *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) and *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). *Id.* at 555-56. While Trujeque is correct that *Alleyne v. U.S.*, 570 U.S. 99, 133 S.Ct. 2151, 2162, 186 L.Ed.2d 314 (2013) calls into question the importance of the above distinction, between enhancements and crimes, when determining what facts must be submitted and proven to a jury—a Sixth Amendment question—it does not necessarily or even persuasively affect the same criminal conduct determination. Br. of App. (Trujeque) at 47.

firearm substantially differ. McGrew's delivery of a controlled substance charge requires knowledge that the substance was controlled. And the mens rea for second degree unlawful possession of a firearm is knowledge of possession and/or control of a firearm. The objective intents for McGrew's crimes are entirely different.

Id. (internal citations omitted).³² Furthermore, our Supreme Court has consistently concluded that where a “defendant has the potential to commit distinct drug crimes in the present *and* in the future with the substances found, . . . that the defendant possesses a different criminal intent for each charge.” *State v. Porter*, 133 Wn.2d 177, 184, 942 P.2d 974 (1997); *State v. Maxfield*, 125 Wash.2d 378, 403, 886 P.2d 123 (1994); *State v. Burns*, 114 Wn.2d 314, 319-20, 788 P.2d 531 (1990).

b. Same Time and Place

The same time and place requirement does not require that crimes happen simultaneously in order for them to be considered to have happened at the same time. *Price*, 103 Wn.App. at 855 (citing *Porter*, 133 Wn.2d at 183, 185-86). Instead, to satisfy the same time requirement the crimes, if not simultaneous, must be part of “a continuing, uninterrupted sequence of conduct” over a very short period of time. *Id.*; *Porter*, 133

³² *State v. Sims* in discussing the mental element of the crime of possession with intent to deliver noted that “[i]t is impossible for a person to intend to manufacture or deliver a controlled substance without knowing what he or she is doing. By intending to manufacture or deliver a controlled substance, one necessarily knows what controlled substance one possesses as one who acts intentionally acts knowingly. Without knowledge of the controlled substance, one could not intend to manufacture or deliver that controlled substance.” 119 Wn.2d 138, 142, 829 P.2d 1075 (1992) (internal citation omitted).

Wn.2d at 183 (holding “that immediately sequential drug sales satisfy the ‘same time’ element of the statute”). Relatedly, multiple crimes occurring at one address does not necessarily mean the crimes occurred in the same place. *State v. Stockmyer*, 136 Wn.App. 212, 220, 148 P.3d 1077 (2006) (holding that “guns found in different rooms in the same house are found in different ‘places’ for purposes of the same criminal conduct test under RCW 9.94A.589(1)(a)”); *State v. Garnier*, 52 Wn.App. 657, 661, 763 P.2d 209 (1988) (holding that each burglary of multiple suites inside one building “was a complete and final act” and did not constitute the same criminal conduct).

Here, a straightforward application of *Chenoweth* and *McGrew* compel the conclusion that the trial court did not abuse its discretion when it determined that Trujeque’s firearm crimes were not the same criminal conduct as his drug crimes with firearm enhancements as the crimes does not have the same statutory intent. 185 Wn.2d 218; 156 Wn.App. 546. In addition, the drug crime charged in Count 1 (the heroin found in Santiago’s purse) did not occur at the same time and place as the other drug counts (drugs at the apartment). In light of the fact that courts “must narrowly construe RCW 9.94A.[589](1)(a) to disallow most assertions of same criminal conduct,” the trial court did not abuse its discretion when it

found that those drug counts were not the same criminal conduct. *Price*, 103 Wn.App at 855.

XI. The maximum term of imprisonment that is doubled under RCW 69.60.535 is the statutory maximum and not the standard range.

RCW 69.50.401(a) provides that “it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.” When a defendant commits one of these crimes within 1,000 feet of a school zone RCW 69.50.435 is applied. This statute provides that:

Any person who violates RCW 69.50.401 by . . . possessing with the intent to . . . sell[] or deliver a controlled substance listed under RCW 69.50.401 . . . (c) [w]ithin one thousand feet of a school bus route stop designated by the school district [or] (d) [w]ithin one thousand feet of the perimeter of the school grounds . . . may be punished . . . by imprisonment of up to twice the imprisonment *otherwise authorized by this chapter.*”

RCW 69.50.435(1) (emphasis added). Our Supreme Court has summarized the interplay of the above statutes present in the Uniform Controlled Substances Act (UCSA) with those of the Sentencing Reform Act (SRA), where the standard range sentence for crimes are found, as follows:

RCW 69.50.401 enumerates the maximum penalties, in fines and imprisonment, for certain drug crimes, and RCW 69.50.435 allows those penalties to be doubled when the crimes are committed in specified locations. The

Legislature added RCW 69.50.435 to the Uniform Controlled Substances Act (UCSA) in 1989. The UCSA delineates offenses and establishes maximum penalties, but does not set out determinate sentence ranges, which are provided for in the Sentencing Reform Act of 1981 (SRA). The SRA contains a more specific penalty provision relating to RCW 69.50.435.

State v. Silva-Baltazar, 125 Wn.2d 472, 475-76, 886 P.2d 138 (1994). The more specific penalty provision is the 24 month enhancement for the drug violation taking place in the school zone. RCW 9.94a.533(6). Since RCW 69.50.435 was enacted our courts have definitively and consistently concluded that the statutory language “up to twice the imprisonment otherwise authorized by this chapter” means the statutory *maximum sentence* rather than the standard range sentence. *In re Cruz*, 157 Wn.2d 83, 88-90, 134 P.3d 1166 (2006) (citing cases); *Silva-Baltazar*, 125 Wn.2d at 479 (examining the legislative history for RCW 69.50.435); *State v. Blade*, 126 Wn.App. 174, 107 P.3d 775 (2005); *State v. Barajas*, 88 Wn.App. 387, 960 P.2d 940 (1997); *State v. Lua*, 62 Wn.App. 34, 813 P.2d 588 (1991).

Here, the trial court doubled the statutory maximum term for count 4 based on the jury’s finding of a school zone enhancement. Trujeque urges this court to not follow the above cited cases because they do not address *Blakely*. *Blakely* does not change the analysis. As *Blakely* notes “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence

a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” 542 U.S. at 303 (emphasis in original) (citations omitted). The jury found the school zone enhancement and thus found the facts necessary for the determination that the statutory maximum is to be doubled to 20 years in accordance with RCW 69.50.435. Trujeque’s sentence should be affirmed.

XII. In the event the State substantially prevails on appeal it will not seek appellate costs.

State will not seek appellate costs if it prevails.

CONCLUSION

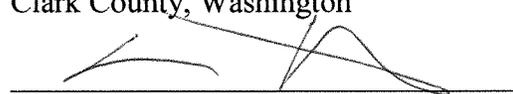
For the reasons argued above, this Court should affirm the trial court’s ruling denying Trujeque’s motion to suppress, affirm Trujeque’s convictions and sentence, and affirm Molina’s convictions and sentence.

DATED this 30 day of November, 2017.

Respectfully submitted:

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