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

STATE OF WASHINGTON, Respondent

v.

KEANDRE DESHAWN BROWN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-02249-9

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court properly allowed opinion testimony.**
- II. Brown received effective assistance of counsel.**
- III. The trial court did not err in finding Brown used a motor vehicle in the commission of counts 1 through 5.**
- IV. Brown's claim of error regarding CrR 3.5 findings is now moot.**

STATEMENT OF THE CASE

Keandre Brown (hereafter 'Brown') was charged by information with Robbery in the First Degree with a pharmacy enhancement and two firearm enhancements, four counts of Assault in the Second Degree, each with two firearm enhancements, and two counts of unlawful possession of a firearm. CP 1-3. The case proceeded to a jury trial.

The evidence presented at the trial is summarized as follows:

Chris Ramsay is a pharmacist working at the Mill Plain Medical and Pharmacy on August 22, 2016. RP 161. The pharmacy has two entrances. RP 193-94. One goes directly into the parking lot, with automatic, glass doors. RP 194. On that date, Mr. Ramsay was working with a few other technicians, Cheryl Wilcox, Mary Canjoli, Bianca Clyde, and Valentin Logunov. RP 162, 174-76, 192. Mr. Ramsay was working behind the pharmacy counter when a man pointed a gun at him and told

him to get to the ground. RP 163. The man was wearing a hat pulled low, and he was black. RP 163. The gun was pointed at Mr. Ramsay's face from a distance of about 6 feet. RP 164. Mr. Ramsay followed the man's directions and laid on the floor. RP 164. The man asked where the safe was and where they kept the drugs; Mr. Ramsay pointed over his shoulder towards the room with the safe. RP 165. Mr. Logunov took the gunman to the safe. RP 166. There was a second gunman in the lobby area of the pharmacy and the two men would yell back and forth to each other. RP 183. The gunman in the lobby started yelling to the first gunman that they had to leave. RP 167.

Mr. Logunov was attending to a customer at the drive thru window when he saw a man walk in and say, "get down, get down." RP 176. The man jumped on the pharmacy counter and Mr. Logunov could see he had a gun in his hand. RP 178. The gunman told Mr. Logunov to get down. RP 178. Then the gunman went over to another pharmacy technician and had her get on the ground as well. RP 180. The gunman walked around behind the pharmacy counter and then asked, "where are the oxys?" RP 181. "Oxy" is used to refer to oxycodone, a narcotic. RP 181. Mr. Logunov got up and helped the gunman to the room with the safe to get him the drugs. RP 181-82. The gunman told Mr. Logunov to get down again, so he did, and then the gunman went into the safe, going through it. RP 182. After

the gunman rustled through the safe a couple times, Mr. Logunov heard it go quiet. RP 184. He then decided to call 911 and rushed to the phone. RP 184. Once Mr. Logunov did that, the other workers and customers started to get up; many were crying and hugging each other. RP 184.

Ms. Wilcox, another pharmacy technician was working at her desk, across from the automatic sliding doors that lead out to the parking lot. RP 194. Ms. Wilcox had her head looking down as she worked, when a man approached her with a gun. RP 194. The man was black, approximately 5'9" to 6' tall, and wearing dark clothing and white shoes. RP 199. The gun, a semi-automatic, was pointed directly at her and the man told her to "get the fuck down, get the fuck down, get the fuck down. Get out here." RP 195-96. He wanted her to come out from around her desk. RP 195. Ms. Wilcox was terrified; she went to the side of her desk and knelt down; but the gunman came to her and put the gun against her head and told her to "get the fuck out here." RP 196-97. Just then, the gunman was distracted by another employee, Penny Jones, coming through the hallway from the other pharmacy entrance. RP 197-98. He pointed the gun towards her and told her to come into the store. RP 197. Ms. Wilcox took the gunman's distraction as an opportunity to run out of the pharmacy. RP 197. The gunman started to chase her and yelled that she had "better stop" or he would "fucking kill [her]" and that she was "going to die right here." RP

197. But the gunman came across another employee, Jessica Adler, in the will-call area just to the right of the front entrance, and Ms. Wilcox was able to get out of the pharmacy. RP 198-99. She yelled at the people in the parking lot not to go into the pharmacy, to leave, that they were being robbed. RP 199. Ms. Wilcox ran next door to the insurance agency and had them call 9-1-1. RP 199. Ms. Wilcox was very shaken up and never felt safe working at the pharmacy again. RP 202. She quit her job there in February 2017, within six months of the robbery. RP 206.

Penny Jones is a supervisor in the medical claims biller for the Mill Plain Medical and Pharmacy. RP 214. Ms. Jones works on the third floor of the building where the pharmacy is located; the pharmacy is on the first floor. RP 215. On the day of the robbery, Ms. Jones went down to the first floor pharmacy to pick up the mail. RP 216. She came in through the side, interior entrance and felt like something was wrong. RP 217. She heard a man tell her to “come here, come here,” and then Ms. Wilcox made a squealing noise and ran out the front door. RP 218. Ms. Jones immediately turned around and left back out the side entrance and ran up the stairs to the third floor. RP 218. She used her phone to call the pharmacy, and while the phone engaged, no one spoke into the phone on the pharmacy end. RP 218. She then heard a voice come through the phone that she did not recognize as someone who belongs in the pharmacy. RP 218. She then

called 9-1-1. RP 218. The man who had told her to “come here” was a black man carrying a yellow and black backpack. RP 219. After the police arrived, Ms. Jones gave them a statement; everyone was really shaken up and they closed the pharmacy for the rest of the day. RP 220-21.

Jessica Adler works as a clerk at the pharmacy and was there on August 22, 2016. RP 235. Ms. Adler was on the phone with a patient when she heard Ms. Wilcox scream and then saw her run out the front door. RP 237. A man pointing a gun at her was following her. RP 237. The man had a dark complexion and big eyes, wearing baggy clothes. RP 247. The man had a full face and was of a heavier build. RP 247. The man then stopped and saw Ms. Adler looking at him; he tried to wave her forward, but she shook her head no. RP 238. He then tried to grab her hand, but she smacked it away. RP 238. He did it again and she realized he had a gun in his hand. RP 238. The gunman told her to get on the ground. RP 239. At one point Ms. Adler tried to will herself to run, she stood up, but the gunman came back to her and had her get down again. RP 239. The gunman then had her crawl further into the store, and then lock the side entrance door. RP 240. Then he directed Ms. Adler to stay next to another co-worker, Codi Cofer, and a female customer. RP 241-42. Ms. Adler was scared at this point, and praying for God to keep her safe. RP 243.

Ms. Cofer had only been working at the pharmacy for about a week when the robbery occurred. RP 275. She quit about two months after the robbery due to the stress that the robbery had caused her at work. RP 276. On August 22, 2016, Ms. Cofer was helping a customer when she became aware of a person standing near her repeating himself over and over. RP 277. The customer Ms. Cofer was with got on the ground, and that's when Ms. Cofer realized what the man was saying and that he had a gun in his hands. RP 278. The gun was pointed at her, so Ms. Cofer also kneeled down. RP 278. The man told her to come out from behind her desk. RP 278. Ms. Cofer was scared and she was on the ground next to the customer she had been helping. RP 279. She heard Ms. Wilcox run out the front door, and the man with the gun went towards where Ms. Wilcox was. RP 280. The man came back and had Ms. Adler with him and put her on the ground near Ms. Cofer. RP 280. Ms. Cofer realized there was a second robbery when the man who had pointed the gun at her started talking to the other man, saying something about cops coming. RP 281. Ms. Cofer kept her head down during the robbery; she was scared she was going to get shot or something else terrible would happen. RP 282.

Rikki Gadberry was a customer at the pharmacy when the robbery occurred. RP 261. She saw a man come up behind the pharmacist and tell everyone to get down. RP 263. She thought he had a gun. RP 263. She

remained on the ground during the robbery. RP 265. Near the end, the man came over to her and picked up her bag and dumped the contents out. RP 265. He told her he was going to use her bag to put the stuff they were taking in, but she told him no. RP 265-66. He left her bag and took a plastic tub full of the items they stole. RP 266.

Matthew Bachelder is a police officer with the Vancouver Police Department. RP 286. On August 22, 2016 he was on patrol in the area of the Mill Plain Pharmacy. RP 287-88. He was driving southbound on 87th Ave. RP 289. The medical center/hospital was on the left, and the building the pharmacy was in was on his right. RP 290. Officer Bachelder was stopped for the red light a few cars back from the intersection, when he looked to his right and saw two men running through the pharmacy parking lot. RP 290. They ran to a car that was parked alongside the building to the left; the vehicle had been backed into the parking spot. RP 290. It looked like they were running carrying some bags and Officer Bachelder found it odd they were running in the pharmacy parking lot. RP 291. Officer Bachelder noticed the man who got in the passenger side of vehicle had a white hat with a dark bill, and a two-toned sleeveless hoodie and shorts. RP 292. He was carrying something that looked like a white bag. RP 292. The vehicle was tannish in color and looked like a mid-2000s Lexus, although the officer did not get a good look at it. RP 293.

Officer Bachelder decided to go into the parking lot to see what was going on with the men in the vehicle, but by the time he was able to get through traffic into the parking lot the vehicle was gone. RP 294. As he was pulling out of the parking lot after seeing the vehicle was gone, the alert for the robbery came through Officer Bachelder's radio. RP 295.

Believing then that the two men he had seen were the robbers, Officer Bachelder pulled out onto the street and attempted to see if he could see the vehicle. RP 295-96. He did not see the vehicle on the street. RP 296. Officer Bachelder then pulled back into the pharmacy parking lot and a woman came up to him and said she got a license plate of the vehicle the men were driving and gave it to him as Oregon 061DNB. RP 297. That license came back registered to a 2002 Toyota Avalon. RP 298-99. A Toyota Avalon's appearance is consistent with the vehicle Officer Bachelder saw. RP 301.

Darren McShea is a detective with the Vancouver Police Department. RP 307. Det. McShea was involved in investigating the robbery and he obtained a surveillance video that the pharmacy maintained that was admitted into evidence. RP 311-12. During the investigation, officers learned of similar pharmacy robberies committed in Portland, Oregon, and the officers identified potential suspects. RP 456. Police showed a probation officer, Henry Bradshaw, still photos from the

pharmacy surveillance video to see if he could identify the persons involved in the robbery. RP 107.

Henry Bradshaw is a juvenile parole and probation officer with the Oregon Youth Authority. RP 99. Mr. Bradshaw knew Brown through his employment with the Oregon Youth Authority. RP 100. Brown was at Hillcrest, a juvenile facility, for three to four years starting in approximately 2012. RP 100. Mr. Bradshaw had previously supervised Brown's uncle and knew several of Brown's uncle's friends and peers, so he was familiar with Brown and met him when he was at the Hillcrest. RP 100. Mr. Bradshaw had multiple interactions with Brown over the course of three and a half years; they spoke about another youth on Mr. Bradshaw's caseload, and when Brown's probation officer was on vacation, Mr. Bradshaw would fill in and have contact with Brown. RP 101-02. Brown also reached out to Mr. Bradshaw to check in about people Brown knew. It is common for youths incarcerated at a correction facility to ask probation officers how other people they know are doing. RP 101. Mr. Bradshaw indicated that he had about 10 conversations or meetings with Brown, some lasting 2 to 3 minutes, and others lasting as long as 10 minutes, with one lasting about 20 minutes. RP 102. Due to Mr. Bradshaw's occupation, he pays particular attention to a person's

appearance. RP 103. Mr. Bradshaw's last contact with Brown was in early 2016, right before Brown left Hillcrest. RP 104.

Mr. Bradshaw was also familiar with Brown's accomplice, Keith Woody. RP 104. Mr. Bradshaw has known Woody for about ten years and originally supervised him when he was in the juvenile correctional facility and also supervised him while he was on parole. RP 104-05. Mr. Bradshaw had numerous interactions with Woody over the course of eight to ten years. RP 105. Mr. Bradshaw had an opportunity to observe Woody's features and mannerisms. RP 105. Mr. Bradshaw was also told by Woody that he and Brown were friends, and Mr. Bradshaw knew that Woody and Brown were at a transitional camp program together. RP 106. Mr. Bradshaw has also seen numerous photographs of Woody and Brown together on social media. RP 106. Mr. Bradshaw also last saw Woody in person in early 2016. RP 107.

During Vancouver Police's investigation of this case, Mr. Bradshaw was shown surveillance footage and still photographs by Detective Neil Martin. RP 107-08. From that footage and the photographs, Mr. Bradshaw recognized Brown. RP 108.

In determining the admissibility of Mr. Bradshaw's opinion on the identification of the robbers, the trial court found the video showed a clear view of Brown's face, and weighed the evidence under ER 403, finding

the probative value is significant enough that it was not outweighed by the danger of unfair prejudice. RP 134-35. In this case, the superior court found the quality of the still photographs was “very high quality.” RP 121.

Brown was arrested when a van he was riding in was stopped. RP 368-70, 380. Brown concealed a gun in the van; he was prohibited from possessing guns due to a prior felony conviction. RP 402, CP 4.

The jury convicted Brown of Robbery in the First Degree, four counts of Assault in the Second Degree, two counts of unlawful possession of a firearm, and found the robbery was of a pharmacy, and that for each of counts 1 through 5 that both Brown and his accomplice were armed with firearms. CP 5-22. Prior to sentencing, Brown’s attorney worked with the prosecutor, and made a pitch as to why the standard sentencing range was too harsh. RP 680-81. At the sentencing hearing, the State moved to dismiss five firearm enhancements so that Brown’s standard range would be reduced by 15 to 20 years, approximately. RP 680. The State asked the Court to impose 360 months, a standard range sentence after the dismissal of five firearm enhancements. RP 680-81. The court acknowledged its ability to impose an exceptional sentence based on youthfulness, and discussed that the 45 to 49 year sentence would effectively be a life sentence, so he agreed with the parties that a 30 year sentence was more appropriate. RP 682. In addition, the court discussed

the dangerous conduct Brown engaged in and the impact on the victims and stated, “It is without question that it is quite dangerous conduct, and so the 30 years is appropriate in that regard.” RP 683. Thus, having read the sentencing memoranda discussing youthfulness as a possible basis to depart from the standard range, and considering that the dismissal of the enhancements by the State lead to a significant reduction, the trial court imposed the 30 year recommendation. RP 681-83; CP 33. The Court also found that a motor vehicle was used during the commission of counts 1 through 5. CP 37.

This appeal timely followed. After Brown filed his opening brief, the trial court entered findings of fact and conclusions of law from the CrR 3.5 hearing it held prior to trial. Those findings have been designated as supplemental clerk’s papers.

ARGUMENT

I. The trial court properly allowed opinion testimony

Brown argues the trial court erred in allowing Mr. Bradshaw to testify that based on his numerous contacts with Brown, he recognized Brown in the surveillance footage of the robbery. Based on the applicable case law and the testimony Mr. Bradshaw provided, it is clear the trial court properly allowed Mr. Bradshaw to testify as to his opinion on the

identity of the persons depicted in the surveillance footage and still photographs from the footage. Brown's claim should be denied.

This Court reviews a trial court's ruling on the admission of evidence for an abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 125 (2008). A trial court abuses its discretion if its decision is based on untenable grounds, made for untenable reasons, or is manifestly unreasonable. *Id.* (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). A lay witness may give opinion testimony if it is rationally based on the perception of the witness and helpful to a clear understanding of the testimony or the determination of a fact in issue. ER 701.

“A lay witness may give opinion testimony as to the identity of a person in a surveillance photograph as long as ‘there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.’” *State v. George*, 150 Wn.App. 110, 118, 206 P.3d 697 (2009) (quoting *State v. Hardy*, 76 Wn.App. 188, 190-91, 884 P.2d 8 (1994), *aff'd*, *State v. Clark*, 129 Wn.2d 211, 916 P.2d 384 (1996)). A lay witness's opinion as to the identity of a person in a surveillance photograph is appropriate if that lay witness “has had sufficient contacts with the person...” *Id.* (citing *United States v. La Pierre*, 998 F.2d 1460, 1465 (9th Cir. 1993)).

Hardy, supra involved two cases that had been consolidated on appeal, both dealing with whether an officer appropriately gave an opinion as to the identity of a person depicted in a video. In one case, the officer testified that he had known the defendant for several years. *Hardy*, 76 Wn.App. at 191. In the second case, the officer testified he had known the defendant for six or seven years. *Id.* at 192. The Court in *Hardy* found that the officers properly gave opinions on the identities of the persons in the videos based on their contact with the defendants, and finding that the officers were more likely to correctly identify the defendants than the juries. *Id.* at 192.

In *George, supra*, this Court again addressed whether an officer was appropriately allowed to testify as to the identity of two co-defendants from a video. *George*, 150 Wn.App. at 119. The officer there observed the defendant, George, exit a van and run away, and also later at the hospital that same day. *Id.* The officer observed the other defendant, Wahsise, when he exited the van and was handcuffed, and also at the police station in an interview room. *Id.* This Court held that these contacts were far from extensive, and did not support a finding that the officer knew enough about the defendants to express an opinion that they were the ones depicted in a very poor quality video, one in which no facial features were discernable. *Id.*

More recently, in the unpublished decision of *State v. Everson*, 199 Wn.App. 1047 (Div. 1, 2017),¹ the Court held that an officer who spent about one hour with a defendant was properly allowed to testify as to the defendant's identity in a video. *Everson*, slip. op. at 3. There, the officer spent 45 minutes sitting only 3 or 4 feet across a table from the defendant while interviewing him. *Id.* Three days later, the officer spent 15 minutes with the defendant when the officer arrested him. *Id.* The Court found the officer involved in *Everson* had a better opportunity to become familiar with the defendant's appearance than the officer in *George*, *supra* did. *Everson*, slip. op. at 3. Additionally, the image involved in *Everson* clearly showed the person's facial features. *Id.* Given that the officer spent 45 minutes face-to-face with the defendant, and given the officer's opportunity to spend time with the defendant in close quarters, the Court found that the officer was more likely than the jury to correctly identify the defendant from the video images. *Id.* Accordingly, the Court rejected the contention that the officer's opinion testimony invaded the province of the jury.

¹ GR 14.1 allows citation to opinions of the Court of Appeals issued on or after March 1, 2014. These opinions are not binding authority and may be afforded as much persuasive value as this Court sees fit.

In another unpublished decision, *State v. Robinson*, 200 Wn.App. 1065 (Div. 1, 2017),² this Court considered, in an ineffective assistance of counsel context, whether the trial court properly allowed an officer to testify as to the officer's opinion that the defendant was the person depicted in a photograph. *Robinson*, slip. op. at 3. There, the officer based her opinion on a prior encounter with the defendant nine years prior, and the officer's repeated exposure to photographs of the defendant. *Id.* at 2. On review, the Court found the situation involved in *Robinson* more like that in *Hardy*, than in *George*. *Id.* at 3. The officer testified that she had looked at numerous photographs of the defendant over the years and was familiar enough with her image that she would be able to look at an image of the defendant and know who it was without being told the defendant's name. *Id.* at 4. Despite the fact that the officer did not have extensive contacts with the defendant, the officer was still more likely to identify the defendant as the person in the surveillance images than the jury due to the officer's prior contacts with her. *Id.* at 4. The testimony from the officer was therefore found to be admissible lay witness opinion testimony. *Id.*

In Brown's case, the witness, Mr. Bradshaw, had several contacts with the defendant over a period of years, rendering the facts closer to the

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cases of *Hardy, supra, Everson, supra, and Robinson, supra* than to the facts of *George, supra*. This case is not at all similar to *George, supra*. Mr. Bradshaw had many contacts over a period of years with Brown, whereas in *George, supra* the officer had, at best, two to three minutes of contact with the defendant, and then gave his opinion as to the identification of the defendant in a low-quality video. *George*, 150 Wn.App. at 119. The trial court properly considered the facts and the applicable law and weighed the evidence pursuant to ER 403, finding the probative value was significant enough that it was not outweighed by the danger of unfair prejudice. RP 134-35. The trial court did not err in admitting the evidence. Brown's claim should be denied.

II. Brown had effective assistance of counsel.

Brown claims his attorney was ineffective for failing to discuss his youth and factors showing his youthfulness from his statement to police in order to justify an exceptional sentence downward, and for failing to let the court know the court had the authority to impose an exceptional sentence based on youthfulness. Brown's attorney worked hard prior to sentencing to get the prosecutor to dismiss several enhancements so that Brown's standard range was reduced by nearly 20 years. His attorney was not ineffective for failing to ask for an even more lenient sentence after receiving such a reduction given that the trial court sentenced him to mid-

range and could have sentenced him to high-end if angered by the defendant's refusal to accept responsibility and/or failure to acknowledge that the State's dismissal of the aggravating factors was already a significant reduction and that his behavior did not warrant a more lenient sentence than that. Additionally, as Brown recognizes in his brief, the trial court was well aware of its sentencing authority and did not abuse its discretion by believing it could not impose a sentence that it could lawfully impose, and therefore Brown's attorney was not deficient for failing to explicitly point that out to the court. It was a reasonable strategy for the attorney to argue as he did and Brown cannot show prejudice from his attorney's actions. Brown's claim of ineffective assistance of counsel fails.

This Court reviews claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). Defendants have a constitutional right to the effective assistance of counsel. U.S. Const. Amend. VI; *Strickland v. Washington*, 466 U.S. 668, 685-87, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient, and that that deficient performance prejudiced him. *State v. Carson*, 184 Wn.2d 207, 216, 357 P.3d 1064 (2015). A defendant must prove both prongs in order to have a successful ineffective

assistance of counsel claim. *Id.* A defense attorney is ineffective if his or her performance was not reasonably effective under prevailing norms. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Brown's attorney's performance in obtaining a very favorable sentence for him was quite effective. Brown's attorney saved him from serving an additional 15 to 19 years in prison by convincing the prosecution that Brown's case warranted a reduced sentence. Brown cannot establish either deficient performance or prejudice.

Brown appears to argue that the trial court was not aware of its authority to sentence him to an exceptional sentence and that his attorney was ineffective for failing to make the court aware of that authority. However, the trial court was well aware of its authority to sentence Brown to an exceptional sentence below the standard range based on youthfulness. The prosecutor submitted a sentencing memorandum that discussed the recent case law on youthfulness and exceptional sentences. RP 678-79. The State argued the defendant was not living the life of a youth, but living the life of a hardened criminal. RP 679. Additionally, the State and court discussed that the standard range of the crimes and enhancements as convicted was 45.75 years to 49.25 years, but that the prosecutor asked to vacate several enhancements as it felt a 30 year

sentence was a more appropriate outcome than a 45 to 49 year sentence.

RP 680.

As defense counsel noted at the sentencing hearing,

The defense has accomplished its goal by filing its request for a reduced sentence. The State has read our argument, evaluated it, spoke with their superiors, and found that the standard sentencing range is too harsh for the conduct. Whether this young man at 19 was considered too youthful or too mature for any kind of alternative, the State has determined, after reading the defense's request and argument under case law, that the compounding of the firearm enhancement created an unjust sentencing and has asked for 204 months to be reduced. That was our request. That is our goal.

The Court has read our memorandum. The Court knows what the Court may do and must do under the SRA. This is a young man who had a single prior criminal history point on his record. And now he has nine because of this verdict.

...

We agree with the State and the State has agreed with the defense that the standard range in the way it compounds sentencing relating to the firearm is unjust. We ask this Court for a just verdict as the Court may deem appropriate.

RP 681. Brown's contention on appeal that his attorney failed to apprise the trial court of its ability to consider a mitigated exceptional sentence is without support. Prior to sentencing, defense counsel filed a memorandum entitled "Defense presentence memorandum of authorities in support of an exceptional sentence." CP 23-28. In that memorandum, defense asks the court to impose an exceptional sentence below the standard range. *Id.*

Therefore Brown's contention his attorney was ineffective for failing to advise the court of its ability to impose an exceptional sentence is wholly without merit.

In addition, Brown's claim his attorney was ineffective for failing to point out specific parts of the defendant's life history in order to obtain an exceptional sentence is also without merit. Brown's attorney worked with the prosecutor, made a pitch to the prosecutor as to why the standard sentencing range was too harsh, likely pointing out many of the things Brown now claims his attorney should have told the trial court. RP 680-81. Brown's attorney was fully effective in getting something even better than an exceptional sentence for his client: dismissal of enhancements a jury had already found he committed. Instead of arguing for an exceptional sentence below the standard range, which the State could have then appealed, Brown's attorney got the prosecutor to agree to dismiss enhancements in order to make the standard range much lower. His attorney's work saved him a potential 19 additional years under a standard range sentence. The judgment and sentence noted the "recommended sentencing agreements... as follows: 360 months." CP 31. That sentencing recommendation was up to 228 months shorter than it would have been had the State not agreed to dismiss several enhancements. Brown's attorney was far from ineffective in representing him. Counsel obtained a

200 month reduction for him that is immune from appeal by the State, and an agreement with the State that prevented the trial court from imposing higher than the standard range of 345 to 387 months (standard range on Robbery of 129 to 171, plus 12 month pharmacy enhancement and 60 month firearm enhancement on the Robbery, and four 36 month enhancements on the assault convictions) without finding some exceptional aggravating factor was present. Counsel's representation was more than effective; he obtained an extremely favorable result for Brown when Brown had no real bargaining power. That is the opposite of ineffective assistance of counsel.

In addition, Brown cannot show prejudice from his counsel's performance. In order to prove prejudice, Brown must show that there was a reasonable probability that the result of the sentencing hearing would have been different had his attorney raised additional youthfulness factors to the trial court. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694).

At sentencing, the court acknowledged the ability to impose an exceptional sentence based on youthfulness, and discussed that the 45 to 49 year sentence would effectively be a life sentence, so he agreed with the parties that a 30 year sentence was more appropriate. RP 682. In

addition, the court discussed the dangerous conduct Brown engaged in and the impact on the victims and stated, “It is without question that it is quite dangerous conduct, and so the 30 years is appropriate in that regard.” RP 683. Thus, having read the sentencing memoranda discussing youthfulness as a possible basis to depart from the standard range, and considering that the dismissal of the enhancements by the State lead to a significant reduction, the trial court imposed the 30 year recommendation. It is clear from the trial court’s statements at sentencing that the sentencing judge was present during trial, and therefore heard the contents of what Brown now claims his attorney should have presented, and based on everything in this case felt 30 years was appropriate. In addition, the statements Brown made to police during his interview do not show someone living the life of a youth and instead support the court’s imposition of a standard range sentence. Brown had completed a year in college. Ex. 1, p. 4. However, he was caught with a gun and his college career ended. *Id.* at p. 5. While serving a sentence for his juvenile conviction, Brown spent a year at a camp in Florence, Oregon, graduating from high school there, and working in the yard service industry. *Id.* at p. 6. He came out with \$6,000 earned from working. *Id.* Afterwards, Brown worked at the Frito Lays factory and drove a vehicle to and from work. *Id.* at p. 12. Brown himself even told police that he has a “stronger head on my shoulders,” at age 19

than he did as a juvenile. *Id.* at p. 34. The interview with police does not support a request for an exceptional sentence based on youthfulness. Brown has not shown, and cannot show, a reasonable probability that the trial court would have sentenced him to an exceptional sentence below the standard range had his attorney highlighted Brown's statements in his interview with police. Brown's claim of ineffective assistance of counsel fails.

III. The trial court did not err in finding Brown used a motor vehicle in the commission of counts 1 through 5.

Brown argues the trial court erroneously found he used a motor vehicle in commission of the crimes, however, Brown's use of the vehicle was essential to the accomplishment of his crimes and therefore the trial court properly found he used a motor vehicle during the commission of counts 1-5.

A trial court may instruct the Department of Licensing to revoke a defendant's license for one year upon conviction of a "felony in the commission of which a motor vehicle is used." RCW 46.20.285(4). This Court reviews the application of a statute to a specific set of facts *de novo*. *State v. Depuis*, 168 Wn.App. 672, 674, 278 P.3d 683 (2012). The statute does not define "use," so we rely on case law interpreting the meaning of the statute. Our Courts have found that for this statute to apply, the vehicle

must have contributed in some way to the accomplishment of the crime, and there must be some relationship between the vehicle and the commission or accomplishment of the crime. *State v. Alcantar-Maldonado*, 184 Wn.App. 215, 227-28, 340 P.3d 859 (2014) (citing *State v. Batten*, 140 Wn.2d 362, 365, 997 P.2d 350 (2000)). If the vehicle is only incidental to the commission of the crime, the vehicle was not “used” in the commission of the crime for purposes of RCW 46.20.285(4). *Alcantar-Maldonado*, 184 Wn.App. at 228.

In *Alcantar-Maldonado*, the Court found the vehicle was not used in the commission of the crime of assault when the vehicle was used to transport the defendant to and from the house where he committed the assault. *Alcantar-Maldonado*, 184 Wn.App. at 227-28. Using this case to support his claim, Brown argues that the vehicle in his case was only used to transport him to and from the pharmacy and therefore the trial court improperly found it was “used” in the commission of the crimes. However, robbery is an ongoing crime that is not accomplished until the defendant escapes, that escape which was done by pre-planned use and staging of a motor vehicle. In addition, the defendant used the vehicle to transport contraband, i.e. the stolen drugs from the pharmacy, away from the scene of the crime, another basis for finding that the defendant “used” a motor vehicle in the commission of the crime. For those reasons, the trial

court did not err in finding the defendant used a motor vehicle in the commission of counts 1-5 pursuant to RCW 46.20.285(4).

Washington has adopted a transactional “analysis of robbery, whereby the force or threat of force need not precisely coincide with the taking. *State v. Troung*, 168 Wn.App 529, 535, 277 P.3d 74 (2012) (citing *State v. Manchester*, 57 Wn.App. 765, 770, 790 P.2d 217 (1990)). This means that the “taking is ongoing until the assailant has effected an escape” and that, as a result, robbery “includes violence during flight immediately following the taking.” *Id.* at 536 (citations omitted). Simply put, under Washington’s robbery statute, provided there is evidence force was used to “retain possession of the property, resist apprehension, or facilitate escape” then there is sufficient evidence to sustain a robbery conviction. *State v. Handburgh*, 119 Wn.2d 284, 292, 830 P.2d 641 (1992). This reasoning has a useful application in understanding how a motor vehicle can be “used” to commit the crime of robbery. The taking of property, a required element of robbery, is ongoing until the defendant escaped. In Brown’s case, he acquired a vehicle that was not registered to him, and had it specifically parked with its nose pointing outwards to make leaving easier, and immediately ran from the pharmacy, with his accomplice, straight to the vehicle which he used to flee, taking the guns and fruits of the crime with him. In a “stick ‘em up” type of robbery like

the one Brown committed, a get-away car is a necessary tool in completing the crime. It is clear from the set of facts in Brown's case that the vehicle was instrumental to his successful completion of the crime. Had Brown walked away, or taken a bike or a bus, he likely would not have affected his escape. Based on the reasoning of *Alcantar-Maldonado, supra*, the trial court's finding was proper. The vehicle contributed to the accomplishment of the crimes and there is a clear relationship between the vehicle and the accomplishment of the crime. This vehicle was not merely incidental to the commission of the robbery; it was a necessary tool, without which Brown could not have accomplished his escape.

In addition, courts have held that use of a vehicle to hide a firearm and store drugs constituted "use" of a motor vehicle in the commission of felonies. *Batten*, 140 Wn.2d at 365-66. The Court in *Batten* relied upon a California case in which the court applied their, nearly identical, statute. *Id.* (discussing *In re Gaspar D.*, 22 Cal. App. 4th 166, 27 Cal. Rptr 2d 152 (1994)). There, the defendant's stashing of a stolen tape deck in an accomplice's car was sufficient "use" of the motor vehicle for a finding that the vehicle was used during the commission of a felony. In addition, where a vehicle was necessary to take items from a residence during the commission of a burglary, our Court has found a sufficient nexus existed such that the vehicle was "used" in the commission of the felony. *State v.*

Sand, 195 Wn.App. 1024 (Div. 1, 2016) (unpublished).³ Here, Brown and his accomplice carried out a white tub of medications, using the vehicle to conceal the obvious pharmacy property from the public, and also to carry the contraband away for their own personal use. This is another reasonable basis for which the trial court properly found the defendant used a vehicle in the commission of a felony.

This Court should find the trial court did not err in finding that Brown used a motor vehicle in the commission of a felony under RCW 46.20.285(4) and should affirm that finding.

IV. Brown’s claimed error regarding the CrR 3.5 findings is now moot.

Findings were entered after Brown submitted his opening brief. They have been designated as supplemental clerk’s papers. The issue of the trial court’s failure to enter findings is now moot.

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³ GR 14.1 allows citation to opinions of the Court of Appeals issued on or after March 1, 2014. These opinions are not binding authority and may be afforded as much persuasive value as this Court sees fit.

CONCLUSION

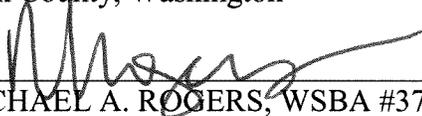
The trial court properly admitted opinion evidence in this case, and Brown had effective assistance of counsel. None of Brown's claimed error merit relief. The trial court should be affirmed in all respects.

DATED this 30th day of November, 2018.

Respectfully submitted:

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