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Division II
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NO. 52343-4-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

AARON MYLAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR JEFFERSON COUNTY

BRIEF OF APPELLANT

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A. INTRODUCTION

Aaron Mylan was sitting in his girlfriend's Volvo when Sergeant Pernsteiner walked up to the car, reached through the window, unlocked the door, and ordered Mr. Mylan to get out. Although Sergeant Pernsteiner believed Mr. Mylan may have been driving without a license and was dangerous, instead of arresting or frisking Mr. Mylan, he emptied Mr. Mylan's pocket and pulled out a bag containing heroin. This led to the discovery of additional heroin and methamphetamine in the Volvo. The State charged Mr. Mylan with possession with intent to distribute and, at trial, the prosecutor attempted to link Mr. Mylan with Mexican cartels by repeatedly referring to the heroin as a "Mexican ounce," despite the trial court's statements that the suggestion was unsupported by the evidence.

The State additionally charged a "school bus route stop" sentencing enhancement, yet inexplicably failed to present evidence as to the official school bus route or testimony by a school-district employee. This Court should reverse and remand for suppression and dismissal or for a new trial. Alternatively, this Court should reverse the sentencing enhancement and remand for resentencing.

B. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied the motion to suppress evidence of Sergeant Pernsteiner's unlawful search, in violation of Mr.

Mylan's rights under the Article I, section 7 of the Washington Constitution and the Fourth Amendment.

2. The prosecutor committed misconduct when she repeatedly suggested that Mr. Mylan may be involved with a Mexican drug cartel without any evidence to support the theory.

3. The evidence was insufficient to establish beyond a reasonable doubt that the offense occurred within 1,000 feet of a school bus route stop designated by the school district.

4. Mr. Mylan is indigent and the $200 filing fee should be stricken as no longer mandatory.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Sergeant Pernsteiner stopped Mr. Mylan for Driving While License Suspended. Although he briefly detained and handcuffed Mr. Mylan, Sergeant Pernsteiner did not arrest Mr. Mylan and informed Mr. Mylan that, if he cooperated, he would be cited and released once his license status was confirmed. Sergeant Pernsteiner then reached directly into Mr. Mylan's pockets and removed a plastic bag containing heroin. Did the trial court err in denying the motion to suppress where the warrantless search did not fall within the narrowly guarded exceptions of a search incident to arrest or a search pursuant to an investigatory stop?

2. A prosecuting attorney must act impartially in the interest of justice. It is misconduct for a prosecutor to inject racial bias into a trial or to appeal to the passion and prejudice of the jury. Did the prosecutor engage in misconduct by repeatedly suggesting Mr. Mylan was involved with a Mexican cartel despite the trial court's rulings that the argument was unsupported by the evidence and could be "highly prejudicial"?

3. The State charged a sentencing enhancement under RCW 69.50.435(1)(c), alleging that the offense occurred within 1,000 feet of a school bus route stop designated by the school district. At trial, the State failed to present testimony from anyone employed by the school district or other evidence identifying the district's official bus route or stops. Was the evidence insufficient to prove the enhancement beyond a reasonable doubt?

4. RCW 36.18.020(2)(h) prohibits courts from imposing a $200 filing fee as a legal financial obligation. Should this Court strike the $200 filing fee where Mr. Mylan is indigent and the trial court erroneously believed the fee was mandatory?

D. STATEMENT OF THE CASE

Sergeant Andrew Pernsteiner first contacted Aaron Mylan in February 2017. RP 25. Although he believed Mr. Mylan was driving with a suspended license, he did not have enough evidence to arrest or cite Mr.

Mylan for the offense. RP 24. Four months later, Sergeant Pernsteiner saw a law enforcement alert bulletin issued by the Department of Corrections (DOC), describing Mr. Mylan as potentially armed and having a history of fleeing or resisting arrest. RP 9-10. Recognizing Mr. Mylan as the individual he contacted in February, Sergeant Pernsteiner took it upon himself to check Mr. Mylan's driving status and saw that his license was still suspended. RP 9, 17-18. Sergeant Pernsteiner also learned that Mr. Mylan was living with his uncle in a nearby trailer park and was dating Crystal Smith, who Sergeant Pernsteiner knew owned a gold Volvo. RP 11-12.

Over the next few days, Sergeant Pernsteiner drove through the trailer park, observing Mr. Mylan's uncle's home, and noticed that Ms. Smith's Volvo was parked in the driveway. RP 28-29. Finally, on June 15th, as he was yet again driving past Mr. Mylan's uncle's house, Sergeant Pernsteiner saw the Volvo preparing to exit the park with Mr. Mylan sitting in the driver's seat. RP 12-13, 29. Sergeant Pernsteiner parked his car next to the Volvo and asked Mr. Mylan why he was driving without a license. RP 17-18. Sergeant Pernsteiner did not activate his emergency lights, check Mr. Mylan's driving status, or ask Mr. Mylan for his license and registration because he believed that "it's quicker to take action than it is to pull over and wait five minutes for a return." *See* RP 32-34.

Mr. Mylan stated that his girlfriend was sick and he needed to go to the store to get some cough syrup. RP 18. Taking this as an admission of guilt, Sergeant Pernsteiner exited his vehicle, reached through Mr. Mylan's open window, unlocked the car door, and instructed him to get out of the car. RP 18-19. Sergeant Pernsteiner saw that there was another individual in the car, but could not see who it was. RP 19-20. The car was in drive and, when Mr. Mylan stepped out, it began to roll forward. RP 20. As Mr. Mylan moved towards the car to prevent it from rolling, Sergeant Pernsteiner grabbed Mr. Mylan's hands to handcuff him. RP 20. The passenger was able to pull the emergency brake and stop the car. RP 20.

Mr. Mylan tried to free his arms and appeared to reach for his front right pocket. RP 21-22. Sergeant Pernsteiner responded by wrapping his arms underneath Mr. Mylan's arms and walking Mr. Mylan to the police car. RP 21-22. Sergeant Pernsteiner did not place Mr. Mylan in the police car and informed Mr. Mylan that, if he cooperated, he would only get a citation for driving with a suspended license, but that he would go to jail if he continued to struggle. *See* RP 43-44. Mr. Mylan thereafter cooperated and allowed himself to be handcuffed. RP 44.

Sergeant Pernsteiner immediately emptied Mr. Mylan's right front pocket and pulled out a bag containing a little under one ounce of heroin. RP 23, 44, 260. Sergeant Pernsteiner then placed Mr. Mylan under arrest

for possession of heroin and read Mr. Mylan his *Miranda* rights. RP 277. Mr. Mylan informed Sergeant Pernsteiner that someone named "Mike" gave him the drugs in lieu of money. RP 279-80. Mr. Mylan stated that he did not use drugs but was going to trade the heroin for a car. RP 279-80. He pleaded with Sergeant Pernsteiner to lose the drugs and stated he would be in the Sergeant's debt. RP 282.

After Sergeant Pernsteiner detained and searched Mr. Mylan, a back-up officer arrived and observed a large manila envelope on the floor of the car. RP 101-02. Believing it contained money, Sergeant Pernsteiner obtained a search warrant for the car, requesting to seize heroin, contraband, or "fruits of crime." CP ___ (Sub. No. 113). His affidavit asserted that, based upon the large amount of heroin on Mr. Mylan's person, he believed the envelope or car may have additional evidence of the offense. CP ___ (Sub. No. 113). In his search, Sergeant Pernsteiner discovered that the envelope contained three ounces of heroin, packaged in approximately one-ounce quantities. RP 291, 252, 255, 260-61. He additionally observed a soda bottle cap with a residue that ultimately tested positive for methamphetamine. RP 258, 293.

Law enforcement did not ask Mr. Mylan whether he was aware of the envelope on the floorboard or its contents. *See* RP 322. Although there was a second individual in the car and Mr. Mylan was not the owner of the

car, Sergeant Pernsteiner never interviewed the passenger and could not recall if he interviewed Ms. Smith to obtain further information about the source of the heroin. RP 325-26.

The State charged Mr. Mylan with possession of heroin with intent to manufacture or deliver (count 1), possession of methamphetamine (count 2), and third-degree driving while license suspended (DWLS) (count 3). CP 25-26. The State later amended the information to add a sentencing enhancement under RCW 69.50.435(1)(c) to count 1, alleging the act occurred "within 1,000 feet of a bus stop designated as a school bus stop by the Chimacum School District." CP 25-26.

1. Pretrial Suppression Hearings

a. CrR 3.6 hearing.

Defense counsel moved to suppress all evidence resulting from the warrantless search of Mr. Mylan's person pursuant to CrR 3.6. CP 7-16. At the suppression hearing, Sergeant Pernsteiner confirmed that he saw the DOC bulletin that was issued a week prior to the stop, but could not recall the exact date. RP 9. Similarly, he could not recall when he checked Mr. Mylan's driving status, but agreed it could be the same day he saw the bulletin. RP 29. Sergeant Pernsteiner's testimony regarding probable cause at the time of the stop was somewhat contradictory; he initially testified that – particularly given Mr. Mylan's statement that he was going to the

store – there was probable cause to arrest, while later stating that he believed he had probable cause to detain Mr. Mylan for further investigation. RP 32, 36-37. One reason Sergeant Pernsteiner did not activate his emergency lights was his uncertainty about Mr. Mylan's license status. RP 31. Ultimately, Sergeant Pernsteiner decided to detain Mr. Mylan for further investigation to run the license check. RP 36-37.

Planning to put Mr. Mylan in the patrol car while he checked his licensing status, Sergeant Pernsteiner decided to search Mr. Mylan. RP 37-39. Instead of patting Mr. Mylan down, however, Sergeant Pernsteiner immediately emptied Mr. Mylan's pocket. RP 44-45. According to Sergeant Pernsteiner, because Mr. Mylan associated with individuals who use hypodermic syringes, patting the exterior clothing could be dangerous. RP 44. Instead, he described his technique as "you grab the pocket and you open it and you pull whatever's in it out." RP 44-45. Although he was concerned that Mr. Mylan may have a weapon, Sergeant Pernsteiner admitted that he really had no idea what was in Mr. Mylan's pocket. RP 46-47. Defense counsel clarified:

> Q: You said you did not pat him down, correct?
>
> A: I said I didn't pat like you normally think of a pat search.
>
> Q: Yeah. You just emptied his pockets?
>
> A: Correct.

RP 46.

After arresting Mr. Mylan for possession of heroin, Sergeant Pernsteiner confirmed that Mr. Mylan's license was suspended on ID only – meaning Mr. Mylan either never had a driver's license or his license expired. RP 38-39.

The trial court denied the motion to suppress. CP 110. The court found that Mr. Mylan was not under arrest when he was handcuffed and searched, but nevertheless concluded that the search was valid as Sergeant Pernsteiner had probable cause to detain or arrest Mr. Mylan for DWLS. *See* CP 109-110. The court additionally found that Sergeant Pernsteiner had reason to be concerned for his safety throughout the contact. CP 110. Although defense counsel's motion requested suppression of all evidence obtained pursuant to the search, including evidence discovered in Ms. Smith's vehicle, the parties did not address the validity of the warrant after the trial court's ruling. *See* CP 15; RP 65.

b. CrR 3.5 hearing.

The State sought to admit Mr. Mylan's post-*Miranda* statements, including that he obtained the heroin in his pocket from someone named "Mike." *See* RP 107. Believing Mike's ethnicity to be relevant, the prosecutor elicited testimony from Sergeant Pernsteiner that Mr. Mylan made a statement that Mike was "a Hispanic man." RP 100. The

prosecutor then sought to clarify, "Did he say Hispanic or Mexican?" RP 100. When Sergeant Pernsteiner could not recall, the prosecutor provided him with a copy of his report stating that Mike was Mexican. RP 101. The trial court ultimately ruled that the majority of Mr. Mylan's statements regarding his personal drug use and intent to trade the heroin for a car were admissible as spontaneous statements. RP 111-13.

The trial court did, however, take exception to any statements regarding Mike's nationality or ethnicity, concluding that whether he was Mexican was irrelevant. *See* RP 112, 114. The prosecution disagreed, arguing the quantity possessed by Mr. Mylan could not be obtained locally and the fact that Mike was Mexican was indicative of cartel involvement. *See* RP 114. The court disagreed, noting that the statement was likely irrelevant and "could be highly prejudicial, particular in this day and age." RP 114. The court concluded that it would determine the admissibility of the statement if defense counsel objected on relevancy. RP 144. Defense counsel immediately did so, arguing there was no evidence of cartel activity. RP 114. However, the trial court did not make a second ruling at the hearing. *See* RP 114-15.

2. Trial Proceedings

The State presented testimony by Sergeant Pernsteiner regarding the initial stop, the warrantless search of Mr. Mylan, and the subsequent

search of the car. RP 264-297. The State additionally called Sergeant Brett Anglin to testify about indications of personal use of heroin versus signs of distribution. RP 406-434. Despite the trial court's pretrial rulings, the prosecutor continued to make efforts to suggest Mr. Mylan was linked to a Mexican drug cartel, repeatedly asking about the term "Mexican ounce" and eliciting testimony from Sergeant Anglin regarding drug distribution chains originating in Mexico. RP 262, 410-11, 422-23.

The State also attempted to establish that the offense occurred within 1,000 feet of a school bus route stop designated by a school district. According to Sergeant Pernsteiner, in June of 2018 – a year after the offense – he went to the location of the original stop with Sergeant Anglin. RP 301. Using a tape measure, they measured the distance from the initial stop to a student drop off point as 477 feet. RP 301, 304. Sergeant Pernsteiner testified that the drop off was used by parents and that "it could be" used by buses. RP 304. He stated that it was designated for that purpose but did not indicate who designated it as a drop off point or when the designation occurred. *See* RP 304.

Sergeant Anglin confirmed that he assisted in measuring the distance between the encounter and "a school bus stop near the library" using a tape measure from collision scenes. RP 435-36. He then generated an aerial map which confirmed the distance as approximately 477 feet. RP

435-36, 438. He was not completely certain that the measurement on the map was correct as he used Google Earth and acknowledged that the bus stop is not visible on the map. RP 440.

Finally, the State presented testimony by Douglas Noltemeier, the Geographic Information Systems (GIS) Coordinator Administrator for Jefferson County. RP 369. At the request of law enforcement and using information from the Public Works Department and Assessor's Office (not the School District), Mr. Noltemeier generated a map showing a 1,000-foot buffer around the school perimeter. RP 373-78. He then measured the linear distance from the corner of the school building and school perimeter to the location where Mr. Mylan was stopped as under 1,000 feet. RP 383-85.

Defense counsel, while not objecting to his testimony, objected to the admission of Mr. Noltemeir's map. RP 388. The court sustained the objection, concluding the map was not relevant as it only reflected the school property and did not include any school bus stops, where the Information charged that the offense occurred within a 1,000 feet of a school bus route stop under RCW 69.50.435(1)(c). RP 394-95, 399. Although the prosecutor initially believed the jury could find the enhancement based upon the alternate means of being within 1,000 of a

school bus stop or school grounds, she acknowledged the Information was limited to charging the former. RP 394-95.

Mr. Mylan testified on his own behalf. RP 475. He described his struggles with substance use and stated the heroin in his pocket was his own, for personal use. RP 482, 484. He was adamant that he was not aware of the contents of the envelope in Ms. Smith's car. RP 482.

Gabrielle Caudill testified on Mr. Mylan's behalf. RP 459. Ms. Claudill, a recovering methamphetamine user, is a Chemical Dependency Professional, National Certified Addiction Counselor, and a clinical supervisor at Believe and Recovery, an intensive outpatient facility. RP 459-60, 462-63. According to Ms. Caudill, it would not be uncommon for someone to possess an ounce for personal use depending on the status of their addiction, the purity of the substance, whether they smoke or inject the drug, and how much money they have. RP 464-67. Based upon her experience, she believed the upper limit for someone struggling with heroin addiction to use was six to seven grams in a day. RP 467.

The jury was instructed on the lesser-included offense of possession of heroin and also given a special verdict form, in which they were asked to decide whether Mr. Mylan possessed with intent to deliver a controlled substance "within one thousand feet of a school bus route stop designated by a school district." CP 74. The jury found Mr. Mylan guilty as charged

on all counts and answered "yes" to the sentencing enhancement. CP 73-74, 76. The trial court sentenced Mr. Mylan to a prison-based Drug Offender Sentencing Alternative (DOSA), with 57 months of confinement followed by 57 months of community custody. CP 82. The court also imposed what it believed to be a mandatory $200 filing fee. CP 83.

E. ARGUMENT

1. The trial court committed reversible error when it denied the motion to suppress evidence obtained pursuant to the illegal, warrantless search of Mr. Mylan's pocket.

Sergeant Pernsteiner violated Mr. Mylan's constitutional rights when he emptied Mr. Mylan's pocket without a lawful arrest or pat down. Under the Fourth Amendment to the United States Constitution, warrantless searches are *per se* unreasonable unless they fall within one of the few "jealously and carefully drawn" exceptions to the warrant requirement. U.S. Const. amend. XIV; *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (citing, *inter alia*, *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)). Article 1, section 7 of the Washington Constitution provides even greater protection from police intrusion as "unlike the Fourth Amendment, article I, section 7 'focuses on the rights of individuals rather than on the reasonableness of the government action.'" *State v. Eisfeldt*, 163 Wn.2d 628, 639, 185 P.3d 580 (2008) (footnote omitted) (quoting *State v.*

Morse, 156 Wn.2d 1, 12, 123 P.3d 832 (2005)); *see also State v. Schultz*, 170 Wn.2d 746, 765 n. 6, 248 P.3d 484 (2011) (noting that, unlike the Fourth Amendment, article 1, section 7 does not include a good faith exception to the exclusionary rule).

When asserting an exception to the warrant requirement, the State bears the heavy burden of proving the validity of a warrantless search by clear, cogent, and convincing evidence. *State v. Russell*, 180 Wn.2d 860, 867, 330 P.3d 151 (2014). A court's factual findings on a motion to suppress are reviewed for substantial evidence while the court's legal conclusions are reviewed de novo. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002) (citing *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)).

a. The warrantless search of Mr. Mylan's pockets did not qualify as a search incident to arrest.

The State failed to establish that the search was incident to an arrest as Mr. Mylan was never, in fact, arrested. Like other exceptions to the warrant requirement, the exception for a search incident to arrest is narrower under article 1, section 7 than under the Fourth Amendment. *State v. O'Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003). Article I, section 7 demands an actual custodial arrest as a prerequisite to any search incident to arrest. *Id*. at 587. "It is the fact of arrest itself that provides the

‘authority of law’ to search.” *State v. Parker*, 139 Wn.2d 486, 496-97, 987 P.2d 73 (1999) (citing *State v. Cyr*, 40 Wn.2d 840, 843, 246 P.2d 480 (1952), *overruled on other grounds by State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983)). No exception exists for a search incident to noncustodial arrest. *State v. McKenna*, 91 Wn. App. 554, 561, 958 P.2d 1017 (1998) (citations omitted).

That an officer had probable cause to arrest for an offense is insufficient to justify the search. *O’Neill*, 148 Wn.2d at 585 (“[P]robable cause for a custodial arrest is not enough. There must be an actual custodial arrest to provide the ‘authority’ of law justifying a warrantless search incident to arrest under article I, section 7.”); *McKenna*, 91 Wn. App. at 564 (“the fact that an arrest could have been made, but was not made, is immaterial”). This is because probable cause is the basis to obtain a warrant and not itself an exception to the warrant requirement. *State v. Tibbles*, 169 Wn.2d 364, 369-70, 236 P.3d 885 (2010).

It is undisputed that Sergeant Pernsteiner did not arrest Mr. Mylan for DWLS. The trial court explicitly found that Sergeant Pernsteiner did not arrest Mr. Mylan prior to searching him. CP 109. Sergeant Pernsteiner’s testimony at the suppression hearing was unambiguous – he was detaining Mr. Mylan pending confirmation of his driving status. RP 37. Indeed, because Sergeant Pernsteiner “always believe[s] that it’s

quicker to take action," he did not check Mr. Mylan's status before detaining him and was uncertain whether Mr. Mylan was actually driving with a suspended license. RP 32, 39. It was a simple DWLS and Sergeant Pernsteiner's "initial intent" was that "likely [Mr. Mylan] would probably be cited and released for it." RP 104. It was only after Sergeant Pernsteiner emptied Mr. Mylan's pockets and arrested Mr. Mylan for possession of heroin that he verified Mr. Mylan's license was suspended. CP 109; RP 38-39. The police report confirms that Mr. Mylan was not booked for DWLS. CP 6.

Even without the trial court's findings or Sergeant Pernsteiner's testimony, the State did not establish that a reasonable person in Mr. Mylan's circumstances would have believed he was under arrest. The determination of custody depends on whether the "manifestation" of the arresting officer's intent would lead a reasonable detainee to believe they were under full custodial arrest. *State v. Patton*, 167 Wn.2d 379, 219 P.3d 651 (2009); *State v. Radka*, 120 Wn. App. 43, 83 P.3d 1038 (2004) (reasonable person in defendant's position would not have believed he was under full custodial arrest despite officer's telling defendant he was under arrest and placing him in police car as defendant was not handcuffed and allowed to use his cell phone in car) (citing *State v. Clausen*, 113 Wn. App. 657, 660-61, 56 P.3d 587 (2002) and *State v. Craig*, 115 Wn. App.

191, 196, 61 P.3d 340 (2002)). "The existence of an arrest depends in each case upon an objective evaluation of all the surrounding circumstances." *Patton*, 167 Wn.2d at 387 (quoting 12 Royce A. Ferguson, Jr., Washington Practice: Criminal Practice and Procedure § 3104, at 741 (3d ed. 2004)).

Although handcuffing and placing an individual in the back of a patrol car are indicative of an arrest, courts have additionally afforded great weight to an officer's statements as a manifestation of the intent to make a custodial arrest. *Patton*, 167 Wn.2d at 387 n. 6 (while not decisive, whether an officer informed a defendant he is under arrest is an important circumstance); *McKenna*, 91 Wn. App. at 562 (no custodial arrest where officer informed defendant she was free to leave); *Clausen*, 113 Wn. App. at 661 (officer clearly manifested intent to place defendant under custodial arrest when he told defendant he was under arrest and would be released after booking). Indeed, "[t]he right to search incident to a lawful custodial arrest, once acquired, terminates no later than when the officer announces that the arrestee will be released rather than booked." *McKenna*, 91 Wn. App. at 561-62.

Here, *before* placing Mr. Mylan in handcuffs, Sergeant Pernsteiner informed Mr. Mylan that, if he allowed himself to be handcuffed pending the check of his driver's license, he would be released with a citation. *See*

RP 44.[1] Mr. Mylan immediately complied. RP 44. From Mr. Mylan's perspective, he had every reason to believe Sergeant Pernsteiner would do as promised. Sergeant Pernsteiner's lights were not activated, the stop was based solely upon a simple traffic offense, and Mr. Mylan was not in the patrol car when the search was conducted. There was nothing to suggest Mr. Mylan knew of the DOC bulletin or that Sergeant Pernsteiner's contact was related to concerns outside of Mr. Mylan's driving status. He was released by Sergeant Pernsteiner four months earlier despite suspicions of DWLS. RP 24.

The trial court erred in finding that, because Sergeant Pernsteiner had probable cause to arrest, the search was a valid search incident to arrest. *See* CP 110; RP 64-65. As *O'Neill* and *McKenna* make clear, probable cause is not enough. Regardless of whether Sergeant Pernsteiner could have arrested Mr. Mylan, he did not; in the absence of a custodial arrest, the State did not establish that the warrantless search fell within the search incident to arrest exception.

[1] In his trial testimony, too, Sergeant Pernsteiner confirmed that he told Mr. Mylan that if his license was suspended, he would probably just get a ticket and leave, but would go to jail if he struggled. RP 272.

b. The warrantless search of Mr. Mylan's pockets exceeded the scope of a weapons frisk under Terry.

Moreover, the warrantless search of Mr. Mylan's pockets does not fall within the *Terry* frisk exception. In *Terry v. Ohio*, the United States Supreme Court carved out one of the narrowly guarded exceptions to the warrant requirement, allowing officers to briefly detain an individual as part of an investigatory stop. 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). During the stop, an officer may frisk the individual for weapons, but only where the officer has reasonable grounds to believe the individual to be armed and presently dangerous. *Terry*, 392 U.S. at 29; *State v. Hobart*, 94 Wn.2d 437, 441, 617 P.2d 429 (1980). "The purpose of this limited search is not to discover evidence of a crime, but to allow the officer to pursue his investigation without fear." *Hudson Adams v. Williams*, 407 U.S. 143, 145–46, 92 S. Ct. 1921, 32 L .Ed. 2d 612 (1972). Importantly, a search conducted pursuant to a *Terry* stop must be justified not only in its inception, but also in its scope. *Terry*, 392 U.S. at 20.

Our Supreme Court has concluded that a valid search pursuant to a *Terry* stop is "strictly limited in its scope to a search of the outer clothing; a patdown to discover weapons which might be used to assault the officer." *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994)

(citing *Terry*, 392 U. S. at 29–30). The instances in which an officer may exceed the search beyond a pat down of the outer clothing are generally limited to cases where that pat down is "inconclusive." *Hudson*, 124 Wn.2d at 112 (citing *State v. Allen*, 93 Wn.2d 170, 172, 606 P.2d 1235 (1980) and *State v. Vasquez*, 807 P.2d 520 (Ariz. 1991)). Even where the pat down reveals an object that could be a weapon, officers may only examine that particular object. *Hudson*, 124 Wn.2d at 113 (citing *Terry*, 392 U.S. at 30). Once an officer determines a pocket does not contain a weapon, further manipulation or squeezing of the pocket is an unconstitutional search. *Hudson*, 124 Wn.2d at 116-17 (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 378, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993)).

The constitutional significance of the inside of an individual's pocket has been clear since the inception of the *Terry* framework. Indeed, in *Terry*, the Court implicitly disavowed searching the inside of a defendant's pocket without a pat down:

> Officer McFadden patted down the outer clothing of [the suspects]. He did not place his hands in their pockets or under the outer surface of their garments until he felt weapons, and then he merely reached for and removed the guns. He never did invade [the third man's] person beyond the outer surfaces of his clothes, since he discovered nothing in his pat-down which might have been a weapon.

Id. at 7.

Issued the same day as *Terry*, the Court's decision in *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968), is even more compelling. *Sibron* applied the *Terry* framework to a search of the defendant's pockets without a pat down, in which the officer discovered a bag of heroin. Although it found the search unconstitutional based on the fact that the search failed the first prong of *Terry* – that officer lacked facts supporting a belief that the defendant was armed and dangerous – the Court's dicta is telling. Even assuming the officer did have grounds to search the defendant, "the nature and scope of the search conducted by [the officer] were so clearly unrelated to that justification as to render the heroin inadmissible." *Sibron*, 392 U.S. at 65. Namely, as compared to the search in *Terry*, the officer did not attempt to do a pat down, instead "thrust[ing] his hand into [defendant's] pocket and took from him envelopes of heroin." *Id.* at 45.

The limitation on searching the inside of a suspect's pockets is consistent with the purpose of a permissible *Terry* frisk. Patting down a suspect is typically an effective procedure for detecting a weapon, even where the suspect is reasonably suspected of being armed and dangerous. *U.S. v. Casado*, 303 F.3d 440, 448 (10th Cir. 2012) (search exceeded permissible scope of *Terry* stop when officer reached into the defendant's

pockets without a pat down); *State v. Barnes*, 568 P.2d 1207 (Haw. 1977) (pat down generally limited to outer clothing and further intrusion prohibited unless officer is able to point to articulable facts after the pat down justifying the search) (citations omitted); *see also Dickerson*, 508 U.S. at 376 ("The very premise of *Terry*, after all, is that officers will be able to detect the presence of weapons through the sense of touch."). Given the extremely limited purpose of the search, admitting evidence unrelated to weapons would be "to invite the use of weapons' searches as a pretext for unwarranted searches." *Hudson*, 124 Wn.2d at 113 (quoting *Hobart*, 617 P.2d 429).

In this case, as argued by defense counsel, it is questionable whether Sergeant Pernsteiner truly believed Mr. Mylan was dangerous or just got ahead of himself. RP 56. Even assuming, however, the search met the first prong under *Terry*, it exceeded the permissible scope of a valid search under the second prong. Sergeant Pernsteiner testified that he was concerned that there may be a weapon in Mr. Mylan's pocket, but stated "I don't know what was in the pocket." RP 47. As to why he did not engage in the preliminary pat down, Sergeant Pernsteiner could only offer that he believed Mr. Mylan associated with individuals who used needles and did not want to injure himself. RP 44. He was unable to explain how reaching

into a pocket to empty it would be more protective than a pat down. *See* RP 44-45. Common sense would defy such an argument.

Instead, Sergeant Pernsteiner's testimony suggests that a personal bias against Mr. Mylan caused him to rush into the illegal search. Sergeant Pernsteiner was clearly frustrated that he was not able to arrest Mr. Mylan in his February encounter because he "wasn't able to prove" DWLS. RP 25. Having seen the DOC bulletin, Sergeant Pernsteiner took it upon himself to again check Mr. Mylan's driving status. He then patrolled the trailer park in the days after the bulletin was released, taking particular notice that the Volvo was parked in Mr. Mylan's uncle's driveway. Finally, having contacted Mr. Mylan, Sergeant Pernsteiner unlocked Mr. Mylan's window from the outside, had him step outside the car, and immediately handcuffed him. This behavior reflects a strong desire to catch Mr. Mylan red-handed and an enthusiastic and aggressive response to what was ostensibly a simple stop for DWLS. The State did not meet its burden to establish the search was lawful and this Court should reverse and remand for a new trial.

a. Evidence in the car seized pursuant to the search warrant must be suppressed as fruit of the poisonous tree.

The search warrant which led to the discovery of heroin and methamphetamine inside Ms. Smith's car was predicated entirely on the

warrantless search of Mr. Mylan's pocket. Evidence derived from an unlawful search must be suppressed under the fruit of the poisonous tree doctrine. *State v. Gaines*, 154 Wn.2d 711, 717, 116 P.3d 993 (2005) (citing *State v. O'Bremski*, 70 Wn.2d 425, 428, 423 P.2d 530 (1967)). Where a subsequent warrant is based upon the illegally obtained information, it is invalid unless the affidavit contains facts independent of that information sufficient to establish probable cause. *See Gaines*, 154 Wn.2d at 718 (citations omitted). In assessing the validity of a search warrant issued based upon illegally seized evidence, a reviewing court considers the effect of the evidence upon both the officer's decision to seek the warrant and the magistrate's decision to issue it. *State v. Spring*, 128 Wn. App. 398, 403, 115 P.3d 1052 (2005) (citing *Murray v. United States*, 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988)).[2]

In this case, absent the discovery of the unlawfully seized heroin, the affidavit lacked probable cause to search Ms. Smith's vehicle. The affidavit identified the crime justifying the search as possession of heroin; it was the heroin seized from Mr. Mylan's pockets that made the envelope in the car appear suspicious. As stated by Sergeant Pernsteiner, "[i]nside

[2] Where it is unclear whether the fruit of the poisonous tree doctrine would have invalidated a particular warrant, the appellate court should remand the matter to the trial court for consideration. *State v. McReynolds*, 104 Wn. App. 560, 571, 17 P.3d 608 (2000). However, where it is clear that evidence is the fruit of an unlawful search, an appellate court may resolve the issue itself. *Id.*

the car I observed a folded yellow envelope that appeared to have something inside of it. Due to the quantity of the heroin on Mylan's person (27 grams) I believed the envelope to contain a sizeable amount of currency." CP ___ (Sub. No. 113). As described by Sergeant Pernsteiner, the drugs in the car were "fruits of the crime." CP ___ (Sub. No. 113).

Without the heroin, the affidavit describes a man driving his girlfriend's car without a license and an otherwise innocuous manila envelope. CP ___ (Sub No. 113). [3] This does not satisfy article 1, section 7 or the Fourth Amendment.

Moreover, Sergeant Pernsteiner would not have requested the warrant absent the unlawfully seized evidence. His testimony at trial indicated his initial intent was to release Mr. Mylan with a citation for DWLS. RP 104. In the absence of any independent basis to search Ms. Smith's car, this Court should suppress the evidence obtained pursuant to the search as fruit of the poisonous tree. Alternatively, this Court should remand to the trial court for determination of whether the search warrant survives absent the illegally obtained evidence.

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[3] Even after discovering the heroin in Mr. Mylan's pocket, Sergeant Pernsteiner believed the envelope contained currency, which is not illegal. CP ___ (Sub. No. 113).

b. Mr. Mylan's statements must be suppressed as fruit of the poisonous tree.

Mr. Mylan's post-arrest statements are similarly inadmissible as fruit of the poisonous tree. Where a defendant's confession is the direct result of an unlawful search, "the evidence is 'tainted' by the illegality and must be excluded." *State v. Avila-Avina*, 99 Wn. App. 9, 13-14, 991 P.2d 720 (2000), *abrogated on other grounds by State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009) (citing *Wong Sun v. United States*, 371 U.S. 471, 484-85, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) and *State v. Gonzales*, 46 Wn. App. 388, 397-98, 731 P.2d 1101 (1986)). *Miranda* warnings do not necessarily render incriminating statements voluntary; rather, the statement must be "sufficiently an act of free will to purge the primary taint." *Brown v. Illinois*, 422 U.S. 590, 602, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975) (quoting *Wong Sun*, 371 U.S. at 486).

Here, Mr. Mylan's statements were a direct result of the unlawful search. He did not make any statements regarding controlled substances prior to his arrest. Nor were his post-arrest statements an act of free will. Rather, they reveal desperation, with Mr. Mylan pleading with Sergeant Pernsteiner throughout the car ride to let him go or lose the drugs and stating that he would be going back to prison for a long time. RP 102, 282.

Even if this Court does not find that Mr. Mylan's statements should be suppressed as fruit of the poisonous tree, they are insufficient to support the conviction. Under the *corpus delicti* rule, a defendant's statements cannot be used to prove the defendant's guilt absent independent evidence corroborating the admission. *State v. Whalen*, 131 Wn. App. 58, 62, 126 P.3d 55 (2005) (citing *State v. Aten*, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996)). As argued above, the unlawful search demands the exclusion of both the heroin taken from Mr. Mylan's pocket and that found in the car. Without evidence of the existence of any controlled substance, Mr. Mylan's statements that he possessed heroin and intended to trade it for a car are uncorroborated and cannot serve as the basis for his conviction.

2. <u>The prosecutor committed prejudicial misconduct when she repeatedly suggested Mr. Mylan was working with a Mexican cartel.</u>

From the suppression hearing throughout her closing, the prosecutor inserted race into the proceedings and appealed to the passion and prejudice of the jury by repeatedly suggesting that Mr. Mylan was involved with a Mexican drug cartel. Prosecutors represent the people "in a quasijudicial capacity in a search for justice." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). "Defendants are among the people the prosecutor represents." *Id*. Thus, while ardently seeking justice,

prosecutors must also subdue their zeal to preserve the defendant's right to a fair trial. *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009).

Although defense counsel did not object to each of the prosecutor's improper questions and arguments, counsel's objection during the CrR 3.5 hearing constitutes a standing objection. *See Fisher*, 165 Wn.2d at 748 n. 4. Specifically, at the summation of the CrR 3.5 hearing, the trial court determined it would rule on any defense objection to testimony that Mike was Mexican. RP 114. Defense counsel immediately objected, arguing there was no evidence of cartel involvement. RP 114.

Even should this Court find that defense did not have a standing objection, reversal is warranted as the prosecutor's misconduct was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice" which could not be cured by a jury instruction. *Fisher*, 165 Wn.2d at 747 (internal quotations omitted). Here, despite the trial court's repeated statements that no evidence supported the prosecutor's theory, the prosecutor repeatedly emphasized that Mr. Mylan was in possession of a "Mexican ounce," implying cartel involvement.

a. The prosecutor appealed to racial bias.

"A prosecutor engages in misconduct when making an argument that appeals to jurors' fear and repudiation of criminal groups or invokes racial, ethnic, or religious prejudice as a reason to convict." *State*

v. Perez-Mejia, 134 Wn. App. 907, 916, 143 P.3d 838 (2006) (citing *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1998)). Prosecutorial misconduct based upon an appeal to racial bias requires reversal unless the State can establish beyond a reasonable doubt that the misconduct did not affect the jury's verdict. *Monday*, 171 Wn.2d at 680.

Here, the prosecutor was on notice from day one that any attempt to link Mr. Mylan with a Mexican cartel was unsupported and potentially highly prejudicial. RP 114. Nevertheless, at trial, the prosecutor attempted to elicit the prejudicial evidence suggesting cartel activity, asking Daniel Van Wyk – a forensic scientist at the Washington State Patrol laboratory – whether he was familiar with the term "Mexican ounce." RP 262. Defense counsel immediately objected to the testimony and the trial court sustained the objection, sua sponte striking both the question and answer. RP 262.

Undeterred by the trial court's rulings, the prosecutor again explicitly elicited information about a "Mexican ounce," asking Sergeant Anglin whether he noticed anything specific when reviewing the weight of the packages. RP 422. Sergeant Anglin's answer – clearly known to the prosecutor – identified the packages as 25 grams instead of 28 grams, which is "commonly referred to as a Mexican ounce." RP 422. The prosecutor continued, asking "is a Mexican ounce a term of art? Or a street term?" RP 423. Sergeant Anglin believed it was the latter. RP 423. This

suggested cartel involvement as the label and quantity for the amount of drugs possessed by Mr. Mylan was developed by the cartels themselves.

Attempting to back door further testimony suggesting cartel involvement, the prosecution asked Sergeant Anglin to testify about the drug distribution chain of how substances arrive in Jefferson County. RP 409. Sergeant Anglin testified that he believed large amounts of heroin typically originate in Mexico, that Jefferson County is the end of the distribution chain, and that the drugs are broken down into one-ounce quantities after entering the United States. RP 410-11. After exhaustive testimony about the chain of distribution, the trial court sustained defense counsel's objections, again finding no evidence of cartel involvement:

> And so – just a minute. It is very, very simple. It's not complicated. We're not talking about a distribution chain from Mexico, Everett, Tacoma, or anything.
>
> ….
>
> And [defense counsel] is right – beyond that though is that this case does not involve some distribution chain from Mexico, blah, blah, blah. And we're not going down that road because there is no evidence of that.

RP 426.

Still the prosecutor persisted, committing the most egregious misconduct during closing, referring to the drugs as "Mexican ounces" on four separate occasions. First, she argued that the envelope found in Ms.

Smith's car contained "what you might call a Mexican ounce – it's 25 grams, it's not 28. Probably because it's easier to do the math with fives and tens." And later, "[s]o, let's just throw in on top of that another three Mexican ounces of heroin in the car." RP 533. Defense counsel tried to neutralize the prosecutor's comments, arguing that there was no evidence regarding distribution through Mexico. RP 541. The prosecutor nevertheless had the final word: "And when I say identical [weights], it's light right there at 25 – right there at 25 grams, a Mexican ounce … they are Mexican ounces – 25 grams of heroin." RP 558, 562.

The repeated statements were, as opined by the trial court, highly prejudicial "in this day and age." RP 114. Although Mr. Mylan is not himself Mexican, the current political climate aims to create a deep-rooted fear of Mexicans as drug dealers and terrorists and Mexican cartels as the cause of the opioid epidemic. As confirmation, we need only look to the oval office. In 2015, then-candidate Donald Trump, tweeted, "The border is wide open for cartels & terrorists. Secure our border now. Build a massive wall & deduct the costs from Mexican foreign aid!"[4] Over the last four years, the fear mongering has been unrelenting. In 2017, arguing for a

[4] Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, Time Magazine (Aug. 31, 2016), http://time.com/4473972/donald-trump-mexico-meeting-insult/.

border wall, President Trump stated that "[t]he drugs are pouring in at levels nobody has ever seen … We'll be able to stop them once the wall is up."[5] In 2019, "[e]very week, 300 of our citizens are killed by heroin alone, 90 percent of which floods across from our southern border. More Americans will die from drugs this year than were killed in the entire Vietnam War."[6] The animus only continues to grow, with President Trump recently announcing that he was considering designating Mexican cartels as foreign terrorist organizations.[7]

In short, the general public is bombarded from all sides with stereotypes of Mexicans as drug dealers and Mexican cartels as terrorist organizations. This narrative carries with it the derivative prejudice that anyone who may be associated with a Mexican cartel must be a drug dealer who poses a threat to the United States. The prosecutor herself made this connection in arguing that it was important to admit Mr.

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[5] Jana Winter, *Trump Says Border Wall Will Stop Drugs. Here's What a DEA Intel Report Says.*, Foreign Policy (Aug. 29, 2017), https://foreignpolicy.com/2017/08/29/trump-says-border-wall-will-stop-drugs-heres-what-a-dea-intel-report-says/.

[6] Vann Newkir II, *Trump Is Using the Opiod Crisis to Build His Wall*, The Atlantic (Jan. 9, 2019), https://www.theatlantic.com/politics/archive/2019/01/how-trump-using-opioid-crisis-build-wall/579922/.

[7] John Wagner, *Trump: 'Very seriously' considering designating Mexican drug cartels as terrorists*, The Washington Post (March 12, 2019), https://www.washingtonpost.com/politics/trump-very-seriously-considering-designating-mexican-drug-cartels-as-terrorists/2019/03/12/9bfc30f0-44cb-11e9-8aab-95b8d80a1e4f_story.html?utm_term=.cb106e6e1b04.

Mylan's statement that he got the heroin from a Mexican; i.e. if a Mexican gave Mr. Mylan drugs, then Mike – and Mr. Mylan – must be associated with cartels. RP 101, 114.

Mr. Mylan's only defense was that the heroin in his pocket was for personal use; by repeatedly referring to the drugs as a "Mexican ounce" and eliciting irrelevant testimony that the drug distribution chain originating in Mexico, the prosecutor sought to paint Mr. Mylan as a drug dealer and not a drug user. She did so despite clear pretrial rulings that the evidence was inadmissible. *See Fisher*, 165 Wn.2d at 747-48 (it is misconduct for a prosecutor to violate pretrial rulings). The prosecutor cannot demonstrate beyond a reasonable doubt that her repeated appeal to racial bias was harmless. Accordingly, this Court should reverse Mr. Mylan's convictions and remand for a new trial.

b. The prosecutor's repeated reference to a "Mexican ounce" appealed to the passion and prejudice of the jury.

Even if this Court does not consider the prosecutor's comments an appeal to racial bias, the arguments were obviously designed to appeal the passion and prejudice of the jury. Again, it is misconduct to make an argument that appeals to jurors' fear and repudiation of criminal groups." *Perez-Mejia*, 134 Wn. App. at 916 (citing *Belgarde*, 110 Wn.2d at 507).

Beyond appealing to racial bias, the prosecutor's arguments suggested that Mr. Mylan was affiliated with a criminal gang (the gang which the United States deems akin to terrorists). Evidence of gang affiliation is presumed prejudicial. *State v. Scott*, 151 Wn. App. 520, 527, 213 P.3d 71 (2009) (citing *State v. Asaeli*, 150 Wn. App. 543, 208 P.3d 1136 (2009)). Unless properly admitted under ER 404(b), "the only reasonable inference for the jury to draw" from evidence of gang affiliation is that the defendant is a bad person. *Scott*, 151 Wn. App. at 529.

In this case, for the reasons stated above, there is a substantial likelihood that the prosecutor's constant references to a "Mexican ounce," affected the verdict. *See In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). This Court should reverse Mr. Mylan's conviction and remand for a new trial.

3. <u>The evidence was insufficient to support the sentencing enhancement.</u>

The State failed to establish that a student drop off location identified by law enforcement was a school bus route stop designated by the school district or that it existed in June 2017. Due process demands the State prove all elements of an offense beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; *State v. Rich*, 184 Wn.2d 897, 903,

365 P.3d 746 (2016) (citing *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Requiring the State to bear the burden of proving guilt beyond a reasonable doubt is "indispensable" in protecting a defendant's presumption of innocence. *Winship*, 397 U.S. at 363-64. Aggravating factors are elements of an offense that must be proved to a jury beyond a reasonable doubt. *See State v. Allen*, 192 Wn.2d 526, 543, 431 P.3d 117 (2018); *see also Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (the State must prove beyond a reasonable doubt any fact that increases punishment, except prior convictions); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (same for sentence enhancements).

On a challenge to the sufficiency of the evidence, this Court must reverse and dismiss a sentencing enhancement if, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010). Although the evidence is viewed in the light most favorable to the prosecution, "[i]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). "A 'modicum' of evidence does not

meet this standard." *Rich*, 194 Wn.2d at 903 (quoting *Jackson*, 443 U.S. at 319).

Under RCW 69.50.435(1)(c), the State must establish beyond a reasonable doubt that the offense was committed within 1,000 feet of a "school bus route stop designated by the school district." RCW 69.50.435(1)(c), (6)(c). This requires the State prove both the existence of an officially designated stop and that the stop existed at the time of the offense. *State v. Rojas*, 198 Wn. App. 1072, 2017 WL 1927930, at *2-3 (2017) (map generated six months after offense insufficient to establish bus stop existed on date of offense); *State v. Bodine*, 196 Wn. App. 1013, 2016 WL 5417398, at *1-2 (2016) (evidence insufficient where witnesses did not testify that bus stop existed at time of offense, approximately one year prior to trial).[8]

In this case, the State failed on both fronts. First, the State presented no evidence that a student drop off point identified by law enforcement was, in fact, a bus route stop designated by the school district. The State did not call anyone from the school district and did not present any list of route stops or other evidence of designated school bus

[8] These cases are unpublished and are cited as persuasive authorities pursuant to GR 14.1.

stops.[9] The closest the State got to eliciting evidence that the drop off point was designated bus stop was through Sergeant Pernsteiner's testimony:

Q: Okay, and is that an area that can be used by, for instance, parents?

A: Oh, yes.

Q: Can it also be used by buses?

A: It could be.

Q: Is that an area that's designated specifically for that purpose?

A: It is.

RP 304.

Second, although it established the drop off point existed in June of 2018, the State failed to present any evidence that it existed on June 15, 2017, the date of the offense. *See* RP 301. At most, the State established that, in June 2018, there was a student drop off point that could be used by buses and was designated as a drop off by an unknown entity. This is not sufficient to prove RCW 69.50.435(1)(c) beyond a reasonable doubt.

[9] RCW 69.50.435(5) allows the State to use an official map to establish the location of bus stops. Additionally, the Washington Administrative Code requires school districts to keep school bus route logs and to submit regular reports which include a list of school bus routes. WAC 392-141-420.

Finally, evidence that the school perimeter was within 1,000 feet of Mr. Mylan's home, while relevant to whether the State could prove a sentencing enhancement under RCW 69.50.435(1)(d), is insufficient to establish RCW 69.50.435(1)(c). Although unpublished, this Court's opinion in *State v. Kolb* is significant. 192 Wn. App. 1067, 2016 WL 917830 (2016). In *Kolb*, the State charged enhancements alleging the acts occurred both within 1,000 feet of a school bus route stop and within 1,000 feet of the perimeter of school grounds under RCW 69.50.435(1)(c) and (d). *Id.* at *2. Despite presenting testimony by a school district official and the county's GIS manager, the State failed to ask if either the school or school bus existed at the time of the offense. Finding the evidence sufficient to support the school grounds enhancement, the *Kolb* Court nevertheless accepted the State's concession that the evidence was insufficient to prove the bus stop enhancement. *Id.* at *3. The court noted that the location of bus stops may change and that neither the testimony nor the date stamp on the map established that the stop existed at the time of the offense. *Id.*

In the absence of testimony by a school district employee or documentation of the school district designated bus routes in use in June 2017, no rational juror could have found that a non-descript student drop off point was a school bus route stop designated by the school district,

much less that it was one at the end of the previous school year. Accordingly, this Court should reverse the sentence enhancement and remand for resentencing.

4. This Court should strike the $200 filing fee pursuant to RCW 36.18.020.

The trial court imposed a $200 court filing fee, which it listed as mandatory. CP 83. While the fee was previously mandatory under RCW 36.18.020(2)(h), the statute was amended shortly before Mr. Mylan's sentencing to prohibit the imposition of the fee on indigent defendants. Mr. Mylan is indigent, as evidenced by the trial court's entry of an order authorizing appeal at public expenses two weeks after the entry of the Judgement and Sentence. CP 91-92. Accordingly, this Court should strike the fee.

F. CONCLUSION

This Court should reverse Mr. Mylan's conviction and remand for suppression and dismissal as all evidence of both the heroin and the methamphetamine was admitted in violation of his constitutional right to be free from unlawful search and seizure. Alternatively, this Court should reverse and remand for a new trial because the prosecutor engaged in misconduct by injecting race into the proceeding and appealing to the passion and prejudice of the jury. Alternatively, this Court should remand

for resentencing as the evidence insufficient to support the "school bus route stop" sentencing enhancement.

DATED this 17th day of April, 2019.

Respectfully submitted,

s/Devon Knowles
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 52343-4-II
v.	)	
	)	
AARON MYLAN,	)	
	)	
Appellant.	)	

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