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NO. 52343-4-II

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

AARON MYLAN,

Appellant,

vs.

STATE OF WASHINGTON,

Respondent.

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

Brief of the Respondent

Jefferson County Superior Court No. 17-1-00103-7

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I. STATEMENT OF THE CASE

1. 3.6 Hearing – Search/Seizure

Shortly after midnight on June 15th, 2017, Jefferson County Sheriff's Deputy, SGT Pernsteiner, was on routine patrol in Port Hadlock, Jefferson County, Washington. CP at 00005. At this time SGT Pernsteiner saw a gold sedan leaving a nearby trailer park. *Id.* Based on prior contacts, SGT Pernsteiner was familiar with this vehicle and knew it belonged to Crystal Smith; SGT Pernsteiner was also aware that Ms. Smith was dating an individual by the name of Aaron Mylan– the Appellant. *Id.* As SGT Pernsteiner pulled up to the car he observed that the Appellant was sitting in the driver's seat. *Id.*

Prior to his contact with the Appellant on June 15th, SGT Pernsteiner had a previous encounter with the Appellant and knew that his driver's license was suspended in the Third Degree. Additionally, SGT Pernsteiner had recently reviewed a law enforcement bulletin issued by the Department of Corrections concerning the Appellant dated June 6th, 2017. CP at 0005 and 141. The bulletin included a picture of the Appellant along with a physical description. CP at 141. The bulletin also stated:

“**ALERT:** Danger to Law Enforcement; Violent Offender; Documented Norteno Affiliate; Known to carry and use firearms, and knives.

“Mylan has requested to transfer from Clallam County where he is homeless to the above address². He is living at the above address pending the transfer investigation.

“This offender has a major chip on his shoulder as he has a well-developed dislike of law enforcement, has spent most of his life in prison, and is associated with a gang and the gang lifestyle.

“Mylan is a drug dealer who is known to have/carry firearms and/or knives. He is known to flee and resist arrest. He is also a prolific property offender. It is not just likely but highly probable that you will be having contact with this offender soon. I am requesting that ANY and ALL contact be reported to me immediately and that I be called to the scene to assist with this offender as he has 934 days of prison time (as of this date) to take if/when he commits a significant violation.

“Please be mindful of this offender and be careful out there!”

CP at 141. During the suppression hearing that was held on March 7th, 2018, SGT Pernsteiner testified that after he saw the bulletin June 6th that he, again, checked the status of the Appellant’s license that day and learned that it was still suspended in the Third Degree. VRP at 17-18.

² 611 Cedar Ave, Port Hadlock.

He testified that he thought it was particularly relevant that the bulletin stated that the Appellant was “known to carry weapons, flee and resist arrest, and has a dislike for law enforcement”. VRP at 11.

SGT Pernsteiner then testified that as he approached the vehicle driven by the Appellant, rolled down his window, and asked the Appellant “what are you doing driving without a driver’s license?” VRP at 13. The Appellant responded with “ya, but my girlfriend’s sick and I have to go to the store to get her some cough syrup”. VRP at 18. According to SGT Pernsteiner the Appellant’s statement confirmed his suspicion that the Appellant’s license was still suspended. SGT Pernsteiner testified that he then exited his vehicle and walked over to the Appellant’s vehicle, unlocked the Appellant’s car door and asked him to exit. VRP at 19. SGT Pernsteiner added that while there was individual sitting the passenger seat of the car, his attention was fixed on the Appellant because “of the officer safety bulletin ...it would be possible he could be armed with a gun or a knife or he’d try to flee or try or run away from me”. VRP at 20.

The Appellant was then asked to step out of the vehicle, but as he did so the car began roll forward because the car was still in drive. VRP at 20. The Appellant then lunged back into the car, presumably to stop it from rolling, but SGT Pernsteiner grabbed his wrists to prevent him from getting back into the car. *Id.* The vehicle’s passenger was then able to execute the emergency brake to keep the vehicle from continuing to roll forward. VRP

at 20-21. According to SGT Pernsteiner the Appellant continued to physically struggle with him and resist being detained. VRP at 21. At this point in time SGT Pernsteiner was neither accompanied by other law enforcement officers nor was he able to summon any assistance due to the fact that his radio was malfunctioning. *Id.* While the Appellant was struggling with SGT Pernsteiner he tried reaching for an object in his front right pants pocket, however SGT Pernsteiner was able to prevent this and successfully handcuffed the Appellant. VRP at 22. Fearing that the object could be weapon or something else that could cause harm, SGT Pernsteiner reached into the pocket and removed the object. The object turned out to be a bag contain a large ball of a tar-like brown substance that SGT Pernsteiner suspected was heroin. VRP at 23.

SGT Pernsteiner re-iterated towards the end of his testimony that his actions that night were influenced by the following factors: the Appellant was a known flight risk, was known to carry weapons – guns and knives, the Appellants actions that night in resisting arrest and lunging for an object in his pants pocket, SGT Pernsteiner was without backup, it was after midnight, and the fact that there was still an additional unknown individual in sitting in the passenger seat of the car. VRP at 24. When asked if under these circumstances it would be normal procedure for him to detain an individual in handcuffs, SGT Pernsteiner replied “yes, definitely”. VRP at 24.

On Cross-examination SGT Pernsteiner stated that he had sufficient facts to place the Appellant under arrest. VRP at 32. He explained that he refused to allow the Appellant to re-enter the car once it started rolling because he feared there might be a weapon in the car. VRP at 32. This turned out to be true. VRP at 299.

On re-direct SGT Pernsteiner stressed that “[i]t all happened very quickly”. VRP at 40. That he tried to requesting the aid of another unit but was unable to. *Id.* This was re-iterated on re-cross when SGT Pernsteiner said that he had safety concerns and no back-up. VRP at 43.

The court held that DOL information that SGT Pernsteiner checked on or about June 6th was not stale when he contacted the Appellant on June 15th. VRP at 59, 62. The court also held that SGT Pernsteiner had sufficient information to believe that the Appellant was dangerous. VRP at 62. Upon the Appellant’s tacit admission that he did not have his license, SGT Pernsteiner had probable cause to arrest the Appellant. VRP at 63-65. The court observed that everything happened very quickly. *Id.* SGT Pernsteiner grabbed the Appellant as he lunged for the vehicle to keep him from accessing a weapon. *Id.* SGT Pernsteiner had a legitimate safety concern throughout his entire contact with the Appellant. VRP at 64. Given all the circumstances, the detention, arrest, and search were all appropriate. *Id.* at 65. Following this hearing the court entered Findings of Facts and Conclusions of Law. CP 107-110.

2. Alleged Prosecution Error re: “Mexican ounce”

Prior to trial the court conducted a 3.5 motion on the admissibility of the Appellant’s statements at trial. During its ruling the court held that the Appellant’s statement that he received the heroin from “a guy named Mike, a Mexican” should be truncated so that neither party could mention the Appellant’s description of him being a Mexican. VRP at 112. The State countered that this was relevant to its theory of the case, that the Appellant had links to the Mexican cartels that they were funneling drugs from Mexico into the United States and into Jefferson County. VRP AT 114. The court refused to change its ruling on the mention of “Mike” being “a Mexican” and reserved on whether it would permit the State to discuss possible links to cartels. *Id.*

During trial SGT Pernsteiner testified that he found a sandwich baggie with a “large brown rock” in the Appellant’s pocket after he had detained him. This was consistent with his testimony during the earlier suppression hearing. VRP at 274. Based on his training and experience, he suspected that this “rock” was heroin. *Id.* SGT Pernsteiner later discussed executing a search warrant on the vehicle the Appellant was driving and finding “a whole bunch of heroin” on the floor board of the car. VRP at 290-91. He elaborated that he found three large “rocks” of suspected heroin that were individually packed. VRP at 292.

During the trial Washington State Crime Laboratory Forensic Scientist Daniel Van Wyk testified that he weighed three of the four suspected heroin packages and that they weighed 25.12g, 25.02g, and 24.21g respectively and that each package tested positive for heroin. VRP 253-55, 260-61.

Later in the trial, SGT Brett Anglin with the Jefferson County Sheriff's Office was called to provide testimony by the Respondent mainly for the purpose of providing expert testimony on narcotics. VRP at 400. SGT Anglin testified that he had been a sheriff's deputy for 18 years and that he had spent six of those years as a detective with a regional drug task force focusing on the sale and delivery of controlled substances. *Id.* SGT Anglin explained that his work with the drug task force involved using informants to purchase controlled substances and that through this work he had the opportunity to speak with drug users and learn about behaviors, patterns, and nomenclature. VRP at 407-408. SGT Anglin added that he considered his knowledge of drug use to be current, that he had had over 240 hours of drug investigation training, and that he had previously testified as an expert on drug use in Jefferson County Superior Court. VRP at 409. SGT Anglin then explained to the jury that "we've always seen drugs originate from Mexico. They all come up from the border. Jefferson County is an end point in the distribution chain". VRP at 410. That this was why "the quantities we see are usually less than what you'd find, say, in Texas or California". *Id.* SGT Anglin went on to explain that he had never seen a kilogram of drugs

in Jefferson County, but that these were not uncommon elsewhere in the state. *Id.* Rather, the distribution quantities that were common in Jefferson County were often an ounce. *Id.* None of this testimony was objected to.

SGT Anglin then went on at length about how drugs typically arrive in Tacoma or Everett in large quantities before being broken down into smaller quantities, such as an ounce, prior to arriving in smaller locations such as Jefferson County. VRP at 410-12 SGT Anglin explained how there were typically several mid-level dealers that operated between the Mexican cartels and the end level users. *Id.* He elaborated the terminology used in the drug community specifically as it pertained to different quantities heroin such as a “point”³, a “teener”⁴, a “ball”⁵, and a “Mexican ounce”⁶. VRP at 412, 418-19. SGT Anglin explained that a “Mexican ounce” typically contained 25 grams of drugs but often weighed approximately 28 grams due to the added weight of the packaging. VRP 422-23. In his opinion this was because it was easier to subdivide quantities weighing 25 grams than 28 grams. *Id.* During this testimony the Appellant offered no objection. VRP at 23. As SGT Anglin was about to provide his opinion as to whether the heroin in the Appellant’s possession was consistent with distribution or personal use that Appellant objected. VRP at 424. Of concern to the

³ 0.1 grams.

⁴ 1.75 grams

⁵ 3.5 grams.

⁶ 25 grams.

Appellant was that SGT Anglin would violate the province of the jury by offering an opinion as to whether the Appellant was a drug dealer. *Id.* At this point, outside the presence of the jury, the court offered its opinion of the case –

“It’s not complicated. We’re not talking about a distribution chain from Mexico, Everett, Tacoma, or anything. The only issue here is the quantity that this Defendant had, is it consistent with personal use or, I guess, consistent with selling it: period. And he’s going to probably express an opinion. End of witness. End of Testimony. It’s that simple. Okay?”

VRP at 425-26. SGT Anglin then concluded that based on his knowledge of drug use and drug distribution that the quantity possessed by the Appellant was consistent with distribution, not personal use as advocated by the Appellant. VRP at 427. Despite the court’s comments during the objection, the prior testimony on distribution had already been presented and it was not struck.

Using this foundational information, the State used the term “Mexican Ounce” several times in its closing argument. VRP at 533, 558, and 562. The State accurately described the heroin in the Appellant’s vehicle as “Mexican ounces” based on their weight. VRP at 533. The State then later reiterated that a “Mexican ounce” is defined as consisting of 25g on two further occasions in comparison to the amount of heroin found with the Appellant. VRP 558, 562.

3. School Zone Enhancement

During the trial SGT Pernsteiner testified that he and SGT Anglin measured the distance from where he stopped the Appellant to a nearby bus stop on the corner of Cedar Avenue. VRP at 301. SGT Pernsteiner testified that he used a 300 foot long tape measure to calculate the distance between the point of the stop and the bus stop. VRP at 303. The State then offered into evidence an exhibit⁷ showing the school bus stop at a nearby library, which was admitted. *Id.* SGT Pernsteiner discussed that he was working on day shift and he repeatedly referred to the area in question as a “school bus stop” and as a “Drop Off Point”. VRP at 301, 303-04. He mentioned that the area is used as a student drop-off point for the nearby Chimacum Creek Primary School. VRP at 304. SGT Pernsteiner then reviewed State’s Exhibit 30 which he identified as a picture of the area in question with a line drawn between the point where the Appellant was contacted and the “school bus stop”. VRP at 303. SGT Pernsteiner confirmed that it was between those two points that he measured with the tape measure. *Id.*

The testimony went as follows:

“Prosecutor: Do you recognize what that’s a picture⁸ of?”

SGT Pernsteiner: I do.

⁷ State’s Exhibit 30.

⁸ Referring to State’s Exhibit 31.

P: And what is that?

SGT P: It's a picture of a student drop off point at the edge of the school property, right before the library on Cedar Avenue.

P: Okay. And is that an area that can be used by, for instance, parents?

SGT P: Oh, yes.

P: Can it also be used by buses?

SGT P: It could be.

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

SGT P: It is.

P: And are you familiar with the Chimacum Creek Primary School that's nearby?

SGT P: Yes, my daughter went there a long time ago.

P: And this student drop off location, the distance of which you measured, is that on the school's property.

SGT P: Yes.

P: And was the distance from the locations of the stop to the student drop off point there?

SGT P: I believe it was 477 feet".

VRP at 304. State's exhibit 31 was then admitted without objection. It depicts a sign on the side of the road that reads "Student Drop Off Point".

VRP at 305. No objection was made by the Appellant during this part of the testimony or to this admission of State's Exhibit 31. VRP 301-305.

Later, when SGT Anglin was testifying, he informed the court that he had assisted SGT Pernsteiner in measuring the distance between the

location where the stop occurred and the school bus stop near the county library. VRP at 434-45. He testified that he and SGT Pernsteiner used a tape measure that is typically used to measure collision scenes and that the distance between the point of the stop and the school bus stop was 477 feet. VRP at 438. SGT Anglin also testified that in mapping out the distance from the original point of contact to the school bus stop the computer program he used indicated that the distance was also 477 feet. VRP at 439. After the State had rested the Appellant confirmed on cross-examination that he was contacted by SGT Pernsteiner at the same place that the State had earlier alleged. VRP at 488-89.

II. ISSUES PRESENTED

1. Whether SGT Pernsteiner conducted an illegal search when he reached into the Appellant's pocket when the Appellant attempted to grab something in his pocket while struggling with SGT Pernsteiner after SGT Pernsteiner had witnessed the Appellant committing a crime and ordered that the Appellant be detained?
2. Whether the State committed Prosecutorial Error when it presented expert testimony that 25 grams of drugs is commonly referred to as a "Mexican ounce" due to its ease in dividing drugs from larger amounts and because most drugs flow up the West Coast from Mexico in a trial for Possession with Intent to Deliver a Controlled Substance?

3. Whether the State presented sufficient evidence that the Appellant committed Possession of Intent to Deliver a Controlled Substance within 1000 feet of a School Bus Stop when the State presented evidence that the crime occurred 477 feet from a local elementary school's designated drop off point that is used by buses?
4. The State concedes that the \$200 filing fee should be struck.

III. ARGUMENT

On review of a lower court's ruling on a suppression motion the findings of the lower court are verities on appeal so long as those findings are supported by substantial evidence. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.3d 313 (1994). Substantial evidence is present when a sufficient quantity of evidence exists in the record "to persuade a fair-minded, rational person of the truth of the finding. *Id.*

1. SGT Pernsteiner conducted lawful stop and search of the Appellant

Under the fourth amendment, individuals can be seized and searched without a warrant under circumstances involving consent, exigency, searches incident to valid arrest, inventory searches, plain view searches, and searches executed pursuant to *Terry v. Ohio*, 391 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The Terry exception is actually two exceptions: one allows for a temporary seizure based on a reasonable suspicion that a person is about to or in the process of committing a crime, and the other allows an officer to “make a reasonable search for weapons without violating the Fourth Amendment, regardless of whether he has probable cause to arrest the individual, if the circumstances lead the officer to reasonably believe that his safety or the safety of others is endangered”. *Id.* at 20-27. A Terry stop is to further the State’s interest in crime prevention and detection, while a Terry frisk is justified by concerns about officer safety and the safety of others in the vicinity. *Id.* at 20-22.

A Terry frisk is justified for reasons that separate it from a Terry detention, and for that reason a lawful Terry frisk, may occur outside of a Terry detention. *City of Seattle v. Hall*, 60 Wn. App. 645, 651, 806 P.2d 1246 (1991). For example, Terry frisks may be conducted on a passenger in a vehicle that has been seized due to the driver’s violation of a traffic statute when an officer has reasonable grounds to believe the person may be armed

or dangerous⁹, on an arrestee's companion when an officer has particular facts that provide reasonable grounds to believe the person is armed¹⁰, or even a runaway child that has been taken into protective custody and is being transported¹¹.

Under the Washington State Constitution, probable cause is an “objective standard by which the reasonableness of the arrest is measured”. *State v. Graham*, 130 Wn.2d 711, 724, 927 P.2d 227 (1996). Probable cause exists where “facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed”. *State v. Terranova*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986).

a) The search of the Appellant was legally valid taking into account a totality of the circumstances

Crime prevention and crime detection are legitimate purposes for investigative stops or detentions. *State v. Kennedy*, 107 Wn.2d 1, 5-6, 726 P.2d 445 (1986). The constitution permits law enforcement officers to briefly stop and detain individuals for an investigation without a warrant if the officer suspects that the individual is engaged or about to be engaged in criminal conduct. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266

⁹ *Arizona v. Johnson*, 555 U.S. 323, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009).

¹⁰ *State v. Flores*, 186 Wn.2d 506, 379 P.3d 104 (2016).

¹¹ *See State v. A.A.*, 187 Wn. App. 475, 349 P.3d 909 (2015).

(2009). Individuals detained by officers can be frisked for weapons if the officer reasonably believes his or her “safety or that of others is endangered”. *Id.*

A permissible *Terry* stop must establish the following: 1) the initial stop is legitimate, 2) a reasonable safety concern exists to justify a protective frisk for weapons, and 3) the scope of the frisk is limited for protective purposes. *State v. Duncan*, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002). Courts should be reluctant to substitute their judgment for the judgment of the officer in the field. *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (citing *State v. Belieu*, 112 Wn.2d 587, 601-02, 773 P.2d 46 (1989)).

In the present case SGT Pernsteiner had recently reviewed a safety bulletin issued by the Department of Corrections on June 6th, 2017 which specifically stated that the Appellant was known to carry firearms and knives, it mentioned that he was known to flee or resist arrest and that he had a well-developed dislike of law enforcement. Shortly after reviewing the bulletin SGT Pernsteiner confirmed that the Appellant’s driver’s license was still suspended. On June 15th, 2017 SGT Pernsteiner observed a vehicle that was known to belong to the Appellant’s girlfriend. The Appellant was in the driver’s seat of said vehicle. SGT Pernsteiner then, without activating his emergency light, rolled down his window and asked the Appellant why he was driving without a license. In his response, the Appellant confirmed

that his license was still suspended. With these facts in mind SGT Pernsteiner had a reasonable suspicion to justify detaining the Appellant.

SGT Pernsteiner also had a reasonable safety concern to justify the protective search for weapons. The Department of Corrections bulletin that SGT Pernsteiner had recently reviewed stressed the Appellant's dislike of law enforcement, lack of cooperation, and his likelihood to carry weapons. CP at 141. During the encounter with SGT Pernsteiner the Appellant attempted to lunge back into the car after he stepped out. SGT Pernsteiner then physically restrained him but the Appellant continued to struggle and attempted to grab an object out of his pocket. Given the information known to SGT Pernsteiner in addition to the actions of the Appellant a reasonable safety concern existed to justify searching the Appellant.

In the present case the protective frisk of the Appellant was extremely limited. While he was being detained, the Appellant attempted to grab something out of his pants pocket. It was this pocket and only this pocket that SGT Pernsteiner searched during the protective frisk that followed. No general search of the Appellant occurred at the time the suspected heroin was found on the Appellant's person.

- b) The totality of the circumstances surrounding the traffic stop provided SGT Pernsteiner with the legal justification to search the Appellant

Following the initiation of a traffic stop, police officers may “take whatever steps necessary to control the scene, including ordering the driver to stay in the vehicle or to exit it, as circumstances warrant. *State v. Horrace*, 144 Wn.2d 386, 393, 28 P.3d 753 (2001) (quoting *State v. Mendez*, 137 Wn.2d 208, 220, 970 P.2d 722 (1999) (abrogated on other grounds). If the officer has articulable facts that lead him or her to reasonably believe that the suspect is armed and/or presently dangerous the officer “is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him”. *Id.* (citing *Terry*, 392 U.S. at 30). Some of the articulable facts that courts have held as justifying a search include operating in hours of darkness, the number of officers, the number of vehicle occupants, the location of the stop, and the officer’s knowledge of the occupants. *Mendez* 221; *See also Collins*, 121 Wn.2d at 175-76.

In the present case, the Appellant was apprehended shortly after midnight. SGT Pernsteiner was by himself, and due to a malfunctioning radio, could not immediately summon additional officers. SGT Pernsteiner was also outnumbered given that the Appellant had an unidentified passenger in his car. Furthermore, SGT Pernsteiner was aware of information as provided by the DOC bulletin that the Appellant was known

to be armed and dangerous – a fact that turned out to be true as a large knife was found in the back the Appellant’s car. VRP at 299. Given all the facts and circumstances of this case, SGT Pernsteiner had lawful authority to search the Appellant’s pocket. Even if the facts of the apprehension were different, SGT Pernsteiner would still have had the authority to stop the Appellant’s car, ask him to step out, and conduct a protective frisk without the additional facts present in this case such as the Appellant’s attempts to resist being taken into custody or his reaching for his front pocket.

- c) Using the objective standard of probable cause, SGT Pernsteiner had the authority to execute a lawful arrest on the Appellant

Whether probable cause exists is determined by an objective standard. *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). An arresting officer has probable cause when the officer is “aware of facts or circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe a crime has been committed”. *Id.* (citing *Terranova*, 105 Wn.2d at 643). Probable cause does not require sufficient facts, at the time of arrest, to prove each element of the offense beyond a reasonable doubt. *Id.* A police officer may effectuate a warrantless arrest when a misdemeanor or gross misdemeanor is committed in the presence of the officer. RCW 10.31.100.

In *Gaddy*, two police officers initiated a traffic stop against the defendant after observing a traffic infraction. 152 Wn.2d at 67. Once the

stop was made, the officers made contact with the defendant who was unable to provide them with her driver's license. *Id.* Instead, the defendant provided the officers with her name and date of birth, with this information the officers were able to determine that her license was suspended in the third degree. *Id.* Following a search incident to arrest, the officers found cocaine located inside her purse. *Id.*

While the case was pending the defendant moved to suppress the discovery of cocaine, contending that officers lacked probable cause and therefore could not search her incident to arrest. *Id.* at 68. At issue was the argument presented by defendant that her license was not actually suspended on the date of arrest and that Department of Licensing (hereafter DOL) had committed an error. *Id.* The trial court denied the motion and the defendant was subsequently convicted of possession of a controlled substance. *Id.* On appeal the court of appeals held that information provided by DOL was presumptively reliable and that the defendant had failed to rebut that presumption. *Id.* at 73. Therefore, the arresting officers had probable cause to believe that the defendant had committed a crime and the authority to conduct a search incident to arrest. *Id.* at 74.

Similarly, in the present case SGT Pernsteiner had previously checked the Appellant's DOL status approximately a week before the arrest. At that time DOL indicated that the Appellant's license was suspended in the third degree. The Appellant confirmed this when he verbally acknowledged to

SGT Pernsteiner that he did not have his license. Citing *State v. Perea*¹², the trial judge held that the DOL information SGT Pernsteiner had obtained approximately one week earlier was not “stale”. VRP at 62. That in combination with the Appellant’s admission provided SGT Pernsteiner with probable cause to arrest the Appellant. Because it is an objective standard, whether SGT Pernsteiner believe he had probable cause is not material to this analysis. Objectively, SGT Pernsteiner had probable cause to arrest the Appellant for driving with a suspended license, therefore his detention and apprehension of the Appellant were legal as the Appellant was lawfully arrested.

d) Having been lawfully arrested, the Appellant was properly search incident to arrest

Warrantless searches are *per se* unreasonable, however, one of the exceptions to this rule is the search incident to a valid arrest. *Garvin*, 166 Wn.2d at 249. Once a person has been lawfully arrested the arrestee’s person as well as the area within the arrestee’s immediate control may be searched. *State v. Bonds*, 174 Wn. App. 553, 570, 299 P.3d 663 (2013) (citing *State v. Valdez*, 167 Wn.2d 761, 773, 224 P.3d 751 (2009)). An

¹² *State v. Perea*, 85 Wn. App. 339, 342-43, 932 P.2d 1258 (2008). Holding that “[a]t a minimum, the seven-day-old” DOL information that a suspect’s license was suspended supported probable to arrest a defendant for driving with a suspended license.

arrestee's person, including their clothing, is *always* under his or her immediate control. *Id.* (emphasis added).

In *Bonds*, the defendant was arrested on an outstanding DOC warrant. *Id.* at 558. During a search incident to arrest, law enforcement found an identification card belonging to the Appellant in the Appellant's pocket. *Id.* at 558. Once the defendant's identity was confirmed it was determined that he was the respondent of a no-contact order and that he was in the presence of the protected party. *Id.* The defendant was then subsequently charged and convicted of violation of a no-contact order. *Id.* at 562. On appeal, the defendant charged the search of his pocket which revealed his identification card. *Id.* On appeal, the court of appeals recognized search incident to a valid arrest as a long-standing warrantless search exception. *Id.* at 569-70. The court observed that pocket searches had previously been specifically included in the search incident to valid arrest exception. *Id.* (citing *State v. Jordan*, 92 Wn. App. 25, 31, 960 P.2d 949 (1998)). Finding the present case no different, the court declined to invalidate the search. *Id.* at 571.

In the present case, SGT Pernsteiner objectively had probable cause to arrest the Appellant. Therefore, the subsequent search of the Appellant's pocket falls under the gamut of search incident to valid arrest. Consequently, the court should hold that the arrest and the search of the Appellant were valid and affirm the trial court.

2) The State did not commit prosecutorial error when it elicited testimony using the term “Mexican ounce” because the term is not pejorative and did not appeal to racial bias

Successful claims of prosecutorial error must establish that the conduct was “*both* improper and prejudicial”. *In Re Sandoval*, 189 Wn.2d 811, 832, 408 P.3d 675 (2011) (quoting *State v. Davis*, 175 Wn.2d 287, 330, 290 P.3d 43 (2012)). Racist arguments or arguments that rely on racial stereotypes are a grave violation of the Washington State Constitution. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). Even subtle references to racial stereotypes designed to trigger bias can be deemed to be “highly improper”. *Id.* at 679.

A defendant’s failure to object to allegedly improper remarks by the prosecution at trial “‘*strongly suggests*’ that the remark did not appear critically prejudicial in the trial’s context. *Id.* at 679. (Quoting *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)) (emphasis added). A party waives appellate review of an improper argument when it fails to object at trial. *State v. Berube*, 171 Wn. App. 103, 121, 286 P.3d 402 (2012). Absent an objection at trial, courts will not review claims of prosecution error unless the conduct is so “flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction”. *State v. Warren*, 165 Wn.2d 17, 43, 195 P.3d 940 (2008) (citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Comments that appeal to racial bias and stereotypes will be reviewed even

in absence of a trial court objection, any resulting conviction will be vacated unless the State can show the comments were harmless beyond a reasonable doubt. *Monday*, 171 Wn.2d at 680-81.

In *Monday*, an African American defendant was on trial for murder and several other charges. *Id.* at 669. During the trial the prosecutor made several improper remarks, however the ones at issue were primarily race based. *Id.* at 675-677. While presenting its case in chief, the prosecutor presented the testimony of several African American witnesses who expressed a reluctance to testify. *Id.* at 671-73. During the trial the prosecutor repeatedly mocked the way his witnesses pronounced the word “police” as “po-leese” and also asked the jury to actively question some of the testimony of the State’s witnesses, on the basis witness’s race, arguing that there was a “code” that “black folk don’t testify against black folk”. *Id.* at 673-74. On appeal, the Washington State Supreme Court held that repeatedly saying “po-leese” called attention to the witness’s skin color and asking a jury to question a witness’s veracity on the basis of that skin color was highly improper and merited reversal. They also found it to be a violation of the Washington State and Federal constitutions, and thus also merited reversal unless the State could demonstrate that the remarks were harmless beyond a reasonable doubt, which it could not. *Id.* at 678-81.

Not every mention of race constitutes an appeal to bias though. *In re Sandoval*, 189 Wn.2d 811, 834, 408 P.3d 675 (2011). The heightened

standard the State faces on appeal of proving that the conduct was harmless beyond a reasonable doubt “*applies only* when a prosecutor mentions race in an effort to appeal to a juror’s potential racial bias”. *Id.* (emphasis added). However, mentioning race in order to logically explain the evidence to the jury not only fails to merit this higher standard on review, but is not improper to begin with. *Id.* at 835. Of particular concern to the courts are comments that constitute an open call to convict a defendant “on the basis of racial, ethnic, or religious prejudices”. *See State v. Rafay*, 168 Wn. App. 734, 830, 285 P.3d 83 (2012).

In *Sandoval*, the defendant was Hispanic and a member of the gang, ELS¹³, which was involved in a homicide. *Id.* at 834. In closing the prosecutor sought to explain that, of the people involved with the crime, the defendant had a senior role in the commission of the crime because he was Hispanic and the gang ELS only permitted Hispanics into its upper echelons; in contrast to the other individuals who were involved but were not Hispanic and therefore could not have held a senior position. *Id.* On review, the Washington State Supreme Court held that the use of race in this context was merely an attempt to logically explain the evidence to the jury. *Id.* at 834-35. Because the prosecution was not attempting to use race

¹³ Eastside Lokotes Sureños. 189 Wn.2d at 815.

to appeal to the jury's potential bias the remarks were not improper and the defendant's claim lacked merit. *Id.*

The context in which a term is used and how it is used is important in determining whether an appeal to racial bias was made. *In re Gentry*, 179 Wn.2d 614, 634, 316 P.3d 1020 (2014) (holding that characterizing forensic evidence as “negroid” was not racist but rather a term of art). Terms that are potentially racist can be employed in a manner so that they are not improper. *Id.* at 635. (holding use of the word “bitch” was not an improper racially based appeal even though the word had connections to late 1980s African American urban culture). Again, of particular importance to the court is the context in which the allegedly improper remarks are made with regard to “the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury” and not by “looking at the comments in isolation”. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *Brown*, 132 Wn.2d at 561).

In the present case the Appellant, a white male, was charged with Possession with Intent to Deliver a Controlled Substance – Heroin. In presenting its case the State was very upfront about its theory of the case: that the amount of heroin the Appellant possessed was so great that it was beyond personal use and it signified that the Appellant must have had close connections to drug traffickers who are mainly cartels and their affiliates who traffic drugs up the West Coast from Mexico. VRP at 114. This theory

directly tied into the charges that the State was required to prove. The court never explicitly forbade the State from presenting this case. What the court forbade was the Appellant's statement that he received the drugs from "a Mexican"; a ruling that was observed by the State. VRP at 112, 114. Indeed, the State did present its case that drugs seen in Jefferson County usually originate in Mexico and make their way up the West Coast. VRP at 410. The drugs are broken up along the way into smaller amounts that what makes it into Jefferson County is typically on the order of an ounce. CP at 417-18. Therefore, in the opinion of the State's expert, a person who had four ounces was likely to be a distributor of drugs in Jefferson County, not a user, which was the Appellant's theory of the case. VRP at 427, 242-43. The State's expert testified that drugs are broken down into different amounts along the way each with their own slang terms such as a "teener", a "point", a "ball", and a "Mexican ounce". VRP at 419, 422. Importantly, none of this testimony was objected to¹⁴ for the simple reason that it was perfectly understood to fit within in the context of the State's theory of the case and was not understood by any of the trial participants to be an appeal to racial bias. Only after this testimony was admitted¹⁵ was an objection

¹⁴ Earlier the court had sustained an objection to the question of "have you ever heard the term "Mexican ounce?" on the basis of relevance when it was posed to a Crime Lab analyst.

¹⁵ With the exception of the expert opinion that the quantity at issue was consistent with distribution. VRP at 427.

made and the basis of that objection was that State's expert might be "invading the purview of the jury" by declaring the Appellant a drug dealer. VRP at 424. It was at this point, outside of the presence of the jury, that the court rendered its opinion on the case that "we're not talking about a distribution chain from Mexico, Everett, Tacoma, or anything". VRP at 425-26. However, the testimony concerning the distribution chain of drugs had already been properly admitted through prior testimony and the court declined to strike it from the record.

The State also takes exception to the Appellant's characterization of the term "Mexican Ounce" as racist, or an attempt to appeal to racial prejudice. Brief of Appellant at 30. For better or worse, the term "Mexican ounce" is a real term that has been in existence for some time^{16, 17, 18, 19, 20, 21}. It is

¹⁶ See *State v. Galvan*, No. 14920-0-III, 1997 WL 437676, (Wash. Ct. App. Aug. 5, 1997) (discussing a detective who describe a quantity of drugs weighing 25g as a "Mexican Ounce"). This is an unpublished decision, the Respondent is not citing this case as a legal authority, but only to demonstrate the prior existence of the term in question.

¹⁷ *U.S. v. Minnis*, 489 F.3d 325, 331-32 (8th Cir. 2007). In *Minnis*, the Court held that the trial court correctly determined the defendant's offender score based on the "120 Mexican ounces (three kilograms)" and other amounts of heroin he possessed. The Court specifically observed that one of the witnesses had testified that "an ounce of heroin is often called a 'Mexican ounce,' containing 25 grams per ounce, rather than the "standard ounce being 28.6 grams." *Id.* at 330 fn. 3.

¹⁸ *U.S. v. Bueno-Risquet*, 799 F.2d 804, 807 fn. 5 (7th Cir 1986). In *Bueno-Risquet*, a case involving drug charges the court offered a somewhat different version of the definition of a "Mexican ounce" stating that "[t]he ounces were so-called 'Mexican ounces,' a term for all amounts equaling ¼ kilogram of heroin. *Id.*

¹⁹ See also *La Abra Silver Min. Co. v. U.S.*, 175 U.S. 423, 478, 20 S. Ct. 168, 44 L.Ed.223 (1899).

²⁰ Actor Robert Downey, Jr. *Arrested for Possession of Drugs, Weapon*, AP Online (June 24, 1996). "An ounce, actually a Mexican Ounce which is about 25 grams, goes for about \$800. It will last you a week".

²¹ Allan R. Pringle, *What We Can Do About Drug Abuse*, Page 16, Institute for Substance Abuse Research (1993). <https://www.ncjrs.gov/pdffiles1/Photocopy/145677NCJRS.pdf>

consistently defined amounting to 25 grams, which is consistent with SGT Anglin's testimony. VRP at 423. It was the opinion of SGT Anglin that weight of the "Mexican ounce" was at an amount that would make it mathematically easier to subdivide from the kilograms of heroin that came up from Mexico. In closing the state referred to the heroin in the Appellant's possession as "Mexican ounces" because *this was the correct terminology for that amount* based on the previous testimony that each package of heroin weighed approximately 25g. Again, this was never objected to for the simple reason that it did not occur to anyone present at the trial that this nomenclature was out of place. It fit completely in with the State's theory of that case that the Appellant was a drug distributor who fit somewhere in the pipeline of drugs that arrive from Mexico and end up with drug users in Jefferson County. If anything, the term "Mexican ounce" is a reference to geography given the supply chain that was established by State's expert.

It is unfortunate that the Appellant has chosen to grossly distort the record in order to twist the prosecutions logical explanation of the evidence into something racist and improper. The trial judge never held that the term "Mexican ounce" could not be used. The judge never prevented the State from presenting its theory of the case. Moreover, there were no objections in closing and the State was allowed to use the situationally correct term

(last visited Jun 28, 2019) "[Heroin] is referred to as a piece or Mexican ounce (25 grams)."

“Mexican Ounce” several times in describing the evidence that had been previously permitted as prosecutors are expressly permitted to do²². This was important because to establish that the Appellant Possessed with the Intent to Deliver, as opposed simple possession as advocated by the Appellant, the State needed to show that the Appellant was the possessor of all the heroin, not just what was in his pocket. This was done by demonstrating to the jury the similarities that all the packages had both, in packaging and in quantity.

The actions here are easily distinguishable from *Monday*, where jurors were told to evaluate the veracity of the witness’s testimony based on the skin color of the witnesses. In the present case race had simply nothing to do with the case and based on the trial record all of the participants agreed.

Because the testimony and closing arguments were proper in their given context the State respectfully requests that the court reject the Appellant’s baseless contention that the State made an improper argument on the basis of race.

²²*Brown*, 132 Wn.2d at 565. ““In closing argument a prosecuting attorney has wide latitude in drawing and expressing reasonable inferences from the evidence.”” (Quoting *State v. Gentry*, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995)).

3) The State presented sufficient evidence for the jury to find that the Appellant committed Possession with Intent to Deliver within 1000 feet of a School Zone

Courts review challenges to the sufficiency of the evidence in the light most favorable to the State in order to determine whether *any* rational trier of fact could have found the essential elements beyond a reasonable doubt. *State v. Jones*, 140 Wn. App. 431, 436, 166 P.3d 782 (2007). It is *not*, whether there is substantial evidence to support the allegation. *State v. Green*, 92 Wn.2d 216, 221, 616 P.2d 628 (1980). When an appellant claims insufficiency of the evidence the appellant admits the “truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Persons who commit the crime of Possession of a Controlled Substance with Intent to Deliver within 1000 feet of a of school bus stop are subject to sentencing enhancements. RCW 69.50.435(1)(c), 9.94A.533(6). This statute impacts the specific location where the offenses was committed meaning “the terminal point of the measurement for RCW 69.50.435(a) must be the actual site on which the offense was committed”. *State v. Clayton*, 84 Wn. App. 318, 322, 927 P.2d 258 (1996).

In the present case the State, viewing the evidence in the light most favorable to the State and accepting all of it as true, presented sufficient evidence to establish that the Appellant committed the offense within 1000 feet of a school bus stop. The State presented evidence from two Sheriff's

deputies that they were familiar with the area in question and aware of the school bus stop in on Cedar Avenue, which itself was near school property. SGT Pernsteiner testified that the area was a drop off point used by car and buses to drop off kids to the adjacent Chimacum Creek Elementary School. State's Exhibit 31 displayed a street sign that read "Student Drop Off Point". From the nature of the sign as it is depicted in State's Exhibit 31 the jury could rationally and easily infer that this was a permanent sign and that the bus stop/drop off point did not change from year to year. This could also be inferred from the testimony that indicated that the sign was adjacent to school property. VRP at 304, 437. SGT Pernsteiner testified that this was the point he measured to from the area he contacted the Appellant. He testified that the distance between the two points was 477 feet. SGT Anglin also provided testimony that was consistent with this and also added that he also used a computer program to measure the distance and that also indicated it was 477 feet.

The Appellant must, by the nature of his argument, accept all of this evidence as true. The courts must view this evidence in the light most favorable to the State. With those two considerations the Court must affirm the jury's finding of the enhancement. The jury heard that the distance was 477 feet, they heard that area in question is specifically designated to be used as a school drop off point/bus stop by parents and school buses, and they had evidence between the testimony and exhibits that this area was still

in use for that purpose. Both deputies were familiar with this location, one of them used to send his daughter to this school and the other one was a life-long county resident. This evidence was not challenged on cross-examination or objected to on the basis of foundation. All of these facts must be deemed to be true. And perhaps the best argument, that there was sufficient evidence for the jury to find the school zone enhancement is the fact that the jury *did* find the school zone enhancement.

Because there was sufficient evidence to find that the Appellant committed the crime of Possession with Intent to Deliver a Controlled Substance within 1000 feet of a School Bus Stop the State respectfully requests that the Court reject the Appellant's argument that there was insufficient evidence.

4) The State Agrees that the \$200 filing fee should be struck from the Appellant's Judgment and Sentence

The Appellant correctly observes that he was sentenced shortly after a change in law which made the filing fee discretionary rather than mandatory. Even though counsel relies on the entry of an order, which occurred after the sentencing, deeming the Appellant to be eligible for public defense, the State believes that had the trial court conducted a *Blazina*²³ analysis the \$200 filing fee would not have been imposed.

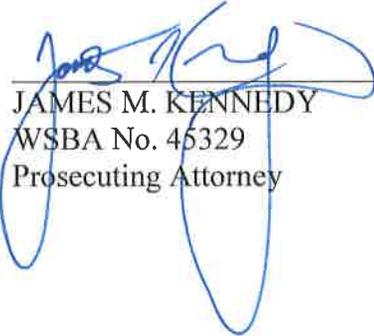
²³ *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

IV. CONCLUSION

For the aforementioned reasons the Respondent respectfully requests that the Court of Appeals reject the arguments made by the Appellant except for that involving the application of the \$200 filing fee.

Dated this 10 day of July, 2019

Respectfully submitted,



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JEFFERSON COUNTY PROSECUTING ATTORNEY'S OFFICE

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