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No. 53151-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Alejandro Anaya-Cabrera,**

Appellant.

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Grays Harbor County Superior Court Cause No. 18-1-00509-7

The Honorable Judges Ray Kahler and David Mistachkin

**Appellant's Opening Brief**

Jodi R. Backlund  
Manek R. Mistry  
Attorneys for Appellant

**BACKLUND & MISTRY**  
P.O. Box 6490  
Olympia, WA 98507  
(360) 339-4870  
backlundmistry@gmail.com

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. The trial court erred by denying Mr. Anaya-Cabrera's suppression motion.
2. The unlawful seizure violated Mr. Anaya-Cabrera's Fourth Amendment right to be free from unreasonable searches and seizures.
3. The officer invaded Mr. Anaya-Cabrera's right to privacy under Wash. Const. art. I, §7 by seizing him in the absence of a reasonable suspicion.
4. The trial court erred by entering Conclusion of Law No. 1.

**ISSUE 1:** An investigatory stop is unlawful unless supported by specific, articulable facts giving rise to a reasonable belief that the person seized is engaged in criminal activity. Did police improperly seize Mr. Anaya-Cabrera in violation of his right to privacy under Wash. Const. art. I, §7 and his right to be free from unreasonable seizures under the Fourth Amendment?

5. The firearm enhancement was imposed in violation of Mr. Anaya-Cabrera's Sixth and Fourteenth Amendment right to a jury trial.
6. The firearm enhancement was imposed in violation of Mr. Anaya-Cabrera's Fourteenth Amendment right to due process.
7. Detective Ramirez provided testimony that invaded the province of the jury and infringed Mr. Anaya-Cabrera's right to an independent determination of the facts.
8. Detective Ramirez provided improper profile testimony implying that Mr. Anaya-Cabrera was guilty based on the characteristics of other offenders.

**ISSUE 2:** Opinion testimony on the guilt of an accused person infringes the right to an independent jury determination of the facts. Was the firearm enhancement imposed in violation of Mr. Anaya-Cabrera's constitutional rights, because it was based in part on profile testimony amounting to a nearly explicit opinion on guilt?

9. Mr. Anaya-Cabrera was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
10. Mr. Anaya-Cabrera's attorney provided ineffective assistance of counsel by failing to object to inadmissible profile testimony.

**ISSUE 3:** Defense counsel provides ineffective assistance by failing to object to inadmissible evidence absent a valid tactical reason. Was Mr. Anaya-Cabrera denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel by his attorney's failure to object to inadmissible profile testimony that amounted to a nearly explicit opinion on guilt?

11. The State failed to prove that Mr. Anaya-Cabrera was armed with a firearm.
12. The State did not show that Mr. Anaya-Cabrera was aware of the gun police found in the truck.
13. The State did not prove that the gun was easily accessible and readily available.
14. The State failed to prove a nexus between Mr. Anaya-Cabrera, the gun, and the crime.

**ISSUE 4:** A person's lack of knowledge is relevant to determine if the person is "armed" with a firearm. Was the evidence insufficient to justify two firearm enhancements where the State failed to prove that Mr. Anaya-Cabrera was aware of the gun police found in his truck?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

While driving his pickup in Aberdeen, Alejandro Anaya-Cabrera passed a sheriff's car going in the opposite direction. CP 17. The deputy turned around and activated his overhead lights. CP 17. Mr. Anaya-Cabrera had not committed any traffic infraction or other driving offense. CP 16-17.

The deputy, whose name was Keith Peterson, was responding to a "disturbance" call at a nearby property owned by Bill Hagara. CP 16. Peterson had been to the property many times and had numerous contacts with Hagara and his son. RP (11/6/18) 12-13.

The nature of the disturbance was "unclear." CP 16. To Peterson, "it sounded like" a Hispanic man was keeping Hagara from leaving or was taking things without permission. RP (11/6/18) 13; CP 16-17. It later turned out that Hagara had been the one keeping a Hispanic man from leaving the property. RP (11/6/18) 13.

While on his way to the Hagara property, Peterson saw a truck coming toward him, driven by a Hispanic man. CP 17. He later testified that it was his "impression it was Mr. Cabrera at the time." RP (11/6/18) 16. He turned around and activated his emergency lights. CP 17-18.

Peterson had seen Mr. Anaya-Cabrera a few weeks earlier while serving a warrant at another person's property elsewhere in town. CP 17.

During that earlier encounter, Peterson had taken Mr. Anaya-Cabrera into custody and interviewed him, but no charges resulted. RP (11/6/18) 19; CP 17. At that time, Mr. Anaya-Cabrera told officers that he'd recently moved from the Hagara property, and that there'd been a conflict relating to rent or getting kicked off the property.<sup>1</sup> CP 17.

When Peterson turned to pull behind him and activated his emergency lights, Mr. Anaya-Cabrera stopped at a traffic light behind other vehicles. CP 17-18. He rolled down his window and called out to Peterson, telling him "I'll meet you back down at the gate." CP 18. Peterson told him to stop and followed him to the Hagara property with both his lights and sirens activated. CP 18; RP (11/6/18) 21, 44.

When they reached the property, Mr. Anaya-Cabrera stopped his truck, stepped out, and walked a few feet away from the truck. CP 18. Peterson drew his gun and told him to stop. CP 18.

Mr. Anaya-Cabrera pulled his hands from his pockets and raised them. CP 18. As he did so, a small package containing methamphetamine fell from his pocket onto the ground. CP 18. After examining the package, Peterson arrested Mr. Anaya-Cabrera, impounded the vehicle, and obtained a search warrant. CP 18-19.

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<sup>1</sup> There was a moving van parked on the property police were searching during that earlier encounter. CP 17.

When the warrant was executed, police found more drugs and a handgun. RP (11/15/18) 209, 215. The gun was under the driver's seat. RP (11/15/18) 215, 269, 275. The gun was not registered to anyone. RP (11/15/18) 254.

Mr. Anaya-Cabrera was charged with two counts of possession with intent to deliver, and one count of carrying a concealed pistol without a license. CP 1-2. He moved to suppress the evidence, arguing (among other things) that Peterson did not have grounds to stop him.<sup>2</sup> RP (11/6/18) 72-79; CP 19.

The trial court denied the motion to suppress. CP 16-22. The court noted a single disputed fact: “[W]hether Deputy Peterson was advised by dispatch that a silver pickup was involved in the disturbance.” CP 17.

Peterson's report did not include anything showing he'd received this information prior to stopping Mr. Anaya-Cabrera's silver Avalanche. CP 17. He claimed to have recalled this detail when discussing the case with the prosecutor. RP (11/6/18) 14, 39-40. This was after Mr. Anaya-Cabrera had filed his suppression motion. RP (11/6/18) 14, 39-40.

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<sup>2</sup> Although counsel apparently prepared a written motion and brief, this pleading does not appear in the court file, and the court did not receive a bench copy. RP (11/6/18) 3-4, 71-72. The prosecutor did not receive the brief in time to prepare a written response. RP (11/6/18) 5.

The trial judge did not resolve this factual dispute. CP 16-22. Instead, the court found the other information sufficient for a stop, even if dispatch had not mentioned a silver pickup. CP 20.

At trial, the evidence showed that Mr. Anaya-Cabrera was not the registered owner of the truck. RP (11/15/18) 250, 267. An officer whom the State characterized as an “expert”<sup>3</sup> provided testimony that drug transporters commonly use vehicles that are registered to others. RP (11/15/18) 267.

The State did not introduce statements or other evidence showing that Mr. Anaya-Cabrera knew there was a handgun under the driver’s seat. Instead, the State’s “expert” testified that people engaged in drug activity “[n]ormally” carry a firearm “so they don’t get ripped off or for protection.” RP (11/15/18) 292-293. This “expert” also testified that people carrying the quantity of drugs found in the truck have firearms “about 90 percent of the time.” RP (11/15/18) 293.

Mr. Anaya-Cabrera was acquitted of both counts of possession with intent to deliver. CP 35, 37. Instead, he was convicted of simple possession (two counts) and the misdemeanor charge involving the handgun. CP 36, 38-39. Jurors also returned special verdicts finding that

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<sup>3</sup> RP (11/16/18) 365.

he was armed with a firearm during commission of the possession charges. CP 40-41.

Although he had no criminal history, he was sentenced to two consecutive 18-month terms for the two enhancements. CP 49. The court imposed three months for the remaining charges, for a total of 39 months in prison. CP 49.

Mr. Anaya-Cabrera appealed. CP 58.

### **ARGUMENT**

**I. THE TRIAL COURT SHOULD HAVE GRANTED THE SUPPRESSION MOTION BECAUSE DEPUTY PETERSON DID NOT HAVE A REASONABLE SUSPICION THAT MR. ANAYA-CABRERA WAS INVOLVED IN CRIMINAL ACTIVITY.**

Under the state and federal constitutions, warrantless seizures are *per se* unreasonable.<sup>4</sup> *State v. Doughty*, 170 Wn.2d 57, 61-62, 239 P.3d 573 (2010). The State bears the burden of proving that a warrantless seizure falls into one of the “jealously and carefully drawn” exceptions to the warrant requirement. *Id.* The State failed to meet its burden in this case, because it did not show that Peterson had a valid basis to stop Mr. Anaya-Cabrera’s truck.

An investigatory stop must be based on reasonable suspicion. *State v. Butler*, 2 Wn.App.2d 549, 572, 411 P.3d 393 (2018). The officer must

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<sup>4</sup> Appellate courts review *de novo* the constitutionality of a warrantless seizure. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

be able to point to specific and articulable facts that the person has been or is about to be involved in a crime. *Id.*

Under the state constitution, a person is seized whenever a reasonable person would not feel free to leave following an officer's show of authority. *Id.*, at 556. The test "is a purely objective one, looking to the actions of the law enforcement officer." *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1998).

Thus, in Washington, a seizure occurs even if the suspect does not submit to the officer's show of authority. *Id.*; *see also Butler*, 2 Wn.App.2d at 566. Under the federal test, by contrast, the person must submit to the officer's show of authority. *See California v. Hodari D.*, 499 U.S. 621, 626-628, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991).

Mr. Anaya-Cabrera was seized when Peterson turned his car, got behind the pickup, and activated his emergency lights. *State v. Gantt*, 163 Wn. App. 133, 141, 257 P.3d 682 (2011). Under these circumstances, a reasonable person would not have felt free to leave. *Id.*; *see also, e.g., State v. DeArman*, 54 Wn. App. 621, 624, 774 P.2d 1247 (1989).

The officer's show of authority also amounted to a seizure under the Fourth Amendment, even though Mr. Anaya-Cabrera did not immediately pull over. *Hodari D.*, 499 U.S. at 626-628. This is so because he submitted to Peterson's show of authority by turning his truck around,

telling the officer he'd meet him "back down at the gate," and stopping at the Hagara property to wait for the officer. CP 18.

The seizure was unconstitutional under both the federal constitution and Wash. Const. art. I, §7. Peterson did not have a reasonable suspicion based on specific and articulable facts that Mr. Anaya-Cabrera had committed any crime.

All Peterson knew when he turned on his emergency lights was that a Hispanic man may have been involved in a disturbance at the Hagara property,<sup>5</sup> that Mr. Anaya-Cabrera was a Hispanic man who was driving near the property, and that Mr. Anaya-Cabrera had previously had a dispute with Hagara. CP 16-17.

These facts do not provide a reasonable suspicion that Mr. Anaya-Cabrera was involved in any criminal activity. Peterson did not know who had caused the disturbance at the Hagara residence, a place he'd visited numerous times for contact with Hagara and his adult son. RP (11/6/18) 12-13. He had only a vague notion regarding the nature of the disturbance; his understanding turned out to be incorrect. RP (11/6/18) 13; CP 16-17.

He did not know that Mr. Anaya-Cabrera had any involvement with the current problem. CP 16-17. Indeed, he had not even been certain

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<sup>5</sup> It is not clear from Peterson's testimony what information he actually had about the "disturbance" at the Hagara property. RP (11/6/18) 12-13; CP 16

he'd recognized the driver, but instead had the "impression" it was Mr. Anaya-Cabrera.<sup>6</sup> RP (11/6/18) 16.

The parties disputed whether Peterson had any additional information. He claimed in his testimony that he'd learned from dispatch that a silver pickup "may have been involved" in the disturbance. CP 17. However, he did not include the information in his report, and only recalled this detail after discussing the defendant's suppression motion with the prosecutor. RP (11/6/18) 14, 39-40.

The trial court did not make a finding on this disputed issue. CP 16-22. In the absence of such a finding, the Court of Appeals must presume that the State failed to sustain its burden. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

The stop was unjustified. The unlawful seizure occurred when Peterson turned on his overhead lights. *Butler*, 2 Wn.App.2d at 566. At that time, Peterson did not have a well-founded and reasonable suspicion that Mr. Anaya-Cabrera was engaged in criminal activity. *Doughty*, 170 Wn.2d at 62.

All subsequently discovered evidence should have been suppressed as "fruit of the poisonous tree." *See State v. Kinzy*, 141 Wn.2d 373, 393, 5

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<sup>6</sup> It appears that race played a significant role in Peterson's decision to stop the pickup truck. He knew a Hispanic man had been involved in a disturbance, and he saw a Hispanic man driving. This cannot provide a legitimate basis for a stop.

P.3d 668, 680 (2000), *as corrected* (Aug. 22, 2000). Accordingly, Mr. Anaya-Cabrera’s convictions must be reversed. *Id.* The evidence must be suppressed, and the charges remanded for dismissal with prejudice. *Id.*

**II. POLICE TESTIMONY INVADED THE PROVINCE OF THE JURY AND DEPRIVED MR. ANAYA-CABRERA OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A JURY TRIAL.**

The State used profile evidence to suggest Mr. Anaya-Cabrera was “armed” with the firearm found under the driver’s seat. This violated Mr. Anaya-Cabrera’s right to a jury determination of the facts necessary for imposition of the firearm enhancements. The Court of Appeals should vacate the enhancements.

A. The Court of Appeals should review *de novo* this manifest constitutional error.

Alleged constitutional errors are reviewed *de novo*. *Blomstrom v. Tripp*, 189 Wn.2d 379, 389, 402 P.3d 831 (2017). A manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3).

To raise a manifest error, an appellant need only make “a plausible showing that the error... had practical and identifiable consequences in the trial.”<sup>7</sup> *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). An error

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<sup>7</sup> The showing required under RAP 2.5 (a)(3) “should not be confused with the requirements for establishing an actual violation of a constitutional right.” *Id.*

has practical and identifiable consequences if “given what the trial court knew at that time, the court could have corrected the error.” *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).

Here, the prosecutor introduced improper profile evidence that invaded the province of the jury. RP (11/15/18) 292-293. Given what the trial judge knew at the time, he could have corrected the error. *Id.* The error is manifest and may be raised for the first time on appeal. RAP 2.5(a)(3); *State v. King*, 167 Wn.2d 324, 331-332, 219 P.3d 642 (2009).

B. The prosecutor improperly relied on profile evidence to show that Mr. Anaya-Cabrera was “armed” with a firearm.

Testimony providing an improper opinion of guilt invades the constitutional right to a jury trial. *Id.*; U.S. Const. Amend. VI, XIV; Wash. const. art. I, §§21, 22. Neither a lay nor an expert witness may offer improper opinion testimony by direct statement or inference. *Id.* The right to a jury trial is violated whenever a witness provides a nearly explicit opinion on guilt. *Id.*

Profile testimony is evidence suggesting that the accused person “possesses one or more behavioral characteristics typically displayed by another person engaged in crime.” *State v. Crow*, --- Wn.App.2d ---, \_\_\_, 438 P.3d 541 (2019). It improperly suggests guilt based on “evidence beyond the individual circumstances of the case and on one or more traits

the accused possesses in common with others who purportedly commit the same crime.” *Id.*

Profile evidence cannot be used as substantive proof of guilt. *Id.* It creates a risk of conviction “not for what [the defendant] did but for what others are doing.” *Id.*

An expert opinion in the form of “profile” testimony creates the risk of “unfair prejudice and the ensuing false impression the jury might derive about the value of the expert's ostensible inference.” *State v. Braham*, 67 Wn. App. 930, 935, 841 P.2d 785 (1992).<sup>8</sup> Such evidence has “virtually no probative value.” *Id.*, at 939.

Here, the State was required to prove that Mr. Anaya-Cabrera was “armed” with a firearm. *State v. Gurske*, 155 Wn.2d 134, 137, 118 P.3d 333 (2005). This required proof that the weapon was easily accessible and readily available for offensive or defensive purposes. *Id.* The State was also obligated to show a nexus between the defendant, the crime, and the gun. *Id.*, at 138.

The prosecution improperly introduced profile testimony to show that Mr. Anaya-Cabrera was armed. The State’s “expert” testified that

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<sup>8</sup> See also *State v. Maule*, 35 Wn. App. 287, 293, 667 P.2d 96 (1983); *State v. Steward*, 34 Wn. App. 221, 223, 660 P.2d 278 (1983); *State v. Petrich*, 101 Wn.2d 566, 576, 683 P.2d 173, 180 (1984), modified in part on other grounds by *State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988).

drug offenders were often armed, and that they “[n]ormally” carry a firearm “so they don’t get ripped off or for protection.” RP (11/15/18) 292-293. He also linked the presence of the firearm to the quantity of drugs found in the truck. According to the officer, a gun would be present “about 90 percent of the time” when the case involved the amount of drugs recovered here. RP (11/15/18) 293.

This testimony was improper profile testimony. *Crow*, --- Wn.App.2d at \_\_\_\_\_. Its admission infringed Mr. Anaya-Cabrera’s constitutional right to a jury determination of the facts required for imposition of the enhancement.

The “expert” suggested that there was a nexus here because Mr. Anaya-Cabrera’s case was similar to other cases involving drugs and guns. The officer implied that Mr. Anaya-Cabrera had the gun under the seat for the same reason as other drug offenders: so he wouldn’t “get ripped off or for protection.” RP (11/15/18) 292-293. He also told jurors that Mr. Anaya-Cabrera was like 90 percent of the other drug offenders caught with a similar quantity of drugs. RP (11/15/18) 292-293.

The clear import of this testimony was that there was a nexus between Mr. Anaya-Cabrera, the gun, and the crime, based on the characteristics of other drug offenders. The testimony also suggested that the gun was available for offensive or defensive purposes relating to the possession charges.

The improper profile testimony implied that Mr. Anaya-Cabrera was “armed” based on characteristics of others involved in drug activity. *See Braham*, 67 Wn. App. at 939. It amounted to a nearly explicit opinion on guilt. *King*, 167 Wn.2d at 331-332.

The testimony invaded the province of the jury and violated Mr. Anaya-Cabrera’s Sixth and Fourteenth Amendment right to a jury trial. *Id.* The firearm enhancement must be vacated, and the case remanded for a new trial on the firearm issue.<sup>9</sup> *Id.*

C. If the constitutional error is not manifest, Mr. Anaya-Cabrera’s attorney provided ineffective assistance by failing to object.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To obtain relief on an ineffective assistance claim, a defendant must show “that (1) his counsel’s performance fell below an objective standard of reasonableness and, if so, (2) that counsel’s poor work prejudiced him.” *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010); *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Although courts apply “a strong presumption that defense counsel’s conduct is not deficient,” a defendant rebuts that presumption if “no conceivable legitimate tactic explain[s] counsel’s

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<sup>9</sup> *See State v. Woolfolk*, 95 Wn. App. 541, 552, 977 P.2d 1 (1999) (remanding “for retrial on the question whether Woolfolk was armed with a firearm.”)

performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).<sup>10</sup>

Counsel performs deficiently by failing to object to inadmissible evidence absent a valid strategic reason. *Crow*, --- Wn.App.2d at \_\_\_\_\_. Reversal is required if an objection would likely have been sustained and the result of the trial would have been different without the inadmissible evidence. *Id.*

Profile testimony is inadmissible under ER 401, ER 402, and ER 403. *Id.*; *Braham*, 67 Wn. App. at 937-939. It has “virtually no probative value” and is “unduly prejudicial.” *Braham*, 67 Wn. App. at 939. Here, the prosecutor relied on profile testimony to imply Mr. Anaya-Cabrera’s guilt, based on the characteristics of known offenders. This was improper. *Id.*

A reasonable defense attorney would have objected. *Crow*, --- Wn.App.2d at \_\_\_\_\_. Mr. Anaya-Cabrera’s lawyer provided deficient performance by failing to protect his client from the irrelevant, highly prejudicial evidence. *Id.*

There was no valid tactical reason underlying defense counsel’s failure to object to the inadmissible profile testimony. *Id.* Counsel’s

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<sup>10</sup> Ineffective assistance is an issue of constitutional magnitude that the court can consider for the first time on appeal. *Kyllo*, 166 Wn.2d at 862; RAP 2.5 (a)(3).

failure to object deprived Mr. Anaya-Cabrera of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Id.* The firearm enhancement must be vacated, and the case remanded for a new trial on the firearm issue. *Id.*; *Woolfolk*, 95 Wn. App. at 552.

**III. THE STATE FAILED TO PROVE THAT MR. ANAYA-CABRERA WAS ARMED WITH A FIREARM.**

In this case, the State did not meet its burden of proving that Mr. Anaya-Cabrera was “armed.” It did not prove that the firearm was easily accessible and readily available, because it did not show that Mr. Anaya-Cabrera was aware of the gun. Nor did the prosecution prove a nexus between the defendant, the crime, and the gun.

A defendant’s lack of knowledge is relevant to determine if the person is armed. *Woolfolk*, 95 Wn. App. at 546-551. If a person “does not know [a gun] exists, he cannot use the gun.” *Id.*, at 550. Although knowledge is not an element of the enhancement,<sup>11</sup> a lack of knowledge suggests that the firearm is not easily accessible and readily available. *Id.* It also suggests that there is no nexus between the defendant, the crime, and the weapon. *Id.*

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<sup>11</sup> See *State v. Barnes*, 153 Wn.2d 378, 382-387, 103 P.3d 1219 (2005). In *Barnes*, the defendant did not argue the insufficiency of the evidence. *Id.*, at 387.

Furthermore, mere proximity or constructive possession is insufficient to prove that a person is armed. *Id.* Thus, for example, a drug dealer who keeps cocaine in his house and a rifle under his bed is not “armed” within the meaning of the statute. *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993).

A person is not necessarily armed even if arrested within a few feet of the firearm, or if police discover guns and drugs right next to each other. *Gurske*, 155 Wn.2d at 136-137; *see also State v. Mills*, 80 Wn. App. 231, 907 P.2d 316 (1995); *State v. Johnson*, 94 Wn. App. 882, 974 P.2d 855 (1999).

In *Mills*, police found a pistol “lying beside” drugs in the defendant’s motel room (after he was arrested elsewhere). *Mills*, 80 Wn. App. at 233. This evidence was insufficient to prove that the defendant was armed because he was not near the weapon “at a time when availability for use... was critical.” *Gurske*, 155 Wn.2d at 141 (discussing *Mills*).

In *Johnson*, the defendant was arrested within a few feet of a loaded gun, but “there was no evidence from which the trier of fact could infer that the weapon was easily accessible and readily available for use... and there was insufficient nexus between the defendant and the weapon.” *Id.* (discussing *Johnson*). The court found it significant that the defendant

“made no movement toward” the gun’s location when police entered. *Id.*, at 142 (discussing *Johnson*).

Similarly, in *Gurske*, police found a backpack sitting “directly behind” the driver’s seat in the defendant’s car. *Gurske*, 155 Wn.2d at 136. The backpack held a pistol, methamphetamine, and the defendant’s wallet. *Id.* The Supreme Court found these facts insufficient to prove the defendant was armed.<sup>12</sup> *Id.*, at 137-144.

Here, the evidence was insufficient to prove that Mr. Anaya-Cabrera was armed. The State did no more than prove proximity to the gun. It did not establish beyond a reasonable doubt that the gun was readily accessible and easily available or that there was a nexus between the defendant, the gun, and the crime.

Nothing in the record shows that Mr. Anaya-Cabrera was aware of the gun’s presence. He did not reach toward the gun when stopped by the police. The State did not introduce any statements showing that Mr.

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<sup>12</sup> The *Gurske* court also referenced *State v. Sabala*, 44 Wn. App. 444, 445, 723 P.2d 5 (1986). In that case, the defendant drove to and from a drug transaction with a loaded handgun under his seat. *Id.* The Court of Appeals found the evidence sufficient to prove the defendant was “armed” at the time of the offense. *Id.*, at 447-449. Here, by contrast, nothing showed that Mr. Anaya-Cabrera was on his way to or from a drug deal. *Cf. State v. Sassen Van Elsloo*, 191 Wn.2d 798, 829-831, 425 P.3d 807 (2018) (evidence sufficient where a shotgun was used to protect an ongoing criminal enterprise selling drugs from car.)

Anaya-Cabrera knew the gun was under the seat. Nor did he say that he kept the gun to protect the drugs, or that he would use it to resist arrest.<sup>13</sup>

The record does not show that Mr. Anaya-Cabrera was “armed” with a firearm. *Id.* The State did no more than prove that he constructively possessed a firearm.

Under the circumstances, the gun was not easily accessible and readily available, and there was no nexus between Mr. Anaya-Cabrera, the gun, and the possession charges of which he was convicted. *Id.* The firearm enhancements must be vacated, and the case remanded for a new sentencing hearing. *Id.*

### **CONCLUSION**

Deputy Peterson did not have a reasonable suspicion when he turned to follow Alejandro Anaya-Cabrera’s truck and activated his patrol car’s emergency lights. The stop was unlawful and requires suppression of the evidence. Mr. Anaya-Cabrera’s convictions must be reversed, and the case remanded for dismissal.

The prosecution improperly introduced profile testimony. The inadmissible testimony suggested that Mr. Anaya-Cabrera was “armed” based on the characteristics of others accused of drug offenses. The

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<sup>13</sup> As noted above, the State introduced inadmissible profile testimony to suggest that Mr. Anaya-Cabrera was like 90% of other drug offenders, who “[n]ormally” carry a firearm “so they don’t get ripped off or for protection.” RP (11/15/18) 292-293.

testimony invaded the province of the jury and violated Mr. Anaya-Cabrera's right to due process. The firearm enhancements must be vacated, and the case remanded for a new trial. If a new trial is held, the inadmissible profile testimony must be excluded.

Defense counsel should have objected to the inadmissible profile testimony. Counsel's failure to object deprived Mr. Anaya-Cabrera of the effective assistance of counsel. The firearm enhancements must be vacated and the case remanded for a new trial.

The State failed to prove that Mr. Anaya-Cabrera was "armed" with a firearm. The State did not show that he was aware the gun was under the seat, and thus could not prove that the gun was easily accessible and readily available. Nor did the prosecution prove a nexus between the gun, the defendant, and the simple possession charges of which Mr. Anaya Cabrera was convicted. The firearm enhancements must be vacated and the case remanded for a new sentencing hearing.

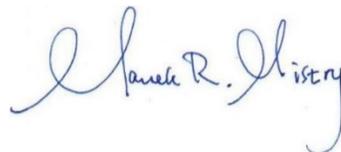
Respectfully submitted on July 5, 2019,

**BACKLUND AND MISTRY**



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant



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Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Alejandro Anaya-Cabrera, DOC# 412751  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Grays Harbor Prosecuting Attorney  
rtrick@co.grays-harbor.wa.us  
appeals@co.grays-harbor.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 5, 2019.



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

# BACKLUND & MISTRY

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## Transmittal Information

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