

FILED
Court of Appeals
Division II
State of Washington
10/24/2019 4:00 PM

No. 53151-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Alejandro Anaya-Cabrera,

Appellant.

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

The Honorable Judges Ray Kahler and David Mistachkin

Appellant's Reply 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

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT..... 1

I. Deputy Peterson did not have a valid basis to stop Mr. Anaya-Cabrera..... 1

II. The prosecutor improperly used profile testimony to imply that Mr. Anaya-Cabrera was “armed.” 5

A. Detective Ramirez’s testimony invaded the province of the jury..... 6

B. The constitutional error is sufficiently manifest to warrant review. 13

C. Mr. Anaya-Cabrera was deprived of the effective assistance of counsel. 15

III. The State failed to prove that Mr. Anaya-Cabrera was armed with a firearm..... 17

CONCLUSION 17

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

<i>Clark Cty. v. Growth Mgmt. Hearings Bd.</i> , --- Wn.App.2d ---, 448 P.3d 81 (2019).....	2, 4, 14
<i>In re Pullman</i> , 167 Wn.2d 205, 218 P.3d 913 (2009).....	3, 16
<i>State v. Acrey</i> , 148 Wn.2d 738, 64 P.3d 594, 598 (2003).....	1, 2
<i>State v. Avendano-Lopez</i> , 79 Wn.App. 706, 904 P.2d 324 (1995) review denied 129 Wn.2d 1007, 917 P.2d 129 (1996).....	9
<i>State v. Black</i> , 109 Wn.2d 336, 745 P.2d 12 (1987).....	11
<i>State v. Braham</i> , 67 Wn.App. 930, 841 P.2d 785 (1992).....	7, 8, 16
<i>State v. Butler</i> , 2 Wn.App.2d 549, 411 P.3d 393 (2018).....	1, 2, 5
<i>State v. Claflin</i> , 38 Wn.App. 847, 690 P.2d 1186 (1984).....	7, 8
<i>State v. Crow</i> , --- Wn.App.2d ---, 438 P.3d 541 (2019).....	6, 8, 12, 15, 16
<i>State v. Cruz</i> , 77 Wn. App. 811, 894 P.2d 573 (1995).....	9
<i>State v. King</i> , 167 Wn.2d 324, 219 P.3d 642 (2009).....	11, 13
<i>State v. Kinzy</i> , 141 Wn.2d 373, 5 P.3d 668 (2000), as corrected (Aug. 22, 2000).....	5
<i>State v. Kitchen</i> , 110 Wn.2d 403, 756 P.2d 105 (1988).....	7
<i>State v. Maule</i> , 35 Wn. App. 287, 667 P.2d 96 (1983).....	7, 8
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	14
<i>State v. McNeair</i> , 88 Wn.App. 331, 944 P.2d 1099 (1997).....	3, 16
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).....	13, 14

State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984) 7, 8

ARGUMENT

I. DEPUTY PETERSON DID NOT HAVE A VALID BASIS TO STOP MR. ANAYA-CABRERA.

When he activated his lights to pull over Mr. Anaya-Cabrera, Deputy Peterson had very limited information. This information did not provide a reasonable suspicion that Mr. Anaya-Cabrera “[had] been or [was] about to be involved in a crime.” *State v. Butler*, 2 Wn.App.2d 549, 572, 411 P.3d 393 (2018) (quoting *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594, 598 (2003)).

Respondent concedes that Mr. Anaya-Cabrera was seized “at the moment Dep. Peterson turned on his emergency lights...” Brief of Respondent, p. 9. Respondent suggests that “[t]he initial seizure *could be* viewed as an attempt initially to determine if Dep. Peterson correctly recognized Mr. Anaya-Cabrera.” Brief of Respondent, p. 11 (emphasis added). According to Respondent, “[t]hat stop would be very brief, just long enough for Dep. Peterson to contact the driver.” Brief of Respondent, p. 11.

Respondent provides no authority suggesting that a seizure can be examined based on what might have happened rather than what actually happened. Brief of Respondent, p. 11. Where no authority is cited, this court should assume counsel has found none after diligent search. *See Clark Cty. v. Growth Mgmt. Hearings Bd.*, --- Wn.App.2d ---, ___, 448

P.3d 81 (2019). The seizure must be analyzed based on what actually happened, not on what might have happened.¹

The limited information Peterson had at the time he stopped Mr. Anaya-Cabrera may be grouped into three parts. Even when taken together, these three categories of information do not provide a reasonable suspicion that Mr. Anaya-Cabrera was involved in criminal activity.

First, Peterson had been told that a “Hispanic male” had been involved in a “disturbance.” RP (11/6/18) 13; CP 16. He admitted that the nature of the disturbance was “unclear.” CP 16.

Although he testified that it “sounded like” the Hispanic man was either keeping the property owner from leaving or taking things without permission,² Peterson didn’t provide “specific articulable facts”³ explaining why it “sounded like” that. RP (11/6/18) 13; CP 16-17. In the absence of specific articulable facts, Peterson’s conclusion that it “sounded like” the Hispanic man was acting improperly was insufficient to show criminal activity. *See Butler*, 2 Wn.App.2d at 572.

In its brief, Respondent does not outline any specific articulable facts explaining the basis for Peterson’s conclusions regarding the nature of the disturbance. Brief of Respondent, pp. 9-14. This failure may be

¹ Respondent also implies that this court should ignore the trial court’s failure to make a finding on the only disputed fact—whether dispatch advised Deputy Peterson that the Hispanic male left in a silver truck. Brief of Respondent, pp. 12-13. However, Respondent concedes that “the trial court did not consider this fact” and thus that “it is moot to dispute on appeal.” Brief of Respondent, p. 13.

² This proved to be incorrect: the property owner was keeping the Hispanic man from leaving. RP (11/6/18) 13.

³ *Acrey*, 148 Wash.2d at 747.

treated as a concession. *See In re Pullman*, 167 Wn.2d 205, 212 n. 4, 218 P.3d 913 (2009); *State v. McNeair*, 88 Wn.App. 331, 340, 944 P.2d 1099 (1997).

Second, Peterson saw a Hispanic man driving a truck near the property. CP 17. He had the “impression” that this person was Mr. Anaya-Cabrera. RP (11/6/18) 16. However, he did not provide specific and articulable facts explaining why he had this “impression.” RP (11/6/18) 9-70; CP 16-22.

In its brief, Respondent does not outline any specific articulable facts justifying Peterson’s “impression” that the driver was Mr. Anaya-Cabrera. This failure may be treated as a concession. *See Pullman*, 167 Wn.2d at 212 n. 4; *McNeair*, 88 Wn.App. at 340.

Third, Peterson knew that Mr. Anaya-Cabrera was Hispanic and had a tenuous connection to the property where the “disturbance” took place.⁴ CP 17. However, Peterson had no information showing that Mr. Anaya-Cabrera was the “Hispanic male” involved in the “disturbance.”⁵ CP 16-22.

Respondent suggests that “[the] nature of the call *could have been* a natural landlord/tenant dispute.” Brief of Respondent, p. 13 (emphasis added). Again, Respondent cites no authority for the idea that a stop

⁴ He’d moved from the property following a conflict that may have related to rent. CP 17.

⁵ Respondent does not suggest that Mr. Anaya-Cabrera’s race played no role in the stop. Instead, according to Respondent, “[t]he fact that the Appellant being Hispanic played a role in the seizure is only because that the race of the suspect was a descriptive trait broadcast by dispatch.” Brief of Respondent, p. 13.

should be analyzed based on what “could have been.” Brief of Respondent, p. 13. This suggests Respondent found no authority supporting the State’s position. *Clark Cty.* --- Wn.App.2d at ____.

In summary, Respondent cannot show that Peterson had a reasonable suspicion based on specific articulable facts that Mr. Anaya-Cabrera was involved in criminal activity. Peterson testified that it “sounded like” a Hispanic man was engaged in misconduct but didn’t explain why he reached this conclusion. RP (11/6/18) 13; CP 16-17. He said he had the “impression” that Mr. Anaya-Cabrera was the driver he saw in the truck but didn’t explain what gave him that impression. RP (11/6/18) 16. He assumed that Mr. Anaya-Cabrera was the “Hispanic male” person involved in the “disturbance,” but did not provide an explanation for this belief, other than to say that Mr. Anaya-Cabrera was Hispanic and had previously moved from the property following a dispute. RP (11/6/18) 13; CP 16.

In fact, Respondent makes no substantive arguments supporting the trial court’s decision.⁶ Brief of Respondent, pp. 9-14. Respondent first speculates that Peterson hypothetically might have activated his lights merely to identify the driver but does not claim that the trial judge’s

⁶ In addition, Respondent makes an unsupported claim that is apparently aimed at making Mr. Anaya-Cabrera appear more culpable than the evidence suggests: Respondent claims that police found black electrical tape in the truck that was “just like the sort wrapped around the methamphetamine Mr. Anaya-Cabrera dropped on the ground.” Brief of Respondent, pp. 6-7. Nothing in the record shows that Mr. Anaya-Cabrera dropped methamphetamine wrapped in electrical tape. Furthermore, the electrical tape found in the truck did not match tape wrapped around a package of drugs that was also found within the truck. RP 228, 256, 261.

decision should be upheld on that basis. Brief of Respondent, p. 11. Respondent next describes as “moot” the court’s refusal to enter a finding regarding a disputed fact. Brief of Respondent, p. 13. Finally, Respondent argues that the stop was not the result of racial profiling. Brief of Respondent, p. 13.

None of these arguments address whether Peterson had a well-founded and reasonable suspicion that Mr. Anaya-Cabrera had been or was about to be involved in a crime. *Butler*, 2 Wn.App.2d at 572. The evidence should have been suppressed. *State v. Kinzy*, 141 Wn.2d 373, 393, 5 P.3d 668, 680 (2000), *as corrected* (Aug. 22, 2000). Mr. Anaya-Cabrera’s convictions must be reversed, and the case remanded for dismissal with prejudice. *Id.*

II. THE PROSECUTOR IMPROPERLY USED PROFILE TESTIMONY TO IMPLY THAT MR. ANAYA-CABRERA WAS “ARMED.”

Detective Ramirez testified that drug offenders “[n]ormally” carry firearms “so they don’t get ripped off or for protection.” RP (11/15/18) 292-293. This is true “about 90 percent of the time” in cases involving quantities of drugs such as those found here. RP (11/15/18) 293.

This amounted to profile testimony; it suggested Mr. Anaya-Cabrera was “armed” within the meaning of the court’s instructions. CP 32-33. It violated due process and Mr. Anaya-Cabrera’s right to a jury determination of the facts necessary for conviction.

A. Detective Ramirez’s testimony invaded the province of the jury.

An accused person may not be convicted on the basis of profile testimony. *State v. Crow*, 8 Wn.App.2d 480, 495-503, 438 P.3d 541 (2019). In this case, the firearm enhancements were based on profile evidence.

The State was required to prove that Mr. Anaya-Cabrera was “armed” with a firearm which was “readily available for offensive or defensive use.” CP 32. Jurors were also required to find a nexus between the firearm, the crime, and Mr. Anaya-Cabrera. CP 33.

The State presented profile testimony to establish these facts. Detective Ramirez testified that drug offenders “[n]ormally” carry a firearm “so they don’t get ripped off or for protection.” RP (11/15/18) 292-293. This is true “about 90 percent of the time” in cases involving quantities of drugs such as those found here. RP (11/15/18) 293.

This testimony linked Mr. Anaya-Cabrera to people who possess firearms for offensive or defensive use 90% of the time. RP (11/15/18) 292-293. It suggested a nexus between the gun, the crime, and Mr. Anaya-Cabrera. RP (11/15/18) 292-293. It was inadmissible profile testimony under *Crow. Id.*

Instead of attempting to distinguish *Crow*, Respondent argues that the *Crow* decision is “seriously flawed.” Brief of Respondent, p. 18. But many of the other authorities cited by Respondent echo the holding in *Crow*. See Brief of Respondent, pp. 15-16.

Thus, for example, it is improper to base a conviction on “expert testimony regarding the practice of grooming by sexual assault perpetrators.” Brief of Respondent, p. 15 (citing *State v. Braham*, 67 Wn.App. 930, 841 P.2d 785 (1992)). The analysis in *Braham* is similar to that outlined by the *Crow* court.

It is likewise improper to introduce testimony regarding the high percentage of molestation cases that involve someone known to the child, or a male parent figure. Brief of Respondent, p. 16 (citing *State v. Maule*, 35 Wn. App. 287, 293, 667 P.2d 96 (1983); *State v. Clafin*, 38 Wn.App. 847, 690 P.2d 1186 (1984); and *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)).

In each of these cases, as in *Crow*, the appellate court found the introduction of profile evidence improper. These authorities require reversal in Mr. Anaya-Cabrera’s case as well. Each case included testimony describing the shared characteristics of a loosely defined group (sex offenders). In each case, testimony implied that the defendant belonged to this group and was thus more likely guilty of the charged crime.

This is the same reasoning outlined in *Crow*: profile testimony in that case outlined the shared characteristics of a loosely defined group—felons who possess firearms. The testimony was improper because it suggested that the defendant was more likely guilty because he was a

member of that group, charged with being a felon in possession of a firearm.

The reasoning applies here as well: the State presented evidence outlining the shared characteristics of drug offenders—that they normally possess firearms “so they don’t get ripped off or for protection,” and that they carry firearms “about 90 percent of the time” in cases involving quantities of drugs such as those found here. RP (11/15/18) 292-293. As in *Crow* and the other authorities outlined above, this amounted to improper profile evidence.

Furthermore, in none of the cases referenced by Respondent did the witness explicitly state that the accused person fit the profile. *See* Brief of Respondent, pp. 22-23. Instead, the connection was implied: each witness outlined group characteristics, while other testimony showed that the defendant had those same characteristics. The witnesses did not explicitly testify that the defendant belonged to the group; nor did witnesses explicitly testify that similarities between the defendant’s case and the group’s characteristics confirmed the defendant’s guilt. *See Braham*, 67 Wn. App. at 933-934; *Maule*, 35 Wn. App. at 289, 293; *Clafin*, 38 Wn. App. at 852; *Petrich*, 101 Wn.2d at 569, 576.

As these cases show, it is improper to imply that a person should be convicted on the basis of profile testimony. This is the same problem addressed by the *Crow* court. *Crow*, 8 Wn.App.2d at 487-490, 495-503. It is also the error presented in this case. *Crow* and these other authorities outlined above all support reversal in this case. *Id.*

Respondent erroneously relies on two 1995 cases to support its argument. Brief of Respondent, pp. 17, 20 (citing *State v. Avendano-Lopez*, 79 Wn.App. 706, 904 P.2d 324 (1995) review denied 129 Wn.2d 1007, 917 P.2d 129 (1996) and *State v. Cruz*, 77 Wn. App. 811, 894 P.2d 573 (1995)). Neither case should control here.

In *Avendano-Lopez*, the challenged evidence was not directed toward establishing an element of the charged crime.⁷ See *Avendano-Lopez*, 79 Wn. App. at 709-711. As the court noted, “[t]he officer’s testimony... did not identify any group as being more likely to commit drug offenses.” *Id.*, at 711. Instead, it “explained the arcane world of drug dealing.” *Id.* Similarly, in *Cruz*, the challenged testimony involved evidence regarding “typical” heroin transactions. See *Cruz*, 77 Wn. App. at 813-814.

Here, by contrast, Ramirez’s testimony went directly to disputed elements of the firearm enhancement. Testimony that drug offenders normally carry guns “so they don’t get ripped off or for protection” helped the State imply that the firearm in this case was “for offensive or defensive use.” CP 32; RP (11/15/18) 292-293. This testimony (along with evidence that 90% of drug offenders caught with similar quantities are armed) also implied a nexus between the gun, the crime, and Mr. Anaya-Cabrera. CP 33; RP (11/15/18) 292-293.

⁷ The *Crow* court criticized the outcome in *Avendano-Lopez*. See *Crow*, 8 Wn.App.2d at 502-503.

Respondent also argues that “[t]he ‘profile’ of ‘drug offender’ in Grays Harbor County is generalized and imprecise so as to be meaningless.” Brief of Respondent, p. 23; *see also* Brief of Respondent, pp. 1, 14.

This may be true. However, it does not undermine Mr. Anaya-Cabrera’s argument. Instead, it calls into question the substance of Detective Ramirez’s testimony.

The problem here is that Detective Ramirez claimed such a profile exists. He purported to describe the characteristics of drug offenders who deal with “heavier weights” of controlled substances. RP (11/15/18) 292. He testified that such people “[n]ormally” carry a firearm “so they don’t get ripped off or protection.” RP (11/15/18) 292. He also testified that people who are “carrying... that much drugs” have firearms “about 90 percent of the time.” RP (11/15/18) 292.

Respondent is correct to say that “the ‘profile’ of a drug offender in Grays Harbor County is... statistically meaningless.” Brief of Respondent, p. 25. This makes Detective Ramirez’s testimony especially egregious: he provided improper profile testimony resting on a category that doesn’t exist.

Furthermore, Respondent’s argument reflects a misunderstanding of the issue. The profile testimony here was not aimed at proving that Mr. Anaya-Cabrera was “more statically [sic] likely to *become* a drug offender.” Brief of Respondent, p. 26 (emphasis in original). Instead, the

testimony was used to show that he was “armed” within the meaning of the court’s instructions. CP 32, 33.

The testimony suggested that he, like other drug offenders, possessed the firearm for offensive or defensive purposes—so he wouldn’t “get ripped off or for protection.” RP (11/15/18) 292. It also suggested a nexus connecting the firearm, the crime, and Mr. Anaya-Cabrera, since people “carrying... that much drugs” have firearms “about 90 percent of the time.” RP (11/15/18) 292.

Respondent claims that Detective Ramirez did not testify as an expert. Brief of Respondent, pp. 3, 14, 27, 37, 45. But Mr. Anaya-Cabrera’s argument does not hinge on Ramirez’s status as an expert. As the Supreme Court has pointed out, “neither a lay nor an expert witness ‘may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.’” *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009) (quoting *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)).

Ramirez provided profile testimony aimed at establishing a likelihood that Mr. Anaya-Cabrera was “armed” within the meaning of the court’s instructions. CP 32-33; RP (11/15/18) 291-292. This profile testimony—whether characterized as lay testimony or expert testimony—violated due process and infringed Mr. Anaya-Cabrera’s Sixth and Fourteenth Amendment right to a jury trial. *See* Appellant’s Opening Brief, pp. 12-15.

Furthermore, the State *did* present Ramirez as an expert. The State introduced evidence establishing Ramirez as “a witness qualified as an expert... by experience [and] training.” ER 702.

At the prosecutor’s insistence, Ramirez repeatedly referenced his “training and experience.” RP (11/15/18) 273, 278-279, 280-281, 290-291, 292-293. Furthermore, the prosecutor emphasized Ramirez’s membership in the drug task force and his 10 years of service at the sheriff’s department. RP (11/15/18) 272, 273; RP (11/16/18) 364-365. In closing, the State argued that Ramirez had “extensive training in drug enforcement.” RP (11/16/18) 365.

Although the argument here does not hinge on Ramirez’s status as an expert, the prosecutor relied on Ramirez’s expertise to heighten the impact of the improper profile testimony.

The Court of Appeals should disregard Respondent’s argument that Ramirez was not presented as an expert. *See* Brief of Respondent, pp. 27-28. The State improperly introduced profile testimony suggesting that Mr. Anaya-Cabrera was “armed” based on characteristics allegedly shared by other drug offenders. Respondent admits that drug offenders cannot meaningfully be categorized, providing even more weight to Mr. Anaya-Cabrera’s argument.

The improper profile evidence amounted to an opinion that Mr. Anaya-Cabrera was guilty of committing each offense while armed with a firearm. *Crow*, 8 Wn.App.2d at 495-503. The testimony invaded the province of the jury and violated Mr. Anaya-Cabrera’s right to due process

and his right to a jury trial. *King*, 167 Wn.2d at 331. The firearm enhancements must be vacated. The case must be remanded for a new trial on the enhancement issue.

B. The constitutional error is sufficiently manifest to warrant review.

The improper profile testimony created a manifest error affecting Mr. Anaya-Cabrera's constitutional right to a jury trial. *See* Appellant's Opening Brief, pp. 11-12. The error "affects" this constitutional right because it is an "opinion as to the guilt of [the] defendant... [by] inference." *King*, 167 Wn.2d at 331.

It is "manifest" because the facts necessary to find a constitutional violation appear in the record. *State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). The error may be reviewed under RAP 2.5(a)(3).

Respondent argues that there was no "actual prejudice," suggesting that the error had no "practical and identifiable consequences." Brief of Respondent, p. 33. But Respondent conflates the manifest error inquiry with a harmless error analysis. Brief of Respondent, pp. 33-34.

The Supreme Court has explained what is meant by the phrase "practical and identifiable consequences." *Id.* The court equates this language with the phrase "actual prejudice." *Id.*, at 99.

An error is identifiable (and thus produces "actual prejudice") if "the trial record [is] sufficient to determine the merits of the claim." *Id.* Thus, "[i]f the facts necessary to adjudicate the claimed error are not in

the record on appeal, no actual prejudice is shown and the error is not manifest.” *Id.*, (quoting *State v. McFarland*, 127 Wash.2d 322, 333, 899 P.2d 1251 (1995)).

Accordingly, “the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review.” *Id.*, at 99-100. The proper test, as announced by the *O’Hara* court, focuses on the presence or absence of facts in the record: “to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.” *Id.* at 100.

Here, the facts supporting Mr. Anaya-Cabrera’s claim appear in the record. Given what the trial court knew at the time, the court “could have corrected the error.” *Id.* This court should reach the merits of the claim.

Without citation to authority, Respondent implies that improper profile testimony cannot be reviewed as manifest error unless it “directly steer[s] a jury’s deliberations, or where the jury, to acquit, must to decide [sic] directly contrary to how a State’s witness had opined.” Brief of Respondent, pp. 30-31. Where no authority is cited, this Court should assume counsel has found none after diligent search. *Clark Cty.*, --- Wn.App.2d at _____. Respondent’s proposed standard does not reflect the proper test for manifest constitutional error.

Respondent also implies that any error can be disregarded because “[t]he jury’s verdict shows the Appellant received a fair trial.” Brief of Respondent, p. 32. Again, Respondent cites no authority supporting this argument. *Id.*

Furthermore, contrary to Respondent’s argument, Mr. Anaya-Cabrera’s claim does not relate to the substantive offense. *See* Brief of Respondent, p. 32. Instead, his argument addresses the firearm enhancements. *See* Appellant’s Opening Brief, pp. 11-15. Respondent’s reliance on the acquittal in the trafficking charge reflects a misunderstanding of the argument. *See* Brief of Respondent, p. 32.

The constitutional violation is manifest. The facts necessary to support Mr. Anaya-Cabrera’s constitutional claim appear in the record. Accordingly, the error may be reviewed under RAP 2.5(a)(3).

C. Mr. Anaya-Cabrera was deprived of the effective assistance of counsel.

Defense counsel provides deficient performance by failing to object to inadmissible evidence absent a valid strategic reason. *Crow*, --- Wn.App.2d at _____. Counsel should have objected to the inadmissible profile testimony in this case.

There is no indication that defense counsel was pursuing any legitimate strategy by failing to object. Respondent argues that “counsel may have been acting strategically,” but does not outline a legitimate strategy incorporating the specific evidence at issue here. Brief of

Respondent, pp. 35-36. Instead, Respondent outlines counsel's general approach to other testimony introduced at trial. Brief of Respondent, pp. 35-36.

Nothing in Respondent's summary suggests that defense counsel had a reason to allow profile testimony strengthening the State's case. Defense counsel's failure to object cannot be characterized as a legitimate strategy.

Furthermore, Ramirez's testimony was highly prejudicial. Ramirez suggested that Mr. Anaya-Cabrera was "armed" within the meaning of the court's instructions because other drug offenders carry firearms 90% of the time "so they don't get ripped off or for protection." RP (11/15/18) 292-293. This profile testimony had "virtually no probative value" and was "unduly prejudicial." *Braham*, 67 Wn. App. at 939. It established the elements of the firearm enhancements. CP 32, 33.

Addressing the prejudice prong, Respondent again argues an absence of prejudice based on the acquittal for the trafficking charge. Brief of Respondent, pp. 36-37. Respondent does not address the prejudice as it relates to the enhancements. This failure may be taken as a concession. *Pullman*, 167 Wn.2d at 212 n. 4; *McNeair*, 88 Wn.App. at 340.

Mr. Anaya-Cabrera was denied the effective assistance of counsel. He was prejudiced by counsel's deficient performance. *Crow*, --- Wn.App.2d at _____. The firearm enhancements must be reversed and the case remanded for a new trial on the enhancement issue. *Id.*

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

Mr. Anaya-Cabrera rests on the argument set forth in Appellant's Opening Brief.⁸

CONCLUSION

Mr. Anaya-Cabrera was unlawfully seized when Deputy Peterson turned on his overhead lights. The evidence must be suppressed, and the case remanded for dismissal.

In addition, the State failed to produce sufficient evidence to prove that Mr. Anaya-Cabrera was armed with a firearm. The firearm enhancements must be vacated, and the case remanded for resentencing.

In the alternative, the case must be remanded for a new trial on the firearm enhancements. The State relied on profile testimony to prove that Mr. Anaya-Cabrera was "armed" within the meaning of the court's instructions. The improper profile testimony amounted to a nearly explicit opinion that Mr. Anaya-Cabrera was armed. The testimony violated his right to a jury trial and his right to due process. Furthermore, his attorney's failure to object deprived Mr. Anaya-Cabrera of his right to the effective assistance of counsel. The enhancements must be vacated, and the case remanded for a new trial on the enhancement issue.

⁸ In support of its sufficiency argument, Respondent erroneously claims that "the firearm was loaded with a bullet chambered." Brief of Respondent, p. 37. In fact, nothing in the trial record suggests that there was a bullet in the chamber.

Respectfully submitted on October 24, 2019,

BACKLUND AND MISTRY

Handwritten signature of Jodi R. Backlund in blue ink.

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

Handwritten signature of Manek R. Mistry in blue ink.

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 Reply 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 Reply 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 October 24, 2019.



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

BACKLUND & MISTRY

October 24, 2019 - 4:00 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53151-8
Appellate Court Case Title: State of Washington, Respondent v. Alejandro Anaya-Cabrera, Appellant
Superior Court Case Number: 18-1-00509-7

The following documents have been uploaded:

- 531518_Briefs_20191024155937D2027922_3673.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was 531518 State v Alejandro Anaya Cabrera Reply Brief.pdf

A copy of the uploaded files will be sent to:

- appeals@co.grays-harbor.wa.us
- rtrick@co.grays-harbor.wa.us

Comments:

Sender Name: Jodi Backlund - Email: backlundmistry@gmail.com

Address:

PO BOX 6490

OLYMPIA, WA, 98507-6490

Phone: 360-339-4870

Note: The Filing Id is 20191024155937D2027922