

FILED
Court of Appeals
Division II
State of Washington
10/9/2019 10:41 AM
NO. 53151-8-II

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

STATE OF WASHINGTON,
Respondent,

v.

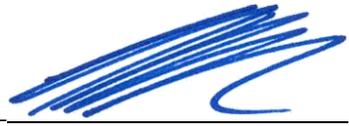
ALEJANDRO ANAYA-CABRERA,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE JUDGES RAY KAHLER AND DAVID MISTACHKIN

BRIEF OF RESPONDENT

KATHERINE L. SVOBODA
Prosecuting Attorney
for Grays Harbor County

BY: 
RANDY J. TRICK
Deputy Prosecuting Attorney
WSBA # 45190

Grays Harbor County Prosecuting Attorney
102 West Broadway Room 102
Montesano, WA 98563
(360) 249-3951

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INTRODUCTION

Trying to define a “drug offender” in Grays Harbor County is like trying to define a third of all people arrested for felony offenses. Such a category of criminal is as vast as it is vague, and in a society where government is split between treating drug addiction as a medical issue or a criminal issue, declaring a “drug offender” to be a “member of a group more likely to commit the charged crime” does no more than label addicts. “Drug offender” is simply not a group that can be easily profiled in Grays Harbor County.

The Appellant asks this Court to find that any time a police officer testifies from his or her training and experience about basic drug habits or the common practices of people who use drugs, that officer’s testimony automatically implicates a defendant as a member of this vague and nebulous category of criminal, elevating, in a sense, that an officer’s testimony to that of an expert. In making this argument, the Appellant asks this Court to follow Division III in expanding the meaning of “profile evidence” to a point beyond its useful and logical meaning. The Appellant seeks this Court to adopt the holding in *State v. Crow*, but *Crow* was wrongly decided.

Instead, this Court should follow the legal analysis and holding in *Crow's* dissent. The evidence at issue does not meet the definition of “profile evidence,” and this Court should recognize that the issues on appeal are “nothing more than a run-of-the-mill evidentiary challenge ... waived by the failure to raise it at trial.” *State v. Crow*, 438 P.3d 541, 560, 438 P.3d 541 (2019).

The record shows that the testimony complained of by the Appellant does not rise to a level requiring review. The jury did not convict the Appellant of being a drug trafficker, even though that would be the logical verdict flowing from the Appellant’s characterization of Det. Ramirez’s testimony. Instead, given the ample evidence presented of the drugs and firearm hidden in a pickup truck, the jury reached a verdict grounded in the evidence after thorough deliberations, unaffected by the testimony complained of by the Appellant.

COUNTERSTATEMENT OF THE ISSUES

1. The trial court correctly found that Deputy Peterson had a reasonable suspicion, based on a specific and articulable facts, that the silver pickup driven by the Appellant leaving the scene of a criminal disturbance, had been engaged in criminal activity, and his seizure of the pickup truck and the Appellant was thus lawful. The court properly denied the motion to suppress.
2. Detective Ramirez's observations of common drug activity, including quantities of drugs, their sale, street prices, and the need for protection and use of firearms, does not constitute "profile" testimony because there is no identifiable profile of "drug offender," the State did not offer his testimony as that of an expert, and his testimony did not implicate the Appellant as having the characteristics discussed. Because the testimony passed without objection, it is not reviewable.
3. If the testimony of Detective Ramirez does constitute improper "profile" evidence, its admission does not rise to a reviewable constitutional error as it was not a manifest error. If it is reviewable, the error was harmless, as the jury rendered a fair verdict in accordance with the other evidence presented.
4. Counsel was not ineffective by not objecting to parts of Detective Ramirez's testimony because the questions were in line with counsel's own line of questioning, and fit within an identifiable trial tactic. Even if there were no tactical reason not to object, the Appellant failed to show the deficiency affected the outcome of the trial, as the jury's verdict was in accordance with the other evidence.
5. The State proved, and the jury properly found, that the Appellant was "armed" with a firearm when he was in possession of controlled substances, as there was ample evidence the firearm was "accessible and readily available," with a nexus between the Appellant, the firearm, and the drugs, even without Detective Ramirez's testimony about firearms.

COUNTERSTATEMENT OF THE ADDITIONAL GROUNDS

1. The Appellant failed to show the government committed misconduct when the controlled substances at issue were sent for forensic testing three weeks before the trial, and failed to show prejudice from any possible misconduct.
2. The trial court properly sentenced the Appellant with two firearm enhancements running consecutive to each other, having been convicted of two offenses, within the statutory authority of the Sentencing Reform Act.
3. Deputy Peterson properly impounded the pickup truck driven by the Appellant pending his application for a search warrant.

STATEMENT OF FACTS

On or about August 23, 2019, Grays Harbor Sheriff's Deputy Keith Peterson applied for and executed a search warrant on a property on Aberdeen Lake Road where Alejandro Anaya-Cabrera and Richard Wagner were suspected of possessing guns and drugs. RP 17–19. During the execution of that search warrant, the Appellant, Mr. Anaya-Cabrera, arrived in a Nissan Titan pickup which contained a stolen firearm and had been modified to conceal items and/or weapons. RP 18. Mr. Anaya-Cabrera was arrested, but the prosecutor's office did not proceed on charges related to the stolen gun. RP 19. During that investigation, Mr. Anaya-Cabrera told Dep. Peterson he was living on a piece of property owned by William "Bill" Hagara property near Junction City, and that there had lately been some "bad blood" between him and Mr. Hagara over rent or the like. RP 16–17, 66.

On September 7, a few weeks after arresting Mr. Anaya-Cabrera at Aberdeen Lake Road, Dep. Peterson received a call for a "disturbance ... a Hispanic male was holding Mr. Hagara against his will...or something to that effect" at the Hagara property. RP 192–93. Dep. Peterson responded because he was the closest sheriff's deputy and, when he turned off Highway 12 onto Sergeant Boulevard, he saw a silver Chevy Avalanche

driven by a man he recognized as Mr. Anaya-Cabrera. RP 193–94. The Appellant is Hispanic.

Deputy Peterson got behind the Avalanche and turned on his emergency lights to stop the truck. CP 195. Mr. Anaya-Cabrera looked out the driver’s window and told him “I’ll meet you back at the gate,” referencing the Hagara property. The truck made a U-turn and drove back with Dep. Peterson in pursuit. Id. Once back at the property, Mr. Anaya-Cabrera got out of the truck, turned his body sideways, and dropped a black item on the ground which turned out to be methamphetamine. RP 196–99. Mr. Anaya-Cabrera was detained then arrested. He had two cell phones, one of which received a message about wanting to buy drugs. RP 200–01.

The Avalanche was impounded and Dep. Peterson applied for a search warrant. Detective Ramirez, an active member of the Grays Harbor Drug Task Force, assisted Dep. Peterson in the execution of the warrant. The truck contained clothing that appeared to belong to Mr. Anaya-Cabrera and his girlfriend, who was in the truck at the time it was stopped. The officers also found and photographed drug paraphernalia (RP 207), electronic scales (RP 220), a hard black locking gun case/safe (RP 202), and black electrical tape (RP 207) just like the sort wrapped around the

methamphetamine Mr. Anaya-Cabrera dropped on the ground. The officers noted pry marks and loose screws on the interior of the truck, so they disassembled the interior. RP 208. Inside the driver's door panel the officers found three bindles of suspected heroin and methamphetamine. RP 209. Dep. Peterson also found a loaded Beretta handgun under the driver's seat, "directly beneath where Mr. Cabrera had been seated in the vehicle, so within arm's reach underneath the front driver's seat." RP 215, 267.

Deputy Peterson, who had been with the sheriff's office for 26 years, ten of those as a member of the Grays Harbor Drug Task Force, testified as to his training and experience with "load cars"—vehicles modified to hide drugs during transport. He also testified about packaging techniques and street prices of drugs, both on direct and on cross examination. RP 188–91, 258–61. Det. Ramirez, on the Drug Task Force at the time, testified generally about his observations and knowledge of drug users' purchasing habits, street prices, and the regularity of firearms being used by drug traffickers for their own protection. RP 277–81, 288–93. Defense counsel did not object to these lines of testimony from Det. Ramirez or Dep. Peterson. The testimony of Det. Ramirez regarding the customary carrying of firearms is the primary matter of this appeal.

Mr. Anaya-Cabrera was charged with three crimes—Possession of Heroin with Intent to Deliver, Possession of Methamphetamine with Intent to Deliver, and the misdemeanor offense of Carrying a Concealed Pistol. The State alleged Mr. Anaya-Cabrera was armed with a firearm at the time he possessed the controlled substances. CP 1–2. The jury found Mr. Anaya-Cabrera guilty of the misdemeanor and of the lesser-included offenses Possession of Heroin and Possession of Methamphetamine. The jury found Mr. Anaya-Cabrera was armed with a firearm at the time he possessed the controlled substances. CP 35–41.

At sentencing, the court imposed the firearm enhancements, per RCW 9.94A.533, consecutive to each other consecutive and to a three-month standard range sentence, for a total of 39 months in prison. CP 46-57.

ARGUMENT

DEPUTY PETERSON LAWFULLY SEIZED THE APPELLANT BASED ON AN ARTICULABLE REASONABLE SUSPICION

The Appellant challenges the trial court's denial of a motion to suppress evidence challenging Deputy Peterson's seizure of the Appellant and his silver pickup truck. The State agrees that the Appellant was seized at the moment Dep. Peterson turned on his emergency lights while behind the pickup truck on Sergeant Road. The issue, both before the trial court and this court, is whether Dep. Peterson had a reasonable suspicion to justify the warrantless seizure of the Appellant at that moment. The court drafted thorough findings of fact and conclusions of law, captioned as the "ORDER RE: CrR 3.6 MOTION," upholding the lawfulness of the stop. CP 16–22. The Appellant only challenges the legal conclusion that Dep. Peterson had a reasonable suspicion to seize Mr. Anaya-Cabrera. Unchallenged findings are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002). Where a conclusion of law is based upon a finding of fact, the appellate review is limited to determining whether a trial court's findings are supported by substantial evidence, and if so, whether those findings support the conclusion of law. *Willener v. Sweeting*, 107 Wn.2d 388, 730 P.2d 45 (1986). The court reviews

conclusions of law pertaining to suppression of evidence *de novo*. *Robel*, 148 Wn.2d at 43.

Police may make a brief investigatory warrantless seizure, known as a *Terry* stop. To justify the intrusion of a *Terry* stop, a police officer must be able to “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968); *State v. Armenta*, 134 Wn.2d 1, 948 P.2d 1280 (1997). The level of articulable suspicion required to support an investigative detention must rise only to “a substantial possibility that criminal conduct has occurred or is about to occur.” *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986); *State v. Mendez*, 137 Wn.2d 208, 223, 970 P.2d 722 (1999).

In ruling that Dep. Peterson’s seizure of the Appellant was lawful, the trial court listed the following specific facts known to Dep. Peterson at the moment of the seizure:

- (1) Deputy Peterson had been dispatched to a disturbance at the Hagara property involving a Hispanic male;
- (2) On his way to the location, he observed the Defendant, a Hispanic male, driving away from the Hagara property, about a quarter mile away from the property;
- (3) Deputy Peterson knew from his recent encounter with the Defendant at the Aberdeen Lake Road

property that the Defendant had recently moved from the Hagara property and that there was some recent history of conflict between him and William Hagara; CP 19–20.

The fourth fact cited by the court, that the Appellant said “I’ll meet you at the gate,” occurred after the initial seizure, even if by a few seconds. The initial seizure could be viewed as an attempt initially to determine if Dep. Peterson correctly recognized Mr. Anaya-Cabrera driving the Avalanche. That stop would be very brief, just long enough for Dep. Peterson to contact the driver. A lawful *Terry* stop is limited in scope and duration to fulfilling the investigative purpose of the stop. *State v. Acrey*, 148 Wn.2d 738, 64 P.3d 594 (2003). If the results of the initial stop “dispel an officer's suspicions, then the officer must end the investigative stop.” *Id.* at 747. But, if the officer's initial suspicions are confirmed or are further aroused, the scope of the stop may be extended and its duration may be prolonged. *Id.* In this case, the Appellant looking back at Dep. Peterson and saying he would meet him back at the gate confirmed Dep. Peterson’s initial thought that Mr. Anaya-Cabrera drove that Avalanche and had been at the Hagara property when the initial call came to dispatch, providing a basis to prolong the seizure. This explains why the court likely chose to include that fourth detail in the first conclusion of law. But, even

before the Appellant told Dep. Peterson he would meet him back at the Hagara property, Dep. Peterson had ample articulable facts to support a reasonable suspicion of criminal activity. “Deputy Peterson had information tying the Defendant to the Hagara property and Mr. Hagara, and the Defendant was observed driving away from the location of the Hagara property.” CP 19-20.

The Appellant focuses on the fact that Dep. Peterson’s report did not include a detail to which he testified—that he heard from dispatch that a silver truck was involved in the disturbance at the Hagara property. The Court noted the factual dispute, but did not make a factual determination. CP 17. Yet, Appellant suggests that in the absence of the trial court making such a finding, the State failed to meet its burden and insists that this Court “must presume that the State failed” to prove that fact. Brief of Appellant 10. The Appellant misconstrues *Armenta* on this point. The *Armenta* Court was faced with an absence of a critical fact in the trial court’s findings of fact, and held that “In the absence of a finding on a factual issue we must *indulge the presumption* that the party with the burden of proof failed to sustain their burden on this issue.” *State v. Armenta*, 134 Wn.2d at 14 (*italics added*). Indulging a presumption is not the same as being required to make the presumption. Regardless, because

the trial court did not consider this fact when finding Dep. Peterson's seizure to be lawful, it is moot to dispute on appeal. "Even without information about a silver pickup truck being involved, this information was sufficient to give Deputy Peterson reasonable and articulable suspicion." CP 20.

The 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; any suggestion by the Appellant of racial profiling by Dep. Peterson is unfounded. Had any other deputy responded to that call, that deputy likely would not have the knowledge that flowed from the arrest of the Appellant at the Aberdeen Lake Road investigation a couple weeks earlier, and likely would not have been justified stopping just any Hispanic male a quarter mile from the scene. But, Dep. Peterson knew the Appellant to be residing on the Hagara property, and knew that he and the residents there had a "recent history of conflict between [the Appellant] and Mr. Hagara relating to rent or the Defendant getting kicked off Mr. Hagara's property." CP 17. Because Dep. Peterson was familiar with the Appellant and his problems with the Hagara property, and because nature of the call could have been a natural landlord/tenant dispute, it was reasonable for Dep. Peterson to link the Appellant with the disturbance

call when he recognized him less than a quarter mile away. Under these facts, the warrantless seizure of the Appellant was lawful and the court properly denied the motion to suppress.

THE TESTIMONY OF DETECTIVE RAMIREZ DOES NOT
CONSTITUTE PROFILE TESTIMONY

The Appellant argues that the State used improper “profile” evidence from Det. Ramirez, a member of the Grays Harbor Drug Task Force, about common trends he has observed to convict the Appellant of the firearm enhancement. The Appellant relies heavily on a recent decision from Division III that this Court should not follow. Instead, a review of the actual testimony complained of, compared to how courts have traditionally recognized “profile evidence,” shows that the Appellant seeks to expand what could be considered “profile” evidence beyond the legal, traditional, or practical meaning.

Contrary to Appellant’s claim, the testimony complained of does not constitute “profile evidence.” The State did not actually present Det. Ramirez as an expert, and his general testimony about drug practices did not actually tie the Appellant to any type of group. The particular “profile” identified by the Appellant—drug offender—is so vague and vast in Grays Harbor that such a label merely categorizes criminal activity, and such a

category is dissimilar to criminal typology courts have previously recognized. Finally, the primary case relied upon by the Appellant, *State v. Crow*, is not binding on this Court and should not be followed.

The definition of “profile” testimony was been narrowly tailored by reviewing courts, and requires expertise or scientific basis

As the Tenth Circuit Court of Appeals stated in *United States v. Robinson*, “We think an appropriate starting point here is a review of what is included in the term 'profile' evidence.” *United States v. Robinson*, 978 F.2d 1554, 1563 (10th Cir. 1992).

“As a general rule, profile testimony ... does nothing more than identify a person as a member of a group more likely to commit the charged crime.” *State v. Braham*, 67 Wn. App. 930, 936, 841 P.2d 785 (1992). Fitting a profile means identifying known tendencies, traits, observed behavior, or characteristics in an individual, and extrapolating from that a higher likelihood that the person has committed a specific criminal act. *See* PROFILE, BLACK'S LAW DICTIONARY (11th ed. 2019). Courts typically encounter profile evidence in the context of child sex crimes, and increasingly in drug trafficking cases. In *Braham*, for example, the objectionable evidence was expert testimony regarding the practice of grooming by sexual assault perpetrators. *Braham*, 67 Wn. App.

930. In *State v. Petrich*, a sexual abuse expert testified that in “eighty-five to ninety percent of our cases, the child is molested by someone they already know.” *Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). Similarly, in *State v. Maule*, an expert testified that “the majority” of child sexual abuse cases involve “a male parent-figure.” *Maule*, 35 Wn. App. 287, 289, 667 P.2d 96 (1983). The *Maule* Court did not find the testimony to be unconstitutional; the testimony was merely objectionable as having a probative value outweighed by the prejudicial effect. *Id.* at 293. In *State v. Claflin*, the court held that an “opinion that the defendant statistically is more likely to have committed the crime because of his membership in a group—in this case, his paternalistic relationship to the victims—is inadmissible.” *Claflin*, 38 Wn. App. 847, 852, 690 P.2d 1186 (1984).

In the context of controlled substances, profile evidence typically involves testimony about a drug organization’s practices to traffic drugs, avoid police detection, or distribute drugs. In this context, the “drug courier” profile becomes less about the characteristics of the individual and more about the habits and practices of the group, or the behavior of the offender within the group. An excellent example of drug profile evidence comes from Division I. In *State v. Avendano-Lopez*, the court reviewed testimony of an officer who had been investigating drug cases

for two years and testified about certain characteristics or behaviors of a typical drug dealer—they usually receive money from users; often have a lot of money and/or narcotics on their person; carry both very small and large quantities of drugs; often keep drugs in their mouths; are often users themselves; and that heroin is often wrapped in small balloons that resemble party balloons. *Avendano-Lopez*, 79 Wn. App. 706, 904 P.2d 324 (1995), *review denied* 129 Wn.2d 1007, 917 P.2d 129 (1996). “Profile testimony identifies a group as more likely to commit a crime and is generally inadmissible owing to its relative lack of probative value compared to the danger of its unfair prejudice.” *Id.* at 710-11, *internal citations omitted*. The *Avendano-Lopez* Court did not find fault with the officer's testimony because it did not identify any group as being more likely to commit drug offenses; instead, the officer presented “permissible expert opinion; it explained the arcane world of drug dealing and certain drug transactions and thus was helpful to the trier of fact in understanding the evidence.” *Id.* at 711. The decision exemplifies how “[p]rofile testimony and permissible expert opinion overlap, which underscores the necessity of objecting to questionable testimony during trial so that the trial court can limit any objectionable ‘profile’ aspect and channel the testimony toward admissible expert opinion instead.” *Id.*

State v. Crow vastly expanded the scope of “profile”
evidence beyond the logical, legal, or traditional meaning

The Appellant relies heavily on the recent Division III decision in *State v. Crow* because it greatly expanded what testimony could be construed as “profile testimony.” *State v. Crow*, 8 Wn. App. 2d 480, 517, 438 P.3d 541 (2019). But, *Crow* is not binding authority in Division II. *Matter of Arnold*, 190 Wn.2d 136, 410 P.3d 1133 (2018) (rejecting “horizontal *stare decisis*” as a matter of law in Washington). The *Crow* decision is seriously flawed in that it adopted a vague definition of “profile evidence,” and in how it lowers the bar for appellate review of testimony from police about general or common sense criminal conduct.

Mr. Crow was arrested and charged with Unlawful Possession of a Firearm in the First Degree and Possession of a Stolen Firearm. He was spotted by Yakima police and led officers on a foot chase, during which he threw a pistol which had been stolen the year during a prowl of a pickup truck in Seattle. At trial, Crow asserted he did not know the firearm was stolen. During cross examination of the primary police officer, defense counsel asked how a person is supposed to know if a gun is stolen and how prohibited persons typically obtain firearms. *Crow*, 8 Wn. App. 2d at 487–88. He said that prohibited persons (felons) will steal them or they will buy them illegally on the street. *Id.* at 488. He was also asked whether

fleeing suspects often attempt to discard stolen property when they're being pursued and "what actions are indicative of somebody knowing something is stolen property?" *Id.* Finally, he and other officers were asked what percentage of prohibited persons who possess guns are found to be possessing stolen guns, to which he said "Pretty high percentage. I would—I couldn't guess a number, but I would say the majority." *Id.* at 489.

The primary problem with the *Crow* decision finding this testimony to be improper "profile evidence" is present in the case at hand. In both *Crow* and here, the testimony did not pertain to any identifiable or distinctive criminal "group." Instead, the testimony pertained to vague and large categories of the criminal population—in that case people who "probably or always possess stolen guns," and "drug offenders" in the case at hand. The dissent recognized this as an "unduly strained" interpretation of profile evidence, *Id.* at 517. The decision took the understood definition of "profile evidence" and stretched it too far just to cover the line of questioning presented at trial. The majority also gave too much weight to the actual prejudicial effect the officer's testimony and missed its purpose. Some questions, such as "do fleeing suspects often attempt to discard stolen property when they're being pursued?" (*Id.*, at 488) are just so

commonsensical that they surely cannot be considered damning profile evidence. As the dissent points out, had the issue for the jury been the actual theft of the pistol, the testimony might have applied to gun thieves, and thus maybe been more on point.

The holding in *Crow* should not be adopted by this Court.

State v. Cruz provides the best understanding of “profile” evidence in the most similar context

Although also not binding, the decision in *State v. Cruz* provides the best analysis and framework for this Court to consider the challenge at hand. In *Cruz*, a prosecution for delivery of heroin, the trial court allowed a detective who had not been involved in the defendant's case to testify about typical heroin transactions and the Seattle heroin market. *Cruz*, 77 Wn. App. 811, 894 P.2d 573 (1995). The actions of that particular defendant fit, of course, the “typical” heroin transactions that had been investigated by the King County Police Department Drug Enforcement Unit. The prosecutor pointedly drew the connection between the defendant’s actions and how they fit within the detective's description of a typical heroin transaction. *Id.* at 813-14. On appeal, Cruz argued that the testimony constituted an impermissible opinion of his guilt, but the Court of Appeals saw no error and affirmed, writing the following:

In the present case, the detective's testimony did not amount to a directive telling the jury what result to reach on the issue of Cruz's guilt or innocence. ... Rather, the testimony consisted solely of the detective's knowledge of typical heroin transactions and typical heroin users gained from his involvement in 500 to 600 undercover investigations involving that drug. ... Even after the detective testified, the jury still had to decide (1) whether to believe the detective, and (2) the ultimate issue of whether the other evidence presented demonstrated Cruz's guilt of the crime charged.

Id. at 815.

Just because Det. Ramirez, in his experience, finds people carrying several grams of controlled substances to be armed nine out of 10 times, the jury could still disregard Det. Ramirez's generalization and determine independently whether the Appellant was armed with the Beretta in the Avalanche at the time. The jury obviously disregarded any generalization about the quantity of drugs being intended for distribution, so it seems certain they likewise gave Det. Ramirez's testimony on that point little weight.

Det. Ramirez's testimony did implicate the Appellant as a member of any given profile. Rather, the generalized testimony helped the jury understand basic drug activity

The testimony at issue followed a cross examination wherein counsel asked about drug users sharing purchases, buying in bulk, and the like. The questions from defense counsel did not directly pertain to the

Appellant, but rather invited Det. Ramirez to explain his observations of how the drug market worked and how drug users sometimes operate. The State's questions continued that line of generalized inquiry. "[T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993).

Det. Ramirez did not testify that the Appellant fit a category, or even testified about any particular trait or behavior of the Appellant. Rather, Det. Ramirez, just like the King County detective in *Cruz*, provided general information about the nature of drug use, drug sales, and drug handling he had seen in his experience. Det. Ramirez never met the Appellant, and not once did he directly tie the Appellant to the behaviors he discussed on cross examination or redirect. In fact, the Appellant was never directly tied to any of the generalized testimony provided throughout the trial by either Dep. Peterson or Det. Ramirez explaining load cars, trafficking techniques, street prices or personal-use quantities.

The testimony in *Crow* fell within this category, with the officers talking about gun thefts and how felons often obtain firearms, without directly implicating Mr. Crow. The dissent took note, saying "no evidence

was presented that Mr. Crow was a member of a group that probably or always possesses stolen guns, nor was proof of such a necessary feature of the State's cases. The evidence presented simply did not constitute a 'profile.'" *Crow*, 8 Wn. App. 2d at 517. Held up to these examples, the testimony of Det. Ramirez at issue cannot be said to constitute a "profile."

The "profile" of "drug offender" in Grays Harbor County is generalized and imprecise so as to be meaningless

To understand the Appellant's argument that Det. Ramirez's testimony constitutes improper profile evidence. This Court must discern what criminal type of person the testimony supposedly profiles. If the testimony grouped the Appellant into the profile of a drug trafficker, the Appellant's argument must fail because the jury found the Appellant did have the intent to deliver them, the key characteristic of a drug trafficker.

Instead, the Appellant argues the "profile" is that of a "drug offender," a term so vague and sadly common in Grays Harbor County it is utterly meaningless for anything other than a way to categorize and label felons. Even then, the claim that the State used testimony to include the Appellant into this profile is undercut by the fact that defense counsel, from the opening statement through argument, put her client in that category by admitting Mr. Anaya-Cabrera uses methamphetamine. RP 183, 367.

Profile evidence must, by definition, be that which identifies the traits of a specific criminal typology, and demonstrates how the person in question, sharing those unique characteristics, fits into that criminal group. The category of “drug offender,” especially in Grays Harbor County, is not specific enough for there to be unique traits or a statistical understanding of its members. Compare, for example, the narrow category of those who molest or sexually abuse children who have some personality trait that can be identified and quantified, such as grooming behavior, abusing a position of trust, etc. Drug traffickers typically belong to larger organizations because the covert manufacturing, packaging, distributing, and collecting of proceeds from drug sales requires an organizational effort. Thus, the drug trafficking organization can have institutional traits (essentially, best practices), and its members can have procedures, habits, or techniques that can be identified and be described as profile evidence. *See United States v. Beltran-Rios*, 878 F.2d 1208 (Ninth Cir., 1989); *United States v. Gomez-Norena*, 908 F.2d 497 (Ninth Cir., 1990) *cert. denied*, 498 U.S. 947, 111 S.Ct. 363, 112 L.Ed.2d 326; *United States v. Lui*, 941 F.2d 844 (Ninth Cir., 1991).

But, a “drug offender” is not criminal typology at all—the label is just an exercise in categorizing. In Grays Harbor County, 2.34 percent of

residents were clients of publicly funded drug or alcohol programs in 2017, more than twice the state average.¹ That year, 250 adults were arrested on drug offenses, constituting a crime rate of 4.5 per 1,000 persons.² And in Grays Harbor County Superior Court that same year, 33.6 percent of the felony cases initiated were controlled substance cases—231 of 686.³

This prevalence of drugs and drug offenders is the reality in Grays Harbor County—the “profile” of a drug offender in Grays Harbor County is about as statistically meaningless a thing as trying to describe the characteristics of people who walk to work, or the households living under the poverty level where the head of the household worked full time (three percent, just higher than the rate of individuals in substance abuse treatment).⁴

1. Aaron Starks Et Al, Washington State Department Of Social And Health Services, Research And Data Analysis Division, Risk And Protection Profile For Substance Abuse Prevention In Grays Harbor County, 15 July, 2019, *available at* <https://www.dshs.wa.gov/data/research/research-4.47-graysharbor.pdf> (last accessed Sep. 21, 2019)

2. *Id.* at 17

3. Administrative Office Of The Courts, Superior Court 2017 Annual Report Annual Caseload Report 36, *available at* <http://www.courts.wa.gov/caseload/content/archive/superior/Annual/2017.pdf> (last accessed Sep. 21, 2019).

4. U.S. Census Bureau, 2013-2017 American Community Survey 5-Year Estimates, Table S1702—Poverty Status In The Past 12 Months Of Families, *available at* <https://factfinder.census.gov> (search for “Grays Harbor County”) (last accessed Sept. 21, 2019).

While there may be broad habits or traits common among drug offenders, like packaging techniques (RP 190), buying on behalf of friends, (RP 291–92), hiding drugs when transporting in case they are stopped by police (RP 188), carrying scales to ensure the amount they are buying is correct (RP 293), and carrying firearms for protection (Id.), using these traits or habits as profile evidence creates a circular definition. People who can be categorized as drug offenders carry scales, paraphernalia, and sometimes buy drugs to resell to friends to offset their own costs *because* they are drug offenders (they would not do so otherwise), not because they are more statically likely to *become* a drug offender.

A true profile of “drug offender” in Grays Harbor County would involve serious research into the socioeconomics of the county’s population, incidence of adverse childhood experiences, the efficacy of the societal safety net, mental health contributors and the availability of treatment services, and so much more. A true and meaningful profile of the Grays Harbor “drug offender” could be developed—but Det. Ramirez’s testimony was not that.

A “profile,” to be meaningful, must be specific. This same broad categorization of criminals highlights why the *Crow* decision fails, and

why Division II should not follow suit. In *Crow*, the “profile” was basically that of a felon.

THE TESTIMONY AT ISSUE IS NOT REVIEWABLE BY THIS COURT

The Appellant mischaracterizes Det. Ramirez’s testimony as that of an “expert.” Counsel did not preserve the error and the testimony is not reviewable

Profile testimony and permissible expert opinion overlap, which underscores the necessity of objecting to questionable testimony during trial so that the trial court can limit any objectionable ‘profile’ aspect and channel the testimony toward admissible expert opinion instead.

Avendano-Lopez, 79 Wn. App. At 711.

The Appellant incorrectly cites to the use of the word “expert” during the state’s closing argument. Brief of Appellant 6 fn 3. The Appellant also labels the testimony of Det. Ramirez as “expert” testimony five times. This label is not supported by the record, or the manner in which the State elicited and used the testimony—there was no lengthy recitation of Det. Ramirez’ credentials, and no reliance on his experience in closing argument regarding the firearm. The Appellant is simply wrong in making this argument. The word “expert” appears only once in the entire proceedings, by defense counsel, to preface a question during the

cross examination of the forensic scientist. RP 323. The word “expertise” was not said once during the entire trial. At no time did the State label Dep. Peterson or Det. Ramirez as “experts.”

This point is critical because, appellate courts will generally not consider issues raised for the first time on appeal. RAP 2.5(a); *State v. Tolias*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998). A party may assign evidentiary error on appeal only on a specific ground made at trial. *Guloy*, 104 Wn.2d at 422, *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). Only by labeling Det. Ramirez as an “expert” and thus claiming his testimony carried enough weight to have tainted the jury’s verdict, can the Appellant seek review of the unchallenged testimony as a constitutional error under RAP 2.5(a)(3)(a). The testimony, if not expert testimony, can only be, as the dissent in *Crow* described that testimony there, “an argument that is nothing more than a run-of-the-mill evidentiary challenge.” *Crow*, 8 Wn. App. 2d at 516, *quoting State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Just as like in *Avendano–Lopez*, defense counsel failed to object; the reviewing court, having found the testimony was not objectionable profile evidence, determined the issue had not been preserved on appeal. *Avendano–Lopez*, 79 Wn. App. at 710.

If the testimony were “profile” evidence, the error did rise to a manifest error affecting constitutional right.

If this court finds that the testimony of Det. Ramirez does constitute improper profile evidence, it can only be reviewed by this Court if the testimony constitutes a manifest error.

An exception to RAP 2.5(a) allows review errors raised for the first time on appeal that are of a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001); *Tolias*, 135 Wn.2d at 140. RAP 2.5(a)(3) serves a gatekeeping function that will bar review of claimed constitutional errors to which no exception was made, unless the record shows that there is a fairly strong likelihood that serious constitutional error occurred. “[P]ermitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995).

To meet the bar of RAP 2.5(a)(3) and raise an error for the first time on appeal, an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension. *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756, 760 (2009), *as corrected* (Jan. 21, 2010).

Stated another way, an appellant must “identify a constitutional error and show how the alleged error actually affected the [appellant]’s rights at trial.” *State v. Kirkman*, 159 Wn.2d 918, 926–27, 155 P.3d 125 (2007). “It is this showing of actual prejudice that makes the error ‘manifest’, allowing appellate review.” *McFarland*, 127 Wn.2d at 333. If a court determines the claim raises a manifest constitutional error, it may still be subject to a harmless error analysis. *O’Hara*, 167 Wn.2d at 98; *McFarland*, 127 Wn.2d at 333.

Under RAP 2.5(a)(3), as applied to improper opinion testimony, “Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a ‘manifest’ constitutional error.” *State v. King*, 167 Wn.2d 324, 332 219 P.3d 642 (2009), *citing Kirkman*, 159 Wn.2d at 936. In the case at hand, to attempt to meet the first threshold question, the Appellant claims that the profile evidence invaded the province of the jury and in doing so deprived the Appellant of a fair trial. The court looks to the record to consider such a claim. *O’Hara*, 167 Wn.2d 98-99. Manifest constitutional error most similar to that claimed by the Appellant includes those errors that directly steer a jury’s deliberations, or where the jury, to acquit, must to decide directly contrary

to how a State's witness had opined. But the testimony here does not rise to that level.

In *State v. King*, for example, the officer testified directly on the elements of the offense of reckless driving, and in doing so invaded the jury's role to determine if the elements had been met. *King*, 167 Wn.2d 324, 219 P.3d 642 (2009). The primary officer was asked "have you been trained on reckless driving ... the elements of reckless driving?" and "So you felt this was within those elements?" The officer answered in the affirmative to both questions. *Id.* at 330. The *King* Court found that the answers, as well as the prosecutor's emphasis on the officer's opinion in closing argument, improperly directed the jury to convict. *Id.* at 330-31.

In *State v. Kirkman*, a doctor testifying in a child molestation matter said that the physical examination was consistent with the minor's account of the sexual contact, and further said the minor's account was "was clear and consistent with plenty of detail." *Kirkman*, 159 Wn.2d at 923. The testimony had not been objected to at trial, and the court needed to determine whether it improperly took on the jury's role in determining a witness's credibility. The Court of Appeals found the testimony constituted a manifest error, but the Supreme Court reversed. The Supreme Court relied on the presumption that juries follow a trial court's

instructions, absent evidence proving the contrary. *Kirkman*, 159 Wn.2d at 928; *see also State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

The jury's verdict shows the Appellant received a fair trial

The constitutional role of the jury requires respect for the jury's deliberations. See Const. art. I, § 21. The assertion that the province of the jury has been invaded may often be simple rhetoric. *Kirkman*, 159 Wn.2d at 928. This presumption includes the instruction to the jurors that “It is your duty to decide the facts in this case based upon the evidence presented to you during this trial” and that “You are also the sole judges of the value or weight to be given to the testimony of each witness.” CP 25. That is the case here. It is easy for the Appellant to claim Det. Ramirez's testimony invaded the province of the jury, but nothing in the record, let alone the outcome, supports the claim. Had the jury convicted the Appellant of Possession with Intent to Deliver, as charged, the claim could have more circumstantial support. But, by finding the Appellant guilty of the lesser included, the jury rejected the theory that he was drug trafficker, a theory arguably more in line with the officers' generalizations. The jury demonstrating this discretion undermines the Appellant's claim that the State deprived him of a fair trial.

The testimony does not constitute a manifest error as there was no actual prejudice, or if so, the error was harmless

If this Court finds that the testimony of Det. Ramirez did actually affect the jury's ability to fairly determine facts, thus constituting a constitutional error, this Court must next ask whether the error was manifest. "Manifest" in RAP 2.5(a)(3) requires a showing of actual prejudice. *O'Hara*, 167 Wn.2d at 99, *citing Kirkman*, 159 Wn.2d at 935; *McFarland*, 127 Wn.2d at 333–34. To demonstrate actual prejudice, there must be a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." *Kirkman*, 159 Wn.2d at 935. The Appellant claims the actual prejudice is the jury's finding that he was "armed," as alleged in the enhancements to counts 1 and 2. As discussed below, the jury had ample evidence that the Beretta firearm found "within arm's reach underneath the front driver's seat" was accessible and readily available. RP 267. Further, the pickup contained a hard locking black gun case which contained the same electrical tape wrapped around the methamphetamine the Appellant dropped. RP 202, 207. The logical inference, therefore, is that the gun absent from the gun safe was the one under the driver's seat. Det. Ramirez's testimony about the prevalence of guns was not necessary for the jury to reach its decision, and there is no actual prejudice from the testimony.

If the Court determines that a manifest constitutional error occurred, the Court next conducts a harmless error analysis. *McFarland*, 127 Wn.2d at 333; *O'Hara*, 167 Wn.2d at 98. Given the ample evidence, as discussed, this Court must find harmless any error in Det. Ramirez's testimony about the frequency with which he encounters firearms and drugs together.

COUNSEL WAS NOT INEFFECTIVE

This Court reviews claims of ineffective assistance of counsel *de novo*. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To show ineffective assistance of counsel, the Appellant must establish that (1) defense counsel's conduct was deficient, *i.e.*, that it fell below an objective standard of reasonableness; and (2) the deficient performance resulted in prejudice, *i.e.*, that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If an Appellant fails to establish either prong, this Court need not inquire further. *Id.*

Representation is deficient "if it falls below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. There is a strong

presumption that a defense counsel's conduct was not deficient.

Reichenbach, 153 Wn.2d at 130. A reviewing court considers a counsel's representation “in light of the entire record and presume that it is within the broad range of reasonable professional assistance.” *State v. G.M.V.*, 135 Wn. App. 366, 371, 144 P.3d 358 (2006). To demonstrate deficient performance, the Appellant must show there were no legitimate strategic or tactical reasons for the challenged conduct. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). The law affords trial counsel wide latitude in the choice of tactics. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 736, 16 P.3d 1 (2001). Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Kyлло*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

Counsel did not err by not objecting to Det. Ramirez’s testimony. First, the testimony was not true profile evidence, nor was it used in such a manner. Second, counsel may have been acting strategically—during the cross examination of Det. Ramirez she ended up receiving helpful answers to questions she posed about general practices involving drug possession and drug dealing. The State’s redirect, including the specific questions at issue, logically continued her line of questioning. Counsel also used the broad generalizations made by both officers as a theme of the defense; she

opened by criticizing the police for not performing any “other investigative work except to say, well, this guy was driving a car and this stuff is inside,” and then argued it to the jury, saying seven times that the officer “made a lot of assumptions.” RP 183, 366–75. Not only that, but counsel used the argument that the police themselves were profiling, making the traffic stop on the Appellant because he was Hispanic. This record shows counsel’s strategy of making the police look like lazy investigators working off of broad assumptions. This theory included counsel’s questioning about the police not contacting the registered owner of the pickup, not checking for fingerprints on the Beretta, etc. With such a tactic identifiable from the record, the Appellant does not meet the first prong of the *Strickland* test.

Appellant also fails to show he was prejudiced by trial counsel’s decision not to object. Actual prejudice means that, but for counsel’s deficiency, the results would have been different. *McFarland*, 127 Wn.2d at 337. The Appellant cannot satisfy this prong either. Not only did counsel make use of Det. Ramirez’s generalizations, labeled “assumptions” in closing argument, but the tactic may have worked. Had the jury convicted the Appellant of Possession with Intent to Deliver, the Appellant would have support for the claim of actual prejudice. But,

similar to the analysis above regarding harmless error, the jury's decision finding the Appellant guilty of the lesser included shows it was not unduly influenced by Dep. Peterson's or Det. Ramirez's generalized testimony. The Appellant has failed to satisfy either prong of the *Strickland* test.

AMPLE EVIDENCE SHOWS THE APPELLANT WAS ARMED

A person is "armed" if a weapon is "easily accessible and readily available for use," either for offensive or defensive purposes. *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993); CP 32. Without a challenge to the jury instructions, a court's inquiry is limited to whether there was sufficient evidence for any rational trier of fact to find beyond a reasonable doubt that a defendant was armed. *State v. O'Neal*, 159 Wn.2d 500, 504, 150 P.3d 1121 (2007).

The Appellant argues that the State improperly introduced the supposed profile evidence to show that he was armed, specifically that the State's "expert" suggested that there was a nexus based on other cases involving drugs and guns, and that he "implied" that the Appellant had the gun under the seat for the same reason as other drug offenders. But this argument mischaracterizes Det. Ramirez as an expert, and ignores the ample evidence—the firearm was loaded with a bullet chambered, under the driver's seat, and easily within reach of the driver. There was an empty

gun safe in the car, suggesting it was associated with the firearm under the seat. RP 207. The inference is obvious that by hiding drugs within the Avalanche, the Appellant sought to protect them, and with that same frame of mind, had the firearm to protect the drugs and himself. A defendant is “armed” where a loaded gun is under the defendant's seat in an automobile, with the grip easily accessible to the defendant. *State v. Sabala*, 44 Wn. App. 444, 448, 723 P.2d 5 (1986). The State presented ample evidence in this case, and the jury made a rational decision given the evidence.

The Appellant’s reliance on *Woolfork* is misplaced. It neither holds that knowledge of a gun is an element of being “armed,” nor that the state must show a defendant had an awareness of a gun. Rather, *Woolfork* holds specifically that a defendant should be permitted to make a common sense argument that he was unaware of a firearm, so long as facts support that claim. *State v. Woolfork*, 59 Wn. App. 541, 977 P.2d 1 (1999). The *Woolfork* Court was specific on this point—“we do not make knowledge of the gun an element of the firearm enhancement that must be proven by the State.” *Woolfork*, 95 Wn. App. at 550. That is not the case here because, unlike in *Woolfork*, the question of lack of knowledge of the firearm did not arise from the evidence—the Appellant did not actually

disclaim possession of the firearm the way Mr. Woolfork did. *Id.* In this case, unlike in *Woolfork*, there was no evidence from which “an inference may be drawn that [the appellant] did not know about the gun.” *Id.* Nonetheless, trial counsel still argued the lack of evidence that the Appellant knew of the gun. The case cited simply does not stand for the proposition the Appellant suggests.

The determination as to whether a person is armed requires more than just possession, and the Appellant relies on *State v. Valdobinos*, 122 Wn.2d 270, 858 P.2d 199 (1993). The *Valdobinos* Court made a fact-specific finding that “an unloaded rifle ... found under the bed in the bedroom, without more, is insufficient to qualify Valdobinos as ‘armed.’” *Id.* at 282. The holding has since been interpreted to mean that “mere constructive possession is insufficient to prove a defendant is ‘armed’ with a deadly weapon during the commission of a crime.” *State v. Schelin*, 147 Wn.2d 562, 567, 55 P.3d 632 (2002).

When a court reviews evidence that a defendant was armed, the proper examination focuses on the nexus between the defendant and the weapon, not just between the drugs and the weapon. *State v. Mills*, 80 Wn. App. 231, 236, 907 P.2d 316, 318 (1995). In this sense, *Valdobinos* was not armed because, while the drugs and gun were found together, he and

the gun were not. Similarly, in *Mills* the defendant was arrested outside a motel room that contained drugs and guns. *Id.* at 233. While in constructive possession of both, there was insufficient nexus between Mr. Mills and his gun, or the gun and the drugs at the time of police contact. *Id.* at 235. In both cases, the space between the weapon and the defendant was too great to say he was armed. The Appellant’s reliance on *Johnson* does not help either. In that case, police found Johnson's weapon in a “cabinet compartment five to six feet away from him, and Johnson was handcuffed at the time.” *Johnson*, 94 Wn. App. 882, 894, 974 P.2d 855, 861 (1999). Because there was no realistic possibility that he could access his gun, the court held that Johnson's jury should not have been allowed to consider the question of whether Johnson was armed. *Id.*⁵

Most on point, a defendant “armed” with a gun under his car seat when stopped while in possession of drugs, and in the process of delivering those drugs. *Sabala*, 44 Wn. App. at 448. “Mr. Sabala was the driver of the car; the gun, fully loaded, was located beneath the driver's seat, with the grip easily accessible to anyone sitting above it.” *Id.* That is the situation here. The Appellant was stopped while in possession of

⁵ Compare *Johnson* to *State v. Taylor*, where the defendant was armed with a gun found in a leather bag on a table near where the defendant was sitting and where narcotics were located. *Taylor*, 74 Wn. App. 111, 125, 872 P.2d 53 (1994).

drugs, and a firearm was within reach at the time of the traffic stop, being hidden just under the driver's seat with the grip facing the driver.

It does not matter that the Appellant was arrested outside of his vehicle, or that the firearm was found later during the search warrant. A defendant does not have to be armed at the moment of arrest to be armed for purposes of the firearm enhancement. *State v. O'Neal*, 159 Wn.2d at 504. In fact, in *O'Neal*, the firearms were in a house—an assault rifle leaning against a wall and a loaded pistol under a bed—and the State could not show that, at any specific moment, the weapons were easily accessible and readily available to those inside. Instead, in an apparent loosening of the nexus needed between a defendant and his weapons, the Supreme Court held that “the State need not establish with mathematical precision the specific time and place that a weapon was readily available and easily accessible, so long as it was at the time of the crime.” *O'Neal*, 159 Wn.2d at 504–05.

Given the testimony presented to the jury, it had ample evidence with which to find the Appellant was armed with the Beretta underneath his driver's seat when he stopped. The evidence of the gun safe, paraphernalia, and the fact that the drugs themselves were hidden for protection against detection or theft provides the nexus between the

firearm and the drugs. The facts are remarkably similar to those in *Sabala*. Det. Ramirez's testimony that carrying firearms is common among people with that amount of drugs was not necessary for the jury to find the Appellant was armed.

THE ADDITIONAL GROUNDS ARE WITHOUT MERIT

The State did not commit misconduct by receiving a crime lab report shortly before trial, and the Appellant has not shown prejudice

The Appellant claims that the State acted with misconduct by having three of the four drug samples sent to the Washington State Patrol Crime Lab for testing three weeks before trial, and that the misconduct put him a position to choose between his right to a speedy trial and his right to have adequately prepared counsel. The record does not contain any indication the Appellant ever actually faced that dilemma. Neither party requested a continuance to await the crime lab's results. When counsel did raise an objection, it was done after jeopardy had attached. RP 159–70. When counsel did raise the objection, she did not articulate how the late discovery actually resulted in prejudice, other than listing things she might have wanted to explore had she had more time. RP 169. Counsel moved for the extraordinary remedy of dismissal, then suppression. The court properly denied the motions to dismiss or suppress, and the Appellant has

failed to show in the record how he was prejudiced or forced to go to trial with an unprepared attorney.

Firearm enhancements are consecutive by statute

The Appellant was given proper notice of the firearm enhancements. CP 1–2. The jury was properly instructed. CP 24–33. The jury found the Appellant was armed at the time he committed two offenses—possession of heroin and possession of methamphetamine, the lesser included offenses to counts 1 and 2. CP 35–38.

“All firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.” RCW 9.94A.533(3)(e). Case law is clear that, even where two offenses constitute the same criminal conduct, the enhancements under 9.94A.533(3) are consecutive. *State v. Mandanas*, 168 Wn.2d 84, 88, 228 P.3d 13 (2010) (“Sentencing courts are statutorily required to impose multiple enhancements where a defendant is convicted of multiple enhancement-eligible offenses that constitute the same criminal conduct under the sentencing statute.”)

The Appellant's reliance on *McFarland*, which relies on *State v. Mulholland*, is misplaced. In *Mulholland*, the Supreme Court held that "a sentencing court may order that multiple sentences for serious violent offenses run concurrently as an exceptional sentence if it finds there are mitigating factors justifying such a sentence." *In re Mulholland*, 161 Wn.2d 322, 328, 166 P.3d 677, 680 (2007). That logic "applies equally to sentencing for multiple firearm-related offenses..." *State v. McFarland*, 189 Wn.2d 47, 50, 399 P.3d 1106 (2017). The holding has not been extended to drug crimes, and the Appellant fails to suggest any mitigating factors upon which the court could base a mitigated sentence. He had the chance to present mitigating circumstances at sentencing, but said simply, "I've got nothing to say." RP 392. For that reason, the sentence is lawful and does not require remand for resentencing.

Dep. Peterson lawfully impounded the Avalanche pending
a search warrant

The Appellant assigns error the impoundment of his vehicle by challenging Dep. Peterson's authority to seize his truck. But, as Dep. Peterson said, "we impounded the vehicle in preparation for a search warrant." RP 30.

A warrant is not required where the police stop an automobile on the highway because they have probable cause to believe it contains

contraband or evidence of a crime. *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980), citing *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979). The impoundment of a vehicle is reasonable “if an officer has probable cause to believe that it was stolen or that it was being used in the commission of a felony.” *Id.* As the court found in the Order denying the Appellant’s suppression on this issue, “The law allows an officer to secure a vehicle or building while waiting for a search warrant.” CP 21, citing *State v. Terrovona*, 105 Wn.2d 632, 645, 716 P.2d 295 (1986).

CONCLUSION

The Appellant tries to make “nothing more than a run-of-the-mill evidentiary challenge” into a mountain of constitutional magnitude by claiming the testimony of Det. Ramirez that he frequently encounters people with drugs carrying guns for protection to be improper “profile” evidence. But, the detective’s testimony does not fit the meaning of “profile evidence,” and this Court should not take the Appellant’s invitation to vastly broaden the meaning of that term.

Det. Ramirez’s testimony does not constitute “profile evidence” because he did not testify with any expertise, nor was he held out by the State as an expert. The profile category created by the Appellant—drug

offender—is imprecise and unworkable, especially in Grays Harbor County. Further, the jury did not give the generalizations presented by Det. Ramirez or Dep. Peterson undue weight, evidenced by the verdict finding the Appellant guilty of merely possessing the drugs, rather than being a drug trafficker. The jury found the Appellant to be armed based on the evidence presented of his possession of the gun, and the inferences supporting the nexus between the gun and the heroin and methamphetamine hidden in the truck.

Counsel had the opportunity to object at trial, but the sweeping generalizations fit within the Appellant’s trial strategy of highlighting the half-measures and assumptions the officers made in conducting their investigation. As the trial record shows this to have been an apparent trial tactic, the decision not to object does not mean counsel was ineffective. By not objecting, the testimony at issue is not reviewable—a calculation any trial attorney must make.

Finally, the trial court correctly denied the Appellant’s motion to suppress, correctly denied the challenge to Dep. Peterson’s decision to impound the Appellant’s vehicle, and correctly sentenced Mr. Anaya-Cabrera to two consecutive firearm enhancements.

For the reasons above, the State respectfully requests this Court uphold the convictions and the sentence.

DATED this ninth day of October, 2019.

Respectfully Submitted,

BY: 

RANDY J. TRICK
Deputy Prosecuting Attorney
WSBA # 45190

GRAYS HARBOR PROSECUTING ATTORNEY

October 09, 2019 - 10:41 AM

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

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