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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

ZACHARY BERGSTROM, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S ASSIGNMENTS OF ERROR**

1. The evidence was insufficient to support Mr. Bergstrom's conviction for second degree unlawful possession of a firearm.
2. The evidence was insufficient to establish possession of a controlled substance with intent to deliver.
3. The evidence was insufficient to establish possession of a controlled substance.
4. The evidence was insufficient to support the finding that Mr. Bergstrom was "armed" for the purpose of the firearm enhancement.
5. Mr. Bergstrom was deprived of his Sixth Amendment right to effective assistance of counsel at resentencing where defense counsel failed to brief or present argument in favor of an exceptional downward sentence despite the trial court's repeated request that he do so.
6. The trial court abused its discretion in ordering Mr. Bergstrom to register as a felony firearm offender.
7. The condition of community custody prohibiting Mr. Bergstrom from having contact with DOC-identified drug offenders is unconstitutionally vague and violates Mr. Bergstrom's fundamental right to freedom of association.
8. The condition of community custody granting Mr. Bergstrom's community corrections officer (CCO) the authority to order Mr. Bergstrom to either remain within or outside any geographical boundary is not crime related, is unconstitutionally vague, and violates Mr. Bergstrom's fundamental right to travel.
9. The condition of community custody requiring Mr. Bergstrom to "obey all conditions of community custody imposed by the Department of Corrections" is unconstitutionally vague.
10. The trial court abused its discretion in entering an off-limits order.

## II. ISSUES PRESENTED

1. Did the State provide sufficient evidence that Mr. Bergstrom constructively possessed a firearm and a large amount of controlled substances, where under the totality of the circumstances of the case the jury could properly infer that Mr. Bergstrom sold controlled substances and hid his firearm and supply of controlled substances when he encountered police?
2. Did the State provide sufficient evidence that Mr. Bergstrom was armed with a functioning firearm when he committed the crime of possession of a controlled substance with intent to deliver, where the true owner of the firearm identified it as a real firearm and law enforcement nonetheless tested the firearm, but it was only offered at trial as a proposed exhibit?
3. Did Mr. Bergstrom receive ineffective assistance of counsel where he cannot demonstrate prejudice for his counsel's failure to articulate a basis for an exceptional downward sentence, where the record does not support an exceptional sentence and the trial court explicitly rejected all the arguments in favor of an exceptional sentence that Mr. Bergstrom now makes on appeal?
4. Did the trial court err by following binding Washington Supreme Court precedent that holds drug addiction is not an appropriate basis for an exceptional downward sentence?
5. Are Mr. Bergstrom's challenges to community custody conditions ripe for review and, if so, are they statutorily mandated, permissible infringements on his fundamental rights, which are not subject to arbitrary enforcement?
6. Did the court err by entering an off-limits order without making the appropriate finding?

### III. STATEMENT OF THE CASE

Zachary Bergstrom appeals from his convictions for: possession of methamphetamine with intent to deliver, with a firearm enhancement; possession of heroin; and unlawful possession of a firearm. CP 134-35.

Deputy Amber Tyler was on patrol late one evening when she encountered a vehicle in a park past operating hours. RP<sup>1</sup> 175-78. She approached the vehicle from the passenger side; she noticed two females in the front two seats and a lone male in the back driver-side seat. RP 179. The male was Mr. Bergstrom. RP 179. She informed the vehicle occupants that the park was closed. RP 180-81.

A few minutes later, Deputy Philip Pfeifer arrived at the scene to assist Deputy Tyler. RP 125-28. He approached the rear driver-side door of the vehicle, where he saw Mr. Bergstrom seated alone in the back, “looking down at his lap and had a baseball hat pulled down like he was trying to conceal his identity.” RP 131. Deputy Pfeifer pointed a flashlight in the window, and as he looked down he saw the handle of a semiautomatic

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<sup>1</sup> The verbatim report of proceedings by Court Reporter Rebecca Weeks will be referred to herein as follows: “Consecutively numbered Volumes 1 and 2 for the dates of 9/10/18, 9/11/18, 9/12/18, and 10/10/18 will be referred herein as “RP”; the 6/27/19 and 7/18/19 transcript will be referred to as “2RP”; and the 7/25/19 transcript will be referred to as “3RP.” The report of proceedings by Court Reporter Dashiell is not referred to in this brief.

handgun in between Mr. Bergstrom's feet. RP 131. The deputies ordered Mr. Bergstrom out of the vehicle; however, he was not fully compliant. RP 132. Mr. Bergstrom was sweating but acted lethargic and slow, and appeared to be under the influence of a controlled substance. RP 182, 143-44.

The driver gave Deputy Tyler oral consent to retrieve the firearm from the vehicle. RP 183-84, 135. The deputies removed the firearm and ran its serial number. RP 136. The retrieved firearm belonged to Daniel Hepting. RP 155-57. Mr. Hepting had reported that specific firearm stolen in 2016. RP 155. Mr. Hepting testified that the gun produced at trial as proposed exhibit 29 belonged to him, and he had never given Mr. Bergstrom or anyone else permission to possess it. RP 157. Mr. Hepting identified his weapon as a Springfield Armory XD .45, labelled as proposed exhibit 29, including matching the serial number. RP 156-57.

After removing the firearm, the deputies sought and obtained a warrant authorizing them to search the vehicle. RP 136. They also took photographs of all items they found in the car and their locations, before they began to remove them. RP 138; Ex. 1-16. The deputies found several items of note. Ex. 1-16.

First, the deputies observed the firearm half-hidden under the driver's seat, directly between Mr. Bergstrom's feet. RP 187, 207; Ex. 1-3.

They also located a small black zippered pouch on the driver-side of the rear floorboard, also where Mr. Bergstrom was sitting and next to the firearm, wedged against the door. RP 187, 207; Ex. 1-3. The officers located 48.6 grams of a white crystalline substance later confirmed as methamphetamine within the pouch. RP 189, 224-25; Ex. 10. The pouch also contained a scale, baggies, and a small tube. RP 195; Ex. 17-19, 21, 25-27. Deputies located .3 grams of a black tar substance later identified as heroin inside the small tube. RP 198-99, 223; Ex. 18. Deputy Tyler testified that in her experience, during a typical arrest for possession of a controlled substance, the arrestee would typically have one gram or less of the substance. RP 202.

There was also a blanket and backpack on the seat next to Mr. Bergstrom. RP 188-89; Ex. 4, 9. Inside the backpack, deputies located a green notebook ledger. RP 190-90; Ex. 11-16. The ledger contained a Goodwill voucher bearing Mr. Bergstrom's name. RP 190. The ledger also contained several names and telephone numbers, as well as writings. RP 190-92; Ex. 12-16. The writings included phrases such as "get more dark," "two zips" with a dollar sign, and "half a piece." RP 191-92. Deputy Tyler testified that, in her training and experience, all of those terms are associated with drug distribution; "get more dark" refers to getting more heroin, while "two zips" and "half a piece" are slang terms for certain amounts of illegal substances. RP 191-92; Ex. 12-16. Deputies located the

holster for the firearm underneath the blanket on which Mr. Bergstrom had placed his backpack. RP 189, 207-08; Ex. 9. They also located a second scale on the seat next to Mr. Bergstrom's backpack. RP 196; Ex. 25.

Law enforcement placed Mr. Bergstrom under arrest and searched him incident to arrest. RP 200. They found \$476 in his wallet. RP 200; Ex. 7, 27. Mr. Bergstrom also carried a fixed-blade knife on his right hip. RP 200. Deputy Tyler testified that, in her training and experience, all of the items were associated with a person selling controlled substances. RP 201.

The deputies catalogued all items in the car, transported them to a property storage facility, and booked them into the facility. RP 139. Deputy Pfeifer testified how his law enforcement agency catalogues, labels, and stores property in the facility by a bar code and report number. RP 140-41. The deputies followed that standard procedure for the items retrieved from the vehicle. RP 141-42, 151-52.

Detective Roger Knight also explained how his agency collects evidence and how containers are transported to and from the agency's property storage facility and the State crime laboratory, and then are resealed when returned to the property facility. RP 117-19. Detective Knight transported the items collected during Mr. Bergstrom's arrest to the State laboratory for testing—including the firearm retrieved

from the vehicle, which the State had labeled as proposed exhibit 29, that belonged to Mr. Hepting. RP 121-22, 157. Detective Knight described the firearm marked as proposed exhibit 29 as a .45-caliber pistol manufactured by Springfield Armory. RP 122. He test-fired the device six times, and determined it was fully operable. RP 122-23. After confirming the firearm was operable, he returned it to the property facility pursuant to his training. RP 124.

*Procedure.*

The State charged Mr. Bergstrom with second degree unlawful possession of a firearm (count 1); possession of a stolen firearm (count 2); possession of a controlled substance with intent to deliver (count 3); and possession of a controlled substance—heroin (count 4). CP 8-9. Count 3 included a special allegation that Mr. Bergstrom was armed with a firearm. CP 8, 80.

After the State rested its case, Mr. Bergstrom moved to dismiss count 2, arguing that, although the located firearm's serial number matched the one reported stolen by Mr. Hepting, no evidence suggested Mr. Bergstrom knew his firearm was stolen. RP 229-31. The trial court

agreed and dismissed that charge.<sup>2</sup> RP 235. The jury found Mr. Bergstrom guilty of the remaining counts, with a special verdict that Mr. Bergstrom was armed with a firearm for the commission of count 3. CP 80; RP 301.

Mr. Bergstrom’s criminal history included one conviction for fourth degree assault with a domestic violence allegation, and prior firearm possession related offenses, as well as other prior convictions not relevant to the issues on appeal. CP 119-20. The court stated that some of Mr. Bergstrom’s “prior offenses involved possession of a firearm, this one involves possession of a firearm.” RP 332. The court considered Mr. Bergstrom’s successive instances of firearm possession. RP 335. At the State’s request, the court required Mr. Bergstrom to register as a felony firearm offender. CP 121. The court attached a specific document to the judgment and sentence document, which noted the court had considered all relevant statutory factors. CP 121. The court sentenced Mr. Bergstrom to a total of 126 months confinement but explicitly ran the sentence consecutive to another matter. RP 336; CP 83, 96. Mr. Bergstrom timely appealed. CP 124.

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<sup>2</sup> The court explicitly mentioned the knowledge element—not the possession element Mr. Bergstrom surmises in his briefing. RP 235; Br. at 38, fn. 10.

However, the State realized Mr. Bergstrom's sentence exceeded the statutory maximum of 120 months for count 3 and moved the court for a resentencing hearing. 2RP 12-13. The court continued the hearing several times, the first continuance was to allow Mr. Bergstrom to obtain conflict counsel. 2RP 1-12. At the second hearing, the trial court determined that it needed to enter an exceptional downward sentence in order to accommodate the statutory maximum but expressed frustration that it could not impose a sentence it wished it could do, in line with what the court perceived Mr. Bergstrom needed, surmising Mr. Bergstrom was only in his position because of substance addiction. 2RP 14. The parties assumed the low-end of the standard range was 100 months. 2RP 16.

The court arrived at the conclusion that it was necessary to impose the mandatory sentence of 36 months for the firearm enhancement but impose an exceptional downward sentence of exactly 84 months, in order to impose a total sentence of 120 months, which is the statutory maximum. 2RP 17. Conflict counsel agreed the low-end was 100 months, the statutory maximum was 120 months, and the mandatory firearm enhancement was 36 months. 2RP 16-17. Counsel asked that the court go lower than 84 months for the base sentence. 2RP 17. The trial court stated that neither party had provided a basis to justify a sentence lower than the statutory maximum. 2RP 17. The court also noted it had asked for briefing twice, but

that counsel had not provided any. 2RP 18. The court continued the case a third time, for briefing from defense counsel. 2RP 19-20. The court addressed Mr. Bergstrom, and impliedly stated that it was requesting briefing in support of an exceptional downward “because my sense is that many of the predicaments you’re in is because of your dependency on narcotics.” 2RP 21.

At the next hearing date, conflict counsel did not provide a brief. 3RP 3. However, counsel argued that the court could impose as low as 72 months, if it ordered 12 months of community custody. 3RP 4, 9-10. Counsel did not cite to authority. 3RP 3-10.

The court issued its ruling, first noting it relied on the State’s briefing.<sup>3</sup> 3RP 15. The State’s briefing provided in part that the court could not reduce the enhancement time and that the statutory maximum is the presumptive sentence in this circumstance, pursuant to RCW 9.94A.599. CP 150, 166. The court then stated:

This is the third time we have been here for your resentencing, and that’s been because I’ve wanted to search

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<sup>3</sup> Prior to withdrawing, the original attorney assigned for Mr. Bergstrom’s resentencing hearing also submitted a brief, but it is not clear whether the court considered that brief.

A second supplemental designation of clerk’s papers and exhibits is being filed contemporaneously herewith. The State’s Resentencing Brief is anticipated to be CP 149-168, and the defendant’s Brief Concerning Resentencing is anticipated to be CP 169-171.

and see if there was any way that I could give you an exceptional down because I believe that you're in the predicament you are in because of your dependency on methamphetamines and that causes people to do things they wouldn't do if they weren't overtaken by the demands of the drug. And I have myself talked to two other judges, whose careers were as criminal prosecutors and/or public defenders and they, as reluctant as I, concluded there wasn't another way that I could approach this sentencing.

I've looked at RCW 9.94A.535, which are guidelines for departures from the standard sentencing ranges and there are numerous categories under there that run A through K. And to spare you from me simply reading the statute and listening, I'm just making a record I looked at those and I haven't been presented with facts to me that give a tenable argument that you would fit into any of those circumstances. But I am mindful that there are other circumstances that aren't codified in 9.94A.535, and they're in the case law. And so I have urged—I shouldn't say urged, I've given two different lawyers a chance to look at your facts, look at the statute, look at the case law and give me a basis to do it and they're all learned and they haven't been able to do it.

3RP 15-16. The court imposed a total sentence of 120 months, the statutory maximum. CP 140.

The judgment and sentence document contains a number of handwritten notes and findings relevant to the sentence. *See* CP 134-45. The court entered a finding justifying an exceptional sentence below the standard range for the possession with intent to deliver charge, with the hand-written note "cannot exceed 120 months. *See* RCW 9.94A.599." CP 138. Another finding notes that the two parties stipulated to this finding, although it incorrectly notes the exceptional sentence is above the standard

range rather than below. CP 138. The court also found that Mr. Bergstrom committed a felony firearm offense as defined in RCW 9.41.010, on the basis of his criminal history, and ordered him to register as a felony firearm offender. CP 139. However, unlike at the first sentencing hearing, the court did not attach an appendix confirming it had considered all relevant factors. CP 121, 139. Specific to count 3, the court imposed a total sentence of 120 months, with 36 of those months allocated to the mandatory firearm enhancement, while the remaining 84 months constituted the sentence for the base crime. CP 139-40. The court struck community custody from that count, in order to comply with the statutory maximum. CP 140. Mr. Bergstrom's counsel, noting that he had spoken with appellate counsel, explicitly objected to several of these notations and findings but, beyond the bare objection, did not develop any factual or legal basis to support his objections. *See 3RP at passim.*

The court also ordered Mr. Bergstrom to have no contact with Department of Corrections (DOC)-identified drug offenders, to remain within or outside of a geographic boundary to be determined by his community custody officer (CCO), and obey all conditions of community custody imposed by DOC. CP 141-43. The court also indicated an off-limits order pursuant to RCW 10.66.020 may apply but specified that it would

accrue only if Mr. Bergstrom's CCO deemed such an order appropriate.  
CP 144.

#### **IV. ARGUMENT**

##### **A. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE CONVICTIONS**

Mr. Bergstrom challenges the sufficiency of the evidence for a number of his charges. He claims: (1) no evidence other than proximity tied him to the pouch of controlled substances, negating counts 3 and 4; (2) no evidence other than proximity tied him to the firearm, negating count 1 and the firearm enhancement on count 3; (3) because the State did not admit the firearm as an exhibit, no evidence demonstrated the firearm Detective Knight tested was the same firearm retrieved from the vehicle, negating count 1 and the firearm enhancement on count 3; and (4) no evidence established a nexus between the firearm and the charged crime, meaning Mr. Bergstrom was not armed with a firearm for purposes of the firearm enhancement. Under the applicable standard of review, the evidence is sufficient.

##### *1. Principles of law.*

In a criminal case, the State must provide sufficient evidence to prove each element of the charged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In evaluating the sufficiency of the evidence, the court must

determine whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995). All reasonable inferences must be interpreted most strongly in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Reviewing courts must defer to the trier of fact “on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). This Court does not reweigh the evidence or substitute its judgment for that of the jury. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). For sufficiency of evidence claims, circumstantial and direct evidence carry equal weight. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). A claim of insufficiency of the evidence admits the truth of the State’s evidence and all reasonable inferences from that evidence. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010).

Possession may be actual or constructive, and constructive possession can be established by showing the defendant had dominion and control over the firearm or over the premises where the firearm was found. *State v. Callahan*, 77 Wn.2d 27, 29-30, 459 P.2d 400 (1969). This

determination is based on the totality of the circumstances presented. *State v. Staley*, 123 Wn.2d 794, 802, 872, 872 P.2d 502 (1994).

The ability to reduce an object to actual possession is an aspect of dominion and control. *State v. Hagen*, 55 Wn. App. 494, 499, 781 P.2d 892 (1989); *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). A passenger may be found in constructive possession of a controlled substance if there is some evidence beyond mere proximity tying him to the controlled substance. *State v. Mathews*, 4 Wn. App. 653, 656-58, 484 P.2d 942 (1971).

2. *Mr. Bergstrom's authorities are distinguishable because the analysis is fact-intensive.*

Because this is a constructive possession case, Mr. Bergstrom relies heavily on *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008); *State v. Gutierrez*, 50 Wn. App. 583, 749 P.2d 213 (1988); and *State v. Chouinard*, 169 Wn. App. 895, 900, 282 P.3d 117 (2012), for the principle that proximity alone cannot demonstrate constructive possession, and particularly when the accused is a mere passenger in a vehicle in which contraband or firearms are found. Those cases are distinguishable.

In *Chouinard*, the defendant was a passenger sitting on the back seat of a vehicle in which police found a firearm after a reported shooting. 169 Wn. App. at 897. The firearm was between the rear seat and the trunk;

Chouinard admitted he knew the gun was there. *Id.* at 898. Division Two reversed his later conviction for unlawful possession of a firearm, reasoning that proximity alone was not sufficient to sustain a conviction under circumstances where the State did not offer any evidence that the defendant “owned or used the contraband.” *Id.* at 903.

*George* notes that constructive possession cases are “fact-sensitive.” 146 Wn. App. at 920. In that case, the court observed the lack of any evidence other than the fact that the pipe itself was found in the back seat with the defendant, including that the arresting officer in question did not notice any signs of intoxication and that the pipe “could have been there days.” *Id.* at 922-23. The court rejected the State’s argument that it was sufficient that the pipe was found on the floorboard behind the driver’s seat, and that George could have reduced the pipe to his actual possession because the State did not identify a case where “proximity plus knowledge of a drug’s presence establishes dominion and control.” *Id.* at 923. This Division has upheld a conviction where “the gun was in plain sight at Mr. Echeverria’s feet and the reasonable inference that he therefore knew it was there” as sufficient evidence. *Echeverria*, 85 Wn. App. at 783. *Chouinard* distinguished *Echeverria* on the basis that Echeverria was the driver the vehicle. *Chouinard*, 169 Wn. App. at 901; *Echeverria*, 85 Wn. App. at 783. However, more facts exist in Bergstrom’s case supporting

constructive possession than in any of those cases. Because constructive possession is a highly fact-intensive analysis, the State will address each charge in turn.

3. *Mr. Bergstrom constructively possessed methamphetamine with intent to deliver and possessed heroin.*

Mr. Bergstrom contends *Gutierrez*, 50 Wn. App. 583, mandates reversal of his conviction. That case has many distinguishable facts. Detectives in that case gave marked bills to an informant, who went to the house of Marvin Warren and returned with cocaine. *Id.* at 583-84. The detectives set up another controlled buy and eventually followed Mr. Warren to a storage unit. *Id.* at 585. Detectives applied for a search warrant of the unit, and during surveillance saw Mr. Warren arrive with Mr. Gutierrez. *Id.* A search of the unit revealed a large trailer, which contained a large amount of contraband. *Id.* at 585-86. A search of Mr. Gutierrez revealed the marked bills used in the second controlled buy. *Id.* at 586. The reviewing court reversed and identified the State's only evidence as "the identified drug money found on his person," his "accompanying the renter of the storage unit and the owner of the travel trailer, Mr. Warren, to the unit," and "staying within the unit for 40 minutes." *Id.* at 593. There was no evidence Mr. Gutierrez had any rental

interest in the storage unit or travel trailer, kept any property within the unit, or had ever previously been seen at the unit. *Id.*

Several facts distinguish the case: Mr. Warren owned the original home at which the buys occurred, Mr. Warren was the target of the investigation, Mr. Guitierrez only went to the storage unit with Mr. Warren one time, and there is no information in the record linking Mr. Guitierrez to the unit where drugs were found. The State never argued Mr. Bergstrom was simply an accomplice to the other occupants of the vehicle, and law enforcement did not encounter Mr. Bergstrom after monitoring the other occupants of the vehicle pursuant to a separate drug investigation.

Several additional facts support the jury's finding that Mr. Bergstrom constructively possessed the pouch, and therefore the contraband inside. Mr. Bergstrom's drug ledger is the most important circumstance relevant to this inquiry. Deputies found a notebook ledger full of terms associated with selling drugs. Critically, inside the ledger was a receipt with Mr. Bergstrom's name on it, establishing evidence of dominion over the drug ledger. The ledger was found in a backpack that was next to Mr. Bergstrom. The backpack was on top of the holster for the firearm that was between Mr. Bergstrom's feet. Mr. Bergstrom had \$476 cash on his person. Deputies described Mr. Bergstrom as under the influence of controlled substances, meaning he had needed to control them in order to

use them. The pouch contained 49 times more combined methamphetamine and heroin than Deputy Tyler usually found on a person when making an arrest for mere possession of a controlled substance, well over a user amount. A reasonable trier of fact could infer from this evidence that Mr. Bergstrom sold drugs, and possessed the pouch full of a large quantity of drugs in furtherance of the sales recorded in his ledger.

Additionally, the testimony described the pouch as “wedged” against Mr. Bergstrom’s rear driver-side door, leading to an inference that Mr. Bergstrom had placed it there after he entered the car, or it would not have been in that position. RP 207. Evidence of momentary handling combined with a motive to hide the item from police is sufficient to prove possession. *State v. Summers*, 107 Wn. App. 373, 386-87, 28 P.3d 780 (2001). Deputy Tyler approached from the passenger-side, but the pouch was wedged against the driver-side rear door. Mr. Bergstrom’s body was between the pouch and Deputy Tyler. The jury could infer that by wedging the pouch in an unnatural position between the driver-side door and himself, Mr. Bergstrom sought to hide the contraband from Deputy Tyler’s view and flashlight, as she was on the opposite side. Minutes passed before Deputy Pfiefer arrived on scene, which provided Mr. Bergstrom ample time to hide his contraband.

Mr. Bergstrom did not cooperate with Deputy Pfeifer's directives, and, as mentioned earlier, the deputies noted that he appeared under the influence of controlled substances. Mr. Bergstrom had motive to hide the contraband from police, particularly when viewed in light of his drug ledger. He also had the opportunity and ability to reduce the pouch to possession, and the pouch was unnaturally wedged against the door. Inside the pouch was a large quantity of heroin and methamphetamine, as well as baggies used for distribution and a second scale. This Court must look at all items and the totality of the circumstances, not simply each individual item in isolation from each other. These circumstances distinguish Mr. Bergstrom's authorities and support constructive possession of the controlled substances.

*4. Mr. Bergstrom constructively possessed the firearm.*

The reasons above mandate a similar outcome for the charge of unlawful possession of a firearm. Additionally, the firearm was in plain sight with the handle immediately between Mr. Bergstrom's feet on the floorboard. RP 131; Ex. 1-4. Deputy Tyler was on the passenger-side of the vehicle, slightly behind the front seat; she would have been unable to see the firearm. Deputy Tyler also described the firearm as being "tucked" under the driver's seat, perhaps as if someone was attempting to hide it. RP 207. Seizing an item even for a fleeting second to hide it from police goes beyond passing control and establishes prima facie evidence of the

element of possession. *State v. Werry*, 6 Wn. App. 540, 542, 548, 494 P.2d 1002 (1972); *see also Summers*, 107 Wn. App at 386-87. Manipulating contraband in some way to hide it supports an inference that the defendant has dominion and control over the contraband. *State v. Nyegaard*, 154 Wn. App. 641, 648, 226 P.3d 783 (2010), *review granted, cause remanded on other grounds*, 172 Wn.2d 1006, 260 P.3d 208 (2011).

Mr. Bergstrom had reason and opportunity to divest himself of the firearm because of the police contact, and his prior convictions prohibited him from possessing a firearm as he stipulated. Again, the circumstances indicate Mr. Bergstrom had time and reason to hide contraband in such a way that it would not be viewable from the passenger-side, slightly in front of his position. But for Deputy Pfeifer's late arrival, law enforcement may never have seen the contraband.

Officers found the holster for the firearm in the backseat. It was on the seat next to Mr. Bergstrom. Mr. Bergstrom had at some point placed his backpack on that seat. Mr. Bergstrom was the only passenger in the backseat, and Mr. Bergstrom's backpack, drug ledger, and controlled substances were also in the back compartment. The holster suggests a greater ability than mere proximity to reduce the firearm to actual possession, which is an aspect of dominion and control. Mr. Bergstrom did not cooperate with Deputy Pfeifer's directions, and was attempting to

conceal his identity. A jury could infer he had placed the firearm under the seat in front of him and the holster under his backpack. Additionally, Mr. Bergstrom had a fixed-blade knife on his hip, suggesting he was not opposed to arming himself with weapons to carry out his dangerous drug trade.

The driver of the vehicle explicitly gave Deputy Tyler permission to remove the handgun. RP 183. This fact also supports the inference that Mr. Bergstrom possessed the firearm because the driver would incur criminal liability for an unsecured firearm in her vehicle.<sup>4</sup>

As argued above, the totality of the circumstances provides sufficient evidence for a reasonable fact finder to determine that Mr. Bergstrom was in constructive possession of the firearm.

*5. The evidence demonstrates the firearm deputies retrieved from the vehicle was the firearm that Detective Knight tested and Mr. Hepting identified in court.*

Mr. Bergstrom's argument is narrow; he claims that although Detective Knight testified he tested the firearm at issue and various deputies

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<sup>4</sup> Pursuant to RCW 9.41.050(2)(a), "[a] person shall not carry or place a loaded pistol in any vehicle unless the person has a license to carry a concealed pistol and (i) The pistol is on the licensee's person, (ii) the licensee is within the vehicle at all times that the pistol is there, or (iii) the licensee is away from the vehicle and the pistol is locked within the vehicle and concealed from view from outside the vehicle." A violation of this section is a misdemeanor. RCW 9.41.050(2)(b).

testified to retrieving the firearm from the car, no testimony demonstrates the firearm retrieved is the one the detective tested. This is mainly because the State chose to use the firearm as a demonstrative exhibit and did not admit the firearm into evidence. But, “[t]he State need not introduce the actual deadly weapon at trial. ‘The evidence is sufficient if a witness to the crime has testified to the presence of such a weapon, as happened here... The evidence may be circumstantial; no weapon need be produced or introduced.’” *State v. Bowman*, 36 Wn. App. 798, 803, 678 P.2d 1273 (1984) (quoting *State v. Tongate*, 93 Wn.2d 751, 754, 613 P.2d 121 (1980)); see further *State v. Tasker*, 193 Wn. App. 575, 373 P.3d 310 (2016) (explaining history and construction of firearm enhancement statute, including discussion of *Tongate*). The State was not required to introduce the actual firearm into evidence as an exhibit, nor even as a demonstrative exhibit, so Mr. Bergstrom’s claim fails. Alternatively, Mr. Bergstrom’s argument is contrary to the standard of review.

All of the law enforcement officers and forensic scientists in this case testified they followed their agencies’ standard evidence procedures, including sealing items. Detective Knight testified he tested the Springfield Armory .45 firearm and it was a real firearm. Deputy Pfeifer testified he “ran the serial number of the firearm” when they retrieved it from the car. RP 136. That led them to Mr. Hepting, because the firearm was

Mr. Hepting's missing stolen firearm. Mr. Hepting identified his firearm, and confirmed that he had reported it stolen in 2016. Mr. Hepting testified the serial number matched. He testified it was a real firearm, specifically a Springfield Armory XD .45. Mr. Hepting's testimony that his firearm—which was retrieved from the vehicle and traced by serial number—was a real firearm is sufficient to sustain the conviction by itself because the State was not required to prove the firearm's operability through Detective Knight. *See Tasker*, 193 Wn. App. 575; *State v. Olsen*, --- Wn. App. ---, 449 P.3d 1089 (2019) (published in part).

Notwithstanding law enforcement's testimony and that of Mr. Hepting, the jury had the opportunity to observe the admitted photographic exhibits showing the firearm and compare that to the firearm that witnesses demonstrated and manipulated at trial as proposed exhibit 29. Thus, the jury could use its own perception to determine whether the firearm deputies seized, the firearm Mr. Hepting identified, and the firearm testified by the detective were one-and-the-same.

Mr. Bergstrom's challenge is akin to chain of custody. The jury assigned weight to the evidence that the firearm deputies retrieved from the vehicle was: (1) Mr. Hepting's firearm, (2) assigned to a report number, (3) identified by report number at the property facility, (4) properly tested after following the proper evidence facility procedure, and (5) identified

again at trial by the true owner, who testified it was a real firearm. The evidence is sufficient.

6. *The evidence demonstrates Mr. Bergstrom was armed with a firearm.*

To prove a defendant was “armed” for purposes of the firearm enhancement, “the State must prove (1) that a firearm was easily accessible and readily available for offensive or defensive purposes during the commission of the crime and (2) that a nexus exists among the defendant, the weapon, and the crime.” *State v. Sassen Van Elsloo*, 191 Wn.2d 825, 826, 425 P.3d 807 (2018); *see also State v. Easterlin*, 159 Wn.2d 203, 206, 149 P.3d 366 (2006). As long as any rational trier of fact could have found that the defendant was armed, viewing the evidence in the light most favorable to the State, sufficient evidence exists. *State v. Eckenrode*, 159 Wn.2d 488, 494, 150 P.3d 1116 (2007).

For the first element, “[t]he use may be for either offensive or defensive purposes, whether to facilitate the commission of the crime, escape from the scene of the crime, protect contraband or the like, or prevent investigation, discovery, or apprehension by the police.” *State v. Gurske*, 155 Wn.2d 134, 139, 118 P.3d 333 (2005). In a drug possession case, for example, a firearm could be used to acquire or protect drugs. *Id.* It also could

be used to inhibit the police from investigation or apprehension at the time they discover the drugs or seek to execute a warrant. *Id.*

To establish the second element, there must be a nexus between “the nature of the crime, the type of weapon, and the circumstances under which the weapon is found.” *State v. Brown*, 162 Wn.2d 422, 431, 173 P.3d 245 (2007). To determine whether a nexus exists, this Court analyzes the nature of the crime, the type of firearm, and the circumstances under which it was found. *Sassen Van Elsloo*, 191 Wn.2d at 827. But when the crime is of a continuing nature, such as a drug operation, a nexus exists if the firearm is “there to be used” in the commission of the crime. *Id.* at 828 (quoting *Gurske*, 155 Wn.2d at 138).

This case meets both of the above elements. For the first, the firearm was readily accessible by Mr. Bergstrom for the purposes identified by *Gurske*: facilitation of delivery of methamphetamine, protection of his methamphetamine, acquisition or protection of drugs, protection of the money he received in exchange for delivering the drugs, or prevention of discovery of his controlled substances by police. The handle of the firearm was, again, right between Mr. Bergstrom’s feet with the barrel hidden under the seat in front of him, and the holster immediately to Mr. Bergstrom’s right underneath his backpack. For the second, Mr. Bergstrom possessed a stolen handgun—a firearm that may be easily used and hidden as opposed

to a rifle. A drug operation is a crime of a continuing nature, as identified in *Sassen Van Elsloo* and *Gurske*, and the firearm is there to be used in the commission of the crime. Mr. Bergstrom had a drug ledger filled with names and drug sale terms, was carrying 49 times more methamphetamine than a user amount, and he and his cohorts were under the influence of substances the night of the incident. *Gurske*, as cited above, notes the many permissible inferences that support whether a person engaged in drug distribution has armed him-or-herself with a firearm, for purposes of the statute. In the light most favorable to the State, the evidence supports the firearm enhancement.

**B. MR. BERGSTROM DOES NOT DEMONSTRATE INEFFECTIVE ASSISTANCE OF COUNSEL**

Mr. Bergstrom contends he received ineffective assistance of counsel at his resentencing hearing. He asserts that counsel could have presented several arguments in support of a lower sentence and failed to do so. But because there is no basis in the record for an exceptional downward sentence, he cannot demonstrate any prejudice from counsel's performance.

*1. Principles of law.*

An appellate court reviews claims of ineffective assistance of counsel de novo. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995). To prevail on a claim of ineffective assistance, a defendant must show both (1) deficient

performance and (2) resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). An appellate court's scrutiny of defense counsel's performance is highly deferential, and the court employs a strong presumption of reasonableness. *Strickland*, 466 U.S. at 689; *McFarland*, 127 Wn.2d at 335-36.

To establish prejudice, a defendant must show a reasonable probability that the outcome of the hearing would have been different absent counsel's deficient performance. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Failure on either prong of the test bars a claim of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697.

## 2. *Analysis.*

Mr. Bergstrom cannot demonstrate deficient performance or prejudice. The court's statements on the record fairly indicate it was not only willing to impose an exceptional downward sentence but was in fact trying to find a permissible basis to do so. Critically, the trial court consulted the lawyers in this case, two other lawyers, two other judges, and conducted its own research, and not one could find a basis on this record that would justify an exceptional sentence downward. All avenues led to the conclusion

the trial court reached: there was no basis on this record to impose an exceptional downward sentence from the presumptive range.

Importantly, the trial court's subjective desire to impose a lower sentence than mandated by the presumptive range gave way to the fact that the court must make an objective inquiry based on the *legislature's* stated purposes for sentencing. *State v. Hortman*, 76 Wn. App. 454, 463, 886 P.2d 234 (1994). Although Mr. Bergstrom relies on the favorable policy reasons, the legislature also enumerated goals counter to Mr. Bergstrom's desire for a lighter sentence: punishment that is proportionate to the seriousness of the offense and the offender's criminal history; a sentence commensurate with the punishment imposed on others committing similar offenses; protect the public; and a reduction of the risk the defendant will reoffend in the community. RCW 9.94A.010. The court should consider all of the policy goals, to ensure it is acting objectively. *State v. Graham*, 181 Wn.2d 878, 887, 337 P.3d 319 (2014). With these additional purposes in mind, Mr. Bergstrom asserts three bases for an exceptional downward sentence, but none succeed.

a. Structure of an exceptional sentence.

Mr. Bergstrom cites an exceptional upward departure case, *State v. France*, 176 Wn. App. 463, 470, 308 P.3d 812 (2013), for the proposition that once a court has imposed an exceptional sentence, it has "all but

unbridled discretion” in fashioning the structure and length of an exceptional sentence. However, that case is distinguishable *precisely* because it is an exceptional upward departure.

The legislature promulgated a statute specifically for Mr. Bergstrom’s scenario, where a firearm enhancement combines with an offender’s high offender score to result in a sentence that exceeds the statutory maximum. RCW 9.94A.599 (emphasis added) provides:

If the presumptive sentence duration given in the sentencing grid exceeds the statutory maximum sentence for the offense, ***the statutory maximum sentence shall be the presumptive sentence***. If the addition of a firearm or deadly weapon enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

Thus, Mr. Bergstrom did not receive an exceptional downward sentence; his presumptive range for count 3 was exactly 120 months, no more and no less. Therefore, the court did not have unbridled discretion to impose whatever sentence it wished because it imposed the presumptive sentence. The State cited RCW 9.94A.599 to the court, although it also mistakenly labeled this an exceptional sentence. The court relied on that statute in determining the sentence must be 120 months; this is reflected in Mr. Bergstrom’s amended judgment and sentence, where the court handwrote the sentence “cannot exceed 120 months. *See* RCW 9.94A.599.”

CP 138. The court required a basis in the trial record to deviate from 120 months.

b. Multiple offense policy.

Mr. Bergstrom cannot demonstrate prejudice under this factor, because the trial court specifically stated it had looked at RCW 9.94A.535(1)(g) and determined it did not provide an appropriate basis. The trial court's ruling is instructive:

This is the third time we have been here for your resentencing, and that's been because I've wanted to search and see if there was any way that I could give you an exceptional down because I believe that you're in the predicament you are in because of your dependency on methamphetamines and that causes people to do things they wouldn't do if they weren't overtaken by the demands of the drug. And I have myself talked to two other judges, whose careers were as criminal prosecutors and/or public defenders and they, as reluctant as I, concluded there wasn't another way that I could approach this sentencing.

*I've looked at RCW 9.94A.535, which are guidelines for departures from the standard sentencing ranges and there are numerous categories under there that run A through K. And to spare you from me simply reading the statute and listening, I'm just making a record I looked at those and I haven't been presented with facts to me that give a tenable argument that you would fit into any of those circumstances. But I am mindful that there are other circumstances that aren't codified in 9.94A.535, and they're in the case law.* And so I have urged—I shouldn't say urged, I've given two different lawyers a chance to look at your facts, look at the statute, look at the case law and give me a basis to do it and they're all learned and they haven't been able to do it.

*And so I don't find that I have a basis to give you an exceptional down.* I am making a record of that, because if I'm wrong, the Court of Appeals can correct it. And I'm certain that you will appeal and I'm certain they will take a hard look at it. We'll see if they agree that I'm correct.

2RP 15-16 (emphasis added). The court and four other sources all considered the categories identified in RCW 9.94A.535(1)(a)-(k) and determined none of them applied. Mr. Bergstrom now reasserts RCW 9.94A.535(1)(g) applies, but the trial court *already rejected it*, specifically, on the record. There are numerous reasons why. Mr. Bergstrom has multiple convictions for distributing drugs. Mr. Bergstrom is a repeat firearm offender. The legislature has created the firearm enhancement and promulgated policies that specifically target firearm offenders, particularly when they possess one illegally. *See, e.g.,* RCW 9.94A.589(1)(c). Mr. Bergstrom cannot claim ineffective assistance of counsel, where counsel did not make an argument that the trial court specifically rejected.

c. Distinguishing factors of the crime.

The court also said it independently considered nonstatutory factors. The court may rely on nonstatutory factors to impose an exceptional downward sentence, provided that “any reasons that are relied on for deviating from the standard range must distinguish the defendant’s crime from others in the same category.” *State v. Fowler*, 145 Wn.2d 400, 405, 38 P.3d 335 (2002) (internal quotation omitted). The court rejected this basis

for an exceptional downward sentence, and for the same reason Mr. Bergstrom cannot demonstrate prejudice.

No distinguishing factors exist for Mr. Bergstrom's crimes. Mr. Bergstrom cannot possess firearms on account of his felony and domestic violence criminal history; this does not distinguish him from other similarly situated offenders. As Mr. Bergstrom's authorities in support of his sufficiency argument demonstrate, criminal offenders are regularly convicted of constructively possessing contraband while riding in cars. Not to rehash the sufficiency argument provided above, but Mr. Bergstrom's circumstances are significantly worse than the cases he cited: Mr. Bergstrom possessed over 49 times a user amount of controlled substances; Mr. Bergstrom hid the firearm and drugs from detection by strategically placing them out of view of Deputy Tyler underneath a seat, next to his leg, and under his backpack; Mr. Bergstrom contained a drug ledger annotating actual drug sales, and was not simply in the business of giving drugs to others as part of a "social encounter;" Mr. Bergstrom and his presumptive customers were actually under the influence of narcotics. Mr. Bergstrom's case goes far beyond simple proximity to his firearm and large amount of controlled substances.

The trial court plainly stated it considered the facts of Mr. Bergstrom's convictions. 3RP 16. It relied not only on its own research

or the arguments of counsel, but also consulted two different judges and two different attorneys. None agreed with Mr. Bergstrom's new proposition that his conduct was *de minimis* compared to the typical lower-level drug distributor who unlawfully possessed a firearm.

**C. THE COURT DID NOT ERR BY CONCLUDING IT COULD NOT IMPOSE AN EXCEPTIONAL DOWNWARD SENTENCE**

Mr. Bergstrom claims the court erred because it determined it did not have the discretion to impose an exceptional downward sentence based on Mr. Bergstrom's substance addiction. Mr. Bergstrom is wrong.

A sentencing court commits error when it operates under the mistaken belief that it does not have the discretion to impose a mitigated exceptional sentence for which a defendant may have been eligible. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017).

Mr. Bergstrom notes that "courts have misconstrued the [Sentencing Reform Act] as barring consideration of personal characteristics, including drug addiction, it is clear that is not the case." Br. at 40. Mr. Bergstrom in a footnote cites *State v. Gaines*, 122 Wn.2d 502, 517, 859 P.2d 36 (1993), for this proposition. In that footnote, Washington Supreme Court case plainly recognizes "drug addiction is not ... a basis for a durational departure from the standard sentence range." *Id.* The Supreme Court explicitly held, "drug addiction and its causal role in an addict's criminal offense may not properly

serve as justification for a durational departure from the standard range. Therefore, the fact that Gaines's drug addiction was directly related to his offense cannot be relied upon to justify a durational departure from the standard sentence range for his offense." *Id.* at 512. The sentencing court did not err by following Washington Supreme Court precedent that it is bound to follow. *See also State v. Evans*, 80 Wn. App. 806, 911 P.2d 1344 (1996); *State v. Clark*, 76 Wn. App. 150, 883 P.2d 333 (1994); *State v. Amo*, 76 Wn. App. 129, 882 P.2d 1188 (1994); *State v. Paine*, 69 Wn. App. 873, 850 P.2d 1369 (1993).

Mr. Bergstrom relies on *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015), to argue otherwise, but *O'Dell* has no application to this case, and certainly does not permit a trial court to overrule the Washington Supreme Court. *O'Dell* stands for the proposition that youthful characteristics may justify an exceptional departure from the standard range sentence, based on recent Eighth Amendment jurisprudence, when a defendant committed a crime while near the age of 18. 183 Wn.2d 696 ("For these reasons, a trial court must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender like O'Dell, who committed his offense just a few days after he turned 18"). Mr. Bergstrom was over 35 years old when he committed his crimes. CP 1.

Because Mr. Bergstrom was not a juvenile or youthful adult when he committed his crimes, *O'Dell* has no relevance. The sentencing court did not err by adhering to binding Washington Supreme Court precedent.

**D. THE COURT CONSIDERED ALL RELEVANT FACTORS WHEN IT REQUIRED MR. BERGSTROM TO REGISTER AS A FELONY FIREARM OFFENDER**

Mr. Bergstrom next challenges the trial court's decision requiring him to register as a felony firearm offender, arguing that the court did not consider all relevant factors. Mr. Bergstrom's bare objection without creating a factual record for review is not sufficient to preserve this argument for review.

*1. Reviewability.*

A party may not assert a claim on appeal that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not first raised at trial. *Id.* at 749. This principle is embodied in Washington under RAP 2.5. The rule is principled as it "affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal." *Strine*, 176 Wn.2d at 749.

Although RAP 2.5 permits an appellant to raise for the first time on appeal an issue that involves a manifest error affecting a constitutional right,

our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). The issue raised here is not constitutionally based. Mr. Bergstrom belatedly objected to the felony firearm registration requirement below, but did not take any steps to develop the record or argue why the court should not impose it. This is insufficient to command review.

This Court should not accept review of this claim based upon an undeveloped record. As in *State v. Stoddard*, 192 Wn. App. 222, 366 P.3d 474 (2016), the issue now raised by defendant was not developed in the trial court with supporting facts that would enable this Court to properly review the claim. In *Stoddard*, this Court emphasized:

We consider whether the record on appeal is sufficient to review Gary Stoddard’s constitutional arguments. Stoddard’s contentions assume his poverty. Nevertheless, the record contains no information, other than Stoddard’s statutory indigence for purposes of hiring an attorney, that he lacks funds to pay a \$100 fee. The cost of a criminal charge’s defense exponentially exceeds \$100. Therefore, one may be able to afford payment of \$100, but not afford defense counsel. Stoddard has presented no evidence of his assets, income, or debts. Thus, the record lacks the details important in resolving Stoddard’s due process argument.

Gary Stoddard underscores that other mandatory fees must be paid first and interest will accrue on the \$100 DNA

collection fee. This emphasis helps Stoddard little, since we still lack evidence of his income and assets.

*Id.* at 228-29. This Court has further clarified the importance of factual development of a record in the context of challenged community custody conditions. *See State v. Peters*, No. 31755-2-III, 2019 WL 4419800 at \*1-2 (Sept. 17, 2019) (declining to review factual challenges where record not developed).

Here, the record is clear that Mr. Bergstrom has a lengthy criminal history spanning multiple jurisdictions, including multiple felony convictions for: (1) possession of a controlled substance; (2) possession of a controlled substance with intent to deliver; (3) felon in possession of a firearm; and (4) possession of a firearm in a drug trafficking crime, as well as a misdemeanor assault domestic violence conviction. CP 119-20. Mr. Bergstrom's current offenses included unlawful possession of a firearm, and possession with intent to deliver while armed with a firearm. Logically, Mr. Bergstrom's complaint must then be that the trial court did not properly consider whether he had ever been acquitted of a crime by reason of insanity. There is no information in the record about whether that hypothetical acquittal ever occurred because the State only provided evidence of Mr. Bergstrom's prior and current convictions. Mr. Bergstrom did not claim such an acquittal had ever occurred, nor did he argue the lack

of any such acquittal would justify his objection to the registration requirement. Despite the belated objection, the record is inadequate to address this claim; Mr. Bergstrom retains the ability to argue matters outside the record in a personal restraint petition. *See McFarland*, 127 Wn.2d at 338.

2. *Principles of law.*

A trial court has discretion to require a defendant convicted of a felony firearm offense to register as a felony firearm offender. RCW 9.41.330(1). This Court reviews a trial court's discretionary decision for an abuse of discretion. *State v. Miller*, 159 Wn. App. 911, 918, 247 P.3d 457 (2011). A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *Id.*

Under RCW 9.41.330, the court "must consider whether to impose" the registration requirement and, in doing so, "shall consider all relevant factors including, but not limited to" the defendant's criminal history, whether the defendant has previously been found guilty by reason of insanity, and the defendant's propensity for violence. There is no requirement the trial court explicitly articulate its consideration of each factor on the record. *See* RCW 9.41.330.

Mr. Bergstrom faults the trial court for only checking one box on the stock judgment and sentence document indicating the basis for the order. However, the court also attached a specific felony firearm offender registration attachment, which specified, “the defendant is required to register because this crime involves a felony firearm offense as defined in RCW 9.41.010, and, after considering statutory factors, the court decided the defendant must register.” CP 121. The court did not abuse its discretion.

As noted above, Mr. Bergstrom has a lengthy criminal history involving possession of firearms in conjunction with his two-decade-long history of distributing drugs. As identified in *Sassen Van Elsloo, supra*, and *Gurske, supra*, the court can permissibly infer firearms are inherently dangerous in such an operation. Further, Mr. Bergstrom’s conviction history includes at least one recent domestic violence conviction for assault, demonstrating his propensity for violence.<sup>5</sup>

Mr. Bergstrom’s criminal history and propensity for violence demonstrate the need for the registration requirement. As argued above, there is no evidence that Mr. Bergstrom has ever been acquitted by reason of insanity because the State only provided Mr. Bergstrom’s prior

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<sup>5</sup> Mr. Bergstrom’s fourth degree assault—domestic violence charge alone prohibits him from possessing a firearm, because of the dangerous nature of domestic violence offenses. RCW 9.41.040(2).

convictions, not all prior charges. Because the trial court attached an additional, specific document to the judgment and sentence stating it had considered all *relevant* factors, and the factors clearly support the registration requirement, the court did not err.

#### **E. COMMUNITY CUSTODY CONDITIONS**

Mr. Bergstrom challenges three of his community custody conditions: (1) a prohibition on associating with any DOC-identified drug offenders, (2) to comply with his CCO's directives, if his CCO orders him to remain inside or outside of specific geographic areas, and (3) to comply with all conditions of community custody imposed by the DOC. His claims are not ripe, and, in the alternative, fail.

*1. The imposed community custody conditions are not ripe for review.*

At sentencing, the trial court imposed community custody provisions to include giving Mr. Bergstrom's future CCO discretion in proscribing geographical conditions and requiring the defendant to obey all conditions imposed by the DOC. CP 111. He now challenges those two conditions as being unconstitutionally vague. However, he has not presented any facts that the complained of conditions of community custody have actually been imposed. In *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008), the court set out a three-part test to determine whether a vagueness challenge to community custody conditions is ripe for review.

The test requires this Court to consider whether: (1) the issues raised primarily legal, (2) the issues require further factual development, and (3) the challenged action final. *Id.*

The second and third of the defendant's claims fail all three parts of the *Bahl* test. There is no record that any complained of conditions have been imposed. There is no record that any geographical limitations have been imposed, nor is there any record of the CCO imposing any further conditions that the defendant is required to obey. Therefore, the issues raised are not primarily legal. For the same reason, the issues require further factual development. Finally, the challenged action is not yet final because future conditions could still be imposed. These two conditions are not yet ripe for review.

## 2. *Principles of law*

A court reviews community custody conditions for an abuse of discretion and will reverse them only if they are “manifestly unreasonable.” *State v. Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). The due process vagueness doctrine under the Fourteenth Amendment to the United States Constitution and article I, section 3, of the Washington State Constitution “requires that citizens have fair warning of proscribed conduct.” *Bahl*, 164 Wn.2d at 752. The doctrine assures that ordinary people can discern the prohibited conduct and gain protection against arbitrary

enforcement of the laws. *Valencia*, 169 Wn.2d at 791; *Bahl*, 164 Wn.2d at 752. If persons of ordinary intelligence can understand what the law proscribes, notwithstanding some possible areas of disagreement, the law is sufficiently definite. *Bahl*, 164 Wn.2d at 754; *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990).

The Sentencing Reform Act (SRA) permits the sentencing court to impose community placement conditions prohibiting contact with a “specified class of individuals.” RCW 9.94A.703(3)(b); RCW 9.94A.660. Limitations on fundamental rights are permissible, provided they are imposed sensitively. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

An offender’s freedom of association may be restricted if reasonably necessary to accomplish the essential needs of the state and public order. *Id.* at 37-38. In general, “[a]n offender’s usual constitutional rights during community placement are subject to SRA-authorized infringements.” *State v. Hearn*, 131 Wn. App. 601, 607, 128 P.3d 139 (2006).

3. *DOC-identified drug offenders.*

Although ripe, this claim fails. In *Hearn*, 131 Wn. App. 601, the defendant argued that a community custody condition demanding that she refrain from associating with known drug offenders violated her freedom to associate, after a jury had found Hearn guilty of drug possession. This Court

affirmed Hearn’s community custody condition, noting “[r]ecurring illegal drug use is a problem that logically can be discouraged by limiting contact with other known drug offenders.” *Id.* at 609. This Court also stated, “[f]reedom of association may be restricted if imposed sensitively and if the restriction is reasonably necessary to accomplish the essential needs of the state and public order.” *Id.* at 607.

The jury found Mr. Bergstrom guilty of multiple drug offenses—including distribution, and his criminal history includes several similar offenses. The sentencing court extensively discussed Mr. Bergstrom’s apparent addiction and dependency on drugs, as noted above in the discussion about his sentence. Therefore, as in *Hearn*, the court reasonably imposed a prohibition from associating with DOC identified offenders. This condition aids Mr. Bergstrom in remaining sober. Discouraging further criminal conduct is a goal of community placement. *Riley*, 121 Wn.2d at 38.

An individual of ordinary intelligence can plainly understand the association with drug offender’s condition prohibits Bergstrom from associating with individuals the DOC labels as drug offenders. This is an SRA-authorized infringement on Mr. Bergstrom’s right to association. Mr. Bergstrom can readily gain a list of those offenders, there is no danger

of arbitrary enforcement. The trial court did not abuse its discretion in imposing this condition.

4. *Obey all conditions imposed by the DOC.*

A review of the applicable statute is appropriate. RCW 9.94A.703, which sets out community custody conditions, states:

When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section.

(1) Mandatory conditions. As part of any term of community custody, the court shall:

...

(b) Require the offender to comply with any conditions imposed by the department under RCW 9.94A.704;

Thus, the statute mandated the court to order Mr. Bergstrom to obey all conditions of community custody imposed by the DOC. The court did not abuse its discretion by following the legislature's mandate.

5. *Comply with CCO's directives pertaining to specified geographical boundaries.*

RCW 9.94A.704, which sets out supervision by the DOC, states:

(1) Every person who is sentenced to a period of community custody shall report to and be placed under the supervision of the department, subject to RCW 9.94A.501.

(2)(a) The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of community custody based upon the risk to community safety.

...

(3) If the offender is supervised by the department, the department shall at a minimum instruct the offender to:

...

(b) Remain within prescribed geographical boundaries;

...

(7)(a) The department shall notify the offender in writing of any additional conditions or modifications.

RCW 9.94A.703 authorizes the court to impose community custody conditions, including authorizing the DOC to impose additional conditions under RCW 9.94A.704. Under RCW 9.94A.704, if the DOC imposes additional conditions, it shall instruct the defendant to remain within prescribed geographical boundaries, and, most importantly, notify the defendant *in writing* of these conditions. And RCW 9.94A.703(3)(a) empowered the court to order Mr. Bergstrom to remain within or outside of a specified geographic boundary itself. The court chose to delegate that determination to the CCO,<sup>6</sup> if the CCO feels such is necessary, because statute already authorizes the DOC to restrict Mr. Bergstrom's travel. The court did not abuse its discretion in ordering Mr. Bergstrom to comply with future geographical restrictions at the discretion of his CCO.

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<sup>6</sup> See *State v. McWilliams*, 177 Wn. App. 139, 154, 311 P.3d 584 (2013).

Insofar as Mr. Bergstrom complains that potential future restrictions may infringe his right to travel, the SRA authorizes the infringement of constitutional rights. *See Riley*, 121 Wn.2d 22. Because the CCO has not ordered Mr. Bergstrom to remain within or outside a boundary yet, this claim cannot be adjudicated as argued above. Regardless, total banishment from a large area such as a county is typically required to trigger a right to travel concern under Washington law; such is not the case with a post-conviction but pre-enforcement challenge to future CCO directives. *See Matter of Martinez*, 2 Wn. App. 2d 904, 413 P.3d 1043 (2018) (total banishment from county where victim lived impermissible); *State v. Schimelpfenig*, 128 Wn. App. 224, 226, 115 P.3d 338 (2005) (“banishment orders encroach on an individual’s constitutional right to travel, which includes the right to travel within a state”).

#### **F. OFF-LIMITS ORDER**

RCW 10.66.020 provides, “[a] court may enter an off-limits order enjoining a known drug trafficker who has been associated with drug trafficking in an area that the court finds to be a [Protected Against Drug Trafficking (PADT)] area, from entering or remaining in a designated PADT area for up to one year.” The State agrees with Mr. Bergstrom that the court did not make the appropriate finding that the location where he committed his crimes was a PADT area. The State requests that this Court

simply strike the order, rather than remand to address the order, because Mr. Bergstrom's future CCO possesses the ability to restrict Mr. Bergstrom from entering specific areas as argued above.

## V. CONCLUSION

Mr. Bergstrom's challenges to his convictions and sentences mostly fail. The evidence is sufficient, and there is no basis in the record justifying an exceptional downward sentence. Although the record supports most sentencing conditions, the State does agree that the off-limits order must be struck. The State respectfully requests this Court affirm.

Dated this 16 day of January, 2020.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Attorney for Respondent

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

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
ZACHARY BERGSTROM,  
  
Appellant.

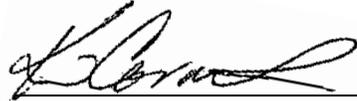
NO. 36381-3-III  
  
CERTIFICATE OF  
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on January 16, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Devon Knowles  
wapofficemail@washapp.org

1/16/20  
**(Date)**

Spokane, WA  
**(Place)**

  
**(Signature)**

# SPOKANE COUNTY PROSECUTOR

January 16, 2020 - 10:32 AM

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**Superior Court Case Number:** 18-1-02398-1

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