No._____

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

GUADALUPE CRUZ CAMACHO,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 45491-2-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 12-1-01854-7
The Honorable Ronald Culpepper & Stanley Rumbaugh, Judges

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I. IDENTITY OF PETITIONER

The Petitioner is GUADALUPE CRUZ CAMACHO, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 45491-2-II, which was filed on August 1, 2017 (attached in Appendix). The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. Does a warrantless canine sniff of a closed automobile violate the Fourth Amendment to the United States Constitution and Article I, section 7 of the Washington State Constitution, where an individual has a heightened privacy interest in his automobile and its contents, where the odors inside the automobile are detected not by a police officer using his own senses but instead by a tool (a canine) that enhances the officer's sense of smell, and where the sniff search is just as likely to reveal the presence of private and legal non-contraband items as it is to reveal contraband?

2. Where probable cause supporting a search warrant must be based on real facts and "reasonably trustworthy information," is an alert from a drug-detecting dog insufficiently reliable to establish probable cause when there is overwhelming evidence that even highly trained narcotics-sniffing dogs have high error rates, often alert to non-contraband, are highly susceptible to cueing from their handlers, and often give positive alerts when there is a residual odor but no actual narcotics present?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Guadalupe Cruz Camacho with two counts of unlawful possession of a controlled substance with intent to deliver (RCW 69.50.401). (CP 1-2, 41-42). Two co-defendants, Javier Espinoza and Gerardo Rafael Hernandez, were also charged. (CP 1-2)

Camacho joined in a joint motion to suppress evidence collected in cars and apartments during the execution of a search warrant. (Espinoza CP 171-266; 06/03/13 RP 64-69)[1] Following a multi-day hearing, Judge Ronald Culpepper orally denied the motion to suppress.[2] (06/07/13 RP 6-21)

The jury convicted Camacho as charged. (CP 105-10; 9RP 2, 3, 5) The trial court imposed an exceptional sentence totaling 120 months of confinement. (CP 119, 122; 10RP 18) Camacho timely appealed. (CP 133) The Court of Appeals affirmed Camacho's convictions and sentence.

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[1] The transcripts labeled volumes I through X will be referred to by their volume number (#RP). The remaining transcripts will be referred to by the date of the proceeding.

[2] Three days of this hearing were unable to be transcribed after the court reporter's equipment failed to record the proceedings. (09/25/14 RP 6-8) The trial prosecutor and the trial court have filed affidavits recounting their recollections of the proceedings. (CP 142-52, 155-62)

B. SUBSTANTIVE FACTS

In the Spring of 2012, Tacoma Police drug units were involved in investigating a man named Alfredo Flores. (3RP 28) Through electronic and visual surveillance, officers observed that Flores spent about 12 hours at an apartment complex located at 9621 10th Avenue East in Tacoma. (3RP 29; 6RP 66-67) When Flores was arrested during a traffic stop the following day, officers found about four pounds of methamphetamine, almost two pounds of heroin, and about $10,000 in cash in his car. (3RP 29-30; 6RP 67)

Based on a tip received six months earlier from a confidential informant, investigators already suspected that apartment number 9 at the 10th Avenue apartment complex was a possible "narcotics stash house." (3RP 29; Exh. D6 at p.3) So after Flores' arrest, investigators immediately began surveillance of that apartment as well. (3RP 30; 4RP 4-5; 6RP 67, 68)

Officers observed a man, who the confidential informant claimed was drug supplier Guadalupe Cruz Camacho, outside of the apartment working on a blue Nissan and a Ford truck with California license plates. (3 RP 38; 6RP 68-69, 70; Exh. D6 at p.3) Officers also observed a red PT Cruiser, which was registered to

Camacho, parked in the same lot. (6RP 68-69, 70; Exh. D6 at p.3) Later, officers observed a group of three to five Hispanic men going back and forth between the apartment and three vehicles; the Ford truck, a Nissan with Oregon license plates, and a Nissan with California license plates. (3RP 30, 31; 6RP 73-74; Exh. 6D at p.4) The men were seen placing packages into the engine compartment and interior doors of the Nissans. (Exh. D6 at p.4)

Officer Henry Betts is part of the K-9 unit. (4RP 18) Officer Betts's dog, Barney, has been trained to detect the odor of narcotics. Barney has been trained to sit when he catches the odor of narcotics, but Officer Betts testified that sometimes Barney will only exhibit a change in behavior. (06/03/13 RP 17-18; 4RP 23-24) Officer Betts and Barney walked through the parking lot and lingered at the suspected vehicles. (4RP 20-21, 28) According to Officer Betts, Barney exhibited a sit response to the California Nissan and exhibited a change in behavior when they approached the Ford truck. (4RP 28, 30-31)

A short time later, officers observed the two Nissans and the Ford truck leaving the apartment complex at the same time. (3RP 75; Exh. D6 at p.4) Officers initiated a traffic stop of the vehicles and detained the occupants. (6RP 75) Camacho was driving the

Ford truck. (3RP 38-39; Exh. D6 at p. 4) The tailgate of the truck appeared to have been recently removed and re-installed. (3RP 39, 45-46) Javier Espinoza was driving the California Nissan. (Exh. D6 at p. 4) Gerardo Hernandez was driving the Oregon Nissan, and was accompanied by his wife and two young children. (3RP 31-32; 4RP 71, 72-73; Exh. D6 at p. 4) Officers noticed a grocery bag filled with cash sitting on the floor of the Oregon Nissan. (3RP 32-33; 4RP 73-74)

Officer Betts arrived at the scene, and directed Barney to sniff the vehicles. (4RP 32) Barney exhibited a sit response when he sniffed the Nissans and exhibited a change in behavior when he sniffed the tailgate of the Ford truck. (4RP 33-34) Betts also took Barney to the 10th Avenue apartment, and Barney alerted when he sniffed the front door.[3] (Exh. D6 at 5; 4RP 37)

Based on this information, Officer Kenneth Smith obtained a search warrant for the vehicles, the 10th Avenue apartment, and a second apartment he believed had been rented by Hernandez.[4]

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[3] The trial court later found that this specific sniff alert was an unconstitutional warrantless search, and ruled that the fact of this alert should not be considered in determining whether there was probable cause for the search warrant. (06/07/13 RP 10-11)

[4] The trial court suppressed all evidence located at this second apartment after finding that the search warrant lacked sufficient facts to establish a nexus between this location and the suspected criminal activity. (06/07/13 RP 21)

(Exh. D6; 6RP 75) Despite Barney's earlier alerts, the officers did not find any narcotics or illegal substances inside the Nissans or the Ford truck. (3RP 40, 41-42; 4RP 54) But Barney gave a sit response when he sniffed a bundle of cellophane-wrapped currency, totaling $42,000, which was found in the California Nissan. (3RP 34; 4RP 34; 6RP 24) The cash found in the Oregon Nissan totaled $56,544. (6RP 14-15, 16)

Officer Betts took Barney to the 10th Avenue apartment, and Barney alerted to items in a bedroom closet, a dresser, a kitchen cabinet, and to a small space between the laundry room wall and the washer and dryer. (4RP 38, 40, 41, 44-45, 45-46 48-49) In these locations, officers found heroin totaling over 8,500 grams, and methamphetamine totaling over 2,000 grams. (4RP 9, 40, 44-45, 45-46, 48-49; 6RP 31-32, 34, 35, 36, 38-39, 41, 48) Officers also found items commonly associated with the distribution and sale of narcotics. (6RP 14, 50, 51)

Camacho had on his person a copy of the key to the 10th Avenue apartment. (6RP 77-78) Officers also found identification for Camacho inside the apartment. (10RP 41; Exh. 64b)

V. ARGUMENT & AUTHORITIES

The issues raised by Camacho's petition should be

addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2). The issues in this case also involve a significant question of law under the Constitution of the State of Washington and the United States. RAP 13.4(b)(3).

A. THE TRIAL COURT ERRED WHEN IT UPHELD THE SEARCH WARRANT AND DENIED THE DEFENSE MOTION TO SUPPRESS EVIDENCE GATHERED DURING THE EXECUTION OF THE SEARCH WARRANT.

Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." "Article I, section 7 is a jealous protector of privacy." State v. Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009).[5] Thus, subject to a few "jealously and carefully drawn" exceptions, "warrantless searches and seizures are per se unreasonable." State v. Houser, 95 Wn.2d 143, 149,

[5] This section of our constitution provides greater protection to an individual's right of privacy than the Fourth Amendment to the United States Constitution. State v. Parker, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). Where the Fourth Amendment precludes only "unreasonable" searches and seizures without a warrant, Article I, section 7 prohibits any disturbance of an individual's private affairs "without authority of law." See Valdez, 167 Wn.2d at 772(citing York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 305-06, 178 P.3d 995 (2008)). "This language prohibits not only unreasonable searches, but also provides no quarter for ones which, in the context of the Fourth Amendment, would be deemed reasonable searches and thus constitutional." Valdez, 167 Wn.2d at 772.

622 P.2d 1218 (1980).

In determining whether there has been a search under the Washington Constitution, the relevant inquiry is "whether the State has unreasonably intruded into a person's 'private affairs'." State v. Young, 123 Wn.2d 173, 181, 867 P.2d 593 (1994) (quoting State v. Boland, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990)). The intimate details about a person's life, associations, and activities are a "private affair" within the meaning of Article 1 section 7. State v. Jorden, 160 Wn.2d 121, 129, 156 P.3d 893 (2007). "If a search occurs, article 1, section 7, is implicated and police must get a warrant or the search must fall within one of the recognized exceptions to the warrant requirement." State v. Dearman, 92 Wn. App. 630, 633-34, 962 P.2d 850 (1998).

"[W]hen a law enforcement officer is able to detect something by [using] one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a 'search'." Young, 123 Wn.2d at 182 (quoting State v. Seagull, 95 Wn.2d 898, 901, 632 P.2d 44 (1981)). For that reason, courts have held that a police officer's visual surveillance does not constitute a search if the officer observes an object with unaided eyes from a nonintrusive vantage point.

Young, 123 Wn.2d at 182. "This kind of surveillance does not violate article 1, section 7, because what is voluntarily exposed to the general public and observable from an unprotected area without using sense enhancement devices is not part of a person's private affairs." Dearman, 92 Wn. App. at 634 (citing Young, 123 Wn.2d at 182). But "a substantial and unreasonable departure from a lawful vantage point, or a particularly intrusive method of viewing, may constitute a search." Young, 123 Wn.2d at 182-83 (citing State v. Myers, 117 Wn.2d 332, 345, 815 P.2d 761 (1991); Seagull, 95 Wn.2d at 901).

In Young, this Court held that an infrared device is an intrusive means of observation which exceeds the limits on surveillance under Washington law because it allows police to detect heat distribution patterns undetectable to the naked eye or other senses. Young, 123 Wn.2d at 183; see also Kyllo v. United States, 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001).

Subsequently, in Dearman, Division 1 held that a warrant was required to use a canine sniff at a residence, noting:

> Like an infrared thermal detection device, using a narcotics dog goes beyond merely enhancing natural human senses and, in effect, allows officers to "'see through the walls' of the home." The record is clear that officers could not detect the smell of marijuana

> using only their own sense of smell even when they attempted to do so from the same vantage point as [the dog]. As in Young, police could not have obtained the same information without going inside the garage. It is true that a trained narcotics dog is less intrusive than an infrared thermal detection device. But the dog "does expose information that could not have been obtained without the 'device'" and which officers were unable to detect by using "one or more of [their] senses while lawfully present at the vantage point where those senses are used." The trial court thus correctly found that using a trained narcotics dog constituted a search for purposes of article 1, section 7 of the Washington Constitution and a search warrant was required.

Dearman, 92 Wn. App. at 635 (footnotes omitted) (citing Young, 123 Wn.2d at 182-83). More recently, the United States Supreme Court also held that "[t]he government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment. Florida v. Jardines, 569 U.S. 1, 133 S. Ct. 1409, 1417-18, 185 L. Ed. 2d 495 (2013).

Washington courts have held in a number of cases that the canine sniff at issue did not violate the defendant's privacy rights. See State v. Stanphill, 53 Wn. App. 623, 631, 769 P.2d 861 (1989) (no search where a canine sniff was conducted on a package at the post office); State v. Boyce, 44 Wn. App. 724, 730, 723 P.2d 28 (1986) (canine sniff of a safety deposit box at a bank did not require

a warrant); State v. Wolohan, 23 Wn. App. 813, 820, 598 P.2d 421 (1979) (canine sniff of a package being sent by a common carrier was not an illegal search because the defendant had no reasonable expectation of privacy in the area in which the examined parcel was located). In each of these cases, the courts noted that a canine sniff might constitute a search "if the object or location were subject to heightened constitutional protection." Young, 123 Wn.2d at 188. Thus, whether or not a canine sniff is a search "depends on the circumstances of the sniff itself." Boyce, 44 Wn. App. at 729.

In State v. Hartzell, Division 1 held that a canine sniff near an open window of the defendant's vehicle was not a search because the canine merely sniffed the air drifting out of the open window, and the officers were at a lawful vantage point at the time. 153 Wn. App. 137, 221 P.3d 928 (2009). The court found that the sniff was minimally intrusive.

In this case, the Court of Appeals found that Camacho "does not have a reasonable expectation of privacy in the odors that emanate from the car when Barney sniffed from a lawful vantage point in the parking lot." (Opinion at 27, 49) The Court of Appeals was wrong for several reasons. First, Division 2 totally ignored the United States Supreme Court's finding that the use of a trained

police dog to conduct a sniff search from outside a citizen's home is a search under the Fourth Amendment, as well as the established rule that surveillance of a person's home is a search where "the Government uses a device that is not in general public use" to "explore details of the home that would previously have been unknowable without physical intrusion." Jardines, 133 S. Ct. at 1417-18; Kyllo, 533 U.S. at 40; Dearman, 92 Wn. App. at 635.

Division 2 also ignored the fact that, under the Washington constitution, automobiles receive nearly the same heightened privacy protections as a home or residence. See e.g. State v. Parker, 139 Wn.2d 486, 494, 987 P.2d 73 (1999); State v. Gibbons, 118 Wn. 171, 187-88, 203 P. 390 (1922); Wash. Const. art. I, § 7.

Here, Officer Betts and Barney were in a public area when the sniffs occurred. However, the car windows were not open when Barney conducted his first sniff, and Camacho and the other occupants were involuntarily removed from their cars before Barney conducted his second sniff. (06/03/13 59, 4RP 33) By leaving the windows rolled up, Camacho and the other men were choosing not to expose odors from the contents of the vehicles to the air outside. Far from being "minimally intrusive," these two sniff searches invaded an area in which Camacho had a heightened privacy

interest, and that Camacho and the other men had intended to keep private and unexposed to the public. Moreover, the officers were not using their own senses, but were instead using a canine sense enhancement.[6]

Like homes, vehicles are a constitutionally protected area. Camacho did not voluntarily expose the contents of the vehicles to public view, invite the public to examine the vehicles, or otherwise open his private affairs to the public or to government-trained police dogs. The entire reason the officers used Barney was because he could reveal information that would clearly not otherwise be legally accessible to the officers.

Furthermore, Hartzell and the other cases that approve of canine sniffs rely on a premise that we now know to be false: that trained narcotics detection dogs reliably alert only to contraband and not to noncontraband items. See Illinois v. Caballes, 543 U.S. 405, 410, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005) ("A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual

[6] See Jardines, 133 S. Ct. at 1418-19 (Kagan, J. concurring) (police officers invade a citizen's privacy expectations when they use "trained canine assistants to reveal within the confines of a home what they could not otherwise have found there").

has any right to possess does not violate the Fourth Amendment"); People v. Campbell, 367 N.E.2d 949, 953-54 (Ill. 1977) ("Nothing of an innocent but private nature and nothing of an incriminating nature other than the narcotics being sought can be discovered through the dog's reaction to the odor of the narcotics"); State v. Wolohan, 23 Wn. App. at 820 ("A dog's 'search' is limited solely to illegal substances").

But research has shown that a canine sniff is just as likely to reveal the presence of noncontraband as contraband. That is because drug detection dogs are not alerting to the illegal drugs. Rather, the dogs are alerting to particular compounds in the drugs, many of which are not illegal. *See* Leslie A. Shoebotham, *Brief of Amici Curiae Fourth Amendment Scholars in Support of Respondent, State of Florida v. Jardines*, 2012 WL 2641847 at 4 (U.S. 2012).[7]

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[7] See also Kenneth G. Furton, *Identification of Odor Signature Chemicals in Cocaine Using Solid-Phase Microextraction–Gas Chromatography and Detector-Dog Response to Isolated Compounds Spiked on U.S. Paper Currency*, Journal of Chromatographic Science, Vol. 40, March 2002, at 154 ("When a dog is trained to alert to an item ... the dog is often being trained to alert to a scent associated with the item rather than the item itself."); Michael Macias, et al., *A Comparison of Real Versus Simulated Contraband VOCs for Reliable Detector Dog Training Utilizing SPME-GC-MS*, 40 Am. Lab.16 (2008), *available at* http://www.pawsoflife.org/Library/Detection/Marcias.pdf ("It has been shown that canines respond to volatile organic compounds (VOCs) in the headspace above the drug instead of the parent compound itself.").

Using Barney to sniff the vehicles in this case invaded Camacho's privacy and was therefore a search under Article I, section 7. Because the search was conducted without a warrant or a recognized warrant exception, Barney's alerts should have been suppressed, and were not a proper ground on which to base the subsequent search warrant.

If information in a warrant affidavit was obtained pursuant to an unconstitutional search, that information may not be used to support the warrant. State v. Eisfeldt, 163 Wn.2d 628, 640, 185 P.3d 580 (2008). However, a search warrant is not rendered totally invalid if the affidavit contains sufficient facts to establish probable cause independent of the improperly obtained information. State v. Coates, 107 Wn.2d 882, 887, 735 P.2d 64, 67 (1987).

Probable cause exists when the application sets forth "facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." State v. Atchley, 142 Wn. App. 147, 161, 173 P.3d 323 (2007). A piece of information cannot provide probable cause if it is equally consistent with both lawful and unlawful conduct. State v. Neth, 165 Wn.2d 177, 185, 196 P.3d 658 (2008)

Here, once the evidence gained from Barney's alerts is excised from the warrant affidavit, the remaining information is simply insufficient to establish probable cause. The remaining facts, while perhaps suspicious, do not give rise to a reasonable inference that Camacho was involved in criminal activity or that evidence of criminal activity could be found in the apartment or vehicles. The narcotics were seen by the confidential informant six months prior. There is no evidence that Flores obtained his narcotics from the 10th Avenue apartment. The officers were unable to see what the packages were, or what they contained, when they were loaded into the vehicles. And there is nothing criminal about carrying a large amount of cash, or about making after-market alterations to one's vehicle.

Because the dog sniffs were unconstitutional searches, and without them the search warrant application was insufficient to establish probable cause, the physical searches of the vehicles and the 10th Avenue apartment were unconstitutional and all evidence gathered as a result must be suppressed. See Neth, 165 Wn.2d at 186; State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999)).

B. THE SEARCH WARRANT WAS NOT SUPPORTED BY PROBABLE CAUSE BECAUSE THE RELIABILITY OF CANINE SNIFFS WAS NOT ESTABLISHED.

A judge may issue a search warrant only upon a determination of probable cause. State v. Jackson, 150 Wn.2d 251, 264, 76 P.3d 217 (2003). Probable cause must be "grounded in fact" and based on "reasonably trustworthy information." State v. Afana, 169 Wn.2d 169, 182, 233 P.3d 879 (2010); State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). A basis for probable cause that is based solely on suspicion and belief is legally insufficient. Thein, 138 Wn.2d at 140 (quoting State v. Helmka, 86 Wn.2d 91, 92 542 P.2d 115 (1975)). In this case, the State did not establish that canine sniff alerts in general, and Barney's sniffs in particular, provide reliable facts.

"The infallible dog . . . is a creature of legal fiction . . . their supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine . . . In practical terms, the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times."

Caballes, 543 U.S. at 411-12 (Souter, J. dissenting).[8]

As discussed in detail above, even the best trained canines often alert to non-contraband items. So neither a canine handler, nor a reviewing magistrate, can know if a dog is alerting to the presence of contraband or to some other non-contraband substance. But other issues arise that also demonstrate the risk of relying on canine alerts to establish probable cause. For example, whether or not a dog is in fact giving an alert is subjective and open to interpretation by the handling officer. (Exh. D1 at p. 42) See also Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky L.J. 405, 422 (1996) (claiming that "almost all erroneous alerts originate not from the dog, but from the handler's misinterpretation of the dog's signals"); United States v. Trayer, 898 F.2d 805, 809 (D.C. Cir. 1990) (noting, based on expert testimony of a police-dog trainer, that anything "less than scrupulously neutral procedures, which create at least the possibility of unconscious 'cuing,' may well jeopardize the

[8] Citing United States v. Kennedy, 131 F.3d 1371, 1378 (C.A.10 1997) (describing a dog that had a 71% accuracy rate); United States v. Scarborough, 128 F.3d 1373, 1378, n. 3 (C.A.10 1997) (describing a dog that erroneously alerted 4 times out of 19 while working for the postal service and 8% of the time over its entire career); United States v. $242,484.00, 351 F.3d 499, 511 (C.A.11 2003) (noting that because as much as 80% of all currency in circulation contains drug residue, a dog alert "is of little value"), vacated on other grounds by rehearing en banc, 357 F.3d 1225 (C.A.11 2004).

reliability of dog sniffs").

Moreover, significant evidence indicates that dogs can detect trace amounts of narcotics that could be present due to a person having recently handled or been around narcotics, or that dogs may alert to the residual odor when the narcotics are no longer present. See e.g. Jennings v. Joshua Indep. Sch. Dist., 877 F.2d 313, 317 (5th Cir. 1989) (although the dog was trained to detect various contraband, he also was capable of reacting to residual scents lingering for up to four to six weeks); United States v. Carr, 25 F.3d 1194, 1215 (3d Cir. 1994) (Becker, J., concurring in part and dissenting in part) (stating that "a substantial portion of United States currency now in circulation is tainted with sufficient traces of controlled substances to cause a trained canine to alert").

Thus, there is a high risk that a canine will alert to the presence of narcotics when there are in fact no narcotics present. The instant case perfectly illustrates this risk. Barney alerted to the presence of narcotics in both Nissans and the Ford truck, yet no narcotics were found within. (3RP 40, 41-42; 4RP 28, 30-31, 33-34, 54) This shows that a canine alert is not a reliable indicator that narcotics or contraband will be found in the place to be searched.

It is quite clear that canines, including Barney, are not

capable of providing humans with reasonably trustworthy information regarding the presence of illegal narcotics. Thus, the fact of Barney's alerts—if that is what they were—at the vehicles are not reliable facts that the magistrate can use to determine whether probable cause exists to support the issuance of a search warrant. That information should have been stricken because it is not "grounded in fact" or based on "reasonably trustworthy information." Afana, 169 Wn.2d at 182; Thein, 138 Wn.2d at 140.

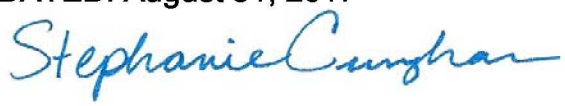
C. ISSUES RAISED BY CO-PETITIONER GERARDO HERNANDEZ

Due to space limitations imposed by RAP 13.4(f) and pursuant to RAP 10.1(g)(2) (allowing a party in a consolidated case to adopt by reference any part of the brief of another party), Camacho hereby adopts and incorporates the issues and arguments raised in co-Petitioner Hernandez's Petition for Review.

VI. CONCLUSION

For the reasons argued above, this Court should accept review and reverse Camacho's convictions.

DATED: August 31, 2017



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APPENDIX

Court of Appeals Opinion in State v Camacho, No. 45491-2-II

Filed
Washington State
Court of Appeals
Division Two

August 1, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAVIER ESPINOZA, Appellant.	No. 45491-2-II Consolidated with:
STATE OF WASHINGTON, Respondent, v. GUADALUPE CRUZ CAMACHO, Appellant	No. 45511-1-II
STATE OF WASHINGTON, Respondent, v. GERARDO RAFAEL HERNANDEZ, Appellant.	No. 45611-7-II
In re the Personal Restraint of JAVIER ESPINOZA, Petitioner.	No. 46486-1-II UNPUBLISHED OPINION

LEE, J. — Javier Espinoza, Gerardo Hernandez, and Guadalupe Cruz Camacho were tried together and now appeal their convictions for two counts of unlawful possession of a controlled

substance with intent to deliver, along with an aggravator and a sentencing enhancement for each of the convictions.

On appeal, all three argue that (1) there was no probable cause to issue a search warrant because dog sniffs are unreliable; (2) the dog sniff itself was a warrantless search; (3) their respective exceptional sentences must be reversed because (a) the aggravator for a major violation of the Uniform Controlled Substances Act was not charged in the amended information, (b) there is insufficient evidence to support applying that aggravator to each individual; and (c) defense counsel were ineffective in failing to argue that the major violation of the Uniform Controlled Substances Act aggravator did not apply; (4) their respective attorneys were ineffective in failing to argue that the two convictions constituted the same criminal conduct; and (5) the sentencing court erred in assigning legal financial obligations (LFOs) without first inquiring into each defendant's ability to pay.

Espinoza and Hernandez also argue (1) there was insufficient evidence to establish that they exercised dominion and control over the drugs, and (2) the trial court did not have authority to order forfeiture of their respective property. Additionally, Espinoza argues that he was denied his right to present a defense when the trial court denied his motion to sever his trial, and that there was insufficient evidence to establish the *corpus delicti*[1] of his possession of a controlled substance with intent to deliver.

[1] "'*Corpus delicti*' literally means 'body of the crime.'" *State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210 (1996).

In a separate personal restraint petition, Espinoza argues that (1) the sentencing court erred in failing to consider his convictions as part of the same criminal conduct, (2) the sentencing court erred in counting his out of state conviction without conducting a comparability test, (3) his out of state conviction washed out, (4) there was insufficient evidence to impose a school zone enhancement, and (5) the trial court abused its discretion in imposing an exceptional sentence.

We hold that the three appellants received ineffective assistance of counsel when their respective attorneys did not argue that the two convictions constituted the same criminal conduct for sentencing purposes. We also hold that the sentencing court erred when it imposed discretionary LFOs without inquiring into the ability to pay. Further, the sentencing court erred in ordering the forfeiture of the Espinoza's and Hernandez's property. Finally, if the State makes a request for appellate costs, a commissioner of this court will determine whether to award appellate costs under RAP 14.2. The remainder of the appellants' arguments on appeal fail. Accordingly, we affirm the appellants' convictions, reverse their sentences, and remand for resentencing consistent with this opinion.

FACTS

A. EVENTS PRIOR TO BEING CHARGED

1. Investigation

In May 2012, the Tacoma Police Department (TPD) was investigating Alfredo Flores for drug trafficking. As part of the TPD's investigation, they observed Flores spending a significant amount of time at an apartment complex located at 9621 10th Avenue East in Tacoma. On May

17, TPD officers arrested Flores during a traffic stop and, pursuant to his arrest, discovered several pounds of methamphetamine and heroin and more than $10,000 in cash.

The TPD was also investigating apartment 9 in the apartment complex located at 9621 10th Avenue East in Tacoma as a "narcotics stash house," based on information officers had received from an informant. Clerk's Papers (CP) (Espinoza) at 72.[2] Once Flores was arrested, the TPD began focusing its surveillance on the 9621 10th Avenue East complex.

2. Surveillance of Apartment Complex

On the evening of Flores's arrest, and during its surveillance of the apartment complex, TPD officers observed a Nissan with Oregon license plates, a white pickup truck with California license plates, and a Nissan with California license plates in the apartment complex's parking lot. The officers saw Cruz Camacho, who the informant had identified by name as a drug trafficker, working on a light blue Nissan and the white pickup truck. The officers also saw a group of three to five individuals of Hispanic ethnicity, coming and going, and carrying packages between apartment 9 and the vehicles. Two of the individuals matched the descriptions of Cruz Camacho and Hernandez.

Officer Henry Betts and his police dog, Barney, are a team with the TPD K-9 unit. Officer Betts and Barney arrived and began surveilling apartment 9 between 7:30 and 8:00 PM. About an

[2] Each appellant designated clerk's papers independently before the appeals were consolidated. As a result, each appellant's citations to the clerk's papers were unique to that appellant. The State cited to the clerk's papers without indication as to which set of clerk's papers it was referring. In this opinion, citations to clerk's papers include the name of the appellant whose clerk's papers the citation refers.

hour after arriving, Officer Betts and Barney began investigating some of the vehicles in the apartment complex's parking lot, with "Barney working the exterior of the vehicles." 4 Verbatim Report of Proceedings (VRP) at 28. While doing so, Barney gave "a sit response"[3] to "a [Nissan] Altima with California plates" at the trunk and passenger door. 4 VRP at 28, 30. As they were leaving the parking lot, Barney pulled towards a white pickup truck, "sniffed intently," and casted his head up.[4] 4 VRP at 30. Fearful of being seen, Officer Betts led Barney away from the parking lot.

At approximately 10:10 PM, a number of people exited apartment 9, got into the Nissan with Oregon license plates, the white pickup truck, and the Nissan with California license plates, and attempted to leave the parking lot. Law enforcement stopped all three vehicles in different locations before they left the parking lot.

Espinoza was driving the Nissan with California license plates. He was arrested after being stopped.

Cruz Camacho was driving the white pickup. Officer Betts and Barney went to the white pickup truck. Barney gave a sit response, alerting to the smell of drugs, upon sniffing the tailgate near the passenger side brake light. The tailgate had a panel secured to it by well-worked rivets with scratch marks at the edges that indicated the panel had been popped off several times. Cruz

[3] Barney's "sit response" signals the location where he has detected the source of drug odors he has been trained to recognize. 4 VRP at 24.

[4] Officer Betts defined "casting" as where the dog "lifts his nose up in the air very high and sniffs intensely and moves his head back and forth." 4 VRP at 30-31.

Camacho was arrested. At the time he was arrested, Cruz Camacho had the key to apartment 9 in his possession.

Hernandez was driving the Nissan with Oregon license plates. Hernandez and the other occupants were removed from the vehicle. Hernandez provided identification that identified him as Miguel Salto Aleman. When Officer Betts and Barney went to the Nissan with Oregon license plates, Barney jumped up at the driver's window, sniffed, and then immediately did a sit response. On the floorboard in the passenger compartment, was a grocery bag filled with U.S. currency that totaled $56,544.

Hernandez was arrested and secured in the back of a police car at the scene. While in the back seat, he volunteered to an officer, "No drugs; just money. No drugs; just money." 4 VRP at 74. In the Nissan with Oregon license plates, the police found several forms of identification that identified Hernandez by several other names.

3. Affidavit for Search Warrant

Officer Kenneth Smith then went back to the police station to apply for a search warrant for the three vehicles and apartment 9. The affidavit for the search warrant stated that an informant had identified apartment 9 as a "narcotics stash house" where the informant had seen large amounts of heroin and methamphetamine packaged for resale about six months before, and had identified Cruz Camacho and Hernandez[5] as the sources of the drugs that were previously seized in the arrest of Alfredo Flores. CP (Espinoza) at 72. The affidavit also stated that apartment 9 was under surveillance; Cruz Camacho and Hernandez used the apartment; the Nissan with California license

[5] At the time, the TPD knew Hernandez as a Miguel Salto Aleman.

plates, the white pickup truck, and the Nissan with Oregon license plates were parked in front of apartment 9 around 7:30 PM; and four to five Hispanic individuals, including two who matched the descriptions of Cruz Camacho and Hernandez, were observed moving packages that police believed to be drugs or money into the Nissan with California license plates. After police saw the people moving packages into the Nissan with California license plates, Barney alerted to the Nissan with California license plates and the white pickup truck in the parking lot. After, at about 10:10 PM, when people were attempting to leave in the three vehicles, each vehicle was stopped. Barney then alerted to the presence of drugs at each of the three vehicles. The affidavit noted that there was a "'trap' panel" with "suspicious rivets" on the white pickup truck and a plastic grocery bag "full of money individually wrapped" in one of the Nissans. CP (Espinoza) at 73.

The affidavit also described the experience and training of Officer Betts and Barney. Barney was trained to detect the odor of marijuana, crack cocaine, powder cocaine, heroin, and methamphetamine. Officer Betts and Barney were certified by the Washington State Criminal Justice Training Center and the Washington Police Canine Association in 2010; had recorded over "20 'Finds' (2012) year to date" which included marijuana, powder cocaine, crack cocaine, heroin and methamphetamine; and trained weekly with the Narcotics Detention Team. CP (Espinoza) at 76. Weekly training included training with vehicles, boats, trailers, parcels, storage areas, motels, and residences. Weekly training also included using varying quantities of drugs, using distracting and masking odors, using "controlled negative (blank) testing in which all objects or locations have no contraband/narcotics present," and teaching the dog to not alert to common items associated with controlled substances "such as plastic bags etc." CP (Espinoza) at 76.

Based on this affidavit, Officer Smith obtained search warrants for the three vehicles that were stopped and for apartment 9.

4. Execution of Search Warrant

Officer Betts and Barney responded to the apartment complex to help execute the search warrant on apartment 9. In the apartment, TPD officers found over 8,500 grams of heroin and over 2,300 grams of methamphetamine. In addition, the officers found a scale next to some of the methamphetamine, Saran wrap and plastic packaging commonly used to wrap drugs, and handwritten notes commonly kept in association with drug distribution. Identification materials for Cruz Camacho were also found in the apartment. ~~6 VRP at 45-46~~.

The three vehicles were impounded. Officer Betts and Barney assisted in searching the impounded Nissan with the California license plates that Espinoza had been driving. Barney went to the front passenger compartment, "pressed his nose against cellophane wrapped up currency and then jumped in the car and gave [Officer Betts] an immediate sit response." 4 VRP at 34. Barney is not trained to locate currency, but is trained to differentiate between currency that has, and has not, been around drugs. The currency wrapped in cellophane totaled $42,000. Also in the car, police discovered a car rental agreement for Espinoza.

5. In-custody Interviews

Detective Jason Catlett interviewed Hernandez and Cruz Camacho. Hernandez told Officer Catlett "that he was an ounce dealer and nothing more, that he only dealt in ounce amounts or smaller." 5 VRP at 28. Detective Catlett knew Hernandez by several names from previous contacts.

Special Agent Erin Jewell interviewed Espinoza. Espinoza told Agent Jewell that he was from California visiting a friend and that he had gone into apartment 9 but did not know the other guys. He said he came to Tacoma in a truck, and when asked what was in the truck, he responded, "'[W]hat do you think was in there?'" 5 VRP at 37.

B. PRE-TRIAL PROCEDURE

1. Charges

The State charged Espinoza, Hernandez, and Cruz Camacho each with two counts of possession of a controlled substance with intent to deliver—one count each for the methamphetamine and the heroin seized from apartment 9. The information charged each as accomplices and alleged a major violation of Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), aggravator.[6]

The State amended the information against each defendant, charging the same crimes—two counts of possession of a controlled substance with intent to deliver for the methamphetamine and heroin, respectively—but alleging a school bus route stop enhancement for being within 1,000 feet of school bus route stop. The amended information made no mention of the VUCSA aggravator alleged in the initial information.

2. Motion to Suppress

The defendants moved to suppress the physical evidence obtained with the search warrant, arguing that Barney's conduct constituted an unconstitutional search and that the results of the dog sniff should not have been considered as a basis to support the search warrant. The trial court

[6] RCW 9.94A.535(3)(e).

denied the motion to suppress. The trial court concluded that Officer Betts and Barney's certification, training, and experience made them sufficiently reliable for a judge to rely on in issuing a search warrant, and that the entirety of the facts and circumstances presented in the search warrant affidavit made it reasonable for the signing judge to believe that probable cause existed that drugs or proceeds from drug trafficking would be found in the locations where the searches were requested. The trial court also concluded that Barney's sniffing of the outside of the cars was not an intrusion into an individual's private affairs and, thus, not a search.

3. Motion to Sever

Espinoza moved to sever his case for trial. Espinoza submitted a declaration from Hernandez stating that Hernandez was willing to testify that he "purchased some real estate in Mexico from Mr. Espinoza's family," that "[o]n May 17, 2012, I met with Mr. Espinoza and paid him cash for that property," and that "[i]f Mr. Espinoza's case is severed from mine and proceeds after my own trial, I am willing to testify to these facts on behalf of Mr. Espinoza." CP (Espinoza) at 342. Also attached to Espinoza's motion was a Spanish document allegedly evidencing the sale.

Hernandez and Cruz Camacho objected to any continuances of the July 9 trial date and supported Espinoza's motion to sever if it avoided a continuance from the July 9 trial date. Hernandez added that he would not testify at his trial and consequently could not testify on Espinoza's behalf if the trials were joined. The court decided to not rule on the motion until July 9 because it was more appropriate for the assigned trial judge to make the ruling.

On July 9, the assigned trial judge denied the severance motion. The trial court reasoned that the defense had not exhausted the other means by which evidence of the alibi could be

produced, such as having Espinoza's mother or uncle, who were the family members listed on the alleged bill of sale, testify, and that the alleged real estate transaction did not appear credible. After speaking with Espinoza, Espinoza's counsel asked the trial court to reconsider based on Espinoza saying that his mother would be unable to testify because she was undergoing dialysis and lived in New Mexico and that his uncle had memory and mental health issues and lived in Mexico. The trial court denied the motion to reconsider, stating it did not regard Espinoza's statements as sufficient proof. The trial was continued until September.

Espinoza renewed the motion to sever at trial in September. The trial court again denied the motion.

C. TESTIMONY AT TRIAL

Officer Betts testified that Barney is trained to detect the odor of marijuana, powder cocaine, crack cocaine, heroin, and methamphetamines, but not to differentiate between the odors or the amount of the drug producing the odor. Officer Betts and Barney underwent a training and certification process before being allowed to become a team with the K-9 unit. Officer Betts had more than 200 hours of initial training before being paired with a dog. Officer Betts and Barney were certified as a team in early October 2010, and had worked together exclusively since that time.

To be certified, the team passed a testing process that put the handler and the dog in a controlled environment where neither knew where drugs were hidden, and the team had to find a certain number of the hidden drugs to pass the test. Barney is trained to signal to Officer Betts when he gets as close as he can to the source. Officer Betts is trained to identify Barney's signals.

Barney signals that he has detected the odor of drugs with a change in behavior, including becoming more excited and focused on a specific area, increasing tail wags, a tensing of muscles, breathing harder and louder, and sitting and staring at Officer Betts when he reaches the point closest to the source.

Where the dog signals the presence of drugs and there are no drugs there, that is called a "false response," and Officer Betts and Barney participate in training designed to minimize the number of false responses. 4 VRP at 25. The team trains with only actual drugs, they do not use other substances that are similar or produce similar scents. In the field, when a dog signals but no drugs are found, it is not considered a false response. The reason is that no one knows whether drugs were there at some point, whereas the presence or absence of drugs in a training or testing environment is known.

Detective Catlett testified about his experience as a member of the Drug Enforcement Agency Task Force in Tacoma. He described the hierarchy in the drug trafficking trade. Specifically, he testified that higher-level dealers transport the drugs from California in various ways, including secret compartments in cars. Also, higher-level dealers often store large quantities of drugs, pounds or kilograms, at homes of friends or family. They tend to sell to mid-level dealers, and the mid-level dealers supply drugs to "runner[s]," who supply the street-level drug dealers. 5 VRP at 13. Detective Catlett also testified that having multiple identifications with different names is indicative of a higher-level dealer. Street-level drug dealers will typically carry 25-28 grams of heroin or methamphetamine at a time, and one to two grams would be the typical amount carried for personal use.

Detective Catlett further testified about the street prices associated with heroin and methamphetamine. Typically, when large amounts of cash proceeds from drug sales are discovered, the cash is wrapped in plastic to avoid detection by police K-9 units. Detective Catlett opined that the volume of drugs and the manner in which the drugs were wrapped in this case was indicative of higher-level dealers who had recently transported the drugs and had not yet had the opportunity to transfer it to mid-level dealers.

Andrew Meyers is the transportation director for the Franklin Pierce School District. He testified that he met with Officer Smith at the apartment complex to show him where the Franklin Pierce school bus stop was and to measure the distance from apartment 9 to the Franklin Pierce school bus stop.

Officer Smith testified that apartment 9 was separated from the Franklin Pierce school bus stop by a sidewalk 3 to 4 feet wide, a parking spot 8 to 9 feet wide, a cement walkway approximately 9 steps long, and a driveway approximately 35 feet long. Officer Smith also testified that the distance from apartment 9 to the Franklin Pierce school bus stop identified by Meyers was significantly less than 1,000 feet.

Espinoza called Benito Cervantes, a private investigator, to testify. Cervantes testified that he obtained a legal real estate contract from a Mexican notary. Cervantes verified that the Mexican notary's name and license number existed in other articles and references that Cervantes had located. He further testified that the real estate contract listed Marcelino Mendoza Rodriguez as the seller and Gerardo Rafael Hernandez Sandoval as the buyer, the document appeared to have

been executed on November 13, 2011, and the document stated that the financial obligations of the contract were agreed to be completed within about six months.

D. CONVICTIONS AND SENTENCING

The State and the defendants stipulated to the jury instructions. The jury instructions included a to-convict instruction for each possession of a controlled substance with intent to deliver charge. The jury instructions also included an instruction explaining when an individual is legally accountable for the conduct of another as an accomplice. Also, the trial court gave instructions related to the special verdict forms for the VUCSA aggravator and the school bus route stop sentencing enhancement for each of the two counts.

The jury found each defendant guilty of two counts of possession of a controlled substance with intent to deliver—one count for the methamphetamine and the other count for the heroin. The jury also entered special verdict forms finding a school bus route stop enhancement violation with respect to each count, and that the VUCSA aggravator applied to each count.

At sentencing, Espinoza and Hernandez stipulated to their respective offender scores. Cruz Camacho stipulated to the imposition of an exceptional sentence above the standard range.

The trial court sentenced Espinoza and Cruz Camacho to 96 months in custody for each count, to be served concurrently, and 24 months for the school bus route stop enhancement. It sentenced Hernandez to 156 months for the underlying offenses, to be served concurrently, and 24 months for the school bus route stop enhancement. Without inquiring into the defendants' separate abilities to pay LFOs, the trial court ordered each defendant to pay $5,800 in LFOs. The trial court

also determined that the defendants' property was subject to forfeiture. The trial court then signed and entered orders of indigency for each defendant.

Espinoza, Hernandez, and Cruz Camacho each appeal. We consolidated their appeals for review.

ANALYSIS

A. JAVIER ESPINOZA

Espinoza argues: (1) the trial court denied his right to present a defense by denying his motion to sever his case, (2) the State provided insufficient evidence to establish he had dominion and control over the drugs and insufficient evidence to establish the *corpus delicti*, (3) the search warrant was not supported by probable cause because dog sniffs are unreliable, (4) the dog sniff constituted a warrantless search, (5) his counsel was ineffective in failing to argue that the two convictions constituted the same criminal conduct; and (6) the trial court erred in imposing LFOs without first inquiring into Espinoza's ability to pay.

Espinoza also adopts Hernandez's arguments that (1) the exceptional sentence must be reversed because (a) the VUCSA aggravator was not charged in the amended information, (b) there is insufficient evidence to support applying that aggravator to him; and (c) his counsel was ineffective in failing to make arguments (a) and (b) above; and (2) the trial court did not have authority to order forfeiture and seize Espinoza's property.

In a separate personal restraint petition, Espinoza argues: (1) the sentencing court erred in failing to consider that his convictions constituted the same criminal conduct, (2) the sentencing court erred in counting his out of state convictions without conducting a comparability test, (3) his

out of state conviction washed out, (4) there was insufficient evidence to impose a school zone enhancement, and (5) the trial court abused its discretion in imposing an exceptional sentence. We affirm Espinoza's convictions, reverse his sentence, and remand for resentencing.

1. Severance Motion

Espinoza argues that the trial court denied his right to present a defense by denying his motion to sever. Espinoza claims that his defense hinged on the jury believing that he was merely meeting with Hernandez to complete a real estate purchase, and that by refusing to sever his trial from Hernandez's, the trial court prevented Hernandez from testifying on behalf of Espinoza, thereby denying Espinoza the right to present his defense. We hold that the trial court did not abuse its discretion in denying Espinoza's motions to sever.

While Espinoza frames his argument as a constitutional violation, he actually challenges the trial court's order denying this motion to sever his trial. We review a trial court's decision on a severance motion for manifest abuse of discretion. *State v. Sublett*, 176 Wn.2d 58, 68-69, 292 P.3d 715 (2012). Separate trials are generally disfavored in Washington. *State v. Dent*, 123 Wn.2d 467, 484, 869 P.2d 392 (1994).

Under CrR 4.4(c), a trial court should sever trials when severance "is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant." CrR 4.4(c)(2)(i). "The defendant has the burden of demonstrating that a joint trial was so manifestly prejudicial as to outweigh the concern for judicial economy." *State v. Canedo–Astorga*, 79 Wn. App. 518, 527, 903 P.2d 500 (1995), *review denied*, 128 Wn.2d 1025 (1996). The defendant must demonstrate a specific prejudice to meet his burden. *Id.* Defendants may demonstrate specific prejudice through

> "(1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculpating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants."

Id. at 528 (quoting *United States v. Oglesby*, 764 F.2d 1273, 1276 (7th Cir.1985)).

Here, none of the instances enumerated in *Canedo–Astorga* exist. Espinoza's defense was not antagonistic to, nor did it conflict with, the defenses proffered by Hernandez and Cruz Camacho. The evidence presented was extensive, but not complex, and it was not of a character that would create difficulties for a jury in determining what evidence related to which defendant. Neither of Espinoza's co-defendants made statements that would inculpate Espinoza. And although the weight of the evidence against each defendant might not have been identical, there was not a "'gross disparity in the weight of the evidence against the defendants.'" *Id.* (quoting *Oglesby*, 764 F.2d at 1276). Accordingly, we hold that the trial court did not abuse its discretion in denying a motion to sever.

Espinoza alternatively argues that the law in Washington should be broadened. Specifically, Espinoza argues that severance to permit a co-defendant's testimony should be required under CrR 4.4 whenever the evidence would be exculpatory and it is demonstrated that the co-defendant will actually testify at a separate trial because the plain language of CrR 4.4(c)(2)(i) "focuses on fairness." Br. of Appellant (Espinoza) at 20. Espinoza acknowledges that the rule he advocates for is not the law in Washington. We decline Espinoza's invitation to broaden the severance rule.

As a second alternative, Espinoza argues we should adopt the analysis set forth in *United States v. Cobb*, 185 F.3d 1193, 1197 (11th Cir. 1999). *Cobb* provides a two-step and eight-prong analysis for motions to sever where a defendant argues for severance on the ground that it will permit the exculpatory testimony of a co-defendant. *Id.* But *Cobb* is factually distinguishable.

Cobb's co-defendant was the only person, other than Cobb himself, who could directly rebut the government's evidence against Cobb. *Id.* at 1198. Under the particular facts of the case, the court held that Cobb suffered significant prejudice to his ability to present his defense. *Id.* Importantly, the court noted that a co-defendant's offer to testify conditioned on having his trial held first does not satisfy the requirement that he "would indeed have testified at a separate trial." *Id.* Because Cobb's co-defendant did not condition his testimony on his own case being tried first, and the other factors weighed in favor of, "or at least did not weigh against," severance, the *Cobb* court held that the Florida district court abused its discretion in refusing to sever the trial. *Id.* at 1199.

Here, even if we were to adopt the federal law applied in *Cobb*, Espinoza's argument would still fail. Hernandez explicitly conditioned his testimony on his own case being tried before Espinoza's. Hernandez's declaration stated, "If Mr. Espinoza's case is severed from mine *and proceeds after my own trial*, I am willing to testify." CP (Espinoza) at 342 (emphasis added). Therefore, even if we were to adopt the analysis set forth in *Cobb*, Espinoza's claim would fail.

Espinoza fails to demonstrate specific prejudice and his alternative arguments fail. Therefore, we hold that the trial court did not abuse its discretion in denying Espinoza's motion to sever.

2. Sufficiency of the Evidence

a. Dominion and control

Espinoza argues that the State presented insufficient evidence to establish that he had constructive possession of the drugs. We hold that, when viewed in the light most favorable to the State, a rational fact finder could conclude that Espinoza had dominion and control over the heroin and methamphetamine.

When evaluating the sufficiency of evidence for a conviction, the test is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). In challenging the sufficiency of the evidence, the defendant necessarily admits the truth of the State's evidence. *Id.* at 106. All reasonable inferences drawn from the evidence is viewed in a light most favorable to the State and most strongly against the defendant. *Id.* We also defer to the trier of fact's resolution of conflicting testimony and evaluation of the persuasiveness of the evidence. *Id.*

Constructive possession is established where the defendant has "dominion and control" over the drugs. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). "Dominion and control means that the object may be reduced to actual possession immediately." *Id.*

The trial court instructed the jury on constructive possession as follows:

> Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.
>
> In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors

> that you may consider, among others, include whether the defendant had the ability to take actual possession of the substance, whether the defendant had the capacity to exclude others from possession of the substance, and whether the defendant had dominion and control over the premises where the substance was located. No single one of these factors necessarily controls your decision.

CP (Espinoza) at 470 (Jury Instruction 16). Espinoza did not object to this instruction, and therefore, it is the law of the case. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998); *State v Johnson*, No. 93453-3, slip op. at 25 (Wash. Jul. 13, 2017), http://www.courts.wa.gov/opinions/pdf/934533.pdf (affirming the "law of the case" doctrine as described in *Hickman*, 135 Wn.2d at 102, remains good law in Washington). Looking at the relevant circumstances in the light most favorable to the State, the evidence presented at trial was sufficient for a rational trier of fact to find that Espinoza exercised dominion and control over the heroin and methamphetamine. Over 8,500 grams of heroin and over 2,300 grams of methamphetamine were found throughout apartment 9. Espinoza admitted to being in the apartment. The TPD officers observed the Nissan with California license plates in the parking lot of the apartment complex for several hours before Espinoza got in and was subsequently stopped. During their surveillance, the officers observed a group of three to five Hispanic individuals carrying packages they believed were drugs or money to and from apartment 9 and the Nissan with California license plates. After that, Barney gave a sit response to the Nissan with California license plates, indicating he sensed the presence of drugs in the vehicle. A while later, Espinoza left apartment 9 and entered the Nissan with California plates. The officers stopped the vehicle. After the officers stopped the vehicle, Barney gave a sit response to the $42,000 wrapped in

cellophane found during a search of the vehicle. Also, police discovered Espinoza's car rental agreement for the Nissan with the California license plates.

Given this evidence, a rational trier of fact could find that Espinoza was at apartment 9 for at least the few hours that TPD observed his rented Nissan with California license plates in the parking lot; during that time, his co-defendants helped move drugs or money to and from apartment 9 and the Nissan with California license plates; Espinoza was stopped while driving the Nissan with California license plates and a large amount of money was found in the vehicle; and Barney sensed the presence of drugs in the vehicle. Thus, a rational trier of fact could find beyond a reasonable doubt that Espinoza had dominion and control over the drugs found in apartment 9. We hold that sufficient evidence supports the jury's verdict that Espinoza exerted dominion and control over the heroin and methamphetamine that was found in apartment 9.

b. *Corpus Delicti*

Espinoza argues that aside from his admission to the police that he had been in apartment 9, the State failed to present any evidence that he had been in the apartment; therefore, the State had failed to prove the *corpus delicti* of his possession charges. We disagree.[7]

Espinoza argues that without his admission to the police that he had been in apartment 9, the State could not sustain a conviction for possession of a controlled substance because there was no independent evidence that he possessed the drugs. However, proof of identity of the person

[7] Espinoza argues in the alternative that if his *corpus delicti* argument was not preserved for appeal, then his counsel provided ineffective assistance for failing to preserve the argument. Because we hold that Espinoza's *corpus delicti* argument fails, his argument for ineffective assistance of counsel also fails.

who committed the crime of possession of a controlled substance is not an element of the *corpus delicti*. *State v. Solomon*, 73 Wn. App. 724, 728, 870 P.2d 1019, *review denied*, 124 Wn.2d 1028 (1994). Instead, the State's burden in satisfying the *corpus delicti* in this type of case is only to show that *someone* possessed the controlled substance. *Id.* As the *Solomon* court stated:

> A defendant may satisfy a jury at trial that the drugs did not belong to him, but that issue is separate from the initial question of whether the body of the crime has been established. Thus, contrary to Solomon's contention, the State did not need to present independent proof that Solomon, in particular, possessed the cocaine.

Id. at 728–29 (footnote omitted).

The State in this case satisfied the *corpus delicti* requirement by presenting evidence that large amounts of heroin and methamphetamine were discovered in apartment 9. The State also presented evidence that four or five individuals of Hispanic ethnicity had gone back and forth between the vehicles and apartment 9, then they left apartment 9 and got into separate vehicles, the vehicles were stopped by police, and Espinoza was in one of the stopped vehicles. From that evidence, it is logical to deduce that someone who was in apartment 9 possessed the drugs. Therefore, we hold that Espinoza's *corpus delicti* argument fails.

3. Probable Cause to Issue Warrant

Espinoza argues that there was insufficient probable cause to support the issuance of the search warrant because Barney's alerts at the cars did not provide the "reasonably trustworthy" information necessary to establish the probable cause. Br. of Appellant (Espinoza) at 29. We disagree.

a. Standard of review

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, a search warrant must be based on probable cause. "Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). There must be a "nexus between criminal activity and the item to be seized and between that item and the place to be searched." *State v. Neth*, 165 Wn.2d 177, 183, 196 P.3d 658 (2008). "Probable cause requires more than suspicion or conjecture, but it does not require certainty." *State v. Chenoweth*, 160 Wn.2d 454, 476, 158 P.3d 595 (2007).

We generally review the issuance of a search warrant for an abuse of discretion, giving great deference to the issuing judge or magistrate. *Neth*, 165 Wn.2d at 182. Although great deference is given to the judge or magistrate, we review the probable cause determination de novo. *Id.* We consider only the information within the four corners of the supporting affidavit. *Id.* All doubts are resolved in favor of the warrant's validity. *Chenoweth*, 160 Wn.2d at 477.

b. Probable cause

Espinoza argues that dog sniffs are not sufficiently trustworthy to constitute probable cause sufficient to support a search warrant. We hold that the affidavit for search warrant set forth probable cause to search Espinoza's rental car.

"Generally, an 'alert' by a trained drug dog is sufficient to establish probable cause for the presence of a controlled substance." *State v. Jackson*, 82 Wn. App. 594, 606, 918 P.2d 945 (1996),

review denied, 131 Wn.2d 1006 (1997). In *State v. Flores–Moreno*, 72 Wn. App. 733, 741, 866 P.2d 648, *review denied*, 124 Wn.2d 1009 (1994), we determined that an affidavit similar to the one in this case was sufficient to establish probable cause. In *Flores-Moreno*, the affidavit stated that the drug dog had received 525 hours of training, had been certified by the Washington State Police Canine Association for narcotics detection, and had participated in 97 searches where narcotics were found. *Id.*

Here, the affidavit stated that Barney alerted to Espinoza's rental car when it was in the parking lot outside of apartment 9. The affidavit also stated that Barney was trained to detect the odor of marijuana, crack cocaine, powder cocaine, heroin, and methamphetamine. The affidavit further stated that Officer Betts and Barney were certified by the Washington State Criminal Justice Training Center in October 2010; were certified by the Washington Police Canine Association in December 2010; had recorded over 20 "'Finds'" that year that included finds of all five types of drugs that they were trained to find; and trained weekly with the Narcotics Detention Team. CP (Espinoza) at 76. The affidavit explained that the weekly testing includes training with vehicles, boats, trailers, parcels, storage areas, motels, and residences; with varying quantities of drugs; using distracting and masking odors; using "controlled negative (blank) testing"; and using "[e]xtinction training." CP (Espinoza) at 76.

Pursuant to *Jackson*, 82 Wn. App. at 606, and *Flores-Moreno*, 72 Wn. App. at 741, we hold that Barney's alert and the information provided about his training and experience with Officer Betts was sufficient to establish probable cause. Therefore, the issuing judge did not abuse his discretion in signing the search warrant.

Furthermore, the remainder of the affidavit, even without the dog sniff information, independently supports probable cause. The affidavit for the search warrant stated that a reliable informant identified apartment 9 in the apartment complex as a "narcotics stash house," where large amounts of heroin and methamphetamine had been seen, and where suspected drug traffickers Cruz Camacho and Hernandez were known to frequent. CP (Espinoza) at 72. The affidavit stated that the Nissan with California license plates, the white pickup truck, and the Nissan with Oregon license plates were parked in front of apartment 9 from 7:30 PM until 10:10 PM, when all three vehicles left at the same time. Before the three vehicles left, four to five Hispanic individuals moved suspected drugs or money into the Nissan with California license plates. Finally, TPD saw a panel on the tailgate of the white pickup truck that they believed was a "trap" compartment, and TPD saw a grocery bag full of money in one of the Nissans. CP (Espinoza) at 73. Based on the entirety of the information contained in the affidavit for the search warrant, we hold that the issuing judge did not abuse his discretion in signing the search warrant for Espinoza's rental car.

4. Dog Sniff as a Warrantless Search

Espinoza argues that Barney's sniff of his rental car in the parking lot outside of the apartment complex constituted a warrantless search. We hold Barney's sniff of Espinoza's rental car in the parking lot was not unlawful.

Article I, section 7 of the Washington State Constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision

serves to protect against warrantless searches. Article, I, section 7 is not implicated if there is no search. *State v. Hartzell*, 156 Wn. App. 918, 928-29, 237 P.3d 928 (2010).

"To determine if there was a search, the court asks whether the State unreasonably intruded into a person's 'private affairs. '" *Id.* at 929 (quoting *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994)). If there was an unreasonable intrusion, then either a warrant or a warrant exception is required to make the search valid. *Id.* In general, there is no search when a law enforcement officer is able to detect something "using one or more of his senses from a nonintrusive vantage point." *Id.*

Whether a dog sniff is a search under article I, section 7 depends on the circumstances of the sniff itself. *State v. Boyce*, 44 Wn. App. 724, 729, 723 P.2d 28 (1986); *State v. Wolohan*, 23 Wn. App. 813, 820, 598 P.2d 421 (1979), *review denied*, 93 Wn.2d 1008 (1980); *State v. Stanphill*, 53 Wn. App. 623, 630, 769 P.2d 861 (1989); *Hartzell*, 156 Wn. App. at 929. As such, each case requires "an inquiry into the 'nature of the intrusion into the defendant's private affairs that is occasioned by the canine sniff.'" *Stanphill*, 53 Wn. App. at 630 (quoting *Boyce*, 44 Wn. App. at 729-30).

Generally, a dog sniff of an object—in contrast to a dog sniff of a person or the effects on that person—is not an unreasonable intrusion into a person's private affairs. *Boyce*, 44 Wn. App. at 730, 730 n.4. Similarly, a dog sniff of a place where the defendant does not have a reasonable expectation of privacy does not constitute a search. *Id.* at 729.

In *Boyce*, the dog sniffed a bank safe deposit box. *Id.* at 730. The dog handler had permission to be in the area, the defendant could not control who was there, and there was no

seizure of the safety deposit box. *Id.* The court found it was not a search. *Id.* Similarly, in *Wolohan*, the court held that a dog sniff of a sealed package in a baggage area was not a search because the defendant did not have a reasonable expectation of privacy in the odor emanating from the package and that the dog sniff took place a semi-public area. 23 Wn. App. at 820. And in *Stanphill*, the court concluded a dog sniff was not a search when the dog sniffed the outside of a package at a post office that officers had reasonable suspicion to believe contained drugs. 53 Wn. App. at 630. Finally, in *Hartzell*, the court concluded that a dog sniff of air through the open window of a parked car did not constitute a search because there is no reasonable expectation of privacy for the air coming from the open window and the dog was at a lawful vantage point outside the vehicle. 156 Wn. App. at 929-30. *Cf. State v. Dearman*, 92 Wn. App. 630, 637, 962 P.2d 850 (1998) (holding that under article I, section 7, a dog sniff of the front door of a private dwelling was so intrusive that it was an illegal search absent a warrant), *review denied*, 137 Wn.2d 1032 (1999).

Here, Barney sniffed the outside of Espinoza's rental car in the parking lot of the apartment complex. Thus, unlike in *Dearman*, the dog sniff occurred in a parking lot, not at the door into a private dwelling. *Id.* And just as in *Hartzell* and *Wolohan*, Espinoza does not have a reasonable expectation of privacy in the odors that emanate from the car when Barney sniffed from a lawful vantage point in the parking lot. 156 Wn. App. at 929-30; 23 Wn. App. at 820. Barney's sniff was conducted from a lawful vantage point and was only minimally intrusive. *Hartzell*, 156 Wn. App. at 929-30. Therefore, we hold that Barney's sniff of Espinoza's rental car in the parking lot was not a search.

5. Ineffective Assistance of Counsel: Same Criminal Conduct

Espinoza argues that his two convictions for possession of a controlled substance with intent to distribute should have been considered the same criminal conduct for sentencing purposes, and that he received ineffective assistance of counsel because his attorney did not bring that issue to the sentencing court's attention. The State concedes that the two convictions should have been considered the same criminal conduct and that remand and resentencing is necessary. We accept the State's concession, reverse Espinoza's sentence, and remand for resentencing.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution grants criminal defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685–86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). To show prejudice, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 337.

When a defendant is convicted of multiple crimes, each conviction is treated like a prior conviction for purposes of calculating the defendant's offender score unless the crimes constitute the same criminal conduct. RCW 9.94A.589(l)(a). A sentencing court must find that two or more

crimes constitute the same criminal conduct if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.* "'If any one element is missing, multiple offenses cannot be said to encompass the same criminal conduct, and they must be counted separately in calculating the offender score.'" *State v. Garza–Villarreal*, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993) (quoting *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992)).

"[W]hen a person possesses two drugs with the intent to deliver, the defendant still has a single mental state." *State v. Vike*, 125 Wn.2d 407, 412, 885 P.2d 824 (1994). In *Garza–Villarreal*, 123 Wn.2d at 44, the State charged the defendant with possession of two substances—heroin and cocaine—with intent to deliver. The defendant had not yet delivered either drug, but because the defendant intended to deliver both drugs in the future, he had the same objective criminal intent for both. *Id. at* 49.

Similarly here, Espinoza was charged with possession of two substances—methamphetamine and heroin—with intent to deliver. Espinoza had not yet delivered either drug, but under *Garza–Villarreal*, 123 Wn.2d at 49, his possession of those two drugs with intent to deliver constituted a single mental state. *See also Vike*, 125 Wn.2d at 412 (holding the same).

Where an offender score is miscalculated, remand is necessary unless the record makes clear that the court would have imposed the same sentence. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). Here, as Espinoza argues, and the State concedes, it is not clear from the record that the sentencing court would have imposed the same sentence had it applied the correct offender score. Thus, we hold that Espinoza has demonstrated that his attorney provided ineffective assistance. Accordingly, we reverse Espinoza's sentence and remand for resentencing.

6. Inquiry into Ability to Pay LFOs

Espinoza argues that the sentencing court erred in ordering him to pay $5,800 in LFOs without first inquiring into his ability to pay.[8] Because we remand Espinoza's case for resentencing, we do not address this issue. On remand, the sentencing court shall inquire into Espinoza's current and future ability to pay before imposing any discretionary LFOs. *See State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015).

7. Major Violation of the Uniform Controlled Substances Act (VUCSA) Aggravator

Espinoza adopts by reference Hernandez's arguments that the exceptional sentence must be reversed. Order Granting Espinoza's Mot. to Adopt (Nov. 30, 2015), *see* court spindle. Specifically, he argues that (a) the amended information did not charge the VUCSA aggravator, (b) insufficient evidence exists to support the VUCSA aggravator, and (c) defense counsel provided ineffective assistance by failing to argue that the VUCSA aggravator did not apply. We address this issue with respect to all three defendants because the issue may arise at resentencing.

a. The VUCSA aggravator was not charged in the amended information

The defendants argue that they cannot be sentenced to exceptional sentences based on the VUCSA aggravator because that aggravator was not charged in the amended information. We disagree.

[8] The trial court ordered Espinoza and Cruz Camacho to pay the following LFOs: $500 for the Crime Victim Assessment, $100 for the DNA database fee, $2,500 for court-appointed attorney and defense costs, $200 for the criminal filing fee, and a $2,500 fine. The trial court ordered Hernandez to pay the following LFOs: $500 for the Crime Victim Assessment, $100 for the DNA database fee, $200 for the criminal filing fee, and a $5,000 fine.

In *State v. Siers*, 174 Wn.2d 269, 276-77, 274 P.3d 358 (2012), our Supreme Court held that a defendant's rights under article I, section 22 of the Washington Constitution, the Sixth Amendment to the United States Constitution, and due process are not violated where the charging information does not allege an aggravating circumstance, "so long as [the] defendant receives constitutionally adequate notice of the essential elements of [the] charge." To receive constitutionally adequate notice of an aggravating circumstance, the court held that the defendant need only "receive notice prior to the proceeding in which the State seeks to prove those circumstances to a jury." *Id.* at 277. Because the State had notified Siers prior to trial of its intent to rely on the same aggravating circumstance that the trial court actually submitted to the jury, the *Siers* court held that an aggravator did not need to be included in the charging information for it to be applied to a defendant. *Id.* at 272-73, 276-77.

Thus, we reject the defendants' argument that the VUCSA aggravator must be dismissed simply because the State did not include it in the amended information. However, the question remains whether the defendants had sufficient notice that the State would seek an exceptional sentence based on the VUCSA aggravator when the State failed to include that aggravator in the amended information.

Here, the record shows that the defendants did have notice that the State would be seeking an exceptional sentence based on the VUCSA aggravator before the jury instructions were given. First, after the defendants' amended information was presented and filed, but before trial, the State told the trial court and defendants during arguments on motions in limine that

> in the jury instructions that I proposed in regard to the aggravator, one of the things that I have to prove is that for this to be a major violation of the Controlled

> Substances Act, I have to prove that this case is more onerous than the typical offense, so I will be drawing some distinctions between a typical drug offense and this offense . . . I did provide copies of the instructions, but I'm not sure if Defense Counsel has read that or had any experience with that particular aggravator before.

2 VRP at 22-23. After a response to that point from Espinoza's defense counsel, the State again directed everyone's attention to its proposed instruction on the VUCSA aggravator, stating:

> [T]urning again to my Proposed Instruction No. 23, as a major violation of one of the factors the jury can consider is whether the offense involved a high degree of sophistication or planning, occurred over a lengthy period of time or involved a large geographic area of distribution. . . .
>
> . . . .
>
> . . . There are five different factors that the instruction points out for the jury. I intend to focus on three of them, one of which would include involving a broad geographic area of distribution, specifically because in this case, Mr. Espinoza drove a car, a rented car, from California.

2 VRP at 24-25. The trial court ruled, in part, that the State could argue "that there was a car rented in California and it was driven up here, if you can prove it, by Mr. Espinoza, and that will get you your geographic area." 2 VRP at 25.

Second, the defendants received the State's proposed instructions before trial, and, on the day before the State rested, each defendant told the trial court that it would not be offering any additional instructions. And none of the defendants took exception to the jury instructions, which included instructions on the VUCSA aggravator.

The defendants had notice and knew of the State's intent to prove the application of the VUCSA aggravator. Accordingly, their argument regarding the VUCSA aggravator not being included in the amended information fails.

b. Application of the VUCSA aggravator to accomplices

The defendants argue that sufficient evidence does not support the application of the VUCSA aggravator to their convictions because they were convicted as accomplices. We disagree.

RCW 9.94A.535(3), which includes the VUCSA aggravator at issue here,[9] does not contain the "express triggering language" that extends its application to convictions based on accomplice

[9] RCW 9.94A.535(3)(e) defines the VUCSA aggravator at issue here as:

> The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:
>
> (i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;
>
> (ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;
>
> (iii) The current offense involved the manufacture of controlled substances for use by other parties;
>
> (iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;
>
> (v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or
>
> (vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

liability. *State v. Hayes*, 182 Wn.2d 556, 563, 342 P.3d 1144 (2015). Therefore, the VUCSA aggravator does not automatically apply to convictions based on accomplice liability.

However, a court may impose an exceptional sentence for an aggravating factor based on the defendant's own conduct. *Id.* at 564. Therefore, if the accomplice's own conduct or knowledge of the principle's conduct provides the basis for the aggravating factor, the VUCSA aggravating factor can be applied to an accomplice. *Id.* at 566.

In *State v. Weller*, 185 Wn. App. 913, 917, 344 P.3d 695 (2015), *review denied*, 183 Wn.2d 1010 (2015), the Wellers were convicted of multiple offenses. For those offenses, a jury answered "yes" to the question, "'Did the defendant's conduct during the commission of the crime manifest deliberate cruelty to the victim?'" *Id.* at 921 (quoting the record). The *Weller* court concluded the exceptional sentence was justified because the jury expressly found that each of the Wellers's own conduct, and not the Wellers's joint conduct, supported the exceptional sentence. *Id.* at 928.

Consistent with *Weller*, the jury here specifically found the VUCSA aggravator applied to each defendant individually and independently. The trial court instructed the jury that "[a] major trafficking violation of the Uniform Controlled Substances Act is one which is more onerous than the typical offense." CP (Hernandez) at 187; CP (Espinoza) at 478; CP (Cruz Camacho) at 90. The trial court also instructed the jury that if "the circumstances of the offense revealed that *the defendant* occupied a high position in the drug distribution hierarchy," then the offense may be a major trafficking violation. CP (Hernandez) at 187 (emphasis added); CP (Espinoza) at 478 (emphasis added); CP (Cruz Camacho) at 90 (emphasis added).

And the record here supports the jury's application of the VUCSA aggravator to each defendant. Detective Officer Catlett testified that higher-level drug dealers often transport drugs in multiple pounds or kilogram quantities from California and store them in homes rented by friends or family before selling the drugs to "runner[s]," who supply the street-level dealers. 5 VRP at 13. He also testified that higher-level drug dealers often have multiple identifications with different names and that higher-level drug dealers often transport drugs in secret compartments in vehicles. With respect to each of the three defendants, Detective Catlett testified that the volume of drugs found in apartment 9 and manner in which the drugs and money were packaged, indicated that the higher-level dealers still possessed the drugs and money at the time the evidence was seized.

Also, Hernandez admitted to Detective Catlett that he was an "ounce dealer," and was known to Officer Catlett by several names based on previous contacts. 5 VRP at 28. Espinoza told Agent Jewell he was from California visiting friends in apartment 9 and came to Tacoma in a truck. And Cruz Camacho and Hernandez were seen by police going between apartment 9 and the Nissan with California license plates, moving packages the police believed to be drugs or money.

In addition, each defendant had an individualized special verdict form in which each defendant's name was the only name included in the caption. Under the caption on each defendant's individualized special verdict form, the text identified that individual defendant in the singular. *See, e.g.*, CP (Espinoza) at 498 (stating on the special verdict form captioned for Espinoza independently, "having found the *defendant* guilty of unlawful possession of a controlled substance with the intent to deliver") (emphasis added); CP (Hernandez) at 206 (stating the same

on the special verdict form captioned for Hernandez independently); CP (Cruz Camacho) at 109 (stating the same on the special verdict form caption for Cruz Camacho independently). Each individualized special verdict form, had "yes" handwritten as the answer to the special verdict question and was signed and dated by the presiding juror. CP (Espinoza) at 498; CP (Hernandez) at 206; CP (Cruz Camacho) at 109.

Thus, the individual defendant's own conduct provided the basis for jury finding the VUCSA aggravator applied to each defendant. Therefore, we hold that the VUCSA aggravator applied to each defendant.

c. Ineffective assistance of counsel

Espinoza, Hernandez, and Cruz Camacho argue that their attorneys' respective failures to object to the application of the VUCSA aggravator at sentencing constituted ineffective assistance. We disagree.

As discussed in Section A.5., *supra*, to establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. *McFarland*, 127 Wn.2d at 334-35. Here, as explained in Section A.7.b., *supra*, the VUCSA aggravators applied to each defendant based on their own individual conduct. Therefore, we hold that each defendant's respective trial counsel was not deficient for failing to argue the inapplicability of the VUCSA aggravators to the defendants as accomplices.

8. Authority to Order the Forfeiture of Property

Espinoza adopts by reference Hernandez's argument that the sentencing court erred in ordering the forfeiture of property. Order Granting Espinoza's Mot. to Adopt (Nov. 30, 2015), s*ee*

court spindle. Specifically, he argues that the sentencing court did not cite to any statutory authority when it ordered the forfeiture, nor do any of the forfeiture statutes authorizing the action the sentencing court took. We hold that the sentencing court erred in ordering the forfeiture of Espinoza's property.

Sentencing courts do no not have inherent power to order property forfeitures in connection with a criminal conviction. *State v. Alaway*, 64 Wn. App. 796, 801, 828 P.2d 591, *review denied*, 119 Wn.2d 1016 (1992). The authority to order property forfeitures in connection with a criminal conviction is purely statutory. *State v. Roberts*, 185 Wn. App. 94, 96, 339 P.3d 995 (2014). "We review de novo whether the trial court had statutory authority to impose a sentencing condition." *Id.*

In *Roberts*, we considered an appeal from a sentencing court's order of forfeiture where the sentencing court ordered forfeiture of "'any items seized by law enforcement.'" *Id.* (quoting the record). The court reversed the forfeiture provision in the defendant's judgment and sentence because the State failed to provide statutory authority for the forfeiture and the sentencing court lacked statutory authority to order the forfeiture. *Id.* at 97. The court held that State has the burden to prove that the sentencing court had statutory authority to include a forfeiture provision in the defendant's judgment and sentence. *Id.* Therefore, it is the State's burden to produce a record that factually supports its claim.

Here, the State did not cite any authority for the sentencing court to order the forfeiture. And the sentencing court failed to cite any statutory authority for ordering the forfeiture.

Therefore, we strike the forfeiture order and remand to the sentencing court to determine whether there is statutory authority to order forfeiture.

9. Personal Restraint Petition

In a separate personal restraint petition, Espinoza argues: (1) the sentencing court erred in failing to consider his convictions as part of the same criminal conduct, (2) the sentencing court erred in counting his out of state conviction without conducting a comparability test, (3) his out of state conviction washed out, (4) there was insufficient evidence to impose a school zone enhancement, and (5) the trial court abused its discretion in imposing an exceptional sentence. We disagree.[10]

a. Legal Principles

"When considering a timely personal restraint petition, courts may grant relief to a petitioner only if the petitioner is under an 'unlawful restraint,' as defined by RAP 16.4(c)." *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 16, 296 P.3d 872 (2013) (quoting RAP 16.4(a)). The collateral relief afforded under a personal restraint petition is limited and requires the petitioner to show prejudice by the alleged error of the trial court. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 819, 650 P.2d 1103 (1982). There is no presumption of prejudice on collateral review. *Id.* at 823. The petition does not serve as a substitute for appeal; nor can the petition renew an issue that was raised and rejected on appeal, unless the interests of justice so require. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 671, 101 P.3d 1 (2004).

[10] Because we reverse Espinoza's sentence and remand for resentencing, we do not address his issues relating to sentencing.

The petitioner must make a prima facie showing of either a constitutional error that, more likely than not, constitutes actual and substantial prejudice, or a nonconstitutional error that inherently constitutes a complete miscarriage of justice. *In re Pers. Restraint of Stockwell*, 161 Wn. App. 329, 334, 254 P.3d 899 (2011), *aff'd*, 179 Wn.2d 588, 316 P.3d 1007 (2014); *Hagler*, 97 Wn.2d at 826; *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 810, 812, 792 P.2d 506 (1990). Without either such showing, this court must dismiss the petition. *Cook*, 114 Wn.2d at 810, 812; *see also In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). However, when the petitioner has not had a previous opportunity to obtain judicial review, such as on claim for ineffective assistance of appellate counsel, this heightened standard does not apply. *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 132, 267 P.3d 324 (2011).

The petitioner's allegations of prejudice must present specific evidentiary support. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992). Such support may come in a variety of evidentiary forms, but it must be competent and admissible and establish a factual basis for the allegations. *Id.* Bald assertions and conclusory allegations are not sufficient. *Id.* If a petitioner makes a prima facie showing of actual and substantial prejudice, but the merits of his assertions cannot be determined on the record before us, we will remand for a hearing pursuant to RAP 16.11(a) and RAP 16.12. *Hews*, 99 Wn.2d at 88.

b. Sufficient evidence to impose a school bus route enhancement

Espinoza contends there was insufficient evidence presented for the jury to find he was subject to the school bus route enhancement. We disagree.

We review a jury's verdict on a sentencing enhancement for substantial evidence just as we do when evaluating the sufficiency of the evidence supporting the necessary elements of a crime. *State v. Yarbrough*, 151 Wn. App. 66, 96, 210 P.3d 1029 (2009). Accordingly, on review, we consider whether, when viewing the evidence in the light most favorable to the State, a rational trier of fact could find the elements of the enhancement beyond a reasonable doubt. *Id.*

The jury found by special verdict that Espinoza had "possess[ed] a controlled substance within one thousand feet of a school bus route stop designated by a school district with intent to deliver the controlled substance at any location," in violation of former RCW 69.50.435(1). CP (Espinoza) at 496 (Count I), 497 (Count II). Former RCW 69.50.435(1) stated,

> Any person who violates RCW 69.50.401 . . . :
>
> . . .
>
> (c) Within one thousand feet of a school bus route stop designated by the school district
>
> . . .
>
> (j)(i) . . . may be punished . . . by imprisonment of up to twice the imprisonment otherwise authorized by this chapter, but not including twice the imprisonment authorized by RCW 69.50.406.

LAWS OF 2003, ch. 53, § 346.

The first element of the enhancement requires that a person violate RCW 69.50.401. Former RCW 69.50.435(1). This element is satisfied here as there was sufficient evidence presented at trial to convict Espinoza of possession of a controlled substance with intent to distribute in violation of RCW 69.50.401. Section A.2, *supra*.

The second element of the enhancement requires that the violation of RCW 69.50.401 occur within one thousand feet of a school bus route stop designated by a school bus district. Former RCW 69.50.435(1). At trial, the Franklin Pierce School District transportation director testified that there was a school bus stop for the school district located at 9621 10th Avenue East at the time of the arrest. He testified that the school bus stop is directly in front of the apartment complex and that he accompanied Officer Smith to the location of the school bus stop when Officer Smith measured the distance. Officer Smith testified that he met with the school district transportation director, who directed him to the location of the school bus stop in front of the apartment complex. Officer Smith also testified that between the door to apartment 9 in the apartment complex and the school bus stop identified by the school district transportation director, there was a breezeway to the apartment door approximately 9 walking steps long, a lane of travel in the parking lot approximately 35 feet wide, a parking stall approximately 8-9 feet long, and then a curb approximately 3-4 feet wide. The distance was "significantly" less than 1,000 feet from the door of the apartment to the school bus stop. 7 VRP at 22.

Based on the foregoing testimony, we hold there was sufficient evidence presented for a rational trier of fact to find that the elements of the school bus route stop enhancement were established beyond a reasonable doubt. Accordingly, we hold Espinoza's challenge to the sufficiency of the evidence for the school bus route stop enhancement fails. Thus, we deny his petition.

B. GERARDO HERNANDEZ

Hernandez argues that (1) his exceptional sentence must be reversed because (a) the VUCSA aggravator was not charged in the amended information, (b) there was insufficient evidence to support applying that aggravator to Hernandez, and (c) his counsel was deficient in failing to make the two arguments above, (2) his counsel was deficient in failing to argue that Hernandez's convictions consisted of the same criminal conduct, (3) the State provided insufficient evidence to establish he had dominion and control over the drugs, (4) there was no probable cause to issue a search warrant because dog sniffs are unreliable,[11] (5) the dog sniff was a warrantless search,[12] (6) the trial court did not have authority to order forfeiture and seize Hernandez's property, and (7) the sentencing court erred in assigning LFOs without first inquiring into Hernandez's ability to pay.

We hold that Hernandez received ineffective assistance of counsel because his two convictions constituted the same criminal conduct, the sentencing court erred in ordering the forfeiture of Hernandez's property, the sentencing court erred in failing to consider Hernandez's ability to pay discretionary LFOs, and the remainder of Hernandez's claims fail. Accordingly, we affirm Hernandez's convictions, reverse his sentence, and remand for resentencing.

[11] For this assignment of error, Hernandez adopts the related arguments made by Espinoza and Cruz-Camacho.

[12] For this assignment of error, Hernandez adopts the related arguments made by Espinoza and Cruz-Camacho.

1. VUCSA Aggravator

Hernandez argues that his exceptional sentence must be reversed because (a) the VUCSA aggravator was not charged in the amended information, (b) insufficient evidence was presented to find that the VUCSA aggravator applied, and (c) defense counsel was ineffective in failing to argue that the VUCSA aggravator did not apply. Espinoza adopted these arguments, and this opinion addressed the merits of these arguments in Section A.7., *supra*.

Based on the analysis in Section A.7.a., *supra*, we hold that Hernandez received constitutionally sufficient notice that the State would try to prove the application of the VUCSA aggravator. Also, based on the analysis in Section A.7.b., *supra*, we hold that the jury expressly found that Hernandez's own conduct supported the application of the VUCSA aggravators. And, based on the analysis in Section A.7.c., *supra*, we hold that the ineffective assistance of counsel argument relating to the aggravator fails.

2. Ineffective Assistance of Counsel: Same Criminal Conduct

Hernandez argues that his two convictions for possession of a controlled substance with intent to deliver should have been considered as the same criminal conduct for sentencings purposes, and that because his attorney did not bring that to the sentencing court's attention, he received ineffective assistance of counsel. Based on the analysis in Section A.5., *supra*, we accept the State's concession that the two counts should have been scored as the same criminal conduct, reverse Hernandez's sentence, and remand for resentencing.

Additionally, Hernandez requests that new counsel be appointed at resentencing "to ensure that Mr. Hernandez is not again denied effective assistance in this case." Br. of Appellant

(Hernandez) at 27. Because we remand for resentencing, we leave this decision to the resentencing court.

3. Sufficiency of the Evidence to Prove Dominion and Control

Hernandez argues that insufficient evidence was presented to convict him of possessing the drugs found in apartment 9. Specifically, Hernandez argues the evidence was insufficient to establish that he exercised dominion or control over the drugs. We disagree.

We address this argument in resolving Espinoza's direct appeal. Section A.2.a., *supra*. We set forth the law relating to the sufficiency of the evidence to prove dominion and control above, and do not repeat it here. *See* Section A.2.a., *supra*.

As with Espinoza, the evidence presented at trial was sufficient for a rational trier of fact to find beyond a reasonable doubt that Hernandez exercised dominion and control over the heroin and methamphetamine. Over 8,500 grams of heroin and over 2,300 grams of methamphetamine were found throughout apartment 9 of the apartment complex. The Nissan with Oregon license plates that Hernandez was stopped in had been in the parking lot of the apartment complex for several hours before Hernandez and his family got in and were subsequently stopped. While the Nissan with Oregon plates was sitting in front of apartment 9, Barney gave a sit response to the trunk and passenger door of the Espinoza's rented Nissan with California license plates, indicating the presence of drugs in the vehicle. Barney also indicated the possibility of drugs in the white pickup truck in which Cruz Camacho was stopped. TPD observed a group of three to five Hispanic

individuals, including one who matched Hernandez's description, carrying packages to and from the vehicles in the parking lot. Hernandez left the apartment complex in the Nissan with Oregon plates at the same time as Espinoza left in his rented Nissan with California license plates and Cruz Camacho left in the white pickup truck. The Nissan with Oregon plates did not leave the parking lot of the apartment complex before the traffic stop of all three vehicles was conducted.

The identification Hernandez provided to TPD when he was stopped in the Nissan with Oregon license plates identified him by a different name. In the passenger compartment of his vehicle, the police saw a grocery bag with folded-up U.S. currency inside. The currency totaled $56,544. After removing Hernandez from the vehicle, Officer Betts and Barney worked the exterior. Barney jumped at the window and gave a sit response. As Hernandez was sitting in the back of the patrol car, he volunteered: "No drugs; just money. No drugs; just money." 4 VRP at 74.

When police interviewed Hernandez, he admitted to being a drug dealer, but claimed to only deal in smaller quantities. The police found at least three different driver's licenses with his picture but with different names. A police narcotics expert testified that multiple identifications with different names was consistent with someone occupying a higher position in the drug trade.

Based on the evidence presented, a rational trier of fact could find beyond a reasonable doubt that Hernandez had dominion and control over the heroin and methamphetamine because the rational fact finder could conclude Hernandez had been in apartment 9 where a large quantity of heroin and methamphetamine were found for at least a few hours, had helped move drugs out

of the vehicles and into apartment 9, left apartment 9 with his co-defendants, was stopped with a large amount of money from the transport of drugs, and occupied a higher position of power within the drug trafficking trade. Thus, we hold that sufficient evidence supports the jury's verdict that Hernandez exerted dominion and control over the heroin and methamphetamine found in apartment 9.

4. Probable Cause to Issue Warrant

Hernandez adopts Espinoza's argument that Barney's alert to the cars did not provide the "reasonably trustworthy" information necessary to establish the probable cause required to issue the search warrant. Br. of Appellant (Espinoza) at 29. We disagree.

The law pertinent to this discussion is discussed above in Section A.3., *supra*. Considering the relevant circumstances based on Officer Betts' and Barney's training and discoveries, discussed in Section A.3.b., *supra*, along with the remainder of the affidavit, we hold that the issuing judge did not abuse his discretion in signing the search warrant.

The affidavit for the search warrant stated that an informant identified apartment 9 as a "narcotics stash house," where large amounts of heroin and methamphetamine had been seen and where suspected drug traffickers Cruz Camacho and Hernandez were known to frequent. CP (Espinoza) at 72. The affidavit stated that a Department of Licensing database search for Hernandez revealed that he has three separate licenses under the names Miguel Salto Alemen, Gerardo Rafael Hernandez, and Angel Villegas Herrerra, all with the same photo. The affidavit also stated that the informant told the police that Hernandez was from California and was now running a large drug operation in Pierce County.

The affidavit stated that Barney had alerted to the two cars that drove out of the parking lot of the apartment complex at the same time as Hernandez. The affidavit also stated that the Nissan with California license plates, the white pickup truck, and the Nissan with Oregon license plates were parked in front apartment 9 from about 7:30 PM until 10:10 PM, when all three vehicles left at the same time. Before the three vehicles left, the affidavit stated that four to five Hispanic individuals, including one who matched Hernandez's description, moved suspected drugs or money into the Nissan with California license plates. Finally, the affidavit noted that after the three vehicles were stopped, Barney again alerted to the presence of drugs in the vehicles, TPD saw a panel on the tailgate of the white pickup truck that they believed was a "trap" compartment, and TPD saw a grocery bag full of money in one of the Nissans. CP (Espinoza) at 73. Based on the entirety of the information contained in the affidavit for the search warrant, including evidence from, and independent of, Barney's alerts, we hold that the issuing judge did not abuse his discretion in signing the search warrant.

5. Dog sniff as a Warrantless Search

Hernandez adopts Espinoza's argument that Barney's sniff of the Nissan with California license plates and the white pickup truck in the parking lot outside of the apartment complex constituted a warrantless search under article I, section 7 of the Washington State constitution. For the same reasons explained in Section A.4., *supra*, we hold Barney's sniff of the cars in the parking lot was not unlawful.

6. Authority to Order the Forfeiture of Property

Hernandez argues that the sentencing court erred in ordering the forfeiture of property. For the same reasons explained in Section A.8., *supra* we hold that the sentencing court erred in ordering the forfeiture of Hernandez's property, strike the forfeiture order, and remand for the resentencing court to determine whether there is statutory authority to order forfeiture.

7. Inquiry into Ability to Pay LFOs

Hernandez argues that the sentencing court erred in ordering him to pay LFOs without first inquiring into his ability to pay. As in Section A.6., *supra*, because we remand Hernandez's case for resentencing, we do not address this issue. On remand, the sentencing court shall inquire into Hernandez's current and future ability to pay before imposing any discretionary LFOs. *Blazina*, 182 Wn.2d at 839.

C. GUADALUPE CRUZ CAMACHO

Cruz Camacho argues: (1) the dog sniff was a warrantless search; (2) there was no probable cause to issue a search warrant because dog sniffs are unreliable; (3) his counsel was ineffective in failing to argue that the two convictions constituted the same criminal conduct; and (4) the sentencing court erred by imposing LFOs without first inquiring into Cruz Camacho's ability to pay. Cruz Camacho also adopts Hernandez's argument that the exceptional sentence must be reversed because (a) the VUCSA aggravator was not charged in the amended information, (b) there was insufficient evidence to support applying that aggravator to Cruz Camacho, and (c) his

counsel was deficient in failing to make the two arguments above.

We hold that Cruz Camacho received ineffective assistance of counsel because his two convictions constituted the same criminal conduct for sentencing purposes, and that the sentencing court should have considered Cruz Camacho's ability to pay before imposing discretionary LFOs. We also hold that the remainder of Cruz Camacho's claims fail. Accordingly, we affirm Cruz Camacho's convictions, reverse his sentence, and remand for resentencing.

1. Dog sniff as a Warrantless Search

Cruz Camacho argues that Barney's sniff of the Nissan with California license plates and the white pickup truck in the parking lot outside of the apartment complex constituted an illegal search under article I, section 7 of the Washington State constitution.[13] For the same reasons explained in Section A.4., *supra*, we hold Barney's sniff of the cars in the parking lot was not unlawful.

2. Dog Sniff was Sufficient to Establish Probable Cause

Cruz Camacho argues that "[w]ithout the evidence of Barney's alerts, Officer Smith's affidavit does not establish probable cause to issue a warrant to search the vehicles and the 10th Avenue apartment." Br. of Appellant (Cruz Camacho) at 20, 23. Cruz Camacho's argument fails because it hinges on the excising of the evidence related to Barney's alerts, and Cruz Camacho has not identified a reason why the evidence from Barney's alert should have been excised. We hold that the issuing judge did not abuse his discretion in signing the search warrant because the entirety

[13] Cruz Camacho also adopts Espinoza's argument on this issue.

of the relevant circumstances contained in the affidavit for the search warrant was sufficient to establish probable cause.

The law pertinent to this discussion is recited above in Section A.3., *supra*. For the same reasons as discussed in Section A.3.b., *supra*, we hold that the warrant was sufficient to with respect to Officer Betts and Barney's training, experience, and discoveries.

The affidavit for the search warrant stated that an informant identified apartment 9 as a "narcotics stash house," where large amounts of heroin and methamphetamine had been seen, and where suspected drug traffickers Cruz Camacho and Hernandez were known to frequent. CP (Espinoza) at 72. The affidavit also stated that a confidential informant arrested earlier that day identified Cruz Camacho as the source of the drugs that TPD seized during that arrest. And the affidavit stated that Cruz Camacho and Hernandez had been the subject of extensive drug investigations by TPD and the DEA.

The affidavit also stated that Barney had alerted to the white pickup truck that Cruz Camacho was driving when he was stopped. The affidavit further stated that the Nissan with California license plates, the white pickup truck, and the Nissan with Oregon license plates were parked in front apartment 9 from 7:30 PM until 10:10 PM, when all three vehicles left at the same time. Before the three vehicles left, four to five Hispanic individuals, including one that matched Cruz Camacho's description, carried packages believed to be drugs or money back and forth between apartment 9 and the Nissan with California license plates. The affidavit noted that after the three vehicles were stopped, Barney alerted to the presence of drugs in the vehicles, TPD saw a panel on the tailgate of the white pickup truck Cruz Camacho was driving that they believed was

a "trap" compartment, and TPD saw a grocery bag of money in one of the Nissans. CP (Espinoza) at 73. Based on the relevant circumstances contained in the affidavit for the search warrant, including evidence from, and independent of, Barney's alerts, we hold that the issuing judge did not abuse his discretion in signing the search warrant.

3. Ineffective Assistance of Counsel: Same Criminal Conduct

Cruz Camacho argues that his two convictions for possession of a controlled substance with intent to distribute should have been considered as the same criminal conduct for sentencings purposes, and that because his attorney did not bring that to the sentencing court's attention, he received ineffective assistance of counsel.[14] As discussed in Section A.5., *supra*, we accept the State's concession that the two counts should have been scored as the same criminal conduct, reverse Cruz Camacho's sentence, and remand for resentencing.

4. Inquiry into Ability to Pay LFOs

Cruz Camacho argues that the sentencing court erred in ordering him to pay LFOs without first inquiring into his ability to pay. As explained in Section A.6., *supra*, because we remand Cruz Camacho's case for resentencing, we do not address this issue. On remand, the sentencing court shall inquire into Cruz Camacho's current and future ability to pay before imposing any discretionary LFOs. *Blazina*, 182 Wn.2d at839.

[14] Cruz Camacho also adopts Espinoza's argument on this issue.

5. VUCSA Aggravator

Cruz Camacho adopts Hernandez's argument that the exceptional sentence must be reversed. Order Granting Cruz Camacho's Mot. to Adopt (Nov. 4, 2015), *see* court spindle. Hernandez's argument is that the (a) the VUCSA aggravator was not charged in the amended information, (b) insufficient evidence was presented to find that the VUCSA aggravator applied, and (c) defense counsel was prejudicially deficient in failing to argue that the VUCSA aggravator did not apply. Espinoza also adopted this argument, and this opinion addressed the merits of the argument in Section A.7., *supra*.

First, based on the analysis in Section A.7.a., *supra*, we hold that Cruz Camacho received constitutionally sufficient notice that the State would try to prove the application of the VUCSA aggravator. Second, based on the analysis in Section A.7.b., *supra*, we hold that the jury expressly found that Cruz Camacho's own conduct supported the application of the VUCSA aggravators. Finally, based on the analysis in Section A.7.c., *supra*, we hold that the ineffective assistance of counsel argument relating to the aggravator fails.

D. APPELLATE COSTS

Espinoza and Cruz Camacho ask that we not impose appellate costs against them if the State prevails on this appeal. A commissioner of this court will consider whether to award appellate costs in due course under RAP 14.2 if the State files a cost bill and an objection to that cost bill is filed.

E. CONCLUSION

In conclusion, we affirm the convictions, reverse the sentences, and remand each case for resentencing consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, P.J.

Sutton, J.

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