

65942-1

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No. 65942-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CARLOS BENITEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR SKAGIT COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial vindictiveness deprived Mr. Benitez of due process.

2. In the absence of proof of each element beyond a reasonable doubt, Mr. Benitez's conviction for possession a stolen firearm deprived him of due process.

3. In the absence of proof beyond a reasonable doubt that Mr. Benitez was "armed" in the commission of three crimes, the court erred in imposing firearm enhancements.

4. Mr. Benitez was denied his right to a unanimous jury's verdict that he was armed with a firearm in the commission of three offenses.

5. Mr. Benitez was denied his Sixth Amendment right to the effective assistance of counsel.

6. The trial court erred in failing to suppress the fruits of the unlawful search of Mr. Benitez's wallet.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fourteenth Amendment due process clause prevents the state from vindictively charging a person as a result of the person's exercise of his or her constitutional rights. Here, the court found the State's decision to charge Mr. Benitez with 17 counts,

including many with mandatory consecutive terms, was motivated purely by Mr. Benitez's decision to exercise his right to trial. Did the State's vindictive prosecution of Mr. Benitez deprive him of due process?

2. Due process requires the State prove each element of an offense beyond a reasonable doubt. A conviction of possession of a stolen firearm requires the State prove the defendant knew the firearm was stolen. Where the State did not prove that Mr. Benitez or an accomplice was aware that a firearm was stolen did the State prove the elements of the offense beyond reasonable doubt?

3. Before a court may impose a firearm enhancement under RCW 9.94A.533, the State must prove beyond a reasonable doubt that a person was armed with a firearm in the commission of an offense. Where the State's proof is based upon a theory of constructive possession, the State must prove a nexus between the defendant and the firearm and a nexus between the firearm and the crime. Where the State did not prove Mr. Benitez possessed a firearm for offensive or defensive purposes, did the State prove he was armed in the commission of three of the crimes?

4. Article I, §section 22 of the Washington Constitution requires a jury's verdict to impose an enhancement be unanimous.

Where the State offers proof of alternative acts which might support the verdict, the State must either elect the act on which the jury is to rely or instruct the jury that it must unanimously agree on a single act. Where neither of these procedures was complied with for the jury's three firearm special verdicts, was Mr. Benitez denied his right to a unanimous jury?

5. The Sixth Amendment guarantees the effective assistance of counsel in all criminal cases. Multiple counts of unlawful possession of a firearm arise from the same criminal conduct where the guns are possessed at the same place. Where counsel failed to assert Mr. Benitez's seven counts of unlawful possession of a firearm, based upon seven guns possessed at the same time and place, was Mr. Benitez denied the effective assistance of counsel?

6. Where officers detain a person based upon suspicion of criminal activity, the officers may frisk the person to search for weapons. However, officers may not frisk the person to search for evidence. Where officers frisked Mr. Benitez and opened his wallet solely to find his identification, should the trial court have suppressed the fruits of that unlawful search?

C. STATEMENT OF THE CASE

Skagit County Drug Task Force officers began investigating the Burlington home of Able Cantu after an informant advised them that Mr. Cantu, who was widely known to sell a variety of drugs, was in possession of a machine gun. RP 220. The informant described the Cantu home as a place with a constant flow of customers coming and going in and out of a detached garage. RP 383. Officers arranged a number of controlled buys during which the informant was able to purchase both drugs and the machine gun from Mr. Cantu. RP 398, 408, 413-16. The informant testified that during both controlled buys, while Mr. Benitez was present in the garage, the informant only purchased drugs from Mr. Cantu. RP 389.

Unaware of the ongoing investigation, Burlington police officers arrived at the Cantu home late one night to serve an arrest warrant on an individual they believed to be staying there. RP 61. After being allowed entry into the home, police discovered drug paraphernalia and numerous weapons in the house. RP 66-68. Officers then obtained a search warrant. RP 68.

After obtaining the warrant, officers began their search in the home's detached garage. RP 70. Although they knew several

people were in the garage, the officers' knocks on the door to gain entry were initially unheeded. RP 70-71. Once they were able to enter the garage, officers found Mr. Cantu and several others. The officers also found several firearms in the garage. RP 75-76. More than 20 minutes after beginning their search, the officers found Mr. Benitez hiding in a corner of the garage under a blanket. RP 78. Officers handcuffed Mr. Benitez, patted him down and searched his wallet. RP 82.

In the course of their search of the garage, officers recovered numerous firearms, quantities of methamphetamine, ecstasy and heroin, as well as scales and packaging materials. RP 77, 101-14, 228, 286, 558-60, 713. A search of Mr. Cantu revealed a variety of drugs on his person. Inside the Cantu home the officers found still more guns and drugs. RP 228, No drugs or weapons were found on Mr. Benitez.

Jessica Gonzalez, Mr. Cantu's fiancée, testified that there were only two keys to the garage, one for her and one for Mr. Cantu. RP 347. Ms. Gonzalez also had a key to a safe in the bedroom she and Mr. Cantu shared in which officers found a large sum of money and four firearms. RP 237. Ms. Gonzalez was not charged with a crime in this matter.

The State charged Mr. Benitez with 17 counts: one count of conspiracy to deliver methamphetamine, ecstasy, cocaine, and heroin; one count each of possessing heroin, methamphetamine and ecstasy with intent to deliver, each with a firearm and school zone enhancement; one count of manufacturing marijuana; one count of criminal impersonation; one count of identity theft; seven counts of first degree unlawful possession of a firearm, one count of possessing a stolen firearm; and two counts of possessing a short-barrel shotgun. CP 27-34.

A jury convicted Mr. Benitez on all 17 counts. CP 98-121.

Mr. Benitez's resulting standard range sentence was 765 to 991 months.

The trial court concluded the State had not properly exercised its discretion in charging Mr. Benitez. Supp. CP \_\_, Sub No. 123. The court found the sentence grossly disproportionate based upon Mr. Benitez's limited involvement in the current crimes, and especially as compared to far more violent crimes. Id. Thus the court imposed a sentence of 368 months. CP 356.

D. ARGUMENT

1. PROSECUTORIAL VINDICTIVENESS  
DEPRIVED MR. BENITEZ OF DUE PROCESS

Able Cantu, the head of the enterprise, owner of the house, target of a regional drug task force investigation, and the one who sold a machine gun to a police informant received a sentence of 8 years. Supp. CP \_\_, Sub No. 123 (Findings of Fact 2.3.4, 7, 8, 16). Mr. Benitez, by contrast, was merely a “groupie” temporarily staying at the home. Supp. CP \_\_, Sub No. 123 (Finding of Fact 5). Despite that, Mr. Benitez faced a standard range sentence of 63.75 years to 82.66 years. Id. (Finding of Fact 23).

The State initially charged Mr. Benitez with one count of conspiracy to deliver a controlled substance, three counts of possession with intent to deliver (with a firearm enhancement and a school-zone enhancement on one count only), one count of possessing a stolen gun, and a single count of unlawful possession of a firearm. CP 1-4.

The State subsequently filed an amended information adding both school and firearm enhancements to the remaining two counts of possession with intent. CP 13-14. The State added counts of manufacturing marijuana, criminal impersonation, identity theft, six

counts of unlawful possession of a firearm and two counts of possession of a short-barrel shotgun. CP 14-17. On top of that, the State sought an exceptional sentence. CP 130.

The trial court found that the only explanation for the State's grossly disparate treatment of Mr. Benitez was his choice "to exercise his constitutional right to go to trial." Supp. CP \_\_, Sub No 123 (Finding of Fact 19) The court found it was not a proper exercise of prosecutorial discretion by the State to charge a "groupie" such as Mr. Benitez with offenses yielding an 82 year standard range when compared to much lower sentences for violent offenses. Id. (Findings of Fact 24-26).

a. Prosecutorial vindictiveness deprives a defendant of due process. The Fourteenth Amendment Due Process Clause demands that a defendant be allowed to exercise his constitutional rights without fear of retaliation by the State. Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978); Blackledge v. Perry, 417 U.S. 21, 28, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974). "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." United States v. Goodwin, 457 U.S. 368, 379-80, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982) (quoting Bordenkircher, 434 U.S.

at 363). “To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is ‘patently unconstitutional.’” Bordenkircher, 434 U.S. at 363, 98 S.Ct. 663 (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 32 n. 20, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973)).

Courts have addressed two kinds of prosecutorial vindictiveness: actual vindictiveness and a presumption of vindictiveness. State v. Korum, 157 Wn.2d 614, 627, 141 P.3d 13 (2006). In this case, the trial court’s findings in support of a mitigated exceptional sentence establish actual vindictiveness.

b. The trial court’s findings establish actual vindictiveness by the prosecutor. In Korum, a sharply divided Court concluded a presumption of vindictiveness does not arise merely from the adding of additional charges. Korum, 157 Wn.2d at 629. But that conclusion does not apply to this case. Here, the question of a presumption is irrelevant as the trial court made an actual finding of vindictiveness; that the State’s charging decision was motivated solely by Mr. Benitez’s assertion of his right to a trial. That finding is supported by substantial evidence. Notably, the trial

judge, the former Skagit County Prosecuting Attorney, found that in his time as a prosecutor and on the bench he had never seen a case prosecuted in this manner. Sup CP \_\_, Sub No. 123 (Finding of Fact 22). The judge noted that prosecutions of rapes, murders, and assaults yield sentences “in the 10, 15, and 25 year range.” Yet a minor participant in a drug case was facing more than 82 years merely because he exercised his right to go to trial.

“That a prosecutor may offer ‘hardball’ choices to a defendant does not make the process constitutionally unfair, so long as the choices are realistically based upon evidence and options known to both sides.” State v. Lee, 69 Wn.App. 31, 35, 847 P.2d 25 (1993). Here, again, the trial judge drawing on his experience on the bench and as elected prosecutor found the State’s decision to stack 17 counts resulting in the equivalent to a life sentence for Mr. Benitez was not a matter of “proper discretion.” Supp CP \_\_, Sub No. 123 (Finding of Fact 26).

The trial court’s findings establish actual vindictiveness by the prosecutor. Indeed, the State had not gathered any additional evidence that caused it to believe it should now add the enhancements to the two remaining possession with intent counts or to justify its decision to add eight additional firearm charges.

The trial court properly found the decision to add these four additional enhancements and eight additional charges all requiring mandatory sentences, was purely in response to Mr. Benitez's exercise of his rights.

This court must dismiss those counts.

2. THE STATE DID NOT PROVE EACH OF THE ELEMENTS OF UNLAWFUL POSSESSION OF A STOLEN FIREARM

a. The State was required to prove the elements of the offense beyond a reasonable doubt. In a criminal prosecution, the Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is sufficient only if, in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

b. The State did not prove Mr. Benitez knew the gun was stolen. The mere possession of a stolen gun is insufficient to justify a conviction for possession of a stolen firearm under RCW

9A.656.310. State v. McPhee, 156 Wn.App. 44, 62, 230 P.3d 284(2010) (citing State v. Couet, 71 Wn.2d 773, 775, 430 P.2d 974 (1967)). Instead, the State was required to prove he knew the gun was stolen at the time he possessed it. McPhee, 156 Wn.App. at 62; State v. Khlee, 106 Wn.App. 21, 24, 22 P.3d 1264 (2001). The State's evidence did not prove Mr. Benitez's knowledge.

The State offered the testimony of the police that a Ruger .32 pistol was recovered in the garage of the Cantu home. RP 558. John Olson testified the gun belonged to him and had been taken from his home in a burglary. RP 492-94. But the State offered no evidence that Mr. Benitez knew the gun was stolen. Indeed, the State did not establish that anyone at the Cantu home knew the gun was stolen.

Because the State did not prove Mr. Benitez knew the gun was stolen, there is insufficient evidence to support his conviction of that charge and Count 9 must be dismissed.

c. The Court must dismiss Mr. Benitez's conviction.

The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson, 443 U.S. at 319. The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an

added element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Because the State failed to prove his knowledge that the gun was stolen, the Court must reverse Mr. Benitez's conviction.

3. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. BENITEZ WAS ARMED WITH A FIREARM AT THE TIME OF THE OFFENSES

With respect to the three counts of possession with intent to deliver drugs, Counts 2, 3, and 4, the State alleged and the jury returned special verdicts finding Mr. Benitez was armed with a firearm at the time of the commission of the offense. CP 101, 104, 107. RCW 9.94A.533 permits the imposition of such an enhancement if the jury finds beyond a reasonable doubt the person was armed at the time of the commission of the offense. The State's evidence did not permit the jury to make that finding in this case.

a. The State was required to prove Mr. Benitez was armed at the time of the offenses. A person is "armed" with a firearm "if the weapon is easily accessible and readily available for use either for offensive or defensive purposes." State v.

Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). Where the weapon is constructively possessed, in addition to proving the weapon is readily available, the State must also prove beyond a reasonable doubt a “nexus between the weapon and the defendant and between the weapon and the crime.” State v. Schelin, 147 Wn.2d 562, 567-68, 55 P.3d 632 (2002). The nexus requirement “means that where the weapon is not actually used in the commission of the crime, it must be there to be used.” State v. Gurske, 155 Wn.2d 134, 138, 118 P.3d 333 (2005).

b. The State did not prove Mr. Benitez was armed in the commission of the offense. With respect to an enhancement, the jury’s special verdict is the sum of its findings and a court may not look to facts which may be implicit in the juror’s verdict on the substantive offenses. State v. Williams-Walker, 167 Wn.2d 889, 899-900, 225 P.3d 913 (2010). Nor may a reviewing court look to the concluding instruction regarding the special verdict form. Id. at 899, n.7 (overruling State v. Pharr, 131 Wn.App. 119, 126 P.3d 66 (2006)). Williams-Walker concluded

For purposes of sentence enhancement, the sentencing court is bound by special verdict findings, regardless of the findings implicit in the underlying guilty verdict. Where a firearm is used in the commission of a crime, the only way to determine

which enhancement is authorized is to look at the jury's special findings.

167 Wn.2d at 900.

Here, the special verdict forms specifically state that the jury found "CARLOS \* BENITEZ, JR was armed with a firearm." CP 101,104, 107. Thus, there must be sufficient proof in the record to establish that finding beyond a reasonable doubt. Because the special verdict specifically finds Mr. Benitez, and not an accomplice, was armed, this Court cannot look to evidence regarding an accomplice to sustain the jury's special verdicts. Williams-Walker, 167 Wn.2d at 899-900. Nor does it matter that the concluding instruction pertaining to the special verdict forms stated that "if one participant in a crime is armed with a firearm, all accomplices to that participant are deemed armed." CP 93.

Because the special verdict forms do not include a finding that anyone other than Mr. Benitez was armed, the finding cannot be sustained upon evidence that an accomplice was armed. Williams-Walker, 167 Wn.2d at 899, n.7.

For purposes of the enhancement it is not enough that the State prove that firearms were found at crime scene. Instead, those firearms must have been at the crime scene for offensive or

defensive purposes by Mr. Benitez . There is no evidence to support that finding. The State did not prove Mr. Benitez was armed in the commission of the crimes. Thus, the court must strike each of the three firearm enhancements.

4. MR. BENITEZ WAS DENIED HIS RIGHT TO A UNANIMOUS JURY.

a. The Washington Constitution requires a unanimous jury in criminal cases. The Washington Constitution requires a unanimous jury verdict in criminal matters. Const. Art. I, § 21; Const. art. I, §22. When the State presents evidence of several acts which could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specified criminal act. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984)). By requiring a unanimous verdict on one criminal act, the court protects a criminal defendant's right to a unanimous verdict based on an act proved beyond a reasonable doubt. State v. Coleman, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007). The constitutional error resulting from the failure to either elect the incident relied upon for conviction or to properly instruct the jury is

harmless only if the reviewing court is satisfied beyond a reasonable doubt that each incident established the crime beyond a reasonable doubt. Kitchen, 110 Wn.2d at 405-06. This requirement, however, does not apply to alternative means cases, that is cases in which the State alleges a single act which may satisfy alternative statutory means of committing a single offense. See e.g. State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997) (holding second degree murder has alternative means – intentional murder and felony murder).

Jurors must unanimously agree the State has proved the facts necessary to support a sentence enhancement. State v. Goldberg, 149 Wn.2d 888, 893, 72 P.3d 1083 (2003).

b. The absence of either a unanimity instruction or an election by the State deprived Mr. Benitez of his right to a unanimous jury. Here the State presented evidence of numerous guns in the Cantu home and garage; ten in the home and seven in the garage. RP 757-58. The State's informant testified that on one occasion when he was in the garage an unidentified person was cutting cocaine at a table with a gun in his waistband. RP 398. Plainly, the State presented evidence of multiple guns. However, the jury was never instructed that it must unanimously agree with

which gun Mr. Benitez was armed with a firearm for purposes of the enhancement. Further, assuming that the jury could base its verdict on the enhancement upon proof that an accomplice was armed, the jury was similarly never instructed as to which accomplice or which gun its verdict should rest upon. Nor was the jury instructed that it must unanimously agree upon which gun or which accomplice its verdict rested.

The State was required to either elect the gun on which it wanted the jury to rely or provide a Petrich instruction. The State did neither. Thus, because the jury was not instructed that it must unanimously agree as to with which gun Mr. Benitez was armed, he was denied his right to a unanimous jury.

c. This Court must reverse Mr. Benitez's enhancements. In limited situations, the right to a unanimous verdict is not violated despite the lack of unanimity instruction in a case where the State validly proved different factual grounds for a conviction. If the State can prove the violation was harmless beyond a reasonable doubt, the failure to give a "unanimity" instruction does not require reversal. State v. Camarillo, 115 Wn.2d 60, 65, 794 P.2d 850 (1990). But, the failure to give a unanimity instruction is harmless only if no rational juror could have

a doubt regarding any of the factual alternatives. Kitchen, 110 Wn.2d at 411; State v. King, 75 Wn.App. 899, 903, 878 P.2d 466 (1994).

Here a jury could have a reasonable doubt as to some of the factual alternatives. For instance, the jury heard evidence that several guns were found under the mattress in the garage near where Mr. Benitez was hiding. A reasonable juror could quite easily determine those guns were not readily accessible. Too, a reasonable juror could conclude that some of the guns were not there to be used for offensive or defensive purpose, but rather had been bartered for drugs. In these circumstances the absence of a unanimity instruction requires reversal. Kitchen, 110 Wn.2d at 411.

5. MR. BENITEZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S FAILURE TO CONTEND THE MULTIPLE FIREARM POSSESSION COUNTS CONSTITUTED THE SAME CRIMINAL CONDUCT.

a. Mr. Benitez was entitled to the effective assistance of counsel. The federal and state constitutions guarantee a criminal defendant the right to counsel. U.S. Const. Amend. VI; Const. Art. I, § 22; Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Powell v. Alabama, 287 U.S. 45, 53

S.Ct. 55, 77 L.Ed. 158 (1932); State v. Romero, 95 Wn.App. 323, 326, 975 P.2d 564, review denied, 138 Wn.2d 1020 (1999). “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed. 268 (1942)). If a defendant cannot afford to hire an attorney, he has the right to appointed counsel. Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

The right to counsel includes the right to the effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); Strickland, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective assistance. Strickland, 466 U.S. at 687; McMann, 397 U.S. at 771. “The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

b. Firearms unlawfully possessed at the same time and place can be deemed the same criminal conduct under RCW

9.94A.589. RCW 9.94A.589(1) provides in relevant part

Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

Offenses arise from the same criminal conduct if they involve the same victim, occur at the same time and place, and share the same objective criminal intent. State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

The victim of the offense of unlawful possession of a firearm is the general public. State v. Haddock, 141 Wn.2d 103, 111, 3 P.3d 733 (2000). Thus, where multiple firearms are unlawfully possessed at the same time and place the resulting convictions arise from the same criminal conduct. Id.; State v. Simonson, 91 Wn.App. 874, 885, 960 P.2d 955 (1998).

RCW 9.41.040(7), which authorizes the State to charge a defendant with separate counts for each gun possessed, does not

foreclose nor change that outcome. Haddock, 141 Wn.2d at 110-11. The correctness of that conclusion has been reaffirmed. State v. Stockmyer, 136 Wn.App. 212, 219, 148 Wn.2d 1077 (2006), review denied, 161 Wn.2d 1023 (2007). Stockmyer concluded, however, that Simonson was limited to instances, such as this one, in which all the guns were in a single room. 136 Wn.2d at 219.

Thus, so long as the multiple counts concern guns possessed in the same place at the same time, the offenses arise from the same criminal conduct. Here, each of the seven guns Mr. Benitez was alleged to have unlawfully possessed was in the garage. RP 803-07. As Haddock, Simonson and Stockmyer have recognized, convictions for unlawfully possessing firearms at the same time and place arise from the same criminal conduct.<sup>1</sup>

In addition to the seven counts of unlawful possession based upon guns recovered from the garage, the State added two additional counts, 14 and 16, for possession of short-barrel shotguns. Those two counts arose from the same criminal conduct as the unlawful possession counts in 13 and 15. With respect to

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<sup>1</sup> Mr. Benitez does not contend his conviction for possessing the stolen pistol arose from the same criminal conduct as the unlawful possession charge concerning that same gun. Haddock concluded such offenses involve separate victims, the owner of the gun and the public at large, and thus cannot be considered the same criminal conduct.

each gun there is but a single act of possession, and thus for each gun the counts occurred at the same time and place. As with the unlawful possession charges, there is not one specific victim other than the public at large. The offenses meet the standard for same criminal conduct.

Mr. Benitez's seven convictions of unlawful possession and two convictions of possessing a short-barrel shotgun arose from the same criminal conduct and should have been considered a single offense for sentencing.

c. Defense counsel was ineffective in agreeing to the State's position that the offenses could not arise from the same criminal conduct. At sentencing defense erroneously conceded the correctness of the State's erroneous scoring of Mr. Benitez's firearm offenses. 8/25/10 RP 24, 30.

In its sentencing memorandum, the State contended that the sentence for each of Mr. Benitez's firearm offenses must be served consecutively to each other, relying upon the decision in State v. McReynolds, 117 Wn.App. 309, 71 P.3d 663 (2003). The McReynolds court concluded Haddock and Simonson were not controlling as, the court opined, they had not addressed the

provisions of RCW 9.41.040(6).<sup>2</sup> But that conclusion requires the assumption that the Supreme Court was unaware of relevant statutes when it decided Haddock. The statutory provision on which McReynolds relied was enacted by Initiative 159 in 1995. See Laws 1995, ch. 129, § 16. Haddock specifically addressed the provisions of that initiative and concluded the initiative did not alter the same criminal conduct analysis. 141 Wn.2d at 114-15. Haddock also concluded the provisions of RCW 9.94.589(1)(c), adopted two years before the court's decision, did not alter that conclusion. 141 Wn.2d at 114-15, n. 7 (citing Laws 1998, ch. 235 § 2. "Once the Washington Supreme Court has decided an issue of state law, its conclusion is binding on lower courts. State v. Zimmerman, 130 Wn.App. 170, 182, 121 P.3d 1216 (2005) (citing State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984)). Thus, Haddock and not McReynolds must control.

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<sup>2</sup> RCW 9.41.040(6) provides:

Nothing in chapter 129, Laws of 1995 shall ever be construed or interpreted as preventing an offender from being charged and subsequently convicted for the separate felony crimes of theft of a firearm or possession of a stolen firearm, or both, in addition to being charged and subsequently convicted under this section for unlawful possession of a firearm in the first or second degree. Notwithstanding any other law, if the offender is convicted under this section for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, then the offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection

As set forth above, Haddock leads to the conclusion that the seven counts of unlawful possession and two counts of possessing a short-barrel shotgun arose from the same criminal conduct. Counsel's concession constituted deficient performance.

The resulting prejudice is readily apparent. Rather than a single conviction and sentence, Mr. Benitez received seven consecutive sentences for the firearm offenses. CP 356.

Mr. Benitez was denied his Sixth Amendment right to the effective assistance of counsel.

6. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE FRUITS OF A WARRANTLESS AND UNCONSTITUTIONAL SEARCH.

a. The state and federal constitutions bar warrantless searches absent a recognized exception. A warrantless search is unreasonable under both the federal and state constitutions unless an exception applies. State v. Loewen, 97 Wn.2d 562, 565, 647 P.2d 489 (1982); State v. Lennon, 94 Wn.App. 573, 579, 976 P.2d 121 (1999). An investigative detention pursuant to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), is one exception, but even where a Terry investigative stop is justified, an officer may not frisk a person unless the officer has reasonable grounds to

believe the person is armed and dangerous. State v. Walker, 66 Wn.App. 622, 629, 834 P.2d 41 (1992); State v. Galbert, 70 Wn.App. 721, 725, 855 P.2d 310 (1993) (citing Sibron v. New York, 392 U.S. 40, 64, 88 S.Ct. 1889, 20 L.Ed.2d. 917 (1968)). A generalized suspicion cannot justify a frisk. Galbert, 70 Wn.App. at 725.

Even where a frisk is justified, the scope must be limited to the protective purpose. State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993). The search “must be one that is reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.” Loewen, 97 Wn.2d at 566 (citing Terry, 392 U.S. at 29). “[I]f the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under Terry and its fruits will be suppressed.” Minnesota v. Dickerson, 508 U.S. 366, 373, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). State v. Hudson, 124 Wn.2d 107, 874 P.2d 160 (1994). Thus, a frisk is valid under Terry only when (1) the initial stop is legitimate, (2) a reasonable and articulable safety concern exists to justify a frisk for weapons, and (3) the scope of the frisk is limited to the protective purposes. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

b. This court should review the unlawful search in this case. Appellate courts will review an error even if the claim was not raised in the trial court so long as it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). Without an affirmative showing of actual prejudice, the asserted error is not “manifest” and thus is not reviewable under RAP 2.5(a)(3). State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” McFarland, 127 Wn.2d at 333.

Thus, the defendant must show the motion likely would have been granted based on the record in the trial court. State v. Contreras, 92 Wn.App. 307, 313-14, 966 P.2d 915 (1998) (quoting McFarland, 127 Wn.2d at 334 n.2). Where the record is sufficiently developed, an appellate court can determine whether a motion to suppress clearly would have been granted or denied, and thus can review the suppression issue, even in the absence of a motion and trial court ruling thereon. Contreras, 92 Wn.App. at 313-14 (“We conclude that when an adequate record exists, the appellate court may carry out its long-standing duty to assure constitutionally

adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal.”). As a result, the appellate court must look to the facts to determine whether a motion to suppress would properly have been granted or denied.

Id.

Here, Mr. Benitez did not specifically object to the search of his wallet, but as is clear from the following discussion, the record is fully developed to address the unlawfulness of that search.

c. The warrantless search of Mr. Benitez’s wallet violated the state and federal constitutions. An officer may not remove an item during a frisk unless it is either a weapon or “an item of questionable identity that has the size and density such that it might or might not be a weapon.” Hudson, 124 Wn.2d at 113. Officer David Goss testified he arrested Mr. Benitez, handcuffed him, and discovered his wallet while patting him down. RP 23-24. Officer Goss and Sergeant Ed Rogge testified their interaction with Mr. Benitez was an effort to identify him. RP 25, 67. Officer Goss testified “we checked the wallet for physical ID.” RP 25. Officer Goss testified that Sergeant Ed Rogge opened the wallet and found an ID for a person other than Mr. Benitez. RP 24.

Because the search of Mr. Benitez's wallet was a search for identification and not a weapon, it exceeded the scope of a Terry stop.

c. The Court must remand with directions to suppress the fruits of the unlawful search. The remedy for a violation of the Fourth Amendment and Article I, §Section 7, is suppression of the fruits of the improper search or seizure. State v. White, 97 Wn.2d 92, 110-12, 640 P.2d 1061 (1982). The unlawful search of Mr. Benitez's wallet yielded the evidence upon which the State convicted him of identity theft. This case should be reversed and remanded with instructions to suppress the fruits of the unlawful search, including dismissal of the identity theft count. State v. Parker, 139 Wn.2d 486, 505, 987 P.2d 73 (1999).

E. CONCLUSION

For the reasons above this court should reverse and dismiss Mr. Benitez's convictions for unlawful possession of a firearm. Alternatively, this court should reverse the sentence and remand the matter for resentencing for the court to determine whether the multiple possession counts arose from the same criminal conduct. The court must reverse the three firearm enhancements. Further,

the court must reverse and dismiss Mr. Benitez's conviction for possessing a stolen firearm and his conviction of identity theft.

Respectfully submitted this 5<sup>th</sup> day of August, 2011.

A handwritten signature in black ink, appearing to read "Gregory C. Link", written over a horizontal line.

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