

NO. 45491-2-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JAVIER ESPINOZA, GUADALUPE CRUZ-CAMACO, and GERARDO
HERNANDEZ, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald Culpepper and Stanley Rumbaugh, Judges

No. 12-1-01852-1, 12-1-01854-7, 12-1-01851-2

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE.

1. Procedure

On May 21, 2012, the Pierce County Prosecuting Attorney (State) charged the defendants Javier Espinoza, Guadalupe Cruz-Camacho, and Gerardo Hernandez each with two counts of unlawful possession of a controlled substance with intent to deliver (UPCSWID) for possession of large amounts of heroin and methamphetamine. CP 1-2. The charges also alleged aggravating circumstances of a major violation of the Uniform Controlled Substance Act. *Id.* The Information was later amended to add a school bus stop sentencing enhancement. CP 91-92.

The defendants filed motions to suppress the evidence, pursuant to CrR 3.6. CP 17-22, 101-170. After hearing evidence and argument, the court denied their motions. 6/7/2013 RP 11, 20.

Espinoza and Hernandez filed motions to sever defendants. CP 322-343, 87-90. The court denied their motions. 7/29/2013 RP 17, 19. The motion was renewed at trial, per CrR 4.4(a). 2 RP 51.

The case was assigned for trial to Hon. Stanley Rumbaugh. 1 RP 2ff. After hearing all the evidence, the jury found the defendants guilty as charged. CP 105-106, 202-203, 494-495. The jury also found the sentence enhancement and the aggravating circumstance. CP 107-110, 203-207, 496-499.

In accordance with the jury's findings, Judge Rumbaugh imposed sentences above the standard range. CP 116-129, 236-249, 509-521. The defendants filed timely notices of appeal. CP 133, 254, 526.

2. Facts

On May 16, 2012, Tacoma Police were investigating suspected drug trafficking at 9621 10th Ave. East in Tacoma. 3 RP 29. Police kept the address under surveillance. 3 RP 28, 4 RP 5. During this surveillance, police saw suspicious activity involving Apt. 9 at the address. 3 RP 30, . Police called in a drug-detection dog to check the suspect vehicles in the parking lot. 4 RP 28. The dog gave a positive response for the presence of narcotics in the vehicles. 4 RP 30-34. Police obtained a search warrant for the vehicles and Apt. 9. 3 RP 31.

Police discovered over eight kilograms of heroin and over 2.3 kilograms of methamphetamine in Apt. 9 at 9621 10th Ave. East. 6 RP 35,38,39,41. Methamphetamine was discovered in the bedroom and kitchen. 4 RP 41, 48. Six kilograms of heroin were hidden in a wall in the laundry room. 6 RP 35. Another 2.5 kilograms of heroin were found in the

bedroom closet. 6 RP 38. Packaging material, a scale, and a notebook containing collection and distribution information were found in the kitchen. 6 RP 48, 50-51.

Police stopped Hernandez and Espinoza as they drove from the scene in separate cars. 3 RP 31, 4 RP 71. Hernandez' car contained \$56,544 in cash, bundled and wrapped in the same plastic wrap found in Apt. 9 and wrapping the heroin. 3 RP 33, 6 RP 16. Espinoza's car contained \$42,000 bundled and wrapped as the heroin was. 3 RP 36, 6 RP 24.

C. ARGUMENT.

1. THE SEARCH WARRANT WAS SUPPORTED BY PROBABLE CAUSE.

a. Investigative detention.

An investigative stop of a person is justified if the officer can “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). The level of articulable suspicion necessary to support an investigative detention is “a substantial possibility that criminal conduct has occurred or is about to occur.” *Kennedy*, at 6.

Probable cause is not required for an investigative stop because a stop is significantly less intrusive than an arrest. *Id.* When reviewing the merits of an investigatory stop; a court must evaluate the totality of circumstances presented to the investigating officer. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). The court takes into account an officer's training and experience when determining the reasonableness of a Terry stop. *Id.* Also, an investigative detention is not rendered unreasonable solely because the officer did not rule out all possibilities of innocent behavior before initiating the stop. *State v. Fuentes*, 183 Wn.2d 149, 163, 352 P.3d 152 (2015).

Here, the police had information similar to that in *Fuentes* to conduct an investigation and stop. The officers had information that suspects were engaged in a large scale drug trafficking operation. CP 283-284, 3 RP 28. They previously conducted surveillance and observed another suspect, Flores, contact the 10th Avenue apartment the day before he was arrested and found to be in possession of a large quantity of narcotics and cash. CP 283, 3 RP 28-29.

Several cars were observed at the address and were registered to two of the defendants. CP 283. Hernandez had driver's licenses issued under different names, Cruz-Camacho had been observed at the apartment and in the parking lot working on the vehicles. CP 283-284. The men were seen coming and going from the apartment as if moving items back and forth. CP 284. Most significantly, K9 Barney alerted to the presence of

narcotics on the three vehicles, and officers observed packages and luggage being moved between the apartment and the vehicles. CP 284. The officers had reason to suspect the defendants were engaged in criminal activity. The stop and detention were lawful.

b. Canine sniff.

Article 1, §7 of the Washington State Constitution states that no person shall be disturbed in his private affairs, or his home invaded, without authority of law. The court must ask whether the State unreasonably intruded into a person's "private affairs." *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994). If the State did not unreasonably intrude into a person's private affairs there is no search and therefore Article 1, §7 is not implicated. *Id.*

The United States Supreme Court has considered the issue of the use of drug-detection dogs in a number of cases. It has held that an inspection by a narcotics-detection dog is not a search under the Fourth Amendment. *See Illinois v. Caballes*, 543 U.S. 405, 409, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005)(during traffic infraction stop by state trooper); *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983)(luggage at an airport). *See also Florida v. Jardines*, -U.S.-, 133 S. Ct. 1409, 1416-1417, 185 L. Ed. 2d 495 (2013)(dog sniff generally permissible, but not at the defendant's front door); *Indianapolis v.*

Edmond, 531 U.S. 32, 40, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000)(dog sniff was permissible, but highway drug checkpoints were not).

Washington residents do not have a reasonable expectation of privacy in the air coming from the open window of a vehicle. *State v. Hartzell*, 153, Wn. App. 137, 149, 221 P.3d 928 (2009). In *Hartzell*, a K-9 unit was called to search for a firearm. *Id.* at 147. To get the scent of the firearm, the dog jumped on the door of Hartzell's vehicle, sniffed, then led detectives to the location of the firearm, less than 100 yards from the vehicle. *Id.* The court found that as Hartzell was not inside his vehicle when the dog sniffed from a lawful vantage point outside the vehicle, the search was only minimally intrusive, so the dog sniff was proper.

In an earlier case, the Court of Appeals also held that if a canine sniffs an object from an area where the defendant has no reasonable expectation of privacy, and the canine sniff itself is minimally intrusive, then no search has occurred. *State v. Boyce*, 44 Wn. App. 724, 730, 723 P.2d 28 (1986). In *Boyce*, police verified facts provided by an informant and began surveillance of Boyce. *Id.* at 725. The officers determined Boyce owned a safety deposit box at a bank. Later that day officers entered the vault area with a narcotics detection dog who "alerted" on Boyce's box. No search occurred. *Id.*, at 729. Police then got a search warrant for the safety deposit box.

Applying those factors to a vehicle parked in a public place yields the same conclusion. The vehicles were parked in an open parking lot,

accessible to the public. The K-9 unit was not trespassing. The dog sniff of the exterior did not cause the vehicle to be seized. The dog sniff was minimally intrusive as the owner was not in the vehicle at the time the dog sniff occurred in the parking lot. Therefore, the K9 examination, or sniff, of the exterior of co-defendants vehicles was lawful.

c. Search warrant.

When a search warrant has been properly issued by a judge, the party attacking it has the burden of proving its invalidity. *See State v. Fisher*, 96 Wn.2d 962, 639 P.2d 743 (1982). A judge's determination that a warrant should issue is an exercise of discretion that is reviewed for abuse of discretion and should be given great deference by the reviewing court. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995).

Courts review the issuance of a search warrant only for abuse of discretion. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). A reviewing court should give great deference to the issuing judge or magistrate. *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994) (citing *State v. Huft*, 106 Wn.2d 206, 211, 720 P.2d 838 (1986)).

“An abuse of discretion is present only if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons.” *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). “A decision is based ‘on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in

the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)(internal quotation marks omitted) (quoting *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)).

“A decision is ‘manifestly unreasonable’ if the court, despite applying the correct legal standard to the supported facts, adopts a view ‘that no reasonable person would take,’ *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 922 (1990), and arrives at a decision ‘outside the range of acceptable choices.’” *Rohrich*, 149 Wn.2d at 654 (quoting *Rundquist*, 79 Wn. App. at 793).

An affidavit supporting a search warrant is to be read as a whole, in a common sense, non-technical manner, with doubts resolved in favor of the validity of the warrant. *State v. Casto*, 39 Wn. App. 229, 232, 692 P.2d 890 (1984); *State v. Partin*, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977). Hypertechnical interpretations should be avoided when reviewing search warrant affidavits. *State v. Freeman*, 47 Wn. App. 870, 873, 737 P.2d 704 (1987).

The United States Supreme Court has held that a positive “alert” by a trained dog is sufficient to establish probable cause for the presence of a controlled substance. See *Florida v. Harris*, -U.S.-, 133 S. Ct. 1050, 1056-1057, 185 L. Ed. 2d 61 (2013). In Washington, multiple cases have come to the same conclusion. See *State v. Valdez*, 137 Wn. App. 280, 289, 152 P.3d 1048 (2007) citing *State v. Jackson*, 82 Wn. App. 594, 606, 918

P.2d 945 (1996). See also *State v. Flores-Moreno*, 72 Wn. App. 733, 741, 866 P.2d 648 (1994).

Here, the facts in the affidavit established that K-9 Barney's training and track record were known to the police at the time of his deployment. The facts set forth in the complaint for the search warrant establish that the officers had information from several sources that the co-defendants were engaged in a large scale drug trafficking operation. They conducted surveillance and observed Flores contact the 10th Avenue apartment the day before he was arrested and found to be in possession of a large quantity of narcotics and cash. Several cars were observed at the address and were registered to two of the co-defendants. Hernandez had driver's licenses issued under different names. Cruz-Camacho had been observed at the apartment and in the parking lot working on the vehicles. K9 Barney alerted to the presence of narcotics on the three vehicles. Officers observed packages and luggage being moved between the apartment and the vehicles. These are sufficient facts for the issuing magistrate to rely on in authorizing the search warrant.

After a lengthy hearing and argument, the trial court found K-9 Barney and his handler to be reliable for the search warrant.¹ 6/7/2013 RP 9. In doing so, the court considered the testimony of the experts, including

¹ Apparently Findings of Fact and Conclusions of Law were drafted. However trial counsel neglected to enter them. The Findings will be entered and designated to the Court as soon as possible.

those of the defense that criticized the training, and therefore the results of K-9 Barney's actions. *Id.*, at 5-9. The court heard and considered the factual issues raised below and argued in detail in Espinoza's appellate brief. Espinoza Brf. at 28-38. The determination of the credibility of such expert testimony is for the trial court. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). It is not re-examined on appeal. *Id.*

The court excluded the dog sniff at the door of the residence, but concluded that there were sufficient facts remaining to justify the issuance of the search warrants. *Id.*, at 11, 14. The trial court's conclusion was based upon the information in the warrant affidavit and the testimony at the hearing. The court neither abused its discretion, nor made an error of law.

2. THE STATE ADDUCED SUFFICIENT EVIDENCE TO PROVE ALL ELEMENTS OF UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER, BEYOND A REASONABLE DOUBT.

a. Trial evidence.

In a challenge to the sufficiency of the evidence, the appellate court determines whether any rational fact finder could have found the essential elements of the charged crime beyond a reasonable doubt, viewing the trial evidence in the light most favorable to the State. *State v. Brockob*, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). An insufficiency

claim “admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Direct and circumstantial evidence are equally reliable. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The Court defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. *Thomas*, at 874-875; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

As the jury was instructed, possession may be actual or constructive. *See* Instruction 16, CP 470. The jury was further instructed that they could consider “all the relevant circumstances in the case.” *Id.* The same instruction gave the jury some factors to consider, including “whether the defendant had the ability to take actual possession of the substance and whether the defendant had dominion and control over the premises where the substance was located.” *Id.*

When a person has dominion and control over a premises, it creates a rebuttable presumption that the person has dominion and control over items on the premises. *State v. Summers*, 107 Wn. App. 373, 389, 28 P.3d 780 (2001). As to the heroin and methamphetamine, possession need not be exclusive. *See* Instruction 16, CP 470. *See, e.g. State v. Turner*, 103 Wn. App. 515, 522, 13 P.3d 234 (2000)(possession of a firearm).

Constructive possession cases are heavily reliant on the particular facts of each case. The Courts have had many opportunities to examine various scenarios. *See e.g. State v. Reichert*, 158 Wn. App. 374, 242 P.3d

44 (2010)(shared residence); *State v. Bowen*, 157 Wn. App. 821, 239 P.3d 1114 (2010)(sole occupant of truck); *State v. Nyegaard*, 154 Wn. App. 641, 226 P.3d 783 (2010)(passenger in car with several occupants).

In a discussion regarding constructive possession of drugs, *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969) is often cited, as the defendant does. Hernandez Br. at 29. In *Callahan*, the defendant was a guest in a Seattle houseboat occupied and frequented by several other drug users. He did not pay rent or live on the premises. *Id.* at 31. Although there was some evidence of the defendant's presence near, and even handling of, the drugs involved, another person, Charles Weaver, testified at trial that the drugs belonged exclusively to him. *Id.* Others also testified that the drugs belonged to Weaver. *Id.*

Here, as opposed to *Callahan*, no one claimed ownership of the drugs or control of Apt. 9. There was no evidence or testimony that any of the defendants were not involved or did not possess the drugs.

b. Evidence of possession with intent to deliver.

Here, the defendants focus their challenge on the possession element. Espinoza Br. at 22; Hernandez Br. at 27. The defendants admit as true, and “all the inferences that reasonably can be drawn from” quite a bit of evidence.

Evidence was spread throughout the apartment. Police discovered over eight kilograms of heroin and over 2.3 kilograms of methamphetamine in Apt. 9 at 9621 10th Ave. East. 6 RP 35, 38, 39, 41. Methamphetamine was discovered in the bedroom and kitchen. 4 RP 41, 48. Six kilograms of heroin were hidden in a wall in the laundry room. 6 RP 35. Another 2.5 kilograms of heroin were found in the bedroom closet. 6 RP 38. Packaging material, a scale, and a notebook containing collection and distribution information were found in the kitchen. 6 RP 48, 50-51.

Police conducting surveillance saw the defendants going back and forth to Apt. 9 from vehicles parked in the lot nearby. 3 RP 30, 4 RP 6, 73. Cruz-Camacho working under the hood of a Nissan Altima and Ford Ranger in the parking lot. 6 RP 67, 70. In the parking lot, a drug-detection dog alerted positively for the presence of drugs on the vehicles Cruz-Camacho had been working on, and a second Nissan Altima. 4 RP 30, 31, 33.

The defendants were later stopped while driving these respective vehicles. Hernandez was driving the Altima with Oregon license plates (3 RP 33), Espinoza an Altima with California license plates (3 RP 36), and Cruz-Camacho the Ford Ranger (3 RP 39).

The Ford Ranger had a compartment in the tailgate where drugs or money could be hidden. 3 RP 39. A Chrysler PT Cruiser registered to Cruz-Camacho had a hidden compartment in the rear bumper. 3 RP 37. Cruz-Camacho had keys that opened the door to Apt. 9. 6 RP 78.

Hernandez' car contained \$56,544 in cash, bundled and wrapped in the same plastic wrap found in Apt. 9 and wrapping the heroin. 3 RP 33, 6 RP 16. He had multiple identifications in three different names. 3 RP 34, 4 RP 72, 6 RP 84. He told police that there were "No drugs, just money." 4 RP 74. He admitted that he was a drug-dealer, albeit a small one. 5 RP 28. He claimed he just used the money to pay bills and deal in used cars. *Id.*

Espinoza's car contained \$42,000 bundled and wrapped as the heroin was. 3 RP 36, 6 RP 24. The drug detection dog alerted positively to the plastic-wrapped money. 4 RP 34. Espinoza admitted that he had been in Apt. 9. 5 RP 36.

Lakewood Police Detective Jason Catlett testified as an expert regarding drug trafficking. Among other things, Det. Catlett testified that heroin and methamphetamine users usually purchase very small amounts, one gram, of the drug at a time. 5 RP 10. Street-level drug dealers typically have one or two ounces in supply. *Id.* He testified that middle and upper-level dealers in heroin and methamphetamine deal in pounds or kilograms. 5 RP 12- 13. Upper-level dealers import the drugs, usually from California, in kilogram quantities. 5 RP 13. The high-level dealers smuggle large amounts of the drugs in hidden compartments in vehicles, which are often registered under a different name. *Id.*

Det. Catlett went on to testify that upper-level drug dealers often store the drugs in a house or apartment rented in someone else's name. 5

RP 14. Those residences usually remain empty, but for hiding or processing the drugs. *Id.*

Det. Catlett testified that one pound of heroin had a value of approximately \$5,000. 5 RP 14. A pound of methamphetamine would cost \$7,500-8,000. 5 RP 15. Street-level amounts, a gram, of heroin would cost \$20-30. *Id.* The same amount of methamphetamine would be \$80-100. *Id.* Street-level drugs would have been diluted and adulterated to increase profits. 5 RP 16.

Det. Catlett opined that because the heroin and methamphetamine in this case were large amounts, they were possessed by high-level dealers. 5 RP 20, 25. When shown photographs of the drugs (Exhibits #52 and 54), Det. Catlett said that the amounts and mode of packaging were indicative of high-level drug smugglers and dealers. 5 RP 21, 22, 23.

From this evidence, the jury could conclude beyond a reasonable doubt that the three defendants were transporting and hiding large amounts of drugs and money. The jury could conclude that, where large amounts of valuables like drugs and money were being smuggled and sold, it was logical for the enterprise to be conducted by more than one person. The defendants were linked where the police saw them walking back and forth between Apt. 9 and the vehicles, the drug dog alerting to the same vehicles in the parking lot, the similarly packaged cash and drugs, and their admissions.

Hernandez and Espinoza admitted being connected. Espinoza argued that the packaged \$42,000 he had was payment for a real estate transaction involving Hernandez' relatives in Mexico. He presented evidence in attempt to prove it. 7 RP 27ff.

The defendants were linked to Apt. 9 by evidence. More than one officer saw the defendants, or men matching their description, coming and going between Apt. 9 and the vehicles in the parking lot. Espinoza admitted that he had been in the apartment. Cruz-Camacho had a key to the door.

c. Evidence of school bus stop.

According to the transportation director of the school district, the school bus stop was right in front of the apartment building; 9621 10th Ave. East. 5 RP 4, 5. Officer Smith measured the distance to the front door of Apt. 9. It was less than 1000 feet. 7 RP 15. In addition to use of a measuring device, Officer Smith testified that Apt. 9 was separated from the school bus stop only by a sidewalk four feet wide, a parking spot eight or nine feet long, and a driveway 35 feet long. 7 RP 20-21. The jury could conclude from this evidence that the crime was committed less than 1000 feet from the school bus stop.

d. Evidence of *corpus delicti* to support admission of defendants' statements.

The corpus delicti doctrine “tests the sufficiency or adequacy of evidence, other than a defendant's confession, to corroborate the confession.” *State v. Dow*, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010) (citing *State v. Brockob*, 159 Wn.2d 311, 327–328, 150 P.3d 59 (2006)). “The purpose of the corpus delicti rule is to prevent defendants from being unjustly convicted based on confessions alone. *Dow*, 168 Wn.2d at 249 (citing *City of Bremerton v. Corbett*, 106 Wn.2d 569, 576, 723 P.2d 1135 (1986)).

To satisfy the corpus delicti rule, the State must present evidence independent of the incriminating statement that shows the crime described in the defendant's statement occurred. *Brockob*, 159 Wn.2d at 328. In determining whether this standard is satisfied, the court reviews the evidence in the light most favorable to the State. In assessing whether there is sufficient evidence of the *corpus delicti*, independent of a defendant's statements, the Court assumes the truth of the State's evidence and all reasonable inferences from it in a light most favorable to the State. *State v. Aten*, 130 Wn.2d 640, 658, 927 P.2d 210 (1996); *City of Bremerton v. Corbett*, 106 Wn.2d 569, 571, 723 P.2d 1135 (1986); *see also Brockob*, 159 Wn.2d at 328.

The independent evidence need not be sufficient to support a conviction, but it must provide prima facie corroboration of the crime

described in a defendant's incriminating statement. *Brockob*, 159 Wn.2d at 328. Prima facie corroboration exists if the independent evidence supports a "logical and reasonable inference" of the facts the State seeks to prove. *State v. Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). "Prima facie" in this context means there is "evidence of sufficient circumstances which would support a logical and reasonable inference" of the facts sought to be proved. *Vangerpen*, at 796. The independent evidence must be consistent with guilt and inconsistent with innocence. *State v. Aten*, 130 Wn.2d 640, 660, 927 P.2d 210 (1996).

Here, both Espinoza and Hernandez gave statements to police. There is more than prima facie evidence to show that the crime charged, possession of heroin and methamphetamine with intent to deliver, occurred. Police discovered very large amounts of drugs: 8.5 kilograms of heroin and 2.3 kilograms of methamphetamine. They discovered packaging material, a scale, and a notebook containing collection and distribution information in the kitchen. Even without Det. Catlett's testimony regarding drug smuggling and dealing, this evidence provided *corpus delicti* of the crime.

3. DEFENSE COUNSEL PERFORMANCE REGARDING SENTENCING.

To establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient, and (2)

the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 685-687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient when it falls below an objective standard of reasonableness under prevailing professional norms. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption that counsel's performance was not deficient. *Id.* The court reviews counsel's performance in the context of all of the circumstances presented by the case and the trial. *Id.* at 334–35. Performance is not deficient where counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009); *McFarland*, 127 Wn.2d at 336.

To establish prejudice, the defendant must show that there is a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors. *McFarland*, 127 Wn.2d at 335.

a. The counts are the same criminal conduct for sentencing.

RCW 9.94A.589(1)(a). "Same criminal conduct," means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. The defendant has the burden to establish that the crimes constitute the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013).

The facts in drug cases often leads to a finding that multiple counts are the same criminal conduct for calculation of the offender score. *See e.g. State v. Williams*, 135 Wn.2d 365, 957 P.2d 216 (1998)(sales of ten rocks of cocaine, at same time and place, to each of two police informants in a controlled buy); *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997)(immediate sequential sales of methamphetamine and marijuana); *State v. Vike* 125 Wn.2d 407, 885 P.2d 824 (1994)(simultaneous simple possession of two different controlled substances); *State v. Garza-Villarreal*, 123 Wn.2d 42, 864 P.2d 1378 (1993)(concurrent counts of attempted possession with intent to deliver two different controlled substances).

Here, the heroin and methamphetamine were possessed at the same time and place. The counts should have been scored as same criminal conduct. However, the enhancements would be still applied under RCW 9.94A.533(6). There, the 24 month school bus stop enhancement would still be added, but not consecutively to each other. *See State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093 (2015).

b. Prejudice and remand for correct score and resentencing.

If deficient, the defendants were not prejudiced where the defendants were all sentenced above the standard range. The jury found

sentence aggravators for all three defendants. The court imposed exceptional sentences.

However, even where an exceptional sentence is imposed, the offender score must be correct. Remand is necessary unless it is clear from the record that the court would have imposed the same sentence. *See State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). Here, while the court remarks upon the seriousness of the crime and length of sentence (10 RP 16-19), it is not clear from the record that the court would impose the same sentence with the correct offender score and range. Remand is necessary to correct the offender scores and resulting standard ranges, and for the court to determine or redetermine the length of the sentences.

c. LFOs

Counsel were not deficient in failing to object to the LFOs. Their clients were caught with drugs worth over \$100,000, and a large amount of money. As pointed out below, the trial produced evidence supporting the court's order. Objecting to the discretionary LFOs would have likely been fruitless.

4. LEGAL FINANCIAL OBLIGATIONS IMPOSED BY THE TRIAL COURT WERE SUPPORTED BY THE RECORD.

- a. The defendants have failed to preserve the alleged error at trial.

Under RAP 2.5(a), issues must be preserved in the trial court before they may be considered on appeal. This includes the imposition of LFOs. See *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 680 (2013); *aff'd* 182 Wn.2d 827, 344 P.3d 680 (2015).

If the defendant has an objection to the imposition of LFOs, he must raise it in the trial court. When properly raised, the court has the opportunity to address the issue and consider the defendant's financial ability or prospects. If the defendant disagrees with the court's determination, he may then appeal it upon a complete record. If the criticisms of the legal system raised in *Blazina* are addressed, or even corrected, the defendant has a duty to raise or discuss the issue below. The Court of Appeals should decline to review such complaints, just as it declines to review any other legal issue that the defendant fails to raise below.

- b. The discretionary LFOs are supported by the record.

Imposition of some LFOs such as defense costs and attorney fees is discretionary. See *State v. Barklind*, 87 Wn.2d 814, 817–819, 557 P.2d 314 (1976); *State v. Smits*, 152 Wn. App. 514, 520–521, 216 P.3d 1097

(2009); RCW 10.01.160(1), (2). “Discretionary” generally means “involving an exercise or judgment and choice not an implementation of a hard-and-fast rule.” *State v. Osman*, 168 Wn.2d 632, 639, 229 P.3d 729 (2010), citing Black's Law Dictionary (9th ed. 2009).

Unlike the admission of evidence, which is also generally discretionary, there are no clear “rules” for the imposition of discretionary LFOs. In *Blazina*, 182 Wn.2d at 839 the Supreme Court held that sentencing courts must make an individualized inquiry into the defendant's current and future ability to pay before the court imposes discretionary LFOs under RCW 10.01.160. Although suggesting the criteria found in GR 34 as a guide for trial courts, the Supreme Court declined to require it or establish any other hard rules for the courts to follow.

Appellate courts review a decision on whether to impose LFOs for abuse of discretion. *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The trial court’s factual determination concerning a defendant's resources and ability to pay is reviewed under the “clearly erroneous” standard. *State v. Bertrand*, 165 Wn. App. 393, 403–04, 267 P.3d 511 (2011); *Baldwin*, 63 Wn. App. at 312.

Fines imposed are not a “cost” subject to the statutory requirement that a court inquire into a defendant's ability to pay before imposing a

discretionary legal financial obligation. *State v. Clark*, -Wn. App.-, -P.3d- (2015)(2015 WL 7354717).

Here, the record reflects that the defendants had resources and marketable skills. The defendants were found with over \$100,000 in cash: \$56,544 in Hernandez' car (6 RP16) and \$42,000 in Espinoza's. 6 RP 24. Espinoza and Hernandez both claimed that they had respective employment and that the money was from legitimate businesses. Espinoza was on a business trip here. He had resources to rent a car in California and drive to Tacoma, Washington. Hernandez apparently owned real estate in Mexico, as his claim was that the money was from a sale there. The defendants also had sufficient resources to purchase 14 pounds of heroin, worth over \$70,000 and five pounds of methamphetamine, worth between \$37,000-40,000, as they were in possession of those drugs. The evidence showed that these were truly men of means who could pay LFOs.

5. THE TRIAL COURT HAD STATUTORY AUTHORITY TO ORDER FORFEITURE OF THE PROPERTY SEIZED.

A trial court has no inherent power to order forfeiture of property in connection with a criminal conviction. *State v. Alaway*, 64 Wn. App. 796, 800, 828 P.2d 591 (1992). Any authority for the court to order the forfeiture of property is statutory. *Id.* An appellate court reviews *de novo* whether the trial court had statutory authority to impose a sentencing

condition. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007); *State v. Roberts*, 185 Wn. App. 94, 339 P.3d 995 (2014).

Two statutes authorize the trial court to order the forfeiture of property. RCW 10.105.010(1) generally authorizes forfeiture of instrumentalities and proceeds of felonies. But it does not apply to property subject to forfeiture under RCW 69.50.505. *See* RCW 10.105.900.

In interpreting a statute, the court's primary goal is to give effect to the legislature's intent. To determine legislative intent, the court first looks to see if the meaning of the statute is plain on its face. "The plain meaning of a statute 'is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.'" *Advanced Silicon Materials, LLC v. Grant County*, 156 Wn.2d 84, 89–90, 124 P.3d 294 (2005), quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)).

The language of RCW 69.50.505(1) is similar to RCW 10.105.010(1) in declaring certain property as subject to seizure and forfeiture, but is specific to drug crimes. RCW 69.50.505(1) provides a long list of things that "are subject to seizure and forfeiture and no property right exists in them," including controlled substances (RCW 69.50.505(1)(a)) and money (.505(1)(g)). Although subsection (2) creates an administrative procedure for "any board inspector or law enforcement officer of this state" to seize and forfeit property, the statute does not

provide that this procedure is the exclusive means to forfeit property under this title. Indeed, it would be a curious system where non-judicial officers had the power to forfeit property and the courts did not. Subsection (5) permits redress to the courts:

any person asserting a claim or right may remove the matter to a court of competent jurisdiction. Removal of any matter involving personal property may only be accomplished according to the rules of civil procedure.

The plain meaning of RCW 69.50.505(1) gives the court the authority to order forfeiture of property enumerated in the statute. Under the defendants' reasoning, the courts only authority to order forfeiture is after the civil forfeiture process has begun. This is an improper reading of this statute.

Here, as in *State v. McWilliams*, 177 Wn. App. 139, 152, 311 P.3d 584 (2013), none of the defendants objected to the order of forfeiture when they had the opportunity to do so, at the time of sentencing. None of them complains or explains whether the property was properly seized and forfeited through a civil proceeding under RCW 69.50.505. Also, as in *McWilliams*, none of the defendants asserted ownership of the property at sentencing. The defendants fail to show error by the trial court.

6. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MR. ESPINOZA'S MOTION TO SEVER.

Separate trials have never been favored in Washington. *State v. Grisby*, 97 Wn.2d 493, 647 P.2d 6 (1982). The granting or denial of a motion for severance of jointly charged defendants is entrusted to the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. *State v. Alsup*, 75 Wn. App. 128 876 P.2d 935 (1994); *State v. Barry*, 25 Wn. App. 751, 611 P.2d 1262 (1980). To support a finding that the trial court abused its discretion, the burden is on the defendant to come forward with facts sufficient to warrant the exercise of discretion in his favor. *Alsup*, 75 Wn. App. at 131.

Severance is only proper when the defendant carries the difficult burden of demonstrating undue prejudice from a joint trial. *Grisby*, 97 Wn.2d at 507. Defendants seeking a separate trial must demonstrate manifest prejudice in a joint trial which outweighs the concern for judicial economy. *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991).

A defendant can demonstrate specific prejudice by showing:

(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 inculcating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.

State v. Canedo-Astorga, 79 Wn. App. 518, 528, 903 P.2d 500 (1995).

Here, the defendant fell far short of showing “manifest prejudice” requiring separate trials. There was no admission or statement from defendant Hernandez exculpating Espinoza. The defense alleged a real estate transaction, but had no proof of it. If true, Espinoza could have so testified at trial.

The court queried counsel why other witnesses could not be summoned to testify regarding the alleged real estate transaction. 7/9/2013 RP 9-10. Counsel had no satisfactory explanation. *Id.*, at 10-12. The court concluded that the information would properly come from the persons owning the real estate and supposedly sending Espinoza to collect the money. *Id.*, at 13. After hearing counsel’s argument, the court concluded that the alleged explanation of why Espinoza had the money was not credible on its face and the defense could obtain other, and better evidence of the alleged facts than to sever the cases. *Id.*, at 15, 16. The trial court did not abuse its discretion.

7. THE DEFENDANTS HAD NOTICE OF AGGRAVATING FACTORS.

Article I, §22 of Washington's constitution affords a criminal defendant the right to know “the nature and cause of the accusation against him.” The Sixth Amendment to the United States Constitution provides similar protection. The protection afforded by each of these constitutional

provisions is the same. *See State v. Hopper*, 118 Wn.2d 151, 156, 822 P.2d 775 (1992).

But the Washington Constitution does not require the State to allege aggravating circumstances in a charging document. *State v. Siers*, 174 Wn.2d 269, 281, 274 P. 3d 358 (2012). In *Siers*, the Washington Supreme Court pointed out that, while the Fifth Amendment of the United States Constitution required aggravating circumstances to be alleged in an indictment, this is not true for the States because the Fifth Amendment grand jury clause is not applicable to the states under the Fourteenth Amendment. *See Siers*, at 278-279. The Court held that aggravating factor is not the functional equivalent of an essential element and overruled *State v. Powell*, 167 Wn.2d 672, 682, 223 P.3d 493 (2009). *See Siers*, at 276-277, 282. RCW 9.94A.537(1) does not mandate the manner in which notice must be given. *See Siers*, at 277.

Siers was charged with two counts of assault in the second degree, including a deadly weapon enhancement on each count. The State had informed the defendant of the intent to seek a “good Samaritan” aggravator on one of the counts. *See* RCW 9.94A.535(3)(w). The *Siers* opinion does not state if the notice was verbal or written, but it was not in the Information.

Here, notice of the aggravating circumstances were included in the original Information. CP 1. The defendants were certainly notified of the State’s intent to seek exceptional sentences where the State’s proposed

instructions included Instructions 21 and 23, and corresponding special verdict forms, filed on September 17, 2013. CP 416, 418, 431-436.

8. AGGRAVATING FACTORS APPLIED TO ALL THREE DEFENDANTS.

In order for the trial court to impose an exceptional sentence, the aggravating factor supporting the exceptional sentence generally must be based on the defendant's own conduct. *State v. Hayes*, 182 Wn.2d 556, 342 P.3d 1144 (2015). There, Hayes was convicted of leading organized crime and other charges under accomplice liability. *Id.*, at 559. The question was whether Hayes knew that the offense involved a high degree of sophistication or planning or would occur over a lengthy period of time. Because the Court could not determine from the jury findings whether the exceptional sentence was based improperly on automatic liability for the offense, the exceptional sentence was vacated. *Id.*, at 566.

A similar issue arose in *State v. Allen*, 182 Wn.2d 364, 383, 341 P.3d 268 (2015). Allen was charged as an accomplice, with the murders of four Lakewood police officers. *Id.*, at 369. The allegations included a number of aggravating circumstances for sentencing. The Supreme Court conducted a statutory analysis to determine whether there was express triggering language automatically authorizing an exceptional sentence for accomplices. *Allen*, 182 Wn.2d at 384-385. The Court held that if there is no express triggering language, the Court would then look to the defendant's own actions to form the basis for the aggravator. If the

defendant's own conduct satisfies the elements of the aggravator, then the aggravator applies. *Id.*, at 385.

More recently, in *State v. Weller*, 185 Wn. App. 913, 344 P.3d 695 (2015), the defendants were convicted of multiple offenses arising from abuse of their children. 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?” The *Weller* court concluded the exceptional sentence was justified because the jury found that each of the Wellers' own conduct, and not the Wellers' joint conduct, supported the exceptional sentence. *Id.*, at 928.

The charging language also characterized the defendants for the purpose of the sentence aggravator or enhancement. Although the original Information charged each defendant as an accomplice (CP 1-2), the amended Information omits this characterization and names each specifically as the actor. CP 41-42, 91-92, 379-380. The amended information also alleges that the *defendants* (plural) were acting within 1000 feet of the school bus stop. *Id.*

One special verdict form asks if *the defendant* possessed the controlled substance within 1000 feet of the school bus stop. CP 496. The other special verdict form states “having found the *defendant* guilty,” then asks “was the crime a major violation of the Uniform Controlled Substance Act?” CP 498. Thus, as in *Weller*, the jury’s finding was regarding the individual defendant’s behavior, not “the defendant or an

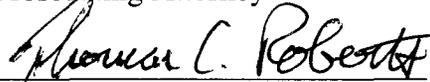
accomplice.” The sentence aggravator and enhancement applies to each defendant.

D. CONCLUSION.

Judge Culpepper’s conclusions at the suppression hearing were well-considered and supported by the record. Judge Rumbaugh’s rulings at trial, with the exception of same criminal conduct and offender score, were correct. The defendants received a fair trial where sufficient evidence was adduced for their convictions. The State respectfully requests that the convictions be affirmed.

DATED: January 27, 2016

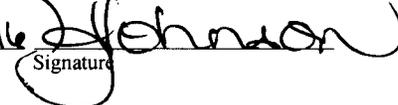
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The undersigned certifies that on this day she delivered by ^{efile} ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/27/16 
Date Signature

PIERCE COUNTY PROSECUTOR

January 27, 2016 - 10:24 AM

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