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Washington State
Court of Appeals
Division Two

April 22, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER RICHARD KOCH, Appellant.	No. 58449-2-II PART PUBLISHED OPINION

MAXA, J. – Christopher Koch appeals his conviction and sentence for multiple crimes, including second degree unlawful possession of a firearm, unlawful possession of fentanyl with intent to deliver, unlawful manufacture of fentanyl, and unlawful manufacture of a counterfeit controlled substance trademark or imprint.

To support its case for the second degree unlawful possession of a firearm conviction, the State established that Koch had prior felonies for forgery, possession of stolen property, and identity theft. Koch argues that his conviction for unlawful possession of a firearm based on nonviolent felonies violates the Second Amendment to the United States Constitution and article I, section 24 of the Washington Constitution.

In the published portion of this opinion, we hold that as applied to Koch, his conviction for second degree unlawful possession of a firearm does not violate the Second Amendment or article I, section 24. In the unpublished portion, we reverse Koch's conviction for unlawful

manufacture of a controlled substance trademark or imprint, but we reject his remaining arguments.

Accordingly, we affirm Koch's conviction for second degree unlawful possession of a firearm. We reverse Koch's conviction for unlawful manufacture of a counterfeit controlled substance trademark or imprint and remand to the trial court for further proceedings, but we affirm Koch's remaining convictions and sentence.

FACTS

The State charged Koch with second degree unlawful possession of a firearm under RCW 9.41.040(2)(a)(i)(A). This was based on the presence of two handguns, a fully automatic AR-15 rifle, and a "ghost" handgun either in his possession or in the possession of an accomplice.

At trial, the State introduced into evidence a 2018 judgment and sentence showing that Koch had prior convictions for two counts of forgery, possession of stolen property, and two counts of identity theft. The jury found Koch guilty of second degree unlawful possession of a firearm.

Koch appeals his second degree unlawful possession of a firearm conviction.

ANALYSIS

A. WAIVER OF CLAIMS

The State argues that Koch waived his Second Amendment and article I, section 24 claims because he did not raise them in the trial court. We disagree.

Under RAP 2.5(a), we generally decline to address issues on appeal that were not properly raised before the trial court. But RAP 2.5(a)(3) permits a party to raise an issue for the first time on appeal for a "manifest error affecting a constitutional right." An error is manifest if the appellant shows actual prejudice. *State v. J.W.M.*, 1 Wn.3d 58, 91, 524 P.3d 596 (2023).

The appellant must make a plausible showing that the claimed error had practical and identifiable consequences at trial. *Id.* Being charged and convicted under an unconstitutional statute is a manifest error effecting a constitutional right. *State v. Rice*, 174 Wn.2d 884, 893, 279 P.3d 849 (2012).

Here, Koch's Second Amendment and article I, section 24 claims are alleged errors affecting his constitutional right to bear arms. And if we hold that his conviction violates either the federal or state constitutions, then the proper remedy is to vacate the conviction and dismiss the charge. Therefore, Koch's alleged error would actually prejudice him by being convicted due to the unconstitutional application of a statute.

Accordingly, we conclude that Koch did not waive his Second Amendment and article 1, section 24 claims.

B. SECOND AMENDMENT CLAIM

Koch argues that his conviction for unlawful possession of a firearm violates the Second Amendment as applied to him based on his prior convictions for the nonviolent felonies of forgery, possession of stolen property, and identity theft. We disagree.

1. Second Amendment Principles

We review the constitutionality of a statute de novo. *State v. Batson*, 196 Wn.2d 670, 674, 478 P.3d 75 (2020). Statutes are presumed to be constitutional. *Id.*

RCW 9.41.040(1)(a) states that a person is guilty of first degree unlawful possession of a firearm if the person "owns, accesses, has in the person's custody, control, or possession, or receives any firearm" after being convicted of any "serious offense." RCW 9.41.040(2)(a)(i)(A) states that a person is guilty of second degree unlawful possession of a firearm if the person "owns, accesses, has in the person's custody, control, or possession, or receives any firearm"

after being convicted of any felony not listed in the definition of first degree unlawful possession of a firearm.

Forgery, possession of stolen property, and identity theft do not fall within the definition of a "serious offense." *See* RCW 9.41.010(42). They are class C felonies. RCW 9A.60.020(3); RCW 9.35.020(3); RCW 9A.56.160(2). And they are classified as nonviolent offenses. RCW 9.94A.030(33), (58).

The Second Amendment states, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The Second Amendment applies to the states as incorporated through the due process clause of the Fourteenth Amendment. *McDonald v. Chicago*, 561 U.S. 742, 777-78, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).

In *District of Columbia v. Heller*, the United States Supreme Court held that the Second Amendment protects a person's right to possess a firearm. 554 U.S. 570, 595, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). Specifically, the Court held that the "absolute prohibition of handguns held and used for self-defense in the home" violated the Second Amendment. *Id.* at 636. But the Court clarified that the right to keep and bear arms is not unlimited. *Id.* at 595. The Court noted that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *Id.* at 626. The Court stated that such regulatory measures are "presumptively lawful." *Id.* at 627 n.26.

The Court repeated this admonition in *McDonald*: "We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons.' " 561 U.S. at 786 (quoting *Heller*, 554 U.S. at 626).

In *New York State Rifle and Pistol Association, Inc. v. Bruen*, the Court held that the Second Amendment protects a person's right to carry a weapon outside the home. 597 U.S. 1, 31-32, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022). The Court noted that the Second Amendment " 'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense." *Id.* at 26 (quoting *Heller*, 554 U.S. at 635). And the Court emphasized that "law-abiding, adult citizens . . . are part of 'the people' whom the Second Amendment protects." *Id.* at 31-32.

The Court established a new test to determine whether a particular statute violates the Second Amendment: "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 24. Therefore, if a statute covers a person's right to bear arms, the government then has the burden of showing that the regulation has a historical analogue from the founding era.[1] *Id.* But the analysis in *Bruen* requires only a "well-established and representative historical *analogue*, not a historical *twin*." *Id.* at 30. A modern firearm regulation does not need to be a "dead ringer" to a historical tradition in order to "pass constitutional muster." *Id.* at 30.

In a concurring opinion joined by Chief Justice Roberts, Justice Kavanaugh noted that "[p]roperly interpreted, the Second Amendment allows a 'variety' of gun regulations." *Id.* at 80 (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 636). Justice Kavanaugh then quoted the statement in *Heller* that " 'nothing in our opinion should be taken to cast doubt on

[1] The Court in *Bruen* declined to identify what precise historical period should be looked to for analogues to modern gun regulation, *i.e.*, whether courts should look to historical analogues around 1791 when the Second Amendment was ratified or around 1868 when the Fourteenth Amendment was ratified. 597 U.S. at 37-38.

longstanding prohibitions on the possession of firearms by felons.' " 597 U.S. at 81 (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 626).

In *United States v. Rahimi*, the Court held that the Second Amendment does not prevent the government from disarming people who pose "a credible threat to the physical safety of an intimate partner . . . while [a domestic violence restraining order] is in effect." 602 U.S. 680, 690, 144 S. Ct. 1889, 219 L. Ed. 2d 351 (2024). In that case, Rahimi had been found by a trial court to be credible threat of committing domestic violence against his intimate partner and imposed a domestic violence restraining order. *Id.* at 686-87. Rahimi subsequently was found with a rifle and was indicted for violating a federal statute prohibiting possession of a firearm while subject to a domestic violence restraining order. *Id.* at 688.

In deciding the Second Amendment issue, the Court admonished lower courts that looked for too strict of an analogue, and held that "[t]he law must comport with the principles underlying the Second Amendment." *Id.* at 692. Accordingly, the Court found the statute constitutional because traditional historical statutes such as surety and going armed laws were analogous to the principle of disarming individuals who threaten domestic violence. *See Id.* at 693.

Rahimi also noted the statement in *Heller* about prohibiting firearm possession by felons:

> *Heller* never established a categorical rule that the Constitution prohibits regulations that forbid firearm possession in the home. In fact, our opinion stated that many such prohibitions, like those on the possession of firearms by "felons and the mentally ill," are "presumptively lawful."

Id. at 699 (quoting *Heller*, 554 U.S. at 626, 627, n.26).

2. Washington Cases

The United States Supreme Court has not squarely decided whether the government may criminalize possession of firearms by felons consistent with the Second Amendment. Four published Washington cases have addressed this issue.

In *State v. Ross*, decided before *Rahimi*, Ross argued that restricting the possession of firearms for people with nonviolent felony convictions – in his case, felony burglary – was unconstitutional as applied to him. 28 Wn. App.2d 644, 646, 537 P.3d 1114 (2023), *review denied*, 2 Wn.3d 1026 (2024). Division One of this court held that RCW 9.41.040(1) is both facially constitutional under the Second Amendment and constitutional as applied to Ross. *Id.* at 651, 653.

Regarding facial constitutionality, the court stated that both *Heller* and *McDonald* recognized the long-standing prohibition of felons possessing firearms. *Id.* at 647-48. In addition, the court emphasized that in *Bruen* the Supreme Court stated that the Second Amendment protected the right of " '*law-abiding* citizens' " to possess firearms. *Id.* at 649 (quoting *Bruen*, 597 U.S. at 8-9). The court noted that the majority opinion in *Bruen* referenced "law-abiding" citizens at least 11 times. *Ross*, 28 Wn. App. 2d at 649 (citing *Bruen*, 597 U.S. at 9, 15, 26, 29, 31, 38, 60, 71). Therefore, the court held that under *Heller*, *McDonald* and *Bruen*, "the Second Amendment does not bar the State from prohibiting the possession of firearms by felons as it has done in RCW 9.41.040(1)." *Ross*, 28 Wn. App. 2d at 651.

Regarding Ross's as applied challenge, the court stated that "Ross's attempt to distinguish violent and nonviolent felons is of his own construct." *Id.* The court noted that neither *Heller* nor *Bruen* distinguished between violent and nonviolent felonies when recognizing prohibitions against felons possessing firearms. *Id.* at 651-52. In addition, both

cases stated that the Second Amendment protects law-abiding citizens. *Id.* at 651-52. The court reasoned that because Ross had been convicted of a felony, he was not a law-abiding citizen.[2] Therefore, the court rejected Ross's as applied challenge. *Id.* at 653.

In *State v. Bonaparte*, the defendant had a prior conviction for first degree assault and challenged his conviction of unlawful possession of a firearm as unconstitutional under the Second Amendment. 32 Wn. App. 2d 266, 270-71, 554 P.3d 1245 (2024). This court recited the statements in *Heller*, *McDonald*, and *Rahimi* indicating that longstanding prohibitions against felons possessing firearms are presumptively valid. *Id.* at 271-74. And the court acknowledged the holding in *Ross* that prohibiting felons from possessing firearms does not violate the Second Amendment. *Id.* at 274. Finally, the court noted that the Supreme Court had stated in *Heller* and *Bruen* that the Second Amendment protects law-abiding citizens. *Id.* at 276.

In conclusion, the court stated,

> An individual's right to keep and bear arms is not unlimited. *Heller*, 554 U.S. at 595. In applying the "historical tradition" framework articulated in [*Bruen*], courts analyze "how and why the [challenged] regulations burden a *law-abiding citizen's* right to armed self-defense." [*Bruen*], 597 U.S. at 29 (emphasis added). As the unlawful possession of a firearm statute, RCW 9.41.040(1)(a), does not burden a law-abiding citizen's right to keep and bear arms and Bonaparte is a convicted felon, the "historical tradition" framework articulated in [*Bruen*] is not applicable to his challenge.

Id. at 279 (some alterations in original). Therefore, the court rejected the defendant's constitutional challenge. *Id.*

In *State v. Olson*, Division Three addressed the argument that prohibiting people convicted of nonviolent felonies violated the Second Amendment. ___ Wn. App. 2d ___, 565

[2] The court also concluded that second degree burglary was defined as a violent crime. *Ross*, 28 Wn. App. 2d at 652. This fact undermined Ross's attempted distinction between violent and nonviolent felonies.

P.3d 128, 137-38 (2025). The court followed *Ross* and *Bonaparte* and held that the unlawful possession of a firearm conviction was not unconstitutional. *Id*. at 138.

In *State v. Hamilton*, the defendant argued that prohibiting firearm possession based on a felony vehicular homicide conviction violated the Second Amendment. ___ Wn. App. 2d ___, 565 P.3d 595, 598 (2025). Division One presumed that the Second Amendment applies to felons and instead moved to the second step of the *Bruen* analysis. *Id*. at 599.

The court concluded that "disarming those with felony convictions is demonstrably consistent with America's historic tradition of firearms regulation." *Id.* at 601. The court noted, "Common law has a long history of disarming individuals, or categories of individuals, who were viewed as a danger to public order." *Id.* at 601-02 The court summarized the firearm bans in existence at the time of our nation's founding. *Id.* at 602-03. The court stated, "[D]isarming those with felony convictions is fully consistent with America's tradition of firearm regulation." *Id.* at 602. Accordingly, the court rejected the defendant's Second Amendment challenge. *Id.* at 603.

3. Analysis

The question here is whether a statute prohibiting a person convicted of nonviolent felonies from possessing a firearm violates the Second Amendment. We conclude that the Second Amendment does not protect convicted felons, who by definition are not law-abiding citizens.

As noted above, *Bruen* outlined a two-part analysis for Second Amendment challenges. 597 U.S. at 24. First, we must determine whether "the Second Amendment's plain text covers an individual's conduct." *Id.* If so, "[t]he government must then justify its regulation by

demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.*

The Second Amendment protects "the right of *the people* to keep and bear Arms." (Emphasis added.) The Court in *Heller* stated that there is a strong "presumption that the Second Amendment right . . . belongs to all Americans." 554 U.S. at 581. But the Court in *Heller* also stated that "longstanding prohibitions on the possession of firearms by felons" are "presumptively lawful." *Id.* at 626 & n.26. The Court repeated that statement in *McDonald*, 561 U.S. at 786, and *Rahimi*, 602 U.S. at 699.

We acknowledge that the statements in *Heller* and *McDonald* about felons came before *Bruen*, but the statement in *Rahimi* suggesting that prohibitions on the possession of firearms by felons are presumptively lawful came after *Bruen*. In addition, the Court in *Bruen* repeatedly stated that the Second Amendment protects law-abiding citizens: "[L]aw-abiding, adult citizens . . . are part of 'the people' whom the Second Amendment protects." 597 U.S. at 31-32.

These cases, as well as *Ross*, *Bonaparte* and *Olson*, support the conclusion that felons – who are not law-abiding citizens – are not among the class of people that the Second Amendment covers. Otherwise, prohibitions on the possession of firearms by felons would not be presumptively lawful as stated in *Heller*. Therefore, we need not engage in *Bruen*'s second step – a historical tradition analysis – to conclude that RCW 9.41.040(2)(a)(i)(A) does not violate the Second Amendment. This court reached the same conclusion in *Bonaparte*. 32 Wn. App. 2d at 279.[3]

[3] Although we do not reach the second step of the *Bruen* analysis, we agree with the court's analysis in *Hamilton*.

Koch argues that even if the Second Amendment does not protect violent felons, the Second Amendment should apply to people convicted of nonviolent felonies. But *Heller*, *McDonald*, and *Rahimi* did not distinguish between violent and nonviolent felons. And nonviolent felons are not law-abiding citizens. The court in *Ross* expressly rejected this argument, 28 Wn. App. 2d at 651-52, and we agree.

Accordingly, we hold that Koch's conviction for unlawful possession of a firearm does not violate the Second Amendment.

B. ARTICLE I, SECTION 24 CLAIM

Koch argues that as applied to him, his conviction for unlawful possession of a firearm violates article I, section 24 of the Washington Constitution. We disagree.

1. Standard of Review

We review constitutional issues de novo. *Batson*, 196 Wn.2d at 674. "A statute that is found unconstitutional as applied remains good law except in similar circumstances." *State v. Jorgenson*, 179 Wn.2d 145, 151, 312 P.3d 960 (2013).

Article I, section 24 states, "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men." We interpret article I, section 24 separately from the Second Amendment. *Jorgenson*, 179 Wn.2d at 152.

"[F]irearm rights guaranteed by the Washington Constitution are subject to reasonable regulation pursuant to the State's police power." *Id.* at 155. A reasonable regulation is one " 'reasonably necessary to protect public safety or welfare, and substantially related to legitimate ends sought.' " *Id.* at 156 (quoting *City of Seattle v. Montana*, 129 Wn.2d 583, 594, 919 P.2d

1218 (1996)). Courts employ a balancing test, assessing the public benefit of a regulation against the extent to which it frustrates the purpose of the constitutional provision. *Jorgenson*, 179 Wn.2d at 156. This requires assessing whether the regulation is substantially related to its purpose. *See id.* at 157-58.

2. Analysis

Here, the State has an interest in limiting the use of firearms by people who previously have been convicted of felonies. The legislature has identified that armed criminals are a threat to public safety, and penalizing individuals convicted of crimes who carry weapons adequately reduces that risk. *See* LAWS OF 1995, ch. 129, § 1.

RCW 9.41.040(2)(a)(i)(A) is substantially related to the purpose of preventing felons from being armed and threatening public safety. Public safety is furthered by disincentivizing felons from possessing weapons through increased jail time. In addition, the provision is tailored by limiting the category of punishment for individuals with less explicitly violent felonies. For example, first degree possession of a firearm is a Class B felony for individuals with prior convictions for crimes of violence, child sexual abuse, or organized crime. *See* RCW 9.41.040(1)(a); RCW 9.41.010(42). In comparison, second degree unlawful possession of a firearm has a shorter sentence. RCW 9.41.040(2)(b) (class C felony).

In addition, Koch is not permanently prohibited from possessing a firearm. A person convicted under RCW 9.41.040 based on a felony offense other than a felony sex offense, a class A felony, or a felony offense with a maximum sentence of at least 20 years may have their firearm rights restored after five years if certain requirements are satisfied. RCW 9.41.041(1)-(2). Once the requirements are satisfied, a trial court must grant a petition for the restoration of

firearm rights. *See Kincer v. State*, 26 Wn. App. 2d 143, 148, 527 P.3d 837 (2023) (applying prior firearm restoration statute).

Accordingly, we hold that RCW 9.41.040(2)(a)(i)(A) does not violate Koch's rights under article I, section 24

CONCLUSION

We affirm Koch's conviction for unlawful possession of a firearm. We reverse Koch's conviction for unlawful manufacture of a counterfeit controlled substance trademark or imprint and remand to the trial court for further proceedings, but we affirm Koch's remaining convictions and sentence.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Unpublished Text Follows

Koch argues that (1) his counsel was constitutionally ineffective for failing to stipulate to his prior convictions, failing to object to evidence regarding prior bad acts involving controlled drug buys, failing to object to hearsay testimony regarding a confidential informant, and failing to propose a jury instruction stating that each charge must be decided separately; (2) insufficient evidence supports his conviction for unlawful manufacture of a counterfeit controlled substance trademark or imprint because the to-convict jury instruction contained a double negative that changed what the State was required to prove; (3) his convictions for unlawful possession of fentanyl with intent to deliver and unlawful manufacturing of fentanyl violate double jeopardy; and (4) the trial court engaged in judicial fact finding in violation of the federal and state constitutions when it assigned a higher seriousness level to his convictions based on special

verdicts that Koch was armed with deadly weapons without deadly weapon special verdicts from the jury.

We reverse Koch's conviction for unlawful manufacture of a counterfeit controlled substance trademark or imprint and remand to the trial court for further proceedings. We affirm Koch's remaining convictions and sentence.

ADDITIONAL FACTS

Law enforcement received information from a confidential informant that Koch had rented and utilized a storage unit. Detective Angel Casteneda observed the storage unit while its door was open and saw a hand pill press. Koch later moved to a warehouse on Marine View Drive. Footage obtained by law enforcement captured people moving a pill press into Koch's warehouse.

After setting up a controlled buy involving Koch, officers executed a search warrant for his person and the warehouse. In Koch's car, law enforcement found an AR-15 rifle and a list with various chemicals and numbers on it. Casteneda also found a baggie with what he described as "pressed blues," or a popular form of drug. Report of Proceedings (June 5, 2023) at 160. In the warehouse, law enforcement found a pill press along with different powders, dye, and stamps. Another gun was found in Koch's backpack.

In addition to unlawful possession of a firearm discussed above, the State charged Koch with unlawful possession of a controlled substance (fentanyl) with intent to deliver, unlawful manufacture of a controlled substance (fentanyl), unlawful manufacture of a counterfeit controlled substance trademark or imprint, unlawful possession of a counterfeit controlled substance device, and unlawful use of a building for drug purposes. On the charges for unlawful possession of a controlled substance and unlawful manufacture of a controlled substance, the

State also charged Koch with committing the offenses while armed with a firearm. All of the charges alleged that the crimes occurred on or about June 15, 2021.

Admission of Prior Judgment and Sentence

At trial, the State offered into evidence a 2018 judgment and sentence that showed that Koch had been convicted of five felonies: two counts of forgery, second degree possession of stolen property, and two counts of second degree identity theft.

The judgment and sentence also listed his previous criminal history, which showed 13 other offenses. But only two – bail jumping and unlawful possession of controlled substance – were felonies. The misdemeanors were third degree theft, assault, two convictions of making a false statement, possession of marijuana, driving while under the influence, disorderly conduct-noise, and four convictions of driving with a suspended license. Further, the judgment and sentence showed that Koch was sentenced in 2018 under a special drug offender sentencing alternative.

Defense counsel did not offer to stipulate that Koch had been convicted of a felony in order to prevent introduction of the judgment and sentence. Defense counsel also did not object to the admission of this judgment and sentence or move to redact any of the information shown.

Testimony Regarding Controlled Buys

The State elicited testimony from law enforcement officers regarding controlled drug buys involving Koch. A controlled buy occurs when law enforcement deliberately sets up a transaction for illegal substances with a confidential informant using marked bills.

Casteneda testified regarding two controlled buys in late May and early June of 2021. In the first, Casteneda testified that he set up a controlled buy involving Koch at the warehouse on Marine View Drive. He patted down the controlled informant and gave him marked bills. The

surveillance team was in place to observe the controlled buy. After the transaction was complete, Casteneda confiscated the alleged drugs from the informant.

In the June 2021 buy, Casteneda testified that he set up a controlled buy at Koch's apartment at Koch's request. Casteneda patted down the confidential informant, confirmed he did not have any other items on him, gave him marked bills, and sent him into the apartment. The apartment was under surveillance, although law enforcement could not see inside the apartment. Casteneda testified that that when the confidential informant returned, he provided Casteneda with a white powdered substance in a bag. Casteneda suspected the substance to be fentanyl.

Inspector Joseph Novak also testified about the two controlled buys. Both Casteneda and Novak testified that in both instances the informant obtained fentanyl from Koch.

Law enforcement then obtained and executed a search warrant against Koch. They found an AR-15 rifle, a list of chemicals and numbers, and pills in bags in Koch's car.

Koch Testimony

Koch testified on direct examination that he was a drug addict at the time of the controlled buys. He also stated on cross-examination that he was still doing drugs at the time he was arrested.

Jury Instructions

The jury instructions that the State submitted and the trial court gave to the jury included an instruction defining count 3, unlawful manufacture of a counterfeit controlled substance trademark or imprint. Jury instruction 17 stated,

> It is unlawful for any person knowingly or intentionally to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness

> thereof, of a manufacturer, distributor, or dispenser, *other than the person who in fact manufactured, distributed, or dispensed the substance*.

Clerk's Papers (CP) at 47 (emphasis added). Jury Instruction 19 stated in part,

> To convict the defendant of the crime of unlawful manufacture of counterfeit controlled substance trademark or imprint, as charged in count 3, each of the following elements of the crime must be proved beyond a reasonable doubt:
> . . . .
>
> (3) *Neither the defendant or an accomplice was <u>not</u>* the manufacturer, distributer, or dispenser of the substance identified on the label.

CP at 49 (emphasis added).

Defense counsel did not propose and the trial court did not give a standard "separate crime" jury instruction, which instructs the jury that a separate crime is charged for each offense and that they must decide each charge separately. *See* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 3.01, at 92 (5th ed. 2021) (WPIC).

Verdict and Sentence

The jury found Koch guilty on all of the charged crimes. On special verdicts regarding firearm enhancements, the jury found that Koch was armed with a .45 caliber handgun and an AR-15 rifle when he committed unlawful possession of fentanyl with intent to deliver and with a .45 caliber handgun when he committed unlawful manufacture of fentanyl.

At sentencing, the parties stipulated that the seriousness level for Koch's conviction of unlawful possession of fentanyl with intent to deliver was 3. The trial court's judgment and sentence reflected this stipulation.

The trial court sentenced Koch to a total of 208 months and one day in prison. This included a mandatory sentence of 108 months for the firearm enhancements.

Koch appeals his convictions and sentence.

ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Koch argues that he was received ineffective assistance of counsel because his trial counsel (1) failed to stipulate to Koch's prior criminal convictions instead of allowing the 2018 judgment and sentence to be admitted into evidence, or in the alternative failing to redact the judgment and sentence to omit his 13 prior convictions; (2) failed to object to evidence of prior bad acts related to the controlled buys; (3) failed to object to hearsay testimony regarding the controlled buys; and (4) failed to propose a "separate crime" jury instruction. We disagree.[4]

1. Standard of Review

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to effective assistance of counsel. *State v. Vazquez*, 198 Wn.2d 239, 247, 494 P.3d 424 (2021). A defendant who claims that he received ineffective assistance of counsel must show both that (1) defense counsel's representation was deficient, and (2) the deficient representation prejudiced the defendant. *Id.* at 247-48. Representation is deficient if after considering all the circumstances, the performance falls below an objective standard of reasonableness. *Id*. Prejudice exists if there is a reasonable probability that, except for defense counsel's deficient performance, the result of the proceeding would have been different. *Id.* at 248.

We apply a strong presumption that defense counsel's performance was reasonable. *Id.* at 247. Defense counsel's conduct is not deficient if it was based on legitimate trial strategy or tactics. *Id.* at 248. To rebut the strong presumption that counsel's performance was effective,

[4] Because we reject all of Koch's individual claims of error regarding ineffective assistance of counsel, we also reject his claim of cumulative error.

the defendant bears the burden of establishing the absence of any legitimate strategic or tactical reason explaining defense counsel's conduct. *Id.* Whether and when to object typically is a strategic or tactical decision. *Id.* And a legitimate trial strategy is to forgo an objection when defense counsel wishes to avoid highlighting certain evidence. *Id.* A person claiming ineffective assistance of counsel based on a failure to object must show that the objection likely would have been sustained. *Id.*

2. Evidence of Prior Convictions

Koch argues that defense counsel was deficient because he did not stipulate that Koch had a prior felony conviction to avoid admission of the 2018 judgment and sentence or, alternatively, move to redact the criminal history section of that judgment and sentence showing 13 prior convictions and the fact that he was sentenced to a special drug offender sentencing alternative. We conclude that although defense counsel's performance may have been deficient, Koch cannot show prejudice.

a. Legal Principles

In order to prove the unlawful possession of a firearm charge, the State had to establish that Koch previously had been convicted of a felony. RCW 9.41.040(2)(a)(i)(A). The State did so by introducing the 2018 judgment and sentence showing that Koch had been convicted of two counts of forgery, possession of stolen property in the second degree, and two counts of identity theft in the second degree.

However, a defendant can stipulate to the existence of a prior felony conviction in order to avoid the prejudicial effect of the details of the prior convictions. *See State v. Roswell*, 165 Wn.2d 186, 195, 196 P.3d 705 (2008) (citing *Old Chief v. United States*, 519 U.S. 172, 191, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997)). Our Supreme Court has recognized that defendants

"regularly stipulate to prior convictions that are elements of the charged crime in order to constrain the prejudicial effect on a jury." *State v. Case*, 187 Wn.2d 85, 91, 384 P.3d 1140 (2016).

b. Analysis

Initially, the State argues that defense counsel was not ineffective because counsel could not have entered into a stipulation without Koch's consent. We disagree. When defense counsel agrees to a stipulation in the defendant's presence, the trial court generally can presume that the defendant consents. *State v. Humphries*, 181 Wn.2d 708, 715, 336 P.3d 1121 (2014). The only limitation is that a decision to stipulate to an element of a crime may not be made over a defendant's express objection. *Id.* at 715-17. Here, there is no indication in the record that Koch was objecting to a stipulation.

However, we see no legitimate reason for not stipulating that Koch had been convicted of a felony, thereby preventing the State from introducing into evidence the judgment and sentence showing multiple convictions. Such a stipulation is standard practice. *See Case*, 187 Wn.2d at 91.

Nevertheless, we conclude that stipulating that Koch had a prior felony conviction would not have made a difference. The convictions shown on the judgment and sentence – forgery, possession of stolen property, and identity theft – all are crimes of dishonesty. *State v. Teal*, 117 Wn. App. 831, 843, 73 P.3d 402 (2003) (forgery); *State v. McKinsey*, 116 Wn.2d 911, 913, 810 P.2d 907 (1991) (possession of stolen property); *State v. Garcia*, 179 Wn.2d 828, 847, 318 P.3d 266 (2014) (theft). Under ER 609, evidence that a witness previously committed a crime of dishonesty or false statement is admissible for impeachment purposes. Therefore, the jury would have heard about these convictions regardless of any stipulation because Koch testified at trial.

And in fact, the prosecutor referenced these convictions in cross-examination of Koch as being ones of dishonesty.

Regarding redaction of the other convictions, the judgment and sentence showed 13 prior convictions, but most were misdemeanors and some were drug related. None of the convictions involved the sale or manufacture of drugs. And the judgment and sentence showed that Koch was sentenced to a special drug offender sentencing alternative. Koch admitted that he was a drug user at the time of the controlled buys and his arrest. The convictions showed that although he may have been involved in low-level criminal activity, he had not been involved in the sale or manufacture of drugs. And the imposition of the special drug offender sentencing alternative showed that even his five 2018 felonies were related to his drug use.

Accordingly, we reject Koch's ineffective assistance of counsel claim based on the failure to stipulate.

3. Evidence of Controlled Buys

Koch argues that defense counsel should have objected to the admission of evidence of two controlled buys in which Koch sold drugs to a confidential informant several weeks before the crimes for which he was charged. We disagree.

ER 404(b) prohibits a court from admitting "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." But such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). This list is not exclusive. *State v. Baker*, 162 Wn. App. 468, 473, 259 P.3d 270 (2011). A trial court must find that (1) the act occurred, (2) it has a legitimate non-propensity purpose, (3) it is

relevant, and (4) the probative value is not substantially outweighed by the risk of unfair prejudice. *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

Here, the legitimate nonpropensity purpose of evidence regarding the controlled buys was to show Koch's continued scheme or plan to sell and manufacture fentanyl. This evidence was plainly relevant to the charged crimes. And we cannot say that the risk of prejudice substantially outweighed its probative value. Therefore, the evidence of prior controlled buys fits within the common plan exception to propensity evidence and Koch cannot show that the trial court would have sustained any objection.

Koch's circumstances also are materially different than cases in which ineffective assistance of counsel is claimed for failure object to drug-related propensity evidence. For example, in *Vasquez* defense counsel failed to object to general testimony that the defendant used methamphetamine and possibly sold it. 198 Wn.2d at 261. In determining that the defense counsel's failure to object was deficient performance, the Supreme Court held that the defendant's general drug use, without attachment to specific dates or times, did not sufficiently identify a common plan and instead supported an inference that the defendant was a criminal because of her prior allegedly criminal acts. *Id.* at 257-58.

By contrast, the testimony in this case was relatively specific as to time and place. The testimony regarding the previous controlled buys detailed specific instances of alleged drug sales shortly before Koch's arrest. Casteneda testified that the first controlled buy was in late May 2021, and the subsequent controlled buy that was the basis of Koch's arrest was in June 2021.

Accordingly, we hold that the failure to object to evidence of the prior controlled buys was not deficient performance.

4. Alleged Hearsay Evidence

Koch argues that defense counsel should have objected to testimony from law enforcement regarding their interaction with the confidential informant because the testimony was hearsay and violated Koch's right to confrontation. We disagree.

Koch emphasizes that although both Casteneda and Novak testified that the confidential informant obtained the fentanyl from Koch, neither actually witnessed the exchange of drugs. Therefore, the fact that Koch sold the drugs could only be based on hearsay statements to them by the confidential informant. During the first controlled buy, the surveillance team actually witnessed the transfer from Koch to the confidential informant. So this argument only relates to the second controlled buy, which occurred inside Koch's apartment.

The officers' statements that the confidential informant obtained the drugs from Koch during the second controlled buy were not hearsay. They did not recite any out-of-court *statements* from a third person; they simply stated their understanding of what happened. Therefore, Koch cannot show that the trial court would have sustained any hearsay objection. Accordingly, we reject this argument.

5. Failure to Request "Separate Crime" Jury Instruction

Koch argues that he received ineffective assistance of counsel because defense counsel should have requested a "separate crime" jury instruction as provided in WPIC 3.01. We disagree.

WPIC 3.01 states, "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." Although it may have been preferable for the trial court to issue this instruction, the court's

instructions clearly identified the different counts as involving different conduct and therefore distinct criminal acts.

In addition, Koch does not show or even argue how he was prejudiced by the failure to give this instruction. Prejudice is an essential element of an ineffective assistance of counsel claim. *Vazquez*, 198 Wn.2d at 247.

Accordingly, we reject this claim.

B. SUFFICIENCY OF THE EVIDENCE – UNLAWFUL MANUFACTURE

Koch argues that the State presented insufficient evidence to convict him of unlawful manufacture of a counterfeit controlled substance trademark or imprint based on the law of the case as presented in the to-convict jury instruction. We conclude that read in context with instruction 17, the to-convict instruction did not change the State's burden of proof. But we conclude that the to-convict instruction was confusing, and reverse the conviction on that basis.

1. Legal Principles

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Scanlan*, 193 Wn.2d 753, 770, 445 P.3d 960 (2019). We resolve all reasonable inferences based on the evidence in favor of the State and interpret inferences most strongly against the defendant. *Id.* And circumstantial and direct evidence are equally reliable. *State v. Cardenas-Flores*, 189 Wn.2d 243, 266, 401 P.3d 19 (2017). The remedy for a finding of insufficient evidence is reversal with instructions to dismiss the prosecution with prejudice. *See State v. Asaeli*, 150 Wn. App. 543, 570, 208 P.3d 1136 (2009).

The law of the case doctrine applies to jury instructions. *State v. Johnson*, 188 Wn.2d 742, 755, 399 P.3d 507 (2017). " '[T]he State assumes the burden of proving otherwise

unnecessary elements of the offense when such added elements are included without objection in the "to convict" instruction.' " *Id.* at 756 (quoting *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998)). Under the doctrine, the to-convict instruction defines the essential element of the crime. *Johnson*, 188 Wn.2d at 760. This includes erroneous to-convict instructions. *Id.*

However, when applying the law of the case we must read the jury instructions in the context of the instructions as a whole. *State v. France*, 180 Wn.2d 809, 816, 329 P.3d 864 (2014).

2. Analysis

RCW 69.50.416(1) states,

> It is unlawful for any person knowingly or intentionally to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser, *other than the person who in fact manufactured, distributed, or dispensed the substance*.

(Emphasis added.) Accordingly, a person is guilty of the offense of unlawful manufacture of a counterfeit controlled substance trademark or imprint if they are not the "person who in fact manufactured, distributed, or dispensed the substance." RCW 69.50.416(1).

Instruction 17, which defined the offense of unlawful manufacture of a counterfeit controlled substance trademark or imprint, correctly reflected RCW 69.50.416(1). But the contested portion of instruction 19, the to-convict instruction for unlawful manufacture of a counterfeit controlled substance trademark or imprint reads: "(3) *Neither* the defendant or an accomplice *was not* the manufacturer, distributer, or dispenser of the substance identified on the label." CP at 174 (emphasis added).

Instruction number 19 arguably uses a double negative. By using "Neither/or" with "was not," the instruction suggested that the jury was affirmatively required to find that either Koch or

an accomplice *was* the manufacturer, distributer, or dispenser of the substance on the label in order to convict Koch. This was an obvious typographical error. Under the statute, the instruction should have read "Neither the defendant nor an accomplice *was* the manufacturer."

But we are required to read instruction 19 in the context of the other instructions. *France*, 180 Wn.2d at 816. Instruction 17 properly states the law: that a person is guilty of the offense if they are *not* the person who in fact manufactured, distributed, or dispensed the substance. Although reading instructions 17 and 19 together is somewhat confusing, we conclude that instruction 19 does not change the State's burden of proof. Therefore, Koch sufficiency claim fails.

However, because instruction 19 is erroneous, we cannot be sure that the jury properly evaluated this charge. Therefore, we reverse Koch's conviction for unlawful manufacture of a counterfeit controlled substance trademark or imprint and remand for further proceedings.

C. DOUBLE JEOPARDY

Koch argues that his separate convictions of unlawful possession of fentanyl with intent to deliver and unlawful manufacturing of fentanyl violate the constitutional protections against double jeopardy. We disagree.

1. Legal Principles

A defendant is protected against multiple punishments for the same offense under the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution. Therefore, a defendant cannot be convicted twice for the same offense. *In re Pers. Restraint of Knight*, 196 Wn.2d 330, 336, 473 P.3d 663 (2020). We review double jeopardy claims de novo. *Id.* And a defendant may raise a double jeopardy claim for the first time on appeal. *State v. Sanford*, 15 Wn. App. 2d 748, 752, 477 P.3d 72 (2020).

The double jeopardy analysis begins with whether the legislature authorized multiple punishments for the both crimes. *Knight*, 196 Wn.2d at 336. Next, we use the *Blockburger*[5] same evidence test to determine whether each offense " '*requires proof of a fact* which the other does not.' " *Id.* at 337 (quoting *State v. Freeman*, 153 Wn.2d 765, 772, 108 P.3d 753 (2005)). The rule asks whether the offenses are the same in fact and in law. *State v. Bell*, 26 Wn. App. 2d 821, 839, 529 P.3d 448, *review denied*, 1 Wn.3d 1035 (2023). Double jeopardy is not violated " '[i]f each offense includes an element not included in the other and requires proof of a fact the other does not.' " *Id.* (quoting *State v. Harris*, 167 Wn. App. 340, 352, 272 P.3d 299 (2012)).

RCW 69.50.401(1) states that except as authorized by law, "it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." This statute was the basis for both the unlawful possession of fentanyl with intent to deliver and unlawful manufacturing fentanyl convictions.

In *State v. Maxfield*, the Supreme Court held that separate convictions under former RCW 69.50.401(a) (1989)[6] for possession with intent to deliver (marijuana) and manufacture of a controlled substance (marijuana) did not violate double jeopardy. 125 Wn.2d 378, 401, 886 P.2d 123 (1994). The court applied the same evidence test. *Id.* at 400. The court noted that manufacturing required proof of "planting, cultivation, growing, or harvesting," while possession with intent to deliver required proof of the intent to deliver. *Id.* at 401. The court held that because the offenses included an element not included by the other, the offenses were different in law. *Id.*

[5] *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed 306 (1932).

[6] Former RCW 69.50.401(a) and current RCW 69.50.401(1) are identical.

Maxfield controls. Possession with intent to deliver required proof that Koch intended to deliver fentanyl. Manufacturing fentanyl required proof that Koch engaged in "the production, preparation, propagation, compounding, conversion, or processing of a controlled substance." Former RCW 69.50.101(ff) (2023). Each offense includes an element not included by the other. Further, the materials found in Koch's car can support an intent to deliver but not manufacturing, while the pill press observed in Koch's warehouse supports the manufacture charge but not the intent to deliver charge. Therefore, each offense " '*requires proof of a fact* which the other does not.' " *Knight*, 196 Wn.2d at 337 (quoting *Freeman*, 153 Wn.2d at 772).

Accordingly, we hold that Koch's convictions for unlawful possession of fentanyl with intent to deliver and unlawful manufacture of fentanyl do not violate double jeopardy.

D. SERIOUSNESS LEVEL OF OFFENSES

Koch argues that the trial court engaged in impermissible judicial fact finding in violation of the Sixth Amendment when it determined Koch's offenses have a seriousness level of 3 without a required jury finding that he used a deadly weapon through a special verdict as required by RCW 9.94A.825. We disagree.

Both unlawful manufacture of fentanyl and unlawful possession of fentanyl with intent to deliver carry a seriousness level of 2 under the Sentencing Reform Act of 1981, chapter 9.94A RCW. RCW 9.94A.518. The seriousness level for these crimes increases from 2 to 3 under the SRA when there is a "deadly weapon special verdict under RCW 9.94A.825." RCW 9.94A.518. And for crimes committed by persons equipped with a firearm, there are specific firearm enhancements that also require a jury finding. RCW 9.94A.533.

Here, the jury's special verdict forms found that Koch used a firearm in the commission of unlawful manufacture of fentanyl and unlawful possession of fentanyl with intent to deliver.

Koch argues that there is a difference between a jury finding whether a defendant was armed with a "deadly weapon" under RCW 9.94A.825 and a jury finding that the defendant was armed with a firearm under RCW 9.94A.533.

In *State v. McGrew*, this court held that for purposes of sentencing enhancements, all firearms are deadly weapons although not all deadly weapons are firearms. 156 Wn. App. 546, 560-61, 234 P.3d 268 (2010). Accordingly, the court held that a jury finding that a person was armed with a firearm necessarily meant that they were armed with a deadly weapon. *Id.* The court noted that the converse is not true and prohibited by Supreme Court precedent: a jury special verdict finding use of a deadly weapon is not sufficient for a firearm-based enhancement. *Id.* at 559-561 (discussing *State v. Williams-Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010)).

Here, the jury found through special verdicts that Koch was armed with a firearm for both unlawful manufacture of fentanyl and unlawful possession of fentanyl with intent to deliver. Because a firearm is a deadly weapon, the seriousness level of the offense increased from 2 to 3. RCW 9.94A.518. This was permissible based on the jury's special verdicts. *McGrew*, 156 Wn. App. at 560.

Accordingly, we hold that the trial court did not err in assigning a seriousness level of 3 to Koch's convictions for unlawful manufacture of fentanyl and unlawful possession of fentanyl with intent to deliver.

CONCLUSION

We reverse Koch's conviction for unlawful manufacture of a counterfeit controlled substance trademark or imprint and remand to the trial court for further proceedings. We affirm Koch's other convictions and sentence.

MAXA, J.

We concur:

VELJACIC, A.C.J.

GLASGOW, J.