No. 91815-5
COA No. 32197-5-III

SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington,
Respondent

v.

Erin E. McGovern,
Appellant

PETITION FOR REVIEW

Attorney for Appellant Erin McGovern:
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Appellant, Ms. Erin Elizabeth McGovern, asks this court to accept review of the unpublished Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The Appellant was charged by information (CP 4-5) with Count I possession of a controlled substance methamphetamine, Count II possession of another's identification, Count III possession of a controlled substance alprazolam, and Count IV possession of a controlled substance methylphenidate. A jury trial was held on November 25, 2013 before the Honorable John O. Cooney in Superior Court of Spokane County, Washington. The jury returned a verdict of guilty on all four counts on November 27, 2014. (CP 137-140) The court sentenced Ms. McGovern on December 11, 2013 (CP 164-168) and a timely appeal was filed. (CP 173-174).

The Appellant seeks review of the decision of the Court of Appeals filed May 19, 2015 in case #32197-5-III.

C. ISSUES PRESENTED FOR REVIEW

1. Under Fourth Amendment and Article I § 7, did the Superior Court committed reversible error in denying motions to suppress evidence based upon illegal detention and search?

2. Under Fourth Amendment and Article I § 7, did the Superior Court committed reversible error by failing to grant a motion for mistrial when the government introduced evidence that the defendant asserted her constitutional rights?

D. STATEMENT OF CASE

On November 07, 2013 a suppression hearing was held before the Honorable Gregory D. Sypolt. (CP 23-54;72-75). The court denied the motion to suppress the evidence. (VRP 11/7/2013 p. 39-46). At a presentment hearing held on November 21, 2013 the defense presented proposed findings of fact and conclusions of law. (VRP 11/21/2013 p. 48/CP 78-81). The government presented their own findings of facts and conclusions of law. (VRP 11/21/2013 p. 50-51). The court adopted the prosecutions proposed order. (VRP 11/21/2013 p. 51-52/CP 88-91).

On November 25, 2013 motions in limine and a 3.5 hearing were held before the Honorable John Cooney. The defense sought to exclude evidence of uncharged crimes. (VRP 11/25/2013 p. 8). The government stated that they intended to introduce why the officer obtained a search warrant. (VRP 11/25/2013 p. 8 lines 15-22). The defense argued why a search warrant was obtained was irrelevant to the jury. (VRP 11/25/2013 p. 9). The defense argues that items unrelated to the charges before the court should be excluded and not used to "impugn my client's integrity" and to convict her based upon facts that aren't

relevant to this case or would be unduly prejudicial under 404(b). (VRP 11/25/2013 p. 9 lines 17-23).

The state argues that the basis for the search warrant is relevant. (VRP 11/25/2013 p. 11 lines 14-24). The defense stated that was decided as a question of law (VRP 11/25/2013 p. 11 lines 25 to pg. 12 line 5) which is not before the jury. The defense objected to the government introducing these facts before the jury to impugn the defendant's character and irrelevant facts would leave the case open to a mistrial. (VRP 11/25/2013 p. 12). The defense argued "The propriety of the search or the search warrant was not for the jury to decide." (VRP 11/25/2013 p. 13). The court ruled evidence of the basis of the warrant and contraband should not be admitted. (VRP 11/25/2013 p. 60-61). The defense asks the court to consider a continuing objection under the Fourth Amendment, Article I § 7, and *Arizona v. Gant* to this evidence. (VRP 11/25/2013 p. 12 lines 6-12).

Ms. Erin McGovern testified she was a passenger in the front seat of the BMW on June 19, 2012 stopped in Spokane County. (VRP 11/7/2013 p. 7). The police removed the driver and the other passenger. (VRP 11/7/2013 – pg. 7). Then they told Ms. McGovern to get out. (VRP 11/7/2013 p. 7-8). She was taken to the front of the BMW and ordered to empty her pockets. (VRP 11/7/2013 p. 8). There were two officers present at the stop and they searched her. (VRP 11/7/2013 p. 9). She was told to stay in front of the car and the police kept her identification. (VRP 11/7/2013 p. 9).

As the police searched the BMW she objected and was moved from the front of the vehicle to the back of the car and handcuffed when (VRP 11/7/2013 p. 10) she stated they could not search the car. (VRP 11/7/2013 p. 11). She observed they were searching her things and she told them again they could not search. (VRP 11/7/2013 p. 11 lines 10-17). She kept asking questions because they said she was not arrested but she was handcuffed. (VRP 11/7/2013 p. 11 lines 21-25). When she kept asking about being handcuffed but not arrested she was read her rights. (VRP 11/7/2013 p. 12). The police continued to search her bags. (VRP 11/7/2013 p. 13). The police left them along the interstate just inside Spokane County and towed the car. (VRP 11/7/2013 p. 14).

The defense argued *State v. Parker* applied to this case. (VRP 11/7/2013 p. 23/CP 23-54/CP 72-75). The deputy searched the compartments and packages without a warrant. (VRP 11/7/2013 p. 11 lines 10-17/CP 28) (VRP 11/7/2013 p. 29). An arrest occurred in handcuffing her outside of the car and detaining her as the search was conducted. (VRP 11/7/2013 p. 29). It was argued the stop was pretext, and it was an unreasonable detention to remove the people from the BMW. (VRP 11/7/2013 p. 31). The defense argues inaccuracies in the search warrant affidavit requires a Franks hearing. (VRP 11/7/2013 p. 31-32/CP 23-54;72-75). The defense argues that the questioning about the relationship of the occupants amounted to an investigation beyond the scope of the speeding

infraction. (VRP 11/7/2013 p. 34-35). Further this investigation violated Article I § 7 and was a pre-text stop. (VRP 11/7/2013 p. 36-37/CP 23-54;72-75). Suppression of all the evidence obtained from the warrantless stop, search, and detention of Ms. McGovern was requested. (VRP 11/7/2013 p. 37 lines 17 to pg. 38).

At a 3.5 hearing Deputy Nathan Bohanek testified the white BMW was stopped for traveling 75mph in a 70mph zone. (VRP 11/25/2013 p.18). Ms. McGovern was seated in the front seat passengers. (VRP 11/25/2013 p. 18). Three people were seated in the vehicle and Deputy Bohanek advised the driver that the stop was due to speeding and tinted windows. (VRP 11/25/2013 p. 19). Deputy Bohanek was assigned to the Criminal Interdiction Team which tries to "interdict criminal activity." (VRP 11/25/2013 p. 29). He was assigned to a "special unit working the highway based on a grant from the state patrol." (VRP 11/25/2013 p. 29-30). They were looking for drug activity on Interstate 90 that day. (VRP 11/25/2013 p. 31). The real reason they were out there that day was looking for drugs, weapons, persons wanted on warrants, and criminal activity. (VRP 11/25/2013 p. 31). He was talking to the driver from the passenger's front side where Ms. McGovern was seated. (VRP 11/25/2013 p. 33).

When Deputy Bohanek inquired who owned the vehicle Ms. McGovern responded, "Victor Antoine." Upon learning the driver of the vehicle had a suspended driver's license she was ordered from the vehicle. (VRP 11/25/213 p.

20). Noting inconsistencies in the driver's story he sought the driver's permission to search the car. (VRP 11/25/2013 p. 21). The driver, non-owner, consented to the search of the vehicle while Ms. McGovern remained in the car. (VRP 11/25/2013 p. 21). The police then "began pulling the remaining two occupants from the vehicle." (VRP 11/25/2013 p. 21). The other two occupants including Ms. McGovern were searched and Cpl. Elliott stood with them while Deputy Bohanek searched the vehicle. (VRP 11/25/2013 p. 22). Ms. McGovern had no choice about exiting the vehicle when told to exit. (VRP 11/25/2013 p. 36 lines 20-25). He did not get permission from Ms. McGovern to search the area of the vehicle where she was seated. (VRP 11/25/2013 p. 37). As he was searching the vehicle Ms. McGovern protested that he could not search the vehicle. (VRP 11/25/2013 p. 37 lines 10-13). He told Ms. McGovern he did not need her permission. (VRP 11/25/2013 p. 37). Ms. McGovern was told he would search the vehicle including the area she was in. (VRP 11/25/2013 p. 38).

Deputy Bohanek found in the backseat a satchel or bag with two laptop computers. (VRP 11/25/2013 p. 22 lines 22-25). Deputy Bohanek claimed that Ms. McGovern told him the bag belonged to her and she did not want him to search the bag. (VRP 11/25/2013 p. 23). In the front passenger's seat area he found two purses. (VRP 11/25/2013 p. 25). One purse was larger and there was a smaller purse belonging he believed to a female. (VRP 11/25/2013 p. 25). Ms. McGovern told him those were her bags and denied consent to search the bags.

In the glove box was also a Leatherman's wallet with credit cards belonging to Victor Antoine and Tyson Andrew. The vehicle was then seized and towed from the scene to obtain a search warrant. (VRP 11/25/2013 p. 27). All three occupants were left alongside the highway. (VRP 11/25/2013 p. 27). The driver was issued a criminal citation for driving while license suspended. (VRP 11/25/2013 p. 39). The Officer did not allow the occupants to remove any of their belongings. (VRP 11/25/2013 p. 40). Moreover, the Officer failed to mention these bags when he prepared his affidavit to search the vehicle. (VRP 11/25/2013 p. 40 lines 5-17/CP 23-54;72-75). He never read Miranda warnings that day because he did not believe the occupants of the vehicle were detained. (VRP 11/25/2013 p. 41).

The Deputy testifies that he obtained written consent to search the vehicle after he completed the search. (VRP 11/25/2013 p. 47-48). The vehicle he drove for the pace had never been certified for accuracy. (VRP 11/25/2013 p. 48).

Defense renewed the 3.6 motion arguing that the stop was without a reasonable basis because the squad car was not certified as accurate. (VRP 11/25/2013 p. 54). Further, the officers were working as a drug interdiction team. The court then denied the motion to suppress. (VRP 11/25/2013 p. 55; p. 76-80).

At trial Deputy Bohanek testified he was driving with a Cpl. Elliott on June 19, 2012. (VRP 11/25/2013 p. 87). The BMW was stopped based upon Deputy Bohanek's estimate that the BMW was traveling over the posted 70 mph

speed limit. (VRP 11/25/2013 p. 89). He contacted the driver at the passenger side window. (VRP 11/25/2013 p. 90). When he asked who owned the vehicle Ms. McGovern stated the owner was Victor Antoine. (VRP 11/25/2013 p. 91). He determined the driver had a suspended license and the car was not registered to Victor Antoine. (VRP 11/25/2013 p. 91-92).

The driver was removed from the car (VRP 11/25/2013 p. 92 lines 9-13) and she authorized the vehicle search. (VRP 11/25/2013 p. 93 line 22). The passengers including Ms. McGovern were removed from the car and frisked. (VRP 11/25/2013 p. 94).

In the back seat he found a satchel with two laptop computers in the bag. (VRP 11/25/2013 p. 95). The prosecution, over defense objection, asked if anyone claimed the bag. The deputy testified Ms. McGovern claimed the bag. The deputy stated that Ms. McGovern "did not want me to search the bag." (VRP 11/25/2013 p. 96 lines 15-20). The defense moved for a mistrial (VRP 11/25/2013 p. 96 lines 18-25) because the prosecution introduced testimony that Ms. McGovern refused under the Fourth Amendment and Article I §7 to allow the search of her property. (VRP 11/25/2013 p. 97).

The defense argued that introducing this violates her right to assert her constitutional rights and not have the assertion of her rights used as evidence against her. (VRP 11/25/2013 p. 97 lines 1-20). The government responds that the reason the officer didn't search the bag was relevant. The prosecution asks the

court give a curative instruction rather than granting a mistrial. (VRP 11/25/2013 p. 98 lines 7-15). The court took a brief recess for the defense to obtain case law to support the mistrial motion. (VRP 11/25/2013 p. 98).

The court returns to the bench without the jury and cites *State v. Gauthier*, 174 Wn. App. 257 which cites *United States v. Prescott* from the 9th Circuit and *State v. Burke* from the Washington Supreme Court. The court states that the two cases stand for the proposition that "like the defendant's Fifth Amendment right, the Fourth Amendment right may not –when they assert that right, it may not be introduced at trial as substantive evidence of guilt." (VRP 11/25/2013 p. 99 lines 13-22). The defense points out that the three cases cited here include *State v. Gauthier*, 174 Wn. App. 257 (2013), *United States v. Prescott*, 581 F.2d 1343 (1978), and *State v. Burke*, 163 Wn.2d 204 (2008) (VRP 11/25/2013 p. 100).

The court states this is troublesome because in *Gauthier* the court held the prosecutor's use of the defendant's constitutional right to refuse a warrantless search as substantive evidence of guilt was manifest constitutional error properly raised for the first time on appeal. That error deprived him of his right to invoke with impunity the protection of the Fourth Amendment. (VRP 11/25/2013 p. 100 lines 13-21). Here, the court believes it was offered for a different purpose and not as substantive evidence of guilt. (VRP 11/25/2013 p. 100 lines 22-25). It was offered here briefly as a basis why a warrant was obtained. (VRP 11/25/2013 p. 11 lines 22-25).

The defense requests a curative instruction. (VRP 11/25/2013 p. 101 line 16). The defense argues that no curative instruction will cure the jury "wondering why would she not allow them to search her items; that must mean that there's something in those items that she didn't want anyone to know about. It impugns her right to not be searched and suggests in some fashion she is guilty of the crime charged here." (VRP 11/25/2013 p. 102 lines 3-9). "A curative instruction would not adequately address the problem raised by the government's introduction of evidence that's not relevant, evidence that's highly prejudicial and that is violative of my client's Fourth Amendment and Article I § 7 right to require law enforcement to get a search warrant before they search her personal items." (VRP 11/25/2013 p. 102 lines 10-19). The defense points out that each time the police discuss obtaining the warrant they ring the bell again. (VRP 11/25/2013 p. 103 lines 1-4). The court proposes a curative instruction reading: "That testimony was provided that the defendant did not consent to a search; you are not to consider this evidence during your deliberations or infer guilt in anyway." (VRP 11/25/2013 p. 103 lines 14-18 and 23-24). The court grants the motion to not allow testimony of the defendant's exercise of her Fourth Amendment Rights. (VRP 11/25/2013 p. 104 lines 13-16). The defense requests it also be given in written instructions to the jury. (VRP 11/25/2013 p. 104 lines 17-20).

The jury returns to the instruction: "Testimony was offered that the defendant did not consent to a search. You are not to consider this evidence

during your deliberations nor are you to infer guilt in any way based on this evidence." (VRP 11/25/2013 p. 105 lines 6-9).

Deputy Bohanek is asked if he determined ownership of the bag in the back seat. The defense objected to introduction of the statements based upon 3.5 and *Miranda*. (VRP 11/25/2013 p. 105 lines 20-22). The court noted the objection and allowed the testimony. (VRP 11/25/2013 p. 105 line 22). The deputy stated he then continued to search the front passenger's seat and the bags and purse were found on the front passenger's seat. (VRP 11/25/2013 p. 105). The deputy testified that Ms. McGovern told him the bags were her bags. (VRP 11/25/2013 p. 105-106). The vehicle was seized and taken to a secured facility to await a search warrant. (VRP 11/25/2013 p. 107-108).

The defense objected to evidence from the search based upon the motion previously made. (VRP 11/25/2013 p. 109). In the black purse found on the front seat was an Idaho identification card with three Washington identification cards. (VRP 11/25/2013 p. 110). The defense renews the motion for mistrial at which time the court conducts a conference at the bench outside the hearing of the jurors. The court states that the pretrial ruling excluded contraband in the vehicle. The defense notes that several identifications involve uncharged crimes which should not be introduced because they are irrelevant and highly prejudicial under 404(b). (VRP 11/25/2013 p. 111). The defense renews the prior objections to

references to the search. (VRP 11/25/2013 p. 112). The court denies the motions on items found in the bags. (VRP 11/25/2013 p. 112).

Next, Deputy Bohanek identifies exhibit 6 which was an evidence envelope. (VRP 11/25/2013 p. 112-113). The deputy identifies three identification cards from Washington and one identification card from Idaho belonged to Ms. McGovern. (VRP 11/25/2013 p. 112-113). The items were admitted subject to the defenses prior objections. (VRP 11/25/2013 p. 114). The prosecution offered exhibit 5 containing a black cylinder with a screw on lid containing a white crystalline substance. Also found in the purse were two Camel brand smokeless tobacco containers which contained a variety of prescription medications. (VRP 11/25/2013 p. 115). The pills were peach colored, yellow colored, and some white powder. (VRP 11/25/2013 p. 117). The defense objects on the white powder being admitted. (VRP 11/25/2013 p. 117). The prosecution hands the deputy P1, P2, P3, and P7 which he identifies as evidence envelopes sent to the evidence lab. (VRP 11/25/2013 p. 119).

The deputy testifies he was working criminal interdiction. (VRP 11/25/2013 p. 132) : "We were attempting to contact people conducting or engaged in criminal behavior." (VRP 11/25/2013 p. 132-133). The deputy testified that they had no radar unit in the police car. (VRP 11/25/2013 p. 133). That he used traffic stops as a reason to stop vehicles looking for criminal activity. (VRP 11/25/2013 p. 133 lines 15-17). The deputy testified that he was

suspicious because he was looking for other criminal activity. (VRP 11/25/2013 p. 135 lines 18-21). The vehicle stopped was a four door 1995 BMW 318. (VRP 11/25/2013 p. 136). The deputy testifies the consent to search the vehicle was signed at 1426 hours, (VRP 11/25/2013 p. 138) after the police searched the vehicle. (VRP 11/25/2013 p. 138). The deputy testifies Ms. McGovern was read her *Miranda* warnings at 1409 hours. (VRP 11/25/2013 p. 143). The stop occurred at 1340 hours according to the deputy. (VRP 11/25/2013 p. 143). Ms. McGovern was told to exit the vehicle and she was searched for weapons. (VRP 11/25/2013 p. 143).

Brendan Cassida testified that exhibit 5 contained his driver's license. (VRP 11/25/2013 p. 155). The driver's license was taken several years before in a car prowl which may have occurred in January 2012. (VRP 11/25/2013 p. 155-156). He never gave Ms. McGovern permission to have his driver's license. (VRP 11/25/2013 p. 156). The prosecution moves to admit P5 which the defense objects to based upon search violations. (VRP 11/25/2013 p. 156). The court admitted P5. (VRP 11/25/2013 p. 156). The defense makes a continuing objection to evidence admitted based upon prior motions. (VRP 166).

Deputy Bohanek is recalled and questioned about who he asked to consent to the search of the vehicle. (VRP 11/26/2013 p. 169). The defense objects to the reopening of this area of questioning because of the courts prior ruling on the mistrial. (VRP 11/26/2013 p. 169). The court overruled the objection to the

reopening of the consent to search issue. (VRP 11/26/2013 p. 169). The prosecutor then asks the deputy if he asked anyone else for consent to search. (VRP 11/26/2013 p. 169 line 17). The deputy claimed "I didn't need to." (VRP 11/26/2013 p. 169 line 16).

The states next witness was Devon Hause who works at the Washington State Patrol Crime Lab in Cheney, Washington. (VRP 11/26/2013 p. 193). She has a bachelor's degree from Eastern Washington University with an emphasis in forensic science. She is certified by the American Board of Criminalistics in drug analysis. (VRP 11/26/2013 p. 194). The witness identified P4 as a lab report.

After a break the jurors return to the court and Ms. Hause returns to the stand testifies over defense objection. (VRP 11/26/2013 p. 208). The witness is given item number 11 which she identifies as a part of a pill. (VRP 11/26/2013 p. 210). The pill was identified as methylphenidate or Ritalin which is a stimulant. (VRP 11/26/2013 p. 211). The court then admitted P1 on the states motion. The court grants the admission of P1 noting the defense objections. (VRP 11/26/2013 p. 211).

The prosecutor then gives Ms. Hause item number 13 which was alprazolam or Xanax. (VRP 11/26/2013 p. 212). It was explained that it is an anti-anxiety drug. (VRP 11/26/2013 p. 212). It was identified as a controlled substance. (VRP 11/26/13 p. 213).

Then the witness identifies item number 27 and exhibit P7 and could not say what was in the bag. (VRP 11/26/2013 p. 225) Exhibit P7 (item 27) was admitted into evidence. (VRP 11/26/2013 p. 227). The state rested and the defense stated that it had a motion. (VRP 11/26/2013 p. 230). The court excused the jury for a recess. (VRP 11/26/2013 p. 231).

The defense sought dismissal of all of the counts because of insufficient evidence. (VRP 11/26/2013 p. 231). There was no testimony from the officer that he found that bag. (VRP 11/26/2013 p. 231). On the count under 9A.56.330 there was no evidence of any level of knowledge or evidence it was maintained for "the sole purpose of misrepresenting herself." (VRP 11/26/2013 p. 232). There has been no evidence of any knowledge or intent by Ms. McGovern to possess the identification. (VRP 11/26/2013 p. 233).

The defense explains there is a knowledge or intent element for which no evidence has been provided. The court must find this crime has no intent or knowledge requirement in spite of section (d). (VRP 11/26/2013 p. 235 lines 7-18). The court denied the defense motion to dismiss any counts for insufficient evidence. (VRP 11/26/2013 p. 236).

The defense rests on the record. (VRP 11/26/2013 p. 238). The defendant elected not to testify or to present a defense based upon the lack of evidence. (VRP 11/26/2013 p. 238). The jury was released for the day to return the following day. (VRP 11/26/2013 p. 238-239).

The court returns on 11/27/2013 without the jurors to continue discussions on jury instructions. The defense renews the motion to dismiss on Count III based upon insufficient evidence. The count regarding the yellow rectangular pill alprazolam. (VRP 11/27/2013 p. 257-258). The court denies the motion to dismiss for insufficient evidence on Count III. (VRP 11/27/2013 p. 258).

Jury instructions were discussed including an instruction regarding the defendant's assertion of her Fourth Amendment rights. (VRP 11/27/2013 p. 258-259/CP 103-109). The defense maintains that a mistrial is the proper remedy but seeks the curative instruction with a modification: "You are to infer no guilt upon the defendant's exercise of these rights nor are you to consider this evidence during your deliberations." (VRP 11/27/2013 p. 260).

The jury returned a verdict on 11/27/2013. On Count I the jury found the defendant guilty, Count II the jury found guilty to the crime of possession of a controlled substance, Count III the jury found guilty to the crime possession of a controlled substance alprazolam, and Count IV guilty of possession of a controlled substance methylphenidate. (VRP 11/27/2013 p. 318). A sentencing was held on December 11, 2013. (VRP 12/11/2013 p. 323). The court sentenced Ms. McGovern on all three felonies, I, III, and IV and the misdemeanor. (VRP 12/11/2013 p. 326/CP 152-163).

E. BASIS FOR REVIEW

RAP 13.4 provides that a "Petition for Review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court."

Here, the Appellant seeks review because Issues 1-3 involve a decision that is in conflict with a decision of the Supreme Court, Court of Appeals, there is a significant question under both the State and U.S. Constitution, and the issues involve a substantial public interest.

F. ARGUMENT

ISSUE 1: Under RAP 13.4(1)-(4), review should be accepted by the Supreme Court in this case because the Superior Court committed reversible error in denying a mistrial based upon the government's introduction of evidence that the defendant asserted her rights under the Fourth Amendment and Article I § 7 of the Washington State Constitution.

The government suggested pretrial that they intended to introduce testimony that they obtained a search warrant when the defendant objected to the search of her property. (VRP 11/25/2013 p. 8-14). The court ruled that the evidence of the basis of the warrant was not to be admitted and that evidence of contraband should not be admitted. (VRP 11/25/2013 p. 60-61). The prosecution

introduced through Deputy Bohanek testimony that: "Ms. McGovern identified the bag as being hers. She did not want me to search the bag." Defense moved for mistrial citing *State v. Gauthier*, 174 Wn. App. 257, *State v. Burke*, 163 Wn.2d 204 (2008), and *United States v. Prescott*, 581 F.2d 1343 (1978) (VRP 11/25/2013 p. 96-100). The court denied the motion but gave a curative instruction although the defense maintained this would not correct the error. (VRP 11/25/2013 p. 100-104).

The use of a defendant's assertion of her right to remain silent cannot be used as evidence of the defendant's guilt without violating the defendant's Fifth Amendment and Article I § 9 of the Washington State Constitution. *State v. Burke*, 163 Wn.2d 204, 222-223 (2008) In *State v. Gauthier*, 283 P.3d 126 (2013) the court held that where defendant's assert their rights under Article I § 7 of the Washington State Constitution and the Fourth Amendment it was privileged conduct that cannot be used as evidence of criminal wrongdoing. *State v. Gauthier*, 298 P.2d 126, 132 (Div. I 2013)[1]

The Court of Appeals attempts to distinguish this case from *Prescott, Gauthier,* and *Burke* by pointing out the State did not reference the refusal to consent to search as an inference of guilty but instead to explain why the officers

[1] *Gauthier, supra* follows the Ninth Circuit opinion in *United States v. Prescott*, 581 F.2d 1343 (9th Cir. 1978). The court held that because the Fourth Amendment gives individuals a constitutional right to refuse a warrantless search is privileged conduct that cannot be used as evidence of criminal wrongdoing. Id. 1351-52. The court in *Prescott* ruled that at retrial the court should take care to exclude all evidence of *Prescott's* refusal to consent to the search. Id. at 1353

obtained a search warrant. *State v. McGovern,* 32197-5-III, p.14 (2015). The Prosecutor clearly used Ms. McGovern's assertion of rights to infer guilt for which a search warrant was obtained to gather evidence. Moreover, the Court of Appeals differentiated this case because a curative instruction was given to the jury. *Id.* The curative instruction was not enough to fix the prejudice towards the Appellant. Instead, it just kept pointing out the issue to the jury.

The admission of evidence that a defendant asserted their right to require a search warrant

under Article I § 7, Fourth Amendment, and Article I § 9 requires reversal and a new trial. The Appellant respectfully asks the Court to accept review because the decision of the Court of Appeals is in Conflict with *State v. Gauthier, State v. Burke,* the U.S. and Washington Constitution, and involves issues of substantial public interest in freely asserting rights.

ISSUE 2: Under RAP 13.4(1)-(4), review should be accepted by the Supreme Court because the Superior Court committed reversible error in failing to suppress evidence seized based upon illegal stop and search of the defendant and her property.

At pretrial and trial the court refused repeated request from defense to suppress evidence based upon illegal stop and search of the defendant. (VRP 11/25/2013 p. 54; p. 109; p. 117/CP 23-54;72-75). Defense argued the stop was a pre-text stop. (CP 72-75). In determining if a stop is pre-textual the court should consider the totality of the circumstances, including the officer's subjective intent

and the subjective reasonableness of the officer's conduct. *State v. Ladsen*, 138 Wash.2d 343, 358-359 (1999).

Evidence in this case that the traffic stop was pre-textual is overwhelming. Deputy Bohanek was assigned to a criminal interdiction team which attempts to "interdict criminal activity." (VRP 11/25/2013 p. 29; p. 55). He was assigned to a "special unit that was working the highway based on a grant from the state patrol." (VRP 11/25/2013 p. 29-30). The deputies were looking for drugs, weapons, wanted persons, and criminal activity. (VRP 11/25/2013 p. 31).

Ultimately, the police conducted a warrantless search of a vehicle based on a minor traffic law violation for speeding 5mph over the limit on the interstate based on an estimated speed. (VRP 11/25/2013 p. 18). The officer stated the real reason for the stop was that they were looking for drugs, weapons, wanted persons, and criminal activity. The warrantless search should have been suppressed based upon Article I § 7 and the Fourth Amendment and case law. The Appellant respectfully asks the Court to accept review because the decision of the Court of Appeals is in Conflict with *State v. Ladsen,* the U.S. and Washington Constitutions, and involves an issue of substantial public interest.

G. CONCLUSION

The Supreme Court should accept review of the decision in *State v. McGovern*, 32197-5-III (2015). The decision of the Court of Appeals is in

conflict with Supreme Court and Court of Appeals cases, the U.S. and Washington Constitution, and involves issues of substantial public interest.

Respectfully submitted this 10 day of August, 2015.

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

STATE OF WASHINGTON, Respondent, v. ERIN E. MCGOVERN, Appellant.	)	No. 32197-5-III
	)	UNPUBLISHED OPINION

FEARING, J. — After a traffic stop of a car, in which Erin McGovern rode as a passenger, McGovern refused law enforcement consent to search her purse. After obtaining a search warrant for the car, an officer searched the purse and discovered unlawful drugs and another's identification. Erin McGovern appeals her convictions for three counts of possession of controlled substances and one count of possessing another's identification. She argues that law enforcement lacked reason to stop the car, the State violated her trial rights when its witness commented that she refused to consent to a search, and insufficient evidence supports her convictions. We disagree and affirm all convictions.

FACTS

On June 19, 2012, Spokane County Sheriff Deputy Nathan Bohanek and Corporal

Justin Elliott, in their role on a criminal interdiction team, traveled eastbound on Interstate 90. The duo surveilled the highway for criminal activity, particularly transportation of drugs and weapons, and for persons wanted on warrants. Eventually the officers followed a white 1985 BMW and established the speed of the BMW to be 75 miles per hour. The posted speed limit was 70. The officers stopped the car. When stopping the BMW, the officers noticed the windows to be illegally tinted.

Deputy Nathan Bohanek approached the BMW and asked the driver, Kerry Gracier, who owned the car. Erin McGovern, a passenger in the front seat of the car, answered that the car belonged to Victor Antoine. Antoine was not the registered owner, nor was he in the car. Kerry Gracier had a suspended license, so the officers asked her to exit the vehicle to investigate whether she legally possessed the car. Gracier complied and verbally consented to a search of the BMW.

Deputy Nathan Bohanek and Corporal Justin Elliott pulled Erin McGovern and another passenger from the BMW and frisked them for weapons. McGovern and Deputy Bohanek disagree as to what occurred once McGovern exited the BMW. Bohanek maintains neither Justin Elliot nor he handcuffed any of the three car occupants. McGovern asserts that the officers moved her from the front of the car to the rear of the car and handcuffed her, because the officers claimed she incessantly moved her feet and she told the officers that they could not search her possessions inside the car. According

to McGovern, the officers insisted they had not arrested her, although she remained handcuffed.

During a search of the BMW, Bohanek found a credit card of someone not in the vehicle; a bag in the back seat containing two laptop computers, which Erin McGovern claimed as hers; and two purses in the front passenger seat, which McGovern also identified as her purses. Deputy Bohanek asked McGovern's permission to search the bag and purses, and she refused. Bohanek searched the trunk and found a backpack, to which all vehicle occupants denied ownership. Bohanek opened the backpack and found a digital scale with methamphetamine residue on its surface. He last searched the unlocked glove box and found another digital scale with methamphetamine residue and a wallet with identification and credit cards belonging to Victor Antoine and Tyson Andrew.

After speaking with his superior officer, Deputy Nathan Bohanek orchestrated a tow of the BMW so he could garner a search warrant for other objects in the car. He did not allow Erin McGovern to retrieve her purses and laptop bag from the car before its towing. Bohanek and Corporal Justin Elliott cited the driver for driving with a suspended license, speeding, and an illegal window tint. The two officers also cited the other passenger for an open container of alcohol in the back seat of the vehicle. Erin McGovern received no citation.

On June 21, 2012, Deputy Nathan Bohanek obtained a warrant to search the BMW and its contents. Upon opening one of the purses claimed by Erin McGovern, Bohanek found a small metal cylinder which contained a white crystalline residue. The white residue tested positive for methamphetamine. Bohanek also found two tins with over 200 legend drugs and narcotic pills in the purse. Finally, Bohanek found in the purse a credit card bearing the name Kristopher White and a Washington State driver's license belonging to Brendan W. Cassida. Bohanek called Cassida and verified that McGovern lacked his permission to possess his driver's license.

PROCEDURE

The State of Washington charged Erin McGovern with three counts of possession of a controlled substance and one count of possession of another's identification. McGovern moved under CrR 3.6 to suppress evidence obtained in the search of the vehicle. She argued, among other contentions, that the traffic stop leading to the search was pretextual.

The trial court entertained the motion to suppress and heard testimony from Erin McGovern. The trial court ruled in favor of the State. The court entered written findings of fact, which included the following finding:

> III. The vehicle was stopped for traveling five miles per hour over the posted speed limit and was not pretextual.

Clerk's Papers (CP) at 89.

During trial, the State questioned Deputy Bohanek regarding the bags, including the purses, found in the BMW:

> Q. Okay. So you asked about the ownership of the bags?
> A. I did.
> Q. What were you told?
> A. Ms. McGovern identified the bag as being hers.
> Q. Did she say anything else?
> A. She did not want me to search the bag.

Report of Proceedings at 96. After this colloquy, Erin McGovern moved for a mistrial, arguing that the government violated her constitutional rights by telling the jury that she asserted her rights. The trial court denied the motion, but allowed McGovern to present a curative instruction to the jury. That instruction read:

> You have heard testimony that the defendant exercised her rights to require a search warrant under the 4th amendment of the United States constitution and the constitution of the State of Washington article 1 section 7. You are to infer no guilt upon the defendant's exercise of these rights nor are you to consider this testimony during your deliberations.

CP at 124.

At the close of the State's case, Erin McGovern moved to dismiss all charges against her based on insufficient evidence. McGovern argued that the State failed to show that Deputy Nathan Bohanek found drugs in a purse over which she claimed ownership. She also asserted that the State presented insufficient evidence for a jury to find she knowingly possessed another's identification. The trial court denied the motion. The trial court reasoned that McGovern's arguments regarding the lack of nexus between

her and the purse went to weight and not to its sufficiency. The court also determined that the State provided sufficient evidence for a jury to infer that McGovern knowingly possessed the identification because it was found in a purse to which she claimed ownership.

A jury found Erin McGovern guilty of all charges. The trial court convicted and sentenced McGovern to thirty days' confinement.

LAW AND ANALYSIS

Traffic Stop

Erin McGovern first contends that the trial court erred in denying her CrR 3.6 motion to suppress evidence obtained in the search of the 1985 BMW. McGovern asks this court to ignore the driver's consent to search the vehicle, because the officers' initial stop of the car for speeding was pretextual. She emphasizes the fact that Deputy Nathan Bohanek and Corporal Justin Elliot served on an interdiction team, thereby following cars on the highway and gazing for drugs, weapons and persons wanted on warrants. According to McGovern, the officers lacked cause to stop the BMW because they observed no drugs or weapons and had no knowledge that the driver lacked a license.

We must first address whether Erin McGovern sufficiently assigned error to the trial court's findings of fact, and, if not, the ramifications of the lack of a proper assignment. In her opening brief, McGovern assigned error to none of the trial court's findings. In her opening brief's argument, she does not criticize any of the trial court's

findings. In her reply brief, Erin McGovern wrote:

> Appellant does assign error to the court's factual findings in the CrR 3.6 hearing.

Reply Br. of App. at 3. McGovern's haphazard assignment of error does not suffice.

RAP 10.3(g) provides in relevant part:

> A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

A general assignment of error to the findings of fact is insufficient under the rule. *State v. Roggenkamp*, 115 Wn. App. 927, 943, 64 P.3d 92 (2003). When the assignments of error to the court's findings of fact do not comply with RAP 10.3(g), the trial court's findings become the established facts of the case. *State v. Arreola*, 176 Wn.2d 284, 288, 290 P.3d 983 (2012); *State v. Roggenkamp*, 115 Wn. App. at 943.

In this appeal, we accept the trial court's findings as accurate, but this acceptance does not end our review. The ultimate determination of whether those facts constitute a violation of the constitution is one of law and is reviewed de novo. *State v. Harrington*, 167 Wn.2d 656, 662, 222 P.3d 92 (2009); *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). The constitutionality of a warrantless stop is a question of law we review de novo. *State v. Gatewood*, 163 Wn.2d at 539.

We review the traffic stop of the 1985 BMW only under Washington law, since

state law affords an accused greater protection. As a general rule, warrantless searches and seizures are per se unreasonable, in violation of article I, section 7 of the Washington State Constitution. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). Washington recognizes at least six narrow exceptions to the warrant requirement: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and *Terry* investigative stops. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). The State bears the burden of demonstrating that a warrantless seizure falls into a narrow exception to the rule. *State v. Doughty*, 170 Wn.2d 57, 61, 239 P.3d 573 (2010).

Whether pretextual or not, a traffic stop is a "seizure" for the purpose of constitutional analysis. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). Warrantless traffic stops are constitutional under article I, section 7 as investigative stops, but only if based on a reasonable articulable suspicion of either criminal activity or a traffic infraction, and only if reasonably limited in scope. *State v. Arreola*, 176 Wn.2d at 292-93 (2012); *State v. Ladson*, 138 Wn.2d at 350. The narrow exception to the warrant requirement for investigative stops has been extended beyond criminal activity to the investigation of traffic infractions because of the law enforcement exigency created by the ready mobility of vehicles and governmental interests in ensuring safe travel, as evidenced in the broad regulation of most forms of transportation. *Arreola*, 176 Wn.2d at 293; *State v. Johnson*, 128 Wn.2d 431, 454, 909 P.2d 293 (1996).

Purely pretextual traffic stops are unconstitutional. *Ladson*, 138 Wn.2d at 358. A pretextual traffic stop occurs when a police officer relies on some legal authorization as a mere pretext to dispense with a warrant when the true reason for the seizure is not exempt from the warrant requirement. *Ladson*, 138 Wn.2d at 358. To determine whether a traffic stop is pretextual, Washington courts evaluate the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior. *Ladson*, 138 Wn.2d at 358-59.

The trial court found that the law enforcement officers' stop of the 1985 BMW was not pretextual, but the result of speeding. Because Erin McGovern failed to object to this finding of fact, we could end our analysis here. We recognize, however, that Deputy Nathan Bohanek and Corporal Justin Elliott may have also been motivated, when halting the BMW, by their principal goal of interdicting drug and weapon traffickers. Assuming we determined the pair to be stimulated by this additional goal, we still would affirm the trial court. The officers would then have had mixed motivations, and mixed motives does not preclude the traffic stop.

Our Supreme Court for the first time addressed a mixed motivation stop in *State v. Arreola*, 176 Wn.2d 284 (2012). The court held:

> A mixed-motive stop does not violate article I, section 7 so long as the police officer making the stop exercises discretion appropriately. Thus, if a police officer makes an independent and conscious determination that a traffic stop to address a suspected traffic infraction is reasonably necessary in furtherance of traffic safety and the general welfare, the stop is not

> pretextual. That remains true even if the legitimate reason for the stop is secondary and the officer is motivated primarily by a hunch or some other reason that is insufficient to justify a stop. In such a case, the legitimate ground is an independent cause of the stop and privacy is justifiably disturbed due to the need to enforce traffic regulations, as determined by an appropriate exercise of police discretion. Any additional reason or motivation of the officer does not affect privacy in such a case, nor does it interfere with the underlying exercise of police discretion because the officer would have stopped the vehicle regardless. The trial court should consider the presence of an illegitimate reason or motivation when determining whether the officer really stopped the vehicle for a legitimate and independent reason (and thus would have conducted the traffic stop regardless). But a police officer cannot and should not be expected to simply ignore the fact that an appropriate and reasonably necessary traffic stop might also advance a related and more important police investigation. [*State v.*] *Nichols*, 161 Wn.2d [1,] 11, 162 P.3d 1122 [2007] ("'[E]ven patrol officers whose suspicions have been aroused may still enforce the traffic code ....'" (quoting *State v. Minh Hoang*, 101 Wn. App. 732, 742, 6 P.3d 602 (2000))[]]. In such a case, an officer's motivation to remain observant and potentially advance a related investigation does not taint the legitimate basis for the stop so long as discretion is appropriately exercised and the scope of the stop remains reasonably limited based on its lawful justification.

Arreola, 176 Wn.2d at 298-99.

State v. Arreola is both controlling and analogous. In *Arreola*, a Mattawa police officer responded to a report of a possible drunk driver. The officer followed the allegedly intoxicated driver, but observed no signs of impaired driving. The officer, nevertheless, stopped the driver because of his car's illegally altered exhaust system. On approaching the car, the officer smelled alcohol and saw open containers in the vehicle. Our Supreme Court affirmed a trial court ruling upholding the traffic stop. Because the trial court's unchallenged finding was that the altered exhaust was the actual reason for

the Mattawa police officer's stop, the stop itself was not pretextual.

As part of a crime interdiction team patrolling Interstate 90, Deputy Nathan Bohanek and Corporal Justin Elliot sought suspects engaged in activities other than speeding. Nevertheless, the BMW exceeded the speed limit. Common wisdom may be that one is free to exceed the speed limit up to five miles per hour. Nevertheless, driving 75 m.p.h. in a 70 m.p.h. zone remains a traffic infraction. The law enforcement officers' ulterior motive of stopping individuals transporting drugs or driving with a suspended license, assuming such motives existed, does not negate the validity of the stop.

Testimony of Denial of Consent

Erin McGovern contends the trial court erred in denying her motion for a mistrial that she forwarded when the State elicited trial testimony from Deputy Nathan Bohanek that indicated McGovern refused consent to search her possessions. McGovern argues that the testimony impermissibly used her refusal as evidence of guilt. McGovern maintains the curative jury instruction did not, and could not, correct the error. The State promotes the admissibility of Deputy Bohanek's testimony as evidence behind the issuance of the warrant to search the BMW and not as substantive evidence of McGovern's guilt. The State further contends that the trial court's curative instruction cured any error and alleviated any harm to McGovern. We do not address whether the testimony of Nathan Bohanek was admissible, because we otherwise find no error in the trial court's denial of the motion for a mistrial.

We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly. *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986), *overruled on other grounds by State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). Only errors affecting the outcome of the trial will be deemed prejudicial. *Mak*, 105 Wn.2d at 701. A constitutional error is harmless if the appellate court is assured beyond a reasonable doubt that the jury verdict is unattributable to the error. *State v. Anderson*, 171 Wn.2d 764, 770, 254 P.3d 815 (2011). This court employs the "overwhelming untainted evidence" test and looks to the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. *Anderson*, 171 Wn.2d at 770 (internal quotation marks omitted).

Erin McGovern is correct that a criminal defendant's assertion of her constitutional right to refuse a warrantless search cannot be used as evidence of her guilt. *State v. Jones*, 168 Wn.2d 713, 725, 230 P.3d 576 (2010); *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008); *State v. Gauthier*, 174 Wn. App. 257, 267, 298 P.3d 126 (2013). Use of the evidence for this purpose amounts to manifest constitutional error. *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978); *State v. Jones*, 168 Wn.2d at 725; *State v. Burke*, 163 Wn.2d at 217. Nevertheless, a mere reference to such an assertion does not always amount to a constitutional violation requiring reversal. Reversal requires

the State to have invited the jury to infer guilt from the invocation of the right. *Burke*, 163 Wn.2d at 217.

Three decisions shed light on how the State invites the jury to infer guilt and what measures the trial court should exercise under such circumstances. In *United States v. Prescott*, 581 F.2d 1343 (9th Cir. 1978), the court considered an appeal by Saundra Prescott, convicted as an accessory after the fact to mail fraud committed by her neighbor. Prescott allowed the neighbor to hide in her house while law enforcement officers raided his apartment across the hall. After finding the neighbor's apartment empty, the agents knocked on Prescott's door. Prescott refused to open the door and denied knowing or harboring her neighbor. Prescott asked the agents if they had a warrant to search her apartment, and, when they said they did not, she continued to refuse them entry. The agents battered Prescott's door, entered the apartment, and found the neighbor with his fraudulently obtained parcels.

In *United States v. Prescott*, the district court judge denied Saundra Prescott the opportunity to argue that her refusal to consent to a warrantless search of her apartment could not be considered as evidence of guilt. The trial court also refused a curative instruction to the jury similar to that used in Erin McGovern's case. In reversing and remanding the conviction, the Ninth Circuit held that the trial court erred in allowing the government to use Prescott's refusal to consent to a warrantless search as evidence of the crime charged.

In *State v. Gauthier*, 174 Wn. App. 257 (2013), this court reversed Thomas Gauthier's conviction for second degree rape and held that the trial court erred in allowing the State to present evidence of Gauthier's refusal to submit to a warrantless DNA test as evidence of his guilt. Gauthier's defense counsel mentioned the refusal during his closing argument, and the State responded, in rebuttal, that Gauthier's refusal was consistent with the actions of a guilty person.

In *State v. Burke*, 163 Wn.2d 204 (2008), our Supreme Court reversed Justin Burke's conviction for third degree rape of a child. The court held that the State impermissibly introduced Burke's refusal to speak with police as evidence of his guilt. The State stressed Burke's assertion of the Fifth Amendment privilege in its opening and closing arguments, direct examination of investigating officers, and cross-examination of Burke. Our high court found that the trial court abused its discretion by allowing the State to present such evidence and provide such an argument.

We distinguish our appeal from the trial events in *United States v. Prescott*, *State v. Gauthier*, and *State v. Burke*. The State of Washington below uttered a short reference to Erin McGovern's refusal to consent to the search of her bags and purportedly offered the evidence for the purpose of explaining the reason officers sought a search warrant. The State did not mention McGovern's refusal to consent in its opening or closing argument. In addition, the trial court submitted a curative instruction, crafted by McGovern, to the jury. The other overwhelming untainted evidence presented by the

State, as explained below, was sufficient on its own to support a finding of guilt. For these reasons, we hold the trial court did not abuse its discretion in denying McGovern's motion for a mistrial.

Sufficient Evidence to Convict

Erin McGovern contends that insufficient evidence supports her four convictions. She argues that the State failed to provide sufficient evidence to prove the mens rea element of her charge for possessing another's identification. She maintains that the State presented insufficient evidence that she possessed the drugs found in bags she claimed as her own. We disagree.

When a defendant challenges the sufficiency of the evidence underlying her conviction, she admits the truth of the State's evidence and all inferences that reasonably may be drawn from the evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). This court views the evidence in the light most favorable to the State and asks whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The reviewing court considers circumstantial evidence equally reliable as direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997); *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The trier of fact judges the credibility of witnesses, and issues of credibility cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Possession of controlled substances: RCW 69.50.4013(1) provides:

> It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

The jury found Erin McGovern thrice offended this statute by possessing methamphetamine, Xanax, and Ritalin.

When reviewing the evidence in a glow most favorable to the State, a jury could have reasonably found the essential elements of these crimes beyond a reasonable doubt. Erin McGovern claimed that the bags in which officers found the drugs and her personal identification. *See State v. Edwards*, 5 Wn. App. 852, 855, 490 P.2d 1337 (1971). The jury heard no evidence that McGovern obtained a valid prescription for the medications. A jury could reasonably infer from this evidence that McGovern possessed the drugs in question.

Possession of another's identification: RCW 9A.56.330 provides, in relevant part:

> (1) A person is guilty of possession of another's identification if the person knowingly possesses personal identification bearing another person's identity, when the person possessing the personal identification does not have the other person's permission to possess it, and when the possession does not amount to a violation of RCW 9.35.020.
>
> (2) This section does not apply to:
>
> (a) A person who obtains, by means other than theft, another person's personal identification for the sole purpose of misrepresenting his or her age;
>
> (b) A person engaged in a lawful business who obtains another person's personal identification in the ordinary course of business;

> (c) A person who finds another person's lost personal identification, does not intend to deprive the other person of the personal identification or to use it to commit a crime, and takes reasonably prompt steps to return it to its owner; and
>
> (d) A law enforcement agency that produces or displays counterfeit credit or debit cards, checks or other payment instruments, or personal identification for investigative or educational purposes.

Again, in the light most favorable to the State, the evidence presented supports the jury's finding of guilt. Officers discovered Brendan Cassida's identification and credit card in one of the bags to which Erin McGovern claimed ownership. The State provided evidence that Cassida had not given McGovern permission to possess his identification, and McGovern presented no evidence that she fell under one of the exceptions listed in section 2 of RCW 9A.56.330.

McGovern argues that the State failed to present sufficient evidence of the "mens rea" element of this charge, the element being knowingly possessing Cassida's identification. *See State v. Thompson*, 68 Wn.2d 536, 540-41, 413 P.2d 951 (1966); *State v. Plank*, 46 Wn. App. 728, 731, 731 P.2d 1170 (1987). While she is correct that the State lacked direct evidence in support of this element, the jury is entitled to reasonably infer McGovern's knowing possession from the circumstances surrounding the discovery of Cassida's identification. *See State v. Tembruell*, 50 Wn.2d 456, 457-58, 312 P.2d 809 (1957). As with the other charges, the trial court did not err in submitting McGovern's charge for possession of another's identification to the jury.

CONCLUSION

We affirm all convictions against Erin McGovern.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Brown, A.C.J.

Korsmo, J.

OFFICE RECEPTIONIST, CLERK

To: Amber C. Henry
Subject: RE: Erin McGovern Filing

Rec'd 08/10/2015

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From: Amber C. Henry [mailto:amberh@phelpslaw1.com]
Sent: Monday, August 10, 2015 2:21 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: RE: Erin McGovern Filing

Good afternoon,

Please find attached a Petition for Review for Erin McGovern. **No. 91815-5**

Regards,

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