No. 46365-2-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RANDALL SMITH,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. The unlawful police entry cannot be validated by a string of claims that were never considered by or proven in the trial court

a. The State bore the burden of proof at the CrR 3.6 hearing.

In the response brief's concoction of a litany of new or unproven arguments on which it contends this Court could find authority to enter and search Mr. Smith's hotel room, the prosecution insists that Mr. Smith had the burden of disproving each of these alternatives at the CrR 3.6 suppression hearing. However, it is the prosecution that bears the burden of proving the justification for an illegal entry, seizure, or search. *See State v. Potter*, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006) ("The State bears the burden of establishing an exception to the warrant requirement."); *State v. Morse*, 156 Wn.2d 1, 7, 123 P.3d 832 (2005) ("burden of proof is on the State to show that a warrantless search or seizure falls within one of the exceptions to the warrant requirement.").

In *Morse*, the police went to an apartment looking for a person who had multiple felony warrants and who had been staying at the apartment. 156 Wn.2d at 5-6. They were not excused from obtaining legal authority to enter the rooms within the apartment by the mere fact

that an arrest warrant existed. Here, the police had not confirmed the warrant's existence. As *Morse* shows, an arrest warrant's existence is not carte blanche to enter and search a residence. There is no dispute that the police lacked a search warrant when they entered the hotel room and there was no evidence that the warrant allegation was confirmed before this entry. In this circumstance, the State bears the burden of proving it acted lawfully.

b. The caretaking exception does not apply.

For the first time in its response brief, the State speculates that the police could have thought Mr. Smith needed medical attention, or if they disbelieved the bail agent's allegations, could have entered to free Mr. Smith from captors under the limited community caretaking exception to the warrant requirement. *See State v. Thompson*, 151 Wn.2d 793, 803, 92 P.3d 228 (2004). This contention is purely speculative and disingenuous. No welfare check occurred. If it applied, the State would bear the burden of proving the police were properly exercising the community caretaking function. *Thompson*, 151 Wn.2d at 803. They offered no such proof and this contention should be disregarded.

c. The independent source contention does not apply.

In *State v. Ibarra-Cisneros*, 172 Wn.2d 880, 885, 263 P.3d 591 (2011), the court held that "[c]ourts should not consider grounds to limit application of the exclusionary rule when the State at a CrR 3.6 hearing offers no supporting facts or argument." Independent source requires proof that the search was lawful based on untainted information obtained independently from the initial, unlawful search, and the State's decision to seek a warrant was not motivated by their discoveries during the initial, unlawful search. *State v. Gaines,* 154 Wn.2d 711, 718, 116 P.3d 993 (2005). It requires an express determination that the officers were not conducting a search based on the illegal or inadequate allegations that prompted the initial entry and the record must be sufficiently developed for the trial court to make this decision. *State v. Miles*, 159 Wn.App. 282, 294, 244 P.3d 1030 (2011). It is not premised on speculation about what the police might have done; such speculation is at the root of the inevitable discovery doctrine which is not an exception to article I, section 7. *State v. Winterstein*, 167 Wn.2d 620, 634, 220 P.3d 1226 (2009).

The response brief's purely speculative notion that the police could have acted based on an allegation of that identity theft evidence

might be found in the hotel room does not meet the independent source requirements. It was not proven by the State at the hearing. The allegation would not have given police authority to enter a residence without a warrant, as occurred here. This doctrine is inapplicable.

d. The bail agents did not authorize police to enter the residence without a warrant.

In an argument the State concedes it did not raise before, it asks this Court to bestow on the police the authority given to private actors who are employed as bail agents. Resp. Brief at 15.

It points to RCW 18.185.300, which gives a police officer immunity from civil suit if she assists or is present when bail agents forcibly enter a building. But this statute does not grant officers the authority to assist bail agents with forcible entry that would otherwise be impermissible. It merely speaks to civil liability. And it applies when the police assist the entry, not when they come later to make an arrest.

As explained in Appellant's opening brief, police officers are bound by the Fourth Amendment and article I, section 7. They do not have authority to enter a residence without a warrant or narrowly drawn exception to the warrant requirement. Contrary to the prosecution's claims, there is no exception to the warrant requirement for allegations

made by bail agents who make money by finding a suspect and getting the police to arrest him. Some corroboration must occur when allegations come from informants who are unknown to the police, and who make seek a bailee's surrender for reasons that have nothing to do with a warrant. *See* Opening Brief at 10-11.

The State muddies the series of events to imply that the police learned more information earlier than evidence shows. Any facts that the State did not prove are interpreted against the State, because it bore the burden of proof. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). The State failed to prove that the officers confirmed the warrant's existence prior to entering the residence and the evidence presented indicated no such corroboration occurred. 2RP 73, 79.

The State asserts it is "unclear" whether the police received the surrender paperwork before they went inside the hotel room. Resp. Brief at 11-12. If unclear, the prosecution failed to prove this fact. But here, the record is clear – the bail paperwork was completed "[a]fter the arrest and just before Tacoma P.D. took" Mr. .Smith so that the bail agents left the scene. 2RP 59. A sergeant for the Tacoma police was the witness for the surrender and the sergeant did not arrive before the police had entered the hotel room; Officer Tiffany arrived by himself,

spoke with Mr. Kaufman, waited for a second officer to arrive, and went inside the room. 2RP 59, 64-65. The bail paperwork was not given to the police until the just before the bail agents left, which happened far later in the course of events. 2RP 59, 65. Mr. Smith was brought out of the room for the "custody transfer" to occur, demonstrating that the police had already been inside the room. 2RP 47.

The prosecution also asserts that police may forcibly enter a "fugitive's place of abode." Resp. Brief at 16. But this may be permitted only if the police have reliable and verified information that a valid warrant exists and the suspect is likely in the residence. *State v. Hatchie*, 161 Wn.2d 390, 402, 166 P.3d 698 (2007). The existence of an arrest warrant does not authorize police to enter a third person's residence. *Id*. "[C]onfirmation of the outstanding warrant" is required. *State v. Sinclair*, 11 Wn.App. 523, 531, 523 P.2d 1209 (1974). No confirmation occurred here.

The State complains that corroboration is an onerous burden for the police, but focuses only the problem that the police did not know the people who identified themselves as bail recovery agents. They did not have information on which to presume their information was trustworthy and reliable. The police could have corroborated their

claims with their own records, but did not do so. This is not an onerous burden; they did not need to run background checks for the bail agents, but did need to ascertain the reliability of the accusations to obtain authority to conduct a warrantless entry into a home.

e. The prosecution frivolously asserts Mr. Smith lacked standing to complain about an unlawful entry into his residence.

Even though the court declined to address the State's standing objections the prosecution continues to insist that because the police later learned that Mr. Smith paid for the room with a fraudulent credit card, he cannot challenge the legality of the search.

The State's argument is wrong under the Fourth Amendment. A person has a reasonable expectation of privacy in a hotel room in which he is staying until he has been evicted. *United States v. Young*, 573 F.3d 711, 714 (9th Cir. 2009). Even when a person has rented a room with a suspected fraudulent credit card, the renter remains the lawful occupant, "entitled to a reasonable expectation of privacy," until his occupancy has been lawfully terminated. *United States v. Bautista,* 362 F.3d 584, 590 (9th Cir.2004).

In its response brief, the prosecution relies on *State v. Wisdom*, 187 Wn.App. 652, 349 P.3d 953, 959 (2015), *as amended on reconsideration in part* (Sept. 3, 2015). But in *Wisdom*, Division Three refused to address standing because it was not raised by the parties, and only asserted by a dissenting judge. Id. at 958.

In *dicta*, the majority also explained the dissenting judge was wrong. Washington liberally confers standing, automatically, even if a person "might technically lack a privacy interest in property." *Id*. at 959. Automatic standing is favored in this state because our courts do not want the State to take "contradictory positions by arguing at a suppression hearing that the defendant did not have possession of the property and therefore lacked Fourth Amendment privacy interests and then arguing at trial that the defendant is guilty of unlawful possession of the property." *Id*. It also benefits a defendant who may challenge the legality of the police action without making a concession that could be used against him at trial. *Id*. Similarly to *Wisdom*, Mr. Smith is charged with possessory crimes and is entitled to automatic standing.

As an overnight guest in the hotel room, Mr. Smith has standing to challenge a warrantless search. *State v. Link*, 136 Wn.App. 685, 692, 150 P.3d 610 (2007). This standing does not get erased if the police

learn after the search that the room was rented with a fraudulent credit card. The State's contention that a person cannot have standing to object to a search when the State subsequently contends that he stole the property at issue would eviscerate the standing doctrine.

State v. Zakel, 119 Wn.2d 563, 565, 834 P.2d 1046 (1992), is also inapposite because the defendant was not in possession of any of the allegedly stolen items at the time of the search. The court refused to address any other aspect of standing. *Id.* at 567-68. In *Zakel*, an officer searched an unlocked, parked, stolen car; saw stolen property inside; and had probable cause to arrest the driver. *Id.* at 565. The officer spoke to Zakel as he was searching the stolen car and Zakel told the officer he had no idea who owned the car. *Id.* The officer walked away and watched the car, saw Zakel get inside, and he arrested Zakel. *Id.* at 566. The Court held that Zakel did not have standing to challenge the officer's earlier search because Zakel did not have possession of the car at the time of the search and denied any possessory interest when the officer was searching it. *Id.* at 570. Unlike *Zakel*, Mr. Smith was inside the hotel room at the time of the search, did not disavow ownership, and it is his presence in the room that it critical to the State's allegation that he possessed the items inside. His presence in a residence that he

rented, that held his personal property, and he lived in gives him standing under article I, section 7 to challenge the State's authority to enter the room.

The police lacked authority to enter the hotel room without a warrant and the evidence they gathered and their observations from that unlawful entry must be suppressed.

2. Mr. Smith's request to speak to a lawyer during Miranda warnings was not ambiguous or misunderstood by the police, but they continued to question him

Contrary to the prosecution's claim that Mr. Smith was being ambiguous when he said "attorney" as a police officer was reading him his Miranda warnings, the police did not perceive his statement as ambiguous. The officer understood and assumed Mr. Smith meant he wanted to speak with an attorney. 2RP 75. But the officer did not contact an attorney, cease questioning, or ask Mr. Smith whether he wanted a lawyer. 2RP 75-76. Instead, he kept reading the *Miranda* rights and once finished, he did not acknowledge the request. He acted as if it never occurred and asked Mr. Smith if he would answer some questions. *Id*. By ignoring Mr. Smith's request, the officer sent the message that his request would not be honored before he answered

questions. 2RP 76. Under these circumstances, the prosecution did not prove Mr. Smith knowingly, voluntarily, and intelligently relinquished his right to have counsel prior to answering questions. *Edwards v. Arizona*, 451 U.S. 477, 482, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *State v. Earls*, 116 Wn.2d 364, 379, 805 P.2d 211 (1991).

The prosecution's harmless error analysis is also misplaced. They are presumptively prejudicial. *State v. Nysta*, 168 Wn.App. 30, 42, 275 P.3d 1162 (2012), *rev. denied*, 177 Wn.2d 1008 (2013). The prosecution used Mr. Smith's uncounseled statements to obtain a search warrant, show he possessed the items in the hotel room, and allege his knowing possession of stolen vehicles parked in the hotel lot. CP 331-32. This evidence formed the crux of the case against Mr. Smith and, because it was elicited in violation of Mr. Smith's right to counsel as well as his right to be free from intrusions in his private affairs, its suppression requires reversal of his convictions.

3. The identity theft "to convict" instruction is a critical yardstick for the jury that must accurately inform the jury of the essential elements.

Our courts have long recognized the importance of the to-convict instruction in accurately informing the jury of the essential elements it must find. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d

1000 (2003). Because this instruction "purports to be a complete statement of the crime" it "must in fact contain every element of the crime charged." *State v. Mills*, 154 Wn.2d 1, 8, 109 P.3d 415 (2005).

> a "to convict" instruction must contain all of the elements of the crime because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence ... an instruction purporting to list all of the elements of a crime must in fact do so.

State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). A reviewing court "may not rely on other instructions" to supply a missing element or correct a mistake. *DeRyke*, 149 Wn.2d at 910.

The prosecution appears to agree that it would be error to inform the jury that it could convict Mr. Smith of identity theft in the second degree as an accomplice if the jury found he "acted with the intent to commit or aid or abet *any crime*." *See, e.g.*, CP 214 (Instruction 19). This concession is correct because "[i]t is a misstatement of the law to instruct a jury that a person is an accomplice if he or she acts with knowledge that his or her actions will promote *any* crime." *State v. Brown*, 147 Wn.2d 330, 338, 58 P.3d 889 (2002) (emphasis in original).

The to-convict's expansion of liability is not cured by the accomplice liability instruction, which generally told the jury that an accomplice must aid in the crime. The to-convict instruction is the

yardstick; it purports to accurately explain the elements to the jury. The accomplice instruction did not explain that the identity theft instruction meant a particular crime and because it purports to explain all essential elements, its language would override any potential inconsistency or ambiguity in its overlap with the to-convict instruction.

As explained in Appellant's Opening Brief, this error is presumed prejudicial and is not harmless beyond a reasonable doubt based Sarah Stetson-Hayden had far more knowledge of banking protocol than Mr. Smith and she appeared to organize and control the creation of financial documents, which she called her "expertise." 7RP 632, 639. She was present in the hotel room that contained the vast amount of identifying information and tools for making identifications. 6RP 537; 7RP 588, 592. The evidence did not unambiguously connect Mr. Smith to using or knowing about all 18 complainants for each identity theft allegation. Based on the ambiguity of the evidence and the clear leadership of Ms. Stetson-Haden, the court's instruction diluting the State's evidentiary burden is not harmless.

4. *The defects in the leading organized crime instruction are not nullified by a closing argument where the jury has been directed to disregard the closing argument as not a statement of law.*

The prosecution did not ask for an instruction explaining the specific requirement that the jury base its verdict for leading organized crime only on Mr. Smith's acts. *See, e.g.*, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.26 (3d Ed) (instruction by which prosecution specifies particular act jury should consider). Instead, the jury was instructed that "The law is contained in the instructions I give you" and they "*must* disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 197 (emphasis added).

The prosecution's closing argument was merely an opportunity to discuss the case for which the jury was directed it must disregard if it was not consistent with the court's instructions, and it could disregard for any reason as it had no binding effect on the jury's determinations. The prosecution's argument does not cure a defect in the instructions that failed to inform the jury that leading organized crime must be based on Mr. Smith's conduct and not his knowing assistance to another person. There was evidence that Mr. Smith worked in conjunction with another expert fraud-perpetrator and this instruction let the jury convict Mr. Smith by aid he gave to her.

Similarly, the court did not instruct the jury on the requirements of unanimity, as explained in Appellant's Opening Brief at 36-38. The jury needed to agree on the necessary qualifying underlying acts committed for financial gain, because they are an essential element. The myriad of identifying documents were not uniformly or even mostly shown to have been used. Mere possession of identifying documents is insufficient. RCW 9A.82.010(15). Without this instruction, Mr. Smith was not afforded his constitutional right to a unanimous jury verdict because there were multiple options before the jury and the evidence did not establish all essential elements of a pattern of criminal profiteering. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); *State v. Noyes,* 69 Wn.2d 441, 446, 418 P.2d 471 (1966);. Reversal of the convictions and a new trial before a properly instructed jury is required.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Smith respectfully requests this Court reverse his convictions and remand his case for further proceedings.

DATED this 10th day of September 2015.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, v. RANDALL SMITH, Appellant.	)))))))))	NO. 46365-2-II

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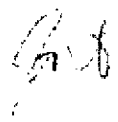

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