

FILED  
Court of Appeals  
Division II  
State of Washington  
6/24/2021 4:40 PM

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
6/24/2021  
BY SUSAN L. CARLSON  
CLERK

Supreme Court No. 99921-0  
(COA No. 54141-6-II)

THE SUPREME COURT OF THE STATE OF  
WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

JIM CASTILLA-WHITEHAWK,

Petitioner.

---

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

---

PETITION FOR REVIEW

---

TRAVIS STEARNS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 610  
Seattle, WA 98101  
(206) 587-2711

TABLE OF CONTENTS

TABLE OF CONTENTS .....i

TABLE OF AUTHORITIES .....ii

A. IDENTITY OF PETITIONER..... 1

B. COURT OF APPEALS DECISION..... 1

C. ISSUES PRESENTED FOR REVIEW ..... 1

D. STATEMENT OF THE CASE ..... 2

E. ARGUMENT ..... 6

    1. The search warrant used to justify the search of the Mini Cooper failed to establish the informant had sufficient knowledge of the facts asserted. .... 6

    2. Mr. Castilla-Whitehawk’s illegal seizure required suppression of his post-arrest statement. .... 12

    3. Allowing the jury to hear that an 8-year old child was present during the alleged crime deprived Mr. Castilla-Whitehawk of his right to a fair trial. .... 13

    4. The trial court improperly instructed the jury on accomplice liability. .... 17

F. CONCLUSION ..... 20

APPENDIX ..... 21

TABLE OF AUTHORITIES

**Washington Supreme Court**

*State v Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000)..... 18

*State v. Allen*, 182 Wn.2d 364, 341 P.3d 268 (2015) ..... 18

*State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021)..... 11, 16

*State v. Byers*, 88 Wn.2d 1, 559 P.2d 1334 (1977) ..... 13

*State v. Clark*, 143 Wn.2d 731, 24 P.3d 1006 (2001)..... 10

*State v. Coria*, 120 Wn.2d 156, 839 P.2d 890 (1992)..... 17

*State v. Emmanuel*, 42 Wn.2d 1, 253 P.2d 386 (1953)..... 14

*State v. Goebel*, 36 Wn.2d 367, 218 P.2d 300 (1950) ..... 14

*State v. Gresham*, 173 Wn.2d 405, 269 P.3d 207 (2012) ..... 15

*State v. Hobart*, 94 Wn.2d 437, 617 P.2d 429 (1980) ..... 10

*State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984)..... 7

*State v. Jackson*, 150 Wn.2d 251, 76 P.3d 217 (2003).....  
..... 7, 8, 11

*State v. Lyons*, 174 Wn.2d 354, 275 P.3d 314 (2012) ..... 6

*State v. Neth*, 165 Wn.2d 177, 196 P.3d 658 (2008) ..... 9, 11

*State v. Ollivier*, 178 Wn.2d 813, 312 P.3d 1 (2013) ..... 7

*State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1986)..... 14, 15

*State v. Thang*, 145 Wn.2d 630, 41 P.3d 1159 (2002) ..... 15

*State v. Thein*, 138 Wn.2d 133, 977 P.2d 582 (1999) ..... 8

**Washington Court of Appeals**

*State v. Gonzales*, 46 Wn. App. 388, 731 P.2d 1101 (1986).... 13

*State v. McCord*, 125 Wn. App. 888, 106 P.3d 832 (2005) ..... 13

*State v. Munden*, 81 Wn. App. 195, 913 P.2d 421 (1996)..... 18

*State v. Rice*, 48 Wn. App. 7, 737 P.2d 726 (1987) ..... 17

*State v. Rodriguez*, 48 Wn. App. 815, 740 P.2d 904 (1987).... 19

*State v. Wheeler*, 22 Wn. App. 792, 593 P.2d 550 (1979) ..... 19

**Statutes**

RCW 69.50.435 ..... 17

RCW 70.160.070 ..... 11

RCW 9A.08.020..... 18

**Rules**

ER 403 ..... 15

ER 404 ..... 1, 13, 14, 15

RAP 13.3..... 1

RAP 13.4..... 1, 6, 12, 14, 18, 20

**Constitutional Provisions**

Const. art. 1, § 22..... 14

Const. art. I, § 7 ..... 6

U.S. Const. amend. V ..... 13

U.S. Const. amend. XIV ..... 14

## A. IDENTITY OF PETITIONER

Jim Castilla-Whitehawk, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review. RAP 13.3; RAP 13.4.

## B. COURT OF APPEALS DECISION

Mr. Castilla-Whitehawk seeks review of the Court of Appeals decision from May 25, 2021, attached as an appendix.

## C. ISSUES PRESENTED FOR REVIEW

1. Was the search warrant lawfully issued when the information provided by the informant lacked sufficient reliability and only innocuous facts could be corroborated?

2. Did Mr. Castilla-Whitehawk's unlawful arrest require suppression of his post-arrest statements?

3. Did allowing the jury to hear that an 8-year-old was present during the charged drug transaction to establish Mr. Castilla-Whitehawk's possession of controlled substances in violation of ER 404(b) deprive Mr. Castilla-Whitehawk of his right to a fair trial?

4. Did the trial court improperly instruct the jury on accomplice liability when the evidence did not establish an accomplice relationship?

#### D. STATEMENT OF THE CASE

An informant told police that Jim Castilla-Whitehawk was planning to meet Timothy Moreno in a Ross Dress for Less parking lot in Olympia to make a drug exchange. RP 16.<sup>1</sup> Mr. Castilla-Whitehawk would be in a silver Mini Cooper and Mr. Moreno would be in a red Honda. RP 24.

When the police arrived, they saw two men in the silver Mini Cooper. RP 24, App. 4. The windows were tinted, and they could not see what was happening inside the car. RP 30. The officers could see smoke coming out of the vehicle and smelt marijuana. RP 29, App. 4. The officers approached the car and arrested both men before witnessing any exchange. RP 30, 33, App. 4. Mr. Castilla-Whitehawk told the police

---

<sup>1</sup> The transcripts are not sequential, except for those from September 16, 2019 to September 19, 2019. References to the sequential transcripts are to the page. *E.g.* RP 42. References to the non-sequential pages include the date of the hearing. *E.g.* 6/18/19 RP 12.

they would find marijuana and oxycodone in the car. RP 34, App. 5.

With both men in custody, the police sought a search warrant for the Mini Cooper. RP 39. According to the affidavit, the police told the magistrate they received a tip from an unidentified informant about the supposed drug transaction. App. 4. The exchange would take place at the Ross Dress for Less parking lot. App. 4. Before the arrest, the only other information the police knew about the men was that Mr. Moreno had prior drug delivery convictions and Mr. Castilla-Whitehawk had been in a house where the police had arrested others for drug deliveries. App. 5.

In the application for the search warrant, the police verified innocuous facts about Mr. Castilla-Whitehawk and Mr. Moreno. However, the affidavit contained no facts that the two men were engaged in illegal activity before they were arrested. RP 55. The only citable infraction they were committing was smoking marijuana in public. RP 29.

In searching the car, the police found heroin, methamphetamine, and oxycodone. CP 1. They also found about \$1,600. RP 347. Before the police took Mr. Castilla-Whitehawk to jail, they found additional methamphetamine where he was seated. RP 526. The government charged Mr. Castilla-Whitehawk with three counts of possession of a controlled substance with the intent to deliver. CP 1.

Mr. Castilla-Whitehawk challenged the warrant in a pre-trial hearing. CP 10. He argued that the warrant affidavit contained insufficient information about the confidential informant's basis of knowledge for why she believed Mr. Castilla-Whitehawk intended to engage in a drug delivery with Mr. Moreno. CP 14. The trial court denied Mr. Castilla-Whitehawk's motion. CP 165-66.

Mr. Castilla-Whitehawk asked the court to suppress the statement he made, as it resulted from the illegal search. CP 85, RP 118. The court denied this motion. RP 119.

Mr. Castilla-Whitehawk also asked the court to preclude evidence an eight-year-old child was in the car when



the police arrested him. CP 88. Mr. Castilla-Whitehawk argued the child's presence was not relevant to any elements of the offense and was highly prejudicial. RP 122, 258. The prosecution argued it was necessary to show who was in the car to rebut any defense that the child might have been the person in possession of the drugs found in the vehicle. RP 122-23. The court denied Mr. Castilla-Whitehawk's request. RP 262. In the alternative, Mr. Castilla-Whitehawk asked the court to preclude the prosecution from telling the jury how old the child was. RP 124. This request was also denied. *Id.*

In its request to the court, the prosecution asked the court to include an instruction on accomplice liability. RP 580. Mr. Castilla-Whitehawk objected, asking the court not to include this instruction. RP 579. The court denied the request, instructing the jury on accomplice liability. RP 580.

The jury found Mr. Castilla-Whitehawk guilty of two counts of possession with the intent to deliver and one count of simple possession of a controlled substance. CP 119-24. The Court of Appeals denied Mr. Castilla-Whitehawk the relief he

requested, other than dismissing the charge of simple possession of a controlled substance, with an order to remand for a new sentencing hearing.

#### E. ARGUMENT

**1. The search warrant used to justify the search of the Mini Cooper failed to establish the informant had sufficient knowledge of the facts asserted.**

Review should be granted to determine whether Mr. Castilla-Whitehawk had the right to have the search warrant results suppressed. The Court of Appeals held the warrant application established the informant's basis of knowledge. App. 13. This decision was made in error. This issue involves a significant question of constitutional law and is an issue of substantial public interest that should be determined by this Court. RAP 13.4.

“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7. This rule requires courts to find probable cause before authorizing a search warrant. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). Probable cause to authorize a

search only exists when the search warrant’s affidavit “sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location.” *State v. Ollivier*, 178 Wn.2d 813, 846–47, 312 P.3d 1 (2013) (citing *State v. Jackson*, 150 Wn.2d 251, 264, 76 P.3d 217 (2003)).

When determining whether probable cause existed to issue a search warrant based on an informant’s information, Washington applies the *Aguilar-Spinelli*<sup>2</sup> two-pronged test. *Ollivier*, 178 Wn.2d at 849-50. This test examines whether the search warrant affidavit establishes the (1) veracity or credibility of the informant and (2) the informant’s basis of knowledge. *Id.* A search warrant should only be issued if the application shows probable cause that the defendant is involved in criminal activity and that evidence of the criminal

---

<sup>2</sup> *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), abrogated by *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), but adhered to in Washington by *State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984).

activity will be found in the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

The government did not provide the magistrate with sufficient information for how the informant formed her basis of knowledge that Mr. Castilla-Whitehawk was engaged in illegal activity. App. 4. Because the information provided to the magistrate about the informant's basis of knowledge was insufficient, the warrant was wrongly issued. *Thein*, 138 Wn.2d at 147; *Jackson*, 102 Wn.2d at 443.

In the affidavit, the police said they received a tip from their informant that she was taking Mr. Moreno to lunch. App. 4. The informant then texted law enforcement that Mr. Moreno was going to meet Mr. Castilla-Whitehawk to exchange drugs. *Id.* The police knew Mr. Moreno had prior convictions for drug delivery and that Mr. Castilla-Whitehawk had been located in a house where a drug arrest had been made. *Id.* The informant believed Mr. Moreno dealt drugs but had never purchased from him. *Id.* The police then received another text from the informant that stated the drug

transaction would take place in the parking lot in Olympia.

*Id.* Mr. Moreno would be in a red Honda. *Id.* Mr. Castilla-

Whitehawk would be in a silver Mini Cooper. *Id.*

These facts were not sufficient to determine probable cause. Instead, they provided only enough information to predict that two men would meet in a parking lot. While the informant suspected illegal activity, she did not provide a factual basis for this belief. Instead, what she told the police, other than her personal beliefs, was entirely consistent with innocent behavior. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). While the Court of Appeals recognizes this information was more than innocuous, because the informant did not provide a basis for her knowledge, it too must be rejected.

Further, nothing the police observed before arresting Mr. Castilla-Whitehawk confirmed he was engaging in a drug transaction. Certainly, as the Court of Appeals observed, the police saw cellophane in Mr. Castilla-Whitehawk's possession. RP 42, App. 4. But without more, this is also an insufficient

basis to believe Mr. Castilla-Whitehawk had committed a crime that would justify searching his vehicle.

Likewise, this Court should reject the notion that this evidence, coupled with the men's criminal history, established probable cause. A history of the same or similar crimes may help determine probable cause, but it falls short of probable cause necessary for a search warrant without other evidence. *State v. Clark*, 143 Wn.2d 731, 749, 24 P.3d 1006 (2001); *State v. Hobart*, 94 Wn.2d 437, 446, 617 P.2d 429 (1980). Otherwise, anyone convicted of a crime would constantly be subject to harassing and embarrassing police searches. *Hobart*, 94 Wn.2d at 446–47, 617 P.2d 429.

The remaining information provided to the magistrate was also insufficient for a search warrant. The affidavit stated that when the police arrived in the parking lot, they confirmed non-criminal facts the informant told them. App. 4. Both cars were in the lot, and the men were in the Mini Cooper. *Id.* The men were smoking marijuana. *Id.* As they took Mr. Castilla-Whitehawk into custody, they saw

cellophane protruding from his fanny pack. App. 5. Mr. Castilla-Whitehawk told the police they would find marijuana and oxycodone in the car. *Id.*

Especially now that possession of a controlled substance was not a crime when this offense occurred, Mr. Castilla-Whitehawk's admission to possession did not establish probable cause. *State v. Blake*, 197 Wn.2d 170, 173, 481 P.3d 521 (2021). The only offense the men may have committed was a traffic infraction for smoking marijuana in a car. RCW 70.160.070. Committing an infraction unrelated to the informant's information does not justify a search warrant.

Further, the affidavit fails to establish how the informant knew what would happen in the Mini Cooper. Her bare conclusion a crime was going to occur was insufficient to justify a warrant. *Jackson*, 102 Wn.2d at 443. Likewise, the additional information gathered by the police was also inadequate. *Neth*, 165 Wn.2d at 184. "[A] strong showing of general trustworthiness should not compensate for the failure to explain how the informant came by his information."

*Jackson*, 102 Wn.2d at 442. At best, the police discovered Mr. Castilla-Whitehawk had committed an infraction, which is insufficient to secure a warrant. Because this information was insufficient to justify the search warrant issued by the magistrate, which is a significant question of constitutional law, Mr. Castilla-Whitehawk asks this Court to accept review.

**2. Mr. Castilla-Whitehawk's illegal seizure required suppression of his post-arrest statement.**

The Court of Appeals found that the informant's information that Mr. Castilla-Whitehawk was involved in a drug transaction was sufficient for an investigative detention. App. 15. The Court determined this was sufficient to question him about his criminal actions. Mr. Castilla-Whitehawk asks this Court to review whether the informant's unsupported allegations were sufficient to question Mr. Castilla-Whitehawk. RAP 13.4 is satisfied because this involves a significant question of constitutional law.

A statement made after an illegal arrest is only admissible if it was obtained "by means sufficiently distinguishable to be purged of the primary taint" and not



through “exploitation of that illegality.” *State v. Gonzales*, 46 Wn. App. 388, 397–98, 731 P.2d 1101 (1986) (quoting *State v. Byers*, 88 Wn.2d 1, 8, 559 P.2d 1334 (1977)); U.S. Const.

amend. V. Mr. Castilla-Whitehawk’s statements were made immediately after his arrest. RP 34. His arrest, based on the innocuous facts provided by the confidential informant, was not lawful. Because the illegal arrest of Mr. Castilla-Whitehawk was not sufficiently distinguishable from the primary taint, the trial court erred when it allowed the jury to hear his statements. Given the immediacy of his statements to his arrest, the illegal arrest required suppression. *State v. McCord*, 125 Wn. App. 888, 895, 106 P.3d 832 (2005). Mr. Castilla-Whitehawk asks this Court to grant review.

**3. Allowing the jury to hear that an 8-year old child was present during the alleged crime deprived Mr. Castilla-Whitehawk of his right to a fair trial.**

The Court of Appeals held the trial court did not err when it admitted evidence of a child present during the alleged drug sale, pursuant to ER 404(b). App. 15. Mr. Castilla-Whitehawk asks this Court to accept review of

whether this error deprived him of a fair trial. This issue involves a significant question of constitutional law and involves an issue of substantial public interest that should be determined by this Court. RAP 13.4.

The principle that persons will be tried for the crimes they are accused of committing and not for other acts is fundamental to our justice system. U.S. Const. amend. XIV; Const. art. 1, § 22; *State v. Goebel*, 36 Wn.2d 367, 368, 218 P.2d 300 (1950). 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.” The presumptive rule of exclusion is grounded on the principle that the accused must be tried for the crimes charged, not for uncharged acts. *State v. Emmanuel*, 42 Wn.2d 1, 13, 253 P.2d 386 (1953). Prior act evidence prejudices an accused even when it is minimally relevant, “where the minute peg of relevancy [is] entirely obscured by the dirty linen hung upon it.” *State v. Smith*, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting *Goebel*, 36 Wn.2d at 379).

The test for admitting evidence of other acts or character is stringent. ER 404(b). The trial court must first find by a preponderance of the evidence the misconduct occurred, determine whether the evidence is relevant to a material issue, state on the record the purpose for which the evidence is being introduced, and balance the probative value of the evidence against the danger of unfair prejudice. *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012).

Even if the evidence is admissible under ER 404(b), it should be excluded if the danger of unfair prejudice substantially outweighs its probative value. *Smith*, 106 Wn.2d at 776; *see also* ER 403. Doubts as to the admissibility of prior act evidence should be resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

The prosecutor justified the need for introducing this evidence to rebut an argument that the eight-year-old possessed the drugs. But no reasonable jury would have thought this was possible. And while the Court of Appeals held the prosecutor needed to introduce evidence of the 8-

year-old to prove the crime of possession, it is challenging to see how. App. 17. Under no scenario was it suggested the 8-year-old was somehow involved in the drug possession. This faulty analysis should be disregarded.

And even were this Court to determine that it was necessary to establish Mr. Castilla-Whitehawk, and not the 8-year-old child, possessed the drugs, simple possession is no longer an offense in this state. *See Blake*, 197 Wn.2d at 173. Certainly, the child was not ever involved in a transaction. As such, the child's presence for the charges of intent to deliver is completely irrelevant. The Court of Appeals does not disagree, as their analysis is only with regard to the possession element. App. 17.

This Court should accept review of whether there was a legitimate reason for letting the jury know of the child's presence at the scene of this alleged crime. The government's stated purpose is not a valid justification for admitting this highly prejudicial evidence, especially since possession of a controlled substance is not an offense in this state.

Further, the probative value of the evidence did not outweigh its prejudicial effect. Having a child present at a drug transaction is extremely prejudicial. The legislature has recognized how harmful it is to have drugs around children, which this Court has affirmed. RCW 69.50.435; *State v. Coria*, 120 Wn.2d 156, 172, 839 P.2d 890 (1992). Knowing that Mr. Castilla-Whitehawk was willing to deliver drugs in front of a child had no purpose other than to prejudice him and should not have been permitted.

Rather than convict Mr. Castilla-Whitehawk for the crimes he may have committed, the evidence a child was in Mr. Castilla-Whitehawk's care when this crime occurred evoked an emotional response that made it likely the jurors would convict Mr. Castilla-Whitehawk for his bad acts. *State v. Rice*, 48 Wn. App. 7, 13, 737 P.2d 726 (1987). Mr. Castilla-Whitehawk asks this Court to accept review.

**4. The trial court improperly instructed the jury on accomplice liability.**

The Court of Appeals held it was not an error to instruct the jury on accomplice liability. App. 18. Mr. Castilla-

Whitehawk asks this Court to review whether this error requires reversal. This issue a significant question of constitutional law and an issue of substantial public interest that should be determined by this Court. RAP 13.4.

To be entitled to an accomplice liability instruction, the government must show the accomplice had actual knowledge the principal was engaged in the crime eventually charged and actual knowledge the accomplice was furthering that crime. RCW 9A.08.020(3)(a); *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015). A person cannot be convicted as an accomplice of a crime unless the government proves “that individual... acted with knowledge that he or she was promoting or facilitating *the* crime for which that individual was eventually charged.” *State v Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000) (emphasis in original.)

“It is error to submit to the jury a theory for which there is insufficient evidence.” *State v. Munden*, 81 Wn. App. 195, 913 P.2d 421 (1996). Indirect speculation about criminal culpability is not a basis for a jury instruction. “[S]ome

evidence must be presented affirmatively to establish” the theory for the sought jury instruction. *State v. Rodriguez*, 48 Wn. App. 815, 820, 740 P.2d 904 (1987) (quoting *State v. Wheeler*, 22 Wn. App. 792, 797, 593 P.2d 550 (1979)).

Here, the jury was asked to speculate about whether Mr. Castilla-Whitehawk knew what Mr. Moreno intended to do with the drugs he possessed. RP 605. In his closing arguments, the prosecutor made clear that he could not allege either man was acting as either the principal or accomplice of the other. *Id.* Instead, the prosecutor argued that “As long as one of them intended to distribute it, they’re acting together in concert as accomplices.” RP 607. This argument allows the prosecution to avoid proving an essential element.

Further, this instruction was not necessary for the prosecution’s case. The jury was instructed that possession could be constructive. With this instruction, the jury could have found Mr. Castilla-Whitehawk possessed the drugs found in the car. The only limitation would have been that the jury would not have been told that it was permissible to

speculate about whether Mr. Castilla-Whitehawk knew what Mr. Moreno intended to do with the drugs he possessed.

There was no evidence Mr. Moreno acted in concert with Mr. Castilla-Whitehawk. Under no theory were they accomplices. Providing the accomplice liability instruction only confused the jury and caused them to speculate about the evidence. This error deprived Mr. Castilla-Whitehawk of his right to a fair trial. He asks this Court to accept review.

#### F. CONCLUSION

Based on the preceding, Mr. Castilla-Whitehawk asks this Court to grant review of the issues raised. RAP 13.4 (b).

DATED this 24<sup>th</sup> day of June 2020.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29335)  
Washington Appellate Project (91052)  
Attorneys for Appellant



APPENDIX

**Table of Contents**

Search Warrant Affidavit..... APP 1  
Court of Appeals Opinion ..... APP 7



Judge: I know but, I know at least tell me what you want to search for and where.

Packard: Oh. Absolutely, okay. So Your Honor, I'm ah, wanting to search a 2000, a silver 2003 Mini-Cooper with Washington license plate B-J-V-1-3-9-9 um, with a matching VIN, last four of 7-0-9-6. Also the per, persons of Timothy C. Moreno, 12-20 of '69 and Jim D., I believe his last name is Castilla-Whitehawk, 1-31 of '88. Your Honor, I'm searching for controlled substances including, but not limited to heron, methamphetamine, and prescription pills. The paraphernalia, and/or equipment relating to the manufacturing, packaging, use, transportation, ordering, purchase, and/or distribution of controlled substances. Um, notes and/or records and/or ledgers um, including records stored on cell phones um, evidencing the acquisition, manufacture, and/or distribution of controlled substance, as well as sources, customers, and other co-conspirators. In addition to records evidencing income of the sales from the controlled substances um, to include ah, the proceeds from the sales um, and records evidencing occupancy, dominion, and control of the vehicle itself um, and any other controlled substances found. Lastly, all monies, negotiable instruments or other proceeds or assets acquired from proceeds of sales of controlled substances or otherwise seizable under RCW 69.50.5-O-5 um, as well as any other weapon, any weapons, any and all weapons ah, to be seized under RCW 9.41.O-9-8 or 69.50.5-O-5. Um, lastly, any personal property or other assets subject to seizing under RCW 69.50.5-O-5 and ah, that would conclude what I'm searching for, what I'm asking to search, and I'm investigating the crime of possession, delivery or possession with intent to manufacture um, or deliver a controlled substance, RCW 69.50.4-0-1.

Judge: All right, go ahead with your training and experience.

Packard: Your Honor, I've been a commissioned law enforcement officer in the State of Wash, Washington since July of 2010, while I was hired by the Kirkland Police Department. I attended the 720-hour Basic Law Enforcement Academy um, which included classes in the investigation of narcotics investigations, the identification, smell um, packaging, use, paraphernalia, etc. Um, in July, er, excuse me, November of 2017, I graduated the um, Basic Law Enforcement Academy and worked for the City of Kirkland Police Department until July of 2012. July of 2012, I transferred to the Thurston County Sheriff's Office where I've since been employed as a commissioned law enforcement officer. I've been ah, employed with the Thurston County Sheriff's Office since that time ah, originally as a patrol deputy then to a K9 handler and ah, in November of 2017, I was assigned to the Thurston County Narcotics Task Force as a narcotics detective. Um, since November of 2017, I have been in this position um, assigned to the Thurston County Narcotics Task Force. In October of 2017, I attended the 80-hour Drug Enforcement Administration Basic Narcotics Investigator's Course, which consisted of um, ah, a lengthy class that consisted of um, the transportation,

concealment, surveillance techniques um, packaging, use, what narcotics look like, their make-ups, ah, compound make-ups, etc., whether it be methamphetamine, heroin, bath salts, marijuana, um, mushrooms, MDMA, Ecstasy, etc. and the list goes on. Your Honor, I've applied for and been granted multiple search warrants for narcotics investigations, to include low-level simple possession um, investigations all the way to mid to high-level investigations ah, pounds of methamphetamine, etc. Um, I've been, like I had stated, I've made multiple arrests, um, for those crimes um, and received multiple convictions for those um, those particular crimes, as well. And so, at that point, this will pretty, that will pretty much sum up my training and experience as it relates to this application of a search warrant.

Judge: Probable cause?

Packard: Yes Ma'am, so um, during the month of September um, maybe late August, I'd received some information from a confidential source um, in reference to a known narcotics dealer by the name of Jim D. Castilla-Whitehawk known, also known as Whitehawk. Um, C, the confidential source, C/S 9-5-9 has provided information um, to the Thurston County Sheriff's Office er, excuse me, to the Thurston County Narcotics Task Force. In the past, um, C/S 9-5-9 been a um, confidential source for our unit for several years, actually two different stints during that time. Ah, C/S 9-5-9 provided information that has, that I've been able to corroborate based on my information, independent information, knowledge, and ah, and other tips received. C/S 9-5-9 has also provided ah, multiple ah, has completed multiple controlled buys um, has provided information that's led to the application of search warrants, that's led to the arrests of subjects, which has also led to the conviction of subjects. Um, C/S 9-5-9 has also um, provided information in reference to different um, investigations, not only narcotics um, other criminal investigations, as well. Currently, C/S 9-5-9, is working in a paid capacity through the Thurston County Narcotics Task Force and um, C/S 9-5-9 ah, has a, a few felony convictions and I apologize, I don't have them specifically sitting here in front of me, but ah, ah, C/S 9-5-9, I believe has had a couple of crimes of we call them, crimes of dishonesty whether it be ah, theft, etc. Um, but and quite a few different crimes of narcotics um, dealing and transactions. C/S 9-5-9 has not had any crimes of dishonesty convictions in several years and ah, C/S 9-5-9 since that time has provided um, a significant amount of credible and reliable information that's been proven based on search warrants, been proven based on um, different um, convictions and investigations. So, Your Honor, in the late August to early September, um, C/S 9-5-9 provided information in reference to the previously mentioned narcotics dealer by the name of um, Jim D. Castilla-Whitehawk and also Timothy C. Moreno. Um, both are known um, drug dealers by ah, tips we've received and by investigations that we've had. Mr. Moreno's been arrested and is actually scheduled to be sentenced shortly for um, several deliveries that he had done um, earlier this year

um, or towards the end of 2000 and 17. Mr. Whitehawk was involved in a federal search warrant that I participated in where a significant amount of money was located within his vehicle and ah, we also believed that, at that time, he had flushed a significant amount of, of dope down the toilet, unable to be proven at that point. So that is what tipped us off to both Mr. Moreno and Mr. Whitehawk. This afternoon, at about 1435 hours, C/S 9-5-9 sent me a text message um, that they were going to pick up ah, Mr. Moreno um, and take him to lunch. Um, actually just prior to that it was her text message to take him to lunch. Um, they, C/S 9-5-9 had provided information that um, they had known that Mr. Moreno was, was a drug dealer, but was not aware ah, it was not super um, initially was not totally in tune of how he, how he does his business because um, he or she did not um, ever purchase or I should say recently has not purchased according to um, him or her ah, any narcotics from Mr. Moreno, but knows that he is, he's offered narcotics to C/S 9-5-9 on several different occasions. Um, at about 1435 hours, C/S 9-5-9 sent me a text message and stated that um, he or she was taking Moreno to the Ross Dress for Less located at the corner of I believe, Fones Road and Pacific Avenue, to meet with um, Jimmy or Jim, Mr. we'll just call him Mr. Whitehawk. Um, the plan was for Mr. Moreno to purchase um, a few ounces of believed heroin from Whitehawk. Um, C/S 9-5-9 advised that ah, that ah, he or she would be in their vehicle um, with Mr. Moreno um, which I know to be a red Honda Accord and that Mr. Whitehawk would be driving a silver Mini-Cooper um, unknown license plate at the time. Um, at approximately 1518 hours or so um, I arrived on scene at the Ross Dress for Less. I observed, who I know to be C/S 9-5-9's red Honda Accord and then the described ah, silver Mini-Cooper with attached license plate B-J-V-1-3-9-9. Um, upon arrival, um, C/S 9-5-9 had sent me a text message stating that he or she was still inside the store and um, would not be coming out. I observed ah, the vehicle to be occupied by two males um, it was later identified that ah, Mr. Moreno was in the driver's seat of that vehicle and Mr. Whitehawk was in the passenger seat of that vehicle. Um, the, I was told also that there was a ah, female named Jessica that was the, inside the Ross Dress for Less, who is Mr. Whitehawk's girlfriend and then a young six year old child that would be either in the Ross Dress for Less or in the vehicle. Um, at that point, Your Honor, based on the credible and reliable information that C/S 9-5-9 has provided and that ah, and that ah, I observed both Mr. Moreno and Mr. Whitehawk um, in the vehicle together um, the vehicle was approached. Both subjects were removed from the vehicle and placed in handcuffs. Um, at, just shortly after that, I read Mr., it should be noted that as we approached, Mr. Whitehawk, there was a, the obvious odor of marijuana coming out of the vehicle um, within the Ross Dress for Less parking lot. We also saw smoke coming out of the sides of the vehicle before we took that down. It should also be noted Your Honor, that there was a six year old child sitting in the back seat while this um, while this smoking had been going on um, and I know that I've been trained in the difference and the smell based on my training and experience the difference and smell of marijuana, fresh, burning um, etc. I've done multiple cases on marijuana

investigations, as well. Um, at that point, Mr. Whitehawk was holding a leather-type um, um, fanny pack um, and in that fanny pack ah, Officer Brett Curtright was able to see some type of cellophane wrapper, which ah, Officer Curtright advised that he, he knows that to be commonly used to store narcotics. Based on my training and experience, I also know cellophane to be commonly used to store narcotics. Um, at that point in time, Your Honor, ah, both occupants were removed from the vehicle. Ah, Mr. Whitehawk was read his Miranda Warnings 'cause he was placed in handcuffs and I wanted to question him further about the, the incident. Um, Mr. Whitehawk advised me that I would not find anything additional in the vehicle other than maybe a little bit of marijuana and he quote unquote some M30s, which I know to be based on my training and experience to be ah, prescription Oxycodone. Um, Mr. Whitehawk informed me that those were for personal use, they were not to be sold, they were just for his um, his personal, his personal use. And um, but albeit admitted to there being narcotics in the vehicle that um, he does not have a prescription for. Um, and furthermore, Your Honor, ah, he said I would find marijuana in the, in the vehicle and which is evidence of the, I should add the, the evidence of the crime of um, possession of marijuana in a public place and then also ah, reckless endangerment by smoking marijuana with a six year old child in the back seat of a somewhat enclosed vehicle windows only down a couple of inches. Um, further I questioned Mr. Whitehawk and explained to him while I, why I was here and ah, he again denied that there would be any um, illegal narcotics in the vehicle except for the M30s. Um, based on all of that, the information from the credible and relial, reliable informant um, my observations of arriving here on scene and seeing Mr. Moreno, who I know to be a known drug dealer, seeing Mr. Whitehawk, who I also know based on tips and from information that I know to be um, a known drug dealer: both those occupants were detained and I believe within either their ah, with, on their person or within the 2000 and 3 Mini-Cooper, Washington plate B-J-V-1-3-9-9, I will find evidence of the crime of possession um, with intent to deliver or manufacture or delivery of a controlled substance um, specifically, heroin, methamphetamine, and/or um, prescription pills. And I'm asking um, the Courts to authorize a search warrant to search that entire vehicle to include um, any and all locked boxes since I know based on my training and experience that people transporting narcotics also utilize safes that can be hidden underneath seats in the back seats of vehicle um, to keep their quote unquote products safe. Um, and that, at this point, Your Honor, will in, conclude my um, probable cause for application of a search warrant.

Judge: Anything further?

Packard: I do not believe so at that time, Your Honor.

Judge: All right, I will find probable cause and authorize the search warrant that has been requested. Will you state the date and time again, please?

Packard: Absolutely, I currently have 10-8-2000 and 18, at 1612 hours.

Judge: All right, when you put my name on the search warrant, my first name is Christine, c-h-r-i-s-t-i-n-e, last name is Schaller, s-c-h-a-l-l-e-r.

Packard: Okay, Your Honor, I'm, I'm sorry, I actually have one additional thing um, I would ask that ah, it is ordered that this search warrant and affidavit in support thereof be sealed....

Judge: Be sealed.

Packard: ...by the Clerk for a period of 90 days um, to protect the safety of the officers and more importantly, to protect the safety of the informants and the integrity of my ongoing police investigation.

Judge: I would authorize that.

Packard: Thank you very much, Your Honor.

Judge: All right, thank you.

Packard: You have a great day. Bye-bye.

Judge: Bye.

cp18.113/cs

May 25, 2021

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

JIMMY DELA CASTILLA-WHITEHAWK,

Appellant.

No. 54141-6-II

UNPUBLISHED OPINION

MAXA, J. – Jimmy Castilla-Whitehawk appeals his convictions for unlawful possession of a controlled substance (methamphetamine) with intent to deliver, unlawful possession of a controlled substance (heroin) with intent to deliver, and unlawful possession of a controlled substance (alprazolam). The convictions arose from information that a confidential informant provided to law enforcement regarding a drug transaction Castilla-Whitehawk intended to have with an acquaintance in a store parking lot.

After receiving the information, law enforcement located two cars in the store parking lot and detained Castilla-Whitehawk and the other individual. Castilla-Whitehawk admitted that officers would find drugs in the car he was in. The officers then obtained a search warrant for the car and discovered various controlled substances.

We hold that the trial court did not err by (1) denying Castilla-Whitehawk’s motion to suppress evidence based on a lack of probable cause for the issuance of a search warrant because



the search warrant affidavit established the confidential informant's basis of knowledge, (2) denying Castilla-Whitehawk's motion to suppress statements he made to law enforcement because the informant's information provided a basis for his detention, (3) admitting evidence that an eight-year-old child was present in the car because the probative value of the evidence outweighed its prejudicial effect, and (4) instructing the jury on accomplice liability because the evidence supported the instruction. However, we hold that Castilla-Whitehawk's unlawful possession of a controlled substance conviction must be vacated under *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

Accordingly, we affirm Castilla-Whitehawk's two convictions of unlawful possession of a controlled substance with intent to deliver, but we reverse his unlawful possession of a controlled substance conviction and remand for the trial court to vacate that conviction and for resentencing.

## FACTS

### *Search Warrant*

On October 8, 2018, Sergeant Chris Packard of the Thurston County Sheriff's Department detained and handcuffed Castilla-Whitehawk and Timothy Moreno in the parking lot of a Ross Dress for Less store. Packard encountered Castilla-Whitehawk and Moreno because a confidential informant (referred to as CS 959) informed him that Moreno planned to purchase heroin from Castilla-Whitehawk at the Ross store. Packard immediately applied for a search warrant for the vehicle Castilla-Whitehawk was in and for both men. A superior court judge took a sworn, telephonic statement from Packard. A transcript of the statement is titled, "Complaint for Search Warrant."

In the statement, Packard discussed in detail the fact that he has worked with CS 959 in the past and that CS 959 had provided credible and reliable information in several prior cases. Packard stated that CS 959 had provided information regarding Castilla-Whitehawk and Moreno. Packard told the judge the following:

1. Packard knew from previous tips and investigations that both Castilla-Whitehawk and Moreno were drug dealers.

2. That afternoon, CS 959 texted Packard and told him that he/she was driving Moreno to the Ross store to meet with Castilla-Whitehawk in order to buy a few ounces of heroin.

3. CS 959 said that his/her car was a red Honda and Castilla-Whitehawk would be in a silver Mini Cooper. CS 959 later texted Packard from inside the store, stating that he/she would not be coming out.

4. Packard arrived at the Ross store and observed the two cars as described. A person later identified as Moreno was sitting in the driver's seat of the Mini Cooper and Castilla-Whitehawk was sitting in the passenger seat.

5. As Packard approached the car, there was an obvious odor of marijuana coming from the car and smoke was coming out of the sides of the car.

6. Packard removed both Castilla-Whitehawk and Moreno from the car and placed them in handcuffs. A young child also was in the car.

7. Castilla-Whitehawk was holding a fanny pack, and another officer, Officer Brett Curtright, could see some type of cellophane wrapper. Both Packard and Curtright knew from experience that cellophane commonly is used to store narcotics.

8. After Packard gave Castilla-Whitehawk *Miranda*<sup>1</sup> warnings, Castilla-Whitehawk informed him that there was marijuana and “M30s” in the car. Packard knew from experience that M30s referred to prescription Oxycodone. Clerk’s Papers (CP) at 26.

9. The marijuana that Castilla-Whitehawk stated would be found in the car was evidence of the crimes of possession of marijuana in a public place and reckless endangerment by smoking marijuana with a child in the car.

The judge found probable cause and authorized the search warrant.

*Search of the Mini Cooper and Castilla-Whitehawk*

Officers searched the Mini Cooper. Under the front passenger seat – where Castilla-Whitehawk had been seated – officers found a black bag with 86.2 grams of methamphetamine, 34 grams of heroin, and 34 fully and 19 partially intact alprazolam pills. Under the driver’s side seat – where Moreno had been seated – police found a zippered blue pouch bag with 57.4 grams of methamphetamine, eight individually packaged bags of heroin in the total amount of 34 grams, a knife, and a digital scale with heroin and methamphetamine residue on it.

Officers searched both men. In the fanny pack that Castilla-Whitehawk had been wearing officers found \$1,620 in cash and 17 Oxycodone pills that later were revealed to contain heroin. Police also seized 29 grams of methamphetamine from Castilla-Whitehawk during his transport to jail.

The State charged Castilla-Whitehawk with four counts of unlawful possession of a controlled substance (methamphetamine, heroin, Oxycodone, alprazolam) with intent to deliver. The State later dismissed the count involving Oxycodone.

---

<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

*Motion to Suppress*

Castilla-Whitehawk moved to suppress the evidence seized from the Mini Cooper and from his person. Castilla-Whitehawk argued that probable cause did not exist to issue a search warrant based on CS 959's information because the search warrant affidavit failed to specify CS 959's basis of knowledge.

Castilla-Whitehawk also moved to suppress the statements he made to Packard after being removed from his car. In that motion, Castilla-Whitehawk argued that he had been unlawfully arrested. Therefore, he claimed that the statement he made regarding controlled substances in the Mini Cooper should not have been considered for probable cause to issue the search warrant.

The trial court denied Castilla-Whitehawk's suppression motions and entered findings of fact and conclusions of law. The court concluded that probable cause supported the search warrant. The court also concluded that the informant was credible and had a basis of knowledge for the information provided. Finally, the court concluded that Castilla-Whitehawk had been properly detained.

*Motion in Limine*

Castilla-Whitehawk moved to exclude any evidence that there was a child in his car at the time of his arrest based on relevance and prejudice. The State contended that the evidence was necessary to prove the element of possession because Castilla-Whitehawk potentially could argue that the drugs belonged to the other person in the car. The State needed to show that the other person in the car was a child who would be unlikely to be in possession of drugs.

The trial court allowed admission of limited evidence regarding the child. The court did give a limiting instruction, informing the jury that they could consider the evidence only on the issue of possession.

*Trial and Conviction*

Packard testified that the quantity of drugs found in Castilla-Whitehawk's car, coupled with the money and plastic baggies found on his person, might be indicative of a low scale dealer. He stated that the digital scale found under Moreno's seat typically was used by both purchasers and dealers to weigh their drugs. Packard opined that the evidence did not indicate that Castilla-Whitehawk and Moreno were mere drug users.

Deputy J.D. Strup also testified that the 86.2 grams of methamphetamine found under Castilla-Whitehawk's seat was not a personal use amount. And Strup stated that the amount of heroin and methamphetamine found in Castilla-Whitehawk's vehicle was an amount you would not typically see on a street level user.

Following the close of evidence, Castilla-Whitehawk objected to referencing accomplice liability in the jury instructions because the State failed to charge him as an accomplice or as a principal. The court denied Castilla-Whitehawk's objection. The to-convict jury instructions for all three charges stated that the jury had to find that Castilla-Whitehawk or *an accomplice* possessed heroin, methamphetamine, and alprazolam with the intent to deliver.

The jury convicted Castilla-Whitehawk of two counts of unlawful possession with intent to deliver (methamphetamine, heroin) and one count of possession of a controlled substance (alprazolam). The trial court determined that his offender score for each conviction was 2 based on the current convictions, which resulted in a standard range sentence for the two possession

with intent to deliver convictions of 12+ to 20 months. Castilla-Whitehawk was sentenced to total confinement of 14 months.

Castilla-Whitehawk appeals the trial court's order denying his suppression motion and his convictions.

## ANALYSIS

### A. VALIDITY OF SEARCH WARRANT

Castilla-Whitehawk argues that probable cause did not support issuance of the search warrant for the Mini Cooper and his person. Specifically, he argues that Packard's statement to the judge failed to show CS 959's basis of knowledge that he was going to commit a crime. We disagree.

#### 1. Legal Principles

A warrant can be issued only if supported by probable cause. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). "Probable cause exists when the affidavit in support of the search warrant 'sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location.'" *State v. Ollivier*, 178 Wn.2d 813, 846-47, 312 P.3d 1 (2013) (quoting *State v. Jackson*, 150 Wn.2d 251, 264, 76 P.3d 217 (2003)).

Our analysis of probable cause is limited to the four corners of the probable cause affidavit. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). Affidavits in support of a search warrant are examined in a commonsense instead of hypertechnical manner, and doubts are resolved in favor of the warrant. *Ollivier*, 178 Wn 2d at 847.

Probable cause may be based on a confidential informant's tip. *State v. Chenoweth*, 160 Wn.2d 454, 475, 158 P.3d 595 (2007). When determining whether probable cause existed to

issue a search warrant based on an informant's information, we apply the *Aguilar-Spinelli*<sup>2</sup> two-pronged test. *Ollivier*, 178 Wn.2d at 849-50. This test examines whether the search warrant affidavit establishes the (1) veracity or credibility of the informant and (2) the informant's basis of knowledge. *Id.* The basis of knowledge prong "may be satisfied by a showing that the informant had personal knowledge of the facts provided to the affiant." *Id.* at 850.

The Supreme Court appears to have adopted two different standards of review for probable cause determinations. In *Ollivier*, the court stated a de novo standard of review of the issuing magistrate's determination of probable cause. 178 Wn.2d at 848. More recently, in *State v. Scherf*, the court applied a more deferential abuse of discretion standard of review. 192 Wn.2d 350, 363, 429 P.3d 776 (2018).

## 2. Analysis

Castilla-Whitehawk challenges only the basis of knowledge prong of the *Aguilar-Spinelli* test. Specifically, Castilla-Whitehawk claims that Packard failed to establish that CS 959's basis of knowledge that Castilla-Whitehawk and Moreno intended to engage in a drug transaction in the Ross store parking lot. We disagree.

Castilla-Whitehawk argues that CS 959 provided only innocuous information – that he and Moreno planned to meet in the Ross store parking lot. He emphasizes that such a meeting is not inconsistent with legal activity.

However, CS 959 provided more than the information that Castilla-Whitehawk and Moreno planned to meet. He/she stated that Moreno planned to purchase heroin from Castilla-Whitehawk. The judge issuing the warrant reasonably could infer that CS 959 had firsthand

---

<sup>2</sup>*Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), *abrogated by Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), *abrogated by Gates*, 462 U.S. 213.

knowledge of Moreno's intended drug transaction with Castilla-Whitehawk because he/she personally drove Moreno to the Ross store in her car. This information satisfied the basis of knowledge prong and provided probable cause to search Castilla-Whitehawk's vehicle for evidence of criminal drug activity.

We hold that under either standard of review, the trial court did not err in denying Castilla-Whitehawk's motion to suppress the evidence seized under the search warrant.

B. SUPPRESSION OF STATEMENT MADE TO LAW ENFORCEMENT

Castilla-Whitehawk argues that the trial court erred in denying his motion to suppress statements that he made to law enforcement following his arrest. However, his argument is limited to a single sentence – that his arrest was unlawful because it was based on CS 959's innocuous information. The State argues that the detention of Castilla-Whitehawk was a valid investigative detention. We agree with the State.

As discussed above, CS 959's information was more than innocuous. There was an inference that he/she had personal knowledge that Castilla-Whitehawk and Moreno planned to conduct a drug transaction. Castilla-Whitehawk does not explain why this information did not give officers probable cause to at least conduct an investigative detention, which is allowed if an officer has a well-founded suspicion that the defendant "is or is about to be engaged in criminal activity." *State v. Fuentes*, 183 Wn.2d 149, 158, 352 P.3d 152 (2015). Therefore, we reject Castilla-Whitehawk's argument.

C. ADMISSION OF PREJUDICIAL EVIDENCE

Castilla-Whitehawk challenges the admission of evidence that there was an eight-year-old child in the Mini Cooper at the time he was meeting with Moreno, arguing it was improperly admitted as evidence of a prior bad act in violation of ER 404(b). We disagree.



1. ER 404(b) - Other Acts Evidence

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). Another recognized exception is for “evidence that is relevant and necessary to prove an essential element of the crime charged.” *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980).

A court may admit evidence of “other crimes, wrongs, or acts” under ER 404(b) for other purposes, as long as the court (1) finds by a preponderance of evidence that the act occurred, (2) identifies the purpose for introducing the evidence, (3) determines that the evidence is relevant to prove the crime charged, and (4) weighs the probative value of the evidence against the prejudicial effect. *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

The general rule is that the trial court’s prior bad act analysis under ER 404(b) must be conducted on the record. *Id.* However, here Castilla-Whitehawk did not argue in the trial court that the evidence was inadmissible under ER 404(b). Therefore, the trial court’s failure to expressly address ER 404(b) is excused. In any event, the court did provide an analysis on the record that addressed the necessary steps in determining admissibility.

We review the trial court’s decision to admit or exclude evidence under ER 404(b) for an abuse of discretion. *Id.* at 922. An abuse of discretion is present if the trial court’s ruling is manifestly unreasonable, based on untenable grounds, or based on untenable reasons. *Id.*

2. Analysis

The first step for determining admissibility under ER 404(b) is a finding by a preponderance of the evidence that the conduct occurred. *Id.* at 923. Castilla-Whitehawk does not dispute that the child was in the Mini Cooper when he was detained.

The second step for determining admissibility under ER 404(b) is to identify the purpose for which the evidence is being introduced and the third step is for the trial court to determine whether the evidence is relevant to prove an element of the crime charged. *Id.* The State offered the evidence to prove the element of possession. The State was concerned that if there was no evidence regarding the age of the third person in the car, a jury might believe that the drugs belonged to the third person. The court concluded that the evidence was relevant; its oral ruling emphasized that this evidence was probative as to who had access to the drugs in the vehicle.

The final step in the analysis is to weigh the probative value of the evidence against the prejudicial effect. *Id.* Here, the trial court weighed the probative nature against the potential for prejudice, which is illustrated by the discussion on the record. In addition, the record indicates the concerns of prejudice were an instrumental reason for the ruling to give a limiting instruction.

On appeal, the question is whether the trial court abused its discretion regarding its rulings on relevance and whether the probative value of the evidence outweighed the prejudicial effect. *See id.* at 922. We conclude that Castilla-Whitehawk has not met his burden of proving that the trial court abused its discretion by admitting evidence that there was a child in his back seat at the time of his drug transaction with Moreno. Such evidence was relevant and necessary to prove an essential element of the crimes charged: possession. And any prejudice was mitigated by the court's limiting instruction.

Therefore, we hold that the trial court did not err in admitting evidence that a child was in the Mini Cooper when Castilla-Whitehawk was detained.

D. ACCOMPLICE LIABILITY INSTRUCTION

Castilla-Whitehawk argues that the trial court erred by instructing the jury on accomplice liability because there was insufficient evidence that he *knew* that Moreno possessed the controlled substances with intent to deliver. We disagree.

1. Legal Principles

a. Standard of Review

We review for abuse of discretion a trial court’s choice of jury instructions. *State v. Miller*, 14 Wn. App. 2d 469, 478, 471 P.3d 927 (2020), *rev. denied*, 196 Wn.2d 1036 (2021). However, a party is entitled to a jury instruction on their theory of the case when they produce sufficient evidence to support the instruction. *Id.*

b. Unlawful Possession With Intent to Deliver

Generally, it is a crime “for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.” RCW 69.50.401(1).<sup>3</sup> In order to prove unlawful possession of a controlled substance with intent to deliver, the State had to prove (1) unlawful possession (2) of a controlled substance (3) with the intent to deliver. RCW 69.50.401(1).

A person can have actual possession or constructive possession of an item. *State v. Reichert*, 158 Wn. App. 374, 390, 242 P.3d 44 (2010). Actual possession requires physical custody of the item. *Id.* Constructive possession occurs when a person has “dominion and

---

<sup>3</sup> This statute was amended in 2019, and those amendments became effective July 28, 2019, after the information was filed in this case. LAWS OF 2019, ch. 379, § 2. Because the 2019 amendments do not affect our analysis, we cite to the current version of the statute.

control” over an item. *Id.* A person can have possession without exclusive control; more than one person can be in possession of the same item. *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008).

As a general rule, “[m]ere possession of a controlled substance, including quantities greater than needed for personal use, is not sufficient to support an inference of intent to deliver.” *State v. O’Connor*, 155 Wn. App. 282, 290, 229 P.3d 880 (2010). But a finder of fact can infer intent to deliver from possession of a significant amount of a controlled substance plus at least one additional factor, “such as a large amount of cash or sale paraphernalia.” *Id.*

c. Accomplice Liability

A person is guilty as an accomplice if, “[w]ith knowledge that it will promote or facilitate the commission of the crime, he or she: (i) [s]olicits, commands, encourages, or requests such other person to commit it; or (ii) [a]ids or agrees to aid such other person in planning or committing it.” RCW 9A.08.020(3)(a). The trial court’s accomplice liability instruction mirrored the statutory language: “A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime he either: (1) solicits, commands, encourages, or requests another person to commit the crime; or (2) aids or agrees to aid another person in planning or committing the crime.” CP at 100.

To convict under the accomplice liability statute, the State must prove that the defendant *actually* knew that he or she was promoting or facilitating the principal in the commission of the crime. *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015). But the State can prove actual knowledge through circumstantial evidence. *Id.* A person has actual knowledge sufficient to impose accomplice liability “when ‘he or she has information which would lead a reasonable

person in the same situation to believe' that he was promoting or facilitating the crime eventually charged." *Id.* (quoting RCW 9A.08.010(1)(b)(ii)).

When considering accomplice liability in the context of unlawful possession with intent to deliver, "whether one or the other of the accomplices actually possessed the [controlled substance] is not dispositive." *State v. McPherson*, 111 Wn. App. 747, 760, 46 P.3d 284 (2002). Instead, the issue is whether the accomplice, by his presence and actions, attempted to facilitate the crime of possession with intent to deliver. *Id.*

## 2. Analysis

In this case, there was sufficient evidence to give an accomplice liability instruction for the unlawful possession of controlled substance with intent to deliver charges. Both Castilla-Whitehawk and Moreno were sitting in a vehicle containing a large amount of methamphetamine and heroin. Because they had the ability to immediately take actual possession of the drugs in the Mini Cooper, they both were in constructive possession of them and that possession was not mutually exclusive. *Reichert*, 158 Wn. App. at 390; *George*, 146 Wn. App. at 920.

In addition, the jury reasonably could infer that both Castilla-Whitehawk and Moreno had an intent to deliver from the quantity of the drugs coupled with other evidence. *O'Connor*, 155 Wn. App. at 290. As both Packard and Strup testified, the quantity of drugs was greater than needed for personal use and indicative of drug dealing. Packard also observed baggies, over \$1,000 in cash, and a digital scale.

Castilla-Whitehawk's actual possession of cellophane baggies and his constructive possession of methamphetamine, heroin, alprazolam, a digital scale, and a knife in close proximity with Moreno – who also was in constructive possession of these substances and

implements – raises a permissible inference that he used these drugs to help facilitate Moreno’s possession with intent to deliver.

Castilla-Whitehawk also challenges the State’s failure to specify whether either Castilla-Whitehawk or Moreno was acting as a principal or an accomplice. He claims that the State’s circular suggestion that either could be the principal or the accomplice allowed the State to avoid proving knowledge. But the accomplice liability instruction clearly imposed a knowledge requirement before the jury could convict Castilla-Whitehawk as an accomplice. And because accomplice liability is not an alternative means of committing a crime, the jury need not be unanimous about whether a defendant acted as a principal or accomplice in committing a crime for which the defendant was charged. *See State v. Dreewes*, 192 Wn.2d 812, 824, 432 P.3d 795 (2019).

We hold that the trial court did not err in instructing the jury on accomplice liability.

E. UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE

In *Blake*, the Supreme Court held that Washington’s strict liability drug possession statute, RCW 69.50.4013(1), violates state and federal due process clauses and therefore is void. 197 Wn.2d at 195. As a result, any conviction based on that statute is invalid. *See In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 857, 100 P.3d 801 (2004) (a judgment and sentence is invalid on its face when a defendant is convicted of a nonexistent crime). And a conviction based on an unconstitutional statute must be vacated. *See State v. Carnahan*, 130 Wn. App. 159, 164, 122 P.3d 187 (2005) (vacating a conviction that was based on a statute that the Supreme Court held was unconstitutional). Therefore, Castilla-Whitehawk’s conviction for unlawful possession of a controlled substance must be vacated.

A conviction that has been vacated cannot be included in the offender score. *See State v. Ammons*, 105 Wn.2d 175, 187, 713 P.2d 719 (1986). Therefore, Castilla-Whitehawk's offender score must be amended to not include his vacated conviction and he is entitled to be resentenced.<sup>4</sup>

CONCLUSION


We affirm Castilla-Whitehawk's two convictions for unlawful possession of a controlled substance possession with intent to deliver, but we reverse Castilla-Whitehawk's conviction for unlawful possession of a controlled substance and remand for the trial court to vacate that conviction and for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
\_\_\_\_\_  
MAXA, P.J.

We concur:

  
\_\_\_\_\_  
CRUSER, J.

  
\_\_\_\_\_  
VELJACIC, J.

---

<sup>4</sup> The State argues that resentencing is unnecessary because Castilla-Whitehawk already has served his sentence. However, Castilla-Whitehawk still is on community custody. On remand, the trial court can determine whether resentencing is necessary.

## DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 54141-6-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

- respondent Joseph Jackson  
[jacksoj@co.thurston.wa.us]  
[PAOAppeals@co.Thurston.WA.US]  
Thurston County Prosecuting Attorney
- petitioner
- Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: June 24, 2021



# WASHINGTON APPELLATE PROJECT

June 24, 2021 - 4:40 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 54141-6  
**Appellate Court Case Title:** State of Washington, Respondent v. Jim Delarosa Castilla Whitehawk, Appellant  
**Superior Court Case Number:** 18-1-01740-1

### The following documents have been uploaded:

- 541416\_Petition\_for\_Review\_20210624164003D2928291\_1744.pdf  
This File Contains:  
Petition for Review  
*The Original File Name was washapp.062421-03.pdf*

### A copy of the uploaded files will be sent to:

- PAOAppeals@co.thurston.wa.us
- jacksoj@co.thurston.wa.us
- marietrombley@comcast.net
- maureen@washapp.org
- valerie.marietrombley@gmail.com

### Comments:

---

Sender Name: MARIA RILEY - Email: maria@washapp.org

**Filing on Behalf of:** Travis Stearns - Email: travis@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:  
1511 3RD AVE STE 610  
SEATTLE, WA, 98101  
Phone: (206) 587-2711

**Note: The Filing Id is 20210624164003D2928291**