SUPREME COURT NO. 89771-9
COURT OF APPEALS NO. 43244-7-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

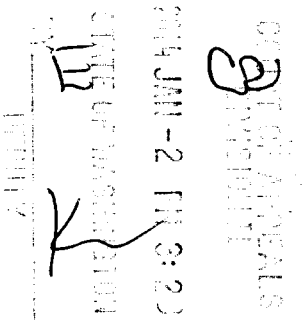
STATE OF WASHINGTON.

Respondent,

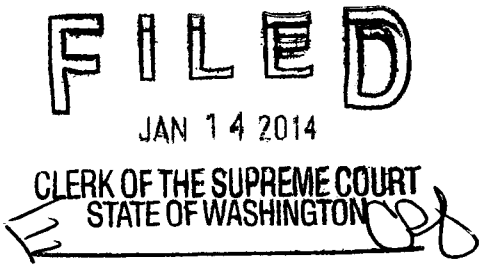
v.

FRANCISCO JAVIER MILLAN,

Petitioner.



PETITION FOR REVIEW



VALERIE MARUSHIGE
Attorney for Petitioner

23619 55th Place South
Kent, Washington 98032
(253) 520-2637

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RULES, STATUTES, OTHER

A. IDENTITY OF MOVING PARTY

Petitioner, Francisco Javier Millan, the appellant below, asks this Court to review the decision of the Court of Appeals, Division II referred to in section B.

B. COURT OF APPEALS DECISION

Mr. Millan seeks review of the Court of Appeals decision in State v. Millan, Court of Appeals No. 43244-7-II, filed on December 3, 2013, attached as an appendix.

C. ISSUE PRESENTED FOR REVIEW

"[W]hen a search can be delayed to obtain a warrant without running afoul of concerns for the safety of the officer or to preserve evidence of the crime of arrest from concealment or destruction by the arrestee (and does not fall within another applicable exception), the warrant must be obtained." State v. Snapp, 174 Wn.2d 177, 195, 275 P.3d 289 (2012). Did officers unlawfully search Mr. Millan's car incident to arrest and seize a gun observed in open view where the warrantless search was not necessary to preserve officer safety or prevent destruction of evidence and the open view exception did not apply?

D. STATEMENT OF THE CASE

1. Procedure

In 2007, the State charged Millan with one count of unlawful possession of a firearm in the first degree and one count of driving while in suspended or revoked status in the first degree. CP 1-2. Millan pleaded guilty to the unlawful driving charge and a jury found him guilty of unlawful possession of a firearm in the first degree. CP 3-19; 1RP 3-33, 4RP 279-83.

Millan appealed and the Court of Appeals affirmed his conviction in State v. Millan, 151 Wn. App. 492, 212 P.3d 603 (2009). This Court reversed and remanded for a suppression hearing in State v. Robinson, 171 Wn.2d 292, 253 P.3d 84 (2011)(consolidated with Millan)

The trial court held a 3.6 hearing and denied Millan's motion to suppress the gun. CP 64-70, 135-37; 6RP 35-38. Millan appealed and the Court of Appeals affirmed.

2. Facts

a. Trial Testimony

Officers Shipp and Caber were on duty on April 1, 2007, when they received a call from dispatch around 1 a.m. about "a disturbance." 2RP 59-

60. Shipp testified that Caber was driving and when they arrived at the scene, "the reporting party" pointed out the car they called about. 2RP 61-62. The officers drove up behind the car and activated their lights and siren. The car gradually slowed down and eventually pulled into a parking stall and stopped. 2RP 63-64. The driver made no furtive movements. 2RP 72-73. Shipp approached the passenger side of the car and asked the woman to step outside. She identified herself as the driver's wife and appeared to be very upset and crying. 2RP 64-65, 68. Ship had her wait in front of the car while he spoke with the reporting party. 2RP 65. Caber contacted Millan, the driver. 2RP 65-66. After conducting an investigation, they arrested Millan. 2RP 65. Caber searched the car incident to arrest and they released the car to Mrs. Millan. 2RP 68-69.

Officer Caber testified that neither the driver nor the passenger made any furtive movements when they pulled the car over. 2RP 96-97. Caber asked Millan to step out of the car and he was compliant. 2RP 88. Caber placed Millan in wrist restraints, patted him down, and put him in the back of the patrol car. 2RP 89. While walking up to the Millans' car to conduct a search, Caber saw a pistol through the window. He retrieved the pistol that was lying on the floorboard behind the driver's seat. 2RP 91, 99. Thereafter, Caber ran a records check and learned that Millan was a convicted felon and that his driver's license had been suspended. 2RP 92-

93. The pistol was not loaded and it was not registered to Millan. 2RP 101, 103-04.

b. Testimony at 3.6 Hearing

Officer Shipp testified that he and Caber responded to a 911 domestic violence call. 6RP 5. The 911 caller reported an altercation between a male and a female and claimed that the male pulled the female back in a car and drove down the street. 6RP 6. There was no report of a weapon. 6RP 13. The officers responded to the scene and drove up behind the car and activated their lights and siren. The car slowed down and eventually stopped. The driver displayed no furtive movements. 6RP 6-7, 14. Shipp approached the passenger side of the car and spoke with Mrs. Millan who said she had been arguing with her husband but no physical assault had taken place. 6RP 7-8. He did not "observe and signs of assault." 6RP 14. The Shipp spoke with the witnesses who had called 911 and followed the Millans' car. They claimed that Millan chased down his wife in the street, pulled her back in the car by her hair, and punched her in the head. 6RP 8-9. Millan was arrested for assault in the fourth degree and driving with a suspended license. 6RP 15. The car was released to Mrs. Millan. 6RP 12.

Officer Caber testified that he approached the driver's side of the car and asked Millan to step out of the car. Caber placed Millan in wrist restraints, advised him that there was probable cause for a domestic violence assault, and searched the car incident to arrest. 6RP 17-21. Caber saw a pistol behind the driver's seat when he opened the rear door of the car. He "took it into custody and ensured that is was in a safe state." 6RP 18-19. Caber could not recall if he initially saw the pistol through the car window or whether they decided to release the car to Mrs. Millan. 6RP 19-20.

2. Trial Court's Ruling

Following argument at the 3.6 hearing, the trial court stated that is would review the trial transcripts and relevant case law before ruling on Millan's motion to suppress the gun. 6RP 31-32. Thereafter, the court denied the motion, concluding that in order to protect the safety of the officers and the general public, "the officers should be permitted to check the status of a weapon when the weapon is in plain view." The court noted that people are seriously injured or killed in domestic violence situations and "it just wouldn't make sense to not allow the officer to safely secure the weapon." 6RP 35-38. The court entered Findings of Fact and Conclusions of Law, concluding that the evidence was admissible. CP 135-37.

3. Court of Appeals Decision

The Court of Appeals affirmed the trial court's denial of Millan's motion to suppress and affirmed his conviction for unlawful possession of a firearm. The Court held that the evidence was admissible because the officers had probable cause to arrest Millan for assault in the fourth degree, the firearm was "clearly relevant evidence of assault," and the "officers properly seized the weapon at the time they arrested Millan for assault and observed it in open view." The Court held that regardless of the fact that Millan was handcuffed and secured in the patrol car, under the totality of the circumstances, "exigent circumstances existed which justified lawful seizure of the pistol after the officers observed it in open view." Slip Opinion at 5-7.

E. WHY REVIEW SHOULD BE ACCEPTED

THIS COURT SHOULD GRANT REVIEW UNDER RAP 13.4(b)(1)(3) BECAUSE THE COURT OF APPEALS DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND THE VIOLATION OF MILLAN'S RIGHT TO PRIVACY INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION.

Article I, section 7 of the Washington Constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision differs from the Fourth Amendment of the United States Constitution in that it "clearly recognizes an individual's

right to privacy with no express limitations." State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). The right to be free from unreasonable governmental intrusion into one's private affairs encompasses automobiles and their contents. State v. Afana, 169 Wn.2d 169, 176, 233 P.3d 879 (2010); State v. Parker, 139 Wn.2d 486, 494, 987 P.2d 73 (1999). "From the earliest days of the automobile in this state, this court has acknowledged the privacy interest of individuals and objects in automobiles." Seattle v. Mesiani, 110 Wn.2d 454, 456-57, 755 P.2d 775 (1988)(citing State v. Gibbons, 118 Wn. 171, 187, 203 P. 390 (1922).

Under article I, section 7, a warrantless search is per se unreasonable unless it falls within one of the carefully drawn exceptions to the warrant requirement. State v. Patton, 167 Wn.2d 379, 386, 219 P.3d 651 (2009). When a vehicle search is conducted pursuant to the search incident to arrest exception, the search "is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed , and that these concerns exist at the time of the search." State v. Buelna Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009).

Under article I, section 7 and the Fourth Amendment, "a warrantless vehicle search incident to arrest is authorized when the arrestee would be

able to obtain a weapon from the vehicle or reach evidence of the crime of arrest to conceal or destroy it." State v. Snapp, 174 Wn.2d 177, 190, 275 P.3d 289 (2012)(citing Arizona v. Gant, 556 U.S. 322, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). In Gant, the United States Supreme Court identified a second form of vehicle search incident to arrest. The Court held that "circumstances unique to the automobile context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.' " Gant, 129 S. Ct. at 1719 (quoting Thornton v. United States, 541 U.S. 615, 632, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004)). Even broader than the "Thornton exception" is the "automobile exception" to the warrant recognized under the Fourth Amendment. The automobile exception allows a warrantless search of a vehicle when "there is probable cause to believe a vehicle contains evidence of criminal activity." Gant, 129 S. Ct at 1721 (citing United States v. Ross, 456 U.S. 798, 820-21, 102 S. Ct. 2157, 72 L. Ed 2d 572 (1982)(allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader)). Unlike under the Fourth Amendment, the Thornton exception and automobile exception do not apply under article I, section 7 of the Washington Constitution. Snapp, 174 Wn.2d at 192, 197.

"A warrantless search of an automobile is permissible under the search incident to arrest exception when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest." Snapp, 174 Wn.2d at 192 (quoting Buena Valdez, 167 Wn.2d at 773). The record here substantiates that the warrantless search of the Millans' car was not necessary to preserve officer safety or prevent destruction or concealment of evidence. Officer Shipp testified that after they stopped the Millans' car, he approached the passenger side of the car and asked Mrs. Millan to step out and wait in front of the car while he spoke with the witnesses who called 911. She waited where he could see her while he talked to the witnesses. 2RP 63-65; 6RP 6-9. Officer Caber testified that he approached the driver's side of the car and asked Millan to step out of the car and he complied. Millan was arrested, placed in wrist restraints, patted down, and put in the back of the patrol car. 2RP 65, 88-89, 6RP 17-18.

At trial, Caber testified that while he walked up to the Millans' car to conduct a search incident to arrest, he saw a pistol through the window, but at the 3.6 hearing he testified that he saw a pistol behind the driver's seat when he opened the rear door. 2RP 91, 99; 6RP 18-19. He retrieved the pistol that was lying on the floorboard behind the driver's seat. 2RP 91, 99. After recovering the pistol, he ran a records check and learned that

Millan was a convicted felon and that his driver's license had been suspended. 2RP 92-93.

Both officers testified that they did not see any furtive movements when they pulled the car over. 2RP 72-73, 96-97; 6RP 6-7, 14. They both testified that Millan and his wife were cooperative and compliant. Millan was handcuffed and secured in the back of the patrol car. Mrs. Millan stood in front of her car where she could be seen. Neither officer testified at any time that they feared for their safety or that they were concerned about the destruction or concealment of evidence. Clearly, the officers could have obtained a warrant before searching the car incident to arrest. Consequently, the search was unlawful under article I, section 7, in violation of Millan's constitutional right to privacy.

The Court of Appeals completely disregarded this Court's decisions and affirmed Millan's conviction by misapplying the open view exception to the warrant. The open view exception applies when an officer makes an observation from a nonconstitutionally protected area. State v. Seagull, 95 Wn.2d 898, 901-02, 632 P.2d 44 (1981). If an officer, after a lawful stop, looks into a car from the outside and sees a weapon or contraband in the car, he has not searched the car and therefore article I, section 7 is not implicated. State v. Kennedy, 107 Wn.2d 1, 10, 726 P.2d 445 (1986).

However, once there is an intrusion into the constitutionally protected area, article I, section 7 is implicated and the intrusion must be justified if it is made without a warrant. Id. In order to seize items in open view, an officer must have probable cause to believe the items were evidence of a crime and be faced with " 'emergent or exigent circumstances regarding the security and acquisition of incriminating evidence,' " such that it is impracticable to obtain a warrant. State v. Jones, 153 Wn. App. 354, 361-62, 259 P.3d 351 (2011), review denied, 173 Wn.2d 1009, 268 P.3d 941 (2012)(citing State v. Gibson, 152 Wn. App. 945, 956, 219 P.3d 964 (2009)(quoting State v. Smith, 88 Wn.2d 127, 137-38, 559 P.2d 970 (1977)).

The Court of Appeals concluded that because the officers had probable cause to arrest Millan for fourth degree assault, the gun was relevant to the crime of arrest. The Court therefore held that the "officers properly seized the weapon at the time they arrested Millan for assault and observed it in open view" and "it is admissible evidence." Slip Opinion at 5. To the contrary, the existence of probable cause standing alone does not justify a warrantless search. Probable cause is not a recognized exception to the warrant requirement, but rather the necessary basis for obtaining a warrant. State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010) (citing State v. Hendrickson, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). In any event, the witnesses never said they saw Millan with a gun and "[f]ourth degree

assault is essentially an assault with little or no bodily harm, committed without a deadly weapon." State v. Hahn, 174 Wn.2d 126, 129, 271 P.3d 892 (2012). Consequently, the officers had no probable cause to believe that the gun was evidence of a crime when they searched the car because they did not know that Millan was a convicted felon until after the search. 2RP 92-93.

The Court of Appeals held further that under the totality of the circumstances, "exigent circumstances existed and justified the officers seizing the weapon after observing it in open view." Slip Opinion at 5. The Court of Appeals' imagined exigent circumstances is unsubstantiated by the record. Nothing in the record supports the Court's conclusion that "an unsecured firearm posed a clear risk to officer safety should Millan's wife take action regarding her objections to the arrest of her husband, and public safety should the car be left on a public street with a gun clearly visible th[r]ough the car's window." Slip Opinion at 6. Neither officer testified that they searched the car because the gun posed a danger to them or the public or Mrs. Millan could use it against them for arresting her husband. They "searched the car incident to arrest." 2RP 68.

The exigent circumstances exception to the warrant applies where " 'obtaining a warrant is not practical because the delay inherent in securing

a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence.' " Tibbles, 169 Wn.2d at 370 (citing State v. Smith, 165 Wn.2d 511, 517, 199 P.3d 386 (2009)(quoting State v. Audley, 77 Wn. App. 897, 907, 894 P.2d 1359 (1995)). Neither officer testified that any delay in obtaining a warrant would compromise their safety or safety of the public, facilitate escape, or permit destruction of evidence.

The record establishes that by the time the officers stopped the car, there was no exigency that necessitated a search without a warrant. Neither Millan nor his wife made any furtive movements when the officers pulled the car over. 2RP 98-97. When Shipp approached Mrs. Millan in the car, she was "facing forward, not moving." 2RP 68. She appeared to be upset but she complied when Caber asked her step out and wait in front of the car where he could see her. 2RP 65. Millan complied when Caber asked him to step out of the car and Caber handcuffed him and put him in the patrol car. 2RP 88-89. There was no open view exception to the warrant requirement because at the time of the search, the officers did not have probable cause to believe the gun was evidence of a crime and no exigent circumstances existed.

"[W]hen a search can be delayed to obtain a warrant without running afoul of concerns for the safety of the officer or to preserve evidence of the

crime of arrest from concealment or destruction by the arrestee (and does not fall within another applicable exception), the warrant must be obtained." Snapp, Wn.2d at 195 (quoting Buena Valdez, 167 Wn.2d at 773)(emphasis added by the court). Reversal is required because the warrantless search of Millan's car incident to arrest was unconstitutional where there was no concern for officer safety or preservation of evidence and no other exception justified the search.

F. CONCLUSION

"Constitutional safeguards must not be sacrificed upon the altar of expediency." State v. Aiken, 72 Wn.2d 306, 355, 434 P.2d 10 (1967). For the reasons stated, Mr. Millan asks this Court to grant review.

DATED this 2nd day of January, 2014.

Respectfully submitted,

Valerie Marushige

VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Petitioner, Francisco Javier Millan

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. FRANCISCO JAVIER MILLAN, Appellant.	No. 43244-7-II UNPUBLISHED OPINION

QUINN-BRINTNALL, P.J. — Francisco Millan was convicted of first degree driving while license suspended and first degree unlawful possession of a firearm. Millan appealed, arguing that under *Gant*,[1] the firearm should have been suppressed. Our Supreme Court held that the new rule in *Gant* applied retroactively, and remanded to the trial court for a suppression hearing to determine whether the firearm was properly admitted at trial. The trial court found that the firearm was properly admitted, and Millan appeals. We affirm.

FACTS

Millan was convicted of first degree unlawful possession of a firearm.[2] *State v. Robinson*, 171 Wn.2d 292, 298, 253 P.3d 84 (2011). Millan appealed, arguing that the recent decision in *Gant* required reversal because the search of the vehicle was unconstitutional.

[1] *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

[2] Millan was originally charged with first degree driving with license suspended and first degree unlawful possession of a firearm. Millan pleaded guilty to first degree driving while license suspended.

Robinson, 171 Wn.2d at 298. Our Supreme Court held that *Gant* applied retroactively to Millan's case. *Robinson*, 171 Wn.2d at 306. Our Supreme Court then remanded the case back to the trial court for a suppression hearing. *Robinson*, 171 Wn.2d at 307.

The arresting officers, Officers Christopher Shipp and Timothy Caber of the Tacoma Police Department, testified at the suppression hearing. Shipp testified that on April 1, 2007, he and Caber responded to a domestic violence call. Two citizen witnesses reported seeing a male, later identified as Millan, grab a female, later identified as his wife, by the hair, drag her into a car, and hit her several times in the head. Millan's wife was obviously upset but told the responding officers that no physical assault had taken place. However, based on the statements of the witnesses, the officers placed Millan under arrest for assault.

At the suppression hearing, Officer Caber testified that he found a pistol in the backseat of the car during a search incident to arrest. He could not then recall when he first saw the pistol or whether the pistol was visible through the window. But at Millan's original trial years earlier, Officer Caber testified that he walked up to the car and saw a pistol through the car window. The pistol was balanced on its spine on the floorboard of the back seat of the car. Under the then applicable law, Officer Caber performed a search incident to arrest and seized the pistol. Holding that the changes in the law announced after the search of Millan's car applied retroactively, our Supreme Court reversed and remanded for a suppression hearing under the new standard.

At the suppression hearing, the trial court concluded that the firearm was in "plain" view and that there was a safety concern for the officers and the public due to the volatile nature of domestic violence incidents. Based on its conclusions of law, the trial court determined that the

firearm was admissible evidence. Because the trial court properly ruled the pistol was admissible, we affirm Millan's conviction for first degree unlawful possession of a firearm.

ANALYSIS

We review the trial court's legal conclusions in a suppression hearing de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996). Under both the Fourth Amendment and article I, section 7, a warrantless search is per se unreasonable unless the search falls within one or more exceptions to the warrant requirement. *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). Originally, Millan's firearm was admitted under the search incident to arrest exception to the warrant requirement. *Robinson*, 171 Wn.2d at 297-98. However, the search incident to arrest exception to the warrant requirement, which allowed officers to search a suspect's car at the time of the arrest, was restricted by the United States Supreme Court's opinion in *Gant* and our Supreme Court's opinion in *State v. Patton*, 167 Wn.2d 379, 394-95, 219 P.3d 651 (2009). Under *Gant* and *Patton*, officers may search a vehicle incident to arrest "only where there is 'a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search.'" *Robinson*, 171 Wn.2d at 302 (quoting *Patton*, 167 Wn.2d at 394-95). Here, the Supreme Court ruled that under *Gant* and *Patton*, Millan was entitled to move to suppress the gun and that under the changes in search and seizure law occurring after the search of Millan's car, the search incident to arrest exception could not justify the search of Millan's car. It remanded for a suppression hearing to determine whether another exception to the warrant requirement allowed admission of the firearm.

Here, the trial court determined the pistol was properly seized under what it referred to as the "plain view" doctrine. Although it used the term "plain view," the trial court actually applied

the open view doctrine in this case and noted that the officers not only saw the pistol from outside the car but that exigent circumstances warranted seizure of the weapon. Thus, it denied the motion to suppress. The pistol was properly admissible under the open view doctrine. We affirm the trial court's order determining that the evidence was admissible.

Although the plain view and open view doctrine are similar, discovery of evidence in open view is not a search within the meaning of the Fourth Amendment. *State v. Barnes*, 158 Wn. App. 602, 612, 243 P.3d 165 (2010) (citing *State v. Perez*, 41 Wn. App. 481, 483, 704 P.2d 625 (1985)). "In the 'plain view' situation, the view takes place *after* an intrusion into activities or areas as to which there is a reasonable expectation of privacy." *Barnes*, 158 Wn. App. at 612 (citing *Perez*, 41 Wn. App. at 483). If the officer's intrusion is justified, evidence in plain view is admissible. *Barnes*, 158 Wn. App. at 612 (citing *Perez*, 41 Wn. App. at 483).

But evidence is in open view when the officer views the evidence from a "'non-intrusive vantage point.'" *Barnes*, 158 Wn. App. at 612 (quoting *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981)). In an open view situation, the officer "'is either on the outside looking outside or on the outside looking inside to that which is knowingly exposed to the public.'" *Barnes*, 158 Wn. App. at 612 (quoting *Seagull*, 95 Wn.2d at 902). There is no reasonable expectation of privacy in an item in open view and, therefore, observation of the evidence "is not within the scope of the constitution." *Barnes*, 158 Wn. App. at 612 (citing *Perez*, 41 Wn. App. at 483). "It is well established that a person has a diminished expectation of privacy in the visible contents of an automobile parked in a public place." *Barnes*, 158 Wn. App. at 612 (citing *State v. Young*, 28 Wn. App. 412, 416, 624 P.2d 725, *review denied*, 95 Wn.2d 1024 (1981)).

Here, the officers did not observe the firearm during a search or invasion of the car, plain view, but rather the court held that they saw the firearm in the backseat of the car through the

window-open view. Therefore, the open view doctrine, not the plain view doctrine, properly applies in this case. *Barnes*, 158 Wn. App. at 612-13. Under the open view doctrine, observation of an item does not constitute a search; however, there must also be exigent circumstances to justify the seizure of the item in open view. *Barnes*, 158 Wn. App. at 613. Millan argues that the seizure of the weapon was not justified because the officers could not identify the firearm as relevant evidence and there were no exigent circumstances. We disagree.

First, the officers had probable cause to believe that a domestic violence assault had occurred. At the time, witnesses reported that the couple was fighting, Millan had hit his wife several times, and the assault continued after Millan dragged his wife into the car. Although the officers originally arrested Millan for fourth degree assault (before seeing the firearm in open view), the presence of the firearm was clearly relevant evidence of assault. *Barnes*, 158 Wn. App. at 613. The fact that Millan was not charged with the crime for which he was arrested does not negate the officers' probable cause to arrest for that crime nor does it render unjustified seizure of evidence relevant to the crime of arrest. Thus, officers properly seized the weapon at the time they arrested Millan for assault and observed it in open view. Therefore, the officers lawfully seized the pistol and it is admissible evidence. *Barnes*, 158 Wn. App. at 613-14.

Second, the trial court found that there were safety concerns for the officers and the public. These exigent circumstances existed and justified the officers seizing the weapon after observing it in open view. We consider the totality of the circumstances to determine whether exigent circumstances exist. *State v. Smith*, 165 Wn.2d 511, 518, 199 P.3d 386 (2009). Although we consider the following six factors when determining whether exigent circumstances exist, it is not necessary for all six factors to be met. *State v. Cardenas*, 146 Wn.2d 400, 408, 47 P.3d 127, 57 P.3d 1156 (2002), *cert. denied*, 538 U.S. 912 (2003). The six factors are

> (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry [can be] made peaceably.

Cardenas, 146 Wn.2d at 406. In addition, five specific circumstances may be considered exigent circumstances including danger to the arresting officer or to the public. *State v. Tibbles*, 169 Wn.2d 364, 370, 236 P.3d 885 (2010) (quoting *State v. Counts*, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983)).

Millan argues that there were no exigent circumstances because the officers had already arrested Millan and placed him in handcuffs so there was no risk to officer safety. But Millan's cursory analysis of exigent circumstances does not take into account the totality of circumstances present in this case. Here, the exigent circumstances need not be such as to allow the officers to search Millan's otherwise private vehicle. Rather, the officers observed a pistol in open view. So the issue is whether, when the pistol can be seen from outside the car, the exigent circumstances warrant seizure of the evidence Millan has left open to public view. Although Millan had already been arrested, his wife was unsecured and in the area of the car. Millan's wife was clearly upset and uncooperative with arresting officers. Based on citizen witness reports, Millan was being arrested for domestic violence assault—an assault Millan's wife said did not occur. Given the totality of the circumstances, an unsecured firearm posed a clear risk to officer safety should Millan's wife take action regarding her objections to the arrest of her husband, and public safety should the car be left on a public street with a gun clearly visible though the car's window. Therefore, exigent circumstances existed which justified lawful seizure of the pistol after the officers observed it in open view.

Although the trial court misstated that it relied on the "plain view" exception to the warrant requirement, the firearm was properly seized and was nonetheless admissible evidence. The firearm was in open view through the window of the vehicle and the officers had reason to believe the firearm was relevant evidence in the assault on Millan's wife. Moreover, under the circumstances presented, failure to secure the weapon would have posed a risk to officer and public safety. Therefore, there were exigent circumstances which justified immediately seizing the pistol left in public view without a warrant before allowing Millan's wife to drive the car away. Accordingly, we affirm the trial court's denial of Millan's motion to suppress the firearm and affirm his conviction for unlawful possession of a firearm.

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.

Quinn-Brintnall, P.J.
QUINN-BRINTNALL, P.J.

We concur:

PENOYAR, J.

MAXA, J.

DECLARATION OF SERVICE

On this day, the undersigned had delivered a copy of the document to which this declaration is attached to Stephen Trinen, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 2nd day of January, 2014, in Kent, Washington.

Valerie Marushige

VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851