

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

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NO. 38256-3

STATE OF WASHINGTON,

Respondent.

vs.

STUART A. BACHMAN,

Appellant.

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DIVISION II  
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On Appeal from the Superior Court of Lewis County

**STATE'S RESPONSE BRIEF**

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## STATEMENT OF THE CASE

Appellant's statement of the case is adequate for purposes of responding to this appeal.

## ARGUMENT

### **A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS FINGERPRINT EVIDENCE.**

Bachman claims that CrR 4.7(b)(2) and his right to privacy under the Fourth Amendment and the Washington Constitution were violated when, a couple of days before trial, a deputy sheriff went to the jail and fingerprinted Bachman without his attorney present, because the State needed Bachman's fingerprints to prove the Unlawful Possession of a Firearm charge. The State disagrees.

By statute, fingerprints may be taken of any adult who is lawfully arrested for the commission of any felony or a gross misdemeanor. RCW 43.43.735 states in pertinent part:

(1) It shall be the duty of the sheriff or director of public safety of every county, and the chief of police of every city or town, and of every chief officer of other law enforcement agencies duly operating within this state, to cause the photographing and fingerprinting of all adults and juveniles lawfully arrested for the commission of any criminal offense constituting a felony or gross misdemeanor.

\* \* \*

(3) Such sheriffs, directors of public safety, chiefs of

police, and other chief law enforcement officers, may record, in addition to photographs and fingerprints, the palm prints, soleprints, toe prints, or any other identification data of all persons whose photograph and fingerprints are required or allowed to be taken under this section when in the discretion of such law enforcement officers it is necessary for proper identification of the arrested person or the investigation of the crime with which he is charged.

West's 43.43.735 (emphasis added). This statute thus authorizes law enforcement officers to fingerprint any person lawfully arrested for a felony. Bachman was arrested for committing at least one felony—therefore, law enforcement could lawfully go to the jail and take Bachman's fingerprints.

But Bachman also alleged that his right to "privacy" under the Fourth Amendment and Article 1 § 7 was violated when the trial court refused to suppress the fingerprint samples taken from him without a warrant and without authorization from the court. Again, the State disagrees.

"It is elementary that a person in lawful custody may be required to submit to . . . fingerprinting. . . as part of the routine identification processes." Smith v. U.S. 324 F.2d 879, 882 (D.C. Cir. 1963); Napolitano v. U.S., 340 F.2d 313, 314 (1st Cir. 1965)(taking fingerprints prior to bail is universally standard

procedure, and no violation of constitutional rights). Additionally, our Federal Courts treat cases where a defendant was fingerprinted as part of an unlawful arrest differently than cases where there was probable cause to arrest the Defendant. See e.g., Davis v. Mississippi, and cases cited therein, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969)(where defendants had been rounded up and fingerprinted without probable cause for their arrest); Hayes v. Florida, 470 U.S. 811, 813, 105 S.Ct. 1643, 84 L.Ed.2d 705(1985)(reversing the state district court of appeal's affirmance of the use of fingerprints taken during police detention *without* probable cause).

But Federal Courts have also held that evidence concerning the identity of a defendant—such as fingerprints used to prove identity—is not suppressible as “fruit of the poisonous tree.” See e.g., U.S. v Garcia-Beltran, 443 F.3d 1126, 1132 (9th Cir. 2006), *and cases cited therein* (discussing the 9th Circuit's “lengthy history of holding that identity evidence cannot be suppressed.”) Similarly, in Washington, our Supreme Court touched upon the issue of identity evidence when it explained that

such individuals have a particularly limited privacy interest in the mere fact of their *identity*. The analogy to fingerprinting is extremely persuasive, in that both

DNA typing and fingerprinting impinge on similar privacy interests. While the Fourth Amendment does impose certain constraints upon the fingerprinting of free persons, Davis v. Mississippi, 394 U.S. 721, 727-28, 89 S.Ct. 1394, 1397, 22 L.Ed.2d 676 (1969), the constitutionality of fingerprinting convicted persons, even accused persons, is unquestioned. See Jones v. Murray, 962 F.2d 302, 306-07 (4th Cir.1992), *cert. denied*, 506 U.S. 977, 113 S.Ct. 472, 121 L.Ed.2d 378 (1992).

State v. Olivas 122 Wash.2d 73, 106-107, 856 P.2d 1076, 1093 (1993)(emphasis added).

Respondent has not found any Washington cases that are directly on point regarding the issue of taking fingerprints from a defendant where there was probable cause for his arrest but he is not yet convicted, and is in custody and represented by counsel. Then again, the State has not found any case law that says it cannot fingerprint a Defendant under such circumstances. And Bachman's counsel at trial also noted he did not find any case law on point. RP 48. Nonetheless, the case law set out above does seem to show that there is no Fourth Amendment violation when a defendant is compelled to provide fingerprints without a court order where—as in this case—probable cause had been found for the defendant's arrest. See discussion in State v. Olivas, *supra*, and Federal cases previously set out above. As the Olivas Court noted,

“the constitutionality of fingerprinting . . . even accused persons, is unquestioned.” Id. (emphasis added). Then there is the Federal case law that appears to show that “identity evidence” cannot ever be suppressed. Garcia-Beltron, supra. Here, the fingerprints taken from Bachman was “identity evidence” in the sense that his prints were used to show that Bachman was indeed the person identified in the certified copy of the judgment and sentence pertaining to Bachman’s prior felony case. Once Bachman was identified as being the person with that prior felony, that evidence was used to prove the Unlawful Possession of a Firearm charge in this case. And again, we have RCW 43.43.735 which allows the taking of fingerprints of anyone arrested for a felony or gross misdemeanor.

While the record here is not clear whether Bachman’s prints had already been taken during the “booking” process, Respondent does not understand how Bachman was prejudiced or harmed by the later taking of his fingerprints. And even Bachman’s trial counsel conceded, “prints are not protected at booking.” RP 26,27. If the prints are not protected “during booking” why would they be protected later in the progression of the case? Moreover, the deputy prosecutor here told the trial court that he specifically instructed the deputy sheriff not to ask any questions of Bachman—

he was to get fingerprints only. RP 17. In sum, Bachman has not shown that the taking of his fingerprints by the State violated his “privacy rights.” Bachman argues that “had the prosecutor simply called a jail employee to authenticate the fingerprints that employee took from the defendant during the booking process, the defendant could not successfully argue a violation of either his rights under the Washington Constitution. . . . [or the] . . . Fourth Amendment.” Brief of Appellant, 12. But Bachman cites no authority for the proposition that the taking of fingerprint evidence from a Defendant in jail, arrested on probable cause, and represented by counsel, violates either Constitution. In this way, Bachman’s argument fails.

However, Bachman also claims that CrR 4.7(b)(2)(iii) mandates that in order to take fingerprints from a Defendant, the State must move the court for an order allowing it. Brief of Appellant 12. The State concedes that there is a provision in this rule by which the State *may* ask the court for an order compelling such evidence. CrR 4.7(b)(2)(iii). However, this rule collides with RCW 43.43.735, which allows the taking of fingerprints when a person has been arrested for a felony or a gross misdemeanor. Moreover, Bachman cites no authority interpreting this provision of CrR 4.7 to mean that the State must get a court order before

requesting fingerprint evidence from a defendant-- where a court has found probable cause for the arrest of said defendant. Here, probable cause had been found. Thus, the State believes it was within its rights to ask Bachman to submit his fingerprints, notwithstanding the provision in CrR 4.7. Put another way, Bachman had no privacy interest in his fingerprints once he was arrested pursuant to probable cause. See RCW 43.43.735 and State v. Olivas, supra; Smith v. U.S. supra; and Napolitano v. U.S, supra. Accordingly, Bachman's argument to the contrary is without merit.

**B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION REGARDING THE GRANTING OF A CONTINUANCE BECAUSE THE COURT IN FACT OFFERED A CONTINUANCE, BUT BACHMAN DECIDED NOT TO AVAIL HIMSELF OF IT.**

Bachman also claims that the trial court abused its discretion when it denied his motion to continue to "prepare to meet the testimony" of the fingerprint expert. This argument is also without merit.

Here, the trial court offered to give Bachman additional time to interview the fingerprint expert and to otherwise prepare to meet the State's evidence connecting Bachman to the previous felony

conviction. RP 34. The trial court also noted that the fingerprint evidence did not bring any new facts into the case because Bachman was on notice from the affidavit of probable cause that the State was alleging he had a prior felony conviction, which was relevant to the Unlawful Possession of a Firearm charge. RP 30, 31. Additionally, the trial court noted:

As far as I'm concerned, I would not have been surprised to see [the prosecutor] stand up in the trial and offer a certified copy of the prior conviction for proof of identity and proof of the existence of the prior conviction whether it had been made available [in discovery] or not. The mere fact that it's not in the discovery material, given the type of evidence that we're talking about here, as far as I'm concerned is not germane to the issue.

RP 31.

Furthermore, Bachman's trial counsel—a former deputy prosecutor and a very experienced trial lawyer—certainly knew from the get-go that the State would have to use fingerprints to connect Bachman to the prior felony conviction (for the Unlawful Possession of the Firearm charge). RP 29 (trial counsel stating “Yes, like I did on [other] cases before this Court, I got copies of the fingerprints cards.”) In this way, trial counsel's protestations of being “prosecuted by ambush” about the tardiness by the State in providing the fingerprint cards seems a bit disingenuous. RP 32.

Nonetheless, defense counsel claimed a lack of notice that the State the State intended to offer a fingerprint expert. Given this claim, the trial offered Bachman additional preparation time when it stated:

If you want time to talk to Detective Kimsey [fingerprint expert] I'll give that to you. If you want time to look at the certified copy of the judgment and sentence, I'll give that to you. If you want to talk to Mr. Bachman about requesting a continuance to somehow attack the existence of the prior and/or the fact he is the same defendant that was previously convicted, I'll give you time to talk to Mr. Bachman out of the Court's presence to do that.

RP 34. Thus, by offering defense counsel the opportunity to discuss with Bachman "about requesting a continuance," the trial judge did offer to continue the case. It is not the trial court's fault that Bachman rejected the offer of a continuance. RP 34.

Bachman's trial attorney told the court, "[w]ell, against my advice, Mr. Bachman wants to go to trial today." RP 34 (emphasis added).

So, contrary to what Bachman claims on appeal, the trial court *did* offer Bachman a continuance but Bachman chose not to avail himself of a continuance. RP 34. Accordingly, Bachman cannot now argue on appeal that the trial court erred when it "denied the defendant's motion for a continuance" because in fact the trial court did *not* deny Bachman a continuance at all. In fact, the trial court

did offer to continue the case to give Bachman additional time to meet the State's evidence regarding the fingerprint evidence. RP 34. But against his attorney's advice, Bachman decided he did not want a continuance. RP 34. Accordingly, Bachman's argument on appeal that he was "denied" a continuance is simply not supported by the record and his argument is thus without merit.

**C. THE PROSECUTOR DID NOT COMMENT ON THE DEFENDANT'S RIGHT TO REMAIN SILENT BECAUSE THE PROSECUTOR WAS INTERRUPTED MID-SENTENCE BY DEFENSE COUNSEL'S OBJECTION.**

Bachman also claims that the prosecutor commented on his right to remain silent during closing argument. However, Bachman reads too much into what the prosecutor started to say.

This allegation by Bachman basically comes down to an allegation of prosecutorial misconduct. To prove prosecutorial misconduct, the defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial; State v. Hughes, 118 Wn.App. 713, 727, 77 P.3d 681 (2003); State v. Gregory, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), citing State v. Kwan Fai Mak, 105 Wn.2d 692, 726, 718 P.2d 407 (1986). Prosecutorial misconduct is reversible error only when there is "a substantial likelihood that the alleged prosecutorial misconduct affected the verdict." State v.

Russell, 125 Wn.2d 24, 86, 882 P.2d 757 (1994). A prosecutor's remarks "must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied 523 U.S. 1007 (1998). Moreover, if the prejudice could have been cured by a jury instruction but the defense did not request one, reversal is not required. State v. Dhaliwal 150 Wn.2d 559, 578, 79 P.3d 432 (2003); State v. Fiallo-Lopez, 78 Wn.App. 717, 726, 899 P.2d 1294 (1995).

Claims of prosecutorial misconduct are also subject to a harmless error analysis. A harmless error under the constitutional standard occurs if the reviewing "court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1985).

Here, Bachman cannot show that he was prejudiced by the prosecutor's allegedly improper remark because he has not shown "a substantial likelihood that the alleged prosecutorial misconduct affected the verdict." State v. Russell, supra. Here, the prosecutor

said in closing that Bachman had told officers at the time he was stopped that he had used the vial containing residue earlier than day. RP 128. The prosecutor then said, “[t]oday for the first time”—but before the prosecutor said anything else, he was interrupted by defense counsel’s prompt objection. RP 128. Contrary to what Bachman argues, the State does not believe that “the import of the words . . . could not have been lost on the jury.” Brief of Appellant 23. Respondent does not know how Bachman has determined that the jury was swayed by these five words given the fact that the prosecutor was stopped mid-sentence, well before he finished the sentence by saying something to the effect of “today for the first time we hear the defendant say. . . .” Had the prosecutor said *that* then we would have a different story. But here given the truncated sentence, we had no idea where the prosecutor was going. Because Bachman has not shown that the prosecutor’s remark, “today for the first time” affected the jury’s verdict, Bachman’s argument to the contrary fails.

#### CONCLUSION

Because a State statute allows the taking of fingerprints from anyone arrested for a felony, the taking Bachman’s fingerprints did not violate his right to privacy under the State or Federal

Constitutions. Nor was Bachman denied a continuance to meet the fingerprint evidence because the trial court offered a continuance but Bachman refused to avail himself of it. Finally, the prosecutor did not commit misconduct because the alleged offending remark was interrupted mid-sentence by a prompt objection by trial counsel. Thus, Bachman cannot show that the verdict was affected by the alleged misconduct. Because all of Bachman's arguments are without merit, his convictions should be affirmed in all respects. RESPECTFULLY SUBMITTED this 12 day of May, 2009.

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by:

  
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COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, )  
Respondent, )  
vs. )  
STUART A. BACHMAN, )  
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\_\_\_\_\_ )

NO. 38256-3 II

DECLARATION OF  
MAILING

STATE OF WASHINGTON  
BY *cm*  
DEPUTY  
MAY 13 2009  
COURT OF APPEALS  
DIVISION II

Ms. Casey Roos, paralegal for Lori Smith, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On May 12, 2009, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

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DATED this 12<sup>th</sup> day of May 2009, at Chehalis, Washington.

*Casey L. Roos*  
\_\_\_\_\_  
Casey L. Roos, Paralegal  
Lewis County Prosecuting Attorney Office