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No. 54141-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

JIM CASTILLA-WHITEHAWK,

Appellant.

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

The Honorable Chris Lanese, Judge
Cause No. 18-1-01743-34

BRIEF OF RESPONDENT

Joseph J.A. Jackson
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court properly denied the defendant's motion to suppress where law enforcement obtained credible information for a known confidential informant that the defendant would be engaged in a drug transaction with a person who the informant was driving to the location with, which was confirmed by matching vehicles, the named individuals who the informant indicated would be involved, what appeared to be drug packaging cellophane from the law enforcement officers' experience and the defendant's statement that controlled substances were in the vehicle.

2. Whether the judge reviewing the search warrant properly considered Castilla-Whitehawk's statement that oxycodone pills would be located in the vehicle prior to issuing a search warrant where law enforcement noticed movements inside the vehicle prior to contacting the two defendants, detained them with handcuffs for evidence and officer safety as part of an investigative stop, and read *Miranda* warnings prior to the statement being made. If not, whether the statement of the confidential informant contained a sufficient basis of knowledge

such that the warrant was valid even without Castilla-Whitehawk's statements.

3. Whether the trial court erred in admitting evidence of a child being present during the commission of the crimes of possession of a controlled substance pursuant to ER 401 and 403 where the trial court properly conducted a balancing test of the probative value versus the possible unfair prejudice and provided a limiting instruction to minimize the prejudice and whether an argument that ER 404(b) should be considered for first time on appeal when only an ER 403 claim was raised.

4. Whether the trial court erred in instructing the jury on accomplice liability where the evidence supported the State's theory that Moreno and Castilla-Whitehawk were both engaged in the possession of controlled substances with the intent to deliver to other persons.

5. If erroneous, whether the trial court's accomplice liability instruction was harmless beyond a reasonable doubt where the quantity and location of the controlled substances clearly demonstrated that Castilla-Whitehawk acted as a principal in the possession of the controlled substances with the intent to deliver.

B. STATEMENT OF THE CASE.

Sergeant Chris Packard of the Thurston County Sheriff's department worked with a confidential informant, identified as CS 959, in October of 2018. RP 13-14. Packard has worked with this confidential informant during the present matter who had assisted him several other investigations where both Packard and the informant had established a sense of familiarity. RP 15. CS 959 has provided successful information in past investigations for Packard and the Narcotics Task Force that Packard was a part of where search warrants had been issued because of this informant's information. RP 16. Past investigations that CS 959 provided information for, led to the issuance of search warrants for Moreno and Castilla-Whitehawk. RP 17.

On October 8, 2019, informant CS 959 contacted Packard about a potential drug transaction between Mr. Castilla-Whitehawk and Mr. Timothy Moreno. RP 16-17. Packard was able to verify the veracity of the information provided by CS 959 in previous investigations. RP 16. Packard testified he had previously been involved with a drug investigation involving Castilla-Whitehawk in which Castilla-Whitehawk was within a residence for the majority of a day, where a search warrant conducted by the Drug Enforcement

Association uncovered a very large sum of money in Castilla-Whitehawk's vehicle. RP 18. In the residence, authorities had recovered drug paraphernalia and methamphetamine residue where Castilla-Whitehawk had been. RP 18-19. It was at this point that Packard had become aware that Castilla-Whitehawk had been involved in narcotic-related activity. RP 19. Packard testified he had been made aware of Moreno in prior investigations as part of controlled buys of drugs which led to a prior arrest of Moreno. RP 19-20. Because of these two prior incidences, Packard testified he became aware of the possibility Castilla-Whitehawk and Moreno were involved with drug-trafficking. RP 20.

CS 959 told Packard both Moreno and Castilla-Whitehawk planned to meet in a Ross Dress for Less parking lot. RP 20. This was for a drug transaction involving a few ounces of meth or heroin that CS 959 learned from Moreno while CS 959 was driving him to the Ross Dress for Less, while also learning the vehicle Castilla-Whitehawk would be in during the transaction which was a Mini Cooper. RP 21. It was understood by Packard that CS 959 had some communication with Moreno that CS 959 would be driving to the location of the transaction and that Castilla-Whitehawk was also on his way to the location as well. RP 22. Because of his prior

knowledge of both individuals being involved in narcotics activity coupled with the information given by CS 959, Packard testified this situation required some sort of immediate action. RP 22-24. Packard and other authorities responded to the situation immediately as CS 959 updated Packard on what was occurring such as identifying the grey Mini Cooper Castilla-Whitehawk was driving. RP 24.

When Packard and authorities arrived, they observed the Mini Cooper and the red Honda CS 959 was driving parked in close proximity to each other. RP 321. The Mini Cooper was driven by Castilla-Whitehawk's girlfriend who went inside of Ross' to use the restroom. RP 82-83. CS 959 also provided Packard with information that Castilla-Whitehawk and Moreno were both in the Mini Cooper that Packard was also able to observe himself. RP 26, 322. Packard testified that the information given to him from CS 959 was consistent with his own observations of the drug transaction. RP 26-28. After noticing quantities of smoke coming from the Mini Cooper, Packard and another officer, Officer Curtright, approached the vehicle to detain both individuals. RP 29, 323. The clothing both authorities had on made it very apparent that both worked with the police that included cloth badges and a

ballistic vest with an identifier that read "Police". RP 324-25, 538-39. When both authorities began to approach the individuals in the vehicle, Packard testified there was a smell of marijuana coming from the vehicle that corroborated the observation of smoke coming from the vehicle. RP 29, 330. Also, Packard testified the windows of the vehicle were down at a considerable distance. RP 31-32. When both authorities approached closer to the vehicle, both could get a better look inside of the vehicle although the windows were a bit tinted. RP 32.

As Packard and Curtright approached the vehicle to detain the individuals, Packard noticed a young child sitting in the backseat. RP 30-31, 330. The child was identified as the son of Castilla-Whitehawk's girlfriend who was only 8 years old. RP 85-86. Packard testified the marijuana was being smoked at the same time the child was present in the backseat. RP 31. Packard and Curtright detained both individuals based off these observations and CS 959's information. RP 32. Both authorities identified themselves as part of the Police and ordered both individuals out of the vehicle. RP 540-41. Curtright observed Castilla-Whitehawk move his hands underneath the seat and continued to move around until Curtright gave his verbal commands. RP 542.

As both individuals were being detained, Packard observed Moreno reach toward the floorboard of the vehicle to put something down while the Curtright recovered a fanny pack from Castilla-Whitehawk. RP 32, 329, 332, 342, 542-43. Curtright observed that the fanny pack was halfway opened and a plastic baggy consistent with packaging material could be seen inside the fanny pack. RP 545. Both individuals were placed in handcuffs, brought to sit in the back of separate vehicles, and were read their Miranda rights. RP 33, 331. Both individuals were ordered to be removed from the vehicle for the prevention of the destruction of any evidence and for the safety of the officers. RP 33. After being read his Miranda warnings, Castilla-Whitehawk told Sergeant Packard that there was Marijuana and M30s, which Packard identified as Oxycodone 30 milligram pills. RP 34, 99, 333. Packard asked Castilla-Whitehawk if the M30s were a prescription, Castilla-Whitehawk stated they were for personal use and did not have a prescription. RP 35-36, 333.

Sergeant Packard applied for a search warrant of the vehicle when both individuals were removed. RP 33, 333-34. In the search warrant application, Sergeant Packard detailed the information that he received from CS 959, the observations that had been made at the scene, and the statements made by Castilla-Whitehawk. CP

183-188.¹ The amount of time it took between the individuals being detained and the application for the search warrant was 37 minutes. RP 39.

When the search warrant was executed, controlled substances such as methamphetamine, heroin, suspected oxycodone, and alprazolam pills were uncovered in multiple quantities from containers, packages, and wrappers in the vehicle along with \$1620 in the fanny pack uncovered from Castilla-Whitehawk, all of which were admitted into evidence. RP 40-41, 345, 347-52, 358-75. Forensic analyst Deborah Price testified that the oxycodone pills did not look correct and actually contained heroin, not oxycodone when she conducted chemical analysis of one of the pills. RP 447.

Inside the fanny pack that Castilla-Whitehawk had been wearing, law enforcement located \$1620 in cash, the suspected oxycodone pills, and a cellophane baggy. RP 345-347. Also, located in the passenger front seat area, where Castilla-Whitehawk had been located, was a bag with heroin, Xanax Bars, and methamphetamine. RP 349-350. The methamphetamine under the

¹ The complaint for the telephonic search warrant is attached as an Exhibit to the State's Response RE Suppression Motion, CP 183-188. It is also attached to the Brief of Appellant as an appendix.

passenger seat weighed 86.2 grams. RP 365. Under the driver's seat, where Moreno had been seated, law enforcement located methamphetamine and heroin. RP 352. The methamphetamine on the driver's side weighed 57.4 grams including packaging. RP 362. The heroin was in individual packages. RP 353. Also, on the driver's side floorboard, law enforcement found a digital scale with residue on it. RP 359.

Captain David Johnson of the Thurston County Sheriff's Office was took photographs from inside the vehicle which were admitted into evidence. RP 471, 473. Washington State Patrol Detective J.D. Strup, who was also assigned to the Narcotics Task Force, located a black backpack in the trunk of the vehicle that included a white crystal substance, commonly associated to methamphetamine, in a small glass jar. RP 352, 485, 501-02. Strup testified that amount of methamphetamine and the amount of heroin recovered from the vehicle were a large quantity. RP 505.

After the search was complete, Castilla-Whitehawk and Moreno were placed under arrest. RP 357. When Castilla-Whitehawk was transferred to the jail, Deputy Howard Reynolds, of the Thurston County Sheriff's Office, found a large bag of white crystalline substance consistent with methamphetamine in the

backseat area where Castilla-Whitehawk had been. RP 518, 526. Deputy Reynolds called Castilla-Whitehawk back to him and stated, "Really? I told you I was gonna check my back seat," to which Castilla-Whitehawk apologized and "said he was going to tell [Reynolds] about that but he had fallen asleep and forgot." RP 526-527. The methamphetamine collected from the backseat was also admitted into evidence. RP 528. That portion of methamphetamine was weighed by law enforcement at 29 grams. RP 362.

As a result of the investigation, Castilla-Whitehawk was charged with unlawful possession with intent to deliver heroin, methamphetamine, oxycodone, and alprazolam. CP 5-6. Prior to the start of trial, defense counsel filed a motion to suppress the physical evidence arguing that insufficient facts supported the issuance of the search warrant. CP 10-27. The State responded, CP 28-46, 170-188. The defense then filed a subsequent motion to suppress, arguing that CS 959 did not provide a basis of knowledge for the information that was provided. CP 195. In that motion, the defense stipulated that the facts and case law demonstrated that CS 959 was credible. CP 195. In addition to the "basis of knowledge argument," the second motion added a claim that Castilla-Whitehawk was unlawfully arrested and therefore, the

statements that he made regarding controlled substances in the vehicle should not have been considered for probable cause to issue the search warrant. CP 200.

Prior to the start of trial, the trial court considered the motion to suppress evidence. Sergeant Packard testified for the State regarding the observations of law enforcement which led to the detention of Moreno and Castilla-Whitehawk and the search warrant. RP 9-105. Castilla-Whitehawk testified during the suppression hearing. According to Castilla-Whitehawk, the reason he met with Moreno was to discuss the sale of cars. RP 92. He also testified he bought the Mini Cooper, but the vehicle was not registered in his name for unknown reasons. RP 92-93. The black fanny pack indeed belonged to Castilla-Whitehawk which included money and M30s wrapped in cellophane wrapper which were not prescribed to Castilla-Whitehawk. RP 94. Castilla-Whitehawk later testified that he indeed was going to meet Moreno in the parking lot to discuss a drug deal and made arrangements for this meeting. RP 95. Castilla-Whitehawk indicated that he felt he was under arrest and had a panic attack when he was detained. RP 88. Sergeant Packard then testified in rebuttal indicating that it would not be a standard procedure to clang a gun against a window to get

someone's attention. RP 103. The trial court denied the suppression motion by ruling:

First, I will note that I am finding, based on the applicable standard and the totality of the circumstances, that the defendant was not under arrest at the time that he made the statements. Additionally, I'm going to note that I believe that Aguilar Spinelli has been satisfied as the basis of knowledge because I believe the court may take the reasonable common-sense inferences from what has been stated, and it is clear from the record that it was Mr. Moreno giving CS 959 that information. But in the alternative, even if it hadn't been sufficiently articulated as a basis of knowledge, I find that the remaining verification independently obtained by law enforcement that day satisfied what is necessary for the search warrant being proper in this case; thus, I am denying the motion.

RP 119. The trial court's findings of fact and conclusions of law were later reduced to writing. CP 161-166.

In a motion in limine, Castilla-Whitehawk asked the trial court to "exclude evidence that officers observed a child in the back seat of Mr. Castilla-Whitehawk's vehicle when officers approached," based on "ER 401 and ER 403." Supp CP __; RP 122. The State opposed, indicating that the fact that the other person in the car was a child would make it "unlikely that that person would be in possession of those types of drugs." RP 122. At that point, the trial court stated:

I do think the age is relevant because of the reduced likelihood as one gets younger that you are the person who was the person who possessed or brought it into that area. For example, an infant is unlikely to be the person who brought it in. It gets continually less likely to do it, and I think that implicit, if not explicit, in [the prosecutor's] proffer was that no one thinks a child is the one that brought it in.

RP 124. The trial court indicated that the parties could have further discussions on it and that the evidence would be kept "very limited."

RP 124.

After the jury was selected, but prior to witness testimony, defense counsel raised the issue again, arguing that the fact that the child was present was irrelevant and "extremely prejudicial to the defendant." RP 258. Defense counsel added, "I am happy to stipulate that we aren't going to blame anyone else in the car for possession of any of these controlled substances other than these two defendants." RP 259. When the trial court asked for clarification as to whether the defense wanted to stipulate to the element of possession, defense counsel reiterated that the offer was simply not to blame anyone else in the car other than Castilla-Whitehawk and Moreno. RP 259. The prosecutor argued:

The State is not seeking to admit that the child was in the car for the purpose of showing that these two individuals are dangerous. The fact of where people were seated and how many people were in the

vehicle is a fact of this case, and the defense wants to just exclude it and say, well, we won't make that argument, but that doesn't prevent the jury from thinking, well, we know that there was a female - - there's going to be testimony about the female that was there and that she was in the Ross Dress for Less store and was located after the police got there. So, it's kind of left open that, well, you know, could it have been someone else's drugs? And to show that there was someone else occupying the back seat I think is necessary for the State to show that that - these drugs and what was occurring was occurring between these two individuals and not someone else.

RP 260-261. The trial court maintained its prior ruling, stating, "I'm going to allow the reference to the fact that there was an eight-year-old child in the back seat of the car, and I am instructing that the State is not to go on at any more length than is necessary to establish that fact." RP 262. The trial court further explained:

While there is some prejudice to the defense concerning this evidence, it is the State's burden to establish possession, and the natural question the jury would ask when hearing about the car is who else was in the car? The State is entitled to present its case to satisfy its sole burden of establishing the guilt beyond a reasonable doubt, and it has to be as to all elements. And so, even if the defense does not raise the argument that there was someone else in the car, their identity as such, that is something that I would expect and in fact hope a jury would be wondering about when determining whether or not the State has met its burden.

RP 262-263. The trial court left open the possibility of a limiting instruction on the issue. RP 263.

Castillo-Whitehawk's counsel then asked, "What would the court do if we stipulated to possession?" RP 263. After some discussion and an indication from the prosecutor that he would be willing to entertain a stipulation, but needed to understand the full parameters, the trial court left the bench to allow for the parties to have discussion. RP 263-264. After the discussion, Castilla-Whitehawk's counsel simply stated, "No stipulation." RP 264.

During trial, when the trial court had discussion regarding jury instructions, the prosecutor asked to remove the proposed instructions regarding the oxycodone charge indicating that it would not be appropriate based on the testimony of the forensic scientist that the pills were actually heroin. RP 568. It was clarified that the State was moving to dismiss that count. RP 568-569. Defense counsel for Castilla-Whitehawk then discussed a limiting instruction regarding the child and counsel for Moreno indicated that Moreno did not want a limiting instruction on the issue. RP 569.

When the jury instructions were settled, Moreno's counsel again asked the trial court not to give a limiting instruction regarding the child and Castilla-Whitehawk's counsel requested the instruction. RP 573. The trial court decided to give the limiting

instruction requested by Castilla-Whitehawk's counsel after some discussion of the wording. RP 575, CP 99.

Counsel for Moreno then took exception to the proposed jury instructions regarding accomplice liability, specifically arguing that the information did not include accomplice liability. RP 579. The prosecutor then pointed out that case law in Washington State does not require that the State charge accomplice liability in order for an accomplice liability instruction. RP 580. Castilla-Whitehawk took no exception to the proposed instructions and did not object to the accomplice liability instruction. RP 579.

During closing arguments, the prosecutor discussed the accomplice liability "concept." RP 605. The prosecutor stated:

If Mr. Whitehawk – if Mr. Castilla-Whitehawk was selling his drugs to Mr. Moreno, Mr. Moreno was not the end user. He was intending to distribute those to someone else; same thing goes to Mr. Moreno. If he was selling his drugs to Mr. Castilla-Whitehawk, Mr. Castilla-Whitehawk was not the end user. Those drugs were going to someone else.

RP 605. The prosecutor clarified, "the State's theory in this case is that they both possessed controlled substances with the intent to deliver, meaning give it, sell it, trade it, barter it away at some point." RP 606.

The prosecutor also focused on the quantity of drugs that Castilla-Whitehawk had in his possession stating:

So, we've got the 29 that was found in the back of the patrol car. We've got 82 grams. These are both methamphetamine. We've got the pills in each on of these, and then we've got 34 grams of heroin. Now when you combine these three things – so if we say 28 grams is an ounce, right, there's three ounces here. Here's another ounce over here, that's four ounces of methamphetamine that Mr. Castilla-Whitehawk had in addition to he had 34 grams, which is over an ounce of heroin, he had 34 full pills and 19 partial pills, and then he had the 17 other pills of heroin.

RP 624. Toward the end of his closing argument, the prosecutor reiterated the State's theory of the case, stating:

If Mr. Castilla-Whitehawk was selling it to Mr. Moreno, he's the principle, he's the accomplice. If Mr. Moreno was selling it to Mr. Castilla-Whitehawk, he's the principle and Mr. Castilla-Whitehawk is the accomplice because those drugs are going further down the line. They're not stopping with these two.

RP 626.

During his closing argument, counsel for Castilla-Whitehawk stated, "Mr. Castilla-Whitehawk is not innocent. I'm not asking you to find him innocent. He's guilty of possessing those drugs. We're asking you to find him guilty of possession of methamphetamine, possession of heroin and possession of Xanax." RP 634. Counsel argued that law enforcement "jumped to the conclusion that both of

these guys were selling drugs. There was drugs everywhere (sic).”

RP 635.

Counsel later argued that “One person in this scenario definitely was selling drugs, there’s no doubt about it, but can you guys say who brought those drugs with any degree of certainty at all?” RP 637. Counsel for Moreno argued that the evidence was insufficient to convict Moreno. RP 647. Counsel for Moreno focused on the fact that Castilla-Whitehawk’s girlfriend was in the driver’s seat before Moreno and argued that the drugs under the driver’s seat might have belonged to her. RP 651. Moreno’s counsel mentioned the accomplice liability instruction, arguing:

So, a person is an accomplice with knowledge if it will promoter facilitate the commission of the crime. I’ll stop there. The State has not presented evidence that Mr. Moreno acknowledged that he was promoting or facilitating a crime, the commission of a crime with anybody.

RP 654.

During rebuttal closing argument, the prosecutor again reiterated the State’s theory, stating:

Whether Mr. Castilla-Whitehawk was gonna sell it to the end user or Mr. Moreno was gonna sell it to the end user, they were still possessing with the intent that it be distributed to someone else, either the next distributor or the end user. This chain could go on at infinitum until it ends up at the user level.

RP 673. The jury found Moreno guilty of unlawful possession of a controlled substance with intent to deliver heroin and unlawful possession of a controlled substance with intent to deliver methamphetamine, and found Castilla-Whitehawk guilty of unlawful possession of a controlled substance with intent to deliver heroin, unlawful possession of a controlled substance with intent to deliver methamphetamine, and unlawful possession of a controlled substance with intent to deliver, alprazolam. RP 682-683.

Castilla-Whitehawk was sentenced to 14 months incarceration. RP (9/26/19) 24, CP 140-151. This appeal follows.

C. ARGUMENT.

1. The trial court did not abuse its discretion when it denied the motion to suppress evidence because the search warrant was sufficient given that CS 959 passes the Aguilar-Spinelli test.

The Fourth Amendment to the United States Constitution provides that warrants may be issued upon a showing of “probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. Amend IV. The Constitution requires that a detached and neutral magistrate or judge make the determination of probable cause. State v. Smith, 16 Wn. App. 425, 427, 558 P.2d 265 (1976).

Article 1 § 7, of the Washington State Constitution State Constitution provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” WASH. Const. Art. 1 § 7. “The authority of law includes legal process such as a search warrant.” State v. Gunwall, 106 Wn.2d 54, 69, 720 P.2d 808 (1986); State v. Gaines, 154 Wn.2d 711, 718, 116 P.3d 993 (2005). In contrast to the Fourth Amendment, the particular requirements for issuance of a warrant in Washington are embedded in statutes and court rules governing searches and seizures. State v. Chenoweth, 160 Wn.2d 454, 158 P.3d 595 (2007).

RCW 10.79.015 states, “Any magistrate, when satisfied that there is reasonable cause, may also, upon like complaint made on oath, issue [a] search warrant.” CrR 2.3 provides, in relevant part:

A search warrant may be issued only if the court determines there is probable cause for the issuance of a search warrant. There must be an affidavit, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony establishing the grounds for issuing the warrant... The evidence in support of the finding of probable cause shall be preserved and shall be subject to constitutional limitations for such determinations and may be hearsay in whole or in part.

CrR 2.3(c).

Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of criminal activity can be found at the place to be searched. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). The issuing magistrate is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit. In re Personal Restraint of Yim, 139 Wn.2d 581, 596, 989 P.2d 512 (1999).

The issuing magistrate's determination of probable cause is reviewed for abuse of discretion and is given deference by the reviewing court. State v. Clark, 143 Wn.2d 731, 748, 24 P.3d 1006 (2001). All doubts are resolved in favor of the warrant's validity. State v. Kalakosky, 121 Wn.2d 525, 852 P.2d 1064 (1993). In determining probable cause, the magistrate makes a practical, common sense decision, taking into account all of the circumstances set forth in the affidavit and drawing common sense inferences. Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Probable cause requires a probability of criminal activity, not prima facie showing of criminal activity. Id.; State v. Seagull, 95 Wn.2d 898, 907, 632 P.2d 44 (1981). The party challenging a search warrant bears the burden of proof that the

information offered in support of the warrant was insufficient. State v. Fisher, 96 Wn.2d 962, 967, 639 P.2d 742, cert. denied. 457 U.S. 1137, 73 L.Ed. 1355, 102 S.Ct. 2967 (1982); State v. Mance, 82 Wn. App. 539, 544, 918 P.2d 527 (1996).

When a search warrant is based on information from an informant, the affidavit in support of the warrant must establish the basis of information and credibility of the informant. State v. Jackson, 102 Wn.2d 432, 433, 688 P.2d 136 (1984). A reviewing court will apply an analysis under the Fourth Amendment called the Aguilar-Spinelli 2-pronged test in figuring the probable cause from an informant's tips. Id.; State v. Chenoweth, 160 Wn.2d 454; Aguilar v. Texas, 378 U.S. 108, 114, 84 S.Ct. 1509, 12 L.Ed 723 (1964); Spinelli v. United States, 393 U.S. 410, 413, 89 S.Ct. 584, 21 L.Ed 2d 637 (1969).

For an informant's tip to create probable cause for a search warrant to be issued, "the officer's affidavit must set forth some of the underlying circumstances from which the informant drew his conclusion so that a magistrate can independently evaluate the reliability of the manner in which the informant acquired his information and the affidavit must set forth some of the underlying circumstances from which the officer concluded that the informant

was credible or his information reliable.” State v. Jackson, 102 Wn.2d. at 138-39. The prongs also can be thought of as the “veracity” or reliability and “basis of knowledge” prong. State v. Atchley, 142 Wn. App. 147, 161, 173 P.3d 323 (2007). Both prongs must be established to satisfy probable cause of a search warrant. State v. Bauer, 98 Wn. App. 870, 875, 991 P.2d 668 (2000). The magistrate judge requires an affidavit informing him or her of the underlying circumstances which lead an officer to conclude the informant was credible and obtained the information in a reliable way. State v. Jackson 102 Wn.2d at 139.

In this case, Castilla-Whitehawk argues that the search warrant affidavit failed to include sufficient information regarding the confidential informant’s basis of knowledge. In the search warrant affidavit, Sergeant Packard informed Judge Schaller that CS 959 had previously provided him reliable and credible information. CP 185. He relayed the information provided to him by CS 959 on the date in question, stating:

CS 959 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 call just call him Mr. Whitehawk. Um, the plan was for Mr. Moreno to purchase um, a few ounces of believed heroin from Whitehawk. Um, CS

959 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.

CP 186. As the trial court found, “the court may take reasonable common-sense inferences from what has been stated, and it is clear from the record that it was Mr. Moreno giving CS 959 that information.” RP 119. The inferences supported a conclusion that CS 959 had direct knowledge of Moreno’s plan to purchase narcotics from Castilla-Whitehawk because by their acknowledgment they were actively part of the plan.

A magistrate issuing a search warrant is permitted to make inferences from the facts stated in the affidavit. State v. Lyons, 174 Wn.2d 354, 363, 275 P.3d 314 (2012); State v. Maddox, 152 Wn.2d 499, 509-510, 98 P.3d 1199 (2004) (“a reasonable person could infer from the facts and circumstances set forth in the affidavit that evidence of methamphetamine dealing remained at Maddox’s home even if he was temporarily out of the drug itself”). The trial court did not abuse its discretion by finding that the basis of knowledge requirement was met. “It is sufficient to show that the informant had personal knowledge of the facts asserted in the affidavit.” State v. Vickers, 148 Wn.2d 91, 113, 59 P.3d 58 (2002).

The trial court did not end its analysis with the statements from CS 959. The trial court further concluded, “but in the alternative, even if it hadn’t been sufficiently articulated as a basis of knowledge, I find that the remaining verification independently obtained by law enforcement satisfied what is necessary for the search warrant being proper in this case.” RP 119. Corroboration of the informant’s tip by independent police investigation may cure a deficiency if either prong of the Aguillar-Spinelli test is not met. State v. Vickers, 148 Wn.2d at 112.

The search warrant affidavit included Sergeant Packard’s additional observations, indicating:

I arrived on scene at the Ross Dress or Less. I observed, who I know to be CS 959’s red Honda Accord and then the described silver Mini-Cooper with attached license plate BJV 1399. Um, upon arrival, um, CS 959 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 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 also told that there was a ah, female named Jessica that was the, inside the Ross Dress for Less, who is Mr. Whitehawk’s girlfriend and that a young six year old child that would either be in the Ross Dress for Less or in the vehicle. Um, at that point, Your Honor, based on the credible and reliable information CS 959 has provided 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.

CP 186. Sergeant Packard later continued:

Um, at that point, Mr. Whitehawk was holding a leather -type um, um fanny pack um, and in that fanny pack, 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 based on my training and experience to be ah, prescription Oxycodone.

CP 186-187. Sergeant Packard further noted that Whitehawk indicated that he did not have a prescription for the Oxycodone.

CP 187.

Sergeant Packard added, "he said I would marijuana 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.” CP 187. All of the facts and circumstances observed by Sergeant Packard and Officer Curtright, including the cellophane packaging and Castillo-Whitehawk’s statements sufficiently corroborated CS 959’s information. Even if this Court were to find that there was an insufficient basis of knowledge provided by CS 959, the search warrant was supported by sufficient information to demonstrate a reasonable inference that illegal narcotics were in the vehicle. The trial court did not abuse its discretion by denying the motion to suppress evidence.

The search warrant affidavit sufficiently covered the veracity prong. CP 185-187. Castilla-Whitehawk does not challenge the trial court’s finding that CS 959 was credible and reliable. CP 163-165. Unchallenged findings are considered verities on appeal. State v. O’Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

2. The trial court did not err by denying the defense motion to exclude Castillo-Whitehawk’s statements because Castilla-Whitehawk was lawfully detained as part of an investigative stop and had been read his Constitutional rights prior to making the statement.

During the suppression hearing, Sergeant Packard testified that, after observing Moreno “reach toward the floorboard like he

was putting something down there, “Whitehawk and Moreno were detained in handcuffs for a “Terry” investigation and read their “Miranda” warnings. RP 32-33. A brief investigatory seizure, commonly referred to as a “Terry stop,” is one exception to the warrant requirement. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). An investigative Terry stop must be based on “a reasonable and articulable suspicion that the individual [stopped] is involved in criminal activity.” State v. Walker, 66 Wn. App. 622, 626, 834 P.2d 41 (1992).

A reviewing court looks at the totality of the circumstances known to the officer at the time of the stop when evaluating the reasonableness of the officer’s suspicion. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). When activity is consistent with criminal activity, but also consistent with noncriminal activity, the behavior may still justify a brief detention. State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). Based on all of the facts and circumstances, including the furtive movements made by Moreno observed by the officers, law enforcement had a reasonable suspicion of criminal activity and were justified in the detention of Moreno and Castilla-Whitehawk for their safety during their investigation. The scope of the intrusion was reasonable in light of

the particular facts known to the officers at the time. State v. Williams, 102 Wn.2d 733, 742, 689 P.2d 1065 (1984); State v. Wheeler, 108 Wn.2d 230, 235, 737 P.2d 1005 (1987). Castilla-Whitehawk has not demonstrated that there was an illegal arrest.

Even if Castilla-Whitehawk could demonstrate that the scope of the stop exceeded that which is allowed by Terry, his statement was still voluntary and admissible. Unlike State v. Gonzales, 46 Wn. App. 388, 401, 731 P.2d 1101 (1986), which Castilla-Whitehawk relies upon, Castilla-Whitehawk was not confronted with the fruits of an illegal search prior to his statements being made. Castilla-Whitehawk did not argue at trial that his statements were involuntary pursuant to CrR 3.5. RP 8. He was advised of his Constitutional rights immediately after being detained and prior to any questioning. RP 33. There can be no showing that his statements were made as a result of exploitation of illegality. There was no error from consideration of Castilla-Whitehawk's statements in the search warrant affidavit. Even without including his statements in the search warrant affidavit, the warrant was valid because the statements from CS 959 provided a sufficient basis of knowledge as noted above.

3. The defense did not preserve an ER 404(b) objection for appeal and the trial court properly admitted evidence regarding the child in the back seat of the vehicle pursuant to ER 401 and 403.

Generally, a reviewing court will not consider an evidentiary issue that is raised for the first time on appeal because failure to object deprives the trial court of the opportunity to prevent or cure any error. RAP 2.5(a)(3); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). A narrow exception, however, exists for "manifest error[s] affecting a constitutional right." RAP 2.5(a)(3); Kirkman, 159 Wn.2d at 936. An objection based on relevance alone will not preserve an ER 404(b) challenge for appeal. State v. Mason, 160 Wn.2d 910, 933, 162 P.3d 396 (2007). Evidentiary issues under ER 404 are not of constitutional magnitude. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986); State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Therefore, pursuant to RAP 2.5(a), such error cannot be raised for the first time on appeal and should not be considered by this Court.

In this appeal, Castilla-Whitehawk argues that the evidence that the eight-year-old child was in the car was an improperly admitted prior act pursuant to ER 404(b). At trial, the only motion to exclude the evidence of the child was made pursuant to ER 401

and ER 403. Supp CP __; RP 122. No ER 404(b) issue was raised or preserved for appeal. This court should decline consideration of the issue.

“Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. ER 403 states, “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” A danger of unfair prejudice exists when evidence is more likely to stimulate an emotional response than a rational response. State v. Beadle, 173 Wn.2d 97, 120, 265 P.3d 863 (2011). An appellate court reviews a trial court’s ruling under ER 403 for abuse of discretion. State v. Scherf, 192 Wn.2d 350, 387, 429 P.3d 776 (2018). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds. State v. Taylor, 193 Wn.2d 691, 697, 444 P.3d 1194 (2019). The burden pursuant to ER 403 of showing prejudice is on

the party seeking to exclude the evidence. Carson v. Fine, 123 Wn.2d 206, 225, 867 P.2d 610 (1994).

In this case, the trial court properly found that the evidence of the child's presence in the car was relevant to the issue of possession of the controlled substances found in the vehicle. Castilla-Whitehawk considered and rejected the possibility of stipulating to possession of the controlled substances in order to reduce or eliminate the relevance of the evidence. RP 263-264. While the trial court noted the potential for prejudice, it limited the use of the evidence and provided the jury with an instruction to consider it only with regard to possession of the drugs. RP 262, CP 99.

Counsel for Moreno specifically asked Sergeant Packard about Castilla-Whitehawk's girlfriend and why law enforcement let her go. RP 387-388. Despite the assurance by Castilla-Whitehawk's counsel that they would not seek to lay blame for possession of the drugs on others, there was implication during the trial which could have led the jury to speculate as to whether or not the person in the back seat possessed the drugs if the trial court had not allowed the State to elicit that the passenger was a child. The trial court clearly weighed the risk of unfair prejudice against

the probative value of the evidence and was well within its discretion when it deemed the evidence admissible. Additionally, the trial court took significant efforts to minimize the prejudice. There was no error in the trial court's ER 403 ruling. Proper evidence will not be excluded because it may also tend to show that the defendant committed bad behavior other than that which is charged. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990)

If this Court considers the current argument that ER 404(b) applies to such evidence, the trial court clearly engaged in the proper analysis, whether the evidence the label of ER 404(b) was provided or not. When conducting an ER 404(b) analysis to admit evidence prior wrongs, the trial court must a trial court must find that a preponderance of evidence shows that the misconduct occurred, identify the purpose for which the evidence is being introduced, determine that the evidence is relevant, and find that its probative value outweighs its prejudicial effect. State v. Baker, 89 Wash. App. 726, 732, 950 P.2d 486 (1997). When ER 404(b) is implicated, the trial court must identify on the record the purpose for which other crimes or misconduct are admitted determining the balancing of probative value and prejudicial effect. State v. Brown,

132 Wn.2d 529, 571, 940 P.2d 546 (1997). Because the effects of ER 404(b) may be prejudicial for the defendant, the trial court must balance the nature of ER 404(b) evidence on the record. State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995).

Here, the prosecutor argued that the evidence that the passenger was a child was part of the facts of the case and necessary to demonstrate that the rear passenger was not in possession of the drugs. RP 122. Such a purpose is proper. Evidence of other acts is admissible to “complete the story of the crime on trial by proving its immediate context of happenings near in time and place.” State v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980); State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1995). There was no argument that the child was not in the back seat of the vehicle and no doubt that the facts presented occurred. Moreover, the trial court very clearly conducted the ER 403 balancing test prior to admitting the statements and gave a proper limiting instruction to minimize the prejudice.

As noted above, “ER 404(b) is concerned with the admissibility of prior misconduct,” not events that occur during the offense. See 5D Karl B. Tegland, *Washington Practice: Courtroom Handbook on Evidence 2018-2019*, at 168. However, even when

viewed in the context of the requirements of ER 404(b), there can be no showing that the trial court abused its discretion in admitting the evidence. Failure to follow the procedures of ER 404(b) is harmless if the record is sufficient to demonstrate that the trial court would still have admitted the evidence under the analysis. State v. Tharp, 96 Wn.2d 591, 600, 637 P.2d 961 (1981). There is no basis upon which this Court should find reversible error.

If this Court finds error in the trial court's ER 403 analysis, any error was harmless. This Court will reverse "for evidentiary error only if there is a reasonable probability that the error materially affected the outcome of the trial." State v. Stenson, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). Here, given the quantity of drugs found in both Castilla-Whitehawk's fanny pack and under his seat, and the limiting instruction provided by the trial court, there is no possibility that the jury's verdict was affected by an emotional reaction to the child being in the car.

4. The trial court did not err giving the jury an accomplice liability instruction because of the overwhelming evidence supporting such an instruction.

Accomplice liability requires proof that a person solicited, commanded, encouraged, or requested commission of the crime,

or aided or agreed to aid commission of the crime. RCW 9A.08.020(3)(a). An accomplice must associate himself with the principal's criminal undertaking, participate in it as something he desires to bring about, and seek by his action to make it succeed. State v. Jamieson, 4 Wn. App.2d 184, 204-205, 421 P.3d 463 (2018). A person is not an accomplice because he was present at the scene and knew that a crime was being committed. State v. Wilson, 95 Wn.2d 828, 631 P.2d 362 (1981). 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 or she either solicits or aids another person in committing the crime. State v. Davis, 101 Wn.2d 654, 682 P.2d 883 (1984). "Aid" means assistance that includes presence and a person is who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. Id. An accomplice need not to have knowledge of each element of the principal's crime in order to be convicted under accomplice liability statute as having general knowledge is sufficient. State v. Roberts, 142 Wn.2d 471, 513, 14 P.3d 713 (2000), as amended on denial of reconsideration (Mar. 2, 2001).

“Each side in a case may have instructions embodying its theory of the case if there is evidence to support that theory.” State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289, *cert. denied*, 510 U.S. 944 (1993). A reviewing court considers a trial court’s decision to about whether to give a jury instruction by looking at whether there was sufficient evidence to support an instruction viewing the evidence in a light most favorable to the requesting party. State v. Fernandez-Medina, 141 Wn.2d 448, 455-456, 6 P.3d 1150 (2000).

To give an instruction for accomplice liability, there must be sufficient evidence to support such an instruction. State v. Haack, 88 Wn. App. 423, 428, 958 P.2d 1001 (1997). Jurors only should conclude unanimously that both the principal(s) and the accomplice(s) participated in the crime, but do not need to be unanimous as to the degree of that participation. *Id.*; citing, State v. Hoffman, 116 W.2d 51, 103, 804 P.2d 577 (1991).

In State v. Munden, 81 Wn. App. 192, 913 P.2d 421 (1996), the issue before the court was to determine whether a jury could convict the defendant on accomplice liability charges when the evidence produced by the State showed the defendant and two others had acted as principals. The defense argued that an individual named Rice entered a market to commit the charged

offense. *Id.* at 196. The State responded that “even if Munden remained outside the market, he could be guilty as an accomplice because he was in possession” of the stolen property proving that he had assisted in removing the property. *Id.* The Court of Appeals held that the evidence, from testimony from the store owner, that Munden was inside the market entitled the jury to find both that he committed the burglary as a principal and that he simultaneously assisted, or stood ready to assist, the acts of burglary committed by his companions. *Id.* The court ruled the jury was entitled to find both that the defendant had committed burglary as a principal and that he assisted the acts of burglary being committed by his companions. *Id.*

In this case, the State’s theory of the case was that both Moreno and Castillo-Whitehawk were in possession of controlled substances with the intent of delivering them to other persons. RP 606. The law enforcement officers testified that in their experience, the quantity of drugs located in the vehicle was consistent with dealers who will resell rather than personal use. RP 414-415, 426-429, 491-493. The evidence supported the inference, as the State argued, that Moreno and Castilla-Whitehawk were mid-level

dealers who were intending that the drugs in the vehicle be moved along the chain.

Like Munden, it can reasonably be inferred from the evidence presented that Castilla-Whitehawk acted as either the principal or an accomplice in the charged offenses. By participating in the drug transaction, Castilla-Whitehawk is still guilty of the crime he has been charged with in accordance with the established rule in Haack and Hoffman. Castilla-Whitehawk had general knowledge of the crime charged when he met with Moreno at the site arranged by both individuals and when he was spotted in the same vehicle with controlled substances in his possession. Thus, the State produced sufficient circumstantial evidence that Castilla-Whitehawk acted as either the principal or accomplice in this case.

The particular accomplice liability instruction given by the trial court required that the jury find that Castilla-Whitehawk had knowledge that he was assisting in promoting or facilitating the crime charged. CP 100. The jury could not have convicted him unless it found that he had the intention that the drugs in the vehicle were possessed with the intent that they be delivered. The facts supported the instruction.

5. If this Court finds that the instructions given by the trial court were erroneous, such error was harmless.

An erroneously given accomplice liability instruction is harmless if the Court concludes beyond a reasonable doubt that the verdict would have been the same absent the error. State v. Brown, 147 Wn.2d 236, 246, 27 P.3d 184 (2001); State v. Wren, 115 Wn. App. 922, 925 (2003). In this case, it is clear that the jury would have found Castilla-Whitehawk guilty of the crimes charged even if the trial court had not instructed the jury regarding accomplice liability.

An error in an accomplice liability instruction is harmless “beyond a reasonable doubt where there was sufficient evidence in the record indicating that the particular defendant was a principal in certain of the charges.” State v. Thomas, 150 Wn.2d 821, 845, 83 P.3d 970 (2004). Here, the quantity of drugs found on both Castilla-Whitehawk’s person and under his seat demonstrated beyond a reasonable doubt that he was acting as a principal in possessing controlled substances with intent to deliver. RP 414-415, 426-429, 491-493. There is no likelihood that the inclusion of the accomplice liability instruction altered the verdicts. This is especially true that the instruction given required that the jury find that Castilla-

Whitehawk have knowledge that his actions would promote or facilitate the delivery of the drugs. CP 100. Castilla-Whitehawk's counsel admitted that he possessed the drugs. RP 635. There is no possibility that the jury would not have found that Castilla-Whitehawk possessed the drugs with the intent to deliver if the trial court had not given the accomplice liability instruction. If any error occurred, it was harmless beyond a reasonable doubt.

D. CONCLUSION.

The magistrate properly issued the search warrant based on the credible information from CS 959, which included facts which provided a rational inference as to the basis of knowledge. The trial court properly denied the motion to suppress evidence. Castilla-Whitehawk was not subject to an illegal arrest, rather he was detained for a reasonable investigative Terry stop and provided a statement to law enforcement after having been advised of his rights. It was not error for the judge who granted to search warrant to consider those statements in authorizing the warrant. Even if there was some error in that consideration, the warrant was still valid because there was a sufficient basis of knowledge provided by the informant and corroborated by the observations of Sergeant Packard.

The trial court properly exercised its discretion pursuant to ER 401 and 403 and balanced the probative value of the fact that a child passenger was in the rear of the vehicle with the potential for unfair prejudice. There was no violation of either ER 403 or ER 404(b). No argument regarding ER 404(b) was raised or preserved at trial. Finally, the facts presented at trial supported the State's theory on accomplice liability that both Moreno and Castilla-Whitehawk were engaged in the possession of controlled substances for sale to others. It was not improper for the trial court to provide an accomplice liability instruction. Even if the instruction were erroneous, the evidence overwhelming demonstrated that Castilla-Whitehawk acted as a principal in the crimes such that, beyond a reasonable doubt, the verdict would have been the same if the trial court had not given the instruction. The State respectfully requests that this Court affirm Castilla-Whitehawk's convictions and sentence in their entirety.

Respectfully submitted this 13th day of July, 2020.



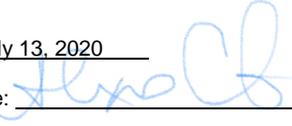
Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

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I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

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Date: July 13, 2020

Signature:  _____

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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