

FILED

NOV 13 2009

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

27895-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER D. BROWN, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
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Mark E. Lindsey
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred by admitting evidence obtained pursuant to a warrantless search of defendant's car incident to his arrest.
2. Insufficient evidence was produced to support the third degree assault conviction.

II.

ISSUES PRESENTED

- A. Did the defendant's decision not to move to suppress the evidence discovered incident to his arrest constitute a "manifest error affecting a constitutional right" under RAP 2.5(a) which may be raised for the first time on appeal?
- B. Did the trial court abuse its discretion in admitting the evidence discovered incident to the defendant's arrest after he drew a gun on the officer during a routine traffic stop for speeding?

- C. Was there sufficient evidence produced at trial to support the defendant's conviction for third degree assault of the deputy?

III.

STATEMENT OF THE CASE

On March 2, 2008, around 3:00 p.m., Spokane County Sheriff Sgt. Matt Lyons was on patrol eastbound on Mission Avenue when he noticed Christopher Brown's vehicle approaching westbound. RP 128. Sgt. Lyons noted that the defendant's vehicle was well in excess of the posted 25 m.p.h. speed limit, so he activated his moving radar and it locked defendant's speed at 42 m.p.h. RP 129. Sgt Lyons made a traffic stop of defendant's vehicle. RP 131. As Sgt. Lyons approached, defendant opened the door, so Sgt. Lyons ended up standing next to the rear door. The defendant provided his license and registration. When Sgt. Lyons started to return to his car to check the information, defendant stated in an icy voice that he had something else for Sgt. Lyons as he was turning to return to his car. RP 137. Sgt. Lyons testified that the change in defendant's voice alerted him that something was wrong so he immediately looked back at the defendant. RP 137. The statement

startled Sgt. Lyons until he observed defendant's hand reach for the butt of a gun between the seat and the center console. RP 138.

Sgt. Lyons saw defendant grab the gun in a firing position with his finger on the trigger and brought it around to bear on the Sgt. RP 138-39. Sgt. Lyons saw the gun coming up, so he backed away and drew his service weapon to defend himself. RP 141. As the defendant brought the gun around it struck the car and was flipped out of his grip onto the pavement a few feet away. RP 142. Sgt. Lyons testified that he believed that defendant was trying to shoot the Sgt. RP143. Sgt. Lyons drew his weapon in reaction to what he perceived as a deadly threat. RP 143.

After the defendant lost control of the gun, Sgt. Lyons grabbed him out of the car as Deputy Hubbell arrived. RP 146. Sgt. Lyons was so shaken by the assault that Deputy Hubbell took control of defendant. RP 146. The deputies processed the vehicle incident to his arrest. RP 146, 150. The vehicle search found crack cocaine in an open plastic grocery bag along with a razor, a knife, syringes and a glass crack pipe. RP 156. The unlocked glove compartment contained more cocaine and another crack pipe. RP 53. Thereafter, the vehicle was turned over to the towing company for impounding.

When the towing company inventoried defendant's vehicle, they found needles and a portable safe which contained money, a knife, and a

razor with a white substance on the blade. RP 66. The towing company notified the Sheriff's Office of the impound inventory results. RP 67. Sheriff Deputies obtained a search warrant for the vehicle and the portable safe, found the cocaine and other items sought. RP 84-86.

IV.

ARGUMENT

A. THE DEFENDANT'S DECISION NOT TO MOVE THE TRIAL COURT TO SUPPRESS THE EVIDENCE FOUND INCIDENT TO HIS ARREST IS NOT A "MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT" UNDER RAP 2.5(a).

On appeal, defendant contends that the trial court committed error in admitting the evidence discovered pursuant to the search of defendant's vehicle incident to his arrest. Defendant claims that his decision not to move the trial court to suppress the results of the search is excusable because it constitutes a "manifest error affecting a constitutional right" under RAP 2.5(a)(3). Usually, a party may assign evidentiary error on appeal only for specific grounds made at trial. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) *cert. denied*, 475 U.S. 1020, 105 S. Ct. 1208, 89 L. Ed. 2d 321 (1986). This procedure provides the trial court with the opportunity to prevent or cure error. *State v. Boast*,

87 Wn.2d 447, 553 P.2d 1322 (1976). Here, the defendant chose not to move to suppress the results of the search incident to his arrest, thereby preventing the trial court from ruling on the issue. Hence, defendant did not preserve the issue for appellate review.

Generally, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). Nevertheless, a claim of error may be raised for the first time on appeal where it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). To qualify for this exception, the error must be “manifest” and truly of constitutional dimension. *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). This threshold requires that the defendant identify a constitutional error and show how the alleged error actually affected the defendant’s rights at trial. Obviously, it is the showing of *actual* prejudice which makes the error “manifest” and triggers appellate review. *State v. McFarland*, 127 Wn.2d at 333.

For defendant’s argument to prevail, this court must find that the *defendant’s choice* not to move the trial court for suppression of the evidence discovered incident to his arrest was a “manifest” constitutional error by the trial court. The defendant bears the burden of proof on appeal that the trial court would most likely have granted the suppression motion

had it been afforded the opportunity. *State v. McFarland, supra*. The Supreme Court noted:

It is not enough that the Defendant allege prejudice—actual prejudice must appear in the record. ...[B]ecause no motion to suppress was made, the record does not indicate whether the trial court would have granted the motion. Without an affirmative showing of actual prejudice, the asserted error is not “manifest” and is not reviewable under RAP 2.5(a)(3).

McFarland, supra at 333-34.

The *McFarland* Court recognized the circular nature of its analysis, yet insisted that the defendant bore the burden of proof, from the record, to show that the trial court would have granted the motion to suppress had one been made. *Id.* Here, since defendant chose not to move to suppress, he cannot show how the trial court would have ruled in this case. The defendant’s failure to show actual prejudice renders the assigned error in this case not “manifest” and forecloses its consideration on appeal. RAP 2.5(a)(3).

Even if this Court reviews the record in spite of *McFarland*, despite the lack of caselaw to support such a *de novo* review, the defendant still cannot show prejudice. The defendant was stopped for speeding. The defendant provided his information, then “icily” stated that he had something for the deputy. RP 64-65. The deputy immediately was alerted by defendant’s change in voice and turned back to face the

defendant. RP 65. Then the deputy observed the defendant reaching for the butt of the gun between the seat and console. RP 65. The defendant grabbed the gun in a firing position with his finger on the trigger as he brought it around to bear upon the deputy. RP 65. The defendant only lost control of the gun when he struck the gun on his car. RP 65-66. Finally, the record reflects that the deputy was backing away and drawing his weapon in apprehension of the defendant's actions. RP 65. The deputy only arrested defendant after he threatened the deputy with the gun. RP 72. The deputy then lawfully searched the car for evidence incident to that arrest. The search found an open plastic grocery bag on the front seat. Looking in to the open bag, the deputy observed additional weapons and the controlled substances which became the basis for the search warrant obtained to search the rest of defendant's vehicle. Based upon this record, it is *not* highly likely that the trial court would have suppressed the evidence even if defendant had filed the motion.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE EVIDENCE DISCOVERED INCIDENT TO HIS ARREST AFTER DEFENDANT DREW A GUN ON THE DEPUTY DURING A ROUTINE TRAFFIC STOP FOR SPEEDING.

The decision to admit evidence is generally within the trial court's sound discretion, and will be reversed only for an abuse of discretion.

State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). An appellate court may affirm the ruling on any ground adequately supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Here, defendant did not dispute at trial that Deputy Lyons properly stopped him for speeding. Defendant did not dispute that the defendant gave the deputy his information, then said in a chilly voice that he had something for the deputy. Defendant then armed himself with a gun as the deputy turned back towards the defendant and tried to bring the muzzle to bear upon the deputy. Defendant did not dispute that he only lost control of the gun when it struck his car. In fact, defendant kept telling the deputy that it was only a BB gun. During closing arguments to the jury, defense counsel argued that the defendant was merely tossing the gun out the window to show the deputy that he was no threat. RP 135, 138. Accordingly, the defendant would be hard-pressed to find in the record support that the results of the search incident to his arrest were unlawful or that the admission of same constituted an abuse of discretion.

Defendant argues that the record contains sufficient facts from which this Court *can only* conclude that the trial court would have granted

a motion to suppress had it been provided the opportunity. In this context, the defendant analyzes the interaction of the Fourth Amendment to the United States Constitution and Art. I §7 of the Washington State Constitution in light of the United States Supreme Court decision in *Arizona v. Gant*, 556 U.S. --, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

Defendant noted that the *Gant* decision recognizes the validity of a warrantless search incident to arrest to a limited extent: (1) where the arrestee is unsecured and physically able to access the interior of the vehicle; or (2) where law enforcement has a reasonable belief that evidence of the crime of arrest *might* be found in the vehicle. *Id.* Defendant contends that the first exception provides more protection than does the Washington Constitution, so this Court should adopt that provision. Next, defendant contends that this Court should not adopt the second *Gant* exception because it provides less protection than does Art. I § 7. Defendant extends the reasoning to arrive at the position that the interaction of the *Gant* decision and Art. I, § 7 has effectively reversed the basis for the Washington Supreme Court's holding in *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986) and reinstated the holding of *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 436 (1983).

Defendant's analysis of the constitutional provisions in light of the *Gant* Court's opinion, while persuasive, fails under the circumstances of

this case. Here, Deputy Lyons stopped the defendant's car for speeding. The defendant provided the deputy with his information then alarmed the deputy with his statement. The deputy then watched the defendant reach for and grip a gun in a firing position, with his finger on the trigger, and bring the gun around towards the deputy. The deputy was prepared to return fire when the gun struck the vehicle and defendant lost his grip. Deputy Lyons then arrested the defendant for displaying a weapon apparently capable of producing bodily harm pursuant to RCW 9A.01.020(1). CP 2-5.

Incident to the arrest of the defendant for the weapons offense, the deputy searched only the passenger compartment and unlocked glove box of the defendant's vehicle. RP 49, 53. The deputy observed an open grocery bag on the front passenger seat. Inside the grocery bag, the deputy observed a knife, razor blade, and several small baggies containing off-white rocks which field-tested positive for crack cocaine. Inside the center console and the glove box, another gun was discovered as well as another knife, and more crack cocaine. RP 37, 53. Applying the analysis of the *Gant* decision, the search of the defendant's vehicle was lawful since it was incident to his arrest for the weapon offense and was for evidence of the offense of arrest which *might* be present therein.

Subsequent to the filing of defendant's brief the Washington Supreme Court issued the decision in *State v. Patton*, No. 80518-1, slip op. (filed October 22, 2009). In *Patton*, the Supreme Court examined the validity of the automobile search incident to arrest exception to the general warrant requirement of Art. I § 7. The Court examined the history of the automobile exception, including its holdings in *State v. Ringer, supra* and *State v. Stroud, supra*. After a careful analysis of the history of the exception, the Supreme Court concluded that "the search incident to arrest exception requires a nexus between the arrestee, the vehicle, and the crime of arrest, implicating safety concerns or concern for the destruction of evidence of the crime of arrest." *State v. Patton*, No. 80518-1, slip op. (filed October 22, 2009). The Court held that: "an automobile search incident to arrest is not justified unless the arrestee is within reaching distance of the passenger compartment at the time of the search, and the search is necessary for officer safety or to secure evidence of the crime of arrest that could be concealed or destroyed. *Id* at 1. In *Patton*, the defendant was arrested after he was already outside his vehicle and was not secured until he was inside his home. As a result, the Supreme Court found that "no connection existed between Patton, the reason for his arrest warrant, and the vehicle", so "there was no basis to believe evidence relating to Patton's arrest would have been found in the car." *Id.*, at 15.

Finally, the Supreme Court observed that: “we hold that the automobile search incident to arrest exception to the warrant requirement does not extend to the circumstances of here.” *Id.* at 16.

Applying the Supreme Court’s *Patton* analysis to defendant’s case, the record reflects that there was more than a sufficient nexus between the defendant, his vehicle, and the crime of arrest. Accordingly, the trial court properly exercised its discretion in finding the evidence admissible.

C. THERE WAS SUFFICIENT EVIDENCE AT TRIAL TO SUPPORT THE JURY VERDICT FINDING DEFENDANT GUILTY OF THIRD DEGREE ASSAULT OF THE DEPUTY.

Defendant contends that there was insufficient evidence that defendant committed a completed assault. Rather, defendant claims that the evidence supports only an attempted assault. The test for sufficiency of the evidence is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could find that each element of the offense has been proved beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). In reviewing the sufficiency of the evidence in a criminal case, the reviewing court must draw all reasonable inferences from the evidence in favor of the State and interpret those inferences most strongly against the defendant. *State v. Lopez*, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995); *State v. Hagler*,

74 Wn. App. 232, 235, 872 P.2d 85 (1994). Application of that standard requires affirmation of the conviction.

The issue presented is whether the defendant's actions constituted an "assault" as defined by RCW 9A.36.031(1)(g). The trial court defined "assault" as "an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury." CP 37. Defendant contends that the evidence shows that defendant was prevented from completing the assault by happenstance, yet defendant's argument to the jury was that he was merely trying to avoid a misunderstanding by throwing the gun out the car door. RP 138-39.

The evidence before the jury included Deputy Lyons's testimony that he thought the defendant was trying to shoot him. RP 71. Deputy Lyons testified that: defendant held the gun "in a grip consistent with firing" and that he "actually saw defendant's finger on the trigger." RP 67. Finally, Deputy Lyons testified that "no question...he was bringing it across fast to beat me...to shoot me before I could shoot." RP 98. Deputy Hubbell testified that Deputy Lyons was obviously upset and shaken by the incident because he thought he was going to be shot. RP 47. The jury carefully

weighed the evidence and rendered its guilty verdict. Therefore, the evidence was sufficient to support the verdict. There was no error.

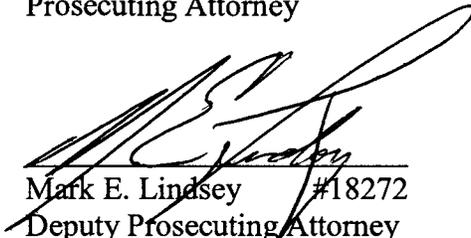
V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 13th day of November, 2009.

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