

6 2732-5

62732-5

No. 62732-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA B. MILLS,

Appellant.

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

The Honorable Mary Yu

BRIEF OF APPELLANT

SARAH M. HROBSKY
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 JUL 13 PM 4:52

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ... 2

C. STATEMENT OF THE CASE 4

D. ARGUMENT 11

1. THE SEARCH OF MR. MILLS' CAR VIOLATED HIS RIGHT TO PRIVACY PROTECTED BY ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION 11

 a. Article I, section 7 prohibits a warrantless search of a vehicle incident to arrest in the absence of exigent circumstances 11

 i. Arrestee secured 15

 ii. Reasonable belief evidence of offense of arrest might be in vehicle 16

 b. Article I, section 7 does not support the so-called "good faith" and "inevitable discovery" exceptions to the exclusionary rule 21

 c. No exigent circumstances excused the officers from obtaining a telephonic search warrant for the vehicle Mr. Mills was driving at the time of his arrest 21

 d. The proper remedy is suppression of the evidence obtained from the warrantless search of the car driven by Mr. Mills 22

2.	THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR. MILLS' MOTION TO SEVER THE PROSECUTIONS FOR FIREARM AND DRUG VIOLATIONS FROM THE PROSECUTIONS FOR IDENTITY THEFT AND POSSESSION OF STOLEN PROPERTY AND TO SEVER THE FORGERY PROSECUTION FROM ALL OTHER JOINED PROSECUTIONS	24
	a. <u>Severance is required where it will promote a fair determination of guilt or innocence of each offense</u>	24
	b. <u>The joinder of the firearm and drug violations with the identity theft and possession of stolen property charges was in error</u>	27
	i. <u>Strength of evidence</u>	28
	ii. <u>Clarity of defenses</u>	28
	iii. <u>Court's instructions</u>	30
	iv. <u>Cross-admissibility</u>	31
	c. <u>Evidence of the multiple offenses was not admissible in a single trial under the <i>res gestae</i> exception to ER 404(b)</u>	34
	d. <u>The joinder of the added charge of forgery was also in error</u>	36
	e. <u>Reversal is the proper remedy</u>	37
3.	THE TRIAL COURT ERRONEOUSLY ADMITTED HIGHLY PREJUDICIAL EVIDENCE OF UNCHARGED BAD ACTS WITHOUT WEIGHING ITS PROBATIVE VALUE AGAINST ITS CLEAR PREJUDICIAL EFFECT	39

a. The admission of evidence of uncharged bad acts was in error 39

i. Probative value and prejudicial effect 39

ii. Res gestae 41

b. Reversal is the proper remedy 42

4. THE TRIAL COURT FAILED TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY CrR 3.6, IN VIOLATION OF MR. MILLS' RIGHT TO A MEANINGFUL APPEAL 43

E. CONCLUSION 46

TABLE OF AUTHORITIES

United States Constitution

Amend. IV 11, 17, 22

Amend. XIV 2, 24

Washington Constitution

Art. I, sec. 3 2, 21

Art. I, sec. 7 1, 2, 11, 12, 13, 16, 18, 20, 21, 22, 23

United States Supreme Court Decisions

Adamson v. California, 332 U.S. 46, 67 S. Ct. 1672, 91
L.Ed.2d 1903 (1947) 37-38

Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145
(1925) 18

Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485
(2009) 14, 15, 16, 17, 20, 23

Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69
L.Ed.2d 543 (1925) 17

Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d
685 (1969) 15, 18

Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098, 91
L.Ed.2d 1399 (1947) 18

Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed.2d
231 (1927) 18

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d
694 (1966) 7

<i>New York v. Belton</i> , 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981)	14, 15, 16
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) ..	12
<i>Thornton v. United States</i> , 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004)	17-18
<i>United States v. Rabinowitz</i> , 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed.2d 653 (1950)	18
<i>United States v. Ross</i> , 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982)	17

Washington Supreme Court Decisions

<i>State v. Alvarez</i> , 128 Wn.2d 1, 904 P.2d 754 (1995)	44
<i>State v. Armenta</i> , 134 Wn.2d 1, 948 P.2d 1280 (1997)	45
<i>State v. Bythrow</i> , 114 Wn.2d 713, 790 P.2d 154 (1990)	26
<i>State v. Dailey</i> , 93 Wn.2d 454, 610 P.2d 357 (1980)	44
<i>State v. Duncan</i> , 146 Wn.2d 166, 43 P.3d 513 (2002)	12
<i>State v. Eisfeldt</i> , 163 Wn.2d 628, 185 P.3d 580 (2008)	21
<i>State v. Everybodytalksabout</i> , 145 Wn.2d 456, 39 P.3d 294 (2002)	33
<i>State v. Foxhaven</i> , 161 Wn.2d 168, 163 P.3d 786 (2007)	33, 40
<i>State v. Gaines</i> , 154 Wn.2d 711, 116 P.3d 993 (2005)	21
<i>State v. Head</i> , 136 Wn.2d 619, 964 P.2d 1187 (1998)	44, 45
<i>State v. Krall</i> , 125 Wn.2d 146, 881 P.2d 1040 (1994)	24-25, 44
<i>State v. LeFever</i> , 102 Wn.2d 777, 690 P.2d 574 (1984)	41

<i>State v. Lough</i> , 125 Wn.2d 847, 889 P.2d 487 (1995)	33
<i>State v. Mendez</i> , 137 Wn.2d 208, 970 P.2d 722 (1999)	23
<i>State v. Miles</i> , 160 Wn.2d 236, 156 P.3d 864 (2007)	20
<i>State v. Morse</i> , 156 Wn.2d 1, 123 P.3d 832 (2005)	11, 21
<i>State v. Neal</i> , 144 Wn.2d 600, 30 P.3d 1255 (2001)	38
<i>State v. O'Neill</i> , 148 Wn.2d 564, 62 P.3d 489 (2003)	21
<i>State v. Powell</i> , 126 Wn.2d 254, 893 P.2d 615 (1995)	35, 41
<i>State v. Riley</i> , 121 Wn.2d 22, 846 P.2d 1365 (1993)	21
<i>State v. Ringer</i> , 100 Wn.2d 686, 674 P.2d 1240 (1983)	12-13, 16, 18, 23
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	26, 27, 34
<i>State v. Saltarelli</i> , 98 Wn.2d 358, 655 P.2d 697 (1982)	40, 41
<i>State v. Simpson</i> , 95 Wn.2d 170, 622 P.2d 1199 (1980)	15
<i>State v. Smith</i> , 106 Wn.2d 772, 725 P.2d 951 (1986)	33, 40
<i>State v. Smith</i> , 74 Wn.2d 744, 446 P.2d 571 (1968), <i>vacated in part</i> , 408 U.S. 934, 92 S.Ct. 2852, 33 L.Ed.2d 747 (1972), <i>overruled on other grounds</i> , <i>State v. Gosby</i> , 85 Wn.2d 758, 539 P.2d 680 (1975)	26
<i>State v. Stroud</i> , 106 Wn.2d 144, 720 P.2d 436 (1986)	13-14, 15, 16, 18
<i>State v. Thang</i> , 145 Wn.2d 630, 41 P.3d 1159 (2002)	33, 40
<i>State v. Tharp</i> , 96 Wn.2d 591, 637 P.2d 961 (1981)	40
<i>State v. White</i> , 135 Wn.2d 761, 958 P.2d 982 (1998)	11

<i>State v. Williams</i> , 102 Wn.2d 733, 689 P.2d 1065 (1984)	12
--	----

Washington Court of Appeals Decisions

<i>State v. Bessestte</i> , 105 Wn. App. 793, 21 P.3d 318 (2001)	21
<i>State v. Bradford</i> , 60 Wn. App. 857, 808 P.2d 174 (1991)	30-31
<i>State v. Bryant</i> , 89 Wn. App. 857, 950 P.2d 1004 (1998)	24, 25-26, 38
<i>State v. Hinshaw</i> , 149 Wn. App. 747, 205 P.3d 178 (2009)	22
<i>State v. MacDonald</i> , 122 Wn. App. 804, 95 P.3d 1248 (2004)	27
<i>State v. Mutchler</i> , 53 Wn. App. 898, 771 P.2d 1168 (1989) ...	35, 41
<i>State v. Trickler</i> , 106 Wn. App. 727, 25 P.3d 445 (2001)	42-43
<i>State v. Wade</i> , 98 Wn. App. 328, 989 P.2d 576 (1999)	33
<i>State v. Watkins</i> , 53 Wn. App. 264, 766 P.2d 484 (1989)	27
<i>State v. Witherspoon</i> , 60 Wn. App. 569, 805 P.2d 248 (1991)	45, 46

Rules and Statutes

CrR 3.6	1, 4, 43-44
CrR 4.3	24, 25
CrR 4.4	24
ER 404(b)	1, 3, 9, 31-32, 37, 39, 41, 42
ER 609	9
RAP 1.2	44
RAP 18.8	44

RCW 9.35.020	8
RCW 9.41.040	8
RCW 9A.56.010	8
RCW 9A.56.140	8
RCW 9A.56.160	8
RCW 9A.60.020	10
RCW 69.50.401	8

Other Authorities

<i>Camacho v. State</i> , 119 Nev. 395, 75 P.3d 370 (2003)	16, 19
<i>Commonwealth v. White</i> , 543 Pa. 45, 669 A.2d 896 (1995)	19
<i>Dorman v. United States</i> , 140 U.S.App. D.C. 313, 435 F.2d 385 (1970)	22
<i>Drew v. United States</i> , 331 F.2d 85 (D.C. Cir. 1984)	25
<i>State v. Bauder</i> , 181 Vt. 392, 924 A.2d 38 (2007)	16, 19-20
<i>State v. Eckel</i> , 185 N.J. 523, 888 A.2d 1266 (2006)	16, 19
<i>State v. Rowell</i> , 144 N.M. 371, 188 P.3d 95 (2008)	16
<i>United States v. Sutton</i> , 605 F.2d 260 (6 th Cir. 1979)	25
22 C. Wright and K. Graham, <i>Federal Practice and Procedure</i> § 5329	35
1 Wigmore, <i>Evidence</i> § 218 (3d Ed. 1940)	35
WPIC 3.01	30

A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting evidence obtained pursuant to a warrantless vehicle search, in violation of Mr. Mills' right to privacy protected by Article I, section 7 of the Washington Constitution.

2. The trial court erred in denying Mr. Mills' motion to sever the charges of unlawful possession of a firearm and unlawful delivery of methamphetamine, Counts I – II, from the charges of identity theft and possession of stolen property, Counts III – VI, in violation of his constitutional right to a fair trial.

3. The trial court erred in denying Mr. Mills' motion to sever the charge of forgery, Count VII, from the remaining six charges, Counts I – VI, in violation of his constitutional right to a fair trial.

4. The trial court erred in failing to exclude evidence of uncharged bad acts, in violation of ER 404(b).

5. The trial court erred in failing to enter written findings of fact and conclusions of law as required by CrR 3.6, in violation of Mr. Mills' constitutional right to a meaningful appeal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Article I, section 7 of the Washington Constitution prohibits a warrantless search of a vehicle where recent occupants of the vehicle are arrested and physically unable to reach a weapon or destructible evidence of the crime for which the arrest was made. Here, the officers conducted a warrantless search of the passenger compartment of the vehicle driven by Mr. Mills after he was arrested, handcuffed, and secured in the back of a patrol car, did the search violate Mr. Mills' privacy rights protected by Article I, section 7? (Assignment of Error 1)

2. The Due Process Clause of the Fourteenth Amendment to the United States Constitution and of Article I, section 3 of the Washington Constitution guarantee a criminal defendant the right to a fair trial. A fair trial requires severance of charges where the defendant is prejudiced by the jury's inability to separate proof of one charge from the other or where the jury uses proof of one offense to infer a criminal disposition to find guilt of another offense. Did the trial court violate Mr. Mills' right to a fair trial and abuse its discretion in denying his motion to sever the charges of unlawful possession of a firearm and unlawful delivery of methamphetamine from the charges of identity theft and possession of stolen property,

and in denying his motion to sever the charge of forgery from all other counts, where the relative strength of the proof of the charges was not the same, the jury was not properly instructed to segregate the evidence to determine whether sufficient evidence supported each charge individually, and the evidence would not have been cross-admissible in separate trials? (Assignments of Error 2, 3)

3. ER 404(b) authorizes admission of evidence of uncharged bad acts only where the trial court finds on the record that the evidence is relevant to an element of the crime charges and its probative value outweighs its prejudicial effect. The evidence is not admissible simply to imply the defendant's guilt of the charged crimes due to a criminal propensity. Here, the trial court admitted evidence of uncharged credit card fraud and uncharged possession of stolen property without balancing the probative value against the obvious prejudicial effect, even though the probative value rested in the improper inference of Mr. Mills' criminal propensity. Did the trial court violate ER 404(b) when it failed to exclude the substantially prejudicial evidence that was not necessary to prove a material element of the charged offenses? (Assignment of Error 4)

4. CrR 3.6 imposes a mandatory duty on a court to file written findings of fact and conclusions of law following a suppression hearing so as to enable meaningful appellate review. Reversal is required when the absence of written findings and conclusions prejudices a defendant's right to appeal. Here, given the complete absence of written findings of fact and conclusions of law following a lengthy suppression hearing that was held almost eight months ago, is the proper remedy reversal of Mr. Mills' convictions? (Assignment of Error 5)

C. STATEMENT OF THE CASE

In December 2006, Auburn Police Department detectives arrested Jason Barnes for passing counterfeit United States \$100.00 bills. 10/9/08 RP 39; 10/13/08 RP 23.¹ Mr. Barnes identified appellant Joshua Mills as the person who produced the counterfeit currency. 10/13/08 RP 24; 10/14/08-A RP 14-15. In exchange for leniency, Mr. Barnes agreed to participate in a "buy-bust" operation, in which he arranged to purchase two counterfeit

¹The Verbatim Report of Proceedings consists of seven volumes, two of which include multiple dates with separate pagination, and one of which includes only the October 14, 2008 afternoon session of the jury trial, where the October 14, 2009 morning session is in one of the volumes with multiple dates. The Verbatim Report will be referred to by date, followed by "RP" and the page number, except the October 14, 2009 morning session will be referred to as "10/14/08-A," and the October 14, 2008 afternoon session will be referred to as "10/14/08-B."

\$100.00 bills and methamphetamine from Mr. Mills while under police surveillance. 10/9/08 RP 48.

The operation was conducted at Mr. Barnes' apartment. 10/9/08 RP 49; 10/13/08 RP 28. Two officers hid in the apartment bedroom and several other officers waited in patrol cars in the apartment building parking lot. 10/13/08 RP 29; 10/14/08-A RP 18, 33; 10/15/08-B RP 14. According to Mr. Barnes, Mr. Mills arrived at the apartment and produced the counterfeit bills and methamphetamine from a red canvas bag. 10/14/08-A RP 18-19. After the transaction, the two men went to the parking lot to see Mr. Mills' "new car," Mr. Mills put the red bag in the car trunk, they chatted for a few minutes, and Mr. Mills drove away. 10/14/08-A RP 20-21. Mr. Barnes returned to his apartment and gave the counterfeit money and methamphetamine to the officers. 10/14/08-A RP 37.

The officers in the patrol cars followed Mr. Mills from the parking lot and pulled him over several blocks away. 10/14/08-B RP 70. Mr. Mills was unable to produce identification and he was placed under arrest, ostensibly for failure to have identification, but actually for counterfeiting United States currency and unlawful delivery of methamphetamine. 10/9/08 RP 28. He was searched

and officers found a key fob credit card in pocket his bearing his name and a genuine \$100.00 bill bearing the same serial number as the bills he provided to Mr. Barnes. 10/9/08 RP 73; 1014/08-A RP 49, 89-89; 10/14/08-B RP 42.

Mr. Mills was placed in a patrol car and, over his objection, officers searched the passenger compartment of the car he had been driving. 10/9/08 RP 28, 32. They found two identification cards, a pay stub, a debit card, and a checkbook all bearing the name "Marvin Dibley," two driver licenses bearing the name "Karen Dole," a social security card bearing the name "Karen Gilbert," which was Ms. Dole's maiden name, a savings bond bearing the name "Brittany Dole," in care of her mother, "Karen Dole," a checkbook bearing the name "Ethan Kayler," the vehicle title signed one day previously by "Clarence Fannin" and bearing a signature line for a notary public with "Pierce County" misspelled, a trip permit bearing the name "Joshua Mills" that was not properly filed out, a money order with the payee name obscured and Mr. Mills' name added, a pay sub bearing the name "Raymond Lapointe," two pay stubs bearing the name "Mark Simpson," a prescription card bearing the name "Mark Simpson," and nine "generic gift cards." 10/14/08-B RP 20, 22-28, 31, 33-34, 40.

After waiving his *Miranda*² rights, Mr. Mills admitted to selling methamphetamine and to counterfeiting several \$100.00 bills per week. 10/9/08 RP 63-64, 67-68. He stated the car belonged to his brother and some items in the car belonged to him but some items belonged to his brother. 10/9/08 RP 69-70.

The car was impounded and the officers obtained a search warrant for the vehicle. 10/14/08-A RP 41. In the trunk of the car, officers found an additional two counterfeit \$100.00 bills bearing the same serial number as those recovered from Mr. Barnes, syringes, the red canvas bag containing an identification card in Mr. Mills' name, a revolver, and ammunition. 10/14/08-A RP 48-49, 56-57. They also found blue folder containing a knife, as well as sheets of numbers and expiration dates, items commonly used for credit card fraud. 10/14/08-A RP 62-65, 67-72. In the passenger compartment of the car, officers found receipts for purchases made with a key fob credit card found on Mr. Mills at the time of his arrest. 10/14/08-A RP 85-86. They also found clothes with store tags that corresponded to one of the receipts. 10/14/08-A RP 88.

Mr. Mills was charged by an amended information filed in King County Superior Court with unlawful possession of a firearm,

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

contrary to RCW 9.41.040(1), unlawful delivery of methamphetamine, contrary to RCW 69.50.401(1) and .401(2)(b), two counts of identity theft in the second degree, contrary to RCW 9.35.020(1) and .020(3), and two counts of possession of stolen property in the second degree, contrary to RCW 9A.56.010(1), .140(1), and .160(1)(c). CP 24-26.

Prior to trial, Mr. Mills moved to suppress the evidence obtained pursuant to the warrantless vehicle search incident to his arrest, on the grounds the police acted on information from an unreliable informant and the stop of his vehicle was pretextual. CP 20-23. He also moved to suppress the evidence obtained from the vehicle after it was impounded and a search warrant was issued, on the grounds the warrant was issued in reliance on information from the unreliable informant and from the illegal warrantless search of the vehicle incident to his arrest. CP 17-20.

The trial court ruled the traffic stop was not pretextual, the informant's reliability was sufficiently established, and, therefore, the evidence obtained from the vehicle driven by Mr. Mills was admissible. 10/9/08 RP 100-03. As of this date, no written findings of fact or conclusions of law have been entered.

Mr. Mills also moved to sever the charges of unlawful possession of a firearm and unlawful delivery of methamphetamine, Counts I – II, from the charges of identity theft and possession of stolen property. CP 103-05. The trial court denied the motion on the grounds joinder was not unduly prejudicial to the defense and promoted judicial economy. 10/9/08 RP 11-13.

Mr. Mills further moved to suppress any evidence or reference to counterfeiting as an uncharged bad act. CP 109-10. The State argued the evidence was admissible pursuant to ER 404(b), ER 609, and as *res gestae*, and stated:

[H]e was found with a ton a stolen property in his car, financial information, things of that nature, and the State has to show to the jury beyond a reasonable doubt that he intended to use those items for ill gain, or that he possessed them with the knowledge that they were stolen.

And I think the fact that he is alleged to have been participating in counterfeiting activities is evidence of his intent and is evidence of his knowledge of the other items being stolen or fraudulent as well.

10/9/08 RP 123-24.

The trial court granted Mr. Mills' motion, and ruled:

[A]fter going back and re-reading 404.B [sic] and trying to really explore and balance the issue of whether or not the issue of counterfeiting is more probative than prejudicial, I have to say that I agree with Defense Counsel, that it is highly prejudicial.

I have gone back to even explore a little further in my own mind [the prosecutor's] argument as it being inseparable, or it being utilized to prove intent. And it's a great argument, but I don't quite get there in that I don't think the State could be deprived of the ability to prove the other cases if they couldn't make reference to the counterfeiting.

In addition, I don't believe that the conduct is so inseparable that they could actually not prove all of the charges that are currently pending.

10/9/08 RP 128-29.

In response to the court's ruling, the State moved to amend the information to add one count of forgery of United States currency, in violation of RCW 9A.60.020(1)(a). 10/9/08 RP 133; CP 37-40. Mr. Mills objected to the amendments and, alternatively, moved to sever the new charge of forgery. 10/9/08 RP 135-36. The trial court granted the State's motion to amend the information and denied Mr. Mills' motion to sever. 10/9/08 RP 136.

Mr. Mills' renewed his motion to sever at the conclusion of the evidentiary portion of the jury trial, which the court also denied. 10/15/08 RP 44-46.

The court instructed the jury on the seven counts, as charged, as well as on the offense of possession of methamphetamine, a lesser offense of unlawful delivery of methamphetamine. CP 43-82.

The jury returned guilty verdicts for all seven counts, as charged. CP 95-102.

D. ARGUMENT

1. THE SEARCH OF MR. MILLS' CAR VIOLATED HIS RIGHT TO PRIVACY PROTECTED BY ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION.

After Mr. Mills was arrested and placed into a patrol car, and despite Mr. Mills' clear denial of permission, the police officers conducted a warrantless search of the passenger compartment of the car he was driving. 10/9/08 RP 28, 32. This warrantless search violated Mr. Mills' right to privacy, protected by Article I, section 7 of the Washington Constitution.

a. Article I, section 7 prohibits a warrantless search of a vehicle incident to arrest in the absence of exigent circumstances.

Article I, section 7 of the Washington Constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." It is well-settled that Article I, section 7 provides greater protection than does the Fourth Amendment to the United States Constitution. See, e.g., *State v. White*, 135 Wn.2d 761, 768, 958 P.2d 982 (1998); see also *State v. Morse*, 156 Wn.2d 1, 10, 123 P.3d 832 (2005) ("while under the Fourth Amendment

the focus is on whether the police acted reasonably under the circumstances, under Article I, section 7 we focus on expectations of the people being searched”).

In general, warrantless searches are *per se* unreasonable, in violation of Article I, section 7 of the Washington Constitution.

State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002).

There are, however, a few “jealously and carefully drawn’ exceptions” to the warrant requirement which provide for those cases where the societal costs of obtaining a warrant (such as danger to officers or the risk of loss or destruction of evidence) outweigh the reasons for prior recourse to a neutral magistrate.

Id. (quoting *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984)). These exceptions include exigent circumstances, a search incident to a valid arrest, an inventory search, a plain view search, and *Terry*³ investigative stops. *Id.* at 172.

In *State v. Ringer*, the Washington Supreme Court considered whether Article I, section 7 prohibited a warrantless search of a vehicle where the driver was arrested and secured away from the vehicle. 100 Wn.2d 686, 674 P.2d 1240 (1983). The Court summarized the history of the “search incident to arrest” exception to the warrant requirement, and concluded:

³*Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Based on our understanding of Const. art. 1, § 7, we conclude that, when a lawful arrest is made, the arresting officer may search the person arrested and the area within his immediate control. A warrantless search in this situation is permissible only to remove any weapons the arrestee might seek to use in order to resist arrest or effect an escape and to avoid destruction of evidence by the arrestee of the crime for which he or she is arrested. The right to search incident to arrest “is merely one of those very narrow exceptions to the ‘guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case.’” The exception must be “jealously and carefully drawn”, and must be strictly confined to the necessities of the situation.

100 Wn.2d at 699-700 (internal citations omitted).

However, two and one half years later, in *State v. Stroud*, the Washington Supreme Court reversed itself, overruled the above holding in *Ringer*, and ruled that Article I, section 7 did not prohibit a warrantless vehicle search, including unlocked glove compartment, even where the driver was arrested and secured away from the vehicle. 106 Wn.2d 144, 150, 720 P.2d 436 (1986).

During the arrest process, including the time immediately subsequent to the suspect’s being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant.

Id. at 152.

In so ruling, the Court noted its agreement with the United States Supreme Court decision in *New York v. Belton*, 453 U.S. 454, 460, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), on the need “to draw a clearer line to aid police enforcement, although because of our state’s additional protection of privacy rights we must draw the line differently than did the United States Supreme Court.” *Stroud*, 106 Wn.2d at 151. In *Belton*, the Court ruled that:

[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile

453 U.S. at 460. Thus, *Stroud* followed *Belton* with the exception of locked containers.

However, *Stroud*’s interpretation of *Belton* was recently overruled in *Arizona v. Gant*, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), in which the Court ruled officers may not conduct a warrantless search of a vehicle incident to arrests, except in two circumstances; (1) the arrestee is secured and physically unable to access interior of vehicle, or (2) the officers have a reasonable belief that evidence of the offense of arrest may be found in the vehicle.

i. Arrestee secured. First, *Gant* held:

Belton does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle.

129 S.Ct. at 1714. The Court stressed that many lower courts have wrongly interpreted *Belton* as expanding the authority of officers to conduct warrantless searches, from the authority set forth in its prior decision in *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).⁴ *Id.* at 1719.

To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception – a result clearly incompatible with our statement in *Belton* that it “in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.”

Id. at 1719 (quoting *Belton*, 453 U.S. at 460).

In abrogating *Stroud's* interpretation of *Belton*, the Court necessarily abrogated the ruling in *Stroud*. A state constitution may provide broader protections of personal liberties, it may not be less protective than the federal constitution. *State v. Simpson*, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980). Thus, to the extent that *Gant* specifically rejected a broad reading of *Belton*, *Stroud's*

⁴In *Chimel*, the Court held that a search incident to arrest is limited to the arrestee and the area within the arrestee's “immediate control” or the area into which the arrestee might reach to grab a weapon or to destroy evidence.

reliance on a broad reading of *Belton* to overrule *Ringer* is no longer viable.

With *Stroud* abrogated, at a minimum, the rule in *Ringer* is revived, that is, Article I, section 7 prohibits a warrantless search incident to arrest of a vehicle where the arrestee is secured and away from the vehicle. This rule has been adopted by other jurisdictions that, like Washington, have strong privacy protections embedded in their state constitutions. See *State v. Rowell*, 144 N.M. 371, 377, 188 P.3d 95 (2008); *State v. Bauder*, 181 Vt. 392, 401, 924 A.2d 38 (2007); *State v. Eckel*, 185 N.J. 523, 539, 888 A.2d 1266 (2006); *Camacho v. State*, 119 Nev. 395, 400, 75 P.3d 370 (2003).

ii. Reasonable belief evidence of offense of arrest might be in vehicle. Second, the *Gant* Court held:

Although it does not follow from *Chimel*, we also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.

Id. at 1719. The Court provided no rationale for the second exception, stating only that it was justified by “circumstances unique to the automobile context.” 129 S.Ct. at 1714. It would therefore appear that the genesis of this exception lies in the so-

called “automobile exception” under the Fourth Amendment, which allows for a warrantless search of a vehicle when there is probable cause to believe the vehicle contains evidence of a crime “because the vehicle can be quickly moved.” *Carroll v. United States*, 267 U.S. 132, 153, 45 S.Ct. 280, 69 L.Ed.2d 543 (1925); accord *United States v. Ross*, 456 U.S. 798, 809, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) (“[T]he exception to the warrant requirement established in *Carroll* -the scope of which we consider in this case- applies only to searches of vehicles that are supported by probable cause. In this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained.”).

The *Gant* opinion states the second exception is “[c]onsistent with the holding in *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004) and following the suggestion in Justice Scalia’s opinion concurring in the judgment in that case.” 129 S.Ct. at 1714. In his concurrence in *Thornton*, Justice Scalia argued that warrantless automobile searches incident to arrest are justifiable simply because the vehicle might contain evidence relevant to the crime of arrest. *Thornton*, 541 U.S. at 629. Justice Scalia based this argument on precedents pre-

dating *Chimel* that upheld searches incident to arrest based on a “more general interest in gathering evidence relevant to the crime for which the suspect has been arrested.” *Id.* (citing *United States v. Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed.2d 653 (1950); *Harris v. United States*, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed.2d 1399 (1947); *Marron v. United States*, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed.2d 231 (1927); *Agnello v. United States*, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925)). Justice Scalia wrote:

The fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of *his* crime from general rummaging. Moreover, it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended.

Id. at 630 (emphasis in original).

But the Washington Supreme Court, under Article I, section 7, rejected the automobile exception in *Ringer, supra*. *Ringer* was overruled in part by *Stroud*, but only insofar as it applied to searches incident to arrest; the rejection of the automobile exception remains good law. Thus, Article I, section 7 does not allow a warrantless search without other exigencies.

Other jurisdictions that, like Washington, have strong constitutional privacy protections have rejected both *Belton* and the second *Gant* exception. See, e.g., *Eckel*, 185 N.J. at 540 (“[A] warrantless search of an automobile based not on probable cause but solely on the arrest of a person unable to endanger the police or destroy evidence cannot be justified under any exception to the warrant requirement and is unreasonable.”); *Camacho*, 119 Nev. at 400 (“[P]olice may not conduct a warrantless search of a vehicle, even if police may have probable cause to believe that contraband is located therein, absent exigent circumstances.”); *Commonwealth v. White*, 543 Pa. 45, 57, 669 A.2d 896 (1995) (“[T]here is no justifiable search incident to arrest under the Pennsylvania Constitution save for the search of the person and the immediate area which the person occupies during his custody.”).

In *Bauder*, the Vermont Supreme Court rejected the second exception in *Gant*, and characterized the exception as:

A variation of *Belton* ... based on a perceived need to authorize routine warrantless searches absent any particularized showing that the delay attendant upon obtaining a warrant is impracticable under the circumstances. ... [S]uch an approach is fundamentally at odds with [the Vermont Constitution], under which warrantless searches are presumptively unconstitutional absent a showing of specific, exigent

circumstances justifying circumvention of the normal judicial process.

181 Vt. at 402-03 (internal quotations omitted). The *Bauder* court noted that an arrest does not automatically provide probable cause that evidence of a crime is present and that the “related to the crime” standard is so vague as to undercut the asserted value of the bright-line rule. *Id.* at 403.

This reasoning is persuasive. Article I, section 7 does not support the *Gant* blanket exception allowing a warrantless search for evidence of the crime for which the person is arrested. Once an arrestee is secured, officers can always obtain a warrant if there is probable cause to believe the vehicle contains relevant evidence, in accordance with this state’s strong preference for the “authority of law’ provided by a warrant. See *State v. Miles*, 160 Wn.2d 236, 247, 156 P.3d 864 (2007) (“As a general principle, our cases have recognized that a search warrant or subpoena must be issued by a neutral magistrate to satisfy the authority of law requirement.”). Article I, section 7 supports warrantless searches only under true exigencies, such as the rare instance wherein the arrestee is not secured, there is a reasonable threat to officer safety, or there is a reasonable likelihood of destruction of evidence.

b. Article I, section 7 does not support the so-called “good faith” and “inevitable discovery” exceptions to the exclusionary rule. Washington courts interpreting Article I, section 7 have “long declined to create ‘good faith’ exceptions to the exclusionary rule in cases in which warrantless searches were based on a reasonable belief of officers that they were acting in conformity with one of the recognized exceptions to the warrant requirement.” *State v. Morse*, 156 Wn.2d at 9-10; *see also, e.g., State v. Eisfeldt*, 163 Wn.2d 628, 185 P.3d 580 (2008); *State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993). As to “inevitable discovery,” the Washington Supreme Court has consistently stated that this issue has not yet been decided under Article I, section 7. *See, e.g., State v. Gaines*, 154 Wn.2d 711, 716 n.5, 116 P.3d 993 (2005); *State v. O’Neill*, 148 Wn.2d 564, 592 n.11, 62 P.3d 489 (2003).

c. No exigent circumstances excused the officers from obtaining a telephonic search warrant for the vehicle Mr. Mills was driving at the time of his arrest. The “exigent circumstances” exception allows a warrantless search where officers do not have adequate time to obtain a warrant. *State v. Bessestte*, 105 Wn. App. 793, 798, 21 P.3d 318 (2001). “Exigent circumstances”

involve a true emergency, *i.e.*, “an immediate major crisis,’ requiring swift action to prevent imminent danger to life, forestall the imminent escape of a suspect, or the destruction of evidence.” *State v. Hinshaw*, 149 Wn. App. 747, 753-54, 205 P.3d 178 (2009) (quoting *Dorman v. United States*, 140 U.S.App. D.C. 313, 317, 435 F.2d 385 (1970)). “Police bear the heavy burden of showing that exigent circumstances necessitated immediate police action,” and “must show why it was impractical, or unsafe, to take the time to get a warrant.” *Hinshaw*, 149 Wn. App. at 754. Where officers fail to show that a warrant could not be obtained before evidence dissipated, the exigent circumstances exception does not apply. *Id.* at 756.

Here, the exigent circumstances exception does not apply because Mr. Mills was arrested and secured away from the car and there was no showing that it would have been unsafe or impractical to obtain a warrant or that evidence in the car would dissipate before a warrant could be obtained.

d. The proper remedy is suppression of the evidence obtained from the warrantless search of the car driven by Mr. Mills. Because Article I, section 7 provides greater protections of personal privacy than does the Fourth Amendment, this Court should hold

that only the first *Gant* exception exists under our state constitution, that is, officers may not conduct a warrantless vehicle search incident to arrest absent exigent circumstances. If the arrestee is secured and not within reaching distance of the vehicle or items of evidentiary interest, the officers must obtain a warrant. This was the rule under *Ringer* and should again be the rule now that *Stroud* has been discredited.

Evidence obtained in violation of an individual's privacy rights must be suppressed. *State v. Mendez*, 137 Wn.2d 208, 226, 970 P.2d 722 (1999). Here, in the absence of exigent circumstances, the warrantless search of the car driven by Mr. Mills violated Mr. Mills' right to privacy under Article I, section 7. Reversal is required.

2. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR. MILLS' MOTION TO SEVER THE PROSECUTIONS FOR FIREARM AND DRUG VIOLATIONS FROM THE PROSECUTIONS FOR IDENTITY THEFT AND POSSESSION OF STOLEN PROPERTY AND TO SEVER THE FORGERY PROSECUTION FROM ALL OTHER JOINED PROSECUTIONS.

a. Severance is required where it will promote a fair determination of guilt or innocence of each offense. A criminal defendant has the constitutional right to a fair trial. U.S. Const. amend. XIV; Wash. Const. art. I, sec. 3. To protect this right, the court rules governing severance, CrR 4.4(b), and joinder, CrR 4.3, "are based on the same underlying principle, that the defendant receive a fair trial untainted by undue prejudice." *State v. Bryant*, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998).

CrR 4.4(b)⁵ provides that the court "shall" sever counts when severance will promote a fair determination of the defendant's guilt or innocence on each offense. The term "shall" creates a mandatory duty. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d

⁵CrR 4.4(b) provides:

The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.

1040 (1994). A trial court's decision on a motion to sever is a question of law and reviewed *de novo* for manifest abuse of discretion. *Bryant*, 89 Wn. App. at 864.

Although CrR 4.3⁶ permits joinder of offenses for purposes of trial, “[a] risk of prejudice, either from evidentiary spillover or transference of guilt, inheres in any joinder of offenses or defendants.” *United States v. Sutton*, 605 F.2d 260, 271 (6th Cir. 1979). This risk is tolerated for purposes of judicial economy, but only so long as prejudice does not result. *Drew v. United States*, 331 F.2d 85, 88 (D.C. Cir. 1984).

To the extent that the distinction between review of joinder and severance issues may have become blurred, we believe it is because the potential for prejudice must be considered in determining, in advance of trial, whether joinder is proper as a matter of law, and because actual prejudice must be considered in determining, at the appellate level, whether joinder was proper as a matter of law.

Bryant, 89 Wn. App. at 865.

⁶CrR 4.3 provides:

(a) Joinder of Offenses. Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:

- (1) Are of the same or similar character, even if not part of a single scheme or plan; or
- (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Bryant, 89 Wn. App. at 865.

While the decision to grant or deny a motion to sever is discretionary, Washington courts have recognized that joinder is inherently prejudicial. *State v. Smith*, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968), *vacated in part*, 408 U.S. 934, 92 S.Ct. 2852, 33 L.Ed.2d 747 (1972), *overruled on other grounds*, *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975). “[E]ven if joinder is legally permissible, the trial court should not join offenses if prosecution of all charges in a single trial would prejudice the defendant.” *Bryant*, 89 Wn. App. at 864.

“Joinder of counts should never be used in such a way as to unduly embarrass or prejudice a defendant or deny him a substantial right.” *State v. Russell*, 125 Wn.2d 24, 62, 882 P.2d 747 (1994) (*citing Smith*, 74 Wn.2d at 754-55). A defendant may be prejudiced if he is embarrassed or confounded in presenting separate defenses, or if a single trial invites the jury to cumulate evidence to infer a criminal disposition or to find guilt when, if considered separately, it would not so find. *Id.* at 62; *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990) (*quoting Smith*, 74 Wn.2d at 755). When determining whether the inherent prejudice of a single prosecution for multiple offenses requires

factors"⁷: (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) if an instruction can properly guide the jury to consider the evidence of each count; and (4) the cross-admissibility of evidence of the counts even if the offenses are not joined. *Russell*, 125 Wn.2d at 63; *accord State v. MacDonald*, 122 Wn. App. 804, 814-15, 95 P.3d 1248 (2004).

b. The joinder of the firearm and drug violations with the identity theft and possession of stolen property charges was in error. The trial court erroneously failed to consider the *Watkins* factors when ruling on Mr. Mills' first motion to sever the charges. Although the court noted that the jury would be instructed to consider each count separately, it apparently considered only whether joinder would be unduly prejudicial.

The question of prejudice is one that we always deal with in trial, and the real question is whether it's unduly prejudicial, because almost anything can fit into this broad category of prejudice.

10/9/08 RP 11.

Prior to the addition of the forgery charge, the charges logically should have been severed into two separate prosecutions; one trial for the charges of unlawful possession of a firearm and

⁷*State v. Watkins*, 53 Wn. App. 264, 269, 766 P.2d 484 (1989).

one trial for the charges of unlawful possession of a firearm and unlawful delivery of methamphetamine, and a separate trial for the charges of identity theft and possession of stolen property. The inherent prejudice of joinder of all six charges was not negated or even mitigated by the strength of the State's evidence, clarity of defenses, jury instructions, or cross-admissibility of evidence.

i. Strength of evidence. In support of his motion to sever the firearm and drugs charges from the identity theft and possession of stolen property charges, Mr. Mills pointed to the disparity of the evidence to support the charges, especially the two counts of identity theft. 10/9/08 RP 6. Specifically, Mr. Mills noted that the car he was driving was not registered in his name, he had possession of the car for no more than one day, and there was no evidence of intent to obtain any credit or services based on the names of the alleged victims. CP 105. On the other hand, Mr. Mills admitted to selling methamphetamine and to counterfeiting United States currency. 10/9/08 RP 67-68.

The trial court erroneously did not address the disparity of evidence for the various charges whatsoever.

ii. Clarity of defenses. Mr. Mills' primary theories of the case were the lack of evidence to establish the

separate offenses and the lack of reliability of the confidential informant. For the firearm offense, he specifically argued that the evidence established he was not the owner of the car in which the weapon was found, he had possession of the car for a very short period of time, and the car was relatively old, creating a reasonable doubt as to whether he had constructive possession of the weapon or was even aware of its existence in the car trunk. 10/15/08 RP 94-95.

For the identity theft and possession of stolen property charges, Mr. Mills warned the jury to distinguish between the evidence located inside the car related to identity theft and possession of stolen property, from the evidence located in the car trunk related to the firearm and drug offenses. 10/15/08 RP 101-02. By contrast, the State specifically urged the jury to consider evidence of all charges as a whole, as well as evidence of uncharged bad acts, to prove a globalized criminal intent, rather than to determine the sufficiency of evidence for each separate charge.

This is all evidence, and simply the fact that he didn't just have one person's stolen items on him at that time, and he didn't just have three. It wasn't just Ms. Dole's, Mr. Kayler's and Mr. Dibley's items.

If you recall, they found pay stub belonging to other people; they found a medical insurance card belonging to someone else.

All of those things taken together tell you without a doubt the Defendant did not have an innocent intent with any of these items.

10/15/08 RP 86.

Again, the trial court erroneously did not address the clarity of defenses, even though the State invited the jury not to compartmentalize the evidence for any of the seven charges.

iii. Court's instructions. The trial court instructed the jury as follows:

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 54 (Instruction No. 8). This instruction is identical to the Washington Pattern Jury Instruction 3.01. However, in *State v. Bradford*, 60 Wn. App. 857, 860-61, 808 P.2d 174 (1991), this Court ruled the above pattern instruction did not sufficiently limit the jury's consideration of evidence for one drug charge as proof of an element of a second drug charge. This Court noted:

It may be that some modification of the instruction consistent with this opinion is in order. We note that the Washington Supreme Court Committee on Jury Instructions modified WPIC 3.01 to delete the phrase "as if it were a separate trial" from the second

contemporaneous discovery. This commonality is insufficient to overcome the inherent prejudice of joining otherwise unrelated offenses.

d. The joinder of the added charge of forgery was also in error. Although the State did not initially charge Mr. Mills with forgery, it proposed to introduce evidence of counterfeit United States currency under the guise of *res gestae*. 10/9/08 RP 120, 122, 124, 125. The trial court disagreed, and ruled:

[A]fter going back and re-reading 404.B [sic] and trying to really explore and balance the issue of whether or not the issue of counterfeiting is more probative than prejudicial, I have to say that I agree with Defense Counsel, that it is highly prejudicial.

I have gone back to even explore a little further in my own mind [the prosecutor's] argument as it being inseparable, or it being utilized to prove intent. And it's a great argument, but I don't quite get there in that I don't think the State could be deprived of the ability to prove the other cases if they couldn't make reference to the counterfeiting.

In addition, I don't believe that the conduct is so inseparable that they could actually not prove all of the charges that are currently pending.

10/9/08 RP 128-29.

Following this ruling, the trial court granted the State's motion to amend the information to add a count of forgery for United States currency. 10/9/08 RP 134, 136. Mr. Mills'

sentence of the instruction to eliminate confusion. Similarly, some additional language informing the jury that in the absence of a limiting instruction, all evidence is applicable on all counts, providing it meets relevance requirements, as needed.

Id. at 862.

Here, too, although Instruction No. 8 was a proper statement of the law, the instruction did not sufficiently mitigate the prejudice of joinder of the various offenses. The instruction simply prohibited the jury from allowing its verdict on one count to dictate its verdict on the other counts. It did not direct the jury to segregate the evidence to determine whether it supported each count individually. Thus, the instruction left the jury to follow the State's invitation to lump all the evidence together to impute criminal intent, regardless of the strength of evidence to support each separate offense.

The instruction did not mitigate the prejudice to Mr. Mills.

iv. Cross-admissibility. The State argued the different counts were "factually identical" and cross-admissible pursuant to ER 404(b).⁸ 10/9/08 RP 8; CP 31. This was incorrect.

⁸ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,

First, the facts necessary to establish identity theft and possession of stolen property are obviously very different from those facts necessary to establish unlawful possession of a firearm and unlawful delivery of methamphetamine. Second, the evidence was not cross-admissible. For example, evidence of Mr. Mills' prior conviction for a serious offense would not have been admissible at a trial for any of the charges other than the firearm offense. Similarly, evidence of a firearm in the trunk was entirely irrelevant to whether Mr. Mills possessed stolen property or intended to commit identity theft.

The primary reason the State sought to join the charges was to demonstrate Mr. Mills' alleged criminal propensity. In fact, the State invited it to do so in rebuttal argument, when the State urged the jury to consider all the evidence as proof of criminal intent and knowledge:

And although you are to assess each count individually, the evidence itself should be viewed as a whole, because all of those items that were stolen, all of those access devices, all of those labels, all of those things go to show you exactly what the defendant's intent was, and exactly what his knowledge was when it came to those items.

10/15/08 RP 112.

preparation, plan, knowledge, identity, or absence of mistake or accident.

Prior to admitting evidence of other wrongs, a court must:

(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (citing *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995); accord *State v. Foxhaven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

This analysis must occur on the record. *State v.*

Everybodytalksabout, 145 Wn.2d 456, 465, 39 P.3d 294 (2002).

Any doubt regarding admissibility must be resolved in favor of the defendant. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986); *State v. Wade*, 98 Wn. App. 328, 334, 989 P.2d 576 (1999).

Here, the trial court did not address the issue of cross-admissibility of evidence and did not conduct an ER 404(b) analysis on the record. The court simply concluded that the charges should be joined for judicial economy. "I don't know what the details are, but that certainly is going to come up. But I would seek for the purposes of judicial economy either the same witnesses, the same individuals, and it makes sense to have these tried together."

10/9/08 RP 13.

By contrast, in *Russell*, the defendant moved to sever two of three counts of murder in the first degree, where each offense occurred at a different time and place. 125 Wn.2d at 62. In determining the cross-admissibility of the evidence, the trial court identified the purpose for which the evidence would be admissible under ER 404(b), identified the relevance of this purpose, and set forth its analysis in written findings and conclusions. 125 Wn.2d at 66-67. The Washington Supreme Court affirmed this reasoning and concluded the trial court properly balanced the resulting prejudice with the relevance. *Id.* at 66-68.

The trial court erroneously failed to address the cross-admissibility of the evidence or to conduct an on-the-record balancing of the probative value with the prejudicial effect.

Severance was required.

c. Evidence of the multiple offenses was not admissible in a single trial under the *res gestae* exception to ER 404(b). The State also argued all the evidence was admissible as *res gestae* for all the charges. 10/9/08 RP 8, 120, 122, 124, 125; 10/14/08 RP 118-19; 10/15/08 RP 86. The narrow *res gestae* or “same transaction” exception to ER 404(b) authorizes admission of evidence of other crimes or bad acts to complete the story of a

crime or to provide the immediate context for events close in time and place to the charged crime. *State v. Mutchler*, 53 Wn. App. 898, 901, 771 P.2d 1168 (1989). Each act must be “a piece of the mosaic necessarily admitted in order that a complete picture [is] depicted for the jury.” *State v. Powell*, 126 Wn.2d 254, 263, 893 P.2d 615 (1995).

Commentators have cautioned that the *res gestae* exception should be narrowly applied to avoid abusive misuse. See 22 C. Wright and K. Graham, *Federal Practice and Procedure* § 5329 at 447, 449-50 (the “inseparable crimes” doctrine “became completely perverted when courts began to use the infamous tag ‘*res gestae*’ to describe the rule”); 1 Wigmore, *Evidence* § 218 at 320-21 (3d Ed. 1940) (the “very looseness and obscurity” of the phrase *res gestae* “lend too many opportunities for its abuse”).

Here, the evidence of a firearm and methamphetamine did nothing to “complete” any “picture” regarding identity theft or possession of stolen property. Nor did the evidence of a firearm and methamphetamine establish any *mens rea* for the charges of identity theft and possession of stolen property.

The only commonality between those two sets of crimes was the physical proximity of the evidence for the offenses and its

immediately moved to sever the forgery, which the court denied.

10/9/08 RP 135-137. This was in error.

The court's initial ruling excluding evidence relating to counterfeit United States currency was the result of its ER 404(b) analysis. Inexplicably, the court did not conduct the same ER 404(b) analysis after the State added the charge of forgery. Yet, this analysis is required pursuant to the fourth *Watkins* factor, cross-admissibility.

The evidence pertaining to the charges of identity theft and possession of stolen property was completely irrelevant to the charge of forgery of United States currency. In fact, absolutely no evidence pertinent to the forgery charge was located in the car or elsewhere, other than the two bills that were recovered from the confidential informant.

The trial court erroneously failed to sever the forgery charge, even though it found the evidence of forgery was separable from the other charges and the prejudicial effect of the evidence outweighed its probative value.

e. Reversal is the proper remedy. Where charges are improperly joined for trial, a defendant is denied his constitutional due process right to a fair trial. *Adamson v.*

57, 67 S. Ct. 1672, 91 L.Ed.2d 1903 (1947). "If joinder was not proper but offenses were consolidated in one trial, the convictions must be reversed unless the error is harmless." *Bryant*, 89 Wn. App. at 864. Wrongful admission of evidence is harmless only "if the evidence is of minor significance in reference to the evidence as a whole." *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

Here, the trial court abused its discretion in denying Mr. Mills' severance motion by failing to adequately consider all four of the *Watkins* factors. The error was not harmless. For example, Mr. Mills stipulated to a prior conviction for a serious offense, a necessary element of the firearm offense. CP 36. Obviously, this highly prejudicial evidence would not have been admissible if the firearm violation had been properly severed. Similarly, under the guise of *res gestae*, the State introduced a evidence of multiple offenses which would not have been cross-admissible had the court ordered separate trials.

The proper remedy is reversal and remand for four separate trials, forgery, identity theft and possession of stolen property, unlawful possession of a firearm, and unlawful delivery of methamphetamine.

2. THE TRIAL COURT ERRONEOUSLY ADMITTED HIGHLY PREJUDICIAL EVIDENCE OF UNCHARGED BAD ACTS WITHOUT WEIGHING ITS PROBATIVE VALUE AGAINST ITS CLEAR PREJUDICIAL EFFECT.

a. The admission of evidence of uncharged bad acts

was in error. Over defense objection, the trial court admitted evidence of a key chain credit card, items purchased with that credit card, blank credit cards and gift cards, a so-called “fraud folder,” as well as a money order, pay stub, and prescription in another person’s name, even though Mr. Mills was not charged with any criminal activity relating to this evidence. 10/14/08-A RP 85-90; 10/14/08-B RP 42, 64-72. However, the trial court did not conduct the requisite balancing of probative value against prejudicial effect on the record, and the evidence was not admissible pursuant to the *res gestae* exception to ER 404(b). Rather, the evidence was admitted simply to demonstrate Mr. Mills’ alleged criminal propensity. This was in error.

i. Probative value and prejudicial effect.

Pursuant to ER 404(b), uncharged criminal conduct may be admitted into evidence only when it is materially relevant to an essential element of the charged crime and its probative value

outweighs its prejudicial effect. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The court's analysis is the same as when considering a severance motion, that is, the trial court must: (1) find the alleged misconduct occurred by a preponderance of the evidence; (2) identify the purpose for admission; (3) determine whether the evidence is relevant to prove an element of a charged offense; and (4) weigh the probative value against the prejudicial effect. *Foxhaven*, 161 Wn.2d at 175; *Thang*, 145 Wn.2d at 642. This analysis must be conducted on the record and doubtful cases must be resolved in favor of the defendant. *Smith*, 106 Wn.2d at 776. Without such balancing and a conscious determination made by the court on the record, the evidence is not properly admitted." *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981).

Here, rather than conduct an analysis on the record, the trial court admitted the evidence of uncharged bad acts over Mr. Mills' objection based on the State's assertion that these items were relevant to establish the intent element of identity theft. 10/14/08-A 118-19. There was no evidence Mr. Mills committed any crime with the key chain credit card, yet the clear inference was that he fraudulently obtained items with that card. Similarly, he was not charged with improperly possessing two pay stubs and a

prescription bearing the name “Mark Simpson,” yet the clear inference was that Mr. Mills was “up to no good.” This was propensity evidence, pure and simple.

“Regardless of whether the evidence is relevant or probative, in no case may evidence be admitted to prove character of the accused in order to show that he acted in conformity therewith.” *State v. LeFever*, 102 Wn.2d 777, 782, 690 P.2d 574 (1984); accord *Saltarelli*, 98 Wn.2d at 362. The trial court erroneously admitted the evidence of uncharged bad acts to establish Mr. Mills’ criminal intent.

ii. Res gestae. Although the State frequently invoked the *res gestae* doctrine, the trial court never ruled the evidence of uncharged bad acts was admissible as such. As stated above, the *res gestae* exception to ER 404(b) authorizes admission of evidence of other crimes or bad acts to complete the story of a crime or to provide the context for events close in time and place. *Powell*, 126 Wn.2d at 254; *Mutchler*, 53 Wn. App. at 901. None of the evidence of uncharged bad acts had any bearing on the charges of unlawful possession of a firearm or unlawful delivery of methamphetamine. As to the forgery charge, the trial

court specifically ruled that evidence of counterfeiting was separable from the other charges. 10/9/08 RP 128-29.

In *State v. Trickler*, officers searched the defendant's room for evidence of property stolen from Thomas Wiley and discovered personal property belonging to Mr. Wiley, as well as a credit card bearing the name "Kathleen D. Nunez" and a firearm. 106 Wn. App. 727, 730, 25 P.3d 445 (2001). The defendant was charged with unlawful possession of a firearm and possession of a stolen credit card belonging to Ms. Nunez. *Id.* at 733. At trial, the State introduced evidence of property stolen from Mr. Wiley, as well as unrelated stolen checkbooks and credit cards that were found in the defendant's possession. On appeal, the court found the evidence was improperly admitted, stating:

ER 404(b) is meant to prohibit the State from attempting to use evidence of bad acts in order to prove the propensity of the defendant to commit the same type of bad act. In theory, the State probably introduced evidence of the allegedly stolen evidence (for which Mr. Trickler was not charged) in order to give the jury a complete picture of the events leading to the discovery of the stolen credit card. In practice, however, by allowing the jury to consider evidence that Mr. Trickler was in possession of a plethora of other allegedly stolen items in order for the State to prove that Mr. Trickler must have known that the credit card was also stolen, the court violated the purpose of ER 404(b). After hearing the witnesses' testimony and seeing evidence of 16 pieces of stolen

property, the jury was left to conclude that Mr. Trickler is a thief.

Id. at 734.

So too here, the evidence of uncharged bad acts was not admissible pursuant to the *res gestae* doctrine.

b. Reversal is the proper remedy. The trial court's decision regarding admission of evidence of uncharged bad acts is reviewed for abuse of discretion. *Trickler*, 106 Wn. App. at 732. Here, there was absolutely no reason to admit evidence that implied Mr. Mills committed multiple acts of possession of stolen property and identity theft simply to prove he had the propensity to commit the offenses with which he was actually charged. Reversal is required. *Id.*

4. THE TRIAL COURT FAILED TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY CrR 3.6, IN VIOLATION OF MR. MILLS' RIGHT TO A MEANINGFUL APPEAL.

CrR 3.6(b)⁹ provides that a court "shall" enter written findings of fact and conclusions of law following an evidentiary hearing to resolve a motion to suppress evidence. Again, the term "shall" is

⁹CrR 3.6(b) provides:

If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

presumptively imperative and creates a mandatory duty. *Krall*, 125 Wn.2d at 148; accord RAP 1.2(b) (“‘Should’ is used when referring to an act a party or counsel for a party is under an obligation to perform. The court will ordinarily impose sanctions if the act is not done within the time or in the manner specified. The word ‘must’ is used in place of ‘should’ if extending the time within which the act must be done is subject to the severe test under [RAP] 18.8(b) or to emphasize failure to perform the act in a timely way may result in more severe than usual sanctions.”).

Written findings and conclusions are necessary to enable a meaningful review of questions presented on appeal. *State v. Head*, 136 Wn.2d 619, 623-24, 964 P.2d 1187 (1998); *State v. Alvarez*, 128 Wn.2d 1, 16, 904 P.2d 754 (1995). An oral ruling has no binding effect unless expressly incorporated into a final written judgment.

A trial court’s oral opinion and memorandum opinion are no more than oral expressions of the court’s informal opinion at the time rendered. An oral opinion has “no final or binding effect unless formally incorporated into the findings, conclusions and judgment.

Head, 136 Wn.2d at 622 (citations omitted), quoting *State v. Dailey*, 93 Wn.2d 454, 458-59, 610 P.2d 357 (1980). The absence of

findings and conclusions is interpreted as a finding against the party with the burden of proof. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

Where the lack of written findings and conclusions prejudices a defendant's right to appeal, the proper remedy is reversal. *Head*, 136 Wn.2d at 624; accord *State v. Witherspoon*, 60 Wn. App. 569, 572, 805 P.2d 248 (1991) (late entry of written findings and conclusions violates appearance of fairness and requires reversal where remand is inadequate remedy due to lengthy delay and defendant's continued incarceration).

Here, Mr. Mills moved to suppress evidence obtained following his arrest on the present charges, based on insufficient evidence the informant had a basis of knowledge or was credible. CP 15-23. Following testimony and argument, the trial court denied the motion in a brief oral ruling that did not include a finding that Mr. Mills was arrested prior to the search, did not specify the permissible parameters for the warrantless search of the passenger compartment of the vehicle, and did not adequately resolve material, disputed evidence. 10/9/08 RP 100-01. In light of the deficiencies of the oral ruling, permitting the prosecutor to draft findings and conclusions at this late date would inappropriately

allow the State to tailor the findings so as to bolster the court's inadequate legal analysis based on issues presented in Mr. Mills' appellate brief.

The complete absence of written findings and conclusions prevents a meaningful appeal of the court's ruling that was vague and did not resolve material factual and legal issues. At this time, during the appellate process and almost eight months after the hearing, it would be unfair to remand for the State or the court to correct errors or inadequacies from the pretrial hearing. The resulting prejudice requires reversal. *Witherspoon*, 60 Wn. App. at 572.

E. CONCLUSION

The trial court erred in failing to sever the charges of unlawful possession of a firearm and unlawful delivery of methamphetamine from the charges of identity theft and possession of stolen property, and in failing to sever the added charge of forgery from the original charges. The court further erred in admitting evidence of uncharged bad acts to establish Mr. Mills' propensity to commit the crimes charged. The court also erred in admitted evidence obtained from a warrantless search of the car Mr. Mills was driving when he was arrested and secured away from

the car. Finally, the court erred in failing to enter findings of fact and conclusions of law following the suppression hearing. For the foregoing reasons, Mr. Mills respectfully requests this Court reverse his convictions for unlawful possession of a firearm, unlawful delivery of methamphetamine, possession of stolen property, identity theft, and forgery.

DATED this 13th day of July 2009.

Respectfully submitted,

Sarah M. Hrobsky by Ann K. Neal
SARAH M. HROBSKY (12352) #7780
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 62732-5-I
v.)	
)	
JOSHUA MILLS,)	
)	
Appellant.)	

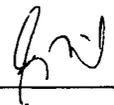
DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF JULY, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
APPELLATE UNIT	()	HAND DELIVERY
KING COUNTY COURTHOUSE	()	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

<input checked="" type="checkbox"/> JOSHUA MILLS	(X)	U.S. MAIL
736205	()	HAND DELIVERY
AIRWAY HEIGHTS CORRECTIONS CENTER	()	_____
PO BOX 2049		
AIRWAY HEIGHTS, WA 99001		

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF JULY, 2009.

X _____ 

FILED
 COURT OF APPEALS
 STATE OF WASHINGTON
 2009 JUL 13 PM 4:52

Washington Appellate Project
 701 Melbourne Tower
 1511 Third Avenue
 Seattle, WA 98101
 Phone (206) 587-2711
 Fax (206) 587-2710