NO. 43244-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

FRANCISCO MILLAN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Thomas P. Larkin

No. 07-1-01782-0

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Federal Cases and Other Jurisdictions

Rules and Regulations

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court's unchallenged findings are verities on appeal?

2. Whether sufficient evidence supports the challenged finding no. 10, so that it too is a verity on appeal?

3. Whether the trial court properly denied the motion to suppress evidence where exigent circumstances and the officer's community caretaking function supported the warrantless seizure of the gun in the back seat of the car?

4. Whether even if this court were to hold the denial of the suppression motion was error, such error was harmless where the fact the officer observed the gun in the car prior to seizing it provided significant independent evidence of the defendant's guilt?

B. STATEMENT OF THE CASE.

1. Procedure

On April 2, 2007 the State filed an information charging the defendant, Francisco Millan with: Count I, Unlawful Possession of a Firearm in the First Degree; Count II, Driving While Suspended or Revoked in the First Degree. CP 1-2.

On October 29, 2007 the defendant entered a plea of guilty to Count II only. CP 142-45 (Statement of Defendant on Plea of Guilty, filed

10-29-2007). The case commenced to jury trial that same day. CP 147-52 Memorandum of Journal Entry, filed 11-01-07). On November 1, 2007 the jury returned a verdict finding the defendant guilty of unlawful possession of a firearm in the first degree as charged in Count I. CP 146 (Verdict Form, filed 11-01-07).

On December 7, 2007 the court sentenced the defendant to 42 months of incarceration (concurrent with his sentence on another case). CP 3-14.

The defendant appealed. While his appeal was pending, the U.S. Supreme court issued its opinion in ***Arizona v. Gant***. Although he had not sought to suppress the State's evidence prior to trial, based on the court's ruling in ***Arizona v. Gant***, he raised the issue for the first time on appeal. The Washington Supreme court held that in light of the significant change in the law represented by ***Gant*** and its Washington progeny, Millan was entitled to raise the suppression issue for the first time on appeal where they case was not yet final. ***State v. Robinson***, 171 Wn.2d 292, 253 P.3d 84 (2011). The court therefore remanded the matter to the trial court for a hearing on whether evidence obtained from Millan's vehicle should have been suppressed. ***Robinson***, 171 Wn.2d at 307-08.

On January 4, 2012 the trial court conducted a suppression hearing, in which it took testimony, but also considered the facts from the trial.

6RP. The court denied the motion to suppress evidence, holding that the evidence was admissible. CP 135-137.

Millan timely filed a notice of appeal. CP 138.

2. Facts

a. Facts at January 4, 2012 Suppression Hearing

The following facts are taken from the court's findings and conclusions and include the court's handwritten additions and modifications. *See* CP 135-37.

THE UNDISPUTED FACTS

1. On April 1st, 2007, Officers Caber and Shipp responded to a 911 call from a citizen.
2. The citizen reported that there was an ongoing domestic violence incident in a car that the citizen was following.
3. The officers pulled over the car.
4. The female was visibly upset and crying.
5. The Officers contacted the reporting party who stated that the male, identified as the defendant, had hit the female as the car was traveling on the roadway.
6. The Officers arrested the defendant for the domestic violence assault. And Driving while license suspended.
7. The car was going to be released to the female victim.
8. The officers searched the driver's side area.
9. The Officers observed a firearm through the window from the outside of the car on the floorboard behind the driver's seat.
10. The officers used a flashlight.
11. The firearm was secured by the officer.
12. A subsequent records check revealed that the defendant was a convicted felon.
13. The officers' testimony was credible.

THE DISPUTED FACTS

There are no disputed facts.

CONCLUSIONS OF LAW
REASONS FOR ADMISSIBILITY OR INADMISSIBILITY OF THE EVIDENCE

1. The contact was justified.
2. The Officers could rely on the information provided from the citizen 911 caller.
3. The detention and the arrest for domestic violence assault were supported by probable cause.
4. People are often seriously injured or killed in domestic violence incidents.
5. The firearm was in plain view.
6. There was a safety concern for the officers and the public.
7. The officers were justified in securing the firearm.
8. The defendants' motion to suppress is denied and all evidence seized is admissible.

b. Facts at 2007 Trial.

In order to simplify the court's review, the State has done its best to conform its references to the report of the proceedings to the system employed by the defense in their brief. *See* Br. App. at 1, n. 1.

On April 1, 2007 Tacoma Police were dispatched to a report of a disturbance in Tacoma's Hilltop area. 2RP 59, ln. 17 to p. 60, ln. 22. The report was specifically of the defendant assaulting his wife, however, in response to a motion *in limine* by the defendant, the court prohibited the officers from referring to the assault. 1RP 16, ln. 22 to p. 17, ln. 14.

Officers located the vehicle and activated their lights, but the vehicle was slow to stop. 2RP 63, ln. 17 to p. 64, ln. 2. Upon stopping the

defendant's vehicle, officers contacted the defendant and his passenger and removed them from the vehicle. 2RP 64, ln. 19-25. After conducting their investigation, the officers arrested the driver of the vehicle, Francisco Millan. 2RP 65, ln. 17 to p. 66, ln. 3.

Officer Caber conducted a search of the vehicle incident to arrest. 2RP 89, ln. 22 to p. 90, ln. 3. Officer Caber clearly observed through the window that there was a pistol behind the driver's seat. 2RP 91, ln. 6-17. The pistol was located on the floor between the driver's seat and the back seat. 2RP 96, ln. 2-4. The gun was sitting on its spine, with the magazine pointing to the top of the car and the barrel pointing toward the back end of the car. 2RP 91, ln. 20 to 92, ln. 1.

C. ARGUMENT.

1. THE UNCHALLENGED FINDINGS OF FACT ARE VERITIES ON APPEAL.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. ***State v. Hill***, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. ***Hill***, 123 Wn.2d at 644. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the

finding. ***Hill***, at 644. Credibility determinations are for the trier of fact and are not subject to appellate review. ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In ***Henderson Homes, Inc v. City of Bothell***, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact but did not argue how the findings were not supported by substantial evidence; made no cites to the record to support its assignments; and cited no authority. The court held that under these circumstances, the assignments of error to the findings were without legal consequence and that the findings must be taken as verities.

> It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities.

Henderson, 124 Wn.2d at 244; *see also* ***State v. Jacobson***, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998).

A finding of fact that is erroneously denominated as a conclusion of law will be treated as a finding of fact. ***Rickert v. Pub.Disclosure Comm'n***, 161 Wn.2d 843, 847, 168 P.3d 826 (2007) (citing ***State v. Luther***, 157 Wn.2d 63, 78, 134 P.3d 205 (2006)). *See* ***Hoke v. Stevens-Norton, Inc***, 60 Wn.2d 775, 778, 375 P.2d 743 (1962); *see also* ***Neil F. Lampson Equip. Rental & Sales, Inc v. West Pasco Water Sys., Inc.***, 68 Wn.2d 172, 174, 412 P.2d 106 (1966) (stating that where conclusions of

law are incorrectly denominated as findings of fact, the court still treats them as conclusions of law).

The court reviews conclusions of law ***de novo***. ***State v. Smith***, 154 Wn. App. 695, 699, 226 P.3d 195 (2010) (citing ***State v. O'Neill***, 148 Wn.2d 564, 571, 62 p.3d 489 (2003); ***State v. Eisfeldt***, 163 Wn.2d 628, 634, 185 P.3d 580 (2008)).

2. SUFFICIENT EVIDENCE SUPPORTS THE TRIAL COURTS FINDING OF FACT, NO. 10.

The appellant assigns error the to the trial court's finding of fact 10. Br. App. 1. That finding is that, "The officers used a flashlight." CP 136 (Finding of Fact 10).

As indicated in the preceding argument section, as to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. ***Hill***, 123 Wn.2d at 644.

The record does support the court's finding that the officers used a flashlight. On re-cross examination, the following exchange took place between defense counsel and Officer Caber.

Q You testified that the gun was in plain view as you walked up the second time and looked in the window. You saw it through the window?
A When I was conducting the search, yes.

Q However, the shell casing was a different matter?

A Yes.

Q "Without a flashlight, you wouldn't have seen it?"

A "No sir."

3RP 214, ln. 20 to p. 215, ln. 5.

Nor did the defense dispute finding no. 10 when the findings and conclusions were entered. 6RP 48, ln. 2-3. This was so even though he sought changes to some of the other conclusions, which changes the State agreed to and were interlineated into the findings. 6RP 46, ln. 12 to p. 48, ln. 14.

This fact that Officer Caber used a flashlight was apparently so well known to the parties, either from the police reports or interviews of the witnesses, that they largely took it for granted. It does not appear to be of any particular consequence for either the trial or this appeal. Nonetheless, sufficient evidence does support the court's finding as to this fact.

The defense counsel asked a leading question on cross examination, as he is entitled to do, in which he indicated that the officer would not have seen the casing if he had not used a flashlight. *See* ER 611(c). Officer Caber answered, "No sir," indicating that he had used the

flashlight when he observed the casing because he would not have observed the casing without the flashlight.

For this reason, sufficient evidence supports the court's finding 10. The defendant's claim on this issue should be denied.

3. THE COURT PROPERLY DENIED THE SUPPRESSION MOTION.

In rendering its opinion, the trial court referred in part to "exigent circumstances" in support of its analysis, and also referred to what it termed the gun as being in "plain view."[1] 6RP 37, ln. 8, ln. 17, ln. 21. However, it is clear that the court's reason for admitting the gun was that in the context of a domestic violence situation, where the female victim was very upset at the time and the gun was visible in open view, the officers were entitled to open the vehicle, check on the status of the weapon and secure it. 6RP 37, ln. 11 to p. 38, ln. 5.

It is the State's position that the court did not abuse its discretion when it denied the suppression motion. The court properly held the seizure of the gun was lawful based upon the exigent circumstances exception to the warrant requirement.

---

[1] The court's use of "plain view" appears to have come from defense counsel who first referred to the gun as being in "plain view" and continued to do so throughout the case. 2RP 99, ln. 20; p. 101, ln. 14; 3RP 214, ln. 20-24; 4RP 260, ln. 25; It appears that what the court and parties properly meant was "open view," rather than "plain view" insofar as it is clear the gun was observed from outside the vehicle and through the window.

However, even if this court were to hold the exigent circumstances did not properly support the seizure of the gun, it may nonetheless affirm on any ground the record adequately supports even if the trial court did not consider that ground. ***State v. Costich***, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). Here the gun was also independently seized under the officer safety and community caretaking exceptions to the warrant requirement.

After a review of the facts from the record, the applicability of each exception will be considered separately.

The State bears the burden of demonstrating that an exception to the warrant requirement applies. ***State v. Tibbles***, 169 Wn.2d 364, 369, 236 P.3d 885 (2010). However,...

> To review a trial court's ruling on a suppression motion, we examine whether substantial evidence supports the challenged findings and whether those findings support the trial court's conclusions of law. ***State v. Ross***, 106 Wash.App. 876, 880, 26 P.3d 298 (2001), review denied, 145 Wash.2d 1016, 41 P.3d 483 (2002). Substantial evidence is " 'evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.' " ***State v. Jeannotte***, 133 Wash.2d 847, 856, 947 P.2d 1192 (1997) (internal quotation marks omitted) (quoting ***Olmstead v. Dep't of Health***, 61 Wash.App. 888, 893, 812 P.2d 527 (1991)). We do not review credibility determinations on appeal, leaving them to the fact finder. ***State v. Frazier***, 82 Wash.App. 576, 589 n. 13, 918 P.2d 964 (1996) (citing ***Fisher Props., Inc. v. Arden–Mayfair,***

> ***Inc.***, 115 Wash.2d 364, 369–70, 798 P.2d 799 (1990)). And we treat unchallenged findings as verities on appeal. ***Ross***, 106 Wash.App. at 880, 26 P.3d 298.

State v. Barnes, 158 Wn. App. 602, 609, 243 P.3d 165 (2010).

Here, the officers got in a position behind the vehicle and activated their emergency lights. Millan, who was later identified as the driver did not stop immediately, taking two blocks to ultimately do so, and the officers were concerned that he was about to attempt to flee. 6RP 6, ln. 17 to p. 7, ln. 7.

Officer Caber first detained Millan in the patrol car and advised Millan of his Miranda rights while Officer Shipp conferred first with the victim, Millan's wife, and then conferred with the reporting witnesses. 6RP 7, ln. 16 to p. 8, ln. 11; p. 11, ln. 14 to p. 12, ln. 1; p. 17, ln. 25 to p. 18, ln. 12.

Mrs. Millan was visibly upset and had obviously been crying, and said that she had been arguing with her husband, who she identified as Francisco Millan, but she claimed that no physical assault had taken place. 6RP 8, ln.4-7.

However, the reporting witnesses said that they saw the victim run across the road westbound and that Francisco Millan ran her down, chased after her in the roadway, and basically pulled her back across the roadway to the car by her hair. 6RP 8, ln. 18-24. Before he put her into the car, Francisco Millan punched his wife in the head, then put her in the car and

drove off northbound. 6RP 8, ln. 24 to p. 9, ln. 2. The witnesses followed the car down the road while calling 9-1-1 and observed Millan strike his wife several more times in the head while doing so. 6RP 9, ln. 5-8.

Based upon their report of assaults on the victim, Officer Shipp contacted Millan in the back of the patrol car and arrested Millan for domestic violence assault 4, as well as suspended driving in the first degree. 6RP 11, ln. 23 to p. 12, ln. 1.

Once Officer Shipp advised Officer Caber that there was probable cause for domestic violence assault, Officer Caber conducted a search of the vehicle incident to arrest. 6RP 18, ln. 19-21.

Prior to Officer Caber searching the vehicle or seeing the gun, Mrs. Millan was standing in the passenger's side door, which was open. Officer Caber asked her to move up onto the curb in front of the vehicle. 2RP 99, ln. 2-12. Officer Shipp was elsewhere talking to other people. 2RP 99, ln. 7-9.

Officer Caber began to conduct a search of the vehicle incident to arrest. He started by searching the driver's compartment area. 2RP 99, ln. 22-23.

Officer Caber found a pistol in the back on the floor behind the driver seat. 6RP 18, ln. 24-25. Officer Caber first observed the pistol through the window, from which view he could clearly see it. 2RP 91, ln. 13-17.

The gun was balanced on its spine, with the barrel pointing toward the back of the car, such that any movement of the car like pulling over or parking would have caused it to fall over. 2RP 91, ln. 20 to p. 92, ln. 1; p. 100, ln. 1-14.

Once he located the firearm, Officer Caber took it into custody and ensured that it was in a safe state. 6RP 19, ln. 15-18.

Once they completed the arrest of Millan, the officers released the car to Mrs. Millan. 2RP 93, ln. 17-19; 6RP 12, ln. 19-20.

a. Exigent Circumstances Supported The Warrantless Seizure Of The Gun.

Exigent circumstances is a well recognized exception to the warrant requirement. ***Tibbles***, 169 Wn.2d at 368-69. To date, Washington courts have recognized at least five circumstances that qualify as "exigent:" 1) hot pursuit; 2) fleeing suspect; 3) danger to arresting officer or to the public; 4) mobility of the vehicle; and 5 mobility or destruction of the evidence. ***Tibbles***, 169 Wn.2d at 370.

In determining whether exigent circumstances exist, the court must look to the totality of the circumstances. ***Tibbles***, 169 Wn.2d at 370. The court has also recognized six non-exclusive factors that may aid in determining the existence of exigent circumstances:

> "(1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is

> guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry [can be] made peaceably."

Tibbles, 169 Wn.2d at 370 n. 3 (quoting ***State v. Smith***, 165 Wn.2d, 518, 199 P.3d 386 (2002)).

Here, the circumstances were exigent because of safety concerns for the officers and members of the public. As for the six non-exclusive factors, a number of those factors are not relevant under the facts of this case, either because Millan was already under arrest, or because the seizure of the gun involved an entry into a car, not a house.

As the first factor, here, Millan was arrested for a crime of domestic violence. While the assaultive acts were of a low level based upon the degree of apparent harm suffered by the victim, crimes of domestic violence are in and of themselves serious offenses. *See* ***State v. Hagler***, 150 Wn. App. 196, 201, 208 P.3d 32 (2009); ***State v. Schultz***, 170 Wn.2d 746, 764, 248 P.3d 484 (2011) (Fairhurst dissenting). While Millan had already been arrested, the significant aspect of this is that the officers were dealing with an emotionally charged domestic violence situation.

The second factor is irrelevant where Millan was already under arrest. He was already reasonably known to be not armed.

For the third factor, there was reasonably trustworthy information that Millan was guilty. Two citizen informants reported seeing Millan

assault his wife multiple times, called and reported the assaults to police, and then made themselves available and identified themselves to police and reported their observations so that they were citizen informants entitled to the highest degree of reliability. This is so even though Millan's wife attempted to deny that he assaulted her.

The fourth factor is irrelevant where the incident involved a car stopped on the street, not a home, and where Millan was already arrested and in the back of the patrol car.

The fifth factor is also irrelevant where Millan had already been apprehended and placed in the back of the patrol car.

The sixth factor favors the State because entry was able to be made peaceably.

The safety concern that rendered the circumstances exigent was not Millan himself, but rather the precarious position the gun was in, and also the highly emotional state of his wife, the victim.

Several of the court's findings should control the issue on appeal.

> 6. The Officers arrested the defendant for the domestic violence assault. And Driving while license suspended.
> 7. The car was going to be released to the female victim.
> 8. The officers searched the driver's side area.
> 9. The Officers observed a firearm through the window from the outside of the car on the floorboard behind the driver's seat.
> 11. The firearm was secured by the officer.
> 12. A subsequent records check revealed that the defendant was a convicted felon.
> 13. The officers' testimony was credible.

Here, Millan had been arrested for a crime of domestic violence assault against his wife. Officers couldn't know if Mrs. Millan might be upset enough with the defendant that once she had access to the gun, she might in anger or retaliation attempt to use it against him.

Mrs. Millan claimed to officers that she had not been assaulted, even though the witnesses reported observing multiple successive assaults. To the extent that she denied having been assaulted, they also had to be concerned for their own safety and that of the third party witnesses, given that by her statements she attempted to cover for Millan's crime and prevent his arrest. There was certainly a reasonable possibility that she might be opposed to Millan's arrest. Unlike Millan, his wife was not under arrest, nor was she handcuffed and locked in the back of a patrol car. Given how upset she was, officers couldn't know if she might attempt to use the gun against them to free Millan, or to retaliate against the third party witnesses for reporting the crime in the first place.

The court also found that the vehicle was going to be released to Mrs. Millan. CP 136 (Finding 7). The trial court didn't think the fact that the vehicle was going to be released to the victim was determinative of the outcome, but did recognize that it was a consideration. It is also worth noting that while the release of the vehicle to the victim is not determinative of any of the issues in this case, by securing the weapon without a warrant, the officers were also able to more quickly release the

vehicle to Mrs. Millan and allow her to go on her way. This is just one of many issues that officers at a scene must weigh when they determine how they will handle a situation.

It is not uncommon for officers to encounter factually complex situations. Nor is it uncommon for such a factual situation to "overflow" the categorical distinctions applied by the attorneys and the courts in the course of later review. Thus, a complex factual situation may implicate a number of different legal doctrines and exceptions that overlap and/or flow into each other, or start off as one thing and develop into something different.

Such is the case here. Under such a circumstance, it is of course important to properly distinguish and separately evaluate the relevant legal doctrines involved. However, this should be done without forgetting the totality and coherence of the factual situation, and without imposing overly fine distinctions that do violence to the reality of the situation the officers were dealing with at the time.

Under the emergency aid exception, the Ninth Circuit Court of Appeals made a point that is equally salient here:

> ...whether the actions of the police are objectively reasonable is to be judged by the circumstances known to them. They were not conducting a trial, but were required to make an on-the-spot decision as to whether [the victim] could be in the apartment in need of medical help; the objective circumstances did not require them to reach the conclusion that there was little or no risk that [the victim] was in the apartment in danger. To the contrary, the

> combination of these circumstances support an objectively reasonable belief that [the victim] could be in the apartment.
>
> This is a case where the police would be harshly criticized had they not investigated and [the victim] was in fact in the apartment. Erring on the side of caution is exactly what we expect of conscientious police officers.

United States v. Black, 482 F.3d 1035, 1040 (9th Cir.), *cert. denied,* 128 S. Ct. 612 (2007). Here, once the officers observed the gun in open view, they were entitled to secure it because under the facts of this case, exigent circumstances existed where officers had a reasonable concern for their safety, and the safety of members of the public. The securing of the gun was also a reasonable exercise of their community caretaking function. Each of these exceptions independently support the officers securing the gun.

b. The Seizure Of The Gun Was Lawful Under The Community Caretaking Exception To The Warrant Requirement.

Even if the court were to hold that the seizure of the gun was not justified under the exigent circumstances exception, it was still permissible as a reasonable exercise of Officer Caber's community caretaking functions. Where the gun was precariously placed on its spine in the vehicle, the officers were entitled to secure it once they observed it in open view.

Police officers serve numerous functions in society, some of which are totally divorced from the investigation of crimes. The non-crime related duties are termed "community caretaking functions." ***Cady v. Dombroski***, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973).

The courts have upheld under the community caretaking exception a warrantless entry into a defendant's bathroom to search for drugs that might pose a hazard to children where the officer entered the home with medical technicians in response to the defendant's call to 911 that she had overdosed on drugs and three children remained in the home after the defendant was taken to the hospital. ***State v. Angelos***, 86 Wn. App. 253, 936 P.2d 52 (1997), *review denied*, 133 Wn.2d 1034 (1998).

Here the gun was balanced on its spine, with the barrel pointing toward the back of the car, such that any movement of the car like pulling over or parking would have caused it to fall over. 2RP 91, ln. 20 to p. 92, ln. 1; p. 100, ln. 1-14. It is a reasonable inference that some lesser motion, such as the shutting of a car door could have also caused it to fall over, and possibly discharge. For this reason, Officer Caber reasonably acted to secure the gun consistent with his community caretaking functions.

It was also reasonable for Officer Caber to secure the gun where as part of his community caretaking functions to prevent subsequent violence in the event Millan were released. Given that both Millan and Mrs. Millan were visibly upset, it was a reasonable safety precaution to secure the gun in the event Millan were to make bail and get released from jail.

See, e.g., ***Feis v. King Co. Sheriff Dept.***, 165 Wn. App. 525, 267 P.3d 1022 (2011) (considering officers' immunity from tort liability for alleged civil rights violations where officers removed guns from the defendant's bedroom at the request of his son-in-law who was the victim of a domestic violence crime).

Additionally, the officers had to be concerned for Mrs. Millan's safety in the event Millan were to bail out of jail. Securing the gun was a reasonable way to do that and ensure that he did not have ready access to the weapon until there was a significant passage of time and he had the chance to cool down.

The court's ruling denying the suppression motion should also be affirmed as a reasonable exercise of Officer Caber's Community caretaking function.

4. EVEN IF THE COURT WERE TO HOLD THAT THE OFFICERS UNLAWFULLY RETRIEVED THE HANDGUN, THE ERROR WAS HARMLESS WHERE THE OFFICERS OBSERVED THE GUN IN OPEN VIEW.

Even if the court were to hold that the gun should have been suppressed, the error was harmless where the officer observed the gun in open view through the window so that any error from the admission of the gun was harmless.

Two different standards for harmless error have been applied to Washington cases. In ***State v. Whelchel***, the Washington Supreme Court

held that a constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. ***State v. Whelchel***, 115 Wn.2d 708, 728, 801 P.2d 948 (1990) (holding the error was harmless were statements were admitted in violation of the defendant's rights under the confrontation clause). The court in ***Whelchel*** held that independent of the improperly admitted statements, there was overwhelming evidence to support the defendant's conviction so that the erroneous admission was harmless beyond a reasonable doubt. ***Whelchel***, 115 Wn.2d at 730.

However, when the same case went before the Ninth Circuit Court of Appeals on an appeal to a habeas corpus motion, the Ninth Circuit held that the standard for harmless error was whether a given error had a substantial and injurious effect or influence in determining the jury's verdict. ***Whelchel v. Washington***, 232 F.3d 1197, 1205-06 (9th Cir. 2000). In ***Whelchel***, the Ninth Circuit affirmed the Federal District Court's grant of habeas corpus relief to the defendant, holding that the statements were not cumulative of other evidence, and were inherently suspect. ***Whelchel***, 232 F.3d at 1208. The court also noted that the other evidence did not point overwhelmingly to Whelchel's guilt. ***Whelchel***, 232 F.3d at 1208. The court did find harmless error as to other improperly admitted statements where they were merely cumulative. ***Whelchel***, 232 F.3d at 1211.

Here, even if the trial court were to hold that the admission of the gun was error, any such error was harmless where Officer Caber testified that he could see the gun through the window. That alone is sufficient to support a conviction for unlawful possession of a firearm. *See* ***State v. McKee***, 141 Wn. App. 22, 167 P.3d 575 (2007); *See, e.g.* ***State. v. Berrier***, 110 Wn. App. 639, 647, 41 P.3d 1198 (2002). For that reason, even if the admission of the gun were error, the error was harmless and the conviction should nonetheless be affirmed.

D. CONCLUSION.

The trial court's findings are verities on appeal where all but one were unchallenged, and the one that was challenged was supported by sufficient evidence.

The trial court properly denied the motion to suppress evidence based on the exigent circumstances exception to the warrant requirement. The precarious position of the gun where it could easily fall and discharged warranted securing the gun under exigent circumstances, as did the fact of the presence of the gun where there was an emotion and upset victim of domestic violence who was attempting to cover for her husband who had been arrested.

Even if the circumstances didn't rise to the level of exigent circumstances, the officer was still entitled to secure the gun as part of his

community caretaking function, especially where the gun was so precariously positioned.

Finally, even if the court were to hold the trial court's suppression of the gun to be error, the error was harmless where before seizing the gun, the officer observed it in open view through the vehicle window, which he could testify to, and which provided substantial independent evidence of the defendant's guilt.

The trial court's ruling denying the motion to suppress evidence should be affirmed. The defendant's conviction should also be affirmed, for that reason, and because of the independent evidence.

DATED: January 28, 2013

MARK LINDQUIST
Pierce County
Prosecuting Attorney

STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/28/13
Date Signature

PIERCE COUNTY PROSECUTOR

January 28, 2013 - 11:37 AM

Transmittal Letter

Document Uploaded: 432447-Respondent's Brief.pdf

Case Name: State v. Francisco Millan

Court of Appeals Case Number: 43244-7

Is this a Personal Restraint Petition? ○ Yes ◉ No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Respondent's
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

ddvburns@aol.com