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COURT OF APPEALS  
DIVISION II

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NO. 43244-7-II

STATE OF WASHINGTON  
BY *[Signature]*

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

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STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO JAVIER MILLAN,

Appellant.

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

The Honorable Thomas P. Larkin

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REPLY BRIEF OF APPELLANT

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*pm 3/27/13*

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A. ARGUMENT IN REPLY

REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN DENYING MILLAN'S MOTION TO SUPPRESS EVIDENCE SEIZED DURING A WARRANTLESS SEARCH OF HIS VEHICLE INCIDENT TO ARREST WHERE THE SEARCH WAS NOT NECESSARY TO PRESERVE OFFICER SAFETY OR PREVENT THE DESTRUCTION OF EVIDENCE.

The State first argues that exigent circumstances supported the warrantless search of Millan's car because "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." Brief of Respondent at 14-18. The record belies the State's argument.

It is evident that the State fails to cite to the record to support its assertion that the officers searched the car and seized the gun for safety reasons because the officers never testified during the trial or the 3.6 hearing that they faced safety concerns. At trial, Officer Shipp testified that Officer Caber "searched the vehicle incident to arrest." 2RP 68. Officer Caber testified that he retrieved a gun that he saw through the car window. 2RP 91. Although it was unusual that the gun was balanced on its spine, Caber never stated that it posed a safety concern. 2RP 91-92, 99-101. At the 3.6 hearing, Caber testified that he saw the gun when he opened the car door and he could not recall whether he saw it through the

car window. 6RP 18-20. Nothing in the record substantiates the State's claim that exigent circumstances existed because of "the precarious position of the gun." Brief of Respondent at 15.

Furthermore, nothing in the record substantiates the State's claim that exigent circumstances existed because of "the highly emotional state of [Millan's] wife, the victim. Brief of Respondent at 15. At trial, Officer Shipp testified that Mrs. Millan "appeared to be very upset," but she complied when he told her to wait in front of the car. She waited where he could see her while he talked to witnesses. 2RP 65. At the 3.6 hearing, Shipp testified that Mrs. Millan was upset and said she had been arguing with her husband but "no physical assault had taken place." 2RP 8. After speaking with Mrs. Millan, he left her and went to talk to the witnesses. 2RP 65. As Shipp's testimony reflects, Mrs. Millan was cooperative and followed his instructions.

The State attempts to create an illusion that "the officers were dealing with an emotionally charged domestic violence situation." Brief of Respondent at 14. To the contrary, the record establishes that by the time the officers stopped the car, there was no exigency that necessitated a search without a warrant. Neither Millan nor his wife made any furtive movements when the officers pulled the car over. 2RP 98-97. When Officer Shipp approached Mrs. Millan in the car, she was "facing forward,

not moving.” 2RP 68. Millan was compliant when Officer Caber asked him to step out of the car and Caber handcuffed him and put him in the patrol car. 2RP 88-89.

Relying on United States v. Black, 482 F.3d 1035 (9<sup>th</sup> Cir.), cert denied, 128 S. Ct. 612 (2007), the State appears to argue that the warrantless search of the car was justified under the “emergency aid” doctrine. Brief of Respondent at 17-18. Under this doctrine, officers “may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.” Black, 482 F.3d at 1041, n. 1. The doctrine applies only if the officer’s decision to enter without a warrant was objectively reasonable. Id.

In Black, police were dispatched to an apartment after Black’s ex-girlfriend called 911, reporting that Black beat her up and that he had a gun. The officers found Black outside the apartment building but could not locate the ex-girlfriend. Using Black’s key, they entered the apartment to search for the ex-girlfriend. 482 F.3d at 1039. The Court determined that the officers entered the apartment because they feared that the ex-girlfriend could be in the apartment, badly injured and in need of medical attention. The Court therefore held that the entry was justified under the exigent circumstances exception and the emergency aid doctrine. 482 F.3d at 1039-41.

The emergency aid doctrine clearly has no application here where officers searched the car incident to arrest and no one required emergency assistance or protection from imminent injury. Consequently, the State's argument fails.

The State argues further that the warrantless search and seizure of the gun was "permissible as a reasonable exercise of Officer Caber's community caretaking functions." Brief of Respondent at 18. The community caretaking exception "allows for the limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance or when making routine checks on health and safety." State v. Thompson, 151 Wn.2d 793, 801, 92 P.3d 228 (2004). Such invasion is allowed only if (1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place being searched. Id.

Fatal to the State's argument is the fact that Caber never stated during his testimony that he seized the gun to render aid or assistance or for health and safety concerns. The State argues that it was reasonable for the officers to secure the gun because it was balanced on its spine and could have fallen over and they "had to concerned for Mrs. Millan's safety

in the event Millan were to bail out out jail,” but fails to show that the record supports its argument. Brief of Respondent at 18-20. An officer must “be able to point to specific and articulable facts and reasonable inferences drawn therefrom,” that justify a warrantless search. State v. Davis, 86 Wn. App. 414, 420, 937 P.2d 1110 (1997). Officer Caber merely testified that once he located the gun, he took it “into custody and ensured that it was in a safe state.” 6RP 19. He did not point to any specific and articulable facts that justified the warrantless search and seizure of the gun.

The State mistakenly relies on State v. Angelos, 86 Wn. App. 253, 936 P.2d 52 (1997), which is clearly distinguishable. Brief of Respondent at 19. In Angelos, an officer responded to Angelos’s 911 call reporting that she had overdosed on drugs. The officer entered her apartment with emergency medical technicians. While the medics were treating Angelos, the officer overheard her saying that her 12-year-old daughter and two friends were also in the home. The officer located the three girls in the bedroom, and Angelos’s daughter said her mother had a prescription drug problem. The officer found a line of cocaine in the bathroom. 86 Wn. App. at 254-55.

The Court affirmed Angelos’s conviction for possession of cocaine under the medical emergency exception to the warrant requirement. 86

Wn. App. at 258. To satisfy the exception, the State must show that the officer, both subjectively and objectively, “is actually motivated by a perceived need to render aid or assistance.” Id. at 256. The Court concluded that the officer’s entry into the bathroom to search for drugs that might present a safety hazard to the children was objectively reasonable. Id. at 258. Unlike in Angelos, the record here establishes that the warrantless search of the car and seizure of the gun was not motivated by any need to render aid or assistance.

Last and not least, the State argues that admission of the gun was harmless error where Officer Caber testified that he saw the gun through the window and that alone is sufficient to support a conviction for unlawful possession of a firearm. Brief of Respondent at 22. “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, despite the error.” State v. Brown, 140 Wn.2d 456, 468-69, 998 P.2d 321 (2000). To make this determination, courts utilize the “overwhelming untainted evidence” test and consider the untainted evidence admitted at trial to determine if it so overwhelming that it necessarily leads to a finding of guilt. State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002). The “overwhelming untainted evidence” test ensures that a conviction will be reversed where there is a reasonable possibility

that the use of the inadmissible evidence was necessary to reach a guilty verdict. Id.

Officer Caber's claim that he saw a gun through the car window hardly constitutes overwhelming untainted evidence. Contrary to the State's conclusory argument, Caber's testimony, with no evidence of a gun, falls far short of overwhelming untainted evidence that necessarily leads to a finding of guilt beyond a reasonable doubt.

Reversal is required because the warrantless vehicle search incident to arrest violated Millan's right to privacy under article I, section 7 of the Washington Constitution where the search was not necessary to preserve officer safety or prevent destruction of evidence. State v. Snapp, 174 Wn.2d 177, 192, 272 P.3d 289 (2012).

B. CONCLUSION

For the reasons stated here and in appellant's opening brief, this Court should reverse the trial court's denial of Mr. Millan's motion to suppress and reverse his conviction.

DATED this 27<sup>th</sup> day of March, 2013.

Respectfully submitted,

A handwritten signature in cursive script that reads "Valerie Marushige". The signature is written in black ink and is positioned above the printed name.

VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Francisco Javier Millan

**DECLARATION OF SERVICE**

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Stephen Trinen, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27<sup>th</sup> day of March, 2013 in Kent, Washington.



VALERIE MARUSHIGE

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