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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
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DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

JASON WILLIAMS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Gary Steiner
The Honorable Beverly Grant

No. 08-1-01529-9

Brief of Respondent

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

1. Whether the defendant's suppression challenge based on the search of the vehicle incident to arrest was waived where the issue was not raised below, and in any case is without merit where the officer acted in good faith on then existing case law?
2. Whether there was sufficient evidence that the defendant possessed the drugs where the bag containing them was touching or under the defendant's arm, the driver said it belonged to the defendant, and where multiple factors existed, supporting dominion and control?
3. Whether the defendant's claim that the prosecutor's closing was misconduct is without merit where the prosecutor never argued that the jury should find dominion and control based on proximity alone?
4. Trial counsel was not ineffective where she was able to argue her theory of the case without a "proximity alone" instruction, and where she did not object to the driver's statement as part of a sound trial strategy to show the drugs belonged to the driver and William's disclaimer was credible?

5. Whether there was no cumulative error where there was no error, the defendant suffered no prejudice, and any claimed errors did not accumulate?

B. STATEMENT OF THE CASE.

1. Procedure

On March 27, 2008 the State filed an information based upon an incident the day before in which the State charged Jason Williams with unlawful possession of a controlled substance with intent to deliver, methamphetamine (Count I); and unlawful possession of a controlled substance, oxycodone (Count II). CP 1-2.

On July 23, 2008 the defendant filed a motion to suppress evidence claiming that the officer had no right to ask Williams for identification. CP 3-35. The State responded that the motion should be suppressed were there was no seizure. CP 36-42. On July 30, 2008 the matter was assigned to Dept. 10, the Honorable Judge Steiner, for the motion hearing only. CP 112; RP 07-30-08. The court denied the motion. CP 106-109; RP 07-30-08, p. 32, ln. 7 to p. 35, ln. 4.

The case was assigned to the Honorable Judge Grant for trial on August 28, 2008. CP 113; I RP 3, ln. 9 to p. 4, ln. 20. During deliberation, the jury sent out a note asking, "What is the legal definition of 'dominion' and 'control'?" CP 44. The court referred the jury to the

instructions and advised it that no further explanation would be given. CP 44.

On Count I the jury found the defendant guilty of the lesser included offense of unlawful possession of a controlled substance, methamphetamine; on Count II, the jury found the defendant guilty as charged of unlawful possession of a controlled substance, oxycodone. CP 68-70

On November 14, 2008 the court sentenced the defendant to 18 months incarceration. CP 80. The notice of appeal was timely filed on December 4, 2008. CP 88-102.

2. Facts

Preliminary facts

a. Facts at Suppression Hearing

The court entered the following findings of fact and conclusions of law from the suppression hearing. Citations to the record have been added. The parties apparently also relied upon facts contained in the police report, a copy of which was attached to the defendant's motion. *See* CP 18-19.

UNDISPUTED FACTS

1. On March 26, 2008 at approximately 1:30 a.m. Officer Brown was on patrol and traveling southbound on Pacific Avenue in the 8200

block of Tacoma. Officer Brown observed two individuals sitting in a parked truck. [RP 07-30-08, p. 13, ln. 12 to p. 14, ln. 5; p. 19, ln. 17 to p. 20, ln. 4.]

2. The truck was off the roadway and was not running. [RP 07-30-08, p. 14, ln. 4-10; p. 20, ln. 3; p. 23, ln. 16-17.]

3. Officer Brown slowed and observed the two individuals were slumped down in the front seat as if trying not to be seen. Officer Brown eventually pulled over and watched the truck for a short time period. [RP 07-30-08, p. 14, ln. 4-8; p. 19, ln. 17 to p. 20, ln. 9.]

4. Officer Brown observed both occupants of the vehicle get out of the truck. [RP 07-30-08, p. 14, ln. 9-11; p. 21, ln. 14-17.]

5. Officer Brown then pulled her patrol vehicle in behind the truck and approached the occupants. Her emergency lights were not activated. [RP 07-30-08, p. 14, ln. 9-14; p. 21, ln. 14-16.]

6. Officer Brown asked if everything was okay. The driver, who was later identified as Robert Rambo stated they had run out of gas. Rambo had a gas can in his hand. [RP 07-30-08, p. 14, ln. 12-21; p. 21, ln. 16-23.]

7. Officer Brown observed a gas station diagonally across the street and also observed that the gas gauge indicated there was just under

half a tank of gas remaining. [RP 07-30-08, p. 14., ln. 21 to p. 15, ln. 3; p. 20, ln. 2-21.]

8. Officer Brown asked the driver if he had any ID, to which he replied yes and handed a Washington ID card to Officer Brown. [RP 07-30-08, p. 15, ln. 3-10.]

9. Officer Brown wrote down Robert Rambo's name and date of birth from the ID card and handed the card back to Rambo. [RP 07-30-08, p. 15, ln. 9-14; p. 22, ln. 17-19.]

10. Officer Brown then asked the passenger, the defendant, who was also standing outside if he had any form of ID. The defendant said yes and handed a Washington State ID card identifying him as Jason Silva Williams. [RP 07-30-08, p. 15, ln. 15 to p. 16, ln. 10.]

11. Officer Brown wrote down the name and date of birth from the identification card. [RP 07-30-08, p. 16, ln. 12-13.]

12. Rambo said they were waiting for a friend to come and give them a ride. [RP 07-30-08, p. 14, ln. 19; p. 20, ln. 25 to p. 21, ln. 2.]

13. Rambo asked if they could sit back inside the truck. Officer Brown said yes. [RP 07-30-08, p. 16, ln. 22-24; p. 21, ln. 24 to p. 22, ln. 5.]

14. Officer Brown returned to her patrol vehicle and ran LESA records check on both names and dates of birth. [RP 07-30-08, p. 17, ln. 9-10.]

15. The records check indicated that Jason Williams had an outstanding bench warrant. [RP 07-30-08, p. 17, ln. 10-19; p. 25, ln. 4-7.]

16. Officer Brown returned to the truck, informed the defendant of the bench warrant and placed him under arrest without incident. [RP 07-30-08, p. 18, ln. 2-7.]

17. Rambo picked up a laptop bag and handed it to Officer Brown, stating that the bag was the defendant's. [RP 07-30-08, p. 18, ln. 7-12; p. 26, ln. 4-10; p. 27, ln. 2-4.]

18. Inside the bag were unspent rounds of ammunition, coffee filters with methamphetamine residue, a variety of burglary tools and a pill bottle with six percocet pills inside. [RP 07-30-08, p. 18, ln. 12 to p. 19, ln. 11.]

19. The defendant denied ownership of the laptop bag.

20. Officer Brown also placed Rambo under arrest. [RP 07-30-08, p. 27, ln. 12-12-13.]

21. Officer Brown searched the vehicle incident to the defendant's arrest and Rambo's arrest. Inside of the truck Officer Brown found a glass pipe, a small walled sized pouch. Inside of the pouch was a medium sized

zip lock baggie with a number of smaller baggies. Also found in the truck was a scale and a zip lock baggie containing methamphetamine. [RP 07-30-08, p. 18, ln. 17 to p. 19, ln. 11.]

22. Officer Brown identified Jason Williams as the defendant.
[RP 07-30-08, p. 12, ln. 24 to p. 13, ln. 7.]

THE DISPUTED FACTS

1. There are no disputed facts.

CONCLUSIONS OF LAW

1. Officer Brown did not initiate a traffic stop. The vehicle the defendant was in, was parked on the side of the road and was not running.
2. State v. Ladsen, 138 Wn.2d 343 (1999) and State v. Meckelson, 133 Wn. App. 431 (2006) do not apply.
3. Officer Brown's contact with the defendant was a social contact analogous to that in State v. Hansen, 99 Wn. App. 575, 99 P2d 885 (2000).
4. No coercive language was used to initiate the contact.
5. There was no seizure of the defendant.
5. The defendant was lawfully arrested.
6. The evidence found in lap top bag is admissible.
7. The evidence found in the truck is admissible.
8. The court finds the testimony of Officer Brown credible.

b. Facts at Trial

Facts from trial

On March 26, 2008 at about 1:00 a.m. Tacoma Police Officer Shelly Brown was on patrol in the area of the 8400 block and Pacific Avenue and came into contact with the defendant when she observed a truck parked on the west side of the street in front of a bank, with two people sitting in it. II RP 33, ln. 11 to p. 36, ln. 14. At that time of night it was not common for people to sit in their cars on the side of the street in that area. II RP 33, ln. 13-15. The intersection is pretty well lit, with two banks on the west side and a gas station on the northeast side, and with a drug store also located on the intersection. II RP 35, ln. 6-10; p. 38, ln. 25; *See also* Exhibit 10.

The truck was parked on the West side of the intersection, facing south, down Pacific. II RP 37, ln. 3-6; Ex 10. The truck was parked and wasn't on, with no lights or break lights, and the ignition was off. II RP 37, ln. 6-8.

When Officer Brown initially observed the vehicle, she was down the street from it, so she slowed, but didn't stop and was still rolling while she waited to see what was going on. II RP 39, ln. 4-22; p. 40, ln. 9-12. The occupants kind of slumped down like they didn't want to be seen and that caught officer Brown's attention. II RP 40, ln. 8-14. Then they got out of the car and grabbed the gas can. II RP 40, ln. 2-5; ln. 14-16.

Officer Brown also observed a male near the gas station that appeared to be walking toward the truck, but then turned and walked away when he saw her. II RP 40, ln. 19-24. She never made contact with that individual to find out why he stopped walking to the truck. II RP 40, ln. 24 to p. 41, ln. 1.

Officer Brown pulled up a car length or two behind the vehicle and got out. II RP 41, ln. 4-5. It was just a stop to see if everything was alright, and was not a traffic stop, so her lights were not on. II RP 41, ln. 5-7. She decided to contact the occupants. II RP 39, ln. 20-24.

She contacted the person on the driver side of the vehicle, who was standing there with the gas tank, and asked him if everything was o.k. II RP 41, ln. 10-13. She asked him if everything was alright and he hemmed and hawed a little bit, but the gist of it was he said his truck didn't work, someone was going to pick him up, and he had a gas can because his tank was empty. II RP 41, ln. 16-20. She was standing outside the vehicle by the door and could see inside the truck. II RP 41, ln. 20 to p. 42, ln. 1. She could see that the gas gauge indicated it was not empty, but rather was almost half full. II RP 42, ln. 1-3.

Officer Brown asked the driver if he had identification and he said yes and handed it to her. II RP 42, ln. 11-14. She wrote down his name and date of birth and handed the ID back to him. II RP 42, ln. 16-18. She then did the same thing with the passenger. II RP 42, ln. 20-25. The passenger was Jason Williams, the defendant. II RP 33, ln. 40 to p. 34, ln.

5; p. 43, ln. 6-23. Officer Brown then returned to her patrol car and ran a records check on the two persons who had been in the truck. II RP 44, ln. 1-6. She received information back that the driver came back with a clear status, but that the defendant had a misdemeanor DUI warrant from Tacoma. II RP 44, ln. 9-11.

A second patrol car arrived at that time and she asked the other officer, Johnson, to place the defendant into handcuffs. II RP 44, ln. 13-18. She then got out and assisted Officer Johnson with handcuffing the defendant. II RP 45, ln. 6-7. As Officer Johnson took Williams back to the patrol car, Officer Brown explained to the driver, Rambo, what was happening. II RP 45, ln. 18-20. Rambo said there was a blue bag in the truck that was William's bag. II RP 45, ln. 20-22. The bag was located on the passenger side of the center of the bench seat. II RP 63, ln. 11-13. Officer Brown picked the bag up and asked, "this bag?" to which Rambo answered yes. II RP 45, ln. 24-25. It was a rectangular laptop style bag. II RP 46, ln. 9-11. She asked Williams if it was his bag, and he denied that it was. II RP 46, ln. 20-22. However, given where Williams was sitting, the bag would have either been touching or under his elbow. II RP 105, ln. 23 to p. 106, ln. 1.

Officer Brown looked inside the bag because she needed to know what was inside it before she put it in her patrol vehicle. II RP 46, ln. 14-25. In the course of looking through the bag, Officer Brown unzipped some of the compartments in the bag. II RP 46, ln. 12-17. The first thing

she noticed in the bag was unspent ammunition. II RP 47, ln. 5-9. She also found a variety of drug stuff, including a pill bottle with no labeling on it. II RP 47, ln. 14-17. The pill bottle contained Percocet. II RP 47, ln. 18-19; p. 123, ln. 7 to p. 124, ln. 24; Ex 1; Ex 7. The bag also contained another bag that held cone shaped coffee filters that were consistent with methamphetamine manufacture and contained methamphetamine. II RP 47, ln. 19-23; II RP 122, ln. 17-25; Ex 1; Ex 6. She opened the bag with the filters and got an incredible aroma, so she re-zipped it and took it out away from the compartment area of the truck because of the smell. II RP 47, ln. 23 to p. 48, ln. 4. She observed suspected drug residue inside the filters. II RP 48, ln. 3-6. Finally, the zippered bag also contained what appeared to be a dealer's notebook or log. II RP 52, ln. 4-23; Ex 3.

Officer Brown also searched the vehicle. II RP 53, ln. 12-14. Right next to the laptop bag, but on the driver's side was a little blue pouch about the size of a wallet. II RP 53, ln. 19-22; p. 63, ln. 5-16; p. 63, ln. 10-16; p. 105, ln. 3-7. Inside was a small scale. II RP 53, ln. 25 to p. 54, ln. 25; Ex 4. Such scales are commonly used for weighing drugs in transactions. II RP 55, ln. 4-23. The blue pouch also contained a second bag that contained about three grams of methamphetamine, and a bag of smaller baggies. II RP 55, ln. 24 to p. 56, ln. 21; p. 57, ln. 5-2; p. 63, ln. 25 to p. 64, ln. 1; II RP 122, ln. 17 to p. 123, ln. 2; Ex 2; Ex 8. She also found a couple of pipes commonly used to consume drugs on Rambo's seat. II RP 53, ln. 22-24.

C. ARGUMENT.

1. THE TRIAL COURT CORRECTLY DENIED
THE DEFENDANT'S MOTION TO SUPPRESS
THE EVIDENCE.

The defense claims for the first time on appeal that the warrantless search of the vehicle was unlawful where the defendant was already secured in the patrol car. Br. App. 6-11. However, the defense did not raise that issue below, and even expressly conceded it. See CP 15. In raising the challenge for the first time, the defense relies on the court's rulings in *Arizona v. Gant*. See Br. App., p. 6ff. (citing *Arizona v. Gant*, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009)). The same issue was recently considered under the Washington Constitution in *State v. Patton*. See *State v. Patton*, Slip. Op. 80518-1, ___ Wn.2d ___, ___ P.3d ___ (2009)).

By his failure to raise the issue below, the defendant waived that issue and may not now raise it for the first time on appeal. A fundamental reason that suppression issues not raised below are waived is because where an issue was not raised a record was not developed that would permit adequate consideration on appeal. See *State v. Riley*, 121 Wn.2d 22, 31-32, 846 P.2d 1365 (1993). That situation is abundantly present in this case. The defense has claimed that two of the court's findings of fact are unsupported by the evidence. Br. App., p. 9. But where the issue the defense now raises was not raised below, no detailed record was

developed as to those facts. The findings of fact that were entered were listed as undisputed, and approved by the defense without objection. CP 106-109. It is often the case that the parties are aware of facts that do not appear in the record through discovery, including interviews of the witnesses. Being aware of discovery, the parties are entitled to agree that certain facts are not in dispute. Where the parties agreed to the findings it is therefore not proper for the defense to now raise a new issue on appeal and in support of that argument claim that the facts agreed to were not supported by the record.

The State does acknowledge that *Gant* and *Patton* apply retroactively to all cases currently pending on direct review and not yet final. See, e.g., *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 716, 93 L. Ed. 2d 649 (1987); *Teague v. Lane*, 489 U.S. 288, 302-04, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989); *In re St. Pierre*, 118 Wn.2d 321, 823 P.2d 492 (1992). Nonetheless, that retroactive application is moot where the issue was waived because it was not raised below. Said otherwise, the issue is how *Gant* and *Patton* affect the present case. The State's position is that they do not affect the present case where the suppression issue was waived below; and where the officers acted in good faith reliance on the then existing case law.

a. The Suppression Motion Was Waived
Where It Was Not Raised Below.

Considering *Gant*, the Court of Appeals (Division II) recently issued an opinion in which it held that suppression issues not raised at the trial court level are waived and may not be raised for the first time on appeal. *State v. Millan*, 151 Wn. App. 492, 502, 212 P.3d 603 (2009). *Millan* would control except that a different panel of the Court of Appeals (Division II), which considered *Gant*, held that waiver was inconsistent with principles of retroactive application of case law, and therefore disagreed with the court in *Millan*. *State v. McCormick*, ___ Wn. App. ___, 216 P.3d 475, 476-477 (2009). *Millan* should control because the analysis of the waiver issue in *McCormick* suffers from several serious flaws.

First, the court in *McCormick* erroneously claimed that the reasoning in *Millan* was contrary to established law, relying on *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987); *United States v. [Eugene] Johnson*, 457 U.S. 537, 566 n. 16, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982), and *State v. Counts*, 99 Wn.2d 54, 57-58, 659 P.2d 1087 (1983) (consolidated case). See *McCormick*, 216 P.3d at 476-77. Those cases all apply new precedent retroactively to cases not final on appeal. But in none of those cases did the State assert, or the court consider, the applicability of the waiver doctrine.

Indeed, in *[Eugene] Johnson*, waiver was inapplicable because the defendant raised the suppression challenge below. *[Eugene] Johnson*, 457 U.S. at 539-40. In *Griffith*, the underlying issue was not a suppression challenge, but was rather effectively a *Batson* challenge (made prior to the issuance of *Batson*) to the fact that the prosecutor in that case had used four of his five allotted challenges to strike four of the five prospective black jurors. *Griffith*, 479 U.S. at 316-17 (citing *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d (1986)). Moreover, in *Griffith*, the defense raised the challenge to the trial court, and continued to preserve the issue so that when *Batson* issued it applied retroactively to *Griffith*. *Griffith*, 479 U.S. at 317-18.

Finally, *Counts* dealt with three cases that were consolidated for appeal; *Counts*, *Holmes*, and *Barilleaux*. *Counts*, 99 Wn.2d 54, 57, 659 P.2d 1087 (1983). In *Barilleaux*, the defendant raised the suppression challenge below so it was not waived. *Counts*, 99 Wn.2d at 64. Presumably *Counts* also raised the issue below, as after trial, but before oral argument, the United States Supreme Court had issued an opinion that the Court of Appeals held did not apply to *Counts* retroactively, but the Washington Supreme court subsequently established it in fact did. *Counts*, 99 Wn.2d at 59-60. Certainly, there is nothing to suggest the suppression issues were raised for the first time on appeal in either *Counts* or *Holmes*.

Second, the court in *McCormick* claimed that applying waiver would thwart the doctrine of retroactivity. *McCormick*, 216 P.3d at 476. However, that claim is also incorrect.

Regarding the federal law requirement that plain error be present for issues to be raised for the first time on appeal, in *United States v. [Joyce] Johnson*, the court held that plain error review applies absent a preserved objection even when the error results from a change in the law that occurs while the case is pending. *United States v. Morelos*, 544 F.3d 916, 921 (8th Cir. 2008) (citing *United States v. [Joyce] Johnson*, 520 U.S. 461, 467, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997)). The 9th Circuit Court of Appeals has recognized a narrow exception to the general rule in that issues raised for the first time on appeal will not be considered where the new issue arises because of a change in the law while the appeal is pending. *United States v. Flores-Payson*, 942 F.2d 556, 558 (9th Cir. 1991).

Nonetheless, a change in the law is not sufficient to justify a plain error review of suppression issues not raised below. Under Federal Rule of Criminal Procedure 12(b)(3), a suppression issue must be raised before the trial court. *United States v. Rose*, 538 F.3d 175, 177 (3rd Cir. 2008). Rule 12(b)(3) supercedes the “plain error” standard of Rule 52(b). This was because suppression issues not raised in the trial court “direct a waiver approach” to the analysis. *Rose*, 538 F.3d at 177-79, 182-83 (citing Fed.R.Crim.P. 12(e) (stating that failure to raise the issues prior to

trial constitutes waiver)). *See also U.S. v. Chavez-Valencia*, 116 F.3d 127, 129-33 (5th Cir. 1997).

Similarly, in Washington the exclusion of improperly obtained evidence is a privilege that may be waived, and the fact that it was not raised is not an error in the proceedings below, i.e. not a manifest error, which is an error that affects the defendant's due process right to a fair trial. *See State v. Tarica*, 59 Wn. App. 368, 372, 798 P.2d 296 (1990) (citing *State v. Baxter*, 68 Wn.2d 416, 413 P.2d 638 (1966)). *See also State v. Valladares*, 31 Wn. App. 63, 639 P.2d 813 (1982), *rev'd. in part on other grounds, State v. Valladares*, 99 Wn.2d 663, 664 P.2d 508 (1982).

To the extent the court in *McCormick* treated defendants who had failed to raise the suppression issue the same as defendants who had raised the issue, it was the *McCormick* court that inverted the retroactivity standard and treated differently situated defendants the same. Persons who have raised the issue below and persons who have failed to do so are not similarly situated.

Opposing parties should have an opportunity at trial to respond to possible claims of error and to shape their cases to issues and theories at the trial level, rather than facing newly asserted errors, theories and issues for the first time on appeal. Tegland, Karl, Washington Practice Series, vol. 2A, Rule Practice, Sixth Ed., p. 192. By dispensing with the doctrine of waiver, the court ends up deciding cases where the State has been given

no notice of the issue and denied the ability to make a record, the lack of which is then used against the State on the appellate review.

The waiver doctrine also serves the interests of judicial economy by encouraging resolution of issues at the trial court level and promotes justice in the form of finality of decisions, rather than permitting justice to be delayed by the raising of a never ending stream of new issues on appeal. By incorrectly deeming waiver to be contrary to principles of retroactivity, the court in *McCormick* in fact created a heretofore unrecognized exception to the waiver doctrine. The doctrines of waiver and retroactivity are complementary, not incompatible. The court in *McCormick* failed to recognize that or give the doctrine of waiver its full due.

By the defendant's waiver of the issue, the State was deprived of the ability to put forth other evidence that could support the search. The evidence may have been admissible under other exceptions to the warrant requirement. Moreover, if the facts necessary for a decision cannot be found in the record review is unwarranted. *State v. Riley*, 121 Wn.2d at 31-32.

- b. Even If The Court Were To, For Some Reason, Consider The Merits Of The Argument, The Evidence Should Not Be Suppressed Where The Officer Acted In Good Faith.

The “good faith” exception to the exclusionary rule applies under both the Fourth Amendment and Article 1, § 7.

- i. **The Fourth Amendment Good Faith Exception To The Exclusionary Rule Applies.**

The exclusionary rule is “a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect” by excluding evidence that is the fruit of an illegal search. *United States v. Calandra*, 414 U.S. 338, 347, 94 S. Ct 613, 38 L. Ed. 2d 561 (1974). Evidence derived from illegal police conduct is an ill-gotten gain, “fruit of the poisonous tree,” that should ordinarily be excluded from evidence. *Wong Sun v. United States*, 371 U.S. 471, 484-85, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Nevertheless, evidence obtained after an illegal search should not be excluded if it was not obtained by the exploitation of the initial illegality. *Wong Sun*, 371 U.S. at 488.

Consistent with these principles, the United States Supreme Court held that an arrest (and a subsequent search) under a statute that was valid at the time of the arrest remains valid even if the statute is later held to be unconstitutional. *Michigan v. DeFillippo*, 443 U.S. 31, 38, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979).

In *DeFillippo*, the Court stated:

At that time [of the underlying arrest], of course, there was no controlling precedent that this ordinance was or was not constitutional, and hence the conduct observed violated a presumptively valid ordinance. A prudent officer, in the course of determining whether respondent had committed an offense under all the circumstances shown by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional.

DeFillippo, 443 U.S. at 37-38.

Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement. *DeFillippo*, 443 U.S. at 37-38 (emphasis added).

The Court further noted that:

[T]he purpose of the exclusionary rule is to deter unlawful police action. No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the respondent, was the product of a lawful arrest and a lawful search. To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule.

DeFillippo, 443 U.S. at 38 (footnote 3, emphasis added). In

DeFillippo the Supreme Court upheld the arrest, search, and conviction of the defendant even though the statute which justified the stop was subsequently deemed to be unconstitutional. *DeFillippo*, 443 U.S. at 40.

The only difference between *DeFillippo* and the present case is that in *DeFillippo* the Court was addressing an arrest based on a presumptively valid statute that was later ruled unconstitutional, whereas

here the situation involves a search held constitutional by well-established and long-standing judicial pronouncements. This distinction does not justify a different result. Law enforcement officers should be entitled to rely on established case law.

Prior to *Gant*, both the federal and state courts had unequivocally endorsed the constitutional validity of the vehicle searches incident to arrest. See *State v. Vrieling*, 144 Wn.2d 489, 28 P.3d 762 (2001). See also, *United States v. Caseres*, 533 F.3d 1064, 1071 (9th Cir. 2008); *United States v. Weaver*, 433 F.3d 1104, 1107 (9th Cir. 2006). Both cases interpret: *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); and *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). The court in *Gant* explicitly recognized that the Court's prior opinions have "been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search. . . ." and that "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception." *Gant*, 129 S. Ct. at 1718.

Likewise, the constitutionality of the search incident to arrest rule was repeatedly confirmed by the Washington Supreme Court over the past 23 years. See, e.g., *Vrieling*, 144 Wn.2d 489; *State v. Parker*, 139 Wn.2d 486, 489, 987 P.2d 73 (1999); *State v. Johnson*, 128 Wn.2d 431, 441, 909 P.2d 293 (1996); *State v. Fladebo*, 113 Wn.2d 388, 779 P.2d 707 (1989).

Since 1987 the rule of the Fifth Circuit has been that the exclusionary rule does not apply to searches that were conducted in reliance on established case law that was subsequently overturned. *United States v. Jackson*, 825 F.2d 853, 865-66 (5th Cir. 1987).

Two federal appellate courts have expressly recognized the application of the “good faith” doctrine to *Gant* cases. See *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009); *United States v. Deitz*, 577 F.3d 672, 687-688 (6th Cir. 2009). However, in *United States v. Gonzalez* the 9th Circuit held that the good faith doctrine was inconsistent with the retroactive application of *Gant*. *United States v. Gonzalez*, 578 F.3d 1130 (9th Cir. 2009).

Prior to the issuance of *McCane* and *Gonzalez* two federal district courts had also reached differing opinions on the application of the good faith doctrine to *Gant* cases. See *United States v. Grote*, 629 F.Supp.2d 1201 (E. Dist. Wash. 2009) (applying good faith); *United States v. Buford*, 623 F. Supp.2d 923 (M.D. Tenn. 2009) (rejecting good faith). It is worth noting that the court in *Buford* failed to consider the United States Supreme Court authority in *DeFillipo*, while the analysis in *Grote*, having done so, is more rigorous.

Subsequent to the issuance of *Gonzalez*, two different federal district courts have rejected the analysis of *Gonzalez* that *Gant* applies retroactively. See *United States v. McGhee*, Slip. Op. 2:09-CR-119, p. 6, 2009 WL 4152798 (S.D. Ohio 2009); *United States v. Peoples*, Slip. Op.

1:09-CR-170, p. 5-6, ___ F.Supp.2d ___, 2009 WL 3586564 (W.D. Mich 2009).¹

ii. The Evidence Should Not Be Suppressed Under Article 1, § 7 Because The Search Was Conducted “Under Authority Of Law” And Pursuant To A Presumptively Valid Case Law.

The pre-*Gant* search here was conducted pursuant to authority of law and presumptively valid judicial opinions. See *State v. Johnson*, 128 Wn.2d 431, 446-47, 909 P.2d 293 (1996) (holding that search of a vehicle incident to arrest of an occupant is one of the exceptions to the warrant requirement under Article I, section 7).

The Washington Supreme Court has adopted the good faith analysis as set forth in *Michigan v. DeFillippo*. In a unanimous decision, the Supreme Court applied the *DeFillippo* rule under article I, section 7, and held that an arrest under a statute valid at the time of the arrest remains valid even if the basis for the arrest is subsequently found unconstitutional. *State v. Potter*, 156 Wn.2d 835, 843, 132 P.3d 1089 (2006). The Court stated:

¹ However, in something of a bizarre *non sequitur*, the court in *Peoples* went on to hold that while the good faith exception applies to actions of the judiciary, it would not extend the exception to reliance on case law because that would extend the exception to the “good faith of the officer alone unchecked by the [...] legislature [...] or the judiciary... *Peoples*, Slip. Op. 1:09-CR-170, p. 6. Of course, reliance on case law is reliance on the judiciary. Moreover, the court in *Peoples* apparently also failed to recognize that a test of reasonable good faith would apply to that reliance.

In [*White*,] we held that a stop-and-identify statute was unconstitutionally vague and, applying the United States Supreme Court's exception to the general rule from *DeFillippo*, excluded evidence under that narrow exception for a law "so grossly and flagrantly unconstitutional" that any reasonable person would see its flaws.

Potter, 156 Wn.2d at 843 (quoting *State v. White*, 97 Wn.2d 92, 103, 640 P.2d 1061 (1982) (quoting *DeFillippo*, 443 U.S. at 38)). In *DeFilippo* the court recognized a "narrow exception" to good faith where a law is "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." *DeFillippo*, 443 U.S. at 37-38.

Under the facts presented in *Potter*, there were no prior cases holding that license suspension procedures in general were unconstitutional, and thus there was no basis to assume that the statutory provisions were grossly and flagrantly unconstitutional. Accordingly, applying *DeFillippo*, the Court affirmed the defendants' convictions despite the fact that the statutory licensing procedures at issue had subsequently been held to be unconstitutional. *Potter*, 156 Wn.2d at 843.

Similarly, in *State v. Brockob*, 159 Wn.2d 311, 341-42, 150 P.3d 59 (2006), a defendant contended that his arrest for driving while his license was suspended and a search incident to that arrest were unlawful for the same reason claimed in *Potter*. The Court rejected the defendant's argument, stating that:

White held that police officers may rely on the presumptive validity of statutes in determining whether there is probable cause to make an arrest unless the law is "so grossly and

flagrantly unconstitutional’ by virtue of a prior dispositive judicial holding that it may not serve as the basis for a valid arrest.”

Brockob, 159 Wn.2d at 341 n. 19 (quoting *White*, 97 Wn.2d at 103 (quoting *DeFillippo*, 443 U.S. at 38)). As in *Potter*, the court held the narrow exception for grossly and flagrantly unconstitutional laws did not apply to *Brockob* “because no law relating to driver’s license suspensions had previously been struck down.” *Brockob*, 159 Wn.2d at 341, n. 19.

Potter and *Brockob* have had the effect of overruling *White* (unanimously, in *Potter*) insofar as *White* can be read to reject the *DeFillippo* good faith reliance on a presumptively valid statute. The only difference between these cases and the present case is that the present case involves presumptively valid case law, as opposed to a presumptively valid statute. This distinction has no bearing on the analysis: the judicial opinions of the Washington Supreme Court are at least as presumptively valid as legislative enactments.

iii. The *McCormick* Court’s Rejection of the Good Faith Exception Was Erroneous.

The court in *McCormick* concluded that *White* is controlling and holds that there is no good faith exception in Washington. As stated above, the State’s position is that the *McCormick* court’s interpretation of *White* is mistaken, and in any case *White* has been superseded by *Potter*

and *Brockob* and is also distinguishable. As noted above, the courts in *Potter* and *Brockob* expressly held that *White* involved a flagrantly unconstitutional statute, and was thus consistent with *DeFillipo*.

In *United States v. McCane*, the Tenth Circuit Court of Appeals has affirmed the applicability of the good faith doctrine to *Gant* challenges. *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009). While the court in *McCane* applied the good faith doctrine to *Gant* cases, it did not expressly consider good faith in relation to retroactivity.

The *McCormick* court's reliance on *United States v. Gonzalez* is also misplaced. *McCormick*, 216 P.3d at 478 (citing *United States v. Gonzalez*, 578 F.3d 1130 (9th Cir. 2009)). The court's opinion in *Gonzalez* failed to recognize that the issue of the retroactive application of a change in the law is a completely separate issue from whether the remedy of suppression is available. The fact that suppression may be unavailable as a remedy does not thwart retroactive application of the law. Rather, the effect of that application simply does not produce the outcome that the defendant hopes for, i.e. no suppression.

Moreover, the *Gonzalez* court's reliance on *Illinois v. Krull*, is misplaced because in *Gonzalez* the court concluded that the good faith exception only applied to cases where the officer relied on a warrant later held invalid. *Gonzalez*, 578 F.3d at 1132 (citing *Illinois v. Krull*, 480 U.S. 340, 349-350, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987)). However, the court in *Krull* noted that the exclusionary rule also does not apply to

evidence obtained by police who acted in objective reasonable reliance upon a state statute. *Krull*, 480 U.S. at 349-350. In reaching that holding, the court noted that the exclusionary rule is aimed at deterring police misconduct and that legislators, like judicial officers, are not the focus of the rule. *Krull*, 480 U.S. at 350. Because a change in case law is made by judicial officers, the reasoning of *Krull* is even more applicable to officer's reliance on the court's published opinions. *See Krull*, 480 U.S. at 350. Indeed, as the court in *Krull* noted, in *State v. Leon*, it already endorsed the position that law enforcement may rely on the actions of judicial officers. *See Krull*, 480 U.S. at 350 (citing United *State v. Leon*, 468 U.S. 897, 916, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)). To the extent that the court in *Gonzalez* attempts to rely on *Krull*, that reliance is misplaced. *Gonzalez*, 578 F.3d at 1132.

Finally, the claim that the defendant was handcuffed and in the back of the patrol car when the bag was retrieved is not supported by the record. The defendant had been handcuffed, but there is nothing to indicate that he was in the back of the patrol car at the time the bag was retrieved. Further, there is a reasonable inference that Officer Johnson was still taking Williams back to the patrol and that he was not yet in the back of the patrol car when officer Brown retrieved the bag. *See* II RP 45, ln. 18-25; p. 112, ln. 1 to p. 115, ln. 6.

2. SUFFICIENT EVIDENCE SUPPORTED THE
CONVICTIONS.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d

60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[...] great deference [. . .] is to be given the [trier's] factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted).

The defendant claims that there was not sufficient evidence that the defendant possessed the bag. Br. App. 11-12. More specifically, the defendant claims that while the defendant may have been proximate to the bag, there was not sufficient evidence to show that the defendant had dominion and control over the bag. Br. App. 11-12.

Possession may be actual or constructive. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). A person actually possesses an item if that person has physical custody of it; a person constructively possesses the item if that person has dominion and control over it. *Jones*,

146 Wn.2d at 333; *State v. Coahran*, 27 Wn. App. 664, 668, 620 P.2d 116 (1980) (citing *State v. Callahan*, 77 Wn.2d 27, 31, 459 P.2d 400 (1969)).

Dominion and control need not be exclusive and can be established by circumstantial evidence. *State v. Chavez*, 138 Wn. App. 29, 34, 156 P.3d 246 (2007) citing *State v. Weiss*, 73 Wn.2d 372, 375 438 P.2d 610 (1968). In a review of whether there is sufficient evidence of dominion and control, the court looks at “the totality of the situation to determine if there is substantial evidence tending to establish circumstances from which the jury can reasonably infer that the defendant had dominion and control of the [prohibited items] and was thus in constructive possession of them.” *State v. Partin* 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). Thus, the court looks to the various indicia of dominion and control with an eye to the cumulative effect of a number of factors. *Partin*, 88 Wn.2d at 906; *State v. Hagen*, 55 Wn. App. 494, 499, 781 P.2d 892 (1989).

Factors the courts have previously recognized include dominion and control over the location or premises where the prohibited item is found; proximity; the ability to exclude others; and the ability to take immediate or actual possession. *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997) (affirming dominion and control over the premises as a factor); *State v. Shumaker*, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007) (holding that dominion and control is one factor from

which constructive possession may be inferred); *State v. Edwards*, 9 Wn. App. 688, 690, 541 P.2d 192 (1973) (considering proximity as one factor and exclusion of others as another factor); *State v. Wilson*, 20 Wn. App. 592, 596, 581 P.2d 592 (1978) (recognizing ability to exclude as a factor); *Hagen*, 55 Wn. App. at 499 (identifying both proximity and the ability to reduce an object to actual physical control as factors).

On the other hand, most of these factors alone will generally not be sufficient to establish dominion and control. *State v. Cantabrana*, 83 Wn. App. 204, 921 P.2d 572 (1996) (dominion and control alone not sufficient); *Shumaker*, 142 Wn. App. at 334 (dominion and control alone not sufficient); *State v. Summers*, 45 Wn. App. 761, 763-64, 728 P.2d 613 (1986) (proximity alone is not sufficient to establish dominion and control); *Hagen*, 55 Wn. App. at 499 (the ability to reduce an object to actual possession alone is not sufficient). Indeed, even actual possession alone may not be sufficient to establish possession, e.g. if it was temporary or fleeting. *State v. Ponce*, 79 Wn. App. 651, 654, 904 P.2d 322 (1995); *State v. Hystad*, 36 Wn. App. 42, 49, 671 P.2d 793 (1983). Finally, while the ability to exclude others is a factor, dominion and control need not be exclusive to establish constructive possession. *Wilson*, 20 Wn. App. at 596; *State v. Weiss*, 73 Wn.2d 372, 378, 438 P.2d 610, 613 (1968).

A person has dominion and control of an item if he has immediate access to it. *Jones*, 146 Wn.2d at 333. Mere proximity, however, is not enough to establish possession. *Id.* No single factor is dispositive in determining dominion and control. *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243, *review denied*, 126 Wn.2d 1016, 894 P.2d 565 (1995). The totality of the circumstances must be considered. *Collins*, 76 Wn. App. at 501.

“An automobile may be considered a ‘premises’ for the purpose of determining whether the defendant exercise dominion and control over the premises” where the prohibited item was found. *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971). “Whether a passenger’s occupancy of a particular part of [the] automobile would constitute dominion and control of either the [prohibited items] or the area in which they are found would depend upon the particular facts in each case.” *Mathews*, 4 Wn. App. at 656.

The State adduced sufficient evidence to show the respondent had dominion and control over the bag with the drugs. As a preliminary matter, in the Brief of Appellant the defendant claims that the conviction in Count I was for possession of methamphetamine, and that was contained in a pouch on the bench seat closest to the driver. Br. App. p. 12. However, the record showed that methamphetamine was in the same

laptop style bag that contained the oxycodone and unspent ammunition. II RP 45, ln. 18 to p. 51, ln. 10; II RP 122, ln. 17-25; Ex 1; Ex 6. There was also separately methamphetamine in the pouch that contained the scale. II RP 55, ln. 24 to p. 56, ln. 22.; II RP 122, ln. 17 to p. 123, ln. 2

From Officer Brown's testimony, the jury could infer that the bag containing the oxycodone, coffee filters, and ammunition was either touching or under Williams's arm. II RP 105, l n. 25 to P. 106, ln. 1. Such an inference would have permitted the jury to find that Williams actually possessed the bag with the filters and oxycodone. Additionally, because dominion and control need not be exclusive, the jury could have also found that both Williams and Rambo possessed the bag simultaneously.

In *State v. Echeverria*, the court found the State presented sufficient evidence to support the juvenile respondent's conviction for possession of a firearm by a minor, in violation of former RCW 9.41.040(1)(e). *State v. Echeverria*, 85 Wn. App. 777, 934 P.2d 1214 (1997). In *Echeverria*, an officer watched *Echeverria*, known to be 15 years old, drive into an apartment complex parking lot and get out of the driver's seat of a vehicle. *Echeverria*, 85 Wn. App. at 780. In addition to *Echeverria*, four other passengers got out of the car. *Echeverria*, 85 Wn. App. at 780. The officer approached *Echeverria*, handcuffed him, and placed him in her patrol car. *Echeverria*, 85 Wn. App. at 780. The officer then returned to the stopped vehicle and saw approximately three inches of

a gun barrel sticking out from directly under the driver's seat. *Echeverria*, 85 Wn. App. at 780. The car belonged to Jesus Calderon who loaned the car to his brother-in-law, Robert Vanagus. *Echeverria*, 85 Wn. App. at 781. Vanagus drove the car to a mini mart and then let Echeverria drive from the mini mart to the apartment complex while Vanagus rode as a passenger. *Echeverria*, 85 Wn. App. at 781. No fingerprints were retrieved from the firearm. *Echeverria*, 85 Wn. App. at 781. When looking at the facts, in *Echeverria* the court found that the location of the gun at Echeverria's feet combined with the gun's visibility allowed a rational trier of fact to find Echeverria had dominion and control over the area and constructive possession of the gun. *Echeverria*, 85 Wn. App. at 783.

Here, ultimately the jury could have inferred that Williams had actual possession of the bag from Officer Brown's testimony that it was touching his arm. The jury could have also found that Williams had dominion and control of the bag based on Rambo's statement that it was Williams. Those facts can be combined with the fact that the jury also could have found that Williams had control over the location where the bag was found where it was touching him, that he had proximity to the bag, that he could exclude others, and that he could take immediate or actual possession of the bag and its contents. The inference of his dominion and control was not based on proximity alone. Accordingly, when all the evidence is viewed in the light most favorable to the State,

and interpreted most strong against the defendant, the finding of the jury should be upheld.

3. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT BECAUSE SHE NEVER ARGUED THAT THE JURY SHOULD FIND THE DEFENDANT GUILTY BASED ON PROXIMITY ALONE.

Absent a proper objection, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so “flagrant and ill intentioned” that no curative instruction would have obviated the prejudice it engendered. *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. Ziegler*, 114 Wn.2d 533, 540, 789 P.2d 79 (1990), *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

The defendant bears the burden of establishing both the impropriety of the prosecutor’s remarks and their prejudicial effect. *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require “that [the] burden of showing essential unfairness be sustained by him who claims such injustice.” *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. *State v. Bryant*, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998) “remarks must be read in context.” *State v. Pastrana*, 94 Wn. App. 463, 479, 972 P.2d 557 (1999).

Improper remarks do not constitute prejudicial error unless the appellate court determines there is a substantial likelihood that the misconduct affected the jury’s verdict. *Finch*, 137 Wn.2d 792 at 839. The trial court is best suited to evaluate the prejudice of the statement. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

“It is not misconduct... for a prosecutor to argue that the evidence does not support the defense theory. Moreover, the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996). If a curative instruction could have cured the error, and the defense failed to request one, then reversal is not required. *Binkin*, at 293-294.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)).

Contrary to the defendant's claim, the prosecutor never argued that proximity alone was sufficient to show dominion and control. *See* Br. App., p. 20. Further, it is not error for the prosecutor to argue any of the factors of dominion and control, including proximity. Moreover, the arguments the defense takes issue with were in fact that the defendant had access to the bag, which relates to the defendant's ability to take immediate or actual possession of the bag and its contents, not proximity. It also relates to his ability to exclude.

Where these arguments are not improper, certainly they did not rise to the level of being so flagrant and ill intentioned that no curative instruction would have cured it. Accordingly, the defendant's argument on this issue is without merit and should be denied.

4. TRIAL COUNSEL WAS NOT INEFFECTIVE.

To demonstrate ineffective assistance of counsel, an appellant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient

representation prejudiced the appellant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995).

However, where an appellant claims ineffective assistance of counsel for trial counsel's failure to object to the admission of evidence, the burden on the appellant is even higher. To prove that the failure of trial counsel to object to the admission of evidence rendered the trial counsel ineffective, the appellant must show that: not objecting fell below prevailing professional norms; that the proposed objection would likely have been sustained; and that the result of the trial would have been different if the evidence had not been admitted. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). To prevail on this issue, the appellant must also rebut the presumption that the trial counsel's failure to object "can be characterized as legitimate trial strategy or tactics." *In re Pers. Restraint of Davis*, 152 Wn.2d at 714 (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (emphasis added in original)). Deliberate tactical choices may only constitute ineffective assistance if they fall outside the wide range of professionally competent assistance, so that "exceptional deference must be given when evaluating counsel's strategic decisions." *In re Pers. Restraint of Davis*, 152 Wn.2d at 714 (quoting *State v. McNeal*, 145 Wn.2d at 362).

Courts engage in a strong presumption that counsel's representation was effective. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. The burden is on an appellant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. *McFarland*, 127 Wn.2d at 334.

- a. Trial Counsel Was Not Ineffective For Failing To Ask For An Instruction That "Mere Proximity" Was In Sufficient To Establish Possession Or An Instruction On Unwitting Possession.

Even when the defense requests an instruction on 'mere proximity,' the trial court has no obligation to include in the possession instruction language that mere proximity is insufficient by itself to establish possession. See *State v. Castle*, 86 Wn. App. 48, 61, 935 P.2d 656 (1997). More specifically, the court in *Castle* held that the lack of the "mere proximity" language does not preclude the defendant from arguing his theory of the case. *Castle*, 86 Wn. App. at 61. And indeed, here the defense did argue to the jury that proximity alone was not a sufficient basis to convict the defendant. III RP 160, ln. 16 to p. 161, ln. 1; p. 161, ln. 16 to p. 163, ln. 10. Accordingly, defense counsel was not ineffective for failing to request specific language that proximity alone is not enough.

On appeal, the defense claims in a heading only that trial counsel should have also asked for an instruction on unwitting possession as well.

However, the defense cites no authority and makes no argument in support of that proposition. Br. App. p. 16-19. For that reason, the court should refuse to consider the issue. *Ensley v. Pitcher*, Slip. Op. 61537-8, p. 18, ___ Wn. App. ___, 216 P.3d 1048, 1051 (2009) (citing RAP 10.3(a)(6)). Moreover, the defendant's theory of the case was not based on unwitting possession.

While it is common to argue alternative inconsistent legal positions on appeal, experienced trial counsel knows full well that such an approach is generally not well regarded by juries. This is because jurors don't think like lawyers, and when a jury is asked to rely on either of alternate inconsistent theories, it tends to conclude that the defense is attempting to mislead them into an unjust decision.

Further, unwitting possession was an inherently self-contradictory argument under the facts of this case. Such an argument would have involved admitting to the jury that the bag was the defendant's, but then essentially claiming that he hadn't put the drugs in there, and didn't know who did. Given that the bag was right next to him, either at or under his arm, that claim would have been difficult to make. *See* II RP 105, ln. 25 to p. 106, ln. 1. Moreover, in order to put that evidence forward, it would have been necessary for the defendant to take the stand and testify to it. However, defense counsel was ethically prohibited from putting on such testimony if it was false [RPC 3.3(4)], and in any case, any time a defendant takes the stand, such a course is fraught with peril for a number

of reasons including detrimental cross examination to the risk that the jury will simply find the defendant not to be credible. Either of those two occurrences are usually fatal to the defendant's case. *See also State v. Berrysmith*, 87 Wn. App. 268, 944 P.2d 397 (1997) (discussing counsel's obligation not to put on testimony for which counsel has sufficient grounds to support a reasonable belief that perjury would occur); *State v. Greve*, 67 Wn. App. 166, 834 P.2d 656 (1992).

Not only was it a reasonable tactical decision for trial counsel not to argue unwitting possession, it was indeed prudent and well considered for trial counsel not to do so.

b. Trial Counsel Was Not Ineffective For Not Objecting To Rambo's Statement That The Laptop Bag Belonged To Williams.

On appeal the defense claims that trial counsel should have objected to the admission of Rambo's statement that the laptop bag belonged to Williams. However, that argument is without merit where there were good tactical reasons for defense counsel not to object.

Officer Brown testified that the bag was effectively touching Williams and under his elbow. II RP 105, ln. 19 to p. 106, ln. 1. From this the jury could have inferred that Williams had actual possession. To counter such an inference by the jury, trial counsel argued that it was Rambo's bag because he pleaded guilty, and that he did so because he was the one who knew what was in the bag where he brought it to Officer

Brown's attention in an attempt to disavow it. III RP 170, ln. 8-21. The fact that Rambo first disavowed the bag, and then pleaded guilty showed that his statement to the officer was not true. III RP 170, ln. 16-19. The obvious inference that defense counsel wanted the jury to draw was that Williams' statement that the bag wasn't his was true because the bag was actually Rambo's. Admitting Rambo's statement to Officer Brown is precisely what enabled the defense to claim William's statement was true. Accordingly, the lack of objection to the statement was a reasonable tactical decision.

Trial counsel conduct did not fall below an objective standard of reasonableness for failing to request a proximity instruction where failure to give the instruction is not error. Nor did trial counsel's conduct fall below an objective standard of reasonableness for failing to object to the Statement of Rambo where doing so was consistent with a reasonable trial tactic of showing that the items found were Rambo's and that Williams disclaimer was credible. Nor can the defendant show prejudice from these actions.

5. THERE WAS NO CUMULATIVE ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional

error was harmless beyond a reasonable doubt.” *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Rose*, 478 U.S. at 577. “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Neder v. United States*, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). “[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” *Brown v. United States*, 411 U.S. 223, 232 (1973) (internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Rose*, 478 U.S. at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometime numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also*

State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998)

(“although none of the errors discussed above alone mandate reversal....”).

The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court’s weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93 94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless errors that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test and therefore they will weigh more on the scale when accumulated. *See Russell*, 125 Wn.2d at 94. Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *See Russell*, 125 Wn.2d at 94. Second, there are errors that are harmless because of the strength of the untainted evidence and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See e.g., Johnson*, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”) (emphasis added).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors amounted to cumulative error and required reversal), with *State v. Wall*, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (holding that three errors did not amount to cumulative error), and *State v. Kinard*, 21 Wn. App. 587, 592 93, 585 P.2d 836 (1979) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see, e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against *Badda*, (2) to disregard the prosecutor's statement that the state was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see e.g., State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility combined with two errors relating to credibility of state witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child rape victim's testimony was cumulative error

because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see, e.g., State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See Stevens*, 58 Wn. App. at 498.

Here, none of the errors alleged by the defendant have merit. Moreover, the defendant can show no prejudice from the alleged errors, nor can he show that they would combine so that together they deprived the defendant of a fair trial.

D. CONCLUSION.

The defendant's suppression challenge that the search of the vehicle incident to arrest was unlawful was waived where the issue was not raised below, and in any case is without merit where the officer acted in good faith on then existing case law.

There was sufficient evidence that the defendant possessed the drugs where the bag containing them was touching or under the defendant's arm, the driver said it belonged to the defendant, and where multiple factors existed to support dominion and control.

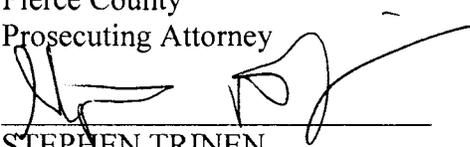
The defendant's claim that the prosecutor's closing was misconduct is without merit where the prosecutor never argued that the jury should find dominion and control based on proximity alone.

Trial counsel was not ineffective where she was able to and did argue her theory of the case without a "proximity alone" instruction, and where she did not object to the driver's statement as part of a sound trial strategy to show the drugs belonged to the driver and that William's disclaimer of them was credible

Whether there was no cumulative error where there was not any error, the defendant suffered no prejudice, and any claimed errors did not accumulate?

DATED: DECEMBER 7, 2009

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 for 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.


Date Signature

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