

FILED

SEP 14 2009

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

No. 27895-6-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER D. BROWN,

Appellant.

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

The Honorable Kathleen M. O'Connor
The Honorable Annette S. Plese

BRIEF OF APPELLANT

SARAH M. HROBSKY
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting evidence obtained pursuant to a warrantless search of Mr. Brown's car incident to his arrest, in violation of the Fourth Amendment to the United States Constitution and Article I, section 7 of the Washington Constitution.

2. In the absence of sufficient evidence to establish beyond a reasonable doubt every element of the offense of assault in the third degree, Mr. Brown's conviction was in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, section 3 of the Washington Constitution.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fourth Amendment to the United States Constitution prohibits a warrantless vehicle search incident to a recent occupant's arrest after the arrestee is secured and cannot access the interior of the vehicle, unless the officer has reason to believe that evidence of the offense of arrest might be found in the vehicle. Here, when Mr. Brown was stopped for speeding, he attempted to aim a gun at the arresting officer but the gun spun out of his hand and onto the road several feet from his car. The officer arrested Mr. Brown for assault, secured him in the patrol car, and then searched the passenger compartment of Mr. Brown's car and

discovered evidence of illegal drugs. Did the warrantless search of Mr. Brown's car violate the warrant requirement of the Fourth Amendment? (Assignment of Error 1)

2. Article I, section 7 of the Washington Constitution prohibits a warrantless vehicle search incident to a recent occupant's arrest where the arrestee is secured and cannot access the interior of the vehicle, regardless of whether the officer has reason to believe that evidence of the offense of arrest might be found in the vehicle. Here, where the officers conducted a warrantless search of the passenger compartment of Mr. Brown's car after he was arrested, handcuffed, and secured in the back of a patrol car, did the search violate Mr. Brown's privacy rights protected by Article I, section 7? (Assignment of Error 1)

3. The due process provisions of the Fourteenth Amendment to the United States Constitution and of Article I, section 3 of the Washington Constitution require the State to prove beyond a reasonable doubt every essential element of assault in the third degree as charged and prosecuted. Here, where the evidence established an attempted assault only, rather than a completed assault, was Mr. Brown's right to due process violated

when he was convicted of assault in the third degree? (Assignment of Error 2)

C. STATEMENT OF THE CASE

On May 2, 2008, Officer Matthew Lyons stopped appellant Christopher Brown for speeding. 10/29/08 RP 128-29; 1/21/09 RP 59.¹ Mr. Brown opened the car door and provided his driver's license and registration. 10/29/08 RP 133-34; 1/21/09 RP 64. As Officer Lyons started to return to his patrol car to check Mr. Brown's identification, Mr. Brown said, "I've got something for you," in an "icy, chilly" voice. 10/29/08 RP 137-38; 1/21/09 RP 64. Officer Lyons turned around immediately and saw Mr. Brown quickly grab the butt of a pistol from between the driver's seat and console and swing the pistol toward the open door. 10/29/08 RP 138-139; 1/21/09 RP 65. However, the muzzle of the gun hit the inside roof of the car, spun out of Mr. Brown's hand, and landed in the road several feet from the car. 10/29/08 RP 142; 1/21/09 RP 65. Officer Lyons pulled Mr. Brown out of the car and placed him in handcuffs. 10/29/08 RP 142-43, 146; 1/21/09 RP 66.

¹The Verbatim Report of Proceedings consists of three volumes, each of which includes multiple dates. The report will be referred to by date, followed by "RP" and the page number.

At this time, Deputy Brett Hubbell arrived to assist Officer Lyons. 10/28/09 RP 44-45; 1/21/09 RP 42. Deputy Hubbell placed Mr. Brown under arrest and secured him in his patrol car. 1/21/09 RP 47.

The two officers searched the passenger compartment and unlocked glove box of Mr. Brown's car and found a plastic bag containing crack cocaine, an opened cigarette pack containing several more plastic bags of crack cocaine, two glass smoking pipes, syringes, a razor blade, and a film canister containing dihydrocodeinone pills, a controlled substance. 10/29/08 RP 49, 53; 10/29/08 RP 118-19, 156-57, 159. Deputy Hubbell then called a towing company to impound the car. 10/28/08 RP 53.

Matthew Stimmler, the tow truck driver, was given Mr. Brown's key ring. 10/28/08 RP 66-67. Mr. Stimmler testified he was required to "inventory the vehicle." 10/28/08 RP 64. Using a key from the key ring, he unlocked the car trunk and found clothes, a paper grocery bag with numerous needles, and a safe. 10/28/08 RP 65-66. Using another key from the key ring, he unlocked the safe which contained a quantity of cash. 10/28/08 RP 66-67. The following day, he contacted the Spokane County Sheriff's Department. 10/28/08 RP 67-68.

Pursuant to a search warrant, Detective Travis Hansen and Sheriff David Knechtel searched the trunk of Mr. Brown's car.

10/29/08 RP 85, 186. Inside the safe, they found \$197.00 in one-dollar bills, as well as a knife and razor with a white substance on the blades. 10/29/08 RP 85-86.²

Mr. Brown was charged with assault in the second degree, or, alternatively, assault in the third degree, in violation of RCW 9A.36.021(1)(c) or RCW 9A.36.031(1)(g), unlawful possession of dihydrocodeinone, in violation of RCW 69.50.4013(1), and unlawful possession of cocaine with intent to deliver, in violation of RCW 69.50.401(1)(2)(a), (b). CP 8-9. At trial, after the State rested, the trial court granted Mr. Brown's motion to dismiss the charge of assault in the second degree. 10/29/08 RP 215. Mr. Brown was convicted of unlawful possession of dihydrocodeinone, as charged, and the lesser included offense of unlawful possession of cocaine. CP 41, 41. The jury was unable to reach a verdict on the charge of assault and a mistrial was declared on that count. 10/30/08 RP 281.

²Apparently, the State's forensic scientist did not test the substance on the blades.

On January 21-22, 2009, Mr. Brown was retried on one count of assault in the third degree and convicted as charged. CP 67; 1/21-22/09 RP 1-156.

D. ARGUMENT

1. THE WARRANTLESS VEHICLE SEARCH VIOLATED MR. BROWN'S FEDERAL CONSTITUTIONAL PROTECTION FROM UNREASONABLE SEARCHES AND HIS STATE CONSTITUTIONAL RIGHT TO PRIVACY.

After Mr. Brown was arrested and placed into a patrol car, the police officers conducted a warrantless search of the passenger compartment and the glove box of the car he was driving. 10/28/08 RP 49, 53; 10/29/08 RP 150, 156-57, 159. This warrantless search violated both the warrant requirement of the Fourth Amendment to the United States Constitution and the privacy protections of Article I, section 7 of the Washington Constitution.

a. This issue is properly before the Court. The failure to suppress evidence of illegal drugs found pursuant to the unauthorized warrantless search of Mr. Brown's car was a manifest error that is properly raised for the first time on appeal. A manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a). An error is "manifest" when it was actually

prejudicial to the defendant. *State v. Contreras*, 92 Wn. App. 307, 311, 966 P.2d 915 (1998). In the context of a failure to move to suppress evidence at trial, the defendant must show the trial court likely would have granted the motion to suppress if it had been made. *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). “[W]he an adequate record exists, the appellate court may carry out its long-standing duty to assure constitutionally adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal.” *Contreras*, 92 Wn. App. at 313.

Here, the record contains all the pertinent facts to adequately review this issue. And for the reasons below, it is highly likely the trial court would have granted a suppression motion, thereby precluding the State from establishing the offenses related to illegal drugs. Therefore, the record establishes actual prejudice. Appellate review is appropriate.

b. The Fourth Amendment prohibits a warrantless search of a vehicle incident to arrest where the arrestee is secured and unable to reach the passenger compartment unless the officers have a reasonable belief that evidence of the offense of arrest might be found in the vehicle. Warrantless searches are *per se* unreasonable and in violation of the Fourth Amendment,³ with a “few specifically established and well-delineated exceptions.” *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). One recognized exception is a limited warrantless vehicle search incident to the arrest of a recent occupant. *Weeks v. United States*, 232 U.S. 383, 392, 34 S.Ct. 341, 58 L.Ed.652 (1912). The search incident to arrest exception is limited to “the arrestee’s person and the area ‘within his immediate control’ – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.” *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

³“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

This issue is controlled by the recent decision of *Arizona v. Gant*, in which the United States Supreme Court ruled the Fourth Amendment prohibits a warrantless vehicle search incident to a recent occupant's arrest, with two exceptions: 1) the arrestee is unsecured and physically able to access to the interior of the vehicle, or 2) officers have a reasonable belief that evidence of the offense of arrest might be found in the vehicle. 556 U.S. ___, 129 S.Ct. 1710, 1714, 173 L.Ed.2d 485 (2009).

The first exception provides more protection than provided in some Washington cases. *See, e.g., State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986). However, a state constitution may not be less protective of personal liberties than the federal constitution. *State v. Simpson*, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980). Therefore, Washington case law that purports to authorize any and all warrantless vehicle searches incident to a recent occupant's arrest is in violation of the Fourth Amendment, as explained in *Gant*. *See* subsection (c), *infra*.

The second exception is rooted in the federal "automobile exception" to the warrant requirement. But this exception is not supported by Article I, section 7 and has been rejected by the Washington Supreme Court. *See, e.g., State v. Ringer*, 100 Wn.2d

686, 700-01, 674 P.2d 1240 (1983), citing *State v. Gibbons*, 118 Wash. 171, 203 Pac. 390 (1922). Therefore, a warrantless vehicle search for evidence of the offense of arrest where the arrestee is secured and unable to access the vehicle is impermissible in this jurisdiction. See subsection (d), *infra*.

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

Article I, section 7 of the Washington Constitution provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” It is well-settled that Article I, section 7 provides greater protection than does the Fourth Amendment to the United States Constitution. See, e.g., *State v. White*, 135 Wn.2d 761, 768, 958 P.2d 982 (1998) (“[A]rticle I, section 7 provides more protection to individuals from searches and seizures than the Fourth Amendment.”). *State v. Morse*, 156 Wn.2d 1, 10, 123 P.3d 832 (2005) (“[W]hile under the Fourth Amendment the focus is on whether the police acted reasonably under the circumstances, under Article I, section 7 we focus on expectations of the people being searched and the scope of the consenting party’s authority.”).

As with the Fourth Amendment, warrantless searches are generally *per se* unreasonable and in violation of Article I, section 7

of the Washington Constitution. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002).

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

Id. (quoting *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984)). Again, one recognized exception is a warrantless vehicle search incident to the arrest of a recent occupant under limited circumstances. *Id.* at 172.

In *Ringer*, the Washington Supreme Court considered whether Article I, section 7 prohibited a warrantless search of a vehicle where the driver was arrested and secured away from the vehicle. 100 Wn.2d at 689. The Court summarized the history of the search incident to arrest exception to the warrant requirement, and concluded:

Based on our understanding of Const. art. 1, § 7, we conclude that, when a lawful arrest is made, the arresting officer may search the person arrested and the area within his immediate control. A warrantless search in this situation is permissible only to remove any weapons the arrestee might seek to use in order to resist arrest or effect an escape and to avoid destruction of evidence by the arrestee of the crime for which he or she is arrested. The right to search incident to arrest “is merely one of those very narrow

exceptions to the 'guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case.'" The exception must be "jealously and carefully drawn", and must be strictly confined to the necessities of the situation.

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

However, two and one half years later, in *State v. Stroud*, the Washington Supreme Court reversed itself, overruled the above holding in *Ringer*, and ruled that Article I, section 7 did not prohibit a warrantless search of the passenger compartment as well as an unlocked glove compartment or unlocked containers therein, even where the driver was arrested and secured away from the vehicle.

106 Wn.2d at 150.

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

Id. at 152.

In so ruling, the Court noted its agreement with the United States Supreme Court decision in *New York v. Belton*, 453 U.S. 454, 460, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), on the need "to

draw a clearer line to aid police enforcement, although because of our state's additional protection of privacy rights we must draw the line differently than did the United States Supreme Court." *Stroud*, 106 Wn.2d at 151. In *Belton*, the Court ruled that:

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

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

But the *Stroud* Court's broad interpretation of *Belton* was specifically rejected in *Gant* where the Court noted:

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

129 S.Ct. at 1714. The *Gant* Court stressed that many lower courts have wrongly interpreted *Belton* as expanding the authority of officers to conduct warrantless searches from that set forth in *Chimel*:

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

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

Thus, because *Gant* specifically rejected a broad reading of *Belton*, *Stroud*'s reliance on a broad reading of *Belton* to overrule *Ringer* is no longer viable. In abrogating *Stroud*'s interpretation of *Belton*, the Court necessarily abrogated the ruling in *Stroud*.

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

d. Article I, section 7 does not support the "automobile exception" to a warrantless vehicle search. The *Gant* Court explained the second exception to the warrant requirement:

Although it does not follow from *Chimel*, we also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is

reasonable to believe that evidence of the offense of arrest might be found in the vehicle.

129 S.Ct. 1719. Other than stating the second exception was justified by the unique circumstances of an automobile, the Court provided no rationale for this exception. *Id.* at 1714. It would appear, however, that the genesis of this exception lies in the so-called “automobile exception” under the Fourth Amendment, which allows for a warrantless search of a vehicle when there is probable cause to believe the vehicle contains evidence of a crime “because the vehicle can be quickly moved.” *Carroll v. United States*, 267 U.S. 132, 153, 45 S.Ct. 280, 69 L.Ed.2d 543 (1925); accord *United States v. Ross*, 456 U.S. 798, 809, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) (“[T]he exception to the warrant requirement established in *Carroll* -the scope of which we consider in this case- applies only to searches of vehicles that are supported by probable cause. In this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained.”).

The *Gant* Court stated the second exception is “[c]onsistent with the holding in *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004) and following the suggestion in

Justice Scalia's opinion concurring in the judgment in that case." 129 S.Ct. at 1714. In his concurrence in *Thornton*, Justice Scalia argued that warrantless automobile searches incident to arrest are justifiable simply because the vehicle might contain evidence relevant to the crime of arrest. *Thornton*, 541 U.S. at 629. Justice Scalia based this argument on precedents pre-dating *Chimel* that upheld searches incident to arrest based on a "more general interest in gathering evidence relevant to the crime for which the suspect has been arrested." *Id.* (citing *United States v. Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed.2d 653 (1950); *Harris v. United States*, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed.2d 1399 (1947); *Marron v. United States*, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed.2d 231 (1927); *Agnello v. United States*, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925)). Justice Scalia wrote:

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

Id. at 630 (emphasis in original).

But the Washington Supreme Court, under Article I, section 7, rejected the automobile exception in *Ringer, supra*. *Ringer* was

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

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

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

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

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

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

Article I, section 7 supports warrantless searches only under true exigencies, such as the rare instance wherein the arrestee is not secured, there is a reasonable threat to officer safety, or there is a reasonable likelihood of destruction of evidence.

e. Article I, section 7 also does not support the “good faith” and “inevitable discovery” exceptions to the exclusionary rule.

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

f. No exigent circumstances excused the officers from obtaining a telephonic search warrant for Mr. Brown's car.

The "exigent circumstances" exception allows a warrantless search where officers do not have adequate time to obtain a warrant.

State v. Bessette, 105 Wn. App. 793, 798, 21 P.3d 318 (2001).

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

Here, the exigent circumstances exception does not apply because Mr. Brown was arrested and secured away from the car and there was no showing that it would have been unsafe or

impractical to obtain a warrant or that evidence in the car would dissipate before a warrant could be obtained.

g. The proper remedy is suppression of the evidence obtained from the warrantless search of Mr. Brown's car. Because Article I, section 7 provides greater protections of personal privacy than does the Fourth Amendment, this Court should hold that only the first *Gant* exception exists under our state constitution, that is, officers may not conduct a warrantless vehicle search incident to arrest absent exigent circumstances. When the arrestee is secured and not within reaching distance of the vehicle or items of evidentiary interest, the officers must obtain a warrant. This was the rule under *Ringer* and should again be the rule now that *Stroud* has been discredited.

Even if the second exception is permissible, there was no reason to believe evidence of an assault would be found in Mr. Brown's car. At the time of his arrest, the air gun with which Mr. Brown allegedly assaulted the officer was on the ground several feet from his car. The subsequent search of his car was not justified by the second *Gant* exception.

Evidence obtained in violation of an individual's privacy rights must be suppressed. *State v. Mendez*, 137 Wn.2d 208, 226,

970 P.2d 722 (1999). Here, in the absence of exigent circumstances, the warrantless search of Mr. Brown's car violated his protection against unreasonable searches under the Fourth Amendment and his right to privacy under Article I, section 7. The evidence of illegal drugs discovered during the wrongful search must be suppressed and Mr. Brown's conviction for unlawful possession of drugs must be reversed.

2. INSUFFICIENT EVIDENCE WAS PRESENTED TO ESTABLISH MR. BROWN COMMITTED A COMPLETED ASSAULT, RATHER THAN AN ATTEMPTED ASSAULT.

a. The State was required to produce sufficient evidence to establish beyond a reasonable doubt every element of the crime of assault in the third degree. The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. U.S. Const. amend. XIV;⁴ Wash. Const. art. I, sec. 3;⁵ *Winship*, 397 U.S. at 358;

⁴"[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). Evidence is sufficient to support a conviction only if, “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.” *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

b. The State presented evidence Mr. Brown committed an attempted assault only, rather than a completed assault, an essential element of assault in the third degree, as charged. Mr. Brown was charged with committing assault in the third degree, in violation of RCW 9A.36.031(1)(g), which provides:

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault.

At the retrial on the assault charge, the jury was provided the following definition of assault:

An assault is an act done with the intent to create in another apprehension and fear of bodily injury, and

⁵“No person shall be deprived of life, liberty, or property, without due process of law.”

which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 59 (Instruction No. 5).⁶ The jury was also provided the following definition of intent:

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

CP 60 (Instruction No. 6).⁷

Washington relies on the common law definition of assault because “assault” is not defined in the criminal code. See *State v. Byrd*, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995). “Washington recognizes three means of assault: (1) assault by actual battery; (2) assault by attempting to inflict bodily injury on another while having apparent present ability to inflict such injury; and (3) assault by placing the victim in reasonable apprehension of bodily harm.” *State v. Hall*, 104 Wn. App. 56, 63, 14 P.3d 884 (2000); accord *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994). Under this classification, Mr. Brown was convicted of committing the third means of assault.

⁶This instruction is identical to Washington Pattern Jury Instruction 35.50.

⁷This instruction is identical to Washington Pattern Jury Instruction 10.01.

Attempted assault in the third degree is a lesser included offense of assault in the third degree by placing an officer in reasonable apprehension of harm. *State v. Godsey*, 131 Wn. App. 278, 287, 127 P.3d 11 (2006). A person attempts to commit a crime if, with intent to commit a specific crime, the person makes an act that is a substantial step toward committing that specific crime. RCW 9A.28.020(1). A person may attempt to commit the first and third means of assault because those means do not necessarily require proof of an attempt, although a person cannot attempt to commit the second means of assault because it necessarily requires proof of an attempt to inflict bodily injury. *Hall*, 104 Wn. App. at 64-65; *State v. Austin*, 105 Wn. App. 511, 514-15, 716 P.2d 875 (1986). See also *State v. Music*, 40 Wn. App. 423, 432, 698 P.2d 1087 (1985) ("There is no logical conflict in charging one with attempting to put another in apprehension of harm.").

The crime of assault in the third degree by placing a person in reasonable apprehension of bodily harm requires the specific intent to create apprehension of harm. *Hall*, 104 Wn. App. at 62 (citing *State v. Eastmond*, 129 Wn.2d 497, 500, 919 P.2d 577 (1996)). Here, the evidence showed Mr. Brown specifically intended to create apprehension of harm by pointing a weapon at Officer

Lyons. However, he was unable to carry out that act when the muzzle of the air gun hit the roof of his car and spun out the window. Therefore, he took a substantial step to commit assault but he was prevented from carrying out that act. See *Hall*, 104 Wn. App. at 65 (“[A] defendant could take a substantial step to use unlawful force to intentionally cause fear and apprehension of imminent bodily injury in another person, but ... could be prevented from carrying out that act.”).

In *Godsey*, the defendant was charged with assault in the third degree with intent to prevent or resist a lawful arrest based on evidence he faced an officer who had probable cause to arrest, put up his fists, said “Come on,” and took a step toward the officer. 131 Wn. App. at 283. The trial court denied his request for an instruction on attempted assault in the third degree, on the grounds the offense did not exist. *Id.* at 287. On appeal, Division Three of this Court ruled the offense of attempted third degree assault does exist. *Id.* at 287-88. Nonetheless, the Court found the defendant was not entitled to the instruction because “no facts support the idea that Mr. Godsey was prevented from carrying out this type of assault.” *Id.* at 288. See also *Hall*, 104 Wn. App. at 65-66 (defendant not entitled to instruction on attempted assault in the

third degree where evidence established he had harmful or offensive contact with two arresting officers and did not have contact with a third officer only because he was in restraints and the officer dodged defendant's attempted head butts).

By contrast, in the present case, Mr. Brown was prevented from completing his assaultive behavior by mere happenstance, not because of any evasive action on the part of Officer Lyons. The evidence was insufficient to prove beyond a reasonable doubt that Mr. Brown committed an assault; the evidence established attempted assault only.

c. The proper remedy is reversal of the conviction for assault in the third degree and dismissal with prejudice. Mr. Brown's conviction for assault in the third degree was based on insufficient evidence, in the absence of evidence of a completed assault. A conviction based on insufficient evidence cannot stand. *State v. Spruell*, 97 Wn. App. 383, 389, 788 P.2d 21 (1990). To retry Mr. Brown for the same conduct would violate the prohibition against double jeopardy. *Burks v. United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1979); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). In the absence of substantial evidence to establish a completed assault, Mr. Brown's conviction

for assault in the third degree must be reversed and the charge dismissed with prejudice.

E. CONCLUSION

The trial court erroneously admitted evidence obtained from a warrantless search of Mr. Brown's car conducted after he was arrested and secured away from the car. Also, Mr. Brown's conviction for assault in the third degree was based on insufficient evidence he committed a completed assault, in that the evidence established an attempted assault only. For the foregoing reasons, Mr. Brown respectfully requests this Court reverse his convictions for violation of the Uniform Controlled Substances Act and for assault in the third degree.

DATED this 11th day of September 2009.

Respectfully submitted,



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