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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

No. _____
Court of Appeals No. 37172-3-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO JAVIER MILLAN,

Petitioner.

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DIVISION ONE
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STATE OF WASHINGTON
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DIVISION II

PETITION FOR REVIEW

On review from the Court of Appeals, Division Two,
and the Superior Court of Pierce County

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STATE OF WASHINGTON

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A. IDENTITY OF PETITIONER

Francisco Javier Millan, appellant below, petitions this Court to review the decision of the court of appeals designated in section B.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(1), (2), (3) and (4), petitioner seeks review of the published decisions of the court of appeals, Division Two, in State v. Millan, __ Wn. App. __, 212 P.3d 603 (2009) (8/7/09).¹

C. ISSUES PRESENTED FOR REVIEW

In Arizona v. Gant, __ U.S. __, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), the U.S. Supreme Court held that it is a violation of a defendant's Fourth Amendment rights for officers to search the passenger compartment of a car "incident to arrest" of a former occupant of the car where that person is no longer within reach of the compartment and officers have no reasonable belief that the vehicle contains evidence of the relevant offense. Gant announced a new interpretation of New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 768 (1981). Prior to Gant, in State v. Stroud, 106 Wn.2d 144, 720 P.2d 46 (1986) and similar cases, this Court had held that Belton authorized such searches.

¹A copy of the Opinion is attached as Appendix A.

Millan was charged with possessing a gun found in a search of the passenger compartment of the car he was driving when officers searched it “incident to arrest” of Millan, who was secured in the back of a police car at the time. Gant was not decided until Millan’s case was on appeal. In its published opinions, Division Two held that Millan could not receive relief under Gant because he and his attorney had failed to move to suppress the evidence below.

1. Can a defendant be held to have waived his Fourth Amendment rights to be free from illegal searches and government exploitation of such searches because he and his counsel failed to move to suppress the evidence even though that failure was based upon the then-existing law? Further, is it proper to hold a defendant to a higher standard than counsel by faulting the defendant for failing to predict future changes in the law while finding that counsel cannot be expected to make such predictions?

2. In State v. Rodriguez, 65 Wn. App. 409, 828 P.2d 636, review denied, 119 Wn.2d 1019 (1992), the court of appeals held that a defendant cannot be deemed to have waived a suppression issue by failing to act on it below when that failure is based upon reasonable reliance on then-existing law. It also held that such a defendant was entitled to

application of a new constitutional pronouncement on search and seizure which was issued after his trial.

Should review be granted under RAP 13.4(b)(2) because Division Two's published decisions in this case directly conflict with Rodriguez?

3. In In re St. Pierre, 118 Wn.2d 321, 823 P.2d 492 (1992), this Court adopted the rule of Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), which mandates that defendants are entitled to the benefit of a new constitutional ruling so long as their case is still on direct review and not "final." Do the published decisions in this case conflict with St. Pierre and Griffith by improperly depriving certain defendants of the benefit of the new constitutional ruling of Gant even though their cases were still pending on direct review when Gant was decided? Do the decisions here also conflict with the long line of cases in this Court and the courts of appeals in which the courts have applied new rulings even where the defendant has not raised the relevant issue below?

4. Because the "retroactivity" doctrine of Griffith followed in St. Pierre was crafted by the U.S. Supreme Court and adopted by this Court based upon strong public policy considerations, should review be granted under RAP 13.4(b)(4) to address whether Division Two's published decisions run afoul of those considerations?

Further, should review be granted under RAP 13.4(b)(4) to address the serious, significant public policy question of whether requiring defendants to raise at trial all issues which have been rejected by Washington courts in the past in order to “preserve” those issues if the law later changes will result in extreme strain on scarce criminal justice resources?

5. Should review be granted where this Court has several other cases already before it which involve the question of application of Gant but none of them involve the situation where, as here, no motion to suppress was made below and the issue of whether a defendant can be deemed to have prospectively waived his rights under future constitutional pronouncements is thus not already pending?

D. SUMMARY OF ARGUMENT

This Court should grant review of the three separate, published decisions of the three judges of Division Two who decided this case, under RAP 13.4(b)(1), (2), (3) and (4). Review should be granted under RAP 13.4(b)(3), because the court of appeals decisions allow violations of the Fourth Amendment rights of certain defendants, in conflict with the mandates of Gant, supra, based upon the failure of defense counsel and the defendant to predict the future and raise at trial an issue which did not

exist under the then-current law. This is in direct conflict with Rodriguez, supra, which held that a defendant does not waive such issues by failing to raise them if that failure is reasonable based on then-existing law. It is also in direct conflict with Rodriguez' holding that, under Griffith, a defendant is entitled to application of a new constitutional ruling regarding search and seizure even where there is no suppression hearing below. As a result, review should be granted under RAP 13.4(b)(2).

Review should also be granted under RAP 13.4(b)(3) to address whether it is proper to hold an indigent defendant such as Millan to a higher standard than counsel. Division Two's decisions find that counsel could not be expected to have predicted changes in the law but holds his client to a different standard, requiring that defendants such as Millan make suppression motions which trained, experienced counsel cannot be faulted for failing to have known needed to be made.

In addition, review should be granted under RAP 13.4(b)(1) because the court of appeals published decisions are in apparent conflict with St. Pierre, supra, and Griffith, supra, because Division Two's holding here deprives certain defendants of relief based on a new constitutional ruling even though their cases were still pending on review at the time of that new ruling. The decisions also run afoul of other cases in which this

Court and the courts of appeals have applied new rulings under St. Pierre even though the relevant issues were not raised below.

Review should also be granted under RAP 13.4(b)(4). St. Pierre was based upon strong public policy reasons as further discussed in Griffith, which have been compromised by Division Two's failure to follow the bright line rule of St. Pierre. Further, the published decisions in this case create a significant issue of public policy in that they raise the specter of defendants having to preemptively raise all possible future constitutional issues regardless of how frivolous under the current state of the law, in order to avoid being found to have "waived" them should the law change in the future. The resulting drain on scarce criminal justice resources is a very real public policy concern which this Court should grant review to address.

Finally, review should be granted because, while this Court is already apparently scheduled in other cases to address application of Gant to cases which were on appeal at the time Gant was decided, none of those cases appears to involve a defendant who did not raise a suppression issue below, nor do they appear to involve the specific "waiver" holding used by Division Two in its published decisions in this case.

E. STATEMENT OF THE CASE

1. Procedural facts

Petitioner Francisco Millan was charged with unlawful possession of a firearm and driving while license suspended. CP 1-2; RCW 9.41.040; RCW 9.41.030; RCW 46.20.342. He was found guilty of the unlawful possession by a jury and entered a plea to the driving while license suspended. CP 10-13, 24; RP 1.² After a standard range sentence was imposed, Millan appealed and, on August 7, 2009, Division Two of the court of appeals affirmed in a part-published decision with a concurrence and a concurrence/dissent. See CP 63-74, 88-100; App. A.

2. Overview of facts³

At just before one in the morning on April 1, 2007, officers from the Tacoma Police Department responded to a report of a “disturbance” and were pointed to a nearby car. RP 57-62, 83-86. The officers signaled for the car to stop and, after a few blocks, it did so. RP 67. The driver, Francisco Millan, was told to get out of the car and was placed into wrist

²Reference to the verbatim report of proceedings is contained in Appellant’s Opening Brief (“AOB”) at 2 n. 1.

³More detailed discussion of the facts regarding the offense is contained in the opening brief at 2-3. Further discussion of the facts relevant to the issues presented for review is contained in the argument section, *infra*.

restraints. RP 64-65, 88-89, 97. The passenger, Millan's wife, got out of the car and seemed very upset and fearful. RP 65. The officers consulted again with the parties who had reported the disturbance. RP 99. Although he was not yet under arrest, the officers put Millan in the back of the police car. RP 99, 106. They said they did so because Millan was yelling at his wife and they knew he and his wife had been involved in an argument. RP 107-108.

The car was searched and, on the floorboard behind the driver's seat, a gun was found perched with its barrel pointing towards the back of the car. RP 91-92. The officer who found it said he saw it in "plain view" when he started searching the car but admitted he had not seen the gun when he had previously approached the car after the stop. RP 91-101. A hair on the gun was not tested but a fingerprint was found on the gun. RP 133-36. The fingerprint did not match that of Mr. Millan. RP 149, 163-64.

3. Proceedings in lower appellate court

After Millan's opening brief and the prosecution's response brief were filed, the Supreme Court decided Gant, supra. Millan moved for and was granted leave to file a supplemental brief on application of Gant.

In affirming, Judge Quinn-Brintnall of Division Two of the court

of appeals held that, although Gant applied to Millan's case, he could not use it to "challenge the search of his vehicle for the first time on appeal." App. A at 4. Applying a standard adopted by federal courts using "plain error review," the judge said "a criminal defendant must preserve an error at trial to raise the issue on appeal." App. A at 5. The judge also stated that Washington courts "generally do not consider issues raised for the first time on appeal, except under RAP 2.5(a), which the court held did not apply because "the facts necessary to adjudicate the claimed error are not in the record on appeal." App. A at 7-11.

After finding that Millan had waived the Gant issue by failing to move to suppress on that basis below, the judge then held that Millan could not receive relief based upon ineffective assistance. App. A at 11. Counsel could not be ineffective, the judge held, because the law at the time of trial made it clear that "the seizure was valid under the search incident to a lawful arrest warrant exception" at the time. App. A at 11. Because counsel could not be expected to "anticipate changes in the law," counsel could not be faulted for failing to move to suppress and thus failing to preserve the issue for appeal. App. A at 11.

In a separate, published opinion, Judge Bridgewater concurred in Judge Quinn-Brintnall's conclusion "that Millan waived his right to

challenge the trial court's admission of evidence gained by an illegal search or seizure by failing to move to suppress the evidence at trial." App. A at 17. He wrote separately only to "emphasize" that he believed such a waiver occurred because Millan did not move to suppress based on the grounds that the search was illegal and because the appellate record was insufficient for the appellate court to determine whether the search was illegal. App. A at 17. In a second separate opinion, Judge Hunt concurred with Judge Quinn-Brintnall's result and "most" of her analysis but disagreed with what Judge Hunt found to be "dicta" on whether Gant applied. App. A at 18. Judge Hunt stated that, because the court ultimately decided that "Gant does not apply in Millan's case. . .we do not need to address whether Gant applies retroactively in the abstract." App. A at 18.

F. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW IN ORDER TO ADDRESS WHETHER CRIMINAL DEFENDANTS WHO DO NOT MOVE AT TRIAL TO SUPPRESS EVIDENCE ON GROUNDS PREVIOUSLY REJECTED BY MULTIPLE COURTS MAY BE DEEMED TO HAVE WAIVED THEIR FOURTH AMENDMENT RIGHTS ON THOSE GROUNDS WHEN THE LAW CHANGES WHILE THEIR CASE IS ON APPEAL, DESPITE ST. PIERRE

Under both the state and federal constitutions, warrantless searches

are per se unreasonable. State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980); Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971); Art. I, § 7, Fourth Amend. There are, however, a few “jealously and carefully drawn” exceptions to the warrant requirement, which include a search incident to a valid arrest. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1997). Until recently, it was believed by not only this Court but also state and federal courts across the country that, under Belton, supra, it was constitutionally permissible under the Fourth Amendment for officers to search the passenger compartment of a car “incident to arrest” of a recent occupant for the purposes of officer safety, even if that person was handcuffed and in the back of a police car at the time of the search. See Stroud, 106 Wn.2d at 152; State v. Rathbun, 124 Wn. App. 372, 101 P.3d 119 (2004); see also United States v. Mapp, 476 F.3d 1012 (D. C. Cir.), cert. denied, 551 U.S. 1156 (2007); United States v. Osife, 398 F.3d 1143 (9th Cir.), cert. denied, 546 U.S. 934 (2005); State v. Rowell, 144 N.M. 371, 188 P.3d 95 (2008); State v. Murrell, 94 Ohio St. 3d 489, 764 N.E.2d 986 (2002). Indeed, Justice O’Connor herself recognized how widespread this interpretation of Belton seemed to be when, in 2005, she declared that court decisions seemed to treat such ability to search as “a police entitlement,” rather than an exception to the

rule against warrantless searched. Thornton v. United States, 541 U.S. 615, 624, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2005).

In Gant, supra, however, the U.S. Supreme Court declared that this interpretation of Belton was wrong. ___ U.S. at ___; 129 S. Ct. at 1715, 1718-19. The Court rejected the idea that it was constitutionally permissible to allow a search “incident to arrest” to be so extended as to permit officers to search a car even when there was no possibility the arrestee could gain access to anything within at the time of the search. ___ U.S. at ___; 129 S. Ct. at 1718-1720. Such an expansive scope of authorization under Belton was deemed to create “a serious and recurring threat to the privacy of countless individuals,” which the Court could not support. ___ U.S. at ___; 129 S. Ct. at 1720-21. It concluded that, under the Fourth Amendment, the proper interpretation of Belton permitted searching a vehicle incident to an occupant’s arrest only if the arrestee was within reaching distance of the compartment at the time or “it is reasonable to believe the vehicle contains evidence of the offense of arrest.” ___ U.S. at ___; 129 S. Ct. at 1723-1724.

At the time of Millan’s trial and until Gant was decided while his case was on appeal, Washington courts had followed the general pre-Gant understanding of Belton and held that searches incident to the arrest of the

recent occupant of a car were reasonable even if the arrestee was secured in the back of a police car at the time. See State v. Smith, 119 Wn.2d 675, 835 P.2d 1025 (1992); Stroud, *supra*; Rathbun, *supra*. The issues presented for review all revolve around whether Millan and others like him are entitled to relief based upon Gant because, under St. Pierre, Gant applies to all cases still on direct review, or whether Division Two's published decisions properly excluded certain defendants from the benefits of the new ruling in Gant based upon the failure to predict that case and raise the issue at their trials below.

1. Review should be granted because Division Two's published decisions conflict with *St. Pierre* and *Rodriguez* and improperly fail to vindicate important Fourth Amendment rights

Under RAP 13.4(b)(1) and (2), review is appropriate if the decision of the court of appeals is in conflict with a decision of this Court or one of another decision of the court of appeals. Further, review is proper under RAP 13.4(b)(3) if the decision raises a substantial issue of constitutional law.

All of those standards are met here. In St. Pierre, this Court adopted Griffith regarding "retroactivity" of new constitutional decisions. 118 Wn.2d at 325-26. After first discussing the "erratic" history of the law

on the topic, this Court then cited the clear, simple rule of Griffith regarding cases still on direct review, which is that new rules are “to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break from the past.” 118 Wn.2d at 326, quoting, Griffith, 479 U.S. at 328. The Griffith rule was adopted after years of using another standard which was found to be unworkable and which required examination of multiple factors including the reliance of the state on the old rule, how application of a new rule would affect administration of justice, and the purpose of the new rule. See, e.g., Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), overruled by Griffith, supra.

This Court has recently reaffirmed its commitment to St. Pierre’s “bright line” rule. State v. Hanson, 151 Wn.2d 783, 791, 91 P.3d 888 (2004).

Rodriguez, supra, properly applied that bright line rule - and St. Pierre. In Rodriguez, the trial attorney moved to suppress, *inter alia*, evidence seized from a trash can. 65 Wn. App. at 417. He withdrew the motion once he discovered the then-existing caselaw did not support it. Id. After trial, this Court held that the type of search involved was

unconstitutional. Id. Just as it did here, the prosecution in Rodriguez claimed that the defendant had “expressly waived his right to challenge the admission of the evidence” by failing to pursue suppression below, despite the change in the law. Id. Applying Griffith and St. Pierre, the Rodriguez Court held that, because the new ruling was a constitutional ruling in a criminal case, the court was required to apply it “retroactively.” 65 Wn. App. at 417. The “waiver” theory Division Two used in its published decisions here was summarily rejected by the Rodriguez Court which held, “there was no waiver of this constitutional right. . .because, at the time of trial, the parties and the court would reasonably have relied on the decision of the Court of Appeals” holding the search in question was proper. 65 Wn. App. at 417.

Division Two’s published decisions in this case directly conflict with both holdings of Rodriguez. By holding that criminal defendants *have* waived a suppression issue by failing to raise it below even though it did not exist under the law at the time of trial, the decisions conflict with the holding of Rodriguez to the contrary. And by holding that defendants in that situation are thus not entitled to relief under new constitutional law announced while their cases are on direct appeal, the decisions conflict with Rodriguez’ holding that, under St. Pierre, the contrary result obtains.

Division Two attempted to distinguish Rodriguez on the grounds that Rodriguez had made a motion to suppress but withdrawn it. See App. A at 8. But in both Rodriguez and here, there was no suppression motion held. See Rodriguez, 65 Wn. App. at 417. If, as Division Two declares, its concern is that the failure to raise the issue below results in an insufficient record for appellate review, there is thus no distinction between the record in Rodriguez and the record in this case on that point.

Indeed, Division Two's decision conflicts with St. Pierre itself, as well as decisions of this Court and the courts of appeals following St. Pierre. St. Pierre makes it clear that *all* defendants are entitled to application of new constitutional pronouncements, so long as their cases are still on direct review or not final. 118 Wn.2d at 325-26. Nothing in that case permits the reviewing court to refuse to apply such new pronouncements if the defendant failed to foresee that the new pronouncement might occur. 118 Wn.2d at 325-26. Nor did this Court qualify its holding in St. Pierre to apply only to those defendants who had raised the relevant issue before the new pronouncement and thus somehow not "waived" it below. 118 Wn.2d at 325-26. And this Court has applied new pronouncements in other cases, using St. Pierre, where the issue in question was never raised below. See, Hanson, 151 Wn.2d at 791; State v.

Cubias, 155 Wn.2d 549, 120 P.3d 929 (2005); see also, State v. Jackson, 124 Wn.2d 359, 878 P.2d 452 (1994); State v. Summers, 120 Wn.2d 801, 846 P.2d 490 (1993). Court of appeals cases have followed suit, even in the face of claims that there were explicit waivers of the rights in question. See State v. Monroe, 126 Wn. App. 435, 109 P.3d 449 (2005), reversed in part and on other grounds, 157 Wn.2d 1015 (2006); State v. Harris, 123 Wn. App. 906, 920, 99 P.2d 902 (2004), reversed in part and on other grounds, 154 Wn.2d 1032 (2005).

Indeed, in Monroe and Harris, the courts dismissed the prosecution's attempts to claim that a defendant should be found to have "waived" a right which Washington law said he did not have at the time of trial. See Monroe, 126 Wn. App. at 441; Harris, 123 Wn. App. at 920.

Here, at the time of trial, the controlling precedent was that the search conducted by the officers was not unconstitutional and its fruits thus not subject to suppression under Belton. Put simply, there was no issue for Millan to raise. Any suppression motion would have been meritless under the law at the time. Yet Division Two's decision requires defendants to raise meritless motions - and thus waste limited criminal justice resources - on the off chance that later the law will change and the motion will suddenly have merit. And it holds Millan, a layperson, to a

higher standard than counsel, who Division Two declares cannot be expected to “anticipate changes in the law.” App. A at 11. This Court should address this issue on review.

2. Division Two’s published decisions run foul of the public policy reasons behind *St. Pierre* and will result in a serious drain on already strained criminal justice resources

This Court should also grant review under RAP 13.4(b)(4) because of the serious public policy issues raised by the published decisions in this case. The bright line rule adopted in *St. Pierre* was crafted because it was necessary to ensure the important policy goals of principled decisionmaking, judicial integrity, and treating similarly situated defendant’s similarly. See *United States v. Johnson*, 457 U.S. 537, 545-46, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982). Constitutional decisions should mean what they say and apply to all defendants whose cases are not final, because the courts have a responsibility to decide cases “in light of our best understanding of governing constitutional principles.” 457 U.S. at 545-46. It violates “basic norms of constitutional adjudication” to fail to apply newly announced constitutional principles to all cases which are not final, rather than fishing certain cases from that stream. *Teague v. Lane*, 489 U.S. 288, 304, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) (O’Connor, J.); see *State v. Jackson*, 124 Wn.2d 359, 878 P.2d 453 (1994)

(recognizing the principles behind allowing all defendants whose cases are not yet final to benefit from new rulings). Division Two's decisions violate all of those principles by depriving Millan and others like him of the benefits of Gant even though their cases are on direct review.

In addition, review should be granted under RAP 13.4(b)(4) because Division Two's published decisions will have widespread, negative impact on already scarce criminal justice resources in this state. Division Two's decision requires defendants such as Millan to raise issues which the existing law says do not exist in order to avoid being found to have waived them, should the law change. Indeed, the U.S. Supreme Court has noted the potential impact of such a holding, noting that "such a rule would result in counsel's inevitably making a long a virtually useless laundry list of objections to rulings that were plainly supported by existing precedent" if it were allowed to stand. Johnson v. United States, 520 U.S. 461, 468, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997).

Finally, review should be granted because this issue does not appear to be before the Court although the issue of the proper application of Gant in other circumstances has already been found by this Court to merit concern. See State v. Adams, 146 Wn. App. 595, 191 P.3d 93 (2008), review granted, 165 Wn.2d 1036 (2009); State v. Afana, 147 Wn.

App. 843, 196 P.3d 770 (2008), review granted, 166 Wn.2d 1001 (2009).

The important issues in this case touch upon Fourth Amendment rights, whether Rodriguez was correctly decided, the limits and proper application of St. Pierre, and strong public policy considerations which are all affected - negatively - by Division Two's published decisions in this case. This Court should grant review.

G. CONCLUSION

For the foregoing reasons, this Court should accept review of the decision of Division Two of the court of appeals in this case

DATED this 28th day of September, 2009.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel and petitioner by depositing the same in the United States Mail, first class postage pre-paid, as follows:

- To: Steven Trinen, Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave S., Tacoma, WA. 98402
- To: Francisco Millan, .DOC 839093, Monroe Corr. Center, PO Box 777, Monroe, WA. 98272-0777.

DATED this 8th day of September, 2009.


KATHRYN RUSSELL SELK, No. 23879
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STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO JAVIER MILLAN,

Appellant.

No. 37172-3-II

PUBLISHED IN PART OPINION

QUINN-BRINTNALL, J. — Francisco J. Millan appeals his first degree unlawful possession of a firearm conviction. The charge was filed after police, who were responding to a citizen's report that a man and woman were fighting in a car, arrested Millan and seized the firearm they found during the search of the vehicle incident to Millan's arrest. For the first time on appeal, Millan argues that under the U.S. Supreme Court's recent decision in *Arizona v. Gant*, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), the search of his vehicle was unlawful and the firearm must be suppressed. But Millan waived his right to challenge the search of his vehicle by failing to file a motion to suppress this evidence in the trial court. Because Millan's counsel's conduct in not filing the motion to suppress did not fall below the pre-*Gant* standard,

Millan was not deprived of his right to effective assistance of counsel. None of Millan's other issues have merit,¹ and we affirm.

FACTS

FACTUAL BACKGROUND

On April 1, 2007, Tacoma Police responded to a report that a domestic violence disturbance was occurring in a vehicle in Tacoma's Hilltop neighborhood. Officers located the vehicle, pulled up behind it, and activated their lights. The driver, Millan, slowed but did not immediately pull over, passing available parking spaces. Concerned that Millan was preparing to elude them, officers activated the patrol vehicle's siren; Millan pulled over in a space located approximately two blocks from where police initially activated their lights.

Officers requested that Millan get out of the car and immediately placed him in wrist restraints and frisk searched him for weapons. They then placed Millan in the back of the patrol vehicle because he "was yelling out the female[passenger's] name and [was] giving . . . hard and intimidating looks in her direction." 2 Report of Proceedings (RP) at 106.

Officers also asked Millan's wife to get out of the vehicle. She "appeared to be very upset, had been crying, and appeared fearful." 2 RP at 65. While the officers investigated, Millan's wife stood either at the front of the vehicle or in the open door of the passenger side of the vehicle. After questioning, Millan was arrested for driving while his license was suspended.

Millan was detained in the back of the patrol car. Before conducting a search of Millan's vehicle incident to this arrest, Officer Timothy Caber requested that Millan's wife step away from the vehicle's open door and move to the curb in front of the vehicle. Caber seized a pistol

¹ In his opening brief and statement of additional grounds (SAG), RAP 10.10, Millan raises additional issues that we address in the unpublished portion of this opinion.

he found on the floor behind the driver's seat. The gun was sitting on its spine, with the magazine pointing toward the front of the vehicle, and the barrel pointing toward the back of the vehicle. Caber ran a records check and, finding that Millan had previously been convicted of a felony, arrested him on the additional charge of first degree unlawful possession of a firearm.

The State charged Millan with first degree unlawful possession of a firearm and first degree driving while license suspended or revoked. Before trial, Millan filed a motion in limine to exclude reference to his domestic violence charges pending in another court, which the trial court granted. He did not move to suppress or otherwise object to the admission of the firearm. On the morning jury trial began, Millan pleaded guilty to first degree driving while license suspended or revoked. The jury returned a verdict finding Millan guilty of first degree unlawful possession of a firearm and, after denying his motion for a new trial on alleged juror misconduct, the trial court calculated Millan's offender score at 4 and sentenced him to a standard range sentence of 42 months incarceration.

Millan timely appealed his conviction and the trial court's denial of his motion for a new trial. On May 11, 2009, Millan filed a supplemental brief, citing *Gant*, in which he argued for the first time that the firearm used to convict him was obtained illegally. At oral argument, Millan's appellate counsel expressly addressed trial counsel's failure to file a suppression motion, acknowledging that because *Gant* was unexpected, trial counsel's performance could not be found to have been deficient. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (To demonstrate ineffective assistance of counsel, a defendant must show that (1) defense counsel's performance was deficient, meaning that counsel's performance fell below an objective standard of reasonableness based on all the circumstances, and (2) the deficient

performance prejudiced him, meaning there was a reasonable probability that the result of the proceeding would have been different absent counsel's unprofessional errors.).

In the published portion of this opinion, we address whether Millan may challenge the search of his vehicle for the first time on appeal. Because the issues raised in Millan's opening brief and SAG are controlled by well-settled law, we address them in the unpublished portion of this opinion.

ANALYSIS

SUPPRESSION OF EVIDENCE

Millan argues that he may challenge the admissibility of evidence on the grounds that it is the product of an unlawful search for the first time on appeal. We disagree.

Initially, Millan asserts that *Gant*, which was issued on April 21, 2009, applies retroactively and contends that, under *Gant*, the warrantless search of his vehicle incident to arrest was unlawful. The State concedes that the rule announced in *Gant* applies to Millan's appeal but counters that Millan has waived his right to challenge the search of his vehicle by failing to raise the issue below. We agree with the parties that *Gant* applies to all cases not yet final on April 21, 2009. See *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final"); *State v. McCormack*, 117 Wn.2d 141, 144-45, 812 P.2d 483 (1991), cert. denied, 502 U.S. 1111 (1992). We disagree, however, about *Gant*'s effect on the case before us.

In *Gant*, Tucson, Arizona police officers arrested Gant for driving on a suspended license. 129 S. Ct. at 1715. After handcuffing Gant and placing him in the back of a patrol car,

officers searched his vehicle and found cocaine in the pocket of a jacket in the back seat.² *Gant*, 129 S. Ct. at 1715. The Supreme Court held that the warrantless search of *Gant*'s car was unconstitutional under the circumstances, announcing the rule:

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Gant, 129 S. Ct. at 1723-24.³

At the trial court, *Gant* moved to suppress evidence seized by police during their warrantless search of his car and, thus, the Supreme Court did not address whether it would review his Fourth Amendment claim absent such a motion. *Gant*, 129 S. Ct. at 1715. But it is well established that federal courts, applying plain error review, recognize the general rule that a criminal defendant must preserve an error at trial to raise the issue on appeal. FED. R. CRIM. P., 51(b), 52(b); see *Puckett v. United States*, ___ U.S. ___, 129 S. Ct. 1423, 1428, 173 L. Ed. 2d 266 (2009) ("If a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue. If he fails to do so in a timely manner, his claim for relief from the error is forfeited."). And every circuit of the United States Court of Appeals has routinely declined to address search and seizure issues raised for the first time on appeal. See, e.g., *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1260 (10th Cir.

² Two other persons were arrested at the scene. They were also handcuffed and locked in separate patrol vehicles at the time of the search. *Gant*, 129 S. Ct. at 1715.

³ Although *Gant* limited the scope of the search incident to a lawful arrest warrant exception, it explicitly did not disturb other established exceptions to the warrant requirement and recognized that warrantless searches may be justified by other safety or evidentiary interests. 129 S. Ct. 1721.

2006) (declining to address claim that consent to search car was made involuntarily because claim was not asserted below); *United States v. Lockett*, 406 F.3d 207, 212 (3d Cir. 2005) (“It is well settled that arguments asserted for the first time on appeal are deemed to be waived and consequently are not susceptible to review in this Court absent exceptional circumstances.”); *United States v. Luciano*, 329 F.3d 1, 8-9 (1st Cir. 2003) (declining to address defendant’s claim that consent to search was coerced because this argument was not included in the motion to suppress below); *United States v. Walls*, 225 F.3d 858, 861-62 (7th Cir. 2000) (an argument not included in the motion to suppress below is forfeited); *United States v. Lampton*, 158 F.3d 251, 258-59 (5th Cir. 1998) (defendant waived argument that evidence should have been suppressed by failing to object below), *cert. denied*, 525 U.S. 1183 (1999); *United States v. Childs*, 944 F.2d 491, 495 (9th Cir. 1991) (declining to address argument raised for the first time on appeal that was not a purely legal issue); *United States v. Crismon*, 905 F.2d 966, 969 (6th Cir. 1990) (“[O]bjections that appear for the first time on appeal are conclusively deemed to be waived, with the effect that [the Court of Appeals is] deprived of jurisdiction”); *United States v. Valdes*, 876 F.2d 1554, 1558 (11th Cir. 1989) (Although a person typically has a legitimate expectation of privacy in his garage such that evidence seized in a warrantless search of the garage would be suppressed, a failure to raise an objection at trial results in a waiver of the claim on appeal); *United States v. Surridge*, 687 F.2d 250, 255-56 (8th Cir.) (declining to address search and seizure issue not raised at trial), *cert. denied*, 459 U.S. 1044 (1982); *Indiviglio v. United States*, 612 F.2d 624, 630 (2d Cir. 1979) (“[A] failure to assert before trial a particular ground for a motion to suppress certain evidence operates as a waiver of the right to challenge the admissibility of the evidence on [that] ground.”), *cert. denied*, 445 U.S. 933 (1980); *United States v. Fisher*, 440 F.2d 654, 656 (4th Cir. 1971) (“Where there are no objections to the search

warrant before or during the trial . . . the question of probable cause is not properly before the court for review.”); *Fuller v. United States*, 407 F.2d 1199, 1214 (D.C. Cir. 1967) (declining to address argument that warrant did not comply with federal rule because objection was not raised in the trial court), *cert. denied*, 393 U.S. 1120 (1969).

WAIVER

Likewise, Washington appellate courts generally do not consider issues raised for the first time on appeal. RAP 2.5(a); *McFarland*, 127 Wn.2d at 332-33. But as an exception to these rules, a party may raise an issue for the first time on appeal if it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); *McFarland*, 127 Wn.2d at 333. Under the exception, the appellant must do more than identify a constitutional error; he must show that the asserted error is “manifest,” meaning the alleged error is apparent on the record and actually affected his rights. RAP 2.5(a); *McFarland*, 127 Wn.2d at 333 (citing *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988)). “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” *McFarland*, 127 Wn.2d at 333.

Here, Millan asserts a constitutional issue, but his failure to file a motion to suppress the evidence, CrR 3.6, or object to its admissibility at trial on the grounds that police obtained the firearm during an illegal search, constitutes a waiver of any error associated with the admission of the evidence at trial. This rule—that a defendant waives the right to challenge the trial court’s admission of evidence gained by an illegal search or seizure by failing to move to suppress the evidence at trial—has roots in early Washington State Supreme Court cases. Even before RAP

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2.5 was published in 1976,⁴ case law barred defendants from raising a search and seizure claim for the first time on appeal. *See State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (“Error predicated upon evidence allegedly obtained by an illegal search and seizure cannot be raised for the first time on appeal.”), *cert. denied*, 389 U.S. 871 (1967); *State v. Baxter*, 68 Wn.2d 416, 423, 413 P.2d 638 (1966) (“The exclusion of improperly obtained evidence is a privilege and can be waived.”).

The rule barring defendants from raising a search and seizure claim for the first time on appeal has not changed. In *State v. Mierz*, 127 Wn.2d 460, 468, 901 P.2d 286 (1995), our Supreme Court stated that defendant’s “failure to move to suppress evidence he contends was illegally gathered constitutes a waiver of any error associated with the admission of the evidence and the trial court properly considered the evidence.” *See also State v. Tarica*, 59 Wn. App. 368, 372-73, 798 P.2d 296 (1990), *overruled on other grounds by McFarland*, 127 Wn.2d 322; *State v. Valladares*, 31 Wn. App. 63, 76, 639 P.2d 813 (1982) (citing *Baxter*, 68 Wn.2d 416, with approval), *rev’d in part on other grounds*, 99 Wn.2d 663, 672, 664 P.2d 508 (1983).

Millan cites *State v. Rodriguez*, 65 Wn. App. 409, 828 P.3d 636, *review denied*, 119 Wn.2d 1019 (1992), for the proposition that he may challenge the legality of the search for the first time on appeal. But Rodriguez did not wait until his appeal to challenge the legality of his search. He moved to suppress the evidence found in an unwarranted search of his garbage before trial but withdrew the motion in reliance on our opinion in *State v. Boland*, 55 Wn. App. 657, 781 P.2d 490 (1989), *rev’d*, 115 Wn.2d 571, 800 P.2d 1112 (1990). *Rodriguez*, 65 Wn.

⁴ 2 WASHINGTON ANNOTATED COURT RULES RAP 2.5 at 635 (2009 ed.).

App. at 417. When our Supreme Court reversed the Court of Appeals decision, Division Three allowed Rodriguez to revive his challenge. *Rodriguez*, 65 Wn. App. at 417. Unlike Rodriguez, Millan never filed a motion in the trial court seeking to suppress the firearm and *Rodriguez* does not alter our decision. Moreover, we agree with the State that under long-standing law requiring issue preservation, Millan waived his right to appeal the admission of evidence seized during a search of his vehicle by failing to file a motion to suppress challenging the legality of the search in the trial court.

INSUFFICIENT RECORD FOR REVIEW

A related basis for not reviewing a suppression issue raised for the first time on appeal is that the record is inadequate to do so. In *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993), our Supreme Court declined to review the defendant's claim that his incriminating statements were the fruits of an invalid search warrant. Because there was no hearing in the trial court, the record did not show whether the defendant made the incriminating statements complained of before or after the officer asserted that he had a search warrant. *Riley*, 121 Wn.2d at 31. The court held that because the record was deficient, there was no manifest error. *Riley*, 121 Wn.2d at 31.

Similarly, in *State v. Kirkpatrick*, 160 Wn.2d 873, 880-81, 161 P.3d 990 (2007), the court held that the defendant did not properly preserve his claim that statements admitted into evidence were the fruit of an unlawful seizure when he failed to raise the issue at a hearing regarding improper *Miranda*⁵ warnings. Because the claim called for "a fact-specific analysis which [the reviewing court] is ill equipped to perform," the error was not manifest and, therefore, not

⁵ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

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reviewable under RAP 2.5(a)(3). *Kirkpatrick*, 160 Wn.2d at 881; *see also State v. Busig*, 119 Wn. App. 381, 390-91, 81 P.3d 143 (2003), *review denied*, 151 Wn.2d 1037 (2004). As one court succinctly put it, “There is no question that the search and seizure issue presented is constitutional, and there is a reasonable possibility that a motion to suppress, had it been made, would have been successful. However, there was no *error* in the trial court proceedings below.” *Tarica*, 59 Wn. App. at 372 (alteration in original).

There is no *per se* constitutional prohibition against admitting unchallenged evidence that may have been obtained in violation of a defendant’s Fourth Amendment property and privacy rights. The exclusionary rule is designed to afford a criminal defendant a mechanism to enforce, and to discourage law enforcement from violating, these rights. *Valladares*, 31 Wn. App. at 76; *see also United States v. Calandra*, 414 U.S. 338, 347, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974) (Exclusionary rule’s purpose is not to redress the injury to the privacy of the search victim, rather “the rule’s prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.”). Thus, a criminal defendant cannot generally challenge the legality of a search for the first time on appeal because, although constitutionally based, any error does not undermine the truth-seeking function of the proceeding appealed. Accordingly, in order to take advantage of the exclusionary rule, a criminal defendant must affirmatively seek its protection before the evidence is admitted at trial. *Valadares*, 31 Wn. App. at 76. Because Millan did not challenge the legality of the officer’s search of his vehicle incident to his arrest by filing a motion to suppress the firearm on this basis in the trial court, the trial court did not err in admitting the unchallenged evidence of

the firearm the officers found during that search. There is no trial court ruling preserved for appellate review.⁶

INEFFECTIVE ASSISTANCE OF COUNSEL

We acknowledge that Millan could present the search issue through a challenge to trial counsel's failure to file the motion to suppress. But defense counsel's failure to move to suppress the seized firearm in the trial court would not constitute ineffective assistance because pre-*Gant* case law indicated that the seizure was valid under the search incident to a lawful arrest warrant exception. *See Gant*, 129 S. Ct. at 1718-20. Thus, under these circumstances, it was not deficient performance for defense counsel not to anticipate changes in the law. *McFarland*, 127 Wn.2d at 334-35; *see also United States v. Fields*, 565 F.3d 290, 296 (5th Cir. 2009) (recognizing that a majority of circuits in the United States Court of Appeals find that it is not ineffective assistance for counsel to fail to anticipate changes in law).

Because he did not file a motion to suppress evidence of the firearm in the trial court, Millan has failed to preserve a challenge of the lawfulness of the search of his vehicle for our review. Accordingly, we affirm Millan's unlawful possession of a firearm conviction against the belated challenge to the admissibility of the evidence that supports it.

⁶ We note that because Millan did not file a motion to suppress in the trial court, the State did not present evidence of all the circumstances surrounding the search, which might have established some other legal grounds for the gun's seizure. For example, we do not know whether the citizen who made the 911 call reporting domestic violence saw Millan with a gun. We do not know whether the gun, which was found on the floorboard behind the driver's seat, was visible from outside the vehicle. And, because the search was not challenged, we do not know whether Millan's wife agreed to a search of the vehicle. In the absence of a motion to suppress or an objection to the admissibility of the evidence, the record is necessarily insufficient and the trial court has made no ruling to be reviewed.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

JURY MISCONDUCT

Millan also argues that the trial court abused its discretion by denying his motion for a new trial based on jury misconduct and, alternatively, by failing to inquire further into the alleged jury misconduct. We disagree. Because defense counsel's affidavit is hearsay, it is not competent evidence to impeach a jury verdict. Moreover, defense counsel's affidavit did not establish a question of fact regarding juror deliberation not inhering in the verdict. Thus, the trial court did not abuse its discretion when it refused to conduct a fact-finding hearing on the alleged misconduct and denied the motion for a new trial.

The party asserting juror misconduct, here Millan, has the burden to show that such misconduct occurred. *State v. Hawkins*, 72 Wn.2d 565, 566-68, 434 P.2d 584 (1967). We will not disturb a trial court's refusal to grant a motion for a new trial absent a manifest abuse of discretion. *State v. Havens*, 70 Wn. App. 251, 255, 852 P.2d 1120 (citing *State v. Hutcheson*, 62 Wn. App. 282, 297, 813 P.2d 1283 (1991), *review denied*, 118 Wn.2d 1020 (1992)), *review denied*, 122 Wn.2d 1023 (1993). The decision of whether there has been jury misconduct is within the discretion of the trial court. *State v. Young*, 89 Wn.2d 613, 630, 574 P.2d 1171, *cert. denied*, 439 U.S. 870 (1978). A much stronger showing of abuse of discretion is required when the trial court orders a new trial than when, as here, the trial court denies a motion for a new trial. *State v. Crowell*, 92 Wn.2d 143, 145-46, 594 P.2d 905 (1979). A trial court also has discretion to conduct a fact-finding hearing to determine whether jury misconduct occurred. *State v. Cummings*, 31 Wn. App. 427, 431, 642 P.2d 415 (1982) (citing *Hawkins*, 72 Wn.2d 565).

Generally, appellate courts are reluctant to inquire into how a jury arrives at its verdict. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). But jury consideration of extrinsic evidence is misconduct and may be grounds for a new trial. *Balisok*, 123 Wn.2d at 118. Extrinsic evidence is “information that is *outside all the evidence* admitted at trial, either orally or by document.” *Balisok*, 123 Wn.2d at 118 (alteration in original) (quoting *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990), *review denied*, 116 Wn.2d 1014 (1991)). Jury consideration of extrinsic evidence is improper because such evidence is not subject to objection, cross-examination, explanation, or rebuttal. *Balisok*, 123 Wn.2d at 118.

In evaluating evidence of alleged juror misconduct, we consider only those facts stated in relation to juror misconduct and that in no way inhere in the verdict itself. *State v. Jackman*, 113 Wn.2d 772, 777-78, 783 P.2d 580 (1989). If facts alleged are linked to the juror’s motive, intent, or belief, or describe their effect upon the juror, the statements cannot be considered because they inhere in the verdict and impeach it. *Gardner v. Malone*, 60 Wn.2d 836, 841, 376 P.2d 651, 379 P.2d 918 (1962).

The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors’ intentions and beliefs, are all factors inhering in the jury’s processes in arriving at its verdict, and, therefore, inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict.

Jackman, 113 Wn.2d at 777-78 (quoting *Cox v. Charles Wright Acad., Inc.*, 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967)).

Here, Millan’s defense counsel presented an affidavit by his co-counsel that stated, “[T]wo jurors stated they believed the 911 disturbance call that directed the officers to the

defendant's vehicle included a gun being brandished [and t]his was followed by several jurors shaking their heads in the affirmative, as if they had discussed it during deliberations." Clerk's Papers at 51. But it is well established that statements by third parties, including trial counsel, alleging jury misconduct is hearsay and incompetent to impeach a jury verdict. *See Jackman*, 113 Wn.2d at 777 (affidavit by trial court bailiff alleging jury misconduct inadmissible hearsay); *Hawkins*, 72 Wn.2d at 566-67 (hearsay affidavits not sufficient to show that jury misconduct occurred); *State v. Maxfield*, 46 Wn.2d 822, 828, 285 P.2d 887 (1955) ("attorney's affidavit is hearsay and incompetent to impeach the verdict of the jury"); *State v. Dalton*, 158 Wash. 144, 146-47, 290 P. 989 (1930) (attorneys' affidavits are nothing more than hearsay statements and are not sufficient to invoke the discretion of the trial court to grant a new trial).

Moreover, even if the affidavit was not inadmissible hearsay, it referred to the jury's thought process and, thus, inheres in the verdict. The affidavit does not allege that any juror introduced evidence regarding the nature of the 911 call into deliberations. Instead, it merely stated that two jurors who heard the evidence in the case believed that the 911 call leading to Millan's arrest included a report about a gun being brandished. Unless there is some evidence that the jurors conducted an independent investigation or obtained evidence outside the courtroom, it is improper for the trial court to inquire how the jurors formed such a belief. *See Jackman*, 113 Wn.2d at 777-78.

Here, defense counsel's affidavit was not based on personal knowledge of the source of the belief and was inadmissible hearsay. Moreover, the affidavit did not allege facts alleging juror misconduct not inhering in the verdict. A juror's surmise during deliberations that the reason that the caller made the 911 call was because he saw a gun is information based on life experience, not the product of improper investigation. Accordingly, the trial court did not abuse

its discretion when it denied Millan's motion for a new trial without conducting a fact-finding hearing.

SAG ISSUES

Millan raises a number of issues regarding the admission of a shell casing into evidence. First, he argues that because the shell casing found in his vehicle did not match up with the gun, it was unfairly prejudicial to present this evidence to the jury. But forensic testing confirmed that the shell found next to Millan's car seat had been fired from the gun recovered in his vehicle.

Next, Millan appears to argue that his counsel was ineffective for failing to object to admission of the shell casing evidence. Again, this argument lacks merit. The record shows that Millan's counsel vigorously argued to the trial court that it should not admit the shell casing into evidence.

Millan also claims that he did not get a fair trial because English is his second language and he did not understand the charges against him. Because it requires examination of matters outside the record, we cannot address this argument on direct appeal. *See State v. Bugai*, 30 Wn. App. 156, 158, 632 P.2d 917, *review denied*, 96 Wn.2d 1023 (1981).

In Millan's remaining SAG arguments, he appears to ask us to reweigh the evidence. But it is the jury's job to resolve conflicting testimony and evaluate the persuasiveness of the evidence and we defer to its decision. *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997) (citing *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992)).

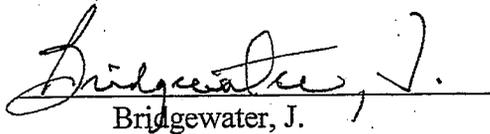
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I affirm.



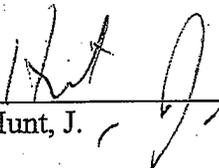
QUINN-BRINTNALL, J.

BRIDGEWATER, J. (concurring in result) — I agree with the majority that Millan waived his right to challenge the trial court's admission of evidence gained by an illegal search or seizure by failing to move to suppress the evidence at trial. *See State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539, *cert. denied*, 389 U.S. 871 (1967); *State v. Baxter*, 68 Wn.2d 416, 423, 413 P.2d 638 (1966). I write separately, however, to emphasize that Millan waived this right because he failed to move to suppress the evidence below on grounds that the search was illegal *and* the record is insufficient for us to determine whether the search was illegal. *See* RAP 2.5(a); *McFarland*, 127 Wn.2d at 333.


Bridgewater, J.

HUNT, J. — Although I concur in the majority's result and in most of the majority's analysis, I write separately to articulate my disagreement with the majority's inclusion of what, in my view, is dicta, namely the statement at page 4 of the majority opinion that *Arizona v. Gant*, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), applies retroactively to all cases not yet final on April 21, 2009, when the United States Supreme Court filed its opinion. We ultimately decide that *Gant* does not apply in Millan's case; therefore we do not need to address whether *Gant* applies retroactively in the abstract, despite what the parties might agree in this case.

My concern is that inclusion of this unnecessary *Gant* dicta can lead only to confusion in future cases. For example, other parties and other courts may misconstrue the *Millan* majority's *Gant* retroactivity statement to mean that *Gant* is controlling whenever there is retroactive application, without regard to other pertinent factors that control here, such as waiver of an alleged search and seizure error and failure to establish a record below. Therefore, I do not concur in the majority's inclusion of this *Gant* retroactivity language.



Hunt, J.