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No. 62732-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JOSHUA B. MILLS,

Appellant.

---

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

The Honorable Mary Yu

---

REPLY BRIEF OF APPELLANT

---

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A. ARGUMENT

1. EVIDENCE OF IDENTITY THEFT AND POSSESSION OF STOLEN PROPERTY WAS ILLEGALLY OBTAINED PURSUANT TO A WARRANTLESS SEARCH OF MR. MILLS' CAR INCIDENT TO HIS ARREST.

- a. The warrantless vehicle search incident to Mr.

Mills' arrest violated Article I, section 7 of the Washington

Constitution.<sup>1</sup> A limited search of a vehicle incident to a recent occupant's arrest is a "jealously and carefully drawn" exception to the warrant requirement of Article I, section 7 of the Washington Constitution. *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002), quoting *Jones v. United States*, 357 U.S.493, 499, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958).

[T]he search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search. While we believe this holding is consistent with the core rationale of our cases, we also recognize that we have heretofore upheld searches incident to arrest conducted after the arrestee has been secured and the attendant risk to the officers in the field has passed. Today, we expressly disapprove of this

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<sup>1</sup> Because Mr. Mills asserts the search of his car violated the Washington Constitution only, the State's arguments regarding the Fourth Amendment should be disregarded. See Br. of Resp. at 37-41, 54-60.

expansive application of the narrow search incident to arrest exception.

*State v. Patton*, No. 80518-1, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2009 WL 3384578, \*7 (Wash., October 22, 2009). Here, Mr. Mills was arrested and secured away from his car at the time of the search, he did not pose a safety risk to the officers, and he was unable to conceal or destroy any evidence of the crime of arrest. Therefore, the warrantless search of his car was unlawful.

b. The good faith exception does not apply to violations of Article I, section 7. The State requests this Court to apply a “good faith” exception similar to that enunciated by the United States Supreme Court in *Michigan v. DeFilippo*, 443 U.S. 31, 38, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979). Br. of Resp. at 38-46. This request should be rejected.

First, the State contends the United States Supreme Court adopted “two new rules concerning vehicle searches incident to arrest” in *Arizona v. Gant*, 556 U.S. \_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). This is incorrect. In *Gant*, the Court merely clarified its prior decisions and disapproved State cases that misinterpreted the Court’s opinions in *Chimel v. California*, 395 U.S.

752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1960) and *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981).

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.”

129 S.Ct. at 1719.<sup>2</sup> *Gant* was thus a clarification and not a “clear break” with the past, as asserted by the State.

Second, in recognition that Article I, section 7 affords greater protection of individual privacy rights than the Fourth Amendment, Washington courts have consistently “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 1, 9-10, 123 P.3d 832 (2005); accord *State v. Eisfeldt*, 163 Wn.2d 628, 639, 185 P.3d 580 (2008) (“The detectives’ beliefs, no matter how reasonably held, cannot be used to validate a warrantless search under the Washington Constitution.”).

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<sup>2</sup>*Gant* affirmed the lower court’s decision that the warrantless vehicle search of *Gant*’s car incident to his arrest was unreasonable without any discussion of the good faith exception.

In *State v. White*, the Washington Supreme Court suppressed evidence obtained as the result of an arrest pursuant to a statute later ruled to be unconstitutionally vague. 97 Wn.2d 92, 95, 640 P.2d 1061 (1982). The Court characterized the good faith exception in *DeFilippo* as “unworkable” with Article I, section 7, and stated:

[t]he result reached ... in *DeFilippo* is justifiable only if one accepts the basic premise that the exclusionary rule is merely a remedial measure for Fourth Amendment violations. ... This approach permits the exclusionary remedy to be completely severed from the right to be free from unconstitutional governmental intrusions. Const. art. I, § 7 differs from this interpretation of the Fourth Amendment in that it clearly recognizes an individual’s right to privacy with no express limitations.

*Id.* at 107, 109.

This explicit rejection of the good faith exception to violations of the warrant requirement has not been altered by the Washington Supreme Court decisions in *State v. Brockob*, 159 Wn.2d 311, 150 P.3d 59 (2006), and *State v. Potter*, 156 Wn.2d 835, 132 P.3d 1089 (2006). In both *Brockob* and *Potter*, the Court considered whether an officer had probable cause to arrest the defendants for driving while license suspended, when the procedure by which the licenses were suspended was later declared unconstitutional. 159 Wn.2d at

341-42; 156 Wn.2d at 844. Because probable cause is determined at the time of arrest, the Court concluded the defendants were lawfully arrested and, therefore, the evidence obtained as a result of a search incident to arrest was properly admitted. 159 Wn.2d at 342-43; 156 Wn.2d at 844.

*Brockob* and *Potter* did not address either the scope of a Washington citizen's privacy rights or the exceptions to the warrant requirement. In that Mr. Mills does not challenge the officers' probable cause to arrest him, the State's reliance on *Brockob* and *Potter* is misplaced. See Br. of Resp. at 43-46.

c. Article I, section 7 prohibits a warrantless search for evidence of the crime for which the person is arrested. As discussed above, the Washington Supreme Court recently ruled that a warrantless vehicle search incident to arrest is unlawful absent a reasonable belief the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be destroyed or concealed. *Patton*, 2009 WL 3384578, \*7.

The State urges this Court to uphold the search based on *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986). Br. of Resp. at 60-62, 69-73. However, *Stroud* did not address when a warrantless search is lawful, but merely provided guidance as to

the scope of a warrantless vehicle search. See *Patton*, 2009 WL 3384578, \*5-6; *State v. Fladebo*, 113 Wn.2d 388, 395, 779 P.2d 707 (1989). The State's reliance on *Stroud* is misplaced.

d. The record below was sufficiently developed for this Court to determine the issue. Appellate courts may review an alleged error not raised at trial where it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). An error is "manifest" where the appellant demonstrates actual prejudice. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1252 (1995); *State v. Lynn*, 67 Wn. App. 339, 346, 835 P.2d 251 (1992). Actual prejudice may be demonstrated where the facts necessary to adjudicate the error are in the record on appeal. *McFarland*, 127 Wn.2d at 333. "[W]hen 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." *State v. Contreras*, 92 Wn. App. 307, 313-14, 966 P.2d 915 (1998). Accordingly, the appellate court must look to the facts of the seizure and arrest to determine whether a motion to suppress would have been properly granted or denied. *Id.*

Here, the record was sufficiently developed in the trial court for this Court to find that the warrantless search of his car was illegal and the resulting seizure of evidence pertaining to the charges of identity theft and possession of stolen property was the product of that unlawful search which must be suppressed. Prior to trial, Mr. Mills moved to suppress the evidence obtained from both the warrantless vehicle search incident to his arrest and the subsequent warranted search on the grounds the searches were conducted based on information from an unreliable informant. CP 17-23. At a pre-trial hearing, the court heard from Trooper Grant Sligh who testified he arrested Mr. Mills, handcuffed him, and placed him in a patrol car. 10/9/08 RP 32. Therefore, the record was sufficiently developed to decide this issue, that is, whether the warrantless vehicle search incident to Mr. Mills' arrest was justified by exigent circumstances to protect the arresting officers or to prevent Mr. Mills from concealing or destroying evidence.

Nonetheless, the State contends Mr. Mills' waived the argument by failing to challenge the search at trial. Br. of Resp. at 27. To support this contention, the State requests this court to adopt the reasoning of *State v. Millan*, in which Division Two of this Court ruled the defendant waived his right to challenge a vehicle

search by not raising the issue at trial and the record was insufficient for appeal review. \_\_\_ Wn. App. \_\_\_, 212 P.3d 603, 607-08 (2009). However, only six weeks later, Division Two unequivocally repudiated its decision in *Millan*, and stated:

But the reasoning in *Millan* is contrary to established law. McCormick does not prevail on appeal because she moved to suppress at trial, but because justice demands that similarly situated defendants whose appeals are pending direct review deserve like treatment following a change in the law. ... We ... hold that under both RAP 2.5(a) and controlling precedent, McCormick has preserved the matter for appeal because the Supreme Court's opinion in *Gant* applies retroactively to all similarly situated defendants in Washington.

*State v. McCormick*, \_\_\_ Wn. App. \_\_\_, 216 P.3d 475, 477 (2009).

Thus, *Millan* has been reversed and is no longer good law.

Pursuant to *McCormick* and RAP 2.5(a), the issue regarding the warrantless search of Mr. Mills' car is properly before this court.

2. THE CHARGES OF FORGERY, UNLAWFUL POSSESSION OF A FIREARM, AND UNLAWFUL DELIVERY OF METHAMPHETAMINE WERE IMPROPELY JOINED WITH THE CHARGES OF IDENTITY THEFT AND POSSESSION OF STOLEN PROPERTY.

The trial court improperly joined the charges of forgery, unlawful possession of a firearm, and unlawful delivery of methamphetamine with the charges of identity theft and possession

of stolen property. Joinder is inherently prejudicial and is authorized only where the offenses “are of the same or similar character” or “are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. CrR 4.3(a); *State v. Smith*, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968), *vacated in part*, 408 U.S. 934, 92 S.Ct. 2852, 33 L.Ed.2d 747 (1972), *overruled on other grounds by State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975). Here, the various charges were not similar, were not based on the same conduct or series of acts, and were not part of a single plan. Joinder was improper.

a. The court failed to consider the appropriate factors necessary to rule on the severance motion. The court erroneously failed to consider (1) the strength of the State’s evidence on each count; (2) the clarity of defenses as to each count; (3) if an instruction can properly guide the jury to consider the evidence of each count; and (4) the cross-admissibility of evidence of the counts even if the offenses are not joined. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994); *accord State v. MacDonald*, 122 Wn. App. 804, 814-15, 95 P.3d 1248 (2004). The record demonstrates that the court merely balanced the prejudice against

judicial economy and noted that the jury would be given an instruction to consider each count separately. 10/9/08RP 11-12.

The State claims the court “clearly understood the test to be applied in evaluating a motion to sever,” on the grounds the factors were set forth in the briefing to the court and the argument of the parties. Br. of Resp. at 22. However, briefing and argument are no substitute for the court’s duty to make its own evaluation of the factors.

The State evaluates the factors to support its argument for joinder. Br. of Resp. at 22-26. Again, however, the State’s argument cannot substitute for the court’s own evaluation of the factors.

Moreover, the State’s evaluation is flawed. The significant amount of evidence and the potpourri of charges made it difficult to “compartmentalize” the evidence. In fact, in rebuttal argument, the State specifically urged the jury to consider all the evidence to prove a generalized criminal intent, rather than to determine the sufficiency of evidence for each separate charge.

And although you are to assess each count individually, the evidence itself should be viewed as a whole, because all of those items that were stolen, all of those access devices, all of those labels, all of those things go to show you exactly what the

defendant's intent was, and exactly what his knowledge was when it came to those items.

10/15/08 RP 112.

Nor was the evidence cross-admissible. For example, the highly prejudicial evidence of Mr. Mills' prior conviction was admissible only for the firearm offense. And contrary to the State's assertion, evidence of the key fob credit card and items purchased with the cards implied the uncharged bad act of credit card fraud, but was actually irrelevant to any of the charges at hand. Evidence of methamphetamine, the firearm, and forgery was irrelevant to the charges of possession of stolen property and identity theft. The only commonality among these various charges was the evidence was discovered at the same time and in the same place.

Moreover, although Instruction No. 8 properly instructed the jury that a verdict on one count should not control a verdict on any other counts, the instruction did not direct the jury to segregate the evidence to determine whether it supported each count individually. *See State v. Bradford*, 60 Wn. App. 857, 860-61, 808 P.2d 174 (1981).

b. The evidence of the various charges was not admissible pursuant to the *res gestae* doctrine. The *res gestae* exception to ER 404(b) authorizes admission of evidence of other crimes to complete the picture or to provide the immediate context of events. *State v. Powell*, 126 Wn.2d 254, 263, 893 P.2d 615 (1995). Here, the evidence of a firearm, methamphetamine, and forged United States currency did nothing to “complete the picture” regarding identity theft and possession of stolen property. Again, the only commonality among these charges was the evidence was discovered at the same time and in the place. This commonality does not overcome the inherent prejudice in joining otherwise unrelated offense.

The State states the charges were properly joined because they were “a string of connected offenses.” Br. of Resp. at 26. This conclusory statement is not persuasive argument and should be disregarded.

The trial court failed to address the cross-admissibility of the evidence, failed to conduct an on-the-record balancing of the probative value versus the prejudicial effect, failed to properly instruct the jury to segregate the evidence, and failed to determine whether the various offenses were admissible pursuant to the *res*

*gestae* exception to ER 404(b). Accordingly, the trial court's denial of the motion to sever was an abuse of discretion.

3. EVIDENCE OF UNCHARGED BAD ACTS WAS NOT ADMISSIBLE PURSUANT TO EITHER ER 404(b) OR THE *RES GESTAE* DOCTRINE.

a. The evidence of uncharged bad acts was wrongly admitted. The trial court erroneously failed to conduct an ER 404(b) analysis on the record. Prior to admitting evidence of other wrongs, pursuant to ER 404(b), a court must:

(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

*State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). This analysis must occur on the record. *State v. Everybodytalksabout*, 145 Wn.2d 456, 465, 39 P.3d 294 (2002). Any doubt regarding admissibility must be resolved in favor of the defendant. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Although the State frequently invoked the *res gestae* doctrine, the court never ruled the evidence was admissible under that doctrine. Also, none of the evidence of uncharged bad acts had any bearing on the charges of forgery, unlawful possession of

a firearm, or unlawful delivery of methamphetamine, and the court specifically found the evidence of forgery was separable from the other charges. 10/9/08 RP 128-29.

The State contends the evidence of uncharged bad acts was admissible pursuant to both ER 404(b) and the *res gestae* doctrine, for the same reasons it contends the charges were properly joined for trial. See Br. of Resp. at 12-17. This contention is incorrect for the same reasons it is incorrect for the joinder argument.

For example, the State argues the evidence of the pay stub and prescription and “items belonging to numerous other individuals” was relevant to his criminal knowledge and intent for possession of stolen property and identity theft, even though those items were not bear the name of the victims. See Br. of Resp. at 13-14. In fact, the State argues, “That Mills had fraudulent credit card numbers associated with his name is evidence that he knowingly possessed pay stubs and prescriptions in the names of other individuals, and intended to use those items to commit crimes.” Br. of Resp. at 13. Yet Mr. Mills was never charged with misuse of the pay stub or prescription. This was nothing more than improper propensity evidence.

In *State v. Trickler*, 106 Wn. App. 727, 25 P.3d 445 (2001), evidence of stolen property found in the defendant's possession but which did to belong to the named victim was found to be inadmissible.

[B]y allowing the jury to consider evidence that Mr. Trickler was in possession of a plethora of other allegedly stolen items in order for the State to prove that Mr. Trickler must have known that the credit card was also stolen, the court violated the purpose of ER 404(b). After hearing the witnesses' testimony and seeing evidence of 16 pieces of stolen property, the jury was left to conclude that Mr. Trickler is a thief.

*Id.* at 734.

The State attempts to distinguish *Trickler* by simply asserting the disputed evidence in the present case "was far more directly connected with the charged crimes." Br. of Resp. at 17. This is not persuasive reasoning and should be disregarded.

b. The error was not harmless. "[I]mproper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

The State asserts there was “no suggestion” that the key fob credit card was illegally obtained. Br. of Resp. at 17. This is absolutely incorrect. In closing argument, the prosecutor stated:

We have also in the car evidence that he actually had been up to these tricks earlier that day. We heard from Mr. Barnes that the Defendant had bragged about his mini debit card key chain to him. The significance of that maybe didn't set in – well, probably didn't set in for Mr. Barnes.

But the police located the mini debit card on the Defendant's key chain and also in the car. And I want you to take a close look at this when you go back into the jury room. The numbers and the name on there look suspiciously like the labels in the little blue fraud kit that was found in the trunk.

10/15/08 RP 85.

The State also asserts the untainted evidence was overwhelming. Br. of Resp. at 18. Yet, to support this assertion, the State refers to the tainted evidence as well as the untainted evidence. “[P]ossession of the credit cards, checkbooks, names, dates of birth information, and social security numbers speak for itself.” Br. of Resp. at 18. The State's argument is unpersuasive.

c. This issue is properly before the Court. The State's assertion that Mr. Mills did not properly object below is simply wrong. See SRB 8-10.

In the morning session of October 14, 2008, Mr. Mills objected to admission of the Rite-Aid receipt, a sheet of stamps and stickers, the key chain credit card, and the so-called "fraud folder." 10/14/08-A RP 85, 88, 93, 98. At the end of the morning session, the court put the side bar on the record. "The Court originally had a side bar to these particular items being introduced into evidence as uncharged crimes and items that were really not related or relevant at all." 10/14/08-A RP 118.

In the afternoon session of October 14, 2008, Mr. Mills objected to admission of a scale, blank credit cards and gift cards, a money order, pay stub, and prescription. 10/14/08-B RP 9, 39, 42. During a break in the testimony, the court again put the side bar on the record.

But I just want to capture it on the record, specifically, that these gift cards which were a part of Exhibit 33 were objected to by counsel for the same reason that he objected to the other exhibits. And that is, that really are not relevant. They go to uncharged crimes and, again, are not relevant to the matters here.

10/14/08-B RP 61. Defense counsel responded,

The only thing I would like to add to it, obviously, in that exhibit, there were other things like health – I don't remember exactly how many things there were, but health cards. My objection is to any of those things.

It's for the same reason that I objected to the Alaska Airline key fob cards. And, basically, these are uncharged crimes and they are not relevant. The probative value is outweighed by the prejudice."

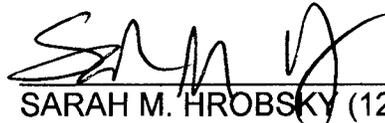
The admissibility of evidence pursuant to ER 404(b) was well-preserved below and is squarely before this Court.

B. CONCLUSION

Evidence obtained pursuant to the warrantless search of Mr. Mills' car must be suppressed for violation of his constitutional right to privacy. The charges of forgery, unlawful possession of a firearm, and unlawful delivery of methamphetamine were improperly joined with the charges of identity theft and possession of stolen property. Evidence of uncharged bad acts was improperly admitted in violation of ER 404(b) and the *res gestae* doctrine. For the foregoing reasons, Mr. Mills respectfully requests this Court to suppress the evidence wrongly obtained from his car, reverse his convictions, and remand for new, properly severed trials.

DATED this 9<sup>th</sup> day of November 2009.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 JOSHUA MILLS, )  
 )  
 Appellant. )

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9<sup>TH</sup> DAY OF NOVEMBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] JOSHUA MILLS 736205 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	<input checked="" type="checkbox"/> (X) U.S. MAIL <input type="checkbox"/> ( ) HAND DELIVERY <input type="checkbox"/> ( ) _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2009.

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