NO. 54141-6-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JIM CASTILLA-WHITEHAWK,

Appellant.

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

OPENING BRIEF OF THE APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

Washington Supreme Court

Washington Court of Appeals

Decisions of Other Courts

Statutes

Rules

Constitutional Provisions

A. INTRODUCTION

Relying on an informant's tip, Thurston County narcotics officers went to an Olympia Ross Dress for Less parking lot, hoping to find Jim Castilla-Whitehawk and Timothy Moreno engaged in a drug transaction.

Before the officers could verify any non-incriminatory facts, the police seized Mr. Castilla-Whitehawk from inside a silver Mini Cooper. Mr. Castilla-Whitehawk was interrogated and made incriminating statements.

This information was insufficient for the magistrate to issue a search warrant for the Mini Cooper. When Mr. Castilla-Whitehawk challenged the sufficiency of the warrant, the trial court should have ordered suppression.

Mr. Castilla-Whitehawk also asks this Court to reverse his conviction because the trial court allowed the jury to hear an eight-year-old child was in the car when the arrest took place. This highly prejudicial evidence prevented Mr. Castilla-Whitehawk from receiving a fair trial.

Other errors are identified in the brief.

B. ASSIGNMENTS OF ERROR

1. In violation of Article I, Section 7, the trial court erred when it did not suppress evidence seized by a warrant based on an informant's allegations without providing the magistrate with the informant's basis of knowledge for the facts alleged.

2. In violation of the Fifth Amendment, the court erred when it did not suppress statements illegally obtained from Mr. Castilla-Whitehawk.

3. In violation of the Fourteenth Amendment and Article 1, Section 22, the trial court erred when it allowed the jury to hear that Mr. Castilla-Whitehawk's charged crimes occurred in front of an eight-year-old child.

4. The court erred when it gave the jury the accomplice liability instruction over Mr. Castilla-Whitehawk's objection.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. When relying on an informant to secure a search warrant, courts examine the credibility of the informant and the informant's "basis of knowledge." The basis of knowledge

prong is only satisfied by information when it is established that the informant personally saw the facts asserted and is passing on firsthand information. The application for the search warrant of the silver Mini Cooper, where the officers found the drugs used to charge Mr. Castilla-Whitehawk, does not provide the magistrate with the informant's basis of knowledge. Other facts gathered by the police before they secured the search warrant are also insufficient to support the search. Must this Court order suppression of the evidence seized as a result of the deficient search warrant?

2. A statement made after an illegal arrest is only admissible if it was obtained by means sufficiently distinguishable to be purged of the primary taint and not through exploitation of that illegality. Mr. Castilla-Whitehawk made his statement immediately after his seizure based on the innocuous facts provided by the informant. Because the police lacked sufficient cause to interrogate Mr. Castilla-Whitehawk, must his statements be suppressed?

3. The state and federal constitutions demand that persons be tried for the crimes they are accused of committing and not for other acts. When the government offers highly prejudicial evidence with little or no evidentiary value, evidentiary rules require that the evidence be excluded. Before trial, Mr. Castilla-Whitehawk asked the court to prevent the prosecution from introducing evidence an eight-year-old was in the car when the prosecution alleged the drug possession took place. This evidence was not relevant to any of the charged crimes and was highly prejudicial. The trial court allowed the jury to hear this evidence. Should this Court hold that allowing the jury to hear that an eight-year-old was in the car when the crimes occurred was so highly prejudicial that it prevented Mr. Castilla-Whitehawk from receiving a fair trial, so that reversal is required?

4. To be entitled to an instruction on accomplice liability, the government must show the accomplice had actual knowledge the principal was engaged in the crime eventually charged and actual knowledge the accomplice was

furthering that crime. The culpability of an accomplice was not intended to extend beyond the crimes of which the accomplice had knowledge. The government presented no evidence either co-defendant knew what the other intended to do if they were in possession of the charged controlled substances. Does the error in instructing the jury that Mr. Castilla-Whitehawk was both a principal and an accomplice to crimes that the government failed to establish he had knowledge of require reversal of his conviction?

D. STATEMENT OF THE CASE

According to an unidentified informant, Jim Castilla-Whitehawk was planning to meet with Timothy Moreno in a Ross Dress for Less parking lot in Olympia. RP 16, App. 4.[1] The informant told the police that the two men were going to make a drug exchange. Mr. Castilla-Whitehawk would be

[1] The transcripts are not sequential, except for those from September 16, 2019 to September 19, 2019. References to the sequential transcripts are to the page. *E.g.* RP 42. References to the non-sequential pages include the date of the hearing. *E.g.* 6/18/19 RP 12. References to the search warrant affidavit are to the attached appendix. *E.g.* App. 1.

driving a silver Mini Cooper. Mr. Moreno would be driving a red Honda. RP 24, App. 4.

When the police arrived in the parking lot, they saw two men in the silver Mini Cooper. RP 24, App. 4. The windows were tinted, and they could not see much of what was happening inside the car. RP 30. The officers could see smoke coming out of the vehicle and could smell marijuana. RP 29, App. 4. Rather than wait to see if an exchange was going to take place, the officers approached the car and arrested both men. RP 30, 33, App. 4. In arresting Mr. Castilla-Whitehawk, he told the police they would find marijuana and oxycodone in the car. RP 34, App. 5.

With both men in custody, the police sought a search warrant to search the vehicle. RP 39. According to the affidavit, the police told the magistrate they received a tip from an unidentified informant that Mr. Castilla-Whitehawk was going to meet with Mr. Moreno to make a drug transaction. App. 4. The exchange would take place at the Ross Dress for Less parking lot. App. 4. Before the arrest, the

only other information the police knew about the men was that Mr. Moreno had prior drug delivery convictions and Mr. Castilla-Whitehawk had been in a house where the police had arrested others for drug deliveries. App. 5.

In the application for the search warrant, the police were able to verify the innocuous facts about Mr. Castilla-Whitehawk and Mr. Moreno. However, the affidavit contained no facts that, before Mr. Castilla-Whitehawk's arrest, the two men were engaged in any illegal activity. RP 55. The only citable infraction they were committing was potentially smoking marijuana in public. RP 29. As a result, the affidavit only demonstrated that the confidential informant's innocuous facts could be verified. App. 4.

After securing the warrant, the police found various drugs, including heroin, methamphetamine, and oxycodone. CP 1. They also found about $1,600 they attributed to Mr. Castilla-Whitehawk. RP 347. Before Mr. Castilla-Whitehawk was taken into jail, additional methamphetamine was found where he was seated. RP 526. The government charged Mr.

Castilla-Whitehawk with three counts of possession of a controlled substance with the intent to deliver. CP 1.

Mr. Castilla-Whitehawk challenged the warrant in a pre-trial hearing. CP 10. He argued that the warrant affidavit contained insufficient information about the confidential informant's basis of knowledge for why she believed Mr. Castilla-Whitehawk intended to engage in a drug delivery with Mr. Moreno. CP 14. The trial court denied Mr. Castilla-Whitehawk's motion. CP 165-66.

Mr. Castilla-Whitehawk asked the court to suppress the statement he made, as it was the result of the illegal search. CP 85, RP 118. The court denied this motion. RP 119.

Before trial, Mr. Castilla-Whitehawk asked the court to preclude evidence that an eight-year-old child was present in the car when the police arrested Mr. Castilla-Whitehawk. CP 88. Mr. Castilla-Whitehawk argued that this evidence was not relevant to any elements of the offense and was highly prejudicial. RP 122, 258. The prosecution argued it was necessary to introduce who else was present in the car to

rebut any defense the child might have been the person in possession of the drugs found in the vehicle. RP 122-23. The court denied Mr. Castilla-Whitehawk's request. RP 262. In the alternative, Mr. Castilla-Whitehawk asked the court to preclude the prosecution from telling the jury how old the child was. RP 124. This request was also denied. *Id.*

In its request to the court, the prosecution asked the court to include an instruction on accomplice liability. RP 580. Mr. Castilla-Whitehawk objected, asking the court not to include this instruction. RP 579. The court denied the request, instructing the jury on accomplice liability. RP 580.

The jury found Mr. Castilla-Whitehawk guilty of two counts of possession with the intent to deliver and one count of simple possession of a controlled substance. CP 119-24. He now appeals his conviction, asking this Court to find the trial court erred when it did not grant his motion to suppress the evidence and his statement, when it allowed the jury to hear bad act evidence about possessing the drugs in front of a child, and when it instructed the jury on accomplice liability.

E. ARGUMENT

1. **The court erred when it did not suppress evidence seized as a result of an insufficient search warrant.**

Mr. Castilla-Whitehawk moved to suppress the evidence seized in his case as a result of a search warrant. CP 47. Based on allegations made by a confidential informant, Mr. Castilla-Whitehawk argued the search warrant was insufficient to justify the government's invasion of Mr. Castilla-Whitehawk's right to be free from unlawful searches. CP 51. The court denied Mr. Castilla-Whitehawk's motion. CP 165-66. This Court should reverse the trial court and order suppression of the unlawfully seized evidence.

a. A search warrant based on information provided by a confidential informant must establish the informant's credibility and basis of knowledge.

Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. A search warrant may be issued only on a determination of probable cause. *State v. Ollivier*, 178 Wn.2d 813, 846–47, 312 P.3d 1 (2013) (citing *State v. Jackson*, 150

Wn.2d 251, 264, 76 P.3d 217 (2003)). Probable cause only exists when the search warrant's affidavit "sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location." *Id.* (quoting *Jackson*, 150 Wn.2d at 264).

When determining whether probable cause exists to issue a search warrant based on an informant's information, this Court applies the *Aguilar-Spinelli*[2] test. *State v. Atchley*, 142 Wn. App. 147, 161, 173 P.3d 323 (2007). This test examines the "veracity" or credibility of the informant and the informant's "basis of knowledge." *Id.* at 161 (quoting *Jackson*, 102 Wn.2d at 435). The basis of knowledge prong is only satisfied by information that the informant personally saw the facts asserted and is passing on firsthand information. *State v. McCord*, 125 Wn. App. 888, 893, 106 P.3d 832 (2005);

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[2] *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), abrogated by *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), but adhered to in Washington by *State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984).

State v. Vickers, 148 Wn.2d 91, 112, 59 P.3d 58 (2002). The veracity and basis of knowledge prongs are independent, and both must be established in the affidavit. *Jackson*, 102 Wn.2d at 437.

A search warrant should only be issued if the application shows probable cause that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). The probable cause requirement is a fact-based determination that represents a compromise between the competing interests of enforcing the law and protecting the individual's right to privacy. *Brinegar v. United States*, 338 U.S. 160, 176, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949).

At both the suppression hearing in the trial court and here, examination of the warrant is limited to the four corners of the affidavit supporting probable cause. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008); *Wong Sun v. United States*, 371 U.S. 471, 481–82, 83 S. Ct. 407, 9 L. Ed. 2d 441

(1963). Although this Court defers to the factual findings made by the magistrate, the assessment of probable cause is a legal conclusion to be reviewed de novo. *State v. Chamberlin*, 161 Wn.2d 30, 40–41, 162 P.3d 389 (2007).

b. The government failed to establish the informant had a sufficient basis of knowledge of the facts asserted.

The government relied on an informant to secure the warrant. The government did not provide the magistrate with sufficient information for how the confidential informant formed her "basis of knowledge" for the magistrate to determine Mr. Castilla-Whitehawk was engaged in criminal activity before his arrest. App. 4. Because the information provided to the magistrate was insufficient, the issuance of the warrant violated Washington's constitution. *Thein*, 138 Wn.2d at 147; *Jackson*, 102 Wn.2d at 443. Suppression is required.

In the affidavit, the police received a tip from their informant that she was going to take Mr. Moreno to lunch. App. 4. The informant then texted law enforcement that Mr.

Moreno was going to meet with Mr. Castilla-Whitehawk to make a drug exchange. *Id.* The police knew Mr. Moreno had prior convictions for drug delivery and that Mr. Castilla-Whitehawk had been located in a house where a drug arrest had been made. *Id.* The informant believed Mr. Moreno dealt drugs but had never purchased from him before. *Id.* The police then received another text from the informant that stated the drug transaction was going to take place in the parking lot of a Ross Dress for Less store in Olympia. *Id.* Mr. Moreno would be in a red Honda. *Id.* Mr. Castilla-Whitehawk would be in a silver Mini Cooper. *Id.*

These facts do not provide a sufficient basis to justify a search warrant. Instead, they provide only enough information for the police to believe Mr. Moreno and Mr. Castilla-Whitehawk were going to meet in the parking lot, as predicted by the informant. *See, e.g., Jackson*, 102 Wn.2d at 442. These facts are consistent with legal activity and do not have a reasonable connection to criminal activity. *Neth*, 165 Wn.2d at 184. Before seizing Mr. Castilla-Whitehawk, the

police had no corroborative evidence of anything other than a meeting between the two men.

The only physical evidence of a drug transaction was the officer's observation of cellophane. RP 42, App. 4. Without more, this is also is an insufficient basis for the issuance of a warrant. *Id.* at 185.

Likewise, the criminal history of Mr. Moreno and Mr. Castilla-Whitehawk did not provide a basis for the search warrant. A history of the same or similar crimes may help determine probable cause, but without other evidence, it falls short of probable cause necessary for a search warrant. *State v. Clark*, 143 Wn.2d 731, 749, 24 P.3d 1006 (2001); *State v. Hobart*, 94 Wn.2d 437, 446, 617 P.2d 429 (1980). Otherwise, anyone convicted of a crime would constantly be subject to harassing and embarrassing police searches. *Hobart*, 94 Wn.2d at 446–47, 617 P.2d 429.

For criminal history to be considered, some factual similarity between the past crime and the currently charged offense must be shown before the criminal history can

significantly contribute to probable cause. *State v. Stone*, 56 Wn. App. 153, 158, 782 P.2d 1093 (1989). No such information, such as a belief the men conducted drug transactions in their cars, was provided to the magistrate.

The remaining information provided to the magistrate was also insufficient for a search warrant. If an affidavit fails to satisfy the *Aguilar-Spinelli* test, corroboration of the informant's tip with information discovered through an independent police investigation may cure the deficiency. *State v. Taylor*, 74 Wn. App. 111, 116, 872 P.2d 53 (1994). For the police investigation to suffice, the information discovered must suggest "probative indications of criminal activity along the lines suggested by the informant." *Jackson*, 102 Wn.2d at 438 (quoting *United States v. Canieso*, 470 F.2d 1224, 1231 (2d Cir.1972)). The investigation must also verify more than innocuous facts. *State v. Huft*, 106 Wn.2d 206, 210, 720 P.2d 838 (1986).

According to the affidavit, when the police arrived in the parking lot, they were able to confirm non-criminal facts

they had been told by the informant. App. 4. Both cars were in the lot. *Id.* Both men were seated in the Mini Cooper. *Id.* As the police approached the vehicle, they could smell the odor of marijuana. *Id.* As they took Mr. Castilla-Whitehawk into custody, they saw cellophane protruding from a fanny pack he had around his waist. App. 5. No drugs were seen. Mr. Castilla-Whitehawk told the police they would find marijuana and oxycodone in the car. *Id.*

The smell of marijuana emanating from a vehicle, without more, does not establish probable cause to arrest all occupants of the vehicle. *State v. Grande*, 164 Wn.2d 135, 138, 187 P.3d 248 (2008). This holding is especially true now that possession of marijuana is legal in Washington. RCW 69.50.4013. It is a traffic infraction to consume marijuana on a public highway. RCW 46.61.745. Mr. Moreno and Mr. Castilla-Whitehawk were not on a public highway but were parked in a shopping mall parking lot. If the car was determined to be a public place, it would be an infraction for the two men to be smoking marijuana in the car. RP 64, *see*

also RCW 70.160.070. Committing an infraction unrelated to the informant's information is insufficient to justify a warrant and cannot justify the search of the Mini Cooper.

In examining the affidavit, it is not clear how the informant formed her basis of knowledge Mr. Castilla-Whitehawk intended to commit a crime. Her bare conclusion a crime was going to occur was insufficient to justify a warrant. *Jackson*, 102 Wn.2d at 443. Likewise, the additional information gathered by the police was also inadequate. *Neth*, 165 Wn.2d at 184. At best, the police discovered Mr. Castilla-Whitehawk had committed an infraction, which is insufficient to secure a warrant. This Court should find the affidavit was insufficient to justify a search warrant for the Mini Cooper.

c. Suppression of the evidence seized from the Mini Cooper is required.

"[A] strong showing of general trustworthiness should not compensate for the failure to explain how the informant came by his information." *Jackson*, 102 Wn.2d at 442. While the reliability of the informant was not contested, the basis of her knowledge, beyond innocuous facts, was not enough to

justify the warrant issued to search the Mini Cooper. *Thein*, 138 Wn.2d at 147; *Jackson*, 102 Wn.2d at 443.

The police corroborated that two men were meeting in a parking lot and would be driving distinctive vehicles. These are innocuous facts insufficient to justify a warrant. The investigation did not cure the defect in showing the informant's reliability. Because the warrant was improperly issued, the trial court should have suppressed the evidence. *McCord*, 125 Wn. App. at 894; *State v. Anderson*, 105 Wn. App. 223, 229, 19 P.3d 1094 (2001). Mr. Castilla-Whitehawk asks this Court to suppress the illegally seized evidence.

2. The court erred when it did not suppress Mr. Castilla-Whitehawk's statements, which were made immediately after his unlawful seizure.

A statement made after an illegal arrest is only admissible if it was obtained "by means sufficiently distinguishable to be purged of the primary taint" and not through "exploitation of that illegality." *State v. Gonzales*, 46 Wn. App. 388, 397–98, 731 P.2d 1101 (1986) (quoting *State v. Byers*, 88 Wn.2d 1, 8, 559 P.2d 1334 (1977)); see also U.S.

Const., amend. V. To determine if the illegal arrest taints a statement, the court considers (1) temporal proximity of the arrest, (2) the presence of significant intervening circumstances, (3) the purpose and flagrancy of the official misconduct, and (4) the giving of *Miranda*[3] warnings. *Gonzales*, 46 Wn. App. at 398.

Here, Mr. Castilla-Whitehawk's statements were made immediately after his arrest. RP 34. His arrest, based on the innocuous facts provided by the confidential informant was not lawful. Given the immediacy of his statements to his arrest, the illegal arrest required suppression. *McCord*, 125 Wn. App. at 895.

3. The court erred when it allowed the jury to hear irrelevant bad act evidence.

Before the start of the trial, Mr. Castilla-Whitehawk asked the court to prevent the prosecution from introducing evidence an eight-year-old child was in the car with Mr. Castilla-

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

Whitehawk. CP 88, RP 122. The government insisted it had to tell the jury about the child, to avoid Mr. Castilla-Whitehawk from arguing the drugs found in the car belonged to the child. RP 122. The court denied Mr. Castilla-Whitehawk's motion and allowed the prosecution to introduce the evidence. RP 262. This Court should find the trial court's ruling violated ER 403(b) and ER 404, preventing Mr. Castilla-Whitehawk from receiving a fair trial.

a. A trial court's decision to admit prior act evidence for an improper purpose is manifestly unreasonable

The principle that persons will be tried for the crimes they are accused of committing and not for other acts is fundamental to our system of justice. U.S. Const. amend. XIV; Const. art. 1, § 22; *State v. Goebel*, 36 Wn.2d 367, 368, 218 P.2d 300 (1950); *Williams v. New York*, 337 U.S. 241, 246, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949).

Evidence of a defendant's prior act evidence is not admissible except for limited purposes. *State v. Gunderson*, 181 Wn.2d 916, 921, 337 P.3d 1090 (2014) (citing ER 404(b));

see also *State v. Fisher*, 165 Wn.2d 727, 744, 202 P.3d 937 (2009). The presumptive rule of exclusion is grounded on the principle that the accused must be tried for the crimes charged, not for uncharged acts. *State v. Emmanuel*, 42 Wn.2d 1, 13, 253 P.2d 386 (1953). Prior act evidence prejudices an accused even when it is minimally relevant, "where the minute peg of relevancy [is] entirely obscured by the dirty linen hung upon it." *State v. Smith*, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting *Goebel*, 36 Wn.2d at 379).

The potential high risk of prejudice requires courts to scrutinize prior act evidence closely. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). A trial court must find by a preponderance of the evidence the prior act occurred, identify the purpose for which the evidence is sought to be introduced, determine whether the evidence is relevant to prove an element of the crime charged, and weigh the probative value against the prejudicial effect. *State v. Foxhoven*, 161 Wn.2d 168, 173, 163 P.3d 786 (2007). The

evidence must also be relevant to be admissible. *Fisher*, 165 Wn.2d at 949; ER 402.

Washington evidence rules prohibit the introduction of other act and character evidence except in limited circumstances. ER 404(b) allows prior act evidence to be admitted for limited purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b); see also ER 403. Other than these exceptions, evidence of prior bad acts is presumptively inadmissible. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

The test for admitting evidence of other acts or character is stringent. ER 404(b). The trial court must first find by a preponderance of the evidence the misconduct occurred, determine whether the evidence is relevant to a material issue, state on the record the purpose for which the evidence is being introduced, and balance the probative value of the evidence against the danger of unfair prejudice. *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012).

Even if the evidence is admissible under ER 404(b), it should be excluded if the danger of unfair prejudice substantially outweighs the probative value of the relevant evidence. *Smith*, 106 Wn.2d at 776; see also ER 403. Doubts as to the admissibility of prior act evidence should be resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

The interpretation of an evidentiary rule is a question of law this Court reviews de novo. *Diaz v. State*, 175 Wn.2d 457, 461-62, 285 P.3d 873 (2012). The question of whether the evidence was properly admitted is reviewed for abuse of discretion. *Gresham*, 173 Wn.2d at 419.

b. Whether a child was in the Mini Cooper when the charged crimes allegedly occurred was irrelevant and highly prejudicial.

No reasonable jury would have found the eight-year-old child possessed the drugs found in the car. There was no reason for the jury to know the child was in the vehicle, other than to impugn Mr. Castilla-Whitehawk for committing a

drug crime in front of a child. Excluding this sort of evidence is the very essence of why courts exclude bad act evidence.

This reasoning is especially true for drug crimes. Washington has a sentence enhancement where a drug crime occurs near where children congregate, like schools and parks. RCW 69.50.435. The purpose of this statute is to keep drug dealers away from children. *State v. Coria*, 120 Wn.2d 156, 172, 839 P.2d 890 (1992). Drug dealing near where children congregate warrants increased sentences, even when children are not there. *Id.* While other crimes can be enhanced when committed in front of a child, society views drug dealing near a child as an especially dangerous activity.

Mr. Castilla-Whitehawk made clear he had no intention of blaming the child for possessing the drugs. RP 122. It is hard to imagine how he could. The child's presence was not relevant to any elements of the charged crime. Nor was the child's presence an aggravator to this sentence in this case. Cf. RCW 9.94A.535. Instead, the only purpose of allowing the jury to hear about the child was to prejudice Mr. Castilla-

Whitehawk, who was not only seen as a drug dealer but one who was willing to deal drugs in front of a small child.

This Court should find there was no valid reason for allowing the jury to hear that a child was in the back seat of the Mini Cooper when Mr. Castilla-Whitehawk was arrested. ER 404(b) only allows the jury to hear evidence of other acts for limited purposes. The government's stated purpose, to establish possession, is not a valid justification for admission of this highly prejudicial evidence. Further, the probative value of the evidence did not outweigh its prejudicial effect. The trial court erred when it allowed the jury to hear a child was in Mr. Castilla-Whitehawk's care when he allegedly committed his crimes.

c. Mr. Castilla-Whitehawk was deprived of his right to a fair trial by the improper admission of the prior act evidence.

The trial court erred when it failed to properly apply ER 404(b) and ER 403 to exclude evidence that a child was present in the Mini Cooper when Mr. Castilla-Whitehawk allegedly committed his crimes. None of the exceptions to ER

404(b) applied, but even if they did, the evidence should have been excluded because the unfair prejudice substantially outweighed the evidence's probative value. *State v. Fuller*, 169 Wn. App. 797, 829-30, 282 P.3d 126 (2012).

Rather than convict Mr. Castilla-Whitehawk for the crimes he may have committed, the evidence a child was in Mr. Castilla-Whitehawk's care when this crime occurred evoked an emotional response among the jurors that made it likely they would convict Mr. Castilla-Whitehawk for his bad acts. *State v. Rice*, 48 Wn. App. 7, 13, 737 P.2d 726 (1987). This error was not harmless and deprived Mr. Castilla-Whitehawk of his right to a fair trial. This Court should reverse his conviction and order a new trial.

4. The court erred when it allowed the jury to hear that Mr. Castilla-Whitehawk acted as an accomplice.

At the close of evidence, Mr. Castilla-Whitehawk asked the court not to instruct the jury on accomplice liability, as the evidence did not support this theory. RP 579. The court declined, adopting the prosecution's instruction, which included the accomplice liability language. RP 580. Mr.

Castilla-Whitehawk asks this Court to reverse his conviction as the court erred in providing the jury with this instruction.

a. Accomplice liability instructions should only be given when the evidence establishes the charged person had actual knowledge they were furthering the crime charged.

An accomplice instruction requires proof that a person solicited, commanded, encouraged, or requested commission of the particular crime, or aided or agreed to aid in the commission of the crime. RCW 9A.08.020(3)(a). Mere presence is insufficient. *State v. Knight*, 176 Wn. App. 936, 949, 309 P.3d 776 (2013), *review denied*, 179 Wn.2d 1021 (2014).

To be entitled to an instruction on accomplice liability, the government must show the accomplice had actual knowledge the principal was engaged in the crime eventually charged and actual knowledge the accomplice was furthering that crime. RCW 9A.08.020(3)(a); *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015).

"The Legislature... intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has 'knowledge.'" *State v. Roberts*, 142

Wn.2d 471, 511, 14 P.3d 713 (2000). As such, a person cannot be convicted as an accomplice of a crime unless the government proves "that individual... acted with knowledge that he or she was promoting or facilitating *the* crime for which that individual was eventually charged." *State v Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). (emphasis in original.)

b. Providing the jury with an accomplice instruction where the prosecution never argued Mr. Castilla-Whitehawk was the principal or accomplice confused the jury, leading to an unjust verdict.

"It is error to submit to the jury a theory for which there is insufficient evidence." *State v. Munden*, 81 Wn. App. 195, 913 P.2d 421 (1996). Indirect speculation about potential criminal culpability is not a basis for a jury instruction. "[S]ome evidence must be presented affirmatively to establish" the theory for which a jury instruction is sought. *State v. Rodriguez*, 48 Wn. App. 815, 820, 740 P.2d 904 (1987) (quoting *State v. Wheeler*, 22 Wn. App. 792, 797, 593 P.2d 550 (1979)).

Here, the prosecution asked the jury to speculate about whether Mr. Castilla-Whitehawk knew what Mr. Moreno intended to do with the drugs he possessed. RP 605. In his closing arguments, the prosecutor made clear that he could not allege either man was acting as either the principal or accomplice of the other. *Id.*

The prosecutor stated:

> If Mr. Whitehawk -- if Mr. Castilla-Whitehawk was selling his drugs to Mr. Moreno, Mr. Moreno was not the end user. He was intending to distribute those to someone else; same thing goes for Mr. Moreno. If he was selling his drugs to Mr. Castilla-Whitehawk, Mr. Castilla-Whitehawk was not the end user. Those drugs were then going to someone else.

RP 605.

The problem with this circular analysis is that it asks the jury to ignore the requirement that the government prove knowledge. Instead, the prosecutor argued that "As long as one of them intended to distribute it, they're acting together in concert as accomplices." RP 607. This argument allows the prosecution to avoid proving an essential element of the crime charged.

Instead, the court should have granted Mr. Castilla-Whitehawk's request not to instruct the jury on accomplice liability. Without this instruction, the government would have still been able to argue its case. After all, the jury was instructed that possession did not need to be actual, but could also be constructive. With this instruction, the jury could have found Mr. Castilla-Whitehawk possessed the drugs found in the car. The only limitation would have been that the jury would not have been told that it was permissible to speculate about whether Mr. Castilla-Whitehawk knew what Mr. Moreno intended to do with the drugs that possessed.

c. The court's erroneous instruction requires the reversal of Mr. Castilla-Whitehawk's conviction.

There is no evidence that Mr. Castilla-Whitehawk had knowledge of Mr. Moreno's intent to deliver any drugs he may have possessed. This Court should hold that it was error to submit an instruction on accomplice liability. Providing the jury with the accomplice instruction only confused the jury and caused them to speculate about the evidence. This error

deprived Mr. Castilla-Whitehawk of a fair trial. He asks this Court to reverse his conviction.

F. CONCLUSION

This Court should reverse Mr. Castilla-Whitehawk's conviction. It should find the affidavit for the search warrant, based on allegations provided by an informant, lacked sufficient information about her basis for knowledge. Reversal is also required because of the trial court's error in failing to suppress Mr. Castilla-Whitehawk's statement. It is further required because of the court's error in allowing the jury to hear evidence an eight-year-old was present in the car when Mr. Castilla-Whitehawk was alleged to have committed his crimes. Finally, reversal is required because of the court's error in instructing the jury on accomplice liability.

DATED this 12th day of May 2020.

Respectfully submitted,

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