IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL H. NICHOLS, Appellant.	No. 39170-8-II UNPUBLISHED OPINION

Worswick, A.C.J. — Michael Nichols appeals his conviction for one count of violating a domestic violence court order. He argues, for the first time on appeal, that his warrantless arrest was not supported by probable cause. Holding that Nichols has not shown manifest error, we affirm.

FACTS

On February 7, 2008, Sharon Commandest was driving to work when she saw Nichols driving on 74th Street in Tacoma.[1] They made eye contact as they passed each other, after which Nichols made a u-turn and drove up beside her. She tried to get away from him, but he continued to follow her. Commandest then called 911.

Tacoma Police Officer Jeff Thiry was working off duty as a school resource officer at Mt. Tahoma High School that morning. While monitoring his police radio, he overheard dispatch advise that there was a violation of a court order in progress near the high school. Officer Thiry

[1] Commandest and Nichols had a prior relationship and a restraining order was in effect at this time.

entered his patrol vehicle and ultimately caught up to Nichols and Commandest. Officer Thiry checked the license plates to confirm that he was behind the correct vehicles. Officer Thiry then followed Nichols, activated his emergency lights and stopped him.

As Officer Thiry approached the vehicle, Nichols immediately stated, "I'm not following anybody." 2 Verbatim Report of Proceedings (VRP) at 47-48. Officer Thiry then advised Nichols of his *Miranda* rights.[2] After acknowledging those rights, Nichols continued to make statements, including that he was in the area going to a job interview on Portland Avenue, even though that street was on the opposite side of town. Officer Thiry then arrested Nichols.

As Officer Thiry dealt with Nichols, Officer Joe Bundy responded and contacted Commandest. She explained to Officer Bundy that she was afraid that Nichols might assault her and that she had a restraining order against him. Officer Bundy contacted Officer Thiry and relayed this information to him.

The State charged Nichols by information with one count of domestic violence court order violation on August 21, 2008. The trial court held a CrR 3.5 hearing and ruled that Nichols's statements to the police were admissible at trial. Nichols did not contest the probable cause for his arrest before trial and the trial court did not conduct a CrR 3.6 hearing. A jury heard the matter and found Nichols guilty. Nichols appeals.

ANALYSIS

Nichols contends for the first time on appeal, that probable cause did not support his warrantless arrest. "Probable cause exists when the arresting officer has 'knowledge of facts

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

sufficient to cause a reasonable [officer] to believe that an offense has been committed' at the time of the arrest." *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007) (quoting *State v. Potter*, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006)). "Probable cause may be based on hearsay, a confidential informant's tip, and other unscrutinized evidence that would be inadmissible at trial . . . . Probable cause requires more than suspicion or conjecture, but it does not require certainty." *State v. Chenoweth*, 160 Wn.2d 454, 475-76, 158 P.3d 595 (2007).

Because Nichols did not raise this issue below, the threshold question is whether this issue is properly before this court. Generally, we will not consider issues raised for the first time on appeal. RAP 2.5(a). But the claim of an error may be raised for the first time on appeal if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). RAP 2.5(a)(3), however, "is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court." *McFarland*, 127 Wn.2d at 333. Rather, the defendant must identify the constitutional error and demonstrate that the trial court likely would have granted the motion if made. *McFarland*, 127 Wn.2d at 333.

Nichols argues that his constitutional right to privacy was implicated by the lack of probable cause, which warrants this court's consideration of the issue under RAP 2.5(a)(3). In making this argument, Nichols references *State v. Gaddy*, 114 Wn. App. 702, 60 P.3d 116 (2002), in which Division One of this court reached the probable cause argument for the first time on appeal on this basis.

Despite Nichols's reference to *Gaddy*, he fails to demonstrate that the trial court here

likely would have granted the motion to suppress if made. *See McFarland*, 127 Wn.2d at 333-34. The information Officer Thiry received over his radio regarding Nichols's conduct, the fact that he confirmed the identity of the vehicles, and Nichols's own statement that he was not "following anybody" as Officer Thiry approached his car is more than enough to support probable cause here. 2 VRP at 48. Because Nichols cannot demonstrate manifest constitutional error, his argument fails.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

Quinn-Brintnall, J.

Williams, J.P.T.