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

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| **STATE OF WASHINGTON,** | ) | **No. 27405-5-III** |
| **Respondent,** | ) | |
| | ) | **Division Three** |
| **v.** | ) | |
| | ) | |
| **JAMES BRUCE HAMBLETON,** | ) | **UNPUBLISHED OPINION** |
| | ) | |
| **Appellant.** | ) | |
| | ) | |

Kulik, A.C.J. — James Hambleton was convicted of identity theft in the second degree, forgery, unlawful possession of payment instruments, and possessing stolen property in the first degree. The trial court imposed an exceptional sentence based on Mr. Hambleton's prior criminal history. Mr. Hambleton appeals, asserting the trial court erred by admitting evidence found after searching the trunk of his car and by not considering other evidentiary questions. He also asserts ineffective assistance of counsel and assigns error to his exceptional sentence. Because we conclude that the trial court acted properly regarding each of Mr. Hambleton's assertions of error, we affirm.

FACTS

On April 15, 2008, Samantha Furrow and James Hambleton visited Michelle Diaz. Mr. Hambleton unsuccessfully attempted to align a name and address in a program on his computer. When Ms. Furrow tried to help Mr. Hambleton, she noticed that the name was "Kevin Griffin," and thought this was "odd." Clerk's Papers (CP) at 73. Mr. Hambleton then printed the name and address onto a check for around $800. Ms. Furrow spoke with the police regarding Mr. Hambleton's activities and gave them a copy of the document she had saved on a flash drive.

On April 17, 2008, Ms. Furrow identified Mr. Hambleton in a photomontage to Detective Greg Castro and Officer Berry Duty. Simultaneously, on April 17, Officer Sullivan stopped Mr. Hambleton in his vehicle to investigate the forgery charge. The police arrested Mr. Hambleton and ultimately impounded and towed his vehicle. Officer Duty was called to the scene from his meeting with Ms. Furrow. Inside Mr. Hambleton's car, Officer Duty noticed credit cards with the name "Bustamante" and some paperwork in plain view. CP at 130. Susan Story, a friend of Ms. Diaz's, drove past Mr. Hambleton's stopped vehicle and noticed that the trunk was open. In a conversation with Detective Castro, Corporal Todd Dronen stated that he did not remember opening the

trunk, but if a credible witness said he or she saw the trunk open, then he probably did.

In an interview, Mr. Hambleton told Detective Castro there was a backpack in the trunk of his car containing blank payroll checks. Mr. Hambleton also stated that a small box in the trunk contained a checkbook in Kevin Griffin's name. Based on this information, Detective Castro obtained a search warrant for Mr. Hambleton's vehicle. Officer Duty assisted in writing the search warrant for the vehicle.

Also in the interview, Mr. Hambleton stated that he created a forged check for John Anderson while at Ms. Diaz's apartment. Mr. Anderson later cashed the check at Wal-Mart.

When the police searched Mr. Hambleton's trunk pursuant to the warrant, they recovered the backpack containing numerous copies of payroll checks, as well as the original payroll check. Some of the copies showed evidence of washing, a process used to remove the original payee's name from a check. The police also recovered Kevin Griffin's checkbook. Each item was found exactly where Mr. Hambleton said it would be.

Kevin Griffin testified that he dropped his wallet at a gas station on January 27. One month later, he started receiving reports that someone was trying to use his identity to open bank accounts and to obtain credit at stores.

At a CrR 3.6 hearing, defense counsel moved to suppress all of the evidence found in the trunk of Mr. Hambleton's car, asserting that the police had illegally searched the trunk before obtaining a warrant. The court found that the trunk may have been opened and searched, but that the search warrant for the car was based on an independent source—Mr. Hambleton's statements to Detective Castro. The court denied the defense's motion.

A jury convicted Mr. Hambleton of identity theft in the second degree, forgery, unlawful possession of payment instruments, and possessing stolen property in the first degree. At sentencing, the State requested an exceptional sentence based on Mr. Hambleton's prior criminal history, which included 20 felony convictions. The court imposed an exceptional sentence of 72 months on the possession of stolen property conviction. Mr. Hambleton appeals.

ANALYSIS

I. Probable Cause

This court reviews de novo the trial court's determination that evidence meets the probable cause standard.[1] *In re Detention of Jones*, 149 Wn. App. 16, 23, 201 P.3d 1066

[1] The trial court did not make a determination as to whether there was probable cause to arrest Mr. Hambleton. We assume that the trial court believed there was probable cause.

(2009).

Mr. Hambleton asserts, for the first time on appeal, that the police lacked probable cause to arrest him. Generally, issues cannot be raised for the first time on appeal.

RAP 2.5(a). However, an issue of manifest error involving a constitutional right is an exception to the rule. RAP 2.5(a)(3). We use a four-step process to determine whether an error is a manifest constitutional error: first, we determine if the alleged error is a constitutional issue; second, we determine if the error is manifest—that is, whether the error actually prejudiced the defendant;[2] third, we address the merits of the issue; and, fourth, we determine if the error was harmless. *State v. Barr*, 123 Wn. App. 373, 380, 98 P.3d 518 (2004).

Both the United States Constitution and the Washington Constitution prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Const. art. I, § 7. A police officer needs probable cause to make a warrantless arrest. *State v. Grande*, 164 Wn.2d 135, 141, 187 P.3d 248 (2008). Whether the officers had probable to cause to stop and arrest Mr. Hambleton is a constitutional issue.

[2] *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

To be a manifest error, the alleged error must actually prejudice the defendant. Here, without probable cause, Mr. Hambleton would not have been arrested and would not have made any statements to Detective Castro. Therefore, Detective Castro could not have obtained a search warrant for the trunk based on Mr. Hambleton's statements. Furthermore, without Mr. Hambleton's statements, and the evidence from the trunk, the State could not have charged Mr. Hambleton with possession of stolen property. If the trial court did err by assuming there was probable cause, Mr. Hambleton was actually prejudiced and, therefore, the alleged error meets the manifest error test.

Next, we address the merits of Mr. Hambleton's assertion that the police lacked probable cause to arrest him. "Probable cause exists when the arresting officer is aware of facts or circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe a crime has been committed." *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004) (emphasis omitted). When probable cause is based on an informant's tip, we employ the two-prong *Aguilar-Spinelli*[3] test. The first prong seeks to evaluate the trustworthiness of the informant's conclusions by examining the

[3] *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 by State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984).

underlying circumstances and the sources of the informant's knowledge. *State v. Jackson*, 102 Wn.2d 432, 437, 688 P.2d 136 (1984). The second prong seeks to evaluate the veracity of the informant. *Id.*

The basis of knowledge prong is satisfied if the informant relays information of a crime he or she has witnessed firsthand. *Id.* Here, Ms. Furrow told the police that she witnessed Mr. Hambleton attempt to align a name and address on a check. Her knowledge was based on information she witnessed firsthand. The first prong of the *Aguilar-Spinelli* test is satisfied.

The State can satisfy the veracity prong by showing that the informant's statement was against his or her penal interest. *Id.* Here, Ms. Furrow admitted that she helped Mr. Hambleton align the name and address on the check. By admitting that she helped Mr. Hambleton, Ms. Furrow was making a statement against penal interest because she admitted to participating in criminal activity.

Ms. Furrow's information meets both prongs of the *Aguilar-Spinelli* test. Based on Ms. Furrow's tip, a reasonable officer could believe that Mr. Hambleton was forging a check. The police had probable cause to arrest Mr. Hambleton.

Because the trial court did not err by assuming the police had probable cause to arrest Mr. Hambleton, we need not address harmless error.

A. *Car Stop.* Mr. Hambleton asserts, for the first time on appeal, that the police unlawfully stopped his car. Because the officers had probable cause, Mr. Hambleton's assertion is without merit. To stop a car, the police must have a reasonable suspicion that the individual is involved in criminal activity. *State v. Lee*, 147 Wn. App. 912, 916, 199 P.3d 445 (2008) (quoting *State v. Walker*, 66 Wn. App. 622, 626, 834 P.2d 41 (1992)). The reasonable suspicion standard is a much lower standard than the probable cause standard. *Id.* at 921-22. Because probable cause existed to arrest Mr. Hambleton, reasonable suspicion existed as well.

B. *Plain View Search.* Mr. Hambleton also asserts, for the first time on appeal, that the plain view search was unlawful because the initial stop was unlawful. We have determined the initial stop was lawful; therefore, the trial court properly admitted the evidence found as a result of the plain view search.

II. Impoundment

Mr. Hambleton asserts, for the first time on appeal, that his vehicle was improperly impounded. He asserts there was no evidence in the record showing that the police had discretion to impound the vehicle and, therefore, their impoundment policy was improper. As discussed above, for Mr. Hambleton to raise a new issue on appeal, he must allege a manifest constitutional error.

Mr. Hambleton does not provide any support for his assertion that the police impoundment policy was improper. He simply states that there was no evidence showing the police had discretion, and then leaps to the conclusion that therefore the police must not have discretion and their impoundment policy was improper. With no other supporting facts in either Mr. Hambleton's brief or the record, it is impossible for us to address this issue.

III. Effective Assistance of Counsel

To prove a claim of ineffective assistance of counsel, the claimant must show: (1) that counsel's performance "fell below an objective standard of reasonableness" and (2) that the defendant was prejudiced by counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Mr. Hambleton asserts that his trial counsel was ineffective because he failed to challenge the car stop, Mr. Hambleton's arrest, and the car impoundment. We addressed each of these issues and found no error. Therefore, trial counsel could not be ineffective for failing to challenge these alleged errors, and Mr. Hambleton received effective assistance of counsel.

IV. Trunk Search

Conclusions of law pertaining to the admission or suppression of evidence are reviewed de novo. *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005).

Mr. Hambleton asserts that the evidence found in the trunk of his car should have been suppressed as the fruit of an illegal search. Mr. Hambleton presented evidence that the police may have wrongfully searched his trunk incident to arrest. The State asserts that, even if the police acted wrongfully, Detective Castro obtained a valid search warrant based on an independent source. Therefore, the State asserts, the trial court properly admitted the evidence.

Generally, warrantless searches are prohibited, unless the search falls under one of the exceptions to the warrant requirement. *Id.* Evidence seized as part of an illegal search is normally suppressed at trial under the exclusionary rule. *Id.* at 716-17. Here, Susan Story stated that she drove past Mr. Hambleton's stopped vehicle and observed that the trunk was open. Corporal Dronen stated that he did not remember opening the trunk when he searched Mr. Hambleton's vehicle, but if a reliable witness said otherwise, then he probably did.

It is unnecessary to determine if Corporal Dronen searched the trunk incident to Mr. Hambleton's arrest because the police obtained a search warrant based on

information independent from any alleged police misconduct. The independent source doctrine states that "evidence tainted by unlawful governmental action is not subject to suppression under the exclusionary rule, provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action." *Id.* at 718.

Here, Mr. Hambleton told Detective Castro that checks bearing Kevin Griffin's name, as well as some blank payroll checks, were in the trunk of his car. Detective Castro sought and was granted a search warrant for Mr. Hambleton's car based on this information alone. Officer Duty assisted Detective Castro in writing the search warrant application. Officer Duty was present at the traffic stop of Mr. Hambleton, but was not the officer alleged to have searched the trunk. The search warrant application does not mention any information obtained through the alleged illegal trunk search.

The warrant was based solely on information independent of the alleged illegal trunk search. This scenario falls within the independent source doctrine. The trial court did not err by admitting evidence obtained pursuant to the valid search warrant.

V. Exceptional Sentence

Constitutional challenges are reviewed de novo. *City of Redmond v. Moore,* 151 Wn.2d 664, 668, 91 P.3d 875 (2004).

Mr. Hambleton asserts that his due process rights were violated because the State

did not give notice that it was seeking an exceptional sentence. The State asserts that notice is not required when the exceptional sentence is based solely on the defendant's criminal history.

A trial court can impose an exceptional sentence when the "defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." RCW 9.94A.535(2)(c). Mr. Hambleton has 20 prior felony convictions and 4 current felony convictions. His high offender score results in some of the current offenses going unpunished.

RCW 9.94A.535 allows for exceptional sentences, stating: "Facts supporting aggravated sentences, *other than the fact of a prior conviction*, shall be determined pursuant to the provisions of RCW 9.94A.537." (Emphasis added.) RCW 9.94A.537 says that the State may give notice any time prior to trial that it is seeking an exceptional sentence. However, the notice statute does not appear to apply to exceptional sentences based on prior convictions because of the language in RCW 9.94A.535.

Furthermore, in *State v. Newlun*, 142 Wn. App. 730, 176 P.3d 529 (2008), the prosecutor recommended standard range sentences for the defendant's multiple current offenses, and the court imposed an exceptional sentence based on RCW 9.94A.535(2)(c). The sentence was upheld on appeal. The fact that the sentence was upheld with no prior

notice, coupled with the language in RCW 9.94A.535 exempting prior convictions from the notice requirements, leads us to the conclusion that notice is not required when the exceptional sentence is based solely on the defendant's criminal history.

Therefore, the trial court did not err by imposing an exceptional sentence.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

*Probation Evidence.* Mr. Hambleton asserts that his fair trial rights were violated when the State presented evidence that he was on federal probation for forgery. All relevant evidence is admissible unless the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. ER 402; ER 403. The State presented a number of telephone calls placed by Mr. Hambleton while he was in jail awaiting this trial. In the telephone calls, a federal parole officer is mentioned, as well as Mr. Hambleton having a "record for forgery." RP (July 15, 2008) at 47. However, no one directly states Mr. Hambleton was on probation for forgery. The court allowed the State to play the calls over Mr. Hambleton's objection. The telephone calls were relevant and, therefore, admissible. While the calls contained some unfavorable information regarding Mr. Hambleton, they were not so unfairly prejudicial that ER 403 would require their exclusion. The trial court did not err by admitting the telephone calls.

*Accomplice Charge.* Mr. Hambleton asserts that he cannot be charged as an

accomplice if the principal was never charged for the crime. However, an accomplice can be charged and convicted even if the principal was never tried or was acquitted. *State v. Dault*, 25 Wn. App. 568, 573, 608 P.2d 270 (1980) (quoting *State v. Nikolich*, 137 Wash. 62, 66, 241 P. 664 (1925)).

Brady[4] *Violation.* Mr. Hambleton asserts that because Mr. Anderson made incriminating statements at trial, there is the possibility of a *Brady* violation. *Brady* applies when the prosecution suppresses exculpatory extra-judicial evidence after the defense has requested it. *Brady*, 373 U.S. at 87. Here, all of Mr. Anderson's statements were in court, and the prosecution did not suppress any extra-judicial statements; therefore, *Brady* does not apply.

*Insufficient Evidence.* Mr. Hambleton asserts that the State presented insufficient evidence to support his forgery conviction. The test for sufficiency of the evidence is whether, when all reasonable inferences are drawn in favor of the State, any rational trier of fact could find guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A person commits forgery if, with intent to injure or defraud, he falsely makes or alters a written instrument. Alternatively, also with intent to injure or defraud, he possesses or "puts off as true a written instrument which he knows to be

[4] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

forged." RCW 9A.60.020.

Here, the State presented evidence that Mr. Hambleton created a fraudulent check that was later cashed at Wal-Mart. Ms. Furrow testified that she helped Mr. Hambleton create the check by aligning a name and address in a computer program. Mr. Hambleton told Detective Castro that Mr. Anderson cashed the check at Wal-Mart, and Mr. Anderson admitted the same. We find there was sufficient evidence to convict Mr. Hambleton of forgery.

*Severing Charges IV, V, and VI.* Mr. Hambleton asserts that the trial court abused its discretion by failing to sever counts IV, V, and VI. At trial, Mr. Hambleton moved to dismiss counts V and VI based on the unit of prosecution for possession of stolen property as stated in *State v. McReynolds*, 117 Wn. App. 309, 71 P.3d 663 (2003). The State conceded, and the court dismissed counts V and VI, leaving only count IV. There is no basis to find that the trial court abused its discretion by granting Mr. Hambleton's motion.

Because we find that the trial court did not err, we affirm Mr. Hambleton's convictions and sentence.

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

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Kulik, A.C.J.

WE CONCUR:

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Sweeney, J. Korsmo, J.