SUPREME COURT NO. 94423-7

Court of Appeals No. 48317-3-II

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JEREMY JAMES, Petitioner

PETITION FOR REVIEW

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
253-445-7920

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I. IDENTITY OF PETITIONER

Petitioner, Jeremy James, by and through his attorney, Marie Trombley, requests the relief designated in Part II.

II. COURT OF APPEALS DECISION

Mr. James seeks review of the March 21 2017, unpublished decision of Division Two of the Court of Appeals affirming his conviction for unlawful possession of a firearm. A copy of the Court's opinion is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

A. Where the basis for a charge of constructive possession of a firearm is mere proximity to it as a passenger in a car, is the evidence sufficient to sustain a conviction for unlawful possession of a firearm?

B. In its opinion, the Court of Appeals held that officers did not detain Mr. James, but rather, he stayed near the car by his own choice. Where officers stop a vehicle, order the passengers to exit one at a time, search each passenger, and direct them where to stand or sit, does that constitute an illegal seizure under Washington law?

C. A car passenger has an independent, constitutionally protected privacy interest in his property, which is not abandoned when he rides in a car with others. This Court has held that Article I, §7 does not

authorize search of non-arrested passengers, or their personal belongings. Where officers know or have reason to know an item belongs to a particular passenger, is a non-consensual search of the item an unconstitutional invasion of privacy ?

D. Probable cause for a search warrant requires a nexus between criminal activity and the item to be seized and between that item and the place to be searched. Where the search warrant affidavit alleges the crime of unlawful possession of a firearm has been committed, based on finding a single round of ammunition in a jacket does the court err in finding probable cause to search a vehicle for a firearm and sales of firearms?

IV. STATEMENT OF THE CASE

Jeremy James was convicted of unlawful possession of a firearm. (CP 89). He rode as a passenger, with two women and another male in a car driven by Leon Oya. (1RP 8). Patrolling Lakewood officers stopped the car for failure to transfer the title within the requisite 45 days. (1RP 33-34). They shined their flashlights into the stopped vehicle and noticed James and another male passenger were not wearing seat belts. (Pl. Exh. 5)[1]; (1RP 9; 21).

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[1] DVD police cam at 6 minutes.

Within 6 minutes of making contact Officer Moody arrested Oya for driving with a suspended license third degree. (1RP34; Pl. Exh. 5).[2] In a search incident to arrest, Moody found a piece of foil with char marks on it, and a portion of a Percoet pill burnt onto the foil. (1RP 20). Mr. Oya consented to a search of the vehicle.[3] (1RP 10;37)

For another 7 minutes the passengers remained in the car, backdoors open, as one officer stood or walked around the outside the vehicle. (Pl. Exh. 5).[4] Then, officers ordered the passengers out of the car one at a time, patted them down, and directed them where to stand. (Pl. Exh. 5).[5] James was directed to the front bumper of the car, where he sat or stood for the next 28 minutes. (Pl. Exh. 5)[6].

Moody testified that he saw a blue jacket in the backseat. (1RP 40;48). The trial court found:

> Officer Moody did suspect that the jacket may have been owned by the defendant before he searched it. He suspected that more strongly than he did as to the other occupants of the car. But he did not have actual knowledge. And this stronger suspicion was because of the location of the jacket sitting on the seat where the defendant had been sitting.

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[2] DVD police cam at 7:01 minutes.
[3] Although issued a microphone to wear on his uniform, Officer Moody did not wear his because it was "charging" in the car. A microphone in the backseat of the car was on, but because the radio was so loud it was impossible to hear what the officers said to the defendant and others at the scene. (Vol. 1 RP 44; Pl. Exh. 5).
[4] DVD police cam at 14:07.
[5] DVD police cam at 14:15 – 16:10.
[6] DVD police cam at 41:47

(1RP 72).

Moody did not ask for consent to search the jacket. (1RP 25). The two girls did not consent to a search of their handbags. (1RP 26). The officer said the passengers could not remove their personal property because: "We had contraband located on the driver, we didn't want other things to be taken from the vehicle because it was still under investigation." (1RP 25). Officer Criss stated the officers were determined to make sure the jacket and purses stayed in the car. (1RP 16-17; 29).

Moody searched the backseat of the car for approximately two minutes before moving on to search the front seat a second time. (P. Exh. 5[7]). Approximately 21 minutes into the stop, Moody placed a single round of ammunition on the hood of the police car. (Pl. Exh. 5)[8]. He testified that he found it in the pocket of the blue jacket. (1RP 29). He reported that he left the blue jacket in the vehicle. (1RP 45). Moody also said that after the search James denied ownership of the ammunition, but stated the jacket belonged to him. (1RP 42).

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[7] DVD police cam at 16:10-18:00).
[8] DVD police cam at 21:00-22:09.

The two young women were released from the scene after about 25 minutes. (Pl. Exh. 5[9]). After approximately 41 minutes, James was released. (Pl. Exh. 5[10]); (1RP 25). On review, the Court of Appeals upheld the trial court's finding that James "was never arrested or detained, and left the scene of his own volition." It found "He stayed near the car during the search by his own choice, not under the officers' orders. The officers neither ordered the passengers to stay nor placed them under arrest." *Appendix* at p.6.

Officers impounded the car. (1RP 39). The application for a search warrant stated in pertinent part:

> **"That for a period of time up to and including 01-17-15, in Pierce County Washington, felonies to-wit: UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE R.C.W. 69.50.401, and UNLAWFUL POSSESSION OF A FIREARM, R.C.W. 9.41.040, was committed by the act, procurement or omission of another…**

Based on the felonies allegedly committed, the warrant requested a search for the following evidence:

> (1) Controlled substances
> (2) Narcotics paraphernalia, including syringes, pipes, packaging materials, and/or weighing equipment
> (3) Documents showing dominion and control

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[9] DVD police cam at 25:00
[10] DVD police cam at 41:47.

(4) Weapons to include firearms, ammunition, and firearm accessories
(5) Books, records, receipts, notes, ledgers and other papers relating to the possession, distribution, transportation, ordering, and/or purchasing of firearms.

(Pl. Exh. 4, p. 1: 7/24/2015).

Officers completed the authorized search of the vehicle. They found a loaded Glock weapon tucked up under the rear portion of the driver's seat. (3RP 78). No fingerprints were recovered from the weapon. (4RP 179). The inventory sheet did not list a blue jacket and photos taken prior to the search show no blue jacket in the car. (4RP 156;237[11]).

Mr. James appealed his conviction. (CP 106). He challenged the trial court's finding of fact that the jacket was not readily recognizable as belonging to him. (Br of App. at 19). Division Two Court of Appeals upheld the trial court's finding, holding the officers credibly believed the jacket could have belonged to any of the males. *Appendix* at 6. The Court also held that police did not detain James and "He stayed near the car during the search by his own choice, not under the officers' orders. The officers neither ordered the passengers to stay nor placed them under arrest." *Appendix* at p. 6

[11] At no point in the hour-long DVD police cam does it show officers removing a blue jacket from the vehicle.

Finally, the Court affirmed the conviction, holding the evidence was sufficient to prove James exercised dominion and control over the firearm. *Appendix* at p.11-12. The Court reasoned that James sat in close proximity to the firearm, the police officer opined that James' feet would likely have touched the gun while he sat in the car; the firearm could only have been placed there from the backseat; James had knowledge of the firearm because when asked if his fingerprints would be on the weapon James shook his head and said he did not know. Also, James had a 9 mm bullet in his jacket, the same type used in the firearm and because the gun had 15 bullets, the 16th was in James' pocket. *Appendix* at 12. Mr. James makes this timely petition for review.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Appellate Court's Decision Is In Conflict With Decisions Of All Three Divisions Of The Court of Appeals Regarding Constructive Possession.

Washington Courts have been reluctant to find sufficient evidence of dominion or control where the State charges passengers with constructive possession. *State v. Chouinard,* 169 Wn.App. 895, 900, 282 P.3d 117 (2012). This is so because a passenger does not own or have control over the premises, the vehicle. While convictions have been upheld for constructive possession of contraband the facts are markedly different from the present case: the defendant was the driver and or owner

of the vehicle, was the sole occupant, admitted to having the weapon and moving it so police would not see it, and admitted touching the weapon *Id.* at 901.

All three divisions of the Court of Appeals have found insufficient evidence supports a conviction for unlawful possession of contraband in fact patterns almost identical to this case here because mere proximity and knowledge is insufficient to establish dominion and control.

Division Three held the evidence was insufficient to convict a passenger in a car with components of a methamphetamine lab, including Mason jars containing chemicals and the defendant's fingerprints. The Court found the State's evidence showed the defendant was "at one point in proximity to the contraband and touched it." It was insufficient to establish dominion and control. *State v. Cote,* 123 Wn.App. 546, 96 P.3d 410 (2004). Like *Cote,* James was a passenger in a car, close in proximity to the weapon. However, there were no fingerprints linking James to the weapon.

Similarly, in *George,* the defendant rode as a passenger in the backseat of a car. *State v. George,* 146 Wn.App. 906, 193 P.3d 693 (2008). Division One held the evidence could not support a conviction of constructive possession, even though the glass pipe with burnt marijuana and empty beer bottles were found in the seat where George had been

sitting. *Id.* at 903. George knew the contraband was in the car, but the State presented no evidence he had used or owned the contraband. *Id.* at 903.

In *Chouinard* the defendant also rode as a backseat passenger. *Chouinard,* 169 Wn.App. at 897. Police stopped the vehicle to investigate reports that shots had been fired out of a car matching its unique description. Officers cleared the car of its passengers and saw a rifle, with an attached flash suppressor, protruding up from the trunk of the car through a gap between the backrest and rear dash. Chouinard denied knowing anything about the gunshots, but acknowledged he had seen the gun in the backseat. *Id.* at 898-99. Division Two reversed the conviction for unlawful possession of a firearm, holding the State demonstrated mere proximity to and knowledge of the presence of the weapon in the car. *Id.* at 896.

Like Chouinard, Mr. James rode as a backseat passenger in a vehicle stopped by police. Also like Chouinard, the weapon was found near his seat. There, Chouinard admitted to knowing the weapon was next to him. Here, the State presented no evidence that Mr. James had any knowledge of the weapon; it was tucked up under the front seat in such a manner that the police officer, who searched the backseat for over two minutes, did not notice it.

The reasoning of the *Chouinard*, *George,* and *Cote* should be applied to this case. The State demonstrated mere proximity to the weapon. There was no evidence he knew of the weapon, or as a passenger, had dominion and control. Possession of the 9 mm bullet does not establish dominion and control over the weapon. The evidence does not sustain a conviction for constructive possession of a firearm.

B. Mr. James Was Unlawfully Seized And Any Evidence Obtained As A Result Of The Bullet Should Have Been Excised From The Warrant.

The ruling by the trial court and the Court of Appeals directly conflicts with the evidence of the police video cam Exhibit 5 and Washington law. Under Article 1, § 7 of the Washington Constitution, a person is "seized" when an officer restrains, either physically or by a show of authority, that person's freedom of movement to such an extent that a reasonable person would not feel free to leave or to decline the officer's request and terminate the encounter. *State v. O'Neill,* 148 Wn.2d 564, 574, 62 P.3d 489 (2003). For the duration of a traffic stop, a police officer effectively "seizes" everyone in the vehicle. *State v. Marcum,* 149 Wn.App. 894, 910, 205 P.3d 969 (2009). Here, the police video cam demonstrates there can be no question that officers were controlling the movements of the passengers.

In the context of a traffic stop, officers are not justified in intruding on the rights of passengers beyond those steps necessary to control the scene, or steps justified by a circumstance, such as officer safety. *State v. Byrd,* 110 Wn.App. 259, 262, 39 P.3d 1010 (2002). Without an independent, articulable, lawful basis for their actions, officers may not extend their control of passengers. *Byrd,* 110 Wn.App. at 263. Rather, a passenger should be free to leave once "any exigent circumstances regarding control of his or her movements dissipates." *Id.*

Officers seized Mr. James when they stopped Oya's vehicle for an infraction. After arresting and searching Oya, the officers wanted to search the car and obtained consent from him. In the interest of officer safety and to control the scene, they ordered the passengers out of the vehicle one at a time and conducted pat downs of each individual. However, where a driver consents to a vehicle search, it does not independently justify a seizure of passengers. *State v. Reichenbach,* 153 Wn.2d 126, 136, 101 P.3d 80 (2004).

Here, rather than issue Mr. James a citation for failure to wear a seat belt and release him, officers extended their control and directed him to the front bumper of the car, escalating his initially justifiable detention to a warrantless seizure. Even though three officers were on scene, Mr.

Oya and the other male passenger were in police custody, officers unreasonably seized Mr. James for over 40 minutes.

The Fourth Amendment to the United States Constitution guarantees "the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A warrantless seizure is presumed unreasonable under the Fourth Amendment. *State v. Smith,* 145 Wn.App. 268, 274, 187 P.3d 768 (2008). An exception to the warrant requirement is the circumstance where the officer has probable cause to believe the individual has committed a crime, or can provide specific and articulable facts that give rise to a reasonable suspicion that the *individual* has been or is about to be involved in a crime. *State v. Armenta,* 134 Wn.2d 1, 10, 948 P.2d 1280 (1997); *Smith* 145 Wn.App. at 275.

Here, there was no individualized suspicion that Mr. James had done anything more criminal than fail to buckle his seat belt. His mere presence in a car, whose driver had a small piece of a charred Percocet pill in his pocket, did not create a reasonable suspicion that Mr. James was involved in criminal activity.

Where the reason for the initial police contact is discharged, any further seizure is without legal authority and evidence obtained as a result

of that seizure should be suppressed. *State v. Coyne,* 99 Wn.App. 566, 570, 95 P.2d 78 (2000).

Mr. James' infraction was failure to wear a seat belt. The officers were authorized to give him a citation, and release him. RCW 46.61.688 (3)(5). Where an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. Suppression is constitutionally required. *State v. Ladson,* 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

C. The Search Of Mr. James' Jacket Violated His Constitutional Right To Privacy.

This Court has consistently held that where a driver consents to a vehicle search, it does not automatically confer a right on officers to search property belonging to non-arrested passengers. *State v. Reichenbach,* 153 Wn.2d at 136. Rather, a passenger has an independent, constitutionally protected privacy interest in his property, which is "not diminished merely upon stepping into an automobile with others." *State v. Parker,* 139 Wn.2d 486, 496, 987 P.2d 73 (1999).

In *Parker,* this Court presented the framework for analyzing whether items belonging to a passenger may be searched incident to the arrest of a driver. The Court must first consider whether the item searched was a personal effect of the passenger and second, whether officers *knew*

or should have known the item was a personal effect of a passenger who was not independently suspected of criminal activity and third, whether there was reason to believe contraband was concealed within the personal item *immediately prior to the search*. *Parker*, 139 Wn.2d at 503.

As a passenger, Mr. James held an independent constitutionally protected privacy interest in his person and items that officers knew or should have known belonged to him. Officer Moody testified that he believed the blue jacket belonged to Mr. James; it appeared to be his size and was on the seat he had just vacated. (1RP 48; 4RP 151; CP 59). Mr. James was not independently suspected of any criminal activity. The State presented no evidence there was any reason to believe contraband had been concealed within the jacket immediately prior to the search. (CP 58, F.F. 17).

Both the trial court and the Court of Appeals concluded the search was lawful and reasonable because the owner of the blue jacket was not "readily recognizable" to the officers before and during the search[12]".

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[12] The trial court, in its oral opinion, relied on *Hill* in its ruling on the suppression motion. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). In *Hill*, officers conducted a search warrant looking for narcotics and paraphernalia. *Id.* at 643. They encountered a naked man, who asked if he could put on a pair of sweatpants laying on the floor near him. The officer did a pat down of the pants and crumbs of rock cocaine fell to the floor. *Id.* There, the trial court entered a finding of fact that the sweatpants were not obviously associated with the defendant. On appeal,

Appendix at 8. This was error because it directly contradicts the testimony of the officers and diminishes the constitutional protection of passengers. *Appendix* at 8.

In *Lohr*, the Court addressed the "readily recognizable" issue, holding that whether the defendant controlled the item or tried to maintain its privacy were not independently dispositive factors. *State v. Lohr*, 164 Wn.App. 414, 424, 263 P.3d 1287 (2011). There, Lohr was being released from the premises being searched. She asked to take her pants and boots when the officer noticed a purse sitting with those items. He asked if it was her purse and she stated it was and she wanted to take it with her. The officer searched the purse, found contraband, and she was arrested. *Id.* at 417.

Likening it to *Worth,* the Court noted in *Worth* the purse rested against the chair on which *Worth* had been seated, stating it was clear that she owned the purse. *Id.* at 420. The *Lohr* Court reasoned that to require an individual to be in control of the item or to tell the officer to stop the search "would turn on its head the concept of requiring consent to a search otherwise unauthorized by law." *Id.*

Hill argued the pants were readily recognizable items of personal effects. The Supreme Court pointed out that Hill did not assign error to the court's finding, thus it was considered a verity on appeal, without ever addressing the question of whether the items were "readily recognizable" as belonging to another not subject to the search. *Id.* at 644.

Likewise, here it was clear the jacket was in the seat where Mr. James had been riding earlier. The officer testified he believed it belonged to James. The trial court entered a finding that the officer suspected the jacket belonged to James based on its position in the car. The officer was required to obtain consent before searching the jacket, just as he requested consent to search the purses in the vehicle.

Here, the State argued that under *Cantrell*, officers need not obtain consent of each passenger to search an area of common authority. (CP 26) *State v. Cantrell,* 124 Wn.2d 183, 875 P.2d 1208 (1994). That case is distinguishable. There, after a traffic stop for speeding, the passenger consented to a search of his father's car; the driver did not consent. The evidence obtained from the search was used to prosecute both individuals. *Id.* at 186. The Court ultimately held the prolonged detention was illegal and tainted an otherwise valid consent.

The *Cantrell* Court specifically noted it did <u>not</u> reach whether mere passengers, as opposed to a permissive driver as in *Cantrell*, had a reasonable expectation of privacy in a vehicle or its contents. The Court held that passengers have a reasonable expectation of privacy in their own belongings. *Id.* at 187. *Cantrell* does *not* stand for the proposition that a passenger's belongings can be opened or searched without his consent, despite the consent of the driver. It does, however, stand for the rule that

where an unconstitutional search or seizure occurs, the remedy demands that all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.

Mr. James was illegally seized and his jacket, which officers knew or should have known belonged to him, was illegally searched. (CP 59 F.F. 30). There is an absence of any articulable, objective suspicion he was armed or dangerous, or had secreted any contraband obtained from police. There was no justification for the search and the evidence obtained later should have been suppressed. *State v. Ladsen,* 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

D. The Search Warrant Was Overbroad And Not Supported By Probable Cause.

A warrant is overbroad if either it fails to describe with particularity items for which probable cause exists, or because it describes items for which probable cause does not exist. A warrant may also be found overbroad if some portions are supported by probable cause and other portions are not. *State v. Higgs,* 177 Wn.App. 414, 427, 311 P.3d 1266 (2013).

Here, the Court of Appeals did not address whether the portion of the warrant related to drug paraphernalia was supported by probable cause. *Appendix* at p.10 FN 7. However, officers admitted and the trial

court entered findings that officers did not know of drug activity in the car beyond the single charred pill found in Oya's pocket. (1RP 50; CP 59 F.F. 24). Officers based their request for the warrant upon their experience that it is common for evidence to be within a car under similar circumstances. (CP 59). "Generalizations do not substitute for facts and investigation." *State v. Thein,* 138 Wn.2d 133, 149, 977 P.2d 582 (1999). The affidavit must demonstrate a reasonable inference that evidence of criminal activity will be found in the place to be searched. Generalized statements about the habits of people in particular criminal enterprises are insufficient to establish probable cause. *State v. Nordlund,* 113 Wn.App. 171, 182-184, 53 P.3d 520 (2002). Under *Thein*, probable cause must be based on more than conclusory predictions. *Thein,* 138 Wn.2d at 147-148. Probable cause did not exist for a warrant to search for controlled substances or narcotics paraphernalia.

Additionally, the application for the search warrant listed the crime of unlawful possession of a firearm had been committed. (P. Exh. 4 p.1, §2). The officer found a single round of ammunition. The cited statute, RCW 9.41.040, does <u>not</u> define possession of ammunition as a criminal offense.

The affidavit stated that Mr. James was a convicted felon and prohibited from carrying a *firearm*. (Pl. Exh. 4 page 2). There was no

evidence he was involved in criminal activity. The affidavit did not demonstrate that Mr. James, or anyone else in the car, was involved in activity prohibited under RCW 9.41.040[13]. As argued above, the round of ammunition should have been excised from the warrant because it was illegally obtained. The trial court and Court of Appeals wrongly affirmed probable cause to search based on the round of ammunition.

The search warrant authorized officers to search for 5 categories of evidence based on the alleged commission of two felonies. (Pl. Exh. 4 page 1). Nothing in the affidavit established probable cause to believe there would be evidence of books, records, receipts, notes, ledgers, and other papers relating to the possession, distribution, transportation, ordering, and/or purchasing of firearms. There was no suggestion that any of these items existed or that they were within the vehicle. The affidavit relied on the single round of ammunition, which not only should not have been seized, but was not illegal to possess.

Because the warrant was overbroad, the evidence must be suppressed, the conviction reversed, and the case dismissed with prejudice. *State v. Perrone,* 119 Wn.2d 538, 545, 834 P.2d 611 (1992); *Higgs,* 177 Wn.App. at 427.

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[13] RCW 9.41.045 provides that offenders under the supervision of DOC are not allowed to own, use or possess firearm or ammunition. Mr. James was not on DOC supervision at the time of this incident.

VI. CONCLUSION

Based on the foregoing facts and authorities, Mr. James respectfully asks this Court to accept review of his petition.

Submitted this 20th day of April 2017.

Marie Trombley

Marie Trombley
WSBA 41410
PO Box 829
Graham, WA 98338
253-445-7920
marietrombley@comcast.net

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JEREMY JACOB JAMES, Appellant.	No. 48317-3-II UNPUBLISHED OPINION

MELNICK, J. — Jeremy James appeals his conviction for unlawful possession of a firearm in the first degree. Police officers validly stopped a vehicle in which James was a passenger. They did not seize James. They conducted a valid warrantless search that, in part, led to the issuance of a search warrant based on probable cause. In addition, sufficient evidence supports James's conviction. We do not reach the issue of appellate costs. We affirm.

FACTS[1]

On January 17, 2015 at approximately 1:41 A.M., Officer Ryan Moody and his partner, Officer Maxwell Criss, conducted a valid traffic stop of a vehicle, driven by Leon Oya. James sat in the backseat behind the driver. Another man sat behind the front passenger seat and a woman sat between them. Another woman sat in the front seat. James and the other male passenger in the backseat were not wearing seat belts.

[1] These facts are from the suppression hearing. The facts are generally not in dispute, and the officers testified to the same facts at trial.

The officers arrested Oya for driving with a suspended license. They searched Oya incident to arrest. Moody discovered a piece of charred foil and a small portion of a Percocet pill, for which Oya admitted he did not have a prescription. Oya consented to a search of the vehicle.

The officers instructed the four passengers to exit the vehicle. James sat down and remained near the front of the vehicle. The police located two purses, but the women denied consent to search them.

Moody found a blue jacket in the back seat. Moody searched it and found a 9mm bullet. Before the search, Moody and Criss did not know to whom the jacket belonged. However, based on the location of the jacket, Moody suspected the jacket belonged to "James more than the other two male passengers." Report of Proceedings (RP) (July 24, 2015) at 48.

After the search, and after waiving his *Miranda*[2] rights, James admitted he owned the jacket, but denied owning the bullet. The officers released Oya, and allowed him and three of the four passengers to leave, including James. James never asked the officers before that point if he could leave.

The officers impounded the car and sought a search warrant. The affidavit in support of the search warrant stated that, in addition to the above information, based on their training and experience, it was common for evidence to be in a vehicle under similar circumstances. The affidavit noted that James was a convicted felon and prohibited from possessing firearms. The officers also believed that the purses may have held more contraband. The affidavit stated that probable cause existed to believe two felonies were committed, unlawful possession of a controlled substance and unlawful possession of a firearm. The affidavit sought, in pertinent part, to search for controlled substances, drug paraphernalia, firearms, ammunition, documents, and records.

[2] *Miranda v. Arizona*, 384 U.S. 436, 468, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Pursuant to a search after a judge issued the search warrant, Criss found a 9mm handgun under the driver's seat. The State charged James with unlawful possession of a firearm in the first degree.[3]

I. MOTION TO SUPPRESS

James filed a motion to suppress evidence. He argued that the search warrant was defective because it relied on an unlawful warrantless search where the officers discovered the bullet in James's jacket. James also argued that the remaining information in the search warrant affidavit did not provide a nexus between the crime of unlawful possession of a controlled substance and the car.

The trial court held a suppression hearing and denied the motion to suppress.[4] It entered an order with written findings of fact and conclusions of law.

The trial court also held a confession hearing pursuant to CrR 3.5. The trial court found that the police officers neither detained nor arrested James and that his statements were admissible.

II. TRIAL

At James's trial, the parties stipulated that James had been convicted of a serious offense in 2008, and he knew that he was prohibited from possessing a firearm after that date.

Officers Moody and Criss testified to the same facts as at the suppression hearing. Moody opined that the seat's mechanical parts prohibited the driver from being able to push the gun underneath the seat from the front. The 9mm handgun had a round in the chamber. It was ready

[3] RCW 9.41.010; RCW 9.41.040(1)(a).

[4] James challenges only three findings of fact for substantial evidence. The remaining unchallenged findings are verities on appeal. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011).

to discharge. All of the males in the vehicle were prohibited from possessing firearms. Criss opined that James's feet would have likely been touching the gun as he sat in the car.

After James waived his *Miranda* rights, Criss asked him if he thought his fingerprints were on the gun. James shook his head and responded that he did not know. James denied knowing about the gun. According to the forensic expert, no forensic evidence existed that James touched the firearm.

The jury found James guilty of unlawful possession of a firearm in the first degree. The trial court sentenced James to 48 months of confinement.

James told the trial court that he received a monthly allowance of $1,600 from the Indian tribe of which he is a member. The trial court entered an order of indigency for appeal. James appeals.

ANALYSIS

I. MOTION TO SUPPRESS

James argues that the trial court erred by denying his motion to suppress because the officers illegally seized him and illegally searched his jacket. In addition, James argues that the search warrant was overbroad and not supported by probable cause. He specifically challenges findings of fact 31 and 34 and conclusions of law 3, 4, and 5 from the suppression hearing order.[5] We disagree.

[5] James also assigns error to finding of fact 26, which the State concedes. The finding states, "3 of the 5 people left the scene, the driver was arrested and the right rear passenger was arrested." Clerk's Papers (CP) at 59. The record reflects that four of the five occupants were released, because the driver was initially arrested, but then released by the officers.

A. Substantial Evidence Supports Challenged Findings of Fact

We review a trial court's denial of a suppression motion in two parts. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011). We review whether the trial court's findings of fact are supported by substantial evidence and whether the findings support the court's conclusions of law. *Lohr*, 164 Wn. App. at 418. Substantial evidence is evidence sufficient to convince a reasonable person of the truth of the trial court's finding. *Lohr*, 164 Wn. App. at 418. Unchallenged findings of fact are verities on appeal. *Lohr*, 164 Wn. App. at 418. We defer to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *Lohr*, 164 Wn. App. at 418. We review the trial court's conclusions of law de novo. *Lohr*, 164 Wn. App. at 418.

First, we consider whether the challenged findings are supported by substantial evidence. James challenges findings of fact 31 and 34.

In finding of fact 31, the trial court found that "[u]nder these circumstances, the jacket was not 'readily recognizable' as belonging to any particular occupant. Before [James] admitted the jacket was his (after it had already been searched) the officers credibly believed it could have belonged to anyone in the car, including the driver." Clerk's Papers (CP) at 59.

Moody testified that before the search he did not know to whom the jacket belonged because Oya and James were close enough in size that it could have belonged to any of the male passengers. Criss also testified that before the search, he did not know who owned the jacket. The trial court made a determination that the officers were credible in believing the jacket could have belonged to any one of the males. Therefore, substantial evidence supports this finding.

Finding of fact 34 states, "The affidavit for the search warrant did not contain any facts that were illegally obtained." As outlined above, this finding is supported by substantial evidence.

"Thus [the warrant] contained sufficient facts to establish probable cause to search the car [James] had been riding in and all items within." CP at 60.

Next, we consider whether the challenged conclusions of law are supported by the findings and whether the trial court erred by denying James's motion to suppress.

B. Warrantless Seizure and Search

1. Detention

James challenges the legality of his seizure because there existed no articulated reason to detain him for more time than giving a traffic citation for his failure to wear a seatbelt. We disagree.

The trial court entered findings of fact that are not challenged. They are verities on appeal. *Lohr*, 164 Wn. App. at 418. The officers did not detain James. He stayed near the car during the search by his own choice, not under the officers' orders. The officers neither ordered the passengers to stay nor placed them under arrest. The trial court found that James "was never arrested or detained, and left the scene of his own volition." CP at 64.

We also note that the police did not obtain any evidence as a result of James's alleged unlawful detention. Even if we concluded that James was illegally seized, there is nothing to suppress. James's argument on this issue fails.

2. Jacket Search

James argues the trial court erred by denying his motion to suppress because the jacket was readily recognizable as belonging to him, and thus, the officers illegally searched his jacket without his consent. We disagree.

A warrantless search is per se unreasonable, unless it fits within one of the "'jealously and carefully drawn exceptions.'" *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996)

(quoting *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)) (internal quotation marks omitted). "These exceptions include exigent circumstances, consent, searches incident to a valid arrest, inventory searches, the plain view doctrine, and *Terry*[6] investigative stops." *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 310, 178 P.3d 995 (2008). The State bears the burden of showing that the search and seizure was supported by a warrant or an exception to the warrant requirement. *Hendrickson*, 129 Wn.2d at 71. The fruits of an unconstitutional search and seizure must be suppressed. *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

Under article I, section 7 of the Washington Constitution, people have a privacy interest in their vehicles and their contents. *State v. Snapp*, 174 Wn.2d 177, 187, 275 P.3d 289 (2012). In situations involving the search of motor vehicles, "the voluntary consent of one with common authority over a vehicle may support a search and evidence discovered can be used against a nonconsenting occupant." *State v. Cantrell*, 124 Wn.2d 183, 191, 875 P.2d 1208 (1994). A person can only consent to a search of a personal item if he or she has an ownership or possessory interest in that item. *State v. Hamilton*, 179 Wn. App. 870, 886-87, 320 P.3d 142 (2014).

Furthermore, "the arrest of one or more vehicle occupants does not, without more, provide the 'authority of law' under article I, section 7 of our state constitution to search other, nonarrested vehicle passengers, including personal belongings clearly associated with such nonarrested individuals." *State v. Parker*, 139 Wn.2d 486, 502-03, 987 P.2d 73 (1999). "[R]eadily recognizable personal effects are protected from search to the same extent as the person to whom they belong." *Parker*, 139 Wn.2d at 498. "Personal effects need not be worn or held to fall within the scope of protection." *Parker*, 139 Wn.2d at 499.

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[6] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Whether an item within a vehicle is "clearly and closely" associated with a nonarrested passenger is determined by utilizing the following test. Officers may

> assume all containers within the vehicle may be validly searched, unless officers *know or should know* the container is a personal effect of a passenger who is not independently suspected of criminal activity and where there is no reason to believe contraband is concealed within the personal effect immediately prior to the search.

Parker, 139 Wn.2d at 503.

We determine whether the trial court's findings support its conclusion of law that the search was lawful because the jacket was not readily recognizable as James's jacket. Conclusion of law 3 stated, that "Moody's search of the vehicle was lawful and reasonable in scope. Since the owner of the blue jacket was not readily recognizable to the officers before and during the search, the officers lawfully searched it and lawfully found the 9mm round." CP at 60.

The trial court's finding that the jacket was not readily recognizable as James's jacket supports a conclusion that the police lawfully searched the jacket because the police did not readily recognize James as the owner of the item. Thus, we conclude that the warrantless search of James's jacket was lawful, and the trial court did not err by denying his motion to suppress.

C. SEARCH WARRANT

James argues that the search warrant was overbroad and not supported by probable cause. We disagree.

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, issuance of a search warrant must be based on probable cause. "Probable cause exists if the affidavit in support of the warrant 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 can be found at the place to be searched." *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). There must be a "nexus between criminal activity and

the item to be seized and between that item and the place to be searched." *State v. Neth*, 165 Wn.2d 177, 183, 196 P.3d 658 (2008). "Probable cause requires more than suspicion or conjecture, but it does not require certainty." *State v. Chenoweth*, 160 Wn.2d 454, 476, 158 P.3d 595 (2007). A warrant is "overbroad" if it describes items for which probable cause does not exist. *State v. Higgs*, 177 Wn. App. 414, 426, 311 P.3d 1266 (2013), *review denied*, 179 Wn.2d 1024 (2014).

Appellate courts generally review the issuance of a search warrant for an abuse of discretion. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). Great deference is given to the probable cause determination of the issuing judge. *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994).

> However, at the suppression hearing the trial court acts in an appellate-like capacity; its review, like ours, is limited to the four corners of the affidavit supporting probable cause. Although we defer to the magistrate's determination, the trial court's assessment of probable cause is a legal conclusion we review de novo.

Neth, 165 Wn.2d at 182 (internal citations omitted).

In conclusion of law 4, the trial court stated, "After they found the 9mm round in the car and discovered [James] could not lawfully possess firearms, the officers had probable cause to believe there would be other evidence in the car relating to a violation of [title 9.41 RCW], such as firearms and ammunition." CP at 60. In conclusion of law 5, the trial court stated, "The search warrant was validly issued because the affidavit's contents were sufficient to establish probable cause to believe there was evidence of firearms crimes within the vehicle." CP at 60.

Based on the facts outlined above, and as presented to the judge in the search warrant affidavit, we conclude that the trial court did not abuse its discretion by finding that probable cause

existed to search for items related to the firearm, including ammunition.[7] Therefore, we conclude that the trial court did not err by denying James's motion to suppress.

II. SUFFICIENCY OF THE EVIDENCE

James argues insufficient evidence exists to support his conviction because there existed no evidence that he knew of the firearm, or as a passenger had dominion and control over the firearm. We disagree.

A. Standard of Review

To determine whether sufficient evidence supports a conviction, we view the evidence in the light most favorable to the State and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010). Any inferences "'must be drawn in favor of the State and interpreted most strongly against the defendant.'" *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). In addition, we "must defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence." *Homan*, 181 Wn.2d at 106.

[7] We need not address whether the portion of the warrant related to drug paraphernalia was supported by probable cause because we conclude that probable cause existed to search the vehicle.

B. Sufficient Evidence Supports the Conviction

To prove that James unlawfully possessed a firearm in the first degree, the State had to prove he had a firearm in his possession or control after having previously been convicted of any serious offense. RCW 9.41.040.

Possession may be actual or constructive. *State v. Raleigh*, 157 Wn. App. 728, 737, 238 P.3d 1211 (2010). Constructive possession is established by showing that the defendant had dominion and control over the firearm. *State v. Murphy*, 98 Wn. App. 42, 46, 988 P.2d 1018 (1999). "Dominion and control" means that the item "may be reduced to actual possession immediately." *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). The defendant's control over the firearm does not have to be exclusive, but mere proximity to the firearm is insufficient to show control. *Raleigh*, 157 Wn. App. at 737. The ability to reduce an object to actual possession is an aspect of dominion and control, but other aspects such as physical proximity should also be considered. *State v. Hagen*, 55 Wn. App. 494, 499, 781 P.2d 892 (1989). "[K]nowledge of the presence of contraband, without more, is insufficient to show dominion and control to establish constructive possession." *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012).

We look at the totality of the circumstances to determine if the jury could reasonably infer dominion and control. *State v. Alvarez*, 105 Wn. App. 215, 221, 19 P.3d 485 (2001). No single factor is dispositive. *Alvarez*, 105 Wn. App. at 221. "Thus, a defendant with prior felony convictions may not be in violation of the law by simply being near a firearm if he or she has not exercised dominion or control over the weapon or premises where the weapon is found." *State v. Lee*, 158 Wn. App. 513, 517, 243 P.3d 929 (2010).

Here, the State presented sufficient evidence to prove James to exercised dominion and control over the firearm. He sat in close proximity to the firearm. Criss opined that James's feet

would have likely touched the gun while he sat in the car. The officers also testified that because of the mechanics of the driver's seat, the firearm could only have been placed there from the backseat. James had knowledge of the firearm because when Criss asked James if he thought his fingerprints were on the gun, James shook his head and responded that he did not know. In addition, James had a 9mm bullet in his jacket, the same type of bullet that would be used in the firearm found in the car. The gun had 15 bullets in it, but it could hold 16 bullets. A reasonable inference is that the 16th bullet was the one in James's coat.

James cites *Chouinard* for support. In *Chouinard*, the State charged a passenger with possession of a firearm. 169 Wn. App. at 897-98. In the vehicle, "the backrest on the backseat had been detached from the car, creating a gap between the backrest and the rear dash." *Chouinard*, 169 Wn. App. at 898. We determined that the backseat passenger's mere proximity to a weapon in the trunk of the vehicle he did not own, along with his knowledge of the weapon's presence, were insufficient to establish dominion and control, and that this evidence alone could not sustain a conviction for constructive possession of a firearm. *Chouinard*, 169 Wn. App. at 903. Here, the state presented a great deal more evidence showing James constructively possessed the firearm.

Based on all of the facts, a rational fact finder could have found that James had constructive possession of the gun beyond a reasonable doubt. Therefore, the State presented sufficient evidence to support the conviction.

III. APPELLATE COSTS

James opposes appellate costs in light of *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016), asserting that he does not have the ability to pay. Under *State v. Grant*, 196 Wn. App. 644, 650, 385 P.3d 184 (2016), a defendant is not required to

address appellate costs in his or her briefing to preserve the ability to object to the imposition of costs after the State files a cost bill. A commissioner of this court will consider whether to award appellate costs in due course under the newly revised provisions of RAP 14.2 if the State decides to file a cost bill and if James objects to that cost bill.

We affirm.

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 in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Bjorgen, C.J.

Lee, J.

CERTIFICATE OF SERVICE

I, Marie J. Trombley, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Petition for Review was sent by first class mail, postage prepaid on April 20, 2017 to:

Jeremy James, DOC 386711
Airway Heights Corrections Center
PO Box 2049
Airway Heights, WA 99001

and by electronic service, per prior agreement between the parties to: Pierce County Prosecutor Office

EMAIL: PCPATCECF@co.pierce.wa.us

Marie Trombley

s/ Marie Trombley WSBA 41410
PO Box 829
Graham, WA 98338
253-445-7920
marietrombley@comcast.net

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