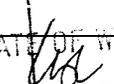


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STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

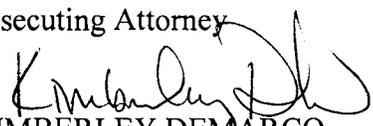
IRVIN DALE CARTER, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle, presiding Judge

No. 06-1-04771-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court act within its discretion when it denied defendant's motion to suppress evidence discovered during an inventory search of defendant's property?
2. Is defendant's sufficiency of the evidence argument without merit where his sole challenge is to the jury's determination of witness credibility?

B. STATEMENT OF THE CASE.

1. Procedure

On October 9, 2006, the State charged IRVIN DALE CARTER, JR., hereinafter "defendant," with one count of murder in the first degree, and one count of unlawful possession of a firearm in the second degree. CP¹ 1-2, 5-6.

On April 14, 2008, defendant moved to suppress seven cartridges that were seized from defendant's trousers four months before the charged crime was committed. RP (04/14/08) 201-50. Officer Rowbottom testified at the hearing. RP (04/14/08) 201-26.

¹ Citations to clerk's papers will be to "CP." Citations to the verbatim reports of proceedings for defendant's first trial will be to "RP (date of hearing)." As defendant's second trial is numbered consecutively starting with page 1, citations to defendant's second trial will be to "RP" with no date.

Officer Rowbottom testified that, on May 14, 2006, defendant was the victim of a shooting. RP (04/14/08) 202. Officer Rowbottom was dispatched to the hospital to take a casualty report of the incident. RP (04/14/08) 202. For a casualty report, the officer interviews the victim, reviews the medical status of the victim, and collects evidence. RP (04/14/08) 202-03. Officer Rowbottom arrived at the hospital just prior to defendant's ambulance. RP (04/14/08) 203. While defendant was conscious, Officer Rowbottom refrained from asking defendant any questions while hospital staff treated him. RP (04/14/08) 204, 215.

Officer Rowbottom collected defendant's bloody clothing after the medical staff cut them off of defendant's body in order to assess his injuries. RP (04/14/08) 204-05, 206. As Officer Rowbottom considered defendant the victim of a crime, he collected the clothing to preserve them as evidence. RP (04/14/08) 205, 216. Officer Rowbottom collected defendant's trousers, belt, and shoes; defendant was not wearing a shirt. RP (04/14/08) 206, 208.

Officer Rowbottom, using standard protocol, inventoried defendant's trousers in order to identify defendant and ensure there were no harmful substances hidden in the pockets, such as flammables, needles, firearms, or other similar items. RP (04/14/08) 205, 222-23. He located a wallet with which he was able to identify defendant for the hospital administration. RP (04/14/08) 206-07. Officer Rowbottom also found seven rounds of ammunition, loose in one of the pockets. RP (04/14/08)

207. The cartridges were of all the same caliber, but were two different types: round nose lead and semi-wad cutter. *See* RP (04/14/08) 210.

The court declined to suppress the cartridges, but failed to enter written findings of fact and conclusions of law. RP 04/18/08 250. Defendant's first trial ended in a mistrial, when the jury could not reach a verdict². CP 410, 411, 412, 413; RP 05/09/08 RP 33.

The State elected to retry defendant on the same charges. Defendant's second trial began on July 7, 2008, also before the Honorable Thomas J. Felnagle. RP 1. Defendant moved to suppress the seven cartridges, but the court again denied the motion, this time without an evidentiary hearing. RP 396-97. At the conclusion of the State's case, the court read defendant's stipulation that a prior felony precluded him from lawfully possessing a firearm to the jury. RP 879-80.

The jury began deliberations on July 23, 2008. *See* RP 1127. The jury received instructions for the crimes of murder in the first degree, the lesser degree crime of murder in the second degree, and unlawful possession of a firearm in the second degree. CP 531-559. The jury found defendant guilty of murder in the first degree and unlawful possession of a firearm in the second degree. CP 560, 563. The jury also found that defendant was armed with a firearm during the commission of the murder. CP 561.

² Defendant's co-defendant, Anthony Lyons, was acquitted. RP 05/09/08 32.

The court imposed a high-end, standard-range sentence of 416³ months, together with a 60-month firearm sentence enhancement. CP 567-580.

Defendant filed a timely notice of appeal. CP 622.

2. Facts

On September 8, 2006, at approximately 6:00 a.m., Brian Meyers arrived for work at Bryant Elementary School located on South Grant Avenue, Tacoma, Washington. RP 91-92. Mr. Meyers sat in his car for a moment, looking at paperwork. RP 93. When he looked up, he noticed what looked like a very full garbage bag lying on the sidewalk in front of the school. RP 93. Upon a closer examination, Mr. Meyers discovered that the “garbage bag” was actually a body, later identified as Julius Williams. RP 93-94, 695-96.

Mr. Williams was lying on the sidewalk with his arms over his head. RP 172. According to the medical report, Mr. Williams died of five gunshot wounds to his torso. RP 456-58, 465-66. The medical examiner recovered two bullets, one located between Mr. Williams’ skin and clothing, and the other lodged in the tissue of Mr. Williams’ thigh. RP 462.

³ Defendant’s offender score of six resulted in a standard range of 312-416 months on count I and 22-29 months on count II. CP 567-580.

The night before, at approximately 9:30 p.m., Mr. Williams and his fiancé, Crystal Taylor, were at Ms. Taylor's apartment preparing to go out. RP 253, 276. As they were getting ready, defendant arrived at Ms. Taylor's apartment, wanting to speak to Mr. Williams. RP 260. Ms. Taylor could hear the men talking, but could not make out what they were saying. RP 261. She could hear that defendant was speaking louder than Mr. Williams. RP 261. After a few minutes of conversation with defendant, Mr. Williams returned and told Ms. Taylor that he would have to join her at the club later that evening. RP 261, 266. Mr. Williams seemed upset and he left the apartment with defendant approximately five to ten minutes later. RP 262-63. Ms. Taylor went to the club, but Mr. Williams never arrived. RP 266.

After the club closed for the night, Ms. Taylor went home, but Mr. Williams was not at the apartment. RP 266. She went to defendant's apartment and knocked on his window. RP 268. Defendant came to the window and told her that Mr. Williams had left him at approximately 9:00 p.m. that evening. RP 269. This seemed strange to Ms. Taylor, as she knew that Mr. Williams and defendant had left her apartment together at 10:00 p.m. RP 269.

Sometime between 10:00 p.m. and 11:00 p.m. that evening, Jelvis Sherman was walking home after buying a six pack of beer. RP 474-77. Mr. Sherman, who had to hide his drinking from his family, quickly drank one 24-ounce can of beer while he was walking. RP 477-78, 559. As he

approached Bryant Elementary school, he found a “blunt⁴” in his pocket. RP 478. Mr. Sherman was so excited to find the blunt that he stopped walking in order to smoke it right away. RP 479, 560.

As he was leaning on a tree smoking his blunt, Mr. Sherman observed defendant standing near the school. RP 479, 481, 486. Another man⁵ approached defendant and Mr. Sherman thought that this man had the appearance of a person who regularly smoked crack cocaine. RP 480, 486. Mr. Sherman thought these two men were smoking crack cocaine. RP 480. Soon, a third man arrived and Mr. Sherman thought by the cut of his clothes that this man was a drug dealer. RP 481-82, 487. One of the men produced a handgun, and Mr. Sherman heard defendant say, “I’m going to pop him.” RP 483-84, 564. Mr. Sherman heard the man who looked like a crack cocaine smoker say that he would do “it,” and heard defendant reply, “No, that’s my job.” RP 564-65, 574.

Shortly after hearing these statements, Mr. Sherman saw Mr. Williams arrive and start bickering with the three men. RP 483-85, 488. Mr. Sherman then heard three shots; he looked up at the first shot and saw defendant shoot Mr. Williams twice while Mr. Williams was on the ground. RP 485, 489, 581-82. Mr. Sherman froze in fear and eventually the three other men left the area. RP 489-90, 608-09.

⁴ A “blunt” is a cigar with marijuana inside instead of tobacco. *See* RP 184, 479.

⁵ It appears that the second man was Mr. Lyons, defendant’s co-defendant who was acquitted at the first trial. *See* RP 486.

Mr. Sherman went home and went to bed. RP 500. The following day, he told his brother about what he saw. RP 500-01. A couple of days later, while investigating an unrelated crime, officers discovered that Mr. Sherman had information regarding the shooting. RP 210, 419-20, 502, 572. As their investigation progressed, the officers showed Mr. Sherman several photographic line-ups, and Mr. Sherman picked defendant and his co-defendant from the first trial, Mr. Lyons, as the first two men he saw that night. RP 504-08, 509, 724.

Approximately four months prior to the shooting, on May 14, 2006, officers had reported to the scene of a different shooting, also involving defendant. RP 292, 311. When the officers arrived at defendant's house, they found defendant had been shot in the abdomen. RP 298. Paramedics cut defendant's shirt off of him and officers collected the shirt as evidence. RP 300. The officers also collected a spent bullet slug they found in the hallway. RP 301.

Officer Rowbottom met defendant at the hospital. RP 366-68. Officer Rowbottom collected defendant's clothing after the medical staff cut them off of defendant's body. RP 373-74, 378-79, 387-88. Officer Rowbottom inventoried defendant's trousers and found seven rounds of ammunition, loose in one of the pockets. RP 380. The cartridges were of all the same caliber, but were two different types: round nose lead and semi-wad cutter. RP 384.

Once defendant became a suspect in the September shooting, officers submitted the two bullets found inside Mr. Williams, the spent bullet recovered from defendant's house in May, and the seven cartridges discovered in defendant's trouser pocket to the laboratory for testing. RP 652. Tests revealed that bullets recovered from defendant and Mr. Williams were all fired from the same gun, and that all three recovered bullets represented the same mixed load of round nose and wad-cutters that had been found in defendant's pocket. RP 654, 659-662, 664-65.

Defendant chose not to testify, but Ben Cruz and Anthony Lyons testified on defendant's behalf. RP 881, 941. Mr. Cruz, defendant's work supervisor, described defendant's general appearance. RP 881-85.

According to Mr. Lyons, he was in the neighborhood of Bryant Elementary School on September 7, 2006, trying to buy drugs. RP 943-44. He saw several people that night, including Mr. Williams, but he did not see defendant. RP 944, 951. Mr. Lyons testified that he did not, in fact, know defendant. RP 951. Mr. Lyons testified that he saw "Rico" and "A-1" with Mr. Williams, arguing near the school. RP 945-48. Then a person he did not know appeared and handed a gun to "A-1." RP 948-49. Mr. Lyons immediately left the area when he saw the gun, and heard four gunshots approximately fifteen minutes later. RP 949.

Defendant also called Tacoma Police Officer Greg Hopkins, who responded to the area of Bryant Elementary School at approximately 11:40 p.m., based on a shots fired all-car broadcast. RP 888-89. Officer

Hopkins saw, and eventually arrested, Mr. Lyons for illegal drug conduct and an outstanding felony warrant. RP 890-92. Finally, Officer Hopkins described the area around the elementary school. RP 893-95.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTION TO SUPPRESS EVIDENCE RECOVERED FROM THE SEIZURE AND SUBSEQUENT SEARCH OF DEFENDANT'S TROUSERS.

A trial court's decision to deny a motion to suppress is reviewed for an abuse of discretion. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Conclusions of law in an order pertaining to suppression of evidence are reviewed de novo. *State v. Carneh*, 153 Wn.2d 274, 281, 103 P.3d 743 (2004).

When a party moves to suppress evidence under CrR 3.6, a trial court may hold an evidentiary hearing or deny the motion without a hearing. If the court does not hold a hearing, it must enter a written order setting forth the reasons for its decision. CrR 3.6(a). If the court holds an evidentiary hearing, it must enter written findings of fact and conclusions of law at the conclusion of the hearing. CrR 3.6(b). As with CrR 3.5 rulings, the court's failure to comply with CrR 3.6 is error, but the error is

harmless if the court's oral findings are sufficient to permit appellate review. *State v. Riley*, 69 Wn. App. 349, 352-53, 848 P.2d 1288 (1993).

Here, the trial court failed to enter findings of fact and conclusions of law to support its denial of defendant's motion to suppress after a CrR 3.6 hearing. As the court engaged in substantial argument with the parties, the oral findings are sufficient to permit appellate review.

The court ultimately declined to suppress the bullets because of the expectation the public has for its police officers to act in situations where they are investigating a crime.

But this is one of those areas where the Court has got to exercise, I think, a large degree of common sense as opposed to being hypertechnical. And you have to look at it from the citizen's point of view of what is a reasonable expectation the citizen has when they call in firefighters and, by necessity, police officers and then those people are confronted with gunshot wounds and the like.

And what is the expectation the public has for its police officers? And I think you have to give the police officer some degree of leeway, and I agree there are lines to be drawn, but I don't think in this particular circumstance the line that's drawn by the police, that we are going to have this level of intervention, is an unreasonable one.

There is community caretaking issues involved. There is exigency involved. There is a degree of implied consent and a degree of public setting involved and that mean [sic] that the officers ought to be able to assess, to safeguard the property, to make an initial determination as to what is going on and to protect the people involved at the hospital and the firefighters.

RP (04/14/08) 249. The court did not address the seizure of defendant's trousers, as it appeared from the record that defendant conceded that issue.

See RP (04/14/08) 231, 238. The court concluded that it was unreasonable to prevent officers from investigating a potential crime because the victim was uncooperative. RP (04/14/08) 250. The court also held that, once Officer Rowbottom lawfully seized defendant's trousers, it was proper for him to inventory it for "possible weapons or dangerous implementations." RP (04/14/08) 250.

These conclusions are sufficient for appellant review.

- a. Officer Rowbottom acted properly when he seized defendant's trousers where they were in open view in a public place.

"When presented with arguments under both the state and federal constitutions, we review the state constitution arguments first." *State v. Puapuaga*, 164 Wn.2d 515, 521, 192 P.3d 360 (2008). "It is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment." *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). "Accordingly, a *Gunwall*⁶ analysis is unnecessary to establish that this court should undertake an independent state constitutional analysis." *State v. Surge*, 160 Wn.2d 65, 71, 156 P.3d 208 (2007).

Article I, section 7 of Washington's constitution provides, "No person shall be disturbed in his private affairs, ... without authority of

⁶ *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

law.” “The interpretation of article, I, section 7 involves a two-part analysis.” *State v. Miles*, 160 Wn.2d 236, 243, 156 P.3d 864 (2007).

The first step requires us to determine whether the action complained of constitutes a disturbance of one’s private affairs. If there is no private affair being disturbed, the analysis ends and there is no article I, section 7 violation. If, however, a private affair has been disturbed, the second step is to determine whether authority of law justifies the intrusion.

Puapuaga, 164 Wn.2d at 522.

The “private affairs” analysis “focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). “Private affairs are not determined according to a person’s subjective expectation of privacy because looking at subjective expectations will not identify privacy rights that citizens have held or privacy rights that they are entitled to hold.” *Surge*, 160 Wn.2d at 72. The analysis begins with an examination of what kind of protection has historically been extended to the asserted interest. *State v. McKinney*, 148 Wn.2d 20, 27, 60 P.3d 46 (2002). Next, the court must determine “whether the expectation of privacy is one that citizens should be entitled to hold.” *Andersen v. King County*, 158 Wn.2d 1, 44, 138 P.3d 963 (2006).

The protections of article I, section 7 are triggered only when a person's private affairs are disturbed or the person's home invaded. *State v. Carter*, 151 Wn.2d 118, 126, 85 P.3d 887 (2004); *City of Seattle v. McCready*, 123 Wn.2d 260, 270, 868 P.2d 134 (1994). Generally, one does not have a privacy interest in what is voluntarily exposed to the public. *State v. Young*, 123 Wn.2d 173, 182, 867 P.2d 593 (2004). Under the "open view doctrine," no search occurs, and the protections of article I, section 7 are not implicated, when a law enforcement officer is able to detect something by using one or more of his senses while lawfully present at a vantage point. *State v. Cardenas*, 146 Wn.2d 400, 408, 47 P.3d 127 (2002); *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981).

No warrant is required when evidence is located within an officer's open view. See *State v. Bobic*, 140 Wn.2d 250, 258-59, 996 P.2d 610 (2000) (Evidence located within a storage unit was in open view to an officer standing within an adjoining unit and peering through a small, pre-existing hole in the wall.); *State v. Rose*, 128 Wn.2d 388, 393-97, 909 P.2d 280 (1996) (Evidence located within a residence was in open view to an officer standing on the porch, even when he had to use a flashlight to peer into the residence through an uncurtained window.). Objects such as weapons, evidence, or contraband found in a public place may be seized by the police without a warrant. *Payton v. New York*, 445 U.S. 573, 586-87, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).

Here, the trial court found, and defendant has not challenged, that the hospital emergency room was a public setting. RP (04/14/08) 250. As it was a public setting, Officer Rowbottom was lawfully present. The trial court accepted defendant's concession that the trousers were properly seized by Officer Rowbottom as they were in the officer's open view. *See* RP (04/14/08) 231, 238.

Defendant's bloody trousers were also clearly of evidentiary value. At the time defendant was being treated, Officer Rowbottom knew only that defendant was the victim of a shooting; a situation he was required to investigate as part of his duties as a police officer. Defendant's trousers not only contained his blood, but could have contained gunshot residue or any number of other pieces of evidence which could help explain how defendant was shot, where he was shot, and who shot him.

While defendant raises several challenges⁷ to the officer's seizure of the trousers, he admits they were in plain view. *See* Appellant's Brief at 28. Defendant instead claims that the trousers were not immediately apparent as the "fruits, instrumentalities, or evidence of a crime." *Id.* Yet

⁷ Notably, defendant had no objection to the admission of the orange shirt he was wearing at the time he shot himself. *See* RP 641. Officer Timothy acquired this shirt after the paramedics cut it off of defendant's body, within his own home. RP 300. Defendant appears to recognize that an officer is acting within his legal duties when he collects evidence from a private home, yet claims that it is impermissible for an officer to do the same thing in a public location.

defendant fails to articulate how an item of clothing soaked with a shooting victim's blood is not evidence of a crime.

The blood-soaked clothes of a victim are clearly relevant to a shooting investigation, and Officer Rowbottom acted properly when he seized defendant's trousers.

- b. Officer Rowbottom did not require a warrant to perform an inventory search of the trousers once they were properly seized.

Inventory searches are a recognized and well-defined exception to the search warrant requirements of the Fourth Amendment and article I, section 7, of the Washington Constitution. *State v. Smith*, 76 Wn. App. 9, 13, 882 P.2d 190 (1994) (citing *United States v. Chadwick*, 433 U.S. 1, 97 S. Ct. 2476, 53 L.Ed.2d 538 (1977); *Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L.Ed.2d 739, (1987)). The purposes for such searches include “to protect the arrestee’s property from unauthorized interference while he is in jail; to protect the police from groundless claims that property has not been adequately safeguarded during detention; and to avert any danger to police or others that may have been posed by the property.” *Smith*, 76 Wn. App. at 13. “Inventory searches are regularly upheld when they are conducted according to standardized police

Procedures, which do not give excessive discretion to the police officers and when they serve a purpose other than discovering evidence of criminal activity.” *Smith*, 76 Wn. App. at 14 (citing *Bertine*, 479 U.S. at 375-76).

Here, defendant was not detained, but his property was seized as evidence of a crime. Defendant was entitled to as much protection in the security of his property as someone who is detained. Inventorying a victim’s property serves the same functions of protecting the police from groundless claims that the property has not been adequately safeguarded while held by law enforcement in evidence, and to avert any danger to police or others that may have been posed by the property. Officer Rowbottom could not adequately refute a claim that defendant’s pants contained a large sum of money if he did not conduct an inventory search.

Also, without searching the pants, Officer Rowbottom would not know if there were needles, explosives, ammunition, or other items that would be harmful to a person handling them before he submitted the trousers into evidence. The inventory search ensures the safety of the people who would be later handling the evidence.

Officer Rowbottom testified that he searched the trousers in order to help the hospital identify defendant and to ensure there were no harmful substances within them before they were admitted into evidence. RP (04/14/08) 205, 206. Officer Rowbottom noted that, “before we can place anything in the property room, we need to make sure that there is nothing that can hurt, such as, flammables, needles, firearms.” RP (04/14/08) 205.

Ammunition is a dangerous item that must be placed into evidence separately. RP (04/14/08) 223.

Officer Rowbottom's search of defendant's trousers was conducted according to standardized police procedure which prohibits the entry of evidence into the property room without having been checked for dangerous substances. As there were no locked or closed containers within the trousers, it does not appear that Officer Rowbottom was given excessive discretion as to the search. Finally, Officer Rowbottom's purpose in searching the trousers was to ensure there were no hazardous substances, not to discover evidence of criminal activity on the part of defendant, who he considered to be the victim of a crime.

This is not a case where defendant was wearing his pants while the pockets were searched. Nor was it a case where Officer Rowbottom seized property from defendant that was unrelated to his investigation into the shooting of defendant. Rather, this is a case where a police officer seized an item of clothing worn by a shooting victim at the time he was shot. Once defendant's pants were cut away from him by medical personnel, they were seized under the open view exception to the warrant requirement as evidence of a crime. Once Officer Rowbottom lawfully seized defendant's pants, he could lawfully inventory the contents prior to placing them into evidence.

The trial court did not abuse its discretion when it declined to suppress the bullets which were located in defendant's trouser pocket at the time he was shot, four months prior to the crime in this case.

2. DEFENDANT'S CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE IS MERITLESS WHERE HIS SOLE CONTENTION IS TO ARGUE AGAINST THE JURY'S DETERMINATION OF WITNESS CREDIBILITY.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly

against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

To convict defendant of murder in the first degree, the State was required to prove beyond a reasonable doubt:

- 1) That on or about the 7th day of September, 2006, [defendant], or an accomplice cause the death of Julius J. Williams;
- 2) That [defendant] or an accomplice acted with intent to cause the death of Julius J. Williams;
- 3) That the intent to cause the death was premeditated;
- 4) That Julius J. Williams died as a result of defendant's or an accomplice's acts; and
- 5) That the acts occurred in the State of Washington.

CP 531-559 (Jury Instruction 14). To convict defendant of unlawful possession of a firearm in the second degree, the State was required to prove beyond a reasonable doubt:

- 1) That on or about the 7th day of September, 2006, [defendant] knowingly had a firearm in his possession or control;
- 2) That the defendant had previously been convicted of a felony; and
- 3) That the possession or control of the firearm occurred in the State of Washington.

CP 531-559 (Jury Instruction 21).

The only elements that are in dispute are those elements that indicate that defendant was the person who committed the crimes. *See* Appellant's brief at 35-40. It is undisputed that Mr. Williams died as the result of gunshot wounds to his torso and that the acts that lead to his death occurred in Washington State. Defendant also entered a stipulation that he had been previously convicted of a felony. *See* RP 879-80. The State presented sufficient evidence for a reasonable fact finder to conclude that defendant did commit murder in the first degree and that, when he shot Mr. Williams, he was unlawfully in possession of a firearm.

Jelvis Sherman testified that defendant was the person he saw shoot Mr. Williams. RP 484-85. He also testified that he saw defendant grab the gun and heard defendant state that he was going to “pop” a person, and when someone else offered to perform this act, defendant responded, “No, that’s my job.” RP 483-84, 564-65, 574. Provided the jury found Mr. Sherman credible, this testimony is sufficient to show that defendant possessed a gun and he acted with the intent to cause Mr. Williams’ death.

Mr. Sherman testified, at length, about his mental health issues, his drug use, his alcoholism, and his memory problems. *See* RP 471-544. Defendant spent considerable time cross-examining Mr. Sherman about all of these issues. *See* RP 544-616. Mr. Sherman’s credibility and ability to recall the shooting was before the jury and it determined that Mr. Sherman was credible. The jury’s credibility determinations are not subject to review on appeal.

In addition to Mr. Sherman’s eye-witness testimony, the State presented circumstantial evidence which tied defendant to Mr. Williams’ murder. Ms. Taylor testified that defendant was the last person seen with Mr. Williams. RP 263. When Mr. Williams did not appear at the club later that night as planned, Ms. Taylor sought out defendant to find out what happened to him. RP 266. Defendant’s statement that he had last seen Mr. Williams at 9:00 p.m. conflicted with Ms. Taylor’s memory of the two men leaving her apartment together at 10:00 p.m. RP 269.

Defendant's demeanor and statements to the investigating officers also suggested defendant's involvement with Mr. Williams' murder. Defendant was surprised to learn that a bullet had been recovered from the May shooting. RP 755. When he was told that bullet matched those found in Mr. Williams, defendant disengaged from the conversation. RP 755-56. Defendant told the officers that he and Mr. Williams were friends who spent time together daily. RP 761. Yet defendant claimed no remorse or even curiosity upon finding out that Mr. Williams was dead. *See* RP 773-74.

Finally, the State presented evidence that the fired bullet recovered from defendant's house in May, and the bullets recovered from Mr. Williams' body, were fired from the same gun. RP 664. Defendant gave inconsistent accounts of how he was shot to different officers throughout both shooting investigations. RP 232, 299, 341, 372, 774-75, 779-80. Defendant had been shot from extremely close range, indicating that he either knew exactly who shot him or, more likely given how calm he was at the scene, he accidentally shot himself. *See* RP 298, 313, 640. The same gun was used to kill Mr. Williams four months later. RP 664.

When all reasonable inferences are drawn in favor of the State, there was sufficient evidence to convince a reasonable fact finder that defendant was guilty of the murder of Mr. Williams. Mr. Sherman positively identified defendant as the shooter, and the gun used to kill Mr.

Williams was the same gun that defendant had accidentally shot himself with, four months prior to the murder.

Defendant's sole contention to the sufficiency of the evidence in this case is to challenge the jury's credibility determination of Mr. Sherman. *See* Appellant's Brief at 35-40. Defendant uses one case to support his challenge. In *State v. Smith*, 130 Wn.2d 215, 227, 922 P.2d 811 (1996), the Supreme Court stated, "Where a case stands or falls on the jury's belief or disbelief of essentially one witness, that witness' credibility or motive must be subject to close scrutiny." Defendant misconstrues the Court's holding in *Smith*.

In *Smith*, the defendant was denied due process when the court curtailed cross-examination of the State's witness. 130 Wn.2d at 227. Smith was arrested for driving under the influence. The officer testified that he "recalled all of the particulars of Smith's arrest with precision." *Id.* Yet he could not remember the reading of the portable breath test. *Id.* While the Court ultimately found the error to be harmless, the Court noted that Smith was entitled to explore the officer's limitations to his recollections on cross examination. *Id.* The Court did not; however, suggest that a jury's determination of credibility is reviewable on appeal.

Defendant does not claim that he was given no opportunity to cross-examine Mr. Sherman. In fact, the record shows that he spent significant time exploring those very inconsistencies he now claims made Mr. Sherman not credible. *See* RP 544-616. Defendant spent significant

time in closing argument attempting to convince the jury that Mr. Sherman was not credible. RP 1043-56. There is absolutely no indication that defendant was unable to explore Mr. Sherman's motives, bias, or ability to remember. Rather, defendant asks this court to interpret *Smith* in a manner which would wreak havoc with one of the most well-settled principles of appellate review; that credibility determinations are for the trial of fact and cannot be reviewed on appeal.

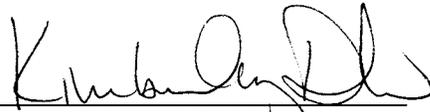
D. CONCLUSION.

Officer Rowbottom was not required to seek a warrant before seizing defendant's trousers which were located in plain view in a public location. He was also not required to obtain a warrant before he performed an inventory search to determine if there were hazardous items within the trouser pockets after the pants were lawfully seized. Finally, the State presented sufficient evidence to convince a reasonable fact finder that defendant was guilty of murdering Julius Williams. For these

reasons, the State respectfully requests this court to affirm defendant's convictions for murder in the first degree and unlawful possession of a firearm in the first degree.

DATED: October 26, 2009.

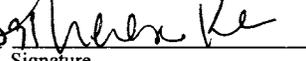
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/27/09 
Date Signature

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