

NO. 47691-6-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JAQUAIL ROBERSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Philip Sorenson

No. 15-1-00178-9

BRIEF OF RESPONDENT

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

1. Did the officers' search of Defendant's backpack violate his rights under Article I, Section 7 when Defendant had just been involved in a shooting and admitted there was a gun in the backpack that was located within his area of control at the time of the search?
2. Did the trial court properly exercise its discretion in denying Defendant's motion to suppress his statements to officers when his statements were made after he was arrested, advised of his *Miranda*¹ rights, and waived those rights?
3. Did the trial court properly exercise its discretion by denying Defendant's motions to dismiss when the evidence admitted at trial established a prima facie case that he was unlawfully in possession of methamphetamine and an operable firearm at the time of his arrest?
4. Was the failure to enter written findings of fact and conclusions of law harmless when the record contains oral rulings from the trial court that are sufficient for an appellate court to review its decision to deny Defendant's motions?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged Jaquail Roberson (hereinafter "Defendant") with one count of unlawful possession of a firearm in the first degree (RCW 9.41.040(1)(a)), and one count of unlawful possession of a controlled

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

substance (RCW 69.50.4013). CP 1-2. Defendant proceeded to trial on both counts. RP1 4.

Prior to trial, Defendant filed a motion to suppress the gun, methamphetamine, and his own statements from evidence. CP 5-11. The court held a hearing pursuant to CrR 3.5 and 3.6 to determine the admissibility of Defendant's statements, the gun, and the methamphetamine. RP1 8. The trial court heard testimony from Defendant's arresting officers and found that the initial frisk was justified as a condition of the courtesy ride and that the subsequent search of his backpack was lawful. RP1 117-118. The trial court also found that Defendant's arrest was lawful, that the officers advised Defendant of his *Miranda* rights, and that Defendant waived those rights before providing statements to police. RP1 123. Therefore, the trial court denied Defendant's motion to suppress. RP1 118; RP1 123.

Two weeks later, Defendant renewed his motion to suppress the methamphetamine and sought dismissal of the charge of unlawful possession of a controlled substance, arguing that the seizure of the methamphetamine was beyond the scope of the safety frisk that led to the seizure of the gun. RP2 134. The trial court found that the methamphetamine was discovered simultaneously with the gun during the course of a lawful search and denied Defendant's renewed motion. RP2 139-140. Defendant renewed his motion for a second time at the

conclusion of the State's case-in-chief, but it was again denied. 4/15/15 RP 16-17.

Defendant moved to dismiss the charge of unlawful possession of a firearm on the grounds that the gun found in his backpack was inoperable in a pretrial *Knapstad*² motion and a halftime motion. RP1 68; 4/15/15 RP 12. The trial court denied both motions. RP1 72; 4/15/15 RP 15.

A jury found Defendant guilty as charged on both counts. CP 114-115. The State recommended a standard range sentence of 35 months incarceration. RP4 290. Defense counsel asked that the court impose a 36 month prison-based DOSA sentence. RP4 295. The trial court adopted defense counsel's recommendation. RP4 298. Defendant filed a timely notice of appeal. CP 170.

2. Facts

On January 13, 2015, officers from the Tacoma Police Department responded to the Shilo Inn on South Hosmer Street in Tacoma in response to a 911 call reporting a shooting nearby. RP2 180-181. Officers arrived to find Defendant seated in the lobby of the hotel. RP2 182. Defendant reported that he had been walking to a nearby restaurant when he passed a car he recognized. RP2 183. Defendant stated that the occupant of the car got out of the vehicle and reached for his waistband. RP2 183. Defendant told the officers that he began to run away, and heard a gunshot as he ran

² *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

towards the Shilo Inn where he told the desk clerk to call 911. RP2 183-184.

The officers offered Defendant medical aid, but he declined. RP2 184. The officers proceeded to take Defendant's statement regarding the possible shooting and gather his contact information for follow-up. RP2 184. Defendant told the officers that he lived in a nearby apartment complex, but did not know the physical address of his building. RP2 184. Defendant informed the officers that he was going to call a taxi to get a ride home. RP2 185. Officer Ron Tennyson offered to give Defendant a ride home as his apartment was only a few blocks away and Officer Tennyson needed Defendant's address for the report on the possible shooting. RP2 185. Defendant accepted Officer Tennyson's offer for a ride home. RP2 185.

Defendant and Officer Tennyson began to leave the Shilo Inn, but Defendant had trouble standing up due to leg cramps. RP2 185. Defendant had a backpack with him. RP2 185. Due to Defendant's leg cramps, Officer Tennyson carried the backpack to the patrol car and placed it on the trunk. RP2 186. Defendant was informed that to ride home in the patrol car, he would need to be frisked for weapons according to Tacoma Police Department policy. RP2 186; RP2 229. Defendant agreed to the pat search and placed his hands on the trunk of the patrol car. RP2 229-230. Officer Tennyson handed Defendant's backpack to Officer Kenneth

Bowers who set it on the trunk of the patrol car within arm's reach of Defendant. RP1 19; RP2 230.

Officer Tennyson began his pat search and found a bullet in Defendant's right front pants pocket. RP2 186. At that point, Officer Tennyson asked Defendant if he had a gun or any other weapons in his possession. RP2 186. Defendant stated that he did not. RP2 186. Officer Tennyson continued his pat search and discovered that Defendant was wearing a bullet-proof vest. RP2 186. Officer Bowers then asked Defendant if he had any weapons in the backpack. RP1 20-21; RP2 230. Defendant admitted that there was a handgun in the backpack. RP2 190; RP2 230.

Officer Bowers opened Defendant's backpack and discovered the gun, a bag of methamphetamine, and two electronic scales. RP2 231-236. Meanwhile, Officer Tennyson detained Defendant in handcuffs. RP2 190; RP2 231. A records check revealed that Defendant had a previous felony conviction and therefore was ineligible to possess a firearm. RP2 232. Defendant was placed under arrest and advised of his *Miranda* rights. RP2 231-232. After waiving his *Miranda* rights, Defendant was questioned and admitted to finding the gun several weeks before and that he had purchased the methamphetamine. RP1 60; RP2 232; RP2 237.

C. ARGUMENT

1. THE SEARCH OF DEFENDANT’S BACKPACK WAS LAWFUL BECAUSE THE OFFICERS HAD A REASONABLE SUSPICION BASED ON ARTICULABLE FACTS THAT DEFENDANT WAS ARMED WITH A FIREARM.

Article I, Section 7 of the Washington State constitution provides greater protection to criminal defendants than the Fourth Amendment. *State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014) (citing *State v. O’Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003)). The protections provided in Article I, Section 7 encompass the legitimate expectations of privacy protected by the Fourth Amendment. *State v. Parker*, 139 Wn.2d 486, 493-94, 987 P.2d 73 (1999).³

- a. The officers did not “seize” Defendant within the meaning of Article I, Section 7 as he was free to decline the courtesy ride and avoid the initial frisk.

Under Article I, Section 7, a seizure occurs when, considering all of the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority. *State v.*

³ Defendant asserts that the search was unlawful under both the State and Federal constitutions. As the protections provided to defendants in Article I, Section 7 encompass all of the protections provided in the Fourth Amendment, the State’s brief will respond to Defendant’s assignments of error using a state constitutional analysis.

Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004) (citing **O’Neill**, 148 Wn.2d at 574). Determining whether a defendant was “seized” under Article I, Section 7 is an objective inquiry conducted by examining the actions of the law enforcement officer. *Id.* (citing **State v. Young**, 135 Wn.2d 498, 501, 957 P.2d 681 (1998)).

The officers initially contacted Defendant because he had called 911 to report being shot at. RP2 182-184. As they were responding to Defendant’s 911 call, the officers treated him as the victim of a crime. RP1 34; RP1 54. In doing so, the officers recorded Defendant’s contact information, but he could not provide his address. Officer Tennyson offered to give Defendant a ride home both as a courtesy and to get his address for the police report. RP1 55; RP1 96; RP2 184-185. The pat search of Defendant was not initiated as part of a seizure or investigative stop, but rather because Defendant had agreed to accept a courtesy ride home from Officer Tennyson. RP2 186; RP2 229. Defendant was free to leave at any time. RP1 48-49.

An objective examination of the officers’ conduct in this case reveals that Defendant’s freedom of movement was never restrained until he agreed to the precautionary frisk prior to the courtesy ride. Frisking individuals before giving them a ride in a patrol car is a constitutionally permissible means of ensuring officer safety. **State v. Acrey**, 148 Wn.2d 738, 754, 64 P.3d 594 (2003); **State v. Wheeler**, 108 Wn.2d 230, 235-6, 737 P.2d 1005 (1987). Defendant understood and agreed when Officer

Tennyson informed him that he would have to be searched prior to riding in the patrol car, and even placed his hands on the trunk of the car in anticipation of the frisk. RP1 20; RP1 90-91. Defendant's freedom of movement was never restrained. He agreed to submit to the frisk as a condition of accepting the courtesy ride. Defendant was never seized within the meaning of Article I, Section 7.

b. The seizure of the gun in Defendant's backpack did not violate Article I, Section 7 as it was within the scope of a permissible safety frisk

The nature of the officers' interaction with Defendant changed once they discovered he had a bullet in his pocket and was wearing a bulletproof vest. The discovery of these facts heightened the officers' safety concerns. Their concerns were confirmed when Defendant admitted that he had a gun in his backpack.

Protective frisks are justified "when an officer can point to 'specific and articulable facts' which create an objectively reasonable belief that a suspect is 'armed and presently dangerous.'" *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (quoting *Terry v. Ohio*, 392 U.S. 1, 21-24 (1968)). "[I]f an officer has information that an individual could have a gun, that information, 'when combined with other circumstances that contribute to a reasonable safety concern . . . could lead a reasonably careful officer to believe that a protective frisk should be conducted to protect his or her own safety and the safety of others.'" *State*

v. Russell, 180 Wn.2d 860, 867, 330 P.3d 151 (2014) (citing *Collins*, 121 Wn.2d at 177). To justify a protective frisk, the officer only needs to have a founded suspicion that the suspect is armed to form a “basis from which the court can determine that the detention was not arbitrary or harassing.” *Id.* at 868 (quoting *Wilson v. Porter*, 361 F.2d 412, 415 (9th Cir. 1966)).

“A protective frisk may extend beyond a person to his or her area of immediate control ‘if there is a reasonable suspicion that the suspect is armed and dangerous and may gain access to a weapon.’” *State v. Laskowski*, 88 Wn. App. 858, 861, 950 P.2d 950 (1997) (quoting *State v. McIntosh*, 42 Wn. App. 579, 582, 712 P.2d 323, *review denied*, 105 Wn.2d 1015 (1986)). “An officer is not restricted to frisking only a suspect’s outer clothing, but may patdown articles of clothing not worn by, but closely connected to a suspect, where the officer reasonably believed a weapon was present therein.” *Id.* (citing *State v. Quaring*, 32 Wn. App. 728, 730, 649 P.2d 173 (1982)).

In the present case, the initial frisk was consensual and a matter of routine before accepting a ride from the police. Additionally, the officers soon discovered reasons to suspect that Defendant was armed. As Officer Tennyson was frisking Defendant, he discovered a bullet in Defendant’s pocket. RP2 186. The officers also discovered that Defendant was wearing a bulletproof vest. RP2 186. Finally, the officers initially contacted Defendant because he had reported being involved in a shooting. RP2 183-184; RP2 227. Discovering the bullet and the vest while investigating a

shooting gave the officers reason to suspect that Defendant was armed. Their suspicion was confirmed when Defendant admitted he had a gun in his backpack. RP2 190; RP2 230.

Washington courts have upheld searches conducted under similar circumstances as the one at issue in this case. In *State v. Franklin*, 41 Wn. App. 409, 704 P.2d 666 (1985), an officer received a tip about a man in a public restroom with a gun. 41 Wn. App. at 410. The officer entered the restroom and found a suspect matching the description he had been provided. *Id.* The officer frisked the suspect but did not find a gun. *Id.* at 411. The suspect then admitted that there was a gun in his bag. *Id.* The officer handcuffed the suspect and then searched his bag. *Id.* The officer discovered a pistol inside. *Id.*

The suspect challenged the search of his bag on appeal, but the court observed that:

[w]here circumstances are such that the officer not only suspects that the detainee/suspect has a weapon, but is actually told by the suspect that, in fact, there is a weapon concealed in his bag or container, then . . . the officer *knows* that handing the container back to the suspect unexamined will expose him to some risk. Even if such suspect is handcuffed, as Franklin was, it is possible that the detention will produce no evidence of criminal activity, and the detainee/suspect will have to be released and allowed to regain access to his container and weapon.

Id. at 415 (citing *United States v. McClinnhan*, 660 F.2d 500, 504 (D.C. Cir. 1981)). The court ultimately held that the search was constitutional

“given the close quarters and other circumstances surrounding [the officer’s] investigation of [the defendant].” *Id.* at 416.

In *Laskowski*, an officer responded to a report of a group of teenagers prowling vehicles. 88 Wn. App. at 859. The officer found a group of teenagers matching the description that had been provided and frisked the group for weapons. *Id.* After discovering a shotgun shell in one of the teenagers’ pockets, the officer frisked a backpack one of them had been wearing and found a loaded shotgun. *Id.* The court upheld the search as constitutional, holding that “[g]iven the potential risk of danger to the officer, the frisk of the backpack was reasonable and did not exceed the scope of a lawful *Terry* stop.” *Id.* at 862.

The search challenged in this case is analogous to the search in *Franklin* and *Laskowski*. In both cases, the officer had reason to believe the suspect was armed, but did not find a weapon during a frisk of their person. However, the suspect in *Franklin* admitted that there was a gun in his bag. The court upheld the search based on concerns for officer safety and the danger posed by permitting a suspect to maintain control of the gun during his interaction with police. Furthermore, the circumstances justifying the search in this case are even stronger than those present in *Laskowski*. The *Laskowski* court upheld a similar search despite the fact that the suspects never admitted to there being a gun in the backpack. The

discovery of a single shotgun shell in one of the suspect's pockets was sufficient to allow the officer to search the backpack.

Given the facts of this case, the officers had a reasonable basis to suspect that Defendant was armed. Their suspicions were confirmed when Defendant admitted that the backpack within his reach contained a firearm. In this case, the officers not only suspected that the backpack contained a weapon, they had actual knowledge that it contained a gun. This knowledge is sufficient to justify entry into the backpack to secure the gun and ensure officer safety. *Laskowski*, 88 Wn. App. at 861. The seizure of the gun in Defendant's backpack was within the scope of a permissible *Terry* frisk and constitutional under Article I, Section 7 and the Fourth Amendment.

- c. The seizure of the methamphetamine in Defendant's backpack was lawful as it was discovered in plain view during the course of a justified safety frisk.

Exceptions to the warrant requirement include searches incident to a valid arrest, consent, exigent circumstances, inventory searches, plain view, and *Terry* investigative stops. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). The plain view exception applies when "the officer had a prior justification for the intrusion and immediately recognized what is found as incriminating evidence such as contraband, stolen property, or other items useful as evidence of a crime." *O'Neill*, 148 Wn.2d at 582-83.

It is difficult to discern precisely how and when the methamphetamine was discovered from the record on appeal. Defendant moved to dismiss the count of unlawful possession of a controlled substance just before trial. RP2 134. The record establishes that neither of the parties were aware of the precise sequence of events leading up to the seizure of the methamphetamine because testimony to that effect had not been elicited during the 3.6 hearing. RP2 134-140. The trial court determined that the methamphetamine was discovered simultaneously with the seizure of the gun. RP2 139. It ruled that the search of the backpack was lawful because Defendant had revealed the presence of the gun and therefore the officers were justified in frisking both him and his backpack. RP2 140.

As pointed out above, the frisk and search of Defendant and his backpack was lawful. During the course of this justified search for the gun, the officers happened upon methamphetamine within the backpack. RP2 234. As the search of Defendant's backpack was justified for the purposes of securing the gun, the officers were also justified in seizing any items they came across within the backpack that were incriminating in nature. The methamphetamine was discovered in the main compartment of the backpack along with the gun and two electronic scales. RP2 236-237. While the primary purpose of searching Defendant's backpack was to secure the gun, the officers discovered evidence of another crime during the course of that search. Under the doctrine of plain view, the seizure of

the methamphetamine was lawful as the officers were justified in their initial intrusion into Defendant's backpack.

- d. The trial court properly exercised its discretion in admitting Defendant's statements as they were given following a voluntary waiver of his *Miranda* rights.

A statement is admissible as evidence if it is given after the defendant is read their *Miranda* rights and makes a knowing, voluntary, and intelligent waiver of those rights. *State v. Athan*, 160 Wn.2d 354, 380, 158 P.3d 27 (2007). A trial court's conclusion that a defendant voluntarily waived their *Miranda* rights will not be disturbed on appeal if that conclusion is supported by evidence in the record. *Id.* (citing *State v. Broadaway*, 133 Wn.2d 118, 129, 942 P.2d 363 (1997)). Waiver is presumed where "a defendant voluntarily discusses the charged crime with police officers and indicates an understanding of his rights." *State v. Ellison*, 36 Wn. App. 564, 571, 676 P.2d 531 (1984) (citing *State v. Gross*, 23 Wn. App. 319, 323, 597 P.2d 894 (1979)).

The record establishes that Defendant was read his *Miranda* rights, understood them, and voluntarily waived them. At the 3.5 hearing, Officer Bowers testified that he read Defendant his *Miranda* rights and recited the rights into the record. RP1 59-60. Officer Bowers also testified that Defendant understood his rights and voluntarily waived them. RP1 60. The validity of Defendant's waiver is supported by the fact that he openly

discussed both the gun and methamphetamine with the officers after those items were discovered in his backpack. RP2 233; RP2 237. The trial court found the testimony from the officers to be credible and ruled that Defendant's statements were admissible. RP1 123.

The record contains sufficient evidence to find that Defendant was properly advised of his *Miranda* rights and made a knowing, voluntary, and intelligent waiver of those rights. Defendant's primary contention on appeal is that his statements are inadmissible as fruit of the poisonous tree because his underlying arrest was unlawful. Br. of App. at 36. However, the officers had probable cause to arrest Defendant for unlawful possession of a controlled substance upon finding the methamphetamine in his backpack at the same time they secured the gun. After discovering these two items of evidence, Defendant was placed under arrest and properly advised of his *Miranda* rights. Defendant understood his rights and voluntarily waived them. Defendant's statements were admissible and the trial court properly exercised its discretion by denying Defendant's motion to suppress his statements to officers.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DEFENDANT'S MOTIONS TO DISMISS AS THE EVIDENCE BEFORE THE COURT ESTABLISHED THAT DEFENDANT WAS IN POSSESSION OF METHAMPHETAMINE AND AN OPERABLE FIREARM.

A trial court's ruling on a motion to dismiss is reviewed for an abuse of discretion. *State v. Lamb*, 175 Wn.2d 121, 132, 285 P.3d 27 (2012). A court abuses its discretion if its decision is based on untenable reasons. *Id.* at 128. A charge may be dismissed on a defendant's motion if there is insufficient evidence to establish a prima facie case of the crime charged. CrR 8.3(c). The trial court properly exercised its discretion in this case by denying Defendant's motion to dismiss as the court's previous rulings admitting the methamphetamine into evidence provided the State with a prima facie case of unlawful possession of a controlled substance.

A charge of unlawful possession of a controlled substance requires the State to prove that the defendant was in possession of a controlled substance without a valid prescription. RCW 69.50.4013(1). The trial court's ruling admitting the methamphetamine into evidence allowed the State to make a prima facie case that Defendant was in possession of methamphetamine when he was arrested. Defendant renewed his objection to the admission of the methamphetamine and sought dismissal of the unlawful possession of a controlled substance charge just before trial. RP2

134. After hearing Defendant's motion, the trial court reiterated its earlier ruling:

[TRIAL COURT]: Well, then, I guess what I'm left with is I determined that there was a lawful basis for them to go into the backpack prior to him being arrested. They recovered the gun. As far as I can tell, simultaneously, once they recovered the gun, they either continued searching to make sure that the gun was a gun and not multiple guns or as they were searching for the gun, they found drugs along the way. There wasn't specific testimony either way. I'm finding that they had a basis to be in the backpack to clear it of danger and, in so doing, they discovered drugs pursuant to a valid search. So I'm going to deny your motion.

RP2 139-140. Thus, the trial court denied Defendant's motion to dismiss on the same grounds as it denied his suppression motion.

The admission of the actual methamphetamine, when combined with the testimony establishing that it was found in Defendant's backpack, is sufficient for the State to make a prima facie case that Defendant was in violation of RCW 69.50.4013 at the time of his arrest. Given the evidence admitted at trial, the trial court properly exercised its discretion by denying Defendant's motion to dismiss count II.

Defendant moved to dismiss the charge of unlawful possession of a firearm on the basis that the gun was inoperable both in a pretrial *Knapstad* motion and a halftime motion at the close of the State's case-in-chief. RP1 68; 4/15/15 RP 12. On appeal, Defendant argues that the trial court abused its discretion by denying his motion to dismiss based on an

illegal seizure of the gun. Br. of App. at 3. The record does not show any independent motion to dismiss the firearm charge on the basis of an illegal search. As addressed above, Defendant did move to suppress the gun from evidence, but that motion was denied. Both the *Knapstad* and halftime motions were argued and denied on the basis of the operability of the gun. RP1 72; 4/15/15 RP 15. Therefore, Defendant's assignment of error regarding the denial of a motion to dismiss the firearm charge on the basis of an illegal search is not properly before this court as the issue was not presented to the trial court. RAP 2.5(a).

Even if the court reaches Defendant's assignment of error, his claim of error regarding the search fails for the reasons outlined above. Furthermore, the trial court properly denied Defendant's motions to dismiss based on operability. A firearm is "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(9). The State presented testimony from Detective Brian Vold of the Tacoma Police Department who test fired the gun found in Defendant's backpack. RP2 247. Detective Vold testified that he was able to fire a bullet from the gun using gunpowder. RP2 254-155. The trial court also admitted the shell casing from the test fire into evidence. RP2 258-259. The trial court cited this evidence as grounds for denying Defendant's *Knapstad* motion:

[TRIAL COURT]: This gun, after several trigger pulls, fired. I mean, I think that's the end of the story. . . . In this particular case there was a connection with a live round, the gun did fire. Whether it's broken now or not, I don't know, but I suspect that anybody who got in the way of that firearm when a projectile came out of it would dispute that that gun didn't work for the purpose of this statute. So, I am going to deny the motion with regard to Knapstad.

RP1 72. The trial court denied Defendant's halftime motion on the same grounds:

[TRIAL COURT]: With regard to the firearm, it seems to me that very little manipulation needed to be done with this particular weapon in order to make it able to be fired, at least the first time. I don't have any idea what Mr. Roberson's working knowledge of the gun was, but the fact of the matter is that when a round was inserted into the breech and the chamber closed and the trigger pulled, when it was properly seated, the gun fired. And there was a shell casing and testimony that -- from direct testimony that the gun actually fired, so I'm going to find that the firearm is operable.

4/15/15 RP 15. Both of these rulings are based on Detective Vold's testimony that the gun was in fact operable at the time it was test fired. As the evidence offered at trial established that the gun found in Defendant's backpack was operable, the trial court properly exercised its discretion by denying Defendant's motions to dismiss.

3. THE TRIAL COURT'S FAILURE TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW IS HARMLESS BECAUSE THE ORAL RECORD IS SUFFICIENT TO FACILITATE APPELLATE REVIEW.

CrR 3.6 requires a trial court to enter written findings of fact and conclusions of law at the conclusion of a suppression hearing.⁴ CrR 3.6(b). However, a failure to enter written findings of fact and conclusions of law is harmless error if the trial court's oral ruling is sufficient to facilitate appellate review. *State v. Smith*, 145 Wn. App. 268, 274, 187 P.3d 768 (2008) (citing *State v. Johnson*, 75 Wn. App. 692, 698 n. 3, 879 P.2d 984 (1994)).

The trial court made three detailed oral rulings on the admissibility of both the physical evidence and Defendant's statements. Regarding the gun, the trial court ruled that the contact between the officers and Defendant was initially a community caretaking interaction that shifted to a *Terry* stop upon the discovery of the bullet, the bulletproof vest, and Defendant's admission to there being a gun in his backpack:

[TRIAL COURT]: It seems to me that the thing, the investigation takes a turn when a bullet is found on him, when a vest is found on him, and then he tells the officers that he's actually got a gun in the bag. It seems to me that, at that point, the investigation changes in character that the officer safety issues are heightened, that the defendant's out of custody, that there's now a gun in play . . . I think it is

⁴ The State has not been able to locate any findings of fact or conclusions of law in the record of this case. This has been brought to the attention of the trial DPA who states he will file submit them as soon as possible.

reasonable to search the backpack once the chain of events has begun. I think it was appropriate to do the pat-down of his person at the outset, and I think, as more information became available to them, that the nature of their inquiry changed and that the backpack was much more of a threat than it had been at the outset. . . . so I'm going to deny the defense motion.

RP1 117-118. As mentioned above, this ruling was supplemented the first day of trial when Defendant renewed his motion to suppress the methamphetamine. RP2 139-140. The trial court discussed the issue for a third time at the conclusion of the State's case when Defendant again renewed his motion to suppress the methamphetamine. 4/15/15 RP 12-13.

The trial court reiterated its ruling for a third time:

[TRIAL COURT]: The testimony was the bag was within proximity of the defendant. . . . The search of Mr. Roberson, his person and his property, was a condition necessary to him getting into the car. The bag was being gone through at which point he alerted the officers perhaps to the safety issue that there was --there was a gun in the car. . . . By that time Officer Tennison had already discovered at least one round of live ammunition in the defendant's pocket, pants pocket. It appears to me as though searching the bag was a prudent thing for the officers to do given that it was on the trunk of the car, given that the defendant's hands were on the trunk of the car, and the defendant presumably knew what was in his bag and where it was. As far as I can tell from the testimony, the drugs were found during the search of the open bag. . . . So I'm going to find that the search was proper and I'm going to find that the recovery of the drugs was proper.

4/15/15 RP 16-17. This oral ruling adequately lays out the court's reasoning for denying Defendant's motion. The trial court found that the

drugs were discovered during a valid safety frisk of Defendant's backpack and therefore they were admissible as evidence.

Regarding Defendant's statements, the trial court ruled that:

[TRIAL COURT]: All right. Well, based on the testimony from Officer Bowers and partially from Officer Tennyson, it appears that Mr. Roberson was arrested, was advised of his Miranda warnings. Officer Bowers recited them from memory in open court, as he testified that he advised Mr. Roberson in the field. There was testimony that Mr. Roberson was lucid, that he was responsive to the questions that were asked . . . I'll find the testimony of both officers to be credible with regards to this issue. I find that the advisement of rights was appropriately given, appropriately understood. There was a knowing and voluntary waiver, and questions were answered by Mr. Roberson in response. The statements are admissible.

RP1 123. This ruling traces the sequence of events established in the 3.5/3.6 hearing. After discovering the gun and methamphetamine, the officers placed Defendant under arrest and read him his *Miranda* rights. He waived those rights and proceeded to discuss the gun and drugs with the officers. The record does not contain any indication that Defendant did not understand his rights or was coerced into making statements to the officers. The record establishes that Defendant was lawfully arrested and questioned.

When viewed in conjunction with the testimony elicited at the 3.5/3.6 hearing, the trial court's oral rulings on both of Defendant's motions are sufficient to facilitate appellate review. The facts supporting

the trial court's rulings are provided by testimony elicited at the 3.5/3.6 hearing and its reasoning for denying Defendant's motions is apparent from the record on appeal. As the record is sufficient to permit appellate review of the trial court's rulings, any error in failing to enter findings of fact and conclusions of law following the 3.5/3.6 hearing was harmless and does not require reversal.

D. CONCLUSION.

Defendant alleges numerous errors occurred in the trial court. The majority of his assignments of error pertain directly to the search of Defendant's backpack. As outlined above, the search was lawful as it was within the scope of a *Terry* frisk where the officers had actual knowledge that Defendant had a gun in his backpack. As the search was lawful, the trial court properly denied Defendant's motions to suppress and motion to dismiss. Finally, even if the trial court failed to enter written findings of fact and conclusions of law, the error was harmless as the record contains extensive oral rulings from the trial court and is sufficient to permit

appellate review. Defendant's convictions and sentence should be affirmed.

DATED: March 23, 2016.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

Spencer Babbitt
Rule 9 Legal Intern

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.

3.23.16 Therun Kahn
Date Signature

PIERCE COUNTY PROSECUTOR

March 23, 2016 - 2:58 PM

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