NO. 48317-3

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JEREMY JAMES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Michael Schwartz

No. 15-1-00820-1

BRIEF OF RESPONDENT

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

1. Did the trial court properly deny defendant's motion to suppress when the brief seizure of defendant was justified as a measure to control the scene and the search of the jacket was lawful because officers reasonably believed it could have belonged to any of the three male occupants?

2. Did the trial court properly issue a warrant to search the vehicle when a controlled substance and narcotics paraphernalia were found on the driver and a bullet was found in the vehicle, occupants of which were prohibited from possessing firearms?

3. Did the State adduce sufficient evidence for a jury to find defendant guilty of unlawful possession of a firearm in the first degree when the State established defendant knowingly possessed or had in his control a firearm?

B. STATEMENT OF THE CASE.

1. Procedure

On January 26, 2015, the Pierce County Prosecutor's Office (State) charged Jeremy Jacob James (defendant) with one count of unlawful possession of a firearm in the first degree. CP 1. Defendant moved to suppress evidence and dismiss, alleging the search of defendant's jacket was illegal and the search warrant was invalid. CP 10-20. The parties

argued the motion after the State presented testimony from responding Officers Moody and Criss in the CrR 3.6 hearing. 7/24/15RP 5-64. The trial court denied the motion, finding the search of the jacket was proper and probable cause supported the warrant. 7/24/15RP 73.

The case proceeded to trial. The trial court declared a mistrial after the jury failed to reach a unanimous verdict. CP 56. The case was called again on October 12, 2015. 10/12/15RP 1. Defendant did not testify or call witnesses on his behalf. 10/15/15RP 258. A jury found him guilty as charged. CP 89. Defendant was sentenced to a standard range sentence. CP 92-105. He filed a timely notice of appeal. CP 106.

2. Facts

On January 17, 2015, Lakewood Police Officers Moody and Criss conducted a traffic stop on a vehicle in which defendant was a back seat passenger. 10/13&14RP 49. There were five people in the vehicle: the male driver, a female passenger in the front seat, defendant in the left rear passenger seat behind the driver, a female in the middle rear seat, and a male in the right rear passenger seat. 10/13&14RP 63-64. Neither defendant nor the male in the right rear passenger seat were wearing seatbelts. 10/13&14RP 52; 10/15RP 185. The driver of the vehicle was identified as Leon Oya; the officers quickly learned he had a suspended license. 10/13&14RP 52, 56. Oya was prohibited from possessing firearms. 10/13&14RP 98. The right rear passenger, later identified as

Julian Broussard, was arrested after providing numerous false names and the officers discovered he had a felony warrant for his arrest. 10/13&14RP 59; 10/15RP 188. The officers discovered defendant was prohibited from possessing firearms. 10/13&14RP 86.

Oya was searched incident to arrest for driving on a suspended license in the third degree. 10/13&14RP 56. During the search, Moody located a piece of foil with some charring and a portion of a prescription pill. 10/13&14RP 56. Oya admitted the pill was Percocet and that he did not have a prescription for it. 10/13&14RP 56. Based on his training and experience, Moody believed it was likely additional contraband would be found in the vehicle. 7/24/15RP 10. After Moody advised Oya of his ***Ferrier***[1] warnings, Oya consented to a search of the vehicle without limitations. 7/24/15RP 11.

The officers had the passengers step out of the car in order to safely conduct the search. 10/13&14RP 57. None of the passengers objected to the search of the vehicle. 7/24/15RP 38-39. Moody found a purse in the front seat where one of the females was sitting and a purse in the back seat where the other female had been sitting. 10/13&14RP 60-61. He did not believe the driver to "be the kind to carry a purse," so he asked the two females if the purses belonged to them and for consent to search them. 10/13&14RP 60-61. Both females claimed ownership of the purses

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[1] ***State v. Ferrier***, 136 Wn.2d 103, 960 P.2d 927 (1998).

but denied consent to search. 10/13&14RP 60-61. Aside from the two purses, none of the passengers claimed ownership of any items in the vehicle. 7/24/15RP 39.

During the search of the vehicle, Moody found a large, blue jacket in the backseat where defendant had been sitting, which he believed to be a man's jacket. 10/13&14RP 60. Prior to the search of the vehicle, Moody did not know who the jacket belonged to and had not seen any of the passengers interacting with or handling the jacket. 7/24/15RP 41. He observed the driver and defendant were close enough in size for the jacket to belong to either one of them. 7/24/15RP 41. When Moody checked inside the pockets of the jacket, he found one round of 9mm ammunition. 10/13&14RP 60. Upon finding the ammunition, Moody contacted both the driver and defendant. 7/24/15RP 41. After proper advisement of ***Miranda***[2] rights, defendant claimed ownership of the jacket but denied ownership of the ammunition. 7/24/15RP 42.

Approximately 25 minutes after the initial stop, Moody advised the two females and defendant they could leave. 7/24/15RP 46-47. The only person not released at the scene was Broussard[3], who was arrested on a

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

[3] The State does not dispute defendant's assignment of error to the trial court's finding of fact that three of the five people left the scene, the driver was arrested and the right rear passenger was arrested. Brief of App. 1. The driver was initially placed under arrest but eventually released with the advisement that his driving on a suspended license would be documented. 10/13&14RP 56, 63. This error has no substantive effect on the issues before the Court.

felony warrant. 10/13&14RP 63. The vehicle was towed to the police station to be impounded pending a search warrant. 7/24/15RP 64.

Superior Court Judge Ronald Culpepper signed a search warrant authorizing the search of the vehicle on January 21, 2015. CP 25. Officers Criss and Moody searched the vehicle the same day. CP 25; 10/13&14RP 77. They discovered a bag of suspected methamphetamine in the purse in the front seat area. 10/13 & 14RP 77. Criss located a 9mm Glock firearm in the backseat area, underneath the driver's seat where defendant had been sitting. 10/13&14RP 77, 80. Moody and Criss both observed it would not be possible to push the gun under the seat from the driver's position due to the mechanical parts and springs underneath the seat, it would have had to have been placed there from the backseat. 10/13&14RP 80-81; 10/15RP 198. The way the gun was situated in the vehicle, defendant's feet would have likely been touching the firearm. 10/15RP 205. The firearm was loaded with 15 rounds of 9mm ammunition. 10/13&14RP 82. The firearm holds 16 rounds of 9mm ammunition. 10/15RP 175.

On January 23, 2015, Officer Criss observed defendant walking out of an apartment complex and contacted him. 10/15RP 203. Criss placed defendant in custody and advised him of his ***Miranda*** rights, which defendant waived. 10/15RP 203. Criss asked defendant if his fingerprints might be on the gun. 10/15RP 204. Defendant paused for a few seconds then responded that he did not know. 10/15RP 204-205.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS BECAUSE THE OFFICERS LAWFULLY ASKED THE PASSENGERS TO EXIT THE VEHICLE IN ORDER TO COMPLETE THE CONSENT SEARCH AND INVESTIGATE SEVERAL INFRACTIONS.

A trial court's denial of a motion to suppress is reviewed for an abuse of discretion. ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. ***State Quaale***, 182 Wn.2d 191, 197, 340 P.3d 213 (2014).

A trial court's finding of facts are reviewed for substantial evidence and the conclusions of law are reviewed de novo. ***State v. Carter***, 151 Wn.2d 118, 125, 85 P.3d 887 (2004). "Evidence is substantial when it is enough to persuade a fair-minded person of the truth stated in the premise." ***State v. Garvin***, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Unchallenged findings of fact are verities on appeal. ***State v. Alfana***, 169 Wn.2d 169, 176, 233 P.3d 879 (2010).

The Fourth Amendment provides the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. ***State v. Byrd***, 178 Wn.2d 611, 616, 310 P.3d 793 (2013). Article I, section 7 of the Washington State Constitution is more protective in that it mandates that "[n]o person shall be disturbed in his

private affairs, or his home invaded, without authority of law." *Id.* Courts turn to the state constitution first when both provisions are at issue. *Id.*

a. The brief seizure of defendant was justified as an appropriate measure to control the scene when officers asked defendant to exit the vehicle in order to safely conduct a search of it.

A person is "seized" under the Fourth Amendment only if a reasonable person would have believed he was not free to leave in view of all of the circumstances surrounding the incident. ***State v. Armenta***, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). A seizure is justified when the police officer can point to specific and articulable facts which, when taken together with rational inferences from those facts, reasonably warrants that intrusion. ***State v. Williams***, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984) (*citing* ***Terry v. Ohio***, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). In evaluating the reasonableness of the stop, courts consider factors such as the purpose of the stop, the amount of physical intrusion upon the liberty of the person stopped, and the length of time the person is detained. ***State v. Acrey***, 148 Wn.2d 738, 747, 64 P.3d 594 (2003).

Defendant does not challenge the trial court's finding that officers had a reasonable suspicion that a traffic infraction was being committed nor does he challenge the trial court's conclusion that the car he was riding in was validly stopped to investigate the traffic infraction. Brief of App. 1-2; CP 58, 60.

A vehicle stop and arrest provides officers an objective basis to ensure their safety by controlling the scene, which may include ordering passengers out of the vehicle. ***State v. Parker***, 139 Wn.2d 486, 502, 987 P.2d 73 (1999). Under some circumstances, nonarrested individuals may frustrate the State's interest in having its laws obeyed by secreting contraband for the arrestee. *Id.* at 501.

Defendant was justifiably asked to exit the vehicle as a means of controlling the scene when the driver was arrested and officers obtained consent to search the vehicle. Ordering passengers out of a vehicle to facilitate a search of the vehicle, incident to the driver's arrest and upon his consent, is not an unconstitutional seizure but rather an appropriate measure to control the scene. ***State v. Rehn***, 117 Wn. App. 142, 151, 69 P.3d 379 (2003) (defendant was properly asked to step out of the car to facilitate a search incident to driver's arrest; it was not an unconstitutional seizure). Defendant does not challenge the trial court's finding of fact "[t]he removal of people from the car was done for officer safety, so there was no one in the car during the search." CP 58. Defendant also does not challenge the trial court's finding that officers based their suspicions (for the warrant for the car) upon their experience that it is very common for evidence to be within the car under similar circumstances. CP 59. Not only was defendant's removal from the vehicle reasonable in ensuring officer safety during the search, but it also served the State's interest in preserving

evidence when there was reasonable suspicion of additional, hidden contraband.

Defendant's investigative detention was brief and reasonably related to the purpose of the stop after the driver was arrested and found to be in possession of contraband. Additionally, defendant was not wearing his seatbelt, an infraction for which he could initially be detained. CP 58. A brief, investigative detention reasonably related to the purposes of the stop is lawful, provided the amount of physical intrusion and length of time a person is detained are limited. ***State v. Mecham***, 2016 WL 3408871 *4, 375 P.3d 604 (Wash. 2016).

Defendant contends he was not free to leave the scene after being investigated for not wearing his seatbelt and exiting the car; that he was ordered to sit on the bumper of the car and remain there. Brief of App. 17. However, the record does not support this contention. In response to the State's question, "[w]here did Mr. James go," Officer Moody testified "Mr. James positioned himself in front of the vehicle near the gas pumps," never indicating defendant was directed where to go or for how long. 10/13&14RP 57. Moody also testified with respect to the video from the patrol car's dash camera, that at 24 minutes and 36 seconds into the stop, he advised defendant that he could go ahead and get moving. 7/24/15RP 46-47.

The evidence indicates defendant chose where to stand during the search and he chose to remain at the scene long after he was released.

10/13&14RP 57; 7/24/15RP 46-47. Defendant does not challenge the trial court's finding he was never arrested or detained and he left the scene of his own volition. CP 64. That defendant chose not to leave at the moment he was released does not transform the brief, lawful initial seizure into an unconstitutional intrusion. *See* ***State v. Williams***, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984) (90-minute detention was an unreasonable seizure absent probable cause to detain).

b. The search of the blue jacket was lawful because officers reasonably believed the jacket could have belonged to any of the three male occupants in the vehicle.

"The 'authority of law' requirement of article I, section 7 is satisfied by a valid warrant, subject to a few jealously guarded exceptions." ***Alfana***, 169 Wn.2d at 176-77. Consent is one such exception to the warrant requirement. ***State v. Reichenbach***, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). In situations involving the search of motor vehicles, the voluntary consent of a person with common authority over the vehicle applies to nonconsenting occupants of the vehicle. ***State v. Cantrell***, 124 Wn.2d 183, 191, 875 P.2d 1208 (1994). Evidence discovered from this consent can be used against a nonconsenting occupant. *Id.* "There is less expectation of privacy in an automobile than in either a home or an office." ***Cantrell***, 124 Wn.2d at 191.

Officers may assume all containers in the vehicle are lawfully subject to search unless officers know or should know a container belongs to a nonarrested occupant. ***Parker***, 139 Wn.2d at 505. Protections only extend to those items which are "readily recognizable personal effects . . . which an individual has under his control and seeks to preserve as private." ***State v. Hill***, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). A passenger's silence during a search is inconsistent with a later claim of retained expectation of privacy. ***Cantrell***, 124 Wn.2d at 191.

The trial court found Oya had legal authority to consent to the search of the vehicle and that he did so knowingly and voluntarily after being properly advised of his ***Ferrier*** warnings. CP 58, 60. Defendant does not challenge this finding. Brief of App. 1-2.

Defendant challenges the trial court's finding that the jacket was not "readily recognizable" as belonging to any particular occupant and the officers credibly believed it could have belonged to anyone in the car, including the driver. CP 59. However, substantial evidence supports the trial court's finding.

Although Moody suspected the jacket belonged to defendant more than the other two male passengers, such suspicion does not make the jacket "readily recognizable" as belonging to defendant nor does it preclude the lawful search of it. *See* ***State v. Hill***, 123 Wn.2d 641, 647, 870 P.2d 313 (1994) (sweatpants within six feet of naked defendant when another scantily clad person was nearby were not so intimately connected

to the defendant to preclude a search of sweatpants). Officer Moody believed the jacket could have belonged to all three of the men in the vehicle, based on the fact that it was a male's coat and there were three males in the vehicle. 7/24/15RP 48. Moody noted the driver and defendant were close enough in size that the jacket could have belonged to either one of them. 7/24/15RP 41. Both the defendant and the driver were wearing sweatshirts. 7/24/15RP 41; EX 5 6:56, 10:22. The confusion over the ownership of the jacket was reasonable and likely, given the similarities in size and outerwear between the driver and defendant.

Defendant did not seek to preserve the jacket as private when he failed to claim ownership of the jacket. Defendant did not object to the search of the car; he did not claim any items within the vehicle; and he did not attempt to retrieve anything from the vehicle when he was asked to exit it. 7/24/15RP 15-16, 39. Defendant's silence during the search of the car and the jacket is inconsistent with what he claims on appeal, that he had an expectation of privacy with regards to the jacket. *See* ***Cantrell***, 124 Wn.2d at 192 (*citing* ***United States v. Anderson***, 859 F.2d 1171, 1176-77 (3rd Cir. 1988)). Although defendant's silence cannot be the basis for obtaining consent to search, it does support the finding that officers credibly believed the jacket could have belonged to anyone in the car. *See* ***State v. Clark***, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001) (the State may comment on what defendant does not say when he chooses not to remain silent and instead talks to police); *See also* ***Roe v. Texas Dept. of***

Protective and Regulatory Services, 299 F.3d 395, 402 (5th Cir. 2002); CP 59.

The blue jacket was not readily recognizable as belonging to defendant; officers did not know nor should they have known it belonged to defendant prior to the search, thereby making the search lawful.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ISSUED A SEARCH WARRANT SUPPORTED BY PROBABLE CAUSE.

A search warrant may be issued only upon a determination of probable cause. ***State v. Jackson***, 150 Wn.2d 251, 264, 76 P.3d 217 (2003). Probable cause is established when the affidavit supporting the search 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). A nexus between criminal activity and the item to be seized, and a nexus between the item to be seized and the place to be searched must be established in the affidavit. ***Thein***, 138 Wn.2d at 140. "Affidavits in support of a search warrant are examined in a commonsense, not a hypertechnical manner, and doubts are to be resolved in favor of the warrant." ***State v. Ollivier***, 178 Wn.2d 813, 846-47, 312 P.3d 1 (2013).

Review of the decision to issue a search warrant is limited to the four corners of the affidavit. ***State v. Neth***, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). Issuance of a search warrant is reviewed for an abuse of discretion. ***State v. Kennedy***, 72 Wn. App. 244, 248, 864 P.2d 410 (1993) (*citing* ***State v. Cord***, 103 Wn.2d 361, 366, 693 P.2d 81 (1985)). "The decision to issue a search warrant is highly discretionary." ***State v. Chenoweth***, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). Great deference is given to the issuing magistrate's determination of probable cause. ***State v. Coates***, 107 Wn.2d 882, 888, 735 P.2d 64 (1987). Doubts concerning the existance of probable cause are generally resolved in favor of the validity of the warrant. ***Chenoweth***, 160 Wn.2d at 477.

a. Probable cause supported the search for evidence of the crimes of possession of a controlled substance and unlawful possession of a firearm.

Probable cause supported the search of the vehicle for evidence of unlawful possession of a controlled substance when, during the search incident to arrest, a controlled substance and narcotics paraphernalia were found on the driver. Officer Moody found a folded up piece of foil that contained char marks and a piece of a pill on Oya, who stated (1) the pill was Percocet, (2) he found it at a friend's house, and (3) he did not have a prescription for it. CP 33. Based on Oya's own admission, few inferences need be drawn in order to suspect he was illegally in possession of the

Percocet, which is a controlled substance. Further, the folded up and charred piece of foil along with the char marks on the pill indicated the pill was ingested in a way consistent with illegal drug use. The fact that the pill found on Oya was a partial pill indicates he was not done smoking it, leading to the rational inference that devices with which to consume the pill were nearby. It is reasonable to suspect evidence such as a pill bottle or container showing the person to whom the pill was prescribed, additional pills or other controlled substances, and devices with which to ingest narcotics would be found within the vehicle.

The nexus between the criminal activity already admitted to by Oya, that he was in possession of a controlled substance for which he had no prescription, and the items to be seized was established in the affidavit. Specifically, the items to be seized related to unlawful possession of a controlled substance listed on the warrant were (1) controlled substances, (2) narcotics paraphernalia, including syringes, pipes, packaging materials, and/or weighing equipment, and (3) documents showing dominion and control. CP 36. Two of the three items listed were already found on Oya, providing the nexus between the criminal activity and the items to be seized. Documents showing dominion and control are relevant evidence in support of the crime of unlawful possession of a controlled substance. For example a prescription would show to whom the Percocet was prescribed.

The nexus between the items to be seized and the place to be searched was also established by the affidavit. Oya was searched upon

being removed from the vehicle when Moody found the controlled substance and narcotics paraphernalia on him. The reasonable inference then was that Oya was in the vehicle while he was in possession of the controlled substance and narcotics paraphernalia, he was possibly ingesting the controlled substance in the vehicle, and further evidence of the crime would be found in the vehicle. Viewed in a commonsense manner, it is reasonable to infer from the facts and circumstances stated in the affidavit that Oya was probably involved in criminal activity in the vehicle.

Probable cause also supported the search for evidence of unlawful possession of a firearm. A live, 9mm round of ammunition was discovered inside the vehicle in defendant's jacket and defendant was prohibited from possessing firearms. The elements of the crime of unlawful possession of a firearm are: (1) the defendant knowingly had a firearm in his possession or control; (2) the defendant had previously been convicted of a serious offense; and (3) the possession or control of the firearm occurred in the State of Washington. WPIC 133.02. Evidence of the crime would include not just firearms. Other relevant evidence would include items indicating one knowingly owned, possessed, or had in his control a firearm, or that one was aware they were prohibited from owning firearms based on their criminal history. Such evidence may be additional ammunition or receipts for ammunition or firearms containing the purchaser's identity and address. It is logical to search for the 9mm firearm itself within the vehicle

based on the discovery of ammunition for the 9mm firearm in defendant's possession. However, the firearm could be found elsewhere, such as defendant's residence, and still be under defendant's control and evidence of such control could be present in the vehicle.

The warrant specifically authorized the search for:

> (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.

CP 36. The items to be seized in the warrant are connected to proving the crime of unlawful possession of a firearm in that they could potentially identify the owner of a firearm.

Defendant relies on the fact that possessing ammunition is not a criminal offense. Brief of App. 26. However, the ammunition need not be illegal per se in order to support a search for evidence of the crime of unlawful possession of a firearm. Probable cause requires a nexus between the crime and the items seized; it does not require that the items themselves be inherently illegal. ***Thein***, 138 Wn.2d at 140; CrR 2.3(b)[4].

It is reasonable to infer when a person possesses a live round of ammunition, that the person has a firearm to go with it. The affidavit in support of the search warrant indicated at least two occupants of the

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[4] CrR 2.3(b) provides in pertinent part, "A warrant may be issued under this rule to search for and seize any (1) evidence of a crime; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed."

vehicle to be searched were convicted felons, with a third person arrested due to a felony warrant. CP 33-34. After having found a bullet inside a vehicle containing occupants prohibited from possessing firearms, it is reasonable that additional evidence would be found and that the occupants were probably involved in criminal activity. The standard does not require absolute certainty the defendant was involved in criminal activity but rather that defendant is "probably" involved in criminal activity. ***Thein***, 138 Wn.2d at 140.

Defendant also contends the warrant was invalid due to false statements contained therein, specifically that the crime of unlawful possession of a firearm had been committed, relying on ***State v. Cord***, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). However, defendant's reliance is misguided. The specification of the crime charged in the warrant was neither an omission of facts nor a knowingly and intentionally false statement of facts relied on in issuing the warrant, which would precluded by ***Cord*** upon a showing by a preponderance of the evidence by defendant. ***Cord***, 103 Wn.2d at 367-68. The statement at issue here indicated which crime was being investigated and for which the warrant was sought. CP 32. A search warrant is not invalid for specifying the crime under investigation and in some cases, it *must* specify the crime. *See* ***State v. Riley***, 121 Wn.2d 22, 27, 846 P.2d 1365 (1993).

Viewing the circumstances in commonsense—defendant was in a car that was pulled over by police, he was prohibited from possessing

firearms, and a bullet was in his jacket pocket—leads to a reasonable inference that defendant may have attempted to hide evidence of the crime of unlawful possession of a firearm before police approached the vehicle.

b. Even if the Court finds insufficient probable cause to support a search for evidence of unlawful possession of a firearm, the firearm seized was admissible under the severability doctrine.

Suppression of items seized pursuant to valid parts of a warrant which also contains items unsupported by probable cause is not required under the severability doctrine. ***State v. Maddox***, 116 Wn. App. 796, 806, 67 P.3d 1135 (2003). "[I]t would be harsh medicine indeed if a warrant which was issued on probable cause and which did particularly describe certain items were to be invalidated in to merely because the affiant and magistrate erred in seeking and permitting a search for other items as well." ***Maddox***, 116 Wn. App. at 807 (*citing* ***State v. Perrone***, 119 Wn.2d 538, 556, 834 P.2d 611 (1992)).

The severability doctrine applies when five requirements are met: (1) the warrant must have lawfully authorized entry into the premises, (2) the warrant must include one or more particularly described items for which probable cause exists, (3) the part of the warrant that includes items supported by probable cause must be significant in comparison to the warrant as a whole, (4) the searching officers must have found and seized the disputed items while executing the valid part of the warrant, and (5)

the officers must not have conducted a general search in flagrant disregard of the warrant's scope. ***State v. Higgs***, 177 Wn. App. 414, 430-31, 311 P.3d 1266 (2013).

As demonstrated in the previous section, probable cause in the form of the driver's admission that he possessed a controlled substance without a prescription coupled with the evidence of the substance and paraphernalia used for smoking it found on the driver supports the search for evidence of unlawful possession of a controlled substance. The warrant particularly described items to be seized connected to the crime of unlawful possession of a controlled substance, namely controlled substances and narcotics paraphernalia. Because of this, the warrant lawfully authorized the search of the vehicle, allowing entry into the premises in which the firearm was located, satisfying the first and second factors for the severability doctrine.

The portion of the warrant related to unlawful possession of a controlled substance was significant compared to the warrant as a whole. Three of the five line items of items to be seized were in support of the investigation of unlawful possession of a controlled substance, satisfying the third factor.

In executing the portion of the warrant related to controlled substances and narcotics paraphernalia, officers would reasonably and necessarily search underneath the seats of the vehicle where occupants could easily secrete contraband. The firearm would have been found

during the search even if it had been limited to narcotics related contraband; the search was not so general nor in flagrant disregard of the warrant's scope, satisfying the fourth and fifth factors of the severability doctrine. Seizing the firearm during the lawful search for evidence of unlawful possession of a controlled substance was also lawful as being in plain view during the justified intrusion into the vehicle. *See* ***State v. Barnes***, 158 Wn. App. 602, 612, 243 P.3d 165 (2010) (objects of obvious evidentiary value in plain view and sighted inadvertently during a lawful search may be lawfully seized).

Even if this Court finds the search for evidence of unlawful possession of a firearm unsupported by probable cause, the admission of the firearm survives under the severability and plain view doctrines.

3. THE STATE INTRODUCED SUFFICIENT EVIDENCE FOR A JURY TO FIND DEFENDANT GUILTY OF UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE BECAUSE A REASONABLE INFERENCE WAS THAT THE DEFENDANT HAD EJECTED A CARTRIDGE AND PUT THE FIREARM UNDER THE SEAT.

Evidence is sufficient to support a conviction if any rational trier of fact could find the defendant guilty beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. *Id.* All

inferences must be drawn most strongly against the defendant. *Id.* Sufficiency of the evidence is reviewed de novo. ***State v. Berg***, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

RCW 9.41.040 proscribes conduct constituting unlawful possession of a firearm in the first degree. The jury was instructed to find the following elements had been proved in order to convict:

> (1) That on or about January 17, 2015, the defendant knowingly had a firearm in his possession or control; (2) That the defendant had previously been convicted or adjudicated guilty as a juvenile of a serious offense; and (3) That the possession or control of the firearm occurred in the State of Washington.

CP 86.

Possession may be actual or constructive. ***State v. Staley***, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Constructive possession is established when the person charged has dominion and control over the goods. ***State v. Callahan***, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Constructive possession need not be exclusive. ***State v. Turner***, 103 Wn. App. 515, 521, 13 P.3d 234 (2000); ***State v. Morgan***, 78 Wn. App. 208, 212, 896 P.2d 731, *review denied*, 127 Wn.2d 904 P.2d 1158 (1995). "[T]he ability to reduce an object to actual possession is an aspect of dominion and control." ***Turner***, 103 Wn. App. at 521.

The evidence supported a reasonable inference that the defendant had dominion and control over the firearm. 10/15RP 196, 205. The firearm was located on the rear passenger floorboard where defendant was sitting

behind the driver. 10/13&14RP 80; 10/15RP 196. Officers Moody and Criss both testified the gun had to have been placed there from the backseat due to the metal bars and mechanical pieces underneath the seat obstructing access from the driver's position. 10/13&14RP 81; 10/15RP 198. There was a bump dividing defendant's floorboards from that of the right rear passenger. 10/15RP 200. A rational trier of fact could infer from this evidence that defendant placed the firearm at his feet on the floorboard in front of him and that he could quickly reduce that firearm to his possession.

The proximity of the firearm to defendant coupled with defendant's own statements demonstrate defendant knew the firearm was in his dominion and control. Criss testified that the way the firearm was situated, defendant's feet would likely have been touching it. 10/15RP 205. It is rational to infer if his feet were touching the firearm, defendant was aware it was there. When asked whether or not his fingerprints would be found on the firearm, defendant paused for a few seconds then responded he did not know. 10/15RP 205. A person who had not touched the firearm and who knows he is prohibited from doing so, would respond by saying no when asked by police if his fingerprints would be on the firearm. But defendant did not say no, he said he did not know. It is rational to infer from defendant's hesitation and uncertainty that he did in fact handle the firearm. Coupling this inference with the evidence the

firearm was so close to defendant, a rational jury could find beyond a reasonable doubt that defendant knew the firearm was there.

The bullet found in defendant's jacket likewise indicates defendant possessed the firearm located at his feet in the vehicle. The firearm located in front of where defendant was sitting in the vehicle was a Glock 9mm caliber firearm. 10/13&14RP 78. The bullet found in the blue jacket located where defendant was sitting was a 9mm bullet. 10/15RP 141-42. After the bullet was discovered in the blue jacket, defendant claimed ownership of the jacket. 10/13&14RP 62. The Glock 9mm firearm contained only 15 bullets when it was found in the vehicle yet it can hold 16 bullets; it was short one 9mm bullet. 10/13&14RP 82-83; 10/15RP 175. It is rational to infer that the bullet in defendant's jacket came from the firearm at defendant's feet. From that inference, a rational trier of fact could find beyond a reasonable doubt that defendant possessed the Glock 9mm firearm at least long enough to eject a bullet from it. Even brief actual possession of the firearm is sufficient in finding unlawful possession, in light of the evidence indicating defendant's constructive possession over the firearm as demonstrated above. *See* ***State v. Summers***, 107, Wn. App. 373, 387, 28 P.3d 780 (2001); *see also* ***Staley***, 123 Wn.2d at 802.

Defendant relies on ***State v. Chouinard*** in arguing the State failed to prove dominion and control. ***State v. Chouinard***, 169 Wn. App. 895, 282 P.3d 117 (2012); Brief of App. 12-14. However, the reliance is

misplaced. In ***Chouinard***, the firearm at issue was located in the trunk of the vehicle in which the defendant was a passenger. ***Chouinard***, 169 Wn. App. at 898. It was not in the passenger area of the car where the defendant was sitting, much less located in such a way that the defendant's feet would have been touching it, as in the present case. Further, while the location of the firearm in ***Chouinard*** indicates any of the occupants of the vehicle could have placed the firearm where it was found, the firearm in this case could only have been placed where it was found by a person in defendant's position. Finally, although the defendant in ***Chouinard*** stated he had seen the gun, there was nothing more to connect the defendant to the gun. ***Chouinard***, 179 Wn. App. at 898. Here, not only was defendant positioned in such a way to quickly and easily reduce the firearm to his own possession, defendant also possessed ammunition for the firearm and indicated he was unsure whether his prints would be found on the firearm.

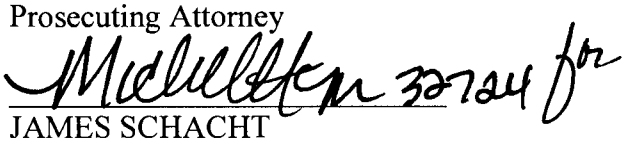
Taking all of the evidence in the light most favorable to the State and the rational inferences therefrom, a rational trier of fact could find defendant possessed the Glock 9mm firearm and that he had knowledge of his possession of it because he placed the firearm on the floorboard at his feet.

D. CONCLUSION.

For the foregoing reasons, the State asks this Court to affirm the defendant's conviction and sentence.

DATED: August 26, 2016

MARK LINDQUIST
Pierce County
Prosecuting Attorney



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Rule 9 Legal Intern

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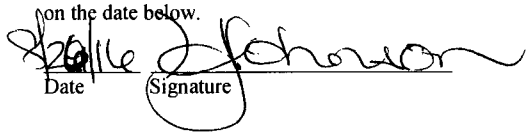

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