NO. 43738-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SAM YOU, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Vicki Hogan

No. 12-1-00789-8

Brief of Respondent

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B. STATEMENT OF THE CASE.

1. Procedure

On March 6, 2012, based on an incident that occurred the day before, the State charged Sam You with: Count I, Unlawful Possession of a Firearm in the First Degree. CP 1.

On May 29, 2012, the defense filed a motion to suppress evidence. CP 4-5, 6-20.

On June 12, 2012, the case was assigned to the Honorable Judge Vicki Hogan for trial. CP 122. The court conducted a hearing on defendant's motion to suppress evidence, and at the conclusion denied the defendant's motion. CP 123. A jury was empaneled on June 14. CP 124.

On June 18, 2012, the State filed a corrected information that changed the date of offense from March 5, 2012, to March 4, 2012. CP 59. The jury returned a verdict of guilty. CP 62.

On June 29, 2012, based on an offender score of 8, the court sentenced the defendant to 90 months in prison. CP 85-97.

The defendant timely filed a notice of appeal on July 27, 2012. CP 103-117.

This is the State's response to the defendant's brief of appellant.

2. Facts

a. Facts at Suppression Hearing

The court entered the following findings of fact and conclusions of law with regard to the suppression hearing. The conclusions of law are included here insofar as they may contain determinations of mixed questions of law and fact. None of the findings are challenged on appeal. Apparently the facts were also not disputed below as the findings contain no disputed facts.

UNDISPUTED FACTS

1. On March 4, 2012 at approximately 11:12 pm, Puyallup Tribal Police Officer Joey Tracy responded to the 3700th block of East Roosevelt Avenue, Tacoma to assist Tacoma Police Officers in an attempt to locate a vehicle that had been involved in a drive-by shooting that had occurred near the 6400th block of East Portland Avenue.

2. Officer Tracy works in the gang-unit and the majority of his work involves investigating gang-related crimes. Based on his training and experience, Officer Tracy knew this area to be a high crime area with

frequent incidents of gang activity and violence. He also knew this area to be the gang territory of both the "44th Street Piru Blood Gang" and the "OLB (44th Original Loko Boyz)."

3. While patrolling the area in search of the Pontiac, Officer Tracy's patrol vehicle was approached from behind by a dark blue Dodge Stratus (WA 255UCB) with its high beam headlights activated. Officer Tracy observed the vehicle circle around the block and leave the area.

4. Believing that the vehicle had left the area, Officer Tracy continued his investigation into the drive-by shooting. However, at approximately 11:17 pm, Officer Tracy again observed the same Dodge Stratus turning from 1400th block of East 35th Street (a dead street) onto East Portland Avenue.

5. Officer Tracy began to follow the vehicle and noticed that the driver continued looking back at his patrol vehicle. As both vehicles turned onto East 29th Street, Officer Tracy observed the vehicle turn onto East R Street and drive southbound. Officer Tracy, who had been investigating a drive-by shooting, became suspicious of this vehicle's actions—wondering why this vehicle had been driving in circles in an area that just experienced a drive-by shooting.

6. Officer Tracy suspected that the vehicle was involved or about to be involved in a drive-by shooting. His suspicion was based on the following behavior (1) the vehicle circled around the neighborhood moments following a drive-by shooting; (2) the time of night—11:00 pm; (3) the vehicle operated its high beams; (4) the neighborhood's high incidents of gang related crimes and violence; (5) the number of passengers; and (6) the driver's behavior changed upon noticing the officer.

7. Officer Tracy stopped the vehicle in the 1800th block of East 35th Street. Upon contacting the vehicle, Officer Tracy was met by a hostile driver.

8. During this initial contact, Officer Tracy observed that Ross had the number four tattooed on each of his forearms (numbered tattoos are commonly associated with gang membership, gang set, or location of territory claimed).

9. The driver told Officer Tracy that he was attempting to drive through Salishan. Again, that area is claimed by the 44th Street Piru Blood Gang. Not only did Ross' tattoos support Officer Tracy's suspicions, but also another passenger in the vehicle was wearing gang attire. For example, the rear passenger (Michael Leair) was sitting next to a red Washington Nationals baseball jacket, which is associated with the Piru Blood gang.

10. Officer Tracy's suspicion regarding this vehicle's behavior in a neighborhood that just experienced a drive-by shooting and the intent of the passenger was heightened based on his observation of gang related tattoos and attire. The driver's combative attitude also contributed to the suspicion that these males were involved or about to be involved in a drive-by shooting.

11. Upon contacting the front passenger side door, Officer Tracy observed the defendant Sam Nang You and a loaded .357 revolver next to his feet.

12. The defendant and the other passengers were arrested and a search warrant was obtained for the vehicle.

13. During the execution of the search warrant, Officer Tracy discovered a [sic] two loaded firearms, additional ammunition, and gang attire.

CONCLUSIONS AS TO ADMISSIBILITY

That the above entitled court has jurisdiction of the subject matter and of the defendant, Sam Nang You. That based on the Court's review of the evidence presented in this matter makes the following Conclusions of Law.

1. Officer Tracy lawfully contacted the defendant and the other passengers based on his reasonable suspicion that they were involved or about to be involved in a drive by shooting.

2. Officer Tracy's suspicion was more than a hunch and was based on reasonable and articulable facts.

3. Because the intial contact was lawful, the firearms obtained during the search warrant are admissible.

b. Facts at Trial

On March 4, 2012, Officer Joe Tracy is a police officer for the Puyallup Tribe of Indians. 2RP 110, ln. 15-16. He is cross-commissioned as a police officer with the State of Washington, City of Fife and Milton. 2RP 111, ln. 14-21. He was working a graveyard shift from 8:00 p.m. to 6:00 a.m. He was advised by his dispatch that Tacoma Police Dispatch

had issued a dispatch regarding a drive-by shooting in the 6400 block of East Portland Avenue. He conducted a check of the area, looking for a vehicle that matched the description from the shooting. 2RP 113, ln. 4-5.

While conducting the area check, he was traveling northbound on East Roosevelt at about the 3700 block when a small blue sedan approached his vehicle from the rear. 2RP 9-13. The vehicle had its high-beam lights activated. 2RP 114, ln. 6-7, 12-13. As he approached the stop sign at the intersection of East Fairbanks and East Roosevelt, Officer Tracy continued northbound, slowing and was able to record the license plate of the blue car, but did not stop the vehicle because he felt it was more important to look for the vehicle that was the subject of the shooting report. 2RP 114, ln. 12-21. The blue car turned left onto East Fairbanks, heading West toward Portland Avenue. 2RP 114, ln. 16-17, p. 115, ln. 2.

After patrolling the area for another five minutes, Officer Tracy saw the same blue vehicle turn from the 1400 block of East 35th ST. 2RP 115, ln. 7-11. East 35th is a dead end that butts up against McKinley Hill to the West. 2RP 115, ln. 14-15. The blue car was turning from that dead end area onto East Portland Avenue, traveling northbound. 2RP 115, ln. 15-17. The vehicle turned out in front of Officer Tracy, who then followed it. 2RP 115, ln. 17-20. The vehicle continued northbound on East Portland avenue, making a right-hand turn onto East 29th Street, which is where the Puyallup Tribal Police Department is located. 2RP 115, ln. 23-25.

Officer Tracy continued to follow the vehicle as it continued on Portland Avenue, making a right-hand turn Southbound onto East "R" Street, along which it continued through two stop signs until East 35th Street, where it made a right-hand turn, basically making a full circle from where he had initially seen it. 2RP 116, ln. 2-10. Officer Tracy found it suspicious and odd that the vehicle was making such a large circle throughout the East side of Tacoma at that time of the night, especially after a drive-by shooting. 2RP 116, ln. 11-17. In his experience, he has noticed that with drive-by shootings, usually there is not just one vehicle involved, but that it will usually be multiple vehicles, with different people acting as a look-out or spotter vehicle. 2RP 116, ln. 18-22. Additionally, quite often a vehicle may come out after a drive-by shooting to act as a retaliatory car. 2RP 116, ln. 22-25.

Most of the time he was following the car, the driver was looking back at Officer Tracy in the rearview mirror. Officer Tracy decided to pull the vehicle over, which he did as it turned onto East 35th Street in about the 1800 block. 2RP 117, ln. 6-9.

As he pulled the vehicle over, Officer Tracy did not see any movement from the occupants, other than the driver looking in his rear view mirror. 2RP 122, ln. 6-13. Officer Tracy first contacted the driver. 2RP 121, ln. 21-25. While he contacted the vehicle, Sam You was in the front passenger seat. 2RP 118, ln. 10-24. While Officer Tracy contacted

the driver, he noticed that You was rigid and really motionless. 2RP 121, ln. 1-5.

The driver, Isaiah Ross, was rather excited that Officer Tracy had pulled him over, which caused Officer Tracy some suspicion because he acted as if he was attempting to draw Officer Tracy's attention from the car. 2RP 161, ln. 4-8. Officer Tracy had the driver, Isaiah Ross, step out of the vehicle and patted him down for weapons. 2RP 153, ln. 11-18; p. 155, ln. 5-18. Officer Tracy then walked around to the passenger side of the vehicle and opened the door and asked You to get out. 2RP 157, ln. 23-25. When You moved to swing his feet out, Officer Tracy could see a silver revolver just inches into the under portion of the front passenger seat. 2RP 119, ln. 7-12; p. 122, ln. 16-24; p. 156, ln. 25 to p. 157, ln. 7; p. 158, ln. 3-7. You did not appear surprised when Officer Tracy observed the gun. 2RP 148, ln. 4-6. Officer Tracy then brought You out of the car and placed him in handcuffs, and removed the other two people from the vehicle as well. 2RP 120, ln. 5-6.

You's feet were positioned to either side of the gun. 2RP 125, ln. 11-13. Based upon the way You was seated the gun was positioned in such a way that You could take immediate possession of the firearm. 2RP 122, ln. 25 to p. 123, ln. 4. *See* Exs. 11-13, 19-23. You could bend down and put the gun where it was located, or he could reach down and pick it up if he wanted to use it. 2RP 125, ln. 14-18. Based on his positioning, You could exclude or prevent both the driver and the back seat passenger

from taking the gun. 2RP 123, ln. 5-17. Moreover, based upon You's positioning in the seat, Officer Tracy believed that You had control of the area where the gun was located. 2RP 123, ln. 18-21.

There was also a piece of toilet paper on the handle of the gun. 2RP 125, ln. 8-10, 19-23. Officer Tracy eventually handled the gun, which was fairly solid. 2RP 125, ln. 1-4. He said the gun could very easily slide as the car was moving prior to the stop if it had been in that position. 2RP 126, ln. 5-7.

After he arrested You, the vehicle was impounded, and Officer Tracy then obtained a search warrant for the vehicle. 2RP 129, ln. 10 to p. 130, ln. 6. Officer Tracy recovered the gun that had been at You's feet, which was a Ruger .357 revolver. 2RP 133, ln. 2-13. In the center console, Officer Tracy also found hollow point .357 ammunition that matched the ammunition in the gun. 2RP 126, ln. 10 to p. 127, ln. 7; p. 128, ln. 2-13; p. 163, ln. 16-18. The defendant had access to the center console. 2RP 128, ln. 14-16.

Officer Tracy also found a second gun behind the back seat of the car, directly under the seat area. 2RP 134, ln. 4-11. It was a 9mm semi-automatic pistol. 2RP 134, ln. 6-7. It was in a black nylon holster. 2RP 138, ln. 3-5. Inside a jacket that had been next to the rear passenger, Officer Tracy found a 9mm bullet, Washington State ID card and a video

camera. 2RP 135, ln. 21-24; 136, ln. 10-12. The rear passenger's name was Michael Leair, and it was his identification in the jacket. 2RP 136, ln. 13-20.

The parties stipulated that You had previously been committed of a serious offense. 2RP 172, ln. 8-20; CP 57-58.

C. ARGUMENT.

1. THE FINDINGS OF FACT ARE VERITIES WHERE THEY ARE NOT CHALLENGED ON APPEAL.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. ***State v. Hill***, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. ***Hill***, 123 Wn.2d at 644. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. ***Hill***, at 644. Credibility determinations are for the trier of fact and are not subject to appellate review. ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In ***Henderson Homes, Inc v. City of Bothell***, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact, but did not argue how the findings

were not supported by substantial evidence; made no cites to the record to support its assignments; and cited no authority. The court held that under these circumstances, the assignments of error to the findings were without legal consequence and that the findings must be taken as verities.

> It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities.

Henderson, 124 Wn.2d at 244; *see also*, ***State v. Jacobson***, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998).

A finding of fact that is erroneously denominated as a conclusion of law will be treated as a finding of fact. ***Rickert v. Pub.Disclosure Comm'n***, 161 Wn.2d 843, 847, 168 P.3d 826 (2007) (citing ***State v. Luther***, 157 Wn.2d 63, 78, 134 P.3d 205 (2006)). *See*, ***Hoke v. Stevens-Norton, Inc***, 60 Wn.2d 775, 778, 375 P.2d 743 (1962); *See also*, ***Neil F. Lampson Equip. Rental & Sales, Inc v. West Pasco Water Sys., Inc.***, 68 Wn.2d 172, 174, 412 P.2d 106 (1966) (stating that where conclusions of law are incorrectly denominated as findings of fact, the court still treats them as conclusions of law).

The court reviews conclusions of law *de novo*. ***State v. Smith***, 154 Wn. App. 695, 699, 226 P.3d 195 (2010) (citing ***State v. O'Neill***, 148 Wn.2d 564, 571, 62 p.3d 489 (2003); ***State v. Eisfeldt***, 163 Wn.2d 628, 634, 185 P.3d 580 (2008)).

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

"'Police may conduct an investigatory stop of a vehicle if the officer has a reasonable and articulable suspicion that the individual is involved in criminal activity.'" ***State v. Lee***, 147 Wn. app. 912, 199 P.3d 445 (2008) (quoting ***State v. Walker***, 66 Wn. App. 622, 626, 834 P.2d 41 (1992)). An articulable suspicion exists where there is "...a substantial possibility that criminal conduct has occurred or is about to occur." ***State v. Carlson***, 130 Wn. App. 589, 593, 123 P.3d 891 (2005) (quoting ***State v. Kennedy***, 107 Wn.2d 1, 6, 726 P.2d 445 (1986)).

"The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop." ***Lee***, 147 Wn. App. at 916 (quoting ***State v. Rowe***, 63 Wn. app. 750, 753, 822 P.2d 290 (1991). *See also*, ***Carlson***, 130 Wn. App. at 593 (citing ***State v. Glover***, 116 Wn.2d 509, 5114, 806 P.2d 760 (1991)). "Police may rely upon information known to its agency and relayed through dispatch." ***Carlson***, 130 Wn. App. at 593 (citing ***State v. Gaddy***, 114 Wn. App. 702, 706, 60 P.3d 116 (2002), *aff'd*, 152 Wn.2d 64, 93 P.3d

872 (2004)). "Circumstances that might appear innocuous to the average person may appear incriminating to a police officer in light of past experiences, and the officer may bring that experience to bear on a situation." ***State v. Thierry***, 60 Wn. App. 445, 448, 803 P.2d 844 (1991).

Once an officer has made a ***Terry*** stop of a vehicle, the officer may search the vehicle for weapons where such a search is reasonably based on officer safety concerns. ***State v. Glenn***, 140 Wn. App. 627, 634, 166 P.3d 1235 (2007). Moreover, an officer can do "far more" in the context of a "Terry" stop if the suspect's conduct endangers life or personal safety than if it does not. ***State v. Thierry***, 60 Wn. App. at 446.

In this case, Officer Tracy conducted a lawful contact with a vehicle he suspected to be involved or about to be involved in a drive-by shooting. ***State v. Thierry*** is the seminal case concerning ***Terry*** stops in the context of an investigation of drive-by shootings. ***State v. Thierry***, 60 Wn. App. 445, 446, 803 P.2d 844 (1991). ***Thierry*** involved two Tacoma police officers working off-duty as security for Pierce Transit. The only observation made by these officers was that Thierry had driven slowly past the 10th and Commerce transit stop in downtown Tacoma about 3:00 pm. ***Thierry***, 60 Wn. App. at 446. This area was a high crime area with a high incidence of gang activity, drug traffic, and violence. ***Thierry***, 60 Wn. App. at 446-447. Officers also reported that the vehicle was driving with its windows down and had been playing loud music. ***Thierry***, 60 Wn. App. at 447. The officers continued to watch Thierry and his

passengers who were slouched down in the front seat of the car, as they drove into a parking lot on Commerce adjacent to the transit area. ***Thierry***, 60 Wn. App. at 447.

Although there were many empty slots in the lot, Thierry drove around it, made no attempt to park and stopped when he got back to the entrance. ***Thierry***, 60 Wn. App. at 447. The behavior of Thierry fit the Tacoma Police Department's profile of drive-by shootings, so the officers approached the car. ***Thierry***, 60 Wn. App. at 447. As they drew near, Thierry immediately turned down his radio, and one of the officers saw a two-foot-long wooden bat on the floor at Thierry's feet. ***Thierry***, 60 Wn. App. at 447. He also noticed that the passenger was making furtive hand motions. ***Thierry***, 60 Wn. App. at 447. The officer, concerned for their personal safety, ordered Thierry and the passenger to bring their hands into view. ***Thierry***, 60 Wn. App. at 447. As one officer walked to the driver's side of the car, he immediately saw a cocked semi-automatic pistol between the front armrests. ***Thierry***, 60 Wn. App. at 447. The defendant filed a motion to suppress in a Pierce County Superior Court and the trial court granted the motion finding the stop invalid. ***Thierry***, 60 Wn. App. at 447. The appellate court disagreed and reversed the trial judge. ***Thierry***, 60 Wn. App. at 447.

The Court of Appeals held that the officer's observations of the defendant driving around the parking lot with his windows rolled down in cold weather, which was consistent with the profile of "drive-by

shootings," gave the officer reasonable cause to conduct an investigatory stop. ***Thierry***, 60 Wn. App. at 448-449. Thierry was unsuccessful in arguing that since no crime had been reported, the officer could have had no reasonable suspicion that he had committed a crime and, further, that the officer had no reason to believe a crime was about to be committed. ***Thierry***, 60 Wn. App. at 448. (Emphasis added). The court reasoned that officers are not required to ignore their observations. ***Thierry***, 60 Wn. App. at 448. The Appellate court explained, "Circumstances that might appear innocuous to the average person may appear incriminating to a police officer in light of past experiences, and the officer may bring that experience to bear on a situation, as the officers did here." ***Thierry***, 60 Wn. App. at 448. The court found that "it is necessary only that the circumstances at the time of the stop be more consistent with criminal than innocent conduct." ***Thierry***, 60 Wn. App. at 448.

It was explained, "even if Thierry's behavior might arguably be viewed as innocent, the ultimate test for reasonableness of an investigative stop involves weighing the invasion of personal liberty against the public interest to be advanced." ***Thierry***, 60 Wn. App. at 448. The court added, "Officers may do far more if the suspect's conduct endangers life or personal safety than if it does not." ***Thierry***, 60 Wn. App. at 448. In conclusion, it was determined that "given the high crime character of the area in question and the drive-by shooting profile, 'the facts in existence immediately prior to the stop did not comport with innocent activity.'"

Thierry, 60 Wn. App. at 448-449. The officer's intrusion under these facts was deemed negligible, and officer's seizure of the pistol and additional weapons was valid. ***Thierry***, 60 Wn. App. at 449.

As was the case in ***State v. Thierry***, here too, Officer Tracy conducted a "Terry" stop on a vehicle, which he believed was or was about to be involved in a drive-by shooting.

Officer Tracy's suspicion was reasonable in light of the following facts. The car had made a large circle around the neighborhood in a way that didn't make sense because they could directly drive across Portland Avenue unrestricted to go to the next area the car was traveling to. 1RP 13, ln. 23 to p. 14, ln. 3. The car was coming from a dead-end road, but still had three occupants. It was close to 11:30 p.m. 1RP 13, ln. 8. The vehicle officer Tracy was looking for was believed to be a black Pontiac, however, the car the defendant was in was also a dark blue sedan, that could have been mistaken for a black Pontiac. 1RP 14, ln.8-13.

Sometimes drive-by shootings involve multiple vehicles. 1RP 14, ln. 13-15. Additionally, the vehicle operated its high beams; the neighborhood had a high incidence of gang related crimes and violence; and the driver's behavior changed upon noticing the officer. CP 100, Undisputed Fact, No. 6.

Officer Tracy had a reasonable suspicion that criminal activity had occurred, or was likely about to occur. When all the facts and inferences are drawn in favor of the court's ruling, officer Tracy had a reasonable

articulable suspicion that the vehicle You was in was engaged in criminal activity. For this reason, the court did not err when it denied the defense motion to suppress the evidence.

Because the defense motion is without merit, it should be denied.

3. SUFFICIENT EVIDENCE SUPPORTED THE CONVICTION.

a. Standard Of Review For Sufficiency Of The Evidence.

The right to a fair trial is secured by both the United States and Washington Constitutions. The right to a fair trial arises from the Due Process clauses of the Fifth and Fourteenth Amendments. However, it is given specific form by the Sixth Amendment, which enumerates particular guarantees. *See* ***U.S. v. Wade***, 388 U.S. 218, 226-27, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). The Fourteenth Amendment also makes the right to a fair trial applicable to the States. ***Cone v. Bell***, 556 U.S. 449, 451, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009).

The Washington Constitution's protection of a fair trial parallels the federal. The right to a fair trial arises from the Due Process Clause of Article I, section 3, while Article I, section 22 enumerates particular guarantees that apply to criminal prosecutions and thereby serve to protect the due process right to a fair trial. *See* ***State v. Clark***, 143 Wn.2d 731, 773, 24 P.3d 1006 (2001). The due process clause of article I, section 3

has repeatedly been held to provide the same protections as the due process clause of the federal constitution. ***State v. McCormick***, 166 Wn.2d 689, 699, 213 P.3d 32 (2009); ***In re Dyer***, 143 Wn.2d 384, 394, 20 P.3d 907 (2001) (citing ***State v. Ortiz***, 119 Wn.2d 294, 304, 831 P.2d 1060 (1992)); ***Young v. Konz***, 91 Wn.2d 532, 538-39, 588 P.2d 1360 (1979); ***State v. Pitney***, 79 Wn. 608, 610, 140 P. 918 (1914).

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 appellant. ***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).

b. There Was Sufficient Evidence Of Dominion And Control Beyond Mere Proximity To Support The Jury's Finding That You Constructively Possessed The Revolver.

Possession of an item may be actual or constructive. ***State v. Jones***, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). A defendant actually possesses an item if he has physical custody of it; he constructively possesses the item if he has dominion and control over it. ***Jones***, 146 Wn.2d at 333; ***State v. Coahran***, 27 Wn. App. 664, 668, 620 P.2d 116 (1980)(citing ***State v. Callahan***, 77 Wn.2d 27, 31, 459 P.2d 400 (1969)).

Dominion and control need not be exclusive and can be established by circumstantial evidence. ***State v. Chavez***, 138 Wn. App. 29, 34, 156 P.3d 246 (2007) citing ***State v. Weiss***, 73 Wn.2d 372, 375 438 P.2d 610 (1968). In a review of whether there is sufficient evidence of dominion and control, the court looks at "the totality of the situation to determine if there is substantial evidence tending to establish circumstances from which the jury can reasonably infer that the defendant had dominion and control of the item and was thus in constructive possession of them." ***State v. Partin*** 88 Wn.2d 899, 906, 567 P.2d 1136 (1977).

Thus, the court looks to the various indicia of dominion and control with an eye to the cumulative effect of a number of factors.

Partin, 88 Wn.2d at 906; ***State v. Hagen***, 55 Wn. App. 494, 499, 781 P.2d 892 (1989). Factors the courts have previously recognized include dominion and control over the location or premises where the prohibited item is found; proximity; the ability to exclude others; and the ability to take immediate or actual possession. ***State v. Echeverria***, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997) (affirming dominion and control over the premises as a factor); ***State v. Shumaker***, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007) (holding that dominion and control is one factor from which constructive possession may be inferred); ***State v. Edwards***, 9 Wn. App. 688, 690, 541 P.2d 192 (1973) (considering proximity as one factor and exclusion of others as another factor); ***State v. Wilson***, 20 Wn. App. 592, 596, 581 P.2d 592 (1978) (recognizing ability to exclude as a factor); ***Hagen***, 55 Wn. App. at 499 (identifying both proximity and the ability to reduce an object to actual physical control as factors).

On the other hand, most of these factors alone will generally not be sufficient to establish dominion and control. ***State v. Cantabrana***, 83 Wn. App. 204, 921 P.2d 572 (1996) (dominion and control alone not sufficient); ***Shumaker***, 142 Wn. App. at 334 (dominion and control alone not sufficient); ***State v. Summers***, 45 Wn. App. 761, 763-64, 728 P.2d 613 (1986) (proximity alone is not sufficient to establish dominion and control); ***Hagen***, 55 Wn. App. at 499 (the ability to reduce an object to

actual possession alone is not sufficient). Indeed, even actual possession alone may not be sufficient to establish possession, e.g. if it was temporary or fleeting. ***State v. Ponce***, 79 Wn. App. 651, 654, 904 P.2d 322 (1995); ***State v. Hystad***, 36 Wn. App. 42, 49, 671 P.2d 793 (1983). Finally, although the ability to exclude others is a factor, dominion and control need not be exclusive to establish constructive possession. ***Wilson***, 20 Wn. App. at 596; ***State v. Weiss***, 73 Wn.2d 372, 378, 438 P.2d 610, 613 (1968).

A person has dominion and control of an item if he has immediate access to it. ***Jones***, 146 Wn.2d at 333. Mere proximity, however, is not enough to establish possession. ***Jones***, 146 Wn.2d at 333. No single factor is dispositive in determining dominion and control. ***State v. Collins***, 76 Wn. App. 496, 501, 886 P.2d 243, *review denied*, 126 Wn.2d 1016, 894 P.2d 565 (1995). The totality of the circumstances must be considered. ***Collins***, 76 Wn. App. at 501.

"An automobile may be considered a 'premises' for the purpose of determining whether the defendant exercise dominion and control over the premises" where the prohibited item was found. ***State v. Mathews***, 4 Wn. App. 653, 656, 484 P.2d 942 (1971). "Whether a passenger's occupancy of a particular part of [the] automobile would constitute dominion and control of either the [prohibited items] or the area in which they are found

would depend upon the particular facts in each case." ***Mathews***, 4 Wn. App. at 656.

Here, there was sufficient evidence to support that You had dominion and control over the gun. You's feet were positioned to either side of the gun. 2RP 125, ln. 11-13. Based upon the way You was seated, the gun was positioned in such a way that You could take immediate possession of the firearm. 2RP 122, ln. 25 to p. 123, ln. 4. *See* Exs. 11-13, 19-23. You could bend down and put the gun where it was located, or he could reach down and pick it up if he wanted to use it. 2RP 125, ln. 14-18. Based on his positioning, You could exclude or prevent both the driver and the back seat passenger from taking the gun. 2RP 123, ln. 5-17. Moreover, based upon You's positioning in the seat, Officer Tracy believed that You had control of the area where the gun was located. 2RP 123, ln. 18-21.

There was also a piece of toilet paper on the handle of the gun. 2RP 125, ln. 8-10, 19-23. Officer Tracy eventually handled the gun, which was fairly solid. 2RP 125, ln. 1-4. He said the gun could very easily slide as the car was moving prior to the stop if it had been in that position. 2RP 126, ln. 5-7.

When all these facts and the reasonable inferences therefrom are drawn in favor of the jury's verdict, there was sufficient evidence to

establish that You was more than proximate to the gun, and that in fact he had dominion and control of it.

Accordingly, the verdict should be affirmed and the defendant's claim in this issue should be denied.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED YOU'S REQUEST TO CONTINUE SENTENCING.

A trial court's decision to grant or deny a motion to continue sentencing is reviewed for an abuse of discretion. ***State v. Herzog***, 69 Wn. App. 521, 524, 849 P.2d 1235 (1993); ***State v. Armstead***, 13 Wn. App. 59, 66, 533 P.2d 147 (1975). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds or reasons. ***State v. Woods***, 143 Wn.2d 561, 626, 23 P.3d 1046 (2001).

For the purposes of sentencing "same criminal conduct" involves crimes that (a) involve the same criminal intent; (b) were committed at the same time and place; and (c) involve the same victim. RCW 9.94A.589(1)(a) (formerly RCW 9.94A.400(1)(a)); ***State v. Tili***, 139 Wn.2d 107, 123, 985 P.2d 365 (1999); ***State v. Lessley***, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The absence of any one of these criteria prevents a finding of same criminal conduct. ***State v. Vike***, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). The Legislature intended the phrase

"same criminal conduct" to be construed narrowly. ***State v. Flake***, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). To determine whether two or more criminal offenses involve the same criminal intent, the Washington Supreme Court established the objective criminal intent test, which requires a court to focus on "the extent to which a defendant's criminal intent, as objectively viewed, changed from one crime to the next." ***State v. Dunaway***, 109 Wn.2d 207, 214-15, 743 P.2d 1237 (1987); ***State v. Lessley***, 118 Wn.2d 773, 777-778, 827 P.2d 996 (1992)).

A sentencing court is required to apply the same criminal conduct test to multiple prior convictions that a court has not already concluded amount to the same criminal conduct. ***State v. Torngren***, 147 Wn. App. 556, 563, 196 P.3d 742 (2008), *abrogated on other, but closely related grounds by* ***State v. Graciano***, --- Wn.2d ---, 295 P.3d 219 (2013) ([with ***Torngren***] citing ***State v. Reinhart***, 77 Wn. App. 454, 459, 891 P.2d 735 (1995)); ***State v. Lara***, 66 Wn. App. 927, 931-32, 834 P.2d 70 (1992).

An appellate court will generally defer to a trial court's decision on whether two different crimes involve the same criminal conduct and will not reverse absent a clear abuse of discretion or a misapplication of the law. ***State v. Haddock***, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); ***State v. Maxfield***, 125 Wn.2d 378, 402, 886 P.2d 123 (1994). The presumption is that a defendant's current offenses must be counted separately in calculating the offender score unless the trial court enters a finding that

they "encompass the same criminal conduct." RCW 9.94A.589(1)(a). *See* ***Graciano***, 295 P.32 at 223. Because a same criminal conduct finding is an exception to the default rule that all convictions must count separately, the defendant has the burden to show that multiple counts constituted the same criminal conduct. ***State v. Graciano***, --- Wn.2d ---, 295 P.3d 219, 223 (2013).

Moreover, the defendant can waive a claim of same criminal conduct where he fails to properly raise it. ***State v. Wilson***, 117 Wn. App. 1, 21, 75 P.3d 573 (2003) (citing ***State v. Nitsch***, 100 Wn. App. 512, 997 P.2d 1000 (2000)).

Where he was unprepared to do so at sentencing, the court did not abuse its discretion by refusing to continue the sentencing hearing. Nor has You asserted a claim of ineffective assistance of counsel.

Further, You has failed to show that any of his prior offenses counted as the same criminal conduct, or that he was entitled to relief. As such, he can show no prejudice from the trial court's discretionary act of refusing to continue the sentencing hearing. Sentencing occurred nearly four months after You's case was filed. He had ample time to prepare a claim that his prior offenses constituted the same criminal conduct. Where he was not prepared to make such a claim at sentencing, the court was not obligated to continue the matter further.

Additionally, to the extent that the record is insufficient to support his argument on direct appeal, it merely demonstrates that this claim should properly be brought in a personal restraint petition rather than on a direct appeal. "If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition." ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

The trial court did not abuse its discretion in refusing to continue the sentencing hearing. To the extent that You wants to pursue the claim, he should file a personal restraint petition and therein submit the documents necessary make a preliminary showing that he could be entitled to relief.

Accordingly, You's claim on this issue should be denied as without merit.

D. CONCLUSION.

The trial court did not err when it denied You's motion to suppress evidence, where the officer had a reasonable articulable suspicion that criminal activity had occurred or was about to occur related to the report of a drive-by shooting.

Sufficient evidence supported You's conviction where all the facts in inferences therefrom indicated more than You's mere proximity to the gun and established his action dominion and control of it.

The trial court did not abuse its discretion where it refused to continue You's sentencing.

You's appeal should be denied.

DATED: April 8, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

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.

4/8/13 Thevina Kar
Date Signature

PIERCE COUNTY PROSECUTOR

April 08, 2013 - 11:27 AM

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