

COURT OF APPEALS
DIVISION II

Court of Appeals No. 38320-9-II

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STATE OF WASHINGTON
BY [Signature]
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**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

IRVIN DALE CARTER,

Defendant/Appellant.

BRIEF OF APPELLANT

**Appeal from the Superior Court of Pierce County,
Cause No. 06-1-04771-2
The Honorable Thomas J. Felnagle, Presiding Judge**

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TABLE OF CONTENTS

	<u>Page(s)</u>
I. ASSIGNMENTS OF ERROR.....	1
II. ISSUES PRESENTED.....	1
1. Was the warrantless search and seizure of Mr. Carter’s clothing lawful where Mr. Carter had a privacy interest in his clothes and their contents, Mr. Carter was not under arrest or the suspect of committing any crime, and no exigency existed which would authorize a warrantless search and seizure of Mr. Carter’s clothing?.....	1
2. Did the State present sufficient admissible evidence to convict Mr. Carter of any crime where the only admissible evidence linking Mr. Carter to any crime was the testimony of a confessed heavy marijuana smoking, excessive-beer-consuming, brain-damaged, methadone-taking man who admitted to having difficulty processing and remembering events and who gave conflicting descriptions of the person who shot Mr. Williams?.....	1
III. STATEMENT OF THE CASE.....	1-13
Factual and Procedural Background.....	1
IV. ARGUMENT.....	13-40
1. The trial court erred in denying Mr. Carter’s motion to suppress the evidence found during the seizure and search of Mr. Carter’s clothing where the seizure and search of Mr. Carter’s clothing violated his Federal and State privacy rights.....	13

a.	The trial court’s findings of fact are unsupported by the facts in the record and the findings of fact do not support the trial court’s conclusions of law.....	15
b.	Mr. Carter has standing under both the Federal and State Constitutions to challenge the seizure and search of his pants by Officer Rowbottom.....	18
i.	Fourth Amendment standing.....	18
ii.	Article 1, § 7 standing.....	20
c.	The warrantless seizure and search of Mr. Carter’s pants by Officer Rowbottom was unlawful under both the Washington and Federal Constitutions.....	20
i.	No warrant was obtained to seize and search Mr. Carter’s pants.....	22
ii.	No exception to the search warrant requirement applies to the seizure and search of Mr. Carter’s pants.....	22
1.	No “exigent circumstances” existed.....	23
2.	No “community caretaking” or “emergency exception” existed.....	24
3.	Mr. Carter did not consent to the seizure and search of his pants.....	25
4.	This was not a valid inventory search.....	26

5.	Mr. Carter’s pants could not be seized under the “plain view” exception.....	27-28
6.	Mr. Carter had not abandoned his pants.....	28-29
7.	The trial court applied the wrong standard in determining that the seizure and search of Mr. Carter’s pants was lawful because it was “reasonable”	30
2.	The State presented insufficient admissible evidence to convict Mr. Carter of any crime.....	35
V.	CONCLUSION.....	40-41

TABLE OF AUTHORITIES

Page(s)

Table of Cases

Federal Cases

Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034 (1969).....33

Colorado v. Bertine, 479 U.S. 367, 107 S.Ct. 738, 93
L.Ed.2d 739 (1987).....26-27

Flippo v. West Virginia, 528 U.S. 11, 120 S.Ct. 7, 145
L.Ed.2d 16 (1999).....20

Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19
L.Ed.2d 576 (1967).....21,31,33

Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57
L.Ed.2d 290 (1978).....34

Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2577, 2580, 61
L.Ed.2d 220 (1979).....19

U.S. v. Brown, 596 F.Supp.2d 611, 629 (E.D.N.Y., 2009).....19

U.S. v. Robinson, 999 F.Supp. 155, 163 (D. Mass, 1998).....19

United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94
L.Ed. 653 (1950), *overruled in part by Chimel v. California*,
395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).....33

Washington Cases

State v. Bencivenga, 137 Wn.2d 703, 974 P.2d 832 (1999).....35

State v. Carney, 142 Wn.App. 197, 174 P.3d 142 (2007),
review denied 164 Wn.2d 1009, 195 P.3d 87 (2008).....15

<i>State v. Coutier</i> , 78 Wn.App. 239, 896 P.2d 747 (1995), <i>review denied</i> , 128 Wn.2d 1019, 911 P.2d 1343 (1996).....	23
<i>State v. Dugas</i> , 109 Wn.App. 592, 36 P.3d 577 (2001).....	27,29
<i>State v. Eisfeldt</i> , 163 Wn.2d 628, 185 P.3d 580 (2008).....	14,20
<i>State v. Evans</i> , 159 Wn.2d 402, 150 P.3d 105 (2007).....	29
<i>State v. Ferrier</i> , 136 Wn.2d 103, 960 P.2d 927 (1998).....	31
<i>State v. Garvin</i> , 166 Wn.2d 242, 207 P.3d 1266 (2009).....	22
<i>State v. Goodman</i> , 150 Wn.2d 774, 83 P.3d 410 (2004).....	35
<i>State v. Goucher</i> , 124 Wn.2d 778, 881 P.2d 210 (1994).....	19
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996),.....	23
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	36
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	15,16
<i>State v. Johnson</i> , 128 Wn.2d 431, 909 P.2d 293 (1996).....	21
<i>State v. Kinzy</i> , 141 Wn.2d 373, 5 P.3d 668 (2000), <i>cert. denied</i> , 531 U.S. 1104, 121 S.Ct. 843, 148 L.Ed.2d 723 (2001).....	24
<i>State v. Ladson</i> , 138 Wn.2d 343, 979 P.2d 833 (1999).....	14,15,21
<i>State v. Lair</i> , 95 Wn.2d 706, 630 P.2d 427 (1998).....	28
<i>State v. Link</i> , 136 Wn.App. 685, 150 P.3d 610, <i>review denied</i> 160 Wn.2d 1025, 163 P.3d 794 (2007).....	21
<i>State v. Loewen</i> , 97 Wn.2d 562, 647 P.2d 489 (1982).....	25
<i>State v. Mendez</i> , 137 Wn.2d 208, 970 P.2d 722 (1999), <i>overruled on other grounds by Brendlin v. California</i> , --- U.S. ---, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007).....	16

<i>State v. Miller</i> , 92 Wn.App. 693, 964 P.2d 1196 (1998), <i>review denied</i> , 137 Wn.2d 1023, 980 P.2d 1282 (1999).....	16
<i>State v. O’Bremski</i> , 70 Wn.2d 425, 423 P.2d 530 (1967).....	15
<i>State v. Reyes</i> , 98 Wn.App. 923, 993 P.2d 921 (2000).....	20
<i>State v. Reynolds</i> , 144 Wn.2d 282, 27 P.3d 200 (2001).....	29
<i>State v. Rison</i> , 116 Wn.App. 955, 69 P.3d 362 (2003), <i>review denied</i> 151 Wn.2d 1008, 87 P.3d 1184 (2004).....	26
<i>State v. Salinas</i> , 192 Wn.2d 192, 829 P.2d 1068 (1992).....	35
<i>State v. Schlieker</i> , 115 Wn.App. 264, 62 P.3d 520 (2003).....	23
<i>State v. Smith</i> , 88 Wn.2d 127, 559 P.2d 970, <i>cert. denied</i> 434 U.S. 876, 98 S.Ct. 226, 54 L.Ed.2d 155 (1977).....	31-32 <i>passim</i>
<i>State v. Smith</i> , 119 Wn.2d 675, 835 P.2d 1025 (1992).....	20
<i>State v. Smith</i> , 130 Wn.2d 215, 922 P.2d 811 (1996).....	36
<i>State v. Walker</i> , 136 Wn.2d 678, 965 P.2d 1079 (1998).....	25
<i>State v. White</i> , 135 Wn.2d 761, 958 P.2d 982 (1998).....	14 n. 2
<i>State v. Williams</i> , 102 Wn.2d 733, 689 P.2d 1065 (1984).....	27

Other Authorities

United States Constitution, Fourth Amendment.....	13,14,20,30
Washington Constitution, Article 1, § 7.....	13,20,31
CrR 3.6.....	16

I. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Carter's motion to suppress the evidence found in his clothes confiscated by police at the hospital.
2. The State presented insufficient admissible evidence to convict Mr. Carter of any crime.

II. ISSUES PRESENTED

1. Was the warrantless search and seizure of Mr. Carter's clothing lawful where Mr. Carter had a privacy interest in his clothes and their contents, Mr. Carter was not under arrest or the suspect of committing any crime, and no exigency existed which would authorize a warrantless search and seizure of Mr. Carter's clothing? (Assignment of Error No. 1)
2. Did the State present sufficient admissible evidence to convict Mr. Carter of any crime where the only admissible evidence linking Mr. Carter to any crime was the testimony of a confessed heavy marijuana smoking, excessive-beer-consuming, brain-damaged, methadone-taking man who admitted to having difficulty processing and remembering events and who gave conflicting descriptions of the person who shot Mr. Williams? (Assignment of Error No. 2)

III. STATEMENT OF THE CASE

Factual and procedural background

On May 14, 2006, Tacoma police responded to a report of a shooting at 504 South Ainsworth. RP 292, 7-10-08.¹ Police dispatch reported that someone named Alvena Parker had accidentally shot her friend in the

¹ Due to the length of the transcript, the fact that there were two trials, and the fact that the transcript is not paginated continuously between all volumes, reference to the record will be made by giving the RP cite followed by the date of the hearing being referenced.

stomach. RP 293, 7-10-08; 343, 349, 7-14-08. Officers Anderson and Timothy responded to the residence and went inside where they were led to the shooting victim, later identified as Irvin Carter, by Mr. Carter's mother and grandmother. RP 295-297, 7-10-08. Mr. Carter was seated in a chair and told the police that he had been standing on the porch when he was shot and that he didn't know who had shot him. RP 298-299, 7-10-08. Fire department paramedics arrived and took Mr. Carter to the hospital. RP 299-300, 7-10-08. Police recovered a spent bullet slug from the hallway of the home. RP 301, 7-10-08. The bullet did not appear to be deformed, but had a cloth imprint on the tip. RP 304, 7-10-08. The officers tried to locate the gun which had shot Mr. Carter but were unable to do so. RP 349-350, 7-14-08.

Officer Rowbottom was dispatched to St. Joseph's Hospital to take a casualty report and interview Mr. Carter. RP 365-366, 385, 7-14-08. Officer Rowbottom arrived before the medic unit did, and met them at the door to the emergency room. RP 367-368, 7-14-08. Mr. Carter was taken out of the medic unit on a gurney. RP 368-369, 7-14-08. Officer Rowbottom followed the medics and Mr. Carter into the hospital, trying to gather information as to what had happened. RP 369, 7-14-08.

As the hospital staff removed Mr. Carter's clothes, Officer

Rowbottom confiscated them for evidentiary purposes. RP 373, 7-14-08. Officer Rowbottom searched Mr. Carter's pants, located and removed Mr. Carter's wallet, searched the wallet and found Mr. Carter's I.D. RP 379-380, 7-14-08. Officer Rowbottom continued searching Mr. Carter's pants and located seven rounds of ammunition in a pocket. RP 380, 7-14-08. The ammunition was all of the same caliber, but was made up of two different types: round-nose lead bullets and semi-wad cutter bullets. RP 384, 7-14-08.

After collecting Mr. Carter's clothes, Officer Rowbottom questioned Mr. Carter. RP 374, 7-14-08. Mr. Carter told Officer Rowbottom he had just gotten out of a car when he was shot and that he did not know who had shot him. RP 372, 7-14-08. Mr. Carter told Officer Rowbottom that the car had been driven by a girl, but then made derogatory comments about the police and indicated that he did not wish to speak to Officer Rowbottom any more. RP 373, 7-14-08.

Jessica Williams was married to Julius Williams. RP 69, 7-9-08. In January of 2006, the Williams had moved to the Waverly Farms Apartments in Tacoma located at 96th and Hosmer. RP 69, 7-9-08. Mr. Williams socialized with the neighbors and began spending more time with them and staying out later and later until the men would be gone all night. RP 70-72, 7-9-08. The neighbors had the street names of Lil' Bang, B.C., Y.S., and Big

Bang. RP 70-71, 7-9-08. Mr. Williams went by J-Dub. RP: 76, 7-9-08.

One night in July of 2006, Ms. Williams went looking for Mr. Williams and was directed by her friend to a house on Hilltop where Mr. Williams was located. RP 72, 7-9-08. Ms. Williams was told that the house belonged to "Big Bang." RP 72, 7-9-08. Mr. Williams was at the house, but Ms. Williams did not see Big Bang. RP 72, 7-9-08.

At the end of July, 2006, Ms. Williams moved out of the apartment she shared with Mr. Williams, but stayed in touch with Mr. Williams. RP 75-76, 78, 7-9-08. Ms. Williams heard that Mr. Williams was living with another female, but she didn't know who. RP 78, 7-9-08.

On September 2, 2006, Ms. Williams spoke with Mr. Williams near at house located at the intersection of South 8th and L streets. RP 76, 7-9-08. Ms. Williams saw Mr. Williams' car parked there and saw him with a couple individuals who seemed to be associated with the house at 8th and L. RP 76, 7-9-08.

On September 7, 2006, Ms. Crystal Taylor was living with Mr. Williams in Tacoma at 13th and J Street for three or four weeks. RP 250, 7-10-08. Ms. Taylor had met Mr. Williams at a club called Area 151 in July of 2006. RP 251-252, 7-10-08. Ms. Taylor knew Mr. Williams as J-Dub. RP 251, 7-10-08. Ms. Taylor thought Mr. Williams was in the military, but, after

he moved in with her, she found out he was AWOL. RP 252-253, 7-10-08.

On the evening of September 7, 2006, Mr. Williams and Ms. Taylor were supposed to go to Area 151. RP 253, 7-10-08. Around 9:30, Ms. Taylor heard a knock on the rear door to her building, so she looked out the window and saw the person she knew as Big Bang. RP 253-259, 276, 7-10-08. When Ms. Taylor saw Big Bang, he was wearing a black shirt, some tan khaki pants, and black Converse Chuck Taylor shoes. RP 275, 7-10-08. Ms. Taylor had first been introduced to Big Bang when Mr. Williams took her to Big Bang's apartment several weeks prior to September 7, 2006. RP 259, 7-10-08. Big Bang's house was near 6th and Ainsworth. RP 265, 7-10-08.

Ms. Taylor told Mr. Williams that Big Bang was knocking on the door, so Mr. Williams went outside and spoke with Big Bang. RP 260-261, 7-10-08. Big Bang's voice was louder and the conversation lasted five to ten minutes. RP 261, 7-10-08. Mr. Williams came back inside the apartment and was upset, but then left with Big Bang in a car Ms. Taylor had seen at Big Bang's house. RP 262-263, 7-10-08.

Ms. Taylor went to Area 151 to wait for Mr. Williams. RP 266, 7-10-08. Ms. Taylor remained at the club until it closed, but Mr. Williams never arrived. RP 266, 7-10-08. Ms. Taylor left the club and went looking for Mr. Williams. RP 266, 7-10-08. Ms. Taylor went to Big Bang's house and

knocked on the window, waking Big Bang up. RP 268, 278-279, 7-10-08. Big Bang came to the window and told Ms. Taylor that Mr. Williams had left “about nine something.” RP 268, 7-10-08.

On September 7, 2006, Mr. Josh Read was living at South 8th and Ainsworth in a house that had a window that faced the Bryant Elementary school. RP 242-244, 7-10-08. Between 11 p.m. and midnight, Mr. Read was visiting with his sister in the living room. RP 243, 7-10-08. Around 11:15 to 11:20, Mr. Read heard between four and six gunshots, so he called police. RP 243-244, 7-10-08. Mr. Read called 911 within seconds of hearing the shots. RP 247, 7-10-08. Nobody from law enforcement contacted Mr. Read that night, but an officer stopped by later in the afternoon of the following day. RP 244, 7-10-08.

On September 7, 2006, Mr. Jelvis Sherman was living in Tacoma with his brother. RP 472, 7-15-08. Mr. Sherman had been hit by a car in 2004, suffered a head injury and was in a coma for several months as a result, and had been hit by two other cars while confined to a wheelchair during his recovery from his first accident. RP 490-494, 7-15-08. In September of 2008, Mr. Sherman was taking methadone for pain, anaproxyn for swelling of his brain, a sleeping medication, smoked strong marijuana daily, and drank so much Budweiser beer that he was known as “The Budweiser King.” RP

495-496, 547-549, 7-15-08. In fact, Mr. Sherman was living with his brother in Tacoma because Mr. Sherman's family was so concerned with how much Budweiser Mr. Sherman drank that Mr. Sherman's brother asked Mr. Sherman to live with him. RP 549, 7-15-08. The methadone made Mr. Sherman high when he took it. RP 496, 7-15-08.

On September 7, 2006, Mr. Sherman had been smoking marijuana all day. RP 499, 7-15-08. Around 10:30 in the evening, after consuming three beers, Mr. Sherman snuck out of his brother's house to purchase a six-pack of 24 ounce cans of Budweiser. RP 474-478, 498, 611, 7-15-08. After purchasing the beer, Mr. Sherman drank one quickly and began walking home. RP 478, 559, 611, 7-15-08. While walking home, Mr. Sherman found a "blunt" (a marijuana cigar) in his pocket and stopped to smoke it. RP 478-480, 7-15-08. Mr. Sherman stopped to smoke the blunt near the school at South 8th and Grant streets. RP 478-479, 7-15-08. While Mr. Sherman attempted to light the blunt, he watched a group of four men assemble near the school. RP 479-489, 7-15-08. Mr. Sherman succeeded in lighting his blunt and smoked it while watching the men. RP 481, 7-15-08.

The first man Mr. Sherman saw was Mr. Carter. RP 486, 7-15-08. The second man Mr. Sherman saw was a dark skinned man with braids who looked to Mr. Sherman like a "smoker" or someone who smoked crack

cocaine. RP 486, 7-15-08. The third man who walked up looked to Mr. Sherman like a cocaine dealer and had a good appearance with dark clothing. RP 487, 7-15-08. The fourth man who walked up was Mr. Williams. RP 488, 7-15-08. Mr. Sherman watched as one man gave what Mr. Sherman believed was a gun to another man in the group who then shot Mr. Williams. RP 479-489, 7-15-08. The men then left the area and Mr. Sherman continued home. RP 490, 7-5-08. The man who shot Mr. Williams was wearing Nike shoes, had numerous rings on all of his fingers, and wore a necklace that had a dolphin on it. RP 541-542, 578-580, 7-15-08. The gun Mr. Sherman saw was an automatic, not a revolver. RP 488-489, 7-15-08.

On September 8, 2006, Mr. Bryan Myers arrived at his work at the Bryant Elementary School located near 8th and Grant and found a body lying on the sidewalk in front of the school. RP 91-94, 7-9-08. Mr. Myers called 911 and the fire department arrived within 2-3 minutes. RP 94, 7-9-08. The body had multiple bullet holes in its back, and, after the body was recovered, it was discovered that there were exit wounds on the front of the body. RP 167-170, 7-10-08. The body was ultimately identified as that of Mr. Williams.

Police were also dispatched. RP 102-104, 7-9-08. The fire personnel arrived first and determined that the person on the sidewalk was dead. RP

102-105, 7-9-08. Police established a perimeter around the scene and walked in a line around the scene to discover evidence. RP 106-133, 165, 7-9-08; 7-10-08. Police recovered a money clip, a pocket knife, and various litter and detritus, but no bullet casings or guns. RP 149-153, 7-10-08. No items were tested for fingerprints. RP 155, 7-10-08. Nothing of evidentiary value was located. RP 192, 7-10-08.

After work at the crime scene had finished, police canvassed the neighborhood to find witnesses. RP 178-179, 207, 7-10-08.

During the post-mortem examination of Mr. Williams' body, two bullets were recovered. RP 453-462, 7-15-08. The bullets recovered from Mr. Williams' body and the bullet recovered from the hallway of 504 South Ainsworth on the day Mr. Carter was shot were all fired from the same gun. RP 662-664, 7-16-08. The bullet types of the unfired bullets matched the bullet types of the fired bullets. RP 664-665, 7-16-08. All of the round nose lead bullets, the unfired and the fired, had a matching cannelure and matching blue colored lubricant. RP 667-668, 7-16-08.

Police spoke with Ms. Taylor on September 8, 2006. RP 272, 7-10-08. Ms. Taylor told police that Big Bang had come to her house at about 9:30 and left in his car with Mr. Williams. RP 278-279, 7-10-08. At trial, Ms. Taylor identified Mr. Carter as Big Bang. RP 271, 7-10-08.

During the investigation, police were made aware of, and questioned, Mr. Jelvis Sherman. RP 209-214, 7-10-08.

On September 12, 2006, police showed Ms. Taylor a picture of Mr. Carter and she confirmed that he was the person Mr. Williams had left with. RP 716-717, 7-16-08.

On October 5, 2006, Mr. Sherman picked Mr. Carter out of a photomontage. RP 724, 7-16-08.

On October 6, 2006, Mr. Carter was arrested at 504 South Ainsworth. RP 752, 7-16-08. Mr. Carter was then interrogated by police. RP 752, 7-16-08. Mr. Carter told police that Mr. Williams was his friend and that he had known Mr. Williams for about six months. RP 759, 7-16-08. Mr. Carter told police that he did not learn that Mr. Williams was dead until a week after the shooting. RP 773, 7-16-08.

On October 9, 2006, Mr. Carter was charged with one count of first degree murder while armed with a firearm, and one count of unlawful possession of a firearm in the second degree. CP 5-6.

On October 10, 2006, police searched Mr. Carter's bedroom at the 504 South Ainsworth home. RP 420. During the search of Mr. Carter's bedroom, police recovered black Converse Chuck Taylor shoes, khaki colored pants, and a black t-shirt. RP 427, 437, 7-14-08. Police did not

recover and Air Jordan shoes or jewelry that had a dolphin pendant or medallion. RP 441, 7-14-08.

On March 28, 2008, Mr. Carter filed a motion to exclude the in- and out-of-court identifications of him by Mr. Sherman and Ms. Taylor, arguing that the photo-identifications were impermissibly suggestive and the photo-identifications tainted the subsequent in-court identification. CP 122-134. The trial court denied the motion. RP 282-286, 4-15-08.

On April 10, 2008, Mr. Carter filed a motion to suppress the evidence discovered pursuant to the search of his clothing by Officer Rowbottom at St. Joseph's Hospital while Mr. Carter was being treated for being shot. CP 244-262. The trial court denied the motion. RP 248-250, 4-14-08.

Jury trial on the charges began on April 16, 2008. RP 366, 4-16-08. The State's theory of the case was that Mr. Carter was the person who shot Mr. Williams, not an accomplice to the shooting, and the charges against Mr. Carter, the jury instructions, the State's evidence, and the State's argument were crafted and presented in accordance to this theory. CP 5-6; RP 1198-1205, 1212-1222, 5-5-08; RP 14, 5-9-08.

Initially, the "to-convict" jury instruction proposed by the State and given to the jury had no language regarding Mr. Carter being guilty as an accomplice. CP 291-328. However, after all parties had rested and presented

closing argument and the jury had deliberations for four days, the jury sent a question to the court asking if the jury instruction on accomplice liability could apply to Mr. Carter as well as to his codefendant who had been charged as an accomplice. RP 3, 31, 5-9-08. Over Mr. Carter's objection, the trial court permitted the State to provide a supplemental jury instruction which replaced the "to-convict" instruction regarding the first degree murder charge relating to Mr. Carter and replaced it with an instruction which allowed the jury to find him guilty as an accomplice. CP 368-370, 371-409; RP 3-24, 5-9-08.

Ultimately, the jury hung as to the charges against Mr. Carter, and a mistrial was declared. RP 31, 5-9-08.

On July 7, 2008, Mr. Carter filed a motion to preclude the State from advancing inconsistent theories of the case against Mr. Carter, arguing that collateral estoppel, judicial estoppel, the law of the case, and due process of law, precluded the State from changing its theory of the case to Mr. Carter being guilty as a an accomplice rather than as a principal. CP 419-429. The trial court denied the motion. RP 15, 7-7-08.

Mr. Carter's second jury trial commenced on July 9, 2008. RP 65, 7-9-08. Mr. Carter renewed his objections to the jury being instructed on accomplice liability and the court permitting the State to proceed on a theory

of accomplice liability, objected to the trial court refusing to give Mr. Carter's proposed jury instructions regarding reasonable doubt, premeditation without accomplice liability, the to-convict instruction, and objected to the trial court's refusal to instruct the jury on first and second degree manslaughter as lesser included crimes. RP 994-1000, 7-21-08. The jury found Mr. Carter guilty of first degree murder while armed with a firearm and unlawful possession of a firearm. RP 1137-1138, 7-24-08.

Notice of appeal was filed on September 12, 2008. CP 622.

IV. ARGUMENT

- 1. The trial court erred in denying Mr. Carter's motion to suppress the evidence found during the seizure and search of Mr. Carter's clothing where the seizure and search of Mr. Carter's clothing violated his Federal and State privacy rights.**

The Fourth Amendment to the US Constitution provides,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article 1, § 7 of the Washington Constitution provides "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

Although they protect similar interests, "the protections

guaranteed by article I, section 7 of the state constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution.” *State v. McKinney*, 148 Wn.2d 20, 26, 60 P.3d 46 (2002). The Fourth Amendment protects only against “unreasonable searches” by the State, leaving individuals subject to any manner of warrantless, but reasonable searches. U.S. Const. amend. IV (“The right of the people to be secure in their ... houses ... against unreasonable searches ... shall not be violated....”); *Illinois v. Rodriguez*, 497 U.S. 177, 187, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990) (“[W]hat is at issue ... is not whether the right to be free of searches has been waived, but whether the right to be free of unreasonable searches has been violated.”).

By contrast article I, section 7 is unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not. Const. art. I, § 7 (“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”). This is because “[u]nlike in the Fourth Amendment, the word ‘reasonable’ does not appear in any form in the text of article I, section 7 of the Washington Constitution.” *State v. Morse*, 156 Wn.2d 1, 9, 123 P.3d 832 (2005). Understanding this significant difference between the Fourth Amendment and article I, section 7 is vital to properly analyze the legality of any search in Washington.

State v. Eisfeldt, 163 Wn.2d 628, 634-635, 185 P.3d 580 (2008).²

Generally, evidence seized during an illegal search is suppressed under the exclusionary rule. *See State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). In addition, evidence derived from an illegal search may also be subject to suppression under the fruit of the poisonous tree doctrine.

² No analysis is necessary under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), where the court applies “established principles of state constitutional jurisprudence.” *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998).

See State v. O'Bremski, 70 Wn.2d 425, 428, 423 P.2d 530 (1967) (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)).

The Washington State Supreme Court has stated: “The ultimate teaching of our case law is that the police may not abuse their authority to conduct a warrantless search or seizure under a narrow exception to the warrant requirement when the reason for the search or seizure does not fall within the scope of the reason for the exception.” *Ladson*, 138 Wn.2d 343, 357, 979 P.2d 833.

- a. *The trial court's findings of fact are unsupported by the facts in the record and the findings of fact do not support the trial court's conclusions of law.*

When reviewing a trial court's ruling on a motion to suppress evidence, the court of appeals independently determines whether (1) substantial evidence supports the trial court's factual findings, and (2) the factual findings support the trial court's conclusions of law. *State v. Carney*, 142 Wn.App. 197, 201, 174 P.3d 142 (2007), *review denied* 164 Wn.2d 1009, 195 P.3d 87 (2008). “Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.” *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Unchallenged findings of fact are treated as verities on appeal. *Hill*,

123 Wn.2d at 644, 870 P.2d 313. (citations omitted). The trial court's conclusions of law are reviewed de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (citation omitted), *overruled on other grounds by Brendlin v. California*, --- U.S. ---, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007).

Here, the trial court failed to enter any findings of fact or conclusions of law regarding Mr. Carter's motion to suppress.

CrR 3.6 requires the trial court to enter written findings of fact and conclusions of law following an evidentiary hearing on a motion to suppress. The trial court's failure to comply is error, but such error is harmless if the court's oral findings are sufficient for appellate review. *State v. Miller*, 92 Wn.App. 693, 703, 964 P.2d 1196 (1998), *review denied*, 137 Wn.2d 1023, 980 P.2d 1282 (1999).

The trial court's oral ruling denying Mr. Carter's motion to suppress the bullets found in his pants pocket by Officer Rowbottom is found at RP 248-250, 4-14-08. The trial court gave several reasons for denying Mr. Carter's motion to suppress the evidence found in his pants: (1) a reasonable citizen who calls firefighters and police has a diminished expectation of privacy in their clothes and the contents of their clothes and impliedly consents to the police searching their clothes (RP 234, 249, 4-14-08); (2) it is reasonable for the public to expect officers to search the contents of the

clothes removed from a shooting victim at the hospital while the victim is being treated (RP 249, 4-14-08); (3) it is reasonable for police to search the clothing of a shooting victim without the shooting victim's consent where the shooting victim is conscious and being treated at a hospital (RP 249, 4-14-08); (4) the warrantless search was justified under the community caretaking exception to the warrant requirement (RP 249, 4-14-08); (5) the warrantless search was justified under the "exigent circumstances" exception to the warrant requirement (RP 249, 4-14-08); (6) the search was lawful because it would be unreasonable to require the police "to stop and not do anything if Mr. Carter tells them to stop and not go any further" (RP 249-250, 4-14-08); (7) the search was lawful because the police have the duty to collect the clothing of shooting victims and therefore must inventory the clothing (RP 250, 4-14-08); and (8) Mr. Carter placed his pants in a public setting and therefore had a diminished expectation of privacy in the contents of his pockets (RP 249, 4-14-08).

The basic facts surrounding the seizure and search of Mr. Carter's pants were not contested at trial, thus, there are no findings of fact to which to assign error. The trial court's muddled and rambling ruling appears to contain a series of conclusions of law regarding: the applicability of various exceptions to the warrant requirement; the conclusion that an individual who

is transported to the hospital by paramedics following a call to 911 regarding a shooting has impliedly consented to a search of his clothing or waived a privacy interest in the contents of his pockets due to the involvement of government entities; and different iterations of the legal conclusion that the seizure and search of Mr. Carter's pants was lawful because it was "reasonable," whether in the eyes of the public or of a citizen who is assisted by paramedics and police.

As will be discussed below, none of the exceptions to the warrant requirement apply to the facts of this case, an individual does not impliedly consent to warrantless searches or suffer a diminished expectation of privacy by relying on government services in being transported to the hospital by paramedics, and the trial court applied the wrong standard in determining whether or not the warrantless search was lawful based on the reasonableness of the search.

b. *Mr. Carter has standing under both the Federal and State Constitutions to challenge the seizure and search of his pants by Officer Rowbottom.*

i. Fourth Amendment standing.

"A defendant may challenge a search or seizure only if he or she has a personal Fourth Amendment privacy interest in the area searched or the property seized. The defendant must personally claim a justifiable,

reasonable, or legitimate expectation of privacy that has been invaded by governmental action.” *State v. Goucher*, 124 Wn.2d 778, 787, 881 P.2d 210 (1994) (internal citations omitted).

An individual has a “‘justifiable,’ ... ‘reasonable,’ or ... ‘legitimate expectation of privacy’” if that individual has manifested an actual, subjective expectation of privacy in the area searched or item seized and society recognizes the individual’s expectation of privacy as reasonable. *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979).

It goes without saying that Mr. Carter had a justifiable, reasonable, and legitimate expectation of privacy in the contents of his pants pockets. However, numerous Federal courts have recognized a privacy interest in pockets. *See U.S. v. Robinson*, 999 F.Supp. 155, 163 (D. Mass, 1998) (“Pockets, although not ‘closed containers,’ do historically have a high expectation of privacy for several reasons. First. When clothing is worn, it is close to the body. Second. When a person is sharing living quarters with others, pockets of clothing are among the few places that an individual can expect to keep private.”); *U.S. v. Brown*, 596 F.Supp.2d 611, 629 (E.D.N.Y., 2009) (“[Defendant’s] expectation of privacy in his own pockets is reasonable and obvious.”)

Thus, Mr. Carter has standing under the Fourth Amendment to

challenge Officer Rowbottom's warrantless seizure and search of his pants pockets.

ii. Article 1, § 7 standing.

Unlike the Fourth Amendment and its reasonableness determination, article I, section 7 protections are not "confined to the subjective privacy expectations of modern citizens." Instead article I, section 7 protects "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant."

Eisfeldt, 163 Wn.2d at 637, 185 P.3d 580.

Washington citizens are entitled to hold a privacy interest in the contents of the pockets of their clothing. *See State v. Reyes*, 98 Wn.App. 923, 930, 993 P.2d 921 (2000) ("Clearly, a citizen has a "traditionally held privacy interest" in the contents of his or her own pockets.") Thus, Mr. Carter has standing to challenge Officer Rowbottom's warrantless seizure and search of his pants pockets under Article 1, § 7 of the Washington Constitution.

c. *The warrantless seizure and search of Mr. Carter's pants by Officer Rowbottom was unlawful under both the Washington and Federal Constitutions.*

"A warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement [.]" *Flippo v. West Virginia*, 528 U.S. 11, 120 S.Ct. 7, 8, 145 L.Ed.2d 16 (1999); *State v. Smith*, 119 Wn.2d 675, 678, 835 P.2d 1025

(1992).

“The warrant requirement is especially important under article I, section 7, of the Washington Constitution **as it is the warrant which provides the ‘authority of law’ referenced therein.**” *Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (emphasis added) (citing *City of Seattle v. Mesiani*, 110 Wn.2d 454, 457, 755 P.2d 775 (1988)).

A warrantless search of constitutionally-protected areas is presumed unreasonable absent proof that one of the few well-established exceptions to the warrant requirement applies. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Ladson*, 138 Wn.2d at 349, 979 P.2d 833; *State v. Johnson*, 128 Wn.2d 431, 446-47, 909 P.2d 293 (1996). “The State bears the burden of proof to show that a warrantless search falls within an exception to the warrant requirement.” *State v. Link*, 136 Wn.App. 685, 695, 150 P.3d 610, *review denied* 160 Wn.2d 1025, 163 P.3d 794 (2007).

As stated above, under both the State and Federal Constitutions, Mr. Carter had a privacy interest in the contents of his pants pockets. Thus, in order for any seizure or search of the pants to be lawful, Officer Rowbottom would have been required to either obtain a warrant to seize and search the pants or some exception to the warrant requirement would have to apply to

the search and seizure of the pants.

- i. No warrant was obtained to seize and search Mr. Carter's pants.

At the hearing on Mr. Carter's motion to suppress the evidence found in Mr. Carter's pants, Officer Rowbottom admitted he had not obtained a warrant to seize or search Mr. Carter's pants prior to seizing Mr. Carter's pants at the hospital. RP 226, 4-14-08.

- ii. No exception to the search warrant requirement applies to the seizure and search of Mr. Carter's pants.

Numerous exceptions exist which permit police to seize or search property without first obtaining a warrant:

There are "a few 'jealously and carefully drawn exceptions' to the warrant requirement," which include exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and *Terry* investigative stops. The State bears a heavy burden to show the search falls within one of the "narrowly drawn" exceptions. The State must establish the exception to the warrant requirement by clear and convincing evidence.

State v. Garvin, 166 Wn.2d 242, 207 P.3d 1266, 1270 (2009).

Other potential exceptions to the warrant requirement include "community caretaking" or "emergency exception" searches, consensual searches, inventory searches, the "plain view" exception, and the abandoned property exception.

1. No “exigent circumstances” existed.

With regards to exigent circumstances, a warrantless search qualifies for an exception to the warrant requirement if delay will probably result in the destruction of evidence or endanger the safety of officers or third persons. *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). “An officer must be able to articulate reasons supporting a belief that [officer] safety may be compromised if [the officer] does not undertake a protective search and such belief must be objectively reasonable.” *State v. Coutier*, 78 Wn.App. 239, 244, 896 P.2d 747 (1995), *review denied*, 128 Wn.2d 1019, 911 P.2d 1343 (1996). If the State invokes the emergency exception, a reviewing court “must be satisfied that the claimed emergency was not simply a pretext for conducting an evidentiary search.” *State v. Schlieker*, 115 Wn.App. 264, 270, 62 P.3d 520 (2003) (quoting *State v. Lynd*, 54 Wn.App. 18, 21, 771 P.2d 770 (1989)).

Mr. Carter was being treated in a hospital. Officer Rowbottom was aware of no facts which would support a belief that Mr. Carter would pose a threat to Officer Rowbottom or other third parties. However, Officer Rowbottom testified that his purpose in collecting Mr. Carter’s clothing and searching them was to place the clothes into evidence, not to protect himself or others or to prevent the destruction of evidence. RP 205, 4-14-08. Officer

Rowbottom simply wanted Mr. Carter's pants for any potential evidentiary value they might possess. Thus, the "exigent circumstances" exception does not apply to the seizure of Mr. Carter's pants.

2. No "community caretaking" or "emergency exception" existed.

Another exception, the "community caretaking" function or "emergency exception," exists so police can render aid or assist citizens and protect property. *State v. Kinzy*, 141 Wn.2d 373, 386, 5 P.3d 668 (2000), *cert. denied*, 531 U.S. 1104, 121 S.Ct. 843, 148 L.Ed.2d 723 (2001).

To prove that a warrantless search was justified under the "emergency exception," the State must show that (1) the officer subjectively believed someone needed assistance for health or safety reasons; (2) a reasonable person in the same situation would also believe there was a need to assist; and (3) the need for assistance was reasonably associated with the place searched. *Kinzy*, 141 Wn.2d at 386-387.

As stated above, at the time of the search, Mr. Carter was in a Hospital Emergency room being operated on by medical personnel. Mr. Carter was already receiving as much aid as possible and needed no aid or assistance from Officer Rowbottom. Thus, any subjective belief that Officer Rowbottom had, that Mr. Carter required his assistance, if, indeed, such a belief actually existed, and that this assistance required searching Mr.

Carter's pants was not objectively reasonable.

One exception which falls under the "emergency exception" is when a person is found seriously injured or unconscious and the warrantless search is completed for the express purpose of finding identification, medical alert cards, or the names of persons to call in case of an emergency. *State v. Loewen*, 97 Wn.2d 562, 567-69, 647 P.2d 489 (1982). However, where the individual being treated is conscious and being treated by medical personnel, it is not reasonable for police to assume a life-threatening emergency existed so as to justify a warrantless search of the individual's belongings for identification, medical alert cards, or the names of persons to call in case of an emergency. *Loewen*, 97 Wn.2d at 567-69, 647 P.2d 489.

As stated above, Mr. Carter was conscious and coherent from his initial contact with police at his residence (RP 298-299, 7-10-08) to Officer Rowbottom's attempts to interview him at the hospital. RP 217-218, 4-14-08. Therefore, no "community caretaking" or "emergency exception" existed to excuse the requirement that Officer Rowbottom obtain a warrant before seizing and searching Mr. Carter's pants.

3. Mr. Carter did not consent to the seizure and search of his pants.

Valid consent to search is an exception to the warrant requirement. *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998).

Officer Rowbottom testified that he never asked Mr. Carter for permission to seize and search Mr. Carter's pants. RP 218, 4-14-08. Therefore, this was not a valid consensual search.

Without citation to authority, the trial court concluded that Mr. Carter had impliedly consented to police searching his clothing by taking advantage of the paramedics attention and transport to the hospital and treatment at the hospital. No authority exists to support such a broad conclusion. However, "consent [to search an area in which one has a privacy interest] may not reasonably be implied by one's silence or failure to object when the officer did not expressly or impliedly ask him for consent to search." *State v. Rison*, 116 Wn.App. 955, 962-963, 69 P.3d 362 (2003), *review denied* 151 Wn.2d 1008, 87 P.3d 1184 (2004). As stated above, Officer Rowbottom never asked Mr. Carter for his consent to search his pants. RP 218, 4-14-08. Therefore, Mr. Carter cannot be found to have given implied consent to Officer Rowbottom, or to anyone else for that matter, to search his clothing.

4. This was not a valid inventory search.

Inventory searches are regularly upheld when they are conducted according to standardized police procedures which do not give excessive discretion to the police officers, and when they serve a purpose other than discovering evidence of criminal activity. *Colorado v. Bertine*, 479 U.S. 367,

375-76, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987).

“The inventory search is a recognized exception because, unlike a probable cause search and a search incident to arrest, the purpose of an inventory search is not to discover evidence of a crime, but to perform an administrative or caretaking function.” *State v. Dugas*, 109 Wn.App. 592, 597, 36 P.3d 577 (2001).

“The purpose of an inventory search is to protect the police from lawsuits arising from mishandling of personal property of a defendant. Clearly, a defendant may reject this protection, preferring to take the chance that no loss will occur.” *State v. Williams*, 102 Wn.2d 733, 743, 689 P.2d 1065 (1984).

Here, Officer Rowbottom did not ask Mr. Carter if he wished to waive his right to have the contents of his pants inventoried. RP 222, 4-14-08. In any event, Mr. Carter was not under arrest, which eliminates the possible applicability of the inventory exception to the warrant requirement. Finally, Officer Rowbottom testified that his purpose in seizing and searching Mr. Carter’s pants was to collect evidence. RP 373, 7-14-08. Thus, this was clearly not an inventory search since the purpose of the search was to gather evidence.

5. Mr. Carter’s pants could not be seized under the “plain view” exception.

If it is immediately apparent to police officials that there are fruits, instrumentalities, or evidence of a crime before them, they may seize such objects. *State v. Lair*, 95 Wn.2d 706, 630 P.2d 427 (1998). Objects are immediately apparent for purposes of a plain view seizure when, considering the surrounding facts and circumstances, the police can reasonably conclude they have evidence before them. *Lair*, 95 Wn.2d at 716, 630 P.2d 427.

While Mr. Carter's pants might have been in Officer Rowbottom's plain view, the contents of Mr. Carter's pants pockets were not. Further, even if Mr. Carter's pants were in plain view, it was not immediately apparent that Mr. Carter's pants were the fruits, instrumentalities, or evidence of a crime. Mr. Carter was the victim of a shooting. Mr. Carter had been shot in the abdomen through the shirt, not the pants. RP 204, 4-14-08. Even if Mr. Carter's shirt could be seized as evidence of the shooting due to the bullet holes, Mr. Carter's pants could not. Because Mr. Carter's pants could not reasonably be interpreted to be the fruits instrumentalities, or evidence of a crime, Officer Rowbottom could not seize and search Mr. Carter's pants under the plain view exception to the warrant requirement.

6. Mr. Carter had not abandoned his pants.

In *State v. Reynolds*, 144 Wn.2d 282, 287, 27 P.3d 200 (2001), the court held, “Needing neither a warrant nor probable cause, law enforcement officers may retrieve and search voluntarily abandoned property without implicating an individual’s rights under the Fourth Amendment or under article I, section 7 of our state constitution.”

A defendant’s privacy interest in property may be abandoned voluntarily or involuntarily. Involuntary abandonment occurs when property was abandoned as a result of illegal police behavior. *See, e.g., State v. Reichenbach*, 153 Wn.2d 126, 137, 101 P.3d 80 (2004).

Voluntary abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent. 1 Wayne R. LaFare, *Search and Seizure* § 2.6(b), at 574 (3d ed.1996). “Intent may be inferred from words spoken, acts done, and other objective facts, and all the relevant circumstances at the time of the alleged abandonment should be considered.” *State v. Dugas*, 109 Wn.App. 592, 595, 36 P.3d 577 (2001). The issue is not abandonment in the strict property right sense but, rather, “whether the defendant in leaving the property has relinquished her reasonable expectation of privacy so that the search and seizure is valid.” *Id.* (quoting *United States v. Hoey*, 983 F.2d 890, 892-93 (8th Cir.1993)); *see also United States v. Nordling*, 804 F.2d 1466 (9th Cir.1986).

State v. Evans, 159 Wn.2d 402, 408, 150 P.3d 105 (2007).

“The status of the area searched is critical when one engages in an analysis of whether or not a privacy interest has been abandoned. That is so because courts do not ordinarily find abandonment if the defendant had a

privacy interest in the searched area.” *Evans*, 159 Wn.2d at 409, 150 P.3d 105.

As discussed above, Mr. Carter had a recognized privacy interest in his pants and in the contents of his pants pockets. Mr. Carter did not voluntarily abandon his pants—his pants were removed from him by hospital personnel and immediately handed to Officer Rowbottom. RP 294-295, 4-14-08. Mr. Carter never disclaimed ownership of his pants or took any action intending to abandon them. Thus, Mr. Carter never abandoned his pants.

Alternatively, should this court be inclined to find that Mr. Carter did abandon his pants, such abandonment was involuntary due to Officer Rowbottom’s illegal seizure of the pants immediately after they were removed from Mr. Carter while he was being treated for the gunshot wound. In either scenario, the warrant exception for abandoned property did not apply to Officer Rowbottom’s seizure and search of the pants, rendering those actions unlawful.

7. The trial court applied the wrong standard in determining that the seizure and search of Mr. Carter’s pants was lawful because it was “reasonable.”

Subject only to a few exceptions, warrantless searches are per se unreasonable under the Fourth Amendment of the United States Constitution

and under article I, section 7 of Washington's Constitution. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *State v. Ferrier*, 136 Wn.2d 103, 111, 960 P.2d 927 (1998).

The trial court ignored this well established principle and, instead, apparently relied on *State v. Smith*, 88 Wn.2d 127, 559 P.2d 970, *cert. denied* 434 U.S. 876, 98 S.Ct. 226, 54 L.Ed.2d 155 (1977) to conclude that Officer Rowbottom's seizure and search of Mr. Carter's pants was lawful because it was "reasonable."

In *Smith*, Mr. Smith was convicted of first degree murder for the drowning death of his son. Mr. Smith had been observed leaving with his son for a walk at midnight and returning home without his son. Mr. Smith was behaving strangely and informed his wife that their son was in a friend's car. Mr. Smith's wife called his parents and, when his parents arrived, Mr. Smith told them that his son had fallen in the creek on the Smith's property and that Mr. Smith was unable to get him out. Mr. Smith was taken by his parents to the hospital where he was checked into the emergency room. The emergency room contacted a doctor who ordered Mr. Smith be confined to one of the security rooms of the hospital.

Mr. Smith's parents contacted and police then returned to the Smith's property. Ms. Smith was found pacing in front of the home, hysterical, and

told police that Mr. Smith had told her the he had put their son in the creek. Ms. Smith also told police that Mr. Smith's pants were wet from the knees down and had mud and sand on them. The police and the family members searched the property and eventually found the body of Mr. Smith's son. The body had been found in the creek and the boy had drowned.

The creek was 8-12 inches deep at the point where the body had been found. Mr. Smith's belt was found on the bank of the creek adjacent to where the body was found and an indentation on the bank was observed which could have been caused by Mr. Smith's corduroy pants had Mr. Smith sat down. A sheriff's deputy proceeded immediately to the emergency room and inquired about Mr. Smith's clothes. The deputy then seized Mr. Smith's clothes as evidence.

The Washington Supreme Court found that the warrantless seizure of the defendant's pants was lawful because it was "good police work and should be characterized only as a reasonable and constitutionally valid seizure of incriminating evidence." *Smith*, 88 Wn.2d at 138, 559, P.2d 970. The *Smith* court held that the deputy "reacted promptly, effectively, and reasonably as a well-trained police officer should." *Smith*, 88 Wn.2d at 141, 559, P.2d 970.

This argument, that a search by police officers must only be

reasonable to be lawful, was the holding of the US Supreme Court in *United States v. Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950), overruled in part by *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). In *Rabinowitz*, the court stated:

The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case.

Rabinowitz, 339 U.S. at 67, 70 S.Ct. 430, 94 L.Ed. 653.

However, as recognized by Justice in his dissent in *Smith, Rabinowitz* was specifically overruled in *Chimel v. California*, 395 U.S. 752, 768, 89 S.Ct. 2034 (1969). Further, the US Supreme court, prior to *Chimel*, had already held in *Katz, supra*, that warrantless searches are per se unreasonable:

[T]his Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful ‘notwithstanding facts unquestionably showing probable cause,’ for the Constitution requires ‘that the deliberate, impartial judgment of a judicial officer * * * be interposed between the citizen and the police * * *.’ ‘Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes,’ and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment —subject only to a few specifically established and well-delineated exceptions.

Katz, 389 U.S. at 356-357, 88 S.Ct. 507.

Thus, the reasonableness of a search is not the proper standard for determining the lawfulness of a search.

[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.

Mincey v. Arizona, 437 U.S. 385, 393, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).

The trial court's conclusion of law that Officer Rowbottom's warrantless seizure and search of Mr. Carter's pants was lawful because it was reasonable was contrary to law.

Further, *Smith* is distinguishable from the instant case. At the time of the seizure of Smith's pants, the police had probable cause to arrest Smith for the death of his son and the pants had already been identified as an item containing significant evidentiary value. Mr. Carter was not a suspect in any crime and Officer Rowbottom had no reason to believe that Mr. Carter's pants or the content of the pockets of the pants had any evidentiary value whatsoever. Any reliance by the trial court on *Smith* was misplaced.

Because Officer Rowbottom did not obtain a warrant prior to seizing and searching Mr. Carter's pants, and because no exception to the warrant requirement applies to the seizure and search of Mr. Carter's pants, the

seizure and search of Mr. Carter's pants was unlawful. Accordingly, the bullets found in Mr. Carter's pants were inadmissible as the fruits of an unlawful search and the trial court erred in finding that the bullets found in Mr. Carter's pants were admissible.

2. The State presented insufficient admissible evidence to convict Mr. Carter of any crime.

Where a criminal defendant challenges the sufficiency of the evidence, the court of appeals reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 192 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all of the inferences that can reasonably be drawn therefrom. *Salinas*, 19 Wn.2d at 201, 829 P.2d 1068. Circumstantial and direct evidence are of equal weight upon review by an appellate court. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). A fact finder is permitted to draw inferences from the facts, so long as those inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999).

If there is insufficient evidence to prove an element, reversal is required and retrial is 'unequivocally prohibited.' *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Here, the State had two bodies of evidence which linked Mr. Carter to the shooting of Mr. Williams: the eyewitness testimony of Mr. Sherman, and the fact that the bullets found in Mr. Carter's pocket months before the shooting were the same caliber and type of bullets and had similar markings and lubricant as the bullets recovered from Mr. Williams' body. However, as discussed above, the bullets were discovered pursuant to an unlawful search and were improperly admitted into evidence.

“Where a case stands or falls on the jury's belief or disbelief of essentially one witness, that witness' credibility or motive must be subject to close scrutiny.” *State v. Smith*, 130 Wn.2d 215, 227, 922 P.2d 811 (1996).

Numerous factors demonstrate that Mr. Sherman lacked sufficient credibility for his testimony alone to support a finding that Mr. Carter shot Mr. Williams. First, Mr. Sherman freely admitted to having drunk four beers, including one immediately prior to seeing Mr. Williams shot, and to having smoked marijuana all day prior to seeing Mr. Williams be shot. Mr. Sherman also admitted that he was taking methadone for pain, which made him high. In addition to brain swelling and brain damage from being struck by three cars, Mr. Sherman drank so much Budweiser on a daily basis that he was known as the “Budweiser King” and his family was concerned enough about his drinking to make Mr. Sherman move in with his brother in an effort to

curb Mr. Sherman's imbibing. Given Mr. Sherman's medical history and drug and alcohol consumption, it cannot credibly be argued that Mr. Sherman's ability to accurately observe and recall events was not impaired to the point of being unreliable. In fact, Mr. Sherman himself testified that the accidents affected his ability to remember and perceive things and that he was having difficulty perceiving things in 2006. RP 610-612, 7-15-08.

Second, Mr. Sherman's description of the appearance of the shooter was inconsistent and was contradicted by the testimony of Ms. Taylor, Mr. Cruz, and the evidence found in Mr. Carter's apartment. Mr. Sherman gave numerous and varying descriptions of the individual who shot Mr. Williams. In Mr. Carter's first trial, Mr. Sherman described the man who shot Mr. Williams as a light-skinned black person wearing blue jeans and a blue jacket who had his hair in braids. RP 568-569, 7-15-08. In fact, during Mr. Carter's first trial, Mr. Sherman remarked, "Hey, he cut them off" when he saw Mr. Carter. RP 569, 7-15-08. In the first trial Mr. Sherman also testified that the man who shot Mr. Williams was wearing a cap, but Mr. Sherman didn't tell the police that the shooter was wearing a cap when he was first interviewed and did not tell the police that the man had braids. RP 566, 573, 7-15-08. However, Mr. Sherman told the police during the October 5 interview that the man who shot Mr. Williams was wearing all black clothes and a pair of black

Nike Air Jordan shoes. CP 361-367; RP 578-579, 7-15-08. Mr. Sherman remembered the shoes because he had just got a pair of the same shoes. RP 579, 7-15-08. Mr. Sherman told police that the shooter was wearing all black Levi's, a black Hanes V-neck t-shirt, jewelry with a dolphin medallion, and rings on every finger, including the thumbs. RP 579-580, 7-15-08.

Mr. Sherman testified that he wasn't sure of all the information he told the police when he was interviewed. RP 573, 7-15-08. Mr. Sherman also testified that when counsel for Mr. Carter interviewed Mr. Sherman in March, 2008, Mr. Sherman confused the details of the shooting of Mr. Williams with a shooting he had witnessed in California and gave incorrect information to Mr. Carter's attorney. RP 591-593, 7-15-08.

In addition to Mr. Sherman's various descriptions of the shooter contradicting each other, Mr. Sherman's description of Mr. Carter as the shooter or Mr. Williams is contradicted by the testimony of Ms. Taylor. Ms. Taylor also saw Mr. Carter on the night Mr. Williams was shot and described Mr. Carter as wearing a black shirt, some tan khaki pants, and black Converse Chuck Taylor shoes. RP 275, 7-10-08. This directly contradicts both of Mr. Sherman's description of the shooter as either wearing all black with black Nike shoes or wearing blue jeans and a blue jeans jacket.

When detective Ringer searched Mr. Carter's residence, he found no

Nike Air Jordans, no jewelry with a dolphin, but did find a pair of Chuck Taylor shoes, some khaki colored pants, a black t-shirt, and some black pants. RP 427-428, 437, 441, 7-14-08.

Additionally, Mr. Sherman's descriptions of the shooter as having braids contradicts the testimony of Mr. Ben Cruz, Mr. Carter's manager at the time of the shooting, that Mr. Carter had shaved hair in September of 2006. RP 881-882, 7-17-08.

Thus, Mr. Sherman testified that he had trouble perceiving and remembering things, gave contradictory and mutually exclusive descriptions of the man who shot Mr. Williams, and all descriptions of the shooter given by Mr. Sherman are contradicted by the evidence found in the search of Mr. Carter's home and the testimony of Ms. Taylor and Mr. Cruz. Even viewing all the admissible evidence in the light most favorable to the State, Mr. Sherman's testimony establishes his unreliability as a witness and completely discredits his testimony. The bullets found in Mr. Carter's pocket by Officer Rowbottom served to bolster Mr. Sherman's credibility in that the bullets provided a link, however tenuous, between the bullets which shot Mr. Williams and Mr. Carter.³ The jury would be more inclined to give credence

³ It is true that Mr. Carter was shot by the same gun that shot Mr. Williams, but both men were the victims of a shooting and the police never recovered the gun or identified who shot Mr. Carter.

to Mr. Sherman's testimony since the bullets provided a neutral link between the shooting of Mr. Williams and Mr. Carter.

Mr. Sherman had serious problems with his credibility, but his testimony was the only testimony which positively identified Mr. Carter as the person who shot Mr. Williams. Had the trial court properly excluded the bullets, the State would have been left with the unreliable and not credible testimony of Mr. Sherman as the sole evidence linking Mr. Carter to the shooting of Mr. Williams. However, Mr. Sherman had serious credibility problems and, without the bullets to bolster Mr. Sherman's assertion that Mr. Carter was involved in the shooting, it is highly unlikely that the jury would have believed Mr. Sherman and convicted Mr. Carter. Absent the bullets, the State presented insufficient admissible evidence to convict Mr. Carter of any crime.

V. CONCLUSION

The trial court erred in admitting the bullets found in Mr. Carter's pocket by Officer Rowbottom. The introduction of the bullets highly prejudiced Mr. Carter in that the introduction of the bullets served to bolster the otherwise unreliable testimony of Mr. Sherman who provided the only link between Mr. Carter and the shooting. Had the bullets been suppressed, as would have been proper, the jury would likely not have found Mr. Carter's

testimony to be credible and would not have convicted Mr. Carter of any crime.

This court should dismiss Mr. Carter's convictions and remand for dismissal with prejudice, or, alternative, vacate Mr. Carter's convictions and remand for a new trial where evidence of the bullets found in Mr. Carter's pants should not be admissible.

DATED this 27th day of July, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sheri Arnold", written over a horizontal line.

Sheri Arnold, WSBA No. 18760
Attorney for Appellant

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STATE OF WASHINGTON
BY _____
DEPUTY

CERTIFICATE OF SERVICE

The undersigned certifies that on July 27, 2009, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, Washington 98402, and by U.S. Mail to and appellant, Irvin Dale Carter, DOC # 836925, Washington State Penitentiary, 1313 North 13th Walla Walla, Washington 99362-1065, true and correct copies of this Brief. 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 July 27, 2009.



Norma Kinter