

**NO. 41147-4-II**

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

STATE OF WASHINGTON, RESPONDENT

v.

MARCUS ANTHONY CHOUINARD, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Frank E. Cuthbertson

No. 08-1-05703-0

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**BRIEF OF RESPONDENT**

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

1. Whether the trial court properly denied the defendant's motion to suppress where the discovery of the rifle in question was made in open view and its subsequent seizure justified by exigent circumstances.

2. Whether, the defendant's conviction of first degree unlawful possession of a firearm should be affirmed where, when viewed in the light most favorable to the State, there was sufficient evidence from which a rational trier of fact could have found the element of possession beyond a reasonable doubt.

3. Whether the defendant waived any issue regarding the trial court's instruction number 14, and, even assuming he had preserved that issue for appeal, whether that instruction was properly given.

B. STATEMENT OF THE CASE.

1. Procedure

On December 2, 2008, Marcus Anthony Chouinard, hereinafter referred to as the "defendant," was charged by information with drive-by shooting in count I and first-degree unlawful possession of a firearm in count II, for acts that occurred on December 1, 2008. CP 1-2. He was

charged with two co-defendants, Deandre Dwanye Robinson and Quinton Jarod Jones. CP 1-2. Robinson pleaded guilty before the defendant's trial began. *See* 7/7/10 RP 4-6, 120-21.

The defendant brought a motion to force Lakewood Police Officers to submit to tape-recorded interviews, which was granted. 6/28/2010 RP 2-28.

On July 7, 2010, the court heard motions pursuant to Criminal Rules (CrR) 3.5 and 3.6. 7/7/10 RP 4-163. Those motions were consolidated into one hearing, at which the State called Officer Jeremy Prater, 7/7/10 RP 7-21, Officer Shawn Noble, 7/7/10 RP 21-47, Officer Skeeter Manos, 7/7/10 RP 47-69, and Officer Jeff Thiry, 7/7/10 RP 70-119. The parties made their arguments, 7/7/10 RP 122-46, and the trial court denied the motion to suppress the firearm and magazine found in the vehicle in which defendant was a passenger and admitted the defendant's statements to officers. 7/7/10 RP 147-63.

The case was called for trial on July 21, 2010 and the parties argued motions in limine. 7/14/10 RP 2; 7/21/10 RP 24-61, 7/26/10 RP 66-67. The parties selected a jury, 7/22/10 RP 62, and gave their opening statements. 7/26/10 RP 72-73.

The State then called Officer Jeremy Prater, 7/26/10 RP 74-103, Officer Skeeter Manos, 7/26/10 RP 103-42, Sean Lamont Coleman,

7/26/10 RP 154-217, Mark Anthony Valerio, 7/26/10 RP 219-35, Officer Jeffrey Thiry, 7/27/10 RP 14-93, Brenda Lawrence, 7/27/10 RP 93-128, Officer Shawn Noble, 7/27/10 RP 133 - 7/28/10 RP 187, Tifni Buchanan, 7/28/10 RP 189-214, Rick Kennedy, 7/28/10 RP 215-56, Melissa Boyce, 7/28/10 RP 256-61, Detective Louise Nist, 7/28/10 RP 261-303, Officer Andrew Hall, 8/2/10 RP 4-8, and Officer Rodney Halfhill, 8/2/10 RP 8-22.

The court then read two stipulations, and the State rested. 8/2/10 RP 24-26. *See* CP 74-77.

The defendant moved for mistrial after the testimony of Officer Prater and again after the testimony of Brenda Lawrence, but both motions were denied. 7/26/10 RP 115-18, 7/27/10 RP 129-32.

Both the defendant and co-defendant, Quinton Jones, moved to dismiss the counts against them for insufficient evidence. 8/2/10 RP 26-43. The court granted the motion made by Jones, and dismissed the charges against him. 8/2/10 RP 44-46. The court also granted the defendant's motion in part, by dismissing count I, drive-by shooting, but denied his motion with respect to count II. 8/2/10 RP 46-48; CP 97.

The defendant called former co-defendant, Quinton Jones. 8/2/10 RP 50-94, and then rested. 8/2/10 RP 94.

The parties discussed jury instructions, and neither party objected or took exception to any of the court's proposed instructions to the jury.

8/2/10 RP 94-102, 8/3/10 RP 2-4. *See* CP 112-31. The court read these instructions to the jury. 8/3/10 RP 5. *See* CP 112-31.

The parties gave their closing arguments, 8/3/10 RP 6-25 (State's closing), 26-40 (defendant's closing), 42-53 (State's rebuttal), and the jury returned a verdict of guilty to the remaining count of first-degree unlawful possession of a firearm. 8/3/10 RP 55-57; CP 78.

On August 27, 2010, the court sentenced the defendant to 26 months in total confinement in the Department of Corrections and to legal financial obligations totaling \$1,300.00. 8/27/10 RP 2-14; CP 98-109.

The defendant filed a timely notice of appeal the same day. CP 84-96. *See* 8/27/10 RP 1214.

## 2. Facts

On December 1, 2008, Mark Valerio, owner of the Juno Bar and Grill, located at 911 Market Street in Tacoma, Washington, 7/26/10 RP 220, called 911 to report a shooting outside his club. 7/26/10 RP 220-21.

Sean Coleman was a security guard who worked the front door at Club Juno that night. 7/26/10 RP 154-56. While working, he heard a "very faint clicking noise." 7/26/10 RP 156. Apparently, a blue vehicle, with a Spider-Man decal and a Georgia license plate was the source of this clicking sound, and club security staff informed the vehicle's owner,

Quinton Jones. 7/26/10 RP 157-58, 8/2/10 RP 81. Coleman then saw a group of people come out of the club and look at the vehicle, later referred to as "the Spiderman car," at which point, they became agitated, began directing profanity at the club, and said, "Come try to steal my stuff now." 7/26/10 RP 159, 161.

One of the people from the group, a black man with dreadlocks, went from the blue "Spiderman car," to a red car parked in front of it, and retrieved something from the trunk of the red car. 7/26/10 RP 161-62. He then turned towards the club, seemed to place something in his waistband, and yelled at the club, "Somebody come out here and see me now" and "Try to take my shit now." 7/26/10 RP 162-63. Coleman wrote in his written statement to police, that the man had placed a handgun in his waistband. 7/26/10 RP 187-88. This man walked between the red car and the blue car about three times. 7/26/10 RP 163-64.

About two minutes later the red car left, followed by the blue car. 7/26/10 RP 170. Sometime thereafter, as Coleman was standing in front of the club, a car drove by and someone inside that car yelled something out the window. 7/26/10 RP 174-75. Coleman ducked down and saw a gun, which he identified as a rifle, come out of the vehicle and fire three to five shots. 7/26/10 RP 176, 190. Coleman identified a person who

appeared to be Hispanic, with relatively short hair, as the one who fired the shots. 7/26/10 RP 193, 208.

Tacoma Police Officers Rodney Halfhill and Hoschouer responded to the 911 call from Club Juno. 8/2/10 RP9-11. When they arrived, at about 12:47 a.m., they observed Coleman standing in front of the club. 8/2/10 RP 12-13.

Lakewood Police officers were notified of the shooting in Tacoma, and the description of a vehicle involved in that shooting. 7/7/10 RP 22 (3.6 hearing); 7/27/10 RP 134(trial). That description was of a 1980s blue or purple Chevrolet "Monte Carlo-style vehicle" with 22- to 24-inch "chrome rims" and Spider-Man decals. 7/7/10 RP 23 (3.6 hearing); 7/27/10 RP 137 (trial). *See* 7/26/10 RP 77.

Officer Shawn Noble recognized that description as matching a vehicle that he had seen on several occasions in Lakewood. 7/7/10 RP 22 (3.6 hearing); 7/27/10 RP 134-35 (trial). So, he positioned his patrol car on the on-ramp to southbound Interstate 5 (I-5), which he thought was the most likely route that vehicle would take in traveling from Tacoma to Lakewood. 7/7/10 RP 25 (3.6 hearing); 7/27/10 RP 135-36 (trial). Noble saw the vehicle "a few minutes after being notified it left the area of the shooting." 7/7/10 RP 25 (3.6 hearing); 7/27/10 RP 137 (trial). He then followed the vehicle until he had sufficient officers to assist in a stop, and

stopped that vehicle on the off-ramp from I-5 to Gravelly Lake. 7/7/10 RP 25(3.6 hearing); 7/27/10 RP 137-38(trial).

Officers performed “a high-risk stop” because they knew that the occupants were either armed or associated with a crime where weapons were used. 7/7/10 RP 25-26 (3.6 hearing); 7/27/10 RP 139 (trial); 8/2/10 RP 6 (trial); 7/7/10 RP 8-9 (3.6 hearing); 7/26/10 RP 110-11 (trial). In other words, officers removed the occupants of the vehicle with their own weapons drawn for safety. 7/7/10 RP 26; 7/27/10 RP 139 (trial); 8/2/10 RP 6 (trial). Officers detained the occupants as they were removed from the vehicle. 7/7/10 RP 16 (3.6 hearing); 7/27/10 RP 140 (trial). Officer Hall noted that the front passenger had dreadlocks. 8/2/10 RP 7-8.

Almost immediately after the vehicle was stopped, as officers were still trying to get the occupants out of that vehicle, the red car pulled up and stopped just in front of the suspect vehicle. 7/27/10 RP 143-44; 7/28/10 RP 163-64. Given the nature of the stop, Officer Noble instructed the occupants of the red car to leave the area immediately. 7/28/10 RP 163-64. Quinton Jones, who was found in the blue car when it was stopped, owned both that car and the red car. *See* 8/2/10 RP 69, 78.

Officer Noble testified that officers were not told how many occupants might be in the vehicle and that the windows of the vehicle were too darkly tinted to see into the vehicle from where he was standing 7/7/10 RP 34. *But see* 7/7/10 RP 14. So, while Noble was detaining the

defendant, other officers approached the suspect vehicle to insure that there were no additional occupants. 7/7/10 RP 28.

Specifically, Officers Manos and Prater “moved up to clear the vehicle, ensure that there were no other occupants inside the passenger compartment.” 7/7/10 RP 10, 52-53 (3.6 hearing); 7/26/10 RP 112-13. (trial); 7/28/10 RP 166 (trial).

They did not see any other occupants in the vehicle, 7/26/10 RP 81, but Officer Manos testified that as he approached the automobile, he noticed that its back seat had been “pulled away from the actual car.” 7/7/10 RP 53-54 (3.6 hearing); 7/26/10 RP 113, 132-33 (trial). Before any officer had entered the vehicle, Officer Manos shined his flashlight into the back seat area of that vehicle, and saw the flash suppressor, or barrel, of a rifle. 7/7/10 RP 54-55, 60 (3.6 hearing); 7/26/10 RP 113-15, 126-27 (trial). It took Manos about thirty seconds to identify the object as a rifle before he notified the other officers, 7/7/10 RP 60-61, 67, but he testified that he was sure that saw the rifle before anyone, including Officer Prater, actually got into the vehicle. 7/7/10 RP 62. Officer Manos never touched the rifle. 7/7/10 RP 65.

Officer Prater testified,

I did notice that the rear seat, the bottom cushion was out of place –it kind of wasn’t sitting like it should, like it had been moved or was unfastened or something to that effect.

Based on the type of incident, somebody being in the back seat, I assumed that it was a reasonable assumption

that there may have been a weapon that was placed under or in that area.

7/7/10 RP 11.

Officer Prater clarified that by “bottom cushion” he was referring to “the seating portion of the seat,” 7/7/10 RP 17, and that he could see a gap between the bottom and back portions of the rear seat, exposing the lower portion of the frame. 7/7/10 RP 17 (3.6 hearing). *See* 7/26/10 RP 81-82 (trial).

While Officer Manos was “right behind” him, Officer Prater performed “a cursory check” of the vehicle. 7/7/10 RP 10-12 (3.6 hearing); 7/26/10 RP 82 (trial). Specifically, he testified that

I lifted up the bottom cushion portion, and at the same time I lifted that up, the rear cushion fell forward. At that time, Officer Manos yelled ‘gun.’

7/7/10 RP 10-12 (3.6 hearing); 7/26/10 RP 82 (trial).

Officer Prater, concerned that someone may be hiding in the trunk, backed out of the car. 7/7/10 RP 12 (3.6 hearing); 7/26/10 RP 82 (trial). Officer Prater never actually saw the gun in question and had no further involvement with the case. 7/7/10 RP 12 (3.6 hearing); 7/26/10 RP 82-83, 87 (trial). However, he did note that he recalled what he “believe[d] to be a firearm sticking out the back of the seat rest area before [h]e left the scene because Officer Manos pointed it out.” 7/26/10 RP 82, 89 (trial).

Officer Shawn Noble testified that he walked up to the vehicle after interviewing the defendant and also observed that the bottom cushion of the backseat “appeared like it was loose and maybe moved slightly forward and that the back cushion was leaning slightly forward, creating a small gap through which he could see a rifle barrel protruding above the seat. 7/7/10 RP 38-42, 46-47 (3.6 hearing); 7/28/10 RP 168 (trial). Noble indicated that the barrel of the rifle extended several inches higher than the top end of the seat, 7/28/10 RP 168-69 (trial), on which the defendant was sitting. 7/27/10 RP 140-43, 7/28/10 RP 164-66. Officer Noble did not touch the rifle and did not see anyone touch it. 7/7/10 RP 43.

Officer Noble discovered through a records check that the defendant was a convicted felon. 7/7/10 RP 43. The parties stipulated at trial that,

[p]rior to December 1, 2008, defendant Macus Chouinard was convicted of a felony offense that prohibited him from owning a firearm or having a firearm under his possession or control until his right to do so was restored by a court of law.

The defendant’s conviction for a crime that is defined as a serious offense for purposes of the unlawful possession of a firearm statute, the defendant’s conviction was a valid conviction on his record on December 1, 2008, and his right to own or possess or control a firearm had not been restored.

8/2/10 RP 24-25; CP 76-77.

During a show-up identification, which included bringing a witness from the scene of the shooting to the scene of the detention, the defendant was identified as being in the vehicle from which the shots were fired. 7/27/10 RP 72. The defendant was then placed under arrest. 7/28/10 RP 172.

Tacoma Police Officer Jeffrey Thiry responded to the scene where Lakewood officers stopped the vehicle and spoke with Officer Noble. 7/7/10 RP 71-74 (3.6 hearing); 7/27/10 RP 17-18 (trial).

Thiry then went up to the vehicle and used his flashlight to look through the rear windshield. 7/7/10 RP 74 (3.6 hearing); 7/27/10 RP 19 (trial). Through a passenger-side speaker hole in the back dashboard of the vehicle, he saw a black rifle. 7/7/10 RP 74-75 (3.6 hearing); 7/27/10 RP 19 (trial). Officer Thiry indicated that the rifle was also visible “because the rear seat was ajar.” 7/7/10 RP 75 (3.6 hearing). *See* 7/7/10 RP 96-97 (3.6 hearing); 7/27/10 RP 20-21 (trial). In other words, the back seat was pulled slightly forward, and the back rest had “slipped down and was pulled away from the bulkhead, the rear bulkhead which it would usually be fastened to.” 7/7/10 RP 75. *See* 7/27/10 RP 21 (trial). Officer Thiry indicated that the seat appeared to have been modified. 7/7/10 RP 76. Thiry testified that a person sitting in the back seat of the vehicle could definitely access the trunk from the passenger compartment by

simply leaning forward. 7/7/10 RP 76. Quinton Jones, the owner of the vehicle in question, indicated that the reason the back seat was not attached was to allow a passenger to access the trunk from that seat. 8/2/10 RP 54-58.

Thiry recovered the rifle from the car to “safeguard” it. 7/7/10 RP 77-81 (3.6 hearing); 7/27/10 RP 22 (trial).

Later in the morning of the shooting, club-owner Valerio found several bullet casings in the area outside the club. 7/26/10 RP 223-25. He placed them in a plastic bag and gave them to Tacoma Police Officer Thiry. 7/26/10 RP 224; 7/27/10 RP 50-56.

That rifle was subsequently tested by Tacoma Police Department forensic specialist Cressden Salvador-Roller for fingerprints, but none were found. 8/2/10 RP 24-25; CP 74-75.

Forensic scientist Brenda Lawrence of the Washington State Patrol Crime Laboratory then tested the rifle and found it to be operable and capable of firing normally. 7/27/10 RP 109-10. Lawrence also analyzed the fired casings found at the scene of the drive-by shooting and found that they were fired from that rifle. 7/27/10 RP 116-17.

Melissa Boyce, a Tacoma Police Department crime scene technician, tested the fired casings found at the scene for latent fingerprint

impressions and found one such impression, but was unable to identify its source. 7/28/10 RP 260-61. See 7/28/10 RP 292.

Jones also testified that, although he drove the vehicle to Club Juno that evening, he never saw the rifle. 8/2/10 RP 75-77.

After being removed from the vehicle, the defendant was detained in handcuffs, and Officer Noble read him the *Miranda* warnings. 7/7/10 RP 26-30, 34 (3.5 hearing); 7/27/10 RP 139-41 (trial). The defendant thereafter stated that he and the other occupants of the vehicle went to “an 18-and-over club,” that they left, and were going to be dropping him off at a relative’s house.” 7/7/10 RP 31 (3.5 hearing); 7/27/10 RP 141-42 (trial). Because it was earlier than the normal closing time for clubs, the officer asked the defendant why they left the club. 7/7/10 RP 31 (3.5 hearing); 7/27/10 RP 142 (trial). The defendant replied, “I don’t know why we left.” 7/7/10 RP 31 (3.5 hearing); 7/27/10 RP 142 (trial). Officer Noble asked the defendant if anything happened at the club that caused them to leave, but the defendant, replied, “I don’t know.” 7/27/10 RP 142 (trial).

Officer Thiry later contacted the defendant and also read him the *Miranda* warnings. 7/7/10 RP 85-89 (3.5 hearing); 7/27/10 RP 46-47 (trial). The defendant told Thiry that he had been at a club. 7/7/10 RP 91. The defendant denied that he was aware of any gunshots. 7/7/10 RP 91 (3.5 hearing); 7/27/10 RP 47. Officer Thiry asked the defendant “if he *knew* about the rifle.” 7/27/10 RP 48 (trial)(emphasis added); 7/7/10 RP

91 (3.5 hearing). *See* 7/7/10 RP 110-11 (3.5 hearing). The defendant stated, yes, that he “saw it behind the seat.” 7/27/10 RP 48 (trial). *See* 7/7/10 RP 91 (3.5 hearing).

C. ARGUMENT.

1. THE TRIAL COURT PROPELRY DENIED THE DEFENDANT’S MOTION TO SUPPRESS BECAUSE THE DISCOVERY OF THE RIFLE WAS MADE IN OPEN VIEW AND ITS SUBSEQUENT SEIZURE JUSTIFIED BY EXIGENT CIRCUMSTANCES.

“When reviewing the denial of a suppression motion, an appellate court determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law.” *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009) (citing *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)). “Evidence is substantial when it is enough ‘to persuade a fair-minded person of the truth of the stated premise.’” *Id.* (quoting *State v. Reid*, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)). This Court “do[es] not review credibility determinations on appeal, leaving them to the fact finder,” *State v. Gibson*, 152 Wn. App. 945, 951, 219 P.3d 964 (2009), and “[u]nchallenged findings of fact are treated as verities on appeal.” *State v. Afana*, 169 Wn.2d 169, 176, 233 P.3d 879 (2010). Finally, courts “review conclusions of law from an order pertaining to the suppression of evidence *de novo*,” *Id.*, *State v. Louthan*, 158 Wn. App. 732, 740, 242 P.3d 954

(2010), and “can uphold the trial court on any valid basis.” *Gibson*, 152 Wn. App. at 948, 958.

The Fourth Amendment to the United States Constitution provides that “[t]he 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.” Article I, section 7 of the Washington State Constitution mandates that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

“[A] warrantless search is per se unreasonable, unless it falls within one of the carefully drawn exceptions to the warrant requirement.” *State v. Patton*, 167 Wn.2d 379, 386, 219 P.3d 651 (2009). Similarly, “[t]he ‘authority of law’ requirement of article I, section 7 is satisfied by a valid warrant, subject to a few jealously guarded exceptions.” *State v. Afana*, 169 Wn.2d 169, 176-77, 233 P.3d 879 (2010).

Illegally obtained evidence is not admissible in court. *Mapp v. Ohio*, 367 U.S. 643, 82 S. Ct. 23, 7 L. Ed. 72 (1961); *State v. Afana*, 169 Wn.2d 169, 180, 233 P.3d 879 (2010).

However, “[w]hen a law enforcement officer observes something in open view from a lawful vantage point, the observation is not a ‘search’ triggering the protections of article I, section 7.” *State v. Swetz*, 160 Wn. App. 122, 134, 247 P.3d 802 (2011) (citing *State v. Kennedy*, 107 Wn.2d 1, 10, 726 P.2d 445 (1986) and *State v. Seagull*, 95 Wn.2d 898, 901, 632

P.2d 44 (1981)). Similarly, “[e]vidence discovered in ‘open view’ is not the product of a “search” within the meaning of the Fourth Amendment.” *State v. Louthan*, 158 Wn. App. 732, 746, 242 P.3d 954 (2010) (citing *State v. Perez*, 41 Wn. App. 481, 483, 704 P.2d 625 (1985) (citing *State v. Seagull*, 95 Wn.2d 898, 901-02, 632 P.2d 44 (1981))).

Indeed,

[u]nder the “open view” doctrine, there is no search because a government agent’s “observation takes place from a non-intrusive vantage point. The governmental agent is either on the outside looking outside or on the outside looking inside to that which is knowingly exposed to the public.” *Seagull*, 95 Wash.2d at 902, 632 P.2d 44 (quoting *State v. Kaaheena*, 59 Haw. 23, 28-29, 575 P.2d 462 (1978)). Accordingly, the object under observation is not subject to any reasonable expectation of privacy and the observation is not within the scope of the constitution. *State v. Kennedy*, 107 Wash.2d 1, 10, 726 P.2d 445 (1986). It is well established that a person has a diminished expectation of privacy in the visible contents of an automobile parked due to a lawful police stop. *Kennedy*, 107 Wash.2d at 10, 726 P.2d 445.

*State v. Louthan*, 158 Wn. App. 732, 746, 242 P.3d 954 (2010).

Therefore, “if an officer, after making a lawful stop, looks into a car from the outside and sees a weapon or contraband in the car, he has not searched the car.” *Gibson*, 152 Wn. App. at 955 (quoting *Kennedy*, 107 Wn.2d at 10). “This is true even if the officer uses a flashlight to view the interior.” *Gibson*, 152 Wn. App. at 955.

In the present case, although the defendant argues that “the *search* through which the evidence was discovered violated federal and state

constitutional law,”<sup>1</sup> Brief of Appellant, p. 22-29 (emphasis added), both the search and subsequent seizure were lawful and the court’s decision to deny the defendant’s motion to suppress was therefore, proper.

The rifle at issue was first discovered by Officer Manos, while he was standing on a public road outside the vehicle. CP 132-36 (finding of fact 6); Appendix A; 7/7/10 RP 53-67. Thus, it was something he observed “in open view from a lawful vantage point,” and under the open view doctrine, his observation was “not a ‘search’ triggering the protections of article I, section 7,” *Swetz*, 160 Wn. App. 122, 134, 247 P.3d 802, or the Fourth Amendment. *Louthan*, 158 Wn. App. 732, 746, 242 P.3d 954 (2010). Because the observation by which he discovered the rifle cannot be a search, it cannot be an unlawful search, and the defendant’s motion to suppress was properly denied.

In arguing against this conclusion, the defendant asserts that Officers “Prater and Manos, each claimed to have discovered the gun differently,” but that the court “tacitly” found only Prater’s version of events credible. Brief of Appellant, p. 27-29. The defendant bases this second conclusion on the court’s reason for admissibility number 4, which found that “[a]fter Officer Prater moved the cushion the rifle was in plain view.” CP 132-36. Brief of Appellant, p. 28-29. The defendant, therefore

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<sup>1</sup> The defendant, stating that “there is no need to determine whether exigent circumstances justified the seizure of the weapon,” does not argue that the seizure of the rifle was unlawful. Brief of Appellant, p. 29.

challenges findings of fact 6, 7, 8, and 19, those which were based on the testimony of Manos, and concludes that “there are no grounds to conclude that Manos’s version was the correct version... and that the weapon was legally discovered through the ‘open view’ doctrine.” Brief of Appellant, p. 28-29.

The fundamental problem with this argument is that Prater and Manos did not “each claim[] to have discovered the gun differently.” Brief of Appellant, p. 27. Indeed, Prater testified that he never discovered the gun at all. 7/7/10 RP 12; CP 132-36 (undisputed finding of fact 9); Appendix A. In fact, Prater never actually saw the gun in question, 7/7/10 RP 12, until Manos pointed it out to him later. 7/26/10 RP 82.

Therefore, the testimony of Officers Manos and Prater was not materially inconsistent. Manos testified that, while outside the car, before any officer had entered the vehicle, he shined his flashlight into the back seat area of that vehicle, and saw the flash suppressor of a rifle. 7/7/10 RP 54-55, 60. Prater testified that, with Manos behind him, he entered the passenger compartment of the vehicle and “lifted up the bottom cushion portion,” at which time, “the rear cushion fell forward,” and that “Officer Manos yelled ‘gun.’” 7/7/10 RP 10-12. Manos testified that it took him about thirty seconds to identify the object he saw through the vehicle’s window as a rifle before he notified the other officers that he had seen a gun, 7/7/10 RP 60-61, 67, but that he was sure that he saw the rifle before

anyone, including Officer Prater, actually got into the vehicle. 7/7/10 RP 62. Prater testified he never saw the rifle. 7/7/10 RP 12.

This testimony is not inconsistent. It simply implies the following sequence of events: 1) Officers Manos and Prater approached the vehicle with Prater in the lead, 2) Manos shined his flashlight through the vehicle's window and saw the rifle in question while standing outside that vehicle, 3) Prater entered the vehicle and lifted the bottom cushion of the backseat, 4) Manos recognized the rifle as a rifle and notified Prater of its presence, and 5) Prater backed out of the vehicle without ever seeing the rifle.

While events 3 and 4 seem to have occurred close in time, and indeed, within 30 seconds of each other, *see* 7/7/10 RP 60-61, there is nothing in the record to suggest that event 3 caused event 4, that is, that Prater's movement of the seat caused Manos to see the rifle. Indeed, the testimony, and particularly event 2, indicates the discovery of the rifle was made by Officer Manos through open view, rather than through any action of Officer Prater.

While it is true that reason for admissibility number 4 states that "[a]fter Officer Prater moved the cushion the rifle was in plain view," CP 132-36, this is not an explicit finding that Manos was not credible.

This finding may not even be supported by substantial evidence. Because the term "plain view" refers to what an officer sees after "intrud[ing] into an area where a reasonable expectation of privacy

exists,” *Gibson*, 152 Wn. App. at 954, reason for admissibility 4 must be a finding that Prater saw the rifle after moving the cushion. However, Prater testified that he never saw that rifle, 7/7/10 RP 12, at least while in the vehicle. 7/26/10 RP 82. If the finding is instead interpreted as meaning that Manos only saw the rifle after the cushion was moved, it is inconsistent with the testimony. Officer Manos was clear that he saw the rifle, though he could not immediately identify it as such, before Prater even entered the vehicle. 7/7/10 RP 54-55. Therefore, far from being a finding that Manos was not credible, “reason[] for admissibility” number 4 may simply not be supported by substantial evidence.

Regardless, reason for admissibility 4 cannot be considered a “tacit” conclusion that Manos was not credible, because the court explicitly found, in reason for admissibility 6, that the testimony of both officers was “generally credible.” CP 132-36. Because this Court “do[es] not review credibility determinations on appeal,” *State v. Gibson*, 152 Wn. App. at 951, and there is otherwise no inconsistency between the testimony of the officers, the testimony of Officer Manos must be considered credible.

More important for purposes of review, however, findings of fact 6, 7, 8, and 19, which were based on Officer Manos’s testimony and challenged here, are supported by substantial evidence.

Finding of fact 6 states:

Officer Manos testified that it was dark out, but that there was some light from streetlights. He testified that as he shined his flashlight in through the back window of the automobile noticed a flash suppressor on the barrel of a rifle. Manos testified that he was able to see the rifle through a 3-4 inch gap between the back cushion of the rear seatr [sic] and the frame of the car, and that it appeared that the automobile appeared to have been modified so that the trunk area, which normally would have been separated from the passenger compartment by the back seat was accessible from the passenger compartment.

CP 133.

This finding is supported by the testimony of Officer Manos.

Specifically, Manos testified that it was after midnight when he approached the vehicle. 7/7/10 RP 48. He testified that he “took [his] flashlight and looked down” and “could see a flash suppressor for a rifle” that “looked like it was attached to a barrel in the back of the car.” 7/7/10 RP 54-55. Manos indicated that he was able to see the rifle through a 3-4 inch gap, *see* 7/7/10 RP 59, between “the back rest” of the rear seat and the “window deck” of the car. 7/7/10 RP 65-66.

Finding of fact 7 states that “Manos testified that no officers entered the car prior to him noticing the rifle.” CP 133; Appendix A. This finding of fact is supported by Manos’ testimony that he saw the rifle “before anybody actually got into the vehicle to do a search.” 7/7/10 RP 62.

Finding of fact 8 states that

“Manos further testified that he then finished ‘clearing’ the car –that is verifying that there were no other occupants –by flashlight from the outside of the automobile. Manos did not believe that he had, at any point during that process shouted “Gun” or “Weapon.”

CP 133; Appendix A.

This finding is also supported by the testimony of Officer Manos, who testified that after noticing the firearm, he continued “clearing the vehicle,” meaning looking in “from the exterior of the vehicle [with his flashlight] to ensure no occupants were in there.” 7/7/10 RP 61. Manos testified that he did not yell “weapon” when he saw the rifle, 7/7/10 RP 66, but did verbally advise other officers that he had seen “a flash suppressor [and that it] looked like it was attached to a barrel in the back of the car.” 7/7/10 RP 55.

Finally, the defendant seems to challenge the portion of Finding of fact 19 which states that “Officer Manos’s [sic] testified that that [sic] no officer entered the car during the sweep.” However, Officer Manos did testify that he saw the rifle, as part of his protective sweep of the car, “before anybody actually got into the vehicle to do a search.” 7/7/10 RP 62.

Given that Manos’ testimony was found to be credible, the testimony outlined above is “enough to persuade a fair-minded person of

the truth of [each of the challenged findings of fact].” See *Garvin*, 166 Wn.2d at 249. Therefore, findings of fact 6, 7, 8, and 19 are supported by substantial evidence.

Moreover, these findings of fact support the conclusion that the discovery of the rifle was made by Officer Manos, while he was standing on a public road outside the vehicle. CP 132-36; 7/7/10 RP 53-67. This rifle was, therefore, something he observed “in open view from a lawful vantage point.” *Swetz*, 160 Wn. App. at 134, and under the open view doctrine, “not a ‘search’ triggering the protections of article I, section 7.” *Swetz*, 160 Wn. App. at 134, or the Fourth Amendment. *Louthan*, 158 Wn. App. at 746. Because the observation by which he discovered the rifle cannot be a search, it cannot be an unlawful search, and the defendant’s motion to suppress was properly denied.

The defendant does not challenge the trial court’s conclusion that the seizure of the rifle was justified by the exigent circumstance of danger to the arresting officer or to the public. Brief of Appellant, p. 22-29 (“there is no need to determine whether exigent circumstances justified the seizure of the weapon.”) However, this conclusion was proper and supported by the findings of fact.

This Court has noted, with some equivocation, see *Louthan*, 158 Wn. App. at 746, that an “officer’s right to seize the items observed [in open view] must be justified by a warrant or valid exception, if the items

are in a constitutionally protected area.” *Swetz*, 160 Wn. App. at 134 (quoting *Kennedy*, 107 Wn.2d at 10). Because the Supreme Court has “recognized that ‘the right to be free from unreasonable governmental intrusion into one’s ‘private affairs’ encompasses automobiles and their contents,’” *State v. Tibbles*, 169 Wn.2d 364, 236 P.3d 885 (2010) (quoting *State v. Parker*, 139 Wn.2d 486, 494, 987 P.2d 73 (1999)), it would seem that seizure of items observed in open view in a vehicle must be justified by a warrant or a valid exception. *Gibson*, 152 Wn. App. at 956.

There are “recognized exceptions for: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops.” *Tibbles*, 169 Wn.2d at 369.

“The exigent circumstances exception to the warrant requirement applies where ‘obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence.’” *Tibbles*, 169 Wn.2d. at 370. There are five circumstances have been “termed ‘exigent’ ” circumstances,” including “(1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; and (5) mobility or destruction of the evidence.” *Id.* See *State v. Terrovona*, 105 Wn.2d 632, 644, 716 P.2d 295 (1986). “A court must look to the totality of the circumstances in determining whether exigent circumstances exist.” *Id.*; *State v. Smith*, 165 Wn.2d 511, 518, 199 P.3d 386 (2009).

“Washington courts have long held that ‘danger to [the] arresting officer or to the public’ can constitute an exigent circumstance.” *Smith*, 165 Wn.2d at 517 (quoting *State v. Counts*, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983)).

Moreover, “[a]lthough no precise guidelines exist as to what constitutes exigent circumstances, courts have upheld warrantless seizures from vehicles under more broadly defined exigent circumstances than those permitted for buildings.” *Gibson*, 152 Wn. App. at 957.

In the present case, the court found, in finding of fact 11, that Thiry then “made an independent observation of the stopped automobile from the outside, using a flashlight,” and, in finding of fact 14, that he could see the rifle through what he believed to be “a hole in the rear ‘deck’ that would normally contain a speaker.” CP 133; Appendix A. The court further found in finding of fact 14 that “it was impossible to determine if the rifle was loaded, if there was a round in the chamber, or if the rifle’s safety was on or off.” CP 133; Appendix A. Although officers subsequently obtained a warrant to search the vehicle, that vehicle, which was on an interstate off-ramp, had to be towed to a secure location before that warrant could be effectively served. *See* CP 133(finding of fact 17); Appendix A. In its finding of fact 15, the court found that “based on his prior experience with similar rifles –which [Thiry] described as ‘tempermental’ [sic] [Thiry] had safety concerns about having the vehicle towed with the potentially loaded rifle in that position.” CP 133; Appendix

A. Thiry, therefore, removed the rifle from the vehicle CP 133; Appendix A; 7/7/10 RP 77-81.

Because none of these findings of fact are challenged, *see* Brief of Appellant, all must be “treated as verities on appeal.” *Afana*, 169 Wn.2d at 176. Therefore, for purposes of this appeal, it must be taken as true that the potentially loaded, un-secured rifle, positioned as it was, posed a danger to those working around the vehicle and trying to tow it. CP 133; Appendix A (undisputed finding of fact 15). If this is true, then this rifle posed a danger to the arresting officer and to the tow truck operator, a member of the public.

Although officers subsequently obtained a warrant, the vehicle had to be removed to a secure location, away from the off-ramp from Interstate 5, before that warrant could be effectively served. *See* CP 133(finding of fact 17); Appendix A. Therefore, Officer Thiry’s efforts to secure that rifle and render it safe by removing it from the vehicle before it was towed were justified by the exigent circumstance of danger to arresting officer or to the public.

As a result, the seizure was lawful, and the court properly denied the defendant’s motion to suppress.

Therefore, the defendant’s conviction should be affirmed.

2. THE DEFENDANT'S CONVICTION OF FIRST-DEGREE UNLAWFUL POSSESSION OF A FIREARM SHOULD BE AFFIRMED BECAUSE, WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ELEMENT OF POSSESSION BEYOND A REASONABLE DOUBT.

In a criminal case, a defendant may challenge the sufficiency of the evidence before trial, at the end of the State's case in chief, at the end of all of the evidence, after the verdict, and on appeal. *State v. Lopez*, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). "In a claim of insufficient evidence, a reviewing court examines whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,' 'viewing the evidence in the light most favorable to the State.'" *State v. Brockob*, 159 Wn.2d 311, 336, P.3d 59 (2006) (quoting *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Thus, "[s]ufficient evidence supports a conviction when, viewing it in the light most favorable to the State, a rational fact finder could find the essential elements of the crime beyond a reasonable doubt." *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* (quoting *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997)). All reasonable inferences from the evidence must be

drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “Determinations of credibility are for the fact finder and are not reviewable on appeal.” *Brockob*, 159 Wn.2d at 336.

In the present case, in its instruction number 10, the trial court instructed the jury that:

[t]o convict the defendant of the crime of unlawful possession of a firearm in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 1<sup>st</sup> day of December, 2008, the defendant knowingly had a firearm in his possession or control;

(2) That the defendant had previously been convicted or adjudicated guilty as a juvenile of a serious offense; and

(3) That the possession or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 112-131 (Instruction 10); Appendix B. *See* RCW 9.41.040(1)(a).

The trial court also gave the following instruction defining possession for purposes of element (1):

Possession means having a firearm in one’s custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual

physical possession but there is dominion and control over the item.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision.

CP 128; Appendix B.

The defendant did not object to either of these instructions, *see* 8/2/10 RP 94-102, 8/3/10 RP 2-4, and they therefore, became the law of the case. *See State v. Hickman*, 135 Wn.2d 97, 101, 954 P.2d 900 (1997).

The defendant here admits that he “stipulated to his prior qualifying crime,” and that “it was undisputed that the events in question occurred in Washington.” Brief of Appellant, p. 30-31. *See* 8/2/10 RP 24-26; CP 76-77 (stipulation) *and* 7/26/10 RP 76 (events occurred in State of Washington). He therefore, does not dispute that there was sufficient evidence of elements (2) and (3). Brief of Appellant, p. 30-31. Indeed, the defendant admits that “the only issue to be proven at trial was [his] possession or control of the firearm,” Brief of Appellant, p. 31, or element (1) above.

When viewed in the light most favorable to the State, there was sufficient evidence from which a rational trier of fact could have found this element beyond a reasonable doubt.

That evidence showed that the defendant was found sitting in the back seat of the vehicle. 7/7/10 RP 26-30, 34. The bottom cushion of that backseat appeared to have been “moved slightly forward,” which created a small gap through which... a rifle barrel [was] protruding above the seat.” 7/7/10 RP 38-42, 46-47, 7/28/10 RP 168. The barrel of the rifle extended several inches beyond the top end of the seat, 7/28/10 RP 168-69, on which the defendant was sitting. 7/27/10 RP 140-43, 7/28/10 RP 164-66.

The rest of the rifle was in the trunk area of the vehicle, *see, e.g.*, 7/7/10 RP 77-81. Officer Thiry testified that a person sitting in the back seat of the vehicle could definitely access the trunk from the passenger compartment by simply leaning forward. 7/7/10 RP 76. Indeed, Quinton Jones, the owner of the vehicle in question, indicated that the reason the back seat was not attached was to allow a passenger to access the trunk from that seat. 8/2/10 RP 54-58.

Moreover, Officer Thiry asked the defendant “if he *knew* about the rifle behind the back seat,” and the defendant indicated that he did. 7/7/10 RP 91 (emphasis added). *See* 7/7/10 RP 110-11. Given that the defendant used the past-tense form of the verb “know,” it is clear that he was

referring to the time at which he was in the vehicle, sitting next to the barrel of the rifle.

Thus, there was evidence that the defendant was sitting right next to and knew about a rifle that he could immediately access. Based on such testimony, it can reasonably be inferred that the defendant “had the immediate ability to take actual possession” of that rifle, and hence that he was in constructive possession of it. CP 128. Because all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant, *State v. Salinas*, 119 Wn.2d 192, 201, this inference must be made. When it is, it is clear that there was sufficient evidence that “on or about the 1<sup>st</sup> day of December, 2008, the defendant knowingly had a firearm in his possession or control.” CP 112-31. As a result, there was sufficient evidence of element (1) and because elements (2) and (3) are not in dispute, there was sufficient evidence of first-degree unlawful possession of a firearm.

Therefore, the defendant’s conviction thereof should be affirmed.

3. THE DEFENDANT FAILED TO PRESERVE ANY ISSUE REGARDING THE TRIAL COURT'S INSTRUCTION NUMBER 14, AND EVEN ASSUMING HE HAD PRESERVED THE ISSUE, THAT INSTRUCTION WAS PROPERLY GIVEN.

“Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case and, when read as a whole, properly inform the jury of the applicable law.” *State v. Fleming*, 155 Wn. App. 489, 503-04, 228 P.3d 804 (2010) (citing *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002)); *State v. Mills*, 154 Wn.2d 1, 109 P.3d 415 (2005); *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). The standard for review applied to a challenge to a trial court's instructions depends on whether the trial court's decision is based upon a matter of law or of fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). “[A] trial court's choice of jury instructions,” is reviewable only “for abuse of discretion.” *Fleming*, 155 Wn. App. at 503; *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds* by *State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997); *Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). However, “an alleged error of law in jury instructions” is reviewed de novo, *Fleming*, 155 Wn. App. at 503; *State v. Bashaw*, 169 Wn.2d 133, 140, 234 P.3d 195 (2010), and in the context of the instructions as a whole.

*State v. Woods*, 143 Wn.2d 561, 590, 23 P.3d 1046 (2001) (quoting *State v. Benn*, 120 Wn.2d 631, 654-55, 845 P.2d 289 (1993)).

In a criminal case, “[j]ury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every element of a criminal offense beyond a reasonable doubt.” *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). See *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). “[A] jury instruction that relieves the prosecution of its burden of proof is subject to harmless error analysis.” *State v. Jennings*, 111 Wn. App. 54, 62, 44 P.3d 1 (2002); *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

The question of whether the defendant was in possession of a weapon may be submitted to the jury if the trial court has a reasonable basis to believe the evidence will show actual or constructive possession. *State v. Jeffrey*, 77 Wn. App. 222, 889 P.2d 956 (1995); *State v. Reid*, 40 Wn. App. 319, 698 P.2d 588 (1985). There is no requirement that the firearm be immediately accessible at the time of possession. *State v. Howell*, 119 Wn. App. 644, 649-50, 79 P.3d 451 (2003).

“Exclusive control is not necessary to establish constructive possession, but mere proximity to the [item at issue] is not enough to establish constructive possession.” *State v. Hagen*, 55 Wn. App. 494,

498, 781 P.2d 892 (1989) (citing *State v. Wheatley*, 10 Wn. App. 777, 779, 519 P.2d 1001 (1974)).

A trial court is not required to define “dominion and control” for the jury. *State v. Amezola*, 49 Wn. App. 78, 741 P.2d 1024 (1987), *abrogated on other grounds*, *State v. McDonald*, 138 Wn.2d 680, 981 P.2d 443 (1999). Whether a person has dominion and control, and thus constructive possession, is determined by “the totality of the situation” and whether “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 at issue] and thus was in constructive possession [thereof].” *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977).

In the present case, the trial court gave the following instruction as its instruction number 14:

Possession means having a firearm in one’s custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession.

Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.

***Proximity alone without proof of dominion and control is insufficient to establish constructive possession.*** Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the item,

whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located. *No single one of these factors necessarily controls your decision.*

CP 128; Appendix B. This instruction is identical to Washington Pattern Jury Instruction –Criminal (WPIC) 133.52. *See also* WPIC 50.03.

Although the defendant now argues that this instruction “allowed conviction if the defendant were merely near the weapon, in violation of state law,” Brief of Appellant, p. 36-42, he did not object to or take exception with this instruction at trial and proposed no alternative to it. *See* RP 8/2/10 RP 94-102, 8/3/10 RP 2-4.

Generally, a court will not consider an issue raised for the first time on appeal unless it involves a manifest error affecting a constitutional right. *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); RAP 2.5(a)(3). Thus, the appellant must identify the constitutional error and show actual prejudice. *Id.* at 333. “Without an affirmative showing of actual prejudice, the asserted error is not ‘manifest’ and thus is not reviewable under RAP 2.5(a)(3).” *Id.* at 334.

In the present case, defendant did not object or take exception to instruction number 14 at trial, *see* RP 8/2/10 RP 94-102, 8/3/10 RP 2-4, and has neither identified a constitutional error nor shown actual prejudice.

With respect to constitutional error, the defendant seems to argue that given the nature of instruction 14, which defined possession, the court failed to instruct the jury on every element of the offense of unlawful possession of a firearm and thereby relieved the State of its burden of proof. *See* Brief of Appellant, p. 36-37. The defendant is correct that a trial court's failure to instruct on elements of an offense is an error of constitutional magnitude, but "nothing in the constitution, as interpreted in the cases of [the Supreme Court] or indeed any court, requir[es] that the meanings of particular terms used in an instruction be specifically defined." *State v. Scott*, 110 Wn.2d 682, 690-91, 757 P.2d 492 (1988). *See also State v. Ng*, 110 Wn.2d 32, 44, 750 P.2d 632 (1988). Consequently, the defendant here has failed to identify a constitutional error.

Further, the defendant has made no argument as to why instruction 14 resulted in actual prejudice. *See* Brief of Appellant, p. 36-42. Because without such "an affirmative showing of actual prejudice, [an] asserted error is not 'manifest' and thus is not reviewable under RAP 2.5(a)(3)," *McFarland*, 127 Wn.2d at 334, the alleged error asserted here is not reviewable.

Therefore, the defendant's conviction should be affirmed.

However, assuming *arguendo* that this issue is properly before the Court, the instruction was proper because it was supported by substantial evidence, allowed the parties to argue their theories of the case and

properly informed the jury of the applicable law. *See Fleming*, 155 Wn. App. at 503-04.

Although the defendant argues that instruction 14 “allowed conviction if the defendant were merely near the weapon, in violation of state law,” Brief of Appellant, p. 36-42, this is not correct. Indeed, the instruction stated exactly the opposite. It admonished the jury that “[p]roximity alone without dominion and control is insufficient to establish constructive possession.” CP 128. These words cannot be read as permitting conviction if the defendant were merely near the weapon in question.

Although the defendant argues that by failing to define “dominion and control,” the instruction “only replaced one legal term of art with another,” Brief of Appellant, p. 38-39, a trial court is not required to define “dominion and control” for the jury. *Amezola*, 49 Wn. App. 78. Indeed, “courts have not treated ‘dominion and control’ as a technical phrase or term of art.” *Id.* The same can be said for the term “proximity,” which the defendant now argues, without citation to any authority, should have been defined. *See* Brief of Appellant, p. 39. However, whether a person has dominion and control, and thus constructive possession, is determined by the “various indicia” of dominion and control, their cumulative effect, and the totality of the situation. *Partin*, 88 Wn.2d 899, 567 P.2d 1136 (1977); *State v. Alvarez*, 105 Wn. App. 215, 19 P.3d 485 (2001).

Because instruction 14 properly informed the jury of such applicable law, it was proper and the defendant's conviction should be affirmed.

Lastly, the defendant seems to argue that the trial court should have adopted a federal jury instruction which defined what, at state law, would be constructive possession as "the power and intention to exercise control over [an object]," Brief of Appellant, p. 40-41. However, the defendant never offered such an instruction to the trial court below, *see* RP 8/2/10 RP 94-102, 8/3/10 RP 2-4, and even if he had, the trial court would have been correct to refuse to give it. Under Washington law, a person need not have an intention of any sort to constructively possess an object. *See, e.g., Hagen*, 55 Wn. App. 494, 499, 781 P.2d 892 (1989). Therefore, instructing the jury that a person would have to have the "intention to exercise control over [an object]" to constructively possess that object, would have been a misstatement of the law.

Because instruction number 14 was supported by substantial evidence, allowed the parties to argue their theories of the case, and properly informed the jury of the applicable law, it was proper and the defendant's conviction should be affirmed.

D. CONCLUSION.

The trial court properly denied the defendant's motion to suppress because the discovery of the rifle in question was made in open view and its subsequent seizure justified by exigent circumstances.

The defendant's conviction of first-degree unlawful possession of a firearm should be affirmed because, when viewed in the light most favorable to the State, there was sufficient evidence from which a rational trier of fact could have found the element of possession beyond a reasonable doubt.

Because the defendant did not object or take exception to instruction number 14 at trial, and neither identified a constitutional error nor demonstrated actual prejudice, the issue of the propriety of instruction number 14 was not preserved for appeal.

Even if it had been, instruction 14 was proper because it was supported by substantial evidence, allowed the parties to argue their theories of the case, and properly informed the jury of the applicable law.

Therefore, the defendant's conviction should be affirmed.

DATED: June 16, 2011

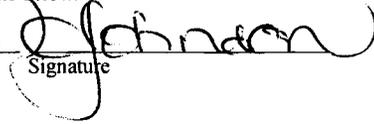
MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

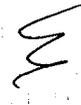


BRIAN WASANKARI  
Deputy Prosecuting Attorney  
WSB # 28945

Certificate of Service:

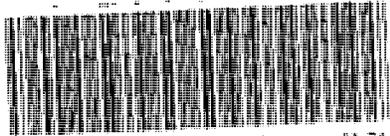
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under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

4/21/11   
Date Signature

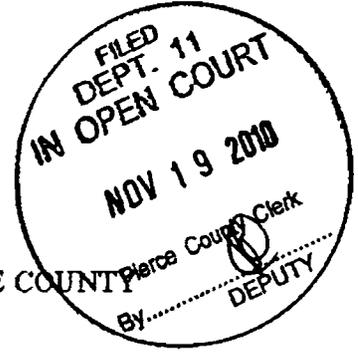


**APPENDIX A**

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 08-1-05703-0

vs.

MARCUS ANTHONY CHOUINARD,

FINDINGS AND CONCLUSIONS ON  
ADMISSIBILITY OF EVIDENCE CrR  
3.6

Defendant.

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THIS MATTER having come on before the Honorable John A. McCarthy on the 7th day of July, 2010, and the court having rendered an oral ruling thereon, the court herewith makes the following Findings and Conclusions as required by CrR 3.6.

THE UNDISPUTED FACTS

1.) At approximately 12:47 AM on December 1, 2009 there was a report to 911 dispatch that indicated that shots were fired in the vicinity of the Juno Café in Tacoma, WA. There was a description of a vehicle involved as a blue or purple, full-sized sedan with "Spiderman" theme decals.

2.) Lakewood Officer Sean Noble testified that he believed that he recognized the vehicle described as one that he had seen on more than one occasion in the city of Lakewood, WA.

3.) Officer Noble was working uniformed patrol, without a partner, in a marked police vehicle and positioned himself to observe the Southbound lanes of Interstate 5 in the vicinity of the Gravelly Lake Road exit on the possibility that the vehicle would return to Lakewood.

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4.) At approximately 1:01 AM, Noble, assisted by other Lakewood officers who had arrived at the scene conducted a high-risk stop on the vehicle on the shoulder of the highway, in the vicinity of the exit off-ramp. The occupants were order out of the vehicle, placed in handcuffs and taken back to the police patrol vehicles which were in the immediate vicinity of the stop.

The driver was later identified as Quinton Jones, the front-seat passenger was later identified as Deondre Robinson, and the back-seat passenger was later identified as the defendant, Marcus Chouinard.

5) After the occupants were removed Lakewood officers Prater and Manos working together, approached the stopped vehicle from the passenger side to "clear" the vehicle.

6.) Officer Manos testified that it was dark out, but that there was some light from streetlights. He testified that as he shined his flashlight in through the back window of the automobile he noticed a flash suppressor on the barrel of a rifle. Manos testified that he was able to see the rifle through a 3 - 4 inch gap between the back cushion of the rear seatr and the frame of the car, and that it appeared that the automobile appeared to have been modified so that the trunk area, which normally would have been seperated from the passenger compartment by the back seat was accessible from the passenger compartment.

7.) Manos testified that no officers entered the car prior to him noticing the rifle.

8.) Manos further testified that he then finished "clearing" the car--that is verifying that there were no other occupants--by flashlight from the outside of the automobile. Manos did not believe that he had, at any point during that process shouted "Gun" or "Weapon".

9.) Officer Prater testified that as he approached the car he noticed that the lower or seat cushion portion of the back seat was "ajar". Prater testified that he moved the cushion slightly and that at

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2 that point he heard Officer Manos shout, "Gun!" Prater testified that the officers then backed  
3 away from the vehicle and the he was able to see the rifle barrel from the outside of the car.

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5 10.) Officer Prater testified that he has had prior experiences with incidents where a person was  
6 hiding in the trunk, and that his observations of the back seat of this car initially gave him  
7 concern that it was possible that someone might be in the trunk of this car.

8  
9 11.) Tacoma Police Department Officer J. Thiry arrived after the sweep had been conducted and  
10 was briefed on the situation by the officers on the scene. He made an independent observation of  
11 the stopped automobile from the outside, using a flashlight.

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13 12.) Officer Thiry has experience with semi-automatic rifles of the sort observed and routinely  
14 carries a similar rifle in his patrol vehicle.

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16 13.) Thiry testified that his intention was to have the automobile impounded and towed from the  
17 scene to a secure location.

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19 14.) Officer Thiry testified that he could only see a portion of the rifle through what he believed  
20 was a hole in the rear "deck" that would normally contain a speaker, and that from the portion of  
21 the rifle that he could see from outside the car, it was impossible to determine if the rifle was  
22 loaded, if there was a round in the chamber, or if the rifle's safety was on or off.

23  
24 15.) Officer Thiry testified that based on his prior experience with similar rifles-which he  
25 described as ""tempermental" he had safety concerns about having the vehicle towed with the  
26 potentially loaded rifle in that position.

27  
28 16.) Officer Thiry subsequently recovered the rifle by opening the trunk and removing the rifle  
from the trunk.

17.) After the automobile was towed to a secure location a search warrant was obtained and  
served on the vehicle.

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18.) During the "clearing" of the vehicle the three occupants were in handcuffs and had been removed from the vehicle. There was not a concern that they were a danger to the officers conducting the sweep.

19) The testimony of Officers Prater that he reached in and touched the back seat lower cushion. Officer Manos's testified that that no officer entered the car during the sweep.

20.) Officers Manos, Prater and Noble testified that the rifle was visible through a gap between the rear seat cushion and the frame of the vehicle. Officer Thiry testified that the rifle was visible through what he believed was an opening in the rear deck that would normally contain an audio speaker.

#### REASONS FOR ADMISSIBILITY OR INADMISSIBILITY OF THE EVIDENCE

- 1.) The initial "high risk" stop of the "Spiderman" vehicle was a lawful seizure.
- 2.) For safety purposes, the officers conducted a protective sweep of the vehicle.
- 3.) During the conduct of that sweep, Officer Prater noticed the rear seat askew and had safety concerns about the apparent modification of the vehicle and the possibility of someone in the trunk.
- 4.) After Officer Prater moved the cushion the rifle was in plain view. It was readily identifiable as a rifle.
- 5.) There were reasonable safety concerns as to whether the rifle was loaded or not, and that could not reasonably be determined with the rifle in place.
- 6.) The testimony of the officers was generally credible. The inconsistencies in their testimony did not lead the Court to conclude that there was any effort to intentionally mislead the Court. In particular, the testimony was consistent that there the back seat of the vehicle was not attached to the frame, and that there was a gap between the upper cushion and the frame to which it would

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2 be normally attached. The rifle was visible wither through this gap, or through a hole for a  
3 speaker in the area of the gap.

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5 7.) Considering the totality of the circumstances, there were legitimate and reasonable safety  
6 concerns -exigent circumstances--that justified the initial sweep and Officer Thiry subsequently  
7 recovering the rifle through the trunk prior to obtaining a search warrant.

8 8.) The motion to suppress the rifle and loaded magazine is denied. The rifle and magazine are  
9 admissible.

10  
11 DONE IN OPEN COURT this <sup>NOVEMBER 4</sup> 19 day of October, 2010

12  
13 John A. McCarthy  
14 JUDGE  
15 John A. McCarthy

16 Presented by:

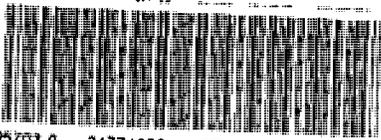
17 Thomas D. Howe  
18 THOMAS D HOWE  
19 Deputy Prosecuting Attorney  
20 WSB # 34050

21 Approved as to Form:

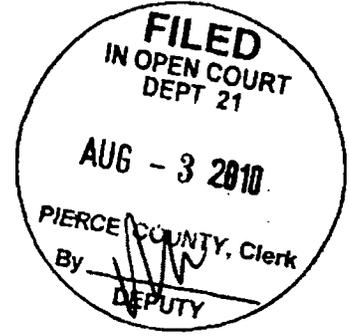
22 Kent H. Underwood  
23 KENT UNDERWOOD  
24 Attorney for Defendant  
25 WSB # 27250



**APPENDIX B**



08-1-05703-0 34774806 CTINJY 08-04-10



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,  
Plaintiff,

CAUSE NO. 08-1-05703-0

vs.

MARCUS ANTHONY CHOUINARD

Defendant.

**COURT'S INSTRUCTIONS TO THE JURY**

DATED this 3 day of August, 2010.

JUDGE

ORIGINAL

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

The defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 3

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 4

A witness who has special training, education, or experience may be allowed to express an opinion *in addition* to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 5

The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way.

INSTRUCTION NO. 6

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of a stipulation that Mr. Chouinard has previously been convicted of a serious offense and may be considered by you only for the purpose of establishing that he has previously been convicted of a serious offense. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

INSTRUCTION NO. 7

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

INSTRUCTION NO. 8

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of a statements made by Quinton Jones while he and Marcus Chouinard were in custody. This evidence may be considered by you only for the purpose of establishing that Quinton Jones and Marcus Chouinard spoke about this case. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

INSTRUCTION NO. 9

A person commits the crime of unlawful possession of a firearm in the first degree when he has previously been convicted or adjudicated guilty as a juvenile of a serious offense and knowingly owns or has in his possession or control any firearm.

INSTRUCTION NO. 10

To convict the defendant of the crime of unlawful possession of a firearm in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 1st day of December, 2008, the defendant knowingly had a firearm in his possession or control;
- (2) That the defendant had previously been convicted or adjudicated guilty as a juvenile of a serious offense; and
- (3) That the possession or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 11

A person knows or acts knowingly or with knowledge with respect to a fact when he or she is aware of that fact. It is not necessary that the person know that the fact is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

INSTRUCTION NO. 12

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

INSTRUCTION NO. B

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

INSTRUCTION NO. 14

Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision.

INSTRUCTION NO. 15

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 16

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the judicial assistant. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and a verdict form for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in the verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict.

When all of you have so agreed, fill in the verdict form to express your decision. The presiding juror must sign the verdict form and notify the judicial assistant. The judicial assistant will bring you into court to declare your verdict.