

No. 934285

FILED

SEP 23 2016

WASHINGTON STATE
SUPREME COURT

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

THEODORE ROOSEVELT RHONE,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 46960-0-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 03-1-02581-1
The Edmund Murphy, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is THEODORE ROOSEVELT RHONE, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 46960-0-II, which was filed on July 6, 2016. The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court. Petitioner's Motion for Reconsideration was denied on August 12, 2016.

III. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals misapply the constitutional harmless error standard, and relieve the State of its burden of proving a constitutional error is harmless, when it finds not that overwhelming untainted evidence supports the guilty verdict, but only that a jury could have rationally found a defendant guilty without the tainted evidence?
2. Does the Court of Appeals misapply the constitutional harmless error standard, and relieve the State of its burden of proving a constitutional error is harmless, when it fails to review the record from trial in order to determine whether overwhelming untainted evidence supports the guilty verdict?
3. Whether offenses involving the use or display of a firearm include possession as one of their essential elements, thereby granting a defendant automatic standing to challenge the search and seizure of the firearm?

IV. STATEMENT OF THE CASE

On May 30, 2003, Pierce County Sheriff's Deputy David Shaffer overheard a dispatch reporting an incident at a Jack in the Box restaurant in Lakewood. (CP 40, 541) An employee had reported that a red Camaro with three occupants (two black men and a white woman) had been through the drive-thru window looking for an employee who owed them money. (CP 40, 541) The car had a license plate number of 677-HCS. The employee also reported that the front seat passenger had displayed a gun. (CP 40, 541)

Deputy Shaffer recognized the car description and license plate as a vehicle he had previously seen parked at a suspected drug house on South Tacoma Way. (CP 41, 541; 04/25/05 RP 155)¹ Deputy Shaffer drove to the house and saw the red Camaro parked outside. (CP 41, 541; 04/25/05 RP 155-56)

As he pulled behind the Camaro, Deputy Shaffer saw a man, later identified as Theodore Rhone, exiting the car's passenger side. (CP 41, 541; 04/25/05 RP 156, 157) When Deputy Shaffer ordered him to show his hands, Rhone slowly and deliberately

¹ The transcripts will be referred to by the date of the proceeding.

looked at Deputy Shaffer and then leaned back into the car. (CP 41, 541) These movements made Deputy Shaffer believe that Rhone had a weapon or was reaching for one. (CP 41, 541) Rhone finally complied with the deputy's commands and Deputy Shaffer detained him. (CP 41, 541)

By this time, other officers arrived and removed the other two occupants, Phyllis Burg and Cortez Brown, from the Camaro. (CP 42, 542) As the officers removed Burg, she told them that they had just returned from the Jack in the Box. (CP 42, 542) The officers patted down all three occupants. (CP 42, 542) Rhone had a knife without a handle, someone else's checkbook, and a \$20 bill. (04/25/05 RP 163) All three were handcuffed and placed in separate police cars. (CP 42, 542; 04/25/05 RP 165; 09/26/14 RP 25-26) As Deputy Shaffer started to return to the Camaro, Burg told him that there was a gun in the car. (CP 42, 542; 09/26/14 RP 26)

At this point, Deputy Shaffer decided to search the Camaro to locate and secure the gun. (CP 42, 542; 04/25/05 RP 165-66) He found the gun in a plastic bag wrapped inside a towel, and found a purple Crown Royal bag containing crack cocaine. (CP 42, 542)

Subsequently, Deputy Shaffer received a call from Deputy Darren Miller, who relayed information he had gathered from witnesses at the Jack in the Box. (CP 42, 542; 04/25/05 RP 167-68) The witnesses told Deputy Miller that the Camaro had gone through the drive-thru window, contacted an employee, and demanded money from him. One of the occupants was holding a gun, so the employee threw money into the vehicle. (CP 42-43, 542-43) After receiving this information, Deputy Shaffer officially arrested all three for armed robbery. (CP 43, 543)

Rhone was charged with and convicted of first degree robbery with a firearm enhancement, unlawful possession of a controlled substance with intent to deliver also with a firearm enhancement, and first degree unlawful possession of a firearm. (CP 34-36, 47-48) The trial court found that Rhone was a persistent offender and imposed a sentence of life without the possibility of parole. (CP 52)

Before trial, Rhone had unsuccessfully moved to suppress the cocaine and the firearm seized during the search of the Camaro. The trial court denied the motion. (CP 43-44) Division 2 affirmed the ruling on direct appeal. (See State v. Rhone, 137 Wn. App. 1046 (2007)).

In 2014, this Court granted Rhone's Personal Restraint Petition, and remanded his case to the Superior Court for reconsideration of the suppression ruling "in light of Arizona v. Gant . . . and State v. Patton["] (CP 98) On remand, the trial court adopted its original findings of fact and legal reasoning, and again upheld the vehicle search and denied the motion to suppress. (10/10/14 RP 51-55; CP 540-44) Rhone again appealed. (CP 61-62)

In an unpublished opinion filed on July 6, 2016, Division 2 found that the suppression motion should have been granted and that the cocaine and firearm should have been suppressed. However, the court nevertheless affirmed Rhone's robbery conviction and its related deadly weapon enhancement after finding that the error in failing to suppress was harmless as to those charges. Specifically, the Court stated:

The jury instructions required the jury to find only that Rhone displayed what appeared to be a firearm in order to convict for first degree robbery, not that he possessed an actual firearm. The unchallenged findings of fact include Miller's statement that the front seat passenger pointed a gun at him when the Camaro proceeded through the drive through, Burg's statements that there was a gun in the car and that they had just returned from the Jack in the Box, and that Rhone exited from the passenger door of the vehicle. The State meets its burden and establishes

that the untainted evidence necessarily supports a finding that Rhone displayed what appeared to be a firearm. Thus, the admission of the weapon is harmless error as it relates to Rhone's conviction for first degree robbery with a firearm enhancement.

(Opinion at 10-11) Rhone's Motion for Reconsideration was denied on August 12, 2016.

V. ARGUMENT & AUTHORITIES

The issues raised by Rhone's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2). The Court of Appeals misapplied the constitutional harmless error standard and relieved the State of its burden of establishing that the error was harmless.

A. THE COURT OF APPEALS MISAPPLIED THE CONSTITUTIONAL HARMLESS ERROR STANDARD AND RELIEVED THE STATE OF ITS BURDEN OF ESTABLISHING THAT THE TRIAL COURT'S ERROR IN FAILING TO SUPPRESS THE ILLEGALLY OBTAINED EVIDENCE WAS HARMLESS.

A constitutional error is presumed to be prejudicial. State v. Cristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). For a constitutional error to be harmless, the appellate court must conclude beyond a reasonable doubt that the jury verdict cannot be attributed to the error. State v. Lui, 179 Wn.2d 457, 495, 315 P.3d

493, *cert. denied*, 134 S. Ct. 2842 (2014). The reviewing court uses the “overwhelming untainted evidence” test in its harmless error analysis. Coristine, 177 Wn.2d at 391 (quoting State v. Guloy, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985)).

The Court of Appeals did not apply this high standard when it determined that the error in failing to suppress the items from the Camaro was harmless. The court found that the error was harmless because the State could have established the elements of the crime without admitting the firearm and because a jury could have convicted Rhone without proof of the firearm. (Opinion at 11) Division 2 applied what amounts to a “sufficiency of the evidence” standard, finding that because there was some evidence that Rhone displayed what was or appeared to be a firearm, a jury could have rationally convicted.² But finding that the State presented some evidence to establish the elements of the crime is not the same as finding that “overwhelming untainted evidence” established the elements of the crime.

Furthermore, the State bears the burden of showing that a

² Under the sufficiency of the evidence standard of review, the Court will affirm a conviction if the evidence presented at trial, viewed in the light most favorable to the prosecution, permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

constitutional error was harmless beyond a reasonable doubt. State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551 (2011); State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). By not reviewing the trial transcript to determine whether the overwhelming untainted evidence presented to the jury at trial established Rhone's guilt, this Court relieved the State of its burden of showing that the error in admitting the illegally seized evidence was harmless beyond a reasonable doubt.

Division 2 simply relied on the trial court's written findings of fact, which were based on the testimony of the responding Deputies given at the CrR 3.6 hearing, relating what they were told by the witnesses on the night of the incident. These findings were not based on testimony of the witnesses themselves, and were entered before the witnesses gave their testimony under oath subject to cross examination. It is improper for an appellate court to rely on the findings of fact to determine whether the State has satisfied the "overwhelming untainted evidence" constitutional harmless error test.

And a review of the complete record shows that the

constitutional harmless error was not met.³ It cannot be said, beyond a reasonable doubt, that the jury would have convicted Rhone of robbery with a firearm enhancement had the jury not been shown the firearm. That is because “[p]ersonal reactions to the ownership of guns vary greatly. Many individuals view guns with great abhorrence and fear . . . [others] may react solely to the fact that someone who has committed a crime has such weapons. Any or all of these individuals might believe that defendant was a dangerous individual ... just because he owned guns.” State v. Rupe, 101 Wn.2d 664, 708, 683 P.2d 571 (1984). Thus, the impact of evidence that there was a gun in the car, and the impact of having the actual firearm in the courtroom and shown the jury, cannot be known.

Furthermore, because the items were not suppressed before trial, the State was able to proceed on the charges of unlawful possession of a firearm and unlawful possession of a controlled substance. (CP 34-36) This allowed the State to present evidence that Rhone possessed cocaine and that he had was ineligible to

³ The trial transcripts from Rhone's earlier direct appeal (No. 34063-1-II) were made part of the record in his current appeal after the Court of Appeals granted Rhone's motion to transfer the report of proceedings, and were therefore available for review.

possess a firearm because he had previously been convicted of a “serious” crime.⁴ The State was also able to present testimony about other items found in the Crown Royal bag, and how those items are commonly used by street level crack dealers. (04/29/05 RP 624-25; 05/03/05 RP 852; 05/04/05 RP 947-48)

Evidence of these additional crimes is highly prejudicial: “the risk that a jury will convict for crimes other than those charged – or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment – creates a prejudicial effect[.]” State v. Rivera, 95 Wn. App. 132, 138, 974 P.2d 882 (1999) (quoting Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 651, 136 L. Ed. 2d 574 (1997)).

This problem is vividly illustrated in the fact that the prosecutor continually relied on the existence of an actual firearm to argue that Rhone intended to threaten violence or cause fear, which was required to prove the robbery charge.⁵ (See 05/04/05 RP 934, 939-40, 942, 944, 947-48) And the State was able to paint an extremely negative picture of Rhone to the jury based on the additional facts. For example, the prosecutor told the jury:

Mr. Rhone is the only one who is armed with a

⁴ RCW 69.50.401; RCW 9.41.040.

⁵ See RCW 9A.56.190.

gun. Why? Because he has the drugs and he is going to be dealing. He needs to defend himself. He also needs to intimidate Isaac Miller. All this adds up to you knowing that Mr. Rhone is the bad actor in this case.

(05/04/05 RP 949)

Thus, it is impossible to say that any reasonable jury would have reached the same result if the illegally obtained items, along with the additional charges and incriminating facts that were allowed to be presented in conjunction with those items, were not admitted at trial.

Finally, while the State may not be required to present the actual firearm in order to prove a charge of first degree robbery, the State is required to prove that a defendant is armed with a real firearm for the purposes of the sentence enhancement. The penalty enhancement provision's language "requires the presence of a firearm or deadly weapon *in fact*." State v. Hentz, 99 Wn.2d 538, 543, 663 P.2d 476 (1983) (emphasis in original); see also State v. Fowler, 114 Wn.2d 59, 62, 785 P.2d 808 (1990) (State is required to prove that the gun used was a gun "in fact," rather than "a gunlike but nondeadly object"); RCW 9.94A.533(3); RCW 9.41.010(9). Accordingly, the improper failure to suppress the gun in this case was clearly not harmless as to the firearm

enhancement for the robbery offense.

B. A DEFENDANT CHARGED WITH A CRIME THAT HAS POSSESSION AND DISPLAY OF A FIREARM AS AN ESSENTIAL ELEMENT HAS AUTOMATIC STANDING TO CHALLENGE THE SEARCH AND SEIZURE OF THE FIREARM.

Should this Court accept review on the harmless error issue, this Court may also need to address the State's argument that Rhone does not have standing. In its unpublished opinion, this Court states:

The State argues that Rhone lacked standing to challenge the search as to the conviction for first degree robbery with a firearm enhancement. However, this argument need not be addressed, as we agree with the State that evidence that Rhone possessed an actual firearm is not necessary for the jury to have found that Rhone displayed what appeared to be a firearm.

(Opinion at 10 fn. 10) But the Court should not affirm Rhone's conviction on this alternative ground because Rhone has automatic standing to challenge the search and because the State did not challenge Rhone's standing at the suppression hearing or at trial.

First, a defendant has "automatic standing" to challenge a search or seizure under article 1, § 7 of the Washington State constitution if (1) the offense of which he is charged involves possession as an essential element of the offense and (2) the defendant was in possession of the seized property at the time of

the contested search. State v. Simpson, 95 Wn.2d 170, 180-81, 622 P.2d 1199 (1980).

To convict Rhone of first degree robbery, the State had to prove that he “[d]isplay[ed] what appear[ed] to be a firearm or other deadly weapon[.]” RCW 9A.56.200(1)(a)(ii). As charged and prosecuted in this case, Rhone’s possession and display of an item that appeared to be a firearm is an essential element that the State had to prove. The firearm seized during the illegal search was the item used during the robbery that “appear[ed] to be a firearm,” and Rhone possessed the firearm at the time of the contested search. Therefore, Rhone did have automatic standing to challenge the search of the car and the seizure of the firearm as it applies to the robbery charge.⁶

Nevertheless, a defendant who lacks automatic standing may still possess a legitimate expectation of privacy in the place searched or the thing seized, and on that basis be able to challenge the search or seizure. See United States v. Salvucci, 448 U.S. 83,

⁶ In State v. White, 40 Wn. App. 490, 495, 699 P.2d 239 (1985), Division 2 noted: “[w]hether the offenses in the case before us, which involve the use or display of a firearm, includes possession as one of their essential elements, as understood in State v. Simpson, *supra*, may be subject to some argument.” But the White court did not resolve the question because it found that the facts of that specific case did not meet the Simpson test.

86-87, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980). In Combs v. United States, the Supreme Court remanded for an evidentiary hearing to permit both parties to present evidence on the issue of standing, which respondent government raised for the first time on appeal. 408 U.S. 224, 92 S. Ct. 2284, 33 L. Ed. 2d 308 (1972). The Combs Court observed it was understandable that the defendant did not assert any possessory or proprietary claim to the searched premises because the government did not challenge his standing either at the suppression hearing or at trial. Combs, 408 U.S. at 227. Since the record was “virtually barren of the facts” necessary to determine a privacy interest, the Court remanded the case to permit the trial court to make such a factual determination. Combs, 408 U.S. at 227-28.

In this case, the State raised a challenge to Rhone's standing for the first time in its response brief on appeal. Accordingly, Rhone did not have the motivation or opportunity below to assert a possessory or privacy interest in the searched vehicle. If this Court finds that Rhone does not have automatic standing, and if the Court is inclined to consider whether Rhone had standing to challenge the search, then this case should first be remanded for an evidentiary hearing on the issue of standing.

VI. CONCLUSION

This Court should grant review and reverse the Court of Appeals because the Court misunderstood and misapplied the constitutional harmless error standard when it held that the error in admitting the firearm was harmless, and because the actual constitutional harmless error standard is not met.

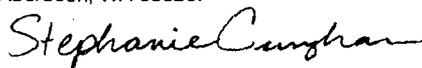
DATED: September 8, 2016



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CERTIFICATE OF MAILING

I certify that on 09/08/2016, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Theodore R. Rhone, #708234, Stafford Creek CC, 191 Constantine Way, Aberdeen, WA 98520.



STEPHANIE C. CUNNINGHAM, WSBA #26436

July 6, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

THEODORE ROOSEVELT RHONE,

Appellant.

No. 46960-0-II

UNPUBLISHED OPINION

SUTTON, J. — Theodore R. Rhone appeals the trial court’s denial of his motion to suppress evidence obtained in a vehicle search related to his 2005 conviction for first degree robbery with a firearm enhancement, possession of a controlled substance with intent to deliver, and possession of a firearm.¹ Rhone argues that on remand for a new suppression hearing, the trial court ignored this court’s prior holding in *State v. Rhone*,² which was the law of the case, that the officer conducted a search incident to arrest, and that the evidence seized in the car should have been suppressed. We hold that the trial court erred in finding that the vehicle search was a search pursuant to a *Terry*³ stop. We also hold that the error was harmless as it relates to the conviction for first degree robbery with a firearm enhancement and that error was not harmless as it relates to

¹ The Washington Supreme Court granted Rhone’s personal restraint petition and remanded to the superior court for reconsideration of the trial court’s suppression order regarding the automobile search in light of *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) and *State v. Patton*, 167 Wn.2d 379, 219 P.3d 651 (2009).

² *State v. Rhone*, noted at 137 Wn. App. 1046, 2007 WL 831725 (2007).

³ *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

the convictions for possession of a controlled substance and possession of a firearm. We vacate these latter two convictions and remand for further proceedings.

FACTS

On May 30, 2003, Pierce County Sheriff's Deputy David Shaffer responded to a call involving an incident at a Jack in the Box restaurant. Workers from the restaurant reported that individuals in a red 1990 T-top Camaro, license plate number 677 HCS, had been at the restaurant on two occasions looking for an employee who owed them money. The report indicated that there were three occupants in the vehicle and that the front passenger was armed with a gun.

Deputy Shaffer recognized the vehicle description and license number as a vehicle he previously had seen at a house located at 10701 S. Tacoma Way. Upon arriving in the area of the house, Deputy Shaffer saw the suspect vehicle. As Deputy Shaffer pulled in behind the vehicle, the passenger door opened and the front passenger, later identified as Theodore Rhone, began to step from the vehicle.

Due to the report that the front passenger was armed with a gun, Deputy Shaffer, who was alone at the time, stepped from his patrol car, drew his weapon, and gave loud verbal commands to Rhone to put his hands where they could be seen. Rhone made eye contact with the deputy, but failed to comply with the deputy's oral commands. Instead, Rhone reached back into the rear interior of the vehicle. Deputy Shaffer feared that Rhone was reaching for a gun and continued to give verbal commands before Rhone eventually complied. Rhone was frisked, handcuffed, and detained in a patrol car by another officer who had just arrived on the scene.

While Deputy Shaffer was dealing with Rhone, the rear passenger of the vehicle, later identified as Phyllis Burg, stated that the individuals in the vehicle had just come back from the

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Jack in the Box. Burg was asked to step from the vehicle and was frisked, handcuffed, and detained by another officer who had arrived on the scene. The driver of the vehicle, later identified as Cortez Brown, was also asked to step from the vehicle and was frisked, handcuffed, and detained by another officer who had arrived on scene.

As Deputy Shaffer approached the vehicle to determine if there was a gun in the vehicle that could pose a threat to law enforcement officers, Burg stated that there was a gun in the car. Deputy Shaffer then entered the vehicle and found a .22 caliber Smith and Wesson revolver in a white plastic bag on the floorboard behind the driver's seat. He also located a white plastic tube containing two pieces of suspected crack cocaine under the driver's seat and a purple Crown Royal bag that contained five bundles of suspected rock cocaine individually wrapped in plastic under the back passenger seat. At the time of this search, all three occupants of the vehicle were being detained in patrol cars.

As the occupants of the vehicle were being detained, Deputy Darin Miller, who had initially also responded to the location of the stop, contacted the Jack in the Box restaurant and spoke with Isaac Miller at approximately 6:00 p.m. Isaac⁴ reported that the occupants of the Camaro came through the drive through claiming that he owed them money. Isaac said that the front seat passenger pointed a gun at him, and he threw what little money he had into the vehicle. Deputy Miller relayed this information to Deputy Shaffer immediately, and Deputy Shaffer arrested all three occupants of the Camaro.

⁴ We refer to Isaac Miller by his first name to avoid any confusion with Deputy Darin Miller, and intend no disrespect.

Rhone was charged with first degree robbery with a firearm enhancement, unlawful possession of a controlled substance with intent to deliver with a firearm enhancement, first degree unlawful possession of a firearm, and bail jumping

Prior to trial, Rhone moved to suppress the evidence seized during the search of the Camaro. The 2005 trial court denied the motion. The trial court concluded that Deputy Shaffer's contact with the vehicle and detention of Rhone was a lawful *Terry* investigatory stop and detention, and that Deputy Shaffer possessed a reasonable concern for his safety and a reasonable suspicion that Rhone was dangerous and may gain access to a weapon. The jury found Rhone guilty of the charges and found that he "possess[ed] . . . a controlled substance with intent to deliver," that he displayed what "appeared to be a firearm" in the commission of a robbery, and that he "[owned or] possess[ed] . . . a firearm" as a previously convicted felon. Clerk's Papers (CP) at 206, 208, 210, 591. The trial court also found him to be a persistent offender and imposed a sentence of life without the possibility of parole.

Rhone appealed the trial court's denial of the motion to suppress. In 2007, this court affirmed the trial court's findings of fact and order denying Rhone's motion to suppress, holding that the search of the vehicle was a valid search incident to arrest because Deputy Shaffer arrested Rhone and the other occupants before the search. *State v. Rhone*, noted at 137 Wn. App. 1046, 2007 WL 831725 at *4 (2007).⁵

⁵ Our Supreme Court accepted review of this court's decision of a jury voir dire issue on Rhone's direct appeal and affirmed this court's decision on that issue and affirmed his conviction. *State v. Rhone*, 168 Wn.2d 645, 658, 229 P.3d 752 (2010).

On January 14, 2013, Rhone filed a personal restraint petition, asserting that the vehicle search was unlawful under *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). Our Supreme Court granted the petition and on April 2, 2014, the court remanded the suppression order for reconsideration in light of *Gant* and *State v. Patton*, 167 Wn.2d 379, 219 P.3d 651 (2009).

On remand, the trial court adopted the 2005 findings and denied Rhone's motion to suppress because it concluded that the search was an investigative stop and detention under *Terry*. Rhone appeals.

ANALYSIS

I. LAW OF THE CASE

Rhone argues that the trial court on remand violated the law of the case doctrine when it ignored the legal rulings made by this court in his direct appeal. We agree.

The law of the case doctrine provides that once there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation. *State v. Schwab*, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008). The doctrine ““seeks to promote finality and efficiency in the judicial process.”” *Schwab*, 163 Wn.2d at 672 (quoting *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005)). However, an appellate court may, at the instance of a party, review the propriety of an earlier decision of the appellate court in the same case. RAP 2.5(c)(2).

Neither Rhone nor the State advised the trial court on remand of this court's 2007 decision in *Rhone*, 2007 WL 831725. While a party generally waives the right to appeal an error unless

preserved at trial, because the State requests that we reconsider the 2007 decision under RAP 2.5(c)(2),⁶ we exercise our discretion to reach this error. RAP 2.5(a).

On direct appeal of Rhone's convictions, we held that the search of the vehicle was a search incident to a valid arrest because Deputy Schaffer had probable cause to believe that the Camaro's occupants had been involved in at least a second degree assault or an attempted robbery. *Rhone*, 2007 WL 831725 at *5. We further held that an objective person would believe that he or she was being detained indefinitely when they were removed from the vehicle at gunpoint, frisked, handcuffed, and placed in a police car. *Rhone*, 2007 WL 831725 at *5.

The unchallenged findings of fact do not support the conclusion of law that Rhone was merely detained by Deputy Shaffer during a *Terry* investigatory stop. Because the 2005 facts were adopted by the trial court on remand and are verities on appeal,⁷ our analysis is unaffected. Thus, we hold that the law of the case must be followed and we reiterate that the search of the vehicle was a search incident to arrest.

II. VEHICLE SEARCH

A. STANDARD OF REVIEW

We review a trial court's ruling on a motion to suppress evidence to determine whether substantial evidence supports the trial court's findings of fact and whether those findings, in turn, support the trial court's conclusions of law. *State v. Russell*, 180 Wn.2d 860, 866, 330 P.3d 151

⁶ The appellate court may at the insistence of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would be best served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review. RAP 2.5(c)(2).

⁷ *State v. Bonds*, 174 Wn. App. 553, 563, 299 P.3d 663 (2013).

(2014). Unchallenged findings of fact are verities on appeal. *State v. Bonds*, 174 Wn. App. 553, 563, 299 P.3d 663 (2013). Substantial evidence is evidence that is sufficient “to persuade a fair-minded person of the truth of the stated premise.” *Russell*, 180 Wn.2d at 866-67 (quoting *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009)). We review questions of law relating to the suppression of evidence de novo. *State v. Parris*, 163 Wn. App. 110, 116, 259 P.3d 331 (2011).

B. MOTION TO SUPPRESS

Rhone argues that the trial court erred in denying his motion to suppress the evidence obtained from the search of the vehicle because the search was conducted incident to arrest. We agree.

Generally, a search warrant is required unless one of the narrowly construed exceptions to the warrant requirement is met. *State v. Ladson*, 138 Wn.2d 343, 356, 979 P.2d 833 (1999). The scope of a vehicle search incident to arrest must be narrowly tailored to increase officer safety and decrease the risk of destruction of evidence of the crime. *State v. Valdez*, 167 Wn.2d 761, 769, 224 P.3d 751, 755 (2009).

In *Gant*, the United States Supreme Court held that a warrantless automobile search incident to arrest of a recent occupant of the vehicle is proper under the Fourth Amendment to the United States Constitution only when (1) the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or (2) it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. 556 U.S. at 332. In *Patton*, our Supreme Court held that under the first of these exceptions, an automobile search incident to arrest is justified only if the arrestee is within reaching distance of the passenger compartment at the time of the search, and the search is necessary for officer safety or to secure evidence of the crime of

arrest that could be concealed or destroyed. 167 Wn.2d at 383. However, in *State v. Snapp* our Supreme Court held that the second of these exceptions is not permissible under article I, section 7 of the Washington Constitution. 174 Wn.2d 177, 181, 275 P.3d 289 (2012).

Thus, a vehicle search incident to a recent occupant's arrest is not authorized in Washington after the arrestee has been secured and cannot access the interior of the vehicle. *Snapp*, 174 Wn.2d at 188. To hold otherwise would “untether the [vehicle search incident to arrest] rule from the justifications underlying . . . the exception.” *Snapp*, 174 Wn.2d at 188 (alteration in original) (quoting *Gant*, 556 U.S. at 343). “[T]he search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search.” *Snapp*, 174 Wn.2d at 189 (quoting *Patton*, 167 Wn.2d at 394-95).⁸

As discussed above, the search of the vehicle was a search incident to arrest because Rhone was handcuffed and detained in a patrol car at the time of the search. However under *Gant* and *Patton*, the search of the vehicle was not lawful because Rhone had been secured, he could not access the interior of the vehicle, he posed no safety risk, and the vehicle contained no evidence that could be concealed or destroyed. 556 U.S. at 332; 167 Wn.2d at 383.

⁸ The State cites *State v. Chang*, 147 Wn. App. 490, 496, 195 P.3d 1008 (2008), to support its position that an officer is permitted to conduct a vehicle sweep for weapons. But *Chang* was decided before *Gant*, 556 U.S. 332, *Patton*, 167 Wn.2d at 386, and *Snapp*, 174 Wn.2d 177. Therefore, the *Chang* holding no longer applies.

C. HARMLESS ERROR

The State argues that any failure to suppress the evidence here is harmless because Rhone's 2005 conviction does not depend on proof that he used an actual firearm. We disagree that the failure to suppress evidence is harmless with respect to his convictions for possession of a controlled substance and possession of a firearm but agree that any failure to suppress the evidence is harmless with respect to Rhone's conviction for first degree robbery with a firearm enhancement.

Constitutional errors may be so insignificant as to be harmless. *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). A constitutional error is harmless if the appellate court is assured beyond a reasonable doubt that the jury verdict cannot be attributed to the error. *State v. Lui*, 179 Wn.2d 457, 495, 315 P.3d 493, *cert. denied*, 134 S. Ct. 2842 (2014). Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. *Coristine*, 177 Wn.2d at 380. This court uses the “overwhelming untainted evidence” test in its harmless error analysis. *Coristine*, 177 Wn.2d at 391 (quoting *State v. Guloy*, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985)). The State must show that the error was not plausibly relevant to the verdict and that the error could not plausibly have been the cause of a guilty verdict from an honest, fair-minded, and reasonable jury. *Coristine*, 177 Wn.2d at 393.

1. Possession of a Controlled Substance with Intent to Deliver

The jury instructions required the jury to find that Rhone possessed a controlled substance with the intent to deliver. Because the unchallenged findings of fact do not contain any independent indication that Rhone was in possession of suspected cocaine beyond the evidence recovered in the search, the State fails to establish that the untainted evidence can support a finding

that Rhone possessed cocaine with the intent to deliver. Therefore, we hold that the trial court's error was not harmless for this conviction.

2. Unlawful Possession of a Firearm⁹

The jury instructions required that the jury find that Rhone had previously been convicted of a felony and knowingly owned or had actual or constructive possession of a firearm. Again, because the unchallenged findings of fact include only Miller's statement that the front seat passenger pointed a gun at him when the Camaro proceeded through the drive through and Burg's statement that there was a gun in the car, the State fails to establish that the untainted evidence can support the finding that Rhone possessed an actual firearm. Therefore, we hold that the trial court's error was not harmless for this conviction.

3. First Degree Robbery with a Firearm Enhancement¹⁰

The jury instructions required the jury to find only that Rhone displayed what appeared to be a firearm in order to convict for first degree robbery, not that he possessed an actual firearm. The unchallenged findings of fact include Miller's statement that the front seat passenger pointed a gun at him when the Camaro proceeded through the drive through, Burg's statements that there was a gun in the car and that they had just returned from the Jack in the Box, and that Rhone exited

⁹ The State argues that Rhone has failed to perfect the record because he did not challenge the conviction for unlawful possession of a firearm in his direct appeal. However, this appeal is a direct appeal of the suppression hearing on remand and the procedural posture of the case has changed.

¹⁰ The State argues that Rhone lacked standing to challenge the search as to the conviction for first degree robbery with a firearm enhancement. However, this argument need not be addressed, as we agree with the State that evidence that Rhone possessed an actual firearm is not necessary for the jury to have found that Rhone displayed what appeared to be a firearm.

from the passenger door of the vehicle. The State meets its burden and establishes that the untainted evidence necessarily supports a finding that Rhone displayed what appeared to be a firearm. Thus, the admission of the weapon is harmless error as it relates to Rhone's conviction for first degree robbery with a firearm enhancement.

III. STATEMENT OF ADDITIONAL GROUNDS (SAG)

In his SAG, Rhone claims that (1) the trial court on remand did not rule consistently with *Gant* and *Patton* and thus, the trial court abused its discretion, demonstrated bias, violated the appearance of fairness doctrine, and violated his due process¹¹ and equal protection¹² rights and (2) the State should be judicially estopped from taking an inconsistent position when they conceded to the Washington Supreme Court in his direct appeal that the stop was a *Terry* stop.¹³

A. APPEARANCE OF FAIRNESS

“Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.” *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995) (quoting former CJC 3(C)(1) (1988)). But our Supreme Court has held that this doctrine does not implicate constitutional rights. *State v. Toliias*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998); see also

¹¹ No state shall make or enforce any law which shall deprive any person of life, liberty, or property, without due process of law. U.S. Const. amend. XIV.

¹² No state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV.

¹³ Rhone also claims that the trial court abused its discretion by not suppressing all evidence seized in a warrantless automobile search by Deputy Shaffer and in failing to follow the directions from our Supreme Court on remand. These claims are analyzed above.

State v. Morgensen, 148 Wn. App. 81, 91, 197 P.3d 715 (2008) (applying waiver to defendant's appearance of fairness claim); *City of Bellevue v. King County Boundary Review Bd.*, 90 Wn.2d 856, 863, 586 P.2d 470 (1978) ("Our appearance of fairness doctrine, though related to concerns dealing with due process considerations, is not constitutionally based."). Consequentially, Rhone waived this claim under RAP 2.5(a)¹⁴ by failing to raise it with the trial court.

B. JUDICIAL ESTOPPEL

Judicial estoppel prevents a party from taking inconsistent factual positions from one proceeding to the next but does not preclude inconsistent legal positions. *State v. Sweany*, 162 Wn. App. 223, 228-29, 256 P.3d 1230 (2011). The State has maintained its factual position throughout the proceedings and Rhone assigns no error to the findings of fact. Judicial estoppel does not preclude the State on remand from arguing a different conclusion since the law has been clarified since Rhone's direct appeal, the trial court entered new findings of fact and conclusions of law, and the procedural posture of the case has changed.

CONCLUSION

We hold that the trial court erred in denying the motion to suppress the evidence obtained in a search incident to arrest and that the motion to suppress should have been granted under *Gant* and *Patton*. We hold that the error is harmless as to Rhone's conviction for first degree robbery with a firearm enhancement, but we hold that the error is not harmless as to Rhone's convictions for possession of a controlled substance and possession of a firearm. We affirm Rhone's conviction for first degree robbery with a firearm enhancement, vacate his convictions for

¹⁴ The appellate court may refuse to review any claim of error which was not raised in the trial court, with few exceptions, including manifest errors affecting a constitutional right. RAP 2.5(a).

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possession of a controlled substance and possession of a firearm, and remand for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.
SUTTON, J.

We concur:

Bjorge, C.J.
BJORGE, C.J.

Maxa, J.
MAXA, J.

CUNNINGHAM LAW OFFICE

September 08, 2016 - 10:53 AM

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