IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON Respondent, v. IRVIN DALE CARTER, JR., Appellant.	No. 38320-9-II UNPUBLISHED OPINION

Hunt, J. – Irvin Dale Carter, Jr., appeals his jury convictions for unlawful possession of a firearm and first degree murder with a firearm sentencing enhancement. He argues that (1) the trial court erred when it refused to suppress ammunition that an officer found in Carter's pants pockets while investigating an earlier shooting in which Carter was the shooting victim; and (2) assuming this ammunition evidence was inadmissible, there was insufficient evidence to support the convictions because the only witness who linked Carter to these crimes was not credible. We affirm.

FACTS

I. Background

A. May 14, 2006 Shooting

On May 14, 2006, a Tacoma Police dispatcher reported that Alvena Parker had called 911 to report that she had accidentally shot her friend in the stomach. Irvin Dale Carter, Jr., the

shooting victim, told the officers responding to Carter's home that he had been shot in the stomach while standing on his porch; but he refused to identify who had shot him. As the paramedics cut off Carter's shirts, the responding officer collected them as evidence; each shirt displayed a bullet hole, burn marks, and blood.

In the hallway, the officers found a spent lead bullet, which was not deformed; it had a cloth imprint on the tip, which could have occurred had the bullet hit cloth at a high speed, and fibers on the bullet that matched one of the shirts Carter had been wearing. The officers were unable to locate Parker, and they did not locate the gun that shot Carter.

Carter was transported to the hospital for treatment. As the hospital staff stabilized Carter, they undressed him and handed his clothing to Tacoma Police Officer Michael Rowbottom[1] to preserve as evidence. In gunshot situations, it was standard procedure for the responding officers to seize the victim's clothing. Carter, who was conscious and able to talk at the time, did not object.

Even though Rowbottom did not consider Carter to be a suspect, Rowbottom was required to search the clothing before he could place it in the police property room. Although Carter was conscious, Rowbottom did not ask Carter for permission to search his clothing because medical staff was trying to stabilize him; nor did Rowbottom ask Carter if he wanted to waive an inventory search. Accordingly, before bagging the clothing, Rowbottom searched it to ensure that it did not contain flammables, needles, firearms, ammunition, or other items that could potentially harm someone handling the clothing.

[1] Rowbottom did not call for a search warrant because he did not "believe [he] needed a warrant to take the victim's clothing." 4 Report of Proceedings (Apr. 14, 2008) at 226.

Rowbottom was also looking for Carter's identification. Inside the pants pockets, Rowbottom found Carter's wallet, which contained Carter's Washington identification card and seven rounds of unspent .38 caliber cartridges, both "round nose lead" and "semi-wad cutter"[2] types. 5 Report of Proceedings (RP) (July 14, 2008) at 384. Rowbottom later used the card to provide the hospital staff with Carter's identifying information.

B. September 7, 2006 Murder

At about 9:30 pm on September 7, 2006, Carter arrived at Crystal Taylor's and asked to speak to Julius Williams. Williams and Carter went outside and talked for a few minutes. Williams came back inside, told Taylor that he would join her at the club later, and left the apartment with Carter around 10:00 pm. Taylor believed that Williams seemed upset after talking with Carter. She went to the club alone, but Williams never arrived.

Between 10:00 and 11:00 pm, Jelvis Sherman was walking home while drinking a beer; he had been smoking marijuana all day and had earlier consumed two or three beers. As he approached Bryant Elementary School, he found a "blunt"[3] in his pocket; stopped to smoke it; and saw a man, later identified as Carter, standing near the school. A second man, Chester Anthony Lyons, an apparent crack smoker, approached Carter; Sherman believed that Carter and Lyons were smoking crack.

A third man, who looked like a drug dealer, soon joined Carter and Lyons, talked with the other two men for a few minutes, and then pulled out a "pistol." 6 RP (July 15, 2008) at 483.

[2] A "semi-wad cutter" is a truncated bullet with a flat surface, used in target practice because it produces a clean hole in the paper target. 5 RP (July 14, 2008) at 384.

[3] A "blunt" is a cigar with marijuana inside rather than tobacco. 6 RP (July 15, 2008) at 479.

Sherman heard Carter say, "'I'm going to pop him.'" 6 RP (July 15, 2008) at 483. When Lyons tried to take the gun, Carter resisted, stating, "'No, that's my job.'" 6 RP (July 15, 2008) at 565. The third man told Lyons to go look for the police; Lyons walked away and then returned.

A short time later, Williams walked past Sherman, looked at Sherman, and begin arguing with the three men. Sherman heard a gunshot and looked up to see Carter shoot Williams twice while Williams was on the ground. The third man gave one of the other men "a sack of dope" and left. 6 RP (July 15, 2008) at 489. When the other men left, Sherman went back to his brother's house. He did not report the murder.

Josh Read, who lived near Bryant Elementary School, also heard four to six gunshots at approximately 11:15 to 11:20 pm on September 7; he called the police immediately. Responding at about 11:40 pm, Officer Greg Hopkins saw Lyons and another man[4] near the school. As the other man walked away, Hopkins contacted Lyons and arrested him on an outstanding warrant and for illegal drug activity.

After the clubs closed around 1:45 am on September 8, Taylor looked unsuccessfully for Williams at her apartment and then drove to Carter's house to see if Williams was there. Carter told Taylor that he and Williams had parted at about "nine-something." IV RP (July 10, 2008) at 269. Taylor drove around the area near Bryant Elementary School, which Williams sometimes frequented; she did not find him.

At about 6:00 am on September 8, Brian Meyers found Williams' body on the sidewalk in front of the school. Williams had been shot four times in the back and once in the right side of his

[4] Hopkins never identified this second man.

abdomen. The medical examiner recovered one round nose bullet and one semi-wad cutter bullet from Williams' body.

About a month later, while investigating another crime in the same area, officers learned that Sherman had information about Williams' shooting, interviewed him, and showed him several photographic lineups. Sherman identified Carter and Lyons as the first two men he had seen at the school the night of the shooting.

After Carter became a suspect, the State tested the spent bullet and the cartridges from the May 2006 shooting. The bullets from Williams' body and the spent bullet from Carter's hallway had been fired by the same gun. Additionally, the bullets from Williams' body and the cartridges Rowbottom had found in Carter's pockets were the same caliber and types, and they shared several similar identifying factors.

II. Procedure

The State charged Carter with first degree murder with a firearm sentencing enhancement and with second degree unlawful possession of a firearm. The State also charged Lyons with first degree murder. Carter and Lyons went to trial together before a jury.

A. Motion To Suppress and First Trial

Before trial, Carter moved to suppress the cartridges Rowbottom had found in his (Carter's) pockets. Carter argued that Rowbottom had unlawfully seized and searched his (Carter's) clothing at the hospital and that no exception to the search warrant requirement applied. During the suppression hearing, Rowbottom testified as described above.

The trial court denied the motion to suppress and gave the following oral ruling:

> But this is one of those areas where the Court has got to exercise, I think, a

> large degree of common sense as opposed to being hypertechnical. And you have to look at it from the citizen's point of view of what is a reasonable expectation the citizen has when they call in firefighters and, by necessity, police officers and then those people are confronted with gunshot wounds and the like.
>
> And what is the expectation the public has for its police officers? And I think you have to give the police officer some degree of leeway, and I agree there are lines to be drawn, but I don't think in this particular circumstance the line that's drawn by the police, that we are going to have this level of intervention, is an unreasonable one.
>
> There is community caretaking issues involved. There is exigency involved. There is a degree of implied consent and a degree of public setting involved that mean that the officers ought to be able to assess, to safeguard the property, to make an initial determination as to what is going on and to protect the people involved in the hospital and the firefighters.
>
> I just think that while I guess the alternative would be for you to say the police need to stop and not do anything if Mr. Carter tells them to stop and not go any further, that's unreasonable, given the way the case came about. That might be fine if Mr. Carter has checked himself into the hospital on his own and presented himself to the hospital, but he has asked or somebody has asked for intervention from firefighters and police, and they need to carry out their duties up to a reasonable degree.
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> And then so that leaves the police with having to gather the material up, put it somewhere, having not inventoried it, having not checked it for possible weapons or dangerous implementations and try to get a search warrant, which ought not to be the case and is totally impractical under the circumstances.
>
> Now, if you have locked boxes, briefcases, things like that, certainly, you ought to take the time because that's a step removed from what we have got in this circumstance.
>
> So I don't think it was obligatory for the police to either abandon the situation or to get a warrant under these circumstances.

4 RP (Apr. 14, 2008) at 249-50.

The jury found Lyons not guilty of first degree murder and of the lesser included offense of second degree murder. But it was unable to reach a verdict on Carter's charges. The trial court declared a mistrial, and the State elected to retry Carter on the original charges.

B. Second Trial

At Carter's retrial, the State's witnesses testified as described above. The trial court

denied Carter's renewed motion to suppress the cartridges. Sherman also testified that (1) he had suffered a head injury when he was struck by a car in 2004 and had been in a coma for several months; (2) he had been hit by another car a few months after he came out of his coma; (3) his injuries affected his ability to remember and to perceive things at the time of the murder and at the time of trial; (4) at the time of the murder, he was taking methadone for his pain (which made him "high"), "Anaproxy" or "Trazodone" for brain swelling, and a sleeping medication; (5) he smoked powerful marijuana daily; and (6) he regularly consumed large quantities of beer.[5] 6 RP (July 15, 2008) at 495-96, 547.

Lyons and Hopkins testified for the defense.[6] Hopkins testified as described above. Lyons testified that (1) he had been at the school on September 7, 2006, to buy drugs; (2) he had seen several people, including Williams, at the school that night; (3) he did not know Carter and had not seen him the night of the shooting; (4) he (Lyons) had seen an unknown man (not Carter) hand a gun or a paper bag, which he (Lyons) assumed contained a gun, to one of the other men; (5) he had then heard the men arguing about someone bringing the wrong gun; and (6) he had walked away from the school and then heard gunshots about 15 minutes later. Carter did not testify.

The jury found Carter guilty of first degree murder with a firearm sentencing enhancement and second degree unlawful possession of a firearm. Carter appeals.

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[5] The record does not reflect that Carter challenged Sherman's competency.

[6] Carter's work supervisor, Ben Cruz, testified about Carter's job and Carter's appearance at the time of the murder.

ANALYSIS

I. Motion To Suppress

Carter first argues that the trial court erred when it denied his motion to suppress the cartridges Rowbottom found in his (Carter's) pants at the hospital.[7] We disagree.

A. Standard of Review

Carter challenges only the trial court's legal conclusions and the legal standards the trial court applied.[8] We review the trial court's conclusions of law de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996). We may affirm the trial court's ruling on any ground the record supports. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution,[9] warrantless seizures and searches are per se unreasonable unless they fall within narrowly drawn exceptions to the warrant requirement,[10] which "the State bears

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[7] Carter notes that the trial court has never entered written findings of fact and conclusions of law memorializing its suppression ruling as required by CrR 3.6. But he does not argue that the trial court's oral ruling is insufficient for our review. Nor do we find the trial court's oral ruling insufficient.

[8] Carter titles one of his subheadings, "The trial court's findings of fact are unsupported by the facts in the record and the findings of fact do not support the trial court's conclusions of law." Br. of Appellant at 15. But he later asserts that the facts are not disputed, and he does not assign error to any factual findings.

[9] Carter argues that Rowbottom's seizure and search of the pants violated both the federal and state constitutions and that the state constitution offers greater protection. But he fails to articulate how federal and state standards differ in this context. Accordingly, we do not address his state and federal claims separately. *See* RAP 10.3(a)(6)

[10] *State v. Johnson*, 104 Wn. App. 409, 414, 16 P.3d 680, *review denied*, 143 Wn.2d 1024 (2001).

the burden of showing." *State v. Kull*, 155 Wn.2d 80, 85, 118 P.3d 307 (2005). "Exceptions to the warrant requirement fall into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry*[11] investigative stops." *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999).

B. Lawful Seizure of Carter's Pants

We first address whether Rowbottom's warrantless seizure of Carter's pants was otherwise lawful. We hold that the plain view or open view doctrine justified Rowbottom's seizure of the pants.

Under the plain view doctrine, an officer may lawfully seize an object if the officer is lawfully present in a constitutionally protected area and the object's incriminating nature is immediately apparent. *State v. Hudson*, 124 Wn.2d 107, 114, 874 P.2d 160 (1994); *State v. Kennedy*, 107 Wn.2d 1, 9, 726 P.2d 445 (1986); *State v. Gibson*, 152 Wn. App. 945, 954, 219 P.3d 964 (2009). Under the open view doctrine, an officer may lawfully seize an object if the officer detects the object from a vantage point that is not constitutionally protected and the detected object is immediately recognizable as incriminating evidence. *Kennedy*, 107 Wn.2d at 10; *Gibson*, 152 Wn. App. at 955. Objects are immediately recognizable as incriminating evidence when, considering the surrounding facts and circumstances, the police can reasonably conclude they have evidence before them. *Hudson*, 124 Wn.2d at 118.

Regardless of whether the hospital emergency room was a constitutionally protected area, Carter does not assert that Rowbottom was not lawfully present.[12] Instead, Carter contends that

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

the evidentiary nature of the pants was not immediately apparent because Carter had been shot in abdomen and the bullet holes were in his shirt, not his pants. We disagree. Rowbottom could have reasonably concluded that the pants had evidentiary value because they could provide additional evidence of the shooting, such as gun powder residue, even in the absence of bullet holes. Accordingly, Rowbottom's seizure of the pants was lawful.

And because Rowbottom then discovered the cartridges in the pants pockets while conducting a lawful inventory search,[13] the trial court did not err when it denied Carter's motion to suppress and admitted the cartridges.[14]

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[12] Although not clearly articulated, to the extent Carter also argues that Rowbottom's seizure violated his (Carter's) reasonable expectation of privacy in his pants, that argument would fail because Carter did not have a reasonable expectation of privacy in his publically-worn bloody clothing, especially when he was a gunshot victim transported to a hospital for medical treatment. *See United States v. Davis*, 657 F. Supp. 2d 630, 637-38 (D. Md. 2009) (plain view doctrine justified law enforcement officer's seizure of bloody clothing from shelf under shooting victim's bed; the bloody clothing later supplied DNA used to implicate shooting victim in another crime); *People v. Sutherland*, 92 Ill. App. 3d 338, 415 N.E.2d 1267, 1271 (1980) (police lawfully obtained shooting victim's clothing from hospital; it was common practice for police to inventory clothing of gunshot wound victims and the shooting victim did not have a reasonable expectation of privacy under the circumstances); *see also State v. Smith*, 88 Wn.2d 127, 139, 559 P.2d 970 (patient has no reasonable expectation of privacy in clothing turned over to hospital personnel without restrictions and hospital personnel consented to search of clothing), *cert. denied*, 434 U.S. 876 (1977).

[13] Washington courts regularly uphold inventory searches when the police conduct such searches according to standardized police procedures that do not give excessive discretion to the police officers and when the search is not a pretext for a general exploratory search that would otherwise require a warrant. *See State v. White*, 135 Wn.2d 761, 770, 958 P.2d 982 (1998); *State v. Smith*, 76 Wn. App. 9, 14, 882 P.2d 190 (1994), *review denied*, 126 Wn.2d 1003 (1995). Rowbottom examined Carter's pants pockets to ensure that there was nothing harmful and because such a search was required before he could put the evidence in the property room. The record supports the trial court's conclusion that this was a proper inventory search.

[14] Because we hold that Rowbottom's seizure of the pants and his subsequent inventory search of the pockets were lawful, we do not reach Carter's other arguments addressing (1) exigent

II. Sufficient Evidence

Carter next argues that without the cartridges from his pants pockets, the remaining evidence was insufficient to convict him because the only evidence that connected him to the murder was Sherman's testimony, which was not credible in light of his head injuries and drug and alcohol use and because some of Sherman's testimony was internally inconsistent or contradicted by other witnesses.[15] This argument fails for two reasons.

First, we hold above that the trial court properly admitted the cartridges, and Carter does not argue that there was insufficient evidence if the trial court properly admitted this evidence. Second, Carter bases his insufficiency argument on Sherman's credibility and the weight of his testimony in light of other conflicting evidence. But we do not review credibility and weight issues when evaluating sufficiency arguments.[16] *State v. Thomas*, 150 Wn.2d 821, 874-75, 83

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circumstances, (2) the community caretaking and emergency doctrines, (3) consent, and (4) abandonment. In addition, because the seizure and search fall under well established exceptions to the search warrant requirement, we do not address Carter's argument that the trial court applied the wrong standard when it determined that the search was "reasonable." Br. of Appellant at 30.

[15] For example, Taylor's and Sherman's descriptions of Carter's clothing on the night of the shooting differed, and the police did not recover from Carter's residence some of the items of clothing that Sherman had described. Sherman also admitted that he had, at times, confused what he had seen when he witnessed this shooting with another shooting he had witnessed in California. Sherman's descriptions of the shooter and many of the specifics about the shooting also changed over time.

[16] Citing *State v. Smith*, 130 Wn.2d 215, 227, 922 P.2d 811 (1996), Carter asserts that because this case rested on the jury's belief or disbelief of Sherman's testimony, Sherman's credibility is subject to close scrutiny. But *Smith* addressed whether the trial court denied a defendant's due process rights by limiting his cross-examination of a key witness. *Smith*, 130 Wn.2d at 227. *Smith* does not hold that we must closely evaluate a witness's credibility in a challenge to the sufficiency of the evidence.

P.3d 970 (2004) (credibility and weight determinations are for the trier of fact and are not subject to review on appeal) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004).

We affirm.

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 pursuant to RCW 2.06.040, it is so ordered.

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Hunt, J.

We concur:

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Van Deren, C.J.

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Penoyar, J.