DIVISION ONE
FILED: 6/6/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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| STATE OF ARIZONA, | ) | 1 CA-CR 12-0053 |
| | ) | |
| Appellee, | ) | DEPARTMENT A |
| | ) | |
| v. | ) | **MEMORANDUM DECISION** |
| | ) | (Not for Publication – |
| LOCY MENDOZA SMITH, | ) | Rule 111, Rules of the |
| | ) | Arizona Supreme Court) |
| Appellant. | ) | |
| | ) | |

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-130766-001

The Honorable Joseph C. Welty, Judge

**AFFIRMED**

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Thomas C. Horne, Attorney General — Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals Section
and Robert A. Walsh, Assistant Attorney General
Attorneys for Appellee

Janelle A. McEachern — Chandler
Attorney for Appellant

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**W I N T H R O P**, Chief Judge

**¶1** Locy Mendoza Smith ("Appellant") appeals his convictions for second degree murder and abandonment or concealment of a dead body. He challenges the court's denial of

his motion to suppress evidence police obtained during a search of his residence. For the reasons that follow, we affirm.

## BACKGROUND[1]

**¶2** On June 9, 2010, Glendale police officers discovered the victim's body in the trunk of his car, which was parked in front of a vacant home. The victim had been fatally shot in the head and neck. Upon investigation, including an interview with Appellant, detectives learned that Appellant and the victim were friends who operated a marijuana trafficking business. They also learned that Appellant and the victim had met to conduct a marijuana transaction at Appellant's home on June 6, 2010. The victim's girlfriend informed detectives that Appellant was the last person known to have been with the victim. A detective ("Detective D") obtained a warrant to search Appellant's home for evidence related to illegal marijuana trafficking activity.

**¶3** As police officers executed the warrant, they observed what appeared to be a bullet strike in a floor tile in the interior entryway, and they found two loaded gun magazines on a closet shelf in the master bedroom. They also observed a freshly painted and patched wall by the interior entryway and what appeared to be blood drops on the baseboards and blood spatter on an adjacent wall. To determine whether the drops

[1] We view the facts in the light most favorable to supporting Appellant's convictions. *See State v. Girdler,* 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983).

were actually blood, a phenolphthalein test was conducted at the search site. The test results were positive for blood, and Detective D terminated the search while he sought an amended warrant to expand the search's scope to include evidence of the victim's homicide. In the probable cause statement of his affidavit requesting the amended warrant, Detective D included the phenolphthalein test results in addition to the observations regarding the loaded gun magazines, the bullet strike in the floor tile, and the freshly painted and repaired wall.

**¶4** After the detective obtained the amended warrant, police officers continued their search of Appellant's residence. Appellant was arrested, and during a police interview, he admitted shooting and killing the victim during an argument regarding finances and a potential marijuana transaction. Appellant also admitted cleaning the house with bleach, picking up projectile fragments, and patching the wall after the murder. Additionally, he admitted disposing of the victim's wallet, the victim's cell phone, and two guns, and placing the victim's body in the car trunk. The State charged Appellant with first degree murder and abandonment or concealment of a dead body.

**¶5** Appellant moved to suppress the blood evidence and evidence subsequently seized during the second search. He argued the blood evidence was obtained in violation of his Fourth Amendment rights because that evidence was not within the

scope of the first search warrant.[2] In response, the State argued the blood evidence was in "plain view" during the first warranted search; therefore, the evidence was not unconstitutionally obtained. After holding an evidentiary hearing, the court denied the motion to suppress. It concluded a second warrant was not required before the police observed the blood drops because the drops were in plain view – and their evidentiary value was immediately apparent – while police were lawfully in Appellant's home pursuant to the first warrant. The court further determined, however, that the phenolphthalein test was an unconstitutional search. Nonetheless, the court ultimately denied the suppression motion after concluding that, if the test results were excised from the affidavit in support of the amended search warrant, the remaining facts contained sufficient probable cause to support the second warrant.[3] The court also found the phenolphthalein test results were admissible because they "were ultimately inevitably discovered."[4]

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[2] Although Appellant did not specifically identify the subsequently seized evidence, he argued it was inadmissible as "fruit of the poisonous tree."

[3] *See State v. Gulbrandson*, 184 Ariz. 46, 58, 906 P.2d 579, 591 (1995) ("The proper method for determining the validity of the search . . . is to excise the illegally obtained information from the affidavit and then determine whether the remaining information is sufficient to establish probable cause.").

[4] *See State v. Paxton*, 186 Ariz. 580, 584, 925 P.2d 721, 725 (App. 1996) ("Evidence obtained in violation of the Fourth

**¶6** The matter proceeded to trial, and Appellant testified. The jury failed to unanimously agree on a verdict for the first degree murder charge but returned a guilty verdict on the lesser-included offense of second degree murder. The jury also found Appellant guilty of abandonment or concealment of a body. The court sentenced Appellant to consecutive terms of imprisonment totaling twenty-four years.

**¶7** Appellant timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes sections 12-120.21(A)(1) (West 2013),[5] 13-4031, and 13-4033(A).

**ANALYSIS**

**¶8** Appellant argues the court erred in denying the motion to suppress because the blood evidence was not in plain view when police were executing the first warrant. Specifically, Appellant contends the blood drops did not immediately appear to be incriminating when officers first observed them.

**¶9** In reviewing the trial court's denial of a motion to suppress, we review only evidence submitted at the suppression hearing, and we view that evidence in the light most favorable

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Amendment need not be suppressed when that evidence would inevitably have been discovered by lawful means." (citation omitted)).

[5] Absent material revisions to a statute after the date of an alleged offense, we cite the statute's current version.

to upholding the court's ruling. *State v. Box*, 205 Ariz. 492, 493, ¶ 2, 73 P.3d 623, 624 (App. 2003). We will not reverse a trial court's ruling on a motion to suppress absent a clear abuse of discretion. *State v. Apelt*, 176 Ariz. 349, 363, 861 P.2d 634, 648 (1993). Although we defer to the trial court's factual determinations, we review *de novo* its ultimate legal conclusion. *Box*, 205 Ariz. at 495, ¶ 7, 73 P.3d at 626.

**¶10** As an exception to the Fourth Amendment's warrant requirement, the plain view doctrine allows law enforcement officers who "are authorized to be where they are . . . [to] seize any item in plain view if its evidentiary value is at once apparent." *State v. DeCamp*, 197 Ariz. 36, 39, ¶ 14, 3 P.3d 956, 959 (App. 1999); *accord State v. Warness*, 26 Ariz. App. 359, 360, 548 P.2d 853, 854 (1976). Appellant does not argue that police officers were unauthorized to be in his home when they first observed the blood evidence. Instead, he only argues that the evidentiary value of the evidence was not immediately apparent. We disagree.

**¶11** To satisfy the "immediately apparent" prong, an officer is not required to know with certainty that the item in question is contraband or evidence of a crime; rather, there must be "probable cause to associate the property with criminal activity." *Payton v. New York,* 445 U.S. 573, 587 (1980), *quoted in Texas v. Brown*, 460 U.S. 730, 741-42 (1983). An officer's

determination of probable cause "does not demand any showing that such a belief be correct or more likely true than false. A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required." *Brown*, 460 U.S. at 742 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

**¶12** Detective D testified at the evidentiary hearing that "items believed to be blood were found inside the living room entryway area." Evidence at the hearing also showed that Detective D was aware Appellant was the last confirmed person to see the victim alive. The evidence further established that the victim's girlfriend last spoke to the victim by phone after he drove his car – the car in which his body was discovered – to meet Appellant, and the two men were together "possibly" at Appellant's home. This evidence, in conjunction with Detective D's testimony that the drops appeared to be blood, satisfies the plain view doctrine's requirement that a seized item's evidentiary value be immediately apparent. The court did not abuse its discretion in denying Appellant's motion to suppress on this basis.[6]

[6] To the extent Appellant argues the court abused its discretion in determining evidence of the phenolphthalein test results admissible based on their inevitable discovery, we would not reverse on this basis because that evidence did not prejudice Appellant. Indeed, evidence of blood found splattered

## CONCLUSION

**¶13** The trial court did not abuse its discretion in denying Appellant's motion to suppress. Appellant's convictions and sentences are affirmed.

_____/S/_____
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

_____/S/_____
PATRICIA A. OROZCO, Presiding Judge

_____/S/_____
PETER B. SWANN, Judge

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around Appellant's home is consistent with his theory of self-defense presented at trial.