FILED
4/26/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CLEANTHONY JIMERSON, Appellant.	No. 77789-1-I DIVISION ONE UNPUBLISHED OPINION

SMITH, J. — In March 2013, a crowded bar in Auburn, Washington, had just announced last call, ushering hundreds of individuals into the parking lot. That night, following what was later described as a brawl, three individuals, including Lorenzo Duncan and Nick Lindsay, were shot and killed, and Cleanthony Jimerson was shot and paralyzed.

In 2015, the State charged Cleanthony[1] with two counts of first degree murder for the fatal shooting of Duncan and Lindsay. After a hung jury in the first trial, Cleanthony was retried, and the jury convicted him of two counts of the lesser included offense, second degree murder, both with firearm enhancements. Cleanthony timely filed an appeal, alleging a number of errors. However, while this appeal was pending, Cleanthony died in custody in December 2019, and his

[1] For clarity, we refer to the Jimerson relatives by their first names. We intend no disrespect. In addition, because Cleanthony's mother, Carolyn Jimerson, has been substituted as appellant, we refer to the arguments on appeal as coming from her. We also note that both parties and the court spelled Carolyn's name numerous ways. We utilize her counsel's most recent spelling.

mother now appeals in his place.

Cleanthony challenges a number of the trial court's orders and findings. While we agree that the trial court erred when it denied his motion to suppress illegally obtained personal belongings, we conclude that the error was harmless. And we conclude that his other challenges are without merit, except that the trial court improperly imposed a DNA (deoxyribonucleic acid) collection fee. Therefore, we remand to the trial court to strike the fee.

FACTS

On March 30, 2013, hundreds of people gathered at the Sports Page bar in Auburn, Washington. Cleanthony and his family and friends, including his girlfriend Kathleen Kovach, his mother Carolyn, his brother Cleden Jimerson, and his cousins, Nicholas[2] and Ricky Pierce and Javon (Do-Do), met at the bar for Cleden's going-away party. Also at the bar, Clarence Whiting celebrated his birthday with a group of friends, including Tiffany Johnson, the mother of Whiting's children, Duncan, Lindsay, Michael Simmons, Malcom Jones,[3] Sam Henderson, and Xavier Ragland. Sharelle Little, Ciarra Beaver, and her brother, Nevante Chaney, were at the bar, as well, and ended up spending time with Whiting's friend group.

At some point in the evening, Johnson confronted Whiting for dancing with Little. While confronting Whiting, Johnson accidently bumped into Little and

[2] Nicholas Pierce is referred to as "Nick" by witnesses and as "Nicholas" throughout the opinion.

[3] We refer to Malcom Jones by his first name, because this case also involves a Detective Jones. We intend no disrespect.

stepped on Little's "new shoes."

At around 1:40 a.m. following last call, the bar's security guards ordered everyone to leave. As everyone exited the bar, a convoluted series of events unfolded involving a multitude of individuals and witnessed by the hundreds of patrons exiting the bar. To this end, at trial, there was conflicting testimony from many witnesses.

In the parking lot, Little and Ragland fought, cursing at one another. Chaney and another person, later identified as Cleden,[4] who was wearing a white t-shirt came up behind Little and began defending her. Malcom joined Ragland. A crowd, including someone in "a striped Polo," formed around the group as they argued. Beaver testified that the Polo looked like it had orange and blue stripes.[5] Malcom punched Cleden, beginning "a brawl." Many more individuals became involved in the fight: running, punching, and yelling at one another. Lindsay, who had tattoos and was wearing a tank top, also ran "towards the fight to figure out who he was going to fight." Beaver testified that the man in the striped polo ran away as he yelled back to Chaney and Cleden to get the person with the tattoos and another individual in a white shirt.

Ragland testified that at one point, he saw a few individuals "jumping" Lindsay. Ragland "heard shots fired" and "ducked in between cars." When he

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[4] At trial, testimony established that the individual in the white t-shirt was Cleden. Specifically, Beaver identified a man in a white t-shirt who was with Cleanthony as the "dude with [her] brother," and Kovach testified that that individual was Cleden.

[5] The main group of individuals involved in the fight at this point included someone in a polo shirt, Cleden, Ragland, Chaney, Cardell Ashford, Little, Malcom, Rahel Tassew and Beaver.

"looked up to see where it was coming from," he testified that Malcom was holding a pistol, pointing it towards the ground. But Ragland testified that he never saw Malcom fire his gun. Ragland then ran to his car to retrieve his gun and returned to where Lindsay had been. He saw someone "walking down the middle of the parking lot . . . holding a pistol." The person with the gun did a "sweeping motion" with his gun, and Ragland ducked behind a car. When he stood back up, he "saw [Lindsay] on the ground and the guy standing over him," and "that's when [he] shot towards the guy standing over" Lindsay, believing the person was going to shoot Lindsay. At trial, he testified that he had previously described what the man was wearing "differently on a couple different occasions" but that he could no longer recall what the man was wearing.[6] Ragland also told police that he had fired 7.62 x 25 mm Tokarev ammunition from a CZ 52 handgun.[7] The same caliber casings were later discovered near a car in the parking lot.

Another witness, Danielle Psachos, after refreshing her recollection with her prior statement to the police, testified that she saw a "'heavy-set'" man with "'short dreads in his hair'" fall to the ground, while someone with a silver gun stood over him. She testified that she saw the man "take the gun and put it to [the other man's] head," and then she "saw the fire from the gun." Psachos testified that the shooter was a black skinny male with short hair. Another witness, Alissa Garza, testified that the shooter was "a little bit husky" with a

[6] Specifically, Ragland had previously contended that the shooter was a "[b]lack male, early 20s, 6 to 6'3, medium build, wearing a white" tank top.

[7] At trial, Ragland testified that he received immunity for his testimony.

white "Polo type shirt with stripes."

Henderson also testified that he saw someone "standing over [Lindsay] shooting." Henderson testified that after the man shot Lindsay, he saw Duncan "come to help" him, but that Duncan quickly turned and ran away. Henderson testified that, as Duncan ran away, he saw "another flash" and that it looked like the man shot Duncan. Then, as Duncan "fell and started crawling," the shooter allegedly "walked up on him," and "[i]t looked like he shot [Duncan] again." Henderson testified that, after shooting Duncan again, the shooter suddenly fell over. Gunshots were still "going on everywhere" and from "[a]ll over the place." Beaver testified that she heard a total of "[m]aybe . . . 30, 40" gunshots that night.

Kovach testified that, as she was running towards her car, she heard gunshots and saw Cleanthony "laying [sic] next to the car" and that he "had been shot." Kovach, Nicholas, and Cleden put Cleanthony into Nicholas's car and drove him to the hospital. At the hospital, a bullet consistent with Ragland's gun was removed from Cleanthony's back.

Lindsay and Duncan died in the parking lot that evening. Another individual in the parking lot, Antuan Greer, also died from a gunshot wound.

Around 2:15 a.m., Auburn Police Detective Robert Jones arrived at Auburn Regional Medical Center to investigate a gunshot victim. There, Detective Jones and Officer Andrew Lindgren spoke with Kovach, Cleden, Nicholas, and Carolyn. Medical staff informed Detective Jones that Cleanthony was receiving medical treatment for his gunshot wounds and that once "he was stabilized, he would be sent to" Harborview Medical Center. The staff then

"directed" Detective Jones to Cleanthony's personal belongings in his private emergency examination room.

While Cleanthony's room was unlocked and unoccupied, Detective Jones found Cleanthony's clothing in a dark green, opaque bag labeled personal belongings, which was under Cleanthony's hospital gurney or bed. He later testified that he believed the bag contained clothing based on his "personal experience" and because "you can practically see through the thing." The bag contained Cleanthony's polo shirt, a white tank top, his wallet, and his shoes.

Following the incident, the police found bullet casings from multiple different firearms in the bar's parking lot.[8] A medical examiner found one gunshot wound at the tip of Lindsay's left shoulder. They also found that Duncan was shot "[o]n his right cheek just below the eye" and on the left side of his chest. The medical examiner recovered a bullet from the latter gunshot wound. At trial, Kathy Geil, a ballistics expert, testified that the bullet fragments in both Lindsay and Duncan were consistent with having been fired from the same "44 caliber class" gun.

In its investigation, the police interviewed many individuals. During a photographic montage, which included an image of Cleanthony, Ragland was unable to identity anyone that he saw firing a gun that evening; Henderson identified Ragland as someone shooting a gun that night but could not identify anyone else from the photographic montage. Henderson, however, provided a

[8] At the CrR 3.5 hearing, Detective Francesca Nix testified that casings from five different firearms were found at the scene.

statement alleging that the shooter was a black male between the age of 23 and 28, around six feet tall, slender, with short hair and little to no facial hair, and that he wore a navy blue and yellow polo. And at trial, the State called Detective Nix to testify that Cato White, an individual drinking at the Sports Page bar the night of the incident, had identified Cleanthony in a montage as the person who shot Lindsay and Duncan, telling the officers that Cleanthony wore a yellow and black striped polo shirt.

On April 25, 2013, Detective Nix interviewed Cleanthony at Harborview Medical Center. Cleanthony stated that, when the bar closed, he saw a confrontation beginning in the parking lot and "scrambl[ed]" to find his mother and older cousin and get them into their vehicle. He recalled that while looking for his girlfriend and little brothers, he heard gunshots. "And in the midst of that [his] legs went numb." He then "crawled . . . with just arms to" his and his cousin's cars. Cleanthony stated that the bullets came from behind him.

After years of investigation, in April 2015, the State charged Cleanthony with two counts of murder in the second degree. At the time, Cleanthony was in Georgetown, Texas, visiting his family. The King County Prosecutor's Office procured a nationwide extradition warrant, which it sent to the Texas police. Detective Nix called Cleanthony and alleged that she was a crime victim compensation staffer and that she needed Cleanthony to fill out outstanding paperwork. When he arrived at the agreed upon location, United States marshals arrested Cleanthony. Detectives Doug Faini and Nix flew to Texas. In the meantime, Kovach had procured counsel for Cleanthony. The detectives

spoke with Cleanthony at Williamson County Jail in Georgetown, Texas, on two separate occasions.

During the first interview, on April 11, 2015, Detective Faini read Cleanthony his rights, and Cleanthony signed the waiver of his rights. At some point during the interview, Cleanthony mentioned he had procured an attorney. During the second interview the next day, Cleanthony affirmed his prior waiver of his rights. The Detectives also clarified Cleanthony's statement about his attorney, which he provided to the detectives the day before. Specifically, Cleanthony stated that he had spoken with his attorney and that "she was fine with" him speaking to the detectives about the statement he provided to the police while he was at Harborview Medical Center.

Throughout the second interview, Detective Faini pressed a self-defense theory, to which Cleanthony replied, "'[I]f I did [shoot them,] it would have to have been self defense because the only thing I wanted to do was get my mom in her car.'" Cleanthony later stated, "[I]f I did pick up a gun, it had to have been when I hit the ground it was something next to me already; you know, somebody falling or dropped dead or whatever." He stated that the incident was a "kill-or-be-killed" situation and agreed with the detectives that he "had to do what [he] did in order to protect people, and unfortunately the person doesn't live anymore." Towards the end of the interview, Cleanthony stated that he did pick a gun up off the ground and used it in self-defense.

In June 2015, the State amended the information and charged Cleanthony with two counts of murder in the first degree and one count of unlawful

possession of a firearm in the second degree.

In December 2016, Cleanthony moved to suppress the statements obtained by the officers while he was in Texas. He argued that the statements were obtained in violation of his right to remain silent and his invocation of his right to counsel. The court denied his motion to suppress his statements and concluded that Cleanthony made the statements voluntarily.

Cleanthony also moved to suppress the clothing evidence seized from his hospital room. The court held a hearing on Cleanthony's motion to suppress the evidence. Among other findings, it found that the room with Cleanthony's clothing was not a private room. It concluded that the plain view exception applied, because "Det. Jones was lawfully in a place from which Mr. Jimerson's clothes could be viewed as evidenced by the fact that he had unfettered permission to enter and remain in all areas of the Auburn Hospital E.R. and had previously been supplied with an access code," he had "a lawful right of access to the clothing," and "[o]nce he located the bag of clothing[,] the incriminating character of the items was immediately apparent." Thus, the court determined that the items and photographs were admissible at trial.

At trial, White testified that he did not remember whether he saw Lindsay or Cleanthony. He testified that he did not see anyone in the courtroom that was in the fight at the bar and that he did not see anyone shooting a gun. When pressed by the State, White stated he could not remember anything and that he did not believe that he had "different memories at earlier times of things that happened" at the bar. In response, the State provided an exhibit to refresh his

memory. White then stated that he remembered talking to Detective Nix. And after he read his statement identifying the shooter as someone matching Cleanthony's description, he stated that the statement was "not the events [as he] remember[ed them]." He also stated that he did not remember placing an X on Cleanthony's photo in the photographic montage he was provided following the incident.

Following a month-long trial, the jury convicted Cleanthony of the lesser included offense, second degree murder, as well as unlawful possession of a firearm in the second degree.

At sentencing, the court concluded that it would enter a no-contact provision for all of the testifying witnesses, except his family. Instead, the judgment and sentence included a no-contact provision pertaining to the "families of Lorenzo Duncan and Nick Lindsay or testifying witnesses, except for officers or experts." Accordingly, the judgment and sentence barred Cleanthony from contacting his family and his longtime girlfriend, Kovach.

Cleanthony timely appealed. However, he passed away while in custody, and his mother moved to substitute herself as appellant.[9] We granted her motion, and Cleanthony's attorney moved to represent her pro bono.

ANALYSIS

Motions To Suppress

"When reviewing a trial court's ruling on a motion to suppress, we determine

[9] After remanding to the trial court to determine whether Cleanthony's appellate counsel could represent Carolyn, as an issue of public expense, counsel advised the court it would be representing Carolyn pro bono.

whether substantial evidence supports the trial court's findings of fact and whether the findings of fact support the trial court's conclusions of law." State v. Russell, 180 Wn.2d 860, 866, 330 P.3d 151 (2014). "Conclusions of law are reviewed de novo." State v. Lakotiy, 151 Wn. App. 699, 706, 214 P.3d 181 (2009).

Search and Seizure

Carolyn contends that the trial court erred when it concluded that, under the plain view doctrine's exception to the warrant requirement, Detective Jones did not violate Cleanthony's right to be free of unreasonable searches and seizures pursuant to Washington Constitution article I, section 7. Cleanthony's examination room constituted a private area, and therefore, we conclude that the plain view doctrine did not apply. Nonetheless, any error in the admission of the clothing was harmless beyond a reasonable doubt.

"The privacy protections of article I, section 7 are more extensive than those provided under the Fourth Amendment." State v. Buelna Valdez, 167 Wn.2d 761, 772, 224 P.3d 751 (2009).[10] "Article I, section 7 of the state constitution provides: 'No person shall be disturbed in [their] private affairs, or [their] home invaded, without authority of law.'" Buelna Valdez, 167 Wn.2d at

[10] Latinx and Spanish-language dominant communities commonly utilize the patrilineal last name (the first of two family names) as their primary identifier. And although "[t]he rules mandate that things be called by their given names . . . , this does not necessarily result in calling things by their right names." See Berta Esperanza Hernández Truyol, Building Bridges--Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement, 25 COLUM. HUM. RTS. L. REV. 369, 417, 430 (1994) (discussing the "need to decode language . . . [to] accommodate diversity" of Latinas/os in our Nation and to "avoid a system whose appellations are designated by 'founding fathers'"). A great place to start is in recognizing the difference in an individual's name. Therefore, we refer to this case as Buelna Valdez.

771. Under article I, section 7's "robust privacy protections . . . , any state intrusion into private affairs" generally must be done pursuant to a valid "warrant or a well-established exception to the warrant requirement." State v. Morgan, 193 Wn.2d 365, 369, 440 P.3d 136 (2019), cert. denied, 140 S. Ct. 1243 (2020).

In evaluating an article I, section 7 argument,

> "[f]irst, we must determine whether the state action constitutes a disturbance of one's private affairs. . . . [I]f a privacy interest has been disturbed, the second step in our analysis asks whether authority of law justifies the intrusion. The 'authority of law' required by article I, section 7 is satisfied by a valid warrant, limited to a few jealously guarded exceptions."

Buelna Valdez, 167 Wn.2d at 772 (quoting York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 306, 178 P.3d 995 (2008)). "The State 'must establish the exception to the warrant requirement by clear and convincing evidence.'" Morgan, 193 Wn.2d at 370 (quoting State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009)).

Disturbance of Private Affairs

Carolyn contends that the trial court erred when it concluded that Cleanthony's examination room was not private.[11] Because the examination room was subject to a reasonable expectation of privacy, we agree that the court erred in its factual and legal findings regarding the examination room.

[11] The trial court labeled this conclusion a "Finding[ ] as to disputed facts." However, because this finding is more appropriately deemed a conclusion of law as to whether the room was subject to privacy interests under article 1, section 7 of our state constitution, we review the conclusion de novo. State v. Z.U.E., 178 Wn. App. 769, 779 n.2, 315 P.3d 1158 (2014), aff'd, 183 Wn.2d 610, 352 P.3d 796 (2015) ("Where a conclusion of law is erroneously labeled as a finding of fact, we review it de novo as a conclusion of law.").

Article 1, section 7's "scope is not limited to subjective expectations of privacy but, more broadly, protects 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.'" State v. Parker, 139 Wn.2d 486, 493-94, 987 P.2d 73 (1999) (quoting State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)). "To determine whether a privacy interest exists under article I, section 7, we must examine whether a particular expectation of privacy is one that a citizen of this state should be entitled to hold." State v. Reeder, 184 Wn.2d 805, 814, 365 P.3d 1243 (2015). "Part of this inquiry focuses on what kind of protection has been historically afforded to the interest asserted, and part of it focuses on the nature and extent of the information that may be obtained as a result of government conduct." Reeder, 184 Wn.2d at 814.

With regard to the historical protection afforded to a hospital examination room, there has not been an explicit determination as to whether there is a privacy interest in an unlocked, unoccupied examination room. While courts have reviewed an individual's expectation of privacy regarding items within an examination room,[12] they have not looked at whether the examination room itself is subject to a privacy interest. Rather, courts have assumed that the examination room is subject to a reasonable expectation of privacy.[13] Here,

[12] See Morgan, 193 Wn.2d at 370 (Morgan did not argue that the officers had no lawful reason to be in the hospital room.). Morgan is discussed in detail below.

[13] See Morgan, 193 Wn.2d at 368-70 (holding that, where the officer and the defendant spoke for hours regarding the alleged crime in the defendant's hospital room, the officer's seizure of the defendant's clothing and a knife fell under the plain view exception).

under these facts, Cleanthony had a right to privacy in the examination room. To this end, other case law can serve as guidance.

For example, in State v. Boland, the police searched and seized Brad Boland's trash after receiving an anonymous letter alleging that Boland had been distributing "legend drugs," "which federal law prohibits . . . without a prescription from a physician." 115 Wn.2d 571, 573, 800 P.2d 1112 (1990). After receiving the letter, the "police began a series of four warrantless searches of defendant's garbage" when Boland took his trash out to the corner for collection. Boland, 115 Wn.2d at 573. On appeal, the court held that the warrantless search of Boland's garbage fell "squarely within the contemplated meaning of a 'private affair,'" because "Boland's trash was in his can and sitting on the curb in expectation that it would be picked up by a licensed garbage collector." Boland, 115 Wn.2d at 578.

In State v. Smith, Harold Bernard Smith was convicted of first degree murder after his son was found drowned in a creek near his home. 88 Wn.2d 127, 128, 131, 559 P.2d 970 (1977). Police had seized Smith's clothing from an "anteroom or entryway which led from a public hallway of the hospital to the security room occupied by" Smith. Smith, 88 Wn.2d at 132. The court noted that "[t]he anteroom . . . was semipublic," and "was equipped with a sink . . . and was open and accessible to doctors and nurses who frequently used the sink to wash their hands." Smith, 88 Wn.2d at 132. The court did not go through a state constitutional analysis, finding that the Fourth Amendment "and article 1, section 7 of the Washington State Constitution are comparable and are to be

given comparable constitutional interpretation." Smith, 88 Wn.2d at 133. It concluded that the police acted according to a probable cause and exigent circumstance exception to the warrantless seizure prohibition. Smith, 88 Wn.2d at 138.

Like the situation in Boland, where an individual reasonably expects that only their trash collector, not strangers, will see their trash, an individual reasonably expects that their private examination room will not be invaded by strangers, even though a nurse or a doctor is expected to enter the room. This is particularly true where here, unlike in Smith, to access the emergency room, a nurse or doctor must let an individual into the area containing the examination rooms, or the person seeking entrance must know a security code and enter it. And contrary to the State's contention and the trial court's conclusion, the hospital providing access to the emergency room area does not necessarily lead to the conclusion that the individual rooms are open to the public. See, e.g., State v. Thomson, 71 Wn. App. 634, 645, 861 P.2d 492 (1993) (in discussing the criminal burglary statute, noting "each tenant has a privacy interest in his or her room or apartment, and that interest is separate from the interests of other tenants").

Similarly, while Smith is distinguishable because it applied the United States Constitution and did not apply the plain view exception,[14] its conclusion that the anteroom to a private emergency room was semipublic logically extends

[14] Since Smith, as noted above, article I, section 7 of Washington's Constitution affords defendants greater protections than the United States Constitution's Fourth Amendment.

to the conclusion that individual examination rooms are not public. Therefore, the trial court erred because the facts do not support the trial court's conclusion that Cleanthony's emergency room was not a private room.

Plain View Doctrine

Carolyn contends that the plain view doctrine does not justify Detective Jones's seizure of Cleanthony's clothing. We agree.

"Exceptions to the warrant requirement are limited and narrowly drawn." Parker, 139 Wn.2d at 496. "The State, therefore, bears a heavy burden to prove the warrantless searches at issue fall within the exception it argues for." Parker, 139 Wn.2d at 496. One exception is the plain view doctrine. "[A] plain view seizure is legal when the police (1) have a valid justification to be in an otherwise protected area, provided that they are not there on a pretext, and (2) are immediately able to realize the evidence they see is associated with criminal activity." Morgan, 193 Wn.2d at 371. "Officers are not restricted to seizing evidence solely when they come across the evidence unintentionally and inadvertently." Morgan, 193 Wn.2d at 371. However, "'the law does not vest in police the discretion to seize first and decipher a piece of evidence's incriminating nature later.'" Morgan, 193 Wn.2d at 371 (quoting Katie Farden, Recording a New Frontier in Evidence-Gathering: Police Body-Worn Cameras and Privacy Doctrines in Washington State, 40 SEATTLE U. L. REV. 271, 284-85 (2016)).

Morgan is instructive. There, a jury found David Morgan guilty of first degree assault, attempted murder, and arson after his ex-wife, Brenda, was

found "nonresponsive and badly injured" in Morgan's garage while the house was on fire. Morgan, 193 Wn.2d at 367-68. At the scene of the crime, Morgan's and Brenda's clothing smelled of gasoline, and Officer Christopher Breault was instructed to "'collect Morgan's clothing [from the hospital].'" Morgan, 193 Wn.2d at 368 (alteration in original). "Officer Breault spoke with Morgan in his hospital room for hours" and, at one point, noticed Morgan's clothing in "'several plastic shopping like bags' . . . on the counter in Morgan's hospital room," as well as "a utility knife with dried blood on the handle." Morgan, 193 Wn.2d at 368. Officer Breault later seized the clothing bags, and before trial, Morgan unsuccessfully moved to suppress the evidence. Morgan, 193 Wn.2d at 368-69.

On appeal, Morgan did not challenge the officer's lawful reason to be in the hospital room. Morgan, 193 Wn.2d at 371. Rather, he argued that the incriminating nature of the clothing was not readily apparent and that, therefore, the plain view doctrine did not apply. Morgan, 193 Wn.2d at 371. Our Supreme Court held that "Officer Breault reasonably concluded that Morgan's clothing would have evidentiary value given the conversation he had with Morgan and observations he made during that time, including spotting a knife with dried blood on the handle." Morgan, 193 Wn.2d at 372. It therefore concluded that "the State met its burden to show that Officer Breault lawfully seized Morgan's clothing under the plain view doctrine." Morgan, 193 Wn.2d at 372-73.

With regard to the first step of the analysis, unlike in Morgan, Carolyn asserts that Detective Jones did not have a lawful right to be in the room. In cases where the officers have entered a hospital room without a warrant, courts

have assumed the officer had a lawful right to be present in the examination room. See, e.g., Morgan, 193 Wn.2d at 371 (assuming the officer had a lawful reason to be in the hospital room because the appellant did not challenge it). However, those cases involved instances where the assumed victim or perpetrator of a crime was present in the room. For example, in Morgan, the officer was speaking with Morgan about the events leading up to the fire. 193 Wn.2d at 368. But here, Detective Jones was in the room for the sole purpose of finding and seizing Cleanthony's clothing. Cleanthony was not in the room, so Detective Jones was not permissibly investigating the shooting. Indeed, he could not gain any information regarding the shooting while Cleanthony was not present, except information provided by the clothing. Therefore, Detective Jones was not lawfully in the examination room.

Furthermore, the incriminating nature of the items seized was not immediately apparent based on observation of the bag. Rather, Detective Jones recognized that the bag contained clothing "based on the packaging." When asked whether he knew the contents of the bag before looking into the bag, he testified, "I was told it was clothing. I believed it was clothing. But exactly what the content was, I can't tell you." In addition, the exhibit shows a bag that is not transparent, but green. Thus, the incriminating nature of the seized evidence was not immediately apparent, and the trial court erred.

Finally, while inadvertence is not a requirement under article I, section 7, it is a characteristic of most valid plain view seizures.[15] But here, Detective Jones

[15] To the extent that Carolyn relies on State v. Kull, 155 Wn.2d 80, 85, 118

sought out and was directed to the clothing. Accordingly, Detective Jones did not inadvertently discover the evidence. For these reasons, the plain view doctrine did not apply, and the trial court erred in concluding it did.[16]

In the alternative to the applicability of the plain view doctrine, the State contends that the examination room was not private and that the open view exception applied to the bag of clothing. "[T]he open view doctrine . . . stand[s] for the proposition that there is no legitimate expectation of privacy 'in those areas of the curtilage that are impliedly open to the public.'" State v. Browning, 67 Wn. App. 93, 96, 834 P.2d 84 (1992) (quoting Robert F. Utter, Survey of Washington Search & Seizure Law: 1988 Update, 11 U. PUGET SOUND L. REV. 411, 430 (1988)). Specifically, "the observation of incriminating evidence from" areas that are not subject to a reasonable expectation of privacy, like the curtilage of the residence, does "not constitute a search." Browning, 67 Wn. App. at 96. But the area with the private examination rooms was not impliedly open to the public. This is particularly true because an individual could not gain access to the area with the examination rooms unless they had authorization to enter from the staff or with a security code. Therefore, the State's assertion is without

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P.3d 307 (2005), for the proposition that inadvertence is a requirement, Morgan recently clarified that it is not. See Morgan, 193 Wn.2d at 371 (Inadvertence "'is not a necessary condition'" to the application of the plain view doctrine; rather, it "'is a characteristic of most legitimate plain-view seizures.'" (internal quotation marks omitted) (quoting Horton v. California, 496 U.S. 128, 130, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990))).

[16] Carolyn asserts that taking the items out of the bag and photographing them was an additional search. However, she provides no case law to support her position, and because the seizure of the bag was unconstitutional, the assertion is unnecessary.

merit.

Similarly, the State's assertion that the hospital staff had authority to provide consent is unpersuasive. "[A] valid consensual search" requires (1) voluntary consent, (2) "granted by a party having authority to consent, and (3) the search must be limited to the scope of the consent granted." State v. Blockman, 190 Wn.2d 651, 658, 416 P.3d 1194 (2018). The State relies on the common authority rule, which provides that cohabitants have authority to consent to a search. Specifically, the "[c]ommon authority [rule] . . . is grounded upon the theory that when a person, by his actions, shows that he has willingly relinquished some of his privacy, he may also have impliedly agreed to allow another person to waive his constitutional right to privacy." State v. Morse, 156 Wn.2d 1, 8, 123 P.3d 832 (2005). But an individual's need to seek medical treatment does not imply that they have willingly relinquished some of their privacy. And because the hospital staff did not have a privacy interest in the room, they did not have authority to consent to its search. See, e.g., State v. Bowman, 14 Wn. App. 2d 562, 569-70, 472 P.3d 332 (2020) (holding that where an individual had no privacy interest in a text message conversation, they lacked the authority to consent to a search of the conversation), review granted, 196 Wn.2d 1031 (2021). Therefore, the hospital staff did not have authority to consent to Detective Jones's entrance into, or search of, Cleanthony's private room.

Harmless Error

Carolyn alleges that the prosecution's reliance on Cleanthony's clothing

undermines the verdict. Because the State had testimony and photographs that provided evidence that Cleanthony wore a blue and yellow polo shirt that evening, we disagree.

"Failure to suppress evidence obtained in violation of a defendant's" right under article 1, section 7 of our constitution is "constitutional error and is presumed to be prejudicial." State v. McReynolds, 117 Wn. App. 309, 326, 71 P.3d 663 (2003). A "[c]onstitutional error is harmless only if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error." State v. Quaale, 182 Wn.2d 191, 202, 340 P.3d 213 (2014).

Here, despite Carolyn's assertion to the contrary, the clothing was not material to the prosecution's case. The State used the physical clothing as evidence that Cleanthony was wearing a blue and yellow polo shirt on March 30 and 31. However, the State also introduced photographs from that evening where Cleanthony was wearing the blue and yellow striped polo shirt. Kovach also testified that Cleanthony was wearing a blue and yellow polo shirt that evening. With or without the seized evidence, the State provided ample evidence that Cleanthony was wearing a blue and yellow striped polo that evening. Thus, to the extent that the jury was convinced of Cleanthony's guilt because of his attire, the State met its burden to show that, beyond a reasonable doubt, a reasonable jury would have reached the same conclusion. Accordingly, any error by the court was harmless.

Sixth Amendment Right to Counsel

Carolyn claims that the trial court erred when it denied Cleanthony's motion to suppress his statements to the detectives, violating either his Sixth Amendment or article 1, section 22 rights. We disagree.

Under the Sixth Amendment to the federal constitution and article 1, section 22 of the Washington Constitution, "[a] criminal defendant has a right to a lawyer after the State files charges." State v. Radcliffe, 164 Wn.2d 900, 905, 194 P.3d 250 (2008). Under United States' precedent, "once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings," including interrogation. Montejo v. Louisiana, 556 U.S. 778, 786, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009).

"The right to counsel may be affirmatively waived, but such a waiver must be knowing, voluntary, and intelligent." State v. Afeworki, 189 Wn. App. 327, 344, 358 P.3d 1186 (2015). "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." Edwards v. Arizona, 451 U.S. 477, 484, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). But, "[i]f the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." Davis v. United States, 512 U.S. 452, 461-62, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).

Here, the trial court found that "[a]t no point before or during either taped

statement in Texas did the defendant state he wanted to have an attorney present." It also found that "[t]he defendant told the detectives that the attorney had suggested that he should wait until he was back in Washington to give a statement. He did not assert or convey that he wanted to wait; rather, he was repeating his attorney's advice or suggestion." The court found that Cleanthony did "not unequivocally invoke his right to counsel or his right to remain silent" on April 11 or April 12.[17] "[O]n April 12, 2015, the defendant confirmed he wanted to speak with the detectives. These findings are supported by substantial evidence.

Cleanthony did not unequivocally request his counsel's presence on either day. Specifically, Cleanthony stated that in their unrecorded conversation on April 11, 2015, he had told the detectives that his attorney was fine with him speaking with them. From the clarification of the unrecorded conversation, Cleanthony agreed that he "had explained to [the detectives] that [he] had communication with [his family] . . . and that [his attorney] had suggested just waiting" to speak with the detectives until he returned to Washington. However, he did not say that he refused to speak with the detectives. Moreover, prior to his discussion with the detectives on April 11, 2015, Cleanthony was read his rights and voluntarily and knowingly signed a waiver acknowledging that he understood them.[18]

On April 12, 2015, he acknowledged having signed the waiver both days.

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[17] The trial court labeled these "conclusions as to disputed facts," likely meaning, "findings as to disputed facts."

[18] This is particularly true considering Cleanthony's statements to Kovach indicating that he willingly agreed to speak with the detectives.

At no point in the conversation on either April 11 or 12 did Cleanthony state that he wanted his attorney present. In fact, he said that his attorney was fine with him speaking with the detectives about his previous statement to the police. Therefore, the trial court's findings of fact were supported by substantial evidence, and Cleanthony did not invoke his right to counsel.

Cleanthony relies on United States v. Santistevan[19] for the proposition that he unequivocally invoked his right to counsel. In Santistevan, the Federal Bureau of Investigation (FBI) was investigating a series of robberies. 701 F.3d at 1290. Manuel Santistevan turned himself in to the police on unrelated charges, but an FBI agent attempted to discuss the robberies with Santistevan while he was in custody. Santistevan, 701 F.3d at 1290. Santistevan declined to speak with the agent. Santistevan, 701 F.3d at 1290. The agent later received calls from (1) Santistevan's girlfriend advising the agent that Santistevan would speak with the agent and (2) Santistevan's attorney advising the agent that Santistevan did not want to speak with him and that he had a letter for the agent. Santistevan, 701 F.3d at 1290-91. At the jail, Santistevan handed the agent the letter, which was from the attorney and stated that Santistevan would not speak to him without his counsel present. Santistevan, 701 F.3d at 1291. The agent nevertheless proceeded with an interview. Santistevan, 701 F.3d at 1291. The court held that Santistevan unequivocally invoked his right to counsel by presenting the agent the letter. Santistevan, 701 F.3d at 1293.

Here, prior to both interviews, the detectives were aware that Cleanthony

[19] 701 F.3d 1289 (10th Cir. 2012).

had obtained an attorney. However, neither Cleanthony nor his attorney made an unequivocal statement that he did not wish to speak with the detectives. Indeed, Cleanthony told the detectives that his attorney was fine with him speaking to them. Accordingly, Santistevan is not analogous.

Carolyn also asserts that the trial court erred when it did not undertake a Gunwall[20] analysis regarding article I, section 22 of the Washington Constitution and the Sixth Amendment. Furthermore, she contends that the Gunwall analysis supports her conclusion that article I, section 22 provides greater protections than the Sixth Amendment. However, even if article I, section 22 required an independent analysis, Cleanthony did not invoke his right to counsel under Washington law, and while the detectives knew that Cleanthony had an attorney, he explicitly agreed to speak with them.

Carolyn cites no authority that supports her assertion that the State violated Cleanthony's right to counsel under article I, section 22. For example, she inappropriately relies on Aichele v. Rhay[21] for the proposition that "the record must show more than '[m]erely asking the defendant whether he wants a lawyer.'" But in Rhay, the court addressed an officer's duty to *inform* a defendant of their right to counsel. 57 Wn.2d at 179-80. The court did not address a defendant's invocation of their right to have counsel present. Rhay, 57 Wn.2d at 179-80. And Washington courts require that a defendant unambiguously invoke their right to counsel. See, e.g., State v. Mayer, 184 Wn.2d 548, 556 n.5, 362

[20] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).
[21] 57 Wn.2d 178, 179-80, 356 P.2d 326 (1960).

P.3d 745 (2015) ("The police must stop an interrogation if a suspect makes 'an unambiguous or unequivocal request for counsel.'" (quoting Davis, 512 U.S. at 461-62)). Therefore, we are unpersuaded.

Similarly, Carolyn's reliance on State v. Tully for the proposition that "when an accused person hires a lawyer, he has the right to their 'guiding hand' at 'every stage' of the case even non-critical proceedings" is misplaced. 4 Wn. App. 720, 727, 483 P.2d 1268 (1971). In Tully, the defendant's counsel failed to appear for a preliminary hearing, and the trial court denied defendant's request to continue the hearing until his counsel was present. 4 Wn. App. at 721. Tully had to represent himself at the hearing. Tully, 4 Wn. App. at 721. Therefore, Tully is factually distinguishable.

For the foregoing reasons, Cleanthony's right to counsel under either the Sixth Amendment or Washington Constitution article I, section 22 was not violated, and the trial court did not err when it denied Cleanthony's motion to suppress his statements.

Juror 48's Dismissal for Cause

Carolyn asserts that Cleanthony was denied his right to a fairly selected jury when the court and the State excused juror 48 for "impermissible reasons." Because the juror's removal was not based on race, we disagree.

Jury selection "is 'the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability.'" State v. Irby, 170 Wn.2d 874, 884, 246 P.3d 796 (2011) (quoting Gomez v. United States, 490 U.S.

858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989)). "The dismissal of a potential juror during voir dire is primarily governed by statute." State v. Sassen Van Elsloo, 191 Wn.2d 798, 808, 425 P.3d 807 (2018). "RCW 4.44.170 . . . outlines three reasons potential jurors may be challenged for particular cause: implied bias, actual bias, and physical inability." Sassen Van Elsloo, 191 Wn.2d at 808. We review a trial court's dismissal of jurors for cause under an abuse of discretion standard. State v. Brett, 126 Wn.2d 136, 158, 892 P.2d 29 (1995). The reason for this deference is that "[t]he trial judge is in the best position to evaluate whether a particular potential juror is able to be fair and impartial based on observation of mannerisms, demeanor and the like." State v. Gonzales, 111 Wn. App. 276, 278, 45 P.3d 205 (2002).

At voir dire, juror 48 indicated that she knew Cleanthony's last name because, as an employee with Seattle Housing Authority, she "come[s] across a lot of last names," that she had heard it in the community and at her church, and that she had heard the last name Jimerson "not represented in a good way." But she did not recognize any of the witnesses' names. And when asked whether her awareness of the Jimerson name would affect how she judged the case or credibility of witnesses, she stated, "I feel like I can be fair and impartial."

However, juror 48 expressed concerns that her personal experience with the court would affect her impartiality. Specifically, her brother was involved in a gang, and he shot and killed someone. Thus, Cleanthony's case "pulled [on her] heartstrings" because her brother's actions were not because he chose that life, but because life "wasn't fair to him," his experiences "pushed him there," and "it's

just hurtful."[22] However, when asked whether her awareness of Cleanthony or her experience with the criminal justice system would affect how she judged the case or credibility of witnesses, she stated, "I feel like I can be fair and impartial."

In dismissing juror 48 for cause, the court noted that in Seattle communities of color, it is difficult to get many degrees of separation between individuals in those communities and that it would not give "weight to" juror 48's knowledge of the Jimerson name. Nonetheless, the court concluded, "I think there is enough specific about her in terms of her brother convicted of murder about which she's clearly and understandably quite emotional, and the nature of her job and her work." On this basis, the court dismissed juror 48 for cause. And the trial judge is in the best position to determine a juror's ability to be impartial. See Gentry, 125 Wn.2d at 634. Because there was reason to believe that juror 48 would not be impartial based on her personal experiences with the justice system and that the stress from her job would affect her ability to focus on the trial, the trial court did not abuse its discretion.

Carolyn disagrees and contends that even though juror 48 was removed for cause, rather than pursuant to a peremptory strike, "the constitutional imperative of prohibiting juror challenges that objectively appear rooted in the juror's race applies equally." However, Carolyn failed to show that the court's

[22] Juror 48 discussed how she believed the system didn't work for her brother: "By him being kind of pushed in that family of the gang life and having that surrounding of friends and people who love you when he wasn't treated right in his early days and at home, some of the things that he experienced that I saw that he did not deserve kind of forced him to live in a life that you try to survive. I just think it's not fair."

dismissal of juror 48 was objectively rooted in race. Therefore, her contention is unpersuasive.

Townsend Instruction

Carolyn contends that the trial court erred when it used a Townsend[23] instruction regarding the death penalty.

In Townsend, the court created a "strict prohibition against informing the jury of sentencing considerations [to] ensure[ ] impartial juries and prevent[ ] unfair influence on a jury's deliberations." 142 Wn.2d at 846. But in State v. Pierce, our Supreme Court overturned Townsend: "We hold that Townsend is incorrect and harmful because it artificially prohibits informing potential jurors whether they are being asked to sit on a death penalty case." 195 Wn.2d 230, 244, 455 P.3d 647 (2020).

Here, after two jurors expressed concerns regarding the death penalty's potential application to the case, the court instructed the jurors, "I cannot tell you whether this case is subject to the death penalty." The court removed both jurors for cause. Because the court appropriately relied on the then-existing precedent, Townsend, the court did not err. And even given our Supreme Court's decision in Pierce, Carolyn failed to show prejudice resulting from either juror's dismissal, and she does not adequately brief the issue. Instead, Carolyn provides conclusory statements that the errors undermined the fairness of the proceeding and that a new trial is necessary. But "[w]e will not consider arguments that a

[23] State v. Townsend, 142 Wn.2d 838, 15 P.3d 145 (2001), overruled by State v. Pierce, 195 Wn.2d 230, 455 P.3d 647 (2020) (plurality opinion).

party fails to brief." Sprague v. Spokane Valley Fire Dep't, 189 Wn.2d 858, 876, 409 P.3d 160 (2018). Therefore, any error stemming from Townsend was harmless and did not result in an unfair trial.

Evidentiary Issues

Carolyn asserts that the trial court erred when it "admitted unreliable identification evidence." Specifically, she challenges the admission of the recording of Henderson's out-of-court statement identifying the shooter's clothing and Detective Nix's testimony regarding what White told her in June 2014. We disagree.

We review decisions to admit evidence for abuse of discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). "'Abuse of discretion' means 'no reasonable judge would have ruled as the trial court did.'" State v. Arredondo, 188 Wn.2d 244, 256, 394 P.3d 348 (2017) (quoting State v. Mason, 160 Wn.2d 910, 934, 162 P.3d 396 (2007)). "Put another way, to reverse we must find the decision is 'unreasonable or is based on untenable reasons or grounds.'" Arredondo, 188 Wn.2d at 256 (internal quotation marks omitted) (quoting Mason, 160 Wn.2d at 922).

Hearsay is an out-of-court statement offered "to prove the truth of the matter asserted" and is inadmissible absent an exception. ER 801(c); ER 802. However, "[a] statement is not hearsay if" it is a prior statement of the witness, "[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is" (i) offered for impeachment purposes, (ii) a consistent statement "offered to rebut an express or implied

charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person." ER 801(d)(1)(i)-(iii). "Whether or not the statement[s] here w[ere] hearsay is a question of law we will review de novo." State v. Edwards, 131 Wn. App. 611, 614, 128 P.3d 631 (2006).

At trial, Henderson testified that he saw Lindsay and Duncan get shot and that he saw the shooter fall, but that he "wasn't really paying attention to what he was wearing and things like that." And he stated that the description he gave to the police was based partially on what he saw and partially on conversations he had following the incident. The State proffered the recording of Henderson's statement describing the shooter and played it for the jury. Detective Nix also testified that Henderson told her that a man in a yellow and blue polo shirt was the shooter.

Carolyn challenges the admission of Henderson's identification to the police in the recording and via Detective Nix's testimony. However, because both statements were offered to impeach Henderson's trial testimony that he did not know who the shooter was or what he looked like, they were not hearsay. Therefore, the trial court did not act manifestly unreasonable when it admitted Henderson's prior statements.

Similarly, the trial court did not err when it admitted White's prior statement. White testified at trial that he could not recall what he discussed with Detective Nix and Detective Faini. Specifically, he said, "I don't recall what we discussed. I mean, I really don't recall the conversation besides what's written

down here." White testified that he could not recall describing the shooter's shirt to Detective Nix and that he could not recall the individual he had identified in photograph 5, whom he "identified as Cleanthony," as the shooter. Detective Nix testified regarding what White told her about the night of the shooting. She testified that White pointed out "Big Cle"—or Cleanthony—in the photo montage and described the shooter as someone who had been shot and who wore a yellow and black striped polo.

Detective Nix's statement regarding what White told her was not hearsay because it pertained to White's prior identification of the shooter and White was present and subject to cross examination. ER 801(d)(iii). Furthermore, despite Carolyn's assertion to the contrary, the State introduced White for more than one reason, including to provide a basis for the admission of his identification of Cleanthony as substantive evidence.[24] Therefore, Detective Nix's statement was not hearsay, and the trial court did not abuse its discretion when it admitted the testimony.

DNA Collection Fee

Carolyn contends and the State concedes that the DNA collection fee should be stricken. Because "the State's records show that [Cleanthony's] DNA

[24] Under ER 607, "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." However, "'[a]lthough the State may impeach its own witness, it may not call a witness for the primary purpose of eliciting testimony in order to impeach the witness with testimony that would be otherwise inadmissible.'" State v. Hancock, 46 Wn. App. 672, 683, 731 P.2d 1133 (1987) (alteration in original) (quoting State v. Lavaris, 106 Wn.2d 340, 345, 721 P.2d 515 (1986)), aff'd, 109 Wn.2d 760, 748 P.2d 611 (1988); see also State v. Gunderson, 181 Wn.2d 916, 930, 337 P.3d 1090 (2014).

was previously collected prior to sentencing" and because a trial court cannot impose a DNA collection fee where the State has previously collected the offender's DNA,[25] we agree.

We affirm that judgment and sentence but remand for the trial court to strike the DNA collection fee.[26]

WE CONCUR:

[25] See RCW 43.43.7541; State v. Ramirez, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

[26] As a final matter, we note that the trial court erred when it failed to quickly correct its clerical error that prevented Cleanthony from contacting his friends and family. See CrR 7.8(a) ("Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.").