FILED

March 25, 2014

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	No. 29916-3-III
Respondent,	)	
	)	
v.	)	
	)	OPINION PUBLISHED
CHAD EDWARD DUNCAN,	)	IN PART
	)	
Appellant.	)	

SIDDOWAY, J. — Chad Duncan appeals his conviction of six counts of assault, each subject to a firearm enhancement, and unlawful possession of a firearm. He assigns error to the trial court's denial of his motion to suppress evidence of a handgun and shell casings found in his car at the time of his arrest and to the trial court's finding that he had the current or future ability to pay legal financial obligations (LFOs). He also assigns error to the trial court's sentence of community custody, which the State concedes was unsupported. He alleges additional errors in a pro se statement of additional grounds.

In the published portion of this opinion, we address his challenge to the trial court's finding that he had the current or future ability to pay LFOs. Because a sentencing court will seldom find that there is no likelihood that an offender will ever be

able to pay LFOs and an offender has good strategic reasons for waiving the issue at the sentencing hearing, we will not consider the issue for the first time on appeal.

In the unpublished remainder of the opinion, we accept the State's concession that the court lacked authority to impose a term of community custody for Mr. Duncan's conviction of unlawful possession of a firearm but find no other error. We affirm Mr. Duncan's conviction and remand the matter to the trial court solely for the purpose of striking the term of community custody.

FACTS RELEVANT TO IMPOSITION OF DISCRETIONARY LFOS

Mr. Duncan was charged with six counts of assault and one count of unlawful possession of a firearm and was found guilty following a jury trial in March 2011.

At the time of sentencing, the proposed judgment and sentence prepared by the State and presented to the court included the following restitution, costs, and assessments, some of which are mandated by statute and others of which are discretionary:

$1,235.54	Restitution
$ 500.00	Crime penalty assessment
$ 200.00	Criminal filing fee
$ 600.00	Court appointed attorney recoupment
$ 100.00	DNA (deoxyribonucleic acid) collection fee
$ 20.00	Sheriff service fee
$ 250.00	Jury fee

Clerk's Papers (CP) at 181.

Boilerplate findings within the judgment and sentence that was completed and entered by the court included a finding that Mr. Duncan had the present or future ability to pay the financial obligations imposed. They also included findings that Mr. Duncan had the means to pay for the costs of incarceration (not to exceed certain maximum amounts) and the means to pay any costs of medical care incurred by the county.

The parties' presentations at the sentencing hearing dealt primarily with whether the court should impose a sentence at the high or low end of the standard range, whether the sentences on the six assaults should run consecutively, and with Mr. Duncan's mother's plea for lenient sentencing. Neither party made any presentation of evidence or argument directly addressing Mr. Duncan's ability to pay. The only fact addressed that had a bearing, indirectly, on his ability to pay was the lengthy sentence (effectively a life sentence) being imposed by the court. In reviewing the judgment and sentence with the parties, the court observed, "He has $2905 and some change to pay if he's released," and that "[c]ost of incarceration, cost of medical care will be imposed." Report of Proceedings (RP) at 992. Mr. Duncan did not object to the costs imposed or to the court's findings.

ANALYSIS OF LFO ISSUE

For the first time on appeal, Mr. Duncan contends that the record does not support the trial court's findings that he has the current or future ability to pay discretionary

LFOs, including incarceration and medical costs. *See In re Pers. Restraint of Pierce*, 173 Wn.2d 372, 379, 268 P.3d 907 (2011) (holding that "costs of incarceration" imposed by RCW 9.94A.760(2) fall within the broad definition of "legal financial obligation"); RCW 70.48.130(4) (authorizing sentencing courts to order offenders to repay all or part of medical costs incurred during confinement as part of a judgment and sentence). He asks that we remand his judgment and sentence to the trial court with instructions to strike the objectionable findings as was done in *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011).

The convergence of three factors has contributed to the recurrent raising in appeals of this and other challenges to discretionary LFOs imposed by trial courts.

First is a statutory requirement that trial courts take some account of a defendant's ability to pay the obligations in the future. RCW 10.01.160(3) provides that a trial court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 9.94A.760(2) provides that the trial court may require an offender to pay costs of incarceration "[i]f the court determines that the offender, at the time of sentencing, has the means to pay." No formal or specific findings of ability to pay are required to be made by the trial court. *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). Still, RCW 10.01.160(3) provides that "the court shall *take account* of the financial resources of the defendant and the nature of the burden that payment of costs will impose." (Emphasis added.) *Curry* observes that, while not required to make

findings, "[t]he court is directed to *consider* ability to pay." 118 Wn.2d at 916 (emphasis added).

Second is the apparent and unsurprising fact that many defendants do not make an effort at sentencing to suggest to the sentencing court that they are, and will remain, unproductive. "The State's burden for establishing whether a defendant has the present or likely future ability to pay discretionary legal financial obligations is a low one." *State v. Lundy*, 176 Wn. App. 96, 106, 308 P.3d 755 (2013). As *Lundy* observes, it has been deemed met by a single reference in a presentence report to the defendant describing himself as "'employable.'" *Id.* (internal quotation marks omitted) (quoting *State v. Baldwin*, 63 Wn. App. 303, 311, 818 P.2d 1116, 837 P.2d 646 (1991)). Indeed, "a trial court is prohibited from imposing legal financial obligations only when it appears from the record that there is no likelihood that the defendant's indigency will end." *Id.* at 99. Sentencing is a context in which most defendants are motivated to portray themselves in a more positive light.

Not only is it unhelpful for a defendant to portray himself or herself as irretrievably indigent at the time of sentencing, a defendant who will truly never be able to pay is not left without protection from collection or punishment. After costs are imposed, a defendant who is not in contumacious default may petition the sentencing court for remission of the payment of all or part of them. RCW 10.01.160(4). Due process precludes the jailing of an offender for failure to pay a fine if the offender's

failure to pay was due to his or her indigence; while the burden is on the offender to show that his nonpayment is not willful, "due process still imposes a duty on the court to inquire into the offender's ability to pay . . . at 'the point of collection and when sanctions are sought for nonpayment.'" *State v. Nason*, 168 Wn.2d 936, 945, 233 P.3d 848 (2010) (citation omitted) (quoting *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997)). Given more important issues at stake in a sentencing hearing, many defendants will consciously and prudently choose not to argue at the time of sentencing that they will be perpetually unemployed and indigent.

The third converging factor is boilerplate findings included in some uniform judgment and sentence forms, which, under CrR 7.2(d) are to be prescribed by the Administrator for the Courts in conjunction with the Supreme Court Pattern Forms Committee. Although perhaps no longer the case,[1] judgment and sentence forms have often included boilerplate findings of ability to pay. We have been presented in many appeals with such boilerplate findings that bear no relation to any evidence or argument presented to the sentencing judge. The boilerplate findings in Mr. Duncan's judgment and sentence to which he objects are:

> 2.7 **Financial Ability:** The Court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood

[1] *See, e.g.*, WPF CR.84.0400P (rev. July 2013), a felony judgment form, *available at* http://www.courts.wa.gov/forms.

> that the defendant's status will change. The Court finds that the defendant has the present ability or likely future ability to pay the financial obligations imposed herein. RCW 9.94A.753.
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> . . . .
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> **4.D.4 Costs of Incarceration:** In addition to the above costs, the court finds that the defendant has the means to pay for the costs of incarceration, in prison at a rate of $50.00 per day of incarceration or in the Yakima County Jail at the actual rate of incarceration but not to exceed $100.00 per day of incarceration (the rate in 2011 is $79.75 per day), and orders the defendant to pay such costs at the statutory rate as assessed by the Clerk. Such costs are payable only after restitution costs, assessments and fines listed above are paid. RCW 9.94A.760(2).
>
> **4.D.5 Costs of Medical Care:** In addition to the above costs, the court finds that the defendant has the means to pay for any costs of medical care incurred by Yakima County on behalf of the defendant, and orders the defendant to pay such medical costs as assessed by the Clerk. Such costs are payable only after restitution costs, assessments and fines listed above are paid. RCW 70.48.130.

CP at 179-81.

The result of these three converging factors are boilerplate findings frequently contained in a judgment and sentence, that are often unsupported by the record, that may well have been supported if addressed at sentencing, but that the defendant had no inclination to object to or challenge at that time.

In *State v. Kuster*, 175 Wn. App. 420, 425, 306 P.3d 1022 (2013), we relied on RAP 2.5(a) to decline to address a challenge to a boilerplate finding of ability to pay LFOs raised for the first time on appeal. Other divisions of the Court of Appeals have taken the same position. *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492, *review granted*, 178 Wn.2d 1010, 311 P.3d 27 (2013); *State v. Calvin*, 176 Wn. App. 1, 316 P.3d

496, *petition for review filed*, No. 89518-0 (Wash. Nov. 12, 2013). *Bertrand*, which is relied upon by Mr. Duncan, involved distinguishable facts: a record from which it affirmatively appeared that the defendant was disabled and was (and would likely remain) indigent, as pointed out in *Lundy*, 176 Wn. App. at 106. Mr. Duncan presents the more typical situation of a record that does not support a finding that he is indigent with no likelihood that his indigency will end.

In other cases, we have often taken our cue from the State's response to this issue—and the State's response has varied among the county prosecutors in our division. Taking our cue from the State, we have sometimes ordered that a finding of ability to pay be stricken if not supported by the record. Other times, we have remanded for a hearing on ability to pay. We have sometimes accepted the argument that an order to pay LFOs (unlike a finding of ability to pay) is not ripe for review before an attempt is made to enforce it. Sometimes, as in *Kuster*, we have refused to consider the challenge, citing RAP 2.5(a).

Here, the State suggests that we remand for a hearing on ability to pay. But having come to the conclusion that ability to pay LFOs is not an issue that defendants overlook—it is one that they reasonably waive—we view this as precisely the sort of issue we should decline to consider for the first time on appeal. We may decline to address an argument under RAP 2.5(a) sua sponte. *State v. Kirkpatrick*, 160 Wn.2d 873, 880 n.10, 161 P.3d 990 (2007), *overruled on other grounds by State v. Jasper*, 174 Wn.2d

96, 271 P.3d 876 (2012). If a trial court fails to consider ability to pay or enters an unsupported finding, it is not constitutional error. *Calvin*, 176 Wn. App. at 24 (citing *Blank*, 131 Wn.2d at 241-42).

We are aware that in *Blazina*, which, along with *State v. Paige-Colter*, noted at 175 Wn. App. 1010, 2013 WL 2444604, *review granted*, 178 Wn.2d 1018, 312 P.3d 650 (2013), has been argued and is presently awaiting decision by the Supreme Court,[2] the defense has argued that entry of unsupported findings on ability to pay falls within the non-rule-based exception to RAP 2.5(a) for sentences in excess of a trial court's statutory authority. *See, e.g.*, *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999); *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). We are not deterred from refusing to entertain the issue for the first time on appeal for several reasons.

In *Mendoza*, the Supreme Court spoke of "belated challenges to criminal history relied upon by a sentencing court" as an exception to what it characterized as Washington appellate courts' "*general reluctance* to address issues not preserved in the trial court," thereby affirming that we will generally not review belated challenges. 165 Wn.2d at 919-20 (emphasis added). We must critically examine whether, if the trial court did fail to comply with RCW 10.01.160(3), it is a sentencing error that should be recognized as a common law exception to RAP 2.5(a).

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[2] Supreme Court Causes 89028-5 and 89109-5 (argued February 11, 2014).

The Supreme Court has recognized shortcomings in the State's proof of a defendant's criminal history as an exception, but its reasoning in doing so does not apply to every error that might be made at sentencing. In *State v. Hunley*, the court reasoned that because the State has the burden to prove prior convictions at sentencing by a preponderance of the evidence, then a failure of proof by the State (even if not raised at trial) raises due process concerns—"because it is 'inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.'" 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012) (citing *Ford*, 137 Wn.2d at 479-80 and quoting *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)); *State v. McCorkle*, 137 Wn.2d 490, 495, 973 P.2d 461 (1999) ("Our holding in *Ford* was directly controlled by the clear burden of proof placed on the State by the [Sentencing Reform Act of 1981, ch. 9.94A RCW]."). By contrast, RCW 10.01.160(3) and RCW 9.94A.760(2) provide that the court is to take account of present or future ability to pay at the time of sentencing, but without imposing a burden of proof on the State at that time.

In *State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996), the Supreme Court offered different reasoning for recognizing an exception for a defendant's failure to raise a timely objection to a sentencing error in the trial court, but reasoning that, again, does not apply here. At issue in *Moen* was a restitution order imposed after the deadline for entering a restitution order had passed. The court reasoned that an exception should be made to

RAP 2.5(a) because (1) allowing a belated challenge would bring the defendant's sentence into compliance with sentencing statutes and (2) the challenge presented no risk that the defendant had engaged in a strategic waiver to the detriment of other parties and the court. Recognizing that a defendant's failure to object to a late order presents no potential for abuse, it held that "[t]his sort of 'correction' of an error does not fall sufficiently within the purpose of the rule"—which it described elsewhere as being to apprise the trial court of the claimed error at a time when it can correct it—"to justify requiring an objection as a prerequisite to appellate review." *Id.* at 547. In the case of LFOs, there is clear potential for abuse, since a defendant might well defer rather than raise a claim of permanent indigency at the time of sentencing, if he or she thought it could be successfully raised for the first time on appeal.

The Supreme Court may clarify this issue in *Blazina* and *Paige-Colter*, but for now we do not understand the reasoning and holdings of *Moen*, *Ford*, and later cases as requiring that we entertain challenges to LFOs and supporting findings that were never raised in the trial court.

In the unusual case of an irretrievably indigent defendant whose lawyer fails to address his or her inability to pay LFOs at sentencing and who is actually prejudiced, a claim of ineffective assistance of counsel is an available course for redress.

We decline to address the issue for the first time on appeal. We affirm Mr. Duncan's conviction and remand the matter to the trial court solely for the purpose of striking the term of community custody for reasons discussed hereafter.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions. RCW 2.06.040.

ADDITIONAL FACTS AND PROCEDURAL BACKGROUND

Shortly before 1 a.m. on a morning in July 2009, Yakima Police Officer Jeff Ely responded to a report of shots fired and the description of a white Subaru or Impala car headed northbound on 5th Avenue. The address where the shooting took place was in west central Yakima, an area known to the officer as being associated with the Sureño gang.

Officer Ely suspected that Norteño gang members were probably responsible for the shooting and would be fleeing to their territory on the east side of town. Railroad tracks run north to south through Yakima, restricting a driver's ability to cross from the west to the east side of town. One of only two direct ways to head east from the address where the shooting took place would be to drive north and then turn eastbound on I Street. Officer Ely therefore headed in that direction. As anticipated, he quickly intercepted a white car headed eastbound on I Street at the railroad tracks and began to follow it.

Officer Ely could see that two passengers were in the car and the driver was wearing a hat that was red, a color claimed by the Norteño gang. He called for backup units and activated his emergency lights. The white car pulled over to the side of the road and stopped. Other officers quickly arrived and together they and Officer Ely conducted a "high risk stop," calling the occupants of the vehicle out at gunpoint, one at a time, having them walk backwards toward police, pull up their shirts and turn in a full circle to ensure there were no weapons in their waistbands, and then lie in a prone position on the ground. By this time, Officer Ely had received a supplemental report that there may be two females in the suspect car, and two females turned out to be in the car, with the defendant, Chad Duncan, driving.

After the three occupants of the car were frisked, handcuffed, and placed in separate patrol cars, the officers performed what they later described as "clearing the vehicle" or a "protective sweep." RP at 71, 93. During that process, Officer Ely saw aluminum shell casings on the floorboard of the car and also what appeared to be a small caliber handgun. Officer Marc Scherzinger also saw spent shell casings in the car. In what officers referred to as a subsequent "frisk" of the car's interior, they retrieved the earlier-observed handgun located between the driver's door and the seat. RP at 72.

Mr. Duncan was charged with six counts of first degree assault for the crime precipitating the dispatch call, with firearm aggravators on each, and with unlawful possession of a firearm. The sufficiency of the evidence to convict him is not at issue.

The principal issue on appeal is, instead, the admission into evidence of the fruits of the stop and search.

Mr. Duncan moved before trial to suppress that evidence on grounds that officers lacked the reasonable suspicion required for a *Terry*[3] stop and exceeded the permissible scope of such a stop. The State responded that the officers had not only a reasonable suspicion, they had probable cause for arrest. It defended the officers' actions as a search incident to arrest. Should the court find probable cause lacking, the State argued, as an alternative justification, that the officers conducted an initial protective sweep of the car for other occupants and later frisked the interior for any firearm that might discharge in the course of the car's being impounded for a later search.

A jury found Mr. Duncan guilty on all counts and returned special verdicts that he had been armed with a firearm in committing each assault. The court imposed consecutive high standard range sentences and community custody of 36 months on the assault convictions, finding that Mr. Duncan was a "criminal street gang member." CP at 188. It also imposed a term of community custody of 12 months on the unlawful possession of a firearm conviction. The judgment and sentence included findings that Mr. Duncan had the present or future ability to pay LFOs as well as the costs of incarceration and the costs of medical care. Mr. Duncan appeals.

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

ANALYSIS

Before trial, Mr. Duncan unsuccessfully moved to suppress evidence. On appeal, he challenges the trial court's refusal to suppress evidence of the handgun and shell casings on two bases. The first, and a basis for his motion to suppress, was that Officer Ely lacked reasonable suspicion for a *Terry* stop, let alone probable cause for what Mr. Duncan argues was essentially an arrest. The second, raised for the first time on appeal, is that the officers' warrantless entry into the car and seizure of the handgun located by the front passenger seat following the stop did not satisfy any exception to the requirement for a warrant under article I, section 7 of the Washington Constitution.

The trial court orally denied the motion to suppress. After Mr. Duncan appealed but before he filed his opening brief, the trial court entered written findings and conclusions supporting its denial of the suppression motion.

I. *Terry* Stop

We first address Mr. Duncan's contention that the officers lacked reasonable suspicion justifying a *Terry* stop. Because the stop was unlawful, he argues, the trial court should have suppressed all evidence of the firearm, shell casings, and other physical evidence obtained during the search of the vehicle.

Warrantless searches and seizures are per se unreasonable unless one of the few, jealously and carefully drawn exceptions to the warrant requirement applies. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). A *Terry* stop is a well-established

exception. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). A police officer who suspects that a particular person has committed a crime can conduct a *Terry* stop and detain that person briefly to investigate the circumstances provoking suspicion. *Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). The purpose of a *Terry* stop "'is to allow the police to make an intermediate response to a situation for which there is no probable cause to arrest but which calls for further investigation.'" *State v. Armenta*, 134 Wn.2d 1, 16, 948 P.2d 1280 (1997) (quoting *State v. Kennedy*, 107 Wn.2d 1, 17, 726 P.2d 445 (1986) (Dolliver, C.J., dissenting)).

To be lawful, the stop must be based on "'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.'" *State v. Diluzio*, 162 Wn. App. 585, 590, 254 P.3d 218 (2011) (alteration in original) (quoting *Terry*, 392 U.S. at 21). The standard for articulable suspicion is a "substantial possibility that criminal conduct has occurred or is about to occur." *Kennedy*, 107 Wn.2d at 6. A reasonable suspicion may be based on "commonsense judgments and inferences about human behavior." *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000).

Whether an officer's suspicion is reasonable is determined by the totality of the circumstances. *State v. Rowe*, 63 Wn. App. 750, 753, 822 P.2d 290 (1991). A police officer may rely on his experience to evaluate apparently innocuous facts. *State v. Martinez*, 135 Wn. App. 174, 180, 143 P.3d 855 (2006) (citing *State v. Samsel*, 39 Wn.

App. 564, 570-71, 694 P.2d 670 (1985)). Facts "which appear innocuous to the average person may appear incriminating to a police officer in light of past experience" and a police officer is not required to set aside that experience. *Samsel*, 39 Wn. App. at 570.

In reviewing a trial court's decision on a motion to suppress, we review challenged findings of fact for substantial evidence, challenged conclusions of law de novo, and determine whether the findings support the conclusions. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Mr. Duncan does not assign error to any of the court's enumerated findings of fact. He does assign error to a number of the court's conclusions of law "[t]o the extent they contain findings of fact," Br. of Appellant at 1, but then fails to identify the particular facts he contests or support his challenge with argument as required by RAP 10.3(a)(6). We therefore treat all of the trial court's findings, whether labeled as findings or contained in the court's conclusions, as verities. *See State v. Moreno*, 173 Wn. App. 479, 491, 294 P.3d 812, *review denied*, 177 Wn.2d 1021 (2013).

The trial court found that at the time Officer Ely pulled over Mr. Duncan's car, he had the following information supporting a reasonable suspicion: there was a victim that had a gunshot wound to the head at 316 Cherry Avenue, which he knew to be an area of town associated with the Sureño gang; the suspects in the shooting were in a white midsized car, either Impala or Subaru type, and had left the scene traveling northbound on 5th Avenue; if members of the rival gang, the Norteños, they would most likely be fleeing toward the east side of town by crossing I Street, where, if that were the case, the

officer believed he would be able to intercept the car; from his experience Officer Ely knew that Sureños claimed the color blue and Norteños the color red; as Officer Ely approached I Street he observed only one white car on the lightly traveled road; and the car, which was occupied by three people, was being driven by an individual wearing a red hat. These specific, articulable facts reasonably warranted the stop. *Cf. Moreno*, 173 Wn. App. at 493 (officer who saw suspect wearing a red shirt—a color associated with the Norteño gang—hurriedly leaving a Sureño neighborhood where shots had been fired reasonably concluded that the person was somehow involved or would have information).

Mr. Duncan alternatively challenges the scope and intensity of the intrusion, arguing that the officers effectively arrested him and his passengers without probable cause.

A *Terry* stop permits officers to briefly detain a person for questioning without grounds for arrest if they reasonably suspect, based on "'specific, objective facts'" that the person detained is engaged in criminal activity or a traffic violation. *State v. Day*, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007) (quoting *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002)). A stop should be minimally intrusive so that the seizure is "'reasonably related in scope to the justification for [its] initiation.'" *Armenta*, 134 Wn.2d at 16 (alteration in original) (internal quotation marks omitted) (quoting *Kennedy*, 107 Wn.2d at 17 (Dolliver, C.J., dissenting)). "[T]he scope of a permissible *Terry* stop will vary with the facts of each case, but . . . it is 'clear' that *Terry* requires that an

investigative detention must be temporary, lasting no longer than is necessary to effectuate the purpose of the stop." *State v. Williams*, 102 Wn.2d 733, 738, 689 P.2d 1065 (1984) (citing *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983)).

While not typically part of a *Terry* stop, police may use intrusive measures such as drawn weapons and handcuffs in order to accomplish the investigatory detention under some circumstances. *Williams*, 102 Wn.2d at 740 n.2. Doing so does not exceed the scope of detention if a reasonable person in the same circumstances would believe he or others are in danger. *State v. Belieu*, 112 Wn.2d 587, 602, 773 P.2d 46 (1989). No hard and fast rule governs the display or use of force; but several facts may bear on the issue of reasonableness, including the nature of the crime under investigation, the degree of suspicion, the physical location of the stop, the time of day, and the reaction of the suspect to the police. *Id.* at 600. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgment—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). The court should be reluctant to second-guess the police officers' determination in the field of how to safely detain a potentially armed suspect. *See Belieu*, 112 Wn.2d at 601.

As already concluded, Officer Ely had a reasonable basis for a *Terry* stop of Mr. Duncan's car. Given the nature of the crime under investigation, it was reasonable to conduct a high risk stop. But we need not decide that the level of intrusion was appropriate for a *Terry* stop because we are satisfied that the officer quickly acquired probable cause for arrest. While initiating the stop, Officer Ely received information that there may be two females in the car, which proved to be the case, leading the officer to be "pretty sure at that point that we had the right—the right vehicle stopped." RP at 71. The trial court concluded that "there was probable cause from the time that Officer Ely saw the white car and saw the occupant with the red hat." CP at 207. We conclude that at a minimum, there was probable cause once the confirmed presence of the two women was added to the information that had justified the stop. Mr. Duncan's argument that the stop was similar in intensity and duration to an arrest fails, where we conclude that the information available to the officers almost immediately constituted probable cause for arrest.

II. Search "Incident to Arrest"

Mr. Duncan's second argument on appeal was not raised in the trial court because it is based on intervening developments in the law.

Mr. Duncan's detention and the seizure of the handgun from his car took place in July 2009, at a time when controlling Washington case law provided that "[d]uring the arrest process, including the time immediately subsequent to the suspect's being arrested,

handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence." *State v. Stroud*, 106 Wn.2d 144, 152, 720 P.2d 436 (1986), *overruled by State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009). While the United States Supreme Court had by that time decided *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), which limited searches incident to arrest, *Gant* still recognized that warrantless automobile searches incident to arrest were proper under the Fourth Amendment to the United States Constitution (1) when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or (2) when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. *State v. Snapp*, 174 Wn.2d 177, 181, 275 P.3d 289 (2012).

The hearing on Mr. Duncan's motion to suppress was conducted following *Gant*, in February 2011. Written findings and conclusions were entered in February 2012. Among the trial court's conclusions in denying the motion to suppress was that "the evidence of the crime of drive-by shooting for which the officers had probable cause to arrest the defendant is both the spent shell casings and the firearm used in the crime," and that seizure of that evidence was therefore "permitted under *Arizona v. Gant*." CP at 207. Its conclusion relied on the second circumstance recognized by *Gant* as supporting a search incident to arrest, referred to by our Supreme Court in *Snapp* as the *Thronton*

exception (after *Thornton v. United States*, 541 U.S. 615, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004)). *Snapp*, 174 Wn.2d at 181 & n.1.

But a couple of months later, in April 2012, our Supreme Court decided in *Snapp* that the *Thornton* exception was not an exception to the warrant requirement under article I, section 7 of the Washington Constitution.

Because Mr. Duncan's appeal was pending when *Snapp* was decided, Mr. Duncan is entitled to the benefit of the decision. *State v. Louthan*, 175 Wn.2d 751, 754, 287 P.3d 8 (2012). And although he did not challenge the constitutionality of a search incident to arrest in the trial court, his circumstances fall within the narrow class of cases in which issue preservation will not prevent him from raising the issue for the first time on appeal.[4] When we apply *Snapp* retroactively, the trial court's conclusion that the handgun and shells were seized in a valid search incident to arrest proves to have been error.[5] The

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[4] In *State v. Robinson*, 171 Wn.2d 292, 305, 253 P.3d 84 (2011), our Supreme Court held that "principles of issue preservation do not apply where the following four conditions are met: (1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation," pointing out that, "[a] contrary rule would reward the criminal defendant bringing a meritless motion to suppress evidence that is clearly barred by binding precedent while punishing the criminal defendant who, in reliance on that binding precedent, declined to bring the meritless motion."

[5] The State argues that the court's holding in *Snapp* should be limited to cases in which the basis for a stop was a minor traffic infraction but nothing in the court's decision supports such a limitation.

principal question presented, then, is whether the officers' actions are defensible on an alternative basis. A related question is whether the record is sufficiently developed for this court to consider those alternative justifications for the officers' actions or whether Mr. Duncan's new argument, implicating new defenses, requires remand. *Cf. State v. Robinson*, 171 Wn.2d 292, 306, 253 P.3d 84 (2011) (remanding for suppression hearings where "neither the petitioners nor the State had the incentive or opportunity to develop the factual record before the trial court").

In this case, because the State anticipated at the time of the suppression hearing that the court might find reasonable suspicion for a *Terry* stop but no probable cause supporting arrest, it presented evidence bearing on alternative justifications for the officers' actions. We address the alternative justifications in turn.

Protective Sweep. Under the Washington Constitution, a valid investigatory stop may include a protective sweep of the suspect's vehicle when the search is necessary to assure officer safety. *Kennedy*, 107 Wn.2d at 12. The protective sweep must be objectively reasonable. *State v. Larson*, 88 Wn. App. 849, 853-54, 946 P.2d 1212 (1997). A protective sweep is a "quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Maryland v. Buie*, 494 U.S. 325, 327, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990). Permissible protective sweeps are not limited to buildings; concerns for officers' personal safety may

justify the search of a vehicle in the course of a *Terry* stop to confirm that no one else is inside. *E.g.*, *United States v. Thomas*, 249 F.3d 725 (8th Cir. 2001). A protective sweep can include opening the door of a vehicle if necessary to see inside. *See id.*; 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 7.4(i) (5th ed. 2012) and cases cited therein.

At the CrR 3.6 hearing, the State presented evidence supporting the alternative of a protective sweep should the trial court decide that officers lacked probable cause for arrest. The trial court's conclusion of law 5, which includes factual findings, states:

> Once the officers had the three observable passengers secured, they acted appropriately to clear the vehicle of anyone else hiding in it, given the appropriate concern for officer safety. . . . *During this process Officer Ely observed the spent shell casings inside the vehicle on the driver's side floor as he was standing outside the vehicle*, clearly establishing probable cause to arrest the defendant at that point in time, since the defendant was the driver of the vehicle.

CP at 207 (emphasis added). Although observed by Officer Ely, the shell casings were not seized until the car was transported to impound and a warrant was obtained. The officers' actions fall within the scope of a cursory visual inspection; the trial court did not err in denying Mr. Duncan's motion to suppress evidence of the shell casings.

Exigent Circumstances. The trial court concluded that the warrantless search was permissible not only as a search incident to arrest but also that the exigent circumstances exception to the warrant requirement applied. "The rationale behind the exigent circumstances exception 'is to permit a warrantless search where the circumstances are

such that obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence.'" *State v. Smith*, 165 Wn.2d 511, 517, 199 P.3d 386 (2009) (quoting *State v. Audley*, 77 Wn. App. 897, 907, 894 P.2d 1359 (1995)). Our Supreme Court has identified five circumstances from federal cases "that '*could* be termed "exigent"' circumstances," including "'(1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; and (5) mobility or destruction of the evidence.'" *State v. Tibbles*, 169 Wn.2d 364, 370, 236 P.3d 885 (2010) (quoting *State v. Counts*, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983)). A court must look at the totality of the circumstances in order to determine whether exigent circumstances support a warrantless search. *Smith*, 165 Wn.2d at 518.

The exigent circumstance urged by the State is based on the trial court's finding that having handcuffed the three passengers and placed them in patrol cars, the officers did a second protective sweep of the interior of the car "to ensure that [they] were not going to be towing a car with a handgun inside that could possibly discharge. During the protective [sweep], officers located a handgun by the front passenger seat, between the door and the seat." CP at 205. The court concluded that the officers were justified in frisking the interior of the vehicle for the suspected weapon because "the presence of an unsecured firearm presented a safety risk to the officers and a danger to anyone in the

area of accidentally discharging while the car was being towed since a car is frequently lifted up and dropped and moved around." CP at 207.

What is lacking is any exigency. The passengers had all been detained in the back of patrol cars. Four officers were present. The State offers no reason why officers could not seek a telephonic search warrant and watch over the car in the meantime. "'To find exigent circumstances based on these bare facts would set the stage for the exigent circumstances exception to swallow the general warrant requirement.'" *State v. Swetz*, 160 Wn. App. 122, 136-37, 247 P.3d 802 (2011) (quoting *Tibbles*, 169 Wn.2d at 372). The seizure of the handgun cannot be justified on this basis.[6]

Open View/Plain View. Finally, and for the first time on appeal, the State asserts the warrantless search was valid under the plain view and/or open view exceptions to the warrant requirement. "[W]e may affirm a trial court's decision on a different ground if the record is sufficiently developed to consider the ground fairly." *State v. Sondergaard*, 86 Wn. App. 656, 657-58, 938 P.2d 351 (1997).

The "open view" exception applies to an officer's observation from a nonconstitutionally protected area. *State v. Seagull*, 95 Wn.2d 898, 901-02, 632 P.2d 44 (1981). Under the open view doctrine when an officer observes evidence from a

[6] A further exception to the warrant requirement allows law enforcement to perform an inventory search in connection with the lawful impoundment of a vehicle. The State does not advance a justification for lawful impoundment or rely upon the inventory exception.

nonconstitutionally protected area, article I, section 7 is not implicated and the observation is not a search. *Kennedy*, 107 Wn.2d at 10. The officer's right to seize the items observed, however, must be justified by a warrant or valid exception to warrant requirement, if the items are in a constitutionally protected area.[7] *Id.* at 9-10. The open view observation is thus not a search at all but may provide evidence supporting probable cause to constitutionally search; in other words, a search pursuant to a warrant. *Swetz*, 160 Wn. App. at 135 (quoting *State v. Lemus*, 103 Wn. App. 94, 102, 11 P.3d 326 (2000)).

The plain view doctrine is an exception to the warrant requirement that applies after the police have intruded into an area where there is a reasonable expectation of privacy. *State v. O'Neill*, 148 Wn.2d 564, 582, 62 P.3d 489 (2003). "[T]he 'plain view' doctrine justifies a seizure only when the officer has lawful 'access' to the seized contraband under some prior Fourth Amendment justification and when the officer has probable cause to suspect that the item is connected with criminal activity." *State v. Gibson*, 152 Wn. App. 945, 954, 219 P.3d 964 (2009) (citing *Illinois v. Andreas*, 463 U.S. 765, 771, 103 S. Ct. 3319, 77 L. Ed. 2d 1003 (1983)). If the requirements of the

[7] "[I]f an officer, after making a lawful stop, looks into a car from the outside and sees a weapon or contraband in the car, he has not searched the car. Because there has been no search, article 1, section 7 is not implicated. Once there is an intrusion into the constitutionally protected area, article 1, section 7 is implicated and the intrusion must be justified if it is made without a warrant." *Kennedy*, 107 Wn.2d at 10.

plain view doctrine are satisfied, then the object may be lawfully seized. *Kennedy*, 107 Wn.2d at 10.

The justification for the intrusion leading to the plain view can be based on a warrant or on one of the recognized exceptions to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 465, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). The extension of the original justification for the intrusion is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges. *Id.* at 466.

Here, the justification relied upon by the State for the intrusion leading to plain view was the initial protective sweep of the car, to make sure that no one was hiding in it. The unchallenged findings of the trial court include its finding that as a part of the initial protective sweep, "both Officer Ely and Officer Scherzinger opened the passenger door and observed . . . what appeared to be a small caliber handgun." CP at 205. We need not review the record for evidence supporting unchallenged findings, which are verities. But in support of the adequacy of the record to address this new and alternative justification, we point out that the finding is supported by Officer Ely's testimony:

> A Well, we safely detained all the vehicle occupants by initiating a high-risk stop. And then we did a—basically a clearance of the vehicle. We walked up to make sure there was no other occupants hiding in the vehicle. It's all standard practice when doing these type of stops. And while clearing the vehicle it was evident there

was aluminum shell casings all over the floorboard and the seat from what appeared to be a small caliber handgun.
Q Did you observe those from outside the vehicle?
A From outside the vehicle.

RP at 71. We defer to the trier of fact on issues of credibility and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). The initial protective sweep by officers was lawful. The gun, having been in plain view in the course of the sweep, was permissibly seized by the officers.

STATEMENT OF ADDITIONAL GROUNDS

In a pro se statement of additional grounds (SAG), Mr. Duncan raises 15. One (his detention, allegedly not based on probable cause) was adequately addressed by counsel and will therefore not be reviewed again. We address the remainder in turn.

Alleged Miranda[8] *Violation.* Mr. Duncan alleges that the trial court erred by denying his CrR 3.5 motion to suppress the statements he made to police. He argues that during the course of being interviewed by officers, he made an unequivocal request for counsel yet the officer continued to question him.

We review a trial court's rulings following a suppression hearing to determine if substantial evidence supports the factual findings and whether the findings support the conclusions of law. *State v. Broadaway*, 133 Wn.2d 118, 130, 942 P.2d 363 (1997). We review de novo whether the trial court's conclusions of law are properly derived from its

[8] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

findings of fact. *State v. Pierce*, 169 Wn. App. 533, 544, 280 P.3d 1158, *review denied*, 175 Wn.2d 1025 (2012).

It appears undisputed that Mr. Duncan made a knowing, voluntary, and intelligent waiver of his rights at the outset of his interview by officers. At some point he asked for a lawyer. The trial court found that "Chad Duncan did not ask for an attorney until after he stated that he had no knowledge about a gun in the car or a shooting. At that point all questioning stopped." CP at 200. Although two officers who witnessed the questioning had different recollections about whether there was further questioning regarding his tattoo after his request for a lawyer, the trial court concluded that all relevant questioning stopped when Mr. Duncan made the request. The fact finder determines the credibility of witnesses and this court will not review that determination on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Based on Officer Tarin Miller's testimony there was substantial evidence to support the trial court's factual findings.

Exculpatory Evidence. Mr. Duncan asserts that the State erred in failing to preserve two pieces of exculpatory evidence: a surveillance tape from a convenience store where Mr. Duncan claims to have met up with a friend who allegedly borrowed his car at the time of the shooting and video from the COBAN audio/video unit in Officer Ely's police cruiser.

Officer Miller attempted to view the convenience store video, but was unable to get a copy because the equipment could not be accessed without the manager's keys. A

detective was supposed to have followed up and obtained the tape, which the store retained for only one week, but he failed to do so.

Officer Ely denied that the COBAN unit in his cruiser activated automatically when he turned on emergency lights as alleged by Mr. Duncan and asserted that he never turned the unit on during their encounter. The State's position was that there was never video from Officer Ely's cruiser that could be produced.

To comport with due process, the prosecution has a duty not only to disclose material exculpatory evidence, but has a related duty to also preserve the evidence. *State v. Wittenbarger*, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). If the State fails to preserve material exculpatory evidence, the trial court must dismiss the criminal charges. *Id.* Evidence is materially exculpatory if it "possess[es] an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* (citing *California v. Trombetta*, 467 U.S. 479, 489, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)). Simply assuming that the evidence would have made defendant's version of events more likely is not enough. *State v. Uribe Valdez*, 158 Wn. App. 626, 629, 241 P.3d 1288 (2010) (citing *State v. Copeland*, 130 Wn.2d 244, 280, 922 P.2d 1304 (1996)).

"Potentially useful" evidence is "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Arizona v. Youngblood*, 488 U.S. 51, 57, 109 S. Ct. 333, 102

L. Ed. 2d 281 (1988). If the State fails to preserve potentially useful evidence that is not material and exculpatory, the State has not violated the defendant's right to due process unless the defendant can show that the State acted in bad faith. *Wittenbarger*, 124 Wn.2d at 477 (citing *Youngblood*, 488 U.S. at 58).

The convenience store video was not lost through the action of the State, although it might have been lost due to its inaction. Nonetheless, Mr. Duncan does not establish that the convenience store video was materially exculpatory. The evidence may be deemed "potentially useful" but Mr. Duncan fails to demonstrate that the police acted in bad faith in failing to secure the video before it was destroyed.

As to the COBAN video, nothing in the record supports Mr. Duncan's contention that officers conspired to turn off their video units.

Nondisclosure of Evidence of Time Trials. Mr. Duncan argues that he was unfairly surprised at trial with evidence of time trials that officers had prepared to address events following the shooting, including his claim that he recovered his loaned car from a friend at the convenience store. He argues, in error, that he was denied a continuance to address the new evidence. The record reveals that after his lawyer objected to the evidence, the trial court allowed the defense the weekend to conduct its own time trials and ordered the officers involved in the State's time trials to be at defense counsel's disposal.

Mr. Duncan makes a passing argument that the State's evidence of its time trials violated the confrontation clause because only one of the officers participating in the time trials testified. The officer did not rely on or present any testimonial statement by a nontestifying witness, however. The confrontation clause was not implicated.

Witnesses Heather Pyles, Sergeant Kelly Willard, and Chief Adam Diaz. Mr. Duncan complains about the testimony of three State witnesses, couching his arguments in "confrontation clause" terms although none appears to raise an issue under the confrontation clause.

His complaint about Heather Pyles, a DNA expert, is based on her late disclosure by the State, which was a subject matter of pretrial motions. The trial court allowed Ms. Pyle to testify because, while she was not timely identified, the defense had had the DNA evidence about which she testified for over a year prior to trial and therefore ample time to investigate. The trial court did not abuse its discretion in allowing Ms. Pyle to testify.

Mr. Duncan takes issue with the testimony of Sergeant Kelly Willard for reasons that are not supported by the record; he is evidently confused about the sergeant's role and the basis for his lawyer's objection to the sergeant's testimony.

Mr. Duncan finally takes issue with the fact that Chief of Police Adam Diaz arrived to testify to Mr. Duncan's predicate offense to the firearm charge in uniform. From the record it appears that the police chief was not ultimately required to testify because Mr. Duncan stipulated to the conviction. There can be no error.

Prosecutorial Misconduct. Mr. Duncan complains that the prosecutor described him as recalcitrant, which he has determined means someone who kicks with heels and, according to Mr. Duncan, implied that he is gay, cowardly, and the type that would stab you with stiletto heels and not a knife.

"Recalcitrant" means "obstinately defiant of authority or restraint : stubbornly disobedient." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1893 (1993). The prosecutor's use of the word to describe Mr. Duncan was neither improper nor prejudicial.

Missing Witness Instruction. The trial court was persuaded by the State to give a "missing witness" instruction. A missing witness instruction informs the jury that it may infer that a person's testimony would have been unfavorable to a party if that person was available to a specific party, could have been a witness at trial on an important issue, it appears to be in the best interests of the party to call that person as a witness, the party does not satisfactorily explain why it did not call the witness, and the inference that the person's testimony would have been unfavorable to the party is reasonable under all the circumstances. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 5.20, at 177 (3d ed. 2008). If a witness's absence can be satisfactorily explained, a missing witness instruction should not be given. *State v. Blair*, 117 Wn.2d 479, 489, 816 P.2d 718 (1991).

Mr. Duncan contends that the prosecutor slipped the instruction into its proposed instructions after the trial court had refused to give it. The record does not reveal any impropriety by the State but only its success in persuading the trial court to reconsider.

We review a trial court's decision whether to give a particular instruction for abuse of discretion. *State v. Winings*, 126 Wn. App. 75, 86, 107 P.3d 141 (2005). The only explanation offered for the absence of the witness was Mr. Duncan's. The court clearly felt that Mr. Duncan's self-serving testimony was an insufficient explanation. We find no abuse of discretion.

Drive-by Shooting Instruction. Mr. Duncan makes a confusing argument that the trial court should have given the jury instructions on second degree assault and drive-by shooting as lesser included crimes to the State's charges of first degree assault. The court did instruct the jury on the lesser degree crime of second degree assault. CP at 135 (Instruction 16).

Mr. Duncan appears to misapprehend an argument by his lawyer, relying on *State v. Danforth*, 97 Wn.2d 255, 258, 643 P.2d 882 (1982), that where a special statute punishes the same conduct that is punished under a general statute, the special statute applies and the accused can be charged only under that statute to the exclusion of the general. A drive-by shooting and a first degree assault are not the same crime. The two have different victims. A victim of a drive-by is the general public. *See State v. Rodgers*, 146 Wn.2d 55, 62, 43 P.3d 1 (2002).

The trial court found that it was the State's role to select the crimes to be charged and theory to pursue. It did not abuse its discretion.

Insufficient Evidence. Mr. Duncan raises two "insufficient evidence" claims, each of which lacks merit. In reviewing a claim of insufficient evidence, the court views evidence in the light most favorable to the State in order to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Brockob*, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). An insufficient evidence claim admits the truth of the evidence as well as all reasonable inferences that can be drawn from the evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Mr. Duncan's first argument of insufficient evidence is that he was not given adequate notice of the loss of his right to possess firearms at the time he was sentenced for his predicate juvenile offense. Typically, ignorance of the law is not a defense. *State v. Minor*, 162 Wn.2d 796, 802, 174 P.3d 1162 (2008). However, the trial court must give oral and written notice that a defendant is not allowed to possess a firearm. *Id.* at 803; RCW 9.41.047(1).

The trial court reviewed Mr. Duncan's guilty plea to the offense, finding that the paragraph relating to firearms was checked, although not initialed. Mr. Duncan had signed, indicating that his lawyer had fully explained the plea and had discussed all of the

paragraphs. From this, the court concluded that Mr. Duncan received written notice regarding the fact he was not to possess firearms.

As for oral notice, the trial court listened to a recording of the sentencing. While the court expressed concern about the quality of the recording, it was able to discern that some mention of firearms was made during the court's statements. The trial court concluded that the sentencing judge substantially complied with RCW 9.41.047(1). Its conclusion was supported by the evidence.

With respect to his conviction of assault, Mr. Duncan argues that there was insufficient evidence that he acted with the specific intent required for first degree assault because it was impossible to see through the window into which shots were fired and he could not intend to inflict great bodily harm without knowing that someone was in the line of fire. Intent is "the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(l)(a). The defendant's "'specific criminal intent . . . may be inferred from the conduct where it is plainly indicated as a matter of logical probability.'" *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004) (quoting *Delmarter*, 94 Wn.2d at 638).

Here, the evidence showed that someone drove by 316 Cherry Avenue and shot at the house. From this evidence a rational jury could infer the intent to hurt or kill as a matter of logical probability.

Suppression of Gang Evidence. Before trial, the State's motions in limine put the court and the defense on notice of its intent to offer ER 404(b) gang evidence. Gang evidence is admissible in a criminal trial if there is a nexus between the crime and gang membership. *State v. Scott*, 151 Wn. App. 520, 521, 213 P.3d 71 (2009). Such evidence is inherently prejudicial, however, and is measured under the standard of ER 404(b). *Id.* at 526.

It was not until the discussion of jury instructions at the conclusion of trial that Mr. Duncan's lawyer raised his belief that the issue of gang evidence had not been resolved pretrial, with the other issues addressed by motions in limine. Because significant gang evidence had been offered, he moved for a mistrial. The motion was denied.

While Mr. Duncan's lawyer was correct that the court did not rule on the admission of gang evidence under ER 404(b), Mr. Duncan does not demonstrate that he objected when the evidence was offered. A party must object while the trial court has the opportunity to correct the problem. Mr. Duncan's objection was raised too late.

Judicial Bias. Mr. Duncan claims that the trial court was biased. A party claiming bias or prejudice must support the claim with evidence of the trial court's actual or potential bias. *State v. Gamble*, 168 Wn.2d 161, 187-88, 225 P.3d 973 (2010). "Judicial rulings alone almost never constitute a valid showing of bias." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004) (citing *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994)). Mr. Duncan's appearance of

fairness or judicial bias claim necessarily fails to the extent it is supported solely by the trial court's adverse rulings.

Mr. Duncan also alleges that the trial court told his mother that the only way to solve the gang problem was with long sentences. Since no such statement can be found in the record, we lack an insufficient basis to review it for any error or abuse. RAP 9.2(b).

We affirm Mr. Duncan's conviction and remand the matter to the trial court solely for the purpose of striking the term of community custody.

Siddoway, J.

WE CONCUR:

Korsmo, C.J.

Brown, J.