

Nº. 35080-7-II

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

STATE OF WASHINGTON
Respondent,

v.

AARON GUSTER CLOUD,
Appellant.

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COURT OF APPEALS
DIVISION II

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Kitsap County,
Cause No. 06-1-00373-8
The Honorable Leonard W. Costello, Presiding Judge

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Cloud's motion to suppress evidence seized pursuant to the *Terry* stop.
2. The trial court erred in granting the State's motion to allow evidence of Mr. Cloud's prior convictions for burglary.
3. Mr. Cloud received ineffective assistance of counsel.
4. There was insufficient probable cause to arrest Mr. Cloud.
5. There was insufficient evidence to convict Mr. Cloud of burglary in the second degree.
6. There was insufficient evidence to convict Mr. Cloud of unlawful possession of a firearm.
7. There was insufficient evidence to establish probable cause to arrest Mr. Cloud.
8. Cumulative error denied Mr. Cloud his right to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Does a police officer have sufficient probable cause to conduct a *Terry* stop where he has no knowledge of facts sufficient to support a well founded suspicion that the individual being stopped has committed a crime? (Assignment of Error No. 1)
2. Is evidence of a defendant's prior convictions for identical crimes admissible for purposes of proving common scheme or plan where there is no unique method of committing the crimes which gives rise to a high probability that the defendant committed them? (Assignment of Error No. 2)
3. Does a defendant receive effective assistance of counsel where trial counsel stipulates to informing the jury that the defendant was prohibited from possessing a firearm because he had previously been convicted of a serious offense identical to the current charges rather than stipulating to informing the jury the defendant had been convicted on an unnamed serious felony? (Assignment of Error No. 3)
4. Did Mr. Cloud's possession of a generic flashlight and generic facemask provide sufficient probable cause to support the issuance of a warrant to arrest Mr. Cloud for burglary? (Assignment of Error No. 4)

5. Did the State present sufficient admissible evidence to convict Mr. Cloud of burglary in the second degree? (Assignment of Error No. 5)
6. Did the State present sufficient admissible evidence to convict Mr. Cloud of unlawful possession of a firearm? (Assignment of Error No. 6)
7. Did the Certification for Determination of Probable Cause provide sufficient facts to support the issuance of an arrest warrant for Mr. Cloud? (Assignment of Error No. 7)
8. Does cumulative error deny a defendant a fair trial where a defendant's counsel stipulates to the admission of highly prejudicial but minimally probative evidence and where the trial court erroneously allows the introduction of highly prejudicial evidence? (Assignment of Error No. 8)
9. Error is assigned to Finding of Fact for Hearing on CrR 3.6 No. VI which reads,

That as the Defendant drove onto the property where the warrant was being executed, Detective Birkenfeld directed the Defendant to stop his car both because he was attempting to secure the scene as the search warrant was being executed and because of officer safety concerns given the previous report associating the Defendant and his vehicle with a shotgun.

10. Error is assigned to Finding of Fact for hearing on CrR 3.6 No VIII which reads,

That based on his viewing of the video surveillance of the burglary, as well as the Defendant's previous admission to a prior burglary at the same store using the same point of entry, Detective Birkenfeld immediately and reasonably recognized the items as evidence of a crime, and seized the items.

C. STATEMENT OF THE CASE

Factual Background

Facts introduced at the 3.6 hearing

In September of 2005, the Handy Andy's convenience store in Bremerton was burglarized. CP 25-37.

In October of 2005, Mr. Cloud was taken into custody in relation to two burglary charges after he was found at the scene of a burglary. RP 8-9, 5-3-06.¹

On November 30, 2005, after being charged with the two burglaries, Mr. Cloud entered into plea negotiations with the State. RP 9-10-5-3-06. As part of the plea negotiations, Mr. Cloud admitted to police that he had committed a number of other burglaries the police suspected Mr. Cloud had committed but had been unable to prove. RP 10, 5-3-06. During the course of the plea negotiations, without being charged or accused of it, Mr. Cloud admitted he was responsible for the September 2005 burglary of the Handy Andy's store. CP 25-37, RP 9-10, 5-3-06.

On December 13, 2005, Mr. Cloud entered pleas of guilty to one count of second degree burglary and one count of residential burglary and received a sentence of four months with credit for time served. CP 74-91.

On February 2, 2006, the Handy Andy's convenience store was again burglarized, this time by two individuals who were filmed by the security cameras in the store. CP 25-37. Detective Birkenfeld attempted to view the security video, but was only able to see 8 to 10 seconds of each security video clip. RP 15-16, 5-3-06. The video was in color, but had shading and distortions due to the camera angles. RP 16, 5-3-06.

From viewing the security video, Detective Birkenfeld was able to determine that two people were involved in the February 2, 2006 Handy Andy's burglary. RP 16, 5-3-06. One appeared to be a male subject wearing a tan or brown Carhart ski mask, a dark colored coat, dark colored running pants with striping on the side, work gloves with white lettering and carrying what appeared to be a blue colored flashlight. RP 16-17, 5-3-06.

¹ The report of proceedings is not paginated continuously between volumes. Reference will be made by giving the RP page number followed by the date of the hearing.

On March 2, 2006, Detective Birkenfeld was conducting a knock-and-talk at a residence on Church Road regarding complaints relating to narcotics traffic. RP 17-18, 5-3-06. Mr. Cloud's mother lived at the residence. RP 18, 5-3-06. Five to ten minutes prior to arriving at Mr. Cloud's mother's residence, Detective Birkenfeld heard over the radio that Deputies Kent and Eberhard were responding to a call at a residence regarding a report of a male subject walking around with a shotgun and pointing it at people. RP 19, 5-3-06. Detective Birkenfeld was able to contact Deputy Eberhard, who identified Mr. Cloud as the person the caller was referring to, and provided a description of Mr. Cloud's vehicle. RP 19-20, 5-3-06. Deputy Eberhard informed Detective Birkenfeld that he had contacted Mr. Cloud and had allowed Mr. Cloud to leave the scene of the other residence. RP 20, 5-3-06. Deputy Eberhard had had the opportunity to search Mr. Cloud's vehicle, but Mr. Cloud had not given Deputy Eberhard permission to search. RP 34, 5-3-06.

As other officers and detectives were talking with the people at the Church Road residence, Mr. Cloud drove into the driveway. RP 21, 5-3-06. Detective Birkenfeld contacted Mr. Cloud and conducted a *Terry* stop, for purposes of investigating the burglary of the Handy Andy's store. RP 21, 49, 5-3-06. As Detective Birkenfeld approached Mr. Cloud's vehicle, he observed Mr. Cloud placing his hands underneath the front seat. RP 21, 5-3-06. Detective Birkenfeld claimed to observe Mr. Cloud placing what appeared to be a ski mask and flashlight under the seat. RP 22, 5-3-06.

Deputy Birkenfeld asked Mr. Cloud to step out of the car because he did not know if there were guns in the car. RP 22, 5-3-06. Deputy Birkenfeld then detained Mr. Cloud based on the ski mask and flashlight. RP 22, 5-3-06. Deputy Birkenfeld explained to Mr.

Cloud that the ski mask and flashlight matched the items seen in the burglary and explained that he needed to detain Mr. Cloud on the firearms related investigation until Mr. Cloud could contact Deputy Eberhard and confirm whether or not Mr. Cloud was still a suspect. RP 22, 5-3-06. Detective Birkenfeld claimed that he had officer safety concerns because he did not know what was in Mr. Cloud's car, Mr. Cloud had a felony conviction, Mr. Cloud had placed his hands under the seat, and ten to fifteen minutes previously Mr. Cloud had been identified as a person possibly waiving a shotgun around. RP 22, 5-3-06.

Detective Birkenfeld then *Mirandized* Mr. Cloud and spoke to Mr. Cloud regarding the fact that the ski mask and the flashlight were similar to the ones in the security video of the burglary. RP 23, 5-3-2006. Mr. Cloud told Deputy Birkenfeld that the facts "looked bad," but that he did not commit the February 2 burglary at the Handy Andy's store. RP 23, 5-3-06.

Deputy Eberhard then arrived at the Church Road residence and he and Detective Birkenfeld obtained verbal consent from Mr. Cloud to search Mr. Cloud's vehicle. RP 23, 5-3-06. At the time Mr. Cloud gave consent for his vehicle to be searched, he was handcuffed. RP 38, 5-3-06. The first thing Detective Birkenfeld did after receiving Mr. Cloud's consent to search was to pull the brown Carhart ski mask and blue Panasonic brand flashlight from under the seat of Mr. Cloud's vehicle. RP 23-24, 5-3-06. Detective Birkenfeld also discovered a small black mini-mag type of flashlight. RP 24, 5-3-06. Detective Birkenfeld searched the rest of Mr. Cloud's vehicle, but because Detective Birkenfeld's concern at that point was "dealing with the weapon issue," Detective Birkenfeld did not open all the bags in the car or pull all the clothes out which were on

hangers in the car. RP 24, 5-3-06. Detective Birkenfeld then loaded all of Mr. Cloud's possessions back into Mr. Cloud's car, told Mr. Cloud that he was going to take the ski mask and flashlights, and told Mr. Cloud he was free to go. RP 24-25, 5-3-06. Mr. Cloud gave permission for Detective Birkenfeld to search his car but not for Detective Birkenfeld to seize the flashlights and ski mask. RP 37-38. 5-3-06.

After Detective Birkenfeld confirmed that Deputy Eberhard did not have any more need to detain Mr. Cloud, he let Mr. Cloud go. RP 26-27.

Detective Birkenfeld seized the ski mask and blue flashlight because they appeared similar to the ones in the security video from the robbery of the Handy Andy's store. RP 25-26, 5-3-06. Detective Birkenfeld seized the black mini-mag flashlight because he wanted to have it since he hadn't watched the entire security video and did not know if there was another flashlight involved with the robbery. RP 50-51, 5-3-06.

After the March 2, 2006, contact with Mr. Cloud, Detective Birkenfeld received assistance in viewing the security footage from Detective Rodrigue. RP 16, 5-3-06. Detective Rodrigue was able to provide Detective Birkenfeld with a complete and enhanced copy of the security video. RP 16, 5-3-06.

Besides the security video and the items seized from Mr. Cloud's vehicle, there was no evidence collected by the police prior to arresting Mr. Cloud. RP 45-46, 5-3-06.

On March 6, 2006, the State applied for a warrant for Mr. Cloud's arrest. CP 7-11.

Facts introduced at trial

On September 16, 2005, a break in occurred at a Handy Andy's store in Kitsap County. RP 189-190, 207-208, 5-9-06. The same Handy Andy's store was broken into

again on February 2, 2006. RP 193, 209-211 5-9-06. Both times the store was broken into by removing the same vent in the roof of the store. RP 191-193, 201-202, 207-211, 5-9-06.

On November 30, 2005, Detective Birkenfeld was present at a meeting with Mr. Cloud, Mr. Cloud's attorney, and the prosecutor. RP 228, 5-9-06. During this meeting, Mr. Cloud confessed to having committed the September break in at the Handy Andy's and described how the entry was made through the roof. RP 228-229, 5-9-06.

The February robbery at the Handy Andy's was filmed by the store's security cameras. RP 194, 5-9-06.

Detective Birkenfeld viewed the security footage from the store. RP 216, 5-9-06. Detective Birkenfeld was only able to view the first ten seconds of each of the three segments of security video. RP 217, 5-9-06. In these clips, Detective Birkenfeld was able to observe people in the store and have rough observations of what the people were wearing. RP 217, 5-9-06.

On March 2, 2006, Detective Birkenfeld came into contact with Mr. Cloud on Church Road. RP 217, 5-9-06. Mr. Cloud was driving a vehicle which pulled into the driveway of a house where Detective Birkenfeld was assisting in obtaining a warrant. RP 217-219, 5-9-06. As Detective Birkenfeld approached Mr. Cloud's vehicle, Detective Birkenfeld observed Mr. Cloud place his hands under the seat of the car. RP 219-220, 5-9-06. Detective Birkenfeld looked at Mr. Cloud's hands and saw a dark colored stocking hat and a flashlight. RP 219-220, 5-9-06. Detective Birkenfeld had Mr. Cloud step out of his vehicle and spoke to Mr. Cloud about the mask and flashlight. RP 220, 5-9-06.

Detective Birkenfeld told Mr. Cloud about the robbery at the Handy Andy's

Detective Birkenfeld was investigating and that the mask and the flashlight appeared to be the same as the ones in the video. RP 220-221, 5-9-06. Mr. Cloud stated that “it looked bad” but that he didn’t commit the burglary. RP 221, 5-9-06. Detective Birkenfeld then searched Mr. Cloud’s car and recovered the mask and the flashlight, exhibits 2 and 1, respectively. RP 221, 223, 5-9-06. After recovering the flashlight and mask, Detective Birkenfeld let Mr. Cloud go. RP 230, 5-9-06.

After contacting Mr. Cloud on March 2, 2006, Detective Birkenfeld investigated the February Handy Andy’s burglary by obtaining the proper equipment to view the security video and viewing it. RP 230-231, 5-9-06. After watching the video, Detective Birkenfeld obtained a warrant for Mr. Cloud’s arrest for the February burglary of he Handy Andy’s store. RP 231-232, 5-9-06.

On March 7, 2006, Mr. Cloud was arrested and his vehicle was impounded. RP 243-246, 5-9-06.

On March 8, 2006, Detective Birkenfeld spoke with Mr. Cloud about the flashlight and mask found in Mr. Cloud’s car. RP 249, 5-9-06. Mr. Cloud told Detective Birkenfeld that he had purchased the flashlight recently but that he had owned the mask for roughly one year. RP 249-250, 5-9-06.

After speaking with Mr. Cloud, Detective Birkenfeld went to the police impound yard and search Mr. Cloud’s vehicle. RP 252-253, 5-9-06. Detective Birkenfeld recovered clothes, a pair of shoes, and a shotgun from Mr. Cloud’s vehicle. RP 254, 5-9-06.

After searching Mr. Cloud’s vehicle, Detective Birkenfeld spoke with Mr. Cloud again and told Mr. Cloud what was found in Mr. Cloud’s vehicle. RP 270, 5-9-06. Mr.

Cloud “strongly” denied committing the burglary and did not wish to speak about the shotgun. RP 270-271, 5-9-06.

Detective Birkenfeld did not compare the mask and shoes depicted in the security video to any other shoes or masks than the ones recovered from Mr. Cloud’s vehicle. RP 287, 5-9-06.

The trial court read to the jury the stipulations entered into by Mr. Cloud and the State that Mr. Cloud had been released from incarceration on January 24, 2006, and that Mr. Cloud had been convicted on December 13, 2005, of residential burglary and second degree burglary. RP 305-307, 5-9-06.

Procedural Background

On March 6, 2006, Mr. Cloud was charged with one count of second degree burglary with the aggravating factor of rapid recidivism. CP 1-6.

On March 13, 2006, the charges were amended to one charge of second degree burglary with the aggravating factor of rapid recidivism, and one count of unlawful possession of a firearm. CP 12-19.

On April 18, 2006, Mr. Cloud filed a motion to suppress evidence seized from him during a *Terry* stop conducted by Detective Birkenfeld on March 2, 2006. CP 25-37.

On May 1, 2006, the State filed a motion for the admission of evidence of Mr. Cloud’s prior burglary convictions under ER 404(b) and an offer of proof regarding such evidence. CP 38-44.

On May 1, 2006, the State filed a “Memorandum of Authorities Re: CrR 3.6 Motion to Suppress Physical Evidence” which was actually a response to Mr. Cloud’s motion to suppress. CP 45-50.

On May 3, 2006, the charges were again amended, this time to include one count of second degree burglary with the aggravating factor of rapid recidivism and alleging that Mr. Cloud was the principal or the accomplice in the commission of the crime, one count of unlawful possession of a firearm with the aggravating factor of rapid recidivism, and one count of possession of stolen property in the second degree with the aggravating factor of rapid recidivism. CP 59-62.

On May 4, 2006, Mr. Cloud moved to suppress statements made by Mr. Cloud as part of previous plea negotiations. CP 70-73.

On May 8, 2006, the charges were amended again, to include one count of burglary in the second degree alleging Mr. Cloud was the principal or an accomplice, two counts of unlawful possession of a firearm in the first degree, and one count of possession of stolen property in the second degree, all with the aggravating factor of rapid recidivism. CP 94-98.

On May 8, 2006, Mr. Cloud and the State stipulated that statements made by Mr. Cloud to Detective Birkenfeld on March 2, 2006, Deputy Shannon and Jay Kent on March 7, 2006, and statements made by Mr. Cloud to Detective Birkenfeld on March 8, 2006, were made following advisement of Mr. Cloud's *Miranda* rights and were made following a knowing, voluntary, and intelligent waiver of those rights. CP 99-101. Mr. Cloud and the State also stipulated that statements made by Mr. Cloud on March 2, 2006, to Officer Eberhard were made voluntarily and prior to Mr. Cloud being placed in custody. CP 99-101.

On May 9, 2006, the charges were again amended, this time the charges included one count of burglary in the second degree with the allegation that MR. Cloud was the

principal or the accomplice and one count of unlawful possession of a firearm in the first degree, both counts with the aggravating factors of rapid recidivism. CP 144-147.

On May 9, 2006, Mr. Cloud and the State stipulated that the jury could be informed that Mr. Cloud was released from incarceration on January 24, 2006. CP 148-150.

Also on May 9, 2006, Mr. Cloud and the State stipulated that the jury could be informed of the following facts: Mr. Cloud was convicted on December 13, 2005 of residential burglary; Mr. Cloud was convicted on December 13, 2005, of second degree burglary; that second degree burglary and residential burglary are serious offenses. CP 151-153.

On May 11, 2006, the jury returned verdicts of guilty on the charges of burglary in the second degree and unlawful possession of a firearm in the first degree and returned special verdicts finding that both crimes were committed shortly after Mr. Cloud was released from incarceration. CP 181-183.

On July 7, 2006, the trial court entered Findings of Fact and Conclusions of Law on Mr. Cloud's motion to dismiss, on the 3.5 hearing, on the 3.6 hearing and on the ER 404(b) hearing. CP 210-222.

On July 7, 2006, Mr. Cloud was sentenced to 41 months incarceration. CP 223-232.

Mr. Cloud filed timely notice of appeal on July 7, 2006. CP 233.

D. ARGUMENT

1. **The trial court erred in denying Mr. Cloud's motion to suppress evidence seized during the *Terry* stop of Mr. Cloud.**

When police officers have a "well-founded suspicion not amounting to probable

cause” to arrest, they may nonetheless stop a suspected person, identify themselves, and ask that person for identification and an explanation of his or her activities. *State v. Glover*, 116 Wn.2d 509, 513, 806 P.2d 760 (1991). A police officer may stop and detain a person for questioning if he reasonably suspects that the person is engaged in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984).

An investigatory detention is a seizure. *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). To support an investigative detention, the circumstances must show there is a substantial possibility that criminal conduct has occurred or is about to occur. *State v. Mendez*, 137 Wn.2d 208, 223, 970 P.2d 722 (1999). In Washington, the officer must have a “well founded suspicion, based on objective facts, that the person is connected to potential or actual criminal activity.” *State v. Kennedy*, 107 Wn.2d 1, 7, 726 P.2d 445 (1986). Such facts are “judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search ‘warrant a [person] of reasonable caution in the belief’ that the action taken was appropriate?” *State v. Almanza-Guzman*, 94 Wn.App. 563, 566, 972 P.2d 468 (1999) (quoting *State v. Barber*, 118 Wn.2d 335, 343, 823 P.2d 1068 (1992)). The level of articulable suspicion required for a car stop is no greater than required for a pedestrian stop. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986) (citing *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)). The circumstances must be more consistent with criminal conduct than with innocent behavior. *State v. Pressley*, 64 Wn.App. 591, 596, 825 P.2d 749 (1992).

A reviewing court decides whether reasonable suspicion existed based on an

objective view of the known facts. *State v. Mitchell*, 80 Wn.App. 143, 147, 906 P.2d 1013 (1995), *review denied* 129 Wn.2d 1019, 919 P.2d 600 (1996). The reviewing court does not base its determination of reasonable suspicion upon the officer's subjective belief. *Mitchell*, 80 Wn.App. at 147, 906 P.2d 1013.

The police may expand an investigatory stop if the initial stop confirms or arouses additional suspicions. *State v. Smith*, 115 Wn.2d 775, 785, 801 P.2d 975 (1990); *State v. Guzman-Cuellar*, 47 Wn.App. 326, 332, 734 P.2d 966 (1987).

Detective Birkenfeld wrote in his report and testified at trial that his stop of Mr. Cloud was a *Terry* stop based on suspicions that Mr. Cloud was involved in the February burglary of the Handy Andy's store. RP 21, 49, 5-3-06.

a. *Detective Birkenfeld lacked sufficient objective facts to support a well founded suspicion Mr. Cloud was involved in the February burglary.*

Here, Mr. Cloud moved to suppress the flashlights and mask found in his vehicle during the initial search by Detective Birkenfeld, a search which Detective Birkenfeld testified was a *Terry* stop performed in relation to the burglary of the Handy Andy's store. RP 21, 49, 5-3-06. While Detective Birkenfeld was certainly justified in believing that a crime had occurred (Mr. Cloud does not dispute that the Handy Andy's store was robbed in February), at the time Detective Birkenfeld conducted the *Terry* stop of Mr. Cloud's vehicle, Detective Birkenfeld lacked a "well founded suspicion, based on objective facts" that Mr. Cloud was "connected to potential or actual criminal activity."

At the time of the initial stop, Detective Birkenfeld had no information linking Mr. Cloud to the February burglary of the Handy Andy's store beyond his knowledge that Mr. Cloud had admitted to burglarizing the store in the past. The only facts

Detective Birkenfeld was aware of regarding Mr. Cloud were that Mr. Cloud had just pulled into the driveway of a residence where Detective Birkenfeld was assisting other police officers in securing a warrant. Even if Detective Birkenfeld had a subjective belief that Mr. Cloud was involved with the February robbery, this is not sufficient to justify a *Terry* investigative stop. Even if Detective Birkenfeld was aware that Mr. Cloud possessed the mask and the flashlights prior to the stop, the fact of Mr. Cloud's possession of these items is more suggestive of innocent behavior than criminal and are therefore not sufficient to establish probable cause to conduct a *Terry* investigative stop.

b. The Terry stop was invalid and all evidence seized following the initial stop should have been suppressed.

If the initial *Terry* stop was unlawful, the subsequent search and fruits of that search are inadmissible as fruits of the poisonous tree. *Kennedy*, 107 Wn.2d at 4, 726 P.2d 445, citing *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed.2d 441 83 S.Ct. 407 (1963).

Here, Detective Birkenfeld clearly lacked knowledge of facts which, when objectively viewed, warrant a person of reasonable caution to believe that Mr. Cloud was involved with the February robbery of the Handy Andy's store. This rendered the initial *Terry* stop of Mr. Cloud invalid and tainted all evidence discovered pursuant to the stop requiring the suppression of the flashlights and mask.

c. The trial court abused its discretion in denying Mr .Cloud's motion to suppress the evidence seized during the Terry stop.

A trial court's denial of a motion to suppress is reviewed by considering whether substantial evidence supports the challenged findings and whether those findings support the trial court's conclusions of law. *State v. Ross*, 106 Wn.App. 876, 880, 26 P.3d 298

(2001), *review denied* 145 Wn.2d 1016, 41 P.3d 483(2002).

- i. There is not substantial evidence in the record to support Finding of Fact for Hearing on CrR 3.6 No. VI.

There are several factual allegations within Finding of Fact on CrR 3.6 No. VI which are not supported by the record.

First, the trial court concluded that the police were at the Church Road residence to execute a warrant. This is directly contrary to Detective Birkenfeld's testimony that the police officers were at the house on a knock-and-talk procedure investigating a complaint regarding narcotics activity and he was securing the perimeter of the property while the other officers gathered evidence to apply for a search warrant. RP 18, 21, 51, 5-3-06. In fact, the State acknowledged that the police were not there to execute a warrant, but were at the property to gather evidence to apply for a warrant. RP 21, 51, 5-3-06. Clearly there was insufficient evidence in the record to support the trial court's conclusion that the police were at the Church Road residence to serve a search warrant.

Second, the trial court found that Detective Birkenfeld directed Mr. Cloud to stop the car for officer safety concerns "given the previous report associating the Defendant and his vehicle with a shotgun." CP 216-219. In order for a stop and frisk of a person to be justified on concerns for officer safety, "(1) the initial stop must be legitimate; (2) a reasonable safety concern must exist to justify a protective frisk for weapons; and (3) the scope of the frisk must be limited to the protective purpose." *State v. Collins*, 121 Wash.2d 168, 173, 847 P.2d 919 (1993). A reasonable safety concern exists, and a protective frisk for weapons is justified, when an officer can point to "specific and articulable facts" which create an objectively reasonable belief that a suspect is "armed and presently dangerous." *Collins*, 121 Wash.2d at 173, 847 P.2d 919.

Here, even assuming, *arguendo*, that the stop of Mr. Cloud's vehicle was legitimate, there were no specific and articulable facts known to Detective Birkenfeld which would create an objectively reasonable belief that Mr. Cloud was armed and dangerous. Detective Birkenfeld was aware that Mr. Cloud had been detained immediately prior to his appearance at the Church Road residence; however, Detective Birkenfeld was also aware that Deputy Eberhard had contacted Mr. Cloud regarding the situation with the shotgun and that Deputy Eberhard had not detained Mr. Cloud and had let him go. RP 20, 5-3-06.

Detective Birkenfeld's knowledge that Deputy Eberhard had already interviewed Mr. Cloud and determined that Mr. Cloud was not dangerous to warrant taking him into custody is strong evidence against the argument that Detective Birkenfeld had an objectively reasonable belief that Mr. Cloud posed a reasonable safety concern. Therefore, the concern that Mr. Cloud might have posed a threat to officer safety is not supported by the evidence introduced at trial, and any stop of Mr. Cloud as he entered the Church Road property on grounds of officer safety is unlawful.

These two errors are highly important as it is anticipated that the State will argue that the stop of Mr. Cloud's car was (1) not a *Terry* stop, and (2) even if the stop was an invalid *Terry* stop, the stop was still justified since, "police may stop vehicles approaching the scene of a search to prevent them from interfering with the search" (*State v. Melin*, 27 Wash.App. 589, 592, 618 P.2d 1324 (1980)), and (3) the stop and search of Mr. Cloud was justified on grounds of officer safety. As discussed above, none of these arguments are supported by the facts introduced at trial.

- ii. There is not substantial evidence in the record to support Finding of Fact for Hearing on CrR 3.6 No. VIII.

In Finding of Fact for Hearing on CrR 3.6 No. VIII the trial court found that Detective Birkenfeld “immediately and reasonably” recognized the flashlight and mask as “evidence of a crime.” CP 216-219. The trial court based this finding on Detective Birkenfeld’s “viewing of the video surveillance of the burglary, as well as the Defendant’s previous admission to a prior burglary at the same store using the same point of entry.” CP 216-219. The reasonableness of Detective Birkenfeld’s conclusion that the facemask and flashlight were evidence of a crime is belied by Detective Birkenfeld’s knowledge that masks of the type observed in the security video were common and widely available.² RP 33, 5-3-06.

The trial court’s conclusion that Detective Birkenfeld’s belief that the mask and flashlight seen in Mr. Cloud’s were evidence of a crime was reasonable is not supported by the record. The fact that a common and widely used item was used in a crime does not mean that any person who possesses such an item should be considered a suspect in the crime.

- iii. The trial court’s conclusions of law are not supported by the findings of fact.

A trial court’s legal conclusions are reviewed de novo. *Collins*, 121 Wn.2d at 174, 847 P.2d 919.

Here, Conclusions of Law for Hearing on CrR 3.6 Nos. II and III are not supported by the findings of fact. As discussed above, Detective Birkenfeld had no lawful reason to stop and search Mr. Cloud’s vehicle. Also as discussed above, when Detective Birkenfeld seized the flashlight and the mask he was not in an area he had a

lawful right to be and was not conducting a lawful search. Further, as discussed above, it was not reasonable for Detective Birkenfeld to conclude that the innocuous items found under the seat of Mr. Cloud's vehicle were evidence of a crime.

2. The trial court erred in allowing evidence of Mr. Cloud's prior convictions for burglary as evidence of a common scheme or plan.

Here, the State sought to introduce evidence pursuant to ER 404(b) that Mr. Cloud had committed seven previous burglaries as evidence of a common scheme or plan between the prior robberies and the February robbery of the Handy Andy's store. CP 38-44. The trial court ruled that the only prior burglary committed by Mr. Cloud which was admissible under ER 404(b) was the September 2005 burglary of the Handy Andy's store. CP 220-222. The trial court ruled that evidence relating to any other burglaries was more prejudicial towards Mr. Cloud than probative of any issue and was inadmissible at trial. CP 220-222.

ER 404(b) provides,

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The State must meet a substantial burden when attempting to bring in evidence of prior bad acts under one of the exceptions to this general prohibition: the prior acts must be "(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial." *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

² In fact, Detective Birkenfeld owns two himself. RP 46, 5-3-06.

There are two different situations wherein the “plan” exception to the general ban on prior bad acts evidence may arise. One is where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan. There is no question that evidence of a prior crime or act would be admissible in such a case to prove the doing of the crime charged. A simple example would be a prior theft to acquire a tool or weapon to perpetrate a subsequently executed crime. The other situation arises when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes.

State v. Lough, 125 Wn..2d 847, 854-855, 889 P.2d 487 (1995).

The issue in *Lough* was the admissibility of evidence of the second type of common scheme or plan, which involves prior acts as evidence of a single plan used repeatedly to commit separate, but very similar, crimes. The *Lough* court held that evidence of this second type of plan may be admissible if the State establishes a sufficiently high level of similarity:

To establish common design or plan, for the purposes of ER 404(b), the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.

Lough, 125 Wn..2d at 860, 889 P.2d 487.

In *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1986), the Washington Supreme Court ruled that the trial court abused its discretion by admitting evidence of burglaries in defendant’s trial for rapes for which no assailant had been positively identified, where the State only identified several very *general* similarities between the rapes and the burglaries with respect to the time, manner and location of the crimes, and noted that the rapist and defendant both wore a leather jacket and gloves when committing the crimes. The *Smith* court wrote that, where the State seeks to offer evidence of a prior criminal act to establish the defendant’s identity as the perpetrator of the current crime charged, “the

method employed in the commission of both crimes *must be so unique* that mere proof that an accused committed one of them creates *high probability* that he also committed the act charged,” and that, “[m]ere similarity of crimes will not justify the introduction of other criminal acts under the rule. There must be something *distinctive or unusual* in the *means employed* in such crimes *and the crime charged.*” *Smith*, 106 Wn.2d at 777-778, 725 P.2d 951 (emphasis in original), citing *State v. Laureano*, 101 Wn..2d 745, 764-765, 682 P.2d 889 (1984).

Here, the State argued that the “distinctive or unusual” means employed in the September robber of the Handy Andy’s store and the February robbery of the Handy Andy’s store was the entry into the store via a roof vent. CP 38-44. However, the State failed to present any evidence at argument to establish that burglarizing a store by entering through a roof vent was such a unique method of committing a burglary that if Mr. Cloud was found to have burglarized a store in the past that it created a high probability that he burglarized the Handy Andy’s in February. In fact, Detective Birkenfeld testified that, in his ten years as a detective, he has investigated roof-top burglaries approximately four or five times, with some investigations involving more than one burglary, and that only two of those investigations involved Mr. Cloud. RP 28-29, 5-3-06. Detective Birkenfeld also testified that he is aware of other roof-top burglaries in Kitsap County that he was not involved in. RP 29, 5-3-06. This clearly does not establish that roof-vent burglaries are a crime limited solely to Mr. Cloud.

The State failed to meet its burden of proof that roof-vent burglaries are a crime so unique that if one occurs it creates a high probability that Mr. Cloud committed it. It was therefore error for the trial court to allow the jury to hear evidence that Mr. Cloud

robbed the Handy Andy's store in September of 2005.

3. **It was ineffective assistance of counsel for Mr. Cloud's trial counsel to stipulate to informing the jury that Mr. Cloud was prohibited from possessing a firearm because he had previously been convicted of burglary rather than stipulating to informing the jury the defendant had been convicted on an unnamed serious felony.**

Article 1, §22 of the Washington State Constitution guarantees a criminal defendant the right to effective assistance of counsel. The Sixth Amendment, as applicable to the states through the Fourteenth Amendment, entitles an accused to the effective assistance of counsel at trial. *Dows v. Wood*, 211 F.3d 480 (9th Cir. 2000), *cert. denied* 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183, *citing McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (“[T]he right to counsel is the right to the effective assistance of counsel.”). To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (*citing State v. Rosborough*, 62 Wn..App. 341, 348, 814 P.2d 679 (1991)). To establish ineffective representation, the defendant must show that counsel's performance fell below an objective standard of reasonableness. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (*citing Strickland v. Washington*, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). To establish prejudice, a defendant must show that but for counsel's performance, the result would have been different. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (*citing State v. Early*, 70 Wn..App. 452, 460, 853 P.2d 964 (1993)).

There is a strong presumption that trial counsel's performance was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (*citing Strickland*, 466 U.S. at 689). If trial

counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

Here, Mr. Cloud was charged with unlawful possession of a firearm in the first degree. CP 144-147. In order to convict Mr. Cloud of unlawful possession of a firearm in the first degree, the State had to establish that Mr. Cloud had previously been convicted of a serious offense as defined in RCW 9.41.010. RCW 9.41.040. Trial counsel for Mr. Cloud stipulated with the State that the jury would be informed that Mr. Cloud had previously been convicted of residential burglary and burglary in the second degree, both serious offenses. CP 151-153, RP 306-307, 5-9-06.

“When the sole purpose of the evidence is to prove the element of the prior conviction, revealing a defendant's prior offense is prejudicial in that it raises the risk that the verdict will be improperly based on considerations of the defendant's propensity to commit the crime charged. This risk is especially great when the prior offense is similar to the current charged offense.” *State v. Young*, 129 Wn.App. 468, 475, 119 P.3d 870 (2005) (footnote omitted), *review denied* 157 Wash.2d 1011, 139 P.3d 350 (2006).

In *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), the defendant, who had a prior assault conviction, stood trial for assault and being a felon in possession of a firearm. He offered to stipulate to being a felon. The Court ruled that the district court's refusal of Old Chief's offered stipulation was an abuse of discretion under Federal Rules of Evidence 403. *Old Chief*, 519 U.S. at 191, 117 S.Ct. 644.

A similar procedure of allowing a defendant to stipulate to informing the jury that the defendant has been convicted of an unnamed felony has been adopted in Washington in order to diminish the possibility of defendant's being unduly prejudiced by the jury learning the nature of a defendant's prior convictions where the only probative aspect of the prior conviction is that it exists. *See State v. Johnson*, 90 Wn.App. 54, 61-63, 950 P.2d 981 (1998); *Young*, 129 Wn.App. at 473, 119 P.3d 870.

Despite being aware of this option (RP 175-180, 5-8-06), trial counsel for Mr. Cloud instead stipulated that the jury would be informed of Mr. Cloud's prior burglary convictions. CP 151-153, RP 183, 305-307, 5-9-06.

It was not objectively reasonable, nor was it legitimate trial strategy, for Mr. Cloud's trial counsel to fail to request that the jury only be informed that Mr. Cloud had been convicted of a serious felony, rather than inform the jury that Mr. Cloud had been convicted of two prior burglaries.

4. There was insufficient probable cause to arrest Mr. Cloud for the burglary of the Handy Andy's store.

The authority and requirements for an arrest warrant or a summons in a state criminal proceeding are governed by CrR 2.2. *State v. Hudson*, 130 Wn.2d 48, 55, 921 P.2d 538 (1996). CrR 2.2 requires that, "A warrant of arrest may not issue unless the court determines that there is probable cause to believe that the defendant committed the offense charged."

An arrest either "with or without a warrant must stand upon firmer ground than mere suspicion." *Wong Sun v. United States*, 371 U.S. 471, 479, 83 S.Ct. 407, 413, 9 L.Ed.2d 441 (1963). The officer must instead possess "probable cause-evidence which would 'warrant a man of reasonable caution in the belief' that a felony has been

committed”. *Wong Sun*, at 479, 83 S.Ct. at 413, *quoting Carroll v. United States*, 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543 (1925).

“A warrantless arrest/search and an arrest/search by warrant must meet the same ‘quantum of evidence’ to satisfy the probable cause requirement within the Fourth Amendment.” *State v. Fisher*, 145 Wash.2d 209, 227 n. 89, 35 P.3d 366 (2001).

Probable cause for an arrest exists when “the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in a belief that an offense has been...committed.” *State v. Herzog*, 73 Wn.App. 34, 53, 867 P.2d 648, *review denied* 124 Wn.2d 1022, 881 P.2d 255 (1994).

A review of the Certification for Determination of Probable cause reveals that the only facts contained in the Certification which might support a belief that Mr. Cloud had burglarized the Handy Andy's store in February 2006 were that Mr. Cloud admitted to burglarizing the store previously in a manner similar to that used in the February burglary; one of the burglars filmed on the security video was wearing a brown colored mask and was carrying a blue flashlight; and that Mr. Cloud had a blue flashlight and a brown mask in his car. CP 7-11. At best, this evidence supports only mere suspicion that Mr. Cloud burglarized that Handy Andy's store in February of 2006.

5. There was insufficient admissible evidence to convict Mr. Cloud of any crime.

The Court of Appeals reviews challenges to sufficiency of evidence by determining whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the charged crimes beyond a reasonable doubt. *State v. Zakel*, 61 Wn. App. 805, 811, 812 P.2d 512 (1991), *affirmed*,

119 Wn.2d 563, 834 P.2d 1046 (1992), citing *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990).

“Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

a. There was insufficient admissible evidence to convict Mr. Cloud of burglary in the second degree.

As stated above, the only evidence that Mr. Cloud burglarized the Handy Andy’s store in February of 2006 was that he had confessed to burglarizing the store in a similar manner previously, one of the burglars was filmed wearing a brown mask and holding a blue flashlight similar to a brown mask and blue flashlight found in Mr. Cloud’s vehicle. However, as discussed above, the search of Mr. Cloud’s vehicle was improper and the mask and flashlight discovered in his vehicle should have been suppressed. Had the flashlight and mask been suppressed, the only evidence linking Mr. Cloud to the February burglary would have been his confession that he had robbed the Handy Andy’s in September. This evidence is insufficient for a rational trier of fact to find that Mr. Cloud committed burglary in the second degree beyond a reasonable doubt.

b. There was insufficient admissible evidence to convict Mr. Cloud of unlawful possession of a firearm in the first degree.

The basis of the unlawful possession of a firearm charge was the shotgun found in Mr. Cloud’s vehicle during a search of the vehicle after the vehicle had been impounded pursuant to Mr. Cloud’s arrest. RP 254, 5-9-06. However, as discussed above, the arrest of Mr. Cloud was invalid. “Any evidence obtained through a constitutionally invalid search is inadmissible.” *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct.

182, 64 L.Ed. 319, 24 A.L.R. 1426 (1920); *State v. York*, 11 Wash.App. 137, 521 P.2d 950 (1974). The shotgun was seized pursuant to an invalid arrest, therefore the shotgun should have been suppressed.

Without evidence that the shotgun was in the back of Mr. Cloud's vehicle, there is no evidence that Mr. Cloud possessed a firearm. Therefore, there was insufficient admissible evidence that Mr. Cloud unlawfully possessed a firearm.

6. Cumulative error denied Mr. Cloud a fair trial.

Where multiple errors occurred at the trial level, a defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994). Courts apply the cumulative error doctrine when several errors occurred at the trial court level, but none alone warrants reversal. *State v. Hodges*, 118 Wn.App. 668, 673, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031, 94 P.3d 960 (2004). Rather, the combined errors effectively denied the defendant a fair trial. *Hodges*, 118 Wn.App. at 673-674, 77 P.3d 375.

Where the defendant cannot show prejudicial error occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn.App. 478, 498, 794 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 128 (1990).

Here, erroneous evidentiary rulings and ineffective assistance of trial counsel combined to deprive Mr. Cloud of a fair trial.

First, as discussed above, Mr. Cloud's trial counsel stipulated to informing the jury that Mr. Cloud had been twice convicted previously for burglaries, crimes identical

to the one he was being charged with. Second, the prejudice that Mr. Cloud suffered from this stipulation is magnified by the trial court's error in admitting evidence that Mr. Cloud had previously pled guilty to burglarizing the Handy Andy's store. From the stipulation the jury learned that Mr. Cloud was convicted on December 13, 2005, of burglary in the second degree (CP 151-153). From the improperly admitted 404(b) evidence, the jury learned that on November 30, 2005, Detective Birkenfeld participated in a meeting with Mr. Cloud, the prosecutor, and Mr. Cloud's attorney where Mr. Cloud admitted to burglarizing the Handy Andy's store on September 16 and that he had entered the store through a roof vent. RP 227-229, 5-9-06. It does not take a large leap in logic for a juror to deduce that the meeting that took place on November 30, 2005 was a plea bargaining session at which Mr. Cloud pled guilty to burglarizing the Handy Andy's store in September of 2005. Further, the evidence erroneously admitted as being evidence of a common scheme or plan is precisely the type of highly prejudicial propensity evidence ER 404(b) was intended to bar.

E. CONCLUSION

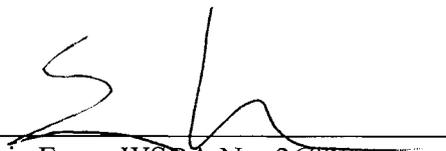
Aside from the security video, all the evidence against Mr. Cloud introduced at trial was unlawfully obtained. Mr. Cloud was arrested without a showing of sufficient probable cause to warrant the arrest. The trial court erred in allowing highly prejudicial and minimally probative evidence relating to Mr. Cloud's prior acts of burglary to be admitted and Mr. Cloud's trial counsel stipulated that the jury should be informed that Mr. Cloud had previously been convicted of burglary. Finally, the State presented insufficient admissible evidence to allow a rational and fair minded jury to conclude that Mr. Cloud burglarized the Handy Andy's store in February of 2006 and that he

unlawfully possessed a firearm, between March 6, 2006, and March 8, 2006.

For these reasons, this court should vacate Mr. Cloud's convictions and dismiss the charges against him. In the alternative this court should vacate Mr. Cloud's convictions and remand for a new trial at which evidence of Mr. Cloud's prior convictions for burglary and the unlawfully obtained evidence are excluded.

DATED this 25th day of January, 2007.

Respectfully submitted,



Eric Fong, WSBA No. 26030
Attorney for Appellant

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	Appeal No. 35080-7-II
Respondent,)	Superior Court No. 06-1-00373-8
)	
vs.)	
)	AFFIDAVIT OF MAILING
AARON GUSTER CLOUD,)	
)	
Appellant.)	
_____)	

The undersigned, being first duly sworn, under oath, states: That on the 25th day of January, 2007, affiant deposited in the United States mails, a properly stamped and addressed envelope directed to:

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway Street, Suite 300
Tacoma, WA 98402

the original and one copy of the Brief of Appellant, and to

Mr. Randall Sutton
Attorney at Law
614 Division Street, MS-35
Port Orchard, WA 98366

Aaron Guster Cloud
DOC #895154
Airway Heights Correction Center
P.O. Box 1899
Airway Heights, WA 99001-1899

a true copy of the Brief of Appellant.

[Signature]
ANN BLANKENSHIP

SUBSCRIBED AND SWORN to before me this 25th day of January, 2007.

[Signature]
MEREDITH NDRA ORPILLA
NOTARY PUBLIC in and for the State of
Washington, residing at Port Orchard.
My commission expires 9/10/11.

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