

NO. 40275-1- II

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

STATE OF WASHINGTON,

Respondent,

v.

DERRICK HUNTER

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable James R. Orlando, Judge

OPENING BRIEF OF APPELLANT

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A ASSIGNMENTS OF ERROR

1. The trial court, in a separate cause, erred in denying Mr. Hunters motion to suppress evidence.¹
2. The trial court, in the separate cause, erred in omitting from its written factual findings in its Criminal Rule (CrR) 3.6 ruling, that the alleged sexual intercourse was between consenting adults and that the warrant was sought months after the alleged improper contacts were made.
3. The trial court, in the separate cause, erred in entering conclusions of law V, VI, VII, and VIII in its written CrR 3.6 ruling.
4. Mr. Hunter was denied the effective assistance of counsel guaranteed by the state and federal constitutions by his trial counsel's conceding that the trial court was bound by the CrR 3.6 ruling of the trial court in the separate cause.
5. The trial court erred in denying Mr. Hunter's motion for an arrest of judgment.
6. The trial court erred in denying Mr. Hunters motion in limine to exclude evidence under Evidence Rule (ER) 404(b).
7. The trial court erred in allowing the witness from the Social Security Administration to give hearsay testimony and this testimony denied Mr. Hunter his state and federal constitutional rights to confrontation of witnesses.
8. There was insufficient evidence to establish that Mr. Hunter possessed the identification and financial information of another person.
9. Cumulative error denied Mr. Hunter a fair trial.

¹ The suppression hearing took place in another cause, Pierce County No. 07-1-0406-5, but the trial court ruled that it was bound by this ruling. See, Statement of the Case, subsection 2, The Suppression Motion, below. The written findings and conclusions are attached in the appendix to this brief.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court in a separate cause err, and deny Mr. Hunter his state and federal rights to be free of unreasonable searches and seizures, when it denied his motion to suppress in that cause?
2. Did the trial court in a separate cause, err when it went outside the four corners of the affidavit to find probable cause, when it found probable cause of criminal activity and when it found there was a nexus between the items to be seized and the areas searched and any alleged criminal activity?
3. Was Mr. Hunter denied his state and federal constitutional rights to the effective assistance of counsel when his trial counsel failed to challenge the legitimacy of the search warrant, issued to search for evidence of unrelated crimes, to seize evidence of identity theft?
4. Did the trial court's error in denying Mr. Hunter's Motion for Arrest of Judgment violate his state and federal constitutional rights to due process of law because RCW 9.35.020 fails to include, and the prosecution failed to prove beyond a reasonable doubt the element that Mr. Hunter knew that he possessed identification and financial information of a real person?
5. Did the trial court erred in admitting evidence of other uncharged crimes where the evidence did not establish a common scheme or plan, was not necessary to complete the picture of the charged crimes and was merely propensity evidence?
6. Did the trial court err in admitting the testimony of an employee of the Social Security Administration under the business records exception to the hearsay rule where no records were admitted and the witness merely testified about his memory of what was contained in the records?
7. Did the trial court err and deny Mr. Hunter his state and federal rights to due process of law where there was insufficient evidence to prove that Mr. Hunter possessed identification or financial information of another where the documents were seized from a house where he lived, but also from a vehicle which was not shown to be his, and the police officer witness who identified the

documents was unable to say which documents came from the house and which came from the car?

8. Did cumulate error deny Mr. Hunter a fair trial?

C. STATEMENT OF THE CASE

1. Procedural history

The Pierce County Prosecuting Attorney's Office charged appellant Derrick Hunter, by amended information, with fourteen counts of identity theft in the second degree. CP 77-82. The prosecutor agreed to the dismissal of Count IX for insufficiency of proof at the close of the evidence. RP 224, 242-243. The jury was unable to reach a verdict on seven counts: (Counts II, VI, VIII, X, XI, XII, and XIV), CP122-128, and returned guilty verdicts on only six counts. (Counts I, III, IV, V, VII, XIII). CP 116-121. The counts on which the jury was unable to reach a verdict were dismissed. RP 311.

The trial court, the Honorable James Orlando, imposed judgment and sentence on January 29, 2010, sentencing Mr. Hunter to concurrent terms within the standard range, but consecutive to his convictions in another cause. CP 148-161.

2. The suppression motion

The documents which formed the basis for the identify theft charges

were seized during a search under a warrant issued in another unrelated cause involving charges of attempted kidnapping and failing to register as a sex offender where the detective affiant indicated that he believed that there might also be evidence of luring or communication with a minor for immoral purposes (Pierce County No. 07-1-0406-5). CP 164.

Probable cause for the warrant issued under the unrelated matter was based on the facts set out in the detective's affidavit:

(1) that, in November 2006, a 15-year-old student named Mary Oh reported that a man she knew as Thomas told her that he was a modeling agent and asked her very personal questions about her virginity;

(2) that, in January 2007, another student, Tiffany Songer, from the same high school reported that a man named Derrick Washington had lured her into his car to talk about modeling and had persuade her to have sexual intercourse with him as part of the interview process²;

(3) that the phone number for Derrick Washington was only one digit different than the phone number given for Thomas and was the number for Derrick Hunter at 4703 101st St. SW in Lakewood, WA 98499;

(4) that both Mary Oh and Tiffany Songer picked Derrick Hunter from a photo line-up;

² Tiffany Songer's boyfriend was in the car initially and Derrick Washington drove them to their homes which were next to one another; Washington and Tiffany drove off after her boyfriend exited the car. CP 164.

(5) that after a letter was sent out from the school about the incidents, ten students responded and eight of the ten identified Mr. Hunter from a photo-montage as someone who approached them about modeling;

(6) that many of the students indicated that the man who approached them at school showed them explicit photos of girls who were naked or dressed in provocative lingerie. One student claimed that the photos looked “home based” and another said the man told her that “his studio was out of his home.”

(7) that most of the students described the man as driving a white, four-door car, and several said that he asked them to get into his car. A 1991 Buick Regal was registered to Darrick L. Hunter at a different address than listed with his phone number although it had been seen at the listed residence by some unspecified person or persons;

(8) that Derrick Hunter was a convicted sex offender from Oregon who had failed to register in Pierce County as a sex offender. CP 18-21; 64-65.

As part of the pre-trial motions in the unrelated matter, the defense challenged the search conducted pursuant to a warrant issued on this information on the grounds that the fact that the residence was listed with the phone number and that his car had been seen there did not mean that Mr. Hunter lived there; that Tiffany Songer was of legal age and no criminal

charges arose from her consensual intercourse in the car; and, most importantly, nothing in the affidavit suggested that she or any of the students had been shown pictures in the car or home, or had seen computer or camera equipment in the car. CP 66.

At the hearing on the suppression motion before the Honorable D. Gary Steiner, counsel argued that the affidavit failed to establish probable cause because it failed to establish a nexus between Mr. Hunter's listed address and his address at the time of his reported conversation with the students in 2006, well before obtaining the search warrant in February 2007. RP (Cause 07-1-00612-7) at 28.

On July 7, 2008, the court tentatively denied the suppression motion but expressed concern that the warrants were insufficient:

[t]he affidavit doesn't explain how the discovery of the photo studio or the photos would link the person to the crime. It looks as though these search warrants may be insufficient. . . .

I have heard nothing coming out of these warrants that would justify the Prosecutor taking a chance on the admission and efficacy of the warrant, because if there is nothing there, we shouldn't waste our time. . . Presently, tentatively, however, the 3.6 is denied. The search warrant is valid.

CP 206-207.

Counsel for Mr. Hunter moved for reconsideration because the trial court, in denying the motion, improperly relied on "an unpublished Division I case concerning child pornography to reach the conclusion that probable

cause existed to support the warrant” and because, unlike the case the court relied on, “There is nothing [in Mr. Hunter’s case] to indicate that the defendant possessed child pornography. The defendant was not charged with child pornography and it was error for the court to conclude that the defendant, like all child pornographers would likely have the photos at any residence he may be [sic] found. There was no nexus here between the items to be seized and the place to be searched.” CP 200-205.

Judge Steiner subsequently entered written findings of fact and conclusions of law. CP 11-15. The findings of fact set out the facts included in the search warrant affidavit. CP 11-15. The conclusions of law included that “The Court believes that the items sought here³ were either in the vehicle or the home. The defendant stated that they were in the car and a photo studio in the home,” even though nothing in the affidavit indicated that Mr. Hunter had stated that anything was in his car. CP 14-21.

The court reiterated in the written findings and conclusions that in analyzing the motion, it relied on an unpublished opinion which upheld a search of the home of an accused child molester even though the warrant

³ The items sought included (1) photographs that depict females or males in undergarments, (2) computers, computer components and related equipment which might contain images of persons in provocative clothing, (3) business cards or documents indicating a modeling agency business, (4) indicia of occupancy or residency such as utility bills, and video tapes,” (5) video tapes or photographs of co-conspirators or other suspects; and (5) “contraband, fruits of the crime, or things otherwise criminally possessed”]

affidavit alleged facts which were ten months old and not the home where the abused allegedly took place. The appellate court had upheld the search because the affiant swore that people who collect child pornography do not destroy it and take it with them when they move. CP 14-21.

At trial on the identity theft charge, counsel for Mr. Hunter filed a CrR 3.6 motion to suppress, CP 10-21, but conceded that the trial court was bound by Judge Steiner's ruling. RP 5. The court agreed that it was bound by the ruling. RP 5.

3. The trial evidence

The state's case at trial consisted primarily of "[f]inancial documents for the most part, billing records, names, Social Security numbers, date of birth, phone numbers, credit card numbers, catalogs of names and personal identification," RP 124, seized during the execution of the search warrant issued under the unrelated cause. RP 122. Most of the documents were found by the police inside either a backpack or one of several briefcases located in the bedroom of the house searched or in a vehicle. RP 121-122. The detective who identified the documents in court was unable to recall with certainty whether the backpack was found in the car or house and was not asked or able to specify where individual documents were found.⁴ RP

⁴ Q. Do you recall where the backpack was located?
A. I don't.

122, *see e.g.* 125-137, 176-177.

Over defense ER 404(b) objection, the trial court allowed the state to introduce, not only the documents relevant to the charged counts, but also a large number of documents unrelated to the charged counts. CP 35-47; RP 107-110. The court ruled that:

Under Rule 404(b), certainly we want to avoid the propensity argument that this is a bad person; he had all these things that he possessed and, therefore, you need to find him guilty just because he possessed it.

But that begs the question because there's a lawful purpose that the State can offer these items for. They have the burden of proving intent, they have the burden of proving knowledge, and they have to basically show a common scheme or — they can show a common scheme or plan with the accumulation of additional pieces of information.

In this case it would seem to be relevant to the issue of intent, also *res gestae* to give a complete picture of what the criminal enterprise was that was involved here and also to prove, certainly, knowledge.

There's not a defense of mistake or accident. . . but I think both to

RP 122.

A. I know that at least one of them [briefcases] was found in the vehicle, and the backpack, if I am not mistaken, was found inside the residence.

RP 176.

Q. Okay. Of these documents here that were admitted, some 75 or 80 of them, you don't know which ones came from where, is that correct?

A. A certain number of them I know that came from the backpack as it's document in the report.

Q. Right, and the backpack was in the vehicle?

A. No, the backpack was in the residence, and one of the briefcases was in the vehicle.

Q. So, you don't know how many of these documents came from there; is that correct?

A. At this time, no. I would have to look back on some other notes, possibly.

RP 177.

showing intent, preparation, knowledge and common scheme or plan as well as res gestae, this is proper 404(b) material.

RP 109-110.

Based on this ruling, the state introduced documents as set out in the chart attached as Appendix A.

Only three of the fourteen alleged victims testified at trial. Gordon Wilborn testified that he did not know Mr. Hunter, never gave him permission to use or copy his driver license or medical waiver, or medical examination certificate. RP 153-154. Mr. Wilborn testified that he was not aware that the documents were missing until the state notified him that they had been found. RP 154-155. Similarly, Claudia Longpre testified that she did not know Mr. Hunter and that she did not give him or anyone else permission to have her name, old phone number or old bank account number. RP 156-157.

Keith Brown testified that he lived with his ex-wife, Althea Faison, and children, Isaiah Brown and Curtis Faison, and that Mr. Hunter was also living at the house. RP 228-229. Mr. Brown testified that he was present during the execution of the search warrant and saw the police take Mr. Hunter's briefcase and personal bags from his bedroom. RP 230. Mr. Brown testified that he did not authorize credit card applications for his son Isaiah. RP 231-232. According to Mr. Brown, Sabrina Montgomery was

Mr. Hunter's cousin, and Ms. Montgomery, her son, Antonia Montgomery, and daughter, Kodalia, visited at the house before they moved to Georgia. RP 232-234. Mr. Brown identified a picture of Ms. Montgomery, RP 233, and denied that he was keeping financial documents related to other people. RP 233-242.

The remainder of the state's case consisted of the testimony of Joseph Rogers of the Social Security Office of the Inspector General, RP 182, testifying over defense hearsay and Confrontation Clause objections, reporting what he said he saw on the agency's computer database with regard to 24 names and either social security numbers or dates of birth provided by the prosecutor. RP 191-192, 208-209. None of the records Mr. Rogers examined were introduced into evidence for the jury. The trial court nonetheless ruled that Mr. Hunter could confront the witness on the review that he conducted. RP 210.

Specifically, Mr. Rogers testified that the card taken in evidence appeared to be the original social security cards of Shannon DeShawn Brown, RP 195, and Niko McCoy. RP 195-196. The social security numbers listed on documents for Michael Backman, Sabrina Montgomery, Antonio Montgomery and Kadalie Montgomery, Darryl Benjamin, Anthony Brown, Ronald Booker, Michael Seghadi, John William McNatt, Kail Holder, Natasha Burris and Shaquale Russell corresponded with the numbers

in the database. RP 198-204. The social security number for Michael Crawford was in a different order than on the database, RP 201, and the numbers did not match exactly for someone named Kirk Wright, and Demetrius Sanders. RP 207. According to Mr. Rogers, the date of birth for Moses Thomas matched the database and one of two social security numbers matched while the other was one number off. RP 205. The date of birth for Abel Korrea matched the database, as did the date of birth and social security number for Gordon Wilborn. RP 206. Mr. Rogers was unable to locate a date of birth for Isaiah Brown. RP 207. On cross-examination, Mr. Rogers agreed that he had made an error — a formatting or typographical error on Shannon Brown’s information. RP 210-211.

The defense did not call any witnesses to testify at trial.

4. Motion for arrest of judgment

Defense counsel moved to arrest judgment based on the decision of the United States Supreme Court in Flores-Figueroa v. United States, 129 S.Ct. 1886, 173 L. Ed. 2d 853 (2009), on the grounds that under this decision “the state was required to prove and did not prove the material element of identity theft that the defendant knew that the means of identification or financial information possessed, used or transferred actually belonged to another person.” CP 129.

At the hearing on the motion, defense counsel argued that the jury

instructions relieved the state of the burden of proving this element,⁵ RP 316, and that the error was not harmless given the evidence in the case. RP 317-322. The trial court ruled that the decision was limited to the specific federal statute under consideration and that Mr. Hunter specifically had a relationship with the Montgomerys. RP 324-325.

D. ARGUMENT

1. THE TRIAL COURT, IN A SEPARATE CAUSE, ERRED IN DENYING MR. HUNTER'S MOTION TO SUPPRESS EVIDENCE.

The documents which formed the basis for the identity theft charges were seized during a search warrant executed in another case involving completely unrelated charges (Pierce County No. 07-1-0406-5). In the other matter, the defense, citing State v. Thein, 138 Wn. 2d 133, 140, 977 P.2d 582 (2009), challenged the validity of the search warrant arguing that there was no nexus between the places to be searched, the items sought and

⁵ The jury was instructed:

To convict the defendant of identity theft in the second degree in Count ____, the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 7th day of March 2007, the defendant knowingly obtained, possessed, or transferred a means of identification or financial information of _____.
- (2) That the defendant acted with intent to commit or aid or abet any crime;
- (3) That the defendant obtained credit, money, goods, services that is \$1500 or less in value from the acts described in element (1) or did not obtain any credit, money, goods, services, or other items of value; and
- (4) Than any of these acts occurred in the State of Washington.

the alleged criminal conduct.

While reviewing courts generally review the issuance of a search warrant for abuse of discretion, State v. Maddox, 152 Wash.2d 499, 509, 98 P.3d 1199 (2004), giving great deference to the issuing magistrate, State v. Young, 123 Wash.2d 173, 195, 867 P.2d 593 (1994) (citing State v. Huft, 106 Wash.2d 206, 211, 720 P.2d 838 (1986)), appellate courts review de novo the trial court's assessment of probable cause, a legal determination. State v. Chamberlin, 161 Wash.2d 30, 40-41, 162 P.3d 389 (2007).

Here, the trial court erred in going outside the four corners of the document and relying on statements purportedly made by Mr. Hunter after the warrant was executed to find probable cause. The warrant, in fact, lacked probable cause to establish evidence of a crime and any nexus between the criminal activity, the places to be searched and the things to be seized.

(a) The Trial Court Went Outside the Warrant to Determine Probable Cause.

The trial judge's review, like the appellate court's, is limited to the four corners of the affidavit supporting probable cause. State v. Murray, 110 Wash.2d 706, 709-10, 757 P.2d 487 (1988); Wong Sun v. United States, 371 U.S. 471, 481-82, 83 S.Ct. 407, 414, 9 L.Ed.2d 441 (1963); State v. Amerman, 84 Md.App. 461, 581 A.2d 19 (1990).

The trial court, contrary to this legal authority, went beyond the four corners of the affidavit supporting the request for a search warrant to seek a nexus between the house and vehicle and evidence of the crimes of communicating with a minor for immoral purposes, attempted kidnapping or luring. The affidavit did not set out any specific assertions that criminal activity occurred in a specific vehicle or residence.⁶ CP 18-21; 64-65.

Instead of looking only to the affidavit, however, the trial court concluded that: “[t]he defendant stated they [a photo studio or photos] were in the car and a photo studio in the home.” CP 10 – 21. Because Mr. Hunter was not contacted by the Detective Miller prior to issuance of the search warrant; if Mr. Hunter made such a statement it was post-search warrant and could not have supported the issuance of a warrant by the magistrate. State v. Murray, 110 Wash.2d at 709-10 (1988).

(b) There Was No Probable Cause of Criminal Activity to Support the Search Warrant.

Not only did the court err by relying on Mr. Hunter’s statements which were not contained in the application for the warrant, but it also erred in upholding the warrant because no probable cause existed to support any alleged criminal activity.

⁶ Tiffany Songer was of legal age and no criminal charges arose from her consensual intercourse in the car. CP 66.

In State v. Neth, 165 Wn.2d 177, 196 P.3d 658 (2008), cited by defense counsel in moving to reconsider the denial of the motion to suppress (07-1-00612-7; CP 180 -207), the defendant was stopped for a speeding infraction and was unable to produce an identification, proof of insurance or a vehicle registration. A search of his name and date of birth revealed a warrant for a suspended license and a failure to appear. Neth was arrested, and a search of his person incident to that arrest revealed several unused plastic baggies in his pocket. When asked, Neth admitted that he had a large amount of cash in the vehicle but explained that it was to pay rent.

Because the warrant could not be verified, Neth was released with only a citation. While the citation was being issued, the officer called for a K-9 unit, which arrived and conducted a walk around the car, resulting in three “alerts.” When Neth would not voluntarily consent to a search of the vehicle, the officer issued the citation, released Neth and his passenger, and impounded the car so a search warrant for the vehicle could be obtained. The next day the officer got a warrant and recovered evidence of unlawful drug activity.

At trial, Neth moved to suppress the evidence found in the vehicle but the trial court, even after excluding the canine sniffs as part of the probable cause, upheld the search. The Supreme Court reversed the

conviction holding that the search warrant was invalid because no probable cause existed to support it. The Supreme Court concluded that facts asserted in the affidavit for probable cause may, taken together, appear odd and even suspicious, but were nevertheless consistent with legal activity. Neth, 165 Wn.2d at 184.

The trial court here appeared to agree that the search warrant affidavit failed to establish probable cause, even while finding the warrant “valid”:

[t]he affidavit doesn’t explain how the discovery of the photo studio or the photos would link the person to the crime. It looks as though these search warrants may be insufficient. . . .

I have heard nothing coming out of these warrants that would justify the Prosecutor taking a chance on the admission and efficacy of the warrant, because if there is nothing there, we shouldn’t waste our time. . . Presently, tentatively, however, the 3.6 is denied. The search warrant is valid.

CP 206-207.

The trial court was correct in concluding that the affidavit failed to establish probable cause and in error for concluding that the warrant was nevertheless valid. Like Neth, these facts while certainly odd and perhaps suspicious did not establish probable cause to believe that evidence of criminal activity would be found at the places to be searched. CP 10 – 21. The trial court erred because more was required to rise to the level of probable cause to support a finding that the search warrant was valid.

(c) The Affidavit and Search Warrant Lacked a Nexus Between the Items to be Seized and Area Searched and any Alleged Criminal Activity.

The trial court relied upon an unpublished opinion, State v. Mills, 98 Wash.App. 1013, 1999 WL1054768 (1999), in upholding the search warrant. CP 10 – 21. The judge appeared to rely on the staleness argument presented and rejected in Mills.⁷ This case is distinguishable from Mills since, here, the defense’s primary argument was not one of staleness of the items seized, but rather, a lack of probable cause to tie the criminal activity to the places to be searched and the items to be seized, particularly in light of the fact that there was no evidence that Mr. Hunter lived at the residence to be searched at the time of the alleged activity. And because no nexus existed between the places to be searched and the alleged suspicious activity, the trial court erred in concluding the search warrant was valid.

Although an affidavit should be evaluated in a commonsense manner, rather than hyper-technically, it still must be based on more than mere suspicion or personal belief that evidence of a crime will be found on the premises searched. State v. Jackson, 150 Wash.2d 251, 265, 76 P.3d

⁷ In Mills the Court relied on State v. Higby, 26 Wash.App. 457, 461, 613 P.2d 1192 (1980)(where the affidavit contemplated finding only a small quantity of marijuana, probable cause was not established where a two week lapse existed between the informant’s observation and the issuance of the warrant).

217 (2003) (citing State v. Vickers, 148 Wash.2d 91, 108, 59 P.3d 58 (2002)). In order for an affidavit to support a search warrant, it must contain probable cause establishing a nexus between the facts asserted concerning the criminal activity, the items to be seized and the places to be searched. Thein, 138 Wn.2d 133 (2009).

The facts in Thein are similar to those found here. In Thein, the officer, to support his request for a search warrant of two residences, asserted generalizations about criminal conduct of drug dealers (e.g., It is a common practice or habit for drug dealers to store a portion of their inventory in their common residences). The state argued “that a nexus is established between the items to be seized and the place to be searched where there is sufficient evidence to believe a suspect is *probably involved* in drug dealing and the suspect resides at the place to be searched.” According to the state, “a search warrant is properly issued at a drug trafficker's residence *even absent proof of criminal activity at the residence.*” Thein at 141 (emphasis added).

The Supreme Court rejected the State’s argument that they need only show that the place to be searched *probably* is connected to the drug dealing, holding instead:

[P]robable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.

Thein, 138 Wn.2d at 140 (internal quotes omitted) citing State v. Goble, 88 Wash.App. 503, 509, 945 P.2d 263 (1997) (citing Wayne R. LaFave, Search and Seizure § 3.7(d), at 372 (3d ed.1996)).

Here, the trial court, in upholding the search warrant, stated in its findings of fact and conclusions of law:

The affidavit for probable cause did not explain how the discovery of the photo studio or the photos would link the person to the crime. However, as the court understands the law, if the magistrate, given the evidence presented, would believe that the item sought is likely to be found in the place searched, then the police have a valid search warrant. . . The Court believes the items sought here were either in the vehicle or the home.

CP 206-207. (emphasis added)

In essence, the trial court's "likely" standard is no different than the "probably" test raised, and rejected, in Thein.⁸

An assertion that an alleged crime may have occurred on the street does not necessarily support probable cause to search one's house. The Supreme Court acknowledged as much in Thein:

Probable cause to believe that a man has committed a crime on the street does not necessarily give rise to probable cause to search his home.

Thein, 138 Wn.2d at 143, (internal quotes omitted) citing State v. Dalton, 73 Wash.App. 132, 140, 868 P.2d 873 (1994).

⁸ "Probability": 1. The extent to which something is probable. 2. An event that is likely to happen. Oxford English Dictionary, Sixth Ed.(2006).

The affidavit was devoid of any factual assertion that any alleged criminal conduct occurred at Mr. Hunter's residence or in his car. And the trial court's speculation that criminal activity "probably" or "likely" had to have occurred in the vehicle or home is insufficient to support the warrant. Thein, 138 Wn.2d at 140.

2. MR. HUNTER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE STATE AND FEDERAL CONSTITUTIONS BY HIS TRIAL COUNSEL'S FAILURE TO CHALLENGE THE LEGITIMACY OF THE SEARCH WARRANT TO SEIZE ITEMS RELATED TO IDENTIFY THEFT.

Trial counsel in this case erroneously conceded that Judge Steiner's ruling upholding the search warrant applied in the instant trial.⁹ Judge Orlando, the trial court for the identify theft charges, agreed with counsel's concession and followed Judge Steiner's prior ruling. RP 5. Defense counsel was ineffective in his concession and Judge Orlando erred in allowing evidence found in the search since there was no probable cause to support the warrant under either cause.

A claim of ineffective assistance of counsel requires a showing (1)

⁹ Trial counsel stated: "So my understanding is, although I respectfully disagree with Judge Steiner's ruling, that it is binding on – under principles of res judicata, would be binding on your Honor, so I am filing it to preserve the issue in this case even though it is res judicata." RP5. The term "res judicata" has sometimes been used to apply to both issue and claim preclusion. Philip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 WASH. L.REV. 805 (1985). It's assumed counsel conceded that issue preclusion applied, not claim preclusion.

that defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, i.e., but for the deficient conduct, the outcome of the proceeding would have differed. State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004); State v. Thomas, 109 Wn.3d 222, 225-26, 743 P.2d 816 (1987) (adopting test from Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

(a) **Trial Counsel's Performance was Deficient.**

Counsel's performance is deficient when it falls below an objective standard of reasonableness. State v. McNeal, 145 Wash.2d 352, 362, 37 P.3d 280 (2002). A decision made by trial counsel for legitimate strategic or tactical reasons cannot support an ineffective assistance of counsel claim. McNeal, 145 Wash.2d at 362. Although there is a strong presumption that defense counsel's conduct is not deficient, the presumption may be rebutted where there is no conceivable legitimate tactic explaining counsel's performance. Reichenbach, 153 Wn.2d at 130; State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

Here, trial counsel's basis for not contesting the search warrant was not grounded in strategy. Instead, the only basis for trial counsel not contesting the warrant and moving for suppression of the identity documents – the sole evidence of the alleged offenses – was an erroneous

belief that issue preclusion applied. A failure to properly employ relevant law and court rules can constitute deficient performance. See State v. Dawkins, 71 Wn.App. 902, 909, 863 P.2d 124 (1993) (reasoning counsel deficient where he failed to object to highly prejudicial evidence); State v. Carter, 56 Wn.App. 217, 224, 783 P.2d 589 (1989) (“An attorney is presumed to know the rules of the court”).

Generally, collateral estoppel, which is often also referred to as res judicata¹⁰, establishes that “when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” Ashe v. Swenson, 397 U.S. 436, 443, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). Despite its civil origin, the doctrine of collateral estoppel applies in criminal law through the concept of the Fifth Amendment guaranty against double jeopardy. State v. Williams, 132 Wash.2d 248, 253-54, 937 P.2d 1052 (1997). Where it is not clear whether an issue was actually litigated, or if the judgment is ambiguous or indefinite, application of collateral estoppel is not proper. Mead v. Park Place Properties, 37 Wash.App. 403, 407, 681 P.2d 256, review denied, 102 Wash.2d 1010 (1984); See 14 Lewis H. Orland & Karl B. Tegland, Wash. Prac. Trial Practice § 368, at

¹⁰ The term “res judicata” has sometimes been used to apply to both issue and claim preclusion. Philip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 WASH. L.REV. 805 (1985).

747-48 (5th ed. 1996).

The party seeking to enforce collateral estoppel must show that:

“(1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of [the] doctrine must not work an injustice.”

State v. Bryant, 146 Wash.2d 90, 98-99, 42 P.3d 1278 (2002)(quoting Williams, 132 Wash.2d at 254, 937 P.2d 1052). Furthermore, the principles of collateral estoppel will apply only if the court in the prior determination fully considered the evidence and applied the correct law. State v. Frederick, 100 Wash.2d 550, 559, 674 P.2d 136 (1983).

This case does not implicate a pure collateral estoppel issue because Mr. Hunter was charged with identity theft – a completely separate and distinct crime than alleged crimes identified in the search warrant affidavit and search warrant itself, and the evidence sought to be suppressed in the identify theft case was entirely different from the evidence sought to be suppressed in the prior case.

The identification documents seized during the search warrant were completely unrelated to the basis for obtaining the search warrant in the first place and the warrant never even purported to establish probable cause to obtain a search warrant to look for evidence of the crime of

identity theft. And since Mr. Hunter was not on trial for identity theft at the time the warrant was challenged, he did not have a full opportunity to litigate the validity of the search warrant as it applied to the seizure of the documents related to identify theft. The warrant simply did not authorize the seizure of documents relating to identify theft and these documents did not look like photographs of females in undergarments, indicia of a modeling agency or residence or computer or other storage devices for such evidence.

The only way the police could have concluded that the evidence seized was evidence of a crime was by examining it in some detail, in spite of the fact that it was not a photo, photo studio or computer. For this reason the evidence was not authorized to be seized under the warrant, nor was it immediately recognizable as evidence of a crime. State v. Lair, 95 Wn.2d 706, 714, 630 P.2d 427 (1981)(Only evidence immediately recognizable as evidence of a crime can be seized under the open view doctrine). This requirement is to prevent the type of general search that occurred here. State v. Alexander, 33 Wn. App. 271, 273, 653 P.2d 1367 (1982); Coolidge v. New Hampshire, 403 U.S. 443, 466, 91 S. Ct. 2022, 29 L.Ed. 2d 564 (1971).

Because trial counsel erroneously believed that Judge Orlando was bound by the decision of Judge Steiner, these significant unadjudicated

issues were never heard or determined.

- (b) But for counsel’s deficient performance, the only evidence used at trial to establish criminal activity, which was seized from an improper search warrant, would have been excluded.**

Had trial counsel properly challenged the validity of the search warrant as applied to the charges of identity theft, the evidence would have been suppressed.

Prejudice occurs when there is a reasonable probability that, ‘but for trial counsel’s errors, the result of the trial would have been different.’ State v. Price, 127 Wn.App. 193, 203, 110 P.3d 1171 (2005). Similarly, counsel’s failure to make a motion does not support an ineffective assistance of counsel claim ‘unless the defendant can show that the motion would properly have been granted.’ Price, 127 Wn.App. at 203.

The Fourth Amendment of the United States Constitution requires that an affidavit supporting a warrant establish probable cause, i.e., it must contain “facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched.” State v. Thein, 138 Wash.2d 133 (2009); State v. Cole, 128 Wash.2d 262, 286, 906 P.2d 925 (1995).

Most importantly here, the fourth amendment also contains a

particularity requirement that prevents general searches and “the issuance of warrants on loose, vague, or doubtful bases of fact.” State v. Perrone, 119 Wash.2d 538, 545, 834 P.2d 611 (1992); State v. Nordlund, 113 Wash.App. 171, 179-180, 53 P.3d 520, 524 (2002). A warrant must describe with particularity the things to be seized, which serves two functions by “limiting the executing officer’s discretion”; and “informing the person subject to the search what items may be seized.” State v. Higgins, 136 Wn.App. 87, 91, 147 P.3d 649 (2006) quoting State v. Riley, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993).

To satisfy the particularity requirement, the warrant must be sufficiently definite to allow the searching officer to identify the objects sought with reasonable certainty. State v. Stenson, 132 Wash.2d 668, 691-92, 940 P.2d 1239 (1997); Perrone, 119 Wash.2d at 546. The degree of required specificity turns on the circumstances and the type of items involved. Stenson, 132 Wash.2d at 692; Perrone, 119 Wash.2d at 546. “A description is valid if it is as specific as the circumstances and the nature of the activity, or crime, under investigation permits.” Stenson, 132 Wash.2d at 692, 940 P.2d 1239. Nordlund, 113 Wash.App. at 180 (2002). A warrant can also be limited by specific examples of items pertinent to the named offense. State v. Reid, 38 Wn.App. 203, 212, 687 P.2d 861 (1984).

As previously noted, the documents used by the prosecution as evidence of identity theft were obtained via a search warrant issued for a completely unrelated offense. The affidavit submitted for the search warrant, and the search warrant itself, did not include any reference to the crime of identity theft, but rather listed items to be seized and areas searched for the specific criminal activity of communication with a minor; attempted kidnapping; luring; and failure to register. CP 18-21; 64-65; 164.

The seizure of evidence of identity theft pursuant to a warrant authorizing only the search for other evidence violated Mr. Hunter's constitutional rights under the Fourth Amendment. The seizure of the evidence was not justified on the grounds that the documents were immediately recognizable as evidence of a crime; the police had to read and inspect these documents to conclude that they might be of evidence of an unrelated crime and clearly unrelated to communication with a minor, luring or attempted kidnapping.¹¹ Had counsel challenged the seizure of

¹¹ Arguably a search warrant for alleged criminal activity that includes identity theft may trigger First Amendment concerns, thus subject to a stricter analysis. When a search warrant has first amendment implications that may collide with fourth amendment concerns, the courts must closely scrutinize compliance with the particularity and probable cause requirements. Zurcher v. Stanford Daily, 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); Stanford v. Texas, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965); Perrone, 119 Wash.2d at 547, 834 P.2d 611 (“Where a search warrant authorizing a search for materials protected by the First Amendment is concerned, the degree of particularity demanded is greater[.]”). See also Stenson, 132 Wash.2d at 692, 940 P.2d 1239 (search warrants for documents are generally given closer scrutiny because of potential for intrusion into personal privacy).

this evidence it would have been excluded and the state would have been unable to proceed to trial.

3. THE TRIAL COURT ERRED IN DENYING MR. HUNTER'S MOTION FOR ARREST OF JUDGMENT BECAUSE RCW 9.35.020 FAILS TO INCLUDE, AND THE PROSECUTION FAILED TO PROVE BEYOND A REASONABLE DOUBT AN ESSENTIAL ELEMENT.

On April 20, 2009, the state filed an amended information, charging Mr. Hunter with numerous counts of identity theft under RCW 9.35.020 alleged to have occurred on or about March 7, 2007. Specifically, the State charged Mr. Hunter in count I with violating RCW 9.35.020(3) and in counts II – XIV the State charged him with violating RCW 9.35.020(1) and (2)(b).¹²

After conviction, Mr. Hunter moved for arrest of judgment based on the recently decided case of United States v. Flores-Figueroa, 129 S.Ct. 1886, 1888, 1894, (2009). CP 129 – 147; RP 313 - 235. Flores-Figueroa provides another reason for granting Mr. Hunter a new trial.

Under Criminal Rule 7.4(a), an arrest of judgment may be granted for (1) lack of jurisdiction of the person or offense; (2) the indictment or information does not charge a crime; or (3) insufficiency of the proof of a material element of the crime. “The evidence presented in a criminal trial is legally sufficient to support a guilty verdict if any rational trier of fact,

¹² Because RCW 9.35.020 was amended and didn't take effect until June 12, 2008, Mr. Hunter was subject to the previous version of RCW 9.35.020. However, neither version of RCW 9.35.020 contains a (2)(b) subsection.

viewing the evidence in a light most favorable to the state, could find the essential elements of the charged crime beyond a reasonable doubt.” State v. Longshore, 141 Wash.2d 414, 420-21, 5 P.3d 1256 (2000). “Review of a trial court decision denying ... a motion for arrest of judgment requires the appellate court to engage in the same inquiry as the trial court.” Longshore, 141 Wash.2d at 420; State v. Huynh, 107 Wash.App. 68, 76-77, 26 P.3d 290, 295 (2001).

In Flores-Figueroa, the defendant gave his employer a false name, birth date and Social Security number and a counterfeit registration card. He was subsequently prosecuted under 18 USC 1028(A)(a)(1), which makes it a crime when a person “knowingly transfers, possesses or uses, without lawful authority, a means of identification of another.”

On appeal, the government conceded that it must prove that the identification numbers belonged to real persons, but contested that it was also required to prove that the defendant knew the identification numbers belonged to a real person. The United States Supreme Court, disagreed with the government, holding:

Section § 1028(a)(1) requires the Government to show that the defendant knew that the means of identification at issue belonged to another person. As a matter of ordinary English grammar, “knowingly” is naturally read as applying to all the subsequently listed elements of the crime.

Flores-Figueroa, 129 S.Ct. at 1888.

The trial judge denied the motion finding that Flores-Figueroa only applied to the federal statute and therefore was not applicable to RCW 9.35.020. RP 324-325. The trial court erred and because RCW 9.35.020 fails to include, and consequently, the prosecution failed to prove beyond a reasonable doubt, an essential element to convict Mr. Hunter of identity theft, the trial court's denial of the arrest of judgment was in error.

Like federal courts, Washington courts have concluded the prosecution, in proving identity theft, must establish that the identification documents or financial information belonged to a real person. See State v. Berry, 129 Wn.App. 59 (2005) (defendant allowed to withdraw guilty plea because certification for determination of probable cause did not establish that documents belonged to a real person). See also State v. Presba, 131 Wash.App. 47, 51, (2005), rev. denied, 158 Wn.2d 1008 (2006) (a defendant assuming a false identity violates the criminal impersonation statute while a defendant using the identity of a real person violates the identity theft statute).

Washington courts, however, have not yet decided whether the state must also prove that the defendant knew the identification documents belonged to a real person. Under the holding and analysis in United States v.

Flores-Figueroa, the state should be required to prove this element.¹³

Like 18 USC 1028(A)(a)(1), Washington's statute RCW 9.35.020(1)

requires:

No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime. (emphasis added).

And, like the federal statute, RCW 9.35.020 must be read to mean that "knowingly" applies to all subsequent elements of the crime of identity theft.

Consequently, not only must the prosecution establish beyond a reasonable doubt that the identification documents belong to a real person; the prosecution must also prove - as an essential element - that the offender knew the identification documents belonged to a real person. Flores-Figueroa, 129 S.Ct. at 1888.

Here, the court's instruction to the jury relieved the state of its burden requiring proof that the defendant knew the information was that of a real person. The "to convict" instruction stated:

To convict the defendant of identity theft in the second degree in Count ___, the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 7th day of March 2007, the defendant knowingly obtained, possessed, or transferred a means of identification or financial information of _____.

¹³ This argument presents an issue of first impression in this court and involves a question of law, subject to de novo review. State v. Vasquez, 109 Wash.App. 310, 314, 34 P.3d 1255 (2001), aff'd, 148 Wash.2d 303, 59 P.3d 648 (2002).

- (2) That the defendant acted with intent to commit or aid or abet any crime;
- (3) That the defendant obtained credit, money, goods, services that is \$1500 or less in value from the acts described in element (1) or did not obtain any credit, money, goods, services, or other items of value; and
- (4) Than any of these acts occurred in the State of Washington.

CP 99-113.

Because the State was relieved of that burden, the defendant's right to a jury trial is violated. Sullivan v. Louisiana, 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); Neder v. United States, 527 U.S. 1, 12, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

While the omission of an element from a jury instruction is subject to a harmless error analysis, if the instruction relieves the state of its burden of proving every element beyond a reasonable doubt it requires automatic reversal. State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002).

Here the instruction is not subject to a harmless error analysis because it clearly relieved the state of its burden of proving that Mr. Hunter knew that he possessed the identity or financial information of a real person. Nothing required the state to prove anything more than that the identification belonged to a particular person. The trial court erred in failing to grant the defendant's motion for arrest of judgment.

4. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF UNCHARGED CRIMES.

Evidence of other uncharged, alleged misconduct by a defendant is never admissible to show that a defendant is the type of person who is likely to have committed the crime charged, nor is it admissible to prove the character of a person to show that he or she acted in conformity therewith during the alleged crime, or that he or she had the propensity to commit the crime.¹⁴ State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487, 489 (1995); ER 404(b).

Under ER 404(b) prior bad acts are presumptively inadmissible to prove character or that a person acted in conformity with his or her character in committing the crime. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982).

Over defense ER 404(b) objection, the trial court allowed the state to introduce, not only the documents relevant to the charged counts, but also a large number of documents unrelated to the charged counts. CP 35-47; RP 107-110. The court ruled that the evidence was relevant to “res geste to give

¹⁴ 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.

a complete picture of what the criminal enterprise was,” to show a common scheme or plan and to show intent or knowledge. RP 109-110.¹⁵

The trial court erred in concluding the evidence was admissible as res gestae. Other misconduct is admissible if it is so connected in time, place, circumstance, or means employed that proof of such other misconduct is necessary for a complete description of the same crime charged. State v. Tharp, 96 Wn.2d 591, 637 P.2d 961 (1981). However, here, there was nothing to support the evidence of uncharged offenses was so inseparable from the evidence of the charged offenses, necessitating the need for admission. See State v. Trickler, 106 Wn. App. 727, 25 P.3d 445 (2001). In Trickler, the defendant was tried for being in possession of a stolen credit card belonging to Kathleen Nunez. At trial, the State was allowed to introduce evidence that several items of personal property belonging to persons other than the named victim were found in Mr. Trickler's possession at the same time the credit card at issue was discovered. The Court of Appeals rejected the res gestae assertion, concluding:

While the events leading up to the discovery of the stolen credit card were relevant and somewhat probative, it was not shown that Mr. Trickler's possession of other allegedly stolen items was an inseparable part of his possession of the stolen credit card, which is the test commonly used in this state.

Trickler, 106 Wn. App. At 733. As in Trickler, it was not demonstrated how

¹⁵ Based on this ruling, the state introduced documents as set out in the chart attached as Appendix A.

Mr. Hunters' alleged possession of other items of identity was inseparable from the evidence used to support the charged offenses.

Further in order for the documents related to uncharged counts to properly have been introduced, the State would have had to meet the requirements for common plan or scheme.

First, the State has the burden of proving by a preponderance of the evidence that the misconduct actually occurred. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995) citing State v. Benn, 120 Wash.2d 631, 653, 845 P.2d 289, cert. denied, 510 U.S. 944, 114, S.Ct. 382, 126 L.Ed.2d 331 (1993). See also Tharp, 96 Wn.2d at 593-94; State v. Bythrow, 114 Wn.2d 713, 719, 790 P.2d 154 (1990).

Then, in order for evidence of uncharged crimes to come in under common plan or scheme, there must be enough specific and unique features in common between the offenses to show that the plan or scheme was carried out by committing the charged offense. In Lough, unlike in this case, the State offered evidence that the defendant had engaged in an overarching, pre-existing scheme or plan. That is, the defendant controlled his victims (charged and uncharged) by rendering them unconscious by the surreptitious use of drugs for the purpose of abusing them sexually.

More specifically, there are two different situations wherein the

“plan” exception to the general ban on prior bad acts evidence may arise. Lough, 125 Wn.2d at 855. One is where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan. Id. The other situation arises when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes. For this situation, 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.

Here, there was no proffer made by the State establishing that there was a pre-existing plan hatched by Mr. Hunter. Without such evidence, the uncharged and charged crimes demonstrate merely similarity in results but do not support that an over-arching pre-existing plan was developed and employed by him.

Similarly the only way that an uncharged crime establishes intent or knowledge is by the forbidden inference that it would be consistent with Mr. Hunter’s character to have committed the charged crime. Thus, the introduction of evidence of uncharged crimes improperly demonstrated propensity evidence and should have been excluded.

Compounding the prejudicial impact of admitting propensity

evidence from uncharged crimes was the trial court's complete failure to provide the jurors with a limited instruction. Lough, 125 Wash.2d 847, 864(The trial court also repeatedly gave a limiting instruction to the jury, before each of the witnesses testifying to prior druggings and rapes and again in the instructions given to the jury by the court at the conclusion of the trial. In that limiting instruction, the judge told the jury that the evidence of the uncharged allegations could not be considered to prove the character of the Defendant in order to show that he acted in conformity therewith, and could only be considered to determine whether or not it proved a common scheme or plan).¹⁶

The number of documents unrelated to the charged crimes far outweighed the evidence related to charged crimes and was overwhelmingly prejudicial. Their introduction should require that Mr. Hunter be given a new trial.

5. THE TRIAL COURT ERRED IN ADMITTING THE HEARSAY TESTIMONY OF THE WITNESS FROM THE SOCIAL SECURITY ADMINISTRATION.

In this case, Joseph Rogers, from the Social Security Administration Office, was called to testify. RP 182 – 221. According to Rogers, he had a spreadsheet with various names, added a few columns of

¹⁶ Although the defense did not request a limited instruction, it did, however, object to the admission of evidence of uncharged crimes in its entirety.

his own, and record on the spreadsheet information he derived from comparing the data with information from the Social Security database. RP 191-192. At trial, the prosecution would hand Rogers certain documents purported to be seized from Mr. Hunter's property, from which Rogers would testify from his notes how he compared the documents' content to written information he viewed on the agency's computer database. RP 188 – 192. The prosecution did not produce records that reportedly supported his testimony, and consequently were uncontested. The defense objected based on hearsay, the Confrontation Clause and the Sixth Amendment. The trial court claimed that data compilation was an exception to the hearsay rule. RP 193. The standard of review is de novo. State v. Kronich, 160 Wn. 2d 893, 901, 161 P.3d 982 (2007).

The state claimed that Roger's testimony was admissible as a business record exception, an exception to the rule excluding out-of-court written or oral statement offered to prove the truth of the matter asserted. ER 801(c). The foundation requirements for the admission of a business record are set forth in RCW 5.45.020:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

The Uniform Business Records as Evidence Act (UBRA), ch. 5.45 RCW, makes evidence that would otherwise be hearsay competent testimony. State v. Fleming, 155 Wash.App. 489, 228 P.3d 804155 (2010); State v. Ziegler, 114 Wash.2d 533, 537, 789 P.2d 79 (1990) (citing RCW 5.45.020).

To be admissible under the business records exception, the business record must (1) be in record form; (2) be of an act, condition, or event; (3) be made in the regular course of business; (4) be made at or near the time of the fact, condition, or event; and (5) the court must be satisfied that the sources of information, method, and time of preparation justify admitting the evidence. Fleming, 155 Wash.App. at 499, citing Ziegler, 114 Wash.2d at 538 (citing RCW 5.45.020). Integral to the requirements set forth above is the presentation of the record.

In State v. Hendrickson, 138 Wn.App. 827, 832, 158 P.3d 1257 (2007), the prosecution called Joseph Rogers, the same Social Security Administration investigator in this case. In Hendrickson, Rogers testified that he interviewed Noe, the alleged victim of the crime. Without objection from defense counsel, Rogers testified to what Noe had told him; specifically, that Noe had lost his wallet, including his social security card, and that no one had permission to use it. This Court held that

Rogers's testimony about Noe's statements was hearsay and was offered to prove a material fact: that Noe did not consent to another person possessing or using his social security card.

The prosecution in Hendrickson, like in this case, asserted that the testimony fit into the business or government records exceptions to the hearsay rule and was therefore admissible. Instead of introducing a business record or information contained in a public record, the prosecutor in Hendrickson merely asked Rogers to testify from memory about a conversation he had during his criminal investigation. The same occurred here: the prosecution did not introduce any business record, but rather asked Rogers to testify from his memory derived from notes created while reading the contents of a database. And since this Court concluded the testimony in Hendrickson was clearly hearsay and inadmissible under the rules of evidence, the trial court erred in admitting it here. Hendrickson, 138 Wn.App. at 833.

6. THERE WAS INSUFFICIENT EVIDENCE THAT MR. HUNTER POSSESSED THE IDENTIFICATION OR FINANCIAL INFORMATION OF ANOTHER AND HIS CONVICTIONS SHOULD BE REVERSED AND DISMISSED.

As a matter of state and federal constitutional law, a conviction cannot be affirmed unless a rational trier of fact taking the evidence in the

light most favorable to the State could find, beyond a reasonable doubt, the facts needed to support the enhancement." Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980).

Here, the state had to prove beyond a reasonable doubt that Mr. Hunter "knowingly obtained, possessed, or transferred a means of identification or financial information." The state's case consisted of evidence that identification and financial information was found in a search of Mr. Hunter's residence or a vehicle; therefore, the issue was whether or not he possessed these documents, either actually or constructively. The state did not introduce any evidence of how the documents were obtained or showing that they had been transferred from another person to Mr. Hunter.

The state's evidence on possession was insufficient to establish possession. Although there was evidence that Mr. Hunter had a room at the house where the search warrant was executed and that his room was searched, there was no evidence of any kind connecting Mr. Hunter to the car that was searched; and the detective who testified about recovering the documents from either the house or car was unable to testify specifically which document was found in which location. At most he testified that he could probably tell if he looked at some notes. RP 177. He did not, however, look at those notes.

Given the absence of testimony or other evidence showing which identification or financial information was found by the police in the residence rather than the car, there is no way that a reasonable juror could have properly found beyond a reasonable doubt that Mr. Hunter constructively possessed that any particular document. The evidence was simply too thin and, for that reason Mr. Hunter's convictions should be reversed and dismissed.

7. CUMULATIVE ERROR DENIED MR. HUNTER A FAIR TRIAL.

The combined effects of error may require a new trial, even when those errors individually might not require reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); United States v. Preciado-Cordobas, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a fair trial. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992); United States v. Pearson, 746 F. 2d 789, 796 (11th Cir. 1984). Here, Mr. Hunter's convictions should be reversed and dismissed because the evidence supporting the charges should have been suppressed and because there was insufficient evidence to support the conclusions. There were, however, trial errors which individually and certainly cumulatively denied Mr. Hunter a fair trial, the introduction of evidence in violation of ER 404(b) and the

hearsay rules, If Mr. Hunter's charges are not reversed and dismissed, they should nonetheless be reversed and his case remanded for retrial.

F. CONCLUSION

Mr. Hunter respectfully submits that his convictions should be reversed and dismissed. At the least they should be reversed and remanded for retrial.

DATED this 15th day of July, 2010



Mark A. Larrañaga, WSBA#22715
Attorney for Appellant

fu 

Rita Griffith, WSBA #14360
Attorney for Appellant

APPENDIX A

	Count	Alleged Victim	Evidence	Exh. #	Page
CC ¹	II	Darryl Benjamin	CA driver license for Darryl Benjamin	1	125
CC	II	Darryl Benjamin	DOB and SSN same as database	1	199
CC	II	Darryl Benjamin	Oregon Ticket Darryl Benjamin	2	126
CC	III	DeShawn Brown	SS card Shannon DeShawn Brown	3	126
CC	III	DeShawn Brown	SS card Shannon Brown	3	194-5
CC	III	DeShawn Brown	CA ID card--Shannon Brown	4	127
CC	III	DeShawn Brown	CA food stamps card--Shannon Brown	5	128
CC	V	Antonio Montgomery	WA ID card with Antonio Montgomery DOB on it	6	128; 170
CC	IV, V, VI	Sabrina Rochel; Antonio Marquiese; Kondalia Olena	SS#s Sabrina, Antonio and Kodalie Montgomery	6	198
CC	IV	Sabrina Rochel	Checkbook U.S.Bank--Sabrina Montgomery	7	129
CC	IX	Jerry Johnson	Note card – with handwritten names, address, phone numbers, credit card #S with expiration date Linda and Jerry Johnson	8	130
N/A	N/A		SS Card Variation of Hunter's name; SS card to Hunter Lang Darrick	10	186
UC ²	None		Blank Check –Anthony Brown (other items of correspondence; address Diff. Names	12	131
CC	VII	Demetrius Sanders	Bank of America letter to Demetrius Sanders	13	132
UC	None		Sears doc re: Anthony Brown	14	132
CC	VII	Demetrius Sanders	Bank of America doc--Sanders	15	133
CC	XIV	Ronald Booker	appl. for driver's license/ID-Ronald Booker—Oregon	16	133

¹ CC represents charged count on the information or charging document.

² UC represents an uncharged count not reflected on the information or charging document.

CC	XIV	Ronal Booker	matches SS database	16	200
UC	None		Anthony Brown from Sears-SS# on; SS# matches database	17	134; 200
UC	None		OR Employment—Kail Holder	18	134
UC	None		SS# matches database	18	203
CC & UC	I, IV, VIII None	Moses Perry Thomas; Isaiah Brown	paper with notes—names Isaiah, Curtis; Antonio, Moses Thomas,--Chase, Capital One, Discovery & phone numbers	19	135
UC	None		Paper with names, DOB and SS# 135; Kirk Wright correct dob; SS# a little of Natasha Burns, Shaquale Russell match	20	135; 203;204
UC	N/A		scratch paper several diff names, credit card companies and D's name and reference #	21	170
UC	N/A		Corresp—Legacy Health Systems (with names, addresses, dob, Credit card #), including Claudia Longpre	22	136
N/A	N/A		Sheet of paper with names and data	23	137
CC	XII	Michael Backman	SS# Backman matches—other names; John William, McNatt, Kail Holden,	23	203
UC	N/A		Legacy Health doc.	24	137
UC	None		credit card bill – Virginia Weldy	25	138
UC	None		blank check –Forest Park Credit Union Carl Hunter	26	139
UC	N/A		Legacy Health—def's name and other Data	27	139
UC	None		mail to Shaquala Russell; D's address	28	139-40
UC	N/A		blank application for SS card	29	185-186
UC	N/A		SS card	29	185
CC	XII	Michael Backman	equifax Michael Backman	30	140
CC	XII	Michael Backman	equifax (credit history) – Michael Blackman	31	140
CC	XII	Michael Backman	scrap handwritten info re: Backman	32	141
CC	XII	Michael Backman	part of VISA stmt. –Backman	33	141
CC	XII	Michael Backman	SS card Michael Backman	33	197-98

CC	XIV	Ronald Booker	Portland CC Financial aid—Booker	34	142
CC	XIV	Ronald Booker	matches SS database	34	200
UC	None		Bank of America doc—Robert Tucker (request for VISA --D's address	35	142
UC	None		letter from Sears credit services to Anthony Brown	36	142
CC	XI	Abel Korrea	WA ID Abel Korrea	37	143
CC	X	Gordon Wilborn	Temporary WA lic. Gordon Wilborn	38	144
CC	X	Gilbert Wilborn	commercial driver license Roy Wilburn(Roy Gordon Wilburn testified – did not know Hunter or give him permission to use his information (not aware lost wallet etc. pp. 151-155)	39	144
CC	X	Gilbert Wilborn	2 docs related to Wilburn	40	144
CC	X	Gilbert Wilborn	matches SSA database	40	206
CC	VIII	Isaiah Brown	Citibank doc. To Isaiah Brown-D's add	41	145
CC	VIII	Isaiah Brown	Chase “ request for credit card Isaiah	42	145
UC	N/A		laminated sheets in envelop	43	124-25
CC	I	Moses Perry Thomas	credit card – Moses Thomas	44	146
CC	I	Moses Perry Thomas	Photo ID New Tribune –Moses Thomas 146-147 I (With D's picture)	45	146-47
CC	I	Moses Perry Thomas	Capital one – Moses Thomas	46	146
CC	I	Moses Perry Thomas	First National – Moses Brown	47	146
CC	I	Moses Perry Thomas	birth certifi-cate (Moses Brown)	48	147
UC	None		fax from UW to Bank of America from Niko McCoy	49	148
UC	None		SS card Niko McCoy		195
CC	I	Moses Perry Thomas	doc from Chase to Thomas	50	158
CC	I	Moses Perry Thomas	letter re: prepaid Visa card—M. Thomas	51	159

CC	I	Moses Perry Thomas	Bank of America request for card- “	53	159
CC	I	Moses Perry Thomas	4 names on scrap paper; Thomas name	54	161
CC	I	Moses Perry Thomas	Washington Mutual credit app. Thomas’ name	55	160
CC	I	Moses Perry Thomas	statement Moses Thomas	56	160
CC	I	Moses Perry Thomas	blank check—Moses Thomas	57	161
CC	I	Moses Perry Thomas	scrap paper personal info Thomas	58	161
CC	I	Moses Perry Thomas	Change of address form for Moses Thomas	59	158
CC	I	Moses Perry Thomas	response to applica-tion by M. Thomas	60	162
CC	I	Moses Perry Thomas	Billing stmt. --M. Thomas	61	162
CC	I	Moses Perry Thomas	Credit card stmt. – M. Thomas	62	163
UC	None		SS card for Niko McCoy	63	164, 195
UC	None		ID card for Niko	64	164
UC	None		ID card for Niko	65	164
UC	None		Billing stmt for McCoy	67	165
UC	None		Fax Face Sheet from McCoy	68	148-49
UC	None		Fax Face Sheet McCoy	69	149
UC	None		Appl for VISA to Nikko	70	166
CC	V	Antonio Montgomery	mail to Antonio Montgomery from Capital One	71	166
UC	N/A		Photocopy of handwritten note with 4 names	72	166-67
CC	XI	Abel Correa	Abel Korrea – matches dob	72	206
CC	VII	Demetrius Sanders	Demetrius Sanders – one on list One number of SS# off	72	207
CC	V	Antonio Montgomery	photocopy of SS card for Antonio Montgomery	73	167
CC	V	Antonio Montgomery	fax cover Chase Bank from Antonio Montgomery	74	168

CC	V	Antonio Montgomery	Bank of America Visa cancelled for A. Montgomery	75	168
CC	V	Antonio Montgomery	Fax transmission report for Ex.74	76	168
CC	V	Antonio Montgomery	community health plan docs to Antonio Montgomery	77	167-68
CC	V	Antonio Montgomery	credit card checks — Antonio Montgomery	78	168
CC	V	Antonio Montgomery	Visa credit checks for Antonio Montgomery	79	169
CC	V	Antonio Montgomery	laminated SS card —Antonio Montgomery	80	169
CC	I	Moses Perry Thomas	VISA card – Moses Thomas	81	172
N/A	N/A		Spread-sheet prepared by Joseph Rogers from SSA	82	220

APPENDIX B

III

The affidavit for probable cause described conduct in which a black male would approach young female students of Clover Park High School and discuss a career in modeling.

IV

The crux of the affidavit focused on two female students who claimed that the defendant approached them. One student, M.O., it states in the affidavit, claimed that the man named Thomas, in discussing the modeling opportunity, asked M.O. personal questions with regards to her virginity and that she would need to lose that virginity to make her hips look better in photographs.

A second female T.S., claimed a man named known as Derrick Washington discussed modeling with T.S. and her boyfriend and convinced her to interview. The affidavit stated that the man drove T.S. and her boyfriend to their homes which were next to each other. When T.S.'s boyfriend exited the vehicle the man drove T.S. to a semi secluded location and engaged in sexual intercourse with her. T.S. was convinced by the man that it was part of the interview process.

V

The detective noticed that the phone number listed for Derrick Washington in T.S.'s case was one digit off from the phone number for Thomas in the M.O. case. A search on the phone number found it registered with Derrick Hunter at 4703 101st SW Lakewood, WA. A booking picture was placed in a montage and both M.O. and T.S. identified the defendant.

FINDINGS AND CONCLUSIONS
RE: CrR 3.6-2

VI

The investigation discovered that numerous students at clover Park High came forward and alleged having contact with a man claiming to be a modeling agent. The affidavit stated that 8 of 10 students identified the defendant in a photo montage.

VII

The affidavit stated that many of the students claimed that the defendant would show them photos of girls in sexually provocative lingerie or naked girls. One student claimed that the photos did not look professional but looked like home based photos. Another student claimed that the defendant had told him that the studio was out of his home.

The affidavit stated that according to several students, he asked them to get into his car. Most of the students who saw the car described it as a white four door vehicle. A white 1991 four door Buick Regal was registered to a Derrick L. Hunter. The affidavit stated that although the vehicle was registered at a different address than the above listed residence for Hunter it had been seen at the listed residence.

CONCLUSION OF LAW

I

The court has jurisdiction over the parties and subject matter.

II

When reviewing a search warrant the trial court's review is limited to the four corners of the affidavit supporting probable cause. The court gives deference to the issuing judge or magistrate.

III

Defendant, in his 3.6. Motion to Suppress, claimed that there was no nexus between the alleged criminal activity and the place to be searched in that there was nothing to indicate that the items sought would be found in Mr. Hunter's residence or vehicle. Probable cause for a search warrant requires that there be a nexus between the criminal activity and the item(s) to be seized and between the item(s) and the place to be searched. State v. Thein, 138 Wn. 2d 133, 140, 977 P. 2d 582 (1999).

IV

A search warrant should only be issued if the affidavit shows probable cause that the defendant is involved in criminal activity and that evidence of criminal activity will be found in the place to be searched. Thein at 140.

V

The affidavit of probable cause did not explain how discovering the photo studio or the photos would link the person to the crime. However, as the court understands the law, if the magistrate, given the evidence presented, would believe that the item sought is likely to be found in the place searched, then the police have a valid warrant.

VI

The court slightly disagrees with defendant's argument that there was no nexus and indication that the item(s) sought would be found in the residence or vehicle. The Court believes that the items sought here were either in the vehicle or the home. The defendant stated that they were in the car and a photo studio in the home.

VII

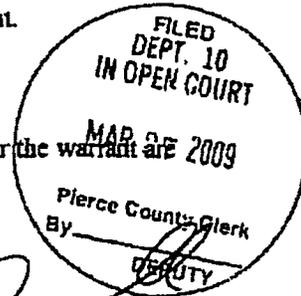
In analyzing this motion, the court relies on State v. Mills, an unpublished case from Division I which upheld the search warrant of a residence of an accused child molester even though the affidavit alleged facts ten months old and the warrant was for a new residence not the one where the molestation occurred. The affidavit was based on the affiant's police officers experience that people who collect child pornography do not destroy it and will take it with them when they move.

Here, while not child pornography as such, the defendant is alleged to have shown photos of nude or partially clad females to victims in this case and it was likely that these items would either be in the residence or vehicle even though in most instances here, several months had passed between the contacts with the females and the issuance of the warrant.

VIII

The defendant's CrR 3.6 motion is denied and the items seized under the warrant are admissible as evidence.

Done in open court this 27 day of March, 2008.



[Signature]
Honorable D. Gary Steiner
Judge

Presented by:

[Signature]
DINO G. SEPE, WSBA#15879
Attorney for Derrick Hunter

Approved as to form:

[Signature]
Deputy Prosecuting Attorney
GRANT BLINN
WSBA #25570

FINDINGS AND CONCLUSIONS
RE: CrR 3.6-5

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN THE COUNTY OF PIERCE

FILED
COUNTY CLERK'S OFFICE

A.M. MAR 02 2007 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, COUNTY CLERK
BY _____ DEPUTY

SEARCH WARRANT

STATE OF WASHINGTON

NO: 07 1 50189 6

COUNTY OF PIERCE

The State of Washington: To any Police Officer in said State:

WHEREAS, sworn application having been made before me by Detective Darin Miller, a commissioned Law Enforcement Officer of the Lakewood Police Department, and full consideration having been given to the matter set forth herein, the Court hereby FINDS:

- (a) There is probable cause for belief that Communication with a minor for immoral purposes RCW 9.68A.090, Attempt Kidnapping 1st (with sexual motivation) RCW 9A.40.020, Luring RCW 9A.40.090 and Fail to Register as a Sex Offender RCW 9A.44.130 were committed.
- (b) There is probable cause for belief that evidence, to include but not limited to;
- 1) Photographs that depict females or males in undergarments and/or other photos of the likeness.
 - 2) Computers, computer components including hard drives, external drives, and other storage devices, software, storage disks, and other related equipment that may contain images of persons in sexually provocative articles of clothing or nude.
 - 3) Business cards, credentials or any other documents indicating modeling agency business association.
 - 4) Indicia of occupancy, residency, and/or ownership of the premises described in the search warrant, including but not limited to utility bills, telephone bills, canceled envelops, registration certificates, and/or keys.
 - 5) Video tapes, and/or photographs of co-conspirators, assets, and or other involved subjects.

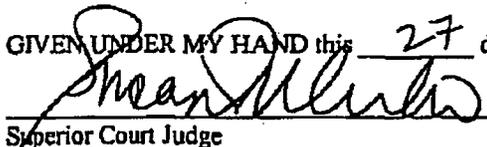
6) Contraband, fruits of the crime, or things otherwise criminally possessed.

(c) That said evidence is located in a residence in Pierce County, Washington at the address of 4703 101st ST SW Lakewood, WA and in said vehicle bearing Washington license plate 368-RKQ. *The residence is a single story light yellow house with a black roof, white trim, and a chain-link fence to the front yard. The house #4703 is located next to the front door to the upper right. The vehicle is a white 1991 Buick Regal, four door. The vehicle is registered to Hunter and has been seen at the above listed address.*

NOW, THEREFORE, it is HEREBY ORDERED that:

In the name of the State of Washington, you are commanded that within ten days from this date, with necessary and proper assistance you search said residence to include vehicles at the residence and then and there diligently search for said evidence, and any other, and if same or evidence material to the investigation or prosecution of said felony or any part thereof, be found on such search, bring the same forthwith before me, to be disposed of according to law.

A copy of this warrant shall be served upon the person or persons found in said residence/vehicle, or a copy of this warrant shall be posted upon any conspicuous place in or on said residence/vehicle, place or thing, and a copy of this warrant and inventory shall be returned to the undersigned Judge or his agent promptly after execution.

GIVEN UNDER MY HAND this 27 day of Feb., 2007 11:40 AM

Superior Court Judge

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN THE COUNTY OF PIERCE

FILED
PIERCE COUNTY CLERK'S OFFICE

A.M. MAR 02 2007 P.M.

**COMPLAINT FOR SEARCH WARRANT
(AFFIDAVIT)**

PIERCE COUNTY WASHINGTON
KEVIN STOCK, COUNTY CLERK
BY AKR DEPUTY

STATE OF WASHINGTON)

COUNTY OF PIERCE)

NO: 07 1 50189 6

COMES NOW DETECTIVE DARIN MILLER LK63, who being first duly sworn on oath complains and says: That between the early months of summer 2006, and January 27, 2007, in Lakewood, Washington, felonies to-wit: **Communication with a minor for immoral purposes**, a violation of RCW 9.68A.090, **Attempt Kidnapping 1st (with sexual motivation)**, a violation of RCW 9A.40.020, **Luring**, a violation of RCW 9A.40.090 and **Fail to Register as a Sex Offender**, a violation of RCW 9A.44.130, were committed by the act, procurement or omission of another, and that the following evidence to-wit:

- 1) Photographs that depict females or males in undergarments and/or other photos of the likeness. Devices such as digital cameras and/or other photo equipment capable of producing photographs.
- 2) Computers, computer components including hard drives, external drives, and other storage devices, software, storage disks, and other related equipment that may contain images of persons in sexually provocative articles of clothing or nude.
- 3) Business cards, credentials or any other documents indicating modeling agency business association.
- 4) Indicia of occupancy, residency, and/or ownership of the premises described in the search warrant, including but not limited to utility bills, telephone bills, canceled envelopes, registration certificates, and/or keys.
- 5) Video tapes, and/or photographs of co-conspirators, assets, and or other involved subjects.
- 6) Contraband, fruits of the crime, or things otherwise criminally possessed.

ALL OF WHICH WILL BE EVIDENCE OF THE OFFENSE OF: Communication with a minor for immoral purposes RCW 9.68A.090, Attempt Kidnapping 1st (with sexual motivation) RCW 9A.40.020, Luring RCW 9A.40.090 and Fail to Register as a Sex

Offender RCW 9A.44.130. That the above material is necessary to the investigation and/or prosecution of the above described felonies for the following reasons: As evidence of the crimes listed above AND THAT EVIDENCE WILL BE FOUND INSIDE A RESIDENCE ADDRESSED AS 4703 101st St SW in Lakewood WA 98499, the residence of Derrick Hunter. The residence is a single story light yellow house with a black roof and white trim. The house #4703 is located next to the front door to the upper right.

Evidence may also be located in the vehicle registered to Hunter. The vehicle is a white 1991 Buick Regal registered to Darrick Hunter (an alias). The VIN on the vehicle is 2G4WB5T6M1841896.

AFFIANT'S BACKGROUND AND EXPERIENCE:

Your affiant has been a Detective with the Lakewood Police Department for 6 months and prior to that a patrol officer for more than two years with the Lakewood Police Department. Your affiant was previously employed with the Pierce County Sheriff's Department and was a deputy with the Pierce County Sheriff's department for over 2 years. Your affiant is currently assigned as a Detective with the Lakewood Police Department's Special Assault Unit. Your affiant has investigated well over 100 felony property crimes and several rape/assault crimes. Your affiant has interviewed numerous subjects during the course of property crimes investigations as well as other complex investigations. Your affiant has also successfully authored more than a dozen search warrants for various crimes. Your Affiant's experience and training allow your affiant to make accurate and reliable assessments of evidence and circumstances concerning crimes against persons.

Affiant's belief is based upon the following facts and circumstances:

On 11-09-06 your affiant was assigned to follow up on case #06-312-1066 in which an adult male had an inappropriate conversation with a fifteen year old student from Clover Park High School named Mary Oh. The student only knew the man as Thomas and that he introduced himself as a modeling agent. The man asked Mary if she wanted to model and Mary said yes just as any young girl would. The man proceeded to ask Mary very personal type questions with regards to her virginity and that she would need to lose her virginity to be a model as it would make her hips look better in photos. The case was without any further leads at the time and was closed pending new leads.

On 01-23-07 I was assigned a case (#07-018-0076) for follow up and was advised there was some similarity between it and #06-312-1066. I found that the case indicated a man named Derrick Washington had presented himself as a modeling agent to another student at Clover Park High School named Tiffany Songer. The man known as Derrick

Washington was able to lure Tiffany and her boyfriend into his car and offer to talk about modeling and an interview. The man eventually drove the two to their homes which were located next to each other and when the Tiffany's boyfriend exited the car, Derrick drove off with Tiffany still in the car. Derrick drove to a semi-secluded location and persuaded Tiffany to remove her clothing. Derrick played on Tiffany's innocence and was able to get Tiffany to engage in sexual intercourse with him under the guise that it was all part of an interview process. When Derrick attempted to penetrate Tiffany with more than just the head of his penis she turned and scratched at his arm. Tiffany reported the incident after she went to the hospital for a rape kit to be done.

I saw the phone number listed for Derrick Washington was only one digit different from the listed phone number for Thomas from case #06-312-1066. I ran a search on that phone number and found it registered to Derrick Hunter at 4703 101st ST SW in Lakewood WA 98499. I looked up Derrick Hunter and found he had a booking photo. I made a photo line-up and presented it to Mary at which time she picked out Hunter as the person who had approached her at the public library after school. I later presented the photo line-up to Tiffany Songer who also pointed out that Hunter was the man she had been contacted by and ultimately had sexual intercourse with.

A letter was sent out within Clover Park School District and shortly thereafter, there were numerous students who came forward alleging that they had very similar experiences with a man who claimed to be a modeling agent.

I produced a few different photo line-ups and presented them to the students at Clover Park High School who had provided handwritten statements about their incidents. In total I presented 10 students with the photo line-ups and 8 of the 10 were able to positively identify Hunter as the suspect who had approached them about modeling. Several of the students were 15 when the incidents happened.

Many of the students indicated that Hunter would show them explicit photos of either naked girls or girls dressed in sexually provocative lingerie. One student claimed the photos did not look professional but rather home based photos. Another student indicated Hunter had told them his studio was out of his home. Most of the students who saw Hunter in a vehicle described it as a white, four door car. I later found that a white, four door, 1991 Buick Regal was registered to Darrick L Hunter. The name Darrick was an alias for Derrick L Hunter. According to several students he had asked them to get into his car. Although the vehicle is registered to a different address it has been seen at the listed residence for Hunter.

Hunter is a convicted sex offender out of Oregon and is required to register in the State of Washington. Hunter has failed to comply and register himself in Pierce County as a Sex Offender.

CONCLUSION:

Based on all of the foregoing information your affiant verily believes that Derrick Hunter committed Attempt Kidnapping 1st (with sexual motivation), Communication with a minor for immoral purposes, Luring and Fail to register as a Sex Offender on or between the summer of 2006 and January 27, 2007. Your affiant believes that the suspect's residence at 4703 101st ST SW in Lakewood, WA contains evidence to these crimes as well as the vehicle (Washington license plate 368-RKQ) registered to that suspect. Your affiant therefore requests that a search warrant be issued immediately to search the residence at 4703 101st ST SW in Lakewood, WA as well as the vehicle bearing Washington license plate 368-RKQ which was last seen parked at the above listed residence.

SUBSCRIBED AND SWORN BEFORE ME THIS 27th DAY OF February, 2007.



Detective Darin Miller LK63

Affiant



JUDGE, PIERCE COUNTY SUPERIOR COURT

CERTIFICATE OF SERVICE

I certify that on the 15th day of July, 2010, I caused a true and correct copy of the Opening Brief of Appellant to be served on the following via first class mail/delivery to his office:

Washington State Court of Appeals
Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

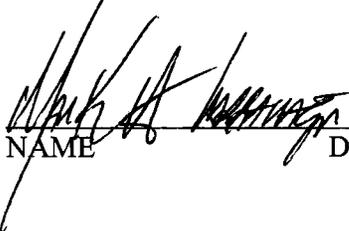
Counsel for the Respondent:

Kathleen Proctor
Pierce County Prosecutor's Office
930 Tacoma Avenue S. Mr. 946
Tacoma, WA 98402-2171

And

Derrick Hunter, #320996
Airway Heights Correctional Center,
P.O. Box 2049
Airway Heights, WA 99001-2049

FILED
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10 JUL 19 AM 9:25
STATE OF WASHINGTON
BY _____

 7/15/10
NAME DATE at Seattle, WA